



Issue Date: 06 June 2018

CASE NO.: 2018-TNE-00015

*In the Matter of:*

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

v.

**RAINBOW LANDSCAPING,**  
*Employer.*

### **CONSENT FINDINGS AND ORDER**

The Administrator, Wage and Hour Division ("Administrator"), and Rainbow Landscaping, Inc. ("Respondent"), consent to resolve this matter and stipulate and agree to the findings and order below. These Consent Findings and Order constitute a full and final resolution of this matter and all issues raised by the Administrator's Determination Letter issued to the Respondent on January 18, 2018.<sup>1</sup> The parties stipulate and agree as follows:

### **JURISDICTION AND PROCEDURAL HISTORY**

1. This action arises from the Secretary of Labor's enforcement authority under the H-2B provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 (a)(15)(H)(ii)(b), 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."). This enforcement authority has been further delegated within DOL to the Administrator. See Secretary of Labor Order No. 01-2014 (Dec. 19, 2014).

2. The issues resolved by these Consent Findings were identified during an investigation conducted by the Wage and Hour Division ("WHD"), covering the period from April 1, 2015 to May 25, 2017, with respect to Respondent's petition for and employment of H-2B workers.

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<sup>1</sup> The Administrator's Determination Letter is dated December 19, 2017. United States Postal Service tracking shows the letter was delivered to Respondent on January 18, 2018. Accordingly, the Secretary considers January 18, 2018 the issuance date, consistent with 29 § 18.30(a)(2)(ii)(C) (stat-ing service is complete upon mailing).

3. On January 18, 2018, the Administrator issued a Determination Letter to Respondent detailing the findings of the WHD investigation. The Determination Letter identified the following violations:

a. A substantial failure to pay the wage offered in the approved H-2B labor certification, in violation of Attestation #5 of the ETA Form 9142 and 20 C.F.R. § 655.22(e) (2008 Rules), and the conditions of the United States Citizenship and Immigration Services Form I-129, Petition for a Nonimmigrant Worker ("I-129 Petition"), Part 5, questions 9 - 10.

b. A substantial failure to pay the wage offered in the job order, in violation of Attestation #5 of the ETA Form 9142 and 29 C.F.R. §§ 503.16(a)(1), (a)(4), and (b) (2015 Rules), and the conditions of the United States Citizenship and Immigration Services Form I-129, Petition for a Nonimmigrant Worker ("I-129 Petition"), Part 5, questions 9 - 10.

c. A substantial failure to comply with the requirement to provide workers with earnings statements that contain all the information required by 29 C.F.R. § 503.16(i) (2015 Rules), in violation of that regulation and Attestation #16 of the ETA Form 9142.<sup>2</sup>

d. A substantial failure to comply with the outbound transportation requirements set forth in 29 C.F.R. § 503.16(j)(1)(i) (2015 Rules), in violation of that regulation and Attestation #17 of the ETA Form 9142.<sup>3</sup>

e. A substantial failure to comply with the inbound transportation requirements set forth in 29 C.F.R. § 503.16(j)(1)(i) (2015 Rules), in violation of that regulation and Attestation #17 of the ETA Form 9142.<sup>4</sup>

f. A substantial failure to comply with the requirement to pay visa fees and/or costs associated with obtaining visas set forth in 29 C.F.R. § 503.16G(2) (2015 Rules), in violation of that regulation and Attestation #17 of the ETA Form 9142.<sup>5</sup>

g. A willful misrepresentation of a material fact on the Application for Temporary Employment Certification (ETA Form 9142) concerning the weekly hours to be worked, in violation of 29 C.F.R. § 503.19(a)(1).

4. Based on the above-cited violations, WHD assessed back wages and civil money penalties ("CMPs") to be paid by Respondent. WHD calculated the total amount of back wages owed to 51 employees as \$277,048.03. WHD also assessed \$58,315.80 in CMPs.

5. On February 18, 2018, Respondent timely filed its Request for a Hearing contesting the findings contained in the Administrator's Determination Letter.

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<sup>2</sup> This Attestation is misidentified in the Administrator's Determination Letter as Attestation #17.

<sup>3</sup> This Attestation is misidentified in the Administrator's Determination Letter as Attestation #18.

<sup>4</sup> See note 3 above.

<sup>5</sup> See note 3 above.

6. Subsequently, counsel for the Administrator and counsel for Respondent conducted settlement discussions regarding this matter. The parties agreed to a settlement without the burden, expense, and delay of further litigation.

7. The parties agree upon the following as provisions of these Consent Findings and Order.

### **GENERAL PROVISIONS**

1. These Consent Findings and Order disposing of this proceeding have the same force and effect as an Order made after a full hearing.

2. The entire record forming the basis on which the Consent Findings and Order is entered shall consist of the Determination Letter, the Request for Hearing, and the provisions contained therein.

3. The parties hereby waive all further procedural steps between themselves before the Administrative Law Judge.

4. The parties waive any right to challenge or contest the validity of these Consent Findings and Order.

5. All violations alleged in the Determination Letter issued by the Administrator are and shall be deemed fully resolved by these Consent Findings and Order with regard to all parties.

6. These Consent Findings and Order shall become final immediately upon approval of the Administrative Law Judge. The effective date of these Consent Findings and Order shall be the date of approval by the Administrative Law Judge.

### **SPECIFIC PROVISIONS**

1. The Administrator, in consideration of the facts of this case and other pertinent litigation factors, hereby agrees to reduce the aggregate CMPs to \$53,872.00 ("Adjusted Penalty").

2. Respondent agrees to pay the assessed back wages, in total amount of \$277,048.03, found due to 51 of its current or former employees.

3. Payment of the assessed back wages and the Adjusted Penalty, plus interest, shall be made in accordance with the installment plan detailed in Table I, infra.

4. Respondent withdraws its Request for Hearing filed in this matter.

5. In resolving this matter, Respondent agrees to comply with all the requirements of the H-2B provisions under the INA, the regulations promulgated thereunder, and the conditions of the 1-129 Petition, and the regulations promulgated thereunder.

6. Additionally, Respondent agrees to the following enhanced compliance provisions:

a. Respondent will post, in a conspicuous location at each worksite, a copy of the attached anti-retaliation statement, in English and in Spanish.

b. Respondent will refrain from engaging in conduct that could interfere with the ability of the U.S. Department of Labor, including but not limited to the Wage and Hour Division (the "DOL"), to investigate the employer's compliance with the H-2B program, including but not limited to:

- i. Terminating or threatening to terminate, or retaliating or discriminating in any way against current and former employees of Respondent, based on the employer's belief that an employee or worker spoke with, intends to speak with, or may speak with a representative of the DOL, files a complaint with the DOL, or cooperates in any way in a DOL investigation;
- ii. Telling anyone who works for Respondent not to speak to representatives of the DOL or to provide false information to the DOL regarding their names, duties and the terms and conditions of employment;
- iii. Altering, editing, and/or destroying the employers' time records and records reflecting payments made to employees of Respondent; or
- iv. Creating falsified documents.

**PAYMENT PROVISIONS**

**Table I. Installment Plan**

Payment No.	Date Due	Principal	Interest	Payment	Balance
1.	5/15/2018	\$100,000.00	\$0.00	\$100,000.00	\$234,229.23
2.	6/15/2018	\$6,597.68	\$94.55	\$6,692.23	\$227,537.00
3.	7/15/2018	\$6,597.68	\$94.55	\$6,692.23	\$220,844.77
4.	8/15/2018	\$6,597.68	\$94.55	\$6,692.23	\$214,152.54
5.	9/15/2018	\$6,597.68	\$94.55	\$6,692.23	\$207,460.31
6.	10/15/2018	\$6,597.68	\$94.55	\$6,692.23	\$200,768.08

<b>Payment No.</b>	<b>Date Due</b>	<b>Principal</b>	<b>Interest</b>	<b>Payment</b>	<b>Balance</b>
7.	11/15/2018	\$6,597.68	\$94.55	\$6,692.23	\$194,075.85
8.	12/15/2018	\$6,597.68	\$94.55	\$6,692.23	\$187,383.62
9.	1/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$180,691.39
10.	2/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$173,999.16
11.	3/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$167,306.93
12.	4/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$160,614.70
13.	5/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$153,922.47
14.	6/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$147,230.24
15.	7/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$140,538.01
16.	8/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$133,845.78
17.	9/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$127,153.55
18.	10/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$120,461.32
19.	11/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$113,769.09
20.	12/15/2019	\$6,597.68	\$94.55	\$6,692.23	\$107,076.86
21.	1/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$100,384.63
22.	2/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$93,692.40
23.	3/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$87,000.17
24.	4/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$80,307.94
25.	5/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$73,615.71
26.	6/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$66,923.48
27.	7/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$60,231.25
28.	8/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$53,539.02
29.	9/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$46,846.79
30.	10/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$40,154.56
31.	11/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$33,462.33
32.	12/15/2020	\$6,597.68	\$94.55	\$6,692.23	\$26,770.10
33.	1/15/2021	\$6,597.68	\$94.55	\$6,692.23	\$20,077.87

Payment No.	Date Due	Principal	Interest	Payment	Balance
34.	2/15/2021	\$6,597.68	\$94.55	\$6,692.23	\$13,385.64
35.	3/15/2021	\$6,597.68	\$94.55	\$6,692.23	\$6,693.41
36.	4/15/2021	\$6,598.91	\$94.50	\$6,693.41	\$0.00
<b>TOTAL:</b>		<b>\$330,920.03</b>	<b>\$3,309.20</b>	<b>\$334,229.23</b>	

Respondent agrees that it will pay each installment by placing a cashier's check or other certified funds, identifying reference number 1811657, payable to "Wage and Hour Division, U.S. Department of Labor," in the U.S. mail, first-class, postage prepaid, on or before the dates above and addressed to the U.S. Department of Labor, Wage and Hour Division, 525 S. Griffin Street, Room #800, Dallas, TX 75202-5007.

In the event that Respondent fails to pay the back wages and Adjusted Penalty as specified above, the entire amount shall become due and payable immediately without further notice or demand by the Administrator. The outstanding unpaid balance of the back wages and Adjusted Penalty shall be subject to the assessment of interest and penalties at rates determined by the U.S. Treasury as required by the Debt Collection Improvement Act of 1996, P.L. 104-134 Stat. 1321, 1348. Additionally, other delinquent charges and administrative costs will be assessed as necessary and authorized by law. The Administrator and/or Secretary of Labor will also pursue additional collection action as may authorized by law that may include, but is not limited to, administrative offset, referral of the account to credit reporting agencies, private collection agencies, and/or the Department of Justice. A decision by the Administrator not to seek immediate enforcement of this Section will not be a waiver of this Section's provisions.

### **REPORTING AND ENFORCEMENT**

1. Jurisdiction, including the authority to issue any additional orders or decrees necessary to effectuate the implementation of the provisions of these Consent Findings and Order, is retained by the Office of Administrative Law Judges.
2. Enforcement proceedings for violation of these Consent Findings and Order may be initiated at any time upon the filing with the Administrative Law Judge a motion for an Order of enforcement and sanctions.
3. Each party will bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding, including but not limited to attorney's fees, which may be available under the Equal Access to Justice Act, as amended.
4. These Consent Findings and Order shall constitute the final Administrative Order in this case.

**ORDER**

The court approves the Consent Findings as set forth above, and as set forth in the original stipulation executed on April 2 and 3, 2018.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge

## **AVISO A TRABAJADORES DE RAINBOW LANDSCAPING, INC.**

### **Ninguna Persona (Nadie) Puede Tomar Represalias Contra Usted Por Dar Informacion A La Division de Horas y Salarios**

Es contra la ley que cualquier persona discrimine contra usted, tome represalias contra usted, lo intimide, lo despidan, o lo amenacen de ser deportado por cooperar con la investigacion de la Division de Horas y Salarios o proveer testimonio en relacion a su empleo con Rainbow Landscaping, Inc. Ambos los empleados presentes y los ex-empleados son protegidos de represalias.

### **Sus Derechos**

Usted tiene el derecho de hablar libremente con la Division de Horas y Salarios en relacion de su empleo con Rainbow Landscaping, Inc. incluyendo el numero de horas que usted ha trabajado, la cantidad de pago que usted ha recibido, y otros temas en relacion a su empleo y pago. U sted tiene el derecho de hablar confidencialmente con investigadores de la Division de Horas y Salarios de su empleo.

Si han tornado represalias contra usted por presentar una queja o por cooperar con los investigadores de la Division de Horas y Salarios, usted puede presentar una queja de represalia con la Division de Horas y Salarios o puede establecer su propia demanda legal para recobrar los remedios apropiados como por ejemplo recuperar su trabajo, sueldos perdidos, y una cantidad igual por danos y perjuicios.

### **Donde Optener Informacion**

Si usted tiene preguntas o preocupaciones, usted puede contactar a el Departamento de Trabajo de Estados Unidos, Division de Horas y Salarios, oficina de Denver al: (720) 264-3250.

Para informacion adicional, visite nuestra pagina web de Division de Horas y Salarios: <http://www.dol.gov/whd/>.

## **NOTICE TO RAINBOW LANDSCAPING, INC. EMPLOYEES**

### **No One Can Retaliate Against You for Providing Information to Wage and Hour**

It is against the law for anyone to discriminate against you, retaliate against you, intimidate you, terminate you, or threaten to have you deported for cooperating with the Wage and Hour Division's investigation or providing truthful testimony regarding your employment with Rainbow Landscaping, Inc. Both current and former employees are protected from retaliation.

### **Your Rights**

You have the right to speak freely with Wage and Hour investigators regarding your employment with Rainbow Landscaping, Inc. including the number of hours you have worked, the amount of pay you have received, and other issues regarding your employment and pay. You have the right to speak confidentially with Wage and Hour investigators about your employment.

If you are retaliated against for filing a complaint or cooperating with a Wage and Hour investigation you can file a retaliation complaint with the Wage and Hour Division or you can file your own lawsuit to recover appropriate remedies such as reinstatement to your job, lost wages and an additional equal amount as liquidated damages.

### **Where to Obtain Additional Information**

If you have questions or concerns, you can contact the U.S. Department of Labor, Wage and Hour Division's Denver Office at: (720) 264-3250.

For additional information, visit the Wage and Hour Division Website:  
<http://www.dol.gov/whd/>.