



In the Matter of:

HE XINMING (SUE),

ARB CASE NO. 04-119

PROSECUTING PARTY,

ALJ CASE NO. 2004-LCA-16

v.

DATE: September 30, 2005

CITIGROUP,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Ryan D. Barack, Esq., Kwall, Showers & Coleman, P.A., Clearwater, Florida

For the Respondent:

William Lee Kinnally, Jr., Esq., Gibney, Anthony & Flaherty, LLP, New York, New York

FINAL DECISION AND ORDER

Xinming (Sue) He filed a complaint with the United States Department of Labor's Wage and Hour Administration (WHA) alleging that Citigroup, her former employer, violated certain provisions of the Immigration and Nationality Act (INA or the Act).¹ The Act permits employers to hire non-immigrants ("H-1B" workers) to fill specialty occupations. In order to protect U. S. workers, the employer must pay the H-1B workers the greater of either the actual wage paid to all other individuals with similar experience and qualifications for the employment in question or the prevailing wage in the area for the type of work involved.² WHA investigated He's complaint, but He was not satisfied

¹ 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182 (n), 1184 (c) (West 1999).

² 8 U.S.C.A. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.731(2004).

with the results of the investigation and requested a hearing. A Department of Labor Administrative Law Judge (ALJ) granted summary decision to Citigroup and dismissed He's request for a hearing. He petitioned the Administrative Review Board (ARB) to review the ALJ's decision.³ The ARB has jurisdiction to review an ALJ's decision pertaining to the INA.⁴ The Board engages in de novo review of the ALJ's decision.⁵

We have examined the entire record. We find that it fully supports the ALJ's findings of fact. Moreover, the ALJ applied the appropriate legal standard in deciding Citigroup's motion for summary decision.⁶ His May 25, 2004 Decision and Order Granting Respondent's Motion for Summary Decision recites the facts thoroughly, fairly, and correctly. Therefore, after considering He's arguments on review, discussed below, we adopt and incorporate the Decision and Order, attached hereto, and dismiss He's request for a hearing.

He's Arguments Are Not Persuasive

In her February 6, 2004 request for a hearing before an ALJ, He contended that Citigroup was underpaying one of its H-1B employees, a Mr. Chandra Mohan, and thus was violating the Act. Her request for a hearing did not name any other Citigroup employee who she claimed was underpaid.⁷ To support its motion for summary decision, Citigroup produced evidence that Mohan was not an H-1B employee and was not underpaid.

He first argues, in essence, that the ALJ erred because he construed her request for a hearing too narrowly and granted summary decision only on the basis that she did not refute Citigroup's evidence that Mr. Mohan was not an underpaid H-1B employee.⁸ She argues that her request for a hearing raised issues other than her allegation that

³ 20 C.F.R. § 655.845.

⁴ 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. *See also* 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, inter alia, under the INA).

⁵ *Yano Enters. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001).

⁶ *See Rockefeller v. United States Dep't of Energy, Carlsbad Area Office*, ARB Nos. 03-048, 03-084, ALJ Nos. 2002-CAA-0005, 2003-ERA-10, slip op. at 3-4 (ARB Aug. 31, 2004).

⁷ February 6, 2004 letter from Xinming (Sue) He to U.S. Department of Labor Chief Administrative Law Judge.

⁸ Initial Brief at 5-7.

Mohan was underpaid. He was pro se below. Therefore, the ALJ and the Board must construe her request for a hearing liberally.⁹ Nevertheless, we find that the only relevant INA issue that He raised in her request for a hearing concerned her contention that Citigroup was underpaying its H-1B employees.¹⁰ She attempted to support this allegation by claiming that Mohan was an underpaid H-1B Citigroup employee. But she did not produce evidence, as she must, refuting Citigroup's showing that Mohan was not an underpaid H-1B employee.¹¹ And, with the opportunity to do so in responding to Citigroup's motion, she did not produce evidence that other Citigroup H-1B employees were underpaid. Therefore, she did not establish an issue of material fact, and the ALJ properly granted summary decision.

He also argues that despite her request to engage in discovery shortly after she filed her request for a hearing, the ALJ did not permit her to do so. Moreover, she contends, the ALJ decided the motion for summary decision despite the fact that in her response to the motion she "again asserted that she felt that discovery was necessary."¹² Therefore, according to He, the ALJ denied her due process and we should reverse the ALJ and remand in order that He can engage in discovery.¹³ Responding to this argument, Citigroup asserts that the ALJ did not deny He discovery and, in fact, she never sought discovery.¹⁴

The record supports Citigroup. On March 2, 2004, during a telephone conference the ALJ had scheduled, He informed the ALJ and Citigroup's lawyer that she needed time for discovery.¹⁵ The ALJ explicitly accommodated this request when he ordered He to file a status report, by March 15, as to when she would be ready to begin the hearing she had requested. This order did not limit the time or manner of discovery. The ALJ

⁹ See *Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9-10 (ARB Feb. 28, 2003).

¹⁰ See, e.g., "From the few LCAs DOL New York office mailed to me, those H-1Bs are paid very well. But in reality they are not." And, "Hard-working, well-educated Americans are driven out of the company or not qualified if they apply, jobs are taken by those cheap paid H-1Bs." February 6, 2004 letter from He to U.S. Department of Labor Chief Administrative Law Judge.

¹¹ ALJ's May 25, 2004 Decision and Order at 5.

¹² Brief at 4.

¹³ Brief at 7-10.

¹⁴ Response Brief at 13.

¹⁵ March 3, 2004 Order Directing Submission of Status Report.

only wanted He to keep him advised of her progress in preparing for the hearing.¹⁶ Therefore, the ALJ did not deny He discovery.

The Rules of Practice and Procedure for Administrative Hearings permit parties such as He to obtain discovery by deposition, interrogatories, production of documents or other evidence for inspection, and requests for admission.¹⁷ As Citigroup points out, a party seeking discovery must take affirmative steps to obtain it.¹⁸ We find no evidence that He served written interrogatories, or requests for production or admissions, or applied to take the deposition of a witness.¹⁹ Therefore, He did not attempt to obtain discovery. Moreover, when He did file her status report on March 14, she informed the ALJ that, “I think I’m ready for a hearing as soon as after given [sic] enough time to serve the subpoenas.”²⁰ Finally, in responding to Citigroup’s motion for summary decision, He never asserts that additional discovery is necessary. Nor does she complain that she has been denied discovery or has been unable to complete discovery. Instead, she wrote that “the hearing date should be scheduled as quickly as possible” and “a hearing with a set date soon from now is necessary.”²¹

CONCLUSION

The ALJ decided Citigroup’s motion for summary decision correctly. And despite He’s arguments, we find no reason to remand this matter because the ALJ did not narrowly construe her request for a hearing and did not deny her discovery. Therefore, we **DISMISS** He’s request for a hearing.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹⁶ *Id.*

¹⁷ 29 C.F.R. § 18.13.

¹⁸ Response Brief at 14.

¹⁹ *See* C.F.R. §§ 18.18, 18.19, 18.20, and 18.22.

²⁰ Letter to Office of Administrative Law Judges from Xinming (Sue) He dated March 12, 2004. A handwritten notation on the letter indicates that He faxed it on March 14.

²¹ Response To Respondent’s Memorandum of Law in Support of Respondent’s Motion for Summary Decision at 2-3.