U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 June 2020

BALCA No.: 2018-TAE-00035

In the Matter of:

ACTING ADMINISTRATOR,
WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMETN OF LABOR
Complainant,

v.

TEN WEST CATTLE, INC.
Respondent.

ORDER GRANTING COMPLAINANT'S PARTIAL MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S CROSS MOTION FOR SUMMARY DECISION

Summary

On April 5, 2019, Complainant filed a Partial Motion for Summary Decision ("Complainant's Motion"). Complainant seeks a partial summary decision that a J-1 visa holder can be considered a non-H-2A visa holder who is engaged in "corresponding employment" as defined by the H-2A regulations. In other words, the issue Complainant asks me to consider is not whether Respondent's J-1 visa holders actually were engaged in "corresponding employment" as a matter of law, but instead whether J-1 visa holders generally may engage in "corresponding employment" as defined by the H-2A regulations. On April 5, 2019, Respondent filed a Cross Motion for Summary Decision ("Respondent's Motion"). Respondent seeks a summary decision that H-2A regulations do not apply to J-1 visa holders. Thus, I will address the question of whether or not J-1 visa holders can be engaged in "corresponding employment" as defined by the H-2A regulations, which will address both Complainant's Motion and Respondent's Motion.

However, a necessary antecedent question to this inquiry is whether or not a J-1 visa holder can be considered to be "employed" for purposes of the H-2A regulations. I conclude that a J-1 visa holder may be considered to be "employed" for purposes of the H-2A regulations. I

also conclude that a J-1 visa-holder can be engaged in "corresponding employment" as defined by the H-2A regulations, because the definitional scope of "corresponding employment" is broad without an applicable exception.

As explained below, I grant Complainant's Motion and deny Respondent's Motion.

Legal Standard

Under 29 C.F.R § 18.72, "[a] party may move for summary decision, identifying each claim or defense – or the part of each claim or defense – on which summary decision is sought." The court "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 a decision as a matter of law." *Id*. 29 C.F.R § 18.72 is analogous to the standard developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, No. 07-100, slip. op. at 5 (ARB May 27, 2010). Generally, the purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, U.S. 574, 587 (1986). Here, the issue presented is solely legal, and does not depend on disputed facts.

Background

This case arises under the H-2A temporary agricultural worker program of the Immigration and Nationality Act ("INA") and the H-2A implementing regulations. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 8 U.S.C. § 1188, 20 C.F.R. § 655, Subpart B, 29 C.F.R. § 501 (collectively, the "H-2A Program"). Respondent commenced operations as a feedlot within the State of Nebraska in 1996. Complainant's Motion at Exhibit A/Respondent's Motion at Exhibit 1, Stipulated Facts ("Stipulated Facts") No. 2. Throughout both the 2015 and 2016 certification periods, Respondent employed H-2A workers, and hosted J-1 visa-holders at the feedlot. Stipulated Facts Nos. 8, 11.

In 2015, Respondent submitted two H-2A Applications for Temporary Employment Certification ("TECs") to the Employment and Training Administration ("ETA"), which were certified on May 15, 2015 (the "2015 Certification"), and January 29, 2016 (the "2016 Certification"), respectively. Stipulated Facts Nos. 4, 6. The 2015 Certification covered one H-2A worker and encompassed the period of July 1, 2015, through April 30, 2016, and the 2016 Certification covered two H-2A workers, and encompassed the period of March 1, 2016, through December 31, 2016. Stipulated Facts, Nos. 5, 7. Both Certifications described the H-2A worker job duties to be performed as "[p]repare for seeding; prepare fertilizer; seed and plant corn using farm equipment; apply fertilizer; harvest corn using combine." Stipulated Facts No. 8.

In addition to H-2A workers, since 2012, Respondent has also hosted J-1 visa-holders furnished by the International Farmers Aid Association ("IFAA"). Stipulated Facts Nos. 9, 10. The IFAA requires "host farmers" participating" in its "internship" program to provide J-1 visa holder "students" free housing, pay them the applicable state minimum wage, and make certain specified deductions from "student" paychecks, which are then to be remitted back to the IFAA. Stipulated Facts No. 10.

The Wage and Hour Division ("WHD") conducted an investigation of Respondent and thereafter issued its Notice of Determination on August 3, 2017, which identified seven violations of the H-2A Regulations, including failure to pay the required rate of pay. Stipulated Facts No. 12. WHD's investigation of Respondent covered the period of June 1, 2015 through September 30, 2016. Stipulated Facts No. 13. Respondent filed its Request for Hearing on September 1, 2017. Stipulated Facts No. 14.

Procedural History

On January 22, 2019, the Parties participated in a conference call with me, and agreed to brief whether J-1 visa holders may be engaged in "corresponding employment" under the H-2A Regulations. As a result, on January 25, 2019, I canceled the previously scheduled hearing, and entered a briefing schedule for the Parties' Cross Motions for Summary Decision and related Oppositions.[1]

The H-2A Program

Under the H-2A Program, an employer may bring foreign, nonimmigrant workers to the United States to perform agricultural work or services of a temporary or seasonal nature under certain conditions. *See* 8 U.S.C. § 1188(a)(1). However, utilization of the H-2A Program is limited and may only occur where the Department has certified that sufficient domestic workers "who are able, willing, and qualified...to perform the labor or services involved in the petition" cannot be found, and the use of foreign labor "will not adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.*

Among other requirements, the H-2A regulations seek to protect agricultural workers in the United States by requiring H-2A employers to pay H-2A workers, at a minimum, the wage rate known as the AEWR. 20 C.F.R. § 655.122(l).

In addition to the central role of the AEWR in protecting domestic workers, the H-2A Program includes a number of protections for workers in "corresponding employment." Corresponding employment is "the *employment* of workers who are not H-2A workers by an employer who has an approved H-2A Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof." 20 C.F.R. § 655.103(b) (unnumbered section defining "Corresponding employment") (emphasis added). H-2A employers must pay their workers engaged in corresponding employment, at a minimum, the required H-2A wage rate. U.S. Dep't of Labor, Temporary Agricultural Employment of H-2A Aliens in the United States (Final Rule), 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010) ("2010 H-2A Rule") (stating that "To ensure that similarly employed workers are not adversely affected by the employment of H-2A workers, the Department makes certain that workers engaged in corresponding employment are provided no less than the same protections and benefits provided to H-2A workers").

[1] I apologize to the parties for the delay in issuing this order.

The J-1 Program

Under the J-1 Exchange Visitor Program, the Department of State may approve sponsored programs to bring any foreign, nonimmigrant, "alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training…." 8 U.S.C. § 1101(a)(15)(J), 22 C.F.R. § 62 (collectively, the "J-1 Program").

In contrast to the H-2A Program, the purpose of the J-1 Program is to "enhance the skills and experience of [foreign nationals] in their academic or occupational fields through participation in structured and guided work-based training and internship programs." 22 C.F.R. § 62.22(b)(1)(i). As it relates to the J-1 Program, the term "student" is defined as "[a] foreign national who is [e]ngaged full-time in a student internship program conducted by a post-secondary accredited academic institution." 22 C.F.R. § 62.4(a)(4). Conversely, the term "trainee" is defined as "[a] foreign national practicing in a structured and guided work-based training program in his or her specific occupational field (in an occupational category for which a sponsor has obtained designation)." 22 C.F.R. § 62.4(c). In addition, a "trainee" must have either "[a] degree or professional certificate from a foreign ministerially-recognized post-secondary academic institution and at least one year of prior related work experience in his or her occupational field outside the United States; or [f]ive years of work experience in his or her occupational field acquired outside the United States." *Id.*

However, "internship programs must not be used as substitutes for ordinary employment or work purposes; nor may they be used under any circumstances to displace American workers." 22 C.F.R. § 62.22(b)(1)(ii). Moreover, "[t]he requirements in these regulations for trainees are designed to distinguish between bona fide training, which is permitted, and merely gaining additional work experience, which is not permitted." *Id.*

Legal Analysis

As Complainant states, the sole question to answer is whether or not J-1 visa holders may be engaged in corresponding employment as defined by the H-2A Program. Complainant's Motion at 1. However, a necessary antecedent question to this inquiry, which neither party has addressed, is whether or not J-1 visa holders are "employed" at all. If J-1 visa holders are not employed, they cannot be engaged in "corresponding employment." *See* 20 C.F.R. § 655.103(b) (defining "corresponding employment" as "the *employment* of workers who are not H-2A workers by an employer who has an approved H-2A Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H-2A workers") (emphasis added). As will be discussed, although the J-1 Program implies that J-1 visa holders are not employed, they may be employed for purposes of the H-2A program.

J-1 Visa Holders May Be Employed for Purposes of the H-2A Program

The J-1 Program implicitly states that J-1 visa holders are not employees. The J-1 Program states that a J-1 visa holder is also known as an "exchange visitor." *See* 22 C.F.R. § 62.2 (defining "exchange visitor" as "a foreign national who has been selected by a sponsor to participate in an exchange visitor program, and who is seeking to enter or has entered the United States temporarily on a non-immigrant J-1 visa or who has obtained J status in the United States based on a Form DS-2019 issued by the sponsor."). Further, an "exchange visitor," which by implication includes a J-1 visa holder, who takes part in an exchange visitor program is also known as a "third party." *See* 22 C.F.R. § 62.2 (defining "third party" as a "person or legal entity with whom a sponsor has executed a written agreement for the person or entity to act on behalf of a sponsor in the conduct of the sponsor's exchange visitor program."). A "third party," and by implication a J-1 visa holder, is outside the definitional scope of an "employee." *See* 22 CFR § 62.2 (defining "employee" as "an individual who provides services or labor for an employer for wages or other remuneration. *A third party*, as defined in this section ... *is not an employee*.") (emphasis added). Thus, the J-1 Program implicitly states that J-1 visa holders are not employees.

Despite the exclusion of J-1 visa holders from the definitional scope of "employee" in the J-1 program, there is no such exclusion from the definitional scope of "employee" in the H-2A Program. The H-2A Program defines "employee" as "a person who is engaged to perform work for an employer, as defined under the general common law of agency." 20 C.F.R. § 655.103. Thus, J-1 visa holders may be considered to be employed for purposes of the H-2A Program; because, unlike the J-1 program, the definitional scope of "employee" in the H-2A Program is based on the common law of agency.

However, before determining if an individual is an employee as defined under the common law of agency, it must be determined if the individual has been hired in the first place. *See O'Connor v. Davis*, 126 F.3d 112, 115 (2nd Cir. 1997) (stating that "only where a 'hire' has occurred should the common-law agency analysis be undertaken."). Courts have split regarding what test to use to determine if an individual is hired. The majority of courts have emphasized the factor of remuneration. *See Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431, 439 (5th Cir. 2013) (adopting the threshold-remuneration test to determine if a volunteer was hired); s*ee also O'Connor*, 126 F.3d at 116 (stating that the "preliminary question of remuneration is dispositive" ... and that in the "absence of either direct or indirect economic remuneration or the promise thereof ... we agree ... that [the plaintiff] was not an employee"); *see also Graves v. Women's Prof'l Rodeo Assoc.*, 907 F.2d 71, 73 (8th Cir. 1990) (stating that although "compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition ... it is an essential condition to the existence of an employer-employee relationship.").

In contrast, in *Bryson v. Middlefield Volunteer Fire Department, Inc.*, the Sixth Circuit decided that remuneration is not the dispositive factor in determining if a party has been hired. 656 F.3d 348, 354 (6th Cir. 2011). The *Bryson* court held that remuneration was not an independent antecedent requirement, but rather was only one nondispositive factor that should be assessed in conjunction with "all of the incidents of the relationship." *Id.* The *Bryson* court

looked to the "contractual relationship [between the parties]" and what benefits the alleged employee received from the alleged employer including workers' compensation coverage, insurance coverage, gift cards, personal use of the facilities and assets, training, and access to an emergency fund. *Id*.

Using either test, I conclude that J-1 visa holders may be hired for purposes of the common law of agency. In fact, I can conclude that J-1 visa holders were hired for the purposes of the common law of agency in *this* case. The J-1 visa holders employed by Respondent in this case were furnished by IFAA, and IFAA required host farmers to "pay them [J-1 visa holders] the applicable state minimum wage. Stipulated Facts Nos. 9 and 10. The J-1 visa holders employed by Respondent in this case thus were hired using the remuneration test outlined above. They also were hired using the multi-factor test from *Bryson*, because in addition to remuneration they received free housing. Stipulated Facts No. 10.

I now turn to whether J-1 visa holders may be employees as defined by the common law of agency. I conclude that they may.

The definition of "employee" in the H-2A regulations provides the relevant factors to consider to determine if an individual is an employee for purposes of the common law of agency:

> Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

20 C.F.R. § 655.103.

In applying these factors in turn, I find that a J-1 visa holder may be within the H-2A Program's definitional scope of an employee. First, the hiring party has the right to control the manner and means by which a J-1 visa holder completes his or her work. The J-1 Program suggests that the work of J-1 visa holders is to train. *See* 22 C.F.R. § 62.22(f)(2)(v) (stating that "the positions that trainees and interns fill exist primarily to assist trainees and interns in achieving the objectives of their participation in training and internship programs"). The host of the J-1 visa holder is required to control the manner and means by which the training is accomplished. *See* 22 C.F.R. § 62.22(f)(2)(iii) (stating that hosts of J-1 visa holders must "ensure that trainees and interns obtain skills, knowledge, and competencies through structured and guided activities such as classroom training, seminars, rotation through several departments, on-the-job training, attendance at conferences, and similar learning activities, as appropriate in specific circumstances"). Secondly, the J-1 visa holder is expected to have minimal knowledge of the profession in which she is training. *See* 22 C.F.R. § 62.22(h)(1) (stating that "all parties involved in [J-1 Exchange Visitor] programs should recognize that [J-1 visa holders] are seeking entry-level training and experience."). Thirdly, the source of the instrumentalities and tools for accomplishing the work is with the employer. *See* § 62.22(f)(2)(i) (stating that hosts of J-1 visa

holders must have "sufficient resources, plant, equipment, and trained personnel available to provide the specified training and internship program"). Fourthly, the host has discretion over when and how the J-1 visa holder works. *See* 22 C.F.R. § 62.22(f)(2)(iii) (stating that hosts of J-1 visa holders must ensure there is "structured and guided activities such as classroom training, seminars, rotation through several departments, on-the-job training, attendance at conferences, and similar learning activities, as appropriate in specific circumstances"). Lastly, there is a fact-dependent analysis to determine if the location of training is at the host's site, and whether the work a J-1 visa holder is engaged in is part of the regular business of the host. Thus, in applying the factors in turn, J-1 visa holders may be employees for purposes of the H-2A Program.

There is No Exception in the Application of the H-2A Program for J-1 Visa Holders

The H-2A program has a broad scope. This is particularly so because of the broad definition of "corresponding employment." As stated above, the H-2A Program defines "corresponding employment" as the "employment of workers *who are not H-2A workers* by an employer who has an approved H-2A Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H-2A workers." 20 C.F.R. 655.103(b) (emphasis added). Thus, the plain language of the H-2A Program applies when a worker performs the relevant agricultural work in the employment of an employer who has an approved H-2A certification. There is no applicable exception in the H-2A Program for J-1 visa holders.

However, Respondent argues that the H-2A wage requirements contain an implicit carve out for J-1 visa holders, because the H-2A wage requirements do not require a wage to be paid to individuals in a "special procedure ... approved for an occupation or specific class of agricultural employment." Opposition to Complainant's Partial Motion for Summary Decision at 6, citing 20 C.F.R § 655.120. However, under 20 C.F.R. § 655.102 that particular exception is inapplicable to J-1 visa holders because while the OFLC Administrator has "the authority to establish, continue, revise, or revoke special procedures for processing certain H-2A applications[,]" the OFLC Administrator has taken no such action regarding J-1 visa holders.

It should also be noted that the H-2A Program does not definitively state that the definition of "corresponding employment" is limited to U.S. workers. *See* Temporary Agricultural Employment of H-2A Aliens in the United States, 74 FR 45906-01 (stating "the employer must advance the transportation and subsistence costs to *U.S. workers in corresponding employment*); *id***.** (stating "A new proposed paragraph (d)(iv) was added. Under the Proposed Rule, an employer's improper layoff or displacement of *U.S. workers or workers in corresponding employment* may be a debarrable violation); *id***.** (stating "The Department is proposing to modify language used in the 2008 Final Rule that defined *"corresponding employment" as including only U.S. workers* who are newly hired by the employer in the occupations and during the period of time set forth in the Application and thereby excluding U.S. workers who were already employed by the H-2A employer at the time the Application was filed") (emphasis added). *Compare* 20 C.F.R. § 655.103(b) broadly defining "corresponding employment" to "workers who are not H-2A workers." Assuming *arguendo* that "corresponding employment" were limited to U.S. workers, the H-2A Program defines "U.S. worker" broadly to potentially include J-1 visa holders. In pertinent part, the H-2A Program defines "U.S. workers"

to include "(3) an individual who is not an unauthorized alien (as defined in 8 U.S.C. § 1324a(h)(3)) with respect to the employment in which the worker is engaging." 20 C.F.R. § 655.103(b). As stated above, J-1 visa holders may be authorized aliens with respect to the *employment* in which the J-1 visa holder is engaging (and, if so, are not "unauthorized alien[s]" with respect to such work). Thus, a J-1 visa holder may be within the definitional scope of "U.S. worker."

It Is Premature to Address Whether the J-1 Visa Holders Were Engaged in Corresponding Employment

The Administrator has objected to Respondent's presentation of facts beyond those in the parties' Stipulated Facts as uncontroverted given the lack of discovery in this matter. Complainant's Oppostion to Respondent's Cross-Motion for Summary Decision at 2-3. I agree. Discovery is necessary for the development of facts that may be presented on the question of whether the J-1 visa holders employed by Respondent were, or were not, engaged in "corresponding employment." It is thus premature to address this issue.

Conclusion

Given the foregoing, I make the following two findings of fact and conclusions of law:

1. I find that J-1 visa holders *may* be engaged in corresponding employment for purposes of the H-2A Program because the definition of "corresponding employment" is broad without an applicable exception; and

2. I find that on the parties' stipulated facts, the J-1 visa holders employed by Respondent in this case were hired for purposes of the common law of agency.

ORDER

For the foregoing reasons, Complainant's Partial Motion for Summary Decision is **GRANTED**, and Respondent's Cross Motion for Summary Decision is **DENIED**.

Discovery may resume in this case.

Within 30 days of the date of this order, the parties shall meet and confer and submit a joint status report proposing three dates in September or October 2020 for a telephonic or video hearing of this matter. Should the parties believe that more than one day is necessary for this hearing, they shall provide an estimate of the time needed for the hearing. Once I set a hearing date in this matter, all deadlines in the pre-hearing order tied to a hearing date will be adjusted to reflect the new hearing date.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge