U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, OFFICE OF FOREIGN LABOR CERTIFICATION, EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

CENTRAL FLORIDA LABOR SERVICES, LLC, JJT SERVICES, LLC, OVERLOOK HARVESTING CO., LLC, OVERLOOK HARVESTING MICHIGAN, LLC,

RESPONDENTS.

ARB CASE NO. 2025-0026

ALJ CASE NOS. 2023-PED-00011, 2023-PED-00012, 2023-PED-00014, 2023-PED-00015
ALJ HEATHER C. LESLIE

DATE: March 28, 2025

Appearances:

For the Prosecuting Party, Administrator, Office of Foreign Labor Certification:

Jonathan L. Snare, Esq.; Matthew Bernt, Esq.; Katherine Zhao, Esq.; Gema J. Hall, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

***For the Respondents*:**

Christopher J. Schulte, Esq.; *Fisher & Phillips, LLP*; Washington, District of Columbia

Before JOHNSON, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge; JOHNSON, Chief Administrative Appeals Judge, concurring

DECISION AND ORDER VACATING AND REMANDING

ROLFE, Administrative Appeals Judge:

This case arises under the debarment provisions of the H-2A temporary agricultural labor program of the Immigration and Nationality Act (INA), as amended, and the H-2A implementing regulations.[1] The Administrator, Office of Foreign Labor Certification (OFLC) of the United States Department of Labor (Administrator) issued a Notice of Debarment to H-2A labor contractors Overlook Harvesting Co., LLC (OHC or Overlook), Central Florida Labor Services, LLC (CFLS), JJT Services, LLC (JJT), and Overlook Harvesting Michigan, LLC (OHM) (collectively, Respondents) for material misrepresentations in their 2020-2021 applications for Temporary Employment Certification.

Respondents appealed to the Office of Administrative Law Judges and an Administrative Law Judge (ALJ) was assigned. The ALJ issued a Decision on the Record Affirming Debarment (D. & O.). Respondents appealed. Finding the ALJ did not resolve material conflicts in the evidence or fulfill her duty of explanation, we vacate the ALJ's decision and remand for further proceedings consistent with this opinion.

BACKGROUND

Respondents submitted H-2A Applications for Temporary Employment Certification to OFLC as H-2A labor contractors (H-2ALCs) providing temporary nonimmigrant workers to fixed-site agricultural businesses in Florida in 2020 and 2021.[2]

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[1] 8 U.S.C. § 1101(a)(15)(H)(ii)(a), as amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986), 8 U.S.C. § 1188, and its implementing regulations at 20 C.F.R. Part 655, Subpart B.

[2] OHC: 9/22/20 Notice of Deficiency, Re: Overlook Harvesting Company, LLC at 221-22, 242; CFLS: 1/4/21 Notice of Deficiency, Re: Central Florida Labor Services at 722; JJT: 2/25/21 Notice of Deficiency, Re JJT Services, LLC at 487-88; OHM: *In the Matter of: Overlook Harvesting Michigan, LLC*, 2021-TLC-00209, slip op. at 2 (BALCA Sept. 24, 2021). An H-2ALC is "[a]ny person who meets the definition of employer . . . who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart." 20 C.F.R. § 655.103(b).

PROCEDURAL HISTORY

1. Notice of Debarment

On October 6, 2022, the Administrator issued a Notice of Debarment to Respondents for substantial violations under 20 C.F.R. § 655.182(e). The Administrator debarred Respondents from the H-2A program for the maximum period of three years.[3]

Based on factual findings in prior Board of Alien Labor Certification (BALCA) decisions, the Administrator found: OHC, CFLS, and JJT were single and joint employers without distinct, temporary or seasonal needs;[4] OHC and OHM were single and joint employers[5] and associated business entities;[6] and OHM had not historically operated in Florida and did not have staff to support operations in Florida.[7] The Administrator concluded that Respondents' combined dates of need "show[ed] a year-round (permanent) need for farmworkers, rather than temporary or seasonal need" as required for participation in the H-2A program.[8]

The Administrator also determined Respondents' debarment was warranted due to material misrepresentations regarding the periods of need stated in their H-2A applications for work to be performed in Florida. It concluded this after OHC's H-2A program director, Noradilia Lora, testified at two BALCA hearings on

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[3] Notice of Debarment at 13; D. & O. at 1.

[4] Notice of Debarment at 3-5, 8 (citing *Overlook Harvesting Co., LLC*, 2021-TLC-00050, slip op. at 19 (BALCA Jan. 21, 2021), *recon. denied* (Feb. 9, 2021) ("Overlook and [CFLS] share common ownership and management and may in fact be considered a single employer for purposes of the H-2A program."); *Overlook Harvesting Co., LLC*, 2021-TLC-00205, slip op. at 11-12, 13 n.15 (BALCA Sept. 9, 2021) ("JJT does not have a distinct seasonal need from CFLS, which I have already determined does not have a distinct seasonal need from Overlook.")).

