ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PROSECUTING PARTY,	*	**ARB CASE NO. 15-082**
v.	*	**ALJ CASE NO. 2015-LCA-00010**
E-BUSINESS INTERNATIONAL, INC., RESPONDENT.	*	
SIDDHARTHA MAITY, COMPLAINANT/PROSECUTING PARTY,	*	
v.	*	
E-BUSINESS INTERNATIONAL, INC., RESPONDENT,	*	
and	*	
ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PARTY-IN-INTEREST.	*	

***AMICUS CURIAE* BRIEF OF THE ADMINISTRATOR, WAGE AND HOUR DIVISION**

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ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PROSECUTING PARTY,	**ARB CASE NO. 15-082**
v.	**ALJ CASE NO. 2015-LCA-010**
E-BUSINESS INTERNATIONAL, INC., RESPONDENT.	
SIDDHARTHA MAITY, COMPLAINANT/PROSECUTING PARTY,	
v.	
E-BUSINESS INTERNATIONAL, INC., RESPONDENT,	
and	
ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PARTY-IN-INTEREST.	

***AMICUS CURIAE* BRIEF OF THE ADMINISTRATOR, WAGE AND HOUR DIVISION**

On January 15, 2016, the Administrative Review Board ("ARB") gave notice of its intent to review the Administrative Law Judge's ("ALJ") order in *Maity v. E-Business Int'l, Inc.,* Case No. 2015-LCA-00010 (ALJ Rosen, Mar. 24, 2015), which had granted E-Business International, Inc's ("E-Business") motion to dismiss Siddhartha Maity's appeal of a determination letter issued by the Administrator on January 9, 2015. The ARB identified three questions it would consider on review. Pursuant to 20 C.F.R. 655.820(b)(1), the Administrator ("Administrator") of

the Wage and Hour Division ("WHD") of the Department of Labor ("DOL") submits this *amicus curiae* brief solely with respect to the question whether the ALJ properly dismissed Mr. Maity's claim on the ground that his cashing of E-Business's check for back wages constituted a waiver of his appellate rights.[1]

As discussed below, consistent with the statutory requirement to create a process to receive, investigate, and dispose of complaints by H-1B workers, DOL's implementing regulations entitle Mr. Maity to appeal the determination letter issued by the Administrator. While an H-1B complainant can waive this appeal right, the receipt and acceptance by a complainant from an H-1B employer of an amount the Administrator finds owing in a determination letter does not constitute a waiver. Rather, a finding of waiver is warranted only when there is evidence that the H-1B complainant voluntarily and knowingly elected to forego the right to appeal. Because the ALJ failed to identify a basis for Mr. Maity's waiver of his entitlement to appeal the determination letter other than acceptance of the payment from E-Business, the ALJ erred. Thus, the ARB should remand the matter to the ALJ for further proceedings with an instruction to the ALJ to determine whether Mr. Maity voluntarily and knowingly waived his right to appeal.

ISSUE PRESENTED

Whether the ALJ erred by dismissing Mr. Maity's claim on the ground that Maity's cashing of Respondent's check for back wages constituted a waiver of his appellate rights.

[1] The Administrator understands that the ARB may not reach the question his brief addresses depending on how it disposes of the other questions the ARB posed in its *Order Granting Reconsideration and Establishing Briefing Schedule*.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The H-1B visa program permits the temporary employment of nonimmigrants in specialized occupations in the United States. *See* 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n); 20 C.F.R. Part 655, subparts H and I. In order to employ an H-1B worker, an employer must first submit a Labor Condition Application ("LCA") to the Secretary of Labor. *See* 8 U.S.C. 1182(n)(1). The Immigration and Nationality Act ("INA" or "Act") requires that the employer affirm in the LCA that it will offer wages to the H-1B worker(s) that are at least the greater of "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment." 8 U.S.C. 1182(n)(1)(A).

Congress authorized the Secretary of Labor to "establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an [LCA]." 8 U.S.C. 1182(n)(2)(A). Congress further specified that "any aggrieved person or organization" may file a complaint, and that the "Secretary shall conduct an investigation . . . if there is reasonable cause to believe that such a failure . . . has occurred." *Id*. Consistent with this authorization, WHD's implementing regulations permit any "aggrieved party" to "file a complaint alleging an [H-1B] violation." 20 C.F.R. 655.806(a). If the Administrator conducts an investigation of the complaint, he must "issue a written determination" regarding the complaint. 20 C.F.R. 655.806(b). The determination letter must *inter alia* "inform the interested parties that they may request a hearing pursuant to § 655.820 of this part." 20 C.F.R. 655.815(c)(2). Any interested party, which includes a complainant, may

"request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s)." 20 C.F.R. 655.820(b)(1). When an interested party requests a hearing under 20 C.F.R. 655.820(b)(1), it becomes the "prosecuting party and the employer [becomes] the respondent." *Id*.

The Fair Labor Standards Act ("FLSA") specifically authorizes the Secretary of Labor to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of [the FLSA]." 29 U.S.C. 216(c). It further provides that the "agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have . . . to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages." *Id*. Neither the INA nor DOL's implementing regulations contain a provision by which the Secretary of Labor supervises payment of unpaid wages to an H-1B complainant, or a provision by which an H-1B complainant's acceptance from an employer of payment of unpaid wages results in a waiver of rights.

B. Statement of Facts and Course of Proceedings

The United States Citizenship and Immigration Services ("USCIS") approved Mr. Maity's status as an H-1B employee of E-Business for the period of October 1, 2013 through September 30, 2014. Exhibit 1. On March 6, 2014, Mr. Maity filed a complaint against E-Business with WHD. Exhibit 2. Mr. Maity's complaint alleged that E-Business failed to pay him for time off due to a decision by E-Business, made unlawful deductions from the required wage, and failed to provide fringe benefits equivalent to those provided to U.S. workers. *Id*.

After conducting an investigation of Mr. Maity's complaint, WHD issued a determination letter dated January 9, 2015, which concluded that E-Business failed to pay Mr. Maity $10,085.44 for nonproductive time. Exhibit 3. The determination letter did not find that E-Business made unlawful deductions from the required wage, or failed to provide required fringe benefits. *Id*. The determination letter notified E-Business that it or "any interested party ha[s] the right to request a hearing on this determination," and directed E-Business that the "procedure for filing a request for a hearing is provided in 20 C.F.R. § 655.820." *Id*.

At some time after receipt of the determination letter, E-Business transferred a check to Mr. Maity for $10,085.44. There is no evidence of any written agreement between Mr. Maity and E-Business memorializing the terms under which E-Business provided, and Mr. Maity accepted, the check. Brief in Support of Petition for Review ("Maity Br."), p. 8 ("Even though I received part of the back wage from the company I did not sign any document to consider it as full and final settlement."); Brief of Respondent, E-Business International, Inc., in Opposition to the Complainant's Petition for Review ("Resp. Br."), p. 11 (contending that Mr. Maity's cashing the check alone "constituted a settlement agreement," without any reference to a written agreement). There is no written agreement between Mr. Maity and the Administrator regarding Mr. Maity's acceptance of the check.

On January 21, 2015, Mr. Maity requested an ALJ hearing on the determination. Exhibit 4. Mr. Maity's request contended that the amount of back wages found owing in the determination letter was incorrect. *Id*. It additionally contended that E-Business had unlawfully compelled Mr. Maity to pay a $1,250.00 premium processing fee to USCIS, and that E-Business had failed to provide certain fringe benefits. *Id*. On March 10, 2015, E-Business moved to

dismiss Mr. Maity's action; the ALJ granted the motion to dismiss by order dated March 24, 2015. Resp. Br., Exhibit A, ALJ's *Order Granting Motion to Dismiss* ("D&O"), p. 2. The ALJ concluded that Mr. Maity's acceptance and cashing of the check that E-Business provided effectuated a waiver of Mr. Maity's right to proceed before the ALJ. *Id*. The ALJ subsequently repeated this reasoning in her *Order Denying Complainant's Motion to Reopen Claim*. Resp. Br., Exhibit B ("D&O 2"), p. 2 (noting that "[c]omplainant accepted and cashed the $10,085.55 check from Respondent. As noted in Heavenridge [v. Ace-Tex Corporation, No. 92-75610, 1993 WL 603201 (E.D. Mich. Sept. 3, 1993)], this constituted waiver of his appeal").

