U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR	**ARB CASE NO. 2022-0038**
	ALJ CASE NO. 2017-LCA-00013
PROSECUTING PARTY,	**DATE: February 21, 2023**

v.

MACKS USA, INC. AND MUJEEB RAHMAN,

RESPONDENTS.

Appearances:

For the Prosecuting Party:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah Kay Marcus, Esq., Rachel Goldberg, Esq., Sarah J. Starrett; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondents:
Ronald B. Weisenberg, Esq.; *Law Office of Ronald B. Weisenberg, P.C.*; New York, New York

Before: HARTHILL, Chief Administrative Appeals Judge, and PUST, Administrative Appeals Judge

DECISION AND ORDER

PUST, Administrative Appeals Judge:

This case arises under the Immigration and Nationality Act (INA) and its implementing regulations, as related to the H-1B visa program.[1] On March 31,

[1] 8 U.S.C. § 1101(a)(15)(H)(i)(b), 20 C.F.R. § 655, Subparts H and I (2022).

2022, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) affirming a determination issued by the U.S. Department of Labor's Wage and Hour Division (WHD). The WHD determined that Macks USA, Inc. (Macks) and Mujeeb Rahman (Rahman) (collectively, Respondents) willfully violated the INA. The WHD ordered back wages and civil money penalties (CMPs) and held Rahman individually liable for the CMPs.[2] Respondents petitioned the Administrative Review Board (ARB or Board) for review. We affirm.

BACKGROUND

Macks is a New York-based information technology consulting company that recruits H-1B workers for placement at third-party worksites.[3] Rahman is Macks's sole owner and functioning officer.[4]

In 2011, Rahman offered to sponsor Shaukat Jalal (Jalal), a Pakistani national, for an H-1B visa through Macks.[5] Macks filed a Labor Condition Application (LCA) with the Department of Labor (DOL) attesting it would pay H-1B non-immigrant workers a prevailing wage of $48,000 per year for computer programing work in New York City.[6] The intended period of employment was from October 2, 2011 to October 1, 2014.[7] The LCA was certified on May 9, 2011.[8] Jalal's visa was approved from March 9, 2012 to October 1, 2014, and listed Macks as his employer.[9]

Near the end of the first LCA period, Macks filed a second LCA on behalf of Jalal, which covered a period of employment from August 26, 2014 to August 25, 2017 with a prevailing wage of $36 per hour.[10] On March 28, 2014, the LCA was certified.[11] Macks then petitioned to extend Jalal's H-1B visa.[12] Although the second LCA was certified, U.S. Customs and Immigration Services (USCIS) denied the extension petition on March 26, 2015, finding that there was insufficient evidence to

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2 D. & O. at 20.

3 *Id.* at 5.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 8.

8 *Id.* at 5.

9 *Id.*

10 *Id.* at 8.

11 Joint Hearing Exh. 11 at 5.

12 D. & O. at 6.

establish the existence of a qualifying employment position.[13] Macks appealed the determination, which appeal was subsequently denied.[14]

From April 2012 to February 2015, the only work assignments Jalal had were with companies he found on his own through a company called I Net Software Technologies (I Net), which marketed his resume to clients.[15] His first job assigned through I Net was with Community Health Systems (CHS) in Tennessee for two weeks in May 2014.[16] His second job assignment was with Cargill, Inc. in Minnesota, from August 2014 to February 2015.[17]

In 2014, the Federal Bureau of Investigation (FBI) investigated Rahman for felony visa fraud unrelated to this case.[18] From April 2015 to November 2016, Rahman was incarcerated for felony visa fraud.[19]

In July 2015, Jalal filed a complaint with the WHD, alleging that he did not receive the required wages listed in the LCAs, Macks did not provide work for him despite Jalal being available and willing to work, and he had to secure his own employment.[20] During its investigation, WHD had difficulty obtaining Macks's business records because the FBI had confiscated them and Rahman was incarcerated.[21] On May 4, 2017, WHD issued a Determination Letter finding that Respondents "fail[ed] to pay the required wage, fail[ed] to provide notice of filing of the [LCA], fail[ed] to otherwise comply and fail[ed] to provide public access files."[22] WHD ordered Respondents to pay a CMP of $2,500.00 and $147,781.44 in back wages.[23]

On May 18, 2017, Respondents requested a hearing before an ALJ with the Office of Administrative Law Judges.[24] On September 12, 2017, the Administrator

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13 *Id.*

14 *Id.*

15 *Id.* at 6-7.

16 *Id.*

17 *Id.*

18 *Id.* at 17.

19 *Id.* at 8.

20 *Id.* at 7.

21 *Id.* at 8.

22 *Id.* at 3.

23 *Id.* at 3-4.

24 *Id.* at 4.

filed a motion for partial summary decision.[25] Also on September 12, 2017, Respondents filed a motion for summary decision.[26] The ALJ granted the Administrator's motion in part and denied it in part, denied Respondents' motion, and awarded back wages for the period April 28, 2014 to March 26, 2015.[27] The ALJ determined that Jalal's complaint was not barred by the H-1B's twelve-month statute of limitations as the violation constituted a "benching" violation, which is a continuing violation that remains actionable for the duration of employment as stipulated by the LCA.[28]

The ALJ determined that the benching violation began on April 2, 2012, when Jalal entered into employment with Macks and Macks failed to pay him, and ended on March 26, 2015, when USCIS denied the petition to extend Jalal's H-1B visa.[29] Although the ALJ recognized that Jalal worked for two weeks in April or May 2014 and for six months beginning on August 25, 2014, the ALJ found that Respondents neither deducted taxes on Jalal's paychecks nor reported those payments to the Internal Revenue Service (IRS) as required.[30] Based on these facts, the ALJ concluded that payments received by Jalal during these two periods did not constitute "[c]ash wages paid for the purposes of satisfying the H-1B required wage[s]" and Jalal was therefore entitled to back pay for the two periods when he was working and the period after the Cargill job ended until his work authorization expired.[31] The ALJ awarded Jalal $34,265.84 in back wages, plus interest, for the period of April 28, 2014 to March 26, 2015.[32] The ALJ determined that it was necessary to hear testimony on the following issues: (1) whether Jalal was entitled to back pay wages for the period from April 2, 2012 to April 25, 2014; (2) whether civil money penalties were appropriate; and (3) whether Rahman was individually liable.[33]

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25 Order Granting in Part and Denying in Part Administrator's Motion for Partial Summary Decision and Denying Respondents' Motion for Summary Decision, at 2 (Partial Summary Decision Order) (ALJ June 26, 2020).

26 *Id.*

27 D. & O. at 4.

28 Partial Summary Decision Order at 8-10.

29 *Id.* at 9.

30 *Id.* at 10.

31 *Id.* at 10-11.

32 *Id.*

33 *Id.* at 3, 11.

After rescheduling the hearing twice,[34] the ALJ held the hearing in this matter on March 2, 2021.[35] On March 31, 2022, the ALJ issued a D. & O., in which the ALJ found that Macks violated the H-1B provisions of the INA, ordered back wages and civil money penalties, and held Rahman individually liable.[36] As grounds for these determinations, the ALJ found that Respondents did not provide Jalal with work from April 2012 to March 2015, despite Jalal being available and willing to work, and that Respondents did not pay Jalal any wages from April 2012 to April 2014.[37] In reaching this conclusion, the ALJ found that Jalal diligently tried to find work on his own, which Rahman's emails confirmed.[38] The ALJ also credited Jalal's testimony that he would have moved to New York if Respondents had offered him work there as evidenced by Jalal's moves to Tennessee and Minnesota for work that he found through another recruiter.[39]

Next, the ALJ found that Jalal never rejected assigned work.[40] Although Respondents had contended Jalal was offered a job contract in 2012 to work for Orabase Solutions, LLC (Orabase), the ALJ found that the record did not support Respondents' assertion.[41] The ALJ opined that it was particularly revealing that Respondents never terminated Jalal's employment despite the alleged refusal of work assignments.[42]

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34 *See* Order Cancelling Hearing and Supplemental Notice of Hearing (ALJ Jan. 4, 2021) (rescheduling the hearing based on the Administrator's medical condition); Order Cancelling Hearing and Supplemental Notice of Hearing (ALJ Oct. 7, 2020) (rescheduling the hearing so Respondents could obtain counsel).

35 D. & O. at 4.

36 *Id.* at 20. In addition, the ALJ found that Respondents violated numerous recordkeeping requirements of the INA, including the failure to provide Jalal with a copy of the first LCA as required by 20 C.F.R. § 655.734(a)(3), the failure to maintain documents proving compliance with the H-1B program posting requirements pursuant to 20 C.F.R. § 655.734, the failure to obtain a new LCA despite Jalal working at a new worksite for over 30 days as required by 20 C.F.R. §§ 655.735(c) and (f)(1), and the failure to make LCAs and other documents available to WHD as required by 20 C.F.R. § 655.760(a). *Id.* at 16-17. Respondents do not challenge these findings. *See* Respondents' (Resp.) Brief (Br.); Resp. Reply Br.

