U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ELLEN XIA,

COMPLAINANT,

v.

LINA T. RAMEY & ASSOCIATES, INC.,

RESPONDENT.

ARB CASE NO. 2023-0046

ALJ CASE NO. 2022-LCA-00013
ALJ TIMOTHY J. MCGRATH

DATE: October 7, 2024

Appearances:

For the Complainant:
Ellen Xia; *Pro Se*; Dallas, Texas

For the Respondent:
Andrew J. Broadaway, Esq.; *Cornell Smith Mierl Brutocao Burton*; Austin, Texas

Before THOMPSON and ROLFE, Administrative Appeals Judges

ORDER REVERSING IN PART AND REMANDING IN PART

THOMPSON, Administrative Appeals Judge:

This case arises under the Immigration and Nationality Act (INA) and its implementing regulations, as related to the H-1B visa program.[1] On July 28, 2023, an Administrative Law Judge (ALJ) issued a Decision and Order Modifying the Administrator's Determination (D. & O.) ordering Lina T. Ramey & Associates, Inc. (Respondent) to pay Ellen Xia (Complainant) $78,914.00 in back wages[2] and

[1] 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655, Subparts H and I (2024).

[2] D. & O. at 9.

$3,140.15 in transportation costs,[3] plus interest.[4] Xia appealed the matter to the Administrative Review Board (ARB or Board). We reverse in part and remand in part for further proceedings consistent with this opinion.

BACKGROUND

In October 2019, Respondent hired Xia, a Chinese citizen, to work in the United States as a Design Engineer pursuant to an H-1B visa.[5] Respondent filed a Labor Condition Application (LCA) with the Department of Labor (DOL).[6] The United States Citizenship and Immigration Services (USCIS) approved Xia's H-1B petition for a period of authorized employment from October 3, 2019, through October 2, 2022.[7] According to the LCA, Xia would work out of the Farmers Branch, Texas office and receive a salary of $70,720.00.[8]

On February 24, 2020, Respondent's Senior Project Manager terminated Xia's employment at an in-person meeting for allegedly refusing to complete assigned work tasks.[9] Xia, for her part, claimed that any alleged refusal to work resulted from being asked to do work that was outside of the LCA and because of on-the-job racial and sexual harassment.[10] A letter memorializing the termination was left on Xia's desk.[11] The letter read in relevant part:

> This letter confirms our discussion that your employment with [Respondent] is terminated as of today. As discussed, the reason for your termination is refusal to do work assigned to you.
>
> You will receive your accrued PTO in your final paycheck which you will receive as part of the regular pay period on March 6, 2020 . . . You are also eligible to receive

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3 *Id*. at 10.

4 *Id*.

5 *Id*. at 3.

6 *Id*.

7 *Id*.

8 *Id*.

9 *Id*. Respondent's president signed a sworn declaration that Respondent decided to terminate Complainant's employment on February 20, 2020. *Id.* at 5.

10 *Id*. at 3 n.5.

11 *Id*. at 3. The termination letter's metadata verifies that it was created and last modified on February 20, 2020. *Id.* at 5.

> transportation costs to return abroad. Please notify [Respondent] of your desire to do this by March 1, 2020.[12]

Xia did not open the termination letter, did not take it with her when she left the office, and never returned to work for Respondent.[13] She later applied for unemployment benefits with the Texas Workforce Commission.[14]

Xia e-mailed Respondent on October 27, 2020, requesting payment for her return ticket to China and package delivery fees.[15] Respondent did not respond to Xia's request.[16] Xia left the United States on December 8, 2020.[17]

On April 7, 2021, Respondent notified USCIS it terminated Xia's employment on February 24, 2020.[18] USCIS revoked Xia's H-1B visa on August 20, 2021.[19]

PROCEDURAL HISTORY

Prior to leaving the United States, on November 20, 2020, Xia filed a complaint with the DOL's Wage and Hour Division's (WHD) Austin District Office alleging various H-1B violations.[20] Xia filed another complaint comprised of the same allegations with the Dallas District Office on February 1, 2021.[21]

The WHD investigated Xia's allegations and the Administrator of the WHD (Administrator) determined Respondent failed to establish a bona fide termination because it failed to notify USCIS and pay return transportation expenses.[22] The

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12 *Id*. at 3.

13 *Id*.

14 *Id.* at 5.

15 *Id*. at 3.

16 *Id*.

17 *Id*.

18 *Id*. at 4.

19 *Id*.

20 *Id*.

21 *Id*.

22 *Id*. A bona fide termination occurs when the employer: (1) gives notice of the termination to the worker; (2) gives notice to the Department of Homeland Security (USCIS); and (3) under certain circumstances, provides the non-immigrant with payment for transportation home. *Manoharan v. HCL America, Inc.*, ARB No. 2021-0060, ALJ Nos. 2018-LCA-00029, 2021-LCA-00009, slip op. at 10 (ARB Apr. 14, 2022) (citations omitted); *see* 20 C.F.R. § 655.731(c)(7)(ii).

Administrator found Respondent owed Xia $56,304.00 in back wages, accruing from February 24, 2020 to December 8, 2020 (the date Xia left the United States), and $4,531.41 in travel expenses.[23] The Administrator did not assess civil money penalties.[24]

Xia timely appealed the Administrator's Determination and requested a hearing before the Office of Administrative Law Judges (OALJ).[25] The Administrator and Respondent filed a Joint Motion for Summary Judgment and Entry of Consent Decree in which Respondent agreed to pay the entire amount assessed by the Administrator.[26] Xia opposed this agreement believing she was entitled to additional back wages and fringe benefits.[27] On November 18, 2022, the ALJ issued an Order Denying Summary Decision and Setting Hearing Date. Following this Order, the ALJ rescheduled the hearing several times due to various filings and motions by the parties.[28]

On February 17, 2023, the ALJ named Xia as a Prosecuting Party but required the Administrator to remain a part of the case to substantiate its Determination Letter.[29] Prior to the hearing, Respondent voiced concerns with taking Xia's testimony remotely due to his characterization of a Chinese law, commonly referred to as a blocking statute, that he asserted prohibits Chinese citizens, in effect, from ever testifying in foreign proceedings from mainland China.[30] The ALJ agreed with these concerns[31] and advised Xia that she would need to travel to the United States or a special administrative region of China to testify at the hearing.[32]

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23 D. & O. at 4.

24 *Id*.

25 *Id*. at 2.

26 *Id*.

27 *Id*.

28 *Id*.; Hearing Transcript (Tr.) at 6-8.

29 D. & O. at 2.

30 *Id*.; November 18, 2022 e-mail at 1-2; November 30, 2022 Telephone Conference Transcript at 4-8, 10-11.

31 *See* Order on Four Pending Motions and Scheduling Hearing at 2-3 (ALJ Jan. 24, 2023) (citing *Ji v. Jling Inc.*, No. 15-CV-4194 (SIL), 2019 WL 1441130, at *11 (E.D.N.Y. Mar. 31, 2019) ("[B]y testifying via video link while located in mainland China, Ji violated Article 277 of the Chinese Civil Law.") (other citations omitted).

32 *Id*.

If Xia planned to testify remotely from a special administrative region of China not subject to the specific probation concerning testimony to get around the blocking statute, the ALJ also ordered her to provide the following information: (1) the precise location from which she would be joining remotely; and (2) a certification from a local attorney or official that all applicable legal requirements concerning her testimony had been satisfied, including requirements concerning the administration of an oath to a witness.

Neither the ALJ nor any of the parties provided a legal foundation for granting OALJ the authority to order an unrepresented complainant to hire an attorney or obtain authorization from an unspecified "official" in order to be permitted to testify, however, nor was a legal source provided authorizing the ALJ to enforce his interpretation of Chinese law.

On April 5, 2023, Xia submitted her proposed exhibits and a document titled, "Certification of Compliance." It stated in relevant part:

> The precise location from which I will be joining remotely at 142 Estrada Governador Albano de Oliveira, Taipa, Macau, Macau, via the Microsoft Teams Meeting platform . . . I am writing, to ensure compliance with all legal requirements of the foreign jurisdiction.[33]

On April 6, 2023, the ALJ sua sponte issued an Order Requesting Position of the Administrator stating that Xia's Certification of Compliance was facially deficient and directing the Administrator to provide a position statement on the legality of taking Xia's testimony from Macau.[34] The Administrator responded that based on information received from a senior attorney at the Department of Justice and because Xia failed to comply with the ALJ's certification requirements, Xia should not be allowed to testify remotely while in Macau.[35] The ALJ issued the order despite the fact his own research indicated that the depositions of Chinese nationals are routinely permitted in Macau without objection or reprisal and that parties to litigation often agree to hold depositions in Macau or another special administrative region of China.

On April 12, 2023, the ALJ issued an Order Setting In-Person Hearing. The ALJ held that Xia was unable to participate at the hearing at all because she: (1) submitted a facially deficient certification; (2) failed to seek assistance with providing foreign testimony or make travel plans to testify in the United States; and

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[33] Order Setting In-Person Hearing at 1 (ALJ Apr. 12, 2023).

[34] Order Requesting Position of the Administrator at 1-2 (ALJ Apr. 6, 2023).

[35] The Administrator's Response to Court's April 6, 2023 Order Requesting Position of the Administrator at 1-2 (Apr. 10, 2023).

(3) failed to show good cause justifying her participation remotely.[36] The ALJ scheduled an in-person hearing for May 18, 2023.[37]

Prior to the hearing, the Administrator and Respondent submitted a Joint Prehearing Statement while Xia submitted her own prehearing statement.[38] At the hearing, counsel for the Administrator and Respondent appeared and presented opening arguments and the ALJ admitted evidence into the record. Xia was present as "an observer" via telephone.[39] She was not permitted to provide her own opening statement or respond to the arguments, and she was not allowed to testify to support her claims.

On July 28, 2023, the ALJ issued the D. & O. The ALJ first recognized the two exceptions that end a company's wage paying obligations: when a worker experiences a period of nonproductive status due to conditions unrelated to their employment and when there has been a bona fide termination of the employment relationship.[40] He then rejected the position of the Administrator and Respondent that Respondent's wage paying liability ended the day Xia left the United States, finding "it conflates the two exceptions" when "the regulations present them as two distinct concepts."[41]

He further explained that "if liability ceased when the employee left the country, the requirement that USCIS be notified immediately would be of negligible importance" because there would be "no incentive" to notify USCIS if "liability was cut-off."[42] In support of that position, the ALJ pointed out that Respondent did not notify USCIS until the Administrator informed it of its obligation over one year after Xia's termination and four months after she left the United States. He thus found the wage paying obligation ended the day Respondent notified USCIS about the termination, April 7, 2021.

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[36] Order Setting In-Person Hearing at 1. On April 11, 2023, five days after the deadline, Complainant filed a new Compliance Certificate. In this Compliance Certificate, Complainant requested to testify remotely from Saipan, Northern Mariana Islands and provided a similar statement that she complied with all legal requirements of the foreign jurisdiction. The ALJ denied this Compliance Certificate because he found it "untimely." Order Setting In-Person Hearing at 2 n.3.

[37] In a subsequent conference call, the Administrator and Respondent agreed to conduct the hearing virtually because Xia would not be present in the United States and the ALJ ruled that she could not testify. *See* D. & O. at 2.

[38] D. & O. at 2.

[39] *Id*.

[40] *Id*. at 6.

[41] *Id*.

[42] *Id*.

The ALJ then found Xia's lack of testimony fatal to several of her remaining claims. He held that Xia's green card fraud claim "can be summarily dismissed as there [was] no testimony supporting" her allegations. Without her testimony (among other things), the ALJ also held there was "no evidence" in the record for her claims for fringe benefits, and he lowered the transportation cost the Respondent had agreed to pay by $1,391.27. He thus ordered Respondent to pay Xia $78,914.00 in back wages, accruing from February 25, 2020, through April 7, 2021 (the USCIS notification date), and $3,140.15 in transportation costs, plus interest.[43]

Xia timely filed a Petition for Review of the D. & O. with the Board generally challenging the ALJ's decision and specifically arguing that barring her from testifying at her own hearing violated due process.

Neither the Administrator nor the Respondent filed a cross-appeal arguing the portion of the ALJ's order rejecting their contention Respondent's wage paying obligation ended when she left the country should be modified. Nor has either party argued that position on appeal: Respondent instead contends the D. & O. should be affirmed in its entirety; the Administrator has not appeared before us.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to 20 C.F.R. § 655.845.[44] Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[45] The ARB therefore has plenary power to review an ALJ's factual and legal conclusions de novo.[46]

The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.[47] An ALJ abuses their discretion if they: (1) base the decision on an error

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[43] *Id*. at 10-11.

[44] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[45] 5 U.S.C. § 557(b); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Macks USA, Inc.*, ARB No. 2022-0038, ALJ No. 2017-LCA-00013, slip op. at 7-8 (ARB Feb. 21, 2023).

[46] *Macks USA, Inc.*, ARB No. 2022-0038, slip op. at 8 (citing *Mehra v. W. Va. Univ.*, ARB No. 2021-0056, ALJ No. 2017-LCA-00002, slip op. at 4 (ARB Dec. 21, 2021)).

[47] *Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. Strates Shows, Inc.*, ARB No. 2015-0069, ALJ No. 2014-TNE-00016, slip op. at 3 (ARB Aug. 16, 2017) (citing *Walia v. Veritas Healthcare Sols., LLC*, ARB No. 2014-0002, ALJ No. 2013-LCA-00005, slip op. at 5 (ARB Feb. 27, 2015)).

of law or use the wrong legal standard; (2) base their decision on a clearly erroneous factual finding; or (3) reach a conclusion that, though not necessarily the product of a legal error of a clearly erroneous finding, cannot be located within the range of permissible decisions.[48]

DISCUSSION

1. The ALJ abused his discretion by denying Xia the ability to participate at the hearing without following binding precedent.

The ALJ ostensibly relied on the OALJ Rules of Practice and Procedure to bar Xia's testimony from mainland China and Macau. The relevant regulation he cited, 29 C.F.R. § 18.81(c), states "For good cause and with appropriate safeguards, the judge may permit a party to participate in an open hearing by contemporaneous transmission from a different location."[49]

The ALJ's decision to bar Xia's participation, however, did not actually relate to any technical issue associated with testifying from a foreign location as might be suggested by the text of the regulation. OALJ has for years routinely conducted remote hearings and consistently allowed overseas testimony on the Microsoft Teams platform. The ALJ, in fact, specifically acknowledged "we do a lot of foreign cases [on Teams]" and that "[l]ast week I did two cases, one out of Peru and one out of North Macedonia."[50] He reasoned "the way I see it," Xia therefore would either need to come to the United States for the hearing or testify "via Microsoft Teams from outside of China[.]"[51]

The sole basis for the ALJ's conclusion was his perception that Chinese law categorically prohibits testimony from mainland China and that Xia had failed to satisfy the extra-statutory conditions he had imposed to allow her to testify from Macau. Unfortunately, in making those determinations, he ignored the framework a U.S. tribunal must first follow under binding Supreme Court precedent prior to enforcing a foreign blocking statute in U.S. litigation.

Broadly speaking, a blocking statute is a law in one jurisdiction intended to prevent application in that jurisdiction of a law of a second jurisdiction. They often purport to generally prohibit the transfer of information—including deposition and

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[48] *Petitt v. Delta Air Lines, Inc.*, ARB No. 2019-0087, ALJ No. 2018-AIR-00041, slip op. at 5 (ARB Aug 26, 2020) (quoting *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018)).

[49] 29 C.F.R. § 18.81(c).

[50] February 6, 2023 Telephonic Status Hearing Transcript at 8.

[51] *Id.* at 9-10.

trial testimony—for the purposes of litigation, and they often limit the means of service of process of foreign discovery requests on citizens within a nation's borders to procedures contained in treaties such as the Hague Convention on Service of Process.[52]

Foreign blocking statutes typically are framed in absolute terms. But U.S. courts have been far from absolute regarding their enforcement in U.S. litigation. Counter to the ALJ's determination that the mere existence of a blocking statute rendered Xia unable to participate and testify from China or Macau, the United States Supreme Court in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct for S. Dist. of Iowa* long ago held that "[foreign blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction" to provide testimony even if the testimony "may violate that statute."[53]

The *Aerospatiale* Court established a straightforward procedure that must be followed in deciding whether to enforce a foreign blocking statute or follow U.S. law. Any party seeking enforcement of the blocking statute first bears the burden of demonstrating that the foreign law bars the production of evidence or testimony at issue.[54] "In order to meet that burden, the party resisting discovery must provide the Court with information of sufficient specificity to allow it to determine whether the discovery sought is indeed prohibited by foreign law."[55] If the party resisting discovery meets that initial burden, the court must then determine under the particular circumstances of the case whether to order the production of evidence despite it, with the ultimate burden remaining on the party resisting discovery.[56]

Since *Aerospatiale*, courts have frequently applied a five-factor test to steer that determination.[57] The *Aerospatiale* Court, however, expressly refused to

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[52] *In re Anschuetz & Co.*, 754 F.2d 602, 614 n.29 (5th Cir. 1985).

[53] *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa,* 482 U.S. 522, 544 n.29 (1987) (*Aerospatiale*).

[54] *Wultz v. Bank of China Ltd.*, 942 F. Supp. 2d 452, 460 (S.D.N.Y. 2013) (citing *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 207 (E.D.N.Y. 2007)).

[55] *Wultz*, 942 F. Supp. 2d at 460 (quoting *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993)).

[56] *See, e.g.*, *USCO S.p.A. v. ValuePart, Inc.*, No. 2:14-cv-02590-JPM-tmp, 2015 WL 11120573, at *2 (W.D. Tenn. Feb. 18, 2015) ("A party which seeks the application of the Hague Evidence Convention procedures rather than the Federal Rules of Civil Procedure bears the burden of persuading the trial court of the necessity of proceeding pursuant to the Hague Evidence Convention.") (internal citation omitted).

[57] Most courts consider the following five factors when evaluating whether to order the production of evidence or apply a foreign blocking statute: (1) the importance to the investigation or litigation of the documents or other information requested; (2) the degree of

"articulate specific rules to guide [that] delicate task."[58] Rather, it instructed lower courts to adjudicate conflicts based on their "knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke."[59] While at first blush it may seem counterintuitive, a seemingly overwhelming majority of courts since *Aerospatiale* have since ordered parties (and nonparties) to violate foreign law and produce evidence for use in U.S. litigation—often in more intrusive circumstances than those at issue here.

Courts have, for example, consistently ordered parties who have not initiated the suit to violate blocking statutes.[60] Courts have also held that individuals can waive the application of blocking statutes and service requirements either voluntarily through contract or involuntarily through conduct.[61] And courts have even ordered non-parties to litigation to produce discovery under the threat of sanction in violation of their own country's banking laws.[62]

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specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located. *Aerospatiale*, 482 U.S. at 544 n.28; *see, e.g. Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 314-15 (E.D.N.Y. 2006) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c)) (1987).

58 *Aerospatiale*, 482 U.S. at 546.

59 *Id.*

60 *See, e.g., Munoz v. China Expert Tech., Inc.*, No. 07 Civ. 10531 (AKH), 2011 WL 5346323, at *3 (S.D.N.Y. Nov. 7, 2011) (ordering discovery despite the Chinese blocking statute); *Sofaer Glob. Hedge Fund v. Brightpoint, Inc.*, No. 1:09-CV-01191-TWP-DML, 2010 WL 4701419, at *5 (S.D. Ind. Nov. 12, 2010) (ordering discovery despite a French blocking statute); *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458 (RJS) (THK), 2010 WL 808639, at *8 (S.D.N.Y. Mar. 8, 2010) (ordering discovery despite a Malaysian blocking statute).

61 *See, e.g., Image Linen Servs., Inc. v. Ecolab, Inc.*, No. 5:09-cv-149-Oc-10GRJ, 2011 WL 862226, at *4 (M.D. Fla. Mar. 10, 2011) (potential trial witness agreed to "waive the formalities of the Hague Convention."); *Boss Mfg. Co. v. Hugo Boss AG*, No. 97 Civ. 8495 (SHS) (MHD), 1999 WL 20828, at *1 (S.D.N.Y. Jan. 13, 1999) ("[D]efendant reports that the witness will waive the applicability of the Hague Convention[.]"); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 918-19 (S.D.N.Y. 1994) (defendant waived right to protection from discovery requests through its conduct).

62 *See, e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1478-79 (9th Cir. 1992) (affirming order of production notwithstanding Chinese secrecy laws); *Motorola Credit Corp. v. Uzan*, 73 F.Supp.3d 397, 403 (S.D.N.Y. 2014) (ordering banks in France, the United Arab Emirates, and Jordan to produce documents in violation of their secrecy laws); *Brit. Int'l Ins. Co. v. Seguros La Republica, S.A.*, No. 90 Civ. 2370 (JFK) (FM), 2000 WL 713057, at *10-11 (S.D.N.Y. June 2, 2000) (declining to defer to Mexican bank secrecy laws).

Indeed, one commentator documented that in the first twenty-five years after *Aerospatiale,* U.S. courts considered whether to prospectively order (rather than to simply permit) at least forty-two individual violations of foreign blocking statutes. Courts affirmatively ordered parties to violate the foreign country's law in thirty-seven of those instances.[63] In each, the relevant foreign blocking provided for both civil and criminal penalties.[64]

Here, by contrast, OALJ need not order Xia to violate Chinese law for her to participate in a hearing on her own claim; she has expressed a willingness to testify from either mainland China or Macau. With this backdrop in mind, two fundamental interests compel us to remand this case to allow her to do so. Courts most frequently have refused to enforce blocking statutes if doing so would: (1) cause no serious foreign state interest to be undermined; and (2) not constitute an undue hardship on litigants.[65] Both factors strongly favor allowing Xia's testimony in this case.

First, following U.S. law instead of the Hague Convention procedures in these circumstances does not undermine any serious Chinese interest. Respondent, the ALJ, and the Administrator have all failed to demonstrate that China has ever prohibited the testimony of a Chinese national seeking compensation under a U.S. statute. Nor have the parties in this case identified any instance where any other nation has enforced a blocking statute against its own citizen's attempt to assert their rights.

Instead, the cases cited by the ALJ rely on Article 277 of the Chinese Civil Procedure Law.[66] Article 277 is a general civil statute broadly designed to protect

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63 M.J. Hoda, *The Aérospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 CALIF 231, 234 (2018) (citing Gary B. Born and Peter B. Rutledge, *International Civil Litigation in American Courts* 972 (5th ed. 2011)).

64 *Id.*

65 *See Sylejmani v. Flour Conops, Ltd.*, BRB No. 2022-0259, ALJ No. 2020-LDA-02274, slip op. at 10 (BRB May 26, 2023) (citing *Linde v. Arab Bank, PLC*, 706 F.3d 92, 114 (2d Cir. 2013) ("The record . . . does not show that defendant or its employees have been prosecuted for the Bank's voluntary production in other cases."); *Chevron Corp. v. Donziger*, 296 F.R.D. 168, 207 (S.D.N.Y. 2013) ("The record reveals that [the objecting entity] has provided [similar] documents and materials throughout the history of this case when such materials were thought helpful . . . Not once has he been prosecuted or subject to a penalty. The absence of any such evidence weighs against a finding that a party faces hardship[.]")).

66 Order on Four Pending Motions and Scheduling Hearing at 2. Article 277 is the predecessor and identical to Article 284. U.S. courts have translated Article 277 as follows:

Chinese citizens from vexatious discovery and from providing information generated within China's borders.[67] Neither concern is implicated here. On the contrary, Xia strongly wishes to testify—and has shown a willingness to go to great measures to do it—in an action she filed under a U.S. statute subject to U.S. jurisdiction covering things that occurred exclusively to her while she was in the United States. As one court has observed, there is a lack of "any evidence that Article 277 has ever been enforced against discovery activities relating to U.S. litigation" in these circumstances.[68]

With good reason. Far from protecting her interests, barring Xia from participating in the hearing turns the purpose of Article 277 on its head by preventing her from securing compensation for harms she allegedly suffered while outside of China, while simultaneously shielding the foreign employer who allegedly harmed her. We conclude from the purpose of Article 277 and China's lack of enforcement of it that China has no real interest in preventing Xia's testimony from mainland China or Macau.[69]

> Request for and to provide judicial assistance shall be made through channels prescribed by international treaties concluded or acceded to by the People's Republic of China; or in the absence of such a treaty, shall be made through diplomatic channels.
>
> A foreign embassy or consulate to the People's Republic of China may serve process on and investigate and collect evidence from its citizens but shall not violate the laws of the People's Republic of China and shall not take compulsory measures.
>
> Except for the circumstances in the preceding paragraph, no foreign authority or individual shall, without permission from the competent authorities of the People's Republic of China, serve process or conduct investigation and collection of evidence within the territory of the People's Republic of China.

Glam and Glitz Nail Design, Inc. v. Igel Beauty, LLC, No. SA CV 20-00088-JVS (DFMx), 2022 WL 17078947, at *1 (C.D. Cal. Sept. 30, 2022).

[67] *Inventus Power v. Shenzhen Ace Battery*, 339 F.R.D. 487, 504 (N.D. Ill. 2021) (citing *TruePosition, Inc. v. LM Ericsson Telephone Co.*, No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012)).

[68] *Id.* at 6 (internal quotation omitted).

[69] The four cases relied on by the ALJ do not change this calculation. China did not enforce its blocking statute in any of them. Rather, in *Jling*, 2019 WL 1441130, at *11, the court struck a deposition that had already taken place in mainland China—without any indication China objected to it—and without balancing the factors mandated by *Aerospatiale*. Similarly, *Glam*, 2022 WL 17078947, relied primarily on *Jling* with very little

[footnote continued on next page]

Second, prohibiting Xia's testimony has created enormous hardship for her. Xia's testimony is fundamental. As the ALJ recognized, she alone witnessed many of the key events in this matter, and he explicitly informed her that "if you want to present your case, you're going to have to testify about certain things that happened because only you have knowledge from your point of view about those things."[70] Similarly, Respondent's counsel remarked "this is a case where the credibility of witnesses is of tantamount importance" and "I think there's some very real substantive due process concerns if we're not allowed to conduct the hearing in person[.]"[71] These warnings were not merely speculative; they materialized when the ALJ summarily denied Xia's green card claim outright based on the lack of testimony to support it.[72]

[footnote continued from previous page]

discussion while at the same time acknowledging that another court applying *Aerospatiale* ordered a deposition to take place in mainland China. Similarly, *Wang v. Hull*, No. C18-1220RSL, 2020 WL 4734930, at *1 (W.D. Wash. June 22, 2020) also ignored *Aerospatiale*, baldly referring to "U.S. caselaw," "Article 277," and "the State Department's Advisory" before summarily ordering a deposition take place in Macau, among other possible places. Not to be undone, *Su v. Sotheby's Inc.*, No. 17-CV-4577 (VEC), 2019 WL 4053917, at *3 (S.D.N.Y. Aug. 28, 2019) refers to the same general State Department advisory, does not mention *Aerospatiale*, and simply concludes "as the record stands today, there is a non-negligible risk that swearing an oath and answering deposition questions, even those posed remotely, could violate Chinese law—an issue that Plaintiffs have failed to address in proposing their alternative." Determining whether something might violate Chinese law, however, is only the first step of the *Aerospatiale* analysis.

Moreover, the State Department website advisory that all of these cases (and the ALJ) rely on merely links China's Declarations and Reservations to the Hague Convention before admitting (in all caps no less) that it "is provided for general information only," and "may not be accurate in a specific case," before just as emphatically concluding "questions involving interpretation of specific foreign laws [therefore] should be addressed to the appropriate foreign authorities or foreign counsel." U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, CHINA JUDICIAL ASSISTANCE INFORMATION, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html (all capitals omitted).

[70] February 6, 2023 Telephonic Status Hearing Transcript at 8.

[71] November 30, 2022 Telephone Conference Transcript at 6.

[72] The critical nature of Xia's testimony weighs heavily in her favor of allowing her to testify under the *Aerospatiale* factors. *See, e.g., Luminati Networks Ltd. v. Teso LT*, No. 2:19-CV-00395-JRG, 2020 WL 6815153, at *1-2 (E.D. Tex. Oct. 28, 2020) (weighing *Aerospatiale* factors, determining no alternative means of securing requested information, and granting requestor's motion to obtain deposition); *Triumph Aerostructures, LLC v. Comau, Inc.*, No. 3:14-cv-2329-L, 2015 WL 5502625, at *5-16 (N.D. Tex. Sept. 18, 2015) (weighing *Aerospatiale* factors, determining no alternative means of securing requested

Moreover, denying Xia's fundamental right to participate in her own hearing flatly contradicts U.S. law. Xia legitimately filed her claim seeking relief under the INA subject to U.S. jurisdiction and U.S. enforcement. Doing so entitled her to have her claim adjudicated in accordance with the Act and its accompanying regulations. That involves providing all parties an opportunity to be heard in a meaningful manner and at a meaningful time, including the ability to participate at hearings and to present their respective cases by submitting evidence on the relevant issues, rebuttal evidence, and cross-examining witnesses.[73]

Conversely, allowing her testimony from China creates only an extremely speculative, hypothetical risk for the other litigants (and the ALJ). China has been a signatory to the Hague Convention since 1991 with limitations on discovery from the beginning. No evidence in the record suggests that China has in those thirty-three years ever sanctioned foreigners for taking testimony from mainland China, let alone foreigners who never set foot in the country. Had the ALJ taken Xia's testimony from Macau, which Xia had already agreed to, whatever wholly speculative risk that might exist would have been eliminated entirely, as recognized by the same cases the ALJ relied on (and by the ALJ himself) in proposing Macau as an alternative.[74]

Finally, enforcing blocking statutes in these and similar circumstances unquestionably undermines the enforcement of the INA, given the Act's purpose and the people it is designed to protect. One of the purposes in the enforcement of the Act is to protect American workers' interests by ensuring the benefits and

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documents, and granting in part and denying in part requestor's motion to obtain documents from non-party); *Linde*, 463 F. Supp. 2d at 315 (weighing *Aerospatiale* factors and determining "the discovery sought here is essential to the proof of plaintiffs' case. Without it, the plaintiffs cannot prove the defendant's involvement in and knowledge of the financial transactions that are the basis of the plaintiffs' theory of liability."), *aff'd*, 706 F.3d 92 (2d. Cir. 2017); *Strauss*, 249 F.R.D. at 441-43, 456 (weighing *Aerospatiale* factors, determining discovery sought is vital to the litigation of plaintiffs' claims and no other means exist to obtain discovery, and ordering production of bank records and documents relating to bank customer).

[73] *See* 20 C.F.R. § 655.825; 29 C.F.R. §§ 18.21(a), 18.81(c); *see also Matthews v. Eldridge*, 424 U.S. 319, 349 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

[74] Order on Four Pending Motions and Scheduling Hearing at 2; *see also Inventus Power*, 339 F.R.D. at 506-07 (finding that depositions can lawfully proceed in Macau and permitting them to take place there); *Wang*, 2020 WL 4734930, at *1 (authorizing remote testimony from a place like Macau); *Dagen v. CFC Grp. Holdings Ltd.*, No. 00 Civ. 5682, 2003 WL 22533425, at *2 (S.D.N.Y. Nov. 7, 2003) (permitting testimony by telephone of witnesses based in Hong Kong); *Homedics-USA, Inc. v. Yejen Indus., Ltd.*, No. 05-70102, 2007 WL 9700635, at *2 (E.D. Mich. June 15, 2007) (noting "that telephonic depositions are permissible in Hong Kong, as they are in the United States.").

protections provided to U.S. workers are extended to similarly-situated alien workers to prevent a race to the bottom in the relevant labor market.[75] U.S. Courts have long recognized U.S. interests in enforcing U.S. law present a high bar for foreign blocking statutes to overcome.[76]

We thus hold that by not applying *Aerospatiale* before barring Xia's testimony, the ALJ abused his discretion, and that *Aerospatiale* further favors enforcing U.S. law rather than going through Hague Conventions process to arrange her testimony from mainland China. Because the ALJ's error was not harmless, we need not weigh whether it rises to the level of a due process violation as Xia claims.[77] Moreover, even if we did not view this as a pure error of law and instead viewed it as a mixed question of law and fact, we would still come to the same conclusion under our plenary standard of review.[78]

We therefore vacate the ALJ's findings concerning Xia's green card fraud claim and requests for fringe benefits and reasonable transportation costs. The ALJ is directed upon remand to take such further actions as necessary including allowing her testimony from Macau or another agreed upon location without the ALJ's conditions and certifications.[79] Following the remote hearing, and in light of Xia's testimony, the ALJ shall reassess Xia's green card fraud claim and requests for fringe benefits and reasonable transportation costs.[80]

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75 *See* 20 C.F.R. § 655.0(a)(3).

76 *See, e.g., Reino De Espana v. Am. Bureau of Shipping*, No. 03 CIV 3573 LTSRLE, 2005 WL 1813017, at *3-4 (S.D.N.Y. Aug. 1, 2005) (ordering discovery over government of Spain's objection and finding that under *Aerospatiale* "a privilege that is asserted pursuant to foreign law does not apply in this forum of its own force" and that the United States has a "substantial interest in fully and fairly adjudicating matters before its courts.") (internal citations and quotation omitted).

77 *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (an error is not harmless if it could have made a difference in the outcome of an issue).

78 *Macks USA, Inc.*, ARB No. 2022-0038, slip op. at 8 (citing *Mehra*, ARB No. 2021-0056, slip op. at 4).

79 We reiterate that Xia is not limited to providing testimony from Macau but specifically mention it here because she had previously agreed to do so. If Xia is no longer able to travel to Macau, the ALJ shall work with Xia to find a suitable location consistent with this decision.

80 *See, e.g., Cabinets To Go, LLC v. Qingdao Haiyan Real Est. Grp., LLC*, No. 3:21-civ-00711, 2023 WL 3922640, at *6 (M.D. Tenn. May 30, 2023) (holding under *Aerospatiale* that the FRCP rather than Hague Convention applied to Chinese nationals in China *opposed to discovery* and ordering they come to the United States for depositions despite the risk of civil and criminal penalties because "speculative interests" in "'potentially' violating a Chinese law[] do not outweigh the interests of the United States[.]") (emphasis added).

2. The ALJ erred in determining that Respondent effected a bona fide termination.

An employer seeking to hire a temporary worker under the H-1B program must commit to paying the prospective employee wages for the length of the LCA.[81] The regulations provide two exceptions to an employer's wage-paying obligation. The first exception occurs when an H-1B worker "experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from [their] duties at [their] voluntary request and convenience."[82] The second exception—at issue in the present appeal—applies when there has been a "bona fide termination of the employment relationship."[83]

The applicable regulation provides:

> Payment need not be made if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled . . ., and require the employer to provide the employee with payment for transportation home under certain circumstances.[84]

The Board has held that a bona fide termination occurs when the employer: (1) gives notice of the termination to the worker; (2) gives notice to the Department of Homeland Security (USCIS); and (3) under certain circumstances, provides the non-immigrant with payment for transportation home.[85] If an employer discharges the employee but does not make a bona fide termination, "its obligation to pay [the employee] the 'actual wage' continue[s] until the expiration of [the employee's] authorized period of employment."[86]

In the present case, the ALJ determined that Respondent effected a bona fide termination on April 7, 2021, and he extended its wage paying obligation through that date under the second exception, rejecting the position of the Respondent and

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81 20 C.F.R. §§ 655.731(c)(1), (c)(7)(i).

82 *Id*. at § 655.731(c)(7)(ii).

83 *Id*.

84 *Id*.

85 *Manoharan*, ARB No. 2021-0060, slip op. at 10 (citations omitted); *see* 20 C.F.R. § 655.731(c)(7)(ii).

86 *Manoharan*, ARB No. 2021-0060, slip op. at 12 (citing *Mao v. Nasser Eng'g & Computing Servs.*, ARB No. 2006-0121, ALJ No. 2005-LCA-00036, slip op. at 10 (ARB Nov. 26, 2008)).

the Administrator that the wage paying obligation ended when Xia left the country under the first exception.[87] As an initial matter, we agree entirely with the ALJ's conclusion that the previous position of the Respondent and the Administrator conflates the two exceptions and we affirm it on the merits and because it is unchallenged on appeal.

On appeal, Xia argues Respondent failed to satisfy the three mandatory elements to effect a valid bona fide termination.[88] Specifically, Xia claims that Respondent: (1) provided no credible proof it notified her of the termination in February 2020; (2) failed to notify USCIS until April 2021; and (3) never paid for her transportation back to China.[89]

Respondent met the first two requirements. Respondent notified Xia it terminated her employment during an in-person meeting on February 24, 2020, and the termination was memorialized by a letter left on her desk that same day.[90] The record contains: (1) a sworn declaration from Respondent's president that it decided to terminate on February 20, 2020; (2) the February 24, 2020 termination letter; and (3) the termination letter's metadata, which verifies that the document was created and last modified on February 20, 2020.[91] Additionally, Xia's actions following February 24 indicate that she received notice she was no longer employed by Respondent. Xia never returned to work at Respondent's office and later, applied for unemployment benefits with the Texas Workforce Commission.[92]

Regarding the second requirement, Respondent notified USCIS on April 7, 2021, that it had terminated Complainant on February 24, 2020.[93]

As to the third requirement, however, it is undisputed that Respondent did not pay for Xia's return transportation costs to China.[94] Instead, the ALJ found that Respondent satisfied this requirement because "Respondent made a good faith attempt to provide Xia with transportation costs in the February 2020 termination letter."[95] The ALJ reasoned this effort qualified as a "good faith attempt" because:

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87 D. & O. at 8.

88 Opening Brief of Appellant (Comp. Br.) at 18-21.

89 *Id*. at 19-20.

90 D. & O. at 5; Joint Exhibit (JX) 21.

91 D. & O. at 5; JX-28, JX-31.

92 D. & O. at 5; JX-27.

93 D. & O. at 6; JX-9.

94 D. & O. at 7.

95 *Id*.

(1) Xia left the letter on her desk which deprived her of important information that would have allowed Respondent to comply with the regulations; (2) the letter contained an offer to pay for return transportation costs;[96] and (3) "Xia remained in the United States for nine months after she was terminated indicating she did not have the intention to immediately leave[,]" and thus, it was "not reasonable to expect an employer to pay for return transportation costs when it does not know when or whether the employee is leaving the county or what those costs amount to."[97]

We disagree. Although the ALJ correctly identified good faith exceptions to an employer's obligation to pay for travel expenses to effectuate a bona fide termination,[98] we find under our plenary review of the facts and law that Respondent did not establish a good faith exception in this case. Rather, it acted in bad faith by disregarding its regulatory burdens throughout the termination process, including not legitimately offering to pay her travel expenses.[99]

The exceptions to the obligation to pay for travel expenses are contingent on an employer's good faith attempt to comply with the law or an employee's change to another lawful status.[100] The Board has examined an employer's good faith attempt

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[96] *Id.* In his D. & O., the ALJ distinguished the Board's decision in *Jinna v. MPRSoft, Inc.*, because in his view, Respondent provided Complainant with information about how to receive her transportation costs, while in *Jinna*, the employer notified the employee that transportation costs would be provided but did not indicate how to obtain the costs. *Jinna v. MPRSoft, Inc.*, ARB No. 2019-0070, ALJ No. 2018-LCA-00039, slip op. at 8 n.4 (ARB Apr. 15, 2020). As further discussed below, the Board disagrees.

[97] D. & O. at 7.

[98] *Id.*

[99] Although the remaining analysis focuses on an employer's burden to pay for return transportation costs and exceptions to pay for these costs, we note Respondent waited nearly fourteen months to comply with the second regulatory requirement, notifying USCIS of the termination, which further exemplifies Respondent's disregard for its regulatory burdens.

[100] The present case does not involve an employee's change to another lawful status. However, we note the following cases alleviating the employer of its burden to provide for the reasonable transportation costs when an employee changes to another lawful status: *Puri v. Univ. of Ala. Huntsville*, ARB No. 2013-0022, ALJ Nos. 2008-LCA-00038, 2012-LCA-00010 (ARB Sept. 17, 2014) (holding payment of return transportation costs was not necessary to effect a bona fide termination where employee married a United States citizen and employer knew they did not want return transportation to their country of origin); *Batyrbekov v. Barclay's Capital*, ARB No. 2013-0013, ALJ No. 2011-LCA-00025 (ARB July 16, 2014) (holding payment of return transportation costs was not necessary to effect a bona fide termination because H1B employee secured USCIS approval for change of employer).

to comply with the law in *Baiju v. Fifth Ave. Comm.*,[101] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Univ. of Miami*,[102] and *Childs v. DimensionalMechanics, Inc.*[103] In *Baiju* and *Univ. of Miami*, the employer offered to pay return transportation costs to their former employee but the employee did not accept the offer.[104] In *Childs*, the employer made repeated attempts to contact the employee to pay for return transportation costs but never received a response from the employee.[105]

Comparatively, Respondent informed Xia that she was "eligible to receive transportation costs to return abroad" via the termination letter, which it knew Xia did not open and left on her desk.[106] And even if she had read it, it did not satisfy Respondent's obligation to pay her transportation costs.

First, the termination letter only notified Xia that she could receive transportation costs, which were contingent on Xia's response. At no time did Respondent produce an actual check or airplane ticket that Xia could have accepted or denied. Nor did Respondent simply say if she did not reply in the window it provided, reasonable return costs would be included in her final check. Rather, counter to the ALJ, we find the language in the termination letter—and the failure to pay transportation costs—analogous to the situation in *Jinna v. MPRSoft, Inc.* There, an employer e-mailed its employee stating that "H1B will be terminated and fligh [sic] back tickets will be provided with effective date of 2/7/2017."[107] The Board noted that "stating return flights 'will be provided' does not constitute proof of actual payment of reasonable transportation cost for [the employee's] return to his home country.'"[108]

So too here. In both scenarios, the employers only notified the employees that they were eligible for return transportation costs or would receive transportation tickets; there were no formal offers made to pay for return transportation costs,

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101 *Baiju v. Fifth Ave. Comm.*, ARB No. 2010-0094, ALJ No. 2009-LCA-00045 (ARB Mar. 30, 2012).

102 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Univ. of Miami*, ARB Nos. 2010-0090, -0093, ALJ No. 2009-LCA-00026 (ARB Dec. 20, 2011).

103 *Childs v. DimensionalMechanics, Inc.*, ARB No. 2021-0001, ALJ No. 2017-LCA-00008 (ARB Sept. 30, 2021).

104 *Baiju*, ARB No. 2010-0094, slip op. at 9; *Univ. of Miami*, ARB Nos. 2010-0090, -0093, slip op. at 9 ("University offered return transportation (plus $5,000.00 additional for moving costs) to [the employee].").

105 *Childs*, ARB No. 2021-0001, slip op. at 7.

106 D. & O. at 3.

107 *Jinna v. MPRSoft, Inc.*, ALJ No. 2018-LCA-00039, slip op. at 14 (ALJ July 16, 2019).

108 *Jinna*, ARB No. 2019-0070, slip op. at 8 n.4.

actual payments made, or tickets purchased on the employees' behalf as compared to the attempts made in *Baiju*, *Univ. of Miami*, and *Childs*.

Second, the information provided in Complainant's termination letter was conditioned on an arbitrary and unreasonable deadline. The termination letter states, "[y]ou are also eligible to receive transportation costs to return abroad. Please notify [Respondent] of your desire to do this by March 1, 2020."[109] The termination letter was left on Xia's desk on February 24, 2020, six days before the deadline. The regulations do not authorize employers to limit their liability for reasonable costs of return transportation by imposing rapidly expiring deadlines on terminated employees.[110]

Third, the regulatory burden to pay for return transportation costs—or to demonstrate that a good faith effort was made to pay those costs—remains on the employer, it is not transferred to the employee through arbitrary deadlines.[111] Even if Xia remained unaware of Respondent's invalid 6-day deadline by refusing to open her termination letter to avail herself of the fleeting offer to pay her transportation costs, Respondent should have made additional attempts to pay for Xia's return transportation costs to fulfill its regulatory obligation. This is especially true when, as was the case here, Respondent knew that Xia was not in possession of the termination letter since it remained unopened on her desk after her termination.[112]

Finally, Xia requested payment for her return transportation costs on October 27, 2020, long before Respondent notified USCIS in April 2021 of her termination.[113] Yet Respondent did not tender payment or respond to Xia's request in any manner. Rather, it simply ignored her request.[114]

The ALJ created an argument to relieve Respondent of its burden to pay return transportation costs, stating that while he was "not sure why [Respondent] did not tender payment at that time" he could speculate [Respondent] mistakenly believed it was no longer under any obligation to [pay] because Xia did not timely request [payment] pursuant to the termination letter."[115] Again, we disagree.

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109 D. & O. at 3.

110 20 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(4)(iii)(E).

111 *See* 20 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(4)(iii)(E).

112 D. & O. at 3; JX-13, JX-28.

113 JX-27.

114 D. & O. at 3.

115 *Id*. at 7 n.8.

Although Xia waited eight months before requesting reimbursement for transportation costs from Respondent, that fact alone does not excuse an employer's regulatory obligations to pay for such costs. In this case, it is impossible to reasonably argue that Respondent had a good faith belief that it was excused from paying Xia's transportation costs at a time when it had yet to meet its obligation to notify USCIS that Xia had been terminated. And even if Respondent had made such an argument, its failure to notify USCIS meant that at the time Xia requested payment of her return travel costs she was still in possession of a valid visa; thus, any uncertainty about the timing of her departure to China was due to Respondent's own disregard for its regulatory obligations. Under those circumstances, we would not have found an 8-month delay in Xia's return to China sufficient to absolve Respondent of its obligations under the law. Furthermore, if Respondent mistakenly believed it was no longer under any obligation to pay for reasonable transportation costs because Xia delayed in making her request, "ignorance of the law or mistake of law is no defense . . . [and] is deeply rooted in the American legal system."[116]

Respondent was obligated to pay for return transportation costs following Xia's termination. In limited circumstances an employer may demonstrate that it was relieved of that obligation through a showing of either a good faith attempt to make payment or a good faith reason why no payment was owing. Respondent has failed to carry its burden to show that it paid, made a good faith attempt to pay, or demonstrated that it was not obligated to pay for Xia's transportation costs.

Accordingly, we reverse the ALJ's finding that Respondent effectuated a bona fide termination. Thus, Respondent owes Xia back wages from February 24, 2020, through October 2, 2022, the authorized period of employment, plus interest.[117]

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[116] *OFCCP v. WMS Sols.*, ARB No. 2020-0057, ALJ No. 2015-OFC-00009, slip op. at 10 (ARB Mar. 8, 2023) (quoting *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 646 (2015)).

[117] Xia filed a Motion to Request Front Pay and Other Compensations on May 1, 2024. Xia requested front pay "from the date of the trial onward until the court comes to a decision," emotional distress fees, breach of contract damages, back pay, fringe benefits, and legal fees. The Board denies Xia's Motion to Request Front Pay and Other Compensations.

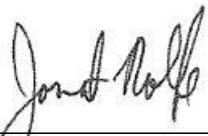
First, the Board is only authorized to provide specific remedies under the INA and its applicable regulations. *See* 20 C.F.R. § 655.815 (noting the Administrator may prescribe any remedies, including the amount of back wages assessed, amount of any civil money penalties assessed, and other remedies assessed). Second, any requests for additional compensation should have been raised to the ALJ. We decline to consider these new requests and arguments six months after the briefing deadline. *See Bagri v. Erection & Welding Contractors, LLC*, ARB No. 2020-0033, ALJ No. 2020-LCA-00003, slip op. at 2 n.5

CONCLUSION

We **REVERSE** the ALJ's finding that Respondent effected a bona fide termination. We **REMAND** the case to the ALJ (1) to enter judgment on back wages for Xia consistent with this decision and (2) for further proceedings to reassess Xia's green card fraud claim, requests for fringe benefits, and reasonable transportation costs.

SO ORDERED.

ANGELA W. THOMPSON
Administrative Appeals Judge



JONATHAN ROLFE
Administrative Appeals Judge

(ARB Jan. 29, 2021) (noting the ARB declines to consider arguments that a party raises for the first time on appeal); *see also Frantz v. Hoselton Auto. Grp.*, ARB Nos. 2021-0050, -0051, -0052, ALJ No. 2018-MAP-00003, slip op. at 10-11 n.72 (ARB Nov. 17, 2023) (noting the ARB does not consider arguments made for the first time in reply briefs). Third, as to the legal fees request, Xia alleges that she paid $3,000.00 for legal consultation fees. No attorney filed a Notice of Appearance before the OALJ or Board on behalf of Xia. Additionally, Xia did not attach a receipt or proof of payment of the alleged legal fees to the motion. Instead, the only exhibit attached to the motion appears to list of other costs incurred, internet phone fees, international roaming charge fees, U.S. visa application fees, U.S. Embassy transportation fees, and Hong Kong and Macao entry permit visa fees.

Given that the Board has remanded this matter to the ALJ, Xia will be entitled to back wages from February 24, 2020, to October 2, 2022, plus interest, and potentially additional compensations (for her green card fraud claim and requests for fringe benefits and reasonable transportation costs) as determined by the ALJ following the remote evidentiary hearing.

CERTIFICATE OF SERVICE

ARB-2023-0046 Ellen Xia v. Lina Ramey (Case No: 2022-LCA-00013)

I certify that the parties below were served this day.

10/07/2024
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