

In the Matter of:

**ADMINISTRATOR, WAGE AND
HOUR DIVISION,

PROSECUTING PARTY,**

ARB CASE NO. 16-049

ALJ CASE NO. 2015-LCA-005

DATE: February 23, 2018

v.

**GOVERNMENT TRAINING, LLC,

RESPONDENT.**

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.; Sara A. Conrath, Esq.; U.S. Department of Labor, Washington, District of Columbia

For the Respondent:

Don W. Dickson, VP; Government Training LLC; pro se; Longboat Key, Florida

Before: E. Cooper Brown, Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Leonard J. Howie III, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act (INA), 8 U.S.C.A. §§ 1101-1537 (2017), and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2017). Government Training, LLC (GT) appealed to the Administrative Review Board (ARB or Board) from a Department of Labor Administrative Law Judge (ALJ) Decision and Order issued February 24, 2016 (D. & O.). The ALJ concluded, in the D. & O., that GT violated the H-1B program's required wage obligation when it failed to pay Puneet Sharma the required wage rate while he worked for GT on an H-1B visa. Because GT did in fact fail to pay Sharma the required wage rate for two Labor Condition Application (LCA) periods and because neither of the regulatory exceptions to the required wage obligation applies, the Board affirms the ALJ's D.

& O., with modification of the award of damages to require GT to pay pre- and post-judgment interest.

BACKGROUND

1. Legal background

If an employer wants to hire an H-1B nonimmigrant, the employer must first seek the approval of the United States Department of Labor (DOL) by filing with the Secretary of Labor what is known as a Labor Condition Application (LCA).¹ In that LCA, the employer must attest that it “is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant” the required wage—that is, “wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level . . .”.² The “actual wage” is determined in one of two ways depending on whether the employer has other similarly employed employees. If the employer has employees other than the H-1B nonimmigrant “with substantially similar experience and qualifications in the specific employment in question,” the actual wage is the amount paid to those other employees.³ But if “no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer.”⁴

It is the employer’s responsibility to ensure DOL receives a complete and accurate LCA.⁵ In submitting the LCA, and by affixing its signature on the LCA, the employer attests that the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in the LCA.⁶ The employer must identify on the LCA “the gross wage rate to be paid to each nonimmigrant.”⁷ Furthermore, the LCA shall contain LCA statements “which provide that no individual may be admitted or provided status as an H-1B

¹ 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700(b)(1).

² 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a) (when employer signs form ETA 9035E or 9035, the employer attests that the required wage will be paid (that the wage shall be the greater of the actual wage rate or the prevailing wage)); but the “INA does not preclude an employer from paying H-1B nonimmigrants more than the higher of the actual wage or the prevailing wage.” 57 Fed. Reg. 1316-01, 1992 WL 3062 (Jan. 13, 1992).

³ 20 C.F.R. § 655.731(a)(1).

⁴ *Id.*

⁵ 20 C.F.R. § 655.730(b).

⁶ 20 C.F.R. § 655.730(c)(2).

⁷ 20 C.F.R. § 655.730(c)(4).

nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that [t]he employer is offering and will offer . . . no less than the greater of” the actual or prevailing wage (the required wage).⁸ An employer is required to make documentation available about its LCAs including “[a] full, clear explanation of the system that the employer used to set the ‘actual wage’ the employer has paid or will pay workers in the occupation for which the H-1B nonimmigrant is sought”⁹

An employer is required to pay its H-1B nonimmigrant employees for the duration of the H-1B visa unless the employer can show that one of two exceptions applies.¹⁰ Under the first exception, the employer is excused from its wage obligation if the reason the employee is not working is “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).”¹¹ Under the second exception, the employer may discharge the H-1B nonimmigrant employee (effect a “bona fide termination”) and then stop paying the employee altogether.¹²

2. Factual and procedural background

GT is a limited liability company that provides training on business management, acquisition, security, and grant writing.¹³ GT filed an LCA in February 2010 on behalf of Puneet Sharma for the position of software engineer that identified a required wage rate of \$65,000 per year.¹⁴ DOL approved the LCA. On the LCA, GT’s owner and C.E.O., Clara Boothe, attested

⁸ 20 C.F.R. § 655.730(d).

⁹ 20 C.F.R. § 655.760.

¹⁰ 20 C.F.R. § 655.731(c)(7) (“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*, the employer is required to pay the salaried employee . . . at the required rate for the occupation listed on the [Labor Condition Application]” (emphasis added)).

¹¹ 20 C.F.R. § 655.731(c)(7)(ii); see *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, slip op. at 16 (ARB May 29, 2014).

¹² *Id.* (“Payment need not be made if there has been a *bona fide* termination of the employment relationship.”); see *Baiju v. Fifth Ave. Comm.*, ARB No. 10-094, ALJ No. 2009-LCA-045, slip op. at 9 (ARB Mar. 30, 2012, Reissued Apr. 4, 2012) (“To effect a bona fide termination, an employer must (1) give notice of the termination to the H-1B worker, (2) give notice to the Department of Homeland Security (USCIS), and (3) under certain circumstances, provide the H-1B non-immigrant with payment for transportation home.”).

¹³ D. & O. at 3-4.

¹⁴ *Id.* at 4.

that the required wage rate was \$65,000 and the prevailing wage was 55,806.00 for the period of intended employment (February 3, 2010 to January 31, 2013).¹⁵ GT included supporting documentation for the LCA in its submission. First, Boothe signed a “Notice of the filing of a [LCA] for one H-1B nonimmigrant worker” that stated that it would be posted at the place of employment and offered the position from February 2010 to January 2013 and that the position would pay at least \$65,000 per year.¹⁶ Second, she signed a memorandum “To: The H-1B public disclosure file of Mr. Puneet Sharma” that confirmed Sharma’s salary figure of \$65,000 per year.¹⁷ The memorandum states (1) that the \$65,000 salary figure was calculated on the basis of Sharma’s qualifications and experience; the prevailing wage figure for this type of position; and the salaries of other, similarly employed workers and (2) that the salary of other, similarly employed workers (“the actual wage”) was calculated on the basis of their qualifications and experience, and the prevailing wage.

GT filed a second LCA on Sharma’s behalf for the position of computer programmer in 2012, to cover the period February 1, 2013, to January 18, 2016.¹⁸ It listed both the offered wage and prevailing wage as \$24.24 per hour. DOL approved the LCA on August 16, 2012.

Sharma arrived in the United States in January 2010 and became available to work on February 18, 2010.¹⁹ GT paid Sharma \$34,271.78 in 2010, \$35,242.95 in 2011, \$36,128.25 in 2012, and \$15,718.47 in 2013.²⁰ Sharma voluntarily resigned from his employment on September 15, 2013, and left the United States on September 21, 2013.²¹

Sharma filed a timely complaint with the DOL Wage and Hour Division alleging that GT supplied incorrect information on LCAs, failed to pay him the required wages, and failed to provide fringe benefits equal to those provided to U.S. workers.²² Wage and Hour conducted an investigation and the Administrator found that GT failed to pay Sharma the required wages and failed to maintain documents as required by the regulations.²³ The Administrator issued a Determination Letter citing GT with violations and notifying GT that it owed Sharma \$47,855.82

¹⁵ AX 1 at 1, 3, 4.

¹⁶ AX 1 at 6.

¹⁷ AX 1 at 7.

¹⁸ D. & O. at 4-5.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 5-6.

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.* at 7.

in back wages.²⁴ GT admitted that it did not pay Sharma \$65,000 per year for the first LCA period.²⁵

GT filed a request for hearing and the case was assigned to an Administrative Law Judge (ALJ), who scheduled a hearing. The Administrator proceeded to file a Motion for Summary Decision with supporting exhibits, requesting that judgment be entered against GT because it failed to pay Sharma the actual wage or prevailing wage as set forth in the LCAs and because GT owed Sharma back wages. GT filed a Reply to the motion with supporting exhibits. Both parties also submitted an additional reply regarding the motion.

The ALJ concluded that the complaint was timely filed, that GT failed to pay Sharma the required wage from September 18, 2011, to September 15, 2013, and that the two situations when an employer is not required to pay wages to an H-1B worker (the worker's own non-productive status or a bona fide termination) were inapplicable.²⁶ GT admitted before the ALJ that it failed to pay Sharma the required wages under the two LCAs, but argued that it should be excused from paying for various reasons. These reasons included a downturn in business, that Sharma should have mitigated his damages by finding other work or returning to India, that Sharma took more time off of work than the Administrator accounted for (eight days), and that the Administrator exceeded its authority by assessing back wages for a two-year period of time. The ALJ dismissed all of these arguments, as none of them relieve GT of its obligation to pay Sharma the required wages under the LCAs it filed for him. The ALJ reviewed the Administrator's findings and the evidence of record and found that GT failed to present any evidence that a triable issue of fact existed regarding its obligation to pay the ordered amount of back wages of \$47,855.82. GT failed to keep records of Sharma's hours and failed to submit any documentation that any other benefits that could be viewed as compensation (health insurance, car, cell phone) were ever recorded or reported either on Sharma's payroll or to the IRS, as required by the regulations.

GT filed a timely petition for review of the ALJ's D. & O. granting Prosecuting Party's Motion for Summary Judgment.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in cases under the H-1B provisions of the Immigration and Nationality Act.²⁷ The Board has plenary authority to review an ALJ's legal conclusions de novo.²⁸

²⁴ *Id.* at 7.

²⁵ *Id.*

²⁶ *Id.* at 8-9.

²⁷ *See* 20 C.F.R. § 655.845; *see also* Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377; 69,378 (Nov. 16, 2012).

DISCUSSION

In our Notice of Intent to Review, we specified three issues we would review in this case: 1) Did the ALJ properly grant summary judgment on the issue whether Respondents failed to pay the H-1B employee the wages it owed under the terms of the applicable LCAs?, 2) If so, did the ALJ properly determine the time period for which Respondent owes back wages, and 3) If so, did the ALJ properly determine the amount of wages Respondent owes to the H-1B employee? We address these three issues in turn.

1. GT violated its required wage obligation

An employer is required to pay its H-1B nonimmigrant employees the required wage, including for so-called “nonproductive time,” for the entire duration of the H-1B visa, unless the employer can show that one of the two exceptions to the benching provision applies.²⁹ GT failed to pay Sharma the required wage for certain periods during the duration of his two H-1B visas, and neither of the two exceptions applies.

GT failed to pay Sharma the required wage, and does not argue that it did so. Further, GT does not argue that either of the two regulatory exceptions to GT’s requirement to pay the required wages applies. Instead, GT repeats the arguments it made to the ALJ about mitigation; impracticability; and payments it allegedly made for Sharma’s health insurance, a car, and cell phone, but none of these arguments speak to the law’s two available exceptions. The ALJ addressed all of these arguments and we affirm the ALJ’s findings that GT failed to pay Sharma the required wage under both LCAs for the reasons he explained.

2. The ALJ properly determined the time period for back wages

GT attested on its first LCA that it would pay Sharma \$65,000 for 2010 to January 2013, and it attested on its second LCA that it would pay Sharma \$24.24 per hour with a minimum yearly salary of \$38,500, from February 2013 to January 2016. Thus, the Administrator had the discretion to order GT to pay Sharma back wages for the entirety of both LCA periods until Sharma quit his employment.³⁰ Instead, the Administrator only required GT to pay wages going back two years before Sharma resigned on September 15, 2013 (to September 18, 2011). It was

²⁸ *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2011-LCA-005, slip op. at 3 (ARB June 6, 2013).

²⁹ 20 C.F.R. § 655.731(b)(7)(ii).

³⁰ As long as a complaint is timely filed, an H-1B employee may recover back wages for periods more than one year before a complaint is filed. *Adm’r, Wage & Hour Div. USDOL, Greater Missouri Med. Pro-Care Providers, Inc.*, ARB No. 12-015, ALJ No. 2008-LCA-026, slip op. at 15 (ARB Jan. 29, 2014); see 20 C.F.R. § 655.806 (a)(5) (The 12-month jurisdictional bar “does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.”).

within Wage and Hour's discretion to investigate up to two years prior to Sharma's resignation, and the ALJ properly awarded back wages for this time period.

3. The ALJ properly determined the amount of back wages owed

The Administrator calculated the underpayment for the first LCA based on a required wage of \$65,000 per year, and for the second LCA based on a required wage of \$24.24 per hour at 30.5 hours per week (or an annual remuneration of \$38,500). Based on the required wages for a period of two years before Sharma filed his complaint, wages paid, and the eight days Sharma was unavailable to work, the Administrator determined that GT owed Sharma \$47,855.82 in back wages. The ALJ ordered this amount in back wages due.

GT has not appealed the use of the \$65,000 figure as the appropriate required wage for the back wage determination. In brief, the Administrator has requested that the Board remand the case to the ALJ for a recalculation of the required wage because it states that the ALJ awarded the incorrect amount of back wages and failed to award pre- and post-judgment interest.³¹ The Administrator has changed positions since arguing the case to the ALJ and is now asking for a calculation of the back wages using the prevailing wage as listed on the first LCA, rather than the wage of \$65,000 identified on the LCA as the "required wage" to be paid Sharma. The Administrator now reasons on appeal that because GT never paid Sharma more than the prevailing wage (and asserts that Sharma was the only employee in his position) that the amount GT paid Sharma was the actual wage.³² The Administrator further reasons that because the actual wage (the wage paid to Sharma) was less than the prevailing wage, the prevailing wage becomes the "required wage."³³ The Administrator now requests that the Board remand to the ALJ for a recalculation of the wages owed Sharma based on this reasoning. For the reasons that follow, the Board declines to do so.

We note first that the ALJ ordered that GT pay Sharma \$47,855.82, which was the amount that the Administrator set forth in its determination and referenced that GT owed Sharma in its motion for summary decision. In its brief in support of the motion for summary decision, the Administrator noted that \$65,000 per year was "the required wage rate" as listed on the first LCA.³⁴ The Administrator also referenced GT's "Notice of Filing a Labor Condition Application" and memorandum for the "H-1B Public Disclosure File of Mr. Puneet Sharma" that both referenced \$65,000 as the salary for the position and explicitly in the memorandum, as the actual wage.³⁵

³¹ Adm'rs Br. at 22-25. In GT's response brief, it did not address either of these assertions.

³² 20 C.F.R. § 655.731(a)(1).

³³ 20 C.F.R. § 655.731(a) (explaining that to satisfy the wage requirement an employer must attest to pay the required wage rate to the H-1B non-immigrant that is the greater of the actual wage rate or the prevailing wage).

³⁴ Adm'rs Brief in Support of His Motion for Summary Decision at 6.

³⁵ *Id.* at 7.

The H-1B regulations require employers to attest to the actual and prevailing wage and to pay the required wage (that is at least the greater of these two) for the LCA period unless exceptions apply. In this case, GT attested that the actual wage was \$65,000 per year in its first LCA and supporting documentation.³⁶ Specifically, GT attested that it would pay Sharma \$65,000 per year and that this calculation was in part based on the salaries of other, similarly employed workers, and that these other similarly employed workers' salaries were calculated on the basis of their qualifications, experience, and the prevailing wage.³⁷ Thus, notwithstanding the Administrator's assertion on appeal, the record before the Board indicates that there were other similarly employed workers. The regulation cited by the Administrator mandating that the "actual wage" to be paid is the wage that the employer actually pays the H-1B nonimmigrant worker where other employees with substantially similar experience and qualifications do not exist does not apply.³⁸ While the Administrator asserts that Sharma was the only individual GT employed in the specific employment in question, the Administrator fails to cite evidentiary support for this in its brief.³⁹ The failure of the Administrator (or, for that matter, Respondent) to argue the contention that Sharma's employment was unique when this case was before the ALJ or to cite any evidence supporting the contention to the Board now, renders the Administrator's argument as to the applicability of this regulatory provision ineffectual.

The ALJ's calculation of wages owed under the first LCA is additionally affirmed because of GT's responsibility for the accuracy of the LCAs it filed and the attestations it made. Award of the LCA is premised upon the truthfulness and accuracy of the representations contained in the LCA. The Board finds no basis, nor can we conceive of any justification, for ignoring those representations in this case. Given those representations, GT owes back wages to Sharma based on the actual wage of \$65,000 that it attested to the government that it would pay as the required wage for the first LCA period (as this is the greater of the actual or prevailing wage) that GT represented in the LCA was based on the amount paid to similarly employed workers.⁴⁰

Finally, the ALJ's calculation of wages is affirmed because it is not appropriate at this juncture for the Board to consider his arguments, not raised below, since the Administrator did not file a petition for review in this case. Allowing the Administrator to make this argument at this point is unfair to the employee, who did not participate in this appeal, and had no one to protect his interests. Had Sharma known that the Administrator was going to raise this

³⁶ Adm'rs Motion for Summary Decision, Exhibit D (AX D).

