

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 02 July 2004

IN THE MATTER OF:

TITO E. GONZALES,
Respondent.

Case No.: 2002-MSP-00005 R and P

APPEARANCES:

ROBERT L. WALTER, ESQ.
For the Department of Labor

TITO ELI GONZALES, ESQ.
Pro Se

DECISION AND ORDER

This matter arises from Tito E. Gonzales' (Respondent's) objection to the U.S. Department of Labor's (Department's or Plaintiff's) assessment of a \$1,000 civil money penalty under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) at 29 U.S.C. § 1802(7) and its implementing regulations at 29 C.F.R. Part 500.

I

Statutory and Regulatory Framework

The purpose underlying enactment of the MSPA is "to remove the restraints on commerce caused by activities detrimental to migrant and seasonal workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers . . ." 29 C.F.R. § 500.1(a). The provisions at 29 C.F.R. § 500.20(p)(1)(ii) specifically exclude from MSPA coverage "[a]ny temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)(a) and 214(c) of the Immigration and Nationality Act."

Relevant to these proceedings, 20 U.S.C. § 1811(a) directs that "[n]o person shall engage in any farm labor contracting activity, unless such person has a certificate of registration from the

Secretary specifying which farm labor contracting activities such person is authorized to perform.” Twenty C.F.R. § 500.1(c) states, in part, as follows:

Any farm labor contractor . . . is required to obtain a Certificate of Registration issued pursuant to the Act from the Department of Labor or from a State agency authorized to issue such certificates on behalf of the Department of Labor. Such a farm labor contractor must ensure that *any individual whom he employs to perform any farm labor contracting activities also obtains a Certificate of Registration.*

(emphasis added). Further, “farm labor contracting activity” is defined as “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” 29 C.F.R. § 500.20(i). Failure to obtain the required certificate of registration may result in a maximum penalty of \$1,000.00 per violation. 29 C.F.R. § 500.1(e).

II Procedural history

On behalf of certain employers, Respondent advertised in area United States newspapers for persons to pick oranges. The text of the advertisement, in relevant part, is as follows:

U.S. workers needed to pick oranges from 11/15/99 to approximately
6/8/2000 . . . for more information . . . contact Mr. Tito Eli Gonzalez . . .

Plaintiff’s Exhibit (Px.) 2. At this point in time, Plaintiff commenced an investigation of Respondent to ascertain his compliance with the requirements of the MSPA. The investigation included an interview of Respondent by Diane Reynolds, a Wage and Hour Investigator for the Department of Labor, on October 20, 1999 concerning his recruitment of domestic, nonimmigrant workers for area harvesters. *Tr.* at 10; *Px.* 1. Reynolds also identified copies of advertisements placed by Respondent in local newspapers in Florida to recruit U.S. workers. *Px.* 2.

In response to the investigation, Respondent submitted a Form WH-31, “Employee Personal Interview Statement,” dated October 20, 1999 which stated, in part, the following:

I am working as an agent for Jesus Moreno, Maria Barajas, Victor Rivera, and Sigfrido Cisneros. I recruit the workers who will be employed by each of these contractors. I have spoken with 4 or 5 individuals in Mexico who have ‘groups’ of people who will come here to work.

. . .

Once each (farm labor contractor) has the H-2A certificate, I will go to Mexico and interview each worker and get all the information required.

. . .

I have been to Belle Glade looking for workers for the (farm labor contractors) also. I have placed ads in the local newspapers—my name is listed as the person to contact . . .

Respondent further acknowledged that he did not have a farm labor contractor certificate, but stated that he would apply for such a certificate with the state. *Px. 1.*

Respondent then submitted a letter dated November 1, 1999 wherein he changed his position, asserting that he was not required to register for a farm labor contractor certificate. *Px. 4.* Citing to 20 C.F.R. § 655.101(a)(2), Respondent argued that he merely acted as an “agent” for farm labor contractors in filing applications for temporary alien agricultural labor certification. Respondent maintained:

As you can see an Agent does not have to be a Farm Labor Contractor, and so I am not going to get a Farm Labor Contractor license, since it is not required for the work I am doing for these Farm Labor Contractors.

Miss Reynolds (Plaintiff’s investigator) probably got the idea (that a certificate was required) from the fact that I was a Farm Labor Contractor until the year 1996. I discontinued being a Farm Labor Contractor because I could not get any Legal Alien to work.

