**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 18 August 2016**

Case No.: 2016-LCA-00022

*In the Matter of:*

**ALEXIA PALMER,**
*Complainant/Prosecuting Party*,

*v.*

**TRUMP MODEL MANAGEMENT,**
*Respondent.*

## DECISION AND ORDER
## DENYING REQUEST FOR HEARING DUE TO LACK OF JURISDICTION

This matter arises under the H-1B non-immigrant worker program of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and implementing regulations at 20 C.F.R. Part 655, subparts H and I.

## Background and Applicable Law

An employer who seeks to hire a non-immigrant in an H-1B specialty occupation must obtain approval of a Labor Condition Application ("LCA") from the United States Department of Labor. The Secretary of Labor has established a system of enforcement proceedings and sanctions for employers who fail to meet a condition specified in the LCA or misrepresent a material fact when completing the LCA. The system provides for the filing of complaints, investigations by the Wage and Hour Division ("WHD"), hearings before an administrative law judge ("ALJ"), and appellate review by the Administrative Review Board ("ARB"). 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.700, 655.800. The regulations are very specific about when a party may request a hearing before an ALJ or an appeal to the ARB.

A party may request a hearing only in the circumstances enumerated by the regulations: where, after an investigation, the Administrator makes a determination about whether an employer has committed violations.[1] The regulations also provide that "[n]o hearing or appeal

[1] § 20 C.F.R. § 655.820(b) states that a party may request a hearing only:
(1) . . . where the Administrator determines, *after investigation*, that there is no basis for a finding that an employer has committed violation(s) . . . .
(2) . . . where the Administrator determines, *after investigation*, that the employer has committed violation(s). . . .
(emphases added).

pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted." § 655.806(a)(2). The ARB has found that these regulations require a WHD investigation as a prerequisite for an ALJ hearing. *See Gupta v. Headstrong, Inc.*, ARB Nos. 11-008, 11-065, ALJ No. 2011-LCA-38 (ARB June 29, 2012) (affirming that a WHD investigation and determination is a prerequisite for an ALJ hearing, even where a decision not to investigate is based on untimeliness rather than the merits of the complaint; and finding no jurisdiction to evaluate arguments for equitable tolling when such jurisdiction is lacking).

On October 15, 2014, Alexia Palmer ("Complainant"), an H-1B employee, filed a class action complaint in the U.S. District Court for the Southern District of New York seeking relief under the Fair Labor Standards Act ("FLSA"), the INA, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and state law.[2] The district court dismissed the complaint on March 23, 2016. *Palmer v. Trump Model Management*, No. 14-cv-8307, 2016 U.S. Dist. LEXIS 51061 (S.D.N.Y. Mar. 23, 2016). The court found that Ms. Palmer failed to plead sufficient facts to support a FLSA claim, and that the RICO claim was not a proper avenue for relief, Congress having intended in the INA to limit LCA enforcement to administrative mechanisms prior to resort to court action. The court found that Ms. Palmer had failed to exhaust her administrative remedies. The court, having dismissed the federal claims, declined to exercise pendent jurisdiction over the state law claims.

On March 24, 2016, Complainant filed an LCA complaint with the WHD. On April 1, 2016, the WHD found a lack of reasonable cause to investigate because the alleged violations had not occurred within 12 months of the complaint, and the complaint did not present adequate grounds for equitable tolling. As required by § 655.806(a)(2), the WHD gave Complainant an opportunity to submit additional information. Complainant did so on April 8, 2016, providing an argument as to why equitable tolling should be applied. The WHD determined that none of the grounds for equitable tolling had been established, and again found a lack of reasonable cause to conduct an investigation. The WHD based this determination largely on evidence that Complainant knew that a WHD complaint was the proper means to allege an LCA violation, and elected instead not to file such a complaint while her federal lawsuit was pending. Thus, the WHD determined that she had not "mistakenly" filed in the wrong forum.

On May 24, 2016, I issued a *Notice of Docketing and Order to Show Cause* ("Order to Show Cause") in response to a request for hearing made by Complainant.[3] In it, I directed Complainant to show cause why this matter should not be dismissed for lack of jurisdiction in light of the fact that the Administrator determined that an investigation was not warranted. The Order to Show Cause also granted Respondent 15 days to file a reply to Complainant's response. On June 22, 2016, Complainant filed an *Answer to the Order to Show Cause* ("Answer").[4] On

[2] The background is based solely on Complainant's complaint, and should not be construed as findings of fact.

[3] On May 3, 2016, OALJ received Complainant's *Complaint and Request for Investigation*, and my law clerk subsequently contacted Complainant's counsel and was informed that the filing was intended as a request for a hearing.

[4] A member of my staff added page numbers to Complainant's unpaginated Answer to allow for pinpoint citations.

June 28, 2016, I issued an order extending the deadline for Respondent to file a reply.[5] On August 9, 2016, Respondent filed its Reply.

## Arguments of the Parties

Complainant makes three arguments in response to the Order to Show Cause. First, Complainant contends that the WHD's decision was arbitrary and capricious because equitable tolling is appropriate in this case.[6] (Answer at 2-11.) Second, Complainant argues that Respondent did not effectuate a bona fide termination of Complainant. (Answer at 12-13.) Third, Complainant argues that Respondent made unauthorized deductions from Complainant's wages. (Answer at 13-14.)

Respondent asserts that Complainant's Answer is not responsive to the Order to Show Cause, as the Answer focuses on equitable tolling, which it asserts is only properly considered after jurisdiction is established. Respondent contends that a hearing on the matter is precluded because the Administrator has determined that there is not reasonable cause to conduct an investigation. (Reply at 1-2.) Respondent also notes that various motions filed in the federal court case establish that Complainant knew that the WHD was the proper forum for her complaint. (Reply at 2.) Respondent attaches the following from the federal court case: its Memorandum of Law in Support of Defendants' Motion to Dismiss, (Exhibit A); and Complainant's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, (Exhibit B).

## Discussion

This Office is an administrative tribunal of limited jurisdiction. Subject matter jurisdiction over LCA complaints originates from the regulations at 20 C.F.R. § 655.820. Pursuant to those regulations, this Office has subject matter jurisdiction to adjudicate claims only after the Administrator conducts an investigation. The regulations and case law are clear that the OALJ does not have jurisdiction to hold a hearing where the Administrator determines that an investigation into a complaint is not warranted. 20 C.F.R. § 655.806(a)(2); *Gupta*, ARB Nos. 11-008, 11-065. Complainant does not address the jurisdictional issue highlighted in the Order to Show Cause, nor does she dispute that the Administrator determined that an investigation is not warranted. Instead, Complainant disputes the Administrator's determination, arguing that equitable tolling is appropriate, and that Respondent violated the INA. Consequently, I find that this tribunal has no jurisdiction to review the Administrator's determination that an investigation is not warranted. Accordingly, this tribunal lacks jurisdiction to entertain Complainant's arguments regarding equitable tolling and alleged INA violations.

[5] On June 27, 2016, a member of my staff sent Respondent's legal representative a copy of the Order to Show Cause after being informed that Respondent had not received it. Counsel subsequently requested an additional 45 days to file a reply.

[6] Complainant argues that equitable tolling is appropriate because (i) she did not know that WHD was the proper forum to file a complaint, (Answer at 2-3); (ii) she filed the same claim in the wrong forum, (Answer at 11); (iii) she "pursued her rights diligently" by filing suit in the District Court for the Southern District of New York, (Answer at 6-8); and (iv) the passage of time between the filing of the claim in federal court on October 15, 2014 and the issuance of the decision on March 23, 2016 constituted extraordinary circumstances that caused the delay in filing the complaint with WHD, (Answer at 8-9).

## Order

Based on the foregoing, the above-captioned matter is **DISMISSED** for lack of subject matter jurisdiction.

**SO ORDERED:**

Digitally signed by STEPHEN R. HENLEY
DN: CN=STEPHEN R. HENLEY, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

**STEPHEN R. HENLEY**
Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.