ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:	)	
ADMINISTRATOR, WAGE & HOUR DIVISION,	)	ARB Case No. 2019-0001
Prosecuting Party,	)	ALJ Case No. 2017-LCA-00018
v.	)	
INTEGRATED GEOPHYSICS CORPORATION,	)	
Respondent.	)	

ACTING ADMINISTRATOR'S RESPONSE BRIEF

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ACTING ADMINISTRATOR'S RESPONSE BRIEF[1]

This case arises under the H-1B provisions of the Immigration and Nationality Act ("the Act" or "INA"), 8 U.S.C. 1101(a)(15)(H)(i)(b), 8 U.S.C. 1182(n), and the implementing regulations promulgated by the Secretary of Labor, 20 C.F.R. Part 655, Subparts H and I. Consistent with the determination of the Administrator of the Department of Labor's Wage and Hour Division ("Administrator"), the Administrative Law Judge ("ALJ") ruled that Respondent, Integrated Geophysics Corporation, failed to pay Ms. Maria Hanciuc the wages she was owed pursuant to the Labor Condition Applications in which Respondent attested that such wages would be paid for the relevant periods. This attestation includes payment during any benching

[1] As of February 2019, the Acting Administrator is the ranking official responsible for the U.S. Department of Labor's Wage and Hour Division.

period (a period of nonproductive status) in the absence of certain conditions that did not apply here, namely, that a bona fide termination was effectuated or that the lack of work resulted from reasons unrelated to employment. The Administrative Review Board ("ARB") should affirm the ALJ's decision in its entirety.

ISSUES TO BE REVIEWED[2]

1. Did the ALJ properly determine that the Respondent was required to pay back wages where it failed to meet its wage obligation to Ms. Hanciuc?

2. Alternatively, did the failure of the Respondent's business or Ms. Hanciuc's understanding that she would not to be paid under the terms of the labor condition application(s) relieve the Respondent of its obligation to pay wages to her under the H-1B visa program? Or did the Respondent remain legally obligated to pay wages to Ms. Hanciuc under the terms of the labor condition application(s) until she submitted a resignation, as the ALJ determined?

3. Is the ALJ's back pay award to Ms. Hanciuc, an H-1B nonimmigrant worker, affected by the fact that the Respondent likewise did not pay its United States workers, and yet this back wage award does not compensate them?

STATUTORY AND REGULATORY FRAMEWORK

The H-1B visa program permits the temporary employment of nonimmigrants in specialized occupations in the United States. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, Subparts H and I. In order to employ an H-1B worker, an employer must first

[2] The Deputy Administrator has enumerated the issues essentially as the Board did in its Notice Of Intent To Review.

submit a Labor Condition Application ("LCA") to the Secretary. *See* 8 U.S.C. 1182(n)(1). The LCA specifies the starting and ending date of the H-1B worker's employment, as well as the wage rate the employer will pay the nonimmigrant(s) covered by the LCA. *See* 20 C.F.R. 655.730(c)(4)(iii)-(iv). The employer attests that it will pay the greater of the prevailing or actual wage. *See* 20 C.F.R. 655.630(d)(1). In signing and submitting 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. *See* 20 C.F.R. 655.730(c)(2).

In accordance with 8 U.S.C. 1182(n)(1), the greater of the prevailing or actual wage is the "required wage." 20 C.F.R. 655.731(a). If "there are other employees with substantially similar experience and qualifications in the specific employment in question – *i.e.* they have substantially the same duties and responsibilities as the H-1B nonimmigrant," the actual wage is the amount the employer pays such other employees. 20 C.F.R. 655.731(a)(1). If "no such other employees exist at the place of employment," the actual wage is the wage the employer pays to the H-1B nonimmigrant. *Id.*

An employer's wage obligation to an H-1B worker extends throughout the entire period of authorized employment. *See* 8 U.S.C. 1182(n)(1). Therefore, an employer must pay an H-1B worker the required wage for the occupation listed on the LCA even "[i]f 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 …." 20 C.F.R. 655.731(c)(7)(i); *see* 8 U.S.C. 1182(n)(2)(C)(vii).

Section 655.731(c)(7)(ii) specifies the two circumstances in which the employer's wage obligation may not apply during the period of authorized employment. First, the employer's wage obligation will typically not apply when "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…or render the nonimmigrant unable to work …." 20 C.F.R. 655.731(c)(7)(ii). Second, the employer's wage obligation will cease if the employer effects a "bona fide termination" of the worker. 20 C.F.R. 655.731(c)(7)(ii) ("Payment [of wages] need not be made if there has been a bona fide termination of the employment relationship. DHS [Department of Homeland Security] regulations require the employer to notify DHS that the employment relationship has been terminated so that the petition is canceled (8 C.F.R. 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 C.F.R. 214.2(h)(4)(iii)(E)).". An employer may terminate the employment relationship prior to the ending date specified in the approved LCA based on a lack of work or other reasons permitted by law. *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations 65 Fed. Reg. 80,110, 80,169-70 (Dec. 20, 2000) (Final Rule) (discussing the effect of 20 C.F.R. 655.731(c)(7)).

The INA, 8 U.S.C. 1101 *et seq.*, mandates that the Department of Labor ("Department") conduct enforcement proceedings related to H-1B program requirements, specifically directing the Department to:

> establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under [this Act]...or a petitioner's misrepresentation of material facts in such an application.

8 U.S.C. 1182(n)(2)(A). The Department has accordingly adopted regulations permitting the enforcement of LCA obligations. *See* 20 C.F.R. 655.800 *et seq.* The regulations both specify that it is a violation to fail to pay wages as required, including the failure to pay wages for nonproductive time, *see* 20 C.F.R. 655.805(a)(2), and permit the Administrator to "assess and oversee the payment of back wages…[which] shall be equal to the difference between the amount that should have been paid and the amount that actually was paid …." 20 C.F.R. 655.810(a).

STATEMENT OF THE CASE

A. Statement of Facts

Respondent Integrated Geophysics Corporation ("Respondent") is a closely held corporation operating out of Houston, Texas as a registered geophysics firm providing consulting, integrated interpretation of geophysical and geological data, structural modes, and basement interpretations. September 26, 2018 ALJ Decision and Order ("D&O") 1. Complainant, Ms. Hanciuc is a foreign citizen trained as a geophysicist. D&O 4.

In 2009, Respondent hired Ms. Hanciuc as an H-1B recipient employee. D&O 1. On April 30, 2012, Respondent submitted a signed a LCA to continue to employ Ms. Hanciuc as a geophysicist, for a period of employment from September 8, 2012 through September 7, 2015. D&O 2. The LCA listed Ms. Hanciuc's required wage rate and the prevailing wage rate as $78,894. *Id.*

In March 2015, Respondent told all its employees, including Ms. Hanciuc, that economic conditions and a resulting reduction in business would force Respondent to make significant cutbacks. D&O 2. Respondent tried to save its business, with help from loans both from

Respondent's president and from an employee. *Id.* However, Respondent was not able to pay its employees, including Ms. Hanciuc. *Id.* Some employees left their jobs with Respondent and those that remained, including Ms. Hanciuc, were told their pay would be cut in half. *Id.* At this time, Respondent's president met with Ms. Hanciuc to discuss her immigration options with the goal of avoiding the cancellation of her visa to enable her to remain in the United States. *Id.*

In August 2015, Respondent told all its remaining employees, including Ms. Hanciuc, that it could no longer pay any of its employees and advised them to find other employment. D&O 2. While Ms. Hanciuc remained an employee, many of the staff quit and some filed for unemployment benefits. *Id.* Despite its financial troubles, on August 8, 2015, Respondent signed a new LCA for a geophysicist covering the period of August 26, 2015 through December 20, 2016 with a required wage rate and prevailing wage of $80,538. *Id.* Respondent submitted this LCA and kept Ms. Hanciuc employed knowing it would be impossible for it to pay her that amount. *Id.*

While still employed by Respondent, but not receiving any pay, Ms. Hanciuc began seeking other employment. D&O 2. Ms. Hanciuc submitted her formal resignation to Respondent on April 1, 2016. D&O 4. The total difference between the amount Respondent paid Hanciuc and the amounts listed on the LCAs is $68,738.84. D&O 2.

B. Course of Proceedings

In April 2016, Ms. Hanciuc filed a complaint against Respondent with the Wage and Hour Division ("WHD"). D&O 4. The complaint alleged that Respondent failed to meet its obligations under the LCAs. *Id.* Following an investigation, on June 27, 2017, the

Administrator of the WHD issued a determination that Respondent owed $68,738.84 in back pay to Ms. Hanciuc. D&O 1.

Respondent timely contested the Administrator's determination and requested a hearing. D&O 1. Both parties filed motions for summary decision. *Id*. After a conference with the ALJ on May 30, 2018, the parties agreed that they had no factual disputes and that the case presented only legal issues. *Id.* Accordingly, they agreed to waive an in-person hearing and instead filed a joint stipulation of fact and individual legal arguments. *Id.* On September 26, 2018, the ALJ issued a Decision and Order affirming the Administrator's determination in its entirety. D&O 5. On October 12, 2018, Respondent petitioned the Board for review of the ALJ's Decision and Order.

C. The ALJ's Decision

In its decision, the ALJ determined that Respondent failed to pay Ms. Hanciuc in compliance with the required wages listed on the LCAs that Respondent submitted. D&O 4. The ALJ first set forth the regulatory requirement that a non-immigrant H-1B employee must be paid the greater of the actual wage or the prevailing wage for the entire period of the LCA after such an employee enters into employment, unless one of two regulatory exceptions apply—if the employee is not working as a result of conditions that are not related to her employment, or if the employer effectuates a bona fide termination. D&O 3 (citing 20 C.F.R. 655.731). The ALJ stated that once an H-1B employee begins her employment period, her employer must pay the required wage regardless of whether the employee is performing work or not, unless one of the two regulatory exceptions apply. *Id.*

Given that the parties submitted a joint stipulation of facts, the ALJ found that the essential facts in the case were straightforward. D&O 4. He determined that Respondent hired Ms. Hanciuc as an H-1B geophysicist in 2009 and "continued her employment through multiple LCA applications." *Id*. The ALJ determined that Ms. Hanciuc resigned from her position on April 1, 2016, meaning that Respondent was not obligated to pay wages beyond that date. D&O 2. He further concluded, however, that Respondent failed to pay Ms. Hanciuc the wages listed on the LCAs until the time of such resignation and that neither of the two regulatory exceptions applied; Respondent did not fire Ms. Hanciuc (and in fact renewed her LCA during the period in question) and Ms. Hanciuc remained available to work. D&O 4-5.

The ALJ specifically rejected Respondent's defense that its business failure as the result of an economic downtown relieved it of its responsibility to pay Ms. Hanciuc the wages listed on the LCAs. D&O 4. He further rejected Respondent's equitable argument that the Administrator's back pay order would force Respondent to treat Ms. Hanciuc more favorably than any of its other employees, contrary to the intent of the INA. D&O 4-5. The ALJ held that "equity and good faith toward its non-immigrant employee do not excuse the failure to comply with the statute and implementing regulations." D&O 5. He explained that when "Respondent's business began to fail and it was no longer able to meet the wage conditions of the LCA application, to act in good faith in terms of its obligations under the H-1B program meant it was required to discharge Ms. Hanciuc." *Id.* When Respondent did not do so, the ALJ concluded, it remained legally obligated to pay Ms. Hanciuc until she submitted her resignation. *Id.* As the undisputed facts showed that Respondent failed to meet that legal obligation, the ALJ upheld the

Administrator's determination that Respondent owed Ms. Hanciuc $68,738.84 in back wages. *Id.*

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, vests the Board here with "all the powers which it would have in making the initial decision." 5 U.S.C. 557(b). The Board's review is accordingly de novo. *See Adm'r v. Am. Truss*, ARB Case No. 05-032, slip op. at 2-3 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB Case No. 04-100, slip op. at 8 (ARB Jan. 31, 2007), for the proposition that the Board exercises de novo review in INA cases).

ARGUMENT

I. THE ALJ PROPERLY DETERMINED THAT RESPONDENT FAILED TO PAY COMPLAINANT THE REQUIRED H-1B WAGES UNDER THE INA

A. Respondent Did Not Comply with the H-1B Wage Obligations.

Respondent failed to pay the Ms. Hanciuc the required wage during her entire period of H-1B employment, in violation of 8 U.S.C. 1182(n)(1)(A), and 20 C.F.R. 655.731 and 20 C.F.R. 655.805(a)(2). The H-1B regulations require an employer to pay the greater of the actual wage or the prevailing wage, i.e., the required wage, to the H-1B employee for the entire period listed on the LCA. *See* 20 C.F.R. 655.731. The required wage must be paid to the employee "cash in hand, free and clear, when due." 20 C.F.R. 655.731(c). As the ALJ found, Respondent underpaid (and at times, failed to pay) Ms. Hanciuc throughout her period of employment. D&O 1-2, 5.

There are only two circumstances by which an employer can avoid its obligation to pay the required wage during the entire authorized period of employment as set out in an LCA and

the ALJ correctly determined that Respondent could not prove that either of the two circumstances applied here. D&O 3-5; *see* 20 C.F.R. 655.731(c)(7)(ii).[3] First, Respondent did not effectuate a bona fide termination of Ms. Hanciuc.[4] The Board has repeatedly indicated that an employer, in order to effect a bona fide termination of the employment relationship of an H-1B employee, 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." *Baiju v. Fifth Ave. Comm.,* ARB Case No. 10-094, slip op. at 9 (ARB Mar. 30, 2012); *see Adm'r v. Univ. of Miami*, ARB Case Nos. 10-090, 10-093, slip op. at 8-9 (ARB Dec. 20, 2011) (same); *Amtel Grp. Of Fla., Inc. v. Yongmahapakorn*, ARB Case No. 07-104, slip op. at 2 n.4 (ARB Jan. 29, 2008) (same). The burden of proof for each element of the bona fide termination rests with the employer. *See Gupta v. Jain Software Consulting, Inc.*, ARB Case No. 05-008, slip op. at 5-6 n.3 (ARB Mar. 30, 2007). In its decision, the ALJ properly concluded that Respondent never terminated Ms. Hanciuc. D&O 2. Respondent did tell all staff in August 2015 that it would no longer be able to meet any payroll obligations and encouraged staff to find other employment. *Id*. However, rather than notifying Ms. Hanciuc that her employment was terminated due to Respondent's inability to meet payroll obligations, on August 8, 2015, Respondent instead signed a new LCA

[3] Respondent appears to argue on appeal that a third exception, or "escape clause," exists. *See* Pet'r's Br. 6 (citing *Adm'r v. Ken Techs., Inc.*, ARB Case No. 03-140, slip op. at 4 (ARB Sept. 30, 2004)). However, no such exception exists and the portion of *Ken Technologies* Respondent cites concerns the requirements for showing that a bona fide termination occurred under 20 C.F.R. 655.731(c)(7)(ii). *See* Pet'r's Br. 4 (citing *Ken Techs., Inc.*, slip. op. at 4-5).

[4] Respondent did not contest this before the ALJ, but appears to do so on appeal. *See* Pet'r's Br. 4-6.

for Ms. Hanciuc covering the next 16 months with a wage rate and prevailing wage of $80,538. *Id*. Thus, Respondent failed to meet any of the regulatory requirements for a bona fide termination.[5] Accordingly, the ALJ properly concluded that there was no evidence in the record that Respondent had effected a bona fide termination of Ms. Hanciuc. D&O 5.

Regarding the second exception, Respondent does not contest that there is no evidence in the record demonstrating that Ms. Hanciuc experienced a period of nonproductive status due to conditions unrelated to her employment which took her "away from []her duties at []her voluntary request and convenience…or render[ed her]…unable to work." 20 C.F.R. 655.731(c)(7)(ii). Instead, the ALJ found that while Ms. Hanciuc knew that Respondent was unable to pay her, she remained "ready, willing, and able" to work. D&O 2; *see* 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 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]."); *see also Adm'r v. Gov't Training, LLC*, ARB Case No. 16-049, slip op. at 6 (ARB Feb. 23, 2018) (holding that an employer is not relieved of its H-1B wage obligations where the H-1B nonimmigrant employee remains able to work but the employer is unable to pay him due to a downturn in business). It was thus as a result of Respondent's decision, not Ms. Hanciuc's, that Ms. Hanciuc was not working.

As Respondent failed to demonstrate that either of the two regulatory exceptions applied, it was required to pay Ms. Hanciuc the required wage under the H-1B regulations for her periods

[5] Respondent does not dispute that it did not notify USCIS that it terminated Ms. Hanciuc.

of employment prescribed in the applicable LCAs. Therefore, the ALJ properly held that Ms. Hanciuc was entitled to back wages from Respondent in the amount of $68,738.84, and the Board should affirm that holding.

B. Economic Downturns Do Not Relieve Respondent of Its H-1B Obligations.

Respondent argues that that the failure of its business relieved it of its obligation to pay Ms. Hanciuc the wages owed to her under the terms of the LCA. Pet't's Br. 6. However, the ALJ correctly rejected this argument, noting that "[w]hen Respondent's business began to fail and it was no longer able to meet the wage conditions of the LCA application, to act in good faith in terms of its obligations under the H-1B program meant it was required to discharge Hanciuc and notify the Department of Homeland Security." D&O 5.

The law is clear that economic downturns do not relieve employers of their H-1B wage obligations. The regulations explicitly state that an employee must be paid even "[i]f 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*)." 20 C.F.R. 655.731(c)(7)(i) (emphasis added); *see* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations, 65 Fed. Reg. 80,110, 80,170-71 (Dec. 20, 2000) (Final Rule) (Department rejects requests by commenters to allow non-payment to H-1B workers during periods of economic downturn or business shutdowns, regardless of whether U.S. workers are also affected by the downturn, based on clear language of the statute). Board precedent is also clear on this subject. *See Adm'r v. Gov't Training, LLC*, ARB Case No. 16-049, slip op. at 6 (ARB Feb. 23, 2018) (rejecting employer's argument that it should be excused from paying the wages owed under the terms of the LCA due to a downturn in business, holding

that "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"). Thus, the regulations and Board precedent both address the exact situation Respondent faced here—a lack of work due to an economic downturn—and clearly state that H-1B employees must still be paid in such a situation.

As the ALJ noted, once Respondent's business began to fail, it had a choice: it could have continued to pay Ms. Hanciuc the wages required by the regulations, despite the downturn, or it could have terminated her. Similarly, the Board has reiterated, consistent with the regulations, an employer that wishes to cease its wage obligation to an employee not performing work is not without recourse; it can effectuate a bona fide termination. *See Adm'r v. Bedi & Datalinks Computer Prods., Inc.*, ARB Case No. 14-096, slip op. at 5 (ARB Feb. 29, 2016) ("If Respondents had wanted to end the requirement to pay wages because [Complainant] was not performing work under the LCA, then they should have effected a bona fide termination of her employment."). Respondent could not, however, have properly chosen to fail to pay Ms. Hanciuc the required wages without first terminating their employment relationship in a bona fide manner. Since Respondent did not terminate its employment relationship with Ms. Hanciuc, and in fact did the very opposite by submitting a new LCA, it could not refuse to pay her the required wages.

C. Complainant's Understanding That She Would Not Be Paid Under the Terms of the LCA Does Not Relieve Respondent of its H-1B Obligations.

As discussed *supra*, the regulations clearly provide that, even when an H-1B employee is not performing work, an employer is required to pay that H-1B employee at the rate listed on the

LCA, unless one of two exceptions apply. *See* 20 C.F.R. 655.731(c)(7). In other words, unless one of the two exceptions apply, an employee cannot somehow on her own relieve an employer of its H-1B obligations, even by accepting a lower salary than that which is listed on the LCA. *See Adm'r v. Wings Dig. Corp.*, ALJ Case No. 2004-LCA-00030, slip op. 16 (OALJ Mar. 21, 2005) (finding that an employee was owed back wages when the employer reduced the employee's salary, with his consent, to an amount below that which was listed on the LCA); *c.f. Adm'r v. Efficiency3 Corp.*, ARB Case No. 15-005, slip op. 9-12 (ARB Aug. 4, 2016) (rejecting employer's argument that employee's alleged wrongdoings relieved the employer of its obligations to pay the employee the wage listed in the LCA); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (the Supreme Court's "decisions interpreting the FLSA [Fair Labor Standards Act] have frequently emphasized the nonwaivable nature of an individual employee's right[s] … under the Act" and "have held that FLSA rights cannot be abridged by contract or otherwise waived"). Accordingly, because neither of the two regulatory exceptions applied in this case, the ALJ correctly concluded that even though Ms. Hanciuc knew that she would not be paid in accordance with the terms of the LCA but still chose to remain an employee of Respondent, Respondent remained legally obligated to pay wages to Ms. Hanciuc under the terms of the LCA until she submitted her resignation. D&O 4. *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations, 65 Fed. Reg. at 80,171 ("Nor will the Department relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract.").

II. THE ALJ'S BACK WAGE AWARD WAS APPROPRIATE

The ALJ properly determined that Respondent owed $68,738.84 in back wages to Ms. Hanciuc, even though none of the U.S. workers that Respondent employed similarly received pay for the period in question. As the ALJ noted, "equity and good faith toward its non-immigrant employee do not excuse the failure to comply with the statute and implementing regulations." D&O 5. Regardless of how the U.S. employees of Respondent were treated, Respondent remained legally obligated to terminate Ms. Hanciuc or pay her until she submitted her resignation. *Id.*; *see* 20 C.F.R. 655.731(c)(7)(ii). Respondent failed to meet that legal obligation. Accordingly, the Administrator had the authority to "assess and oversee the payment of back wages…[which] shall be equal to the difference between the amount that should have been paid and the amount that actually was paid …." 20 C.F.R. 655.810(a).

On appeal, Respondent argues that the ALJ's back wage award is contrary to the purpose of the statute because it places Ms. Hanciuc in a better position than U.S. workers, and thus such an award should not be permitted. Pet'r's Br. 9-10. This argument is without merit. First, awarding back pay to Ms. Hanciuc is not contrary to the purpose of the statute. The statute and the Department's enforcement process is intended to protect both U.S. *and* foreign workers. *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations, 59 Fed. Reg. 65646, 65648 (Dec. 20, 1994) (Final Rule) (noting that Congress and the Department both sought to "better safeguard workers (both foreign and domestic) against abuses by employers"). The regulations allow *any* aggrieved party to file a complaint, defined as a "worker whose job, *wages*, or working conditions are *adversely affected by the employer's alleged noncompliance with the labor conditions application*." 20 C.F.R.

655.715 (emphases added). As Respondent admittedly did not comply with the LCA, the statute and regulations provided protection for foreign workers like Ms. Hanciuc. Moreover, consistent and strict application of the statutory and regulatory requirements ensures that both U.S. and foreign workers will be protected in each and every possible situation that might arise. Indeed, it is the very requirements placed on employers vis-à-vis their H-1B workers that provide the protection Congress intended for U.S. workers, and thus must be stringently applied. *See, e.g., Eva Kolbusz-Kijne v. Tech. Career Inst.*, DOL Off. Adm. App. No. 93-LCA-0004, 1994 WL 897284, * 7 (Sec'y July 18, 1994) ("The intent of the labor condition application provisions was to protect the wages and working conditions of H-1B workers, and thereby, also protect the wages and working conditions of U.S. workers similarly employed."); *see also* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations, 65 Fed. Reg. at 80,110 ("The statute, among other things, requires that an employer pay an H-1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.").

Second, Respondent relies on unrelated and immaterial cases in arguing that the statutory and regulatory protections should not apply to Ms. Hanciuc. *See* Pet'r's Br. 8-10. Respondent argues that the law "must be construed to avoid an absurd result." *See* Pet'r's Br. 8 (citing *Holy Trinity Church v. United States*, 143 U.S. 457 (1892)). However, awarding Ms. Hanciuc the back wages she is entitled to under the statute is not an "absurd result." As explained *supra*, while the statute was in large part intended to protect U.S. workers, it also protects foreign workers from low wages and abuse by employers. *See* Labor Condition Applications and

Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations, 59 Fed. Reg. at 65648. Thus, requiring Respondent to comply with the terms of the LCA it submitted for Ms. Hanciuc is not absurd in any way but, rather, furthers the purposes of the statute and regulations. Moreover, *Holy Trinity Church* states that if a literal reading of a statute would lead to an absurd result, the act in question must be construed in a manner that would avoid such absurdity. *See* 143 U.S. at 460. In the case before this Board, however, there is no doubt as to the proper textual construction of the statute and applicable regulations; it is in fact their very clarity that leaves no room for any conclusion other than that back wages are due to the H-1B employee given Respondent's failure to effect a bona fide termination of Ms. Hanciuc's employment, as it was required to do if it wished to avoid liability.

Respondent failed to comply with the terms of the LCA and failed to show that one of two regulatory exceptions applied. Under the terms of the statute and regulations, Ms. Hanciuc is accordingly entitled to back pay. Thus, the ALJ's holding that Respondent owes Hanciuc $68,738.84 in unpaid wages should be upheld.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests the Board affirm the ALJ's decision that Respondent failed to pay Ms. Hanciuc the wages it owed her under the terms of the applicable Labor Conditions Applications and, accordingly, Respondent owes Ms. Hanciuc the back wages determined by the ALJ in the amount of $68,738.84.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2019, I served the foregoing Acting Administrator's Response Brief was served via express mail on the following:

Patrick M. Rosenow
Administrative Law Judge
Office of Administrative Law Judges
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