U.S. Department of Labor

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

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR	**ARB CASE NO. 2020-0005**
	ALJ CASE NO. 2018-TNE-00023
PROSECUTING PARTY,	**DATE: April 4, 2022**
v.	
C.S. LAWN & LANDSCAPE, INC.,	
RESPONDENT.	

Appearances:

For the Prosecuting Party:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah Kay Marcus, Esq., Rachel Goldberg, 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

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

DECISION AND ORDER

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 September 6, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding C.S. Lawn & Landscape, Inc. (Respondent) violated the provisions of the INA covering the period from February 15, 2013, to December 15, 2015. Respondent

appealed to the Administrative Review Board (ARB or Board). For the following reasons, we affirm in part and vacate and modify in part.

BACKGROUND

Respondent C.S. Lawn & Landscape is a residential and commercial landscaping company based in Maryland and has participated in the H-2B program for over 20 years. Charles Saine is the president and sole owner. There are three ETA Form 9142 Temporary Employment Certification (TEC) Applications at issue in the present action, covering the periods of February 15, 2013, through December 2013 (2013 season); February 15, 2014, through December 15, 2014 (2014 season); and February 15, 2015, through December 15, 2015 (2015 season).

A complainant filed a complaint with the Department of Labor (Department) Wage and Hour Division (WHD), alleging several violations of the INA. In February or March 2015, the matter was assigned to a WHD investigator.[1]

On March 4, 2015, while the WHD was investigating the complaint, 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.[2] The District Court also permanently enjoined the Department from enforcing the H-2B regulations at Subpart A.[3] 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."[4]

The WHD subsequently resumed the investigation.[5] On February 20, 2018, the WHD Administrator issued a determination letter citing Respondent for several violations of the INA and attestations found in the TECs spanning the period from February 15, 2013, to December 15, 2015. These violations included a substantial failure to comply with the recruitment and hiring of U.S. workers, unfavorable terms and working conditions, impermissible pay deductions, and a willful misrepresentation of a material fact regarding the accuracy of its need for

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1 D. & O. at 8.

2 *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).

3 *Id*.

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

5 D. & O. at 8 (citing Tr. at 188).

temporary workers. The WHD determined Respondent owed $147,200.84 in unpaid wages and $75,000 in civil money penalties (CMPs).[6]

On March 20, 2018, Respondent requested a hearing before an ALJ with the Office of Administrative Law Judges (OALJ). The hearing was held on November 4, 5, and 26, 2018.

On September 6, 2019, the ALJ issued a D. & O. finding several violations of the INA. First, the ALJ determined Respondent substantially failed to comply with Attestation 4 of the TEC and 20 C.F.R. § 655.22(a) during the 2013 and 2014 seasons because it offered prospective U.S. workers less favorable terms than it did some of its H-2B workers. The ALJ found that Respondent's advertisements listed a minimum and maximum salary of $9.01 per hour in 2013 and $9.78 per hour in 2014, but paid several H-2B workers at a higher rate than what was advertised.[7] Although the ALJ noted the job orders for the 2013 and 2014 seasons stated "DOE (Depends on Experience)," the ALJ found the language was meaningless because the minimum and maximum rates were identical.[8]

Second, the ALJ determined Respondent willfully failed to comply with Attestation 13 and 20 C.F.R. § 655.22(n) during the 2013, 2014, and 2015 seasons because it inflated the requested number of H-2B workers by two.[9] The ALJ found Respondent brought in the wives of two of Respondent's H-2B workers knowing it would not employ them. The ALJ determined Respondent's conduct was a willful failure based on Mr. Saine's testimony that he included the wives knowing they would not work for Respondent.[10]

Third, the ALJ determined Respondent substantially failed to comply with 20 C.F.R. § 655.22(g)(1) because of improper uniform cleaning deductions during the 2015 season, and improper deductions for housing during the 2013, 2014, and 2015 seasons. Regarding the uniform cleaning deduction, the ALJ found that Respondent deducted an incorrect amount. The ALJ noted Mr. Saine agreed that the employment contract informed workers of a uniform deduction of $13.66 per pay period but deducted $18.62 per pay period instead.[11]

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6 *Id.* at 1-2.

7 *Id.* at 33.

8 *Id.* at 34.

9 *Id.*

10 *Id.* at 35.

11 *Id.* at 36.

Regarding the housing deduction, the ALJ found that housing unit 1107 Butterworth Court was not zoned for residential use.[12] The ALJ noted the employment contract stated the housing arrangements would "meet all applicable state and local codes for rental property."[13] However, the ALJ found 1107 Butterworth Court was zoned as "suburban industrial," and the unit was not legally permitted to be used as a residential living quarters.[14] The ALJ ordered Respondent to pay $2,083.20 in back wages to 21 workers for improper uniform deductions and $36,000 in back wages for improper housing deductions.

In light of these violations, the ALJ ordered Respondent to pay a CMP. In determining the appropriate amount of the CMP, the ALJ made the following findings[15]:

- There was no evidence Respondent previously violated provisions of the H-2B program;
- Respondent made a good faith effort to comply with the program requirements and did not deliberately attempt "to game the system" for its own pecuniary advantage;
- Respondent made improper uniform deductions during the 2015 season that impacted most, if not all, of Respondent's workers;
- Respondent made improper housing deductions that impacted several, but not all H-2B workers; and
- Respondent failed to offer to potential U.S. workers the same terms and conditions as those offered to H-2B workers, which impacted an undetermined number of potential U.S. workers during the 2013 and 2014 seasons who may have applied for jobs if they had been provided accurate wage information.

Based on these findings, the ALJ determined the gravity of the violations was moderate and reduced the CMP from $75,000 to $21,000.

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

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12 *Id.* at 37.

13 *Id.*

14 *Id.*

15 *Id.* at 38-39.

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.[16] 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 . . . ."[17]

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."[18]

The Administrator has been delegated the enforcement responsibility for ensuring that H-2B workers are employed in compliance with statutory and regulatory labor certifications.[19] This includes the power to impose administrative remedies, including civil money penalties, on employers who violate the H-2B program requirements.[20]

1. Applicability of the 2008 Regulations

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 of whether the 2008 regulations are unenforceable remains viable, and it wishes to preserve this argument on appeal. We note the same District Court subsequently issued a decision in February 2019, holding that

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16 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).

17 5 U.S.C. § 557(b).

18 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

19 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).

20 8 U.S.C. § 1184(c)(14)(A)(i).

the 2008 regulations are still enforceable as a result of its prior Clarifying Order.[21] Consequently, the 2008 regulations apply to labor certifications issued before the permanent injunction was issued on March 4, 2015.

Specifically, Respondent contends the Board has previously determined in *Adm'r v. Strates Shows, Inc.* that the 2008 regulations are not enforceable.[22] However, the Board subsequently vacated this decision.[23] Respondent maintains that the Board's initial interpretation is correct because it did not reverse the findings of its initial decision. We disagree. The Board recently issued a decision in *Deggeller Attractions, Inc.* in which we rejected the exact same argument before us here for the exact same reasons previously articulated in *Strates Shows, Inc.*[24] Respondent has not advanced any legal or factual basis for the Board to reach a contrary conclusion in the present matter. Accordingly, the Board reaffirms its holding in *Deggeller Attractions, Inc.* that the 2008 H-2B regulations apply to TEC certifications issued prior to the injunction in *Perez*.

This action involves certifications for three years. The TEC for the 2013 season was certified on December 7, 2012.[25] The TEC for the 2014 season was certified on February 3, 2014.[26] The TEC for the 2015 season was certified on December 24, 2014.[27] All TECs were certified before the permanent injunction was issued. Therefore, we conclude the 2008 regulations apply in this matter.

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[21] *Drew's Lawn & Snow Serv., Inc.*, *v. Acosta, Sec'y of Labor*, No. 18-cv-00979, 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.").

