



In the Matter of:

NALINABAI P. CHELLADURAI,

ARB CASE NO. 03-072

COMPLAINANT,

ALJ CASE NO. 03-LCA-004

v.

DATE: April 26, 2006

INFINITE SOLUTIONS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Nalinabai P. Chelladurai, pro se, Tamil Nadu, India

For the Respondent:

Ganapathy Muruges, Roseville, California

For the Wage and Hour Administrator as Amicus Curiae:

Steven J. Mandel, William C. Lesser, Paul L. Frieden, Joan Brenner, United States Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act of 1990, 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 (2005). The Complainant, Nalinabai Chelladurai, an H-1B nonimmigrant senior programmer analyst, filed a complaint under the INA with the Wage and Hour Division, Employment Standards Administration, United States Department of Labor (WHD) against her employer, the Respondent, Infinite Solutions, Inc. (ISI). Chelladurai alleged that ISI failed to pay wages as required by the INA. A WHD determined that ISI failed to pay Chelladurai \$2,273.27 in wages in violation of 20 C.F.R. §§ 655.731(c), 655.805(a)(2), and 655.805(a)(6). Specifically, the investigator

found that ISI owed Chelladurai back wages for the two-week period following April 16, 2001, the date from which Chelladurai first came under ISI's control subsequent to the April 9, 2001 validity date of the Immigration and Naturalization Service's (INS)¹ April 12, 2001 approval of ISI's December 14, 2000 Petition for Nonimmigrant Worker.² Respondent's Exhibits K, L. Subsequently, the Administrator, WHD assessed ISI back wages in the amount of \$2,273.27, but recognized that ISI had previously paid this assessment in full. Respondent's Exhibit A.

Chelladurai requested a hearing before the Office of Administrative Law Judges. By Amended Decision and Order dated February 25, 2003, the administrative law judge (ALJ) affirmed the WHD's determination.³ Chelladurai filed an appeal with the Administrative Review Board (ARB). Chelladurai contends that she is entitled to back wages from January 3, 2001, to April 16, 2001, under the portability provisions of the INA. Chelladurai argues that her entitlement to wages is not determined by the date upon which INS approved ISI's petition filed with INS on Chelladurai's behalf, as the ALJ found, but rather, is determined by the date upon which Chelladurai made herself available for work. We agree with Chelladurai's contention, and modify the ALJ's Decision and Order (D. & O.) as explained below.

STATUTORY AND REGULATORY FRAMEWORK

The INA permits an employer to hire a nonimmigrant alien worker in a specialty occupation in the United States. 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c). This worker is commonly referred to as an H-1B nonimmigrant. The H-1B category of specialty occupations consists of occupations requiring the "theoretical and practical application of a body of highly specialized knowledge, and ... attainment of a bachelor's or higher degree in the 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 an H-1B nonimmigrant, the employer must obtain certification from the United States Department of Labor (DOL) after filing a Labor Condition Application (LCA). 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. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After the employer secures the certified LCA, the employer petitions

¹ INS is now the "U.S. Citizenship and Immigration Services" or "USCIS." *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

² ISI complied with WHD's decision and paid Chelladurai the assessed wages. Wage and Hour H-1B Narrative Report at 30, 34; *see also* Respondent's Exhibit B; December 11, 2002 Hearing Transcript at 58-59.

³ The administrative law judge originally issued his Decision and Order on February 7, 2003; the decision was reissued to include a "Notice of Appeal Rights" section and to correct an incomplete service of process.

for and the nonimmigrant may receive, an H-1B visa issued by the United States Department of State, upon INS's approval of the employer's petition for H-1B classification of the nonimmigrant it wishes to hire. 20 C.F.R. § 655.705(b).

The "increased portability of H-1B status" provisions of the INA, 8 U.S.C.A. § 1184(n), authorize a nonimmigrant alien, who was previously issued a visa or otherwise provided nonimmigrant status under 8 U.S.C.A. § 1101(a)(15)(H)(i)(b), to accept new employment upon the filing by a prospective employer of a new petition for H-1B classification on behalf of the nonimmigrant alien. 8 U.S.C.A. § 1184(n)(1). Such employment authorization continues for the nonimmigrant alien until INS adjudicates the new petition; if INS denies the petition, the employment authorization ceases. *Id.* The portability provisions apply to nonimmigrant aliens who were lawfully admitted into the United States; on whose behalf an employer has filed a nonfrivolous petition for new employment before the expiration date of the period of stay authorized by the Attorney General; and who has not been employed without authorization in the United States before the prospective employer's filing of the petition for H-1B classification on behalf of the nonimmigrant alien. 8 U.S.C.A. § 1184(n)(2).

The portability provisions make it unnecessary to wait for approval of the prospective employer's new petition for H-1B classification filed with the INS on the nonimmigrant alien's behalf, before the individual may be employed. 65 Fed. Reg. 80110, 80118.

Under the INA, the H-1B nonimmigrant must receive the required pay beginning with the date when the nonimmigrant "enters into employment" with the "new" employer. 20 C.F.R. § 655.731(c)(6). The H-1B nonimmigrant is considered to "enter into employment" when he or she first "makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination and includes all activities thereafter." 20 C.F.R. § 655.731(c)(6)(i). 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)," the employer is obligated to pay the required wage. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i).

BACKGROUND

Chelladurai entered the United States on July 14, 1998, on an H-1B visa and worked for other H-1B employers before moving to Sacramento, California in January of 2001 to work for ISI. Exhibit D-60; December 11, 2003 Hearing Tr. at 23-35. Prior to working for ISI, Chelladurai worked in Los Angeles for Adeo Consulting, who contracted her out to IXL; Adeo Consulting paid Chelladurai through December 10,

2000, and closed its Los Angeles office as of January 31, 2001.⁴ *Id.* at 32-35, 85-86; *see* Respondent's Exhibit O.

On December 14, 2000, ISI filed a Petition for Nonimmigrant Worker with the INS, requesting H-1B classification for Chelladurai and representing to the INS that Chelladurai's then-current nonimmigrant status was "H1B1" which would expire on April 16, 2003. Respondent's Exhibit L. ISI intended to employ Chelladurai from January 2, 2001, to October 31, 2003. *Id.* In his attached December 14, 2000 letter to the INS, Ganapathy Muruges, President of ISI, certified that ISI needed the services of Chelladurai from January 2, 2001, until October 31, 2003.⁵ *Id.* ISI submitted to the INS an LCA previously approved by DOL, for ten H-1B nonimmigrant positions as senior programmer analysts at a prevailing annual wage rate of \$54,558.40. *Id.* On April 12, 2001, INS approved ISI's petition and indicated that Chelladurai's H-1B classification was valid from April 9, 2001, to October 31, 2003. Respondent's Exhibits D, K.

On January 2, 2001, Chelladurai moved from Los Angeles to Sacramento to work for ISI and moved in with Mr. and Mrs. Muruges, owners of ISI. December 11, 2003 Hearing Transcript at 35. From January 3, 2001 to late May of 2001 when ISI terminated Chelladurai's employment, *see* Complainant's Exhibit 1, Chelladurai completed a computer course at ISI, Exhibit 14, Respondent's Exhibit E; sent out her resume, interviewed, and otherwise marketed herself for contracting work at ISI's prompting, request, or direction, Exhibits 4, 16, 17, 19, 20, 24, 25, 33-35, 37, 43, 44, 46, 48, 50; and rendered technical price quotes on prospective contracts at ISI's request, Exhibits 18, 44. Chelladurai never found any work, and ISI terminated her employment effective May 21, 2001. Complainant's Exhibit 1. ISI notified the INS accordingly. Respondent's Exhibit U.

ISSUES

1. Did the ALJ err in finding that the portability provisions of the INA do not apply in this instance?

⁴ On July 20, 2000, INS approved the Petition for Nonimmigrant Worker that "Core Consultants, Inc., c/o Basil Xavier, Vice President" filed on Chelladurai's behalf. Chelladurai's H-1B classification was valid from July 20, 2000, to April 16, 2003. Respondent's Exhibit O. Chelladurai testified that Core Consultants, Inc. was the "pattern company" of Adeo Consulting. December 11, 2002 Hearing Transcript at 36.

Chelladurai testified that Adeo Consulting contracted her out to IXL in Los Angeles from July 31, 2000, and that IXL petitioned the INS for H-1B classification on Chelladurai's behalf, but she never became an employee of IXL. *Id.* at 33; *see also* Exhibits P, 41. Chelladurai pursued employment with ISI, though. Basil Xavier, her former boss at Adeo Consulting, contacted Chelladurai on December 27 or 28 of 2000, and again on January 3, 2001, to offer her new employment. December 11, 2002 Hearing Transcript at 35-37.

⁵ ISI offered Chelladurai employment on December 1, 2000, with an expected start date of January 2, 2001. Respondent's Exhibit M.

2. Did Chelladurai “enter into employment” with ISI within the meaning of 20 C.F.R. § 655.731(c)(6)(i), on April 16, 2001, as the ALJ determined or on some date prior thereto?
3. How much is Chelladurai due in back wages?

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review an ALJ’s decision under 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 ARB, 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 reviews the ALJ’s decision de novo. *United States Dep’t of Labor v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-10 to 25, slip op. at 4 (ARB May 31, 2005); *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

1. Applicability of the INA’s “portability provisions”

Chelladurai contends that she may take advantage of the INA’s “portability provisions” to trigger ISI’s obligation to pay her the required wage as of the date she “entered into employment” with ISI.

The “portability provisions” apply to nonimmigrant aliens who were lawfully admitted into the United States; on whose behalf an employer has filed a nonfrivolous petition for new employment before the expiration date of the period of stay authorized by the Attorney General; and who has not been employed without authorization in the United States before the prospective employer’s filing of the petition for H-1B classification on behalf of the nonimmigrant alien. 8 U.S.C.A. § 1184(n)(2). Chelladurai argues that the “portability provisions” apply because, (1) she had entered the United States lawfully with H-1B nonimmigrant status; (2) ISI had filed with the INS a nonfrivolous Petition for Nonimmigrant Worker on Chelladurai’s behalf “before the

expiration date of the period of stay authorized by the Attorney General;” and (3) Chelladurai had not been employed without authorization in the United States before ISI’s December 14, 2000 filing of the petition for H-1B classification on her behalf. 8 U.S.C.A. § 1184(n)(2). The ALJ determined that Chelladurai’s “appeal to the newly enacted portability provisions must fail in this instance for the simple reason that there was no ‘work’ available for [Chelladurai] to perform at any point eventually leading to the ‘termination’ of the employment by ISI a little over a month after the H-1B application was approved.” D. & O. at 3.

Contrary to the ALJ’s finding, the applicability of the “portability provisions” is not dependent on whether ISI had “work” available for Chelladurai to perform. Rather, the “portability provisions” apply by operation of law where certain requirements are met, such as in the instant case. Chelladurai, who had previously been issued a visa under 8 U.S.C.A. § 1101(a)(15)(H)(i)(b), had the authority to accept ISI’s December of 2000 offer of new employment upon ISI’s December 14, 2000 filing with INS of its petition for H-1B classification on her behalf, pursuant to the “portability provisions. 8 U.S.C.A. § 1184(n)(1). The “portability provisions,” 8 U.S.C.A. § 1184(n), apply in this instance where, (1) Chelladurai had been lawfully admitted into the United States on an H-1B visa, Exhibit D-60; December 11, 2003 Hearing Tr. at 23-35; (2) ISI filed a nonfrivolous petition for new employment before April 16, 2003, the expiration date of the period of stay previously authorized by the Attorney General for Chelladurai’s work with Adeo Consulting, Respondent’s Exhibit O; and (3) Chelladurai had not been employed without authorization in the United States before ISI filed its petition for H-1B classification on her behalf, Respondent’s Exhibits L, O. 8 U.S.C.A. § 1184(n)(2). Based on the foregoing, we agree with Chelladurai’s argument that the “portability provisions” apply in this instance, and we hold that the ALJ erred in finding that they did not.

2. To “enter into employment” Within the Meaning of 20 C.F.R. § 655.731(c)(6)(i)

Chelladurai contends that she is entitled to wages as of January 3, 2001, the day she first made herself available for work with ISI or otherwise came under ISI’s control. The ALJ found that Chelladurai was not entitled to wages as of January 3, 2001, because (1) the work she performed with ISI from January 3, 2001, until ISI terminated her employment on May 21, 2001, was aimed at finding work for her and was not performed on ISI’s behalf, D. & O. at 3-4; and (2) while ISI represented to Chelladurai and to the INS that it would employ Chelladurai as of January 2, 2001, *see* Respondent’s Exhibits L, M, ISI also indicated that the start of Chelladurai’s employment was contingent upon INS approval of ISI’s petition and the issuance of an H-1B visa. D. & O. at 4. The ALJ also found no evidence that ISI and Chelladurai intended to create an employment relationship prior to INS approval of ISI’s petition; he noted that the parties acknowledged that they never came to an agreement on salary. *Id.* The ALJ concluded, however, that ISI, by filing its petition for H-1B classification on Chelladurai’s behalf, subjected itself to the regulations governing H-1B employees. The ALJ held that under 20 C.F.R. § 655.731(c)(7)(i), ISI was obligated to pay the required wage while

Chelladurai was in a “nonproductive status” due to a decision by ISI, namely because of a lack of assigned work, from April 16, 2001, - the date of the first full pay period following the INS’s April 12, 2001 approval of INS’s petition. *Id.* Chelladurai argues that her entitlement to wages is not contingent on INS approval of ISI’s petition, but is determined by the date upon which she first made herself available for work or otherwise came under ISI’s control, namely January 3, 2001.

Under the INA, an H-1B nonimmigrant must receive the required pay beginning with the date when the nonimmigrant “enters into employment” with the “new” employer. 20 C.F.R. § 655.731(c)(6). The H-1B nonimmigrant is considered to “enter into employment” when she first makes herself “available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination and includes all activities thereafter.” 20 C.F.R. § 655.731(c)(6)(i). 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),” the employer is obligated to pay the required wage. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i).

The ALJ properly determined that ISI was obligated to pay the required wage while Chelladurai was in a “nonproductive status” due to a decision by ISI, namely for lack of assigned work. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i). The parties both acknowledged that they never found any “work” for Chelladurai. The ALJ erred, however, by finding that ISI’s obligation to pay Chelladurai did not start until the first full pay period following INS’s April 12, 2001 approval of ISI’s petition, or as of April 16, 2001. Rather, Chelladurai is entitled to receive the required pay beginning with the date she “entered into employment” with ISI. 20 C.F.R. § 655.731(c)(6). Under the “portability provisions,” Chelladurai was eligible for employment with ISI at any time after ISI’s December 14, 2000 *filing* with the INS of its petition; her eligibility for employment was not dependent on INS *approval* of the petition. 8 U.S.C.A. § 1184(n); 20 C.F.R. § 655.705(c)(4). On January 2, 2001, Chelladurai moved from Los Angeles to Sacramento to work for ISI in Sacramento and moved in with Mr. and Mrs. Murugesh, making herself available for work or otherwise coming under ISI’s control as of the following day, January 3, 2001. Thereafter and until late May of 2001 when ISI terminated Chelladurai’s employment, *see* Complainant’s Exhibit 1, Chelladurai completed a computer course at ISI, Exhibit 14, Respondent’s Exhibit E, and used ISI’s computers, as well as her own equipment, to send out her resume, set up interviews, and to otherwise market herself for contracting work, at ISI’s prompting, request, or direction.⁶ Exhibits 4, 16, 17, 19, 20, 24, 25, 33-35, 37, 43, 44, 46, 48, 50. Also, at ISI’s request, Chelladurai rendered technical price quotes on prospective contracts. Exhibits 18, 44. Chelladurai performed all of these tasks with ISI’s support and knowledge. Since Chelladurai made herself available for employment as of January 3, 2001, she “entered

⁶ Mrs. Murugesh testified that ISI had Chelladurai use a particular computer located in one of its two training rooms. December 23, 2002 Hearing Transcript at 342-343, 360-361.

into employment” with ISI as of that date within the meaning of 20 C.F.R. § 655.731(c)(6)(i) and is entitled to the required pay as of that date.⁷ Notwithstanding the fact that Chelladurai had no “assigned work” and was in a “nonproductive status” much of the time, ISI was required to pay Chelladurai the required wage as of January 3, 2001. 8 U.S.C.A. § 1182(n)(2)(C)(vii); 20 C.F.R. § 655.731(c)(7)(i).

2. Applicable Wage Rate For Back Wages Due Chelladurai

Chelladurai contends that back wages should be calculated using either the \$65,000.00 annual salary referred to in ISI’s offer of employment or the \$60,000.00 annual salary referred to in ISI’s letter to the INS. *Compare* Respondent’s Exhibit L with Respondent’s Exhibit M. The ALJ calculated back wages using the prevailing annual wage rate of \$54,558.40 set forth in the LCA.

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(c)(6)(i), 655.731(c)(7)(i). The ALJ, and the WHD investigator, properly used the annual prevailing wage rate listed in the LCA as there is no alternative wage rate in this instance. Chelladurai is entitled to back wages from January 3, 2001, based on the prevailing wage rate of \$54,558.40 per annum as set forth in the LCA. *Id.*; *see* Respondent’s Exhibit L.

Further, Chelladurai summarily asserts that she is a “whistle blower worker” because ISI terminated her employment because she asked to be paid, or, alternatively, because of “false propaganda” that ISI alleges she generated against it. Complainant’s Brief at 8, 9, 15, 18. However, while the case was pending before the ALJ, Chelladurai did not make specific arguments that could reasonably be considered to state a cause of action or violation under the INA’s whistleblower provisions. *See* Complainant’s Closing Argument dated December 19, 2002. We, therefore, do not further address Chelladurai’s argument on appeal. *Saporito v. Cent. Locating Servs., Ltd. & Asplundh Tree Expert Co.*, ARB No. 01-004, ALJ No. 01-CAA-13 (ARB Feb. 28, 2006).

PENDING MOTIONS

We now address three motions filed by Chelladurai. Chelladurai filed a Motion for Judgement (sic) with Respect to Stalking dated June 20, 2003. Chelladurai refers to a statement in the WHD investigator’s report that indicates that Mr. Murugesh reported to the investigator that Chelladurai had threatened him by stalking him around his office. Chelladurai requests a remand of “the issue of stalking” to the appropriate agency or,

⁷ Mr. Murugesh asserts that ISI filed with the INS a petition for H-1B classification on Chelladurai’s behalf as part of an arrangement made between his family and Chelladurai’s family to help Chelladurai, a relative and friend of the Murugesh family. It is, however, the representations Mr. Murugesh and ISI made to the United States Government, not the expectations or agreement of the parties, which are relevant here.

alternatively, requests that the ARB assert DOL's lack of jurisdiction in the matter. Mr. Murugesh has filed no stalking complaint with the Board; therefore, there is no complaint of stalking before us to adjudicate. In any event, as Chelladurai appears to recognize, stalking is not a matter over which we have jurisdiction.

Chelladurai filed a Motion for Temporary Restraining Order and Preliminary/Temporary Injunction and Affidavit in Support [] Thereof dated August 1, 2003. Chelladurai requests that the ARB, (1) enjoin Mr. and Mrs. Murugesh and Jithy Bose from claiming that Chelladurai is a relative of Mrs. Murugesh; (2) order ISI to preserve all relevant records; and (3) restrain ISI from using any "private and confidential information." Complainant's Motion at 4. The Board knows of no authority that allows for the injunctive relief urged by Chelladurai, and Chelladurai cites to none. Further, the evidence deemed relevant by the parties has been introduced into the record. Chelladurai's Motion is therefore **DENIED**.

Chelladurai filed a Motion for Sanctions dated December 23, 2003. Chelladurai requests compensation from ISI for causing a delay of the ARB's disposition of this case and for expenditures made in responding to ISI's misrepresentations and false allegations. Chelladurai also requests that the ARB, (1) order ISI to preserve all relevant evidence; (2) enjoin ISI from engaging in "any harassing, intimidating, annoying and alarming actions;" and (3) disclose all misrepresentations made by ISI. Complainant's Motion at 5. We know of no authority that allows for the compensation or the injunctive relief urged by Chelladurai, and Chelladurai cites to none. Chelladurai's other requests are baseless where the evidence deemed relevant to the parties has been introduced into the record, and where the ARB herein addresses all contentions raised by the parties pertaining to the case before us. Consequently, Chelladurai's Motion is **DENIED**.

We next consider Respondent's Motion to Re-Open Evidentiary Hearing to Take Additional Evidence dated October 10, 2003, filed by ISI in response to the WHD Administrator's Brief. The Administrator argues that, pursuant to the INA's "portability provisions," 8 U.S.C.A. § 1184(n), Chelladurai is entitled to wages from sometime in January of 2001 when she "entered into employment" with ISI within the meaning of 20 C.F.R. § 655.731(c)(6)(i). The Administrator argues that more factual findings by the ALJ are necessary to determine when Chelladurai "entered into employment" with ISI and thus requests a remand of the case. ISI disagrees with the Administrator's position that the "portability provisions" apply. ISI contends that because Adeo Consulting terminated Chelladurai's employment before December 14, 2000, when ISI filed its petition with INS, ISI did not file its petition "before the expiration date of the period of stay authorized by the Attorney General" as required under 8 U.S.C.A. § 1184(n)(2) to invoke the "portability provisions." ISI also asserts that Chelladurai never entered into employment with ISI because ISI merely tried to help Chelladurai due to a family connection. ISI states that while it represented to the INS that it intended to employ Chelladurai from January 2, 2001, *see* Respondent's Exhibit L, this statement "was merely an indication for an expeditious processing of the petition by INS." Respondent's Motion at 7. Further, ISI requests that the ARB determine whether the development of further evidence is necessary where, it asserts, the ALJ improperly denied ISI's request

for additional time in which to further develop its evidence and because Chelladurai fabricated evidence.

We review the ALJ's conduct of the hearing based on an abuse of discretion standard. *Shirani v. Com/Excelon Corp.*, ARB No. 03-028, ALJ No. 02-ERA-28 (ARB Dec. 10, 2002), quoting *Hasan v. J. A. Mgt. Servs.*, ARB No. 02-096, ALJ NO. 02-ERA-18, slip op. at 2 (ARB July 16, 2002). In this case, the ALJ issued pre-trial orders and statements notifying the parties of the hearing. The ALJ fully informed the parties as to how the hearing would proceed, taking into consideration that they appeared without the benefit of counsel. December 11, 2002 Hearing Transcript at 5-19. The ALJ conducted the hearing on December 11, 2002, and continued it on December 23, 2002, granting ISI's request for a continuance to accommodate the schedules of two witnesses, Rani Daisy Muruges and Joseph Tassinari. The record supports the ALJ's finding that both parties had ample opportunity to present their cases and to develop and submit all evidence they deemed relevant. December 23, 2002 Hearing Transcript at 487, 491. Therefore, when the ALJ closed the record at the end of the December 23, 2002 hearing, he did not abuse his discretion. Accordingly, we deny ISI's request for a remand of the case to afford it further opportunity to develop its evidence.

Further, as discussed above, *see* discussion, *supra* at 5-7, Mr. Muruges's motivation in filing with INS ISI's petition for H-1B classification on Chelladurai's behalf, is not a controlling factor in determining the applicability of the INA's "portability provisions."

CONCLUSION AND ORDER

ISI violated the INA when it did not pay Chelladurai wages starting from January 3, 2001, when she "entered into employment" with ISI. The ALJ's decision is hereby **MODIFIED** to order payment of back wages for the period from January 3, 2001, to April 16, 2001, at the prevailing wage rate of \$54,558.40 per annum as set forth in the LCA. Respondent's Exhibit L. All pending motions are **DENIED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge