U.S. Department of Labor

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

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NOS. 2023-0058 2024-0003**
PROSECUTING PARTY,	**ALJ CASE NO. 2018-TAE-00035 ASSOCIATE CHIEF ALJ PAUL R. ALMANZA**
v.	
TEN WEST CATTLE, INC.,	**ALJ CASE NO. 2023-TAE-00002 ALJ JONATHAN C. CALIANOS**
RESPONDENT.	**DATE: May 29, 2025**

Appearances:

For the Prosecuting Party:
Jennifer S. Brand, Esq., Rachel Goldberg, Esq., and Katelyn J. Poe, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
Kara E. Stockdale, Esq.; *Baird Holm LLP*; Omaha, Nebraska

Before JOHNSON, Chief Administrative Appeals Judge, and THOMPSON and KAPLAN, Administrative Appeals Judges; KAPLAN, Administrative Appeals Judge, concurring; THOMPSON, Administrative Appeals Judge, dissenting

DECISION AND ORDER

These cases arise under the H-2A provisions of the Immigration and Nationality Act (INA), as amended, and their implementing regulations.[1] The INA's H-2A program allows employers to hire foreign, nonimmigrant workers to temporarily fill agricultural positions in the United States.[2] Respondent Ten West Cattle, Inc., a feedlot operator in Nebraska, employed H-2A workers for the 2015, 2016, 2018, and 2019 seasons. During these seasons, Respondent also hosted individuals participating in United States Department of State's J-1 Exchange Visitor Program (EVP), which allows nonimmigrant foreign nationals to temporarily come to the United States as "trainees and interns."[3]

The Administrator, Wage and Hour Division (WHD), United States Department of Labor (Administrator), investigated Respondent for compliance with H-2A program requirements. At the end of the investigations, the Administrator found that Respondent committed various violations of the H-2A regulations and issued two Notices of Determination covering the different certification periods. Central to the current case is the Administrator's finding that Respondent did not pay J-1 program participants the H-2A minimum wage rate for time spent in "corresponding employment" with Respondent's H-2A workers.[4]

On appeal, Respondent argues that J-1 program participants cannot engage in "corresponding employment" with H-2A workers, as that term is defined by the H-2A regulations. Specifically, Respondent argues: (1) only "U.S. workers" may be engaged in "corresponding employment" with H-2A workers under the H-2A regulations, and (2) J-1 program participants cannot be considered "U.S. workers" for purposes of the H-2A program. The Administrator counters: (1) the H-2A definition of "corresponding employment" extends to any worker, not just "U.S.

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[1] 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B (2010); 29 C.F.R. Part 503 (2024). Unless otherwise indicated, the references and citations to 20 C.F.R. Part 655, Subpart B herein are to the regulations promulgated in 2010, which applied at the time the violations were alleged to have occurred in this case. Portions of the regulations have since been amended, but those amendments do not impact our analysis.

[2] 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

[3] 22 C.F.R. § 62.22.

[4] The Administrator also identified other violations in the Notices of Determination, but those violations are not before us on appeal.

workers," and (2) in the alternative, J-1 visa program participants can be considered "U.S. workers."

Consistent with our decision in *Administrator v. CTO/CHF Partnership (Cider Hill),*[5] we agree with Respondent and conclude that (1) only U.S. workers may be engaged in "corresponding employment" with H-2A workers, and (2) J-1 program participants, by definition, cannot be considered "U.S. workers" under the H-2A program.

BACKGROUND

1. Factual and Legal Background

Employers who participate in the H-2A program must provide their H-2A workers with certain benefits and working conditions, including a minimum wage called the Adverse Effect Wage Rate (AEWR).[6] Employers must also pay the AEWR and other benefits to other employees in "corresponding employment" with their H-2A employees.[7] The applicable regulations define corresponding employment as "[t]he employment of workers who are not H-2A workers by an employer . . . in any

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[5] *Adm'r, Wage & Hour Div. U.S. Dep't of Lab. v. CTO/CHF P'ship (Cider Hill)*, ARB No. 2020-0022, ALJ No. 2019-TAE-00010 (ARB Nov. 23, 2020).

[6] 20 C.F.R. § 655.120(a).

[7] 20 C.F.R. § 655.122(a), (l); *see also* Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 45,906, 45,911 (Sept. 4, 2009) (stating that "[t]o ensure that similarly employed workers are not adversely affected by the employment of H-2A workers, the department makes certain that workers engaged in corresponding employment are provided no less than the same protections and benefits provided to H-2A workers."). In its Response Brief, Respondent argues as a threshold issue that the term "corresponding employment" is not applicable to sections of the regulations where that term is not used, including Section 655.122(l). Accordingly, it argues that it is not required to pay the AEWR to any workers in corresponding employment with H-2A workers, no matter how that term is defined. Brief of Respondent Ten West Cattle in Opposition to Administrator's Opening Brief (Respondent's Resp. Br.) at 9. Respondent did not file a cross-appeal; accordingly, this question is not before the Board. A "'party who neglects to file a cross appeal may not use his opponent's appeal as a vehicle for attacking a final judgment in an effort to diminish the appealing party's rights thereunder.'" *Booker v. Exelon Generation Co., LLC*, ARB No. 2022-0049, ALJ No. 2016-ERA-00012, slip. op at 18 n.134 (ARB Sept. 21, 2023) (quoting *Batyrbekov v. Barclays Cap.*, ARB No. 2013-0013, ALJ No. 2011-LCA-00025, slip op. at 8 (ARB July 16, 2014)).

work included in the job order, or in any agricultural work performed by the H-2A workers."[8]

Respondent, a feedlot operator, employed H-2A workers to prepare and apply fertilizer, and seed, plant, and harvest corn.[9] Simultaneously, through the J-1 EVP, Respondent hosted foreign J-1 program participants, furnished by the International Farmers Aid Association.[10] The J-1 EVP permits sponsors to temporarily host foreign nationals for "teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training[.]"[11] Respondent hosted J-1 program participants under the EVP's "trainees and interns" program, the purpose of which is to "enhance the skills and expertise of exchange visitors in their academic or occupational fields through participation in structured and guided work-based training and internship programs."[12]

2. *Cider Hill*

In 2020, the Board considered the current issue before us—whether the "corresponding employment" definition limits its coverage to U.S. workers or instead applies to all workers—in *Cider Hill*.[13] In that case, the Administrator issued a Notice of Determination to the respondent, Cider Hill Farm, charging it with failing to pay the AEWR and certain other required benefits to its J-1 program participants.[14] Cider Hill Farm moved to dismiss, arguing that its J-1 program participants were not covered by the "corresponding employment" regulation

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8 29 C.F.R. § 501.3; *accord* 20 C.F.R. § 655.103.

9 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Ten West Cattle, Inc.*, ALJ No. 2018-TAE-00035, slip op. at 2 (ALJ Mar. 17, 2022) (Order Granting Respondent's Renewed Motion for Partial Summary Decision).

10 *Id.*

11 8 U.S.C. § 1101(a)(15)(J); *see also* 22 C.F.R. Part 62.

12 22 C.F.R. § 62.22(b)(1)(i).

13 *CTO/CHF P'ship (Cider Hill)*, ARB No., 2020-0022, ALJ No. 2019-TAE-00010 (ARB Nov. 23, 2020) (adopting and attaching *CTO/CHF P'ship (Cider Hill)*, ALJ No. 2019-TAE-00010 (ALJ Dec. 9, 2019)).

14 *CTO/CHF P'ship (Cider Hill)*, ALJ No. 2019-TAE-00010, slip op. at 2 (ALJ Dec. 9, 2019).

because they were not "U.S. workers."[15] The Administrator countered, as it does in the present case, that under a plain reading of the regulation, the J-1 program participants could be engaged in "corresponding employment" even if they were not U.S. workers and, alternatively, Cider Hill Farms' J-1 program participants were U.S. workers.[16]

In a detailed and thorough decision, Administrative Law Judge (ALJ) Noran J. Camp agreed with Cider Hill Farm and dismissed the case. First, considering the regulatory language, the regulatory history, Board precedent,[17] and the WHD's non-litigation position as articulated in a published Fact Sheet, ALJ Camp determined that only U.S. workers can be engaged in corresponding employment with H-2A workers.[18] ALJ Camp explained:

> [G]iven the history of the regulation, its interpretation by the ARB, and its interpretation by the DOL itself, it would not be a faithful exercise of regulatory interpretation to say that non U.S. workers can be in corresponding employment. All the history and binding interpretation of the term exists in the context of a basic assumption – that the term refers to U.S. workers. There is no indication that any other type of worker was even contemplated wherever the term was used.[19]

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15 *Id.* at 3.

16 *Id.*

17 Specifically, ALJ Camp found that the Board's decision in *Overdevest Nurseries, L.P.*, ARB No. 2016-0047, ALJ No. 2015-TAE-00008 (ARB Mar. 15, 2018) was "binding authority" that "corresponding employment" is limited to U.S. workers. *Cider Hill*, ALJ No. 2019-TAE-00010, slip op. at 8-9. In *Overdevest*, the Board, when reviewing the 1987 definition of "corresponding employment," added "U.S. domestic" in brackets to the definition. *Overdevest Nurseries,* ARB No. 2016-0046, slip op. at 6 ("From 1987 to January 17, 2009, the relevant H-2A regulations stated '[t]hese regulations are also applicable to the employment of other [U.S. domestic] workers hired by employers of H-2A workers . . ."). It is not clear whether the Board in *Overdevest* intended to rule on whether the corresponding employment definition limits its coverage to U.S. workers, or was just stating the facts in the case before it. Either way, and even setting *Overdevest* aside, we find that ALJ Camp's conclusion is ultimately correct for the reasons set forth below.

18 *Cider Hill*, ALJ No. 2019-TAE-00010, slip op. at 8-13.

19 *Id.* at 14-15.

Second, considering the regulatory language and scheme, ALJ Camp determined that J-1 program participants cannot be "U.S. workers."[20] ALJ Camp concluded: "The Administrator's argument attempts to unravel the finely-tuned regulatory scheme set forth in the Exchange Visitor Program. Those regulations specifically *prohibit* J-1 program participants from engaging in the type of employment the Administrator now argues they are engaged in."[21]

On appeal, the Board affirmed ALJ Camp's decision as "well-reasoned [and] based on the undisputed facts and the applicable law."[22] Specifically, the Board held that ALJ Camp "properly concluded that J-1 visa holders do not fall under the 'corresponding employment' definition . . . because the definition limits 'corresponding employment' only to U.S. workers."[23] Accordingly, the Board adopted and attached ALJ's Camp's decision.[24]

3. *Ten West I*

On August 3, 2017, the Administrator issued a Notice of Determination to Respondent covering the 2015 and 2016 seasons (*Ten West I*). The Notice of Determination explained that Respondent failed to comply with, among other program requirements, 20 C.F.R. § 655.122(l), because of a "[f]ailure to pay the offered/required wage rate. Specifically, the investigation disclosed that employer did not pay the contracted rate" to workers performing the same work as the H-2A workers.[25] The Administrator determined Respondent owed $64,598.64 in unpaid wages for this violation, and assessed Respondent an additional $8,566 in civil money penalties (CMPs).[26] Respondent appealed the Administrator's decision and Associate Chief ALJ Paul R. Almanza was assigned to hear the matter.

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20 *Id.* at 13-15.

21 *Id.* at 13 (emphasis original).

22 *Cider Hill*, ARB No. 2020-0022, slip op. at 2.

23 *Id.*

24 *Id.* at 3.

25 *Ten West I* Notice of Determination at 6.

26 *Id.* It is not clear from the Notice of Decision what portion of these wages were assessed for work performed by J-1 interns as opposed to other workers, if any, in "corresponding employment," but the Board need not resolve that factual issue to address the legal issue presented.

While *Ten West I* was pending before ALJ Almanza, the Board issued its decision in *Cider Hill*. Respondent then sought dismissal of the Administrator's claims as to Respondent's J-1 interns. On March 17, 2022, ALJ Almanza granted Respondent's motion, explaining that he found the Board's *Cider Hill* decision dispositive of the legal issue of whether J-1 interns may be engaged in corresponding employment.[27]

4. *Ten West II*

On December 15, 2021, the Administrator issued a second Notice of Determination to Respondent which covered the 2018 and 2019 seasons (*Ten West II*). The Notice of Determination explained that Respondent failed to comply with, among other program requirements, 20 C.F.R. § 655.122(a) and (l), because "H2A workers were paid a higher rate than US workers in corresponding employment."[28] The Administrator determined that Respondent owed $47,992.04 in unpaid wages for this violation, and assessed Respondent an additional $10,772 in CMPs.[29] Respondent appealed and ALJ Jonathan C. Calianos was assigned.

Before the ALJ, the parties reached a settlement of all issues excluding those relating to Respondent's J-1 interns. Regarding Respondent's J-1 interns, the parties requested ALJ Calianos adopt the reasoning from ALJ Almanza's March 17, 2022 Order and enter judgment in favor of Respondent as to the Administrator's claims regarding Respondent's J-1 interns, to allow for *Ten West I* and *Ten West II*

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[27] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Ten West Cattle, Inc.*, ALJ No. 2018-TAE-00036, slip op. at 5 (ALJ Mar. 17, 2022) (Order Granting Respondent's Renewed Motion for Partial Summary Decision). Before the Board issued *Cider Hill*, ALJ Almanza issued an Order Granting Complainant's Partial Motion for Summary Decision and Denying Respondent's Cross Motion for Summary Decision, concluding that a J-1 visa holder could be engaged in corresponding employment with an H-2A worker. ALJ Almanza revisited the issue and issued the Order Granting Respondent's Renewed Motion for Partial Summary decision reaching the opposite result after the Board issued *Cider Hill*. The parties later reached a settlement agreement resolving all non-J-1 intern issues, and those issues are not before the Board.

[28] *Ten West II* Notice of Determination at 6.

[29] *Id.* Again, it is not clear from the Notice of Decision what portion of these wages were assessed for work performed by J-1 interns as opposed to other workers, if any, in "corresponding employment," but the Board need not resolve that factual issue to address the legal issue presented.

to be consolidated on appeal before the Board. On September 29, 2023, ALJ Calianos issued a Decision and Order Adopting Parties' Proposed Order.[30]

5. Before the Board

The Administrator appealed ALJ Almanza's March 17, 2022 Order and ALJ Calianos' September 29, 2023 Order to the Board. The Board accepted both petitions and consolidated the appeals on October 16, 2023.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the authority to review this matter to the Board.[31] The ARB reviews an ALJ's decision de novo and acts with "all the powers [the Secretary] would have in making the initial decision."[32]

DISCUSSION

On appeal, the Administrator urges the Board to reconsider its ruling in *Cider Hill*. First, the Administrator argues that the Board's holding that only U.S. workers may be engaged in corresponding employment with H-2A workers conflicts with the plain text, purpose, and regulatory history of the definition. The Administrator argues that all workers, not just U.S. workers, may be in corresponding employment with H-2A workers. Alternatively, the Administrator argues that if the Board declines to overturn *Cider Hill*, Respondent's J-1 interns may qualify as U.S. workers.

For the following reasons, we affirm our decision in *Cider Hill*. We also conclude that J-1 visa holders cannot be U.S. workers.

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[30] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Ten West Cattle, Inc.*, ALJ No. 2023-TAE-00002 (ALJ Sept. 29, 2023) (Decision and Order Adopting Parties' Proposed Order).

[31] 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); 29 C.F.R. § 501.42.

[32] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Wash. Farm Lab. Ass'n*, ARB No. 2021-0069, ALJ No. 2018-TAE-00013, slip op. at 8 (ARB Mar. 31, 2023); *see also* 5 U.S.C. § 557(b).

1. "Corresponding Employment" is Limited to U.S. Workers

Both parties argue that the plain reading of the "corresponding employment" definition supports their opposing positions as to whether the term is limited to "U.S. workers." The text of the regulation defines corresponding employment as "[t]he employment of workers who are not H-2A workers by an employer . . . in any work included in the job order, or in any agricultural work performed by the H-2A workers."[33] It is not readily apparent whether "corresponding employment" extends beyond U.S. workers and to all workers, as the Administrator argues, or is limited to U.S. workers, as Respondent argues. However, looking to the context and history of the regulation, as well as contemporaneous and non-litigation pronouncements of the meaning of "corresponding employment" by the Department, we affirm *Cider Hill's* holding that only U.S. workers are covered by the corresponding employment definition.[34]

The Preamble to the 2010 Rule, which controls the current case, repeatedly and exclusively discusses the term "corresponding employment" only in the context of U.S. and/or domestic workers. The Department stated that "[t]he effect of the proposed definition [ ] **would require U.S. workers** to be paid the same wages and conditions that H-2A workers receive when performing the same work . . . ."[35] Likewise, the Department explained that "[u]nder this Final Rule, **longtime U.S. workers** will be entitled to the wage rates paid to H-2A employees," that "**[d]omestic workers** should not be disadvantaged when an employer violates the terms and conditions of the H-2A job order," and that new language was added to the regulatory definition of corresponding employment to "address the adverse impact on **U.S. workers** . . . ."[36] In the Notice of Proposed Rulemaking associated with the 2010 Rule, the Department also plainly stated: "[T]he Department proposes to define 'corresponding employment' to more accurately reflect the statutory requirement that, as a condition for approval of H-2A petitions[,] the Secretary certify that the employment of the alien in such labor or services will not

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33 29 C.F.R. § 501.3; *accord* 20 C.F.R. § 655.103.

34 *See Abramski v. United States*, 573 U.S. 169, 179 (2014) (stating that in interpreting statutory language, the tribunal must "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose . . . not to mention common sense.") (internal citations and quotations omitted).

35 Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6,884, 6,885 (Feb. 12, 2010) (emphasis added).

36 *Id.* at 6,886 (emphasis added).

adversely affect the wages and working conditions of **workers in the U.S. similarly employed**."[37] Thus, it is clear from the Preambles of both the Final Rule and the Notice of Proposed Rulemaking that the Department intended the definition of "corresponding employment" to extend only to U.S. workers.[38] As ALJ Camp aptly summarized in *Cider Hill*, "[t]here is no indication that any other type of worker [other than U.S. workers] was ever contemplated when the term" corresponding employment was used in the regulation.[39]

In fact, the Department explained in the Preamble to the 2010 Rule that "corresponding employment" has historically and consistently been contemplated to extend only to U.S. workers, well before the 2010 amendments. The Preamble explained the history of the Rule:

> The effect of the proposed definition which would require **U.S. workers** to be paid the same wages and conditions that H-2A workers receive when performing the same work **is not new**. Hearings were held in 1962 to address the impact on the wages and working conditions of **domestic workers** due to the use of temporary foreign workers to perform agricultural work. The 1980 Senate Judiciary Report on Temporary Worker Programs discussing the 1962 hearings stated that U.S. employers were required to offer **domestic workers** wages equal to foreign workers as a prerequisite for labor certification . . . . For many years, the H-2 program has required employers to pay wage rates to **domestic workers** as determined by DOL . . . .

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37 74 Fed. Reg. at 45,911 (emphasis added).

38 *See Wilgar Land Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 85 F.4th 828, 838 (6th Cir. 2023) ("[C]ourts may look to the preamble—just as they may look to other interpretive guidance—to clarify ambiguities in the regulation.") (citation omitted); *Wy. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("[W]e have often recognized that the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules.") (citation omitted); *Puri v. Univ. of Ala. Birmingham Huntsville*, ARB No. 2013-0022, ALJ Nos. 2008-LCA-00038, -00043, 2012-LCA-00010, slip op. at 8 (ARB Sept. 17, 2014) (considering the preamble to provide support of an interpretation of a regulation).

39 *Cider Hill*, ALJ No. 2019-TAE-00010, slip op. at 15.

> The preamble to the 1979 H-2 rulemaking provided that employers must offer and provide **U.S. workers** at least the same level of wages, benefits, and working conditions offered or provided to foreign workers. . . . The 1987 Rule **continued the application of this principle and introduced the term corresponding employment** . . . .[40]

Thus, as with the 2010 iteration of the regulation, previous versions of the regulation always contemplated that only U.S. workers could be engaged in corresponding employment with H-2A workers.

Despite these pronouncements, the Administrator argues that the regulatory history supports the conclusion that corresponding employment is not limited to U.S. workers. The Administrator observes that the H-2A regulations only explicitly limited the definition of corresponding employment to "U.S. workers" briefly from 2008 to 2010, but otherwise the regulation has not contained that explicit limitation. The Administrator argues that by removing the specific reference to "U.S. workers" in the 2010 Rule, the Department intended to expand coverage to all workers.[41] We disagree.

While the Administrator is correct that neither the 1987 Rule nor the 2010 Rule expressly limited the definition of corresponding employment to U.S. workers,[42] as explained above the Department has made it clear in its pronouncements that corresponding employment is, and has always been, limited to U.S. workers. Consistent with this history and intent, the Department amended the

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40 75 Fed. Reg. at 6,885-86 (emphasis added). While the Administrator argues that we "need not have considered the regulatory history at all since the plain meaning of the regulation is clear," Administrator's Opening Brief (Adm'r Br.) at 24, we agree with ALJ Camp in *Cider Hill* that the regulatory language is not as clear as the Administrator contends. *See Cider Hill*, 2019-TAE-00010, slip op. at 9 n.32.

41 Adm'r Br. at 25-26.

42 Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act, 52 Fed. Reg. 20,524, 20,527 (June 1, 1987) ("These regulations are also applicable to the employment of other workers hired by employers of H-2A workers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H-2A certification, including any extension thereof. Such other workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.").

regulations in 2008 to explicitly limit "corresponding employment" to U.S. workers, providing that "[t]hese regulations are also applicable to the employment of **United States (U.S.) workers** newly hired by employers of H-2A workers . . . ."[43] Although the Department subsequently removed the explicit reference to "U.S. workers" in the 2010 Rule, it is clear the 2010 Rule was amended not to expand "corresponding employment" to *any* worker, as the Administrator argues, but instead to remove the new and short-lived limitation imposed by the 2008 Rule that only *newly hired* U.S. workers, and not *existing* U.S. workers, would fall under the definition of corresponding employment.[44]

Like ALJ Camp in *Cider Hill*, we also note that prior to the *Cider Hill* decision, the WHD's non-litigation position and guidance to the public was that only U.S. workers could be engaged in corresponding employment with H-2A workers. In a published Fact Sheet—which, we note, remains available on the WHD's website even today—the WHD stated:

> The Department of Labor's regulations governing the H-2A Program also apply to the **employment of U.S. workers** by an employer of H-2A workers in any work included in the ETA-approved job order or in any agricultural work performed by the H-2A workers during the period of the job order. Such U.S. workers are engaged in corresponding employment.[45]

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[43] Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,230 (Dec. 18, 2008); *see also id.* at 77,195 (in explaining the reason for the 2008 change, stating "the INA only requires that the employment of the alien in such labor or services not adversely affect the wages and working conditions of workers in the United States similarly employed").

[44] 75 Fed. Reg. at 6,886 ("The 2008 Final Rule stripped these protections from longtime employees of H-2A employers, applying H-2A protections only to newly-hired workers and the H-2A workers themselves. . . . Under this [2010] Final Rule, longtime **U.S. workers** will be entitled to the wage rates paid to H-2A employees without having to quit their jobs and be rehired." (emphasis added)).

[45] Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA), *available at* https://www.dol.gov/agencies/whd/fact-sheets/26-H2A (emphasis added).

While certainly not determinative,[46] this Fact Sheet lends yet more support to the conclusion that only U.S. workers may be engaged in corresponding employment.

We also find it significant that the H-2A regulations have been amended since we issued our decision in *Cider Hill*, yet the Department has not altered the definition of "corresponding employment" to address or overrule our decision that the term is limited to U.S. workers. The Department's inaction further supports the conclusion that the definition of corresponding employment was always, and continues to be, limited to U.S. workers.

We also disagree with the Administrator's argument that the H-2A regulations' sporadic use of "U.S. workers" and "workers in corresponding employment" in the disjunctive demonstrates that "corresponding employment" is not limited to U.S. workers. When reviewing the two examples the Administrator provided[47] in the context of the other language used, Respondent's argument that the disjunctive use of "U.S. workers" and "workers in corresponding employment" could fairly be read to reach different, and broader classes of, individuals is more persuasive.[48]

Finally, we reject the Administrator's policy arguments. The Administrator asserts that broadly construing "corresponding employment" is consistent with the INA's "statutory mandate," and that excluding J-1 visa holders from the definition "would create a significant loophole in the H-2A program."[49] To the contrary,

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[46] ALJ Camp noted in *Cider Hill* that it was "a complicated matter to figure out what deference, if any, [the ALJ] should give to this document," but that "even if it is entitled to *no deference* as a legal matter, it would present troubling fairness issues to permit the Administrator to proceed against an employer after the Department of Labor had issued express guidance that the regulations at issue did not apply to them." *Cider Hill*, ALJ No. 2019-TAE-00010, slip op. at 12-13 (emphasis original). On the latter point, the Board agreed. *Cider Hill*, ARB No. 2020-0022, slip op. at 2 ("As noted by the Respondent, there is also a basic fairness issued raised in this case as the Department failed to provide clear guidance to employers that 'corresponding employment' could extend beyond U.S. workers.").

[47] Adm'r Br. at 20-21 (citing 20 C.F.R. § 655.182(d)(1)(iv), 29 C.F.R. § 501.5).

[48] As explained by ALJ Camp in *Cider Hill*, the regulations may refer to both workers in corresponding employment, and to other U.S. workers, whether in corresponding employment or not, who were improperly rejected or displaced. *Cider Hill*, 2019-TAE-00010, slip op. at 11-12.

[49] Adm'r Br. at 23.

limiting corresponding employment to U.S. workers is consistent with the INA and one of its fundamental purposes to protect the U.S. workforce.[50]

As ALJ Camp summarized, "given the history of the regulation, its interpretation by the ARB, and its interpretation by the DOL itself, it would not be a faithful exercise of regulatory interpretation to say that non U.S. workers can be in corresponding employment."[51] Accordingly, we find that only U.S. workers may be in "corresponding employment" with H-2A workers.

2. J-1 Program Participants are not U.S. Workers

We now turn to the Administrator's alternative argument that a J-1 visa holder participating in the EVP intern program may qualify as a "U.S. worker" as defined under the H-2A regulations.[52] As relevant here, the H-2A regulations define a "U.S. worker" as "[a]n individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging."[53] "Unauthorized alien," in turn, means "with respect to the employment of an alien at a particular time, that the alien is not at that time . . . authorized to be so employed by this chapter [Chapter 12 of the INA] of by the Attorney General."[54] Stated simply, an alien may be considered a "U.S. worker" with respect to a particular type of employment for purposes of the H-2A program so long as they are "authorized to be so employed" under the INA.

J-1 program participants in the trainee and intern program are not "authorized" to be engaged in *any* employment, let alone the type of employment which H-2A workers perform. As ALJ Camp recognized in *Cider Hill*, the J-1 EVP is

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50 *See* 8 U.S.C. § 1188(a)(1)(B) (providing that an employer may not recruit H-2A workers unless the employment of the H-2A workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed"); *Mendoza v. Perez*, 754 F.3d 1002, 1017 (D.C. Cir. 2014) ("The clear intent of [8 U.S.C. § 1188(a)(1)] is to protect American workers . . . . In particular, Congress was concerned about (1) the American workers who would otherwise perform the labor that might be given to foreign workers, and (2) American workers in similar employment whose wages and working conditions could be adversely affected by the employment of foreign laborers.").

51 *Cider Hill*, ALJ No. 2019-TAE-00010, slip op. at 14-15.

52 Adm'r Br. at 32-35.

53 20 C.F.R. § 655.103.

54 8 U.S.C. § 1324a(h)(3).

a "finely-tuned regulatory scheme" designed to allow, in specific, limited, and defined circumstances, foreign nationals with significant experience in their occupational field to temporarily travel to the United States to receive training.[55] In this carefully designed program, the U.S. Department of State has clearly distinguished between bona fide training and internships, on the one hand, and ordinary employment or work, on the other:

> The requirements in these regulations for trainees are designed to distinguish between bona fide training, which is permitted, and merely gaining additional work experience, which is not permitted. The requirements in these regulations for interns are designed to distinguish between a period of work-based learning in the intern's academic field, which is permitted (and which requires a substantial academic framework in the participant's field), and unskilled labor, which is not.[56]

Thus, while J-1 program participants are authorized to engage in training and internship programs under the EVP, they are not authorized to engage in ordinary employment.[57] In other words, "what J-1 program participants are *authorized* to do is training, not employment."[58]

As a result, we conclude that J-1 program participants cannot be considered as "U.S. workers" in "corresponding employment" with H-2A workers. To be entitled to the AEWR under the H-2A program, a J-1 program participant would, by definition, have to be engaged in "employment."[59] Yet, if the J-1 program

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55 *Cider Hill*, 2019-TAE-00010, slip op. at 13; 22 C.F.R. § 62.22(a).

56 22 C.F.R. § 62.22(b)(1)(ii).

57 *Id.* § 62.22(a) ("These regulations include specific requirements to ensure that both trainees and interns receive hands-on experience in their specific fields of study/expertise and that they do not merely participate in work programs."), (b)(1)(ii) ("Exchange Visitor Program training and internship programs must not be used as substitutes for ordinary employment or work purposes; nor may they be used under any circumstances to displace American workers.").

58 *Cider Hill*, 2019-TAE-00010, slip op. at 15 n.43 (emphasis original).

59 *See* 29 C.F.R. § 655.103 (defining "corresponding employment" as "[t]he employment of workers;" defining "U.S. worker" in the context of "the employment in which the worker is engaging;" and defining "employee" by incorporating the common law of agency).

participant was engaged in "employment," then, by definition, they would have exceeded the authority of the J-1 EVP.[60] And, if the J-1 program participant exceeded the authority of the J-1 EVP, then, by definition, they would not be a "U.S. worker" and would not be entitled to the benefits of the H-2A program, including the AEWR.[61] As the regulatory programs are structured, J-1 program participants simply cannot be both properly engaged as interns or trainees under the J-1 EVP and simultaneously "employed" under the H-2A program.

We are not persuaded by the Administrator's arguments to the contrary. The Administrator notes, for example, that in the Preamble to the 2007 Interim Final Rule for the J-1 trainees and interns regulations, the Department of State observed that "work is an essential component of on-the-job training, and that in many respects there are no conceptual legal distinctions between an employee and a trainee. These two perspectives are not inconsistent."[62] From this, the Administrator deduces that a J-1 program participant may simultaneously be an intern for purposes of the J-1 EVP *and* an employee under the H-2A program. We disagree.

To be sure, we agree with the Department of State that it is "not inconsistent" for a J-1 intern to engage in "work" and "on-the-job training," which, in many respects, may be like work performed by others for the same employer. The J-1 EVP regulations recognize as much, emphasizing that "hands-on experience" and "work-based learning" are key components of the J-1 intern program.[63] Yet, the J-1 EVP regulations also recognize that work-based learning must be distinguished from ordinary employment. The regulations provide, for example, that "Exchange Visitor Program training and internship programs must not be used as substitutes for ordinary employment or work purposes," and that the J-1 regulations "include specific requirements to ensure that both trainees and interns receive hands-on

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60 *See* 22 C.F.R. § 62.22(a), (b)(1)(ii) (distinguishing authorized internship and training from unauthorized employment).

61 *See* 8 U.S.C. § 1324a(h)(3) (defining "unauthorized alien" as an alien engaged in employment which they are not authorized to perform); 29 C.F.R. § 655.103 (stating that an "unauthorized alien" is not a "U.S. worker").

62 Adm'r Br. at 33 (quoting Exchange Visitor Program—Trainees and Interns, 72 Fed. Reg. 33,669, 33,670 (June 19, 2007)).

63 22 C.F.R. § 62.22(a), (b)(1)(ii).

experience in their specific fields of study/expertise and that they do not merely participate in work programs."[64]

The Preamble cited by the Administrator also echoes this sentiment, expressing that while the Department of State "recognizes that work is an essential component of on-the-job training," "[b]y the same token, the [EVP] regulations were not meant to supply U.S. employers with employees under the guise of being trainees."[65] Indeed, the Department of State expressly stated that the J-1 visa was not to be used as a substitute for an H-visa, explaining:

> [B]oth the Department and the GAO have found there have been occasions where training programs were being misused by some sponsors (e.g.; trainees were actually being used as "employees" and the J visa was being used in lieu of the H visa . . ."). . . . Regulations strictly prohibit the use of the trainee category for ordinary employment purposes, stating in particular that sponsors must not place trainee participants in positions that are filled or would be filled by full-time or part-time employees.[66]

Thus, we agree with the Administrator that the J-1 EVP makes provision for appropriate work-based training. That does not mean, however, that a J-1 program participant may be properly and simultaneously classified as both a J-1 intern and an employee under the H-2A program.

We are also not persuaded by the Administrator's argument that J-1 program participants may be considered employees under the H-2A program merely because the J-1 EVP regulations identify other employment-related statutes with which J-1 program sponsors and hosts must comply, including the Fair Labor Standards Act

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64 *Id.*

65 72 Fed. Reg. at 33,670. For this reason, we do not share the Administrator's concern that our decision may "create a disincentive for a prospective H-2A employer to employ U.S. workers in the H-2A job opportunity alongside H-2A workers when the employer instead could supplement its H-2A workforce with workers exempt from the rule's wage requirements, such as J-1 visa holders." Administrator's Reply Brief at 3. Such a practice would likely run afoul of the J-1 regulations.

66 72 Fed. Reg. at 33,670.

and the Migrant and Seasonal Workers Protection Act.[67] Notably, while the J-1 regulations identify certain, specific statutes and obligations with which J-1 employers must comply, the J-1 regulations do not include or identify the H-2A (or any H-visa) regulations among that list. To the contrary, as observed above the Preamble to the 2007 Interim Final Rule is clear that J-1 visas are not a substitute for H-visas.[68] Simply because J-1 employers are required to follow specific statutory requirements does not mean that J-1 program participants must then be considered employees, or are authorized to be employed, for *all* purposes, including for purposes of benefit eligibility under the H-2A program, especially given the clear indications to the contrary built into the J-1 EVP regulations themselves.

Accordingly, we conclude that J-1 interns may not be "U.S. workers," as that term is defined in the H-2A regulations.[69]

CONCLUSION

Accordingly, we **AFFIRM** ALJ Almanza's March 17, 2022 Order and ALJ Calianos' September 29, 2023 Order.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge

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67 Adm'r Br. at 33-34 (citing 22 C.F.R. § 62.22(b), (f), (g), (h), Exchange Visitor Program—Trainees and Interns, 75 Fed. Reg. 48,555, 48,556 (Aug. 11, 2010)).

68 72 Fed. Reg. at 33,670.

69 We do not opine on whether the J-1 program participants in this case were actually engaged in "employment" for purposes of the H-2A program. That issue is not before us. Our holding is, instead, only that *if* they were engaged in "employment" for purposes of the H-2A program, then they would be "unauthorized aliens" with respect to that employment, and therefore not be entitled to the benefits of the H-2A program, including the AEWR. Likewise, we offer no opinion on the extent to which such "employment" would subject an employer or sponsor to enforcement actions or sanctions under the J-1 program, over which the ARB has no jurisdiction. *See* 22 C.F.R. §§ 62.50, .60-.63.

KAPLAN, Administrative Appeals Judge, concurring:

I concur with the majority that the regulatory history supports the holding that only U.S. workers may be in "corresponding employment" with H-2A workers and that J-1 interns/trainees cannot be U.S. workers, and therefore, Respondent's J-1 visa holders cannot be U.S. workers in corresponding employment with H-2A workers as well explored by ALJ Camp on *Cider Hill*.[70] I am also moved by ALJ Camp's rejection of the Administrator's arguments about why J-1 visa holders are U.S. workers when Judge Camp found (1) that "(t)he Administrator points out that the current regulations often speak of 'workers' and 'U.S. workers' in the disjunctive, indicating that they must refer to different sets of persons . . . . The Administrator's explanation for the disjunctive form, while sensible from a plain English perspective, is not persuasive in this regulatory context;"[71] and (2) "[f]inally the requirement that 'U.S. workers' receive the AEWR, and be provided housing and subsistence, would make no sense if J-1 program participants are U.S. workers."[72] As ALJ Camp aptly concluded, "I simply do not have the authority to re-write the regulations, or to ignore the guidance of the ARB, as the Administrator is essentially asking me to do. If a *regulatory* solution is needed here, I cannot provide it."[73]

The Administrator's actions are so egregious that deference would not be appropriate, and they demonstrate the importance of the Supreme Court's decision in *Loper Bright*,[74] effectively ending *Chevron* deference. The concept of deference is that agencies have expertise in their specific fields and are better equipped to make policy choices in areas where statutory language is ambiguous. The Supreme Court stated that courts must make their own decisions about statutory interpretation, even if it means disagreeing with the agency.

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70 *See Cider Hill*, ALJ No. 2019-TAE-00010 (ALJ Dec. 9, 2019).

71 *Id.* at 17-18. ALJ Camp found that the Administrator's explanation for the disjunctive form, while sensible from a plain English perspective, is not persuasive in this regulatory context (*id.* at 11) and that the Administrator's argument attempts to unravel the finely-tuned regulatory scheme set forth in the Exchange Visitor Program (*id.* at 13). Those regulations specifically prohibit J-1 program participants from engaging in the type of employment the Administrator now argues they are engaged in (*id.* at 13), prompting ALJ Camp to find that the Administrator's argument contradicts itself.

72 *Id*. at 14.

73 *Id.* at 15 (emphasis original).

74 *Loper Bright Enters. v Raimondo*, 603 U.S. 369 (2024).

In this matter, the additional element of fairness shrieks[75] for attention. In my opinion, the Administrator put policy ahead of fairness. Although I do not know if the Equal Access to Justice Act ("EAJA") program applies, after seven years of litigation, and still going, by a government with a limitless budget against a business that has complied with the legal requirements of the governmental program, but it should. EAJA states that an agency that conducts an adversary adjudication shall award, to the prevailing party other than the United States, fees and other expenses incurred by that party in conjunction with that proceeding unless the adjudicating officer of the agency finds that the position of the agency

[75] As used in Shakespeare's *Macbeth* (Act 2, Scene 2), Lady Macbeth says, "It was the owl that shriek'd, the fatal bellman," referring to the ominous sound marking King Duncan's Death. In Homer's *Odyssey* (Book 12), the Sirens are known for shrieking or singing to lure sailors to their deaths. Shriek is often tied to fear, supernatural events, or intense emotion.

was substantially justified or that special circumstances make an award unjust.[76, 77] I do not intend to opine on whether these proceedings constitute an "adversary adjudication" under EAJA, or whether Respondent satisfies the eligibility

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[76] ALJ Camp found the following: (1) ". . . the requirement to pay the AEWR to employees in 'corresponding employment' appears nowhere in the regulation requiring the payment of the AEWR to H-2A workers" (*Cider Hill*, ALJ No. 2019-TAE-00010, slip op. at 5); (2) ". . . following binding authority from the Administrative Review Board, I must find that 'workers in corresponding employment' refers to 'U.S. workers' only." (*id.* at 8-9); (3) "the rule defining corresponding employment means 'U.S. workers' when it refers to 'other workers.'" (*id.* at 9); (4) "The Administrator points out that the current regulations often speak of 'workers' and 'U.S. workers' in the disjunctive, indicating that they must refer to different sets of persons. . . . The Administrator's explanation for the disjunctive form, while sensible from a plain English perspective, is not persuasive in this regulatory context" (*id.* at 11); (5) "The Administrator's argument attempts to unravel the finely-tuned regulatory scheme set forth in the Exchange Visitor Program. Those regulations specifically *prohibit* J-1 program participants from engaging in the type of employment the Administrator now argues they are engaged in . . . . Indeed, the Administrator's argument contradicts itself." (*id.* at 13); (6) "Finally, the requirement that 'U.S. workers' receive the AEWR, and be provided housing and subsistence, would make no sense if J-1 program participants are U.S. workers. . . . If the J-1 program participants and Cider Hill are complying with the regulations, then by definition, the participants are separately able to support and house themselves. The Administrator offers no explanation for why the regulation would then require that they be provided the AEWR, housing or subsistence." (*id.* at 14); and (7) "However, I simply do not have the authority to re-write the regulations, or to ignore the guidance of the ARB, as the Administrator is essentially asking me to do. If a *regulatory* solution in needed here, I cannot provide it." (*id.* at 15) (emphasis original).

[77] *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552 (1988) (affirming the lower court's finding that the government's position was not substantially justified); *Dantran, Inc., v. U.S. Dep't of Lab.*, 246 F.3d 36 (1st Cir. 2001) (finding government's continued pursuit of debarment was not substantially justified after ALJ determined that contractor was relieved from debarment); *Halverson v. Slater*, 206 F.3d 1205, 1211 (D.C. Cir. 2000) ("The Department has failed to demonstrate that its position was substantially justified for a very good reason: the merits panel, as even a cursory review of its opinion reveals, found the Department's position entirely without merit."); 5 U.S.C. § 504; 28 U.S.C. § 2412.

requirements under EAJA.[78]

ELLIOT M. KAPLAN
Administrative Appeals Judge

THOMPSON, Administrative Appeals Judge, dissenting:

Because I agree with the reasoning articulated by the Administrator of the Wage and Hour Division in their briefing for this case, I dissent.

A plain language reading of the H-2A regulations at issue here makes clear that J-1 visa holders may be engaged in corresponding employment, defined broadly as "[t]he employment of workers who are not H-2A workers by an employer who has an approved H-2A Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H-2A workers."[79] According to the Preamble of the relevant regulatory rule, this definition was intended to encompass "all workers employed by H-2A employers doing work performed by H-2A employees" and included language to ensure coverage for "any agricultural work performed by the H-2A workers" regardless whether it was properly certified under the H-2A application process.[80] Thus, the rule at issue in this case was intended to cover workers broadly and was an expansion of the statutory regime intended to further prevent harm to the wages of domestic agricultural workers by offering wage protections in order to disincentivize

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[78] In *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc.* ARB No. 2021-0047, ALJ No. 2018-TNE-00022 (Sec'y Aug 9, 2023), the Acting Secretary of Labor found that the EAJA does not apply to H2-B enforcement proceedings because they are not "adversary adjudications." However, of interest, in *Sun Valley Orchards, LLC v. U.S. Dep't of Lab.*, the District Court examined whether issue exhaustion applied to an H-2A enforcement proceeding, noting that "[i]ssue exhaustion is at its greatest where the parties are expected to develop the issues in an *adversarial administrative proceeding*." No. 1:21-CV-16625, 2023 WL 4784204, at *7 (D.N.J. July 27, 2023) (emphasis added), *appeal docketed*, 23-2608 (3rd Cir. Sept. 15, 2023). The District Court concluded that issue exhaustion applied because "DOL's H-2A enforcement proceedings require 'formal adversarial adjudications'" and the "ALJ does not look into its own issues," among other reasons. The District Court cited several provisions in support, including 29 C.F.R. § 18.101, for the claim that it was a "formal adversarial adjudication," but we note that 29 C.F.R. § 18.101 does not apply to H-2A proceedings because 29 C.F.R. § 501.34 states "29 CFR part 18, subpart B, will not apply."

[79] 29 C.F.R. § 501.3; *accord* 20 C.F.R. § 655.103.

[80] 75 Fed. Reg. at 6,885.

exploitive labor practices that depress U.S. agricultural wages. As stated in the Administrator's briefs, applying the regulations to all non-H-2A workers in the circumstances presented is consistent with the overall H-2Aregulatory structure and supports the purpose of the corresponding employment regulation.[81]

Our previous holding in *Cider Hill*[82] that corresponding employment protections apply only to U.S. workers should be overruled as inconsistent with the H-2A regulations. *Cider Hill* conflicts with the plain language of the regulations, and with the purpose of the H-2A statute and regulations, by failing to require that the Adverse Effect Wage Rate (AEWR) minimum wage protections—put in place to help prevent the depression of agricultural worker wages in the United States—be applied to any non-H-2A worker performing H-2A work, i.e., workers in corresponding employment. First, as the Administrator argued in their briefing, the issue of whether J-1 visa holders are U.S. workers under the regulations was not before the Board on appeal in *Cider Hill*.[83] And, even if it were, the decision in *Cider Hill* as interpreted by the ALJs in *Ten West I* and *II* flouts the language of the regulation regarding corresponding employment by excluding a segment of non-H-2A workers performing H-2A work for an H-2A employer pursuant to a certified Temporary Employment Certification (TEC). Second, exempting a category of non-H-2A workers from regulatory wage protections creates a disincentive for H-2A employers to hire domestic workers to work alongside H-2A workers because they could employ J-1 visa holders at a lower wage rate. Thus, I agree with the Administrator's request that we overturn *Cider Hill*, and that we instead hold that under the plain language of the regulations, J-1 visa holders—along with any other non-H-2A worker employed by an H-2A employer doing H-2A work as plainly stated in the regulation—can be engaged in corresponding employment as a matter of law.

Under this theory of the case, I would reverse the ALJ's Decision and Order in *Ten West I* and *II*, and remand both cases back to the ALJs for further proceedings regarding Respondent's J-1 visa holders as requested by the Administrator.

Furthermore, I agree with the Administrator's alternative argument that even without overturning *Cider Hill*, J-1 visa holders are covered by the AEWR minimum wage requirement because they are U.S. workers as that term is defined in the H-2A regulations. The relevant definitions of U.S. worker in the regulations (29 C.F.R. § 501.3) state that a U.S. worker is a "worker who is . . . [a]n individual who is not an unauthorized alien . . . with respect to the employment in which the worker is engaging." Here, the J-1 visa holders are either authorized to do the H-2A

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81 Adm'r Br. at 22-23.

82 *Cider Hill*, ARB No. 2020-0022, slip op. at 1.

83 Adm'r Br. at 30-32.

work being performed or they are not, the latter potentially meaning that Respondent is violating the terms of both the TEC and the J-1 visa program.[84] Thus, even under *Cider Hill*, we should find that J-1 visa holders may be engaged in corresponding employment because they are individuals who are not unauthorized aliens with respect to the employment in which they are engaging alongside their H-2A counterparts.

Under this theory, I would remand the case to the ALJs for further proceedings on whether the J-1 visa holders were U.S. workers in corresponding employment performing work under the H-2A contract, entitling them to the minimum wage as set by the AEWR.

ANGELA W. THOMPSON
Administrative Appeals Judge

[84] Although not raised by the parties in this case, to the extent Respondent effectively used J-1 visa holders as replacements for H-2A visa holders, there could be a question regarding whether Respondent provided accurate information about its staffing needs on its H-2A applications covering the years 2015, 2016, 2018, and 2019.