In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 05-106**
	ALJ CASE NO. 2005-LCA-21
PROSECUTING PARTY,	**DATE: August 31, 2005**

v.

THE BOARD OF TRUSTEES OF INDIANA UNIVERSITY,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:
Dianne Barriger, pro se, ***Nashville, Tennessee***

For the Defendant:
Sharon L. Groeger, Esq., ***Office of University Counsel, Bloomington, Indiana***

FINAL DECISION AND ORDER DISMISSING APPEAL

On April 29, 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[1] and its interpretive regulations[2]. 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 days of the date of the decision and order.[3] The petition for review that the Petitioner,

[1] 8 U.S.C.A §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c) (West 1999).

[2] 20 C.F.R. Part 655 (2004).

[3] 20 C.F.R. § 655.845(a).

Dianne M. Barriger, filed was not timely. The Board initially must determine, therefore, whether to toll the limitations period and to accept her untimely petition. Upon review of Barriger's arguments in support of her request that we toll the limitations period and Indiana University's opposition to it, we have determined that Barriger failed to establish extraordinary circumstances that would support tolling of the limitations period.

BACKGROUND

The INA defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes.[4] One class of aliens, known as "H-1B" workers, may enter the United States on a temporary basis to work in "specialty occupations."[5]

To hire an H-1B worker, an employer must file a Labor Condition Application (LCA) with the Department of Labor (DOL). The LCA includes the job title, the employer's name, the area of intended employment, the dates of intended employment, the prevailing wage, actual wage, or a wage range for the position, the source of the employer's wage information, and the number of positions requested. The employer is also required to make available for public examination at the employer's principal place of business, within one working day after the LCA is filed, a copy of the LCA, along with any necessary supporting documentation.[6]

The employer must make certain representations and attestations in the LCA regarding its responsibilities, including a representation that it will pay the alien the greater of either the actual wage level paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage in the area for the type of work involved.[7] An employer must also represent and attest that it has provided notice to its employees in the occupational classification and location for which the H-1B workers are sought that it has filed the LCA with DOL.[8] After DOL certifies the LCA, the employer petitions for, and the aliens receive, H-1B visas from the State Department upon INS approval.[9]

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[4] 8 U.S.C.A. § 1101(a)(15).

[5] *Id.* at § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700.

[6] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.705(c).

[7] 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.731.

[8] 8 U.S.C.A. § 1182(n)(1)(C)(ii); 20 C.F.R. § 655.734.

[9] 20 C.F.R. § 655.705(b). The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS." *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

In this case, the Administrator of DOL's Wage and Hour Division determined, after investigation, that Indiana University had violated the INA when it failed to pay required wages and failed to make the LCA and other documents available for public examination.[10] The Administrator determined that Indiana University owed back wages to 32 H-1B nonimmigrants in the amount of $35,537.42, and set out the specific violations and remedy imposed for each violation.[11] The Administrator directed Indiana University to pay the back wages but determined that the University was not liable for civil money penalties.[12] The University satisfied the back wage assessment.[13]

Barriger, one of the affected H-1B workers, requested review of the Administrator's determination, as an "interested party."[14] She stated that although she did not contest the Administrator's determination that Indiana University was liable for back wages to be paid to her and other H-1B workers, she wished to appeal the Administrator's failure to assess civil money penalties.[15] She also argued that the Administrator did not fully investigate all of the issues that she raised in her original complaint filed in April 2003, or that if he did, he did not inform her of the outcome.[16]

The ALJ determined that the Administrator's civil money penalty determination was not adverse to Barriger because she had no stake in the outcome of any appeal of the Administrator's failure to assess civil money penalties.[17] Thus he found that Barriger lacked standing to raise the civil money penalty issue. He also found that the Administrator's determination that an investigation on a complaint is not warranted is not subject to appeal.[18] Accordingly, the ALJ found that the claim must be dismissed. The last paragraph of the D. & O. states:

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[10] D. & O. at 2.

[11] *Id.*

[12] *Id.*

[13] D. & O. at 2.

[14] 20 C.F.R. § 655.820(a).

[15] D. & O. at 2.

[16] *Id.* at 3.

[17] *Id.*

[18] *Id.* citing 20 C.F.R. § 655.806(2).

> **NOTICE OF APPEAL RIGHTS:** Pursuant to 20 CFR § 655.845, any party dissatisfied with the Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, 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.[19]

The thirtieth calendar day after the date on which the ALJ issued the D. & O. was Saturday, May 29, 2005.[20] Barriger filed a petition for review with the Board dated May 29, 2005, but the Board received the petition on Tuesday, June 7, 2005. The Board also received a corrected copy of the petition for review containing the following postscript:

> Several attempts were made to fax this petition to the ARB on May 31, 2005 (the 29th day after the petitioner had received the Decision and Order of the ALJ dated April 29, 2005). These were unsuccessful, so petitioner called the ARB telephone number at about 3.35pm [sic] on May 31, 2005, to enquire whether she had the correct number. The lady who answered the call went to check the ARB's fax machine and advised, on her return, that it was out of paper. She asked petitioner to call back in about 17 minutes, as she said she was unfamiliar with the machine and did not know how long it would take to insert new paper. This would have meant that the fax might have been received after normal business hours, so the petitioner went to the local post office instead and sent her petition by Certified Mail, US Postal Service. A further attempt to fax the petition later that evening was also unsuccessful.

