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

In the Matter of:	)	
ADMINISTRATOR, WAGE & HOUR DIVISION,	)	ARB Case No. 2019-0009
Prosecuting Party,	)	ALJ Case No. 2018-TNE-00022
v.	)	
GRAHAM AND ROLLINS, INC.,	)	
Respondent.	)	

ACTING ADMINISTRATOR'S REPLY BRIEF

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ACTING ADMINISTRATOR'S REPLY BRIEF

In the opening brief, the Acting Administrator ("Administrator") of the Wage and Hour Division ("WHD") argued that the Administrative Law Judge ("ALJ") erred when she determined that the five-year statute of limitations set forth in 28 U.S.C. 2462, which addresses an action to recover penalties, applied to the Administrator's action in this case, which clearly sought to recover back wages under the H-2B program. Respondent's brief largely fails to refute the arguments set forth in the Administrator's brief, instead alleging numerous perceived errors about the Administrator's determination letter and Prehearing Statement. The following specific points nevertheless warrant a rebuttal.

1. Contrary to the ALJ's decision, the case the Administrator brought against Graham and Rollins, Inc. ("Graham and Rollins" or "Respondent") was manifestly an action for H-2B back wages, not one for a penalty under section 2462;[1] significantly, neither the INA nor any

[1] In fact, Respondent's brief appears to acknowledge that WHD clearly identified in its determination letter that it was seeking "back wages" or "unpaid wages" as "reimbursement of

other statute sets a limitations period for H-2B back wage enforcement actions. *See* Opening Br. 11-15. Thus, because there is no statute that directly sets a limitations period for the Administrator's remedial enforcement authority, and because the penalty limitations period of 28 U.S.C. 2462 is not applicable, back wage actions such as this one are not subject to a time bar. Respondent's brief fails to rebut this argument. Indeed, Graham and Rollins only addresses the ALJ's conclusion – that the Administrator was seeking penalties in this case and thus the five-year limitations period of section 2462 applies – in passing, despite the fact that it is this very ruling that the Administrator has petitioned the Administrative Review Board ("Board") to review. *See* Resp. Br. 16, 17, 21; Pet. for Review 2. To the extent that the Respondent's brief fails to directly support the ALJ's ruling that this was an action for penalties under section 2462, as opposed to an action for back wages, any such argument should be considered conceded.

2. Respondent argues that the Administrator's Prehearing Statement could not amend the determination letter, and claims that the Administrator needed to formally move to amend WHD's determination. *See* Resp. Br. 7-11. Respondent also alleges a number of errors or inconsistencies in the determination letter and Prehearing Statement.[2] However, Respondent has

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transportation expenses." Resp. Br. 13-14. By virtue of its detailed description of the determination letter, Respondent's brief shows that that letter, the accompanying Summary of Violations chart, and the Summary of Unpaid Wages all clearly set forth that WHD was assessing back wages in this case. *See id.*

[2] The Administrator has already set forth the corrected calculations for back wages in the Prehearing Statement and again in the Opening Brief. *See* A10-12; Opening Br. 20-21. Among other alleged errors, Respondent makes much of the alleged discrepancy between the number of workers listed on the determination letter and Prehearing Statement. *See* Resp. Br. 14-17. As has been repeatedly acknowledged, the numbers on the determination letter – including the number of workers (126) – were the result of a clerical error. *See* A50 n.1; *see also* Opening Br. 7, 20-22. As Respondent surely knows, some of the H-2B workers who were dismissed early (and thus were owed back wages) worked in both the 2011 and the 2012 seasons; thus, the discrepancy between 105 and 133 H-2B workers is explained by the number of "duplicate" workers who were counted separately in each of the seasons they worked. In fact, the total number of unduplicated workers (105), i.e., the total number of individual workers, is included in

not identified, and cannot identify, any prejudice that occurred when the Administrator *reduced* the amount of back wages it was seeking in the Prehearing Statement, the error that Respondent focuses on. Although the Administrator has acknowledged that there were errors in the determination letter, WHD has been clear and consistent from the beginning that it was seeking back wages as a result of Respondent's failure to reimburse H-2B workers for their return transportation. *See, e.g.*, A1-5. The change made in the Prehearing Statement was to the *amount* of back wages only, not to the violation being charged or that back wages were being sought – and the correction benefitted Respondent. Graham and Rollins accuses the Administrator of changing his position for "litigation convenience," but fails to explain how reducing the amount of back wages assessed has in any way prejudiced Respondent.

Because the errors in the determination letter were corrected in the Prehearing Statement and the correction reduced the amount of back wages assessed, those errors are by definition harmless. *Cf.*, *e.g.*, *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (harmless

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the amended Summary of Unpaid Wages, Form WH-56, which was provided to the employer. *See* Supplemental Appendix, A64-81. The 105 individual workers are also listed in the Prehearing Statement. *See* A13-15.

Respondent also alleges confusion over the statement included in the Summary of Violations chart that where an employer "violate[s] both an I-129 [Petition] requirement and the corresponding 9142 Application [for Temporary Employment Certification] requirement, the associated back wages are listed under each citation. However, the back wages for such violations will be collected under only one citation." Resp. Br. 13-14. First, this statement provides further evidence that the Administrator clearly identified that he was seeking back wages in the determination letter. Second, WHD has the authority to enforce the terms and conditions of both the I-129 Petition and the 9142 Application. *See* 20 C.F.R. 655.50(a) (2008). Respondent here violated the requirement – found on both the I-129 and the 9142 – to pay return transportation in 2011 and in 2012; the Summary chart sets out back wages due for both violations in both years, but, as clearly evidenced by the column headed "Total(s) Due for Payment Regarding this Violation," back wages will only be collected once in each year. Indeed, the sentence Respondent has questioned is merely intended to ensure that WHD does not double collect for behavior that violates conditions of both the Petition and the Application; it is not further evidence of the Administrator's inconsistency, as Respondent claims.

error rule applies to agency actions where error did not cause prejudice and did not affect outcome); *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (same). In light of the fact that this correction did not prejudice Graham and Rollins, it was improper for the ALJ to so heavily rely, in issuing her decision on the statute of limitations, on inconsistencies she found in the Administrator's determination letter. In addition, despite the error, nothing in the Administrator's filings obfuscated the fact that the Department was seeking to recover back wages and back wages only, as opposed to any penalty, and this, in and of itself, is dispositive regarding the issue before this Board on appeal.

3. Respondent argues that the cited violation of 20 C.F.R. 655.22(m) (2008)[3] does not implicate a back wage remedy because it is merely a notice provision, and "actually imposes no requirement upon an employer to pay transportation costs." Resp. Br. 18. This argument is without merit. First, the source of the requirement to pay return transportation costs is the statute itself, which provides that an employer "shall be liable for the reasonable costs of return transportation" of an H-2B worker who is dismissed prior to the end of the work period. 8 U.S.C. 1184(c)(5)(A).[4] Second, the portion of the preamble to the 2008 Rule that explains section 655.22(m) clearly states that "[u]nder the Final Rule, employers have a responsibility to inform foreign workers of their duty to leave the United States at the end of the authorized period of stay, *and to pay for the return transportation* of the H–2B worker if that worker is dismissed early." *See Labor Certification Process & Enf't for Temporary Emp't in Occupations Other Than Agric. or Registered Nursing in the U.S. (H–2B Workers)*, 73 Fed. Reg. 78,020, 78,042,

[3] All references to 20 C.F.R. Part 655 in this brief are to the Final Rule published on December 19, 2008, which became effective on January 18, 2009, and which was in turn superseded by the Interim Final Rule that was published and took effect on April 29, 2015.

[4] 8 U.S.C. 1184(c) is listed as one of the sources of authority for the 2008 Rule. *See* 73 Fed. Reg. at 78,052.

2008 WL 5262663 (Dec. 19, 2008) (Final Rule) (emphasis added). Thus, it is evident from the preamble that section 655.22(m) requires more than just notice; employers also have the responsibility to pay for these transportation costs. To the extent that the language of section 655.22(m) could have more clearly distinguished between the requirement to give workers notice and the requirement to pay for return transportation, that ambiguity is clarified by the preamble, and indeed by the statute itself. Respondent's interpretation of this section is not only inconsistent with the statutory requirement, but would give H-2B workers a right (notice that an employer is liable for return transportation) without a corresponding remedy, which "is no right at all." *Angel v. Bullington*, 330 U.S. 183, 209 (1947).

4. Respondent also reiterates the ALJ's erroneous interpretation of 20 C.F.R. 655.65(i), arguing that back pay is "only available to remedy violations of section 655.22(e)." Resp. Br. 17-18. Section 655.65(i) sets forth the remedies that the Administrator may seek for a violation of the H-2B program. Section 655.22(e), referenced in section 655.65(i), defines the offered wage – the wage employers are required to pay to H-2B workers as one of the conditions for participating in the H-2B program. As the Administrator argued in the Opening Brief, the reference to 655.22(e) in section 655.65(i) is definitional and not limitational: if the employer does not pay the offered wage – as defined by 655.22(e) – then the Administrator may seek back wages up to that offered wage. *See* Opening Br. 18-19. A definitional reference is not an appropriate use for the interpretive principle of *expressio unius est exlusio alterius* (when one possibility is included in a provision, it implies the exclusion of another), as Respondent argues. The inclusion of 655.22(e) as a *definition* in this provision of the amount employers are required to pay cannot reasonably be read to exclude the Administrator from seeking back wages for all

violations that result in H-2B workers not receiving the full offered wage as required. *See* Opening Br. 15-19.

5. Respondent argues that if the Administrator is seeking back wages – which he is – the action is untimely because the two-year statute of limitations for the Fair Labor Standards Act should apply. *See* Resp. Br. 19-20. Respondent claims that because the Administrator is "borrow[ing] concepts" from the FLSA, the Board should adopt the FLSA's two-year limitations period for back wages. *See id.* at 19.[5] In cases brought by the government, however, courts have disapproved of "borrowing" the statute of limitations period from another statute. *See, e.g., Alden Mgmt. Servs., Inc. v. Chao*, 532 F.3d 578, 581-82 (7th Cir. 2008) (stating that "nothing in the [INA] establishes a period of limitations for the Secretary's proceeding" and 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 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) (state statute of limitations did not apply to Secretary of Labor's action seeking injunctive relief, including backpay and reinstatement, under the Occupational Safety and Health Act); *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 367-68

[5] To the extent that the Administrator's argument that back wages are due in this case "relies upon rationale for the FLSA," as Respondent argues, this is because the Department has long relied on the principles of the FLSA to assist in the analysis of the H-2B program, as it is beneficial to both WHD and the regulated community to be able to rely upon WHD's decades of experience in enforcing the FLSA and the many court decisions interpreting that statute. *See, e.g.*, *Temporary Non-Agricultural Emp't of H-2B Aliens in the U.S.* ("2015 H-2B Rule"), 80 Fed. Reg. 24,042, 24,062, 2015 WL 1908169 (Apr. 29, 2015) (Interim Final Rule). However, despite the incorporation of certain FLSA principles in H-2B enforcement, for the reasons set forth below, borrowing the statute of limitations from the FLSA is not appropriate.

(1977) (refusing to apply a state statute of limitations to government suits brought by the EEOC because it would frustrate or interfere with policies underlying the federal statute).

The INA's H-2B temporary nonimmigrant worker program balances critical labor and immigration policies by authorizing employers to bring in foreign workers to meet short-term labor needs if sufficient U.S. workers are not available, but only if a foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 C.F.R. 214.2(h)(6)(iii)(A), (D). Importing the FLSA's two-year statute of limitations into a statutory scheme involving temporary foreign workers that does not contain a statute of limitations would interfere with the Administrator's ability to ensure that employers pay their H-2B workers properly. This would in turn adversely affect domestic workers by potentially bringing down wages and working conditions for similarly-employed U.S. workers, which would be contrary to the purposes of the program.

6. Finally, in a footnote, Respondent suggests that the Board lacks subject matter jurisdiction over this action due to the vacatur of the 2008 H-2B regulations in 2015 by the U.S. District Court for the Northern District of Florida. *See* Resp. Br. 5 n.2 (citing *Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015)). As the Administrator explained in his Opening Brief, 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). And the Board itself has recognized that the Department still may enforce the 2008 Rule for labor certifications filed before the issuance of the *Perez* injunction. *See Adm'r v. Strates Shows, Inc.*, ARB Case No. 15-069, Amended Final Decision & Order, slip op. at 2-3 (ARB Aug. 16, 2017).

An H-2B employer recently sought to have the *Perez* court hold the Department in contempt for enforcing the 2008 Rule. The district court dismissed the petition for a contempt action, stating explicitly that "based on the Court's clarification, the permanent injunction in *Perez* does not apply retroactively to prevent DOL from enforcing the conditions of labor certifications issued under the 2008 Regulations prior to the entry of the injunction." *Drew's Lawn & Snow Serv., Inc. v. Acosta*, No. 18-cv-979, Doc. 14, slip op. at 6 (N.D. Fla. Feb. 11, 2019). The court then stated that because the petitioner's labor certification had been issued before the 2008 Rule was enjoined, the Department had not violated the injunction by seeking to enforce the terms and conditions of that certification against the employer. *See id.* The labor certification at issue in this case was issued long before the *Perez* court's injunction, and therefore the Department has authority to enforce the 2008 Rule and the Board does not lack jurisdiction.

CONCLUSION

For these reasons, as well as those stated in the Administrator's Opening Brief, the Administrator requests that the Board reverse the ALJ's decision and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 8, 2019, a true copy of the foregoing Acting Administrator's Reply Brief and Supplemental Appendix were sent electronically to:

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