ARB No. 2023-0045

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Petitioner,

v.

LUCERO POOL PLASTER, INC.,
Respondent.

On Appeal from the
Office of Administrative Law Judges
ALJ No. 2019-TNE-00011

ADMINISTRATOR'S RESPONSE BRIEF

JENNIFER S. BRAND
Associate Solicitor

RACHEL GOLDBERG
Counsel for Appellate Litigation

JENNIFER HUGGINS
Senior Attorney

JENNIFER STOCKER
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Washington, D.C. 20210

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Cases – Continued:

Cases – Continued:

Cases – Continued:

Cases – Continued:

Statutes

Regulations

Regulations – Continued:

Other Authorities

ARB No. 2023-0045

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Petitioner,

v.

LUCERO POOL PLASTER, INC.,
Respondent.

On Appeal from the
Office of Administrative Law Judges
ALJ No. 2019-TNE-00011

ADMINISTRATOR'S RESPONSE BRIEF

The Administrator ("Administrator") of the Wage and Hour Division ("WHD") respectfully requests that the Administrative Review Board ("Board" or "ARB") reject the arguments by Lucero Pool Plaster, Inc. ("Lucero") for reversing the decision of the Administrative Law Judge ("ALJ") insofar as he found that Lucero violated the terms and conditions of the H-2B program and imposed civil money penalties ("CMPs").

STATEMENT OF THE ISSUES

1. Whether the ALJ properly found that Lucero failed to pay its H-2B workers for all hours worked, in violation of the H-2B program obligations, and properly applied *Mt. Clemens* to calculate back wages.

2. Whether Lucero's several failures to comply with its obligations, despite acknowledging and certifying its compliance with those obligations under penalty of perjury, were willful and significant deviations from the terms and conditions of the H-2B program, as necessary to constitute violations under 29 C.F.R. 503.19(a)(2).

3. Whether the ALJ properly imposed CMPs under 29 C.F.R. 503.23.

STATEMENT OF THE CASE

I. Statement of Facts

The Administrator incorporates by reference the facts presented in her opening brief. Adm'r's Opening Br., *Adm'r v. Lucero Pool Plaster, Inc.*, ARB No. 2023-0040 (Nov. 9, 2023), at 8-16. Additional facts are set forth herein as necessary to respond to Lucero's arguments in its opening brief.

A. *WHD's Investigation and Determination*

At the conclusion of WHD's investigation, WHD Investigators held a final conference with Lucero's president Hector Guzman and Lucero's attorney to

discuss their findings of violations, including "failing to pay all of the hours worked to the H-2B workers." PX M at 33. The Investigators informed Guzman of the back wages and CMPs assessed for each violation, including the violation of "attestation #5, in which the firm failed to pay all of the hours worked to the H-2B workers." *Id.* at 34.

On November 14, 2018, the Administrator issued a Notice of Determination Pertaining to Violations Involving H-2B Nonimmigrant Workers and Notice of Debarment to Lucero. JX A. The Notice included a "Summary of Violations and Remedies" setting forth the specific violations found, the related regulatory provision, and the remedy to be imposed. JX A at 8-12. The Notice identified as one violation that Lucero "failed to pay for all hours worked and paid for hours worked at a rate less than the certified wage rate," citing Attestation 5 and 29 C.F.R. 503.16(a)(1), (a)(4), and (b). *Id.* at 9.

B. *Facts Presented at the ALJ Hearing*

1. Lucero admitted that it failed to retain original records of its workers' hours. *Administrator v. Lucero Pool Plaster, Inc.*, ALJ No. 2019-TNE-00011, slip op. 25 (OALJ June 20, 2023) ("D&O"). Guzman testified that the crew leader at each job site was responsible for recording workers' hours on paper, but the papers were not retained. Tr. at 460:1-14, 474:23-475:9. The crew leader wrote down the

names of all the workers on the crew and a single round number reflecting the total hours the crew spent on the job each day. Tr. at 195:8-12. Guzman informed the WHD Investigator that this number was not exact but "an estimate of the number of hours the workers would have taken to finish the pool." Tr. at 195:15-18. No record was made of workers' start and stop times. Tr. at 195:2-4. The number reflecting the crew's estimated hours for the day was copied to a whiteboard at the shop. Tr. at 195:18-196:6; JX F. The numbers recorded on the whiteboard were sent to Lucero's accountant for processing paychecks. Tr. at 461:18-23.

2. Lucero's payroll records (i.e., the records used to process paychecks) showed that H-2B workers were paid for an average of 31.79 hours per week in 2016 and 36.42 hours per week in 2017. D&O at 27. Lucero's payroll records also showed that Lucero's U.S. workers[1] were paid for more hours than H-2B workers. JX T. During the H-2B workers' period of employment, U.S. workers were paid for an average of 43.95 hours per week in 2016 and 52.78 hours per week in 2017. *Id*.

3. The Administrator submitted evidence in the form of interview statements

[1] For purposes of Lucero's failure to pay H-2B workers for all hours worked, the references to Lucero's U.S. workers indicate its field workers and not, for example, its administrative staff. In comparing H-2B workers' and U.S. workers' hours and wages, WHD considered only field workers (i.e., those who worked on plastering jobs). Tr. at 265:10-13.

from U.S. and H-2B workers that H-2B workers worked 10-11 hours per day and 4-7 days per week, and that they worked the same hours as the U.S. workers. D&O at 28-29. These workers reported that both U.S. and H-2B workers were required to meet at Lucero's shop at the same time each morning to load materials into trucks. D&O at 30; PX B at 3; PX K at 12, 23, 30, 36, 40. The workers then drove together to job sites, where they worked side by side before returning to the shop. PX K at 1, 7, 9, 12, 30, 36, 40. One H-2B worker also testified at the hearing, corroborating the information provided in the interview statements. Tr. at 75:22-76:12, 77:17-21, 85:14-86:24. The H-2B workers who worked for Lucero in both 2016 and 2017 reported that they worked roughly the same schedule both years. PX B at 2-3; Tr. at 70:14-25, 85:13-19, 106:9-15.

4. Lucero produced competing evidence in the form of multiple affidavits from H-2B workers stating that they were paid for all hours worked. RX 1A-31A. These workers reported that their hours were tracked and recorded by the crew leader; they also reported that they tracked their hours themselves but did not describe how they tracked them and did not retain any records. RX 2A at 2; RX 4A at 3; RX 6A at 3; RX 8A at 3; RX 10A at 3; RX 12A at 3; RX 14A at 3; RX 16A at 3; RX 18A at 3; RX 20A at 3; RX 22A at 3; RX 24A at 3; RX 26A at 3; RX 28A at 3; RX 29A at 3. The affidavits did not discuss the workers' average hours worked,

approximate start and end times, or whether they were required to report to the shop to load materials before traveling to job sites.

Lucero also produced evidence in the form of testimony from Guzman and two U.S. workers. Guzman testified that H-2B workers were not required to meet at the shop before traveling to job sites but that most did meet at the shop. Tr. at 472:16-473:15. Guzman also testified that U.S. workers were paid more because they performed additional tasks, but he conceded that H-2B workers worked during the same time. Tr. at 480:11-14 (admitting that H-2B workers were not "sitting around while the U.S. workers are all out doing other things" but were working on other jobs). The two U.S. workers testified regarding the tasks they performed and gave equivocal statements regarding whether H-2B workers performed the same tasks. D&O at 32.

Other evidence in the record indicated that H-2B workers may in fact have performed some of the tasks that were allegedly assigned only to U.S. workers. Tr. at 446:17-19 (Guzman testifying that H-2B workers may have occasionally driven forklifts); PX B at 2 (H-2B worker reporting that he drove Lucero's trucks to job sites); Tr. at 548:16-549:15, 558:3-11 (testimony of Lucero's U.S. workers that they performed certain tasks "more commonly" or "more often" than H-2B workers, not that H-2B workers never performed such tasks). Although crew

leaders allegedly took notes of who performed which tasks, this information was not transferred to the whiteboard or recorded in Lucero's payroll records. Tr. at 460:7-12; 475:3-15.

