

**U.S. Department of Labor**

Office of Administrative Law Judges  
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Newport News, VA 23606

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**Issue Date: 04 April 2016**

Case No.: 2016-LCA-00011

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,

Prosecuting Party,

v.

MD2 SYSTEMS, INC.,

Respondent,

**ORDER OF DISMISSAL**

This case arises under the H-1B visa program of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1101, et seq, as amended, and its implementing regulations found at 20 C.F.R. Part 655, Subparts H and I. This case was assigned to the undersigned on February 8, 2016. On March 2, 2016, the undersigned issued an Order to Show Cause as to Why this Case Should Not Be Dismissed for not timely requesting a hearing. On March 15, 2016, the undersigned received Respondent's response.

**Timeline of Events**

**June 24, 2009** – The date that employee Mayur Mhatre submitted a complaint to Wage and Hour Division.

**December 7, 2015** – The date of the Administrator's Determination.

**December 11, 2015** – The date that the Administrator's Determination was received by the Washington D.C. OALJ.

**"Around Christmas Time 2015"** – The date that Respondent attested he received the Administrator's Determination.

**January 15, 2016** – The date listed at the top of Respondent's Request for Hearing. Respondent incorrectly listed January 15, 2015.

**January 18, 2016** – The date that Respondent’s Request for Hearing was placed in the mail per the FedEx envelope.

**January 20, 2016** – The date that Respondent’s Request for Hearing was received by the Washington D.C. Office of Administrative Law Judges (OALJ). This is also the date that the case was docketed by the OALJ.

**February 1, 2016** – The date that the case was referred to the Newport News, Virginia OALJ.

**February 2, 2016** – The date that the case was received by the Newport News, Virginia OALJ.

**February 8, 2016** – The dated that the case was assigned to Judge Rosen.

### Background

On December 7, 2015, District Director Carmen Otero-Infante issued the Administrator’s Determination. She found that Respondent:

1. Willfully failed to pay wages as required in violation of 20 C.F.R. § 655.731. The violation included failure to pay the required wage rate for productive work and for nonproductive time, and taking illegal deductions. Respondent was assessed a civil penalty in the amount of \$14,875. Respondent was ordered to pay \$115,513.80 in back wages to seven H-1B nonimmigrant workers.
2. Willfully and substantially failed to provide notice of the filing of LCA(s) in violation of 20 C.F.R. §655.734. The violation included a failure to post notice of the LCA filing for 10 days in two conspicuous locations at each place of employment where an H-1B nonimmigrant will be employed. Respondent was assessed a civil penalty in the amount of \$29,750.
3. Failed to make available for public examination the LCA and necessary document(s) at Respondent’s principle place of business or worksite in violation of 20 C.F.R. § 655.760(a). No civil penalty was assessed.
4. Failed to comply with the provisions of subpart H or I in violation of 20 C.F.R. § 655. No civil penalty was assessed.

The Administrator's Determination complied with the applicable regulations.<sup>1</sup> In particular, the Administrator's Determination set forth the procedure for timely requesting a hearing and noted that the Administrator's Determination would "become a final and unappealable order of the Secretary of Labor if its Request for Hearing was not timely filed." The Administrator's determination was also mailed to "the parties' last known addresses." 20 C.F.R. § 655.815 (a).

The date of the Administrator's Determination was December 7, 2015. Respondent's Request for Hearing was incorrectly dated January 15, 2015 and received by the Washington D.C. Office of Administrative Law Judges on January 20, 2016. The regulations specifically state that

[t]he 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.

20 C.F.R. § 655.820(d) (emphasis added).<sup>2</sup>

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<sup>1</sup> 20 C.F.R. § 655.815 What are the requirements for the Administrator's determination?

(a) The Administrator's determination, issued pursuant to § 655.806, 655.807, or 655.808, shall be served on the complainant, the employer, and other known interested parties by personal service or by certified mail at the parties' last known addresses. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the complaint and the Administrator's determination.

(c) The Administrator's written determination required by § 655.805 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed.

(2) Inform the interested parties that they may request a hearing pursuant to § 655.820 of this part.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of labor (upon whom copies of the request must be served).

(5) Where appropriate, inform the parties that, pursuant to § 655.855, the Administrator shall notify ETA and the DHS of the occurrence of a violation by the employer.

<sup>2</sup> 20 C.F.R. § 655.820 How is a hearing requested?

(a) Any interested party desiring review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.

The date that Respondent's Request for Hearing was received by the Chief Administrative Law Judge (January 20, 2016) is more than 15 days after the date of the Administrator's Determination (December 7, 2015). Respondent's Request for Hearing was submitted 29 days past the regulatory deadline and 44 days after the Administrator's Determination on December 7, 2015. Therefore, the Request for Hearing was 29 days late and not timely filed under the regulations.

### Discussion

On March 15, 2016, the undersigned received Respondent's response to the March 2, 2016 Show Cause Order. The response was written by Devi Misra, CEO/President of MD2 Systems, Inc. Mr. Misra stated that he received a copy of the Administrator's Determination when his registered agent (Business Filings, Inc.) "notified [him] via email around Christmas time 2015." Mr. Misra stated that he was in India at the time and could not respond to the Administrator's Determination because he "was very sick and jet lagged."

The undersigned finds that Respondent's response to the Show Cause Order does not adequately show cause as to why this case should not be dismissed for the late filing of the Request for Hearing. The regulations specifically state that a Request for Hearing must be received by the Office of Administrative Law Judges "no later than 15 calendar days after the date of the determination." 20 C.F.R. § 655.820(d). Respondent did not comply with this mandatory deadline, even though this deadline was reiterated in the Administrator's Determination. Respondent did not respond within 15 days of the date that Mr. Misra received notice of the Administrator's Determination (around December 25, 2015). Respondent's response contains no

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- (2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.
- (c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:
- (1) Be dated;
  - (2) Be typewritten or legibly written;
  - (3) Specify the issue or issues stated in the notice of determination giving rise to such request;
  - (4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;
  - (5) Be signed by the party making the request or by an authorized representative of such party; and
  - (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.
- (d) The 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. An interested party which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d) or through participation as an amicus curiae pursuant to 29 CFR 18.12.
- (e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.
- (f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

legal argument as to why this case should not be dismissed for the late filing of the Request for Hearing.

**ORDER**

It is hereby ORDERED that Respondent's case is **DISMISSED** for failure to comply with the applicable regulations regarding the timely filing of a Request for Hearing. Respondent's Request for hearing was not timely filed under the regulations.

DANA ROSEN  
Administrative Law Judge

DR/ERH/mja  
Newport News, VA