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,

PROSECUTING PARTY,

v.

BUTLER AMUSEMENTS, INC.,

RESPONDENT.

ARB CASE NO. 2021-0007

ALJ CASE NO. 2018-TNE-00019
ALJ RICHARD M. CLARK

DATE: July 28, 2023

Appearances:

For the Respondent:
R. Wayne Pierce, Esq.; *The Pierce Law Firm, LCC*; Annapolis, Maryland

For the Administrator, Wage and Hour Division:
Elena S. Goldstein, Esq.; Jennifer S. Brand, Esq.; Rachel Goldberg, Esq.; Sara A. Conrath, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

Before HARTHILL, Chief Administrative Appeals Judge, and PUST and BURRELL, Administrative Appeals Judges

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the H-2B provisions of the Immigration and Nationality Act (INA), as amended, and its implementing regulations.[1] The H-2B program permits employers to hire nonimmigrant workers to perform temporary nonagricultural work on a one-time, seasonal, peak load, or intermittent basis, all as defined by the Department of Homeland Security (DHS).[2] DHS requires that employers petitioning for H-2B visas obtain a labor certification from the U.S. Department of Labor (Department or DOL) before applying for H-2B visas through DHS.[3]

To obtain a labor certification, employers first obtain a prevailing wage determination for the job opportunity from DOL's Employment and Training Administration (ETA) by submitting an Application for a Prevailing Wage Determination (ETA Form 9141).[4] Employers must offer and pay H-2B workers the highest of the determined prevailing wage or the applicable federal, state, or local

---

[1] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) et seq., 1184(c)(14), and 20 C.F.R. Part 655, subpart A (2008); 29 C.F.R. Part 503 (2015). The 2008 H-2B regulations apply to the instant case because Respondent submitted the operative labor certification application in 2012, which was approved by the Department of Homeland Security (DHS) in 2013. D. & O. at 5-6. Although the U.S. District Court for the Northern District of Florida issued an order vacating and permanently enjoining DOL from enforcing the 2008 Rule with an effective date of April 30, 2015, see *Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015), the court later clarified that "'the permanent injunction was not intended to, and does not, apply retroactively.'" *Perez v. Perez*, No. 14-cv-682, Doc. 62 (N.D. Fla. Sept. 4, 2015). *See Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. Deggeller Attractions, Inc.*, ARB No. 2020-0004, ALJ No. 2018-TNE-00008, slip op. at 4-5 (ARB Jan. 25, 2022) (noting that the *Perez* court's clarification held that the 2008 regulations were still enforceable and thus apply to labor certifications issued before April 30, 2015). The 2015 H-2B regulations provide that with respect to determinations to enforce provisions of the job order or provisions under 8 U.S.C. § 1184(c), the procedures and rules contained in 29 C.F.R. § 503, Subpart C "will apply regardless of the date of violation." 29 C.F.R. § 503.40(b). Accordingly, the 2015 rules apply to the procedural issues in this matter.

[2] 8 C.F.R. § 214.2(h)(6)(ii)(B). An H-2B employee is defined as "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . ."
8 U.S.C. § 1101(a)(15)(H)(ii)(b).

[3] 8 C.F.R. § 214.2(h)(6)(iii)(A).

[4] 20 C.F.R. § 655.10 (2009). The 2008 H-2B regulations (2008 regulations) were promulgated on December 19, 2008, effective on January 18, 2009, and codified into the Code of Federal Regulations in 2009. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. No. 245, 78,020 (Dec. 19, 2008). References to 20 C.F.R. § 655 refer to the 2008 regulations unless otherwise specified.

minimum wage.[5] After obtaining a prevailing wage determination, the employer must submit an Application for Temporary Employment Certification (ETA Form 9142B) and a recruitment report to the ETA for approval.[6]

Section 214(c)(l4) of the INA gives DHS the authority to impose administrative remedies when the Secretary of DHS finds "a substantial failure to meet any of the conditions of the petition to admit . . . a nonimmigrant worker under [8 U.S.C. § 1101(a)(l5)(H)(ii)(b)] or . . . a willful misrepresentation of a material fact in such petition."[7] DHS is authorized to delegate this enforcement authority to the Secretary of Labor,[8] and has delegated to the Secretary of Labor its authority "to enforce compliance with the conditions of a petition and Department of Labor approved temporary labor certification to admit or otherwise provide status to an H-2B worker."[9] This enforcement authority has been further delegated within DOL to the Administrator, Wage and Hour Division (WHD) of the Department (Administrator).[10]

In 2013, the Administrator conducted an on-site investigation of Respondent Butler Amusements, Inc.'s (Butler Amusements or Respondent) [11] location in Santa Barbara, California.[12] On February 6, 2018, WHD issued a Determination Letter finding that Butler Amusements substantially failed to comply with certain attestations it made in its ETA Forms 9141 and 9142B and assessed back wages and civil monetary penalties (CMPs).[13] Butler Amusements contested WHD's

---

5 20 C.F.R. § 655.22(e).

6 20 C.F.R § 655.20.

7 8 U.S.C. § 1184(c)(14)(A).

8 8 U.S.C. § 1184(c)(14)(B).

9 8 C.F.R. 214.2(h)(6)(ix).

10 *See* Secretary's Order 01-2014, 79 Fed. Reg. 77,527-01 (Dec. 19, 2014). As of the date of this opinion, the Principal Deputy Administrator is the ranking official responsible for the U.S. Department of Labor's Wage and Hour Division.

11 Butler Amusements' former CEO, Michael Brajevich, was a named party below but the ALJ concluded that he was not individually or personally liable for Butler Amusements' violations. *Id.* at 30. Because Respondent did not appeal this determination to the Board, it has become final; accordingly, we have removed Mr. Brajevich from the case caption and refer only to Butler Amusements as the Respondent herein.

12 D. & O. at 6.

13 *Id.* The ALJ noted that the February 6, 2018 Determination Letter originally cited $24,987.20 in unpaid wages to nine H-2B workers, and $10,000 in CMPs. *Id.* at 6 n.8. The ALJ's May 2, 2019 Second Order Granting In Part Motion to Amend and Reconsidering April 12 Amendment Order (May 2, 2019 Order) amended the unpaid wages to $26,955.40. *Id.*

finding and assessed remedies and requested administrative review with the Office of Administrative Law Judges (OALJ).[14]

On September 30, 2020, a DOL Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) determining that Respondent failed to comply with the requirements of the H-2B program and ordered Respondent to pay back wages and assessed CMPs. Respondent petitioned the Administrative Review Board (ARB or Board) for review of the ALJ's decision. For the reasons set forth below, we **AFFIRM** the ALJ's D. & O.

BACKGROUND

The following facts were determined by the ALJ in the D. & O. and are not disputed on appeal.

Butler Amusements operated a traveling amusement carnival providing rides, games, and concessions to fairs in California, Oregon, Washington, Idaho, Arizona, and Nevada.[15] In October 2012, Butler Amusements requested a prevailing wage determination for the job opportunity "Amusement and Recreation Attendants" (ARAs) for 246 H-2B workers.[16] Its agent, James Kendrick Judkins (Judkins), completed and submitted ETA Forms 9141 and 9142B on its behalf.[17] On ETA Form 9142B, Michael Brajevich (Brajevich), Butler Amusements' former CEO, and Judkins both attested that the information on the application was true and accurate.[18]

1. Butler Amusements' Application and Certification for H-2B Workers

In 2012, Butler Amusements completed ETA Form 9141 and entered "Amusement and Recreation Attendants - Traveling Carnival" as the "Job Title," "39-3091" as the "*Suggested* SOC (ONET/OES) code," and "Amusement Recreation Attendants" as the "*Suggested* SOC (ONET/OES) occupation title."[19] The Standard Occupational Code (SOC) system utilized by ETA had an occupation search engine called O*NET (Occupational Net) which provided extensive information about any occupation including occupational categories and characteristics (knowledge, skills,

---

14 *Id.* at 13.

15 *Id.* at 2-3.

16 *Id.* at 3.

17 *Id.*

18 *Id.*

19 *Id.*; RX 5 at 1.

abilities, tasks and general work activities).[20] For ARA positions, O*NET identified the core tasks as: selling tickets; collecting fees; selling refreshments; recording details of attendance, sales, receipts, reservations, or repairs; providing information about facilities; directing patrons, monitoring safety; cleaning rides; and staying informed of safety measures.[21]

Under "Job duties," Butler Amusements represented that the H-2B workers would, "[p]erform [a] variety of attending duties at amusement facility (traveling carnival). Set up, tear down, operate amusement rides, food concessions and/or games."[22] The H-2B workers were to work 40 hours per week from 1:00 p.m. to 10:00 p.m., travel to multiple worksites, and receive no overtime.[23] No experience, education, training, specific skills, or special licenses were required for the job, except for a drug and criminal background check.[24] Butler Amusements indicated that H-2B workers in this position would not supervise any other employees.[25]

In October 2012, Butler Amusements posted job advertisements for 250 open positions for Carnival and Amusement Recreation Attendants.[26] The advertisements explained that the jobs included "a variety of attending duties" at amusement facilities, including "set up, tear down, operate amusement rides, food concessions and/or games."[27] Butler Amusements would "pay the weekly salary for each week the worker was employed," make "available mobile housing valued at $125.00 per week" and make "available transportation from venue to venue and scheduled transportation to laundry, shopping valued at $25.00 per week."[28]

In December 2012, Butler Amusements filed ETA Form 9142B and represented a temporary need for 246 full-time seasonal ARAs for Butler Amusements' 2013 season.[29] Under "job duties," Butler Amusements again

---

20 *Id.* at 3, 22.

21 *Id.* at 22.

22 *Id.* at 3; RX 5 at 2.

23 *Id.* at 3.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* Workers would typically work 40 hours per week, Wednesday through Sunday, from 1:00 pm to 10:00 pm, making a weekly wage ranging from $323.60 to 368.40 per week, and were required to travel with the carnival to Washington, California, Arizona, Nevada, Oregon, and Idaho. *Id.*

28 *Id.* at 3-4; RX 1 at 1.

