U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 12 April 2004

CASE NO: 2004-LCA-23

IN THE MATTER OF:

MARK J. WATSON, PRO SE

Complainant

v.

BANK OF AMERICA

Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND CANCELLING FORMAL HEARING

This proceeding involves a claim under the Immigration and Nationality Act, as amended by the Immigration Act of 1990 and 1991, 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n) and 1184(c) (hereinafter "the Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, brought by Mark Watson (Complainant) against Bank of America (Respondent).

I. DISCUSSION

A. Procedural History

On or about Wednesday, February 4, 2004, Complainant, who is pro se, filed with the Wage and Hour Division, Department of Labor (DOL), a "Supplemental Claim For Relief" (Supplemental Claim) in which he argued Respondent denied his applications for its Technology Project Manager job and two consultant jobs in contravention of the Act.[1] He noted his Supplemental Claim

[1] On July 31, 2002, Complainant was informed by Respondent pursuant to a job application that Respondent evaluates applications based on various business needs and makes recruitment decisions without regard to any unlawful factor. Respondent further indicated "candidates must possess the right to work in the United States, as it is not the normal business

"merely supplements" his May 27, 2003 "Original Claim for Relief." He also indicated his "original complaint" was "actually filed" in "Dallas County Small Claims Court" on Friday, May 31, 2002, for "the purpose of obtaining discovery," but the case was dismissed for "lack of jurisdiction."[2] (Complainant's Supplemental Claim, pp. 1-4).

In his Supplemental Claim, Complainant demanded his legal protections be enforced and relief granted, noting that "It wasn't until recently (... **this week**) when I came across the *Labor Condition Application* (LCA) the ***Respondent* filed** to fill the *Consultant – Systems Engineer Architecture & Analysis* position." According to Complainant, he filed his February 4, 2004 Supplemental Claim pursuant to 20 C.F.R. 806(a)(1)[3] because Respondent's June 25, 2002 LCA Case Number I-02169-0144407, which related to one of the consultant jobs for which Complainant apparently unsuccessfully applied, "willfully misrepresented material facts in its attestation." The basis for Complainant's demand was "the reasonable cause . . . of a pattern of willful and substantial violations," which were established "**through my own investigation**" and which were "supported by [Respondent's LCA filings identified as Case Nos. I-02141-0114983 (Technology Project Manager Job, May 23, 2002); I-02169-0144407 (Consultant Job, June 25, 2002); and I-02235-0220203 (Consultant Job, August 29, 2002)]." Id. (bold emphasis added).

Complainant included with his Supplemental Claim an "H-1B Nonimmigrant Information Form," in which he alleged Respondent:

---

practice of [Respondent] to sponsor individuals for work visas." (Resp. Motion for Summary Decision, exh. no. 4, p. 5).

[2] Complainant included a CD-Rom on which his February 4, 2004 Supplemental Claim is located at: "\02-2004\Supplemental Claim for Relief.pdf."

He did not attach a May 27, 2003 "Original Claim for Relief" with his February 4, 2004 Supplemental Claim, nor did he submit a copy of his Texas State Court civil complaint/discovery request.

[3] 20 C.F.R. § 655.805(a)(1) provides, "No particular form of complaint is required, except that the complaint shall be written or, if oral, shall be reduced to writing by the Wage and Hour Division official who receives the complaint." 20 C.F.R. § 655.805(a)(1) (2003).

(1) supplied incorrect or false information on the Labor Certification Application (LCA); (2) does not afford H-1B worker(s) working conditions (hours, shifts, vacation periods) on the same basis as it does U.S. worker(s), or the employment of H-1B worker(s) adversely affects the working conditions of U.S. worker(s); (3) failed to maintain and make available for public examination the LCA and necessary documents at the employer's principal place of business or worksite; (4) failed to recruit U.S. worker(s) for jobs for which H-1B worker(s) are sought; and (5) failed to hire a U.S. worker who applied and was equally or better qualified for the job for which the H-1B worker was sought.[4] (Respondent's Motion for Summary Decision, exhibit number 1, pp. 1-3).

In Complainant's undated H-1B Nonimmigrant Information Form, he indicated Respondent's alleged violations occurred on May 23, 2002, June 25, 2002, and August 29, 2002. By a hand-written entry atop the form, Complainant indicated his "complaint" was "originally filed" on May 27, 2003; however, he did not indicate where he filed the complaint nor with whom the complaint was filed. In a section of the form designated, "For DOL Use Only," there is no indication his complaint was received by any individual on any date. Id.

On or about February 5, 2004, Complainant filed an "Amended Supplemental Claim for Relief" (Amended Claim) with the Wage and Hour Division, DOL. He noted his Amended Claim supplemented his May 27, 2003 "Original Claim for Relief" and indicated he "actually filed" his "original complaint" regarding "(LCA) Case Number: I-02169-0144407" in "Dallas County Small Claims Court on Friday, May 31, 2002, for the purpose of obtaining discovery," but the case was dismissed for "lack of jurisdiction."[5] He again

---

[4] Complainant's undated H-1B Nonimmigrant Information Form is located on his CD-Rom submission at "\02-2004\02042004_WH4.pdf." Notably, Complainant's undated form indicates "Complaints regarding this [Complainant's fifth alleged] violation should be filed with the U.S. Department of Justice (DOJ), 10th and Constitution Ave., N.W., Washington. D.C., 20530. There is no indication Complainant filed such complaints with DOJ.

[5] Complainant's CD-Rom submission includes a copy of his February 5, 2004 Amended Claim at "\02-2004\Amended Supplemental Claim for Relief.pdf". He attached no May 27, 2003 "Original Claim for Relief" with his February 5, 2004 Amended Claim. Likewise, he submitted no copy of his Texas State Court civil

stated he was inappropriately denied employment for Respondent's Technology Project Manager and Consultant jobs and again noted "it wasn't until recently (**this week**) when I came across the LCA the ***Respondent* filed** to fill the *Consultant – Systems Engineer Architecture & Analysis* position." (Compl. Amended Claim, pp. 1-5) (bold emphasis added).

According to Complainant, he was filing his Amended Claim pursuant to 20 C.F.R. 806(a)(1) because Respondent's LCA filings "in my opinion . . . would constitute a willful misrepresentation of material fact." The basis for Complainant's demand was "the reasonable cause . . . of a pattern of willful and substantial violations," which were established "**through my own investigation**" and which were supported by [Respondent's LCA filings identified as Case Nos. I-02141-0114983 (Technology Project Manager Job, May 23, 2002); I-02169-0144407 (Consultant Job, June 25, 2002); and I-02235-0220203 (Consultant Job, August 29, 2002)]." He demanded his legal protections be enforced and appropriate relief should be granted. Id. (bold emphasis added).