II. The ALJ's Decision

1. The Administrator incorporates by reference the summary of the course of proceedings and ALJ's decision presented in her opening brief. Adm'r's Opening Br. at 16-19. In order to respond to Lucero's arguments in its opening brief, the Administrator here summarizes the ALJ's findings and conclusions regarding Lucero's failure to pay its H-2B workers for all hours worked.

2. The ALJ weighed the competing evidence regarding H-2B workers' hours and credited the Administrator's evidence showing that H-2B workers were not paid for all hours worked and that Lucero therefore substantially failed to comply with its obligation to pay its H-2B workers the offered wage for all hours worked. D&O at 24-32; *see also id.* at 24 (concluding that 29 C.F.R. 503.16(a)(1), (a)(4), and (b) "implicitly requir[e] that employers pay workers the required wage for every hour worked").[2] The ALJ credited the Administrator's evidence showing

[2] Though there had been some evidence suggesting that Lucero paid at least some of its H-B workers on a piece-rate basis, which section 503.16(a)(4) addresses, the ALJ concluded that it was not necessary to analyze whether Lucero paid its H-2B workers hourly or on a piece-rate basis because, in either case, Lucero was required to pay the same minimum amount, which was at least the offered wage for the number of hours worked. D&O at 24 n.141.

that H-2B workers worked the same hours as U.S. workers, but that Lucero's payroll records were "an inadequate representation of the hours that H-2B workers worked." D&O 28-29. The ALJ noted that Lucero's system for tracking workers' hours—i.e., having crew leaders record estimated numbers for all crew members and copy them to a whiteboard, from which they were then sent to an accountant for payroll processing—was vaguely described, prone to inaccuracy, and inconsistent with Lucero's payroll records (e.g., the number copied to the whiteboard was always round but overtime hours were recorded in non-round numbers). D&O at 26-27.

Of particular significance, the ALJ credited the Administrator's interview statements over Guzman's testimony regarding whether or not H-2B workers were required to report to the shop at the start of their workday to load materials onto trucks for the day. D&O at 30-31. The ALJ concluded that the H-2B workers should have been paid for their time at the shop in the mornings and time spent travelling from the shop to the worksite, but that the payroll records did not reflect payment for this time. D&O at 31. The ALJ concluded that Lucero's actions "demonstrate a reckless disregard for ensuring that it paid its workers the required wage" and that this violation was a significant deviation because it impacted all of Lucero's H-2B workers, the gravity of the violation was severe, and Lucero gained

a significant financial advantage from the violation, as shown by the amount of back wages owed. D&O at 24.

3. Because Lucero failed to keep accurate payroll records or any other records of the total hours the H-2B workers worked, the ALJ applied the *Mt. Clemens* burden-shifting framework for determining the amount of back wages due to Lucero's H-2B employees. D&O at 25-34. The ALJ noted that the Administrator relied on Lucero's payroll records for its U.S. workers to reconstruct the hours the H-2B workers worked because they were "the best—and only—evidence of the hours the H-2B workers actually worked." D&O at 24-25. Given the ALJ's findings that the H-2B workers worked the same hours that the U.S. workers worked, but that the payroll records for the H-2B workers did not reflect payment for that number of hours, the ALJ concluded that the Administrator carried her burden of showing sufficient evidence "to reasonably infer the amount and extent" and the H-2B workers' uncompensated work. D&O at 31.

The ALJ then shifted the burden to Lucero to show the precise amount of work performed by H-2B workers or otherwise negate the reasonableness of the inference drawn from the Administrator's evidence. D&O at 31. The ALJ concluded that Lucero did not produce any evidence showing the precise amount of work performed by H-2B workers, and the evidence that Lucero did produce

was insufficient to negate the reasonableness of the inference that H-2B workers worked the same hours as U.S. workers but were paid for fewer hours. D&O at 31-32. Addressing Lucero's contention that U.S. workers were paid more because they worked on different tasks than H-2B workers, the ALJ found that Lucero did not produce sufficient evidence to support it. *Id*. Because Lucero failed to meet its burden under *Mt. Clemens*, the ALJ assessed back wages for Lucero's failure to pay its H-2B workers for all hours worked consistent with the amount that the Administrator calculated. D&O at 34.

SUMMARY OF THE ARGUMENT

1. The ALJ correctly determined that Lucero violated its obligations under the H-2B program when it failed to pay its H-2B workers for all hours worked. Lucero received notice from the Administrator of the basis for her finding that its failure to pay its H-2B workers for all hours worked constituted a violation of the H-2B program. The H-2B regulations require employers to pay H-2B workers at least the offered wage for the entire period of their employment. The requirement to pay at least the offered wage necessarily encompasses a requirement to pay that offered wage for all hours worked. The offered wage is the effective minimum wage for H-2B workers and the Administrator looks to the Fair Labor Standards Act and its implementing regulations for guidance. Thus, the ALJ properly treated

the failure to pay its H-2B workers for all their hours worked as a violation of the H-2B program.

The ALJ's finding that Lucero failed to pay its H-2B workers for all hours worked was correct. The ALJ weighed the competing evidence and concluded that the Administrator's evidence credibly established that H-2B workers worked the same hours as U.S. workers but that U.S. workers were paid for more hours than H-2B workers. The ALJ's reasons for crediting the Administrator's evidence over Lucero's were well-explained and supported by substantial evidence. Having found that Lucero failed to pay its H-2B workers for all hours worked, the ALJ properly applied *Mt. Clemens* to ascertain the amount of back wages owed, because Lucero failed to keep accurate records of its workers' hours. Based on the evidence that H-2B hours worked the same hours as U.S. workers, the ALJ found that the Administrator met her minimal burden of showing the amount and extent of H-2B workers' uncompensated work. The ALJ then shifted the burden to Lucero to show the precise amount of work performed by H-2B workers or otherwise negate the reasonableness of the inference drawn from the Administrator's evidence. The ALJ properly found that Lucero failed to meet this burden. Lucero's contention that U.S. workers were paid more because they performed different tasks does not address whether U.S. workers performed more

hours. Because Lucero failed to produce sufficient evidence to negate the Administrator's evidence that U.S. workers worked the same hours as H-2B workers, the ALJ properly applied *Mt. Clemens* to calculate the amount of back wages owed to H-2B workers based on the average hours recorded for U.S. workers.

2. Lucero's several failures to comply with its obligations were willful and significant deviations from the terms and conditions of the H-2B program. Lucero's failures were willful because Lucero attested to its knowledge of and compliance with the obligations at issue in both 2016 and 2017, yet the evidence showed that Lucero never took steps to ensure that it was complying with them. Lucero's willful failures to comply also constituted significant deviations. Contrary to Lucero's argument, the ALJ was not required to address each factor for finding a significant deviation; rather, he was required to address the factors most relevant to the particular willful failure at issue. Lucero received proper notice of the Administrator's reasons for determining that Lucero had committed willful failures that significantly deviated from the terms and conditions of the H-2B program.

3. CMPs were warranted for Lucero's many violations of its H-2B obligations. The Administrator's and ALJ's decisions to impose CMPs were consistent with the statutory and regulatory provisions governing the imposition of

CMPs. There is no merit to Lucero's various arguments for eliminating or reducing CMPs, especially as the ALJ already made several unjustified reductions to the amounts properly assessed by the Administrator. Finally, Lucero's challenges under the Due Process Clause to the sufficiency of the Administrator's Notice of Determination should be rejected because Lucero had adequate notice of the issues in controversy and an adequate opportunity to defend itself at the ALJ hearing.

