



In the Matter of:

KUANYSH BATYRBEKOV,

ARB CASE NO. 13-013

PROSECUTING PARTY,

ALJ CASE NO. 2011-LCA-025

v.

DATE: July 16, 2014

**BARCLAYS CAPITAL
(BARCLAYS GROUP US INC.),**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Kuanysh Batyrbekov, *pro se*, Almaty Kazakhstan

For the Respondents:

WM. Lee Kinnally, Jr, Esq., New York, New York

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended (INA).¹ The complainant, Kuanysh Batyrbekov filed a complaint in April of 2009 against Barclays Capital (Barclays). Batyrbekov's complaint alleged, inter alia, that Barclays owed him back wages, among other benefits, because Barclays failed to effect a bona fide termination of his H-1B employment. The Wage and Hour Division (WHD) investigated and determined that Batyrbekov was owed an additional \$9,707.24 in back wages for the period

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).

between October 15, 2008, and March 31, 2009. Batyrbekov believed he was entitled to more money and requested a hearing before an Administrative Law Judge (ALJ). On September 13, 2012, after holding an evidentiary hearing, the ALJ issued a Decision and Order (D. & O.) that determined that Batyrbekov was entitled only to back wages until March 4, 2009. However, the ALJ upheld WHD's back wages determination because Barclays had not requested a hearing, among other reasons. Similarly, because only Batyrbekov appealed² the ALJ's decision to the Administrative Review Board (ARB or Board), we only address whether he is entitled to additional damages and not whether he is entitled to less. We affirm the ALJ's determination on alternative grounds for the reasons provided below.

INTRODUCTION

The bulk of Batyrbekov's back wage claim requires us to decide whether Barclays's obligation to pay back wages under its approved LCA continued after (1) Barclays notified him it terminated his employment and (2) a new employer subsequently secured an approved H-1B authorization to hire Batyrbekov. In September 2008, Batyrbekov's H-1B work authorization transferred from Lehman Brothers to Barclays after Barclays purchased Lehman Brothers's North American assets. Barclays terminated Batyrbekov's employment on October 14, 2008, but continued to give him his regular installments of pay until January 10, 2009. On January 7, 2009, Advanced Human Resourcing, Inc. (AHR) filed an H-1B petition to hire Batyrbekov. USCIS approved AHR's H-1B petition on January 21, 2009, but revoked it on February 19, 2009, pursuant to AHR's request. Batyrbekov never entered into employment with AHR. Finding that Barclays failed to effect a bona fide termination, WHD determined that Barclays was liable for back wages until March 31, 2009, the date per WHD's investigation that Batyrbekov entered into subsequent employment. After Batyrbekov requested a hearing, the assigned ALJ determined that Barclays owed back wages through March 4, 2009, the date per the ALJ that Batyrbekov became permanently unavailable to work for Barclays. As we explain below, we hold that Barclays's unequivocal termination of Batyrbekov's employment coupled with AHR's approved H-1B petition ended Barclays's LCA wage obligations on January 21, 2009; therefore, we deny Batyrbekov's claim for back wages beyond March 4, 2009, as well as his claims for additional relief.

BACKGROUND

We state the relevant facts here based on the ALJ's findings of fact and reasonable inferences arising from those findings, where substantial evidence supports those findings and inferences. Lehman Brothers filed an H-1B petition on Batyrbekov's behalf that USCIS granted on April 19, 2007.³ The petition authorized Batyrbekov to work for Lehman Brothers from

² Because the deadline for filing a petition fell on a weekend, we deem Batyrbekov's filing on the next business day after the deadline as timely and reject Barclays's pending motion to dismiss. *See* 20 C.F.R. § 655.845; 29 C.F.R. § 18.4(a); Fed R. App. P. 26(a)(1).

³ Respondent's Exhibit (RX) 4.

October 1, 2007, until August 20, 2010.⁴ In its LCA, Lehman Brothers attested to a prevailing wage rate of \$52,125 per year for Batyrbekov's position as a capital markets analyst.⁵ Batyrbekov joined Barclays on September 22, 2008, after Barclays purchased Lehman Brothers's North American assets.⁶ In this appeal to the ARB, no party disputes that Barclays was a proper successor in interest to Lehman Brothers.⁷

The employee manual in use when Batyrbekov entered into employment with Barclays stated that "[a]wards are determined at management's sole and exclusive discretion and are not automatically awarded year to year . . . [d]iscretionary incentive awards are payable only to employees who, in addition to being chosen for such award, are in the employment of Barclays as of the date of payment of the award."⁸

Barclays terminated Batyrbekov's employment on October 14, 2008, as part of a reduction in force.⁹ Batyrbekov's separation agreement provided that he would remain in active employment until November 13, 2008, and receive his base salary and benefits through January 10, 2009, in addition to a \$3,000 special separation payment.¹⁰ On December 25, 2008, Batyrbekov returned to Kazakhstan using a plane ticket his parents purchased.¹¹

Batyrbekov was the beneficiary of an H-1B petition that AHR filed on January 7, 2009.¹² USCIS granted AHR's petition on January 21, 2009.¹³ Batyrbekov admits that "he didn't even start working for AHR because the client assignment they hired me for has fallen through."¹⁴ USCIS revoked the petition on February 19, 2009.¹⁵

⁴ D. & O. at 13 (citing RX 4).

⁵ D. & O. at 14 (citing RX 10).

⁶ D. & O. at 13 (citing RX 1).

⁷ See D. & O. at 5 n.10 (citing Transcript (Tr.) at 73-74).

⁸ RX 2; see D. & O. at 5-6.

⁹ See D. & O. at 13 (citing RX 5), 24, 26.

¹⁰ D. & O. at 20; RX 5.

¹¹ D. & O. at 24-25; Tr. at 187-88.

¹² D. & O. at 25 (citing RX 22, 23).

¹³ *Id.*

¹⁴ RX 18.

¹⁵ D. & O. at 25.

Batyrbekov's H-1B visa, sponsored by Lehman Brothers, expired on January 15, 2009, but Batyrbekov applied for and received a B1/B2 visitor visa.¹⁶ Batyrbekov returned to the U.S. from February 15 to February 27, 2009.¹⁷ A Weekly Market Review, published on March 4, 2009, by RESMI Finance and Investment House (RESMI), also listed Batyrbekov as an employee.¹⁸ RESMI later confirmed that it employed a "Kuanysh Batyrbekov," with the same birthdate as the petitioning party in this case, between March and June of 2009.¹⁹ It is uncontested that Batyrbekov resumed his studies in Kazakhstan in June of 2009.²⁰

Batyrbekov filed his complaint with the Department of Labor in April of 2009.²¹ He told Jacqueline Petricevic, the investigator for WHD, that he had entered into subsequent employment.²² Petricevic contacted Barclays on September 28, 2009, regarding Batyrbekov's complaint.²³ The next day, Barclays notified USCIS that it had terminated Batyrbekov's employment.²⁴ On October 1, 2009, Barclays sent Batyrbekov a check for \$ 1,155.00, which was intended to pay for his return transportation to Kazakhstan.²⁵

In his April 2009 complaint, Batyrbekov alleged that:

- The employer supplied incorrect or false information on the LCA;
- The employer failed to pay the higher of the prevailing or actual wage;
- The employer failed to provide fringe benefits equivalent to those provided to U.S. workers;
- The employer failed to provide employees with notice of its intent to hire nonimmigrant workers, or failed to provide to nonimmigrant worker(s) with a copy of the LCA;

¹⁶ See D. & O. at 12, 15 (citing Complainant's Exhibit (CX) 4, RX 24); Complainant's Petition to the Administrative Review Board to Review the Decision and Order of ALJ at 25 (Oct. 8, 2012).

¹⁷ See D. & O. at 25; *id.*

¹⁸ D. & O. at 16 (citing RX 33).

¹⁹ D. & O. at 14 (citing RX 12).

²⁰ D. & O. at 21-22.

²¹ D. & O. at 1.

²² *Id.* at 4.

²³ *Id.* at 7.

²⁴ *Id.* at 3; RX 6.

²⁵ D. & O. at 12 (citing CX 10).

- The employer failed to maintain and make available for public examination the LCA and other required documents at the place of business or worksite, and that;
- The employer failed to pay for Batyrbekov's return transportation home and the transportation of his belongings.²⁶

On April 4, 2011, using the prevailing wage (\$52,125), WHD determined that Barclays owed Batyrbekov \$9,707.24 in back wages, which Barclays subsequently paid.²⁷ WHD used Batyrbekov's actual wage of \$64,615.44 to determine Barclays's liability for two weeks of vacation plus two weeks of severance pay, and found the \$3,000 that Barclays paid to be insufficient.²⁸ Petricevic determined that Batyrbekov subsequently entered into a nonproductive status on account of Barclays's actions that continued its obligation to pay the LCA wages for nonproductive periods according to 20 C.F.R. § 655.731(c)(7)(ii).²⁹ Because Barclays continued to pay Batyrbekov until January 10, 2009, Petricevic determined that Barclays owed back wages for the period between January 10 and March 31, 2009. She ended the back wage calculation on March 31, 2009, because Batyrbekov mentioned that he had entered into subsequent employment.³⁰

Batyrbekov filed a timely appeal of WHD's findings on April 15, 2011. On July 26, 2011, the ALJ conducted a hearing at which Batyrbekov participated electronically from Kazakhstan. In her D. & O. dated September 13, 2012, the ALJ held that Barclays's liability for back wages ended on March 4, 2009. The ALJ based her determination on a RESMI report, translated from Russian, which listed "Kuanish Batirbekov" as a finance employee in the Department of Investment and Transaction Structuring.³¹ However, the ALJ upheld the back wage award because she was not aware of a method to recoup voluntary overpayment and because Barclays did not request a hearing.³² The ALJ did not award any additional damages. Batyrbekov appealed to the ARB on October 15, 2012.

²⁶ D. & O. at 2.

²⁷ *Id.* at 2 (citing Administrator's Exhibit (AX) 7).

²⁸ D. & O. at 20.

²⁹ The Chapter of the Field Operations Manual, on which Petricevic relied, was not offered into evidence and is not publicly available, although some chapters of the Manual are. *See* Wage and Hour Division, *Field Operations Handbook*, available at <http://www.dol.gov/whd/FOH/> (Apr. 28, 2014 12:50PM). Jennifer McGraw, a DOL Regional Immigration Coordinator, testified that Batyrbekov had been "terminally benched," which she understood to mean that "an employer still owes wages if the employee is not working due to a decision made by the employer, and this obligation continues up until the point either a bona fide termination is effected or the employee is no longer available for work." D. & O. at 7 (emphasis in original).

³⁰ D. & O. at 20.

³¹ *Id.* at 21 (citing RX 30).

³² D. & O. at 22.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision.³³ Where the statute and regulations provide no expressed standard of review, as in H-1B appeals, we choose to defer to the ALJ's fact findings if they are reasonable, and we make reasonable inferences permitted by the ALJ's findings and/or the undisputed record. The ARB has plenary power 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.³⁴ Finally, we also follow well-accepted appellate principles that permit appellate bodies to affirm on alternate grounds.³⁵

DISCUSSION

The Immigration Act of 1990 modified the H-1B program to allow for the admission into the United States of a limited number of temporary nonimmigrants to fill jobs in specialty occupations.³⁶ The process of classifying and admitting nonimmigrants into the United States for employment involves four federal agencies: the Department of Labor, the Department of State, the Department of Justice, and the Department of Homeland Security.³⁷ The H-1B nonimmigrant moves through three procedural phases that fundamentally impact DOL's resolution of H-1B wage complaints. The first of the three phases requires the H-1B petitioner to file a completed LCA with DOL for certification.³⁸ In the LCA, the employer attests to the wage levels and working conditions, among other things, that it guarantees for the H-1B beneficiary for the period of his or her authorized employment.³⁹ Second, if DOL certifies the LCA, then the employer must file with USCIS the LCA, along with the USCIS Form I-129 and other required documents, which collectively constitute an H-1B petition. Third, if USCIS grants the H-1B

³³ 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).

³⁴ *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2007-LCA-005, slip. op. at 3 (ARB June 6, 2013).

³⁵ *E.g., Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994) (citing *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 725 (2d Cir.1978)).

³⁶ The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified in part at 8 U.S.C.A. § 1101(a)(15)(H)(i)(b)).

³⁷ 20 C.F.R. § 655.705(a), (b).

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

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

petition, the H-1B beneficiary must apply to the U.S. State Department to receive an H-1B visa.⁴⁰ The 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.”

The Immigration Act of 1990 included a requirement that if an H-1B nonimmigrant “is dismissed from employment by the employer before the end of the period of authorized admission, [then] the employer shall be liable for the reasonable costs of return transportation of the alien abroad.”⁴¹ In 1990, the Immigration and Naturalization Service (now DHS) promulgated a requirement that “[t]he petitioner shall immediately notify the Service of any changes in the employment of a beneficiary which would affect eligibility under 101(a)(15)(H) of the Act”⁴²

After the Immigration Act of 1990, two statutory amendments made significant changes to the H-1B program that are central to the present case. In 1998, the American Competitiveness and Workforce Improvement Act (ACWIA) clarified that the H-1B employer’s obligation to pay LCA wages continued during periods of non-productivity, except in a few instances.⁴³ More specifically, 8 U.S.C.A. § 1182(n)(2)(C)(vii) provides that an H-1B employer violates the INA if it fails to pay an H-1B employee who is “in nonproductive status due to a decision by the employer (based on factors such as lack of work)”⁴⁴ DOL also subsequently promulgated regulations to implement the continuing wage obligations under ACWIA and to clarify that a bona fide termination can end the H-1B employer’s wage obligations.

With respect to a bona fide termination, the regulations provide that:

an employer is no longer liable for payments for nonproductive status if there has been a *bona fide* termination of the employment relationship. The Department would not likely consider it to be a bona fide termination . . . unless [USCIS] has been notified that the employment relationship has been terminated . . . and the

⁴⁰ 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.

⁴¹ The Immigration Act of 1990, Pub. L. No. 101-649, Sec. 207(b)(5), 104 Stat. 4978, 5026 (1990) (codified at 8 U.S.C.A. § 1184(c)(5)(A)).

⁴² Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606-01 (Proposed Jan. 26, 1990) (codified at 8 C.F.R. § 214.2(h)(11)(i)(A)).

⁴³ The American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277, Sec. 413,112 Stat. 2681-641, 2681-647 (1998) (codified in part at 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I)).

⁴⁴ 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I).

employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA^{45]}

In 2000, Congress passed the American Competitiveness in the Twenty First Century Act (AC21) and included provisions known as the H-1B “portability” provisions.⁴⁶ The portability provisions allow a nonimmigrant previously granted H-1B status to begin working for a prospective employer once the prospective employer files a non-frivolous H-1B petition.⁴⁷ To qualify for the portability provisions, the H-1B nonimmigrant must have been lawfully admitted into the U.S. and not have engaged in unauthorized employment.⁴⁸ The nonimmigrant’s employment authorization continues until USCIS acts on the H-1B petition. If USCIS denies the H-1B petition from the prospective employer, the temporary authorization to work for the prospective employer ceases.⁴⁹

A. The ALJ’s Denial of Back Wages After March 4, 2009

As we previously indicated, because only Batyrbekov appealed to the Board, we need only decide whether Batyrbekov is entitled to more weeks of back wages and not whether Barclays overpaid. We adhere to the principle that “[a] party who neglects to file a cross-appeal may not use his opponent’s appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party’s rights thereunder.”⁵⁰

The ALJ’s decision to cut off back wages as of March 4, 2009, stemmed from her view of Batyrbekov’s availability to work for Barclays. Relying on *Mao v. Nasser Eng’g & Computing Servs.*, the ALJ stated that “an employer’s pay obligation continues, so long as the employer has not effected a bona fide termination of the employment and the employee remains available for work.”⁵¹ The ALJ explained that a nonimmigrant is no longer available “once the H-1B employee absents himself from his duties, for reasons of his own convenience,” based on

⁴⁵ Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, 65 Fed. Reg. 80,171 (Proposed Dec. 20, 2000) (emphasis in original) (codified at 20 C.F.R. § 655.731(c)(7)(ii)).

⁴⁶ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-31, § 105(a), 114 Stat 1251, 1253 (2000).

⁴⁷ 8 U.S.C.A. § 1184(n)(1)-(2).

⁴⁸ *Id.*

⁴⁹ *Id.*; see FRAGOMEN ET. AL, H-1B HANDBOOK § 8:5 (2013 ed.).

⁵⁰ *Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 232 (1st Cir. 2007) (citing *Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998)).

⁵¹ D. & O. at 22 (citing *Mao v. Nasser Eng’g & Computing Servs.*, ARB No. 06-121, ALJ No. 2005-LCA-036, slip op. at 10 (ARB Nov. 26, 2008)).

20 C.F.R. § 655.731(c)(7)(ii).⁵² The ALJ found that Barclays's liability for back wages ended on March 4, 2009, when Batyrbekov became definitively unavailable. Her finding was based on Batyrbekov's return flight to Kazakhstan and a RESMI report dated March 4, 2009, that listed Batyrbekov as an employee.

Batyrbekov disagrees with the ALJ and argues that he is owed damages until August 10, 2010, the expiration of his authorized period of H-1B employment with Barclays. In support of his claim, he relies on a strict application of our decision in *Amtel Group of Fla., Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11 (ARB Sept. 29, 2006), which requires employers to meet three requirements to effect a bona fide termination of H-1B employment and end their obligations to pay wages promised under LCAs: (1) expressly terminate the employment relationship with the H-1B nonimmigrant; (2) notify USCIS of the termination so that the petition may be cancelled, and; (3) provide the nonimmigrant with the reasonable cost of return transportation to his or her home country. In affirming the ALJ's award of damages, rather than focusing on Batyrbekov's availability, we find that USCIS's approval of AHR's H-1B petition on January 21, 2009, constituted a bona fide termination in this case and ended Batyrbekov's entitlement to wages from Barclays. To reach this conclusion, we first explain why the Board's definition of bona fide termination announced in *Amtel* does not govern this case, where a new employer obtained USCIS's approval to hire Batyrbekov after Barclays unequivocally notified him that it had terminated his employment.

1. Amtel Does Not Apply in this Case

First, *Amtel* does not apply here because the facts in *Amtel* materially differ from the facts in Batyrbekov's case in at least one critical aspect. In *Amtel*, after the H-1B employee (Rung) learned that Amtel fired her, she did not have a new employer later secure USCIS's approval of a new H-1B petition. Rung returned to the United States from vacation only to discover suddenly that she no longer had a job, and she argued that Amtel did not effect a bona fide termination. While Rung's termination was undisputed, Amtel never notified USCIS of the termination and never paid for Rung's return transportation.⁵³ The ALJ found that Amtel had not effected a bona fide termination because it had "failed to establish a legal justification for Rung's termination."⁵⁴ The ALJ awarded Rung front pay for the remaining validity of her H-1B visa. The ARB affirmed the award on alternate grounds, holding that:

section 655.731(c)(7)(ii), when read in conjunction with its accompanying comments elucidating its purpose, compel us to hold that, to ultimately effectuate a "*bona fide* termination" under the INA, an employer must notify the INS that it has terminated the employment relationship with the H-1B nonimmigrant

⁵² *Id.* (citing 20 C.F.R. § 655.731(c)(7)(ii)).

⁵³ *Amtel*, ARB No. 04-087, slip. op at 9. Note that USCIS is the successor agency to the INS.

⁵⁴ *Id.* at 3.

employee and provide the employee with payment for transportation home.^[55]

But the ARB made this holding in a case that did not include a new employer that had secured USCIS's approval to hire Rung. Consequently, in *Amtel*, the ARB had no need to decide the requirements for effecting a bona fide termination, where the H-1B employee was positioned to start a new job with a new authorized H-1B employer, rather than returning to her home country.

Aside from the factual differences, the *Amtel* definition of bona fide termination does not properly account for the complexities that can arise in cases involving multiple H-1B employers. In 2000, the INA was amended by AC21, which allows for H-1B nonimmigrants to port to a new employer.⁵⁶ The portability provisions do not place a limit on the number of times that an H-1B nonimmigrant may port employers. Thus, a strict reading of *Amtel* would suggest that each time an H-1B nonimmigrant ports to a new employer, the former employer would remain liable for back wages until it provides the nonimmigrant with the cost of return transportation. Instead, we think that back wage claims against a former employer must stop accruing if it is clear that the H-1B employee changes from one H-1B employer to another and USCIS approves the subsequent H-1B petition allowing for the change.

Our preceding observations compel us to find that the *Amtel* definition of a bona fide termination cannot be strictly applied to cases involving multiple H-1B employers. In this case, we find that a bona fide termination of employment can occur and end back wage liability for an employer that proves it (1) expressly notified an H-1B employee that it terminated the H-1B employment, and (2) thereafter, the H-1B employee secured USCIS's approval for a "change of employer." The burden of proving the end of back wage liability remains with the employer.⁵⁷ To clarify, we do not mean to suggest that an H-1B employer may ignore an obligation it might have to request that USCIS officially cancel an H-1B authorization after the H-1B employer terminated an H-1B's employee's employment. We can envision cases where an H-1B employer's failure to notify USCIS of an H-1B employee's termination could cause confusion as to whether the employment relationship is in fact ongoing. In this case, we see no such confusion in Barclays's failure to notify USCIS in a timely manner. We next address whether AHR selected the "change of employer" category in its I-129 Form.

Beyond the preceding concerns we identified, applying the *Amtel* definition of bona fide termination to this case would ignore the significance of a subsequently-filed I-129 Form for a "[c]hange of employer." Form I-129 requires the H-1B employer petitioner to check one of the following six "Bas[e]s for Classification" for an H-1B nonimmigrant: (a) [n]ew employment;

⁵⁵ *Id.* at 10 (emphasis in original).

⁵⁶ *See generally*, 8 U.S.C.A. § 1184(n).

⁵⁷ *Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, slip op. at 15 (ARB May 29, 2014) ("[T]he 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.").

(b) [c]ontinuation of previously approved employment without change with the same employer; (c) [c]hange in previously approved employment; (d) [n]ew concurrent employment; (e) [c]hange of employer; or (f) [a]mended petition.⁵⁸

When “[c]oncurrent employment” is requested, the petitioner is “applying for a beneficiary to begin new employment with an additional employer in the same nonimmigrant classification the beneficiary currently holds while the beneficiary will continue working for his or her current employer in the same classification.”⁵⁹ In deciding whether to approve concurrent employment, USCIS reviews the attestations contained in the LCAs of multiple petitioning employers collectively.⁶⁰ To this end, USCIS requires additional documentary evidence in the case of I-129 petitions requesting concurrent employment.⁶¹ The plain language of the I-129 Form, the USCIS guidance, and the regulatory structure indicate that when USCIS approves a petition for concurrent employment, it intends to grant the nonimmigrant the right to work for multiple employers pursuant to the attestations contained in their respective petitions. USCIS makes clear to us that the “[c]oncurrent employment” category applies to those situations where an H-1B employee may lawfully work for multiple employers during the same time period.

In contrast, when a petitioner selects the “[c]hange of employer” category, it is “applying for a beneficiary to begin employment working for a new employer in the same nonimmigrant classification that the beneficiary currently holds.”⁶² The plain language of the USCIS guidance and the regulatory structure indicate that a grant of change of employer by USCIS authorizes the H-1B employee to work for the most recent petitioning employer according to that employer’s attestations contained in its petition, rather than the previous H-1B employer.⁶³ The nonimmigrant may remain authorized to work for the previous employer if it does not notify USCIS, as required by 8 C.F.R. § 214.2(h)(11)(i)(A).⁶⁴ Logically, USCIS’s approval of a

⁵⁸ Form I-129, OMB No. 1615-0009 (2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-129.pdf>.

⁵⁹ *Id.* (emphasis in original).

⁶⁰ *See* H-1B HANDBOOK § 3:3, *supra*.

⁶¹ *See id.*

⁶² *Instructions for Form I-129 Petition for a Nonimmigrant Worker, supra* at 3 (emphasis in original); *Id.* (“the initial petition was filed by an employer and the alien will discontinue working for this employer and start working for a new employer in the same nonimmigrant category.”)

⁶³ *See* STEPHEN A. CLARK & VINCENT W. LAU, H-1B SPECIALTY WORKERS, § 4.4.2 Change of Employer (2012) (“An amended petition must be filed when there is a material change in the terms and conditions of employment or the beneficiary’s eligibility. 8 C.F.R. § 214.2(h)(2)(i)(E). This was not intended to require reporting of minor changes, only to assure that when a new employer is involved that the new employer will become liable for the return transportation and to file an LCA.”).

⁶⁴ *See* STEEL ON IMMIGRATION LAW § 3:14 (2013 ed.).

“change of employer” must end the previous H-1B employer’s obligation to pay wages and the cost of the H-1B employee’s return to his or her home country.

Similarly, a petitioner may select “[n]ew employment” if “the beneficiary: (1) [i]s outside the U.S. and holds no classification; (2) [i]s to begin employment for new U.S. employer in a different nonimmigrant classification than the alien currently holds; or (3) [w]ill work for the same employer but in a different nonimmigrant classification.”⁶⁵ A grant of “[n]ew employment” begins the H-1B employment process, and the beneficiary will be counted against the H-1B cap, subject to certain exceptions.⁶⁶ Like “[c]hange of employer,” USCIS’s approval of “[n]ew employment” would have the effect of stopping any previous H-1B employer’s back wage liability from further accrual.

2. USCIS’s Approval of AHR’s H-1B Petition Ended Barclays’s Wage Obligations

As a preliminary matter, we note that Batyrbekov refused to produce AHR’s I-129 Petition for a Nonimmigrant Worker filed on Batyrbekov’s behalf, the document that would have shown whether AHR selected “concurrent employer” or “change of employer.”⁶⁷ Batyrbekov’s deliberate refusal to produce this critical document supports the negative inference that it was not helpful to his argument that his employment with Barclays did not end. We feel that Batyrbekov waived his right to complain if the ALJ or the ARB draws an adverse inference based on his failure to produce the petition.⁶⁸

⁶⁵ *Instructions for Form I-129 Petition for a Nonimmigrant Worker, supra* at 2-3 (emphasis in original).

⁶⁶ H-1B HANDBOOK § 3:3, *supra*.

⁶⁷ Tr. at 30-31 contains the following exchange:

JUDGE ODEGARD: What would Barclays[’s] position have been if he [Batyrbekov] had chosen to take other employment after the end of the severance package?

MR. KINNALLY: Certainly would have affected the calculation of back wages here, Your Honor.

JUDGE ODEGARD: But there was no objection to him taking other employment?

MR. KINNALLY: We had no idea.

JUDGE ODEGARD: Alright. I will --

MR. KINNALLY: And may I say, Your Honor, we’ve tried to get the entire petition and Mr. Batyrb[e]kov refused to allow the attorney to release it.

JUDGE ODEGARD: Okay. I will withhold ruling on these three [Exhibits 21-23] subject to testimony. Okay. And then exhibits 25 through 28. (exhibit 21 was not admitted into evidence Tr. at 210).

⁶⁸ *Knightsbridge Mktg. Servs., Inc. v. Promociones y Proyectos, S.A.*, 728 F.2d 572, 575 (1st Cir. 1984) (“The district court was entitled, as are we, to draw an adverse inference against the defendant for its failure to produce either pretrial or at trial its earnings figures for 1981 and 1982.”);

In spite of Batyrbekov's refusal to produce AHR's I-129 Form and H-1B petition documents, we find that the ALJ's findings and the undisputed facts show, as a matter of law, that Batyrbekov could not legally be granted the right to work concurrently for both Barclays and AHR on January 21, 2009. The reason for this conclusion is that Batyrbekov was no longer working for Barclays when AHR filed its H-1B petition. The ALJ found that Barclays notified Batyrbekov on October 14, 2008, that: (1) it was terminating his employment and he was no longer "expected to report to work";⁶⁹ (2) the last day he would be expected to be an "active employee" would be November 13, 2008;⁷⁰ (3) it provided Batyrbekov with a 30-day "notice period" of the end of his active employment;⁷¹ and (4) it paid him "2 weeks of severance pay and 2 weeks of unused vacation pay."⁷² The ALJ found and it is undisputed that, on January 7, 2009, AHR filed an H-1B petition to hire Batyrbekov, and USCIS granted the petition on January 21, 2009.⁷³ On January 15, Batyrbekov's H-1B visa sponsored by Lehman Brothers expired, but he was granted a B1/B2 tourist visa on January 28, 2009.⁷⁴ All of these facts make it clear that AHR had no factual basis to lawfully assert that it would be Batyrbekov's "additional employer" on January 21, 2009, which would have granted him the authorization to work for, and receive back wages from, more than one H-1B employer. Based on the totality of facts, we hold that Barclays's obligation to pay LCA wages to Batyrbekov stopped at least by January 21, 2009, after it had given clear notice of terminating his employment and USCIS had approved AHR's H-1B change of employer petition.⁷⁵

B. Barclays's Liability for Back Wages Before January 21, 2009

The Administrator's back wage calculation determined that Barclays owed Batyrbekov an additional \$9,707.24 in back wages accruing between October 14, 2008, and March 31, 2009. The Administrator first determined that Barclays owed Batyrbekov two weeks' vacation and two weeks' severance at \$31.07 per hour, which equaled \$4,970.42 in severance. Next, the

Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.").

⁶⁹ RX 5; D. & O. at 26 (citing RX 5).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² RX 5; D. & O. at 20.

⁷³ D. & O. at 15, 25; RX 22.

⁷⁴ See D. & O. at 4, 15 (citing CX 4, RX 24); Complainant's Petition to the Administrative Review Board to Review the Decision and Order of ALJ at 25 (Oct. 8, 2012).

⁷⁵ Because Barclays did not appeal, we need not decide whether Barclays's obligation could have ceased earlier. As we explain, as of January 21, 2009, Barclays owed far less than the \$9,707.24 that the Administrator awarded and Barclays paid. If Barclays's wage obligation ceased earlier than January 21, 2009, it would only mean that it overpaid even more.

Administrator calculated Barclays's liability for 11 semi-monthly pay periods at the prevailing wage of \$52,125 per year, which totaled \$23,890.68. The Administrator subtracted the amount paid by Barclays after October 14, 2008 (\$19,153.86) from the total of the two previous amounts (\$28,861.11) to determine that Barclays owed \$9,707.24 in back wages. Batyrbekov challenges the method by which the Administrator calculated the back wage award in two ways. First, he argues that the ALJ should have used the rate of \$100,000 per year as the actual wage rate based on his 2008 tax returns.⁷⁶ Second, Batyrbekov argues that "the Administrator [] erroneously counted the Complainant's Severance Pay [sic] . . . as part of the back wages calculation in RX-20 (page 3) . . . which would require a further award of at least USD\$3,000 in back wages, replacing the USD\$3,000 belonging to back fringe benefits."⁷⁷ We understand the second challenge to mean that \$16,153.86 of the Administrator's determination constituted wages, but that \$3,000 was not.

We find no basis for determining \$100,000 to be the actual wage. It is undisputed that Barclays assumed Batyrbekov's employment after Lehman Brothers filed for bankruptcy and Barclays fired numerous people, events that surely affected "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question."⁷⁸ We find that the record supports the Administrator's determination that the actual rate was \$2,692.31 on a semi-monthly basis (or \$64,615.44 annually), and the prevailing wage was \$2,485.21 on a bi-weekly basis (or \$52,125.00 annually). Batyrbekov did not dispute the Administrator's determination that Barclays paid him \$16,153.86 between October 14, 2008, and January 15, 2009, the same amount he would have received at the actual semi-monthly rate of \$2,692.31. Consequently, Batyrbekov received the higher rate of pay as required by regulation.⁷⁹

We agree that the Administrator improperly credited \$3,000 towards Barclays's back wage liability to Batyrbekov. The ALJ found that Barclays employees "who were terminated before the date for which they would become eligible for bonuses were tendered a special payment of \$3,000" and that "this payment was given to both H-1B employees and U.S. employees" indicating that the payment was not part of Barclays's H-1B wage obligation.⁸⁰ Accordingly, Barclays paid Batyrbekov \$16,153.86, not \$19,153.86, in back wages after October 14, 2008.

We find that one week of back wages accrued between January 15, 2009, when Batyrbekov was removed from Barclays's payroll, and January 21, 2009, the latest date that back wage liability could have ended. One week of back wages at the actual wage would constitute

⁷⁶ *Complainant's Opening Brief in Support of Complainant's Petition for Review* at 23 (Dec. 10, 2012).

⁷⁷ *Complainant's Rebuttal Brief* at 9 (Jan. 28, 2013).

⁷⁸ *See* 8 U.S.C.A. § 1182(n)(1)(A)(i).

⁷⁹ 20 C.F.R. § 655.731(a).

⁸⁰ D. & O. at 9.

\$1,346.16. Thus, Batyrbekov was entitled to no more than \$4,346.16 (\$3,000 plus \$1,346.16) plus interest, meaning that he was over-compensated by approximately \$5,631.08.⁸¹

C. Other Issues on Appeal

1. Fringe Benefits

Regarding fringe benefits, Batyrbekov alleged that Barclays failed to pay him cash bonuses, failed to pay him healthcare costs, and failed to provide him with 401(k) accounts equivalent to those that U.S. workers received.⁸² The ALJ found that Petricevic limited her investigation in this regard solely to the issue of bonuses. The ALJ held that under 20 C.F.R. § 655.806(a)(2) and *Gupta*, the investigator's determination whether to investigate an allegation is wholly discretionary, which restricted the court's jurisdiction to adjudicating only the issue of cash bonuses.⁸³

The ALJ's reading of *Gupta* is overly-broad. *Gupta* involved a complainant's ability to appeal the Administrator's decision not to investigate any part of his complaint.⁸⁴ At issue was 20 C.F.R. § 655.806(a)(2), which states that "[n]o hearing or appeal pursuant to this subpart shall be available where the Administrator determined that an investigation on a complaint is not warranted." In *Gupta*, the ARB emphasized that the investigation triggered the right to appeal.⁸⁵ In *Puri v. Univ. of Ala. Birmingham Huntsville*, the ARB held it to be proper to presume that an entire complaint was investigated unless the Administrator provided notice that a particular claim failed to present reasonable cause for investigation.⁸⁶ Here, *Gupta* does not apply and *Puri* controls because the Administrator deemed his aggrieved party complaint warranted an investigation and conducted such investigation, although a limited one.

Batyrbekov filed a motion to compel discovery on July 8, 2011, which included a request for information related to the fringe benefits that Barclays provided to U.S. workers. There is no record of the ALJ ruling on this motion, even though it was within the deadline she had imposed for filing motions. On appeal, however, Batyrbekov does not argue that the ALJ's failure to compel discovery was in error, nor does he point to evidence that would have changed the result, and we accordingly consider the argument to be waived.

⁸¹ We find that Barclays's check for \$1,155 constituted the reasonable cost of return transportation. We find Barclays's practice of researching the price of one-way airfare purchased on short notice was an acceptable manner in which to base its calculation. *See* D. & O. at 24-25.

⁸² D. & O. at 18.

⁸³ *Id.* at 19 (citing *Gupta v. Headstrong, Inc.*, ARB Nos. 11-065, 11-068 (ARB June 29, 2012)).

⁸⁴ D. & O. at 2.

⁸⁵ *Id.* at 4.

⁸⁶ ARB No. 10-004, ALJ Nos. 2008-LCA-008, -043; slip op. at 10 (ARB Nov. 30, 2011).

The only evidence that the record contains regarding fringe benefits is a listing of the price of employee contributions towards various continuing coverage premiums under COBRA.⁸⁷ Such evidence is insufficient as a matter of law to allow the ALJ to make findings of fact regarding the value of additional fringe benefits. Batyrbekov himself does not provide a value, but rather suggests that “there should be another theoretical figure determined by WHD after investigating Barclays’s employee records.”⁸⁸ Although the ALJ had jurisdiction to rule on the adequacy of fringe benefits, Batyrbekov had the burden of providing sufficient evidence such that the ALJ could make the requisite calculations. We determine that Batyrbekov has failed to meet this burden as a matter of law.

2. Pre- and Post- Judgment Interest

Pre- and post-judgment compound interest is commonly ordered to make a complainant whole.⁸⁹ The ALJ did not award interest on back pay because she determined that Batyrbekov had already been overcompensated by receiving wages between March 4 and March 31, 2009. We agree that Batyrbekov is not entitled to compound interest as part of his make-whole remedy. Barclays paid the back wage amount, the Administrator calculated, in April of 2011; the same month that the Administrator’s Determination was issued.⁹⁰ We find no reason to award interest as there is no additional amount owed. Batyrbekov has already been made whole because he was awarded more than the pay he was owed with interest added from December 15, 2008, to April 26, 2011, the day Barclays paid what the Administrator claimed it owed.⁹¹

The ARB frequently awards pre- and post-judgment interest according to 26 U.S.C.A. § 6621.⁹² 26 U.S.C.A. § 6621-622 provides for interest to accrue at the federal short-term rate for the underpayment of taxes, as posted quarterly by the Internal Revenue Service, plus three percentage points and compounded daily. The applicable interest rates varied between 3.41 percent and 3.84 percent between January 2009 and April 2011,⁹³ when Barclays paid Batyrbekov’s back wages. We note that even at 3.84 percent, the highest interest rate during the

⁸⁷ See CX 24.

⁸⁸ Complainant’s Petition to the Administrative Review Board to Review the Decision and Order of ALJ at 22 (Oct. 8, 2012).

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

⁹⁰ See D. & O. at 11 (citing AX 5, 7).

⁹¹ AX 7.

⁹² E.g., *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000).

⁹³ See *Index of Applicable Federal Rates (AFR) Rulings*, Internal Revenue Service, <http://apps.irs.gov/app/picklist/list/federalRates.html?indexOfFirstRow=50&sortColumn=number&value=&criteria=&resultsPerPage=25&isDescending=true> (last visited July 10, 2014).

period, \$4,346.16 would accumulate only about \$437 over two and a half years. Thus, Batyrbekov was owed at most \$4,783 (\$4,346.16 plus \$437) in April of 2011. He was therefore overcompensated by approximately \$4,924.

3. *Equitable Remedies*

Batyrbekov requests that the ARB reverse the U-5 termination notice and nullify Barclays's separation agreement as equitable remedies.⁹⁴ The ARB has held that "private employment agreements are outside the scope of the INA and are beyond our jurisdiction."⁹⁵ Instead, "DOL's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to the INA's H-1B provisions."⁹⁶ The separation agreement entered into by Batyrbekov and Barclays constituted a private employment agreement outside the scope of the INA. Similarly, the U-5 termination notice is a securities industry regulation that is entirely separate from the INA.

Batyrbekov also requests judgment on "all of the equitable remedies requested in his initial appeal" to the ALJ.⁹⁷ In his appeal to the ALJ, Batyrbekov requested additional compensatory damages "for the payment of early termination fee on my lease" and "emotional distress that I suffered as the result of my wrongful termination."⁹⁸ Batyrbekov has not submitted any evidence regarding his payment of an early termination fee on his lease, and the ARB therefore has no basis for considering the argument.

Regarding damages for emotional distress based on wrongful discharge, we note that the H-1B provisions did not provide Batyrbekov with such protections. Moreover, the ALJ denied Batyrbekov's request to amend his complaint to allege a violation of the INA's whistleblower provision. Batyrbekov did not allege error in the ALJ's denial, and we consider the argument to be waived. He is therefore not entitled to any equitable remedies.

⁹⁴ Complainant's Opening Brief in Support of Complainant's Petition for Review at 28 (Dec. 10, 2012).

⁹⁵ *E.g., Jain v. Empower IT*, ARB No. 08-077, ALJ No. 2008-LCA-008, slip op. at 12, n.87 (ARB Oct. 30, 2009).

⁹⁶ *Administrator v. Integrated Informatics, Inc.*, ARB No. 08-127, ALJ No. 2007-LCA-026, slip op. at 14 (ARB Jan. 31, 2011).

⁹⁷ Complainant's Petition to the Administrative Review Board to Review the Decision and Order of ALJ at 23 (Oct. 8, 2012).

⁹⁸ Re: Administrator's Determination for Case at 3 (Apr. 15, 2011).

CONCLUSION

In sum, the ALJ's Decision and Order is **AFFIRMED**, as **MODIFIED**, in part.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge