



**In the Matter of:**

**JUAN CARLOS LUBARY,**

**ARB CASE NO. 10-137**

**COMPLAINANT,**

**ALJ CASE NO. 2010-LCA-020**

**v.**

**DATE: June 18, 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**

### **ORDER DENYING RECONSIDERATION**

This case is before the Administrative Review Board (ARB or Board) based on a complaint Juan Carlos Lubary 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). Lubary complained that his employer, El Floridita d/b/a Buenos Ayres Bar & Grill (El Floridita), reprimanded him, did not pay him his wages, and terminated his employment. After the parties responded to a Department of Labor Administrative Law Judge's order to show cause why Lubary's hearing request should not be denied as untimely, the ALJ found that Lubary's complaint was untimely and that equitable modification was not warranted. Thus, the ALJ dismissed Lubary's claim. Lubary appealed.

In our Decision and Order dated April 30, 2012, we reviewed the record and found that it supports the ALJ's decision. Therefore, the ARB agreed with the ALJ's determinations that the claim was untimely and that equitable tolling was not warranted. *Lubary v. El Floridita d/b/a/ Buenos Ayres Bar & Grill*, ARB No. 10-137, ALJ No. 2010-LCA-020 (ARB Apr. 30, 2012).

On May 15, 2012, Lubary filed a Motion to Reconsider. Lubary disagrees with the ARB's decision to affirm the ALJ's Decision and Order. Lubary asserts that he denies that he ever cashed a check from El Floridita and that the Board's "determination" that he had cashed a check was a "turning point" in its decision.

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 examines 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 material facts presented to the court before its decision.

*See 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).

Lubary denies that he ever cashed a check from El Floridita as mentioned in the Board's Final Decision and Order (F. D. & O.) in this case. He appears to claim that this is grounds for reconsideration. We disagree. First, our decision did not turn on whether Lubary cashed a check from El Floridita; the Board merely referenced this information as additional support for its conclusion.<sup>1</sup> Our determination rests on the fact that Lubary received a determination that told him what an interested party requesting a hearing had to do, and he failed to do it. F. D. & O. at

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<sup>1</sup> If El Floridita did not pay Lubary the amount that the Administrator ordered it to pay in the determination, then Lubary must pursue an enforcement action in the proper forum, not before the Board.

5. Lubary has not demonstrated any reason to reconsider our ultimate conclusion. Second, El Floridita asserted to the ALJ that it had paid Lubary in full regarding settlement of the matter and that Lubary had cashed the check on February 19, 2009. Knowing this, Lubary failed to dispute that he had cashed the check either to the ALJ or to the Board on appeal. His argument is not based on new evidence, nor is it based on a difference in fact from that presented to the Board of which Lubary did not know.

Because Lubary's Motion to Reconsider does not refer to a difference in fact or law from that presented to the Board, or refer to a new, material change in fact or law, or point to any failure by the Board to consider material facts, it does not satisfy any of the above-mentioned circumstances under which we will reconsider our Decision and Order. Therefore, Lubary's Motion to Reconsider is **DENIED**.<sup>2</sup>

**SO ORDERED.**

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

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

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<sup>2</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.