

U.S. Department of Labor

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



In the Matter of:

VIMALRAJ MANOHARAN,

ARB CASE NO. 2021-0060

PROSECUTING PARTY,

**ALJ CASE NOS. 2018-LCA-00029
2021-LCA-00009**

v.

DATE: April 14, 2022

HCL AMERICA, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Vimalraj Manoharan; *pro se*; Tamilnadu, India

For the Respondent:

R. Blake Chisam, Esq., K. Edward Raleigh, Esq., and Samantha A. Caesar, Esq.; *Fragomen, Del Rey, Bernsen & Loewy, LLP*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the H-1B visa program of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014) and 8 U.S.C. § 1182(n) (2013), and its implementing regulations at 20 C.F.R. Part 655, subparts H and I (2020). Vimalraj Manoharan (Complainant) filed a complaint against his former employer, HCL America, Inc. (Respondent), with the Wage and Hour Division of the U.S. Department of Labor (WHD), alleging that Respondent failed to pay him required wages and terminated his employment in retaliation for protected conduct. After an investigation, the WHD determined that

Respondent had failed to pay Complainant all of his required wages and awarded Complainant back wages. The WHD later found that the retaliation claim was not substantiated. Complainant filed objections to the WHD's findings and requested a hearing with an Administrative Law Judge (ALJ).

Respondent filed a motion for summary decision on the back wages claim. The ALJ granted summary decision, holding that Respondent did not owe Complainant further wages. Complainant thereafter submitted a motion to recuse the ALJ from the proceedings, which the ALJ denied. Complainant again moved for recusal of the ALJ a few months later, which the ALJ denied. Respondent moved to dismiss the retaliation claim for lack of prosecution, which the ALJ granted. Complainant appealed the ALJ's decisions to the Administrative Review Board (Board). We affirm.

BACKGROUND

Complainant, an Indian national, worked for Respondent as an H-1B nonimmigrant. The first approved Labor Condition Application (LCA) and H-1B petition (Petition) for Complainant's employment in Sunnyvale, California, both specified an end date of February 20, 2018.¹ On July 16, 2015, Complainant entered the United States and arrived at work the following day.² Upon entering the U.S., the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) issued Complainant an I-94 form that authorized him to stay in the country until March 1, 2017.³ On October 7, 2015, Respondent filed a new LCA for a position in Galesberg, Michigan, ending on September 29, 2018.⁴ After the Department of Labor (DOL) approved the LCA, Respondent filed an amended Petition for Complainant. On April 11, 2016, USCIS approved the second Petition with an end date of March 1, 2017.⁵

Complainant traveled to India in April 2016.⁶ Upon his return to the U.S. on April 29, 2016, the Customs and Border Patrol (CBP) issued a new I-94 authorizing him to stay until February 20, 2018.⁷ On December 3, 2015, Respondent filed another LCA to employ ten H-1B workers in Seattle, Washington, until November

¹ Decision and Order Granting in Part Respondent's Motions for Summary Decision (D. & O.) at 3; Respondent's Exhibit (RX) B, D.

² D. & O. at 3.

³ RX G.

⁴ RX E.

⁵ RX H.

⁶ RX F.

⁷ *Id.*

2, 2018, which the DOL approved.⁸ On June 12, 2016, Respondent filed a Petition to employ Complainant under the third LCA with an end date of November 2, 2018.⁹ USCIS never approved the third petition.

On January 21, 2017, Respondent notified Complainant that his last day of work would be February 3, 2017, which it later extended to February 10.¹⁰ On February 16, 2017, Respondent requested the Department of Homeland Security (DHS) to cancel Complainant's H-1B work permits, which DHS confirmed on March 6.¹¹ On May 9, 2017, Complainant left the U.S.¹²

On February 22, 2017, Complainant filed a complaint with the WHD, alleging that Respondent had committed several violations of the H-1B provisions of the INA, including failure to pay him the required wage rate and retaliation for protected activity. On August 2, 2018, the Administrator of the WHD (Administrator) issued a determination letter finding that Respondent had violated the INA by failing to pay Complainant all of his required wages.¹³ The WHD found Respondent had failed to pay Manoharan the required wage rate from February 1, 2017, to March 1, 2017.¹⁴ However, the WHD did not award damages because Respondent had since paid the wages it owed to Complainant.¹⁵ The WHD later found that the retaliation claim was not substantiated.¹⁶

Complainant requested a hearing with an ALJ, arguing that the back wage assessment was too low because the WHD incorrectly determined the start and end dates of his employment and contesting the WHD's finding that the retaliation claim was not substantiated.¹⁷ On March 4, 2021, Respondent moved to dismiss the

⁸ RX J.

⁹ *Id.*

¹⁰ D. & O. at 10.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 2; RX Q.

¹⁴ RX N, O.

¹⁵ D. & O. at 2. Respondent had owed \$8,999.45. *Id.*; RX Q.

¹⁶ D. & O. at 4; RX S. The Administrator initially failed to issue findings on the retaliation claim in the determination letter, and the Board later ordered her to provide her findings. *Manoharan v. HCL Am., Inc.*, ARB No. 2019-0067, ALJ No. 2018-LCA-00029 (ARB Dec. 7, 2020). On February 25, 2021, the ALJ consolidated the retaliation claim with the back wages claim.

¹⁷ The ALJ had dismissed the back wages claim on October 2, 2019, because the WHD declined to prosecute it. The Board reversed and remanded the decision and held that

retaliation claim, contending that the ALJ lacked jurisdiction over the claim, that Complainant failed to allege that he had engaged in protected conduct, and that the claim was time-barred. On March 17, 2021, Respondent moved for summary decision on the back wages claim, arguing that it did not owe further back wages because the WHD's assessment used the correct start and end dates of Complainant's employment.¹⁸

On March 31, 2021, the ALJ issued a Decision and Order granting Respondent's motions in part.¹⁹ The ALJ concluded that the WHD had correctly determined the beginning and end dates of Respondent's wage obligation to Complainant. However, the ALJ concluded that she had jurisdiction to review the retaliation claim and declined to dismiss the claim because there were genuine issues of material fact regarding whether the claim was time-barred or if Complainant had engaged in protected activity.²⁰

For the back wages claim, the ALJ first determined when Complainant had "entered into employment" for Respondent. Complainant contended that he had started his employment on February 9, 2015, the day he signed his employment offer letter.²¹ The ALJ highlighted several exhibits from 2015 that contradict Complainant's assertion, including: (1) a February 9 letter stating that the offer was contingent on passing a background check and holding a valid visa permit; (2) a February 9 email informing Complainant the first step toward joining Respondent was filling out a joining form; (3) a February 20 email advising Complainant the visa process could take around three weeks; (4) a March 24 email notifying Complainant that his visa transfer was approved; (5) an email on April 7 stating that Respondent was still waiting on the approval documents; (6) paystubs showing Complainant was still working for his previous employer until at least April 8; (7) a May 4 email from Complainant stating he had not "even joined HCL yet"; and (8) a June 2 email stating that Complainant would be joining Respondent "very soon."²²

Complainant could act as prosecuting party for his claim. *Manoharan v. HCL Am., Inc.*, ARB No. 2020-0007, ALJ No. 2018-LCA-00029 (ARB Dec. 21, 2020).

¹⁸ On March 8, 2021, the ALJ denied a motion for summary decision filed by Respondent on February 18, 2021, as moot because the parties consolidated the back wages and retaliation cases on February 25, 2021. D. & O. at 2.

¹⁹ The decision's title was "Decision and Order Granting in Part Respondent's Motions for Summary Decision and Affirming the Determination of the Administrator." The ALJ reissued the decision on April 1, 2021, with a Notice of Appeal Rights. The ALJ also ruled on two issues in the decision that are not pertinent to this appeal.

²⁰ D. & O. at 11-12. The ALJ treated the motion to dismiss as a motion for summary decision because the arguments included exhibits. *Id.* at 2 (citing *Hoffenberg v. Hoffman & Pollock*, 288 F. Supp. 2d 527, 534 (S.D.N.Y. 2003)).

²¹ *Id.* at 5.

²² *Id.* at 8-9.

The ALJ noted a July 10, 2015 email from Respondent stating that Complainant had “joined HCL 3 months back.”²³ However, the ALJ discounted it as inconsistent with the rest of the evidence and insufficient to support a February 9 start date.²⁴ The ALJ thus concluded there was no genuine issue of fact that Complainant had entered into employment on July 17, 2015, the first day he reported for work.²⁵

The ALJ then considered the end date of Complainant’s period of authorized employment. Respondent argued that the wage obligation ended on March 1, 2017, the end date on Complainant’s most recently approved Petition.²⁶ Complainant argued that the date on his I-94 form, February 20, 2018, should be the end date.²⁷ The ALJ determined that no authority supported Complainant’s argument and agreed with the end date of March 1, 2017.²⁸ Accordingly, the ALJ determined that Respondent owed no further wages and granted summary decision on the claim.

On April 1, 2021, Complainant submitted a Motion to Recuse the ALJ from the proceedings, arguing that the ALJ demonstrated bias and partiality toward Respondent.²⁹ On the same day, the parties attended a scheduled formal hearing, in which Complainant expressed an intention to appeal the summary decision.³⁰ On April 6, 2021, the ALJ denied Complainant’s motion, noting that Complainant made no claims of personal bias against the ALJ, and ordered a stay of the proceedings pending an appeal.³¹

On July 6, 2021, the ALJ issued an Order Requesting Hearing Dates, rescinding the order to stay, and ordering the parties to provide three dates and times for a hearing.³² After the parties had failed to agree on a date, the ALJ chose

²³ *Id.* at 9.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 3. Respondent did not argue that it had performed a bona fide termination of Complainant’s employment. *Id.*

²⁷ *Id.* at 3, 10.

