21-1536

ORIGINAL

No. 21-_____

In The

Supreme Court of the United States

ARVIND GUPTA, *pro se*
Petitioner,

v.

HEADSTRONG, INC., GENPACT LIMITED,
and,
MARTY WALSH, in his official capacity as
Secretary of the U.S. Department of Labor,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ARVIND GUPTA, *pro se*
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Petitioner

Dated: June 2, 2022

QUESTIONS PRESENTED FOR REVIEW

Question 1:

Whether employers can have a legally enforceable private settlement and release agreement with the nonimmigrant worker in violation of 'INA' requirements.

Question 2:

In the absence of any complaint, claim or counterclaim by employer for breach of contract by nonimmigrant worker, did the district court properly award attorneys' fees to the employer.

Question 3:

Did Headstrong, Inc. comply with required wage obligations for the period of violations found by the Administrator (Wage-Hour) and the Administrative Law Judge (ALJ).

PARTIES TO THE PROCEEDING

Petitioner Arvind Gupta, *pro se* is a citizen of India. He worked as a nonimmigrant worker under the H-1B work authorization program of the Immigration and Nationality Act, 1956 as amended, ('INA') with Headstrong, Inc. beginning April 2006.

Headstrong, Inc. is a global provider of comprehensive consulting and IT services with a specialized focus in capital markets and healthcare. Headstrong is a part of Genpact Capital Markets.

Genpact Limited (NYSE:'G') is a Bermuda company with its address at Canon's Court, 22 Victoria Street, Hamilton HM12 Bermuda, Tel: (441) 295-2244. The Company is a global professional services firm and a leader in business process management and technology services. Genpact acquired Headstrong, Inc. in or about May 2011. For the full year 2021 Genpact had a total revenue of about $4.0 billion and net income of $369 million.

Respondent Honorable Marty Walsh is sued in his official capacity as the Secretary of the U.S. Department of Labor. He is responsible for the supervision and management of all decisions within the U.S. Department of Labor.

RELATED PROCEEDINGS

1. *Gupta v. Headstrong*, ALJ No. 2010-LCA-032, Office of Administrative Law Judges (OALJ), New Jersey, Order of Dismissal entered October 12, 2012.

2. *Gupta v. Headstrong*, ALJ No. 2011-LCA-038, OALJ, New Jersey, Order [Dismissing case for lack of Jurisdiction] entered July 19, 2011.

3. *Gupta v. Headstrong*, ARB Nos. 11-065, 11-008. Administrative Review Board (ARB), Washington, DC. Final Decision and Order entered June 29, 2012. (2012 WL 2588596)

4. *Gupta v. Headstrong*, ARB Nos. 11-065, 11-008. Administrative Review Board (ARB), Washington, DC. Order Denying Motion for Reconsideration entered July 31, 2012. (2012 WL 3164361)

5. *Gupta v. Headstrong et al,* No. 12-cv-6652 (RA), U.S. District Court for the Southern District of New York. Stipulation and Order of Remand and Dismissal entered Dec. 10, 2012. (Unpublished, Not reported in Fed. Supp.)

6. *Gupta v. Headstrong et al,* No. 12-cv-6652 (RA), U.S. District Court for the Southern District of New York. Memorandum Opinion and Order [Granting Headstrong's Motion to Dismiss] entered August 30, 2013. (2013 WL 4710388, Not reported in Fed. Supp.)

7. *Headstrong,* DOL Case #1682431 Administrator (Wage-Hour). Determination including Summary of Violations and Remedies entered March 13, 2014. *(reproduced as Appendix E, at 150a – 155a)*

8. *Gupta v. Headstrong et al,* No. 12-cv-6652 (RA), U.S. District Court for the Southern District of New York. Order [Denying four motions] entered September 4, 2014. (Unpublished, Not Reported in Fed. Supp.)

9. *Gupta v. Headstrong*, ALJ No. 2014-LCA-008, OALJ, New Jersey, Decision and Order entered January 21, 2015. *(reproduced as Appendix D, at 45a – 149a)*

10. *Gupta v. Headstrong*, ARB Nos. 15-032, 15-033. Administrative Review Board (ARB), Washington, DC. Final Decision and Order entered Jan. 26, 2017. (2017 WL 512655) *(reproduced as Appendix C, at 37a – 44a)*

11. *Gupta v. Headstrong*, ARB Nos. 15-032, 15-033. Administrative Review Board (ARB), Washington, DC. Order Denying Motion for Reconsideration entered Feb. 14, 2017. (2017 WL 1032319)
(reproduced as Appendix G, at 158a – 161a)

12. *Gupta v. Headstrong et al,* No. 17-cv-2088 (EEB), U.S. District Court for the Northern District of Illinois. Notification fo Docket Entry [Transferring the case to Southern District of New York) entered June 14, 2017. (Unpublished, Not Reported in Fed. Supp.)

13. *Gupta v. Headstrong et al,* No. 17-cv-5286 (RA), U.S. District Court for the Southern District of New York. Opinion and Order [Granting Headstrong's motion to Dismiss] entered March 30, 2018. (2018 WL 1634870, Not Reported in Fed. Supp.)

14. *Gupta v. Headstrong et al,* No. 17-cv-5286 (RA), U.S. District Court for the Southern District of New York. Opinion & Order [Granting Headstrong's Motion to Dismiss and Secretary of Labor's motion for Summary Judgment] entered Sept. 9, 2019. (2019 WL 4256396, Not Reported in Fed. Supp.)

15. *Gupta v. Headstrong et al,* No. 17-cv-5286 (RA), U.S. District Court for the Southern District of New York. Judgment entered Sept. 9, 2019.

16. *Gupta v. Headstrong et al,* No. 19-2828-cv, U.S. Court of Appeals for the Seventh Circuit. Order (Dismissing appeal of transfer order for lack of jurisdiction) entered Nov. 20, 2019.

17. *Gupta v. Headstrong et al,* No. 19-3044-cv, U.S. Court of Appeals for the Second Circuit. Order [Granting Headstrong's Motion to Dismiss] entered May 28, 2020. (2020 WL 5667285, Not Reported in Fed. Rptr.)

