



Issue Date: 09 September 2005

In the Matter of:

AC CONSULTING, LLC,
Appellant/Employer,

Case No.: 2005-JSW-2

v.

EMPLOYMENT AND TRAINING
ADMINISTRATION, UNITED STATES
DEPARTMENT OF LABOR,
Appellee.

DECISION AND ORDER DISMISSING CLAIM FOR LACK OF JURISDICTION

On January 25, 2005, the Office of Administrative Law Judges (“OALJ”) issued an Order to Show Cause as to why the above captioned claim should not be dismissed for lack of jurisdiction. On February 14, 2005, AC Consulting, LLC (“Appellant”) filed its Response to the show cause order. On February 18, 2005, the Employment and Training Administration (“ETA”) filed its response to Appellant’s arguments.

This claim arises from a dispute over a wage determination made by the ETA as requested by a Wage and Hour investigator in the course of an investigation into whether Appellant had complied with the prevailing wage aspects of an H-1B labor condition application (LCA). *See* 20 C.F.R. §§ 655.705 and 655.800. On July 29, 2004, Angela Telang of the ETA, Wage and Hour Division office in Detroit informed the Appellant that it had obtained a prevailing wage determination pursuant to 20 C.F.R. § 655.751(d)(1) from ETA relating to Wage and Hour’s LCA investigation, and that if Appellant wished to challenge ETA’s determination, it should take an appeal within 10 days of receipt of the letter under the Employment Service complaint system at 20 C.F.R. Part 658, Subpart E with the appropriate ETA Regional Office.

Appellant claims that on August 6, 2004, it sent “a notice to challenge the prevailing wage determination” to certifying officers in the New York, Chicago, Dallas, Atlanta, and San Francisco ETA offices. The content of these letters is unknown. Each of the ETA offices acknowledged receipt of Appellant’s appeal of the wage determination in letters dated September 2, 7, 8, and 9, 2004. In each of these letters from the ETA offices, Appellant was directed to submit a copy of the survey utilized by Appellant pursuant to 20 C.F.R § 655.731(a)(2)(iii)(C) to establish the prevailing wage on the LCA and all documentation related to the survey which supports its validity within thirty days. Each letter specifically stated that if the survey and

related documentation were not submitted within thirty days that Appellant's appeal would be considered abandoned.

Appellant failed to submit anything to any of the ETA offices within the 30 day time frame established by each of the ETA offices. Appellant acknowledges that it did not submit any materials to any of the ETA offices until November 18, 2004, seventy days after the latest ETA letter allowing Appellant thirty days to submit the survey at issue and supporting documentation. As a result of Appellant's failure to comply with the thirty day deadlines, each ETA office sent Appellant a letter explaining that the appeal was considered abandoned for failure to file any documentation. The letters reaffirmed the prevailing wage determination as stated in the July 24, 2004 letter. Additionally, the letters also specifically stated that the decision made was final and could not be appealed pursuant to 20 C.F.R §658.421(h). These letters were dated from November 10, 12, and 16, 2004.

On November 10, 2004, Vincent Costantino, counsel for ETA, left a voice mail for Rami Fakhoury, counsel for Appellant, inquiring into whether Appellant planned to respond to the September letters requesting a copy of the survey utilized by Appellant pursuant to 20 C.F.R § 655.731(a)(2)(iii)(C) to establish the prevailing wage on the LCA and all documentation related to the survey which supports its validity. Fakhoury claims that Costantino stated, "[w]e haven't yet received anything from you and our intention is to send you a letter indicating that if we don't receive it within 10 days, to essentially reject your appeal." Appellant understood this to mean that it had 10 days from November 10, 2004 to submit the survey and supporting documentation although such a response was due at least 31 days prior to this voice mail. Appellant never received a letter from Costantino or any other ETA official confirming what Appellant believed was an extension of time. Appellant never contacted Costantino or any other ETA official regarding the voice mail.

On November 18, 2004, Appellant sent to all of the ETA offices at issue and to Vincent Costantino, counsel for ETA, a copy of the survey utilized by Appellant pursuant to 20 C.F.R § 655.731(a)(2)(iii)(C) and a letter dated August 24, 2004 from Amarnath Gowda, counsel for Appellant in the filing of the LCAs, to Angela Telang explaining that the survey had previously been accepted by the Department in other LCA filings.

On November 23, 2004, Appellant sent letters to all of the ETA offices explaining that DOL Region 3 had previously publicly endorsed the survey used. Appellant included copies of a transmittal letter from Dietrich Associates, Inc., the firm that prepared the survey, with its November 23, 2004 letter. Appellant also argued that any "additional submission is moot as a matter of public policy and reliability" in light of the Department's alleged previous acceptance of a Dietrich survey.

