

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: 29 November 2017

Case No.: 2018-TNE-00005

In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,**
Prosecuting Party,

v.

B/H DRYWALL AND STUCCO CO., INC.,
Respondent.

ORDER APPROVING CONSENT FINDINGS AND DISMISSING CASE

The above-captioned case arises from the Secretary of Labor's enforcement of the H-2B temporary non-agricultural visa provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and the implementing regulations at 20 C.F.R. Part 655, Subpart A, and 29 C.F.R. Part 503.

In a letter dated November 2, 2017, the Administrator of the Wage and Hour Division ("Administrator"), U.S. Department of Labor, acting through the District Director of the Phoenix District Office, issued a notice of determination to B/H Drywall and Stucco Co., Inc. ("Respondent") finding certain violations of the H-2B provisions of the INA and its implementing regulations and assessed \$97,269.64 in unpaid wages and \$60,000.00 in civil money penalties. Respondent objected to findings and requested a hearing.

This case was subsequently docketed with the Office of Administrative Law Judges ("OALJ") on November 15, 2017, when the District Director transmitted the Administrator's determination, Respondent's letter requesting a hearing, and a November 7, 2017 Consent Judgement issued by the United States District Court for the District of Arizona (*Acosta v. BH Drywall, Stucco, & Painting Co.*, No. CV-17-00544-PHX-DLR (Nov. 7, 2017)). In the cover letter to the transmittal, the District Director explained that

The requested hearing was ... conducted on November 2, 2017 as part of a federal mediation to comprehensively resolve all wage claims and other issues under the Fair Labor Standards Act ("FLSA") and Section 214(c)(14) on the [INA] and applicable regulations pertaining to violations involving H-2B nonimmigrant

workers. As a result of the hearing, [Respondent] agreed to pay H-2B civil money penalties totaling \$10,000.00. The agreement was recorded in the enclosed consent judgement.

Dist. Dir. Letter at 1 (citation omitted).

As detailed in the enclosed Consent Judgement, the District Court case against Respondent pertained to a complaint filed by the U.S. Department of Labor alleging that Respondent violated provisions of Sections 15(a)(2) and 15(a)(5) of the FLSA. With regard to the H-2B enforcement action, the Consent Judgement states,

The parties agree that Defendants will pay an additional \$48,634.82 in back wages and \$10,000.00 in civil money penalties to resolve the Secretary's H-2B investigation. This paragraph is included to memorialize the parties' agreement to resolve the Secretary's H-2B investigation. This investigation is not subject to the Court's jurisdiction.

Consent Judgement at 2.

On November 20, 2017, my law clerk telephonically contacted Respondent's attorney at my direction to confirm whether Respondent agrees that a hearing on the Administrator's H-2B determination is no longer necessary. Respondent's attorney advised that the parties intended the Consent Judgement entered in District Court to resolve the H-2B enforcement action now pending before OALJ and that the instant proceeding should be closed.

Discussion

29 C.F.R. Part 503, Subpart C prescribes the administrative appeals process applicable here and grants OALJ the authority to conduct hearings on the Administrator's determinations regarding enforcement of the H-2B program, including the assessment of civil money penalties or back pay. 29 C.F.R. §§ 503.43, 503.46. If the parties reach a settlement resolving the case after initiation of proceedings before OALJ, they may submit an agreement containing consent findings and an order to OALJ for approval pursuant to § 503.49. Such an agreement must contain certain provisions required by § 503.49(b), including a waiver of any further procedural steps before OALJ and a waiver of any right to challenge or contest the validity of the agreed-on findings and order. Within thirty days of submission of such agreement, the administrative law judge "will, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings." *Id.* § 503.49.

Here, the District Director has transmitted Respondent's timely request for hearing to OALJ, thereby initiating this matter, and no hearing has yet been held. While the District Director's letter seems to imply that the federal mediation conducted pursuant to the District Court FLSA case constitutes a "hearing" on the H-2B enforcement action, the case before OALJ remains open as the parties' resultant agreement regarding the H-2B action has not been approved by OALJ. Moreover, the District Court's Consent Judgement on the FLSA complaint does not constitute a disposition on the instant matter. While the Consent Judgement memorialized the parties' agreement with regard to the H-2B action, the District Court did not approve that agreement and, in fact, stated that it did not have jurisdiction over the matter.

However, the parties have indicated that they intended the Consent Judgement to dispose of the H-2B enforcement action, and the terms of their agreement on this matter are adequately documented therein. For these reasons, I construe the parties' submission of the Consent Judgement as a request for approval of the provisions memorializing their agreement to resolve the H-2B action. I will therefore review these provisions under § 503.49 as an agreement containing consent findings and an order resolving the issues to be adjudication before OALJ.

The parties' agreement provides that Respondent agrees to pay \$48,634.82 in back wages and \$10,000.00 in civil money penalties to resolve the H-2B violations found in the Administrator's determination, without admitting to any violations. Although the terms of the agreement do not explicit conform to the requirements of § 503.49(b), it is reasonable to conclude from the parties' verbal and written statements that they intended their agreement to be read to include the provisions required by that Section.¹ I am therefore satisfied that the agreement substantially conforms to the requirements of § 503.49(b) and is an acceptable resolution of the previously-contested issues. Accordingly, the agreement, as construed above, is adopted and incorporated in full into this Order. The case is hereby DISMISSED with prejudice.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

¹ Specifically, an agreement containing consent findings and an order disposing of the proceeding must provide: (1) that the order will have the same force and effect as an order made after full hearing; (2) that the entire record on which any order may be based will consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement; (3) a waiver of any further procedural steps before the ALJ; and (4) a waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement. 29 C.F.R. § 503.49(b). As both parties have represented that the H-2B issues set for adjudication have been resolved and request that this case be treated as closed, I find that they intended their agreement to include these provisions, despite that they are not specifically memorialized in the Consent Judgement. However, if the parties intended otherwise, a motion for reconsideration of this Order may be filed no later than ten (10) days after service. 29 C.F.R. § 18.93.