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ISSUE DATE: 30 JUNE 2011

OALJ CASE №: 2011-LCA-00005

In the matter of:

KEVIN LIMANSETO,
Prosecuting Party,

v.

GANZE & COMPANY,
Respondent/Employer.

Appearances: Stanley D. Radtke, Esq.,
for the Prosecuting Party

Gordon J. Fine, Esq.,
for the Respondent/Employer

Decision and Order

Ganze & Co. (Ganze) made a labor condition application with two inherent components, and wants to ignore half of what it did. Its primary focus was to have a worker. Because Limanseto, the Prosecuting Party, never did its work during the application's three year term, it bridles at the suggestion it should pay him a dime. But then there is the immigration half of the story, the half that requires Ganze to pay, with no offsets.

A. Background

Limanseto complained to the Department that Ganze hadn't paid him. He became the prosecuting party when he requested review[1] of the November 2, 2010 finding the Administrator of the Wage and

[1] The procedural rules published at 29 C.F.R. Part 18, Subpart A govern this review proceeding. 20 C.F.R. § 655.825(a) (2011).

Hour Division made that Ganze hadn't violated the statute or regulations that govern labor condition applications.[2] The trial adjourned on June 2, 2011; record closed after the parties addressed a legal issue. The Administrator's action is reversed.[3]

B. Ganze's 2008 H-1B Petition

Limanseto wasn't a lawful permanent resident alien. A citizen of Indonesia studying in the United States,[4] he eventually was authorized to be present in the United States at Ganze's behest.[5] It attested[6] that there was a sophisticated job of the type the H-1B statute and regulations describe for Limanseto as a tax accountant[7] that it wanted him to do in the United States.[8] His compensation package was equivalent to what U.S. citizens and lawful residents earned for similar work in Napa, California.[9] He was authorized to be

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[2] His request for hearing was timely, and Ganze does not contend otherwise. 20 C.F.R. § 655.820(b)(1), (d) (2011).

[3] A judge "may affirm, deny, reverse, or modify, in whole or in part," the Administrator's determination. 20 C.F.R. § 655.840(b) (2011).

[4] Limanseto Ex. 10 (his Indonesian passport) and Joint Statement of Stipulated/Uncontested Facts (Joint Statement) ¶¶ 1, 2, 4, 5.

[5] Ganze Ex. 1 and Limanseto Ex. 3. Both notices from U.S. Citizenship and Immigration Services (USCIS) grant the petition Ganze filed for Limanseto's H-1B nonimmigrant status.

[6] Promises the employer makes that arise from required statements embedded in its labor condition application are what the regulations sometimes call "attestations." 20 C.F.R. § 655.730(c)(2) (2008). The Secretary of Labor enforces those promises. *Administrator, Wage and Hour Division v. Integrated Informatics, Inc.*, ARB No. 08-127, ALJ No. 2007-LCA-00026, slip op. at 13–14 (Jan. 31, 2011). Attestation topics are detailed at 20 C.F.R. §§ 655.731 to 655.734 (2008). All further citations to the Code of Federal Regulations are to its 2008 edition.

[7] Congress created the H-1B visa program to temporarily employ nonimmigrants in the United States in "specialty occupations" or as "fashion models of distinguished merit and ability" by amendments to the Immigration and Nationality Act in the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, codified at 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1182(n). "Specialty occupations" require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or more advanced academic degree in the specific specialty as a minimum requirement for entry into the occupation. 8 U.S.C. § 1184(i)(1). Tax accounting qualifies. See Limanseto Ex. 8 at 31–32.

[8] Limanseto Ex. 5 at 23.

[9] The wage must be the higher of the prevailing wage for the occupation in the area where the nonimmigrant will be employed, or the actual wage the employer pays individuals of similar experience and qualification. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(b)(2), (3). Additionally "health, life, disability, and other insurance plans" as well as "retirement and savings plans, and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)" must be offered on the same basis, and according to the same criteria, as the employer offers

here from October 1, 2008, to September 2, 2011,[10] because of that specific tax accounting job—hence the statute classifies those with H-1B visas like Limanseto as "nonimmigrants." When Ganze signed and submitted its labor condition application to the Department of Labor[11] as part of its H-1B petition, it represented that the statements in it were accurate and acknowledged that it had to comply with its obligations under the H-1B program regulations.[12] It reaffirmed those obligations when it petitioned the immigration authorities in the Department of Homeland Security to approve its H-1B petition.[13]

