



In the Matter of

MAJID VARESS,

ARB CASE NO. 2018-0023

PROSECUTING PARTY,

ALJ CASE NO. 2016-LCA-00019

v.

DATE: SEP 26 2019

PERSIAN BROADCAST SERVICE
GLOBAL, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Jonathan D. Wasden, Esq.; *Wasden Immigration Law*; Reston,
Virginia

For the Respondent:

Jonathan R. Sturman, Esq.; *Law Offices of David M. Sturman*;
Encino, California

BEFORE: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie,
Administrative Appeals Judges

**DECISION AND ORDER
REVERSING AND REMANDING**

PER CURIAM. This case arises under the E-3 visa program¹ provisions of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. § 1101(a)(15)(E)(iii) (2014), and implementing regulations at 20 C.F.R. Part 655, subparts H and I (2018). The Complainant Majid Varess urges the Administrative Review Board

¹ The ALJ erroneously stated that the case arises under the H-1B program.

(Board) to reverse the Amended Decision and Order Denying Relief (December 14, 2017) of the Administrative Law Judge (ALJ). The ALJ found in favor of the Respondent Persian Broadcast Service Global, Inc. Complainant appealed to the Board. We reverse and remand.

BACKGROUND

In September 2011, Respondent filed a labor certification application (LCA) with the U.S. Department of Labor (DOL) for Complainant. D. & O. at 2. DOL approved the LCA for a validity period of September 12, 2011, to September 12, 2013, at an annual wage rate of \$45,000.00. D. & O. at 2. Amir Shadjareh, Respondent's president, signed the LCA. D. & O. at 6. On November 23, 2011, Complainant entered the U.S. and began working for Respondent as a television producer and reporter. *Id.* at 2. During periods of his employment under the LCA, Complainant worked outside of the United States producing and hosting sports programs for Respondent. *Id.*

In August 2013, Respondent filed a second LCA with DOL for Complainant. *Id.* DOL approved the second LCA for a validity period of September 12, 2013, to September 12, 2015, at an annual wage rate of \$60,000.00. *Id.* Respondent's president, Shadjareh, also signed the second LCA. *Id.* at 6. On September 7, 2013, Shadjareh signed a letter stating that he was confirming that Complainant was working for Respondent as a sports producer until September 2015 with a monthly salary of \$5,000.00. CX 4.

On November 13, 2013, Shadjareh sent a letter to the U.S. Consulate in Sydney, Australia, stating that Respondent wished to continue to engage Complainant's services as a TV producer and reporter at a salary of \$60,000 per year. CX 5. In the letter he described the duties of the position, which included reporting "live from relevant sporting arenas and other external locations." *Id.* Shadjareh requested approval of Complainant's continued E-3 visa status. *Id.*

During Complainant's employment with Respondent he worked in several different locations around the world and Respondent never paid him a regular salary. D. & O. at 7-9. In 2013 and 2014, Respondent made irregular payments to Complainant by check in amounts varying between \$300.00 and \$2,300.00 until at least July 11, 2014. RX 6. On July 11, 2014, Shadjareh texted Complainant that he could not pay Complainant's wages because he did not have the money. The text

continued that Respondent might have been able to pay Complainant if he had broadcast the news show daily and they could have attracted sponsors. CX 9. At no point before or after July 14, 2014, did Respondent notify DOL that it had terminated Complainant's employment. D. & O. at 3.

Complainant filed a complaint against Respondent with the Administrator, Wage and Hour Division for unpaid wages on February 5, 2015. *Id.* at 3; see RX 2. The Administrator determined that the Respondent had not committed any violations. The Complainant filed objections with the Office of Administrative Law Judges requesting a hearing. The ALJ found for Respondent. Complainant appealed the ALJ's decision to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's Decision and Order. 20 C.F.R. § 655.845; see Secretary's Order 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019).

DISCUSSION

On appeal, Complainant argues that he is entitled to back pay for the difference between the wages Respondent attested it would pay him on the two LCAs and the amounts it actually paid him. He argues that the ALJ failed to follow the plain language of the statute and regulations that require H-1B and E-3 employers to pay wages under the terms of LCAs unless there has been a *bona fide* termination or the employee has placed himself in a voluntary nonproductive status. We agree. We reverse and remand the ALJ's decision because Respondent failed to pay Complainant the required wage under his two LCA periods and neither of the two possible exceptions applies.

1. Statutory and regulatory framework

The INA defines various classes of aliens who, under different visa classifications, may enter the United States for prescribed periods of time. 8 U.S.C. § 1101(a)(15). The E-3 visa allows employers to temporarily hire Australian workers in specialty occupations. 8 U.S.C. § 1101(a)(15)(E)(iii). The E-3 visa regulations

require employers to file an LCA and guarantee specified prevailing wages and working conditions, among other things.²

An employer must pay an E-3 employee the prevailing wage listed on the employee's LCA starting on the date that the employee "enters into employment" with the employer" or, if the employee has not "enter[ed] into employment" with the employer, thirty days after the Complainant has obtained permission to enter the U.S. and work for the employer or sixty days after the employee becomes eligible to work for the employer. 20 C.F.R. § 655.731(c)(6). The employee "enter[s] into employment," when he/she first makes him/herself available for work or otherwise comes under the control of the employer" 20 C.F.R. § 655.731(c)(6)(i). An employer is obligated to pay the wages specified in the employee's LCA even if it places the employee in a nonproductive status or "benches" the employee. 20 C.F.R. § 655.731(c)(7)(i). If an employer places an E-3 employee in nonproductive status "due to a decision by the employer" and does not pay the employee full-time wages in accordance with the LCA, then the employer commits a violation of the Act. 8 U.S.C. § 1182(n)(2)(C)(vii)(I).

In signing and filing an LCA, an employer attests that for the entire "period of authorized employment," it will pay the required wage to the E-3 nonimmigrant. 20 C.F.R. §§ 655.700(d)(4); 655.730(c)(2). But the employer need not pay wages to the employee if there has been a *bona fide* termination of the employment relationship. To effect a *bona fide* termination, the employer must notify the employee that his employment has been terminated and also notify the Department of Homeland Security (DHS) so that it may revoke approval of the visa.³ An employer is also not required to pay wages if a nonimmigrant worker is in nonproductive status due to his or her "voluntary request and convenience." 20 C.F.R. § 655.731(c)(7)(ii).

² 20 C.F.R. § 655.700(c)(3); 20 C.F.R. § 655.700(d)(4). Several subsections in Subparts H and I of Part 655 apply only to H-1B nonimmigrant workers and not to E-3 nonimmigrant workers.

³ 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.731(a). Under certain circumstances, the employer must also provide the employee with payment for transportation home. 8 C.F.R. § 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(c)(7)(ii); *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5-6 (ARB Mar. 30, 2007).

2. Respondent owed Complainant wages as specified in the LCAs

In this case, Respondent failed to pay Complainant the required wage under the first LCA which was \$45,000 per year. Respondent also failed to pay Complainant the required wage of \$60,000.00 for the second LCA period. Because Respondent's president signed and filed both LCAs with the DOL, it was legally obligated to pay the Complainant the specified wages when Complainant entered into employment until the LCA period expired unless an exception to that obligation applied.

A. Complainant "entered into employment"

On November 23, 2011, Complainant entered the U.S. and began working for Respondent under the first LCA as a television producer and reporter. D. & O. at 2. On September 3, 2013, Complainant entered the U.S. and began or continued working for Respondent under the second LCA on or about September 12, 2013. D. & O. at 3; CX-7.

B. Respondent did not effect a bona fide termination

As noted earlier, the employer may end any obligation to pay wages under the LCA is through a *bona fide* termination. The Act and its regulations impose the duty to terminate the employment relationship on the employer, not the nonimmigrant employee. 20 C.F.R. § 655.731(c)(7)(ii); *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Avenue Dental Care*, ARB No. 07-101, ALJ No. 2006-LCA-029, slip op. at 8 (ARB Jan. 7, 2010). Respondent concedes that it never effected a *bona fide* termination of Complainant's employment. Resp. Br. at 19.

C. Complainant did not enter into voluntary nonproductive status

An employer is also freed from the LCA's wage obligation when a nonimmigrant worker is in nonproductive status due to his or her "voluntary request and convenience." 20 C.F.R. § 655.731(c)(7)(ii).

As stated previously, the ALJ found that during periods in 2012 and 2013, Complainant produced and hosted sports programs for Respondent outside the United States. D. & O. at 2. Respondent urges us to find that when Complainant voluntarily left the United States on November 16, 2013, and never returned, he quit his employment or that he voluntarily placed himself in a nonproductive status.

It is undisputed that during Complainant's employment with Respondent, he performed work producing television programs outside of the United States. Shadjareh testified that when Complainant was outside of the U.S., he produced his television program by "scribe or internet." Tr. 165. In a letter, Shadjareh described Complainant's duties to the U.S. Consulate as including reporting "live from relevant sporting arenas and other external locations." CX 5. Further, Respondent's records show that it paid him for work throughout 2013 and up to at least July 2014, with many or most of the payments occurring during periods when Complainant was outside of the United States. Thus, the mere fact that Complainant was outside of the United States does not by itself indicate that he was not performing work for Respondent. Indeed, Respondent does not appear to allege that Complainant was not performing work as an employee. Rather, Respondent appears to rely solely on the fact that Complainant left the U.S.

As stated previously, when a nonimmigrant worker stops working for an employer, it is the employer's responsibility to effect a *bona fide* termination including notice to DHS and this Respondent failed to provide that notice. Respondent's allegation that Complainant "quit" does not negate Respondent's responsibility to pay wages under the LCAs in this case. Respondent has not proven that Complainant put himself in nonproductive status simply because he was out of the country.

D. Complainant's misrepresentations and other misconduct do not relieve Respondent from LCA wage obligations

Under the implementing regulations at § 655.731, *bona fide* termination and voluntary nonproductive status found in 731(c)(7)(ii) are the only two alternatives to the employer's obligation to pay LCA wages through the LCA period.⁴ The employer's lack of work or the employee's misconduct do not excuse an employer's failure to pay wages.

In this case, Respondent argues that Complainant misled Respondent by handling all the paperwork, making all the arrangements, and misrepresenting the

⁴ "If the H-1B [including E-3 nonimmigrants] 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 the full pro-rata amount due." 655.731(c)(7)(i) (emphasis added); *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Efficiency3 Corp.*, ARB No. 15-005, ALJ No. 2014-LCA-007, slip op. at n.13 (ARB Aug. 4, 2016).

binding nature of LCAs. “Once [Complainant] secured his visa, he had no interest in abiding by the terms of the LCAs.” Resp. Br. 3.

Complainant’s alleged misconduct does not affect Respondent’s duty to pay Complainant the wage set in the LCAs. The INA and the regulations provide that *employers* must submit labor condition applications to DOL. Respondent’s president Shadjareh signed both LCAs for submission to DOL as Complainant’s employer. Shadjareh’s signature affirms the truth of the statements on the LCA and acknowledges the employer’s agreement to those labor condition statements (attestations) that are specifically identified. Shadjareh testified that he signed the LCAs because he was relying on Complainant and Complainant’s attorney’s representations that they were just a formality and he wanted to do a favor for Complainant. D. & O. at 6, 9; Tr. 199. However Shadjareh may not evade his obligations under the LCAs by asserting that he did not believe the documents were valid or enforceable. We hold that Complainant’s misrepresentations, even assuming their success, do not relieve Respondent of the obligation to pay back wages.⁵

Next, Respondent argues that Complainant did not comply with the terms of the LCA or regulations requiring him to work in the area of intended employment since he was outside of the United States. Respondent claims that it should be absolved of its wage obligations under the INA. Respondent failed to cite any legal authority empowering DOL to consider Complainant’s noncompliance with respect to LCAs as negating Respondent’s wage obligations under the INA. Without legal support, we find this argument is unpersuasive.

3. We remand for the ALJ to address the Respondent’s claim that Complainant’s complaint is untimely

Finding for the Respondent on other grounds, the ALJ avoided Respondent’s claim that the Complainant’s complaint was untimely filed. D. & O. at 9. Regulation § 655.806(a)(5) provides that a complainant must file a complaint alleging a violation of the nonimmigrant worker regulations “not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the *employer* allegedly failed to perform an action or fulfill a

⁵ *Avenue Dental Care*, ARB No. 07-101, slip op. at 8-9; *Efficiency3 Corp.*, ARB No. 15-005, slip op. at 13-14.

condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA.” 20 C.F.R. § 655.806(a)(5) (emphasis added).

