



**In the Matter of:**

**ADMINISTRATOR,  
WAGE & HOUR DIVISION,**

**PROSECUTING PARTY,**

**v.**

**GREATER MISSOURI MEDICAL  
PRO-CARE PROVIDERS, INC.,**

**RESPONDENT.**

**ARB CASE NO. 12-015**

**ALJ CASE NO. 2008-LCA-026**

**DATE: January 29, 2014**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Administrator, Wage and Hour Division:*

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Sara L. Johnson, Esq.; U.S. Department of Labor, Office of the Solicitor; Washington, District of Columbia**

*For the Respondent:*

**Brent N. Coverdale, Esq.; Seyferth Blumenthal & Harris LLC; Kansas City, Missouri**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge. Judge Brown, concurring in part, dissenting in part.**

**FINAL DECISION AND ORDER**

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).<sup>1</sup> Alena Gay Arat, an H-1B non-immigrant employee, filed a complaint on June 22, 2006,

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<sup>1</sup> 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2013). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2013).

alleging that her employer, Greater Missouri Medical Pro-Care Providers, Inc. (Greater Missouri), had failed to pay her the wages required under its Labor Condition Application (LCA) for time off due to a decision by the employer, had illegally made deductions from her wages, and had required her to pay an illegal penalty for ceasing employment with the employer prior to a date agreed upon by her and the employer. Greater Missouri Exhibit (RX) 429, 431.

After an investigation, the Administrator issued a determination, finding that Greater Missouri had committed numerous LCA violations – relating not only to Complainant, but to dozens of other Greater Missouri non-immigrant employees – including failing to pay the required wages during nonproductive periods of employment, illegally deducting fees, illegally collecting or attempting to collect penalties for early termination of employment, failing to maintain documentation as required by the regulations, and liability for ongoing violations. ALJ Decision and Order (D. & O.) at 2-3; RX 419. The Administrator ordered Greater Missouri to pay back wages in the amount of \$382,889.87 to 45 H-1B employees. D. & O. at 3

Greater Missouri requested a hearing before a Department of Labor Administrative Law Judge (ALJ). In a D. & O. issued October 18, 2011, the presiding ALJ upheld most of the Administrator's determinations. Greater Missouri timely appealed to the Administrative Review Board (ARB or Board). For the following reasons, we affirm in part and reverse in part.

## BACKGROUND

Greater Missouri was established in 2001. D. & O. at 7. In 2003, the company began bringing non-immigrant workers into the U.S. under the H-1B program to work as occupational and physical therapists. *Id.* Its principal place of business for these operations is in Joplin, Missouri. *Id.* Greater Missouri's president and chief executive officer, Kamendra Mishra, testified that the majority of his H-1B employees come from the Philippines. *Id.* The ALJ thoroughly described the circumstances under which H-1B immigrants in Greater Missouri's employ entered the country and began working. In essence, after Greater Missouri's H-1B employees entered the United States, they had to pass an exam and obtain a Missouri therapy license before they received the salary listed on their LCA. *Id.* at 8. In the interim period, Greater Missouri provided an apartment to its H-1B employees and paid each employee \$50.00 per week while they attended training, performed job shadowing, and studied for the state license exam. *Id.* at 9. Mishra admitted that Greater Missouri required its H-1B employees, between 2003 and 2006, to pay both USCIS fees and attorney's fees pertaining to extensions of their H-1B visas and that these fees were deducted from their wages. *Id.*

Greater Missouri's H-1B employees signed employment agreements both before and after they arrived in the United States to work. D. & O. at 9-10. The employment agreements contain provisions that require employees to repay Greater Missouri for certain expenses and pay damages if they terminate employment before the end of the contract term. *Id.* at 10.

On June 22, 2006, Alena Gay Arat, a therapist from the Philippines who worked for Greater Missouri, filed an H-1B complaint against her employer, Greater Missouri. The complaint contained allegations of a number of H-1B violations including that: (1) Respondent

paid Arar and other H-1B therapists working for it only \$50 per week prior to gaining their Missouri state therapist licenses; (2) she paid all fees, including attorney's fees, related to her H-1B visa and its extension amounting to over \$6,000.00; (3) Respondent assigned her to multiple workplaces not identified in her contract or her LCA; (4) Respondent failed to pay reasonable relocation fees as promised under her contract; (5) Respondent failed to grant her vacation time as requested; and (6) Respondent was threatened to charge her \$4000 in "liquidated damages" when she notified it of her intention to resign prior to the end of her contract. RX 431 at 3-4. The Department of Labor's Wage and Hour Division reviewed her allegations and found reasonable cause to initiate an investigation under the INA. D. & O. at 2. The Wage and Hour investigator assigned to the case, Erica Simon, noted that the initial period covered by the investigation would be from June 23, 2005, to June 22, 2006. *Id.* at 14. Simon notified Greater Missouri of the date she planned to visit and provided Greater Missouri with lists of records it was required to make available for her inspection. *Id.*

Ultimately, the Administrator determined that Greater Missouri committed violations including illegally deducting fees relating to extensions of H-1B visas from employee wages, failing to pay employees the prevailing wage for periods of non-work occasioned by the employer, and illegally requiring or attempting to require H-1B nonimmigrants to pay a penalty for ceasing employment prior to an agreed upon date. D. & O. at 16, 17, 24-25. The Administrator ordered Greater Missouri to pay back wages in the amount of \$372,897.93 to 44 H-1B nonimmigrant workers. *Id.* at 2-3. On November 17, 2008, the Administrator issued an Amended Determination detailing the same violations but this time against 45 H-1B nonimmigrant workers and ordered Greater Missouri to pay \$382,889.87 in back wages. RX 420. The Amended Determination also contained a civil penalty of \$2000.00 for willful violations of the INA; however, the Administrator ultimately withdrew this charge. D. & O. at 2, 4.

Greater Missouri requested a formal hearing. *Id.* at 3. On February 10, and 26, 2009, Greater Missouri and the Administrator filed motions for summary decision. *Id.* The ALJ denied these motions. On February 12, 2009, the Administrator filed a motion for partial summary decision alleging that Greater Missouri violated the Act and regulations when it failed to pay the required wages to H-1B employees during periods of nonproductive employment and that it violated the Act and regulations by illegally deducting H-1B extension fees and related attorney's fees from the wages of its H-1B employees. *Id.* Greater Missouri opposed the motion. *Id.* The ALJ granted summary decision to the Administrator on both of these issues. *Id.* at 4. The ALJ also found that Greater Missouri illegally withheld the final paychecks of some of its H-1B employees. *Id.* Determination of which employees were affected by her summary decision and any available remedies were left to proof at hearing.

The ALJ held a hearing on July 28-29, 2010, and closed the record after the parties filed closing briefs. *Id.*

## JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845.<sup>2</sup> Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."<sup>3</sup> The Board has plenary power to review an ALJ's legal conclusions de novo.<sup>4</sup> The Board reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.<sup>5</sup>

## DISCUSSION

The INA defines various classes of aliens who, under different visa classifications, may enter the United States for prescribed periods of time. 8 U.S.C.A. § 1101(a)(15). The H-1B visa allows employers to temporarily hire workers in specialty occupations (generally requiring a four-year degree). 8 U.S.C.A. § 1101(1)(15)(H)(i)(B). Employers must file an LCA for employees they want to hire and guarantee specified prevailing wages and working conditions among other things. 8 U.S.C.A. § 1182(n)((1); 20 C.F.R. §§ 655.731-733. After securing the LCA, and upon approval by the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.<sup>6</sup>

An employer must pay an H-1B employee the prevailing wage listed on the employee's LCA starting on the date the employee "enters into employment" with the employer." 20 C.F.R. § 655.731(c)(6). An H-1B employee "enters into employment," when he/she first makes him/herself available for work or otherwise comes under the control of the employer." 20 C.F.R. § 655.731(c)(6)(i). An employer is obligated to pay the wages specified in the H-1B employee's LCA even if it "benches" the H-1B employee by placing him in nonproductive status. 20 C.F.R. § 655.731(c)(7)(i). If an employer places an H-1B employee in nonproductive status "due to a decision by the employer" and does not pay the employee full-time wages in accordance with the

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<sup>2</sup> See Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378, § 5(c)(19) (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

<sup>3</sup> *Adm'r, Wage & Hour Div. v. The Lambents Group*, ARB No. 10-066, ALJ No. 2008-LCA-036, slip op. at 4 (ARB Nov. 30, 2011) (quoting 5 U.S.C.A. § 557(b) (West 1996)).

<sup>4</sup> *Id.* (citing *Yano Enters., Inc. v. Adm'r*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Adm'r v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001)).

<sup>5</sup> *Id.* (citing *Mao v. Nasser*, ARB No. 06-121, ALJ No. 2005-LCA-036, slip op. at 12 (ARB Nov. 26, 2008); *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 9 (ARB Apr. 26, 2006)).

<sup>6</sup> 20 C.F.R. § 655.705(a), (b).

LCA, then the employer commits a violation of the Act. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I). Thus, if an employee reports as available to work, whether it is for orientation, training, or to study for a licensing examination, the employer violates the Act if it does not pay the H-1B employee his LCA-specified wages.

H-1B employers are not permitted to require H-1B employees to pay a penalty for ceasing employment with the employer prior to an agreed upon date. 20 C.F.R. § 655.731(c)(10)(i)(A). H-1B employers are permitted to receive bona fide liquidated damages from its H-1B employees who cease employment with the employer prior to an agreed upon date. 20 C.F.R. § 655.731(c)(10)(i)(B). To deduct such damages from an H-1B employee's wages however, the requirements of subsection (c)(9)(iii) must be fully satisfied. *Id.*

“Authorized deductions” for purposes of the H-1B employers’ satisfaction of the required wage obligation does not include any recoupment of “attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition).” 20 C.F.R. § 655.731(c)(9)(iii)(C).

The ALJ issued a decision and order on October 18, 2011. The ALJ found that (1) Greater Missouri owed 40 H-1B employees back wages for uncompensated “benching” time, (2) the early termination damages provisions in the employment contracts were bona fide liquidated damages under Missouri law, (3) Greater Missouri failed to comply with subsection (c)(9)(iii) when it deducted from the paychecks of Alena Gay Arat, Estella Daraway, Michael Gonzales, and Kahlila Quidlat-Fowler to recoup liquidated damages, and (4) the H-1B employees were entitled to pre-judgment compound interest on their individual back wage awards and to post-judgment interest on their back wage awards from the date of the ALJ decision until Greater Missouri satisfies its back wage liability to each individual employee. D. & O. at 94. The ALJ also found, pursuant to her order of October 23, 2009, that Greater Missouri violated the Act and regulations by deducting expenses from the wages of its H-1B employees for H-1B extension fees and related attorney’s fees.<sup>7</sup> *Id.*

Greater Missouri filed a petition for review with the Board. Both parties filed briefs. Greater Missouri argues that the ALJ erred in (1) awarding backpay for issues and individuals outside of the specific aggrieved party complaint, (2) awarding backpay for actions beyond the twelve-month time limitation, (3) allowing the Administrator to rely on untimely, unclear, and unreliable evidence not disclosed during discovery and shifting the burden to Greater Missouri to

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<sup>7</sup> Citing 8 U.S.C.A § 1182(n)(2)(C)(I) prohibiting penalties for early cessation of employment, the Administrator originally awarded damages to eight employees against whom Respondent had assessed liquidated damages for ending their employment prior to the date agreed upon in their employment contracts. The ALJ upheld the awards to those employees from whom damages had been deducted directly from their paychecks, finding that such deductions violated regulatory requirements. However, the ALJ reversed the Administrator’s award to five employees who had paid Respondent independently of deductions made from their paychecks. The ALJ found that in the cases where the liquidated damages were not deducted from the employees’ paychecks, the damages for early termination were *bona fide* liquidated damages under Missouri Law. D. & O. at 93. The Administrator did not appeal this finding.

disprove when employees entered employment with Greater Missouri, and (4) awarding pre- and post-judgment interest. We discuss each of these allegations of error in turn.

### **1. Scope of investigation not limited to allegations in aggrieved-party complaint**

The ALJ found that Greater Missouri owed 40 H-1B employees back wages for benching; she also found various other violations of the INA in regard to a smaller number of its H-1B employees. D. & O. at 94.

Greater Missouri argues that because the matter began as a single aggrieved-party complaint initiated by Alena Arat, the investigation was limited to those violations Arat alleged. Resp. Br. at 9. Greater Missouri's argument centers around the idea that the INA "expressly details the limited nature of an aggrieved party complaint," which is delineated at 8 U.S.C.A. § 1182(n)(2)(A). *Id.* at 9, 10. It asserts that "there is no statutory or regulatory authority for this matter to extend beyond the specific aggrieved party complaint here," and that "the Administrator and ALJ only had the authority to address the specific matters raised by Arat in her complaint." *Id.* at 10.

The Administrator, on the other hand, argues that Wage and Hour investigations into statutory compliance are not limited to the specific violations alleged in an aggrieved-party complaint. We agree with the Administrator that this authority is consistent with the INA, the implementing regulations, and Board precedent. As explained below, the INA's "aggrieved party" provisions explicitly authorized the investigation that the Wage and Hour Division conducted in this case.

The INA provides a number of ways in which the Secretary may initiate an LCA investigation including (1) following receipt of a complaint filed by an aggrieved person or organization (including bargaining representatives); (2) following receipt of credible information from a source likely to have information (including an aggrieved party) under 8 U.S.C.A. § 1182(n)(2)(G)(ii),(iv); (3) for "reasonable cause" under 8 U.S.C.A. § 1182(n)(2)(G)(i); and (4) by means of a "random investigation" of a willful violator under 8 U.S.C.A. § 1182(n)(2)(F).

Here, Alena Gay Arat, who Greater Missouri employed as a therapist, filed an "aggrieved party" complaint. The INA does not define "aggrieved party" beyond stating that complaints may be filed by "any aggrieved person or organization (including bargaining representatives)." 8 U.S.C.A. § 1182(n)(2)(A). The regulations, however, define the term "aggrieved party" broadly to include employees adversely affected (both U.S. and foreign), along with bargaining representatives, competitors, and certain adversely affected government agencies. 20 C.F.R. § 655.715.

Arat's June 22, 2006 complaint contained detailed allegations of numerous H-1B violations by her employer including allegations that: (1) Greater Missouri paid Arat and other H-1B therapists only \$50 per week prior to gaining their Missouri state therapist licenses; (2) Arat paid all fees, including attorney's fees, related to her H-1B visa and its extension amounting to over \$6,000.00; (3) Greater Missouri assigned Arat to multiple workplaces not identified in her contract or on her LCA; (4) Greater Missouri did not pay her reasonable relocation fees as

promised under her contract; (5) Greater Missouri did not grant her vacation time as requested; and (6) Greater Missouri threatened her with charges of \$4000 in “liquidated damages” when she notified it of her intention to resign prior to the end of her contract. RX 431 at 3-4. After receiving Arat’s complaint, as required under the relevant regulations, the Wage and Hour Division determined that reasonable cause existed to initiate an investigation.<sup>8</sup> 20 C.F.R. § 655.715.

Neither the statute nor the regulations require that the Wage and Hour Division notify an employer of an investigation initiated pursuant to an aggrieved party complaint. Nevertheless, on August 4, 2006, the Wage and Hour Division notified Greater Missouri that it had initiated an investigation and would need to review “all public access documentation required by the Federal Regulations, Part 655.760” including the LCAs for all Greater Missouri’s H-1B employees. The notice also requested a list of all H-1B workers employed from June 23, 2005, to June 22, 2006, as well as other documentation relating to those employees. RX 411. Given Arat’s detailed allegations regarding a number of different serious LCA violations against her and other H-1B therapists working for Greater Missouri, it was entirely appropriate for Wage and Hour to find reasonable cause to investigate Greater Missouri regarding those and any other related H-1B violations encountered in the course of that investigation. Once Wage and Hour establishes that reasonable cause exists to initiate an “aggrieved party” investigation, neither the statute nor the regulations dictate the exact contours of that investigation.

Investigator Simon testified that where Wage and Hour receives an individual “aggrieved party” complaint, as occurred in this case, Wage and Hour does a “full investigation” as to all H-1B employees for the past 12 months “to see if there are violations to any employee during that time period.” RX 424 at 132-135, 142, 185. The Administrator ultimately ordered the payment of back wages and assessed civil money penalties against Greater Missouri for multiple violations of the rights of the complainant, Arat, as well as over 40 of Greater Missouri’s other H-1B employees.<sup>9</sup> Each of the classes of violations the Administrator ultimately found was alleged in Arat’s initial complaint. In our view, the Wage and Hour investigation was routine and necessary in light of its statutory and regulatory obligations to enforce the H-1B program. We find that the Administrator acted squarely within her authority to determine the scope of the H-1B investigation initiated after finding reasonable cause to pursue such investigation.

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<sup>8</sup> D. & O. at 14; see also RX 422 (Investigator Simon’s H-1B Narrative), and RX 430 (WHISAARD Complaint Information Form). As Simon explained in her deposition, July 18, 2006, was the date “when we knew we had a potentially valid complaint, something that we would have reasonable cause to move forward with.” RX 424 at 127-128.

<sup>9</sup> On May 21, 2008, the District Director for the Kansas City office of the Wage and Hour Division issued a Determination Letter based on Simon’s investigation, addressed to Greater Missouri. The Determination Letter detailed Wage and Hour’s findings of non-compliance and ordered the payment of back wages with respect to all of its H-1B employees. RX 419. The Determination Letter was supplemented with further findings and assessments on November 17, 2008. RX 420.

A. The plain language of INA and implementing regulations authorizes the Secretary to determine the scope of reasonable cause investigation.

INA provisions relating to investigations of LCA violations explicitly delegate the design and implementation of those investigations to the Secretary of Labor: “the Secretary shall establish a process for the receipt, investigation, and disposition of complaints . . . .” 8 U.S.C.A. § 1182(n)(2)(A). The statute further provides that “any aggrieved person or organization (including bargaining representative)” may file a complaint. The Secretary has held that “[a] broad reading of the relevant statutory language ‘any aggrieved person or organization (including bargaining representative),’ promotes effective enforcement of the H-1B labor condition application process and helps to achieve the Congressional intent of protecting both U.S. and foreign workers in the H-1B program.”<sup>10</sup>

On the WH-4 Complaint Form, Investigator Simon checked the box “Aggrieved Party” as the source of the complaint. Accordingly, Wage and Hour conducted the investigation under the “aggrieved party” provisions of the statute.<sup>11</sup> These statutory provisions nowhere restrict the scope of H-1B investigations to allegations contained in a single aggrieved-party complaint. Nor do the Secretary’s implementing regulations dictate the scope of an investigation by the Wage and Hour Division once Wage and Hour determines that reasonable cause exists to initiate such an investigation.

Indeed, the regulations pertaining to the conduct of H-1B investigations explicitly grant broad authority to the Secretary to determine the scope of her investigations. The regulation provides that “[t]he Administrator, either pursuant to a complaint *or otherwise*, shall conduct investigations *as may be appropriate* and . . . *as deemed necessary* by the Administrator to determine compliance . . . .” 20 C.F.R. § 655.800(b) (italics added). The language and phrases, “or otherwise” and “as may be appropriate,” and “as deemed necessary” signal a clear grant of discretion to the Administrator to determine the scope of her investigation.

The procedural requirements for aggrieved party complaints are accommodating and provide additional support for the Administrator’s broad authority to investigate alleged INA

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<sup>10</sup> *Eva Kolbusz-Kijne v. Technical Career Inst., Inc.*, No. 1993-LCA-004, slip op. at 6 (Sec’y July 18, 1994) (citation omitted).

<sup>11</sup> It is worth noting that because Arat alleged “benching” violations of other H-1B therapists working for Greater Missouri, the investigation of those violations could have been authorized under the “credible source” provisions of the statute had Arat been denominated a “credible information source”– rather than an “aggrieved party.” Subsection 1182(n)(2)(G)(ii) states that “If the Secretary of Labor receives specific credible information from a source who is likely to have knowledge of an employer’s practices or employment conditions, . . . and whose identity is known to the Secretary of Labor, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(D), (1)(E), (1)(F), (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor may conduct an investigation into the alleged failure or failures.”



violations involving H-1B workers who did not file complaints. No particular form is required for complaints,<sup>12</sup> and an “aggrieved party” is broadly defined as a person or entity whose interest is adversely affected by an employer’s LCA violations including, “but not limited to,” employees, bargaining representatives, competitors, and government agencies. Given that parties who are not H-1B employees can initiate investigations on behalf of non-complaining H-1B employees, it is logical to assume that an H-1B complainant can likewise initiate an investigation on behalf of non-complainants. As the Deputy Administrator reasons in her Response to Petition for Review, it would be inconsistent with the encompassing definition of “aggrieved party” to limit the scope of an aggrieved-party complaint investigation to either the specific complainant or the complainant’s LCA. Statement of the Deputy Administrator in Response to Petition for Review at 16.

A broad variety of parties have standing to file an “aggrieved party” complaint. The pivotal statutory requirement for initiating an investigation, however, is a finding of reasonable cause by the Secretary. Once reasonable cause has been established, the statutory requirements for initiating an investigation have been met and the scope of that investigation may be conducted “*as deemed necessary* by the Administrator to determine compliance . . . .” 20 C.F.R. § 655.800(b) (italics added).

*B. The Secretary’s authority to determine scope of investigation is consistent with statutory and regulatory history.*

Statutory history is sparse regarding the specific issue of the scope of H-1B investigatory authority once an investigation has been initiated pursuant to reasonable cause. However, taking a long view of the relevant statutory and regulatory changes since the beginning of the H-1B program confirms our view that the Administrator was authorized to investigate violations pertaining to H-1B employees who did not file complaints in this case.

The Immigration and Nationality Act of 1952 created the H-1 nonimmigrant category to assist U.S. employers to temporarily hire foreign professionals “of distinguished merit and ability” performing services of an “exceptional nature.”<sup>13</sup> The H-1B program as we know it, however, was not established until passage on November 29, 1990, of the Immigration Act of 1990, which made sweeping changes to the H-1 program.<sup>14</sup>

It is widely acknowledged that the 1990 INA Amendments were a product of compromise between labor unions, the immigration bar, and various interests supporting increasing the supply of foreign labor.<sup>15</sup> Generally speaking, the controversy surrounding the

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<sup>12</sup> 20 C.F.R. § 655.806; 20 C.F.R. § 655.807.

<sup>13</sup> Pub. Law No. 82-414, 66 Stat. 163 (1952).

<sup>14</sup> Pub. Law No. 101-649, 104 Stat. 4978 (1990).

<sup>15</sup> 51 Fed. Reg. 11705, 11706-7 (Mar. 20, 1991) (“The Department believes that the broad intent of the Act is clear. The Act retains family reunification as the major objective of permanent immigration but also seeks to make the immigration system more efficient and responsive to the

program fell into two camps – those interests who viewed an expansion of a foreign labor supply as necessary to sustain the U.S.’s competitiveness in the face of a shortage of certain skilled workers versus those who wished to protect the domestic labor market by assuring the admission of foreign workers served a legitimate need.<sup>16</sup> The 1990 amendments reflected these dual goals: on the one hand, the ability of U.S. companies to hire foreign workers through the employment-related immigrant visa provisions were expanded; however, changes to the H-1B nonimmigrant visa category included substantial new burdens and liabilities on U.S. employers seeking to hire temporary foreign workers.<sup>17</sup> Although a few of the new H-1B provisions were more favorable to employers, the changes to the H-1B program mainly reflected the interests of domestic labor and those seeking to stop perceived abuses of foreign workers by H-1B employers.<sup>18</sup> Responding to organized labor, Congress capped the number of H-1B visas issued where no quota had existed in prior law and introduced the labor condition application (LCA) process into the H-1B program.

The LCA process was designed to prevent employers from using foreign workers to break strikes or undercut domestic wages and working conditions.<sup>19</sup> Employers were required to file an application with the Secretary of Labor attesting that foreign workers would be paid prevailing wages, working conditions would not adversely affect conditions of workers similarly employed, and there was no on-going strike or lock-out in the relevant classification. The new provisions also, for the first time, authorized the Department of Labor to enforce the LCA attestations by providing for legal remedies for both U.S. workers and foreign workers – the Secretary of Labor was directed to “establish a process for the receipt, investigation, and disposition of complaints,” which “may be filed by any aggrieved person or organization

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needs of employers experiencing labor shortages, while at the same time providing greater safeguards and protections for both U.S. and alien workers.”); see also H. Rosemary Jeronimides, Note, *The H-1B Visa Category: A Tug of War*, 7 GEO. IMMIGR. L.J. 367, 373-4 (June 1993) (“Congress’s intent in approaching the 1990 Act reforms consisted of a balancing of dual concerns: establishing a more efficient immigration system which is responsive to labor needs, while simultaneously according greater protection to both domestic and alien workers.”); Steven J. Kleiman, *Hiring Foreign Talent – Nonimmigrant Business Visas after the 1990 Act*, 38 FED. B. NEWS & J. 430 (Oct. 1991); H.R..REP. NO. 101-723, pt. 1, at 6745 (1990).

<sup>16</sup> See Angelo A. Paparelli & Mona D. Patel, *The Immigration Act of 1990: Death Knell for the H-1B?*, 25 INT’L LAW, 995, 997, 1001 (1991); *The Immigration Act of 1990 Analyzed: Part 4- Nonimmigrant Visas B to H-1A*, 68 Interpreter Releases 1 (Jan. 7, 1991).

<sup>17</sup> See Paparelli & Patel at 1001, note 14, (stating that even though the 1990 Act does not impose a positive obligation to recruit United States workers, the attestation requirements are a dramatic expansion of the “burden and liabilities on employers who use the H-1B provision to sponsor foreign workers”); Ellen G. Yost, *NAFTA – Temporary Entry Provisions – Immigration Dimensions*, 22 CAN.-U.S. L.J. 211, 214 (1996).

<sup>18</sup> H.R. REP. NO. 101-723, pt. 1, at 6741, 6745 (1990).

<sup>19</sup> 56 Fed. Reg. 54,720; 54,721-2 (Oct 22, 1991).

(including bargaining representatives).” As stated in the House Conference Report, “providing the legal process for enforcement on challenges and complaints about attestation conditions gives meaningful protections for U.S. workers.”<sup>20</sup> Nevertheless, those urging expansion of the H-1B program prevailed upon Congress to streamline the LCA process by restricting the Department of Labor’s ability to deny LCAs.<sup>21</sup> Thus, Congress struck a balance between the competing interests of organized labor and the business community in the H-1B context by focusing Department of Labor resources on the back-end enforcement of the LCA process through “aggrieved party” complaints rather than the front end screening of an employer’s attestations.<sup>22</sup>

Congress has amended the H-1B program many times since the 1990 Amendments, but the fundamental structure of the Secretary’s role in the LCA process has remained the same – the Secretary does not scrutinize employer attestations pre-admission but is explicitly authorized by Congress to design and implement “a process for the receipt, investigation, and disposition of complaints” to safeguard the interests of both U.S. and foreign workers post-admission.<sup>23</sup>

The scope of the investigation undertaken in the present case was fully consistent with the dual Congressional purpose behind the H-1B program – that is, to streamline the nonimmigrant approval process, while at the same time concentrating resources on post-admission enforcement of the program. Once reasonable cause is found based upon the claims of one H-1B employee, the Administrator has the discretionary authority to expand that investigation to other claims or other employees not contained within the four corners of the original complaint. Expanding the scope of post-admission investigations does nothing to hinder the Congressional goal of efficient H-1B admissions. Instead, it bolsters the Secretary’s ability to detect INA violations and ultimately serve the Congressional goal of protecting domestic and foreign labor.

Particularly in light of the realities of the H-1B program, it is sound policy for the Administrator to retain discretion to expand the scope of an investigation once she finds reasonable cause to believe that an employer is violating the rights of at least one H-1B employee. The H-1B program is a voluntary program designed to permit employers to temporarily hire skilled foreign workers under certain carefully prescribed conditions. Congress explicitly authorized aggrieved parties, not just H-1B employees, to file complaints to facilitate enforcement and deter abuse. H-1B employees themselves are often reluctant to file complaints

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<sup>20</sup> *Id.* at 6741.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 6723, 6741; 56 Fed. Reg. 54,720-01; 54,721 (Oct 22, 1991) (“The Department believes that Congress, in enacting the Act, intended to provide greater protection than under prior law for U.S. and foreign workers without interfering with an employer’s ability to obtain the H-1B workers it needs on a timely basis.”).

<sup>23</sup> 8 U.S.C.A. § 1182(n)(2)(A).

because their employers hold the key to their continued legal residency.<sup>24</sup> To effectively enforce the H-1B program, the Administrator must have the discretion to determine an investigation's scope once reasonable cause to initiate such an investigation has been found.

The Administrator's discretionary authority to determine the scope of a "reasonable cause" investigation is also consistent with the evolution of Department of Labor regulations implementing the 1990 Amendments. The Secretary's interim final regulations implementing the 1990 Amendments originally provided that the Wage and Hour Administrator could conduct investigations of potential INA violations only pursuant to a complaint.<sup>25</sup> However, by 1994, the Department had concluded that no-complaint or "directed" investigations were necessary to adequately enforce the H-1B program:

As a result of its experience in operating the H-1B program and after consideration of the comments on the proposed rule, the Department has determined that it is neither necessary nor appropriate to limit its post-admission investigation of possible LCA violations to those where complaints have been filed by aggrieved parties. Thus the Final Rule allows post-admission investigations which the Department may conduct on its own initiative. This has no impact on the pre-admission LCA approval process.<sup>[26]</sup>

In comments accompanying the regulations, the Department explained in detail why, despite opposition by the regulated business community, it determined that "no-complaint" investigations were necessary and "consistent with a general Congressional principle in enacting immigration laws – to provide for the admission of foreign workers under terms and conditions of employment that do not adversely affect the wages and working conditions of similarly employed U.S. workers."<sup>27</sup>

In 1998, Congress passed the American Competitiveness and Workforce Improvement Act (ACWIA), which, among other things, expanded the Department's authority to conduct investigations based on information from sources other than aggrieved parties.<sup>28</sup> INA Section

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<sup>24</sup> See Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 865-69 (Summer 2003) (positing that the H-1B program creates de facto indentured servitude due to difficulty of switching employers and obtaining permanent residency); U.S. General Accounting Office, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157, p. 20 (Sept. 2000).

<sup>25</sup> 57 Fed. Reg. 1,317; 1,324 (Jan. 13, 1992).

<sup>26</sup> 59 Fed. Reg. 65,646-01; 65,650 (Dec. 20, 1994).

<sup>27</sup> *Id.* at 65,651 (citations omitted).

<sup>28</sup> Pub. Law No. 105-277, 112 Stat. 2681 (1998).

1182(n)(2) was amended by adding subparagraph (F) providing for random investigations of employers found to have committed willful violations of their LCAs and also adding subparagraph (G) providing for investigations based upon the receipt of credible information following the Secretary's personal certification of the existence of reasonable cause.

On their face, these amendments constituted a statutory enlargement of the Department's H-1B authority to conduct investigations based upon information from sources other than aggrieved parties. However, the conditions under which this information could be used to initiate investigations were strictly circumscribed by statute. The Department could undertake random investigations of employers only when the employer had previously committed a willful LCA violation. A credible source investigation required "specific credible information" by a source "whose identity is known to the Secretary" and that "such information provides reasonable cause to believe that an employer has committed" substantial LCA violations. This "credible source" investigatory authority was further restricted by requiring that the Secretary "personally certify that the requirements for conducting such an investigation have been met." The plain language of the statute did not explicitly address "no complaint" investigations and although it expanded the Secretary's investigatory authority, that authority was carefully delineated.<sup>29</sup>

The the Secretary's statutory authority to conduct investigations was expanded again in 2004<sup>30</sup> when credible source investigations were separated from reasonable cause investigations and authorized *without* personal certification by the Secretary. This amendment clearly facilitated the Department's investigatory authority, but the resulting four sources of authority nevertheless retained certain restrictive features including, in each case, a requisite finding of "reasonable cause" for the investigation.<sup>31</sup> The plain language of these enforcement provisions, in effect to this day, reflects evolving Congressional intent to delegate broad authority to the Secretary to enforce the H-1B program based upon information from a variety of sources (aggrieved and otherwise) but only when such information provides reasonable cause to investigate. The Department's investigation in the case before us, based as it was on reliable information from an H-1B employee, was entirely consistent with the statute, the Congressional approaches behind it, and the Department's regulations.

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<sup>29</sup> In recognition that these new enforcement provisions reflected compromise among competing interests, the Department's proposed regulations retreated on its "no-complaint" authority. 65 Fed. Reg. 80,110-01; 80,118; 80,177 (Dec. 20, 2000), 2000 WL 1852810 (F.R.) ("The resulting legislation was a compromise, and there was no conference committee report or joint statement by the negotiators that would provide clear legislative history as to its intent.").

<sup>30</sup> The H-1B Visa Reform Act of 2004 was part of the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (Dec. 8, 2004).

<sup>31</sup> 8 U.S.C.A. §1182(n)(2)(A); 8 U.S.C. § 1182(n)(2)(F); 8 U.S.C.A. § 1182(n)(2)(G)(i); 8 U.S.C.A. § 1182(n)(2)(G)(ii), (iv).

### C. Board precedent

As the Administrator maintains, the Board has affirmed a number of multiple employee awards arising out of a single aggrieved-party complaint. In *Adm'r v. Synergy Sys. Inc.*, the Board affirmed the ALJ's determination that a complainant's complaint under section 1182(n)(2)(A) encompassed not only his grievances "but also all other similar violations involving the same LCA, even if those other violations involve other aggrieved persons who were not identified by the person making the complaint."<sup>32</sup> The Board stated that the Administrator has the authority to investigate an H-1B employer's alleged INA violations involving H-1B workers even in the absence of a complaint by them. The Board noted that under the regulations, "[t]he Administrator, *either* pursuant to a complaint or *otherwise*, shall conduct such investigations as appropriate." 20 C.F.R. § 655.800(b) (emphasis added). The Board compared *Adm'r v. Synergy* to *Adm'r v. Beverly Enter., Inc.*,<sup>33</sup> a case brought under the Immigration Nursing Relief Act of 1989,<sup>34</sup> and its implementing regulation at 20 C.F.R. § 655.400(b), which contains the same language as 20 C.F.R. § 655.800(b), in which the Board "held that the Secretary of Labor could act, complaint or not, when a facility seeking to employ a nurse is allegedly violating the terms of an LCA." The Board observed "that Synergy's construction of the INA and 20 C.F.R. § 655.800(b) would have the Administrator "'stand idly by, despite having received, as here, serious allegations from a credible source.'"<sup>35</sup>

Based on the plain language of the statute and regulations, Board precedent, and a broad reading of the relevant legislative and regulatory history, we hold that the Administrator had the authority to investigate alleged INA violations involving H-1B workers who did not file complaints.

## 2. Time bar on investigation of complaint

The ALJ found that the Act and regulations do not "limit the Administrator from investigating matters occurring outside a twelve month period prior to the filing of a complaint."<sup>36</sup> Based on this finding, the ALJ assessed damages against Greater Missouri for LCA violations that occurred well over a year before Arat filed her complaint on June 22, 2006.

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<sup>32</sup> ARB No. 04-076, ALJ No. 2003-LCA-022 (ARB June 30, 2006).

<sup>33</sup> ARB No. 99-050, ALJ No. 1998-ARN-003, slip op. at 9-10 (ARB July 31, 2002).

<sup>34</sup> 8 U.S.C.A. §§ 1101 *et seq.* (West 1999).

<sup>35</sup> *Beverly Enter., Inc.*, ARB No. 99-050, slip op. at 10.

<sup>36</sup> *Adm'r v. Greater Missouri Med. Pro-Care Providers, Inc.*, ARB No. 12-015, ALJ No. 2008-LCA-026, slip op. at 5 (ALJ Oct. 23, 2009) (Order Granting the Administrator's Motion for Partial Summary Decision on the Issues of Failure to Pay H-1B Employees in Non-Productive Status, and Taking Illegal Deductions from Wages (Order Granting Partial Summary Decision)).

The Administrator urges the Board to affirm the ALJ and argues that the H1-B statutory and regulatory requirements are met as long as one claim within a complaint falls within the 12-month deadline. Given our past holdings to the contrary, the Administrator requests that we reconsider our precedent.<sup>37</sup>

Missouri argues that the Act limits the scope of the investigation and any resultant liability in this matter to adverse actions which occurred during the 12-month period immediately preceding Arat's aggrieved party complaint – that any violations occurring before this time period are time barred. Resp. Br. at 14. Greater Missouri asserts that the Administrator lacked jurisdiction over matters arising prior to the relevant time period and that the ALJ erred in failing to recognize and apply this express statutory limitation. *Id.* at 19. We agree.

The INA provision containing the aggrieved party complaint provisions at 8 U.S.C.A. § 1182(n)(2)(A), states that “[n]o investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.” Similarly, § 1182(n)(2)(G)(vi) provides that “[n]o investigation described in clause (ii) (or hearing . . . based on such investigation) may be conducted with respect to information about a failure to meet a condition described in clause (ii), unless the Secretary of Labor receives the information not later than 12 months after the date of the alleged failure.” The reference to “clause (ii)” in the preceding quotation refers to an LCA investigation initiated under § 1182(n)(2)(G)(ii), the “credible source” provision. The regulations, at 20 C.F.R. § 655.806(a)(5) state that “[a] complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA. This jurisdictional bar does not affect the scope of remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.”

The plain meaning of these statutory and regulatory provisions dictate a finding that any LCA violations which occurred more than a year before Arat filed her complaint are not actionable.<sup>38</sup> We have similarly held in both *Jain* and *Avenue Dental Care*.<sup>39</sup> Although the ALJ

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<sup>37</sup> See *Adm'r, Wage & Hour Div. v. Avenue Dental Care*, ARB No. 07-101, ALJ No. 2006-LCA-029 (ARB Jan. 7, 2010); *Jain v. Empower IT, Inc.*, ARB No. 08-077, ALJ No. 2008-LCA-008, (ARB Oct. 30, 2009).

<sup>38</sup> The statute's legislative history supports this reading. In a House of Representatives Report on September 19, 1990, it was stated that “[t]he bill limits the period during which such a complaint may be filed to the 12 months following the date of the employer's action or inaction. This process is designed to protect employer and worker due process rights to the statutorily-prescribed and employer-attested conditions.” Family Unity and Employment Opportunity Immigration Act of 1990, 14018 H.R. 723, Part 1 (Sept. 19, 1990).

<sup>39</sup> *Avenue Dental Care*, ARB No. 07-101, slip op. at 11 (in which the Board held that while the complainant's claim for back pay was timely and thus actionable, his claim regarding filing fees was

correctly noted that the relevant regulation provides that the one-year statute of limitations does not affect the scope of remedies, she nevertheless erred in her finding that discrete claims outside the statute of limitations are actionable.

As we ruled in *Avenue Dental Care*, a claim for back pay may extend beyond the one-year limitation as long as it was timely filed: “the issue bec[omes] how far back in time to go in calculating the back pay . . . . Put simply, [the employee’s] complaint about back pay was timely, and thus actionable, because he filed it less than one year after [the employer] continued not to pay him.”<sup>40</sup> In *Gupta v. Jain Software Consulting, Inc.*, we explained that “the express terms of the regulation make a benching violation a ‘continuing violation’ that remains actionable for the duration of the employment relationship . . .” as long as the benching complaint is filed within a year of the latest date on which the employer failed to pay the employee as stipulated in the LCA.<sup>41</sup> Thus, the scope of a remedy for a timely filed claim is not limited by the one-year limitation period. However, each discrete violation must be timely filed on its own to be actionable; if the violation underlying the claim occurred more than 12 months before a complaint is filed, any remedies for that violation are barred under the statute.<sup>42</sup>

We have reviewed the ALJ’s D. & O. and the record to determine which of the violations are timely and which are untimely. Since Arat filed her complaint on June 22, 2006, only violations that occurred on or after June 22, 2005, or that began before that date but continued to or after June 22, 2005, are timely. To determine whether a given claim was timely, we first looked to the D. & O. to see whether the ALJ had engaged in fact-finding regarding the dates for the benching periods; if so, we used those dates. Where the ALJ did not find benching period dates, we consulted the parties’ joint stipulations at JT-1, in conjunction with the “Wage Transcription and Computation Sheet” for each H-1B worker (the exhibit numbers for these sheets are listed next to each H-1B worker’s name below). In all cases, the stipulated amount for back wages for time spent in nonproductive status matched the amount listed on the respective wage transcription and computation sheet. Therefore, because these back wages due amounts matched, we assumed for the purpose of determining timeliness that the benching periods listed

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“time-barred and not actionable because the violation he allege[d] occurred more that [sic] one year before he filed that claim.”); *Jain*, ARB No. 08-077, slip op. at 12 (in which the Board overturned the decision of the ALJ that all of the complainant’s claims were actionable “as long as the complaint [wa]s filed within 12 months of when the employee was last employed under an H-1B visa,” because under the INA, claims are not actionable unless they arose within 12 months from the violation alleged.).

<sup>40</sup> *Avenue Dental Care*, ARB No. 07-101, slip op. at 11.

<sup>41</sup> ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5 (ARB Mar. 30, 2007).

<sup>42</sup> Although the Secretary is barred from imposing remedies for violations outside the limitation period applicable to aggrieved party or “credible source” investigations, we note that the Secretary may, under section 1182(n)(2)(F), conduct random investigations, without a limitations period, for up to five years after a final ruling.



on the sheets were accurate. A list indicating the timeliness of the claims for benching violations follows:

- a. Marissa Acharon, untimely, D. & O. at 59 (benching period for one week starting February 1, 2004, and from May 4, 2004, to June 3, 2004);
- b. Rhandie Aloya, untimely, G-19 (benching period from January 2, 2005, to March 31, 2005);
- c. Alena Gay Arat, untimely, G-23 (benching period from February 28, 2005, to April 30, 2005);
- d. Euphill Juliette Aseniero, untimely, D. & O. at 60 (benching period from April 16, 2004, to June 29, 2004);
- e. Aileen Bausa, untimely, G-37 (benching period from December 17, 2004, to February 28, 2005);
- f. Ellanie Berba, untimely, D. & O. at 63 (benching period from June 4, 2004, to August 22, 2004);
- g. Frances Bertulfo, untimely, G-46 (benching period from February 26, 2005, to April 30, 2005);
- h. Karen Gay Bunanig, timely, G-49 (benching period from June 5, 2005, to August 15, 2005);
- i. Zadel Cabrera, untimely, D. & O. at 64 (benching period from December 1, 2003, to February 15, 2004);
- j. Darlene Claud, untimely, G-58 (benching period from December 2, 2004, to January 31, 2005);
- k. Perlas Dang-awan, timely, G-64 (benching period from May 21, 2005, to October 31, 2005);
- l. Estella Daraway, untimely, G-68 (benching period from December 29, 2004, to March 31, 2005);
- m. Rinna Daymiel, untimely, D. & O. at 66 (benching period from July 12, 2004, to September 27, 2004);
- n. Iris de la Calzada, untimely, D. & O. at 67 (benching period from June 2, 2004, to July 29, 2004);

- o. Ryan de los Reyes, untimely, G-86 (benching period from December 30, 2004, to March 31, 2005);
- p. Naomie del Mar, untimely, G-90 (benching period from December 29, 2004, to February 28, 2005);
- q. Mary Carmel Elizon, untimely, D. & O. at 69 (benching period from March 31, 2004, to June 3, 2004);
- r. Emmanuel A. Fernandez, untimely, G-185 (benching period from December 5, 2004, to February 28, 2005);
- s. Allan Roque H. Fruelda, untimely, G-97 (benching period from February 27, 2005, to April 15, 2005);
- t. Michael M. Gonzales, untimely, G-100 (benching period from December 6, 2004, to February 28, 2005);
- u. Marjorie Ham, timely, D. & O. at 70 (benching period from August 12, 2005, to November 3, 2005);
- v. Franklin Herrera, untimely, G-112 (benching period from January 19, 2005, to March 31, 2005);
- w. Darlene Himbing, untimely, G-116 (benching period from March 19, 2005, to April 30, 2005);
- x. Hazel Mae H. Hofilena, timely, G-119 (benching period from March 5, 2005, to July 31, 2005);
- y. Joshua E. Inventor, timely, G-122 (benching period from January 3, 2005 to June 30, 2005);
- z. Michelle Lumapas, untimely, G-128 (benching period from February 24, 2005, to April 30, 2005);
- aa. Charmaine T. Manuel-Isip, untimely, G-133 (benching period from December 2, 2004, to January 31, 2005);
- bb. Angeles Mojica, timely, D. & O. at 71 (benching period from July 6, 2005, to November 3, 2005);
- cc. Grethel Ocampo-Dakay, untimely, D. & O. at 73 (benching period from July 15, 2003, to September 17, 2003);

- dd. Lordele Pato, untimely, G-142 (benching period from January 25, 2005, to March 31, 2005);
- ee. Kahlila Quidlat-Fowler, untimely, G-148 (benching period from January 6, 2005, to March 15, 2005);
- ff. Mae Ian T. Regis, timely, G-156 (benching period from February 14, 2005, to August 15, 2005);
- gg. Jason Sablan, untimely, G-159 (benching period from March 14, 2005, to April 30, 2005);
- hh. Jerome Satorre, untimely, G-162 (benching period from March 12, 2005, to May 31, 2005);
- ii. Roselle Y. Solijon, untimely, G-166 (benching period from January 19, 2005, to March 31, 2005);
- jj. Maria Elena Soriano, untimely, G-170 (benching period from March 8, 2005, to April 30, 2005);
- kk. Eva L. Tarce, untimely, G-173 (benching period from December 17, 2004, to February 28, 2005);
- ll. Caren Grace O. Uy, timely, G-176 (benching period from June 6, 2005, to August 15, 2005);
- mm. Helenber Villaster, untimely, G-179 (benching period from December 2, 2004, to March 15, 2005);
- nn. Trixy L. Ypil, untimely, G-182 (benching period from December 31, 2004, to February 28, 2005).

A list indicating the timeliness of claims based on violations for illegally deducting USCIS fees and attorney fees for H-1B extensions follows:

- a. Rhandie Aloya, G-19, \$185.00, timely (fee October 10, 2005);
- b. Alena Gay Arat, G-23, \$690.00, timely (fees December 31, 2005, January 31, 2006, February 28, 2006, March 31, 2006, April 30, 2006, May 15, 2006);
- c. Euphill Juliette Aseniero, G-32, \$685.00, timely (fees October 10, 2005, October 25, 2005, November 10, 2005, November 25, 2005, December 10, 2005);
- d. Aileen Bausa, G-37, \$685.00, timely (fees October 10, 2005, October 15, 2005, October 31, 2005, November 15, 2005, November 30, 2005);

- e. Perlas Dang-awan, G-64, \$690.00, timely (fees April 10, 2006, April 25, 2006, May 10, 2006, May 25, 2006, June 10, 2006);
- f. Estella Daraway, G-68, \$685.00, timely (fees October 25, 2005, November 10, 2005, November 25, 2005, December 10, 2005, December 25, 2005);
- g. Rinna Daymiel, G-77, \$685.00, timely (fees October 10, 2005, October 15, 2005, October 31, 2005, November 15, 2005, November 30, 2005);
- h. Ryan de los Reyes, G-86, \$685.00, timely (fees October 10, 2005, October 25, 2005, November 10, 2005, November 25, 2005, January 1, 2006);
- i. Naomie del Mar, G-90, \$685.00, timely, (fees October 10, 2005, October 25, 2005, November 10, 2005, November 25, 2005, December 10, 2005);
- j. Michael Gonzales, G-100, \$185.00, timely (fee October 10, 2005);
- k. Franklin Herrera, G-112, \$685.00, timely (fees October 10, 2005, October 15, 2005, October 31, 2005, November 15, 2005, November 30, 2005);
- l. Joshua E. Inventor, G-122, \$185.00, timely (fee October 10, 2005);
- m. Yvette L. Jakosalem, G-125, timely (fee June 25, 2006);
- n. Michelle Lumapas, G-128, \$185.00, timely (fee October 10, 2005);
- o. Kahlila Quidlat-Fowler, G-148, \$685.00, timely (fees October 10, 2005, October 25, 2005, November 10, 2005, and November 25, 2005, December 10, 2005);
- p. Jerome Satorre, G-162, \$185.00, timely (fee October 10, 2005);
- q. Roselle Y. Solijon, G-166, \$185.00, timely (fee October 10, 2005).

Finally, a list indicating the timeliness of claims for the violation of illegally withholding final paychecks follows:

- a. Alena Gay Arat, G-23, \$1,964.59, timely (July 2006);
- b. Estella Daraway, G-68, \$4,166.68, timely (June 2006, July 2006);
- c. Michael Gonzales, G-100, \$575.01, timely (April 2006);
- d. Kahlila Quidlat Fowler, G-148, G-151, \$1,577.95, timely (December 2005).

### 3. Evidentiary issues and burden shifting

Prior to the hearing in this matter, the ALJ issued a summary decision finding that Greater Missouri “violated the Act by failing to pay the required wages to 41 of its H-1B employees during ‘benching’ periods.” D. & O. at 55. The parties stipulated to the amount of back wages due to 30 of the H-1B employees, but they disputed the amount of wages due to 11 other H-1B employees. *Id.* Following the hearing, the ALJ issued a decision addressing the back wage claims of each of those 11 employees.

Greater Missouri argues that the ALJ erred in admitting and relying upon evidence submitted by the Administrator regarding the disputed “benching” periods of those 11 nonimmigrant workers. Resp. Br. at 26. Greater Missouri asserts that this evidence was untimely, improper, and unreliable because the Administrator made “self-serving assertions of (and then withdrawals of) privilege,” because the Administrator relied on dates of arrival in the United States and that for a few individuals, the dates came from interviews with the nonimmigrant workers, and because the Administrator did not make any effort to present testimony from the nonimmigrant workers or provide any witnesses for Greater Missouri to question. *Id.* at 20-23. Greater Missouri takes issue with the fact that some of the Administrator’s exhibits incorporated multiple statements, were an amalgamation of typewritten and handwritten words, and that most of the statements were unsworn, unsigned, and did not indicate when the individuals came to report to work. *Id.*

Greater Missouri also asserts that the Administrator’s statements regarding when H-1B workers arrived and/or began receiving an allowance were hearsay and that, when the Administrator’s notes contained statements made by others, those notes were hearsay within hearsay and that the ALJ improperly used this information as evidence of when eleven of the H-1B workers became available to work.

Greater Missouri also argues that because the Administrator’s evidence on when its employees reported to work “was far from compelling,” the ALJ improperly shifted the burden of proof to Greater Missouri to disprove the Administrator’s determination of the relevant dates. *Id.* at 27 (citing the ALJ’s October 18, 2011 Order at 56, 58, 69). Greater Missouri described the ALJ’s “approach” as “boil[ing] down to penalizing GMM for not providing evidence of the precise date when individuals entered employment.” *Id.*

Finally, Greater Missouri objects that the Administrator improperly provided evidence a year and a half after the close of discovery, when Greater Missouri had requested the information during discovery and moved to compel it earlier on. *Id.* at 24.

The Board reviews an ALJ’s legal conclusions de novo and evidentiary rulings under an abuse of discretion standard.<sup>43</sup>

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<sup>43</sup> See supra Jurisdiction and Standard of Review.

A. Burden of Proof

Greater Missouri did not submit any evidence of when the eleven H-1B workers in question became available to work. The only document that Greater Missouri submitted for determining when H-1B employees arrived for work was GX 4, and it did not list the arrival dates for the eleven H-1B employees at issue. D. & O. at 57. The ALJ relied on *Anderson v. Mt. Clemens Pottery Co.*,<sup>44</sup> in which the Supreme Court held that “when an employer fails to provide adequate records, a prosecuting party meets its initial burden of proving that employees performed work for which they were not properly compensated if ‘he proves that [an employee] has in fact performed work for which [the employee] was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.’” *Id.* (citing *Mt. Clemens*, at 687).

The ALJ correctly noted that the Board has applied the *Mt. Clemens* burden shifting principles to other labor statutes requiring payment of specified wages including wage determinations in Davis-Bacon Act cases, as well as those in the context of LCA claims.<sup>45</sup> H-1B employers, like the FLSA employer in *Mt. Clemens* and employers subject to the Davis-Bacon Act, are required by law to maintain sufficient and accurate documentation to demonstrate they are abiding by the contours of the governing law.<sup>46</sup> As the Supreme Court explained in *Mt. Clemens*, “it is the employer who has the duty under [the governing law] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed.”<sup>47</sup> Applying *Mt. Clemens*, this Board has similarly ruled that, “although the Administrator has the burden of establishing that the employees performed work for which they were improperly compensated, where an employer’s records are inaccurate or incomplete, employees are not to be penalized by denying them back wages simply because the precise amount of uncompensated work cannot be proved.”<sup>48</sup>

*Mt. Clemens* further instructs that if the employer fails to supply accurate records, the ALJ must draw reasonable inferences from whatever evidence the Administrator produces.<sup>49</sup> At

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<sup>44</sup> 328 U.S. 680 (1946).

<sup>45</sup> See, e.g., *Pythagoras Gen. Contracting Corp. v. Adm’r*, ARB Nos. 08-107, 09-007; ALJ No. 2005-DBA-014, slip op. at 5 (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011), *aff’d*, 926 F. Supp. 2d 490 (S.D.N.Y. 2013); *Adm’r v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033; ALJ No. 2001-LCA-029, slip op. at 7 (ARB June 30, 2005); *Cody-Zeigler, Inc., v. Adm’r, Wage & Hour Div.*, ARB Nos. 01-014, -015; ALJ No. 1997-DBA-017, slip op. at 8 (ARB Dec. 19, 2003).

<sup>46</sup> See 20 C.F.R. § 655.731(b)(1).

<sup>47</sup> *Mt. Clemens Pottery Co.*, 328 U.S. at 687.

<sup>48</sup> *Cody-Zeigler*, ARB Nos. 01-014, -015; slip op. at 8.

<sup>49</sup> *Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 13.

that point the burden shifts to the employer to present evidence that negates the inference drawn from the prosecuting party's proof and, if the employer fails to present such evidence, damages may then be awarded even though they may only be an approximation. D. & O. at 57 (citing *Mt. Clemens*, 328 U.S. at 688). The Supreme Court reasoned "that an employer 'cannot be heard to complain that the damages lack the exactness and precision of measure that would be possible had he kept records in accordance with the [statutory] requirements.'" *Id.* Here, Greater Missouri failed to maintain the requisite records as to when its own employees became available for work; under *Mt. Clemens Pottery Co.*, it may not now be heard to claim that it was disadvantaged by the lack of the information it was obligated by law to maintain.

*B. The ALJ relied on sufficient evidence*

Given our ruling above on the lack of remedy for out-of-time LCA violations, it appears that the "benching" violations of all but two of the eleven H-1B employees in question occurred prior to June 22, 2005. As we explained above, any benching violations that did not begin or end within a year prior to the filing of the complaint on June 22, 2006, are not actionable. The benching violations committed against Margorie Ham and Angeles Mojica (D. & O. at 69-72), however, occurred after June 22, 2005. In both those cases, the absence of accurate employer records from Greater Missouri, permitted the ALJ to review the Administrator's evidence including DOL investigator Simon's testimony and calculations, as well as the employees' statements.

As the ALJ correctly ruled, hearsay is generally admissible in administrative proceedings.<sup>50</sup> The H-1B regulations provide that "any oral or documentary evidence may be received in proceedings under this part" and that the "Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure . . . shall not apply."<sup>51</sup> Moreover, the Board has explicitly held that the testimony of an investigator summarizing employee interview statements is admissible and may support back pay awards to non-testifying employees.<sup>52</sup> The ALJ did not abuse her discretion by admitting DOL investigator and/or employees' testimony and statements, over Greater Missouri's hearsay objections.<sup>53</sup> D. & O. at 56.

Greater Missouri also objects to the ALJ's admission of evidence the Administrator provided a year and a half after the close of discovery. Greater Missouri identifies neither the exact evidence to which it refers, when exactly the evidence was provided or whether the evidence was even used to support any of the ALJ's findings. From our review of the record, it

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<sup>50</sup> *Opp. Cotton Mills v. Administrator*, 312 U.S. 129 (1949); *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938).

<sup>51</sup> 20 C.F.R. § 655.825(b).

<sup>52</sup> *Cody-Zeigler*, ARB Nos. 01-014, -015; slip op. at 12.

<sup>53</sup> *Pythagoras*, ARB Nos. 08-107, 09-007; slip op. at 15 (in the absence of employer records, the Administrator properly relied on employee statements and other investigative evidence regardless of whether they were notarized, sworn or authenticated).

appears that Greater Missouri refers to a document that the Administrator submitted on February 26, 2009, with its opposition to Greater Missouri's motion for summary judgment. The evidence in question was a different, less-redacted, version of an Intake Form the Administrator had produced during discovery. See October 22, 2009 Order Denying Respondent's Motion to Strike. We agree with the ALJ that Greater Missouri was not prejudiced by this production. The production occurred well over a year before this case was tried on July 28, and 29, 2010. Greater Missouri had ample time to develop and submit rebuttal evidence before and during the trial. Further, nothing in the record leads us to believe that the ALJ relied on this evidence to arrive at the benching periods for either Ham or Mojica (the only surviving claims of the 11 contested employee claims). The ALJ determined these two back pay findings based largely upon Greater Missouri's own records and testimony. D. & O. at 69-72. Furthermore, Greater Missouri failed to produce any evidence to rebut the ALJ's reasonable inferences. An award of back pay based upon those reasonable inferences is therefore consistent with *Mt. Clemens Pottery Co.* The ALJ's determinations regarding the dates these employees were benched are sound, permit an award of back pay consistent with *Mt. Clemens Pottery Co.*, and we affirm them.

#### 4. Interest

Greater Missouri asserts that the Administrator's Amended Determination does not reference pre- or post-judgment interest and that the circumstances here do not support such an award. Resp. Br. at 28. Greater Missouri cites delay on the part of the Administrator and the ALJ as a reason that Greater Missouri "should not singularly bear the brunt of the lengthy nature of these proceedings. . . ." *Id.* at 29. Greater Missouri argues that an award of pre- and post-judgment interest is overly burdensome and has no basis in law or fact. *Id.*

The INA does not specifically provide for the award of pre-judgment interest or post-judgment interest on back pay by statute or regulation. However, the Board has routinely awarded pre- and post-judgment interest on awards in H-1B cases, just as it does in cases arising under other remedial Department of Labor employee protection statutes.<sup>54</sup> The rationale of compensating the aggrieved employee for loss of the use of his/her money applies equally in all these statutes. Based on Board precedent and the remedial policies underlying the H-1B statutes and regulations, the H-1B workers in this case are entitled to pre-judgment and post-judgment compound interest on the pay award until Greater Missouri satisfies the debt.<sup>55</sup> We further find

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<sup>54</sup> ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000); 41 C.F.R. § 60-741.65(a)(1)("[Office of Federal Contract Compliance Programs] may seek back pay and other make whole relief for aggrieved individuals . . . . Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.")

<sup>55</sup> *Adm'r, Wage & Hour Div. USDOL v. University of Miami, Miller Sch. of Med.*, ARB Nos. 10-090, -093; ALJ No. 2009-LCA-026, slip op. at 13 (ARB Dec. 20, 2011) (citing *Amtel Group, Inc. v. Rungvichit Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 12 (ARB Sept. 29, 2006) (holding that even in absence of express authority under INA, the remedial nature and "make whole" goal of back pay warrants prejudgment compound interest and post judgment interest)).



that any delay in the proceedings was not due solely to the Administrator, much less the aggrieved employees for whom the interest is due. Accordingly we decline to reduce the interest award on that basis. The pre- and post-judgment interest shall be calculated according to the procedures set out in *Doyle v. Hydro Nuclear Servs.*<sup>56</sup>

## ORDER

We **AFFIRM** the ALJ's finding that the scope of a Wage and Hour investigation initiated in response to an aggrieved party complaint is not limited to the allegations contained in that complaint. We also **AFFIRM** the ALJ's evidentiary rulings and her ruling on the availability of pre- and post-judgment interest on awards in H-1B cases. We **REVERSE** the ALJ's finding that discrete violations occurring outside a twelve-month period prior to the filing of a complaint are actionable. Consequently, **IT IS THEREFORE ORDERED** that:

1. Greater Missouri Medical Pro-Care Providers, Inc., shall pay back wages for benching violations to the following individuals in the specified amounts:

|                          |             |
|--------------------------|-------------|
| a. Karen Gay Bunanig     | \$7,895.42  |
| b. Perlas Dang-awan      | \$17,369.92 |
| c. Marjorie Ham          | \$8,697.72  |
| d. Hazel Mae H. Hofilena | \$15,790.83 |
| e. Joshua E. Inventor    | \$18,845.00 |
| f. Angeles Mojica        | \$13,060.30 |
| g. Ian T. Regis          | \$17,274.58 |
| h. Caren Grace O. Uy     | \$7,852.08  |

2. Greater Missouri Medical Pro-Care Providers, Inc., shall pay back wages for illegally deducting USCIS fees and attorney's fees for H-1B extensions, to the following individuals in the specified amounts:

|                              |          |
|------------------------------|----------|
| a. Rhandie Aloya             | \$185.00 |
| b. Alena Gay Arat            | \$690.00 |
| c. Euphill Juliette Aseniero | \$685.00 |
| d. Aileen Bausa              | \$685.00 |
| e. Perlas Dang-awan          | \$690.00 |
| f. Estella Daraway           | \$685.00 |
| g. Rinna Daymiel             | \$685.00 |
| h. Ryan de los Reyes         | \$685.00 |
| i. Naomie del Mar            | \$685.00 |

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<sup>56</sup> *Id.* (citing *Doyle*, ARB Nos. 99-041, 99-042, 00-012; slip op. at 18-21; *see also Administrator & Wirth v. University of Miami*, ARB 10-090, 10-093; ALJ No. 2009-LCA-026 (ALJ July 6, 2012) for a recent and comprehensive model for the calculation of pre- and post-judgment interest.

|                           |          |
|---------------------------|----------|
| j. Michael Gonzales       | \$185.00 |
| k. Franklin Herrera       | \$685.00 |
| l. Joshua E. Inventor     | \$185.00 |
| m. Yvette L. Jakosalem    | \$190.00 |
| n. Michelle Lumapas       | \$185.00 |
| o. Kahlila Quidlat-Fowler | \$685.00 |
| p. Jerome Satorre         | \$185.00 |
| q. Roselle Y. Solijon     | \$185.00 |

3. Greater Missouri Medical Pro-Care Providers, Inc., shall pay back wages for illegally withholding final paychecks to the following individuals in the specified amounts:

|                           |            |
|---------------------------|------------|
| a. Alena Gay Arat         | \$1,964.59 |
| b. Estella Daraway        | \$4,166.68 |
| c. Michael Gonzales       | \$575.01   |
| d. Kahlila Quidlat Fowler | \$1,577.95 |

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring in part and dissenting in part.**

I concur in the majority’s ruling to the extent that it applies to Alena Gay Arat, the “aggrieved party” complainant in this case. I dissent from the majority’s ruling in all other respects. Greater Missouri asserts on appeal that Wage and Hour’s investigation into possible violations pertaining to H-1B employees other than Ms. Arat exceeded the scope of its authority under 8 U.S.C.A. § 1182(n)(2)(A).<sup>57</sup> I agree, for the reasons hereafter discussed.

Resolution of the question of whether the Wage and Hour Division exceeded its authority in its investigation into violations pertaining to all of Greater Missouri’s H-1B employees requires a clear understanding of certain highly relevant facts. This is not a case in which Wage and Hour’s investigation into possible violations pertaining to H-1B employees other than Ms. Arat was undertaken based on information she provided, as the majority suggests. Rather, the information upon which Wage and Hour initiated its investigation into violations beyond those

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<sup>57</sup> Petition for Review, at p. 9; Respondent’s Brief in Support of Petition for Review, at p. 11; Respondent’s Rebuttal Brief in Support of Petition for Review, at pp. 3-4.

pertaining to Arat was independently obtained during the course of its investigation into Arat's complaint. As such, the broader investigation undertaken by Wage and Hour was subject to the provisions of 8 U.S.C.A. § 1182(n)(2)(G)(ii) and 20 C.F.R. § 655.807, which were not in this case followed.

Contrary to the majority's assertion, Arat, as the complainant, did not allege H-1B violations pertaining to anyone other than herself. Nor did she provide information to Wage and Hour about any violations affecting other Greater Missouri H-1B employees. Arat's allegations of violations, and the information she provided in her complaint, pertained to herself only. RX 431.<sup>58</sup> The ALJ understood the exclusively personal focus of Arat's complaint,<sup>59</sup> as did the Wage and Hour investigator.<sup>60</sup> Additional information secured from Arat, upon which Wage and Hour ultimately found reasonable cause for investigating four possible violations pertaining to Arat's employment, was also limited to information pertaining to Arat only, as the H-1B Nonimmigrant Information Form, ESA Form WH-4 (RX 429) makes abundantly clear.<sup>61</sup>

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<sup>58</sup> The majority asserts that Arat alleged in her complaint that "she and other H-1B therapists working for Respondent were paid only \$50 per week prior to gaining their Missouri state therapist licenses," and that "Arat alleged 'benching' violations of other H-1B therapists working for Greater Missouri. *Ante*, at pp. 6 and 8 n.11. What Arat's complaint actually stated with respect to the \$50 per week payment was: "*My Employer . . . made me and the rest of us (therapist) stayed in a company-paid apartment to review for NPTE and during that non-productive period, my employer just gave US\$50.00 per week for food allowance.*" RX 431, at p. 3 (emphasis added). Out of context, this statement could arguably be construed as alleging that Arat's fellow H-1B employees were only paid \$50 per week (and thus presumably "benched"). However, within the context of the rest of Arat's complaint, in which she exclusively alleges facts pertaining to her claim that Greater Missouri violated her employment rights, her assertion that "my employer just gave US\$50.00 per week for food allowance" can only be construed as pertaining to herself.

<sup>59</sup> The ALJ described Arat's complaint as follows: "On June 22, 2006, Alena Gay Arat filed a complaint against GMMPCPI with the Missouri Department of Economic Development, Division of Workforce Development (Missouri Department). RX 431. Ms. Arat alleged that GMMPCPI failed to pay her a salary during a nonproductive period of employment from when she reported for work in Joplin, Missouri, to the date she obtained her Missouri therapist license. RX 431. She also alleged that GMMPCPI made numerous deductions from her paychecks for USCIS fees and attorney fees related to the extension of her H-1B visa. RX 431. Furthermore, Ms. Arat alleged that, after resigning her employment prior to the end of the term in her employment agreement, GMMPCPI demanded that she pay between \$4,000.00 and \$5,446.00 in damages for breach of contract. RX 431." ALJ Decision & Order, at 14.

<sup>60</sup> According to Wage and Hour investigator Simon, the information Arat provided supported the singular charge in Arat's complaint that Greater Missouri "required or attempted to require a penalty for ceasing employment prior to agreed date." RX 424, at pp. 130 (quoting WHISARD Case Registration/Investigator Assignment (July 18, 2006), RX 430, at p. 2). *See also* RX 424, at p. 131 (Investigator Simon, in response to deposition question of whether Arat raised any issues other than the penalty issue in her complaint, stated: "Not off the top of my head, no.").

<sup>61</sup> The H-1B Nonimmigrant Information Form, dated June 26, 2006, signed by investigator Simon, identified Arat as the "aggrieved party" source of the information recorded therein supporting

As the ALJ noted,<sup>62</sup> it was only in the course of its investigation into Arat's "aggrieved party" complaint that Wage and Hour discovered violations pertaining to other employees for which it charged Greater Missouri with H-1B violations. Arat's complaint was received by the Wage and Hour Division on June 22, 2006. Reasonable cause to investigate her complaint was found by Wage and Hour to exist on June 26, 2006. As a result, Arat's complaint was officially registered as filed on July 18, 2006.<sup>63</sup> Although Wage and Hour's determination of reasonable cause was based on information pertaining to alleged H-1B violations concerning Arat only, in subsequently notifying Greater Missouri on August 4, 2006, that the company had been scheduled for investigation, Wage and Hour (per Simon) requested the identity of all of Greater Missouri's H-1B employees and all company documents pertaining to those employees. RX 411. On November 8, 2006, Simon requested additional information pertaining to all of Greater Missouri's H-1B employees. RX 414. Based upon the information Simon thus acquired, the Wage and Hour Division expanded its investigation to potential H-1B violations by Greater

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the four alleged H-1B violations that were listed. The alleged violations, all of which pertained to Arat only, included: (1) "Employer failed to pay H-1B worker(s) for time off due to a decision by the employer . . . or for time needed by the H-1B worker(s) to acquire a license or permit." (2) "Employer made illegal deductions from H-1B worker's wages. . . ." (3) "Employer required H-1B worker(s) to pay all or any part of \$500/\$1000 filing fee." (4) "Employer imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer." RX 429, at p. 2. The specific facts supporting these allegations of violations, recorded by Wage and Hour in the H-1B Nonimmigrant Information Form, were as follows: "Complainant arrived on 2/21/05 and was parked until 5/6/05 when she completed her licensing. Complainant had a temporary license when she arrived. Complainant alleges that the employer is currently requiring her to pay a \$4000.00 fee for early termination (breach of contract) in addition to employer expenses for testing and relocation fees (note: employee is currently still employed and all the monies have not yet been deducted). Complainant gave notice and her last day of work is to be July 10, 2006. The employer has deducted/charged the H-1B worker for lawyers fees associated with her request for a green card (subsequently withdrawn and 10% of the fees charged to employee). The employee was also required to pay the fees for their H-1B extension in March of 2006. Complainant was petitioned to work in Jefferson City, Mo (prevailing wage: \$27,898, listed rate of pay \$36,100). Employee has not worked at this location (employed at Monett, MO and Sikeston, MO). The complainant also was required to pay fees (lawyer, bank, courier and visa) prior to her arrival in the U.S." RX 429, at p. 3.

<sup>62</sup> "The investigation in this case was triggered by a complaint filed by an aggrieved individual on June 23 [sic], 2006. The Administrator found violations in addition to those alleged by the complainant, affecting several H-1B employees, and seeks remedies on their behalf back to July 5, 2003." ALJ Order Denying the Respondent's Motion for Summary Judgment and the Administrator's Cross Motions (Oct. 22, 2009), at pg. 3.

<sup>63</sup> See RX 422 (Investigator Simon's H-1B Narrative), and RX 430 (WHISAARD Complaint Information Form). As Simon explained in her deposition, July 18, 2006, was the date "when we knew we had a potentially valid complaint, something that we would have reasonable cause to move forward with." RX 424, at pp. 127-128.

Missouri unrelated to Arat.<sup>64</sup> In justification, Simon explained that where Wage and Hour receives an individual “aggrieved party” complaint, as occurred in this case, Wage and Hour does a “full investigation” as to all H-1B employees for the past 12 months “to see if there are violations to any employee during that time period.” RX 424, at pp. 132-135, 142, 185. Based upon the findings resulting from this expanded investigation, the Administrator ordered the payment of back wages and assessed civil money penalties against Greater Missouri for multiple violations of the rights of virtually all of the company’s H-1B employees.<sup>65</sup>

The foregoing facts are critical to the determination of which of the investigatory authorization provisions of 8 U.S.C.A. § 1182(n)(2) applies to Wage and Hour’s expanded investigation. The Immigration and Nationality Act establishes four authorized bases for conducting investigations to determine an employer’s compliance with the Act: investigations upon the filing of an “aggrieved party” complaint under 8 U.S.C.A. § 1182(n)(2)(A); “random investigations” on a case-by-case basis of employers found to have willfully violated specified conditions in the previous five years, pursuant to Section 1182(n)(2)(F); “reasonable cause” investigations upon the personal certification of the Secretary of Labor under Section 1182(n)(2)(G)(i); and investigations based on “specific credible information” from a “reliable source” pursuant to Section 1182(n)(2)(G)(ii). Of relevance to the instant case are the investigatory provisions of 8 U.S.C.A. § 1182(n)(2)(A)-(C) (“aggrieved party” investigations) and 8 U.S.C.A. § 1182(n)(2)(G)(ii)-(viii) (“credible information-reliable source” investigations).

Where an “aggrieved party” complaint is filed, as occurred in the present case, the Administrator of the Wage and Hour Division, on behalf of the Secretary of Labor, is required within 10 days of receipt of the complaint to determine whether reasonable cause exists to believe that a violation of the Act has been committed and that an investigation is warranted.<sup>66</sup> If the Administrator determines that an investigation is warranted, the complaint is accepted for

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<sup>64</sup> See Declaration of Erica Simon (Sept. 8, 2008), RX 421, wherein Simon states: “Through my investigative efforts, I became aware of state court lawsuits which had been filed by GMM against former employees. I also reviewed some employment contracts between GMM and certain H-1B employees. I received other evidence which led me to conclude that GMM was attempting to collect a penalty and make illegal deductions from the required wage, which is prohibited by 20 C.F.R. 655.731(c)(10)(i).” RX 421, at p. 1.

<sup>65</sup> On May 21, 2008, the District Director for the Kansas City office of the Wage and Hour Division issued a Determination Letter based on Simon’s investigation, addressed to Greater Missouri. The Determination Letter detailed Wage and Hour’s findings of non-compliance and ordered the payment of back wages with respect to all of its H-1B employees. RX 419. The Determination Letter was supplemented with further findings and assessments on November 17, 2008. RX 420.

<sup>66</sup> See 20 C.F.R. § 655.805(a)(1)-(16) for a detailed listing of the violations that may be investigated pursuant to an “aggrieved party” complaint.

filing and investigation by the Wage and Hour Division.<sup>67</sup> The facts of this case establish that Wage and Hour followed these procedures in its investigation of possible H-1B violations pertaining to Arat.

The evidence of record also establishes that Wage and Hour's investigation into potential H-1B violations beyond those pertaining to Arat was *not* authorized under the INA's "aggrieved party" investigatory provisions. Because the information about other possible H-1B violations was discovered by the Wage and Hour investigator during the course of Wage and Hour's investigation into Arat's complaint, Wage and Hour's authority to investigate more broadly into these additional violations resides in the provisions of 8 U.S.C.A. §§ 1182(n)(2)(G)(ii) and (iv), which provide in relevant part:

(ii) If the Secretary of Labor receives specific credible information from a source who is likely to have knowledge of an employer's practices or employment conditions, or an employer's compliance with the employer's labor condition application under paragraph (1), and whose identity is known to the Secretary of Labor, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor may conduct an investigation into the alleged failure or failures. . .

(iv) Any investigation initiated or approved by the Secretary of Labor under clause (ii) shall be based on information that satisfies the requirements of such clause and that . . . (II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this chapter of any other Act.

Based on the evidence of record, it is clear that Wage and Hour's authority to undertake its expanded investigation pertaining to Greater Missouri H-1B employees other than Arat is governed by the provisions of 8 U.S.C.A. § 1182(n)(2)(G)(ii)-(viii) and the Department of Labor's implementing regulations found at 20 C.F.R. § 655.807. It is also clear, from what the evidence of record indicates did *not* occur, that Wage and Hour's expanded investigation failed to comply with these provisions and the regulations. Wage and Hour undertook its expanded investigation without affording Greater Missouri prior notice and an opportunity to respond, and without securing the Secretary of Labor's personal certification of reasonable cause and authorization to investigate. These omissions are critical because under the Department's

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<sup>67</sup> A final determination as to whether a violation has occurred is required to be issued within 30 days of the date the complaint was accepted for filing, unless otherwise extended. 8 U.S.C.A. § 1182(n)(2)(A)-(C); 20 C.F.R. § 655.806.

implementing regulations an investigation under 8 U.S.C.A. § 1182(n)(2)(G)(ii) may not proceed in the absence of the Secretary of Labor's personal certification of the existence of reasonable cause and approval of the investigation. Moreover, the Secretary's certification and approval is conditioned upon the Administrator having first provided the employer with notice of the alleged violations and an opportunity to respond.<sup>68</sup>

Under the investigatory scheme established by regulation in implementation of 8 U.S.C.A. § 1182(n)(2)(G)(ii), the Administrator of the Wage and Hour Division is charged with determining, upon receipt of information of a possible H-1B violation, whether the source of the information is reliable, whether the information is credible, and whether the information "appear[s] to provide reasonable cause to believe" that the employer has committed a specified violation, "engaged in a pattern or practice of violations," or "committed substantial violations, affecting multiple employees." 20 C.F.R. § 655.807(d). Upon determining that these conditions have been met, the Administrator is required, as an additional pre-condition to initiating an investigation under Section 1182(n)(2)(G)(ii), to notify the employer of Wage and Hour's intent to investigate the alleged violations and afford the employer an opportunity to respond. Section 1182(n)(2)(G)(vii) requires "notice to an employer with respect to whom there is reasonable cause to initiate an investigation described in clauses (i) or (ii), prior to the commencement of an investigation under such clauses, of the intent to conduct an investigation. The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced." Implementing this provision, 20 C.F.R. § 655.807(f)(1) requires the Administrator to "promptly notify the employer that the information has been received, describe the nature of the allegation in sufficient detail to permit the employer to respond, and request that the employer respond to the allegation within 10 days of its receipt of the notification." This notification is not required if the Administrator determines that such notification would interfere with efforts to secure the employer's compliance. 8 U.S.C.A. § 1182(n)(2)(G)(vii); 20 C.F.R. § 655.807(f)(2). However, Congress has made it clear that such a determination is not to be lightly made given the importance of the notification requirement and the purposes it is intended to achieve.<sup>69</sup> Thus, in the absence of any

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<sup>68</sup> The Administrator may dispense with notification of the employer where it is determined that notification might interfere with the investigation. 20 C.F.R. § 655.807(f)(2). However, that determination must be expressly made. Where it does not appear in the record, as in the present case, it may not be assumed. See discussion, *infra*.

<sup>69</sup> Senate Conference Report on the American Competitiveness and Workforce Improvement Act of 1998 (per Senator Abraham), 144 Cong. Rec. S12741, S12755 (Oct. 21, 1998) ("That the decision whether to waive it is left to the Secretary's discretion does not mean that it should be made lightly, or that it should be the rule rather than the exception. Rather, it is Congress's expectation that the Secretary will provide the otherwise required notice unless she has a reasonable belief, based on credible evidence, that the employer can be expected to avoid compliance because of the notice. Past, proven willful violations could be such evidence. Congress's belief, however, is that most employers will correct a problem if brought to their attention and it cannot be assumed that simply because allegations have been made that the employer will not do so. The scant number of willful violations that DOL has found in the history of this program suggests that this is likely to be the rule rather than the exception. Thus, in many cases, notice will advance the twin ends of compliance (or a credible explanation demonstrating that the facts do not support the allegations and an investigation

evidence that the Administrator determined that notification would interfere with efforts to secure compliance, that determination cannot be assumed. It is required to be made as a matter of record.<sup>70</sup>

Upon receipt of the employer's response to the notification, the Administrator is charged with determining, based on all of the information received, "whether the allegations should be referred to the Secretary for a determination whether an investigation should be commenced by the Administrator." 20 C.F.R. § 655.807(g). Consistent with the Act's legislative history,<sup>71</sup> section 655.807(h)(1) provides: "No investigation shall be commenced unless the Secretary (or the Deputy Secretary or other Acting Secretary in the absence or disability) personally authorizes the investigation and certifies" that the information received or otherwise obtained pursuant to a lawful investigation "provides reasonable cause to believe" that the employer has willfully failed to meet its statutory obligations, engaged in a pattern or practice of such failure, or that the employer has engaged in "substantial violations affecting multiple employees."<sup>72</sup> If the Secretary certifies the existence of reasonable cause and authorizes the investigation, the Wage and Hour Division is charged with conducting the investigation. 20 C.F.R. § 655.807(i).<sup>73</sup>

I don't dispute Wage and Hour's discretionary authority to broadly investigate an employer's H-1B compliance upon the filing of an "aggrieved party" complaint, including expanding the scope of its investigation beyond violations pertaining to the complainant. However, where Wage and Hour obtains credible information as a result of that expanded investigation providing reasonable cause to believe that H-1B violations have occurred affecting other H-1B employees, as it did in this case, Wage and Hour must comply with the provisions of 8 U.S.C.A. § 1182(n)(2)(G)(ii)-(viii) and 20 C.F.R. § 655.807. The fact that the Wage and Hour Division undertook its expanded investigation without affording Greater Missouri prior notice and an opportunity to respond, and without securing the Secretary's personal certification of

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is not needed) and the ability to preserve the Secretary's enforcement resources so they can be used on other pressing matters.").

<sup>70</sup> The Department of Labor's explanation accompanying adoption of the regulations implementing 8 U.S.C.A. § 1182(n)(2)(G) states: "Where the Administrator has determined that notification to the employer should be dispensed with, the Secretary will be advised in the referral [from the Administrator for a determination as to whether an investigation should be commenced]." 65 Fed. Reg. 80,110, 80,178 (Dec. 20, 2000).

<sup>71</sup> See Senate Conference Report, 144 Cong. Rec. at S12754.

<sup>72</sup> Unlike the other provisions of the INA implementing regulations that delegate the Secretary of Labor's authority to the Administrator of the Wage and Hour Division, the duties imposed upon the Secretary of Labor under 20 C.F.R. § 655.807 are nondelegable. 20 C.F.R. § 655.800(a).

<sup>73</sup> Upon completion of the investigation, a determination letter is issued by the Administrator, 20 C.F.R. §§ 655.807(k), 655.815, whereupon the employer or any interested party may seek review of the determination by requesting a hearing before the Department of Labor's Office of Administrative Law Judges. *Id.* at § 655.820; see 8 U.S.C.A. § 1182(n)(2)(G)(viii).



reasonable cause and authorization to investigate, renders that investigation and the Administrator's resulting assessment of penalties in excess of statutory authority.

The legislative history supports this conclusion, beginning with Congressional passage of the Immigration Act of 1990, Pub. Law No. 101-649, 104 Stat. 4978 (1990), wherein the Department of Labor was authorized to conduct "aggrieved party" complaint investigations. 8 U.S.C.A. § 1182(n)(2)(A), as adopted at that time, was identical in all meaningful respects to Section 1182(n)(2)(A) in its current form.<sup>74</sup> The explanation accompanying this provision was straightforward, contemplating a process by which an aggrieved party could complain about an employer's failure to comply with a labor condition application and obtain relief:

The bill establishes a process by which persons or organizations aggrieved by employer failure to include a required element in an attestation or to take an action to which it has attested, or by a misrepresentation of a material fact in that attestation, may complain of the employer's action and obtain relief. The bill specifies that a bargaining representative may itself be an "aggrieved organization."

House Committee Report 101-723, Part 1 (Sept. 19, 1990), at p.65.<sup>75</sup>

The authority to conduct "credible information-reliable source" investigations pursuant to 8 U.S.C.A. § 1182(n)(2)(G) was added (along with "random investigation" authority under Section 1182(n)(2)(F)) as part of the statutory changes made to the Immigration and Nationality Act (INA) by the American Competitiveness and Workforce Improvement Act of 1998 (Title IV of Pub. L. 105-277, 112 Stat. 2681). Noting that the Department of Labor's authority under then-current law was limited under 8 U.S.C.A. § 1182(n)(2)(A) to investigating complaints concerning violations received from aggrieved parties, Congress sought to supplement the Department's authority by granting the Secretary "limited additional authority to investigate certain kinds of allegations of failures to comply with labor condition attestations . . . . Under the authority granted by new subparagraph (G) of [section 1182](n)(2) . . . under certain circumstances the Secretary will also be authorized to investigate for 30 days allegations of

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<sup>74</sup> 8 U.S.C.A. § 1182(n)(2)(A), as adopted in 1990, provided: "The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred."

<sup>75</sup> House Committee Rept. 101-723 accompanied H.R. 4300, the Family Unity and Employment Opportunity Immigration Act of 1990, whose provisions authorizing "aggrieved party" complaint investigations were incorporated into the Immigration Act of 1990.

willful failures to meet a condition of paragraph (1)(A), (1)(B), (1)(E), (1)(F), or (1)(G)(i)(I), allegations of a pattern or practice by an employer of failures to meet such a condition, or allegations of a substantial failure to meet such a condition that affects multiple employees even if those allegations do not come from an aggrieved party.”<sup>76</sup>

As adopted in 1998, Section 1182(n)(2)(G) differed from its present version in that it only authorized “credible information-reliable source” investigations. Clause (i) of the 1998 version of Section 1182(n)(2)(G) provided:

(i) If the Secretary receives specific credible information from a source, who is likely to have knowledge of an employer’s practices or employment conditions, or an employer’s compliance with the employer’s labor condition application under paragraph (1), and whose identity is known to the Secretary, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary may conduct a 30-day investigation into the alleged failure or failures. The Secretary (or the Acting Secretary in the case of the Secretary’s absence or disability) shall personally certify that the requirements for conducting such an investigation have been met and shall approve commencement of the investigation. The Secretary may withhold the identity of the source from the employer, and the source’s identity shall not be subject to disclosure under section 552 of Title 5.

In 2004, Congress further expanded the Department of Labor’s investigatory authority by the adoption of what is now Section 1182(n)(2)(G)(i).<sup>77</sup> The “credible information-reliable source” investigatory provision that had been subparagraph (G)(i) was redesignated subparagraph (G)(ii) and modified to remove the requirement that the Secretary personally

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<sup>76</sup> Senate Conference Report, 144 Cong. Rec. at S12754. *See also* House Conference Report (per Congressman Smith), 144 Cong. Rec. E2323, E2327 (Nov. 12, 1998).

<sup>77</sup> Adopted as part of Public Law 108-447 (HR 4818), 118 Stat. 2809 (Dec. 8, 2004), Title IV, Subtitle B, H-1B Visa Reform Act of 2004, Section 1182(n)(2)(G)(i) currently provides: “(i) The Secretary of Labor may initiate an investigation of any employer that employs non-immigrants described in section 1101(a)(15)(H)(i)(b) of this title if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with this subsection. In the case of an investigation under this clause, the Secretary of Labor (or the acting Secretary in the case of the absence of disability of the Secretary of Labor) shall personally certify that reasonable cause exists and shall approve commencement of the investigation.”

certify the existence of reasonable cause and approve commencement of the investigation.<sup>78</sup>

Section 1182(n)(2)(G)(ii), as recodified in 2004, does not authorize “self-directed” or “self-initiated” investigations by the Department of Labor. The authority to investigate, including the determination of reasonable cause, is expressly tied to the provisions of subparagraphs (G)(ii) through (G)(viii).<sup>79</sup> As the legislative history accompanying adoption in 1998 of what is now Section 1182(n)(2)(G)(ii) explains:

In order for the Secretary to exercise the authority granted her under new subparagraph (G), the allegations will have to be based on specific credible information from a source who is likely to have knowledge of an employer’s practices of employment conditions or an employer’s compliance with the employer’s labor condition application. Thus, this provision does not authorize ‘self-directed’ or ‘self-initiated’ investigations by the Secretary. Rather, as specified in clauses (ii) and (iii), an investigation can only be launched on the basis of a communication by a person outside the Department of Labor to the Secretary, or on the basis of information the Secretary acquires lawfully in the course of another investigation within the scope of one of her statutory investigative authorities.

Senate Conference Report, 144 Cong. Rec. at S12754. Congress viewed the requirements of subparagraphs (G)(ii) through (G)(viii) as “procedural safeguards” designed to prevent the Department of Labor’s investigatory authority under Section 1182(n)(2)(G) “from being abused.” *Id.* See also House Conference Report, 144 Cong. Rec. at E2327.

In its promulgation in 2000 of regulations implementing what at the time was 8 U.S.C.A. § 1182(n)(2)(G)(i) – now Section 1182(n)(2)(G)(ii) – the Department of Labor clearly understood Congress’s intent to limit investigations thereunder to cases in which the Department obtains credible information of an H-1B violation from a reliable source. The Department considered “directed (no complaint)” investigations to be “appropriate where the Department becomes aware of a possible H-1B violation, whether in the course of an investigation of another

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<sup>78</sup> At the same time, the new Section 1182(n)(2)(G)(i) retained the requirements that the Secretary of Labor personally certify the existence of reasonable cause to believe that an employer is not in compliance with 8 U.S.C.A. § 1182(n) and approve commencement of any investigation undertaken pursuant to subparagraph (G)(i).

<sup>79</sup> *Administrator v. Beverly Enters.*, ARB No. 99-050, ALJ No. 1998-ARN-003 (ARB July 31, 2002), cited by the Administrator in support of the contention that Wage and Hour had unfettered authority to investigate violations beyond those pertaining to Arat, is distinguishable because neither the enforcement provisions of the Immigration Nursing Relief Act, 8 U.S.C.A. § 1182(m)(2), under which *Beverly Enterprises* was decided, nor the INRA’s implementing regulations at 20 C.F.R. § 655.400, contain the express limitations that are imposed upon the Secretary’s authority under 8 U.S.C.A. § 1182(n)(2)(G)(ii) and 20 C.F.R. § 655.807.

employer, an investigation under another statute, or as the result of the receipt of information from some other source.” 65 Fed. Reg. 80,110; 10,177 (Dec. 20, 2000). The Department viewed the authority to conduct such investigations, where no complaint has been filed, not to have been precluded by Congress to the extent that “the explicit provisions of the ACWIA concerning random investigations of willful violators and investigations based on credible information from sources other than aggrieved parties allow it to conduct ‘directed’ investigations. . . .” *Id.* Thus, consistent with congressional intent, the Department concluded that its investigatory authority extended (in the absence of the 2004 amendment adding new Section 1182(n)(2)(G)(i)) to three situations only: “investigations pursuant to complaints from aggrieved parties, investigations based on information from sources other than aggrieved parties (including information obtained by the Secretary during an investigation under the INA or any other Act), and random investigations of willful violators.” *Id.*

In promulgating the INA implementing regulations, the Department also clearly understood the dependency of investigations authorized under subparagraph (G)(i) to the other provisions of 8 U.S.C.A. § 1182(n)(2)(G), explaining:

Section [1182](n)(2)(G) of the INA as amended by the ACWIA authorizes the Secretary to investigate possible violations based on information provided to the Department by sources other than aggrieved parties. The Department may . . . undertake an investigation under this authority when it receives specific credible information that provides reasonable cause to believe that a particular type of violation has occurred. . . . [T]he Secretary is authorized to commence an investigation under this provision if the information was obtained by the Secretary in the course of an investigation under the INA or any other Act.

65 Fed. Reg. at 80,176; 80,177.

The Department also understood the critical role notice to the employer was to play in the sequence of procedural events prior to moving forward with an investigation:

The section has been restructured, in accordance with the Department’s reading of the statute, to provide that the employer will ordinarily be provided information regarding the allegations and given an opportunity to respond after the Administrator has made an initial determination that the statutory standards are met, rather than prior to this determination. The Administrator will then review this information in order to determine if the allegations should be referred to the Secretary for a determination as to whether an investigation should be commenced.

*Id.*, at 80,178.

Authority for the conduct of the expanded investigation undertaken by the Wage and Hour Division in this case is not found under 8 U.S.C.A. § 1182(n)(2)(A). The sole and exclusive authority for undertaking that investigation resides in 8 U.S.C.A. § 1182(n)(2)(G)(ii). Again, I don't dispute Wage and Hour's discretionary authority, as part of its investigation of an "aggrieved party" complaint, to expand its inquiry into areas beyond violations immediately pertaining to the party-complainant. There is nothing of which I am aware that prevents Wage and Hour from casting a wide net in such instances. However, once a Wage and Hour investigator lawfully obtains credible information during that investigation about potential violations other than those pertaining to the complainant, Wage and Hour's authority to proceed in the investigation of those violations is dependent upon compliance with the provisions of 8 U.S.C.A. § 1182(n)(2)(G)(ii)-(viii) and 20 C.F.R. § 655.807.

In the instant case, the Wage and Hour Division initiated its investigation into possible violations of the INA beyond those pertaining to Arat without first notifying Greater Missouri of the alleged violations that had been discovered and affording the company an opportunity to respond. Furthermore, there is nothing in the evidentiary record indicating that the Administrator dispensed with notifying Greater Missouri because the Administrator determined that notification might interfere with securing the company's compliance. Nor did the Administrator obtain the Secretary's certification of reasonable cause and approval before Wage and Hour initiated its expanded investigation.

Under the statutory authority for conducting a "credible information-reliable source" investigation, affording an employer prior notice and an opportunity to respond is mandatory. As discussed, Section 1182(n)(2)(G)(vii) and 20 C.F.R. § 655.807(f)(1) require that the Administrator provide prior notice of Wage and Hour's intent to investigate and afford the employer an opportunity to respond. I recognize that the 2004 amendments to the INA removed the statutory requirement of the Secretary of Labor's personal involvement in the decision to proceed with a "credible information-reliable source" investigation under Section 1182(n)(2)(G), and that adoption of the Department's implementing regulations found at 20 C.F.R. § 655.807 preceded those amendments. Nevertheless, the ARB is obligated to adhere in its adjudication of this case to the Department's regulations.<sup>80</sup> Those regulations expressly require the Secretary's personal certification of the existence of reasonable cause and the Secretary's authorization to investigate prior to the exercise by the Wage and Hour Division of its authority to proceed with an investigation under section 1182(n)(2)(G)(ii). 20 C.F.R. § 655.807(h)(1). Because the requisite notice and opportunity to respond was not afforded Greater Missouri, and because the determination of reasonable cause and decision to proceed with the investigation were not made by the Secretary, Wage and Hour's expanded investigation into possible violations pertaining to Greater Missouri's H-1B employees other than Arat to have exceeded the statutory authority for such investigations under 8 USCA § 1182(n)(2)(G)(ii)-(viii) and 20 C.F.R. § 655.807. Consequently, I cannot join with my colleagues in holding Greater Missouri liable for violating the rights of the H-1B employees identified in this case other than Arat.

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<sup>80</sup> Secretary's Order 02-2012, 77 Fed. Reg. 69378 (Nov. 16, 2012), which establishes the Administrative Review Board's authority, provides: "The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."

In reaching my conclusion, I am mindful of the fact that my opinion may be at odds with what appears to be long-standing administrative practice.<sup>81</sup> However, as Justice Souter stated in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000), the policy respecting precedent in statutory interpretation “does not demand that recognized error be compounded indefinitely.” 528 U.S. at 342 (Souter, J., concurring).

**E. Cooper Brown**  
**Deputy Chief Administrative Appeals Judge**

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<sup>81</sup> Although I do not consider *Administrator v. Synergy Sys.*, ARB No. 04-076, ALJ No. 2003-LCA-022 (ARB June 30, 2006), cited by the Administrator, to support this apparent practice, inasmuch as the “aggrieved party” complaint filed by the complainant in that case “concerned both his own employment and that of Mr. Trimbakkar [the H-1B employee who had not joined in the filing of the complaint].” *Administrator v. Synergy Sys.*, ALJ No. 2003-LCA-022, slip op. at 16 (ALJ Mar. 5, 2004).