



In the Matter of:

JUAN CARLOS LUBARY,

ARB CASE NO. 10-137

COMPLAINANT,

ALJ CASE NO. 2010-LCA-020

v.

DATE: April 30, 2012

**EL FLORIDITA d/b/a BUENOS AYRES
BAR & GRILL,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Julio Cesar Alejandro Serrano, Esq.; Bayamon, Puerto Rico

For the Respondent:

Luis Francisco Colon-Conde, Esq.; Colon Conde & Mirandes; San Juan, Puerto Rico

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge.

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).¹ Juan Carlos Lubary, an H-1B non-immigrant employee, filed a complaint in June 2008 alleging that his employer El Floridita d/b/a Buenos Ayres Bar & Grill (El Floridita) had failed to pay him the wages required under its Labor Certification Application (LCA). After an

¹ 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2011). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2011).

investigation, the Assistant District Director of the Puerto Rico Wage and Hour Division issued a determination, which included a finding that El Floridita had committed a violation and ordered that it pay back wages to Lubary. Lubary was dissatisfied with the amount of the back wages the Administrator found to be due to him and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). In a Decision and Order issued July 14, 2010, the presiding ALJ found that Lubary did not timely request a hearing and that principles of equitable tolling did not apply. Lubary timely appealed to the Administrative Review Board (ARB or Board). El Floridita also filed a brief. For the reasons stated, we affirm the ALJ's Decision and Order.

BACKGROUND

The INA permits an employer to hire nonimmigrant workers in "specialty occupations" to work in the United States for prescribed periods of time.² These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.³ An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).⁴ The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.⁵ After securing the certification, and upon approval by the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.⁶

Pursuant to a complaint filed by Lubary, the Department of Labor's Wage and Hour Division initiated an investigation under the INA, and issued a Determination Letter on January 21, 2009, charging El Floridita with the failure to pay wages as required and ordering it to pay Lubary \$4,605.39 in back wages.⁷ The determination notified the parties that they could request a hearing on the determination by sending a dated, written request to the Chief Administrative Law Judge of the U.S. Department of Labor within fifteen calendar days after the date of the determination. D. & O. at 2.

On January 28, 2009, Lubary met with Edison Fernandez of the Puerto Rico Wage and Hour office, and expressed his objections to the amount of back wages in the Administrator's

² 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

³ 8 U.S.C.A. § 1184(i)(1).

⁴ 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

⁵ 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

⁶ 20 C.F.R. § 655.705(a), (b).

⁷ Wage and Hour sent an initial determination letter on January 5, 2009, in error. The January 21, 2009 determination stated that it rescinded and replaced the January 5, 2009 determination.

determination letter. D. & O. at 2; Comp. Br. at 4. On February 4, 2009, Lubary personally requested information from Wage and Hour regarding how the Administrator determined the back wage amount. D. & O. at 2; Comp. Br. at 4. On February 9, 2009, Lubary reiterated his request for information on the amount calculated in writing by sending a fax or e-mail to the Assistant District Director requesting information under the Freedom of Information Act (FOIA). D. & O. at 2, 3; Comp. Br. at 5.

On February 9, 2009, Fernandez told Luis Colon-Conde, El Floridita's counsel, that Lubary had not appealed the Administrator's determination. Resp. Br. at 7. Based on this information, El Floridita paid Lubary \$4,605.39 in back wages. Resp. Br. at 7. Lubary cashed the check, labeled "Final Payment," on February 19, 2009. Resp. Br. at 7.

On March 24, 2010, Lubary filed another FOIA request for information. D. & O. at 2; Comp. Br. at 5.

On March 26, 2010, Lubary met with Assistant District Director Marin who informed Lubary that his case was closed. D. & O. at 2; Comp. Br. at 5. Thus, on April 7, 2010, Lubary sent a letter to the Philadelphia Wage and Hour office stating that he personally presented a claim to the Puerto Rico Wage and Hour office on February 4, 2009, requesting information regarding the calculation used to determine the back wage amount. D. & O. at 3. On April 19, 2010, the Philadelphia Wage and Hour office informed Lubary that his request for review was untimely and that if he wanted to request review of the timeliness decision he should submit the request to the Department of Labor's Office of Administrative Law Judges (OALJ). D. & O. at 2. Therefore, on May 12, 2010, Lubary sent a letter regarding the Administrator's January 21, 2009 determination to the OALJ. D. & O. at 2.

On May 20, 2010, the ALJ issued an order to Lubary to show cause why his hearing request should not be denied as untimely and to El Floridita to show cause why the request should not be found to be timely or why Lubary should not be entitled to equitable tolling of the limitations period. D. & O. at 2-3. On June 1, 2010, Lubary submitted a timely statement confirming request for hearing. D. & O. at 3. On June 21, 2010, Lubary filed a brief arguing that his February 9, 2009 FOIA request with the Puerto Rico Wage and Hour office was a timely request for an administrative hearing because it was a reiteration of his timely February 4, 2009 request. D. & O. at 3. The Respondent also filed a brief. D. & O. at 4. The Administrator filed a statement in which she noted that the Respondent had paid the back wages to the Administrator's satisfaction in reference to the Determination letter issued on January 21, 2009. D. & O. at 4.

BANKRUPTCY

On July 28, 2011, El Floridita's counsel notified the ARB that the company was in Chapter 11 bankruptcy proceedings and requested that the Board issue a final determination in this matter. The evidence consisted of a notice of a meeting of the creditors scheduled for June 16, 2010; a notice of hearing set for August 9, 2011; and a bankruptcy court order to show cause

why the bankruptcy action should not be dismissed for El Floridita's failure to file an amended reorganization plan.

We have held that the Bankruptcy Code's automatic stay provision applies to cases, for which the Board issues final agency decisions, that are litigated by private parties under the whistleblower protection provisions of a number of different statutes.⁸ Accordingly, the Board issued a show cause order for the parties to respond as to why the Board should not stay the proceedings due to the pendency of the Bankruptcy proceeding. On April 17, 2012, Lubary responded to the show cause order, asserting that a plan was confirmed in the Bankruptcy case and that a confirmation order had been issued. Lubary attached a minute entry from the confirmation hearing indicating that El Floridita's bankruptcy was confirmed, that an estimated claim amount of \$10,000.00 was allowed for Lubary's claim against El Floridita for confirmation purposes only, and that the estimated amount was without prejudice to Lubary's "continuing actions before administrative, state, and federal forums." El Floridita also responded to the show cause order and also attached the Minutes of the Confirmation Hearing. El Floridita asserted that in light of the confirmation in bankruptcy, the Board should conclude that the case is no longer stayed.

In proceedings before the Bankruptcy Court, on May 31, 2011, Lubary moved for relief from the automatic stay in this matter. *Lubary v. El Floridita, Inc. (In re El Floridita, In re Maria I. Marty Ravena)*, Case Nos. 10-04089-ESL11, 1-04118-ESL11 (Bankr. D.P.R. May 31, 2011). On June 15, 2011, El Floridita responded to Lubary's motion, stating that El Floridita had "no interest in objecting to the regulatory function" of the Department of Labor in this matter, stating that this action fell under an exception to the automatic stay provisions under 11 U.S.C.A. § 362(b)(4).⁹ *In re El Floridita, In re Maria I. Marty Ravena*, Case Nos. 10-04089-ESL11, 1-04118-ESL11 (Bankr. D.P.R. June 15, 2011). The Bankruptcy Court agreed with El Floridita when it granted El Floridita's opposition. Order, *In Re El Floridita, In re Maria I. Marty Ravena*, Case. Nos. 10-04089-ESL11, 1-04118-ESL11 (Bankr. D.P.R. June 23, 2011). We note that both of the parties have submitted that the reorganization plan has been confirmed, with full knowledge of this pending administrative action. In light of this information, we deduce that we may proceed to the merits of Lubary's claim.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845.¹⁰ Under the Administrative Procedure Act, the

⁸ *Haubold v. KTL Trucking Co.*, ARB No. 00-065, 2000-STA-035 (Aug. 10, 2000); 11 U.S.C.A. §§ 362 (a)(1), 362 (c)(2) (Thomson Reuters 2012).

⁹ (Thomson Reuters 2012).

¹⁰ See Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision" ¹¹ The ARB has plenary power to review an ALJ's factual and legal conclusions de novo. ¹² The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard. ¹³

DISCUSSION

It is undisputed that the DOL issued a determination letter on January 21, 2009, finding that El Floridita violated the act and owed Lubary \$4,605.39 in back wages. Lubary received this determination on January 24, 2009. Comp. Br. at 4. The determination states that "any interested party ha[s] the right to request a hearing on this determination" and specifies how the request must be filed. It also states that the request must be made to and received by the Chief ALJ no later than fifteen calendar days after the date of the determination, in this case February 5, 2009. Lubary did not request a hearing until May 12, 2010. The ALJ thus correctly determined that Lubary's hearing request was untimely.

We also agree with the ALJ that equitable modification principles are not warranted in this case. When deciding whether to relax the limitations period in a particular case, the Board is guided by the principles of equitable tolling applied in *School Dist. of the City of Allentown v. Marshall*, in which the Third Circuit recognized three situations in which tolling is proper: "(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."¹⁴

¹¹ 5 U.S.C.A. § 557(b) (West 1996).

¹² *Yano Enters., Inc. v. Adm'r*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Adm'r v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

¹³ *See, e.g., Mao v. Nasser*, ARB No. 06-121, ALJ No. 2005-LCA-036, slip op. at 12 (ARB Nov. 26, 2008); *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 9 (ARB Apr. 26, 2006).

¹⁴ *Wakileh v. Western Ky. Univ.*, ARB No. 04-013, ALJ No. 2003-LCA-023, slip op. at 4 (ARB Oct. 20, 2004) (citing *Marshall*, 657 F.2d 16, 18 (1981) (citation omitted)); see also *Udofot v. NASA/Goddard Space Ctr.*, ARB No. 10-027, ALJ No. 2009-CAA-007 (ARB Dec. 20, 2011).

Lubary bears the burden of justifying the application of equitable tolling principles.¹⁵ Though Lubary’s inability to satisfy one of these elements is not necessarily fatal to his claim, courts “‘have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.’”¹⁶

Lubary admitted in his brief to the ARB that he received the January 21, 2009 determination on January 24, 2009. Comp. Br. at 4. While Lubary has argued at times that he did not receive this determination, this is contradicted by his statement that he *did* receive it. Lubary bears the burden to prove that equitable modification is warranted. The determination, which he admittedly received, clearly instructed interested parties on the procedure for requesting a hearing on the determination. As the ALJ noted, Lubary has shown that he is capable of creating and filing documents in the English language. D. & O. at 7. Moreover, Lubary accepted “Final Payment” when he cashed the check that El Floridita paid to him in satisfaction of the back wages that he was due pursuant to the Determination Letter, and he does not even allege that he did anything to pursue his claim between February 9, 2009, and March 26, 2010, a long period of inactivity, which shows a failure to exercise due diligence in preserving his legal rights. Based on all of these considerations, we agree with the ALJ and conclude that there is an insufficient basis to justify equitable tolling in this case.

ORDER

The ALJ’s Decision and Order is **AFFIRMED** and Lubary’s complaint is **DISMISSED**.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

¹⁵ *Id.* (citing *Accord Wilson v. Secretary, 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)).

¹⁶ *Id.* (quoting *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 4-5 (ARB May 14, 2003) (citations omitted)).