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Issue Date: 14 July 2010

OALJ No.: 2010-LCA-00020
Wage and Hour No.: 1512592

In the Matter of:

JUAN CARLOS LUBARY,
Complainant/Prosecuting Party,

v.

EL FLORIDITA
d/b/a
BUENOS AYRES BAR & GRILL,
Respondent.

BEFORE: STEPHEN L. PURCELL
Acting Chief Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINANT'S UNTIMELY REQUEST FOR A HEARING

This matter arises out of a determination issued by the Administrator, Wage and Hour Division, under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(i)(B) and 1182(n), the implementing regulations at 20 C.F.R. Part 655, subparts H and I, relating to labor condition applications for H-1B visas.[1]

BACKGROUND

On January 21, 2009, the Assistant District Director of the Puerto Rico Wage and Hour Division (WHD) office issued a determination to El Floridita d/b/a Buenos Ayres Bar & Grill (Respondent).[2] The Administrator's determination included a finding that Respondent failed to

[1] The following abbreviations will be used as citations to the record: "Admin. Det." for the Administrator's January 21, 2009 determination letter; "Comp. Letter to Phil. WHD" for Complainant's April 7, 2010 letter to the Philadelphia WHD office; "Comp. Br." for Complainant's Show Cause Brief; "Resp. Br." for Respondent's Show Cause Brief; "CX" for Complainant's Exhibit; "EX" for Respondent's Exhibit, and "Admin. Letter" for the Administrator's July 12, 2010 letter.

[2] Complainant states that he filed a complaint with the Puerto Rico WHD office in March 2008 alleging that Respondent underpaid him $36,160 in wages and $26,000 in car allowances between 2003 to 2007. CX I.

pay wages required under its H-1B Labor Certification Application (LCA) and required Respondent to pay back wages of $4,605.39 to one H-1B nonimmigrant worker.[3] The determination notified Respondent and any interested parties that a request for a hearing on this determination could be made by sending a dated, written request to the Chief Administrative Law Judge of the U.S. Department of Labor within 15 calendar days after the date of the determination.

On April 7, 2010, more than a year after the Administrator's determination, Complainant sent a letter and other documents to the Philadelphia WHD office, stating that on January 28, 2009, he had met with Mr. Edison Fernandez, Assistant District Director of the Puerto Rico WHD office and expressed his objections to the amount of back wages in the Administrator's determination letter.[4] Comp. Let. to Phil. WHD at 3. Complainant alleged that on this date, he did not accept the check tendered by Respondent to satisfy the Administrator's determination. *Ibid*. In Complainant's letter, he further stated that on February 4, 2009, he personally requested information from the Department of Labor regarding how the Administrator calculated the amount of back wages. *Ibid*. Additionally, Complainant stated that on February 9, 2009, he reiterated this request in writing by sending a fax to the Assistant District Director requesting information under the Freedom of Information Act (FOIA).[5] *Ibid*. Complainant noted that because he did not receive a response, he filed another request for information on March 24, 2010,[6] and that he met with Assistant District Director David G. Marin on March 26, 2010, who informed Complainant that the case was closed. *Ibid*. Complainant's letter to the Philadelphia WHD office requested that the case be reviewed again and that his February 9, 2009 request be accepted as a timely request for appeal or reconsideration of the Administrator's determination. *Ibid*.

By letter dated April 19, 2010, the Philadelphia WHD informed Complainant that his request for review was untimely and that if he wanted to request a review of the timeliness of his appeal, he should submit such request to the Chief Administrative Law Judge of the U.S. Department of Labor. On May 12, 2010, the Office of Administrative Law Judges (OALJ) received a package from Lolita Semidey, Esq., on behalf of Complainant,[7] related to the Administrator's January 21, 2009 determination.

Following receipt of this package, I issued a Notice of Docketing, Order Directing Submission of Statement Confirming Request for Hearing, and Order to Show Cause on May 20, 2010. As Complainant did not include a specific request for review of the timeliness of his appeal with the package received on May 12, 2010, the Order instructed Complainant to file a

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[3] This January 21, 2009 determination rescinded and replaced a January 5, 2009 determination letter. Admin. Det. at. 1. Only the January 21, 2009 determination is a part of the evidentiary record.

[4] Complainant also sent the Philadelphia WHD office a copy of Respondent's 2003 petition on Complainant's behalf for a nonimmigrant worker (Immigration and Naturalization Services Form I-129) on April 14, 2010. CX A.

[5] The record contains a copy of a letter dated February 9, 2009 to Assistant District Director Sr. Edison Fernandez requesting information under the Freedom of Information Act. CX J.

[6] On March 24, 2010, Complainant sent a Freedom of Information Act (FOIA) request to the Philadelphia WHD office, and the Philadelphia WHD office confirmed receipt on March 25, 2010. CX K.

[7] In Complainant's Statement Confirming Request for Hearing, dated June 1, 2010, he stated that he was responsible for sending this package to this Office and attached a certified mail receipt showing the sender as Lolita Semidey, Esq.

written Statement Confirming Request for Hearing by June 4, 2010 and to show cause why the hearing request should not be denied as untimely. In addition, the Order required Respondent to show cause why the request should not be found to be timely or why Complainant should not be entitled to equitable tolling of the limitations period.

On June 1, 2010, Complainant submitted a timely Statement Confirming Request for Hearing. Thereafter, on June 21, 2010, Complainant, through counsel, filed a brief arguing that Complainant's February 9, 2009 FOIA request with the Puerto Rico WHD was a timely request for an administrative hearing because it was a reiteration of Complainant's timely February 4, 2009 request. Comp. Br. at 2. Complainant's counsel further states that Complainant's April 7, 2010 letter informed the Philadelphia WHD office that he "personally presented a claim" to the Puerto Rico WHD office on February 4, 2009 requesting information regarding the calculation used to determine the back wage amount, and argues that "[p]ersonally presented implies that the claim was written and actually delivered personally to the [Puerto Rico WHD office]." Comp. Br. at 2 n. 1. Complainant's counsel asserts that a copy of an email sent to the Assistant Director of the Puerto Rico WHD office, Mr. Edison Fernandez "further support[s] the possibility that [Complainant] sent a written note on February 4, 2009." *Ibid*. As this email was written in Spanish, Complainant's counsel's provided the following English translation: "Mr. Edison Fernandez: enclosed herein a reiteration of the February 04, 2009 note in accordance to the conversation of last Friday. Regards."[8] *Ibid*.

Additionally, Complainant asserts that even if the request for hearing is not timely, principles of equitable estoppel apply to toll the limitations period. Comp. Br. at 4. Complainant argues that he raised the precise statutory claim at issue, namely, the calculation of the backpay award in the Administrator's determination letter, but did so in the wrong forum. *Ibid*. Complainant contends that because he submitted the correct claim but mistakenly believed the Puerto Rico WHD was the correct forum, his request for an administrative hearing should be granted.

Finally, Complainant further argues that the he was "impeded in an extraordinary way" in following through on his right to request an administrative hearing. Comp. Br. at 4. Complainant argues that the Puerto Rico WHD office did not provide him with sufficient notice regarding the proper procedure for requesting an administrative hearing. *Ibid*. According to Complainant, he never received a copy of the January 21, 2009 determination letter, and instead received a duplicate copy of the January 5, 2009 rescinded determination letter on January 21, 2009. Comp. Br. at 3. Complainant states that the "transmittal letter" accompanying the Administrator's determination letter did not apprise him of his appeal rights. Complainant admits that the transmittal letter directed Complainant to the applicable regulations for appealing the Administrator's determination but asserts it did not state that Complainant only had fifteen days to request a hearing. Comp. Br. at 6. Additionally, Complainant argues that his immigrant status was an additional impediment for pursuing an appeal "since not only the language, but also the overall legal system would seem strange and complicated to the complainant." Comp. Br. at 4.