[5] Notice of Debarment at 3-4, 8-9 (citing *Overlook Harvesting Co., LLC,* 2021-TLC-00209, slip op. at 11, 12 ("The evidence in the record clearly shows that OHC and OHM are joint employers for purposes of this application")); *Overlook Harvesting Co., LLC,* 2022-TLC-00013, slip op. at 16 (BALCA Nov. 24, 2021) ("[N]umerous BALCA administrative law judges have concluded that other companies that Overlook has created, including JJT, Overlook Harvesting Michigan, and CFLS, are joint employers for purposes of analyzing whether Overlook has a seasonal need for H-2A workers.").

[6] Notice of Debarment at 3-4, 12 (citing *Overlook Harvesting Co., LLC*, 2021-TLC-00205, slip op. at 11, 1).

[7] *Id.* at 12.

[8] *Id.* at 5.

January 11 and 14, 2021, that despite previously applying for H-2A labor at Marian Gardens nursery in Florida through mid-September 2021, agricultural work there ended in June 2021. Lora testified OHC planned to transfer the H-2A laborers to worksites in other states during the Florida off season in July-August 2021.[9]

In affirming the OFLC Certifying Officer's (CO) denial of H-2A application no. H-300-20301-889431 (-889431) for lack of seasonality, however, BALCA ALJ Evan H. Nordby found Lora not credible:

> I find it remarkable that the Employer would have a witness admit under oath to an intentional H-2A program violation – submitting a materially false application as to intended employment, even if it was denied and then withdrawn – to try to save this case. I choose to rely on the filed and sworn application in case -805501 over this testimony, and find that the period of need for first-line supervisors continued through September 14, 2021.[10]

Citing Lora's testimony, the Administrator found Respondents substantially violated a material term or condition of temporary labor certification under 20 C.F.R. § 655.182(d)(4) by submitting the following H-2A applications:

OHC application -805501

OHC filed H-2A application no. H-300-20248-805501 (-805501) on September 16, 2020.[11] It sought certification for 21 first line supervisors to perform work for fixed site grower Marian Gardens in Florida and attested to a period of seasonal need of November 15, 2020, to September 14, 2021. Relying on Lora's testimony

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9 Notice of Debarment at 10-11 (citing OHC witness testimony at: (1) a January 11, 2021 hearing on OHC's November 20, 2020 H-2A application (no. H-300-20323-917244) seeking certification for agricultural workers for February 1, 2021 to July 4, 2021 (*Overlook Harvesting Co.*, *LLC*, 2021-TLC-00050, slip op. at 9-10, 18) for the same agricultural work on behalf of grower Marian Gardens at various worksites in Florida; and, (2) a January 14, 2021 BALCA hearing on OHC's November 2, 2020 H-2A application no. H-300-20301-889431 for H-2A labor in Florida from December 26, 2020 through June 30, 2021 (*Overlook Harvesting Co.*, *LLC*, 2021-TLC-00042, slip op. at 6-7 (BALCA Jan. 26, 2021)).

10 *Overlook Harvesting Co.*, *LLC*, 2021-TLC-00042, slip op. at 7.

11 The D. & O. states OHC filed H-2A application no. -805501 on November 16, 2020. D. & O. at 2-3. The Administrator's December 5, 2022 Final Determination on Debarment clarifies that -805501 was in fact filed on September 16, 2020. Final Determination on Debarment at 4.

that agricultural work there ended in June 2021, the Administrator determined OHC materially misrepresented its period of need.[12]

CFLS application -954035

CFLS filed H-2A application no. H-300-20346-954035 (-954035) on December 29, 2020. It attested to a seasonal period of need of February 15, 2021 to October 15, 2021 for 60 nursery workers for the same area of intended employment as OHC's application -805501.[13] The Administrator debarred CFLS on October 6, 2022 because application -954035 contained a material misrepresentation of fact which "contradict[ed] the [joint and single] employer's [OHC and CFLS'] purported off-season summer months of July and August" in OHC's "first known attempt at manipulating its seasonal need by using an associated entity [CFLS] to circumvent H-2A program requirements."[14]

JJT application -059385

JJT filed H-2A application no. H-300-21036-059385 (-059385) on February 18, 2021, in which it attested to a seasonal period of need of April 6, 2021 to December 15, 2021 for 50 farmworkers in the same areas of intended employment in OHC's and CFLS's H-2A applications (for work to be performed at Marian Gardens).[15] Per the October 6, 2022 debarment notice, JJT violated the H-2A program as its application -059385 had "nearly identical contractual requirements" as joint and single employer OHC and again conflicted with OHC's earlier report that the contract's off season was July and August.[16] The Administrator thus found JJT's application -059385 materially misrepresented its period of need in another

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[12] *See supra* p. 3; Notice of Debarment at 10-11; D. & O. at 1 n.1, 12. The CO of the Chicago National Processing Center (CNPC) had ultimately denied application -805501 for lack of seasonal need on October 13, 2020. OHC requested a de novo hearing on October 14, 2020, but withdrew its appeal prior to a hearing. Decision on the Record Affirming Debarment at 3.

[13] D. & O. at 1 n.1; Notice of Debarment at 8.

[14] Notice of Debarment at 8; D. & O. at 1 n.1, 12. The CO issued a Notice of Required Modification to CFLS regarding application -954035 on January 15, 2021, and CFLS filed a request for a de novo hearing. On February 2, 2021, CFLS filed a motion to withdraw its hearing request, which an ALJ granted on February 3, 2021. The CO ultimately denied CFLS' H-2A application -954035 on February 12, 2021, as CFLS had not modified the application. D. & O. at 4; Final Determination on Debarment at 16 n.50.

[15] Notice of Debarment at 9.

[16] *Id.* at 12-13; D. & O. at 12-13.

attempt by OHC to bypass the H-2A seasonality requirements using an associated entity.[17]

OHM application -445870

OHM filed application no. H-300-21187-445870 (-445870) on July 13, 2021. It attested to a seasonal need of September 6, 2021 to June 25, 2022, and sought certification for 21 farmworkers to work at Casa Flora Nursery sites in Florida.[18] The Administrator determined OHM materially misrepresented the seasonality of its need in application -445870, and committed a substantial violation under 20 CFR § 655.182(d)(4) that warranted its debarment.[19]

On November 4, 2022, Respondents filed a rebuttal to the Notice of Debarment.[20] On December 5, 2022, the Administrator issued a Final Determination on Debarment.[21]

2. ALJ Proceedings

On January 4, 2023, Respondents requested a de novo hearing before an ALJ challenging their debarment pursuant to 20 C.F.R. § 655.182(f)(3).[22] On February 21, 2023, Respondents' four appeals were consolidated.[23]

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[17] Notice of Debarment at 9-10, 12-13; D. & O. at 1 n.1, 12-13. After the CO had issued a Notice of Deficiency to JJT and gave it the opportunity to modify application -059385 on February 25, 2021, employer withdrew the application on March 8, 2021. D. & O. at 4.

[18] Notice of Debarment at 8-9, 12; Final Determination on Debarment at 15-16. *Overlook Harvesting Co., Inc*., 2021-TLC-00223, slip op. at 14 (BALCA Oct. 13, 2021). OHM application -445870 was denied in *Overlook Harvesting Michigan, LLC*, 2021-TLC-00209. BALCA ALJ Joseph E. Kane denied OHM's motion for reconsideration and affirmed the denial, finding OHC and OHM were joint employers, and that OHM's/OHC's "actual total" or "overall" need "span[ned] the course of a year." *Overlook Harvesting Michigan, LLC*, 2021-TLC-00209, slip op. at 3, 11-12; D. & O. at 4-5.

[19] Notice of Debarment at 8-9, 12.

[20] Final Determination on Debarment at 2-3.

[21] Final Determination on Debarment.

[22] D. & O. at 3.

[23] Notice of Docketing and Order of Consolidation.

On October 20, 2023, Respondents and the Administrator filed cross-motions for summary decision and their respective oppositions on November 3, 2023.[24] On December 19, 2023, the ALJ issued an order denying Respondents' motion for summary decision and granting in part and denying in part the Administrator's motion for summary decision.[25]

3. ALJ Summary Decision Order

A. Debarment for Uncertified Applications

In their October 20, 2023 motion for summary decision, Respondents argued 20 C.F.R. § 655.182 did not confer authority on the Administrator to debar employers for alleged H-2A violations arising from uncertified applications and that the October 6, 2022 debarment notice was untimely as to Respondent OHC.[26] In an Order Denying Employer's Motion for Summary Decision, the ALJ determined that the Administrator has the authority to debar employers who submit uncertified applications under the H-2A program to uphold the integrity of the H-2A program per its purpose, and that the alternative "would yield absurd results."[27]

B. Statute of Limitations

The ALJ found the October 6, 2022 debarment notice timely as to Respondent OHC. She found it undisputed that OHC reasserted the same period of need stated in application -805501 (filed on September 16, 2020) in its appeal of the CO's denial of certification on October 14, 2020.[28] The ALJ concluded that as OHC "continue[d] the alleged violation" of materially misrepresenting its period of need on October 14,

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[24] Order Denying Employer's Motion for Summary Decision; Order Granting in Part and Denying in Part Administrator's Motion for Summary Decision (Summary Decision Order) at 2.

[25] Summary Decision Order.

[26] Employer's Motion for Summary Decision and Memorandum of Law in Support at 4-7.

[27] Summary Decision Order at 6-7.

[28] *Id.* at 9-10 Administrator's Motion for Summary Decision at 17 ("Overlook Harvesting asserts that its need for H-2A labor as set forth in [Application -805501] presents a seasonal need as defined in Section 655.104(d), which forecasts a period of seasonal employment consistent with its seasonal needs in past seasons, and consistent with its needs to seasonally employ Farmworkers and Laborers in central and south-central Florida.").

2020, the October 6, 2022 Notice of Debarment was issued within the 2-year limitations period and was not time-barred.[29]

On January 2, 2024, the ALJ issued an order granting the parties' motions for a decision on the record.[30] In their motion, Respondents argued that the Administrator was collaterally estopped from basing their debarment on Lora's testimony given Judge Nordby's finding she was not credible in his decision in *Overlook Harvesting Co., LLC*, 2021-TLC-00042 (BALCA Jan. 26, 2021).[31] They further argued this credibility finding estopped the ALJ from affirming the debarment.[32]

3. ALJ Decision on the Record Affirming Debarment

The ALJ affirmed the Administrator's determination in all but one respect. She reduced the debarment period from 3 to 1.5 years after considering seven factors relevant to weighing the substantiality of violations for which an employer can be debarred and finding that only two factors existed.[33]

A. Single and Joint Employers

The ALJ concluded (1) OHC and CFLS as well as (2) OHC, CFLS, and JJT were single and joint employers without distinct seasonal needs; and that,

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[29] *Id*. at 9. The ALJ reserved the question of whether the period of need OHC claimed in -805501 was a material misrepresentation of fact for a hearing. *Id*. at 9-10. The ALJ did not address the other arguments in the Administrator's motion for summary decision, which were: (a) The continuing violations or equitable tolling principles applied to toll the limitations period as to OHC's debarment (Memorandum of Law in Support of Administrator's Motion for Summary Decision at 19-24), and in the alternative, (b) even if the filing of OHC's application -805501 was too dated a violation to form a basis for debarment of OHC, the misrepresentations in Respondents' remaining H-2A applications, which were clearly filed within the limitations period, were sufficient to support debarment as to all the Respondents (Memorandum of Law in Support of Administrator's Motion for Summary Decision at 24-25).

[30] D. & O. at 2.

[31] Employer's Motion for Decision on the Record at 7-10.

[32] *Id*.

[33] D. & O. at 17-19; 20 C.F.R. § 655.182(e).

(3) OHC and OHM were single and joint employers with overlapping seasonal needs based on such findings in BALCA decisions.[34]

B. Material Misrepresentations of Fact

The ALJ noted that a "material misrepresentation of fact" under 20 C.F.R. § 655.182(d)(4) is not strictly defined in the regulations. She found, however, that a misrepresentation is material when it has a "natural tendency to influence the decision of the [agency]," and "addresses a core or primary objective of the [H-2A] program."[35] A misrepresentation of fact in the H-2A application process is material, she concluded, where "an essential principle or element of the program is frustrated, *e.g.* seasonal need."[36]

The ALJ determined that as the periods of need in OHC's, CFLS's, and JJT's H-2A applications "contradicted [OHC's] purported off-season of July and August," they contained "an assertion . . . not in accord with the facts."[37] Respondents' misrepresentations of fact were "material as a violation of 20 C.F.R. § 655.182(d)(5)" because they were "material to the final outcome of the [H-2A] application[s]."[38]

In support of her finding OHC, CFLS, and JJT materially misrepresented their periods of need, the ALJ cited Lora's testimony that OHC's need for H-2A labor ended in June 2021.[39] The ALJ did not address Judge Nordby's determination that Lora's testimony was not credible.[40]

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[34] OHC and CFLS: D. & O. at 7 (citing *Overlook Harvesting Co., LLC*, 2022-TLC-00013; *Overlook Harvesting Co., LLC,* 2021-TLC-00205 (determining that OHC's founders owned 75% of CFLS, had "similar duties" vis-a-vis CFLS, and that OHC and CFLS were "essentially the same thing.")); OHC, CFLS, and JJT: D. & O. at 7 (citing *Overlook Harvesting Co., LLC,* 2022-TLC-00013 and *Overlook Harvesting Co., LLC,* 2021-TLC-00205 where BALCA concluded JJT was owned by the spouses of CFLS' owners and assumed the identical H-2ALC contract covered by CFLS' denied H-2A application (-954035)).

[35] D. & O. at 9-10 (citing *Bestkey Sols*., *Inc*., 2014-PER-01248, slip op. at 4 (Apr. 6, 2018)).

[36] *Id.* at 10 (citing *Direct Staffing LLC*, 2024-TLC-00020, slip op. at 8 (Feb. 28, 2024)).

[37] *Id.* at 12-13 (citing *Barrer v. Women's Nat'l Bank*, 761 F.2d 752, 758 (D.C. Cir. 1985); Petitioners, 2012 WL 9160221 at *4 (June 4, 2012)).

[38] *Id.* at 13.

[39] *Id.* at 12.

[40] *Id.*; *Overlook Harvesting Co*., *LLC*, 2021-TLC-00042, slip op. at 6-7.

The ALJ next found that "the true issue is whether [OHC] used [OHM] to materially misrepresent its period of need."[41] She determined that as the OHC and OHM applications contained "conflicting periods of need on their respective applications," they contained material misrepresentations and violated the H-2A program under 20 C.F.R. § 655.182(d)(5).[42]

The ALJ found that as seasonality was a core fact and central element of the H-2A program, a misrepresentation of fact concerning seasonality could be deemed a material misrepresentation, for which debarment was an available remedy.[43]

C. Substantiality of Violations

The ALJ next reviewed the seven factors the Administrator may consider in evaluating whether a violation is "substantial" to permit debarment under 20 C.F.R. § 655.182(a).[44] She determined that two of the seven factors existed (a history of previous violations and the gravity of the violation) with respect to Respondents' material misrepresentations. The ALJ concluded that thus the instant case was not the "most egregious" of cases for which the maximum debarment period of three years would have been appropriate. She instead found the facts supported a "one-and-a-half-year debarment period."[45]

Respondents timely appealed the ALJ's decision to the Administrative Review Board (Board) on December 24, 2024.[46] The parties filed briefs with the Board. On appeal, Respondents argue their H-2A applications did not contain material misrepresentations, the Notice of Debarment was time-barred as to OHC, OHM's H-2A application did not form a basis for debarment, and the Administrator exceeded its authority in debarring Respondents for alleged misrepresentations in uncertified H-2A applications. The Administrator, in turn, argues the ALJ's decision should be affirmed

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41 D. & O. at 15.

42 *Id.* at 15. Periods of need in OHC and OHM's H-2A applications: OHC – November 15, 2020 to September 14, 2021; OHM – September 6, 2021 to June 25, 2022. *Id.* at 1 n.1.

43 *Id.* at 15-17.

44 *Id.* at 17-18; 20 C.F.R. § 655.182(a), (e).

45 D. & O. at 18.

46 Respondents' Petition for Review (Resp. Pet. for Review).

DISCUSSION

The Board has the authority to decide appeals of ALJ decisions under the H-2A provisions of the INA.[47] As a condition for appellate review under the Administrative Procedure Act (APA), an ALJ has a duty to adequately explain why she credited certain evidence and discredited other evidence.[48] While an ALJ's corresponding duty of explanation is "not intended to be a mandate for administrative verbosity[,]"[49] a reviewing tribunal must be able to "understand what the ALJ did and why [she] did it."[50]

We understand what the ALJ did here, but it is not clear why she did it: in our view, the ALJ did not fulfill her duty of explanation by failing to resolve a material conflict in the evidence and by failing to adequately explain her affirmance of OHM's debarment.

1. The ALJ did not resolve a conflict in the evidence regarding the credibility of a material witness.

The ALJ determined OHC, CFLS, and JJT misrepresented their periods of need in their H-2A applications seeking workers for periods covering July and August. In so doing, the ALJ -- without discussion -- accepted as true Noradilia Lora's January 14, 2021 testimony in *Overlook Harvesting Co.*, LLC, 2021-TLC-00042 that OHC's need for workers in Florida ended in June.[51] As such, Lora's testimony forms the basis for the Administrator's and the ALJ's findings that the periods of need in OHC, CFLS, and JJT's H-2A applications were material misrepresentations that justified their debarment.[52]

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[47] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 8 U.S.C. §§ 1103(a)(6), 1184(c)(1); 20 C.F.R. § 655.182(f)(4), (5).

[48] 5 U.S.C. § 557(c)(3)(A). Specifically, the APA requires the ALJ to include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *Id.*

[49] *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999).

[50] *Lane Hollow Coal Co. v. Dir., OWCP, U.S. Dep't of Lab.*, 137 F.3d 799, 803 (4th Cir. 1998).

[51] D. & O. at 11-13; *Overlook Harvesting Co., LLC*, 2021-TLC-00042, slip op. at 6-7.

[52] The ALJ determined Respondents' collateral and judicial estoppel arguments were "without merit as the issue of misrepresentation of seasonal need has not been litigated by the parties before." D. & O. at 5 n.5. See Employer's Motion for Decision on the Record at 7-10 for Respondent's collateral and judicial estoppel arguments before the ALJ.

On appeal, Respondents argue "[t]he problem for the ALJ and the Administrator is that Judge Nordby [the BALCA ALJ], on the very page cited by the ALJ in the Decision, explicitly found that he did not credit Ms. Lora's testimony and, at the request of OFLC, made a specific finding of fact that OHC did need those H-2A workers through September 14, 2021."[53] Respondents thus allege that the debarments "in this case all rest on OFLC's current argument that the opposite is true; that Ms. Lora was telling the truth and application -805501 contained a lie about Overlook Harvesting's (sic)."[54] And Respondents conclude it therefore was "reversible error for ALJ Leslie to reach the opposite credibility determination from ALJ Nordby, who had the opportunity to observe Ms. Lora and make a credibility determination."[55]

The Administrator counters that while Judge Nordby "decided in favor of Respondents, several other BALCA judges affirmed that the seasonal statement made in the -805501 filing was 'another example of the Employer misrepresenting its alleged period of seasonal need'" and they "consistently agreed that Respondents materially misrepresented their respective periods of needs on the H-2A applications in a series of attempts to diversify their farm labor contracts and circumvent H-2A program requirements."[56] The Administrator asserts "the ALJ only made the decision to find Ms. Lora's testimony credible[ ] after carefully reviewing the entire record and all the BALCA decisions relevant to this case" and that "[b]ased on [her] thorough examination of the same evidence[]" she properly determined Respondents "misrepresented the stated period of need on their respective application[s]."[57]

While the Administrator ultimately may be correct, we find none of that careful consideration currently discussed in the ALJ's decision: the ALJ did not note Judge Nordby's discrediting of Lora's testimony, consider whether it conflicted with any other credibility findings of BALCA ALJs, nor attempt to explain whether such a conflict, if it exists, affects Respondents' alleged misrepresentations. Although the Administrator deftly urges us to bridge the gap between the record and the ALJ's stated basis for her credibility determination based on an implied assumption the ALJ considered and reconciled this potential conflict in evidence, the APA does not allow us to do so.[58]

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53 Respondent's Opening Brief (Resp. Br.) at 12.

54 *Id*. at 13.

55 *Id*.

56 Administrator's Response Brief (Admin. Br.) at 24.

57 *Id*. at 25.

58 *Dir., OWCP, U.S. Dep't of Lab. v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (stating that when an ALJ fails to make necessary factual findings, the proper course for a

Accordingly, we vacate the ALJ's determination that OHC, CFLS, and JJT materially misrepresented their periods of need in their respective H-2A applications, and remand for the ALJ to thoroughly review *Overlook Harvesting Co.*, LLC, 2021-TLC-00042 together with the remaining underlying BALCA decisions. The ALJ shall thereafter adequately explain her credibility determination and reassess the basis for the Administrator's debarment of OHC, CFLS, and JJT for material misrepresentations of fact in their H-2A applications in light of that determination.

2. The ALJ did not fulfill her duty of explanation in affirming the debarment of OHM.

In debarring OHM, the Administrator determined that OHC and OHM were single and joint employers[59] and associated business entities.[60] The Administrator further found OHM's July 13, 2021 application -445870 (in which it attested to a seasonal need of September 6, 2021 to June 25, 2022 and sought certification for 21 farmworkers to work at Casa Flora Nursery sites in Florida)[61] materially misrepresented the seasonality of OHM's need, and was a substantial violation under 20 C.F.R. § 655.182(d)(4), warranting its debarment.[62]

At the ALJ level, Respondents argued OHM application -445870 contained no material misrepresentations subjecting it to debarment[63] because: (1) it covered a contract with Casa Flora (not Marian Gardens, the contract covered by OHC, CFLS, JJT's H-2A applications); (2) it sought H-2A labor for a period which was firmly within the season for agricultural work in Florida (and outside of the July and

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reviewing tribunal is to remand the case to the ALJ rather than to fill the gaps in the ALJ's opinion).

[59] Notice of Debarment at 3-4, 8-9. *Overlook Harvesting Co., LLC,* 2021-TLC-00209, slip op. at 11, 12 ("The evidence in the record clearly shows that OHC and OHM are joint employers for purposes of this application"); *Overlook Harvesting Co., LLC,* 2022-TLC-00013, slip op. at 16 ("[N]umerous BALCA administrative law judges have concluded that other companies that Overlook has created, including JJT, Overlook Harvesting Michigan, and CFLS, are joint employers for purposes of analyzing whether Overlook has a seasonal need for H-2A workers.").

[60] Notice of Debarment at 3-4, 12.

[61] *Id.* at 8-9; Final Determination on Debarment at 15. *Overlook Harvesting Co., Inc.*, 2021-TLC-00223, slip op. at 17. OHM's application -445870 was denied in *Overlook Harvesting Michigan, LLC*, 2021-TLC-00209, slip op. at 12 n.13.

[62] Notice of Debarment at 8-9. Final Determination on Debarment at 15-16, 20.

[63] Employer's Response to Administrator's Motion for Decision on the Record at 6-11.

August Florida off season);[64] and, (3) OHM was a "separate entit[y]" from OHC and to which the "single employer" and "successor-in-interest" tests did not apply to subject OHM to debarment by virtue of its relationship with OHC.[65]

The Administrator countered that OHM's application contained material misrepresentations for which debarment was justified because: (1) OHC received multiple BALCA decisions affirming that OHC, CFLS, and JJT were single and joint employers with a combined year-round need for labor; (2) OHC filed application -445870 as OHM to bypass the earlier denials of certification for lack of seasonality; and, (3) OHC filed the application "despite the fact that OHM had not historically worked in Florida and did not have its own staff to support these operations in Florida." [66]

The ALJ's decision presents the parties' respective arguments as to whether OHM's application resulted in a material misrepresentation of fact with lengthy direct quotes from their briefs.[67] But it does not resolve them. The ALJ simply concludes that, because OHC and OHM sought "conflicting periods of need on their respective applications," they materially misrepresented their periods of need and violated the H-2A program under 20 C.F.R. § 655.182(d)(4).[68]

On appeal of the ALJ's decision, Respondents repeat the arguments submitted to the ALJ.[69] They add that the parameters of OHM's H-2A application, which "already fit exactly into the well-established [OHC] fall-spring season," could not "achieve [OHC] year-round H-2A employment in Florida."[70] The Administrator responds that the ALJ determined OHM materially misrepresented its period of need via a "thorough examination" of the evidence.[71]

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64 Employer's Motion for Summary Decision and Memorandum of Law in Support at 11-12.

65 *Id*. at 11.

66 Administrator's Opposition to Respondent's Motion for Decision on the Record at 8-9.

67 D. & O. at 14-15.

68 *Id.* at 15. Periods of need in OHC and OHM's H-2A applications: OHC – November 15, 2020 to September 14, 2021; OHM – September 6, 2021, to June 25, 2022. *Id.* at 1 n.1.

69 Resp. Br. at 24-26.

70 *Id*. at 25.

71 Admin. Br. at 22, 25.

But beyond reciting the parties' arguments and generally citing a single BALCA decision for the premise OHM and OHC are joint and single employers,[72] the ALJ again failed to adequately explain the basis for her conclusion the periods of need in OHC and OHM's applications were conflicting and how this conflict illustrates a material misrepresentation by OHM.[73] Moreover, although the ALJ reasoned "the true issue is whether [OHC] used [OHM] to materially misrepresent its period of need,"[74] she did not independently reach a finding on it. In the absence of the ALJ's factual determination and an explanation of the ALJ's legal grounds for OHM's debarment for OHC's actions, the ALJ's finding OHM's H-2A application materially misrepresented its period of need does not pass muster under the APA.[75]

We therefore further direct the ALJ on remand to reassess whether OHM's application materially mispresented its need for H-2A labor.

3. Potential mitigation of period of debarment.

Finally, in determining the severity of Respondents' violations, the ALJ found they involved two of the seven non-exclusive factors outlined at 20 C.F.R. § 655.182(e) -- a "[p]revious history of violation(s)" and the "gravity of the violation(s)."[76] She found these factors supported by Respondents' repeated violations and material misrepresentations, and reduced the debarment period from 3 to 1.5 years.[77] Should the ALJ modify or reverse the Administrator's determination that any of the Respondents misrepresented their periods of need in their H-2A applications, the repetition and thus the gravity of their violations under 20 C.F.R. § 655.182(d) will be diminished. In that instance, the ALJ shall proportionally mitigate the 1.5 year debarment period meted out in her November 27, 2024 decision.

We decline to reach the Respondents' remaining arguments unless and until they reach us on a fully developed record.

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72 D. & O. at 7; *Overlook Harvesting Co., LLC,* 2021-TLC-00205.

73 D. & O. at 7, 14-15.

74 *Id.* at 14.

75 5 U.S.C. § 557(c)(3)(A).

76 D. & O. at 16-18; 20 C.F.R. § 655.182(e) (2010 Rule).

77 D. & O. at 17-18; 20 C.F.R. § 655.182(c)(2) (2010 Rule) ("No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision.").

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JOHNSON, Chief Administrative Appeals Judge, concurring:

I concur with the analysis and result above. While I reserve final judgment on this issue and the remaining issues until (and if) the case is before us on a complete record, I write separately here to note my strong disagreement with the Administrator's claimed authority to debar employers for alleged material misrepresentations in their *uncertified* H-2A applications. The operative umbrella proviso is at 20 C.F.R. § 655.182(a), which states, in relevant part, that debarment is available when an employer "substantially violated a material term or condition of its temporary agricultural labor certification."[78] Apparently the issue is one of first impression.

The Administrator hangs its argument on the language in 20 C.F.R. § 655.182(d)(4), that there was a "[a] material misrepresentation of fact during the application process."[79] But this lone sentence cannot be read independently from the overall dictates of 20 C.F.R. § 655.182(a), as if detached from the broader regulation. To reiterate, 20 C.F.R. § 655.182(a) states debarment is available when an employer "substantially violated a material term or condition *of its temporary*

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[78] 20 C.F.R. § 655.182(a).

[79] 20 C.F.R. § 655.182(d)(4) (2010 Rule). The ALJ's D. & O. cites this provision as 20 C.F.R. § 655.182(d)(5) from the debarment regulations amended in 2022. *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 87 Fed. Reg. 61,660 (Oct. 12, 2022). However, the H-2A applications in this case were filed in 2020-2021 such that the 2010 regulations apply. Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6,884 (Feb. 12, 2010) ("2010 Rule").

agricultural labor certification."[80] While a material misrepresentation is one defined "violation" which may arise in the process of applying for certification, it is clear, in my view, that the Administrator may not take the affirmative step of debarring an employer for that "violation" unless that misrepresentation also violated a material term or condition of the certification granted by the Administrator.[81] The provision at 20 C.F.R. § 655.182(d)(4) is thus bound by the criteria prefaced at 20 C.F.R. § 655.182(a).[82] Untethering "material misrepresentation of fact in the application process" from the requirements of 20 C.F.R. § 655.182(a) would surely give new meaning to the phrase "the tail wagging the dog."

The Administrator urges the Board to defer to its interpretation of "§ 655.182(d) as a clarification and expansion of § 655.182(a)" to allow it to pursue debarment without the certification of an H-2A application.[83] But regulatory interpretation must be governed by a review of the entire regulatory structure and not be driven by a sentence here or there, whatever its apparent meaning in isolation. "Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction."[84] Careful consideration of the "text, structure, history, and purpose of a regulation" must first be employed.[85] Justice O'Connor has explained: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation.

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[80] 20 C.F.R. § 655.182(a) (2010 Rule) (emphasis added). The language of 20 C.F.R. § 655.182(a) tracks that of the enabling statute: "The Secretary of Labor *may not issue a certification* under subsection (a) with respect to an employer if the conditions described in that subsection are not met or if . . . [T]he employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period *substantially violated a material term or condition of the labor certification* with respect to the employment of domestic or nonimmigrant workers." 8 U.S.C. § 1188(b)(2)(A) (emphasis added).

[81] 20 C.F.R. § 655.182(d)(4) (2010 Rule).

[82] *Id*.

[83] Admin. Br. at 33.

[84] *Kisor v. Wilkie*, 588 U.S. 558, 566 (2019).

[85] *Id*. at 559 (citing *Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[86]

A diligent search of the preambles of the Notice of Proposed Rulemaking[87] and the Final Rule[88] (albeit not exhaustive) which could have provided useful insight as to the definitive meaning of the subject debarment provisions' interlocking phrases, has not unearthed meaningful guidance, nor has the Administrator provided any (even assuming weight could be given to the preambles).

Further, for obvious reasons, debarment has long been considered the "death penalty" of procurement law as it can cut off the lifeblood of an employer or contractor's business.[89] Given this fact, it would be odd that the purported power to debar for material misrepresentations in uncertified applications (if in fact such power was ever added) would yield little to no apparent ascertainable mention in the rulemaking records of the 2010 regulation. It is even more perplexing the Administrator has not pointed to any instances in which it has utilized this purported power in the past, if it in fact exists.

Lastly, the Administrator argues that its position should be adopted because it advances the "integrity" of the program. But the program has long been enforced without this sanction, resulting in hundreds of denied applications.[90]

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[86] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000). That Justice O'Connor's comments were made in the context of *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) does not affect the import of her analysis. Indeed, I would argue that it becomes even more salient in the legal environment which exists following the repeal of *Chevron* in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) which (in basic terms) requires less deference to agencies.

[87] Proposed Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 Fed. Reg. 45,906 (Sept. 4, 2009).

[88] Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6,884 (Feb. 12, 2010).

[89] Daniel E. Schoeni, *Personal Debarment for Non-Distributive Corporate Misconduct: On the Efficacy of Debarring the Individuals from Government Contracts for Collective Wrongdoing*. 46 Pub. Cont. L.J. 51 (2016). Obviously, the utilization of debarment as a sanction to block an employer from using the H-2A program differs somewhat from debarment from access to government contracts. However, both types of debarment exact a severe toll on the involved businesses.

[90] I take judicial notice of U.S. Department of Labor data showing the OFLC denied 1,751 applications from 2017 through 2024. *See Employment and Training Administration, Foreign Labor Certification, Performance Data*, https://www.dol.gov/agencies/eta/foreign-labor/performance for Historical Program

Employers who submit untruthful applications already face denial of their applications, together with penalties for perjury under 18 U.S.C. § 1001[91] to induce credibility in the application process. Stated simply, given this is the first time this issue has arisen in the many years the H-2A program has operated, it begs credulity that debarment at the pre-certification stage is needed for effective enforcement. Further, the enforcement structure of any statute (or regulation) is based on many factors and considerations. It typically strikes a balance between penalties which are adequate to promote compliance, but are not so harsh as to drive employers away from the program entirely, and other factors.[92] A narrow view of what promotes enforcement alone must not, therefore, dictate the interpretation of a regulation or statute.

In sum, the Administrator's proposal of a significantly expanded debarment power has profound implications which must be based on more than the slim reeds presented here.

Fact Sheets entitled *H-2A Temporary Agricultural Program – Selected Statistics* for fiscal years 2017-2024.

[91] *See* 20 C.F.R. § 655.164 (2010 Rule) for the provision on the denial of certification. *See also* Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States;* 75 Fed. Reg. 6,884-01, 6,920, 6,935 (Feb. 12, 2010) (2010 Rule). Application for Temporary Employment Certification; ETA Form 9142 – Appendix A.2. U.S. Department of Labor. 18 U.S.C. § 1001. For a recent application of 18 U.S.C. § 1001, see *U.S. v. Rynn*, No. 2:24-cr-00653-RMG, 2025 WL 746007 (D.S.C. Mar. 7, 2025).

[92] See *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Volt Mgmt. Corp.*, ARB No. 2018-0075, ALJ No. 2012-LCA-00044, slip op. at 11-15 (ARB Aug. 27, 2020) for a discussion of statutory and regulatory interpretation which balances the competing interests and policy concerns in the H-1B context. *See also* 42 U.S.C. § 1981a(b)(3) (the statutory caps on punitive and compensatory damages in cases of disparate treatment under Title VII of the 1964 Civil Rights Act and the Americans with Disabilities Act as a compromise balancing several considerations); *Hernandez-Miranda v. Empresas Diaz Masso, Inc.*, 651 F.3d 167, 172 (1st Cir. 2011) ("The sparse legislative history of the 1991 amendments reflect that this provision arose from a political compromise between those who wanted to broaden the availability of damages under Title VII and the Americans with Disabilities Act and those concerned that an expansion of remedies under these statutes might result in frivolous litigation and awards that posed economic perils to businesses.").