



In the Matter of:

**ADMINISTRATOR, WAGE AND
HOUR DIVISION, UNITED STATES
DEPARTMENT OF LABOR,**

ARB CASE NO. 05-090

ALJ CASE NO. 2004-LCA-30

PROSECUTING PARTY,

DATE: July 22, 2005

v.

WINGS DIGITAL CORPORATION,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Jennifer R. Marion, Esq., Paul L. Frieden, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, U. S. Department of Labor, Washington, D.C.

For the Defendant:

R. Rehani, R. Rehani & Co., New York, New York

FINAL DECISION AND ORDER DISMISING APPEAL

On March 21, 2005, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) in this case arising under the Immigration and Nationality Act (INA), as amended, and its interpretive regulations.¹ The Administrative Review Board must receive an interested party's petition requesting review of an administrative law judge's decision and order under the INA within thirty (30) calendar

¹ 8 U.S.C.A §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c) (West 1999); 20 C.F.R. Part 655 (2004).

days of the date of the decision and order.² Wings Digital Corporation did not timely file its petition for review. The Board must determine whether Wings Digital has established extraordinary circumstances that compel the Board to toll the limitations period. We conclude that neither the illness of Wings Digital's representative or his misinterpretation of the regulations establishing the time limitations for filing a petition for review merit tolling of the limitations period.

BACKGROUND

On April 29, 2004, the Administrator of the Wage and Hour Division issued a determination letter to Wings Digital stating that it owed back wages to six of its H-1B employees.³ Wings Digital requested a hearing before a Department of Labor

² 20 C.F.R. § 655.845(a). The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the INA. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002).

³ The INA permits employers to hire nonimmigrant alien workers (H-1B nonimmigrants) in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). "Specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher in the specific specialty. 8 U.S.C.A. § 1184(i); 20 C.F.R. § 655.715. The U.S. Citizenship and Immigration Services Bureau (USCIS) identifies and defines the occupations covered by the H-1B category and determines an alien's qualifications for such occupations. The Labor Department administers and enforces the labor condition applications relating to the employment. 20 C.F.R. § 655.705; 59 Fed. Reg. 65,646 (Dec. 20, 1994).

To hire an H-1B worker, the employer must file a Labor Condition Application (LCA) with the Employment and Training Administration of the United States Department of Labor. In the LCA, the employer must make certain representations and attestations regarding his responsibilities, including a representation that the alien will be paid at the actual wage level paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n).

The employer then obtains certification from the DOL that it has filed the LCA. After it secures the certified LCA, the employer submits a copy to and petitions USCIS for an H-1B classification for the nonimmigrants it wishes to hire. Upon USCIS approval, the United States Department of State issues H-1B visas to the nonimmigrants. 20 C.F.R. § 655.705(b). *See generally Administrator, Wage & Hour Div. v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-00010 – 2001-LCA-00025, slip op. at 2 (ARB May 31, 2005); *Matloff v. Sun Microsystems, Inc.*, ARB No. 03-129, ALJ No. 2003-LCA-2, slip op. at 2 (ARB July 30, 2003).

Administrative Law Judge.⁴ After hearing the case and considering the parties' arguments, the ALJ found that Wings Digital owed the H-1B employees \$78,5977.25 in back wages and owed one of the employees \$90.00 for reimbursement of medical expenses.⁵ The ALJ's D. & O. contained the following:

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board . . . by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.

Wings Digital filed a petition for review with the Board. To be effective, the petition for review was due at the Board on or before April 20, 2005. Wings Digital's petition for review is dated April 18, 2005, but the cover letter accompanying the petition is dated April 21, 2005, and the FedEx envelope in which the petition arrived indicates that the petition was shipped on April 21, 2005. The Board received the petition on April 22, 2005.

Accordingly, because Wings Digital failed to timely file its petition for review, the Board ordered it to show cause why the Board should not dismiss its appeal. Wings Digital filed a response to the Show Cause Order and the Administrator filed a reply to Wings Digital's response.

DISCUSSION

Pursuant to the regulations that dictate the time limitations period for filing a petition for review of an administrative law judge's decision and order under the INA:

The Administrator or any interested party desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.⁶

⁴ 20 C.F.R. § 655.820

⁵ D. & O. at 20.

⁶ 20 C.F.R. § 655.845.

Because the regulation establishing a thirty-day limitations period for filing a petition for review with the Board does not confer important procedural benefits upon individuals or other third parties outside the Board, we may, under the proper circumstances, accept an untimely petition for review.⁷ Principles of equitable tolling guide the Board in determining whether to relax the limitations period in a particular case and accept an untimely petition.⁸ The ARB has recognized three situations in which it will accept an untimely petition:

- (1) [when] the respondent has actively misled the complainant respecting his rights to file a petition,
- (2) the complainant has in some extraordinary way been prevented from asserting his or her rights, or
- (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.⁹

Wings Digital bears the burden of justifying the application of equitable modification principles.¹⁰ It argues that it was prevented from timely filing its petition because its representative was ill from April 18-20 and because he misinterpreted the regulation governing the timeliness of petitions for review. We do not find Wings Digital's arguments to be persuasive.

⁷ *Accord Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-16, slip op. at 3 (ARB Jan. 25, 2005); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999); *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).

⁸ *Flood*, slip op. at 3-4; *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5 (ARB Aug. 31, 2000); *Gutierrez*, slip op. at 2.

⁹ *Hemingway*, slip op. at 4, citing *School Dist. v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981) (holding that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and therefore may be subject to equitable tolling).

¹⁰ *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995)(complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). See also *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984)(pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence).

Wings Digital's representative states that he was unable to send out the appeal before April 20th because he had a "pounding headache and fever" from April 18-April 20. But apparently his illness was not so serious as to prevent him from drafting the petition for review, which is dated April 18, 2005. If the representative was well enough to draft the document, it seems that at the very least he should have been well enough to fax a copy of the petition to the Board or to contact the Board to request an enlargement of time to file the petition. The representative made no such efforts. Accordingly, we conclude that the representative's illness did not constitute extraordinary circumstances that would merit tolling of the limitations period.

Wings Digital also states that its representative mistakenly believed that he had thirty days from the date it received the D. & O. to file the petition for review. As we held in *Hemingway*, "we are unwilling in this case to depart from the general principle that 'ignorance of legal rights does not toll a statute of limitations.'"¹¹ The ALJ provided Wings Digital with an unambiguous statement of the steps it must take to perfect its appeal. Wings Digital's representative was obligated to carefully read the Notice of Appeal Rights and his failure to do so is not an extraordinary circumstance that excuses Wings Digital's failure to timely file its petition.¹²

The Board has recognized that the three *Marshall* elements are not necessarily exclusive¹³ and Wings Digital's failure to satisfy one of these elements would not have necessarily been fatal to its claim if it had identified another factor that would justify tolling the limitations period. We find, however, that it has failed to do so.

Accordingly, we conclude that Wings Digital has not established that exceptional circumstances precluded it from timely filing a petition for review, and we **DISMISS** its appeal.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹¹ *Hemingway*, slip op. at 5, quoting *Larson v. American Wheel & Brake, Inc.*, 610 F.2d 506, 510 (8th Cir. 1979). See also *Baldwin County Welcome Ctr.*, 446 U.S. at 151 (pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence).

¹² *Accord Flood*, slip op. at 5.

¹³ *Gutierrez*, slip op. at 4.