In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

API ACCOUNTING & COMPUTER CONSULTING,

RESPONDENT.

ARB CASE NO. 07-081

ALJ CASE NO. 2006-LCA-026

DATE: January 25, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Tina Chiang, *pro se,* City of Industry, California

For the Respondent:
Joan Brenner, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Steven J. Mandel, Esq.; Jonathan L. Snare, Esq.; *U.S. Department of Labor,* Washington, District of Columbia

FINAL DECISION AND ORDER APPROVING SETTLEMENT AGREEMENTAND DISMISSING CASE

The Administrator, Wage and Hour Division, United States Department of Labor has moved the Administrative Review Board for a final order approving a settlement agreement, signed by both parties, and dismissing this case arising under the H-1B nonimmigrant alien worker provisions of the Immigration and Nationality Act (INA or

the Act) [1] and applicable regulations.[2] The Complainant, API Accounting and Computer Consulting, was offered the opportunity to show cause why the Board should not approve the settlement and dismiss the case. But after the Board cautioned API that if it failed to respond to the Board's Order to Show Cause why the Board should not approve the proffered settlement, the Board could enter an order approving the settlement without further notice to the parties, API failed to respond. Accordingly, finding no impediment to granting the Administrator's motion, we approve the settlement and dismiss this case.

BACKGROUND

On April 26, 2007, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) in this case finding that API was liable for $11,243.52 in back wages and unauthorized deductions to two former H-1B employees. The ALJ also imposed a civil money penalty of $7,500.00 on API for willful failure to pay proper wages, and ordered that the firm be debarred from approval of any H-1B petitions for a two-year period. API filed a timely notice of appeal requesting the Board to review the ALJ's D. & O.[3] The Board issued a Notice of Intent to Review and established a briefing schedule. Subsequently, the parties informed the Board that they were engaged in settlement negotiations and the Board issued an order holding the briefing schedule in abeyance.

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[1] 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004). The INA permits employers to employ nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations are occupations that require "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C.A. § 1184(i)(1). To employ H-1B nonimmigrants, the employer must obtain certification from the United States Department of Labor after filing a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n). The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. After it secures the LCA, the employer petitions for and nonimmigrants receive H-1B visas from the United States Citizenship and Immigration Services. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

[2] 20 C.F.R. Part 655, Subparts H and I (2007).

[3] The Board has jurisdiction to review an ALJ's decision arising under the INA. 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

On November 28, 2007, the Administrator filed a Motion for Approval of Settlement Agreement. The Administrator attached to the Motion a Settlement Agreement, which he stated "has been fully executed by the parties." The Administrator averred, "the Administrator and API Accounting and Computer Consulting, through its owner and President, Tina Chiang (collectively "API"), agree that this case should be resolved by entry of a Final Order in accordance with the terms and conditions set forth in the Settlement Agreement." A settlement agreement apparently signed by both parties was attached to the Administrator's motion.

Nevertheless, on December 3, 2007, API filed a document titled "THE BRIEFING" before the Board. In this document, API stated

> API agreed to settle this case in efficient way or judged or got appeal but did not mean to recognize or admit willfully violation of H-1B status or any shortage of wages. . . . The above statements are Respondent brief and settlement process is not completed yet. Respondent waits Review Board for extension of brief and settlement process and not affect the tax season coming.

Because the purpose of API's filing was unclear, the Board ordered API to show cause no later than December 21, 2007, why the Board should not enter an Order approving the settlement to which the Administrator and API apparently had agreed. The Board cautioned API that if it failed to timely respond to this Order, the Board could enter an Order approving the settlement without further notice to the parties. API has failed to respond to the Board's show cause order.

DISCUSSION

As the Board observed in *Macktal v. Brown & Root, Inc.*,[4]

> A settlement is a contract, and its construction and enforcement are governed by principles of contract law. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975); *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 905 (11th Cir. 1987); *Orr v. Brown & Root, Inc.*, Case No. 85-ERA-6, Secretary's Decision and Order issued October 2, 1985, slip op. at 2. A settlement agreement, therefore, must meet the same requisites of formation and enforceability as any other contract. There must be a meeting of the minds on all essential terms, *Blum v. Morgan Guaranty Trust Co. of New York*, 709 F.2d 1463, 1467 (11th Cir. 1983), and in evaluating the validity of a

[4] No. 1986-ERA-023, slip op. at 4-5 (Sec'y Nov. 14 1989), *aff'd in part, rev'd, in part, on other grounds sub nom. Macktal v. Sec'y of Labor*, 923 F.2d 1150 (5th 1991).

> settlement "the court would have to determine . . . that the employee's consent to the settlement was voluntary and knowing." *Alexander v. Gardner - Denver Co.,* 415 U.S. 36, 52, n.15 (1974). When properly reached, settlement agreements are as binding, final and conclusive of rights as a judgement [sic], *Thomas v. State of Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976), and a party is bound by such an agreement even though he later realizes the agreement is disadvantageous, *Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1227 (8th Cir. 1983), or he changes his mind. *Lyles v. Commercial Lovelace Motor Freight Inc.*, 684 F.2d 501, 504 (7th Cir. 1982).

The parties have entered into a settlement to resolve the issues raised in this case, which on its face, appears to have been properly reached. The settlement agreement, which bears Tina Chiang's signature, plainly and unequivocally states that "Respondent [previously identified in the agreement as 'API Accounting and Computer Consulting, through its owner and President, Tina Chiang'] agrees to pay to the Department of Labor back wages in the total amount of $11,243.52" and $500.00 representing "the total agreed upon amount of the civil money penalty," and that "[u]pon issuance of the Board's Order in this matter, the U.S. Department of Labor will notify the Department of Homeland Security that API should be denied the opportunity to sponsor any aliens for employment under the H1-B program for a period of two years for its willful failure to pay wages as required." In response to the Board's Show Cause Order, API has not provided the Board with any grounds for rejecting the settlement to which the parties have agreed. Accordingly, the Board **GRANTS** the Administrator's motion for approval of the settlement and **DISMISSES** this case.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge