



**Issue Date: 25 January 2012**

CASE NO.: 2010-LCA-00024

ARB NO.: 11-041

In the Matter of

**ARVIND GUPTA**

Prosecuting Party

v.

**WIPRO LIMITED (trading as WIPRO TECHNOLOGIES)**

Respondent

**ORDER ADMITTING POST-REMAND EXHIBIT; DENYING MOTIONS;  
AND DECISION AND ORDER ON REMAND  
FROM THE ADMINISTRATIVE REVIEW BOARD**

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (the “Act”), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 *et seq.*

Procedural History

The Prosecuting Party, Arvind Gupta (“Gupta”), is an individual who is a resident of India. He is not represented by counsel. The Respondent, Wipro Technologies (“Wipro”), is a company that has an office located in Mountain View, California. This matter was transferred to me in July 2010, when it was reassigned from another administrative law judge.

By Order dated March 28, 2011, after notice to Gupta and the Administrator, I granted summary decision (“SD Decision”) in favor of the Administrator; and dismissed the case. The Prosecuting Party appealed to the Administrative Review Board (the “Board”).

By Decision and Order of Remand dated August 11, 2011, the Board remanded this matter to me for additional consideration. In its Decision and Order of Remand, the Board did not provide any specific instructions to me. Rather, it stated that “it is within the ALJ’s discretion, after proper notice to Gupta, the Administrator, and Wipro, to conduct the proceedings on remand in the manner she believes appropriate.” Decision and Order of Remand at 6.

Upon my receipt of this matter back from the Board, I issued a number of Orders, each of which was served on Wipro, on Gupta, and the Administrator.<sup>1</sup> In my Order of August 30, 2011, I informed the parties that I was reconsidering my SD Decision. Order of Aug. 30, 2011, at 2. I opened the record to permit Wipro to submit any materials it deemed relevant to Gupta's complaint, as well as any argument in support of its position. I also specifically informed Wipro that, in the event Wipro did not submit any materials or argument, I would presume that Wipro does not object to any of the findings of fact or conclusions of law set out in my dismissal order of March 28, 2011, and also does not object to my dismissal of Gupta's complaint. Order of Aug. 30, 2011, at 3.

By Order dated November 28, 2011, I admitted items that Gupta had submitted, and denominated the items as "Gupta's Post-Remand Exhibit."<sup>2</sup> In that same Order, I specifically advised Gupta that I was considering granting summary decision in favor of the Administrator, and authorized him to submit any additional materials he wished me to consider. Order of Nov. 28, 2011, at 2. In response, Gupta submitted two items: a copy of an LCA for the period from June 14, 2005 to June 10, 2008; and his declaration.<sup>3</sup> As no party has submitted any objection or response to Gupta's submission, these items are hereby admitted and denominated as "Gupta's Post-Remand Exhibit 2."<sup>4</sup>

In addition to the items that Gupta submitted, I received from Wipro a one-page letter dated November 4, 2011, stating that, in its view, the Department of Labor has determined Gupta's allegations against it to be meritless, and it has no further comment. The Administrator did not submit any substantive items.<sup>5</sup>

### My Prior Summary Decision

In my prior SD Decision, I found that, because the Administrator had initially accepted Gupta's complaint, under the governing regulation an investigation must be conducted and a determination letter issued. SD Decision at 8. I also noted that a determination letter (as described in 20 C.F.R. § 655.806(b)) serves multiple purposes, not just for a complainant, but for other parties as well. For example, it serves as a record of the Administrator's action; and if no party requests a hearing, then the administrator's action becomes final. *Id.* Although I found that the Administrator's failure to issue a determination letter was inconsistent with the regulation, I also determined Gupta had not suffered any harm thereby, because he had requested a hearing before an administrative law judge. SD Decision at 8, 10.

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<sup>1</sup> Not all of my Orders are summarized herein.

<sup>2</sup> Gupta stated these items were in support of his renewed Motion to amend the dates of his employment. I will discuss Gupta's Motion to amend the dates of his employment below.

<sup>3</sup> Gupta's late submission of these items is recounted in my Order of December 22, 2011.

<sup>4</sup> Because I now have admitted Gupta's Post-Remand Exhibit 2, I re-name his earlier Post-Remand Exhibit as "Post-Remand Exhibit 1."

<sup>5</sup> By letter dated September 19, 2011, the Administrator's representative certified that Wipro had been provided with copies of the items submitted to me prior to my dismissal order in March 2011. *See* Order of Aug. 30, 2011, at 2.

What I failed to consider when I granted summary decision, however, is whether Wipro's interests had been adequately protected. This the Board recognized. On review, and upon consideration of the entire record on remand, I determined that the Board's principal concern was that Wipro had not had the opportunity to fully participate in the proceedings before me. Order of Aug. 30, 2011, at 2. More specifically, I now recognize that prior to dismissing the case, I had not provided Wipro with notice of the proceedings before me or given Wipro an opportunity to participate in proceedings to defend its interests.

After notice from me, and receipt of copies of all items that had been submitted to me by the other parties in this matter, Wipro responded it had no comment on the proceedings.<sup>6</sup> Notably, Wipro was given the opportunity to comment and interpose objections to my prior summary decision. It chose not to do so. Consequently, I infer that Wipro has no objection to my dismissal of Gupta's complaint.

I find that notice to Wipro about these proceedings, and my consideration of Wipro's position, adequately resolves the concern the Board expressed in its Order of Remand. See Decision and Order of Remand at 6.

#### The Issues to be Determined

Now that I have determined that Wipro has not interposed any objection to a summary decision in favor of the Administrator, I find it is appropriate to review the issues that are before me. The gravamen of Gupta's complaint against Wipro on which I issued summary decision was that Wipro took "unauthorized deductions" from employee pay. SD Decision at 1; See also WHISARD Complaint Information Form; Gupta's Exhibit 10 (EX 10). Based on the record before me at that time, I found Gupta's complaint as a former employee was untimely, and he failed to establish that equitable tolling should apply to excuse the untimeliness of his complaint. SD Decision at 11-12. I also found that Gupta was not able to establish any alternative basis under the regulation to be considered as an aggrieved party or as a credible information source. SD Decision at 13-14.

On remand, on careful review of the Board's Decision and Order on Remand, I find that my determination is limited to the same issue that was initially before me. Therefore, notwithstanding that Gupta now asserts I should address other issues (such as his contention that Wipro is responsible to pay him wages up to June 10, 2008, as he suggests in his Motions), I decline to do so.

#### Standard for Summary Decision

The standard for granting summary decision is set forth in my earlier SD Decision. SD Decision at 10.

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<sup>6</sup> Wipro also stated that the Administrator had determined Gupta's allegations to be meritless. This is not entirely accurate; rather, the Administrator determined that Gupta's allegations were time-barred. See, e.g., Administrator's Letter-brief of Dec. 2, 2010, at 4-5.

### Gupta's Pending Motions

Gupta made a motion before the Board to amend the dates of his employment. See "Motion for Leave to Amend Dates of Employment and Motion for Remand." The Board did not act on Gupta's Motion. Before me on remand, on August 15, 2011, Gupta renewed his motion to amend the dates of his employment. See "(Renewed) Motion for Leave to Amend Dates of Employment and Motion for Remand." I have not heretofore addressed Gupta's Motion.<sup>7</sup> On review, I DENY Gupta's Motion. As set forth above, I have found that it is proper to limit my decision on remand to the issues that were before me at the time I initially adjudicated this matter. Gupta's Motion does not relate to these issues, but rather seeks to interject new issues.

By Motion dated November 23, 2011, Gupta requested that I issue an Order to Show Cause to Wipro Why Partial Summary Decision in Favor of Complainant [Gupta] Should Not be Entered. In his Motion, Gupta contended that Wipro has "failed to present any material evidence or legal arguments to meet its burden of proof regarding termination or bona fide termination of employment of Arvind Gupta prior to '06/10/2008.'" I DENY the Motion. As noted above, my adjudication is limited to re-examining my prior SD Decision. It is inappropriate to consider new issues, such as those contained in this Motion.<sup>8</sup>

### Consideration of Exhibits Gupta Submitted on Remand

As set forth above, I once again consider whether summary decision in favor of the Administrator is appropriate in this matter. By Order dated November 28, 2011, I informed Gupta that I was considering summary decision. The record before me consists of all of the items that were previously entered into the record, as well as the items I have since admitted: Gupta's Post-Remand Exhibit and Gupta's Post-Remand Exhibit 2.<sup>9</sup>

Gupta's Post-Remand Exhibit consists of two documents. First, an "Earnings Statement" from Wipro, Ltd., at an address in East Brunswick, New Jersey, to "Arvind Gupta" at an address in Atlanta, Georgia, for the period from 03/01/2008 to 03/31/2008, reflecting income of \$5,523.00, and deductions for federal and state taxes (including deductions for "NE State Income Tax)." Second, a W-2 Form, issued to "Arvind Gupta" at an address in Atlanta, Georgia, reporting income of \$5,323.00.

Gupta's Post-Remand Exhibit 2 also consists of two documents. First, a copy of an LCA for the period from 06/14/2005 to 06/10/2008, for Wipro, Limited, for a "business systems analyst" in Omaha, (Nebraska); second, Gupta's declaration. In his declaration, Gupta states that

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<sup>7</sup> I note it was received in my office on August 30, 2011, the same date as the date I issued my "Order Acknowledging Receipt of Remand from Administrative Review Board," etc. I was unable to review Gupta's Motion before issuing the Order.

<sup>8</sup> Moreover, under the governing regulation, although an administrative law judge is authorized to enter summary decision in favor of any party, such action is never required. See 29 C.F.R. § 18.41(a). Consequently, whether to issue a show cause order on the issue of summary decision is a matter completely within my discretion.

<sup>9</sup> The items that were previously entered into the record are listed in my SD Decision at 2-3.

Wipro “could but did not present any argument or submitted [sic] any material in support of bona fide termination of Complainant’s employment prior to 06/10/2008 – end of authorized period of employment approved by USCIS.” Declaration at 2.

#### Findings of Fact

In my SD Decision, I made 17 findings of fact. SD Decision at 6-8.

Based on the Post-Remand Exhibits, which I have admitted into the record, I find it is appropriate for me to review my earlier findings of fact. I have reviewed my earlier findings of fact, and I find that it is unnecessary to amend any of them. I also conclude that, based on the Post-Remand Exhibits, it is appropriate to enter additional findings of fact.

Gupta’s first Post Remand Exhibit consists of a W-2 and a pay stub from Wipro. Gupta’s Post-Remand Exhibit 1. These two documents establish that Wipro paid Gupta \$5,523.00 in March 2008; and that this constitutes all of the money paid to him by Wipro in that year. The only deductions taken from Gupta’s 2008 wages, as shown in both the pay stub and W-2 form, were federal and state taxes. Gupta’s Post Remand Exhibit 2 is an additional LCA application from Wipro. The new LCA application reflects that the place of employment is to be Omaha, and the period of employment is June 14, 2005 to June 10, 2008.

Therefore, and based on the Post-Remand Exhibits, I make the following additional findings of fact:

18. Wipro paid wages to Gupta in March 2008, pursuant to an LCA authorizing employment through June 10, 2008. Post-Remand Exhibits 1, 2.

19. Wipro deducted federal and state taxes from Gupta’s wages in March 2008, but did not take any other deductions from his wages. Post-Remand Exhibit 1.

20. The wages Wipro paid in March 2008 were the only wages Wipro paid to Gupta in that calendar year. Post-Remand Exhibit 1.

I find that none of these new factual findings is necessarily inconsistent with the prior record or my prior findings of fact.

On review, I also find that Gupta’s 2008 employment with Wipro does not establish the timeliness of Gupta’s complaint that is before me on review. Under the regulation, a complaint must be filed not later than 12 months after the latest date on which alleged violations were committed. 20 C.F.R. § 655.806(a)(5). The record establishes that Gupta filed his complaint in May 2009, and I previously so found. WHISARD Complaint Information Form; SD Decision at 7. Taking into consideration the Post-Remand Exhibits, which establish that Wipro’s last payment of wages to Gupta was in March 2008, Gupta’s complaint was untimely, because it was more than 12 months after the wages were paid.

Moreover, I also find that the Post-Remand Exhibits do not provide additional evidence relating to the merits of Gupta's complaint. His initial complaint alleged only that Wipro was taking unauthorized deductions, and I previously so found. WHISARD Complaint Information Form; SD Decision at 7. The Post-Remand Exhibits establish that, in March 2008, Wipro deducted only federal and state taxes, which are specifically authorized under the H-1B program. See 20 C.F.R. § 655.731(c)(9). Based on these items, I find there is no evidence that in March 2008 Wipro was taking unauthorized deductions from Gupta's pay.

Based on the foregoing, therefore, I conclude that Gupta's submission of Post-Remand Exhibits does not provide any basis for me to reverse my prior determination granting summary decision in favor of the Administrator. In this regard, I am mindful that all inferences must be made in favor of Gupta, as a non-moving party, and I have done so.

### Conclusion

After remand, Wipro has declined to submit any additional evidence or argument on the issue of the appropriateness of my earlier determination granting summary decision in favor of the Administrator. Gupta has had the opportunity to submit additional items and I admitted Post-Remand Exhibits. However, on review, I have determined that these items do not provide any basis for me to reverse my prior determination.

Therefore, on remand, I find that summary decision in favor of the Administrator is appropriate. The Complainant's complaint is DISMISSED.

**A**

Adele H. Odegard  
Administrative Law Judge

Cherry Hill, New Jersey

**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 thirty (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).