March 10, 1993
CASE NO.: 92-TAE-7

In the Matter of

U.S. DEPARTMENT OF LABOR

v.

OKEELANTA CORPORATION

Appearances:

Yvonne K. Sening, Esq. and
Annaliese Impink, Esq.
For U.S. Department of Labor

Charles Kelso, Esq., and
Tillman Y. Coffey, Esq.
For Okeelanta Corporation

Robert A. Williams, Esq.
Florida Rural Legal Services, Inc.

DECISION AND ORDER

Before: ROBERT M. GLENNON
Administrative Law Judge

This proceeding is submitted under the provisions of the Immigration and Naturalization Act of 1952 ("INA"), as amended by the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1101 et seq. The pertinent Department of Labor regulations implementing INA and IRCA are found at 20 CFR Part 655.

By a letter dated June 24, 1992, the Regional Administrator of the Employment and Training Administration of the Department of Labor ("RA") issued a notice to Okeelanta Corporation of his determination that a Department of Labor ("DOL") investigation had

produced evidence of Okeelanta's violation of the terms of its 1986-87 temporary alien labor certification, in several enumerated respects. The RA concluded:

> Pursuant to 20 C.F.R. 655.210(a) you have violated the terms of your 1986-1987 labor certification and would be ineligible to apply for labor certification for the coming year under the H-2 program.

Okeelanta was advised that, unless it requested a hearing within 30 days, the June 24, 1992 notice would become the "Final Determination" of the Department of Labor. The notice further advised:

> You should be aware that pursuant to 20 C.F.R. 655.110(g)(l) (i) (D) your ineligibility to apply for certification under the H-2 program constitutes a substantial violation of the H-2A program and therefore will preclude a labor certification under that program as well.

On July 2, 1992, Okeelanta requested a de novo hearing on the substance of the Regional Administrator's June 24, 1992 notice, asserting a variety of factual and legal responses, and requesting that its planned H-2A application for temporary alien labor certification for the 1992-93 harvesting season be processed in due course. Among other things, Okeelanta argued that the Regional Administrator's June 24, 1992 notice did not comply with applicable law, and that it was issued pursuant to expired statutes and regulations.

Okeelanta's July 2, 1992 request for a hearing on the Regional Administrator's June 24, 1992 notice served to initiate this formal hearing process before the Office of Administrative Law Judges. As will be seen in the discussion below, this proceeding presents an unusual and complex amalgam of administrative law processes. The governing statute and regulations were amended, effective June 1, 1987, in a way which presents a question on the validity of the Regional Administrator's reliance upon the Section 655.210(a) enforcement provision in his June 24, 1992 notice. Notably, for example, the Regional Administrator's notice to Okeelanta asserts that it "would be" ineligible to secure H-2 certification in the coming year, a hypothetical formulation of the penalty proposed under the H-2 regulatory process. In fact, the actual debarment penalty would have to be imposed under a different regulatory process, the H-2A alien labor certification process.

For convenience, the Regional Administrator's June 24, 1992 letter will at times be referred to merely as "the Notice."

On July 27, 1992, the Department of Labor and Okeelanta entered an agreement on certain special procedures designed, first, to secure a decision on Okeelanta's arguments for dismissal, and then, if needed, a hearing on the merits of the Regional Administrator's determination. That procedural agreement allowed Okeelanta, pending resolution of this matter, to obtain an H-2A temporary alien labor certification for the 1992-1993 harvest season." The

Department of Labor agreed that a hearing on the merits of the Regional Administrator's Notice should precede denial of H-2A certification based on the alleged 1986-1987 violations. The Department of Labor agreed that:

> DOL will not assert the issues raised in this case as a basis for denial to Okeelanta of H-2A labor certification until there has keen a final decision of the Secretary after such hearing.

With the filing of certain subsequent pre-trial motions, it became evident that there was serious question, essentially jurisdictional in nature, which required a pre-trial resolution. My Order of October 5, 1992 directed the parties specifically to address those problems, and a briefing schedule was set for that purpose. Certain individual farmworkers, represented by counsel for the Florida Rural Legal Services, Inc., were granted amicus curiae status on the jurisdictional issue.

Okeelanta's brief on the jurisdictional issue, which included a motion to dismiss, was filed on October 19, 1992. The response of the DOL's Regional Administrator was filed on December 17, 1992, with a reply filed by Okeelanta on January 25, 1993. The Regional Administrator filed a further response on February 4, 1993, limited to an assertedly new issue in Okeelanta's reply brief.

1. Factual background. The Okeelanta Corporation grows, harvests, and mills sugar cane in a largely rural area near the southeast corner of Lake Okeechobee in Florida. A DOL investigation report in the administrative file in this case states that its pertinent holdings include 90,000 acres of land in and around South Bay, Florida, which is located at the southern tip of Lake Okeechobee.

For many years, Okeelanta Corporation has relied upon temporary foreign workers to harvest its sugar cane crop, seasonal work generally done between late October and early March. It states that while there have been recent advances in machine-harvesting technology, harvesting by hand, by foreign workers, is very important in its operations.

In September 1986, Okeelanta received certification from the Department of Labor to employ approximately 1,900 workers from the West Indies, to work as cane cutters during the 1986-87 sugar cane harvest season. Some number of workers from the West Indies were imported pursuant to this certification. A labor dispute took place during the 1986-87 harvest, however, and a number of the workers were discharged and sent back to their homes in the West Indies. In its December 17, 1992 brief, the Department of Labor describes what took place as follows:

In December, 1986, a complaint was filed with the Wage and Hour Division, U.S. Department of Labor after approximately 300 H-2 workers were fired and repatriated on November 22, 1986. The workers were dismissed after a labor dispute arose regarding Okeelanta's alleged under-

reporting of workers' hours. As a result of the complaint and other information, the Department of Labor (DOL) conducted an investigation into the alleged violations. As part of its investigation, DOL reviewed thousands of payroll records, interviewed workers, bus drivers cooks and other individuals employed by Okeelanta during the 1986/1987 season. Due to the volume of documents to be reviewed and the difficulty in reaching and interviewing workers, the investigation was not completed until June of 1992.

As noted above, this DOL investigation of Okeelanta's actions during the 1986-1987 harvest season formed the basis of the June 24, 1992 violation notice issued by the Regional Administrator.

2. The Underlying Legislation. United States immigration laws have provided for the admission of temporary agricultural workers for many years. The Department of Labor's H-2A program for granting certifications allowing employment of foreign workers on a temporary basis originated in the Immigration and Nationality Act of 1952. Subparagraph (H)(ii) of Section l0l(a)(15) of that Act described the foreign workers eligible for entry for that temporary work as follows:

> (H) an alien having a residence in a foreign country which he has no intention of abandoning . ..(ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country... 8 U.S.C. § 1101(a) (15) (H) (ii)

A staff report prepared for the Committee on Education and Labor of the House of Representatives summarized the objectives of the 1952 legislation as follows:

> In creating the H-2 program, Congress attempted to address the problems that DOL had documented pertaining to wage depression and job displacement caused by foreign agricultural workers. An explicit intent of the law, therefore, was to reserve American jobs for American workers. Thus the H-2 program allowed the admission of nonimmigrant workers into the U.S. to perform temporary services only if willing, able and qualified U.S. workers could not be found. Further to offset the adverse impact of foreign labor on the domestic agricultural labor market, the regulations required H-2 agricultural employers to pay an enhanced wage rate, known as the "adverse effect wage rate." Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3 (Comm. Print 1991)

The enactment of the 1986 IRCA amendments to the 1952 immigration law provided a special new category for aliens as temporary agricultural workers (now designated as "H-2A" workers), describing such eligible workers as:

> (H) an alien... (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor . . . of a temporary or seasonal nature... 8 U.S.C. § 1101(a)(H) (ii)(A)

The House staff report stated the following background of the special new category of alien workers performing seasonal farm labor:

