DATE: August 8, 1988
CASE NO. 88-TAE-3

IN THE MATTER OF

U.S. DEPARTMENT OF LABOR,
COMPLAINANT,

v.

VIRGINIA CAROLINA AGRICULTURAL
PRODUCERS ASSOCIATION, INC.,
RESPONDENT.

DECISION AND ORDER - GRANTING SUMMARY JUDGMENT

The above-captioned case arose out of a previous suit brought by various growers and associations, including the Virginia Carolina Agricultural Producers Association, Inc. (VCAPA), to challenge a new method for determining the adverse effect wage rates under the Immigration and Nationality Act (INA), 8 U.S.C. §ll0l et seq., and its implementing regulations beginning at 20 C.F.R.§655.1. Virginia Agricultural Growers Association, et al v. William Brock, et al, Civil Action No. 83-0146-D. During the pendency of that suit, District Court Judge Jackson L. Kiser ordered VCAPA growers who participated in the H-2 program to open an escrow account for the deposit of the funds at issue, i.e., the difference between the wages actually paid and those calculated by the Department of Labor as adverse effect wage rates (AEWR). On August 22, 1984, Judge Kiser ruled that the AEWR regulation was arbitrary and capricious, and therefore invalid.

The U.S. Court of Appeals for the Fourth Circuit reversed and remanded on appeal, finding that the District Court erred in determining that the regulation was arbitrary and capricious and in denying the Department of Labor's (DOL's) motion for summary judgment. VAGA v. Donovan, 774 F.2d 89 (4th Cir. 1985).

Upon remand, the District Court found that VCAPA and some of its members had not complied with the court's previous escrow order. On August 17, 1987, the court imposed a $5,000.00 fine on VCAPA and held that it was jointly and severally liable with the individual growers for the deficiencies in the escrow account. (Regional Administrator's Record (RA) pp. 73-79). Subsequently, DOL filed a motion to compel VCAPA to fulfill its escrow obligations. (RA pp. 63-64). In an order dated March 3, 1988, the court denied DOL's motion, noting, among other reasons, that "[t]he Secretary has it within his power not to recognize VCAPA as an agent for employers of prospective H-2 labor." (RA pp. 19-20). Thereafter, DOL filed a motion for reconsideration or, in the alternative, for clarification of Judge Kiser's Order. (RA p. 8). In response to that motion, Judge Kiser issued an Order denying it, in which he declared, "Past

litigation in this area has indicated to this Court that the Secretary is fully authorized to deny participation to growers who have failed to live up to their promises in previous years. It further seems logical that if the Secretary has the power to deny participation to the principal (grower), then he also has power to deny participation by the agent (VCAPA), who is acting on behalf of his principal (grower). It would appear, therefore, that the Secretary has the power under its regulations to at least indirectly control VCAPA." (RA pp. 6-7).

On April 27, 1988, the Regional Administrator notified VCAPA that, pursuant to 20 C.F.R. §655.210, it would be ineligible to act as an agent in the temporary labor certification program for the coming year due to its failure to comply with its court-ordered escrow obligations. (RA pp. 4-5). As a result, on May 4, 1988, VCAPA requested a hearing before an administrative law judge, and this matter was referred to the undersigned for hearing. (RA pp. 2-3).

A pre-hearing notice was issued on June 1, 1988, asking the parties to designate the issues, to notify this Office whether a hearing would be necessary, and to submit briefs. On July 12, 1988, the parties filed their responses to the pre-hearing notice, at which time the Regional Administrator indicated that a hearing would not be necessary.[1] In its response to the prehearing notice, the Regional Administrator also filed a motion for summary judgment, arguing that the sole issue is whether the Department of Labor has the authority to declare VCAPA ineligible to participate in the temporary labor certification. According to the Regional Administrator, that issue was fully litigated and decided by the District Court in the VAGA case. Therefore, principles of collateral estoppel preclude VCAPA from relitigating it. Certain worker intervenors filed a memorandum in support of the Regional Administrator's position.

In VCAPA's response to the pre-hearing notice, the producers' association maintained that DOL had no authority to disqualify it as an agent for its grower members in the labor certification process. According to VCAPA, DOL admitted on two occasions that it did not have that power (RA pp. 13-16, 71), and neither the Act nor the implementing regulations provide for such action. With respect to Judge Kiser's Orders to the contrary, VCAPA argues that they authorize its disqualification only with respect to those particular growers who are delinquent in making their escrow payments. Subsequently, on July 22, 1988, VCAPA filed its response to the motion for summary judgment, asserting that the requirements for collateral estoppel have not been met.

According to the United States Supreme Court,

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[1] VCAPA did not address the question whether a hearing would be necessary, but, based on the content of its filing, it must be presumed that VCAPA agreed with the Regional Administrator that no hearing would be necessary. The parties apparently concur that this case involves solely legal issues: whether the DOL has the authority to disqualify VCAPA as an agent in the temporary labor certification process; whether the resolution of the preceding issue is foreclosed by collateral estoppel; and whether VCAPA's disqualification may be limited to those producer-members who failed to comply with the court's escrow order. The facts herein are clearly established: VCAPA acts as an agent to numerous employers in the temporary labor certification process; and six of its members did not fulfill their obligations in the process.

> [u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Montana v. United States, 440 U.S. 147, 153. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Allen v. McCurry, 449 U.S. 90, 94 (1980) (footnote omitted).

The Court, however, recognizes one general limitation, i.e., "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Allen at 95. (further citations omitted).

In the instant case, it is clear that the critical issue, i.e., whether the DOL has the authority to disqualify VCAPA as an agent in the labor certification process, was fully litigated[2] before and decided by Judge Kiser. Although the result may be arguable given the regulations,[3] nevertheless, the District Court's holding bars relitigation of that question. Following Judge Kiser's decision holding VCAPA jointly and severally liable for the escrow payments, the Regional Administrator filed a motion to compel VCAPA to make the escrow payments. In effect, the Regional Administrator sought enforcement of the District Court's previous decision upon remand. A court necessarily has the authority to effectuate its decisions, and upon consideration of the Regional Administrator's motion to compel, Judge Kiser determined that the DOL, without further intervention from his court, could implement his decision by disqualifying VCAPA.

VCAPA, however, argues that Judge Kiser's determination that the Secretary has the authority to disqualify it in the labor certification process should be limited to its representation of those members who have not fulfilled their escrow obligations. Although VCAPA's proposal initially appears reasonable, a review of Judge Kiser's Orders of August 17, 1987, March 2, 1988, and April 5, 1988, reveals that VCAPA's alternative would be inappropriate.

In the Order issued August 17, 1987, following hearing on VCAPA's liability, Judge Kiser found that "the Association assumed a leadership role in this case and assumed

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[2] VCAPA filed responses to both the Regional Administrator's motion to compel compliance with the escrow order and his motion for reconsideration or clarification. See Exhibits 1 and 2 to the Regional Administrator's Response tore-Hearing Notice No. 1 and Motion for Summary Judgment, dated July 12, 1988. VCAPA's admission that it did not take the Regional Administrator's motions seriously does not eliminate the fact that it had a "full and fair opportunity" to litigate the issue of the DOL's authority to disqualify under the Act.

[3] Review of the regulations, specifically 20 C.F.R. §655.110 and §655.200(b), seemingly indicates that Congress intended to distinguish between "employers" and their "agents."

responsibility for the actions of its members. * * * I also am going to hold the Association jointly and severally liable with the individual growers for deficiencies in the escrow fund." (RA p. 78). Although the scope of the court's orders are not entirely clear, taken together, they compel the inference that Judge Kiser determined that VCAPA could be disqualified generally. Limiting the court's decision, as proposed by VCAPA, to its representation of noncomplying growers would render ineffective the disqualification remedy authorized by the Court. VCAPA would have little incentive to prevent further violations by its general membership in the future.

Judge Kiser determined that the DOL is authorized to disqualify "growers who have failed to live up to their promises." 'Apparently relying on general principles of agency, the court also concluded that "tilt further seems logical that if the Secretary has the power to deny participation to the principal (grower), then he also has power to deny participation by the agent (VCAPA), who is acting on behalf of its principal (grower)." Since the purpose of disqualification appears to be to persuade delinquent employers to comply with the terms of the labor certification process and since the court found VCAPA jointly and severably liable for the missing escrow amounts, it must be concluded that Judge Kiser's various Orders in the previous case preclude the undersigned from revisiting these issues. Therefore, pursuant to Federal Rule of Civil Procedure 56, no genuine issue of material fact remains to be decided. Accordingly, the Department of Labor's motion for summary judgment based on collateral estoppel is hereby granted.

THEODOR P. VON BRAND
Administrative Law Judge

TPvB/KKC/jbm