U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

IN THE MATTER OF:

EDMUNDO VICUÑA,

COMPLAINANT,

v.

WESTFOURTH ARCHITECTURE, P.C.

and

VLADIMIR ARSENE, President,

RESPONDENTS.

ARB CASE NO. 15-034

ALJ CASE NO. 2012-LCA-023

DATE: APR - 6 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Complainant:
Bradford D. Conover, Esq. and Molly Smithsimon, Esq.; *Conover Law Offices*, New York, New York

For Respondents:
Nathaniel M. Glasser, Esq.; *Epstein Becker & Green, P.C.;* Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge,* Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DENYING PETITION FOR REVIEW

On January 16, 2015, a Department of Labor Administrative Law Judge issued a Decision and Order in this case arising under the H-1B[1] provisions of the Immigration

[1] This cases involves an employee hired pursuant to Section H(i)(b)(1) of the INA, 8 U.S.C.A. §§ 1101(a)(15)(H) (i)(b1), 1184(g)(8)(A)(i) (Thomson/West 2005), which applies specifically to nonimmigrant employees who are entering the United States pursuant to the

and Nationality Act (INA), as amended, 8 U.S.C.A. §§ 1101-1537 (Thomson/West 2005), as implemented by 20 C.F.R. Part 655, Subparts H and I (2014). After a two-day hearing the ALJ determined that Respondents violated the H-1B provisions by failing to effect a bona fide termination of H-1B1 employee Edmund Vicuña's employment.[2] The ALJ awarded Vicuña $49,006.08 in back wages, $7200.00 for health care benefits, $1,152.78 for Vicuña's return airfare to Chile and pre- and post-judgment interest.[3]

Included in the ALJ's D. & O. was a Notice of Appeal Rights. This Notice informed the parties:

> Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. To be effective, such petition shall be received by the Board within Thirty (30) calendar days of the date of this Decision and Order. . . . If no petition for review is filed this Decision and Order becomes the final order of the Secretary of Labor.[4]

The H-1B regulations describe the requirements for a petition for review that a party wishing to appeal an ALJ's decision shall file with the Board:

> (b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:
> (1) Be dated;
> (2) Be typewritten or legibly written;
> (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
> (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
> (5) Be signed by the party filing the petition or by an authorized representative of such party;
> (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

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United States-Chile Free Trade Agreement. *Vicuña v. Westfourth Architecture, P.C.*, ALJ No. 2012-LCA-0023, slip op. at 1 n.1 (Jan. 16, 2015) (D. & O.).

2 *Vicuña,* ALJ No. 2012-LCA-0023, slip op. at 36-38.

3 *Id.* at 41.

4 *Id.* at 42. *See also* 20 C.F.R. § 655.845.

> (7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.[5]

Neither party filed a petition for review with the Board within thirty days of the date of the decision and order (February 15, 2015).[6] On February 23, 2015, Respondents filed a Motion for Extension of Time to Submit Petition for Review. On March 12, 2015, pursuant to a Board order, Vicuña filed a response to the Motion.

DISCUSSION

Respondents did not file a timely petition for review of the ALJ's D. & O. in this case. Subsequent to the due date for a filing a timely petition, Respondents requested an enlargement of time to file a petition. The Board does not consider the limitations period for filing a petition for review to be jurisdictional.[7] In determining whether the Board will toll a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.[8] But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Respondents' claim.[9] Nevertheless, the party requesting tolling of the limitations period bears the burden of establishing the applicability of the equitable tolling principles.[10]

Respondents have failed to directly address any of the four bases for equitable tolling listed above. Respondents have not argued that Vicuña misled them about the cause of action, that they filed their petition for review in the wrong forum, or that Vicuña's actions lulled them into a prompt attempt to vindicate their rights. At most,

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5 20 C.F.R. § 655.845(b)(1)-(7).

6 February 15th was a Sunday, and February 16th was a federal holiday.

7 *Administrator, Wage & Hour Div. v. Foodpro Int'l, Inc.*, ARB No. 09-014, ALJ No. 2008-LCA-005, slip op. at 4-6 (Dec. 12, 2008).

8 *Selig v. Aurora Flight Scis.*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

9 *Id.* at 4.

10 *Id.* at 5.

Respondents appear to argue that they were in some extraordinary way prevented from timely filing, that they acted in good faith, and that permitting them to file a petition for review would not prejudice Vicuña.

In particular, Respondents aver:

> (1) the service copy of the Administrative Law Judge's Order was unduly delayed by at least two weeks in reaching either Respondents or their then-counsel, Proskauer Rose LLP[11]; the sister of Respondent's Director, Stephanie Charny, suddenly and unexpectedly passed away on February 4, 2015, causing Ms. Charny and Westfourth's President, Mr. Arsene, to be out of the office; (3) the federal government was closed on February 17, 2015 due to inclement weather; and (4) as a result of a dispute with former counsel, Respondents have engaged new counsel, Epstein Becker & Green, P.C., since the issuance of the Order.[12]

The evidence regarding the date on which Respondents' counsel received the ALJ's decision is somewhat conflicting. Westfourth's Director, Stephanie Charny, avers that her former counsel, Mr. Chinn, did not receive a copy of the decision by mail until January 30, 2015. Declaration of Stephanie Charny at 2, para.3. However in an e-mail from Chinn to Charny, he stated that "[i]t did take the decision several days to arrive here for reasons that are unknown to me." Vicuña's counsel received her copy of the ALJ's decision, postmarked on January 16, 2015, on January 20, 2015. Declaration of Molly Smithsimon in Opposition at 1, para. 4. The receipt of the decision on January 20th is consistent with Chinn's statement that the decision took several days to arrive, but inconsistent with Charny's statement that her former counsel did not receive it until January 30, 2015.[13] In any event, it is undisputed that Respondents received a copy of

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[11] We note that Respondents' current counsel before the Board was one of Respondents' attorneys of record before the ALJ. D. & O. at 1.

[12] Motion for Extension of Time to Submit Petition for Review (Resp. Mot.) at 1.

[13] Respondents aver in a footnote to their Motion that "Ms. Charny, without the direction or input from counsel, attached to that fax cover sheet an email exchange that should not have been attached, and, on February 23, 2015, the undersigned called Judge Timlin's office to withdraw the attachments to that fax cover sheet. In addition, by this motion, Respondents formally withdraw those attachments." Resp. Mot. at 3 n.4. It is understandable why Respondents would want to withdraw the e-mail attachment, since it contradicts Charny's Declaration regarding when her counsel received the D. & O., but the ALJ has forwarded this attachment to the ARB as part of the administrative appeals record, and Respondents have cited no authority for the proposition that the ARB may disregard it in considering Respondents' Motion.

the D. & O. no later than January 31, 2015, more than two weeks before the petition for review was due. Thus Respondents had sufficient time to file either a petition for review or, at the very least, a motion for enlargement of time to file the petition, before the limitations period expired and the ALJ's D. & O. became the Secretary's final Order. Thus we must answer the question whether there is sufficient cause to excuse Respondents' failure to either file the petition, or a motion for an enlargement of time to file the petition, during the following two weeks.[14]

Respondents cite their travel schedules and the unexpected death of Charny's sister on February 4, 2015, as grounds for tolling the limitations period. Vladimir Arsene, the founder and President of Respondent Westfourth Architecture and Charny admit receiving an electronic copy of the D. & O. on January 31. Declaration of Victor Arsene at 1 para. 4, Declaration of Stephanie Charny at 1-2, paras. 3-4. Although the Board is, of course, sympathetic to Respondents Arsene and Charny's loss, Arsene admits that after February 7, he worked at home, Declaration of Victor Arsene at 2 para. 5, and Charny, following her sister's death, did not return to the office, but handled "only urgent matters relating to the business of Westfourth." Resp. Mot. at 3. *See also* Declaration of Stephanie Charny at 1-2, paras. 3-4. Apparently, although Respondents were advised of the consequences of failing to file a timely appeal, and they conducted other business, they did not consider the perfecting of an appeal of the ALJ's D. & O., or even the filing of a motion asking for additional time to do so, to be an urgent business matter.

The Second Circuit Court of Appeals has held:

> [E]quitable tolling is only appropriate "in [ ] rare and exceptional circumstance[s]," in which a party is "prevented in some extraordinary way from exercising his rights."
>
> Equitable tolling is generally considered appropriate "where the plaintiff actively pursued judicial remedies but filed a defective pleading during the specified time period," where plaintiff was unaware of his or her cause of action due to misleading conduct of the defendant, or

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[14] We also note that the reason for Respondents' delayed receipt of the D. & O. appears to be their decision to have their mail forwarded from the address on file with the ALJ to their home address, without notifying the ALJ of this change. Resp. Mot. Ex. B-1. Interestingly, the Respondents' Exhibit B-1 is a photocopy of a Department of Labor envelope with a sticker noting that the envelope had been forwarded, but the postmark indicating when the envelope was posted is cut off. Furthermore, although Respondents cite the Government closure on February 17 as "inhibiting Respondents' ability to file a timely petition for review," the Board's fax machine and e-mail and internet filing options for filing were operational on that date. In any event, the Government shut-down on February 17th is irrelevant to the tolling issue, as Respondents failed to file either a motion for enlargement or a petition for review on February 18th.

> where a plaintiff's medical condition or mental impairment prevented her from proceeding in a timely fashion, When determining whether equitable tolling is applicable, a district court must consider whether the person seeking application of the equitable tolling doctrine (1) has "acted with reasonable diligence during the time period she seeks to have tolled," and (2) has proved that the circumstances are so extraordinary that the doctrine should apply.[15]

Charny did contact the ALJ during the limitations period and expressed an interest in appealing the case. But the Notice of Appeal Rights on the ALJ's D. & O. was clear. To perfect a timely appeal the Respondents were required to file a petition for review with the Board within thirty days of the date of the ALJ's decision. Although Respondents claim that a dispute with counsel inhibited their ability to timely file, neither Arsene, nor Charny claimed that they did not understand the Notice of Appeal rights or its warning that if a petition was not timely filed, the ALJ's order would become the Department of Labor's final order. During the limitations period, both Arsene and Charny conducted business activities. They simply decided that filing the petition for review, or even a motion for enlargement of time to file the petition, was not an urgent business matter. Accordingly, we hold that Respondents failed to act with reasonable diligence and failed to establish that the circumstances were so extraordinary that we should toll the limitations period in this case.

Accordingly, Respondents' petition for review is **DENIED** as untimely filed.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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15 *Zerilli-Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 80-81 (2003)(citations omitted).