



In the Matter of:

SIDDHARTHA MAITY,

ARB CASE NO. 15-082

COMPLAINANT,

ALJ CASE NO. 2015-LCA-010

v.

DATE: AUG 30 2017

E-BUSINESS INTERNATIONAL, INC,

RESPONDENT,

and

ADMINISTRATOR, WAGE AND HOUR
DIVISION, UNITED STATES
DEPARTMENT OF LABOR

PARTY-IN-INTEREST.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Siddhartha Maity, pro se, Bloomington, Minnesota

For the Respondent:

Patrick Papalia, Esq., Archer & Greiner, P.C., Hackensack, New Jersey

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).¹ Siddhartha Maity filed a complaint with the United States Department of

¹ 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thompson Reuters Supp. 2016), as implemented at 20 C.F.R. Part 655, Subparts H and I (2016).

Labor's Wage and Hour Division (WHD) alleging that his employer, E-Business International, Inc. (E-Biz), failed to pay him for non-productive time, made unlawful deductions from his wages, and provided none of the customary fringe benefits. WHD investigated and on January 9, 2015, determined that E-Biz failed to pay Maity \$10,085.44 in wages for non-productive time until June 18, 2014, when ICIS (U.S. Citizenship and Immigration Services) revoked his H-1B status.

Maity requested a hearing before an Administrative Law Judge (ALJ). Prior to the hearing, the ALJ granted E-Biz's motion to dismiss Maity's complaint on March 24, 2015. On June 15, 2015, the ALJ received a letter from Maity asking that his claim be re-opened. The ALJ denied Maity's re-opening request on July 14, 2015.

On August 17, 2015, the Administrative Review Board (ARB or Board) received Maity's petition for review.² The ARB received the petition more than four and one-half months after the ALJ's order dismissing Maity's complaint, and thirty-four calendar days after the ALJ denied Maity's request to reopen his case.

Under the INA, a party desiring review of an ALJ's decision and order must file a petition for review with the Administrative Review Board within 30 calendar days from the date of the ALJ's decision and order.³ Consequently, on May 31, 2017, the ARB issued an Order to Show Cause why the ARB should accept his untimely petition for review.⁴ Maity and E-Biz responded to the order.

The limitations period for filing an appeal with the ARB is not jurisdictional. Consequently, the ARB will toll the limitations period upon the appealing party's demonstration of an equitable justification for doing so. In determining whether to allow an untimely appeal in a particular case, the ARB has recognized four non-exclusive bases in equity for tolling the limitations period.⁵

² 8 U.S.C.A §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c). *See* 20 C.F.R. § 655.845. The Secretary of Labor has delegated authority to issue final agency decisions in cases arising under the INA's H-1B provisions to the Administrative Review Board. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

³ 20 C.F.R. § 655.845(a).

⁴ *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 3-4 (ARB Nov. 8, 1999).

⁵ The four identified situations are not exclusive, and an inability to satisfy any of them is not necessarily fatal if the appealing party can demonstrate another equitable basis for tolling the limitations period.

- (1) [when] the respondent has actively misled the complainant respecting his rights to file a petition,
- (2) the complainant has in some extraordinary way been prevented from asserting his or her rights, or
- (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum, or
- (4) where the employer's own acts or omissions have lulled the [complainant] into foregoing prompt attempts to vindicate his rights.^[6]

Maity bears the burden of proof to demonstrate that an equitable basis exists for tolling the 30-day limitations period for filing an appeal with the ARB. In his response to the ARB's show cause order filed on June 8, 2017, Maity stated that when the ALJ issued his July 14, 2015 denial of his motion to re-open, he had returned to India and "it was not possible for me to receive a physical copy of the order." Maity added that he had informed the ALJ of his "inability to communicate" with the Office of Administrative Law Judges (OALJ) and had asked to receive communications by e-mail.⁷ Maity stated that he had received no communication and was unaware that the ALJ had dismissed his July 14, 2014 motion to re-open the record.⁸

Maity argued that the OALJ is required to put a copy of any order on its website but did not post the ALJ's denial of his motion to re-open. He also alleged that OALJ officials whom he called for assistance were "unwilling or unable" to help him. He added that he finally sent an e-mail to the webmaster of the OALJ site inquiring about his case and was informed by e-mail on August 14, 2015, that the ALJ had denied his motion. He then took "2-3 days" to file his petition for review to the ARB. Finally, Maity points out that the "deviation of just 3 days" in filing his appeal was "completely unintentional" and the fault of the ALJ office and lack of proper communication.⁹

Viewing Maity's stated justifications in the light most favorable to him, they do not compel tolling of the limitations period. Maity has not alleged that E-Biz misled him

⁶ *Yabot v. Board of Educ. of Prince George's Cty.*, ARB No. 12-012, ALJ No. 2011-LCA-059, slip op. at 6 (ARB Feb. 21, 2013). See also *DeFazio v. Sheraton Steamboat Resorts & Villas*, ARB No. 11-063, ALJ No. 2011-SOX-035, slip op. at 3 (ARB Oct. 23, 2012). *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).

⁷ The record did not contain a forwarding address at that time. Since then, pleadings have been filed and served on Maity electronically at connect2sid@live.com. This e-mail address has remained in use throughout Maity's pending complaint. Maity now has a mailing address in West Bengal, India.

⁸ Response to Show Cause Order at 1.

⁹ *Id.* at 2.

in any way about his right to file an appeal of an ALJ's decision. Nor has he raised his complaint in the wrong forum or alleged that his former employer lulled him into foregoing his appeal rights.

Maity claims that he was prevented from filing a timely petition with the ARB because he was unaware that the ALJ had denied his petition to re-open the record. But he does not allege that he did anything to pursue his claim between the March 13, 2015 order continuing the hearing, which he had requested, and June 15, 2015 when he finally requested a re-opening of the record.

In his March 9, 2015 motion to continue the scheduled April 8, 2015 hearing, Maity informed the ALJ that he was leaving the United States on March 19, 2015, indefinitely and would provide a forwarding address when he returned to India. The ALJ served his March 24, 2015 dismissal of Maity's claim on his then-current address in Bloomington, Indiana. The record contains no evidence that Maity updated his mailing address with the ALJ or left a forwarding address. Nor did Maity include a copy of the August 14, 2015 e-mail he allegedly received from the OALJ.

Further, in Maity's petition for review to the ARB, he also challenged the ALJ's March 24, 2015 dismissal of Maity's complaint, claiming that E-Biz violated several INA regulations and owed him additional back wages. Even if Maity had timely appealed the ALJ's July 14, 2015 denial of his motion to re-open, or we were to have found that equitable principles warranted tolling the limitations period for appeal of that order, the ALJ's March 24, 2015 order of dismissal became final 30 days from its issuance, and Maity has presented no justification for the 83-day delay in asking the judge to re-open the March order.¹⁰

Maity's appeal of the ALJ's July 14, 2015 denial of his request to re-open the record was untimely. To the extent his petition for review is construed as an appeal from the ALJ's March 24, 2015 order of dismissal, that appeal was also untimely. Because Maity has failed to demonstrate an equitable basis justifying tolling the 30-day limitation

¹⁰ 29 C.F.R. § 1980.109 (e), 1980.110(b). *See* 29 C.F.R. § 18.93; *see also* 29 C.F.R. § 18.90(b)(1)(motion to reopen the record must be made promptly after the additional evidence is discovered).

period for filing his appeal of either ALJ order, the Board **DISMISSES** Maity's appeal as untimely filed.

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge