U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 11 February 2005

BALCA Case Nos.: 2005-INA-1 through 5
ETA Case Nos.: P2003-MO-05421170, P2003-MO-05421171, P2003-MO-05421172, P2003-MO-05421174, P2003-MO-05421175

In the Matters of:

SIEMENS ENERGY AND AUTOMATION, INC.,
Employer,

on behalf of

NICU POSTOLACHE, JAVIER VILLEGAS, INGO MAGURA, HERBERT ULLMANN, RAYMOND DOLD,
Aliens.

Certifying Officer: Marie C. Gonzalez
Chicago, Illinois

Appearances: David C. Whitlock, Esquire
Fisher & Phillips LLP
For the Employer and the Aliens

Charles D. Raymond, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
R. Peter Nessen, Attorney
For the Certifying Officer

BEFORE: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

ORDER DENYING INTERLOCUTORY REVIEW AND DISMISSING APPEALS

These alien labor certification matters arise under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.

On October 5, 2004, the Board received the Employer's request for review of the Certifying Officer's ("CO") denial of the Employer's request for Reduction in Recruitment processing in the above-captioned cases. The Employer stated that the CO had refused to forward their request for review and the Employer was now appealing directly to the Board. The Employer requested review of the denials by the Board, rather than the remand of the applications to the state agency for regular processing.

Upon docketing the matters, the Board requested briefs on the issue of whether the Board has the authority to consider interlocutory appeals and whether the instant cases provide grounds for such appeals.

DISCUSSION

Reduction in Recruitment (or "RIR") processing "is an alternative to the basic labor certification process in which a CO may reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at the prevailing wage and working conditions. 20 C.F.R. § 656.21(i)." *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003).

The regulation at 20 C.F.R. § 656.26(a) states: " If a labor certification is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals...." Thus, on its face, the regulation limits Board review to labor certification applications that have been "denied."

The denial of an RIR is usually not the final decision of the CO. Rather, such a denial

usually would result in the remand of the application by the CO to the local job service for regular processing, *Compaq Computer, Corp., supra*, unless the Employer fails to comply with a deadline set by the CO for responding to the CO's inquiries about the RIR request, *Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004), or the application is so fundamentally flawed that a remand would be pointless, *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). In the cases before us, it is clear that the CO's intention was to remand for regular processing rather than to deny the applications outright. Accordingly, Employer's request for BALCA review is a request for interlocutory review.

The Employer argues that the source of BALCA authority to entertain an interlocutory appeal is found in the Administrative Procedure Act at 5 U.S.C. § 706(2)(A) (review of agency action under the arbitrary, capricious and abuse of discretion standard) and the BALCA panel decision in *Plastic Design, Inc.*, 1999-INA-170 (June 10, 1999).

Section 706 of the Administrative Procedure Act sets out the scope of review of agency action by the Judicial Branch of the federal government rather than the scope of review for agency review boards in the Executive Branch. Thus, we find that this section of the APA is not relevant to defining the scope of BALCA's review authority.

Moreover, we find that the panel's ruling in *Plastic Design* does not support BALCA review of interlocutory rulings of the CO. Rather, the ruling in *Plastic Design* was grounded in the principle that "actions during the processing of an application at the CO level that were tantamount to a denial of an application ... establish BALCA jurisdiction." The CO's denial of an RIR request and remand for further processing clearly is not tantamount to a denial of the application, but, as the CO states in her brief, "simply part of the process by which a final decision is eventually made." CO's Brief at 3-4.

Nonetheless, we observe that the Secretary of Labor held in the context of "whistleblower" cases arising under 29 C.F.R. Part 24, that the fact that Part 24 is silent on

interlocutory appeals does not foreclose them. The Secretary observed that 29 C.F.R. § 18.29(a) authorizes an ALJ to turn to the Rules of Civil Procedure for the United States District Courts, and indicated that an ALJ could certify a question to the Secretary for interlocutory review, as a district court may do in certifying a question to a court of appeals under 28 U.S.C. § 1292(b) (1982). *Plumley v. Federal Bureau of Prisons*, 1986-CAA-6 (Sec'y Apr. 29, 1987). The Administrative Review Board, which was delegated authority to review Part 24 cases after the *Plumley* decision, likewise has recognized that interlocutory appeals may be available under the Federal Rules in circumstances that are not specifically addressed by the 29 C.F.R. Part 18 Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, although such appeals are disfavored.1 *Erickson v. U.S. Environmental Protection Agency, Region 4*, ARB No. 04-071, ALJ No. 2004-CAA-7 (ARB Apr. 30, 2004); *Greene v. United States Environmental Protection Agency*, ARB No. 02-050, ALJ No. 2002-SWD-1 (ARB Sept. 18, 2002).

One type of interlocutory appeal recognized by the ARB involves the certification of an issue by the presiding ALJ. As there has been no such certification, this does not apply to the instant circumstances.

The other type of interlocutory review recognized by the ARB is grounded in 28 U.S.C.A. § 1291. In *Erickson*, a case in which the ARB was considering whether to entertain an interlocutory appeal of an ALJ's decision not to recuse himself, the ARB wrote:

> The Board's general rule against accepting appeals from interlocutory orders parallels the standard that has developed in the Federal courts regarding Section 1291. Similar to the Federal appellate courts, the Board applies the finality requirement in the interest of "'combin[ing] in one review all stages of the proceeding that effectively may be reviewed and corrected if and when'" a decision on the merits of the case is issued by the administrative law judge. *See Greene,* slip op. at 4 (quoting *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S.

1 Organizationally, BALCA is part of the U.S. Department of Labor, Office of Administrative Law Judges. The Part 18 rules of practice and procedure are applicable to BALCA cases to the extent that they are not inconsistent with the labor certification regulations at 20 C.F.R. Part 656. 29 C.F.R. § 18.1(a).

> 541, 546 (1949)). The Board also applies the collateral order exception allowed by the *Cohen* standard, and will hear appeals from orders rendered in the course of the proceeding before the administrative law judge that meet certain criteria. Specifically, the collateral order exception accommodates the review of orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978); *see Greene,* slip op. at 4.
>
> As discussed by the Board in *Greene*, the question of whether or not an administrative law judge should have disqualified himself is reviewable on appeal with the decision on the merits issued by an administrative law judge. *See Greene,* slip op. at 4 and cases there cited. Consequently, an order of recusal, like that issued by the ALJ on March 16, 2004, does not qualify for immediate review under the collateral order exception to the *Cohen* finality doctrine.

BALCA has also employed the Federal Rules by reference through 29 C.F.R. Part 18.1(a) in circumstances where neither Part 18 nor the Part 656 regulations addressed a procedural issue. *See, e.g., Lignomat USA, Ltd*., 1988-INA-276 (Jan. 24, 1990) (*en banc*) (*den recon*) (referencing Federal Rule of Civil Procedure 59(e) to set the time limit for filing a motion for reconsideration by BALCA). Thus, we find that Part 656's silence concerning interlocutory appeals does not necessarily foreclose them.

We do not need, however, to resolve the issue of whether BALCA has implicit authority to consider an interlocutory appeal because, assuming arguendo that such authority exists, the circumstances of the cases presented for review do not merit departing from the policy disfavoring interlocutory appeals. Like the ARB's ruling in *Erickson* that an ALJ's ruling on a motion to recuse is reviewable with a later decision on the merits and therefore not appropriate for interlocutory review, a CO's decision not to grant an RIR request is reviewable on appeal if the CO later decides not to grant a labor certification after regular processing. Accordingly, assuming that BALCA has the authority to entertain interlocutory review petitions, we would deny the instant petition as failing to meet the criteria for an interlocutory appeal.

Based on the foregoing, the Employer's request for interlocutory review is **DENIED** and these appeals are **DISMISSED**.

SO ORDERED.

A

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.