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Issue Date: 18 February 2016

Case No.: 2015-TAE-00008

In the Matter of

OVERDEVEST NURSERIES, LP
Respondent

DECISION AND ORDER GRANTING ADMINISTRATOR'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S CROSS MOTION FOR SUMMARY DECISION

This matter arises under the Immigration and Nationality Act ("INA" or the "Act") temporary alien employment H-2A visa program and its implementing regulations at 29 C.F.R. Part 501; 20 C.F.R. Part 655, Subpart B; and 8 C.F.R.§ 214.2(h)(5). Administrator of the Wage and Hour Division of the United States Department of Labor ("Administrator") seeks back wages and civil money penalties from Overdevest Nurseries, L.P. ("Respondent") for Respondent's alleged failure to pay certain domestic workers their required rate of pay under the regulations. Both parties have submitted dispositive motions for summary decision. The decision that follows is based upon a thorough analysis of the record, the arguments of the parties, and the applicable law.

Procedural History

An after a 2013 investigation regarding Respondent's participation in the H-2A visa program, the United States Department of Labor, Wage and Hour Division ("WHD") issued a Notice of Determination dated September 25, 2013, after concluding that that Respondent had violated certain provisions in the regulations. Respondent timely requested a formal hearing by letter dated October 18, 2013. On March 20, 2015, Administrator filed an Order of Reference with the Chief Administrative Law Judge in Washington, D.C. The matter was subsequently referred to me.

A Notice of Hearing and Pre-hearing Order was issued on May 5, 2015. By Order dated September 8, 2015, the hearing in this matter was postponed until further notice to allow for consideration of dispositive motions the parties indicated each would file.

On September 17, 2015, Respondent submitted a Motion for Summary Decision and Motion in Limine ("Respondent's Motion") to which was attached the following nine exhibits: a letter dated September 15, 2015, from Administrator's Counsel, Jacob Hyman-Kantor, revising Administrator's back wage calculations (Exhibit 1); Administrator's Response to First Set of Interrogatories – Response to Interrogatory No. 22 (Exhibit 2); a set of documents produced by Respondent in discovery, with Respondent's Bates Stamp Numbers preceded by the letter "R"

(Exhibit 3); a set of documents produced by Administrator in discovery, with Administrator's Bates Stamp Numbers preceded by "ADM" (Exhibit 4); the August 12, 2015 deposition transcript of Ed Overdevest (Exhibit 5); the August 11, 2015 deposition transcript of James Mooney (Exhibit 6); the August 10, 2015 deposition transcript of John Crudup (Exhibit 7); the August 10, 2015 deposition transcript of Richard Torres (Exhibit 8); and a September 17, 2015 Declaration of Ed Overdevest (Exhibit 9). In its Motion, Respondent argues that it has complied with the H-2A regulations in full, including the "corresponding employment" provisions, and thus requests a decision in its favor as a matter of law. Respondent also argues that the Administrator has incorrectly assessed back wages and civil money penalties in this matter.

On September 18, 2015, Administrator submitted a Motion for Summary Decision ("Administrator's Motion") to which the following was attached: a September 11, 2015 Declaration ("Decl.") of John Crudup (with accompanying exhibits A through J); and a September 15, 2015 Declaration of Jacob Heyman-Kantor (with accompanying exhibits K through L). The Exhibits A through L are as follows: a 2012 Application for Temporary Employment Certification (Exhibit A); a 2012 Agricultural and Food Processing Clearance Order ETA Form 790 (Exhibit B); a 2013 Application for Temporary Employment Certification (Exhibit C); a 2013 Agricultural and Food Processing Clearance Order ETA Form 790 (Exhibit D); Respondent's payroll documents for the 2012 growing season (Exhibit E); Respondent's payroll documents for the 2012 growing season through August 2013 (Exhibit F); District Director Patrick Reilly's notes regarding the civil money penalties assessment (Exhibit G); Respondent's payroll documents for the end of 2013 growing season, from September to November 2013 (Exhibit H); Respondent's staff chart (Exhibit I); John Crudup's back wage calculations (Exhibit J); the September 25, 2013 Notice of Determination (Exhibit K); and the August 12, 2015 deposition transcript of Ed Overdevest (Exhibit L).

Administrator's Motion states that there is no genuine issue of material fact, that Respondent failed to pay certain domestic workers the required rates of pay in violation of the regulations, and requests a decision in Administrator's favor as a matter of law. Administrator requests that back wages and civil money penalties be assessed against Respondent.

On October 15, 2015, Respondent submitted its Opposition to Administrator's Motion for Summary Decision ("Respondent's Opposition"). On October 15, 2015, Administrator submitted its Opposition to Respondent's Motion for Summary Decision and Motion in Limine ("Administrator's Opposition") to which was attached an October 15, 2015 Declaration of Jacob Heyman-Kantor (with accompanying Exhibits 1 through 6) in support of Administrator's Opposition. The Exhibits 1 through 6 are as follows: August 2015 email from Jacob Heyman-Kantor with attached Wage and Hour Division Field Operations Handbook (Exhibit 1); the August 11, 2015 deposition transcript of James Mooney (Exhibit 2); a copy of the decision in *Administrator v. Hyatt Farms*, 2005-TAE-00002 (ALJ Nov. 14, 2006) (Exhibit 3); Respondent's July 15, 2015 Response to Administrator's First Set of Interrogatories (Exhibit 4); additional excerpts from the August 12, 2015 deposition transcript of Ed Overdevest (Exhibit 5); and an email from a court reporter providing Ed Overdevest deposition transcript to Administrator on August 19, 2015 (Exhibit 6).

On November 5, 2015, this office received a letter from Administrator clarifying and correcting the back wage computations in this matter.

Statement of Facts

Respondent is a large nursery and wholesale producer of plant material operating in Southern New Jersey. Overdevest Deposition ("Dep.")[1] at 16-17, 34. Respondent has utilized workers from the H-2A visa program since 1999. Overdevest Dep. at 46. The H-2A visa program allows for the lawful admission of temporary, nonimmigrant workers to perform agricultural labor or services of a temporary or seasonal nature. For the 2012 and 2013 growing seasons, Respondent applied for and was certified by the Department of Labor (the "Department" or "DOL") for 55 H-2A workers each year for the "order puller" position. Respondent's Motion, Exhibit 4 at ADM 223, 264; Crudup Decl. ¶ 6

Each season, as part of its applications, Respondent submitted an Application for Temporary Employment Certification (ETA Form 9142) ("TEC") and Agricultural and Food Processing Clearance Order (ETA form 790) ("job order"[2]). Administrator's Motion, Exhibits B-D. Respondent submitted almost identical TECs and job orders in December 2011 and December 2012. Respondent's 2012 job order and TEC list the anticipated period of employment (or period of intended employment) as from February 8, 2012 to November 29, 2012. Crudup Decl., Exhibits A, B. Respondent's 2013 job order and TEC list the anticipated period of employment (or period of intended employment) as from February 11, 2013 to November 30, 2013. Crudup Decl., Exhibits C, D.

Respondent's 2012 job order lists the job specifications for the position as a worker with "[t]hree months of recent nursery experience" who is "familiar with a range of proper plant names and sufficiently familiar with plant identification as to accurately and timely pull and load orders," and who must be able to "[g]enerate occasional written reports." Crudup Decl., Exhibit B. Both job orders contain a broad provision which states that the H-2A worker will also perform "other general nursery tasks as necessary." *Id.*; *see also* Crudup Dep. at 35-42. Ed Overdevest, President of Respondent company, characterized this as a "catch-all" provision that would allow the H-2A workers "to work in lesser skilled tasks, when they're not busy pulling orders or other higher order tasks." Overdevest Dep. at 181-82. Respondent generally refers to workers who do not have the requisite skills listed in the job order, who are limited to basic production activities, as "production workers." Respondent's Motion, Exhibit 3 at R40.

Prior to the 2012 growing season, Respondent's application for workers under the H-2A included a requirement in the job order that stated the H-2A workers must have at least nine months of experience in identifying plants and pulling orders. Overdevest Dep. at 53. For the 2012 application, the Department refused to approve the application requiring nine months of

[1] This refers to the deposition transcript of Ed Overdevest which was included with both Administrator's Motion and Respondent's Motion as Exhibit 5 and Exhibit L, respectively.

[2] The regulations define "job order" as the "document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter- and intra-state job clearance systems based on the employer's Agricultural and Food Processing Clearance Order (Form ETA-790), as submitted to the SWA." 20 C.F.R. § 655.103(b).

experience, and after appealing the decision, Respondent changed the job order to only require three months of experience.[3] Overdevest Dep. at 13, 53. Due to this appeal and delay in approval of H-2A workers, Respondent hired temporary domestic workers; these temporary domestic workers did not have the requisite experience to perform the higher-skilled tasks as listed in the H-2A job orders.[4] Overdevest Dep. at 13, 146.

Respondent concedes that while the H-2A works spend the "majority of their time performing higher skilled tasks," that they "occasionally perform some of the lesser-skilled duties performed by the domestic workers." Respondent's Motion at 5, 7; Overdevest Dep. 85-86, 105-106, 181-182. The domestic workers performed certain work listed in the job orders, but did not possess the skill or ability to perform the higher skilled "order pulling" tasks. Overdevest Dep. 184-186, 112-113, 173; Crudup Dep. at 97; Torres Dep. at 27-28. However, every domestic worker from 2012 and 2013 engaged in activities that are listed in the job orders. Overdevest Dep. at 185.

An investigation and audit was conducted in 2013 by Wage and Hour Division (WHD) Investigators John Crudup and Richard Torres, who then conferred with the WHD Regional Agricultural Coordinator for the Northeast Region, James Mooney. *See* Mooney Dep. at 9-10.[5] James Mooney's position with the WHD involves developing the training materials given to WHD investigators and teaching courses to investigators on the H-2A program. *Id.* at 23-26, 40-41. He also assists with particular investigations upon request—such as when John Crudup requested assistance in this matter. *Id.* at 9. During the 2013 investigation, the domestic workers were not asked questions about their prior nursery experience, and the Department did not obtain any information regarding the prior experience of the domestic workers. Torres Dep.[6] at 73-75; Mooney Dep. at 100-111. After the 2013 investigation, Administrator issued a Notice of Determination letter dated September 25, 2013 finding that Respondent had violated 20 C.F.R. § 655.122(*l*) by failing to pay forty-two domestic workers engaged in corresponding employment the Adverse Effect Wage Rate ("AEWR"). *See* Respondent's Motion, Exhibit 4 (ADM 016-021) ("WHD Notice of Determination").

Administrator later revised its Notice of Determination on September 15, 2015, finding that 70 domestic workers engaged in corresponding employment and increasing the back wages. *See* Respondent's Motion, Exhibit 1. By letter received November 5, 2015, Administrator noted

[3] *See generally* "Decision and Order Affirming the CO's Notice of Deficiency," 2012-TLC-00018 (Feb. 16, 2012).

[4] Three types of workers will generally be referred to in this decision: the temporary/emergency domestic production workers (that Respondent hired in 2012 due to a delay in receiving H-2A workers); the domestic production workers that Respondent generally employs; and the H-2A workers. The 69 workers that Administrator alleged were improperly paid less than the AEWR included the domestic production workers and the temporary/emergency domestic production workers. Furthermore, it is of note that Respondent employs other United States workers as order pullers in addition to its H-2A workers; these workers are paid at least the AEWR. Overdevest Dep. at 13-15.

[5] Administrator's Opposition, Exhibit 2.

[6] Respondent's Motion, Exhibit 8.

a correction of a previous error in the back wage calculations, stating the proper amount of back wages is $92,984.22 for 69 domestic workers (not 70 workers).[7]

Respondent does not dispute that the 70 domestic workers identified by Administrator were paid less than the AEWR. *See* Respondent's Motion at 16; *see also* Crudup Decl., Exhibit I; Overdevest Dep. at 12-14. Administrator initially determined that Respondent owed its domestic workers $72,193.89 in back wages. Crudup Decl. ¶ 8-12, Exhibits E and F. After receiving additional sets of payroll records from 2012 and 2013, as well as more information regarding the job descriptions of certain workers, Administrator adjusted its back wage calculation and determined that Respondent owed its domestic workers $93,179.53 in back wages. Crudup Decl. ¶ 14-15, Exhibits H, I, and J. Citing error, Administrator later reduced the amount of back wages owed to $92,984.22 for 69 domestic workers. *See* Administrator's Letter dated October 27, 2015. Administrator assessed a total of $50,400 in civil money penalties for Respondent's failure to pay its domestic workers in corresponding employment the AEWR rate. *See* WHD Notice of Determination; Crudup Decl. ¶ 13.

The 2013 audit was not the first time that WHD investigated Respondent. Respondent was investigated by Wage and Hour Division Deputy District Director John Kelly in 2007. Mooney Dep. at 66. The issue of corresponding employment was raised, but "no determination was made to charge a violation at the time." Mooney Dep. at 67. In June 2007, John Kelly sent an email to Ed Overdevest after the investigation informing him that the Department would not proceed with a violation, noting that the Department did "not have guidance on comparably employed," but stating that if litigation or a change in the regulations "clear[ed] up the matter," he would inform him of the same. Respondent's Motion, Exhibit 3 at R73; Mooney Dep. at 67-68. Prior to the violations alleged in this matter as a result of the 2013 investigation, Respondent had never been charged with a corresponding employment violation since it began participating in the H-2A program in 1999. Mooney Dep. at 95.

Issues

The following issues are presented for consideration:

1. Were the United States domestic production workers employed by Respondent in corresponding employment with the non-immigrant agricultural H-2A workers employed by Respondent?

2. Are the Administrator's back wage calculations correct?

3. Are Civil Money Penalties assessed by Administrator arbitrary or an abuse of discretion?

[7] Because this letter was received after the submission of both parties' motions and oppositions, the parties incorrectly refer to the 70 workers and the inaccurate back wages calculation throughout their arguments. When summarizing the parties' arguments in this decision, I have refrained from correcting this information. It will be discussed in more detail later in the decision.

Standard for Summary Decision

Summary decision is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. 29 C.F.R. §18.72. The movant bears the burden to show the absence of a genuine issue of material fact and all justifiable inferences are drawn in favor of the non-moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

In determining if summary decision is appropriate, all reasonable inferences must be drawn in favor of the non-moving party, credibility determinations may not be made and evidence may not be weighed. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on its pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324; 29 C.F.R. § 18.72.

Corresponding Employment

Respondent challenges Administrator's determination that domestic production workers that it employed were in corresponding employment with its H-2A workers. Upon a thorough analysis of the record, the arguments of the parties, and the applicable law, these domestic production workers did engage in corresponding employment with the H-2A workers.

The INA, as amended by the Immigration Reform and Control Act of 1986, states that a petition to import an H-2A may not be approved unless "there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition" and "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1).

To protect the wages of domestic workers who are similarly employed to H-2A workers, the Department requires that employers commit to paying domestic workers in "corresponding employment" the same Adverse Effect Wage Rate ("AEWR") rate that the employer must pay its H-2A workers. *See* 75 Fed. Reg. 6884, 6885 (Feb. 12, 2012); 20 C.F.R. § 655.122. The AEWR is the "annual weighted average hourly wage for field and livestock workers" as published by the U.S. Department of Agriculture. 20 C.F.R. § 655.103(b). For workers paid hourly, including both H-2A workers and domestic workers engaged in corresponding employment, "the employer must pay the worker at least the AEWR . . . for every hour or portion thereof worked during a pay period." 20 C.F.R. § 655.122(*l*).

The applicable regulations define corresponding employment as follows:

> The employment of workers who are not H-2A workers by an employer who has an approved H-2A Application for Temporary Employment Certification in any

> work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

20 C.F.R. § 655.103(b).

Respondent has conceded that it employed its domestic workers in work included in the job order. In fact, all of the work that the domestic production workers performed was included in the job orders due to the broad language of the job order, which allowed H-2A workers to perform "other general nursery tasks as necessary." Moreover, the domestic workers did in fact perform agricultural work that was performed by the H-2A workers. Accordingly, per the regulatory language cited above, the domestic workers should have been paid the AEWR rates for all hours worked.

Are the ability, willingness, and qualifications of the domestic workers relevant in determining whether they worked in corresponding employment?

Respondent argues that the domestic workers could not be considered in corresponding employment with the H-2A workers because the domestic production workers were not qualified to perform the "order puller" position of the H-2A workers. In support of its argument, Respondent states that the definition of "corresponding employment" in the regulations must be read in context with the overall regulations and authorizing statute—and that a narrow, literalistic reading is "plainly erroneous and inconsistent with and in conflict with the Department's own interpretation of the provision, and does not reflect the Department's fair and considered judgment." Respondent's Motion at 20. Respondent also argues that a narrow and literalistic reading "ignores the Department's recognition of the need for and role of experience at the time of hiring that is then arbitrarily ignored at the time of pay."[8] *Id*. at 20-21.

Respondent's argument focuses on the two factors that must be considered before an H-2A petition is approved, namely that (1) "there are not sufficient workers who are able, willing, and qualified" to perform the labor, and (2) that the employment of an H-2A worker "will not adversely affect the wages" of a "similarly employed" domestic worker. 8 U.S.C. § 1188(a)(1).

To address the first factor, the employer must take steps to advertise or offer the job to domestic workers. *See* 20 C.F.R. §§ 655.150-158. To address the second factor, employers are required to pay the AEWR to domestic workers in corresponding employment with the H-2A

[8] Alternatively, Respondent argues that the corresponding employment provision "is invalid, as its issuance would have been arbitrary and capricious in light of the authorizing statute, regulatory history, preamble and other provisions of the 2010 H-2A Rule, the Department's experience allowances, and previous agency interpretation." Respondent's Motion at 21. Nothing in the Act or implementing regulations grants an Administrative Law Judge the authority to invalidate a Department regulation as written. *See also* 5 U.S.C. § 706 (the Administrative Procedures Act states that a reviewing court shall set aside Administrative Law Judges findings that are in excess of statutory jurisdiction or authority). However, Respondent has preserved the issue of the validity of the regulations for subsequent review. *See* Respondent's Motion at 21.

workers. Respondent argues that this language shows an inherent consideration of the ability, willingness, and qualifications of the domestic workforce. Respondent's Motion at 21-22.

Respondent argues that the Administrator "did not question the U.S. workers as to their prior nursery experience, nor their qualifications or abilities." *Id.* at 24. Moreover, Respondent argues that the domestic workers for whom the Administrator seeks back wages for did not possess the order pulling experience and were not "able, willing, and qualified" for the position and were not "similarly employed" as the H-2A workers. *Id.* at 25-26.

The ability, willingness, and qualifications of domestic production workers are not relevant in determining whether they worked in corresponding employment.[9] Respondent's reliance on the statutory language of the Act regarding the approval of H-2A petitions, 8. U.S.C. § 1188(a), process is inapposite. As discussed above, the regulations specifically define "corresponding employment," and such definition does not include any reference to a worker's ability, willingness, or qualifications to perform the job duties of the H-2A worker as listed in the job order. *See* 20 C.F.R. § 655.103(b). All that is required is that the domestic workers engaged "in *any work* included in the job order, or in any agricultural work performed by the H-2A workers." *Id.* (emphasis added). Here, there is no genuine dispute as to the fact that Respondent's domestic production workers performed work that was included in the job orders.

Can a worker be engaged in corresponding employment prior to the actual arrival of the H-2A workers?

Respondent argues that of the 69 workers that Administrator seeks back wages for, 43 are temporary/emergency production workers from 2012 and should not be considered as having engaged in corresponding employment because they were working prior to the arrival of the H-2A workers. Respondent's Motion at 26-29.

The regulatory definition of corresponding employment states that "[t]o qualify as corresponding employment the work must be performed *during the validity period of the job order*, including any approved extension thereof." 20 C.F.R. § 655.103(b) (emphasis added). Accordingly, the appropriate inquiry is whether these 43 temporary domestic production workers were employed in any work included in the job order during the validity period of the job order. As previously stated, Respondent does not dispute that these workers engaged in the lesser-skilled work that was included in the job order, but were unable to perform the higher-skilled tasks.

The 2012 job order became valid on February 23, 2012. *See* Administrator's Motion, Crudup Decl. at ¶ 6 and Ex. B (approval stamp date). Respondent listed its anticipated period of

[9] Respondent's Motion includes a request that if Administrator attempts to offer the introduction of any testimony or evidence which is "related to experience or the ability of domestic workers to perform all job duties in 2012 or 2013 job orders," that such testimony or evidence be excluded, i.e., its "Motion in Limine.". *See* Respondent's Motion at 25, n.1. As Administrator has not offered any such evidence, Respondent's Motion in Limine is not ripe for consideration at this time. Moreover, as Administrator argues that the qualifications of the domestic workers are irrelevant on the issue of whether they engaged in corresponding employment, it is unlikely that Administrator would later attempt to offer such evidence. *See* Administrator's Opposition at 3-6.

employment for the H-2A workers as from February 8, 2012 to November 29, 2012.[10] *Id*. Respondent did not begin hiring temporary domestic workers until February 27, 2012. Crudup Decl. at ¶ 15 and Ex. I at R42-43. The H-2A workers did not arrive until the end of March 2012. Overdevest Dep. at 146-147.

Here, the there is no genuine dispute as to the fact that Respondent's temporary domestic production workers performed work that was included in the job orders. Nor is there a genuine dispute that the validity period of the 2012 job order began on February 23, 2012. The plain regulatory language states that the corresponding employment is for work performed during the validity period of the job order. The reason for any delay in the arrival of the H-2A workers for the 2012 season, whether attributable to the Department or to Respondent, does not affect the validity period of the job order and Respondent's obligations during that time. Furthermore, nothing in the Act or regulations establishes that a worker cannot be engaged in corresponding employment simply because the H-2A workers had not yet began working.

Does the regulatory history necessitate a different interpretation of "corresponding employment"?

Respondent also argues that the regulatory history supports a finding that the domestic production workers were not working in corresponding employment. Respondent's Motion at 29-34.

The Department first addressed the concept "corresponding employment" as used in the H-2A program in the introduction to its regulations issued in 1987. *See* 52 Fed. Reg. 20,524, 20,527 (Jun. 1, 1987). These regulations were in effect at the time John Kelly investigated Respondent in 2007. The regulations provided as follows:

> These regulations are also applicable to the employment of other workers hired by employers of H-2A workers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H-2A certification, including any extension thereof. Such other workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.

52 Fed. Reg. 20,524, 20,527 (Jun. 1, 1987).

As previously stated, no violation was charged at that time and John Kelly's email to Ed Overdevest explained that the Department was not proceeding with a violation, in part, due to a lack of guidance on the "comparably employed" issue. Mooney Dep. at 66-68.

[10] The Department of Labor received Respondent's application on December 20, 2011. *See* "Decision and Order Affirming the CO's Notice of Deficiency," 2012-TLC-00018 (Feb. 16, 2012). The Certifying Officer issued a notice of Deficiency on December 27, 2011 rejecting Respondent's nine-month experience requirement. *Id*. Respondent, instead of curing the deficiencies, opted for a formal hearing. *Id.* Administrative Law Judge William S. Colwell affirmed the Certifying Officer's Notice of Deficiency on February 16, 2012. *Id.*

In 2008, the Department of Labor issued new H-2A regulations. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008). The 2008 regulations permitted H-2A workers to perform "[o]ther work typically performed on a farm that is not specifically listed on the Application for Temporary Employment Certification and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the Application for Temporary Employment Certification) and incidental to the agricultural labor or services for which the H–2A worker was sought." 73 Fed. Reg. 77,110, 77,212. Moreover, the definition of corresponding employment was limited to "workers *newly hired* by employers of H–2A workers in the same occupations as the H–2A workers during the period of time set forth in the labor certification approved by ETA as a condition for granting H– 2A certification, including any extension thereof." 73 Fed. Reg. 77,110, 77,230 (emphasis added).

The short-lived 2008 H-2A regulations were replaced by the current regulations issued in 2010. *See* 75 Fed. Reg. 6884 (Feb. 12, 2010). The 2010 regulations removed the language permitting H-2A workers to perform other work "minor" and "incidental" work, removed the "newly hired" limitation of corresponding employment—and signified a "return to the 1987 Rule." 75 Fed. Reg. 6884, 6885-86, 6888.

The Department noted the concerns of commenters who objected to this change, who argued that "the removal of this language would unfairly limit their flexibility in assigning H-2A workers to different kinds of work, and/or to work which was not listed on the job order" and would further subject employers to "debarment if H-2A workers perform work that is outside the scope of the job order for even a small fraction of their time." 75 Fed. Reg. 6884, 6888.

The Department responded that "[i]t is incongruous to claim that such a broad degree of flexibility is needed to encompass work that has not yet been identified, while representing in the Application for H-2A workers that there are not enough U.S. workers available to perform such work. To approve an Application that would allow a worker to perform a substantial amount of work that was not included in the Application would not be in keeping with the plain statutory language requiring the Department to find that there are not enough workers available to perform the work for which H-2A workers are being sought." 75 Fed. Reg. 6884, 6889. The Department further noted that in exercising its enforcement discretion, "it did not intend to debar an employer whose H-2A workers perform an insubstantial amount of agricultural work not listed in the Application," and that debarment requires that the violation be substantial. 75 Fed. Reg. 6884, 6889.

Thus, in the 1987 regulations, workers in corresponding employment were those "in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H-2A certification." The current 2010 regulations define corresponding employment as those non- H-2A workers who perform "any work included in the job order," or "any agricultural work performed by the H-2A workers." 20 C.F.R. § 655.103(b). Despite the differing language, Respondent argues that the 2010 rules are, in essence, a return to the 1987 rules, and that because previous investigations under the old regulations did not result in violations, despite the same circumstances—the Administrator's current position is inconsistent with and contrary to the definition of corresponding employment. Respondent's Motion at 29-34. Respondent contends that the new "any work included in the job order, or in any agricultural

work performed by the H-2A workers" language must be read in context of the Department's rejection of the "minor" and "incidental" work language in the 2008 regulations. Respondent's Motion at 33.

In discussing the changes to the definition of corresponding employment in the 2010 regulations, the Department stated that it was adopting the proposal that "all workers employed by H-2A employers doing work performed by H-2A workers be considered engaged in corresponding employment," noting that this was a "return[] to the requirements of the 1987 Rule, with one difference," the addition of the phrase "or in any agricultural work performed by the H-2A workers." 75 Fed. Reg. 6884, 6885. The Department explained that this "does not require that every worker on a farm be paid the H-2A required wage. It does, however, require that workers employed by an H-2A employer who perform the same agricultural work as the employer's H-2A workers be paid at least the H-2A required wage for that work." 75 Fed. Reg. 6884, 6885.

Respondent's argument relies on using the language in the preamble to the 2010 regulations in order to explain the definition of corresponding employment. However, the operative definition of corresponding employment contained within the 2010 regulations is clear and unambiguous. While the preamble contributes to the general understanding of the INA and its implementing regulations, it does not control the unambiguous definition of corresponding employment contained within the 2010 regulations. *See Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 569-70 (D.C. Cir. 2002) (citing *Ass'n of American R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)); *see also Int'l Union v. MSHA*, 68 Fed. Appx. 205, 206 (D.C. Cir. 2003) ("[I]t is well-settled that preambles, though undoubtedly 'contributing to a general understanding' of statutes and regulations, are not 'operative parts' of statutes and regulations."). Respondent employed its domestic production workers in work included in the job order the domestic workers performed agricultural work that was performed by the H-2A workers. Thus, the domestic production workers were engaged in corresponding employment under the unambiguous 2010 regulatory definition. *See* 20 C.F.R. § 655.103(b).

Moreover, whether Respondent's conduct during the 2012 and 2013 growing seasons would have violated the 1987 regulations is irrelevant.[11] The current regulations applicable to this case have been in effect since 2010. *See* 75 Fed. Reg. 6884 (Feb. 12, 2010). Furthermore, the Department specifically updated the regulations to provide the complete definition of corresponding employment (as opposed to just defining it in the introduction to the regulations). 20 C.F.R. § 655.103(b). Thus, the 2010 regulations were not just a complete return to the 1987 regulations, but rather added the phrase "or in any agricultural work performed by the H-2A workers." 75 Fed. Reg. 6884, 6885. Respondent's reliance on a statement from an email in June 2007 that it would be notified if the corresponding employment issue became more clear does not excuse its failure to familiarize itself and comply with the current regulations. *See* Respondent's Motion, Exhibit 3 at R73. Respondent employed its domestic workers in

[11] Thus, any dispute as to the Department's interpretation of the 1987 regulations is not a dispute as to a material fact. Furthermore, the fact that a WHD Deputy District Director exercised his enforcement discretion in not charging a violation in 2008 due to a lack of guidance on the corresponding employment issue does not necessarily mean that the Department has endorsed Respondent's practices at that time.

agricultural work performed by the H-2A workers; thus, these workers engaged in corresponding employment according to the applicable 2010 regulations.

Is the Administrator's interpretation of corresponding employment feasible for employers participating in the H-2A program?

Respondent argues that it is not feasible for an employer to simultaneously comply with the requirements of the three-fourths guarantee, the limits of work outside of the job description, and the Department's interpretation of corresponding employment—in other words, Respondent posits this creates a "Catch-22." Respondent's Motion at 34-38.

The implementing regulations of the H-2A programs require that employers offer H-2A workers a total number of work hours consistent with the "Three-Fourths Guarantee." The Three-Fourths Guarantee requires that:

> The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

20 C.F.R. § 655.122(i)(1).

If during the total work contract period the employer affords an H-2A worker less employment than that required under the Three-Fourths Guarantee, the employer must pay the worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. 20 C.F.R. § 655.122(i)(1)(iv).

In addition to the Three-Fourths Guarantee, the regulations provide that it is a violation to employ an H-2A worker "outside the area of intended employment, or in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof." 29 C.F.R. § 501.20(d)(1)(vii). A substantial violation of this provision would allow the Administrator to debar an employer from receiving future labor certifications under the H-2A program. 29 C.F.R. § 501.20(a).

The practical effect of these two regulatory provisions is that they encourage an employer to a broad job order which encompasses many different activities, as to avoid employing the H-2A worker in an activity not listed in the job order, and to ensure that there are enough activities that can be delegated to the H-2A employee to meet the Three-Fourths Guarantee. On the other hand, with the corresponding employment provisions in the regulations encourage an Employer to narrow the activities listed in the job order in order to avoid having its non H-2A workers performing "any work included in the job order, or in any agricultural work performed by the H-2A workers," if they wish to avoid paying those workers the AEWR.

Respondent argues that drafting the job order narrowly would require it to pay its workers to sit idly for some period of time while receiving pay. Respondent's Motion at 25. Thus, Respondent drafted its job orders very broadly, including allowing the H-2A workers to perform "other general nursery tasks as necessary." Respondent argues that a plain reading of the regulatory definition of corresponding employment is untenable, as this would lead to a "catch-22" which "requires violation of other regulatory provision (three-fourths guarantee and/or work outside the job order) in order to comply with another regulatory provision (the definition of corresponding employment)." Respondent's Motion at 37.

Respondent is incorrect that following one or more of these regulatory provisions necessitates a violation of the other. There is, of course, a middle ground wherein an employer can draft the job order to include enough activities that H-2A workers do not perform activities outside the job order or sit idly—while not crafting the job order too broadly so that almost all of its agricultural workers are in corresponding employment (e.g., including a catch-all job duties provision). Furthermore, the regulations are not as rigid as Respondent suggests. The Three-Fourths Guarantee necessarily allows for some flexibility by its nature (e.g., the H-2A workers would not be paid to be idle unless employer is unable to offer "employment for a total number of work hours equal to at least three-fourths of the workdays of the total period"). 20 C.F.R. § 655.122(i)(1).

The Department is aware that "certain circumstances or events beyond the control of the employer may make the fulfillment of the contract impossible," and therefore, upon a finding of contract impossibility, the employer is "relieved of the full three-fourths guarantee obligation and is instead permitted to reduce the guarantee to the time period from the start of the work until the time of the contract's termination." 75 C.F.R. § 6884, 6913 (Feb. 12, 2010) (noting that "the contract impossibility provision strikes an appropriate balance between ensuring fairness to workers and flexibility to employers"); *see also* 20 C.F.R. 655.122(o). Additionally, the Department has stated that it would use its enforcement discretion to avoid debarment of an employer when an H-2A worker performs activities outside of the job order due to "unplanned and uncontrollable events (such as a freeze that prevents planting or heavy rains that prevent harvesting) . . . so long as the activities are within the scope of H–2A agriculture, have been occasional or sporadic, and the time spent in total is not substantial." 75 Fed. Reg. 6884, 6889 (Feb. 12, 2010).

An artfully drafted job order maintains the purpose of the Act, to allow the employment of H-2A workers where there are insufficient United States workers who are able, willing, and qualified at the time and place needed, and to avoid "adversely affect[ing] the wages and working conditions of workers in the United States similarly employed." *See* 20 C.F.R. 655.100. Respondent's broadly written job order reflected its desire to employ its H-2A workers (55 H-2A workers each season) in tasks performed by its domestic production workers—while simultaneously wishing to avoid paying those workers in corresponding employment the AEWR. The regulations do not permit Employer to do so, and the domestic workers here should have been paid the AEWR rates for all hours worked. *See* 20 C.F.R. § 655.103(b).

Back Wages

Respondent conceded that it paid its domestic production workers less than the AEWR rate paid to the H-2A workers for the 2012 and 2013 growing seasons. *See* Respondent's Motion at 16; see also Crudup Decl., Exhibit I; Overdevest Dep. at 12-14.

In 2012, Respondent paid most of its domestic workers $9.00 per hour and in 2013, Respondent paid most of its domestic workers $9.25 per hour. Crudup Decl. ¶ 8, Exhibits E and F. In 2012, the AEWR rate in New Jersey was $10.34 and in 2013, the AEWR rate in New Jersey was $10.87. 76 Fed. Reg. 79711, 79711 (Dec. 12, 2011); 78 Fed. Reg. 1259 (Jan. 8, 2013).

In order to determine the amount of back wages owed to the workers engaged in corresponding employment in 2012 and 2013, Administrator subtracted the hourly rate actually paid to each domestic worker from the AEWR that was in effect, and then multiplied that number times the number of hours worked during the growing season. Administrator's Motion at 14; Crudup Decl. ¶ 8-12, Exhibits E and F. Administrator determined that Respondent owed its domestic workers $72,193.89 in back wages. Crudup Decl. ¶ 12. The $72,193.89 amount is listed in Administrator's Notice of Determination letter dated September 25, 2013. *See* WHD Notice of Determination.

Since the Notice of Determination letter dated September 25, 2013, Administrator has amended the back wage calculations three times—through its Order of Reference dated March 20, 2015, and its letters dated September 15, 2015 and November 5, 2015. After the Notice of Determination letter was issued, Administrator obtained two additional sets of payroll records from Respondent relating to the last several months of 2013. Crudup Decl. ¶ 14, Exhibit H. Based on these records, Administrator amended the back wage amount to $84,494.84 by its Order of Reference dated March 20, 2015. *Id.*; Order of Reference (Mar. 20, 2015).

Further information was received by Administrator at a later date which showed an additional 27 domestic workers employed in corresponding employment in 2012 that were not listed on other payroll documents. Crudup Decl. ¶ 15, Exhibits I & J; Heyman-Kantor Decl. ¶ 8-10. Respondent responded to Administrator's First Set of Interrogatories on July 15, 2015—the responses included a chart including the "temporary production workers." Heyman-Kantor Decl. ¶ 6-7; Respondent's Motion, Exhibit 3 at R39-49. This was the first set of documents provided to Administrator with information regarding the 27 "temporary production workers." Heyman-Kantor Decl. ¶ 8; *see also* Crudup Decl. ¶ 15. The chart lists the duties of a production work as "limited to basic production activities" including less skilled work such as weeding, hoeing, and moving plants. Respondent's Motion, Exhibit 3 at R40. While the chart lists "temporary production workers" as a position, it does not provide a more specific description of this position. *Id.*

Ed Overdevest, President of Respondent business, was deposed on August 12, 2015. He further clarified the Respondent's distinction between production workers and temporary production workers. Overdevest Dep. at 13-15. Administrator received a copy of that deposition transcript on August 19, 2015. Heyman-Kantor Decl. at ¶ 10. By letter dated September 15,

2015, Administrator again adjusted the back wage calculation using the same method described above, to take into account the additional 27 domestic workers, and determined that Respondent owed $93,179.53 in back wages. *Id*.; Respondent's Motion, Exhibit 1. By letter received November 5, 2015, Administrator noted a correction of a previous error in the back wage calculations, stating the proper amount of back wages is $92,984.22 for 69 domestic workers (not 70 workers).[12]

Should Administrator be permitted to increase the back wages after its initial determination letter?

Respondent states that when the October 18, 2013 Order of Reference was filed in this matter, Administrator was fully aware of the identities of each of Respondent's employees in the 2012 and 2013 season, as well as the amount that each of those employees was paid. Respondent's Motion at 16-17. Respondent argues that the Administrator's delay in increasing the back wages demand until the eve of the parties filing their dispositive motions is untimely and unfair, and tantamount to a "trial by ambush," and thus it should not be allowed. Respondent's Motion at 16-17 (citing *Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978)). Respondent does not however dispute the Administrator's factual assertions regarding these additional employees, i.e., the nature of their job duties and the wages they received during the relevant period.

As stated above, Administrator first increased the amount of back wages by its Order of Reference on March 20, 2015. Respondent incorrectly asserts that the Order of Reference filed on March 20, 2015 sought $72,193.89 in back wages; Administrator specifically amended the amount to $84,494.84. Respondent's Motion at 16; Order of Reference (Mar. 20, 2015). This increase was timely because Respondent was aware of it even before this case was docketed with the Office of Administrative Law Judges on March 25, 2015. Furthermore, this increase was made to properly take into account continuing violations committed after the Determination Letter was issued on September 25, 2015.

The second increase in back wages as reflected in Administrator's September 15, 2015 letter and later corrected in Administrator's letter received November 2015 were also proper. Prior to Respondent's responses to interrogatories on July 15, 2015, Administrator did not have enough information to determine that the additional 27 domestic workers were engaged in corresponding employment. *See* Heyman-Kantor Decl. ¶ 8; Crudup Decl., Exhibit 8. Administrator could have amended the back wage calculations after receipt of the additional payroll information in July 2015, but waited for further clarification at the August 12, 2015 deposition of Ed Overdevest (the transcript of which was received on August 19, 2015). Thus, Administrator's second increase to the back wages came, at the longest, two months after Administrator received the necessary information regarding the 27 temporary domestic workers. Moreover, this second increase of back wages is based on the same theory set forth in

[12] Administrator explained that the previous computations inadvertently computed back wages twice for the same individual. In its initial computations, Administrator incorrectly stated that Respondent employed an individual named "Carols Guzman," but Respondent did not employ such an individual and the hours reported for this individual are correctly attributed to Respondent's employee, Carlos Gomez. *See* Crudup Decl., Exhibit J.

Administrator's Determination Letter dated September 25, 2013. Thus, there was no unfair surprise and Respondent is not unduly prejudiced by such an amendment.

