PETITION APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of September, two thousand twenty-one.

PRESENT:

JOHN M. WALKER, JR.,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
Circuit Judges.

COMPUNNEL SOFTWARE GROUP, INC.,
Petitioner-Counter-Claimant-Counter-Defendant-Appellee,

v.

ARVIND GUPTA,
Respondent-Counter-Defendant-Counter-Claimant-Appellant,

MARTY WALSH, in his official capacity as Secretary, United States Department of Labor,
Respondent-Counter-Defendant-Appellee.

19-1761

FOR PETITONER-COUNTER CLAIMANT-COUNTER DEFENDANT-APPELLEE: SANJAY CHAUBEY, Law Offices of Sanjay Chaubey, New York, NY.

FOR RESPONDENT-COUNTER
DEFENDANT-COUNTER
CLAIMANT-APPELLANT: ARVIND GUPTA, *pro se*, New York, NY.

FOR RESPONDENT-COUNTER-
DEFENDANT-APPELLEE: BRANDON M. WATERMAN, Benjamin H. Torrance, Assistant United States Attorneys, *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeal from an order of the United States District Court for the Southern District of New York (Abrams, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Arvind Gupta, pro se, appeals from a series of district court orders in his proceeding against his former employer, Compunnel Software Group, Inc., and his petition for review of an administrative proceeding before an Administrative Law Judge ("ALJ") and the Administrative Review Board ("ARB") of the U.S. Department of Labor ("DOL").

Compunnel employed Gupta from 2007 to 2009. In 2008, Gupta filed an administrative complaint against Compunnel before the Wage and Hour Division ("WHD") of the DOL, alleging violations of the H-1B visa program under the Immigration and Nationality Act (INA) based on failure to pay required wages. Ultimately, in 2016, the parties entered into a settlement agreement and the ALJ dismissed the matter pursuant to the agreement. Gupta then repudiated the settlement agreement and sought review by the ARB. The ARB denied his petition for review on the grounds that the settlement agreement was facially valid and the ARB did not have the authority to review Gupta's collateral attacks on the agreement's validity. Gupta then sought review in the district court. After discovery, the district court granted Compunnel's and the DOL's motions for summary judgment and denied Gupta's cross-motion for partial summary judgment, reasoning that the DOL's decision was not arbitrary and capricious because the settlement agreement was valid, the approval was procedurally proper, and the agreement was otherwise fair and reasonable. Gupta moved for reconsideration; the district court denied the motion. Gupta then appealed from the order denying reconsideration, the order and judgment granting Compunnel summary judgment, and several earlier orders. We assume the parties' familiarity with the record. Because the

district court correctly concluded that the settlement agreement was valid and enforceable, its judgment is affirmed, and Gupta's appeals from the prior orders are moot. *See Chevron Corp. v. Donziger*, 990 F.3d 191, 202 n.6 (2d Cir. 2021); *Wallach v. Lieberman*, 366 F.2d 254, 259 (2d Cir. 1966).

When reviewing a district court's "grant of summary judgment involving a claim brought under the Administrative Procedure Act, we review the administrative record *de novo* without according deference to the decision of the district court." *Karpova v. Snow*, 497 F.3d 262, 267 (2d Cir. 2007). However, we will only set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or where there is no "rational connection between the facts found and the choice made." *See id.* at 267–68 (citing 5 U.S.C. § 706(2)(A)).

Here, the ALJ and ARB approved, and the district court enforced, the settlement agreement between Gupta and Compunnel. In reviewing a district court's decision to enforce a settlement agreement, we review legal conclusions de novo and factual findings, including whether a settlement agreement existed and the parties assented to it, for clear error. *Ciaramella v. Reader's Digest Ass'n, Inc.*, 131 F.3d 320, 323–24 (2d Cir. 1997). We review a district

court's denial of reconsideration for abuse of discretion. *See Harris v. Kuhlmann*, 346 F.3d 330, 348 (2d Cir. 2003).

The district court did not err by concluding that Gupta entered into a valid settlement agreement with defendants.[1] "A settlement agreement is a contract that is interpreted according to general principles of contract law." *Powell v. Omnicom*, 497 F.3d 124, 128 (2d Cir. 2007). In New York, "one who signs a document is, absent fraud or other wrongful act of the other contracting party, bound by its contents." *Da Silva v. Musso*, 53 N.Y.2d 543, 550 (1981). Further, "a release that is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced." *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 463 (2d Cir. 1998) (citing *Skluth v. United Merchants & Mfrs., Inc.*, 559 N.Y.S.2d 280, 282 (1st Dep't 1990)).

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[1] Gupta only conclusorily challenges the district court's ruling that the language of the settlement agreement was clear and unambiguous, and that it was not procured through fraud or duress. In passing, Gupta refers to "the unconscionable settlement of 'INA' claims" and that he signed one page of the settlement agreement "under duress." These two conclusory statements, unexplained and unsupported by legal authority, are not sufficient to properly raise an argument on appeal. *See Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013).

The record shows that Gupta, after negotiating with Compunnel about the payment schedule and terms of the release, signed the settlement agreement. The agreement provided that Compunnel would pay Gupta $28,000 "as payment in full and final compensation from [Compunnel] to Gupta arising from or in any way related to the employment of Gupta with [Compunnel]." More specifically, the parties agreed to "giv[e] up their right to a trial in connection with the allegations contained in the complaints filed with U.S. Department of Labor – Wage and Hour Division (WHD) against [Compunnel] or any other rights which are the subject of this Agreement and Stipulation including any rights in the administrative proceedings in [the ALJ, ARB, or district court cases]." Thus, the district court correctly ruled that the terms of the release contained in the settlement agreement were clear and unambiguous and enforced its terms accordingly.

Gupta's remaining arguments attacking the validity of the settlement agreement, and the ALJ's (and ARB's) authority to approve, as here, a facially valid settlement agreement, are meritless. As an initial matter, ALJs have "all powers necessary to conduct fair and impartial proceedings," which include, among other things, the power to "[t]erminate proceedings through dismissal or remand when not

inconsistent with statute, regulation, or executive order" and "[i]ssue decisions and orders." 29 C.F.R. § 18.12(b). Gupta has not pointed to any provision of the INA or its implementing regulations that limits the ALJ's (or ARB's) authority to dismiss a case pursuant to a valid settlement agreement. *See Talukdar v. Dep't of Veterans Affs.*, ARB No. 04-100, 2007 WL 352434, at *2 (DOL Admin. Rev. Bd. Jan. 31, 2007) (concluding that ARB has the same authority as ALJs to dismiss H-1B cases based on settlements reached by the parties).[2] The parties appeared before the ALJ and agreed that the settlement had "the same force and effect as an [o]rder made after a full hearing pursuant to 20 C.F.R. § 655.840 in accordance with 29 C.F.R. § 18.71(b)(1)." Further, the record demonstrates that Gupta was personally present when the parties submitted the agreement to the ALJ, did not then object to it, and negotiated and signed the agreement himself. Lastly, the ARB's decision constituted a "final agency action" subject to judicial review substantially for the reasons stated by the district court. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); see also 5 U.S.C. § 704. Accordingly, Gupta's

[2] As the district court acknowledged, H-1B claims are settled routinely. *See* U.S. Dep't of Labor, Office of Administrative Law Judges, LCA Decisions, https://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/CASELISTS/LCA_DECISIONS.HTM.

agreement with Compunnel is valid, it extinguished his claims against his former employer, the DOL's ALJ and ARB properly approved the settlement, and the district court correctly granted Compunnel and the DOL summary judgment and denied relief on reconsideration.

We have considered all of Gupta's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMPUNNEL SOFTWARE GROUP, INC.,
Petitioner,

v.

ARVIND GUPTA, and R. ALEXANDER ACOSTA, in his capacity as Secretary, United States Department of Labor,
Respondents.

No. 14-CV-4790-RA

OPINION & ORDER

DATE FILED: SEPTEMBER 30, 2018

RONNIE ABRAMS. United States District Judge:

Arvind Gupta, proceeding pro se, seeks judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, of orders of an Administrative Law Judge ("ALJ") and the Administrative Review Board ("ARB") of the Department of Labor ("DOL"). The challenged orders

concern Gupta's DOL complaint against his former employer, Compunnel Software Group, Inc., for violations of the H-1B visa program of the Immigration and Nationality Act ("INA"). Gupta also brings associated claims against Compunnel Before the Court are Compunnel's motion for summary judgment, the Secretary of Labor's motion for summary judgment, and Gupta's cross-motion for partial summary judgment. For the reasons that follow, the motions for summary judgment of Compunnel and the Secretary are granted and Gupta's motion for partial summary judgment is denied.

BACKGROUND

The following facts are undisputed unless otherwise indicated.[1]

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[1] The facts are drawn from the complete Administrative Record ("AR") submitted to the Court on November 17, 2017. Dkt. 202. In reviewing the agency's actions under the APA, the Court is "limited to examining the administrative record to determine whether the agency decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Riverkeeper, Inc. v. U.S. E.P.A.*, 358 F.3d 174, 184 (2d Cir. 2004); *accord* 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). After this case was reopened in December 2016, Compunnel and Gupta were permitted to take additional discovery related to the private dispute between them. Dkt. 189. Gupta was not, however,

I. Gupta's Employment with Compunnel

Gupta is a citizen of India who was employed by Compunnel to work in the United States pursuant to an H-1B visa. AR 27. The H-1B visa program permits non-immigrant foreign workers to work temporarily in the United States in "specialty occupation[s]." 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n). "Specialty occupations" are defined by the INA as jobs that require the application of "a body of highly specialized knowledge," as well as attainment of a bachelor's degree or higher in the specialty. 8 U.S.C. § 1184(i)(1).

In order to hire a non-immigrant worker pursuant to the H-1B provisions of the INA, an employer must submit specified materials to the DOL and the Department of Homeland Security ("DHS"). First, the employer must file a Labor Condition Application ("LCA") with the DOL, specifying, among other things, the occupation the employer seeks to fill and the wage rate. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.730(c), On the LCA, the employer must also attest that he will, among other things, pay the

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permitted to engage in discovery against the Secretary. Dkt. 211. The Court considers the evidence developed outside the administrative record only to the extent it considers the private dispute between Gupta and Compunnel.

nonimmigrant the stipulated wage rate for the period of authorized employment. 20 C.F.R. § 655.730(d); *see* 8 U.S.C. § 1182(n)(1)(A), (2)(C)(vii)(I). This wage obligation applies throughout the period of authorized employment, including any "nonproductive" time "due to a decision by the employer" (such as a "lack of work"). 8 U.S.C. § 1182(n)(2)(C)(vii)(I), (IV); 20 C.F.R. 655.731(c)(7)(i), (ii). After filing the LCA and obtaining the DOL's certification, the employer must file an H-1B petition with the DHS's United States Citizenship and Immigration Services ("USCIS"). 20 C.F.R. § 655.705(a), (b). If USCIS approves the H-1B petition, the prospective employee may then apply for an H-1B visa. AR 1251. A prospective employee who has been previously approved for an H-1B visa is permitted to accept new employment in the United States upon the new employer's filing of an H-1B petition, with his employment authorization extended while the petition is under review. 8 U.S.C. § 1184(n).

On December 1, 2006, Compunnel initiated Gupta's application for H-1B employment by filing an LCA with the DOL. AR 1244, 49-51. At the time, Gupta had already been approved for an H-1B visa and had entered the United States pursuant to the H-1B petitions of two other employers, Wipro Limited and

Headstrong, Inc.[2] AR 1244-45. The DOL certified Compunnel's LCA, and Compunnel then filed an H-1B petition, which was received by USCIS on December 11, 2006. AR 1245, 48. USCIS then approved Compunnel's H-1B petition for a period of authorized employment running from February 27, 2007 through April 30, 2009. AR 1245. Gupta began working for Compunnel in February 2007.

From February 2007 until April 30, 2009, Gupta resided in the United States and was employed by Compunnel. AR 1246-49. During this time period, Gupta at times worked actively on projects and at times was "nonproductive." *Id.* Specifically, Gupta

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[2] The Court takes judicial notice of another case that Gupta has pending before this Court: *Gupta v. Headstrong, Inc.*, No. 17-CV-5286 (RA), 2018 WL 1634870, at *1 (S.D.N.Y. Mar. 30, 2018). *See Anderson v. Rochester-Genesee Reg'l Transp. Auth.*, 337 F.3d 201, 205 n.4 (2d Cir. 2003). In that case, Gupta entered into a settlement agreement with his employer in May 2008 and thereafter proceeded to challenge that agreement and its release in the DOL and in this Court. *See Headstrong*, 2018 WL 1634870, at *1, 2. Similar to the allegations here, Gupta claimed that he rescinded the agreement after entering into it, that the agreement lacked consideration, and that he entered into the contract under duress and the influence of fraud. *See id.* at *3, 4. In 2015, just one year prior to his entering a settlement in this case, the DOL ruled on his challenge to the agreement with Headstrong, concluding that "Headstrong had no remaining monetary liability because of the agreement's release of all claims." *Id.* at *2.

worked actively from approximately Febrary 5, 2007 to June 6, 2007; June 11, 2007 to July 16, 2007; and December 11, 2007 to March 31, 2008. *Id.* Gupta was nonproductive for a total of approximately a year and a half—from July 23, 2007 to December 10, 2007, and then again from March 31, 2008 to April 30, 2009. AR 1247-48. On April 30, 2009, Gupta left the United States. AR 1249.

II. Gupta's DOL Compaint and Initial Proceedings Before the ALJ and ARB

On November 17, 2008 Gupta filed a complaint with the DOL alleging that Compunnel had violated the H-1B provisions of the INA. AR 413-419. He alleged, among other things, that Compunnel had failed to pay him for nonproductive time and, as to productive time, had failed to pay him the wage rate required by the law. *Id.* A few months later, Gupta amended his complaint to add further claims, including a claim that Compunnel had retaliated against him for disclosing the company's H-1B violations to Compunnel officials. AR 429-438. The Wage and Hour Division ("WHD") of the DOL investigated Gupta's complaint and issued a determination letter concluding that Compunnel "failed to pay wages as required." AR 1-4. The WHD further concluded that Compunnel owed Gupta $6,976.00 in back wages, but determined that the company had already paid

the back wages in full. AR 1, 1243. The WHD declined to impose a civil monetary penalty. AR 4.

Gupta disputed the WHD's determination and requested a hearing before an ALJ. AR 810. On February 1, 2012 the ALJ affirmed, concluding that Compunnel owed Gupta the $6,976.00 in back wages for certain periods of productive time, but that Compunnel did not owe Gupta back wages for his nonproductive time, AR 807-22. The ALJ likewise affirmed the WHD's determination that Compunnel's liability had already been discharged. AR 821. Finally, the ALJ denied Gupta's retaliation claim on the grounds that Gupta had failed to establish any adverse action or retaliatory motive. AR 818-21.

Gupta appealed to the ARB. On May 29, 2014, the ARB issued a Decision and Order of Remand, which in substantial part reversed the determinations of the ALJ in favor of Gupta. AR1243-63. Contrary to the determinations of the ALJ, the ARB concluded that Compunnel owed Gupta back wages, benefits, and interest for Gupta's nonproductive periods from July 23, 2007 to December 1, 2007 and March 31, 2008 to April 30, 2009. AR 1258-60. The ARB also vacated the ALJ's denial of Gupta's retaliation claim, and affirmed (on other grounds) the ALJ's determination that Gupta was not owed back wages from December 1, 2006 to February 2, 2007. AR

1252-55. The ARB remanded to the ALJ for (1) calculation of the damages owed to Gupta for his nonproductive time and (2) reconsideration of Gupta's retaliation claim. AR 1263.

III. Compunnel's Petition for Review and Initial Proceedings Before this Court

On June 27, 2014, before the ALJ addressed Gupta's case on remand, Compunnel petitioned this Court for judicial review of the ARB's order. Dkt. 2. Gupta answered the petition and filed numerous counterclaims against Compunnel, as well as cross-claims against the Secretary. Dkt. 22, 33. On October 22, 2014, this Court held that, because the ARB's order remanded the case to the ALJ, the order was not final and was therefore not yet subject to judicial review. Dkt. 38 at 3. Accordingly, the Court dismissed without prejudice (1) Compunnel's claims for review of the ARB order and (2) five of Gupta's counterclaims and cross-claims, all of which were also based on review of that order. Dkt. 38 at 3. The Court directed the ALJ—who had held the case in abeyance pending a decision from this Court on Compunnel's petition—to consider the case on remand and to issue an order within 30 days. *Id.* at 3-4.

While the ALJ considered the case on remand,

Gupta's remaining counterclaims against Compunnel (for breach of contract and damages) proceeded before this Court. On March 17, 2015, this Court granted Compunnel's motion for judgment on the pleadings on those claims. Dkt. 86.

IV. Post-Remand Proceedings Before the ALJ and ARB

Meanwhile, the ALJ lifted its prior order holding the case in abeyance and proceeded to consider Gupta's case on remand. AR 1369-71. Between November 2014 and January 2016, Gupta and Compunnel submitted numerous briefs and motions to the ALJ, including motions to reopen the record, to strike exhibits from the record, to authenticate USCIS documents, and to obtain litigation costs and interest. *See*, e.g., AR 1419, 1512, 1373, 1389. The ALJ issued at least six orders ruling on these various requests. *See*, e.g., AR 1383, 1579.

Toward the end of January 2016, Compunnel and Gupta communicated conflicting messages to the ALJ about the possibility of settling their dispute. AR 1604-07. For example, on January 29, 2016, Compunnel's counsel emailed the office of the ALJ (copying Gupta) and stated that Compunnel and Gupta had negotiated a settlement agreement. AR 1607. Approximately ten minutes later, Gupta

replied to that email stating that he "categorically den[ied] . . . having agreed to any settlement agreement[.]" AR 1604. One hour after that, the ALJ's law clerk replied to both parties, informing them that the status of the case remained unchanged and explaining that should the parties wish to settle, they would need to follow the "mandatory process" of submitting a signed stipulation of settlement and joint motion requesting the ALJ's approval. AR 1603. The clerk referred the parties to the procedures for "approval of settlement or consent findings" outlined in the Rules of Pratice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. *Id.*; *see* 29 C.F.R. § 18.71.[3] The email concluded that "[u]ntil Judge

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[3] 29 C.F.R. § 18.71 states as follows:

(a) Motion for approval of settlement agreement. When the applicable statute or regulation requires it, the parties must submit a settlement agreement for the judge's review and approval.

(b) Motion for consent findings and order. Parties may file a motion to accept and adopt consent findings. Any agreement that contains consent findings and an order that disposes of all or part of a matter must include:

(1) A statement that the order has the same effect as one made after a full hearing.

(2) A statement that the order is based on a record that consists of the paper that began the proceeding (such as a complaint, order of reference, or notice of administrative determination), as it may have been amended, and the agreement;

Timlin receives these two documents and approves their content in an issued Order, the case remains before her and ready for a full adjudication." *Id.*

Approximately six weeks later, on March 9, 2016, Gupta and three representatives from Compunnel appeared in person at the office of the ALJ. AR 1741, 1696, 1613. The parties had made no prior appointment, and the ALJ was not in the office. AR 1613. The parties met with the ALJ's law clerk, who memorialized his recollection of the events in a "memo to file," which is part of the administrative record and is signed and dated March 9. *Id.*. According to this memo, Compunnel's representatives arrived at the office and told the clerk that the parties had reached a settlement agreement that they wished to sign before the ALJ that day. *Id.* The Compunnel representatives had brought with them cashier's checks made out to Gupta. *Id.* Shortly thereafter, Gupta arrived. *Id.* The law clerk explained to Gupta that the settlement procedure required a signed agreement from both parties, as well as the ALJ's determination that the terms of the agreement were fair. *Id.* Only after that,

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(3) A waiver of any further procedural steps before the judge; and

(4) A waiver of any right to challenge or context the validity of the order entered into in accordance with the agreement.

the law clerk explained, could "money exchange hands." *Id.* Gupta stated that he wanted to receive cash that day and refused to sign the agreement, prompting Compunnel to offer Gupta the entire amount agreed upon—$28,000—up front, instead of in installments. AR 1614. According to the law clerk's memo, Gupta agreed to the proposed change, and the law clerk instructed Compunnel to handwrite and sign off on the amendment directly on the agreement, which Compunnel did. *Id.* After further discussions, during which Gupta raised concerns about another term in the agreement, the law clerk spoke with the ALJ on the phone. *Id.* After describing the situation and Gupta's concerns about the agreement to the ALJ, the ALJ asked the law clerk to request that the parties return the next day to resume discussions. *Id.* The law clerk notified the parties, who agreed to return to the office the next day. AR 1615.

The next day, March 10, 2016, the parties met before the ALJ. AR 1696, 1741. The details of what happened that day are in dispute. According to Compunnel, the parties jointly moved to settle the matter, and the ALJ then approved the settlement agreement and dismissed the case with prejudice. AR 1741. According to Gupta, Gupta informed the ALJ that he did not agree to settle his INA claims and, during a moment when Gupta and Compunnel's

representatives were left alone, Compunnel induced Gupta to sign the agreement by falsely representing to him that by doing so he would release only his legal claims against Compunnel in India. AR 1696-97. Despite the parties' decidedly different accounts of how the agreement came to be signed, it is undisputed that both parties signed the agreement, that Compunnel gave Gupta the full $28,000 that day, and that Gupta accepted and deposited the checks into his bank account, also on March 10, 2016. AR 1682-83.

The following day, the ALJ issued a Final Order Approving the Parties' Settlement Agreement. AR 1622-23. The order stated that "the original Settlement Agreement was received in the Office of the Administrative Law Judges" on March 10, 2016. AR 1623. The order further stated that the Settlement Agreement "appears to be fair and reasonable," and that "[t]he parties agree that an Order disposing of this proceeding shall have the same force and effect as an Order made after a full hearing pursuant to 20 C.F.R. § 655.840 in accordance with 29 C.F.R. § 18.71(b)(1)." *Id.* Accordingly, the order stated, the parties' Settlement Agreement was "approved" and the matter was dismissed with prejudice. *Id.*

The Settlement Agreement was incorporated by

reference into the ALJ's order. *Id.* The agreement is signed by both parties and dated March 10, 2016. AR 1621. It is notarized as to Compunnel's signature, but not as to Gupta's. *Id.* The agreement states, among other things, that Compunnel agrees to pay Gupta $28,000 "as payment in full and final compensation from [Compunnel] to Gupta arising from or in any way related to the employment of Gupta with [Compunnel]." AR 1616-17. A typewritten installment plan for payment of the settlement amount to Gupta is crossed out in pen and replaced by a handwritten note that reads, "On approval by the Court[,] Respondent shall pay the entire settlement amount of $28,0000 payable today." AR 1617. The handwritten note is signed by the President of Compunnel and dated March 9, 2016. *Id.*

Paragraph 10 of the agreement states that the parties "are giving up their right to a trial in connection with the allegations contained in the complaints filed with the U.S. Department of Labor—Wage and Hour Division (WHD) against [Compunnel] or any other rights which are the subject of this Agreement and Stipulation including any rights in the administrative proceedings in ALJ case No. 2011-LCA-045, ARB Case No. 12-049, USDC Case No. 14-CV-4790 (SAS) or any other court related to this matter." AR 1617-18. Paragraph 18

states that Gupta "has no grievances, complaint or protest against Compunnel] for any reason whatsoever[,]" and that he "assures and promises that he withdraws his claims as filed against Compunnel with Department of Labor, Federal or State or US Citizenship and Immigration services and any other governmental authority in United States or India." AR 1619.

Almost two weeks after signing the Settlement Agreement, on March 22, 2016, Gupta challenged the ALJ's approval order in this Court by filing an emergency motion for a preliminary injunction and a motion to reopen his case. Dkt. 118. Shortly thereafter, however, Gupta withdrew the emergency motion, stating that he would first exhaust his remedies before the ARB. Dkt. 127.

On March 29, 2016, Gupta filed with the ARB a "Motion for Summary Reversal or Vacatur" of the ALJ's Settlement Order. AR 1692. In the motion, he challenged the ALJ's order approving the settlement agreement on numerous grounds, including that the order was contrary to the ARB's 2014 mandate, that it was procedurally improper, that it was entered into under fraud and duress, and that the ALJ lacked jurisdiction to approve the agreement. On April 29, 2016, the ARB ruled on Gupta's challenge in a Final Decision and Order. AR 1838-41. The ARB

construed Gupta's appeal as "rest[ing] entirely on collateral attacks against the Settlement Agreement, including fraud, duress, lack of consideration, lack of voluntariness, lack of initials on every page, and contradiction of public policy." AR 1840. Finding that the agreement "appear[ed] valid on its face," the ARB held that "as an administrative body with only the authority emanating from statutes, implementing regulations, and delegations of authority," it lacked jurisdiction to adjudicate Gupta's collateral attacks to a facially valid agreement. *Id.* Accordingly, the ARB declined Gupta's petition for review and dismissed the matter with prejudice. AR 1841.

V. Post-Settlement Proceedings Before this Court

On May 5, 2016, in light of the ARB's Final Decision and Order, Gupta moved to reopen his case in this Court. Dkt. 131. The Court granted the motion to reopen, and on December 30, 2016, Gupta filed his Fourth Amended Petition for Review, Petition for Enforcement, and Complaint (the "Fourth Amended Complaint" or "FAC"), which is the operative pleading in this action. Dkt. 146. The Fourth Amended Complaint principally seeks judicial review of the ALJ and ARB's orders dismissing Gupta's

DOL complaint against Compunnel.[4] Specifically, in Counts 1, 2, and 3, Gupta asserts that the ALJ's approval of the settlement agreement was procedurally and constitutionally improper and challenges the DOL's jurisdiction to approve settlement agreements. In Counts 4 and 5, Gupta argues that certain of the ARB's findings in its 2014 remand order should be reversed. Count 6 alleges a

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[4] The counts are titled as follows: (1) Count 1: Whether the agency (DOL) has jurisdiction to approve, adopt and/or enforce private agreements or consent findings in violation of federal law ('INA'); (2) Count 2: Whether the ALJ (and ARB) dismissal of the case before the agency based on an alleged private agreement that is denied by Gupta is procedurally and constitutionally valid; (3) Count 3: Whether the amount of $28,000 allegedly paid by Compunnel to Gupta is fair, reasonable, and 'adequate' and in 'public interest' to extinguish Compunnel's required wage obligation under 'INA' per ARB Order dated May 29, 2014, and other 'INA' claims of Gupta including retaliation. Whether Gupta's alleged consent is 'knowing' and 'voluntary'; (4) Count 4: Required wages and benefits for the period December 11, 2006 to February 2, 2007; (5) Count 5: Agency's erroneous finding that Compunnel required but Gupta did not go to headquarters in April 2008; (6) Count 6: Retaliation by Compunnel; (7) Count 7: Disqualification of Compunnel from participating in H-1B program, civil money penalties; (8) Count 8: Enforcement of ARB 'DOR' for back wages and benefits, with interest for various periods of violations; (9) Count 9: Enforcement of Administrator's Determination for back wages with interest for various periods of violations; (10) Count 10: Compensatory damages; and (11) Count 11: Punitive damages.

retaliation claim against Compunnel. Count 7 asserts that the DOL abused its discretion in declining to impose civil penalties or to disqualify Compunnel from participation in the H-1B program. Counts 8 and 9 seek partial enforcement of the ARB's 2014 remand order. Counts 10 and 11 seek compensatory and punitive damages against Compunnel.

Compunnel filed a motion to dismiss the FAC, but submitted with it numerous materials outside the pleadings. Dkt.*See generally* Dkts. 149-52. This Court declined to convert Compunnel's motion into one for summary judgment, and Compunnel and Gupta proceeded to take additional discovery. Dkt. 174. Compunnel, the Secretary, and Gupta filed the instant motions for summary judgment, Dkts. 227, 231, 236.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d

156, 164 (2d Cir. 2011) (ciation omitted). "When both sides have moved for summary judgment, each party's motion is examined on its own merits, and all reasonable inferences are drawn against the party whose motion is under consideration." *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011). When "a party seeks judicial review of agency action, summary judgment is appropriate, since whether an agency action is supported by the administrative record and consistent with the APA standard of review is decided as a matter of law." *Residents for Sane Trash Solutions, Inc. v. U.S. Army Corps of Eng'rs*, 31 F. Supp. 3d 571, 586 (S.D.N.Y. 2014) (citation omitted).

Under the APA, "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. §702. A reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[A]gency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise.'" *Natural Res. Def. Council v. U.S. E.P.A.*, 658 F.3d 200, 215 (2d Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The reviewing court is not to "substitute its judgment for that of the agency" and must uphold the agency's decision "[i]f there is sufficient evidence in the record to provide rational support for [its] choice." *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 102 (2d Cir. 2017) (citation omitted).

DISCUSSION

Compunnel moves for summary judgment principally on the ground that the settlement agreement, which released Gupta's claims against Compunnel in the proceedings before the DOL and this Court, bars all of Gupta's current claims. The Secretary moves for summary judgment on the ground that it was not arbitrary and capricious for the agency to approve the settlement agreement and dismiss Gupta's case. For the reasons set forth below, the Court grants summary judgment to the Secretary and Compunnel.

I. The Settlement Agreement

"Under New York law, a release is governed by principles of contract law and a court should enforce a valid release by its clear terms." *Ladenburg*

Thalmann & Co. v. Imaging Diagnostic Sys., Inc., 176 F. Supp. 2d 199, 204 (S.D.N.Y. 2001).[5] In addition, "[f]ederal courts have articulated a strong policy in favor of enforcing settlement agreements and releases." *Levine v. Bd. of Educ. of City of New York,* 1998 WL 386141, at *2 (2d Cir. 1998) (table decision). The settlement agreement signed by Gupta and Compunnel contains a clear and unambiguous release of Gupta's claims. Paragraph 10 of the agreement states that Gupta and Compunnel are both "giving up their right to trial" in three expressly identified proceedings: the proceedings before the ALJ, the proceedings before the ARB, and the proceedings before this Court, AR 1617-18, In addition, paragraph 18 of the agreement states that Gupta "has no grievances, complaint or protest against [Compunnel] for any reason whatsoever," and that he "assures and promises that he withdraws his claim as filed against [Compunnel] with Department of Labor, Federal or State or US Citizenship and Immigration Services and any other

[5] The settlement agreement contains the following choice of law provision: "This Agreement shall be governed by and construed under the laws of the United States of America and Competent Court of New York." Although Gupta challenges the validity of the agreement, he does not challenge the choice of law provision, and the parties do not dispute its application. Accordingly, the Court will apply New York and federal law to interpret the contract. *See Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F. Supp. 2d 514, 526 (S.D.N.Y. 2001).

governmental authority in United States or India." AR 1619.

These terms are clear and unambiguous. By entering into the settlement agreement, Gupta agreed to withdraw his claims against Compunnel in the proceedings before this Court, as well as in the proceedings before the Department of Labor. Thus, if the settlement agreement is valid, it bars Gupta's claims against Compunnel and Compunnel is entitled to judgment as a matter of law. *See Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 298 (S.D.N.Y. 1997) ("Summary judgment on a contract interpretation dispute is clearly permissible when the language of the contract provision in question is unambiguous.").

Gupta does not dispute that the terms of the settlement agreement unambiguously release his claims against Compunnel. Rather, he asserts that the settlement agreement is invalid and unenforceable for the following reasons: his signature does not appear on every page, his signature appearing on the final page is not notarized, the agreement was entered into under circumstances constituting fraud and financial duress, and the agreement was promptly rescinded. All of these arguments lack merit.

As to the signatures, "[a] party need not sign every page of a contract for the whole of the document to be effective." *Master Palletizer Sys., Inc. v. T.S. Ragsdale Co., Inc.*, 725 F. Supp. 1525, 1531-32 (D. Colo. 1989). Nor is notarization necessarily required to bind parties to a settlement agreement. *Cf.* N.Y. Gen. Obligations Law, Ch. 24-a, § 5-705 (requiring notarization for assumption of indebtedness secured by a mortgage); N.Y. Real Prop. Law § 298 (permitting notarization to serve as one method of effecting transfer of real property).[6] Gupta does not claim that the signature appearing on the final page of the settlement agreement was forged or that it otherwise does not belong to him. Gupta Counterstatement ("Gupta CS"), at ¶¶ 13, 15, 17, 64 (Dkt. 245). To the contrary, there is no genuine dispute that the final page of the agreement was "signed by Gupta." *Id.* ¶ 17. Gupta's challenge to the form and placement of his signature thus does not itself raise a dispute of material fact, so long as there was "a meeting of the minds and an intention to be bound." *Carroll v. Fremont Inv. & Loan*, 636 F. Supp. 2d 41, 49-50 (D. D.C. 2009).

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[6] Even signatures are not necessarily required to manifest assent to a written contract, when the parties' conduct manifests that assent. *See 251 W. 18th St., LLC v. Del Rio Stellita*, 2002 WL 992097, at *1 (1st Dep't Apr. 26, 2002) (per curiam) (unsigned contract valid where tenant failed to sign lease but made payments in accordance with its terms).

Gupta argues that no such meeting of the minds took place, asserting that the agreement was signed under circumstances constituting fraud and economic duress. Gupta states, for example, that when he and Compunnel were at the office of the ALJ on March 10, the parties were briefly left alone and Compunnel "coerced Gupta to accept $28,000 by checks in exchange for settling any potential legal claims under the laws of India by signing only one paper that does not contain any release language for 'INA' claims." Gupta Declaration ("Gupta Decl."), at ¶¶ 39-40 (Dkt. 233). Elsewhere, Gupta states that he signed the settlement agreement under illegal financial duress caused by Compunnel by depriving him of his statutory wages guaranteed by 'INA' for several years." Gupta Mem. in Opp. at 17 (Dkt. 232).

Each of these arguments fails. First, to establish a claim for economic duress, Gupta must show that he was "forced by [a] wrongful threat precluding the exercise of [his] free will into involuntarily executing the Settlement Agreement because of economic duress." *Benjamin Goldstein Prods., Ltd V Fish*, 198 A.D.2d 137, 850 (1st Dep't 1993). Gupta has not made any showing whatsoever that he was threatened by Compunnel, much less that he was threatened to the point of being unable to exercise his free will. To the contrary, the record shows the

Gupta voluntarily and independently met Compunnel's representatives at the office of the ALJ, and that the day before signing the agreement, he negotiated to receive the $28,000 payment upfront, rather than in installments. AR 1614, 1617.

As to fraud, "[a] plaintiff seeking to invalidate a release due to fraudulent inducement must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury." *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C. V.,* 17 N.Y.3d 269,276 (2011). The record establishes that, at the very least, one of these elements-Justifiable reliance-is not satisfied here. The day before the agreement was signed, Gupta discussed the details of the agreement's terms with both Compunnel and the ALJ's law clerk at the office of the ALJ. AR 1613. He negotiated to obtain the $28,000 payment up front, rather than in installments, and he asked questions about the scope and meaning of another of its terms. *Id.* Moreoever, in the weeks leading up to its signing, Gupta corresponded over email with Compunnel's counsel and participated in the drafting of the settlement agreement. AR 1763-75. For example, in reply to an email from Compunnel's counsel that attached a

document titled "Settlement Agreement - Gupta FINAL," Gupta wrote, "I notice two minor corrections: Clause 19: In last ... line, correct spelling error, 'to and government agency' [] to [']any government agency' ... Clause 21: Delete the sentence-'In addition [Compunnel] will be liable for monetary penalty as described in Clause 6 of this Agreement.'" AR 1771-72. Moreover, on March 7, 2016-three days before the agreement was signed-Gupta sent an email to Compunnel's counsel stating "[t]his is to acknowledge our discussions to settle the litigation" for $28,000 paid in installments. AR 1775. At the top of the email, Gupta wrote in bold "Re: ALJ Case No. 2011-LCA-045, Compunnel," referring to the case number of his proceedings against Compunnel before the ALJ. *Id.* The record thus firmly establishes that Gupta participated in negotiating and drafting the terms of this agreement, that he viewed the agreement multiple times before the date of signing, and that he was well aware that the agreement pertained to his proceedings before the DOL. To the extent Gupta relied on any representation by Compunnel that the settlement agreement solely released Gupta's claims under the laws of India, such reliance was surely unjustified. *See Merrill Lynch & Co. v. Allegheny En., Inc.*, 500 F.3d 171, 182 (2d Cir 2007) (holding that justifiable reliance requires proof "that [the] reliance on the alleged misrepresentations was not so utterly

unreasonable, foolish or knowingly blind as to compel the conclusion that whatever injury it suffered was its own responsibility.").[7]

Furthermore, even if Gupta were able to make a showing of fraudulent inducement or economic duress, that would make the settlement agreement merely voidable, not void, and rather than void the agreement-Gupta subsequently ratified it. "Under New York law, a contract or release, the execution of which is induced by duress, is voidable." *VKK Corp. v. Nat 'l Football League*, 244 F.3d 114, 122 (2d Cir. 2001) (citation omitted). Likewise, "[i]t is well-settled in New York that where a party is fraudulently induced to enter into a contract, the contract is voidable at the instance of the defrauded

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[7] In any event, this Court rejects as a matter of law Gupta's present claim that when he signed page six of this agreement-the very agreement he had been negotiating with Compunnel for days-he thought he was signing an entirely different agreement that released only his legal claims against Compunnel in India. Not only is there ample evidence in the record regarding his knowledge of the terms of the agreement at issue here, but there is also no evidence (other than Gupta's mere assertion) that there existed any agreement to settle only the claims in India. *See Scottv. Harris*, 550 U.S. 372,380 (2007) ("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.").

party." *Bazzano v. L'Oreal, S.A.*, No. 93-CV-7121 (SHS), 1996 WL 254873, at *3 (S.D.N.Y. May 14, 1996). Although fraud may render a contract void in "rare cases," *see Ipeon Collections LLC v. Costco Wholesale Corp.*, 698 F.3d 58, 62 (2d Cir. 2012) (citation marks omitted), there is simply no evidence that this is such a case.

A voidable contract, unlike a void contract, may be ratified by the parties' "fail[ure] to timely disaffirm it or by acts ... that are consistent with a showing of an intent to be bound[.]" *Weiss v. Phillips*, 157 A.D.3d 1, 8 (1st Dep't 2017). Thus, "[a] party who executes a contract under duress and then acquiesces in the contract for any considerable length of time, ratifies the contract." *Sheindlin v. Sheindlin*, 88 A.D.2d 930, 931 (2d Dep't 1982). "To disaffirm the contract, the defrauded party must offer to return any consideration received." *Ladenburg*, 176 F. Supp. 2d at 204; *Nicomedez v. AIG*, No. 12-cv-490 (KBF), 2012 WL 5264560, at *4 (S.D.N.Y. Oct. 16, 2012) ("It is well established that where money paid as consideration for a release acquired by fraud or duress is retained after the releaser becomes aware of the fraud or the duress is removed, ratification may be found."). Here, it is undisputed that Gupta never offered to return the $28,000 he received from Compunnel after signing the settlement agreement. Gupta Dep. Tr. at 74:8. On March 10, 2016,

Compunnel gave Gupta the full $28,000 agreed to in the contract. Gupta deposited the full sum into his bank account that day, and he has kept it ever since. Gupta CS at ¶ 15, 33, 43; AR 1682-83; Gupta Dep. Tr. at 74:8.

Moreover, Gupta cannot claim that in the time since receiving the money he has been "under the same continuing duress," because his court filings show that he became aware of the purported fraud, and complained of it to the Court, just two weeks after executing the agreement. *See* Dkt. 118; *Sosnojfv. Carter*, 165 A.D.2d 486, 492 (1st Dep't 1991). Nonetheless, he failed to return the money. Gupta's claim that he rescinded the contract fails for a similar reason. *Ferguson v. Lion Holdings, Inc.*, 312 F. Supp. 2d 484, 499 (S.D.N.Y. 2004) ("Generally a party seeking rescission of a contract must tender the return of consideration it received pursuant to the voidable contract."); *Cf Sec. Mut. Life Ins. Co. of New York v. Rodriguez*, 65 A.D.3d 1, 626 (1st Dep't 2009) (disagreeing with *Prudential Ins. Co. of Am. V. BMC Indus., Inc.*, 630 F. Supp. 1298, 1300-03 (S.D.N.Y. 1986)).[8]

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[8] Gupta's rescission claim also fails on the merits. As explained above, the Court sees no basis in the record for any claims of "fraud, duress, misrepresentation, or undue influence," nor is the contract "unconscionable under the circumstances." *See generally Miller v. Hartford Life Ins. Co.*, 64 F. App'x 795, 798

The Court thus finds that there is no genuine dispute of material fact concerning the validity and enforceability of the settlement agreement. The Court further finds that the agreement contains an unambiguous release of Gupta's claims against Compunnel, both in this Court and in the DOL. Accordingly, Gupta's claims against Compunnel are barred and Compunnel is entitled to judgment as a matter of law.

II. The Agency's Orders

Despite the valid settlement agreement barring his claims in this Court and in the DOL, Gupta seeks judicial review of the DOL's orders approving the settlement agreement and dismissing his case with prejudice. Gupta asserts numerous arguments as to why the DOL's dismissal of his case was arbitrary and capricious, including that the ALJ lacked jurisdiction to approve his settlement agreement, that the approval of the agreement was procedurally deficient and denied him due process and equal protection under the law, and that the ALJ arbitrarily determined that the amount of the agreement was fair and reasonable. FAC, Counts

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(2d Cir. 2003) (summary order) (listing bases for rescinding annuity agreements and other contracts under New York law).

1-3.[9] Although Gupta raises interesting questions about the propriety of the DOL's orders under the unique circumstances of this case, this Court need not decide those questions to resolve the instant dispute.

Regardless of whether it was proper for the DOL to approve the settlement agreement and dismiss Gupta's case, Gutpa still has entered into a valid and enforceable agreement releasing his claims against Compunnel. Neither the H-1B provisions of the INA nor its implementing regulations required the DOL to approve the parties' settlement agreement in order for it to become effective. *See* 8 U.S.C. § 1182(n)(2); 20 C.F.R. 655 Subpart I. As discussed above, the settlement agreement is valid and has been ratified by Gupta's continued adherence to the

[9] To the extent that Gupta seeks damages from the ALJ and ARB for purportedly violating his constitutional rights, such claims fail on multiple grounds, not least of which is that the ALJ and ARB are protected by quasi-judicial and sovereign immunity. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) ("Because an action against a federal agency or federal officers in their official capacities is essentially a suit against the United States, such suits are also barred under the doctrine of sovereign immunity, unless such immunity is waived."); *Gertskis v. New York Dep't of Health & Mental Hygiene*, No. 13-CV-2024 (JMF), 2014 WL 2933149, at *5 (S.D.N.Y. June 27, 2014) ("[T]he doctrine of quasi-judicial immunity ... bars claims against administrative law judges performing judicial functions." (citation omitted)).

contract. Thus, even if the Court were to find either that the ALJ had erred in approving the settlement agreement or that the ARB had erred in declining to review it, Gupta still has released his claims against Compunnel by virtue of the settlement agreement and his claims before the DOL are therefore barred. Indeed, even if the Court were to reverse the DOL's orders and remand the case back to the ARB, the ARB would simply dismiss Gupta's case again, because his claims in the proceedings before the ALJ and the ARB are barred by the valid release and his ratification of the contract. Remand under these circumstances would thus be "completely futile." *Alam v. Gonzales*, 438 F.3d 184, 188 (2d Cir. 2006). "[A]n error does not require a remand if the remand would be pointless because it is clear that the agency would adhere to its prior decision in the absence of error." *Id.* at 187-88 (quoting *Xiao Ji Chen v. U.S. Dept of Justice,* 434 F.3d 144, 161 (2d Cir. 2006)). Accordingly, without deciding whether the ALJ or ARB erred, this Court declines to vacate the administrative orders or to remand to the DOL, where the inevitable result, as before, is the dismissal of Gupta's case. Gupta's petition for review is thus denied and the Secretary's motion for summary judgment is granted.

CONCLUSION

For the foregoing reasons, the motions for summary judgment of the Secretary and Compunnel are granted. Gupta's motion for partial summary judgment is denied.[10] The Clerk of Court is respectfully directed to terminate the motions pending at docket entries 220, 227, 231, and 236, enter judgment for Compunnel and the Secretary, and mail a copy of this Opinion to Gupta.

SO ORDERED.

Dated: September 30, 2018
New York, New York

/s/ Ronnie Abrams
Ronnie Abrams
United States District Judge

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[10] In light of the Court's grant of summary judgment in favor of the Secretary and Compunnel, Gupta's "motion to strike affirmative defenses" is denied as moot.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMPUNNEL SOFTWARE GROUP, INC.,
Petitioner,

-against-

ARVIND GUPTA, and R. ALEXANDER ACOSTA, in his capacity as Secretary, United States Department of Labor,
Respondents.

14 CIVIL 4790 (RA)

JUDGMENT

DATE FILED: SEPTEMBER 30, 2018

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the court's Opinion and Order dated September 30, 2018, the motions for summary judgment of the Secretary and Compunnel are granted; Gupta's motion for partial summary judgment is denied, and judgment is entered for Compunnel and the Secretary; accordingly, the case is closed.

Dated: New York, New York
September 30, 2018

RUBY J. KRAJICK

Clerk of Court

BY: /s/
Deputy Clerk

APPENDIX D

U.S. Department of Labor
Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

ARB CASE NO. 16-056

ALJ CASE NO. 2011-LCA-045

DATE: APRIL 29, 2016

In the matter of:

ARVIND GUPTA,
PROSECUTING PARTY,

v.

COMPUNNEL SOFTWARE GROUP, INC.,
RESPONDENT

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Arvind Gupta, pro se, New York, New York

For the Respondent:
Kamal K. Rastogi, Esq.; Plainsboro, New Jersey

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge.*

FINAL DECISION AND ORDER

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended, 8 U.S.C.A. §§ 1101-1537 (INA or the Act) (Thomson Reuters 2014) and the regulations promulgated at 20 C.F.R. Part 655, subparts H and I (2015). This case was previously before the Administrative Review Board (ARB or Board). In *Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045 (ARB May 29, 2014)(Judge Brown concurring, in part, and dissenting, in part), the ARB affirmed in part and reversed in part, and remanded the case to the Office of Administrative Law Judges for further evaluation of the retaliation claim and for a recalculation of certain damages.

Respondent sought review of the ARB's decision in the United States District Court for the

Southern District of New York, *Compunnel Software Group v. Gupta & Perez*, 14 Civ. 4790 (SAS). When the ALJ subsequently ordered the remanded case (ALJ No. 2011-LCA-045) held in abeyance pending a decision by the district court, Gupta requested that the ARB summarily reverse the ALJ's abeyance order, or, alternatively, accept his petition for review (ARB No. 14-086). The ARB declined Gupta's request, indicating that it had divested itself of jurisdiction of the case when it remanded the case to the Office of Administrative Law Judges. Consequently, the ARB closed the appeal. *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 14-086 (Order Sept. 23, 2014).

The district court thereafter dismissed Compunnel's petition, as well as several of Gupta's counterclaims, because the ARB had not yet issued a final decision; granted Compunnel's motion for judgment on the pleadings and dismissed all of Gupta's remaining counterclaims; and denied Gupta's motion for reconsideration. *Compunnel Software Grp. v. Gupta & Perez*, 14 Civ. 4790 (SAS)(Memorandum Opinion and Order Apr. 13, 2015); (Judgment Mar. 19, 2015); (Opinion and Order Mar. 17, 2015)(Order Oct. 22, 2014).

By Order dated November 14, 2014, the ALJ lifted her order of abeyance and the matter was then

before her for consideration of the case (ALJ No. 2011-LCA-045) as remanded by the ARB in its May 29, 2014 decision. Subsequently, the parties negotiated a settlement, and the ALJ received their signed Settlement Agreement on March 10, 2016, for approval. Upon review, the ALJ found that the settlement was fair and reasonable; that Respondent agreed to pay to Gupta, upon the ALJ's approval, the entire settlement amount of $28,000.00; that the parties agreed that the ALJ's Order disposing of the proceeding "shall have the same force and effect as an Order made after a full hearing pursuant to 20 C.F.R. § 655.840 in accordance with 29 C.F.R. § 18.71(b)(1);" and that each party bears its own fees and expenses. Accordingly, the ALJ approved the parties' Settlement Agreement and dismissed the matter with prejudice. ALJ's Final Order Approving The Parties' Settlement Agreement (Mar. 11, 2016) in *Arvind Gupta v. Compunnel Software Group, Inc.*, ALJ No. 2011-LCA-045.

On March 22, 2016, Gupta filed with the district court a motion to reopen the prior case and an ex-parte emergency motion for injunctive relief. Gupta sought a court order to enjoin the ALJ, the Secretary of Labor, and/or any other authorized Department of Labor official or agency from discontinuing adjudication of the remanded case. Gupta also requested that the court set aside, vacate,

or declare a nullity, the ALJ's March 11, 2016 Final Order approving the Settlement Agreement. A telephone conference occurred on March 28. The next day, Gupta moved to withdraw his motion, which withdrawal the court granted. *Compunnel Software Group v. Gupta & Perez*, 14 Civ. 4790 (SAS)(Court Order March 29, 2016).

In the case before us (ARB No. 16-056), the ARB has received:

- Gupta's Motion For Enlargement Of Time To File Petition For Review, Or To Proceed Otherwise (Mar. 22, 2016); Compunnel's Opposition To Motion For Enlargement Of Time To File Petition For Review, Or To Proceed Otherwise (Apr. 4, 2016);

- Prosecuting Party's Motion for Summary Reversal or Vacatur of ALJ's Dismissal Order, Alternatively, Petition for Review (Mar. 29, 2016)(indicating that ARB may construe motion as incorporating motion to withdraw Mar. 22, 2016 Motion); Compunnel's Opposition To Motion For Summary Reversal Or Vacatour [sic] Of ALJ's Dismissal Order; Alternatively, Petition For Review (Apr. 8, 2016); Prosecuting Party's Reply To Compunnel's Opposition To His Motion For Summary Reversal Or Vacatur Of ALJ's Dismissal

Order; Alternatively, Petition For Review (Apr. 20, 2016);

- Prosecuting Party's Motion to Strike Compunnel's Exhibits (ARB-R-1 & ARB-R-3 to R-7) (Apr. 13, 2016); Compunnel's Opposition To Motion To Strike Compunnel's Exhibits (ARB-R-1 & R-3 to R-7) As Outside Record (Apr. 25, 2016); Prosecuting Party's "Reply" to Compunnel's "Opposition" To His Motion To Strike Compunnel's Exhibits (ARB-R-1, R-3 to R-7 (Apr. 27, 2016).

This Board has authority to review final decisions arising under the Immigration and Nationality Act, as amended, 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n)(2) and its implementing regulations, 20 C.F.R. § 655.845 (2015). See also Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012)(delegating to the ARB the Secretary's authority to review cases arising under the INA).

The regulations provide that if a party files a timely petition for review, the decision of the Administrative Law Judge (ALJ) shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary

has not issued notice to the parties that the Secretary will review the ALJ's decision. 20 C.F.R. § 655.840, 655.845. Gupta filed a timely petition for review.

Gupta appeals the ALJ's dismissal of this case by contesting the validity of the Settlement Agreement, the sole basis for the ALJ's dismissal. Gupta's appeal rests entirely on collateral attacks against the Settlement Agreement, including fraud, duress, lack of consideration, lack of voluntariness, lack of initials on every page, and contradiction of public policy. The Board is an administrative body with only the authority emanating from statutes, implementing regulations, and delegations of authority.[1] Gupta points to no statute or regulation that authorizes the Board to adjudicate collateral attacks to a facially valid contract (i.e., a settlement agreement). We do not suggest that we can never review an ALJ's dismissal of a case involving settlement agreements under the INA, and we will not speculate as to every conceivable case where we

[1] *See e.g., Gilbert v. Bauer's Worldwide Transport.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 5 n.10 (ARB Nov. 28, 2012) (saying the same)(citing *Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008) (Federal Circuit Court agreed with the Merit Systems Protection Board that the administrative law judge had no jurisdiction to review the Office of Personnel Management's discretionary decision pertaining to benefit rules)).

may have authority to review the ALJ's dismissal of a case. In this case, as confirmed by Gupta's own motion, the Settlement Agreement appears valid on its face as it is signed, no party challenges the signatures, and the agreement expressly identifies this case as part of the settlement. Because Gupta raises only collateral attacks to the validity of the settlement agreement and does not raise any appealable issue, we lack jurisdiction and decline to accept his petition.

Accordingly, the petition for review is **DECLINED**. The above-listed motions are **DENIED** as moot. This matter is **DISMISSED** with prejudice.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judg

APPENDIX E

U.S. Department of Labor
Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002
(856) 486-3800
(856) 486-3806 (FAX)

ISSUE DATE: 11 March 2016

CASE NO.: 2011-LCA-00045

ARB No.: 12-049

In the matter of

ARVIND GUPTA
Prosecuting Party
v.
COMPUNNEL SOFTWARE GROUP, INC.
Respondent

FINAL ORDER APPROVING THE PARTIES' SETTLEMENT AGREEMENT

This matter arises under the Immigration and Nationality Act ("INA") H-1B visa program, 8 U.S.C. § 1101(a)(15)(H)(i)(b) and § 1182(n), and the

implementing regulations promulgated at 20 C.F.R. § 655.700, *et seq.* The Prosecuting Party is not represented.

On February 1, 2012, Administrative Law Judge ("ALJ") Romano issued a decision in this matter in which he affirmed the Administrator's determination that the Respondent failed to pay $6,976.00 in required wages to the Prosecuting Party in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c). In addition, ALJ Romano found the Respondent's liability discharged by confirmation of payment from the Administrator dated June 15, 2011. Finally, ALJ Romano affirmed the Administrator's determination that no other payment is due to the Prosecuting Party based on his complaint. Subsequently, on March 7, 2012, ALJ Romano denied the Prosecuting Party's motion for reconsideration.

The Prosecuting Party appealed ALJ Romano's decision and on May 29, 2014, the Administrative Review Board ("ARB") issued a Decision and Order of Remand. As ALJ Romano had retired, the matter was assigned to me for adjudication. On July 14, 2014, I issued a Notice of Assignment and Order Scheduling Briefs on Remand. However, Respondent appealed the ARB's decision to the U.S. District Court, Southern District

of New York. On July 22, 2014, I issued an Order holding the matter in abeyance while it was before the U.S. District Court. On August 4, 2014, I denied the Prosecuting Party's motion for reconsideration of the Order holding the matter in abeyance. The Prosecuting Party appealed to the ARB, and on September 23, 2014, the ARB denied the appeal and closed the case.

On October 22, 2014, U.S. District Court Judge Scheindlin issued an order dismissing the appeal to her court, holding that as the ARB had remanded the matter to the Office of Administrative Law Judges, the ARB's decision was not final and thus unappealable. Thus, the matter is now before me for consideration of the issues the ARB raised in its May 29, 2014 Decision and Order of Remand. Consequently, by Order dated November 14, 2014, I lifted the Order of July 22, 2014 holding this case in abeyance.

On March 10, 2016, the original Settlement Agreement was received in the Office of Administrative Law Judges, Cherry Hill, New Jersey for my approval. Having reviewed the parties' Settlement Agreement, which is hereby incorporated by reference, I make the following findings:

1) The Settlement Agreement appears to be fair

and reasonable, and reflects a fair and reasonable settlement.

2) The Respondent agrees to pay $28,000.00 as settlement in full to one (1) H-1B non-immigrant.

3) On approval by the Court, Respondent shall pay the entire settlement amount of $28,000.00 to the Prosecuting Party.

4) The parties agree that an Order disposing of this proceeding shall have the same force and effect as an Order made after a full hearing pursuant to 20 C.F.R. § 655.840 in accordance with 29 C.F.R. § 18.71(b)(1).

5) Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

Accordingly, I hereby **APPROVE** the parties' Settlement Agreement and **DISMISS** this matter with prejudice.

SO ORDERED.

/s/ Theresa C. Timlin
THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

APPENDIX F

U.S. Department of Labor
Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

ARB CASE NO. 12-049

ALJ CASE NO. 2011-LCA-045

DATE: May 29, 2014

In the matter of:

ARVIND GUPTA,
PROSECUTING PARTY,
v.
COMPUNNEL SOFTWARE GROUP, INC.,
RESPONDENT

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Arvind Gupta, *pro se*, Mumbai, India

For the Respondents:
Kamal K. Rastogi, Esq.; Plainsboro, New Jersey

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; Judge Brown concurring, in part, and dissenting, in part.

DECISION AND ORDER OF REMAND

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended (INA).[1] Arvind Gupta filed complaints with the United States Department of Labor's Wage and Hour Division (WHD), claiming that Compunnel Software Group, Inc. (Compunnel) owes him additional wages and benefits and that it unlawfully retaliated against him. After an investigation, WHD found that (1) Compunnel owed Gupta back wages in the amount of $6,976 when he was productively working, (2) Compunnel did not owe wages during Gupta's nonproductive time periods and (3) Gupta failed to

[1] 8 U.S.C.A. §§ 1101-1537 (Thomson Reuters 2014), as implemented by 20 C.F.R. Part 655, Subparts H and I (2013). "H-1B" refers to the nonimmigrant class described in 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

prove his retaliation claim. Gupta believed he was owed more and requested a hearing before an administrative law judge (ALJ). A Department of Labor (DOL) ALJ affirmed WHD's determination. We affirm in part, reverse in part, and remand this matter to the ALJ for the calculation of damages connected with Gupta's nonproductive time periods and for further consideration of Gupta's retaliation claim.

INTRODUCTION

Gupta's claims against Compunnel cover the period from December 1, 2006, to April 30, 2009. On December 1, 2006, as a mandatory step for securing Gupta's H-1B employment, Compunnel filed a Labor Condition Application (LCA) with DOL. After certification, Compunnel then filed an H-1B petition that Department of Homeland Security's (DHS) United States Citizenship and Immigration Services (USCIS) received on December 11, 2006. USCIS granted Compunnel's H-1B petition effective February 27, 2007, through April 30, 2009, the day that Gupta departed from the United States. Gupta claims that Compunnel owes him wages and benefits for nonproductive periods between December 1, 2006, and April 30, 2009, as well as damages for alleged retaliation. As we explain below, we reverse the ALJ's ruling on Gupta's claim for wages and benefits

for February 3, 2007, and for the nonproductive time periods occurring after February 27, 2007. With respect to Gupta's retaliation claim, we vacate the ALJ's ruling, and we remand the case for the ALJ to clarify the burdens of proof he used, assuming that Gupta continues to pursue such claim.

FACTUAL BACKGROUND[2]

On November 8, 2001, Gupta entered the U.S. as an H-1B nonimmigrant.[3] USCIS approved two H-1B petitions that permitted Gupta to work for Wipro Limited from November 8, 2002, to August 8,

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[2] For the factual background, we draw from the ALJ's seventeen findings of fact in the "Factual Background" section of the ALJ's Decision and Order (D. & O.), the additional findings of facts appearing throughout the "Procedural History" and "Legal Analysis" of the D. & O., including all reasonable inferences from such findings, and the exhibits the ALJ cited. *See Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (appellate body reviewing a trial or hearing court's findings of fact may draw reasonable inferences); *see also Jackson v. Comm'r*, 864 F.2d 1521, 1524 (10th Cir. 1989) (citations omitted). The factual background recites facts that we find are supported by substantial evidence of record. We note that the ALJ expressly accepted all the exhibits into evidence ((Complainant's Exhibit) (CX) 1 – 33; RX A – N). D. & O. at 4.

[3] Gupta and Compunnel submitted identical copies of Gupta's visa. *See* CX-15 (Visa); Respondent's Exhibit RX J (Visa).

2008.[4] On March 23, 2006, Gupta was the beneficiary of an H-1B Petition for a Nonimmigrant Worker (Form I-129) filed by Headstrong, Inc. (valid from April 24, 2006, to November 8, 2007).[5]

Background to Gupta's Wage Claim for 12/1/06 through 2/3/07[6]

On November 14, 2006, Gupta applied for a job with Compunnel and received, and later accepted, an offer to work as a business analyst earning $20 per hour.[7] On December 1, 2006, Compunnel filed an LCA for Gupta to work as a "Market Research Analyst" in Woodbridge, New Jersey.[8] The LCA certified a wage

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[4] RX L (USCIS I-797 Notice of Action for Wipro Limited's H-1B petitions). *See also Gupta v. Wipro Ltd.*, ARB No. 12-050, ALJ No. 2010-LCA-024, slip op. at 2 (ARB Feb. 27, 2014).

[5] RX M (USCIS I-797 Notice of Action for Headstrong petition).

[6] In his appeal to the Board, Gupta expressly challenges the non-payment of wages during three nonproductive periods: 12/1/06 to 2/3/07; 7/23/07 to 12/10/07; and 4/1/08 to 4/30/09. Complainant's Petition for Review and Opening Brief at 5-7 (Mar. 12, 2012). He does not challenge the amount of wages WHD awarded him for the periods from 2/5/07 to 7/22/07 and 12/11/07 through 3/31/08.

[7] *See* D. & O. at 3 (citing RX C).

[8] *See* D. & O. at 6; RX C.

rate of $20 per hour beginning December 1, 2006, and ending November 30, 2009.[9] To secure Gupta's H-1B employment, Compunnel then filed a "change of employer" H-1B petition with USCIS.[10] USCIS received Compunnel's LCA and H-1B petition on December 11, 2006. Gupta completed employment forms throughout January, including a Form I-9 and an "Employment Agreement" ("entered into" on February 5, 2007).[11] On March 1, 2007, USCIS notified the parties that it had granted Gupta a change of employer effective February 27, 2007, and ending April 30, 2009.[12] Gupta began "working" for Compunnel in February 2007.[13] On February 3,

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[9] *See* D. & O. at 3, 6; RX C.

[10] RX B, CX 2 (*see* Form I-129 Notice of Action).

[11] RX H (see "Employment Eligibility Verification," "Employment Agreement"). The record also indicates that Gupta attempted to secure work in January 2007. See D. & O. at 5 (citing CX 4).

[12] RX B, CX 2 (I-129 Notice of Action).

[13] D. & O. at 6. *See also* D. & O. at 3, 8. While the ALJ found that Gupta began "working" for Compunnel in 2007, as we explain later in our opinion, there is no evidence in the record or a finding of fact that Compunnel ever assigned any work duties to Gupta before sending him to California for a project that began on February 5. Consequently, we understand the ALJ's finding to mean that Gupta entered into an "employment relationship" in 2007 with Compunnel. *See* 20 C.F.R. § 655.731(c)(6).

2007, he traveled to San Francisco to "join the project on Mon 02/05."[14]

Background to Compensated Productive Time (2/5/07 to 7/20/07)[15]

For Gupta's first productive assignment as a Compunnel H-1B employee, Compunnel sent Gupta to San Francisco to work with a third party on a project beginning February 5.[16] To cover this assignment in San Francisco, Compunnel filed a second LCA on February 12, 2007.[17] DOL approved this LCA for the period from February 12, 2007, to February 12, 2010 at a wage rate of $22.75 an hour.[18]

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[14] D. & O. at 6; CX 4 (1/31/07 e-mail regarding travel).

[15] Gupta does not challenge the amount he was paid during this productive time as supplemented by the Administrator's award.

[16] While the ALJ found that Gupta entered "productive status" in San Francisco on February 7, 2007 (D. & O. at 6), both parties assert that he started on February 5, 2007, and the earning statements show that he was paid for February 5 and 6, 2007. D. & O. at 5; CX 6. But this conflict in the record is inconsequential because Gupta raised no wage dispute for the period of time starting after February 3 and running through July 23, 2007.

[17] D. & O. at 6; RX C2.

[18] RX C2.

Gupta worked in the San Francisco area until June 6, 2007, earning $52.00 per hour.[19]

After the San Francisco project, Compunnel again sent Gupta to a third party location to work on a project. Gupta started working on a project in New York City on June 11, 2007, and was paid by Compunnel.[20] Two days later, Compunnel filed a third LCA for Gupta to work in New York at a wage rate of $25.47 an hour.[21] DOL certified this New York LCA for the period of June 13, 2007, to June 13, 2010.[22] Gupta worked in New York through July 16, 2007, earning $60 per hour.[23]

Background to Gupta's Wage Claim for 7/23/07 to 12/10/07

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[19] CX 6.

[20] D. & O. at 6 n.5; CX 7 (earnings statements).

[21] *Id.* at 6; RX C3.

[22] RX C3.

[23] *See* D. & O. at 6 (citing CX 7). The record is unclear about the actual days that Gupta worked during the week of July 16, 2007. Again, as we previously explained, this lack of clarity during the productive period is harmless. *See* note 16, *supra*. Gupta subsequently claimed to have received a cash bonus of $35 per hour for the work he performed on the New York project. CX 8.

On July 23, 2007, Gupta began a period of "nonproductive status" that lasted until December 10, 2007.[24] During this time, Compunnel presented Gupta with "multiple employment opportunities."[25] In August 2007, Compunnel informed Gupta that it received his resume and "started working on it."[26] On September 20, 2007, a Compunnel "recruiter" notified Gupta that he was added as a "candidate" on the "hot list." A September 26, 2007 e-mail indicates that Gupta attended an interview in Malvern,

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[24] *See* D. & O. at 6, 9. The ALJ found that "[t]he Respondent presented multiple employment opportunities to the Prosecuting Party between July and November 2007." D. & O. at 6.

[25] D. & O. at 6; (citing CX 9). The ALJ's reference to "opportunities" is ambiguous. But we agree with Gupta that the record contains no evidence that the "opportunities" were actual job assignments that Gupta could fill by simply showing up to the worksite. *See* Complainant's Petition for Review and Opening Brief, ¶ 21 (Mar. 12, 2012). In fact, as we demonstrate above, the ALJ relies on an exhibit (CX 9) that merely identifies opportunities to compete for work projects with a third party and does not support an inference that Gupta made himself unavailable for assigned work duties.

[26] All the e-mails referenced in this paragraph are referenced by the ALJ. *See* D. & O. at 6 (citing CX 9). Gupta also called Compunnel on October 29, 2007, to say he was looking for a project and that his marketing was not going well. D. & O. at 7 (citing RX E).

Pennsylvania. On or about October 3 and 16, 2007, Compunnel submitted Gupta's name for a position with Bank of New York and for a position with Fannie Mae in Washington, D.C. On October 18, 2007, CyberWorld Group, Inc. e-mailed Gupta about a position in Portland, Oregon. At the end of October 2007, Compunnel submitted Gupta for positions in Benton Harbor, Michigan; and Charlotte, North Carolina. In November 2007, Compunnel notified Gupta about a project with TIAA-CREF and a project in Jersey City ("ONLY looking for candidates with prior financial experience") (emphasis in original). Finally, on November 26, Gupta granted Galaxy Systems, Inc. permission to submit his name for a project with TD Ameritrade. Galaxy Systems, Inc. notified Gupta that he was "confirmed for the project with TD Ameritrade." As a result of securing the TD Ameritrade project, Compunnel "deactivated" Gupta's name from the "hot list" on December 5, 2007. Gupta re-entered productive H-1B employment status on December 11, 2007, and worked on the TD Ameritrade project until March 31, 2008, earning $64 an hour.[27]

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[27] D. & O. at 6; CX 10.

Background to Gupta's Wage Claim for 4/1/08 to 4/30/09

After the TD Ameritrade project, Gupta returned to nonproductive status and never again worked with Compunnel on any project after March 31, 2008.[28] On April 3, 2008, Compunnel sent Gupta a letter and telephoned him to request that he report back to its headquarters in Monmouth, New Jersey to "avoid cancellation due to 'no show.'"[29] Yet, just like Gupta's preceding period of nonproductive status, Compunnel continued to submit Gupta for "new projects into 2009."[30] Compunnel reactivated Gupta's name on the "hot list" on March 27, 2008, and submitted his name for various projects on April 2, April 11, and April 22,

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[28] D. & O. at 6, 7, 9 (Gupta's "last project" for Compunnel ended in March 2008).

[29] D. & O. at 7 (citing RX E). As shown by RX E, a phone contact log and a letter contained virtually the same message, both discussing the end of his "current project" with a "client" and asking Gupta to "report" to Compunnel's New Jersey office "at the earliest" and that Compunnel "hope[d] to see [Gupta] soon." Nowhere in either document does Compunnel indicate that it had job duties for Gupta. We find that neither RX E nor the e-mails in the record permit a reasonable inference that Gupta chose to make himself unavailable for any actual job duties at Compunnel.

[30] D. & O. at 9 (citing CX 11, 12). The examples we cite are all referenced in these exhibits.

2008. On May 2, 2008, Gupta asked for a new placement as soon as possible, and contacted Compunnel in May and June about new work opportunities, which Gupta in turn pursued. Gupta had potential interviews or actual interviews throughout June 2008. He updated and revised his resume in July 2008. Compunnel submitted applications on Gupta's behalf on August 1, 6, and 12 and also contacted him several times in September 2008. On October 3, 2008, Gupta contacted Compunnel's president and asked that "the sales team [] market me aggressively at the lowest possible rates," noting, "I hope this will help in getting me placed on a project ASAP." Compunnel agreed. On October 13, 2008, Sam Handa acknowledged Gupta's request that Compunnel expand its search to include both business analyst and retail openings. Subsequently, Compunnel submitted Gupta's application for three more positions during October and November of 2008. On December 11, 2008, Gupta again asked for a new project. On January 13 and 14, 2009, Gupta applied for two more work opportunities.[31]

Based on the parties' representations in their briefs, the ALJ found that in late 2008 or early 2009,

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[31] Again, for the preceding examples of job search efforts, see CX 11 and 12.

Compunnel instructed Gupta to return to India and wait for government approval to return to the United States for employment.[32] On January 21, 2009, Compunnel provided Gupta with a roundtrip plane ticket (2/1/09 departure to Mumbai, India; 4/16/09 return to Newark, New Jersey).[33] The next day, Compunnel had deactivated him in its "hot list" database.[34]

During this nonproductive period, Compunnel also worked with Gupta to obtain a Permanent Labor Certification. More specifically, on April 23, 2008, Compunnel filed with DOL an Application for Permanent Labor Certification with Gupta as the beneficiary.[35] DOL received this application that same day and approved it on July 2, 2008.[36] On

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[32] D. & O. at 7.

[33] D. & O. at 7; RX I.

[34] CX 12 at 25.

[35] D. & O. at 3; CX 11 at 5. An approved Application for Permanent Labor Certification, when filed with USCIS in conjunction with an I-140, constitutes an application for lawful permanent residence. A lawful permanent resident is commonly known as a "green card" holder. *See I Am an Employer: How Do I Sponsor an Employee for U.S. Permanent Resident Status,* US Citizenship and Immigration Servs., 1 (Oct. 2013), http://www.uscis.gov/sites/default/files/USCIS/Resources/E2en.pdf.

[36] RX F.

August 14, 2008, Compunnel's Senior Legal Manager asked Gupta to fill out an I-140 Immigrant Petition for Alien Worker, which he did.[37] On January 7, 2009, Compunnel re-filed an Application for Permanent Labor Certification on Gupta's behalf, which DOL certified on October 26, 2009.[38]

On February 19, 2009, based on Compunnel's withdrawal request, USCIS automatically revoked Compunnel's petition.[39] However, USCIS reopened Compunnel's H-1B petition the following week. [40] Gupta left the U.S. on April 30, 2009, and arrived in India the following day.[41]

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[37] CX 11 at 29.

[38] D. & O. at 3, 7; CX 12 at 20.

[39] D. & O. at 3, 7; RX G. The date of Compunnel's request is in dispute.

[40] D. & O. at 9 (citing CX 12). The ALJ found that USCIS reopened Gupta's "green card" petition, but we find that this is simply an inadvertent mischaracterization by the ALJ, given that the record shows that USCIS reopened the H-1B petition not the green card petition. The record contains no further disposition by USCIS on Gupta's H-1B petition.

[41] D. & O. at 7.

Gupta's H-1B Complaint

On November 17, 2008, Gupta filed a complaint against Compunnel alleging that it failed to (1) pay him the higher of the prevailing or actual wage; (2) pay him for time off due to a decision by Compunnel; (3) provide fringe benefits equivalent to those provided to U.S. workers; and (4) provide a copy of the LCAs.[42] He supplemented his complaint against Compunnel on January 22, 2009, to claim additional back wages, as well as the cost of health insurance and fringe benefits.[43] He also alleged retaliation. WHD investigated Gupta's complaint. On March 24, 2011, WHD found, as a result of its investigation, that Compunnel owed Gupta $6,976.00 in back wages for the "Period Covered by Work Week Ending Dates" February 10, 2007, to April 5, 2008.[44] These assessed back wages related entirely to periods in which Gupta was in productive status but was not paid 40 hours per week.[45] Gupta filed his last complaint against Compunnel on May 12, 2009.[46]

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[42] *See* D. & O. at 7; CX 20.

[43] CX 20.

[44] D. & O. at 4; RX A.

[45] D. & O. at 4; RX N.

[46] D. & O. at 7; CX 21.

Gupta accepted the $6,976.00 back wage payment but also requested a hearing before an ALJ to recover additional damages.

The ALJ scheduled this matter for an evidentiary hearing on the merits, but Gupta waived his right to testify by requesting a decision on the record. The ALJ granted Gupta's request and canceled the hearing, noting, "[t]he record is closed and all discovery issues are now resolved."[47] The ALJ affirmed WHD's decision, specifically WHD's (1) award of damages for back wages during Gupta's productive time; (2) rejection of Gupta's claim for back wages for periods in which he was in nonproductive status; and (3) WHD's rejection of Gupta's retaliation claim. Gupta appealed to the Administrative Review Board.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision, and our review in this case turns solely on rulings of law.[48] The Board has plenary power to review an ALJ's

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[47] D. & O. at 4.

[48] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845; see Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

legal conclusions de novo, including whether a party has failed to prove a required element as a matter of law.[49]

DISCUSSION

The INA's H-1B provisions permit employers in the United States to hire foreign nationals in certain "specialty occupations" 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] More importantly, the H-1B hiring process involves three procedural phases that fundamentally impact DOL's resolution of H-1B wage complaints. The first of the three phases requires the H-1B employer to file with DOL for certification of the completed LCA.[52] In the LCA, the employer stipulates to the wage levels and working conditions, among other things, that it guarantees for the H-1B worker

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[49] *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2007-LCA-005, slip op. at 3 (ARB June 6, 2013).

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

[51] 20 C.F.R. § 655.705(a).

[52] 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700-.760 (Subpart H).

for the period of his or her authorized employment.[53] Second, if DOL certifies the LCA, then the employer must file an H-1B petition with USCIS, requesting permission to employ the H-1B worker and allowing the H-1B beneficiary to apply for an H-1B visa.[54] Third, if USCIS approves the H-1B petition, the H-1B beneficiary must apply to the U.S. State Department for an H-1B visa. An approved visa grants the H-1B beneficiary permission to seek entry into the United States up to a date specified on the visa as the "expiration date."

Once the H-1B 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

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

[54] 20 C.F.R. § 655.705(a), (b). The visa request may be unnecessary if the H-1B worker is already lawfully present in the United States. Our general discussion at this point outlines the typical steps needed where the H-1B employer seeks to hire an H-1B nonimmigrant who is outside of the United States. Further below in our opinion, we discuss the statutory amendments in 2000 that permit an H-1B worker already in the United States to begin working for a prospective H-1B employer pending approval of the H-1B petition filed by that employer, as in this case.

petitioning employer."[55] The H-1B employer must begin paying the H-1B worker within the time prescribed in 20 C.F.R. § 655.731(c)(6)(ii). More importantly, the H-1B petitioner must pay the required wage even if the H-1B nonimmigrant is in "nonproductive status" (i.e., not performing work) "due to a decision by the employer (e.g., because of the lack of assigned work) . . . ."[56] 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.[57] In "certain circumstances," the H-1B petitioner must pay for the H-1B worker's return trip to his home country.[58]

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[55] 20 C.F.R. § 655.731(c)(6)(ii).

[56] 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

[57] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii) (emphasis in original).

[58] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii). There are additional requirements for H-1B workers considered "H-1B dependent" or "willful violators." *See* 8 U.S.C.A. § 1182(n)(1)(F). In its H-1B petition, Compunnel marked "yes" for the box that asked: "[i]s the petitioner a dependent employer?" (and affirmed a similar question in its LCA) submitted on December 1, 2006. RX C.

Similarly, to work in more than one location, an H-1B nonimmigrant "must include an itinerary with the dates and locations of the services or training and [the itinerary] must be filed with USCIS as provided in the form instructions."[59] USCIS explained that this regulation "was designed to ensure that aliens seeking H-1B nonimmigrant status have an actual job offer and are not coming to the United States for the purpose of seeking employment" upon arrival.[60] Thus, the H-1B process requires that the employer have actual assignable work within the specialty occupation when the petition is filed.[61] In the event of a material change in the terms or conditions of the nonimmigrant's employment, the petitioning employer must file a new certified LCA together with an amended H-1B petition with USCIS.[62] USCIS's guidance provides that any change in employment

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[59] 8 C.F.R. § 214.2(h)(2)(i)(B).

[60] Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214).

[61] Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214).

[62] 8 C.F.R. § 214.2(h)(2)(i)(E).

that requires a new LCA also requires an amended H-1B petition.[63]

1. Back Wages from 12/1/06 to 2/3/07

a. The Parties' Contentions and ALJ's Findings

Gupta argues that he is entitled to be paid from December 1, 2006, through February 3, 2007, because he entered into employment with Compunnel "based on the INA's portability provisions effective December 1, 2006,"[64] provisions we discuss below. Without citing any law, the ALJ found that Gupta was not entitled to wages during this time period because: (1) Gupta had the "burden to establish that wages were inadequately paid," and; (2) Gupta presented "conflicting information" regarding his availability to work, that is, that his employment with his previous employer (Headstrong) ended on November 26, 2006, and that he was "benched"[65] until November 2007. We

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[63] Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214).

[64] Complainant's Petition for Review and Opening Brief, ¶ 17 (Mar. 12, 2012).

[65] Benching an H-1B nonimmigrant refers to "placing him in nonproductive status without pay due to a decision by the employer (e.g., because of lack of assigned work)," and is a violation of INA and its implementing regulations. *E.g., Gupta*

affirm the ALJ's ultimate ruling, with one exception, but on different grounds. We divide our analysis of this time period in two: before and after December 11, 2006 (the day that USCIS received Compunnel's H-1B petition).

With respect to the time period before December 11, 2006, we agree with the ALJ that Compunnel owes Gupta nothing. As previously explained, to employ Gupta, Compunnel was required to file with USCIS a nonfrivolous H-1B petition on Gupta's behalf. *See supra* at 8-9. The ALJ found that USCIS received Compunnel's H-1B petition on December 11, 2006. We find no legal basis to hold Compunnel liable to Gupta for H-1B wages before USCIS received Compunnel's H-1B petition on December 11, 2006, where it is undisputed that Gupta performed no actual work for Compunnel during this time. Consequently, we affirm the ALJ's ruling that Gupta was not entitled to wages before December 11, 2006.

Turning to the period from December 11, 2006, through February 3, 2007, we first address the ALJ's reasons and bases for rejecting Gupta's claim for back

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v. Jain Software Consulting, Inc., ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 2 (ARB Mar. 30, 2007) (citing 20 C.F.R. § 655.731(c)(7)(i)(2006); 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I)).

wages. We find several fundamental deficiencies with the ALJ's conclusory analysis of Gupta's allegedly "conflicting evidence" that Headstrong fired and "benched" him. First, the ALJ provided no legal basis that explains why allegedly being "benched" by Headstrong makes Gupta unavailable to work for Compunnel. The law permits an H-1B nonimmigrant to work for more than one employer so long as each employer has filed an H-1B petition on the nonimmigrant's behalf with USCIS.[66] Form I-129 provides that the H-1B petition may be based on, inter alia, a request for "concurrent employment," or on a request for a "change of employer."[67] Additionally, being "benched" suggests that Gupta was not physically working for Headstrong; therefore, Gupta's alleged admission does not support the conclusion that he was unavailable to work for Compunnel. The ALJ's error is nevertheless harmless because, as we explain below, Gupta had the burden of proving that he actually worked for Compunnel during this time, a burden he cannot meet with the record before us.

b. Portability Provisions

To determine whether Compunnel owes Gupta wages for the period between December 11, 2006, and

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[66] 8 C.F.R. § 214.2(h)(2)(i)(C).

[67] See RX B.

February 3, 2007, we must examine the law governing the portability phase of H-1B employment. In 2000, the American Competitiveness in the Twenty-First Century Act (AC21) amended the INA to allow H-1B nonimmigrants to begin working for a new H-1B employer upon the filing of a nonfrivolous H-1B petition.[68] The ability to change employers is known as "portability" and is codified as follows:

> (1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a) of this section. Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.
>
> (2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien—
>
> (A) who has been lawfully admitted into the United States;

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[68] American Competitiveness in the Twenty–First Century Act of 2000, Pub. L. No. 106-311, § 105(a), 114 Stat 1251, 1253 (2000) (Codified in part at 8 U.S.C.A. § 1184(n) (Thomson Reuters 2014)).

(B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

(C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.[69]

On its face, this portability provision merely "authorizes" an H-1B worker to accept employment if he qualifies to do so under 8 U.S.C.A. § 1184(n)(2); it does not address the employer's payment obligations during the portability period. Pursuant to 20 C.F.R. § 655.750(b)(3) and (c)(3), after DOL approves an LCA, the H-1B employer must pay the wage rates required under §§ 665.731 and 655.732 "at any time H-1B nonimmigrants are employed pursuant to the [LCA] application . . . ." Beyond these regulations, we have not found, nor have the parties presented, any regulations or legal authority that address the H-1B employer's payment liability during the portability phase of the H-1B petitioning process. In the end, the portability provisions permit the H-1B employer and the H-1B employee to decide whether to work together while the H-1B petition is pending approval by USCIS. Consequently, in the absence of mandatory

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[69] 8 U.S.C.A. § 1184(n) (Thomson Reuters 2014). Note that the cross-reference to 8 U.S.C.A. § 1184(a) merely refers to the H-1B approval process in general.

employment provisions, we find that it is the H-1B employee's burden to prove that he qualifies under 8 U.S.C.A. § 1184(n)(2) to work for a new employer during a portability phase and that he engaged in compensable activities for such employer.

The ALJ's findings and the record demonstrate that Compunnel owes no wages for the period from December 11, 2006, through February 2, 2007. First, Gupta did not establish that he qualified under 8 U.S.C.A. § 1184(n)(2) to work during the portability period. Second, the ALJ found and the parties agree that this time period was a "nonproductive" time period. Third, Gupta presented no evidence of any compensable work he performed during this time period. Fourth, the record shows that Gupta signed an "Employment Agreement" stating that he "entered into" the agreement on February 5, 2007.[70] However, we view February 3, 2007 differently. With respect to February 3, 2007, the ALJ found, and it is undisputed, that Gupta traveled to San Francisco to work and did so at Compunnel's request. Therefore, Gupta is entitled to compensation for his travel time.[71]

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[70] RX H (see Employment Eligibility Verification); RX H (see Employment Agreement).

[71] *See* 20 C.F.R. § 655.731(1)(C)(4) (travel time).

For the preceding reasons, we affirm the ALJ's denial of damages for the period up to and including February 2, 2007. For February 3, 2007, we must remand this case for the ALJ to determine what wages are owed for Gupta's time traveling to San Francisco on that date.

2. Back Wages from 7/23/07 to 12/10/07

For the time periods from July 23, 2007, to December 10, 2007, the ALJ placed on Gupta the burden to show that he was available for work.[72] The ALJ awarded no back wages for this period based on his finding that Gupta failed to establish that he was available to work for Compunnel. The ALJ found that Gupta did not meet his burden for two reasons: (1) for the period between July and October 2007, Gupta did not demonstrate that he was interested in taking assignments, and; (2) for the period between October 2007 and December 2007, Gupta also claimed to be benched by Headstrong.[73] In so doing, the ALJ committed reversible error by placing the burden of proof on the wrong party. As discussed below, not only

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[72] As we discuss later in our opinion, the ALJ also erroneously placed the burden on Gupta to prove that he was available to work during the nonproductive period running from March 31, 2008, to April 30, 2009.

[73] D. & O. at 9.

does this burden of proof rest with Compunnel, but the evidence of record indicates that Compunnel cannot meet this burden as a matter of law. As we discuss below, the only question that remains is the matter of the calculation of damages, for which remand to the ALJ is required.

a. Law Regarding Nonproductive Periods

The H-1B implementing regulations provide that once the H-1B employer's obligation to pay H-1B wages begins, the employer must continue to pay wages unless the employer can prove by a preponderance of the evidence the presence of any of the circumstances specified at 20 C.F.R. § 655.731(c)(7)(ii)[74] where the wages guaranteed in

[74] 20 C.F.R. § 655.731(c)(7)(ii) also provides that liability for back wages ends when the employer effects a bona fide termination of the employment relationship. However, the bona fide termination question is not pending before us. The ALJ did not make a determination that Gupta's employment had been terminated, but instead upheld the Administrator's determination that Gupta was unavailable to work for Compunnel during nonproductive periods. In its briefing before the ARB, Compunnel did not argue that a bona fide termination occurred. Compunnel asserts that Gupta "was terminated on May 1, 2008," but it does not cite to any evidence in the record to support its claim, much less argue that it was as a bona fide termination. *See* Respondent's Brief in Opposition to Complainant's Opening Brief at 5 (May 4, 2012). To the contrary, the investigator's report states that during the closing

the H-1B petition need not be paid.[75]

The provisions found at 20 C.F.R. § 655.731(c)(6) establish when the H-1B employer's obligation to pay the H-1B worker starts. That subsection provides, in relevant part:

> (6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H-1B nonimmigrant shall receive the required pay *beginning* on the date when the nonimmigrant "*enters* into employment" with the employer.

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conference on March 25, 2011, Compunnel's attorney stated that "Compunnel was prepared to terminate [Gupta] several times, but did not." RX N.

[75] *See Administrator v. Ken Techs., Inc.*, ARB No. 03-140, ALJ No. 2003-LCA-015, slip op. at 4 (ARB Sept. 30, 2004) ("Therefore, in order to avoid liability, Ken must prove by a preponderance of the evidence the presence of 'circumstances where wages need not be paid.'"). *See also Administrator v. University of Miami*, ARB No. 10-090, -093; ALJ No. 2009-LCA-026, slip op. at 8 (ARB Dec. 20, 2011) ("[T]he ALJ properly found that the University was obligated to pay Wirth wages beginning on October 12, 2006, because Wirth made herself available to the University on that date, and the University did not establish that she was unavailable to work after that date.").

> (i) For purposes of this paragraph (c)(6), the H-1B nonimmigrant is considered to "*enter* 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.

(Emphasis added.) The words "beginning," "enters" and the phrase "first makes him/herself available" convinces us that the H-1B regulations contemplate that entering into employment is a one-time event that initiates the petitioning employer's liability to pay the wages identified in its H-1B petition attestations.[76] It is also clear from this provision that the employer's obligation to pay wages continues subject to the conditions in subsection 20 C.F.R. § 655.731(c)(7). It is this continuing obligation to pay coupled with the employer's attestations in the LCA and H-1B petition that lead us to conclude that the

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[76] 20 C.F.R. § 655.731(c)(6)(i). Although not relevant to this case, we note that the H-1B implementing regulations also create an automatic commencement of the H-1B employer's payment obligation in certain specified instances. *See* 20 C.F.R. § 655.731(c)(6)(ii).

employer bears the burden of proving it is excused from paying the employee.[77]

Pursuant to the INA[78] and 20 C.F.R. § 655.731(c)(7), the H-1B employer's obligation to pay wages continues except during some, but not all, types of non-productive periods. Subsection 655.731(c)(7)(i) provides, in relevant part, that the H-1B employer must pay wages:

> If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of *lack of assigned work*), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section . . . .

(Emphasis added.) Conversely, an H-1B employer need not pay wages:

> If an H–1B nonimmigrant experiences a period of nonproductive status *due to conditions unrelated to employment* which take the nonimmigrant away

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[77] *See* 20 C.F.R. § 655.731(c)(7)(ii).

[78] 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I), (IV).

> 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) . . . .

(Emphasis added.)

It is clear from these provisions that an H-1B employee's non-productivity caused by the H-1B employer, and particularly due to a "lack of assigned work," results in the continuing obligation to pay. If, however, during a period of non-productivity, the H-1B employee has "assigned work" duties that he is not performing, then the focus turns to the reasons that take him away from those duties. Subsection 655.731(c)(7)(i) makes clear that the employer is liable for any reason that takes the employee away from his duties "except" those specified in subsection 20 C.F.R. § 655.731(c)(7)(ii). Under 20 C.F.R. § 655.731(c)(7)(ii), to be relieved from paying wages for nonproductive periods the H-1B employer must prove: (1) the existence of conditions unrelated to the employee's employment that either; (2) took the employee away from his/her duties at his or her request and convenience, or (3) otherwise render the employee unable to work. A "condition unrelated to

employment" cannot take an employee "away from his duties" if the employee has no duties. Logically, to invoke the unavailability exception to wage liability, the employer must prove that the H-1B employee had assigned work. Then, the employer must prove that the worker requested to be away from those duties for reasons unrelated to work or that conditions unrelated to work rendered him "unable" to do those assigned duties.[79]

b. Applying the Law to the Facts of this Case

It is undisputed that Gupta entered into employment with Compunnel no later than February 3, 2007, when he flew to San Francisco, and that Compunnel began paying him on February 5, 2007.

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[79] 20 C.F.R. § 655.731(c)(7)(ii) provides a second basis for excusing an H-1B employer's liability for back wages, "conditions unrelated to employment which . . . render the non-immigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the non-immigrant)." However, this alternative basis is not before us and, therefore, we need not address its significance in cases in which employees have no actual work duties to perform for the H-1B petitioning employers. In finding that Gupta was unavailable to work for Compunnel, the ALJ did not conclude that Gupta was "unable" to work. D. & O. at 8-10. Similarly, Compunnel did not argue that Gupta was "unable" to work. *E.g., Respondent's Brief in Opposition to Complainant's Opening Brief* at 3 (May 4, 2012) ("Gupta was working at some other place during his absent [sic] . . .").

Consequently, for the subsequent nonproductive period of July 23, 2007, to December 10, 2007, Compunnel must prove that it was excused from the obligation to pay Gupta the wages it promised under the LCA and H-1B petition filed in December 2006.

The ALJ's findings and the evidentiary record demonstrate that, as a matter of law, Compunnel cannot meet its burden of proof. Compunnel hired Gupta as a market research analyst. But nowhere does the ALJ find, nor is there any evidence in the record, that Gupta had any assigned duties (i.e., market research or any other work) during the nonproductive period between July and December 2007. Phone records indicating that Compunnel "left vm-asking [Gupta] to call back if he has any issues," and evidence that Compunnel inquired as to Gupta's interviews, do not prove that Gupta had assigned duties.[80] Similarly, records that Compunnel "notified" and "submitted" Gupta for approximately eleven projects between July and December 2007 and documenting that Gupta interviewed for a position in Pennsylvania, do not show that Gupta had assigned duties.[81] Accordingly, Compunnel cannot carry its burden of proof that it had assigned Gupta any duties,

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[80] RX E.

[81] CX 9.

and therefore, we do not reach the remaining elements of the unavailability test.

3. Back Wages from 3/31/08 to 4/30/09

The Administrator also determined that Gupta was not entitled to back wages between March 31, 2008, and April 30, 2009, because Gupta did not establish that he was available for work.[82] The ALJ again misapplied the burden of proof in affirming the Administrator's determination for this period of time. The ALJ found that Compunnel required Gupta to come to its Monmouth, New Jersey headquarters to "avoid cancellation due to 'no show,'" in a letter and phone call from April 3, 2008.[83] The ALJ also found that Gupta received the letter but did not go to the headquarters as instructed.[84] However the April 3 letter does not mention any particular project or assignment. Nor did the ALJ find that Compunnel had work at its Monmouth, New Jersey headquarters, and there is nothing in the record to support such a finding. In fact, during the month of April 2008, Compunnel again "submitted" Gupta for projects.[85]

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[82] D. & O. at 10.

[83] D. & O. at 7; CX 18A; RX E.

[84] D. & O. at 10.

[85] CX 11.

The same as for the period from July 23, 2007, to December 10, 2007, there is simply no record evidence that Gupta had any assigned work duties between March 31, 2008, and April 30, 2009, much less that Gupta elected to be away from any such duty. Accordingly, we hold that Gupta was nonproductive because of a lack of assigned work and, therefore, entitled to back wages during this time.[86]

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[86] We note the troubling inference arising from the record that Compunnel may have acted more like a job placement or "job shop" than an employer that needed Gupta as a company market research analyst. *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, 65 Fed. Reg. 80,144 (Dec. 20, 2000) (codified at 20 C.F.R. Parts 655-656) (quoting 144 Cong. Rec. H8584 (Sept. 24, 1998)) ("The employers most prone to abusing the H-1B program are called job contractors or job shops . . . . They are in business to contract their H-1Bs out to other companies. The companies to which the H-1Bs are contracted benefit by paying wages to the foreign workers often well below what comparable Americans would receive."); Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (proposed June 4, 1998) (codified at 8 C.F.R. Part 214) ("Recruitment agencies and entities which merely locate an alien for employers . . . may not file an H-1B petition . . . . The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs . . . ."). However, we are not presented with the question

4. Fringe Benefits

Gupta argues that he is entitled to certain additional fringe benefits, including paid vacation and holidays, paid sick leave, and health insurance. The ALJ determined that Gupta was only entitled to fringe benefits when he was in productive status.[87] The ALJ denied Gupta these fringe benefits during times in which the ALJ determined Gupta to be in nonproductive status. We disagree to the extent that the evidence of record does not support a finding that Gupta's periods of nonproductive status were attributable to circumstances identified under 20 C.F.R. § 655.731(c)(7)(ii) during which wages need not be paid. The INA provides:

> It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to

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of whether Compunnel was committing such violations of the H-1B program.

[87] D. & O. at 11.

> participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and saving plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.[88]

Pursuant to this regulation, Gupta is entitled to all fringe benefits afforded U.S. workers during the course of his employment. Because we remand this case for the ALJ to calculate Gupta's back wages, we also remand this case for the ALJ to calculate fringe benefits associated with his back wages. On remand, the ALJ must ensure that Gupta is afforded all fringe benefits to which he was entitled during the course of his employment with Compunnel.

Gupta also correctly contends that he is due interest on all awards of back pay.[89] We reject as

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[88] 8 U.S.C.A. § 1182 (n)(2)(C)(viii); *see also* 20 C.F.R. §§ 655.731-32, 655.820.

[89] *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000).

unsupported the employer's contention that Gupta waived his right to seek the interest due him on the WHD back pay award, an issue he preserved by requesting a hearing and seeking additional damages. The record thus demonstrates that Gupta invoked and did not waive his right to interest on the back pay award.

5. Gupta's Retaliation Claim

Gupta alleges that Compunnel retaliated against him for engaging in activity protected by the INA's Section 8 U.S.C.A. § 1182(n)(2)(C)(iv). The statute provides, in pertinent part:

> It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee . . . because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule

> or regulation pertaining to this subsection . . . .[90]

Unfortunately, neither the statute nor the implementing regulations provide explicit guidance as to the employee's burden of proof on his case-in-chief or the employer's burden on any alleged defenses.

Given the absence of explicit regulatory guidance, the ALJ decided to apply the standards applicable to the "employee-protection provisions contained in the nuclear and environmental whistleblower statutes administered by DOL."[91] The ALJ expressly relied on "[w]histleblower cases analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and other anti-discrimination statutes."[92] Next, without discussing

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[90] 8 U.S.C.A. § 1182(n)(2)(C)(iv); *see also* 20 C.F.R. §§ 655.801, 655.810(b), (b)(2).

[91] D. & O. at 12 (citing DOL's background comments to the H-1B regulations that merely point to the "well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 C.F.R. Part 24))."

[92] *Id.* The cases cited generally make up the often-cited *McDonnell Douglas/Burdine/St. Mary's Honor Center* burden-shifting paradigm. See generally *McDonnell Douglas Corp. v.*

the appropriate burdens of proof, the ALJ analyzed whether Gupta established a "prima facie case of retaliation" under an analysis that applied shifting burdens to "produce evidence."[93] Ultimately, the ALJ rejected Gupta's claim on two grounds, presumably assuming arguendo that protected activity occurred:[94] (1) Gupta "is unable to establish that [Compunnel] took adverse actions against him," and; (2) Gupta "provides no credible evidence to show a retaliatory motive."[95]

Gupta challenges the ALJ's findings on several grounds. He argues Compunnel retaliated by: (1) failing to pay all of his wages and fringe benefits in 2008; (2) failing to file Form I-140 (Immigrant Petition for Alien Worker) with USCIS in October 2009; (3) reassigning him overseas; (4) sending back-dated letters to USCIS, and; (5) creating false employment

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Green, 411 U.S. 792, 802-804 (1973); *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-11 (1993).

[93] *Id.*

[94] On the issue of protected activity, the ALJ stated that Gupta "claims he engaged in protected activity in December 2008" when he reported wage violations. *Id.*

[95] *Id.*

records.[96] On the issue of retaliatory motive, he argues that retaliatory motive is not necessary and he points to evidence of temporal proximity, pretext, and shifting explanations to establish a causal nexus between his alleged protected activity and Compunnel's retaliation.[97]

We find that the ALJ's ruling on the retaliation claim is unreviewable and must be remanded for further findings. Stated simply, the ALJ's reliance on "the nuclear and environmental whistleblower statutes" incorporates two fundamentally different burdens of proof,as plainly reflected in 29 C.F.R. Part 24 that the ALJ cited. Specifically, pursuant to 29 C.F.R. § 24.109(b)(1) and (2), the "contributing factor" causation standard applies to whistleblower claims brought under the Environmental Reorganization Act of 1974, as amended (ERA), while the more difficult "motivating factor" causation standard applies to the other six environmental statutes listed in 29 C.F.R. Part 24. This difference in causation standards among the environmental statutes has existed for more than twenty years after Congress passed the Energy Policy

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[96] Complainant's Petition for Review and Opening Brief, ¶¶ 58-78 (Mar. 12, 2012).

[97] *Id.* at ¶ 56.

Act of 1992[98] that amended the ERA whistleblower provision, 42 U.S.C.A. § 5851. In *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997), the Eleventh Circuit Court of Appeals prominently noted this change. The court pointed out that the "prima facie" phrase in the ERA "bred some confusion, chiefly because the phrase evokes the sprawling body of general employment discrimination law," but the 1992 amendment created a "free standing" evidentiary framework. Before we can decide which burden of proof should apply, we find it more prudent to allow the parties to more fully address this issue on remand and, after such briefing, allow the ALJ to explicitly apply a burden of proof to the facts in this case.

Before the ALJ embarks on an in depth analysis and discussion of the proper burdens of proof, we suggest that the ALJ first determine whether Gupta alleged his retaliation claim as an alternate claim for damages or as a claim for additional damages. We say this because our decision will result in Gupta receiving all of the back wages, which he has requested, plus interest, and perhaps addresses the deteriorating financial condition that Gupta allegedly experienced during the time that he was employed by Compunnel. Gupta is not entitled to reimbursement

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[98] *See* Energy Policy Act of 1992, Pub. L. 102-486, § 2902(d).

for his return trip to India because the award in this case provides him with all of his wages through the end of his H-1B authorization in 2009, thereby placing on him the financial burden of returning to India. We note that the Administrator has no authority to extend an H-1B visa authorization or to enforce remedies related to applications for employment-based permanent residence. If the ALJ determines that Gupta continues to pursue viable remedies for a retaliation claim, then the ALJ must provide explicit findings as the burdens of proof used to rule on such claim and the findings on each claim.

CONCLUSION

In sum, we order as follows: (1) the ALJ's Decision to deny Gupta damages for the time period from December 1, 2006, through February 2, 2007, is **AFFIRMED** on other grounds; (2) the ALJ's decision on the issue of compensation for travel time on February 3, 2007, is **REVERSED** and **REMANDED** for the ALJ to calculate those damages; (3) the ALJ's denial of wages and fringe benefits for the nonproductive periods after February 27, 2007, is **REVERSED** and **REMANDED** for the ALJ to calculate those damages; and (4) the ALJ's denial of Gupta's retaliation claim is **VACATED** and **REMANDED** for further findings. We **REMAND**

this case for further consideration consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, *concurring, in part, and dissenting, in part*:

I concur in the majority's opinion awarding Mr. Gupta back wages and fringe benefits for the nonproductive periods of Gupta's employment on February 3, 2007, and after February 27, 2007. Hopefully the Board's decision awarding Gupta damages for these contested periods of nonproductive employment ("benching") will serve as an impetus in bringing to an end the deceptive practice of H-1B nonimmigrant worker third-party placement ("Job Shopping") by "staffing companies"[99] in violation of 8

[99] *See* U.S. Gov't Accountability Office, GAO-11-26, *H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program* 52-55 (2011) (recommending stricter enforcement against H-1B "staffing companies" because, among other problems, "workers procured by staffing companies were

U.S.C.A. § 1182(n)(1)(F). I dissent from the majority's ruling regarding the ALJ's resolution of Gupta's retaliation claim because I am of the opinion that the ALJ applied the correct burdens of proof causation standard,[100] and that the ALJ's

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either not working for the employer listed or not performing the duties described on the LCA"). *See also* Donald Neufeld, Memorandum, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, U.S. Citizenship & Immigration Services, U.S. Dept. of Homeland Security (January 2010).

[100] It is true, as the majority notes, that the ALJ's reference to the applicability of the nuclear (ERA) and environmental whistleblower statutes administered by the Department of Labor under 29 C.F.R. Part 24 is by itself confusing, since the burden of proof standards and evidentiary framework of the ERA has been since 1992 different from the environmental whistleblower provisions that are also covered under the referenced regulations. Nevertheless, the ALJ's analysis was undertaken in accordance with traditional Title VII burden of proof and burden shifting framework case law, which the ALJ cites, and I consider applicable in analyzing whether or not Gupta has met his burden of proof under 8 U.S.C.A. § 1182(n)(2)(C)(iv). My one concern, which I view as harmless error, is the ALJ's requirement that the complaint, to prevail, establish a prima facie case of discrimination – a lesser burden of proof standard than that required of a complainant at the hearing stage before an ALJ where the complainant must prove by a preponderance of the evidence that his protected activity caused or was a motivating factor in the adverse personnel action at issue. *See, e.g., Mugleston-Utley v. E.G.&G. Def. Materials*, ARB No. 12-025, ALJ No. 2009-CAA-009 (ARB May

determination that Gupta failed to prove his claim of retaliation in violation of 8 U.S.C.A. § 1182(n)(2)(C)(iv) is supported by substantial evidence of record.

E. Cooper Brown
Deputy Chief Administrative Appeals Judge

18, 2013) (interpreting burden of proof requirements under the environmental whistleblower statutes).

APPENDIX G

U.S. Department of Labor
Wage and Hour Division
3131 Princeton Pike
Building 5, Room 216
Lawrenceville, NJ 08648
Telephone: 609-538-8310
Fax: 609-538-8314

May 31, 2011

CERTIFIED MAIL RETURN RECEIPT REQUESTED: 7009 2820 0001 7937 4650

Rakesh Shah, President
Compunnel Software Group, Inc.
103 Morgan Lane, Suite 102
Plainsboro, NJ 08536

Subject: Administrator's Determination Pursuant to Regulations at 20 C.F.R. Part 655 H-1B Specialty Occupations under the Immigration and Nationality Act (INA) administered by the Department of Labor (DOL) Reference#: 1531643

Dear Mr. Shah:

Based on the evidence obtained in the recently concluded Wage and Hour Division investigation of Compunnel Software Group, Inc. under the H-1B provisions of the INA, as amended, (8 U.S.C. § 1182(n)), it has been determined that your firm committed the following violations: failed to pay wages as required. Any Labor Condition Application (LCA) (Form ETA 9035 and/or ETA 9035E) included in this investigation is listed or enclosed.

The specific violations and the remedy imposed for such violations are set forth on the enclosed Summary of Violations and Remedies. No civil money penalty is assessed as a result of the violation. Your firm has been assessed back wages in the amount of $6,976.00 due to 1 H-1B nonimmigrant and has paid the back wage assessment in full. The employer is responsible for withholding the legally required deductions (e.g., Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities. Your firm is liable for any ongoing violations.

You and any interested party have the right to request a hearing on this determination. Such request must be dated, be typewritten or legibly

written, specify the issue(s) stated in this notice of determination on which a hearing is requested, state the specific reason(s) why the requestor believes this determination to be in error, be signed by the requestor or by an authorized representative, and include the address at which the requestor or the authorized representative desires to receive further communications relating to the hearing request.

The request must be made to and received by the Chief Administrative Law Judge (OALJ) at the following address no later than 15 calendar days after the date of this determination:

U.S. Department of Labor
Chief Administrative Law Judge
ATTN: Deputy Secretary of BALCA
800 K Street NW., Room 400 North
Washington, DC 20001-8002

If you or any interested party do not make a timely request for a hearing, this determination will become a final and unappealable order of the Secretary of Labor.

The procedure for filing a request for a hearing is provided in 20 C.F.R. § 655.820. Please note that 20 C.F.R. § 655.820(f) requires that a copy of any such request for a hearing must also be

sent to me and to those parties listed below who were provided a copy of this determination. The Department of Labor will notify any complainant and interested parties of any appeal. Due to the delayed delivery of mail in certain areas, you may wish to transmit your request to the OALJ via facsimile at 202-693-7365 to ensure timely receipt.

A copy of 20 C.F.R. Part 655 subparts H and I can be found at the following web address: http://www.access.gpo.gov/nara/cfr/waisidx_10/20cfr655_10.html

Sincerely,

/s/ Patrick Reilly
Patrick Reilly
District Director

Enclosures: LCA
Summary of Violations and Remedies

cc: U.S. Department of Labor
Chief Administrative Law Judge
800 K Street NW., Room 400 North
Washington, DC 20001-8002
(with enclosures and with copy of complaint per 20 C.F.R. § 655.815(b))

Administrator
U.S. Department of Labor
Wage and Hour Division
Room S-3510
200 Constitution Ave., NW
Washington, DC 20210

U.S. Department of Labor
Office of the Solicitor
Room N-2716
200 Constitution Ave., NW
Washington, DC 20210

U.S. Department of Labor
Office of the Regional Solicitor
201 Varick Street, Room 983
New York, NY 10014

Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room C-4312
Washington, DC 20210

Kamal Rastogi, Esq.
Compunnel Software Group, Inc
103 Morgan Lane, Suite 102
Plainsboro, NJ 08536

Complainant and other interested parties

Summary of Violations and Remedies
Compunnel Software Group, Inc.

Violation: Compunnel Software Group, Inc. failed to pay wages as required in violation of 20 C.F.R. § 655.731. See 20 C.F.R. § 655.805(a)(2).

> The violation includes failure to pay the required wage rate for productive time.

Remedy: No civil money penalty is assessed. Compunnel Software Group, Inc. is ordered to pay back wages in the amount of $6,976.00 to 1 H-1B nonimmigrant worker. The full amount has already been paid. (The employer is responsible for withholding the legally required deductions (*e.g.*, Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities.) Compunnel Software Group, Inc. is ordered to comply with 20 C.F.R. § 655.731 in the future.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of December, two thousand twenty-one.

Compunnel Software Group, Inc.,
Petitioner-Counter-Claimant-
Counter-Defendant-Appellee,

v.

Arvind Gupta,
Respondent-Counter-Defendant-
Counter-Claimant-Appellant,

v.

Eugene Scalia, in his official capacity as Secretary, United States Department of Labor,
Respondent-Counter-
Defendant-Appellee.

ORDER

Docket No: 19-1761

Appellant, Arvind Gupta, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

UNITED STATES COURT OF
APPEALS SECOND CIRCUIT

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMPUNNEL SOFTWARE GROUP, INC.,
Petitioner,

v.

ARVIND GUPTA, and R. ALEXANDER ACOSTA, in his capacity as Secretary, United States Department of Labor,
Respondents.

No. 14-CV-4790-RA

MEMORANDUM OPINION & ORDER

DATE FILED: MAY 20, 2019

RONNIE ABRAMS. United States District Judge:

Arvind Gupta seeks reconsideration of this Court's September 30, 2018 Opinion and Order denying his motion for partial summary judgment and granting the motions for summary judgment of the Secretary of Labor and Compunnel Software Group, Inc. For the reasons that follow, the motion is denied.

BACKGROUND

The factual background and procedural history of this case is set forth in detail in the Court's September 30, 2018 Opinion and Order, familiarity with which is assumed. The Court here provides a brief overview of the factual background that is relevant to the instant motion.

Gupta is a citizen of India who was employed by Compunnel to work in the United States pursuant to an H-1B visa.[1] On November 17, 2008, he filed a complaint with the Department of Labor ("DOL") alleging, *inter alia*, that Compunnel had failed to pay him the appropriate wage rate, as required by the H-1B provisions of the Immigration and Nationality Act ("INA"). The Wage and Hour Division (WHD") investigated Gupta's complaint and issued a determination letter concluding that Compunnel owed Gupta $6,976.00 in back wages, but that that the company had already paid the back wages in full. Gupta disputed the WHD's determination and requested a hearing before an Administrative Law

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[1] The H-1B visa program permits non-immigrant foreign workers to work temporarily in the United States in "specialty occupation[s]" that require the application of "a body of highly specialized knowledge," as well as attainment of a bachelor's degree or higher in the specialty. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(i)(1).

Judge ("ALJ"), who subsequently affirmed the determination of the WHD. Gupta then appealed to the Administrative Review Board ("ARB"), which reversed in substantial part the determinations of the ALJ. The ARB held that Compunnel owed Gupta back wages, benefits, and interest for specified periods and remanded to the ALJ for a calculation of damages and for reconsideration of Gupta's retaliation claim.

On June 27, 2014, Compunnel petitioned this Court for judicial review of the ARB's order. Gupta answered the petition and filed numerous counterclaims against Compunnel, as well as cross-claims against the Secretary. The Court dismissed the petition, as well as the majority of Gupta's counterclaims, on the ground that the ARB order was non-final and therefore not yet subject to judicial review. Shortly thereafter, the Court granted Compunnel's motion for judgment on the pleadings as to Gupta's remaining counterclaims.

While Gupta's DOL complaint was on remand before the ALJ, Compunnel and Gupta reached a settlement agreement. The agreement was signed on March 10, 2016 in a conference before the ALJ. It provided, among other things, that in exchange for a payment of $28,000 from Compunnel to Gupta, the parties were "giving up their right to a trial in

connection with the allegations contained in the complaints filed with the U.S. Department of Labor—Wage and Hour Division (WHD) against [Compunnel] or any other rights which are the subject of this Agreement and Stipulation including any rights in the administrative proceedings in ALJ Case No. 2011-LCA-045, ARB Case No. 12-049, USDC Case No. 14-CV-4790 (SAS) or any other court related to this matter." Administrative Record ("AR") at 1617-18. The following day, the ALJ approved the settlement agreement as fair and reasonable, and dismissed the matter with prejudice.

Approximately three weeks later, Gupta petitioned the ARB for review, arguing that the ALJ's approval of the settlement agreement and dismissal of his case was, among other things, contrary to the ARB's mandate. The ARB declined Gupta's petition for review and dismissed the matter with prejudice, holding that it lacked jurisdiction to adjudicate Gupta's collateral attacks to a facially valid settlement agreement.

On May 5, 2016, Gupta filed a motion to reopen the case in this Court. The Court granted the motion, and Gupta filed a Fourth Amended Petition for Review seeking judicial review of the ALJ and ARB's orders dismissing his DOL complaint. Compunnel and the Secretary each moved for summary

judgment, and Gupta moved for partial summary judgment. On September 30, 2018, this Court denied Gupta's motion and granted the motions of the Secretary and Compunnel. The Court held, first, that there was no genuine dispute of material fact as to the validity and enforceability of the settlement agreement, which had been ratified by Gupta and which unambiguously released Gupta's claims against Compunnel in both this Court and the DOL. Second, the Court held that, in light of the parties' valid and binding settlement agreement, any remand to the ALJ or ARB would be futile. On October 10, 2018, Gupta filed the instant motion for reconsideration.

STANDARD OF REVIEW

"Motions for reconsideration are governed by Local Civil Rule 6.3 and Federal Rule of Civil Procedure 60(b)." *Farmer v. United States*, No. 15-CV-6287 (AJN), 2017 WL 3448014, at *2 (S.D.N.Y. Aug. 10, 2017) (quotation omitted). "A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Cohen Lans LLP v. Naseman,* No. 14-CV-4045 (JPO), 2017 WL 1929587, at *1 (S.D.N.Y. May 10, 2017) (quotation omitted). "In order to prevail on a motion for reconsideration, a movant must demonstrate '(i)

an intervening change in controlling law; (ii) the availability of new evidence; or (iii) the need to correct clear error or prevent manifest injustice.'" *Id.* (citation omitted). "The standard governing motions for reconsideration 'is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked.'" *Bldg. Serv. 32BJ Health Fund v. GCA Servs. Grp., Inc.*, No. 15-CV-6114 (PAE), 2017 WL 1283843, at *1 (S.D.N.Y. Apr. 5, 2017) (quoting *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012)).

DISCUSSION

Gupta moves for reconsideration based on an asserted need to "correct clear error or prevent manifest injustice." Gupta Mot. for Reconsideration at 3. He argues that (1) the Court, the ALJ, and the ARB each lacked jurisdiction to uphold the settlement agreement; (2) remand to the agency would not be futile, and (3) the settlement agreement is preempted by the INA and therefore invalid. Each of these arguments fails.

I. Jurisdiction

Gupta first argues that the Court, the ALJ, and the ARB each lacked jurisdiction to uphold the settlement agreement. He asserts that the WHD's

determination was never appealed, and on that basis argues that both the ALJ and the ARB lacked jurisdiction to approve the settlement agreement, which Gupta contends contradicts the determinations of the WHD. Gupta further argues that this Court lacked jurisdiction to uphold the settlement agreement, because Compunnel failed to exhaust its administrative remedies.

Gupta's argument fails because it relies on an incorrect recitation of the procedural history of this case. Contrary to Gupta's assertion, the WHD's determination was, in fact, appealed—by Gupta—on June 6, 2011. AR 8-19. Gupta, in fact, successfully appealed the WHD's determination to the ARB, which reversed the ALJ's affirmance of the WHD and remanded for reconsideration and calculation of damages. While pending on remand, however, Gupta and Compunnel entered into the settlement agreement. The ALJ, accordingly, dismissed the case, and the ARB subsequently dismissed the ease with prejudice on the ground that it lacked jurisdiction to consider Gupta' attacks to the facially valid settlement.

Thus, contrary to Gupta's assertions, the WHD's determination was not the final determination of the Secretary. The ALJ and ARB each properly heard Gupta's appeals, which were brought pursuant to the

applicable regulations. *See* 20 C.F.R. § 655.820 (providing for review by an ALJ), § 655.845 (providing for review by the ARB). Furthermore, since the agency's dismissal with prejudice of Gupta's case "mark[ed] the consummation of [its] decision-making process" and was a decision "by which rights or obligations [were] determined," it constituted a "final agency action" subject to judicial review. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see* 5 U.S.C. § 704. The Court, accordingly, rejects Gupta's argument that the Court and agency lacked jurisdiction to dismiss Gupta's case based on the parties' settlement agreement.

II. Futility

Gupta next argues that the Court erred in concluding that remand to the agency would be futile, because the parties' settlement agreement did not absolve the DOL from its statutory obligation to enforce the H-1B provisions of the INA. Gupta's argument misses the point. In the settlement agreement, Gupta expressly waived his "right to a trial in connection with the allegations contained in the complaints filed with the U.S. Department of Labor—Wage and Hour Division (WHD)," as well as his "rights in the administrative proceedings in ALJ Case No. 2011-LCA-045, ARB Case No. 12-049, USDC Case No. 14-cv-4790 (SAS) or any other court

related to this matter." AR at 1617-18. This Court has already ruled that the settlement agreement as a whole, and this release provision in particular, were valid and enforceable. And Gupta cites no authority to support the proposition that claims for violations of the H-1B program cannot be settled. Indeed, such claims appear to settle routinely.[2] Thus, independent of any statutory obligation belonging to the Secretary, Gupta has given up his rights to pursue his claims against Compunnel before the agency and this Court. Any remand to the agency would thus necessarily result, once again, in the dismissal of Gupta's claims.

III. Preemption

Finally, relying on the Supremacy Clause and the doctrine of conflict preemption, Gupta argues that the settlement agreement is invalid because it was preempted by federal law. Conflict preemption, however, applies "where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *Figueroa v. Foster*, 864 F.3d 222, 228 (2d Cir. 2017). Since this

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[2] *See* LCA Decisions, Office of Administrative Law Judges, United Slates Department of Labor. Available at https://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/CASELISTS/LCA _DECISIONS.HTM.

case does not involve any conflict between federal law and local law, conflict preemption is inapplicable.

CONCLUSION

For the foregoing reasons, Gupta's motion for reconsideration is denied. The Clerk of Court is respectfully directed to terminate the motion pending at docket entry 254 and to close this case.

SO ORDERED.

DATED: May 20, 2019
New York, New York

/s/ Ronnie Abrams
RONNIE ABRAMS
United States District Judge

APPENDIX J

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

5 U.S.C. § 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that

the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8 U.S.C. § 1182 (n)(1)(A)

(1) No alien may be admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer-

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title wages that are at least-

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

8 U.S.C. § 1182 (n)(2)(A)

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

8 U.S.C. § 1182 (n)(2)(C)(iv)

(iv) It is a violation of this clause for an employer

who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

8 U.S.C. § 1182 (n)(2)(C)(vii)(I)

(I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H–1B nonimmigrant designated as a full-time employee on the petition filed under section 1184 (c)(1) of this title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to

pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

8 U.S.C. § 1182 (n)(2)(C)(vii)(IV)

(IV) This clause does not apply to a failure to pay wages to an H–1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

8 U.S.C. § 1182 (n)(2)(D)

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

8 U.S.C. § 1182 (n)(4)(C)

(C) The term "H–1B nonimmigrant" means an alien admitted or provided status as a nonimmigrant described in section 1101 (a)(15)(H)(i)(b) of this title.

8 C.F.R. § 214.2(h)(2)(i)(E)

(E) **Amended or new petition.** The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

20 C.F.R. § 655.700 What statutory provisions govern the employment of H–1B, H–1B1, and E–3 nonimmigrants and how do employers apply for H–1B, H–1B1, and E–3 visas?

(b) *Procedure for obtaining an H–1B visa classification.* Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to the Department of Labor (DOL), and obtain DOL certification of, a labor condition application (LCA). The requirements for

obtaining a certified LCA are provided in this subpart. The electronic LCA (Form ETA 9035E) is available at *http://www.lca.doleta.gov*. The paper-version LCA (Form ETA 9035) and the LCA cover pages (Form ETA 9035CP), which contain the full attestation statements incorporated by reference into Form ETA 9035 and Form ETA 9035E, may be obtained from *http://ows.doleta.gov* and from the Employment and Training Administration (ETA) National Office. Employers must file LCAs in the manner prescribed in § 655.720.

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (DHS Form I-129), together with the certified LCA, to DHS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, DHS are set forth in DHS regulations. The DHS petition (Form I–129) may be obtained from an DHS district or area office.

(3) If DHS approves the H–1B classification, the nonimmigrant then may apply for an H-1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other

than H-1B, he/she may apply to the DHS for a change of visa status.

20 C.F.R. § 655.705 **What Federal agencies are involved in the H-1B and H–1B1 programs, and what are the responsibilities of those agencies and of employers?**

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. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

(a) *Department of Labor (DOL) responsibilities.* DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:

(1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for

compiling and maintaining a list of LCAs and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210.

(2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an employer's misrepresentation in or failure to comply with LCAs in the employment of H–1B nonimmigrants.

(c) *Employer's responsibilities.*

This paragraph applies only to the H–1B program; employer's responsibilities under the H–1B1 and E–3 programs are found at § 655.700(d)(4). Each employer seeking an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I of this part, including:

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding

its responsibilities, including the wages, working conditions, and benefits to be provided to the H–1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H-1B-dependent employers and employers found to have willfully violated the H–1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer the job to U.S. applicants who are equally or better qualified than the H–1B nonimmigrant(s) sought for the job, and to avoid the displacement of U.S. workers (either in the employer's workforce, or in the workforce of a second employer with whom the H–1B nonimmigrant(s) is placed, where there are indicia of employment with a second employer (8 U.S.C. 1182(n)(1)(E)–(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If ETA certifies the LCA, notice of the certification will be sent to the employer by the same means the employer used to submit the LCA (that is, electronically where the Form ETA 9035E was submitted

electronically, and by U.S. Mail where the Form ETA 9035 was submitted by U.S. Mail). The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I–129, for an H–1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

20 C.F.R. § 655.731 What is the first LCA requirement, regarding wages?

(c) *Satisfaction of required wage obligation.*

(1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

(2) "Cash wages paid," for purposes of satisfying the H–1B required wage, shall consist only of those payments that meet all the following criteria:
(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);
(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H–1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization

arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

20 C.F.R. § 655.731(c)(7)(i)-(ii)

(7) *Wage obligation(s) for H–1B nonimmigrant in nonproductive status*

(i) *Circumstances where wages must be paid.* If the H–1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), 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 (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of "part-time employment," the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I-129 petition filed by the employer with the DHS and incorporated by reference on the LCA. If the I-129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H-1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer

than the minimum number of hours indicated for the range of part time employment. In all cases the H–1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

(ii) *Circumstances where wages need not be paid.*

If an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which 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), then the employer shall not be obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Payment need not be made if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that

the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

20 C.F.R. § 655.740 What actions are taken on labor condition applications?

(c) *Truthfulness and adequacy of information.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application.

20 C.F.R. § 655.750 What is the validity period of the labor condition application?

(b) *Withdrawal of certified labor condition applications.*

(3) An employer shall comply with the "required wage rate" and "prevailing working conditions" statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is withdrawn, at any time H–1B nonimmigrants are employed pursuant to the application, unless the application is

superseded by a subsequent application which is certified by ETA.

20 C.F.R. § 655.800 Who will enforce the LCAs and how will they be enforced?

(a) *Authority of Administrator.* Except as provided in § 655.807, the Administrator shall perform all the Secretary's investigative and enforcement functions under sections 212(n) and (t) of the INA (8 U.S.C. 1182(n) and (t)) and this subpart.

20 C.F.R. § 655.801 What protection do employees have from retaliation?

(a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has -

(1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t), including this subpart I and subpart H of this part and any pertinent regulations of DHS or the Department of Justice; or

(2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t).

20 C.F.R. § 655.810 What remedies may be ordered if violations are found?

(a) Upon determining that an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H–1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s).

20 C.F.R. § 655.815(c)(1), 815(c)(3) What are the requirements for the Administrator's determination?

(c) The Administrator's written determination required by § 655.805 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons

therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

20 C.F.R. § 655.820 How is a hearing requested?

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or

appear as amicus curiae at any time in the proceeding, at the Administrator's discretion. (2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

20 C.F.R. § 655.830 What rules apply to service of pleadings?

(b) Two (2) copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

20 C.F.R. § 655.850 Who has custody of the administrative record?

The official record of every completed administrative hearing procedure provided by

subparts H and I of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

29 C.F.R. § 18.10 Scope and purpose.

(a) *In general.* These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

29 C.F.R. § 18.12 Proceedings before administrative law judge.

(b) *Authority.* In all proceedings under this part, the judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act, 5 U.S.C. 556. Among them is the power to:

(1) Regulate the course of proceedings in accordance with applicable statute, regulation or executive order;
(2) Administer oaths and affirmations and examine witnesses;
(3) Compel the production of documents and appearance of witnesses within a party's control;
(4) Issue subpoenas authorized by law;
(5) Rule on offers of proof and receive relevant evidence;
(6) Dispose of procedural requests and similar matters;
(7) Terminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order;
(8) Issue decisions and orders;
(9) Exercise powers vested in the Secretary of Labor that relate to proceedings before the Office of Administrative Law Judges; and
(10) Where applicable take any appropriate action authorized by the FRCP.

29 C.F.R. § 18.30 Service and filing.

(b) *Filing with Office of Administrative Law Judges—*

(1) Required filings. Any paper that is required to be served must be filed within a reasonable time after service with a certificate of service. But disclosures under § 18.50(c) and the following discovery requests and responses must not be filed until they are used in the proceeding or the judge orders filing:
(i) Notices of deposition,
(ii) Depositions,
(iii) Interrogatories,
(iv) Requests for documents or tangible things or to permit entry onto land;
(v) Requests for admission, and
(vi) The notice (and the related copy of the subpoena) that must be served on the parties under rule 18.56(b)(1) before a "documents only" subpoena may be served on the person commended to produce the material.