



**In the Matter of:**

**BISHNU S. BAIJU,**

**ARB CASE NOS. 10-094**

**COMPLAINANT,**

**ALJ CASE NO. 2009-LCA-045**

**v.**

**DATE: May 31, 2012**

**FIFTH AVENUE COMMITTEE,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Bishnu S. Baiju, *pro se*, Elmhurst, New York**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge***

### **ORDER DENYING RECONSIDERATION**

This case is before the Administrative Review Board (ARB or Board) based on a complaint Bishnu Baiju filed under the Immigration and Nationality Act, as amended (INA or the Act) and its implementing regulations. 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2011); 20 C.F.R. Part 655, Subparts H and I (2011). Baiju

complained that his employer, Fifth Avenue Committee (FAC), did not pay him the wage rate as determined by the New York State Department of Labor and retaliated against him. After a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) held that FAC was not required to pay Baiju the wage rate as determined by the New York State Department of Labor, that FAC was liable for back wages to Baiju as computed by the Wage & Hour Division, that Baiju did not engage in protected activity, and that FAC did not discriminate against Baiju because he engaged in protected activity. The ALJ ordered FAC to pay Baiju back wages in the total amount of \$377.28 pursuant to the instruction set forth in the Administrator's Determination Letter, plus pre- and post-judgment interest until satisfaction of the liability. Baiju appealed.

In the ARB's Decision and Order dated March 30, 2012, we reviewed the record and found that it supports the ALJ's recitation of facts and resolution of conflicting evidence with the exception that we found that Baiju engaged in protected activity. However, we agreed with the ALJ that FAC did not retaliate against Baiju in any part because he engaged in protected activity. Therefore, the ARB agreed with the ALJ's findings of fact and conclusions of law and affirmed her Decision and Order. *Baiju v. Ultimo Software Solutions, Inc.*, ARB Nos. 09-056, -44; ALJ No. 2008-LCA-011 (ARB Mar. 31, 2011) (F. D. & O.).

On April 10, 2012, Baiju filed two Motions to Reconsider. On April 11, 2012, Baiju filed a third Motion to Reconsider. Baiju disagrees with the ARB's decision to affirm the ALJ's Decision and Order. Baiju asserted in his first motion to reconsider that the Board failed to consider certain issues, that new material facts occurred after the ALJ's decision that the ARB accepted as material evidence, and that the Board failed to consider whether FAC proved by clear and convincing evidence that it would have discharged Baiju absent his protected activity. In his second motion, Baiju asserted that the ARB erred when it affirmed the ALJ's finding that FAC terminated Baiju's employment because he failed to perform work. In his third motion, Baiju asserted that the ARB erred when it affirmed the ALJ findings about Baiju's work for several companies, that FAC was not required to pay the New York State Department of Labor's wage determination rate, and that FAC terminated Baiju's employment because he refused to work.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the Board issued the decision. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007). In considering whether to reconsider a decision, the Board has applied a four-part test to determine whether the movant has demonstrated:

- (i) material differences in fact or law from that presented to a court of which the moving party could not have known

through reasonable diligence, (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision, and (iv) failure to consider a material fact presented to court before its decision.

*Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003; slip op. at 4 (ARB Feb. 16, 2011).

Baiju raises a number of arguments in support of his motion for reconsideration, none of which satisfy any of the criteria by which the ARB will reconsider a decision and order previously issued. Baiju's arguments are many, the more salient of which are here listed: (1) that there is a lack of appropriate law and substantial evidence to support the ALJ's decision; (2) that the ALJ used scare tactics to pressure him to take part in the hearing against his will after it became apparent that the ALJ had met one of FAC's attorneys; (3) that the ALJ improperly failed to confirm the minimum wage determined by the New York State Department of Labor at CX 4; (4) that the ALJ improperly failed to determine whether the Wage and Hour Division sent a wage determination request letter to the Employment and Training Administration citing RX 2; (5) that the Board must reconsider its decision because the ALJ applied the wrong law at 20 C.F.R. § 656.10(c)(4); (6) that 20 C.F.R. § 656.40 mandates that the same policies and procedures must be followed for permanent labor certification and H-1B applications; (7) that the Board overlooked that the New York State Department of Labor issued two wage determinations, the first related to his H-1B application, listed \$45,000, and the second related to his PERM application, listed \$48,000, and that the New York State Department of Labor issued an H-1B wage determination on November 9, 2006; (8) that the ALJ and/or the Board overlooked and/or failed to consider the relevant wage determination and other pertinent evidence supportive of Baiju's contention as to the proper wage determination and rate that should have been applied; (9) that De La Uz took adverse action against him because he engaged in protected activity; (10) that the Board overlooked its own bona fide termination criteria; (11) that FAC did not send USCIS a March 11, 2008 letter notifying USCIS that FAC terminated Baiju's employment, citing Michelle De La Uz's affidavit (CX 28), and that USCIS confirmed that it did not receive such a notification; and (12) that FAC was required to show by clear and convincing evidence that it would have terminated Baiju's employment absent protected activity; and (13) that FAC forced Baiju to work for other companies besides FAC, including BWI/Leap and Brooklyn Wood.

The ARB, in its Decision and Order of March 31, 2012, fully considered and addressed the multitude of issues Baiju raised in support of his Motions to Reconsider. In again presenting these issues, Baiju has nevertheless failed to demonstrate any material difference in fact or law from that previously presented to the Board that Baiju could not have previously known of through reasonable diligence. Nor does Baiju's motion

identify new and material facts that occurred after the Board's decision, or a change in the law since that decision was rendered, or point to any failure by the Board to consider material facts that had been previously presented.

Baiju also asserted in support of his first motion for reconsideration that we did not consider CX 24 and CX 28 in our decision.<sup>1</sup> When determining whether to consider new evidence submitted for the first time on appeal, the Board relies upon the same standard applicable to proceedings before DOL Administrative Law Judges found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2011). The regulation at 29 C.F.R. § 18.54(c) provides that “[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.” Pursuant to this standard, we have rejected consideration of the evidence Baiju has submitted to the Board because Baiju has failed to establish that the evidence was newly discovered and material and that it was not readily available prior to the closing of the record by the ALJ in this case.<sup>2</sup>

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<sup>1</sup> CX-24 consists of: 1) a June 15, 2010 letter from NYS Department of Labor to Baiju stating that they were giving him a copy of a prevailing wage determination; 2) a prevailing wage determination dated June 7, 2010, with determination date listed as November 9, 2006, listing the prevailing wage as 34.89; 3) a letter from Baiju to the New York State Department of Labor regarding his request for a copy of the prevailing wage determination; and 4) a letter from William Carlson at the Employment and Training Administration to Baiju telling him that he must apply to the New York State Workforce Agency to obtain a prevailing wage determination for his position. CX-28 is Michelle De La Uz's affidavit dated July 22, 2010, stating what she did to effect Baiju's bona fide termination including that she notified Baiju by mail and notified USCIS by mail on March 11, 2008.

<sup>2</sup> For the same reasons, we also did not consider the additional evidence that FAC submitted.

Baiju's several motions for reconsideration do not satisfy any of the circumstances or criteria under which the Board will reconsider its Decision and Order. Therefore, Baiju's three Motions to Reconsider are **DENIED**.<sup>3</sup>

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>3</sup> The appropriate United States District Court has review authority over final agency action under the INA's H-1B visa program. 20 C.F.R. § 655.850.