



Issue Date: 13 November 2014

**BALCA Case No.:** 2013-PWD-00002  
ETA Case Nos.: H-400-13042-222266  
H-400-13017-673356  
H-400-13042-952115

*In the Matter of:*

**ISLAND HOLDINGS LLC,**  
*Employer.*

Before: William S. Colwell, *Associate Chief Administrative Law Judge*;  
Paul C. Johnson, Jr., *District Chief Administrative Law Judge*;  
and Paul R. Almanza, Timothy J. McGrath, and Patrick Rosenow,  
*Administrative Law Judges*<sup>1</sup>

Ruling for the Board filed by COLWELL, *Associate Chief Administrative Law Judge*, with whom Judges ALMANZA, JOHNSON, MCGRATH AND ROSENOW join:

**ORDER DENYING MOTION FOR DECLARATORY ORDER**

On December 3, 2013, the Board of Alien Labor Certification Appeals (“BALCA”) issued a Decision and Order in the above-captioned matter remanding to the Certifying Officer three supplemental prevailing wage determinations (“SPWDs”) with instructions to vacate those SPWDs. *Islands Holdings, LLC*, No. 2013-PWD-2 (Dec. 3, 2013) (en banc). To date, the Certifying Officer has taken no action to implement this remand order. On September 3, 2014, BALCA received a motion from the Employer requesting, in pertinent part, that BALCA issue a declaratory order:

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(3) Re-affirming that all post-certification Supplemental Prevailing Wage Determinations ("SPWDs") were void ab initio and that the employers who sought review of SPWDs need not comply with them ...;

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<sup>1</sup> Administrative Law Judge Stephen M. Reilly sat on the en banc decision on this matter. He has since retired, and has been replaced by Administrative Law Judge McGrath for consideration of the Employer’s motion for a declaratory order. See 29 C.F.R. § 18.30 (in event ALJ becomes unavailable, the Chief ALJ may designate another ALJ).

(4) Clarifying that the Certifying Officer ("CO") has a ministerial duty under 20 C.F.R. §§ 655.33(e)(2) & (3) to vacate his affirmances of the Island Holding SPWDs as well as the SPWDs of similarly situated Employers ...;

(5) Declaring that the CO has not discharged this ministerial duty ...; and

(6) Declaring that the CO's erroneous affirmation of the National Prevailing Wage Center's decision upholding the SPWDs issued to Island Holdings is deemed vacated as a matter of law.

(Employer's Motion at 1-2).

BALCA exercises authority only as defined by statute or regulation. *See Entergy Services, Inc. v. OFCCP*, ARB No. 13-025, ALJ No. 2013-OFC-1 (ARB May 19, 2014), USDOL/OALJ Reporter at 3; *J.E. Cooley Farms*, 2014-TLC-54, slip op. at 8 (ALJ Mar. 26, 2014); *Entergy aff'd*, *Entergy Services, Inc.*, ARB No. 13-025, ALJ No. 2013-OFC-1 (ARB May 19, 2014)

The Immigration and Nationality Act does not address BALCA's authority in regard to review of a National Prevailing Wage Center prevailing wage determination relating to the H-2B program.

The applicable H-2B regulations<sup>2</sup> provide that "BALCA shall handle appeals in accordance with § 655.33." 20 C.F.R. § 655.11(e)(4) (2009). Section 655.33(e) states BALCA's scope of review and authority:

e) The BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the denial of the temporary labor certification; or

(2) Direct the CO to grant the certification; or

(3) Remand to the CO for further action.

20 C.F.R. § 655.33(e) (2009). On the face of 20 C.F.R. § 655.33(e), BALCA has no defined authority to conduct a declaratory order proceeding.

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges at 29 C.F.R. Part 18 do not provide authority for an ALJ to issue a declaratory order. Moreover, although 29 C.F.R. § 18.1(a) provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied in a situation not provided for or controlled by these rules, or by any statute, executive order or regulation," Federal Rule of Civil Procedure 57 does not invest BALCA with the authority to issue a declaratory order.

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<sup>2</sup> See 79 Fed. Reg. 11450, 11453 (Mar. 5, 2014).

*See Entergy Services, Inc., supra*, slip op. at 5 and n.6 (the referral in 29 C.F.R. § 18.1(a) and 41 C.F.R. § 60-30.1 to the FRCP to fill procedural gaps cannot give ALJs authority reserved to Article III courts); *U.S. Security Associates, Inc.*, 2012-OFC-4 (ALJ Sept. 17, 2012) (similar ruling).

The declaratory order provision of the Administrative Procedure Act (“APA”) provides:

The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

5 U.S.C. § 554(e). Section 554 of the APA, however, “applies, according to the provisions thereof, in every case of adjudication *required by statute to be determined on the record after opportunity for an agency hearing....*” 5 U.S.C. § 554(a) (emphasis added, and omitting certain exceptions not relevant to the instant matter). *See Entergy Services, Inc., supra*, slip op. at 4. No such formal hearing right exists for the H-2B program. Thus, the APA does not provide direct statutory authority for BALCA to conduct a declaratory order proceeding on H-2B adjudication issues.

Based on the foregoing, we find that BALCA does not have the authority to conduct a declaratory order proceeding relating to an H-2B PWD appeal. BALCA remanded these matters to the CO and once it did, jurisdiction passed to the Office of Foreign Labor Certification. Accordingly, Island Holdings’ motion seeking a declaratory order from BALCA is **DENIED**.<sup>3</sup>

**SO ORDERED.**

For the Board:

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

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<sup>3</sup> This ruling moots the CO’s request that BALCA stay consideration of the Employer’s motion.