ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

IN THE MATTER OF:		
ADMINISTRATOR, WAGE AND HOUR DIVISION,		
PROSECUTING PARTY,		ARB CASE NO. 15-069
v.		ALJ CASE NO. 2014-TNE-016
STRATES SHOWS, INC.,		
RESPONDENT.		

ADMINISTRATOR'S RESPONSE BRIEF

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

KATELYN POE
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Room N-2716
Washington, DC 20210
(202) 693-5304

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ADMINISTRATOR'S RESPONSE BRIEF

This case arises under the H-2B temporary worker program of the Immigration and Nationality Act ("INA"). See 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c)(14). In May 2014, the Administrator ("Administrator") of the Department of Labor's ("DOL") Wage and Hour Division ("Wage and Hour") issued a determination that Strates Shows, Inc. ("Respondent") had violated several provisions of the H-2B program. The Respondent subsequently requested a hearing. Following vacatur of DOL's 2008 H-2B regulations on March 4, 2015, the Administrator filed a motion to dismiss this case without prejudice so that he could issue a new determination letter citing nearly identical wage violations of the terms and conditions of the petition to admit

("I-129").[1] Administrative Law Judge ("ALJ") Daniel F. Solomon dismissed the case without prejudice on May 19, 2015 and issued an Errata Order of Dismissal clarifying his order to be a dismissal without prejudice on June 4, 2015. Respondent filed a Petition for Review of that decision on July 2, 2015 and the Administrative Review Board ("Board") accepted review on July 8, 2015. Respondent asks the Board to overturn the ALJ's ruling. For the reasons that follow, the Petition for Review should be denied.

ISSUE PRESENTED

Whether the ALJ properly exercised his discretion when he dismissed this case without prejudice in light of the vacatur of the 2008 H-2B regulations, thereby allowing the Administrator to issue a new determination letter citing violations of the terms and conditions of the I-129, pursuant to DOL's delegated statutory authority to enforce the H-2B program and under the 2015 H-2B Interim Final Rule procedural regulations.

[1] The "petition to admit" referred to in INA section 214(c)(14) is Department of Homeland Security ("DHS") Form I-129 Petition for Nonimmigrant Worker ("I-129"). An employer must file this petition with DHS and obtain approval before an H-2B nonimmigrant visa may be granted. See 8 U.S.C. 1184(c)(1); 8 C.F.R. 214.2(h)(2)(i)(A); DHS Form I-129 Petition for Nonimmigrant Worker. Hereinafter, the petition to admit will be referred to as the "I-129."

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The H-2B program allows employers to hire foreign workers to perform temporary, non-agricultural labor or services in the United States "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)(b). INA section 214(c)(14) provides that the Secretary of the Department of Homeland Security ("DHS") may impose such administrative remedies as the Secretary determines to be appropriate, including civil monetary penalties, where the Secretary finds, after notice and an opportunity for a hearing, "a substantial failure to meet any of the conditions of" or "a willful misrepresentation of a material fact in" the I-129. 8 U.S.C. 1184(c)(14)(A). INA section 214(c)(14) further authorizes the Secretary of DHS to delegate this enforcement authority to the Secretary of Labor. See 8 U.S.C. 1184(c)(14)(B). Effective January 2009, the Secretary of DHS delegated this enforcement authority to the Secretary of Labor. See DHS Delegation of Authority to DOL (effective January 18, 2009); 8 C.F.R. 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of, among other things, an H-2B petition and a DOL-approved temporary labor certification). The Secretary of Labor in turn

delegated this enforcement authority to the Administrator. See U.S. Dep't of Labor, Secretary's Order No. 01-2014 (Dec. 19, 2014), 79 Fed. Reg. 77,527 (Dec. 24, 2014).

At the time of the Administrator's initial determination in this case, in May 2014, the Department was enforcing employer obligations and the terms and conditions of H-2B employment pursuant to its 2008 H-2B regulations. See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), 73 Fed. Reg. 78,020 (Dec. 19, 2008) (codified at 20 C.F.R. parts 655-56) ("2008 H-2B regulations"). On March 4, 2015, the United States District Court for the Northern District of Florida vacated DOL's 2008 H-2B regulations, concluding that DOL lacked independent rulemaking authority. See Perez v. Perez, No. 14-cv-682, 2015 U.S. Dist. LEXIS 27606, at *4 (N.D. Fla. Mar. 4, 2014). The district court's decision in Perez v. Perez was limited to DOL's rulemaking authority. The decision did not pertain to nor did it affect DOL's delegated statutory authority to enforce the terms and conditions of the I-129.

