



Issue Date: 16 May 2018

**Case Numbers: 2016-TNE-00009
2017-PED-00002**

In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
ADMINISTRATOR, OFFICE OF FOREIGN LABOR CERTIFICATION,**
Prosecuting Parties,

v.

**KELLY-MILLER BROS CIRCUS, LTD.
d/b/a Kelly-Miller Circus,**
Respondent.

ORDER APPROVING CONSENT FINDINGS

These cases arise under the H-2B temporary labor program provisions of the Immigration and Nationality Act (“INA”), as amended, 8 U.S.C. § 1101 *et seq.*, and the implementing regulations governing the H-2B labor certification process published in 2008 by the U.S. Department of Labor (“DOL”), *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture (H-2B Workers)*, 73 Fed. Reg. 78,020 (Dec. 19, 2008) (codified at 20 C.F.R. Part 655, subpart A) (the “2008 H-2B Regulations”).

Background

By letter dated May 18, 2016, the Administrator of the DOL’s Wage and Hour Division (“WHD”) issued a determination to Kelly-Miller Bros Circus, Ltd. d/b/a Kelly-Miller Circus (“Respondent”), alleging violations of the H-2B provisions of the INA and its implementing regulations¹ and assessing back wages and civil money penalties. Upon receipt of Respondent’s objections and request for hearing, the case was docketed with the DOL’s Office of Administrative Law Judges (“OALJ” or “Office”) on June 17, 2016 and assigned case number 2016-TNE-00009. By letter dated November 10, 2016, the Acting Administrator, Office of Foreign Labor Certification, Employment Training Administration of the DOL, issued a Notice of Debarment to Respondent based on the violations found by the Wage and Hour Division. Upon receipt of Respondent’s objection and request for hearing, OALJ docketed the debarment

¹ Specifically, WHD determined Respondent violated the H-2B provisions of the INA during the period February 22, 2014 through October 25, 2014 by: (i) failing to pay the offered wage because the wage rate was based on a collective bargaining agreement not negotiated at arm’s-length; and (ii) a substantial failure to comply with the accuracy of temporary need.

matter as 2017-PED-00002. On December 14, 2016, I issued *Order of Consolidation and Order Changing Hearing Date and Location*, consolidating these separate proceedings. 29 C.F.R. § 18.43.²

After engaging in mediation sponsored by this Office, the parties submitted *Settlement Agreement and Consent Findings* (“First Settlement Agreement”) on July 7, 2017, which appeared to resolve the issues set for adjudication. However, on that same date, Respondent filed *Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Strike the Pending Settlement Agreement and Consent Findings*, with a *Memorandum in Support of the Motion* and a draft *Order* (“Motion to Dismiss”). The Motion to Dismiss requested that these cases be dismissed for lack of subject matter jurisdiction in light of the Administrative Review Board’s (“ARB”) June 30, 2017 *Final Decision and Order in Administrator, Wage & Hour Division v. Strates Shows, Inc.*, ARB Case No. 15-069, ALJ Case No. 2014-TNE-016 (June 30, 2017), which upheld a dismissal of an H-2B enforcement action based on the DOL’s lack of authority to enforce the 2008 H-2B Regulations.

On July 12, 2017, the Prosecuting Parties filed *Response in Opposition to Respondent’s Motions to Dismiss and to Strike Settlement Agreement and Motion to Stay*, with a *Memorandum of Points and Authorities* (“Opposition to Motion to Dismiss”). Therein, the Prosecuting Parties requested that the instant matter be stayed pending the ARB’s ruling on emergency motions for reconsideration of the final decisions and orders in *Administrator v. Strates Shows, Inc.*³ and *Administrator v. Wade Shows, Inc.*⁴ On July 17, 2017, I issued *Order Holding Matters in Abeyance*, finding good cause to hold the *Motion to Dismiss* in abeyance until the ARB ruled on the emergency motions.

On August 16, 2017, the ARB issued *Amended Final Decision and Order in Strates Shows*. On September 11, 2017, the ARB issued *Order Granting Reconsideration and Modifying Order on Reconsideration in Wade Shows*.

On October 18, 2017, the Prosecuting Parties filed *Supplemental Memorandum in Opposition to Respondent’s Motions to Dismiss and to Strike Settlement Agreement* (“Supplemental Opposition to Motion to Dismiss”) requesting that the Court lift the stay on this matter, deny the Motion to Dismiss, and proceed with entry of an order based on the parties’ settlement agreement filed July 7, 2017. Also on October 18, 2017, Respondent filed *Motion for Leave to File an Amended Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Strike the Pending Settlement Agreement and Consent Findings and Motion for Leave to File a Reply Memorandum*, with a draft *Order* (“Motion for Leave to Amend Motion to Dismiss”). On November 6, 2017, Prosecuting Parties filed *Memorandum in Opposition to Respondent’s Request to Submit an Amended Motion to Dismiss* (“Memorandum Opposing Amendment”). On November 30, 2017, I orally granted Respondent’s unopposed *Motion for Leave to File a Reply Memorandum* and allowed Respondent until December 15, 2017 to reply to the Prosecuting Parties’ Supplemental Opposition to Motion to Dismiss. On December 18, 2017, Respondent filed *Reply Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Strike the Pending Settlement Agreement and Consent Findings* (“Reply”).

² Hereinafter, the Administrator of the Wage and Hour Division and the Acting Administrator of the Office of Foreign Labor Certification will be referred to collectively as the “Administrators” or “Prosecuting Parties.”

³ ARB Case No. 15-069, ALJ Case No. 2014-TNE-016 (ARB June 30, 2017).

⁴ ARB Case No. 15-069, ALJ Case No. 2013-TNE-001 (ARB July 20, 2017).

On February 6, 2018, I issued *Order Denying Respondent's Motion to Amend Motion to Dismiss and Denying Respondent's Motion to Dismiss*. I held that Respondent's interpretation of the amended and modified decisions in *Strates Shows* and *Wades Shows*, respectively, was refuted by the plain language of those decisions and the context in which they were issued. In both cases, the ARB's initial decisions explicitly relied on a March 4, 2015 federal district court order in *Perez v. Perez*, which vacated and permanently enjoined DOL from enforcing the 2008 H-2B regulations.⁵ See Final Decision and Order at 6, *Strates Shows*, ARB No. 15-069 (holding the district court injunction "rendered [DOL's] legal authority for pursuing [H-2B enforcement] action[s] null and void" and the ALJ had "no choice but to dismiss the action" for want of subject matter jurisdiction); Order Granting Reconsideration and Modifying Dismissal Order at 2, *Wade Shows*, ARB No. 15-052 (citing the *Perez* injunction to support the premise that the ARB lacks jurisdiction to review the case because "the 2008 H-2B regulations that were the basis for the Administrator's initial enforcement action had been vacated.").

The ARB's initial decisions in *Strates Shows* and *Wade Shows* did not reference the *Perez* court's September 4, 2015 Order clarifying that the injunction "was not intended to, and does not, apply retroactively." The Administrator requested that the ARB's decisions be stayed and reconsidered in light of the ARB's failure to consider the *Perez* court's September 4, 2015 Order clarifying that the permanent injunction entered on March 4, 2014, did not enjoin DOL from enforcing the terms and conditions in labor certifications issued under the 2008 H-2B regulations before the injunction's effective date of April 30, 2015.

After directing briefing on the issue, the ARB granted the requests for reconsideration because its reliance on district court's order "created unintended consequences in other tribunals and impeded [the Wage and Hour Division's] enforcement efforts." *Wade Shows*, ARB No. 15-052, slip op. at 2; Order Vacating Final Decision and Order and Granting Reconsideration at 2, *Strates Shows*, ARB No. 15-069. Thus, in *Wade Shows*, the ARB expressly modified its June 20, 2017 order in accordance with the *Perez* court's "September 4, 2015 order clarifying that enforcement of the 2008 H-2B regulations is applicable to labor certifications issued prior to April 30, 2015." *Wade Shows*, ARN No. 15-052, slip op. at 2-3.

Likewise, the ARB amended its decision in *Strates Shows* to "omit the characterization of the 2008 H-2B regulations as unenforceable." *Strates Shows*, ARB No. 15-069 at 2. Thus, I found that the amended and modified decisions in *Strates Shows* and *Wades Shows* did not conflict with the *Perez* court's order clarifying that the injunction did not apply retroactively.

Given the ARB's previous determinations regarding the enforceability of the 2008 H-2B regulations relied on the *Perez* injunction, and the *Perez* court's clarification that the injunction does not apply retroactively, I found that the amended and modified decisions in *Strates Shows* and *Wade Shows* did not prevent enforcement actions based on labor certifications issued under the 2008 H-2B regulations before the April 30, 2015 effective date of the *Perez* injunction.

⁵ On March 4, 2015, the U.S. District Court for the Northern District of Florida issued an order vacating the 2008 H-2B regulations and permanently enjoining DOL from enforcing those regulations based on its conclusion that DOL lacks authority to engage in legislative rulemaking under the H-2B program. *Perez v. Perez*, Case No. 3:14-cv-00682/MCR/EMT, 2015 U.S. Dist. LEXIS 27606 (N.D. Fla. Mar. 4, 2015). The *Perez* court temporarily stayed vacatur of the 2008 H-2B regulations and ultimately lifted the stay by order issued April 30, 2015, thereby rendering the injunction effective as of that date. Thereafter, the *Perez* plaintiff filed an unopposed motion to clarify that the March 4, 2015 injunction "was not intended to deprive DOL of its authority to enforce compliance with substantive work terms contained in labor certifications issued pursuant to the 2008 [H-2B regulations] prior to the entry of the Court's permanent injunction." Unopposed Motion to Clarify Permanent Injunction at 1, *Perez*, Case No. 3:14-cv-00682-MCR-EMT, Doc. 58. On September 4, 2015, the district court entered an order on September 4, 2015, clarifying that the injunction "was not intended to, and does not, apply retroactively." Order, *Perez*, Case No. 3:14-cv-00682-MCR-EMT, Doc. 62.

However, by its terms, the First Settlement Agreement did not become effective until approval by OALJ. (Settlement Agreement at 3). Thus, while I rejected Respondent's challenges to DOL's authority in this action, I declined to enter an order approving the Settlement Agreement as the Prosecuting Parties requested. To the extent that Respondent's request to strike the Settlement Agreement constituted a withdrawal from the agreement, such an order would be inappropriate. I therefore allowed both parties an opportunity to consider whether they wish to resolve this case through the Settlement Agreement already submitted, submit a new Settlement Agreement, or withdraw from the Settlement Agreement and proceed with a hearing on these matters.

Second Settlement Agreement

On April 30, 2017, counsel for the Administrator filed *Settlement Agreement and Consent Findings* ("Second Settlement Agreement") indicating that the parties have, in fact, reached a resolution on all issues, thereby obviating the need for a formal hearing. In pertinent part, the parties indicate that Respondent agrees to pay a total gross amount of \$57,035.00 in back wages and pay a civil money penalty in the amount of \$2,500.00 on or before April 16, 2018, and withdraws its requests for hearing.⁶ In return, the OFLC Administrator withdraws its Notice of Debarment. WHD Administrator shall distribute the proceeds of the back wages to the persons listed on Exhibit A, or to their estates.

The administrative procedures relevant to the approval of consent findings are set forth at 29 C.F.R. § 503.49. After reviewing the terms of the agreement, I am satisfied that they conform to the requirements of 29 C.F.R. § 503.49(b) and are a satisfactory resolution of the issues previously contested. Accordingly, the *Settlement Agreement and Consent Findings* dated April 30, 2018 are adopted and incorporated in full into this Order. The back wages and civil money penalty having been paid, this matter is DISMISSED WITH PREJUDICE.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁶ At my request, a member of my staff contacted counsel for the Prosecuting Parties who indicated that Respondent has paid the back wages and civil money penalty.