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**Issue Date: 19 July 2022**

CASE NO.: 2021-LCA-00015

*In the Matter of:*

ANKIT JAIN,
Prosecuting Party,

v.

HINGE HEALTH, INC.,
Respondent.

## DECISION AND ORDER[1]

This matter arises under the H-1B provisions of the Immigration and Nationality Act ("INA"), as amended, (8 U.S.C. § 1101 *et seq.*), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. Ankit Jain (hereafter "Jain" or "Complainant") filed a timely appeal of the Administrator's Determination issued on June 30, 2021, contending that the Administrator had miscalculated the back wages owed by Hinge Health, Inc. ("Respondent"). Respondent did not file an appeal of the Administrator's Determination. Due to the Covid-19 pandemic, I held a video hearing on December 13, 2021.[2] Jain is the Prosecuting Party and represented himself. Attorneys Jon G. Daryanani and Christopher B. Wilkinson of Perkins Coie LLP represented Respondent.[3]

During the hearing, I admitted into evidence Joint Exhibits ("JX") 1 to 13, Jain Exhibits ("CX") 1 to 5, and Administrative Law Exhibit A ("ALJX-A"). Hearing Transcript ("TR") at 13-15, 19-20; 16-18 (CX 3-5).[4] After the hearing, I admitted into evidence Jain Exhibit 6 (CX 6) over Respondent's objection. Both parties submitted written closing briefs.

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[1] Jain has a second pending matter (OALJ No. 2021-LCA-00018) involving a different employer.
[2] The hearing day was not without glitches. The judge twice lost power, and the hearing eventually finished by telephone.
[3] Jain's Motion to Compel disclosure of the valuation of Respondent's series D and E stock was held in abeyance pending decision on the merits. Jain alleged that that the stock valuation is relevant to potential damages, while Respondent argued it is not relevant because Jain was terminated before this stock options vested. If Complainant prevailed, a separate expedited hearing would be set if necessary. *See* TR at 25-26. Based upon the ruling today, Complainant's motion to compel is denied as moot.
[4] At the outset of the hearing, Jain made a motion to close the hearing to the public, including counsel from a separate, unrelated matter. The request was denied. *See* TR at 6-10.

As discussed below, I find under precedent of the Administrative Review Board ("ARB"), which performs appellate review of cases involving the H-1B provisions of the INA,[5] that Jain's claims are barred, and I deny all requests for relief and dismiss this case. In the alternative, if for some reason the bar is not upheld, then I would have found that Jain is entitled to two additional weeks of backpay for the period February 13, 2021, to February 28, 2021. I would not have found Jain entitled to any stock options.

I. Administrator's Determination

The parties stipulated that in March 2021 the Administrator began to investigate a complaint made by Jain. The date Jain filed the complaint with DOL was not established. On June 30, 2021, the Administrator issued a determination finding two violations related to Jain's claims.[6] *See* JX 6. The determination letter is conclusory and only includes findings of violations. The determination letter does not provide any explanation or reasoning for the amount of backpay determined to be owing, nor does it state which other potential violations the Administrator investigated.

First, the Administrator determined that Respondent had failed to pay wages as required in violation of 20 C.F.R. § 655.731. Determination at 1, 4. The Administrator did not assess any civil money penalties but assessed back wages due to Jain in the amount of $25,974.70, which Respondent had paid in full. Determination at 1, 4. The Administrator said Respondent was responsible for withholding the legally required deductions (e.g., Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities.

Second, the Administrator determined that Respondent failed to either offer equal benefits or equal eligibility for benefits or both in violation of 20 C.F.R. § 655.731(c)(3), noting that the violation included "failure to either offer benefits or equal eligibility for benefits such as 401k, PTO, stock vesting and health/wellness benefits." Determination at 4. The Administrator stated that Respondent had paid $14,975.06 in back wage benefits to Jain. Determination at 4. The Administrator did not assess any civil money penalties but assessed a total amount of $40,949.76 in back wages and benefits due, which Respondent had paid.

On July 14, 2021, this office timely received Jain's appeal of the Administrator's June 30, 2021, decision. Jain alleged that there was no bona fide termination, and that the Administrator miscalculated the wages it ordered Respondent to pay. Jain contends he is owed pay for his nonproductive time because he was not offered airfare to return to his home country of India (or Sri Lanka) and that he was not timely notified of the withdrawal of his Labor Condition Application ("LCA"). Jain sought administrative review of the amount of back wages calculated by the Administrator. Jain also noted that the Administrator erred in not finding additional violations for which he originally filed the complaint, but he did not delineate what those specific allegations were.

[5] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. *See* Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

[6] Administrator's Determination Pursuant to Regulations at 20 C.F.R. Part 655 H-1B Specialty Occupations under the Immigration and Nationality Act (INA) Administered by the Department of Labor (DOL) (Hereafter, "Determination").

II. Contention of the Parties

Jain contends that the DOL awarded back wages through February 13, 2021, but Respondent had not effected a bona fide termination by that date and he is owed back wages through June 2021. Jain asserts that when Respondent terminated him on October 27, 2020, it was not a termination but a notice of his change to unproductive status. Since the violation period extended past the date he would have vested in his stock options, Jain contends he is now entitled to the value of the stock. Jain also contends that the Administrator improperly credited the amount Respondent paid him in severance to his regular wages, so he is owed $33,654.00 that was offset. TR at 21, 46-47. This is in addition to the $40,949.76, in back wages that the Administrator determined Respondent owed. TR at 46-47. Jain contends, as listed in exhibit JX 7, the general release in the settlement agreement is outdated and not enforceable. TR at 27-28.

Respondent argues that it hired Jain on January 6, 2020 and terminated his employment on October 27, 2020. After he was terminated, Jain obtained an attorney and settled claims related to his termination. As part of the settlement, Jain sought accelerated vesting of his stock options and five months of pay through January 2021. To resolve the issues, Respondent and Jain through his attorney negotiated and agreed to settle the claims and Jain executed a general release of all claims related to his employment, both known and unknown claims. As part of the resolution, Jain acknowledged that he was not vested in any stock as of October 27, 2020. In exchange, he received the monetary equivalent of stock and five months of pay. In addition to releasing unknown claims, Jain, working through his attorney, affirmed that he had been paid all amounts owed by Respondent and was owed no further amounts. Respondent asserts that Jain is attempting to "double dip" and obtain money he already received because Respondent did not offer to pay his transportation home. Respondent contends, however, that it was excused from offering to pay transportation because Jain never intended to leave the United States. Moreover, Jain sought and obtained new employment in the U.S. that started on March 1, 2021, for which he would have had to apply and interview before getting hired, further emphasizing that he never intended to leave the U.S. If Respondent had any liability, it ended when Jain started his new employment.

III. Issues for Hearing[7]:

a. Is the Prosecuting Party entitled to additional wages that were not awarded by the Wage and Hour Division?[8]
b. Did the Wage and Hour Division err in the date it calculated the bona fide termination entitling the Prosecuting Party to additional money?
c. Did the Wage and Hour Division err when it credited the Prosecuting Party's severance towards wage payments?
d. Did the Prosecuting Party waive the right to any relief when he signed a settlement agreement with Respondent dated December 8, 2020?

[7] At the hearing, Jain requested to add as an issue that his LCA wasn't timely provided to him by Respondent. Jain said he thought the first time he saw the LCA was when Respondent's counsel emailed it him as part of its initial disclosures for this hearing. The request was denied. *See* TR at 12-13; *See* 20 CFR § 655.806(a); *Puri v. University of Alabama*, ARB No. 10-004 (ARB Nov. 30, 2011); *Watson v. Electronic Data Sys. Corp*., ARB Nos. 04-023, -029, -050 (ARB May 31, 2005).

[8] At the prehearing conference and in the prehearing order, I told Jain that he should calculate a specific amount he thinks he is owed and explain how he arrived at the number.

e. Does the option provision in the employment agreement between the Prosecuting Party and Respondent bar any claim for additional money related to stock?

IV. Stipulated Facts:

The parties agreed-upon stipulated facts which were marked as ALJX-A and admitted at the hearing. The following facts are stipulated by the parties and require no proof:

a. Claimant Ankit Jain ("Jain" or "Claimant") was hired by Respondent Hinge Health, Inc. ("Hinge" or "Respondent" or "Company") as a Senior Software Engineer.
b. On or about January 6, 2020, Jain executed an employment agreement ("Employment Agreement") with Hinge.
c. Jain's annual base salary was $175,000 at the start of his employment with Hinge.
d. Jain was terminated by Hinge on October 27, 2020.
e. Subsequent to October 27, 2020, Jain did not perform any services for Hinge.
f. Jain executed a general release of claims in favor of Hinge on December 8, 2020 ("Release").
g. As part of that Release, Jain received $33,654.00, which is equivalent to ten (10) weeks of Jain's base salary. The severance was paid from December 16, 2020 to February 12, 2021.
h. Jain's Employment Agreement confirms Jain had the option to purchase 4,500 shares of the Company's Common Stock. The Employment Agreement confirms that the first vesting of such options, ability to purchase such options, would vest no earlier than one year after the Effective Date, and at that one-year mark, 12.5% of the options will vest.
i. The Effective Date of the Employment Agreement is January 6, 2020. Jain was terminated on October 27, 2020. As such, Jain was employed by Hinge for less than eleven (11) months.
j. The Employment Agreement further confirms that Jain's options "will cease to vest if the Employee's service as an employee of the Company is terminated for any reason."
k. The Employment Agreement further confirms "Any issuance, offer or sale of the Company's shares (including shares issuable upon exercise of the Option) will be subject to compliance with state and federal securities law and the terms of any underwriting, offering or listing agreements."
l. Jain executed a document entitled "2017 Equity Incentive Plan" ("Equity Incentive Plan") and "Stock Option Agreement" ("Option Agreement"), which confirmed that Jain's exercise price on any option was $1.90.
m. The Option Agreement further confirms in Paragraph 4(b), the following: "Vesting Schedule. The Option shall cease to vest immediately in the event that Optionee ceases to be a Service Provider. "Service Provider" means an Employee, Director or Consultant, per Paragraph 2.25 of the Equity Incentive Agreement.
n. On January 29, 2021, the immigration law firm Higgs, Fletcher and Mack sent a notice of Withdrawal of Jain's H-1B petition.
o. In approximately March of 2021, the U.S. Department of Labor began investigating a claim for Jain's back wages.
p. On June 30, 2021, the U.S. DOL issued a finding that $40,949.76 was owed in

back wages to Jain, which included a failure to offer airfare.

q. Jain received payment via check of $40,949.76 from Hinge and cashed the check.
r. On or about July 14, 2021, Jain appealed the decision of the DOL.
s. Jain has not left the United States since his termination of employment with Hinge on October 20, 2020.
t. Jain obtained subsequent employment in the United States in March 2021.

The stipulated facts are consistent with the evidence in the record and are accepted as conclusively proved for all purposes in this matter.

V. Additional Finding of Facts

Complainant

Jain has resided in the United States since 2009, when he moved here for higher education, and he had remained in the United States ever since on a valid visa. TR at 51-52. During that time, he has worked for at least eight companies, and worked for a company named ForeThought just prior to working at Respondent. TR at 51-52. Each time he found new work, the new employer extended his visa and his ability to stay in the United States. TR at 30-31. Prior to working at ForeThought, in 2018 and 2019, Jain worked at Metromile and was terminated from that position. TR at 52.

On November 12, 2020, attorney Joong Im sent a letter to Respondent seeking to resolve issues with Jain's termination. TR at 43-44; CX 4. Mr. Im's letter stated that his office had "been retained by Ankit Jain ("Jain") to represent him with respect to all matters arising out of his employment with Hinge Health ("Company")." CX 4. Jain claimed the attorney did not represent him, but Jain had asked the attorney to send the letter on his behalf because "a person with authority really helps in proper communication." TR at 44. Jain said that Mr. Im wrote a demand letter on his behalf, but was not representing him, and was only to provide a demand letter. TR at 56-57; JX 4. Even though the demand letter states that he would have been owed stock options as of January 2021, had he not been terminated, Jain contends that was "the language of the lawyer and doesn't really represent" Jain's thoughts, and it was only a demand letter. TR at 57-59.

Jain testified, "So, I think my main goal was to get someone and to probably settle the claim of wrongful termination under California State Law, to basically like, you know, they had violated all -- most of the laws related to medical leave and disability, and that was something that explicitly we were trying to settle on the goals. Those were things that we were aware of during that time." TR at 46. Jain claimed to have been in a very vulnerable mental state when the letter was sent and did not agree that he understood what his lawyer communicated. TR at 57.

Jain signed the severance agreement that was negotiated by Mr. Im, but Jain said "Mr. Im was just, I think his main primary thing was to make sure that, you know, like I get proper health coverage." TR at 59; JX 7. Jain doesn't believe his attorney looked at the agreement but the attorney was on the email chain and forwarded the agreement to Jain. TR at 59. Jain did not have any changes to the severance agreement but did ask Mr. Im to get Cobra coverage. TR at 59-60. Mr. Im then reached out to Respondent and had that added to the agreement. TR at 60. Jain signed the severance agreement with a general release on December 8, 2020. TR at 61; JX 7.

