ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of: ADMINISTRATOR, WAGE & HOUR DIVISION, Prosecuting Party, v. BUTLER AMUSEMENTS, INC., Respondent.	ARB Case No. 2021-0007 ALJ Case No. 2018-TNE-00019

PRINCIPAL DEPUTY ADMINISTRATOR'S RESPONSE BRIEF

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JURISDICTIONAL STATEMENT

This matter arises under the H-2B temporary foreign worker program of the Immigration and Nationality Act ("INA"). 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c)(14); U.S. Department of Labor's ("Department") H-2B regulations, 20 C.F.R. Part 655, subpart A (2009) (and applicable procedural regulations in 29 C.F.R. Part 503 (2015)). In 2018, the Administrator ("Administrator")[1] of the Wage and Hour Division ("WHD") brought an H-2B enforcement action against Butler Amusements, Inc. ("Respondent" or "Butler"). Respondent sought review of the Administrator's determination, and requested a hearing before an Administrative Law Judge ("ALJ"). The ALJ issued an Order Denying Summary Decision on November 14, 2018. A hearing was held in May 2019, and the ALJ issued his decision on September 30, 2020.

The Administrative Review Board ("Board" or "ARB") has jurisdiction to review an ALJ's decision and issue the final determination of the Secretary of Labor ("Secretary") under the H-2B program. U.S. Dep't of Labor, Sec'y's Order 01-2020, *Delegation of Auth. & Assignment of Responsibility to the Admin. Review Bd.* (Feb. 21, 2020), 85 Fed. Reg. 13,186, 2020 WL 1065013 (Mar. 6, 2020); *see also* 29 C.F.R. 503.51 (2015). The Board reviews an ALJ's decision de novo and

[1] As of January 20, 2021, the Principal Deputy Administrator is the ranking official responsible for the U.S. Department of Labor's Wage and Hour Division.

acts with "all the powers [the Secretary] would have in making the initial decision." 5 U.S.C. 557(b); *see Adm'r v. Am. Truss*, ARB Case No. 05-032, slip op. at 2-3 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB Case No. 04-100, slip op. at 8 (ARB Jan. 31, 2007) for proposition that "ARB applies de novo review in INA cases"); *see also Adm'r v. Elderkin Farm*, ARB Case Nos. 99-033, 99-048, slip op. at 12 (ARB June 30, 2000) (clarifying that de novo review means the Board may substitute its judgment for the ALJ's on civil money penalties).

STATEMENT OF THE ISSUES

1. Whether the ALJ correctly determined that the Administrator's enforcement action was not time-barred.

2. Whether the ALJ appropriately held that, by employing nine H-2B workers in positions outside the certified job classification, Respondent substantially failed to comply with the requirement in the applicable H-2B regulations to accurately represent its temporary need for H-2B workers.

3. Whether the ALJ correctly concluded that awarding back wages was an appropriate remedy for the violation at issue and correctly calculated the back wages due to nine H-2B workers who worked outside the certified job classification.

4. Whether the ALJ correctly assessed civil money penalties for Respondent's violation.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

The H-2B program permits the employment of nonimmigrants to perform temporary, non-agricultural labor or services, but only 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). In order to ensure this, the Department of Labor must certify to the Department of Homeland Security ("DHS") "whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." 8 C.F.R. 214.2(h)(6)(iii)(A).

Thus, employers seeking to employ H-2B workers must obtain a certification from the Department of Labor before they petition DHS to employ H-2B workers. 20 C.F.R. 655.1(b) (2009).[2] As part of the certification process, an

[2] All references to 20 C.F.R. Part 655 in this brief are to the regulations as codified by the Final Rule published on December 19, 2008, which became effective on January 18, 2009. U.S. Dep't of Labor, Emp't & Training Admin., *Labor Certification Process and Enf't for Temp. Emp't in Occupations Other Than Agric. or Registered Nursing in the U.S. (H–2B Workers), & Other Tech. Changes*, 73 Fed. Reg. 78,020, 78,047, 2008 WL 5262663 (Dec. 19, 2008) (hereinafter "2008 Rule"). The 2008 Rule was superseded by the Interim Final Rule that was

employer must first obtain a prevailing wage determination for the job position or positions for which the employer seeks to employ H-2B workers by submitting ETA Form 9141, Application for a Prevailing Wage Determination ("9141") to the Department's Office of Foreign Labor Certification ("OFLC"). 20 C.F.R. 655.10. The 9141 instructs H-2B employers to "describe the job duties, in detail, to be performed by any worker filling the job opportunity" and to include a "Standard Occupational Classification"[3] or Occupational Net (O*NET) code[4] for the requested occupation. Decision and Order ("D&O") 3 (Sept. 30, 2020).

After obtaining a prevailing wage determination, the employer must file ETA Form 9142, the Application for Temporary Employment Certification ("TEC" or "9142") with OFLC. 20 C.F.R. 655.20.[5] On the TEC, an employer must

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published and took effect on April 29, 2015, but this case involves only violations of the 2008 Rule.

[3] The Standard Occupational Classification ("SOC") system is a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.

[4] O*NET is a database of descriptive occupational information maintained by the Department's Employment and Training Administration. O*NET's comprehensive database includes job characteristics and tasks, as well as worker attributes, and can be searched using SOC codes for specific occupations.

[5] As part of the certification process, an employer must take certain actions to recruit U.S. workers for the job opportunity, including submitting a job order to the state workforce agency, advertising the job, and including in the job order and advertisement a description of the job duties and the wage offered. 20 C.F.R. 655.15, 655.17.

attest that it will abide by the terms and conditions set by the H-2B regulations and the obligations on its TEC. 20 C.F.R. 655.20(a), 655.22. The employer must certify, under penalty of perjury, that the information contained on the TEC is true and accurate, and it must acknowledge and accept each obligation of the H-2B program. 20 C.F.R. 655.65(f). Those obligations include, among others, the requirement to accurately represent the employer's "dates of temporary need, reason for temporary need, and number of positions being requested." 20 C.F.R. 655.22(n) (hereinafter referred to as the "temporary need requirement"). A TEC is "valid only for the number of H-2B positions, the area of intended employment, the specific services or labor to be performed, and the employer certified . . . ." 20 C.F.R. 655.34(b). The requirements that H-2B employers not advertise to U.S. workers a different position or different working conditions than those offered to H-2B workers, not bring in more H-2B workers than are needed, and not place H-2B workers in locations or jobs that were not advertised to U.S. workers ensure that employers using the H-2B program do not adversely affect the wages or working conditions of U.S. workers, as required by 8 C.F.R. 214.2(h)(6)(iii)(A) and 20 C.F.R. 655.1(b). After the Department certifies the TEC, the employer is required to submit the approved TEC along with its petition to DHS to employ H-2B workers. 8 C.F.R. 214.2(h)(6)(iv).

Pursuant to 8 U.S.C. 1184(c)(14)(B), effective in 2009, DHS delegated to the Department of Labor its investigative and enforcement authority to assure compliance with the terms and conditions of employment under the H-2B program. *See* 2008 Rule, 73 Fed. Reg. at 78,046. The statute permits DHS to delegate the authority to "impose such administrative remedies . . . as the Secretary of [DHS] . . . determines to be appropriate." 8 U.S.C. 1184(c)(14)(A)(i). This authority was delegated within the Department to the WHD Administrator. 20 C.F.R. 655.50. In accordance with the delegation of enforcement authority, the Department's 2008 Rule set forth employer obligations under the H-2B program, 20 C.F.R. 655.22, as well as a WHD enforcement process, 20 C.F.R. 655.50.[6]

[6] In 2015, the Department's 2008 Rule was vacated and permanently enjoined by the U.S. District Court for the Northern District of Florida. *Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015). However, the *Perez* court later clarified this order, stating that "the permanent injunction was not intended to, and does not, apply retroactively." *Perez v. Perez*, No. 14-cv-682, Doc. 62 (N.D. Fla. Sept. 4, 2015). In 2018, an H-2B employer brought a contempt action in the same court, seeking sanctions against the Department for violating the *Perez* injunction by continuing to enforce the 2008 Rule. *Drew's Lawn & Snow Serv., Inc.*, No. 18-cv-979, Doc. 14 (N.D. Fla. Feb. 11, 2019). The court dismissed the case with prejudice, and stated, "based on the Court's clarification, the permanent injunction in *Perez* does not apply retroactively to prevent [the Department] from enforcing the conditions of labor certifications issued under the 2008 Regulations prior to the entry of the injunction." *Id.*, slip op. at 6.

