In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,

PROSECUTING PARTY,

v.

PARSETEK, INC.,

RESPONDENT.

ARB CASE NO. 16-001

ALJ CASE NO. 2013-LCA-010

DATE: November 7, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Quinn Philbin, Esq.; *United States Department of Labor,* Washington, District of Columbia

For the Respondent:
Gus M. Shihab, Esq.; *Shihab & Associates, Co., LPA*; Columbus, Ohio

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER REMANDING THE CASE FOR THE CALCULATION OF ADDITIONAL WAGES AND BENEFITS

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended (INA or the Act).[1] Sumi Kutty Maniyanakunnath filed a complaint in

[1] 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2017), as implemented by 20 C.F.R. Part 655, Subparts H and I (2016). "H-1B" refers to the nonimmigrant class described in 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

March 2010 with the United States Department of Labor's Wage and Hour Division (WHD), claiming that Parsetek, Inc., a company, which at all relevant times placed H-1B employees with a third party customer, owed her additional wages. WHD conducted an investigation. WHD determined that Parsetek owed Maniyanakunnath $58,692.80 in back wages for the period from October 4, 2008, through March 13, 2010. Administrator's Trial Exhibits 1, 2. Parsetek objected to WHD's determination and requested a hearing. A Department of Labor Administrative Law Judge (the ALJ) held a hearing on September 23, 2014. The ALJ found that Parsetek established that Maniyanakunnath was in nonproductive status due to reasons of her own that were unrelated to her employment, from April 12, 2009, until March 11, 2010, and thus concluded that Parsetek had no wage liability for this period. Decision and Order (June 1, 2015) (D. & O.).[2] The Administrator, Wage and Hour Division, appealed the ALJ's decision to the Administrative Review Board (ARB or Board) and is the Prosecuting Party. The Administrator contends that the ALJ's decision is inconsistent with applicable statutory and regulatory law as well as the ARB's decision in *Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-149, ALJ No. 2011-LCA-045 (ARB May 29, 2014). On review, we reverse the ALJ's finding that Parsetek is relieved of its liability to pay Maniyanakunnath her wages from October 4, 2008, to March 11, 2010. We remand the case to the ALJ for the calculation of wages and benefits consistent with this opinion.

FACTUAL BACKGROUND[3]

Parsetek employed Maniyanakunnath under the H-1B nonimmigrant visa program as a computer programmer during the period in question, namely April 12, 2009, to March 11, 2010. This is the period of the wage claim before us. Administrator's Petition for Review at 1. Parsetek filed a Labor Condition Application with the United States Department of Labor listing Maniyanakunnath's annual salary at $51,376. Administrator's Trial Exhibit 13. In October 2008, Maniyanakunnath moved from Virginia to Chicago with Abhishek Puppala, whom she married in April 2009. Maniyanakunnath notified Parsetek, and received permission, to move to Chicago and live with Puppala. The couple later moved in October 2009 to Texas because of Puppala's work with a Parsetek customer. Parsetek unsuccessfully marketed Maniyanakunnath for placement with its customers for programming work in different

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[2] The ALJ refers to Maniyanakunnath as "Complainant 2." The ALJ also decided the claims of Parsetek H-1B employee, Abhishek Puppala or "Complainant 1" (Puppala). The ALJ described Puppala as Maniyanakunnath's "boyfriend/husband." D. & O. at 21. Only one wage claim, that pertaining to Maniyanakunnath, is before the Administrative Review Board.

[3] We set forth the relevant facts as determined by the ALJ, or uncontested or stipulated to by the parties.

states. Parsetek did not assign Maniyanakunnath any computer programming work during her employment. Parsetek effected a bona fide termination of Maniyanakunnath's employment on March 11, 2010.[4]

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision and order.[5] The Board has plenary power to review an ALJ's legal conclusions de novo, including whether a party has met or failed to meet its wage obligation under the Act, regulations, and applicable precedent.[6]

DISCUSSION

The INA's H-1B provisions permit employers in the United States to hire nonimmigrant workers in certain "specialty occupations" defined by the INA and its implementing regulations.[7] "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."[8] The H-1B hiring process involves three procedural phases that impact DOL's resolution of H-1B wage claims. The first of the three phases requires the H-1B employer to file with DOL for certification of the completed Labor Condition Application (LCA).[9] 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.[10]

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[4] The ALJ noted the parties' stipulation that Parsetek effected a bona fide termination of Maniyanakunnath's employment on March 11, 2010. D. & O. at 5, 17. The ALJ concluded that effecting a bona fide termination "releas[ed] Respondent from the continuing obligation to pay [wages.]" D. & O. at 19; *see* 20 C.F.R. § 655.731(c)(7)(ii).

[5] 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).

[6] *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 12-149, ALJ No. 2011-LCA-045 (ARB May 29, 2014).

[7] 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1184(i)(1).

[8] 20 C.F.R. § 655.705(a).

[9] 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700-.760 (Subpart H).

[10] 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732 (2013).

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.[11] 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 obligations after the H-1B beneficiary enters the country or becomes "eligible to work for the petitioning employer."[12] The H-1B employer must begin paying the H-1B worker within the time prescribed in 20 C.F.R. § 655.731(c)(6)(ii). Of critical importance to this case, 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) . . . ."[13] 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.[14] In "certain circumstances," the H-1B petitioner must pay for the H-1B worker's return trip to his home country.[15]

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."[16] 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.[17] Thus, the H-1B process requires that the employer have actual assignable work within the specialty occupation when the petition is filed.[18] In the event of a material change in the terms or conditions of the nonimmigrant's employment,

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[11] 20 C.F.R. § 655.705(a), (b).

[12] 20 C.F.R. § 655.731(c)(6)(ii).

[13] 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

[14] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii).

[15] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii).

[16] 8 C.F.R. § 214.2(h)(2)(i)(B).

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

[18] *Id.* at 30,420.

the petitioning employer must file a new certified LCA together with an amended H-1B petition with USCIS.[19] USCIS's guidance provides that any change in employment that requires a new LCA also requires an amended H-1B petition.[20]

Wage claim from April 12, 2009, to March 11, 2010

At the crux of this appeal is the fact that the ALJ found that Parsetek established that Maniyanakunnath was in nonproductive status due to reasons of her own that were unrelated to her employment, from April 12, 2009, until March 11, 2010, and thus concluded that Parsetek had no wage liability for this period under 20 C.F.R. § 655.731(c)(7)(ii). The ALJ based his finding on his determination that Maniyanakunnath made herself, in effect, unavailable for work, but he arrived at this determination merely referring to but never considering the impact of the fact that Parsetek never assigned her any computer programming work. The ALJ determined that Maniyanakunnath "frustrated Respondent's attempts to place her" by not responding or rarely responding to emails, by disconnecting her telephone, by moving from Parsetek's guest house, and by moving to another state—"effectively making it impossible for Respondent to place her" by making herself unavailable. The ALJ explained:

> Respondent was obligated to pay [Maniyanakunnath] whether she was placed or not. However, I also found that Employer was able to establish that [Maniyanakunnath] did understand and reasonably should have understood that she was similarly expected to remain available and in communication with Respondent so it could market her, place her, and thereby recoup her wages (plus a profit). That was her duty and she did not do it, apparently preferring to avoid placement that would separate her from her boyfriend/husband.[]

Decision and Order (June 1, 2015) (D. & O.) at 21 (footnote omitted). The ALJ concluded that Parsetek was thus relieved of its liability to meet its obligation to pay Maniyanakunnath her wages during this period and ordered no corresponding back wage award. D. & O. at 19-22. In so ruling, the ALJ did not address the Administrator's argument that Parsetek was, in fact, obligated to pay wages during this period because Maniyanakunnath was in nonproductive status and not performing work due to a decision by Parsetek, namely because of the lack of assigned work, for which payment of wages is

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[19] 8 C.F.R. § 214.2(h)(2)(i)(E).

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

required under 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i), as discussed in the ARB's decision in *Gupta*.

On appeal, the Administrator urges the ARB to reverse the ALJ's decision relieving Parsetek of its liability to meet its wage obligation to Maniyanakunnath during the period in question, as the decision is contrary to law and inconsistent with the ARB's 2014 decision in *Gupta*. Specifically, the Administrator argues that it is reversible error for the ALJ to fail to consider the import of *Gupta*. In *Gupta*, the ARB indicated that logically, to invoke the unavailability exception to wage liability at 20 C.F.R. § 655.731(c)(7)(ii), the employer must prove that the H-1B employee had assigned work and requested to be away from those duties for reasons unrelated to his or her employment.[21] Parsetek responds and asserts that its efforts in seeking to place Maniyanakunnath with third party customers constituted the assignment of work. Parsetek also argues that the ALJ properly determined that Maniyanakunnath voluntarily made herself unavailable for work.

