In the Matter of:

SEYANABOU A. NDIAYE, **ARB CASE NO. 05-024**

COMPLAINANT, **ALJ CASE NO. 2004-LCA-36**

DATE: May 9, 2007

v.

CVS STORE NO. 6081,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Seyanabou A. Ndiaye, *pro se*, Cincinnati, Ohio

For the Respondent:
Martha A. Schoonover, Esq., John F. Scalia, Esq., *Greenberg Traurig, LLP*, McLean, Virginia

ORDER GRANTING RECONSIDERATION BUT DENYING RELIEF

The Complainant, Seyanabou A. Ndiaye, filed a complaint with the Wage and Hour Division of the Department of Labor (DOL), alleging a violation of H-1B provisions of the Immigration and Nationality Act (INA).[1] Ndiaye contended that CVS improperly discharged her because she complained that CVS was not paying her the compensation to which she was entitled under the terms of its Labor Certification

[1] 8 U.S.C.A. § 1101 *et seq.* (West 2007).

Application.[2] A DOL Administrative Law Judge (ALJ) granted Respondent CVS's Motion for Summary Judgment, finding that Ndiaye failed to file a timely complaint and raised no questions of fact regarding her entitlement to tolling of the statute of limitations. On November 29, 2006, the Administrative Review Board (ARB or Board) issued a Final Order and Decision affirming the ALJ's dismissal of Ndiaye's complaint.

On December 6, 2006, Ndiaye filed a Motion for Review on the ARB's Decision, which the Board will consider a motion for reconsideration. In her motion, the Complainant asserted two bases for reconsidering the Board's determination that she did not timely file her complaint:

1. Ndiaye's filing on September 24, 2002, for unemployment benefits with the Ohio Department of Job and Family Services constitutes a "mistaken filing" of the correct statutory claim in an incorrect forum and thus is a basis for equitable tolling.

2. The limitations period did not begin to run until CVS accomplished a "*bona fide* termination," as recently articulated in *Amtel Group v. Yongmahapakorn* (*Rung*).[3]

The ARB is authorized to reconsider earlier decisions.[4] Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure.[5] Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[6] A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position that may prove more successful.[7] Likewise, issues not presented in initial briefs or during

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[2] To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After securing DOL certification for the LCA, the employer petitions for and the nonimmigrants receive an H-1B visa from the State Department upon DHS approval. 20 C.F.R. § 655.705(a), (b).

[3] ARB No. 04-087, ALJ No. 2004-LCA-6 (ARB Sept. 29, 2006).

[4] *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-23, slip op. at 2-6 (ARB Nov. 20, 1998).

[5] *See generally* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3986.1 (West 2006).

[6] Fed. R. App. P. 40(a)(2).

[7] *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

oral argument are not appropriate subjects for rehearing.[8] But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome.[9] In consideringwhether to reconsider a decision, the Board has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from the presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[[10]]

DISCUSSION

1. Ndiaye's claim for unemployment benefits in Ohio did not constitute the filing of an H-1B complaint in a mistaken forum.

Ndiaye first contends that her filing with the Ohio Department of Job and Family Services Office of Unemployment Compensation (UCRC) should merit equitable tolling. The Board, in deciding Ndiaye's case, specifically addressed the issue of equitable tolling. Ndiaye has not directed the Board's attention to any unforeseen judicial decisions or legislation or any differences in or failure to consider material facts that would compel us to reconsider the applicability of equitable relief to her claim. Nevertheless, even if Ndiaye was entitled to reconsideration of this issue, she has raised no genuine issue of material fact relevant to the applicability of equitable tolling to her complaint.

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[8] *Utahns for Better Transp. v. United States Dep't of Transp*., 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods*., 989 F.2d 1256, 1264 (1st Cir. 1993).

[9] *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989).

[10] *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 03-LCA-4, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-184; ALJ Nos. 2002-CAA-5, 2003-ERA-10, slip op. at 2 (ARB May 17, 2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 03-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.*, ARB No 04-120, ALJ No. 2004 SOX-54, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-LCA-3, slip op. at 3 (ARB Oct. 24, 2005).

The Board has held that limitation periods adopted to expedite the administrative resolution of cases that do not confer important procedural benefits upon individuals or other third parties outside the ARB are subject to equitable tolling.[11] We have has recognized three situations in which we will accept an untimely complaint.[12]

> (1) When the respondent has actively misled the complainant respecting his or her 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.[13]

In Ndiaye's motion for reconsideration, she addresses only the third element of equitable tolling, mistakenly filing in the wrong forum. She contends that she meant to file her H-1B complaint with the UCRC. On her request for appeal with the UCRC she mentions "Immigration Law" and "H1B1" status. The form contains no other allusions to Ndiaye's DOL claim.[14] On the form, Ndiaye expresses her intent to contest "[the UCRC's] decision to disallow an unemployment compensation benefit."[15] Ndiaye contends that this is her "mistaken" filing in another forum justifying equitable tolling.

Under the *Allentown* standards as enumerated in our Final Decision and Order, Ndiaye must raise "the precise statutory claim in issue."[16] Although she filed in another

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11 *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36, slip op. at 16 (ARB June 2, 2006).

12 *Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999).

13 *Accord School Dist. of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981)(the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complaint must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling); *see Hemingway*, ARB No. 00-074, slip op. at 4; *Gutierrez*, ARB No. 99-116, slip op. at 3.

14 Motion for Review of the ARB's Decision, Ex. 2.

15 *Id.*

16 *Allentown*, 657 F.2d at 18.

forum, she sought relief through a different statutory claim, one that provided for unemployment benefits, not for relief from H1-B violations.[17] To qualify for equitable relief, she was required to seek relief under the INA's H-1B provisions.[18] Having failed to do so, Ndiaye does not meet the standards for equitable tolling.

2. An employer need not accomplish a "*bona fide* termination" to take an adverse action that commences the running of the limitations period.

Ndiaye also contends in her motion that her firing was not a bona fide termination, as articulated in *Rung*.[19] Therefore, she contends, since a bona fide termination was not effected, the statute of limitations had not expired and her filing was timely.

Ndiaye filed her original brief with the ARB on May 13, 2005. She then filed a response brief to the Respondent's brief on June 22, 2005. The Board's briefing schedule provided for no further briefing. On September 29, 2006, the ARB issued a Final Order and Decision in *Rung* interpreting the term "*bona fide* termination" in relation to H-1B visa cases.[20] The ARB issued the Final Decision and Order in Ndiaye's case on November 29, 2006.[21] Ndiaye could have filed a citation of supplemental authorities (see F.R.A.P. 28(j)) with the Board immediately after we issued *Rung*. But given the short period between the issuance of *Rung* and our decision in this case and that Ndiaye is pro se, we find that Ndiaye has demonstrated a material difference in law from that presented to the Board of which Ndiaye could not have been aware through reasonable diligence. Thus we will consider the merits of her request for reconsideration based on *Rung.*

The issue in *Rung* was whether an employer who notified the H-1B employee, but not the Immigration and Naturalization Service,[22] that it had terminated the employee's

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[17] OHIO REV. CODE ANN. § 4141.281 (West 2006).

[18] *See Ferguson v. Boeing Co.,* ARB No. 04-084, ALJ No. 2004-AIR-5, slip op. at 13-14 (ARB No. Dec. 29, 2005).

[19] Motion for Review of the ARB's Decision; *see Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung),* ARB No. 04-087, ALJ No. 2004-LCA-6 (ARB Sept. 29, 2006).

[20] *Id.*

[21] *Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, ALJ No. 2004-LCA-36 (ARB Nov. 29, 2006).

[22] The INS is now the "U.S. Citizenship and Immigration Services" or "USCIS," which is located within the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

employment had cut off its back wage liability to the employee pursuant to 20 C.F.R. § 655.731(c)(7)(ii) (2004).[23] The Board held that the termination, for the purposes of determining "back wage liability," was not effective until it was "*bona fide*," i.e., the employer must notify the H-1B employee and the INS that it has terminated the employment relationship with the H-1B nonimmigrant employee and provide the employee with payment for transportation home.[24] Since Amtel failed to contact the INS, Rung was entitled to back wages until the point of a "*bona fide* termination."[25]

Even if we were to assume that CVS did not effect a "*bona fide* termination," of Ndiaye's employment and her employment continued to run until the end of the H-1B visa, the cause of action would not extend to that point. As we recently held in *Erickson v. EPA*:[26]

> The thirty-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation.[[27]]

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[23] Pursuant to 20 C.F.R. § 655.731(c)(7)(ii):

> Payment need not be made if there has been a bona fide termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

The term INS under 20 C.F.R. § 655.731(c)(7)(ii) (2004), effective at the time of the facts in this case, has since been changed to DHS. *See* 20 C.F.R. § 655.731(c)(7)(ii) (2006).

[24] *Rung*, ARB No. 04-087, slip op. at 10, 11; *see* 20 C.F.R. § 655.731(c)(7)(ii) (2006).

[25] *Rung*, ARB No. 04-087, slip op. at 11, 12.

[26] ARB Nos. 03-002, 03-003, 03-004, 03-064; ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18 (May 31, 2006).

[27] *Erickson*, ARB Nos. 03-002, 03-003, 03-004, 03-064, slip op. at 20.

"Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities.[28] Furthermore, the limitations period begins to run when the employer communicates to the employee its "final, definitive, and unequivocal" intent to implement an adverse employment decision, rather than on the date on which the employee experiences the consequences of that decision.[29] CVS gave Ndiaye final and definitive notice of the termination of her employment on August 2, 2002. The fact that Ndiaye filed for unemployment benefits demonstrates that she had notice that she had been discharged from her position with CVS. Further, we note that measuring an adverse action from the point of a "*bona fide* termination" could potentially allow employers to shield themselves from any potential causes of actions by never effecting a bona fide termination, and thus never taking a cognizable adverse action. Accordingly, Ndiaye's cause of action accrued from the date of notice and not the date of effecting a "*bona fide* termination."

CONCLUSION

Ndiaye, in her Motion for Review on the ARB's Decision, properly raised questions of law arising from the Board's decision in *Rung*, of which she could not have known with reasonable diligence prior to the disposition of her case. However, the definition of "*bona fide* termination" the Board elucidated in *Rung* is not relevant to the disposition of the timeliness question at issue in Ndiaye's case. A "*bona fide* termination" date must be determined to assess the compensability of an H-1B employee's claim for damages under the INA. But, an employer can give an H-1B employee final and definitive notice of its intention to terminate such employee's employment without also informing the INA and offering the employee a return ticket. Such final and definitive notice constitutes an adverse action, regardless whether the employer also effects a "*bona* fide termination." CVS notified Ndiaye that her employment was terminated on August 2, 2002. Her complaint, filed March 30, 2004, was outside the statute of limitations and therefore, the ALJ properly dismissed it as untimely.

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[28] *Id.*

[29] *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated).

Accordingly, since the Board has not misapprehended any point of law or fact, we **AFFIRM** the Final Decision and Order by this Board and **DENY** the relief requested in the Complainant's Motion for Review on the ARB's Decision.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge