



Issue Date: 13 September 2021

Case Nos.: 2020-TNE-00051
2020-TNE-00052

In the Matters of:

OCEAN BAY MANAGEMENT, INC.

and

DUNE RESORTS LLC d/b/a DUNE RESORTS
Respondents

ORDER APPROVING CONSENT FINDINGS

The above-captioned matters arise from the request for hearing filed by Ocean Bay Management, Inc. (“Ocean Bay”) and Dune Resorts LLC d/b/a Dune Resorts (“Dune”) (collectively referred to as “Respondents”) on the determinations of the Administrator, Wage and Hour Division (“Administrator”) dated May 20, 2020 which arose from the Secretary of Labor’s enforcement of H-2B provisions of the Immigration and Nationality Act (“INA”), 8 U.S.C. §1101(a)(15)(H)(ii)(b), as amended, and its implementing regulations set forth at 20 C.F.R. Part 655, Subpart A and 29 C.F.R. Part 503. The implementing regulations are found at 20 C.F.R. Part 655, Subpart A.¹

In the May 20, 2020 determinations, the Administrator concluded that, between April 1, 2017 through November 15, 2018 (for Ocean Bay) and between April 1, 2018 through November 15, 2018 (for Dune), Respondents violated various H-2B provisions of the INA. Specifically, the Administrator determined that Respondents failed to comply with requirements specified for Applications for Temporary Certification (“TEC”), ETA Form 9142B with Appendix B, and associated USCIS Petitions for Nonimmigrant Workers, in violation of 29 C.F.R. § 503.16(a)(1), (c), (j)(1)(i) and (ii), (q), (s), (w), (x). The Administrator’s determination issued to Dune also provided notice it would be debarred from obtaining labor certifications for a five-year period, pursuant to 29 C.F.R. § 503.24.

¹ These regulations have been subject to recent court challenges that resulted in a preliminary injunction enjoining Department of Labor (DOL) from their implementation and enforcement. On April 29, 2015, the DOL and the Department of Homeland Security (DHS) jointly promulgated an interim final rule to replace the invalidated regulations and that interim final rule applies to this case. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24,042 (Apr. 29, 2015) (codified at 8 C.F.R. Part 214, 20 C.F.R. Part 655, 29 C.F.R. Part 503).

On June 18, 2020, Respondents objected to the Administrator’s determinations and requested a hearing. The case was docketed at the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ”) and subsequently assigned to undersigned for adjudication.

A hearing was last scheduled in these matters for August 11-13, 2021, but it was postponed based on the parties’ representation that a settlement agreement had been reached. On September 8, 2020, Administrator filed a documented entitled “Consent Findings” signed and executed by the parties. The Consent Findings submitted by the Administrator are attached to this Order and incorporated herein by reference. The undersigned approves the Consent Findings attached, finding them to be fair and adequate.

Reiterating what, in part, has been set forth in the Consent Findings attached to this Order, the parties waive any further proceeding before OALJ in this matter and waive any right to challenge or contest the validity of the Consent Findings entered into in accordance with their agreement. 29 C.F.R. §§ 18.71(b)(3)-(4) and 503.49(b)(3)-(4). Each party will bear its own costs, attorney’s fees and other expenses incurred in connection with this proceeding. This Order approving the parties’ Consent Findings as proposed will have the same force and effect as an order made after full hearing in accordance with 29 C.F.R. §§ 18.71(b)(1) and 503.49(b)(1).

The hearing previously postponed is hereby is canceled.

SO ORDERED.



Digitally signed by LYSTRA HARRIS
DN: CN=LYSTRA HARRIS,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: **WAGE_AND_HOUR_DIVISI_v_OCEAN_BAY_MANAGEMENT_**

Case Numbers: **2020TNE00051, 2020TNE00052**

Document Title: **ORDER APPROVING CONSENT FINDINGS**

I hereby certify that a copy of the above-referenced document was sent to the following this 13th day of September, 2021:



Digitally signed by Jonathan P. Brooks
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**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
CHERRY HILL, NEW JERSEY**

In the Matter of:)	
)	
ADMINISTRATOR,)	
WAGE AND HOUR DIVISION,)	
U.S. DEPARTMENT OF LABOR)	
<i>Prosecuting Party</i>)	
v.)	Case Nos.: 2020-TNE-00051
)	2020-TNE-00052
OCEAN BAY MANAGEMENT INC.,)	
<i>Respondent</i>)	
and)	
)	
DUNE RESORTS LLC d/b/a DUNE RESORTS,)	
<i>Respondent</i>)	

CONSENT FINDINGS AND ORDER

Ocean Bay Management Inc. (“Ocean Bay”) and Dune Resorts LLC (“Dune”) (collectively, “Respondents”) and the Administrator of the Wage and Hour Division, U.S. Department of Labor (“Administrator”), Prosecuting Party (collectively, the “Parties”), represent that they have reached an accord to resolve this matter, and to that end hereby stipulate and agree that:

1. This action arises under the Immigration and Nationality Act of 1952, P.L. 82-414, 66 Stat. 163, codified as amended at 8 U.S.C. § 1101 et seq. (“the INA”), as amended by the Immigration Reform and Control Act of 1986, P.L. 99-603, 100 Stat. 3359. Jurisdiction over the hearing in this matter is vested in the U.S. Department of Labor Office of Administrative Law Judges by the INA at §§ 103(a)(6), 214(c) and 20 C.F.R. Part 655, Subpart A, and 29 C.F.R. Part 503.

2. On May 20, 2020, the U.S. Department of Labor, Wage and Hour Division (“WHD”) issued Determination Letters to each Respondent alleging violations of the H-2B provisions of the INA, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), et seq., and 1184(c)(14), alleging violations and assessing back wages and civil money penalties.

3. As to Ocean Bay, WHD’s investigation covered the period from April 1, 2017 through November 15, 2018, and as to Dune, WHD’s investigation covered the period from April 1, 2018 through November 15, 2018 (“the Relevant Time Periods”).

4. Specifically, the Determination Letters alleged that during the Relevant Time Periods, Respondents committed violations regarding specified Applications for Temporary Certification (“TEC”), ETA Form 9142B with Appendix B, and associated USCIS Petitions for Nonimmigrant Workers,¹ in violation of 29 C.F.R. § 503.16(a)(1), (c), (j)(1)(i) and (ii), (q), (s), (w), (x). The Determination Letter issued to Respondent Dune also provided notice that it would be debarred

¹ WHD’s investigation covered Respondents’ TECs listed below and their corresponding I-129Petitions:

YEAR	Dune’s TEC #	CONTRACT PERIOD	# OF WORKERS EMPLOYED	JOB TITLE
2018	H-400-17341-537415	04/01/2018 – 09/30/2018	10	Cabana Attendant
2018	H-400-17339-062620	04/01/2018 – 10/15/2018	35	Housekeeping
2018	H-400-17341-464085	04/01/2018 – 10/15/2018	10	Laundry Worker
2018	H-400-17339-117812	04/01/2018 – 10/15/2018	10	Front Desk
YEAR	Ocean Bay’s TEC #	CONTRACT PERIOD	# OF WORKERS EMPLOYED	JOB TITLE
2018	H-400-17342-106663	04/01/2018 – 11/30/2018	30	Housekeeping
2018	H-400-17346-810090	04/01/2018 – 10/31/2018	5	Cabana Attendant
2018	H-400-17342-862861	04/01/2018 – 10/15/2018	10	Laundry Worker
2017	H-400-16342-126802	04/01/2017 – 12/01/2017	25	Housekeeping
2017	H-400-16342-968745	04/01/2017 – 11/01/2017	12	Cabana Attendant

from obtaining labor certifications for a period of five years, pursuant to 29 C.F.R. § 503.24.

5. On June 18, 2020, Respondents filed timely requests for a hearing with respect to the allegations of violations set forth in the May 20, 2020 Determination Letters.

6. The Parties now agree to these Consent Findings to resolve the findings of WHD's investigation pursuant to the H-2B program, obtain Respondents' assurance of future compliance with the provisions of the H-2B program, and obtain the prompt payment of H-2B back wages and H-2B civil money penalties due.

7. The Parties enter into this Agreement to resolve the dispute that has arisen between them and to avoid the burden, expense, and risk of continued litigation. Respondents neither admit nor deny the allegations set forth in WHD's May 20, 2020 Determination Letters. Respondents deny that they have violated the New York State Human Rights Law and state that nothing herein shall be considered an admission of a violation of the New York State Human Rights Law.

8. The Administrator hereby amends the May 20, 2020 Determination Letters to allege that Respondent Dune owes back wages in the total amount of \$121,567.24 (due to Respondent Dune's employees listed in Exhibit A) and civil money penalties in the amount of \$32,454.65, and Respondent Ocean Bay owes back wages in the total amount of \$23,523.46 (due to Respondent Ocean Bay's employees listed in Exhibit A), and civil money penalties in the total amount of \$32,454.65. The Administrator also hereby amends its May 20, 2020 Determination Letter to Dune to provide notice that Respondent Dune will be debarred from obtaining labor certifications for a period of two years, pursuant to 29 C.F.R. § 503.24. No other amendments are made to the Determination Letters.

9. Respondents withdraw their exceptions to the May 20, 2020 Determination Letters. Each agree to pay the owed amounts listed in Paragraph 8 according to the procedures set forth in Paragraph 10 of these Consent Findings and Order and Respondent Dune agrees to a two-year period of debarment from obtaining labor certifications pursuant to 29 C.F.R. § 503.24 and 20 C.F.R. § 655.73.

10. Respondents shall make electronic payment twenty-one days from the date these Consent Findings and Order are so-ordered as follows:

A. Back wage payment:

- i. Go to <https://pay.gov/public/form/start/77689032>, select “Continue to Form,” and complete the required fields.
- ii. The “BW Case Number” is Case No. 1859481 for Dune and Case No. 1861102 for Ocean Bay.
- iii. The “Date of Assessment” is the date of the Order.

B. Civil money penalty payment:

- i. Go to <https://pay.gov/public/form/start/77734139>, select “Continue to Form,” and complete the required fields.
- ii. The “CMP Case Number” is Case No. 1859481 for Dune and Case No. 1861102 for Ocean Bay.
- iii. The “Date of Assessment” is the date of the Order.

11. The Administrator shall distribute the back wages described in Paragraph 8 less any legally required deductions, to the persons named in the Exhibit A below, or, in her sole discretion, to their estates if that be necessary, and any money not so paid within a period of three years from the date of its receipt, because of an inability to locate the proper persons or because of their refusal to accept it, shall then be deposited in the Treasury of the United States, as miscellaneous receipts.

Respondents remain responsible for paying the employers' share of any applicable taxes to the appropriate local, state, and federal revenue authorities.

12. Respondents and any of their agents or anyone acting on their behalf will not, directly or indirectly, solicit or accept the return or refusal of any sums paid or due under these Consent Findings.

13. Within 30 calendar days of the date these Consent Findings are ordered, Respondents shall provide WHD the social security number, if such is available, and all known addresses and phone numbers of each former or current employee listed in Exhibit A.

14. Respondent Dune agrees that, pursuant to 29 C.F.R. § 503.24 and 20 C.F.R. § 655.73, the Administrator, Office of Foreign Labor Certification, will not issue future labor certifications under 20 C.F.R. Part 655, Subpart A to Respondent Dune or any successor in interest for a two-year period of debarment, starting on the date these Consent Findings and Order are approved by the Court if that approval is issued within twenty-one (21) days of the date Respondents sign this agreement, and if not, then on the date Respondents sign this agreement. Respondent Dune further agrees that, pursuant to 29 C.F.R. § 503.24(f) and 20 C.F.R. § 655.73(i), Respondent Dune and any successor in interest will be disqualified from filing any other labor certification applications or labor condition applications with the Department of Labor for the same two-year period of time. The parties agree that in the Relevant Time Periods Ocean Bay was not a successor in interest of Dune.

COMPLIANCE ASSURANCES AND ENHANCED COMPLIANCE PROGRAM

15. Respondents represent that they are currently in compliance with the requirements of the H-2B program and applicable regulations, and that they will remain in compliance.

16. Respondents hereby agree to fully comply with the requirements of the H-2B program and applicable regulations, including but not limited to: the prohibition against preferential

treatment of foreign workers, 29 C.F.R. § 503.16(q); the recruitment requirements, 29 C.F.R. § 503.16(s) and (w); the requirement to disclose all deductions, 29 C.F.R. § 503.16(c); the requirement to keep H-2B workers working within the approved job classifications, 29 C.F.R. § 503.16(x); the obligation to pay wages listed on its I-129 Petition and 9142 Application for all hours worked, 29 C.F.R. § 503.16(a)(1); and the requirement to pay or reimburse H-2B workers for subsistence costs during inbound and outbound transportation, 29 C.F.R. 503.16(j)(1)(i) and (ii). Further, Respondents will not discharge or in any way discriminate against any employee because such employee has lawfully: (1) Filed a complaint under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder; (2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder; (3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder; (4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder; or (5) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder.

17. Respondents shall implement the following provisions, without limitation, as part of a comprehensive Enhanced Compliance Program. Respondent Ocean Bay shall continue to implement the following provisions for five years (so long as Respondent Ocean Bay employs any employees pursuant to the H-2B program) following the date these Consent Findings are ordered,

and Respondent Dune shall begin to implement the following provisions upon the expiration of the two-year debarment period and continue three years thereafter (so long as Respondent Dune employs any employees pursuant to the H-2B program):

A. On or before 15 days from the date these Consent Findings and Order are approved by the Court, Respondents shall hire a third-party contractor (“H-2B Compliance Contractor”) to assist Respondents in complying with the H-2B regulations.

- i. Within 30 days of designation of the contractor, or designation of any subsequent H-2B Compliance Contractor, Respondents shall provide a written description of the H-2B Compliance Contractor’s responsibilities to the H-2B Compliance Contractor, and the H-2B Compliance Contractor shall sign a written certification that they have read and understood these Consent Findings and Order and their responsibilities as related to these Consent Findings and Order. During the five-year period following the date these Consent Findings are ordered, Respondents shall produce this certification to WHD within 15 days of a written request by WHD.
- ii. Respondents shall ensure that the H-2B Compliance Contractor is knowledgeable of the H-2B regulations’ prohibition against intimidation, retaliation, blacklisting, discharge, discrimination, and other prohibited conduct by an H-2B employer (as further set forth at 29 C.F.R. § 503.16(n)).
- iii. On or before 60 days from the date these Consent Findings and Order are approved by the Court, the H-2B Compliance Contractor shall train all of Respondents’ owners, supervisors, and any other employees with managerial roles, on the rights of workers to engage in activities protected

by § 503.16(n) without fear of retaliation. Respondents shall also ensure that all newly hired or promoted owners, supervisors, and any other employees with managerial roles, are provided with the same anti-retaliation training, within 60 days of their start date in such positions. Any employee who is rehired will be considered a new hire for the purposes of the anti-retaliation training requirements set forth in this subparagraph. Respondents shall maintain the position of H-2B Compliance Contractor for a minimum of five years following the date these Consent Findings are ordered.

B. Together with their contractor:

- i. Respondents shall conduct pre-season reviews of all the requirements of the H-2B regulations and of the Respondents' policies and practices to ascertain that all procedures are in place for full compliance.
- ii. Respondents shall conduct mid-season reviews to evaluate compliance with all of the H-2B regulations.
- iii. Respondents shall conduct post-season audits to evaluate compliance with all of the H-2B regulations.
- iv. Respondents shall conduct trainings for Respondents' owners, agents, managers, and supervisors to ensure compliance with this Agreement.
- v. Within 14 days of H-2B employees' arrival, Respondents shall provide each employee with a copy of the job order in their primary language, obtain signed confirmation of receipt from each employee, and provide verbal notice of the requirements of the job order, including Respondents'

obligations to maintain H-2B employees in their approved job classifications, pay the required prevailing wage, as well as premium pay for hours worked over 40 in a workweek, pay or reimburse inbound and outbound transportation and subsistence costs, and to provide notice of all deductions not required by law, including charges for housing. Respondents agree to comply with 29 C.F.R. § 503.16(e). Among other requirements, while Dune is debarred, H-2B workers approved for Ocean Bay cannot work for Dune, and once Dune's period of debarment has ended, vice-versa.

- vi. Respondents agree to enhanced recruitment of U.S. workers as outlined in this section.
 - a. To comply with the requirements outlined in 20 C.F.R. §§ 655.40-49 to notify and offer employment to former U.S. workers, Respondents must provide each U.S. worker employed in positions identical to the TEC jobs who was either laid off for lack of work within 120 days of the date of need, or employed in the previous year (except those who were dismissed for cause or who abandoned the worksite), with a written job offer containing the terms of the job order in both English and each worker's primary language if other than English, during the recruitment period specified by 20 C.F.R. §§ 655.40(b), that is, within 14 calendar days from the date the Notice of Acceptance. The written job offer must be provided to each such U.S. worker via first class mail sent to the last known address. Respondents must maintain copies of

the job offers and must make these documents available for inspection to representatives of WHD within 72 hours following a request.

- b. In order to avoid making an offer of employment to any former U.S. worker the following year, before Dec. 31 of the year of that worker's employment Respondents must provide a written notice of dismissal and maintain copies of any such written dismissals and must make these documents available for inspection to representatives of WHD within 72 hours following a request.
- c. Respondents must post ads announcing the availability of the TEC jobs in two conspicuous locations: 1) prominently placed near the time clock in each hotel or other facility that will be a place of employment under the TEC; and 2) prominently placed in any facility where any seasonal workers are housed. The notification should be posted on the first date of the recruitment period specified by 20 C.F.R. §§ 655.40(b) and remain posted until 21 days before the date of need. The notification should contain the information required by 20 C.F.R. § 655.41.
- d. In all recruiting activities, Respondents must offer to U.S. workers no less than the same benefits, wages, and working conditions that it is offering, intends to offer, or will provide to H-2B workers. Specifically, Respondents' ads must describe the same access to housing and overtime to U.S. workers as will be provided to H-2B workers. For example, Respondents may state: 1) that low-cost housing

may be provided on a first-come, first-serve basis; and 2) that overtime hours, and overtime pay, may be available on an as-needed basis. Furthermore, Respondents must not impose on U.S. workers any restrictions or obligations that will not be imposed on the H- 2B workers.

- e. After submitting H-2B Applications and all accompanying materials to ETA for certification, Respondents must continue to hire qualified U.S. workers referred from any of the above activities or any other recruitment sources until 21 days before the date of need stated on the H-2B Application.
- f. In addition to the recruitment report that captures all information required by 20 C.F.R. § 655.48, Respondents must also prepare a second recruitment report, identifying U.S. workers who applied after the initial report was submitted to ETA through 21 days before the date of need; the second report must include the items identified in 20 C.F.R. § 655.48. Respondents must retain the second recruitment report and all supporting documents for both reports (including, but not limited to, resumes of U.S. applicants, evidence of contact with workers, the SWA job posting, copies of all job ads, etc.) for a period of at least five years and must make these documents available for copying, transcription, or inspection to representatives of WHD within 72 hours following a request.

18. Jurisdiction, including the authority to issue any additional orders or decrees necessary to effectuate the implementation of the provisions of these Consent Findings and Order (including the Enhanced Compliance Program) is retained by the Office of Administrative Law Judges.

19. The Administrator may initiate enforcement proceedings for violations of these Consent Findings and Order (including the Enhanced Compliance Program) after providing notice and allowing 15 days for a cure period.

GENERAL PROVISIONS

20. Nothing in these Consent Findings and Order shall in any way limit the authority or rights of WHD to conduct future investigations of Respondents within WHD's enforcement authority, or to take appropriate enforcement actions or remedies with respect to any violations disclosed by such investigations.

21. These Consent Findings constitute the entire agreement between the Administrator and Respondents relating to this matter and supersede and replace any other understandings or agreements, whether written or oral, relating to this matter.

22. Respondents acknowledge that they have been represented by counsel and fully understand their obligations under these Consent Findings.

23. The Parties agree that an Order disposing of this proceeding in accordance with these Consent Findings shall have the same force and effect as an order made after a full hearing in accordance with 29 C.F.R. §§ 18.71(b)(1) and 503.49(b)(1).


24. The entire record on which this Order may be based shall consist solely of the Determination Letters, as amended herein, and these Consent Findings and Order, 29 C.F.R. §§ 18.71(b)(2) and 503.49(b)(2).

25. The Parties hereby waive any further procedural steps before an Administrative Law Judge of the U.S. Department of Labor regarding this matter, 29 C.F.R. §§ 18.71(b)(3) and 503.49(b)(3).

26. Respondents hereby waive any right to challenge or contest the validity of these Consent Findings and Order entered into in accordance with this Agreement, 29 C.F.R. §§ 18.71(b)(4) and 503.49(b)(4).

27. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

The undersigned expressly acknowledge and represent that they are authorized to execute these Consent Findings on behalf of the listed parties.

 SAUL ZABELL Zabell & Collotta, PC One Corporate Drive, Suite 103 Bohemia, NY 11716	JENNIFER S. BRAND Associate Solicitor for Fair Labor JEFFREY S. ROGOFF Regional Solicitor BY: <i>/s Peter F. Kellett & Hollis V. Pfitsch</i> PETER F. KELLETT HOLLIS V. PFITSCH Trial Attorneys
Attorney for Respondents	Attorneys for the Administrator

SO ORDERED:

HONORABLE LYSTRA A. HARRIS
Administrative Law Judge

DATE

CERTIFICATE OF SERVICE

I, Peter F. Kellett, an employee of the United States Department of Labor, Office of the Solicitor, 201 Varick Street, Room 983, New York, NY, 10014, certify that on September 7, 2021, I served a true and correct copy of the foregoing Consent Findings and Order by electronic mail to

Respondents' counsel:

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szabell@laborlawsny.com

/s/ Peter F. Kellett
Peter F. Kellett