

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

**Issue Date: 22 September 2015**

CASE NO.: 2015-TAE-00013

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*In the Matter of:*

**WILLIAM NICHOLS dba  
NICHOLS TREE FARM**  
*Respondent.*

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**ORDER DENYING MOTION TO DISMISS**

This matter arises under the Immigration and Nationality Act, 8 U.S.C. §1101(a)(15)(H)(ii)(a), 1184(c), and 1186 and the implementing regulations set forth at 20 C.F.R. Part 655, and 29 C.F.R. Part 501.

Upon receipt of the case file, the Court held a pretrial telephonic conference call on September 8, 2015 with attorneys for Respondent and the Administrator, Wage and Hour Division, U.S. Department of Labor (“Administrator”). During that call there was discussion about the procedural posture of the case as well as the regulatory requirement of an expeditious hearing. In the days preceding the conference call, Respondent filed its *Motion to Dismiss Order of Reference* (“Motion”). During the conference call, the Administrator indicated it would oppose the Motion.

On September 10, 2015, the Court issued a Notice of Assignment and Hearing and Pre-Hearing Order, setting the trial date for October 6, 2015. Shortly afterwards, on September 15, 2015, the Administrator filed its *Opposition to the Motion to Dismiss* (“Opposition”).

In the Motion, Respondent argues this matter should not proceed to hearing on the merits because the Administrator did not promptly refer the case to the Office of Administrative Law Judges (“OALJ”) pursuant to 29 C.F.R. § 501.37(a).<sup>1</sup> Respondent argues that by allowing the case to proceed would constitute a violation of due process rights under the 5<sup>th</sup> Amendment to the United States Constitution.

Respondent notes the Administrator previously assessed a civil penalty (in the amount of \$47,250.00), and proposed debarment against him via a letter dated August 12, 2013. On

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<sup>1</sup> Respondent avers the delay was either 137 days or 538 days depending on which request for hearing date is used. Motion, 2.

September 11, 2013, Respondent's previous attorney contested both the civil monetary penalty and debarment and also requested a hearing before the OALJ.

For reasons unclear at this point, the Administrator did not forward the case to the OALJ at that time. On March 3, 2015, however, the Administrator forwarded a letter to Respondent entitled, "Rescission of Previous Determination and Notice of Determination of Civil Monetary Penalty Assessment." The amount of penalties assessed in this notice was \$42,750.00.

On April 2, 2015, Respondent's current attorney contested the findings and requested a hearing before the OALJ. On August 17, 2015, the Administrator, with its Order of Reference, forwarded the case to the Chief Administrative Law Judge.

Within the Opposition filed on September 15, 2015, the Administrator argued that the delay in filing an Order of Reference was not unreasonable because there is a reasonable explanation for the delay, Respondent made no effort to assert a right to a speedy hearing, and Respondent has failed to show any prejudice due to the delay.

The Administrator concedes that although the delay in filing the Order of Reference was not ideal, the delay was not unreasonable. The Administrator avers the delay was due to a shift in attorneys assigned to the case, a reprioritization of resources, and discovery of an error in the calculation of civil monetary penalties.

In determining whether the delay was a violation of Respondent's due process rights, I look to the four factor test set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 514 (1972). Those factors to be considered are (a) the length of the delay; (b) reason for the delay; (c) the defendant's assertion of his rights; and (d) prejudice to the defendant. *Id.*; *Tom Rob, Inc.*, WAB Case No. 94-03 (June 21, 1994); *Public Developers Corp.*, WAB Case No. 94-02 (July 29, 1994). "None of these factors is a necessary or sufficient condition for finding unreasonable delay." *U.S. v. \$8,850*, 461 U.S. 555, 555 (1983). Rather, a balancing of these four factors is necessary to determine whether the government's delay was reasonable. *Id.*; *U.S. v. Churchill*, 483 F.2d 268, 273-74 (1<sup>st</sup> Cir. 1973).

The key element to consider in this case is whether the Respondent has been prejudiced by the delay when the Administrator failed to promptly forward the matter to the OALJ for hearing. In the Motion, Respondent fails to articulate his basis for actual prejudice. Respondent argues, "This delay comes nowhere close to falling within the definition of 'promptly' within the meaning of 29 C.F.R. § 501.37(a) and substantially prejudices the Respondent's rights and ability to defend himself against these allegations." Motion, 3 (emphasis added). Respondent cites no concrete examples of how his case has been prejudiced or compromised by the delay. The Benefits Review Board, noting when respondents presented only general arguments that the mere passage of time had prejudiced their defense, concluded that "[s]uch generalized claims simply do not suffice." *KP & L Electrical Contractors, Inc., et al.*, ARB Case No. 99-039 (May 31, 2000).

The passage of time has resulted in the Administrator recalculating the civil monetary penalty resulting in a \$4,500.00 reduction of the assessment against Respondent. Additionally,

the Administrator notes its Notice of Debarment of March 3, 2015 must fail due to an untimely filing, and therefore, “cannot and will not, pursue a remedy of debarment in this matter, and the . . . reference to debarment should be deemed excised.” Opposition, 5. The delay has therefore resulted in a reduction in the penalty and has the effect of dismissing a cause of action. The Court fails to see these results as prejudicial to the Respondent.

Without a showing of actual prejudice to the Respondent due to the passage of time, it is not necessary to consider the other factors. *See KP & L Electrical Contractors, Inc.*, ARB Case No. 99-039 (refusing to address the first three factors under *Barker* because Respondent failed to establish actual prejudice resulting from the passage of time).

Therefore, the Respondent's Motion to Dismiss is **DENIED**.

**SO ORDERED.**

**TIMOTHY J. McGRATH**  
Administrative Law Judge

Boston, Massachusetts