29 *Id.* at 4.

described the position's "Job duties" as to "[p]erform [a] variety of attending duties at amusement facility (traveling carnival). Set-up, tear-down, operate amusement rides, food concessions and/or games."[30] The position required "no special skills, licenses/certifications."[31] The H-2B workers would not supervise the work of other employees.[32] Butler Amusements also noted that it would follow the prevailing practices in the Traveling Amusement Industry with regard "to housing, transportation and weekly salary for workers."[33] Butler Amusements submitted an Addendum to ETA Form 9142B, listing 71 worksites and again stated it "makes available mobile housing valued at $125.00 per week," and "transportation from venue to venue, and scheduled transportation to laundry, shopping valued at $25.00 per week."[34]

On ETA Form 9142B, an employer must attest that it will abide by certain terms, assurances, and obligations as a condition for receiving a temporary labor certification.[35] In Section I, Declaration of Employer and Attorney/Agent, Butler Amusements checked "Yes" confirming they had read and agreed to all applicable terms, assurances, and obligations in Appendix B.1 of ETA Form 9142.[36] Judkins signed Appendix B.1 Section A, and Brajevich signed Appendix B.1 Section B.[37] By signing Butler Amusements' Declaration (Attestation #13), Brajevich certified that the job opportunity was a full-time temporary position and that "[t]he dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification has been truly and accurately stated on the application."[38] Brajevich took full responsibility for the accuracy of any representations made by his agent or attorney, in this case, Judkins, and declared under penalty of perjury that he had read and reviewed the application and that to the best of his knowledge it was true and accurate.[39]

On December 14, 2012, based on the attestations and documentation provided, ETA certified Butler Amusements' application for temporary labor

---

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 4-5.

35 *Id.* at 5.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

certification of 246 H-2B workers as ARAs.[40] The workers arrived in early February 2013.[41]

2. WHD Investigation and Findings

In 2013, WHD Investigator Carrie Aguilar (Aguilar) visited Butler Amusements' worksite in Santa Barbara, California.[42] Aguilar and her WHD team observed Butler Amusements' operations and interviewed employees.[43] In November 2013, WHD found that nine H-2B workers were employed outside the approved job duties of ARA.[44] The investigator determined that these workers had worked as drivers, maintenance workers, and supervisors, all of which have different SOC codes and prevailing wage determinations.[45]

A. Butler Amusements Employed H-2B Workers Outside the Approved Job Duties of ARA

WHD determined that Butler Amusements employed two H-2B workers, Antonio Mendez (Mendez) and Omar Lopez (Lopez), as supervisors as indicated by a roll sheet listing both Mendez and Lopez as supervisors.[46] Multiple employees stated they reported to either Mendez or Lopez as their supervisor.[47] In 2013, Butler Amusements had employed Mendez for 12 years, and he had been a supervisor for six years.[48] In Mendez's position as an supervisor, he checked to make sure employees were doing their jobs, dealt with customer complaints, responded to ride operators when something was broken, and filled out the ride roster.[49] Mendez was the general manager's "left hand."[50] When visiting, Mendez gave the Wage and Hour Investigators the tour, a role which, in Aguilar's experience, supervisors typically assume.[51] Lopez supervised 16 employees, and in

---

40 *Id.*

41 *Id.* at 13.

42 *Id.* at 6.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 9.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

their statements multiple employees stated Lopez told them when to start each day.[52] Lopez also filled out the ride roster.[53]

WHD determined that Butler Amusements employed Jaime Hernandez and Felipe Villegas (Villegas) solely as shop workers, in which they exclusively worked in the "shop" or "spare parts trailer" cleaning parts and supplies, welding, doing inspections, and repairing rides.[54]

WHD further determined that Butler Amusements employed Saul Estadillo Herrera (Estadillo), Sergio Guzman (Guzman), Jose Ivan Ortega (Ortega), Gustavo Gamero (Gamero), and Fernando Preza (Preza) as truck drivers.[55] These Commercial Driver's License [CDL] drivers drove tractor trailers and semi-trucks to transport rides, but did not operate rides.[56] Multiple records referred to these H-2B employees as drivers.[57] Two handwritten notes in Butler Amusements' payroll records listed Ortega, Guzman, and Preza as drivers who were all paid $500 for the week ending April 7, 2013, in Yuma.[58] A payroll spreadsheet for "Butch's Unit" listed Ortega, Guzman, and Preza as drivers.[59] While Estadillo and Gamero were not listed as drivers, the pay slips regularly showed that they did not work on weekends which were the longest and busiest days for ride operators, and typically the days the drivers would not transport rides.[60]

Estadillo worked for Butler Amusements as a driver for three years and drove the trailers hauling rides.[61] To comply with Department of Transportation regulations, Estadillo did not drive more than 10 hours per shift and kept a transportation logbook of his hours, which ranged from 20 to 60 hours per week.[62]

---

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 10.

56 *Id.*

57 *Id.*

58 *Id.* The ALJ commented that while the note did not include the year 2013, it was "reasonable to assume it was 2013 because Butch's unit was in Yuma during that time period in 2013." *Id.* at 10 n.32.

59 *Id.* at 10.

60 *Id.*

61 *Id.* The ALJ noted that Estadillo referred to the vehicles he drove as trailers, thus it is not clear whether these are distinct from the "semi-trucks" to which Ortega referred. *Id.* at 10 n.33.

62 *Id.* at 10.

His pay was the same regardless of his hours.[63] When he was not driving, he inspected the trailer truck and was on standby for whatever the manager needed.[64]

Ortega drove semi-trucks to transport rides but not to transport people.[65] He drove a maximum of 10 hours per shift, and his hours varied weekly.[66] He recorded his driving hours in a logbook, which he submitted to Butler Amusements.[67] Butler Amusements provided the semi-truck in which he lived and slept and did not charge him for his living accommodations.[68]

B. Butler Amusements' Pay Practices

Butler Amusements paid the nine workers more than the ARA prevailing wage, but less than the prevailing wage for the jobs they performed (first-line supervisors, maintenance shop workers, and drivers).[69]

Butler Amusements provided free housing in trailers, transportation from venue to venue, and local transportation to run errands.[70] No employee reported deductions for any of these items.[71] Not all of the employees stayed in the provided trailers, and there was no evidence that employees who did not stay in the provided lodging received higher wages for not using the trailers.[72] The occupancy of the trailers varied, with some employees sharing with four people or only one roommate, and some employees with private rooms.[73] Butler Amusements provided a payroll spreadsheet listing employee information, including columns titled "gross, draws, uniforms, ID, bunk, and net."[74] None of the employees had a deduction for "bunk" identified on the spreadsheet.[75]

---

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* at 12, 24.

70 *Id.* at 8.

71 *Id.* The only deductions were cash advances. *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

Butler Amusements submitted 1,132 pages of payroll records and photocopied pay slips for review.[76] Butler Amusements also submitted its own summary of the hours that each of the nine employees worked.[77] The Administrator found that "Butler Amusements' payroll records did not represent the hours H-2B workers actually worked, and that the dollar amounts on the pay slips were likely accurate but the documented hours were unreliable."[78] The ALJ found that the errors in Butler Amusements' payroll records and summary exhibit (Butler Amusements' Hearing Exhibit RX 45) made both documents unreliable.[79] The ALJ noted that the submitted pay slips omitted amounts paid, contained duplicate pay slips for the same person for the same period, and were inexplicably missing records for some employees.[80] The ALJ also noted that records were missing for several of the nine employees.[81] The ALJ also found that there were duplicate pay slips for Estadillo, Gamero, and Lopez which indicated different hours worked during the same time period and so could not be reconciled to determine which pay slip record was correct.[82]

The Administrator did not credit the hours documented on Butler Amusements' pay slips because it suspected the hours were inaccurate.[83] Based on his review of the employee interviews and the pay slips, the ALJ found that this decision was reasonable, and that the Administrator reasonably reconstructed hours worked based on the attestation in ETA Form 9142B rather than by relying on incomplete and questionably accurate pay slips.[84]

---

76 *Id.* at 11.

77 *Id.* (citing RX 45 (Respondent's Summary Exhibit of Hours Worked by H-2B Workers)).

78 *Id.* Based on the pay slips, the ALJ found it was reasonable to conclude that during the period of investigation all nine employees traveled from Riverside County to Maricopa County, to Yuma County, and to Santa Barbara County. *Id.* at 13.

79 *Id.* at 11.

80 *Id.* For example, for the week of February 24 to March 3, Butler Amusements recorded that Preza worked 37 hours, but no pay was documented. *Id.*

81 *Id.* For another example, Gamero, Guzman, Preza, Ortega, and Estadillo each had no pay slip with hours from April 1 to April 7. *Id.*

82 *Id.* at 11-12. For example, there were duplicate pay slips for Estadillo for March 25 to March 31, the first indicating he worked 17.5 hours and the second indicating he worked 38.5 hours that week. *Id.* at 11. Additionally, in Butler Amusements' summary exhibit RX 45, it referred to pages that were not included in the exhibit, attributed hours to the wrong pay periods, and made questionable conclusions regarding employee duties. *Id.* at 12.

83 *Id.*

84 *Id.*

Based on the investigation, WHD sent Butler Amusements a Summary of Unpaid Wages which listed ten employees with varying amounts of unpaid wages for the period from February 2, 2013, to April 27, 2013.[85]

3. Procedural History and ALJ's Decision

On February 6, 2018, the Administrator issued a Determination Letter finding that Butler Amusements substantially failed to comply with Attestation #13—which requires the employer to accurately state the dates of temporary need, reason for temporary need, and number of workers for temporary need—or stated another way, failed to comply with the requirement to provide proper job classification information on Form 9142B and DHS Form I-129.[86] The Administrator based this finding on the substantive provisions of the 2008 H-2B regulations and the procedural provisions of the 2015 H-2B regulations, and determined that Butler Amusements "violated Attestation #13 and 20 C.F.R. § 655.22(n) (2009) as well as the Form I-129's part 5, question 1."[87] The Administrator assessed back wages totaling $24,987.20, and $10,000 in CMPs.[88] On February 28, 2018, Butler Amusements contested the Administrator's finding and remedies and requested administrative review with the OALJ.[89]

Before the ALJ, Butler Amusements filed an Opposed Motion for Summary Judgment, and the ALJ issued an Order Denying Summary Decision on November 14, 2018. In his Order, the ALJ concluded, among other things, that that the five-year statute of limitations in 28 U.S.C. 2462 for actions to enforce a civil fine or penalty was applicable to this case, and that the Administrator had timely filed its determination letter within the five-year limitations period.[90] The ALJ also concluded that back wages were an appropriate remedy under 20 C.F.R. 655.65(i) for the violations alleged in this case.[91] The ALJ's May 2, 2019 Order noted that the original amount of unpaid wages cited in the Determination Letter was $24,987.20, but amended the unpaid wages to $26,955.40 due to an inadvertent omission of one of the employees entitled to back wages.[92]

---

85 *Id.* at 6.

86 *Id.* at 13.

87 *Id.*

88 *Id.* at 6.

89 *Id.* at 13.

90 Order Denying Summary Decision at 14-18 (ALJ Nov. 14, 2018) (Summary Decision Order).

91 *Id.* at 12-13.

92 May 2, 2019 Order at 3; D. & O. at 6 n.8.

A hearing was held in May 2019, and the ALJ issued the D. & O. on September 30, 2020, finding that Butler Amusements substantially failed to comply with the H-2B program by employing nine H-2B workers outside the job duties of amusement and recreation attendants.[93] The ALJ found that Butler Amusements had instead employed the workers as drivers, maintenance shop workers, and supervisors.[94] The ALJ concluded that WHD's method of calculating back wages through reconstruction was appropriate, but in recalculating the back wages owed, he lowered them from $26,955.40 to $26,786.[95] The ALJ rejected Butler Amusements' claim that it was entitled to certain credits.[96] Finally, the ALJ held that the Administrator's assessment of a $10,000 CMP was reasonable.[97]

Butler Amusements timely appealed to the Board.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review an ALJ's decision and issue the final determination of the Secretary of Labor ("Secretary") under the H-2B program.[98]

---

93 *Id.* at 19.

94 *Id.*

95 *Id.* at 25-26.

96 *Id.* at 27.

97 *Id.* at 28. The ALJ also concluded that Respondent could not show that the doctrine of laches should apply, that Brajevich was not individually or personally liable for Butler Amusements' violations, and that an anti-retaliation order for any H-2B worker owed back wages was warranted. *Id.* at 15-17, 30-31. None of these issues have been presented to the Board for appeal, and thus the ALJ's decision on these matters is final. We note that although Butler Amusements mentioned laches in the Petition for Review, it did not brief this issue. The Board will deem an argument waived when a party asserts a conclusory proposition on appeal without providing an explanation or elaborating on the proposition as it relates to the party's argument. *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Washington Farm Lab. Ass'n*, ARB No. 2021-0069, ALJ No. 2018-TAE-00013, slip op. at 29 n.113 (ARB Mar. 31, 2023) (internal citations omitted).

98 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see also* 29 C.F.R. § 503.51.

The Board reviews an ALJ's decision de novo[99] and acts with "all the powers [the Secretary] would have in making the initial decision."[100]

DISCUSSION

Upon review of the ALJ's D. & O., the parties' arguments on appeal, and the record, the Board concludes that: (1) the current case is not time barred; (2) Butler Amusements violated the INA and H-2B regulations by employing H-2B workers outside of the job classification listed on ETA Form 9142B; (3) the ALJ's recalculation of back wages owed was properly determined; (4) Butler Amusements is not eligible for any credits under the 2008 H-2B regulations; and (5) the ALJ's affirmance of CMPs is reasonable under the facts in the current matter.

1. The Administrator's Case Is Not Time Barred

A. The Administrator Timely Issued the Determination Letter

WHD issued its determination letter on February 6, 2018, covering the period from February 1, 2013, through April 24, 2013.[101] Applying a five-year limitations period, the ALJ found that WHD's February 6, 2018 Determination Letter was timely because it was issued before April 24, 2018.[102]

Butler Amusements argues that the ALJ incorrectly determined that the statute of limitations accrued when the violation *concluded* on April 24, 2013, rather than on February 1, 2013, when the workers arrived and the violation *began.*[103] Butler Amusements further argues that the "moment of employment" (which it argues began on February 1, 2023, when the workers began working for

---

99 *See Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. Am. Truss*, ARB No. 2005-0032, ALJ No. 2004-LCA-00012, slip op. at 2-3 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affs.*, ARB No. 2004-0100, ALJ No. 2002-LCA-00025, slip op. at 8 (ARB Jan. 31, 2007) (for the proposition that "ARB applies de novo review in INA cases.")).

100 5 U.S.C. 557(b).

101 D. & O. at 6; RX 19.

102 D. & O. at 16-17; Summary Decision Order at 16-18. Although the Administrator did not agree that the five-year statute of limitations in Section 2462 applied to the back wages sought in this case, the Administrator has not appealed this aspect of the ALJ's decision on the basis that it is not determinative. We agree that the application of the five-year limitations period in the D. & O. does not eliminate any period of time for which the Administrator sought back wages, and therefore we do not need to address whether Section 2462's five-year statute of limitations applies to H-2B proceedings where the Administrator seeks to recover back wages.

103 Respondent's (Resp.) Brief (Br.) at 5-6.

Butler Amusements) was a single discrete violation that provided grounds for the Administrator's cause of action,[104] and "[t]he fact that the purported violations may have continued until April 24, 2013, has no bearing on the statute of limitations accrual."[105]

In support of its argument that the violation in this case occurred once, and that it was not continuing or repeating, Butler Amusements argues that the statute of limitations for this violation is limited by a scienter requirement, which requires a "subjective state of mind of recklessly disregarding whether its conduct was prohibited by the statute"[106] and is illustrated in discrimination cases.[107] Butler Amusements argues that "even if the subjective reckless disregard standard could be contorted into objective recklessness (i.e., gross negligence), it would change nothing because the willfulness prong would still determine the date of 'first accrual.'"[108]

In response, the Administrator argues that the violation in this case was not a single discrete event, but instead consisted of recurring failures to comply with the H-2B program requirements.[109] The Administrator points to the fact that during the February-April 2013 period which WHD investigated, Butler Amusements employed at least nine H-2B workers outside the certified job classification; therefore, Butler Amusements substantially failed to comply with the terms and conditions of ETA Form 9142B throughout that same period.[110] The Administrator analogizes this substantial failure violation to an FLSA action, where there is "a series of repeated violations of an identical nature" such that "each failure to pay . . . begins a new statute of limitations period as to that particular event."[111] Thus, "the underpayment is not the 'effect' of a prior violation; it is the violation itself."[112]

---

104 *Id.* at 6-7 (citations omitted).

105 *Id.* at 7. Under this interpretation of the accrual rule, Butler Amusements concludes that the determination letter was time-barred. *Id.* at 5-6.

106 Resp. Reply Br. at 4 n.1.

107 *Id.* at 4-6.

108 *Id.* at 4 n.1.

109 Administrator's (Adm'r) Br. at 25-26.

110 *Id.*

111 *Id.* (citing *Figueroa v. D.C. Metro. Police Dep't*, 633 F.3d 1129, 1135 (D.C. Cir. 2011) (internal quotation marks omitted)); *see also Knight v. Columbus, Ga.*, 19 F.3d 579, 580-81 (11th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994).

112 Adm'r Br. at 26 (citing *Figueroa*, 633 F.3d at 1135).

Butler Amusements counters that the accrual of an INA claim is more analogous to the situation in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[113] in which the Supreme Court held that the applicable limitations period did not begin anew for each paycheck reflecting a prior violation of Title VII.[114] The Court distinguished FLSA claims from Title VII claims because the latter do not require proof of specific intent to discriminate. Butler Amusements equates the H-2B provision's willfulness requirement to Title VII's specific intent requirement. This argument fails for two reasons. First, H-2B's definition of "willful" includes reckless disregard, which does not equate to specific intent.[115] Second, the Supreme Court did *not* appear to equate proof of willfulness with Title VII's specific intent requirement because it cited to FLSA's "willful violation" provision when distinguishing the FLSA from Title VII.[116]

We agree with the Administrator that each significant deviation from the terms and conditions of the H-2B petition and accompanying labor certification is the violation itself, [117] and thus begins a new statute of limitations.

Butler Amusements also argues that the Administrator was required to charge this violation as a willful misrepresentation, rather than a substantial

---

[113] *See* 550 U.S. 618, 641 (2007).

[114] Resp. Reply Br. at 4.

[115] 20 C.F.R. § 655.65(e) ("'[W]illful failure' means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart.").

[116] *Ledbetter*, 550 U.S. at 641 ("Again, however, Ledbetter's argument overlooks the fact that an FLSA minimum wage or overtime claim does not require proof of a specific intent to discriminate. See 29 U.S.C. § 207 (establishing overtime rules); cf. § 255(a) (establishing 2–year statute of limitations for FLSA claims, except for claims of a "willful violation," which may be commenced within 3 years)."). In support of this proposition, Butler Amusements also cites to breach of contract cases and Clean Air Act cases, but we are unable to discern why these are analogous. Resp. Reply Br. at 4-6.

[117] *See* 8 U.S.C. 1184(c)(14) (an employer violates the INA when it willfully fails to comply with the H-2B requirements and that failure constitutes a "significant deviation" from the terms and conditions of the employer's petition). *See also Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. 5 Star Forestry*, ARB No. 2013-0056, ALJ No. 2012-TNE-00010, slip op. at 5 (ARB Nov. 6, 2014) (Final Decision and Order on Civil Money Penalty) (affirming ALJ's decision charging the employer with four separate H-2B violations, instead of a single violation, for placing H-2B workers in four different locations outside the area of the intended employment the employer listed in its application for temporary employment certification). In *5 Star Forestry,* the Board found that *each* placement was a substantive deviation from the terms and conditions of the H-2B petition (to conduct the necessary measures to confirm the absence of U.S. workers in each location it attends to place H-2B workers), and thus each deviation was a violation in itself. *Id.* at 5-6.

failure to comply, and that any willful misrepresentation would have occurred when it filed its ETA Form 9142B in 2012 (outside the limitations period).[118] However, an employer may willfully misrepresent facts on its ETA Form 9142B and be charged with willful misrepresentation, or an employer may substantially fail to comply with the statements it made on its ETA Form 9142B regarding its temporary need for H-2B workers and be charged with a substantial failure to comply.[119]

In this case, Butler Amusements had not substantially failed to comply with the requirement in 20 C.F.R. § 655.22(n) *until* it actually acted with reckless disregard of the H-2B program requirements by employing nine H-2B workers in job classifications other than ARA. Therefore, the Secretary's claim did not begin to accrue until February 2013, and Butler Amusements substantially failed to comply repeatedly throughout the period that WHD investigated, to April 2013. Therefore, the Board finds that that Administrator's February 6, 2018 Determination Letter was timely filed within the five-year limitations period.

B. The Four-Year Limitations Period in 28 U.S.C. 1658(a) Does Not Apply to Administrative Actions

Butler Amusements argues in the alternative that the statute of limitations is governed by the four-year limitations period set forth in 28 U.S.C. § 1658(a),[120] which governs "civil action[s] arising under an Act of Congress enacted after" 1990. Butler Amusements argues that DOL's enforcement actions are considered a civil matter, thus, Section 1658(a) governs the current matter.[121]

Butler Amusements is incorrect. As the Federal Communications Commission (FCC) recently recognized, "[t]he text, context, purpose, and history of Section 1658(a) make clear that it governs court actions, not agency

---

[118] Resp. Br. at 3, 7 n.1, 24-25 (Butler Amusements arguing that 20 C.F.R. § 655.22(n) "can only be violated through a misrepresentation in the application, not through substantial failure to comply," thus the only relevant moment in time occurred when it submitted the application on 11/7/2012.); *see also id.* at 6 (for Butler Amusements' argument that the violation occurred upon submission of the application because that was the moment of either willfulness or reckless disregard).

[119] The Administrator can identify different types of violations after an investigation, including a willful misrepresentation of a material fact on a petition, or a substantial failure to meet any conditions of the labor certification or DHS Form I-129. 20 C.F.R. § 655.60.

[120] Resp. Br. at 8-12; *see* 28 U.S.C. § 1658(a).

[121] Resp. Br. at 11-12.

proceedings . . . ."[122] First, as the FCC explained, the term "action," as used in federal statutory provisions, most frequently refers to judicial proceedings in civil matters and not agency proceedings. The Fourth Circuit, when analyzing the term "civil action" in 28 U.S.C § 1658(a), similarly held that it did not apply to a civil commitment hearing, noting that such a proceeding was distinct from a civil action, which is one that "seek[s] to enforce or protect a private civil right."[123] An administrative enforcement action, such as in the current case, does not seek to enforce or protect a private civil right. Similarly, the Supreme Court, when analyzing 28 U.S.C. § 2415(a), another federal limitations statute, stated that the term "action" is "ordinarily used in connection with judicial, not administrative, proceedings."[124]

The FCC's analysis of the context, purpose and history of Section 1658(a) further supports the conclusion that this section only applies to suits brought in federal court:

> Section 1658 was enacted as part of the Judicial Improvements Act of 1990. Title III of that Act, in which Section 1658 was enacted, is the Federal Courts Study Implementation Act of 1990. As those names would suggest, where the term "action" appears in the enacting law, it refers to formal judicial proceedings or other action by the judiciary or its governing bodies.
>
> ***
>
> 'The primary goals of [the Judicial Improvements] Act [were] to decrease delays in the federal court system as a result of overloaded case dockets, to increase overall efficiency, and to reduce costs and litigation expenses." The

---

[122] *Sandwich Isles Comms., Inc.*, FCC 18-172, 2019 WL 105385, at *39 (F.C.C. Jan. 3, 2019), *reh'g denied*, 2019 WL 2564087 (D.D.C. 2019); *see also Garvey v. Hale*, SE-14527, 1997 WL 566262, at *1 n.3 (N.T.S.B. Aug. 29, 1997) (stating that Section 1658(a) applies to "certain civil actions in federal court" and not to proceedings before the National Transportation Safety Board).

[123] *United States v. Searcy*, 880 F.3d 116, 124 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 285 (2018).

[124] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). The cases cited by Butler Amusements as examples of the term "civil action" being applied to administrative proceedings are inapposite because they apply the Administrative Procedure Act, which provides a cause of action for review of administrative actions in federal court, and thus involves a judicial proceeding not limited to administrative proceedings. *See* Resp. Br. at 10-12.

> purpose of Section 1658 specifically was to eliminate the need for federal courts to "borrow" the most analogous state or federal law limitations period for federal claims that lacked their own designated limitations period.
>
> ***
>
> In other words, the legislative concerns that animated the enactment of Section 1658, and the goals of Judicial Improvements Act of 1990 as a whole, related to proceedings in federal court, not administrative proceedings.[125]

The FCC concluded by noting that it could find no case where section 1658(a) was used to set the limitations period for an administrative proceeding.[126] The Board likewise concludes that the limitations period set forth in 28 U.S.C. § 1658(a) does not apply to this administrative enforcement action.

C. *Statutes of Limitations Should Not Be Borrowed from Other Statutes in Suits Brought by the Government*

Butler Amusements also argues that the ALJ erred by failing to "borrow" a statute of limitations from either the Fair Labor Standards Act or the H-2A program for application in this case.[127] However, the borrowing principles relied upon by Butler Amusements apply to private actions brought under a federal statute that does not itself specify a statute of limitations—not, as here, where the enforcement action is brought by the government itself.[128] Because these borrowing principles do not apply in cases brought by the government,[129] the ALJ did not err in refusing the requested action.

---

[125] *Sandwich Isles Comms., Inc.*, 2019 WL 105385, at *39 (citations omitted).

[126] *Id.* at *40.

[127] *See* Resp. Br. at 12-15. Butler Amusements' references to the H-2A program two-year statute of limitations, *id.* at 14, is also misplaced because it applies to *debarment* actions, not enforcement actions. *See* 8 U.S.C. 1188(b).

[128] *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355-56 (1991) (discussing borrowing principles in the context of a private action), *reh'g denied*, 501 U.S. 1277 (1991); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 488 (1980) (same).

[129] *See, e.g., Alden Mgmt. Servs., Inc. v. Chao*, 532 F.3d 578, 581-82 (7th Cir. 2008) (noting that "nothing in the [INA] establishes a period of limitations for the Secretary's proceeding" and stating that "a borrowing approach . . . does not apply to administrative proceedings initiated by the national government" (citation omitted)); *Dole v. Local 427*, 894

2. Butler Amusements Violated the INA and the H-2B Regulations by Employing H-2B Workers Outside the Job Classification Listed on the Application for Temporary Labor Certification

The ALJ found that the Administrator had adequately established that Butler Amusements substantially failed to comply with the 2008 H-2B regulations by employing nine H-2B workers as ARAs who did not perform ARA job duties.[130] Instead, Butler Amusements employed these H-2B employees as drivers, shop workers, and supervisors of ARAs.[131] After reviewing the ALJ's finding de novo, we agree with the ALJ for the following reasons.

A. Statutory and Regulatory Background

In 2008, the DOL proposed and instituted an attestation-based filing system for the H-2B program; the employer's "information and attestations on the application form" were to provide the Department with "the necessary assurances . . . to initially verify program compliance."[132] The regulation also provided for the Department to conduct compliance audits of H-2B applications[133] and for the Administrator to conduct investigations.[134]

Following an investigation, the Administrator can identify three types of violations: (1) a willful misrepresentation of a material fact on a petition; (2) a substantial failure to meet any conditions of the labor certification or DHS Form I-

---

F.2d 607, 614-15 (3d Cir. 1990) (rejecting argument that an analogous federal statute of limitations should apply to Secretary of Labor's suit brought under the Labor Management Reporting and Disclosures Act); *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260, 263 (10th Cir. 1980) (refusing to apply state statute of limitations to Secretary of Labor's action under the Occupational Safety and Health Act).

130 D. & O. at 19.

131 *Id.*

132 *Id.* at 17 (citing Lab. Certification Process and Enf't for Temp. Em't in Occupations Other Than Agric. or Registered Nursing in the U.S. (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 245, 78,020 (Dec. 19, 2008); Final Rule, 73 Fed. Reg. 245, 78,035 (Dec. 19, 2008) (codified at 20 C.F.R. §§ 655 and 656)).

133 *Id.* (citing 20 C.F.R. § 655.24).

134 *Id.* at 17-18 (citing 20 C.F.R. § 655.60). The Administrator performs all of the Secretary's investigative and enforcement functions, and pursuant to a complaint or otherwise, conducts investigations and gathers information as deemed necessary by the Administrator to determine compliance with the H-2B program. 20 C.F.R. §§ 655.50(a)-(b).

129; or (3) a misrepresentation of a material fact to the State Department on a visa application.[135]

In this case, WHD's 2013 investigation found that Butler Amusements substantially failed to meet the conditions of the labor certification application attested to as listed in Section 655.22.[136] Section 655.22(n) requires the employer to attest that it truly and accurately stated the number of workers needed, the dates of need, and the reasons underlying the temporary need in its labor certification request.[137]

On ETA Form 9142B, Butler Amusements represented that it had a temporary need for 246 full-time seasonal "Amusement and Recreation Attendants" starting on February 1, 2013, and ending on October 31, 2013.[138] Butler Amusements listed the job duties that these workers would perform as a "variety of attending duties at amusement facility (traveling carnival). Set-up, tear-down, operate amusement rides, food concessions and/or games."'[139] When Brajevich signed the Employer's Declaration in Appendix B.1 Section B on ETA Form 9142, he certified that the "job opportunity was a full-time temporary position and that 'the dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification has been truly and accurately stated on the application[.]"'[140] However, because Butler Amusements employed nine H-2B workers as supervisors (2), shop workers (2), and drivers (5), WHD determined that Butler Amusements substantially failed to meet the conditions of the labor certification.[141] The ALJ agreed.

On appeal, Butler Amusements contends that the ALJ erred in finding that it violated 20 C.F.R. § 655.22(n) because while the statute is violated when there is a misrepresentation on the application, it is not violated when an employer compensates workers at the approved wage rate for the approved job code although

---

135 *Id.* at 17 (citing 20 C.F.R. § 655.60).

136 *Id.* at 17-18. *See* 20 C.F.R. § 655.60(b) (Administrator to determine through investigation whether the employer has "[s]ubstantially failed to meet any of the conditions of the labor certification application attested to, as listed in § 655.22, or any of the conditions of the DHS I-129, Petition for a Nonimmigrant Worker for an H-2B worker in 8 CFR 214.2(h).").

137 20 C.F.R. § 655.22(n).

138 D. & O. at 4.

139 *Id.* (citation omitted).

140 *Id.* at 5 (citation omitted).

141 *Id.* at 9-10, 13.

the workers may have also performed additional "incidental" job duties.[142] Butler Amusements argues its application did not contain a misrepresentation of its temporary need and therefore, it could not have violated Section 655.22(n).[143] Butler Amusements argues that, instead of charging it under 20 C.F.R. § 655.22(n) for mispresenting its temporary need for workers, the Administrator was required to charge this case as a willful misrepresentation of a material fact when Butler Amusements submitted the application in 2012 or when it was approved.[144]

Contrary to this argument, the Administrator was not required to charge this matter as a willful misrepresentation case. The Administrator may charge an employer with a willful misrepresentation or a substantial failure to comply with the conditions attested to on ETA Form 9142B,[145] and in this case chose the latter. A substantial failure violation occurs after the workers are in the U.S.[146]

We now turn to whether Butler Amusements substantially failed to comply with the temporary need requirement in 20 C.F.R. Section 655.22(n). The INA defines substantial failure as "the *willful failure* to comply [with this section which] constitutes a *significant deviation* from the terms and conditions of a petition."[147]

---

142 Resp. Br. at 3-4, 34.

143 *Id.* at 24-25.

144 *Id.* at 7 n.1.

145 20 C.F.R. § 655.60(a)-(b).

146 *See* RX 40 (Deposition of Carrie Aguilar) at 18-19 (Aguilar explaining the difference between a misrepresentation (occurs when "something that was known at the time of the filing to be an error or incorrect" before the workers are in the country) and a substantial failure (a failure "to comply substantially with the terms and conditions outlined in" ETA Form 9142B "[a]fter the workers are here and the terms and conditions of [ETA Form 9142B] are not complied with"); *see also Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. C.S. Lawn & Landscape, Inc.*, ARB No. 2020-0005, ALJ No. 2018-TNE-00023, slip op. at 8 (ARB Apr. 4, 2022) (in which the Board held that the employer's substantial failure to comply with Section 655.22(g)(1) did not start to accrue until the employer actually took the housing deduction from the workers' paychecks).

147 8 U.S.C. § 1184(c)(14)(D) (emphasis added). Section 214(c)(14) of the INA states that if DHS finds "a substantial failure to meet any of the conditions of the petition to admit . . . a nonimmigrant worker under [8 U.S.C. § 1101(a)(15)(H)(ii)(b)] or . . . a willful misrepresentation of a material fact in such petition," it may impose such administrative remedies, including civil monetary penalties, as it determines to be appropriate. 8 U.S.C. § 1184(c)(14)(A). The statute continues: "In this paragraph, the term 'substantial failure' means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition." 8 U.S.C. § 1184(c)(14)(D). In addition, "the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers." 8 U.S.C. § 1184(c)(14)(C).

Likewise, a substantial failure under the 2008 H-2B regulations means a "willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS I-129."[148]

B. *Butler Amusements Willfully Failed to Comply with the 2008 Regulations Because It Recklessly Disregarded Whether It Was in Compliance with the INA and H-2B Program Requirements*

The 2008 H-2B regulations define "willful failure" as a "knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart."[149] Under this standard, the term "willful" refers to conduct that is "voluntary," "deliberate," or "intentional," and "not merely negligent."[150] A violation is willful if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited . . . ."[151] An act is not "willful" if the employer simply knew potential violations were "in the picture."[152]

The ALJ found Butler Amusements "acted with reckless disregard for whether it was in compliance with the INA and its implementing regulations by ignoring the regulations and instructions accompanying the temporary employment certification application and employing nine H-2B workers outside of its job certification."[153]

Butler Amusements argues that it did not act with reckless disregard because: (1) it did not have proper notice or knowledge of its obligations under the H-2B program as the 2008 Rule did not provide or explain how much detail to provide when submitting a job code, how to complete ETA Form 9142B or instructions for describing job duties, or what the correct test was to determine a job code; (2) 20 C.F.R. § 655.22(n) does not address the impropriety of compensating workers at the approved job rate if they were not performing the job duties for the approved job code but addresses misclassification on the application; and (3) that it did not know of a regulatory requirement to only employ H-2B workers in the certified job classifications, nor did the ALJ ever identify any pertinent regulatory duty.[154]

---

148 S*ee* 20 C.F.R. § 655.65(d); *see also* 8 U.S.C. § 1184(c)(14)(A).

149 20 C.F.R. § 655.65(e) (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Trans World Airlines v. Thurston (Thurston)*, 469 U.S. 111 (1985)).

150 *McLaughlin*, 486 U.S. at 133.

151 *Id.*

152 *Thurston*, 469 U.S. at 127.

153 D. & O. at 19.

154 Resp. Br. at 24-29.

i. Butler Amusements Ignored the 2008 H-2B Regulations

Butler Amusements argues that an agency must provide notice of its interpretation of what is prohibited before it may impose penalties.[155] The agency provides notice "[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform."[156]

Here, we agree with the ALJ that "[t]he regulations and instructions accompanying the certification application provided ample notice and guidance for Employer to comply with the INA and the terms of its certification,"[157] and that several sections of the 2008 H-2B regulations would have given Butler Amusements notice of its obligations.[158] The 2008 H-2B regulations dictated that employers must truly and accurately state, "the dates of temporary need, reason for temporary need, and number of positions being requested for labor certification . . . on the application."[159] These directions are clear, and we agree with the ALJ that Butler Amusements "should have known that it was supposed to employ the number of ARA workers it had truly and accurately requested."[160]

Butler Amusements argues on appeal that the 2008 H-2B regulations do not provide notice to employers about how to request a job code during the application process or "limit the employer's assigned job duties to the job code requested."[161] Butler Amusements argues that because of the lack of guidance from the H-2B regulations, including how much time and effort it should have spent on selecting a job code, "attempting to impose a regulatory duty would seriously undermine the public's ability to understand the rules that must be followed."[162]

We agree with the ALJ that "[t]he content and purpose of the advertising requirements should have given Respondent notice of the level of specificity

---

155 *Id.* at 30; *see also* D. & O. at 19 ("An agency must provide notice of its interpretation of what is prohibited before it may impose penalties.") (citing *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)).

156 D. & O. at 19-20 (citing *Gen. Elec. Co.*, 53 F.3d at 1329).

157 *Id.* at 19.

158 *Id.* at 20.

159 20 C.F.R. § 655.22(n).

160 D. & O. at 20.

161 Resp. Br. at 26-27.

162 *Id.* at 27, 32.

required for the job description."[163] The 2008 H-2B regulations explain that "[b]efore receiving a temporary labor certification for H-2B workers, an employer must ensure that there are not enough interested and able U.S. workers to fill the positions.[164] Employers must advertise the job with enough specificity "to apprise applicants . . . where [they] will likely have to reside to perform the services or labor" and describe the "opportunity (including the job duties) . . . with sufficient detail to apprise applicants of services or labor to be performed . . ." as well as, "[t]he job opportunity's minimum education and experience requirements . . . ."[165] Furthermore, the job description in the advertisement and the temporary employment certification application have to be similar because employers cannot place "less favorable" job requirements on U.S. workers.[166] Thus, like the ALJ, we find unconvincing Respondent's arguments that it did the best it could in the absence of clear directive and guidance.

Butler Amusements also argues that workers performed a variety of job duties but that none of these job duties were assigned outside of the job code, and that it was being efficient by concentrating approved duties in a small number of H-2B workers.[167] Butler Amusements argues that when it searched the different job titles, every single one of the duties listed was an approved job duty for "Amusement and Recreation Attendants." Thus, it satisfied the only regulatory staffing requirement, which is to comply with industry practice.[168] Like the ALJ, we find that Butler Amusements should have known it was required to describe the job duties with enough specificity to inform workers of the labor to be performed. However, "despite its representations on the temporary employment certification, [Butler Amusements] placed workers in positions where they were supervising other employees, exclusively driving semi-trucks, or working in a repair shop—all duties which were not listed on ETA Form 9141, 9142B, or the I-129."[169]

We also agree with the ALJ that Sections 655.20 and 655.34(b) also provide notice that a strategy of concentrating duties to promote efficiency violates the 2008 H-2B regulations.[170] Section 655.20(d) states that "[c]ertification of more than one position may be requested on the application as long as all H-2B workers will

---

163 D. & O. at 20.

164 *Id.* (citing 20 C.F.R. § 655.17).

165 20 C.F.R. § 655.17.

166 *Id.*

167 Resp. Br. at 30-31.

168 *Id.*

169 D. & O. at 20.

170 *Id.*

perform the same services or labor on the same terms and conditions, in the same occupation . . . ."[171] Section 655.34(b) states "[a] temporary labor certification is only valid for the . . . specific services or labor to be performed . . . ."[172] We find it notable that, although the company had participated in the H-2B program since 2000, CEO Brajevich admitted he had never read or referenced the 2008 H-2B rules. As the ALJ noted, if Brajevich had read the regulations, "these requirements would have put [Butler Amusements] on notice that all workers within a certification should perform the same labor, under the same conditions, and in the same occupations and that the certification was only valid for the services or labor specified in the application."[173]

Having carefully reviewed the record de novo, we see no reason to disturb the ALJ's findings.[174] We therefore conclude that Butler Amusements showed reckless disregard for complying with the statute and regulations when it submitted a temporary employment certification for 246 ARA workers, and did not review the implementing regulations, and then employed some of its certified H-2B workers exclusively in occupations outside of the certification.

ii. Butler Amusements Ignored Instructions on ETA Forms 9141, 9142B, and DHS I-129

Regardless of whether Brajevich read the 2008 H-2B rules, the instructions accompanying ETA Forms 9141, 9142B, and the DHS I-129 informed Butler Amusements of its obligations. Thus, we agree with the ALJ that Butler Amusements "seemingly ignored the instructions they did receive with their temporary employment certification."[175] The ALJ provided an example:

> [T]o enable ETA to make a prevailing wage determination (PWD), [Butler Amusements was] to '[d]escribe the job duties, in detail, to be performed by any worker filling the job opportunity.' The instructions stated, 'specify field(s) and/or product(s)/industry(ies) involved, any equipment to be used, and pertinent work conditions.' The duties provided must be specific enough to be classified under a relevant SOC pursuant to the O*Net publication.[] The

171 20 C.F.R. § 655.20(d).

172 20 C.F.R. § 655.34(b).

173 D. & O. at 20.

174 As stated by the ALJ, Butler Amusements' "strategy to 'just put [workers] wherever we can get them to be efficient,' was expedient, but clearly violated this explicit requirement." *Id.*

175 *Id.* at 21.

> instructions also directed [Butler Amusements] to indicate the number of employees the H-2B workers would supervise and whether the supervised workers would be subordinates or peers. The ETA Form 9142B has similar instructions.[176]

We agree with the ALJ that despite this guidance, Butler Amusements "did not include in the description any mention of needing a commercial driver's license, driving a semi-truck to transport rides, working in a repair shop, or supervising other employees."[177] Butler Amusements instead employed H-2B workers in positions dramatically different from the job description—in the positions of first-line supervisors, maintenance shop workers, and drivers—that was used to generate a prevailing wage determination, advertised to U.S. workers, and certified for H-2B workers.[178]

If Butler Amusements wished to fill positions that included supervisory roles, driving, and shop work, it "should have submitted separate applications for the various jobs they sought to fill."[179] Instead, Butler Amusements "exerted minimal effort to comply with the INA and the 2008 H-2B regulations, which demonstrated more than mere negligence, but a reckless disregard for whether its actions violated the statute and regulations."[180]

iii. Butler Amusements Did Not Act Reasonably or with a Good Faith Belief That It Had Not Committed a Violation of the 2008 H-2B Regulations

Butler Amusements argues that, because it relied on an experienced consultant when filing out the Form 9142B, it could not have willfully violated the regulations.[181] As the ALJ noted, "[i]n the Notice of Proposed Rulemaking, the Department confirmed '[i]n the H-2B program, the agent simply represents the employer in the labor certification process. The employer is ultimately responsible for its obligations under the program . . . ."[182] By signing Butler Amusements' Declaration on ETA Form 9142B, Brajevich "certified the job opportunity was a full-

---

176 *Id.* (citations omitted).

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* The ALJ found if Butler Amusements "had reviewed the regulations and other documents in good faith, [it] could have ascertained what actions to take to comply." *Id.* (citing *Gen. Elec. Co.*, 53 F.3d at 1329).

181 Resp. Br. at 32-33.

182 D. & O. at 21 (citing RX 76 at 17; 73 Fed. Reg. 245, 78,035 (Dec. 19, 2008)).

time temporary position and that '[t]he dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification has been truly and accurately stated on the application . . . .'"[183] Brajevich "took full responsibility for the accuracy of any representations made by his agent or attorney and declared under penalty of perjury that he read and reviewed the application and that to the best of his knowledge it was true and accurate."[184]

As did the ALJ, we find the Supreme Court's *Thurston* case instructive on this issue. In *Thurston*, the record showed that the employer, an airline, acted reasonably and in good faith.[185] When airline officials met with lawyers, they determined that the airline's existing policy violated the Age Discrimination in Employment Act (ADEA), and proposed and adopted a new policy.[186] Relying on these facts, the Court held that the airline did not show willful or reckless disregard for whether its conduct violated the ADEA.[187] We agree with the ALJ's finding that, unlike the airline in *Thurston*, Butler Amusements did not act reasonably and in good faith.[188] The airline in *Thurston* "did not just consult counsel, they engaged with the process, and changed their plan of action based on counsel's advice."[189] Thus, merely "[c]onsulting counsel is not sufficient to show that one acted in good faith, nor is pleading ignorance."[190]

On appeal, Butler Amusements argues that its expert consultant advised it to pursue this course of action and that the ALJ imposed "strict liability" for relying on an erroneous professional consultant.[191] We disagree. The ALJ correctly noted that it was Butler Amusements and "Brajevich [who] took full responsibility for the accuracy of any representations made by his agent or attorney and declared under

---

183 *Id.* (citing AX C-9 (Attestation #13)).

184 *Id.* at 21-22 (citing AX C-9). The ALJ also noted that Brajevich testified that Respondent's counsel acted on Butler Amusements' authority. *Id.* at 22(citing the RESTATEMENT (THIRD) OF AGENCY, § 2.01 (2006) (which states that "[a]n agent acts with actual authority when at the time of taking action that has legal consequences for the principal, the agent reasonably, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.")). The ALJ concluded that Respondent's counsel "acted with actual authority and Butler Amusements is bound to the legal consequences of his actions." *Id.*

185 469 U.S. at 129.

186 *Id.*

187 *Id.*

188 D. & O. at 22 (citing *Thurston*, 469 U.S. at 113).

189 *Id.* (citing *Thurston*, 469 U.S. at 129).

190 *Id.*

191 Resp. Br. at 33.

penalty of perjury that he read and reviewed the application and that to the best of his knowledge it was true and accurate."[192] The ALJ did not impose strict liability by finding that Butler Amusements did not reasonably rely on counsel, but instead concluded it is ultimately the employer's responsibility to ensure that its application is accurate, and in this case Butler Amusements failed to do so.

Relying on counsel with expertise in the H-2B program alone is not persuasive evidence that an employer acted reasonably or in good faith with the INA and H-2B program requirements. In sum, the Board agrees with the ALJ that, despite adequate notice of its obligations, Butler Amusements made convenient decisions and exerted minimal effort to comply despite relying on and consulting with counsel.

C. *Butler Amusements Placed Nine H-2B Employees Outside of ARA Positions and Its Reckless Disregard Resulted in a Significant Deviation from the Terms and Conditions of ETA Forms 9141 and 9142B*

As set out in the Background section in detail, the core tasks for ARA positions as published in O*NET are vastly different than those represented by Butler Amusements in ETA Forms 9141 and 9142B.[193] In the face of the disparity between the O*NET core task description and the work that the nine subject H-2B workers actually performed, Butler Amusements argues that employing workers exclusively in supplemental activities was not a significant deviation from the job certification because their strategy of concentrating approved duties in a small number of H-2B workers made them more efficient and thus was acceptable under the H-2B regulations under the "incidental-duty rule."[194] This argument fails both factually and legally.

Turning first to the facts, the O*NET description for "supplemental activity" lists includes "inspecting equipment to detect wear and tear and making minor repairs," and similarly, "an ARA might spend some time maintaining inventories of

---

192 D. & O. at 21-22 (citation omitted).

193 In O*NET, the core duties for ARA positions are: selling tickets; collecting fees; selling refreshments; recording details of attendance, sales, receipts, reservations, or repairs; providing information about facilities; directing patrons, monitoring safety; cleaning rides; and staying informed of safety measures. *Id.* at 22 (citation omitted). On ETA Forms 9141 and 9142B, Butler Amusements represented that the H-2B workers it sought as ARAs would, "[p]erform a variety of attending duties at amusement facility (traveling carnival)" and they would "[s]et up, tear down, operate amusement rides, food concessions and/or games." *Id.* No experience, education, training, specific skills, or special licenses were required for the job, and though the workers would travel to different worksites they would not supervise any other employees. *Id.*

194 Resp. Br. at 34.

equipment and assembling and disassembling equipment."[195] Here, the ALJ found that none of the nine employees performed the core duties associated with an ARA position, and that they also rarely performed the supplemental duties.[196] The ALJ noted that "[t]he five drivers spent their time almost exclusively transporting rides on semi-trucks. They self-identified as drivers and were listed as drivers. Additionally they slept in their trucks, had commercial drivers' licenses, and kept logbooks to comply with [U.S.] Department of Transportation regulations."[197] As for the two shop workers, they "labored solely in the maintenance shop cleaning parts and supplies, welding, doing inspections, and repairing rides."[198] "[T]he supervisors described themselves as supervisors, and other employees, as well as Butler Amusements' management, corroborated this."[199] "The supervisors walked around to make sure employees were doing their jobs, dealt with customer complaints, responded to ride operators when something was broken, and filled out the ride roster."[200] Thus, the ALJ found that "[t]he nine employees did not perform core ARA duties and only minimally performed supplemental ARA duties."[201]

Next, we turn to the law. As an initial matter, the Board is unpersuaded by Butler Amusements' argument that the "incidental-duty rule" should be "borrowed" from H-2A regulations for application to the current case.[202] Butler Amusements is also incorrect that the 2008 H-2B Regulations did not require it to employ H-2B workers only in the job code that was requested and approved.[203] This argument

---

195 D. & O. at 22-23 (citations omitted).

196 *Id.* at 23.

197 *Id.* (citations omitted).

198 *Id.* (citations omitted). The ALJ noted that Villegas did not need his company shirt because he spent so little time working with the public. *Id.* (citation omitted).

199 *Id.* (citation omitted).

200 *Id.* (citation omitted).

201 *Id.* (citation omitted).

202 The "incidental activities" argument fails because this provision is related to the type of "work activity of the type typically performed on a farm and *incident to the agricultural labor or services for which an H-2A labor certification was approved may be performed by an H-2A worker*." 73 Fed. Reg. 77,110 (Dec. 19, 2008) (emphasis added).

203 Resp. Br. at 26. Respondent also argues that the new language in the 2012 and 2015 regulations prohibiting workers outside of the certified job classifications demonstrated that the 2008 H-2B regulations did not prohibit the practice. *Id.* at 24-26. The clarifying language in those later regulations, however, indicated that the requirement existed under the 2008 H-2B regulations but was not explicit. D. & O. at 23 (noting that the 2012 and 2015 H-2B regulations added clarifying language that "'an H–2B worker is only permitted to work in the job and in the location that OFLC [Office of Foreign Labor Certification] approves unless the employer obtains a new temporary labor certification.'").

ignores and undermines the purpose of the INA and the Department's temporary labor certification process to protect U.S. workers. Butler Amusements certified that there were no qualified U.S. workers available for the positions and that employment of H-2B workers would not adversely affect the wages and working conditions of U.S. workers.[204] If the regulations did not require H-2B workers to be only employed in the job code requested, the Department's certification process would be rendered meaningless—as the ALJ succinctly stated, "to allow employers to select a job code, receive a prevailing wage determination, advertise the job to [U.S.] workers, hire H-2B workers after certifying that no [U.S.] workers wanted the position, and then employ H-2B workers to perform a different job entirely, undermines the purpose of the INA to protect U.S. workers."[205]

Accordingly, we agree with the ALJ that Butler Amusements "failed to advertise the nine positions to [U.S.] workers and adequately compensate the nine employees."[206] "Drivers, shop workers, and supervisors all have different SOC codes and corresponding prevailing wage rates, which are higher than the [prevailing wage rate] for [an] ARA."[207] As Butler Amusements "placed these nine employees outside of the ARA position but paid them as if they were ARA employees, [Butler Amusements] significantly deviated from its certification and owes back wages."[208] Butler Amusements' reckless disregard for the regulations and its lack of a good faith effort to comply with the rules resulted in a substantial failure to meet

---

204 *See* RX 2 (ETA's Certification of Butler Amusements' Application) at 21.

205 D. & O. at 23. By placing workers outside the position of ARA, Butler Amusements failed to ensure that there no qualified workers in the U.S. for the positions of drivers, shop workers, and supervisors. Butler Amusements' failure not only ignored regulatory guidance, but also undermined the labor certification process of ensuring that it had been "unsuccessful in locating sufficient numbers of qualified U.S. applicants *for the job opportunity for which labor certification is sought*." 20 C.F.R. §655.22(c) (emphasis added). *See also Outdoor Amusement Bus. Ass'n, Inc. v. U.S. Dep't of Homeland Sec.*, 983 F.3d 671, 675 (4th Cir. 2020), *cert. denied*, 142 S. Ct. 425 (2021) ("A core part of the H-2B visa program is labor certifications—the process of determining whether American workers are available and whether employment of H-2B workers would adversely affect similarly employed American workers."); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Homeland Sec.*, 491 F.Supp.3d 549, 565 (N.D. Cal. 2020), *appeal dismissed*, No. 20-17132, 2021 WL 1652546 (9th Cir. 2021) ("[A]ccording to the existing statutory scheme, the H-2B visa category requires that a visa can only be issued 'if unemployed persons capable of performing [the necessary temporary] service or labor cannot be found in this country[]' [and] [t]hat safeguard is achieved through a careful and robust certification process overseen by the Department of Labor[.]") (citations omitted).

206 D. & O. at 24.

207 *Id.* (citation omitted).

208 *Id.* (citation omitted).

conditions of the labor certification, and thus, Butler Amusements violated 20 C.F.R. § 655.22(n).

3. Remedy

If the Administrator finds that an employer has not paid wages at the wage level required by Section 655.22(e), the Administrator may require the employer to pay back wages.[209] Back wages further the purposes of the H-2B program by reducing the employer's incentive to bypass U.S. workers in order to hire H-2B workers who are more easily exploited.[210] The Board acknowledges the necessity and authority of WHD to reconstruct hours worked and payments made to determine back wages when the employer's records are unreliable.[211]

A. The ALJ's Recalculation of Back Wages Owed

WHD reconstructed the back wages owed based on a 40-hour week (per the temporary employment certification), the itinerary in the temporary employment certification, and SOC job codes for drivers, first-line supervisors, and maintenance and repair workers.[212] In finding that Butler Amusements owed $26,955.40, the Administrator did not rely on its pay slips because the Administrator found the number of hours worked recorded on the pay slips was not credible.[213] The ALJ found that the "pay slip hours were unreliable and could not have been used to reconstruct employee back wages" based on Aguilar's testimony that the typed timecards were less reliable than handwritten timecards because employees did not contemporaneously document when they started and stopped working and because the hours listed on the pay slips did not align with employee accounts.[214]

However, the ALJ found that the data in RX 26 was reasonably reliable regarding the location of the workers, and so recalculated the wages that Butler Amusements owed each worker as could be best determined from the locations

---

209 20 C.F.R. § 655.65(i).

210 73 Fed. Reg. 78,020, 78,047 (Dec. 19, 2008).

211 *See Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. Peter's Fine Greek Food, Inc.*, ARB No. 2014-0003-B, ALJ Nos. 2011-TNE-00002, 2012-PED-00001, slip op. at 6 (ARB Sept. 17, 2014). Thus, the ALJ's decision to disregard some pay records did not impose a "de facto timekeeping obligation" on Butler Amusements, Resp. Br. at 35, and its FLSA-exempt status and statutory time-keeping obligations are irrelevant.

212 D. & O. at 24 (citation omitted).

213 *Id.* at 25 (citation omitted).

214 *Id.*

available in the exhibit.[215] The ALJ based the hourly wage rate on the Foreign Labor Certification (FLC) wage data in Administrator's Hearing Exhibit (AX) J, specifically the mean (H-2B) rate, for the respective location and occupation of the H-2B worker.[216] Based on the ALJ's recalculation of back wages using the mean H-2B wage for each worker as best determined from the locations available in RX 26, the ALJ found that Butler Amusements owed $26,786 in back wages.[217]

B. The ALJ Properly Determined the Amount of Back Wages Owed

Butler Amusements first contends that the ALJ erred as a matter of law by awarding back wages because they were not available for violations of Section 655.22(n) under the 2008 Rule.[218] Butler Amusements is incorrect. The first clause of Section 655.65(i) provides that "the Administrator may impose *such other administrative remedies as the Administrator determines to be appropriate*, including reinstatement of displaced U.S. workers, or *other appropriate legal or equitable remedies*."[219] Thus, under this broad grant of authority, the ALJ properly concluded that the Administrator can require Butler Amusements to pay back wages. Back wages are "appropriate" because the workers were not paid the prevailing wages that they should have been paid for the work they performed.

With regard to hours worked, Butler Amusements next argues that the ALJ erred as a matter of law by "imposing a de facto timekeeping duty with strict liability" by disregarding pay records countersigned by the H-2B workers.[220] This argument fails because the ALJ did not impose such a duty; the record and D. & O. reflect that the ALJ carefully reviewed the Respondent's pay records and

---

215 *Id.*

216 *Id.* at 25-26. AX J contains the different SOC codes and corresponding prevailing wage rates for drivers, shop workers, and supervisors, which are higher than the prevailing wage rate for ARA. *Id.* at 24.

217 *Id.* at 25-26. The ALJ relied on data from RX 26, AX H, and AX J. *Id.* at 25. Butler Amusements summarily argues that "[t]he ALJ also erred as a matter of law by adopting the mean or average H-2B wage rate, D&O 26, even though that calculation did not exist under the 2008 DOL Rule." Resp. Br. at 38. Butler Amusements argues that the Administrator was required to present any evidence on which of 4 skill levels applied under 20 C.F.R. § 655.10 (2009) and alludes to skill level I as the appropriate wage rate. *Id.*

218 Resp. Br. at 35. Butler Amusements cites to 20 C.F.R. § 655.65(i), but appears to base this contention solely on the second clause of 655.22(i), which provides for back pay for violations of 20 C.F.R. § 655.22(e).

219 20 C.F.R. § 655.65(i) (emphasis added).

220 Resp. Br. at 35-38. Butler Amusements argues, *inter alia,* that because it was an FLSA-exempt employer and not required to keep records, the Administrator shifted the "burden of proof" to the employer. *Id.*

determined they were unreliable because some were incomplete, some were missing (including the driver logs), and some timesheets conflicted with others such that the ALJ had no way of determining which one was accurate.[221] The ALJ noted that Butler Amusements' pay slips were not contemporaneously recorded time cards and employees did not record their own hours; instead, carnival supervisors would record and report employees' hours to a payroll clerk.[222] The pay slips did not always reflect the hours H-2B employees spent driving, thus the pay slips did not always reflect accurate hours H-2B employees worked.[223] Employees who drove the vans were paid extra, but these hours were not reflected on the pay slips.[224] The unrecorded time spent driving was estimated to have been between two to eight hours, depending on the distance between fairs.[225]

Accordingly, we agree with the ALJ's conclusion that, based on these facts and not on any "de facto timekeeping duty," it was reasonable for the Administrator to use the 40 hours per week that Butler Amusements certified the H-2B workers would work, not the pay records.[226] With regard to the location of the workers, the ALJ found that the data regarding their location was reasonably reliable, and he then recalculated the wages that Butler Amusements owed each worker as could best be determined from the location evidence available.[227]

Butler Amusements also summarily argues that the ALJ erred as a matter of law by adopting the mean or average H-2B wage rate, because that calculation did not exist under the 2008 Rule.[228] We find that the ALJ reasonably looked at FLC data for mean hourly wage rates in the relevant period to determine wage rates for the jobs that the H-2B workers were actually performing.[229] Indeed, Butler Amusements agreed with the propriety of the Administrator's use of the average pay rate for the alternate job codes.[230] To the extent Butler Amusements is now

---

221 D. & O. at 11-12.

222 *Id.* at 6-7.

223 *Id.*

224 *Id.* at 7

225 *Id.*

226 *See Peter's Fine Greek Food, Inc.*, ARB No. 2014-0003-B, slip op. at 6 (acknowledging the necessity and authority of WHD to reconstruct hours worked and payments to determine back wages when the employer's records are unreliable).

227 D. & O. at 25 (recalculating back wages and finding a small discrepancy based on the investigator's projected itinerary).

228 Resp. Br. at 38 (citing to 20 C.F.R. § 655.10 (2009)).

229 *See* D. & O. at 25-26.

230 Resp. Post-Hearing Br. at 18.

arguing that the wage rates it requested in its application for ARAs should have been used instead, it does not explain why the ALJ should have used those other rates in a subsequent enforcement action.

In sum, we have reviewed the ALJ's calculations and methodology and discern no sufficient reason to disturb the ALJ's calculations.

C. Butler Amusements Is Not Eligible for Any Credits

Under the 2008 H-2B regulations, employers were permitted to make deductions from a worker's pay, consistent with the FLSA, for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees.[231] The 2008 H-2B regulations stated: "The job offer must *specify* all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable."[232]

Here, Butler Amusements claimed that it was entitled to credits for providing housing, local transportation, relocation expenses, taxes, and reimbursement for a prepayment plan because employees did not reach 40 hours a week during the period of investigation.[233] Butler Amusements argues that the ALJ erred by rejecting its proof of credits to offset legal obligations.[234]

As an initial matter, the ALJ noted that the Butler Amusements did not cite to any authority in support of these requested credits.[235] Instead, Butler Amusements submitted a joint statement signed by employees in 2019 who worked for them in 2013 that stated "employees received 'valuable benefits' such as housing, transportation, food, relocation, visa processing fees, 'and so on.'"[236] The ALJ did not give this statement any weight as he had no context for the circumstances in which it was signed, and noted there were inconsistencies between this statement, employee statements in 2013, and Butler Amusements' claim for credits.[237]

---

231 D. & O. at 26 (citation omitted).

232 20 C.F.R. § 655.22(g)(1) (emphasis added). This regulation applies regardless of FLSA exemptions. *Id.*

233 D. & O. at 26-27.

234 Resp. Br. at 41-45.

235 D. & O. at 26-27.

236 *Id.* at 26.

237 *Id.* at 27. The ALJ provided examples. First, Butler Amusements did not mention taxes or the prepayment plan in the letter but claim a credit for them for 2013 in RX 47

The ALJ also gave no weight to statements in Butler Amusements' job offer, wherein it stated it would make "available mobile housing valued at $125.00 per week" and "transportation from venue to venue and scheduled transportation to laundry, shopping valued at $25.00 per week."[238] The ALJ found this language ambiguous; it was not clear whether the employer was deducting this benefit from the worker's pay or providing a free benefit.[239] Moreover, in 2013, all of the employees who lived in the trailers stated that housing was free.[240] Butler Amusements' temporary employment certification application also stated, "Employer follows prevailing practices for Traveling Amusement Industry in regards to housing, transportation and weekly salary for workers."[241] The ALJ found that "[t]his statement was also vague; it does not clearly specify all, or any, of the deductions [Butler Amusements] will make."[242]

Finally, the ALJ noted that WHD documented that at least two of the drivers did not live in the trailers.[243] The ALJ found that Butler Amusements' request for a deduction of $1,290 to $1,555 per employee for sleeping in a semi-truck cab was unreasonable.[244]

We find that, given all of the above facts, the ALJ properly determined that Butler Amusements was not entitled to take any offsets for wages due.

Butler Amusements also argues that the ALJ's interpretation that deductions must be disclosed in the ETA Form 9142B application is contrary to its reasonable interpretation that a deduction could be disclosed at any time before the workers' arrival at the worksite.[245] The ALJ concluded that the language in an addendum to the ETA Form 9142B "'reserving the right to charge a fee for housing and

---

(Respondent's Recalculation of Back Wages with Credits Applied). *Id.* The ALJ also noted that all employee statements in 2013 stated that housing was free, and they independently pooled their money for food. *Id.* Additionally, the ALJ found that Butler Amusements' "and so on" statement did not pass muster as a specific valuable benefit to deduct. *Id.* (citing 20 C.F.R. § 655.22(g)(1)).

238 D. & O. at 27 (citation omitted).

239 *Id.*

240 *Id.* (citation omitted).

241 *Id.* (citation omitted).

242 *Id.* (citing 20 C.F.R. § 655.22(g)(1)).

243 *Id.* (citation omitted).

244 *Id.* (citing 20 C.F.R. § 655.22(g)(1)) (other citation omitted).

245 Resp. Br. at 38-41.

transportation,'" was an attempt to reserve a deduction "just in case" and failed to comply with Section 655.22(g)(1).[246] But as explained above, the ALJ did not rely on this interpretation of the disclosure requirement to reject Respondent's credits; the ALJ based his decision on Butler Amusements' lack of reliable evidence in support of the credits requested.[247]

D. The ALJ Properly Determined the Amount of Civil Money Penalties Owed

The ALJ upheld the Administrator's assessment of a $10,000 CMP for Butler Amusements' substantial failure to pay employees for the work they actually performed.[248] We affirm the ALJ's finding for the following reasons.[249]

The Administrator may assess CMPs of up to $10,000 for an employer's substantial failure to meet a condition of the Temporary Employment Certification or the DHS Form I-129, a willful misrepresentation in the application, or a failure to cooperate with a DOL investigation.[250] To determine an appropriate CMP, the Administrator "shall consider the type of violation committed and other relevant factors."[251] In addition to considering the willfulness of the violation,[252] the Administrator may also consider other discretionary factors to determine the appropriate CMP.[253]

---

246 D. & O. at 27.

247 Thus, Butler Amusements' arguments regarding "dueling interpretations" are irrelevant.

248 D. & O. at 28.

249 "Regardless of whether the Board has the authority to perform a de novo review, we choose to accept the ALJ's findings if they are reasonable." *Peter's Fine Greek Food, Inc.*, ARB No. 2014-0003-B, slip op. at 2; *cf. Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. Wash. Farm Labor Ass'n*, ARB No. 2021-0069, ALJ No. 2018-TAE-00013, slip op. at 8 (ARB Mar. 31, 2023) (reviewing ALJ's CMP assessment under the H-2A program *de novo*).

250 20 C.F.R. § 655.65(c).

251 20 C.F.R. § 655.65(g).

252 "[T]he highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers." 8 U.S.C. § 1184(c)(14)(C); 20 C.F.R. § 655.65(g). Under the INA, a "willful failure" means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to Section 214(c) of the INA. 20 C.F.R. § 655.65(e); *see McLaughlin*, 486 U.S. at 133.

253 The regulatory factors include: (1) the previous history of H-2B violations by the employer; (2) the number of workers affected by the violation; (3) the gravity of the violation; (4) the employer's good faith efforts to comply; (5) the employer's explanation of the violation; (6) the employer's commitment to future compliance; and (7) the extent to

The ALJ independently weighed the discretionary factors used to assess CMPs[254] and found that, based on the mitigating factors, the Administrator's assessment of a $10,000 CMP was reasonable.[255] Specifically, the ALJ determined: (1) although Butler Amusements did not have a history of violations, its records evidenced a broader lack of adherence to H-2B rules; (2) the Administrator convincingly argued that the violations were likely not limited to the nine employees in this case and reasoned that the same practices were used throughout Butler Amusements' operation but because these additional violations were not investigated or charged this factor does not weigh for or against Butler Amusements; (3) Butler Amusements' violation undermined objectives of the INA, thus the third factor favors assessing a large CMP; (4) although they hired a consultant, Butler Amusements put minimal effort into compliance; (5) Butler Amusements' explanation of its violation was wanting, and its delegation of work to a consultant was insufficient to show a good faith effort to comply; (6) although Butler Amusements refused to state that it would comply in the future because it was unwilling to admit it was out of compliance,[256] the ALJ found it likely that Butler Amusements will comply in the future; and (7) Butler Amusements gained financially by using ARA classifications that have lower prevailing wages than the other classifications.[257]

We agree with the ALJ's balancing of the above factors, only two of which neither weighed for or against Butler Amusements, and likewise conclude that the discretionary factors favored imposing the maximum CMP of $10,000 in this instance.[258]

---

which the employer achieved a financial gain due to the violation, or the potential financial loss to the employer's workers. 20 C.F.R. § 655.65(g).

254 20 C.F.R. § 655.75(b) (The ALJ "may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator," with the "reason or reasons for such order" to be stated in the decision.); *see also Adm'r, Wage and Hour Div., U.S. Dep't of Lab. v. Prism Enters. of Cent. Fl.*, ALJ No. 2001-LCA-00008, slip op. at 13 (ALJ June 22, 2001), *aff'd*, ARB No. 2001-0080 (ARB Nov. 25, 2003) (in which the ALJ noted that she weighed the seven factors differently than the Administrator weighed them).

255 D. & O. at 28-30.

256 *Id.* at 29.

257 *Id.* at 28-29.

258 The ALJ's finding would also have been appropriate under 29 C.F.R. § 655.65(a) given the back wages owed.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's determination that Butler Amusements violated 20 C.F.R. § 655.22(n), **AFFIRM** the WHD Administrator's assessment of back wages in the amount of $26,786.00, and **AFFIRM** the WHD Administrator's assessment of a civil money penalty of $10,000.

SO ORDERED.[259]

SUSAN HARTHILL
Chief Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

[259] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, and not the Administrative Review Board.