After Respondent terminated him in October 2020, Jain said, "I think during this time my main goal was to not find a job or not travel back, but to save my immigration status and somehow not create any immigration loss." TR at 31. Jain then said that he was, "like was working on trying to secure tickets, trying to find a way to get back to India, safely, because I wasn't vaccinated, right. Also, I was looking into other options as to like going to Sri Lanka, I had actually made multiple calls to them to see how Sri Lanka, because that was like a neighboring country with India, which was still allowing, you know, people from India to be, you know, to go there."[9] TR at 31-32. Jain said he made "a lot of attempt[s] to actually like travel back to India, right, because of COVID, you know, there were multiple things that are going on. My main purpose was not to break immigration status, not to be out of status or break any immigration law, which could be by any means." TR at 67.

On January 30, 2021, Mr. Im, who had acted as Jain's attorney during the settlement agreement and release, sent an email to Zane Bryant, an attorney for Respondent, stating that he had "been retained by Ankit Jain" regarding the H-1B visa application. CX 3. Mr. Im wrote that, "The information is by [sic] the Employee's new employer." CX 3. Jain, however, said he consulted an attorney who helped him file a complaint against Respondent for not providing transportation. He said this occurred when he was not employed and needed transportation back home. TR at 32. According to Jain, Mr. Im was only a friend and he did not hire him. TR at 41-43; CX 3. Jain said he was frantic and terrified to get information about his visa status and Mr. Im helped him get information from Respondent. TR at 43. Jain sent a separate email to Zane Bryant, on January 31, 2021, seeking a copy of the U.S. Citizenship and Immigration Services ("USCIS")[10] withdrawal notice and his transportation expenses. CX 3. The email was copied to Joong Im and Sutha Mogun. CX 3.

Referring to obtaining information about traveling to India or Sri Lanka, Jain alleged that this all happened before he thought of filing a complaint with WHD. TR at 31-32; *see* CX 6. Jain said he requested transportation from Respondent "while I was doing that, which was ignored" and he didn't receive a response. TR at 32. According to Jain, while the DOL investigation was ongoing he was able to correct his immigration status and extend his stay in the United States. TR at 32-33.

Jain said he "managed to find a job" and "probably got an offer after I filed a complaint, right, and just really quick I would say." TR at 34. Jain said the new employer was able to correct his immigration status and notify USCIS "about things that were not under [his] control." TR at 34. Jain said he started at the new employer, who he called Employer X out of fear of retaliation, around the first of March 2021 and was still employed there. TR at 35-36.

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[9] In his closing brief at pages 7-8, Jain expanded with what appears to be new, unsworn testimony: The phone calls presented in exhibits show the calls they made to hotels and immigrations authorities. These phone numbers are public numbers and a quick google search will show that the numbers are general reception numbers to various hotels. Sri Lanka required visitors to quarantine in hotels for 2 weeks and had a quarantine bubble in place for visitors. Jain had three active phone numbers with AT&T, two had area code 510 and one had area code 415, which he kept rotating due to security and privacy concerns. The phone numbers are redacted for the same reason. Jain wrote that some calls presented in the evidence were made at 2:00 AM Sri Lanka time and that hotel front desks are usually open at that time. Also, people who want to visit the USA call the US embassy and not the Sri Lankan immigration authorities which issues visas for Sri Lanka. TR at 8-10. Jain had ample time to offer this information during the hearing, and in fact testified about attempting to go to a Sri Lanka. I found it suspect that he included this new information for the first time in his closing brief and gave it no weight.

[10] The Immigration and Naturalization Service (INS) is now the "U.S. Citizenship and Immigration Services" or "USCIS," which is located within the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, *Pub. L. No. 107-296*, *116 Stat. 2135*, 2194-96 (Nov. 25, 2002); *Limanseto v. Ganze Co.*, ARB No. 11-068, slip at 2, N.5 (ARB Jun. 6, 2013).

Jain contends that the "violations basically ended, you know, in June 2021, when they actually proffered transportation." TR at 68. When he complained to DOL, he didn't have a job, was still trying to get transportation, and "was looking at every single avenue that I could, which I understood during that time, to not break immigration law, which actually included, you know, getting out of the country in a safe and secure way." TR at 68. Jain offered a "screen-shot" of his telephone, which he said shows "my telephone calls to Sri Lanka and other countries during that time . . .." TR at 69. "I'm going to verbally say it, is like, you know, I made calls between, you know, February 4th and 21 February 27th, that's for Sri Lanka and then I made other calls that I made to, you know, USCIS, you know, Model Security, to make sure that, you know, I am not violating any of my status. And I was -- yeah, that's it." TR at 69-71.

Jain provided a copy of his final pay stub at Respondent to show that his reimbursements were taxed. TR at 36; CX 1. Jain provided a variety of other receipts for amounts he alleged Respondent owed him but had not been reimbursed. TR at 36-41; *see* CX 2. In all, Jain sought a total of $365.20 in reimbursement[11] consisting of $139.32[12] in fitness expenses, and $225.88 in professional development and miscellaneous work expenses.[13]

Jain also included a bill dated February 27, 2021, for $2,250.15 spent at 24-hour fitness, which he says was bulk payment for classes for which he enrolled; he was no longer asking for the amount because it doesn't fit the benefit sheet. TR at 39, 41; CX 1. On cross examination, Jain said he didn't know if the $2,250.15 bill was prepayment for several months to a year of membership, if not longer, but admitted that was what he told the WHD investigator. TR at 62-64; CX 2. When he made the commitment to 24-hour fitness, he had received his job offer "the day before". TR at 64. Jain was not sure when he had interviewed for the job at Employer X, but it was, "probably like, February, first week or something." TR at 65.

As part of working at Respondent, Jain signed an employment agreement, and agreed that he was an at will employee. TR at 53-54. He also received a copy of the option agreement and equity incentive plan offered by Respondent, but said he never read it. TR at 61-62; JX 13. According to Respondent's calculations, had the equity agreement vested, Jain would have been entitled to 562 shares at $13.99 per share, totaling $7,862.38. JX 12; *see* JX 13. Jain does not agree that he was terminated on October 20, 2020, but only notified of his unproductive status. TR at 55. Jain said he talked to Respondent about airfare at the end of January 2021, and he consulted an attorney regarding airfare, but did not hire an attorney. TR at 56. He also agreed that in his prior testimony that, at the time of his termination, he asked for airfare and then went to an attorney. TR at 56.

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[11] Jain requested reimbursement for $40.00 towards a January 3, 2021, Fitness SF monthly bill that totaled $79.95, TR at 38, $30.00 for a monthly bill from 24-hour Fitness from February 27, 2021, TR at 41, $30.92 for a yoga mat and knee strap purchased on August 17, 2020, TR at 40, and $38.40 for an "ab roller" purchased on August 16, 2020. TR at 40. Jain said Respondent reimbursed fitness expenses up to $40.00 per month, but the totals could be cumulated over each month. TR at 40. Jain also sought reimbursement for $42.26 for a book purchased for professional development on June 27, 2020, and $19.99 for an audio book purchased on June 26, 2020, for the same reason. TR at 40-41. He also requested reimbursement in the amount of $17.80 for ink cartridges in September 2020, which he was not sure whether it had been reimbursed, TR at 39, $136.13 for a printer purchased on September 19, 2020, and $9.70 for paper purchased on September 28, 2020. TR at 41.