Respondent argues to the Board that since Complainant was never authorized to work under the second LCA (because Complainant never renewed his E-3 visa for the second LCA period), the expiration date of the first visa, September 12, 2013, is the latest date on which a violation could have occurred and he did not file his complaint until February 5, 2015, which would make such complaint untimely. Alternatively, Respondent asserts that Complainant’s complaint is untimely because Complainant voluntarily departed the U.S. on November 16, 2013, and never returned. Respondent argues that it is irrelevant that it never effected a *bona fide* termination of Complainant’s employment.

As we discussed above, the second LCA was signed by the Respondent, certified by the DOL, and constituted an obligation Respondent had to abide by until the expiration of the LCA period or an exception to that obligation was satisfied. Respondent’s argument attempts to shift the relevant focus to the Complainant’s activity but the regulations provide that the Complainant has to file a complaint “not later than 12 months after the latest date on which the alleged [employer’s] violation(s) were committed.” 20 C.F.R. § 655.806(a)(5). As such, we will remand to the ALJ to make appropriate findings of fact as to whether Complainant’s February 5, 2015 complaint was filed “not later than 12 months after the latest date on which” Respondent violated its LCA obligations.

4. Computation of damages

The ALJ stated that Complainant had never submitted a computation of his claimed damages. D. & O. at 5 n.1. Respondent also argues that Complainant failed in his burden to compute damages and that as a result, his complaint should be dismissed on this ground.

The regulations governing proceedings before DOL ALJs provide that unless ordered otherwise, the prehearing statement before the ALJ must state “[a] precise statement of the relief sought.” 29 C.F.R. § 18.80(c)(3). General provisions regarding discovery provide that a party must provide to the other parties “[a] computation of each category of damages claimed by the disclosing party. . . .” 29 C.F.R. § 18.50(c)(1)(i)(C).

Contrary to Respondent's position and the ALJ's findings of fact, Complainant provided a clear statement of the relief sought in the supplement to his complaint sent by his attorney to the Wage and Hour Division on February 5, 2015,⁶ and also in the Complainant's disclosure statement filed with the Office of Administrative Law Judges on July 24, 2017. In the supplement to the complaint, Complainant asserted Respondent owed him at least \$109,385.58 in unpaid wages. Complainant alternatively stated that Respondent owed him \$177,769.14, in unpaid wages considering the entire period of the two LCAs.⁷

Additionally, in the July 24, 2017 Disclosure Statement, Complainant detailed anew that for the first LCA period Respondent owed him \$43,169.00 plus interest for the period November 23, 2011, to seventeen months later (having taken into account payments made by Respondent to Complainant) and \$8,876.88 plus interest for 72 days of work he performed during the period after Respondent ceased paying him beginning on July 3, 2013. Disclosure Statement at 4. With respect to the second LCA, Complainant stated that Respondent owed him \$28,334.14 plus interest for the period September 12, 2013, to July 11, 2014 (when Respondent ceased paying him and having taken into account \$21,473 in payments made by Respondent during this period) and \$70,354.64 plus interest for the period July 12, 2014, to the end of the second LCA period on September 12, 2015. The total amount computed as back wages was \$150,734.66, plus interest, penalties, and attorney's fees. As such, remand is necessary to allow the ALJ to make findings of fact consistent with this decision as to the amount of damages due Complainant.⁸

CONCLUSION

For the reasons explained above, we hold that the ALJ erred in concluding that the Respondent did not violate its LCA attestations and did not owe wages as

⁶ RX-2. This letter purports to support a complaint made by telephone call on December 9, 2014, and e-mails that followed the call.

⁷ RX 2, at 4. Each of these amounts reflect a starting date of September 8, 2011, which does not appear to take into account that Complainant did not enter the U.S. to begin his employment until November 23, 2011.

⁸ We make clear that the ALJ is not constrained by Complainant's calculations in making fact findings on the issue of back pay on remand and may develop the record as necessary.

specified in the LCAs. Accordingly, we **REVERSE** the decision and order below and **REMAND** to the ALJ to make findings of fact concerning the timeliness of Complainant's complaint and a computation of damages. Within 120 days of the date of issuance of this decision, the ALJ will transmit to the Board the findings of fact mandated above as part of a revised Decision and Order on Remand that corrects the noted errors of law and is consistent with the holdings of this decision.

SO ORDERED.