ARB No. 2023-0040

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 OPENING BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Cases – Continued

Cases – Continued

Statutes

Code of Federal Regulations

Code of Federal Regulations – Continued

Other Authorities

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The Administrator ("Administrator") of the Wage and Hour Division ("WHD") respectfully requests that the Administrative Review Board ("Board" or "ARB") reverse the portions of the Administrative Law Judge's ("ALJ") October 13, 2022 Decision and Order that found that Lucero Pool Plaster, Inc. ("Respondent" or "Lucero") did not violate its obligations under the H-2B program for its willful preferential treatment of foreign workers and that reduced the civil money penalties ("CMPs") and period of debarment associated with the violations the ALJ did find.

JURISDICTION AND STANDARD OF REVIEW

This case arises under the H-2B temporary foreign worker provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c)(14), and the U.S.

Department of Labor's ("the Department" or "DOL") H-2B regulations, 20 C.F.R. Part 655, Subpart A and 29 C.F.R. Part 503, Subpart B. In 2018, the Administrator brought an H-2B enforcement action against Lucero. Lucero sought review of the Administrator's determination and requested a hearing before an ALJ. A hearing was held in July 2021, and the ALJ issued a decision on June 20, 2023. *Administrator v. Lucero Pool Plaster, Inc.*, ALJ No. 2019-TNE-00011 (OALJ June 20, 2023) ("D&O"). Having been granted an extension, the Administrator timely filed a Petition for Review of the D&O on August 21, 2023.

The Board has jurisdiction to review an ALJ's decision and issue the final determination of the Secretary of Labor ("Secretary") under the H-2B program. U.S. Dep't of Labor, Secretary's Order 01-2020, *Delegation of Authority and Assignment of Responsibility to the ARB*, 85 Fed. Reg. 13,186, 2020 WL 1065013 (Mar. 6, 2020). 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).

STATEMENT OF THE ISSUES

1. Whether the ALJ erred in determining that Lucero's willful preferential treatment of foreign workers was not a substantial failure to comply with 29 C.F.R. 503.16(q).

2. Whether the ALJ erred in not imposing CMPs equal to the amount of back wages owed for Lucero's violations related to wages, consistent with 29 C.F.R. 503.23(b), and instead

relying on factors provided in 29 C.F.R. 503.23(e) to reduce these CMPs.

3. Whether the ALJ erred in reducing the Administrator's CMP assessment for Lucero's substantial failure to pay the offered wage for all hours worked by 50 percent, based on the size of the Lucero's business.

4. Whether the ALJ erred in ruling that multiplying the CMPs for the number of states in which Lucero placed workers outside the area of intended employment was unreasonable.

5. Whether the ALJ erred in giving undue weight to whether Lucero had a previous history of violations as a basis for reducing the CMPs for all of the violations.

6. Whether the ALJ erred in reducing the debarment period from three years to the minimum of just one year.[1]

STATEMENT OF THE CASE

I. Relevant Statutory and Regulatory Framework

A. *Overview of H-2B Program*

The H-2B program permits the employment of nonimmigrants to perform temporary, non-agricultural labor or services, but only if "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). By regulation, DOL must certify to the Department of Homeland Security ("DHS") "whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of

[1] Although the Administrator's petition for review listed as a separate issue the ALJ's failure to consider harm to U.S. workers when reducing CMPs for placing workers outside the area of intended employment, the Administrator is no longer treating this as a distinct issue. Rather, the ALJ's failure to consider the harm to U.S. workers caused by Lucero's violations is relevant to all the issues raised herein.

similarly employed United States workers." 8 C.F.R. 214.2(h)(6)(iii)(A).

Pursuant to 8 U.S.C. 1184(c)(14)(A)(i) and (B), DHS delegated to DOL its investigative and enforcement authority to assure compliance with the terms and conditions of employment under the H-2B program. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24,042, 24,045 (Apr. 29, 2015) ("2015 Rule"). In 2015, DOL and DHS jointly issued regulations setting out the framework for DOL to issue H-2B labor certifications, in 20 C.F.R. Part 655, Subpart A, as well as regulations for DOL to investigate and enforce the program in 29 C.F.R. Part 503, Subpart B. The 2015 Rule went into effect on April 29, 2015, 80 Fed. Reg. at 24,042, and governs this matter.

Under the applicable regulations, employers seeking to employ H-2B workers must obtain a certification from DOL before they petition DHS to employ H-2B workers. 20 C.F.R. 655.1. To obtain the certification, the employer must file ETA Form 9142B, H-2B Application for Temporary Employment Certification ("TEC"), with DOL. 20 C.F.R. 655.15. As part of the certification process, the employer must undertake efforts to recruit U.S. workers to ensure there are no qualified U.S. workers available for the position(s) it intends to fill with H-2B workers. 20 C.F.R. 655.40(a). These efforts must include recruiting U.S. workers in all the geographical areas of intended employment listed in the TEC by submitting a job order to the State Workforce Agency ("SWA") serving each area of intended employment. 20 C.F.R. 655.16(a)(1). A job order is a document containing all the material terms and conditions of employment for the position(s) for which H-2B workers are sought. 20 C.F.R. 655.5. The employer must also advertise the position(s) to U.S. workers, and the advertisements must describe the geographical area of intended employment "with enough specificity to apprise applicants of any travel

requirements and where applicants will likely have to reside to perform the services or labor."[2] 20 C.F.R. 655.41(b)(2). In its recruiting and advertising, the employer must offer the same wage and other benefits and terms and conditions of employment that it will offer H-2B workers. 20 C.F.R. 655.18.

On the TEC, the employer must attest that it will abide by the terms and conditions set by the H-2B regulations. 29 C.F.R. 503.16. By submitting the TEC, the employer represents that the statements on its forms are accurate and that it knows and accepts the obligations of the H-2B program. 29 C.F.R. 503.19(d). The H-2B employer's obligations are designed to ensure that the employment of H-2B workers does not displace qualified U.S. workers or adversely affect their wages or working conditions, in accordance with 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 8 C.F.R. 214.2(h)(6)(iii)(A). As relevant here, H-2B employers are prohibited from offering different working conditions to U.S. workers than they offer to H-2B workers, refusing to hire U.S. workers for reasons that are unrelated to the job, and placing H-2B workers in locations other than the area of intended employment indicated in the TEC. 29 C.F.R. 503.16(q), (r), (x).

Additionally, several employer obligations afford protections to H-2B workers. Employers must pay H-2B workers at the offered wage rate set forth in the TEC and must do so during the entire certification period. 29 C.F.R. 503.16(a). And they must pay or reimburse H-2B workers for their transportation and subsistence costs. 29 C.F.R. 503.16(j). They also must disclose the job order to the workers and contractually forbid, in writing, the employer's agents

[2] During the period of time relevant here, employers were affirmatively required to advertise positions in newspapers serving the area of intended employment. 2015 Rule, 80 Fed. Reg. at 24,124. This requirement has since been rescinded and electronic advertising requirements have been added. *Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States*, 84 Fed. Reg. 62,431 (Nov. 15, 2019).

and recruiters from seeking payments from the workers. 29 C.F.R. 503.16(*l*), (p).

After the Department certifies an employer's TEC Application, the employer submits to DHS an approved labor certification, along with its petition to employ H-2B workers. 8 C.F.R. 214.2(h)(6)(iv).

B. *DOL's Enforcement Authority*

Within DOL, the authority to investigate and enforce compliance with the H-2B program is delegated to the Administrator for WHD. 29 C.F.R. 503.7(a); *see also* 29 C.F.R. 503.4 ("Administrator, Wage and Hour Division means the primary official of the WHD or Administrator's designee").

As relevant here, an employer commits a violation when it substantially fails to meet the terms and conditions attested to on the TEC or the petition. 8 U.S.C. 1184(c)(14)(A); 29 C.F.R. 503.19(a). A substantial failure is defined as a "willful failure to comply with the [H-2B provisions] that constitutes a significant deviation from the terms and conditions of the petition." 8 U.S.C. 1184(c)(14)(D). Under the regulations, a "willful failure" occurs when the employer, its attorney, or agent 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). In determining whether a willful failure to comply is a "significant deviation," the Administrator "may consider" several factors including but not limited to: (1) 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).

After investigating and determining that an employer has violated the requirements of the H-2B program, the Administrator may assess remedies, including the recovery of back wages owed to workers, the assessment of CMPs, and debarment from the H-2B program. 29 C.F.R. 503.20(a). For violations related to wages, impermissible deductions, or prohibited fees and expenses, the Administrator may assess CMPs "that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s)," subject to a maximum of $12,383.[3] 29 C.F.R. 503.23(b). For all other violations relevant here (i.e., violations not related to wages, deductions, fees, or expenses), the Administrator may assess CMPs up to the maximum of $12,383 per violation. 29 C.F.R. 503.23(d). For CMP assessments related to such violations, the Administrator may consider the type of violation committed and other relevant factors including: (1) any previous history of H-2B violations by the employer; (2) the number of workers affected by the violation; (3) the gravity of the violation; (4) the good-faith efforts by the employer to comply; (5) the employer's explanation for the violation; (6) the employer's commitment to future compliance; and (7) the extent to which the employer achieved a financial gain or workers suffered a potential financial loss. 29 C.F.R. 503.23(e). The "highest penalties" are reserved for violations that "involve harm to U.S. workers." 8 U.S.C. 1184(c)(14)(C); 29 C.F.R. 503.23(e).

The Administrator may debar employers from the H-2B program for a period of no less than one year and no more than five years. 29 C.F.R. 503.24(c). Debarrable violations include

[3] By statute, this maximum 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. *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7, 8, 12-13 (Jan. 2, 2018).

the failure to pay required wages, the employment of H-2B workers outside the area of intended employment, and "[a]ny other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected." 29 C.F.R. 503.24(a).

II. Statement of Facts

A. *Lucero's Participation in the H-2B Program*

1. Lucero is a swimming pool plastering and remodeling firm based in Schaumburg, Illinois, and owned by Hector Alvino Guzman and Carlos Lucero. D&O at 6. Lucero began using the H-2B program in 2015 to obtain seasonal workers during its busy season from April to September. Tr. at 500:25-501:2. In 2015, Lucero employed five H-2B workers. Tr. at 501:23-25.

In 2016, Lucero filed a TEC and DOL certified Lucero to hire 20 H-2B workers as construction laborers for the period of April to September 2016, at the basic pay rate of $27.46 per hour and an overtime rate of $41.19 per hour. D&O at 7-8; JX C at 7. Guzman signed Appendix B to the 2016 TEC, attesting under penalty of perjury to his knowledge of and compliance with the terms and conditions of the H-2B Program. JX C at 9-11. In 2016, Lucero employed 19 H-2B workers (along with around 10 U.S. workers). PX D at 21-22; Tr. at 490:3-6.

In 2017, Lucero filed a TEC and DOL certified Lucero to hire 20 H-2B workers as construction laborers for the period of April to September 2017, at the basic pay rate of $27.35 per hour and an overtime rate of $41.03 per hour. D&O at 8; JX D at 8. Guzman signed Appendix B to the 2017 TEC, attesting under penalty of perjury to his knowledge of and compliance with the terms and conditions of the H-2B Program. JX D at 10-12. In 2017, Lucero employed 17 H-2B workers (along with around eight U.S. workers). PX D at 22; Tr. at 490:11-14.

2. Guzman, on behalf of Lucero, signed Appendix B of the TEC, which includes

Attestation 4, which states: "The employer has not/will not offer terms, wages, and working conditions to U.S. workers that are less favorable than those offered or will be offered to H-2B workers . . . ." JX C at 9; JX D at 10.

Between 2013 and 2017, Lucero worked as many as four union projects per year. Tr. at 508:10-17. In 2016, 12 of Lucero's H-2B workers worked on union projects paying approximately $75 per hour. D&O at 10; PX D at 2-3. In 2017, one of Lucero's H-2B workers worked on a union project paying $75 per hour. D&O at 10; PX D at 3-4. Lucero did not disclose the possibility of higher-paying union jobs in its SWA job orders, advertisements, or TECs in 2016 or 2017. D&O at 10. In both years, Lucero advertised only wages at approximately $27 per hour and an overtime rate of approximately $41 per hour. D&O at 8; JX D at 10-12.

Between 2015 and 2017, Lucero provided housing to its H-2B workers at a house it owned in Wheeling, Illinois, at a rate of $200 per month per worker. D&O at 10; PX D, No.1, Tr. at 37:14-16; 81:18-23; 220:8-17; 501:11-16. In 2015, Lucero housed some of its H-2B workers at this house. Tr. at 37:14-16; 38:19-22; 79:8-10; 81:18-23; 231:8-9. In 2016, Lucero provided housing to 11 H-2B workers. D&O at 10. In 2017, Lucero provided housing to seven H-2B workers. *Id*. In 2016, the house was located immediately adjacent to Lucero's shop, where the workers started each workday. PX B at 2. In 2017, the shop moved to a nearby town. PX B at 3, Tr. at 487:20-23. Lucero did not disclose the possibility of employer-provided housing in its SWA job orders, advertisements, or TECs in 2016 or 2017. D&O at 10. Lucero's SWA job orders for 2016 and 2017 both stated that "[a]ssistance finding and securing board & lodging is not available." *Id*.

3. Guzman, on behalf of Lucero, signed Appendix B of the TEC, which includes Attestation 5, which states that the employer "will pay at least the offered wage . . . during the

entire period of this application" and that the offered wage is at least "the highest of the most recent prevailing wage for the occupation" that DOL has or will issue to the employer for the TEC time period. JX C at 9; JX D at 10.

Lucero admitted that, in both 2016 and 2017, its H-2B workers were paid at a basic rate of $27.11 and an overtime rate of $40.67, which were lower than the rates that Lucero offered and therefore was required to pay in 2016 and 2017. D&O at 14; PX D at 24. Lucero's 2016 TEC listed the offered wage rate as $27.46 and an overtime rate of $41.19. JX C at 7. Lucero's 2017 TEC listed the offered wage rate as $27.35 and an overtime rate of $41.03. JX D at 8.

Lucero's payroll records reflected that H-2B workers worked an average of 31.79 hours per week in 2016 and 36.42 hours per week in 2017. D&O at 27. However, several of Lucero's U.S. and H-2B workers reported in witness statements that the H-2B workers worked 10-11 hours per day and 4-7 days per week. D&O at 29. These workers also reported and testified that they were required to arrive at Lucero's shop to load materials onto the trucks before proceeding together to job sites. D&O at 30; Tr. at 75:22-76:12. They said that it could take three hours, and sometimes all day, to travel between the shop and job sites. Tr. at 44:15-17, 45:9-17. They travelled between the shop and the job sites in vehicles with Lucero's U.S. workers, working the same jobs and hours as Lucero's U.S. workers. PX K at 1, 23, 40; Tr. at 72:8-10, 72:17-73:9, 77:17-21. Therefore, Lucero's H-2B workers worked over 40 hours per week but were not paid for all their hours worked up to 40 and were not paid the overtime rate for the overtime hours they worked. D&O at 29.

4. Guzman, on behalf of Lucero, signed Appendix B of the TEC, which includes Attestation 11, which states: "The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment . . . unless the employer has obtained

a new approved [TEC].” JX C at 10; JX D at 11.

In 2016 and 2017, Lucero sent H-2B workers to work at no less than 50 locations outside of the area of intended employment. D&O at 36-37. Lucero’s 2016 TEC listed only the Cook County-Chicago-Naperville-Joliet Metropolitan Division as the area of intended employment. D&O at 11. In 2016, Lucero’s H-2B workers performed work at six locations in Wisconsin, two locations in Michigan, and five locations in Indiana. D&O at 11-12. Lucero’s 2017 TEC listed only the Cook County-Chicago-Naperville-Arlington Heights Metropolitan Division as the area of intended employment. D&O at 12. In 2017, Lucero’s H-2B workers performed work at 28 locations in Wisconsin, five locations in Michigan, three locations in Indiana, and one location in Iowa. *Id*. Lucero admitted to sending workers outside of the location indicated on its TECs. PX D at 6-13.

5. Guzman, on behalf of Lucero, signed Appendix B of the TEC, which includes Attestation 17, which states: “The employer has disclosed how it will provide transportation and subsistence costs in the job order. The employer will either advance all visa, visa-related, border crossing, subsistence, and transportation expenses to workers traveling to the employer’s worksite, pay for them directly, or reimburse such expenses.” JX C at 10; JX D at 11.

Beginning in 2015, at the recommendation of its attorney, Lucero employed a third-party company, Monarch Butterfly (“Monarch”), to process its H-2B workers’ visas at the U.S. Consulate in Monterrey, Mexico. D&O at 13; Tr. at 29:5-17, 39:9-14 (testimony of H-2B worker regarding his interactions with Monarch in 2015). Lucero claimed that it assumed that Monarch would handle reimbursing the workers for transportation and subsistence costs. D&O at 39.

In 2016 and 2017, Lucero’s H-2B workers spent roughly one day and one night traveling from their respective hometowns to Monterrey, where they stayed in hotels during the 3-4 days

while their visas were processed. D&O at 38-39. Lucero failed to reimburse these workers for their bus fare to Monterrey, their lodging in Monterrey, and all their subsistence costs between their hometowns and Illinois. *Id*. Lucero admitted that it failed to reimburse these inbound transportation and subsistence costs, claiming that it did not know it was required to and that it relied on Monarch and its attorney to handle those matters. *Id*. Lucero arranged for the workers' transportation from Monterrey to Illinois at no cost to the workers through a different third-party company. PX M at 21-22.

At the end of the 2016 work period, Lucero's H-2B workers spent roughly three days and two nights traveling from Illinois back to Mexico. D&O at 39-40. Lucero admitted that it failed to pay for or reimburse all outbound transportation and subsistence costs for these workers. *Id*.

6. Guzman, on behalf of Lucero, signed Appendix B of the TEC, which includes Attestation 19, which requires the employer to provide a copy of the job order to its H-2B workers in a language they understand. JX C at 10; JX D at 11. Lucero admitted that it did not provide any of its H-2B workers with a copy of the job order in 2016 or 2017. D&O at 13; PX D at 16.

7. Guzman, on behalf of Lucero, signed Appendix B of the TEC, which includes Attestation 22, which requires the employer to "contractually forbid in writing any agent or recruiter . . . whom the employer engages, directly or indirectly, in international recruitment of H-2B workers to seek or receive payments or other compensation from prospective workers." JX C at 11; JX D at 12. Lucero and Monarch had no written contract in either 2016 or 2017. D&O at 13; PX D at 18. Lucero failed to contractually forbid Monarch from seeking payments from Lucero's H-2B workers. *Id*. Lucero was evidently unaware that it was required to forbid third parties like Monarch from seeking payments from workers until this investigation. PX M at 34.

8. Guzman, on behalf of Lucero, signed Appendix B of the TEC, which includes Attestation 26, which requires the employer to retain all documents pertaining to the TEC, all recruitment-related documents, and payroll records for a period of three years. JX C at 11; JX D at 12. Lucero admitted that it failed to retain original records of the hours worked by its H-2B workers. D&O at 25. Lucero also failed to retain records of its claimed reimbursements for transportation and subsistence costs, as well as records relating to its recruitment of U.S. workers. D&O at 44.

B. *WHD's Investigation and Determination*

1. In 2017, WHD initiated an investigation of Lucero covering the period from January 1, 2016, through September 8, 2017. D&O at 3; Tr. at 176:17-19; PX M at 1. 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 Administrator determined that Lucero substantially failed to comply with numerous H-2B obligations in both 2016 and 2017. Specifically, Lucero gave preferential treatment to H-2B workers over U.S. workers, failed to pay the offered wage, placed workers outside the area of intended employment, failed to pay inbound and outbound transportation and subsistence costs, failed to disclose the job order, failed to contractually forbid third parties from seeking payments from employees, and failed to retain documents. D&O at 7.[4]

2. For the several violations that deprived workers of their wages or failed to reimburse

[4] The Administrator had also determined that Lucero engaged in discriminatory hiring practices by failing to hire a qualified U.S. worker in 2017 in violation of 29 C.F.R. 503.16(r), and failed to provide requisite notices to DHS and DOL of early separations in 2017 in violation of 29 C.F.R. 503.16(y). D&O at 7. Because these violations are not the subject of the Administrator's petition, the Administrator notes them only minimally in this brief.

costs, the Administrator ordered that Lucero pay back wages. Specifically, for Lucero's failure to pay its H-2B workers the offered wage for all hours worked, the Administrator determined the wages owed by reconstructing the H-2B workers' hours based on the average weekly hours recorded for U.S. workers, given that the H-2B workers worked the same jobs and hours as the U.S. workers, travelling between the shop and job sites together (and the records of the U.S. workers' hours worked appeared accurate). D&O at 33-34. The Administrator multiplied the reconstructed non-overtime hours by the offered wage rate and the reconstructed overtime hours by the offered overtime wage rate, and then subtracted the amounts actually paid to the H-2B workers. D&O at 33. The Administrator determined that all H-2B workers were owed back wages totaling $301,448.05 ($133,960.50 for 2016 and $167,487.55 for 2017).

For Lucero's failure to reimburse its H-2B workers for their inbound and outbound transportation and subsistence costs, the Administrator reconstructed the workers' costs based on their interview statements. JX A 10-11; PX M at 21-22. The Administrator found that Lucero owed $11,112.69 in back wages ($5,863.56 in inbound costs in 2016 and 2017 and $5,249.13 in outbound costs in 2016). PX M at 21-22.[5] The Administrator found that Lucero did not owe any back wages for outbound costs in 2017. *Id*.

3. For Lucero's violations that resulted in back wages owed, the Administrator assessed CMPs equal to the amount of back wages owed, subject to the maximum of $12,383 per worker

[5] Failure to pay or reimburse workers for travel and subsistence costs results in back wages being owed. "If employers were permitted to shift their business expenses onto H-2B workers, they would effectively be making a de facto deduction and bringing the worker below the H-2B required wage, thereby risking depression of the wages of U.S. workers . . . . This regulatory requirement, therefore, ensures the integrity of the full H-2B required wage . . . over the full period of employment." 2015 Rule, 80 Fed. Reg. at 24,068-69.

per year. D&O at 46, 50. Consistent with 29 C.F.R. 503.23(b), the Administrator did not consider any aggravating or mitigating factors. PX M at 10-11, 21-22. Thus, for Lucero's failure to pay the offered wage in 2016 and 2017, the Administrator assessed $295,551.23 in CMPs, and for Lucero's failure to pay transportation and subsistence costs in 2016 and 2017, the Administrator assessed $11,112.69 in CMPs. JX A at 9-11.

4. For all other violations, the Administrator assessed CMPs at a base amount of $6,191.50 (half of the maximum possible CMP)[6] per violation per year and then considered aggravating or mitigating factors pursuant to 29 C.F.R. 503.23(e). With respect to history of violations, the Administrator found that Lucero had no prior citations for violations of the H-2B program and therefore did not impose an upward adjustment for any of the violations' associated CMPs. PX M at 15, 18, 24. WHD considers an employer's history of violations only as an aggravating factor and not as a basis to reduce penalties. PX M at 6; Tr. at 228:20-229:2.

For Lucero's placement of H-2B workers outside the area of intended employment, the Administrator assessed the base penalty of $6,191.50 per year, then multiplied it by three to correspond to the number of violations, i.e., the number of states outside of Illinois where Lucero placed H-2B workers in both 2016 and 2017, which resulted in $37,149 in CMPs. PX M at 16, 18.

For Lucero's failure to provide its H-2B workers with a copy of the job order, the Administrator reduced the penalty by 10 percent due to Lucero's commitment to future compliance, as evidenced by its agreement to add the requirement to its future contracts with processing agents. PX M at 24-25. With the 10 percent reduction, the Administrator assessed

[6] By policy, WHD sets the base CMP for violations that do not result in back wages at half the maximum allowed by statute. Tr. at 216.

$11,144.70 in CMPs. JX A at 11.

For Lucero's failure to contractually forbid Monarch from seeking payments from workers, the Administrator reduced the penalty by 80 percent due to the lack of gravity, Lucero's good-faith reliance on the guidance of its attorney, and its commitment to future compliance, as evidenced by its agreement to add the required language to its future contracts with processing agents. PX M at 26-27. With the 80 percent reduction, the Administrator assessed $2,476.60 in CMPs. JX A at 11.

For Lucero's failure to retain records, the Administrator reduced the penalty by 10 percent due to Lucero's commitment to future compliance, but increased it by 10 percent due to the gravity of the violations. PX M at 29-30. Thus, the Administrator assessed $12,383 in CMPs. JX A at 12.

5. Finally, the Administrator found debarment from the H-2B program appropriate for a period of three years, based on Lucero's failure to pay all wages due to H-2B workers, failure to offer employment to a qualified U.S. worker, and placement of H-2B workers outside the area of intended employment. JX A at 3.

III. Course of Proceedings

Lucero timely sought review of WHD's determination by an ALJ. D&O at 3. The ALJ held a virtual hearing from July 27 through July 29, 2021. D&O at 4. The ALJ issued his Decision and Order on June 20, 2023. Lucero and the Administrator filed petitions for review by the Board on August 18, 2023, and August 21, 2023, respectively. The Board accepted the petitions on August 24, 2023, and set briefing schedules for both, with Lucero's petition and briefing to proceed under a separate case number, ARB No. 2023-0045.

IV. The ALJ's Decision

1. In his Decision and Order, the ALJ found that Lucero violated most, but not all, of the provisions at issue. The ALJ found that Lucero substantially failed to meet the terms and conditions of the H-2B program in 2016 and 2017 by failing to pay the offered wage, placing workers outside the area of intended employment, failing to pay inbound and outbound transportation and subsistence costs, failing to disclose the job order, failing to contractually forbid third parties from seeking payments from employees, and failing to retain original payroll records. D&O at 22-34, 36-45.

2. By contrast, the ALJ found that Lucero did not commit a violation when it gave preferential treatment to foreign workers by offering more favorable terms to H-2B workers than U.S. workers. D&O at 19-22. Even though the ALJ found that Lucero willfully failed to advertise the possibility of union jobs and availability of housing to U.S. workers in both 2016 and 2017, he concluded that Lucero's failures were not a "significant deviation" under 29 C.F.R. 503.19(c). D&O at 22. The ALJ reached this conclusion on the basis that Lucero had no history of prior violations under the H-2B program, the gravity of the violations was minimal, and the Administrator did not provide evidence that "U.S. applicants were *actually* deterred." *Id*. (emphasis in original).[7]

3. With respect to the violations that Lucero committed for which back wages were owed (i.e., Lucero's failure to pay the offered wage and to pay for the workers' transportation and subsistence costs), the ALJ ordered back wages in the same amount calculated by the

[7] The ALJ also found no violation for the failure to hire a qualified U.S. worker and the failure to notify DHS and DOL of early separations. D&O at 16-19, 35-36. The Administrator is not appealing these findings.

Administrator. D&O at 31-34, 40-41.

4. However, the ALJ reduced all the CMPs assessed by the Administrator. D&O at 46-53. Across the board, the ALJ applied a 10 percent reduction based on Lucero's lack of a history of violations. He additionally reduced the CMPs for specific types of violations as follows.

For Lucero's failure to pay the offered wage for all hours worked, the ALJ reduced the Administrator's CMP assessment by 70 percent, which included a 50 percent reduction based on the "relatively small size" of Lucero's business (plus 10 percent for Lucero's commitment to future compliance and the 10 percent for the lack of history of violations noted above). D&O at 47. The ALJ found that the assessed CMPs constituted about six to eight percent of Lucero's gross revenue, which the ALJ deemed "excessive and unreasonable." *Id*. The ALJ further found that the amount of the CMPs "is not merely punitive; it also runs the risk of harming Respondent's current and prospective U.S. workers." *Id*. Thus, for this violation, the ALJ imposed $88,665.37 in CMPs. *Id.*

For Lucero's failure to pay or reimburse workers for their inbound and outbound transportation and subsistence costs, the ALJ reduced the Administrator's CMP assessment by 40 percent, which consisted of 10 percent for Lucero's good faith efforts to comply by hiring and relying on an attorney and Monarch, 10 percent for Lucero's ignorance of some of the applicable requirements, 10 percent for Lucero's commitment to future compliance, and 10 percent for the lack of history of violations as noted above. D&O at 50-51. Thus, for this violation, the ALJ imposed $6,667.62 in CMPs.

For placing H-2B workers outside the area of intended employment, the ALJ found unreasonable the Administrator's multiplication of penalties by the number of states outside Illinois to which Lucero sent its workers because, according to the ALJ, sending workers to one

worksite outside the area of intended employment is sufficient to constitute a violation. D&O at 49. The ALJ also reduced the CMPs by 10 percent because Lucero was not aware of the obligation to not send workers outside the area of intended employment, plus the 10 percent for the lack of history of violations noted above. *Id.* Thus, the ALJ imposed $9,906.04 in CMPs for this violation.[8]

5. Finally, the ALJ reduced the period of debarment from the Administrator's three years to one year. D&O at 56. The ALJ relied in part on the fact that he found no violation for failing to hire a qualified U.S. worker. D&O at 55. Additionally, Lucero had argued that the period of debarment should be reduced because "Guzman felt he had already been debarred when he got [the Administrator's] Determination, and while this action was hanging over his head, he did not apply for the H-2B program in the years 2019, 2020, or 2021, which negatively impacted the business." D&O at 56. Although the ALJ rejected this argument, he found Lucero's commitment to future compliance sincere and reduced the period of debarment on that basis. *Id*.

SUMMARY OF THE ARGUMENT

1. The ALJ erred in determining that Lucero's willful preferential treatment of foreign workers was not a substantial failure to comply with 29 C.F.R. 503.16(q). The ALJ did not give proper weight to the gravity of Lucero's willful violations. Lucero's failure to advertise to U.S. workers the opportunity for jobs paying almost triple the normal hourly rate and employer-provided housing are significant terms offered to H-2B workers but not to U.S. workers. Instead, the ALJ improperly focused on Lucero's lack of a history of violations, which is both a flawed basis on which to measure significance for this particular violation and unsupported by the

[8] A chart outlining the CMPs assessed by the Administrator and the CMPs imposed by the ALJ is attached hereto for the Board's convenience.

record. The ALJ also imposed an impossible evidentiary standard on the Administrator to show actual harm to U.S. workers by producing an U.S. worker who was deterred from applying for the jobs but would have if they had known of the higher wage and housing benefit; there is no basis in law to impose such an evidentiary requirement to establish a violation for preferential treatment.

2. The ALJ erred in not imposing CMPs equal to the back wages owed for Lucero's violations related to wages, consistent with 29 C.F.R. 503.23(b), which provides for CMPs equal to the back wage owed. For violations that relate to wages, those wages provide a clear measure by which to assess CMPs. Instead, the ALJ reduced CMPs based on factors provided in 29 C.F.R. 503.23(e), which is the section of the regulation that relates to calculating CMPs based on violations that do not relate to wages.

3. The ALJ further erred in reducing the CMPs for Lucero's failure to pay the offered wage for all hours worked based on the size of Lucero's business, a factor not found anywhere in the statute or regulations. H-2B employers are primarily small businesses. If small businesses were entitled to a reduction in CMPs by virtue of their size, then CMP assessments for a significant number of violators would decrease. Such a result would particularly undermine 29 C.F.R. 503.23(b), which is designed to have CMPs for wage violations increase as monetary damages do. Even if business size were a proper consideration in the H-2B context, its consideration here was arbitrary, capricious, and not supported by substantial evidence. Relying on nothing more than Lucero's self-reported annual gross sales, the ALJ concluded that the full CMPs authorized by 29 C.F.R. 503.23(b) would harm Lucero's ability to hire or retain U.S. workers. Lucero did not raise this argument or present evidence to support it. The ALJ's conclusion is sheer speculation and therefore cannot support the 50 percent reduction of the

CMPs for Lucero's failure to pay H-2B workers the offered wage for all hours worked.

4. The ALJ erred in reducing the CMPs for Lucero's placement of H-2B workers on no less than 50 locations outside the area of intended employment in 2016 and 2017. The Administrator multiplied the CMPs by the number of states outside the area of intended employment where Lucero sent workers in both years. The ALJ improperly held the multiplication of penalties unreasonable. The Board previously upheld the assessment of per-location CMPs for sending H-2B workers outside the area of intended employment in *Administrator v. 5 Star Forestry, LLC*, ARB No. 2013-0056, 2014 WL 6850015 (ARB Nov. 6, 2014). As *5 Star Forestry* emphasized, imposing per-location penalties effectuates the INA's statutory and regulatory goal of avoiding displacement of U.S. workers at the work location. The Board should reaffirm its holding in *5 Star Forestry* and reinstate the Administrator's assessment of per-location CMPs for Lucero's numerous instances of employing workers outside the area of intended employment.

5. The ALJ erred in giving undue weight to whether Lucero had a previous history of violations as a basis for reducing the CMPs for all the violations. The ALJ erroneously conflated the fact that WHD had not investigated this employer in the past with an assumption that it therefore had no previous history of violations. The error is particularly pronounced given the substantial evidence in the record that indicates that Lucero had been violating its H-2B obligations in almost the same manner since it first became a H-2B employer in 2015, a year before the investigation period.

6. The ALJ reduced the Administrator's three-year debarment determination to just the minimally permissible period of one year based on unsubstantiated promises of future compliance. In reducing the debarment period to the one-year minimum, the ALJ erred in not

giving due consideration to the gravity of Lucero's violations.

ARGUMENT

I. The ALJ Erred in Determining that Lucero's Willful Preferential Treatment of Foreign Workers Was Not a Substantial Failure to Comply with 29 C.F.R. 503.16(q).

1. Under the H-2B program, a violation occurs when, as relevant in this case, there is a "substantial failure" to meet any of the terms and conditions of the TEC or other required forms. 8 U.S.C. 1184(c)(14)(A); 29 C.F.R. 503.19(a)(2). "A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions" of the TEC or other required forms. 8 U.S.C. 1184(c)(14)(D); 29 C.F.R. 503.19(a)(2). To determine if a violation is a significant deviation, the Administrator may consider: (1) the employer's history of violations under the program; (2) the number of workers affected by the violation; (3) the gravity of the violation; (4) any financial gain for the employer due to the violation or financial loss or injury to the workers; and (5) whether U.S. workers have been harmed. 29 C.F.R. 503.19(c).

These factors reflect several different ways to measure the significance of a broad array of H-2B employer obligations and the employer's failure to satisfy those obligations. Thus, while the ALJ has discretion in applying these factors, the application must be reasonably related to the willful failure at issue. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (decision by an agency not based on consideration of the relevant factors or based on a clear error of judgment is arbitrary and capricious). Not all of these factors necessarily apply for every willful failure. Rather, the decision-maker should rely on only those factors most relevant to the specific willful failure to determine whether the employer's failure was a significant deviation from the employer's obligations. *Cf. Adm'r v. Halsey,* ARB No. 2004-0061, 2005 WL 2415938, at *10 (ARB Sept. 29, 2005) (upholding the ALJ's CMP determination for Fair Labor

Standards Act child labor violations after finding that the ALJ properly considered factors relevant to the specific violations).

2. Lucero willfully gave preferential treatment to foreign workers at the expense of U.S. workers by failing to include the potential for higher-paying union work and the availability of housing in its recruiting and advertising efforts aimed at U.S. workers. Contrary to the ALJ's conclusion, this willful preferential treatment is a significant deviation from the terms and conditions that are at the heart of the H-2B program – namely offering employment to U.S. workers on the same terms and with the same benefits that is offered to H-2B workers. 29 C.F.R. 503.16(q) and Attestation 4 prohibit preferential treatment of foreign workers and specifically require that an employer offer "the same benefits, wages, and working conditions" to U.S. workers as to H-2B workers.

In 2016 and 2017 Lucero submitted TECs in which it attested, under penalties of perjury, it "has not/will not offer terms, wages, and working conditions to U.S. workers that are less favorable than those offered or will be offered to H-2B workers . . . ." JX C at 9; JX D at 10. Despite these yearly attestations, Lucero admitted that it provided higher paying union job assignments for several years before 2016 and housing to H-2B workers in 2015, and continued to do both in the 2016 and 2017 TEC periods, but failed to disclose this pay and benefit in its SWA job orders and advertisements to potential U.S. job applicants. PX D at 2-4. The ALJ properly found that Lucero willfully failed to comply with this obligation. D&O at 20-21. However, his finding that Lucero's willful failure was not a significant deviation, D&O at 22, is based on a misunderstanding of law and not supported by the record.

3. On their face, 29 C.F.R. 503.16(q) and Attestation 4 go to the crux of the issue that Congress was most concerned about when creating the H-2B program. Congress was concerned

that companies could use this program to favor foreign workers over U.S. workers. 2015 Rule, 80 Fed. Reg. at 24,053 ("Congress has long intended that similarly employed U.S. workers should not be treated less favorably than temporary foreign workers.").[9] The regulations regarding the information that must be included in the job order used to recruit U.S. workers is thus aimed at preventing employers from purposefully sabotaging the recruitment of U.S. workers by offering them less favorable terms than the employers actually provide to H-2B workers. *See* 29 C.F.R. 503.16(q) ("The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers."); 655.18(a)(1) (same)[10]; 655.18(b)(5) (employer's job order must specify the wage that the employer is offering, "or, in the event that there are multiple wage offers, the range of wage offers"); 655.18(b)(10) (employer's job order must specify if the employer provides the worker with the option of lodging and if so, the cost of such lodging). The preamble to the 2015 Rule explained that the prohibition on preferential treatment is "to protect U.S. workers by ensuring that employers do not understate wages and/or benefits in an attempt to discourage U.S. applicants" and that "[t]he job order is essential for U.S. workers to make informed employment decisions." 2015 Rule, 80 Fed. Reg. at 24,062.

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[9] *See also* Congressional Research Service, Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues 53 (1980); H.R. Rep. No. 99-682, pt. 1 at 80 (1986) ("The essential feature of the H-2 program has been and would continue to be the requirement that efforts be made to find domestic workers before admitting workers from abroad. A corollary rule, again preserved in the bill, is that the importation of foreign workers will not be allowed if it would adversely affect the wages and working conditions of domestic workers similarly employed").

[10] "The substance of this provision [at 20 C.F.R. 655.20 and 29 C.F.R. 503.16] is identical to the assurance found at 655.18(a)(1) relating to the job order . . . ." 2015 Rule, 80 Fed. Reg. at 24,070.

Where the willful failure to comply involved preferential treatment of H-2B workers, a relevant factor to measure the degree to which this failure deviates from the employer's obligation under 29 C.F.R. 503.19(c) is the gravity of the violation. For preferential treatment that consists of failing to offer the same wages and benefits to U.S. workers, one way that the gravity of the violation can reasonably be assessed is by the difference between the wages and benefits advertised to U.S. workers and those that the employer actually paid and provided to H-2B workers. Here, Lucero failed to notify potential U.S. job applicants that they would likely have the opportunity to earn nearly triple the amount of their regular wage for certain job assignments if they worked for Lucero. As the ALJ found, Lucero intended to offer union rate projects for the jobs it advertised when such projects became available and, because it had a consistent history of booking union rate jobs every year since at least 2013, it was unreasonable to conclude that no such project would be available in 2016 and 2017. D&O at 21. A job's pay rate is a key concern to any potential applicant. Without full knowledge of the possibility of dramatically higher rates, U.S. applicants were not able to make informed decisions about whether they should apply for these jobs. Thus, based on the advertised wage alone, substantial evidence in the record demonstrates that Lucero's willful violation was extremely grave.

With regard to the housing that Lucero provided to H-2B workers annually, Lucero did more than leave off the possibility of employer-provided housing in its job order and ads to U.S. workers. It affirmatively proclaimed that "housing assistance [was] not available." JX E at 1; JX I at 1. Despite this proclamation to the U.S. workforce, Lucero provided housing to its H-2B workers each season since 2015. Tr. at 37:14-16, 38:19-22, 79:8-10, 81:18-23, 231:8-9; PX D at 2. Worse yet, the Lucero corporation owned the house. D&O at 20; PX D at 2. The fact that Lucero owned the house makes clear that Lucero knew it had housing available for its workers

and also knew the relatively low rent it would charge workers. As the ALJ found, Lucero knew that it would provide housing in 2016 and 2017. D&O at 20, 22. Additionally, in both 2015 and 2016 this house was immediately adjacent to Lucero's shop. PX B at 2. The workers typically began each workday at the shop, loading equipment and supplies onto trucks. *Id.*; Tr. at 487:20-23. Lucero provided transportation from its shop to its job sites. Tr. at 43:19-22. It could sometimes take an entire day to get to a job site from the shop. Tr. at 44:15-17, 45:9-17. The proximity between the house that Lucero provided and the shop, especially in 2016 when it was on the same property as the house, was a significant benefit for workers, providing convenience for workers who had to travel, sometimes great distances, to job sites during the workday. Tr. at 465:4-7 (Lucero admits that housing was a benefit utilized by its workers).[11]

Individually, the opportunity for jobs paying almost triple the normal hourly rate and employer-provided housing are significant terms not offered to U.S. workers. Combined, they show vastly different terms and conditions of the jobs advertised versus those actually provided. If U.S. workers are unaware of the true nature of a job opportunity (and its potential for higher wages and better benefits), they cannot accurately evaluate whether to apply for such jobs, which hampers DOL's ability to determine whether the employment of H-2B workers will adversely affect the employment of U.S. workers. Therefore, the requirement that employers offer U.S. workers no less than the wages and working conditions offered to H-2B workers is vital to supporting the INA's goal of protecting U.S. workers. *Cf. Adm'r v. Butler Amusements*, ARB Case No. 2021-0007, 2023 WL 5126052, at *17 n.205 (ARB July 28, 2023) (holding that placing

[11] In 2015 and 2016, Lucero's shop was located on the same property where the workers were housed. In 2017, Lucero moved the shop's location to a nearby town and workers "typically" continued to start their day at the shop before Lucero transported most workers to the job sites. PX B; Tr. at 487:20-23.

H-2B workers outside of advertised job classification "undermined the labor certification process of ensuring that it had been "unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which labor certification is sought."). The ALJ erred and certainly acted in an arbitrary and capricious manner when he summarily concluded that the gravity of Lucero's willful failure was "at most, minimal." D&O at 22.

4. After summarily dismissing the gravity of this violation, the ALJ focused instead almost exclusively on two factors in 29 C.F.R. 503.19(c). First, the ALJ chose to measure the significance of Lucero's preferential treatment by looking at whether Lucero had a history of violations. D&O at 22; *see also* 29 C.F.R. 503.19(c)(1). If Lucero had been cited for preferential treatment of its H-2B workers in the past, a repeat of this same violation would be significant. However, it does not follow that the grievous violations of this provision in this matter are somehow mitigated or less grievous because this is the first time the government discovered these violations. In fact, the record demonstrates that Lucero may have violated this obligation prior to 2016. Tr. at 507:25-508:23 (Guzman testified on behalf of the Lucero corporation that Lucero booked union rate jobs since 2013 or 2014), 37:14-38:2 (worker testified to living in Lucero-provided housing since 2015), 38:19-39:14 (same), 80:15-81:23 (same). Evidence that the government did not previously look for and identify violations prior to the current enforcement action is, at best, neutral in determining if a willful failure is a significant deviation. *Cf. Butler Amusements*, 2023 WL 5126052, at *21 (where an H-2B employer likely engaged in violations that were not investigated or charged, no CMP mitigation is warranted). Ultimately, the fact that WHD did not investigate Lucero before the investigations at issue in this case to discover earlier violations bears little rational relation to the measure of this particular violation's significance.

The second factor the ALJ relied on to declare this willful failure not a significant deviation was whether U.S. workers were harmed. D&O at 22; *see also* 29 C.F.R. 503.19(c)(5). While this factor is rationally related to preferential treatment of foreign workers, the ALJ twisted this factor to create an impossibly high evidentiary threshold for the Administrator to demonstrate that Lucero's willful preferential treatment was a substantial deviation from its TEC obligations. The ALJ required the Administrator to produce, in 2021, a U.S. worker who saw Lucero's job ad back in 2016 or 2017 and chose not to apply. D&O at 22. The ALJ has no basis in law to create such an unachievable evidentiary standard.

The provision prohibiting preferential treatment presumes that U.S. workers are harmed when H-2B workers are offered better pay and benefits. *See* 2015 Rule, 80 Fed. Reg. at 24,062 ("So long as the employer offers U.S. workers at least the same level of benefits, wages, and working conditions as will be provided to the H-2B workers, the employer will be in compliance with [the prohibition against preferential treatment]."). This provision does not require the Administrator to show that a U.S. worker was actually harmed any more than the employer has to show that a U.S. worker was *not* harmed to avoid liability for such a violation. Instead, the Administrator need only prove that Lucero substantially failed to comply with the prohibition against giving H-2B workers preferential treatment because the job offered to U.S. workers provided significantly different (and less generous) potential wages and benefits when compared to those offered to H-2B workers. *Id*. To ensure that the Department can successfully hold employers accountable for unlawfully favoring H-2B workers over U.S. workers, the ARB should reverse the ALJ's creation of an impossibly high and unrealistic evidentiary standard; failing to reverse the ALJ risks invalidating the core obligation of preventing adverse effect though requiring equal treatment of U.S. and H-2B workers.

In sum, the Board should vacate the ALJ's conclusion that Lucero's willful preferential treatment of H-2B workers at the expense of U.S. workers was not a significant deviation from the terms and conditions of Lucero's TECs. The Board should instead conclude that this preferential treatment was a significant deviation and, therefore, Lucero substantially failed to comply with the prohibition against preferential treatment.[12]

II. The ALJ Erred in Not Imposing CMPs Equal to the Back Wages Owed for Lucero's Violations Related to Wages, Consistent with 29 C.F.R. 503.23(b), and Instead Relying on Factors Provided in 29 C.F.R. 503.23(e) to Reduce These CMPs.

1. 29 C.F.R. 503.23, the section of the H-2B regulations that discusses CMP assessments, has separate CMP standards based on whether a violation relates to wages (or deductions or expenses) or not. Where the violation relates to wages (or deductions or expenses), section 503.23(b) states that the Administrator may assess CMPs "equal to the difference between the amount that should have been paid and the amount that actually was paid to the worker(s)," i.e., CMPs equal to the back wage assessment for such violations. Where the violation does not relate to wages (or deductions or expenses) and therefore there is no damages assessment by which to measure CMPs, section 503.23(b) provides a non-exhaustive list of factors that the Administrator can consider when calculating CMPs for such violations. This approach to CMPs is long-standing. *See* 2015 Rule, 80 Fed. Reg. at 24,088 ("Similar to the CMPs in the 2008 rule, the CMP assessments set CMPs at the amount of back wages owed for violations related to wages and impermissible deductions or prohibited fees . . . . There is also a catch-all CMP provision for

[12] While the Board could remand for the ALJ to consider the proper CMP amount for this violation, because the Board's review is de novo, the Board can also simply affirm the $12,383 CMP that the Administrator assessed for this violation. *See Butler Amusements*, 2023 WL 5126052, at *7 ("The Board reviews an ALJ's decision [under the H-2B program] de novo and acts with all the powers [the Secretary] would have in making the initial decision.") (internal quotation marks and footnotes omitted).

any other violation . . . . Section 503.23(e) sets forth the factors WHD will consider in determining the level of penalties to assess for all violations but wage violations.").

2. The ALJ erred in disregarding the process for CMP assessments that is set forth in the regulations. The ALJ determined (properly) that Lucero violated 29 C.F.R. 503.16(a) and (b) by failing to pay the offered wage to its H-2B workers for every hour worked, which resulted in $301,448.06 in back wages for 2016 and 2017, and violated 29 C.F.R. 503.16(j)(1)(i)-(ii) by failing to pay inbound and outbound transportation costs which resulted in $11,112.69 in back wages for 2016 and 2017. D&O at 34, 41. Both violations relate to wages and expenses and provide a clear monetary assessment by which to measure the appropriate CMP. As such, CMPs should have been assessed under 29 C.F.R. 503.23(b), allowing for CMPs that are equal to the amount of back wages owed, subject to the regulatory maximum. Instead, the ALJ erroneously applied the factors in 29 C.F.R. 503.23(e) to reduce the CMPs for these violations. D&O at 47, 50.[13] The ARB should vacate the ALJ's CMP assessment and order that Lucero pay $295,551.23 in CMPs to track the back wages for Lucero's failure to pay the offered wage for all hours worked, and $11,112.69 in CMPs to track the back wages for Lucero's failure to pay the workers for their transportation and subsistence costs.[14]

III. The ALJ Erred in Halving CMPs for Lucero's Failure to Pay the Required Wage for All Hours Worked Based on the "Relative" Size of Lucero's Business.

1. Even assuming that it were proper to apply discretionary factors to reduce CMPs

[13] In applying these factors, the ALJ reduced the CMP assessment due to the size of Lucero's business and because the ALJ found that Lucero had no history of previous violations. As discussed below, both bases for reduction were flawed.

[14] CMPs for the failure to pay the offered wages were assessed pursuant to 29 C.F.R. 503.23(a), which states that "each such violation involving the failure to pay an individual worker properly . . . constitutes a separate violation."

assessed for wage-related violations notwithstanding section 503.23(b) and section 503.23(d)'s express instruction otherwise, the ALJ erred in considering the size of Lucero's business as a basis to reduce the CMP assessment for Lucero's failure to pay the offered wage for all hours worked. Business size is an improper factor for reducing penalties in the H-2B context. Moreover, the ALJ's reliance on the size of Lucero's business to halve the CMP for these wage violations was unsupported by substantial evidence.

2. Although business size is not an uncommon factor for assessing CMPs under other statutory schemes enforced by the Department, the H-2B statutory provisions are silent on business size.[15] The Department is familiar with the use of business size as a factor under other statutes and has included this factor in parallel regulations. 29 C.F.R. 579.5(b) (CMPs for FLSA child labor violations); *id.* at 578.4(a) (CMPs for FLSA minimum wage and overtime violations). However, the omission of business size as a factor for reducing penalties under the H-2B program's CMP regulation at 29 C.F.R. 503.23 should be presumed to be intentional for purposes of evaluating the ALJ's decision below. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . We would not presume to ascribe this difference to a simple mistake in draftsmanship.") (internal quotation marks omitted).

[15] Most notably, the Fair Labor Standards Act ("FLSA") mandates consideration of the size of the employer's business. 29 U.S.C. 216(e)(3). However, the FLSA also mandates consideration of the gravity of the violation, which may outweigh the size of the business even where an employer has serious financial difficulties. *Id.*; *see also Adm'r v. Elderkin Farm*, ARB Nos. 1999-0033 & 1999-0048, 2000 WL 960261, at *11 (June 30, 2000) (reasoning that, although employer was small and in serious financial difficulties, "those facts, when weighed (as they must be) against the gravity of the violations," supported the Administrator's original FLSA CMP assessment for child labor violations).

Moreover, while unenumerated factors may be considered for CMPs under 29 C.F.R. 503.23(e), the consideration of business size in the H-2B context would undermine the Department's ability to enforce the requirements of the H-2B program. The H-2B program "is used primarily by small businesses, including landscaping, hotel, construction, restaurant and forestry businesses." *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1083 (11th Cir. 2013); *see also G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205, 208 n.4 (10th Cir. 2015). The Department has found that the two industries that most commonly employ H-2B workers, landscaping and janitorial services, largely consist of small establishments. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,038, 10,121 (Feb. 21, 2012) ("Approximately 7 percent of janitorial service and 3 percent of landscaping establishments have more than 50 year-round employees; and, 86 percent of janitorial services and 91 percent of landscaping establishments have fewer than 20 year-round employees."). If small businesses were entitled to a reduction of CMPs by virtue of their size, then a significant number of H-2B employers that violate the program requirements would benefit from a reduction in CMPs not contemplated by the statute or implementing regulations. This would be a particularly pernicious result as applied to wage violations. Section 503.23(b) is designed to increase CMPs in proportion to monetary damages. Here, the ALJ found that the amount of the CMPs corresponding to the back wages owed was too great—in other words, that Lucero's violations were too great—for Lucero to bear. This approach would also presumably incentivize bolder and more egregious violations by smaller businesses who would know that their size will help shield them from significant penalties. In consideration of the large number of small businesses like Lucero's among H-2B employers and the text and purpose of 29 C.F.R. 503.23, the Board should reject business size as a basis to reduce CMPs.

3. Even if business size were an appropriate basis to reduce CMPs, the evidence in the record is insufficient to support the 50 percent reduction applied here. The Board affirms an ALJ's factual findings that are supported by substantial evidence. *Adm'r v. Sun Valley Orchards, LLC*, ARB No. 2020-0018, 2021 WL 2407468, at *5 (May 27, 2021). 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)). An ALJ's speculative conclusion about events that could or might happen is not substantial evidence. *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 840 (D.C. Cir. 2005) (finding that ALJ's "sheer speculation" about what "could" have happened is not substantial evidence); *White ex rel. Smith v. Apfel*, 167 F.3d 369, 375 (7th Cir. 1999) ("Speculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence."). Furthermore, a speculative conclusion is arbitrary and capricious, as it fails to provide adequate grounds to support the ALJ's decision. *See Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014)

The ALJ's 50 percent reduction based on the size of Lucero's business and the impact that the Administrator's CMP assessment could have on Lucero's business and workers going forward was speculative. The ALJ stated that the CMPs would be six to eight percent of Lucero's annual gross revenue, which was, the ALJ opined, excessive and risked harming Lucero's current and future employees. D&O at 47. The ALJ's statement rested on nothing more than a portion of an e-mail in which a representative of Lucero replies to Lucero's attorney's request for its gross sales in 2016 and 2017. *Id.* (citing JX P). Standing alone, this is insufficient to show that the size of Lucero's business is too small to support the CMPs assessed by the

Administrator. An employer's size is measured by more than just annual revenue.[16] No evidence on this subject was sought or submitted. The size of Lucero's business was not a subject of dispute for either party, and the Administrator had no notice or reasonable expectation that the ALJ would raise it as a factor for reducing CMPs. Consequently, the information regarding Lucero's size is incomplete.

Relying on nothing other than Lucero's self-reported annual gross sales, the ALJ concluded that the full amount of CMPs for the wage violations "runs the risk of harming Respondent's current and prospective U.S. workers." *Id*. This conclusion is sheer speculation and therefore arbitrary, capricious, and not supported by substantial evidence. *See Sorenson Communications*, 755 F.3d at 708; *Enloe*, 433 F.3d at 840; *White ex rel. Smith*, 167 F-3d at 375. Lucero presented no evidence regarding the potential impact of the CMPs on its business, let alone its ability to hire or retain U.S. workers. The ALJ's speculative conclusion about what might or could happen if Lucero is required to pay the full CMPs authorized by 29 C.F.R. 503.23(b) is arbitrary, capricious, and not based on substantial evidence. The ARB should reverse the 50 percent reduction in the CMPs for Lucero's failure to pay the offered wage for all hours worked.

IV. The ALJ Erred in Ruling that Multiple CMPs for Placing Workers in Multiple States Outside the Area of Intended Employment Is Unreasonable.

1. 29 C.F.R. 503.16(x) prohibits placing workers outside the area of intended employment listed in the job order. In Attestation 11 of the 2016 and 2017 TECs, Guzman

[16] By contrast, pursuant to the child-labor provisions of the FLSA, DOL requires consideration of several types of evidence when assessing the size of the business, including "the number of employees . . . , dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business." 29 C.F.R. 579.5(b).

certified under penalty of perjury that Lucero would not place workers outside the area of intended employment (the Chicago metropolitan area). JX C at 10; JX D at 11. Lucero placed H-2B workers in at least 13 different locations in three states other than Illinois in 2016 and in at least 37 different locations in four states other than Illinois in 2017. D&O at 36-37, 49. The Administrator multiplied the base CMP for this violation by three, corresponding to the number of states other than Illinois in which Lucero placed H-2B workers in both 2016 and 2017 (i.e., Wisconsin, Michigan, and Indiana). PX M at 16-17.[17] The ALJ found the multiplication of penalties "unreasonable" because, the ALJ opined, sending workers to a single worksite outside the area of intended employment is sufficient to constitute a violation. D&O at 49. The ALJ also applied additional mitigating factors, resulting in a total reduction of the CMPs from $37,149 to $9,906.40. *Id*.

2. Contrary to the ALJ's finding that per-location penalties are unreasonable, the Board has already ruled that CMPs may be multiplied by the number of locations in which the employer committed this violation of placing workers outside the area of intended employment. *Adm'r v. 5 Star Forestry, LLC*, ARB No. 2013-0056, 2014 WL 6850015, at *4 (ARB Nov. 6, 2014). In *5 Star Forestry*, the Board upheld the assessment of fourfold CMPs for each of four counties in which the employer sent H-2B workers outside of Mississippi, the area of intended employment. *Id.* at *2. The Board determined that per-location penalties are "directly tied to the statutory and regulatory policy of avoiding the displacement of U.S. workers at the work

[17] The Administrator only learned during discovery about the fourth state (Iowa) outside the area of intended employment in which Lucero placed workers in 2017. When the Administrator assessed CMPs at the conclusion of the investigation, she knew of only three states outside the area of intended employment. PX M at 15-17. For that reason, WHD multiplied the CMPs for 2017 by three rather than four.

location." *Id.* at *4. The employer had failed to conduct recruitment of U.S. workers in each location where it sent H-2B workers. *Id*. Such recruitment efforts are necessary for DOL to accurately advise DHS whether or not U.S. workers are available to perform the work for which H-2B workers are sought. *Id.* (citing 8 C.F.R. 214.2(h)(6)(iii)). "DOL can so advise DHS only if the employer accurately names each place of employment and conducts the necessary recruitment measures to confirm the absence of domestic workers in each location." *Id*. The Board concluded that holding employers financially accountable for each unauthorized location, rather than assessing a single violation regardless of the number of unauthorized locations, reduces employers' incentive to commit multiple such violations. *Id*.

The holding and reasoning of *5 Star Forestry* fully apply here. Lucero did not post job orders to SWAs (or conduct any other form of recruitment of U.S. workers) in any state other than Illinois. Yet it sent H-2B workers to several states outside Illinois on multiple jobs, requiring several hours and sometimes even full days of travel. Tr. at 44:15-24, 45:13-17. Because Lucero did not test the labor market in any location other than Illinois, DOL was unable to accurately advise DHS regarding the availability of U.S. workers in those other locations. *See 5 Star Forestry*, 2014 WL 6850015, at *4. Holding Lucero accountable for each unauthorized location where it sent H-2B workers is necessary to promote the INA's goal of protecting U.S. workers from displacement.[18]

[18] *5 Star Forestry* approved of an even more granular per-location CMP than the Administrator applied here. In *5 Star Forestry*, the Board approved of four CMPs corresponding to the four counties in which the employer placed the workers outside the intended area of employment – two of those counties were in the same state (Idaho) and the Board approved of separate CMPs corresponding to each of those counties. 2014 WL 6850015, at *2, *4. Thus, given the number of different locations in which Lucero placed workers outside the intended area of employment (13 locations in 2016 and 37 locations in 2017, though it is not clear from the record how many

The importance of the employer's obligation to ensure the unavailability of qualified U.S. workers is further supported by the H-2B regulations, which set forth specific recruitment measures employers must undertake, including the submission of accurate job orders to all relevant SWAs. 20 C.F.R. 655.16, 655.40. These regulations "set the standards by which employers demonstrate to DOL that they have tested the labor market and found no or insufficient numbers of qualified, available U.S. workers, and set the standards by which employers demonstrate to DOL that the offered employment does not adversely affect U.S. workers." 2015 Rule, 80 Fed. Reg. at 24,045. Further, accurate job orders are essential to ensuring that U.S. workers have adequate information from which to determine whether to accept a job opportunity. *Id.* at 24,062. Without correct information regarding the areas of intended employment, U.S. workers cannot ascertain where they would have to reside to perform the work. 20 C.F.R. 655.41(b)(3).

In finding the multiplication of penalties unreasonable, the ALJ cited a now-vacated decision involving multiplied penalties under a different statute. D&O at 49 n.304 (citing *Adm'r v. A&M Labor Mgmt.*, OALJ Nos. 2022-MSP-00002 & 2022-TAE-00004 (OALJ Mar. 23, 2023)). In *A&M*, the Chief ALJ reduced the Administrator's assessment of per-worker CMPs for violations of the Migrant and Seasonal Agricultural Worker Protection Act on the basis that a single failure to adhere to the applicable requirement for one worker is sufficient to constitute a violation and therefore only a single CMP was warranted. *Id.*, slip op. at 17. The Board vacated that decision and reinstated the Administrator's multiple CMPs, corresponding to the multiple

different counties were among these locations), the Administrator could have imposed significantly higher CMPs for Lucero's violation than the threefold multiplier that the Administrator applied.

workers for whom the employer failed to comply with the statutory requirements. *Adm'r v. A&M Labor Mgmt.*, ARB No. 2023-0025, 2023 WL 5126054, at *6 (July 31, 2023). The Board grounded its reasoning in the statutory text at issue in that case. *Id.* at *4-5. With respect to the H-2B provisions of the INA, the Board has already conducted the appropriate textual analysis in *5 Star Forestry* and concluded that WHD's policy of per-location penalties "advances the INA's goals to protect both domestic and foreign workers by assuring proper enforcement of the INA's H-2B provisions." 2014 WL 6850015, at *4.

Consistent with *5 Star Forestry* and *A&M*, the Board should reinstate the Administrator's multiplication of CMPs by the number of states in which Lucero placed workers other than the area of intended employment.

V. The ALJ Erred in Giving Undue Weight to Whether Lucero Had a Previous History of Violations as a Basis for Reducing the CMPs for All the Violations.

1. The regulation setting out factors to consider when determining the amount of CMPs to be assessed for violations unrelated to wages, deductions, or expenses includes consideration of an employer's previous history of violations. 29 C.F.R. 503.23(e)(1). Here, the ALJ reduced the CMPs for all of Lucero's violations for what the ALJ deemed Lucero's lack of history of violations. D&O at 47-53. The ALJ repeatedly referenced this factor as the basis for reducing the CMP assessments. D&O at 47 (reducing CMPs for offered wage violations), 49 (reducing CMPs for placing workers outside the area of intended employment), 50-51 (reducing CMPs for the failure to pay transportation and subsistence costs), 52 (reducing CMPs for the failing to disclose the job order to its H-2B workforce), 53 (reducing CMPs for failing to contractually forbid third-parties from seeking payments from workers) and 53 (reducing CMPs for violating the document

retention and recordkeeping requirements).[19] The ALJ's reduction on this basis was erroneous because the ALJ ignored record evidence suggesting that Lucero had not complied with the H-2B program prior to WHD's investigation and, in any event, the ALJ applied this factor in a way that unreasonably lets employers escape full liability simply because WHD has not previously investigated the employer.

2. The evidence in the record indicates that Lucero likely did not adhere to all of the H-2B requirements in 2015, the year it began participating in the program. When WHD began investigating Lucero in 2017, it investigated Lucero's H-2B compliance for two seasons, 2016 and 2017. PX M at 1. It did not investigate whether Lucero complied with the H-2B program in 2015. Nonetheless, evidence in the record shows that many of the violative practices that Lucero is liable for in 2016 and 2017 were simply a continuation of its business practices in 2015, when Lucero first became an H-2B employer. The record shows that since 2015, Lucero provided higher paying union jobs and housing to H-2B workers that it did not offer to U.S. workers. PX D at 2, Tr. at 37:14-16. There is also evidence in the record that, in 2015, Lucero had the same pay scheme that he had in 2016 and 2017. Tr. at 130: 25-135. Lucero contracted with the same third-party contractor, Monarch, in 2015. The fact that Lucero did not have a written contract with Monarch in 2016 and 2017, let alone one forbidding Monarch from seeking payments from Lucero's H-2B workers, suggests that it is likely that it had no written contract with Monarch

[19] The ALJ also referenced this factor as the basis for concluding that some of Lucero's willful failures to comply did not substantially deviate from its obligations. D&O at 22 (concluding no substantial deviation from the prohibition against preferential treatment of foreign workers), and 36 (concluding no substantial deviation from the obligation to provide agencies with notices of early separations). While the Department is not appealing the ALJ's conclusion related to the early separations, the Department is appealing and seeks reversal of the ALJ's conclusion related to whether Lucero's willful preferential treatment of foreign workers was a substantial deviation from Lucero's obligations.

that contained the required provision in 2015. PX D at 17. It appears that Lucero's attorney did not know that companies like Monarch were forbidden from seeking payments from workers until this investigation. PX M at 34. Lucero provided no testimony that its business and pay practices in 2015 were different from those in 2016 and 2017. Thus, not only is there no evidence in the record to confirm that Lucero complied with its H-2B obligations before it was first investigated by WHD in 2017, the record suggests that Lucero likely violated several H-2B requirements before WHD investigated it.

The Board confronted a similar scenario in *Butler Amusements*. There, the employer had no investigatory history with Department, but "its records evidenced a broader lack of adherence to the H-2B rules," and there was evidence that the employer's violations went beyond the scope of the particular investigation, though they had not been investigated or charged. The ALJ concluded and the Board affirmed that, in these circumstances, no mitigation of the CMP amount was warranted. *Butler Amusements*, 2023 WL 5126052, at *21. Likewise, in this matter the WHD Investigator testified at the hearing that the Administrator considers violation history as solely an aggravating factor (i.e., if the employer has committed previous violations, an increase in the CMP assessment is warranted), not a mitigating factor. Tr. at 228:20-229:2.

The Administrator's consideration of this factor as an aggravating factor only is consistent with the statutory and regulatory framework of the H-2B program. First, contrary to the ALJ's approach, nothing in the H-2B statute or regulations requires that this factor be considered exclusively in a binary fashion (i.e., the factor must either increase or decrease the CMP amount). In other words, nothing in the regulations indicates that CMPs must be mitigated when WHD has not previously investigated and cited the employer for violations. *Cf. United States v. R&SL Inc.*, 13 OCAHO 1333B, 2022 WL 1396204, at *28 (O.C.A.H.O. Jan. 6, 2022)

(explaining, in determining CMPs to be assessed under the INA, 8 U.S.C. 1324a, that "[t]he failure to establish the aggravation of a statutory factor does not require mitigation of that factor"). Second, unlike other similar nonimmigrant visa programs (H-2A and H-1B), an H-2B employer can be found to have violated any of its obligations only if it acted willfully or in reckless disregard of law. 8 U.S.C. 1184(c)(14)(A), (D). Thus, given the H-2B program's robust application process that requires sworn affirmations coupled with a violation standard that requires a higher level of proof than other similar programs, a violation-free history should be expected under the H-2B program and thus, at most, treated a neutral factor. *Cf. In re Delta Air Lines, Inc.*, No. CP90**0019, 1992 WL 753173, at *2 (F.A.A. Jan. 7, 1992) (Administrator for the Federal Aviation Administration refused to reduced penalties for violations of the Federal Aviation Regulations because of the air force carrier's lack of violation history).

3. The ALJ erred in treating the fact that WHD had not previously investigated Lucero for H-2B compliance as proof that Lucero did not violate the H-2B program before 2016. The fact that an employer does not have a history of violations does not mean that the employer has, in fact, not committed violations. It simply means that WHD has not previously investigated the employer (there is no private right of action under the H-2B program). Using a lack of investigative history as a mitigating factor encourages H-2B employers to recklessly disregard the obligations that they agree to abide by when they decided to participate in the program, an outcome that runs directly counter to the goals of the INA and the Department's implementing regulations. The ALJ's standard for assessing CMPs sends a message to the regulated community that employers will be held fully accountable for violations of this program only after they are caught a second time.

Moreover, applying the ALJ's standard to this factor assumes that the Department has the

resources to closely monitor the daily compliance of each and every employer that participates in the H-2B program. Given the number of H-2B workplaces in the U.S. and the Department's enforcement obligations under numerous other statutes, the Department does not have the resources to meet such a high enforcement standard. Thus, the Board should reverse the ALJ's erroneous and unreasonable reduction of CMPs for all of Lucero's violation based on a lack of history of violation.

VI. The ALJ Erred in Reducing the Debarment Period from Three Years to the Minimum of Just One Year.

1. 29 C.F.R. 503.24(a) provides for debarment if the Administrator determines that the employer engaged in violations as defined by 29 C.F.R. 503.19. The regulation lists twelve specific violations, any one of which would merit debarment. 29 C.F.R. 503.24(a)(1)-(12). As relevant here, the list includes failing to pay required wages, placing H-2B workers outside the area of intended employment, failing to offer employment to qualified U.S. workers except for lawful, job-related reasons, and "[a]ny other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected." 29 C.F.R. 503.24(a)(1), (2), (7), (10). The debarment period ranges from a minimum of one to a maximum of five years. 29 C.F.R. 503.24(c).

2. The Administrator recommended a three-year debarment period, which was based on Lucero's failure to pay the required wages to H-2B workers, including for transportation costs, repeated placement of H-2B workers outside the area of intended employment, failure to hire a qualified U.S. worker, and preferential treatment of H-2B workers. D&O at 55. While the ALJ concluded that Lucero did not commit the violation of failing to hire a qualified U.S. job applicant or the preferential treatment of H-2B workers (which conclusion the Administrator is

appealing), the ALJ determined that Lucero had committed the other two violations: Lucero failed to pay the required wage and repeatedly placed workers outside the area of intended employment. D&O at 24, 36. Nevertheless, the ALJ reduced the debarment period from the recommended three years to the minimum permitted one year. D&O at 56. In making that determination, the ALJ relied heavily on Lucero's commitment of future compliance to the program. D&O at 56.[20]

3. In reducing the debarment period to the one-year minimum, the ALJ erred in not giving due consideration to the gravity of Lucero's violations. Instead, the ALJ gave undue weight to unsubstantiated promises of future compliance. Additionally, the ALJ's reduction of the debarment period undermines the purpose of debarment.

a. The Department has made clear that the main consideration in determining the period of debarment is the severity of the violations. 2015 Rule, 80 Fed. Reg. at 24,084 ("[T]he appropriate period of debarment [is] based on the severity of the violation."). In the 2015 Rule, the Department updated the regulations to make clear that even a single violation is sufficient to merit debarment, which further reflects that debarment and the period of debarment are based on the severity of the violation. *Id.* (noting that the most significant difference between the prior rule and the 2015 Rule regarding the list of violations warranting debarment is that "a single act as

[20] The ALJ also referenced this factor as the basis for concluding that some of Lucero's willful failures to comply did not substantially deviate from its obligations. D&O at 22 (concluding no substantial deviation from the prohibition against preferential treatment of foreign workers), and 36 (concluding no substantial deviation from the obligation to provide agencies with notices of early separations).

opposed to a pattern or practice of such actions, would be sufficient to merit debarment").[21]

Here, the ALJ found that Lucero's violations were significant. As the ALJ found, Lucero willfully underpaid numerous workers for at least a two-year period by over $300,000, and placed workers at no less than 50 different locations outside the area of intended employment in just two years. D&O at 24, 37. Yet, in reducing the debarment period to the minimally permissible period, the ALJ ignored his own conclusions that Lucero flagrantly disregarded the law. The fact that the ALJ concluded that Lucero did not commit one of the violations on which the debarment was based – failing to hire a qualified U.S. worker – does not justify reducing the debarment so drastically. That violation involved only one worker, unlike the broad impact of the violations the ALJ did find (i.e., willfully failing to pay the offered wage for all hours worked to numerous H-2B workers, resulting in over $300,000 in back wages, and willfully placing H-2B workers at no less than 50 locations outside the area of intended employment).[22] In any event, consistent with the governing regulations, even just one of these two violations was sufficiently severe that either alone would warrant debarment for three years.

b. To the extent it is proper to consider post-investigation conduct, such as a commitment to future compliance, on which the ALJ relied here, such consideration should not override the severity of the violation as the main consideration when determining the period of debarment. And when focusing on post-investigation compliance, the Board in *Administrator v. Peter's Fine Greek Food* cautioned against relying on such post-investigation declarations of compliance as a

[21] While the Department is not appealing the ALJ's conclusion related to the early separations, the Department is appealing and seeks reversal of the ALJ's conclusion related to whether Lucero's willful preferential treatment of foreign workers was a substantial deviation from Lucero' obligations.

[22] As discussed above, the ALJ erred in concluding that Lucero's preferential treatment of H-2B workers was not a violation.

basis for reducing the debarment period. ARB No. 14-003-A, 2014 WL 860734, at *3 (ARB Feb. 26, 2014). The Board warned that such declarations should be considered with caution where WHD had no opportunity to investigate the employer's post-investigation compliance. *Id*. Here, the ALJ cited to *Peter's Fine Greek Food* in support of debarment reduction, D&O at 56 n.341, while doing the very thing that the Board was concerned about: reducing the debarment period in H-2B cases based simply on the employer's unsubstantiated promises of future compliance.

Not only should such assertions "be considered cautiously where the WHD Administrator had no opportunity to investigate assertions of post-investigation compliance," *Peter's Fine Greek Food*, 2014 WL 860734, at *3, but here, the record does not support the ALJ's finding that Lucero demonstrated a commitment to future compliance with the H-2B program's requirements. The ALJ must employ a reasonable exercise of discretion when deciding the debarment period. *Id.* But such discretion is not without limitations. The ALJ's exercise of discretion must "effectuate[] the purposes of the Secretary's regulation – fostering compliance with the provisions of the labor standards provisions of the [Davis Bacon and Related Acts] and furthering the public policies underlying those provisions." *In re A. Vento Constr. Contractor Arnold Vento*, WAB Case No. 87-51, 1990 WL 484312, at *3 (Oct. 17, 1990) (interpreting the debarment regulations under the Davis Bacon and Related Acts ("DBRA") and rejecting the ALJ's reduction of DBRA debarment from three to one year based on events subsequent to violation).[23] And when an exercise of discretion is based on a finding, that finding must be supported by substantial evidence in the record. *See, e.g., Adm'r v Deggeller*, ARB Case No.

[23] In considering the proper debarment period under the H-2B program, the Board noted that "other similar departmental regulations may provide meaningful guidance." *Peter's Fine Greek Food*, 2014 WL 860734, at *3.

2020-0004, 2022 WL 355152 at *4 (ARB Jan. 25, 2022) (The ARB upheld the ALJ findings, related to overtime pay, because they were based on substantial evidence in the record.); *see also Mach Mining, LLC v. Sec'y of Lab.*, 809 F.3d 1259, 1263 (D.C. Cir. 2016) ("The ALJ's factual findings underlying these determinations are subject to review for substantial evidence, which requires the court to determine whether there is such relevant evidence as a reasonable mind might accept as adequate to support the judge's conclusion.") (internal quotation marks omitted).

The evidence on which the ALJ relied in concluding that Lucero demonstrated a commitment to future compliance, D&O at 47, was flimsy and unsubstantiated. The ALJ cited testimony of Lucero's President Hector Alvino Guzman in which he was asked, by his attorney, what he *would* do if he were "allowed back into the H-2B program," to which he declared "we have records now." Tr. at 537-38. The ALJ also cited workers' statements to WHD during its investigation that, after WHD began its investigation, Lucero "started writing down hours of work." PX. K at 37; *see also* JX J ¶ 37 (similar statement). There is no basis to infer from these snippets of testimony or statements that Lucero finally started to maintain accurate time and pay records. Guzman simply declaring that Lucero has more records than it previously did is not evidence that those records accurately reflect lawful pay practices. *Cf. Brennan v. Correa*, 513 F.2d 161, 163 (8th Cir. 1975) (reasoning that a "trial court's belief that the employer desires to comply with the [FLSA] in the future" is not likely a sufficient basis to deny the Secretary projective injunctive relief). And the worker had no basis to know whether the hours that Lucero "started writing down" were in fact accurate records of the hours the H-2B workers worked. Indeed, the fact that Lucero kept records in the past but the ALJ determined that those records were incomplete and inaccurate, D&O at 27, 29, undermines any reliance on these fragments of testimony or statements as evidence that Lucero has demonstrated a commitment to future

compliance. Given Lucero's history of inaccurate records and the ALJ's finding that Lucero willfully disregarded the law regarding its recordkeeping obligations, the ALJ's conclusion that Lucero demonstrated a commitment to future compliance is both unreasonable and unsupported by substantial evidence in the record.

Moreover, the ALJ's determination that Lucero has sincerely committed to future compliance is unreasonable and not supported by evidence in the record where the undisputed evidence shows that Lucero made attestations to the federal government that it was in compliance and would continue to be in compliance with specific listed H-2B obligations, but then failed to comply with numerous of those obligations. Tr. at 467:18-25 (Guzman testified that he did not know he was responsible for transportation and subsistence costs from when the respondents left their hometowns). *See Butler Amusements*, 2023 WL 5126052, at *13 ("The regulations and instructions accompanying the certification application provided ample notice and guidance for Employer to comply with the INA and the terms of its certification . . . ."); *Adm'r v. C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, 2022 WL 1469015, at *8 n. 72 (ARB Apr. 4, 2022) (citing *Adm'r v. Home Mortg. Co. of Am.*, 2004-LCA-00040, slip op. at 15 (OALJ Mar. 6, 2006) (An employer's failure to read the terms of the TEC or properly learn about the H-2B program requirements amounts to "reckless disregard."), and *Adm'r v. Avenue Dental Care*, ARB No. 2007-0101, 2010 WL 348304, at *5 (Jan. 7, 2010) ("The [H-1B] employer's signature on the [Labor Certification Application] constitutes the employer's representation of the truth of the statements on the [Labor Certification Application] and acknowledges the employer's agreement to the labor condition statements (attestations) that are specifically identified.")).

To the extent that the ALJ supported his decision to reduce the debarment to the

minimum period allowed by pointing to the Administrator's reliance on Lucero's declaration that it would comply in the future, D&O at 56 n.340, that reliance was unfounded. The Administrator credited Lucero's post-investigation claims that it would comply in the future as a basis for mitigating some of the CMPs under the standard for CMP calculations set out in 29 C.F.R. 503.23(e)(6). Tr. at 230:19-24; PX M at 14, 16, 19.[24] Not only did the Administrator consider Lucero's commitment to future compliance for a different purpose, i.e., CMPs, not debarment, but the Administrator made very minimal reductions to her CMP assessments based on this factor. The Administrator reduced Lucero's CMP assessment by a mere 10 percent per applicable violation. In contrast, the ALJ reduced the debarment period by two-thirds, to the lowest possible debarment period.

c. The Administrator's three-year debarment period is also more appropriate than the ALJ's one year, given the purpose of debarment. Unlike CMPs, debarment is not punitive. *Adm'r v. KDE Equine, LLC*, OALJ Case No. 2022-TNE-003 (OALJ Aug. 17, 2022) (holding "H-2B debarment is an action brought primarily to vindicate public rights not a 'penalty'"); *See In re Brite Maint. Corp.*, WAB Case No. 87-07, 1989 WL 407462, at *2 (May 12, 1989) (debarment under the DBRA is not punitive); *United States v. Rusk*, 96 F.3d 777, 778–79 (5th Cir. 1996) (concluding that because debarment by the Federal Deposit Insurance Corporation was not punitive in nature, there can be no double jeopardy when debarment is issued after criminal sanctions, and citing cases reaching same conclusion under other statutory schemes). The purpose of debarment is to protect the integrity of a program. 2015 Rule, 80 Fed. Reg. at 24,087

[24] WHD indicated in its narrative report that, during WHD's final conference with the employer, Lucero claimed that it will attend a H-2B seminar, held a meeting with employees to explain their rights, sought advice by experts, and promised that all work locations will be included in the area of intended employment with the appropriate prevailing wage in that area.

(explaining that "[t]he debarment of entities from participating in a government program is an inherent part of an agency's responsibility to maintain the integrity of that program") (internal quotation marks omitted); *cf. Rusk*, 96 F.3d at 779 (debarment orders do not serve a punitive purpose, but rather the remedial goal of protecting the banking industry). Debarment ensures that law abiding employers operate on a level playing field with other law-abiding employers seeking to participate in this program to bring in foreign workers. *Cf. Vento*, 1990 WL 484312 at *6 (rejecting ALJ's debarment reduction under the DBRA from three years to one year where employer falsified payroll to simulate compliance, and the violation occurred over more than a two-year period and involved numerous contracts resulting in $39,000 in wage underpayments because the longer debarment period "best serves the interests of employees and contracting agencies, as well as the interests of law-abiding contractors who deserve a level playing field in the competition for government contracts"). Thus, debarment assures the public that the government only permits responsible employers to participate in this program. Here, given Lucero's flagrant and numerous violations, debarring Lucero for the minimally allowed period would undermine the public's confidence that only the most trustworthy employers are given permission to bring in foreign workers to work in the U.S. The Board should vacate the ALJ's decision to reduce the debarment period, and should debar Lucero for at least three years, consistent with the Administrator's determination.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board reverse the ALJ's conclusion that Lucero's willful preferential treatment of foreign workers was not a significant deviation from Lucero's obligations, and the ALJ's reduction of the CMPs for the back wage related violations, reduction of per-location CMPs for placing workers outside the

area of intended employment, reduction of CMPs for a lack of history of violations, and reduction of the period of debarment. The Administrator further requests that the Board enter an order concluding that Lucero's willful preferential treatment of foreign workers was a violation, reinstating the CMPs assessed by the Administrator for the wage related violations, increasing the CMPs for placing workers outside the area of intended employment by the number of states in which the violation occurred, increasing the other CMPs by the amount that the ALJ reduced for the lack of history of violations, and reinstating the Administrator's three-year debarment period.

Respectfully submitted,

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Attachment

Violation at Issue[i]	Back Wages[ii]	WHD's Total CMPs[ii]	ALJ's Total CMPs[iii]
Preferential treatment of H2B workers	n/a	$12,383.00	n/a
Failure to pay offered wage for all hours worked	$301,448.05	$295,551.23	$88,665.37
Placing H2B workers outside area of intended employment	n/a	$37,149.00	$9,906.40
Failure to pay inbound transportation & subsistence costs	$5,863.56	$5,863.56	$3,518.14
Failure to pay outbound transportation & subsistence costs	$5,249.13	$5,249.13	$3,149.48
Failure to disclose job order	n/a	$11,144.70	$7,429.80
Failure to forbid agent from seeking payments from workers	n/a	$2,476.60	$1,238.30
Document retention	n/a	$12,383.00	$9,906.40
TOTAL	**$312,560.75**	**$382,200.22**	**$123,813.89**

[i] This chart excludes the violations for discriminatory hiring and failing to give notices of early separations.
[ii] PX M at 6-31.
[iii] D&O at 57-58.