

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. 2018-0038

ALJ CASE NO. 2017-LCA-00024

PROSECUTING PARTY,

DATE: December 9, 2020

v.

DOCTOR'S HELP, INC.,

RESPONDENT.

Appearances:

For the Prosecuting Party:

**Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., William C. Lesser,
Esq., Paul L. Frieden, Esq., Heather Maria Johnson, Esq.; U.S.
Department of Labor, Office of the Solicitor; Washington, District of
Columbia**

For the Respondent:

E. Lois Simmons; *pro se*; National Harbor, Maryland

**BEFORE: James A. Haynes and Thomas H. Burrell, *Administrative Appeals
Judges; Judges Haynes and Burrell concurring***

DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C. §§ 1101-1537 (2014), and implementing regulations, 20 C.F.R. Part 655, Subparts H and I (2020). On April 2, 2018, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) affirming the Wage and Hour Division's (WHD's) determination that Doctor's Help, Inc. (Respondent) violated the INA. Respondent petitioned the Administrative Review Board (ARB) for review. We summarily affirm.

BACKGROUND

Respondent is a business that provides medical training, staffing, and administrative services to the health care industry.¹ In December 2008, Respondent posted a job listing for an assistant manager.² Kelly Silva, a Brazilian pharmacist and chemist, applied. Respondent agreed to sponsor her and Ms. Silva paid the cost of an attorney and the processing fees for her H-1B visa application.³ Her application was approved.⁴

Prior to her start date, Respondent emailed Ms. Silva that it had lost the contract under which Ms. Silva was meant to work. Respondent said it would try to place her in a different job and suggested a part-time position because Respondent anticipated more work in 2010.⁵ Ms. Silva arrived in the U.S. in time to start work on October 1, 2009. In November, Ms. Silva requested payment for the part-time hours she had worked, but she was not paid these wages and she was not reimbursed for the cost of legal and processing fees.⁶ On December 5, 2009, she returned to Brazil.⁷ On December 7, 2009, Respondent emailed Ms. Silva that her employment was terminated and submitted a letter to the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) to confirm

¹ Transcript (Tr.) at 21-22, 112; Administrator's Exhibit (CX) 3.

² CX 3.

³ Tr. at 23-28, 39, 46-47, 49-50; CX 6-12; CX 21.

⁴ Her application was approved to work from October 1, 2009, until September 23, 2012, in a full-time position at a wage rate of \$12.30 per hour. CX 5.

⁵ Tr. at 30-32; CX 13-14; Respondent's Exhibit (RX) 7-8, 10.

⁶ CX 19.

⁷ Tr. at 47, 52-53.

the end of her employment.⁸ The letter was received by USCIS on December 15, 2009.⁹

In December 2009, Ms. Silva filed a complaint with WHD seeking back wages and reimbursement for the fees. Approximately two years later, WHD investigated the matter.¹⁰ On August 15, 2017, WHD determined Respondent failed to pay Ms. Silva the required wages and ordered payment and reimbursement for the fees. Respondent requested a hearing before an ALJ. After a hearing, the ALJ issued a D. & O. awarding back wages. The ALJ did not award pre- and post-judgment interest.

Respondents filed a petition for review with the Board on May 1, 2018. Both Respondent and the Administrator filed briefs.

JURISDICTION

This Board has jurisdiction to review the ALJ's decision and order in cases under the H-1B provisions of the Immigration and Nationality Act.¹¹

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.¹² These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.¹³ An employer seeking to hire an H-1B worker must obtain DOL certification by filing

⁸ Tr. at 106-07; RX 13.

⁹ Tr. at 84.

¹⁰ The WHD investigator who testified at the hearing stated that another investigator had been assigned to the case in 2012 and that he was assigned only in March 2017. He did not know what happened from December 2009 to 2012 or why the investigation was not finished. Tr. at 72-74.

¹¹ See 20 C.F.R. § 655.845; see also 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. 13186 (Mar. 6, 2020).

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

¹³ 8 U.S.C. § 1184(i)(1).

a Labor Condition Application (LCA).¹⁴ The LCA sets the wage levels and working conditions that the employer guarantees for the H-1B employee.¹⁵ After securing the certification, and upon approval by USCIS, the Department of State issues H-1B visas to these workers.¹⁶

After the 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.”¹⁷ 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 nonimmigrant is in “nonproductive status” (i.e., not performing work) “due to a decision by the employer (e.g., because of the lack of assigned work)”¹⁸ The employer may end its obligation to pay the H-1B worker through a “bona fide termination” of the employment relationship, and it must inform DHS of the termination.¹⁹ In certain circumstances the H-1B employer must pay for the worker’s return to his or her home country.²⁰

Respondent asserts there was a bona fide termination before Ms. Silva arrived in the United States. However, the record is clear that Respondent did not terminate Ms. Silva’s employment prior to her arrival.²¹ Further, there is no dispute that Respondent did not provide the required notice of a termination to DHS/USCIS until December 15, 2009.²² We agree with the ALJ’s finding that Respondent did not effect a bona fide termination of Ms. Silva’s employment.

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

¹⁵ *Id.*

¹⁶ 20 C.F.R. §§ 655.705(a), (b).

¹⁷ 20 C.F.R. § 655.731(c)(6)(ii).

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

¹⁹ 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii).

²⁰ *Id.*

²¹ Respondent informed Ms. Silva that the contract was cancelled. However, Respondent also discussed a part-time position and the possibility of amending her contract. RX 8. Further, although Respondent argues that it warned Ms. Silva not to come to the United States, Respondent emailed Ms. Silva, “Call me when you arrive in DC.” CX 14.

²² Tr. at 84.

Respondent next contends that Ms. Silva never worked. However, the record demonstrates that Ms. Silva worked at least some hours.²³ Moreover, Ms. Silva made herself available to work from October 1, 2009, until she returned to Brazil on December 5, 2009.²⁴ That she did not work as planned was due to a lack of assigned work, which placed her in a non-productive status. Thus, we also agree with the ALJ's finding that Ms. Silva is entitled to compensation.

Respondent also raises issues that were either not raised before the ALJ or were stipulated to at the hearing. First, Respondent contends the investigation constitutes harassment by WHD. However, because Respondent did not raise this issue before the ALJ, it is waived.²⁵ Next, Respondent argues it should not be required to reimburse a portion of the fees Ms. Silva's husband paid on her behalf. However, at the hearing, Respondent stipulated to the repayment of all legal and processing fees.²⁶

The Administrator contends that the ALJ erred by failing to award pre- and post-judgment interest in her response brief. However, the Administrator did not file a cross-petition to request a revision to the ALJ's D&O. As such, we deny her request.²⁷

CONCLUSION

²³ Specifically, Respondent's email to Ms. Silva in mid-November 2009 discussed previous hours Ms. Silva worked and confirmed her schedule. RX 12-13.

²⁴ Tr. at 30, 32-33, 47, 52-53; RX 11; CX 15-17.

²⁵ *Adm'r, Wage & Hour Div. USDOL v. Am. Truss*, ARB No. 2005-0032, ALJ No. 2004-LCA-00012 (ARB Feb. 28, 2007); ALJ Exhibit (ALJX) 4 at 1-5. However, even if Respondent did not waive this issue, the Administrator has the authority to investigate and determine whether an H-1B employer has failed to pay wages. 20 C.F.R. § 655.805(a)(2). Respondent has not presented any evidence that WHD abused its authority.

²⁶ Tr. at 11, 98-100. Even if Respondent had not agreed to this payment, an H-1B employer is prohibited by law from receiving and the employee is prohibited from paying, the filing fee for an H-1B visa. 20 C.F.R. § 655.731(c)(10)(ii). Further, payment for business expenses, including attorney fees, are required to be paid by the employer. 20 C.F.R. § 655.731(c)(9)(ii).

²⁷ *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521 (11th Cir. 1987); *Batyrbekov v. Barclays Capital (Barclays Group US Inc.)*, ARB No. 2013-0013, ALJ No. 2011-LCA-00025 (ARB July 16, 2014) ("We adhere to the principle that '[a] party who neglects to file a cross-appeal may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder.'").

For the foregoing reasons, the ALJ's Decision and order is summarily **AFFIRMED.**

SO ORDERED.

James A. Haynes, *Administrative Appeals Judge, concurring:*

I concur with the result reached and with the analysis of the facts and the law in this case. But I write separately regarding the standard of review. I conclude that the ARB should explicitly adopt de novo review for ALJ conclusions of law and substantial evidence review for findings of fact in cases where the applicable statutes or regulations fail to provide a standard of review.

The ARB has not adopted any consistent standard of review for ALJ findings of fact in H-1B and H-2B cases.²⁸ The variety of language and standards is a source of confusion and inconsistency for the appellate courts which review ARB decisions. Likewise, litigants before the ARB confront an array of possible standards which

²⁸ See, e.g., *Adm'r, Wage and Hour Div. v. Integrated Geophysics, Corp.*, ARB No. 2019-0001, ALJ No. 2017-LCA-00018, slip op. at 2 (ARB May 13, 2020) ("The Board has plenary authority to review an ALJ's legal conclusions de novo."); *Adm'r, Wage and Hour Div. v. Fernandez Farms, Inc.*, ARB No. 2016-0097, ALJ No. 2014-TAE-00008, slip op at 2 (ARB Sept. 16, 2019) ("The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo."); *Vyasabattu v. eSemantiks*, ARB No. 2010-0117, ALJ No. 2008-LCA-00022, slip op. at 5-6 (ARB Feb. 11, 2015) ("Where the statute and regulations provide no expressed standard of review, as in H-1B appeals, we choose to defer to the ALJ's fact findings if they are reasonable, and we make reasonable inferences permitted by the ALJ's findings and/or the undisputed record."); *Batyrbekov v. Barclays Capital*, ARB No. 2013-0013, ALJ No. 2011-LCA-00025, slip op. at 6 (ARB July 16, 2014) ("[W]e also follow well-accepted appellate principles that permit appellate bodies to affirm on alternate grounds."); *Adm'r v. American Truss*, ARB No. 2005-0032, ALJ No. 2004-LCA-00012, slip op. at 2 (ARB Feb. 28, 2007) ("We have jurisdiction under 20 C.F.R. § 655.845, and our review is de novo.").

complicate their briefing and advocacy. I believe it to be incorrect to assert that there is any established ARB precedent for the standard of review in H-1B or H-2B visa cases.

This array of standards of review has no basis in any substantive difference in the way ALJs perform their duties. The general process and procedure by which ALJs conduct hearings and deliberate does not differ from statute to statute. It is no different in the case before us, which involves an employer's obligations to an employee under the H-1B visa program, than it is in cases arising under the Service Contract Act²⁹ or under the whistleblower provisions of numerous other Federal statutes.³⁰ Logic suggests that where possible, the ARB should treat ALJ decisions similarly where they are the product of a similar process. The ARB's adoption of varying standards of review when considering appeals of ALJ decisions cannot be explained based on any difference in how the ALJ performs his or her work.

A substantial portion of matters which come before the ARB involve witness testimony offered at hearing. The presiding ALJ is uniquely positioned to evaluate the demeanor of witnesses offering live testimony. In addition, where documentary or other non-testimonial evidence is received into the record, the ALJ is in the best position to question the proponent of that evidence to clarify its probative value. It is certainly possible that other appellate administrative tribunals must evaluate records consisting of exclusively of non-testimonial evidence where both the initial finder of fact and the appellate reviewer are equally able to evaluate the factual record. That is not the role of the ARB.