> In response to complaints by the agriculture industry that the H-2 program was too burdensome and inflexible to meet its labor needs, Congress amended the program in 1986 to create separate agricultural and non-agricultural temporary foreign worker programs.... The new agricultural program is known as "H-2A," after the new subsection designation. The process of applying for temporary foreign workers has been greatly streamlined under the H-2A program. However, the amendment also has incorporated in to the statute many of the protections for U.S. workers that previously had been established by regulation under the H-2 program. The H-2A statute continues to prohibit the admission of temporary foreign workers at wage rates or working conditions which will adversely affect similarly-employed United States workers. Report, supra, p.3, 4

3. Positions of the Parties. Okeelanta contends that the 1987 IRCA amendments, and the implementing DOL regulations found at 20 CFR 655.110 and 655.112, provide the only permissible basis for denying any prospective H-2A alien labor certification; that the IRCA statute and those DOL regulations provide an effective 2-year limitation on alleged certification violations DOL may consider in deciding H-2A applications; and that the RA's June 24, 1992 determination to deny a prospective H-2A application by Okeelanta, based on allegations of violations occurring in the 1986-1987 harvest season, is barred by the statute and regulations, and should be dismissed. Okeelanta points out that, prior to the Regional Administrator's June 24, 1992 notice of determination, it had been duly certificated by DOL to employ temporary alien workers under the H-2A program for every harvest season following the 1986-1987 season.

Okeelanta also contends that the RA's determination to deny a future H-2A certification based on the 1986-1987 allegations is barred by the 5-year statute of limitations against enforcement of any civil fine, penalty or forfeiture, as provided in 28 U.S.C. § 2462. The DOL's Regional Administrator contends that, in enacting the IRCA amendments, Congress did not extinguish all penalties that may have arisen under the INA, the pre-existing statute, and that:

> Not only did Congress fail to affirmatively extinguish all penalties that may have arisen under the INA, it never expressly repealed Section 1l0l(a)(l5) (h)(ii) prior to the enactment of the Section 1101(a)(H) (ii)(a).

Therefore, the Regional Administrator contends, it must be assumed that Congress intended that those pre-IRCA enforcement actions be maintained. For this argument, the Regional Administrator relies upon the General Savings Clause, 1 U.S.C. § 9, which provides that:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide....

Accordingly, the RA contends, it was proper for him to apply the provisions of 20 CFR 655.210(a), a regulation implementing the pre-1987 INA statute, to determine that Okeelanta's violations of its 1986-1987 H-2 certificate were sufficient to warrant denial of a new H-2 application for a certificate. In turn, that determination could be the basis for denial of a new H-2A application for a later year, in accordance with the provisions of 20 CFR 655.110(g)(l)(D) in the regulations implementing the IRCA amendments to INA. The concept advanced by the RA proposes two distinct, consecutive administrative hearing procedures. On Brief, the RA describes that concept as follows:

> The employer is given the opportunity to appeal the Regional Administrator's decision to deny a labor certification under the H-2 program. If the ALJ upholds the Regional Administrator's decision, and the Regional Administrator determines that the violations that occurred under the H-2 program are substantial violations as defined in the H-2A program, certification can be denied under the H-2A program for the coming year. The employer can appeal that decision to the ALJ pursuant to section 655.112 (a).

Discussion and Conclusions. I am persuaded that the amended immigration statute and implementing regulations preclude the enforcement action taken by the DOL's Regional Administrator pursuant to 20 CFR 655.210(a), and that therefore the June 24, 1992 Notice purporting to bar a future certification should be vacated.

In its formal aspect, the Regional Administrator's June 24, 1992 Notice presents itself as an implementation of the prior immigration law, the pre-IRCA law, but its reality and purpose are to deny certification by means not allowed under the amended statute.