In letters dated December 2, 3, and 6, 2004, each ETA office acknowledged receipt of Appellant's November 18 and 23, 2004 letters. The ETA offices also reminded Appellant that the appeal had previously been considered abandoned due to Appellant's failure to submit any evidence within the time frame allowed and that each certifying officer in his discretion did not authorize an appeal of his determination pursuant to 20 C.F.R. § 658.431(h). Despite the appeal having been previously dismissed, each ETA office reviewed Appellant's November

submissions and determined that the information was insufficient to alter the previous determination. Each ETA office stated, “[m]y decision regarding your appeal remains the same.”

On December 30, 2004, OALJ received Appellant’s “Notice of Intent to Appeal to the Board of Alien Labor Certification Appeals” dated December 27, 2004. The Board of Alien Labor Certification Appeals (“BALCA”) is housed within OALJ. The filing contained a number of attachments indicating that this matter was probably an appeal from a wage determination made by the Employment and Training Administration (“ETA”) as requested by a Wage and Hour investigator in the course of an investigation into whether Appellant had complied with the prevailing wage aspects of an H-1B labor condition application. *See* 20 C.F.R. §§ 655.705 and 655.800.¹ The filing, however, did not contain the determination letter from which the appeal was sought, nor did it cite the regulatory basis for the appeal. Consequently, a member of the OALJ staff telephoned the Appellant’s attorney and requested that the determination letter from which the appeal is being taken be provided in order for OALJ to docket the appeal. By facsimile dated January 18, 2005, Appellant’s attorney provided the requested information.

In its Response to the January 25, 2005 Order to Show Cause, Appellant argues that its appeal was timely and that OALJ does have jurisdiction over the appeal. In order to examine the timeliness issue, the OALJ must have jurisdiction over the matter. Thus, the jurisdiction issue will be examined first.

The Job Service Complaint System at 20 C.F.R. Part 658 does not provide an aggrieved party with an absolute right to appeal to the OALJ. The OALJ has authority to hear appeals resulting from hearing requests made pursuant to 20 C.F.R. § 658.421(d), (f), or (h). *See* 20 C.F.R. § 658.424(a). Appellant’s appeal arises under 20 C.F.R. §658.421(h), which states:

If the appeal is not resolved, pursuant to paragraph (e) of this section [authorizing the Regional Administrator to undertake an investigation if the Regional Administrator determines such investigation is warranted], to the appellant’s satisfaction, the Regional Administrator may, in the Regional Administrator’s discretion, offer the appellant in writing by certified mail a hearing before a DOL Administrative Law Judge provided the appellant requests such a hearing in writing from the Regional Administrator within 20 working days of the certified date of receipt of the Regional Administrator’s offer of hearing.

20 C.F.R. § 658.421(h).

None of the Regional Administrator’s involved in this case offered the appellant a hearing before the OALJ.² The letters dated November 10, 12, and 16, 2004 specifically stated

¹ Such appeals are heard by an individual administrative law judge rather than by BALCA.

² It is noted that Appellant’s December 27, 2004 “Notice of Intent to Appeal to the Board of Alien Labor Certification Appeals” only mentioned ETA’s December 6, 2004 decision. The New York, Dallas, and Atlanta ETA offices denied Appellant’s appeal on December 6, 2004. The same analysis regarding OALJ’s jurisdiction applies to all ETA denials issued in this case.

that an appeal to the OALJ was not being offered. Subsequent letters from the ETA offices dated December 2, 3, and 6 reaffirmed that decision. The OALJ has no authority to review the Regional Administrator's decision not to offer Appellant a hearing before the OALJ. The Regional Administrator may offer a hearing before the OALJ at his discretion. There are no provisions for the OALJ to review that decision to determine if there has been an abuse of discretion. Thus, Appellant's arguments regarding the cause of the Regional Administrator's denial and decision not to offer a hearing before the OALJ are not relevant to OALJ's lack of jurisdiction to hear Appellant's appeal.

Appellant's argument that it is protected under the law of excusable neglect is misplaced. Appellant states, "The Federal Rules provide that the Court can '...permit the act to be done where the failure to act was the result of excusable neglect...' Federal Rules of Civil Procedure." Rule 6 of the Federal Rules of Civil Procedure provides:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ... upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect....

Fed. R. Civ. P. 6(b). Initially, it is noted the Federal Rules of Civil Procedure do not apply to wage determinations completed by ETA. Secondly, even if OALJ had jurisdiction over this appeal, which it does not, the excusable neglect provision of Rule 6 is inapplicable in the current claim. The time period in question was established by individual ETA offices and not under the Federal Rules of Civil Procedure, notice given under such rules, or by a court. Additionally, Appellant has made no motion to permit the act to be done. Appellant has also offered no evidence or argument that its failure to comply with the thirty day deadline established by the ETA offices was the result of excusable neglect.

Because the OALJ has no jurisdiction over this appeal, it is dismissed.

IT IS SO ORDERED.

A
Thomas M. Burke
Associate Chief Administrative Law Judge