There is authority for the standard of review suggested in this opinion. In Secretary's Order 01-2020, the Secretary of Labor "delegated authority and assigned responsibility to act for the Secretary of Labor in review or on appeal of" matters arising under more than seventy statutes and regulations. In cases arising under some of those laws, the ARB is required or has explicit authority to review

²⁹ 41 U.S.C. § 6701 et seq. (2011); *see, e.g., MLB Transp., Inc. v. Adm'r, Wage and Hour Div.*, ARB No. 2016-0078, (Feb. 13, 2020).

³⁰ *See, e.g.,* cases arising under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 (1977); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610 (1980); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1994); Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2010); or Surface Transportation Assistance Act, 49 U.S.C. § 31105(a) (2007).

findings of fact de novo.³¹ But the Board should not choose, at its discretion, to develop facts without regard to the ALJ's findings. That is the unforced error of ignoring the credibility judgments of the person best able to make those judgments. This devalues the Department's entire system of ALJ fact finding followed by an appellate review by the Secretary or the Secretary's designees.

It is also clear that, even where a solid standard of review is consistently included in ARB decisions, our predecessors and colleagues have disagreed over how to resolve questions of fact. For example, in a case arising under the Surface Transportation Assistance Act, one member explained in a concurrence why the ARB should exercise caution when attempting to resolve factual disputes:

Key is that we simply do not know whether Pattenaude's story is correct, and, as an appellate body, we should not be resolving the dispute. Indeed, we have no way of knowing based on the reading of a dry transcript, since the dispute involves the resolution of direct conflicts in testimony by witnesses at a hearing. Pattenaude's story is not implausible—indeed, if an ALJ were to believe that story, Pattenaude's testimony would be sufficient evidence for Pattenaude to prevail in this case—but we do a real disservice to the Department's entire system of adjudication by usurping the ALJ's role and resolving factual disputes of this kind. As the majority points out, perhaps the ALJ failed to consider the mismatch in access to evidence between employees and employers, and he should have. But then we should remand so that the ALJ can consider the mismatch in access to evidence, rather than decide that the ALJ believed the wrong witnesses. Determining whom to believe is the paradigmatic decision

³¹ See, e.g., *OFCCP v. Bank of America*, ARB No. 2013-0099, ALJ No. 1997-OFC-00016, slip op. at 8-9 (ARB Apr. 21, 2016) (under Executive Order 11246, Section 503 of the Rehabilitation Act (29 U.S.C. § 793), and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. § 4212))(" Because no standard of review exists in EO 11246, the implementing regulations, or Secretary's delegation of authority, we rely on the Administrative Procedure Act. Under the Administrative Procedure Act, we have previously determined that our review is de novo and that the standard of proof in administrative adjudications 'is the traditional preponderance-of-the-evidence standard.'").

on which to defer, and here, that is exactly what we should have done.³²

The Secretary's Order imposes on ARB the responsibility to decide cases promptly and fairly. To meet that obligation, the Board should adopt a uniform standard of review wherever possible. The Order grants the Board the power to adopt standards of review where none is provided within the statute or regulation governing the appeal brought before the Board. In the vast majority of its cases the ARB uses a de novo standard of review for legal conclusions but has deferred to ALJ findings of fact where they are supported by substantial evidence. This distinction between fact and law is the most honest method for the ARB to resolve the cases that come before it.

The argument in favor of consistency rests heavily on obvious practical benefits. The ARB will forward the goal of access to justice by making its own deliberative process less confusing and opaque. Litigants before ARB would certainly have a clearer idea of the standard of proof they must reach, and those parties will be better able to calculate their legal positions with a broadly understood "substantial evidence" standard than with several less widely applied standards. A consistent ARB standard of review for ALJ decisions is also a benefit to the Article III Courts which hear appeals of final Department of Labor decisions and apply their own consistent standards of review in cases before them.³³ And it is reasonable to assume that the department's goals of prompt, fully adequate agency decisions will be furthered by a simpler process.

The ARB would benefit in its deliberations by adopting a consistent standard of review allowing de novo review of legal holdings and substantial evidence review of ALJ findings of fact. The Secretary's Order grants the ARB the power to adopt such standards where the statutes in question are silent. I can see no disadvantage to consistency and urge my colleagues to adopt a single standard of review which distinguishes questions of fact and law wherever the governing statutes allow it. I

³² *Pattenaude v. Tri-Am Transp., LLC*, ARB No. 2015-0007, ALJ No. 2013-STA-00037, slip op. at 33 (ARB Jan. 12, 2017) (Desai, J., concurring).

³³ *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 557-58 ("We first consider whether the Court of Appeals applied the correct standard when reviewing the District Court's determination that the Secretary's position was not substantially justified. For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion").

can see no advantage in substituting a novel and heretofore unrecognized reading of the Administrative Procedure Act to ARB factual determinations.

Thomas H. Burrell, Administrative Appeals Judge, concurring:

I join the majority opinion above affirming the ALJ’s decision. With respect to my colleague’s opinion, I would state our JURISDICTION AND STANDARD OF REVIEW as the following (which follows the framework established by the Administrative Procedure Act, 5 U.S.C. 557(b) and long-standing ARB precedent):

This Board has jurisdiction to review the ALJ’s decision and order in cases arising under the H-1B provisions of the INA.³⁴ The APA provides, at 5 U.S.C. § 557(b), that “[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision” Thus, the Board is permitted to review the ALJ’s findings of fact and legal conclusions *de novo*,³⁵ although on the record that was before the ALJ.³⁶

Title 5 U.S.C. 557(b) provides the following (which I will refer to as the “APA Default):”

(b) . . .When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have

³⁴ See 20 C.F.R. § 655.845; *see also* 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. 13186 (Mar. 6, 2020).

³⁵ 5 U.S.C. §§ 554, 557; *see also* *Adm’r, Wage & Hour Div., U.S. Dep’t of Labor v. ZL Rest. Corp.*, ARB No. 2016-0070, ALJ No. 2013-FLS-00004, slip op. at 4 (ARB Jan. 31, 2018).

³⁶ See 29 C.F.R. § 580.15; *see also* *ZL Rest. Corp.*, ARB No. 2016-0070, slip op. at 4.

in making the initial decision except as it may limit the issues on notice or by rule. . . .³⁷

Although the Department of Labor has modified the applicable regulations implementing INA’s H-1B program numerous times over the years, the Department has not adopted regulations limiting the agency’s standard of review in H-1B cases.³⁸

To the contrary, the Department *has* adopted regulations limiting the agency’s review to “substantial evidence” in its whistleblower regulations.³⁹ In my opinion, the ARB, as a delegatee of the Secretary, does not have the authority to self-impose a rule limiting agency review where the implementing regulations are silent on the issue. I would leave that policy decision with the Department’s regulatory authorities. As a result, I would continue to rely upon the APA Default in our JURISDICTION AND STANDARD OF REVIEW as we have done in the past for cases under numerous statutes.

Plenary authority for agency review identified in the APA Default does not mandate exercise of that authority for every case. If, in a particular case arising under a statute without a promulgated regulation limiting agency review, the ARB decides to defer to and affirm an ALJ’s findings of facts because the findings are reasonable or amply supported by the record, it is within the discretion of the ARB to do so⁴⁰—as we have done in numerous cases, for example, cases involving an ALJ’s demeanor-based credibility findings.

³⁷ 5 U.S.C. § 557(b).

³⁸ 20 C.F.R. § 655.845. This is true of a majority of statutes under the ARB’s jurisdiction. Secretary’s Order No. 01-2020, para. 5.

³⁹ *See, e.g.*, 29 C.F.R. § 1979.110 (AIR 21) (“The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.”); 29 C.F.R. § 1980.110 (SOX); 29 C.F.R. § 1981.110 (Pipeline Safety Act).

⁴⁰ *Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 544 F.3d 509 (3d Cir. 2008); *Janka v. Dept. of Transp., Nat’l Transp. Safety Bd.*, 925 F.2d 1147 (9th Cir. 1991); *Chen v. Gen. Accounting Off.*, 821 F.2d 732 (D.C. Cir. 1987).