37 *Id.* at 10-11.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.* at 11-12.

42 *Id.*

The ALJ concluded that Respondents' failure to pay Jalal for non-productive time was a willful violation of the INA regulations.[43] The ALJ based this conclusion on his findings that: (1) although Macks had no prior history of H-1B violations, Macks did not make good-faith efforts to comply with the H-1B program's requirements, (2) Rahman neither explained the violations nor committed to remedying them, and (3) Respondents yielded a significant financial gain by taking a cut of Jalal's earnings for the jobs he found on his own.[44] As a result, the ALJ debarred Respondents from filing new H-1B petitions for two years and ordered Respondents to pay $113,515.60 in additional back wages plus interest and a CMP of $2,500.[45]

The ALJ further concluded that it was necessary to "pierce the corporate veil" and hold Rahman individually liable.[46] As this case arose in New York, the ALJ applied New York State's two-prong veil-piercing analysis.[47] Regarding the first prong, the ALJ found that Rahman exercised complete domination over Macks.[48] In reaching this conclusion, the ALJ noted that Rahman was Macks's sole owner and functioning officer.[49] The ALJ further noted that Rahman's sister-in-law, Sherry Kaye (Kaye), signed LCAs and offer letters as President of Macks, but disregarded these facts because Rahman admitted he regularly prepared those documents and had Kaye sign them and described Kaye's role as "on paper only . . . not active."[50] The ALJ also noted that Rahman did not hold regularly scheduled meetings with Kaye or keep meeting notes.[51] In addition, the ALJ found that Rahman was the only person who communicated with H-1B recruits, intermediate vendors, and end clients.[52] The ALJ also found that Macks failed to follow corporate formalities and keep corporate records, and that Rahman negotiated and signed all of Jalal's subcontractor agreements and signed Jalal's paychecks.[53] The ALJ further found

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43 *Id.* at 13-14. The ALJ found a violation of 20 C.F.R. § 655.731(c).

44 *Id.*

45 *Id.* at 14-15. Respondents do not challenge whether the amount of the CMP was reasonable. *See* Resp. Br.; Resp. Reply Br.

46 "Piercing the corporate veil" refers to the legal doctrine allowing corporate shareholders to be held personally liable for corporate action. *See Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc.*, 716 F. App'x 23, 27 (2d Cir. 2017).

47 D. & O. at 18.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

that Rahman habitually commingled his personal assets with Macks's and those of his immigration services company, International Law Associates (ILA), of which he was also the sole owner and functioning officer.[54] Next, the ALJ noted that Rahman listed his personal residence as an alternate address for Macks on documents, used the same personal email address to communicate with Macks's employees, used one operating account for Macks and ILA that only he could access, and admitted that he regularly took money from that corporate account to pay for his personal expenses.[55]

Regarding the second prong of the veil-piercing test, the ALJ found that Rahman used his domination over Macks to commit a wrong against Jalal.[56] Specifically, the ALJ found that Rahman "willfully used his total control over Macks as an entity to violate the H-1B program's wage requirements" and wronged Jalal by leaving him without work or pay for two years.[57] Lastly, the ALJ noted that Macks has been out of business since 2015 and found that it is therefore "exceedingly unlikely that any judgment for back wages against the company will ever reach Mr. Jalal."[58] Accordingly, the ALJ concluded it was necessary to "pierce the corporate veil" and hold Rahman individually liable.[59]

On May 2, 2022, Respondents appealed the ALJ's decision to the Board.[60] Both parties filed timely briefs.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to 20 C.F.R. § 655.845.[61] Under the Administrative Procedure Act (APA), ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making

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54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at 19-20.

58 *Id.* at 20.

59 *Id.*

60 Respondents' Petition for Review (May 2, 2022).

61 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

the initial decision . . . ."[62] The ARB therefore has plenary power to review an ALJ's factual and legal conclusions de novo.[63]

DISCUSSION

The INA permits an employer to hire nonimmigrant foreign workers in "specialty occupations" to work in the United States for prescribed periods of time.[64] These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.[65] An employer seeking to hire an H-1B worker must obtain certification from the DOL by filing an LCA.[66] The LCA sets the wage levels and working conditions that the employer guarantees for the H-1B employee.[67] After securing the certification and upon approval of the H-1B petition by USCIS, the Department of State issues H-1B visas to these workers.[68]

1. Statute of Limitations

Respondents contend that the ALJ's award of back wages is time-barred by 20 C.F.R. § 655.806(A)(5) and 8 U.S.C. § 1182(n)(2)A), which require that complaints be investigated within one year from the date of the alleged violation.[69] Respondents note that Jalal filed his complaint with WHD on July 21, 2015, and assert that the limitations period bars any award for back wages due before July 21, 2014.[70]

A complainant must file a complaint within one year, measured from the latest date on which an alleged violation occurred.[71] A benching violation constitutes nonproductive time due to a decision by the employer during which the

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62 5 U.S.C. § 557(b); *Lubary v. El Floridita*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 4-5 (ARB Apr. 30, 2012).

63 *Mehra v. W. Va. Univ.,* ARB No. 2021-0056, ALJ No. 2017-LCA-00002, slip op. at 4 (ARB Dec. 21, 2021) (citing *Lubary*, ARB No 2010-0137, slip op. at 5).

64 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

65 8 U.S.C. § 1184(i)(1).

66 8 U.S.C. § 1182(n)(1); 20 C.F.R. §§ 655.731-33.

67 *Id.*

68 20 C.F.R. §§ 655.705(a), (b).

69 Resp. Br. at 5.

70 *Id.*

71 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.806(a)(5).

non-immigrant worker was not paid.[72] The Board has consistently held that "the express terms of the regulation make a benching violation a 'continuing violation' that remains actionable for the duration of the employment relationship as stipulated in the LCA."[73] The Board has further held that, in such cases, the "complaint must be filed within twelve months after the latest date upon which the alleged violation was committed."[74]

In the present matter, Jalal filed his complaint with WHD on July 21, 2015.[75] As this complaint relates to a benching violation and a benching violation is a continuing violation, the last alleged instance of Jalal being benched must have occurred prior to July 21, 2014, in order for the claim to be timely. We find that the last time Respondents failed to pay Jalal was on March 26, 2015, when Jalal's work authorization expired.[76] As this date was less than twelve months from July 21, 2014, we conclude that the claim is not time-barred.

In an attempt to avoid the applicable limitations period, Respondents assert that they had no obligation to pay Jalal after the occurrence of certain events. An employer need not pay wages in two relevant circumstances.[77] The first circumstance is as follows:

> 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

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[72] *Adm'r v. Volt Mgmt. Corp.*, ARB No. 2018-0075, ALJ No. 2012-LCA-00044, slip op. at 4 (ARB Aug. 27, 2020).

[73] *Gupta v. Jain Software Consulting, Inc.*, ARB No. 2005-0008, ALJ No. 2004-LCA-00039, slip op. at 5 (ARB Mar. 30, 2007) (remanding the case to OALJ as the benching complaint was filed before the term of employment had expired). *See Adm'r v. ME Global, Inc.*, ARB No. 2016-0087, ALJ No. 2013-LCA-00039 (ARB Mar. 22, 2019) (adopting and attaching the ALJ's decision and order that the 12-month limitations period does not bar a benching violation complaint); *Adm'r v. Greater Mo. Med. Pro-Care Providers, Inc.*, ARB No 2012-0015, ALJ No. 2008-LCA-00026, slip op. at 16 (ARB Jan. 29, 2014) (quoting *Gupta*, ARB No. 2005-0008, slip op. at 5), *aff'd in relevant part sub. nom. Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132 (8th Cir. 2015); and *Adm'r v. Ave. Dental Care*, ARB No. 2007-0101, ALJ No. 2006-LCA-00029, slip op. at 10-11 (ARB Jan. 7, 2010) (a claim for back wages was not time barred as the last violation occurred within one year of the filing).

[74] *Gupta v. Adm'r*, ARB No. 2012-0050, ALJ No. 2010-LCA-00024, slip op. at 5 (ARB Feb. 27, 2014) (affirming the ALJ's dismissal as the complaint was filed three years after the last alleged violation).

[75] Partial Summary Decision Order at 9-10.

[76] *Id.*

[77] 20 C.F.R. § 655.731(c)(7)(ii).

> 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), then the employer shall not be obligated to pay the required wage rate during that period, provided that such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.)."[78]

The second circumstance in which an employer need not pay wages is "if there has been a bona fide termination of the employment relationship."[79]

Respondents assert that they are not required to pay Jalal under the first circumstance because Jalal quit his job for family reasons.[80] Respondents contend that Jalal's quitting work was an intervening act that broke the continuing violation, and the ALJ therefore erred in awarding back wages from April 2012 to April 2014.[81]

Although Respondents are correct that Jalal left CHS after two weeks in part due to family reasons, Jalal explained that he also quit for work-related reasons because the job required him to pay for travel, lodging, and other expenses out of pocket.[82] Prior to taking the CHS job, Jalal stated that he was not notified he would have to cover travel expenses.[83] He testified that he was only reimbursed a small portion of what he was required to pay.[84] He expressed that this put him in a "very difficult situation."[85] Respondents' records support the conclusion that Jalal quit in part due to the "office work environment."[86] Jalal explained that he did not provide more information in his email to Rahman because CHS was not a Macks client.[87] Thus, although Jalal quit in part for family reasons, Jalal also quit due to conditions related to his employment. Therefore, we find that Jalal left his job due to working conditions.

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78 *Id.*

79 *Id.*

80 Resp. Br. at 6; Resp. Reply Br. at 2-3.

81 *Id.*

82 Hearing Transcript (Tr.) at 58-59.

83 *Id.*

84 *Id.*

85 *Id.*

86 Resp. Hearing Exh. 1 at 8.

87 Tr. at 59.

In addition, we find that the payments from Jalal's two jobs do not constitute "cash wages paid" for the purposes of satisfying the H-1B required wage, and therefore are not an "intervening event." The H-1B regulations require H-1B employers to make the appropriate tax withholdings and report payments to the IRS.[88] We find that Respondents did not establish that Macks made the appropriate tax deductions from Jalal's wage payments or that Respondents reported these payments to the IRS. Although Rahman testified that he paid taxes,[89] nothing else in the record supports his testimony. Jalal testified that he did not receive any paystubs from the CHS job that would show that taxes were deducted.[90] Viewed as a whole, the record supports the ALJ's finding that Respondents did not deduct any taxes from Jalal's pay.[91]

As the last violation occurred within one year of when the complaint was filed, the matter is not time-barred. Therefore, we find that the Administrator had jurisdiction to award back wages for the entire benching period as a single continuing violation.

2. Availability and Willingness to Work

For several reasons, Respondents contend that the ALJ erred in finding that Jalal was willing to work throughout his visa authorization period.[92] Specifically, Respondents contend that Jalal was unavailable to work, was unwilling to relocate for work, and was offered a job at Orabase Solutions but refused it.

A. Jalal's Availability

After an H-1B petition is granted, the petitioning employer assumes obligations when the H-1B worker enters the country or becomes "eligible to work for the petitioning employer."[93] The 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

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88 20 C.F.R. § 655.731(c).

89 Tr. at 197.

90 *Id.* at 61.

91 Declaration of Shaukat Jalal. As the ALJ found, Respondents did not challenge this assertion in either Rahman's Affidavit, Respondents' Documentary Affidavit, or Respondents' Motion and Opposition.

92 Resp. Br. at 6.

93 20 C.F.R. § 655.731(c)(6)(ii).

nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of the lack of assigned work) . . . ."[94]

In *Gupta v. Compunnel Software Group, Inc.*, the Board held as follows:

> [T]o 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.[95]

Respondents assert that Jalal's admission that he quit his job at CHS because of a family reason and the office work environment demonstrates that Jalal was not willing to work.[96] As discussed above, we found that, although Jalal quit his job at CHS in part because of a family reason, he also quit in part for reasons related to work. Thus, we find that Jalal's quitting his job at CHS does not satisfy the unavailability exception to wage liability.

A. Jalal's Willingness to Relocate

Respondents contend that Jalal was unwilling to move to New York for work because he was working at a university and wanted to wait until his family received their visas and could join him.[97] As the ALJ found, the record demonstrates that Jalal resigned from his temporary position at a university as soon as his H-1B application was approved and asked Rahman for an assignment.[98] Thus, we are not persuaded by Respondents' argument.

Respondents also assert that as both of Jalal's relocations for work were temporary and not permanent, Jalal cannot establish that he was willing to relocate to New York.[99] However, as Jalal showed he was willing to relocate for work and the

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94 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

95 *Gutpa v. Compunnel Software Grp., Inc.*, ARB No. 2012-0049, ALJ No. 2011-LCA-00045, slip op. at 16 (ARB May 29, 2014).

96 Resp. Br. at 6-7.

97 *Id.* at 7.

