In the Matter of:

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

PROSECUTING PARTY,

v.

FOODPRO INTERNATIONAL, INC.,

RESPONDENT.

ARB CASE NO. 09-014

ALJ CASE NO. 2008-LCA-005

DATE: December 12, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER DISMISSING APPEAL

On September 4, 2008, 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),[1] as amended by the American Competitiveness and Workforce Improvement Act of 1998,[2] and its implementing regulations.[3] The ALJ found that FoodPro failed to pay required wages under the H-1B visa program to one of its employees in the amount of $47,799.70 and ordered Foodpro to pay this amount to the Wage and Hour Division (WHD) of the United States Department of Labor within 15 days after the D. & O. became final. FoodPro filed an untimely petition for review with the Administrative Review Board, and the WHD Administrator moved the Board to

[1] 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n) (West 1999 & Supp. 2004).

[2] Pub. L. 105-277, 112 Stat. 2681 et seq.

[3] 20 C.F.R. Part 655, Subparts H and I (2007).

dismiss the untimely filed appeal. Finding that FoodPro has proffered no justification that would support a tolling of the limitations period, we grant the Administrator's motion and dismiss FoodPro's appeal.

BACKGROUND

The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations.[4] These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations are those occupations that require "theoretical and practical application of a body of highly specialized knowledge, and … attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[5] To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA) and file it with the Department of Labor (DOL).[6] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant for the period of his or her authorized employment.[7] After securing DOL certification for the LCA, the employer petitions for, and the nonimmigrant may receive an H-1B visa from the State Department upon United States Citizenship and Immigration Services (USCIS) approval.[8]

FoodPro is a California corporation that plans and designs food processing plants and distribution operations.[9] Its president, M. W. Washburn, is ultimately responsible for hiring decisions, including approving LCAs on the company's behalf under the H-1B visa program.[10] FoodPro hired Biljana Ivanova as a Financial Analyst under this program.[11]

A WHD District Director conducted an investigation and determined that FoodPro had failed to pay required wages to Ivanova under the terms of the LCA and

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4 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

5 8 U.S.C.A. § 1184(i)(1).

6 8 U.S.C.A. § 1182(n).

7 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

8 20 C.F.R. § 655.705(a), (b).

9 D. & O. at 2.

10 *Id.*

11 *Id.* at 1-2.

concluded that FoodPro owed back wages in the amount of $47,799.70.[12] He assessed no civil penalty.[13] FoodPro timely requested a hearing before a DOL administrative law judge.[14] The ALJ heard the case and ultimately determined that FoodPro was liable for $47,799.70 in back wages.[15]

The ALJ included the following recitation of appeal rights in his September 4, 2008 decision ordering FoodPro to pay back wages:

> To appeal, you must file a Petition for Review . . . that is received by the Administrative Review 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). . . .
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> If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor.[16]

On September 19, 2008, Washburn wrote to the ALJ indicating that "[the ALJ's] findings were received on September 8th," that FoodPro was unable to pay the amount assessed, and requesting advice on options other than appeal.

The Administrative Review Board received no petitions for review of the D. & O. within thirty days of the date on which the ALJ issued the decision. On October 20, 2008, 15 days after the petition for review had been due, FoodPro filed a letter, signed by Washburn, requesting the Board to review the D. & O.[17] FoodPro acknowledged that the request for review was "a bit behind schedule" but explained, "the decision of Judge Berlin was tardy in arriving to our office and, when it did, I was out of town so was unable to file the petition. Also, I had a question which I addressed to Judge Berlin . . . but have yet to receive a response from him. I had hoped to have his response and thus avoid filing this petition but have decided that I can wait no longer to file."

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12 *Id.* at 1.

13 *Id.*

14 *Id.*

15 *Id.* Before the ALJ, the Administrator moved the ALJ to allow the WHD to recover $4,509.85 in additional wages based on evidence that he had acquired after he issued the determination letter indicating that FoodPro owed Ivanova $47,799.70. *Id.* The ALJ denied the Administrator's motion. *Id.*

16 D. & O. at 14.

17 We note that while the letter is dated October 10, 2008, it was postmarked October 14th and sent by regular mail from San Jose, California.

In response to FoodPro's letter, the Acting WHD Administrator filed a Motion to Dismiss Petition for Review on October 20, 2008. He averred that the ARB should dismiss the petition for review because FoodPro had failed to file it within 30 days of the date of the D. & O. as provided by the applicable regulations. The Acting Administrator acknowledged that the ARB had previously held that it could equitably toll the limitations period for petitions for review under the proper circumstances, but stated that no such circumstances existed in this case. In particular the Acting Administrator pointed out that FoodPro's explanation that "the decision of Judge Berlin was tardy in arriving to our office and, when it did, I was out of town so was unable to file the petition" was belied by Washburn's letter to the ALJ filed on September 19th (within the 30-day period) stating that the D. & O. had been received on September 8th (just four days after it had been issued, including an intervening week-end).[18]

Because the ARB has held that equitable tolling principles apply to appeals from administrative law judges' decisions in H-1B cases, we issued an Order giving FoodPro the opportunity to establish that this case falls within the circumstances that justify equitable tolling. FoodPro responded to the Board's Order; the Acting Administrator did not reply to FoodPro'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.[**19**]

FoodPro has conceded that it failed to file a petition for review within the thirty-day period. Nevertheless, the ARB has recognized three situations in which tolling of a limitations period to file a petition for review before the Board is proper:

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[18] Acting Administrator's Motion to Dismiss Petition for Review at 3-4.

19 20 C.F.R. § 655.845.

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[20]

But the ARB has not determined that these categories are exclusive.[21] FoodPro's inability to satisfy one of these elements is not necessarily fatal to its claim but courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[22] Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting tolling identifies a factor that might justify such tolling, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."[23]

Foodpro bears the burden of justifying the application of equitable tolling principles.[24] Ignorance of the law will generally not support a finding of entitlement to equitable tolling, especially in a case in which the ALJ plainly notified the party of the limitations period for timely filing.[25]

FoodPro did not specifically address the applicability to this case of any of the three recognized tolling situations. Instead it spent the majority of its response arguing that it did not receive a fair hearing and that the ALJ incorrectly decided its case. FoodPro again asserted that the ALJ's D. & O. was "tardy," although FoodPro acknowledged that it received it four days after it was issued (with an intervening week-

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[20] *Administrator, Wage & Hour Div. v. Wings Digital Corp.*, ARB No. 05-090, ALJ No. 2004-LCA-030, slip op. at 4 (ARB July 22, 2005).

[21] *Id.* at 3.

[22] *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). *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).

[23] *Baldwin County Welcome Ctr.*, 446 U.S. at 152.

[24] *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).

[25] *Accord Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, 015, slip op. at 4-5 (ARB Aug. 31, 2000).

end) and FoodPro had sufficient time to write to the ALJ on September 19, 2008, fifteen days after the ALJ issued his D. & O. Accordingly, because FoodPro has failed to establish that it was misled as to the proper filing date, some extraordinary circumstance precluded it from timely filing, it filed the precise claim in the wrong forum, or that it was in any other way justified in failing to timely file its appeal, we find that FoodPro is not entitled to tolling of the limitations period. Consequently, we **GRANT** the Acting Administrator's Motion and we **DISMISS** FoodPro's appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge