

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

\*\*\*\*\*  
\*  
In the Matter of: \*  
\*  
MOHAMMED REHAN PURI, \*  
\*  
Prosecuting Party, \*  
\*  
v. \*  
\*  
UNIVERSITY OF ALABAMA \*  
BIRMINGHAM, HUNTSVILLE, \*  
\*  
Respondent. \*  
\*  
\*\*\*\*\*

ARB CASE NO. 13-022  
ALJ CASE NOS. 2008-LCA-038  
2008-LCA-043  
2012-LCA-010

**ACTING DEPUTY ADMINISTRATOR'S AMICUS BRIEF**

M. PATRICIA SMITH  
Solicitor of Labor

JENNIFER S. BRAND  
Associate Solicitor

WILLIAM C. LESSER  
Deputy Associate Solicitor

PAUL L. FRIEDEN  
Counsel for Appellate Litigation

QUINN PHILBIN  
Attorney

U.S. Department of Labor  
Office of the Solicitor  
Room N2716  
200 Constitution Avenue, NW  
Washington, D.C. 20210  
(202) 693-5561

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
ISSUE PRESENTED .....	1
STATEMENT OF THE CASE.....	2
A.    STATUTORY AND REGULATORY FRAMEWORK .....	2
B.    COURSE OF PROCEEDINGS .....	3
C.    STATEMENT OF FACTS .....	5
D.    THE ALJ’S DECISION.....	8
STANDARD OF REVIEW .....	10
ARGUMENT .....	11
A.    THE BOARD HAS CONCLUDED THAT AN EMPLOYER CAN, UNDER CERTAIN CIRCUMSTANCES, EFFECT A BONA FIDE TERMINATION WITHOUT PROVIDING A DISMISSED H-1B EMPLOYEE RETURN TRANSPORTATION COSTS .....	12
B.    THE BOARD SHOULD LOOK TO THE PURPOSES OF THE RETURN TRANSPORTATION COSTS OBLIGATION AND DEEM A TERMINATION AS BONA FIDE WHEN THOSE PURPOSES ARE SERVED, AS THEY ARE HERE, EVEN IN THE ABSENCE OF PAYMENT OF THOSE COSTS.....	13
C.    DR. PURI’S ARGUMENTS ON APPEAL TO THE BOARD LACK MERIT .....	16
CONCLUSION.....	21
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

### Cases:

<u>Adm’r, Wage &amp; Hour Div. v. Am. Truss,</u> ARB No. 05-032, ALJ No. 2004-LCA-12 (ARB Feb. 28, 2007).....	10
<u>Adm’r, Wage &amp; Hour Div. v. Itek Consulting, Inc.,</u> ALJ No. 2008-LCA-00046 (ALJ May 6, 2009) .....	9, 12
<u>Amtel v. Yongmahapakorn,</u> ARB No. 04-087, ALJ No. 2004-LCA-006 (ARB Sept. 29, 2006).....	19
<u>Amtel v. Yongmahapakorn,</u> ARB No. 07-104, ALJ Case No. 2004-LCA-006 (ARB Jan. 29, 2008) .....	11, 16, 19
<u>Baiju v. Fifth Ave., Comm.,</u> ARB No. 10-094, ALJ No. 2009-LCA-045 (ARB Mar. 30, 2012) .....	11, 12, 17
<u>Gupta v. Jain,</u> ARB No. 05-008, ALJ Case No. 2004-LCA-39 (ARB Mar. 30, 2007) .....	11, 16, 19
<u>Huang v. Ultimo Software Solutions, Inc.,</u> ALJ No. 2008-LCA-00011 (ALJ Dec. 17, 2008) .....	19, 20
<u>Huang v. Ultimo Software Solutions, Inc.,</u> ARB Nos. 09-044, 09-056, ALJ No. 2008-LCA-00011 (ARB Mar. 31, 2011) .....	19
<u>Limanseto v. Ganze &amp; Co.,</u> ALJ No. 2011-LCA-00005 (ALJ June 30, 2011) .....	10
<u>Puri v. UAB,</u> Case Nos. 2008-LCA-38, 2008-LCA-43, 2012-LCA-10 (Oct. 23, 2012) .....	5, 8, 9, 10, 16
<u>Talukdar v. U.S. Dep’t of Veterans Affairs,</u> ARB No. 04-100, ALJ No. 2002-LCA-25 (ARB Jan. 31, 2007) .....	10
<u>Vojtisek-Lom v. Clean Air Technologies Int’l, Inc.,</u> ALJ No. 2006-LCA-009 (ALJ June 18, 2007) .....	9, 10, 12

Cases – continued

Wirth v. Univ. of Miami,  
ARB Nos. 10-090, 10-093, ALJ No. 2009-LCA-026  
(ARB Dec. 20, 2011) ..... 9, 11, 12, 20

Yongmahapakorn v. Amtel,  
ALJ No. 2004-LCA-006 (ALJ Mar. 23, 2004) ..... 19

**Statutes:**

Administrative Procedure Act,  
5 U.S.C. 551 et seq. .... 10  
5 U.S.C. 557(b) ..... 10

Immigration and Nationality Act of 1990,  
8 U.S.C. 1101(a)(15)(H)(i)(b) ..... 1, 2  
8 U.S.C. 1182(n) ..... 1, 2  
8 U.S.C. 1182(n)(1) ..... 2  
8 U.S.C. 1184(c)(5)(A) ..... 3

**Code of Federal Regulations:**

8 C.F.R. 214.2(h)(11) ..... 3  
8 C.F.R. 214.2(h)(4)(iii)(E) ..... 3, 8, 9, 16, 20  
8 C.F.R. 274a.12(a)(9) ..... 6

20 C.F.R. Part 655, Subparts H and I ..... 1, 2  
20 C.F.R. 655.730(c)(4)(iii) ..... 2, 3  
20 C.F.R. 655.730(c)(4)(iv) ..... 2  
20 C.F.R. 655.731(c)(7) ..... 2  
20 C.F.R. 655.731(c)(7)(i) ..... 2  
20 C.F.R. 655.731(c)(7)(ii) ..... *Passim*

**Federal Register:**

65 Fed. Reg. 80110, 80170, 80171 (Dec. 20, 2000) ..... 2, 8, 13, 14, 18

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

\*\*\*\*\*

In the Matter of:

MOHAMMED REHAN PURI,

Prosecuting Party,

v.

UNIVERSITY OF ALABAMA  
BIRMINGHAM, HUNTSVILLE,

Respondent.

ARB CASE NO. 13-022

ALJ CASE NOS. 2008-LCA-038  
2008-LCA-043  
2012-LCA-010

\*\*\*\*\*

**ACTING DEPUTY ADMINISTRATOR'S AMICUS BRIEF**

This case arises under the H-1B provisions of the Immigration and Nationality Act (“INA”), 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and the implementing regulations promulgated by the Secretary of Labor (“Secretary”), 20 C.F.R. Part 655, Subparts H and I. The Administrative Law Judge (“ALJ”) ruled that Respondent, University of Alabama Birmingham, Huntsville (“UAB”), effected a bona fide termination of the Prosecuting Party, Dr. Mohammed Rehan Puri (“Dr. Puri”), on July 30, 2007. Under the particular circumstances of this case, the Acting Deputy Administrator (“Administrator”) submits that UAB did effect a bona fide termination of Dr. Puri. The Administrative Review Board (“Board”) should accordingly affirm the ALJ’s ruling.

**ISSUE PRESENTED**

Whether the ALJ properly concluded that, under the facts of this case, UAB executed a bona fide termination of Dr. Puri’s employment on July 30, 2007 (thereby extinguishing its

liability for further wages under a Labor Condition Application) when it informed Dr. Puri and the United States Citizenship and Immigration Services (“USCIS”) that it had terminated his employment, even though at that time it did not offer to pay for his return trip to Pakistan.

## **STATEMENT OF THE CASE**

### **A. STATUTORY AND REGULATORY FRAMEWORK**

The H-1B visa program permits the temporary employment of nonimmigrants in specialized occupations in the United States. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, Subparts H and I. In order to employ an H-1B worker, an employer must first submit a Labor Condition Application (“LCA”) to the Secretary. *See* 8 U.S.C. 1182(n)(1). The LCA specifies the starting and ending date of the H-1B worker’s employment, as well as the wage rate the employer will pay the nonimmigrant(s) covered by the LCA. *See* 20 C.F.R. 655.730(c)(4)(iii)-(iv).

“If 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, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly wage employee for a full-time week ... at the required wage for the occupation listed on the LCA.” 20 C.F.R. 655.731(c)(7)(i); *see* 8 U.S.C. 1182(n)(2)(C)(vii). An employer may terminate the employment relationship prior to the ending date specified in the approved LCA based on a lack of work or other reasons permitted by law. *See* 65 Fed. Reg. 80170 (Dec. 20, 2000) (discussing the effect of 20 C.F.R. 655.731(c)(7)). The employer, however, must effect a bona fide termination of the employee for the wage obligation to cease. *See* 20 C.F.R. 655.731(c)(7)(ii) (“Payment [of wages] need not be made if there has been a bona fide termination of the employment relationship. DHS [Department of

Homeland Security] regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 C.F.R. 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 C.F.R. 214.2(h)(4)(iii)(E)).”<sup>1</sup>

## **B. COURSE OF PROCEEDINGS**

On June 18, 2007, Dr. Puri filed a complaint with the Department of Labor’s (“Department”) Wage and Hour Division (“WHD”), alleging that UAB failed to pay him for involuntary time off and that UAB had improperly required H-1B employees to pay expedited processing fees for their visas. After conducting an investigation, WHD issued a determination letter on July 1, 2008, finding that UAB owed \$54,894.00 in back wages to 84 H-1B nonimmigrants. Dr. Puri timely appealed the Administrator’s determination to the Office of Administrative Law Judges, challenging the Administrator’s failure to award him back wages for involuntary time off. The presiding Administrative Law Judge (“ALJ”) scheduled a hearing in the matter for December 18, 2008.

On December 11, 2008, UAB filed a Motion to Dismiss and, in the alternative, a Motion for Summary Decision. The ALJ issued a Decision and Order on April 27, 2009 that granted in part, and denied in part, both UAB’s Motion to Dismiss and its Motion for Summary Decision. The result of the ALJ’s decision was to permit Dr. Puri to pursue a hearing on the issues that remained in dispute. Those issues were whether UAB effected a bona fide termination of Dr.

---

<sup>1</sup> Both the INA and a DHS regulation render an employer “liable for the [H-1B’s worker’s] reasonable costs of return transportation” when it dismisses the worker “before the end of the period of authorized admission.” 8 U.S.C. 1184(c)(5)(A); 8 C.F.R. 214.2(h)(4)(iii)(E). UAB’s “liability” to pay Dr. Puri’s return transportation costs under 8 U.S.C. 1184(c)(5)(A) and 8 C.F.R. 214.2(h)(4)(iii)(E) is not before the Board, as it transmitted to him his return transportation costs in June 2009. *See infra*.

Puri and whether UAB had an obligation to pay Dr. Puri wages through June 11, 2009, the date on which he received a check from UAB covering his return transportation costs to Pakistan.

On July 23, 2009, Dr. Puri submitted a Motion for Summary Decision. UAB submitted a response and its own Motion for Summary Decision on August 19, 2009. On September 14, 2009, the ALJ issued an order ruling that she lacked jurisdiction to resolve whether UAB owed Dr. Puri wages through June 11, 2009 because the issue was not the subject of an investigation or determination by the Administrator. As this finding disposed of both issues before the ALJ, she granted UAB's summary decision motion.

Dr. Puri timely appealed the ALJ's decision to the Board. On November 30, 2011, the Board reversed the ALJ's decision, ruling that the ALJ possessed authority to review Dr. Puri's claim for wages through June 11, 2009 (based on the alleged failure by UAB to effect a bona fide termination). It accordingly vacated the ALJ's decision and remanded the matter for further proceedings consistent with its opinion.

While Dr. Puri's initial appeal to the Board was pending, he filed another claim, 2012-LCA-10, to preserve his claim to wages through June 11, 2009. Following the Board's decision, 2012-LCA-10 was consolidated with the earlier matters, 2008-LCA-038 and 2008-LCA-043, before a single ALJ. The sole remaining issue was whether UAB effected a bona fide termination of Dr. Puri.

The parties agreed that a hearing on the issue was not necessary. They submitted a joint stipulation of facts to the ALJ on May 29, 2012, followed by the submission of briefs. On

October 23, 2012, the ALJ ruled that, under the circumstances of this case, UAB had effected a bona fide termination of Dr. Puri on July 30, 2007, when it notified USCIS of the dismissal.<sup>2</sup>

On November 20, 2012, Dr. Puri submitted a Petition for Review to the Board, requesting a review of the ALJ's October 23, 2012 ruling. On December 5, 2012, the Board issued a Notice of Intent to Review the ruling.

### **C. STATEMENT OF FACTS**

On April 19, 2006, the Department certified an LCA authorizing UAB to employ an H-1B nonimmigrant as a medical resident for the period covering July 1, 2006 through July 1, 2009. EX 2A.<sup>3</sup> UAB subsequently hired Dr. Puri as a first-year resident in the Family Medicine Program to fill the medical resident position. CX A; EX 2. The LCA specified that UAB would pay Dr. Puri an annual salary of \$40,782.00. CX A; EX 2.

On December 29, 2006, UAB's Residency Program Director, Dr. Allan J. Wilke, sent Dr. Puri a memorandum informing him that UAB would not renew his contract for the 2007-2008 academic year. CX C; EX 3. On February 19, 2007, Dr. Wilke sent Dr. Puri a second memorandum notifying him of the nonrenewal of his contract. CX D; EX 4. The memorandum, like the one Dr. Wilke sent on December 29, 2006, informed Dr. Puri that he had ten days from its receipt to request a hearing. *Id.*; CX C; EX 3. Dr. Puri requested a hearing, which was held before the UAB Judicial Review Committee on April 9, 2007. CX E. UAB placed Dr. Puri on leave while the hearing was pending. EX 7.

---

<sup>2</sup> There is no dispute that UAB had notified both Dr. Puri and USCIS of his termination by July 30, 2007.

<sup>3</sup> Factual citations reflect the method used by the ALJ. *See Puri v. UAB*, Case Nos. 2008-LCA-38, 2008-LCA-43, 2012-LCA-10, slip op. at 3 n.3 (Oct. 23, 2012). Attachments 1 through 17 of the Employer's brief to the ALJ will be referenced as "EX" followed by the appropriate number. Attachments A through O to Complainant's brief to the ALJ are referred to as "CX" followed by the appropriate letter.

On May 21, 2007, Dr. Puri married a U.S. citizen, Ms. Raheela Khan. Sometime prior to June 21, 2007, Dr. Puri filed a USCIS Form I-765 seeking work authorization, presumably as the spouse of a U.S. citizen. See *Claimant's Reply to Administrator's Brief* ("Cl. Reply") to the ALJ, Exhibit ("Ex.") 4.<sup>4</sup> USCIS approved Dr. Puri's I-765 application for work authorization, effective September 19, 2007. *Id.*

On June 28, 2007, the Judicial Review Committee upheld the decision to terminate Dr. Puri's residency. EX 2B; CX H. On June 30, 2007, UAB deposited \$8,335.15 into Dr. Puri's bank account, which constituted the wages he had not yet been paid for the period covering March 6, 2007 through June 30, 2007. Ex. 7, 8.<sup>5</sup> On July 2, 2007, UAB informed Dr. Puri of the Review Committee's decision. EX 2B; CX E.

On July 24, 2007, UAB's Dean's Council for Graduate Medical Education convened to review the Judicial Review Committee's decision. EX 2B; CX H. A July 26, 2007 memorandum of the Dean's Council unanimously upheld the Review Committee's decision to terminate Dr. Puri's residency. *Id.* On that same day, the Dean's Council mailed a copy of the memorandum to Dr. Puri's lawyer, noting that the termination was effective July 26, 2007. EX 2C; CX H.<sup>6</sup>

---

<sup>4</sup> The approval of Dr. Puri's I-765 application for employment authorization indicates that USCIS received the application on June 21, 2007. Cl. Reply Ex. 4. Status as the spouse of a U.S. citizen is one basis on which to seek employment authorization under the I-765 form. See 8 C.F.R. 274a.12(a)(9).

<sup>5</sup> Following the payment of back wages to Dr. Puri, UAB placed him on its payroll through, and including, July 27, 2007. EX 7.

<sup>6</sup> While the letter stated that Dr. Puri's effective termination date was July 26, 2007, the parties subsequently stipulated that the effective termination date was July 27, 2007. EX. 7.

On July 30, 2007, UAB sent a letter to USCIS, informing it that the university had dismissed Dr. Puri and that the agency should cancel his H-1B petition. EX 2C; CX 1. On April 23, 2008, USCIS confirmed that it had revoked Dr. Puri's H-1B petition. CX J.

On May 22, 2009, Dr. Puri's counsel contacted UAB to confirm whether it had provided him the reasonable cost of transportation home to Pakistan. EX 11. Via letter dated June 10, 2009, UAB sent Dr. Puri a check for \$1,506.00, stating that the check covered the reasonable cost of Dr. Puri's return to Pakistan. EX 2; CX P.

In the months before Dr. Puri's termination in July 2007, Lowell Virginia Craft, UAB's Director of Graduate Medical Education, communicated numerous times with Dr. Puri. EX 13. In these communications, Dr. Puri requested that UAB schedule his hearings around his wedding. *Id.* He also represented to Ms. Craft that his marriage reduced his concerns about delaying the internal hearings. *Id.* Dr. Puri additionally forwarded two separate U.S. addresses to UAB during this period to facilitate his communications with the university. EX 13. Ms. Craft represented that, as a result of her communications with Dr. Puri, UAB believed that Dr. Puri had an alternative basis to remain in the United States, i.e., his marriage to a U.S. citizen, and that he did not intend to return to Pakistan. *Id.*

WHD Investigator Timothy Erwin took an "Employee Personal Interview Statement" of Dr. Puri on June 8, 2011. EX 2H. In the statement, Dr. Puri confirmed to Mr. Erwin that, prior to his dismissal from the UAB Residency Program, he had informed Ms. Craft that he did not wish to return to Pakistan and that he was marrying a U.S. citizen. *Id.* Dr. Puri further represented to Mr. Erwin that, after his termination, he again informed UAB that he was not returning to Pakistan. *Id.*

In a September 8, 2008 submission to the ALJ, Dr. Puri represented that “[i]n order to be legal in the US I got married here.” EX 6. In an affidavit dated January 8, 2009, Dr. Puri referred to the time after the termination of his employment, as follows:

My visa status was also in jeopardy and every day I feared that removal from this country was near. However, I married my wife, a U.S. citizen, on May 21, 2007, and this momentous and joyous occasion brought some serenity and calmness to my mind.

EX 2G. Dr. Puri has accordingly resided lawfully in the United States since his dismissal by UAB in July 2007. He has lived in Houston, Texas; Fairburn, Ohio; Dayton, Ohio; Madison, Tennessee; and Valley Stream, New York. CX F; EX 15; EX 12; EX 16; EX 17.

#### **D. THE ALJ’S DECISION**

On October 23, 2012, the ALJ ruled that UAB had executed a bona fide termination of Dr. Puri on July 30, 2007 when it informed USCIS to revoke his H-1B petition. Decision (“Dec.”) 10.<sup>7</sup> The ALJ observed that the “clear intent of” 20 C.F.R. 655.731(c)(7)(ii) and 8 C.F.R. 214.2(h)(4)(iii)(E) is to “prevent H-1B employees from remaining in the United States illegally once their petitions have been revoked.” *Id.* at 8. The ALJ located this intent in section 655.731(c)(7)(ii)’s obligation to provide return transportation costs “only under certain circumstances, i.e. [according to the ALJ], when the nonimmigrants have not otherwise obtained lawful status.” *Id.* at 9. (internal quotation marks omitted). The ALJ opined that the comments in the preamble accompanying section 655.731(c)(7)(ii) reinforced this interpretation since they make clear that an “H-1B worker must either leave the United States or seek a change in immigration status once its employment relationship has been terminated.” *Id.* at 8 (citing 65 Fed. Reg. 80,171 (Dec. 20, 2000)).

---

<sup>7</sup> The ALJ ordered UAB to pay Dr. Puri wages for the workday of July 30, 2007 - an amount it calculated as \$161.83 - because it had previously paid him wages only through July 27, 2007 (which was a Friday). Dec. 10. It additionally ordered the university to pay pre-judgment compound interest to Dr. Puri on this sum plus any post-judgment interest due on this amount until it is paid or otherwise satisfied. *Id.*

The ALJ concluded that awarding Dr. Puri back wages beyond July 30, 2007 would contravene the purposes of 20 C.F.R. 655.731(c)(7)(ii) and 8 C.F.R. 214.2(h)(4)(iii)(E). Dec. 9. The ALJ observed that on May 21, 2007, two months before his dismissal, Dr. Puri's marriage to a U.S. citizen rendered his presence in the United States lawful. *Id.* She further observed that UAB knew of Dr. Puri's marriage and of his express desire to remain in the United States. *Id.* Given these facts, the ALJ concluded that awarding back wages until the date UAB provided return transportation costs (June 11, 2009) would contravene the regulations' purpose to only require payment of return transportation costs to an employee who has not obtained alternative authorization to remain in the country. *Id.*

The ALJ found support for her holding in Vojtisek-Lom v. Clean Air Technologies International, Inc., ALJ No. 2006-LCA-009 (June 18, 2007), and Administrator, Wage and Hour Division v. Itek Consulting, Inc., ALJ No. 2008-LCA-00046 (May 6, 2009). The ALJ stated that in both cases "[ALJs] ... found that an employer effected a *bona fide* termination even though it did not pay for a nonimmigrant's transportation home." Dec. 7. Specifically, the ALJs found the employers' back wage obligation ceased when their former employees had obtained alternative lawful status via a subsequent H-1B employment relationship. *Id.* at 8. Since Dr. Puri, like the claimants in Itek and Vojtisek-Lom, obtained other lawful means to remain in the United States, i.e., as the spouse of a U.S. citizen, the ALJ concluded that the change in immigration status "obviated the need for [Dr. Puri] to leave the United States." *Id.*

The ALJ additionally cited Wirth v. University of Miami, ARB Nos. 10-090, 10-093, ALJ No. 2009-LCA-026 (ARB Dec. 20, 2011), where the Board concluded that the employer effected a *bona fide* termination by offering to pay return transportation costs, despite the employee's rejection of the offer. The ALJ stated that Vojtisek-Lom, Itek, and Wirth

collectively “reflect that the criteria for effecting a *bona fide* termination are flexible and that awards of back wages are not intended to be punitive.” Dec. 8.

The ALJ rejected Dr. Puri’s argument that Limanseto v. Ganze & Co., ALJ No. 2011-LCA-00005 (June 30, 2011), was compelling precedent for the conclusion that UAB did not effectuate a bona fide termination. Dec. 9. Instead, she found the decision inapposite. *Id.* Specifically, she noted that whereas the “claimant [in Limanseto] returned to his home country of Indonesia with his own money even before the employer notified USCIS that it had terminated his employment ... Dr. Puri has continued to reside in the United States despite receiving a check for his return transportation on June 11, 2009.” *Id.*

The ALJ indicated her understanding that an employer’s return transportation cost obligation also “embodies a notion of fairness,” since workers cannot lawfully earn income to finance a return trip home once USCIS revokes their petition. Dec. 9. The ALJ concurred that application of this equitable notion was appropriate in the circumstances of Limanseto. *Id.* But she found the notion inapplicable here, since Dr. Puri was able to change his immigration status prior to his dismissal and continued to reside lawfully in the United States, even after receipt of the check for return airfare in 2009. *Id.*

### **STANDARD OF REVIEW**

The Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, vests the Board here with “all the powers which it would have in making the initial decision.” 5 U.S.C. 557(b). The Board’s review is accordingly de novo. *See Administrator, Wage and Hour Division v. American Truss*, ARB No. 05-032, ALJ No. 2004-LCA-12, slip op. at 2-3 (ARB Feb. 28, 2007) (citing Talukdar v. U.S. Dep’t of Veterans Affairs, ARB No. 04-100, ALJ No. 2002-LCA-25, slip op. at 8 (ARB Jan. 31, 2007), for the proposition that the Board exercises de novo review in INA cases).

## ARGUMENT

The Board has repeatedly indicated that an employer, in order to effect a bona fide termination of the employment relationship of an H-1B employee, must “(1) give notice of the termination to the H-1B worker, (2) give notice to the Department of Homeland Security (USCIS), and (3) *under certain circumstances*, provide the H-1B non-immigrant with payment for transportation home.” Baiju v. Fifth Avenue Committee, ARB No. 10-094, ALJ No. 2009-LCA-045, slip op. at 9 (ARB March 30, 2012) (emphasis added); see Wirth, slip op. at 8-9; Amtel v. Yongmahapakorn, ARB No. 07-104, ALJ Case No. 2004-LCA-006, slip op. at 2 n.4 (ARB Jan. 29, 2008) (Amtel II); Gupta v. Jain, ARB No. 05-008, ALJ No. 2004-LCA-39, slip op. at 5 (ARB March 30, 2007). The Board’s recognition that, under certain circumstances, payment for transportation home is not necessary to effect a bona fide termination adopts the applicable regulatory language verbatim. See 20 CFR 655.731(c)(7)(ii). The Board, however, has not yet had occasion to define explicitly what circumstances might obviate an employer’s need to pay transportation costs in order to effect a bona fide termination.

The particular circumstances here obviate the employer’s obligation to pay transportation costs to effect a bona fide termination. Notice to an employee and USCIS of the employee’s dismissal fulfills an employer’s bona fide termination obligation where an H-1B employee obtains alternate lawful status to remain in the United States prior to his dismissal; the employer knows that the employee has obtained alternate lawful status in the United States prior to his dismissal; the employee represents to his employer that he intends to remain in the United States; and the employee does not, in fact, incur return transportation costs during the period specified in the applicable LCA. Thus, the Board should uphold the ALJ’s decision concluding that UAB

effected a bona fide termination when it notified USCIS of the termination on July 30, 2007, thereby ending any back wage obligation it may otherwise have incurred.

**A. THE BOARD HAS CONCLUDED THAT AN EMPLOYER CAN, UNDER CERTAIN CIRCUMSTANCES, EFFECT A BONA FIDE TERMINATION WITHOUT PROVIDING A DISMISSED H-1B EMPLOYEE RETURN TRANSPORTATION COSTS.**

Consistent with the relevant regulatory language at 20 C.F.R. 655.731(c)(7)(ii), Board precedent allows an employer, under certain circumstances, to effect a bona fide termination without actually providing return transportation costs to the dismissed employee. *See Baiju*, slip op. at 9; *Wirth*, slip op. at 8-9. In *Baiju* and *Wirth*, the employer offered, and the employee rejected, return transportation costs after the employee's dismissal. The Board concluded that, under those circumstances, the employers effected a bona fide termination without providing the dismissed employees return transportation costs.

An ALJ has likewise ruled that an employer may effect a bona fide termination without providing, or even offering, return transportation costs to the dismissed employee. *See Vojtisek-Lom*, slip op. at 21. In *Vojtisek-Lom*, the complainant "did not return to the Czech Republic when his employment ... ended [but] ... instead began working" for another firm immediately after his dismissal. *Id.* The ALJ ruled that, under those circumstances, a termination was bona fide based solely on notice to USCIS and the employee. *Id.* ("[S]ince the USCIS was notified of the termination of complainant and respondent's employment relationship not later than the end of March, the termination became bona fide at that time."); *cf. Itek Consulting*, slip op. at 16-17 (concluding that an H-1B worker - who found immediate alternate employment after his dismissal - was only entitled to back wages through his last day of actual employment, despite the failure of the employer to offer to pay return transportation costs).

Thus, depending on the circumstances presented, the payment of return transportation costs to an H-1B employee might not be necessary to effectuate a bona fide termination.

**B. THE BOARD SHOULD LOOK TO THE PURPOSES OF THE RETURN TRANSPORTATION COSTS OBLIGATION AND DEEM A TERMINATION AS BONA FIDE WHEN THOSE PURPOSES ARE SERVED, AS THEY ARE HERE, EVEN IN THE ABSENCE OF PAYMENT OF THOSE COSTS.**

While Baiju and Wirth confirm that under certain circumstances payment of return transportation costs are not necessary to effectuate a bona fide termination, they do not examine the range of circumstances that might permit a bona fide termination without the payment of such costs. Neither 20 C.F.R. 655.731(c)(7)(ii) itself, nor the rule's preamble, specifically identify such circumstances. Without such controlling guidance, the Board should identify the obligation's purposes and permit exceptions from the return transportation payment obligation when those purposes are served.

One clear purpose of the transportation payment obligation is facilitating the departure of an individual no longer authorized to remain in the country. Indeed, as the preamble to 20 C.F.R. 655.731(c)(7)(ii) suggests, a terminated H-1B employee typically must leave the country immediately. *See* 65 Fed. Reg. 80171 (Dec. 20, 2000) (“[O]nce an employer terminates the employment relationship with the H-1B nonimmigrant, regardless of any arrangements for severance pay or benefits, that H-1B employee must either depart the United States upon termination of his or her services, or seek a change of immigration status for which he or she may be eligible.”). The means to finance a departure benefits both the employee, who would avoid the possibility of penalties for remaining in the country on an unauthorized basis, *Prosecuting Party's Opening Brief* (“Br.” or “brief”) 16, and federal immigration law, which seeks to limit unauthorized individuals' presence within U.S. borders.

Dr. Puri's marriage, however, authorized him to remain in the country after his termination. Indeed, he obtained alternate authorization to remain in the United States prior to his effective termination date. Since federal law authorized Dr. Puri to remain in the country, payment of transportation costs was not necessary to facilitate the departure of an individual unauthorized to be here.

A second purpose of the return transportation payment obligation is to ensure that only individuals authorized to work in the United States fill U.S. based jobs. If a terminated H-1B employee lacks the resources to return home, his or her economic circumstances will likely necessitate seeking work on an unauthorized basis. The employer's payment of return transportation costs ensures that the terminated employee has the economic means to finance a return trip home, thereby avoiding the dilemma of choosing between economic hardship or seeking unauthorized work. *Cf.* 65 Fed. Reg. 80170 (Dec. 20, 2000) (discussing a purpose of the employer's obligation to pay the wages of a "benched" employee who cannot lawfully work for another employer as ensuring that the employee is not "without any legal means of support in the country").

Dr. Puri's marriage, however, permitted him to seek immediate work authorization. Dr. Puri sought such authorization prior to his effective date of termination. Thus, Dr. Puri's circumstances did not present a significant risk of a terminated, unauthorized H-1B employee depriving authorized workers of U.S. based jobs.

Third, employer payment of return transportation costs serves an equitable purpose. When a nonimmigrant H-1B employee comes to work in the United States, an employer obtains authorization to employ him or her for a specific period of time. But an employer may terminate the relationship at any time. Under typical circumstances, equitable considerations would not

allow the sponsoring employer to terminate the employment relationship before the authorized period of employment elapses without bearing the financial repercussions of the employee's unexpected return home.<sup>8</sup>

The record indicates, however, that Dr. Puri had no desire to return home after UAB terminated him. Dr. Puri expressly informed UAB that he intended to remain in the country. He acted consistently with his stated intention, as there is no evidence that Dr. Puri returned to Pakistan for nearly five years after his dismissal. Since the evidence indicates Dr. Puri had no desire to leave the United States following his termination, not receiving return transportation costs from UAB did not result in any unfairness to him.

Indeed, the circumstances here relating to equitable considerations are similar to those in Vojtisek-Lom. In both cases, a dismissed H-1B employee found an alternate means to maintain authorized status in the U.S. after his dismissal and declined to return home when his employment ended. Under such circumstances, non-receipt of return transportation costs results in no unfairness to the H-1B employee since the worker can lawfully fulfill his express desire not to leave the country.

Finally, UAB knew, *at the time of Dr. Puri's dismissal*, that his marriage to a U.S. citizen authorized him to remain in the country. It also knew that Dr. Puri did not intend to return to Pakistan. UAB's knowledge of Dr. Puri's circumstances fully serves to uphold the purposes that underlie the return transportation cost obligation. Such prior knowledge ensures that an employer does not arbitrarily elect not to pay a dismissed employee's return transportation costs, without a subjective awareness that the employee is authorized to remain in the country and does

---

<sup>8</sup> Of course, return transportation costs for H-1B visa workers may be costly. For example, UAB estimated Dr. Puri's return transportation costs to Pakistan to be approximately \$1,500.00 in June 2009.

not wish to leave. Under these circumstances, the Board should find that UAB effected a bona fide termination by notifying Dr. Puri and USCIS of the termination.<sup>9</sup>

**C. DR. PURI’S ARGUMENTS ON APPEAL TO THE BOARD LACK MERIT.**

1. Dr. Puri’s brief omits a crucial phrase from the proper test for a bona fide termination. Br. 14. It is true that “clear notice to the employee of the termination [and] notice to the USCIS of the termination,” *id.*, are necessary but “payment of the reasonable costs of return transportation to the employee’s home country, *id.*,” is only necessary “under certain circumstances.” 20 C.F.R. 655.731(c)(7)(ii) (“DHS regulations ... require the employer to provide payment for transportation home *under certain circumstances* (8 C.F.R. 214.2(h)(4)(iii)(E)).”) (emphasis added). It is that crucial latter phrase that Dr. Puri omits. Indeed, the Board has regularly acknowledged – in the very cases that the brief incompletely cites - that the proper bona fide termination standard is one that only requires payment of return transportation costs “under certain circumstances.” Gupta, slip op. at 5 (“To effect a *bona fide* termination, the employer must take three steps ... [including] provid[ing] the employee with payment for transportation home *under certain circumstances*.”) (emphasis added); Amtel II, slip op. at 2 n.4 (same). The ALJ’s Decision and Order makes clear that the “under the circumstances” language is a pivotal part of the standard. Dec. at 8-9 (“[E]mployers are required to pay for their return transportation only under certain circumstances, i.e. [according to the ALJ], when the nonimmigrants have not otherwise obtained lawful status.”) (internal quotation

---

<sup>9</sup> The Administrator does not endorse an expansive employer power to effect a bona fide termination without providing return transportation costs. Rather, where an employer, like UAB, can demonstrate that it knew – at the time of the termination – that the employee had obtained alternate lawful status to remain in, and had no intent to leave, the country (and the employee incurs no actual return transportation costs during the LCA employment period), the circumstances warranting payment of return transportation costs do not exist.

marks omitted). The Board should reject Dr. Puri's attempt to read out this qualifying language from the bona fide termination standard.

2. The brief's incomplete statement of the appropriate standard leads to further misplaced arguments. The Administrator is not arguing that the assessment of back wages beyond the date of notice to USCIS of the termination would create "overly harsh financial consequences for the employer." Br. 14. The Administrator is merely contending that, under the circumstances here, where Dr. Puri's marriage permitted him to remain in the country and he represented to UAB that he had no intent to return to Pakistan (and Dr. Puri incurred no return transportation costs during the LCA employment period), UAB effected a bona fide termination based solely on notice to USCIS and Dr. Puri. As stated *supra*, an employer's obligation to pay the wages required under the H-1B program simply ceases upon a bona fide termination. See 20 C.F.R. 655.731(c)(7)(ii).

Nor is the Administrator asking the Board to adopt an amorphous "all the facts and circumstances standard for determining when payment of the return transportation cost must be made." Br. 20 (internal quotation marks omitted). Rather, the Administrator is arguing for an interpretation of a standard that properly reflects the applicable regulatory language at 20 C.F.R. 655.731(c)(7)(ii) and that the Board itself has adopted. See, e.g., Baiju, slip op. at 9. For this reason, Dr. Puri's assertion that the Administrator is somehow advocating "an approach [that] necessarily involves the courts in a legislative role than an adjudicative one" wholly misses its mark. Br. 17. In defining the "certain circumstances" under which an employer does not have to pay return transportation costs in order to effect a bona fide termination, the Board will be interpreting the meaning of existing regulatory language to resolve a dispute. This is properly an adjudicative function.

3. Dr. Puri's brief's recitation of the purposes the employer's payment of return transportation costs serves – counteracting the unfair competition authorized workers might face from unauthorized terminated H-1B employees seeking jobs, addressing the unfairness of requiring an H-1B employee to purchase often expensive return transportation brought on by an unexpected termination, and deterring employers from not paying return transportation costs, Br. 18-20 - does not support payment in Dr. Puri's circumstances. First, Dr. Puri was not “immediately out of status” when UAB terminated him, since his marriage permitted him to remain in the country. Br. 18. Second, while it is true that Dr. Puri no longer had authorization to work as an H-1B for UAB, his marriage entitled him to seek, and he applied for, alternate employment authorization more than a month before his termination. Third, nonpayment of transportation costs here did not cause any unfairness to Dr. Puri. Br. 18. Dr. Puri expressed to UAB that he had no intent to return to Pakistan, and his marriage ensured that he was under no pressure to depart the country to avoid incurring the repercussions of staying without a visa.

Fourth, compelling UAB to pay back wages until it provides Dr. Puri return transportation costs might very well deter other employers from failing to meet their return transportation costs obligation in *every* circumstance. Br. 20. But the regulation is plain, as is the Board's precedent, that there are “certain circumstances” where fulfilling the obligation is not necessary to effect a bona fide termination. Thus, the brief's deterrence-based argument does little to answer whether UAB, under the circumstances of Dr. Puri's termination, had an obligation to pay him return transportation costs to effectuate a bona fide termination.<sup>10</sup>

---

<sup>10</sup> While it is true that a bona fide termination is “not likely” to occur absent the payment of return transportation costs, Br. 13 (quoting 65 Fed. Reg. 80171), the regulation anticipates “certain circumstances” where such a payment is not necessary. As set forth *supra*, the Board can identify the otherwise unspecified “circumstances” by looking to the purposes of the return transportation obligation. When those purposes are met, as here, without the payment of return

4. The decisions Dr. Puri's brief cites to support his position are distinguishable. In Amtel v. Yongmahapakorn, ARB No. 04-087, ALJ No. 2004-LCA-006 (ARB Sept. 29, 2006) ("Amtel I"), there was no evidence that the employer notified USCIS of the termination. *See* slip op. at 11. In Amtel II, the employer sought, unsuccessfully, to introduce new evidence indicating that it had provided notice to USCIS of the termination. *See* slip op. at 5. The Board stated, in dicta, that even if it reopened the record, the employer had admitted that it failed to pay the complainant's return transportation costs, rendering its termination not bona fide for that reason. *Id.* There was no evidence, however, that the complainant had an alternate means to remain in the country on an authorized basis after her termination. Furthermore, after her termination, the complainant returned to Thailand – her home country - before the period of employment specified in her LCA lapsed, thereby herself incurring the return transportation costs. *See* Yongmahapakorn v. Amtel, ALJ No. 2004-LCA-006, slip op. at 35-36 (March 23, 2004).

In Gupta, the ALJ had ruled that the employer effected a bona fide termination based solely on notice of the termination to USCIS. *See* slip op. at 6. There was no evidence in the record, however, to show the employer had notified the employee of the termination (or provided him return transportation costs). *Id.* The Board accordingly remanded the dispute to the ALJ.

In Huang v. Ultimo Software Solutions, Inc., ARB Nos. 09-044, 09-056, ALJ No. 2008-LCA-00011, slip op. at 4 (ARB March 31, 2011), the Board upheld the ALJ's decision, concluding that the employer did not effect a bona fide termination. While the ALJ noted that the employer failed to provide return transportation costs, he also determined that the employer had failed to notify the employee of the termination. Huang v. Ultimo Software Solutions, Inc.,

---

transportation costs, the Board should conclude that an employer effected a bona fide termination.

ALJ No. 2008-LCA-00011, slip op. at 22 (Dec. 17, 2008). Thus, as in Amtel I, Amtel II, and Gupta, the Board did not face the circumstances here, where an employer fulfills its notification obligations, knows that the H-1B employee both wishes to remain in the U.S. and has an alternate, lawful means to stay here, and the employee does not actually return home during the LCA employment authorization period.

Dr. Puri's reliance on Limanseto is equally unavailing. First, there is no indication that the employer knew that the H-1B worker had an alternative means to remain in the country on an authorized basis after the dismissal or that the employee represented to the employer that he intended to remain in the country. In addition, as in Amtel II, the H-1B worker actually returned home after his termination and paid his own transportation costs to do so. These different factual circumstances render Dr. Puri's reliance on Limanseto unpersuasive.

5. Finally, even if a voluntary resignation by the employee is the "only exception to the requirement of paying the benched employee's return transportation abroad contained in 8 C.F.R. 214.2(h)(4)(iii)(E)," Br. 12, UAB's *liability to pay Dr. Puri return transportation costs* under 8 C.F.R. 214.2(h)(4)(iii)(E) is not in dispute because the employer paid him those costs in June 2009. *See* n.1, *supra*. What is in dispute is UAB's *back-wage liability* to Dr. Puri under 20 C.F.R. 655.731(c)(7)(ii), which is distinct from its liability to pay return transportation costs. *See Wirth*, slip op. at 8-11 (treating the determination of back wage liability based on an alleged employer failure to effect a bona fide termination as distinct from the determination of liability for return transportation costs). Under the circumstances presented here, UAB is not liable for the back wages Dr. Puri is seeking because it properly effected a bona fide termination without providing return transportation costs.

**CONCLUSION**

Under the facts of this case, where Dr. Puri obtained alternate lawful status to stay in the United States prior to his dismissal; UAB knew that Dr. Puri had obtained such alternate lawful status prior to dismissing him; Dr. Puri represented to UAB that he intended to remain in the United States; and Dr. Puri did not, in fact, incur return transportation costs during the period specified in the applicable LCA, UAB effected a bona fide termination based on notice to Dr. Puri and USCIS of his termination. Thus, the Board should affirm the ALJ's decision concluding that UAB effected a bona fide termination on July 30, 2007.

RESPECTFULLY SUBMITTED,

M. PATRICIA SMITH  
Solicitor of Labor

JENNIFER S. BRAND  
Associate Solicitor

WILLIAM C. LESSER  
Deputy Associate Solicitor

PAUL L. FRIEDEN  
Counsel for Appellate Litigation

---

Quinn Philbin  
Attorney  
U.S. Department of Labor  
Office of the Solicitor  
Room N2716  
200 Constitution Avenue, NW  
Washington, D.C. 20210  
(202) 693-5561

**CERTIFICATE OF SERVICE**

This is to certify that on this 4<sup>th</sup> day of February, 2013, copies of the foregoing ACTING

DEPUTY ADMINISTRATOR'S AMICUS BRIEF were sent via first class mail to:

David E. Larson  
Fifth Third Center, Suite 1590  
One South Main Street  
Dayton, Ohio, 45402

Kathleen Kauffman  
UAB Health System  
500 22<sup>nd</sup> Street South, Suite 408  
Birmingham, AL 35233

Anita Bonasera  
UAB, Huntsville  
Director of Employment relations  
1530 3<sup>rd</sup> Avenue South  
Birmingham, AL 35294

J. Neil Grindstaff  
UAB  
1100 Superior Avenue, 20<sup>th</sup> floor  
Cleveland, Ohio 44114

Ian MacDonald  
Emily Liss  
Alex R. Frondorf  
Littler Mendelson  
334 Peachtree Street Road, N.E. Suite 1500  
Atlanta, GA 30326

Hon. Linda S. Chapman  
Administrative Law Judge  
Office of Administrative Law Judges  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Muhammad Rehan Puri  
272 Hamilton Place  
Hackensack, NJ 07601