U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

SANDEEP BAGRI, **ARB CASE NO. 2020-0033**

PROSECUTING PARTY, **ALJ CASE NO. 2020-LCA-00003**

v. **DATE: January 29, 2021**

ERECTION & WELDING CONTRACTORS, LLC,

RESPONDENT.

Appearances:

For the Prosecuting Party:
Sandeep Bagri; *pro se*; Denver, Colorado

For the Respondent:
Salvatore G. Gangemi; *Murtha Cullina LLP*; Stamford, Connecticut

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the H-1B visa program of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014) and 8 U.S.C. § 1182(n) (2013). The statute has implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2020).

On January 23, 2020, an Administrative Law Judge (ALJ) issued a Decision and Order Dismissing Case (D. & O.) for lack of a hearing request. Sandeep Bagri (Complainant) petitioned the Administrative Review Board (ARB or Board) for review. For the following reasons, we affirm the ALJ's D. & O.

BACKGROUND

Complainant, an H-1B employee, worked for Erection & Welding Contractors, LLC (Respondent) from approximately January 2, 2018, to July 29, 2019. On April 11, 2019, Complainant filed a Complaint with the Wage and Hour Division (WHD), alleging that Respondent failed to pay required wages.

On November 19, 2019, the Administrator of the WHD (Administrator) issued a determination letter, finding that Respondent failed to pay required wages in violation of 20 C.F.R. § 655.731. The determination letter assessed back wages in the amount of $27,291.79, and noted that Respondent had "paid the back wage assessment in full." The determination letter also notified the parties of their right to request a hearing with an ALJ and detailed the requirements for requesting a hearing.

Subsequently, the matter was assigned to an ALJ. However, the ALJ questioned whether Complainant had actually requested a hearing. The only possible request for a hearing was an undated letter that Complainant had sent to the WHD, but it was unclear whether the letter was a hearing request. On January 16, 2020, the ALJ held a telephone conference with the parties to clarify whether Complainant had requested a hearing.[1]

On January 23, 2020, the ALJ issued a D. & O., which dismissed the matter because the ALJ determined that Complainant had not requested a hearing in accordance with 20 C.F.R. 655.820(a).[2] The ALJ found that Complainant's undated letter was "not intended to be, and [was] not, a request for a hearing," and that Complainant had "stated that he did not file a request for hearing."[3] The ALJ also found that, "based upon representations made by email by counsel for the Solicitor," Complainant had been "served with the Determination Letter."[4]

On February 18, 2020, Complainant filed a petition for review of the ALJ's decision. [5]

---

1 D. & O. at 1.

2 *Id.* at 2.

3 *Id.*

4 *Id.*

5 Complainant also raised new issues on appeal, which the ARB declines to consider. *See Privler v. CSX Transp., Inc.*, ARB No. 2018-0071, ALJ No. 2018-FRS-00021, slip op. at 3 (ARB Mar. 24, 2020) (The ARB "decline[s] to consider arguments that a party raises for the first time on appeal.").

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review ALJ decisions and orders in cases under the H-1B provisions of the Immigration and Nationality Act.[6] The Administrative Procedure Act (APA) provides, at 5 U.S.C. § 557(b), that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ." The ARB reviews an ALJ's procedural rulings under an abuse of discretion standard.[7]

DISCUSSION

We first address whether Complainant requested a hearing to review the Administrator's determination. The INA's implementing regulations require that an interested party file a hearing request "no later than 15 calendar days after the date of the [Administrator's] determination."[8]

The record shows that Complainant never requested a hearing. In fact, Complainant expressly stated that he did not request a hearing.[9] The undated letter itself does not request a hearing nor can such a request be inferred from its contents. Moreover, on appeal, Complainant does not contest the ALJ's conclusion that Complainant never requested a hearing. Thus, we agree with the ALJ that Complainant did not request a hearing in accordance with 20 C.F.R. § 655.820.[10]

The Board, however, may toll the deadline for requesting a hearing if it determines that Complainant is entitled to equitable tolling. In determining whether the Board will toll time limitations, we have recognized four principal situations in which equitable modification may apply:

---

6 *See* 20 C.F.R. § 655.845; *see also* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

7 *Lubary v. El Floridita d/b/a Buenos Ayres Bar & Grill*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 5 (ARB Apr. 30, 2012).

8 20 C.F.R. § 655.820.

9 D. & O. at 2.

10 The record also shows that the Administrator sent the determination letter to Complainant on November 19, 2019. The WHD Counsel explained in a letter to the ALJ that the determination letter was sent "to the same address to which the WHD sent Mr. Bagri his back wage payment, which he received." Thus, we agree with the ALJ's finding that Complainant was served with the determination letter.

> (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.[11]

The party requesting tolling "bears the burden of establishing the applicability of the equitable tolling principles."[12] Though the "inability to satisfy one of these elements is not necessarily fatal to" a party's claim, "courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise *due diligence* in preserving his legal rights."[13] We also note that the Board "construe[s] complaints and papers filed by pro se complainants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude."[14]

On appeal, Complainant has not specifically requested equitable tolling of the deadline to request a hearing, but he has presented explanations for why he never received the determination letter. Complainant contends that the determination letter was "misplaced," and "extraordinary circumstances" prevented him from receiving the determination letter. He acknowledges that the Administrator sent the determination letter to the same address as the back wages check, but Complainant alleges that he had only intended to use that address as a "temporary address," and he would have received the determination letter if it had been sent to his "home address."

When liberally construing Complainant's above arguments, they resemble the second equitable tolling scenario. Specifically, Complainant suffered mailing address issues, which caused him to "misplace" the determination letter. Thus, Complainant's circumstances prevented him in an "extraordinary way" from filing a hearing request.

Complainant, however, still cannot meet the burden for equitable tolling to apply because Complainant failed to exercise due diligence to preserve his legal rights and keep the Administrator apprised of his best mailing address. The Administrator's responsibility is to send the determination letter to the parties'

---

[11] *Vicuña v. Westfourth Architecture*, ARB No. 2015-0034, ALJ No. 2012-LCA-00023, slip op. at 3 (ARB Apr. 6, 2015).

[12] *Id.*

[13] *Lubary*, ARB No. 2010-0137, slip op. at 6 (emphasis added).

[14] *Menefee v. Tandem Transp. Corp.*, ARB No. 2009-0046, ALJ No. 2008-STA-00055, slip op. at 7 (ARB Apr. 30, 2010) (inner quotations and citations omitted).

"last known addresses,"[15] but it is Complainant's responsibility to inform the Administrator of any changes in the address. [16] Based on the record and arguments on appeal, Complainant's "temporary address" was his "last known address" and it was where Complainant received the back wages check.[17]

Complainant may have intended to receive future mail at a different address than his "temporary address," but Complainant had the responsibility of informing the Administrator of that intention. Nothing in the record or Complainant's arguments indicate that Complainant clarified his intentions to the Administrator or provided the Administrator with a preferable address before the Administrator sent the determination letter.

We find that Complainant's failure to keep the Administrator informed of his best address constitutes a lack of due diligence. Consequently, Complainant does not meet the burden for equitable tolling to apply.

CONCLUSION

Accordingly, because Complainant did not request a hearing and Complainant has not met the burden for equitable tolling to apply, Complainant's Petition for Review is **DISMISSED** and the ALJ's D. & O. is **AFFIRMED.**

SO ORDERED.

---

[15] 20 C.F.R. § 655.815(a).

[16] *See Wakileh v. W. Ky. Univ.*, ARB No. 2004-0013, ALJ No. 2003-LCA-00023, slip op. at 5 (ARB Oct. 20, 2004) (failing to notify the Administrator of a change of address constituted a "lack of due diligence" by the complainant. Thus, the complainant was precluded from asserting that his change in address was an "extraordinary circumstance that [warranted] tolling of the deadline.").

[17] The record shows that Complainant provided the Administrator with his "temporary address" for the back wages check, and then Complainant received the back wages check on November 13, 2019 at the "temporary address." Telephone Conference Transcript at 13. Subsequently, on November 19, 2019, the Administrator sent the determination letter to the same "temporary address." Complainant failed to provide the Administrator with a preferable address before the Administrator sent the determination letter. Thus, the "temporary address" was Complainant's "last known address."