ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of:	
ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,	ARB Case No. 2018-0075
Complainant,	ALJ CASE No. 2012-LCA-00044
v.	
VOLT MANAGEMENT CORPORATION, D/B/A VOLT WORKFORCE SOLUTIONS,	
Respondent.	

ACTING ADMINISTRATOR'S OPENING BRIEF

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ACTING ADMINISTRATOR'S OPENING BRIEF[1]

The H-1B visa program provides employers a source of skilled employees who otherwise would be unauthorized to work in the United States. An employer that elects to take advantage of this privilege assumes a legal responsibility not to adversely affect the interests of similarly employed U.S. workers. The primary mechanism to protect similarly employed U.S. workers' interests is the statutory obligation to pay H-1B workers no less than the required wage during the H-1B worker's entire period of authorized employment, which typically applies even when the H-1B employee is not working.

[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.

Respondent Volt Management Corporation, d/b/a/ Volt Workforce Solutions ("Volt"), is a staffing agency that benefits from its frequent use of the H-1B program. As a frequent user of the program, Volt regularly attests in a pre-employment submission to the Department of Labor ("Department") that it will comply with its obligation to pay H-1B workers at least the required wage. The Department's Wage and Hour Division ("WHD") conducted an investigation of Volt that revealed it did not meet this obligation. Specifically, WHD uncovered hundreds of instances in which, contrary to its repeated attestations, Volt failed to pay H-1B employees the required wage when the workers were not working – a violation that the Administrative Review Board ("ARB" or "Board") refers to as benching.

WHD conducted its investigation pursuant to an aggrieved-party complaint that alleged Volt benched the complainant. Controlling ARB precedent permitted WHD to also investigate whether Volt benched other H-1B workers. This precedent ensures that Volt and other H-1B employers cannot benefit from the privileges the H-1B program confers while escaping the reasonable responsibilities it imposes. Contrary to this precedent, the Administrative Law Judge's ("ALJ") Decision and Order ("D&O") on review concluded that the Administrator improperly expanded the scope of the investigation. Because the ALJ's conclusion is inconsistent with controlling ARB precedent, the ARB should reverse the ALJ's decision.

ISSUE

Whether the ALJ erred in concluding that the ARB's reasoning in *Administrator v. Greater Missouri Medical Pro-Care Providers* and its decision in *Administrator v. Aleutian Capital Partners, LLC* are not controlling with respect to the Administrator's power to expand an aggrieved-party complaint investigation arising within the U.S. Court of Appeals for the Ninth Circuit's jurisdiction.

STATEMENT OF THE CASE

STATUTORY AND REGULATORY FRAMEWORK

1. 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 submit a Labor Condition Application ("LCA") to the Secretary of Labor. *See* 8 U.S.C. 1182(n)(1). The Immigration and Nationality Act ("INA" or "statute") requires that the employer affirm in the LCA that it will offer wages to the H-1B worker(s) that are at least the greater of "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 for the occupational classification in the area of employment." *Id*. The higher of the actual or prevailing wage is the "required wage rate." 20 C.F.R. 655.715.

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); 20 C.F.R. 655.731(a). An employer accordingly must pay an H-1B worker the required wage rate for the occupation listed on the LCA "[i]f the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer . . . 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). The ARB uses the term "benching" to describe an H-1B employer's improper failure to pay an H-1B worker the required wage when the individual is in nonproductive status. *See, e.g., Adm'r Wage & Hour Div. v. Greater Mo. Med. Pro-Care Providers*, ARB Case No. 12-015, slip op. at 4, 2014 WL 469269 (ARB Jan. 29, 2014) ("An employer is obligated to pay the wages specified in the H-1B employee's LCA even if it

'benches' the H-1B employee by placing him in nonproductive status."), *aff'd Greater Mo. Medical Pro-Care Providers v. Perez*, 2014 WL 5438293 (W.D. Mo Oct. 24, 2014), *rev'd* 812 F.3d 1132 (8th Cir. 2015).

2. The Department generally may not "investigate the veracity of the employer's attestations on the LCA prior to certification." *See, e.g., Cyberworld Enter. Techs., Inc. v. Napolitano,* 602 F.3d 189, 193 (3d Cir. 2010). Rather, the statute directs the Department to certify LCAs unless it finds that the LCA is "incomplete or obviously inaccurate." 8 U.S.C. 1182(n)(1)(G) (undesignated paragraph). Absent incompleteness or obvious inaccuracies, DOL must certify the LCA within seven days of receipt. *Id.*

Because the Department may not conduct a front-end review of an employer's LCA attestations, enforcement of program compliance generally must occur through back-end investigations. *See* Labor Condition Applications and Requirements for Employers Using Aliens on H-1B Visas in Specialty Occupations, 56 Fed. Reg. 54,720, 54,721, 1991 WL 212836 (Oct. 22, 1991) (Final Rule). The Secretary of Labor delegated to the WHD Administrator the authority to perform all H-1B investigative and enforcement functions under the INA. *See* 20 C.F.R. 655.800(a). The Administrator may investigate employers, enter and inspect the employer's premises, inspect records, and question such persons and gather such information as deemed necessary regarding matters that are part of its investigation involving the employer's compliance with the LCA obligations and attestations. *See* 20 C.F.R. 655.800(b).

3. With respect to Department efforts to enforce program requirements on the back-end, the INA specifically requires the Secretary of Labor to "establish a process for the receipt, investigation, and disposition of complaints" from "any aggrieved person or organization." 8 U.S.C. 1182(n)(2)(A). The statute does not define "aggrieved person," but the agency's

regulations define "[a]ggrieved party" in the H-1B context to include a worker whose job or wages are adversely affected by the employer's alleged LCA violations, or a bargaining representative or a competitor whose interests are adversely affected by the employer's alleged violation. *See* 20 C.F.R. 655.715. The regulations authorize any aggrieved party to file a complaint. *See* 20 C.F.R. 655.806(a).

The Administrator must conduct an aggrieved-party investigation if there is "reasonable cause" to believe a violation has occurred. 8 U.S.C. 1182(n)(2)(A). The Department's regulations authorize the Administrator to determine the scope of his investigations, providing that "[t]he Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate . . . ." 20 C.F.R. 655.800(b). The regulations further permit the Administrator to "gather such information" as he "deem[s] necessary . . . to determine compliance regarding the matters which are the subject of the investigation." *Id*.

4. The Department may not conduct an investigation on a complaint unless the complainant files the complaint within 12 months after an alleged violation ("12-month filing window"). *See* 8 U.S.C. 1182(n)(2)(A); 20 C.F.R. 655.806(a)(5). The requirement that a complainant timely file a complaint in order for the Department to conduct an investigation does not, however, "affect the scope of remedies" the Administrator may assess in a duly-authorized investigation. 20 C.F.R. 655.806(a)(5). The Administrator may accordingly assess back wages in the period prior to the 12-month filing window provided he receives a timely-filed complaint. *Id.*

5. With respect to nearly all H-1B employers, WHD may not direct an investigation of an employer's compliance with H-1B program requirements.[2] Rather, to conduct an investigation WHD typically must receive a complaint from an aggrieved party that provides reasonable cause to conduct an investigation; receive information from a credible source that provides reasonable cause to conduct an investigation; or the Secretary of Labor must personally certify that he has reasonable cause to believe an employer is not in compliance with program requirements. *See* 8 U.S.C. 1182(n)(2)(A), (G)(i-ii). The Department accordingly lacks authority to investigate nearly all H-1B employers unless it receives information that provides reasonable cause to believe an employer committed a violation.

STATEMENT OF FACTS

Volt is a staffing agency that places H-1B workers on temporary work assignments with its clients, which include Boeing and Microsoft. *See Decl. of Wage & Hour Investigator Ming Sproule* ("Sproule Decl."), ¶ 3, *attached to* the February 23, 2017 *Administrator's Mot. for Summ. Decision*. Volt employed Sergey Nefedyev as an H-1B worker. *Id*. at ¶4. On September 22, 2009, Mr. Nefedyev submitted a complaint to WHD alleging that Volt failed to pay him between the time he completed his final assignment, on June 30, 2009, and August 18, 2009, when he received a letter dated August 13, 2009 informing him of his termination. *Id.*; D&O at 1.

Volt, however, also employed numerous other H-1B workers during the period covered by WHD's investigation. *See Sproule Decl.*, ¶3. At the outset of its investigation, WHD sought payroll records for each H-1B worker that Volt employed during the period of September 23,

[2] WHD may conduct random, directed investigations of H-1B employers that the Department has previously found committed certain willful program violations. *See* 8 U.S.C. 1182(n)(2)(F).

2007 through September 22, 2009. *See* March 24, 2010 Letter from WHD Investigator Ming Sproule, Bates Stamp 000357-59 ("Appointment Letter"). WHD's review of the records Volt produced during the investigation revealed that Volt committed benching violations against scores of H-1B workers going back as far as 2001. *See Sproule Decl.*, ¶22, 29, 33, 36 & Schedule A. WHD subsequently found that Volt owed its H-1B workers $298,413.78 for those benching violations. *Id*. at ¶37.

WHD found that Volt regularly benched workers outside the 12-month window. *See, e.g., Sproule Decl.*, Schedule A. WHD only assessed back wages for benching outside the 12-month window when it also found that Volt benched the particular worker within the 12-month window. *See Sproule Decl.*, ¶¶25, 30, 34 & Schedule A. For example, the Administrator found that Volt benched Christopher Pugh multiple times within the 12-month filing window and assessed back wages for Volt's benching of Mr. Pugh on dates outside the 12-month filing window as well. *See*, Schedule A, p. viii.

COURSE OF PROCEEDINGS

The parties settled Mr. Nefedyev's claim for relief on May 2, 2016. *See* June 16, 2016 *Final Order Granting Summ. Decision* at 2. The following month an ALJ concluded that the Administrator lacked authority to investigate Volt's compliance with the INA with respect to its other H-1B workers. *Id*. at 6. The Administrator moved for reconsideration on June 27, 2016, arguing that the ALJ's decision was inconsistent with the Board's decision in *Adm'r Wage & Hour Div. v. Aleutian Capital Partners*, ARB Case No. 14-082, 2016 WL 4238464 (ARB June 1, 2016). The ALJ recognized the controlling force of the ARB's *Aleutian* ruling in a letter to the parties' counsels on June 28, 2016 and subsequently granted the Administrator's motion.

The parties proceeded to file cross-motions for summary decision. Despite the ALJ's earlier acknowledgment that the ARB's decision in *Aleutian* authorized the Administrator to investigate Volt's compliance with respect to its H-1B workers other than Mr. Nefedyev, Volt again contended that the Administrator's investigation exceeded the bounds of his authority. Following completion of the parties' summary decision briefing, the district court for the Southern District of New York upheld the ARB's outcome in the *Aleutian* matter. *See Aleutian Capital Partners, Inc. v. Hugler*, No. 16 civ. 5149, 2017 WL 4358767, at *9-11 (S.D.N.Y. Sept. 28, 2017), on appeal, No. 17-3810-cv (2d Cir.). After reviewing the parties' cross motions for summary judgment, the ALJ concluded that the district court had "modified" the ARB's *Aleutian* ruling. D&O at 4. The ALJ then opined that a Board decision that a district court upholds is not "controlling authority" when an ALJ concludes the district court modified the ARB's decision. *Id*. In lieu of applying the ARB's *Aleutian* ruling, the ALJ "rel[ied] on the Eighth Circuit's rationale in *Greater Missouri*," which the ARB expressly rejected in *Aleutian*, "as well as the district court's discussion in *Aleutian Capital Partners* concerning open-ended aggrieved party investigations." *Id*. at 6-9. Applying the reasoning of these decisions, the ALJ determined that the Administrator had exceeded his authority when he investigated Volt's compliance with respect to its H-1B workers other than Mr. Nefedyev. *Id*. at 9. He accordingly dismissed the matter. *Id*.

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, vests the Board with "all the powers which it would have in making the initial decision." 5 U.S.C. 557(b). The Board's review here is de novo. *See Adm'r v. Am. Truss,* ARB Case No. 05-032, slip op. at 3, 2007 WL 626711 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB Case No.

04-100, slip op. at 8, 2007 WL 352434 (ARB Jan. 31, 2007), for the proposition that the Board exercises de novo review in INA cases).

ARGUMENT

A. The ALJ's Decision is Inconsistent with the ARB's Reasoning in *Administrator v. Greater Missouri Medical Pro-Care Providers* and its Decision in *Administrator v. Aleutian Capital Partners, LLC*.

