[Cite as *Daisley v. Office of Work Force Dev.*, 2009-Ohio-7129.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

SHELDON DAISLEY

Plaintiff

v.

OFFICE OF WORK FORCE DEVELOPMENT

Defendant

Case No. 2008-10064-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Sheldon Daisley, filed this action against defendant, the Office of Workforce Development, an agency of the Ohio Department of Job and Family Services (ODJFS), alleging he was given improper and inadequate guidance during the application process for Foreign Labor Certification (FLC), which caused him to incur unnecessary expense due to the fact his FLC application was ultimately denied. Conversely, defendant "asserts that it provided more than appropriate and adequate information and guidance to plaintiff in the foreign labor certification (FLC) process, and that whatever costs plaintiff incurred were of his own making, and partly resulted from his failure to follow federal regulations, as well as the instructions that were given to him by" Workforce Development personnel. Essentially, defendant maintained any expense plaintiff incurred was attributable to his own actions in failing to follow federal regulations and instructions forwarded by Workforce Development in connection with the application for an "H-2B Certification for Temporary Nonagricultural Work."

{¶ 2} Defendant submitted an advisory letter with accompanying regulations from the United States Department of Labor (USDOL) concerning procedures for

agencies such as Workforce Development to follow when processing an H-2B Certification for Temporary Non-Agricultural Work or commonly known as FLC. Under background information the USDOL letter noted, "[t]he H-28 non-immigrant visa program permits employers to hire foreign workers to come temporarily to the United States and perform temporary non-agricultural services or labor on a one-time, seasonal, peakload or intermittent basis." Under the title "Application Filing Procedures" USDOL regulations required that "An employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, Offer of Employment portion of the Application for Alien Employment Certification <u>with the State Workforce Agency</u> (defendant in the instant action) <u>serving the area of intended employment</u>." Regulations required applicants to provide "[d]ocumentation of any efforts to advertise and recruit U.S. workers prior to filing the (FLC) application with the (State Workforce Agency) SWA." Regulations mandated "the SWAs shall advise employers to file requests for temporary labor certification <u>at least 60 days</u> before the worker(s) is needed in order to receive a timely determination" and required the SWA to return to the employer any filed FLC request providing a time frame of "more than 120 days before the worker(s) is needed." In the case where an FLC application exceeded the 120 days need requirement, regulations provided the SWA to advise the employer applicant "to re-file the application no more than 120 days before the worker(s) is needed." The regulations required the particular SWA to communicate any deficiencies in the FLC application expeditiously. Regulations required the employer to "advertise the job opportunity in a newspaper of general circulation for <u>3 consecutive calendar days</u> or in a readily available professional, trade/or ethnic publication, whichever the SWA determines is most appropriate for the occupation and most likely to bring responses from U.S. workers." All FLC applications were subject to approval by the USDOL National Processing Center (NPC) Certifying Officer of the Employment and Training Administration (ETA). Any finding that a certification cannot be made is final and there is no appeal of that denial within the USDOL.

{¶ 3} Pursuant to federal regulations a copy of 66,000 H-2B visas was in place for the federal fiscal year spanning October 1, 2007 through September 30, 2008. Any employer, such as plaintiff, seeking to employ a temporary H-2B worker was required to file two Form ETA 750 applications with the specific SWA, defendant in the instant

claim, who in turn forwarded the complete application to the National Processing Center (NPC) for processing. Defendant related it received a Form ETA 750 A (copy submitted) from plaintiff on November 13, 2007. Specifically, plaintiff sought FLC approval for a "child monitor." Under the Form ETA 750 A caption "Exact Dates You Expect To Employ Alien" plaintiff wrote November 1, 2007 - August 31, 2008. The Form ETA 750 A bore plaintiff's signature with the written date "7/16/07." Defendant pointed out plaintiff's FLC application "was not received until after the November 1, 2007 (employment) start date (plaintiff listed), instead of 60 days in advance of the start date" as required by federal regulations. It appears the Form ETA 750 A was received on November 30, 2007. Defendant explained "plaintiff submitted the ETA 750 A so that he could obtain a USDOL certification showing that he had appropriately complied with federal regulations regarding advertising the job to domestic workers, which is a precursor to obtaining a visa from U.S. Citizenship and Immigration Services (CIS) for use by a foreign worker." Defendant further noted its "role in this process is to facilitate the correct completion of the ETA 750 A, to prepare and post the resulting job order, and to refer to the employer any qualified domestic candidates that apply for the job." Defendant advised that deficiencies were found in the Form ETA 750 A plaintiff filed in November 2007.

{¶ 4} On November 30, 2007, defendant mailed a written notification of deficiencies (copy submitted) in plaintiff's H-2B application to plaintiff's stated address in Cincinnati, Ohio. The deficiency letter, generated by defendant's State Program Policy Manager, Pablo Nunez, clearly pointed out multiple deficiencies plaintiff made on the submitted H-2B application and provided directions to correct these deficiencies. Plaintiff responded to the November 30, 2007 letter with a letter of explanation (copy submitted) dated December 7, 2007. The letter sent to Pablo Nunez addressed certain items outlined in the November 30, 2007 deficiency letter. An amended H-2B application accompanied plaintiff's December 7, 2007 letter. On December 13, 2007 defendant sent plaintiff a second notification of deficiencies letter (copy submitted). The letter outlined the particular deficiencies and additional documentation required of plaintiff. The letter contained the following advisements:

{¶ 5} "The SWAs and NPCs need at least 60 calendar days to enable them to complete recruitment and processing of an employer's application. As your application

was not filed within this 60-day time frame, the SWA process might not be completed within its allowed 30 days. **(February 1, 2008 would be the earliest suggested date to be listed in item 18b of the ETA 750 A).**

{¶ 6} "Item 18b of the ETA 750 A contains the actual dates of employment (beginning and ending), not to exceed 364 days.

{¶ 7} " • **The Travel Statement provided dated 12/7/07 indicates a need for one year.**

{¶ 8} "The employer must submit a signed and dated detailed statement (on the employer's letterhead) to explain the temporary nature of the job. The employer must clearly show that need for the temporary worker is of the short, **identified length** of the as stated on the ETA 750 A.

{¶ 9} "• **The Statement provided does not contain an identified length of time as stated on the ETA 750 A.**

{¶ 10} " • **The Statement provided indicates a need for one year.**"

{¶ 11} Apparently, plaintiff responded to this deficiency letter by amending line 18b on the ETA 750 A to include dates of employment from February 1, 2008 to January 20, 2009.

{¶ 12} On January 2, 2008, defendant's employee, Pablo Nunez, sent plaintiff a letter advising him that he was being given permission to begin recruitment for the "child monitor" position as required by the USDOL regulations. The letter contained instructions for plaintiff to advertise the "child monitor" job position in a newspaper (the Cincinnati Enquirer was recommended) for a three day period and submit proof of the advertisement to defendant's office. The newspaper advertisement was to contain specified information including the job order number supplied by defendant and a particular place where job applicants could apply. The letter also contained instructions for plaintiff to file a "Recruitment Report" in connection with the "child monitor" position being advertised. The letter advised plaintiff to submit required documentation[1] or face

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[1] Required documentation addressed in the January 2, 2008 letter:

"1. Copies of newspaper pages ('tear sheets') or other **legible** proof of publication (affidavit of publication, invoices, electronic tearsheets) furnished by the newspaper for **each** of the 3 days. The **specific advertisement in the newspaper must be marked**. Documentation must **clearly** show the dates of publication.