(emphasis in original).

On November 10, 1999, Barry Lenz the assistant district director of the Tampa District Office of the Department’s Wage and Hour Division issued a \$1,000.00 civil money penalty assessment against Respondent for failing to register as a farm labor contractor prior to engaging in farm labor contracting activities. *Px. 3.*

Respondent registered for renewal of his farm labor certificate on December 15, 1999. *Px. 8.* Certification was issued on December 22, 1999.

Respondent appealed the civil money penalty assessment and, on May 7, 2002, Plaintiff issued an *Order of Reference*. Upon receipt of the *Order of Reference*, the undersigned issued a *Notice of Hearing and Pre-hearing Order*. A hearing was held on February 26, 2004 in Tampa, Florida. At the hearing, Plaintiff’s Exhibits 1-4 and 8 and Respondent’s Exhibit 1 were admitted as evidence.

III Issues Presented and Arguments of the Parties

The issues presented for adjudication are: (1) whether Respondent violated the MSPA by failing to obtain a Certificate of Registration; and, if so, (2) whether a \$1,000.00 civil money penalty should be assessed for the violation.

Plaintiff asserts that the \$1,000.00 penalty was properly assessed on grounds that Respondent attempted to recruit migrant domestic workers for a harvesting company and refused to register for, and obtain, a farm labor contracting certificate as required by 29 C.F.R.

§ 500.4. Respondent counters that he served as an “agent” of certain employers that each had the required farm labor contracting certificate and he was not required to independently obtain a certificate of registration to “secure H-2A workers from Mexico and from other countries to work in the United States.”

IV Discussion and conclusions

A. FAILURE TO OBTAIN CERTIFICATION OF REGISTRATION

Respondent testified that he has a power of attorney to serve as an agent of certain employers and, on their behalf, to place ads in area newspapers, interview prospective employees, and make commitments to workers on behalf of the employers. *Tr.* at 35-37. According to Respondent, the employers “assume full responsibility for the application and for all representations made by (Respondent) on the employer’s behalf.” *Tr.* at 35-37. One of the employers who makes use of the Respondent’s services is Samuel Barajas. Barajas testified that he and his wife recruit H2A workers for employment as “harvesters” engaged in picking oranges. *Tr.* at 45. Barajas employs about 50 people to harvest oranges and, at this time, all of his employees are alien workers under the H-2A program. *Tr.* at 47-48. Barajas testified that Respondent obtains the H2A certificate for his company, he serves as their “agent”, and he files notices and places all ads in the newspapers. *Tr.* at 48. Barajas stated that Respondent does not go to Mexico to recruit workers. *Tr.* at 48. Barajas submitted an affidavit stating that, in addition to serving as their agent for recruitment of foreign workers, Respondent also serves as an interpreter for Mrs. Barajas when English-speaking people answer her ad. *Tr.* at 46; *Respondent’s Exhibit (Rx.) 1.*

Barajas recalls that he first hired Mexican workers under the H2A program in 1999. Prior to that time, he used domestic, migrant workers. *Tr.* at 50.

There are two categories of workers at issue in this case. The MSPA requires certification for farm labor contracting activities related to recruiting and hiring “migrant (domestic) agricultural workers.” On the other hand, the MSPA specifically excludes from its coverage “any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a) and 1184(c) of Title 8.” Based on this exclusion from coverage, the Department concedes that the MSPA does not require certification for farm labor contracting activities related to recruiting and hiring nonimmigrant alien workers whose visas are issued through the H-2A program. *See* 29 C.F.R. § 501.10(m).

Lenz, the Wage and Hour assistant district director, explained when “agents” are required to be certified to recruit workers under the MSPA:

[I]f they're recruiting domestic workers and foreign workers and they do not have an H2A certification, then that work is covered under the Migrant and Seasonal Agricultural work and requires a license.

If they're recruiting foreign workers, once they receive certification for H2A workers, then that falls under the H2A requirement and at that point in time, they would not have to have certification. Those foreign workers are going to be certified through Immigration in the United States.

Respondent had not registered, and did not have a certificate, to recruit and hire "migrant (domestic) agricultural workers" from 1996, when his previous certification expired, until December 22, 1999, when he renewed his certification. There is some dispute regarding whether Respondent *actually* offered employment to "migrant agricultural workers" during this time period, although it appears that since December 22, 1999 he has offered employment to only H-2A workers for which no MSPA registration certificate is required. Respondent states that, even though he advertises for openings in local newspapers in the United States as required by law, no "migrant (domestic) agricultural workers", who would be covered by the MSPA, have responded. Therefore, he has recruited and hired only H-2A workers. However, the fact that Respondent advertised, and continues to advertise, in area newspapers in the United States means that he is conducting "farm labor contracting activity" to attract domestic migrant workers for which he needs a certificate under the MSPA. It is irrelevant whether domestic migrant workers were actually hired.

Respondent also argues that he does not need a certificate as the employer's agent when recruiting foreign workers under the H-2A program if the employer has registered for the certificate. *Tr.* at 38-39. However, there is no provision in the MSPA or its implementing regulations that allows Respondent to rely on the certificates of employers for whom he serves as an authorized agent. To the contrary, 29 C.F.R. § 500.1(c) requires that a farm labor contractor as well as "any individual whom he employs to perform any farm labor contracting activities" must obtain a Certificate of Registration. Placing advertisements in local United States' newspapers qualifies as a "farm labor contracting activity" and Respondent is paid \$200.00 by the employers for each worker hired. As a result, Respondent is required to obtain a Certificate of Registration.

Respondent's reliance on the temporary labor certification provisions at 20 C.F.R. Part 655 is misplaced. The MSPA certification process for farm labor contractor activities serves an entirely different purpose than the certification process for obtaining temporary employment visas for nonimmigrant aliens.

B. PROPRIETY OF CIVIL MONEY PENALTY ASSESSMENT

Having determined that Respondent violated the MSPA by failing to register for certification to conduct "farm labor contracting activity" with regard to "migrant (domestic) agricultural workers from 1996 until December 22, 1999, it must be determined whether the violation warrants imposition of a \$1,000 penalty. 29 C.F.R. § 500.262(c).

29 C.F.R. § 500.143 provides that the following factors must be considered in determining the amount of a civil money penalty:

- history of previous violations;
- the number of workers affected by the violation;
- the gravity of the violation;
- good faith efforts to comply with the Act;
- explanation of the person charged with the violation;
- the commitment to future compliance; and
- the extent to which the violator achieved a financial gain due to the violation or the potential financial loss or potential injury to the workers.

29 C.F.R. § 500.143(b).

Lenz explained that his penalty assessment was based on consideration of three factors: (1) Respondent's history of prior investigations and violations; (2) whether Respondent cooperated during the investigation; and (3) whether Respondent agreed to comply with the request that he register.

Lenz acknowledged that Respondent has no history of violations but stated that, because Respondent "refused to comply" and "refused to register as a farm labor contractor," the maximum penalty of \$1,000.00 was assessed. *Tr.* at 24. Lenz identified Respondent's November 1, 1999 letter containing Respondent's refusal to register for certification under the MSPA. *Tr.* at 25; *Px.* 4.

Plaintiff has presented no evidence that any workers have been affected by the violation, or that Respondent experienced financial gain due to the violation. Moreover, there is no evidence of potential financial loss or potential injury to the workers. Respondent ultimately conceded and registered for renewal of the labor certificate. Nevertheless, it cannot be said that he initially demonstrated a good faith effort to comply with the Act. In his November 1999 letter to Plaintiff, Respondent explicitly refused to obtain the certification on grounds that he was an "agent" of certain farm labor contractors that did have the required certification. Moreover, it is evident that Respondent is aware of the various statutes and regulations applicable to his activities as he previously obtained a farm labor contracting certificate under the MSPA, which expired in 1996.

Balancing the foregoing factors, it is determined that Respondent shall be assessed a \$500.00 civil money penalty for failing to register for certification to conduct farm labor activities under the MSPA. Accordingly,

ORDER

IT IS ORDERED that Respondent, Tito E. Gonzales, shall pay to the U.S. Department of Labor a total of \$500.00 as a civil money penalty assessed for failure to register for, and obtain, certification to conduct farm labor contracting activities as defined under the MSPA.

A
Thomas M. Burke
Associate Chief Administrative Law Judge