[8] The unsigned email is from abprinting@gmail.com, and the display name associated with this email address is "Gabriel Bielicki." CX J.

On July 2, 2010, Respondent filed a brief arguing that Complainant's request for a hearing should be denied as untimely and that no equitable tolling principles are applicable. Respondent's counsel asserts that on February 9, 2009, he personally spoke with Mr. Edison Fernandez, Assistant District Director of the Puerto Rico WHD office, who informed him that no appeals had been received in this matter. He further states that Respondent therefore made a payment to satisfy the Administrator's determination, the check was deposited on February 19, 2009, and under the doctrine of accord and satisfaction, the deposit put an end to this matter. Resp. Br. at 3. Additionally, Respondent argues that the communications between Complainant and the Assistant District Director of the Puerto Rico WHD office on February 4, 2009 and February 9, 2009 are simply requests for information under FOIA and do not constitute requests for a hearing to appeal the Administrator's determination. Resp. Br. at 5. Further, Respondent argues that Complainant is not entitled to equitable tolling of the limitations period and that Complainant should not be granted any latitude based on his alleged pro se status, asserting that Complainant was in fact represented by counsel during the relevant time period.[9] Resp. Br. at 2, 5.

On July 12, 2010, counsel for the Administrator filed a statement in which she noted that "[t]he Respondent in this case has paid the back wages to the Administrator's satisfaction in reference to the Determination Letter issued on January 21, 2009." Admin. Letter at 1. Counsel further states that the Administrator is not a party to this action and takes no position as to the issue of the timeliness of Juan Carlos Lubary's hearing request." *Ibid.*

DISCUSSION

In order to employ H-1B nonimmigrant alien workers in specialty occupations, an employer must complete a Labor Condition Application. 8 U.S.C. §1101(a)(15)(H)(i)(b); 8 U.S.C. § 1182(n). The Administrator of the Wage and Hour Division has the authority to investigate purported violations by employers of H-1B workers regarding applicable immigration laws and regulations. 20 C.F.R. § 655.800. The LCA regulations provide that after the Wage and Hour Division determines that an employer has committed a violation of the applicable regulations, "any interested party" may request a hearing by writing to the Chief Administrative Law Judge. 20 C.F.R. § 655.820(a). A request for an administrative hearing must be received by the Chief Administrative Law Judge within fifteen calendar days of the date of the Administrator's determination. 20 C.F.R. § 655.820(d). The regulations provide that if an interested party fails to meet this 15 day deadline, the party may only participate in the hearing with the consent of the ALJ. 20 C.F.R. § 655.820(d).

While no particular form is prescribed for any request for hearing, the regulations require certain information be included in the request for an administrative hearing. Among the

[9] Respondent attached a complaint filed by Complainant against Respondent in Estado Libre Asociado de Puerto Rico, Tribunal de Primera Instancia, Sala Superior de San Juan (Commonwealth of Puerto Rico, Court of First Instance, Superior Court of San Juan) on March 12, 2008, in which Complainant was represented by two attorneys. EX A. Additionally, Respondent submitted a translated copy of Complainant's interview at the Guaynabo, Puerto Rico WHD office on April 11, 2008 in which he stated, "my attorney, Mr. Jose R. Vazquez Fernandez called [Respondent] in December 2007 to request payment of monies due…[Respondent] told my attorney that she is not going to pay." EX B at 2.

requirements, the request must specify the issue(s) stated in the notice of determination giving rise to the hearing request and state the specific reason(s) why the party requesting the hearing believes the WHD determination is in error. 20 C.F.R. § 655.820(c)(3),(4). If such a request is timely filed, the WHD determination is inoperative unless or until the case is dismissed or the presiding administrative law judge issues an order affirming the decision. 20 C.F.R. § 655.820(a).

Timeliness of Complainant's Request for a Hearing

As noted above, any request for an administrative hearing must be in writing, must specify the issues giving rise to the hearing request and the specific reasons why the party requesting the hearing believes the WHD determination is in error, and must be received by the Chief Administrative Law Judge within fifteen calendar days of the date of the Administrator's determination. 20 C.F.R. § 655.820(d). Complainant did not comply with these requirements.

Complainant asserts that on January 28, 2009, he personally met with Mr. Edison Fernandez at the Puerto Rico WHD office to express his objection to the amount of the back wage determination and that he refused to accept the check tendered by Respondent to satisfy the determination. Comp. Letter to Phil. WHD at 3. However, he does not allege, and there is no documentation in the record to demonstrate, that Complainant filed a written request for review of the Administrator's determination on January 28, 2009.

Complainant also contends that on February 4, 2009, he "personally presented a claim to the Department of Labor requesting information as to the calculation used to reach the sum agreed between the Department and my former employer." *Ibid*. Again, however, the record does not contain any documentation from February 4, 2009, and his request, even if written, was for information under FOIA and not a request for an administrative hearing.

Similarly, although a February 9, 2009 email to Edison Fernandez, Assistant District Director of the Puerto Rico WHD, offered by Complainant references a "note" purportedly dated February 4, 2009, the attachment clearly again requests information under FOIA relating payments made by Complainant's former employer. This communication does not comply with the regulatory requirements for a hearing request, nor was it directed at the proper party.

While I recognize that ALJs have an obligation to "construe complaints and papers that pro se complainants file 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude," *Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076, ALJ No. 2003-LCA-2 (July 29, 2005), Complainant's communications with the Puerto Rico WHD following the Administrator's determination in this matter simply cannot be construed as a challenge to that determination and a request for administrative review. I thus find that Complainant did not file a timely hearing request in this matter.

Principles of Equitable Tolling

The Administrative Review Board has held that filing limitations periods are subject to the doctrine of equitable tolling, and has applied these principles in cases involving H1-B

provisions of the INA. *See Seyanabou A. Ndiaye v. CVS Store No. 6081*, ARB Case No. 05-024 (May 7, 2007); *Administrator v. Wings Digital Corp.*, ARB Case No. 05-090 (July 22, 2005). The ARB has identified three situations where the doctrine of equitable tolling may be applicable, *i.e.*, when: (1) the respondent has actively misled the complainant regarding his or her rights to file a petition; (2) the complainant has been prevented from filing a claim in some extraordinary way; or (3) the complainant raised the precise statutory complaint but has mistakenly done so in the wrong forum. *Ndiaye*, ARB No. 05-024. Complainant asserts that equitable tolling is applicable in this case for two reasons. First, he argues that he was prevented in an extraordinary way from filing the claim. Second, he asserts he raised the precise statutory complaint in the wrong forum. For the reasons outlined below, I find neither of these arguments persuasive.

According to Complainant, extraordinary circumstances, including lack of notice of his appeal rights, prevented him from timely filing his request for hearing. Complainant's counsel asserts that his client never received the January 21, 2009 determination letter and, instead, received a January 21, 2009 "transmittal letter" and a copy of the previously issued January 5, 2009 determination letter which had been rescinded by WHD. Comp. Br. at 3. According to counsel, "[t]he record given to the undersigned contained no contemporaneously issued determination directed at the respondent, but rather contained a determination letter dated January 5, 2009 attached to both the January 6 and the January 21, 2009 transmittal letters." Comp. Br. at 2-3. This is the first time, however, that Complainant has asserted that the Puerto Rico WHD did not provide him with a copy of the Administrator's January 21, 2009 determination letter. I note that Complainant made no such allegation in his April 7, 2010 letter to the Philadelphia WHD office, when he stated "On January 24, 2009, [Respondent] received a revised determination from Wage and Hour for the amount of $4,605.39." Comp. Letter to Phil. WHD at 3. The credibility of this belated assertion is somewhat dubious. However, even if I accept as true the claim that Complainant did not receive a copy of the January 21, 2009 determination letter, Complainant has not offered any explanation regarding why the notice of appeal rights contained in the January 5, 2009 determination letter, which he admits receiving, was insufficient to fully inform him of his rights and obligations with respect to challenging the Administrator's decision in this case.[10] Based on the foregoing, I find that Complainant was not prevented by extraordinary circumstances from timely filing his request for a hearing.

[10]Despite having the burden to establish entitlement to equitable tolling in this case, Complainant has not offered as an exhibit in this case a copy of the January 5, 2009 determination letter although he and his counsel clearly acknowledge receipt and possession of the letter. Having previously reviewed numerous determination letters issued by the Department's Wage and Hour Division in cases such as this one, I am aware that they routinely contain language regarding the procedures and time requirements for interested parties to request a hearing before the Office of Administrative Law Judges which is identical to, or substantially the same as, the language set forth in the Administrator's January 21, 2009 determination letter. Indeed, the applicable regulations *require* that the Administrator's written determination inform the parties they may request a hearing within fifteen days and "[s]et forth the procedure for requesting a hearing, give the address of the Chief Administrative Law Judge (with whom the request must be filed) . . . ." 20 C.F.R. §655.815(c)(2)-(4), and I assume the January 5, 2009 determination complied with this requirement. To the extent that is not the case, and Complainant wishes to augment the record before me with a copy of the January 5, 2009 determination letter to establish otherwise, he may do so by filing a copy of that letter with the undersigned no later than fifteen days from the date of this order.

Complainant's counsel also contends that language[11] and a legal system that seemed "strange and complicated" impeded Complainant in some extraordinary way from requesting an administrative hearing. While Complainant may have been unfamiliar with the American administrative judicial system, ignorance of the law does not support a finding of entitlement to equitable tolling. *See Ndiaye*, ARB No. 05-024 (May 7, 2007); *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, slip op. at 8 (Sept. 29, 2006). Furthermore, the fact that Complainant was able initiate a complaint with WHD asserting a claim for failure to pay required wages, as well as his ability to request information under the Freedom of Information Act, undermines such contention.

With respect to any purported language impediment to filing a timely request for hearing, I note that Complainant admits he met several times with the Assistant District Director in the Puerto Rico WHD office, and the majority, if not all, of their communications were in Complainant's native language. Comp. Letter to Phil. WHD at 1. Additionally, while the January 21, 2009 determination letter is written in English, Complainant's April 7, 2010 and April 14, 2010 letters to the Philadelphia WHD office are *also* written in English, and these letters clearly demonstrate a proficiency in the English language. These letters are signed by Complainant, and there is no indication that he had assistance writing these letters. I thus find that neither Complainant's language skills, nor his purported lack of familiarity with the administrative judicial process, prevented him in any "extraordinary way" from filing a timely request for a hearing.

Complainant also asserts that when he requested information from the Puerto Rico WHD office regarding the method of calculation used to determine the back wages owed by Respondent, he raised the precise statutory claim (his challenge to the Administrator's determination and request for a hearing) but did so in the wrong forum. Comp. Br. at 4. While Complainant may have made what he clearly identified as "FOIA requests" because he disagreed with the decision, he never said that he did, nor did he file a written request for a hearing. FOIA requests are simply not the equivalent of a request for an administrative hearing, and Complainant's post hoc attempts to characterize them as such are unconvincing.

Based on the foregoing, I find that equitable tolling does not apply in this case to toll the limitations period until April 7, 2010 when Complainant wrote to the Philadelphia WHD office and requested review of his claim. Complainant's request for a hearing is therefore untimely.

[11] By which, I presume that Complainant's counsel means that Complainant's first language is Spanish, while the transmittal and determination letters were written in English.

Order

Complainant's request for a hearing is DENIED and this appeal is DISMISSED for failure to timely file a request for a hearing. The Administrator's January 21, 2009 determination is therefore final.

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STEPHEN L. PURCELL
Acting Chief Administrative Law Judge

Washington, D.C.

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).