U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 September 2017

Case No.: 2017-TAE-00014[1]

In the Matter of:

SANDRA LEE BART,
Respondent.

DECISION AND ORDER GRANTING DEPUTY ADMINISTRATOR'S MOTION FOR SUMMARY DECISION

This matter arises under the H2-A provisions of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1188 *et seq.*, as amended by the Immigration Reform and Control Act, and implementing regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 501.[2] 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. 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.

PROCEDURAL HISTORY

On January 10, 2017, the Administrator of the Wage and Hour Division ("WHD") issued a Notice of Debarment against Sandra Lee Bart ("Respondent"), after finding that her substantial violation of the Act and regulations warranted debarment from participating in the H-2A temporary employment certification program. The Administrator stated that on August 8, 2016, the Respondent was convicted of three counts of conspiracy to commit fraud related to the H-2A program, including "one count of conspiracy to commit fraud in foreign labor contracting, one count of conspiracy to commit false swearing in an immigration matter, and one count of conspiracy to commit wire and mail fraud." After considering the definition of a "substantial violation" pursuant to 29 C.F.R. § 501.20(d) and the gravity of the Respondent's violation, the Administrator concluded that the Respondent violated 29 C.F.R. § 501.20(d)(x) by committing a "single heinous act showing flagrant disregard for the law that her future compliance with program requirements cannot reasonably be expected." Consequently, the Administrator

[1] Due to administrative error, this case was previously identified as a "PED" case. As this case involves an enforcement action initiated by the Wage and Hour Division, not the Office of Foreign Labor Certification, it is now correctly captioned as a "TAE" case.

[2] The regulations at 29 C.F.R. Part 501 govern the enforcement of all contractual obligations applicable to the employment of H-2A workers and workers in corresponding employment. 29 C.F.R. § 501.0.

concluded that the Respondent should be debarred from applying to the Department of Labor ("Department") for H-2A certification for a period of three years.

By letter dated January 23, 2017, the Respondent objected to the Administrator's findings in the Notice of Debarment and timely requested a hearing.

On April 27, 2017, the Deputy Administrator[3] filed a Motion for Summary Decision and Memorandum of Law ("Motion for Summary Decision") pursuant to 29 C.F.R. § 18.72. Attached to its Motion for Summary Decision, the Deputy Administrator attached evidence demonstrating that on January 25, 2017, District Court Judge David Doty of the United States District Court, District of Minnesota ("District Court"), entered a Judgment in a Criminal Case against Sandra Lee Bart ("Judgment"). (Exhibit E.) The Judgment indicates that the Respondent was required to surrender for the service of her sentence on April 25, 2017. (*Id*.) The Deputy Administrator argued that because there is no genuine issues as to any material fact regarding the Respondent's substantial violation of 29 C.F.R. § 501.20(d), the Department is entitled to a decision, as a matter of law, debarring the Respondent from participating in the H-2A program for three years.

As of mid-July, the Respondent had not responded to the Deputy Administrator's Motion for Summary Decision. Therefore, on July 20, 2017, I issued an Order to Show Cause why the Motion for Summary Decision should not be considered on its merits.[4]

On August 7, 2017, the Respondent sent to the undersigned a written communication in response to the Order to Show Cause. In her written filing, the Respondent asked the undersigned to hold this case in abeyance because she "filed an appeal in the U.S. Court of Appeals for the Eighth Circuit (Appellate Case #17-1236)." On August 21, 2017, I denied the Respondent's request. Moreover, because the Respondent did not serve her written filing on every party to this case, I issued a Notice of Ex Parte Contact, to which her written communication was attached and served on all parties. Moreover, I gave the Respondent twenty-one days to respond to the Deputy Administrator's Motion for Summary Decision. Thereafter, on August 25, 2017, I issued an Amended Order that reflected the Respondent's updated address and gave the Respondent twenty-one days from the date of the Amended Order to file a response.

On September 11, 2017, the Respondent replied to the Deputy Administrator's Motion for Summary Decision. She asked "that the Deputy Administrator's Motion for Summary Decision be denied and a hearing held." She added, "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 H2-A program."

[3] As noted in the Deputy Administrator's Motion for Summary Decision, as of January 20, 2017, the Deputy Administrator for Program Operations is the ranking official responsible for the Wage and Hour Division.

[4] The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges provide that a "party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing." 29 C.F.R. § 18.33(d).

ARGUMENTS OF THE PARTIES

In its Motion for Summary Decision, the Deputy Administrator argued that because the Respondent violated 29 C.F.R. § 501.20(d), she should be debarred from participating in the H-2A program for three years. The Deputy Administrator attached to its Motion for Summary Decision a Superseding Indictment from the District Court against the Respondent and her co-conspirators. (Exhibit A). The evidence reveals that the Respondent was convicted of conspiracy to commit fraud in foreign labor contracting, false swearing in an immigration matter, and wire and mail fraud involving the H-2A program. (*Id*.) It further evidences that from approximately 2008 and continuing through November 18, 2015, the Respondent "operated an unregistered business called Labor Listo, which recruited employers in the United States to hire H-2A workers from the Dominican Republic and coordinated the hiring and employment of the H-2A workers from the Dominican Republic with the employers." (Exhibit A at 5.) The Respondent required H-2A workers to "pay illegal fees to secure their employment for the next year's growing season" and "pay for the cost of their flights to and from the United States," in violation of the H-2A regulations. (Exhibit A at 6-8, 10, 11.) Moreover, the Respondent and her co-conspirators defrauded the United States by submitting false declarations on multiple Department of Labor ("DOL") forms. (Exhibit A at 8.) Moreover, the Respondent and her co-conspirators "failed to comply with overtime payment requirements under Minnesota law and, as a result of the kickback payments, failed to pay the workers the prevailing wage set by DOL, in violation of 18 U.S.C. § 1546(a)." (Exhibit A at 11.)

On January 25, 2017, Judge Doty entered a Judgment against the Respondent, finding her guilty of the following counts: (1) conspiracy to commit false swearing in an immigration matter (18 U.S.C. § 371); (2) conspiracy to commit fraud in foreign labor contracting (18 U.S.C. § 1349); and (3) conspiracy to commit wire and mail fraud (18 U.S.C. § 1349). (Exhibit E at 1.) The Respondent was "committed to the custody of the Federal Bureau of Prisons for a total term of 60 months on each count to run concurrent with one another." (Exhibit E at 2.) Moreover, the Respondent was ordered to pay criminal monetary penalties totaling $261,107.62. (Exhibit E at 6.)

The evidence submitted with the Deputy Administrator's Motion for Summary Decision reveals that between the date of the Superseding Indictment, November 18, 2015, and the date of the Judgment, January 25, 2017, the Respondent filed a Recruitment Report with the DOL's Employment and Training Administration, Office of Foreign Labor Certification, on January 7, 2017. (Motion for Summary Decision at 2; Exhibit B at 1.) In response to her filing, by notice dated January 10, 2017, the DOL issued a Debarment against the Respondent. (Exhibit C.) Citing the Superseding Indictment and 29 C.F.R. § 501.20(d)(x), the Administrator found that the Respondent "committed a single heinous act showing flagrant disregard for the law that her future compliance with program requirements cannot reasonably expected." (Exhibit C at 2.) Therefore, the Administrator determined that the Respondent should be debarred from applying to the DOL for H-2A certification for a period of three years. (*Id*.)

Thereafter, on February 1, 2017, Judge Doty ordered that the Respondent and the business she owns "shall be prohibited from engaging in employment involving the recruiting or hiring of foreign workers." (Exhibit F.)

Based on the above-mentioned evidence, the Deputy Administrator argued that pursuant to 29 C.F.R. § 501.20(b), an agent may be debarred from future labor certification if he or she participated in an employer's substantial violation. After weighing the regulatory factors to be considered when determining whether a violation is so substantial that it merits debarment, the Deputy Administrator concluded that the Respondent's "foreign labor contracting crimes constitute 'a single heinous act showing such flagrant disregard for the law that future compliance with [H-2A] program requirements cannot reasonably be expected.'" (Motion for Summary Decision at 6.) Moreover, the Deputy Administrator argued that the doctrine of collateral estoppel precludes re-litigation of the District Court's findings. (Motion for Summary Decisions at 4-5.)

In response to the Motion for Summary Decision, the Respondent stated that she had evidence to support her innocence. However, she did not submit any evidence or exhibits into the record.[5]

For the reasons set forth below, I find that the Deputy Administrator has established that there are no genuine issues of material fact that must be addressed at a hearing. Therefore, the Deputy Administrator is entitled to summary decision as a matter of law.

DISCUSSION AND APPLICABLE LAW

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges provide that an administrative law judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion." 29 C.F.R. § 18.72(a) (2015). A material fact is one whose existence affects the outcome of the case. *Reddy v. Medquist, Inc*., ARB No. 04-123, slip op. at 4 (Sep. 30, 2005) (SOX) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). The regulations provide that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by" citing to materials in the record, "including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or "[s]howing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." 29 C.F.R. § 18.72(c)(i)-(ii) (2015). If the undersigned finds that there is a genuine issue of material fact, the case must proceed to hearing. In reviewing a request for summary decision, the undersigned must view all of the evidence in the light most favorable to the nonmoving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

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.

[5] To the extent the Respondent is professing her innocence and seeking to re-litigate the issues already decided by the District Court, the doctrine of collateral estoppel precludes re-litigation of those findings. The 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 in this proceeding.

1188, 20 CFR part 655, subpart B or 29 CFR part 501, if the WHD Administrator finds that the agent or attorney participated in an employer's substantial violation, by issuing a Notice of Debarment." 29 C.F.R. § 501.20(b). A debarment may not last longer than three years from the date of the final agency decision. 29 C.F.R. § 501.20(c)(2). A "violation" is defined by the regulation as follows:

> (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.

29 C.F.R. § 501.20(d).

In this case, the Deputy Administrator has provided irrefutable evidence that a jury and District Court found the Respondent guilty of conspiracy to commit false swearing in an immigration matter, conspiracy to commit fraud in foreign labor contracting, and conspiracy to commit wire and mail fraud. (Exhibit E.) The evidence establishes that Respondent engaged in fraudulent foreign labor contracting from 2008 until 2015 and required H-2A workers to pay illegal fees and pay for their flights to and from the United States, which is the Employer's responsibility under the H-2A regulations. Moreover, the Respondent has been ordered to pay criminal monetary penalties totaling $261,107.62. The Respondent's acts show her disregard of the statutes and regulations governing the H-2A program. Therefore, I find that the evidence establishes that the Respondent committed a substantial violation "showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected." 29 C.F.R. § 501.20(d).

In determining whether the Respondent's actions were so substantial to merit debarment, the Deputy Administrator considered the factors in set forth in 29 C.F.R. § 501.19(b). The factors that may be considered include, but are not limited to, the following:

> (1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part;
> (2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
> (3) The gravity of the violation(s);
> (4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in this part;
> (5) Explanation from the person charged with the violation(s);
> (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. 1188;
> (7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

29 C.F.R. § 501.19(b).

As evidenced by the Superseding Indictment and the District Court's Judgment, the Respondent defrauded the U.S. government and violated the H-2A regulations by requiring H-2A workers to pay her illegal fees and failing to pay H-2A workers the prevailing wage. Moreover, I find that the record does not present any issue of material fact. These actions amount to grave violations under 29 C.F.R. § 501.19(b)(3), as a matter of law. Further, various other factors in 29 C.F.R. § 501.19(b) weigh against the Respondent. She committed violations over a period of many years and her criminal actions negatively affected dozens of H-2A workers, in violation of 29 C.F.R. § 501.19(b)(2). In addition, by requiring H-2A workers to give her kickback payments, she achieved financial gain at the expense of the H-2A workers, in violation of 29 C.F.R. § 501.19(b)(7). Finally, considering 29 C.F.R. § 501.19(b)(5), I note that the Respondent has neither taken personal responsibility for nor provided an explanation for her actions; she has simply stated that she is innocent of the crimes outlined in the Judgment. After weighing all of the factors in 29 C.F.R. § 501.19(b), I find that no question of material fact or law exists, and the Respondent's actions are so substantial that she should be debarred from participating in the H-2A program for three (3) years.[6]

CONCLUSION

Having reviewed the Deputy Administrator's motion and evidence attached thereto, I find that the Respondent committed a substantial violation of the H-2A regulations and she should be debarred from participating in the H-2A program for a period of three years. Despite drawing all inferences in favor of the Respondent, because there is no genuine dispute as to any material fact, the Deputy Administrator is entitled to summary decision as a matter of law.

ORDER

The Deputy Administrator's Motion for Summary Decision and Memorandum of Law is **GRANTED**.

SO ORDERED.

JOHN P. SELLERS, III
Administrative Law Judge

[6] Consistent with my ruling, I note that in January 2017, Judge Doty ordered that the Respondent and the business she owns "shall be prohibited from engaging in employment involving the recruiting or hiring of foreign workers." (Exhibit F.)

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review ("Petition") with the Administrative Review Board ("ARB") within 30 days of the date of this decision. 29 C.F.R. § 501.42. 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

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

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. §501.42(a).