U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 September 2013

In the matter of:
GONS GO, INC.,
Employer,

WOOD TRUCKING, LLC,
Employer,

LIONEL MOUNIER JR FARM,
Employer,

LOUISIANA CRAWFISH CO.,
Employer,

BERGERON'S SEAFOOD,
Employer,

HENDERSON FARMS,
Employer,

JOHNDALES FARM,
Employer,

LEVIN SAVOY FARM,
Employer,

POPE BROTHERS DAIRY, LLC,
Employer,

WHO'S TRUCKING, LLC,
Employer,

BALCA Case Nos.: 2013-TLC-00051, 2013-TLC-00055, 2013-TLC-00056, 2013- TLC-00057, 2013-TLC-00058, 2013-TLC- 00059, 2013-TLC-00060, 2013-TLC-00061, 2013-TLC-00062, 2013-TLC-00063

ETA Case Nos.: H-300-13227-655297, H-300-13212-286362, H-300-13235-050770, H-300-13235-198733, H-300-13235-340984, H-300-13235-4909388, H-300-13227-000369, H-300-13212-221867, H-300-13235-171317, H-300-13227-534947

Certifying Officer: Chicago National Processing Center

ORDER OF REMAND

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C.§ 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor ("the Department") at 20 C.F.R. Part 655.

The H–2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the Department. 8 U.S.C. 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On September 3, 2013 Cajun Visa Company, Inc. ("Cajun") requested expedited review of the denial of temporary labor certifications in the above-captioned matters. The Certifying Officer ("CO") denied the applications on the basis that Cajun is an agent that has been debarred from participation in the H-2A program. The CO found that Cajun had

> offered insufficient evidence to demonstrate that it is not the disguised continuance, or alter ego, of Linda White & Associates, an agent that has been debarred from participation in the H-2A program. Rather, the evidence in the record supports the Department's conclusion that Cajun is the disguised continuance, or alter ego, of Linda White and Associates.

Cajun argues that, contrary to the findings of the CO, it is not a disguised continuance or alter ego of any previously debarred agent.

After receiving H-2A applications from Cajun, the CO issued notices of deficiency summarizing the basis for the Department's belief that it Cajun is the alter ego of a debarred agency. Upon reviewing new evidence submitted by Cajun in a modified application, the CO concluded that Cajun's response did not sufficiently rebut the Department's determination.

On September 11, 2013 I issued an Order to Show Cause why the matter should not be remanded to the CO for issuance of a Notice of Debarment in accordance with the debarment procedure at 20 C.F.R. § 655.182 as the CO made its determination that Cajun is an alter ego of a debarred agent in its review of Cajun's H-2A applications on behalf of the above employers and did not pursue debarment under 20 C.F.R. § 655.182.

The Solicitor submitted a response to my Order to Show Cause on September 16, 2013. The Solicitor argues that this case is properly before the BALCA because the CO is not seeking to debar a new entity. As the CO considered Cajun to be the same entity as the debarred agent, the CO used the same process to deny the application that it would use if an application were submitted by the debarred agent directly. The Solicitor further argues that forcing the CO to pursue debarment each time a debarred entity reconstitutes itself would render debarments virtually unenforceable and therefore meaningless. The Solicitor points to the fact that the debarment process is significantly longer than the period of time given to the CO to accept or deny an application (within 7 days of receiving the application), and argues that a debarred entity could continue submitting applications through its alter ego for a minimum of 30 days and up to 60 days until the final agency action is issued, and the CO would be forced to certify those applications even where the CO has evidence that the entity is merely the reincarnation of an already debarred entity. Moreover, even if the debarment process results in the debarment of the alter ego entity, the debarred agent can then easily set up a new alter ego and begin the process again.

Although I note the Solicitor's arguments, I nevertheless find that the appropriate process for determining whether Cajun is the alter ego of a debarred agent is the debarment procedure at 20 C.F.R. § 655.182. If the employers' agent were determined to be an alter ego of a debarred agent within an adjudication of the employers' applications for an H-2A visa application, the employers' applications would be denied without the employers' first having been put on notice that their agent is a debarred entity.[1] In the interest of due process, the employers deserve an opportunity to obtain a non-debarred agent as they pursue their applications for H-2A visas. I also note that the CO, in determining whether Cajun is the alter ego or disguised continuance of a debarred entity, did not cite to any caselaw or specify which legal standard it was applying. Moreover, in alleging that Cajun is the alter ego or disguised continuance of a debarred agent, the CO did not even provide proof that the original entity is a debarred one.

Requiring this determination to be made in a debarment proceeding would not necessarily result in rendering debarments virtually unenforceable and meaningless, as the Solicitor suggests. Where the alter ego or disguised continuance theory is invoked, review of the employer's application, if the employer chooses to retain the agent, should be stayed pending the debarment proceeding.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that this matter is remanded to Certifying Officer for issuance of a Notice of Debarment in accordance with the debarment procedure at 20 C.F.R. § 655.182. The employers are to be put on notice that Cajun is alleged to be a debarred entity.

Digitally signed by Daniel Solomon
DN: CN=Daniel Solomon, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

[1] § 655.182(b) provides that the Administrator may not issue future labor certifications under this subpart to any employer represented by a debarred agent or attorney.