Because Barriger failed to timely file her petition for review, the Board ordered her to show cause why the Board should not dismiss her appeal. Barriger filed a response to the Board's Order to Show Cause and Indiana University filed a reply to the response urging the Board to dismiss the untimely petition.

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[19] D. & O. at 3.

[20] 20 C.F.R. § 655.845 (a). The Administrative Review Board has jurisdiction to review an administrative law judge's decision under the INA. 8 U.S.C.A. § 1182(n)(2). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

DISCUSSION

The regulation that dictates the time limitations period for filing a petition for review of an administrative law judge's decision and order under the INA provides:

> 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.[21]

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.[22] Principles of equitable tolling guide the Board in determining whether to relax the limitations period in a particular case and accept an untimely petition.[23] 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,
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> (2) the complainant has in some extraordinary way been prevented from asserting his or her rights, or
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> (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[24]

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[21] 29 C.F.R. § 655.845(a).

[22] *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).

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

[24] *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. §

Barriger bears the burden of justifying the application of equitable modification principles.[25] She initially argues that the first tolling ground applies to this case but she apparently has misinterpreted the basis for its application. She states, "this ground provides that the petition may be accepted when the Plaintiff has been or would be harmed by the actions of the defendant in this cause of action."[26] This statement is incorrect. This ground applies in a case in which the respondent has acted to deceive the petitioner for the purpose of preventing him or her from timely filing a petition. While Barriger argues that Indiana University took actions during the course of their employment relationship that injured her, she does not claim that the University took any steps to prevent her from timely filing her appeal. Thus we reject her argument that the fist tolling ground is applicable to this case.

Barriger also argues that based on her reading of certain regulations and her "understanding of the conventions in other local, State and Federal Court proceedings," she had thirty days from the date of her receipt of the D. & O. to file the petition for review and that if the 30th day after receipt fell on a Saturday, Sunday or federal holiday, she had until the next business day.[27] Two of the regulations Barriger cites apply to proceedings before the Department of Labor's Office of Administrative Law Judges.[28] The third provision applies to the Board's notification to the parties of its decision to review an administrative law judge's decision.[29] None of the cited provisions applies to the limitations period for filing a petition for review with the Administrative Review Board.

Moreover, it was entirely unnecessary for Barriger to rely on these irrelevant provisions in her attempt to determine the due date of her petition because not only does a provision in one of the regulations that she cited in support of her mistaken interpretation of the limitations period unambiguously state that, "[t]o be effective, such petition **shall**

2622(b)(1976 & Supp. III 1979), that provided 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).

[25] *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (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).

[26] Response to Order to Show Cause (Resp.) at 2.

[27] *Id.* at 3.

[28] I.e., 20 C.F.R. § 655.830(c); 29 C.F.R. § 18.4 (2004).

[29] I.e., 20 C.F.R. § 655.845(c).

be received by the Board within 30 days"[30] but the ALJ clearly notified Barriger in her D. & O. of the proper procedure for filing a notice of appeal. Thus, it was completely unnecessary for Barriger to rely upon her (ultimately mistaken) interpretation of the regulations. A careful reading of the ALJ's Notice would have sufficiently informed Barriger of the procedure she was required to follow to file a timely appeal.

Accordingly, 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.'"[31] Barriger was obligated to carefully read the Notice and relevant regulation and her failure to do so is not an extraordinary circumstance that excuses her failure to timely file her petition.[32]

Furthermore, even if Barriger had been correct that the due date is extended if the 30th day after filing (not receipt) of the D. & O. was a Saturday, Sunday or federal holiday (in this case May 31, 2005), her petition was still untimely because the Board did not receive it until June 7th. Although Barriger claims that she attempted to fax the petition for review twice on May 31, 2005, the Board's facsimile activity report lists no such unsuccessful attempts. Moreover, a petitioner who waits until the day a petition for review is due and then unsuccessfully attempts to serve it by facsimile has not demonstrated the necessary diligence to invoke the tolling provision.[33]

The Board has recognized that the three *Marshall* elements are not necessarily exclusive,[34] and Barriger's failure to satisfy one of these elements would not have

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[30] 20 C.F.R. § 655.845(a) (emphasis added). As noted above, Barriger relies upon 20 C.F.R. § 655.845(c), which applies to the Board's notification of its decision to accept an appeal.

[31] *Hemingway* at 5, quoting *Larson v. American Wheel & Brake, Inc*., 610 F.2d 506, 510 (8th Cir. 1979). *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).

[32] *Accord Flood* at 5.

[33] *Accord Shank v. Secretary , Dep't of Veteran's Affairs*, 2004 WL 1870532 , E.E.O.C Doc. 01A43498 (Aug. 10, 2004)(complainant failed to justify enlargement of the filing period where his attempt to file complaint by facsimile on the due date was unsuccessful); *Grant v. Department of the Air Force*, 63 M.S.P.R. 28 (June 7, 1994)(MSPB rejected argument that unsuccessful attempt to fax a petition for review on the last day should be sufficient to toll the limitations period and held that unexpected delays occurring on the last day for filing do not provide good cause for waiving the Board's filing deadlines).

[34] *Gutierrez*, slip op. at 4.

necessarily been fatal to her claim if she had identified another factor that would justify tolling the limitations period. We find, however, that she has failed to do so.

We conclude that Barriger has not established that sufficient grounds for tolling the statute of limitations in this case, and, accordingly, we **DISMISS** her untimely appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge