



In the Matter of:

SELVA KUMAR,

ARB CASE NO. 11-025

COMPLAINANT,

ALJ CASE NO. 2010-LCA-035

v.

DATE: May 9, 2012

NIHAKI SYSTEMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Selva Kumar, *pro se*, Houston, Texas

For the Respondent:

Michael J. Lauricella, Esq.; *Herten, Burstein, Sheridan, Cevasco, Bottinelli, Litt & Har, L.L.C.*; Hackensack, New Jersey

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*.
Judge Corchado, concurring.**

FINAL DECISION AND ORDER

This matter arises under the Immigration and Nationality Act (INA or Act) H-1B visa program, 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thompson Reuters Supp. 2011), which permits employment of non-immigrants to fill specialized jobs in the United States. Complainant Selva Kumar was an H-1B nonimmigrant employed by respondent Nihaki Systems, Inc (Nihaki). On July 28, 2010, a District Director, acting for the Administrator of the Wage and Hour Division, determined that Nihaki violated the Act by, inter alia, failing to pay required

wages, and ordered the payment of back wages to Kumar. The District Director notified the Respondent and interested parties that any request for a hearing before a Department of Labor Administrative Law Judge (ALJ) was due within 15 days, or August 12, 2010. Kumar requested a hearing on September 3, 2010. The Respondent moved the ALJ to dismiss the request as untimely. On December 7, 2010, the ALJ entered an order granting the motion to dismiss and cancelling the hearing. Kumar petitions for review. We affirm.

BACKGROUND AND PROCEEDINGS BELOW

Under the H-1B program, an employer seeking to hire a foreign national must submit a Labor Condition Application (LCA) to the Department of Labor (DOL). In the LCA, the employer attests that it will pay the H-1B worker “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment, whichever is greater.” 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II). After the DOL certifies the LCA, the United States Citizenship and Immigration Services (USCIS) may approve the H-1B petition seeking to employ the non-immigrant worker. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). The DOL has authority to investigate complaints, require payment of back wages to H-1B workers, and impose civil money penalties, 8 U.S.C.A. § 1182(n)(2)(A), (C) & (D).

Kumar was working for Nihaki under the H-1B program when he filed a complaint in April 2010. Following an investigation, the District Director concluded that Nihaki had failed to pay wages as required, failed to provide notice of the filing of LCAs, and failed to comply with the provisions of subpart H or I of the Act. On July 28, 2010, the District Director sent a Determination Letter ordering Nihaki to pay back wages in the amount of \$26,292.70, with interest, to Kumar. See Determination Letter (dated July 28, 2010), Attachment, Summary of Violations and Remedies, Nihaki Systems, Inc. No civil money penalties were assessed. The Letter included instructions regarding the process for interested parties to request a hearing before an ALJ, and stated that a request must be made to, and received by, the Office of Administrative Law Judges (OALJ) no later than 15 calendar days after the date of the determination, or August 12, 2010. *Id.* at 2.

On August 30, 2010, about four weeks after the District Director issued the July 28, 2010 Determination Letter, Kumar telecopied a letter to the Chief of the Office of Administrative Law Judges (OALJ) stating “Motion to Extend” in the subject line. Kumar Fax to Chief ALJ (dated Aug. 30, 2010). By that correspondence, Kumar inquires (1) why a civil penalty was not imposed against his employer, and (2) why his back pay award was being paid to him in installments rather than a lump-sum.

On September 3, 2010, about six weeks after the Determination Letter was issued, the OALJ received a request for a hearing from Kumar. The ALJ issued a Notice of Hearing and Pre-Hearing Order on September 21, 2010. That order set a formal evidentiary hearing for December 29, 2010.

On November 18, 2010, Nihaki moved to dismiss the hearing request and complaint on timeliness grounds. The ALJ granted the motion, determining that Kumar's hearing request was made more than 15 days after the Determination Letter, and that equitable tolling did not apply.¹ ALJ Order at 4.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. Secretary's Order No. 1-2010, 75 Fed. Reg. 3924 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA). The ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision." 5 U.S.C.A. § 557(b) (West 1996). The ARB reviews an ALJ's decision on the merits de novo. *Baiju v. Fifth Avenue Comm.*, ARB No. 10-094, ALJ No. 2009-LCA-045 (ARB Mar. 30, 2012). An ALJ's procedural rulings are reviewed for abuse of discretion. *Id.*

DISCUSSION

The INA and its implementing regulations provide that an interested party desiring review of a determination issued by the Administrator shall make a request for a hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. 20 C.F.R. § 655.820(a). The regulations also state that the request for hearing shall be received by the Chief Administrative Law Judge no later than 15 calendar days after the date of the determination. 20 C.F.R. § 655.820(d). These regulatory requirements were clearly set out in the July 28, 2010 Determination Letter that the Administrator issued. Determination Letter at 2.

While Kumar contends that he did not receive the Determination Letter until August 10, 2010, and that he sent a request for a hearing on that date, the ALJ determined that there was no evidence in the record to support that contention. The ALJ found that "the 'Motion to Extend' was only received by the OALJ as an enclosure with his 'Addendum Request' filed September 3, 2010," and that the "envelope in which the 'Addendum Request' and 'Motion to Extend' were submitted was postmarked August 31, 2010." Order Granting Respondent's Motion to Dismiss and Cancelling Formal Hearing at 3 (ALJ Ord.). We find no reason to disturb that

¹ Kumar sought an administrative hearing to challenge the District Director's decision not to impose civil penalties. The record does not reflect that Kumar sought to challenge the amount of the back pay that he was awarded, only the employer's apparent decision to reimburse Kumar in installments rather than a lump-sum payment. See *supra* at 2. As to the civil penalty, the ALJ did not address whether Kumar is an interested party and thus has standing to request a hearing to challenge the Administrator's decision not to issue civil penalties. Since we dispose of this case on timeliness grounds, we also do not address that issue.

determination. The regulations state: “The request for such hearing shall be *received* by the Chief Administrative Law Judge . . . no later than 15 calendar days after the date of the determination.” 20 C.F.R. § 655.820(d); see also 29 C.F.R. § 18.4(c) (“Documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges.”). “When documents are filed by mail, five (5) days shall be added to the prescribed period.” *Id.* The ALJ determined that the initial correspondence from Kumar, the fax dated August 30, 2010, was received by the OALJ on September 3, 2010. This constitutes substantial evidence to support the ALJ’s determination that Kumar did not meet the deadline to request a hearing, in this case August 12, 2010, even with the five-day extension for mailing.

The ALJ also considered whether the time limitations could be tolled by equitable consideration and concluded that equitable tolling is not appropriate. ALJ Ord. at 3, citing *School District of Allentown v. Marshall*, 657 F.3d 16 (3d Cir. 1981). As there is no allegation that Nihaki “mised [Kumar] in any fashion regarding his right to appeal the determination to OALJ” (ALJ Dec. at 2), or that Kumar was prevented from asserting his rights in any extraordinary way, we again see no reason to disturb this conclusion. The Administrator instructed Nihake and interested persons, including Kumar, on requesting a hearing before an ALJ. Kumar failed to adhere to those instructions.

Based on our review of the administrative record, we find that the ALJ’s ruling dismissing Kumar’s request for a hearing on timeliness grounds is in accordance with law.²

CONCLUSION

Because the Complainant failed to request a hearing within the prescribed 15 days following the date of the Administrator’s determination, we **AFFIRM** the ALJ’s Order and **DISMISS** Kumar’s complaint.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

² We reject Kumar’s submission of new evidence on appeal. Kumar fails to show that the new evidence “was not readily available prior to the closing of the record.” 29 C.F.R. § 18.54(c) (2011); *see also Doyle v Hydro Nuclear Servs.*, ARB No. 98-022, ALJ No. 1989-ERA-022, slip op. at 2 (ARB Sept. 6, 1996).

Luis A. Corchado, Administrative Appeals Judge, concurring:

I concur that Selva Kumar's request for hearing was untimely, but not for all the reasons cited by the majority decision. Stated simply, the regulations focus on the date that a request for hearing is received by the Office of Administrative Law Judges (OALJ). 20 C.F.R. § 655.8201(d)(2011). Though a bit harsh, the regulation requires that requests for hearings be received by OALJ fifteen calendar days after the date of determination, which was July 28, 2010, in this case. See *Wakileh v. Western Ky. Univ.*, ARB No. 04-013, ALJ No. 2003-LCA-023, slip op. at 4 (ARB Oct. 20, 2004). It is undisputed that the OALJ did not "receive" any document from Kumar until it received the August 30, 2010 telecopy, almost a month after the date of determination. In addition, the majority opinion appears to engage in some factual analysis and substantial evidence review, which is inconsistent with a ruling on a motion to dismiss. See generally *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 14 (ARB May 25, 2011). When deciding whether a motion to dismiss was properly granted, the focus is limited to the allegations without assessing credibility or determining whether there is "evidence" or substantial evidence in support of the allegation. Finally, regarding the issue of equitable tolling, I note that Kumar expressly asserted that he received the Administrator's determination on July 29, 2010, and that he allegedly mailed a "Motion to Extend" on August 10, 2010. See Kumar's *Memorandum in Opposition To Respondent's Motion To Dismiss* at 3. He was able to telecopy documents on August 30, 2010, and fails to provide sufficient reasons as to why he could not do the same on August 10, 11, or 12, 2010, or send an overnight delivery on August 10, 2010 (especially where he claims to have drafted and mailed a document on August 10, 2010).

LUIS A. CORCHADO
Administrative Appeals Judge