U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ACTING ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

COMPLAINANT,

v.

TEN WEST CATTLE, INC.,

RESPONDENT.

ARB CASE NO. 2020-0059

ALJ CASE NO. 2018-TAE-00035

DATE: September 14, 2020

Appearances:

For the Complainant:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Rachel Goldberg, Esq. and Katelyn J. Poe, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For Respondent:
Kara E. Stockdale, Esq.; *Baird Holm LLP*; Omaha, Nebraska

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Heather C. Leslie, and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the H-2A temporary agricultural worker program of the Immigration and Nationality Act ("INA") and the H-2A

implementing regulations.[1] Respondent Ten West Cattle, Inc. is an H-2A employer that also hosts J-1 visa holders participating in internships under the Exchange Visitor Program. Complainant, Acting Administrator, Wage and Hour Division, United States Department of Labor investigated Respondent's operations and charged Respondent with seven violations of the H-2A Program's requirements.

Respondent requested a hearing before an Administrative Law Judge (ALJ). Prior to any hearing the parties submitted motions for summary decision to address the issue of whether a J-1 visa holder can be considered a non-H-2A visa holder who is engaged in "corresponding employment" as defined by the H-2A regulations. On June 30, 2020, the ALJ issued an Order Granting Complainant's Partial Motion for Summary Decision and Denying Respondent's Cross Motion for Summary Decision (Order) holding that it is possible for a J-1 visa holder to be engaged in corresponding employment for purposes of the H-2A Program. On July 29, 2020, Respondent filed a Petition for Review of the Order. Because the ALJ has not yet issued a decision on the merits in this case, Respondent's petition is for interlocutory review (i.e., review of a non-final decision).

The Secretary of Labor and the Board have repeatedly held that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.[2] Although the Secretary has given the Board discretion to consider interlocutory appeals, such discretion may only be exercised in "exceptional circumstances."[3]

When a party seeks review of an ALJ's interlocutory order, the Board has elected to look to the interlocutory review procedure provided in 28 U.S.C. § 1292(b). The first step in this process is to have the ALJ certify the interlocutory issue for appellate review.[4] But even if a party has failed to obtain interlocutory certification, the ARB may also consider interlocutory appeals under the "collateral order"

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[1] *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 8 U.S.C. § 1188(g)(2) (2000), 20 C.F.R. § 655, Subpart B (2019); 29 C.F.R. § 501 (2019).

[2] *See, e.g., Kim v. SK Hynix Memory Sols.,* ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 3 (ARB Jan. 28, 2020).

[3] Secretary's Order No. 01-2020, § 5(b)(69).

[4] *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2015); *Johnson v. U.S. Bancorp*, ARB No. 2011-0018, ALJ No. 2010-SOX-00037, slip op. at 4 n. 15 (ARB Mar. 14, 2011).

exception.[5] To fall within the "collateral order" exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[6] The appeal must meet all of these criteria.

Respondent did not ask the ALJ to certify this case for appeal as provided in 28 U.S.C. § 1292(b). And Respondent's assertion that review is required to resolve a split in authority between ALJs on the issue of coverage and thereby provide guidance to employers does not constitute an exceptional circumstance warranting interlocutory review.[7] Therefore, to consider this appeal, the Board would need to determine that the Order falls within the collateral order exception.

The Order addressed whether J-1 visa holders may, generally, be engaged in corresponding employment under the H-2A regulations and not whether Respondent's J-1 visa holders were in fact engaged in corresponding employment. The question of whether J-1 visa holders may be engaged in corresponding employment is not separate from the merits of WHD's claims against Respondent but is instead central to the case.

Resolving the issue of whether the Respondent's J-1 visa-holding employees are subject to the regulations governing H-2A workers requires specific findings of fact not before us. The ALJ held that it was premature to address whether those employees were engaged in corresponding employment because "the Administrator has objected to Respondent's presentation of facts beyond those in the parties' Stipulated Facts as uncontroverted given the lack of discovery in this matter" and "discovery is necessary for the development of facts that may be presented on the question of whether the J-1 visa holders employed by Respondent were, or were not, engaged in 'corresponding employment.'"[8]

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[5] *See, e.g., Jordan v. Sprint Nextel Corp*., ARB No. 2006-0105, ALJ No. 2006-SOX-00041, slip op. at 3, citing *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 546 (1949)).

[6] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

[7] *See* Ten West Cattle, Inc.'s Response to Order to Show Cause at 3-6.

[8] Order at 8. The ALJ instead held that "on the parties' stipulated facts, the J-1 visa holders employed by Respondent in this case were hired for purposes of the common law of agency." *Id*.

Questions of employee coverage are merits issues that are fully reviewable upon appeal of a final decision of the ALJ.[9] In sum, Respondent has failed to either show that the Order falls within the collateral order exception or present exceptional circumstances which persuade the Board to consider the interlocutory appeal presented. We therefore **DENY** Respondent's Petition for Review.

SO ORDERED.

[9] *Lindner v. CitiMortgage, Inc.*, ARB No. 2018-0047, ALJ No. 2017-CFP-00007, slip op. at 4 (ARB Feb. 25, 2020).