



In the Matter of:

LINA SUSAN INNAWALLI,

ARB CASE NO. 04-165

PROSECUTING PARTY,

ALJ CASE NO. 2004-LCA-13

DATE: September 29, 2006

v.

**AMERICAN INFORMATION
TECHNOLOGY CORPORATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Lina Susan Innawalli, *pro se*, Honolulu, Hawaii.

For the Respondent:

Albert D. Hammack, Esq., Dallas, Texas.

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004) and the regulations at 20 C.F.R. Part 655, Subparts H and I (2004). Lina Susan Innawalli, a nonimmigrant alien worker, brings this case against her former employer, American Information Technology Corporation (AITC). She claims AITC did not pay her during a portion of her employment. A Department of Labor Administrative Law Judge (ALJ) ruled in Innawalli's favor. AITC appeals. We affirm but modify the ALJ's recommended decision.

STATUTORY AND 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 are commonly referred to as H-1B nonimmigrants. Specialty occupations are occupations that require “theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor’s or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must file a Labor Condition Application (LCA) with the United States Department of Labor (DOL). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant for the period of his or her authorized employment. 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732. After it secures DOL certification of the LCA, the employer petitions for, and the nonimmigrant may receive, an H-1B visa from the United States Department of State upon Immigration and Naturalization Service (INS) approval. 20 C.F.R. § 655.705(a), (b).¹

Under the INA’s “no benching” provisions, the employer is obligated to pay the required wages even if the H-1B nonimmigrant is in “nonproductive status” (i.e., not performing work) “due to a decision by the employer (e.g., because of the lack of assigned work)” 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i). But the employer does not have to continue to pay an H-1B nonimmigrant if “there has been a *bona fide* termination of the employment relationship.” The employer must notify INS that the employment relationship has ended so that INS may revoke approval of the H-1B visa. 20 C.F.R. § 655.731(c)(7)(ii); 8 U.S.C.A. § 214.2(h)(11) (2005).² Additionally, the employer need not pay wages to an H-1B nonimmigrant that is in nonproductive status due to conditions unrelated to employment that remove the nonimmigrant from his or her duties at his or her “voluntary request and convenience” or which render him or her unable to work, such as a requested leave of absence. 20 C.F.R. § 655.731(c)(7)(ii).

BACKGROUND

AITC, located in Flower Mound, Texas, is engaged in software development and computer consulting. Ramki Chebrolu, President of AITC, filed two LCAs, which DOL approved, covering a Programmer Analyst position in Massachusetts from

¹ The Immigration and Naturalization Service is now the “U.S. Citizenship and Immigration Services” or “USCIS,” which is an agency within the United States Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

² The employer now notifies the Department of Homeland Security.. 20 C.F.R. § 655.731(c)(7)(ii)(2006).

February 22, 2000, to February 14, 2003, and a Programmer Analyst position in New York from November 16, 2000, to October 25, 2003. AITC petitioned for, and the INS approved, an H-1B visa classification for Innawalli effective from October 19, 1999, to April 14, 2002. AITC paid Innawalli an annual salary of \$60,000, which exceeded the prevailing wage for a programmer analyst position. AITC made Innawalli available to its clients, first as a Programmer Analyst at Medical Systems Management in Massachusetts from January through August of 2000 and then as a Senior Programmer Analyst at IBM Global Services, PepsiCo Account, in New York until April 26, 2002. On March 22, 2002, AITC requested that INS extend Innawalli's H-1B visa to cover the time between its April 14, 2002 expiration and the April 26, 2002 end of the PepsiCo project. USCIS approved AITC's request on September 4, 2002, extending Innawalli's H-1B visa from April 15, 2002, to February 14, 2005.³

By letter dated April 26, 2002, mailed to Innawalli in Connecticut, AITC notified her that it no longer needed her services and was terminating her employment effective April 27, 2002. It offered to pay for her return trip to India. Respondent's Exhibit (RX) E; Hearing Transcript (HT) 118-120 (testimony of Ramki Chebrolu). Also by letter dated April 26, 2002, AITC notified INS that it no longer needed Innawalli's services as of April 27, 2002, and asked for a withdrawal of its previously filed extension request. RX D. In mid-May 2002, AITC received a letter from Innawalli with a Hawaii return address. RX I, J. AITC claims that it then sent a copy of the April 26, 2002 letter that it had sent to Innawalli's Connecticut address to the Hawaii address.⁴ HT 120-123; RX G. Innawalli claims that AITC actually sent training materials to help her become certified in "Cognos" programming. HT 29.

Innawalli testified that at the end of the PepsiCo project, AITC requested that she become certified in Cognos programming, which she did on July 29, 2002, while living in Hawaii. HT 29, 30; Prosecuting Party's Exhibit (PX) E; RX I. On the next

³ See the November 30, 2004 letter from USCIS to AITC revoking the visa extension that INS/USCIS granted on September 4, 2002. AITC requested that we supplement the record by admitting this document, which was unavailable at the time of the hearing. When determining whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2006). The regulation at 29 C.F.R. § 18.54(c) provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c). We find that USCIS's November 30, 2004 Notice of Revocation is new and material evidence that was not available prior to the closing of the record. We therefore grant AITC's Verified Motion to Supplement the Record.

⁴ Innawalli testified that she moved in with a friend in Hawaii because AITC was not paying her and she could no longer afford to pay rent. She lived in Hawaii from May 2002 to September 2002 when she returned to Connecticut to live with friends. HT 69, 75-76, 102, 103. She then moved to Pennsylvania. Prosecuting Party's Exhibit (PX) C at 2.

day, AITC included in Innawalli's resume that she was Cognos certified, formatted her resume, asked her to "make all the projects in Pepsi in Cognos," and characterized Innawalli as a "Cognos Certified Professional." PX E at 2-12. Shortly thereafter, Kamlesh Tewary, AITC's lawyer, sent an ETA Form 750, Application for Alien Employment Certification to Innawalli in Hawaii. Chebrolu had signed this form on July 31, 2002. This document indicated that Innawalli was then an employee of AITC and was present in the United States with H-1B status. RX L; PX A. In late September, AITC also reimbursed Innawalli \$163.28 for medical expenses she had incurred. PX D at 4.

Meanwhile, as noted above, on September 4, 2002, the INS approved AITC's March 22, 2002 extension request, and Shobana Balasundaram, AITC's technical recruiter, informed Innawalli of the approval. RX F; PX B. Chebrolu thought this approval was a mistake. HT 145-147. In a letter dated November 18, 2002, AITC again notified the INS that it no longer needed Innawalli's services and requested cancellation of her H-1B status effective April 27, 2002.

But in December 2002, Balasundaram asked Innawalli to "change into PB/Oracle" certain information describing Innawalli's skills and responsibilities. PX D at 7. In January 2003, Bhaskar Ramamurthy, an AITC employee, submitted Innawalli's "Cognos Resume . . . for the Chicago position," and sent Innawalli "Client Details" on a client named "Merial." *Id.* at 10, 11. And Balasundaram sent Innawalli an "Employee Consent" form to complete, sign, and return so that AITC would have it in its records before it arranged an interview for her. *Id.* at 8, 13. Also in January 2003, according to Innawalli, a consultant working with AITC to arrange interviews for Innawalli submitted her resume for a job posting on Monster.com. *Id.* at 15-17. Innawalli asked this consultant whether he had been able to "speak with my company AITC" about this posting. *Id.* at 15. The consultant replied that he had left a message "with Bhaskar." *Id.*

On February 3, 2003, Ramamurthy sent Innawalli two e-mails. In the first one, he listed the names and contact information for two people. PX E at 13. Ramamurthy indicated that the first person "would be your Project Lead in the Pepsi Project" and asked Innawalli to "[t]alk to him and make sure that you are both in sync." *Id.* Ramamurthy indicated that the second person "would be your ref. for the project you did in MASS" and asked Innawalli to "[t]alk to her before forwarding the ref. to Ashish." *Id.* Ashish Dhir was Senior Technical Recruiter at a company called Hall Kinion in New York City. Court's Exhibit 2. In the second e-mail, Ramamurthy listed the name and contact information for one more person. He wrote, "He was your Project Manager in Pepsi" and asked Innawalli to "[m]ake sure you talk to him and discuss any specifics so that everyone is in [s]ync." *Id.* at 15. Thereafter, on February 6, Innawalli interviewed with Hall Kinion in New York City for a Cognos Administrator position. Innawalli testified that AITC sent her on the interview. HT 20, 21, 40, 41. Innawalli made two calls to AITC on the day of the interview. PX C at 1. Innawalli asserts that AITC reimbursed her in cash for her travel expenses for this

interview. HT 23-25; PX C at 2. Finally, also in February 2003, Innawalli forwarded to AITC a “Vendor Agreement” she received from a consultant and indicated her objection to some of its provisions. PX D at 18.

On March 12, 2003, AITC asked Innawalli to “fill the skillset matrix – Position in Albany.” Later that month Innawalli exchanged e-mails with Chebrolu. On March 26, Innawalli indicated that she had called and left messages for Chebrolu and needed to talk to him. The next day Chebrolu replied that he hoped that “Shobana was able to take care of the issue, if any.” Innawalli e-mailed back that Shobana had not been able to take care of the issue. She explained that she wanted to take a vacation to India and needed him to send her proof of INS’s approval of AITC’s extension request, the attached Form I-94, and an “employment letter” for travel purposes. On March 29 Innawalli made a more urgent second request for the documents.⁵

When Chebrolu was not forthcoming with the documents she requested, Innawalli went to USCIS on April 7, 2003, to file a complaint. She filed the complaint that is the subject of this case later in April. See Innawalli’s February 25, 2004 Pleading filed March 1, 2004, with the Office of Administrative Law Judges.⁶ Innawalli purchased an airline ticket for \$1,120 and flew to India in January 2004. PX I.

Pursuant to 20 C.F.R. §§ 655.805, 655.815, DOL’s Wage and Hour Division (WHD) investigated Innawalli’s complaint and found no violation of the H-1B provisions of the INA. RX A, B, C. At Innawalli’s request, a United States Department of Labor Administrative Law Judge (ALJ) held an evidentiary hearing. The ALJ found that AITC violated the INA and awarded Innawalli \$60,000 in back wages.⁷ AITC filed a Petition for Review with the Board. The Board issued its Notice of Intent to Review the case on September 23, 2004. See 20 C.F.R. § 655.845 (2003).

⁵ On direct examination, Chebrolu testified that Innawalli telephoned him and AITC staff in November 2002, asking for her Form I-94 and requesting a letter documenting her continued employment with AITC. Hearing Transcript at 140. Chebrolu said that Innawalli explained that she had another job offer and needed documentation of her current employment with AITC so that she could get her visa transferred to a new employer. *Id.* Chebrolu refused to give Innawalli the documents she requested because, he testified, AITC no longer employed Innawalli and her intended use of them was illegal. *Id.* at 140, 141. On cross-examination Innawalli pressed Chebrolu for documentary proof of this conversation, which he was unable to produce. *Id.* at 172, 173. We find that the subject matter of this telephone conversation, if it occurred, is disputed. As such, it does not prove that AITC did or did not employ Innawalli in November 2002.

⁶ The record is silent as to the date Innawalli filed her complaint with DOL.

⁷ The ALJ also assessed a civil money penalty under 20 C.F.R. § 655.810(b) in the amount of \$1,000 for AITC’s willful failure to pay the required wages. AITC does not contest this assessment on appeal.

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. *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 Secretary of Labor's designee, 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 decision concerning the INA. *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).

DISCUSSION

The ALJ found that AITC's actions after her "alleged termination" on April 26, 2002, demonstrated that the company and Innawalli maintained an ongoing employment relationship for one more year. Decision and Order (D. & O.) at 14-24. He found that the alleged termination was not bona fide because it "was not made in good faith and was not genuine, but instead entailed simulation and pretense." *Id.* at 24. He therefore concluded that AITC violated the INA when it did not pay Innawalli wages for one year after April 26, 2002. He awarded Innawalli \$60,000 (one year's gross wages) and, as noted above, assessed a \$1000 civil money penalty against AITC pursuant to 20 C.F.R. § 655.810(b). The ALJ denied Innawalli's request for reimbursement for her \$1,120 airline fare to India because of his finding that AITC did not terminate her employment. *Id.*

AITC argues that it terminated Innawalli's employment effective April 27, 2002, duly notified INS of that termination, and is not liable for wages beyond that date. AITC contends that any actions it took to aid Innawalli in her efforts to find work after the termination were taken for benevolent reasons. Alternatively, AITC argues that Innawalli was in voluntary nonproductive status "for most, if not all" of the time following the end of her work with PepsiCo. Therefore, it is not liable for wages during those periods. Finally, AITC argues that if it is liable for any back wages, that

liability must be calculated based on Innawalli's wages less authorized deductions. AITC Brief at 11-29.

Innawalli contends that she never received notice that AITC had terminated her employment. She asserts that AITC's letters to her and to the INS purporting to effect a termination are fictitious and were never sent. Innawalli argues that she remained an AITC employee after the April 26, 2002 end of the PepsiCo project through March 2003. She claims that during that time she was in non-productive status because AITC did not assign her any work. Therefore, Innawalli contends that AITC's obligation to pay her wages continued through March 2003. Innawalli Brief at 1-30.⁸

AITC Did Not Terminate Innawalli's Employment on April 26, 2002. Rather, their Employment Relationship Continued to Exist Until April 7, 2003.

We reject AITC's argument that it terminated Innawalli's employment on April 26, 2002, when it sent letters notifying her that it no longer needed her and also notified the INS of the same. This record supports the ALJ's finding that AITC's actions from April 2002 through March 2003 demonstrate that no termination occurred. D. & O. at 14-24.

We give no effect to AITC's April 26, 2002 and November 18, 2002 letters to the INS terminating Innawalli's employment because the company continued to act as if a termination never occurred. Like the ALJ, we find that the record supports Innawalli's version of the relevant events. D. & O. at 14-24. Thus, shortly after Innawalli completed the PepsiCo project on April 26, 2002, Balasundaram asked Innawalli to become certified in "Cognos" training and provided the training materials. Between April 29 and July 29, Innawalli was in Hawaii, not on vacation, but training to become certified in "Cognos." On July 30, the day after Innawalli became certified in "Cognos," AITC updated her resume and subsequently marketed her as a "Cognos Certified Professional" to its clients and potential clients. AITC also submitted Innawalli's resume for a position in Chicago, sent her information about an AITC client, and asked Innawalli several times to update her resume or to fashion it in a certain way. Further, AITC asked Innawalli to sign an Employee Consent form, apprised her of INS's approval of AITC's request to extend her H-1B visa, and reimbursed her for medical expenses she had incurred. Moreover, AITC, through its president, Chebrolu, and its attorney, Tewary, filed forms with the United States Government representing that AITC was Innawalli's employer and that she was present in the United States with H-1B visa status.

⁸ AITC has filed Objections to Plaintiff's Introduction of Additional Evidence Into the Record and Motion to Strike. AITC correctly notes that, in her Brief, Innawalli, who appears before us pro se, asserts and relies upon "purported evidence" that is not part of the record. We sustain all six objections and grant AITC's Motion to Strike. Moreover, we note that on the one hand Innawalli claims back wages owed from the end of April 2002 until late March 2003. Brief at 2-3, 19-20, 30. On the other hand, she argues that the ALJ properly awarded her a full year's salary. *Id.* at 30.

Innawalli's H-1B status continued after April 26, 2002, because INS extended her H-1B visa from April 15, 2002, to February 14, 2005, though INS later revoked this extension on November 30, 2004. Therefore, Innawalli was entitled to the guarantees and protections of the INA until November 30, 2004, so long as she continued H-1B employment. The ALJ did not determine the last day that AITC employed Innawalli. He merely concluded that she was entitled to one year of back wages (\$60,000). For the following reasons, we find that Innawalli's employment ended on April 7, 2003.

On March 28, 2003, to prepare for a vacation trip to India, Innawalli e-mailed Chebrolu asking that he send her proof that INS had extended her H-1B visa. She also asked that he send her "INS form I-94 departure record" that aliens need for travel purposes, and an "employment letter." PX D at 25. The next day Innawalli repeated her request to Chebrolu but more urgently. *Id.* at 27. Chebrolu never responded to these requests. HT 140. On April 7, 2003, Innawalli "approached" USCIS to file a complaint against AITC.

Therefore, given Chebrolu's refusal to provide Innawalli with documents evidencing her employment coupled with Innawalli's decision to seek redress against AITC, we find under the specific facts of this case that by April 7, 2003, the parties mutually intended to end their employment relationship.⁹

AITC Is Liable for Back Wages for the Period Beginning April 27, 2002, through April 6, 2003.

As we explained above, an H-1B employer must pay the nonimmigrant employee the required wages even when the employee is not performing because of lack of work, i.e., is in "nonproductive status." Innawalli's work with PepsiCo ended on April 26, 2002. From April 27, 2002, until April 6, 2003, she was an H-1B nonimmigrant in nonproductive status that AITC employed but did not pay. Therefore, AITC violated the INA by not paying Innawalli for the period from April 27, 2002, to April 6, 2003. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I). Innawalli is thus entitled to back pay. 8 U.S.C.A. § 1182(n)(2)(D). Innawalli's twice per month gross pay was \$2500. From this we subtract authorized deductions. *See* 20 C.F.R. § 655.731(c)(2), (9). Her twice-a-month net pay was \$1,738.35. Innawalli Response Brief at 29; AITC Rebuttal Brief at 13. Accordingly, we find that AITC is liable for \$39,433.50 in back wages (\$114.30 net wages per day x 345 days).

Furthermore, Innawalli is also entitled to prejudgment compound interest on the back pay award and post judgment interest until AITC satisfies the debt. *Amtel Group, Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 12

⁹ Our finding is based on the nature of the employment relationship that existed between these parties. Accordingly, we do not find, nor do we suggest, that a party's approach to the USCIS or the DOL to enforce his or her H-1B rights under the INA necessarily evinces an intention by that party to end the employment relationship.

(ARB Sept. 29, 2006) (holding that even in absence of express authority under INA, the remedial nature and “make whole” goal of back pay warrants prejudgment compound interest and post judgment interest). The prejudgment and post judgment interest shall be calculated according to the procedures set out 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).

Finally, Innawalli contends that AITC is liable for the cost of her return flight to India. The pertinent regulation reads:

The employer will be liable for the reasonable costs of return transportation of the alien if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act.

8 C.F.R. § 214.2(h)(4)(iii)(E). Thus, since we found that AITC did not dismiss Innawalli but that the parties mutually intended the employment to end, Innawalli is not entitled to the \$1120 she paid for the airline ticket to return to India.

CONCLUSION

Despite AITC’s arguments to the contrary, Innawalli and AITC continued their H-1B employment relationship after April 26, 2002. AITC’s purported termination letters to Innawalli and its notice to INS that it terminated Innawalli’s employment did not effect an end to the employment relationship. Therefore, AITC violated the INA when it did not pay Innawalli wages from April 27, 2002, through April 6, 2003, even though she was in nonproductive status due to a lack of assigned work. Accordingly, we **ORDER** AITC to pay Innawalli \$39,433.50, plus compound prejudgment interest and post judgment interest until paid. We **FURTHER ORDER**, pursuant to 20 C.F.R. § 655.810(b), that AITC pay a \$1000 civil money penalty.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge