

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

United States of America, Complainant v. Commander Construction, Inc. t/a Commander Construction Company and t/a Commander Construction Corporation, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100094.

DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge.

Appearances: ROBERT S. FINKELSTEIN, Esq., and DENISE NOONAN SLAVIN, Esq. for the Immigration and Naturalization Service.

AMERICO M. OLIVEIRA, President of respondent

Discussion and Decision:

This proceeding was initiated before me when, by notice of hearing dated October 4, 1988, respondent was advised of the filing by the Immigration and Naturalization Service (INS) of a complaint alleging violations of the statutory prohibition against unlawful employment of unauthorized aliens and violations of the employment verification requirements.

By a document in the form of a September 26, 1988 settlement agreement executed by counsel for complainant and by respondent through its president, the parties have tendered an agreed disposition which contemplates a final order by the judge and which forms the basis of this Decision and Order. By Motion to Enter Consent Order and Dismiss Remaining Counts, dated September 26, 1988, counsel for INS and respondent through its president transmitted the settlement agreement and consistent with its terms, tendered a proposed consent order. This Decision and Order is issued in lieu of the proposed order as tendered.

The controlling regulation, i.e., the interim final rules of practice and procedure of this Office, 52 Fed. Reg. 44972, 44976, November 24, 1987, (to be codified at 28 C.F.R. 68.10), contemplates two differ-

ent and distinct forms of agreed dispositions: one, an agreement containing consent findings which provide the basis for a decision disposing of any part or all of the proceeding, 28 C.F.R. 68.10(c)(1), and another, a settlement upon the basis of which the parties or their counsel ``[n]otify the Administrative Law Judge that the parties have reached a full settlement and have agreed to dismissal of the action. . . .'' 28 C.F.R. 68.10(c)(2).

In this proceeding, the agreement and jointly tendered motion constitute notification that the parties have reached a full settlement. Paragraph 5 of the settlement agreement, stating that ``the request for hearing filed by Respondent . . . is withdrawn,'' suggests that the parties jointly seek to restore the status quo ante with respect to the jurisdiction of this Office.

It would be consistent with use of the term ``withdrawn'' to understand the parties to have contemplated a request for approval of dismissal of the action as distinct from a request for a decision containing consent findings. See the distinction between dismissal, 28 C.F.R. 68.10(c)(2) and consent findings, id. at 68.10(c)(1). It may be supposed that in a given case the parties in reaching an agreed disposition prefer one or another mode of disposition, i.e., dismissal or consent findings.

Under 8 U.S.C. 1324a(e)(4), in any case where the judge finds a violation of prohibitions against the unlawful hiring, recruiting or referring for a fee of an alien knowing the alien is unauthorized with respect to such employment (8 U.S.C. 1324a(a)(1)(A)), or continuing to employ an alien knowing the alien is (or has become) an unauthorized alien with respect to such employment (8 U.S.C. 1324a(a)(2)), both a cease and desist order and imposition of at least the statutory minimum civil money penalty must be included in the order disposing of the proceeding. In that light, a particular respondent may well seek to settle on a basis that falls short of consent findings, in which case a dismissal, although subject to approval by the judge, may contain provisions which do not trigger issuance of a cease and desist order and civil money penalties.

Considering the provisions of the settlement agreement implicating consent findings in the present case, together with the explicit request in the motion for entry of a consent order, it is reasonable to conclude, as I do, that the tenor of the document overall is understood to be a proposed agreement containing consent findings. Disposition of this proceeding, therefore, is governed by 28 C.F.R. 68.10(d). Section 68.10(d) provides that when ``satisfied'' with ``an agreement containing consent findings,'' the judge may ``accept such agreement by issuing a decision based upon the agreed findings.'' I am so satisfied in the present case. Because the agreement

tendered contains some but not all of the provisions required of an agreement containing consent findings, it is necessary to add the provisions required by 28 C.F.R. 68.10(b) in the case of ``[a]ny agreement containing consent findings.''

Findings of Fact and Conclusions of Law

(1) The settlement agreement referred to above, including recitation of facts contained therein, is adopted and made a part of this Decision and Order, according to its terms as fully as if set out herein.

(2) The parties have agreed that respondent admits the allegations set forth in: Count I of the notice of intent to fine (NIF) incorporated by reference in the complaint; paragraphs A2, A5, A8, B, and C of Count II of the NIF; and Count III of NIF, thereby conceding violations of sections 274A(a)(1)(B) and 274A(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)(B) and 8 U.S.C. 1324a(a)(2) respectively), and that paragraphs A1, A3, A4, A6, A7, and A9 of Count II of the NIF are to be dismissed. I conclude that the agreement is fair and satisfactory, and there is no reason not to accept it, within the contemplation of 28 C.F.R. 68.10. [References to paragraphs A1, A3, A4, A6, A7, and A9 of Count I in paragraph 4 of the settlement agreement are understood to be references to those paragraphs of Count II.]

(3) On the basis of the settlement agreement, I find and conclude that Commander Construction, Inc. t/a Commander Construction Company and t/a Commander Construction Corporation, has violated 8 U.S.C. 1324a(a)(1)(B) and 8 U.S.C. 1324a(a)(2), sections 274A(a)(1)(B) and 274A(a)(2) of the Immigration and Nationality Act respectively, with regard to the employment of individuals identified in the complaint.

ACCORDINGLY, IT IS HEREBY ORDERED:

(1) that the respondent cease and desist from violating the provisions of section 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1324a(a)(2);

(2) that the respondent pay a civil money penalty in the amount of \$1,750.00 as to Count I, paragraph A2, A5, A8, B, and C of Count II, and Count III of the complaint, for a total of \$1,750.00.

(3) that each party bear its own attorney fees, other expenses and costs incurred by such party in connection with any stage of these proceedings.

(4) that this Decision and Order has the same force and effect as a decision and order made after a full administrative hearing;

(5) that the entire record on which this Decision and Order is based consists solely of the complaint, the notice of hearing, and the September 26, 1988 settlement agreements between the parties;

(6) that the parties have waived any further procedural steps before the administrative law judge;

(7) that the parties have waived any right to challenge or contest the validity of this Decision and Order;

(8) that the hearing previously scheduled is canceled; and

(9) that as provided in section 68.52 of the Interim Final Rules of Practice and Procedure, supra, this Decision and Order shall become the final order of the Attorney General unless within thirty (30) days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED.

Dated this 1st day of November, 1988.

MARVIN H. MORSE
Administrative Law Judge