²⁸ *Id.* at 10-11.

²⁹ Order of Dismissal (OD) at 1.

³⁰ *Id.* at 2. On April 21, 2021, Complainant petitioned the Board to review the ALJ’s grant of summary decision on the wage claim and denial of the first recusal motion. The Board dismissed the appeal because it was interlocutory. *Manoharan v. HCL Am., Inc.*, ARB No. 2021-0031, ALJ Nos. 2018-LCA-00029, 2021-LCA-00009 (ARB June 30, 2021).

³¹ April 6, 2021, Order Denying Motion to Recuse at 1-3; OD at 2.

³² OD at 2.

July 27, 2021, a date offered by Respondent, and ordered the parties to refile exhibits and witness lists by July 26.³³ Complainant did not refile his exhibits and witness list.³⁴ On July 23, Complainant again moved to recuse the ALJ, alleging bias and partiality.³⁵ The ALJ denied the motion on July 26, holding that Complainant failed to substantiate his claims of personal bias and that further allegations of bias stemmed from Complainant's general disagreements with the ALJ's orders.³⁶

On July 26, 2021, at 11:07 PM, Complainant filed a Motion to Continue, stating that he was unavailable to attend the July 27 hearing "due to other commitments."³⁷ The ALJ cancelled the hearing and scheduled a status conference with the parties on August 2, 2021.³⁸ At the conference, Complainant explained that he had filed the Motion to Continue because 7:00 p.m. is not during "business hours" and he could not stop visitors from coming to his house.³⁹ Complainant further explained that he did not refile his exhibits as ordered because it was not necessary and that the hearing was "meaningless" unless the ALJ also considered the back wages claim.⁴⁰ On August 3, 2021, Respondent moved to dismiss the retaliation claim for lack of prosecution, citing Complainant's failure to provide good cause for delaying the hearing and failure to comply with the ALJ's orders to submit witness lists and exhibits.⁴¹

On August 16, 2021, the ALJ issued an Order of Dismissal, concluding that Complainant's conduct warranted dismissal of the retaliation claim and that any lesser sanction would not alter his conduct. The ALJ noted that the Office of Administrative Law Judges (OALJ) Rules of Practice and Procedure permitted ALJs to manage their dockets to enhance the "orderly and expeditious disposition of cases" and terminate proceedings for a party's failure to comply with orders. As grounds for the dismissal, the ALJ cited Complainant's failure to comply with her orders to resubmit exhibits, his belief that a hearing would be meaningless, the filing of motions right before the hearing, his failure to justify his inability to attend the scheduled hearing, the prejudice suffered by Respondent from the late filings,

³³ *Id.* The ALJ had also ordered the parties to resubmit exhibits relevant to the retaliation claim in the order granting summary decision. *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ July 26, 2021, Order Denying Motion to Recuse at 1-3.

³⁷ OD at 2.

³⁸ *Id.*

³⁹ *Id.* at 3.

⁴⁰ *Id.*

⁴¹ *Id.*

and his failure to appear at the status meeting on time.⁴² The ALJ concluded that lesser sanctions would not alter Complainant's conduct because he continued to protest her prior orders and used such disagreements to defend his failures to participate in an orderly manner.⁴³

The ALJ also concluded in the alternative that Complainant's conduct warranted his removal from the proceedings under the OALJ rules that permit an ALJ to exclude a person for contumacious conduct such as refusal to comply with directions, continued use of dilatory tactics, and refusal to adhere to reasonable standards of orderly or ethical conduct.⁴⁴ Complainant, acting pro se, would be unable to prove his retaliation claim if removed from the proceedings.⁴⁵ Accordingly, the ALJ dismissed the retaliation complaint.

Complainant filed a timely Petition for Review of the ALJ's grant of summary decision, denials of the recusal motions, and dismissal of the retaliation claim with the Board. On December 16, 2021, the Board issued an Order Directing Supplemental Briefing, requesting the Administrator to file a brief explaining her position that Complainant's period of authorized employment ended on March 1, 2017, the end date on his Petition. The Board further asked whether the circumstances of the case, including Respondent notifying Complainant and DHS that the employment relationship ended, the expiration of the Petition on March 1, 2017, and Complainant leaving the country, constructively ended Respondent's wage obligation, even if the LCA sets the period of authorized employment. The Board provided Complainant and Respondent an opportunity to respond to the supplemental brief. The parties all filed timely briefs in response to the order.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's decision.⁴⁶ Under the Administrative Procedure Act, the Board, "as the Secretary of Labor's designee, acts with 'all the powers [the Secretary] would have in making the initial decision.'"⁴⁷ The Board reviews orders granting summary decision de novo and will affirm "if, upon review of the evidence in the light most favorable to the nonmoving party . . .

⁴² *Id.* at 5-6.

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 6-8.

⁴⁵ *Id.* at 8.

⁴⁶ 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).

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

there is no genuine issue as to any material fact” and “the ALJ correctly applied the relevant law.”⁴⁸

DISCUSSION

Complainant presents several issues on appeal. First, Complainant argues that the ALJ erred in concluding that the Administrator correctly determined the start and end dates of Respondent’s wage obligation to him. Second, Complainant contests the ALJ’s decision to dismiss the retaliation claim. Third, Complainant argues that the ALJ should have granted his motions to recuse. We address each argument.

1. Regulatory Background⁴⁹

The INA’s H-1B provisions permit employers in the United States to hire foreign nationals in certain “specialty occupation[s]” defined by the INA and its implementing regulations (H-1B workers).⁵⁰ “Four federal agencies (Department of Labor, Department of State, Department of Justice, and Department of Homeland Security) are involved in the process relating to H-1B nonimmigrant classification and employment.”⁵¹

The H-1B hiring process involves three procedural phases. The first requires the H-1B employer to file a completed LCA with DOL for certification.⁵² In the LCA, the employer stipulates wage levels and working conditions for the H-1B worker for the period of his or her authorized employment.⁵³ The LCA must provide the start and end dates of the employment and the number of nonimmigrants sought.⁵⁴ Second, if DOL certifies the LCA, the employer must file an I-129 Petition with USCIS, requesting permission to employ the H-1B worker and allowing the H-1B beneficiary to apply for an H-1B visa.⁵⁵ Third, if USCIS approves the H-1B petition,

⁴⁸ *Watson v. Elec. Data Sys. Corp.*, ARB Nos. 2004-0023, -0029, -0050, -0099, ALJ Nos. 2003-LCA-00030, 2004-LCA-00009, -00023, slip op. at 3-4 (ARB May 31, 2005). A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁴⁹ This analysis applies only to the H-1B program and not to similar programs like H-1B1 and E-3.

⁵⁰ 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(h)(i)(1).

⁵¹ 20 C.F.R. § 655.705.

⁵² 8 U.S.C. § 1182(n); 20 C.F.R. §§ 655.700 to 655.760 (Subpart H).

⁵³ 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732 (2013).

⁵⁴ 20 C.F.R. § 655.730(c)(4).

⁵⁵ 20 C.F.R. § 655.705(a), (b).

it issues a Form I-797, Notice of Action, specifying the dates the nonimmigrant may work for the employer. USCIS then shares the approval with the U.S. Consulate where the nonimmigrant intends to apply for an H-1B visa, which authorizes the worker to apply for admission to the U.S. during a designated period.⁵⁶ The H-1B beneficiary must apply to the U.S. State Department for an H-1B visa. When the nonimmigrant arrives at a port of entry in the U.S. with a valid H-1B visa, CBP authorizes the worker to stay in the country for a length of time, which is recorded on a Form I-94.⁵⁷

Once the Petition is granted, the petitioning employer assumes various legal obligations after the H-1B beneficiary enters the country or becomes “eligible to work for the employer.”⁵⁸ An H-1B employer must pay the H-1B nonimmigrant the required wage rate for the position for the entire “period of authorized employment.”⁵⁹ The required wage is the greater of either the prevailing wage rate for the occupational classification in the geographic area of the H-1B employee’s position or the actual wage rate paid by the employer to all other workers with similar experience and qualifications for the position.⁶⁰ The “period of authorized employment” is defined by the validity dates provided in the I-797 form approving the H-1B nonimmigrant’s Petition.⁶¹

The H-1B employer must provide an H-1B nonimmigrant worker “the required pay beginning on the date when the nonimmigrant ‘enters into employment’ with the employer.”⁶² An H-1B nonimmigrant “enters into employment” when “he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.”⁶³

An employer is not required to pay the H-1B nonimmigrant during the period of authorized employment in two circumstances. First, the employer does not need

⁵⁶ 20 C.F.R. § 655.705(b); 22 C.F.R. § 41.112(a).

⁵⁷ This period may differ from the timeline provided in the H-1B visa. See 22 C.F.R. § 41.112(a).

⁵⁸ 20 C.F.R. § 655.731(c)(6)(ii).

⁵⁹ 20 C.F.R. § 655.731(a).

⁶⁰ 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a).

