



In the Matter of:

**EDWARD GLADSTON ROSARIO
PRAGASAM,**

PROSECUTING PARTY,

ARB CASE NO. 11-017

ALJ CASE NO. 2010-LCA-018

DATE: April 12, 2011

v.

WELLNESS HOME HEALTH CARE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DENYING INTERLOCUTORY APPEAL

On December 1, 2010, the Administrative Review Board (ARB) received a motion from Edward Pragasm, the Prosecuting Party, requesting an enlargement of time to file a petition requesting review of a Department of Labor Administrative Law Judge's decision under the Immigration and Nationality Act, as amended.¹ The motion stated that the Administrative Law Judge (ALJ) had issued the decision on November 1, 2010, and

¹ 8 U.S.C.A §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c) (West 1999 & Thomson Reuters Supp. 2010) (INA). See 20 C.F.R. § 655.845 (2010). The Secretary of Labor has delegated her authority to issue final agency decisions in cases arising under the INA's H-1B provisions to the ARB. See Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010).

that Pragasam had filed a motion with him requesting an enlargement of time to file a motion for reconsideration, but the Judge had not yet ruled on the motion. Upon review of the Judge's docket, we noted that the Judge issued two orders on November 1, 2010, one disposing of a number of procedural and discovery dispute issues² and the other relating to scheduling the hearing and pre-hearing procedures.³ Neither of the Orders is a final decision and order disposing of Pragasam's complaint.

Accordingly, on December 15, 2010, we issued an order that provided:

[I]f the Prosecuting Party intends to file an interlocutory appeal, we will **GRANT** the motion for enlargement of time to file it. If the Prosecuting Party wishes to proceed under the certification procedure of 28 U.S.C.A. § 1292(b), he will have to request the Judge to certify the issues he wants to appeal as that section provides and then request interlocutory review within **ten (10)** days of the Judge's ruling on the certification request. If the Prosecuting Party wishes to proceed under the collateral order procedure for obtaining interlocutory appeal, he must file his petition for interlocutory review within **ten (10)** days of the date the Judge issues his order in response to the Prosecuting Party's motion for reconsideration. Otherwise, the Prosecuting Party may defer his appeal until the Judge issues his final decision and order disposing of the Prosecuting Party's complaint. If the Prosecuting Party decides not to proceed with an interlocutory appeal, he must so inform the Board, as soon as possible, so that the Board may close the current docket number.

Because the Board had received no further communication from Pragasam, by February 24, 2011, regarding his intention to file an interlocutory appeal, the Board issued an order requiring him to show cause, no later than March 9, 2011, why the Board should not dismiss his interlocutory appeal.

² This order was entitled, "Order to Comply with Filing Procedures and Order Denying Request to Transcribe Evidence and Order Denying Request for Joinder of Parties and Order to Follow Subpoena Procedures and Order Denying Request to Compel Respondent to Amend Admissions Responses and Order Allowing Leave to File and Amend Complaint and Order Granting Change of Venue and Order of Continuance and Notice Rescheduling Hearing."

³ This second order was entitled, "Order Rescheduling Hearing and a New Prehearing Order."

On February 28, 2011, the ALJ issued an Order Denying Motion for Reconsideration and Other Miscellaneous Orders. In this order, the ALJ explained clearly and fully why he refused to reconsider his November 1st Order disposing of a number of procedural and discovery dispute motions Pragasam had filed. In particular, he denied Pragasam's request for sanctions against the Respondent and its counsel for false admission responses noting, "[i]n the Order dated November 1, 2010, I carefully reviewed the Prosecuting Party's arguments and the Respondent's admissions responses and found there was no indication that the Respondent provided false or evasive answers to the requested admissions."⁴

The ALJ also denied Pragasam's request for a default judgment for failing to file an answer to the Prosecuting Party's "Amended H1B Complaint." The ALJ found that the Prosecuting Party had not in fact filed an "amended" complaint, but instead a further explanation of the original complaint.⁵

The ALJ reiterated his denial of Pragasam's motion to Join the District Director of the Wage and Hour Division and a Wage and Hour investigator as parties to this case because as he had previously explained, neither the District Director, nor the investigation are necessary to accord relief to either the Prosecuting Party or the Respondent in the de novo proceeding before the ALJ.⁶

While the ALJ noted that he did not understand Pragasam's objection to rescheduling the hearing, he stated that obviously it was impossible to move the hearing date back to November 16, 2010, and that he had rescheduled the hearing date because it was clear to him that the case was not yet ready for hearing as Pragasam had not completed his discovery.

Ultimately, the ALJ denied Pragasam's request to postpone ruling on his motion for reconsideration until he is able to have audio CDs transcribed from Tamil into English and to have oral argument on the motion because Pragasam will have every opportunity to present any relevant evidence or argument at the hearing.

On March 9, 2011, Pragasam filed a Petition requesting the Board to review the ALJ's February 28th Order Denying Motion for Reconsideration and Other Miscellaneous Orders. In particular, Pragasam requested the Board to grant the petition for review and issue a briefing schedule with oral hearing, grant 30 days to file a brief, fax all communications to the prosecuting party as well as serving by U.S. Mail, and fax to him a copy of the ARB's order with the case number.

On March 14, 2011, the ALJ issued an Order Denying Request to Certify Issues

⁴ Order Denying Motion for Reconsideration and Other Miscellaneous Orders at 4.

⁵ *Id.* at 4-5.

⁶ *Id.* at 5.

for Interlocutory Appeal. In this Order the ALJ stated that Pragasam had misinterpreted the ARB's December 15th Order as requiring the ALJ to certify the case for interlocutory appeal. Further the ALJ concluded:

My February 28, 2011, Order was not a final decision and order disposing of the Prosecuting Party's complaint. The Order disposed of a number of procedural and discovery dispute issues. None of these issues involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b).^[7]

On March 22, 2011, Pragasam filed with the Board a Motion to Reopen the Closed Interlocutory Appeal. In this Motion, the Prosecuting Party averred that he had not received the Board's Order to Show Cause until the ALJ forwarded him a copy on March 14, 2011.⁸

DISCUSSION

The Board has carefully reviewed the ALJ's November 1, 2010, February 28, 2011, and March 14, 2011 orders in this case. We deny Pragasam's request to file a brief in support of his petition for interlocutory review with the Board, because on their face the procedural and discovery dispute issues presented in the Orders that Pragasam has attempted to appeal are not appropriate for interlocutory review, and therefore briefing would not aid the Board in its resolution of Pragasam's request for interlocutory review.

As the Board explained in its December 15, 2010 Order, "[a]s a general matter the Board only considers appeals in H1-B cases after the ALJ issues a final decision and order."⁹ In limited circumstances, the Board will consider an interlocutory appeal of an

⁷ Order Denying Request to Certify Issues for Interlocutory Appeal at 4.

⁸ The United States Postal Service (USPS) Tracking report confirmed that the USPS carrier left a notice on March 4, 2011, when he or she initially unsuccessfully attempted to deliver the Board's Order to the Prosecuting Party, and left a second notice on March 17, 2011. The USPS designated the Order as unclaimed on March 21, 2011, and returned it to Washington, D.C. on March 30, 2011. Pragasam offers no explanation for why he failed to claim the Order after the USPS left two notices documenting its attempts to deliver the Order.

⁹ 20 C.F.R. § 655.845. *Accord OFCCP v. Bank of America*, ARB No. 10-048, ALJ No. 1997-OFC-016 (ARB Apr. 29, 2010).

ALJ's non-final decision. These circumstances include when a Judge certifies an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b)(Thomson/West 2006)¹⁰ or where the party seeks review of a collateral order. But interlocutory appeals are generally disfavored and these exceptions are strictly construed because there is a strong policy against piecemeal appeals."¹¹

In this case the ALJ found that the procedural and discovery dispute issues in this case do not involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."¹² Accordingly, the ALJ denied Pragasam's request to certify the case for interlocutory appeal. Because the ALJ has not certified the procedural and discovery dispute issues for interlocutory appeal, and given the nature of the disputed orders, finding no reason to disagree with the ALJ's certification denial, we decline to accept this appeal for review as provided in 28 U.S.C.A. § 1292(b).¹³

¹⁰ 28 U.S.C.A. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

¹¹ Order at 2.

¹² Order Denying Request to Certify Issues for Interlocutory Appeal at 4 *quoting* 28 U.S.C.A. § 1292(b).

¹³ *Johnson v. U.S. Bancorp/U.S. Banknational Ass'n.*, ARB No. 11-018, ALJ No. 2008-SOX-037, slip op. at 4 (ARB Mar. 14, 2011); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 6 (ARB Oct. 31, 2005), *quoting Plumley v. Federal Bureau of Prisons*, 1986-CAA-006, slip op. at 3 (Sec'y Apr. 29, 1987) (citation omitted). Some courts have held that district court certification is a jurisdictional prerequisite to interlocutory review under section 1292(b). In *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002), the court explained:

Furthermore, there is no viable argument that the procedural and discovery dispute issues presented here are subject to the collateral order exception permitting 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.”¹⁴

In general, the Board is very reluctant to interfere with an ALJ’s control over procedural and discovery issues.¹⁵ The ARB can most certainly review the procedural issues Pragasam has raised regarding default judgment, joinder of parties, and audio CD transcription upon appeal of the ALJ’s final decision in this case. Discovery orders are also readily subject to review upon appeal.¹⁶ In *Lewis v. Bloomsburg Mills, Inc.*, the Fourth Circuit cited with approval Judge Clark’s dissent in *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*:¹⁷

A district judge’s orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. . . . I believe this is an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future - all contrary to settled federal law against piecemeal appeals.^[18]

The whole point of § 1292(b) is to create a dual gatekeeper system for interlocutory appeals: Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.

¹⁴ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

¹⁵ *Accord Saporito v. G.E. Med. Sys. Adecco Tech.*, ARB No. 04, 007, ALJ Nos. 2003-CAA-001, -002, slip op. at 4 (ARB Nov. 25, 2003); *Hasan v. Commonwealth Edison Co.*, ARB No. 99-097, ALJ No. 1999-ERA-017, slip op. at 2 (ARB Sept. 16, 1999).

¹⁶ *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995); *Reise v. Board of Regents*, 957 F.2d 293, 295 (7th Cir. 1992).

¹⁷ 280 F.2d 800, 805-806 (2d Cir.1966).

¹⁸ 608 F.2d 971, 973 (4th Cir. 1979). The Supreme Court also quoted Judge Clark’s dissent with approval in *Switzerland Cheese Ass’n v. E. Horne’s Market*, 385 U.S. 23, 25 n.3 (1966). In accordance with Judge Clark’s dissent, the Second Circuit, en banc, subsequently reversed *Peter Pan Fabrics, Inc. Chappell & Co. v. Frankel*, 367 F.2d 197, 200 (1996).

If Pragasam believes that the ALJ's procedural and discovery orders constitute an abuse of discretion that prejudice his case, he may so argue upon appeal, if and at such time as, the ALJ issues a decision and order denying his complaint. Accordingly, because the ALJ has refused to certify the case for interlocutory appeal, and the procedural and discovery issues of which Pragasam desires review may indisputably be effectively reviewed upon appeal, we **DENY** Pragasam's motion to file an interlocutory appeal in this case.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge