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.

ACE AMUSEMENTS AND MIDWAY WEST AMUSEMENTS, INC.,

RESPONDENTS.

ARB CASE NOS. 2024-0019
2024-0036

ALJ CASE NOS. 2022-TNE-00015,
2022-TNE-00016
ALJ CHRISTOPHER LARSEN

DATE: June 9, 2026

Appearances:

For the Prosecuting Party:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Rachel Goldberg, Esq., Karla Jackson Edwards, Esq.; *United States Department of Labor, Office of the Solicitor*; Washington, District of Columbia

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

Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL, Administrative Appeals Judge

DECISION AND ORDER

This case arises under the H-2B provisions of the Immigration and Nationality Act (INA),[1] as amended, and its implementing regulations.[2] On January 5, 2024, an Administrative Law Judge (ALJ) issued a Decision and Order

[1] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b); 1184(c)(14).

[2] 20 C.F.R. Part 655, Subpart A (2026); 29 C.F.R. Part 503 (2025).

Debarring Employers (D. & O.) finding that Respondents Ace Amusements (Ace) and Midway West Amusements, Inc. (Midway West) violated provisions of the INA.[3] Both Respondents and the Administrator for the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) appealed to the Administrative Review Board (Board). For the following reasons, we affirm in part and vacate and remand in part.

BACKGROUND

Respondents operate carnivals throughout the western United States.[4] Midway West is owned and operated by Michelle Jensen,[5] and Ace is owned by her son, Jordan Jensen.[6] In 2021, Ace and Midway West both filed I-129 Petitions for Nonimmigrant Workers and Temporary Employment Certifications (TEC).[7] The DOL granted certification for Midway West to hire forty-two H-2B workers and for Ace to hire fifty workers for April 1, 2021, to November 15, 2021.[8]

On July 1, 2021, police officers executed a search warrant on Midway West because they had received information about possible labor trafficking.[9] Police observed the scene, identified Jordan and his brother Hunter, and witnessed Hunter handing Mexican passports to adult Latino males.[10] Subsequently, the police arrested Jordan.[11]

Upon learning of the police activity and arrest, the WHD District Office in Phoenix, Arizona, launched an investigation into Midway West and Ace.[12] The

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3 D. & O. at 4, 130.

4 *Id.* at 2.

5 *Id.* at 33.

6 *Id.* at 28.

7 *Id.* at 2.

8 *Id.* at 4.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

WHD conducted surveillance, site visits, and interviews.[13] Kristin Espinoza, a WHD Investigator, attempted to meet with Michelle and requested documents several times to no avail.[14]

On April 14, 2022, after several months of failed attempts at contacting Michelle, the WHD issued the Midway Determination Letter.[15] The WHD assessed back wages and civil money penalties (CMPs) for Midway West's seven violations of the Attestations set forth in the TEC, and imposed a five-year debarment.[16] That same day, the WHD also issued the Midway/Ace Determination Letter, which assessed back wages and CMPs for Midway West and Ace's nine joint violations and imposed a five-year debarment.[17]

Respondents requested a hearing before an ALJ with the Office of Administrative Law Judges (OALJ).[18] A hearing was held on April 18-19, 27-28, and May 1-3, 2023.[19] On January 5, 2024, the ALJ issued the D. & O., finding that Respondents committed twelve violations and debarred them for five years.[20] The ALJ reversed the WHD's imposition of CMPs, and remanded all wage determinations, including the payment of wages, overtime, reimbursement for travel expenses, and the failure to make deductions required by law, to the WHD for further consideration.[21]

Both parties petitioned the Board to review the D. & O.

13 *Id.*

14 *Id.* at 5.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 6.

19 *Id.* at 1.

20 *Id.* at 111-27.

21 *Id.* at 130.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final determinations under the H-2B program.[22] The Board reviews an ALJ's decision de novo[23] and acts with "all the powers [the Secretary] would have in making the initial decision."[24]

DISCUSSION

Upon review of the D. & O., the parties' arguments, and the record, the Board: (1) affirms the ALJ's findings that Respondents violated twelve provisions of the H-2B regulations and TEC Attestations; (2) reverses the ALJ's finding that Respondents did not violate the prohibition against placing workers in unapproved classifications and finds that Respondents violated this provision; (3) vacates the ALJ's remand to the WHD to determine whether Respondents made all deductions required by law and remands to the ALJ for further consideration; (4) remands to the ALJ to determine whether Respondents violated the requirements to disclose the job order and post a notice of workers' rights; (5) vacates the ALJ's remand order to the WHD to calculate damages and remands to the ALJ to apply the burden-shifting framework articulated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) to determine the amount of damages Respondents owe their H-2B workers; (6) vacates the ALJ's elimination of CMPs and remands to the ALJ for further consideration; and (7) affirms the ALJ's order that Respondents be debarred for five years.[25]

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[22] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[23] *See Adm'r, Wage & 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.")).

[24] 5 U.S.C. § 557(b).

[25] In addition to the arguments set forth below, Respondents make four additional arguments. None of the arguments alter our conclusion. First, Respondents contend that the ALJ's D. & O. should be remanded because it constitutes an interlocutory order. Respondents' (Resp.) Brief (Br.) at 4-6. However, the D. & O. was not interlocutory but rather a final, appealable order. Second, Respondents contend that the ALJ improperly excluded portions of testimony from Assistant District Director Rios. Resp. Br. at 32-34.

1. Legal Standard

The H-2B program permits employers to hire temporary foreign workers to perform nonagricultural services or labor in the United States. Employers may only hire foreign workers under the H-2B program if (1) there are not sufficient U.S. workers who are qualified and available to perform the temporary services or labor, and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.[26]

Under the H-2B program's regulations, employers seeking to employ H-2B workers must obtain a certification from the DOL.[27] To obtain a certification, the employer must file the ETA Form 9142B, Application for Temporary Employment Certification (TEC) with the DOL's Office of Foreign Labor Certification (OFLC).[28] The employer must sign the TEC under penalty of perjury, attesting to their knowledge of, and agreeing to comply with, the terms and conditions of the H-2B program.[29] The regulations require an employer to abide by conditions that relate to, inter alia, non-discriminatory hiring practices, prohibition against preferential treatment of foreign workers, rates of pay, area of intended employment, transportation and visa fees, transportation from the place of employment, disclosure of the job order, contracts with third parties, and retention of documents and records.[30]

However, we find that the ALJ did not abuse his discretion in sustaining objections on questions that called for speculation and legal conclusions. Third, Respondents argue that the ALJ erred by not permitting counsel to consult with their clients about waiving the attorney-client privilege to assert a reliance-on-counsel defense regarding the failure to produce records to the WHD. However, the ALJ considered Respondents' arguments pertaining to their failure to produce records, D. & O. at 121-25. Fourth, Respondents raise constitutional arguments regarding the Department of Labor's authority to enforce the H-2B regulations. Resp. Br. at 35-37. However, the Board does not have the authority to rule on Respondents' constitutional arguments regarding the validity of the H-2B regulations and the Department of Labor's enforcement.

[26] 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 29 C.F.R. § 503.1(a); 8 C.F.R. § 214.2(h)(6)(iii)(A).

[27] 29 C.F.R. § 503.1; 20 C.F.R. § 655.1.

[28] *Id.* § 655.15.

[29] *Id.* § 655.18; 29 C.F.R. § 503.19(d).

[30] 20 C.F.R. § 655.20; 29 C.F.R. §§ 503.16, 503.17.

As part of the certification process, the employer must make an effort to recruit U.S. workers to ensure that there are no qualified U.S. workers available for the position it intends to fill with H-2B workers.[31] The employer must submit a job order to the State Workforce Agency (SWA) serving each geographical area of intended employment listed in the TEC.[32] A job order is a document containing all the material terms and conditions of employment for the position(s) for which H-2B workers are sought.[33] The employer must also advertise the position(s) to U.S. workers, and the advertisements must describe the geographical area of intended employment "with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor."[34] The employer must offer the same wage and other benefits and terms and conditions of employments to U.S. workers that it will offer H-2B workers.[35]

2. Violations

An employer violates the H-2B program requirements when it substantially fails to comply with any of the terms and conditions of the H-2B registration, application for prevailing wage determination, TEC, or the H-2B petition (H-2B Forms).[36] To be "substantial," the employer's failure must be both (1) "willful," and (2) "a significant deviation from the terms and conditions of [the H-2B Forms]."[37]

A willful violation "occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions."[38] In determining whether a violation is significant, the

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[31] 20 C.F.R. § 655.40(a).

