

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 19 May 2015**

*In the Matter of:*  
**ADMINISTRATOR, WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR  
Complainant**

**v.**

**2014 TNE 00016**

**STRATES SHOWS, INC.  
Respondent**

**Andrew M. Katz, Esquire**  
*For the Administrator*

**Wayne R Pierce, Esquire**  
*For the Respondent*

**ORDER OF DISMISSAL  
WITH PREJUDICE**

This case was scheduled for hearing in Orlando, Florida, for December 1 to December 3, 2015, pursuant to the H-2B provisions of the Immigration and Nationality Act, ("INA"), 8 U.S.C. § 1101 (a)(15)(H)(ii)(b), as amended, and the implementing regulations at 20 C.F.R. § 655.1 et seq., and in accordance with 29 C.F.R. Part 18 of the Rules of Practice and Procedure of the Office of Administrative Law Judges, U.S. Department of Labor.

On March 6, 2015 I was notified that the District Court for the Northern District of Florida vacated and permanently enjoined DOL's enforcement of the H-2B regulations. See *Perez v. Perez*, No. 14-cv-682 (N.D.Fla. Mar. 4, 2015) (2008 regulations) and *Bayou Lawn & Landscape Services v. Perez*, No. 12-cv-183 (N.D. Fla. Dec. 18, 2014) (2012 regulations). ETA's Office of Foreign Labor Certification announced on its website at [www.foreignlaborcert.doleta.gov](http://www.foreignlaborcert.doleta.gov) that "[b]ecause of this decision, effective immediately, DOL can no longer accept or process requests for prevailing wage determinations or applications for labor certification in the H-2B program. DOL is considering its options in light of the court's decision."

Accordingly, I entered an Order cancelling a scheduled March hearing.

After I reset the case for hearing, the Wage and Hour Division (WHD) filed a Motion for Voluntary Dismissal without Prejudice and addresses whether WHD retains authority to bring H-2B enforcement actions pursuant to the Immigration and Nationality Act (INA), despite the decision of the district court in *Perez v. Perez*. The court in *Perez v. Perez* vacated the Department of Labor's (DOL or the Department) 2008 regulations at 20 C.F.R. Part 655, subpart A, governing the H-2B program and permanently enjoined the DOL from enforcing those rules based upon its conclusion that DOL does not have authority to independently issue legislative rules under the INA.

I am advised by the Administrator, first, that the Department has continued to defend the validity of its H-2B regulations, and the U.S. Court of Appeals for the Third Circuit has concluded (with regard to a similar challenge to another H-2B regulation promulgated in 2011) that “DOL has authority to promulgate rules concerning the temporary labor certification process in the context of the H-2B program, and that the 2011 Wage Rule was validly promulgated pursuant to that authority.” *La. Forestry Ass’n v. Perez*, 745 F.3d 653, 669 (3d Cir. 2014); but see *Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 713 F.3d 1080 (11th Cir. 2013) (employers are likely to prevail on their allegation that DOL lacks H-2B rulemaking authority).<sup>1</sup>

I am advised further by the Administrator, however, that even if the decision of the *Perez v Perez* court were correct, it would not “deprive the Department of all enforcement authority. The Administrator states that as the April 10 Order stated, section 214(c)(14) of the INA provides that the Secretary of the Department of Homeland Security (DHS) may impose such administrative remedies as the Secretary determines to be appropriate, including civil money penalties, where the Secretary finds after notice and an opportunity for a hearing “a substantial failure to meet any of the conditions of the petition to admit or . . . a willful misrepresentation of a material fact in such petition.” 8 U.S.C. 214(c)(14)(A). The INA further authorizes the Secretary of DHS to delegate this enforcement authority to the Secretary of Labor. 8 U.S.C. 214(c)(14)(B).

Pursuant to this statutory authority, effective January 18, 2009, DHS delegated to the Secretary of Labor its enforcement authority for the H-2B program. See attached DHS Delegation of Authority to the Department of Labor under Section 214(c)(14)(A) of the Immigration and Nationality Act (transferring “to the Secretary of Labor all authority of the Secretary of Homeland Security under section 214(c)(14)(A)(i) of the INA”); 8 C.F.R. § 214.2(h)(6)(ix) (“The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H-2B worker.”). A copy of the Order of Delegation was filed May 13, 2015. According to the document the effective date was January 18, 2009.

I am also advised by the Administrator that because this DHS delegation of authority pursuant to the terms of the INA flows directly from the statute, it is not dependent upon the validity of DOL’s regulations at 20 CFR Part 655, subpart A, implementing the H-2B program. WHD argues that the delegation of authority provides an independent basis, separate and apart from those regulations, for WHD to investigate H-2B employers’ compliance with the terms of the I-129 petition and to require a hearing with regard to a substantial failure to meet any of the conditions of the petition to admit or a willful misrepresentation of a material fact in such petition. “The court’s decision in *Perez*, therefore, does not affect that enforcement authority.”

The Petitioner avers that this conclusion is confirmed by the new interim final rule that DOL promulgated jointly with DHS on April 29, 2015, implementing the H-2B program. See 80 Fed. Reg. 24042 (Apr. 29, 2015). The regulation relating to administrative proceedings before the Office of Administrative Law Judges provides that, with respect to WHD’s determinations of violations “involving provisions under 8 U.S.C. 1184(c), the procedures and rules contained in this subpart will apply regardless of the date of the violation.” 29 C.F.R. § 503.40(b). Therefore, according to the

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<sup>1</sup> The *Perez* court subsequently temporarily stayed that vacatur, initially through April 15, 2015, and subsequently through May 15, 2015.

Administrator, it is clear that, pursuant to section 214(c)(14) of the INA, the delegation of enforcement authority from DHS to DOL, and the 2015 interim final rule, there is continued authority for DOL to pursue enforcement for violations of the I-129 petition, including such violations that occurred before April 29, 2015.

Following the publication of the interim final rule, the court in *Perez* on April 30, 2015, issued an order lifting the stay of the *vacatur* of DOL's 2008 regulations, pursuant to which this proceeding was brought.

I am advised further by the Administrator that I do not have jurisdiction to rule on the validity of the Department's regulations. See *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, slip op. at 9 (ARB Nov. 17, 2010) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.") (quoting Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), § 5(c)(48), 75 Fed. Reg. 3924 (Jan. 15, 2010)). See also *Administrator, Wage and Hour Division v. Ken Technologies, Inc.*, ARB No. 03-140, slip op. at 5 (ARB Sept. 30, 2004); *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, slip op. at 8-9 (ARB Sept. 29, 1998).

Respondent filed a Motion to Dismiss with Prejudice and a Motion to Strike. It argues that according to "[t]he Court's March 4, 2015, *vacatur* order has the effect of setting aside DOL's 2008 rule and taking it 'off the books.'"<sup>2</sup>

I note that the Administrator addresses jurisdiction as to a regulation that has been duly promulgated. The INA confers the authority to enforce the H-2B program requirements on the Secretary of Homeland Security, 8 U.S.C. § 1184(c)(14)(A), but expressly permits the Secretary of Homeland Security to delegate this enforcement authority to the Secretary of Labor, 8 U.S.C. § 1184(c)(14)(B). There is some question whether the 2008 regulation was validly promulgated, as DHS did not grant it any authority until after the regulations became effective.

The situs of this case falls within the 11<sup>th</sup> Circuit Court of Appeals. I agree that the citation to *Perez v. Perez* addresses the DOL's 2008 rule and in effect, takes it "off the books." This ruling may be sustained in this Circuit. However, I am advised that there may be a split among the circuits.

The other cases cited by the Administrator do not extend to the 2008 rule. It is black letter law that an agency may not promulgate retroactive rules absent express Congressional authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). I have not been provided proof of any Congressional authority to grant retroactive effect to the grant of authority by DHS in this case. Although the Administrator alleges that the new interim final rule that DOL promulgated

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<sup>2</sup> Citing to Defendants' Unopposed Motion for Limited Relief from the Vacatur Order and Judgment in *Perez v. Perez*, (citing *Heartland Regional Center v. Sebelius*, 566 F.3d 193, 198-99 (D.C. Cir. 2009) and *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 92 (D.D.C. 2007) ("vacatur takes the rule off the books")). See also *Heartland*, 566 F.3d at 199 ("To "vacate" ... means "to make of no authority or validity."") (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983)).

jointly with DHS on April 29, 2015, implementing the H-2B program “will apply regardless of the date of the violation,” this case relates back to 2013. A provision operates retroactively when it "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). In the administrative context, a rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Nat'l Mining Ass'n v. United States Dep't of Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999) (quoting *Ass'n of Accredited Cosmetology Sch. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992)). The critical question is whether a challenged rule establishes an interpretation that "changes the legal landscape." *Id.* (quoting *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994)).

8 USC § 1184(c)(14) provides:

A. If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 1101(a)(15)(H)(ii)(b) of this title or a willful misrepresentation of a material fact in such petition—

(i) the Secretary of Homeland Security may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed \$10,000 per violation) as the Secretary of Homeland Security determines to be appropriate; and

(ii) the Secretary of Homeland Security may deny petitions filed with respect to that employer under section 1154 of this title or paragraph (1) of this subsection during a period of at least 1 year but not more than 5 years for aliens to be employed by the employer.

(B) The Secretary of Homeland Security may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security under subparagraph (A)(i).

(C) In determining the level of penalties to be assessed under subparagraph (A), the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.

(D) In this paragraph, the term “substantial failure” means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition.

In seeking a voluntary dismissal, the Administrator tacitly admits that the delegation of authority from DHS was given retroactively. The Administrator argues that delegation of authority provides an independent basis, separate and apart from the 2008 regulations, for WHD to investigate H-2B employers' compliance with the terms of the I-129 petition and to require a hearing with regard

to a substantial failure to meet any of the conditions of the petition to admit or a willful misrepresentation of a material fact in such petition. I assume that this allegation is currently pending in *Perez v. Perez*. I find that the issue as to refiling is not currently ripe and because the charges are not before me, I need not decide now whether the Administrator has the authority to issue a revised determination.

At this point, *Perez v. Perez* precludes a hearing in this fact pattern.

Accordingly:

1. The hearing is **CANCELLED**.
2. The claim is **DISMISSED** without prejudice.

SO ORDERED

**DANIEL F. SOLOMON**  
**ADMINISTRATIVE LAW JUDGE**

**NOTICE OF APPEAL RIGHTS:** Any party seeking review of this decision and order, including judicial review, shall file a Petition for Review (“Petition”) with the Administrative Review Board (“ARB”). The ARB must receive the Petition within 30 calendar days of the date of this decision and order. 20 C.F.R. § 76(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. No particular form is prescribed for the Petition; however, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

If filing paper copies, you must file an original and four copies of the petition for review with the Board. If you e-File your petition, only one copy need be uploaded.

20 C.F.R. § 655.76(b). If the ARB determines that it will review this decision and order, it will issue a notice specifying the issue or issues to be reviewed; the form in which submissions shall be made by the parties (e.g., briefs); and the time within which such submissions shall be made. 20 C.F.R. § 655.76(e). When filing any document with the ARB, the party must file an original and two copies of the document. 20 C.F.R. § 655.76(f).

