



**In the Matter of:**

**ARVIND GUPTA,**

**ARB CASE NO. 11-041**

**PROSECUTING PARTY,**

**ALJ CASE NO 2010-LCA-024**

**v.**

**DATE: August 11, 2011**

**WIPRO LIMITED (trading as WIPRO  
TECHNOLOGIES),**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Prosecuting Party:*

**Arvind Gupta, *pro se*, Mumbai, India**

*For the Administrator, Wage and Hour Division:*

**Joan Brenner, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer  
S. Brand, Esq.; M. Patricia Smith, Esq.; *United States Department of Labor,  
Washington, District of Columbia***

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, and Luis A. Corchado,  
*Administrative Appeals Judge***

### **DECISION AND ORDER OF REMAND**

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended.<sup>1</sup> On March 28, 2011, a Department of Labor Administrative Law

---

<sup>1</sup> 8 U.S.C.A §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c) (West 1999 & Thomson Reuters Supp. 2011) (INA). See 20 C.F.R. § 655.845 (2010). The Secretary of Labor has delegated her authority to issue final agency decisions in cases arising under the INA's H-1B provisions to the Administrative Review Board. See Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010).

Judge (ALJ)<sup>2</sup> entered a Decision and Order Granting Summary Decision; and Dismissing Case (D. & O.). The ALJ stated in a footnote on the first page of the D. & O.:

By fax dated June 24, 2010 to Administrative Law Judge (ALJ) Russell D. Pulver, of the San Francisco District Office, Office of Administrative Law Judges, to whom this matter was then assigned, the Prosecuting Party requested that his identity remain confidential “to the extent possible.” In a previous order, dated November 3, 2010, I found it was not yet necessary to provide notice of this matter to the Respondent. To date, the Respondent has not been served with notice of these proceedings.<sup>[3]</sup>

Thus the ALJ neither notified Respondent Wipro of the proceedings before her, nor provided it the opportunity to participate in the proceedings to defend its interests. Upon Gupta’s appeal of the ALJ’s D. & O., we became concerned that Wipro was denied its basic right to due process. Accordingly, we issued an Order to Show Cause why the case should not be remanded to the ALJ to permit Wipro to appear and fully participate in the ALJ proceedings. Both Gupta and the Administrator responded to the Board’s Order. The Board granted Wipro’s request for an enlargement of time to respond to the Show Cause Order, but nevertheless, Wipro did not file a response as anticipated.

## BACKGROUND

Wipro employed Gupta under the INA’s H-1B provisions. The INA permits an employer to hire nonimmigrant alien workers in “specialty occupations” to work in the United States for prescribed periods of time.<sup>4</sup> These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty.<sup>5</sup> An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).<sup>6</sup> The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B

---

<sup>2</sup> This case was originally assigned to Judge Pulver. Because of Gupta’s preference for a hearing in New York City, it was transferred to Judge Odegard. All references to “the ALJ” in this decision are to Judge Odegard.

<sup>3</sup> D. & O. at 1 n.1.

<sup>4</sup> 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

<sup>5</sup> 8 U.S.C.A. § 1184(i)(1).

<sup>6</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731-733.

nonimmigrant.<sup>7</sup> After securing the certification, and upon approval by the Department of Homeland Security (DHS), the Department of State issues H-1B visas to these workers.<sup>8</sup> Before the ALJ, Gupta contended that his employment ended in 2006.<sup>9</sup>

In May 2009, Gupta filed a complaint asserting that Wipro had violated the H-1B provisions by taking unauthorized deductions from his pay. The Department of Labor initially rejected the complaint as untimely. But in June 2009, Gupta provided additional information regarding “unauthorized deductions,” and the DOL accepted the complaint for investigation, with Gupta considered to be an aggrieved party based on his status as Wipro’s business competitor. Gupta informed the Administrator that he had obtained an employee’s pay stub dated June 1, 2009, in the course business as a recruiter. In a January 7, 2010 letter, the San Francisco, California H-1B Regional Enforcement Coordinator, Wage and Hour Division, informed Gupta that “there is reasonable cause to conduct an investigation based on the information you have provided as per 20 C.F.R. § 655.806(a)(5).”

The complaint was transferred to Lawrenceville, New Jersey.<sup>10</sup> By e-mail dated April 22, 2010, Gupta informed the Administrator’s representative that he decided not to start a recruiting business. The WHD District Director in Lawrenceville informed Gupta that based on the original information received, an investigation was assigned. But after reviewing all the information provided, the WHD determined that there was no reasonable cause for an investigation. Gupta was invited to submit additional information, which he did.

Gupta requested a hearing before the Office of Administrative Law Judges. The case was transferred to Judge Odegard. While it was pending before the ALJ, the District Director informed Gupta that the additional information he provided was not sufficient to change his decision that there was no reasonable cause to conduct an investigation. Gupta requested the ALJ to establish discovery and briefing schedules and a hearing and pre-hearing order.

In response the ALJ issued an Order Directing the Administrator to Show Cause

---

<sup>7</sup> 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731, 732.

<sup>8</sup> 20 C.F.R. § 655.705(a), (b).

<sup>9</sup> In a Motion for Leave to Amend Dates of Employment and Motion for Remand filed with the Board on May 19, 2011, Gupta sought to amend the date of the termination of his employment, contending that his employment with his H-1B employer did not terminate until June 10, 2008. Given our decision to remand this case to the ALJ, Gupta may appropriately renew his motion in the ALJ proceedings.

<sup>10</sup> The ALJ indicated that the record did not reveal the reason for the transfer. D. & O. at 2 n.2.

Why the Administrator Should Not Be Required to Follow Regulatory Requirements. Initially in this Order, the ALJ acknowledged Gupta's request that his identity remain confidential "to the extent possible," and stated, "Because this order relates to a preliminary matter, and I have directed only the Administrator to respond, I find it is not necessary to provide notice of this matter to the Respondent at this time."<sup>11</sup>

The ALJ noted that the Administrator's San Francisco office initially notified Gupta that an investigation was warranted, but that the Administrator's Lawrenceville Office subsequently informed Gupta that there was no reasonable cause to undertake an investigation. The ALJ concluded that the applicable regulation provides for two distinct procedures in response to a complaint:

- If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted; and a determination shall be issued. 20 C.F.R. § 655.806(a)(3). If an investigation has been conducted, the complainant is notified of the outcome in a formal determination letter, and may request a hearing. A complainant may request a hearing whether or not the Administrator has determined that there is a basis to conclude that a violation has occurred. 20 C.F.R. §§ 655.815, 655.820.
- If the Administrator determines "that the complaint fails to present reasonable cause for an investigation" the Administrator shall notify the complainant, who may submit a new complaint with additional information. No hearing or appeal is available to a complainant where the Administrator determines that an investigation on a complaint is not warranted. 20 C.F.R. § 655.806(a)(2).<sup>[12]</sup>

Here the ALJ found that the Administrator accepted the complaint, at least initially, but neither conducted an investigation, nor issued a determination triggering Gupta's opportunity to request a hearing. Because the ALJ reasoned that "[i]t does not appear that the regulation authorizes any procedure whereby the Administrator initially

---

<sup>11</sup> Order Directing the Administrator to Show Cause Why the Administrator Should Not Be Required to Follow Regulatory Requirements (O.S.C.) at 1.

<sup>12</sup> *Id.* at 3.

accepts a complaint for investigation, but later concludes that no investigation is warranted,”<sup>13</sup> she ordered the Administrator to show cause why the Administrator should not be required to follow the procedures set forth in 20 C.F.R. § 655.806(b) and 20 C.F.R. § 655.815. She also directed the Administrator to address whether Gupta’s actions constitute a request for hearing that would permit the ALJ to adjudicate the complaint. The ALJ ordered Gupta to file a reply to the Administrator’s response to the O.S.C.

Upon consideration of the Administrator’s and Gupta’s responses to the O.S.C., the ALJ concluded:

- Pursuant to 20 C.F.R. § 655.806(a)(3), the Administrator was required to issue a determination letter to Gupta.
- Because Gupta requested a hearing, he was not prejudiced by the Administrator’s failure to issue a determination letter.
- Gupta’s complaint, based on his status as Wipro’s former employee, was untimely, and Gupta has failed to assert any facts that would permit the tolling of the 12-month limitations period.
- Gupta is not an aggrieved party based on a status as a Wipro competitor. Therefore any complaint based upon Gupta’s status as a purported competitor of Wipro must be dismissed.
- The Administrator’s refusal to investigate any of Gupta’s complaints, presuming his status not to be an aggrieved party as defined in 20 C.F.R. § 655.715 (i.e., a worker whose job, wages, or working conditions are adversely affected by the employer’s alleged non-compliance with the labor condition application) is within the Administrator’s sole discretion, and is nonreviewable.

Accordingly, based on the record before the ALJ, she found that summary decision was appropriate, and she dismissed Gupta’s complaint. Gupta filed a simultaneous petition for review and opening brief with the Board. The Administrator has not appealed the ALJ’s D. & O.

## DISCUSSION

As justification for her decision not to allow Wipro a meaningful opportunity to participate, the ALJ pointed to Gupta’s request that his identity remain confidential to the extent possible<sup>14</sup> and her limitation of the Show Cause Order to a “preliminary matter” to

---

<sup>13</sup> *Id.*

which she requested only the Administrator to respond. This limitation might have gone unquestioned if, in fact, the only issue the ALJ considered was whether the Administrator had an obligation to undertake an investigation and issue a determination with appeal rights. But once the ALJ found that Gupta was entitled to a hearing and proceeded to decide that Gupta's claim as an employee was untimely and Gupta was not a competitor, she ventured into issues that were no longer preliminary, but went directly to the merits of Gupta's complaints and Wipro's potential defenses to those complaints.

One might argue "no harm, no foul" since Gupta lost on both of these issues. But Gupta is now seeking to overturn the ALJ's decision and given our due process concerns, the Board cannot review this appeal at this juncture without Wipro's involvement. Furthermore, it should be noted that the original reason the ALJ proffered for denying Wipro an opportunity to participate is now moot given that Gupta, himself, informed Wipro that he has filed an H 1-B complaint,<sup>15</sup> the ALJ's D. & O. is published on the Office of Administrative Law Judges's website, and the Board served Wipro with a copy of its Show Cause Order.

In response to the Board's Show Cause Order, Gupta averred that he does not oppose remand to give Wipro the opportunity to participate in the ALJ proceedings.<sup>16</sup> The Acting Administrator responded asking the Board "not to remand the case to the ALJ at this juncture."<sup>17</sup>

In support of her response, the Acting Administrator argues that "a concern that Wipro might be found to have been denied due process if the ALJ's decision is reversed on appeal is too remote and hypothetical a concern upon which to base a remand at this time."<sup>18</sup> The Acting Administrator contends that the ALJ's D. & O. is correct as a matter

---

<sup>14</sup> We note that 20 C.F.R. § 600.800(d) provides, "The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart I or subpart H of this part."

<sup>15</sup> Petition for Review and Complainant's Opening Brief at 21 n.23. Gupta also avers that, "The Respondent did not participate in the preliminary proceedings before the ALJ till the Dismissal of this case." But the nature and extent of the Respondent's "participation," if any, is unclear given the ALJ's statement that as of the date of her D. & O., "the Respondent has not been served with notice of these proceedings." Slip op. at 1 n.1.

<sup>16</sup> Complainant's Response to Order to Show Cause at 2.

<sup>17</sup> Response of the Acting Administrator to the Administrative Review Board's Order to Show Cause at 1.

<sup>18</sup> *Id.* at 7.

of law and the possibility of remand “unlikely.”<sup>19</sup> Accordingly, she argues that it would impose undue burdens on the ALJ, and potentially on the Acting Administrator, to require the ALJ to reopen the proceedings to permit Wipro to participate. But the Acting Administrator does not cite to any case as precedent for her argument that due process may be ignored in the interests of administrative efficiency if (at least to the ALJ and the Acting Administrator) it is indisputable that the outcome obtained without the participation of the party in question was “correct.” Furthermore, the Acting Administrator fails to distinguish the Board’s precedent in *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int’l Union*,<sup>20</sup> quoting the Supreme Court’s decision in *Nelson v. Adams USA, Inc.*,<sup>21</sup> in which the Court stated, “judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords.”<sup>22</sup> Accordingly, we are not convinced that administrative efficiency should be permitted to trump due process in this case, and we remand the case to the ALJ for further proceedings consistent with this order.

Finally, the Acting Administrator requests that if the Board remands the case, the remand be limited to “involvement by Wipro” and asserts that “Gupta has been given every opportunity to present his case before the ALJ. He should not be offered the opportunity, under the cloak of protecting Wipro’s due process rights, to effectively get a second bite at the apple in terms of litigating his case.”<sup>23</sup> However, it was not Gupta who raised the due process issue requiring remand for additional ALJ proceedings. Therefore, it is within the ALJ’s discretion, after proper notice to Gupta, the Administrator, and Wipro, to conduct the proceedings on remand in the manner she believes appropriate, consistent with the Board’s remand.

**SO ORDERED.**

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

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

---

<sup>19</sup> *Id.* at 9.

<sup>20</sup> ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 7-8 (ARB Aug. 31, 2007).

<sup>21</sup> 529 U.S. 460, 471 (2000).

<sup>22</sup> *Powers*, ARB No. 04-111, slip op. at 7.

<sup>23</sup> Response of the Acting Administrator to the Administrative Review Board’s Order to Show Cause at 9.