As noted *supra*, this case arises under the H-1B provisions of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and its implementing regulations, 20 C.F.R. Part 655, Subparts H and I. The Secretary of Labor has authorized the ARB to issue "final agency decisions" with respect to matters arising under the INA's H-1B provisions. Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, Sec'y's Order No. 02-2012, (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012), 2012 WL 5561513 ("Sec'y's Order No. 02-012"). The ARB has previously issued a final agency decision on the issue presently before the Board. The ALJ's disregard for that ruling is unjustified.

1. In *Greater Missouri*, the ARB ruled that the Administrator "has the discretionary authority to expand [an aggrieved-party] investigation to other claims or other employees not contained within the four corners of [a single employee's] original complaint" when he finds reasonable cause to investigate the claim(s) contained in the original complaint. Slip op. at 11. The U.S. Court of Appeals for the Eighth Circuit reversed this ruling, concluding that the Administrator generally must confine an aggrieved-party investigation to the allegations in the complaint. *See Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132 (8th Cir. 2015). However, the ARB later confirmed that it "continue[s] to adhere to the opinion expressed by th[e] Board in the majority decision in *Greater Missouri*" in matters that arise outside the Eighth Circuit. *Aleutian Capital Partners, LLC*, slip op. at 5 (concluding that because the matter

arose in New York, the ARB is not "bound by and thus do[es] not acquiesce in the Eighth Circuit's ruling").[3]

The underlying complaint here, which alleged that Volt improperly benched the complainant, arose within the U.S. Court of Appeals for the Ninth Circuit's jurisdiction. *See* D&O at 2, 4. After determining that there was reasonable cause to investigate complainant's benching claim, the Administrator expanded his investigation and found that Volt had improperly benched 74 workers other than complainant and owed such workers back wages totaling $298,413.78. *Id*. at 1-2; 7-8. ARB precedent, as made clear in the Board's decision in *Aleutian*, expressly permits the Administrator to expand an H-1B investigation in this manner, provided the matter arises outside of the Eighth Circuit's jurisdiction. This Board precedent is controlling with respect to ALJs. *See, e.g., Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 778 (6th Cir. 2005) (recognizing that the "ARB acts for the Secretary of Labor and is responsible for issuing final agency decisions") (citation omitted); *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) ("It is commonly recognized that ALJs 'are entirely subject to the agency on matters of law.'") (quoting Antonin Scalia, *The ALJ Fiasco-A Reprise*, 47 U.CHI.L.REV. 57, 62 (1979)); *see also* Sec'y's Order No. 02-2012 ("The Board is hereby delegated authority and assigned responsibility to act for the Secretary of Labor in review or on appeal of the matters listed below [encompassing those matters arising under the INA], including, but not limited to, the issuance of final agency decisions."); *Bechtel Constructors Corp.*, ARB Case No. 97-149,

[3] A district court affirmed the outcome in *Aleutian*. It ruled that the Administrator appropriately "tethered" his investigation to the complaint, which alleged a failure to pay the required wage to complainant, when he expanded the investigation to include whether Aleutian failed to pay required wages to other H-1B workers during a defined period of time. *See Aleutian Capital Partners, Inc.*, 2017 WL 4358767, at *9-10. Aleutian's appeal of the matter to the U.S. Court of Appeals for the Second Circuit is pending; the parties presented oral argument on February 6, 2019. *See Aleutian Capital Partners, Inc. v. Acosta*, Case No. 17-3810 (2d Cir.).

slip op. at 4, 1998 WL 168939 (ARB Mar. 25, 1998) ("This Board . . . requires that once the law of the case is established, an ALJ is not free to substitute his or her judgment for our final agency action."). Because this matter arose within the Ninth Circuit's jurisdiction, it was error for the ALJ to conclude that the ARB's reasoning in *Greater Missouri* and its decision in *Aleutian* did not control with respect to the scope of the Administrator's power to investigate based on an aggrieved-party complaint.

2. Moreover, because the ARB's reasoning in *Greater Missouri* and ruling in *Aleutian* effectuate the purposes of the H-1B program and are consistent with the Department's H-1B regulatory scheme, there is no cause to reconsider them. The statute authorizes the Secretary to "establish a process for the receipt, investigation, and disposition of [aggrieved-party] complaints." 8 U.S.C. 1182(n)(2)(A). Pursuant to this statutory delegation, the Secretary empowered the Administrator to:

> conduct . . . investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records . . . , question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of the investigation.

20 C.F.R. 655.800(b). Interpreting this regulation to permit the Administrator to expand an aggrieved-party benching complaint in a manner that results in the discovery of other benching violations against other H-1B workers advances Congress's desire to permit back-end enforcement of the H-1B program. *See, e.g., Greater Mo.*, slip op. at 11 ("Congress struck a balance . . . in the H-1B context by focusing Department of Labor resources on the back-end enforcement of the LCA process through 'aggrieved party' complaints rather than the front-end screening of an employer's attestations."); *see also Aleutian Capital Partners, Inc.*, 2017 WL 4358767, at *9 (noting that "to minimize interference with an employer's ability to hire H-1B employees and provide greater

protections under the H-1B program at the same time, Congress created a system of minimal front-end review coupled with more robust back-end investigations").

Conversely, constraining DOL's investigative authority would undermine Congress's purpose to safeguard domestic wages. The INA "requires that an employer pay an H-1B worker the [required wage] to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers." Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110, 2000 WL 1852810 (Dec. 20, 2000) (Final Rule). Restricting DOL's ability to recover back wages solely to the single H-1B worker making the complaint, rather than to all similarly situated H-1B workers who WHD learns an employer underpaid in the course of an investigation, would be contrary to the congressional purpose to preserve U.S. workers' wages.

Indeed, such a restriction would constitute an improper restraint on the Department's already limited investigative authority. The statute authorizes the Department to investigate when an aggrieved party or a credible source provides information to the Department that gives it reasonable cause to believe that a violation occurred. It also permits the Department to conduct Secretary-certified investigations when the Secretary determines there is reasonable cause to believe that a violation occurred. Thus, with respect to nearly all H-1B employers, the Administrator cannot self-initiate or direct a compliance investigation. Rather, in order to conduct an investigation, the statute requires the Administrator or Secretary to *receive information* that provides a reasonable cause to believe a violation occurred. Here, no one has disputed that the Administrator received information that provided a reasonable cause to believe

a violation occurred; indeed, Volt agreed to settle the allegation contained in the complaint. To disallow the Administrator to investigate an employer's compliance with respect to other H-1B workers when he has established reasonable cause to conduct an investigation would improperly circumscribe the Administrator's already narrow investigative authority.

B. The Department is Seeking to Enforce Benching Violations Outside the 12-Month Filing Window Solely on Behalf of Individuals Against Whom Volt Continued to Commit Benching Violations within the Filing Window.

The ARB has characterized a violation that begins prior to but continues into the 12-month filing window as a "continuing violation." *See Greater Missouri*, slip op. 15-16 (distinguishing actionable continuing violations, parts of which occurred outside the 12-month filing window, and "discrete violation[s]," which are only actionable if they occur within the filing window); *see also Gupta v. Jain Software Consulting, Inc.*, ARB Case. No. 05-008, slip op. at 5, 2007 WL 1031365 (ARB March 30, 2007). Section 655.806(a)(5) specifically permits WHD to assess "back wages for a period prior to one year before the filing of a complaint" when a complaint alleges violations within the 12-month filing window. The Department codified the obligation not to bench a worker in 20 C.F.R. 655.731(c)(7)(i), *see supra* p. 3, and when an employer violates section 655.731(c)(7)(i) by benching a worker, back wages constitute the worker's remedy. *See* 20 C.F.R. 655.810(a) ("Upon determining that an employer has failed to pay wages . . . as required by § 655.731 . . . , the Administrator shall assess and oversee the payment of back wages . . . to any H-1B nonimmigrant who has not been paid . . . as required."). Because a worker's remedy for benching is back wages and section 655.806(a)(5) permits the recovery of back wages outside the 12-month filing window when WHD receives a timely complaint, the ARB has ruled that "the express terms of [section 655.806(a)(5)] make a benching

violation a 'continuing violation' that remains actionable for the duration of the employment relationship as stipulated in the LCA." *Gupta*, slip op. at 5.

The Department's investigation revealed many benching violations outside the 12-month filing window. The Department, however, is only seeking to enforce findings of benching violations outside the 12-month filing window with respect to specific individuals when Volt also committed benching violations against those individuals within the filing window. Thus, all the benching violations that WHD is seeking to enforce outside the 12-month window continued into the 12-month window, i.e., they all constitute continuing violations.

C. Consistent with Board Precedent Set Out Above and the Department's Governing Regulation, the ARB Should Issue an Order Compelling Volt to Remedy All Continuing Violations the Administrator Seeks to Enforce.

1. The INA contains no temporal limitation on the Administrator's authority to remedy continuing violations. While section 1182(n)(2)(A) requires a *private party* to *file* a complaint within a time certain, it contains no limitation on the *Department's* power to *remedy* continuing violations discovered pursuant to a timely-filed complaint. *See Vojtisek-Lom v. Clean Air Techs., Inc.*, ARB Case No. 07-097, slip op. at 9, 2009 WL 2371236 (ARB July 30, 2009) (noting that "the INA itself . . . does *not* contain any language that limits the period for back pay recovery") (emphasis in original). In accordance with this statutory framework, a Department regulation expressly permits the Administrator to assess back wages outside the 12-month filing window, with no temporal limitation, when the Administrator receives a timely-filed complaint. *See* 20 C.F.R. 655.806(a)(5) ("This jurisdictional bar [of filing a complaint within 12 months of the latest violation] 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."); *see also Adm'r v. Gov't Training,*

LLC, ARB Case No. 16-049, slip op. at 6 n.30, 2018 WL 2927670 (ARB Feb. 23, 2018) (permitting recovery of back wages outside 12-month window because "[a]s 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"); *Greater Mo.*, slip op. at 16 ("[T]he scope of a remedy for a timely filed claim is not limited by the one-year limitation period."). The ARB has repeatedly interpreted this regulation to authorize the recovery of back wages outside the 12-month filing window when necessary to remedy continuing violations. *See Adm'r. v. Avenue Dental Care*, ARB Case No. 07-101, slip op. at 11, 2010 WL 348304 (ARB Jan. 7, 2010) (ruling that complainant is "entitled to back-pay for the entire period of his authorized employment[,]" including time outside the 12-month window, when his employer "continued to violate the Act" within the 12-month window); *Vojtisek-Lom*, slip op. at 7-9 (upholding ALJ ruling entitling complainant to back wages in the period between 2000 and 2005); *Gupta v. Jain Software Consulting, Inc.*, ARB Case. No. 05-008, slip op. at 5, 2007 WL 1031365 (ARB March 30, 2007) (ruling that the "express terms of [section 655.806(a)(5)] make a benching a 'continuing violation' that remains actionable for the duration of the employment relationship as stipulated in the LCA"); *see also Aleutian Capital Partners*, 2017 WL 4358767, at *8 (district court ruling that section 655.806(a)(5) permits the Administrator to remedy violations outside the 12-month filing window provided the Administrator investigated pursuant to a timely-filed complaint).

It is undisputed that the Administrator received a timely-filed complaint in this case. When the Administrator receives a timely-filed complaint, section 655.806(a)(5) permits the assessment of back wages (in this case for benching) in the period before the 12-month filing window. Here, the Administrator is seeking to enforce all continuing benching violations that occurred within three years prior to the filing of the complaint as is permitted pursuant to the

relevant regulation at 20 C.F.R. 655.806(a)(5).[4] Thus, the ARB should issue an order compelling Volt to remedy all the benching violations the Administrator found within three years prior to the filing of the complaint, as well as those benching violations that occurred after the filing of the complaint.[5]

Section 655.806(a)(5) authorizes the Administrator to remedy *all* the continuing benching violations he sought to enforce in the ALJ proceeding, including those that occurred more than three years prior to the complaint's filing. However, requesting the Board to order Volt to remedy those benching violations that occurred within three years prior to the complaint's filing is a permissible exercise of the Administrator's enforcement discretion. *See Gov't Training*, slip op. at 6-7 (recognizing the Administrator's discretion to designate an appropriate back wage period).[6] Indeed, the Administrator's exercise of discretion with respect to the period of enforcement here derives from a reasonable reading of the INA's H-1B provisions as a whole, the statute's purpose, and a Department of Homeland Security implementing regulation. *Cf.*

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[4] The complaint was filed on September 22, 2009. The Administrator is seeking to enforce with respect to all benching violations he found from September 23, 2006 through September 22, 2009, as well as with respect to benching violations Volt committed after the filing of the complaint. *See Sproule Decl.* 9-14 and Schedule A, pg. viii.

[5] To the extent that Volt contends that section 1182(n)(2)(A)'s 12-month filing window suggests a temporal limitation on the Department's authority to remedy continuing violations, it would effectively be asserting the Department exceeded its authority when it issued section 655.806(a)(5) of its regulations. Challenges to the legality of a regulatory provision are not properly before this body. *See* Sec'y's Order No. 02-012 ("The Board shall not have jurisdiction to pass on the validity of any portion of the [C.F.R.] that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."). Rather, the ARB should continue to "observe" section 655.806(a)(5)'s mandate permitting the assessment of back wages before the 12-month filing window. *Id*.

[6] The Administrator discovered the violations that Volt committed more than three years prior to the complaint's filing because Volt provided employee payroll records dating back further than those the Administrator had requested. *See* Appointment Letter (requesting payroll records for the 2-year period between September 23, 2007 and September 22, 2009).

Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 427 (1965) (noting that "[i]n order to determine congressional intent" when interpreting a statute of limitations for tolling purposes "we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act").

The INA requires employers to offer H-1B workers the required wage during the entire period of authorized employment. *See* 8 U.S.C. 1182(n)(1). This obligation applies not only to periods in which the H-1B worker is providing services but also to any period in which an employer benches the worker. *See* 8 U.S.C. 1182(n)(2)(C)(vii); 20 C.F.R. 655.731(c)(7)(i). The statute generally limits the period of authorized admission for an H-1B worker to six years. *See* 8 U.S.C. 1184(g)(4). However, pursuant to a Department of Homeland Security regulation, an approved petition for a specialty occupation can only be valid for up to three years and may not exceed the LCA's validity period. *See* 8 C.F.R. 214.2(h)(9)(iii)(A). Thus, an H-1B employer generally has a statutory obligation to pay an H-1B worker the required wage for the entire period of authorized employment, which typically lasts up to three years. To facilitate Congress's intent to ensure that H-1B workers receive the required wage for the entire period of authorized employment, the statute specifically authorizes the Secretary to order an employer that fails to pay the required wage "to provide for payment[s] of such amounts of back pay" as are necessary to comply with the requirements of section 1182(n)(1). 8 U.S.C. 1182(n)(2)(D). *Cf. Gov't Training*, slip op. at 6-7 (opining that the Administrator "had the discretion to order [the employer] to pay [complainant] back wages for the entirety of" the complainant's period of authorized employment).

To limit the Administrator's discretion to enforce violations to a period shorter than the period of authorized employment under a typical single LCA, i.e., up to three years, would

frustrate Congress's purpose in section 1182(n)(1)(A) to protect similarly employed U.S. workers from an adverse effect on their wages. For example, in the present case, restricting enforcement authority to the 12-month filing window would preclude the Administrator from remedying approximately $75,000 in benching violations he found from September 23, 2006 through September 22, 2008. Thus, limiting the Administrator's enforcement authority in this manner would be inconsistent with section 1182(n)(2)(D) because it would prohibit the payment to affected workers of back wages the Administrator determined were owing, and would be adverse to the interests of U.S. workers by allowing H-1B workers to be paid less. It would also, here and in other enforcement matters, undermine the Administrator's power to remedy benching violations in particular, thereby limiting the Administrator's ability to advance Congress's intent as expressed in section 1182(n)(2)(C)(vii). In sum, because a three-year remedial period here constitutes a reasonable exercise of the Administrator's enforcement discretion that effectuates congressional intent, the ARB should order Volt to remedy the benching violations that occurred within three years prior to the filing of the complaint.

CONCLUSION

For the foregoing reasons, the Acting Administrator requests that the Board reverse the ALJ's decision and issue an order compelling Volt to remedy all the benching violations the Administrator found within three years prior to the filing of the complaint, as well as those benching violations that occurred after the filing of the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, I served the foregoing Acting Administrator's Opening Brief on the following by sending a copy via first-class mail to:

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