UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 17, 1993

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding OCAHO Case No. 92A00272
POWER OPERATING COMPANY, INC. OSCEOLA MILLS, PENNSYLVANIA Respondent.	)	

ORDER DENYING REQUEST FOR CERTIFICATION

On September 2, 1993, respondent sent a letter via facsimile to the undersigned, in which it advised that it intended to secure the depositions of Allen LeGrand, Albert LeGrand, Robert J. Dillen, Larry F. Foster, and James Supenia on September 14 and 15, 1993, and requested that the undersigned issue subpoenas to each of the individuals for that purpose.

On September 2, 1993, those subpoenas were issued.

On that date, also, the undersigned issued an Order Extending Hearing Date, stating therein:

> ...because the summary decision motion currently under consideration is potentially dispositive of the issue of respondent's liability and may render a hearing in this matter unnecessary, the hearing date is extended generally, pending ruling on complainant's summary decision motion. If a hearing is necessary, a prehearing conference will be held on the earliest convenient date after such time as the undersigned has ruled on complainant's motion.

On September 10, 1993, complainant filed a Motion for Protective Order and Response to Request for Subpoena, asserting therein that

to permit the depositions at issue would require complainant to attend depositions that may prove to be unnecessary. In that motion, complainant also requested that those depositions not be taken. Complainant also requested a prehearing conference to discuss this issue.

On September 10, 1993, also, respondent filed a return of service for the subpoenas issued on September 2, 1993. Respondent noted therein that it had forwarded the pertinent mileage and witness fees to each witness.

On September 10, 1993, also, respondent filed its reply to complainant's Motion for Protective Order, asserting therein that there is no basis for the issuance of a protective order under the circumstances presented by the government's motion, and asserted generally that cancellation of the depositions would result in expense and unspecified prejudice to respondent.

On September 10, 1993, also, the undersigned held a prehearing conference with counsel for both parties during which respondent's counsel contended that there was no provision for complainant's motion under the procedural regulations, but did not assert that his client firm would be prejudiced in the event that complainant's motion was granted. The undersigned informed the parties that a ruling on complainant's summary decision motion should be issued within 10 days, and in view of that fact the scheduled depositions were not to be taken, pending the ruling on complainant's Motion for Summary Decision.

Shortly thereafter, and on the same date, respondent requested another prehearing conference, to discuss a potential motion for costs. That prehearing conference was convened on the afternoon of September 10, 1993.

At the second prehearing conference, respondent's counsel requested a reconsideration of the order of the undersigned at the first prehearing conference, which in effect canceled the depositions scheduled to be taken on September 14 and 15, 1993, on the ground that complainant's Motion for Protective Order had not been timely filed.

In response, complainant's counsel stated that respondent had noticed the depositions at issue directly before the Labor Day

weekend, and contended that it would be burdensome for the parties to go forward with the depositions at this time because they may prove to be unnecessary, pending the ruling on the Motion for Summary Decision.

Complainant's counsel also stated that he would request that the potential deponents return the mileage and witness fees which had been tendered by respondent.

The pertinent procedural regulation governing protective orders, 28 C.F.R. 68.18(c), provides, in pertinent part:

> Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge may make any order which justice requires to protect a party from...undue burden or expense, including the following:
>
> (1) The discovery not be had;
> (2) The discovery may be had only on specified terms and conditions...

This provision parallels the rule governing protective orders in federal courts, F.R.C.P. 26(c). For this reason, reference to federal case law interpreting that rule is instructive. Kamal-Griffin v. Cahill, Gordon & Reindel, 3 OCAHO 487 at 5 (2/11/93).

The granting of protective orders is within the discretion of the trial court and may be reversed only by a clear showing of abuse of discretion. See Gallella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973). See also In re Penn Cent. Sec. Litig., 347 F. Supp. 1347, 1348 (E.D. Pa. 1972) (court, in its discretion, may issue orders for the protection of parties in the taking of depositions).

Inherent in the power of the trial court to grant protective orders is that of issuing orders staying discovery pending rulings on dispositive motions. See Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir. 1987); Jarvis v. Regan, 833 F.2d 149, 155 (9th Cir. 1987); Hachette Distr., Inc. v. Hudson County News Co., 136 F.R.D. 356, 358 (E.D.N.Y. 1991).

In that connection, a protective order staying discovery pending determination of a potentially dispositive motion should not be granted if the order will prejudice the non-moving party. See Wood v. McEwen, 644 F.2d 797, 801-802 (9th Cir. 1981), cert. denied, 455 U.S. 942 (1982).

In that connection, respondent has failed, despite three opportunities to have done so, to specify how it has been prejudiced by having these depositions stayed, except to note that it has tendered the required mileage and witness fees to the five deponents. It is to be noted that complainant's counsel has offered to arrange that those fees be returned to respondent, thus avoiding the sole ground of prejudice alleged to date.

Moreover, a protective order staying discovery should be issued only when, as here, the potentially dispositive issues under consideration are questions of law, and not of fact. Jarvis, 833 F.2d at 155; Florsheim Shoe Co. v. United States, 744 F.2d 787, 797 (Fed. Cir. 1984); Hachette, 136 F.R.D. at 358.

In the summary decision motion under consideration, only the legal conclusions to be drawn from the undisputed facts in this case are at issue, and are potentially dispositive of this matter.

Accordingly, on September 10, 1993, because respondent failed to allege specific prejudice resulting therefrom, and for good cause shown, the undersigned issued an Order granting complainant's Motion for Protective Order, in accordance with the provisions of 28 C.F.R. §68.18(c).

On September 13, 1993, respondent's counsel requested that the undersigned certify the Order granting complainant's motion for protective order, dated September 10, 1993, for review by the Chief Administrative Hearing Officer.

The applicable procedural regulations provide that an administrative law judge in a case arising under 8 U.S.C. §1324a:

> ...may certify an interlocutory order where the Administrative Law Judge determines that the order contains an important question of law or policy on which there is substantial ground for difference of opinion; and where an immediate appeal will advance the ultimate termination of the proceeding or where subsequent review will be an inadequate remedy.

28 C.F.R. §68.53(d)(i).

Accordingly, three criteria must be met before an interlocutory appeal may be granted: the order from which appeal is taken must (1) involve an "important question of law"; (2) be such that an immediate appeal would "advance the ultimate termination of the proceeding" or

that subsequent review will prove to be an inadequate remedy; and (3) offer substantial ground for difference of opinion as to its correctness. See Katz v. Carte Blanche Corp., 496 U.S. 747, 754 (3rd Cir. 1974) and Urbach v. Sayles, 779 F. Supp. 351, 353 (D.N.J. 1991) interpreting an analogous provision governing interlocutory orders in federal district court cases, 28 U.S.C. §1292(b).

Because the order at issue fails to meet all three of these criteria, respondent's request for certification is being denied.

The term "important question of law" is not defined in section 68.53(d)(i), but the Order at issue cannot be said to contain an issue of law that is anything but ancillary to this case. The Complaint alleges that respondent knowingly employed nine aliens not authorized for employment in the United States, and failed to prepare and/or present for inspection employment eligibility forms (Forms I-9) for those individuals, in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a. The Order at issue involves a discovery issue in the resulting litigation. Respondent fails to allege that its ability to defend itself against the allegations made in the Complaint has been prejudiced by the Order staying discovery pending determination on what may be a dispositive motion. Therefore, the Order fails to meet the first of the three criteria for certification.

The second criteria which must also be met before the Order at issue can be certified and interlocutory appeal granted, is that which requires that the Order must be of such a nature that an immediate appeal would advance the ultimate termination of the proceeding, or be of a type that subsequent review will prove to be an inadequate remedy.

Although it may be asserted that the ultimate termination of the proceedings may be advanced in the event that the protective order is lifted and respondent is allowed to take these depositions, respondent has failed to make that assertion. Furthermore, any gains accruing from a lifting of the protective order would be offset by the resulting inconvenience to the complainant and the five deponents. Specifically, the undersigned estimates that his determination on the summary decision motion will be forthcoming in 10 days. Any discovery that proves necessary after a determination is made on complainant's motion may be done at that time, i.e., some 10 days following that ruling. The 10-day discovery delay is not inordinate in view of the fact that this proceeding has been pending for more than 10 months.

Realistically, an appeal of the Order at issue would not therefore materially advance the ultimate termination of the proceeding.

Moreover, because neither party is disadvantaged by the protective order, subsequent review will not only be inadequate, but will be unnecessary on this issue. Respondent has failed to show that it would be disadvantaged by the protective order, nor has it shown any resulting prejudice, aside from the tendering of mileage and witness fees.

Therefore, the Order in question fails the second criteria for certification.

Finally, respondent has not asserted that the Order in question offers substantial ground for difference of opinion as to its correctness, nor is this fact readily apparent.

Accordingly, respondent's request for certification of the September 13, 1993, Order is hereby denied.

JOSEPH E. McGUIRE
Administrative Law Judge