⁶¹ The period of authorized employment is modified by pending Petitions under certain conditions, as discussed *infra*.

⁶² 20 C.F.R. § 655.731(c)(6).

⁶³ 20 C.F.R. § 655.731(c)(6)(i).

to pay the required wage during nonproductive time due to conditions unrelated to employment that take the nonimmigrant away from their duties at their voluntary request and convenience or render them unable to work.⁶⁴ However, the H-1B petitioner must pay the required wage 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 lack of assigned work).”⁶⁵ Second, the employer may end its obligation to pay the H-1B nonimmigrant through a “bona fide termination” of the employment relationship, and it must inform DHS of such termination.⁶⁶ Under Board precedent, a bona fide termination occurs when the employer: (1) notifies the H-1B nonimmigrant of the end of their employment relationship, (2) notifies DHS that the employment relationship has ended, and (3) provides the employee with payment for transportation home.⁶⁷ The H-1B petitioner must pay for the H-1B worker’s return to his or her home country in certain circumstances.⁶⁸ If an employer fails to pay the required wage rate, the Administrator shall assess back wages equal to the difference between the wages paid and the wages that should have been paid.⁶⁹

2. The Back Wages Claim and Period of Authorized Employment

Complainant argues that the ALJ had incorrectly determined the start and end date of Respondent’s wage obligation in granting the motion for summary decision and that Respondent owed him further back wages.

A. Complainant’s Start Date

Complainant argues that the evidence raised a genuine issue of material fact as to whether he had started his employment on July 17, 2015, and contends the wage obligation began on February 9, 2015, the day he signed his employment offer. Complainant describes a litany of exhibits that he claims the ALJ ignored, failed to

⁶⁴ 20 C.F.R. § 655.731(c)(7)(ii). Examples of nonproductive time due to conditions unrelated to employment include “touring the U.S., caring for ill relative,” “maternity leave, automobile accident which temporarily incapacitates the nonimmigrant,” etc. *Id.*

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

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

⁶⁷ *Puri v. Univ. of Alabama Birmingham Huntsville*, ARB No. 2013-0022, ALJ Nos. 2008-LCA-00038, -00043, 2012-LCA-00010, slip op. at 8 (ARB Sept. 17, 2014) (identifying exceptions to three-part test); *see also Vinayagam v. Cronous Sols., Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029, slip op. at 8 (ARB Feb. 14, 2017) (holding that the employer’s wage obligation ended with its notice to DHS because the H-1B nonimmigrant voluntarily chose to remain in the U.S. after her discharge).

⁶⁸ 8 C.F.R. § 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(c)(7)(ii).

⁶⁹ 20 C.F.R. § 655.810(a).

address adequately, or demonstrate that he entered into employment prior to July 17, 2015. Most pieces of evidence highlighted by Complainant are not probative or relevant. A few pieces of evidence, however, are relevant and warrant consideration.

Complainant notes a July 10, 2015 email from an employee for Respondent stating Complainant had “joined HCL 3 months back.” Second, Complainant cites two emails sent on April 15 and 22, 2015, from Respondent requiring him to attend an induction meeting, which Complainant claims would qualify as “reporting for orientation or training.” The ALJ acknowledged the July 10 email and dismissed it as inconsistent with the rest of the record.

Respondent presents several pieces of evidence that indicate Complainant began working for Respondent no earlier than July 17, 2015, including an email from May 4, 2015, in which Complainant told employees he had not “even joined HCL yet,” and a June 2, 2015 email from his eventual supervisor that stated Complainant “will be joining HCLA America very soon.” Respondent notes that it sent the induction meeting emails to everyone who had joined the company recently, even if they had already attended a meeting, and that the emails were not personalized. Complainant presents no evidence that he attended one of the meetings. Most importantly, Complainant did not enter the U.S. until July 16, 2015, and reported for work the following day.

Complainant attempts to qualify his trip to India in early June 2015 for visa stamping before entering the U.S. as “going to an interview.”⁷⁰ However, participating in the visa application process does not make a nonimmigrant “available for work” or “under control of the employer,” since they are unable to work for their employer prior to obtaining the visa and entering the country.⁷¹ Complainant also argues that a June 2, 2015 email, in which his future manager informs another manager for Respondent that he could speak with Complainant to “see if his profile suits” him, showed he had entered into employment. However, the manager states in the same email that Complainant “will be joining” Respondent “very soon,” indicating that the purpose of a discussion was for the manager to see if Complainant could work with him when Complainant begins his employment.

⁷⁰ We note that our review of the record indicates that Complainant failed to argue to the ALJ that his June 2015 trip to India for visa stamping constituted “going to an interview.” See *Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 2007-0100, ALJ No. 2007-SOX-00013, slip op. at 11 (ARB May 27, 2010) (“[S]ince [the complainant] had the opportunity to . . . argue his contention to the ALJ before the ALJ issued his decision but did not, he has waived this argument on appeal.”).

⁷¹ Complainant also argues that the interview at the consulate in India, which Respondent mandated, was work because Respondent had the option to port his H-1B work authorization from his previous job to the job for Respondent. However, Respondent notes that it was unable to port Complainant’s prior H-1B authorization because Complainant failed to produce records that he had been authorized to work in the US. See RX C.

The record shows no genuine issue that Complainant did not start working for Respondent before July 17, 2015. Complainant presents limited evidence that, viewed in a light most favorable to him, could convince a reasonable factfinder to find otherwise.⁷² We therefore conclude that the ALJ correctly concluded that Complainant entered into employment on July 17, 2015.

B. Complainant's End Date

Employers are required to pay H-1B nonimmigrant workers the required wage rate “for the entire period of authorized employment.”⁷³ If an employer discharges the employee but does not make a bona fide termination of the employment relationship, “its obligation to pay [the employee] the ‘actual wage’ continue[s] until the expiration of [the employee’s] authorized period of employment.”⁷⁴

Complainant contests the ALJ’s conclusion that the Administrator correctly concluded that his period of authorized employment ended on March 1, 2017, the end date of Complainant’s most recently approved Petition. Complainant argues that Respondent’s wage obligation continued until the end date specified in his first LCA or second I-94, February 20, 2018.

As noted above, the employer first submits an LCA for DOL to certify, which includes start and end dates and the number of nonimmigrants sought.⁷⁵ Second, the employer must submit an I-129 Petition for an H-1B nonimmigrant to USCIS with the certified LCA attached.⁷⁶ If USCIS approves the petition, it issues a Form I-797 specifying the dates the nonimmigrant may work for the employer. The employee may then apply for an H-1B visa at the U.S. Consulate. When the nonimmigrant arrives at a port of entry in the U.S. with a valid H-1B visa, CBP authorizes the worker to stay in the country for a length of time, which is recorded on a Form I-94.

⁷² *Horne v. United Parcel Serv., Inc.*, ARB No. 2008-0007, ALJ No. 2007-STA-00039, slip op. at 8 n.44 (ARB May 29, 2009) (quoting *Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008)) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).

⁷³ 20 C.F.R. § 655.731(a).

⁷⁴ *Mao v. Nasser Eng’g & Computing Servs.*, ARB No. 2006-0121, ALJ No. 2005-LCA-00036, slip op. at 10 (ARB Nov. 26, 2008) (citing 20 C.F.R. § 655.731(c)(7)(ii)).

⁷⁵ 20 C.F.R. § 655.730(c)(1), (c)(4).

⁷⁶ 20 C.F.R. § 655.705(b).

In her supplemental brief, the Administrator clarifies that the approved Petition defines the scope of the period of authorized employment and cites pertinent statutory and regulatory language in support. The Administrator notes that the INA provides that the “question of importing any alien as a nonimmigrant” under nonimmigrant work programs, including the H-1B, “shall be determined by [DHS], after consultation with the appropriate agencies of Government, upon *petition* of the importing employer.”⁷⁷ DHS regulations provide that an alien admissible in H-1B classification may work in the U.S. only during the validity period of the petition.⁷⁸ Thus, DHS is the agency that authorizes an H-1B nonimmigrant to work for a period of time by approving a Petition, meaning the period of authorized employment refers to the period specified in the I-797, the Petition approval notice.

The Administrator further notes that the INA provides under its H-1B portability provision that a nonimmigrant may accept “new employment” if the new employer has filed a Petition for the new job before the previously authorized period of stay expires.⁷⁹ If the employer properly files a new Petition, “[e]mployment authorization shall continue for such alien until the new petition is adjudicated.”⁸⁰ Another DHS regulation provides that an H-1B worker whose work authorization has expired may continue their employment for up to 240 days if their employer has timely filed a Petition to extend the worker’s stay.⁸¹ Under either provision, the nonimmigrant’s employment authorization ends if USCIS denies the Petition.⁸²

The Administrator also explains that the LCA and I-94 do not determine the period of authorized employment for an H-1B nonimmigrant. The Administrator notes that a certified LCA permits an employer to hire H-1B workers for a certain position but does not authorize it to employ a particular nonimmigrant. Indeed, the DOL does not require an employer to provide the name of the H-1B worker who it intends to employ on the LCA.⁸³ Further, the I-94 permits an H-1B worker to stay in the U.S. but does not provide them permission to work in the U.S.⁸⁴

⁷⁷ 8 U.S.C. § 1184(c)(1) (emphasis added). Though the text of this provision tasks the “Attorney General” to authorize the importation of a nonimmigrant, Congress transferred the responsibility to adjudicate petitions to DHS in 2002. *Hovhannisyan v. U.S. Dep’t of Homeland Sec.*, 624 F. Supp. 2d 1135, 1142 (C.D. Cal. 2008) (referring to the Homeland Security Act of 2002, Pub. L. No. 107-296, § 471(a), 116 Stat. 2135, 2205 (Nov. 25, 2002)).

⁷⁸ 8 C.F.R. §§ 214.1(l)(1), 214.2(h)(13)(i)(A).

⁷⁹ 8 U.S.C. § 1184(n); 8 C.F.R. § 214.2(h)(2)(i)(H).

⁸⁰ 8 U.S.C. § 1184(n)(1) (emphasis added).

⁸¹ 8 C.F.R. § 274a.12(b)(20).

⁸² 8 U.S.C. § 1184(n)(1); 8 C.F.R. § 274a.12(b)(20).

⁸³ See 20 C.F.R. § 655.730(c)(4). H-1B regulations require an LCA to identify: (1) the occupation, (2) the number of nonimmigrants sought, (3) the gross wage to be paid to the

We agree with the Administrator's position. The INA and the relevant regulations demonstrate that an LCA authorizes the employer to employ H-1B nonimmigrants for a particular position in the country, while the approved Petition authorizes an individual H-1B nonimmigrant to work for an employer in the U.S. Complainant had two sources of employment authorization at the time Respondent terminated his employment: the approved second Petition and the pending third Petition. The pending Petition permitted him to work under the H-1B portability provision until Respondent withdrew it on February 16, 2017. Therefore, Complainant's period of authorized employment concluded on March 1, 2017, the end date on the second approved Petition. Accordingly, the ALJ correctly granted summary judgment on the back wages claim.⁸⁵

3. The Retaliation Claim

Complainant contests the ALJ's decision to dismiss his retaliation claim because of his conduct leading to the hearing. Complainant contends that the dismissal conflicts with the ALJ's stated desire to conduct a hearing on a new date after postponing the scheduled hearing. Respondent argues that Complainant's failure to follow the ALJ's orders and dilatory conduct justified the dismissal.

ALJs have the "inherent authority to 'manage their own affairs so as to achieve the orderly and expeditious disposition of cases'" and may dismiss a proceeding because of a complainant's failure to comply with orders.⁸⁶ ALJs may consider several factors to determine whether a dismissal is warranted, including: (1) prejudice to the other party; (2) the amount of interference with the judicial process; (3) the culpability, willfulness, bad faith, or fault of the litigant; (4) whether

nonimmigrants, (4) the starting and end dates of the nonimmigrants' employment, (5) the place of intended employment, (6) the prevailing wage for the occupation, and (7) whether the employer is H-1B dependent or a willful violator and, if so, whether they will use the LCA only in support for exempt H-1B nonimmigrants. *Id.*

⁸⁴ *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 853 n.4 (9th Cir. 2004) ("An I-94 Form is an alien arrival-departure record that serves as proof of the bearer's current immigration status and the time period during which his stay in this country is authorized.").

⁸⁵ The Administrator did not address the Board's question whether the circumstances of the case, including Respondent notifying DHS and Complainant of the end of the employment relationship and Complainant leaving the country, constructively ended Respondent's wage obligation because her conclusion that the LCA does not define the scope of the period of authorized employment made the question moot. Because it is not necessary for us to rule on the question and Respondent did not argue that its wage obligation constructively ended before March 1, 2017, we will not address it.

⁸⁶ *Ho v. Air Wisconsin Airlines*, ARB No. 2020-0027, ALJ No. 2019-AIR-00009, slip op. at 4-5 (ARB June 30, 2021).

the party was warned in advance that dismissal could be ordered for failure to cooperate or noncompliance; and (5) whether the efficacy of lesser sanctions were considered.⁸⁷ The Board reviews an ALJ's order of sanctions, including dismissal, for abuse of discretion.⁸⁸

The ALJ cited Complainant's failure to follow her orders to resubmit exhibits for the retaliation claim. Complainant did not admit his fault when the ALJ asked about his failure to file the exhibits and instead argued that the refiling was unnecessary and that the hearing was "meaningless" without considering the other claims. A judge may decide to dismiss a case because of a party's failure to comply with their discovery orders,⁸⁹ especially if a party fails to justify their noncompliance.⁹⁰

An "overall course of dilatory and contemptuous behavior" that interferes with the judicial process may also justify dismissal.⁹¹ The ALJ noted that Complainant filed two motions shortly before the two scheduled hearing dates: a Motion to Recuse on the morning of the first hearing and a Motion to Continue on the night before the second. Complainant reasoned that he had requested a continuance the day before a hearing because he had guests visiting, which the ALJ did not accept. Complainant was also late to the subsequent status conference and had continually expressed disagreement with the ALJ's past decisions, leading him to file two Motions to Recuse the ALJ. The ALJ also credited Respondent's argument that the late filings caused prejudice because it had to coordinate the attendance of witnesses, costing it time and expenses.

We hold that the ALJ did not abuse her discretion in dismissing the retaliation claim. Though Complainant's conduct was not extraordinarily egregious, the circumstances supported the ALJ's conclusion that Complainant's recalcitrant behavior was unlikely to improve, given his failure to admit his fault in failing to follow the ALJ's orders and continued objections to the ALJ's past decisions.

⁸⁷ *Howick v. Campbell-Ewald Co.*, ARB Nos. 2003-0156 and 2004-0065, ALJ Nos. 2003-STA-00006 and 2004-STA-00007, slip op. at 8 (ARB Nov. 30, 2004). These factors "do not create a rigid test." *Id.*

⁸⁸ *Ho*, ARB No. 2020-0027, slip op. at 4.

⁸⁹ 29 C.F.R. § 18.57(b)(1)(v); *see also Howick*, ARB Nos. 2003-0156 and 2004-0065, slip op. at 7; *Ho*, ARB No. 2020-0027, slip op. at 4; *Lindner v. Citibank, N.A.*, ARB No. 2018-0066, ALJ No. 2018-SOX-00002, slip op. at 3 (ARB Jan. 28, 2020).

⁹⁰ *See Govindarajan v. N2 Servs., Inc.*, ARB No. 2020-0032, ALJ No. 2020-LCA-00001, slip op. at 2 (ARB Mar. 17, 2021).

⁹¹ *Howick*, ARB Nos. 2003-0156 and 2004-0065, slip op. at 9.

Complainant fails to present any persuasive argument that the ALJ erred in her decision. Accordingly, we affirm the ALJ's Order of Dismissal.⁹²

4. The Motions to Recuse

Complainant contends that the ALJ should have granted his first and second motions to recuse her from the proceedings. For each motion, the ALJ concluded that Complainant failed to provide any evidence of bias or partiality. An ALJ may recuse themselves if their “impartiality might reasonably be questioned” or they have “a personal bias or prejudice concerning a party.”⁹³ ALJs are “presumed to be impartial,” and a party moving for recusal has a “substantial burden” to prove otherwise.⁹⁴ We review rulings on motions to recuse for abuse of discretion.⁹⁵

Complainant provides several examples that he alleges shows bias, including some clerical errors made by the ALJ and legal decisions that Complainant believes were incorrect. Complainant further criticizes the ALJ’s hearing date selection, claiming that she did not try to reconcile the date disagreements. However, recusal generally is not warranted without “proof of an extra-judicial source of bias,”⁹⁶ which Complainant fails to substantiate. Further, legal errors in ALJ orders, even assuming arguendo that those occurred in this case, are not sufficient to prove bias.⁹⁷ Complainant fails to provide any justification for the ALJ’s recusal. Accordingly, the ALJ did not abuse their discretion in denying the motions.

⁹² The ALJ, in the alternative, dismissed the claim because Complainant had violated the standards of conduct before the OALJ, which warranted his exclusion from the proceedings. See 29 C.F.R. §18.87(b). Thus, Complainant could not prove his case because he represented himself. While we need not discuss this decision, we discern no abuse of the ALJ’s discretion in dismissing Complainant on these alternative grounds. 29 C.F.R. §18.87(c).

⁹³ *Vudhamari v. Advent Glob. Sols.*, ALJ No. 2018-LCA-00022, slip op. at 4-5 (ALJ Jan. 29, 2021), adopted and attached, ARB No. 2021-0018 (ARB Apr. 26, 2021).

⁹⁴ *Id.* at 4 (quoting *Billings v. Tennessee Valley Auth.*, Case No. 1991-ERA-00012, slip op. at 4 (ARB June 26, 1996)).

⁹⁵ *Baiju v. Fifth Ave. Comm.*, ARB No. 2010-0094, ALJ No. 2009-LCA-00045, slip op. at 7 (ARB Mar. 30, 2012) (reissued Apr. 4, 2012).

⁹⁶ *Vudhamari*, ALJ No. 2018-LCA-00022, slip op. at 5.

⁹⁷ *Id.* (quoting *Matthews v. Ametek, Inc.*, ARB No. 2011-0036, ALJ No. 2009-SOX-00026, slip op. at 3 (ARB May 31, 2012)).

CONCLUSION⁹⁸

We **AFFIRM** the ALJ's order granting summary decision on the back wages claim, the Order of Dismissal, the Order Denying Motion to Recuse dated April 6, 2021, and the Order Denying Motion to Recuse dated July 26, 2021.

SO ORDERED.

⁹⁸ In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).