"2. A written, detailed, and dated Recruitment Report that is signed by the employer. The written recruitment report must:

the consequence of having his case being closed. The letter bore the notation, "[w]e will not forward incomplete H-2B applications to the NPC." Apparently attached to the authorization to advertise letter was another document generated by the US Citizenship and Immigration Services (USCIS) dated October 1, 2007 (copy submitted) which provided notice that the H-2B cap for the first half of fiscal year 2008 (October 1, 2007 to April 1, 2008) had been reached. The letter advised that "USCIS is hereby notifying the public that September 27, 2007 is the 'final receipt date' for new H-2B workers petitions requesting employment start dates prior to April 1, 2008." Additional notification in the letter advised "USCIS will also reject petitions for new H-2B workers seeking employment start dates prior to April 1, 2008 that are received after September 27, 2007." The USCIS letter provided a web address and telephone number for interested parties to receive information regarding the H-2B work program. Plaintiff acknowledged receiving the USCIS update letter.

{¶ 13} Defendant related that after plaintiff received the authorization to advertise he contacted Workforce Development by e-mail (copy submitted dated January 4, 2008) to request instructions for changing the employment dates on line 18b on his ETA Form 750 A to reflect dates from April 1, 2008 to March 30, 2009. Defendant's employee advised plaintiff he would be permitted to change the expected employment span dates, but he in turn needed to change the dates on both his newspaper advertisement and line 18b of the ETA Form 750 A. Defendant stated Workforce Development staff then "mailed the application and related forms to the plaintiff with instructions that they be returned along with the recruitment summary."[2] Defendant asserted it received

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" Identify each requirement source by name;
" State the name, address, and telephone number of each applicant;
" Provide all resumes or letters of interest/application received; and
" Explain the lawful job-related reason(s) for not hiring each U.S. worker.

"3. In addition, please include all correspondence sent to and from the applicant, such as copies of letters to which applicants failed to respond or mail returned as undeliverable; and

"4. If applicable, documentation that union and other recruitment sources were contacted and either unable to refer qualified applicants or non-responsive."

[2] The Recruitment Summary **must be submitted on the employer's letterhead** and **signed and dated by the employer. It must include all the following:**

"• Identification of each recruitment source by name (newspaper. ODJFS, union, etc.)

"• The name, address, telephone number, and resume (if provided) of each U.S. worker who applied for the job.

"• Explanation of the **lawful job-related** reason(s) for not hiring each U.S. worker

"• Documentation (e.g. certified mail receipt) showing an attempt to contact any referral not

plaintiff's recruitment summary along with a copy of his newspaper advertisement on February 5, 2008. The required newspaper advertisement (copy submitted dated Saturday, January 12, 2008) referenced employment need dates for a child monitor "from 10/01/08 to 9/29/09." The advertisement did not reflect the amended work dates plaintiff requested (April 1, 2008 to March 30, 2009) and defendant permitted in response to plaintiff's January 4, 2008 e-mail, which gave specific instructions to reference the new dates (April 1, 2008 to March 30, 2009) on both the ETA Form 750 A and the newspaper advertisement. Essentially, defendant maintained plaintiff had advertised for a work need date starting October 1, 2008 without first obtaining any prior authorization or approval. Defendant explained that "[h]ad plaintiff asked defendant about changing the start date to October 1st, defendant would have denied the request and explained to plaintiff that FLC regulations do not allow applications to be filed earlier than 120 days prior to the desired start date." Consequently, defendant closed and returned plaintiff's application due to the expressed reasons "1) The requirement information shown in the advertisements was not the information defendant had approved; and 2) The application start date of October 1, 2008 placed the dates of need outside the 120 days maximum." Using a start date of October 1, 2008 plaintiff by regulation was prohibited from filing an application no earlier than June 1, 2008 and he was informed of the policy by defendant. Reportedly, plaintiff subsequently refiled an ETA Form 750 A on June 20, 2008 and withdrew this application on July 14, 2008.

{¶ 14} Plaintiff contended his ETA Form 750 A application was denied due to defendant's failure to provide proper guidance during the application process, which he recalled covered the dates from October 2007 through June 2008. Plaintiff related he made ample requests by e-mail for guidance by defendant to comply with regulations and defendant failed to provide this requested guidance resulting in an ultimate denial of

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interviewed

"• Under employer signature, documentation that union and other recruitment sources were contacted and either unable to refer qualified applicants or non-responsive

"• **Legible** copies of newspaper pages ('tear sheets') or other proof of publication (affidavit of publication, invoices) furnished by the newspaper for **each** of the 3 days. Documentation must clearly show the content of the advertisement and the dates of publication. **Proof of advertisements on Internet websites cannot be accepted.**

"To expedite the certification process, it is recommended that the employer provide a **pre-paid, overnight** envelope addressed to: **U.S. Department of Labor Foreign Labor Certification, 844 N. Rush St. 12th Floor, Chicago, IL 60611**."

his ETA Form 750 A applications. Plaintiff asserted he was never informed by defendant that he was required to conform to federal regulations when listing a work start date on line 18b on the ETA Form 750 A application; applications must be filed no earlier than 120 days before the listed work start date. Plaintiff further asserted defendant's purported failure to inform him of this regulation, despite voluminous e-mail communications, resulted in him incurring unnecessary advertisement expense, travel expenses, and mailing costs. Plaintiff stated defendant's staff "caused malicious and discriminatory activities, and practice." Additionally, plaintiff claimed that when he attempted to refile the ETA Form 750 A, defendant's employee Pablo Nunez, "burdened my refile application with an unfair dates to respond to deficiencies and a malicious guidance" that he needed to file an application in Texas. Plaintiff filed this action seeking to recover stated damages in the amount of $2,500.00 representing, "Advertisement cost; $1,345.90; Ticket Travel Expenses abroad; $295.91 and $55.71, to obtain signature from Alien; calling cards expense; $40; Postage $4.94 and $2.61; Business expense incurred in rescheduling some appointments as well as costs in cancelling other appointments through travel disruptions in order to address family, baby needs; $754.93." The filing fee was paid.

{¶ 15} Plaintiff asserted he specifically requested advice by e-mail from defendant between January 3, 2008 and January 30, 2008 in processing the ETA Form 750 A application and defendant failed to adequately respond to his requests for assistance. Plaintiff also asserted he sent an e-mail to defendant on February 11, 2008 requesting advice about amending the employment start date on the ETA Form 750 A and defendant offered no response, but denied ever receiving the communication.

{¶ 16} Plaintiff submitted copies of numerous e-mails he sent to defendant, responses received from defendant, and communications regarding newspaper advertisements he sent to and received from the Cincinnati Enquirer. In an e-mail dated January 3, 2008, plaintiff acknowledged receiving notice to advertise the child monitor job along with receipt of the USCIS letter regarding rejection of petitions for H-2B workers seeking employment start dates prior to April 1, 2008. In this e-mail, plaintiff requested advice from defendant about setting the employment start date on his newspaper advertisement to April 1, 2008. Defendant responded to plaintiff's request on January 4, 2008 advising him that "[i]f you wish to change the dates in the

advertisement, the dates must be changed in the application" (ETA Form 750 A). On January 9, 2008, plaintiff sent defendant an e-mail noting "[a]s advised, I will shift my date to October 1, 2008 to September 29, 2009." The claim file is devoid of any evidence establishing plaintiff was instructed by defendant's personnel to designate the work dates on his newspaper advertisement as starting October 1, 2008 and ending September 29, 2009. Plaintiff did submit an e-mail to defendant dated January 4, 2008 in which he expressed the intention to change the employment dates on the ETA Form 750 A line 18b to April 1, 2008 to March 30, 2009 and "advertise as such." Plaintiff was in turn advised by defendant to follow instructions "in the Authorization to Advertise correspondence" and to amend his ETA Form 750 A to comply with the work dates listed in the advertisement. Plaintiff submitted a copy of the advertisement published in the Cincinnati Enquirer which listed a job opening for a child monitor "from 10/01/08 to 9/29/09." Plaintiff filed an amended ETA Form 750 A to reflect work dates available from October 1, 2008 to March 29, 2009.

{¶ 17} On February 11, 2008, defendant sent plaintiff an e-mail advising him that the employment start date he chose of October 1, 2008 did not comply with federal regulations because, "[a]n application for H-2B Non-agricultural Temporary Foreign Labor Certification can not be filed earlier than 120 days before the start date of need." Also contained in the February 11, 2008 e-mail were the following suggestions from defendant's employee:

{¶ 18} "1) You can either amend your ETA 750 A dates of need to reflect an earlier start state which would require

{¶ 19} "re-advertisement with the corrected dates of need.

{¶ 20} "2) Re-file the application to fall within the required filing guidelines depending on the start date of need.

{¶ 21} "If you decide to keep the 10/1/08 start date, the earliest you can file the H 2B application would be

{¶ 22} "June 2, 2008."

{¶ 23} Plaintiff responded to this February 11, 2008 e-mail from defendant on that same day (copy submitted). Defendant denied receiving this February 11, 2008 e-mail from plaintiff. In his e-mail, plaintiff referenced a USCIS Update letter dated January 3, 2008 which advised that the cap of 33,000 H-2B workers for the second half

of the 2008 federal fiscal year (April 1, 2008 through September 30, 2008), had been met and consequently no more applications for worker petitions needed in that time frame would be processed. Plaintiff provided a copy of this USCIS update in a response. No copies of the January 3, 2008 USCIS update were submitted with either plaintiff's complaint or defendant's investigation report. An earlier USCIS update letter dated October 1, 2007 (copy submitted) advising that the 33,000 H-2B worker cap had been met for the first half of fiscal year 2008 (October 1, 2007 through March 31 2008) had been sent to plaintiff and was part of defendant's investigation report. These USCIS updates effectively notified any employer applicant, such as plaintiff, that he was barred from advertising for an employment need start date at any time frame during fiscal year 2008 since the 66,000 cap for H-2B workers had already been met. Plaintiff then seemingly concluded he should advertise an employment start date to coincide with the beginning of fiscal year 2009, October 1, 2008. Also, in his February 1, 2008 e-mail plaintiff noted he was advised by an unidentified employee in defendant's office that he could amend the employment need start date on his H-2B application to October 1, 2008. Additionally, plaintiff requested specific information from defendant in regard to how to proceed with the application process, specifically if there was a need to refile. Since defendant asserted the February 11, 2008 e-mail was not received until April 2008, no response was forwarded to plaintiff. Plaintiff disputed defendant's allegation that the February 11, 2008 e-mail was not received at the Office of Workforce Development considering all other e-mail correspondence was received.

{¶ 24} Defendant submitted a statement from Pablo Nunez, the state program policy manager for the Foreign Labor Certification (FLC) unit in the ODJFS Office of Workforce Development regarding his knowledge in the process for obtaining an H-2B visa. Initially, Nunez pointed out the United States Department of Labor (USDOL)-Foreign Labor Certification Office (FLC)-National Processing Center (NPC) decides whether or not to certify applications after first being filed with the particular state workforce agency (SWA), such as defendant in the present claim. According to Nunez, certified applications along with a petition are forwarded to the United States Citizenship and Immigration Services (USCIS) for a visa, with the United States Department of State (USDOS) issuing an H-2B visa to workers who "are able to be admitted into the U.S. under the provisions of the Immigration and Nationality Act (INA)." Nunez

explained that "SWAs like ODJFS help and supervise the employers efforts to test the labor market for the availability of U.S. workers, by ensuring proper completion of the Alien Labor Certification applications (ETA 750 A), preparing and posting the job orders, and referring qualified domestic workers to employers." Additional explanation of defendant's role in the FLC process was offered with Nunez providing the following pointed descriptions:

{¶ 25} "The foreign labor certification process is the responsibility of the employer, and there are requirements that the employer must complete prior to the issuance of a labor certification. ODJFS is engaged in only the first step of this process to obtain an H-2B visa. We have a narrow focus when considering the entire process.

{¶ 26} "1. The employer must ensure that the position meets the qualifying criteria for the requested program.

{¶ 27} "2. The employer must complete the ETA form designated for the requested program. This may include the form and any supporting documentation (e.g., job description, resume of the applicant, etc.).

{¶ 28} "3. The employer must ensure that the wage offered equals or exceeds the prevailing wage for the occupation in the area of intended employment.

{¶ 29} "4. The employer must ensure that the compliance issues effected upon receipt of a foreign labor certification are completely understood.

{¶ 30} "5. The completed ETA form is submitted to the designated Department of Labor office for the requested program (e.g., SWA, regional office or the national office).

{¶ 31} "6. The employer is notified of DOL's determination."

{¶ 32} Furthermore, defendant provided an affidavit from Nunez regarding his knowledge of the chronology of events between plaintiff and the Office of Workforce Development acting in its capacity as an SWA for Foreign Labor Certification. Nunez stated:

{¶ 33} "That on November 13, 2007, FLC received an application for alien labor certification from plaintiff-applicant Sheldon Daisley with an invalid start date of November 1, 2007;

{¶ 34} "That federal regulations require that applications be submitted at least 60 days in advance of the start date of employment;

{¶ 35} "That on November 30, 2007, the FLC analyst sent a deficiency letter to applicant, and informed him that he needed to file the application at least 60 days prior to the start date of his job. We recommended he change the job start date to February 1, 2008 and comply with FLC regulations that require applications to be filed at least 60 days before the job start date;

{¶ 36} "That on December 11, 2007, we received a response from the applicant, but he did not change the start date on the form as we recommended;

{¶ 37} "Because FLC cannot process his application without a valid start date, on December 13, 2007, a second deficiency letter was sent to the employer to give him a second opportunity to change the start date;

{¶ 38} "That later in December, 2007 we received applicant's response and the start date was changed to February 1, 2008;

{¶ 39} "That on January 2, 2008, we sent a letter to the applicant with instructions on how to advertise his job opening;

{¶ 40} "That on January 3, 2008, applicant e-mailed us asking whether he could change the start date to April 1, 2008;

{¶ 41} "That on January 4, 2008, we approved the applicant's request and on January 7, 2008 stated we would return his application so he could make the necessary changes and return it to us with the April 1, 2008 start date;

{¶ 42} "That on January 30, 2008, we requested a recruitment summary from the applicant;

{¶ 43} "That on February 5, 2008, we received a copy of the applicant's job advertisement and it showed that the job would start October 1, 2008. The applicant did not advertise the job for the correct start date, and used a different date than the one that he requested and that we approved.

{¶ 44} "That at no time did ODJFS approve a 10/01/08 start date. Had applicant requested 10/01/08, we would have explained to him that the federal regulations do not permit him to file an application or advertise a job earlier than 120 days prior to the start date of the job."

{¶ 45} Defendant asserted plaintiff was provided proper guidance at all times during the application process by the Office of Workforce Development. Defendant related its "role in the FLC process is to ensure compliance with USDOL regulations,

particularly with respect to completion of the ETA 750 A, preparing and posting job orders, and referring qualified domestic candidates." Defendant related plaintiff was, at all times during the process, "provided more than sufficient guidance, instruction and assistance." Defendant explained plaintiff's numerous requests to amend the ETA Form 750 A application regarding employment start dates were approved. However, defendant contended "plaintiff repeatedly disregarded the notices and instructions (sent by the Office of Workforce Development), as most clearly evidenced by his decision to use a different employment start date (on his job advertisement) than the one approved by defendant." Defendant further contended plaintiff "is solely responsible for any costs he incurred." Defendant specifically denied authorizing an October 1, 2008 employment start date or directing plaintiff to advertise an October 1, 2008 employment start date. Defendant asserted plaintiff was at all times provided with clear instructions when he made specific requests to amend his ETA Form 750 A. Defendant argued it "provided fair and equal treatment to the plaintiff throughout the application process, and there is no evidence to the contrary to suggest or prove discriminatory or unequal treatment, in the legal definition of those terms." Furthermore, defendant contended this court does not have jurisdiction to hear such claims.

{¶ 46} Plaintiff filed a response insisting he was directed by defendant's personnel to advertise and file his H-2B application using the October 1, 2008 employment start date. Plaintiff recalled he received a USCIS update (copy submitted) from defendant on January 8, 2008 serving as notification to the public that the H-2B cap for the second half of fiscal year 2008 had been reached and consequently, no additional applications would be accepted for processing. Acting on this information, plaintiff sent an e-mail (copy submitted) to defendant on January 9, 2008 stating: "[a]s advised, I will shift my date of October 1, 2008 to September 29, 2009" to apparently coincide with the dates of the next fiscal year when new H-2B applications would be available for processing. Plaintiff observed that when he sent this e-mail expressing his intention to change the dates for the worker needed he had not advertised for the child monitor position. Plaintiff reasoned he was being directed by implication to change the dates of work needed to cover fiscal year 2009 when he had already received notification that no more H-2B visas were available for foreign workers during fiscal year 2008. Furthermore, plaintiff reasoned that since defendant did not respond to his

January 9, 2008 e-mail concerning changing the work dates, defendant tacitly approved the change. Plaintiff contended defendant, by not expressing any objection to his January 9, 2008 e-mail notice about changing dates actually consented to the change.

{¶ 47} From the facts and allegations in this claim, it appears plaintiff is seeking a remedy under the doctrine of promissory estoppel. To prevail on a claim of promissory estoppel, the party claiming the estoppel must have relied on the conduct of an adverse party in such a manner as to alter his position for the worse and this reliance must have been reasonable to the extent that the party pursuing a claim of estoppel did not know and could not have known that the adverse party's conduct was misleading. *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio ST. 3d 89, 2009-Ohio-2057. Plaintiff, in the instant claim, has alleged he was granted approval and directed by defendant to alter the work need dates on his newspaper advertisement and his ETA Form 750 A. Although there is no evidence to establish that any of defendant's personnel either verbally or in writing gave plaintiff direction and approval to amend the stated work dates, plaintiff has seemingly asserted the direction and approval was tacit. This tacit direction and approval, under plaintiff's argument, was shown when defendant did not object to plaintiff's expressed intent to amend the work start date after he received the USCIS update letter concerning caps being met for fiscal year 2008, which was sent to him by defendant's office.

{¶ 48} Generally, a "claim of promissory estoppel involves four elements: 1) a clear and unambiguous promise; 2) reliance by the party to whom the promise was made; 3) the reliance is reasonable and foreseeable; and 4) the party relying on the promise must have been injured by the reliance." *Patrick v. Painesville Commercial Properties, Inc.* (1997), 123 Ohio App. 3d 575, 583, 704 N.E. 2d 1249, citing *Doe v. Adkins* (1996), 110 Ohio App. 3d 427, 437, 674 N.E. 2d 731. Plaintiff essentially maintained defendant's conduct constituted a promise he could amend the dates on his newspaper advertisement and ETA Form 750 A and ultimately then have the H-2B application forwarded to federal agencies for processing. Plaintiff asserted he relied on directions by defendant either express or tacit and was injured by that reliance.

{¶ 49} Although promissory estoppel under the right circumstances presents a cause of action, the doctrine as a general authority cannot be utilized as a basis for recovery against the state. *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio

St. 3d 306, 31 OBR 584, 511 N.E. 2d 112; *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St. 3d 143, 555 N.E. 2d 630. "Mistaken advice or opinions of a governmental agent do not give rise to a claim based on promissory estoppel." *Drake v. Med. College of Ohio* (1997), 120 Ohio App. 3d 493, 496, 698 N.E. 2d 463, citing *Halluer v. Emigh* (1992), 81 Ohio App. 3d 312, 610 N.E. 2d 1092; see also *Anderson v. Ohio Univ.*, Franklin App. No. 08AP-154, 2008-Ohio-4901 (noting estoppel generally does not apply against state agencies). Under the facts of the instant claim and under the guidance of precedent, plaintiff has failed to present any circumstances entitling him to the relief requested. Plaintiff's claim is denied.

Court of Claims of Ohio

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SHELDON DAISLEY

Plaintiff

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OFFICE OF WORK FORCE DEVELOPMENT

Defendant

Case No. 2008-10064-AD

Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff.

____
DANIEL R. BORCHERT
Deputy Clerk

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