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Issue Date: 10 April 2018

CASE NO: 2017-TNE-00001

In the Matter of:

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

DREW'S LAWN AND SNOW SERVICE, INC.,
Respondent.

ORDER DENYING MOTION TO DISMISS
ORDER RESCHEDULING HEARING

This matter arises under the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.*, and the implementing regulations at 20 C.F.R. Part 655. The Administrator, Wage and Hour Division of the U.S. Department of Labor ("DOL") issued a determination (Reference #1725767) to Drew's Lawn & Snow Service, Inc. ("Respondent") via letter on September 9, 2016, stating that Respondent was found to be in violation of certain H-2B provisions of the INA covering the period from April 2, 2012 through April 26, 2014.

PROCEDURAL HISTORY

On July 14, 2017, Respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss"). It its Motion to Dismiss, Respondent argued that the Administrator "lacks authority to enforce these vacated [2008 H-2B] regulations and the DOL is without jurisdiction to consider cases initiated under them." (Motion to Dismiss at 1). Respondent cited the case *Perez v. Perez*, No. 3:14-cv-00682 (N.D. Fla. Mar. 4, 2015), in which the U.S. District Court for the Northern District of Florida "vacated the 2008 H-2B regulations finding that DOL failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)." (Motion to Dismiss at 2). Respondent also cited to two recent cases by the Administrative Review Board ("ARB" or "Board"), *Administrator v. Wade Shows, Inc.*, ARB Case No. 15-5-2 (June 20., 2017), and *Administrator v. Strates Shows, Inc.*, ARB Case No. 15-069 (June 30, 2017), saying that the ARB relied on *Perez* in finding that the Administrator lacked authority to enforce the 2008 H-2B regulations and the DOL is without jurisdiction to hear cases under them.

On July 26, 2017, the parties filed a Joint Motion to Stay Pretrial Deadlines, Hold Decision on Pending Motion to Dismiss in Abeyance, and Continue Trial Date to a Date to be Determined ("Joint Motion") in the above-captioned matter. The parties indicated that they wished to continue the hearing currently set to commence on October 17, 2017, in order "to promote judicial economy" in light of the pending Deputy Administrator's motions for reconsideration of the ARB's rulings in both *Wades Shows* and *Strates Shows*. The parties concluded by requesting that the hearing be rescheduled for a date to be determined. I granted the parties' motion on August 30, 2017. On October 17, 2017, the parties filed a Joint Status Update and Joint Motion for Scheduling Conference, indicating that the ARB granted the Deputy Administrator's motions for reconsideration in *Strates Shows* on August 16, 2017 and *Wade Shows* on September 11, 2017, and the parties requested a scheduling conference to determine briefing schedule, prehearing deadlines, and to set a hearing date.

On November 16, 2017, Respondent filed a Supplemental Memorandum. In its Supplemental Memorandum, Respondent reiterated its argument that "DOL lacks authority to enforce the 2008 H-2B regulations, and therefore is without jurisdiction to consider cases initiated under them, since the U.S. District Court for the Northern District of Florida vacated the 2008 H-2B regulations finding that DOL failed to comply with the Administrative Procedure Act…" (Supplemental Memorandum at 1). Respondent said that "DOL makes much of the Court's clarification of its Order in *Perez v. Perez*, but the clarification did not operate to revive the vacated regulations." Respondent argues that the District Court did not adopt the Administrator's proposed language, which "would have limited the injunction only to new labor certifications, and not the enforcement portion of the regulations," and instead the District Court clarified that "the permanent injunction was not intended to, and does not, apply retroactively." Respondent says the Board then "reversed itself" when it granted the Deputy Administrator's motion for reconsideration on September 11, 2017. Respondent argues that:

> [t]he fundamental problem with [the ARB's holding on reconsideration] is that it uses an order that states it does not apply retroactively to completely invalidate the entire holding and make it an academic ruling. The injunction issued by the District Court enjoins nothing. If the District Court had intended to invalidate the injunction, it would have done so directly. Under the interpretation (and rejected proposed order), the Secretary may continue to enforce the vacated 2008 regulations prospectively from the date of the injunction. It leaves you with the question, what, if anything, is enjoined and what effect, if any, was there in vacating the regulations. Allowing certificates issued before the regulation to be effective made sense prior to the injunction; however, to allow prospective enforcement of the vacated regulations renders the injunction meaningless. When one interpretation allows both Orders to have meaning and the other interpretation does not, the first interpretation should be used. Allowing the Secretary to proceed with prospective enforcement under the guise that it is only enforcing retroactively is in contempt of the injunction.
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> (Supplemental Memorandum at 4 – 5).

Respondent concluded by asking this court "to recognize that DOL cannot enforce regulations that have been vacated, and consequently that it cannot cite [Respondent] for alleged violations of those very regulations, as it has attempted to do." (Supplemental Memorandum at 5).

On December 12, 2017, Administrator filed Prosecuting Party's Brief in Opposition to Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Opposing Brief"). In its Opposing Brief, the Administrator cited the Board's recent decision granting reconsideration in both *Strates Shows* and *Wade Shows*, in which the Board found that "enforcement of the 2008 H-2B regulations is applicable to labor certifications issued prior to April 30, 2015." Administrator says that despite these rules, "Respondent refused to withdraw its neutered Motion to Dismiss, and instead doubled down on its baseless position it is supplemental briefing." (Opposing Brief at 3). Administrator argues that Respondent's Motion to Dismiss should be denied because "[t]here is nothing ambiguous either in the September 14, 2015, *Perez* order or in the ARB's decisions on reconsideration in *Wade Shows* and *Strates Shows*," namely, that the Deputy Administrator has authority to enforce the 2008 H-2B regulations for labor certifications issued prior to April 30, 2015. (Opposing Brief at 4).

DISCUSSION

On March 4, 2015, the United States District Court for the Northern District of Florida ("District Court") issued an order ("Injunction") vacating and permanently enjoining the U.S. Department of Labor ("DOL") from enforcing the H-2B regulations promulgated at 73 Fed. Reg. 78020 ("2008 Rule"). *Perez v. Perez,* No. 3:14-cv-00682 (N.D. Fla. Mar. 4, 2015). The effective date of the Injunction was April 30, 2015. In a September 4, 2015 order ("Clarifying Order"), the District Court clarified that the Injunction "was not intended to, and does not, apply retroactively," thus allowing DOL to enforce the terms of labor certifications under the 2008 Rule. *See Perez* (Doc. No. 62).

In *Administrator, Wage and Hour Division v. Strates Shows, Inc.*, ARB No. 15-069, ALJ No. 2014-TNE-00016 (June 30, 2017) ("Strates Shows"), the ARB held that the Injunction "rendered [DOL's] legal authority for pursing [H-2B enforcement] action[s] null and void" and that an ALJ had "no choice but to dismiss the action" for want of subject matter jurisdiction. The Office of the Solicitor filed an emergency motion requested that the ARB reconsider its decision. In *Administrator, Wage and Hour Div., USDOL v. Strates Shows, Inc.*, ARB No. 16-069, ALJ No. 2014-TNE-16 (ARB Aug. 16, 2017), the ARB granted the motion for reconsideration and vacated its June 30, 2017 decision. The ARB also issued an Amended Final Decision and Order in which it omitted the characterization of the 2008 H-2B regulations as unenforceable.

Based on the foregoing, DOL may enforce the 2008 Rule for labor certifications issued before the injunction took effect on April 29, 2015. Cases involving a labor certification issued on or after April 29, 2015 are governed by the 2015 interim final rule and do not involve the *Strates Shows* case. Therefore, contrary to Respondent's contention, the Board's order on reconsideration in *Strates Shows* does not "render the injunction meaningless" by the District Court in *Perez*. The injunction remains in effect for labor certifications issued on or after April 29, 2015, preventing enforcement of the 2008 H-2B regulations on these labor verifications and requiring enforcement of the 2015 interim final rule. This is consistent with the District Court's Clarifying Order indicating that the Injunction "was not intended to, and does not, apply

retroactively." As it is undisputed that the Respondent's labor certification was issued before April 29, 2015, Administrator has authority to enforce the 2008 H-2B regulations upon Respondent's labor certification, and the DOL has jurisdiction to consider this case.

ORDER

Accordingly, Respondent's July 14, 2017 Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED**.

ORDER RESCHEDULING HEARING

Based on dates previously held available, the hearing in this matter will begin on at **9:30 AM, May 22, 2018, in Chicago, Illinois**. It is anticipated that the hearing will take no more than two (2) days to complete. The parties are to confer and provide my office with three (3) mutually agreeable dates when they are available for a brief prehearing conference call. The exact location of the hearing will be provided during the call.

SO ORDERED.

CARRIE BLAND
Administrative Law Judge

Washington, D.C.