In the Matter of:

AMTEL GROUP OF FLORIDA, INCORPORATED,

PETITIONER,

v.

RUNGVICHIT YONGMAHAPAKORN,

RESPONDENT.

ARB CASE NO. 07-104

ALJ CASE NO. 2004-LCA-006

DATE: January 29, 2008

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

ORDER DENYING RECONSIDERATION

Rungvichit Yongmahapakorn (Rung) filed a complaint with the United States Department of Labor's Wage and Hour Division contending that Amtel Group of Florida, Incorporated, (Amtel) had violated the Immigration and Nationality Act (INA or the Act)[1] when Amtel terminated its employment relationship with her. The INA 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. A Department of Labor (DOL) Administrative Law Judge (ALJ) ruled in Rung's favor, holding that Amtel had not

[1] 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2006), as implemented at 20 C.F.R. Part 655, Subparts H and I (2007).

effected a "*bona fide* termination" of its employment relationship with Rung and, therefore, he awarded Rung back wages. Amtel appealed.

On September 29, 2006, the Board issued a Final Decision and Order, in which the it held that Amtel fulfilled its required wage obligation to Rung under the INA. *Amtel Group of Florida, Inc. v. Yongmahapakorn*, ARB No. 04-087, 2004-LCA-006 (ARB Sept. 29, 2006). But the Board further held that Amtel did not effectuate a "*bona fide* termination" of its employment relationship with Rung under the INA because the record did not contain evidence that Amtel notified the Immigration and Naturalization Service (INS)[2] that it had terminated Rung and that Amtel provided Rung with payment for her transportation home.[3] Accordingly, the Board ordered Amtel to pay Rung the prevailing wage owed her until the expiration of her authorized period of stay for H-1B employment.[4]

Amtel appealed the Board's decision to the United States District Court, Middle District of Florida, Fort Meyers Division. On July 2, 2007, the court issued an Order to Remand, which granted the Petitioner's Amended Unopposed Motion to Remand to [the Administrative Review Board (ARB)] for Reconsideration of ARB's Final Agency Action in Light of Discovery of New Evidence and Accompanying Memorandum of Law.

The ARB is authorized to reconsider earlier decisions.[5] Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure.[6] Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact

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[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).

[3] *See* 20 C.F.R. § 655.731(c)(7)(ii) (2007).

[4] After we decided this case, we further clarified what constituted a "*bona fide* termination" in *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5-6 (ARB Mar. 30, 2007). In *Gupta*, we held that to effect a *bona fide* termination, the employer must take three steps: it must give the employee notice that the employment relationship is terminated; it must notify DHS that the employment relationship has been terminated; "[*a*]*nd* it must provide the employee with payment for transportation home under certain circumstances." *Gupta*, slip op. at 5 (emphasis added).

[5] *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 1986-ERA0-23, slip op. at 2-6 (ARB Nov. 20, 1998).

[6] *See generally* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3986.1 (West 2006).

that the petitioner believes the court has overlooked or misapprehended . . . ."[7] A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position that may prove more successful.[8] Likewise, issues not presented in initial briefs or during oral argument are not appropriate subjects for rehearing.[9] But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome.[10] In considering whether to reconsider a decision, the Board has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[[11]]

DISCUSSION

On June 1, 2003, Rung signed and dated a memorandum from Amtel officials to her, also dated June 1, 2003, notifying her that she had been terminated.[12] But the record contained no evidence that Amtel notified the INS that it had terminated Rung or that Amtel provided Rung with payment for her transportation home. To the contrary, there

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7 Fed. R. App. P. 40(a)(2).

8 *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

9 *Utahns for Better Transp. v. U.S. Dep't of Transp*., 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods*., 989 F.2d 1256, 1264 (1st Cir. 1993).

10 *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989).

11 *Chelladurai v. Infinite Solutions, Inc.,* ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-184; ALJ Nos. 2002-CAA-005, 2003-ERA-010, slip op. at 2 (ARB May 17, 2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 2003-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.,* ARB No 04-120, ALJ No. 2004 SOX-054, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.,* ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior,* ARB No. 03-040, ALJ No. 2001-LCA-003, slip op. at 3 (ARB Oct. 24, 2005).

12 *See* AX 4-J, 26.

was evidence that Rung paid for her own return transportation home.[13] Consequently, the Board held that Amtel did not effectuate 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) (2004).[14]

On reconsideration, Amtel has submitted evidence not previously offered indicating that Amtel, through its immigration counsel, had in fact provided written notification of Rung's termination to the INS on June 2, 2003.[15] Amtel's counsel before the Board states that Amtel's immigration counsel did not provide this evidence to him until December 15, 2006, subsequent to the date upon which the Board issued its Final Decision and Order and of Amtel's appeal of the Board's decision to the United States District Court.

Amtel submits that the unique and intervening circumstances of this case compel the Board to consider Amtel's new evidence, reconsider its decision and reverse its holding that Amtel did not effectuate a "*bona fide* termination" of its employment relationship with Rung under the INA. Specifically, Amtel contends that neither Rung nor the Administrator ever raised the issue of whether Amtel had effectuated a "*bona fide* termination" either when Rung filed her complaint, nor before the ALJ or the Board. In addition, Amtel argues, without any support, that the Board erred in holding that to effect a *bona fide* termination under 20 C.F.R. § 655.731(c)(7)(ii), the employer must notify the INS that the employment relationship has been terminated and provide the employee with payment for transportation home. Thus, to hold Amtel liable to pay Rung the prevailing wage owed her until the expiration of her authorized period of stay for H-1B employment solely for having failed to pay Rung for her transportation home would, according to Amtel's characterization, create an absurd and nonsensical result.

But the regulation setting forth the requirements to effect a *bona fide* termination at 20 C.F.R. § 655.731(c)(7)(ii) was effective when Rung's termination occurred in this case.[16] Thus, as Rung ably answers in her response, Amtel could have known through reasonable diligence not only of the requirements set forth under section 655.731(c)(7)(ii), but also of the relevant evidence indicating that Amtel had provided written notification of Rung's termination to the INS on June 2, 2003, prior to the adjudication of Rung's case before the ALJ.

Consequently, because the requirements set forth at 20 C.F.R. § 655.731(c)(7)(ii) and Amtel's newly submitted evidence on reconsideration indicating that it timely

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13 *See* PX L.

14 *See* 65 Fed. Reg. 80,171 (Dec. 20, 2000).

15 *See* Exhibits on Recon. 1, A, B.

16 *See* 65 Fed. Reg. 80,171 (Dec. 20, 2000).

notified the INS of Rung's termination do not demonstrate a basis for the Board to reconsider its decision in this case, we reject Amtel's request for reconsideration.[17] Even if we were to reopen the record to allow Amtel to submit its new evidence and we reconsidered our decision based on the fact that Amtel timely notified the INS of Rung's termination, we note that Amtel nevertheless stipulates in its brief on reconsideration that it did not provide payment to Rung for her transportation home.[18] Thus, in any event, Amtel still did not effectuate a "*bona fide* termination" of its employment relationship with Rung under the INA in accordance with the requirements at 20 C.F.R. § 655.731(c)(7)(ii).[19]

Accordingly, Amtel's request for reconsideration is **DENIED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[17] The requirements set forth at 20 C.F.R. § 655.731(c)(7)(ii) and Amtel's newly submitted evidence on reconsideration indicating that it timely notified the INS of Rung's termination do not demonstrate a material difference in fact or law from those presented to the Board, which Amtel could not have known through reasonable diligence or new material facts that occurred after the Board's decision, nor a change in the law after the Board's decision or a failure to consider material facts presented to the Board before its decision.

[18] *See* Amtel's Brief in Support of Its Motion for Recon. at 5, n. 2; PX L.

[19] *See* 65 Fed. Reg. 80,171 (Dec. 20, 2000).