18. *Gupta v. Headstrong et al,* No. 19-3044-cv, U.S. Court of Appeals for the Second Circuit. Order [Denying Reconsideration] entered Aug. 11, 2020.
(Unpublished, Not Reported in Fed. Rptr.)

19. *Gupta v. Headstrong et al,* No. 17-cv-5286 (RA), U.S. District Court for the Southern District of New York. Memorandum Opinion and Order [Granting Headstrong's Motion for Attorney's Fee] entered Sept. 28, 2020. (2020 WL 5764389, Not Reported in Fed. Supp.)
(reproduced as Appendix B, at 10a - 35a)

20. *Gupta v. Headstrong et al,* No. 17-cv-5286 (RA), U.S. District Court for the Southern District of New York. Judgment entered Oct. 26, 2020.
(reproduced as Appendix H, at 162a - 163a)

21. *Gupta v. Headstrong et al,* No. 20-3657-cv, U.S. Court of Appeals for the Second Circuit. Summary Order [affirming District Court Judgment) entered Oct. 19, 2021. (2021 WL 4851396, Not Reported in Fed. Rptr.)
(reproduced as Appendix A, at 1a - 9a)

22. *Gupta v. Headstrong et al,* No. 20-3657-cv, U.S. Court of Appeals for the Second Circuit. Order [Deny Rehearing] entered Jan. 6, 2022.
(reproduced as Appendix F, at 156a – 157a)

23. *Gupta v. Headstrong et al,* No. 17-cv-5286 (RA), U.S. District Court for the Southern District of New York. Order [Denying Stay of Judgment] entered Feb. 11, 2022.
(Unpublished, Not Reported in Fed. Rptr.)

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TABLE OF AUTHORITIES

Cases:

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Petitioner Arvind Gupta, pro se, respectfully prays that a writ of certiorari issue to review and to vacate and reverse the 'Summary Order' of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 19, 2021, and the subsequent Order Denying Rehearing dated January 6, 2022. The corporate defendants are collectively referred to as "Headstrong".

OPINIONS BELOW

The 'Summary Order' of the Second Circuit is not reported in federal reporter. It is available at 2021 WL 4851396 and 2021 U.S. App. LEXIS 31268 and reproduced as *Appendix A*, at 1a-9a. The Second Circuit's 'Order' [Denying Rehearing] is reproduced as *Appendix F*, at 156a-157a.

The September 2020 'Memorandum Opinion and Order' of the United States District Court for the Southern District of New York is not reported. It is available at 2020 WL 5764389 and 2020 U.S. Dist. LEXIS 178129 and reproduced as *Appendix B*, at 10a-36a. The Judgment dated October 26, 2020, is reproduced as *Appendix H*, at 162a-163a.

The September 2019 'Opinion and Order' of the United States District Court for the Southern District of New York granting Headstrong's motion

to dismiss and U.S. Secretary of Labor's motion for summary judgment is not reported in federal supplement but available at 2020 WL 4256396 and 2019 U.S. Dist. LEXIS 153308. The Judgment was entered same day Sept. 9, 2019. The Second Circuit Order granting Headstrong's motion to dismiss entered on May 28, 2020, is not reported in federal reporter but available at 2020 WL 5667285 and 2020 U.S. App. LEXIS 30725. Second Circuit Order denying reconsideration entered on August 11, 2020, is not published and not reported in federal reporter.

ARB 'Final Decision and Order' dated January 26, 2017, in ARB Case Nos. 15-032, 15-033, is available at 2017 WL 512655, and is reproduced as *Appendix C*, at 37a-44a. ARB 'Order Denying Motion for Reconsideration' dated February 14, 2017, is available at 2017 WL 1032319 and is reproduced as *Appendix G*, at 158a-161a.

The Department of Labor Administrative Law Judge (ALJ) 'Decision and Order' in ALJ Case No. 2014-LCA-008 dated January 21, 2015, is reproduced as *Appendix D*, at 45a-149a.

Administrator (Wage-Hour) Determination including Summary of Violations and Remedies issued in DOL Case #1682431 dated March 13, 2014, is reproduced as *Appendix E*, at 150a-155a.

JURISDICTION

Second Circuit 'Summary Order' was issued on October 19, 2021. The petition for panel rehearing, or, in the alternative, for rehearing *en banc* was denied on January 6, 2022. On March 23, 2022, Justice Sotomayor extended the time to file a petition for certiorari until June 5, 2022. (Application No. 21A534). This day being a Sunday, per Supreme Court Rule 30.1 the period is extended up to Monday, June 6, 2022. The court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The text of following statutes and regulatory provisions involved in this petition is included as *Appendix I*, at 164a-188a.

5 U.S.C. § 706(2)

8 U.S.C. § 1182(n)(1)(A)
8 U.S.C. § 1182(n)(2)(A)
8 U.S.C. § 1182(n)(2)(C)(iv)
8 U.S.C. § 1182(n)(2)(C)(vii)(I)
8 U.S.C. § 1182(n)(2)(C)(vii)(IV)
8 U.S.C. § 1182(n)(2)(D)
8 U.S.C. § 1182(n)(4)(C)

8 C.F.R. § 214.2(h)(2)(i)(E)

20 C.F.R. § 655.700(b)(1)
20 C.F.R. § 655.700(b)(2)
20 C.F.R. § 655.700(b)(3)
20 C.F.R. § 655.705(a), (c)
20 C.F.R. §§ 655.731(c)(1)-(2)
20 C.F.R. §§ 655.731(c)(6)(i)-(ii)
20 C.F.R. § 655.731(c)(7)(i)
20 C.F.R. § 655.731(c)(7)(ii)
20 C.F.R. § 655.740(c)
20 C.F.R. § 655.750(b)(3)
20 C.F.R. § 655.800(a)
20 C.F.R. §§ 655.801(a)-(b)
20 C.F.R. § 655.810(a)
20 C.F.R. § 655.815(c)(1)
20 C.F.R. § 655.815(c)(3)
20 C.F.R. § 655.820(b)(2)
20 C.F.R. § 655.850

Fed. R. Civ. P. Rule 1
Fed. R. Civ. P. Rule 3
Fed. R. Civ. P. Rule 13(a) & (b)

The text of DOL's implementing regulations 20 C.F.R. §§ 655.700 – 855 (Subpart H and I) is available on the internet at: *https://www.ecfr.gov/current/title-20/chapter-V/part-655*

STATEMENT OF THE CASE

The H-1B work authorization program of the Immigration and Nationality Act, 1956 as amended ('INA') is a voluntary program that allows the temporary employment of "nonimmigrants" to fill "specialized" jobs in the United States. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n).

At least three federal agencies are involved in authorizing H-1B employment of nonimmigrant workers in United States. The Labor Condition Application (LCA) is approved by Employment and Training Administration (ETA) a division of U.S. Department of Labor. 20 C.F.R. §§ 655.700(b)(1), 705(a). After the LCA is approved, the employer is required to petition the U.S. Department of Homeland Security (USCIS) on Form I-129 to grant H-1B work authorization for the nonimmigrant worker. 20 C.F.R. § 655.700(b)(2) Once USCIS grants the work authorization, the nonimmigrant can apply for H-1B visa with the consular office of the U.S. Department of State. 20 C.F.R. § 655.700(b)(3). Private agreements inconsistent with the LCA attestations are neither required nor recognized by Government agencies under the H-1B program.

As part of the H-1B program, the employer must pay the nonimmigrant a "required wage." 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. §§ 655.705(c), 715, 731(a)(1), (2). Specifically, an employer who places an H-1B employee "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" must pay the employee full-time wages for all nonproductive time. 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

Under 20 C.F.R. § 655.750(b)(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.*" (emphasis added). 20 C.F.R. §§ 655.731(c)(1)-(2) describes the "required wages".

See, 20 C.F.R. § 655.731(c)(7)(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, ..." (emphasis added)

See 20 C.F.R. § 655.731(c)(7)(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, ... Payment need not be made if there has been a bona fide termination of the employment relationship."

A private agreement or release between the employer and nonimmigrant worker is not a valid reason for the employer to escape its statutory obligation to pay the required wages. *See*, 8 U.S.C. §§ 1182(n)(2)(C)(vii)(I), (IV). If there is material change in terms and conditions of employment, then employer is required to file a new H-1B petition with USCIS with a current or new certified labor condition application. 8 C.F.R. § 214.2(h)(2)(i)(E)

Under 'INA' a nonimmigrant worker lacks private right of action to directly prosecute the employer in the first instance. His remedy is to file a complaint with Administrator (Wage-Hour) and appeal with ALJ and ARB, if necessary. 20 C.F.R. §§ 655.806, 820, 845. The final decision of the agency can be appealed in federal court for judicial review under Administrative Procedure Act (APA). 20 C.F.R. § 655.850, 5 U.S.C. § 706(2).

Complaints filed under the Act ('INA') and participation in administrative and judicial proceedings by nonimmigrant workers constitute protected activity. 8 U.S.C. § 1182(n)(2)(C)(iv), 20 C.F.R. §§ 655.801(a)-(b).

Petitioner Arvind Gupta entered into employment with Headstrong, Inc. in April 2006 under the H-1B nonimmigrant worker authorization program of the 'INA'. 8 U.S.C. § 1182(n)(4)(C) Headstrong voluntarily submitted a Labor Condition Application ("LCA") to United States Department of Labor ("DOL") mentioning the period of employment starting March 16, 2006, to March 16, 2009. (*Appendix J*, at 189a) In the LCA the wage rate is mentioned as $105,000 per year (or $8,750 per month). Based on Headstrong's H-1B petition that included the DOL certified LCA, United States Citizenship and Immigration Services ("USCIS")

authorized Gupta's period of employment from April 24, 2006, to Nov. 8, 2007. In Oct. 2006 Headstrong filed an additional LCA with DOL for change in Gupta's work location at the same wage rate. USCIS approved the second H-1B petition of Headstrong.

During Gupta's employment under the H-1B program Headstrong violated its LCA attestations to pay the required wage rate (higher of actual or prevailing wage rate) to Gupta for both productive and nonproductive periods of employment. It did not pay Gupta required wages under H-1B program after November 27, 2006.

In November 2006, Gupta received a letter from Headstrong, terminating his "at-will" employment effective November 27, 2006. The letter did not make any reference to the LCA certified by the DOL or to Gupta's H-1B employment status authorized by USCIS. The letter did not effectuate *bona fide* termination of H-1B employment relationship.[1]

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[1] In *Amtel Group of Fla., Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11, 2006 WL 2821406 at *8 (ARB Sept. 29, 2006) ARB held that an employer must meet three requirements to effect a *bona fide* termination under 20 C.F.R. § 655.731(c)(7)(ii) and end its obligation to pay wages: (1) expressly terminate the employment relationship with the H-1B nonimmigrant worker; (2) notify USCIS of the termination so that USCIS can revoke its prior approval of the employer's H-1B petition under 8

During Gupta's subsequent discussions with other management officials, they told Gupta that Headstrong will not inform USCIS to cancel his approved H-1B petition, they will look for alternative positions and when suitable opportunity will arise, they will offer the same to Gupta.

Thereafter Gupta continued his employment with Headstrong in nonproductive status after November 27, 2006. Alternatively, he reentered into employment with Headstrong on or about November 28, 2006, per the previously approved LCA and H-1B petition filed by Headstrong and continued his employment with Headstrong in nonproductive status due to a decision by the employer. 20 C.F.R. §§ 655.731(c)(6)(i)-(ii), 731(c)(7)(i).

On February 2, 2007, Headstrong sent Gupta an air ticket for travel on February 24, 2007, to Bengaluru (formerly, Bangalore), India where Headstrong has an overseas office.

In January 2008 Gupta filed a complaint over telephone with U. S. DOL, New York office. He followed it up by filing a written complaint with U.S. DOL in May 2008. 8 U.S.C. § 1182(n)(2)(A)

C.F.R. § 214.2(h)(11); and (3) provide the H-1B nonimmigrant worker with payment for transportation home under certain circumstances as provided in 8 C.F.R. § 214.2(h)(4)(iii)(E).

In April 2008 Gupta sent a demand letter to Headstrong for required wages for the entire period of authorized employment. Headstrong declined to comply with 'INA' required wage obligation but offered only $7,000 to Gupta in exchange for signing a private settlement and release agreement on "take-it-or-leave-it" basis. Facing severe economic duress because of Headstrong's violation of 'INA', Gupta signed a private settlement and release agreement but continued to pursue his claims with DOL. In February 2010 Gupta informed Headstrong that he has rescinded the settlement and release agreement. Headstrong did not object to the rescission or tried to enforce the agreement in any forum.

After Gupta filed his complaints in January 2008 and May 2008, DOL (erroneously) found the complaint to be untimely and declined to investigate. In June 2010 Gupta filed a hearing request with Office of Administrative Law Judges (OALJ) for resolving timeliness and other issues. Headstrong participated in the ALJ proceeding but did not raise the issue of settlement. By Order dated October 12, 2010, the presiding ALJ dismissed Gupta's complaint for lack of jurisdiction. (ALJ No. 2010-LCA-032) By Order dated July 19, 2011, the presiding ALJ dismissed Gupta's another request for hearing concerning misrepresentation of material facts by Headstrong. (ALJ No. 2011-LCA-038)

Administrative Review Board (ARB) accepted Gupta's petition for review from both ALJ Orders. (ARB Case Nos. 11-008, 11-065) In its Order dated June 29, 2012, ARB affirmed the ALJ decisions (2012 WL 2588596). In a subsequent order dated July 31, 2012, ARB denied Gupta's motion for reconsideration (2012 WL 3164361).

In August 2012 Gupta petitioned for review of agency decision under Administrative Procedure Act (APA) and filed a complaint against Headstrong in the district court (SDNY) Case No. 1:12-cv-06652-RA. By Order dated December 12, 2012, the district court approved a stipulation entered by U.S. Secretary of Labor and Gupta and remanded the case to DOL to issue a new decision on Gupta's complaint. In August 2013 the Court granted Headstrong's motion to dismiss Gupta's other claims based on lack of exhaustion. (2013 WL 4710388) Gupta's appeal from the district court (SDNY) opinion and orders was dismissed by Second Circuit (2d Cir. No. 14-3437, Jan. 8, 2015) (unpublished).

Administrator (Wage-Hour) subsequently found reasonable basis, conducted an investigation and found several violations of 'INA' by Headstrong including failure to pay required wages up to January 23, 2007, and failure to provide copy of LCA to Gupta. (WHD Case No. 1682431). DOL ordered

Headstrong to comply with 'INA' required wage regulation 20 C.F.R. § 655.731 in future.

Administrator assessed back wages in the amount of $5,736.96 but found that Headstrong has already paid the back wages. Headstrong accepted the Administrator's Determination for wage violations up to January 23, 2007 and did not request a hearing with ALJ to challenge the Administrator's Order to comply with the required wage obligation on any basis.

In March 2014 Gupta requested ALJ hearing for his required wages beyond January 23, 2007, and other issues. (ALJ Case No. 2014-LCA-008) Gupta also did not raise any issue with the Administrator's order for Headstrong to comply with required wages regulations of 'INA'.

Post hearing, the presiding ALJ issued a Decision & Order on Jan. 21, 2015. The ALJ ruled in favor of Gupta, finding the complaint to be timely, extended the period of employment up to February 2, 2007, the *bona fide* termination date found by the ALJ, and found more violations by Headstrong. The ALJ calculated wages owed to Gupta by Headstrong as $11,491.26 (before interest). The ALJ however found that because of the May 2008 private agreement Headstrong does not owe additional money to Gupta.

By 'Final Decision and Order' ('FDO') dated January 26, 2017, ARB affirmed the ALJ decision to deny Gupta's claims based on the May 2008 private settlement and release agreement. (ARB Case Nos. 15-032, 15-033, 2017 WL 512655) ARB declined to rule on Gupta's objections to the settlement. By an Order dated February 14, 2017, ARB denied Gupta's motion for reconsideration. (2017 WL 1032319)

In March 2017 Gupta filed his petition for review in the district court (N. D. Ill), Case No. 1:17-cv-02088 (EEB). By Docket Entry dated June 14, 2017, pursuant to 28 U.S.C. § 1406(a) the court (N. D. Ill.) transferred the case to district court (SDNY). The U.S. Court of Appeals for the Seventh Circuit dismissed Gupta's appeal of transfer order for lack of jurisdiction. Case No. 19-2828-cv, (7th Cir. Nov. 20, 2019) (unpublished). The administrative record was filed by the U.S. Department of Labor in Court. (SDNY Dkt. No. 90) By Order dated Sept. 9, 2019, The district court (SDNY) granted Headstrong's motion to dismiss and also granted U.S. Secretary of Labor's motion for summary judgment (2019 WL 4256396). The district court issued its Judgment on the same day. Gupta appealed but the appeal was dismissed by the Second Circuit. (2d Cir. No. 19-3044, May 28, 2020) (2020 WL 5667285). By Order dated Aug. 11, 2020, the Second Circuit denied Gupta's motion for reconsideration.

In October 2019 Headstrong moved for attorney's fees without alleging and proving any breach of contract by Gupta. Gupta moved for costs, expenses and pre-litigation fees (as costs). After motion practice by the parties, by Order dated Sept. 28, 2020, the district court (SDNY) denied Gupta's motion and granted Headstrong's motion for attorney's fees. (2020 WL 5764389) On October 26, 2020, district court entered a Judgment ordering Gupta to pay $105,081.05 as attorney's fees to "Genpact Limited" parent of Headstrong, Inc.

Gupta appealed the order and judgment of the district court (SDNY) in the United States Court of Appeals for the Second Circuit. By Summary Order dated Oct. 19, 2021, the Second Circuit affirmed the decision of the district court (2021 WL 4851396). By a subsequent order dated Jan. 6, 2022, the circuit court denied Gupta's petition for rehearing. Second Circuit issued its mandate on Feb. 10, 2022.

REASONS FOR GRANTING THE PETITION

I. Second Circuit decision recognizing and enforcing private agreements in violation of 'INA' is in conflict with law of other circuits.

In its summary order the Second Circuit affirmed the judgment of the district court (SDNY) finding the

private settlement agreement in violation of 'INA' valid and enforceable and awarded attorney's fee of more than $100,000 to Headstrong on the basis of the private agreement. This decision creates a split with the Sixth and Seventh Circuit.

See, Kutty v. USDOL, No. 05-cv-510, 2011 WL 3664476, at *9 (E.D. Tenn. Aug. 19, 2011) (H-1B "wages [a]re set by statute, not by contract," "[r]egardless of [any] private contracts"); (*aff'd. Kutty v. DOL*, 764 F.3d 540, (6th Cir. Aug. 20, 2014); *See also, Id.* at 64 F.3d 544, 2014 WL 4085824 at *2 ("In order to employ H-1B nonimmigrants, employers must complete and file with the DOL a Labor Condition Application (LCA) that provides for wage-level guarantees, and have it certified by the DOL. 20 C.F.R. § 655.700(a)(3)"). *Patel v. Boghra*, 369 Fed. Appx. 722, 724 (7th Cir. 2010) (Illinois does not enforce agreements to violate federal or state law; it leaves the parties where it found them.).

In the Third Circuit the district court (DNJ) rejected the use of private release and agreements by H-1B employers to escape 'INA' statutory wage requirements. *See, Pegasus Consulting Group v. Admin. Rev. Bd.*, No. 3:05-cv-05161-FLW, slip op. at 37, 2008 WL 920072 at *19 (D.N.J. March 31, 2008) (Court affirming ARB award of required wages and finding of willful violations despite H-1B employer

obtaining a private release of wage claims from its nonimmigrant workers)

Also, 65 Fed. Reg. 80110, 80171, (Dec. 20, 2000) ("Nor will the Department relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract.")

While cases cited *supra* deal with employers' attempt to circumvent 'INA' required wage obligations by signing private agreements with nonimmigrant workers, the right to file a complaint with government authorities and in federal court and participating in such proceedings without fear of retaliation is also statutorily protected and not subject to modification by private agreements. 8 U.S.C. § 1182 (n)(2)(C)(iv), 20 C.F.R. § 655.801.

Paragraph K of the Labor Condition Application (LCA) discussing complaints states as follows:

> "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division, U.S. Department of Labor."
> (*Appendix J*, at 200a)

Headstrong did not file any new LCA with DOL depriving Gupta of his statutorily protected right to file a complaint and participate in administrative and judicial proceedings for Headstrong's violations of LCA attestations. A private agreement is not recognized in LCA enforcement proceedings before the agency and federal courts. It is not approved or certified by DOL and is not the basis of Gupta's H-1B petition approved by the USCIS. The H-1B program is run by federal agencies, DOL, USCIS and U.S. Dep't of State and not by private agreements of employers with nonimmigrant workers.

For the requirement to file a new or amended H-1B petition with U.S. Department of Homeland Security (USCIS) *see, Matter of Simeio Solutions, LLC*, 26 I & N Dec. 542, 547, 2015 WL 1632652 at *4 (AAO 2015), "When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E)."

Other circuits that have considered the issue of private settlement and release in administrative cases have required the involvement of U.S. Secretary of Labor as a precondition to finding an agreement valid and enforceable. *See, Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153 (5th Cir. 1991) (case under ERA-Energy Reorganization Act)

(Once a complaint is filed, the statutory language authorizes only three options: (1) an order granting relief; (2) an order denying relief; or (3) *a consensual settlement involving all three parties.)* (emphasis added); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 307 (7th Cir. 1986) (FLSA case) (the court held that the mere cashing of a check issued under a DOL-supervised settlement did not release the employees' claims where the DOL did not send out the applicable release forms."). Here DOL neither supervised the settlement nor sent any applicable release form to Gupta; *also, Beliveau v. U. S. Dep't of Labor*, 170 F.3d 83, 86-88 (1st Cir. 1999) (case under multiple environmental statutes including TSCA, WPCA, SDWA, SWDA, CAA, CERCLA) (holding that settlement agreements for complaints filed with DOL require review and approval of the Secretary of Labor and remanding the case to the agency); *Id.* at 86 ("The statute makes no exception for cases in which the complainant and the company reached an independent settlement.) (quoting *Macktal* 923 F.2d 1150 at 1154).

In *Oubre v. Entergy Ops.*, 522 U.S. 422, 428 (1998) this court held that "the release cannot bar the ADEA [statutory] claim because it does not conform to the statute". *Also, Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in

cases controlled by the federal law."); *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.")

The cases cited in the Second Circuit 'Summary Order' and the district court opinion do not arise under the 'INA' H-1B employment program. Gupta's employment was authorized under federal H-1B program and Headstrong is not at liberty to bind Gupta to private terms and conditions contrary to the aim of the H-1B program requirements by signing private contracts. *See*, *Access Therapies v. Mendoza*, 2014 WL 4670888 at *2 (S.D. Ind. Sept. 18, 2014) (Consular Office of U.S. Dep't of State required the private contract between employer and nonimmigrant worker to conform to employer's submissions to the Government) Here Headstrong did not submit its private contract with Gupta to recover attorney's fees for filing a complaint and to settle the required wages requirements at a much lower rate to Government for approval.

The May 2008 private settlement and release agreement is signed only by Headstrong and Gupta. The Administrator (Wage-Hour) did not enter into any settlement with Headstrong for the INA violations, nor has the Administrator (Wage-Hour) offered any settlement to Gupta for his claims. *See*

20 C.F.R. § 655.800(a) "... the Administrator shall perform *all* the Secretary's investigative and enforcement functions ..." (emphasis added); *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 198 (3d Cir. 2010) (The Department of Labor's enforcement of LCAs "vindicate[s]" rights that "are of a 'public' nature, since [the Department] is acting to protect the U.S. workforce from displacement by [nonimmigrant visa] recipients and to enforce the rules of the immigration system.").

Second Circuit and District Court (SDNY) orders awarding attorney's fee to Headstrong on the basis of private agreement are also contrary to the Administrator's Determination that ordered Headstrong to comply with 20 C.F.R. § 655.731 (required wages) that had become the final decision of the U.S. Secretary of Labor because neither Gupta nor Headstrong appealed from this part of the determination. 20 C.F.R. § 655.815(c)(3). The ALJ, ARB and the federal courts did not specifically modify or vacate this order of the Administrator.

Under 'INA' Headstrong cannot legally settle or release any claims privately because Gupta has no authority to interpret or enforce 'INA'. *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative

interpretation of the statute to be so enforced as well." (citations omitted)). Here Gupta lacks private right of action against Headstrong for its 'INA' violations and unlike U.S. Secretary of Labor he lacks legal authority to interpret the 'INA' or enforce the regulations.

The purely private agreement between Headstrong and Gupta, in violation of 'INA' regulations governing the complaint process and payment of required wages, is insufficient to award attorney's fee to Headstrong and relieve it of its obligations arising from the certified labor condition application. *National Assn. of Mfrs. v. Department of Defense*, 583 U. S. ___, ___ (2018) (slip op., at 11-12) ("Of course, those are not the words that Congress wrote, and this Court is not free to "rewrite the statute" to the Government's liking."). USCIS approved Headstrong's H-1B petition for Gupta's employment on the basis of LCA and not any private agreement. 8 U.S.C. § 1182 (n)(2)(C)(vii)(IV); 20 C.F.R. §§ 655.731(c)(7)(ii), 655.740(c).

Headstrong cannot rely on Gupta's failure to return the agreement money to justify its knowing and willful violations of 'INA'. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998) (ADEA case) ("[T]he employer cannot invoke the employee's failure to tender back as a way of excusing its own

failure to comply.") Gupta has, however, offered to adjust the private payment, if necessary, from the amount of H-1B wages owed by Headstrong because Gupta is denied his statutory wages for several years and he lacks the means to repay the amount readily. *See Oubre* 522 U.S. at 527, "In many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return .... We ought not to open the door to an evasion of the statute by this device."

This court's review is necessary because Second Circuit and District Court (SDNY) decision allows employers to justify their violation of federal law ('INA') by claiming that their employees owe them money – a legal position not supported by the 'INA'. *See, Headstrong*, 2019 WL 4256396 at *4 (SDNY Sept. 9, 2019) (finding ratification of private agreement in violation of 'INA' because Gupta did not return the consideration).

A number of agency cases support Gupta's litigation position that private agreements and payments are separate and apart from the H-1B program requirements. These cases include *Administrator v. Prism Enterprises,* ARB No. 01-080, ALJ No. 2001-LCA-008, slip op., at 5, 2003 WL 22855211 at *3 (ARB Nov. 25, 2003) ("payment made by employer pursuant to the terms of a voluntary

agreement is separate and apart from the H-1B wage requirements."); *Chelladurai v. Infinite Sol.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op., at 8 n. 7, 2006 WL 1151942 at *8 n. 7 (ARB April 26, 2006) ("It is, however, the representations [H-1B employer] made to the United States Government, not the expectations or agreement of the parties, which are relevant here.").

See also, Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704-05, 65 S. Ct. 895, 900-01 (1945) ("It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.") There is no argument by Headstrong or finding by Courts that the attorney fee awarded to Headstrong is based on any contract approved by the federal agencies as part of Gupta's H-1B work authorization. The private agreement required by Headstrong was entered in May 2008 *after* the start of Gupta's H-1B employment in April 2006 that was approved by USCIS based on DOL certified LCA. The private agreement was never submitted to or approved by USCIS as part of a new H-1B petition and is not enforceable by courts for award of attorney's fee to Headstrong.

In *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) this court concluded "that allowing the [NLRB] Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Id.* at 151. The instant case requires this court to prevent the opposite situation where the lower courts are rewarding the employer for its 'INA' required wage and other violations by enforcing private agreements to award attorney's fee and denying back wages to a legal nonimmigrant worker despite him succeeding in proving the wage violations by the employer.

Gupta worked legally with Headstrong under the protection of 'INA' H-1B program that prohibits retaliation for filing a complaint and provides for wage guarantees. Awarding attorney's fee to Headstrong and depriving Gupta of his statutory wages because of an illegal private agreement would trivialize immigration laws and condone and encourage future violations of 'INA' required wage obligations by the employers.

The federal court decisions to the contrary need to be vacated or reversed.

II. The federal courts lack jurisdiction to enforce the private settlement agreement

See, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 382 (1994) ("... [E]nforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.") Here the federal courts did not have jurisdiction to enforce Headstrong's alleged private agreement with Gupta and award attorney's fee.

Neither the district court or the Second Circuit discussed the basis of district court's jurisdiction over Headstrong's motion for attorney's fee that was based on a private settlement and release agreement. There is neither federal question jurisdiction nor there is any diversity jurisdiction for the district court to exercise and rule on the motion.

See, Arizona v. United States, 567 U.S. 387, 409 (2012) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress. . .") So Headstrong as H-1B employer is not at liberty to enter into private settlement of its 'INA' violations with Gupta, a nonimmigrant worker, require payment of attorney's fee and federal courts have no jurisdiction to award attorney's fee to Headstrong because Gupta filed a complaint allowed by the 'INA'.

III. Second Circuit decision to award attorney's fee to employer without any underlying claim of breach of contract is contrary to Supreme Court opinions

See, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (requiring a complaint to plead "enough facts to state a claim to relief that is plausible on its face.") Headstrong never filed a formal complaint specifying the elements any breach of contract claim against Gupta within the statute of limitations or later. It also did not file any counterclaim against Gupta in any proceeding - administrative or federal court. When there is no complaint, claim or counterclaim for breach of any contract by Gupta, then the Second Circuit and district court (SDNY) order and judgment granting attorney's fee to Headstrong on this basis is totally unreasonable, and should be vacated and set aside. *Uzuegbunam v. Preczewski*, 592 U. S. __ (2021) (slip op., at 11) (A request for attorney's fees or costs cannot establish standing because those awards are merely a "byproduct" of a suit that already succeeded, not a form of redressability.); *Lewis v. Continental Bank Corp.*, 494 U. S. 472, 480 (1990) ("[An]interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"). Gupta's hearing request with ALJ and subsequent review petitions

with ARB and in federal court under APA are in accordance with 'INA' statute and regulations and protected under 'INA'.

Per Fed. R. Civ. P. 1 these "rules govern the procedure in all civil actions and proceedings in the United States district courts ..." and per Fed. R. Civ. P. 3, "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 13(a) & (b) require a pleader to specify compulsory or permissive counterclaims against opposing party in a pleading.

Headstrong's motion for attorney fees is based on an alleged breach of a contract for which Headstrong never filed any complaint, claim or counterclaim against Gupta. In the Determination the Administrator (Wage-Hour) provided Gupta (and, also Headstrong) notice of their "right" to request a hearing. 20 C.F.R. § 655.815(c)(1). Headstrong never objected to Gupta's right to appeal in the agency or later in federal forum at any time. *Jennings v. Stephens*, 574 U. S. 271, 276 (2015) ("But an appellee who does not cross-appeal may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary."") Headstrong never gave notice of any alleged breach to Gupta or afforded an opportunity to cure or respond to any such breach.

Reach Music Publ'g, Inc. v. Warner/Chappell Music, Inc., 2014 U. S. Dist. LEXIS 159139 at *16-17 (SDNY Nov. 10, 2014) ("In order to make out a colorable breach of contract claim, a plaintiff must show: (1) an agreement; (2) adequate performance by plaintiff; (3) breach by the defendant; and (4) damages. *Fischer & Mandell LLP v. Citibank, N.A.*, 632 F.3d 793, 799 (2d Cir. 2011)"). Headstrong never alleged and proved any breach of contract in a formal claim or counterclaim in any court and its motion for attorney's fees is not based on any legal victory obtained by filing a complaint, claim or counterclaim against Gupta and proving its claims under due process of law, but is retaliation in response to Gupta's protected activity under 'INA'. 20 C.F.R. § 655.801. *See, BE&K Constr. Co. v. NLRB*, 536 U. S. 516, 534 (2002) ("As long as a plaintiff 's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.") (emphasis in original). Headstrong's motion for attorney's fee is retaliatory and court award of attorney's fee, without Headstrong alleging and proving any breach of contract, effectively encourages and rewards H-1B employers to commit 'INA' violations against the nonimmigrant workers and has a chilling effect on protected activity.

In the district court litigation Headstrong used the alleged settlement only as a shield by raising it as an affirmative defense in its motion to dismiss. *Perry v. Merit Systems Protection Board,* 582 U. S. __ (2017) (slip op., at 14 n. 9) ("In civil litigation, a release is an affirmative defense to a plaintiff's claim for relief, not something the plaintiff must anticipate and negate in her pleading.") Gupta is *pro se* and he never had notice and opportunity to respond to any legal breach of contract claim by Headstrong. Gupta is denied due process of notice of claim or counterclaim of breach of any contract at any time, there is lack of any discovery related to any breach of contract and no opportunity for Gupta to develop any present any defense.

The Second Circuit and district court finding that the fee shifting provision of the contract is "sufficiently clear" to exempt Headstrong from filing any counterclaim (or claim for breach of contract) is contrary to Supreme Court decisions and violates Gupta's due process rights of notice and opportunity to respond. *Ashcroft v. Iqbal*, 556 U. S. 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *Nelson v. Adams USA, Inc.*, 529 U. S. 460, 471 (2000) ("judicial predictions about the outcome of hypothesized litigation cannot

substitute for the actual opportunity to defend that due process affords."); *U. S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U. S. 18, 28 (1994) ("We again assert the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits."). A motion is not a substitute of a complaint, claim or counterclaim.

As the record reflects Headstrong participated in the administrative and district court proceedings at least since year 2010 and several decisions of agency and federal courts were issued over the years. ALJ No. 2010-LCA-032 (ALJ October 12, 2010); ALJ No. 2011-LCA-038 (ALJ July 19, 2011); ARB Nos. 11-065, 11-008, (ARB June 29, 2012); SDNY 1:12-cv-6652 (RA) (SDNY Aug. 30, 2013); 2d Cir. Case 14-3437 (2d. Cir. Aug. 1, 2015); ALJ No. 2014-LCA-008 (ALJ Jan. 21, 2015); ARB Nos. 15-032, 15-033 (ARB Jan. 26, 2017); and, N.D. Ill. Case No. 17-2088 (EEB) (N. D. Ill. June 14, 2017). Headstrong did not file any claim for breach of contract or a motion for attorney's fees on the basis of the private agreement in any other case for past at least ten years and Gupta never had notice that Headstrong intends to file any motion for attorney's fees. Accordingly, Headstrong should be deemed to have waived or forfeited any claim for attorney fees on the basis of breach of any private settlement agreement.

Headstrong is barred by statute of limitations or laches for bringing any motion for attorney's fees as Gupta filed his DOL complaint against Headstrong in January 2008, followed it up in May 2008, and informed Headstrong of rescission of the alleged settlement in February 2010. Headstrong simply failed to assert any claim of breach of contract and attorney's fees for nearly a decade. *Deutche Bank v. Quicken Loans*, 810 F.3d 861, 865 (2015) ("The statute of limitations on a breach of contract claim in New York is six years, and this period begins to run when a breach occurs.") (citations omitted); *National Railroad Passenger Corp. v. Morgan*, 536 U. S. 101, 121 (2002) ("[laches] bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant.")

Similar to the district court (SDNY), the Second Circuit also stated that, "Gupta clearly breached the agreement ... when he filed a Department of Labor complaint, followed by this federal lawsuit, in 2017." (2021 WL 4851396 at *2). But the panel overlooked that Headstrong never filed any complaint, claim or counterclaim against Gupta for breach of contract but only filed a motion claiming attorney's fee for breach of contract. Headstrong never alleged and proved any breach of contract by Gupta. The cases cited by the Second Circuit also support Gupta's arguments that without first alleging and prevailing

on a breach of contract claim, it is improper for Headstrong to directly file its motion for attorney's fee. *See, McGuire v. Russell Miller, Inc.,* 1 F.3d 1306, 1313 (2d Cir. 1993) (A judge can decide the amount of attorney's fee "*after* the liability for such fees is decided at a trial, whether bench or jury.") (emphasis added). In *Hooper Assocs., Ltd. v. AGS Computers, Inc.,* 74 N.Y.2d 487 (1989), the plaintiffs successfully sued for breach of contract before moving for attorney's fee.

Accordingly, this court should vacate or reverse the Second Circuit order affirming district court (SDNY) award of attorney's fee to Headstrong for lack of any underlying claim of breach of contract.

IV. Headstrong is required, but did not comply with its H-1B wage obligation for the period of violations found by the agency

Under 'INA', payment by employers that constitute H-1B wages is defined by the regulations at 20 C.F.R. §§ 655.731(c)(1)-(2). Here Headstrong was found to be in violation of required wage requirements by the Administrator (Wage-Hour) up to January 23, 2007, and by the ALJ up to February 2, 2007. Under 8 U.S.C. § 1182(n)(1)(A)(i), the employer's "enforceable" wage obligation is the actual wage or the prevailing wage, whichever is

greater. The settlement payment which is less than the prevailing wage rate is "not enforceable" under 'INA' and not in conformance with the definition of required wages under the H-1B regulations. *Administrator v. Prism Enterprises,* ARB No. 01-080, ALJ No. 2001-LCA-008, slip op., at 5, 2003 WL 22855211 at *3 (ARB Nov. 25, 2003) ("payment made by employer pursuant to the terms of a voluntary agreement is separate and apart from the H-1B wage requirements."). Gupta's appeal with the ARB was denied because of ARB's legal error of considering the private settlement and release agreement as a bar to Gupta's claims.

The ALJ calculated Gupta's wages up to February 2, 2007, as follows:

November 2006:	$1,193.18
December 2007:	$8,750.00
January 2007:	$8,750.00
February 2007:	$875.00
TOTAL:	$19,568.18

(*Appendix D,* at 137a)

The ALJ then committed legal error of reducing the four weeks of severance payment $8,076.92 from this amount because the private payment did not conform to the definition of H-1B wages under the

'INA' regulations. *Batyrbekov v. Barclays*, ARB No. 13-013, ALJ No. 2011-LCA-025, slip op., at 17, 2014 WL 3886828 at *11 (ARB Jul. 16, 2014) ("The separation agreement entered into by Batyrbekov and Barclays constituted a private employment agreement outside the scope of the INA."); *Ingvarsdottir v. Datalink Computer*, ARB No. 14-096, ALJ No. 2012-LCA-057, slip op., at 5, 2016 WL 866115 at *3 (ARB Feb. 29, 2016) ([Employer] can only receive credit for wages paid as that is defined under the regulations.); *Aleutian Capital Partners v. Pizzella,* 975 F.3d 220, 231 (2d Cir. 2020) ("A policy that allowed for employers to "self-remedy" months of underpayment with a later bulk payment would not require consistent, predictable payment of wages at all, and would disadvantage domestic workers, contrary to the aims of the Program."); *See also*, 20 C.F.R. § 655.810(a).

The ALJ ruled that the 2008 settlement effectively extinguished Gupta's claims against Headstrong. (*Appendix D*, at 141a - 142a). On appeal ARB affirmed ALJ's order based on the private settlement agreement and did not reach the issue of H-1B wages owed by Headstrong. (*Appendix C*, at 42a). On Gupta's petition for APA review, the district court (SDNY) also granted summary judgment to the U.S. Secretary of Labor on the basis of the private settlement agreement with

Headstrong. 2019 WL 4256396 at *5 (SDNY Sept. 9, 2019). In 2d Cir. Case No. 20-3657 in his 'Opening Brief' Gupta raised the issue of H-1B wages owed by Headstrong based on finding of violations by the agency but the Second Circuit also affirmed the award of attorney's fee to Headstrong based on the private agreement and did not specifically rule on the issue of wages owed by Headstrong. 2021 WL 4851396 (2d Cir. 2021). This issue is purely legal and this Court can rule on the same by applying the relevant 'INA' regulations.

As calculated by the ALJ, for back wages up to February 2, 2007, Headstrong owes at least $19,568.18 plus interest to Gupta in accordance with the H-1B regulations. Neither the severance payment of December 2006 nor the settlement payment of May 2008 conform to H-1B wages under the regulations. 20 C.F.R. § 655.731(c)(1)-(2).

Under 'INA' if the nonimmigrant is unwilling or refuses to accept his H-1B wages then such wages are to be deposited in the U. S. Treasury through the DOL. *Administrator v. Unique Services*,[2] ALJ Case

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[2] This decision is available on OALJ website at, https://www.oalj.dol.gov/DECISIONS/ALJ/LCA/2019/WAGE_AND_HOUR_DIVISI_v_UNIQUE_SERVICES_ASSO_2019LCA00019_(MAR_13_2020)_165648_CADEC_PD.PDF

No. 2019-LCA-019, Order at 2 ¶ 12 (ALJ March 13, 2020); *Administrator v. Volt Management Corp.,*[3] ALJ Case No. 2012-LCA-044, Order at 3 ¶ 2 (ALJ May 2, 2016); *Administrator v. Renee Systems,*[4] ALJ Case No. 2011-LCA-019, Order at 3 ¶ 4 (ALJ July 24, 2012). The statutory wages illegally retained by Headstrong for past several years are owed to Gupta and as an alternative they are to be deposited with U. S. Treasury as miscellaneous receipts. 65 Fed. Reg. at 80,110 (required wage requirement's purpose is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers").

After Administrator issued its Determination ordering Headstrong to comply with 20 C.F.R. § 655.731 – 'INA' required wage regulation, Headstrong never filed a request for ALJ hearing raising the issue of any private settlement or filed any claim of breach of contract against Gupta in any forum. Therefore ALJ, ARB and the federal court do

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[3] This decision is available on OALJ website at, https://www.oalj.dol.gov/DECISIONS/ALJ/LCA/2012/In_re_VOLT_MANAGEMENT_CORP_2012LCA00044_(MAY_02_2016)_144436_ORDER_PB.PDF

[4] This decision is available on OALJ website at, https://www.oalj.dol.gov/DECISIONS/ALJ/LCA/2011/WAGE_and_HOUR_DIVISI_v_RENEE_SYSTEMS_INC_2011LCA00019_(JUL_24_2012)_104222_CADEC_SD.PDF

not have jurisdiction to dismiss Gupta's claims under 'INA'. 20 C.F.R. § 655.820(b)(2). *Greenlaw v. United States*, 554 U. S. 237, 253 (2008) ("The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal."); *Chao v. Russell P. Le Frois Builder, Inc*, 291 F.3d 219, 227-229 (2d Cir. 2002) (Commission and courts lacks jurisdiction where the employer did not timely contest the Secretary's citation); 8 U.S.C. § 1182(n)(2)(D).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the Second Circuit order below vacated and reversed.

Respectfully Submitted,

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