

Issue Date: 20 July 2011

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

CASE NO.: 2011-LCA-00050

In the Matter of:

**ADMINISTRATOR, WAGE & HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,**
Prosecuting Party

v.

CYBERWIZ, INC.
Respondent

**ORDER DISMISSING CASE AND
CANCELLING HEARING**

This matter arises out of a determination by the Administrator, Wage and Hour Division, U.S. Department of Labor (“Administrator”) under the enforcement provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* (“INA” or the “Act”), and the implementing regulations found at 20 C.F.R. Part 655, Subparts H and I.

On May 31, 2011, the Administrator issued a Determination Letter which found Cyberwiz, Inc. (“Respondent”) violated the Act and its implementing regulations by: failing to pay wages as required; misrepresenting a material fact on the Labor Condition Application (“LCA”); substantially failing to provide notice of an LCA; failing to make a required displacement inquiry; requiring or accepting payment or remittance of the additional petition fee from an H-1B worker; failing to make available for public examination the LCA and necessary documents; and failing to comply with the provisions of subparts H and I of the regulations.

The Administrator’s determination explicitly stated the Respondent’s request for a formal hearing must be received by the Chief Administrative Law Judge (“OALJ”) no later than fifteen calendar days from the date of the determination. If such a request was not received, the Administrator’s determination would become a final order of the Secretary of Labor. Respondent’s hearing request was faxed and mailed overnight delivery on June 22, 2011.

On June 30, 2011 the undersigned issued a Notice of Hearing and Prehearing Order setting a formal hearing in this matter for August 24, 2011.

On July 5, the Administrator filed a Motion For Order to Show Cause Why Respondent's Hearing Request Should Not Be Deemed Untimely. The Administrator's motion argues that the Administrator's Determination Letter informed Respondent that in order to request review of the Administrator's finding, Respondent was required to file a request for a hearing with the Chief Administrative Law Judge "no later than 15 calendar days after the date of the determination," pursuant to 20 C.F.R. § 655.820. Mot. at 1. A timely request for a hearing should have been received by the OALJ no later than June 15, 2011. The Administrator contends that because the Respondent's hearing request was not sent until June 22, 2011, it is untimely.

On July 6, 2011, the undersigned issued an Order requiring Cyberwiz to respond to the Administrator's motion by July 14, 2011, in light of the approaching hearing date. In essence an order directing Cyberwiz to show cause why it's hearing request should not be deemed untimely.

On July 13, 2011, Respondent faxed and mailed overnight a Response to Motion Why Respondent's Hearing Request Should Not Be Deemed Untimely along with a brief in support of its contention. In its brief in support of its response, Respondent argues that it lacked counsel and did not fully understand its rights pursuant to the Determination Letter, and that Respondent filed its request for a hearing within a day of meeting with counsel. For these reasons, Respondent maintains its late hearing request ought to be excused and the matter be permitted to proceed. R. Br. at 1-2. Respondent admits that the Determination Letter finding Respondent violated the Act was issued on May 31, 2011, and that its request for a hearing was not mailed or faxed until June 22, 2011. Response at ¶ 1. The Respondent submitted the affidavit of Santhosh Bijinapally, the President of the Cyberwiz, who avers that he picked up and signed for the Determination Letter on June 7, 2011.

I find Respondent's request for hearing was untimely submitted to OALJ. The Administrator's Determination Letter explicitly informed Respondent of his appeal rights stating:

You and any interested party have the right to request a hearing on this determination. Such a request must be dated, be typewritten or legibly written, specify the issue(s) stated in this notice or determination on which a hearing is requested, state the specific reason(s) why the requestor believes this determination to be in error....

The request must be made to and received by the Chief Administrative Law Judge (OALJ) at the following address no later than 15 calendar days after the date of this determination:

* * * *

If you or any interested party **do not make a timely request for a hearing, this determination will become a final and unappealable order of the Secretary of Labor.**

Determination Ltr at 2 (emphasis supplied). The Determination Letter's instruction for requesting a hearing to challenge the Administrator's findings is consistent with the regulation at 20 C.F.R. § 655.820(d) providing a "request for such hearing **shall be received** by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, **no later than 15 calendar days** after the date of the determination." (emphasis supplied). As noted, Respondent's request for hearing was not received until June 22, 2011, seven calendar days beyond the time for filing the request.

Untimeliness is not an absolute bar to administrative action and may be tolled by equitable consideration. The ARB has recognized three situations where equitable tolling may be granted to an employer that has filed a petition untimely: (1) when the party has been actively misled; (2) when the party has in some extraordinary way been prevented from asserting its rights; or (3) when the party mistakenly raised the precise statutory claim in the wrong forum. *Herchak v. Am. W. Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-12 PDF at 5 (ARB May 14, 2003) (citing *Sch. Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981)).¹

In this matter, there is no evidence that the Administrator misled the Respondent as to the actions required in requesting a hearing to challenge the Administrator's determination, nor has Respondent asserted extraordinary circumstances prevented it from asserting its rights. As noted the Administrator's Determination Letter explicitly stated the Respondent must request a hearing before the OALJ within fifteen calendar days from the date of the determination or the determination would become the final unappealable order of the Secretary of Labor. The Respondent received actual notice of and possessed all of the information necessary to request a hearing before OALJ; the Administrator's Determination Letter gave unequivocal and express written instructions on the procedure and time requirements for requesting a hearing. Nor is there any allegation here that the Respondent filed its hearing request in the wrong forum.

As Respondent did not file his hearing request until June 22, 2011, at the earliest, after he had been given explicit, express written instruction from the Administrator as to the procedural and timeliness requirements for requesting a hearing before OALJ, I find Respondent's request for hearing to be untimely. I further find that the Respondent has not established factors supporting equitable tolling. Considering the foregoing, I find that the Administrator is entitled to dismissal in this matter, and this matter is hereby **DISMISSED** with prejudice.

¹ The Sixth Circuit, in which this case arises, has identified "factors" to be used to determine if equitable tolling is appropriate: "(1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the [opposing party]; and (5) [the] reasonableness in remaining ignorant of the notice requirement." *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988). The Sixth Circuit further cautions that equitable tolling should be sparingly bestowed; usually only where "a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000) (citing *Andrews*, 851 F.2d at 151; and *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984)). The Sixth Circuit explained that "[P]rejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply [only] once a factor that might justify tolling is identified, it is not an independent basis for invoking the doctrine." *Andrews*, 851 F.2d at 151 (citing *Baldwin County*, 466 U.S. at 152).

It is further ordered that the formal hearing in this case on August 24, 2011 is **CANCELLED**.

ORDER

For the foregoing reasons, the case is **DISMISSED** with prejudice on timeliness grounds.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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).