



Issue Date: 26 May 2010

Case No.: 2008-LCA-00022

In the Matter of:

RAVINDER VYASABATTU,
Complainant

v.

E SEMANTIKS, INC.,
RAJESH NARAYAN,
Respondents

Appearances:

Ravinder Vyasabattu, *Pro se*
Rajesh Narayan, *Pro se*

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended ("INA"), 8 U.S.C. §§ 1101-1537, and regulations at 20 C.F.R. Part 655, Subparts H and I (2008). On December 30, 2006, Ravinder Vyasabattu filed a complaint with the United States Department of Labor, Employment Standards Administration, Wage and Hour Division, alleging that his Employer, eSemantiks, Inc., and its owner, Rajesh Narayan, failed to pay him wages and benefits and provide working conditions in accordance with his Labor Condition Application and assorted other violations. (Ex. 1).

The Administrator, Wage and Hour Division (the "Administrator") issued a determination letter stating that, based on evidence obtained in the investigation of the complaint, it had been determined that there was no violation. *Id.* Vyasabattu disagreed and requested a formal hearing pursuant to 20 C.F.R. § 655.820 on the Administrator's determination. (Ex. 2).

A hearing took place in Chicago, Illinois, on October 28, 2009. Both parties appeared without the assistance of counsel. Vyasabattu testified via videoconference from Hyderabad, India.

I. Introduction

The INA's H-1B visa program permits American employers to temporarily employ alien workers in "specialty occupations" in the United States for proscribed periods of time.¹ 8 U.S.C. § 1101(a)(15)(H)(i)(b). In order to protect United States workers and their wages from an influx of foreign workers, an employer must file a Labor Condition Application ("LCA") with the Department of Labor before an alien will be admitted to the United States as an H-1B nonimmigrant worker. 8 U.S.C. § 1182(n)(1). As part of that LCA, the employer must attest that it:

(i) Is offering and will offer during the period of authorized employment to [H-1B employees] wages that are at least –

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application

Id. at § 1182(n)(1)(A)(i)(I) and (II). After securing the certification, and upon approval by the Department of Homeland Security, the Department of State issues H-1B visas to these workers. 20 C.F.R. § 655.705(a) and (b).

II. Summary of the Evidence

The record contains 37 Administrative Law Judge Exhibits. ("Ex."). Vyasabattu has filed a closing brief.² A hearing took place on October, 28, 2009, in Chicago, Illinois. ("Tr."). Narayan and Vyasabattu testified at the hearing.

¹ "Specialized occupation" is defined within the Act as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. §1184(i)(1).

² Although Narayan indicated that he intended to file a closing brief (and subsequently requested additional time to do so), I never received Narayan's closing brief. My legal assistant attempted to contact Narayan by phone (May 5, 2010) and email (May 6, 2010) to inform him of this. Narayan has not responded.

The documentary evidence and correspondence have been compiled and arranged in chronological order. Administrative Law Judge Exhibits 1-37, as described below, are admitted into the record.

- Ex. 1 Determination of Administrator, U.S. Department of Labor, Wage & Hour Division, dated April 28, 2008
- Ex. 2 Appeal of Administrator's determination filed by Ravinder Vyasabattu via facsimile requesting hearing and dated May 7, 2008
- Ex. 3 Original copy of appeal of Administrator's determination filed by Ravinder Vyasabattu requesting hearing and dated May 7, 2008
- Ex. 4 Notice of Hearing and Pre-Hearing Order dated August 26, 2008
- Ex. 5 Response to Notice of Hearing and Pre-Hearing Order filed by Ravinder Vyasabattu and dated November 7, 2008
- Ex. 6 Order of Administrative Law Judge dated November 12, 2008, serving a copy of filing (November 7, 2008) on Respondents
- Ex. 7 Response to Order dated November 12, 2008, filed by Ravinder Vyasabattu on November 19, 2008
- Ex. 8 Notice of Hearing Location issued by Administrative Law Judge on December 2, 2008
- Ex. 9 Letter to Administrative Law Judge from Ravinder Vyasabattu dated December 6, 2008, advising copy of pre-hearing statement sent to Respondents returned unclaimed
- Ex. 10 Request for continuance of hearing filed via facsimile on December 4, 2008, by Rajesh Narayan
- Ex. 11 Order of Continuance issued by Administrative Law Judge on December 8, 2008
- Ex. 12 Notice of Hearing and Pre-Hearing Order issued by Administrative Law Judge on January 15, 2009
- Ex. 13 Copy of response of Notice of Hearing dated August 26, 2008, originally filed via facsimile on November 7, 2008, by Ravinder Vyasabattu; filed again via facsimile on March 27, 2009
- Ex. 14 eSemantiks' Answer and Motion to Dismiss filed on April 2, 2009, via e-mail
- Ex. 15 Order of Administrative Law Judge dated April 3, 2009, allowing Prosecuting Party until April 10, 2009, to file a response to the Motion to Dismiss

- Ex. 16 Response to Notice of Hearing and Pre-Hearing Order dated January 15, 2009, filed by Ravinder Vyasabattu and dated April 4, 2009
- Ex. 17a E-mail from Ravinder Vyasabattu to Legal Assistant dated April 10, 2009, attaching response to motion for summary decision
- Ex. 17b Second e-mail from Ravinder Vyasabattu to Legal Assistant dated April 10, 2009, advising response to motion for summary decision not attached to original e-mail; now attached as Annexure G
- Ex. 17c Third e-mail from Ravinder Vyasabattu to Legal Assistant dated April 10, 2009, advising attachment should be J not G
- Ex. 18 Motion dated April 8, 2009, filed by Ravinder Vyasabattu requesting hearing be held via teleconference
- Ex. 19 Response to motion requesting hearing be held via teleconference filed by Rajesh Narayan via e-mail on April 10, 2009
- Ex. 20 Order Continuing Hearing issued by Administrative Law Judge on April 13, 2009
- Ex. 21 E-mail dated April 13, 2009, to Legal Assistant from Rajesh Narayan requesting clarification of Order Continuing Hearing
- Ex. 22 E-mail correspondence to Legal Assistant from Rajesh Narayan dated April 7 and 13, 2009, pertaining to the filing of his pre-hearing statement
- Ex. 23 E-mail from Legal Assistant to Rajesh Narayan advising he will not have to appear at hearing scheduled for April 16, 2009
- Ex. 24 Order to Show Cause Why Claim Should Not Be Dismissed as Untimely issued by Administrative Law Judge and dated April 15, 2009
- Ex. 25 Response to Order to Show Cause filed by Ravinder Vyasabattu and dated April 24, 2009
- Ex. 26 Order Denying Respondents' Motion for Summary Decision and Denying Complainant's Motion to Appear by Telephone at Hearing
- Ex. 27 Transcript of telephone conference conducted on April 1, 2009
- Ex. 28 Order dated June 12, 2009, issued by Administrative Law Judge advising telephone conference call scheduled for June 19, 2009, to discuss hearing
- Ex. 29a E-mail dated June 8, 2009, from Ravinder Vyasabattu to Legal Assistant advising preparations made for hearing via video conference

- Ex. 29b Filing by Ravinder Vyasabattu submitting proof of payment to hold hearing via videoconference on August 5 and 6, 2009
- Ex. 30 E-mail dated June 26, 2009, from Ravinder Vyasabattu to Legal Assistant inquiring if damages can be assessed against Respondents
- Ex. 31 Transcript of Telephone Conference held on June 19, 2009
- Ex. 32 Second Notice of Hearing and Pre-Hearing Order issued by Administrative Law Judge and dated August 28, 2009
- Ex. 33 Response to second notice of hearing filed via facsimile by Ravinder Vyasabattu and dated September 5, 2009
- Ex. 34 Notice of Hearing Location issued by Administrative Law Judge and dated October 19, 2009
- Ex. 35 Notice of Completion of Document Submission issued by Administrative Law Judge and dated October 22, 2009
- Ex. 36 Order dated October 23, 2009, issued by Administrative Law Judge denying Respondents' renewed motion to dismiss
- Ex. 37 Order dated October 27, 2009, issued by Administrative Law Judge listing Exhibits to be admitted into evidence at the hearing

III. Factual Findings

I have carefully considered and evaluated the rationality and internal consistency of the testimonial evidence, including the manner in which the testimony supports or detracts from the other record evidence. I have observed the behavior and outward bearing of the witnesses and gathered impressions as to their demeanor. To the extent credibility determinations must be weighed to resolve the issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard to the demeanor of the witnesses.

Narayan owns eSemantiks, a technology consulting company that hires foreign employees to work in information technology. (Tr. 137). Since 2003, eSemantiks focused on providing Systems Application and Programming ("SAP") services for client companies. (Tr. 138-43). SAP is used to run many of the operations in a large company, including sales, supply chains, finance, payroll, customer relations management, and others. (Tr. 138-39). Client companies pre-negotiate a rate with eSemantiks. (Tr. 147). After receiving the resumes of eSemantiks consultants, client companies interview the consultants over the telephone. *Id.* Then the company decides whether to hire the consultant at the pre-negotiated rate based on this interview. *Id.*

Narayan testified that the interviews would be “very technical.” (Tr. 148). Every month, the client companies approve the consultants’ time sheets. *Id.* Based on the time sheet, eSemantiks would invoice the client, and the client would, in turn, pay eSemantiks for the consultants’ hours. *Id.*

There are two types of possible client companies. (Tr. 149). The first is called a “direct client” and the second is called an “indirect client.” (Tr. 33-34). According to Narayan, many companies have a list of five or six “preferred vendors,” which the company uses for all of its SAP-related needs. (Tr. 149). These companies are direct clients. (Tr. 34). In other instances, there may be another consulting company involved; meaning eSemantiks works with another consulting company, which then signs a contract with the client company for which an eSemantiks consultant will work. (Tr. 152). Narayan cautioned that the more “layers,” the greater the chance that eSemantiks would not get paid. (Tr. 153). Whether the work is for a direct or indirect client, the interviews for consultants are conducted over the phone. (Tr. 34).

About a year after forming eSemantiks, Narayan decided to expand the one-man company. (Tr. 137). He looked for potential consultants in both India and the United States. *Id.* In order to accommodate the future employees, Narayan leased a “guesthouse” from a rental company. (Tr. 144). The guesthouse had a telephone, cable television, and internet access. *Id.* It was located near public transportation in Chicago. *Id.*

Vyasabattu was among the first group of employees recruited from India. (Tr. 141). In compliance with the regulations, eSemantiks filed an LCA with the Department of Labor in order for Vyasabattu to be admitted to the United States as an H-1B non-immigrant worker. (Ex. 1). The LCA at issue here covered a three-year period from October 1, 2004, through October 1, 2007. *Id.* An eSemantiks employee signed the LCA, attesting that eSemantiks would pay the SAP Programmer \$45,000 per year during this period. *Id.*

Vyasabattu arrived in the United States on April 29, 2005. (Tr. 16). Narayan met him at the airport and took him to the company’s guesthouse. *Id.* Although Vyasabattu initially “resisted going on a job without a social security number” (Tr. 44), he eventually completed a number of interviews (Tr. 24). Besides interviewing with client companies, Vyasabattu testified that he applied for and received a social security number during his stay at the guesthouse. (Tr. 19). Vyasabattu also testified that he took one or more exams relating to SAP. (Tr. 27-28).

But Vyasabattu was not hired by any of the client companies. (Tr. 24). Vyasabattu testified that the client companies told him that “the billing rate was too high” and “was above the market rate.” *Id.* Narayan disputed this. According to Narayan, the rate had already been pre-negotiated with the client companies. (Tr. 147). Narayan claimed that Vyasabattu was not hired by the client companies because Vyasabattu lacked SAP knowledge. (Tr. 50). He stated that he received feedback from the clients that Vyasabattu was not familiar with SAP and did not understand the interview questions. *Id.*

Vyasabattu stayed four months at the company guesthouse. (Ex. 3). Vyasabattu testified that he understood that he would be paid every month and that pay was not contingent on one of the client companies hiring him. (Tr. 26-27). But he claimed that he never received a salary, health insurance, or other benefits. (Ex. 3). Vyasabattu described a conversation in which Narayan told him that he would begin charging Vyasabattu \$500 per month to stay in the guesthouse if he “did not get a job in the next interview.” *Id.* At the hearing, however, Vyasabattu testified that he left the guesthouse because of dirty and crowded conditions. (Tr. 125-36). Eventually, Vyasabattu told Narayan that he would leave the guesthouse to “find a project on his own.” (Tr. 30). He also indicated that he would go to visit his brother in St. Louis to “refresh” and then “go ahead with, you know, interviews.” (Tr. 54). Vyasabattu acknowledged that Narayan told him “you will not be paid” and “we [eSemantiks] are not going to pay you.” (Tr. 54). Based on Vyasabattu’s testimony, I find that when Vyasabattu left the guesthouse, he had knowledge that he would not receive wages from eSemantiks or Narayan. I further find that Vyasabattu intended to find his own projects.

Vyasabattu left the guesthouse. Subsequently, Narayan requested that Vyasabattu’s I-129 Petition for Alien Worker be revoked. (Tr. 154-55). A few months later, on November 22, 2005, Narayan received a Notice from the United States Citizenship and Immigration Services (“USCIS”) that his request was successful. (Ex. 14). Narayan explained that it typically takes three months for USCIS to revoke a visa; thus, the fact that Vyasabattu’s visa was revoked in November is evidence that Narayan requested revocation three months earlier, in August—about the time Vyasabattu left the guesthouse. *Id.* Based on the parties’ testimony, I find that Vyasabattu left the eSemantiks guesthouse in August 2005, after a four-month stay.

Narayan testified that he attempted to contact Vyasabattu by phone and email to tell him about his visa. (Tr. 155; 179). Narayan testified that Vyasabattu never responded to emails sent to Vyasabattu’s eSemantiks email address or Vyasabattu’s personal email address. (Tr. 155-156). He stated that Vyasabattu was

“incomunicado” during the period immediately following Vyasabattu’s departure from the guesthouse. (Tr. 154-55). When asked why he thought an H-1B employee would abandon his job, Narayan explained that the nonimmigrant could get work approval from a competing consulting company. (Tr. 162). Because Narayan believed Vyasabattu abandoned eSemantiks, Narayan maintained that eSemantiks was not obligated to pay for Vyasabattu’s return flight to India. (Tr. 108).

After leaving the guesthouse, Vyasabattu testified that he worked for three different companies. (Tr. 60). He told these companies that he was in the United States on an LCA through eSemantiks and expected to eventually be paid by eSemantiks, after it received the money from the companies. (Tr. 59). During this time, Vyasabattu testified that he thought he was still working for eSemantiks because he had no notice from Narayan that his visa had been canceled. (Tr. 62).

Although Vyasabattu never received wages from eSemantiks or Narayan, Vyasabattu denied receiving notice, either by voicemail or email, that Narayan terminated his employment. (Tr. 55). Vyasabattu further cited emails from November and December 2005, in which Narayan communicated with Vyasabattu but did not mention the canceled visa. (Tr. 55; ex. 13). The first email states that Narayan “hope[s] you are on some project by now and doing well.” (Ex. 13). And the second informs Vyasabattu that his credit card was delivered to the guesthouse. *Id.*

A few months later, on February 11, 2006, Narayan sent an email to Vyasabattu in which he congratulated Vyasabattu on joining a different company. (Ex. 13). Narayan also demanded \$10,600 from Vyasabattu, which covered reimbursement for recruitment and Visa costs (\$4,000), flight cost from India to the United States (\$600), and six months’ stay in the corporate guesthouse (\$6000). *Id.*

Next, an email from Vyasabattu to Narayan indicated that Vyasabattu unsuccessfully attempted to have his visa converted to a different consulting company sometime prior to March 8, 2006. (Ex. 14). Regardless, Vyasabattu indicated that he worked for JP Morgan Chase from May 30 to September 6, 2006. *Id.* He stated that he found the job through a consulting company called Reliance Global. *Id.* Subsequently, Narayan demanded money from Vyasabattu. *Id.* According to Vyasabattu:

[Narayan] stated that he had invested money on me and that he needs to levy penalty on me for his late returns. At the same time, my family [applied] for H4 visa stamping and I was desperate to get on a pay roll.

Id. There is evidence that Vyasabattu’s brother gave \$3,500 to Narayan, apparently with the hope that Narayan would issue a W-2 statement. (Ex. 3; 13). Vyasabattu indicated

that a W-2 statement was needed to process a green card application. (Ex. 17). It is not clear whether Vyasabattu believed that this would re-establish his relationship with eSemantiks. *Compare* tr. 114 (“I did think in that way that my relationship was going to be [reestablished].” *with* tr. 115 (“I was not thinking that I was, I was reestablishing the relation with eSemantiks.”). Either way, I find this to be evidence that Vyasabattu believed there was no employment relationship, contrary to his testimony that he had no notice of the termination.

Finally, in September and October 2006—more than one year after Vyasabattu left the eSemantiks guesthouse—Narayan responded to email requests from Vyasabattu that Narayan pay his back wages according to the LCA. (Ex. 14). Narayan responded that “you never worked for eSemantiks” and “your services were terminated long ago right when you went absconding right after your arrival from India.” *Id.* Narayan further stated, “I promptly canceled your Visa and informed your brother Mahendra over the phone.” *Id.* He also referenced the February 2006 email, in which Narayan congratulated Vyasabattu on joining a new company. *Id.* Vyasabattu responded, demanding a return ticket to India. *Id.* Vyasabattu acknowledged that he received these emails. (Tr. 97). But he stated that he did not believe Narayan had canceled his visa because Narayan did not provide return transportation to India. (Tr. 100). He was under the impression that Narayan was trying to threaten him. *Id.*

Vyasabattu left the United States in August 2007, after being notified by a government official that his visa had been canceled. (Tr. 105; 103). His brother paid for the return ticket. (Tr. 105; Ex. 16). The price was \$825. (Ex. 16). When asked how he was able to live in the United States for more than two years without receiving any pay, Vyasabattu explained that he received \$500 to \$600 dollars per month from his brother to cover his living expenses. (Tr. 67). Vyasabattu also acknowledged a sum of \$2,000 to \$2,500, which he received from Reliance Global. (Tr. 67; 94). According to Vyasabattu, Reliance Global provided him with accommodations for a period of time. (Tr. 96).

IV. The Parties’ Contentions

Vyasabattu alleges the following violations: (1) failure to pay H-1B workers the higher of the prevailing or the actual wage, (2) failure to provide fringe benefits to H-1B workers equivalent to those provided to United States workers, and (3) failure to maintain and make available for public inspection the LCA and supporting documents at the employer’s place of business.³ (Ex. 2).

³ In my Order dated April 15, 2009, I found that allegations of other violations selected on the original Form WH-4 complaint (ex. 1), but not raised in Complainant’s hearing request, have been

Narayan first disputes the timeliness of Vyasabattu's complaint. (Tr. 33). According to Narayan, Vyasabattu filed his complaint on December 30, 2006, more than one year after Vyasabattu's visa was revoked, which occurred in November 2005. *Id.* In response, Vyasabattu denies ever receiving notice that his visa was terminated. He also maintains that Narayan should have provided return transportation to India.

Next, Narayan disputes that Vyasabattu ever entered into employment with eSemantiks. According to Narayan, because Vyasabattu never started a project, he never entered into employment. (Tr. 143; 155). In the alternative, Narayan argues that there was a bona fide termination on November 22, 2005, when Vyasabattu's visa was revoked by USCIS. (Tr. 154).

Because I ultimately find Vyasabattu's complaint to be untimely, the remaining issues are moot.

V. Law and Analysis

The regulations require that an aggrieved party file a complaint with the Administrator "not later than 12 months after the latest date on which the alleged violation(s) were committed." 20 C.F.R. § 655.806(a)(5). Vyasabattu is clearly an aggrieved party. *See* 20 C.F.R. § 655.715. Further, in alleging that eSemantiks failed to pay wages, Vyasabattu has alleged that eSemantiks committed a violation of 20 C.F.R. § 655.805(a). Thus, I will first address when the limitations period began to run and then whether any equitable tolling is applicable.

A. Timeliness

The limitations period begins to run on the date that a complainant receives final, definitive, and unequivocal notice of a discrete adverse employment action. *Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, ALJ No. 2004-LCA-36, slip op. at 3 (ARB May 9, 2007) (*citing Erickson v. EPA*, ARB Nos. 03-002, 03-003, 03-004, 03-064; ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18 (May 31, 2006)). The Board explained:

"Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. Furthermore, the limitations period

abandoned. 20 C.F.R. § 655.820(3), (4) (requiring that the request for a hearing "[s]pecify the issue or issues stated in the notice of determination giving rise to such request," and "[s]tate the specific reason or reasons why the party requesting the hearing believes such determination is in error.").

begins to run when the employer communicates to the employee its “final, definitive, and unequivocal” intent to implement an adverse employment decision, rather than on the date on which the employee experiences the consequences of that decision.

Id. (footnotes omitted).

In *Ndiaye*, the complainant argued that her firing was not a bona fide termination. *Id.* As a result, she argued that the statute of limitations had not expired. *Id.* The Board decided that complainant’s cause of action accrued from the date the complainant received notice of her termination and from not the date the employer effected a bona fide termination. *Id.* The Board explained that “measuring an adverse action from the point of a ‘bona fide termination’ could potentially allow employers to shield themselves from any potential causes of actions by never effecting a bona fide termination, and thus never taking a cognizable adverse action.” *Id.*

Here, as in *Ndiaye*, the alleged bona fide termination did not coincide with any adverse employment actions. Narayan did not effect a bona fide termination in August 2005, when Vyasabattu left the guesthouse.⁴ Other than Narayan’s testimony, there is no evidence in the record that Vyasabattu received notice that his visa had been revoked until September 2006. True, Narayan indicated that he told Vyasabattu’s brother that Vyasabattu’s visa was revoked much earlier. Narayan also stated that he communicated this to Vyasabattu by email in August and September 2005. But these emails are not in the record, and Vyasabattu’s brother was not called to testify at the hearing. Further, Narayan never paid for Vyasabattu’s return transportation to India. Vyasabattu left the United States in August 2007 after being notified by a government official that his visa had been canceled. His brother paid for the return ticket. Assuming that eSemantiks has failed to effectuate a bona fide termination and Vyasabattu’s employment continued to run until the end of his H-1B visa, however, the cause of action does not extend to that point.

Final, definitive notice of termination constituted an adverse employment action in *Ndiaye*. Similar evidence of termination is not found in this case because Narayan

⁴ To effect a bona fide termination, the employer must take three steps. *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-39, slip op. at 5 (ARB March 30, 2007). It must give the employee notice that the employment relationship is terminated. *Id.* It must notify the Department of Homeland Security that the employment relationship has been terminated. *Id.*; 20 C.F.R. § 655.731(c)(7)(ii). And it must provide the employee with payment for transportation home under certain circumstances. 20 C.F.R. § 655.731(c)(7)(ii). The Board has stated that the employer has the burden of proof on each element of a bona fide termination. *Gupta*, slip op. at 5.

argues that Vyasabattu was never an employee.⁵ But Vyasabattu did receive final, definitive notice that he would not be paid by eSemantiks. Vyasabattu testified that Narayan told him “you will not be paid” and “we [eSemantiks] are not going to pay you.” (Tr. 54). These statements denote conclusive communications that leave no further chance for discussion. They are not ambiguous. Vyasabattu could come to only one conclusion—eSemantiks would not pay his wages.

Moreover, I find it wholly unreasonable that Vyasabattu would believe himself to be an eSemantiks employee after he left the guesthouse in August 2005. Although Vyasabattu testified that he never received notice of the termination, I have found other testimony to be contrary evidence. Further, he never received any wages from eSemantiks. Narayan in fact told Vyasabattu that he did not become an employee of eSemantiks until he secured his first project with a client company. This never happened. At the time Vyasabattu left the guesthouse, Vyasabattu received final, definitive notice that eSemantiks would not pay his wages. At this time, Narayan communicated his intent to implement an adverse employment decision. The limitations period began to run in August 2005. His complaint, filed December 30, 2006, was outside the statute of limitations.

B. Equitable Tolling

The Board recognizes three situations that will toll the statute of limitations in this claim:

- (1) When the respondent has actively misled the complainant respecting his or her rights to file a petition,
- (2) The complainant has in some extraordinary way been prevented from asserting his or her rights, or
- (3) The complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

⁵ Narayan argues that because Vyasabattu never started a project with a client company, he never entered into employment. The statute and regulations do not support his arguments. An H-1B nonimmigrant is entitled to receive pay beginning on the date when the nonimmigrant “enters into employment” with the employer. 20 C.F.R. § 655.731(c)(6). An H-1B nonimmigrant has “entered into employment” when he first makes himself available for work or otherwise comes under the control of the employer, “such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.” *Id.* at § 655.731(c)(6)(i); *Vojtisek v. Clean Air Tech., Inc.*, ARB No. 07-097, ALJ No. 2006-LCA-9, slip op. at 10-11 (ARB July 30, 2009).

Ndiaye, slip op. at 2. Subjective belief by complainant that they might not be terminated does not warrant tolling. *Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, ALJ No. 2004-LCA-36, slip op. at 6-7 (ARB November 29, 2006). Ignorance of the law also does not support a finding of equitable tolling. *Id.*

There is no evidence that Narayan actively misled Vyasabattu with respect to his rights to file a petition, nor has Vyasabattu made any assertion that he was misled. There is also no evidence that Vyasabattu was prevented from asserting his rights or that Vyasabattu previously raised this claim in the wrong forum. To the extent that Vyasabattu may claim ignorance of the law or a subjective belief that he was still an employee of eSemantiks, neither claim warrants equitable tolling.

ORDER

IT IS ORDERED that, based on the findings in this case, Ravinder Vyasabattu's request for relief is denied. His complaint is **DISMISSED** as untimely, and the Administrator's determination dated April 28, 2008, is **AFFIRMED**.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).

