



Issue Date: 17 December 2010

CASE NOS: 2010-LCA-35

IN THE MATTER OF

SELVA KUMAR

Prosecuting Party/Complainant

v.

NIHAKI SYSTEMS, INC.

Respondent

**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
AND CANCELLING FORMAL HEARING**

This proceeding arises under the H-1B provisions of the Immigration and Nationality Act (hereinafter INA or the Act), 8 U.S.C. § 1101, et seq., and its implementing regulations at 29 C.F.R. Part 507, et seq., and, more specifically, 20 C.F.R. Part 655 relating to Labor Condition Applications for H-1B non-immigrants (herein LCA).

On July 28, 2010, the District Director, in his Administrator's Determination, found Respondent violated the Act by failing to pay required wages, failing to provide notice of the filing of LCAs and failing to comply with the provisions of subparts H and I. The determination stated that Respondent or any interested party, including Complainant, must request a hearing no later than fifteen calendar days from July 28, 2010. Specific instructions were given on the form requirements of the request.

On August 30, 2010, Complainant faxed an "Addendum request," received by OALJ on September 3, 2010, stating he mailed an August 10, 2010 "Motion to Extend" some time during the second week of August, but it had not yet reached the OALJ. In the addendum, Complainant readily admitted he "may have to face the timeline issue on [the] request due to the timeliness nature of this matter."

On September 21, 2010, the undersigned issued a Notice of Hearing and Pre-Hearing Order setting a formal hearing in this matter for December 29, 2010, in Houston, Texas.

On September 24, 2010, Complainant filed a formal request for hearing with DOL, specifically disagreeing with the Administrator's Determination and seeking civil penalties against Respondent.

On November 18, 2010, Respondent filed a Motion to Dismiss, seeking dismissal of Complainant's complaint against it, arguing the request for hearing was untimely filed on August 30, 2010. Specifically, Respondent argues the Administrator's Determination expressly outlined the procedure and timeline requirements for Complainant to request a formal hearing; as Complainant made no such timely request, the Administrator's Determination became a final and unappealable Order of the Secretary of Labor on August 12, 2010 (15 calendar days from July 28, 2010).

On November 26, 2010, the undersigned issued an Order to Show Cause, ordering Complainant to show cause by December 10, 2010, why the undersigned should not grant Respondent's Motion to Dismiss Complainant's complaint on the grounds of untimeliness.

On December 8, 2010, Complainant filed a Memorandum in Opposition to Respondent's Motion to Dismiss, arguing his August 10, 2010 "Motion to Extend" was initially sent to the OALJ within fifteen days of the date of the Administrator's Determination. In support of his argument, Complainant attached Exhibit "E," which is Complainant's "Motion to Extend" bearing a typewritten date of August 10, 2010.

On December 9, 2010, Respondent filed a "letter brief and Certification" in response to Complainant's memorandum in opposition, again urging Complainant's request for hearing was untimely. Respondent additionally argued Complainant was not an interested party pursuant to 20 C.F.R. § 655.820 because he was not disputing that Respondent failed to pay wages, but instead was disputing a separate and distinct agreement that it would pay Complainant in installments.

On December 15, 2010, Complainant filed a letter in response to Respondent's "letter brief" filed December 9, 2010. Complainant argued he filed his request for hearing on August 10, 2010. He further argued that because DOL assigned the case to an Administrative Law Judge and a Notice of Hearing and Pre-Hearing Order was subsequently issued, the request was considered timely filed under 20 C.F.R. § 655.835(a).

I find Complainant's request for hearing was untimely submitted to OALJ. Though Complainant's "Motion to Extend" is dated August 10, 2010, the record is devoid of any indicia that it was mailed on or around that date. "For the requesting party's protection, if the request is by mail, it should be certified mail." 20 C.F.R. § 655.820(e). The "Motion to Extend" was only received by OALJ as an enclosure with his "Addendum Request" filed September 3, 2010. The envelope in which the "Addendum Request" and "Motion to Extend" were submitted was postmarked August 31, 2010. Moreover, Complainant recognizes and admits in his "Addendum Request" he may face timeliness issues due to the late filing of his request for hearing. Further, even if Complainant had evidentiary support of his mailing the request on August 10, 2010, documents are not deemed filed until receipt by OALJ, and a period of only five days is added to the prescribed period for filings by mail. 29 C.F.R. § 18.4(c). As previously stated, Complainant's request for hearing was not filed until September 3, 2010, well after the time for filing the request had lapsed, even with the five day extension.

Though untimeliness is not an absolute bar to administrative action and may be tolled by equitable consideration, equitable tolling is appropriate only where (1) a Respondent actively misled the complainant regarding the cause of action; (2) the Complainant has been prevented from asserting his rights in some extraordinary way; (3) a Complainant has raised the right claim, but has mistakenly done so in the wrong forum; or (4) Complainant lacked information essential to his

claim. School District of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981); Coke v. General Adjustment Bureau, Inc., 654 F.2d 584 (5th Cir. 1981); Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978); Prybys v. Seminole Tribe of Florida, Case No. 95-CAA-15 (ARB November 27, 1996); Coppinger-Martin v. Solis, 9th Cir., No. 09-73725, 11/30/10).

In this matter, there is no evidence that Respondent misled Complainant in any fashion regarding his right to appeal the determination to OALJ; nor was there any evidence Complainant was prevented from asserting his rights in an extraordinary way. The Administrator's Determination explicitly stated Complainant and/or Respondent must request a formal hearing before OALJ within fifteen calendar days from the date of the determination under penalty of the determination becoming a final order of the Secretary of Labor. As the date of the determination was July 28, 2010, Complainant had until August 12, 2010, to file a request for hearing before OALJ. Whether Complainant filed his request in the correct forum is not an issue because nothing that could be construed as a request for hearing was filed with any office until September 3, 2010, well beyond the August 12, 2010 deadline. Finally, Complainant had all the information essential to requesting a formal hearing before OALJ; the District Director gave unequivocal and express written instructions on the procedure and time requirements for requesting a hearing.

As Complainant did not file his request until September 3, 2010, at the earliest, after he had been given explicit, express written instruction from the District Director as to the procedural and timeliness requirements for requesting a hearing before OALJ, I find Complainant's request for hearing to be untimely. I further find that the principle of equitable tolling is inappropriate and thus inapplicable in this matter.

Considering the foregoing, I find that Respondent is entitled to dismissal in this matter, and its Motion to Dismiss is hereby **GRANTED**.

Since the matter is being dismissed on timeliness grounds, I find that the issues of whether Complainant is an interested party and whether venue is proper and/or convenient, to be moot.

Accordingly,

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss be, and it is, **GRANTED**, and that Complainant Selva Kumar's complaint is hereby **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that the formal hearing scheduled in this case on December 29, 2010, in Houston, Texas, be, and it hereby is, **CANCELLED**.

ORDERED this 17th day of December, 2010, at Covington, Louisiana.

A

LEE J. ROMERO, JR.
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 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).