The Regional Administrator's Notice provides findings of an investigation conducted pursuant to Section 655.210(a). Those findings allege violations of the pre-IRCA H-2 alien labor certification granted Okeelanta for the 1986-1987 harvest. In accordance with the pre-IRCA regulations, certificate violations found in a Section 655.210(a) proceeding could be ground for denial of a new H-2 alien labor certification "in the coming year." Indeed, the only enforcement penalty the Regional Administrator could impose in a Section 655.210(a) proceeding is the denial of certification for the employer in the coming year. 20 CFR 655.210(b)

In fact, then, in the case at hand the only legal consequence to follow from a Section 655.210 (a) enforcement proceeding, and thus from the RA's June 24, 1992 Notice, would be a denial of a future alien labor certification for this employer. However, the Section 655.210(a) provision relied upon by the Regional Administrator is found in rules that, since 1987, have governed only logging employment certifications, not agricultural labor. Any new alien farm labor certification request by Okeelanta will have to be judged under post-IRCA H-2A certification rules for agricultural workers. The IRCA amendments provided a statutory and regulatory scheme greatly changed from the rules that had previously applied. Plainly stated, the amended statute and the pertinent regulations make it clear that, with a limited "savings clause" exception, H-2A alien labor certifications sought after June 1, 1987 must be awarded or denied under the new statutory and regulatory criteria.

First of all, the H-2 regulations for issuing alien labor certifications were amended explicitly in 1987 to exclude certifications for temporary alien farm workers, the H-2A category of aliens. That change in the regulations was mandated by Section 301(d) of the INCA amendments, which provided:

> (d) EFFECTIVE DATE. - The amendments made by this section apply to petitions and applications filed under Sections 214(c) and 216 of the Immigration and Nationality Act on or after . . . [June 1, 1987] Pub. L. 99-603, § 301(d), 100 Stat. 3359, 3416

In response to that mandate, the preamble to the H-2 certification rules was amended in 1987 to state that the H-2 rules thereafter would apply as follows:

> (a) This subpart applies to applications for temporary alien agricultural labor certification filed before June 1, 1987, and to applications for temporary alien labor certification for logging employment. 20 CFR 655.200 (a)

Clearly then, the Subpart 655.200 rules for H-2 alien certification do not apply -- at least not directly, in any event -- to any temporary alien labor certification filed by Okeelanta after June 1, 1987. That fact explains the hypothetical formulation in the Regional Administrator's June 24, 1992 Notice, that Okeelanta "would be" ineligible in the coming year. Presumably, if the H-2 rules were fully applicable, the RA would have concluded directly that Okeelanta "will not" be eligible in the coming year.

Secondly, with enactment of the 1987 IRCA amendments, an elaborate, comprehensive new regulatory scheme for temporary alien agricultural workers was constructed. The legislative history of the new immigration law shows that the new H-2A provisions were a deliberate legislative compromise between American labor and American agriculture, with a new law that:

> [M]odifies the existing H-2 program to make it concomitantly more protective of American Labor and more responsive to the legitimate needs of growers who are

> unable to secure such labor. House Comm. on the Judiciary, Immigration Reform and Control Act of 1986, H. Rep. No. 682(I). Reprinted in 1986 U.S.C.C.A.N 5649, 5654

A range of specific protections is provided to minimize adverse effects on the wages and conditions of domestic workers. Similarly, a range of procedural protections is provided for growers seeking certifications of temporary alien workers, most notably, for present purposes, a series of specific time limitations on the DOL's discretion in the processing and determination of new H-2A certification requests. See, generally, 1966 U.S.C.C.A.N. 5649 and following.

The DOL's rules implementing the new H-2A statute provide, at Subpart 655.90, and following, an extensive array of specific definitions, guidelines, assurances, requirements, conditions, criteria, time frames, fees, labor disputes rules, etc., applicable to new H-2A certification requests. They also provide, as a counterpart to the Section 655.210 enforcement mechanism for H-2 certifications, a far more comprehensive new enforcement mechanism for investigating, evaluating, measuring, correcting and/or penalizing employer violations of H-2A certifications. Among other things, the new H-2A enforcement mechanism, Section 655.110, distinguishes between "substantial" and "less than substantial" violations and gives the Regional Administrator broad, flexible discretionary powers to assure future H-2A compliance by employers. 20 CFR 655.110(c)

The statutory foundation for the Section 655.110 enforcement mechanism is restated in substantial detail in the revised regulations. As pertinent here, the amended statute provides:

> The Secretary of Labor may not issue a certification under subsection (a) of this section with respect to an employer . . . if any of the following conditions are met:
>
> * * * *
>
> (2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary has determined, after notice and opportunity for hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.
>
> (B) No employer may be denied certification under subparagraph (a) for more than three years for any violation described in such subparagraph. 20 CFR 655.90(b)(2); 8 U.S.C. § 1188(b)(2)(A), (B)

That "two-year period" time frame for monitoring compliance is incorporated specifically both into the initial approval rules for new H-2A certification requests, 20 CFR 655.106(b)(l)(iii), and into the post-certification Section 655.110 enforcement mechanism.

Examining those new H-2A rules for approving new certification requests, and the rules for post-certification enforcement, in context with the language of the statute quoted above, there is an unequivocal "two-year period" limitation on the DOL's pertinent investigative reach when denying a new H-2A temporary alien agricultural certification. Pursuant to the Section 6.55.106(b) initial approval rules, for example, the Regional Administrator will deny certification if:

> (iii) The employer during the previous two-year period employed H-2A workers and the RA has determined after notice and opportunity for hearing, that the employer at any time during that period substantially violated a material term or condition of a temporary alien agricultural labor certification with respect to the employment of U.S. or H-2A workers

20 CFR 655.106(b)(l) (iii)

The DOL obviously could not have used that rule in this case, in June 1992, to deny an H-2A certification based on violations in the 1986-1987 harvest season.

The Section 655.110 enforcement rules apply the "two-year period" statutory provision from a different perspective. Depending upon the nature of the violations found, a debarment may be imposed under these enforcement rules for up to three years. 20 CFR 655.110(a) Under Section 655.110, the RA may bar an anticipated certification request of an employer, if the RA finds substantial violations of a certificate "during the period of two years after a temporary alien agricultural labor certificate has been granted." While that phrasing does not explicitly limit the investigatory "two-year period" to the specific "previous two-year period" stated in the IRCA amendments, I construe the regulation and the statute to mean the same thing. As shown above, the statutory three-year debarment limitation, upon which Section 655.110 is founded, is expressly tied to the "previous two-year period" specified in 8 U.S.C. § 1188(b) (2)(A). I conclude that the two-year period provided in Section 655.110(a) is co-extensive with the two-year period explicitly described in Section 655.106(b)(l)(iii). The Section 566.110(a) enforcement provision, accordingly, could not have been used in this case, in June 1992, to bar a prospective H-2A certification based on 1986-1987 violations.

The H-2A alien agricultural labor regulations also contain a "savings clause" provision that applies to the period of transition from the prior H-2 enforcement regulations. That "saving" effect is achieved by identifying an employer's contemporary debarment under the H-2 rules as a "substantial violation," that category of violation that bars a future certification under Section 655.110(a). Subparagraph (g) of Section 655.110 provides that it will be considered a "substantial violation" if the Regional Administrator determines, among other things:

> (D) That the employer is not currently eligible to apply for a temporary alien agricultural labor certification pursuant to § 655.210 of this part (failure of an employer to comply with the terms of a temporary alien agricultural labor

certification in which the application was filed under Subpart C of this part prior to June 1, 1987);
20 CFR 655.110(g)(1)(i)(D)

While it is true as the Regional Administrator here asserts, that the IRCA amendments did not "affirmatively extinguish all penalties that may have arisen" under the prior E-2 agricultural labor certifications, the statutory changes clearly were intended to replace the prior process with an elaborate structure of new processes for certification and enforcement. Employer does not argue in this proceeding, and I do not find, that the IRCA amendments "extinguished" penalties incurred under the prior law. Inclusion in the new Section 655.110 enforcement regulations of the limited "savings clause" demonstrates contemporary evaluation. of the question of transition from the H-2 enforcement scheme to the new H-2A enforcement scheme.

The plain meaning of the Section 655.110 "savings clause" is that those penalties having been imposed -- for an employer having been found "not currently eligible" as the result of a Section 655.210 investigation proceeding -- will be continued in effect under the new enforcement process. Inclusion of that provision in the new regulations excludes the likelihood that the new regulations were intended or expected to be applied as the Regional Administrator advocates in this proceeding.

Since the Department of Labor did provide a reasonable and limited scope in its "savings clause" provision in the new enforcement regulations, a provision allowing continued debarment of an employer already found in violation of the prior law, it is not necessary here to examine the applicability of the statutory General Savings Clause, or its interaction with the civil penalty 5-year statute of limitations relied upon by Okeelanta.

The practical justification stated in this proceeding for the Regional Administrator's use of the 1986-1987 investigative data in a 1992 administrative enforcement action warrants a brief discussion. As noted above, the Regional Administrator here asserts that the agency had been unable to complete its investigation until June 1992 because of the volume of documents to be reviewed and the difficulty in interviewing the 1986-1987 harvest workers. The fact of the matter, however, is that virtually all of the factual allegations presented as certificate violations in the Regional Administrator's June 24, 1992 Notice -- particularly the eight consecutive paragraphs on pages 1 and 2 of that Notice -- are verbatim quotations from a February 20, 1987 DOL investigator's report. That report, written by Carl F. Miller, a DOL farm labor specialist, is an extraordinarily detailed and documented analysis of Okeelanta's performance under the 1986-1987 certification. The report alleges numerous significant violations. It is proffered by the Regional Administrator as evidence in the administrative file in this case, at pages 642 through 730 of that file. The report and its documentation could have been the basis for a reasonably contemporary enforcement proceeding under either the H-2 or H-2A regulations in 1987.

Finally, there is, in addition, a procedural anomaly which strongly suggests that further litigation under the Section 210(a) H-2 enforcement provision was not anticipated in 1987 after

enactment of the IRCA amendments. On its face, Section 210(a) specifically provides for an employer's appeal of the Regional Administrator's findings in accordance with:

> [T]he procedures set forth at § 658.321(i)(l), (2), and (3) of this chapter. The procedures contained in §§ 658.421(j), 458.422 and 658.4 23 of this chapter shall apply to such hearings. 20 CFR 655.210(a)

Indeed, Sections 658.421(i)(l), (2) and (3), and 658.421(j) simply do not exist in Chapter 20 of the Code of Federal Regulations. Also, Sections 658.422 and 658.423 plainly do not apply to litigation like that involved here. Rather, those rules apply to certain types of complaints arising in the Federal-State job service agency system under the Wagner-Peyser Act of 1933. See 20 CFR 658.400

The Regional Administrator's answer to this procedural question is that the references in Section 655.210(a) were just "erroneous,'" and that:

> Section 655.210(a) should have referred employers, wishing to appeal the Regional Administrator's decision under 655.210(a), to section 658.424. . . . It is clear that the provision at 655.210 gives the Regional Administrator authority to determine that an employer is ineligible for labor certifications for violations occurring in a prior year. It is also clear that once such a determination is made, the appeal procedures are those set out in section 658, particularly 658.424. RA Response Brief, December 17, 1992, p. 9

The regional Administrator's response on this issue is not persuasive. Section 658.424 is designed to provide a Federal-level hearing process following a State-level hearing process for complaints filed under the Wagner–Peyser Act. Those rules could surely be adapted, if necessary, for an appeal of a Regional Administrator's enforcement findings, but those rules are not written for a Section 655.210(a) appeal process. The matter ultimately is moot, because of the decision reached here. The anomalous appeal provisions in Section 655.210(a) simply are a further indication that present-day temporary alien agricultural labor certification requests, and enforcement actions, are governed by the law and regulations that became effective June 1, 1987. As far as procedures are concerned, for present, purposes in resolving a matter arising under Section 655.210(a), the provisions of 20 CFR Part 18, the Rules of Practice and Procedure for Administrative Hearings, provide an effective residual procedural framework.

I conclude that the Regional Administrator's June 24, 1992 issuance of a Notice that Okeelanta "would be ineligible to apply for labor certification in the coming year under the H-2 program" is not in conformity with the provisions of the Immigration and Naturalization Act, as amended, nor with its implementing regulations, and should be vacated.

ORDER

The June 24, 1992 Notice of ineligibility issued by the Regional Administrator is hereby vacated.

ROBERT M. GLENNON
Administrative Law Judge