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Issue Date: 05 July 2007

CASE NO.: 2007-LCA-00019

In the matter of

ADMINISTRATOR, WAGE & HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR
Prosecuting Party

v.

GURUKRUPA LLC,
d/b/a BESTWAY INN & SUITES / DAYS INN
Respondent

DECISION AND ORDER DISMISSING RESPONSDENT'S UNTIMELY REQUEST FOR HEARING

The above matter, which arises from the Administrator, Wage & Hour Division, U. S. Dept. of Labor's ("Administrator" or "Prosecuting Party") investigation and enforcement of an H-1B Labor Condition Application under section 212(n) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(n), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart I (hereinafter, the "Act"), is before the Office of Administrative Law Judges on the Respondent's request for a hearing pursuant to 20 C.F.R. § 655.820.

I. Statement of the Case

On April 17, 2007, the Administrator issued an Administrator's Determination Pursuant to Regulations at 20 C.F.R. Part 655 H-1B Specialty Operations under the INA as administered by the Department of Labor ("DOL"), Reference No. 1455244 ("Determination Notice"), to Respondent Gurukrupa LLC, d/b/a/ Bestway Inn & Suites/Days Inn, Mr. Umesh Patel, Agent ("Respondent" or "Gurukrupa").

On May 9, 2007, the Respondent's Request for Hearing, also dated May 9, 2007, was received by the Office of the Chief Administrative Law Judge. On May 14, 2007, this Court issued an order to show cause as to why the Respondent's request for hearing should not be denied as untimely. The Respondent timely filed its Response to the Order to Show Cause and Request that the Court Make a Finding of Excusable Delay, along with Counsel's Affidavit in Support, with this court on May 29, 2007 ("Gurukrupa Resp."). On June 6, 2007, the Administrator filed its Opposition to Respondent's Response to Order to Show Cause ("Administrator's Opp'n.").

For the reasons outlined below, I conclude that the Respondent's objections were not timely filed within the 15-day limitation period and that it has not established sufficient grounds necessary for tolling the limitation period. Accordingly, the Respondent's request that its hearing notice considered timely must be denied, the hearing request is dismissed, and the April 17, 2007 determination notice shall be considered final and not subject to further appeal. *See* 20 C.F.R. § 655.815(c)(3).

II. Findings of Fact and Conclusions of Law

A. Doctrine of Equitable Tolling

The Secretary of Labor, through its agent the Administrator, is required to investigate complaints alleging violations of the Act and to notify the interested parties in writing of the findings through a determination letter. 20 C.F.R. §§ 655.800(a), 655.805(b). Pursuant to 20 C.F.R. § 655.820(d), when the Administrator issues a Determination Notice to an employer, that employer must request a hearing before an administrative law judge within fifteen (15) days of the date of the Notice. Specifically, the implementing regulation in pertinent part states:

> 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 C.F.R. § 1810(b) through (d) or though participation as an amicus curiae pursuant to 20 C.F.R. § 18.12.

20 C.F.R. § 655.820(d).

The U.S. Supreme Court and the Department of Labor Administrative Review Board ("ARB") have consistently held that filing limitation periods are not jurisdictional thus it is subject to the doctrine of equitable tolling. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding statutory time limits for filing an timely charge of discrimination with the EEOC under Title VII are subject to equitable tolling because they are not jurisdictional); *see also, Duncan v. Sacramento Metropolitan Air Quality Management District*, ARB No. 99-011 (Sept. 1, 1999) (compliance with filing periods is not jurisdictional and may be tolled for equitable reasons).

Where a party fails to timely request a hearing to challenge a DOL determination, the ARB has routinely applied this doctrine. *See Administrator v. Wings Digital Corp.*, ARB Case No. 05-090 (July 22, 2005) (principles of equitable tolling applied in litigation under the H1-B provisions of the INA); *Seyanabou A. Ndiaye v. CVS Store No. 6081*, 2007 WL 1578489, ARB Case No. 05-024 (May 7, 2007) (principles of equitable tolling applied in litigation under the H1-B provisions of the INA). After careful review of the documentary evidence, and in light of

the voluminous case law on this matter, I find the doctrine of equitable tolling is applicable in the instant matter.

B. Application of Equitable Tolling

The Administrator's determination notice is dated April 17, 2007.[1] Therefore, the Respondent's request for hearing was due to be received by no later than May 2, 2007. *See* 20 C.F.R. § 655.830. As the Respondent's request for hearing is dated May 9, 2007 and was received on that date via facsimile transmission to the Office of the Chief Administrative Law Judge, it is clear that the Respondent's request was not filed within the allowable limitations period. As discussed above, the Respondent was ordered to show cause as to why its request for hearing should not be dismissed as untimely in light of the fact that it was not filed with the CALJ within the allowable limitations period. The Respondent timely answered that order, asserting that the late filing was not unduly prejudicial, did not constitute any inconvenience and was merely the result of "excusable delay." Gurukrupa Resp. at 1-2. Specifically, the Respondent avers that, due to a change in ownership, some confusion with regard to counsel's representation developed in the present matter and led to the delay in filing, which, counsel argues, is neither excessive nor unduly prejudicial. *Id.* Respondent thus moves this court for a "finding of excusable delay," thereby finding the Respondent's request for hearing timely and allowing a hearing on the Determination Notice to go forward. *Id.* at 2.

In its opposition, the Administrator argues that equitable tolling only applies upon the showing of extraordinary circumstances and, because it cannot show the existence of extraordinary circumstances, the Respondent failed to establish sufficient grounds to support equitable tolling. *Id.* at 5.

Federal Courts and the ARB have recognized three situations where the doctrine of equitable tolling may be applicable:

1). When the defendant has actively misled the plaintiff respecting the cause of action,

2). When the plaintiff has, in some extraordinary way, been prevented from asserting his rights, or;

3). When the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

School District of City of Allentown v. Marshall, 657 F.2d 16, 20 (3rd Cir.1981) *quoting Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir.1978). *See also Ndiaye*, 2007 WL 1578489 at 2.

[1] The April 17, 2007 determination letter also notified the Respondent that a hearing request "must be made to and received by the Chief Administrative Law Judge (OALJ) . . . no later than 15 calendar days after the date of this determination." *See* Apr. 17, 2007 Determination Letter at 2.

The Respondent does not contend that the Administrator actively misled it regarding the applicable time frame or that it filed its request in the wrong forum. Thus, the Respondent can only avail itself of the doctrine of equitable tolling if it can establish that extraordinary circumstances existed preventing the Respondent from timely filing its request for hearing.

Here, the Respondent's counsel explains that the confusion regarding his ongoing representation of the Respondent was the result of the sale of Gurukrupa prior to the issuance of the Administrator's decision. Apparently, when counsel's client, whom he also represents in a pending criminal matter, sold his stake in Gurukrupa to his co-owner, counsel for Respondent misunderstood his client's view of his role in the pending DOL investigation. Counsel for Respondent emphasizes that upon receiving the Determination Notice, he believed, "barring unforeseen developments, my role was completed … [because] the Administrator's Determination contained no suggestion that criminal charges might be brought." Gurukrupa Resp. at 6. On May 9, 2007, counsel for Respondent was informed that Gurukrupa's owners "were under the view that I was representing Gurukrupa in the Wage and Hour Division's investigation." *Id.* Counsel for respondent then faxed his request for hearing to the CALJ that same day.

The United States Supreme Court, in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), discussed equitable tolling, stating:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

See also Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."). It is well established that ignorance of legal rights or the negligence of counsel cannot rise to a level sufficient to establish equitable tolling. "The principles of equitable tolling … do not extend to what is at best a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96 (declining to toll a filing deadline where the attorney was absent from office when EEOC notice was received). *See also, Almond v. Department of Transportation*, 701 F.2d 34, 36 (5th Cir.1983) (no abuse of discretion when the Merit Systems Protection Board refused to extend time for administrative appeals where petition for review was untimely due to inadvertence of legal counsel). Furthermore, in *Miranda v. Castro*, 292 F.2d 1063, 1067 (9th Cir.2002), the Ninth Circuit noted that "the miscalculation of the limitations period by … counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."

After careful review of the documents before me, I conclude that the Respondent has shown no more than excusable neglect, which, for the reasons outlined above, fails to establish the extraordinary circumstances necessary to toll the limitations period in the instant matter.[2] Accordingly, the following order is entered:

1). The Respondent's motion requesting a hearing on the Administrator's Determination Notice is denied;

2). The hearing scheduled for July 13, 2007 is hereby cancelled, and;

3). The Administrator's Determination Notice of April 17, 2007 shall be considered final and not subject to further appeal. See 20 C.F.R. § 655.815(c)(3).

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

[2] Respondent argues no prejudice can result from the delay in filing; however, the absence of prejudice is not a controlling factor in determining the applicability of the doctrine of equitable tolling. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).