[22] *Adm'r v. Strates Shows, Inc.*, No. 2015-0069, ALJ No. 2014-TNE-00016, slip op. at 6 (ARB June 30, 2017) ("vacatur of the 2008 H-2B regulations rendered the Administrator's legal authority for pursuing the present action null and void.").

[23] *Adm'r v. Strates Shows, Inc.*, No. 2015-0069, slip op. at 2-3 (ARB Aug. 16, 2017) (Amended 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).

[24] *Deggeller Attractions, Inc.*, ARB No. 2020-0004, ALJ No. 2018-TNE-00008, slip op. at 4 n.11, 5 (ARB Jan. 25, 2022) (concluding the 2008 regulations apply to a TEC that was certified on December 20, 2012, well before the permanent injunction was issued in *Perez*).

[25] RX 5.

[26] RX 17.

[27] RX 28.

2. Statute of Limitations

A. Which Statute of Limitation Applies

The ALJ did not make any findings regarding the statute of limitations. On appeal, Respondent contends there are several statutes of limitation that could apply in this case. We address each of Respondent's arguments in turn below.

First, Respondent contends the ALJ could have applied the 28 U.S.C. § 1658(a) four-year "catch-all" statute of limitations provision for actions arising under an act of Congress enacted after 1990. Respondent asserts this statute of limitations could apply in this case because there was no mechanism for imposing back wages or civil money penalties under the H-2B program before 1990. In the alternative, Respondent contends the two-year statute of limitations in the H-2A program could apply. Finally, Respondent contends the FLSA statute of limitations, which is two years for less-than-willful violations and three years for willful violations, could apply.

The INA is silent as to the statute of limitations for H-2B enforcement actions.[28] However, in *Deggeller Attractions, Inc.*, the Board recently determined that neither the 28 U.S.C. § 1658(a) four-year statute of limitations nor the H-2A two-year statute of limitations for debarment actions applies to H-2B enforcement actions.[29] Rather, the Board applied the five-year statute of limitations found at 28 U.S.C. § 2462, which states:

> 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.[30]

Notably, in *Deggeller Attractions, Inc.*, the employer was exempt from the provisions of the FLSA.[31] Here, Respondent contends the FLSA statute of limitations could apply because the ALJ's finding of a violation of 20 C.F.R. § 655.22(g)(1) was based on a provision of the FLSA. Section 655.22(g)(1) states: "an

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28 *See* 8 U.S.C. § 1101 *et seq.*

29 *Deggeller Attractions, Inc.*, ARB No. 2020-0004, slip op. at 18-19.

30 28 U.S.C. § 2462.

31 *Deggeller Attractions, Inc.*, ARB No. 2020-0004, slip op. at 19.

employer subject to the FLSA may not make deductions that would violate the FLSA."[32] However, this incorporation is narrowly tailored to whether a deduction is permissible pursuant to the FLSA and does not incorporate the FLSA's statute of limitations.

Thus, as this matter includes the assessment of a civil money penalty, we conclude that the five-year statute of limitations found at 28 U.S.C. § 2462 controls.

B. When the Claims Accrued

The WHD issued its determination letter to Respondent on February 20, 2018. The Administrator determined that the violations assessed during the 2014 and 2015 seasons fall within the five-year statute of limitations. Regarding the violations assessed during the 2013 season, Respondent and the Administrator agree that the violations of Sections 655.22(a) (less favorable terms to U.S. workers) and 655.22(n) (inflating number of workers by two) are barred by the statute of limitations because both claims accrued during 2012.

Respondent contends the Section 655.22(g)(1) housing deduction claim is also barred by the statute of limitations because the claim accrued either when workers were notified of the rental charge, or when H-2B workers arrived on February 19, 2013.

We disagree. We agree with the ALJ's findings that the claim did not accrue until Respondent actually took the housing deduction from H-2B workers' paychecks.[33] The ALJ credited Mr. Saine's testimony that he charged rent for nine out of the ten months during the 2013 season, and he began deducting rent several weeks after workers arrived to give them time to earn money first.[34] Based on this, the ALJ awarded back wages amounting to nine months of rent, dating back to March 2013.[35] The ALJ's findings are supported by the record.[36] Because each housing deduction was made after February 20, 2013, we conclude that Administrator's finding is not barred by the five-year statute of limitations found at 28 U.S.C. § 2462.

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[32] 20 C.F.R. § 655.22(g)(1).

[33] Respondent fails to point to a concrete discrete event, such as a lease, from which the rent deductions flow. The mere notice of the amount of the deduction upon arrival is not such an event.

[34] D. & O. at 37-38.

[35] *Id.*

[36] Tr. at 682-83 (testimony indicating Respondent took housing deductions for nine months).

3. Violations

The Administrator shall determine whether an employer has willfully misrepresented a material fact or substantially failed to meet any of the conditions of the labor certification attested to, or any of the conditions of the DHS Form I-129, Petition for a Nonimmigrant Worker.[37] A "willful failure" is defined as a "knowing failure or reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart."[38] 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."[39] In addition, an employer's submission and signature on the TEC constitutes the employer's representation that the statements are accurate and its acknowledgement and acceptance of the obligations of the program.[40]

A. Substantial Failure to Comply with Attestation 4 and 20 C.F.R. 655.22(a)

On appeal, Respondent contends the antidiscrimination clause requires an employer to not discriminate against U.S. workers by providing more favorable information to H-2B workers. Respondent asserts that, while it paid H-2B workers higher wages based on experience, U.S. workers were not disadvantaged because both prospective U.S. and H-2B employees were provided the same information in the job offer and advertising.[41]

Attestation 4 states:

> The offered terms and working conditions of the job opportunity are normal to workers similarly employed in the area(s) of intended employment and are not less favorable than those offered to the foreign worker(s) and are not less than the minimum terms and conditions required by Federal regulation at 20 C.F.R., Subpart A.[42]

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37 20 C.F.R. § 655.60.

38 *Id*. at § 655.65(e).

39 *Id.* at § 655.65(d).

40 *Id*. at § 655.65(f).

41 Resp. Br. at 45.

42 RX 17.

Section 655.22(a) requires that employers not offer terms to U.S. workers that are "less favorable than those offered to the H-2B worker(s) and are not less than the minimum terms and conditions required by this subpart."[43] In addition, all advertisements must contain "[t]he wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers."[44]

We agree with the ALJ's finding that Respondent's TEC and job advertisements for the 2014 season listed a lower hourly rate of pay than what most H-2B workers were paid.[45] The TEC listed $9.78 as the basic rate of pay and $14.67 as the overtime rate of pay.[46] Additionally, although the job order states "DOE (Depends on Experience)," the minimum and maximum wage rates were both $9.78.[47] Further, job ads list $9.78 as the hourly rate of pay, and do not disclose a range of the rate of pay.[48] However, as the ALJ correctly found, most of Respondent's H-2B workers were paid more than this rate.[49] By the end of the season, all but one H-2B worker earned a higher hourly rate.[50]

Although Respondent may have advertised the same wage information to both prospective U.S. and H-2B applicants, Respondent's practice of paying a higher wage rate than what was listed supports a reasonable inference that it may have misled U.S. workers into not applying for the positions. This practice contradicts Respondent's attestation that the job opportunity was clearly open to U.S. workers on the same terms and conditions offered to its H-2B workers. In addition, Respondent did not disclose the multiple wage offers as Section 655.17(g) requires. Thus, we affirm the ALJ's finding that Respondent substantially failed to comply with Attestation 4 and Section 655.22(a) in 2014.

B. Willful Failure to Comply with Attestation 13 and 20 C.F.R. 655.22(n)

On appeal, Respondent contends the ALJ erred in determining it improperly included the two wives of H-2B workers for the 2014 and 2015 seasons.[51] Specifically, Respondent contends it is only required to accurately state the number

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43 20 C.F.R. § 655.22(a).

44 *Id*. at § 655.17(g).

45 As noted above, the claim for the 2013 season was barred by the statute of limitations.

46 RX 17.

47 RX 11.

48 RX 12.

49 D. & O. at 33, RX 63, CX 33.

50 D. & O. at 33, RX 67 at 610.

51 The statute of limitations for 2013 TEC violation expired.

of workers it needed in its request. Respondent asserts there is no evidence it knew the two wives would not work there, and that it was undisputed that they previously worked for Respondent and could do so in the future. Respondent also asserts that the two women were entitled to enter the country as dependents on H-4 visas and contends there is no practical difference regarding which visa they used to enter the country.[52] Respondent also notes the ALJ's finding is undercut because he credited testimony from Respondent's witness that it was always shorthanded and looking for more workers.[53] Respondent further contends any failure to comply with Attestation 13 and Section 655.22(n) is not willful as the discrepancies between the job order and ads are not a significant deviation from its obligations.

Attestation 13 states that "[t]he dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification have been truly and accurately stated on the application."[54] Section 655.22(n), requires that the "number of positions being requested for labor certification have been truly and accurately stated on the application."[55]

We agree with the ALJ's finding that Respondent willfully inflated the number of workers it purportedly needed by two to account for the two wives. Although they were former employees, it is undisputed that neither woman worked for Respondent during the dates in question.[56] As the ALJ stated, while Respondent's intentions may not have been bad, it could not "truly and accurately" state its number of worker positions it requested when that number "always included a plus-two for the women [it] knew were not coming into the United States to work for Respondent as [it] represented they would be doing."[57] In addition, Respondent's argument that there is no practical difference between an H-2B and an H-4 visa lacks merit because the H-2B program is capped at 66,000 visas per year.[58]

Thus, we affirm the ALJ's finding that Respondent willfully violated Attestation 13 and Section 655.22(n).

C. Substantial Failure to Comply with 20 C.F.R. 655.22(g)(1)

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52 Resp. Br. at 43.

53 D. & O. at 34-35; Resp. Br. at 42.

54 RX 17, RX 28.

55 20 C.F.R. § 655.22(n).

56 D. & O. at 11-12, 21, 35; Tr. at 519-22.

57 D. & O. at 35.

58 8 U.S.C. § 1184(g)(1)(B).

An employer's "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. However, an employer subject to the FLSA may not make deductions that would violate the FLSA."[59] The 2008 rule does not define "job offer." In *Deggeller Attractions, Inc*., the Board discussed the distinction between the TEC, the "job order," and the "job offer," and remanded the case for the ALJ to determine whether a housing deduction had properly been disclosed to potential employees prior to hiring them.[60]

i. Uniform Cleaning Deduction

On appeal, Respondent contends it disclosed the full uniform-cleaning deduction when its H-2B workers arrived at the worksite. Respondent notes this issue concerns the legal question of the meaning of "job offer," which is undefined by the statute. Respondent asserts the H-2B program was based on the H-2A program, which permits deductions to be disclosed upon arrival at the worksite. Respondent submits that the same reasoning should extend to this matter.[61] Lastly, Respondent contends it could not have violated a regulation that does not exist.

We agree with the ALJ that Respondent substantially failed to comply with 20 C.F.R. 655.22(g)(1) because it improperly deducted more than the amount it disclosed in its job offer.[62] While Respondent contends workers being informed of the accurate amount upon arrival was a sufficient disclosure, the Board's holding in *Deggeller Attractions, Inc.* focuses "job offer" on what the employer disclosed to potential employees prior to hiring them, not what employees were informed of upon arrival. Here, Respondent disclosed a uniform deduction of $13.66 in the employment contract.[63] However, $18.62 was deducted.[64] Mr. Saine acknowledged this discrepancy, and agreed the deduction was higher than it should have been.[65]

Thus, we affirm the ALJ's finding that Respondent substantially failed to comply with 20 C.F.R. 655.22(g)(1) when it improperly deducted more than the amount disclosed in the job offer.

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59 20 C.F.R. § 655.22(g)(1).

60 *Deggeller Attractions, Inc.,* ARB No. 2020-0004, slip op. at 10-14.

61 Resp. Br. at 39 (citing 20 C.F.R. § 655.104(q)(200) (must provide job contract no later than the first day of work)).

62 D. & O. at 36.

63 *Id.*

64 *Id.*

65 *Id.*; Tr. at 505.

ii. Housing Deduction

Respondent contends there is no regulation that requires housing to comply with local ordinances.[66] Respondent also contends that the regulations prohibit neither reimbursements for non-compliant housing, nor rental deductions for housing where a tenant cannot reside due to zoning ordinances. Respondent further contends the term "reasonable" applies to the cost of housing, not its condition, and asserts the housing here was a good value for the rent. Respondent claims it was unaware that the housing conditions violated the local zoning ordinance. In addition, Respondent contends the Administrator is attempting to recover the deduction based on the FLSA's prohibition on deductions for housing that violates a local ordinance, which was never part of the case.

However, the Administrator has consistently maintained that Respondent violated Section 655.22(g)(1), which incorporates a provision of the FLSA regarding permissible deductions.[67] Section 655.22(g)(1) states, in relevant part, that "[a]ll deductions must be reasonable" and "an employer subject to the FLSA may not make deductions that would violate the FLSA."[68] Section 531.31 of the FLSA similarly states that "[f]acilities furnished in violation of any Federal, State, or local law, ordinance, or prohibition will not be considered facilities 'customarily' furnished."[69] In addition, Respondent's own employment contract states housing would "meet all applicable state and local codes for rental property."[70]

The ALJ correctly found that the housing unit at 1107 Butterworth Court was zoned "suburban industrial" and was not permitted to be used as a residential living quarters.[71] Respondent used 1107 Butterworth Court as a residential unit, in violation of local law. Thus, the housing was not "customarily furnished" pursuant to Section 531.31 of the FLSA, which in turn violated Section 655.22(g)(1).

Moreover, the housing deduction also violated the provision of Section 655.22(g)(1) requiring the deduction to be reasonable. We agree with the ALJ's finding that it is unreasonable to collect rent for a premises in which residential use is prohibited.

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66 Resp. Br. at 40.

67 D. & O. at 2.

68 20 C.F.R. § 655.22(g)(1).

69 29 C.F.R. § 531.31.

70 D. & O. at 37, CX 11, CX 29, CX 42.

71 CX 19, CX 55, CX 56.

Finally, while Respondent argues it was unaware of the zoning ordinance, an employer's failure to know the H-2B program's requirements does not excuse a violation.[72]

Thus, we affirm the ALJ's finding that Respondent substantially failed to comply with Section 655.22(g)(1) by impermissibly deducting the cost of housing at 1107 Butterworth Court.

iii. Back Wages

Respondent contends the ALJ erred in ordering it to pay back wages for the improper uniform and housing deductions. Specifically, Respondent contends that back wages are not an appropriate remedy for violations of Section 655.22(g)(1) because Section 655.65(i) provides that back wages are permissible for violations of Section 655.22(e) and does not mention any other category.

Respondent is correct that Section 655.65(i) specifies that back pay applies to Section 655.22(e) violations.[73] However, this same regulation also provides that appropriate legal or equitable remedies may be imposed for all other violations.[74]

Here, the ALJ ordered Respondent to reimburse $2,083.20 to the 21 H-2B workers who were affected by the improper uniform deductions. The ALJ also ordered Respondent to reimburse $36,000 to the H-2B workers who lived at 1107 Butterworth Court for the improper rent deductions. Both deductions were improperly taken in violation of the applicable regulations. As a result, we conclude that the ALJ's order to reimburse workers for the entire amount of these deductions is a legally appropriate remedy.[75]

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[72] *Adm'r v. Avenue Dental Care*, ARB No. 2007-0101, ALJ No. 2006-LCA-00029, slip op. at 13 (ARB Jan. 7, 2010) (An employer's ignorance of the INA's requirements does not excuse noncompliance.); *Adm'r v. Home Mortg. Co. of Am.*, 2004-LCA-00040, slip op. at 15 (ALJ Mar. 6, 2006) (An employer's failure to read the terms of the TEC or properly learn about the H-2B program requirements amounts to "reckless disregard.").

[73] 20 C.F.R. § 655.65(i).

[74] *Id.*

[75] Notably, in *Deggeller Attractions, Inc.,* the Board remanded the matter to the ALJ to determine whether a housing deduction was properly disclosed, and, if not, what the appropriate remedy would be for a failure to properly disclose a deduction in the job offer under the 2008 regulations. *See Deggeller Attractions, Inc.*, ARB No. 2020-0004, slip op. at 15. However, we distinguish the present case from *Deggeller* because this matter involves an improper deduction in violation of applicable housing and zoning codes.

Thus, we affirm the ALJ's order that Respondent pay $2,083.20 for the improper uniform deduction to the 21 workers listed in RX 47, and $36,000 for the improper housing deduction to the workers reported to have lived at 1107 Butterworth Court.

4. Civil Money Penalties

On appeal, Respondent contends that CMPs are not available for willful misrepresentations. Respondent submits that CMPs may be imposed only for a substantial failure to comply with the provisions of the INA.

We disagree. Respondent's argument is flawed because it quotes only part of 20 C.F.R. 655.65(c). Rather, Section 655.65(c) states:

> The Administrator may assess civil money penalties in an amount not to exceed $10,000 per violation for any substantial failure to meet the conditions provided in the H-2B Application for Temporary Employment Certification or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or successor form, or any *willful misrepresentation* in the application or petition.[76]

Thus, contrary to Respondent's argument, CMPs may be assessed for willful misrepresentations in the application or petition.

The regulations provide several discretionary factors that may be considered when assessing the amount of the CMP. These factors include: 1) the previous history of violations 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.[77]

Because the claims that Respondent violated Section 655.22(a) and 655.22(n) during the 2013 season are barred by the statute of limitations, we vacate the ALJ's order that Respondent pay a CMP of $2,500 for the 2013 substantial failure to comply with Attestation 4 and Section 655.22(a) and $2,500 for the 2013 substantial failure to comply with Attestation 13 and Section 655.22(n).

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[76] 20 C.F.R. § 655.65(c) (emphasis added).

[77] *Id*. at § 655.65(g).

Regarding the remaining violations, we agree with the ALJ's assessment for the reasons stated in the relevant sections above and need not be repeated here. We conclude that the ALJ considered the relevant regulatory factors, and his findings are supported by the record. Thus, we affirm the ALJ's assessment of the CMPs as follows:

- $2,500 for the 2014 substantial failure to comply with Attestation 4 and 20 C.F.R. § 655.22(a) for offering terms and conditions less favorable than those offered to H-2B workers;
- $2,500 for the 2014 willful failure to comply with Attestation 13 and 20 C.F.R. § 655.22(n) for the failure to truly and accurately state the number of H-2B positions needed;
- $2,500 for the 2015 willful failure to comply with Attestation 13 and 20 C.F.R. § 655.22(n) for the failure to truly and accurately state the number of H-2B positions needed;
- $2,500 for the 2013 substantial failure to comply with 20 C.F.R. § 655.22(g)(1) for the improper housing deduction;
- $2,500 for the 2014 substantial failure to comply with 20 C.F.R. § 655.22(g)(1) for the improper housing deduction; and
- $2,500 for the 2015 substantial failure to comply with 20 C.F.R. § 655.22(g)(1) for the improper housing and uniform cleaning deductions.

Therefore, Respondent is ordered to pay a CMP of $16,000.

CONCLUSION[78]

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

SO ORDERED.

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