U.S. Department of Labor

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

In the Matter of:

ADMINISTRATOR,
WAGE & HOUR DIVISION,

PROSECUTING PARTY,

v.

VOLT MANAGEMENT CORP.
D/B/A VOLT WORKFORCE
SOLUTIONS,

RESPONDENT.

ARB CASE NO. 2018-0075

ALJ CASE NO. 2012-LCA-00044

DATE: August 27, 2020

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Kate O. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Paul L. Frieden, Esq.; Rachel Goldberg, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
Roland M. Juarez, Esq.; *Hunton Andrews Kurth LLP*; Los Angeles, California

Before: James D. McGinley, *Chief Administrative Appeals Judge*; James A. Haynes, Thomas H. Burrell, Heather C. Leslie, and Randel K. Johnson, *Administrative Appeals Judges*, presiding en banc.

DECISION AND REMAND ORDER

This case arises under the H-1B visa program provisions of the Immigration and Nationality Act, as amended (INA, or the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014) and 8 U.S.C. § 1182(n) (2013), and its implementing regulations at 20 C.F.R.

Part 655, subparts H and I (2019). Sergey Nefedyev, an H-1B non-immigrant employee, filed a complaint with the Administrator of the Wage and Hour Division of the U.S. Department of Labor (Administrator) alleging that his employer, Respondent Volt Management Corp. (Volt), failed to pay him the wages required by the INA. The Administrator investigated and determined that Volt had committed violations with respect to many of its H-1B employees.

The Administrative Law Judge (ALJ) assigned to the case entered summary decision in favor of Volt, concluding that the violations and penalties imposed by the Administrator with respect to all H-1B employees other than Mr. Nefedyev were based on an unauthorized investigation that exceeded the scope of the Administrator's power under the INA. For the reasons set forth herein, we reverse the ALJ's grant of summary decision and remand this case for further proceedings.

BACKGROUND

1. Statutory and Regulatory Background

The INA permits employers to hire non-immigrant alien workers in "specialty occupations" to temporarily work in the United States under the H-1B program.[1] An employer desiring to hire an H-1B non-immigrant worker must file a Labor Condition Application (LCA) with the U.S. Department of Labor.[2] After the employer secures a certified LCA from the Department of Labor and receives approval by the Department of Homeland Security, the Department of State issues an H-1B visa for the non-immigrant worker.[3]

In signing and filing an LCA, the employer makes certain attestations and is required to meet certain obligations as to the terms and conditions of employment for the worker it seeks to bring to the United States.[4] Among other things, the employer attests that for the entire period of authorized employment, it will pay the H-1B worker the wages required by 20 C.F.R. § 655.731. Wages must even be paid if

---

1 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

2 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.700.

3 20 C.F.R. § 655.705(a)-(b).

4 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.730(c)(2).

the worker is "not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work) . . . ."[5]

Balancing competing interests and policy concerns, Congress struck a compromise in the INA with respect to enforcement of the H-1B program requirements.[6] On the front end, the Department of Labor is given very little scope in reviewing and approving LCAs. Generally, the Department of Labor must approve LCAs where all items on the forms have been appropriately completed and are not obviously inaccurate.[7] On the back end, the INA grants the Secretary of Labor investigatory and enforcement powers to ensure compliance after certification.[8] The INA allows the Secretary to conduct investigations under the following circumstances: (1) upon receipt of an aggrieved party complaint;[9] (2) on a random basis, if the employer has been found to be a willful violator of the INA within the past five years;[10] (3) upon personal certification of the Secretary of Labor that there exists reasonable cause to believe that the employer is not in compliance;[11] and (4) in response to specific credible information from a known source who is likely to have knowledge of an employer's practices or employment conditions in certain circumstances.[12] If the Administrator finds that the employer has violated the wage requirements, she may order the employer to pay back wages to its H-1B employees.[13]

2. Factual Background

---

5 20 C.F.R. § 655.731(c)(5), (c)(7)(i)*; see also* 8 U.S.C. § 1182(n)(2)(C)(vii).

6 *See* Alien Temporary Employment Labor Certification Process, 56 Fed. Reg. 11,705, 11,706-07 (Mar. 20, 1991).

7 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.740(a)(1); *see also Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 193 (3d Cir. 2010) (stating that generally the Department of Labor may not "investigate the veracity of the employer's attestations on the LCA prior to certification").

8 *See* Labor Condition Applications and Requirements for Employers Using Aliens on H-1B Visas in Specialty Occupations, 56 Fed. Reg. 54,720, 54,721 (Oct. 22, 1991) (Final Rule).

9 8 U.S.C. § 1182(n)(2)(A).

10 8 U.S.C. § 1182(n)(2)(F).

11 8 U.S.C. § 1182(n)(2)(G)(i).

12 8 U.S.C. § 1182(n)(2)(G)(ii).

13 8 U.S.C. § 1182(n)(2)(D); 20 C.F.R. § 655.810(a).

Volt Management is a staffing agency and employs numerous H-1B non-immigrants. It hired Mr. Nefedyev for a temporary assignment as a Software Design Engineer for one of Volt's clients.[14] Mr. Nefedyev entered the United States on an H-1B non-immigrant visa.[15]

On September 22, 2009, Mr. Nefedyev filed a complaint with the Administrator alleging that Volt had failed to pay him in accordance with the requirements of the INA and the attestations in his LCA.[16] According to Mr. Nefedyev, Volt did not pay him between June 30, 2009, when his assignment with Volt's client ended, and August 18, 2009, when Volt issued Mr. Nefedyev a notice of termination letter.[17] Mr. Nefedyev alleged that the June 30 to August 18 period constituted nonproductive time due to a decision by Volt (commonly known as a "benching" period), during which he should have been paid.[18]

The Administrator commenced an investigation in response to Mr. Nefedyev's complaint on March 1, 2010.[19] By letter dated March 24, 2010 (the Investigation Letter), the Administrator provided notice to Volt of the investigation.[20] The Investigation Letter instructed Volt to make available a number of records concerning Volt's H-1B employees and LCAs for a two-year period, from September 22, 2007 to September 22, 2009.[21] The Investigation Letter did not indicate that it

---

14 Declaration of Wage and Hour Investigator Ming Sproule in Support of the Administrator's Motion for Summary Decision (Sproule Decl.) at ¶3; July 31, 2008 Request for Temporary Work Visa for Sergey Nefedyev, attached as Exhibit 5 to Declaration of Roland M. Juarez in Support of Volt Management Corporation's Notice of Motion and Cross-Motion for Summary Decision and Opposition to Administrator's Motion for Summary Decision (Juarez Decl.).

15 *See* Sproule Decl. at ¶4.

16 September 22, 2009 Complaint of Sergey Nefedyev, attached as Exhibit 1 to Juarez Decl.

17 *Id.*

18 *Id.*

19 *See* Administrator's Responses to Respondent's First Set of Requests for Admission (RFA), at RFA 2, attached as Exhibit 3 to Juarez Decl.

20 March 24, 2010 Investigation Letter, attached as Exhibit 2 to Juarez Decl.

21 *Id.*

was prompted by a complaint, nor did it reference Mr. Nefedyev or the allegations of his complaint.[22]

The Administrator ultimately determined that Volt violated 20 C.F.R. § 655.731[23] by failing to pay Mr. Nefedyev and many other H-1B employees for nonproductive time.[24] In total, the Administrator seeks $298,413.78 in back wages on behalf of 74 H-1B employees.[25] Volt objected to the determination and requested a formal hearing before an ALJ.

Volt and the Administrator submitted cross motions for summary decision below. Having resolved Mr. Nefedyev's individual claim with the Administrator, Volt argued, among other things, that the Administrator's investigation with respect to all of the other H-1B non-immigrant workers exceeded the authority granted to the Administrator by the INA. The ALJ agreed, and granted summary decision in favor of Volt. The Administrator appealed. For the following reasons, we remand.

JURISDICTION AND STANDARD OF REVIEW

---

[22] *See id.* The Investigation Letter stated "[t]his is to notify you that your firm has been scheduled for investigation pursuant to and under authority of INA and implementing regulations at 20 C.F.R. Part 655 . . . ."

[23] The Administrator also determined that Volt violated 20 C.F.R. § 655.734 by failing to post notice of its LCA filing for ten days in conspicuous locations in the areas of intended employment. The Administrator ordered Volt to comply with the regulation, but assessed no civil money penalty for the violation.

[24] June 13, 2012 Determination Letter, attached as Exhibit 5 to Juarez Decl. The Administrator found that Volt had benched its employees in a variety of ways: between the end of an assignment to a client and the receipt of notice of termination (as Mr. Nefedyev had alleged), in between assignments to clients, during a client-mandated 100-day break in service, and during a client-mandated "winter break." *See generally* Sproule Decl. Although the benchings occurred under different circumstances, each constituted a violation of the same regulation, 20 C.F.R. § 655.731, requiring payment during nonproductive time.

[25] The Administrator initially issued a determination letter on June 13, 2012 seeking back wages of $543,126.99 on behalf of 141 employees. The Administrator has since revised its demand and now seeks $298,413.78 on behalf of 74 employees. Sproule Decl. at ¶37; Volt Management Corporation's Memorandum of Points and Authorities in Support of Opposition to Administrator's Motion for Summary Decision and Cross-Motion for Summary Decision at 1.

The Administrative Review Board (the ARB or the Board) has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C. § 1182(n)(2) and 20 C.F.R. § 655.845.[26] The Board has plenary power to review legal conclusions de novo.[27] The Board also reviews an ALJ's grant of summary decision de novo.[28] Under the regulations governing the entry of summary decision by an ALJ, which are also applicable to the ARB upon review of an ALJ's summary decision, judgment must be entered if the pleadings, affidavits, material obtained in discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[29] In reviewing such a motion, the evidence before the ALJ is viewed in the light most favorable to the non-moving party, and he may not weigh the evidence or determine the truth of the matter.[30]

DISCUSSION

The parties agree that the Administrator's investigation in this case was initiated based on Mr. Nefedyev's aggrieved party complaint[31] pursuant to 8 U.S.C. § 1182(n)(2)(A), which provides:

---

[26] *See also* 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).

[27] *Limanseto v. Ganze & Co.*, ARB No. 2011-0068, ALJ No. 2011-LCA-00005, slip op. at 3 (ARB June 6, 2013).

[28] *Vinayagam v. Cronous Solutions, Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029, slip op. at 2 (ARB Feb. 14, 2017).

[29] 29 C.F.R. §18.72.

[30] *Vudhamari v. Advent Global Solutions*, ARB No. 2019-0061, ALJ No. 2018-LCA-00022, slip op. at 3 (ARB July 30, 2020).

[31] An aggrieved party is:

> a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the labor condition application and includes, but is not limited to:
>
> (1) A worker whose job, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;
>
> (2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;
>
> (3) A competitor adversely affected by the employer's alleged non-compliance with the labor condition application; and

> [T]he Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an [LCA] or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

The issue before the ALJ, and before the Board on appeal, is the permissible scope of the Secretary's investigation in response to an aggrieved party complaint under the foregoing statute, something that the Board, and federal courts, have previously had the opportunity to address. The Board first grappled with the issue in *Admin., Wage & Hour Div. v. Greater Missouri Med. Providers, Inc.*[32] In that case, an aggrieved H-1B non-immigrant worker filed a complaint alleging a number of H-1B violations by her employer against her and other H-1B non-immigrants.[33] The Administrator investigated and ordered the employer to make payment of back wages and civil money penalties for multiple violations with respect to the complainant, as well as over 40 other H-1B employees.[34]

The employer challenged the Administrator's determination, arguing that the investigation was limited to those violations the individual complainant alleged in

---

> (4) A government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.

20 U.S.C. § 655.715.

[32] ARB No. 2012-0015, ALJ No. 2008-LCA-00026 (ARB Jan. 29, 2014)

[33] *Id.* at 6-7.

[34] *Id.* at 3.

her complaint.[35] The majority of a divided Board disagreed. Looking to the text of the INA and regulations, giving deference to the delegation of authority to the Secretary and Administrator, and considering the legislative and regulatory history and policy behind the Act, the majority in *Greater Missouri* concluded that the INA did not constrain investigations to the specific allegations contained in a single aggrieved party complaint and delegated to the Administrator the power and authority to conduct investigations within her discretion.[36] The Board concluded that the complainant's detailed allegations regarding a number of different LCA violations against her and other H-1B workers made it appropriate for the Administrator to find reasonable cause to investigate the employer for those and any other related H-1B violations encountered in the course of that investigation.[37]

The employer appealed the Board's decision to the Eighth Circuit,[38] where the Secretary argued for broad investigatory powers.[39] The Secretary argued the statute was silent as to the scope of the Secretary's authority to investigate aggrieved party complaints, leaving it to the agency to conduct investigations, even comprehensive ones, as it deemed appropriate.[40]

The Eighth Circuit disagreed and circumscribed the scope of the investigation the Administrator could conduct in response to an aggrieved party complaint. Although the Eighth Circuit expressly declined to "dictate the exact contours" of an investigation into an aggrieved party complaint, the court held that the plain language of the statute precluded the Administrator from conducting a "comprehensive" or "open-ended investigation of the employer and its general compliance without regard to the actual allegations in the aggrieved-party complaint . . . ."[41] The court therefore found the Administrator's "full investigation

---

35 *Id.* at 6.

36 *Id.* at 6-13.

37 *Id.* at 7.

38 The Board's decision in *Greater Missouri* was first affirmed by the Western District of Missouri in *Greater Missouri Med. Pro-Care Providers, Inc. v. Perez*, No. 3:14-CV-05028-MDH, 2014 WL 5438293 (W.D. Mo. Dec. 14, 2015).

39 *Greater Missouri Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132 (8th Cir. 2015).

40 *Id.* at 1139.

41 *Id.* at 1137-38, 1140 (internal quotations omitted).

under the H-1B provisions," conducted without regard to the allegations of the complaint, exceeded the scope of her authority under the INA.[42]

After the Eighth Circuit issued its ruling in *Greater Missouri*, the Board was presented with the same issue again in *Admin., Wage & Hour Div. v. Aleutian Capital Partners, LLC*[43], though this time on a smaller scale. In *Aleutian*, the Administrator expanded an aggrieved party investigation to cover not only the complainant, but also the employer's lone other H-1B non-immigrant worker.[44] The Board[45] rejected the Eighth Circuit's interpretation of the INA, summarily affirmed its holding from *Greater Missouri*, and held that the Administrator's expansion of the investigation was within the authority granted to her under the Act.[46]

The Board's *Aleutian* decision was appealed to the Southern District of New York, which affirmed the outcome reached by the Board that the expanded investigation was a permissible exercise of the Administrator's discretion to conduct aggrieved party investigations under the INA.[47] Before the Southern District of New York, the employer advocated for a strict reading of § 1182(n)(2)(A) which

---

42 *Id.* at 1134, 1141.

43 ARB No. 2014-0082, ALJ No. 2014-LCA-00005 (ARB June 1, 2016).

44 *Id.* at 2.

45 Administrative Appeals Judge Luis A. Corchado dissented in part, but concurred in the holding of the majority with respect to the issue of the scope of the Administrator's investigation. The majority in *Aleutian* consisted of the same two Board Members as in *Greater Missouri*.

46 *Aleutian*, ARB No. 2014-0082, slip op. at 5. In summary affirmance, the Board stated:

> The Eighth Circuit's decision in *Greater Missouri* conflicts with those of this agency and we are not bound to acquiesce in the appeals court's view of the Secretary of Labor's authority to investigate and aggrieved-party complaint such as that filed by [the complainant]. This matter arises in New York and comes within the ambit of the United States Court of Appeals for the Second Circuit. Under these circumstances, we are not bound by and thus do not acquiesce in the Eighth Circuit's ruling. *See Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). Rather, we continue to adhere to the opinion expressed by this Board in the majority decision in *Greater Missouri Med. Pro-Care Providers, Inc.*, ARB No. 12-015 (ARB Jan. 29, 2014).

47 *Aleutian Capital Partners, LLC v. Hugler*, 16 Civ. 5149 (ER), 2017 WL 4358767 (S.D.N.Y. Sept. 28, 2017) (available on Westlaw).

would limit the Administrator's investigation to the specific allegations of the complaint as they pertain to the complainant.[48] The court held such a narrow interpretation was contrary to the plain language of the INA and its regulations, which explicitly granted authority and discretion to the Administrator to conduct investigations without explicitly defining the scope thereof.[49] As a result, the Southern District of New York concluded that it was not an arbitrary or capricious exercise of her delegated power for the Administrator to conduct an investigation that went beyond the four corners of a complaint to encompass a review of the employer's treatment of another H-1B employee in similar circumstances as the complainant.[50]

But importantly, the Southern District of New York held that the Administrator's investigatory powers are not unlimited. Emphasizing in particular the language of the regulation that the Administrator may only determine compliance "regarding the matters which are the subject of the investigation," the court held that the investigation must remain "tethered" to the allegations of the complaint.[51] Although the court allowed the expanded investigation under the facts of the case, the Southern District of New York ended with a caution that it would not condone an open-ended, general compliance investigation in response to an aggrieved-party complaint.[52]

The Administrator urges the Board to recommit to its holdings in *Greater Missouri* and *Aleutian*. Consistent with those holdings, the Administrator argues that the statutory and regulatory language and the policy considerations behind the INA permit the expanded investigation that occurred in response to Mr. Nefedyev's complaint. Volt counters that the Board should adopt the holdings of the Eighth Circuit and Southern District of New York. In light of those rulings, Volt argues the Administrator exceeded her authority by investigating Volt's H-1B compliance with respect to all non-immigrant workers, other than Mr. Nefedyev.[53]

---

48 *Id.* at *10.

49 *Id.* at *9.

50 *Id.* at *10.

51 *Id.* at *9.

52 *Id.* at *10. *Aleutian* has been appealed to the Second Circuit Court of Appeals. As of the date of this opinion, the Second Circuit has not decided the appeal.

53 The parties also devoted a significant portion of their briefs in this appeal to the issue of whether the ALJ erred in departing from the Board's precedent in *Greater Missouri* in light of the rulings of the Eighth Circuit and the Southern District of New York. In

To resolve the issue, we begin, as we must, with the statutory and regulatory language.[54] As quoted more fully above, § 1182(n)(2)(A) provides that the Secretary must "establish a process for the receipt, investigation, and disposition **of complaints** respecting a petitioner's failure to meet a condition specified in" an H-1B LCA. (emphasis added). The statute also provides that an investigation shall be conducted only if "there is reasonable cause to believe that such a failure or misrepresentation has occurred." Stripped to its base proposition, the statute only grants to the Secretary the authority to conduct investigations of complaints, and only where such complaints give reasonable cause to believe a violation or misrepresentation has occurred. We read the statute naturally, as the Eighth Circuit and the Southern District of New York did to varying degrees, to impose a degree of limitation on the Administrator's investigation in response to such a complaint. The authority to conduct an investigation is triggered by the filing of a

---

granting summary decision to Volt, the ALJ departed from the Board's precedent because he concluded that it had been reversed or modified on appeal. We disagree with the ALJ. Although the Board's *Greater Missouri* decision was reversed by the Eighth Circuit Court of Appeals, the Board stated in *Aleutian* that it was not bound by and did not acquiesce in the Eighth Circuit's ruling outside of the Eighth Circuit. ARB No. 2014-0082, slip op. at 5. Given the Board's statement of non-acquiescence in *Aleutian*, a decision of the Southern District of New York, whatever the outcome, would not be determinative for this case, which falls within the jurisdiction of the Ninth Circuit Court of Appeals. And, although the Southern District of New York expressed disagreement with the Board's precedent in *Aleutian*, ultimately that court did not reverse the Board's decision. The Board's precedent remained valid for purposes of this case, and the ALJ was bound to follow it. *See Lockert v. Pullman Power Products Corp.*, 1984-ERA-00015, 1985 WL 286184, at *1 (Sec'y Aug. 19, 1985) (available on Westlaw) ("The ALJ had no authority in this case to refuse to follow clearly applicable precedent from the Secretary or the court . . . ."); Secretary's Order No. 01-2020, 85 Fed. Reg. 13,186 (delegating to the Board the "authority and assigned responsibility to act for the Secretary of the Labor in review or on appeal of," among other things, H-1B enforcement matters). Our conclusion that the ALJ was bound by Board precedent does not resolve this appeal, however; we must still address the substance of the parties' arguments regarding the permissible scope of an investigation.

[54] *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." (internal citations and quotations omitted)); *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 2005-0026, -0054, ALJ No. 2003-STA-00039, slip op. at 9 (June 29, 2007) ("If the statute's meaning is plain and ambiguous, there is no need for further inquiry and the plain language of the statute will control its interpretation"); Secretary's Order No. 01-2020, 85 Fed. Reg. 13,186,13,187 ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof . . . .").

complaint, and must therefore be fashioned and conducted with regard to the content and context of the complaint itself.

The Secretary's implementing regulation reinforces the limiting principle that the Secretary, and, by delegation, the Administrator, must conduct investigations with regard to the particular complaints that prompt them. The regulation provides:

> The Administrator, either pursuant to a complaint or otherwise, shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance **regarding the matters which are the subject of the investigation**.[55]

Thus, any investigation is, by regulation, limited to only those "matters" which are within the scope of the investigation.[56] Read in conjunction with the statute, the regulation confirms that the Secretary's and Administrator's investigation is bounded in its purpose, nature, and scope.

At the same time, Congress expressly delegated to the Secretary the authority to determine the processes for conducting aggrieved party investigations. Although the INA requires aggrieved party investigations be conducted with regard

---

55 20 C.F.R. § 655.800(b) (emphasis added).

56 Although the Board quoted 20 C.F.R. § 655.800(b) in part in *Greater Missouri* in support of the proposition that neither the statute nor the regulation constrain the scope of the investigation the Administrator may conduct in response to an aggrieved party complaint, the Board conspicuously omitted the requirement that the investigation may only extend so far as to cover "the matters which are the subject of the investigation." *Greater Missouri*, ARB No. 2012-0015, slip op. at 8 (quoting the regulation as "[t]he Administrator, either pursuant to a complaint *or otherwise*, shall conduct investigations *as may be appropriate* and . . . *as deemed necessary* by the Administrator to determine compliance . . . ."). Notably, this language was twice quoted and emphasized by the Southern District of New York in *Aleutian*. 2017 WL 4358767 at *9, 10. That court read the emphasized language to support its conclusion that although the Secretary and Administrator have discretion with regards to the contours of their investigation, the investigation must remain tethered to the aggrieved party complaint. *Id.* Neither court, however, defined "matters" or the "subject of the investigation."

to the complaints that prompt them, the statute is otherwise silent as to what the investigation may or must entail or how far the investigation may go. Congress expressly left it to the Secretary to define the process of the investigations of aggrieved party complaints.[57] The Secretary, in turn, delegated authority to the Administrator in 20 C.F.R. § 655.800(b). The regulation gives the Administrator the authority to "conduct such investigations as may be appropriate," and delineates several investigative techniques that the Administrator may employ "as deemed necessary" to effectuate the purpose of the statute. While the regulation limits the Administrator's discretion by restricting her to examining only an employer's compliance with the "matters which are the subject of the investigation," the regulation does not elaborate on the definition of "matters" or the "subject of the investigation." Thus, both the statute and the regulation grant significant discretion with respect to defining and conducting an investigation. This discretion gives the Administrator the power and authority to go beyond the four corners of the complaint, as may be appropriate.

Furthermore, we do not interpret the Eighth Circuit's opinion in *Greater Missouri* or the Southern District of New York's opinion in *Aleutian* as binding the Administrator strictly to the four corners of the complaint in defining the scope of or conducting aggrieved party investigations. Neither court was required to define or even approximate the permissible breadth of an investigation in response to an aggrieved party complaint. Significantly, both courts recognized, to varying degrees, that the Administrator did have latitude to conduct investigations beyond the bounds of the initiating complaint as necessary and appropriate, so long as the investigation did not lose sight of the complaint or the finding of reasonable cause.[58]

As the Board explained in *Greater Missouri*, there is good cause for a robust grant of discretion and power to the Secretary and Administrator in defining the scope of and conducting an investigation in response to an aggrieved party

---

[57] 8 U.S.C. § 1182(n)(2)(A) ("[T]he Secretary shall establish a process for the receipt, investigation, and disposition of complaints . . . .").

[58] *Greater Missouri*, 812 F.3d at 1139-40 (stating that the court does "not pretend to dictate the exact contours of" an aggrieved-party investigation); *Aleutian*, 2017 WL 4358767 at *9 ("Congress was silent as to what such [aggrieved party] investigation should in entail in particular, leaving that determination to the DOL."), *10 ("[I]t cannot be said that the DOL's determination that it is authorized to look beyond the four corners of a complaint in formulating an appropriate investigation is arbitrary, capricious, or contrary to law.").

complaint.[59] It is generally agreed that the INA, the LCA process, and the Secretary's investigation and enforcement powers are the product of a compromise. On the one hand, some viewed an expansion of a foreign labor supply as important for American businesses to compete in the global economy, especially in the face of a dearth of skilled labor.[60] Congress therefore eased the LCA process by restricting the Department of Labor's ability to deny certifying or approving an LCA, except in narrow circumstances, which allowed prompt, streamlined access to foreign labor.[61]

On the other hand, others wished to protect the domestic labor market by assuring the admission of foreign workers served a legitimate need that did not undercut the domestic workforce.[62] Congress therefore provided robust investigatory and enforcement powers—powers which have grown with amendments—on the back end to ensure program compliance.[63] As stated in the House Conference Report, "providing the legal process for enforcement on challenges and complaints about attestation conditions gives meaningful protections for U.S. workers."[64]

The compromise statutory scheme may be undermined with too narrow of an application of the aggrieved party complaint investigation provision of the INA. The H-1B program is, after all, a voluntary program offered by the government, and employers participate in the program because of the benefit it provides. The Department of Labor has been given the power, and the responsibility, to ensure

---

59 *Greater Missouri*, ARB No. 2012-0015, slip op. at 9-11.

60 *See* Angelo A. Paparelli & Mona D. Patel, *The Immigration Act of 1990: Death Knell for the H-1B?*, 25 INT'L LAW. 995, 997, 1001 (1991); H.R. REP. NO. 101-723, pt. 1, at 6721, 6723 (1990) (recognizing "the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages.")

61 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.740(a)(1); H.R. REP. NO. 101-723, pt. 1, at 6741 (1990).

62 *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110 (Dec. 20, 2000) (Final Rule) (noting that the INA "requires that an employer pay an H-1B worker the [required wage] to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers"); Paparelli & Patel, 25 INT'L LAW. at 997.

63 56 Fed. Reg. 54,720, 54,721; *Aleutian*, 2017 WL 4358767 at *9.

64 H.R. REP. NO. 101-723, pt. 1, at 6741.

that the applicable laws and rules are followed by all the participants in the H-1B visa program. It is incomprehensible that Congress would delegate enforcement power to the Secretary in an elaborate, detailed statutory scheme without also giving the Secretary the means to exercise that delegated power and responsibility.

As the foregoing discussion reflects, while the Administrator's investigation is prompted by and must be conducted with regard to a particular aggrieved party complaint, there is authority for and circumstances in which the investigation may extend beyond the aggrieved complainant or his particular grievance. But, just as the Eighth Circuit and the Southern District of New York did, we decline today to define the exact contours of an investigation in response to an aggrieved party complaint.

Our reservation rests on our belief that based on the record before us, we cannot determine whether the investigation here was authorized under the INA. Decided as it was on summary decision, we have limited evidence concerning the actual nature and scope of the Administrator's investigation. Although we have the Investigation Letter requesting a variety of documents regarding all of Volt's H-1B employees, we are not convinced that the scope of the documents requested is always equivalent to, or substantially reflective of, the scope of the investigation or the type or nature of violations with which an investigation is concerned. Indeed, although the documents requested by the Administrator were quite broad, the violations that are the subject of this appeal are all variants of the specific grievance identified by Mr. Nefedyev in his complaint—benchings. Similarly, although we have Mr. Nefedyev's initial written complaint, we do not have before us testimony or other evidence from the Administrator regarding what else may have been considered relevant in a finding of reasonable cause or setting the scope of this investigation.

On this record, we do not know what the Administrator's finding of reasonable cause was or the extent of what the Administrator may have considered in making that finding. Likewise, we do not know what the exact scope of the Administrator's investigation was or how or why the Administrator defined the bounds of her investigation. We do not have a full picture of what the investigation entailed, aside from the Investigation Letter, the determination letter, and limited declarations concerning the results of the investigation.[65] As a result, we conclude

---

[65] Such further findings will aid the ALJ, and if necessary the Board, in determining as a factual and legal issue whether the Administrator adhered to investigating "matters

that it was error for the ALJ to find that under no set of facts could the Administrator demonstrate that the expansion of her investigation was within the authority granted to her by the INA and its implementing regulations, merely because the investigation expanded to cover other H-1B employees. Neither the Eighth Circuit's decision in *Greater Missouri* nor the Southern District of New York's decision in *Aleutian* demand such a result. It would be premature to decide whether the Administrator's investigation exceeded the scope of her authority without these and other important facts, and therefore we remand to the ALJ for additional proceedings and factual development.[66]

CONCLUSION

For the reasons stated herein, we find that the ALJ erred by granting summary decision in favor of Volt. Accordingly, we **REVERSE** the ALJ's entry of judgment in favor of Volt, and **REMAND** for further proceedings consistent with this Order.

SO ORDERED.

---

which are the subject of the investigation," This may require further briefing by the parties if the ALJ deems it necessary.

[66] In the summary decision briefs below, the parties also debated whether the Administrator could seek back wages for benching violations that allegedly took place outside of the applicable limitations period. Although the ALJ did not reach this issue and although it was not included as an issue on appeal in the Administrator's Petition for Review, the Administrator raised the issue in her opening brief. In her reply, though, the Administrator conceded that it "is not necessary for the ARB to reach [that] legal issue . . . because the ALJ has not yet ruled on those issues." Administrator's Reply Brief at 2 n.1. We therefore do not address that issue in this appeal.