U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 05 October 2011

In the Matter of

DOLAPO POPOOLA, Case No.: 2011-LCA-00027
Prosecuting Party,

v.

BOARD OF EDUCATION of PRINCE GEORGE'S COUNTY,
Respondent;

and

CHARMAINE BEHARIE, Case No. 2011-LCA-00028
Prosecuting Party,

v.

BOARD OF EDUCATION of PRINCE GEORGE'S COUNTY,
Respondent;

and

MAKARAND BIDWAI, Case No. 2011-LCA-00029
Prosecuting Party,

v.

BOARD OF EDUCATION of PRINCE GEORGE'S COUNTY,
Respondent;

and

MARIA ANGELICA V. ARISTON, Case No. 2011-LCA-00030
Prosecuting Party,

v.

BOARD OF EDUCATION of PRINCE GEORGE'S COUNTY,
Respondent;

and

APOLINARIO F. SANDOVAL, Case No. 2011-LCA-00031
Prosecuting Party,

v.

BOARD OF EDUCATION of PRINCE GEORGE'S COUNTY,
Respondent;

and

JENNIFER V. SANDOVAL, Case No. 2011-LCA-00032
Prosecuting Party,

v.

BOARD OF EDUCATION of PRINCE GEORGE'S COUNTY,
Respondent.

ORDER GRANTING IN PART THE JOINT MOTION OF THE ADMINISTRATOR AND THE BOARD OF EDUCATION TO DISMISS, AND GRANTING MOTION TO SEVER

This matter arises under the H-1B provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101, as amended by the American Competitiveness and Workforce Improvement Act of 1998, 8 U.S.C. §§1101(a)(15)(H)(i)(b), 1154, 1182(n), and 1184(c), and the implementing regulations found at 20 C.F.R. Part 655, subparts H and I ("H-1B program"). The INA and the regulations establish an H-1B Labor Condition Application ("LCA") program for aliens who come to the United States temporarily to perform services in a "specialty occupation," as defined in section 214(I)(1) of the INA. *See* 8 U.S.C. §1101(a)(15)(H)(i)(b).

After conducting an investigation into Respondent Board of Education of Prince George's County ("Board of Education" or "Board")[1], the Administrator of the Wage and Hour Division issued a determination letter on April 4, 2011, ordering the Board of Education to pay civil penalties for willful and non-willful failure to pay the required wage rate and for recordkeeping violations. The Administrator also ordered the Board to pay back wages to over 1,000 H-1B nonimmigrant workers.

By letter dated April 18, 2011, the Board of Education requested a *de novo* hearing on all issues. The individual prosecuting parties under the regulations, likewise timely requested *de*

[1] The Administrator designated "Prince George's County Public Schools" as the entity being investigated; however, under Maryland law, the county Board of Education is the entity with the authority to engage in litigation on behalf of the county school system. Md. Code Ann., Education Article §§ 3-103 and 3-104. Accordingly, the Board of Education is the proper Respondent in these matters.

novo hearings. Five of the six individual prosecuting parties raised only the issue of debarment, while the sixth, Makarand Bidwai, raised only the issue of discriminatory response by the Board to his having raised concerns about the H-1B process. By Order dated June 24, 2011, I consolidated all seven cases for discovery and hearing. Under cover of letter dated July 7, 2011, the Administrator and the Board of Education submitted a settlement agreement in Case Number 2011-LCA-00026 for review and approval. After permitting objections by the individual prosecuting parties and two amici curiae, I approved the settlement agreement on September 20, 2011. Under the settlement agreement, the Board of Education agreed to pay the full amount of wages that the Administrator had determined it had wrongfully withheld, agreed to pay a civil penalty of $100,000, and agreed to a two-year debarment period during which the Board would submit no petitions in support of an employment-related visa. As a consequence of that debarment, the Department of Homeland Security and the Employment and Training Administration would be required to disapprove any petitions based on employment with the Board. Approval of the settlement agreement disposed of Case Number 2011-LCA-00026.

At the same time that the Administrator and the Board submitted the settlement agreement for review, they jointly moved for dismissal of the cases involving the six individual prosecuting parties. The movants argued that, after approval of the settlement agreement, there would be no issues left for hearing or for a decision by the undersigned. I deferred ruling on the motion to dismiss until after resolution of the request for approval of the settlement agreement. Now that the settlement agreement has been approved, the motion to dismiss is ripe for decision.

Motion

The movants' joint motion to dismiss rests essentially upon two grounds. First, they argue that debarment is mandatory upon a determination that the Board committed a willful violation. Second, they argue that the individual prosecuting parties may not contest debarment because the Administrator is vested with the sole authority to enforce the provisions of the Act.

Opposition

The major objections[2] by the individual prosecuting parties and amici curiae are summarized as follows:

- Because no record has been developed, there is no basis for a finding that the Board's violations were willful, and therefore debarment is inappropriate;
- Debarment is manifestly inequitable because it will deprive the H-1B workers of their lawful status to stay and work in the United States and to obtain legal permanent resident status through employment with Prince George's County Public Schools; and
- The monetary aspects of the settlement do not provide a full reimbursement for fees unlawfully charged to the workers.

[2] Additional objections by the various individuals and amici curiae that are not summarized here have nonetheless been considered and I find that they are without merit.

Prosecuting Party Maria Angelica V. Ariston argues that based upon past practice, as evidenced by two previous cases, debarment is not mandatory for all H-1B workers, and current H-1B workers should therefore be excepted from the debarment provisions;

Prosecuting Party Makarand Bidwai argues that because he raised concerns about the Board's H-1B program, and he was terminated after doing so, he is entitled to "whistleblower" remedies under the Act and its regulations. He suggests that his case should go forward, as he has requested (1) certification in support of a U visa; (2) reinstatement; and (3) damages.

Reply

The movants, in their reply brief, reiterate that debarment is mandatory upon a finding that an employer committed willful violations of the INA. They additionally argue that the past practice of allowing individual exceptions to debarment is not truly a past practice, and distinguish the two cases on which Ms. Ariston relies to show that it is.

Discussion

The applicable regulations specify who may act as a "prosecuting party" after the Administrator has made a determination on allegations that an employer has committed violations of the Act and its regulations. If the Administrator has determined that there has been a violation of the H-1B program, "the Administrator shall be the prosecuting party and the employer shall be the respondent." 20 C.F.R. § 655.825(b)(2). If the Administrator has determined that there has been no violation of the H-1B program, "the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent…." 20 C.F.R. § 655.825(b)(1).

In five of the six cases involving individual complainants, the Administrator made a determination that there had been violations of the H-1B program. Those cases are designated as 2011-LCA-027, -028, -030, -031, and -032, and involve Dolapo Popoola, Charmaine Beharie, Maria Angelica V. Ariston, Apolinaro F. Sandoval, and Jennifer V. Sandoval. In those cases, under Section 655.825(b)(2), the Administrator is the prosecuting party. As the prosecuting party, the Administrator has the responsibility to pursue remedies for the violations, including appearance at any administrative hearing, submission of evidence, and preparation of briefs and motions.

In Case No. 2011-LCA-026, the Administrator entered into a settlement agreement with the Board which included a debarment period of two years, specifically including debarment from sponsoring extensions of visas for current H-1B workers whose visas expire. Under that agreement, the Board may not petition for, and DHS may not approve, any extension of the H-1B visas of the individual complainants. The Administrator as prosecuting party in these six cases has determined that the issue of debarment should not go forward, and the Administrator is the party responsible for the prosecution of these cases, rather than the individual workers. I therefore agree with the Administrator that individual prosecuting parties Popoola, Beharie, Ariston, Apolinaro Sandoval, and Jennifer Sandoval cannot go forward on a hearing regarding the sole issue they appealed – the issue of debarment.

As a second reason to dismiss the claims of the individual prosecuting parties other than Mr. Bidwai, I agree with the Administrator that debarment is mandatory under the circumstances of this case. The United States Courts of Appeals and the Administrative Review Board (ARB) have made it clear that the statute allows for no discretion to allow exceptions to debarment on the part of the Administrator, an administrative law judge, or the ARB. See *Cyberworld Enterprise Technologies, Inc. v. Napolitano*, 602 F.3d 189, 204 (3rd Cir. 2010); *Talukdar v. U.S. Dep't. of Veteran Affairs*, ALJ No. 2002-LCA-025, ARB No. 04-100, slip op. at 13 n. 2 (ARB Jan. 31, 2007). In this case, the agreement by the Administrator and the Board that the Board had committed violations warranting a debarment, and agreement to a two-year period of debarment, are tantamount to a finding of a willful violation. Accordingly, debarment is mandatory, and the five named individual plaintiffs who objected only to debarment may not go to a hearing to contest it.

Ms. Ariston argues that debarment need not be a blanket prohibition on filing petitions, but can provide for exceptions to allow individuals to pursue extensions of their H-1B status. She points to *Talukdar, supra,* ALJ No. 2002-LCA-025 and *Cambridge Resource Group*, 2008-LCA-007 in support of her argument. As the Administrator points out, however, neither of those cases resulted in individual exceptions to mandatory debarment. In *Talukdar*, the ALJ determined that debarment was not appropriate against the respondent in that matter; however, the ARB stated in the same case that debarment was mandatory because "[u]nder the INA and its implementing regulations, the Administrator is responsible for notifying the Department of Homeland Security (DHS) when DOL has determined that an employer has violated the INA's employee protection provision" and that therefore the ALJ's determination that debarment was not appropriate was invalid as an advisory opinion. In *Cambridge Resource Group*, the settlement agreement initially negotiated between the Administrator and the employer permitted the employer to file for extensions to H-1B visas for current employees. DHS, however, questioned the settlement and declined to allow exceptions to debarment, believing that doing so would violate the mandatory nature of the debarment provisions. The Administrator thereafter withdrew the request that DHS honor the partial debarment agreed to by the parties. Thus, it is clear that the cases on which Ms. Ariston relies to argue for exceptions to debarment do not support her argument, and actually support the proposition that debarment is mandatory.

Based on the foregoing, the joint motion of the Administrator and the Board to dismiss Case Numbers 2011-LCA-027, -028, -030, -031, and -032 will be granted.

With respect to Case Number 2011-LCA-029, the Administrator made no explicit determination in the April 4, 2011 letter whether Mr. Bidwai was the victim of discrimination or retaliation for raising questions about the Board's H-1B program. The Administrator argues that no such determination was made because Mr. Bidwai would be entitled to no greater remedy at a hearing than he would receive under the settlement agreement – that is, repayment of the immigration-related fees that Mr. Bidwai was improperly required to pay and payment of wages for a "benching" period. I find that the Administrator's failure to address Mr. Bidwai's retaliation complaint, although acknowledging consideration of available remedies, is the equivalent of a determination that no violation occurred. Mr. Bidwai, accordingly, is properly designated as a prosecuting party.

The Administrator additionally argues that certification in support of a U visa is not a remedy available after a hearing, that Mr. Bidwai is not entitled to reinstatement because he does not have a current visa allowing him to work in the United States, and that in general Mr. Bidwai cannot receive any remedies after a hearing than he is receiving under the settlement agreement. I disagree with the Administrator. First, it is possible that evidence at the hearing may show that he is entitled to certification of a U visa. Second, the evidence at this stage of the proceedings does not show that Mr. Bidwai's visa has expired and that he is therefore not entitled to reinstatement. Third and most important, under 20 C.F.R. § 655.810(a) and (e)(2), a worker who suffers discrimination in response to raising concerns about the employer's H-1B program may be entitled, in addition to reinstatement and back wages, to "other appropriate legal or equitable remedies." In determining what remedies are appropriate, an ALJ is "guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 C.F.R. part 24)." 65 Fed. Reg. at 80178. Under 29 C.F.R. Part 24, one of the available remedies is compensatory damages, which can include compensation for pain and suffering, mental anguish, embarrassment and humiliation caused by such discrimination. *See, e.g., Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000) slip op. at 29.

In conclusion, it is incorrect that Mr. Bidwai may not receive any more remedies after a hearing than he is receiving under the settlement agreement. Dismissal at this stage of the proceedings is therefore inappropriate; Mr. Bidwai should have the opportunity to prove discrimination and, if he successfully does so, to show his entitlement to additional remedies. He may not, however, contest the Board's debarment from supporting any employment-related visas.

ORDER

In light of the foregoing, IT IS ORDERED:

1. The joint motion of the Administrator and the Board to dismiss is GRANTED IN PART;

2. The following cases are DISMISSED:

   Popoola v. Board of Education, Case No. 2011-LCA-00027
   Beharie v. Board of Education, Case No. 2011-LCA-00028
   Ariston v Board of Education, Case No. 2011-LCA-00030
   Apolinaro Sandoval v. Board of Education, Case No. 2011-LCA-00031
   Jennifer Sandoval v. Board of Education, Case No. 2011-LCA-00032; and

3. The alternative motion of the Administrator and the Board to sever *Bidwai v. Board of Education*, Case No. 2011-LCA-00029 is GRANTED, and said case will be set for hearing in due course.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).