



In the Matter of:

**AMTEL GROUP OF FLORIDA,
INCORPORATED,**

PETITIONER,

v.

RUNGVICHIT YONGMAHAPAKORN,

RESPONDENT.

ARB CASE NO. 04-087

ALJ CASE NO. 2004-LCA-006

DATE: September 29,2006

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

John M. Hament, Esq., *Kunkel, Miller & Hament*, Sarasota, Florida

For the Respondent:

Rungvichit Yongmahapakorn, *pro se*, Bangkok, Thailand

For the Administrator, Wage and Hour Division, as Amicus Curiae:

Carol B. Feinberg, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor*, Washington, D.C.

FINAL DECISION AND ORDER

The Immigration and Nationality Act (INA or the Act)¹ requires that employers pay a certain, prescribed wage to the nonimmigrant alien workers whom they hire. However, payment need not be made if an employer has effected a “*bona fide* termination” of the employment relationship. After Amtel terminated its employment relationship with Rungvichit Yongmahapakorn (Rung), Rung filed a complaint with the United States Department of Labor’s Wage and Hour Division contending that Amtel

¹ 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), as implemented at 20 C.F.R. Part 655, Subparts H and I (2004).

Group of Florida, Incorporated (Amtel) had violated the Act. A Department of Labor (DOL) Administrative Law Judge (ALJ) ruled in Rung’s favor, holding that Amtel had not effected a “*bona fide* termination” of its employment relationship with Rung and, therefore, awarded Rung back wages. Amtel appealed. We affirm the ALJ’s decision in part and reverse in part.

REGULATORY FRAMEWORK

The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty. 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After securing DOL certification for the LCA, the employer petitions for and the nonimmigrants receive H-1B visas from the State Department upon Immigration and Naturalization Service (INS) approval. 20 C.F.R. § 655.705(a), (b).²

An employer need not compensate a nonimmigrant, however, if it has effected a “*bona fide* termination” of the employment relationship. 20 C.F.R. § 655.731(c)(7)(ii). The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11) (2004).

BACKGROUND

Amtel, a Florida business, operated a hotel. Administrator’s Exhibits (AX) 23. In October 1999, Amtel submitted an LCA to the DOL seeking certification to employ one H-1B nonimmigrant to work as an internal auditor from November 29, 1999, to November 28, 2002, at a prevailing wage rate of \$52,041 per year. AX 1. The DOL certified the LCA on October 29, 1999. *Id.* Amtel submitted a petition for an H-1B visa for Rung, a Thai citizen, which indicated that she was to be paid \$49,500 per year. AX 12. The INS approved Rung’s H-1B visa starting from January 18, 2000, through November 28, 2002. *Id.*

Rung began working for Amtel on March 1, 2000. AX 6. Before the initial certified LCA and Rung’s approved period of employment as an H-1B nonimmigrant ended on November 28, 2002, Amtel submitted another LCA to the DOL again seeking certification to employ one H-1B nonimmigrant to work as an internal auditor from November 29, 2002 to November 28, 2004, at a prevailing wage rate of \$52,041 per year which the DOL certified on September 11, 2002. AX 2. Amtel submitted a petition for

² The INS is now the “U.S. Citizenship and Immigration Services” or “USCIS,” which is located within the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

an H-1B visa for Rung, again indicating that she was to be paid \$49,500 per year. AX 8. The INS approved Rung's H-1B visa from November 29, 2002, through November 28, 2004. AX 9.

Amtel approved Rung's request to take a 14-day leave of absence to travel to Thailand from May 10, 2003, through June 1, 2003. AX 22. Upon her return to Amtel's hotel in Florida on June 1, 2003, Amtel notified Rung that it had terminated her employment, AX 26, but there is no indication in the record that Amtel notified the INS that it had terminated Rung. By letter dated July 23, 2003, Rung filed a complaint with the DOL's Wage and Hour Division contending that Amtel had violated the INA. AX 6. Specifically, Rung alleged that Amtel failed to pay her the prevailing wage rate for the actual job she performed for the company and, therefore, alleged that Amtel had filed a false LCA with the DOL. *Id.* In addition, Rung alleged that Amtel wrongfully terminated her and, therefore, discriminated against her, since it failed to provide any justification for its action or follow Amtel's own discipline policy. AX 19 at 6; *see also* AX 7; Prosecuting Party's Exhibits (PX) X, AA, DD, II. Finally, Rung asserted that Amtel owed her for unreimbursed work pay and expenses, accrued vacation pay, and the required costs for her return transportation to Thailand upon her termination. AX 6.

After conducting an investigation, the DOL's Wage and Hour Division Administrator issued an October 29, 2003 determination that Amtel violated the H-1B provisions of the INA. AX 3. Specifically, the Administrator found that, while Amtel had approved three weeks of vacation leave for Rung prior to her termination, from May 10, 2003, through June 1, 2003, she had only been paid for two weeks. *See* Hearing Transcript (HT) at 47; AX 3, 22. Consequently, the Administrator concluded that Amtel failed to offer Rung equal benefits or equal eligibility for benefits or both in violation of the regulations at 20 C.F.R. § 655.731(c)(3) and 20 C.F.R. § 655.805(a)(2). AX 3. Thus, the Administrator ordered Amtel to pay back wages in the amount of \$1,000.79 to Rung, but did not assess any civil money penalty against Amtel for the violation. *Id.* Rung appealed the Administrator's determination, AX 4, and the case was assigned to the ALJ for a hearing.

The ALJ conducted a hearing and issued a Decision and Order (D. & O.). Although Rung's H-1B visa had been approved pursuant to the two consecutive LCAs describing her job for Amtel as an internal auditor, the ALJ agreed with Rung's contention that she had performed duties of a vice-president for Amtel beyond the duties of an internal auditor. D. & O. at 25. Thus, the ALJ found that Amtel owed Rung back wages for the higher prevailing wage rate for a vice-president set forth in a different LCA that Amtel had filed with the DOL seeking certification to employ two H-1B nonimmigrants to work as "vice-president" from April 1, 1999, to March 31, 2002. *See* AX 4-D; PX N. Amtel, however, never actually submitted a petition to the INS seeking approval of an H-1B visa for Rung pursuant to this LCA seeking to employ her as a "vice-president." Nevertheless, the ALJ relied on the prevailing wage for a vice-president set forth in that LCA in ordering Amtel to pay Rung \$5,208 per month from the beginning of her employment with Amtel on March 1, 2000, up to the date of the ALJ's

order on March 23, 2004, while crediting the lower salary Amtel had paid to Rung during that period. D. & O. at 25, 40.

Also, the ALJ found that Amtel failed to establish a legal justification for Rung's termination and, therefore, held that Amtel had not effected a "*bona fide* termination" of its employment relationship with Rung under the INA. D. & O. at 28. Thus, the ALJ held that Rung was entitled to retain her position with Amtel until the end of the INS's approval of her H-1B visa on November 28, 2004. D. & O. at 38; *see* AX 9. Finding reinstatement impractical, the ALJ found that Rung was entitled to "front pay" for the remaining period of approval of her H-1B visa and, therefore, ordered Amtel also to pay Rung the prevailing wage for a vice-president, rather than for an internal auditor, of \$5,208 per month from the date of the ALJ's order on March 23, 2004, until November 28, 2004. D. & O. at 38, 40. While noting that the INA does not specifically provide for interest, the ALJ also ordered Amtel to pay prejudgment compound interest on the back pay it owed and post judgment interest until satisfaction. D. & O. at 39, 41. Moreover, the ALJ also ordered, as equitable remedies, that Amtel notify all of its employees at the time of Rung's termination, by certified mail, that Rung was not properly terminated and post a copy of the letter in a conspicuous place for one year from the date of the ALJ's order. D. & O. at 38, 41.

In addition, the ALJ found that Amtel owed Rung for two weeks of unpaid vacation and \$353.76 in unreimbursed work-related expenses that she incurred during her vacation. D. & O. at 25, 34, 40. The ALJ also noted that Amtel employees received free room rental at the hotel in lieu of pay, and monthly food and laundry expense allowances as prevailing working conditions and fringe benefits of their employment. Consequently, the ALJ determined that Amtel owed Rung \$10,829.98 for reimbursement of the \$251.86 bi-weekly rent that Rung paid Amtel during the period between October 9, 2000, and May 21, 2002, during her employment with Amtel when she was not provided a free room in lieu of pay to which she was entitled. D. & O. at 32, 40; *see* AX 4-H. And finally, the ALJ determined that, because some other Amtel employees received \$100 more per month than Rung in monthly food and laundry expense allowances, Amtel owed Rung \$100 per month for the period of her employment until her termination due to Amtel's violation of the prevailing working conditions sections of the INA. D. & O. at 33, 40.

Amtel filed a timely petition for review. *See* 20 C.F.R. § 655.655. The Administrator filed a brief with the Board as *amicus curiae* pursuant to 20 C.F.R. § 655.820(b)(1), seeking reversal of the ALJ's determination that Amtel had not effected a "*bona fide* termination" of its employment relationship with Rung under the INA because it failed to establish a valid basis for Rung's termination.³

³ Rung timely filed a response brief, urging that we affirm the ALJ's D. & O. Amtel subsequently filed a rebuttal brief after its due date, along with a motion requesting the Board to accept the brief, time having expired. Consideration of Amtel's rebuttal brief seemingly does not prejudice Rung, as it merely reiterates arguments made in Amtel's original brief.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review an ALJ's decision concerning the INA. 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845 (2004). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

Under the Administrative Procedure Act, the Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(B) (West 1996), quoted in *Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board engages in de novo review of an ALJ's INA decision. *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). *See generally* *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

ISSUES

1. Did Amtel properly pay Rung the prevailing wage of an internal auditor?
2. Did Amtel effect a "bona fide termination" of its employment relationship with Rung?
3. Does Amtel owe Rung for unreimbursed rental expenses, monthly food and laundry expense allowances, and work-related expenses?

Thus, upon consideration, the Board **GRANTS** Amtel's motion and accepts its rebuttal brief for consideration.

DISCUSSION

1. **Amtel properly paid Rung the prevailing wage of an internal auditor.**

Amtel contends that the ALJ erred in determining that Rung performed duties of a vice-president for Amtel and, therefore, owed Rung the higher prevailing wage rate for a vice-president rather than the prevailing wage it paid her as an internal auditor. In response, Rung notes that she was referred to as a “vice-president” on Amtel company forms and in a company telephone directory, *see* AX 4-C, 14; PX T, and, therefore, argues that Amtel failed to accurately specify the job and wage rate on the LCA under which she would be employed as required under 20 C.F.R. § 655.805(a)(6). The ALJ determined that Amtel owed Rung the \$5,208 per month, prevailing wage rate for a vice-president as set forth in an LCA that Amtel had filed with the DOL. D. & O. at 25, 40; *see also* AX 4-D; PX N.

Pursuant to 20 C.F.R. § 655.731(c)(8):

If the employee works in an occupation other than that identified on the employer’s LCA, the employer’s required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

As Amtel points out, the record contains no evidence that Amtel ever submitted a petition to the INS seeking approval of an H-1B visa for Rung pursuant to the LCA it had filed to employ two H-1B nonimmigrants as “vice-president.” Rung’s H-1B visa had been approved pursuant only to the two consecutive LCAs describing her job for Amtel as an internal auditor.⁴ We note that Rung testified at the hearing that prior to her termination, she never complained that Amtel had failed to specify the job that she performed accurately or had failed to pay her the appropriate wage rate because she feared that, if she complained, she would be terminated. HT at 114-115, 128. However, the INA contains whistleblower protection provisions designed to protect an H-1B nonimmigrant employee who makes such a complaint.⁵ Even so, as the ALJ noted, Rung

⁴ Moreover, although the ALJ ordered Amtel to pay Rung the higher prevailing wage for a vice-president until November 28, 2004, which was the expiration date of Rung’s H-1B visa based on the LCA describing her job as an internal auditor, D. & O. at 38, 40; *see* AX 2, 9, the LCA Amtel filed for a potential “vice-president” position expired on March 31, 2002, *see* AX 4-D; PX N.

⁵ Specifically, no employer shall discharge or 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 the INA or because the employee

never complained about any potential INA violations prior to her termination. *See* D. & O. at 14 n.17; 30.

Thus, Amtel's required wage obligation to Rung was based on the job description of internal auditor as identified on the LCA, which was the only LCA pursuant to which Rung's H-1B visa had been approved. 20 C.F.R. § 655.731(c)(8). Consequently, we reverse the ALJ's determination that Amtel owed Rung the higher prevailing wage rate for a vice-president. Accordingly, next we consider whether Amtel fulfilled its required wage obligation to Rung and actually paid her the prevailing wage of an internal auditor.

The Administrator found that Amtel fulfilled its required wage obligation to Rung because Amtel paid her the prevailing wage of an internal auditor. The enforceable wage obligation for an employer of an H-1B nonimmigrant is the actual wage level or the prevailing wage level listed in the LCA, whichever is greater. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a). The "prevailing wage" is the wage rate for the occupational classification in the area of intended employment at the time the LCA is filed. 20 C.F.R. § 655.731(a)(2). The employer may obtain prevailing wage information from any of a variety of sources such as a "State Employment Security Agency" (SESA) or, as they are now known, a "State Workforce Agency" or SWA. *Id.*⁶ The "wage rate" is the remuneration to be paid to the H-1B employee stated in terms of amount per hour, day, month, or year. 20 C.F.R. § 655.715.

The Administrator's investigator found that the prevailing wage of \$52,041 per year for an internal auditor, listed on the LCA that Amtel filed, accurately reflected the prevailing annual wage for internal auditors in Florida, in accordance with the Florida Department of Labor and Employment Security determination that the prevailing wage for internal auditors was \$1000.80 per week. HT at 22-24; AX 10. Pursuant to the regulations that were effective at the time of the facts in this case, "[n]o prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by" 20 C.F.R. § 655.731(a)(2)(iii) (2004). 20

cooperates in an investigation concerning the employer's compliance with the requirements of the INA. 8 U.S.C.A. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801. Section 1182(n)(2)(C)(iv) of the INA, as amended by the ACWIA, "essentially codifies current [DOL] regulations concerning whistleblowers," 65 Fed. Reg. 80,178 (Dec. 20, 2000), *quoting* Senator Abraham, 144 Cong. Rec. S12,752 (Oct. 21, 1998). The comments accompanying its implementing regulation state that the DOL, "in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by the [DOL] (see 29 CFR part 24)." 65 Fed. Reg. at 80,178; *see also* 29 C.F.R. Part 24 (2004).

⁶ The definition of "SESA" under 20 C.F.R. §§ 655.715 and 20 C.F.R. § 655.731(a)(2) (2004), effective at the time of the facts in this case, has since been amended to reflect that such a state agency is now known as a "State Workforce Agency" or SWA. *See* 70 Fed. Reg. 72,557, 72,561 (Dec. 5, 2005); 71 Fed. Reg. 35,521 (June 21, 2006); 20 C.F.R. §§ 655.715, 655.731(a)(2) (2006).

C.F.R. § 655.731(d)(4) (2004).⁷ Thus, Amtel met its obligation to pay Rung at least 95 percent of the prevailing wage of an internal auditor if it paid Rung \$49,438.95 per year, \$1901.50 every two weeks or \$950.75 per week.

The record indicates that Rung's salary or gross pay was \$49,500 per year or \$1,900 every two weeks. AX 1-2, 4-K, 28; PX F; HT at 34. Rung's W-2 forms for 2002 and 2001 indicate that her actual annual wages were \$48,787.96 and \$48,503.26, respectively, and her wages for the ten months she worked in 2000, when she began working on March 1, were \$40,470.00. AX 27; RX 1. Therefore, although Amtel did not pay Rung wages that were exactly 95 percent of the prevailing wage of an internal auditor, the deficit was so insignificant as to be "de minimis." In addition, Amtel provided Rung a \$60 per month laundry allowance, a \$200 per month food allowance, free meals valued at \$10 per day, and free room and board between March 1, 2000 and October 9, 2000, as well as between May 21, 2002, and June 1, 2003. AX 4-H, 7, 14, 17-18, 21; RX 9-10, 14; HT at 36-39, 67, 122. Thus, the Administrator's investigator concluded that Amtel fulfilled its required wage obligation to Rung, because he found that Amtel paid her at least 95 percent of the prevailing wage of an internal auditor based on the compensation she received, including the value of her room and board and food allowances. HT at 35, 40-41.

Since the Administrator is vested with "enforcement discretion" and considers the totality of circumstances "in fashioning remedies appropriate to the violation," 65 Fed. Reg. at 80,180 (Dec. 20, 2000), and since "the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including . . . back wages to workers who have been displaced or whose employment has been terminated in violation of these provisions . . ." 20 C.F.R. § 655.810(e)(2); *see also* 20 C.F.R. § 655.810(f) (back wages "determined by the Administrator to be appropriate"), we will not disturb or modify the Administrator's calculations, because they were neither arbitrary nor do they evidence an abuse of discretion.

2. Amtel did not effect a "bona fide termination" of its employment relationship with Rung.

Next, the ALJ considered whether Amtel had effected a "bona fide termination" of its employment relationship with Rung under the INA in accordance with 20 C.F.R. § 655.731(c)(7)(ii). Pursuant to 20 C.F.R. § 655.731(c)(7)(ii):

⁷ On December 8, 2004, subsequent to the time of the facts in this case, the President signed into law the Consolidated Appropriations Act of 2005, which amended INA Section 212(p)(3), 8 U.S.C.A. § 1182(p)(3) (2005), and became effective on May 11, 2005, to require an employer to pay a wage that is 100 percent of the prevailing wage. Thus, the DOL's Employment and Training Administration eliminated reference to the allowance of a 5 percent variance under 20 C.F.R. § 655.731(a)(2)(iii) and eliminated 20 C.F.R. § 655.731(d)(4) altogether, which allowed employers to pay 95 percent of the prevailing wage. 69 Fed. Reg. 77326, 77366, 77374-77375 (Dec. 27, 2004); 20 C.F.R. § 655.731 (2006).

Payment need not be made if there has been a bona fide termination of the employment relationship. INS regulations require the employer to notify the INS 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)).⁸

The ALJ defined the term “*bona fide* termination” in accordance with Black’s Law Dictionary definition of “bona fide” as one made “with good faith, honestly, openly and sincerely.” D. & O. at 26. With that definition in mind, the ALJ found that Amtel had not followed its own policy of progressive discipline, as set forth in its own Employee Handbook, *see* RX 14, before it terminated Rung and had not provided any reason for the termination. D. & O. at 26-27. Indeed, the ALJ noted that a State of Florida determination that Amtel had not terminated Rung’s employment for misconduct, in a state claim for unemployment insurance that Rung filed, supported the ALJ’s conclusion that Amtel had not provided any reason for Rung’s termination, *see* PX X; D. & O. at 27. Thus, the ALJ determined that Amtel had not effected a “*bona fide* termination” of its employment relationship with Rung under the INA because Amtel failed to establish any valid basis for Rung’s termination. *See* D. & O. at 28.

Both Amtel and the Administrator, as amicus curiae, *see* 20 C.F.R. § 655.820(b)(1), contend that the ALJ erred in determining that Amtel had not effected a “*bona fide* termination” of its employment relationship with Rung. Amtel asserts that because Rung does not challenge that she was terminated and stopped working at Amtel as of June 1, 2003, the ALJ erred in awarding Rung pay beyond that date.⁹ The Administrator argues that a “*bona fide* termination” under the INA occurs when an employee receives notice of his or her termination. In response, Rung contends that because the record contains no evidence that Amtel notified the INS it had terminated her or that it paid Rung for her return transportation to Thailand, Amtel has not effected a “*bona fide* termination” under the INA.

We recognize that an aggrieved H-1B nonimmigrant employee might also have other rights or remedies that arise under, for instance, a separate employment agreement or contract, a union contract, common law, or other state or federal statutes apart from the

⁸ The term INS under 20 C.F.R. § 655.731(c)(7)(ii) (2004), effective at the time of the facts in this case, has since been changed to DHS. *See* 20 C.F.R. § 655.731(c)(7)(ii) (2006).

⁹ Specifically, the ALJ held that Rung was entitled to retain her position with Amtel until the end of the INS’s approval of her H-1B visa on November 28, 2004. D. & O. at 38; *see* AX 9. Finding reinstatement impractical, the ALJ found that Rung was entitled to “front pay” instead for the remaining period of approval of her H-1B visa. D. & O. at 38, 40.

H-1B provisions of the INA. The scope of the Board's jurisdiction to review cases involving an employment relationship arising under the INA, however, extends only insofar as that relationship arises under, or is terminated pursuant to, the INA's H-1B provisions. *See* 8 U.S.C.A. § 1182(n)(1)-(2); 20 C.F.R. §§ 655.705(a)-(b), 655.731, 655.732, 655.845 (2004); Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272.

The ALJ relied on Amtel's own company policy and a determination from a state proceeding in holding that Amtel had not demonstrated any valid basis for Rung's termination and, therefore, that Amtel had not effected a "*bona fide* termination" under the INA. The ALJ's definition of the term "*bona fide* termination," however, confuses the determination whether there was a valid basis or good cause for an H-1B employee's termination with the determination whether the employer had effected a "*bona fide* termination" under the H-1B provisions, at issue in this case.

Contrary to the ALJ's determination, an employer need not establish a valid basis or good cause for an employee's termination to effect a "*bona fide* termination" under the INA's H-1B provisions. The comments accompanying 20 C.F.R. § 655.731(c)(7) when the regulation was promulgated specifically state that the regulation does not prohibit an employer from terminating an H-1B worker's employment "for any" reason for the purpose of determining whether a "*bona fide* termination" has occurred and the extent of the employer's back wage liability. *See* 65 Fed. Reg. 80,170 (Dec. 20, 2000) (quoting Senator Abraham on the effect of 20 C.F.R. § 655.731(c)(7)). Consequently, consistent with the comments, we reject the ALJ's conclusion that Amtel had not effected a "*bona fide* termination" of its employment relationship with Rung under the INA's H-1B provisions solely because it failed to establish a valid basis for Rung's termination. Accordingly, we also reject the ALJ's holding that Rung was "entitled to retain" her position with Amtel and, therefore, was entitled to "front pay" in lieu of reinstatement. *See* D. & O. at 38, 40. For the same reason, we do not accept the ALJ's recommended order that Amtel notify its employees that Rung was not properly terminated and post a copy of the notice. *See* D. & O. at 38, 41.

Nevertheless, we hold that Amtel did not effect a "*bona fide* termination" of its employment relationship with Rung in accordance with the INA and its relevant implementing regulations. There is no issue in this case that Amtel's employment relationship with Rung had been terminated when she returned from her vacation on June 1, 2003. On June 1, 2003, Rung signed and dated a memorandum from Amtel officials to Rung, also dated June 1, 2003, notifying her that she had been terminated. *See* AX 4-J, 26. Yet even though Amtel terminated its employment relationship with Rung, the issue in this case is whether Amtel ultimately effected a "*bona fide* termination" under the H-1B provisions pursuant to 20 C.F.R. § 655.731(c)(7)(ii), thereby cutting off its back wage liability to Rung.

The comments accompanying section 655.731(c)(7) when it was promulgated state that:

The Department would not likely consider it to be a bona fide termination for purposes of [20 C.F.R. § 655.731(c)(7)(ii)] unless INS has been notified that the employment relationship has been terminated pursuant to 8 CFR 241.2(h)(11)(i)(A) and the petition canceled, and the employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA and INS regulations at 8 CFR 214.2(h)(4)(iii)(E).

65 Fed. Reg. 80,171 (Dec. 20, 2000); *see also* 20 C.F.R. § 655.731(c)(7)(ii) (2004). Consequently, section 655.731(c)(7)(ii), when read in conjunction with its accompanying comments elucidating its purpose, compel us to hold that, to ultimately effectuate a “*bona fide* termination” under the INA, an employer must notify the INS that it has terminated the employment relationship with the H-1B nonimmigrant employee and provide the employee with payment for transportation home. 65 Fed. Reg. 80,170 (Dec. 20, 2000) (“The [DOL] also observed that the employer, at any time, may terminate the employment of the worker, notify INS [now DHS], and pay the worker’s return transportation, thereby ceasing its obligations to pay for non-productive time under the H-1B program.”).¹⁰ Thus, we reject the Administrator’s assertion in this case that a “*bona fide* termination” under the INA occurs simply when an employee receives notice of his or her termination.¹¹ While notice to the employee is a necessary concomitant to termination of the employment relationship, that alone is not sufficient to end the employer’s obligation to pay the required wages to an H-1B employee. The employer does not effect a “*bona fide* termination” and, therefore, end its obligation to pay the required wages to the H-1B employee unless the employer has also notified the INS, so that the INS can cancel the H-1B employee’s visa.

In this case, the record contains no evidence that Amtel notified the INS that it had terminated Rung or that the INS canceled Rung’s H-1B visa petition. There is evidence that Rung paid for her own return transportation home, but no evidence that Amtel provided Rung with payment for her transportation home. *See* PX L. Consequently, we hold that Amtel did not effectuate a “*bona fide* termination” of its

¹⁰ Under its “no benching” provisions, the INA requires that an employer pay the required wage specified in the LCA even if the H-1B nonimmigrant employee is in a nonproductive status (i.e., not performing work) because of lack of assigned work or some other employment-related reason. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(ii), (7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus. Solutions, Ltd.*, ARB No. 03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31, 2004).

¹¹ *See* Administrator’s Brief at 11 n. 8; *but see* Administrator’s Brief at 12 (citing to 65 Fed. Reg. 80,171 (Dec. 20, 2000)).

employment relationship with Rung under the INA in accordance with 20 C.F.R. § 655.731(c)(7)(ii) (2004). *See* 65 Fed. Reg. 80,171 (Dec. 20, 2000).

In signing and filing an LCA, an employer attests that for the entire “period of authorized employment,” the required wage rate will be paid to the H-1B nonimmigrant. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a). On the most recent petition for an H-1B visa that Amtel submitted for Rung, Amtel certified that it agreed “to the terms of the [LCA] for the duration of the alien’s authorized period of stay for H-1B employment.” Rung’s visa authorized her to work from November 29, 2002, through November 28, 2004. AX 8 at 3; AX 9. Thus, because Amtel did not effectuate a “*bona fide* termination” of Rung, Amtel’s required wage obligation to Rung continued until November 28, 2004. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731(a).

Accordingly, Amtel owes Rung at least 95 percent of the prevailing wage for an internal auditor, at the rate of \$52,041 per year, from November 29, 2002 through November 28, 2004, *see* 20 C.F.R. §§ 655.731(a)(2)(iii), 655.731(d)(4) (2004), but is entitled to receive credit for any amount of this required wage obligation that it has previously paid to Rung.¹² Furthermore, since Amtel’s required wage obligation to Rung extends until November 28, 2004, we need not address Amtel’s contention as to whether the ALJ properly found that Amtel owed Rung for two weeks of unpaid vacation prior to her being given notice of her termination.

Finally, since the INA does not specifically provide for an award of interest on back pay, Amtel argues that the ALJ erred in ordering Amtel to also pay prejudgment compound interest on the back pay it owes and post judgment interest until satisfaction. *See* D. & O. at 39, 41. The ALJ relied on the Board’s holding in *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 89-ERA-22, slip op. at 18-21 (May 17, 2000), a case arising under the whistleblower protection provisions of the Energy Reorganization Act (ERA) of 1974, 42 U.S.C.A. § 5851 (West 1993). The ERA does not specifically authorize an award of interest on back pay. Nevertheless, the Board held that a “back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest.” *Doyle*, slip op. at 18. The Board reasoned that in light of the “remedial nature” of the whistleblower provisions of the federal statutes the Secretary administers, and the “make whole” goal of back pay, prejudgment interest on back pay ordinarily shall be compound interest. *Doyle*, slip op. at 19. Moreover, the Board held the same rate of interest would be awarded on back pay awards, both pre- and post-judgment. *Doyle*, slip op. at 21. Consequently, as Amtel has not offered any contrary authority, we order Amtel to also pay prejudgment compound interest on the back pay it owes and post judgment

¹² Moreover, because there has been no “*bona fide* termination” and Amtel is required to pay its wage obligation to Rung until the expiration of her authorized period of stay for H-1B employment on November 28, 2004, Amtel is not required to provide or pay for the costs of Rung’s return transportation home pursuant to 8 U.S.C.A. § 1184(c)(5)(A) and 8 C.F.R. § 214.2(h)(4)(iii)(E).

interest until satisfaction in accordance with the procedures to be followed in computing the interest due on back pay awards outlined in *Doyle*. Cf. *Doyle*, slip op. at 18-21.

3. Amtel does not owe Rung for unreimbursed rental expenses, monthly food and laundry expense allowances, and work-related expenses.

Amtel contends that, because it fulfilled its required wage obligation to Rung, the ALJ erred in determining that Amtel owed Rung reimbursement for the room rent that she paid to Amtel and that Amtel owed Rung for unpaid food and laundry expense allowances. Rung urges the Board to affirm the ALJ's determinations.

The ALJ noted that Amtel employees received a free room rental at the hotel in lieu of pay and monthly food and laundry expense allowances as prevailing working conditions and fringe benefits of their employment. Thus, the ALJ determined that Amtel owed Rung reimbursement for the rent that she paid Amtel during the period of her employment with Amtel when she was not provided a free room in lieu of pay to which she was entitled. D. & O. at 32, 40; see AX 4-H. And the ALJ determined that because some other Amtel employees received more per month than Rung in monthly food and laundry expense allowances, Amtel owed Rung the difference for the period of her employment until her termination due to Amtel's violation of the prevailing working conditions sections of the INA. D. & O. at 33, 40.

An employer's required wage obligation to an H-1B nonimmigrant employee includes the obligation "to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers." 20 C.F.R. § 655.731(a). But an employer "may offer greater or additional benefits" to an H-1B nonimmigrant than are offered to "similarly employed U.S. workers," and the benefits an H-1B nonimmigrant receives "need not be identical" to benefits "similarly employed U.S. workers" receive, so long as the employer complies with applicable nondiscrimination laws. 20 C.F.R. § 655.731(c)(3)(i)-(ii).

The record indicates Amtel provided Rung, an internal auditor, a \$60 per month laundry allowance, a \$200 per month food allowance, and a free room between March 1, 2000, and October 9, 2000, as well as between May 21, 2002 and June 1, 2003. AX 4-H, 7, 14, 17-18, 21; RX 9-10, 14; HT at 36-39, 67, 122. On the other hand, the record shows that Kevin Matney, the general manager of the hotel, received a \$120 per month laundry allowance, a \$300 per month food allowance, and Matney testified that he received a free room. RX 9; AX 18; HT at 148. Also Morton Goldberg, whose job description is not provided in the record, received a \$300 food allowance. RX 9; AX 18. But when compared to Rung's job as an internal auditor, there is no evidence indicating whether Matney or Goldberg could be considered "similarly employed U.S. workers." See 20 C.F.R. § 655.731(c)(3)(i)-(ii).

Amtel fulfilled its required wage obligation to Rung, even during the period when she was not provided a free room, since it paid her at least 95 percent of the prevailing

wage of an internal auditor based on the compensation she received. The INA and its implementing regulations do not guarantee Rung reimbursement for the rent she paid or to any further food or laundry allowance beyond what she in fact received. Consequently, we reverse the ALJ's orders that Amtel owes Rung \$10,829.98 for reimbursement of rent payments and \$100 per month for the period of her employment for unpaid food and laundry expense allowances.

Finally, Amtel similarly contends that the ALJ erred in finding that it owed Rung \$353.76 in unreimbursed expenses that she incurred during her vacation because they were work-related. D. & O. at 25, 34, 40. In response, Rung notes that Matney testified that "Suwalee or Chevy," owners of the hotel, would authorize reimbursement of employee expenses. See HT at 169. Contrary to Rung's suggestion, however, Matney further testified that he was not aware of any agreement between Amtel and Rung that Amtel would pay for any expenses she incurred during her vacation. HT at 167. Moreover, as the Administrator's investigator determined, the record contains no evidence establishing that Amtel owes Rung for any expenses that she incurred on her vacation or that the expenses were work-related. HT at 42-43, 72-74. Consequently, we reverse the ALJ's order that Amtel owes Rung \$353.76 in unreimbursed work-related expenses.

CONCLUSION

Amtel fulfilled its required wage obligation to Rung under the INA, since it paid her the prevailing wage of an internal auditor, the job description identified on the only LCAs pursuant to which Rung's H-1B visa had been approved. But Amtel did not effectuate a "*bona fide* termination" of its employment relationship with Rung under the INA because there is no evidence that Amtel notified the INS that it had terminated Rung and that Amtel provided Rung with payment for her transportation home. Accordingly, it is **ORDERED** that Amtel pay Rung the prevailing wage for an internal auditor, at the rate of \$52,041 per year, until the expiration of her authorized period of stay for H-1B employment on November 28, 2004, plus prejudgment compound interest on the back pay it owes and post judgment interest until satisfaction, but Amtel is entitled to receive credit for any amount of this required wage obligation which it has previously paid to Rung.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge