In the Matter of:

NALINABAI P. CHELLADURAI,	**ARB CASE NO.**	**02-110**
PETITIONER/ PROSECUTING PARTY,	**ALJ CASE NO.**	**02-LCA-0010**
v.	**DATE:**	**August 26, 2003**

CORE CONSULTANTS INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Petitioner/Prosecuting party:
Nalinabai P. Chelladurai*, pro se, Sacramento, California*

FINAL ORDER OF DISMISSAL

On July 23, 2002, a Department of Labor Administrative Law Judge (ALJ) issued an Order of Dismissal (O.D.) pursuant to 8 U.S.C.A. § 1182(n)(2) (West 1999), the enforcement provision of the H-1B visa program of the Immigration and Nationality Act (INA), as amended, 8 U.S.C.A. § 1101(a)(15)(H)(i)(B), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2002). The Petitioner/Prosecuting Party Nalinabai P. Chelladurai timely filed a petition for review with the Administrative Revew Board pursuant to 20 C.F.R. § 655.845(a). For the reasons set forth herein, we affirm the ALJ's decision to dismiss the Petitioner's case as abandoned pursuant to 29 C.F.R. § 18.39(b), based on the Petitioner's failure to appear before the ALJ as scheduled.

BACKGROUND

The Immigration and Nationality Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under various types of visas. 8 U.S.C.A. § 1101(a)(15). One class of aliens, known as "H-1B" workers, is allowed entry into the United States on a temporary basis to work in "specialty occupations." 8 U.S.C.A. § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700.

"Specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bacherlor's degree or higher in the particular speciality. 8 U.S.C.A. § 1184(i); 20 C.F.R. § 655.715. The Immigration and Naturalization Service identifies and defines the occupations covered by the H-1B category and determines an alien's qualifications for such occupations. An employer who wants to employ a non-immigrant alien under the H-1B program must file a labor condition application (LCA) that meets the criteria provided at 20 C.F.R. § 655.700. Such employer is required to compensate the LCA employee at a specified wage rate, and to provide them with certain fringe benefits and working conditions. 20 C.F.R. §§ 655.731 - 655.733. The aforesaid requirements are among those enforced by the DOL Wage and Hour Division under the INA. 20 C.F.R. § 655.705(a); 59 Fed. Reg. 65,646 (Dec. 20, 1994).

This case arose from the Wage and Hour Division's investigation of a complaint that Respondent Core Consultants Inc. (Core) had failed to comply with LCA wage requirements in respect to Chelladurai and another H-1B employee. The Administrator of the Wage and Hour Division determined that Core had failed to pay the two employees as required and that Core owed Chelladurai $288.46. O.D. at 1 n.1; *see* Administrator's determination letter to Basil Xavier, Core Consultants Inc., dated Jan. 17, 2002.

Chelladurai disagreed with the Administrator's determination, asserting that Core owed her $4,615.39 rather than $288.46. Pursuant to 20 C.F.R. § 655.820, Chelladurai requested a hearing to challenge the Administrator's January 17, 2002 determination. O.D. at 1; *see* Chelladurai's Pre-Hearing Statement of Position filed Apr. 30, 2002 at unnumbered p.4.

On March 13, 2002, the ALJ issued a Notice of Final Hearing, advising the parties to appear at a calendar call to be conducted at 2:30 pm on Monday, May 6, 2002, when a specific hearing time during the following week would be set. Notice of Final Hearing dated Mar. 13, 2002. The notice also directed the parties to complete discovery, to submit pre-hearing statements, and to exchange copies of documents each would offer into evidence at hearing by specified dates in the weeks prior to May 6. *Id.* at 1-2. Finally, the notice advised the parties that a failure to fully comply with all aspects of the notice could result in the imposition of sanctions pursuant to 29 C.F.R. §§ 18.6(d)(2), 18.29. *Id.* at 2.

Chelladurai, who was unrepresented by counsel before the ALJ, as she is before the Board, complied with the pre-hearing submissions and document exchanges that were ordered by the March 13 notice, but she did not appear before the ALJ on May 6, 2002. She also did not contact the ALJ prior to May 6 to seek a postponement. She also did not contact the ALJ after May 6 to explain her failure to appear, until after she received the Order to Show Cause that the ALJ issued on May 14. O.D. at 2; *see* Chelladurai letter to ALJ dated May 22, 2002; Complainant's Reply to the Show Cause Notice Order [sic] filed June 4, 2002.

The ALJ's May 14 show cause order noted that Core had appeared at the May calendar call and that Chelladurai's pre-hearing submissions served to confirm that she had received the March 13, 2002 notice of hearing. The May 14 order afforded Chelladurai until May 24 to demonstrate why the case should not be dismissed pursuant to 29 C.F.R. § 18.39. Order to Show Cause dated May 14, 2002. On May 22, Chelladurai filed a request for an extension of time – of "about a week[]" – in which to provide a response to the show cause order. In support of that request, Chelladurai cited travel requirements imposed by her current employment and stated that she was also representing herself in a civil court action in the State of Florida against Core. She also stated that she did not wish to reveal any information about her current employment to Core.[1] Chelladurai stated that, if the ALJ did grant her an extension, she expected to mail her response to the show cause order by June 1, 2002. On May 24, the ALJ granted Chelladurai until June 3 to file a response to the show cause order. Order Extending Time to Respond to Order to Show Cause dated May 24, 2002.

STATEMENT OF JURISDICTION

The Administrative Review Board has jurisdiction to review ALJ decisions under the H-1B program pursuant to 20 C.F.R. § 655.845. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

ISSUE PRESENTED

The issue before the Board is whether the ALJ properly determined that Chelladurai had abandoned her hearing request within the meaning of 29 C.F.R. § 18.39(b).

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[1] Chelladurai's May 22 extension request and her June 4 response to the show cause order both refer to Adeo Consulting, Inc. as the responding employer in this case. Chelladurai letter to ALJ dated May 22, 2002; Chelladurai Reply to Show Cause Notice Order at 1. Documents in the record generated by Core indicate that it also does business as Adeo Consulting, Inc. *See, e.g.*, E-mail message dated Dec. 28, 2000, from B. Xavier to Chelladurai, attached to Chelladurai's request for hearing filed Feb. 22, 2002.

DISCUSSION

The ALJ's analysis of Chelladurai's response to the order to show cause

The primary reason for her failure to appear before the ALJ on May 6 that Chelladurai cited in her June 4 response to the ALJ's Order to Show Cause was that her employment at that time required her to attend training on short notice. Chelladurai's Reply to the Show Cause Notice Order filed June 4 at unnumbered p.1. Chelladurai's June 4 response does not focus on the question of why she did not contact the ALJ either before she failed to appear on May 6 or afterwards, until she received the May 14 show cause order. *Id.* She did state that she believed "most of the exhibits and the relevant arguments are before the DOL and (therefore available to) the Honorable Judge" and that, in her absence from the hearing, the ALJ would render an "ex parte[] decision" in the matter. *Id.* at unnumbered p.2. Chelladurai concluded her response to the show cause order by asserting that she was "keen on pursuing this case." *Id.* at unnumbered p.5.

The ALJ carefully addressed the points advanced in Chelladurai's June 4 response that are relevant to her failure to appear on May 6, 2002. He based his conclusion that she had failed to provide adequate justification for her May 6 absence on the following factors. First, the ALJ questioned the credibility of Chelladurai's assertion that she did not submit records to support her statements regarding training demands at her employment because she did not want Core to have access to such records. O.D. at 3. The ALJ also stated that, aside from the question of not having provided substantiation for her statements regarding training, Chelladurai's June 4 response failed to explain "why she made no effort to postpone the trial if she could not attend, and why she then failed to come forward to offer a reason for her absence promptly after the scheduled trial." *Id.*

The ALJ similarly did not find persuasive Chelladurai's statement that she believed the ALJ would render a decision on the merits of her claim despite Chelladurai's absence from the hearing. The ALJ concluded that the March 13 pre-hearing notice had clearly apprised the parties that the hearing before the ALJ was to be an evidentiary proceeding involving the submission of documentary evidence and the presentation of testimony. O.D. at 3. The ALJ also found Chelladurai's failure to contact his office between April 24, when the asserted training demands began, and the May 6 calendar call, to be puzzling. The ALJ pointed out that nothing in Chelladurai's June 4 response indicated that she had experienced an unanticipated emergency that prevented her from contacting the ALJ's office or from appearing on May 6. *Id.*

Based on the foregoing, the ALJ concluded that Chelladurai's failure to appear on May 6 was based on her decision to prioritize her new job above the hearing that she herself had requested. O.D. at 3. The ALJ further concluded that such circumstances did not justify Chelladurai's failure to appear for the May 6 calendar call, which was a necessary preliminary to the hearing, and that because Chelladurai had failed to

demonstrate good cause for her absence, the case would be dismissed under 29 C.F.R. § 18.39(b). *Id.* at 3-4.

The applicable law and the Petitioner's arguments on appeal

The rules of practice for hearings in LCA enforcement cases under Subpart I of Part 655 are found at Section 655.825. That regulation states that, "[e]xcept as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart," the Rules of Practice and Procedure for hearings before the DOL Office of Administrative Law Judges, which are found at 29 C.F.R. Part 18, apply to LCA enforcement proceedings before an administrative law judge. 20 C.F.R. § 655.825(a). The Subpart I regulations that address the procedures applicable to a Part 655 hearing – 20 C.F.R. §§ 655.830, 655.835, 655.840 – do not negate the application of 29 C.F.R. § 18.39 to determine whether a party's hearing request should be dismissed based on abandonment. Section 18.39 reflects the "inherent power" of courts to dismiss a case on their own initiative for lack of prosecution. *See Dickson v. Butler Motor Transit,* ARB No. 02-098, ALJ No. 01-STA-039, slip op. at 4 (ARB July 25, 2003) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962)). Such authority is necessary to allow administrative law judges, like judges in the state and federal courts, to manage their dockets so as to enhance "the orderly and expeditious disposition of cases." *Id.* Nothing in the Subpart I regulations suggests that this principle should not be applied to hearings in LCA cases.

In her petition for review and brief, the Petitioner presents a number of points that do not relate to the abandonment issue that is before the Board. Instead, the majority of the arguments offered by Chelladurai concern the merits of her claim that Core owes her a larger sum for underpayment of wages than was found by the Wage and Hour Administrator. *See* Pet. for Review filed Aug. 22, 2002, at 4-7; Petitioner's Brief filed Oct. 15, 2002, at 2-8, 10-19. Our review of the ALJ's dismissal order does not extend to consideration of arguments that would have been relevant had a hearing been held on the merits of Chelladurai's claim against Core. The Petitioner's arguments regarding that claim are thus not properly before us and will not be addressed.

Relevant to the ALJ's conclusion that Chelladurai had abandoned her hearing request pursuant to Section 18.39(b), the Petitioner elaborates on the work-related reasons for not appearing before the ALJ on May 6 that she cited in her response to the ALJ's show cause order. Pet. for Review at 2, 8-13. None of the Petitioner's assertions undermine the ALJ's findings that Chelladurai had failed to contact his office before May 6 or immediately thereafter without justification, such as an unanticipated emergency. O.D. at 3. Indeed, Chelladurai states in this appeal that she missed the hearing because "many obligations at her [then-]current workplace . . . gained precedence." Petitioner's Brief at 9. That statement confirms the ALJ's conclusion that Chelladurai's failure to

appear on May 6 was based on her decision to prioritize her new job over the hearing that she had requested in this case. O.D. at 3.[2]

The Petitioner also urges that the ALJ should have issued a decision on the merits of her claim against Core, despite Chelladurai's failure to appear on May 6 or to file a request with the ALJ for a decision on the written record. Pet. for Review at 7. As support, Chelladurai cites Section 18.5, which provides for entry of a default decision against a party who does not appear at hearing. *Id.* Chelladurai further urges that the Part 18 regulations should be flexibly applied to allow for issuance of a decision on the record by the ALJ in the circumstances present in this case. *Id.*

Section 18.39 does provide the option for a judge to issue a decision based solely on a written record of documentary evidence, but only if the parties waive the right to appear in an oral hearing before the judge. 29 C.F.R. § 18.39(a). The option for a decision on a written record is not available in the circumstances in this case, where the Petitioner failed to appear before the ALJ at the designated time and place or to show good cause for such failure. *Compare* 29 C.F.R. § 18.39(a) *and* § 18.39(b). In short, an unexcused failure to appear at hearing is addressed by Section 18.39(b), and cannot substitute for a *waiver* of the right to appear that is filed with the ALJ prior to the hearing date under Section 18.39(a). Section 18.39(b) specifically provides that:

> A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either

[2] The Petitioner also has submitted documents – and offered to provide still others – to support her statements regarding the work pressures that contributed to her decision not to appear before the ALJ on May 6, 2002. Pet. for Review at 14. The regulations governing an appeal from the ALJ's decision under Subpart I of Part 655 limit the parties to filing documents already included in the record developed before the ALJ. 20 C.F.R. § 655.845(b)(7); *see* 20 C.F.R. § 655.845(e)(2); *see generally* 56 Fed. Reg. 37175, 37180 (Aug. 5, 1991) (Notice of proposed rules, 20 C.F.R. Part 655; discussing short deadlines provided for ALJ's hearing and discretionary review by Secretary, pursuant to 8 U.S.C. § 1182(n)(2)(B)). Furthermore, inasmuch as the Petitioner offers such documentation as support for her acknowledgement that she made a conscious decision not to appear before the ALJ on May 6 in favor of attending to job-related matters, a remand to the ALJ for consideration of further evidence regarding that decision simply would not change the dismissal outcome under 29 C.F.R. § 18.39(b). *Cf. In re Immigration and Naturalization Serv.*, ARB No. 99-122, slip op. at 6 (ARB Mar. 31, 2000) (explaining that Board reviewed evidence submitted for the first time on appeal in a case arising under the Service Contract Act, 41 U.S.C.A. § 351, only for the purpose of determining whether the evidence warranted remand for consideration by the Wage and Hour Division Administrator).

> (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear
>
> or
>
> (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for such failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear.

29 C.F.R. § 18.39(b). In view of Chelladurai's failure to appear, or to provide – either before or after May 6 – adequate justification for not appearing, the ALJ properly dismissed the hearing request as abandoned.

The Petitioner also mistakenly relies on the default provision of Section 18.5(b) as authority for issuance of a decision on a written record in lieu of a formal hearing in this case. A default decision, as provided for by Section 18.5(b) and referred to in Section 18.39(b), is a decision against a responding party who fails to appear at hearing to defend against a complaint. 29 C.F.R. § 18.5(b); *see Allen v. EG&G Defense Materials, Inc.*, ARB No. 98-073, ALJ No. 89-OFC-1 (Order Denying Interloc. App.) (ARB Sept. 28, 1998). In this case, the Respondent Core did appear before the ALJ on May 6, through an appointed representative. O.D. at 3. As the ALJ stated, dismissal of Chelladurai's hearing request had the effect of affirming the Administrator's finding that Core owed Chelladurai $288.46, rather than the larger sum claimed by Chelladurai.

Finally, we address the Petitioner's representation of herself before the ALJ and in this appeal. She states that she is not an attorney and is not "conversant with" Title 29 of the Code of Federal Regulations. Pet. for Review at 2. We have taken Chelladurai's pro se status into consideration in interpreting her arguments in the Petition for Review and the supporting brief. *See generally Young v. Schlumberger Oil Field Servs.,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (noting Board's liberal construction of pro se complainant's arguments on appeal and discussing ALJ's role in case involving pro se complainant). Nothing that the Petitioner has stated in this appeal or before the ALJ suggests that her failure to appear before the ALJ on May 6 was related to the lack of legal counsel, however. Indeed, although the Petitioner refers to the difficulty and amount of time required to pursue this and other legal matters, she does not suggest that she has attempted to engage counsel for assistance. *Cf. Khandelwal v. Southern California Edison,* ARB No. 98-159, ALJ No. 97-ERA-6, slip op. at 3-5 (ARB Nov. 30, 2000) (vacating dismissal of complaint and remanding case because administrative law judge abused discretion in denying complainant's request for continuance to obtain counsel).

On the foregoing basis, we conclude that the ALJ's application of Section 18.39(b) is well supported by the facts of this case and in accordance with pertinent law.

CONCLUSION and ORDER

Accordingly, we **AFFIRM** the ALJ's decision to **DISMISS** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge