In the Matter of:

LUDWIG KERSTEN, **ARB CASE NO. 06-111**

COMPLAINANT, **ALJ CASE NO. 2005-LCA-017**

v. **DATE: October 17, 2008**

LAGARD, INC. AND MASCO CORP.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Vida M. Holguin, Esq., Hermosa Beach, California

For the Respondents:
Kenneth J. Rose, Esq., *Littler Mendelson*, San Diego, California

FINAL DECISION AND ORDER

Ludwig Kersten filed a complaint with the United States Department of Labor alleging that his former employer, LaGard, Inc. (LaGard), violated the Immigration and Nationality Act, as amended (INA).[1] A Labor Department Administrative Law Judge (ALJ) dismissed Kersten's complaint on summary decision. Kersten appealed. We affirm.

[1] 8 U.S.C.A. §§ 1101-1537 (West 2008). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2008).

BACKGROUND

LaGard, a company owned by Masco, Incorporated, manufactures high security locks and is located in Torrance, California. In 1998, LaGard's then-president, Larry Cutter, offered Kersten a management position. When Cutter made the offer, Kersten lived in Europe. Kersten accepted the offer. He came to the United States on a visitor's visa and began working for LaGard in January 1999. About a month later, LaGard terminated its General Manager, Juan Gonzalez. Kersten moved into Gonzalez's office.

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.[2] These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the specific specialty.[3] An employer seeking to hire an H-1B worker must obtain certification from the United States Department of Labor (DOL) by filing a Labor Condition Application (LCA).[4] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.[5] After securing the certification, and upon approval by the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.[6]

To comply with these regulations, Kersten worked with LaGard's immigration attorneys, including Michael Friedberg, to apply for both an H-1B visa and, later, a green card (permanent residency). Friedberg testified that he met with Cutter and Kersten in the first part of 1999 to discuss obtaining a visa for Kersten. Friedberg surmised that he would have advised Kersten that a "production manager" position would be appropriate

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[2] 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

[3] 8 U.S.C.A. § 1184(i)(1).

[4] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733. Employers filing LCAs after January 19, 2001, must meet additional requirements if (1) they are H-1B dependent (that is fifteen percent of their workforce is foreign) or (2) DOL considers them to be a willful violator. 8 U.S.C.A. § 1182(n)(1)(E). The additional requirements mandate that an employer will (1) not displace any of its U.S. workers, (2) not place an H-1B worker at another employer's worksite without ensuring that an U.S. worker will not be displaced, (3) recruit U.S. workers, and (4) offer the job to any U.S. worker who is equally or better qualified than the H-1B worker. 8 U.S.C.A. § 1183(n)(1)(F)-(G). The ALJ found that LaGard is neither an H-1B dependent employer nor a willful violator. Order on Motion to Strike and Granting Summary Decision Dismissing Complaint (Order) at 4. Kersten does not appeal from these findings.

[5] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

[6] 20 C.F.R. § 655.705(a), (b).

to use on the green card application but not on the H-1B visa petition since, in his experience, USCIS does not "recognize managers as professionals for H-1B purposes." Friedberg testified that Kersten "was an integral part of the document preparation process."

LaGard filed the LCA in July 1999. Kersten signed it. LaGard represented in the LCA that it would employ Kersten as a Quality Control Engineer from October 1, 1999, through October 1, 2002, at an annual salary of $60,000. LaGard also described Kersten's job duties. DOL certified the LCA and, following approval by USCIS, the State Department issued Kersten an H-1B visa in early November 1999. Kersten claims that when Cutter informed him of his salary and position as Quality Control Engineer, he was "stunned" because Cutter had promised him a management position. Cutter responded that he was retiring, and Kersten would have to deal with his successor, Brian Walsh. Kersten began employment with LaGard as an H-1B nonimmigrant on November 15, 1999.

Walsh testified that he knew that Cutter had verbally promised Kersten a production manager position, but he did not fulfill Cutter's promise to Kersten. Walsh also acknowledged that Kersten worked beyond the duties associated with his job title, Quality Control Engineer, in that he developed new product and worked with LaGard's European distributors. In fact, LaGard never made Kersten a manager though Kersten sought to have LaGard honor Cutter's promise during Walsh's tenure (2000 – 2001) and the tenure of Walsh's successors, Mike Wright and Roger Carlson.

In late 2002, Steve Cima became LaGard's Quality Director and, in 2003, Kersten's direct supervisor. Cima previously worked for Computerized Security Services, a company that Masco also owned but that had ceased its manufacturing operations. Carlson was then LaGard's president. On September 23, 2002, Cima petitioned for an extension of Kersten's H-1B status and filed an LCA indicating that LaGard intended to employ Kersten as a Quality Control Engineer from October 2, 2002, to October 2, 2005, with an annual salary of $66,000. Cima included a description of Kersten's duties in that position. In March 2003, USCIS requested that LaGard provide further information, including a detailed job description of Kersten's duties and the percentage of time to be spent on each duty. LaGard's Vice President of Operations, Ken Fox, gave USCIS all of the requested information. Cima testified that some of the duties Kersten performed in 2003 while Cima supervised him are not reflected in the H-1B extension application Cima filed in September 2002. Cima testified that Kersten also managed "[t]he quality system."

In June 2003, Kersten wrote two letters to Mary Rastigue, LaGard's Director of Human Resources.[7] On June 16 he wrote that the "expiration of my H1 work visa caught me totally by surprise" and sought clarification of his employment with LaGard. He indicated that neither the H-1B extension application nor the permanent residency

[7] Declaration of Kenneth J. Rose In Support of Respondent's Motion for Summary Decision, Tabs 22, 23.

application had been approved. He also detailed Cutter's promise of a management position, "quite possibly in the General Manager position." Kersten added, "Unfortunately, Mr. Cutter left the company in December of 1999 and the general manager position was never re-established. Further, other management opportunities never materialized as I had been led to believe."

In his June 30, 2003 letter to Rastigue, Kersten asked for a response to his earlier letter and again detailed Cutter's promise of a "'major' position within LaGard management." Kersten explained, "Mr. Cutter made me the promise to induce me to take the job and I did, relying on his promise. I have mentioned this promise to each of my four supervisors in the past four years. No one ever denied this promise or denied my request for a promised position. However, I fully expected to be a vice president or at the very least a Director. These are the positions I was promised." Kersten concluded, "I look forward to hearing from you or management about my promised position."

Then, in July 2003, Kersten's attorney, Vida Holguin, also wrote to Rastigue.[8] Holguin stated that Cutter made "certain promises to Mr. Kersten with the intention of inducing him to work for LaGard, which included his relocation from Germany to the United States. Mr. Cutter promised Mr. Kersten that if he came to work for LaGard, Mr. Kersten would receive a significant position within LaGard management." Holguin requested LaGard's resolution of the matter or she would "proceed accordingly to protect my client's rights."

LaGard terminated Kersten's employment on September 3, 2003. According to LaGard's pre-hearing brief, "Kersten was laid off due to a reorganization of the engineering functions at LaGard and Computerized Security Services. His work performance was a contributing factor."[9]

Kersten filed his complaint on April 12, 2004. He alleged that LaGard had violated five provisions of the INA: (1) that LaGard supplied incorrect or false information on the LCA; (2) that LaGard failed to pay Kersten the higher of the prevailing or actual wage; (3) that LaGard did not afford Kersten the same working conditions (hours, shifts, vacations) as it does U.S. workers, or that LaGard's employment of H-1B workers adversely affects the working conditions of U.S. workers; (4) that LaGard required Kersten to pay all or part of the LCA filing fee; and (5) that LaGard retaliated or discriminated against Kersten for disclosing information, filing a complaint or cooperating in an investigation or proceeding about a violation of the H-1B laws or regulations.

In mid-June 2004, a DOL investigator asked Kersten to answer twenty-seven questions. Kersten's June 22, 2004 response indicated that LaGard had not required him to pay any fee associated with obtaining his H-1B visa and had not required him to pay

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[8] Kersten's Appeal of DOL Order Granting Summary Decision, Ex. 3.

[9] Pre-Trial Statement of Position at 24.

USCIS any filing fee. Kersten also indicated that LaGard had offered him the same fringe benefits as other workers. In response to the investigator's request for a description of Kersten's "primary duties," Kersten provided the job description that Ken Fox had submitted to USCIS on May 27, 2003, in connection with LaGard's petition for an extension of Kersten's H-1B visa. Thereafter, Kersten withdrew his allegations that LaGard did not afford him working conditions on the same basis as it does U.S. workers and that LaGard required him to pay all or part of the LCA filing fee.

On February 3, 2005, DOL's Wage and Hour Division Administrator (the Administrator) determined that LaGard had not violated the INA. Kersten requested a hearing before a DOL ALJ. LaGard then filed a motion for summary decision. It argued that the allegations pertaining to incorrect or false information on the LCA and failure to pay the proper wage were time-barred. Furthermore, LaGard argued, even if they were not time-barred, both these claims and the retaliation claim must fail for lack of evidence. Kersten responded that his complaint was timely filed, and that since the record indicated that fact issues existed on his claims, summary decision should be denied.

The ALJ determined that Kersten had not submitted evidence to support the incorrect or false information claim and the wage underpayment claim. Furthermore, he found that they were time-barred. As for the retaliation claim, the ALJ found that Kersten had not provided evidence that he had engaged in activity that the INA protects. Therefore, he found that Kersten could not prevail on that claim either. Thus, in his May 10, 2006 Order on Motion to Strike and Granting Summary Decision Dismissing Complaint (Order), the ALJ dismissed Kersten's claims.[10] Kersten appealed.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision.[11] 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 . . . ."[12] The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[13]

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[10] Before the ALJ, Kersten alleged other INA violations that he did not include in his complaint. In its brief in support of its motion for summary decision, LaGard argued that since these new allegations were not in Kersten's complaint and since Kersten did not seek to amend that complaint, they should be dismissed. The ALJ did so. Order at 7-8.

[11] 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).

[12] 5 U.S.C.A. § 557(b) (West 2008).

We review a grant of summary decision de novo, i.e., under the same standard that ALJs employ. Set forth at 29 C.F.R. § 18.40(d) (2008) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.[14] The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.[15] If the non-moving party fails to demonstrate an element essential to his case, there can be "no genuine issue as to any material fact," because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[16]

Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.[17]

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[13] *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).

[14] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[15] *Id.* at 256; *see also* Fed. R. Civ. P. 56(e).

[16] *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 3 (ARB May 28, 2004), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[17] *Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 1999-TSC-004, slip op. at 3 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 6 (ARB Nov. 30, 1999).

DISCUSSION

Kersten's Incorrect or False Information and Wage Underpayment Claims Are Time-Barred

By submitting and signing the LCA, the employer represents that the statements on it are accurate and acknowledges and accepts its obligations under the H-1B visa program. That acceptance is re-affirmed when the employer petitions USCIS for approval of the H-1B visa application as supported by the LCA.[18] The Administrator investigates complaints filed by an aggrieved party alleging that an employer failed to meet a condition specified in the LCA or misrepresented material facts in the LCA.[19] An aggrieved party, defined at 20 C.F.R. § 655.715, is one whose interests are adversely affected by the employer's alleged non-compliance with the LCA. In this case, after investigating, the Administrator had to determine whether LaGard filed an LCA that misrepresented a material fact, and whether the company failed to pay Kersten the $60,000 during the first employment period and the $66,000 during the second period.[20] As noted earlier, both the Administrator and the ALJ found that LaGard had not violated the INA.

Kersten argues to us that he made the allegations about incorrect or false information and wage underpayment because he performed duties in addition to those listed in the LCA (quality control engineer) and should have been paid the prevailing wage for this work, which included most of the duties of the general manager, Gonzalez, who had left LaGard.[21] Kersten also asserts that LaGard reneged on Cutter's promise of a management position and salary.[22] Therefore, Kersten argues that an issue of material fact exists as to his incorrect or false information and wage underpayment claims.[23]

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[18] 20 C.F.R. § 655.805(d).

[19] 8 U.S.C.A. § 1182(n)(2)(A).

[20] *See* 20 C.F.R. § 655.805(a)(1),(2).

[21] Petition for Review at 3-4; Supporting Brief at 2-3, 9-12, 16-18.

[22] Petition for Review at 3; Supporting Brief at 3-4, 11, 15-18.

[23] The essence of Kersten's argument is that the Labor Department should enforce Cutter's promise and also compel LaGard to pay him for his additional work. But these separate employment agreements exist outside the scope of the INA. Kersten may have remedies that arise under, for instance, a separate employment agreement or contract, a union contract, common law, or other state or federal statutes apart from the H-1B provisions of the

But even if we found that Cutter promised Kersten a management position and a manager's salary and that Kersten did perform duties beyond those of a Quality Control Engineer, and that, therefore, Kersten created issues of fact as to the false information and wage underpayment claims, those claims are nevertheless time-barred.

The INA provides that a complaint must be filed not later than twelve months after the date of the alleged failure to meet a condition specified in the LCA or an employer's misrepresentation of a material fact in the LCA.[24] The implementing regulation provides:

> A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA [[25]].

In arguing below that Kersten's incorrect or false information and wage underpayment claims are time-barred, LaGard pointed to the fact that Kersten's complaint, filed in April 2004, alleged that LaGard had supplied the incorrect or false information on the LCAs it had filed in 1999 and 2002. Therefore, LaGard argued, since Kersten did not file his complaint within twelve months after the latest date on which the alleged incorrect or false information occurred, or 2002, those claims were time-barred. Kersten argued that the "continuing violations doctrine" tolls the one-year limitations period. That is to say, because LaGard failed to make good on Cutter's promises and did not pay him for the work he performed in addition to his Quality Control Engineer duties, it engaged in a course of wrongful conduct that continued until Kersten's September 2003 termination. Thus, he argued, these claims are not time-barred because he filed his April 2004 complaint not later than twelve months from his September 2003 firing.

The ALJ rejected Kersten's continuing violations argument because Kersten admitted that he performed only quality control engineer duties from September 2002

INA. But DOL's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to, the INA's H-1B provisions. *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 Florida, Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 9-10 (ARB Sept. 29, 2006).

[24] 8 U.S.C.A. § 1182(n)(2)(A).

[25] 20 C.F.R. § 655.806(a)(5).

until September 2003, when he was fired.[26] Therefore, since he admitted that he did not perform duties in addition to those listed in the 2002 LCA and thus was not underpaid, LaGard did not continue to violate the terms of the 2002 LCA after September 2002. Since Kersten filed his complaint in April 2004, more that 12 months after September 2002, the ALJ concluded that these claims were time-barred.[27] The record supports the ALJ's conclusion.

With regard to the retaliation claim, LaGard did not argue that it was time-barred, and the ALJ made no finding. Even so, we conclude that because the retaliation claim was filed on April 12, 2004, not more than twelve months after the date on which the alleged retaliation occurred, September 3, 2003, it is not time-barred.

Kersten's Retaliation Claim

Kersten also alleged that LaGard retaliated against him because he disclosed information, filed a complaint, or cooperated in an investigation or proceeding about a violation of the H-1B laws or regulations. Kersten argues that the record contains evidence that LaGard terminated him because he disclosed LaGard's violations of the H-1B provisions.

The INA protects H-1B workers who disclose information to the employer, or to any other person, "that the employee reasonably believes evidences a violation" of the INA's H-1B provisions. It also protects employees who cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of the H-1B provisions of the INA. H-1B employers may not "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate" because the employee has engaged in protected activity.[28] To prevail on a retaliation claim, the employee must prove by a preponderance of the evidence that he engaged in protected activity, that his employer knew about this activity, and that his employer took adverse action against him because of his

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[26] Declaration of Kenneth J. Rose, Tab 12.

[27] Order at 9. We note that in *Nat'l R..R.. Passenger Corp v. Morgan*, 536 U.S. 101, 110, 114-115 (2002), the Supreme Court specifically rejected the theory that a statute of limitations may be tolled under the continuing violations doctrine. *See Lewis v. U.S. E.P.A.*, ARB No. 04-117, ALJ Nos. 03-CAA-5, -6, slip op. at 20, 23 (ARB March 30, 2007) (ARB applies *Morgan* to whistleblower complaints filed under six federal environmental statutes).

[28] 8 U.S.C.A. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801.

protected activity.[29] Both the Administrator and the ALJ found that LaGard did not retaliate against Kersten.[30]

Kersten argues that LaGard terminated his employment in September 2003 after he and his lawyer sent letters to Rastigue claiming that Cutter had promised him a management position and salary to induce him to work for LaGard, and that LaGard had reneged on the promise. These letters asserted that Cutter made "certain promises" to Kersten "with the intention of inducing him to work for LaGard;" that LaGard promised Kersten "an important career in their organization;" and that Cutter promised Kersten "a major position" with LaGard's management.[31] Kersten argues that because the record contains evidence, namely these letters, that he disclosed information about Cutter's promise and about LaGard's reneging on that promise, a genuine issue of fact exists as to whether LaGard fired him in retaliation for disclosing that LaGard was in violation of the H-1B provisions.

But this argument has no merit because the letters do not evince Kersten's reasonable belief that LaGard had violated the INA's H-1B provisions or regulations. Even assuming that LaGard did fire Kersten for complaining about not receiving what Cutter had promised, the letters only complain that LaGard had not kept Cutter's promises. Those promises, as we have already explained, do not pertain to the scope of the INA's H-1B provisions or regulations and thus cannot be the basis for INA protected activity. Thus, because Kersten did not adduce evidence that he engaged in protected activity for which LaGard terminated him, LaGard is entitled to summary decision on the retaliation claim.

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[29] *U.S. DOL, WHD v. Kutty,* ARB No. 03-022, ALJ Nos. 2001-LCA-010 through 2001-LCA-025, slip op. at 13 (ARB May 31, 2005).

[30] The Administrator investigates and initially determines whether the employer retaliated. 20 C.F.R. § 655.805(a)(13).

[31] Declaration of Kenneth J. Rose In Support of Respondent's Motion for Summary Decision, Tabs 22, 23; Kersten's Appeal of DOL Order Granting Summary Decision, Ex. 3.

CONCLUSION

The ALJ properly concluded that Kersten's incorrect or false information and wage underpayment claims are time-barred. And since Kersten did not present evidence that LaGard retaliated against him, LaGard is entitled to summary decision on that claim too. Therefore, we **AFFIRM** the ALJ's decision to grant summary decision to LaGard and **DISMISS** Kersten's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge