

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) OCAHO Case No. 95A00097
AMERICAN TERRAZZO CORP.,)
d/b/a JOHN DELALLO FOODS,)
Respondent.)
_____)

**ORDER DENYING COMPLAINANT'S MOTION FOR
CERTIFICATION OF THE COURT'S DECEMBER 8, 1995
ORDER DENYING IN PART COMPLAINANT'S MOTION FOR
SUMMARY DECISION**

On December 12, 1995 this office received a motion from Complainant requesting that I certify to the Chief Administrative Hearing Officer (CAHO) the Court's denial of the Complainant's Motion for Summary Decision.

In fact, as the transcript and prehearing conference report reflect, I granted the motion with respect to the liability issues in Counts II and III. Further, I granted summary decision with respect to paragraphs A through C of Count I, but I denied summary decision with respect to paragraphs D and E which asserted that Respondent knowingly hired and/or continued to employ an alien unauthorized for work in the United States. I did not make a ruling with respect to penalty because the motion, while not entitled a motion for partial summary decision, only requested a ruling on liability. Hence the parties were given until December 15, 1995 to indicate whether they desired to present oral testimony on the remaining issues of liability and penalty.

Although the motion for certification does not explain which issues Complainant wants me to certify, presumably it is my denial of

6 OCAHO 829

the motion with respect to the liability issue raised by Count I, rather than my failure to assess a penalty with respect to Counts II and III. The Rules of Practice authorize the Judge to certify an interlocutory order to the CAHO within five days of the date of the interlocutory order, either on his own discretion or upon request of a party. 28 C.F.R. §68.53(d)(1). Here the request does appear to be timely. Although the Rules do not specify any time period for making a request for certification, the Judge only has five days from the date of the order to certify the order for review. The order denying the summary decision motion in part was rendered during the conference held on Friday, December 8, 1995. Applying the time computation rule prescribed by 28 C.F.R. §68.9(a), which excludes intermediate Saturdays and Sundays when the time period is seven days or less, the last day to certify is Friday, December 15, 1995. Therefore, Complainant's motion is timely.

The Rules permit the Judge to certify an interlocutory order when "the Administrative Law Judge determines that the order contains an important question of law or policy on which there is substantial ground for difference of opinion; and where an immediate appeal will advance the ultimate termination of the proceeding or where subsequent review will be an inadequate remedy." 28 C.F.R. §68.53(d)(1)(i).

Complainant's motion is legally insufficient because it does not assert that the certification concerns an important issue of law or policy on which there is substantial difference of opinion. Nor does it argue that an immediate appeal will advance the ultimate termination of the proceeding. It merely argues that Complainant will lose the opportunity for review of the denial unless the matter is certified to the CAHO. In addition, as will be reflected in both the transcript of the conference and the Prehearing Conference Report, at the conference I noted that there is no substantial difference of opinion on the issue of constructive knowledge. In fact, the Ninth Circuit decisions on which I relied have been very clear and definitive. *See* Prehearing Conference Report and transcript of prehearing conference.

Just as importantly certification is warranted only when the interlocutory appeal would involve a question of law or policy. My denial of the motion with respect to paragraphs D and E of Count I primarily was based on the fact that the movant had failed to show the absence of genuine issues of material fact with respect to Respondent's state of mind. As noted in the case law cited in the Prehearing Conference Report, summary decision is particularly inappropriate in cases in-

6 OCAHO 829

volving state of mind where one party is attempting to show that the other party knew or should have known of certain facts. As Complainant conceded at the conference, none of the OCAHO cases which found constructive knowledge were decided on motions for summary decision. Thus, since the partial denial was based on a finding of a disputed factual issue, certification is inappropriate.

Prior decisions by judges on the question of certification show that certification by the judge pursuant to Section 68.53(d)(1)(i) requires a finding that there is a substantial question of law, that there is a substantial ground for difference of opinion on that question of law, and that the appeal either would advance the ultimate termination of the proceeding or that subsequent review would be inadequate. *See United States v. Power Operating Company, Inc.*, 3 OCAHO 561 (1993). In a more recent case Judge Morse certified an interlocutory order *sua sponte*, but only after he specifically found that the order contained an important question of law or policy, that there might be a substantial ground for difference of opinion, and that an immediate appeal would advance the ultimate termination of the proceeding. *See United States v. Thoronka*, 5 OCAHO 772, at 7 (1995).

Finally, I must disagree with Complainant that subsequent review will provide an inadequate remedy. The Rules of Practice provide that where a party requests administrative review of an interlocutory order and the CAHO chooses not to review the interlocutory order, the party has not waived its ability to raise the issue contained in the interlocutory order through a later appeal. *See* 28 C.F.R. §68.53(d)(3). Here Complainant's motion has been denied in part but the issue of whether Respondent had actual knowledge or constructive knowledge of the employee's unauthorized status remains a viable issue in the case. If, after considering the parties' evidence, my ruling is that Complainant has failed to show either actual or constructive knowledge, Complainant certainly preserves its right to pursue an appeal of that ruling. *See* 28 C.F.R. §68.53(a)(1).

Accordingly, Respondent's request for certification of the December 8, 1995 order is denied.

ROBERT L. BARTON, JR.
Administrative Law Judge