

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 04 August 2008

Case No. 2008-LCA-23

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,

Prosecuting Party,

v.

NEW HOPE SOLUTIONS, LLC,

Respondent.

ORDER APPROVING WITHDRAWAL
OF REQUEST FOR HEARING
AND
ORDER CANCELLING HEARING

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101 and § 1182 ("the Act"), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. A hearing in this matter is scheduled to commence on October 15, 2008, in Columbus, Ohio.

PROCEDURAL HISTORY

By letter, dated, April 28, 2008, an Administrator's Determination was issued in the above-captioned matter. The letter was addressed to Mr. Ganesh Ponneri, Vice President Technical, New Hope Solutions, LLC and informed him that a recently concluded investigation had determined that New Hope Solutions, LLC had committed numerous violations of the Act; and, as a result of the violations, a civil money penalty in the amount of \$50,850.00 was assessed against New Hope Solutions, LLC. Also, New Hope Solutions, LLC owed back wages in the amount of \$355,503.66 to sixteen H-1B nonimmigrants and that the company would be denied the right to sponsor any aliens for employment for at least two years. Mr. Ponneri was informed that "[he] and any interested party have the right to

request a hearing on this determination." If Mr. Ponneri or any interested party did not request a timely hearing then "this determination will become a final and unappealable order of the Secretary of Labor."

By letter, dated May 13, 2008, Mr. Ponneri's counsel, in response to the Administrator's Determination letter, stated in pertinent part:

As you are aware, New Hope Solutions, LLC incurred a financial failure, ceased all operations as of December 31, 2007, and filed a certificate of dissolution with the Ohio Secretary of State. No assets remain. For that reason, there were no employees of New Hope Solutions available to timely assist the DOL during its investigation. As a result, Mr. Ponneri also disputes the Determination to the extent it concludes any failure to cooperate with the DOL investigation or to produce records.

It is our understanding and belief that Mr. Ponneri, as one of the former shareholders of New Hope Solutions, LLC has no individual liability or responsibility for the sanctions against New Hope Solutions, LLC as set forth in the Determination of April 28, 2008. If it is your contention to the contrary, please advise immediately. If in fact such is your assertion, please accept this as Mr. Ponneri's request for hearing pursuant to 20 CFR § 655.820. Of course, if you agree that Mr. Ponneri has no individual or personal liability for the sanctions imposed by the Determination upon New Hope Solutions, LLC, please advise and we shall withdraw any appeal or request for hearing.

This matter was forwarded to the undersigned for a hearing. On May 19, 2008, the undersigned issued a Preliminary Order. By letter, dated May 22, 2008, Mr. Ponneri's counsel, in response to the Preliminary Order, stated in pertinent part:

The DOL's Determination clearly applies only to New Hope Solutions, LLC. The DOL, in its investigation and Determination, seems to agree the 'employer' in the LCAs, which were the subject of the DOL investigation, was at all times identified as New Hope Solutions, LLC. The regulations under which the Determination was issued also clearly limit the

sanctions imposed in the Determination to the 'employer' (New Hope Solutions, LLC) and does not include agent of the "employer." See 20 CFR § 655.715; see also 20 CFR § 655.810 (contrast with the Fair Labor Standards Act, 29 U.S.C. § 203(d), which imposes the potential for liability upon those "acting directly or indirectly in the interests of an employer").

As a result, there is simply no reason for a hearing in this matter, unless it is the DOL's position that Mr. Ponneri has any personal obligation for the sanctions set forth in the Determination against New Hope Solutions, LLC. Having not made such an allegation in the investigation or the Determination, and having no authority for that in the implementing regulations, the Administrator should not now be allowed to use the hearing or the discovery in this matter to go on a fishing expedition not authorized by law.

By letter, dated, July 1, 2008, Mr. Ponneri's counsel requested the following:

. . . [T]his firm represents Mr. Ganesh Ponneri. We do not represent the Respondent in this matter, New Hope Solutions, LLC. By correspondence dated May 13, 2008, we attempted to simply clarify with the Department of Labor that the 'employer' which was the subject of both its investigation and its determination of April 28, 2008, was New Hope Solutions, LLC. Unfortunately, it appears from the case caption, that our correspondence of May 13, 2008, has been interpreted as an appeal or a request for a hearing on behalf of New Hope Solutions, LLC. Such was not the intent of our May 13th correspondence.

Because we do not represent New Hope Solutions LLC (in fact, it was officially dissolved on December 31, 2007), and because Mr. Ponneri is not the 'employer' subject to the Department's investigation or Determination, Mr. Ponneri hereby withdraws his letter of May 13, 2008, and any appeal or request for hearing under 20 C.F.R. § 655.420 it may have implied.

In response to an Order to Show Cause, issued July 10, 2008, by the undersigned as to why Mr. Ponneri's counsel's request should not be granted, the Administrator's counsel filed a response, dated July 18, 2008, objecting to Mr. Ponneri's withdrawal and requesting that Mr. Ponneri be added as a party. In pertinent part, the Administrator's counsel made the following argument:

Complainant believes the evidence at hearing will show that Mr. Ponneri is an alter ego of the corporate respondent, New Hope Solutions, LLC, which is now out of business. Under the Administrative Review Board decision in Mohan Kutty, M.D. (ARB Case No. 03-022, 2005), Mr. Ponneri is arguably liable for the H-1B violation of New Hope Solutions, LLC. Complainant believes that Mr. Ponneri is the primary owner of New Hope Solutions, LLC, signed many of the Labor Condition Applications (LCA's) at issue in this case, and frequently employed H-1B workers not at New Hope Solutions, LLC, as stated on their respective LCA's, but at separate businesses owned by Mr. Ponneri, or his wife, such as restaurants and convenience stores. The H-1B employees were not employed in the profession, or at the rate stated on their LCA's. Complainant states that Mr. Ponneri would have been named in the original determination letter in this matter if Complainant had been aware that New Hope Solutions, LLC was out of business. However, despite New Hope Solutions, LLC ceasing operations in December of 2007, Complainant was not notified of this fact until after the issuance of the determination letter.

By letter, dated July 23, 2008, Mr. Ponneri's counsel forwarded a response to Administrator's Response to the Order to Show Cause and Request to Add Party. He opined in part:

II. Ponneri's Withdrawal Does Not Require the Administrator's Consent.

This matter currently exists only because of Ponneri's correspondence dated May 13, 2008. Such correspondence was interpreted as a request for review of the DOL's Determination on behalf of New Hope Solutions, LLC. Absent a timely request for such a review by 'an interested party,' the Administrative Law Judge has no jurisdiction over

this matter. See, 20 C.F.R. § 685.820. As Ponneri was the only 'interested party' who made a timely request for review of the DOL's Determination, the ALJ's jurisdiction is dependent upon Ponneri's continuing desire for review. As Ponneri does not desire such a review and there is no prejudice to any party by allowing it, the withdrawal should be allowed and this matter dismissed.

III. The Administrator's Focus on the Merits of Its Defense is Premature.

The Administrator apparently desires a review of this matter so it can persuade the ALJ to alter the DOL's Determination of April 28, 2008, to include a finding that Ponneri is an 'employer' under 20 C.F.R. § 655.715. The Administrator's Response misses the point of the Show Cause Order. The Response provides no basis for conducting a 'review' under 20 C.F.R. § 655.820 if the only 'interested party' which allegedly sought the review withdraws such a review request. Instead, the Administrator's Response relies upon a factually distinguishable case from the Administrative Review Board for the proposition that if reviewed, the DOL Determination could arguably be applied to Ponneri as a part owner of New Hope Solutions, LLC. [Footnote omitted]. Notably absent is any reason why Ponneri cannot withdraw his purported request for review.

DISCUSSION

Title 20 C.F.R. § 655.820 provides that any interested party who desires a review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request in writing to the Chief Administrative Law Judge. The regulation provides that:

(b) Interested parties may request a hearing in the following circumstances:

. . . .

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s).

I am aware of no authority that does not allow a "party" or an "interested party" from withdrawing its request for a hearing. As counsel for Mr. Ponneri is aware, upon the granting of his request for withdrawal, the Administrator's determination becomes final. By letters, dated July 1, 2008, and July 23, 2008, Mr. Ponneri's counsel advised that Mr. Ponneri wished to withdraw his request as an "interested party" for an appeal from the Administrator's April 28, 2008, Determination filed pursuant to 20 C.F.R. § 655.815.

ORDER

Accordingly, the request of Mr. Ponneri to withdraw his appeal is hereby **GRANTED** and the April 28, 2008, Determination of the Administrator is hereby **AFFIRMED**.¹ The hearing scheduled for October 15, 2008, is hereby **CANCELLED**.

A

LARRY S. MERCK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. See 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. See 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the

¹ My decision in this case moots Administrator's Counsel's motion to add Mr. Ponneri as a named party. Additionally, whether or not the Administrator's Determination may be enforced against Mr. Ponneri under an "alter ego" theory of liability is not before this Court, and I make no determination as to whether or not the Administrator's Determination may be enforced against Mr. Ponneri in some other Federal proceeding.

administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 655.840(a).