ARB No. 2020-0022

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

v.

CTO/CHF PARTNERSHIP dba CIDER HILL FARM
Respondent.

On Appeal from the
Office of Administrative Law Judges
ALJ No. 2019-TAE-00010

ADMINISTRATOR'S REPLY BRIEF

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH K. MARCUS
Deputy Associate Solicitor

RACHEL GOLDBERG
Counsel for Appellate Litigation

KATELYN J. POE
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., NW
Room N-2716
Washington, D.C., 20210
(202) 693-5304

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Immigration and Nationality Act

Code of Federal Regulations

Other Authorities **Pages**

ARB No. 2020-0022

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

v.

CTO/CHF PARTNERSHIP dba CIDER HILL FARM
Respondent.

On Appeal from the
Office of Administrative Law Judges
ALJ No. 2019-TAE-00010

ADMINISTRATOR'S REPLY BRIEF

In her Opening Brief, the Administrator ("Administrator") of the Department of Labor's ("Department") Wage and Hour Division ("WHD") argued that the Administrative Law Judge ("ALJ") erred in holding that corresponding employment under the Department's H-2A regulations is limited to "U.S. workers" because the plain language and structure of the statute and its implementing regulations include within corresponding employment any worker who is not an H-2A worker and is performing the requisite work for an H-2A employer. Therefore, the Administrative Review Board ("ARB") should reverse

the ALJ's December 9, 2019 decision and order dismissing the Administrator's claims against Respondent with respect to Respondent's non-H-2A workers.

In its Response Brief, Respondent argues that the H-2A program's corresponding employment requirements apply only to U.S. workers under the plain language of the regulations, that this reading is the only interpretation that is consistent with the program's central purpose of protecting U.S. workers, and that it has been adopted by the Department itself. Resp. Br. 4-37. Respondent also argues that a finding that its J-1 visa holders were engaged in corresponding employment would be inconsistent with the J-1 visa program's requirements, and that the Government has other available remedies to address alleged J-1 visa program abuses. *Id*. 37-46.

Respondent's position is flawed, as it relies on the unwarranted inference that the only means to achieve the statute's goal of preventing adverse effects on U.S. workers is to limit corresponding employment to U.S. workers only. Respondent's arguments also contravene the plain language and structure of the H-2A regulations, misread Departmental guidance as limiting corresponding employment to only U.S. workers, and unduly attempt to expand the issues and authorities relevant to this appeal. The following points in particular merit a reply.

A. The Plain Language and Structure of the Regulations Apply the H-2A Program's Corresponding Employment Requirements to All Workers Engaged in Corresponding Employment, Not Limited to U.S. Workers, Consistent with the Purpose of the Statute and Regulations.

Respondent acknowledges that the "specific wage control provisions" of the H-2A program are found at 20 C.F.R. 655.122(l), which requires H-2A employers to pay "the worker" the H-2A wage rate, without referencing U.S. workers or workers in corresponding employment. Resp. Br. 11-12. As reflected in the ARB's decision in *Administrator v. Overdevest Nurseries, L.P.*, ARB No. 16-047, 2018 WL 2927669, at *12 (ARB Mar. 15, 2018) (*Overdevest I*), and as affirmed by the district court in *Overdevest Nurseries, L.P. v. Scalia*, No. 1:18-CV-01347, 2020 WL 1873491, at *2 (D.D.C. Apr. 15, 2020) (*Overdevest II*), section 655.122(l)'s wage obligations extend to both H-2A workers and workers in corresponding employment. *See also* 20 C.F.R. 655.120(a) ("To comply with its obligation under § 655.122(*l*), an employer must offer, advertise in its recruitment, and *pay* a wage that is the highest of the [Adverse Effect Wage Rate ("AEWR")], the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage . . . ." (emphasis added)); *id.* at 655.122(q) (requiring the employer to provide a copy of the work contract containing the material terms and conditions of employment required by the H-2A regulations, including the H-2A wage rate, to "a worker in corresponding employment").

