U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

SANDRA LEE BART, **ARB CASE NO. 2018-0004**

RESPONDENT, **ALJ CASE NO. 2017-TAE-00014**

DATE: September 22, 2020

Appearances:

For the Respondent:
Sandra L. Bart; *pro se*; Alderson, West Virginia

For the Administrator:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Sara A. Conrath, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: James A. Haynes, Heather C. Leslie, and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

This case arises under the employee protection provisions of the H-2A temporary agricultural worker program of the Immigration and Nationality Act (INA or Act) as amended by the Immigration Reform and Control Act of 1986, and its implementing regulations.[1] The H-2A nonimmigrant worker visa program permits employers to employ foreign workers on a temporary or seasonal basis when insufficient U.S. workers are "able, willing, and qualified" to do the job, and when employing foreign workers will not "adversely affect the wages and working conditions of" similarly situated U.S. workers.[2]

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[1] 8 U.S.C. § 1188 et seq.; 20 C.F.R. Part 655; 29 C.F.R. Part 501.

[2] 75 Fed. Reg. 6884 (Feb. 12, 2010); 8 U.S.C. §§1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188.1; 20 C.F.R. Part 655.

BACKGROUND

The Administrator of the Wage and Hour Division (WHD) issued a Notice of Debarment against Sandra Lee Bart (Respondent) on January 10, 2017. The Administrator found that Respondent was convicted of three counts of conspiracy to commit fraud related to the H-2A program and considered these crimes a "substantial violation" pursuant to 29 C.F.R. § 501.20(d). Consequently, the Administrator concluded that Respondent should be debarred from applying to the H-2A certification program for a period of three years.[3]

Respondent appealed the Administrator's findings to the Department of Labor (DOL) Office of the Administrative Law Judges (OALJ). During the pre-hearing phase, the Deputy Administrator moved for summary decision. Attached to the Deputy Administrator's Motion for Summary Decision and Memorandum of Law (Motion for Summary Decision) was a Superseding Indictment against Respondent and her co-conspirators in the United States District Court, District of Minnesota, and the Judgment entered against Respondent on January 25, 2017.[4] The Deputy Administrator argued that there were no genuine issues as to any material fact regarding Respondent's substantial violation of 29 C.F.R. § 501.20(d), that the Administrator was entitled to a decision as a matter of law, and that Respondent should be debarred from participating in the H-2A program.[5]

The Administrative Law Judge (ALJ) issued an Order to Show Cause as to why he should not consider the Motion for Summary Decision on its merits because Respondent did not respond to the Motion. Respondent sent a response to the Order to Show Cause on August 7, 2017. Respondent requested to hold the case in abeyance because "she filed an appeal in the U.S. Court of Appeals for the Eighth Circuit."[6]

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[3] *In re Bart*, ALJ No. 2017-TAE-00014, slip op. at 1 (ALJ Sep. 19, 2017) (Decision and Order Granting Deputy Administrator's Motion for Summary Decision).

[4] Respondent was convicted by a jury on August 8, 2016. The District Judge did not impose the Judgment until January 25, 2017. *See U.S. v. Bart*, Criminal Case No. 15-190 (Aug. 8, 2016) (jury verdict).

[5] Motion for Summary Decision at 4-6.

[6] D. & O. at 2.

On August 21, 2017, the ALJ denied Respondent's abeyance request and directed her to respond to the Motion for Summary Decision within twenty-one days. Respondent replied to the Motion for Summary Decision on September 11, 2017. In her response, Respondent argued that "I have evidence legally sufficient to support my innocence of the charges and proving that I am not in violation of the Act and regulations and, therefore, should not be debar[r]ed from the H-2A program."[7] However, Respondent did not submit any evidence or exhibits into the record.

On September 19, 2017, the ALJ granted the Deputy Administrator's Motion for Summary Decision (D. & O.). On October 16, 2017, the Administrative Review Board (ARB or Board) received Respondent's Petition for Review. The ARB issued its Notice of Intent to Review on November 2, 2017, stating it would review whether: (1) the ALJ properly denied Respondent's motion to hold the case in abeyance pending her appeal in the U.S. Court of Appeals for the Eighth Circuit of her conviction on three counts of conspiracy involving the H-2A program; and (2) if so, did the ALJ properly find that there was no genuine dispute as to any material fact entitling the Deputy Administrator to summary decision.

Respondent filed her written Informal Brief of Pro Se Respondent on December 11, 2018. The Administrator filed its Response Brief on January 26, 2018. Respondent filed her written Informal Reply Brief of Pro Se Respondent on March 27, 2018. For the reasons discussed below, we affirm the ALJ's D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from ALJ final decisions in cases under the INA's H-2A provisions.[8] The ARB reviews ALJ's procedural rulings under an abuse of discretion standard.[9]

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[7] *Id*.

[8] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 20 C.F.R. § 655.112; 29 C.F.R. § 501.42.

[9] *Boegh v. EnergySolutions, Inc.*, ARB No. 2015-0062, ALJ No. 2006-ERA-00026, slip op. at 7 (ARB Feb. 24, 2017) (citing *NCC Electrical Servs., Inc.*, ARB No. 2013-0097, ALJ No. 2012-DBA-00006, slip op. at 6 (ARB Sept. 30, 2015).

Conversely, the ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJ's employ under 29 C.F.R. Part 18.4. [10] An ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[11] In assessing this summary decision, we view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party.[12]

DISCUSSION

1. The ALJ did not abuse his discretion in denying Respondent's abeyance request

Respondent argues that the ALJ erred in denying her abeyance request because she was incarcerated, was not able to participate in the H-2A program during her incarceration, and that her appeal before the Eighth Circuit would be heard within three to four months.[13] While the Board recognizes that Respondent is pro se and must construe "papers filed by pro se complainants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude[,]"[14] we also have a duty to not become an advocate for a pro se litigant.[15] After reviewing Respondent's arguments, it appears that she has presented several new arguments that she did not raise before the ALJ.[16] Under our well-established precedent, we

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[10] *See* 29 C.F.R. § 18.40(d).

[11] 29 C.F.R. § 18.72.

[12] *Darrah v. City of Oak Park*, 225 F.3d 301, 305 (6th Cir. 2001).

[13] Petition for Review at 1-2.

[14] *Cummings v. USA Truck, Inc.*, ARB No. 2004-0043, ALJ No. 2003-STA-00047, slip op. at 2 (June 30, 2005).

[15] *Pik v. Credit Suisse AG*, ARB No. 2011-0034, ALJ No. 2011-SOX-00006, slip op. at 5 (ARB May 31, 2012).

[16] In addition to Respondent's arguments in her Petition for Review, she presented several other new arguments in her Informal Reply Brief including: (1) that she is likely to prevail in her appeal because there is no proof of a conspiracy; (2) "[i]t would be harmful absent a stay as it is paramount to seeking the truth and justice to let the 8th Circuit Court of Appeals make their decision;" (3) she has not requested any H-2 workers since February 1, 2017; and (4) that it is in the public interest "to always seek the truth and allow the process to work before making decisions." Informal Reply Brief at 1.

decline to consider arguments that a party raises for the first time on appeal.[17] Instead, we will focus on her argument before the ALJ—requesting an abeyance because she filed an appeal in the Eighth Circuit.

The Board applies a four-part test to determine whether to stay its own actions:

> (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants the stay; and (4) the public interest in granting a stay.[18]

Respondent's only argument fails to address any of these factors. As a result, we find that the ALJ did not abuse his discretion in denying Respondent's abeyance request. Moreover, while this matter has been pending before the ARB, we were notified that Respondent's appeal before the Eighth Circuit was denied.[19] Therefore, even had the ALJ abused his discretion in denying the abeyance, this issue is now moot.[20]

2. The ALJ did not err in granting the Deputy Administrator's Motion for Summary Decision

The regulation governing debarment in H-2A cases provides that:

> [the] WHD Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B or 29 CFR part 501, if the WHD Administrator finds that

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[17] *Privler v. CSX Transp., Inc.*, ARB No. 2018-0071, ALJ No. 2018-FRS-00021, slip op. at 3 (ARB Mar. 24, 2020) (per curiam) (citing *Carter v. Chapman Bus, Inc.*, ARB No. 2005-0076, ALJ No. 2005-SOX-00023, slip op. at 7 (ARB Sept. 29, 2006).

[18] *Cefalu v. Roadway Express, Inc.*, ARB Nos. 2004-0103, -0161, ALJ No. 2003-STA-00055, slip op. at 2 (ARB May 12, 2006).

[19] *U.S. v. Bart*, No. 17-1236, slip op. at 9 (8th Cir. 2018).

[20] Similar to Respondent's abeyance request before the ALJ, Respondent requested an abeyance before the ARB on December 11, 2017, and May 16, 2018. Since the Eighth Circuit denied Respondent's appeal, the abeyance request before the ARB is now also moot.

> the agent or attorney participated in an employer's substantial violation, by issuing a Notice of Debarment.[21]

A debarment may not last longer than three years from the date of the final agency action.[22] The regulation defines a "violation" as:

> (1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:
> . . .
> (x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.[23]

Similar to Respondent's abeyance request appeal, Respondent presents several new arguments that she did not raise before the ALJ including: (1) that in her criminal trial, "the government did not present evidence sufficient to prove the charge of conspiracy[;]" (2) that all efforts on her behalf were legitimate to assist workers; (3) that there was no substantial evidence to support her criminal conviction; (4) that she had no direct involvement with her criminal co-defendant's operation or assisted in preparing his forms; (5) that she did not receive money from her criminal co-defendant or aware of his violations, kickbacks, and fees, which another co-defendant testified; and (6) that the Administrator's Notice of Debarment was not timely.[24] Respondent's only argument before the ALJ was that she had evidence to support her innocence.[25]

As previously stated, we decline to consider arguments that a party raises for the first time on appeal.[26] However, even if we elected to consider Respondent's new arguments, many are one-to-two sentences without citation to authority or otherwise lack merit, including her timeliness argument.

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21 29 C.F.R. § 501.20(b).

22 29 C.F.R. § 501.20(c)(2).

23 29 C.F.R. § 501.20(d).

24 Respondent's Initial Brief at 1; Respondent's Reply Brief at 1-3.

25 D. & O. at 4.

26 *Privler*, ARB No. 2018-0071, slip op. at 3.

The regulations provide that "[t]he WHD Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation."[27] In *Dedios v. Medical Dynamic Systems, Inc.*, the Board held that "the limitations period for the INA is not jurisdictional. Thus, an objection to timeliness may be waived if not raised. The defense that a complaint is untimely falls into the category of defenses that must be raised in a motion to dismiss for failure to state a claim."[28] In the present case, Respondent did not raise a timeliness objection until her appeal before the Board. Since Respondent failed to raise this objection before the ALJ, we find that she has waived it.

Moreover, had Respondent's objection not been waived, the Administrator's Notice of Debarment was nevertheless timely. The Notice of Debarment was issued on January 10, 2017. Respondent was convicted in Criminal Case No. 15-190 on August 8, 2016. Respondent was found guilty on counts 1, 2, and 3, and according to the Judgment attached to the Motion for Summary Decision, these three offenses ended in May 2015. Even though Respondent claims that any H-2A violations occurred in June 2014,[29] we are bound by the Minnesota District Court's findings due to collateral estoppel.

The doctrine of collateral estoppel bars issues that have been litigated from being litigated again.[30] The Board had held that the following requirements must be met in order for collateral estoppel to apply:

> (1) The same issue was actually litigated; (2) the issue was necessary to the outcome of the first case; and (3) precluding litigation of the

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[27] 29 C.F.R. § 501.20(c).

[28] *Dedios v. Med. Dynamic Sys., Inc.*, ARB No. 2016-0072, ALJ No. 2013-LCA-00009, slip op. at 7 (ARB Mar. 30, 2018).

[29] Respondent's Informal Reply Brief at 3.

[30] *See Montana v. United States*, 440 U.S. 147, 153 (1979) (holding that once an issue has been "actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.").

> issue in the second case will not constitute basic unfairness to the party being bound by the first judgment.[31]

As illustrated in the Administrator's Brief, all three requirements for collateral estoppel to apply are present in this case. First, Respondent fully litigated her criminal case and was convicted for conspiracy to commit fraud against the H-2A program, the underlying basis for debarment in this case.[32] "Second, the issue of Respondent's guilt of criminal conspiracy to commit fraud was obviously necessary to the determination by the district court, that is, her conviction."[33] Third, there is no resulting unfairness to Respondent being bound by the first judgment because the Board is unable to overturn her criminal conviction and Respondent was able to fully argue that case before a jury.[34] Since we are bound by the District Court's finding that Respondent engaged in these H-2A violations up until May 2015, the Administrator's Notice of Debarment issued on January 10, 2017, was within the required limitations period.

Similarly, the ALJ also correctly applied the doctrine of collateral estoppel to Respondent's only argument before him—that she had evidence to support her innocence. As stated by the ALJ, "[t]he issue of her guilt has already actually and necessarily been determined by a court of competent jurisdiction. Therefore, the Judgment finding the Respondent guilty of three counts of conspiracy is conclusive."[35]

Accordingly, we agree with the ALJ's conclusion that there is no genuine issue as to any material fact and that the Administrator is entitled to summary decision. We **AFFIRM** the ALJ's D. & O.

SO ORDERED.

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[31] *Siemaszko v. First Energy Nuclear Operating Co.*, ARB No. 2009-0123, ALJ No. 2003-ERA-00013, slip op. at 12-13 (ARB Feb. 29, 2012); see also *Adm'r v. ZL Restaurant Co.*, ARB No. 2016-0070, ALJ No. 2016-FLS-00004, slip op. at 5 (ARB Jan. 31, 2018) (holding that collateral estoppel applies and that the ALJ was bound by the district court's decision on the question of whether the employer's FLSA violations were repeated and willful).

[32] Administrator's Brief at 21.

[33] *Id*.

[34] *Id*.

[35] D. & O. at 4 n.5.