Ganze originally had hired Limanseto from January to April 2006 as an unpaid intern to prepare tax returns, work that earned him credit in his bachelor's program at Sonoma State University.[14] After graduating with a bachelor's degree that year, he returned in August preparing tax returns full-time for Ganze, earning $20 per hour. His visa for undergraduate study apparently permitted that work.[15]

He continued to work full time at Ganze until July 2007. He began full-time study on September 12, 2007, in the Master of Science in Taxation program in San Francisco at Golden Gate University, a program he would complete in late April, 2008.[16] He returned to Ganze in February 2008 as part of his graduate program at Golden Gate, where two CPAs at Ganze, Karen Stuart and John Dillinger, supervised his work preparing tax returns for individuals, fiduciaries, partnerships and corporations.[17] From February 1, 2008, through April

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them to United States workers. 8 U.S.C. § 1182(n)(2)(C)(viii); 20 C.F.R. § 655.731(c)(3)(i).

[10] Ganze Ex. 1, the May 9, 2008 Notice Action from U.S. Citizenship and Immigration Services (USCIS) approving the H-1B status for Limanseto that Ganze sought. See also the Petition for Nonimmigrant Worker (form I-129) Ganze filed with the immigration authorities, Limanseto Ex. 4 at 18–22.

[11] Limanseto Ex. 5, which Ganze filed on March 21, 2008. To employ an H-1B nonimmigrant, the employer must obtain a certification from the Department of Labor by filing a labor condition application. 8 U.S.C. § 1182(n). The program regulations and application (the Department's Form ETA 9035) are discussed comprehensively at 65 Fed. Reg. at 80,110 to 80,208 (Dec. 20, 2000).

[12] Limanseto Ex. 5 at Section H (Ganze's labor condition application); *see also* 20 C.F.R. § 655.805(d).

[13] Limanseto Ex. 4, the form I-129 Ganze filed with USCIS, coupled with the legal standard established in 20 C.F.R. § 655.805(d).

[14] Joint Statement at ¶1.

[15] Ganze represented in its 2008 "H Classification Supplement to form I-129" that it "[p]reviously" hired Limanseto "under [an] optional practical training status." Limanseto Ex. 4 at 22, § 1, ¶ 2. See also Hearing Transcript (Tr.) at 44.

[16] Joint Statement at ¶ 4; Limanseto Ex. 9 at 35, 37; Tr. at 32.

[17] Joint Statement at ¶ 5; Limanseto Exs. 2 at 12 and 8 at 30.

24, 2008, Limanseto was authorized to work at Ganze as a graduate student under his F-1 nonimmigrant student status.[18] He moved to Napa in February of 2008 to be part of the permanent staff of Ganze where he then was paid $23 per hour, raised to $25.30 per hour in July 2008.[19]

A student present in the United States on an F-1 nonimmigrant visa may receive a change of status to that of an H-1B nonimmigrant worker. An employer petitions the USCIS to grant the student H-1B status as its employee. The Petition for Nonimmigrant Worker and associated labor condition application Ganze filed to change Limanseto's status in June 2007[20] wasn't granted. The statutory limit on H-1B nonimmigrant visas for that year was exhausted on April 2, 2007, the first business day for filing H-1B applications for fiscal year 2008. On that one day, USCIS received more than double the number of petitions needed to reach the statutory cap for the fiscal year.[21] But the petition Ganze filed in March 2008 asking the immigration authorities to change Limanseto's status and extend his stay

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[18] Tr. at 32; Limanseto Ex. 9 at 37 (showing the request Golden Gate University made under 8 C.F.R. § 214.2(f)(10)(ii)(A)(3) on Limanseto's INS form I-20 for optional practical training work status as an F-1 student through May 15, 2009, about 12 months after his graduation from the Golden Gate University master's program in taxation; the hearing transcript at pg. 32 referred to this as OPT). *See also*, 8 C.F.R. § 214.2(f)(5)(defining the period of a student's F-1 status as the time the student pursues a full course of study at a certified school or engages in authorized optional practical training after completing the course of study). Limanseto was one of what the Department of Homeland Security estimated in April 2008 were "approximately 70,000 F-1 students" engaged in optional practical training in the United States. 73 Fed. Reg. at 18,950 (April 8, 2008). Ganze errs when it argues that Limanseto's F-1 status terminated when he graduated. It likely converted on May 9, 2008 from F-1 to H-1B when USCIS granted the H-1B status Ganze sought. But if a nonimmigrant can have more than one status at a time, Limanseto's F-1 OPT was good for a year after he graduated. In any event his H-1B status continued until USCIS revoked it in August 2010 (well after Limanseto had returned to Indonesia), when Ganze finally reported to USCIS that Limanseto was not working as its employee. Limanseto had a valid immigration status that permitted him to be present for all of his time in the U.S., in large part due to Ganze's inaction.

[19] Limanseto Ex. 2 at 11, 13; and Ex. 8 at 30, 33.

[20] Joint Statement at ¶ 3.

[21] See the interim final rule and request for comments, entitled "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions" that the Department of Homeland Security, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, published at 73 Fed. Reg. 18,944 (April 8, 2008) at 18,946. At the time of that publication, Ganze's petition for Limanseto's H-1B nonimmigrant visa had been submitted but not yet granted. The petition was submitted on Mar. 25, 2008 (Limanseto Ex. 4 at 21) and was granted on May 9, 2008 (Ganze Ex. 1).

succeeded.[22] USCIS granted Ganze's H-1B petition on May 9, 2008 for the three-year period running from October 1, 20008 to September 21, 2011.[23]

The Immigration and Nationality Act, its regulations,[24] and the Secretary of Labor's labor condition application regulations[25] share the premise that as the beneficiary of Ganze's labor condition application, Limanseto would remain in the United States only so long as Ganze employed him. Ganze doesn't claim that Limanseto rejected the "offer of employment [that] became the basis for an alien obtaining or continuing H-1B status;"[26] he was fired.[27]

C. No *Bona Fide* Termination

The H-1B visa didn't make Limanseto an indentured servant. Both he and Ganze remained free to end the relationship[28] that served as the basis for his immigration status; when it ended, both had to deal with the consequences. The parties agree, and I find, that about six weeks before the October 1, 2008 start date its labor condition application had proposed—on August 14, 2008—Ganze "ended the employment relationship."[29] That part of Ganze's proof may be sufficient to end the employment under state law, but won't suffice to end its federal liability.

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[22] Limanseto Ex. 4 at 18, Part 2, § 5(b).

[23] Joint Statement at ¶¶ 7, 11; Ganze Ex. 1 (the notice from USCIS to Ganze granting its H-1B petition); Limanseto Ex. 5 (the labor condition application Ganze filed with the Dept. of Labor on March 25, 2008) and Limanseto Ex. 4 at 18–22 (the form I-129 Petition for Nonimmigrant Worker Ganze filed on with immigration authorities on March 25, 2008).

[24] 8 C.F.R. 214.2(h)(11)(i)(A) ("If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition [at USCIS]").

[25] 20 C.F.R. § 655.750(b).

[26] 8 C.F.R. § 214.2(h)(4)(iii)(E).

[27] Joint Statement at ¶ 12; Ganze Ex. 2; Tr. at 46–47.

[28] In analyzing comments from the public when it adopted 20 C.F.R. § 655.731(c)(7), the Department of Labor said: "The Department also observed that the employer, at any time, may terminate the employment of the worker, notify INS, and pay the worker's return transportation, thereby ceasing its obligations to pay for non-productive time under the H–1B program." 65 Fed. Reg. 80,170 (Dec. 20, 2000). Duties of the INS later became those of Citizenship and Immigration Services of the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194–96 (Nov. 25, 2002).

[29] Joint Statement ¶ 12; *see also* Ganze Ex. 2 (the Notice of Change in Relationship that Ganze prepared dated August 14, 2008); Limanseto Ex. 2 at 14.

A *bona fide* termination of an H-1B worker requires the employer to prove three things:

1. notice to the worker (which Ganze has shown);
2. notice to Immigration and Customs Enforcement, authorities so that the Form I-129 "Petition for a Nonimmigrant Worker" can be cancelled; and
3. payment for the worker's transportation home.[30]

Ganze neglected to tell the Government it changed its mind and wouldn't be Limanseto's H-1B employer after all. Yet immigration authorities[31] and the Secretary of Labor[32] expect to be told when an H-1B nonimmigrant isn't working for the petitioning employer. An employer with an approved H-1B application has a powerful incentive to cooperate. Informing the immigration authorities that the employment has been terminated is the *quid pro quo* to be relieved of

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[30] *Huang v. Ultimo Software Solutions, Inc.*, ARB No. 09-044, 09-056, ALJ No. 2008-LCA-11, slip op. at 4 (March 31, 2011) (affirming the ALJ's finding that the employer "never effected a bona fide termination under 20 C.F.R. § 655.731(c)(7)(ii), as it must to be relieved of its obligation to pay [the beneficiary's] wages"); *Amtel Group v. Yongmahapakorn (Rung)*, ARB No. 07-104, ALJ No. 04-LCA-006, slip op. at 2 & n. 4 (Jan. 29, 2008) [hereinafter *Amtel II*] (Order Denying Reconsideration); *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5–6 (Mar. 30, 2007); *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 9–12 (Sept. 29, 2006) [hereinafter *Amtel I*];*see also* 65 Fed. Reg. 80,171 (Dec. 20, 2000) ("The Department agrees that an employer is no longer liable for payments for nonproductive status if there has been a *bona fide* termination of the employment relationship. The Department would not likely consider it to be a *bona fide* termination for purposes of this provision 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)." (italics in original)). *But see, Administrator, Wage & Hour Division v. Ken Technologies, Inc.,* ARB No. 03-140, ALJ No. 2003-LCA-15, slip op. at 4–5 (Sept. 15, 2004) (indicating that failure to notify the immigration authorities is not conclusive on the issue whether the employee was terminated). The Board's more recent decisions such as *Amtel I,* slip op. at 11–12, can't be reconciled with the idea that a bona fide termination can occur without all three elements. Yet the Board hasn't explicitly receded from *Ken Technologies*.

[31] 8 C.F.R. § 214.2(h)(11). A regulation of the Secretary of Labor repeats the requirement an employer with an approved labor condition application must inform the immigration authorities "that the employment relationship has been terminated so that the [H-1B] petition is cancelled," incorporating that same immigration regulation. *See* 20 C.F.R. § 655.731(c)(7)(ii).

[32] An employer with an approved labor condition application also should withdraw it at the Department of Labor to end its obligation to pay the required wage rate. 20 C.F.R. § 655.750(b).

one of the duties the employer promises to fulfill when it signs[33] the labor condition application: the duty to pay the required wage rate. Until it does, the employer remains on the hook for the H-1B worker's wages and benefits. For the price of a postage stamp, the Employer often can absolve itself of further liability.[34] U.S. Citizenship and Immigration Services (USCIS) promptly revoked Limanseto's H-1B immigration status more than two years later, when Ganze eventually reported that Limanseto wasn't employed.[35]

When it perfected the second element of a *bona fide* termination, Ganze might have been relieved of its obligation to pay Limanseto's wages when it sent the required notice on August 26, 2010.[36] But Ganze remains liable because can't prove the third element of a *bona fide* termination.[37]

To ensure that Limanseto would be able to depart before the three-year employment period Ganze requested had ended, the final element of a *bona fide* termination required Ganze to pay for his trip home.[38]

Limanseto returned home to Indonesia on November 3, 2009 at his own expense, well before Ganze sent USCIS the required notice of termination. Of course he couldn't work for Ganze from Indonesia,[39] so once he departed, Ganze's wage liability might be thought to end.

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[33] Limanseto Ex. 5 (Ganze's labor condition application) at 25, Section H, where "by signing this form" it agreed "to comply . . . with the Department of Labor regulations [at] 20 C.F.R. part 655, Subparts H and I;" *see also* 20 C.F.R. § 655.805(d).

[34] *Gupta, supra,* slip op. at 5–6 (discussing the elements of a "bona fide" termination that ends the H-1B employer's liability for wages and benefits).

[35] Once Ganze told USCIS that it didn't employ Limanseto in the capacity specified in the petition, USCIS "automatically revoked" the petition for the H-1B visa on September 1, 2010, by treating Ganze's petition as withdrawn. *See* 8 C.F.R. § 214.2(h)(11)(ii); Ganze Ex. 5 (the August 26, 2010, notice to USCIS); Ganze Ex. 6 (the USCIS response revoking Limanseto's immigration status).

[36] *Mao v. Nasser Engineering & Computing Services*, ARB No. 06-121, ALJ No. 2005-LCA-36, slip op. at 9–10 (Nov. 26, 2008); *Amtel I,* slip op. at 9–11 (Sept. 29, 2006).

[37] *Amtel II*, *supra*, slip op. at 4–5; *Amtel I, supra*, slip op. at 12 & n.12, 14.

[38] 8 U.S.C. § 1184(c)(5)(A); 8 C.F.R. § 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(c)(7)(ii); 65 Fed. Reg. 80,171 (Dec. 20, 2000).

[39] Having been told not to return, his absence from work at Ganze was involuntary. See 20 C.F.R. § 655.731(c)(7)(ii) (describing as circumstances that relieve the employer from its wage obligation, the H-1B worker's voluntary request to be absent from work, perhaps to tour the United States or care for an ill relative); *see also* 65 Fed. Reg. 80,171 (Dec. 20, 2000) (warning that the Secretary of Labor "will look closely at any situation where there is any question about whether the period of nonproductive time is truly voluntary").

Binding precedent says it continues. The failure to prove every element of a *bona fide* termination leaves an employer who petitioned for an H-1B worker's admission liable "for the entire period of authorized employment,"[40] which here is until September 21, 2011.[41] Ganze never paid the cost of return transportation, and an offer now (which hasn't been made) wouldn't do.[42]

Limanseto paid for his return home primarily with frequent flier miles, and some cash. The record's vagueness about what a ticket to Indonesia cost when he left makes no difference, because Ganze remains liable for wages for the entire term of the H-1B petition. In that situation, it doesn't owe the cost of return transportation.

Ganze is liable for wages for the entire period of the labor condition application, at the actual wage it had been paying him before the attempted termination: $25.30 per hour.[43]

D. Mitigation of Damages Doesn't Apply

The tax season after Ganze fired him, Limanseto found work for 40 to 50 hours or so per week at another Bay area accounting firm from mid-January 2009 to mid-April at $32 per hour,[44] a higher wage than the $23 per hour Ganze had promised to pay in its labor condition application and H-1B petition, or the $25.30 per hour Ganze was paying before it let him go. He earned about $9,000 there during the 2009 tax season.[45] Upon completion of the master's degree program, Limanseto's F-1 student status may have left him eligible to perform work in the United States related to his field of study for 14 months after graduation.[46] The work he did during the 2009 tax season

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[40] *Amtel I, supra*, slip op. at 12 (internal quotations omitted) (requiring the employer to pay wages for the entire term of the labor condition application where the employee paid for her own return transportation home to Thailand after the employer fired her before term of her H-1B petition and its underlying labor condition application had expired).

[41] Ganze Ex. 1.

[42] *Amtel II, supra*, slip op. at 4–5; *Amtel I supra*, slip op. at 12 & n.12.

[43] *Vojtisek-Lom v. Clean Air Technologies International, Inc.*, ARB No. 07-097, ALJ No. 2006-LCA-00009, slip op. at 13–14 (July 30, 2009) (affirming a back wage calculation based on the higher amount the employer actually paid to the H-1B worker, not the prevailing wage listed on the labor condition application, relying on 8 U.S.C. § 1182(n)(1) and 20 C.F.R. § 655.731(a) for the proposition that "[t]he enforceable wage obligation for an employer of an H-1B nonimmigrant is the 'actual wage' or the 'prevailing wage,' whichever is greater.")

[44] Limanseto Ex. 2 at 15; Tr. at 25–26.

[45] Tr. at 27.

[46] 8 C.F.R. § 214.2(f)(10)(ii)(A)(3); Limanseto Ex. 9 at 37, the March 7, 2008 form I-20A-B from Golden Gate University that requested USCIS to authorize employment

occurred during the period post-graduation employment may have been permissible.[47] Ganze expects to have all Limanseto's earnings there deducted from its liability. Not so, on two grounds.

First, this is not a cause of action at law for damages due to breach of an employment contract or to remedy invidious discrimination. Then an employer may raise as an affirmative defense a plaintiff's failure to mitigate damages (or as it is sometimes called, willful loss of earnings[48]) to reduce damages dollar for dollar by available substitute earnings.[49] Ganze's legal responsibility is based on the immigration statute and applicable H-1B regulations, where only compliance with the regulatory program ends or reduces Ganze's liability. When the beneficiary voluntarily requests an absence from the H-1B employment, the statute excuses the H-1B employer from the duty to pay wages.[50] Second, when Limanseto worked for the other firm, he wasn't doing it during a voluntary absence from Ganze. I have already found Ganze proved just the first of the three elements of a *bona fide* termination. For purposes of the H-1B program he remained an employee; no voluntary absence excused Ganze from paying the

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in the United States under Limanseto's F-1 student status through May 15, 2009. Ganze's success on its H-1B petition about 60 days later (on May 9, 2008) that authorized work for three years may have superseded the more circumscribed 12-month period following graduation in which Limanseto, as an F-1 nonimmigrant student, could work in "optional practical training" in a job directly related to taxation, his major area of study. See 73 Fed. Reg. 18,945–18,947 (discussing the "Cap–Gap" for students transitioning from F-1 to H-1B status, and authorizing an extension of F–1 student status for those caught in a "cap-gap" between graduation and the start date of an approved H–1B petition).

[47] Limanseto had a colorable claim to work in F-1 OPT status (that Golden Gate University had sought for him) at Bradford & Co. through the 2009 tax season, work completed before that F-1 OPT status expired. The Secretary of Labor need not settle this fine point of immigration law—whether Limanseto could simultaneously have H-1B and F-1 OPT work status—to dispose of this H-1B complaint. He had H-1B authorization to be present in the U.S. until Ganze's H-1B petition was revoked by USCIS on Sept. 1, 1010. Ganze Ex. 6.

[48] *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 198–200 (1941); *Kawasaki Motors Mfg. Corp. v. NLRB,* 850 F.2d 524, 527 (9th Cir. 1988); *NLRB v. Seligman & Assoc.,* 808 F.2d 1155, 1164-65, 1168 (6th Cir.1986), referring (with citations omitted) to *NLRB v. Westin Hotel,* 758 F.2d 1126, 1129–30 (6th Cir. 1985).

[49] *Johnson v. Roadway Express, Inc.*, ARB Case No. 99-111, ALJ Case No. 1999-STA-00005, slip op. at 13–14 (Mar. 29, 2000) (discussing the deductions taken from the make whole relief available to an employee who suffers whistleblower discrimination and why the employers proof failed); *Timmons v. Franklin Elec. Coop.,* ARB Case No. 97-141, ALJ Case No. 97-SWD-2, slip op. at 10–12 (Dec. 1, 1998) (same).

[50] 8 U.S.C. § 1182(n)(2)(C)(vii)(IV).

required wages and benefits.[51] Limanseto's absence flowed from the attempt at a *bona fide* termination Ganze bungled.

E. Ganze Must Pay the Lawyer's Fee for its H-1B Application

One last violation is involved. An employer who names a foreign worker as the beneficiary in an H-1B petition it files with the United States immigration authorities must pay the related filing and legal fees. These include a fee to submit its Form I-129 "Petition for a Nonimmigrant Worker,"[52] and a fraud detection fee.[53] The employer is forbidden to reduce the worker's net wages by passing those filing fees, or the H-1B legal costs, back to the worker.[54] Limanseto paid the employer's legal fees in March 2008,[55] when he shouldn't have.

Ganze knew the payment of the lawyer's fee was in issue. It offered no documentary proof that it paid any part of the legal fee for its 2008 H-1B petition.

F. Ganze's Offset Claim is Both Unavailable and Unpersuasive

The request for an offset in the amount of $4,993.11 that Ganze raised, claiming Limanseto owes it that much on a promissory note,

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[51] 20 C.F.R. § 655.731(c)(7)(ii).

[52] 8 C.F.R. § 103.7(b)(1) (listing Form I-129 filing fee).

[53] 8 U.S.C. § 1184(c)(9), (12).

[54] 8 U.S.C. § 1182(n)(2)(C)(vi)(II), as well as 20 C.F.R. § 655.731(c)(9)(iii)(C) (forbidding deductions from wages for "attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (*e.g.*, preparation and filing of LCA and H-1B petition)"); 20 C.F.R. § 655.731(c)(10)(i)(C) (categorically excluding the filing fees as permissible elements of liquidated damages); and 20 C.F.R. § 655.731(c)(10)(i) (forbidding direct or indirect recovery of any part of the employer's filing fees from the worker); *see also*, the discussion of 20 C.F.R. § 655.731(c)(10)(ii) at 65 Fed. Reg. 80175 (Dec 20, 2000) and 144 Cong. Rec. S12752 (Oct. 21, 1998)(8 U.S.C. § 1182(n)(2)(C)(iv)(II) "prohibits employers from requiring H-1B workers to reimburse or otherwise compensate employers for the new fee imposed under new [INA] section 214(c)(9), or to accept such reimbursement or compensation.") (statement of Senator Abraham); and 144 Cong. Rec. E2325 (Nov. 12, 1998) ("Congress included this provision to make it very clear that these fees are to be borne by the employer, not passed on to the workers.") (statement of Congressman Smith).

[55] Joint Statement ¶¶ 8–10; Limanseto Ex. 2 at 12–13; Limanseto Ex. 7 at 28–29 (his cancelled checks for $1,500 he paid to the lawyer who prepared Ganze's 2008 (and the 2007) H-1B filings. See also the correspondence from the lawyer at Limanseto Ex. 6 at 27 (stating that the I-129 petition Ganze filed to obtain H-1B status for Limanseto had been granted).

fails.[56] Ganze's liabilities to pay wages and the H-1B application and related legal fees under the H-1B program simply aren't subject to offset here. The Secretary of Labor adjudicates only those aspects of the parties' relationship that arise under the labor condition application and related H-1B visa.[57] Employers can only deduct from wages the items specified in the H-1B program regulations.[58]

The Administrative Review Board recently held that wage deductions to repay a loan the employer had made before the H-1B employment period are impermissible; repayment must be handled in a way that doesn't violate the regulations on permissible deductions.[59] Ganze claims to have loaned Limanseto tuition money in early 2008,[60]

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[56] *See* Ganze Proposed Ex. 9 (purported unsecured promissory note). The applicable evidentiary standard is the broad one administrative proceedings traditionally employ. Neither the Federal Rules of Evidence, nor the evidentiary rules of the Office of Administrative Law Judges (OALJ) published at 29 C.F.R. Part 18, Subpart B, apply. 20 C.F.R. § 655.825(b). Obedient to the evidentiary principles of the Administrative Procedure Act, 5 U.S.C. § 556(d), the applicable regulation says that "any oral or documentary evidence may be received" and "principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive." 20 C.F.R. § 655.825(b). But the OALJ rules of procedure at apply too. 20 C.F.R. § 655.825(a). The Notice of Rescheduled Hearing and Pre-Hearing Order of February 28, 2011 fixed May 23, 2011 as the date for the parties to exchange their exhibit lists and exhibits, something a judge is empowered to schedule by 29 C.F.R. § 18.47(b). Parties were notified that failure to follow the Pre-Hearing Order could lead to exclusion of evidence. Notice of Rescheduled Hearing and Pre-Hearing Order at 3 (cautioning that a "failure to comply with all aspects of this Order subjects the offending party to the exclusion of evidence at the final hearing"). Ganze didn't exchange its proposed exhibit 9 (the purported unsecured promissory note) or 10 (an associated 1099-C) as required, nor did it notify Limanseto before trial of its intention to offer them as exhibits. Objections to both proposed exhibits 9 and 10 were sustained. Tr. at 35–36.

[57] *Vojtisek-Lom v. Clean Air Technologies International, Inc.*, *supra,* slip op. at 16, upholding an ALJ's exclusion of evidence related to a proposed offset "because the Labor Department's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to, the INA's H-1B provisions" (relying on 8 U.S.C. § 1182(n) (1), (2) and 20 C.F.R. §§ 655.705(a)–(b), 655.731, 655.732, 655.845).

[58] *See* 20 C.F.R. § 655.731(c)(9)–(10) (describing "authorized" and "prohibited" deductions).

[59] *Administrator, Wage and Hour Division v. Integrated Informatics, Inc.*, ARB No. 08-127, ALJ No. 2007-LCA-00026, slip op. at 14 (Jan. 31, 2011). Like this case, the employer in *Integrated Informatics* sought to deduct amounts it had loaned to its H-1B employee, and evidenced by a promissory note, from the wages it owed. *Id.* Because that loan agreement was signed more than two weeks before the H-1B status was granted and the associated labor condition application period began, it could not recoup the loan through deductions from the worker's wages. *Id.*

[60] Limanseto Ex. 2 at 11.

although the promissory note it relies on is dated September 8, 2008.[61] The labor condition application and the H-1B visa period that were authorized began October 1, 2008. Any loan made before they became effective is not a matter the Secretary of Labor will consider in determining whether the nonimmigrant worker was paid what was due under her regulations. This loan falls outside the Secretary of Labor's purview.

In the alternative, four reasons lead me to doubt that the excluded promissory note and the debt it purports to evidence are enforceable or genuine. First, the promissory note[62] is facially dubious: created and dated after the termination, it doesn't bear Limanseto's signature.[63] Second, its principal amount is an unusual number ($4,993.11) that appears to represent Ganze's unilateral view of what Limanseto owed as of the date it wanted to fire him, not some amount Lomanseto agreed to borrow and Ganze agreed to lend. Third, emails that Ganze retained in the electronic records of its paperless office that could explain the terms of any underlying transaction weren't offered.[64] Fourth, Ganze issued an IRS form 1099-C to Limanseto for the $4,993.11 in 2008 that covered what Ganze characterized on that form as a "student loan." Ganze represented to the U.S. Treasury Department when it filed the 1099-C on December 15, 2008 that it had cancelled or extinguished Limanseto's alleged liability to it in that amount.[65] Limanseto can't be liable to the Government for income on a forgiven debt and be liable to Ganze to pay the debt. If I had jurisdiction to adjudicate an offset, I would find the proof of indebtedness Ganze offered unpersuasive.

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[61] Ganze Proposed Ex. 9; *see also*, Tr. at 61.

[62] Ganze Ex. 9, the note, was received for identification only, but not into evidence. Tr. 35. The court reporter's indication at Tr. 65 that Ganze Exhibits 9 and 10 were admitted into evidence is an error.

[63] Ganze Ex. 9 for identification; Tr. at 30, 61. The signature of "the party against whom enforcement is sought" is ordinarily required. Cal. Civil Code § 1624(3)(D), (4).

[64] Tr. at 62–63 (the witness for Ganze brought e-mails with her, but they were not offered).

[65] According to the U.S. Dept. of the Treasury's 2008 "Instructions for Forms 1099-A and 1099-C," the form appropriately is filed only "when a debt is cancelled," which means there has been "a cancellation or extinguishment making the debt unenforceable in a receivership, foreclosure, or similar federal or state court proceeding." www.irs.gov/pub/irs-prior/i1099ac--2008.pdf at 3.

G. Interest

Ganze owes pre-judgment and post-judgment interest on all the amounts due.[66] Interest is due on the wages from the time each installment of wages became due. The wage liability begins the first day of the approved H-1B period, October 1, 2008,[67] and wages became payable at the end of the month;[68] the liability ends only on September 21, 2011. Interest is due on the legal fees Ganze had Limanseto pay for its H-1B petition from the time he paid them. The interest rate is that for underpayment of Federal income taxes, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points, compounded and posted quarterly.[69]

The Secretary's regulations prescribe that the Administrator will "oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid . . . as required."[70] The amounts due (including compound interest) must be calculated by the Administrator, and the Administrator must disburse the unpaid wages, reimbursed legal fees, and associated interest to Limanseto.[71] These duties the regulations describe don't depend on whether the Administrator participated as a litigant in the adjudication that fixes the wages and other amounts due.[72] The amounts Ganze must pay are due immediately.[73]

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[66] *Mao, supra*, ARB No. 06-121, ALJ No. 2005-LCA-36, slip op. at 11 (Nov. 26, 2008); *Amtel I, supra*, slip op. at 12–14; *Inkwell v. Am. Info. Tech. Corp.*, ARB No. 04-165, ALJ No. 2004-LCA-13, slip op. at 8 (Sept. 29, 2006); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989- ERA-022, slip op. at 18 (May 17, 2000).

[67] 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(i); *see also* the Department's commentary at 65 Fed. Reg. 80,172 (Dec. 20, 2000). Limanseto already had "entered into employment" with Ganze during his graduate studies. Limanseto Ex. 2 at 10–14.

[68] Hourly wages are payable no "less frequently than monthly." 20 C.F.R. § 655.731(c)(4), (5). Neither party proved whether Ganze pays its employees 12, 24 or 26 times per year.

[69] *Doyle*, *supra*, slip op. at 16–18.

[70] 20 C.F.R. § 655.810(a); see also § 655.810 (f).

[71] See 20 C.F.R. § 655.810(f) (prescribing the Administrator's involvement in the distribution of unpaid wages, and presumably other unpaid amounts too).

[72] *Huang*, *supra,* slip op. at 32 (ALJ Dec. 17, 2008), *aff'd,* ARB No. 09-044, 09-056 (Mar. 31, 2011); *cf.*, 20 C.F.R. § 655.820(b)(1) (reposing discretion in the Administrator about whether to intervene when a H-1B worker is the prosecuting party).

[73] "[B]ack wages, and/or any other remedy(ies) . . . are immediately due for payment . . . upon the decision by an administrative law judge . . . ." 20 C.F.R. § 655.810(f).

Order

The Administrator's decision is reversed. It is ordered that within 30 days:

1. Ganze must pay the Administrator for distribution to Limanseto back wages from October 1, 2008 at the rate of $25.30 per hour for 40 hours per week, payable monthly, for 154.57[74] weeks;
2. Ganze must pay the Administrator for distribution to Limanseto $1,500 to reimburse Limanseto for what he paid in March 2008 as legal fees associated with preparing the labor condition application and form I-129 Petition for a Nonimmigrant Worker;
3. Ganze must pay pre-judgment interest and post-judgment interest on these amounts at the Federal Short Term Interest rate plus 3%, as specified in 26 U.S.C. § 6621, compounded quarterly;[75]
4. the Administrator of the Wage and Hour Division, DOL, must make any calculations necessary and appropriate to effectuate this Decision and Order; and
5. Ganze must pay the amounts computed to the Wage and Hour Division, U.S. Department of Labor, 2800 Cottage Way, Suite W-1836, Sacramento, California 95825-1886.

So Ordered.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

Notice of Appeal Rights:

To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-

[74] *See* Limanseto Ex. 5 at 23. The Labor Condition Application covers a period of two full years (52 weeks each) plus 50.57 weeks. *Id.* Limanseto is listed as a full-time employee, which corresponds to 40 hours per week of work. *Id.*

[75] *Amtel I*, *supra*, slip op. at 12–13 (citing *Doyle*, *supra*).

5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).