[12] $40.00 for January 2021, $30.00 for February 2021, $40.00 for August 2020, with $29.32 carry over to September 2020.

[13] Jain also included a bill from Basic $606.52, dated December 17, 2020, which he said was a health insurance bill. The amount was reimbursed, and he was not seeking any money. TR at 45-46; CX 5.

Sutha Mogun

Sutha Mogun is an Associate Vice President for the "People Team" at Respondent. TR at 73. Jain started at Respondent when his application for H-1B was received, and he did not wait for approval to begin work. TR at 74. Respondent and Jain entered into an employment agreement on December 21, 2019, which was effective on January 6, 2020. JX 9. Respondent terminated Jain due to issues with coworkers, and it was easier to settle the issues and move on. TR at 74-76. During the negotiation, Jain asked to stay on payroll because he was concerned about his H1B status and wanted to get another job. TR at 76-77. In response to a letter from Jain's attorney, Respondent added items to the severance agreement and Jain signed the release agreement. TR at 75-76. Jain received the payout under the agreement by direct deposit. TR at 75-76.

According to Ms. Mogun, Jain asked to be kept on the payroll because he intended to stay in the U.S., and he wanted to protect his visa status, and "he was pretty adamant about that, yes." TR at 76-77, 78. Jain never said he wanted to go back to India but wanted to be put on a leave of absence or have the severance paid out so it looked to DOL like he was still on their payroll; she assumed he was staying in the U.S. because he wanted to stay on payroll. TR at 78, 85. The equity amount for stock was not included in the severance because Jain did not make it one year. TR at 80. Respondent did not offer him transportation and did not notify USCIS within 48 hours of his signing the settlement agreement. TR at 84.

Other Evidence

On January 4, 2020, Respondent filed a LCA for Nonimmigrant Workers seeking a Senior Software Engineer for the period January 6, 2020, to January 5, 2023. JX 1. Ms. Mogun signed the application. JX 1 at 5. Respondent sent a letter to USCIS dated January 8, 2020, supporting the LCA application and specifically stating that it wanted to hire Jain for temporary, at-will employment and sought an extension to allow Jain to stay in the U.S. an additional three years. JX 2 at 8-9. Respondent notified U.S. Department of Homeland Security that it sought to hire Jain in a letter dated December 26, 2019. JX 3. In addition to the LCA, Respondent and Jain signed an employment agreement, which set forth his wage and included the possibility of stock options after one year of employment. *See* JX 9.

The parties provided copies of Jain's biweekly paystubs during the period of his employment. JX 4. Jain received his last paycheck on October 30, 2020, and did not receive a paystub again until December 16, 2020. JX 4 at 35-36. As of October 30, 2020, Jain's year to date earnings at Respondent were $49,730.44. JX 4 at 35. The severance total paid to Jain was $33,654.00, less withholdings based upon monthly pay of $7,291.67 as determined by DOL. JX 13. Respondent then paid Jain biweekly severance from mid-December 2020 to February 12, 2021. JX 4 at 36-40. Initially, the checks were in the amount of $4,327.03 after withholdings, then on January 15, 2021, the final three checks were for $3,965.78 after withholdings. JX 4 at 36-40. The total amount paid was $32,064.56. JX 13 (last page). Respondent determined and then paid Jain's severance in the amount of $33,654.00 based upon 10 weeks x 40 hours per week at $84.13 per hour. JX 13 at 126 (unnumbered).[14] The parties also included a copy of a Benefit Summary, which stated the cost of the benefits offered by Respondent. JX 5. Jain contended that Respondent withheld inappropriate or incorrect amounts from his pay under the

[14] JX 13 is numbered from page 72 to 125. After page 125, the numbering stopped.

settlement agreement but offered no proof or persuasive explanation; the evidence showed the withholdings were the same as withheld from his from his regular pay before termination.

The parties included a copy of "Confidential Severance and General Release Agreement" "General Release Agreement") signed by Jain on December 8, 2020, and Respondent on December 10, 2020. JX 7. The General Release Agreement states that Jain was terminated effective October 27, 2020. JX 7 at 48. Jain acknowledged that he had "received payment of any and all outstanding wages, accrued, but unused vacation, commissions and bonuses and that he is not owed any further payment or compensation of any type as a result of his rendering services for the Company." JX 7 at 48. Jain received the gross amount of $33,654.00, which was equal to 10 weeks of Jain's base salary and would be paid biweekly. JX 7 at 48. If Jain elected COBRA coverage, then Respondent would reimburse three months of the COBRA premium. JX 7 at 48. Jain agreed that the payments were in addition to anything of value that he was entitled without entering the agreement, and that but for the signed agreement, he would not be entitled to the monies and benefits outlined in the agreement. JX 7 at 49.

The agreement included a General Release at paragraph 3:

> (a) Employee hereby voluntarily, knowingly and willingly releases, acquits and forever discharges the Company (including, without limitation the Company's affiliated entities), including, without limitation, all of their former, current and future agents, managers, employees, officers, directors, shareholders, investors, joint venturers, attorneys, representatives, predecessors, successors, assigns, owners and servants from any and all claims, costs or expenses of any kind or nature whatsoever, whether known or unknown, foreseen or unforeseen, including without limitation, any contract claims or any claims under the Americans with Disabilities Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act, the California Labor Code, the California Constitution, or under state, federal or common law, which against any or all of them Employee ever had, now has or hereinafter may have, up to and including the date of Employee's execution of this Agreement, including, without limitation, those arising out of or in any way related to Employee's employment at Company or the separation of employment from the Company.
>
> (b) It is a condition hereof, and it is Employee's intention in the execution of the General Release in subparagraph 3(a), above, that the same shall be effective as a bar to each and every claim specified above, and in furtherance of this intention, Employee hereby expressly waives any and all rights and benefits conferred upon him by Section 1542 of the California Civil Code which provides:
>
> > A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the Release, which if known by him or her must have materially affected his or her settlement with the debtor.

*See* JX 7 at 49.

The DOL provided a Summary of Unpaid Wages on June 22, 2021, noting that Jain was due back wages in the amount of $40,949.76 for the period November 7, 2020, to February 13, 2021. JX 8. Respondent agreed to pay the amount on June 24, 2021. JX 8. The document does not explain how the DOL calculated the information.

## VI. Analysis and Legal Conclusions

### a. General Principles of the INA H-1B Provisions

The INA permits an employer to hire non-immigrant, H-1B workers in "specialty occupations" to work in the United States for prescribed periods of time in specialized occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. "Specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher in the particular specialty. 8 U.S.C. § 1184(i)(1); 20 C.F.R. § 655.715. An employer seeking to hire an H-1B worker must obtain a labor certification from the Department of Labor ("DOL") by filing a LCA which sets forth the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant for the period of the authorized employment. 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732; *Limanseto v. Ganze Co.*, ARB No. 11-068, slip at 5, (ARB Jun. 6, 2013). By signing and filing the LCA, the employer "attests the statements in the LCA are true and promises to comply with the labor condition statements." 20 C.F.R. §§ 655.730(c)(2), 655.705(c)(1); *see* 20 C.F.R. § 655.805(d).

In an LCA, an employer attests that for the entire "period of authorized employment," including nonproductive time, it will pay the required wage to the H-1B non-immigrant. 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.731(a). Under the INA, if an H-1B worker "is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad." 8 U.S.C. § 1184(c)(5)(A). Neither the statute nor the Department of Homeland Security ("DHS") implementing regulations specify when and how the employer must comply with its obligation to provide the reasonable cost of return transportation, but an employer need not pay H-1B wages for the entire period "if there has been a *bona fide* termination of the employment relationship." 20 C.F.R. § 655.731(c)(7)(ii). "DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 C.F.R. § 214.2(h)(11)) and require the employer to provide the employee with payment for transportation home under certain circumstances (8 C.F.R. § 214.2(h)(4)(iii)(E))." *Id.*

To effect a *bona fide* termination of an H-1B worker, the employer must: (1) notify the worker of the employment termination, (2) notify DHS/USCIS that the employment relationship with the H-1B worker has been terminated, and (3) provide the H-1B employee with payment for transportation home under certain circumstances. *Limanseto v. Ganze Co.*, ARB No. 11-068, slip at 5, (ARB Jun. 6, 2013) citing *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, slip op. at 5 (ARB Mar. 30, 2007) (citations omitted); *see Chettypally v. Premier IT Solutions, Inc.*, ARB No. 2017-0057, Slip op. at 4 (ARB Jan. 21, 2020) (stating requirements of a *bona fide* termination).[15]

[15] The Board has found *bona fide* termination despite the non-payment of transportation costs: *Vinayagam v. Cronous Solutions, Inc.*, ARB No. 15-045, Slip op. at 7-8 (ARB Feb. 14, 2017) (employer proved that the prosecuting party voluntarily chose to remain in the United States, "admittedly without a visa or other legal permission or authority to be in the United States."); *Baiju v. Fifth Avenue Committee*, ARB No. 10-094 (ARB March 30, 2012) (Employer offered to pay but

Respondent "has the burden on the question of whether it had the duty to provide such payment and whether it satisfied that requirement." *Vinayagam v. Cronous Solutions, Inc.*, ARB No. 15-045 (ARB Feb. 14, 2017). Transportation costs are due to the non-immigrant's "last place of foreign residence." 8 C.F.R. § 214.2(h)(iii)(E).

Any interested party desiring review of the Administrator's determination may request a hearing before an administrative law judge ("ALJ"). The ALJ may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator. 20 C.F.R. § 655.820; 20 C.F.R. § 655.840(b). The prosecuting party has the burden of proof at the hearing, and the party who requests a hearing before an ALJ in an LCA case is the prosecuting party. *Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076 (ARB Jul. 29, 2005). The prosecuting party has the burden of providing sufficient evidence to make the necessary calculations. *Batyrbekov v. Barclays Capital*, ARB No. 13-013, slip op. at 16 (ARB Jul. 16, 2014). An H-1B worker who is the prosecuting party in an LCA case may meet his or her initial burden through his or her testimony, and other evidence that he or she performed work without fair compensation; where an employer fails to provide adequate records, the testimony and evidence may be accepted by the finder of fact as a matter of just and reasonable inference. *Jain v. ACI InfoTech, Inc.*, ARB No. 2019-0038 (ARB Oct. 29, 2020).

When "an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid or provided fringe benefits as required." 20 C.F.R. § 655.810(a). In calculating damages, "[t]he back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s)." *Id.*

b. Credibility

The finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw inferences from the evidence, and is not bound to accept the opinion or theory of any witness or advocate. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 290 U.S. 459, 467 (1968); *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 613 (11th Cir. 1990). The fact finder is not bound to believe or disbelieve the entirety of a witness's testimony but may choose to believe only certain portions of the testimony. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991). "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 52 (7th Cir. 1971) *(quoting Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963)). Credible testimony must not only come from a truthful source but "be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it," as well as "meet[] the test of plausibility." *Id.* (internal quotations omitted). The ARB prefers that the judge "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071 (ARB Jul. 2, 2009).

In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while

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nonimmigrant refused payment); *see also Batyrbekov v. Barclays Capital*, ARB No. 13-013 (ARB Jul. 16, 2014) (H-1B employee decided to remain in the United States to begin employment with a different employer).

testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, slip op. at 4 (ARB Jan. 31, 2006).

Only two witnesses testified at hearing, the most consequential of whom was Jain.

i. Sutha Mogun

Sutha Mogun testified on behalf of Respondent. She was involved in both the hiring of Jain and his termination. Her demeanor was appropriate, and she answered the questions in a forthright, believable manner. There were no indications of bias in favor of Respondent or that she was misrepresenting anything that occurred. Her testimony was consistent with other documentary evidence in the record, and her testimony at times was consistent with that of Jain. In portions where Jain and Ms. Mogun might have varied, I believed Ms. Mogun over Jain; she was more believable and her opinions and testimony were more trustworthy—she showed less interest in the outcome of the proceeding and appeared to be recounting her observations and information from her personal knowledge. Mr. Jain tended to hedge his testimony and account of what occurred to the point that it was not believable. Ms. Mogun did not hold back in her testimony and was much more believable. I gave Ms. Mogun's testimony significant weight.

ii. Complainant

I cannot say the same for Jain, who I did not find particularly credible. His testimony seemed contrived at times and skewed towards supporting what he wanted the story to be, at times contrary to the documentary evidence in the record. I did not find him trustworthy or believable, and I did not find him to be a good historian of the events that occurred. Jain frequently couched his testimony with statements such as I think this is what I would say, or I think at that time I was trying to do something, which distracted from his testimony. I accounted for the possibility that witnesses are nervous in hearing, or that he had particular mannerisms, but overall, those reasonable explanations could not account for the discrepancies and logical flow of questioning, and what appeared to be contrived responses. While I did not discount his testimony entirely, it caused me to scrutinize the testimony closely and in light of other information in the record. I was left with the distinct impression that Jain was providing testimony in a manner that favored his position rather than in a manner the was responsive, forthright, and truthful.

There were a number of concerns with his testimony, including whether he hired an attorney or not to assist him with his claim against Respondent. Jain obviously had the help of counsel, who wrote a detailed demand letter on his behalf following his termination wherein the attorney said he represented Jain. That same attorney worked with Jain again in January 2021 and again wrote an email explicitly stating he represented Jain. Even with this information in the record, however, Jain said that in fact he was not represented by the attorney or was only represented by the attorney for piecemeal aspects of his claims against Respondent because it appeared to benefit Jain by saying he did not have an attorney. To the extent there was a conflict between Jain and his attorney, I gave the information provided by the attorney more weight than Jain's testimony. The demand letter written by the attorney was specific and the parties worked from that email to resolve their differences and enter into a settlement agreement. Jain tried to downplay that he resolved his issues with an attorney because he appeared concerned that it might have prevented further monetary recovery. The settlement

agreement addressed and resolved most, if not all, of the points raised by Jain's attorney in the demand letter.

I also found Jain's testimony about whether he found another job (Employer X) to be contrived and not convincing. Jain could not remember when he interviewed for the new job with Employer X or when he started, which he said was around the first of March 2021. He gave accounts of interviewing in early February or mid-February, which did not make sense considering the need to deal with his visa status. Moreover, his recollection was belied by an email sent to Respondent by his attorney at the end of January 2021 that references the need for information on the visa status to assist a new employer. A reasonable inference from that email communication was that in fact Jain had another job already or was well into the hiring process with the new company. I did not believe that Jain was unaware of the timeline of his hiring at the new company.

Jain also offered evidence during and after the hearing about phone calls he allegedly made to Sri Lanka and India about his visa status and whether he would be able to get into one of those countries given the pandemic and the loss of his job. He expanded on the reason for the calls in his closing brief, which I did not give any weight. However, at the time those phone calls were made, the evidence shows that Jain had already interviewed and secured new employment that he started on March 1, 2021. I am not inclined to believe that the heavily redacted phone calls were made to authorities trying to figure out where he could go when it appears that he had already secured employment in the U.S. and that he never intended to leave. Before making those calls, Jain's attorney was seeking information about his visa status to help a new employer. I find that Jain in fact never intended to leave the U.S., though I do tend to believe that he was concerned about his visa status immediately following his termination. I do not believe that the same concern existed in February 2021 and that it is just as likely, if not more so, that the reason for those calls was to tell family and friends that he in fact secured new employment.

On the whole, I did not find Jain to be a trustworthy witness. When there was evidence corroborating what he said, then I viewed it more favorably, but overall, I found his account of what occurred to be biased in his favor and not forthcoming. I gave his testimony little weight.

c. Employer's claims on appeal

Respondent contends that the Administrator's decision should be overturned, and that the relevant evidence should have been more closely considered by the Administrator when it rendered its determination. Jain has been actively employed in the U.S. since 2011, and he never had an intent to return to India. In order to be entitled to stock options, he had to be actively employed for one year and he was not. Jain also seeks to expand his pay-out time period from February to June 2021. Respondent contends that the obligation to pay cannot go on forever and Jain started working at another job in March 2021. *See generally* TR at 22-25. Jain objects to any consideration of Respondent's arguments since it did not appeal the Administrator's determination. Jain argues that Respondent cannot now use his appeal to perfect arguments it should have made in its own appeal. I agree.

Respondent did not appeal the Administrator's determination, only Jain did. Respondent argues that, since Jain appealed, all claims are in play and that it can use Jain's appeal to bootstrap its contentions that it should not have been found in violation by WHD. I decline to consider Respondent's claims. "We adhere to the principle that "'[a] party who neglects to file a cross-appeal may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish

the appealing party's rights thereunder.'" *Batyrbekov v. Barclays Capital,* ARB No. 13-01; *Sueiro Vazquez v. Torregrosa de la Rosa,* 494 F.3d 227, 232 (1st Cir. 2007) (*citing Figueroa v. Rivera,* 147 F.3d 77, 81 (1st Cir. 1998)). Therefore, any claims made by Respondent related to WHD's findings are denied.

d. Settlement Agreement and Release

Respondent contends that Jain entered into a valid and enforceable settlement agreement and release of claims, which extinguished his right to back wages or any other compensation from Respondent. Respondent agreed to pay Jain severance in exchange for a waiver of his claims. Jain had an attorney, who negotiated with Respondent on Jain's behalf, and then Jain signed the settlement agreement and general release on December 8, 2020. Respondent argues that should end this matter, citing *Gupta v. Headstrong,* ARB Case Nos. 15-032, 15-033 (ARB Jan. 26, 2017).

Jain contends that he did not waive all claims, but only claims related to state law, that he cannot waive back wages that DOL might investigate and find, that the general release clause in the agreement used outdated language and is therefore not enforceable, and that his case is distinguishable from *Gupta v. Headstrong*. Jain argues that in *Gupta*, the severance agreement was signed one year after the termination, when the violations had ended. Therefore, in *Gupta*, the LCA claims were known and had been discussed prior to the settlement agreement, whereas here, Jain alleges he was not aware of the LCA claims until after the settlement agreement and release had been signed. Jain argues that the Respondent's violations were continuing and that the violations existed after the signature of the severance agreement. TR at 29.

The settlement agreement entered into by the parties included this clause under General Release:

> Employee hereby voluntarily, knowingly and willingly releases, acquits and forever discharges the Company (including, without limitation the Company's affiliated entities), including, without limitation, all of their former, current and future agents, managers, employees, officers, directors, shareholders, investors, joint venturers, attorneys, representatives, predecessors, successors, assigns, owners and servants from any and all claims, costs or expenses of any kind or nature whatsoever, whether known or unknown, foreseen or unforeseen, including without limitation, any contract claims or any claims under the Americans with Disabilities Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act, the California Labor Code, the California Constitution, or under state, federal or common law, which against any or all of them Employee ever had, now has or hereinafter may have, up to and including the date of Employee's execution of this Agreement, including, without limitation, those arising out of or in any way related to Employee's employment at Company or the separation of employment from the Company.

JX 7 at 49. It also includes a clause stating that, "[Jain] hereby expressly waives any and all rights and benefits conferred upon him by Section 1542 of the California Civil Code" and listed the specific statutory language. JX 7 at 49.

Because the issue of the general release potentially resolves all the issues for hearing, I am addressing that issue first. After reviewing the record and the applicable case law, I find that Jain

waived his claim to back wages in the settlement agreement and general release he signed on December 8, 2020, before he raised a claim at WHD. I find under ARB precedent that Claimant's claims are barred, and I dismiss this case. In the alternative, as discussed below, I would have found that Jain is entitled to two additional weeks of backpay for the period February 13, 2021, to February 28, 2021. I would not have found him entitled to any stock options.

1. Jain released all claims

Respondent terminated Jain on October 27, 2020. There is no dispute that Jain had notice and knowledge of the termination. Jain obtained an attorney and made a demand on Respondent, and, rather than litigate the dispute, Respondent agreed to pay Jain severance for a period of 10 weeks and to also pay him what it explained was the value of stock options that had not yet vested. Respondent paid Claimant as agreed over a period of 10 weeks, with the final payment made on February 13, 2021. In exchange for the payment of the additional wages, Jain waived all claims, known and unknown, related to his employment with Respondent. The waiver was broad but appropriate, and covers the issues raised by Jain in this appeal. Because the general release agreed to by Jain bars all claims, the case is dismissed.

Respondent argued that *Gupta v. Headstrong* ARB Case Nos. 15-032, 15-033 (ARB Jan. 26, 2017), a case under the same H-1B provisions of the INA at issue here, stands for the proposition that the general release and waiver is valid and bars any recovery here. *Gupta* involved an appeal by the complainant following an investigation and determination by WHD that the respondent was liable to him for back wages but had already paid the wages. *Id.* at 2. In *Gupta*, the ARB affirmed a dismissal by an ALJ following hearing finding the settlement agreement included a release of all claims related to Gupta's employment and barred the claim. *Gupta v. Headstrong*, slip op. at 3. The ARB noted that it did not have authority to adjudicate collateral attacks on a facially valid contract and that Gupta had "evoked no statute, regulation, or precedent authorizing" it to do so. *Id.* In a footnote, the ARB doubted whether "Gupta had a right to pursue his claims by seeking a formal hearing", stating "It appears that Gupta waived his right to a hearing and, by extension, any authority we may have to review the settlement agreement, by signing it." *Id.* at 3, n. 4.[16]

Here, both parties addressed *Gupta* during the hearing and argument. In the current matter, Jain makes similar arguments to those made and rejected in *Gupta*. Jain argues that the settlement agreement cited outdated waiver language that should invalidate the agreement or at least make it unenforceable, and attempts to distinguish this matter from *Gupta*, contending that in *Gupta* the INA matters had been known prior to the waiver, whereas here they arose after. Both arguments are not persuasive and are rejected. First, the settlement and release agreement appear to be facially valid. Jain was represented by counsel, and, even if the Section 1542 language was not the most current version, courts have rejected that argument as I do here. *See Segla v. San Diego Unified Sch. Dist.*, 2021 WL 1377007, at *4 (S.D. Cal. Mar. 9, 2021) (rejecting plaintiff's argument that the Section 1542 waiver was invalid because it did not quote the current version of the statute finding "no material difference between the two versions, and Plaintiff offer[ed] none."). In *Segla*, the court noted that "[a] general release that explicitly purports to cover all claims, known or unknown, and waives the provisions of

[16] In *Gupta*, the Administrator asserted in an amicus brief that while "an H-1B employee may file a complaint notwithstanding any release of his claims in a settlement agreement entered into by the employee and his H-1B employer, the employee cannot seek a formal evidentiary hearing because he effectively waived his right to do so in the settlement agreement." *Id.*

California Civil Code Section 1542, is valid and enforceable." *Id.* Jain has not asserted how he was prejudiced by the change in statute or even what the statutory language should be. The material portions of the waiver language align with the current California statute, and I do not find any prejudice to Jain or any reason to find the waiver invalid, if I had any authority to do so.

Second, whether the claim was known before he signed or after, is of no import because he waived known and unknown claims.[17] Similar to what the ARB stated in *Gupta*, Jain's claims that the settlement is ineffective or unenforceable are collateral issues that I do not have authority to address. *Gupta* at 3.

Jain, with the benefit of counsel, negotiated a settlement after Respondent terminated his employment. The settlement agreement included a waiver of known and unknown claims under both state and federal laws. I find no evidence of and no merit to Jain's argument that he was only resolving state issues. The express waiver language mentions state and federal claims. Further, Jain had not vested in his stock options at the time he signed the settlement agreement and I find no evidence establishing that the waiver did not cover those claims as well. The value of the stock was included as a part of the release agreement but was not an admission that Respondent believed he was entitled to the valuation. Even though Respondent had no liability for the options, it agreed to pay Jain the value. For the same reason, Jain's contention that he is owed reimbursement for additional money for gym memberships and professional publications and supplies is also denied. Jain expressly agreed that he was not owed any additional money from Respondent for the time he worked there. As the ARB found in *Gupta*, a complainant can waive claims known and unknown, and I find that is precisely the bargain that Jain made here.

I find that Jain is not entitled to any further recovery from Respondent due to the general release he signed in December 2020. It is arguable whether Jain should have even been able to bring this matter to hearing considering the waiver, but since Respondent did not appeal the Administrator's finding, I do not reach that issue. Jain's requests for relief are denied. The matter is dismissed.

2. Alternative Findings: Bona fide Termination—Jain never intended to leave the U.S.

In the alternative, Jain argues that Respondent had never effected his bona fide termination and therefore Respondent was not absolved of paying his wages until it did so. Jain contends that Respondent never offered to pay transportation back to India, which makes Respondent liable for his ongoing wages until it did so. Respondent counters that it was not liable for transportation because Jain never intended to leave the U.S. and thus it wasn't required to render a bona fide termination. Having reviewed the record, I find that if the settlement agreement did not extinguish Jain's claims, then Respondent complied with the regulations without offering to pay transportation because Jain never intended to leave the United States.

An employer need not pay H-1B wages for the entire period "if there has been a *bona fide* termination of the employment relationship." 20 C.F.R. § 655.731(c)(7)(ii). To effect a *bona fide*

[17] Incidentally, Jain made various arguments about unethical behavior, sharing of his personal information, and generally being bullied and harassed by Respondent and its counsel in this matter as well as the pending case involving Metromile. I find absolutely no evidence to substantiate Jain's claims and find no evidence of any improper conduct by counsel in this matter at all (or in Metromile).

termination of an H-1B worker, the employer must: (1) notify the worker of the employment termination, (2) notify the DHS/USCIS that the employment relationship with the H-1B worker has been terminated, and (3) provide the H-1B employee with payment for transportation home under certain circumstances. *Limanseto v. Ganze Co.*, ARB No. 11-068, slip at 5, (ARB Jun. 6, 2013) citing *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, slip op. at 5 (ARB Mar. 30, 2007) (citations omitted); 20 C.F.R. § 655.731(c)(7). Since I have found that Jain never intended to leave the U.S., Respondent did not have a duty to offer transportation to Jain. *See Vinayagam v. Cronous Solutions, Inc.*, ARB No. 15-045, ALJ No. 2013-LCA-029, slip op. at 7-8 (ARB Feb. 14, 2017). Jain immediately began seeking new employment and appears to have found new employment by the end of January 2021 or by mid-February at the latest. He started work at Employer X on March 1, 2021. There was no testimony that his wage at Employer X was not comparable to his wage at Respondent. Even if Jain had not extinguished all his claims by entering the settlement agreement and general release, his case would still fail because he is not entitled to any additional award of monies, either back pay or stock.

The Administrator concluded its investigation on June 30, 2021, finding that Respondent owed Jain back wages and the cost of the stock options. The Administrator did not explain its determination, but the periods and amounts appear to mirror the settlement agreement and general release signed by the parties. I did not take the settlement agreement as an admission of liability or wrongdoing by either party, but as a good faith resolution of a potential dispute between Jain and Respondent. As part of the settlement agreement, Respondent paid Jain his wage from mid-December 2021 to February 13, 2021, for a total of 10 additional weeks of pay. Jain received his last check on February 13, 2021, and started his new job on March 1, 2021, just two weeks later.

The statutes at issue here are remedial, not punitive, and are designed to ensure that an H-1B worker is able to return home or receives pay until new employment or a return ticket home is received. It is not designed as a windfall for H-1B workers, with unlimited money owed until transportation is offered in circumstances where the worker never intended to return home. The statutes are intended to provide a make whole remedy, not a double recovery. The remedy is not a penalty; the employer loses the benefit of the employee's work but must keep paying wages until it makes a bona fide termination, the employee finds other work, or the LCA expires. Had the claims not been waived, I would have found that Jain had a duty to mitigate his damages, which he did when he found new work effective March 1, 2021.[18]

Jain was made whole by the severance agreement. His wages were paid until he found new work. He received the value of stock options even though he was not contractually entitled to them. Because Jain never intended to the leave the United States, Respondent did not have an obligation to offer him transportation. Respondent expressly terminated Jain on October 27, 2020, and notified USCIS on January 29, 2021, of that termination. That is arguably the date that Respondent's liability would have ended yet it paid Jain through February 13, 2021. Under the applicable regulations, Jain was made whole by the payment of his wages through the date that USCIS was notified. He is entitled to nothing more.

[18] *See Limanseto v. Ganze Co.*, ARB No. 11-068, slip at 5, n.30 (ARB Jun. 6, 2013). In *Limanseto*, the ALJ concluded that Limanseto was not required to mitigate his damages under the H-1B program by seeking alternative employment. I was not persuaded that mitigation is not required. However, the ARB did not reach the mitigation issue because the complainant voluntarily offered to offset his claim for damages by the three-month period where he was employed elsewhere.

Even though Respondent did not offer to pay Jain transportation back to India, on these facts, I would have found that payment of transportation was not necessary. Jain and his attorney communicated at the end of January 2021 with Respondent and discussed transportation and the need for information about USCIS so that Jain could inform a new employer. I find that Jain never intended to leave the United States and always intended to find additional work as he had done multiple times since arriving in the U.S. in 2009. Jain told Ms. Mogun that he intended to stay in the United States while they were negotiating the settlement agreement, and Ms. Mogun described Jain as "adamant" about making it look like he had not left his employment with Respondent. His behavior was consistent with someone who intended to stay in the United States, including having his attorney contact Respondent to find out the status of his visa for a new employer. I find that Jain never intended to leave the U.S.

Jain argues that Respondent had never effected his bona fide termination and therefore it was not absolved of paying his wages until it did so. Jain contends that Respondent never offered to pay transportation back to India, which makes Respondent liable for his ongoing wages until it did so. Since I have found that Jain never intended to leave the U.S., Respondent did not have a duty to offer transportation to Jain. Jain immediately began seeking new employment and appears to have found new employment by the end of January 2021 or by mid-February at the latest. He started work at Employer X on March 1, 2021.

3. Second Alternative Finding

Had Jain not waived all claims, or if Respondent is found to have been required to offer transportation as part of a bona fide termination, on this record, I would have found that Respondent owed wages to Jain only until his first day of work at the new employer on March 1, 2021. The evidence established that Jain received pay as part of the severance with Respondent through February 13, 2021, and but for the waiver, he would have arguably been entitled to wages to February 28, 2021, the day before his new employment started. If for some reason the general release is not held valid as to this claim, then alternatively, I would have ordered Respondent to pay Complainant a total of $7,931.56 in back wages, which equates to two additional weeks of pay from February 14 to February 28, 2021, at the rate $3,965.78 per week.[19] JX 4 at 36-40. Jain offered no other means to evaluate his pay and Respondent provided persuasive evidence of what Jain's wages were. Jain also offered no information about the wage he made at his new position. Jain started a new full-time position on March 1, 2021.

I would not order any additional stock payments. Jain was paid under the settlement agreement for the value of the stock he would have been owed had he vested. It is clear on this record that he did not vest. I find no merit in Jain's argument that even though Respondent terminated his employment that somehow it was not an actual termination but changed his status to unproductive

[19] "Authorized deductions" may lower "the cash wage below the level of the required wage." 20 C.F.R. § 655.731(c). Such deductions must be (1) mandated by law (*e.g.*, income tax); (2) "authorized by a collective bargaining agreement, or [are] reasonable and customary in the occupation and/or area of employment"; or (3) made pursuant to "a voluntary, written authorization by the employee" for the benefit of the employee. 20 C.F.R. § 655.731(c)(9)(i)-(iii). Unauthorized deductions are deemed nonpayment of the required wage, "and in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H-1B and other immigration programs, if willful)." *Id.* § 655.731(c)(11). Here, there is no evidence that the deductions were for any unauthorized reason. I find that Respondent properly withheld the amounts from his pay as required by law. I further find that Jain is not entitled to any reimbursement for excessive or inappropriate withholding. Jain argued that $33,654.00 was withheld, but there was no evidence that the withholding was in error or otherwise inappropriate. Jain's claim for reimbursement is denied.

time. Unproductive status under the H-1B rules does not to prevent employers from terminating difficult employees. The evidence established that Respondent terminated its ties with Jain when it fired him, and there is no evidence that Jain's termination converted his termination into unproductive status employment. There may be arguments about how much longer Respondent owed wages and benefits to Jain, but it did not ever agree or otherwise indicate that it wanted to keep him employed.

ORDER

1. Jain entered into a valid and enforceable waiver of his employment rights. Thus, Jain's requests for relief are denied. The complaint is dismissed.

2. Alternatively, if for some reason the waiver of claims is not upheld, then I would have found that Respondent was not required to effectuate a bona fide termination because Jain never intended to leave the United States, and would have denied all requests for relief.

3. If the waiver is not upheld, and Respondent was required to offer a bona fide termination, then, as a second alternative finding, I would have ordered Respondent to pay Jain an additional $7,931.56 in back wages for the period February 14, 2021, to February 28, 2021. I would not have ordered any additional money for the non-vested stock options.

   SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. Such petition shall be received by the Board within 30 calendar days of the date of the decision and order. The petition shall be served on all parties and on the administrative law judge.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. See 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.

IMPORTANT NOTICE ABOUT FILING APPEALS:
The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.