Therefore, in accordance with the *Perez* clarification, the Department still enforces compliance with the 2008 Rule for labor certifications issued pursuant to that rule before the district court's permanent injunction took effect on April 30, 2015, such as the certification in this case. The Board has approved this approach. *Adm'r v. Strates Shows, Inc.*, ARB Case No. 15-069, Amended Final Decision & Order, slip

After conducting an investigation, WHD determines whether a violation has occurred: whether the employer willfully misrepresented a material fact, or substantially failed to meet the conditions attested to, on the TEC or the petition. 8 U.S.C. 1184(c)(14)(A); 20 C.F.R. 655.60. A substantial failure is defined in the INA as a "willful failure to comply with the [H-2B provisions] that constitutes a significant deviation from the terms and conditions of the petition." 8 U.S.C. 1184(c)(14)(D). The H-2B regulations define a "willful failure" as "a knowing failure or reckless disregard with respect to whether the conduct was contrary" to the INA and its regulations. 20 C.F.R. 655.65(e).

After determining that an employer has violated the requirements of the H-2B program, WHD may assess the following remedies for violations: civil money

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op. at 2-3 (ARB Aug. 16, 2017) (reconsidering decision characterizing 2008 H-2B Rule as unenforceable and noting that the district court in *Perez* "held that the permanent injunction did not apply retroactively—did not apply to past labor certifications approved under the 2008 [Rule] before the injunction").

Respondent argues that the Board's earlier, vacated order in *Strates Shows* "remain[s] persuasive," Resp't Br. 49. As the ALJ correctly noted, the Board in *Strates Shows* vacated its earlier order in its entirety and thus it "does not reflect the ARB's current view on the enforceability of" the 2008 Rule. Order Denying Summary Decision Order ("Summ. Decision Order") 6 (Nov. 14, 2018).

In light of the rulings of both the U.S. District Court for the Northern District of Florida and the ARB in favor of the Department's continued authority to enforce the 2008 Rule, Respondent's continued attempts to argue – or even to preserve the argument – that the 2008 Rule is unenforceable, Resp't Br. 48-49, borders on frivolous.

penalties, reinstatement of displaced U.S. workers, back wages, or other appropriate legal or equitable remedies. 20 C.F.R. 655.65. The Department has explained that awarding back wages for failure to pay the correct prevailing wage "further[s] the purposes of the H-2B program because it will reduce employers' incentives to bypass U.S. workers in order to hire and exploit H-2B foreign workers, and guard against depressing U.S. workers' wage rates." 2008 Rule, 73 Fed. Reg. at 78,047.

For civil money penalties, WHD may assess penalties "in an amount not to exceed $10,000 per violation for any substantial failure to meet the conditions provided" in the TEC Application. 20 C.F.R. 655.65(c). When determining the amount of penalties, WHD is required to consider the type of violation committed and other relevant factors including: 1) the previous history of H-2B violations by the employer; 2) the number of workers affected by the violation; 3) the gravity of the violation; 4) the good faith efforts by the employer to comply; 5) the employer's explanation of the violation; 6) the employer's commitment to future compliance; and 7) the extent to which the employer achieved a financial gain as a result of the violation. 20 C.F.R. 655.65(g). The "highest penalties" shall be for violations that "involve harm to [U.S.] workers." 8 U.S.C. 1184(c)(14)(C); 20 C.F.R. 655.65(g).

II. Statement of Facts

Butler Amusements operates a traveling amusement carnival that provides rides, games, and concessions to fairs in Arizona, California, Idaho, Nevada, Oregon, and Washington. D&O 2-3. Michael Brajevich was Butler's president and chief executive officer. *Id.* at 2; Tr. 268:11-13.[7] Respondent is a longtime participant in the H-2B program, and claims that it is exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act under 29 U.S.C. 213(a)(3). D&O 3. Butler Amusements has used James K. Judkins, an agent, to file applications for H-2B workers since 2000. Tr. 274:2-10. Respondent's participation in the H-2B program was based on its asserted need for workers to fill Amusement and Recreation Attendant positions. D&O 3.

In 2012, Judkins filled out Butler's Application for a Prevailing Wage Determination (the 9141) for "Amusement and Recreation Attendants – Traveling Carnival" for Butler's 2013 season. D&O 3. On the 9141, Respondent entered "Amusement and Recreation Attendants" as the Standard Occupation Code/O*NET job title. *Id.* Respondent listed the job duties as "[p]erform a variety of attending duties at amusement facility (traveling carnival). Set up, tear down,

[7] Brajevich was included in the caption in the case below, but the ALJ determined that he was not personally or individually liable. D&O 30. Because the Administrator did not appeal and that determination thus became final, the Administrator has removed Brajevich from the caption on appeal.

operate amusement rides, food concessions, and/or games." *Id.* Respondent also stated that no experience, education, training, specific skills, or special licenses were required for the job, and that the workers would not supervise other employees. *Id.*

In October 2012, Respondent posted job advertisements with the Yakima Herald and online seeking 250 Carnival and Amusement and Recreation Attendants. D&O 3. The ads, which stated that Butler would pay $323.60 to $368.40 per week, listed the job duties as "a variety" of tasks including "set up, tear down, operate amusement rides, food concessions and/or games," and stated the job would typically be 40 hours per week. *Id.*

In December 2012, Judkins filed an Application for Temporary Employment Certification (the 9142) on Butler's behalf, seeking to employ 246 H-2B workers as Amusement and Recreation Attendants for a period from February 1, 2013, through October 31, 2013. D&O 4. Respondent listed the same job duties as it had listed on the 9141, and again indicated that no special skills or licenses were required, and that the workers would not supervise others. *Id.* Again, Respondent stated that the job opportunity was for 40 hours a week and would pay $323.60 to $368.40 per week. *Id.* The 9142 included a proposed itinerary for the carnival. *Id.* at 5.

Respondent checked the box on the 9142 confirming that it had read and agreed to all applicable terms, assurances, and obligations on Appendix B.1. D&O 5. One of those assurances, Attestation 13, requires an H-2B employer to attest that "the dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification have been truly and accurately stated on the application." *Id.* Both Judkins and Brajevich, as Respondent's representative, signed the 9142. *Id.* Brajevich attested that Respondent took "full responsibility" for the accuracy of any representations made by its agent, that Butler would comply with the conditions of the H-2B program, and that the information contained on the TEC was true and accurate. *Id.*

On December 14, 2012, the Department certified Respondent to employ 246 H-2B workers as Amusement and Recreation Attendants. D&O 5. Eight of the nine relevant H-2B workers arrived by February 2, 2013, while one arrived on February 11. *Id.* at 13.

In 2013, WHD conducted an investigation of Butler's location in Santa Barbara, California covering the period from February 1, 2013 through April 24, 2013. D&O 6. Employees reported working slightly over 40 hours in a workweek, with most employees working at the fair and assembling and disassembling the rides. *Id.* at 7-8. WHD determined that Butler committed a violation of the H-2B program: specifically, that Respondent employed nine H-2B workers outside the

approved job classification of Amusement and Recreation Attendants, and instead employed two of them as supervisors, two as maintenance shop workers, and five as drivers. *Id.* at 6; Tr. 47:17-48:8.

WHD determined that Butler employed two H-2B workers, Antonio Mendez and Omar Lopez, as supervisors. D&O 9; Tr. 47:15-23; 60:24-61:4. Respondent's roll sheet listed Mendez and Lopez as supervisors, and multiple employees stated that they reported to either Mendez or Lopez. D&O 9; Tr. 37:24-38:4; 44:25-45:3; 46:18-24. The supervisors walked around to ensure that other employees were doing their job, addressed customer complaints, responded to ride operators when something was broken, and filled out the ride roster. D&O at 23. Two other H-2B workers, Jaime Hernandez and Felipe Villegas, worked solely in the "shop" or spare parts trailer, cleaning parts and supplies, welding, repairing rides, and doing inspections. *Id.* at 9, 23; Tr. 37:19-23; 47:6-9; 60:18-21.

WHD determined that Butler employed five H-2B workers, Jose Ivan Ortega, Sergio Guzman, Saul Estadillo, Gustavo Gamero, and Fernando Preza, as drivers. D&O 10. The drivers did not operate rides or provide concessions; they exclusively drove tractor-trailers to transport the rides between fair locations. *Id.*; Tr. 37:2-5; 45:4; 47:6-9; 60:18-21. These drivers performed commercial truck driving duties requiring a commercial driver's license and compliance with U.S. Department of Transportation requirements. D&O 10. Some of the drivers reported

keeping a transportation logbook of their hours, consistent with Department of Transportation regulations. *Id.* Respondent listed some of these H-2B workers as "driver" in its payroll records. *Id.*; Tr. 36:24-37:12. Two drivers were not listed as a "driver," but Respondent's pay records showed that they rarely worked on weekends, when the fairs were in operation, which was typical for drivers. D&O 10.

All three occupations – first-line supervisor, maintenance shop worker, and driver – command a higher prevailing wage than is paid to Amusement and Recreation Attendants. D&O 24. Butler did not pay these nine H-2B workers the correct prevailing wage for the job classification in which they actually worked, although they were paid more than the prevailing wage required for Amusement and Recreation Attendants. *Id.* at 12, 24.

On February 6, 2018, after a delay caused primarily by litigation challenging the Department's authority to issue and enforce the 2008 Rule, *see supra* at 6-7 n.6, WHD issued a determination letter charging Respondent with a substantial failure to comply with the proper job classification requirement and citing 20 C.F.R. 655.22(n). D&O 6. The determination letter and the enclosed Summary of Violations and Remedies stated that WHD had assessed back wages[8] and $10,000

[8] WHD originally calculated that Respondent owed $24,987.60 in back wages, but that was amended to $26,955.50 pursuant to the ALJ's May 2, 2019 Order. D&O 6 n.8.

in civil money penalties against Respondent. *Id.* To calculate the back wages owed to each of the nine improperly classified H-2B workers, WHD calculated the prevailing wage that Butler should have paid the workers for the job classification in which each worker actually worked. *Id.* at 24-25. WHD then calculated the difference between the prevailing wage classification that should have applied for each worker and the wage that the worker was actually paid, and multiplied that by the hours worked. *Id.* In determining the number of hours each worker worked, WHD found that Respondent's payroll did not accurately represent the hours actually worked, and therefore WHD reconstructed the hours worked based on the 40 hours per week that Butler attested its employees would work on its 9142. *Id.* at 12, 25.

III. Course of Proceedings

Butler timely sought review of WHD's determination by an ALJ. Respondent filed a Motion for Summary Judgment in June 2018, contending, among other arguments, that the Administrator lacked the authority to enforce the 2008 Rule and that the Administrator's determination was barred by the statute of limitations. The ALJ denied that motion on November 14, 2018. Summ. Decision Order. A hearing was held on May 8 and 9, 2019. The ALJ issued his Decision and Order on September 30, 2020. D&O.

On October 30, Butler petitioned the Board for review of the ALJ's September 30 Decision. The Board accepted the petition on November 3, 2020, and issued a Notice of Appeal and Order Establishing Briefing Schedule. Respondent filed its opening brief on December 31, 2020.

IV. The ALJ's Decisions

In its Summary Decision Order, the ALJ concluded, among other things, that that the five-year statute of limitations in 28 U.S.C. 2462 for actions to enforce a civil fine or penalty was applicable to this case, and that the Administrator had timely filed its determination letter within the five-year limitations period. Summ. Decision Order 14-18. Specifically, the ALJ concluded that 28 U.S.C. 2462 applied to H-2B actions for back wages, as well as those for civil money penalties, based on his view that unpaid wages sought in an H-2B enforcement action are a penalty because both public and private interests are at issue in violations of the H-2B program. Summ. Decision Order 17. The ALJ rejected Respondent's argument that the statute of limitations accrued on the date that the Department approved Respondent's TEC, which was outside of the five-year limitations period. *Id.* at 18. The ALJ explained that the limitations period began to accrue when Respondent allegedly violated the regulations by employing H-2B workers in jobs not identified in the TEC and ran through April 24, 2013 (the close of WHD's investigation period), which was within the five-year limitations period. *Id.* The

ALJ also concluded that back wages were an appropriate remedy under 20 C.F.R. 655.65(i) for the violations alleged in this case. *Id.* at 12-13.

After a hearing, the ALJ issued a Decision & Order holding that Respondent substantially failed to comply with the H-2B program by employing nine H-2B workers outside the job classification of Amusement and Recreation Attendant. D&O 19. Respondent instead employed the workers as drivers, maintenance shop workers, and supervisors. *Id.*

To reach that conclusion, the ALJ determined that Butler "acted with reckless disregard for whether it was in compliance . . . by ignoring the regulations and instructions accompanying the temporary employment certification application and employing nine H-2B workers outside of its job certification." D&O 19. The ALJ found that the regulations and instructions "provided ample notice and guidance" for H-2B employers in how to comply with the H-2B program requirements. *Id.* As relevant here, the ALJ noted that 20 C.F.R. 655.22(n) requires an employer to truly and accurately state the dates of temporary need, the "reason for temporary need" and the number of positions requested on the TEC, which notified Respondent of the requirement that an H-2B employer must accurately represent its temporary need and cannot place H-2B workers outside the classification approved on the TEC. *Id.* at 20. The ALJ further pointed to the "level of specificity required for the job description" in advertisements, which must

match the job description on the TEC. *Id.* at 20. Additionally, the instructions on the 9141 and the 9142 directed Respondent to describe the job duties in detail, including the equipment to be used and whether the H-2B worker would supervise others. *Id.* at 21. The ALJ found that Respondent "seemingly ignored" these instructions. *Id.*

The ALJ reasoned that Respondent "should have submitted separate applications for the various jobs [it] sought to fill" but instead "exerted minimal effort to comply," and concluded that this demonstrated a reckless disregard for the H-2B program requirements. *Id.* at 21. The ALJ also dismissed Respondent's arguments that it had relied on its agent, Judkins, who had experience in the H-2B program, because Judkins was acting with Butler's authority and Butler, as the employer, is ultimately responsible for its obligations under the H-2B program. *Id.* at 21-22.

The ALJ further concluded that Butler's reckless disregard resulted in a significant deviation from the conditions listed on the labor certification. D&O 23-24. The ALJ rejected Respondent's arguments that H-2B employers were not actually required by the 2008 Rule to employ H-2B workers only in the certified job, noting that those arguments "seemed disingenuous." *Id.* at 23. The ALJ also rejected Respondent's arguments that some of the tasks that the nine workers engaged in were listed as "supplemental" tasks under O*NET for Amusement and

Recreation Attendants and therefore Respondent had not substantially failed to comply with the terms and conditions on the TEC. *Id.* at 22-23. The ALJ found that "none of the nine employees performed the core duties associated with an [Amusement and Recreation Attendant] position and they rarely performed the supplemental duties." *Id.* at 23. Ultimately, the ALJ concluded that Butler's "strategy to 'just put [workers] wherever we can get them to be efficient' was expedient, but clearly violated [the] explicit requirement" that H-2B employees must only perform the jobs that the Department has certified their employer for. *Id.* at 20.

The ALJ then addressed the Administrator's back wage calculations. After careful review of the employer's payroll records and employee interview statements, the ALJ found that Respondent's pay slip hours were "unreliable and could not have been used to reconstruct employee back wages." D&O 25. Specifically, the ALJ reviewed the payroll records and determined that they "omitted amounts paid, contained duplicate pay slips for the same person for the same period," including many that could not be reconciled, and "were inexplicably missing records for some employees." *Id.* at 11-12. The ALJ concluded that the Administrator's reconstruction of hours using the 40 hours per week that Respondent attested on its 9142 was reasonable given Respondent's "incomplete and questionably accurate pay slips." *Id.* at 12, 25. The Administrator

reconstructed the back wages owed to the nine H-2B workers using the prevailing wage for the job that each worker actually performed, based on that job's average wage of the localities listed on the itinerary submitted by Respondent. *Id.* at 25. The ALJ concluded that WHD's method of reconstruction was appropriate, except that he recalculated using specific locations rather than an average. *Id.* Therefore, the ALJ lowered the back wages owed from $26,955.40 to $26,786. *Id.* at 25-26.

The ALJ rejected Respondent's claim that it was entitled to credits for providing housing, local transportation, relocation expenses, employee taxes, and reimbursement for a prepayment plan for weeks that employees did not work 40 hours. D&O 26-27. The ALJ noted that Respondent had not cited any authority in support of the credits and relied solely on a statement signed by H-2B workers in 2019 who worked during the 2013 season. *Id.* at 26. The ALJ gave no weight to the statement because there were inconsistencies between the statement, employee statements in 2013, and the credits Respondent attempted to claim. *Id.* at 27.

Finally, the ALJ held that the Administrator's assessment of a $10,000 civil money penalty was reasonable. D&O 28. The ALJ independently reviewed the factors set forth in the H-2B regulations at 20 C.F.R. 655.65(g), determined that

the factors "favor[ed] imposing a high" civil money penalty, and concluded that an assessment of $10,000 in civil money penalties was appropriate. *Id.* at 28-30.[9]

SUMMARY OF ARGUMENT

1. The Administrator timely brought this action for H-2B back wages and civil money penalties against Respondent. The Administrator charged Respondent with a substantial failure to comply with the requirements of the H-2B program through April 24, 2013. Given the ALJ's conclusion that the five-year statute of limitations in 28 U.S.C. 2462 applied to this case and the fact that the Administrator issued its determination on February 6, 2018, which is less than five years after the violations occurred, the action is not time-barred.

Contrary to Respondent's argument, neither the INA nor the H-2B regulations required WHD to cite Respondent's violation as a willful misrepresentation (which would have occurred earlier and outside the limitations period). Instead, the Administrator properly cited a substantial failure to comply with the temporary need requirement (which did fall within the limitations period).

[9] The ALJ also concluded that Respondent could not show that the doctrine of laches should apply, that Michael Brajevich was not individually or personally liable for Butler's violations, and that an anti-retaliation order for any H-2B worker owed back wages was warranted. D&O 15-17, 30-31. Aside from a perfunctory reference to laches in Respondent's Petition for Review, none of these issues have been presented to the Board for appeal, and thus the ALJ's decision on these matters is final.

Nothing in the statute or regulations prevents WHD from choosing to charge the violation in that manner.

Respondent attempts to find other shorter limitations periods to apply to this action, but none of Respondents' arguments are supported by the facts or the law. Shortening the limitations period as Respondent tries to do would undermine the Administrator's ability to appropriately enforce the requirements of the H-2B program and would frustrate the purpose of the requirements of the H-2B program: to reduce employers' incentives to bypass American workers in favor of H-2B workers and to guard against depressing U.S. workers' wages.

2. The ALJ correctly concluded that Respondent violated the H-2B provisions of the INA and the applicable regulations. H-2B employers commit a violation of the H-2B regulations when they place H-2B workers in job classifications that the Department did not certify. If an employer places its H-2B workers in a job classification outside the one the employer listed on the TEC and for which did it not advertise, the Department cannot accurately determine whether the H-2B worker's employment will adversely affect U.S. workers, and U.S. workers are deprived of the opportunity to apply for the actual jobs for which the employer seeks to hire H-2B workers. This is consistent with the Board's decision in *Adm'r v. 5 Star Forestry*, which recognized that an employer's failure to accurately state the areas of intended employment for H-2B workers violated the

regulations, precisely because it hampered the Department's ability to determine the impact of the position on U.S. workers. ARB Case No. 13-056, slip op. at 2 (ARB Nov. 6, 2014). The requirement that H-2B employers accurately represent their temporary need is essential to upholding the INA's purpose of protecting U.S. workers. Respondent violated this temporary need requirement by employing at least nine H-2B workers outside the Amusement and Recreation Attendant job classification for which it was certified.

Respondent's violation was a substantial failure to comply because Respondent recklessly disregarded whether its conduct was contrary to the H-2B program's temporary need requirement. The ALJ properly concluded that Respondent had notice of the H-2B program requirements, including the temporary need requirement, but was reckless in its disregard of those requirements. And its reckless disregard resulted in a significant deviation from the terms and conditions in its TEC and petition. The jobs in which Butler employed the H-2B workers – driver, maintenance shop worker, and supervisor – required Respondent to pay higher wages than Amusement and Recreation Attendant. But Respondent never advertised those higher-paying jobs to U.S. workers. Therefore, the ALJ properly held Respondent's actions substantially failed to comply with the H-2B regulation's requirement that employers accurately represent their temporary need on the TEC. The Board should not reward such a substantial failure to comply with

the requirements and obligations of the H-2B program by overturning the ALJ's decision.

3. The ALJ correctly concluded that back wages were an appropriate remedy for Respondent's violation and that the back wage calculation, with minor adjustments, was reasonable. The ALJ carefully reviewed Respondent's incomplete and unreliable records and properly found that WHD had reasonably declined to rely on the hours listed on those records and instead relied on the Respondent's own representation of the number of hours that its H-2B workers would work. Respondent's belated attempt to seek offsets for alleged benefits without providing credible supporting evidence was properly rejected.

4. Finally, the ALJ's assessment of $10,000 in civil money penalties against Respondent was reasonable. The ALJ's independent analysis of the factors relevant in determining the amount of civil money penalties was thorough and detailed. His conclusion that the factors weighed in favor of imposing a high amount of penalties was well supported.

For all of these reasons, the Board should affirm the ALJ's holding that Respondent violated the temporary provision of the H-2B regulations and uphold his back wage and civil money penalty assessments.

ARGUMENT

I. THE ADMINISTRATOR'S CASE IS NOT TIME BARRED

A. The Administrator Timely Issued the Determination Letter

The Administrator issued the determination letter to Butler within the five-year statute of limitations period that the ALJ determined applied in this case. The ALJ concluded that 28 U.S.C. 2462, which sets a five-year limitations period for actions or proceedings to enforce a civil fine or penalty, applied to both the civil money penalties and the back wages owed in this case. Summ. Decision Order 16-17.[10] On February 6, 2018, WHD issued its determination letter, which covered the

[10] The Administrative Review Board recently adopted and affirmed a decision by an ALJ that section 2462's five-year statute of limitations applies to H-2B proceedings where the Administrator seeks to recover penalties, including for violations of the employer's requirement to pay outbound transportation costs. *Adm'r v. Graham & Rollins*, ARB Case No. 19-009, slip op. at 2 (ARB Nov. 16, 2020). *Graham & Rollins* did not address the statute of limitations for back wages. *Adm'r v. Graham & Rollins*, ALJ Case No. 2018-TNE-022, slip op. at 8-9 (OALJ June 26, 2018).

While the Administrator did not agree that the five-year statute of limitations in section 2462 applied to the back wages sought in this case, Summ. Decision Order 14, the Administrator did not appeal the ALJ's decision that the five-year statute of limitations applied to the back wages here because it was not determinative. The application of the five-year limitations period in the ALJ's Summary Decision Order did not eliminate any period of time for which the Administrator sought back wages, and thus any petition for review on that issue filed by the Administrator would not have sought to change the outcome, but merely to request an advisory opinion. The Board has a "well-established policy against issuing advisory opinions." *Hoffman v. NetJets Aviation, Inc.*, ARB Case No. 09-021, slip op. at 17-18 n.85 (ARB March 24, 2011) (listing cases).

period from February 1, 2013 through April 24, 2013, in which it concluded that Butler substantially failed to comply with the temporary need requirement of the H-2B regulations during the 2013 season and assessed both back wages and civil money penalties against Respondent. D&O 6. Therefore, because the determination letter was issued before April 24, 2018 and within the five-year limitations period, the ALJ correctly determined that it was timely. Summ. Decision Order at 18.

Respondent argues that the cause of action for this case occurred no later than February 1, 2013, when the H-2B workers arrived, and therefore the determination letter was time-barred. Resp't Br. 5-8. Respondent's argument is that there was one discrete violation that occurred at a single definitive point in time that provided the Administrator's cause of action. *Id.* at 6-7.

Respondent's argument is unavailing because Butler's violation was not a single discrete event, but instead recurring failures to comply with the H-2B program requirements. During the entire three-month period that WHD investigated, Respondent employed at least nine H-2B workers outside the certified job classification, and therefore, Butler substantially failed to comply with the terms and conditions of the TEC throughout that same period. In this way, it is like an action under the FLSA where there is "a series of repeated violations of an identical nature" such that "each failure to pay . . . begins a new statute of

limitations period as to that particular event." *Figueroa v. D.C. Metro. Police Dept.*, 633 F.3d 1129, 1135 (D.C. Cir. 2011) (internal quotation marks omitted); *see also Knight v. Columbus, Ga.*, 19 F.3d 579, 581 (11th Cir. 1994).[11] Regarding FLSA overtime violations, the U.S. Court of Appeals for the District of Columbia Circuit stated that "the underpayment is not the 'effect' of a prior violation; it is the violation itself." *Figueroa*, 633 F.3d at 1135. As noted above, an employer violates the INA when it willfully fails to comply with the H-2B requirements and that failure constitutes a "significant deviation" from the terms and conditions of the employer's petition. 8 U.S.C. 1184(c)(14). Each significant deviation from the terms and conditions of the H-2B petition and accompanying labor certification is the violation itself, and thus begins a new statute of limitations. Treating Butler's repeated significant deviations as one discrete event, as Respondent argues, would result in Butler not being held to account for the repeated misconduct of employing these nine H-2B workers for a three-month period in job classifications for which Butler was not certified.

[11] The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* distinguished FLSA claims from Title VII claims by noting that "an FLSA minimum wage or overtime claim does not require proof of a specific intent to discriminate." 550 U.S. 618, 641 (2007). Although H-2B violations require proof of willfulness, this is not like specific discriminatory intent because willfulness includes a reckless disregard with respect to whether the conduct was contrary to the H-2B requirements, 20 C.F.R. 655.65(e), which does not require specific intent.

Respondent also claims that the Administrator was required to charge this violation as a willful misrepresentation, rather than a substantial failure to comply (and that any willful misrepresentation would have occurred when Respondent filed its TEC, which is outside the five-year limitations period). Resp't Br. at 7 n.1, 24-25. Specifically, Respondent contends that, because 20 C.F.R. 655.22(n) states that an employer must "accurately state[] on the application" the "dates of temporary need, reason for temporary need, and number of positions being requested," the only way that this regulatory provision can be violated is via a willful misrepresentation on the application itself. Resp't Br. 24-25. The Board should reject this argument. It is entirely possible for an employer to willfully misrepresent facts on its TEC *or* to substantially fail to comply with the statements it made on its TEC regarding its temporary need for H-2B workers. The INA clearly permits the Administrator to charge employers with either a willful misrepresentation or a substantial failure to comply, and does not limit either of those to certain specific violations. 8 U.S.C. 1184(c)(14)(A).

Here, Butler substantially failed to comply. It filed its application seeking Amusement and Recreation Attendants in November 2012. But until it actually acted with reckless disregard of the H-2B program requirements by employing nine H-2B workers in job classifications other than Amusement and Recreation Attendant, it had not substantially failed to comply with the requirement in 20

C.F.R. 655.22(n). Therefore, the Secretary's claim could not have begun to accrue until February 2013. And Butler repeatedly substantially failed to comply throughout the period that WHD investigated, to April 2013. Therefore the Administrator's February 6, 2018 determination letter was timely filed within the five-year limitations period.

B. 28 U.S.C. 1658(a) Does Not Apply to This Case Because It Does Not Apply to Administrative Actions

Respondent also argues that the Board should apply the four-year limitations period set forth in 28 U.S.C. 1658(a), which governs "civil action[s] arising under an Act of Congress enacted after" 1990. Resp't Br. at 8-12. However, as the Federal Communications Commission recently recognized, "[t]he text, context, purpose, and history of Section 1658(a) make clear that it governs court actions, not agency proceedings . . . ." *Sandwich Isles Comms., Inc.*, FCC18-172, 2019 WL 105385, at *39 (F.C.C. Jan. 3, 2019); *see also Garvey v. Hale*, 1997 WL 566262, at *1 (N.T.S.B. Aug. 29, 1997) (stating that section 1658(a) applies to "certain civil actions in federal court" and not to proceedings before National Transportation Safety Board).

The term "action," as used in federal statutory provisions, most frequently refers to judicial proceedings. Analyzing 28 U.S.C. 2415(a), another federal limitations statute, the Supreme Court stated that the term "action" is "ordinarily used in connection with judicial, not administrative, proceedings." *BP Am. Prod.*

Co. v. Burton, 549 U.S. 84, 91 (2006). The Fourth Circuit analyzed the term "civil action" in 28 U.S.C 1658(a) and held that it did not apply to a civil commitment hearing, noting that such a proceeding was distinct from a civil action, which is one that "seek[s] to enforce or protect a private civil right." *United States v. Searcy*, 880 F.3d 116, 124 (4th Cir. 2018). An administrative enforcement action such as this does not seek to enforce or protect a private civil right.

Respondent's purported examples of the term "civil action" being applied to administrative proceedings, Resp't Br. 10-12, do not support Respondent's claims. Instead, the reports and manuals that Respondent cites mainly discuss the Administrative Procedure Act, a federal statute that provides a cause of action for review of administrative actions *in federal court*, and thus involves a judicial proceeding. *Id.*

Finally, the FCC's analysis of the legislative history of section 1658(a) clarifies that it applies only to suits brought in federal court:

> Section 1658 was enacted as part of the Judicial Improvements Act of 1990. Title III of that Act, in which Section 1658 was enacted, is the Federal Courts Study Implementation Act of 1990. As those names would suggest, where the term "action" appears in the enacting law, it refers to formal judicial proceedings or other action by the judiciary . . . . 'The primary goals of [the Judicial Improvements] Act [were] to decrease delays in the federal court system . . . .' The purpose of Section 1658 specifically was to eliminate the need for federal courts to "borrow" the most analogous state or federal law limitations period for federal claims that lacked their own designated limitations period. . . . In other words, the legislative concerns that animated the enactment of Section 1658, and the goals of Judicial

> Improvements Act of 1990 as a whole, related to proceedings in federal court, not administrative proceedings.

Sandwich Isles Comms., Inc., 2019 WL 105385, at *39. The FCC concluded by noting that it could find no instance of case where section 1658(a) was used to set the limitations period for an administrative proceeding. *Id.* at *40. Therefore, it is clear that the limitations period set forth in 28 U.S.C. 1658(a) does not apply to this administrative enforcement action.

C. Statutes of Limitations Should Not Be Borrowed from Other Statutes in Suits Brought by the Government

Respondent further argues that the ALJ erred by failing to "borrow" a statute of limitations from either the Fair Labor Standards Act or the H-2A program.[12] Resp't Br. 12-15. However, in cases brought by the government, such borrowing principles do not apply. *See, e.g., Alden Mgmt. Servs., Inc. v. Chao*, 532 F.3d 578, 581-82 (7th Cir. 2008) (noting that "nothing in the [INA] establishes a period of limitations for the Secretary's proceeding" and stating that "a borrowing approach . . . does not apply to administrative proceedings initiated by the national government"); *Dole v. Local 427*, 894 F.2d 607, 614-15 (3d Cir. 1990) (rejecting

[12] Respondent claims that the H-2A program has a two-year statute of limitations. Resp't Br. 14. However, the two-year limitations period in the INA only applies to H-2A debarment actions; otherwise the INA sets no limitations period for H-2A enforcement actions. 8 U.S.C. 1188(b); *see also, e.g.*, *Three D Farms, LLC*, slip op. at 25-26, ALJ Case No. 2016-TAE-003 (OALJ Aug. 18, 2016); *Three Chimneys Farm, LLC*, slip op. at 6 n.10, ALJ Case No. 2013-TAE-011 (OALJ Feb. 2, 2015).

argument that an analogous federal statute of limitations should apply to Secretary of Labor's suit brought under the Labor Management Reporting and Disclosures Act); *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260, 263 (10th Cir. 1980) (refusing to apply state statute of limitations to Secretary of Labor's action under the Occupational Safety and Health Act).

Indeed, the borrowing principles relied upon by Respondent apply to private actions brought under a federal statute that does not itself specify a statute of limitations – not, as here, where the enforcement action is brought by the government itself. *See, e.g.*, *Lampf v. Gilbertson*, 501 U.S. 350, 356 (1991) (discussing borrowing principles in the context of a private action); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 488 (1980) (same).

Applying any of the shorter limitations periods that Respondent seeks to the Administrator's enforcement would frustrate the purpose of the H-2B provisions of the INA. In particular, importing a short, two-year statute of limitations into a statutory scheme involving temporary foreign workers would interfere with the Administrator's ability to ensure that employers pay their H-2B workers properly, which is necessary to prevent adverse effects on the wages and working conditions of similarly employed U.S. workers. For this reason, as well as those above, the Board should reject all of Respondent's arguments that this action is time-barred.

II. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED THE INA AND THE H-2B REGULATIONS

A. Respondent Violated the Temporary Need Requirement in the H-2B Regulations by Employing H-2B Workers in Jobs Outside the Job Classification on Respondent's Application for Temporary Labor Certification

Butler Amusements was only certified to employ H-2B workers as Amusement and Recreation Attendants, but employed at least nine H-2B workers outside that classification. Because of this, the ALJ properly concluded that Respondent violated 20 C.F.R. 655.22(n), the requirement that an H-2B employer must accurately represent, among other things, the "reason" for its need for temporary workers.

This requirement is a crucial part of the temporary labor certification process necessary to advance one of the central tenets of the H-2B program. The H-2B program permits employers to employ temporary nonimmigrant workers only "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). In order to ensure that this statutory requirement is met, DHS has directed the Department to advise it "that qualified workers in the United States are not available and that the [H-2B worker's] employment will not adversely affect the wages and working conditions of similarly employed United States workers." 8 C.F.R. 214.2(h)(6)(iv)(A). The Department accomplishes this through the temporary labor certification process, in

which the Department necessarily relies on the H-2B employer's attestations "to ensure adherence to program requirements." 2008 Rule, 73 Fed. Reg. at 78023.

One of those attestations is the reason for the employer's temporary need to hire H-2B workers. 20 C.F.R. 655.22(n). If, during the certification process, the Department is not aware of the true nature of the reason for the employer's temporary need to hire H-2B workers – such as the job opportunity in which H-2B employers will ultimately employ their H-2B workers – the Department cannot accurately determine whether the H-2B workers' employment will adversely affect U.S. workers. Similarly, U.S. workers that are unaware of the true nature of a job opportunity (and its potentially higher pay) cannot accurately evaluate whether to apply for such jobs. Therefore, the requirement that H-2B employers accurately represent their temporary need is vital to supporting the INA's goal of protecting U.S. workers.

The Board has previously held that a failure to accurately represent the terms and conditions of a job opportunity is a violation of the H-2B regulations, precisely because it prevents the Department from being able to fully determine the impact on U.S. workers of the potential employment of a foreign workers in that position. In *5 Star Forestry*, the Board upheld the Administrator's assessment of four separate civil money penalties for an H-2B employer's failure to identify or advertise four different locations at which the employer ultimately placed H-2B

workers. *5 Star Forestry*, ARB Case No. 13-056, slip op. at 2. The employer argued that this constituted only a single violation, but the Board disagreed. The Board stated the employer "failed to undertake any of these [required] recruitment measures at each of the four locations where it placed its H-2B workers. Consequently, no assessment of the impact of H-2B employment on U.S. workers was conducted at any location." *Id.* at 6. The Board held that these failures constituted "four substantive deviations" from the requirements of the H-2B regulations. *Id.*[13]

In *5 Star Forestry*, the H-2B employer placed H-2B workers outside the intended area of employment, which rendered the Department entirely unable to assess whether U.S. workers were available to fill the applicable positions in each location, or whether the employment of those H-2B workers would affect the wages and working conditions of similarly employed workers in those areas. Similarly, Butler Amusements placed H-2B workers in job classifications other than the one it attested it had a need for and advertised to U.S. workers. Butler's failure to comply had the same effect as the employer's violations in *5 Star*

[13] The Board noted that neither the INA nor the H-2B regulations explicitly address whether separate penalties could be assessed for each location that was not disclosed, but held that WHD's policy of making such assessments "advances the INA's goals to protect both domestic and foreign workers by assuring proper enforcement of the INA's H-2B provisions." *5 Star Forestry*, ARB Case No. 13-056, slip op. at 6-7.

Forestry in that it prevented the Department from being able to accurately determine whether Butler's employment of H-2B workers would adversely impact U.S. workers. Therefore, the Board should apply the same analysis in this case and conclude that Butler violated the temporary need requirement in the H-2B regulations by employing H-2B workers in jobs not included in its approved TEC.

Butler argues that the H-2B regulations do not prohibit employing H-2B workers outside the job classification listed on the TEC for which Butler was certified. Resp't Br. 24-27. Respondent's contention is belied by the regulatory language. Section 655.22(n) requires employers to "accurately" state their "reason for temporary need." An employer that places H-2B workers in job classifications that it did not include on its Application for Temporary Labor Certification – exactly as Respondent did – has failed to accurately state the reason that it needs H-2B workers.[14] As discussed above, an employer's adherence to this regulation serves to protect U.S. workers from being adversely impacted by the employment of the H-2B workers. And the regulations further provide that, once the Department certifies the TEC, the certification "is valid only for," among other

[14] *See Adm'r v. JML Landscape Mgmt.*, ALJ Case No. 2017-TNE-008, slip op. at 10-13 (OALJ Oct. 22, 2018) (granting summary decision against H-2B employer for a violation of the temporary need requirement in 20 C.F.R. 655.22(n) in which "H-2B workers performed work outside of the work for which they were certified").

things, "the specific services or labor to be performed . . . specified on" the TEC. 20 C.F.R. 655.34(b). This regulation makes clear that the obligation to employ the H-2B workers in the job classification on the TEC continues throughout the entire period for which the certification applies.

B. The ALJ Properly Concluded that Respondent's Violation of the Temporary Need Requirement Was a Substantial Failure to Comply

The ALJ properly determined that Butler's violation of the temporary need requirement was a substantial failure to comply with the H-2B regulations and requirements. D&O 19; *see also* 8 U.S.C. 1184(c)(14)(A) (employer violates the H-2B provisions of the INA if it substantially fails to meet the conditions of the petition).[15] A substantial failure is defined as a willful failure – that is, a knowing failure or reckless disregard with respect to whether the conduct is contrary to the H-2B program requirements – that constitutes a significant deviation from the terms and conditions certified on the TEC or H-2B petition. 8 U.S.C. 1184(c)(14)(D); 20 C.F.R. 655.65(d), (e). Respondent recklessly disregarded the H-2B program's requirements, and its violation constituted a significant deviation from the terms and conditions that it certified, under penalty of perjury, that it would offer to its H-2B workers.

[15] As explained above, there is no requirement that the Administrator must cite a willful misrepresentation for this violation. *See supra* at 27-28.

1. *Respondent recklessly disregarded whether its conduct was contrary to the H-2B program requirements.*

The ALJ correctly concluded that Respondent acted with reckless disregard with respect to whether its actions were in compliance with H-2B program requirements or not. D&O 19-22. Respondent argues that it did not act with reckless disregard because it did not have proper notice or knowledge of its obligations under the H-2B program. Resp't Br. 24-29. Respondent contends that 20 C.F.R. 655.22(n) "says nothing at all about the impropriety of compensating workers at the approved job rate if they were not performing the job duties for the approved job code." Resp't Br. 24. Similarly, Respondent claims that it is not liable because it did not know of the requirement to employ H-2B workers in only the job classifications for which it was certified to employ such workers. *Id.* at 28-29. There is no merit to Respondent's contention.

The ALJ properly rejected that argument and found that Respondent ignored both regulatory guidance and the instructions on the relevant forms that provided information to H-2B employers such as Respondent concerning their obligations under the program. D&O 19-21. In addition to the requirement in 20 C.F.R. 655.22(n) that an H-2B employer "accurately" represent the "reason" for its need for temporary workers, the ALJ correctly noted that the H-2B regulations require employers to advertise the job opportunity, which specifically includes identifying the job duties and requirements, to U.S. workers. D&O 20; 20 C.F.R. 655.17. The

ALJ likewise noted that the H-2B regulations clearly state that a temporary labor certification "is valid only for . . . the specific services or labor to be performed [that] the employer specified on the certified Application . . . ." D&O 20; 20 C.F.R. 655.34(b). The ALJ also determined that the instructions on the 9141 and the 9142 "informed Respondent[] of [its] obligations" but found that Respondent "seemingly ignored" those instructions. D&O 21.[16]

While Respondent may have failed to educate itself regarding its H-2B obligations, it certainly had notice of those obligations, as the ALJ properly found, and recklessly disregarded them. Respondent's CEO Brajevich admitted that he signed the TEC Application on behalf of Butler Amusements, but that he had not read – or even looked at – the H-2B regulations prior to this case. Tr. 275:12-19; 347:12-348:4. An employer's failure to read the terms of the forms submitted on its behalf to the Department or to become educated concerning program requirements prior to signing or submitting an application is conduct that exhibits "a 'reckless disregard' for which penalties and disqualification are warranted."

[16] Respondent appears to argue that because the Department's H-2B regulations did not incorporate every instruction for filling out every necessary form, Resp't Br. 26, an H-2B employer cannot be held responsible for not following those instructions. This is absurd on its face. Respondent's violation consisted of substantially failing to comply with the H-2B regulation's temporary need requirement, not the instructions on the forms. The instructions are relevant because they demonstrated that Respondent had notice of the relevant H-2B requirements.

Adm'r v. Home Mortg. Co. of Am., ALJ Case No. 2004-LCA-040, slip op. at 15 (OALJ Mar. 6, 2006) (employer's failure to investigate H-1B program responsibilities constitutes reckless disregard); *see also Adm'r v. Prism Enters. of Cent. Fla.*, ALJ Case No. 2001-LCA-008, slip op. at 13 (OALJ June 22, 2001) (H-1B employer's failure to "consult anyone as to the H-1B wage requirements" or to do research "constitutes reckless disregard of the program requirements"); *see also* 20 C.F.R. 655.65(e).

Respondent also argues that it did not act with reckless disregard because it acted upon the advice of an experienced consultant in the carnival industry when filling out the 9142. Resp't Br. 32-33. The ALJ properly dismissed these arguments as "a nonstarter." D&O 21. First, the preamble to the 2008 Rule is clear that even if an agent represents an employer during the H-2B certification process, "[t]he employer is ultimately responsible for its obligations under the program," noting that it is the employer "who signs the application form, and attests to the veracity of the information provided and that it will meet all obligations." 2008 Rule, 73 Fed. Reg. at 78,035-36. Brajevich signed the TEC Application on behalf of Butler and attested that it would comply with its obligations under penalty of perjury. D&O 5, 21-22. Furthermore, Brajevich testified that he relied on Judkins to fill out the paperwork. Tr. 274:16-18. Therefore, Judkins, who had experience with and knowledge of the H-2B program and its requirements, was acting with

actual authority, binding Butler Amusements to the legal consequences of his actions. *See* Restatement (Third) of Agency § 2.01 (2006) ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.").

Brajevich admitted that Respondent used H-2B workers in the manner it did in order to be efficient: "when we need 25 guys, we just get 25 guys and we put them wherever they are that makes the carnival business the most efficient that we can to operate." Tr. 303:25-304:3. The protections of the H-2B program cannot be ignored simply to make a carnival more "efficient." Rather than submitting separate TEC Applications for the different job categories it needed, as it should have done, the ALJ found that Respondent "exerted minimal effort to comply" with the statute and regulations and therefore properly concluded that this "demonstrated more than mere negligence, but a reckless disregard for whether its actions violated the statute and regulations." D&O 21.

2. *Respondent's reckless disregard constituted a significant deviation from the terms and conditions of its TEC.*

The ALJ properly concluded that Respondent's reckless disregard of the H-2B program requirements by employing H-2B workers in jobs other than the Amusement and Recreation Attendant job classification for which it received certification "was a significant deviation from the conditions of the labor

certification." D&O 22. Butler employed at least nine H-2B workers outside the Amusement and Recreation Attendant occupation. Those nine H-2B workers did not perform the duties that Respondent listed on the 9141 or the TEC to describe the job opportunity for which it sought H-2B workers. None of those workers operated any of the amusement equipment, games, or concessions to "attend" to customers. Instead, the Respondent's own records and interviews with Respondent's employees demonstrated that these workers were employed as drivers, maintenance shop workers, and supervisors. After carefully reviewing the evidence presented at trial, the ALJ found that the five drivers spent their time "almost exclusively" transporting rides on semi-trucks; that the two shop workers "labored solely in the maintenance shop;" and that the employer's records and employee statements corroborated that the two supervisors supervised other employees. D&O 23.

Employing these H-2B workers in job positions not certified on the TEC constituted a significant deviation from the terms and conditions that Butler itself listed on its TEC. Butler never advertised to U.S. workers any jobs other than Amusement and Recreation Attendant or jobs with duties other than those listed on the TEC. Butler never indicated on the TEC that it would employ individuals to perform job duties beyond those listed on the TEC, even though separate SOC codes are available for drivers, maintenance shop workers, and first-line

supervisors. D&O 24. The ALJ specifically emphasized that the 9141 and 9142 require employers to describe the job opportunity in detail, including equipment to be used, special skills or licenses that are required for the job, and whether the H-2B workers would supervise others, but that Respondent failed to include information on the TEC about the job duties that the nine H-2B workers actually performed, such as the need for a commercial driver's license, driving a semi-truck, working in a repair shop, or supervising other employees. *Id.* at 21-22. The job classifications of drivers, maintenance shop workers, and supervisors all require payment of a higher prevailing wage than Amusement and Recreation Attendants. Respondent's practice of employing H-2B workers in these job classifications, not the Amusement and Recreation Attendant classification for which it was certified, was a significant deviation.

To dispute that it significantly deviated from the terms and conditions on the TEC, Respondent claims that the job duties performed by the nine H-2B workers were all listed, in one way or another, under the Amusement and Recreation Attendants classification on O*NET, and thus these workers were not working outside their job classification. Resp't Br. 31. But as the ALJ properly determined, the nine H-2B workers did not perform any of the job duties that Respondent listed on the TEC. D&O 22-23. Likewise, none of these workers performed the core duties listed on O*NET for Amusement and Recreation Attendants. *Id.* at 23.

While they may have engaged in limited supplemental duties that are listed on O*NET for this classification, such as inspecting equipment and making minor repairs, the ALJ found that they did so only "rarely." *Id.* This was not, and still is not, sufficient to refute the ALJ's finding that Respondent's violation constituted a significant deviation from the terms and conditions of the TEC.

The purpose of the Department's temporary labor certification process is to determine that there are no qualified U.S. workers available for the positions and that employment of the H-2B workers will not adversely affect the wages and working conditions of U.S. workers. When employers place H-2B workers in job classifications outside the one listed on the TEC, the Department's certification becomes meaningless. As the ALJ aptly recognized, "to allow employers to select a job code, receive a prevailing wage determination, advertise the job to U.S. workers, hire H-2B workers after certifying that no U.S. workers wanted the position, and then employ H-2B workers to perform a different job entirely, undermines the purpose of the INA to protect U.S. workers." D&O 23.

III. THE ALJ PROPERLY DETERMINED THAT RESPONDENT OWED BACK WAGES AND THE AMOUNT OF BACK WAGES OWED

A. The ALJ Correctly Determined that the Administrator Can Assess Back Wages for Violations of the Temporary Need Requirement

The ALJ properly concluded that the Administrator may assess back wages when employers place H-2B workers in job classifications not certified on the

employer's TEC. D&O 24; Summ. Decision Order 12-13. Respondent argues that back wages are not available as a remedy under the 2008 Rule for this violation. Resp't Br. 35. There is no merit to this argument because it stems from a misunderstanding of 20 C.F.R. 655.65(i). The Administrator has broad authority to impose appropriate remedies. The relevant provision states:

> If the WHD Administrator finds a violation of the provisions specified in this subpart, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including reinstatement of displaced U.S. workers, or other appropriate legal or equitable remedies. If the WHD Administrator finds that an employer has not paid wages at the wage level specified under the application and required by § 655.22(e), the Administrator may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of § 655.22(e).

20 C.F.R. 655.65(i). Contrary to Respondent's suggestion otherwise, the ALJ correctly interpreted this regulatory language to not limit back wages as a remedy solely for a violation of 20 C.F.R. 655.22(e). Summ. Decision Order 13. Here, the Administrator is seeking back wages for H-2B workers that represent the amount they should have been paid, had Respondent complied with the H-2B program requirements and submitted separate 9142s for maintenance shop workers, truck drivers, and supervisors. Thus, the ALJ properly concluded that the Administrator can require Respondent to pay back wages.

B. The Back Wages Assessed by the ALJ Are Appropriate

In order to review WHD's back wage calculations, the ALJ carefully reviewed Respondent's pay records. D&O 11-12. He found them to be "unreliable." *Id.* at 11. In particular, the ALJ emphasized that there were conflicting pay slips for the same employee and same pay period that could not be reconciled, meaning "one is accurate and the other is not, but we have no means of determining which is accurate." *Id.* The ALJ also considered missing and incomplete records provided by Respondent and Respondent's failure to produce the driver logs for those H-2B workers employed as drivers. *Id.* at 11-12. Based on his finding that Respondent's records were "unreliable," the ALJ concluded that it was reasonable for the Administrator to not credit the hours documented on Respondent's records but instead to use the hours that Respondent certified on the TEC that its H-2B workers would work. *Id.* at 12.

Respondent certified to the Department on the TEC that its H-2B workers would work 40 hours per week.[17] Using that figure, along with the itinerary provided by Respondent, the Administrator calculated the back wages due to the nine H-2B workers. D&O 24-25. WHD calculated the difference between what Respondent actually paid each of the nine workers and what each should have been paid for the correct job classification, based on the average wage for the locations

[17] Employees reported working slightly over 40 hours in a workweek. D&O 7.

on Respondent's itinerary. *Id.* at 24-25. The ALJ approved of the Administrator's method of calculating back wages with one small exception regarding locations that lowered the back wage calculation slightly, from $26,955.40 to $26,786.00. *Id.* at 25-26.

Respondent argues that the ALJ's decision to disregard its pay records "effectively imposed a de facto timekeeping obligation" on the employer. Resp't Br. 35. This is incorrect. The ALJ did not impose a timekeeping requirement on Respondent; it simply engaged in fact finding. The ALJ reviewed the records created by Respondent and provided to the Department; took into account incomplete, missing, and conflicting timesheets; and made a factual finding that those records were unreliable. The ALJ's factual finding did not rest on an inference or implicit requirement that H-2B employers must keep records of hours worked, but on his review of the records actually provided by Respondent. And ultimately, the hours the Administrator used in the back wage reconstruction were those provided by Respondent to the Department (i.e., on its TEC).

The Board has acknowledged the necessity and authority of WHD to reconstruct hours worked and payments to determine back wages when the employer's records are missing or unreliable. *See Adm'r v. Peter's Fine Greek Foods, Inc.*, ARB Case No. 14-003, slip op. at 6 (ARB Sept. 17, 2014); *cf. Adm'r v. Advanced Prof. Mktg.*, ARB Case No. 12-069, slip op. at 12. (ARB June 3,

2014) (upholding, in an H-1B case, reconstructed back wages as a result of missing and incorrect records). The reconstruction of the wages owed to the nine H-2B workers here was reasonable and based exclusively on information gathered by WHD during the investigation, provided by Respondent, or certified by Respondent to the Department. Therefore, the Board should uphold the ALJ's back wage calculation.

C. The ALJ Properly Rejected Respondent's Arguments for Offsets

Respondent claims that it is entitled to significant credits that would offset its back wage liability. Resp't Br. 38-45. The ALJ properly found that Respondent was entitled to no credits because the evidence that Respondent submitted in support of these credits deserved "no weight." D&O 27. Respondent submitted a purported "joint statement" signed by employees in 2019 who worked for Respondent in 2013. *Id.* at 26. The statement claimed that these workers had received "valuable benefits" such as housing, transportation, food, relocation, visa processing fees, "and so on." *Id.* The ALJ noted inconsistencies between the statement and employee statements made in 2013, which indicated that no employees were charged for housing, and that employees themselves pooled their money to pay for food. *Id.* at 27.

Additionally, Respondent provided no evidence to demonstrate that the 2019 statement was not coerced. "[A]n employer is prohibited from obtaining, under

coercive circumstances, employee declarations, particularly declarations that are relevant to and go to the heart of a pending claim that the employer failed to fully compensate employees." *Acosta v. Austin Elec. Servs.*, 322 F. Supp. 3d 951, 958 (D. Ariz. 2018); *see also Acosta v. Sw. Fuel Mgmt.*, No. 16-cv-4547, 2018 WL 2207997, at *2 (C.D. Cal. Feb. 20, 2018) (gathering declarations from employees during the course of litigation over wages is inherently coercive). For that reason alone, the ALJ was correct to give the statement no weight.[18] Therefore, the ALJ properly determined that Butler is not eligible to take any offset for wages due.

IV. THE ALJ'S CIVIL MONEY PENALTY ASSESSMENT WAS REASONABLE

The ALJ properly held that the Administrator's assessment of a $10,000 civil money penalties was appropriate. D&O 28-30. The ALJ independently reviewed the factors set forth in the H-2B regulations and concluded that "the discretionary factors favor imposing a high [civil money penalty]." *Id.* at 30. Although the Board can review an ALJ's assessment of civil money penalties de novo, in the past the Board has accepted the ALJ's findings when it determines

[18] A further illustration that Respondent's argument is baseless is the fact that, as the ALJ noted, WHD determined that two of the nine H-2B workers did not live in the housing that Respondent provided. Respondent is not entitled to a credit for housing that workers did not live in. D&O 27.

they are reasonable. *Peter's Fine Greek Foods*, ARB Case No. 14-003, slip op. at 2.

The ALJ carefully considered all of the regulatory factors[19] and reasonably concluded that all but two weighed against Respondents. D&O 28-30. First, the ALJ noted that although Respondent did not have a history of violations, the Administrator presented evidence that Butler had committed other violations that the Administrator did not charge because WHD conducted a limited investigation. These included substantial failures to accurately represent the dates of need on the TEC, as documented by the arrival and departure dates of the H-2B workers. D&O 28-29.[20] The ALJ found that this demonstrated a "broader lack of adherence to H-2B rules" and concluded that the first factor weighed against Respondent. *Id.*

Second, the ALJ recognized that although WHD's determination limited recovery to only nine H-2B workers, this was due to the investigation being limited to only one crew at one location. D&O 29; Tr. 74:15-75:1; 97:21-98:8; 271:5-17

[19] The factors set forth in the H-2B regulations include: 1) the previous history of H-2B violations by the employer; 2) the number of workers affected by the violation; 3) the gravity of the violation; 4) the good faith efforts by the employer to comply; 5) the employer's explanation of the violation; 6) the employer's commitment to future compliance; and 7) the extent to which the employer achieved a financial gain as a result of the violation. 20 C.F.R. 655.65(g).

[20] The ALJ also noted that although only 187 H-2B workers (of 246 requested) crossed the border from Mexico to enter the country at the beginning of the period of need, Respondent transported nearly 400 workers back to Mexico at the end of the season. D&O 28-29.

(explaining WHD limited its investigation and that Butler splits its H-2B workers into multiple smaller units). The ALJ also noted that Respondent's own records listed at least other one additional H-2B employee as a "driver." D&O 29. Therefore, the ALJ found that the second factor, the number of workers affected, did "not mitigate" the civil money penalty assessment. *Id.*

The ALJ found that the third factor, the gravity of the violation, weighed in favor of the assessment of a large civil money penalty. As a result of Respondent's violations, "H-2B workers lost wages and U.S. workers were denied an opportunity to apply to positions as supervisors, shop workers, or drivers" at a higher wage than was advertised for Amusement and Recreation Attendants and therefore this violation "undermined the objectives of the INA." D&O 29.
The ALJ also found that the fourth and fifth factors, good faith efforts to comply and the employer's explanation of the violation, weighed against Respondent because Respondent "put minimal effort into compliance" with the H-2B regulations, and "its delegation of work to a consultant is insufficient to show a good faith effort." D&O 29; *see also supra* at 39-40. The ALJ found the employer's explanation of its violations to be "wanting" and stated that Respondent seems "to believe [it] should be able to agree to comply with a scheme, receive the benefit of that scheme, fail to comply with it, and then blame someone else for [its] noncompliance." D&O 29.

With regard to the sixth factor, commitment to future compliance, the ALJ noted that Respondent refused to state whether it would comply in the future because it refused to admit to being out of compliance, and therefore the ALJ found that the factor weighed neither for nor against Respondent. D&O 29. And finally, the ALJ concluded that the seventh factor weighed against Respondent because Respondent financially gained from its violations by failing to properly compensate H-2B workers at the rates it would have been required to, had it properly requested certification for all job classifications that it needed. *Id.*

Therefore, finding that the majority of the factors counseled in favor of the assessment of a high civil money penalty, the ALJ agreed with the Administrator's assessment of $10,000 in penalties. *See Peter's Fine Greek Foods*, ARB Case No. 14-003, slip op. at 5-7 (upholding Administrator's assessment of $10,000 penalty where five factors weighed against employer). The ALJ's assessment of the factors was thorough and reasoned, and the ARB should affirm.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board affirm the decision of the ALJ, including the ALJ's award of back wages and civil money penalties for Respondent's violation of the requirement that H-2B employers accurately represent their temporary need.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This document complies with the word limit of FRAP 32(a)(7)(B)(i) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 12,285 words.

I certify that I electronically filed the foregoing Administrator's Response Brief with the Administrative Review Board by using the Department's eFile/eServe system on March 3, 2021. I also certify that a copy was sent electronically to:

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