³⁷ *Id.* at 7.

³⁸ 20 C.F.R. § 655.731(a)(1).

³⁹ Adm'rs Response Brief at 21.

⁴⁰ See *Vojtisek-Lom and Adm'r, Wage & Hour Div. USDOL v. Clean Air Techs. Int'l, Inc.*, ARB No. 07-097, ALJ No. 2006-LCA-009, slip op. at 14 (ARB July 30, 2009) (in which the Board affirmed an ALJ finding that the wage as listed on the LCA was also the actual wage (albeit also because the wage was paid to the H-1B nonimmigrant), and therefore the required wage).

argument, either because he raised it below or in a petition for review, he could have protected his interests by asking to intervene. Thus, for all the reasons discussed, the amount of back wages that the ALJ ordered with respect to the first LCA was proper and is affirmed.

With regard to the second LCA, the Administrator asserts that the ALJ miscalculated the amount due because he stated that Sharma was underpaid \$14,605.31, when the investigator had stated that \$14,605.31 was the amount that Sharma was actually paid.⁴¹ But careful review of the record indicates that in ordering the payment of back wages of \$47,855.82, the ALJ did not miscalculate, but simply made a typographical error with respect to the \$14,605.31 figure as “underpaid” versus “paid,” on page 12 of his decision. Because the ALJ did not do an independent calculation of the back wages, but relied on the final total number as set forth by the WHD investigator in her affidavit, the ALJ’s typographical error on this point is harmless. Stated another way, the investigator stated that Sharma was paid \$14,605.31 from February 2013 to September 2013, that GT owed Sharma \$9,086.21 for this period, and that considering these wages owed and the wages owed under the first LCA, the total back wages GT owed Sharma was \$47,855.82—this is the amount the ALJ ordered GT to pay Sharma, and therefore was based on the correct back wage figures.⁴² Accordingly, the Board affirms the ALJ’s order of the total amount of back wages due in the amount of \$47,855.82.

CONCLUSION

In sum, GT failed to pay Puneet Sharma, an H-1B nonimmigrant employee, the required wage for two LCA periods until he voluntarily resigned. GT thus owes Sharma \$47,855.82 in back pay.⁴³ The Board also awards Sharma pre- and post-judgment interest on the award.⁴⁴ The

⁴¹ Adm’rs Brief at 22 (citing D. & O. at 12), 22, n.7).

⁴² Adm’rs Motion for Summary Decision, G. at 3-5.

⁴³ 20 C.F.R. § 655.810(a).

⁴⁴ See *Greater Missouri Med. Pro-Care Providers, Inc.*, ARB No. 12-015, slip op. at 24 (“The INA does not specifically provide for the award of pre-judgment interest or post-judgment interest on back pay by statute or regulation. However, the Board has routinely awarded pre- and post-judgment interest on awards in H-1B cases, just as it does in cases arising under other remedial Department of Labor employee protection statutes (citation omitted). The rationale of compensating the aggrieved employee for loss of the use of his/her money applies equally in all these statutes. Based on Board precedent and the remedial policies underlying the H-1B statutes and regulations,” H-1B workers are entitled to pre-judgment and post-judgment compound interest on pay awards until the employer satisfies the debt.) (citing *Adm’r, Wage & Hour Div. USDOL v. Univ. of Miami, Miller Sch. of Med.*, ARB Nos. 10-090, -093; ALJ No. 2009-LCA-026, slip op. at 13 (ARB Dec. 20, 2011) (citing *Amtel Grp., Inc. v. Rungvichit Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 12 (ARB Sept. 29, 2006) (holding that even in absence of express authority under INA, the remedial nature and “make whole” goal of back pay warrants prejudgment compound interest and post judgment interest)).

pre- and post-judgment interest shall be calculated according to the procedures set out in *Doyle v. Hydro Nuclear Servs.*⁴⁵

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

⁴⁵ *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, -042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000); *see also Adm'r & Wirth v. Univ. of Miami*, ARB 10-090, 10-093; ALJ No. 2009-LCA-026 (ALJ July 6, 2012) (for a comprehensive model for the calculation of pre- and post-judgment interest).