



In the Matter of:

TITO E. GONZALEZ,

ARB CASE NO. 04-178

PETITIONER,

ALJ CASE NO. 02-MSP-5 R and P

v.

DATE: March 29, 2007

**ADMINISTRATOR, WAGE & HOUR
DIVISION, UNITED STATES
DEPARTMENT OF LABOR,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Tito E. Gonzalez, *pro se*, Arcadia, Florida

For the Respondent:

Paula Wright Coleman, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor*, Washington, D.C.

FINAL DECISION AND ORDER

This case arises pursuant to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C.A. §§ 1801-1872 (West 1999), and its implementing regulations at 29 C.F.R. Part 500 (2007). An Administrative Law Judge (ALJ) properly determined that the petitioner, Tito E. Gonzalez, performed farm labor contracting activities under the MSPA when he placed advertisements in United States newspapers seeking to recruit domestic, nonimmigrant workers on behalf of farm labor contractors for whom he worked as their agent. Because Gonzalez had failed to obtain a required Certificate of Registration prior to engaging in such farm labor contracting activities, the ALJ properly determined that Gonzalez violated the MSPA and assessed a civil money penalty ("CMP") of \$500 against Gonzalez. On Gonzalez's petition, we affirm the ALJ's Decision and Order (D. & O.).

PROCEDURAL BACKGROUND

The Wage and Hour Division (WHD) investigated whether Gonzalez violated the MSPA by performing farm labor contracting activities as an employee of farm labor contractors without obtaining a required Certificate of Registration. WHD determined that Gonzalez had performed farm labor contracting activities when he placed advertisements in United States newspapers and on the radio seeking to recruit domestic, nonimmigrant workers on behalf of the farm labor contractors for whom he worked as their agent. Because Gonzalez had failed to obtain the required Certificate of Registration prior to engaging in such farm labor contracting activities, WHD assessed a civil money penalty (CMP) of \$1000 against Gonzalez.

Gonzalez objected and requested that the matter be referred to an ALJ. After holding a hearing, the ALJ issued a D. & O., in which he determined that Gonzalez had violated the MSPA when he failed to obtain the required Certificate of Registration to conduct farm labor contracting activities, but he reduced the CMP assessment against Gonzalez to \$500.

Pursuant to 29 C.F.R. § 500.264, Gonzales filed a petition requesting the Administrative Review Board to issue a notice of intent to modify or vacate the D. & O. The Board gave notice of its intent to modify or vacate the D. & O. pursuant to 29 C.F.R. § 500.265(b) and indicated that it would consider:

- (1) Whether the ALJ properly found that Gonzalez violated 29 C.F.R. § 500.1(c) when he failed to obtain a Certificate of Registration as a farm labor contractor.
- (2) If so, whether the ALJ properly imposed a \$500 civil money penalty for this violation.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to the MSPA and its implementing regulations (*see* 29 C.F.R. § 500.264), as well as Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002)(delegating to ARB the Secretary's authority to issue final orders under, *inter alia*, the MSPA). Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. *See* 5 U.S.C.A. § 57(b) (West 1996); *Zappala Farms*, ARB No. 01-054, ALJ No. 1997-MSP-9, slip op. at 6 (ARB Aug. 29, 2001).

REGULATORY FRAMEWORK

The MSPA protects migrant and seasonal farm workers "whose employment had been historically characterized by low wages, long hours and poor working conditions" H.R. Rep. No. 97-885, at 3 (1982) reprinted in 1982 U.S.C.C.A.N. 4547. "It is the

purpose of this chapter to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to *require farm labor contractors to register* under this chapter; and to assure necessary protection for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.” 29 U.S.C.A. § 1801 (emphasis added); *see also* 29 C.F.R. § 500.1(a). A “farm labor contractor” is “any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.” 29 U.S.C.A. § 1802(7); *see also* 29 C.F.R. § 500.20(j). “Farm labor contracting activity” is defined as “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” 29 U.S.C.A. § 1802(6); *see also* 29 C.F.R. § 500.20(i). As this definition is in the disjunctive, a person need only engage in one of the specified activities to be considered a farm labor contractor. *Timothy Reilly, D/B/A Reilly Bros. Berry Farm*, 91-MSP-12, slip op. at 2 (Sec’y Feb. 13, 1995).

Even more relevant to this case, 29 U.S.C.A. § 1811 provides:

(a) Persons engaged in any farm labor contracting activity

No 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.

(b) Hire, employ, or use of any individual to perform farm labor contracting activities by farm labor contractor; liability of farm labor contractor for violations

A farm labor contractor shall not hire, employ, or use any individual to perform farm labor contracting activities unless such individual has a certificate of registration, or a certificate of registration as an employee of the farm labor contractor employer, which authorizes the activity for which such individual is hired, employed, or used.

29 U.S.C.A. § 1811(a), (b) (emphasis added). Similarly, 29 C.F.R. § 500.40 provides:

Any employee of a registered farm labor contractor who performs farm labor contracting activities solely on behalf of such contractor, and who is not an independent contractor, must obtain a Farm Labor Contractor Employee Certificate of Registration authorizing each such activity.

29 C.F.R. § 500.40 (emphasis added); *see also* 29 C.F.R. § 500.1(c). A civil money penalty of not more than \$1000 may be imposed for each violation of the MSPA, such as the failure to obtain a Certificate of Registration. *See* 29 U.S.C.A. § 1853(a)(1).

DISCUSSION

Gonzalez gave a signed and sworn statement to a WHD investigator in which he stated that he worked as an agent for four farm labor contractors to recruit workers for them. Government Exhibit (GX) 1 at 1; Hearing Transcript (HT) at 20. Gonzalez further testified that he was paid \$200 for each person who ultimately was contracted to work for the farm labor contractors. HT at 58. On behalf of the farm labor contractors, Gonzalez placed advertisements in United States newspapers and on the radio seeking to recruit domestic, nonimmigrant “U.S. workers,” which listed his name as the person for any interested potential worker to contact. GX 1 at 2; GX 2; HT at 35. In addition, both Gonzalez, and a farm labor contractor for whom he worked, indicated that he served as an interpreter between prospective English-speaking U.S. workers who answered the advertisements and the farm labor contractors. Respondent’s Exhibit (RX) 1; HT at 39-40, 46. But Gonzalez admitted that he did not have a Certificate of Registration at the time that the WHD conducted its investigation in 1999. GX 1 at 3.

The ALJ properly found that placing advertisements in United States newspapers seeking to recruit domestic, nonimmigrant “U.S. workers” satisfies the MSPA’s definition of “farm labor contracting activity.” D. & O. at 5; *see* 29 U.S.C.A. § 1802(6); 29 C.F.R. § 500.20(i) (farm labor contracting activity includes recruiting or soliciting any migrant or seasonal agricultural worker); *Reilly, supra*.¹ Thus, because any person who performs farm labor contracting activities on their own behalf or on the behalf of a farm labor contractor must have a Certificate of Registration, *see* 29 U.S.C.A. § 1811(a), (b); 29 C.F.R. §§ 500.1(c), 500.40, the ALJ properly determined that Gonzalez had violated the MSPA as he admitted that he did not have a Certificate of Registration when WHD conducted its investigation in 1999.²

¹ As the ALJ properly noted, because placing advertisements seeking to recruit domestic, nonimmigrant “U.S. workers” satisfies the MSPA’s definition of “farm labor contracting activity,” whether the farm labor contractors ultimately hired any domestic, nonimmigrant “U.S. workers” is irrelevant. D. & O. at 5; *see* 29 U.S.C.A. § 1802(6); 29 C.F.R. § 500.20(i); *Reilly, supra*.

² The ALJ also properly determined that Gonzalez’s contention that he was not required to have a Certificate of Registration to work as an agent for farm labor contractors in obtaining H-2A temporary employment visas for nonimmigrant alien workers under 20 C.F.R. Part 655, Subpart B or other regulations implementing the Immigration and Nationalization Act is misplaced. D. & O. at 5. Because Gonzalez also recruited domestic, nonimmigrant “U.S. workers,” which satisfies the definition of “farm labor contracting activity” under the MSPA, he was required to obtain a Certificate of Registration pursuant to 29 U.S.C.A. § 1811(a), (b) and 29 C.F.R. § 500.40 for that purpose.

Gonzalez also contends that he was not required to have a Certificate of Registration under the MSPA because he merely worked as an agent for the farm labor contractors. Under the MSPA, “[t]he term ‘employ’ has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act [29 U.S.C. § 201 et seq.].” 29 U.S.C.A. § 1802(5). Pursuant to the Fair Labor Standards Act (FLSA), an entity “employs” a person if it “suffers or permits” the individual to work. 29 U.S.C.A. § 203(g). Thus, in defining employment under the FLSA, and therefore the MSPA, Congress expressly rejected the common-law definition of employment, which is based on limiting concepts of control and supervision, *see Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947), and expanded the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles, *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). *See also* H.R. Rep. No. 97-885, 97th Cong., 2d Sess. (1982) 6-8 reprinted in 1982 U.S.C.C.A.N. 4547, 4552-54 (declaring intent that terms “employee,” “employer” and “independent contractor” used in the MSPA “not be construed in their limited common law sense”).

The “suffer or permit to work” standard has been called “the broadest definition [of employee] that has ever been included in one act.” *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)(quoting 81 Cong. Rec. 7,657 (1938))(statement of Sen. Hugo Black). An entity “suffers or permits” an individual to work if, as a matter of economic reality, the individual is dependent on the entity. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961). Thus, as the farm labor contractors “suffer[ed] and permit[ted]” Gonzalez to work and compensated him for each person he contracted to work for them, Gonzalez was an employee of the farm labor contractors, *see* 29 U.S.C.A. §§ 203(g) and 1802(5); *Goldberg, supra*; who performed farm labor contracting activities on their behalf and, therefore, was required to have a Certificate of Registration, *see* 29 U.S.C.A. § 1811(a), (b); 29 C.F.R. § 500.40.

The WHD Administrator’s determination is entitled to enhanced deference even in this matter in which it does not constitute formal regulatory guidance. *See Sec’y of*

Similarly, Gonzalez’s contention before the Board that he is entitled to exemptions from the requirement to obtain a Certificate of Registration under the MSPA or the Fair Labor Standards Act of 1938 is also misplaced. Specifically, although the “family business” exemption at 29 U.S.C.A. § 1803(A)(1), *see also* 29 U.S.C.A. § 213(a)(6)(A); 29 C.F.R. § 500.30(a), exempts individuals who engage in farm labor contracting activity on behalf of a farm that they or a family member owns, the record contains no evidence indicating that Gonzalez owns a farm or that the family labor contractors for whom he worked were members of his family. Finally, while the “small business” exemption at 29 U.S.C.A. § 1803(a)(2), *see also* 29 U.S.C.A. § 213(a)(6)(B); 29 C.F.R. § 500.30(b), excludes certain persons from MSPA coverage, the exemption expressly does not apply to farm labor contractors.

Labor v. Peters, 1987-MSP-16, slip op. at 4 (Mar. 17, 1995).³ The \$500 civil money penalty the ALJ assessed pursuant to 29 U.S.C.A. § 1853(a) and 29 C.F.R. §§ 500.143(b) and 500.262(c) is unchallenged by any party on appeal, unrebutted and uncontroverted by any evidence of record. Therefore, we adopt the ALJ's decision, attach and incorporate the D. & O. with respect to the civil money penalty.

CONCLUSION

Accordingly, because Gonzalez violated the MSPA when he failed to obtain a required Certificate of Registration prior to engaging in farm labor contracting activities in 1999, we affirm the imposition of the civil money penalty totaling \$500.00 against Gonzalez and Gonzalez is **ORDERED** to remit that amount to the U.S. Department of Labor's Wage and Hour Division forthwith in accordance with 29 C.F.R. § 500.144.⁴

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

³ While the courts render the ultimate decisions on the Act's interpretations, *Mitchell v. Zachry*, 362 U.S. 310 (1960); *Kurchbaum v. Walling*, 316 U.S. 517 (1942), on those matters that the courts have not determined, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law to carry out their administrative and enforcement responsibilities. *Skidmore v. Swift*, 323 U.S. 134 (1944).

⁴ 29 C.F.R. § 500.144 provides:

Where the assessment is directed in a final order by the Secretary or in a final judgment issued by a United States District Court, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof, as finally determined, to the Secretary by certified check or by money order, made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed either to the Administrator, in Washington, DC, or to the Wage and Hour Division Regional Office for the area in which the violations occurred.