

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 October 2003

Case No: 2003-LCA-0023

GEORGE J. WAKILEH
Prosecuting Party

v.

WESTERN KENTUCKY UNIVERSITY
Respondent



Appearances:

George J. Wakileh, pro se
For the Prosecuting Party

Deborah T. Wilkins
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

ORDER OF DISMISSAL

The Respondent, Western Kentucky University, moves this Court to dismiss the complaint filed against it by the Prosecuting Party, George Wakileh, on the grounds that Dr. Wakileh failed to request a hearing within the fifteen calendar day period as provided under 20 C.F.R. § 655.820(d). On May 4, 2003, Dr. Wakileh, operating pro se, opposed the Respondent's "Motion to Deny Request for Hearing and Motion to Dismiss" filed on September 18, 2003, stating that because he was in the process of moving from Kentucky to California, he could not meet the fifteen-day deadline.

Procedural Background

The Immigration and Nationality Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under the various types of visas. 8 U.S.C.A. § 1101(a)(15). One class of aliens, known as "H-1B" workers, is allowed

entry to the United States on a temporary basis to work in "specialty occupations." *Id.* at § 101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700.

"Specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher in the specific specialty. 8 U.S.C.A. § 1184(i); 20 C.F.R. § 655.715. The Immigration and Naturalization Service (INS) identifies and defines the occupations covered by the H-1B category and determines an alien's qualifications for such occupations. The Labor Department administers and enforces the labor condition applications relating to the employment. 20 C.F.R. § 655.705; 59 Fed. Reg. 65,646 (Dec. 20, 1994).

To hire an H-1B worker, the employer must file a Labor Condition Application (LCA) with the Employment and Training Administration of the United States Department of Labor. In the LCA, the employer must make certain representations and attestations regarding its responsibilities, including a representation that the alien will be paid at the actual wage level paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n).

The employer is required to make available for public examination at the employer's principal place of business, within one working day after the LCA is filed, a copy of the application, along with any necessary supporting documentation. 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.705(c). The LCA includes information about the job title, the employer's name, the area of intended employment, the dates of intended employment, the prevailing wage, actual wage or a wage range for the position, the source of the employer's wage information, and the number of positions requested by the LCA.

Dr. Wakileh joined Western Kentucky University as an associate professor of electrical engineering on an H-1B nonimmigrant visa in August of 2001. On August 1, 2002, Dr. Wakileh filed a grievance with the Department of Labor alleging H-1B Violations under the Immigration and Naturalization Act. 8 U.S.C. §1101(a)(15) (H)(i)(b), § 1182(n), and § 1184(c). The Immigration and Naturalization Act, INA, requires that an employer pay a non-immigrant worker admitted to the United States under an H-1B visa the higher of the actual wage or the prevailing wage. *Id.* Dr. Wakileh filed his grievance alleging that Western Kentucky University did not comply with this provision of INA. Subsequently, on October 5, 2002, Dr. Wakileh filed a second grievance alleging retaliation for filing the first complaint.

Upon completion of the investigation and pursuant to 20 C.F.R. § 655.815, the Administrator of the Wage and Hour Division of the U.S. Department of Labor issued a written determination that Western Kentucky University violated § 1182(n) of the INA by failing to make the Labor Condition Application Form (LCA) available for public examination. The Administrator did not impose a monetary penalty. In accordance with § 655.815(3), the Administrator informed the parties that they may request a hearing pursuant to § 655.820, but in the absence of a timely request, received by the Chief Administrative Law Judge within fifteen calendar days of such determination, the decision of the Administrator would become final and

unappealable. 20 C.F.R. § 655.815(3). The Administrator issued his determination on March 26, 2003 and a timely request for a hearing should have been received by April 16, 2003.

Dr. Wakileh responded to the determination in a faxed letter sent to the Chief Administrative Law Judge on May 4, 2003, stating that he was unable to meet the fifteen-day deadline because of a move to California from Kentucky. Dr. Wakileh did not explicitly request a hearing in his correspondence but instead provided a list of additional incidents he felt proved retaliation against him on the part of Western Kentucky University. His letter was construed as a request for a hearing under 20 C.F.R. § 655.820(c) and the file was assigned to this Administrative Law Judge for a hearing.

Applicable Law and Discussion

Under 20 C.F.R. § 655.820, the relevant portions of the hearing request process are outlined as follows:

(a) Any interested party desiring review of a determination issued under §§655.805 and 655.815, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge... (b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent...

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party requesting the hearing believes such determination is in error;

(5) Be signed by the party making the request or by an authorized representative of such party; and

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 CFR 18.10 (b) through (d)¹ or through participation as an *amicus curiae* pursuant to 29 CFR 18.12.²

¹ 29 C.F.R. 18.10:

(b) Other persons or organizations shall have the right to participate as parties if the administrative law judge determines that the final decision could directly and adversely affect them or the class they represent and if they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties.

(c) A person or organization wishing to participate as a party under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person or organization has knowledge of or should have known about the proceeding. The petition shall be filed with the administrative law judge and served on each person or organization who has been made a party at the time of filing. Such petition shall concisely state: (1) Petitioner's interest in the proceeding, (2) how his or her participation as a party will contribute materially to the disposition of the proceeding, (3) who will appear or petitioner, (4) the issues on which petitioner wishes to participate, and (5) whether petitioner intends to present witnesses.

(d) If objections to the petition are filed, the administrative law judge shall then determine whether petitioners have the requisite interest to be a party in the proceedings, as defined in paragraphs (a) and (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he or she may recognize one or more of such petitioners. The administrative law judge shall give each such petitioner written notice of the decision on his or her petition. If the petition is denied, he or she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as *amicus curiae*. The administrative law judge shall give written notice to each party of each petition granted.

² 29 C.F.R. 18.12:

A brief of an *amicus curiae* may be filed only with the written consent of all parties, or by leave of the administrative law judge granted upon motion, or on the request of the administrative law judge, except that consent or leave shall not be required when the brief is presented by an officer of an agency of the United States, or by a state, territory or commonwealth. The *amicus curiae* shall not participate in any way in the conduct of the hearing, including the presentation of evidence and the examination of witnesses.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the requestor or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the requestor to the Wage and Hour Division official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of Labor identified in the notice of determination, and to all known interested parties.

Respondent, Western Kentucky University, argues that the hearing request was not timely because it exceeded the fifteen day limit and additionally, that the other procedures were not followed: specifically that the Prosecuting Party failed to state which issues he contested and the reasons why he contested them, he failed to meet the ten (10) day deadline for a faxed request, and that he failed to copy the request to Respondent. *Id.* (c)(3-4), (e), (f). Dr. Wakileh counters that he was unable to meet the request deadline due to a cross-country move. He does not allege that he received the Administrator's notice of determination late but merely that he filed his request late.

In *Sanchez v. Sun Microsystems, Inc.*, ARB No. 03-130, ALJ No. 03-LCA-2 (ARB July 31, 2003), Mr. Sanchez, an interested party, filed a petition for review of a decision issued under the same provisions of the Immigration and Nationality Act as Dr. Wakileh's complaint. *Santiglia v. Sun Microsystems, Inc.*, ALJ No. 03-LCA 2 (ALJ Feb. 19, 2003). The Administrator had issued a notice of determination and a request for a hearing was timely filed and a hearing was held. After the Administrative Law Judge issued a Decision and Order on February 19, 2003, Mr. Sanchez petitioned for review before the Administrative Review Board under 20 C.F.R. § 655.845(a). *Sanchez*, ARB No. 03-130. The Administrative Review Board dismissed the petition of Mr. Sanchez because it was filed after the thirty-day deadline imposed by § 655.845(a).

The provisions of § 655.845 governing petitions for review to the Administrative Review Board are analogous to the provisions of § 655.820 governing petitions for requests for a hearing before an Administrative Law Judge. In both the *Sanchez* case and the case at bar, the petition for review was untimely filed under the applicable deadline. *See, also, Smith v. Sun Microsystems, Inc.*, ARB No. 03-131, ALJ No. 03-LCA-2 (ARB July 31, 2003)(request for review dismissed because untimely filed.); *U.S. Dept. of Labor v. Vibex, Inc.*, ALJ No. 2003-LCA-00009 (March 25, 2003)(the petition for hearing must be dismissed due to an untimely request filed after the 15-day deadline imposed by § 655.820(d)).

In *Herchak v. American West Airlines, Inc.*, the complainant filed a petition for review one day late under the applicable statute which required that the petition be received within 15 days of the Administrative Law Judge's Decision and Order. ARB No. 03-057, ALJ No. 02-AIR-12 (ARB May 14, 2003). The Complainant argued that he was entitled to equitable tolling

of the time limitations where the delay in filing was due to Airborne Express' failure to deliver his request on time. *Id.* The Administrative Review Board applied the holding of *School District of the City of Allentown v. Marshall* where the Court recognized three situations where equitable tolling of the time limits for filing a complaint with the Secretary of Labor would be permitted:

- (1) [when] the defendant has actively misled the plaintiff,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

657 F.2d 16, 18-20 (3rd Cir. 1981), *quoting Smith v. American President Lines, LTD.*, 571 F.2d 102, 109 (2nd Cir. 1978).

The Court in *Herchak*, decided that only (2) above might apply under the facts, however, failure of a mail carrier to deliver as promised “did not constitute an **extraordinary** event that precluded the timely filing” and, therefore, the application of equitable tolling was not justified. *Id.*, *see also, Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984), *reh'g denied* 467 U.S. 1231 (1984)(*pro se* party who was informed of the due date but filed six days late was not entitled to equitable tolling where she failed to exercise due diligence; procedural requirements established by Congress should not be disregarded); *Gutierrez v. Regents of the University of Calif.*, ARB No. 99-116, ALJ No. 98-ERA 19, slip op. (ARB Nov. 8, 1999).

Turning to the facts at bar, Dr. Wakileh has put forth no facts to justify the invocation of the equitable tolling doctrines. He alleges no reasons for his untimely request that would constitute an “extraordinary” event that would preclude filing on time. Dr. Wakileh's request, faxed on May 4, was due on April 16, some twelve days earlier by mail and seventeen days earlier because it was faxed. Such a late response belies the due diligence and good faith efforts that equitable doctrines require and undermines the balance between the claimant's interests to be protected and the time within which the respondent-employer would be exposed to liability. *School District, supra* at 20. Congress' intent was clear that these disputes are to be resolved expeditiously and it is not for this Court to disregard the intention of the legislature. *Accord, Mohasco Corp. v. Silver*, 447 U.S. 807, 825-826 (1980). Therefore, pursuant to 20 C.R.F. § 655.820(d), where Dr. Wakileh's petition was filed outside of the 15-day time limit, and the doctrine of equitable tolling is not available under these facts, the Respondent's Motion to Dismiss is hereby granted.

Order

It is ordered that Respondent's Motion to Dismiss is granted and this appeal is dismissed for failure to timely file a request for hearing. The Administrator's request has become final.

A

Joseph E. Kane
Administrative Law Judge

Notice of Appeal Rights Pursuant to 20 C.F.R. § 655.845, any party dissatisfied with this decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, FPB, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the decision and Order. Copies of the petition shall be served on all parties and on the Administrative Law Judge.