U.S. Department of Labor

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

**In the Matter of:**

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| **ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR** | **ARB CASE NO. 2020-0004** |
| | **ALJ CASE NO. 2018-TNE-00008** |
| **PROSECUTING PARTY,** | **DATE: January 25, 2022** |
| **v.** | |
| **DEGGELLER ATTRACTIONS, INC.,** | |
| **RESPONDENT.** | |

**Appearances:**

***For the Prosecuting Party:***
**Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah Kay Marcus, Esq., Sara A. Conrath, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia**

***For the Respondent:***
**R. Wayne Pierce, Esq.; *The Pierce Law Firm, LLC*; Annapolis, Maryland; T.W. Anderson, Jr., Esq.; *Nelson Mullins*; Boca Raton, Florida**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges***

## DECISION AND ORDER OF REMAND

PER CURIAM. This case arises under the H-2B provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(14), and the implementing regulations at 20 C.F.R. Part 655, Subpart A (2009). On August 6, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding Deggeller Attractions, Inc. (Respondent) violated the provisions of the INA based on Respondent's ETA form 9142, Application for Temporary Employment

Certification (9142 form) for the year 2013. Respondent appealed to the Administrative Review Board (ARB or Board). For the following reasons, we affirm in part, vacate in part, and remand.

## BACKGROUND

Respondent is a mobile amusement operator that travels from Florida to Pennsylvania and has participated in the H-2B program since sometime between 2005 and 2007. In 2012, Respondent filed a 9142 form for February 1, 2013, to November 27, 2013, and was later certified to hire 42 H-2B workers.

In 2014, this matter was referred to the Department of Labor (Department) Wage and Hour Division (WHD) from a human trafficking office after receiving complaints from individuals who identified themselves as H-2B workers employed by Respondent.

On March 14, 2015, while the WHD was investigating the complaints, the U.S. District Court for the Northern District of Florida vacated Part 655, Subpart A, of the 2008 H-2B regulations because the Department lacked rulemaking authority to promulgate the 2008 rules under the relevant statutes. The District Court also permanently enjoined the Department from enforcing the H-2B regulations at Subpart A.[1] As a result, the WHD paused its ongoing H-2B investigations, including this matter. In September 2015, the District Court issued a Clarifying Order that stated "the permanent injunction was not intended to, and does not, apply retroactively."[2] The WHD resumed the investigation.

After investigating, the WHD Administrator issued a determination letter citing Respondent for several violations of the INA and attestations found in the Application for Temporary Employment Certification (TEC) covering the period from February 1, 2013, to November 27, 2013 (2013 season). The Administrator determined that Respondent had failed to substantially comply with the terms, working conditions, and offered wage requirements for unpaid overtime and improper housing deductions. In addition, the Administrator determined that Respondent owed $150,205.77 in unpaid wages to one U.S. worker and 42 H-2B nonimmigrant workers and also assessed $15,500 in civil monetary penalties.

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[1] *Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015).

[2] *Perez v. Perez*, No. 14-cv-682, Doc. 62 (N.D. Fla. Sept. 4, 2015).

Respondent requested a hearing before an ALJ with the Office of Administrative Law Judges. A hearing was held on October 4-5, 2018. On August 6, 2019, the ALJ issued a D. & O. lowering the amount of back pay to $81,960 and the total amount of civil money penalties to $5,000. Respondent filed a motion for reconsideration, and, on September 6, 2019, the ALJ denied the motion.

Respondent filed a timely appeal with the Board. Both parties filed briefs.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the Immigration and Nationality Act, as amended.[3] The Administrative Procedure Act (APA) provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ."[4]

## DISCUSSION

The H-2B classification applies to a non-agricultural worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country."[5]

The Administrator has been delegated with the enforcement responsibility for ensuring that H-2B workers are employed in compliance with the statutory and regulatory labor certifications.[6] This includes the power to impose administrative

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[3] 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. 13186 (Mar. 6, 2020).

[4] 5 U.S.C. § 557(b).

[5] 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

[6] The Secretary of Homeland Security delegated authority to the Department of Labor pursuant to 8 U.S.C. § 1184(c)(14)(B). The Secretary of Labor delegated authority to the Administrator pursuant to Secretary's Order 01-2014, 79 Fed. Reg. 77,527 (Dec. 24, 2014).

remedies, including civil money penalties, on employers who violate the H-2B program requirements.[7]

**1. Applicability of the 2008 Regulations**

On March 4, 2015, while the WHD was investigating the complaints, the U.S. District Court for the Northern District of Florida vacated Part 655, Subpart A, of the 2008 H-2B regulations because the Department lacked rulemaking authority to promulgate the 2008 rules under the relevant statutes.[8] The District Court also permanently enjoined the Department from enforcing the H-2B regulations at Subpart A.[9] As a result, the WHD paused its ongoing H-2B investigations, including this matter. In September 2015, the District Court issued a Clarifying Order that stated, "the permanent injunction was not intended to, and does not, apply retroactively."[10] The WHD subsequently resumed its investigation and issued the determination letter now before us on appeal.

On appeal, Respondent contends the 2008 regulations are no longer enforceable in light of the permanent injunction issued in the initial *Perez* decision. Respondent states that the issue whether the 2008 regulations are unenforceable remains viable, and it wishes to preserve this argument on appeal.[11] We note the

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[7] 8 U.S.C. § 1184(c)(14)(A)(i).

[8] *Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015) (vacating the 2008 H-2B regulations).

[9] *Id*.

[10] *Perez v. Perez*, No. 14-cv-682, Doc. 62 (N.D. Fla. Sept. 4, 2015).

[11] Respondent contends the Board has previously determined that the 2008 regulations are not enforceable. *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Strates Shows, Inc.*, ARB No. 2015-0069, ALJ No. 2014-TNE-00016, slip op. at 6 (ARB June 30, 2017) (Final Decision and Order) ("vacatur of the 2008 H-2B regulations rendered the Administrator's legal authority for pursuing the present action null and void."). However, the Board subsequently vacated this decision. *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Strates Shows, Inc.*, ARB No. 2015-0069, ALJ No. 2014-TNE-00016 (ARB Aug. 16, 2016) (Order Vacating Final Decision and Order and Granting Reconsideration); *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Strates Shows, Inc.*, ARB No. 2015-0069, ALJ No. 2014-TNE-00016, slip op. at 2-3 (ARB Aug. 16, 2017) (Amended

same District Court subsequently issued a decision in February 2019, holding that the 2008 regulations are still enforceable in light of its prior Clarifying Order.[12] Consequently, the 2008 regulations apply to labor certifications issued before the permanent injunction was issued. Here, the 9142 form was certified on December 20, 2012, well before the permanent injunction was issued.[13] Therefore, we conclude the 2008 regulations apply in this matter.

**2. Overtime Requirement**

The ALJ held that Respondent violated Attestation 5 of the 9142 form because the offered wage did not equal or exceed the highest of the prevailing wage, the applicable federal minimum wage, the state minimum wage, or the local wage. The ALJ determined that Federal law does not apply because Respondent is exempt from the Fair Labor Standards Act (FLSA). The ALJ also determined that local law does not impose an overtime obligation because the Administrator did not present evidence of it. The ALJ then determined the only relevant evidence of an overtime obligation was pursuant to state law when Respondent operated in North Carolina during the 2013 season. The ALJ cited North Carolina law requiring employers to pay overtime to its employees for work done in North Carolina that exceeded 45 hours per week.[14] The ALJ also found that the Respondent's time records were incomplete and inaccurate and that 50 hours per week is the figure best supported by the record. The ALJ ordered the parties to identify the employees who worked in North Carolina for more than 45 hours per week and to determine the amount of overtime back wages they are owed.

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Final Decision and Order) (noting the Court's holding that the permanent injunction does not apply retroactively to labor certifications issued under the 2008 regulations before the injunction). Respondent maintains that the Board's initial interpretation is correct because it did not reverse the findings of its initial decision.

[12] *Drew's Lawn & Snow Serv., Inc., v. Acosta, Sec'y of Labor*, No. 18-cv-979, Doc. 14, slip op. at 6 (N.D. Fla. Feb. 11, 2019) (dismissing a case with prejudice, stating, "based on the Court's clarification, the permanent injunction in *Perez* does not apply retroactively to prevent DOL from enforcing the conditions of labor certifications issued under the 2008 Regulations prior to the entry of the injunction.").

[13] RX 7.

[14] D. & O. at 27; *see also id.* at 20 (citing Tr. at 418) (ALJ found "Mr. Pierce agreed that in North Carolina the threshold for overtime is 45 hours per week.").

On appeal, Respondent first contends the ALJ erred in applying FLSA overtime requirements despite being exempt from the FLSA. This argument is without merit because the ALJ found that Respondent violated its obligation to pay overtime based on the provisions of the INA, rather than the FLSA, as well as Respondent's own agreement to pay the offered wage, including overtime wages, to the extent it is required to do so by law or otherwise. Section 655.22(e) of the regulations requires H-2B employers to pay the offered wage listed on the 9142 form.[15] In addition, Attestation 5 of the 9142 form contains nearly identical language requiring H-2B employers to pay the offered wage.[16] The offered wage is defined as equaling or exceeding the highest of the prevailing wage, or the applicable Federal, state, or local minimum wage.[17]

In this matter, the only overtime obligation at issue on appeal is the state wage for when Respondent operated in North Carolina.[18] Respondent contends the ALJ erred in finding it was obligated to pay overtime pursuant to North Carolina state law because it did not have notice the law was at issue and because North Carolina's overtime requirements do not relate back to the determination letter. However, in the determination letter, the Administrator put Respondent on notice of an alleged violation, the "[o]ffered wage did not equal or exceed the highest of the prevailing wage Federal, State or local minimum wage or the employer failed to pay the wage listed on the I-129 Petition or 9142 Applications."[19] Respondent contends it did not have notice that North Carolina's minimum wage was at issue because the determination letter "says nothing about overtime provisions under that state's law."[20] However, a state's overtime provisions are based on the state's minimum

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[15] 20 C.F.R. § 655.22(e).

[16] RX 7.

[17] 20 C.F.R. § 655.22(e).

[18] The ALJ noted that based on Respondent's 9142 form, it operated at four events in North Carolina during the 2013 season: 1) a community fair in Harnett County from April 17-21; 2) a festival in Cumberland County on April 20; 3) a fair in Cumberland County from April 25 to May 18; and 4) a celebration in Dare County from June 11-15. D. & O. at 27.

[19] RX 34. We note the WHD investigator's report found that Respondent owed $59,999.86 to 40 of its H-2B workers and $925.91 to one U.S. worker in unpaid overtime wages. RX 33 at 5, 14. The WHD investigator also explained his method of computation to Mr. Pierce. *Id*. at 14.

[20] Respondent's (Resp.). Reply Brief (Br.) at 6.

wage for those hours. The ALJ issued an order notifying the parties that he intended to take judicial notice of the relevant North Carolina overtime statutes.[21]

Further, the ALJ found that Respondent's counsel, Mr. Pierce, "was aware of North Carolina's requirement to pay time and a half for hours in excess of 45 hours per week for work performed in the state."[22] The ALJ found that Pierce prepared Respondent's ETA Form 9142 and "personally crafted" the language stating "[o]vertime is defined by and paid in accordance with prevailing law[.]"[23] Further, Pierce is one of two signatories on the 9142 form and its attestations.[24] In addition, the Administrator consistently argued that all hours above 40 hours per week were at issue for overtime in every state Respondent operated in, which includes North Carolina.[25] Thus, we conclude the ALJ correctly determined Respondent had proper notice the North Carolina overtime requirements were at issue and those requirements relate back to the Administrator's determination letter.

In addition, substantial evidence in the record supports the ALJ's finding that Respondent agreed to pay overtime as required. Section G of the 9142 form lists the overtime rate of pay as "N/A."[26] However, the Addendum to Section G notes the overtime hours are listed as "N/A" because the electronic format "defaulted to 'N/A,' which is not correct[]," and because the correct amount of overtime hours "varies" based on location.[27] The Addendum further adds that "[o]vertime is defined by and paid in accordance with prevailing law."[28] In addition, Andrew Deggeller testified he believed this language was intended to mean that he would pay overtime as required by law.[29] Further, the job ads and the job order note that overtime would be paid as required.[30] Thus, we conclude the ALJ correctly determined that Respondent was obligated to pay overtime when it operated in

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21 D. & O. at 26.

22 *Id.*

23 *Id.* at 26-27.

24 *Id.* at 27.

25 The Administrator did not object to the ALJ's use of 45 hours. *See id.* at 26.

26 RX 7.

27 *Id.*

28 *Id.*

29 Tr. at 280.

30 RX 2-RX 5.

North Carolina, which requires overtime be paid for all hours that exceed 45 hours per week.

Next, Respondent contends the ALJ erred in finding that employees worked 50 hours per week. Respondent states the "evidence was absolutely clear that, even though the workers were paid for 50 hours each week, they were not actually working those hours."[31] Respondent further states the undisputed evidence showed with "100% certain[ty]" that it was "impossible" that these workers were employed exactly 50 hours every week.[32] The only evidence that Respondent points to in support of its contention are statements from a few employees and Mr. Dean, the WHD investigator. Respondent argues that every one of the Administrator's employee statements indicated the hours worked were substantially less than 50 hours per week. This argument is without merit.[33]

As an initial matter, it defies common sense that an employer would pay workers for work that was not done. Respondent's argument contradicts the representation that Pierce, Respondent's attorney, made to Dean during the WHD investigation. More specifically, Pierce provided Dean with employee payroll records,[34] and Dean testified that Pierce told him that the 50 hours per week reflected in the payroll records was a "reliable estimate" of the hours each of its employees actually worked each week.[35] Although payroll records are not the same as time sheets, it is the only evidence Respondent provided to Dean documenting the number of hours each employee worked during the 2013 season. Further, nearly every payroll record lists 50 hours per week.[36] The ALJ agreed that "Mr. Pierce had corroborated that 50 hours per week was a reliable estimate [,] and Mr. Dean verified it in interviews with workers from the previous season."[37]

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[31] Resp. Br. at 5.

[32] *Id*.

[33] Respondent only challenges the ALJ's finding that its employees worked an average of 50 hours per week. It does not claim that it paid its employees for the additional five hours of overtime they worked each week.

[34] RX 51.

[35] D. & O. at 5 (citing Tr. at 82).

[36] RX 51.

[37] D. & O. at 5 (citing Tr. at 82).

The employee statements that Respondent relies on were heavily redacted and, therefore, are not sufficiently reliable to support its contention. For example, two statements indicate 40 hours or less per week.[38] On the other hand, more than half of the employee statements indicate a range of 40-50 hours worked per week.[39]

Respondent does not address the ALJ's finding that he gave the payroll records little weight because they were incomplete and inaccurate.[40] Instead the ALJ relied upon Complainant's statement that he substantiated that Respondent's employees worked an average of about 49 hours for the 2013 season.[41] The ALJ found that figure is close to the 50 hours per week that Respondent acknowledges it paid its employees.[42] The ALJ stated that while "it is unlikely that all of its employees worked exactly 50 hours per week, Respondent failed to provide records to establish the actual hours that its employees worked."[43] The ALJ' determined that for the season, "50 hours per week – the figure Respondent used for its payroll – is the figure best supported by the evidence of record."[44] Respondent has not provided any basis for us to disturb the ALJ's findings. Thus, the ALJ's findings are affirmed as supported by substantial evidence in the record.

In sum, the ALJ determined that Respondent's failure to pay its employees for their work in excess of 45 hours per week when it operated in North Carolina for the four events during the 2013 season was a substantial failure to comply with the terms and conditions of the certification of its 9142 form.[45] For the reasons discussed above, we affirm the ALJ's order that Respondent pay overtime back wages for all hours that employees worked in North Carolina during the 2013 season that exceeded 45 hours per week.

Based upon an hourly wage of $8.01, the ALJ determined that employees who worked in North Carolina during the 2013 season would be entitled to an additional $4.01 per hour (i.e., time and a half) for the 5 hours in excess of 45 hours, or a total

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38 RX 21.

39 *Id*.

40 D. & O. at 25.

41 *Id*.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*. at 27.

of $20.05 per week.[46] The ALJ was unable to determine from the evidence in the record which of the Respondent's employees worked in North Carolina during the 2013 season, the exact periods of time they worked there, and the number of hours for which they were paid when working in North Carolina. Accordingly, the ALJ ordered the parties, within 30 days of his decision, to confer and identify the Respondent's employees who worked more than 45 hours a week in North Carolina during the 2013 season and determine the amount of overtime due to those employees.[47]

### 3. Housing Deductions

Respondent deducted $60.00 per week from the paychecks of employees who stayed in its mobile trailers. The ALJ determined this deduction violated Attestation 5—the offered wage did not equal or exceed the highest of the prevailing wage, Federal, state or local minimum wage; or the wage, as listed on the 9142 form. In its determination letter, WHD asserted that Respondent's failure to disclose deductions violated Section 655.22(e) of the 2008 regulations, which provides that: "The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage, and the employer will pay the offered wage during the entire period of the approved H-2B labor certification."[48] Before the ALJ, WHD also claimed that Respondent's failure to specify deductions was a violation of § 655.22(g). The ALJ did not address how an undisclosed housing deduction violates Section 655.22(e), but did analyze WHD's allegation under § 655.22(g).

Regulation 20 C.F.R. § 655.22(g)(1) states, in part, that "the job offer must specify all deductions not required by law that the employer will make from the worker's paycheck." The ALJ determined the "job offer" was part of the 9142 form.[49] Accordingly, the ALJ found that Respondent substantially failed to comply with the

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[46] *Id*.

[47] *Id*. at 27-28.

[48] Regarding the housing deduction contained in Attestation 5 "Offered Wage[,]" the WHD investigation report states Respondent violated Section 655.22(e), I-129 Petition part 5, questions 9-10. RX 33 at 4, 6. Moreover, the WHD investigation report states "Impermissible deductions: The Employer, its agent or attorney sought or received payment of any kind from the employee as a condition of employment. 20 C.F.R. § 655.22(g)(1) and I-129 Petition H-supplement, section 2, questions 8-10" . . . "No violations noted." *Id.* at 9-10.

[49] D. & O. at 29.

requirements of the 2008 regulations because Respondent did not disclose the housing deduction on the 9142 form.

On appeal, Respondent contends the ALJ erred in finding it substantially failed to comply with the requirements of the regulations by not disclosing the housing deduction on the 9142 form. Specifically, Respondent contends the 2008 regulations do not require that deductions be disclosed on the 9142 form. In the alternative, Respondent contends that, even if the 2008 regulations did require such a disclosure, the 9142 form did not contain a space to adequately disclose deductions. Rather, Respondent purports that it only had to provide workers of the housing deduction prior to their arrival, which it did. In addition, Respondent contends the ALJ "attempted to buttress his finding" by finding the housing deduction was improper because it reduced the actual wages paid below the required offered wage. However, Respondent maintains that the 2008 regulations do not contain this provision, which was not adopted until the 2015 regulations.

The 2008 version of Section 655.22(g)(1) provides that "[t]he employer must make all deductions from the worker's paychecks that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck." The 2008 regulations themselves do not define the term "job offer." In determining that the "job offer" is part of the 9142 form, the ALJ analyzed how the term "job offer" was used in the 2008 regulations and the preamble to the regulations. The ALJ observed the term "job offer" appeared twice in the 2008 regulations, once regarding Section 655.22(g)(1) and once regarding amendments to labor certifications under Section 655.34(c).[50] The ALJ further observed that the term appeared six times in the preamble, once regarding the notice of deductions and five times regarding the process of certifying the 9142 form by DOL and a state work force agency (SWA). Based on his determination that the term "job offer" was used consistently in Section 655.22(g)(1) and in the preamble of the 2008 regulations, the ALJ found "it is clear that ["job offer"] refers to the proposed terms and conditions of employment and that the job offer predates approval or disapproval of the application for certification."[51]

The ALJ then concluded the "2008 regulation mandated that deductions other than those required by law had to be disclosed in the job offer, that the job offer was part of the application for labor certification, and that the failure to disclose that Respondent would deduct $60.00 per week from workers' pay was a

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50 *Id*. at 28.

51 *Id*. at 29.

substantial failure to comply with the requirements of the regulation."[52] In short, the ALJ determined Respondent's failure to disclose the housing deduction in the "job offer" was a substantial violation of Section 655.22(g)(1) under the 2008 regulations because it was required by law to be disclosed in the job offer, the job offer was part of the 9142 form, but the 9142 form did not specify the deduction.

One of the critical pieces missing from the ALJ's analysis of the 2008 regulations is the "job order" that is filed with an SWA. In the preamble to the 2008 regulations, the Department explained, "[t]the Department's requirement that the employer submit an acceptable job order to the appropriate SWA for posting mandates that the employer complete and submit information regarding all of the job duties and terms and conditions of the job offer." The 2008 regulations associate "job order" with the application process before the SWA.[53] The 2008 regulations do not define "job order," nor do they specify what goes into the "job order." However, Respondent disclosed the housing deduction in the SWA job order.[54] In finding that Respondent violated Section 655.22(g)(1), the ALJ discounted the significance of Respondent's disclosure in the "job order" based on his interpretation that the housing deduction was required to be first disclosed in the "job offer"—as a condition of certification of the TEC.[55]

We find that the ALJ erred by conflating the deductions disclosed in the "job offer" with the content specified in the 9142 form. Although the 9142 form Section F contains details about the "job offer," this does not mean the 9142 form itself is the "job offer." Rather, the content of the "job offer" overlaps with the required content in the 9142 form. Notably, as Respondent points out, the 9142 form does not specifically ask the applicant to list deductions, which suggests this is not where deductions were required to be disclosed. The 9142 form also has a separate Section

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[52] *Id*.

[53] 20 C.F.R. §§ 655.15(a)(2) ("Submit a job order to the SWA.") and 655.15(e) (2008) ("Job order. (1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H–2B workers, identifying it as a job order to be placed in connection with a future application for H–2B workers. . . . Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting.").

[54] RX 4.

[55] D. & O. at 29.

G for rate of pay, but again, this section does not clearly ask the applicant to specify deductions. Further, the 9142 form does not satisfy the purpose behind Section 655.22(g)(1), which is to provide potential employees notice of deductions. There is no indication in the record that employees were given the 9142 form, and, if this is where deductions were required to be disclosed, the employees would not have had notice if the deduction had been specified.

In evaluating the ALJ's analysis of the 2008 regulations in this case, it is helpful to compare the 2008 regulations with the 2015 regulations, which made their way into the ALJ's and WHD's regulatory citations. At issue here, Section 655.22(g)(1) of the 2008 regulations provides that employers "must make all deductions from the worker's paychecks that are required by law. 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." Other than this regulatory provision, the 2008 regulations omit any other obligations and assurances concerning deductions pertinent to this matter.

In contrast, the 2015 regulations squarely address the nuances at issue in this case by adding several new regulatory provisions and amendments. The 2015 regulations state that "the job order must specify all deductions not required by law which the employer will make from the worker's pay."[56] The 2015 regulations define "job offer" and "job order" at 20 C.F.R. § 655.5.[57] "Job offer" is defined as the offer made by an employer or potential employer of H-2B workers to both U.S. and H-2B workers describing all material terms and conditions of employment, including those relating to wages, working conditions, and other benefits. In contrast, a "Job order" is defined as the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other

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[56] 20 C.F.R. § 655.20(c).

[57] In the preamble to the 2015 regulations, the Department states, "We have included the definitions of job offer and job order to make certain that employers understand the difference between the offer that is made to workers, which must contain all the material terms and conditions of the job, and the order that is the published document used by SWAs in the dissemination of the job opportunity. The definition of job order reflects that it must include some, but not all, of the material terms and conditions of employment as reflected in § 655.18, which identifies the minimum content required for job orders. The definition of job offer requires an employer's job offer to contain all material terms and conditions of employment."

benefits, including obligations and assurances under 29 C.F.R. part 503 and this subpart that is posted between and among SWAs on their job clearance systems.

Further, the 2015 regulations break down the required content into several subsections, including a category for boarding and lodging.[58] Copies of the job order filed with the SWA must be given to the employees.[59] The 2015 regulations also require that deductions and the job order number, if applicable, be disclosed during recruitment.[60] Finally, deductions not disclosed on the job order are unauthorized and must be treated as deductions bringing the wage below the prevailing wage.[61] Thus, the 2015 regulations specify what deductions must be identified, where they must be identified and disclosed, and what the consequences are for failing to identify and disclose them. Unlike the 2015 regulations, which expressly cover every intersection at issue in this matter, the 2008 regulations only specify that the job offer must include deductions not required by law.

Accordingly, we vacate the ALJ's order that Respondent pay $81,960.00 for the total cost of the housing deduction and remand the matter back to the ALJ to consider the 2008 regulations and what information was conveyed in the "job offer" in light of this clarification on the distinction between the 9142 form, the "job order," and the "job offer." Specifically, on remand, the ALJ must determine whether the housing deduction was disclosed to potential employees under the 2008 regulations prior to hiring the employees for the 2013 season.[62]

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[58] 20 C.F.R. § 655.18(b)(10) (contents of job order).

[59] 20 C.F.R. § 655.20(l).

[60] 20 C.F.R. § 655.41.

[61] 20 C.F.R. § 655.20(c).

[62] For example, the record identifies witness statements from twelve employees that they knew of the housing deduction. RX 62. Mr. Deggeller, whom the ALJ found to be a credible witness, testified that employees knew about the deduction. TR. at 322-25. The housing deduction was disclosed in job advertisements. RX 2, RX 3, RX 5. The housing deduction was also disclosed in the job order. RX 4.

Besides civil monetary penalties, the 2008 regulations do not clearly provide for a remedy if a deduction is not properly disclosed.[63] The ALJ determined Respondent must pay $81,960.00, the total cost of the housing deduction, to workers for violating Section 655.22(g)(1). However, as discussed above, the ALJ erred in finding that Respondent violated Section 655.22(g)(1) by conflating the definition of "job offer" with other terms and procedures under the 2008 regulations. Here, the 2008 regulations specify that back pay applies to Section 655.22(e) violations.[64] For all other violations, the 2008 regulations state that appropriate legal or equitable remedies may be imposed.[65] If the ALJ determines on remand that Respondent's failure to disclose the housing deduction to its employees in the job offer violated Section 655.22(g)(1) of the 2008 regulations, the ALJ must then determine the appropriate remedy under the 2008 regulations.

**4. Civil Money Penalties**

The Administrator may assess civil money penalties of up to $10,000 for an employer's substantial failure to meet the conditions provided in the H-2B application for temporary employment.[66] A substantial failure is defined as a "willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or successor form."[67] A "willful failure" is defined as a "knowing failure or reckless disregard with respect to whether the

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[63] In the 2008 regulations, Section 655.75 (Decision and order of the administrative law judge) contemplates an award of back wages for violations of 655.22(g). It provides: "(c) In the event that the WHD Administrator assesses back wages for wage violation(s) of § 655.22(e), (g), or (j) based upon a [prevailing wage determination] obtained by the Administrator from OFLC . . . ." 20 C.F.R. § 655.75(c). However, back pay is not associated with violations of 655.22(g) in 655.65 (Remedies for violations). Rather, the remedy associated with violations of 655.22(g) is a civil monetary penalty. "(a) Upon determining that an employer . . . willfully made impermissible deductions from pay as provided in § 655.22(g), the WHD Administrator may assess civil money penalties . . . ." 20 C.F.R. § 655.65(a).

[64] 20 C.F.R. § 655.65(i).

[65] *Id.*

[66] 20 C.F.R. § 655.65(c).

[67] 20 C.F.R. § 655.65(d).

conduct was contrary to sec. 214(c) of the INA, or this subpart."[68] There are several discretionary factors that may be considered, which include: 1) the previous history of the violation by the employer, 2) the number of U.S. or H-2B workers employed by the employer who are affected by the violation; 3) the gravity of the violation; 4) efforts made by the employer in good faith to comply with the INA and its corresponding regulations; 5) the employer's explanation of the violation; 6) the employer's commitment to future compliance; and 7) the extent to which the employer achieved a financial gain due to the violation, or the potential loss to the employer's workers.[69]

The ALJ determined Respondent owes $5,000.00 in a civil money penalty for violating Attestation 5. In reaching this conclusion, the ALJ assessed that the gravity of the violations was moderate. Specifically, the ALJ opined that the failure to pay overtime in North Carolina did not have a significant impact given that it amounted to approximately $20.00 per week. In addition, the ALJ assessed that the housing deduction also had a moderate impact on the total amount of the workers' wages. The ALJ found that Respondent's explanations for the violations were not compelling. However, the ALJ also found that Respondent made a good faith effort to comply with the requirements of the H-2B program, will continue to do so in the future, and that Mr. Deggeller was a sincere and credible witness. Notably, the ALJ did not delineate how much of the civil money penalty was for failing to pay its workers overtime when it operated in North Carolina and how much was attributable to its failure to disclose the housing deduction to its employees.

On appeal, Respondent contends it did not willfully violate the terms and conditions of the INA or the 9142 form. Respondent contends that neither violation can constitute a significant deviation from the terms and conditions of the 9142 form based on the ALJ's determination that the violations had a moderate impact. Respondent also contends the violations are not willful as it relied on the advice of its counsel. With regard to the North Carolina overtime provision, Respondent contends there was not a willful violation because it was unaware that the statute applied. With regard to the housing deduction, Respondent contends there was no obligation to disclose it on the 9142 form and, even if there was, it did not constitute a significant deviation as employees were notified of the deduction prior to their arrival.

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[68] 20 C.F.R. § 655.65(e).

[69] 20 C.F.R. § 655.65(g).

In light of our remand for the ALJ to reconsider whether the housing deduction was properly disclosed, we vacate the civil money penalty. If on remand, the ALJ finds that the housing deduction was not properly disclosed in the job offer, the ALJ may reconsider an appropriate civil money penalty. Although the ALJ determined the violations were substantial, he did not articulate his analysis within the context of the regulatory language that defines "substantial" with "willful" and "willful" with "reckless disregard." On remand, the ALJ must thus analyze whether any failure to disclose the housing deduction constitutes a "substantial failure" and a "willful failure" as defined by 20 C.F.R. §§ 655.65(d) and (e).

If the ALJ finds that the Respondent disclosed the housing deduction in the job offer, the ALJ must disentangle his original analysis and evaluate the civil money penalty on the overtime violation alone. If the ALJ determines the Respondent's failure to pay overtime was a substantial failure to comply with the terms and conditions of the labor certification, he may award an appropriate civil money penalty. In considering the appropriate amount of any civil money penalty, the ALJ must consider the total amount Respondent owes in overtime based on the resolution of his earlier order for the parties to identify the Respondent's employees who worked more than 45 hours a week in North Carolina during the 2013 season, and determine the amount of overtime due to those employees.

**5. Statute of Limitations**

*A. Which Statute of Limitation Applies*

The ALJ observed that the H-2B regulations do not specify a statute of limitations and applied the five-year statute of limitations found at 28 U.S.C. § 2462.[70] Section 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.[71]

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[70] The INA is silent as to the statute of limitations for H-2B enforcement actions. *See* 8 U.S.C. § 1101 *et seq*.

[71] 28 U.S.C. § 2462.

The ALJ reasoned this is a "catch-all" statute of limitations for claims that involve the enforcement of a penalty. As this matter includes the assessment of a civil money penalty, the ALJ determined it is the most suitable statute of limitations because it includes his assessment of a civil money penalty.[72]

On appeal, Respondent contends the ALJ erred in applying the five-year statute of limitation period in 28 U.S.C. § 2462. We disagree. Because this case involves an assessment for civil money penalties, we affirm the ALJ's determination that the five-year statute of limitations period in 28 U.S.C. § 2462 is the appropriate limitations period.[73]

Respondent also argues there are several other statutes of limitation that could apply in this case. We address each of Respondent's arguments in turn below.

First, Respondent contends that the four-year statute of limitations period found at 28 U.S.C. § 1658(a) applies, which states, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [enacted Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues." However, in *Sandwich Isles Communications*, the Federal Communications Commission analyzed Section 1658(a), its history, and the meaning of "cause of action," and held this section "governs court actions, not agency proceedings."[74] The FCC also opined it was "unaware of any instance in which Section 1658(a) has been applied to cut off administrative proceedings."[75] In addition, the Supreme Court, when analyzing a different federal limitations statute, opined that the term "action" is "ordinarily

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[72] Order Denying Respondent's Motion for Summary Judgment, at 4-5 (ALJ Sept. 20, 2018).

[73] The Administrator contends that, while 28 U.S.C. § 2462 applies to actions involving civil money penalties, there is no statute of limitations period for back wages. However, as the matter concerning overtime back wages falls within the five-year limitations period, we decline to address this argument.

[74] *Sandwich Isles Comms., Inc.*, FCC18-172, 2019 FCC Lexis 41, 34 FCC Rec'd 577, 2019 WL 105385, at *161-67 (F.C.C. Jan. 3, 2019); *see also Garvey v. Hale*, 1997 WL 566262, at *1 (N.T.S.B. Aug. 29, 1997) (stating that 1658(a) applies to "certain civil actions in federal court" and not to proceedings before National Transportation Safety Board).

[75] *Id.*

used in connection with judicial, not administrative, proceedings."[76] Thus, we conclude the four-year statute of limitations in 28 U.S.C. § 1658(a) does not apply to this proceeding.

Next, Respondent contends the two-year statute of limitations period from the H-2A program should be borrowed. However, this two-year limitation period applies to H-2A debarment actions only.[77] Thus, we conclude there is not an applicable statute of limitations from the H-2A program that applies to this matter.

Respondent also contends that the two-year statute of limitation under North Carolina law for overtime actions could apply here. Immigration powers are within the realm of the Federal sovereign.[78] Applying a state statute of limitations would be an inappropriate vehicle for the enforcement of federal law because it would interfere with WHD's ability to enforce the provisions of the INA.

Last, Respondent contends the FLSA statute of limitations could also apply, which is a two-year limitation for less-than-willful violations and a three-year limitation for willful violations. The FLSA statute of limitations applies to actions enforcing "any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the FLSA or its related acts.[79] However, as Respondent repeatedly argued, and as the ALJ correctly found, Respondent is exempt from the FLSA. Therefore, we conclude the FLSA's statute of limitations also does not apply in this case.

*B. When the Claims Accrued*

The ALJ determined the claim accrued in February 2013, when the workers were scheduled to arrive.[80] The ALJ reasoned that there was not a complete cause

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[76] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (analyzing 28 U.S.C. § 2415(a)).

[77] *See* 8 U.S.C. § 1188(b).

[78] *See 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 OSHA because the suit was brought by a Federal agency to vindicate important public interests).

[79] 29 U.S.C. § 255.

[80] Order Denying Respondent's Motion for Summary Judgment, at 5-6 (ALJ Sept. 20, 2018).

of action until then as "[a]ny violation would only be apparent once the workers arrived."[81]

With regard to the overtime violation, the ALJ is correct. There was not a complete cause of action until the workers arrived and received their first paycheck because it would not have been apparent that they were not being paid overtime until then. The record demonstrates that workers received their first paycheck in February 2013.[82] As the WHD determination letter was issued on December 15, 2017, this overtime matter is not time-barred.

However, with regard to the housing deduction, if the ALJ determines on remand that Respondent failed to disclose it in the job offer, then there would have been a complete cause of action when the job offer was conveyed to employees or the date Respondent attested to this obligation.[83] On remand, the ALJ may need to engage in additional fact finding to determine whether the housing deduction issue and any ordered remedies are time-barred by 28 U.S.C. § 2462.

## CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order in part, **VACATE** in part, and **REMAND** the case for further proceedings consistent with this opinion.

**SO ORDERED.**

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81 *Id.* at 6.

82 RX 47, RX 51.

83 20 C.F.R. § 655.22(g).