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) where the wages guaranteed in the H-1B petition need not be paid.[22]

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.
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> (i) For purposes of this paragraph (c)(6), the H-1B nonimmigrant is considered to "*enter* into employment"

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[21] *Gupta*, ARB No. 12-149, slip op. at 16.

[22] *See Administrator v. University of Miami*, ARB No. 10-090, -093; ALJ No. 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.").

> 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.[23] 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.[24]

Pursuant to the INA[25] 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-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) . . . .

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23 20 C.F.R. § 655.731(c)(6)(i).

24 *See* 20 C.F.R. § 655.731(c)(7)(ii).

25 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), (IV).

(Emphasis added.)

Under these provisions, 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 wages. 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.[26]

We agree with the Administrator that the ALJ committed legal error by failing to analyze how Parsetek could avoid its obligation to pay Maniyanakunnath her wages given its admitted failure to ever assign her any work—work for which she was hired under the H-1B program. The ALJ merely analyzed whether Maniyanakunnath was unavailable to work for reasons unrelated to her employment. D. &. O. at 19-21. Under *Gupta*, Parsetek cannot logically claim that it was relieved of its liability to pay wages for the period in question because Maniyanakunnath was in nonproductive status and away from her work duties for reasons unrelated to her employment and under conditions effectively making her unavailable for work, without first establishing that it assigned her computer programming work duties. The ALJ did not address the issue of how Maniyanakunnath could be away from work duties if Parsetek never assigned her any.[27] On this record and given Parsetek's admitted failure to assign work, we hold that Parsetek cannot meet its legal burden to make a showing otherwise. D. & O. at 5.

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[26] 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.

[27] *See Gupta*, ARB No. 12-149.

Moreover, the record here amply demonstrates that Parsetek was *not unable* to assign computer programming work, certainly not as a result of Maniyanakunnath frustrating that effort; it just never did. This record shows that Parsetek was able to communicate with, and did communicate with, Maniyanakunnath both by telephone and e-mail. Administrator's Exhibits 28-31, 35, 49, 50; Respondent's Exhibits 5, 18. *See also* D. & O. at 5-8, 10-13. And, Parsetek admits *its* failure to assign computer programming work to Maniyanakunnath. Certainly, Parsetek could have fired or disciplined any H-1B employee who frustrated its ability to assign work.[28]

For the foregoing reasons, we reverse the ALJ's finding that employer is not liable to meet its continuing obligation to pay Maniyanakunnath's wages for the period from April 12, 2009, through March 11, 2010.

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[28] The Administrator asserted in its Petition for Review as follows:

> Neither *Gupta* nor the relevant case law clearly speaks to circumstances in which the H-1B employee frustrates the process to obtain an assignment. An appeal of this decision would allow the ARB, after considering the briefs of the parties, to clarify its position regarding cases of unavailability and any role the employee might have in the assignment of work.

Petition for Review at 5 n.4. The law as it stands is clear that the unavailability of an employee for work assignment is not an exception to the continuing obligation of an employer to pay the employee's wages, unless there is a showing by employer that it assigned work from which work the employee was away for reasons unrelated to his or her employment. The law as it stands also allows for an H-1B employer to fire an H-1B employee for any legal reason, and the record here is plain that Parsetek could have terminated Maniyanakunnath's employment much earlier than it did. *See Administrator, Wage and Hour Div. v. Efficiency3 Corp.*, ARB No. 15-005, ALJ No. 2014-LCA-007, slip op. at 10, at 10 n.61 (ARB Aug. 4, 2016).

CONCLUSION

In sum, we **REVERSE** the ALJ's award ordering no compensation for the period from April 12, 2009, through March 11, 2010. We **REMAND** the case for the ALJ to calculate Maniyanakunnath's wages and benefits for this period and for such further consideration consistent with this opinion.

SO ORDERED.

LEONARD J. HOWIE III
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge