In the Matter of:

ARVIND GUPTA, **ARB CASE NO. 12-049**

PROSECUTING PARTY, **ALJ CASE NO. 2011-LCA-045**

v. **DATE: May 29, 2014**

COMPUNNEL SOFTWARE GROUP, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Arvind Gupta, *pro se*, Mumbai, India

For the Respondents:
Kamal K. Rastogi, Esq.; Plainsboro, New Jersey

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge;* Judge Brown concurring, in part, and dissenting, in part.

DECISION AND ORDER OF REMAND

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended (INA).[1] Arvind Gupta filed complaints with the United States Department of Labor's Wage and Hour Division (WHD), claiming that Compunnel

[1] 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2014), as implemented by 20 C.F.R. Part 655, Subparts H and I (2013). "H-1B" refers to the nonimmigrant class described in 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

Software Group, Inc. (Compunnel) owes him additional wages and benefits and that it unlawfully retaliated against him. After an investigation, WHD found that (1) Compunnel owed Gupta back wages in the amount of $6,976 when he was productively working, (2) Compunnel did not owe wages during Gupta's nonproductive time periods and (3) Gupta failed to prove his retaliation claim. Gupta believed he was owed more and requested a hearing before an administrative law judge (ALJ). A Department of Labor (DOL) ALJ affirmed WHD's determination. We affirm in part, reverse in part, and remand this matter to the ALJ for the calculation of damages connected with Gupta's nonproductive time periods and for further consideration of Gupta's retaliation claim.

INTRODUCTION

Gupta's claims against Compunnel cover the period from December 1, 2006, to April 30, 2009. On December 1, 2006, as a mandatory step for securing Gupta's H-1B employment, Compunnel filed a Labor Condition Application (LCA) with DOL. After certification, Compunnel then filed an H-1B petition that Department of Homeland Security's (DHS) United States Citizenship and Immigration Services (USCIS) received on December 11, 2006. USCIS granted Compunnel's H-1B petition effective February 27, 2007, through April 30, 2009, the day that Gupta departed from the United States. Gupta claims that Compunnel owes him wages and benefits for nonproductive periods between December 1, 2006, and April 30, 2009, as well as damages for alleged retaliation. As we explain below, we reverse the ALJ's ruling on Gupta's claim for wages and benefits for February 3, 2007, and for the nonproductive time periods occurring after February 27, 2007. With respect to Gupta's retaliation claim, we vacate the ALJ's ruling, and we remand the case for the ALJ to clarify the burdens of proof he used, assuming that Gupta continues to pursue such claim.

FACTUAL BACKGROUND[2]

On November 8, 2001, Gupta entered the U.S. as an H-1B nonimmigrant.[3] USCIS approved two H-1B petitions that permitted Gupta to work for Wipro Limited

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[2] For the factual background, we draw from the ALJ's seventeen findings of fact in the "Factual Background" section of the ALJ's Decision and Order (D. & O.), the additional findings of facts appearing throughout the "Procedural History" and "Legal Analysis" of the D. & O., including all reasonable inferences from such findings, and the exhibits the ALJ cited. *See Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (appellate body reviewing a trial or hearing court's findings of fact may draw reasonable inferences); *see also Jackson v. Comm'r*, 864 F.2d 1521, 1524 (10th Cir. 1989) (citations omitted). The factual background recites facts that we find are supported by substantial evidence of record. We note that the ALJ expressly accepted all the exhibits into evidence ((Complainant's Exhibit) (CX) 1 – 33; RX A – N). D. & O. at 4.

[3] Gupta and Compunnel submitted identical copies of Gupta's visa. *See* CX-15 (Visa); Respondent's Exhibit RX J (Visa).

from November 8, 2002, to August 8, 2008.[4] On March 23, 2006, Gupta was the beneficiary of an H-1B Petition for a Nonimmigrant Worker (Form I-129) filed by Headstrong, Inc. (valid from April 24, 2006, to November 8, 2007).[5]

Background to Gupta's Wage Claim for 12/1/06 through 2/3/07[6]

On November 14, 2006, Gupta applied for a job with Compunnel and received, and later accepted, an offer to work as a business analyst earning $20 per hour.[7] On December 1, 2006, Compunnel filed an LCA for Gupta to work as a "Market Research Analyst" in Woodbridge, New Jersey.[8] The LCA certified a wage rate of $20 per hour beginning December 1, 2006, and ending November 30, 2009.[9] To secure Gupta's H-1B employment, Compunnel then filed a "change of employer" H-1B petition with USCIS.[10] USCIS received Compunnel's LCA and H-1B petition on December 11, 2006. Gupta completed employment forms throughout January, including a Form I-9 and an "Employment Agreement" ("entered into" on February 5, 2007).[11] On March 1, 2007, USCIS notified the parties that it had granted Gupta a change of employer effective February 27, 2007, and ending April 30, 2009.[12] Gupta began "working" for Compunnel

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[4] RX L (USCIS I-797 Notice of Action for Wipro Limited's H-1B petitions). *See also Gupta v. Wipro Ltd.,* ARB No. 12-050, ALJ No. 2010-LCA-024, slip op. at 2 (ARB Feb. 27, 2014).

[5] RX M (USCIS I-797 Notice of Action for Headstrong petition).

[6] In his appeal to the Board, Gupta expressly challenges the non-payment of wages during three nonproductive periods: 12/1/06 to 2/3/07; 7/23/07 to 12/10/07; and 4/1/08 to 4/30/09. Complainant's Petition for Review and Opening Brief at 5-7 (Mar. 12, 2012). He does not challenge the amount of wages WHD awarded him for the periods from 2/5/07 to 7/22/07 and 12/11/07 through 3/31/08.

[7] *See* D. & O. at 3 (citing RX C).

[8] *See* D. & O. at 6; RX C.

[9] *See* D. & O. at 3, 6; RX C.

[10] RX B, CX 2 (*see* Form I-129 Notice of Action).

[11] RX H (see "Employment Eligibility Verification," "Employment Agreement"). The record also indicates that Gupta attempted to secure work in January 2007. *See* D. & O. at 5 (citing CX 4).

[12] RX B, CX 2 (I-I29 Notice of Action).

in February 2007.[13] On February 3, 2007, he traveled to San Francisco to "join the project on Mon 02/05."[14]

Background to Compensated Productive Time (2/5/07 to 7/20/07)[15]

For Gupta's first productive assignment as a Compunnel H-1B employee, Compunnel sent Gupta to San Francisco to work with a third party on a project beginning February 5.[16] To cover this assignment in San Francisco, Compunnel filed a second LCA on February 12, 2007.[17] DOL approved this LCA for the period from February 12, 2007, to February 12, 2010 at a wage rate of $22.75 an hour.[18] Gupta worked in the San Francisco area until June 6, 2007, earning $52.00 per hour.[19]

After the San Francisco project, Compunnel again sent Gupta to a third party location to work on a project. Gupta started working on a project in New York City on June 11, 2007, and was paid by Compunnel.[20] Two days later, Compunnel filed a third LCA for Gupta to work in New York at a wage rate of $25.47 an hour.[21] DOL certified this New York LCA for the period of June 13, 2007, to June 13, 2010.[22] Gupta worked in New York through July 16, 2007, earning $60 per hour.[23]

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[13] D. & O. at 6. *See also* D. & O. at 3, 8. While the ALJ found that Gupta began "working" for Compunnel in 2007, as we explain later in our opinion, there is no evidence in the record or a finding of fact that Compunnel ever assigned any work duties to Gupta before sending him to California for a project that began on February 5. Consequently, we understand the ALJ's finding to mean that Gupta entered into an "employment relationship" in 2007 with Compunnel. *See* 20 C.F.R. § 655.731(c)(6).

[14] D. & O. at 6; CX 4 (1/31/07 e-mail regarding travel).

[15] Gupta does not challenge the amount he was paid during this productive time as supplemented by the Administrator's award.

[16] While the ALJ found that Gupta entered "productive status" in San Francisco on February 7, 2007 (D. & O. at 6), both parties assert that he started on February 5, 2007, and the earning statements show that he was paid for February 5 and 6, 2007. D. & O. at 5; CX 6. But this conflict in the record is inconsequential because Gupta raised no wage dispute for the period of time starting after February 3 and running through July 23, 2007.

[17] D. & O. at 6; RX C2.

[18] RX C2.

[19] CX 6.

[20] D. & O. at 6 n.5; CX 7 (earnings statements).

[21] *Id.* at 6; RX C3.

[22] RX C3.

Background to Gupta's Wage Claim for 7/23/07 to 12/10/07

On July 23, 2007, Gupta began a period of "nonproductive status" that lasted until December 10, 2007.[24] During this time, Compunnel presented Gupta with "multiple employment opportunities."[25] In August 2007, Compunnel informed Gupta that it received his resume and "started working on it."[26] On September 20, 2007, a Compunnel "recruiter" notified Gupta that he was added as a "candidate" on the "hot list." A September 26, 2007 e-mail indicates that Gupta attended an interview in Malvern, Pennsylvania. On or about October 3 and 16, 2007, Compunnel submitted Gupta's name for a position with Bank of New York and for a position with Fannie Mae in Washington, D.C. On October 18, 2007, CyberWorld Group, Inc. e-mailed Gupta about a position in Portland, Oregon. At the end of October 2007, Compunnel submitted Gupta for positions in Benton Harbor, Michigan; and Charlotte, North Carolina. In November 2007, Compunnel notified Gupta about a project with TIAA-CREF and a project in Jersey City ("**ONLY** looking for candidates with prior financial experience") (emphasis in original). Finally, on November 26, Gupta granted Galaxy Systems, Inc. permission to submit his name for a project with TD Ameritrade. Galaxy Systems, Inc. notified Gupta that he was "confirmed for the project with TD Ameritrade." As a result of securing the TD Ameritrade project, Compunnel "deactivated" Gupta's name from the "hot list" on December 5, 2007. Gupta re-entered productive H-1B employment status on December 11, 2007, and worked on the TD Ameritrade project until March 31, 2008, earning $64 an hour.[27]

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[23] *See* D. & O. at 6 (citing CX 7). The record is unclear about the actual days that Gupta worked during the week of July 16, 2007. Again, as we previously explained, this lack of clarity during the productive period is harmless. *See* note 16, *supra*. Gupta subsequently claimed to have received a cash bonus of $35 per hour for the work he performed on the New York project. CX 8.

[24] *See* D. & O. at 6, 9. The ALJ found that "[t]he Respondent presented multiple employment opportunities to the Prosecuting Party between July and November 2007." D. & O. at 6.

[25] D. & O. at 6; (citing CX 9). The ALJ's reference to "opportunities" is ambiguous. But we agree with Gupta that the record contains no evidence that the "opportunities" were actual job assignments that Gupta could fill by simply showing up to the worksite. *See* Complainant's Petition for Review and Opening Brief, ¶ 21 (Mar. 12, 2012). In fact, as we demonstrate above, the ALJ relies on an exhibit (CX 9) that merely identifies opportunities to compete for work projects with a third party and does not support an inference that Gupta made himself unavailable for assigned work duties.

[26] All the e-mails referenced in this paragraph are referenced by the ALJ. *See* D. & O. at 6 (citing CX 9). Gupta also called Compunnel on October 29, 2007, to say he was looking for a project and that his marketing was not going well. D. & O. at 7 (citing RX E).

[27] D. & O. at 6; CX 10.

Background to Gupta's Wage Claim for 4/1/08 to 4/30/09

After the TD Ameritrade project, Gupta returned to nonproductive status and never again worked with Compunnel on any project after March 31, 2008.[28] On April 3, 2008, Compunnel sent Gupta a letter and telephoned him to request that he report back to its headquarters in Monmouth, New Jersey to "avoid cancellation due to 'no show.'"[29] Yet, just like Gupta's preceding period of nonproductive status, Compunnel continued to submit Gupta for "new projects into 2009."[30] Compunnel reactivated Gupta's name on the "hot list" on March 27, 2008, and submitted his name for various projects on April 2, April 11, and April 22, 2008. On May 2, 2008, Gupta asked for a new placement as soon as possible, and contacted Compunnel in May and June about new work opportunities, which Gupta in turn pursued. Gupta had potential interviews or actual interviews throughout June 2008. He updated and revised his resume in July 2008. Compunnel submitted applications on Gupta's behalf on August 1, 6, and 12 and also contacted him several times in September 2008. On October 3, 2008, Gupta contacted Compunnel's president and asked that "the sales team [] market me aggressively at the lowest possible rates," noting, "I hope this will help in getting me placed on a project ASAP." Compunnel agreed. On October 13, 2008, Sam Handa acknowledged Gupta's request that Compunnel expand its search to include both business analyst and retail openings. Subsequently, Compunnel submitted Gupta's application for three more positions during October and November of 2008. On December 11, 2008, Gupta again asked for a new project. On January 13 and 14, 2009, Gupta applied for two more work opportunities.[31]

Based on the parties' representations in their briefs, the ALJ found that in late 2008 or early 2009, Compunnel instructed Gupta to return to India and wait for government approval to return to the United States for employment.[32] On January 21,

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[28] D. & O. at 6, 7, 9 (Gupta's "last project" for Compunnel ended in March 2008).

[29] D. & O. at 7 (citing RX E). As shown by RX E, a phone contact log and a letter contained virtually the same message, both discussing the end of his "current project" with a "client" and asking Gupta to "report" to Compunnel's New Jersey office "at the earliest" and that Compunnel "hope[d] to see [Gupta] soon." Nowhere in either document does Compunnel indicate that it had job duties for Gupta. We find that neither RX E nor the e-mails in the record permit a reasonable inference that Gupta chose to make himself unavailable for any actual job duties at Compunnel.

[30] D. & O. at 9 (citing CX 11, 12). The examples we cite are all referenced in these exhibits.

[31] Again, for the preceding examples of job search efforts, see CX 11 and 12.

[32] D. & O. at 7.

2009, Compunnel provided Gupta with a roundtrip plane ticket (2/1/09 departure to Mumbai, India; 4/16/09 return to Newark, New Jersey).[33] The next day, Compunnel had deactivated him in its "hot list" database.[34]

During this nonproductive period, Compunnel also worked with Gupta to obtain a Permanent Labor Certification. More specifically, on April 23, 2008, Compunnel filed with DOL an Application for Permanent Labor Certification with Gupta as the beneficiary.[35] DOL received this application that same day and approved it on July 2, 2008.[36] On August 14, 2008, Compunnel's Senior Legal Manager asked Gupta to fill out an I-140 Immigrant Petition for Alien Worker, which he did.[37] On January 7, 2009, Compunnel re-filed an Application for Permanent Labor Certification on Gupta's behalf, which DOL certified on October 26, 2009.[38]

On February 19, 2009, based on Compunnel's withdrawal request, USCIS automatically revoked Compunnel's petition.[39] However, USCIS reopened Compunnel's H-1B petition the following week.[40] Gupta left the U.S. on April 30, 2009, and arrived in India the following day.[41]

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[33] D. & O. at 7; RX I.

[34] CX 12 at 25.

[35] D. & O. at 3; CX 11 at 5. An approved Application for Permanent Labor Certification, when filed with USCIS in conjunction with an I-140, constitutes an application for lawful permanent residence. A lawful permanent resident is commonly known as a "green card" holder. *See I Am an Employer: How Do I Sponsor an Employee for U.S. Permanent Resident Status*, US Citizenship and Immigration Servs., 1 (Oct. 2013), http://www.uscis.gov/sites/default/files/USCIS/Resources/E2en.pdf.

[36] RX F.

[37] CX 11 at 29.

[38] D. & O. at 3, 7; CX 12 at 20.

[39] D. & O. at 3, 7; RX G. The date of Compunnel's request is in dispute.

[40] D. & O. at 9 (citing CX 12). The ALJ found that USCIS reopened Gupta's "green card" petition, but we find that this is simply an inadvertent mischaracterization by the ALJ, given that the record shows that USCIS reopened the H-1B petition not the green card petition. The record contains no further disposition by USCIS on Gupta's H-1B petition.

[41] D. & O. at 7.

Gupta's H-1B Complaint

On November 17, 2008, Gupta filed a complaint against Compunnel alleging that it failed to (1) pay him the higher of the prevailing or actual wage; (2) pay him for time off due to a decision by Compunnel; (3) provide fringe benefits equivalent to those provided to U.S. workers; and (4) provide a copy of the LCAs.[42] He supplemented his complaint against Compunnel on January 22, 2009, to claim additional back wages, as well as the cost of health insurance and fringe benefits.[43] He also alleged retaliation. WHD investigated Gupta's complaint. On March 24, 2011, WHD found, as a result of its investigation, that Compunnel owed Gupta $6,976.00 in back wages for the "Period Covered by Work Week Ending Dates" February 10, 2007, to April 5, 2008.[44] These assessed back wages related entirely to periods in which Gupta was in productive status but was not paid 40 hours per week.[45] Gupta filed his last complaint against Compunnel on May 12, 2009.[46] Gupta accepted the $6,976.00 back wage payment but also requested a hearing before an ALJ to recover additional damages.

The ALJ scheduled this matter for an evidentiary hearing on the merits, but Gupta waived his right to testify by requesting a decision on the record. The ALJ granted Gupta's request and canceled the hearing, noting, "[t]he record is closed and all discovery issues are now resolved."[47] The ALJ affirmed WHD's decision, specifically WHD's (1) award of damages for back wages during Gupta's productive time; (2) rejection of Gupta's claim for back wages for periods in which he was in nonproductive status; and (3) WHD's rejection of Gupta's retaliation claim. Gupta appealed to the Administrative Review Board.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision, and our review in this case turns solely on rulings of law.[48] The Board has plenary power

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42 *See* D. & O. at 7; CX 20.

43 CX 20.

44 D. & O. at 4; RX A.

45 D. & O. at 4; RX N.

46 D. & O. at 7; CX 21.

47 D. & O. at 4.

48 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845; *see* Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

to review an ALJ's legal conclusions de novo, including whether a party has failed to prove a required element as a matter of law.[49]

DISCUSSION

The INA's H-1B provisions permit employers in the United States to hire foreign nationals in certain "specialty occupations" defined by the INA and its implementing regulations (H-1B workers).[50] "Four federal agencies (Department of Labor, Department of State, Department of Justice, and Department of Homeland Security) are involved in the process relating to H-1B nonimmigrant classification and employment."[51] More importantly, the H-1B hiring process involves three procedural phases that fundamentally impact DOL's resolution of H-1B wage complaints. The first of the three phases requires the H-1B employer to file with DOL for certification of the completed LCA.[52] In the LCA, the employer stipulates to the wage levels and working conditions, among other things, that it guarantees for the H-1B worker for the period of his or her authorized employment.[53] Second, if DOL certifies the LCA, then the employer must file an H-1B petition with USCIS, requesting permission to employ the H-1B worker and allowing the H-1B beneficiary to apply for an H-1B visa.[54] Third, if USCIS approves the H-1B petition, the H-1B beneficiary must apply to the U.S. State Department for an H-1B visa. An approved visa grants the H-1B beneficiary permission to seek entry into the United States up to a date specified on the visa as the "expiration date."

Once the H-1B petition is granted, the petitioning employer assumes various legal obligations after the H-1B beneficiary enters the country or becomes "eligible to work for the petitioning employer."[55] The H-1B employer must begin paying the H-1B worker

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[49] *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2007-LCA-005, slip op. at 3 (ARB June 6, 2013).

[50] 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1184(i)(1).

[51] 20 C.F.R. § 655.705(a).

[52] 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700-.760 (Subpart H).

[53] 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732 (2013).

[54] 20 C.F.R. § 655.705(a), (b). The visa request may be unnecessary if the H-1B worker is already lawfully present in the United States. Our general discussion at this point outlines the typical steps needed where the H-1B employer seeks to hire an H-1B nonimmigrant who is outside of the United States. Further below in our opinion, we discuss the statutory amendments in 2000 that permit an H-1B worker already in the United States to begin working for a prospective H-1B employer pending approval of the H-1B petition filed by that employer, as in this case.

[55] 20 C.F.R. § 655.731(c)(6)(ii).

within the time prescribed in 20 C.F.R. § 655.731(c)(6)(ii). More importantly, the H-1B petitioner must pay the required wage even if the H-1B nonimmigrant is in "nonproductive status" (i.e., not performing work) "due to a decision by the employer (e.g., because of the lack of assigned work) . . . ."[56] The employer may end its obligation to pay the H-1B nonimmigrant through a "*bona fide* termination" of the employment relationship, and it must inform DHS of such termination.[57] In "certain circumstances," the H-1B petitioner must pay for the H-1B worker's return trip to his home country.[58]

Similarly, to work in more than one location, an H-1B nonimmigrant "must include an itinerary with the dates and locations of the services or training and [the itinerary] must be filed with USCIS as provided in the form instructions."[59] USCIS explained that this regulation "was designed to ensure that aliens seeking H-1B nonimmigrant status have an actual job offer and are not coming to the United States for the purpose of seeking employment" upon arrival.[60] Thus, the H-1B process requires that the employer have actual assignable work within the specialty occupation when the petition is filed.[61] In the event of a material change in the terms or conditions of the nonimmigrant's employment, the petitioning employer must file a new certified LCA together with an amended H-1B petition with USCIS.[62] USCIS's guidance provides that any change in employment that requires a new LCA also requires an amended H-1B petition.[63]

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[56] 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

[57] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii) (emphasis in original).

[58] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii). There are additional requirements for H-1B workers considered "H-1B dependent" or "willful violators." *See* 8 U.S.C.A. § 1182(n)(1)(F). In its H-1B petition, Compunnel marked "yes" for the box that asked: "[i]s the petitioner a dependent employer?" (and affirmed a similar question in its LCA) submitted on December 1, 2006. RX C.

[59] 8 C.F.R. § 214.2(h)(2)(i)(B).

[60] Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214).

[61] Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214).

[62] 8 C.F.R. § 214.2(h)(2)(i)(E).

[63] Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214).

1. Back Wages from 12/1/06 to 2/3/07

a. The Parties' Contentions and ALJ's Findings

Gupta argues that he is entitled to be paid from December 1, 2006, through February 3, 2007, because he entered into employment with Compunnel "based on the INA's portability provisions effective December 1, 2006,"[64] provisions we discuss below. Without citing any law, the ALJ found that Gupta was not entitled to wages during this time period because: (1) Gupta had the "burden to establish that wages were inadequately paid," and; (2) Gupta presented "conflicting information" regarding his availability to work, that is, that his employment with his previous employer (Headstrong) ended on November 26, 2006, and that he was "benched"[65] until November 2007. We affirm the ALJ's ultimate ruling, with one exception, but on different grounds. We divide our analysis of this time period in two: before and after December 11, 2006 (the day that USCIS received Compunnel's H-1B petition).

With respect to the time period before December 11, 2006, we agree with the ALJ that Compunnel owes Gupta nothing. As previously explained, to employ Gupta, Compunnel was required to file with USCIS a nonfrivolous H-1B petition on Gupta's behalf. *See supra* at 8-9. The ALJ found that USCIS received Compunnel's H-1B petition on December 11, 2006. We find no legal basis to hold Compunnel liable to Gupta for H-1B wages before USCIS received Compunnel's H-1B petition on December 11, 2006, where it is undisputed that Gupta performed no actual work for Compunnel during this time. Consequently, we affirm the ALJ's ruling that Gupta was not entitled to wages before December 11, 2006.

Turning to the period from December 11, 2006, through February 3, 2007, we first address the ALJ's reasons and bases for rejecting Gupta's claim for back wages. We find several fundamental deficiencies with the ALJ's conclusory analysis of Gupta's allegedly "conflicting evidence" that Headstrong fired and "benched" him. First, the ALJ provided no legal basis that explains why allegedly being "benched" by Headstrong makes Gupta unavailable to work for Compunnel. The law permits an H-1B nonimmigrant to work for more than one employer so long as each employer has filed an H-1B petition on the nonimmigrant's behalf with USCIS.[66] Form I-129 provides that the H-1B petition may be based on, inter alia, a request for "concurrent employment," or on a

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64 Complainant's Petition for Review and Opening Brief, ¶ 17 (Mar. 12, 2012).

65 Benching an H-1B nonimmigrant refers to "placing him in nonproductive status without pay due to a decision by the employer (e.g., because of lack of assigned work)," and is a violation of INA and its implementing regulations. *E.g., Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 2 (ARB Mar. 30, 2007) (citing 20 C.F.R. § 655.731(c)(7)(i)(2006); 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I)).

66 8 C.F.R. § 214.2(h)(2)(i)(C).

request for a "change of employer."[67] Additionally, being "benched" suggests that Gupta was not physically working for Headstrong; therefore, Gupta's alleged admission does not support the conclusion that he was unavailable to work for Compunnel. The ALJ's error is nevertheless harmless because, as we explain below, Gupta had the burden of proving that he actually worked for Compunnel during this time, a burden he cannot meet with the record before us.

b. Portability Provisions

To determine whether Compunnel owes Gupta wages for the period between December 11, 2006, and February 3, 2007, we must examine the law governing the portability phase of H-1B employment. In 2000, the American Competitiveness in the Twenty-First Century Act (AC21) amended the INA to allow H-1B nonimmigrants to begin working for a new H-1B employer upon the filing of a nonfrivolous H-1B petition.[68] The ability to change employers is known as "portability" and is codified as follows:

> (1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a) of this section. Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.
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> (2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien—
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> (A) who has been lawfully admitted into the United States;
> (B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

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67 *See* RX B.

68 American Competitiveness in the Twenty–First Century Act of 2000, Pub. L. No. 106-311, § 105(a), 114 Stat 1251, 1253 (2000) (Codified in part at 8 U.S.C.A. § 1184(n) (Thomson Reuters 2014)).

> (C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.[69]

On its face, this portability provision merely "authorizes" an H-1B worker to accept employment if he qualifies to do so under 8 U.S.C.A. § 1184(n)(2); it does not address the employer's payment obligations during the portability period. Pursuant to 20 C.F.R. § 655.750(b)(3) and (c)(3), after DOL approves an LCA, the H-1B employer must pay the wage rates required under §§ 665.731 and 655.732 "at any time H-1B nonimmigrants are employed pursuant to the [LCA] application . . . ." Beyond these regulations, we have not found, nor have the parties presented, any regulations or legal authority that address the H-1B employer's payment liability during the portability phase of the H-1B petitioning process. In the end, the portability provisions permit the H-1B employer and the H-1B employee to decide whether to work together while the H-1B petition is pending approval by USCIS. Consequently, in the absence of mandatory employment provisions, we find that it is the H-1B employee's burden to prove that he qualifies under 8 U.S.C.A. § 1184(n)(2) to work for a new employer during a portability phase and that he engaged in compensable activities for such employer.

The ALJ's findings and the record demonstrate that Compunnel owes no wages for the period from December 11, 2006, through February 2, 2007. First, Gupta did not establish that he qualified under 8 U.S.C.A. § 1184(n)(2) to work during the portability period. Second, the ALJ found and the parties agree that this time period was a "nonproductive" time period. Third, Gupta presented no evidence of any compensable work he performed during this time period. Fourth, the record shows that Gupta signed an "Employment Agreement" stating that he "entered into" the agreement on February 5, 2007.[70] However, we view February 3, 2007 differently. With respect to February 3, 2007, the ALJ found, and it is undisputed, that Gupta traveled to San Francisco to work and did so at Compunnel's request. Therefore, Gupta is entitled to compensation for his travel time.[71]

For the preceding reasons, we affirm the ALJ's denial of damages for the period up to and including February 2, 2007. For February 3, 2007, we must remand this case for the ALJ to determine what wages are owed for Gupta's time traveling to San Francisco on that date.

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[69] 8 U.S.C.A. § 1184(n) (Thomson Reuters 2014). Note that the cross-reference to 8 U.S.C.A. § 1184(a) merely refers to the H-1B approval process in general.

[70] RX H (see Employment Eligibility Verification); RX H (see Employment Agreement).

[71] *See* 20 C.F.R. § 655.731(1)(C)(4) (travel time).

2. Back Wages from 7/23/07 to 12/10/07

For the time periods from July 23, 2007, to December 10, 2007, the ALJ placed on Gupta the burden to show that he was available for work.[72] The ALJ awarded no back wages for this period based on his finding that Gupta failed to establish that he was available to work for Compunnel. The ALJ found that Gupta did not meet his burden for two reasons: (1) for the period between July and October 2007, Gupta did not demonstrate that he was interested in taking assignments, and; (2) for the period between October 2007 and December 2007, Gupta also claimed to be benched by Headstrong.[73] In so doing, the ALJ committed reversible error by placing the burden of proof on the wrong party. As discussed below, not only does this burden of proof rest with Compunnel, but the evidence of record indicates that Compunnel cannot meet this burden as a matter of law. As we discuss below, the only question that remains is the matter of the calculation of damages, for which remand to the ALJ is required.

a. Law Regarding Nonproductive Periods

The H-1B implementing regulations provide that once the H-1B employer's obligation to pay H-1B wages begins, the employer must continue to pay wages unless the employer can prove by a preponderance of the evidence the presence of any of the circumstances specified at 20 C.F.R. § 655.731(c)(7)(ii)[74] where the wages guaranteed in the H-1B petition need not be paid.[75]

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[72] As we discuss later in our opinion, the ALJ also erroneously placed the burden on Gupta to prove that he was available to work during the nonproductive period running from March 31, 2008, to April 30, 2009.

[73] D. & O. at 9.

[74] 20 C.F.R. § 655.731(c)(7)(ii) also provides that liability for back wages ends when the employer effects a bona fide termination of the employment relationship. However, the bona fide termination question is not pending before us. The ALJ did not make a determination that Gupta's employment had been terminated, but instead upheld the Administrator's determination that Gupta was unavailable to work for Compunnel during nonproductive periods. In its briefing before the ARB, Compunnel did not argue that a bona fide termination occurred. Compunnel asserts that Gupta "was terminated on May 1, 2008," but it does not cite to any evidence in the record to support its claim, much less argue that it was as a bona fide termination. *See* Respondent's Brief in Opposition to Complainant's Opening Brief at 5 (May 4, 2012). To the contrary, the investigator's report states that during the closing conference on March 25, 2011, Compunnel's attorney stated that "Compunnel was prepared to terminate [Gupta] several times, but did not." RX N.

[75] *See Administrator v. Ken Techs., Inc.*, ARB No. 03-140, ALJ No. 2003-LCA-015, slip op. at 4 (ARB Sept. 30, 2004) ("Therefore, in order to avoid liability, Ken must prove by a preponderance of the evidence the presence of 'circumstances where wages need not be paid.'"). *See also Administrator v. University of Miami*, ARB No. 10-090, -093; ALJ No.

The provisions found at 20 C.F.R. § 655.731(c)(6) establish when the H-1B employer's obligation to pay the H-1B worker starts. That subsection provides, in relevant part:

> (6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H-1B nonimmigrant shall receive the required pay *beginning* on the date when the nonimmigrant "*enters* into employment" with the employer.
>
> (i) For purposes of this paragraph (c)(6), the H-1B nonimmigrant is considered to "*enter* into employment" when he/she *first* makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(Emphasis added.) The words "beginning," "enters" and the phrase "first makes him/herself available" convinces us that the H-1B regulations contemplate that entering into employment is a one-time event that initiates the petitioning employer's liability to pay the wages identified in its H-1B petition attestations.[76] It is also clear from this provision that the employer's obligation to pay wages continues subject to the conditions in subsection 20 C.F.R. § 655.731(c)(7). It is this continuing obligation to pay coupled with the employer's attestations in the LCA and H-1B petition that lead us to conclude that the employer bears the burden of proving it is excused from paying the employee.[77]

Pursuant to the INA[78] and 20 C.F.R. § 655.731(c)(7), the H-1B employer's obligation to pay wages continues except during some, but not all, types of non-

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2009-LCA-026, slip op. at 8 (ARB Dec. 20, 2011) ("[T]he ALJ properly found that the University was obligated to pay Wirth wages beginning on October 12, 2006, because Wirth made herself available to the University on that date, and the University did not establish that she was unavailable to work after that date.").

[76] 20 C.F.R. § 655.731(c)(6)(i). Although not relevant to this case, we note that the H-1B implementing regulations also create an automatic commencement of the H-1B employer's payment obligation in certain specified instances. *See* 20 C.F.R. § 655.731(c)(6)(ii).

[77] *See* 20 C.F.R. § 655.731(c)(7)(ii).

[78] 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), (IV).

productive periods. Subsection 655.731(c)(7)(i) provides, in relevant part, that the H-1B employer must pay wages:

> If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of *lack of assigned work*), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section . . . .

(Emphasis added.) Conversely, an H-1B employer need not pay wages:

> If an H–1B nonimmigrant experiences a period of nonproductive status *due to conditions unrelated to employment* which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant) . . . .

(Emphasis added.)

It is clear from these provisions that an H-1B employee's non-productivity caused by the H-1B employer, and particularly due to a "lack of assigned work," results in the continuing obligation to pay. If, however, during a period of non-productivity, the H-1B employee has "assigned work" duties that he is not performing, then the focus turns to the reasons that take him away from those duties. Subsection 655.731(c)(7)(i) makes clear that the employer is liable for any reason that takes the employee away from his duties "except" those specified in subsection 20 C.F.R. § 655.731(c)(7)(ii). Under 20 C.F.R. § 655.731(c)(7)(ii), to be relieved from paying wages for nonproductive periods the H-1B employer must prove: (1) the existence of conditions unrelated to the employee's employment that either; (2) took the employee away from his/her duties at his or her request and convenience, or (3) otherwise render the employee unable to work. A "condition unrelated to employment" cannot take an employee "away from his duties" if the employee has no duties. Logically, to invoke the unavailability exception to wage liability, the employer must prove that the H-1B employee had assigned work. Then, the employer must prove that the worker requested to be away from those duties for reasons unrelated to work or that conditions unrelated to work rendered him "unable" to do those assigned duties.[79]

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[79] 20 C.F.R. § 655.731(c)(7)(ii) provides a second basis for excusing an H-1B employer's liability for back wages, "conditions unrelated to employment which . . . render the non-immigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the non-immigrant)." However, this alternative basis is not before us and, therefore, we need not address its significance in cases in which employees have no actual work duties to perform for the H-1B petitioning employers. In finding that Gupta was unavailable to work for Compunnel, the ALJ did not conclude that Gupta was "unable" to

b. Applying the Law to the Facts of this Case

It is undisputed that Gupta entered into employment with Compunnel no later than February 3, 2007, when he flew to San Francisco, and that Compunnel began paying him on February 5, 2007. Consequently, for the subsequent nonproductive period of July 23, 2007, to December 10, 2007, Compunnel must prove that it was excused from the obligation to pay Gupta the wages it promised under the LCA and H-1B petition filed in December 2006.

The ALJ's findings and the evidentiary record demonstrate that, as a matter of law, Compunnel cannot meet its burden of proof. Compunnel hired Gupta as a market research analyst. But nowhere does the ALJ find, nor is there any evidence in the record, that Gupta had any assigned duties (i.e., market research or any other work) during the nonproductive period between July and December 2007. Phone records indicating that Compunnel "left vm-asking [Gupta] to call back if he has any issues," and evidence that Compunnel inquired as to Gupta's interviews, do not prove that Gupta had assigned duties.[80] Similarly, records that Compunnel "notified" and "submitted" Gupta for approximately eleven projects between July and December 2007 and documenting that Gupta interviewed for a position in Pennsylvania, do not show that Gupta had assigned duties.[81] Accordingly, Compunnel cannot carry its burden of proof that it had assigned Gupta any duties, and therefore, we do not reach the remaining elements of the unavailability test.

3. Back Wages from 3/31/08 to 4/30/09

The Administrator also determined that Gupta was not entitled to back wages between March 31, 2008, and April 30, 2009, because Gupta did not establish that he was available for work.[82] The ALJ again misapplied the burden of proof in affirming the Administrator's determination for this period of time. The ALJ found that Compunnel required Gupta to come to its Monmouth, New Jersey headquarters to "avoid cancellation due to 'no show,'" in a letter and phone call from April 3, 2008.[83] The ALJ also found that Gupta received the letter but did not go to the headquarters as instructed.[84] However,

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work. D. & O. at 8-10. Similarly, Compunnel did not argue that Gupta was "unable" to work. *E.g.*, *Respondent's Brief in Opposition to Complainant's Opening Brief* at 3 (May 4, 2012) ("Gupta was working at some other place during his absent [sic] . . .").

80 RX E.

81 CX 9.

82 D. & O. at 10.

83 D. & O. at 7; CX 18A; RX E.

84 D. & O. at 10.

the April 3 letter does not mention any particular project or assignment. Nor did the ALJ find that Compunnel had work at its Monmouth, New Jersey headquarters, and there is nothing in the record to support such a finding. In fact, during the month of April 2008, Compunnel again "submitted" Gupta for projects.[85] The same as for the period from July 23, 2007, to December 10, 2007, there is simply no record evidence that Gupta had any assigned work duties between March 31, 2008, and April 30, 2009, much less that Gupta elected to be away from any such duty. Accordingly, we hold that Gupta was nonproductive because of a lack of assigned work and, therefore, entitled to back wages during this time. [86]

4. Fringe Benefits

Gupta argues that he is entitled to certain additional fringe benefits, including paid vacation and holidays, paid sick leave, and health insurance. The ALJ determined that Gupta was only entitled to fringe benefits when he was in productive status.[87] The ALJ denied Gupta these fringe benefits during times in which the ALJ determined Gupta to be in nonproductive status. We disagree to the extent that the evidence of record does not support a finding that Gupta's periods of nonproductive status were attributable to circumstances identified under 20 C.F.R. § 655.731(c)(7)(ii) during which wages need not be paid. The INA provides:

> It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the

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[85] CX 11.

[86] We note the troubling inference arising from the record that Compunnel may have acted more like a job placement or "job shop" than an employer that needed Gupta as a company market research analyst. *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, 65 Fed. Reg. 80,144 (Dec. 20, 2000) (codified at 20 C.F.R. Parts 655-656) (quoting 144 Cong. Rec. H8584 (Sept. 24, 1998)) ("The employers most prone to abusing the H-1B program are called job contractors or job shops . . . . They are in business to contract their H-1Bs out to other companies. The companies to which the H-1Bs are contracted benefit by paying wages to the foreign workers often well below what comparable Americans would receive."); Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (proposed June 4, 1998) (codified at 8 C.F.R. Part 214) ("Recruitment agencies and entities which merely locate an alien for employers . . . may not file an H-1B petition . . . . The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs . . . ."). However, we are not presented with the question of whether Compunnel was committing such violations of the H-1B program.

[87] D. & O. at 11.

> nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and saving plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.[88]

Pursuant to this regulation, Gupta is entitled to all fringe benefits afforded U.S. workers during the course of his employment. Because we remand this case for the ALJ to calculate Gupta's back wages, we also remand this case for the ALJ to calculate fringe benefits associated with his back wages. On remand, the ALJ must ensure that Gupta is afforded all fringe benefits to which he was entitled during the course of his employment with Compunnel.

Gupta also correctly contends that he is due interest on all awards of back pay.[89] We reject as unsupported the employer's contention that Gupta waived his right to seek the interest due him on the WHD back pay award, an issue he preserved by requesting a hearing and seeking additional damages. The record thus demonstrates that Gupta invoked and did not waive his right to interest on the back pay award.

5. Gupta's Retaliation Claim

Gupta alleges that Compunnel retaliated against him for engaging in activity protected by the INA's Section 8 U.S.C.A. § 1182(n)(2)(C)(iv). The statute provides, in pertinent part:

> It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee . . . because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection . . . .[90]

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88 8 U.S.C.A. § 1182 (n)(2)(C)(viii); *see also* 20 C.F.R. §§ 655.731-32, 655.820.

89 *Doyle v. Hydro Nuclear Serv.,* ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000).

90 8 U.S.C.A. § 1182(n)(2)(C)(iv); *see also* 20 C.F.R. §§ 655.801, 655.810(b), (b)(2).

Unfortunately, neither the statute nor the implementing regulations provide explicit guidance as to the employee's burden of proof on his case-in-chief or the employer's burden on any alleged defenses.

Given the absence of explicit regulatory guidance, the ALJ decided to apply the standards applicable to the "employee-protection provisions contained in the nuclear and environmental whistleblower statutes administered by DOL."[91] The ALJ expressly relied on "[w]histleblower cases analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and other anti-discrimination statutes."[92] Next, without discussing the appropriate burdens of proof, the ALJ analyzed whether Gupta established a "prima facie case of retaliation" under an analysis that applied shifting burdens to "produce evidence."[93] Ultimately, the ALJ rejected Gupta's claim on two grounds, presumably assuming arguendo that protected activity occurred:[94] (1) Gupta "is unable to establish that [Compunnel] took adverse actions against him," and; (2) Gupta "provides no credible evidence to show a retaliatory motive."[95]

Gupta challenges the ALJ's findings on several grounds. He argues Compunnel retaliated by: (1) failing to pay all of his wages and fringe benefits in 2008; (2) failing to file Form I-140 (Immigrant Petition for Alien Worker) with USCIS in October 2009; (3) reassigning him overseas; (4) sending back-dated letters to USCIS, and; (5) creating false employment records.[96] On the issue of retaliatory motive, he argues that retaliatory motive is not necessary and he points to evidence of temporal proximity, pretext, and shifting explanations to establish a causal nexus between his alleged protected activity and Compunnel's retaliation.[97]

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91 D. & O. at 12 (citing DOL's background comments to the H-1B regulations that merely point to the "well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 C.F.R. Part 24))."

92 *Id*. The cases cited generally make up the often-cited *McDonnell Douglas/Burdine/St. Mary's Honor Center* burden-shifting paradigm. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973); *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-11 (1993).

93 *Id*.

94 On the issue of protected activity, the ALJ stated that Gupta "claims he engaged in protected activity in December 2008" when he reported wage violations. *Id.*

95 *Id*.

96 Complainant's Petition for Review and Opening Brief, ¶¶ 58-78 (Mar. 12, 2012).

97 *Id*. at ¶ 56.

We find that the ALJ's ruling on the retaliation claim is unreviewable and must be remanded for further findings. Stated simply, the ALJ's reliance on "the nuclear and environmental whistleblower statutes" incorporates two fundamentally different burdens of proof as plainly reflected in 29 C.F.R. Part 24 that the ALJ cited. Specifically, pursuant to 29 C.F.R. § 24.109(b)(1) and (2), the "contributing factor" causation standard applies to whistleblower claims brought under the Environmental Reorganization Act of 1974, as amended (ERA), while the more difficult "motivating factor" causation standard applies to the other six environmental statutes listed in 29 C.F.R. Part 24. This difference in causation standards among the environmental statutes has existed for more than twenty years after Congress passed the Energy Policy Act of 1992[98] that amended the ERA whistleblower provision, 42 U.S.C.A. § 5851. In *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997), the Eleventh Circuit Court of Appeals prominently noted this change. The court pointed out that the "prima facie" phrase in the ERA "bred some confusion, chiefly because the phrase evokes the sprawling body of general employment discrimination law," but the 1992 amendment created a "free standing" evidentiary framework. Before we can decide which burden of proof should apply, we find it more prudent to allow the parties to more fully address this issue on remand and, after such briefing, allow the ALJ to explicitly apply a burden of proof to the facts in this case.

Before the ALJ embarks on an in depth analysis and discussion of the proper burdens of proof, we suggest that the ALJ first determine whether Gupta alleged his retaliation claim as an alternate claim for damages or as a claim for additional damages. We say this because our decision will result in Gupta receiving all of the back wages, which he has requested, plus interest, and perhaps addresses the deteriorating financial condition that Gupta allegedly experienced during the time that he was employed by Compunnel. Gupta is not entitled to reimbursement for his return trip to India because the award in this case provides him with all of his wages through the end of his H-1B authorization in 2009, thereby placing on him the financial burden of returning to India. We note that the Administrator has no authority to extend an H-1B visa authorization or to enforce remedies related to applications for employment-based permanent residence. If the ALJ determines that Gupta continues to pursue viable remedies for a retaliation claim, then the ALJ must provide explicit findings as the burdens of proof used to rule on such claim and the findings on each claim.

CONCLUSION

In sum, we order as follows: (1) the ALJ's Decision to deny Gupta damages for the time period from December 1, 2006, through February 2, 2007, is **AFFIRMED** on other grounds; (2) the ALJ's decision on the issue of compensation for travel time on February 3, 2007, is **REVERSED** and **REMANDED** for the ALJ to calculate those

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[98] *See* Energy Policy Act of 1992, Pub. L. 102-486, § 2902(d).

damages; (3) the ALJ's denial of wages and fringe benefits for the nonproductive periods after February 27, 2007, is **REVERSED** and **REMANDED** for the ALJ to calculate those damages; and (4) the ALJ's denial of Gupta's retaliation claim is **VACATED** and **REMANDED** for further findings. We **REMAND** this case for further consideration consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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

I concur in the majority's opinion awarding Mr. Gupta back wages and fringe benefits for the nonproductive periods of Gupta's employment on February 3, 2007, and after February 27, 2007. Hopefully the Board's decision awarding Gupta damages for these contested periods of nonproductive employment ("benching") will serve as an impetus in bringing to an end the deceptive practice of H-1B nonimmigrant worker third-party placement ("Job Shopping") by "staffing companies"[99] in violation of 8 U.S.C.A. § 1182(n)(1)(F). I dissent from the majority's ruling regarding the ALJ's resolution of Gupta's retaliation claim because I am of the opinion that the ALJ applied the correct burdens of proof causation standard,[100] and that the ALJ's determination that Gupta

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99 *See* U.S. Gov't Accountability Office, GAO-11-26, *H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program* 52-55 (2011) (recommending stricter enforcement against H-1B "staffing companies" because, among other problems, "workers procured by staffing companies were either not working for the employer listed or not performing the duties described on the LCA"). *See also* Donald Neufeld, Memorandum, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, U.S. Citizenship & Immigration Services, U.S. Dept. of Homeland Security (January 2010).

100 It is true, as the majority notes, that the ALJ's reference to the applicability of the nuclear (ERA) and environmental whistleblower statutes administered by the Department of Labor under 29 C.F.R. Part 24 is by itself confusing, since the burden of proof standards and evidentiary framework of the ERA has been since 1992 different from the environmental whistleblower provisions that are also covered under the referenced regulations. Nevertheless, the ALJ's analysis was undertaken in accordance with traditional Title VII burden of proof and burden shifting framework case law, which the ALJ cites, and I consider applicable in analyzing whether or not Gupta has met his burden of proof under 8 U.S.C.A. § 1182(n)(2)(C)(iv). My one concern, which I view as harmless error, is the ALJ's

failed to prove his claim of retaliation in violation of 8 U.S.C.A. § 1182(n)(2)(C)(iv) is supported by substantial evidence of record.

E. Cooper Brown
Deputy Chief Administrative Appeals Judge

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requirement that the complaint, to prevail, establish a prima facie case of discrimination – a lesser burden of proof standard than that required of a complainant at the hearing stage before an ALJ where the complainant must prove by a preponderance of the evidence that his protected activity caused or was a motivating factor in the adverse personnel action at issue. *See, e.g., Mugleston-Utley v. E.G.&G. Def. Materials*, ARB No. 12-025, ALJ No. 2009-CAA-009 (ARB May 18, 2013) (interpreting burden of proof requirements under the environmental whistleblower statutes).