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

In the Matter of: Vimalraj Manoharan, Prosecuting Party, v. HCL America, Inc., Respondent.	ARB Case No.: 2021-0060

ACTING ADMINISTRATOR'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

On December 16, 2021, the Board issued an order requesting that the Acting Administrator ("Administrator") of the Wage and Hour Division ("WHD") file a brief concerning the determination of the end of the period during which an employer must pay the required wage to a worker employed under the H-1B provisions of the Immigration and Nationality Act ("INA"). For the reasons discussed below, the Administrator's position is that an H-1B worker's "period of authorized employment" for purposes of the wage obligation ends on the later of (1) the expiration date on the worker's most recent I-797 petition approval notice issued by the Department of Homeland Security's ("DHS") United States Citizenship and Immigration Services ("USCIS"), or (2) the last date when the worker is permitted by statute, regulation or USCIS to work in H-1B status under a pending petition. Accordingly, the Administrator and the Administrative Law Judge ("ALJ") correctly determined that in this case, the employer's wage liability to the complainant ended on March 1, 2017.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. Required Government Approvals for H-1B Employment

The H-1B program permits nonimmigrants to work temporarily in the United States in specialty occupations. In general, four government approvals are prerequisites to a worker's ability to work in the United States in H-1B status:

(1) **LCA:** The Department of Labor ("DOL") must certify an employer's

Labor Condition Application ("LCA"). 20 C.F.R. § 655.705(a)(1), 8 C.F.R. § 214.2(h)(4)(i)(B)(1). In an LCA, the employer indicates its intent to employ one or more unspecified H-1B workers for a certain position during a specified period of intended employment, and attests that it will adhere to certain labor requirements. 20 C.F.R. § 655.730(c)(4); *see also* Exs. to Resp't's Renewed Mot. for Summ. Decision, Mar. 17, 2021 ("RX") B at 13-18 (employer's first LCA in this case)

(2) **Petition Approval (I-797):** DHS's USCIS must approve an employer's petition to employ a named H-1B worker in accordance with a certified LCA attached to the petition. 20 C.F.R. § 655.705(b); 8 C.F.R. § 214.2(h)(2)(i)(A); *see also* RX B (employer's first petition in this case). When approving a petition, USCIS issues a Form I-797 approval notice specifying the dates the employer may employ the worker. *See* RX D (I-797 for employer's first petition in this case).

(3) **Visa:** The State Department must issue an H-1B worker who is not already in the United States an H-1B visa, which authorizes the worker, during a designated period, to travel to the United States and to request admission at a port of entry. 20 C.F.R. § 655.705(b); *see also* RX F at 3 (photo of complainant's visa).

(4) **Authorized Stay (I-94):** While a visa permits a nonimmigrant to travel to the U.S. and request admission, DHS must authorize the nonimmigrant to enter and stay in the United States for a designated period. 22 C.F.R. § 41.112(a). The period of authorized stay is recorded on a Form I-94. *See* RX G, I. For

nonimmigrants entering the United States, DHS's Customs and Border Protection ("CBP") determines the authorized stay period at a port of entry and stamps it on the nonimmigrant's passport. *See* RX F at 3 (complainant's "ADMITTED" stamps). For nonimmigrants already in the United States whose status, length of stay, or terms of employment are being modified, USCIS attaches an updated I-94 to the new petition approval notice. *See* RX H at 1 (I-797 with attached I-94).

B. The H-1B Wage Requirement

Employers must pay H-1B workers a required wage specified in the LCA "during the period of authorized employment." 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a). This includes a requirement to pay H-1B employees for any "nonproductive time" during this period, except under specified circumstances. 8 U.S.C. § 1182(n)(2)(C)(vii)(I-II); 20 C.F.R. § 655.731(c)(7)(i).