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, vests the Board with "all the powers which it would have in making the initial decision." 5 U.S.C. 557(b). The Board's review is accordingly de novo. *See Adm'r v. Am. Truss,* ARB Case No. 05-032, 2007 WL 626711, at *1 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB Case No. 04-100, 2007 WL 352434, at *6 (ARB Jan. 31, 2007), for the proposition that the Board exercises de novo review in INA cases).

ARGUMENT

I. MR. MAITY HAS A RIGHT TO BE A PROSECUTING PARTY IN A HEARING BEFORE THE ALJ

The INA entitles aggrieved H-1B nonimmigrants to file complaints alleging that their H-1B employer violated the Act. *See* 8 U.S.C. 1182(n)(2)(A). The Act requires the Secretary of Labor to establish a process for the receipt, investigation, and disposition of such complaints. *Id*. The process the Secretary of Labor created pursuant to this authorization permits H-1B

complainants to appeal determination letters issued by the Administrator which conclude that an employer has not committed a violation(s) alleged by the complainant. *See* 20 C.F.R. 655.820(b)(1). Thus, consistent with an express statutory authorization to create an H-1B complaint process, DOL permits H-1B complainants to themselves "prosecut[e]" the claims that DOL has investigated, and rejected. *Id*.

Mr. Maity's complaint alleged that E-Business failed to pay him for nonproductive time. *See* Exhibit 2. The Administrator determined that E-Business failed to pay Mr. Maity $10,085.44 for nonproductive time. *See* Exhibit 3. Mr. Maity, however, believes that E-Business "benched" him for the entire period covering February 1, 2014 through September 30, 2014, when his visa expired. *See* Exhibit 4. As Mr. Maity's appeal to the ALJ asserts, he would be entitled to considerably greater monetary relief than the determination letter provides if E-Business benched him for this entire eight-month period. *Id*. (estimating that because the applicable LCA contained a prevailing wage of $60,000, the back wage for the nonproductive eight months would be $40,000). By finding that Mr. Maity is only entitled to $10,085.44 for nonproductive time in the determination letter, the Administrator has effectively concluded, "after investigation, that there is no basis for a finding" that E-Business "has committed violations" entitling Mr. Maity to the greater monetary relief which he is seeking on appeal to the ALJ. *See* 20 C.F.R. 655.820(b)(1). Thus, because the Administrator rejected part of the back wage claim Mr. Maity is seeking, he is entitled to "be the prosecuting party" in a hearing before the ALJ. *Id*.; *see, e.g.*, *Baiju v. Fifth Ave. Comm.,* ARB Case No. 10-094, 2012 WL 1102520, at *6 (ARB Mar. 30, 2012) (reviewing complainant prosecuting party's assertion that back wages

found owing in the determination letter issued by the Administrator did not satisfy the employer's actual back wage obligation to the complainant).

Mr. Maity is additionally entitled to be the prosecuting party in a hearing before the ALJ because the Administrator rejected two other claims contained in his complaint. Mr. Maity's complaint alleged that E-Business failed to provide certain fringe benefits. *See* Exhibit 2. Mr. Maity's complaint also alleged that E-Business unlawfully required Mr. Maity to pay visa application fees. *See* Exhibit 2. The Administrator's determination letter did not find that E-Business had committed these violations, *see* Exhibit 3, and Mr. Maity's request for a hearing restates these alleged violations as matters he wishes to prosecute before the ALJ. *See* Exhibit 4. Because the Administrator did not find merit in these claims, Mr. Maity is entitled to prosecute them, together with his claim for further back wages, in a hearing before the ALJ.[2]

Finally, the fact that E-Business paid the back wage violations found owing in the Administrator's determination letter does not bar Mr. Maity's right to be a prosecuting party before the ALJ. Indeed, even if an employer fully satisfies the back wage violations WHD finds owing in a determination letter, a complainant is still entitled to a hearing before an ALJ to seek additional relief. *See Puri v. UAB, Huntsville*, ARB Case No. 10-004, 2011 WL 6141658, at *2, 9 (ARB Nov. 30, 2011) (an H-1B complainant is entitled to an ALJ hearing to seek monetary relief sought in addition to the back wages found owing in the Administrator's determination

[2] DOL's implementing regulations require E-Business to have offered fringe benefits to Mr. Maity on the same basis and in accordance with the same criteria as E-Business offered them to U.S. workers, *see* 20 C.F.R. 655.731(c)(3), and it can be unlawful for an H-1B employer to compel an H-1B worker to pay certain visa application fees, *see* 20 C.F.R. 655.731(c)(10)(ii). Thus, Mr. Maity has stated claims on which the ALJ could provide relief if the ALJ determined the claims to be meritorious.

letter, which the Administrator had concluded the employer had fully satisfied). Thus, Mr. Maity has the right to prosecute his claim before the ALJ despite E-Business's payment of the back wages the Administrator found owing in the determination letter.

II. THE ALJ ERRED IN RULING THAT MR. MAITY WAIVED HIS RIGHT TO A HEARING WITHOUT MAKING THE PREDICATE FINDING THAT MAITY VOLUNTARILY AND KNOWINGLY WAIVED HIS RIGHT TO APPEAL

Individuals may waive the right to pursue federal employment claims in a settlement agreement. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (assuming that an employee can waive Title VII cause of action as part of a voluntary settlement agreement). However, such a "waiver[] of federal remedial rights . . . [is] not lightly to be inferred." *Pierce v. Atchison Topeka & Santa Fe Railway Co.*, 110 F.3d 431, 438 (7th Cir. 1997); *Torrez v. Pub. Serv. Co. of N.M., Inc.,* 908 F.2d 687, 689 (10th Cir. 1990) (same); *Lyght v. Ford Motor Co.,* 643 F.2d 435, 440 (6th Cir. 1981) (same); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1172 (5th Cir. 1976) (same). Thus, for such a waiver to be effective, "a court [must] determine at the outset that the employee's consent to the settlement [i]s voluntary and knowing." *Gardner-Denver*, 415 U.S. at 52 n.15; *see Pierce*, 110 F.3d at 433-34 (finding, under the totality of the circumstances, that there was no knowing and voluntary waiver of race and age discrimination claims despite *specific written release* "of any and all claims" against employer); *Torrez*, 908 F.2d at 689 (finding, under the totality of the circumstances, a material question of fact as to whether appellant knowingly and voluntarily released his right to pursue employment discrimination claims *in a signed settlement agreement* that released appellee from "any and all claims . . . arising out of or related to my employment"). A decision by the predecessor Wage

Appeals Board ("WAB") is instructive in this regard. In *In re Academy Geotechnical Engineering*, WAB Case No. 93-03, slip op. at 4 (WAB May 26, 1993), the WAB concluded that the ALJ erred in failing to approve a signed agreement settling Davis-Bacon Act claims and, significantly, observed that "enforcement of settlement agreements *knowingly and voluntarily* entered into by the parties is strongly favored." (Emphasis added.)[3] Finally, it is the employer's burden to demonstrate that the employee knowingly and voluntarily consented to waive the right to pursue the employment claim. *See, e.g., Pierce*, 110 F.3d at 438 (because "[k]nowing and voluntary consent is . . . a prerequisite to the effectiveness of waivers of federal antidiscrimination claims . . . the party seeking to enforce a waiver of [employee] rights should bear the burden of proving knowing and voluntary consent").

Here, E-Business asserted, and the ALJ concluded, that Mr. Maity waived his right to assert his H-1B claims in a hearing based solely on acceptance and cashing of a check. *See* D&O, p. 2 ("Respondent argued that Complainant's claim for additional compensation for the same claim was waived by his cashing the check . . . . I agree."). However, neither E-Business's pleading with the ARB, nor the ALJ's decisions, identify a settlement agreement or any other evidence suggesting that Mr. Maity voluntarily and knowingly consented to waive his right to assert employment-based H-1B claims. On the contrary, E-Business argued that Mr. Maity continued to object to the Administrator's findings when he accepted the payment from E-Business. *Id.* ("The Respondent argued that Complainant accepted the payment while continuing to object to the Department of Labor findings."). This suggests that Mr. Maity neither

[3] The Administrator has attached as an Addendum a copy of the *Academy Geotechnical Engineering* decision for the Board's convenience.

voluntarily nor knowingly consented to waive his right to a hearing before the ALJ based on acceptance of the check. It further suggests that E-Business *knew* that Mr. Maity was not voluntarily and knowingly waiving his right to a hearing before the ALJ based on acceptance of the check.[4]

Moreover, *HeavenRidge v. Ace-Tex Corporation*, No. 92-75610, 1993 WL 603201 (E.D. Mich. Sept. 3, 1993), which the ALJ relied on to conclude that Mr. Maity waived his right to a hearing, does not support a finding of waiver here because the unique supervised settlement process of the Fair Labor Standards Act ("FLSA") does not apply to Mr. Maity's H-1B claim. The FLSA authorizes the Secretary of Labor to:

> supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of [the FLSA and states that] the *agreement of any employee to accept such payment shall upon*

[4] A determination letter issued by the Administrator is not a judgment. However, case law addressing whether the payment by a defendant to a plaintiff of the full amount found owing in a judgment precludes a plaintiff from pursuing an appeal contending that the judgment was inadequate is instructive. In that circumstance, "[i]t is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." *U.S. v. Hougham*, 364 U.S. 310, 312 (1960). Rather, a plaintiff is generally "foreclosed from appealing the damages award 'only if the parties mutually intended a final settlement of all the claims in dispute and a termination of the litigation.'" *Gloria v. Valley Grain Prods., Inc.,* 72 F.3d 497, 498-99 (5th Cir. 1996) (finding that appellant exhibited "no manifestation of [an] intent to bring the litigation to a definite conclusion" through mere acceptance from appellee of a check equal in amount to the judgment where, *inter alia*, "the check was delivered without any form of settlement or release being signed or presented to [appellant]") (quoting *McGowan v. King*, Inc., 616 F.2d 745, 747 (5th Cir. 1980)). That E-Business transmitted the check to Mr. Maity knowing that he continued to challenge the determination letter issued by the Administrator strongly indicates that the parties did *not* mutually intend a final settlement of all Mr. Maity's claims and a termination of the administrative proceeding through acceptance, and cashing, of the check. *See generally Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666 (2016) ("We hold today, in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force.").

> *payment in full constitute a waiver* by such employee of any right he may have . . . to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

29 U.S.C. 216(c) (emphasis added). Under section 16(c), Congress has expressly empowered the Secretary of Labor to supervise settlements of FLSA minimum wage and overtime claims, and explicitly mandated that when the Secretary exercises this power, the agreement by an employee to accept a payment shall upon payment in full result in a "waiver" of such claims. *Id*. The *Heavenridge* court was accordingly correct to determine that plaintiff's agreement to accept payment of an amount the Secretary obtained on plaintiff's behalf in an FLSA supervised settlement resulted, upon payment in full, in a waiver of the plaintiff's right to pursue part of his FLSA action, even when the plaintiff did not sign a release.

In contrast, the H-1B provisions of the INA contain no process by which, as a matter of law, a complainant waives his right to seek relief merely by receiving a payment from an employer that equals the amount that the Administrator finds owing. Nor do DOL's regulations implementing the H-1B complaint process that the INA requires contemplate a waiver under such circumstances. Furthermore, neither the INA nor DOL's implementing regulations create a formal role for the Department in supervising settlements between H-1B complainants and employers. Thus, *Heavenridge* is not apposite here and the general rule requiring a showing of voluntary and knowing consent to waive a federal employment claim, rather than the specific waiver rule contained in section 16(c) of the FLSA, applies.

CONCLUSION

The ALJ's failure to determine if Mr. Maity voluntarily or knowingly consented to waive his right to a hearing constituted error. The Board should therefore reverse the ALJ's *Order Granting E-Business's Motion to Dismiss*. While the Administrator is unaware of any record evidence indicating that Mr. Maity knowingly and voluntarily waived his right to a hearing, the Administrator recommends remand to the ALJ to determine, in the first instance, the waiver issue, with an instruction to the ALJ to employ the knowing and voluntary standard described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 20th day of May 2016, a copy of the foregoing *Amicus Curiae Brief of the Administrator, Wage and Hour Division*, was sent by regular mail to:

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