U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, D.C. 20001-8002

Date: **OCTOBER 29, 1993**

In the Matter of

SEQUEL CONCEPTS, INC.,
Employer

on behalf of Case No: 92-INA-421

NADIA UNSON VILLANUEVA,
Alien

and

EGS, INC.,
Employer

on behalf of Case No: 93-INA-472

RAJIVA PRAKASH,
Alien

Before: Brenner, Clarke, Glennon, Groner,
Guill, Huddleston and Litt
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

ORDERS OF DISMISSAL

I. STATEMENT OF FACTS

A. Sequel Concepts

On March 10, 1992, the Certifying Officer ("CO") issued a Final Determination ("FD") denying labor certification in this matter. The Employer filed a Motion for Reconsideration of the CO's decision on April 15, 1992. The CO denied the Motion on June 23, 1992. She then forwarded the Motion and the Appeal File directly to the Board of Alien Labor Certification Appeals for review of the full case on the merits. On July 29, 1993, the Board issued an Order requiring the Employer and the CO to respond to the following inquiries:

> (1) whether the CO erroneously transmitted the appeal file in the absence of a request for review being submitted as required by [20 C.F.R.] § 656.26(b)(1) of the regulations; and (2) whether the Board has jurisdiction to consider this appeal in light of the fact that the CO transmitted the appeal file.

On August 20, 1993, the CO submitted a response to the Board. The CO stated that, "[s]ince the only review of final determinations provided for in the regulations is performed by this Board, the Certifying Officer treats all requests for review as requests for review by the Board and transmits the file." She further stated:

> [t]he Board, by definition, has "jurisdiction" to determine whether or not the employer's motion for reconsideration should be treated as an appeal to the Board for the purposes of 20 C.F.R. § 656.26 [C]onsistent with the regulatory scheme, motions for reconsideration which are rejected by the Certifying Officer should be treated as requests for review by the Board. Logic suggests that most employers who go to the trouble to file a motion for reconsideration will likely pursue an appeal with the Board.

The Employer did not respond to the Board's Order.

B. EGS, Inc.

On June 11, 1993, the Certifying Officer issued a Final Determination denying the request for certification filed by Employer, EGS, Inc. The Employer filed a Motion for Reconsideration of the CO's decision on July 7, 1993. No decision on its Motion for Reconsideration was issued by the CO and the case was forwarded by the CO to Board of Alien Labor Certification Appeals for review.

On September 3, 1993, Employer filed a letter with the Board to inform the Board that it had not requested an appeal of the Certifying Officer's decision in this matter. Employer noted that it has never received a decision on its Motion for Reconsideration. Employer authorized the Board to treat the letter as a Notice of Withdrawal of Appeal, while noting its position that, in fact, it had never filed an appeal.

II. Discussion and Conclusion

The CO contends that she properly treats all requests for review, including motions for reconsideration, as requests for review by the Board and that the Board necessarily has jurisdiction to review such cases. The Board, however, disagrees.

The regulations at 20 C.F.R. § 656.26 require that:

> (a) If a labor certification is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals:

(1) By the employer; and

(2) By the alien, but only if the employer also requests such a review.

(b)(1) The request for review shall be in writing and shall be mailed to the Certifying Officer who denied the application within 35 calendar days of the date of the determination, that is, by the date specified on the Final Determination form ...

Although the regulations do not explicitly provide authority for the CO to reconsider Final Determinations, the Board interpreted the regulations as providing the CO with this authority in Harry Tancredi, 88-INA-441, (Dec. 1, 1988) (en banc). The Board therein declared that "the power to reconsider is inherent in the power to decide." In Meriko Tamaki Wong, 90-INA-407, (Jan. 27, 1992), a three judge panel of the Board clarified the mechanics of the Tancredi decision. We reaffirm that decision. The panel reasoned that if a motion to reconsider is filed, the 35 day time period in which to file a request for review by the Board begins anew from the date of the CO's order denying the motion for reconsideration or the CO's decision on reconsideration.[1] In finding that a motion for reconsideration tolls the 35 day time limit for the employer to request review, the Board implicitly intended that a specific request for review must still be filed.[2]

Moreover, it cannot be assumed, as the CO contends, that by filing a motion for reconsideration an employer desires judicial review and, therefore, intends that the motion serve as a request for review in the alternative. That argument is undercut by the factual circumstances presented in both Sequel Concepts and EGS, Inc.. The Employer in Sequel Concepts did not file a request for Board review, did not file a brief in response to the Board's routine Notice of Docketing, and did not respond to the Board's July 29, 1993 Order in this case. The Employer's inaction thus indicates that it has no interest in appealing this case to the Board. The facts of EGS, Inc. are even more telling. In its September 2, 1993, letter addressed to BALCA, the Employer pointedly states that its Motion for Reconsideration was not intended as a request for Board review and it requests that any appeal be withdrawn.

In light of the above, the Board will not consider a Motion for Reconsideration as tantamount to a request for Board review. Because the Employer in Sequel Concepts did not specifically request review by the Board, the Board does not have jurisdiction to review the CO's Final Determination. Moreover, because, as noted, the Employer did not respond to our July 29,

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[1] The Wong decision noted that this was consistent with Federal Rule of Appellate Procedure 4(a)(4)(iii).

[2] The employer and the alien should be specifically advised of this requirement by the CO in any order denying a motion for reconsideration or in any decision on reconsideration.

1993, Order, we have no concern that the Employer intends that an appeal be pending before us.[3] Accordingly,

The case Sequel Concepts is hereby DISMISSED for want of jurisdiction. Moreover, on Employer's Notice of Withdrawal of Appeal, the case EGS, Inc. is also DISMISSED.

Washington, D.C.

For the Board:

Lawrence Brenner
Administrative Law Judge

LB/jg

[3] While by the above-styled Orders of Dismissal the Board finds it lacks jurisdiction to review any case where a specific request for Board review has not been properly filed, fairness dictates that cases already docketed with BALCA not be summarily dismissed despite the absence of a request for Board review or the filing of a brief on appeal. In such cases, the Board will continue to issue an Order to Show Cause whether employer intends an appeal to lie with the Board.