In the Matter of:

WILLIAM NICHOLS, D/B/A/ NICHOLS TREE FARM,

RESPONDENT.

ARB CASE NO. 16-008

ALJ CASE NO. 2015-TAE-013

DATE: January 19, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:
Cyrus F. Rilee, III, Esq.; *Rilee & Associates, P.L.L.C.*; Beford, New Hampshire

For the Administrator, Wage and Hour Division:
Katelyn Poe, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor*, Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DENYING INTERLOCUTORY REVIEW

On October 22, 2015, Respondent filed a Petition for Review in this case arising under the Immigration and Nationality Act, 8 U.S.C.A. §§ 1101(a)(15)(ii)(a), 1184(c), 1186 (West 1999 & Thomson Reuters Supp. 2015). The Petition seeks review of a Department of Labor Administrative Law Judge's Order Denying [Respondent's] Motion to Dismiss, issued on September 22, 2015.

Because the Administrative Law Judge, to which this case was referred for disposition, has not yet issued a decision on the merits of this case, the Respondent's petition is for interlocutory review. But although the Board may accept interlocutory

appeals in "exceptional" circumstances,[1] it is not the Board's general practice to accept petitions for review of non-final dispositions.

Accordingly, the Board ordered Respondent to show cause why the Board should not dismiss Respondent's interlocutory appeal. Respondent has filed a response to the Board's order and the Wage and Hour Administrator has filed a reply. Finding that Respondent has demonstrated no basis for departing from the Board's general practice of refusing to accept interlocutory appeals, we **DENY** Respondent's petition for interlocutory review.

BACKGROUND

After investigating Respondent's compliance with the requirements of the H-2A temporary agricultural worker program, the Administrator issued a determination letter on August 12, 2013, charging Respondent with violations of the H-2A program requirements, assessing civil money penalties of $47,250.00, and notifying Respondent of the Administrator's decision to debar Respondent from the H-2A program.[2] Respondent requested a hearing on the determination letter on September 11, 2013.[3] Eighteen months after Respondent requested a hearing, the Administrator rescinded the August 12, 2013 determination letter and issued a new determination letter on March 3, 2015.[4] The new letter reduced the civil money penalties to $42,750.00.[5]

On April 2, 2015, Respondent again requested a hearing before an administrative law judge.[6] Four months later, the Administrator forwarded the case to the Chief Administrative Law Judge. After assignment of the case to the ALJ, Respondent filed a Motion to Dismiss Order of Reference. In the Motion, Respondent argues that this matter should not proceed to hearing on the merits because the Administrator did not promptly refer the case to the Office of Administrative Law Judges as provided in 29 C.F.R. §

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[1] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, 5(c)(66) (Nov. 16, 2012).

[2] Order Denying Motion to Dismiss at 1.

[3] *Id.* at 1-2.

[4] *Id.* at 2.

[5] The Administrator has conceded that its Notice of Debarment of March 3, 2015 must fail due to an untimely filing, that it cannot and will not pursue a debarment remedy. *Id.* at 2-3.

[6] *Id.* at 2.

501.37(a).[7] Respondent also averred that allowing the case to proceed would constitute a violation of due process rights under the 5th Amendment to the U.S. Constitution.[8] The ALJ denied Respondent's Motion to Dismiss.

DISCUSSION

The Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.[9] Nevertheless, where a party seeks interlocutory review of an ALJ's order, the ARB has elected to look to the procedures found at 28 U.S.C.A. § 1292(b) (Thomson/West 2006) to determine whether to accept an interlocutory appeal for review.[10] These procedures provide for certification by the presiding judge of issues involving a controlling question of law as to which there is substantial ground for difference of opinion, an immediate appeal of which would materially advance the ultimate termination of the litigation. In *Plumley v. Federal Bureau of Prisons*,[11] the Secretary ultimately concluded that because no ALJ had certified the questions of law the respondent raised in his interlocutory appeal, as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken."[12] Respondent did not seek certification of the issues arising in the ALJ's interlocutory order in this case.

Nevertheless, even if a party has failed to obtain interlocutory certification, the ARB would consider reviewing an interlocutory order meeting the "collateral order" exception the Supreme Court recognized in *Cohen v. Beneficial Indus. Loan Corp.*,[13] if the decision appealed belongs to that "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that

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7 *Id.* at 1.

8 *Id.*

9 *See, e.g., Gunther v. Deltek*, ARB Nos. 12-097, 12-099; ALJ No. 2010-SOX-049 (ARB Sept. 11, 2012); *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015 (ARB May 13, 2004).

10 *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 5 (ARB Oct. 31, 2005); *Plumley v. Federal Bureau of Prisons*, 1986-CAA-006 (Sec'y Apr. 29, 1987).

11 1986-CAA-006 (Sec'y Apr. 29, 1987).

12 *Id.*, slip op. at 3 (citation omitted).

13 337 U.S. 541 (1949).

appellate consideration be deferred until the whole case is adjudicated."[14] 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."[15]

Respondent has not demonstrated that his appeal falls within the collateral order exception. Respondent has conceded that disposition of the issue it wants the Board to decide, i.e., whether this matter should not proceed to hearing on the merits because the Administrator did not promptly refer the case to the Office of Administrative Law Judges as provided in 29 C.F.R. § 501.37(a), may require the Board to remand the case to the ALJ for additional fact finding.[16] Thus, the ALJ's order cannot be said to have conclusively determined a disputed question of law. Further, Respondent has not demonstrated that the issues raised are effectively unreviewable on appeal from a final judgment. Finally, Respondent cites to no support for his argument that the timeliness issues raised are "threshold dispositive jurisdictional issues."[17]

Accordingly, Respondent's Petition for Interlocutory Review is **DENIED.**

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

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14 *Id.* at 546.

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

16 Respondent's Response to Order to Show Cause at 2. The ALJ found that the "[k]ey element to consider in this case is whether the Respondent has been prejudiced by the delay when the Administrator failed to promptly forward the matter to the OALJ for hearing." Order Denying Motion to Dismiss at 2. Respondent avers that the ALJ's order is contrary to law because it did not give Respondent the "ability" to conduct any discovery or present any evidence on the issue of actual prejudice due to the passage of time. Respondent's Response to Order to Show Cause at 2. Respondent also states that if the Board accepts this appeal, the Board may have to "remand to the ALJ for preliminary discovery relating to the procedural background of this case and the factual allegations by the Administrator relating to purported reasons for the almost two (2) year delay in this matter [to hearing]." *Id.*

17 *Id.*