One circumstance in which the required wage need not be paid during the "period of authorized employment" is a "bona fide termination of the employment relationship." 20 C.F.R. § 655.731(c)(7)(ii). The applicable DOL regulation explains that "DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E))." *Id.* When DOL promulgated this regulation, it explained that

it would "not likely consider it to be a bona fide termination" if these requirements are not met. 65 Fed. Reg. 80,110, 80,171 (Dec. 20, 2000). Consistent with this intent, the Board has interpreted 20 C.F.R. § 655.731(c)(7)(ii) as generally requiring three elements for a bona fide termination of an H-1B worker: the employer must give notice of termination to the worker; it must notify USCIS; and it must provide the worker with payment for return transportation under certain circumstances. *See*, *e.g.*, *Adm'r v. ME Glob., Inc.*, No. 16-0087, 2019 WL 3293915, at *12 (ARB Mar. 22, 2019); *Gupta v. Jain Software Consulting, Inc.*, No. 05-008, 2007 WL 1031365, at *4 (ARB Mar. 30, 2007).

II. FACTUAL BACKGROUND

Vimalraj Manoharan, an Indian national, worked for HCL America, Inc., in H-1B status from July 2015 until February 2017. HCL first employed Manoharan under an approved LCA ("First LCA") and petition ("First Petition") for a position in Sunnyvale, California; the LCA, petition, and petition approval notice all had end dates of February 20, 2018. RX B at 5, 14; RX D at 1. After obtaining his visa, Manoharan entered the United States on July 16, 2015, and was authorized to stay until March 1, 2017 ("First I-94"). RX G. He then began working for HCL.

On October 7, 2015, HCL filed a new LCA ("Second LCA") for a position in Galesburg, Michigan, with an end date of September 29, 2018. RX E at 17-22, 17. One month later, HCL filed an amended petition for Manoharan ("Second

Petition") that relied on the Second LCA but had a proposed end date of March 1, 2017. *Id.* at 5-6. While DOL approved the Second LCA immediately, *id.* at 22, USCIS did not approve the Second Petition until April 11, 2016, RX H. USCIS' approval notice for the Second Petition included an updated I-94 ("Second I-94") which, like the First I-94, authorized Manoharan to stay in the United States until March 1, 2017. RX H at 1. While the Second Petition was pending, Manoharan traveled to India, arriving on April 2, 2016. RX F at 1. When he returned to the United States on April 29, 2016, CBP issued a new I-94 ("Third I-94") authorizing him to stay until February 20, 2018. RX F at 3 (first image); RX I.[1]

On December 3, 2015, while Manoharan's Second Petition was still pending, HCL filed an LCA, which DOL certified, to employ 10 workers in Seattle, Washington ("Third LCA"). RX J at 17-23. On June 12, 2016, HCL filed a petition to employ Manoharan under the Third LCA ("Third Petition"). RX J. Both the Third LCA and Third Petition had end dates of November 2, 2018. *Id.* at 5, 18. USCIS never ruled on the Third Petition.

[1] It is unclear from the record why CBP admitted Manoharan in July 2015 only until March 1, 2017, rather than until February 20, 2018, the First LCA and approved First Petition's end date; why HCL's Second Petition requested to employ Manoharan only until March 1, 2017, rather than until the Second LCA's September 29, 2018 end date; and why CBP admitted Manoharan in April 2016 until February 20, 2018, the approved First Petition's end date, rather than only until March 1, 2017, the approved Second Petition's end date.

On January 21, 2017, HCL notified Manoharan that it was terminating his employment effective February 3, 2017. RX K at 1-2. On February 9, 2017, HCL told Manoharan that the termination date was postponed until February 10, 2017. *Id.* at 3. None of these communications offered to pay for Manoharan's return transportation to India, RX K, and HCL has provided no evidence that it made such an offer or payment, Resp't's Br. at 40, 45. On February 16, 2017, HCL sent USCIS a letter, stating that it wished to "cancel" the "approved . . . applications" for three H-1B workers it no longer employed, providing details in an attachment that included Manoharan's name and the petition number for the pending Third Petition. RX L. Manoharan left the United States on May 9, 2017. RX Y.

Manoharan filed a complaint with WHD for back wages. WHD determined that HCL owed Manoharan wages until March 1, 2017, the last date of his approved Second Petition, due to its failure to effect a bona fide termination. RX N, Q. In granting HCL's renewed motion for summary decision in relevant part, the ALJ rejected Manoharan's argument that he was entitled to additional wages until February 20, 2018. Decision & Order, Mar. 31, 2021, at 9-10. On appeal, the Board has requested the Administrator's view on the following three issues:

(1) "whether the period of authorized employment is set by the validity dates of an H-1B visa petition (here, March 1, 2017) or the intended period of employment in an LCA (February 20, 2018)";

(2) "whether the facts of this case viewed cumulatively—the employer firing the employee in February 2017, the employer notifying DHS and the petition expiring on or before March 1, 2017, and the employee leaving the country in May 2017—constructively end the wage obligation even if the LCA end date of February 20, 2018, is the appropriate date for 'authorized employment' in 20 C.F.R. Part 655"; and

(3) whether an employer's failure to comply with its obligation to pay a terminated H-1B worker's return transportation costs "trigger[s] an obligation to pay wages for an additional year on these facts where a termination has occurred and the employee has left the country on an expired visa petition[.]"

Order Directing Supplemental Briefing, Dec. 16, 2021, at 6.

ARGUMENT

An H-1B worker's "period of authorized employment" generally refers to the period of the worker's approved petition, as well as any period during which the worker is permitted to work under a pending petition. As a result, the "period of authorized employment" expires on the later of the end date of the worker's most recent petition approval or the last date on which the worker was permitted to work in H-1B status under a pending petition. Contrary to Manoharan's argument, neither the LCA nor the I-94 determines the end date of the period of authorized employment for H-1B workers. Thus, WHD and the ALJ correctly determined

that HCL's wage liability to Manoharan ended on March 1, 2017. Importantly, this understanding of the "period of authorized employment" applies only to H-1B workers, and not to E-3 or H-1B1 workers, whose different requirements for authorization of employment warrant a different interpretation of the term. Finally, because this case can be resolved based on the end of Manoharan's "period of authorized employment," the Board need not address whether other factors, such as a worker's subsequent departure from the United States, might relieve an employer of its wage obligation despite a failure to pay for return transportation.

I. FOR PURPOSES OF THE H-1B WAGE OBLIGATION, THE "PERIOD OF AUTHORIZED EMPLOYMENT" ENDS ON THE EXPIRATION DATE OF THE WORKER'S MOST RECENT PETITION APPROVAL OR ON THE LAST DATE THE WORKER IS AUTHORIZED TO WORK IN H-1B STATUS UNDER A PENDING PETITION, WHICHEVER IS LATER.

A. The "Period of Authorized Employment" Encompasses an H-1B Worker's Petition Approval Period and Any Period During Which the Worker May Work under a Pending Petition.

The INA prohibits the employment of "unauthorized aliens," defining that term as aliens who are neither lawful permanent residents nor "authorized to be so employed by this chapter [i.e., the INA] or by [USCIS]." 8 U.S.C. § 1324a(a)(1)(A), (h)(3).[2] Thus, a temporary nonimmigrant worker, who by

[2] While 8 U.S.C. §§ 1324a and 1184(c)(1) (cited below) name "the Attorney General" as authorizing aliens to be employed, these references are deemed to refer to USCIS under the 2002 Homeland Security Act. 6 U.S.C. §§ 271(b), 275(a).

definition is not a lawful permanent resident, has two paths to "authorized" employment: authorization by the INA itself, or authorization by USCIS.

The INA further provides that an H-1B worker's authorization to work generally derives from USCIS' approval of a petition, stating that "[t]he question of importing any alien as a nonimmigrant under [certain provisions, including H-1B] in any specific case or specific cases shall be determined by [USCIS], after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. § 1184(c)(1). Likewise, USCIS regulations prohibit H-1B workers from working in the United States except during a petition's validity or when otherwise authorized, 8 C.F.R. §§ 214.1(*l*)(1), 214.2(h)(13)(i)(A), and specify that H-1B workers "may be employed only by the petitioner through whom the status was obtained," 8 C.F.R. § 274a.12(b)(9). USCIS, therefore, is the agency that "authorize[s]" the employment of an H-1B worker by approving a petition, and the "period of authorized employment" thus normally refers to the period specified in the I-797 petition approval notice.

Additionally, under certain circumstances, the INA and USCIS' regulations permit an H-1B worker to work under a pending petition. Such periods also fall within the "period of authorized employment" since such a worker is "authorized to be . . . employed by . . . [the INA], or by [USCIS]." 8 U.S.C. § 1324a(h)(3). One such circumstance is under the H-1B "portability" provisions, which permit an

existing H-1B worker to accept "new employment" either with the same or a new employer, if, *inter alia*, the new employer has filed a nonfrivolous H-1B petition, with a request to amend or extend the worker's stay, before the worker's previously-authorized period of stay expires. 8 U.S.C. § 1184(n); 8 C.F.R. § 214.2(h)(2)(i)(H)(1). These provisions are what permitted Manoharan to work under the Second and Third Petitions (in their respective positions and geographic locations) while they were pending. A second authority permitting work under a pending petition is the "240-day rule," which allows an H-1B worker whose status has expired to continue working for the same employer for up to 240 additional days if the employer has timely filed a petition to extend the worker's stay. 8 C.F.R. § 274a.12(b)(20). Under either circumstance, the worker's authorization to work under a pending petition terminates immediately if that petition is no longer pending. *See* 8 C.F.R. §§ 214.2(h)(2)(i)(H)(2), 274a.12(b)(20).

B. The "Period of Authorized Employment" and the Wage Obligation End When the Later of Those Two Periods Expires.

As this case demonstrates, the duration of the "period of authorized employment" is important because it serves as the outer limit on the wage requirement's temporal scope. Because the required wage applies only during the "period of authorized employment," 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a), the same is true regarding the principle that an H-1B employer must perfect a "bona fide termination" to avoid continued wage liability to a terminated

worker. Once the "period of authorized employment" has expired, so does the employer's wage liability, even if it had terminated a worker without notifying USCIS or paying return transportation costs.[3]

Because an H-1B worker's "period of authorized employment" includes both the petition approval period and any time during which the worker may work under a pending petition, the "period of authorized employment" lasts until the most recent petition approval's expiration date or the last date under which the worker may work under a pending petition, whichever is later. The implications of this principle for the "bona fide termination" requirements therefore differ depending on whether an H-1B worker is working under an approved petition or only a pending one. In the case of an approved petition, an employer cannot simply end the "period of authorized employment" by notifying USCIS that it wishes to withdraw or cancel the petition, even though doing so immediately ends an H-1B worker's authorization to work. *See* 8 C.F.R. § 214.2(h)(11)(ii) (explaining that an employer's written withdrawal of an approved petition results in its immediate revocation). Rather, an employer that terminates a worker before the petition approval notice's end date must meet all of the bona fide termination

[3] Such an employer remains responsible for complying with the USCIS regulations; however, the expiration of the "period of authorized employment" prevents the employer's failure to meet these requirements from further extending the time during which it must pay the required wage.

requirements, including payment of return transportation costs, to end its obligation to pay the required wage. *See, e.g., Amtel Grp. of Fla., Inc., v. Yongmahapakorn*, No. 07-104, 2008 WL 316046, at *3 (ARB Jan. 29, 2008) (even assuming that an employer had timely notified INS, USCIS' predecessor, of an H-1B employee's termination, it was still liable for the required wage because it had not paid return transportation costs). This is the most reasonable reading of "period of authorized employment," i.e., "the period for which the worker was authorized to be employed." Conversely, under a pending petition, a worker is not authorized to work for a fixed period, but only while the petition is pending. Thus, once that authorization ends, such as when the pending petition is denied or withdrawn, any "period of authorized employment" that rests on such a petition, and therefore any wage obligation, terminates immediately.[4]

[4] One exception to using the most recent petition approval's end date would be the unlikely circumstance where an employer files an amended petition with a shorter stay period than the original petition period in an effort to effectively terminate an H-1B worker's employment. Under such unusual circumstances where the amended, shortened petition is clearly pretextual, the "period of authorized employment" should continue until the end of the employee's *original* petition approval period, rather than the most recent one. Such an exception would not apply in this case, however, because although Manoharan's approved Second Petition expired earlier than his approved First Petition, there is no indication that the Second Petition was a backdoor attempt to terminate Manoharan prematurely, particularly given that HCL filed the Second Petition in November 2015, over 14 months before it first notified Manoharan that his employment would be terminated, and did so to enable Manoharan to work in a different location.

As a practical matter, this distinction means that although an employer of an H-1B worker under an approved petition must effect a bona fide termination, including payment of any required return transportation costs, to end its wage obligation before the petition approval notice's end date, when an H-1B worker is employed only under a pending petition, the employer can end its wage obligation without paying transportation costs by withdrawing the petition and thus ending the "period of authorized employment." This distinction, however, is fully consistent with the purpose underlying the incorporation of the return transportation requirement into the wage requirement. The return transportation requirement applies only when an employee is terminated before the employee's authorized stay expires. 8 U.S.C. § 1184(c)(5)(A); 8 C.F.R. § 214.2(h)(4)(iii)(E). The incorporation of the return transportation requirement as an element of a "bona fide termination" therefore seeks to ensure that prematurely terminated H-1B employees, who are "without any legal means of support in the country," 65 Fed. Reg. at 80,170, are not forced to bear the potentially significant economic costs of a trip home at an unexpected time. Such a rule understandably applies to an employee working under an approved petition, who has a reasonable expectation of remaining in the United States for a certain defined period. But a worker whose "authorized employment" stems only from a pending petition should be on notice that their ability to work in the United States could end at any time. In such a case,

payment of return transportation costs need not be a precondition for ending the employer's wage obligation. Therefore, the conclusion that the "period of authorized employment" under a pending petition terminates immediately upon the withdrawal of the petition is consistent not only with the plain meaning of the term, but with the policies underlying the "bona fide termination" requirements.

C. For H-1B Workers, the LCA and I-94 Do Not Determine the "Period of Authorized Employment."

While a certified LCA and an authorized stay are both requirements for the employment of an H-1B worker, neither the LCA nor the I-94 delineates the bounds of the "period of authorized employment." The best reading of the requirement to pay a worker a required wage during the "period of authorized employment" means to pay the worker that wage during the period that the individual worker has been authorized to be employed. *Accord* 8 U.S.C. § 1182(n)(2)(C)(viii) (specifically referring to "the *nonimmigrant's* period of authorized employment") (emphasis added). A certified LCA, however, does not authorize an individual to be employed, but only permits the employer to employ H-1B workers generally in a given position. *See*, *e.g.*, RX J at 18 (Third LCA to employ 10 workers in Seattle). Thus, the "period of authorized employment" of an H-1B worker does not refer to the LCA period. As to the I-94, while it permits an H-1B worker to *stay* in the United States, it does not permit an H-1B worker to *work* in the United States without a petition or other authorization from USCIS,

and therefore also does not determine the "period of authorized employment."[5]

II. MANOHARAN'S PERIOD OF AUTHORIZED EMPLOYMENT ENDED ON MARCH 1, 2017.

Applying the above principles to Manoharan's case shows that WHD and the ALJ correctly determined that his "period of authorized employment," and HCL's wage obligation, ended March 1, 2017, because that was the end date of his most recent petition approval notice and HCL had withdrawn its pending petition.

At the time HCL fired Manoharan in February 2017, he had two sources of "authorized employment." One was USCIS' I-797 approval notice for the Second Petition; that approval expired March 1, 2017. RX H at 1. The other was the pending Third Petition, which authorized Manoharan to work under the portability rules. RX J. Once HCL sent USCIS its February 16, 2017 letter withdrawing the Third Petition, RX L, the Third Petition was no longer pending and therefore could no longer serve as a source of "authorized employment." However, because Manoharan remained in a "period of authorized employment" under the approved Second Petition, which had not yet expired, HCL was required to effect a bona fide termination to end its wage obligation. Because HCL did not do so due to its failure to pay return transportation costs, its wage obligation continued until March

[5] As discussed in more detail below, however, the LCA and I-94 are relevant in determining the "period of authorized employment" for H-1B1 and E-3 workers, for whom petitions are not required to authorize employment. *See infra* § III.

1, 2017, when the Second Petition's approval period expired.[6]

Manoharan's contention that he was entitled to be paid until February 20, 2018 is incorrect. Although this was the end date of one of Manoharan's LCAs,[7] as explained above, the LCA does not determine the end of an H-1B worker's "period of authorized employment."[8] And while February 20, 2018 was also the end of Manoharan's authorized stay period under the Third I-94, the I-94 did not authorize him to *work* in the United States after his pending petition (the Third Petition) was withdrawn and his approved petition (the Second Petition) expired.

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[6] Perhaps because HCL listed only Manoharan's pending Third Petition receipt number in its February 16 letter to USCIS, RX L at 2, USCIS did not construe the letter as also requesting to withdraw the approved Second Petition. *See* RX M. But even if HCL had withdrawn the Second Petition as well, as discussed above, Manoharan would still have remained in a "period of authorized employment" until the Second Petition approval notice's March 1, 2017 expiration date.

[7] Even if the LCA date were relevant, February 20, 2018, the end date of the First LCA, was no longer applicable by the time Manoharan was terminated, as it had been superseded twice, for purposes of Manoharan's employment, by LCAs with end dates of September 29, 2018 and November 2, 2018, respectively.

[8] Manoharan's argument that an LCA is the true employment authorization, whereas a petition approval notice is merely a stay authorization, Pet'r's Reply at 15-17, is misplaced. While Manoharan is correct that the I-797 approval notice for his Second Petition also included an I-94 stay authorization, RX H, an updated I-94 attached to a petition approval notice is *in addition to* the employment authorization required by the INA that is conferred by the petition approval itself. And while Manoharan accurately notes that he was authorized to work under two pending petitions, such authorization stemmed not from his LCAs, but rather from the INA's portability provisions, under which, as discussed above, his "period of authorized employment" ended once HCL withdrew the pending Third Petition.

Finally, Manoharan's apparent reliance on February 20, 2018 because it was the end date of his *First* Petition, Pet'r's Br. at 24; Pet'r's Reply at 17, is unavailing because that petition was amended and superseded by the Second Petition, which had an end date of March 1, 2017. Manoharan appears to argue that the Second Petition was "invalid" because he had completed his work on the project at issue by the time the petition was approved, and therefore that the First Petition's end date should apply. While this question is beyond the scope of the issues on which the Board requested the Administrator's views, Manoharan has not identified any authority under which DOL may revisit the validity of USCIS' petition approvals. The end date of the approved Second Petition, therefore, was the end of his "period of authorized employment" once the pending Third Petition was withdrawn.

III. A DIFFERENT ANALYSIS IS APPROPRIATE FOR E-3 AND H-1B1 CASES.

The above analysis is limited to H-1B cases, which arise under 8 U.S.C. § 1182(n). While it is unnecessary for the Board to reach this issue here, a different analysis of the "period of authorized employment" is required under 8 U.S.C. § 1182(t), which applies to E-3 and H-1B1 workers. While §§ 1182(n) and 1182(t) both restrict the wage obligation to the "period of authorized employment" and while the rules governing employment of E-3 and H-1B1 workers are identical in many respects to those for H-1B workers, there is one critical distinction between the programs: employers need not file petitions for E-3 and H-1B1 workers.

Rather, the INA authorizes such workers to work in the United States with only an LCA and a visa. 20 C.F.R. §§ 655.700(d)(1); *see also* 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 274a.12(b)(25); 20 C.F.R. § 655.705(b). Given that no petition is required, the period of authorized employment must be determined another way, by looking to the LCA period or, alternatively, the worker's period of authorized stay. *See Persian Broad. Serv. Glob. Inc. v. Walsh*, No. 2:21-cv-00229, 2022 WL 375294, at **9-10 (C.D. Cal. Feb. 7, 2022) (agreeing that the Board reasonably concluded that an employer's wage obligation to an E-3 worker continued for the duration of the LCA period despite the expiration of the worker's visa and his departure from the United States).[9] The Administrator therefore respectfully requests that should the Board adopt the Administrator's analysis above regarding the "period of authorized employment," it clarify that this analysis applies only to the H-1B program and not to similar programs like H-1B1 and E-3.

IV. THE EXPIRATION OF MANOHARAN'S PERIOD OF AUTHORIZED EMPLOYMENT ON MARCH 1, 2017 RESOLVES THE BOARD'S REMAINING TWO QUESTIONS.

The Board also requested the Administrator's views on two additional

[9] *Persian Broadcast* affirmed the Board's decisions in *Varess v. Persian Broadcast*, No. 20-0017, 2020 WL 4274179 (ARB July 14, 2020) and No. 18-0023, 2019 WL 5089599 (ARB Sept. 26, 2019), which Manoharan cites to support his argument that the LCA or I-94 defines the "period of authorized employment." Pet'r's Br. at 25-26; Pet'r's Reply at 18. Because *Varess* was an E-3 case, not an H-1B case, Manoharan's reliance on it is misplaced.

issues. The Board asked whether the cumulative facts of this case constructively ended HCL's wage obligation even if the LCA end date of February 20, 2018, is the appropriate end date of the "period of authorized employment." This question is moot because, as demonstrated above, the LCA end date is not the end date of the "period of authorized employment" for an H-1B worker.

The Board also asked whether, despite the requirement to reimburse a terminated H-1B worker for return transportation costs, HCL's failure to do so required it to pay wages for an additional year on these facts, where HCL had fired Manoharan and Manoharan had left the country on an expired visa petition. This question is resolved in the negative due to the expiration of Manoharan's approved Second Petition and HCL's withdrawal of the pending Third Petition, which, as explained above, ended the "period of authorized employment" and HCL's wage obligation on March 1, 2017. As a result, it is unnecessary for the Board to consider whether any other factors might be sufficient to excuse an employer's failure to pay for return transportation for purposes of the wage obligation.[10]

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[10] While the Board has held in some cases that employers were not required to pay return transportation costs to effect a bona fide termination, those cases are readily distinguishable from Manoharan's, as they involved circumstances where the worker either remained in the United States and did not need return transportation, or expressly declined an offer of transportation costs. *See, e.g.*, *Vinayagam v. Cronous Sols.*, No. 15-045, 2017 WL 1032321, at *6 (ARB Feb. 14, 2017) (worker chose to remain in the United States after she was terminated); *Puri v. Univ. of Ala. Birmingham Huntsville,* No. 13-022, 2014 WL 4966174, at **6-7 (ARB Sept. 17,

Likewise, it is unnecessary for the Board to address here what effect, if any, an H-1B employee's departure from the United States has on the employer's wage obligation. *Cf. Persian Broad.*, 2022 WL 375294, at *10 (agreeing that the Board's conclusion that an employer remained liable for wages to an E-3 worker who continued to work for the employer while abroad was not arbitrary or capricious). Rather, the Board need only conclude that HCL's failure to pay transportation costs meant that its wage obligation to Manoharan persisted until March 1, 2017, two months before he left the United States, and that after that date, HCL was no longer subject to the wage obligation because the "period of authorized employment" ended due to the expiration of HCL's approved petition for Manoharan and HCL's earlier withdrawal of the pending petition.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board conclude that Manoharan's "period of authorized employment," and HCL's wage obligation, ended on March 1, 2017.

2014) (worker did not return home because he married a United States citizen and became eligible for a change in immigration status); *Batyrbekov v. Barclay's Cap.*, No. 13-013, 2014 WL 3886828, at **6-7 (ARB July 16, 2014) (fired employee voluntarily remained in the United States because a new prospective employer had filed an H-1B petition with USCIS); *Baiju v. Fifth Ave. Comm.*, No. 10-094, 2012 WL 1143314, at *6 (ARB Mar. 30, 2012) (employer offered transportation costs but worker declined them); *Wirth v. Univ. of Miami*, Nos. 10-090, 10-093, 2011 WL 6981994, at *7 (ARB Dec. 20, 2011) (same).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 25, 2022, a true and correct copy of the foregoing motion was filed electronically via the Department of Labor's efile system, and was served via electronic mail to the following:

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