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THE DECLINE OF DEFERENCE: BALCA DOES NOT SPEAK FOR THE DOL

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In the ongoing litigation over the authority of the Department of Labor (DOL) to promulgate H-2B prevailing wage methodology in the Third Circuit, *Louisiana Forestry Ass'n v. Secretary of Labor*, No. 12-4030, the DOL wrote a letter stating that the Board of Alien Labor Certification Appeals' decision in *Island Holdings LLC*, 2013-PWD-00002 (BALCA 3, 2012) did not represent the legal position of the Secretary of Labor. The DOL had issued increased prevailing wage determinations to an employer after it changed its wage methodology through an Interim Final rule that took effect on April 24, 2013. The order to increase wages was issued after the DOL had already certified the labor certification for the H-2B workers at a lower wage. BALCA in *Island Holdings* invalidated the wage increases on the ground that there was no specific statutory or regulatory authority that would authorize DOL to increase the wage rate at an unknown future date.

The DOL's letter to the Third Circuit disregarding the BALCA ruling in *Island Holdings* would have enormous implications on labor certification practice and administrative law. We credit Wendel Hall of C.J. Lake, counsel in the Island Holdings case, for alerting us to the significance of this issue and also bringing it to the attention of DOL itself. If BALCA does not speak for DOL, is it necessary to exhaust administrative remedies before challenging a PERM denial in federal court? If BALCA does not speak for DOL, should the courts pay *Chevron* style deference to BALCA decisions? Can DOL ignore other BALCA decisions on PERM since BALCA does not speak for Secretary of Labor?

The Supreme Court established a two-step analysis in *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) for evaluating whether an

agency's interpretation of a statute it is entrusted to administer is lawful. Under Step One, the court must determine whether Congress has clearly spoken to the precise question at issue in the plain terms of the statute. If that is the case, there is no need for the reviewing court to delve any further. Under Step Two, if the statute is silent or ambiguous, the reviewing court must determine whether the agency's interpretation is based on a permissible construction of the statute. A permissible interpretation of the statute need not be the best interpretation or even the interpretation that the reviewing court would adopt. Step Two is commonly known as *Chevron* deference where the reviewing court grants deference to the agency's permissible interpretation of an ambiguous statute.

Still, *Chevron* deference cannot be accorded unless there is an agency construction of a statute to which the federal court must defer. DOL has now told the 3rd Circuit that BALCA does not speak for the Secretary of Labor since the administrative law judges on BALCA are only subordinate DOL employees. Therefore, an interpretation by BALCA does not represent the official view or understanding of the DOL. For this reason, one may never reach the question of deference since there is no agency finding or interpretation capable of commanding it. In *United States v. Mead*, 533 U.S. 218 (9th Cir. 2001), the Supreme Court held that not all agency interpretations qualify for *Chevron* deference, and deference is only accorded "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Using the *Mead* language or rationale, one can conclude that, since DOL has now decided that BALCA does not speak for the DOL, Congress has not delegated any interpretive authority to BALCA. Hence, no deference can or should be paid to any BALCA ruling. Such a ruling would appear not to be entitled to deference

Even under the lower standard in *Skidmore v. Swift & Co*, 323 U.S. 134 (1944) the weight accorded to an administrative interpretation or judgment "depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control." If DOL does not think that BALCA speaks for the Secretary of Labor, using the*Skidmore* criteria, how can BALCA ever have the power to persuade? Not having that, any BALCA

decision would not be invested with any deference under *Skidmore.*

Finally, in *Auer v. Robins*, 519 US 452 (1977), the Supreme Court held that the same Chevron type of deference applies to the agency's interpretation of its own regulations. However, even under the *Auer* concept of deference, which gives federal agencies the right to interpret their own regulations, there would be no deference to a BALCA decision since the DOL has now told the Third Circuit that an opinion by BALCA is not an interpretation by the DOL but only an expression of what individual subordinate DOL employees think.

Since DOL does not think BALCA speaks for the Secretary of Labor, is there a need to exhaust administrative remedies before challenging a PERM labor certification denial in federal court? Moreover, if no deference to a BALCA decision is justified or required, can there be a failure to exhaust? We doubt it. If DOL does not think that BALCA speaks for the agency, how can an appeal to BALCA be mandatory despite 20 CFR 656.24(d)(e)(3) that advises an employer a failure to appeal to BALCA within 30 days constitutes a failure to exhaust. How can going to BALCA be a mandatory administrative remedy when BALCA speaks only for itself and not the DOL? There is a conflict between this regulation and the DOL view in the 3rd Circuit *Louisiana Forestry* case. This regulation is key since, for Administrative Procedure Act purposes, only if exhaustion is required by an agency regulation can recourse to the federal courts be barred. *Darby v. Cisneros*, 509 US 137, 144-54 (1993).

The four criteria set forth in *Darby v. Cisneros* in order to bypass an administrative appeal, are as follows:

- Federal review has been brought pursuant to the APA;
- There is no statute that mandates an administrative appeal;
- Either: a) there is no regulation that mandates an administrative appeal; or b) if there is a regulation that mandates an administrative appeal, it also does not stay the agency decision pending administrative appeal; and
- The adverse agency decision to be challenged is final for purposes of the APA.

BALCA cannot provide an administrative remedy to the parties concerned since its decisions do not represent the official view of the DOL. Rather than constituting "superior agency authority" to use the language of Section 10 (c) of the APA, 5 USC 704, BALCA consists of a collection of subordinate DOL

employees in the view of the DOL itself. Since that is the case, BALCA "lacks the ability or competence to resolve the issue or grant the relief requested..." *Iddir v. INS,* 301 F.3d 492, 498 (7th Cir. 2002).

None of the various reasons most regularly advanced for the exhaustion doctrine apply here given the DOL repudiation of BALCA as the final expression of the DOL. The need to first appeal to BALCA does not promote administrative efficiency since it can be ignored by the DOL as the individual perspectives of subordinate employees. For the same reason, it will not avoid needless litigation or promote the conservation of judicial resources. When DOL agrees with BALCA, it accepts what BALCA says. When DOL disagrees, it can tell the court, as here, that BALCA does not speak for the DOL. This is how and why the lack of deference is linked to the absence of any need to exhaust remedies.

Aggrieved employers and aliens may wish to directly seek review in federal court than seek review at BALCA after the DOL's letter to the Third Circuit. Strategically, going directly into federal court may be advantageous if the plaintiff wished to challenge a regulation on constitutional grounds rather than waste time with BALCA, which may not have jurisdiction over such a challenge. Moreover, if the employer desires to file a new PERM application, and still seek review of the old denial, going to BALCA would preclude the filing of a new application until there was a final adverse decision. 20 CFR § 565.24(e)(6). The same prohibition does not apply if the aggrieved employer directly goes into federal court.

Finally, 20 CFR 656.26 does not require an alien to go to BALCA; indeed, the alien has no such right. In the labor certification context, the alien is not even informed of a right to appeal in contrast to the notification of such right provided to an alien investor, 8 CFR 204.6(k), or fiancé(e) , 8 CFR 123.2 (k)(4). Then, under *Darby*, an alien ought to be able to get APA standing even if the employer does not seek review of the denial with BALCA, which in any event has been downgraded by the DOL. The Sixth Circuit in *Patel v. USCIS* very recently held that an alien had standing to seek review of the denial of an I-140 petition as the alien's interests are within the zone of interests protected by INA section 203(b)(3). *See also Stenographer Machines v. Regional Administrator for Employment and Training*, 577 F.2d 521 (7th Cir. 1978); *Cf Ramirez v. Reich*, 156 F.3d 1273 (DC Cir. 1998) (although alien has standing to sue on a denied labor certification, government's motion to dismiss granted due to absence of

employer's participation in the litigation). Given that the DOL has rendered BALCA irrelevant in its letter to the Third Circuit, aliens ought to be able to bolster their argument about seeking review of a denied PERM labor certification in federal court.

The DOL repudiation of BALCA as an authoritative voice calls into question the relevancy of BALCA itself. If BALCA does not speak for the DOL to a federal judge, how can it do so in any other context? Can BALCA represent the DOL in an administrative law sense only? Is it possible for BALCA to be invested with a sense of finality only with respect to decisions on labor certification, both temporary and permanent, but to lose such imprimatur should the DOL go into court? To answer these questions, we would do well to cast our minds back to the reason that DOL created BALCA in the first place. At that time, the DOL's administrative decisions were neither consistent nor uniform. So the DOL revised the regulations to create a Board of Alien Labor Certification Appeals (BALCA) in 1987 to replace the system of appeals to single administrative law judges within the DOL. The rule creating the BALCA said, "he Board will enhance uniformity and consistency of decisions." 52 Fed. Reg. 11218 (Apr. 8, 1987). A subsequent BALCA decision explained: "The purpose of the Board is to provide stare decisis for the immigration bar." *Matter of Artdesign Inc*., 89–INA–99 (Dec. 5, 1989). Subsequently, however, these goals were not achieved, and the BALCA invented a device (the en banc decision) to resolve inconsistencies in BALCA decisions. The BALCA suffers from a strange defect: unlike the DHS and the BIA where regulations exist that make BIA decisions binding on all officers and employees of the Service and Immigration Judges, BALCA decisions cannot command unquestioning obedience from the federal agency it claims to represent. Yet, until today, both the regulators and the regulated assumed that BALCA spoke not merely or even primarily for the administrative law judges themselves but for the Department of Labor. Now, we are not so sure.

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