Respondent summarily asserts, however, that "the worker" in section

655.122(l) can only mean a U.S. worker or H-2A worker because a different provision—section 655.122(a)—references only those two groups. Resp. Br. 11-12 n.3. Respondent's reliance on section 655.122(a) is misplaced. Section 655.122(a) is not relevant here, as it governs the wages and working conditions that must be offered to U.S. workers as part of the employer's recruitment efforts. The employer's obligations to U.S. workers under section 655.122(a) are separate and distinct from the employer's obligations to its H-2A workers and its workers engaged in corresponding employment, such as the requirement at issue here under section 655.122(l), which sets the minimum wage rate that the employer must pay.[1] As detailed in the Administrator's Opening Brief, the 2010 Rule defines corresponding employment to include all workers performing the requisite work for an H-2A employer, not only those newly hired pursuant to section 655.122(a) recruitment. *See* Op. Br. 27-28.

Adopting the same flawed rationale as the ALJ, Respondent further argues that

[1] Respondent's reliance on the ARB's decision in *Administrator v. Seasonal Ag Services, Inc.*, ARB No. 15-023, 2016 WL 5887688 (ARB Sept. 30, 2016) and the Tenth Circuit's decision in *Llacua v. Western Range Ass'n*, 930 F.3d 1161, 1170 n.11 (10th Cir. 2019), Resp. Br. 11-12 n.3, is likewise misplaced. *Seasonal Ag* concerned only U.S. workers engaged in corresponding employment, *Seasonal Ag*, 2016 WL 5887688, at *2, and *Llacua* did not involve corresponding employment at all, *Llacua*, 930 F.3d at 1161. The court's language in *Llacua* cited by Respondent reflects only that the AEWR is the minimum wage that must be paid to "the worker," and that the AEWR is a critical component in preventing adverse effect on U.S. workers. *Id.* at 1170 n. 11.

section 655.122(l) requires payment of the H-2A wage rate to only U.S. workers in corresponding employment because the ARB used the terms "corresponding employ[ee]" and "U.S. worker" interchangeably when discussing section 655.122(a) in *Overdevest I*. Resp. Br. 12-13, 33. For the reasons set forth in the Administrator's Opening Brief, however, this reasoning misapplies the ARB's decision in *Overdevest I*, and contravenes the plain language and structure of the regulations. Op. Br. 15 n.4, 24-32. Specifically, reading the regulations as the ALJ and Respondent suggest would conflict with and render superfluous the regulations' references to and the definition of workers in corresponding employment. *Id*. 24-32. Additionally, to the extent that Respondent is arguing that section 655.122(a) is the source of an employer's obligation to pay the H-2A wage rate to workers in corresponding employment, it is not; as explained above, section 655.122(l) is the authority for this obligation.

The text and structure of the H-2A regulations demonstrate that "the worker" in section 655.122(l) to whom the H-2A employer must pay the AEWR necessarily includes both H-2A workers and *all* workers engaged in corresponding employment, not limited to U.S. workers. Rather than looking to section 655.122(a) to determine the scope of workers that may be engaged in corresponding employment, and thus due the H-2A wage rate, the ARB should look to the definition of corresponding employment itself, as the plain language of that definition answers the question

presented in this case. 20 C.F.R. 655.103(b), 29 C.F.R. 501.3(a). As detailed in the Administrator's Opening Brief, the regulations define workers in corresponding employment broadly to include any "worker who is not an H-2A worker" employed by an H-2A employer while performing the requisite work. *Id.*; Op. Br. 16-24. Nothing in this regulatory definition limits corresponding employment to U.S. workers.

Respondent correctly notes that the statute and the Department's H-2A regulations reflect an intent to protect U.S. workers from being adversely affected by the hiring of H-2A workers. Resp. Br. 4-11. Respondent errs, however, in claiming that fulfilling this purpose requires that corresponding employment apply only to U.S. workers and implying that every provision of a regulatory scheme must directly fulfill the statute's broad purposes. *Id*. 8-13. As a threshold matter, Respondent cites no authority for the proposition that every provision of a regulation must advance the overarching goals of a statute or regulations. *Id*. Moreover, as noted in the Administrator's Opening Brief, federal courts and the ARB have long recognized that a statute or regulation should be given its plain meaning "unless a clearly express legislative intent is to the contrary or unless the plain meaning would lead to absurd results." Op. Br. 16-17 (citations omitted). As discussed further below, applying the plain language of the regulations to include within corresponding employment any worker who is not an H-2A worker is entirely consistent with and furthers the

protection of U.S. workers. That another interpretation of a regulation also may be consistent with the legislative or regulatory intent is insufficient to set aside the plain language of a regulation. Thus, the ARB need look no further than the plain language of the regulation and apply it as written to include within corresponding employment any worker who is not an H-2A worker, not limited to U.S. workers. *Id*.

Regardless, and as detailed in the Administrator's Opening Brief, requiring the payment of the H-2A wage rate to all workers in corresponding employment is entirely consistent with the statute's central purpose in protecting U.S. workers. Op. Br. 6-7, 17-18. Indeed, requiring payment of the AEWR to *all* workers in corresponding employment, not only U.S. workers, is a critical measure to achieve the statute's mandate to prevent a depressive effect on the wages of the U.S. workers. *Id*. 17-18. If the ALJ's decision stands, and H-2A employers do not have to pay the H-2A wage rate to non-U.S. workers performing the same work as H-2A workers, then employers could potentially supplement their H-2A workforces with non-U.S. workers to perform H-2A work for substantially less pay. *Id*. That result would put agricultural H-2A employers who hire only U.S. workers to perform corresponding employment work at a significant competitive disadvantage vis-à-vis H-2A employers who also utilize non-U.S., non-H-2A workers for such work, and could

thereby drive down the wages of agricultural U.S. workers. *Id*.[2] Respondent's argument is therefore fundamentally flawed because it draws an unwarranted inference from the purpose of the statute and regulations to conclude that there is only one means of achieving that purpose, i.e., by limiting corresponding employment to U.S. workers. On the contrary, applying corresponding employment to *all* workers so engaged serves the purpose of preventing adverse impacts on U.S. workers when an employer participates in the H-2A program.

B. The Department's Guidance Does Not Limit the H-2A Program's Corresponding Employment Requirements to Only U.S. Workers.

Respondent argues that the Department itself has adopted Respondent's interpretation (limiting corresponding employment to U.S. workers) in various guidance documents on which Respondent was entitled to rely. Resp. Br.13-28. This argument fails because, as an initial matter, the regulation itself notifies the regulated community that the Department includes within the scope of corresponding

[2] The U.S. Department of Agriculture's Farm Labor Survey ("FLS"), the survey of wages on which the AEWR is based, collects and reflects the wages paid to *all* hired farm or ranch workers, indiscriminate of and unrelated to whether the worker is a U.S. worker as defined in the Department's H-2A regulations. *See* 2010 Rule, 75 Fed. Reg. at 6895 (discussing AEWR methodology). Thus, when reflected in the FLS survey, lower wages paid to non-U.S. workers in corresponding employment could stagnate or even pull down the resulting AEWR. The Department has long recognized the potential stagnating and even depressive effect of low agricultural wages paid to non-U.S. workers on the wages of U.S. agricultural workers generally. *Id*. at 6894 (discussing potential depressive effect of wages paid to non-U.S. workers, which represent a significant portion of the agricultural workforce in the United States, on wages of U.S. workers).

employment all non-H-2A workers performing the requisite work for an H-2A employer, not limited to U.S. workers, for the reasons detailed in the Administrator's Opening Brief and above. In addition, none of the guidance cited by Respondent adopts the ALJ's interpretation of the regulations or even squarely addresses the issue presented in this case, i.e., whether corresponding employment is limited to U.S. workers.

Respondent first argues that the regulatory history supports its reading of the regulations, limiting corresponding employment to U.S. workers. Resp. Br. 15-18. The Department promulgated the regulations controlling here in 2010. *See* U.S. Dep't of Labor, *Temp. Agric. Emp't of H-2A Aliens in the U.S.*, 75 Fed. Reg. 6884 (Feb. 12, 2010) (Final Rule) ("2010 Rule").[3] As Respondent accurately notes, the Department's primary intent in promulgating the 2010 Rule was to provide greater protections to U.S. workers than afforded under the 2008 Rule. Resp. Br. 15-17 (citing preamble to 2009 notice of proposed rulemaking and preamble to 2010 Rule). This central purpose of protecting U.S. workers, Respondent infers, must therefore evidence an intent to limit the 2010 Rule's corresponding employment requirements to U.S. workers only. *Id*.

[3] As detailed in the Administrator's Opening Brief, prior to issuing the 2010 Rule, the H-2A program was governed by regulations issued in 2008 (the "2008 Rule"), which in turn replaced the Department's previously longstanding regulations issued in 1987 (the "1987 Rule"). Op. Br. 25-27.

There is no basis for Respondent's inference. Indeed, such an inference is inconsistent with the fact that, in undertaking the rulemaking that resulted in the 2010 Rule bolstering protections for U.S. workers, the Department reviewed the "protections afforded under [the 2008 Rule] to *all agricultural workers in general* and the domestic workforce in particular." U.S. Dep't of Labor, *Agric. Emp't of H-2A Aliens in the U.S.*, 74 Fed. Reg. 45,906, 45,907-08 (Sept. 4, 2009) (Notice of Proposed Rulemaking) (emphasis added). The Department thus contemplated that the H-2A regulations afforded protections for the agricultural workforce generally, beyond only U.S. workers, indicating that the Department considered such protections as relevant to the Department's primary goal of promoting the hiring of and preventing adverse effect on U.S. workers. Moreover, as noted above, Respondent's rationale erroneously conflates the statute's primary *purpose* of protecting U.S. workers, as reflected in the Department's regulations, with the specific measures the Department adopted to effectuate that purpose, and misconstrues how the scope of corresponding employment seeks to prevent adverse effects on U.S. workers.

Respondent's view of the regulatory history also discounts the plain language of both the 1987 and 2010 Rules. As detailed in the Administrator's Opening Brief, the 1987 Rule included within corresponding employment "'*other workers* hired by employers of H-2A workers in the occupations and for the period of time set forth in

the job order.'" Op. Br. 26 (quoting 52 Fed. Reg. at 20,527). The preamble to the 1987 Rule further clarified that corresponding employment included both U.S. and *other workers.* *Id.* (citing 52 Fed. Reg. at 20,524). Respondent acknowledges that in promulgating the 2010 Rule, the Department intended to return to the requirements of corresponding employment under the 1987 Rule, with one exception not relevant here. Resp. Br. 14. Respondent does not acknowledge, however, either the 1987 Rule's plain language or the explanatory preamble. And Respondent discounts the significance of both the fact that the 2008 Rule introduced the term "U.S. workers" into the definition of corresponding employment, which had not been previously included in the regulatory definition, and the subsequent removal of this limiting language from the 2010 Rule. The most that Respondent offers by way of explanation is that this language "disappeared" when the Department promulgated the 2010 Rule. *Id*. 15. Respondent further surmises that this case would be clearly resolved if only the Department had retained the 2008 Rule's explicit limitations to U.S. workers in corresponding employment. *Id*. But that is exactly the Administrator's point: the 2008 Rule expressly limited its application to U.S. workers in corresponding employment; the 1987 Rule and the 2010 Rule—controlling here—do not.

Respondent also cites to the ARB's Decision in *Overdevest I* to argue that the Department has adopted Respondent's interpretation of corresponding employment.

Resp. Br. 20-24. Specifically, Respondent posits that the ARB's insertion of "U.S. domestic" to modify "workers" in the regulatory language as part of its discussion of corresponding employment was intended to "harmonize the regulatory text with its express purpose." *Id*. 20-21. As detailed in the Administrator's Opening Brief, however, the ARB in *Overdevest I* did not address the question presented in this case and did not purport to limit corresponding employment to U.S. workers. Op. Br. 29-34. And there is no indication in *Overdevest I* that the ARB had any such intention. As discussed above, the statute's purpose of protecting U.S. workers is entirely consistent with including all non-H-2A workers within the scope of corresponding employment. Thus, there was no need to "harmoniz[e]" the regulatory text with the statutory purpose.

Respondent further suggests that the ARB's insertion of "U.S. workers" into the statutory text at 8 U.S.C. 1188(a)(1)(A), when discussing the statute's mandate that H-2A workers be hired only where able, willing and qualified U.S. workers are unavailable, reflects the ARB's intent to interpret corresponding employment as limited to U.S. workers. Resp. Br. 22 n.6. Respondent's argument here again reflects a misunderstanding of the central role of corresponding employment in satisfying the statute's prohibition on adverse effects. The ARB's discussion cited by Respondent concerned the recruitment mandate of 8 U.S.C. 1188(a)(1)(A), which is appropriately limited to U.S. workers and is separate and distinct from section

1188(a)(1)(B)'s requirement that the hiring of H-2A workers not adversely affect U.S. workers. *Overdevest I*, 2018 WL 2927669, at *1 n.4. It is this second requirement that the Department's corresponding employment regulations are intended to address. *Id*.; *accord Overdevest II*, 2020 WL 1873491, at *2. Accordingly, the ARB's recognition that 8 U.S.C. 1188(a)(1)(A) and its implementing regulations are limited to U.S. workers has no bearing on whether the Department's corresponding employment regulations are similarly constrained.[4]

Respondent next points to more recent Departmental guidance that Respondent argues evidences an understanding by the Department that corresponding employment is limited to U.S. workers, including the Department's July 26, 2019 notice of proposed rulemaking in the H-2A program. Resp. Br. 24-27 (citing U.S. Dep't of Labor, *Temp. Agric. Emp't of H–2A Nonimmigrants in the U.S.*, 84 Fed. Reg. 36,168 (July 26, 2019) (Notice of Proposed Rulemaking) ("2019 NPRM")). In the 2019 NPRM, the Department proposed several changes designed to update the H-2A program's procedures and requirements, while maintaining and enhancing protections for U.S. workers. *See* 2019 NPRM, 84 Fed. Reg. at 36,169. Respondent

[4] Respondent also cites to Fact Sheet 26 and the Department's press release issued after the ALJ issued its decision in the *Overdevest* litigation to argue that the Department has adopted Respondent's interpretation of corresponding employment. Resp. Br. 18-23. As detailed in the Administrator's Opening Brief, Fact Sheet 26 (and similarly, the Department's press release, which uses similar language to Fact Sheet 26) does not purport to limit corresponding employment to U.S. workers only. Op. Br. 32-34.

thus argues that by intending to maintain protections for U.S. workers, the 2019 NPRM reflects an understanding that corresponding employment is limited to U.S. workers. Resp. Br. 24-27. This is incorrect. Rather, for the reasons set forth above, the Department's intent to maintain protections for U.S. workers is entirely consistent with and furthered by applying the corresponding employment requirements to all non-H-2A workers so engaged, not limited to U.S. workers.[5] The only specific proposal from the 2019 NPRM that Respondent cites concerns the past wages paid to agricultural workers that the Department will consider in determining prevailing wage rates (rather than the AEWR, as Respondent states), and has no bearing on the workers to whom an H-2A employer must pay the applicable H-2A wage rate during the certified work contract period. Resp. Br. 25-26 (citing 2019 NPRM).

Finally, Respondent asserts that the Department's recently issued emergency

[5] As Respondent notes, the Department did not propose any changes in the 2019 NPRM to the definition of corresponding employment. *See* 2019 NPRM, 84 Fed. Reg. at 36,262. Respondent apparently suggests that the Department should have revised or clarified its regulations to explicitly cover the factual circumstances present here if indeed the ALJ's holding in this case presents such significant policy concerns as the Administrator alleges. Resp. Br. 25-26. But when applied correctly, as the Administrator urges the ARB to do in this case, the regulations already require the payment of the H-2A wage rate to all workers in corresponding employment, not limited to U.S. workers. And in any event, any possible changes proposed in the 2019 NPRM would be completely irrelevant to the scope of corresponding employment under the 2010 Rule, controlling here.

guidance addressing H-2A program flexibilities in light of the COVID-19 pandemic reflects the Department's interpretation of corresponding employment as limited to U.S. workers because it refers to "domestic workers in corresponding employment." Resp. Br. 27-28. Respondent is reading more into this guidance than is warranted. This guidance, to the degree it touches upon corresponding employment, is focused on the tasks that H-2A workers and workers engaged in corresponding employment may perform and the worksites at which they may perform these tasks; the Department provided that, based on the unique circumstances of the pandemic, it would be permissible for such workers to perform certain tasks not specifically listed in the H-2A job order or to place such workers at certain other worksites not listed in the job order, but only as necessary due to the pandemic and related measures. Resp. Br., Ex. B. As with Fact Sheet 26, *see* Op. Br. 24-26, this emergency guidance does not purport to limit the H-2A regulations' application to U.S. workers in corresponding employment and is not intended to address or define the full scope of workers in corresponding employment. Likewise, even if read as Respondent suggests, this guidance cannot control over the plain language of the Department's regulations, which apply to all workers in corresponding employment, not limited to U.S. workers.

C. The Administrator's Position Is Consistent with Prior Departmental Guidance and Is an Authorized Exercise of the Administrator's Enforcement Discretion.

Respondent argues that the Administrator's position in this case deserves no

deference because it would represent a "radical departure" from prior Departmental guidance on which Respondent was entitled to rely. Resp. Br. 28-37. As an initial matter, Respondent has created a strawman argument regarding deference because the Administrator is not seeking deference by the ARB to her position.

Respondent's reliance argument is also without merit, even if the above guidance could be read in the manner Respondent suggests. This case does not present the same concerns of "unfair surprise" at issue in the authorities cited by Respondent. As detailed in the Administrator's Opening Brief, the plain language of the regulations at issue here provide notice to the regulated community that the H-2A corresponding employment requirements apply to all "workers who are not H-2A workers." Op. Br. 24-29. Since 1987, with the exception of the brief tenure of the 2008 Rule, the Department has included within the scope of corresponding employment all workers performing the requisite work, not limited to U.S. workers. *Id.* And as detailed above, applying the requirements of the H-2A regulations to all workers in corresponding employment, not limited to U.S. workers, is entirely consistent with the statute's mandate to prevent adverse effect on workers in the United States similarly employed.

Moreover, the Administrator's position is not merely a "convenient litigating position," Resp. Br. 31 (quoting *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 155 (2012)), but instead may be inferred from various other preexisting

Departmental guidance. *See*, *e.g.*, Preamble to 2010 Rule, 75 Fed. Reg. at 6885 ("all workers" employed by H-2A employers doing work performed by H-2A workers are considered engaged in corresponding employment); H-2A Employee Rights Card (referring to "other workers"); H-2A Employee Rights Poster (also referring to "other workers"); 2010 Rule Roll Out Presentation, slide 7 (reflecting regulatory language defining corresponding employment to include "workers who are not H-2A workers") (*all available at* https://www.dol.gov/agencies/whd/agriculture/h2a).

Respondent notes that counsel for the Administrator stated at oral argument on the Motion to Dismiss that WHD has brought only one other H-2A enforcement case involving J-1 interns in corresponding employment. Resp. Br. 13 n.4. This fact only reflects that the employment of *J-1 interns* specifically in corresponding employment is a relatively novel enforcement scenario for WHD.[6] Additionally, WHD has previously investigated, determined, and announced publicly that an H-2A employer violated the H-2A program's requirements with respect to J-1 visa holders. *See* U.S. Dep't of Labor, News Release, *U.S. Labor Department Finds $576K in Back Wages, Restitution for Dominican Republic Farm Workers Who*

[6] The Administrator need not and generally does not inquire into whether workers in corresponding employment are "U.S. workers" as defined in the H-2A regulations. Accordingly, the Administrator has no data on the number of prior cases involving non-U.S. workers engaged in corresponding employment.

'Paid' to Pick Vegetables, 2016 WL 4473305 (Aug. 25, 2016). In 2016, as part of a joint effort between WHD and the Departments of Justice, State, and Homeland Security, and subsequent to WHD's investigation, an H-2A employer pled guilty to conspiracy to commit fraud in labor contracting. *Id*. Among other H-2A violations, WHD determined that the employer committed wage violations and owed almost $200,000 in back wages to H-2A workers and J-1 visa holders in corresponding employment (the remaining amount owed was restitution of unlawful kickbacks that the employer demanded of the workers). *Id*.[7] Thus, the Administrator's position in this case is not a "theory of first impression," Resp. Br. 29, but simply presents a case of first impression of a specific fact pattern. The application of the plain language of the regulations to Respondent's workforce is an authorized exercise of the Administrator's enforcement discretion, "an area in which the courts have traditionally been most reluctant to interfere." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (declining to interfere with Secretary's exercise of enforcement discretion).

D. Respondent's Additional Arguments Are Not Relevant to This Appeal.

In addition to its above arguments, Respondent asserts that the ARB should

[7] This matter did not result in the typical administrative proceedings as contemplated under the H-2A regulations because, instead, WHD coordinated with other federal departments, which ultimately resulted in criminal proceedings against this employer.

affirm the ALJ's decision because applying corresponding employment to its J-1 visa holders would be, according to Respondent, incompatible with the J-1 internship program's purpose and intent because J-1 interns are not permitted to be engaged in ordinary employment. Resp. Br. 37-46. At bottom, Respondent's argument is that its J-1 visa holders were not employees but rather interns, and thus not subject to the H-2A program's requirements on this distinct basis. This argument, however, is entirely unrelated to the question before the ARB on review of the ALJ's order granting Respondent's motion to dismiss, i.e., whether, as a purely legal matter, the Department's H-2A corresponding employment requirements are limited to U.S. workers. As detailed above, the answer to this question is no.

As noted in the Administrator's Opening Brief, employment under the H-2A program is defined by the common law of agency. Op. Br. 11-12 n.2 (citing 20 C.F.R. 655.103(b); 29 C.F.R. 501.3(a)). Whether a particular J-1 visa holder is engaged in corresponding employment with H-2A workers will depend on the actual facts and circumstances surrounding the working relationship with the H-2A employer. *Id*. Here, WHD determined after an investigation that Respondent's J-1 visa holders were employed under the common law of agency, and at times engaged in corresponding employment. *Id*. However, given the procedural posture of this case, WHD has not had the opportunity to conduct discovery into the details of the putative employment relationship, nor to present to the ALJ the facts and

circumstances surrounding the work at issue here. *Id.* Thus, Respondent's argument that its J-1 visa holders were not engaged in corresponding employment because they were not employees is premature and not relevant to the purely legal issue on appeal here.

Even if relevant, Respondent's argument lacks merit. The Administrator is enforcing only the H-2A program's requirements as to Respondent's workforce, including any workers engaged in corresponding employment, as she is authorized to do. As explained above, the primary purpose of the H-2A statute and regulations is to protect U.S. workers. The Department's corresponding employment protections are a critical component of that regulatory scheme. Under the ALJ's decision, H-2A employers could engage non-U.S. workers to perform some of the same work as H-2A and U.S. workers but for less pay, creating a potential loophole in the H-2A program's protections. It is thus the circumvention of the Department's carefully considered *H-2A regulatory scheme*, rather than the J-1 visa program's, that the Administrator seeks to prevent.

Similarly, Respondent's argument that the Government has alternative remedies available to address any J-1 visa program abuses is irrelevant. Resp. Br. 43-46. The Administrator is not seeking to remedy or even alleging J-1 visa program abuses, nor is the Administrator alleging FLSA violations. Rather, the Administrator alleges only that Respondent, an H-2A employer, failed to comply

with its obligations under the H-2A program to pay the required H-2A wage rate and inbound transportation costs to its non-H-2A workers engaged in corresponding employment. That these workers may have available protections and remedies under other statutes is irrelevant to this case.

CONCLUSION

For the above reasons and those stated in the Administrator's Opening Brief, the Administrator respectfully requests that the ARB reverse the ALJ's December 9, 2019 decision and order dismissing the Administrator's claims against Respondent with respect to its non-H-2A workers.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH K. MARCUS
Deputy Associate Solicitor

RACHEL GOLDBERG
Counsel for Appellate Litigation

s/Katelyn J. Poe
KATELYN J. POE
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., NW Rm. N-2716
Washington, D.C. 20210
(202) 693-5304

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I served the foregoing Administrator's Reply Brief on Respondent solely via electronic mail as follows, with agreement of opposing counsel and in light of the shift in operations resulting from the COVID-19 pandemic:

Ellen C. Kearns, Esq.
ekearns@constangy.com
Jonathan D. Persky, Esq.
jpersky@constangy.com

/s/Katelyn J. Poe
Katelyn J. Poe