



In the Matter of

MAJID VARESS,

ARB CASE NO. 2020-0017

PROSECUTING PARTY,

ALJ CASE NO. 2016-LCA-00019

DATE: July 14, 2020

v.

PERSIAN BROADCAST SERVICE
GLOBAL, INC.,

RESPONDENT.

Appearances:

For the Complainant and Prosecuting Party:

Jonathan D. Wasden, Esq.; *Wasden Banias, LLC*; Mount Pleasant,
South Carolina

For the Respondent:

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

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*;
James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the E-3 visa program provisions of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. § 1101(a)(15)(E)(iii) (2014), and implementing regulations at 20 C.F.R. Part 655, subparts H and I (2018). The Respondent Persian Broadcast Service Global Inc. requests that the Administrative Review Board (Board) reverse the Administrative Law Judge's (ALJ) Amended Decision and Order After Remand (October 30, 2019). The ALJ

found in favor of Complainant. Respondent appealed to the Board. We summarily affirm.

PROCEDURAL HISTORY

Complainant filed a complaint against Respondent with the Administrator, Wage and Hour Division, for unpaid wages on February 5, 2015. *Id.* at 3; see RX 2. The Administrator determined that the Respondent had not committed any violations. Complainant filed objections with the Office of Administrative Law Judges requesting a hearing. After an ALJ found for Respondent, Complainant appealed the ALJ's decision to the Board, and we reversed and remanded because none of the exceptions to the Respondent's obligations to pay wages under the LCAs applied. In the decision (ARB Decision), we directed the ALJ on remand to make a determination regarding the timeliness of the complaint.

On remand, the ALJ found for Complainant and ordered Respondent to pay Complainant back wages. The ALJ also held that Complainant's complaint was timely filed as Respondent's obligation to pay Complainant wages continued until the end of the second LCA period, which ran from September 12, 2013, to September 12, 2015. D. & O. at 2-3. Respondent again appealed to the Board arguing that the complaint was untimely, and in the event it is found timely, that it is not obligated to pay Complainant for periods of time it argues were nonproductive time due to Complainant's voluntary acts.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in cases under the E-3 provisions of the Immigration and Nationality Act. *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. 13,186 (Mar. 6, 2020). The Board has plenary authority to review an ALJ's legal conclusions de novo. *Limanseto v. Ganze & Co.*, ARB No. 2011-0068, ALJ No. 2011-LCA-00005, slip op. at 3 (ARB June 6, 2013).

DISCUSSION

An employer is required to pay its E-3 nonimmigrant employees the required wage, including for so-called "nonproductive time," for the entire duration of the LCA period, unless the employer can show that one of the two exceptions to the

benching provision applies. 20 C.F.R. § 655.731(b)(7)(ii).¹ Respondent failed to pay Complainant the required wage for certain periods during the duration of his two LCAs and neither of the two exceptions applies. ARB Decision at 5-6.

On appeal, Respondent does not argue that it paid Complainant the required wages under the LCAs it completed for him or that it effected a bona fide termination of his employment. Instead, Respondent's first argument is that Complainant's February 5, 2015 complaint was untimely filed. Regulation § 655.806(a)(5) provides that a complainant must file a complaint alleging a violation of the nonimmigrant worker regulations "not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the *employer* allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA." 20 C.F.R. § 655.806(a)(5) (emphasis added). As the ALJ explained, Respondent was liable to pay wages for the duration of the second LCA (September 12, 2013, to September 12, 2015) and the reasons Respondent provides for why the second LCA was invalid do not relieve it of its obligations.² See ARB Decision at 5. It seems that any nonpayment of wages during the second LCA period would start the clock as a failure to perform an action. Alternatively, the evidence shows that on July 11, 2014, Respondent paid Complainant wages and notified Complainant that it would no longer pay him. ARB Decision at 2-3. Considering this notification, notice of an adverse action, the limitations period would have started running on July 11, 2014. Thus, Complainant February 5, 2015 is timely under either alternative.

Respondent's second argument is that the regulatory exception to its requirement to pay the required wages applies because Complainant voluntarily put himself in nonproductive status. Respondent has the burden to prove nonproductive time that relieves it of the obligation to pay wages. *Gupta v. Compunnel Software Group, Inc.*, ARB No. 2012-0049, ALJ No. 2011-LC-00045, slip op. at 16 (ARB May 29, 2014). As explained in the Board's prior order, Respondent failed to show that

¹ The two exceptions specified in this regulation are (1) when there has been a bona fide termination or (2) when "conditions unrelated to employment ... take the nonimmigrant away from his/her duties at his/her voluntary request 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)."

² The arguments Respondent makes for why its obligation to pay ended at an earlier date (making Complainant's complaint untimely) were rejected in our prior order (for example, that Respondent's obligation ended when Complainant left the country on November 16, 2013).

Complainant put himself in nonproductive status to relieve it of its obligation to pay wages. ARB Decision at 6.

The ALJ addressed all of Respondent's arguments and we affirm the ALJ's findings that Respondent failed to pay Complainant the required wage under both LCAs for the reasons he explained. We also affirm the ALJ's finding that the complaint was timely filed. The ALJ found Respondent liable for \$183,794 in back wages. Respondent does not challenge this computation on appeal other than his previously rejected arguments discussed above. Accordingly, we find that the amount of back wages that the ALJ ordered with respect to the LCAs was proper and is affirmed. 20 C.F.R. §§ 655.810(a), 655.700(c)-(d).

CONCLUSION

In sum, Respondent failed to pay Complainant, an E-3 nonimmigrant employee, the required wage for two LCA periods. Respondent thus owes Complainant \$183,794.00 in back pay plus pre and post-judgment interest.

SO ORDERED.