STANDARD OF REVIEW

The Board reviews an ALJ's decision de novo and 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. 2005-0032, 2007 WL 626711, slip op. at 2-3 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affs.*, ARB Case No. 2004-0100, 2007 WL 352434, slip op. at 8 (ARB Jan. 31, 2007)); *see also Adm'r v. Elderkin Farm*, ARB Case Nos. 1999-0033, 1999-0048, 2000 WL 960261, at *9 (ARB June 30, 2000) (clarifying that de novo review means the Board may substitute its judgment for the ALJ's on CMPs). Although the Board has de novo powers of review under the Immigration and Nationality Act ("INA"), the Board has affirmed an ALJ's factual findings that are supported by substantial evidence. *Adm'r v. Deggeller Attractions, Inc.*, ARB No. 2020-0004, 2022 WL 355152, at *4-5 (Jan. 25, 2022). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

ARGUMENT

I. The ALJ Correctly Found that Lucero Failed to Pay Its H-2B Workers for All the Hours They Worked, Which Is a Failure to Comply with the Terms and Conditions of the H-2B Program, and that the Back Wages Awarded Were Reasonable.

A. *The Administrator's Notice of Determination Provided Sufficient Notice to Lucero of the Basis for the Administrator's Finding that Lucero Violated its H-2B Obligations by Failing to Pay H-2B Workers for All Hours Worked.*

Before addressing Lucero's argument regarding its failure to pay its H-2B workers for all hours worked, the Administrator must first correct Lucero's factual contention that her Notice of Determination did "not identify any term or condition Lucero purportedly violated" and did "not expressly identify the failure to pay for all hours worked" as a violation. Lucero's Opening Br. at 21 & n.7. As one of the several violations that Lucero committed, the Administrator's Notice specifically stated that Lucero "failed to pay *for all hours worked* and paid for hours worked at a rate less than the certified wage rate." JX A at 9 (emphasis added). For this violation, the Notice cited Attestation 5 and 29 C.F.R. 503.16(a)(1), (a)(4), and (b).

Id.[3] Furthermore, WHD Investigators informed Lucero of their finding that it violated Attestation 5 at the final conference that Guzman attended. PX M at 33. Thus, Lucero had notice of the basis for the Administrator's determination that Lucero violated Attestation 5 and 29 C.F.R. 503.16 by failing to pay for all hours worked.

B. *H-2B Employers Must Pay the Offered Wage for All Hours Worked and the Failure to Do So Constitutes a Substantial Failure to Comply with the Terms and Conditions of the H-2B Program.*

Under the H-2B program, an employer commits a violation when, as relevant to this case, it substantially fails to comply with any of the terms and conditions of the Application for Temporary Employment Certification ("TEC") or other required forms. 8 U.S.C. 1184(c)(14)(A); 29 C.F.R. 503.19(a)(2). One of those terms and conditions is the requirement to "pay at least the offered wage, free and clear, during the entire period of [the TEC]." 29 C.F.R. 503.16(a)(1); *see also* 29 C.F.R. 503.16(a)(4) (another term and condition requires wages paid on a piece-rate basis to be "at least as much as the worker would have earned during the

[3] 29 C.F.R. 503.16(a)(1) requires employers to pay "at least the offered wage." 29 C.F.R. 503.16(a)(4) addresses wages paid on a piece-rate basis. It requires such wages to be "at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage *for each hour worked*." *Id*. (emphasis added). 29 C.F.R. 503.16(b) requires that wages be paid finally, unconditionally, and free and clear, in accordance with the FLSA regulations at 29 C.F.R. Part 531.

workweek if the worker had instead been paid at the offered hourly wage *for each hour worked*" (emphasis added)); 29 C.F.R. 503.16(b) (another term and condition requires that wages be paid finally, unconditionally, and free and clear). The employer must list the offered wage on the TEC and specify the basis on which it will be paid (i.e., hourly, weekly, by piece rate, etc.). JX C at 7 (Lucero's 2016 TEC); JX D at 8 (Lucero's 2017 TEC). The employer attests to its knowledge of and compliance with the requirement to pay the offered wage in Attestation 5 of the TEC. JX C at 9; JX D at 10.

In addition to complying with H-2B specific requirements, set out in the H-2B regulations, H-2B employers must comply with all applicable state and federal wage laws, including the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq*.[4] 29 C.F.R. 503.16(z) (providing that "the employer must comply with all applicable Federal, State and local employment-related laws and regulations"). The employer attests to its knowledge of and its compliance with this obligation in Attestation 7 of the TEC. JX C at 10; JX D at 11.

Beyond that specific requirement, the preamble to the 2015 Final Rule promulgating the H-2B regulations confirms the applicability of FLSA principles

[4] Lucero is a covered employer under the FLSA pursuant to 29 U.S.C. 203(s)(1)(A). *See* ALJ X 7 at 5 (stipulation that Lucero's annual gross volume of sales was not less than $500,000).

to wage-related determinations under the H-2B program. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24,042, 24,062 (Apr. 29, 2015) ("2015 Rule") (relying on "FLSA principles to explain the meaning of the requirements of the H-2B program that use similar language"); *id.* at 24,064 (noting employers' obligation to pay wages free and clear, which is consistent with FLSA requirements, "to ensure that wages are not reduced below the required rate"); *id.* at 24,065 (establishing, "consistent with the FLSA," a single workweek as the fixed period for determining whether the employer has paid the required wage). Consistent with FLSA principles, the 2015 Rule "protects the integrity of the H-2B offered wage by treating it as the effective minimum wage." *Id.* at 24,063. It further provides that questions about what constitutes "hours worked" may be resolved under the FLSA regulations. *Id.* at 24,067 (citing 29 C.F.R. Part 785 "for guidance regarding what constitutes hours worked"). Accordingly, just as the FLSA obligates employers to pay workers at least the minimum wage for all hours worked, 29 U.S.C. 206(a), the H-2B regulations obligate them to pay workers at least the offered wage for all hours worked.

Moreover, as a general principle, when an employer is obligated to pay a specific minimum hourly wage, it necessarily has an obligation to pay at least that wage for all hours worked. To conclude that a specific minimum wage obligation

does not carry with it the accompanying obligation to pay that minimum wage for all hours an employee worked and instead permits the employer to not pay anything for some of the hours worked, would effectively nullify the minimum wage to which the employee is entitled. For example, if an employer is required to pay a minimum hourly rate of $10, it must pay that rate for all hours worked. If the employer pays $10 for only 35 hours of work (i.e., $350 per week), but the employee works 40 hours per week, then the employer is effectively paying the employee $8.75 (because $350 divided by 40 hours equals $8.75). Thus, a failure to pay for all hours worked is a failure to pay the hourly wage. Any other conclusion would thwart the very purpose of a minimum hourly wage. Employers cannot be allowed to skirt their wage obligations by simply ignoring some of the hours their employees work.

The Board should reject Lucero's novel assertion that the H-2B regulations and the Attestations it agreed to in its TEC did not obligate it to pay the hourly rate for all hours worked, Lucero's Opening Br. at 21-22. Lucero's position is inconsistent with the H-2B regulations and the purpose of a minimum wage requirement, such as the H-2B requirement to pay at least the offered wage. Instead, the Board should follow a common sense understanding that an employer's obligation under the H-2B program to pay the offered wage necessarily

encompasses a requirement to pay that offered wage for all hours worked. Thus, the Board should affirm that Lucero's failure to pay its H-2B workers for all hours worked was a failure to pay the offered wage.

C. *The Evidence Showed that Lucero Failed to Pay Its H-2B Workers for All Hours Worked.*

The ALJ's finding that Lucero failed to pay its H-2B workers for all hours worked was correct based on the evidence presented at the hearing. Where the Board finds that the ALJ's factual findings are supported by substantial evidence, it may affirm them. *Deggeller*, 2022 WL 355152, at *4-5. In weighing the credibility of the witnesses, the ALJ must consider all relevant factors, including the relationship of the witness to the parties, the witness's interest in the outcome of the proceedings, the witness's opportunity to observe or acquire knowledge about the subject matter of the witness's testimony, and the extent to which other credible evidence supported or contradicted the testimony. *Shirani v. ComEd/Exelon Corp.*, ARB No. 2003-0100, 2005 WL 2445438, at *2 (Sept. 30, 2005).

The Administrator produced evidence showing that Lucero's H-2B workers were not paid for all their hours worked. The Administrator submitted interview statements from both U.S. and H-2B workers that in both 2016 and 2017 H-2B workers worked 10-11 hours per day and 4-7 days per week, and that the U.S. and

H-2B workers worked the same hours. D&O at 29; PX B; PX K. Specifically, the interviewees reported that both U.S. and H-2B workers were required to meet at Lucero's shop at the same time each morning to load materials into trucks. D&O at 30; PX B at 3; PX K at 12, 23, 30, 36, 40. The workers then drove together to the job sites, where they worked side by side before returning to the shop. PX K. Despite working the same hours, the undisputed evidence from Lucero's payroll records showed that Lucero paid its H-2B workers for an average of 31.79 hours per week in 2016 and 36.42 hours per week in 2017, but paid its U.S. workers for an average of 43.95 hours per week in 2016 and 52.78 hours per week in 2017. JX T.

Lucero produced competing evidence in the form of the testimony of Guzman and two U.S. workers and multiple affidavits from H-2B workers stating that they were paid for all hours worked and that the crew leader recorded their hours. Unlike the Administrator's interview statements, however, the affidavits did not discuss the workers' average hours worked, approximate start and end times, or whether they were required to report to the shop to load materials before traveling to job sites.

The ALJ weighed this competing evidence and found that the Administrator's evidence credibly established that H-2B workers worked the same

hours as U.S. workers but that Lucero's payroll records showed that they were paid for fewer hours than the U.S. workers. D&O at 26-32; *see also id.* at 29 (finding, based on all of the evidence that each side presented, "that H-2B workers worked substantially the same hours as U.S. workers, which the recordkeeping system fail[ed] to reflect"). As the ALJ found, Lucero's worker affidavits did not address the disputed issue of what hours the H-2B workers worked and whether those hours differed from U.S. workers' hours. D&O at 31-32. The ALJ considered Guzman's testimony and found that it was outweighed by the consistent statements from U.S. and H-2B workers that the H-2B workers were required to meet at the shop at the start of the workday at the same time as the U.S. workers, travelled with the U.S. workers to the job sites, and worked at the job sites with U.S. workers until they returned to the shop at the end of the day. D&O at 30-31. The ALJ discounted the testimony of Lucero's two U.S. workers due to their lack of knowledge about H-2B workers' pay and their contradictory statements about whether U.S. and H-2B workers worked side by side. D&O at 32.

The ALJ's conclusions were well-founded. He adequately explained his reasons for discrediting Lucero's evidence, and those reasons are consistent with the evidence in the record. Lucero suggests that the ALJ erred in failing to consider its higher number of affidavits as compared to the Administrator's interview

statements. Lucero's Opening Br. at 17, 25 n.9. Strict numerical head-counting is a disfavored approach to resolving conflicting evidence. *Adkins v. Dir., Office of Workers Comp.*, 958 F.2d 49, 52-53 (4th Cir. 1992) (disapproving of "counting heads" as a method of resolving conflicting evidence); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 782 (7th Cir. 1994) (characterizing "a mechanical nose count of witnesses" as "discredited for centuries"); *see also Roberts v. Memphis St. Ry. Co.*, 177 F.2d 302, 303 (6th Cir. 1949) (substantial evidence supported the verdict notwithstanding the numerical preponderance of witnesses in appellant's favor).

Lucero also suggests that its sworn affidavits were entitled to more weight than the unsworn statements proffered by the Administrator. Lucero's Opening Br. at 24-25. The Board has approved of ALJs' reliance on unsworn interview statements where, as here, the employer has failed to keep accurate payroll records. *Adm'r v. Greater Mo. Med. Pro-Care Providers, Inc.*, ARB No. 12-015, 2014 WL 469269, at *15, 17 (Jan. 29, 2014) (relying on unsworn statements to establish when violations occurred); *Pythagoras Gen. Contracting Corp. v. Adm'r,* ARB Nos. 2008-107, 2009-007, 2011 WL 1247207, at *12 (Mar. 1, 2011) (relying on unsworn statements to establish back wages owed to individual workers). As the Board has recognized, "employers have the evidentiary advantage" when it comes to getting supportive witness testimony because workers are often reluctant to

testify against their employers. *Pattenaude v. Tri-Am Transp., LLC*, ARB No. 2015-0007, 2017 WL 512653, at *10 (Jan. 12, 2017). The ALJ properly credited the workers' interview statements over the sworn affidavits because the former actually addressed the disputed issue of what hours the H-2B workers worked.

The Board should affirm the ALJ's factual finding that H-2B workers were not paid for all hours worked as reasonable and well-supported by the evidence in the record.

D. *The Administrator's Back Wage Calculations Were Reasonable and Lucero Failed to Rebut the Reasonableness of Those Calculations.*

1. The ALJ properly relied on the *Mt. Clemens* burden-shifting framework to determine the amount of back wages owed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946); *Adm'r v. Sun Valley Orchards, LLC*, ARB No. 2020-0018, 2021 WL 2407468, at *10 (May 27, 2021). Under this framework, when an employer owes back wages to employees but has failed to maintain records, an employee (or the Administrator acting to recover wages owed to employees) need only produce "sufficient evidence to show the amount and extent of [uncompensated] work as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687. This initial burden under *Mt. Clemens* "is a minimal one." *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991). When the employee meets it, the burden shifts to the employer "to come forward with evidence of the precise

amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687-88. If the employer fails to meet this burden, the court may award damages to the employee "even though the result be only approximate." *Id.* at 688.

2. The H-2B regulations require employers to maintain accurate records of, among other things, the number of hours each worker actually worked each day and the time the worker began and ended each workday. 29 C.F.R. 503.16(i)(1). It is undisputed that Lucero failed to maintain such records. It did not retain any original records of workers' hours. D&O at 25. The crew leaders recorded workers' hours as a single round number on papers that were not retained and they did not record start or stop times. Tr. at 460:1-14, 474:23, 475:9. These numbers were then recorded to a whiteboard before being sent to Lucero's accountant for payroll processing. Tr. at 461:18-23. As the ALJ found, this system for recording workers' hours was vaguely described, prone to inaccuracy, and inconsistent with Lucero's payroll records (e.g., the number copied to the whiteboard was always round but overtime hours were recorded in non-round numbers). D&O at 26-27. For these reasons, the ALJ properly determined that Lucero failed to keep accurate payroll records.

3. As summarized above, the Administrator produced evidence showing that

H-2B workers worked the same hours as U.S. workers but that the payroll records (i.e., the records used to process paychecks) showed that U.S. workers were paid for more hours than H-2B workers. D&O at 26-31. Given the evidence that H-2B workers worked the same hours as U.S. workers, the Administrator relied on the hours the U.S. workers worked, as recorded in Lucero's payroll records, as "the best—and only—evidence of the hours the H-2B workers actually worked" and, using that information, calculated the hours for which the H-2B workers were not paid and the back wages owed. D&O at 24-25; Tr. at 266. Applying *Mt. Clemens*, the ALJ reviewed this evidence and concluded that the Administrator "provided sufficient evidence to reasonably infer the amount and extent" of uncompensated work. D&O at 31.

4. The ALJ then properly shifted the burden to Lucero to show the precise amount of work performed by H-2B workers or otherwise negate the reasonableness of the inference drawn from the Administrator's evidence. *Id*. Lucero did not produce any evidence showing the precise amount of work performed by H-2B workers, and the evidence that Lucero did produce was insufficient to negate the reasonableness of the inference that H-2B workers worked the same hours as U.S. workers but were paid for fewer. D&O at 31-32.

Lucero contended and continues to contend that U.S. workers worked more

hours than H-2B workers because the U.S. workers performed additional tasks that the H-2B workers did not perform. D&O at 31-32; Lucero's Opening Br. at 16-17, 24. Lucero's argument fails for several reasons. First, as the ALJ correctly found, Lucero did not produce sufficient evidence to support its assertion that U.S. workers worked more hours than H-2B workers. D&O at 31. Lucero did not keep records of who performed what tasks, or the hours in which they performed such tasks. *Id*.

Second, evidence in the record suggests that H-2B workers may in fact have performed some of the tasks that were allegedly assigned only to U.S. workers. Tr. at 446:17-19 (Guzman testifying that H-2B workers may have occasionally driven forklifts); PX B at 2 (H-2B worker reporting that he drove Lucero's trucks to job sites); Tr. at 548:16-549:15, 558:3-11 (testimony of Lucero's employees that U.S. workers performed certain tasks "more commonly" or "more often" than H-2B workers, not that H-2B workers never performed such tasks).

Third, and most importantly, even if U.S. workers performed different tasks than H-2B workers, it does not follow that they necessarily worked more hours than the H-2B workers. The assertion that only U.S. workers performed tile cutting, chipping, waterblasting, etc., is irrelevant given the evidence showing that the U.S. workers and H-2B workers all began their workday at the shop loading

materials onto trucks and then travelled to and from the job sites together.[5] Lucero does not point to any evidence showing that H-2B workers were not otherwise engaged when U.S. workers performed additional tasks. Additionally, one of the tasks allegedly assigned exclusively to U.S. workers was driving the H-2B workers to job sites. Lucero's Opening Br. at 16, 24. Lucero's insistence that U.S. workers were paid for the additional task of driving H-2B workers must mean that Lucero did not pay its H-2B workers for their travel time. As the ALJ found, H-2B workers were required to report to Lucero's shop before driving to job sites, and therefore they were required to be compensated for their travel time. *See* 29 C.F.R. 785.38 (worksite-to-worksite travel time during the workday must be counted as hours worked). Because H-2B workers' travel time was compensable, this alone shows that Lucero failed to pay for all their hours worked.

Lucero suggests that the inaccuracy of its payroll records supports an inference that U.S. workers were overpaid as much as the inference that H-2B workers were underpaid, invoking the "rule of equal inferences." Lucero's Opening Br. at 18 (citing *Penn. R.R. Co. v. Chamberlain,* 288 U.S. 333 (1933)).

[5] Lucero's argument does not defeat the possibility that H-2B workers performed plastering work at one job site while U.S. workers performed other tasks at another job site, nor the possibility that H-2B workers were required to wait at job sites while other tasks were completed. *See* 29 C.F.R. 785.15 (employees "engaged to wait" are on duty and must be paid).

The rule of equal inferences holds that the party with the burden of proof cannot prevail where the evidence equally supports two inconsistent inferences. *Chamberlain*, 288 U.S. at 339. This rule does not help Lucero because it had the burden of persuasion under *Mt. Clemens*. *See Pythagoras*, 2011 WL 1247207, at *15 ("Allowing a wage claim to be defeated by an equally contrary inference based on generalized records would remove the incentive for employers to keep precise records as required by law," which *Mt. Clemens* provides). Moreover, it is very unlikely that an employer would overpay workers by an average of 12 hours per week over two years instead of underpaying foreign workers. Because Lucero failed to negate the Administrator's evidence that H-2B workers were not paid for all hours worked, the ALJ properly applied *Mt. Clemens* to estimate the amount of back wages owed to H-2B workers based on the average hours recorded for U.S. workers.

For all the reasons explained above, the ALJ properly found that Lucero failed to pay its H-2B workers for all hours worked, in violation of its obligation to pay the offered hourly rates set forth in its TECs, and properly assessed back wages under *Mt. Clemens*.

II. Lucero's Several Failures to Comply with Its Obligations, Despite Acknowledging and Certifying Its Compliance Under Penalty of Perjury, Were Willful and a Significant Deviation of the Terms and Conditions of the H-2B Program.

A substantial failure to comply with any of the terms or conditions of the TEC or other required forms is a violation of the H-2B program. 8 U.S.C. 1184(c)(14)(A); 29 C.F.R. 503.19(a)(2). A substantial failure is defined as a "willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents." 8 U.S.C. 1184(c)(14)(D); 29 C.F.R. 503.19(a)(2). Lucero's violations were both willful and significant deviations. And the Administrator's Notice of Determination provided sufficient notice to Lucero of the reasons for her findings of violations.

A. *Lucero's Several Failures to Comply Were Willful.*

1. A "willful failure" occurs when the employer knows its conduct is in violation or shows reckless disregard for whether its conduct satisfies the required conditions. 29 C.F.R. 503.19(b); *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

The H-2B program is a voluntary program available only to employers who have shown a need for temporary foreign labor that will not displace qualified U.S. workers or adversely affect their wages or working conditions. 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 C.F.R. 214.2(h)(6)(iii)(A). Participation is not a right but a

privilege granted to those who comply with the obligations set forth in 29 C.F.R. 503.16. *Adm'r v. Ace Amusements*, ALJ Case Nos. 2022-TNE-00015, 2022-TNE-00016, slip op. at 7 (Jan. 5, 2024) ("[N]o employer in the United States has a fundamental right to hire foreign workers for jobs in the United States[.]"). An employer's signature on Appendix B to the TEC clearly evidences its knowledge and acceptance of the assurances and obligations contained in Appendix B and 29 C.F.R. 503.16. *See* 29 C.F.R. 503.19(d); *Adm'r v. Ottaway Amusement Co.*, ALJ No. 2020-TNE-00018, 2023 WL 5670323, at *10 (OALJ Aug. 3, 2023). When an employer signs Appendix B under penalty of perjury but fails to carry out the obligations with which it thereby agrees to comply, the failure amounts to reckless disregard. *Adm'r v. Butler Amusements, Inc.*, ARB No. 2021-0007, 2023 WL 5126052, at *14 (July 28, 2023); *Adm'r v. C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, 2022 WL 1469015, at *8 & n.72 (Apr. 4, 2022) ("[A]n employer's failure to know the H-2B program's requirements does not excuse a violation."); *Ottaway*, 2023 WL 5670323, at *10; *see also Adm'r v. Avenue Dental Care*, ARB No. 2007-0101, 2010 WL 348304, at *7 (Jan. 7, 2010) (H-1B employer's failure to investigate the obligations with which it certifies compliance shows reckless disregard).

The H-2B petition process implemented by the Department of Labor

("DOL") is specifically designed to place employers on notice of their regulatory obligations before hiring H-2B workers. Appendix B to the TEC includes several attestations that an employer must *personally* certify as accurate under penalty of perjury. These attestations follow the regulations at 20 C.F.R. 655.20 and 29 C.F.R. 503.16. Therefore, completing the TEC informs employers of the requirements they must follow. The 2015 Rule makes clear that a critical factor in the willfulness analysis is "the fact that employers submit a signed [TEC] attesting under penalty of perjury that that they know and accept the obligations of the program." 80 Fed. Reg. at 24,086-87. This conclusion is consistent with other areas of federal law where individuals make representations to the government under penalty of perjury. In federal tax law, for example, the Fourth Circuit found it decisive for the purposes of willfulness that the defendant "signed his 2000 federal tax return, thereby declaring under penalty of perjury" he knew the contents of the return. *United States v. Williams*, 489 F. App'x 655, 659 (4th Cir. 2012); *see also United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982) ("[a]ppellant's signature on his return was sufficient to establish knowledge" for the purposes of willfulness analysis).

The Board's recent decision in *Butler* is particularly instructive on this point. There, the employer violated the H-2B program requirements when it employed H-

2B workers outside the approved job duties for which H-2B workers were sought. 2023 WL 5126052, at *4. The employer claimed that its violation was not willful because it did not have notice or knowledge of its obligation to describe the H-2B workers' duties accurately in its TECs. *Id.* at *12. The Board found that the employer had ample notice of its obligations in the form of the regulations, the preamble thereto, and the instructions on the TEC. *Id.* at *13. Because the employer never bothered to read the regulations and ignored the instructions on the TEC, the Board affirmed the ALJ's finding of willfulness. *Id.* at *14-15.

2. Guzman, on behalf of Lucero, attested under penalty of perjury to his knowledge of and compliance with the obligations of the H-2B program when he signed Appendix B to the TEC in 2016 and 2017. JX C at 9-11; JX D at 10-12. Despite these yearly attestations, Guzman admitted that he was unaware of many of the obligations with which he agreed to comply and/or unaware of whether Lucero was complying with them. D&O at 37, 39, 42; PX M at 33-34; Tr. at 467:22. For some of these obligations, Lucero relied on its third-party vendor, Monarch, to establish compliant processes and never investigated or even attempted to confirm whether it was doing so. Lucero's Opening Br. at 34-35 (reciting Lucero's reliance on Monarch to reimburse H-2B workers' transportation and subsistence costs and to voluntarily refrain from seeking payments from H-2B

workers); D&O at 42 (discussing Lucero's reliance on Monarch to distribute job orders to H-2B workers); Tr. at 434:19-23 (Guzman testifying that he did not know what Monarch was doing and "ha[d] no way of knowing" what it was doing). These claims of ignorance demonstrate that Lucero did not undertake any steps to ensure that it satisfied the obligations that it agreed to comply with when it sought to obtain H-2B workers. Lucero's reliance on third parties does not shield it from liability because the employer is primarily responsible for meeting the obligations of the program. *See* 2015 Rule, 80 Fed. Reg. at 24,080; *Butler*, 2023 WL 5126052, at *16 (reliance on counsel is insufficient to show reasonableness or good faith where employer "made convenient decisions and exerted minimal effort to comply").

Moreover, several of Lucero's violations involve terms and conditions that Lucero specified that it would offer to its H-2B workers. Lucero cannot claim ignorance as to the information it supplied in its 2016 and 2017 TECs. Lucero was required to identify the intended area of employment "with as much specificity as possible," including attaching a separate document if necessary to "*complete* a listing of *all* anticipated worksites." JX C at 6 (second emphasis added); JX D at 7 (same). Lucero listed just one intended area of employment and certified in Attestation 11 that it would not employ its H-2B workers elsewhere. Yet it

repeatedly sent them to jobs in multiple states where it failed to recruit U.S. workers. The instructions on the TEC were clear. *See also* 2015 Rule, 80 Fed. Reg. at 24,045 (explaining the reasons for this requirement). A minimal effort to comply with Attestation 11 would have enlightened Lucero as to its obligation to recruit U.S. workers in every location in which it sent H-2B workers.

Lucero certified in Attestation 4 that it would not provide better terms and conditions to H-2B workers than U.S. workers, yet the job orders for U.S. workers did not mention the availability of employer-provided housing and higher-paying union jobs. Lucero knew in 2016 and 2017 that it would provide housing for H-2B workers just as it did in 2015. D&O at 10; Tr. at 37:14-16, 81:18-23, 220:8-17, 501:22-24. Lucero knew in 2016 and 2017 that higher-paying union jobs were possible because it had received such jobs every year since 2013. Tr. at 508:10-17. Lucero chose not to advertise either the higher-paying job or the availability of employer-provided housing to U.S. workers. Moreover, it explicitly denied that it would provide any housing assistance at all. D&O at 10. The violations at issue here arise not merely because Lucero should have known but because it did know exactly what it would or might provide to its workers and failed to meet its obligation to disclose those terms and conditions.

Lucero was required to specify the wage rate and basis that it would pay its

H-2B workers, but it did not actually pay that wage rate and it did not pay anything at all for some of the hours that its H-2B workers worked. Not only did Lucero fail to carry out its obligation to pay its workers for all hours worked, but it continues to dispute that it had any such obligation under the H-2B program. *E.g.,* Lucero's Opening Br. at 21-23. Even if it were remotely debatable that an obligation to pay a specified hourly wage can be satisfied despite failing to pay that wage (or any wage) for a portion of workers' hours, the 2015 Rule is clear that the offered wage is the "effective minimum wage" for H-2B workers and therefore must be paid for each hour worked. 2015 Rule, 80 Fed. Reg. at 24,063, 24,068, 24,069.

The assurances and obligations at issue in this case are not ambiguous, despite Lucero's attempts to obfuscate them. The record is replete with evidence that Lucero failed to undertake even a minimal investigation into the obligations that it acknowledged and accepted under penalty of perjury. Consistent with *Butler* and other cases addressing willfulness under the INA, Lucero's several failures to comply with its obligations were willful.[6]

[6] To the extent that the ALJ's findings of willfulness are unclear or appear to adopt a lower standard, the Board may make findings itself pursuant to its authority as delegated by the Secretary of Labor. *Talukdar*, ARB No. 04-100, slip op. at 8 (ARB applies de novo review in INA cases). The facts supporting a finding of willfulness are not in dispute, and therefore it is unnecessary to remand this issue to the ALJ for further proceedings.

B. *Lucero's Willful Failures to Comply Constituted Significant Deviations.*

In determining whether a willful failure is a significant deviation, the Administrator "may consider" several factors that "include, but are not limited to": (1) a previous history of violations under the H-2B program; (2) the number of H-2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation; (3) the gravity of the violation; (4) the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers; and (5) whether U.S. workers have been harmed by the violation. 29 C.F.R. 503.19(c).

As indicated by the word "may," the factors for finding a significant deviation are not mandatory. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983). Lucero cites inapposite cases dealing with mandatory factors to argue that the ALJ erred by failing to apply them consistently. Lucero's Opening Br. 37-38 (citing case law addressing "controlling factors"). As the Administrator argued in her opening brief, the ALJ's discretionary application of 29 C.F.R. 503.19(c) is limited to consideration of only those factors that are relevant to the specific willful failure at issue. Adm'r's Opening Br. at 22.

Additionally, as the Administrator explained with respect to the similar factors for imposing CMPs, there is no indication that these factors were intended

to apply in a binary fashion. *Id.* at 40-41. Lucero's alleged lack of a prior history of violations is simply a lack of prior investigations. The fact that WHD did not investigate Lucero prior to 2016 does not provide a basis to relieve Lucero from liability for its multiple willful failures to comply with its obligations, especially given the evidence in the record that Lucero in fact committed many of the same willful failures in 2015. *Id.* at 39-42.

Not only are the factors for finding a significant deviation nonmandatory, but rigid application of every factor to each willful failure would frustrate the overarching regulatory goal of protecting the integrity of the H-2B program. *See, e.g.,* 2015 Rule, 80 Fed. Reg. at 24,058 (describing the requisite attestations on the TECs as measures to ensure program integrity). The regulations achieve this goal by imposing various obligations, some that primarily protect U.S. workers, others that primarily protect H-2B workers, and still others that facilitate WHD's enforcement efforts. *See, e.g., id.* at 24,069 (discussing the purpose of the offered wage requirement to avoid adverse effects on workers' wages); *id.* at 24,078 (recruitment requirements are critical to determining if there are qualified U.S. workers); *id.* at 24,080 (recordkeeping requirements are critical to the integrity of the H-2B program by facilitating enforcement efforts). In light of the various purposes served by the H-2B program obligations, consideration of the regulatory

factors must focus on those that are relevant to the harm that each specific obligation is intended to prevent. It would make little sense for the ALJ to consider, for example, the lack of harm to U.S. workers as a basis to find no violation for failing to disclose the job order to H-2B workers—a lack of harm to U.S. workers does not nullify the harm to H-2B workers. As another example, an employer's lack of financial gain is not a meaningful factor when the employer fails to recruit U.S. workers, because the harm that arises when U.S. workers are shut out of employment opportunities does not evaporate merely because the employer does not profit from it.

In asserting that the ALJ erred by failing to address every factor, Lucero prioritizes rote recitation over common sense. For example, Lucero objects that the ALJ did not "recite the extent" of Lucero's financial gain. Lucero's Opening Br. at 38, 40. But the violations for which the ALJ identified Lucero's financial gain as a relevant factor were those for which back wages were owed. D&O at 24, 40. The amount of back wages owed demonstrates the extent of Lucero's financial gain (and its workers' financial loss). Most absurdly, Lucero complains that the ALJ failed to "recite how many" H-2B workers were affected when he determined that all of them were, Lucero's Opening Br. at 39. There is no higher number of H-2B workers that Lucero's violations could have affected than 100 percent.

For all these reasons, the ALJ was not required to address each enumerated factor with respect to all of Lucero's willful failures. Rather, the ALJ was required to address the factors most relevant to each specific willful failure. To the extent that he did so, the ALJ acted within his discretion, and Lucero has not presented any argument that would merit overriding that discretion. For the reasons explained above and in her opening brief, the Administrator requests that the Board find that Lucero willfully failed to comply with the H-2B program by significantly deviating from the terms and conditions as follows: preferential treatment of H-2B workers, failure to pay H-2B workers the offered wage for all hours worked, failure to pay H-2B workers' inbound and outbound transportation and subsistence costs, placement of H-2B workers outside the area of intended employment, failure to disclose the job order to H-2B workers, failure to contractually forbid agents from seeking payments from H-2B workers, and failure to retain records.[7]

C. *The Administrator's Notice of Determination Provided Sufficient Notice to Lucero of the Reasons for the Administrator's Findings.*

Throughout its brief, Lucero argues that the Administrator's Notice of Determination did not adequately explain the reasons for her findings, including

[7] While the Board may simply affirm the ALJ's decision for most of these violations, the Administrator has requested that the Board make a de novo finding that Lucero's willful preferential treatment of H-2B workers was a significant deviation. Adm'r's Opening Br. at 30-37.

the findings that Lucero's failures to comply were willful and significant deviations. Lucero's Opening Br. at 19, 21 n.7, 22-23, 31, 38, 44-45, 50. Under 29 C.F.R. 503.42(a)(5), the Administrator must state the "reason or reasons" for her determination to assess CMPs and debarment. The Administrator's determination is sufficient under 29 C.F.R. 503.42(a)(5) when it identifies the conduct found to be in violation, the governing regulatory provision, and the penalties assessed. *Adm'r v. Turf Masters, Inc.*, ALJ No. 2021-TNE-00007, 2020 WL 13849238, at *1 (OALJ Dec. 16, 2020) (finding Administrator's determination sufficient under 29 C.F.R. 503.42 and noting that respondent may seek additional information about the Administrator's findings in discovery); *In re Green Meadows Lawnscape, Inc.*, ALJ No. 2018-TNE-00002, 2018 WL 11602204, at *3-4 (OALJ Apr. 16, 2018) (reviewing the contents of Administrator's determination, including the "Summary of Violations and Remedies," and concluding that it satisfies the requirements of 29 C.F.R. 503.42).

Here, the Administrator's determination identified Lucero's conduct found to be in violation, the related regulatory provision, and the amount of back wages and CMPs assessed. This information was adequate to inform Lucero of the reasons for her determination as required by 29 C.F.R. 503.42(a)(5). Moreover, the ALJ hearing provided Lucero with the opportunity to seek further information in

discovery regarding the reasons for the Administrator's determination. *See Turf Masters*, 2020 WL 13849238, at *1. Lucero's arguments under 29 C.F.R. 503.42 should be rejected, as should its related arguments under the Due Process Clause, discussed below.

III. The Imposition of CMPs for Lucero's Several Violations Was Proper, and Lucero's Arguments for Reducing CMPs Are Unavailing.

A. *CMPs Were Warranted for Lucero's Multiple Violations.*

The INA provides that if an employer substantially fails to meet any of the conditions of the petition, which includes the TEC,[8] the Secretary of Homeland Security ("DHS") may, among other remedies, impose administrative remedies, including CMPs of up to $10,000 per violation as DHS determines to be appropriate. 29 U.S.C. 1184(c)(14)(A)(i).[9] DHS delegated this authority, along with the rest of the statute's H-2B investigatory and enforcement authority, to

[8] *See* 8 U.S.C. 1184(c)(1) ("The petition shall be in such form and contain such information as the [Secretary of Homeland Security] shall prescribe."); 8 C.F.R. 214.2(h)(6)(iv)(A) ("An H-2B petition . . . shall be accompanied by an approved temporary labor certification.").

[9] By statute, the maximum CMP per violation is regularly adjusted by regulation. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat 584, 599 (2015). The maximum in effect in the present case was $12,383 per violation. *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7, 8, 12-13 (Jan. 2, 2018).

DOL.[10] The regulation at 29 C.F.R. 503.23 sets out the parameters for when and to what extent CMPs should be imposed for violations of the H-2B program. The Administrator's and ALJ's decisions to impose CMPs for Lucero's numerous violations of the H-2B program were consistent with these statutory and regulatory provisions. *Cf. Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186 (1973) (courts will not disturb an agency's decision to impose sanction unless it is "unwarranted in law or without justification in fact"); *Bluestone Energy Design, Inc. v. F.E.R.C.*, 74 F.3d 1288, 1294 (D.C. Cir. 1996) (same regarding agency's decision to impose CMPs).

In challenging the imposition of CMPs, Lucero relies on case law concerning punitive damages awards in jury trials. Lucero's Opening Br. at 45-47 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003), and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)). In *Campbell* and *Gore*, the Supreme Court delineated three "guideposts" to determine whether a punitive damages award is excessive. *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 574-75. *Campbell* and *Gore* do not apply to an agency's imposition of penalties. *Duckworth v. United States*, 418 F. App'x 2, 3 (D.C. Cir. 2011). Punitive damages

[10] *See* 8 U.S.C. 1184(c)(14)(B); 2015 Rule, 80 Fed. Reg. at 24,045. This authority was delegated within the Department to the WHD Administrator. 29 C.F.R. 503.1(c).

awards are creations of common law that are not amenable to bright-line rules. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15, 18 (1991). As such, the federal judiciary's review of punitive damages awards is guided by general principles of reasonableness. *Campbell*, 538 U.S. at 428. CMPs, by contrast, are dictated by statute or regulation, and their imposition is proper if it conforms to the statute or regulation in question. *See, e.g., Butz*, 411 U.S. at 187-88 (upholding administrative sanction that was more severe than sanctions imposed in other cases where the agency found it necessary to deter violations and achieve its statutory objectives). The Board should reject the application of *Campbell* and *Gore* to this case and uphold the Administrator's and ALJ's decisions to assess CMPs for Lucero's many violations of the H-2B program requirements.

B. *There Is No Basis for Further Reducing the CMP Amounts, Especially Where the ALJ Made Several Unjustified Reductions to the Amounts Assessed by the Administrator.*

1. Lucero argues several errors in the ALJ's application of the factors for imposing CMPs, repeating many of its arguments regarding the factors for finding significant deviation. Lucero's Opening Br. at 48-54. Lucero again cites inapposite case law dealing with mandatory factors. *Id.* at 47, 51-52.[11] Like the factors for

[11] Lucero cites one case dealing with nonmandatory factors. Lucero's Opening Br. at 52 (citing *United States v. Ford Motor Co.*, 463 F.3d 1267, 1285 (Fed. Cir.

finding a significant deviation, the factors for imposing CMPs are nonmandatory. 29 C.F.R. 503.23(e) (identifying factors that the Administrator "may" consider). The ALJ was required to consider only the factors that are relevant to the specific violations at issue. Adm'r's Opening Br. at 22-25; *see also Pharaon v. Bd. of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 156 (D.C. Cir. 1998) (upholding penalties where the agency considered each relevant factor and appellant was unable to point to any relevant factor that was ignored).

2. Lucero generally contests the (reduced) CMP amount that the ALJ assessed for Lucero's failure to pay for all hours worked and failure to pay for transportation expenses. First, Lucero argues that the ALJ erred in not discussing or making findings on several of the factors listed in 29 C.F.R. 503.23(e) in connection with the CMP for these violations. Lucero's Opening Br. at 52-53. However, as explained in the Administrator's opening brief, because the factors in section 503.23(e) are not applicable to violations for which back wages are owed, the ALJ erred in considering any of them at all. Adm'r's Opening Br. at 29-30; *see* 29 C.F.R. 503.23(b) (for violations related to wages, the Administrator may assess

---

2006)). In *Ford Motor Co.*, the appellant challenged a penalty on the grounds that three of fourteen non-exhaustive mitigating factors were in its favor. 463 F.3d at 1285. The Federal Circuit upheld the assessment of the maximum penalty permitted by statute, reasoning that any defendant could "find refuge in at least one potentially mitigating factor." *Id*.

CMPs equal to the back wages owed). Furthermore, contrary to Lucero's argument that the ALJ should have considered Lucero's net revenue rather than gross revenue as well as the amount of revenue attributable to these violations, Lucero's Opening Br. at 47-48, the ALJ erred in considering Lucero's revenue at all. Adm'r's Opening Br. at 30-34. Lucero additionally argues that the assessment of CMPs for wage violations constitutes a double punishment. Lucero's Opening Br. at 48, 54. This argument is improper, as back wages do not punish employers but instead make employees whole. *See, e.g.*, *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583 (1942) (FLSA back wages and liquidated damages are "not a penalty or punishment by the Government"); *McClanahan v. Mathews*, 440 F.2d 320, 322-23 (6th Cir. 1971) (same).

3. Lucero also argues that the ALJ erred in applying the factors for its recordkeeping violations, arguing that it has already been punished in the form of the application of *Mt. Clemens* and the assessment of CMPs for wage violations. Lucero's Opening Br. at 49-50, 53-54. The burden-shifting framework of *Mt. Clemens* does not punish employers but rather ensures that "employees are not to be penalized by denying them back wages simply because the precise amount of uncompensated work cannot be proved." *Cody-Zeigler, Inc. v. Adm'r,* ARB Nos. 2001-014, 2001-015; 2003 WL 23114278 (Dec. 19, 2003). Moreover, the harms

involved in Lucero's wage violations and recordkeeping violations are distinct. The failure to pay wages harms workers by denying them what they are owed and by depressing wages in their industry. The failure to maintain records impedes WHD's investigations by compounding the work that it must do to evaluate whether employers are complying with their obligations and, if they are not, to ascertain the amount of workers' losses. *See* 2015 Rule, 80 Fed Reg. at 24,080, 24,086 (recordkeeping requirements facilitate DOL's enforcement of the H-2B program requirements). The ALJ properly treated these violations as distinct for purposes of assessing penalties.

For the foregoing reasons, the Administrator requests that the Board reject Lucero's arguments for eliminating or reducing CMPs and order Lucero to pay CMPs consistent with the arguments presented in the Administrator's opening brief.

C. *Lucero's Due Process Arguments Should Be Rejected Because Lucero Received the Requisite Notice and Opportunity to Contest the Reasons for the Administrator's Determination.*

Throughout its brief, Lucero challenges the sufficiency of the Administrator's Notice of Determination under the Due Process Clause. Lucero's Opening Br. at 19, 21 n.7, 22-23, 31, 38, 44-45, 50. Due process requires that individuals have "fair warning" of the conduct prohibited by statute or regulation.

County of Suffolk, N.Y. v. First Am. Real Estate Sols., 261 F.3d 179, 195 (2d Cir. 2001). A regulated party receives fair warning when an agency explains in its regulations or other public statements the standards to which it expects parties to conform. *Gen. Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). When an agency initiates enforcement action against a regulated party, due process is satisfied when the party is "reasonably apprised of the issues in controversy" and "not misled." *L.G. Balfour Co. v. F.T.C.*, 442 F.2d 1, 19 (7th Cir. 1971); *Savina Home Indus., Inc. v. Sec'y of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *see also U.S. Dep't of Labor v. USAirways, Inc.*, OALJ No. 1993-RIS-4, slip op. at 7-8 (OALJ June 9, 2000) (notice of intent to assess penalty raised due process concerns where it misled employer about the reason for the penalty). To prevail on a due process claim in this context, the party must show prejudice. *Abercrombie v. Clarke*, 920 F.2d 1351, 1360 (7th Cir. 1990). In resolving a due process challenge to an enforcement action, courts consider the overall proceeding. *Brock v. Dow Chem. U.S.A.*, 801 F.2d 926, 931 (7th Cir. 1986). "[T]he dispositive question is not simply whether the pleadings are adequate as a formal matter, but rather whether the procedure afforded the cited employer as a whole was fair." *Id.*; *see also Adm'r v. Thirsty's, Inc.*, ARB No. 1996-143, 1997 WL 453588, at *4 (May 14, 1997) (noting that the ALJ hearing satisfies due process in a challenge to the

Administrator's CMPs).

The Administrator's Notice of Determination provided adequate notice of the issues to be litigated in this case. Lucero does not identify any defect in the proceeding that prevented it from disputing the reasons for the Administrator's determination or mounting a defense during the ALJ proceedings to the Administrator's determination. Seeking to bolster its position, Lucero relies on cases in which an agency decision was reversed because the agency failed to provide notice of the regulatory interpretation on which it relied. *E.g.,* Lucero's Opening Br. at 22-23 (citing *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*, 867 F.3d 564, 578-80 (5th Cir. 2017) (reversing penalties where appellant lacked notice of the agency's specific interpretation of the regulations); *Gen. Elec. Co.*, 53 F.3d at 1331 (vacating agency action where the applicable regulation was unclear and appellant's interpretation was reasonable)). Nothing in the Administrator's assessment of violations against Lucero involved a novel or surprising interpretation of the regulations. Contrary to Lucero's repeated (and troubling) assertions that it was not obligated to pay the offered wage for all hours worked, its obligation was unambiguous and confirmed in the 2015 Rule. Lucero's argument that it lacked adequate notice of the issues it has been litigating for the past five years should be roundly rejected.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board affirm the ALJ's finding of violations for Lucero's failure to pay H-2B workers for all hours worked, and his application of the *Mt. Clemens* standard to determine the amount of back wages owed for these violations based on the Administrator's calculations. The Administrator further requests that the Board reject Lucero's arguments that it did not commit violations of the H-2B program because its several failures to comply with its obligations, despite certifying under penalty of perjury that it would, were willful and significant deviations from the terms and conditions of participation in the H-2B program. Finally, the Administrator requests that the Board reject Lucero's arguments for eliminating or reducing CMPs.

Respectfully submitted,

JENNIFER S. BRAND
Associate Solicitor

RACHEL GOLDBERG
Counsel for Appellate Litigation

JENNIFER HUGGINS
Senior Attorney

/s/ Jennifer Stocker
JENNIFER STOCKER
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5662

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Administrator's Response Brief was served on January 18, 2024, via email and via the Department's eFile/eServe system on each attorney who has appeared in this case and is registered for electronic filing.

/s/ Jennifer Stocker
JENNIFER STOCKER
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5662
Stocker.Jennifer.L@DOL.gov