On or about February 24, 2004, Complainant filed an "Original Request for Hearing" with OALJ in which he again asserted he filed an "Original Claim for Relief (a.k.a. complaint letter) on Tuesday, May 27, 2003. He again indicated his "original complaint" was actually filed in "Dallas County Small Claims Court on Friday, May 24, 2002 for the purpose of obtaining discovery," but the case was dismissed for "lack of jurisdiction." (Compl. Orig. Req. for Hrg.).[6]

In his Original Request for Hearing, Complainant explained that, on February 2, 2004, he "recently . . . came across" Respondent's LCA filings regarding positions which it filled. Specifically, Complainant was "shocked to uncover" DOL's "Alien Certification Disclosure Database," which indicated Respondent filed alien labor certifications during a prior two-year period in which Complainant submitted employment applications for

---

complaint/discovery request. (Compl. Amended Claim; Resp. Motion for Summary Decision, exh. no. 1).

[6] Complainant's CD-Rom submission includes a copy of his February 24, 2004 Original Request for Hearing at "\02-2004\Request for Hearing.pdf". He attached no May 27, 2003 "Original Claim for Relief" with his February 5, 2004 Amended Claim. Likewise, he submitted no copy of his Texas State Court civil complaint/discovery request. (Compl. Orig. Req. for Hrg.).

positions with Respondent. He contended Respondent's LCA filings constituted willful misrepresentation of material facts, namely that Respondent willfully misrepresented its alien labor certifications would not have any adverse effects on working conditions and that Respondent misrepresented it did not fail to offer employment to "an equally or better qualified U.S. worker." He demanded various remedies. Id.

On or about February 24, 2004, Complainant also filed a Declaration in which he asserted he applied for the positions for which "**Respondent filed** alien labor certifications [. . . (LCA) Case Number I-02169-0144407 and LCA Case Number I-02235-0220203] and I **was not provided notice** of their intent to file its LCA." (Declaration of Mark J. Watson).[7]

On or about February 24, 2004, Complainant filed an "Original Notice of Hearing and Litigation Schedule" with the Office of Administrative Law Judges (OALJ), in which he averred Respondent engaged in a "pattern of substantial violations" under the Act requiring revocation of its alien labor certifications. He asserted Respondent willfully misrepresented that: (1) its LCA filings would have no adverse effect on working conditions; (2) Respondent did not fail to offer employment to equally or better qualified U.S. workers; and (3) Respondent provided notice of its LCA-related employment decisions to affected U.S. workers. Additionally, he indicated a "civil complaint" was pending regarding Respondent's alleged employment application-related inquiries into his status as a debtor. (Compl. Orig. Notice of Hrg. and Litigation Sched.).[8]

In his Original Notice of Hearing and Litigation Schedule, Complainant sought a finding that "ESA Wage & Hour Division has failed to enforce fraudulently obtained alien labor certifications leading to a destabilization of wages in the information technology industry." Specifically, he requested the undersigned should find "*ESA Wage and Hour Division's* actions [were] unlawful" and "set aside its action, findings, and conclusions," which should be found to be unwarranted by the facts. He attached information allegedly indicating "over one million alien labor certifications" were approved "in the worst

---

[7] Complainant's CD-Rom submission includes a copy of his Declaration at "\02-2004\Declaration.pdf."

[8] Complainant's CD-Rom submission includes a copy of his Original Notice of Hearing and Litigation Schedule at "\02-2004\Notice of Hearing.pdf."

job market in 20 years." Additionally, he argued Respondent willfully misrepresented material facts to the "ETA Alien Labor Certification Officer" and replaced its "highly qualified and more productive U.S. Workers with non-immigrant labor," relying on a "TechWeb News Article" Internet publication, which was apparently accessed on January 15, 2004, and which describes a "downward spiral" in information technologies salaries related to "outsourcing" domestic jobs to workers in foreign countries. Id.

On or about February 24, 2004, Complainant also filed a "Structured Summary Decision" in which he sought a summary decision awarding numerous remedies based on a finding that "there was reasonable cause for an investigation . . . and ESA Wage and Hour Division failed in its duty to prosecute." He also sought findings that Respondent: (1) willfully misrepresented its LCA applications would have no adverse effects on working conditions; (2) failed to offer employment to an equally or better-qualified U.S. worker; (3) willfully misrepresented its offers of H-1B employment to similarly situated U.S. workers; (4) Respondent failed to provide notice of its H-1B employment decisions to "affected U.S. workers [a.k.a. applicants];" (5) Respondent unlawfully obtained consumer report information without Complainant's consent and unlawfully used the information against Complainant; and (6) Complainant is "an obviously better qualified candidate than the H-1B nonimmigrant workers" who were offered Respondent's consultant jobs. (Compl. Structured Summary Decision).[9]

On or about February 24, 2004, Complainant also filed an Original Request for Admission" and an "Original Motion for Subpoenas." The request for subpoenas was previously ruled upon and is not the subject of this Summary Decision determination.

On March 5, 2004, a Notice of Hearing and Pre-Hearing Order issued by the undersigned in which a hearing was scheduled for May 11, 2004 and associated discovery requirements were set forth accordingly.

On March 18, 2004, Respondent filed a Motion for Summary Decision in which it averred there is no genuine issue of material fact and this action should be dismissed as a matter of law because, generally: (1) a hearing before OALJ is not

[9] Complainant's CD-Rom submission includes a copy of his Structured Summary Decision at "\02-2004\Structured Summary Decision.pdf."

authorized under the Act because no reasonable cause for an investigation of Complainant's allegations was found by DOL, which did not accept Complainant's complaint for filing or otherwise issue a formal determination after conducting any investigation; (2) Complainant's claims are barred by the 12-month limitations period set forth under the Act's implementing regulations; (3) Complainant's claims are substantively without merit because Respondent is not "H-1B dependent," nor has any determination ever issued in which Respondent was adjudicated a "willful violator" of the Act and its implementing regulations; (4) Respondent affords its H-1B workers the same working conditions as its U.S. workers; and (5) Respondent complied with notice requirements set forth in the Act and its implementing regulations by posting the disputed LCAs for ten days at the worksites where its H-1B employees would be working. Accordingly, Respondent requested Complainant's complaints be dismissed as a matter of law.

On March 22, 2004, Complainant filed an "Amended Request for Hearing" in which he again sought various remedies, including "equitable relief," for Respondent's alleged violations under the Act. He again described his "recent" discovery of H-1B data indicating Respondent filed LCA information related to jobs for which he sought employment. He reasserted his position that he filed an "Original Claim for Relief" on May 27, 2003. Likewise, he again noted that his "original complaint" was actually filed in "Dallas County Small Claims Court" on May 24, 2002, but the claim was denied for "lack of jurisdiction." (Compl. Amended Req. for Hrg.).

On March 23, 2004, Respondent filed its "Answer to Original Request for Hearing" in which it denied any willful misrepresentations or patterns of violations under the Act. It denied Complainant was entitled to any relief under the Act. It also denied Complainant's contentions that: (1) Respondent was required to provide Complainant with notice of every Labor Condition Application; (2) Complainant is entitled to relief under the Act; and (3) there is a pattern of willful and substantial violations under the Act established by Complainant's independent investigation. (Resp. Ans. to Orig. Req. for Hrg.).

Respondent averred it was without knowledge or information sufficient to form a belief as to the truth of Complainant's averments that: (1) Complainant filed an Original Claim for Relief on May 27, 2003; (2) an alien labor certification was filed for each of Complainant's applications for employment over

a prior two-year period; and (3) it was not until recently that Complainant came across LCAs which were filed to fill contested job positions. Id.

Respondent admitted Complainant filed an action in Dallas County Small Claims court on or about May 24, 2002 and that his complaint was denied for lack of jurisdiction. Respondent denied it failed to comply with any order in that action and alleged it obtained a "Sanctions Order against Complainant in that matter for $25,258.00." Id.

On March 23, 2004, Respondent also filed its "Response to Complainant's Requests for Admissions," in which it objected to or denied statements contained in Complainant's request for admissions. (Resp. Response to Compl. Req. for Admissions).

On March 26, 2004, Complainant filed an "Original Countermove for Summary Decision" in which he contended Respondent's Motion for Summary Decision is "fundamentally flawed," and "frivolous." He argued the March 5, 2004 Notice of Hearing issued from the undersigned in response to his claims that there was a reasonable cause for an investigation and that the ESA Wage and Hour Division failed in its duty to prosecute. Consequently, Complainant argued the service of the Notice of Hearing and Pre-Hearing Order was predicated upon "holding ESA Wage and Hour Division's actions unlawful and sets aside its action, findings and conclusions found to be unwarranted by the facts to the extent that the facts are subject to trial de novo" before OALJ.

Accordingly, Complainant argued the issuance of the Notice of Hearing and Pre-Hearing Order "places the burden of proof in validating alien labor certification" upon Respondent, relying on the "Board of Alien Labor Certification Appeals Judges' Benchbook (Second Edition – May 1992)." Complainant argued that Respondent failed to carry its "burden of proof in validating alien labor certification" and that he is entitled to a summary decision awarding him various remedies because there is no genuine issue of material fact. (Compl. Orig. Countermove for Summary Decision).

On March 26, 2004, Complainant also filed a "Structured Summary Decision" in which he sought numerous remedies based on requested findings that: (1) there was reasonable cause for an investigation and ESA Wage and Hour Division failed in its duty to prosecute; (2) the ESA Wage and Hour Division's actions were unlawful and its conclusions should be set aside; (3) Respondent

willfully misstated material facts by filing its LCAs; (4) Respondent unlawfully obtained and used consumer report information; and (5) Complainant is better qualified to perform Respondent's jobs than H-1B nonimmigrant workers. (Compl. Structured Summary Decision).

On March 26, 2004, Complainant also submitted a "Default Structured Summary Decision" in which he asserted Respondent failed to sufficiently respond to his discovery requests and pleadings. He again contended a summary decision should issue granting various remedies in his favor for the reasons set forth in his Structured Summary Decision. (Compl. Default Structured Summary Decision).

On March 26, 2004, Complainant also filed an "Original Motion to Determine the Sufficiency of the Respondent's Answer" in which he averred Respondent's discovery responses to his request for admissions were inadequate.

On April 2, 2004, Complainant filed an "Original Answer to Show Cause," in which he again averred the service of the March 5, 2004 Notice of Hearing and Pre-Hearing Order has the effect of holding the ESA Wage and Hour Division's actions unlawful and setting aside its actions, findings and conclusions which were "found to be unwarranted by the facts to the extent that the facts are subject to trial de novo" before OALJ. He argued Respondent conspired with ESA Wage and Hour Division to deprive U.S. Workers of employment by making employment decisions based upon national origin.

Complainant also alleged he filed his complaint "in the wrong court thirty-one days prior to the Respondent filing its Labor Condition Application (LCA)."[10] He added that, if

[10] Notably, Complainant did not identify the alleged filing which was filed in the "wrong court," nor did he indicate which court was the "wrong court." There are two alleged prior complaints: (1) a May 31, 2002 complaint filed in Dallas County Small Claims Court for "discovery purposes;" and (2) a May 27, 2003 "Original Request for Relief." Claimant submitted no copies of any pleadings related to either complaint. As noted above, he included an H-1B Nonimmigrant Information Form with a hand-written entry indicating the form was "originally filed" on May 27, 2003, but there is no indication on the document that any such filing was received by any office at any time.

Respondent had provided proper notice under the Act, he "most likely would have filed [his] complaint with ESA Wage & Hour Division nearly two years ago." Nevertheless, he argued his May 27, 2003 filing of his complaint was "just over 10 months subsequent to the Respondent's fraudulent alien labor certification [LCA I-02169-0144407 filed on June 25, 2002]."[11] He concluded a summary decision in his favor is proper because Respondent "has the burden of proof in an enforcement action regarding [an] LCA" pursuant to 20 C.F.R. 655.740(c), there is no genuine issue of material fact, and he is entitled to summary decision as a matter of law.

On April 9, 2004, Respondent filed its "Opposition to Original Countermove for Summary Decision and Response to Original Answer to Order to Show Cause." It argued Complainant's original answer failed to offer any legal or factual basis to rebut Respondent's Motion for Summary Decision in which it argued: (1) Complainant's claim is jurisdictionally deficient because no investigation by an Administrator of Complainant's complaint ever occurred; (2) Complainant's action is jurisdictionally barred because it was filed beyond the 12-month limitations period set forth in the Act and its implementing regulations; and (3) Complainant's claims are substantively without merit.

Respondent noted Complainant admitted in his original answer that the Administrator never conducted an investigation on his original complaint. It argued OALJ is not the proper forum to review an Administrator's determination not to investigate a complaint. Respondent denied any conspiracy with the Employment and Training Administration and argued Complainant's claim was "completely baseless" and without any factual support. Moreover, Respondent argued OALJ is not the

---

Insofar as Complainant's alleged May 27, 2003 complaint occurred **after** the dates associated with Respondent's May 2002, June 2002 and August 2002 LCAs, Complainant appears to argue his pleadings in the Dallas County Small Claims Court were mistakenly filed in the wrong court because that complaint is apparently the only complaint which could have occurred 31 days before Respondent filed any LCA. It is noted that July 1, 2002 is the thirty-first day after May 31, 2002, but Respondent filed no LCAs in July 2002.

[11] As noted above, there is no record that any agency or court received any filing of an "Original Request for Relief" allegedly submitted by Complainant on May 27, 2003.

proper forum to entertain Complainant's conspiracy theory or grant the relief requested. Respondent argued Complainant never disputed that it fully complied with the notice requirements set forth at 20 C.F.R. § 655.734(a)(1)(ii), but apparently sought personal notice or mandatory electronic notice on the Internet. Respondent contended such notice "goes completely beyond the scope of the regulations."

Respondent argued Complainant's statement that his complaint "obviously has merit" is a "superficial contention, which is "unsupported by any factual basis or allegation" and is "legally insufficient to establish a basis to rebut [Respondent's] motion for summary decision." Respondent denied that it must carry the burden of proof in the instant proceedings, arguing the regulatory provisions on which Complainant relied were inapplicable to the instant claim. Nevertheless, Respondent argued Complainant's contentions must fail even if Respondent is required to carry the burden of proof because the uncontested facts satisfy that evidentiary burden. Respondent concluded Complainant's Motion for Summary Decision must fail because his motion presented no evidentiary bases or factual allegations which would entitled him to his requested relief.

B. Legal Standard

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d), which provides:

> (d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, 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.

20 C.F.R. § 18.40(d) (2003). See, e.g., Stauffer v. Wal Mart Stores, Inc., Case No. 99-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No. 93-ERA-42 @ 4-6 (Sec'y July 17, 1995).

This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 91-ERA-31 and 91-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. at 324. The determination of whether a genuine issue of material fact exists must be made viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 87-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes grant of summary judgment if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

1. OALJ Jurisdiction

The parties do not dispute that Complainant filed the instant complaints pursuant to 20 C.F.R. § 655.806, which sets forth the procedure for an "aggrieved party" to file a complaint under the Act. Pursuant to 20 C.F.R. § 655.806(a)(1), no particular form of complaint is required.

20 C.F.R. § 655.806(a)(2) provides that, upon receipt of a complaint, the Administrator of the Wage and Hour Division of

DOL is authorized with the discretion to determine whether there is reasonable cause to believe that a violation under the Act has been committed, and therefore that an investigation is warranted. This determination shall be made within 10 days of the date that the complaint is received by a Wage and Hour Division official. 20 C.F.R. § 655.806(a)(2) (2003).

If the Administrator determines that the complaint fails to present reasonable cause for an investigation, the Administrator shall notify the complainant, who may submit a new complaint, with such additional information as may be necessary. **No hearing or appeal shall be available regarding the Administrator's determination that an investigation on a complaint is not warranted.** 20 C.F.R. § 655.806(a)(2) (2003) (emphasis added).

On the other hand, if the Administrator determines that an investigation on a complaint is warranted, the complaint "shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing." 20 C.F.R. § 655.806(a)(3) (2003). When an investigation has been conducted, the Administrator shall, pursuant to 20 C.F.R. § 655.815, issue a written determination as described in § 655.805(a), which generally catalogs violations and the appropriate written determinations which must be issued by an Administrator under 20 C.F.R. § 655.805(b). 20 C.F.R. § 655.806(b) (2003).

Pursuant to 20 C.F.R. § 655.815, the Administrator's determination that an investigation on a complaint is warranted **must be served on the interested parties.** The Administrator is also required to file with the Chief Administrative Law Judge, DOL, a copy of the complaint and the Administrator's determination, which must: (1) set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any appropriate remedies; (2) inform the interested parties that they may request a hearing; (3) inform the interested parties that, in the absence of a timely request for a hearing within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable; (4) set forth the procedure for requesting a hearing, and (5) where appropriate, inform the parties that the Administrator shall notify ETA and the Attorney General of the occurrence of a violation by the employer. 20 C.F.R. § 655.815 (2003).

Any interested party desiring **a review of a determination issued under §§ 655.805 and 655.815** shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision. 20 C.F.R. § 655.820(a). 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). 20 C.F.R. § 655.820(b)(1) (2003) (emphasis added).

In light of the foregoing, the Administrator must determine a complaint warrants an investigation, conduct an investigation and issue a determination pursuant to 20 C.F.R. §§ 655.805 and 655.815 for Complainant to request a hearing before OALJ. The parties do not dispute that Complainant filed his complaint with the Administrator of the Employment and Training Association, DOL, on or about February 4, 2004.

Although Complainant contends he filed earlier complaints, there is no dispute that no investigation occurred on any of Complainant's complaints. Likewise, there is no dispute that Complainant's complaints did not result in the Administrator's determination pursuant to 20 C.F.R. §§ 655.805 and 655.815. Complainant clearly submitted no indication that any written determination issued by the Administrator following an investigation of his complaint. I agree with Respondent that OALJ is without general jurisdiction over his complaint.

There is no indication Complainant was ever notified by any Administrator that his complaint did not warrant an investigation pursuant to 20 C.F.R. § 655.806(a)(2). At best, Respondent offered evidence that its counsel contacted DOL to confirm the status of any determination regarding Complainant's February 4, 2004 complaint, but DOL did not respond prior to Respondent's motion for summary decision. (Resp. Motion for Summary Decision, exh. no. 3).

I agree with Respondent that analogous matters decided by other administrative law judges, whose opinions are not binding on this determination, provide illustrative guidance for a resolution of the instant matter. In Watson v. Electronic Data Systems, an OALJ hearing regarding Complainant's complaint against another employer was denied because OALJ lacked

jurisdiction where no investigation by the Administrator was warranted. 2004-LCA-9 (ALJ Dec. 29, 2003). Subsequently, Complainant's request for a hearing on reconsideration was also denied by the administrative law judge, who noted, "Whether alleged violations are brought under 20 C.F.R. § 655.806 or §655.807, no hearing is available before the Office of Administrative Law Judges when the Administrator declines to investigate the complaint. The administrative law judge concluded OALJ "has no general jurisdiction over such matters." Watson v. Electronic Data Systems, 2004-LCA-9 (ALJ Jan. 8, 2004).

In Watson v. Electronic Data Systems, 2003-LCA-30 (ALJ Nov. 12, 2003), Complainant filed a complaint against another employer, and DOL responded on the same date that the complaint would not be investigated because the employer was not an H-1B dependant or a "willful violator" under the Act. Although DOL's response indicated the regulations allowed Complainant to file additional information, which arguably appears consistent with 20 C.F.R. § 655.806(a)(2), the administrative law judge concluded the DOL determination was "procedurally deficient" because it did not comply with "the requirements set forth in 20 C.F.R. § 655.815(c)," which provides that interested parties must be notified that they may request a hearing on the matter and that such request must be made within 15 days of the determination. Watson, slip op. @ 4, n. 1.

In the above matters, unlike the instant claim, DOL specifically issued a response to Complainant's complaints informing Complainant that his complaint did "not provide evidence indicating that a violation of the H-1B requirements has occurred." Consequently, DOL was unable to investigate the complaint; however, DOL notified Complainant he could respond with supplemental evidence, namely that the employer was H-1B dependent. As noted above, there is no issue that Complainant received no response from DOL, other than its failure to investigate, which implicitly indicates a decision that Complainant's complaint warranted no investigation. Otherwise, there is no indication DOL acted upon Complainant's complaint.

In Bartsch v. The Regents of the University of California, 2002-LCA-20 (ALJ Mar. 20, 2003), a complainant wrote to DOL's Wage and Hour Division complaining of possible violations of the H1-B provisions of the Act by the University of California, Berkeley. On November 14, 2001, the Wage and Hour Division, Employment Standards Administration, wrote to Complainant acknowledging receipt of his complaint. On July 11, 2002,

Complainant filed a claim with OALJ alleging that the Administrator did not conduct an investigation within the specified time period and had not issued a determination in the matter. Thus, Complainant asserted he was entitled to a hearing before the Office of Administrative Law Judges. Bartsch, slip op. @ 1.

In Bartsch, the administrative law judge noted that labor condition applications are governed by the Act and its implementing regulations and that jurisdiction is vested in OALJ to **review determinations by an Administrator** pursuant to 20 C.F.R. § 655.820. An examination of the regulations indicated that there was "no default provision conferring jurisdiction on [OALJ] where the Administrator fails to issue a determination or does not timely investigate." Additionally, there was nothing in the Act or its implementing regulations which conferred jurisdiction on OALJ to order the Administrator to investigate or issue a determination. Bartsch, slip op. @ 1-2 (citing Hitek Learning Systems, Inc. v. South Carolina Employment Security Commission and USDOL, 2001-JPT-2 (ALJ Jan. 25, 2002); Kroger v. Directorate of Civil Rights, 1999-JTP-20 (ALJ Oct. 27, 1999)).

Further, in Bartsch, the administrative law judge noted that 20 C.F.R. § 655.806 provides the Administrator with "discretion as to whether or not an investigation of a complaint is warranted." The administrative law judge concluded "such jurisdiction would appear to be in the United States District Court." Id. (citing Marathon Oil Co. v. Lujan, 937 F.2d 498, 500 (10th Cir. 1991) (mandamus relief is an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty)).

Insofar as it arguably appears the Administrator has not conducted an investigation within the specified time period and has not issued a determination in this matter, I agree with the analysis set forth in Bartsch, supra, in concluding that the Act and its implementing regulations do not confer jurisdiction on OALJ where the Administrator fails to issue a determination or does not timely investigate. Likewise, I find nothing in the Act or its implementing regulations which confers jurisdiction on OALJ to order the Administrator to investigate or issue a determination.

Notwithstanding an arguable conclusion that the Administrator failed to timely conduct an investigation and render a determination, which does not confer jurisdiction on OALJ to determine the merits of Complainant's complaint, there

is no genuine issue of material fact regarding the Administrator's failure to investigate Complainant's complaint under the Act. As noted above, Complainant's argument that the undersigned should find there was reasonable cause for the Administrator to investigate his complaint implicitly concedes a decision was made by the Administrator not to investigate his complaint, while Respondent similarly contends a determination was made by the Administrator that Complainant's claim was insufficient to warrant an investigation.

In the absence of the Administrator's investigation, 20 C.F.R. § 655.820(b)(1) does not grant OALJ with jurisdiction to review Complainant's complaint. Accordingly, I find there is no genuine issue of material fact regarding the absence of an investigation by the Administrator, and Respondent is entitled to a judgment in its favor as a matter of law.

Additionally, Complainant contends the undersigned has original jurisdiction to review his claim pursuant to 5 U.S.C. § 702, which provides that "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Likewise, he contends the undersigned is authorized under 5 U.S.C. § 706, which authorizes a reviewing court to decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms in an agency action, to hold unlawful and set aside agency actions, findings and conclusions found to be unwarranted by the facts to the extent that the facts are subject to a trial de novo by the undersigned, I find his arguments without merit.

The Administrative Procedure Act's comprehensive provisions for judicial review of agency actions are contained in 5 U.S.C. §§ 701-706. Any person "adversely affected or aggrieved" by agency action is entitled to review thereof, as long as the action is a "final agency action for which there is no other adequate remedy in a court." The standards to be applied on review are governed by the provisions of 5 U.S.C. § 706; however, "before any review at all may be had, a party must first clear the hurdle of [5 U.S.C.] § 701 (a)," which provides that the chapter on judicial review applies except to the extent that: (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. Heckler v. Chaney, 470 U.S. 821, 832-833 (1985) **(an agency's decision not to take an enforcement action is presumed immune from judicial review under 5 U.S.C. § 701(a)(2);** such a decision has

traditionally been "committed to agency discretion," and it does not appear that Congress in enacting the APA intended to alter that tradition"); see also Lincoln v. Vigil, 508 U.S. 182, 190-191 (1993) (5 U.S.C. § 701(a)(2) makes it clear that **"review is not to be had"** in those rare circumstances where the relevant statute **"is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"**) (citing Heckler, supra at 830; Webster v. Doe, 486 U.S. 592, 599-600 (1988); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)).

As noted above, judicial review regarding the Enforcement of H-1B LCAs is precluded where the Administrator determines that an investigation on a complaint is not warranted. 20 C.F.R. § 655.806(a)(2). Moreover, agency action is committed to agency discretion by law. 8 U.S.C. § 1182(n)(2)(A) provides:

> [T]he **Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application** . . . or a petitioner's misrepresentation of material facts in such an application . . . No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The **Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.**

8 U.S.C. § 1182(n)(2)(A)(emphasis added). 8 U.S.C. § 1182(n)(2)(B) provides that "the **Secretary** shall provide, within 30 days after the date such a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described." The Act's implementing regulations grant the Administrator with the authorization to perform "all of the Secretary's investigative and enforcement functions." 20 C.F.R. § 655.800. Pursuant to such authority, the Administrator is afforded discretion to determine whether or not to investigate a complaint, which may **not** be reviewed if the Administrator determines the matter does not warrant an investigation. 20 C.F.R. § 655.806.

Moreover, neither the Act nor its implementing regulations provides a meaningful standard against which to judge the Administrator's exercise of discretion to investigate complaints. Accordingly, I find Complainant's contention that the undersigned should find there was "reasonable cause" for the Administrator to investigate his complaint pursuant to 5 U.S.C. §§ 702 and 706 is without statutory or jurisprudential support.

Additionally, 5 U.S.C. § 702 specifically indicates "nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief **if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.**

As noted above, the Act's implementing regulations set forth the appropriate complaint and investigation procedure by the Administrator as well as the requirements for a hearing before OALJ. Accordingly, I find the plain language of the Act and its implementing regulations expressly and impliedly forbids the relief which Complainant seeks. Likewise, I find OALJ is without jurisdiction to conduct a trial de novo on Complainant's alleged violations, which are expressly provided for under the Act and its implementing regulations which imbue the Administrator with the appropriate authority to investigate Complainant's complaints and render a determination which may be reviewed under the proper circumstances by OALJ. Accordingly, the relief Complainant requests is not authorized under the Act or its implementing regulations.

Alternatively, Complainant, who offers no supporting statutory or jurisprudential authority, contends the issuance of a Notice of Hearing and Pre-Hearing Order by the undersigned divests jurisdiction from the Administrator and confers jurisdiction upon OALJ to consider his complaints. I find his argument without merit.

Pursuant to 20 C.F.R. § 655.820, any interested party desiring **review of a determination issued under §§ 655.805 and 655.815**, including judicial review, shall make such a request for an administrative hearing to the Chief Administrative Law Judge. Pursuant to 20 C.F.R. § 655.835, all interested parties shall then be notified of the date, time and place of the hearing **within 7 calendar days following the assignment of the case**, and all interested parties shall be given at least 14

calendar days notice of such hearing. Insofar as no determination issued under §§ 605.805 and 655.815, the decision to issue a Notice of Hearing, which is a ministerial task in response to a request for hearing, was arguably erroneous.

Further, in the Notice of Hearing and Pre-Hearing Order, it was specifically noted that Complainant requested a hearing on or about February 27, 2004, when he averred Respondent committed violations of the Act "**based on his own investigation.**" At that time, no contrary responses by Respondent were entertained in concluding a hearing would be tentatively scheduled. For the reasons discussed above, OALJ is without jurisdiction to determine Complainant's complaints in the absence of an investigation by the Administrator. Accordingly, the mere issuance of a Notice of Hearing and Pre-Hearing Order which was based solely upon Complainant's "own investigation" does not confer jurisdiction upon OALJ to determine the merits of his complaint, which is properly determined by the Administrator under the Act and its implementing regulations.

In light of the foregoing, there is no genuine issue of material fact regarding the lack of an investigation by the Administrator or a determination pursuant to 20 C.F.R. §§ 655.805 and 655.815 which authorizes interested parties to request a hearing before OALJ pursuant to 20 C.F.R. § 655.820. Accordingly, Respondent is entitled to summary decision as a matter of law.

2. Complainant's Remaining Claims

Assuming **arguendo** that the undersigned could properly exercise jurisdiction over Complainant's complaint, I find there are no genuine issues of material fact regarding Complainant's remaining claims and Respondent is entitled to summary decision on those claims.

Prefatorily, Complainant argues Respondent bears the burden of proof in the instant matter, relying on the "Board of Alien Labor Certification Appeals Judges' Benchbook" (the Benchbook) and on 20 C.F.R § 655.740(c).

The Administrative Procedure Act provides, "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Further, 20 C.F.R. § 655.820(b)(1) provides that, in the event a hearing before an administrative law judge is properly requested, the

party requesting the hearing shall be the "prosecuting party," while the employer shall be the "respondent."

Here, Complainant requests OALJ to exercise jurisdiction and issue an order casting Respondent liable for various obligations and penalties related to alleged violations under the Act. Consequently, Complainant, as the proponent of the proposed order bears the burden of proof.

The Benchbook citation on which Complainant relies discusses 20 C.F.R. § 656.2(b), which in turn considers the procedure for applying for visas or other documentation required to enter the United States pursuant to 8 U.S.C. § 1361. (Dept. of Labor, United States Department Of Labor Board Of Alien Labor Certification Appeals Judges' Benchbook Second Edition - May 1992 <http://www.oalj. dol.gov/PUBLIC/INA /REFRNC/dbch7.htm> (accessed Apr. 2, 20002)). 20 C.F.R. § 656.2(c)(3) specifically notes that the regulations under Part 656 apply "only to labor certifications for permanent employment." Complainant's reliance upon 20 C.F.R. § 656 is misplaced, because there are no labor certifications for permanent employment at issue in the instant matter.

Further, 20 C.F.R. § 656.2 discusses the procedural requirements for obtaining necessary documentation for entry into the United States and the burden placed upon applicants to establish their eligibility to receive such documentation. Consequently, 20 C.F.R. § 656.2(b) is not dispositive of Respondent's evidentiary burden in the instant matter.

Complainant's reliance upon 20 C.F.R § 655.740(c) for the proposition that Respondent bears the evidentiary burden of proof in the instant matter is equally misplaced. 20 C.F.R. § 655.740 specifically discusses actions taken by a Certifying Officer on a labor condition application submitted for filing. 20 C.F.R. § 655.740(b) expressly provides that any challenges to labor condition applications shall be processed pursuant to Subpart I, or 20 C.F.R. §§ 655.800, et seq. 20 C.F.R. § 655.740(c) simply establishes DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. Rather, the burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application. 20 C.F.R. § 655.740(c).

As noted by Respondent, it is undisputed that no challenge to any of Respondent's labor condition applications has ever

been processed by an Administrator pursuant to 20 C.F.R. §§ 655.800, et seq. Accordingly, I find Respondent is not required to carry the burden of proof in the instant matter pursuant to 20 C.F.R. § 655.740(c).

However, in consideration of the burdens placed upon the parties in this matter, which involves opposing motions for summary decision, I find there are no genuine issues of material fact and Respondent is entitled to summary decision as a matter of law for the reasons that follow.

a. Statute of Limitations

Pursuant to 20 C.F.R. § 655.806(a)(5), "A complaint must be filed within 12 months after the latest date on which the alleged violation(s) were committed . . . ." Complainant's H-1B Nonimmigrant Information Form indicates Respondent's alleged violations occurred on May 23, 2002, June 25, 2002, and August 29, 2002. Complainant's February 4, 2004 complaint was filed approximately more than 17 months after the August 29, 2002 violation. Consequently, I find Complainant's February 4, 2004 complaint is time-barred under 20 C.F.R. § 655.806(a)(5), and his complaint must fail as a matter of law.

Complainant contends he filed an "Original Claim for Relief [a.k.a. complaint letter]" on May 27, 2003, which is more than twelve months after Respondent's alleged violation on May 23, 2002; however, he offered no copies of his May 27, 2003 complaint nor any indication such a complaint was actually received by any office. Likewise, Complainant did not submit any resulting determinations which were issued by the Administrator in response to the alleged May 27, 2003 complaint. Similarly, his H-1B Nonimmigrant Information Form does not appear to have been received by DOL on any date. Moreover, Complainant submitted no copies of any request for a hearing within 15 days after which any previous decision by the Administrator possibly issued, pursuant to 20 C.F.R. § 655.820(d). Consequently, I find his pleadings related to earlier complaints are not properly supported in this matter, which involves opposing summary decision motions.

I agree with Respondent that Complainant's February 4, 2004 pleading, which is characterized by Complainant as a "Supplemental Claim," may not be used to circumvent the twelve-month period of limitation set forth at 20 C.F.R. § 655.806(a)(5). Notably, the "basis" of the "Supplemental Claim" is Complainant's "recent" discovery of LCA data which

Complainant admits was not discovered until the week of February 4, 2004. It follows that the recent evidentiary discovery was **not** the basis of Complainant's "Original Claim for Relief [a.k.a complaint letter]," which was allegedly filed on May 27, 2003. Accordingly, Complainant's contention supports a conclusion that his pleadings prior to his recent discovery were without factual basis, which would further support an arguable conclusion that the Administrator properly decided not to investigate his earlier complaints, if in fact Complainant actually filed any complaints with DOL prior to February 4, 2004.

Similarly, Complainant contends he filed an "original complaint" in Dallas County Small Claims Court "for the purpose of obtaining discovery" on or about May 31, 2002, which predates Respondent's alleged violations on June 25, 2002 and August 29, 2002. Respondent generally admits Complainant filed his complaint on or around May 24, 2002. No copies of any pleadings or any decisions which issued in that matter were attached with any pleadings in the instant matter. Complainant appears to argue his complaints submitted on or after February 4, 2004 should be considered as timely filed under the theory of equitable tolling because he mistakenly filed his complaint in the wrong forum.

Complainant offers no authoritative guidance for a conclusion that his filings on or after February 4, 2004 should be considered as timely filed under a principle of equitable tolling. 20 C.F.R. § 655.806(a)(5) specifically provides a complaint must be filed "not later than 12 months after the latest date on which the alleged violations were committed . . . or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA." There is no provision for the application of equitable tolling under the Act.[12]

[12] In some matters, Congress has explicitly intended the doctrine of equitable tolling to apply. For instance, in matters arising under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305, which provides employee protection from discrimination in protected activity pertaining to commercial vehicle safety and health matters, the implementing regulation at 29 C.F.R. § 1978.102(d)(3) expressly provides, "[T]here are circumstances which will justify tolling of the 180-day period [to file complaint] on the basis of recognized equitable principles or because of extenuating circumstances . . . ." 29 C.F.R. § 1978.102(d)(3) (2003).

Nevertheless, the doctrine of equitable tolling is occasionally deemed appropriate in instances where:

> (1) the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his or her rights; or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Smith v. American President Lines, Ltd, 571 F.2d 102, 109 (2d Cir. 1978); School District of Allentown v. Marshall, 657 F.2d 16, 19-20 (3rd Cir. 1981). The restrictions on equitable tolling must be scrupulously observed. Smith, supra; Allentown, supra at 19; Mohasco Corp. v. Silver, 447 U.S. 807, 825-826 (1980) ("[i]t is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction").

There is no indication Respondent actively misled Complainant respecting the cause of his action. Complainant argues he "most likely would have filed" his complaint sooner had Respondent provided proper notice. As discussed more thoroughly below, Respondent met or exceeded the notice requirements under the Act and its implementing regulations, but Complainant clearly did not file the instant complaint timely. Likewise, his poorly supported opinion that Respondent conspired with ESA Wage and Hour Division against U.S. workers does not establish he was "actively misled" by Respondent respecting his cause of action. Likewise, there is no indication Complainant was prevented in some extraordinary way from asserting his rights. He presently claims he was able to assert his rights on May 31, 2002 in Dallas County Small Claims Court and again on May 27, 2003 with DOL prior to his filings with DOL and OALJ from February 2004 through the present and continuing.

Similarly, the record does not support a conclusion that Complainant's pleadings filed in the Dallas County Small Claims Court raised the "precise statutory claim" in issue. As noted above, Complainant contends the instant complaint stems from his recent discovery of LCA filings which were discovered nearly two years after his alleged "original complaint" was filed "for discovery purposes." Similarly, there is no indication that the discovery remedy Complainant sought in the Dallas County Small Claims Court constitutes the same remedies, including equitable relief, requested in this forum. Accordingly, I find

Complainant's alleged pleadings in the Dallas County Small Claims Court do not establish his complaints on or after February 4, 2004 should be considered as timely filed.

As noted above, the parties do not dispute that the record includes no determination by the Administrator pursuant to 20 C.F.R. §§ 655.805 and 655.815. At best, Complainant offered his opinion, based on his independent investigation which culminated in his discovery of: (1) an October 22, 2003 "Fact Sheet" from U.S. Citizenship and Immigration Services, which ostensibly forms the basis of Complainant's histogram indicating H-1B Petitions filed and approved nationally during fiscal years 2000 through 2003 have increased; (2) a January 14, 2004 Internet "TechWeb News" article, which was apparently accessed on January 15, 2004, indicating "outsourcing" domestic jobs overseas to areas with lower prevailing wage rates might have an adverse impact on domestic wage rates; and (3) LCA filings Complainant found during the week of February 4, 2004 which Complainant contends "seem to support my allegations." Complainant's position that his complaint warrants an investigation because he recently discovered LCA data in 2004 related to alleged 2002 employment violations which occurred more than twelve months prior to his February 4, 2004 complaint is clearly not authorized under 20 C.F.R. § 655.806.

In light of the foregoing, I find no genuine issue exists regarding the filing of Complainant's February 4, 2004 complaint, which is not timely filed pursuant to 20 C.F.R. § 655.806(a)(5). Likewise, I find no genuine issue exists regarding whether Complainant was "actively misled" by Respondent respecting his cause of action or whether his ability to assert his rights was interfered with in some extraordinary way. Similarly, I find no genuine issue exists regarding the "precise statutory claim in issue" and the matters allegedly filed prior to February 4, 2004. I find Respondent is entitled to summary decision as a matter of law, and Complainant's complaint must be denied.

b. Alleged Violations under 20 C.F.R. §§ 655.805(a)(7) and (a)(9)

Complainant's complaints that Respondent committed violations in contravention of 20 C.F.R. §§ 655.805(a)(7) and (a)(9) regarding recruitment and displacement of U.S. Worker provisions of 20 C.F.R. §§ 655.738 and 655.739 are without merit because 20 C.F.R. §§ 655.738 and 655.739 specifically apply to employers which are defined under Section 655.736 as: (1) an H-

1B dependent employer which has at least 51 full-time equivalent employees who are employed in the U.S. and which employs H-1B nonimmigrants in a number that is equal to **at least 15 percent of the number of such full-time equivalent employees**; or (2) a "willful violator," which is an employer who has been **found** by DOL or DOJ on or after October 21, 1998, to have willfully violated their H-1B obligations within a certain five-year period.

Respondent contends it is not an H-1B dependent employer. Specifically, Respondent provided evidence indicating it has employed less than 500 H-1B workers while continuously employing "over 100,000 workers" throughout 2002, 2003 and 2004. Accordingly, Respondent's undisputed and supported contention establishes its H-1B workers constitute "less than .5% of its workforce." Likewise, Respondent provided evidence and pleadings indicating it has never been adjudicated as a "willful violator" by DOL or DOJ, and Complainant does not dispute Respondent's contentions in any of his pleadings. Accordingly, I find that Respondent is neither an "H-1B dependent" employer or a "willful violator," and no genuine issue exists regarding its alleged violations under 20 C.F.R. §§ 655.805(a)(7) and (a)(9). Respondent is therefore entitled to summary decision as a matter of law.

c. Alleged Violations under 20 C.F.R. §§ 655.805(a)(3) and an Alleged Willful Misrepresentation Related to 20 C.F.R. § 655.730(d)(2)

Complainant contends Respondent violated 20 C.F.R. § 655.805(a)(3) involving the failure to "provide working conditions as required under §655.732," which further provides the "working conditions" requirement shall be satisfied when the employer:

> **affords working conditions to its H-1B nonimmigrant employees** on the **same basis** and in accordance with the **same criteria as** it affords to **its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees.** Working conditions include matters such as **hours, shifts, vacation periods, and benefits** such as seniority-based preferences for training programs and work schedules.

20 C.F.R. § 655.732(a) (2003).

Complainant presented no facts indicating Respondent affords working conditions to its H-1B nonimmigrant employees on a disparate basis or in derogation of the same criteria as it affords to its "U.S. worker employees who are similarly employed," and "without adverse effect" upon the working conditions of "such U.S. worker employees." Accordingly, I find his motion for summary decision is not properly supported.

On the other hand, Respondent submitted the declaration of its paralegal who works with its personnel department, copies of various ETA 9035E "Electronic Filing of Labor Condition Application for the H-1B Nonimmigrant Visa Program" Forms, posting notices, job postings and an e-mail to complainant generally indicating Respondent, an equal opportunity employer, affords working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. (Resp. Motion for Summary Decision, exhibit nos. 2 and 4).

Complainant, who was informed of Respondent's recruitment procedures when he applied for employment, appears to argue, based on a histogram indicating levels of H-1B workers over time and an Internet publication related to "outsourcing" domestic jobs to foreign countries where prevailing wages are lower, that he was "adversely affected" by Respondent's decision to hire H-1B workers. As noted above, there are no genuine issues that Respondent is an H-1B dependent or that Respondent has ever been found by DOL or DOJ to be a "willful violator." There is no issue that Respondent "outsourced" jobs to foreign countries; rather, the instant claim specifically concerns hiring H-1B workers for domestic jobs provided by an equal-opportunity employer which is required under the Act to provide working conditions on the same basis and in accordance with the same criteria as it affords its U.S. worker employees who are similarly employed.

Insofar as it appears Complainant contends he was "adversely affected" because he was displaced or was not recruited in good faith by Respondent as a result of its H-1B employment violations, I find his argument restates his contentions that Respondent violated 20 C.F.R. §§ 655.805(a)(7) and (a)(9) regarding the recruitment and displacement of U.S.

Worker provisions of 20 C.F.R. §§ 655.738 and 655.739. As noted above, his argument must fail because those provisions of the Act do not apply to Respondent.

Moreover, there is no issue that any "U.S. worker employee," who was similarly employed by Respondent at any time during the period of alleged LCA violations, is identified or otherwise associated with the instant complaint. I find Respondent is entitled to summary decision as a matter of law regarding Complainant's unsupported contentions that Respondent violated 20 C.F.R. § 655.805(a)(3).

Similarly, Complainant contends Respondent's LCA attestations that it would provide working conditions for nonimmigrants that would not adversely affect similarly employed workers under 20 C.F.R. § 655.730(d)(2) were a willful misrepresentation. For the reasons discussed above, I find his argument is without merit, factually unsupported, and Respondent is entitled to summary decision as a matter of law regarding an alleged misrepresentation involving 20 C.F.R. § 655.730(d)(2).

d. Alleged Violations under 20 C.F.R. § 655.805(a)(5)

Complainant argues Respondent failed to provide notice of its filings of LCAs under 20 C.F.R. § 655.805(a)(5), as required by 20 C.F.R. § 655.734, which explains proper notification under the LCA includes: (1) a statement on the notification directing any related complaints to the Wage and Hour Division of DOL; (2) posting an LCA notice in at least two conspicuous locations at each place of employment whether any H-1B nonimmigrant will be employed; (3) posting notices in their appropriate locations on or within 30 days before the date the LCA is filed; and (4) leaving LCA notices in their appropriate locations for a total of 10 days. 20 C.F.R. § 655.734(a)(1)(ii).

Complainant, who recited the notice criteria set forth under the regulations, offered no evidence that Respondent failed to comply with the Act or its implementing regulations. On the other hand, Respondent submitted the declaration of its paralegal who works with its personnel department, copies of various ETA 9035E "Electronic Filing of Labor Condition Application for the H-1B Nonimmigrant Visa Program" Forms and associated posting notices, which establish proper notice was provided for each LCA identified in Complainant's complaint pursuant to 20 C.F.R. § 655.734.

Notably, two of Respondent's three H-1B notices at issue exceed the ten-day posting requirement under the regulations. Specifically, Respondent posted its H-1B notice for one of its analyst jobs from August 26, 2002 through September 10, 2002, which is a period of 15 days. Respondent's notice related to the Technology Project Manager job was posted from May 23, 2002 through June 5, 2002, a period of 13 days. In all of its posting notices, which were appropriately placed at their proper locations at its principal places of business, Respondent provided complete disclosure of the procedural requirements for filing complaints under the Act. Despite Respondent's compliance with the Act, there is no record of any complaint filed prior to February 2004 by Complainant, who indicated he "most likely would have filed" his complaint with the appropriate office "nearly two years ago," had Respondent provided proper notice.

Complainant appears to argue that he should receive individual hard copy notice regarding any anticipated H-1B filing; however, such a requirement is clearly not authorized under the Act. Likewise, Complainant appears to argue he should receive individual electronic notice because Respondent is required to electronically post LCA filing notices. 20 C.F.R. § 655.734(a)(1)(ii) provides LCA filing notification shall be provided **either** by hard copy notice at specified work locations or by electronic notice.

Complainant clearly does not dispute that Respondent posted the required hard copy notice pursuant to the requirements of the Act. Consequently, there is no issue regarding Respondent's proper notice under the Act, and Respondent is entitled to summary decision as a matter of law regarding notice under 20 C.F.R. §§ 655.805(a)(5) and 655.734.

e. Alleged Violations under 20 C.F.R. §§ 655.805(a)(1), (a)(10) and (a)(16)

Complainant generally contends Respondent's attestations in its LCA filings and its alleged violations under the regulations described above amount to willful misrepresentations of material facts under 20 C.F.R. § 655.805(a)(1). Having found his unsupported arguments are without merit and that there is no genuine issue of material fact regarding the alleged violations, which should be decided in Respondent's favor as a matter of law, I find Respondent is entitled to summary decision as a matter of law regarding alleged violations of 20 C.F.R. 655.805(a)(1).

Likewise, Complainant contends Respondent willfully violated 20 C.F.R. §§ 655.805(a)(3), (a)(5) and (a)(9), "leading to a violation" of 20 C.F.R. §§ 655.805(a)(10) and (a)(16). Findings that there is no genuine issue of material fact regarding Sections 655.805(a)(3), (a)(5), (a)(7) and a(9) and that Respondent is entitled to summary decision as a matter of law regarding those issues, render Complainant's contentions moot. Accordingly, I find Respondent is entitled to summary decision as a matter of law regarding alleged violations of 20 C.F.R. §§ 655.805(a)(10) and (a)(16).

2. Complainant's Original Motion to Determine the Sufficiency of the Respondent's Answer

Complainant's Original Motion to Determine the Sufficiency of the Respondent's Answer was filed during the pendency of the instant Summary Decision determination. A finding that Summary Decision in favor of Respondent is compelled on the facts and pleadings submitted renders Complainant's motion moot and pretermits a discussion of Respondent's discovery responses.

3. Respondent's Alleged Misuse of Consumer Information and Unlawful Consideration of Complainant's Debtor Status in Employment Decisions

Complainant seeks remedies for Respondent's alleged misuse of consumer information data and unlawful consideration of Complainant's debtor status in its employment decisions. Notably, Complainant contends these issues are the subject of a civil suit in another forum. I find no authorization under the Act to grant the relief requested. Accordingly, Complainant's request for summary decision related to Respondent's alleged misuse of consumer information data and unlawful consideration of Complainant's debtor status in its employment decisions is **DENIED.**

IV. ORDER

Based upon the foregoing, and upon careful consideration of the entire record, Complainant's Motion for Summary Decision is **DENIED.** Respondent's Motion for Summary Decision is **GRANTED.** Accordingly, the instant matter/claim is **DISMISSED** with prejudice.

In view of the foregoing, the formal hearing scheduled in this matter for May 11, 2004, is hereby **CANCELLED.**

ORDERED this 12th day of April, 2004, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 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, Frances Perkins Building, 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.