On April 29, 2015, DOL and DHS jointly promulgated an interim final rule. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24,041 (Apr.

29, 2015) (codified at 8 C.F.R. pt. 214, 20 C.F.R. pt. 655, and 29 C.F.R. pt. 503) ("2015 H-2B IFR"). Among other provisions, the 2015 H-2B IFR includes procedural regulations governing administrative proceedings for enforcement actions under the H-2B program. See 80 Fed. Reg. at 24,141-44 (codified at 29 C.F.R. pt. 503, subpt. C). Section 503.40(b) of these regulations provides that "[w]ith respect to determinations . . . involving provisions under 8 U.S.C. 1184(c), the procedures and rules contained in [Subpart C] will apply regardless of the date of violation." 80 Fed. Reg. at 24,141 (emphasis added).

B. Statement of Facts, Course of Proceedings, and ALJ's Decision

Respondent, a traveling carnival, utilizes the H-2B program to hire foreign workers. See Wage and Hour letter dated August 29, 2011 (included in Respondent's Appendix ("RX") at 16-18). Beginning in August 2011, Wage and Hour conducted an investigation of Respondent for compliance with the H-2B program. Id. Within the course of an H-2B investigation, as here, Wage and Hour typically visits the worksite(s), conducts interviews with workers and the employer, and reviews records; Wage and Hour may also conduct subsequent visits and interviews or submit supplemental document requests as the investigation develops. See, e.g., Wage and Hour Request for Information

dated August 2, 2012 (included in RX at 45-46).[2] Upon completing the investigation of Respondent, by letter dated May 16, 2014, the Administrator determined that Respondent had violated its obligations under the H-2B program by willfully misrepresenting facts on its 2010, 2011, and 2012 labor certification applications and by substantially failing to meet a condition on its 2010 labor certification application, specifically, failing to pay the offered wage to its H-2B workers. See Administrator's May 16, 2014 Determination Letter. The Administrator ordered the Respondent to pay back wages totaling $66,570.05 to 42 H-2B workers, in addition to civil monetary penalties. Id. The investigation was undertaken and the determination was issued pursuant to the statutory H-2B provisions and the Department's 2008 H-2B regulations. Id.

Respondent requested a hearing before an ALJ on May 30, 2014. See Respondent's Request for Hearing. After conducting discovery, which included multiple motions to compel by the Administrator in the face of Respondent's refusal to produce discovery, a hearing was set to proceed March 11-13, 2015. See ALJ's Third Amended Notice of Hearing; see also Administrator's

[2] The requests for information referenced by Respondent in its opening brief were part of one Wage and Hour investigation of Respondent covering several years and did not constitute seven separate investigations, as alleged by Respondent. See Respondent's Opening Brief at 5-8.

First, Second, Third, and Fourth Motions to Compel. However, on March 4, 2015, the United States District Court for the Northern District of Florida issued its decision in Perez v. Perez, discussed above, vacating the 2008 H-2B regulations; the ALJ canceled the March hearing. See ALJ's Order Cancelling Hearing. After the promulgation of the 2015 H-2B IFR, on May 7, 2015, the ALJ rescheduled the hearing for December 2015. See ALJ's Fourth Amended Notice of Hearing. The Administrator then filed a motion to dismiss without prejudice. As explained in his motion, the Administrator sought dismissal without prejudice so that Wage and Hour could issue a revised determination letter citing violations of the I-129 pursuant to its delegated statutory authority and under the 2015 H-2B IFR's procedural regulations. See Administrator's Motion to Dismiss without Prejudice. Respondent thereafter filed a motion to dismiss with prejudice and a motion to strike the Administrator's motion to dismiss. See Respondent's Motion to Dismiss with Prejudice and Respondent's Motion to Strike. Respondent's arguments in those motions were substantially the same as those raised in its Petition for Review and Opening Brief to this Board, namely, that the Administrator's motion was somehow an attempt to continue enforcement of the vacated 2008 H-2B regulations and that Respondent would suffer prejudice. Id.

On May 19, 2015, the ALJ issued an order dismissing the case without prejudice. See ALJ's Order of Dismissal ("Order"). In his Order, the ALJ discussed the Administrator's position regarding DOL's continued authority to enforce the terms and conditions of the I-129, pursuant to its delegated statutory authority and under the procedural regulations in the 2015 H-2B IFR. Id. at 2-3. The ALJ further noted that he does not have jurisdiction to rule on the validity of DOL's regulations. Id. at 3 (citing Prince v. Westinghouse Savannah River Co., ARB No. 10-079, 2010 WL 4918429 (ARB Nov. 17, 2010); Adm'r v. Ken Techs. Inc., ARB No. 03-140, 2004 WL 2205233 (ARB Sept. 30, 2004); Jones v. EG&G Def. Materials, Inc., ARB No. 97-129, 1998 WL 686646 (ARB Sept. 29, 1998)). The ALJ then expressed concerns with the principles of retroactivity. Id. at 3-4. However, the ALJ concluded that the issue of refiling "is not currently ripe and because the charges are not before me, I need not decide now whether the Administrator has the authority to issue a revised determination." Id. at 5. He further concluded that the decision in Perez v. Perez precluded a hearing "in this fact pattern" and he canceled the hearing and dismissed the case without prejudice. Id.

However, while the ALJ's Order itself stated that the dismissal was without prejudice, the caption of the ALJ's Order

read that the dismissal was with prejudice. Compare Order at 5 with Order at 1. Therefore, on May 27, 2015, the Administrator filed a motion for clarification and reconsideration, reiterating his position regarding his authority to issue a new determination citing violations of the I-129. See Administrator's Motion for Clarification and Reconsideration. The ALJ issued an Errata Order of Dismissal on June 4, 2015, clarifying that the motion to dismiss was granted without prejudice. The Respondent's Petition for Review and the Board's acceptance of review followed.

By letter dated July 10, 2015, pursuant to INA section 214(c)(14) and the 2015 H-2B IFR procedures, the Administrator determined that Respondent had substantially failed to comply with the conditions of the I-129, specifically, by failing to pay the proper wage as represented to the government on the I-129. See Administrator's July 10, 2015 Determination Letter (included in RX at 174-77).

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review an ALJ's decision and issue the final determination of the Secretary of Labor under the H-2B program. See U.S. Dep't of Labor, Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012). The Board acts with "all the powers which [the Secretary

of Labor] would have in making the initial decision." 5 U.S.C. 557(b). "The Board reviews an ALJ's procedural rulings for abuse of discretion, i.e., whether, in ruling as [he] did, the ALJ abused the discretion vested in [him] to preside over the proceedings." Walia v. Veritas Healthcare Solutions LLC, ARB No. 14-002, 2015 WL 1005045, at *3 (ARB Feb. 27, 2015); see Rowland v. Nat'l Ass'n of Sec. Dealers, ARB No. 07-098, 2009 WL 3165856, at *3 (ARB Sept. 25, 2009) (same).

ARGUMENT

THE ALJ'S DISMISSAL OF THIS CASE WITHOUT PREJUDICE WAS LAWFUL AND A PROPER EXERCISE OF HIS DISCRETION BECAUSE RESPONDENT WILL SUFFER NO LEGAL PREJUDICE AS A RESULT OF THE DIMISSAL

The ALJ's dismissal of this case without prejudice was an appropriate and lawful exercise of the ALJ's discretion. Dismissing without prejudice, thereby allowing the Administrator to issue a new determination letter citing violations of the I-129 pursuant to the Administrator's delegated statutory authority and under the 2015 H-2B IFR's procedural regulations, was consistent with Supreme Court precedent regarding retroactivity principles. Further, the ALJ's dismissal without prejudice appropriately balances the equities of the parties, as it prevents Respondent from circumventing its obligations to pay

the wage listed on the I-129 and does not cause Respondent to suffer any legal prejudice as a result of the dismissal.

A. The ALJ's Dismissal of the Case without Prejudice Was a Lawful Exercise of His Discretion and Was Consistent with Supreme Court Precedent Regarding Retroactivity

1. Dismissal without prejudice was a lawful exercise of the ALJ's authority and discretion under the H-2B program. In its opening brief, Respondent argues that the ALJ's action in dismissing the case without prejudice was "illegal" because the Administrator is seeking to continue to enforce the 2008 H-2B regulations. See Respondent's Opening Brief ("Op. Br.") at 11-12. However, as made clear in the Administrator's motions before the ALJ, the Administrator voluntarily sought dismissal without prejudice in order to cease enforcement under the 2008 H-2B regulations. See Administrator's Motion to Dismiss without Prejudice and Administrator's Motion for Clarification and Reconsideration. A dismissal without prejudice would instead enable Wage and Hour to cite violations of the I-129 pursuant to the Administrator's delegated statutory authority under INA section 214(c) and pursuant to the procedural provisions governing Administrative Proceedings in the 2015 H-2B IFR. Id. Dismissal without prejudice in no way required the ALJ to continue to apply, or the Administrator to continue to enforce, the 2008 H-2B regulations. This is further evidenced by the

Administrator's issuance of a new determination letter which cites only violations of the statutory provisions governing Respondent's obligations under the I-129, and was issued pursuant to the procedural provisions governing Administrative Proceedings in the 2015 H-2B IFR.[3]

2. While the 2008 H-2B rule was indeed vacated at the point of the ALJ's ruling, the 2015 H-2B IFR procedural provisions were effective upon publication (April 29, 2015). Respondent's arguments invite the Board to consider the validity of the Department's H-2B regulations, including the validity of 29 C.F.R. 503.40(b), applying the procedural provisions of the 2015 H-2B IFR to cases involving violations of 8 U.S.C. 1184(c), regardless of the date of violation. See, e.g., Op. Br. at 10-12 ("The very act of making the ruling was illegal," "The ALJ lacked subject matter jurisdiction," and "the new regulations purported to apply retroactively").

However, as recognized by the ALJ, neither he nor the Board may rule on the validity of the Department's duly promulgated

[3] Significantly, in his July 10, 2015 determination letter, the Administrator has charged Respondent only with failure to pay the wage as promised on the I-129. The Administrator has not pursued the other violations found in his May 16, 2014 determination letter, as they related only to misrepresentations on Respondent's labor certification applications rather than on the I-129.

regulations. See, e.g., Prince v. Westinghouse Savannah River Co., ARB No. 10-079, 2010 WL 4918429, at *5 (ARB Nov. 17, 2010) (“‘The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.’”) (quoting Dep’t of Labor, Secretary’s Order No. 01-2010 (Jan. 15, 2010), 75 Fed. Reg. 3924 (Jan. 25, 2010)). Accordingly, the ALJ appropriately declined to rule on the validity of the H-2B regulations. See Order at 3-5.

a. Even if the Board were to consider this argument, the ALJ’s dismissal without prejudice, which allowed the Administrator to issue his July 10, 2015 determination enforcing the terms and conditions of the I-129 pursuant to his delegated statutory authority and under the procedural regulations of the 2015 H-2B IFR, was fully consistent with Supreme Court precedent regarding principles of retroactivity. The Court has explained that while retroactive statutes and regulations are disfavored, “a statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute's enactment.” Landgraf v. USI Film Prods., 511 U.S. 244, 269-70 (1994). Rather, a statute or rule has an impermissible retroactive effect only where “it would impair

rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id. at 280; see Sarmiento Cisneros v. U.S. Att'y Gen., 381 F.3d 1277, 1283 (11th Cir. 2004) ("A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.") (internal citation omitted).

In Landgraf, the Court specifically distinguished application of procedural rules from substantive rules, stating that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. . . . Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." 511 U.S. at 275 (internal citations omitted); see Abhyankar v. Countrywide Fin. Corp., ARB No. 11-043, 2013 WL 1494457 (ARB Mar. 29, 2013) (applying Landgraf and concluding that application of amendments to Sarbanes-Oxley whistleblower statute regarding validity of pre-dispute arbitration agreements to a case arising before enactment of amendments did not affect

substantive rights of parties and thus did not have impermissible retroactive effect).

b. Here, the ALJ properly noted that agencies "may not promulgate retroactive rules absent express Congressional authority" and that a "provision operates retroactively when it 'impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed.'" Order at 3-4 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988), and Landgraf). Consistent with these principles, the Administrator sought dismissal without prejudice in order to issue a new determination letter. In his July 10, 2015 determination letter, the Administrator is enforcing the statutory obligations imposed by INA section 214(c) regarding the conditions of the I-129, provisions to which Respondent has been subject and that the Administrator has had the authority to enforce at all relevant times.[4] Issuance of this new determination letter does not impose any new liabilities, duties, or obligations upon Respondent or impair any rights

[4] As explained in the Administrator's Motion for Clarification and Reconsideration, while the Administrator has had authority to bring citations concerning the I-129 at all relevant times, any such citation would have been duplicative of the Administrator's charge that Respondent substantially failed to meet a condition of the labor certification application – specifically, failure to pay the offered wage.

Respondent had at the time of its relevant conduct. Thus, the substantive duties and obligations the Administrator seeks to enforce are not retroactively imposed on Respondent, as Respondent has been required to comply with these obligations throughout the entire period of investigation.

c. Further, the Administrator sought dismissal without prejudice to enforce these statutory provisions using the procedures for "Administrative Proceedings" set forth in the 2015 H-2B IFR, as provided by 29 C.F.R. 503.40(b). These provisions simply govern the manner in which Wage and Hour issues a determination, how employers may request a hearing, the conduct of hearings, how to seek Board review, and similar procedural matters. The Administrator has not applied, and has no intention to apply, the substantive provisions of the 2015 H-2B IFR. The Supreme Court has repeatedly found the application of such procedural regulations, as distinguished from substantive provisions, to matters arising prior to their enactment to be permissible. For example, in Thorpe v. Housing Authority of Durham, the Supreme Court held that new hearing procedures applied to eviction proceedings commenced prior to issuance of the new regulations because the procedures did not change the parties' obligations under the underlying lease agreement. 393 U.S. 268 (1969). In Landgraf, the Court

explained that the amendments to the Civil Rights Act that created a right to a jury trial, if not linked to increases in liability or penalties, "is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date." 511 U.S. at 280-81. In Regions Hospital v. Shalala, the Court held that a Department of Health and Human Services ("HHS") "reaudit" rule did not have impermissible retroactive effect because it required application of cost-reimbursement principles in effect at the time costs were incurred and thus did not change the standards upon which costs were determined. 522 U.S. 448, 456 (1998). Additionally, the Supreme Court in Regions Hospital discussed and distinguished the Court's decision in Bowen, where the Court concluded that a different HHS rule had an impermissible retroactive effect, on the basis that the regulation at issue in Bowen changed the substantive rights of the parties by "invok[ing] a new substantive standard." Regions Hosp., 522 U.S. at 456.

Here, as in Thorpe, Regions Hospital, and the jury trial example discussed in Landgraf, the 2015 H-2B IFR procedural provisions do not change the bases for Respondent's liability under the H-2B program, increase Respondent's possible penalties, nor in any way create new duties or obligations for Respondent. Rather, these provisions govern only the manner in

which the Department enforces the statutory requirements of 8 U.S.C. 1184(c), obligations to which Respondent has been subject at all relevant times, long before enactment of the 2015 H-2B IFR. Therefore, because the procedural provisions of the 2015 H-2B IFR impose no additional duties, liabilities, or obligations on Respondent, application of these procedures to this case has no impermissible retroactive effect and is consistent with Supreme Court precedent.

B. The ALJ's Dismissal without Prejudice Was Proper because Respondent will not Suffer Legal Prejudice and Respondent Should be Held Accountable for its H-2B Wage Violations

The ALJ's dismissal without prejudice was proper because Respondent is not prejudiced by the Administrator's revised determination, nor did Respondent face any prejudice at the time of the ALJ's ruling allowing for the issuance of that determination.

1. Under Rule 41 of the Federal Rules of Civil Procedure, "an action may be dismissed at the plaintiff's request . . . on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Voluntary dismissals under Rule 41 are without prejudice unless the court indicates otherwise. Id. Courts have "broad discretion" in determining whether to allow a voluntary dismissal and dismissal "'should be granted unless the

defendant will suffer clear legal prejudice, other [than] the mere prospect of a subsequent lawsuit, as a result.'" Pontenberg v. Boston Scientific Corp., 252 F.3d 1253, 1255 (11th Cir. 2001) (emphasis in original) (quoting McCants v. Ford Motor Co., Inc., 781 F.2d 855, 857 (11th Cir. 1986)).

In exercising this broad discretion, courts must "'weigh the relevant equities and do justice between the parties in each case,'" with the critical question being "'[w]ould the defendant lose any substantial right by the dismissal.'" Pontenberg, 252 F.3d at 1255-56 (quoting McCants and Durham v. Fla. East Coast Ry. Co., 385 F.2d 366, 368 (5th Cir. 1967)). Courts may also consider whether the plaintiff's counsel has acted in bad faith. See, e.g., Goodwin v. Reynolds, 757 F.3d 1216, 1219 (11th Cir. 2014).

2. Here, the ALJ appropriately exercised this broad discretion in dismissing the case without prejudice, without attaching conditions or costs, as Respondent will suffer no legal prejudice as a result of the dismissal and the decision appropriately balanced the equities of the parties. The ALJ engaged in a thorough examination of the effect of the vacatur of the 2008 H-2B regulations on this case, the Administrator's authority to enforce the terms of 8 U.S.C. 1184(c), and the Administrator's ability to apply the procedural provisions of

the 2015 H-2B IFR to cases involving violations of 8 U.S.C. 1184(c), regardless of the date of violation. See Order at 2-5. He also discussed his inability to rule on the validity of DOL's duly promulgated regulations. Id. at 3. The ALJ ultimately concluded that the question of whether the Administrator has authority to issue a revised determination was not currently before him. Id. at 5. In light of this unique fact pattern and regulatory framework, the ALJ appropriately dismissed the case without prejudice. By dismissing without prejudice, the ALJ appropriately left these questions open to be determined at the proper time and in the proper forum.

Indeed, the considerations upon which the ALJ based his decision demonstrate that Respondent suffers no legal prejudice in facing the Administrator's July 10, 2015 determination letter, nor in fact has Respondent identified any legal prejudice it suffers. In "weighing the equities" between the parties, it is clear that Respondent will not lose any substantial right by virtue of the dismissal. The Administrator's July 10, 2015 determination letter charges Respondent with substantially failing to pay its workers the wage stated on the I-129. This citation is factually virtually identical to the citation included in the Administrator's May 2014 determination letter for failing to pay the offered wage as

listed in Respondent's labor certification application. While the authority for the revised determination flows directly from the Administrator's delegated statutory authority to enforce the I-129, rather than from the 2008 H-2B regulations, the underlying relevant facts for these citations are the same. Therefore, litigation of this second determination letter will require little, if any, new discovery.[5] While Respondent asserts that it faces "duplicate litigation" and details the discovery already conducted, the prospect or burden of a second lawsuit does not constitute legal prejudice, and is insufficient to warrant a dismissal with prejudice. See Durham, 385 F.2d at 369 ("The record does not disclose any prejudice to the defendant . . . other than the annoyance of a second litigation upon the same subject matter."). Additionally, in this subsequent litigation, the Respondent may seek a protective order from discovery requests that result in undue burden or expense. See Rules of Practice and Procedure, 80 Fed. Reg. 28,768, 28,793 (May 19, 2015) (codified at 29 C.F.R. 18.52).

Nor has the Administrator engaged in "forum shopping" as alleged by the Respondent, as the subsequent litigation will be

[5] As noted in the Administrator's Motion for Clarification and Reconsideration, the relevant I-129 was exchanged during discovery and Respondent had an opportunity to make appropriate discovery inquiries concerning the document.

brought before the Office of Administrative Law Judges, the same forum as the initial proceedings, and the potential assignment of a different administrative law judge to the subsequent litigation does not constitute legal prejudice. See 29 C.F.R. 503.43; see also Goodwin, 757 F.3d at 1222 (finding no legal prejudice where the defendant's only prejudice was loss of its preferred federal forum). Thus, Respondent's alleged prejudices are insufficient to amount to clear legal prejudice and are insufficient to warrant a dismissal with prejudice. Rather, they amount to no more than the common circumstances incidental to subsequent litigation.

Additionally, the Administrator has not engaged in bad faith and has exercised all appropriate diligence in pursuit of this litigation. The Respondent asserts that the Department "knew" its authority was "dubious at best." However, while DOL has faced challenges to its rulemaking authority, DOL has consistently defended its authority under the H-2B program, and courts have reached differing conclusions on the validity of DOL's H-2B regulations. See La. Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor, 745 F.3d 653, 669 (3d Cir. 2014) ("DOL has authority to promulgate rules concerning the temporary labor certification process in the context of the H-2B program, and . . . the 2011 Wage Rule was validly promulgated pursuant to

that authority."). The outcome of the Perez v. Perez litigation does not convert the Department's exercise of its authority into some mode of bad faith or lack of due diligence. Indeed, upon issuance of the decision in Perez v. Perez, the Administrator promptly requested dismissal of the case in order to comply with the court's vacatur and cease enforcement of the 2008 H-2B regulations. Further, regarding the duration and expense of the discovery process, the Administrator previously attempted to conduct discovery as swiftly as possible but was required to file several motions to compel discovery from Respondent. See Administrators First, Second, Third, and Fourth Motions to Compel. The Administrator has acted with all due diligence and clearly has not acted in bad faith, and the facts here certainly do not warrant dismissal with prejudice or the imposition of costs or conditions. See Pontenberg, 252 F.3d at 1257-58 (bad faith requires more than even inattention or negligence); see also Guttenberg v. Emery, 68 F. Supp. 3d 184, 188-89 (D.D.C. Sept. 23, 2014) (imposition of costs and conditions are not required in every case, particularly where legal work already conducted will be useful in subsequent litigation).

Finally, dismissal without prejudice prevents an unjust result. To allow dismissal with prejudice would preclude the Administrator from enforcing Respondent's obligations under 8

U.S.C. 1184(c) and from recovering thousands of dollars in back wages that are collectively owed to over 40 of Respondent's workers. Respondent has availed itself of the H-2B program and in doing so was obligated to abide by the statutory requirements, including paying the wage listed on the I-129. Dismissal with prejudice would allow Respondent to circumvent these statutory obligations to the detriment of the workers. Such an unjust result should not be permitted. See Anderson v. DeKalb Plating Co., Inc., ARB No. 98-158, 1999 WL 563366, at *1 (ARB July 27, 1999) ("Because a dismissal with prejudice prevents a complainant from reinstituting a case . . . it is not a sanction to be imposed lightly.") (internal citations omitted). On these facts, where Respondent has not identified and will not suffer any legal prejudice, and to dismiss with prejudice will unjustly allow Respondent to evade its statutory responsibilities, the equities weigh strongly in favor of dismissal without prejudice. See Arias v. Cameron, 776 F.3d 1262 (11th Cir. 2015) (affirming dismissal without prejudice, where in view of the equities between the parties, the district court did not abuse its discretion). Therefore, the ALJ's dismissal without prejudice was a proper exercise of his discretion and should be affirmed.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board affirm the ALJ's decision dismissing this case without prejudice. The ALJ's decision was a lawful and proper exercise of his discretion, thereby allowing the Administrator to issue a new determination letter to enforce the terms and conditions of the I-129 by which Respondent agreed to abide. Respondent suffers no legal prejudice as a result of the dismissal. Any other outcome will unjustly allow Respondent to circumvent its statutory obligations under the H-2B program to pay its workers the wage as listed on the I-129.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

KATELYN POE
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Room N-2716
Washington, DC 20210
(202) 693-5304

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2015, I served the foregoing Administrator's Response Brief by sending a copy via first class mail, and via electronic mail where indicated, to:

R. Wayne Pierce
The Pierce Law Firm, LLC
133 Defense Highway, Suite 201
Annapolis, MD 21401
wpierce@adventurelaw.com

Hon. Daniel F. Solomon
Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400
Washington, DC 20001-8002

Hon. Stephen L. Purcell
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW, Suite 400
Washington, DC 20001-8002

_____ _____

KATELYN POE
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Room N-27l6
Washington, DC 20210
(202) 693-5304