



In the Matter of:

MARCO SISFONTES,

COMPLAINANT,

v.

**PAVAN KUCHANA, PRESIDENT,
INTERNATIONAL BUSINESS
SOFTWARE SOLUTIONS, INC.
d/b/a IBSS,**

RESPONDENTS.

**ARB CASE NOS. 07-107
07-114**

ALJ CASE NO. 2007-LCA-014

DATE: August 31, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Marco Sisfontes, *pro se*, White Plains, New York

For the Respondents:

Patrick Papalia, *Herten, Burstein, Sheridan, Cevasco, Bottinelli, Litt & Harz, L.L.C.*, Hackensack, New Jersey

FINAL DECISION AND ORDER

Marco Sisfontes filed a complaint with the United States Department of Labor (DOL) in which he alleged that his employer, International Business Software Solutions, Inc. (IBSS), violated the Immigration and Nationality Act, as amended (INA or Act).¹

¹ 8 U.S.C.A. § 1101- 1537 (West 1999 & Supp. 2004), as implemented by 20 C.F.R. Part 655, Subparts H and I (2008).

DOL's Employment Standards Administration (ESA), Wage and Hour Division (WHD) investigated. The Administrator for ESA (the Administrator) determined that IBSS and its president Pavan Kuchana (jointly Respondents) had violated the Act.² The Administrator, inter alia, directed IBSS to pay to seven H-1B non-immigrants, including Sisfontes, back wages with interest and to refund filing fees it had collected from them.³ Sisfontes objected to the Administrator's determination and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).

The ALJ issued a Default Decision and Order based on the Respondents' failure to timely file a pre-hearing report and to show cause why such failure should be excused.⁴ He awarded Sisfontes \$30,869, which included back pay and a refund for the filing fee he paid to IBSS. Both the Respondents and Sisfontes filed a Petition for Review with the Administrative Review Board (ARB).⁵ We affirm.

BACKGROUND

IBSS provides technology solutions to the financial services industry.⁶ In April 2005, IBSS hired Sisfontes, a citizen of Costa Rica who was then in the United States on a student visa, for an initial project.⁷ On April 11, 2005, Sisfontes wrote IBSS a check for \$3,185.00.⁸ The parties disagree as to the nature of the check. IBSS contends that the check was "a training cost deposit," while Sisfontes asserts that it covered the processing fee for the Petition for a Nonimmigrant Worker IBSS filed on Sisfontes's behalf with the United States Department of Homeland Security's United States Citizenship and Immigration Services (USCIS).⁹

² Complainant's Exhibit 40.

³ *Id.*

⁴ Default Decision and Order dated Aug. 3, 2007.

⁵ The ARB assigned the Respondents' appeal ARB No. 07-107 and Sisfontes's appeal 07-114.

⁶ Complainant's Exhibit 1.A.

⁷ Complainant's Exhibits 2, 5; Respondent's Brief at 3-4.

⁸ Complainant's Exhibit 3.

⁹ Respondents' Brief at 3, 13; Complainant's Reply Brief at 7.

IBSS then sought to hire Sisfontes under the INA's H-1B nonimmigrant worker program. The INA permits an employer to hire non-immigrant alien workers in "specialty occupations" to work in the United States for prescribed periods of time.¹⁰ These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty.¹¹ An employer seeking to hire an H-1B worker must obtain certification from DOL by filing a Labor Condition Application (LCA).¹² The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.¹³ After securing the certification, and upon USCIS approval, the Department of State issues H-1B visas to these workers.¹⁴

Without specifically naming Sisfontes, IBSS filed an LCA for a "consultant" at the annual wage rate of \$51,147, which the Labor Department certified on May 11, 2005.¹⁵ On May 16, 2005, IBSS filed a Petition for Nonimmigrant Worker with USCIS naming Sisfontes as the beneficiary. IBSS tendered \$3,185.00 to USCIS for the "premium processing" fee.¹⁶ USCIS authorized Sisfontes's employment with IBSS under the H-1B program from June 22, 2005, to May 11, 2008.¹⁷

It is undisputed that IBSS did not pay Sisfontes the wages it attested that it would pay under the LCA that it filed with DOL. In September and October, Sisfontes asked IBSS for his wages.¹⁸ In a September 22, 2005 letter to IBSS officials, Sisfontes alleged that IBSS had violated "US Immigration, Labor, Social Security, and Tax laws" since the outset of his employment by, inter alia, failing to pay him his wages, and by charging him for "the H1B processing fee."¹⁹ Among other restitution, Sisfontes asked for back wages

¹⁰ 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

¹¹ 8 U.S.C.A. § 1184(i)(1).

¹² 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

¹³ 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

¹⁴ 20 C.F.R. § 655.705(a), (b).

¹⁵ Complainant's Exhibit 6.

¹⁶ Complainant's Exhibits 4, 5.

¹⁷ Complainant's Exhibit 4.

¹⁸ See Complainant's Exhibits 22, 23, 26.

¹⁹ Complainant's Exhibit 22.

for “full time employment, as stated in the LCA.”²⁰ By letter dated October 27, 2005, IBSS informed immigration authorities that Sisfontes “does not work for us” and sought revocation of his H-1B status.²¹ In November, Sisfontes filed the complaint with DOL in which he claimed that IBSS had violated the INA by failing to pay him wages and fringe benefits, illegally deducting from his wages, and retaliating because he had informed IBSS that it had violated the H-1B laws.²²

After investigating, the Administrator determined that IBSS had violated 20 C.F.R. § 655.731 by failing to pay \$72,484.76 in wages to seven H-1B nonimmigrant workers. The Administrator also found that IBSS violated 20 C.F.R. § 655.731 (c)(10)(ii) when it required or accepted from an H-1B worker payment or remittance for the additional petition fee incurred in filing an H-1B petition.²³ The Administrator directed IBSS to pay the back wages with interest and to refund the filing fees.²⁴ As noted, Sisfontes objected to the Administrator’s determination and asked for a hearing before a DOL ALJ.

ALJ Teitler issued a “Notice of Hearing and Pre-hearing Order” on April 13, 2007. He set the hearing for May 24, 2007, and ordered the parties to file pre-hearing reports no later than ten days before then. The Order provided, “Failure to comply with this Order, without good cause shown, may result in the dismissal of the proceeding or

²⁰ *Id.*

²¹ Complainant’s Exhibit Appendix V. On December 12, 2005, USCIS revoked its June 2005 approval of IBSS’s Petition for a Non-Immigrant Worker filed on Sisfontes’s behalf. *Id.*

²² Complainant’s Exhibit Appendix IV.

²³ Complainant’s Exhibit 40. The Administrator also found that IBSS did not post notices that it had filed the LCA, thus violating 20 C.F.R. § 655.734. IBSS was ordered to comply with that regulation in the future.

The Administrator’s Determination does not specify the amount of back wages owed Sisfontes. *Id.* In a January 24, 2007 e-mail to Sisfontes, Ronald Rehl, Wage and Hour’s investigator, explained his calculation of the back wages owed Sisfontes:

The number of weeks in a year is 52. The employment period is 29 weeks the prevailing wage is \$51147. Wages due for the period are \$28524. You received \$1020. Back wages due are \$27504. Fees are \$3185. [T]otal is \$30869.

Complainant’s Exhibit 17.

²⁴ Complainant’s Exhibit 40.

the imposition of other appropriate sanctions against the offending party. *See* 29 C.F.R. §§ 18.6(d)(2), 18.29.”

Sisfontes filed a pre-hearing report and exhibits on May 14, 2007. Three days later on May 17, ALJ Kaplan issued an “Order of Continuance” due to ALJ Teitler’s death. Judge Kaplan cancelled the May 24 hearing and indicated that it would be rescheduled. The hearing was rescheduled for July 16, 2007, and on May 21, ALJ Romano issued a “Notice of Hearing” notifying the parties of the rescheduled hearing. On July 10, 2007, ALJ Romano issued an “Order Cancelling Hearing and Directing Respondents to Show Cause.” ALJ Romano indicated that while Sisfontes had filed a timely pre-hearing report in compliance with ALJ Teitler’s April 13 order, the Respondents had not filed a report. Therefore, ALJ Romano continued the hearing without rescheduling it. He ordered the Respondents to “show cause, if any there be, ON OR BEFORE FIFTEEN (15) DAYS HEREOF, why sanctions as authorized by the forgoing [sic] notice of hearing, including the entry of a default judgment in favor of [Sisfontes] against them, should not be entered.”

Then, in a July 27, 2007 order, ALJ Romano (hereinafter “the ALJ”) found that the Respondents had failed to comply with his July 10 Order that they show cause, “on or before July 25, 2007, why sanctions, including a default judgment, should not be entered against them for failure to file a timely pre-hearing report.” Accordingly, he ordered Sisfontes to “submit a proposed judgment against Respondents for my review.” He added, “[Sisfontes] is advised that such proposed judgment shall include only the amount of unpaid required wages as regards [Sisfontes] only, for productive and nonproductive time as noted in the SUMMARY OF VIOLATIONS AND REMEDIES annexed to the [Administrator’s] determination letter dated March 29, 2007. No other relief will be granted except that as is within the purview of said determination letter under 8 U.S.C. 1182(n).”²⁵ Three days later, on July 30, 2007, the Office of Administrative Law Judges received the Respondents’ response to the ALJ’s July 10 show cause order. In that response, the Respondents asserted, “IBSS did not receive the complaint form and was not aware of the need to file a formal response even though it was prepared to proceed to trial on the matter on July 16, 2007. Accordingly, the Respondent[s] respectfully request that default not be entered against the Respondents.”²⁶

The ALJ issued a “Default Decision and Order” dated August 3, 2007, wherein he stated:

Upon Respondents’ failure to timely file a pre-hearing report as previously ordered, and upon Respondents’

²⁵ Sisfontes filed a letter with the ALJ August 1, 2007, in which he proposed that the ALJ award him \$21,697.27 in back wages and afford him whistleblower protection from October 27, 2005, until January 2006, during which time, he asserted, he was present in the United States in contravention of U.S. immigration laws.

²⁶ Respondents’ July 27, 2007 Brief at 1.

further failure to show good cause why such failure should be excused, it is hereby

Ordered, that Respondents shall pay [Sisfontes] the sum of \$30,869.00 for back wages as found in the [Administrator's] Determination issued March 29, 2007.

The Respondents and Sisfontes filed petitions for review with the ARB. On September 6, 2007, we issued a Notice of Intent to Review the appeals, which we consolidated. We specified the following two issues for review:

- (1) Whether the ALJ properly entered a default Decision and Order against IBSS because IBSS failed to timely file a pre-hearing report as the ALJ ordered and failed to show good cause for its failure to comply with the ALJ's order;
- (2) Whether, if the ALJ properly entered a default judgment against IBSS, he properly limited the relief he granted to "only the amount of unpaid required wages as regards Prosecuting party only, for productive and nonproductive time as noted in the SUMMARY OF VIOLATIONS AND REMEDIES annexed to the determination letter dated March 29, 2007."

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or Board) has jurisdiction to review the ALJ's decision.²⁷ Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision"²⁸ The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.²⁹ In reviewing an ALJ's default judgment, we must determine whether the ALJ abused his or her discretion.³⁰

²⁷ 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845. See Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

²⁸ 5 U.S.C.A. § 557(b) (West 2008).

²⁹ *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

³⁰ See *Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014, slip op. at 3-4 (ARB Sept. 30, 2002) citing *Tri-Way Sec. & Escort Serv., Inc.*, Board of Service Contract Appeals (BSCA) No. 92-05, slip op. at 3-4 (July 31, 1992).

DISCUSSION

1. The Relevant Regulations

The Labor Department's Rules of Practice and Procedure for hearings before the Office of Administrative Law Judges are found at 29 C.F.R. Part 18 (2008). These regulations, which apply to INA enforcement hearings,³¹ provide that "the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings."³² These regulations permit an ALJ to "take such action . . . as is just" when a party fails to comply with an order of the ALJ.³³ In such a case, the ALJ may "[r]ule . . . that a decision of the proceeding be rendered against the non-complying party."³⁴

2. The ALJ Did Not Abuse His Discretion When He Defaulted IBSS.

On April 13, 2007, after Sisfontes objected to the Administrator's findings and requested a hearing, ALJ Teitler set the hearing date and ordered the parties to file pre-hearing reports no later than ten days before the May 24, 2007 hearing, i.e., May 14. The ALJ gave the Respondents adequate opportunity to comply with his order. The Respondents did not file a pre-hearing report. The Respondents argue to us that their brief in response to the ALJ's show cause order, filed July 30, 2007, constitutes a pre-hearing report. But the brief contains none of the attributes of the pre-hearing report that ALJ Teitler ordered.³⁵

Furthermore, ALJ Teitler had warned the parties about the potential consequences of noncompliance. He notified the parties that failure to comply with his order that they file pre-hearing reports by a certain date "without good cause shown, may result in the

³¹ 20 C.F.R. § 655.825(a).

³² 29 C.F.R. § 18.29(a).

³³ 29 C.F.R. § 18.6(d)(2).

³⁴ 29 C.F.R. § 18.6(d)(2)(v).

³⁵ Respondents' Brief at 13. *See* ALJ Teitler's April 13, 2007 Notice of Hearing and Pre-Hearing Order. ALJ Teitler indicated that the pre-hearing report "shall include, (1) a brief statement of the issues presented and the remedies sought; (2) the names and addresses of potential witnesses and a summary of the testimony each witness is expected to furnish; (3) a list of all documents the party expects to offer in evidence; and (4) an estimate as to the time required to present the party's case. The Respondents' July 30, 2007 filing contains none of these items.

dismissal of the proceeding or the imposition of other sanctions against the offending party. *See* 20 C.F.R. §§ 18.6(d)(2), 18.29.” The Respondents argue to us that they “did not file a timely pre-hearing report since [they were] unaware of the requirement and did not receive notice.”³⁶ But the Respondents’ assertion is contrary to the record which shows service of process to Pavan Kuchana, IBSS’s president and a named respondent in this case. Therefore, we find that the Respondents were on notice as to the potential sanctions for failure to comply with ALJ Teitler’s order, including the entry of a default decision.

On July 10, 2007, the ALJ ordered the Respondents to show cause within fifteen days, or by July 25, why their failure to comply with ALJ Teitler’s Order should be excused. The record reveals that the Office of Administrative Law Judges received the Respondents’ response to that order, dated July 27, 2007, on July 30, 2007. The Respondents argue to us that that filing was “well within” the time allotted for a response, and that the ALJ erred by finding them subject to a default decision based on the ALJ’s “very own return date” in the show cause order.³⁷ But the plain fact is that the Respondents’ July 30 filing was 77 days late. Therefore, like the ALJ, we find that the Respondents did not show cause why sanctions, including a default decision, should not be entered against them for failure to timely file a pre-hearing report.

When the ALJ subsequently issued his “Default Decision and Order” against the Respondents, he acted in a manner consistent with the regulations. Thus, he did not abuse his discretion. If a party fails to comply with an order of the ALJ, the ALJ, “for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may” render a decision against the non-complying party.³⁸ “If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply. ”³⁹ To hold otherwise would render the discovery process meaningless and vitiate an ALJ’s duty to conclude cases fairly and expeditiously.⁴⁰

The Respondents’ brief provides no basis for us to reverse the ALJ’s entry of a default decision against them. Without citation, the Respondents argue to us, “Under the applicable *juris prudencia*, it is warranted that this matter be governed and decided on the merits not on a late submission of a pre-hearing statement or in any event as a result of

³⁶ Respondents’ brief at 12–13.

³⁷ *Id.* at 2, 12, 13.

³⁸ 29 C.F.R. § 18.6(d)(2), (d)(2)(v).

³⁹ *Cynthia E. Aiken*, BSCA No. 92-06 (July 31, 1992).

⁴⁰ *Supervan*, slip op. at 6.

the [ALJ's] failure to follow and consider the submission submitted within [the ALJ's] own guidelines."⁴¹ But as set forth above, the Respondents flagrantly ignored the orders of two ALJs, and they did so at their peril and at the risk of having a default decision entered against them. We thus find that the ALJ acted within his discretion when he defaulted the Respondents.⁴²

3. The ALJ Did Not Err in Awarding Sisfontes Only Back Wages and a Refund for the Filing Fee.

In his Petition for Review and Supporting Brief, Sisfontes argues that the ALJ should have granted relief in addition to the \$30,869 for back pay and the filing fee refund. The gist of his argument is that ALJ erred because he did not immunize him with "whistleblower protection." According to Sisfontes, the ALJ's default decision leaves open the possibility that the Respondents will "sue" him for disclosing information that he believed showed their illegal activity and for cooperating with the Wage and Hour investigator. He urges us to provide him the protection that the INA and New Jersey's Conscientious Employee Protection Act (CEPA)⁴³ give to whistleblowers.⁴⁴

We reject this argument. We first note that the Labor Department's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to, the INA's H-1B provisions.⁴⁵ Thus, Sisfontes must pursue any cause of action under CEPA in another forum. Secondly, despite Sisfontes's allegation that IBSS discriminated against him, the Administrator made no finding on this claim.⁴⁶ The INA does indeed protect H-1B employees who disclose information to an employer or to any other person that the employee reasonably believes evidences a violation of the INA.⁴⁷ The successful INA whistleblower is entitled to reinstatement, back pay, and "such other administrative remedies as the Administrator determines to be appropriate."⁴⁸

⁴¹ Respondents' Brief at 13.

⁴² *Supervan*, slip op. at 5-6.

⁴³ N.J.S.A. 34-19-1, *et. seq.*

⁴⁴ Complaint's Petition for Review at 1, 2; Complainant's Brief at 6-7.

⁴⁵ See 8 U.S.C.A. § 1182(n) (1), (2); 20 C.F.R. §§ 655.705(a), (b), 655.731, 655,732, 655.845; Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct, 17, 2002); *Amtel Group of Fla., Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 9-10 (ARB Sept. 29, 2006).

⁴⁶ Complainant's Exhibit 40.

⁴⁷ 8 U.S.C.A. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801.

⁴⁸ 20 C.F.R. § 655.810(e)(2).

The Administrator may also impose civil money penalties if an employer retaliates against an H-1B employee.⁴⁹

Sisfontes has never requested that civil money penalties be imposed. And when, in his DOL complaint, he wrote that “I do not want any further interaction between myself and the company,” he certainly does not seem to be interested in reinstatement.⁵⁰ Furthermore, we can find no authority, nor does Sisfontes point to any, that would permit the Administrator or a DOL ALJ, under the “other administrative remedies” clause, to order that Sisfontes is immune from an IBSS lawsuit. Therefore, even if the Administrator had determined that IBSS retaliated or, after a hearing, the ALJ concluded that the company had retaliated, neither could have provided the remedy that Sisfontes seeks; namely, immunity from potential IBSS lawsuits. Thus, the ALJ did not err when he limited Sisfontes’s remedies to back pay and a refund of his filing fee.

CONCLUSION

The ALJ did not abuse his discretion when he defaulted the Respondents because of their flagrant failure to comply with the pre-hearing order. The ALJ did not err in granting Sisfontes only back wages and a refund for the filing fee. Accordingly, we **AFFIRM** the ALJ’s Default Decision and Order.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁴⁹ 20 C.F.R. § 655.810 (b)(2)(iii).

⁵⁰ Complainant’s Exhibit Appendix IV.