98 D. & O. at 5 (citing Tr. at 42-43).

99 Resp. Br. at 7.

period of intended employment listed on the LCA was itself for a limited duration of time, we are not persuaded by Respondents' reasoning.[100]

Next, Respondents contend that Jalal contradicted himself when he initially stated that he would not have had a problem relocating his family, then later claimed he left his family in Virginia because they had issues with the move.[101] In support of this argument, Respondents cite to Jalal's testimony in which he stated as follows:

> Since they were here in Virginia, so school was very close to their apartment where they were living. So it was like walking distance. And at the same time, shopping area was like, literally it's like 2-minutes walk from the apartment where they were living. So everything was very close, school, hospital, food, shopping, everything where they were living were very close. So I don't see there will be some issues, so that's why I left them here and I moved to my job wherever I find, either in Texas or Minnesota or Tennessee, Nashville. So I was free to move. And my wife was very – you know, she's educated lady, so she can handle all these things.[102]

Notably, Respondents omitted the first sentence of this paragraph, in which Jalal answered the question of whether there were any issues with his children changing schools after his family moved to Minnesota with, "No, there's no issues."[103] In addition, when Jalal was asked whether there were any problems when his family moved to Minnesota, he testified, "No, there was no problem."[104] It is undisputed that he moved for both jobs, and that his family also moved to Minnesota. Thus, we find that Jalal was willing to relocate for work.

C. Orabase Job Opportunity

Respondents contend that the ALJ erred in rejecting Rahman's testimony that Jalal was offered a remote job contract in 2012 with Orabase.[105] Respondents assert that the record demonstrates that Jalal could have worked at Orabase if he

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100 Joint Hearing Exh. 6 (LCA for the employment period of Oct. 2, 2011 to Oct. 1, 2014); Joint Hearing Exh. 11 (LCA for the employment period Aug. 26, 2014 to Aug. 25, 2017).

101 Resp. Br. at 7.

102 *Id.*

103 Tr. at 64.

104 *Id.*

105 Resp. Br. at 8; Resp. Reply Br. at 4.

had completed a training course.[106] Respondents contend that if Jalal was truly available to work he should have been able to complete the training, and that the reason Jalal was not offered work was because he chose not to complete the training.[107] Respondents note that the ALJ rejected any assertion that Orabase offered Jalal a job, and yet the ALJ acknowledged in a footnote that a non-disclosure agreement "appears to be a contract to hire Mr. Jalal to Orabase."[108]

The record does not establish that Jalal was offered a job with Orabase. The "Non-Disclos[ure] Agreement" does contain statements that Orabase would exclusively train and market Jalal, as well as an agreement to work 2080 hours over forty weeks and designation of the income percentage Jalal would make,[109] but was not signed by anyone at Orabase and was not fully dated.[110]

We find that the email communications between Respondents and Orabase do not indicate that Jalal was offered a job at Orabase.[111] The email from Orabase, dated April 30, 2012, discloses information about their training program, which had to be completed prior to beginning work, and details minimum hours that Jalal would be required to work at Orabase as well as the pay structure.[112] Another email dated May 3, 2012, from Rahman to Orabase states, "We do herein confirm the Training Program & Job Placement for Shaukat Jalal as VMWARE Administrator and as scheduled by [Orabase] for further proceedings" with the signed non-disclosure agreement attached.[113] This does not indicate that Jalal was offered a job, but rather that "further proceedings" would be necessary before a job would be offered.

In *Gupta*, the Board held that submitting an H-1B worker for projects and interviews did not show that the employer had assigned any duties, and therefore did not satisfy the unavailability test.[114] Here, Jalal testified that Orabase is similar to I Net in that both are IT consultancy companies, and likened the process at Orabase to an interview.[115] He explained that after a person completes the training,

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106 *Id.*

107 *Id.*

108 Resp. Br. at 8 (citing D. & O. at 11 n.17).

109 Resp. Hearing Exh. 1 at 5-6.

110 *Id.*

111 *Id.* at 2, 4.

112 *Id.* at 2.

113 *Id.* at 4.

114 *Gupta*, ARB No. 2012-0049, slip op. at 16-17.

115 Tr. at 105.

Orabase would market the person's resume and find job openings.[116] We find that Jalal made several attempts to schedule the training, but Orabase's trainer was unable to login at the correct times.[117] In addition, Jalal never received any offers for work on client projects through Orabase, nor was he ever assigned any work duties.[118] Thus, we find that the communications between Jalal and Orabase do not establish that Jalal was unwilling to work.

Last, we find that it is notable that Respondents never terminated Jalal's employment despite Jalal's alleged refusal to take jobs. The record does not indicate that any actions were taken after Jalal's alleged refusal to complete Orabase's training program. Similarly, Jalal testified that, after he left CHS, Rahman's only response was that he should have stayed three months.[119] Respondents' records confirm Jalal's testimony. In an email, Rahman stated, "[it was a v]ery disappointing and uncalled for decision. At least hang on for [three] months on a contract for keeping the visa status and change of status. Please call me asap."[120] Nothing in the record indicates that any further action was taken.

For these reasons, we find that Jalal was available and willing to work, but Macks did not provide work for him or pay him the prevailing wage while Jalal was benched. Therefore, we affirm the ALJ's finding that Respondents willfully violated 20 C.F.R. § 655.731(c) by benching Jalal without pay.[121]

3. Piercing the Corporate Veil and Individual Liability

Generally, "[t]he law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability."[122] This privilege is limited and "courts will disregard the corporate form whenever necessary to prevent fraud or to achieve equity."[123] The ALJ concluded that it was necessary to pierce the

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116 Tr. at 105-07.

117 Declaration of Shaukat Jalal at 1-2.

118 *Id.*

119 Tr. at 60.

120 Resp. Hearing Exh. 1 at 8.

121 Respondents do not challenge the ALJ's finding that the violation was willful. *See* Respondents' Br., Respondents' Reply Br. For the reasons stated in the D. & O., we affirm the ALJ's finding that Respondents' failure to pay Jalal for non-productive time was willful. See D. & O. at 13 (citing Joint Hearing Exh. 6, Joint Hearing Exh. 11).

122 *Griggs v. Weiner*, No. 13CV3885KAMCLP, 2021 WL 4268095, at *21 (E.D.N.Y. Aug. 10, 2021), *report and recommendation adopted*, No. 13CV3885KAMCLP, 2021 WL 3857678 (E.D.N.Y. Aug. 30, 2021) (quoting *Walkovszky v. Carlton*, 223 N.E.2d 6, 7 (N.Y. 1966)).

123 *U.S. v. Lax*, 414 F. Supp. 3d 359, 367 (E.D.N.Y. 2019).

corporate veil and hold Rahman individually liable. As this case arises in New York, the ALJ applied New York State's two-prong veil-piercing analysis.[124] Respondents contend the ALJ misapplied the New York veil-piercing standard and erred in holding Rahman individually liable for judgments issued against Macks.[125]

In *Baiju v. Fifth Avenue Committee*, the Board determined that, under the provisions of the INA, "the corporate veil can be pierced when it is appropriate."[126] The Board affirmed the ALJ's application of the New York State law test for piercing the corporate veil, reasoning that New York law was appropriate because the alleged protected activity and adverse action in that case arose in New York.[127] The Second Circuit Court of Appeals affirmed the Board's decision and use of state law.[128] Further, as the ALJ opined, the Eastern District of New York applies the New York state law test for piercing the corporate veil.[129]

The New York test requires the party seeking to pierce the corporate veil to show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or a wrong against the plaintiff which resulted in plaintiff's injury.[130] Respondents do not challenge the ALJ's finding that Rahman exerted complete domination over Macks.[131] Rather, Respondents contend the ALJ did not properly analyze the test's second prong for several reasons. First, Respondents assert that the ALJ improperly applied New Jersey law, that the Administrator is also arguing in favor of applying New Jersey law, and that the New York standard should be used.[132]

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124 D. & O. at 18.

125 Resp. Br. at 8.

126 *Baiju v. Fifth Ave. Comm.*, ARB No. 2010-0094, ALJ No 2009-LCA-00045, slip op. at 6 (ARB Apr. 4, 2012).

127 *Id.* (citing *Adm'r v. Kutty*, ARB No. 2003-0022, ALJ Nos. 2001-LCA-00010-00025, slip op. at 17-20 (ARB May 31, 2005) (determining it was appropriate to pierce the corporate veil in an H-1B matter and hold Kutty individually liable pursuant to Tennessee common law)).

128 *Baiju v. USDOL*, No. 12-cv-5610, 2014 WL 349295 (E.D.N.Y. Jan. 31, 2014) (unpublished opinion affirming the ARB decision); *Baiju v. USDOL*, No. 14-394 (2d Cir. May 29, 2014) (dismissing appeal because it lacked an arguable basis in law or fact).

129 *Lax*, 414 F. Supp. 3d at 367.

130 *Id.* (internal citations omitted).

131 Resp. Br. at 8-9; Resp. Reply Br. at 4-6.

132 Resp. Br. at 5; Resp. Reply Br. at 5.

The ALJ did not apply New Jersey law, nor is the Administrator contending that New Jersey law should be applied.[133] Rather, the ALJ cited the OALJ's decision in *Adm'r v. Home Mortgage Co.*, in which the ALJ applied the New Jersey veil-piercing standard and found that the lack of separation between the individual respondent and corporation harmed workers because the employer's poor recordkeeping, failure to withhold taxes, and failure to provide workers with documents needed in regards to their pay facilitated the employer's willful violations of the wage requirements.[134] The test applied in *Home Mortgage Co.* was that there "must present some sort of injustice or fundamental unfairness, which may be shown by proving some of the factors" showing that the individual and company were not separate.[135] In the present matter, the ALJ did not apply New Jersey law, but instead analyzed the effect of willful violations in determining whether to pierce the corporate veil.[136] As the present matter arises in the Second Circuit, the Board will not rely on *Home Mortgage Co.*, and instead will apply the Second Circuit's veil-piercing standard.

Next, Respondents contend that the ALJ wrongly found that Rahman was individually liable based on his "domination of a corporation and a wrong."[137] Respondents assert that Macks was "primarily used to provide the services it promised" in obtaining visas and that there was neither a fraudulent nor wrongful scheme to injure Jalal.[138] Respondents contend that Rahman tried to secure employment for Jalal at Orabase, even if a job offer was not ultimately found, and thus there is no evidence that Rahman used Macks to intentionally commit any wrongs.[139]

To satisfy the second prong of the test, "the party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against that party such that a court in equity will intervene."[140] Actual or common

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133 The Administrator does address the ALJ's citation to *Adm'r v. Home Mortg. Co.*, ALJ No. 2004-LCA-00040, slip op. at 20 (ALJ Mar. 6, 2006), but makes no argument that New Jersey law should govern in this matter. See Response Brief of the Principal Deputy Administrator at 21.

134 D. & O. at 19 (citing *Adm'r v. Home Mortg. Co.*, ALJ No. 2004-LCA-00040, slip op. at 20 (ALJ Mar. 6, 2006)).

135 *Home Mortg. Co.*, 2004-LCA-00040, slip op. at 19.

136 D. & O. at 19.

137 Resp. Br. at 9; Resp. Reply Br. at 5-6.

138 *Id.*

139 *Id.*

140 *Matter of Morris v. New York State Dep't of Taxation & Fin.*, 623 N.E.2d 1157 (N.Y. 1993).

law fraud need not be proven.[141] Rather, the evidence must show that the fraud or other wrong resulted in "unjust loss or injury."[142] Although intent to commit fraud or another wrong is "one method of assessing whether the corporate form was sufficiently abused to permit veil piercing," it is not required.[143]

Here, Rahman, as the sole owner of Macks, willfully violated the INA by benching Jalal without pay. In doing so, Jalal was left without work or pay for over two years and was prevented from finding another employer as he lacked the three months of paystubs necessary to change employers.[144] We find that this is a serious wrong that resulted in an unjust injury. Thus, we affirm the ALJ's finding that the Administrator satisfied the second prong of the required test. As such, we affirm the ALJ's determination to pierce the corporate veil and hold Rahman individually liable for all back wages and CMPs owed.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order.[145]

SO ORDERED.

TAMMY L. PUST
Administrative Appeals Judge

SUSAN HARTHILL
Chief Administrative Appeals Judge

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141 *In re Adler*, 467 B.R. 279, 287 (Bankr. E.D.N.Y. 2012), *appeal denied, judgment aff'd sub nom. Ng v. Adler*, 518 B.R. 228 (E.D.N.Y. 2014) (citing *DER Travel Servs. v. Dream Tours & Adventures*, No. 99-2231, 2005 WL 2848939, at *9 (S.D.N.Y. Oct. 28, 2005)).

142 *Id.* at 296.

143 *Am. Federated Title Corp.*, 716 F. App'x at 28 (concluding that, while the court in *Morris* found a lack of intent to defraud was probative in declining to pierce the corporate veil, it did not explicitly restrict the type of wrongs to those committed purposefully). *See In re Adler*, 467 B.R. at 297 (finding that, although it may have been the owner's earnest intention to repay the plaintiffs, that intention was not supported by the evidence, and concluding that it was necessary to pierce the corporate veil).

144 Tr. at 50, 68-70, 200.

145 In any appeal of this Decision and Order, the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.