[32] *Id.* § 655.16(a)(1).

[33] *Id.* § 655.5.

[34] *Id.* § 655.41(b)(2).

[35] *Id.* § 655.18.

[36] 8 U.S.C. § 1184(c)(14)(A); 29 C.F.R. § 503.19(a)(2).

[37] *Id.*

[38] *Id.* § 503.19(b).

regulations identify a non-exhaustive list of factors that the Administrator may consider, including: (1) the employer's previous history of violation(s) under the H-2B program; (2) the number of H-2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s); (3) the gravity of the violation(s); (4) the extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and (5) whether U.S. workers have been harmed by the violation.[39]

The ALJ found that Respondents committed twelve of the sixteen alleged violations, including: (1) Midway West did not pay the proper wage rate, (2) Ace did not pay the proper wage rate, (3) Midway West failed to notify OFLC that several workers separated from employment early, (4) Midway West failed to pay inbound transportation costs, (5) Ace failed to pay inbound transportation costs, (6) Midway West failed to pay outbound transportation costs, (7) Ace failed to pay outbound transportation costs, (8) Midway West engaged in prohibited retaliation and intimidation, (9) Midway West failed to cooperate with the DOL, (10) Ace and Midway West jointly placed workers outside the area of intended employment, (11) Ace and Midway West jointly failed to provide earnings statements, and (12) Ace and Midway West jointly failed to provide safe transportation.[40] The ALJ found that Midway West did not violate the prohibition of placing workers in unapproved job classifications.[41] The ALJ was unable to determine whether Respondents failed to comply with all deduction requirements, and remanded to the WHD for further reconsideration.[42] Lastly, the ALJ did not issue a conclusion on whether Respondents failed to disclose the job order and post a notice of workers' rights.[43]

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39 *Id.* § 503.19(c).

40 D. & O. at 111-27.

41 *Id.* at 115.

42 *Id.* at 125, 128.

43 *Id.* at 127.

A. Respondents Violated Twelve Provisions of the TEC

Respondents contend that the ALJ erred in finding that they substantially failed to comply with the H-2B program's requirements pertaining to the twelve violations listed above.[44] Respondents argue that the willfulness standard set forth in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) requires the Administrator to prove an employer's specific and subjective knowledge, and that the ALJ erred in finding their actions were willful.[45] Respondents contend that an employer must possess actual knowledge or awareness of a violation, citing the 2017 Davis Bacon and Related Acts definition of "willfulness."[46] Respondents further argue that "an employer's subjective good faith precludes any violation from being willful."[47]

We disagree. Pursuant to *McLaughlin v. Richland Shoe Co.*, a violation of the Fair Labor Standards Act (FLSA) is willful when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute."[48] The H-2B regulations define a "willful" violation as one that "occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions."[49] This definition is consistent with the longstanding definition in *Richland Shoe Co.*[50]

Respondents repeatedly cite the FLSA to support their arguments.[51] However, this reliance bears little relevance here. One critical factor in the

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44 Resp. Br. at 7.

45 *Id.* at 7-12.

46 *Id.* at 12 (citing *J.D. Eckman, Inc.*, ARB No. 2017-0023, ALJ No. 2015-DBA-00030, slip op. at 6 (ARB July 9, 2019)).

47 *Id.* at 14.

48 *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

49 29 C.F.R. § 503.19(b)

50 *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24042, 24086 (Apr. 29, 2015) (section 503.19(b)'s definition of willfulness "is consistent with the longstanding definition of willfulness" in *Richland Shoe Co.*).

51 Resp. Br. at 8-11.

willfulness analysis under the H-2B regulations is "the fact that employers submit a signed [TEC] attesting under penalty of perjury that that they know and accept the obligations of the program, which are clearly listed in Appendix B of the [TEC]."[52] Here, the ALJ found violations based on provisions of the INA and Respondents' agreement to abide by the Attestations in Appendix B of the TEC, not on the FLSA.[53]

Likewise, Respondents' reliance on the 2017 DBRA regulations also bears little relevance.[54] The 2017 DBRA regulations applied an "aggravated or willful" standard, which was defined as "voluntary, deliberate, intentional, and not negligent."[55] Unlike the 2017 DBRA regulations, the H-2B's definition of "willfulness" includes a showing of "reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions."[56] Under the H-2B regulations, "reckless disregard" does not require specific intent.[57]

After a thorough review of the record, we agree with the ALJ that Respondents acted with reckless disregard as to whether their conduct satisfied the required conditions and that Respondents significantly deviated from the terms and conditions of their TECs for the reasons stated by the ALJ as it pertains to the following violations: (1) Midway West failed to pay the proper wage rate, (2) Ace failed to pay the proper wage rate, (3) Midway West failed to notify OFLC that several workers separated early from employment, (4) Midway West failed to pay inbound transportation costs, (5) Ace failed to pay inbound transportation costs,

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52 80 Fed. Reg. at 24086-87.

53 *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Deggeller Attractions, Inc.*, ARB No. 2020-0004, ALJ No. 2018-TNE-00008, slip op. at 6 (ARB Jan. 25, 2022) (whether the FLSA applied was irrelevant because the employer had violated its obligation based on provisions of the INA, rather than the FLSA, as well as that employer's agreement to the attestations in the TEC).

54 Resp. Br. at 12 (citing *J.D. Eckman, Inc.*, ARB No. 2017-0023, slip op. at 6).

55 29 C.F.R. § 5.12(a)(1). We note that the DBRA regulations have since been amended.

56 29 C.F.R. § 503.19(b).

57 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Butler Amusements*, ARB No. 2021-0007, ALJ No. 2018-TNE-00019, slip op. at 15 (ARB July 28, 2023) (the "H-2B's definition of 'willful' includes reckless disregard, which does not equate to specific intent") (citation omitted).

(6) Midway West failed to pay outbound transportation costs, (7) Ace failed to pay outbound transportation costs, (8) Midway West engaged in prohibited retaliation and intimidation, (9) Midway West failed to cooperate with the DOL, (10) Ace and Midway West jointly placed workers outside the area of intended employment, (11) Ace and Midway West jointly failed to provide earnings statements, and (12) Ace and Midway West jointly failed to provide safe transportation.

Notably, both Michelle and Jordan on behalf of Midway West and Ace respectively attested under penalty of perjury to their knowledge of and compliance with the obligations of the H-2B program when they signed Appendix B to their TECs in 2021.[58] Despite this, Respondents displayed a stunning indifference to the terms under which they received their certification. Accordingly, we affirm the D. & O. on these twelve violations.

B. Midway West Violated the Prohibition Against Placing Workers in Unapproved Classifications

The regulations provide that an employer must "[d]escribe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties."[59] The regulations also provide that "[e]ach job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment."[60] Attestation 11 on the TEC states that an employer will not place any H-2B workers "in a job classification not listed on the approved application unless the employer has obtained a new approved Form ETA-9142B."[61]

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[58] D. & O. at 4.

[59] 20 C.F.R. § 655.18(b)(3).

[60] 29 C.F.R. § 503.16(e).

[61] Admin. Exhibit (AX) 5 at 11.

The ALJ found that Espinoza and her team observed some Midway West H-2B employees driving vehicles during their investigation.[62] The WHD had determined those workers should have been classified as "tractor-trailer drivers" rather than "carnival workers."[63] However, the ALJ found there was no evidence in the record other than Espinoza's testimony to support that her opinion regarding the classification was correct.[64] Although the ALJ found that Michelle demonstrated "complete and utter indifference to the terms under which Midway West received its certification," the ALJ acknowledged her argument that she classified those workers as "amusement park attendants" both because it was consistent with industry standard and driving vehicles was an incidental activity.[65] The ALJ concluded that Midway West did not violate the prohibition against placing workers in unapproved classifications.[66]

The Administrator contends that the ALJ erred in finding that Midway West did not place six workers in an unapproved job classification.[67] The Administrator argues that Ms. Jensen's testimony regarding industry standard is the only information in the record that supports the ALJ's finding.[68] The Administrator also contends that the ALJ's finding would give H-2B employers carte blanche to ignore the TEC and "adopt any practice they subjectively believed to be common."[69] The Administrator further argues that the ALJ ignored evidence, including Ms. Jensen's testimony that the H-2B workers who drove vehicles spent twenty-to-thirty percent of their time driving; that Midway West indicated "no" on the TEC when asked if a driver's license was required despite a commercial driver's license (CDL) being required for the truck driver position; and that Midway West paid drivers an extra fifty dollars per week.[70]

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62 D. & O. at 115.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 Administrator's (Admin.) Br. at 37.

68 *Id.* at 38.

69 *Id.* (citing *Butler Amusements*, ARB No. 2021-0007, slip op. at 24-25).

70 *Id.* at 39.

Respondents counter that the Administrator failed to show that Respondents willfully and substantially violated this provision by having H-2B workers occasionally drive vehicles.[71] Respondents assert that the WHD never investigated industry practice, and argue that occasional driving is industry standard for carnivals.[72] Respondents further contend that this is not a substantial violation, but rather that the amount of time H-2B workers spent driving was incidental to their overall job duties.[73]

We find that Midway West failed to apprise U.S. workers of all job duties and violated the prohibition against placing workers in unapproved classifications. As stated above, a violation is a substantial failure to comply with the terms and conditions of the H-2B program requirements.[74] A violation is substantial when the employer's failure is both "willful" and "a significant deviation" from the terms and conditions of the H-2B program requirements.[75]

Midway West failed to include driving as a job duty as well as the necessity of having a Commercial Driver License (CDL) on the TEC and Job Order.[76] When asked if a driver's license was required on the TEC, Midway West checked "no."[77] Despite this, Respondents recruited drivers. Hunter Jensen testified that he recruited at least one H-2B worker because he had the equivalent of a CDL based on pictures he saw online of that worker driving carnival rides.[78] Jordan confirmed that his brother recruited this worker.[79] Michelle testified that she preferred to hire truck drivers who held a Licencia Federal, the equivalent of a CDL, and that her

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71 Resp. Reply Br. at 25.

72 *Id.* at 25-26.

73 *Id.* at 26.

74 8 U.S.C. § 1184(c)(14)(A); 29 C.F.R. § 503.19(a)(2).

75 *Id.*

76 AX 5 at 3, 6-7, 17-18.

77 *Id.* at 17.

78 Transcript (Tr.) at 673.

79 *Id.* at 715.

business would not be able to operate without drivers.[80] In addition, José Velazquez Lara, one of the drivers, testified that a recruiter asked him whether he had a Licencia Federal, and stated that he was under the impression that he would work exclusively as a driver.[81] Lastly, as the ALJ found, Michelle argued that Midway West was free to follow industry practice as she understood it regardless of her attestations in the TEC, demonstrating a "complete and utter indifference to the terms under which Midway West received its certification."[82] Thus, we find that Midway West demonstrated reckless disregard for whether its conduct satisfied the required conditions.

We also find that Midway West significantly deviated from the terms and conditions of the H-2B program because the factors set forth in Section 503.19(c) weigh against Midway West. Approximately five to six H-2B workers drove vehicles.[83] These drivers were paid an extra $50 per week,[84] which Midway West did not disclose to U.S. workers. Because H-2B workers were offered better pay than U.S. workers, we find that U.S. workers were harmed, and that this harm was significant.[85]

In addition, we are not persuaded by Respondents' argument that driving was an incidental job activity that was consistent with industry practice. Respondents cite the preamble of the 2008 INA regulations to support their argument that an H-2B worker may perform job duties not listed in the job order if they are "minor and incidental to the activity/activities listed in the job order."[86] However, this case arises under the INA regulations that went into effect on April

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80 *Id.* at 912-13.

81 *Id.* at 222-23, 245-57.

82 D. & O. at 115.

83 AX 4; AX 32 at 28.

84 AX 11.

85 *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Lucero Pool Plaster, Inc.*, ARB Nos. 2023-0040, -0045, ALJ No. 2019-TNE-00011, slip op. at 11-12 (ARB Feb. 27, 2025) (when H-2B workers are offered better pay and/or benefits than U.S. workers, it is presumed that U.S. workers were harmed).

86 Resp. Response Br. at 26 (citing 73 Fed. Reg. 77110, 77117).

29, 2015, not the 2008 regulations.[87] Respondents have not cited any current, binding legal authority to support their argument that the "incidental activities" rule applies. Second, Respondents have not established that driving duties were industry practice. Notably, Respondents stated that a driver's license was not required, which contradicts their argument that driving is industry practice. In addition, driving was not included in either the TEC or Job Order, which both indicate that the job duties were to "perform [a] variety of attending duties at amusement or recreation facility. May schedule use of recreation facilities, maintain and provide equipment to participants of sporting events or recreational pursuits, or operate amusement concessions and rides."[88] Further, at least one H-2B worker was under the impression that he would work exclusively as a driver.[89]

Thus, we find that Midway West failed to apprise U.S. workers of all job duties and violated the prohibition against placing workers in an unapproved job classification. Therefore, we vacate the ALJ's finding and remand for the ALJ to assess CMPs.

C. *The ALJ Erred in Remanding to WHD to Determine Whether Respondents Failed to Make All Deductions Required by Law*

H-2B employers must "make all deductions from the worker's paycheck required by law."[90] The ALJ found that neither Midway West nor Ace could demonstrate that they complied with this requirement because they failed to keep accurate records.[91] However, the ALJ also found that he could not determine that Respondents violated this provision because the records failed to show how much Respondents should have paid in wages, how much should have been deducted, and

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87 80 Fed. Reg. 24042.

88 AX 5 at 3, 17.

89 Tr. at 222-23, 245-57.

90 29 C.F.R. § 503.16(c).

91 D. & O. at 125.

how much was actually deducted.[92] Consequently, the ALJ remanded to the WHD for further consideration.[93]

The ALJ erred in remanding to the WHD. An ALJ's order "may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD."[94] The only situation identified by the parties in which the regulations provide that an ALJ may remand to the WHD is when the "WHD assesses back wages for wage violation(s) of [Section] 503.16 based upon a [prevailing wage determination] obtained by the Administrator from OFLC during the investigation and the ALJ determines that the Administrator's request was not warranted."[95] Determining whether Respondents paid all required deductions does not fall under that narrow circumstance. Thus, the ALJ did not have the authority to remand to the WHD.

When an employer fails to keep and maintain accurate records, an ALJ may use the two-step burden-shifting framework articulated in *Mt. Clemens Pottery Co.*[96] Under the *Mt. Clemens* framework, if the employer's records are "inaccurate or inadequate," the Administrator must show that the workers "in fact performed work for which [they were] improperly compensated" by producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."[97] If the Administrator meets its burden, then the burden shifts to the employer to produce evidence of the precise amount owed.[98] If the employer fails to do so, the court may award damages "even though the result may be only approximate."[99]

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92 *Id.*

93 *Id.* at 128.

94 29 C.F.R. § 503.50(b).

95 *Id.* § 503.50(c).

96 *Lucero Pool Plaster, Inc.*, ARB Nos. 2023-0040, -0045, slip op. at 18.

97 *Mt. Clemens Pottery Co.*, 328 U.S. at 687.

98 *Id.* at 687-88.

99 *Id.* at 688.

Accordingly, we vacate the ALJ's order remanding to the WHD, and remand to the ALJ to apply the *Mt. Clemens Pottery Co.* framework to determine whether Respondents failed to make all deductions required by law, and, if so, to what amount.

D. The ALJ Erred in Not Issuing Findings as to Whether Respondents Violated the Requirements to Disclose the Job Order and to Post a Notice of Workers' Rights

Lastly, the ALJ did not issue a finding on Respondents' alleged failure to disclose the job order or their alleged failure to post a notice of workers' rights.[100] Although the ALJ analyzed these issues and appears to suggest that Respondents violated both provisions, the ALJ did not reach a conclusion.[101] On remand, the ALJ is instructed to issue findings regarding whether Respondents violated the requirements to provide H-2B workers with a copy of the job order[102] and to post a notice of workers' rights "in a conspicuous location at the place of employment" in English, and to the extent necessary, "in any language common to a significant portion of the workers if they are not fluent in English."[103]

3. Remedies

If the Administrator determines an employer has violated the requirements of the H-2B program, the Administrator may assess remedies, including the recovery of unpaid wages and the imposition of CMPs.[104]

A. The ALJ Erred in Remanding the Wage Determinations to WHD

The ALJ remanded all wage determinations, including but not limited to, the payment of wages, overtime, reimbursement of travel expenses, and the failure

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100 D. & O. at 127.

101 *Id.*

102 29 C.F.R. § 503.16(l).

103 *Id.* § 503.16(m).

104 *Id.* § 503.20(a).

to make deductions required by law, to the WHD to determine the amount that Respondents owe their H-2B workers.[105] The ALJ found that while the records showed that Respondents did not pay H-2B workers in accordance with the terms set forth in the TECs, the records also did not support the WHD's calculations.[106]

As stated above, the ALJ may remand to the WHD when the WHD assessed back wages for a violation based on a prevailing wage determination obtained by the Administrator from OFLC during the investigation.[107] That situation does not apply here. Rather, because Respondents failed to keep and maintain records, the ALJ should have applied the *Mt. Clemens Pottery Co.* burden-shifting framework. Therefore, we vacate the ALJ's remand order and instruct the ALJ to apply the *Mt. Clemens Pottery Co.* burden-shifting framework to determine the wages and expenses Respondents owe their H-2B workers for violations committed during the 2021 season.

B. The ALJ Erred in Reversing All CMPs

The Administrator may assess a CMP for each violation that is either a willful misrepresentation of a material fact; a substantial failure to meet any of the terms and conditions of the H-2B forms; or a willful misrepresentation of a material fact to the Department of State during the H-2B nonimmigrant visa application process.[108] "Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of [the aforementioned H-2B forms] constitutes a separate violation."[109]

For violations related to wages, impermissible deductions, or prohibited fees and expenses, Section 503.23(b) provides that the Administrator may assess CMPs "that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s)," subject to a maximum of

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105 D. & O. at 128.

106 *Id.*

107 29 C.F.R. § 503.50(c).

108 *Id.* at §§ 503.19, 503.23(a).

109 *Id.* § 503.23(a).

$12,383.[110] Back wages also "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."[111]

For all other violations, Section 503.23(d) provides that the Administrator may assess CMPs up to the maximum of $12,383 per violation.[112] Section 503.23(e) provides that, when assessing CMPs pursuant to paragraph (d), the Administrator may consider the following factors: (1) any previous history of H-2B violations by the employer; (2) the number of workers affected by the violation; (3) the gravity of the violation; (4) the good-faith efforts by the employer to comply; (5) the employer's explanation for the violation; (6) the employer's commitment to future compliance; and (7) the extent to which the employer achieved a financial gain or workers suffered a potential financial loss.[113] The highest penalties are reserved for willful failures to meet any of the conditions in the TEC and H-2B petition that "involve harm to U.S. workers."[114]

The ALJ reversed the WHD's imposition of all CMPs.[115] The ALJ acknowledged the serious gravity of Respondents' violations but found that the regulatory maximum would be "insufficient to punish" Respondents for their conduct.[116] The ALJ also found that CMPs would be unlikely to ensure Respondents' compliance in the future, and would be "more likely to result in years

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110 *Id.* § 503.23(b). This maximum is adjusted by regulation. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat 584, 599 (2015). The maximum in effect in the present case was $12,383. *See Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7-01, 12 (Jan. 2, 2018).

111 *Butler Amusements*, ARB No. 2021-0007, slip op. at 31.

112 29 C.F.R. § 503.23(d).

113 *Id.* § 503.23(e).

114 8 U.S.C. § 1184(c)(14)(C); 29 C.F.R. § 503.23(e).

115 D. & O. at 129.

116 *Id.*

of contentious litigation."[117] Given the totality of the circumstances, the ALJ found that debarment would serve as an appropriate sanction for Respondents' conduct.[118]

The Administrator contends that the ALJ erred in eliminating all CMPs.[119] Specifically, the Administrator argues that the ALJ ignored the evidence supporting CMPs, the ALJ's conclusion contradicts the purpose of CMPs, and that the ALJ erred in conflating debarment with CMPs, which are separate remedies and serve different purposes.[120] The Administrator asserts that debarment is not a punishment, but rather protects the integrity of the H-2B program, while the purpose of CMPs for H-2B violations is to punish an employer for committing violations and to deter future violations.[121] The Administrator argues that the CMPs the WHD assessed were reasonable in consideration of the facts and regulations, and that there were no facts that warranted eliminating them, such as Respondents' explanations during the investigation or good faith compliance efforts.[122]

The ALJ erred in eliminating all CMPs. Notably, the ALJ did not consider any of the above factors in determining that CMPs were not warranted, nor did the ALJ find any mitigating factors, such as crediting Respondents' explanations or finding that Respondents made a good faith effort to comply.[123] Rather, the ALJ determined that CMPs were an insufficient punishment and eliminated them in an attempt to avoid protracted litigation without citing any legal authority to support his determination.[124] The ALJ's finding contradicts the purpose of CMPs, which is

117 *Id.*

118 *Id.*

119 Admin. Br. at 32.

120 *Id.* at 32-34.

121 *Id.* at 33-34.

122 *Id.* at 34-35.

123 D. & O. at 127-29.

124 Notably, despite the ALJ's elimination of CMPs in an attempt to avoid protracted litigation, both parties appealed the D. & O.

to penalize noncompliance[125] and to serve as a meaningful deterrent.[126] In addition, the ALJ also erred in conflating the purpose of CMPs with debarment, which is meant to maintain the integrity of the H-2B program.[127]

Thus, we vacate the ALJ's order eliminating all CMPs. On remand, we instruct the ALJ to reassess CMPs for each violation that is either a willful misrepresentation of a material fact; a substantial failure to meet any of the terms and conditions of the H-2B forms; or a willful misrepresentation of a material fact to the Department of State during the H-2B nonimmigrant visa application process, and to assess the amount of any CMPs warranted in accordance with Section 503.23.[128]

4. Debarment

An employer may be debarred from the H-2B program for one to five years if it: (1) committed a willful misrepresentation[129] of a material fact in its H-2B forms; (2) substantially failed to meet any of the terms and conditions of the wage determination, TEC, or H-2B petition;[130] or (3) committed a willful

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[125] 80 Fed. Reg. at 24088.

[126] *See Adm'r, Wage & 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).

[127] 80 Fed. Reg. at 24087.

[128] *See Lucero Pool Plaster, Inc.*, ARB Nos. 2023-0040, -0045, slip op. at 35 (although the seven factors listed in Section 503.23(e) are discretionary in application, their consideration must be reasonably related to determining whether an employer significantly deviated from its obligations).

[129] "A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions." 20 C.F.R. § 655.73(d).

[130] In determining whether a violation is a significant deviation from the terms and conditions of the H-2B forms, an ALJ may consider factors including, but not limited to the factors listed in 20 C.F.R. § 655.73(e) (previous history of violations, number of affected workers, gravity of the violations, extent of financial gain or potential financial loss or potential injury to the workers, and whether U.S. workers were harmed).

misrepresentation of a material fact during the visa application process.[131] The regulations list twelve violations that may justify debarment, which includes the failure to pay required wages, the employment of H-2B workers outside the area of intended employment, and impeding an investigation.[132] "The appropriate period of debarment [is] based on the severity of the violation."[133]

The ALJ found that Respondents violated three provisions that may justify debarment—Respondents' failure to pay required wages, employing H-2B workers outside the area of intended employment, and impeding the WHD's investigation.[134] The ALJ also found that Respondents repeatedly disregarded their obligations in spite of their agreement to adhere to the requirements of the H-2B program.[135] The ALJ recognized that Respondents denied having any obligation to do otherwise and that they appeared to be more concerned with "running their business as they choose than in assuming the responsibilities incumbent on every H-2B employer."[136] The ALJ further found that no American employer has an inherent right to hire foreign workers, and that hiring foreign workers in non-compliance with the applicable laws and regulations could affect the employment and working conditions of U.S. workers.[137] Accordingly, the ALJ ordered Respondents' "swift debarment" for the maximum term of five years.[138]

Respondents contend that debarment is harmful and unnecessary.[139] We disagree and affirm the ALJ's finding that Respondents violated three provisions that warrant debarment. As the ALJ found, Respondents demonstrated a wanton and brazen indifference to the INA regulations and the H-2B program requirements. Notably, as the ALJ recognized, Respondents paid "H-2B employees what they liked," worked employees "where they liked in spite of their promise to

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131 *Id.* § 655.73(a); 29 C.F.R. § 503.24(c).

132 *Id.* § 503.24(a).

133 80 Fed. Reg. at 24084.

134 D. & O. at 129.

135 *Id.* at 130.

136 *Id.*

137 *Id.*

138 *Id.* at 129-30.

139 Resp. Petition for Review at 3; Resp. Br. at ii (Respondent's argument is taken from the table of contents. The pages addressing this argument were missing from their brief).

strictly follow their [TEC]," and denied having any obligation to do otherwise.[140] Respondents' actions were a grave departure from their obligations under the H-2B program. Thus, we affirm the ALJ's order that Respondents be debarred for the maximum period of five years.

Conclusion

Accordingly, we **AFFIRM** the ALJ's Decision and Order in part and **VACATE, MODIFY,** and **REMAND** in part.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

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[140] D. & O. at 130.