Respondent also argues that Administrator's increase in back wages does not meet the minimum procedural requirements for a Notice of Determination under 29 C.F.R. §§ 501.31 and 501.32, the requirements for an Order of Reference under 29 C.F.R. § 501.37, nor a motion to amend the Order of Reference under 29 C.F.R. § 18.33.

The regulations at 29 C.F.R. §§ 501.31 and 501.32 provide that a written notice of determination—with specific contents—is required whenever Administrator decides to proceed administratively to enforce contractual obligations or assess a civil money penalty under the Act, among other actions. The contents of the notice shall include "the amount of any monetary relief due or actions necessary to fulfill a contractual obligation" and the "amount of any civil money penalty assessment," and shall set forth the right to request a hearing, the procedures for doing so, and inform any affected persons that the determination shall become final and unappealable in the absence of a timely request for hearing. 29 C.F.R. § 501.32. The September 25, 2013 Notice of Determination meets these requirements. The regulations do not address the process for amending an initial Notice of Determination, but Administrator's subsequent amendments were in writing and included the amount of any monetary relief due or actions necessary to fulfill a contractual obligation and the amount of any civil money penalty assessment. Therefore, the procedural requirements for a notice of determination have been met. The requirement to provide notice of the right to request a hearing is unnecessary at this stage: a formal hearing had already been requested.

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges address the filings of motions and other papers. *See* 29 C.F.R. § 18.33. Nothing in those rules prohibits Administrator from filing written amendments to the initial Notice of Determination as was constructively done in this matter. Amendments after a matter is referred to the OALJ are addressed at 29 C.F.R. § 18.36 which provides that "[t]he judge may allow parties to amend and supplement their filings."[13] Accordingly, Administrator's increase in back wages outlined in the letters from Administrator dated September 15, 2015 and November 5, 2015 meet the minimum procedural requirements for the amendment of a Notice of Determination or Order of Reference as set forth in the regulations.

Civil Money Penalties

Administrator assessed a total of $50,400 in civil money penalties for Respondent's failure to pay its domestic workers in corresponding employment the AEWR rate. *See* WHD Notice of Determination; Crudup Decl. ¶ 13; Crudup Dep. at 51-53. A civil money penalty may be assessed for each failure to pay an individual worker properly in violation of the regulations. 29 C.F.R. § 501.19(a). The ALJ's authority to review the Administrator's assessment specifically includes a determination of the appropriateness of a civil penalty. *See, e.g.*, *Administrator, Wage and Hour Division v. Law Offices of Anil Shaw*, 2003-LCA-20 (ALJ May 19, 2004) (citing *Administrator v. Chrislin, Inc.*, 2002 WL 31751948 (DOL Adm. Rev. Bd.)).

[13] These amendments will be allowed in this matter as there was sufficient opportunity afforded Respondent to address them. Respondent's objections to these amendments as untimely therefore lack merit.

In determining the amount of penalty to be assessed for each violation, the type of violation committed shall be considered with other relevant factors, including, but not limited to: (1) previous history of violations; (2) the number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation; (3) the gravity of the violation; (4) efforts made in good faith to comply with the regulations; (5) explanation from the person charged with the violation; (6) commitment to future compliance; and (7) the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers. 29 C.F.R. § 501.19(b).

In assessing a civil money penalty, Administrator began its calculation with a $1,500 civil money penalty for each of the original 42 workers determined to be owed back wages. Crudup Decl. at ¶ 13. The Administrator considered the factors listed above, and found two of the factors mitigated the civil money penalties in this case. *Id*. Specially, the Administrator found that Respondent's lack of a previous history of violations and Respondent's explanation for its actions at issue merited a 10% reduction for each mitigating factor he deemed applicable. *Id*.; *see also* Answer No. 22, Administrator's Response to First Set of Interrogatories. Administrator found the other mitigation factors inapplicable, as "there were a large number of workers affected by the violations; the violations resulted in low-wage workers being denied significant wages; the employer had made no effort to comply, was not committed to future compliance, and indeed was continuing to violate the regulations; and the employer achieved a financial gain." Crudup Decl. at ¶ 13, Exhibit G.

It was reasonable for Administrator to begin with a $1,500 civil money penalty for each violation, as Respondent's violations were not willful, but rather based on its misunderstanding or disagreement regarding the interpretation of the regulations. *See* 29 C.F.R. § 501.19(c) ("A civil money penalty for each violation of the work contract . . . or the regulations in this part will not exceed $1,500 per violation," with enumerated exceptions); *see also* 29 C.F.R. § 501.19(c)(1) (permitting a civil money penalty of up to $5,000 per violation for willful violations).

The Administrator's reductions based on the above-referenced mitigating factors are also reasonable. For example, Respondent's argument that it relied on an email from June 2007 that it would be notified if the corresponding employment issue became more clear is appropriately considered as part of the explanation from the person charged with the violation—a factor that was already found to warrant a 10% reduction. Administrator's explanation of why the other factors were not mitigating is also reasonable. The 69 workers entitled to back wages are a significant number of workers affected by Respondent's violation, and Respondent achieved a financial gain of over $90,000 due to the violations. Thus, the gravity of the violation is serious, and nothing in the record shows that Respondent has made good faith efforts to comply with the regulations or that it is committed to future compliance. In fact, the day before the September 25, 2013 Notice of Determination was issued, Administrator contacted Ed Overdevest via telephone "to suggest again that he come into compliance. He declined." Crudup Decl. at ¶ 13, Exhibit G. Accordingly, applying the factors set forth at 29 C.F.R. § 501.19(b), a civil money penalty of $50,400 is reasonable. t

The Administrative Review Board has held that the Administrator is vested with enforcement discretion and is able to consider the totality of the circumstances in fashioning an appropriate remedy for a violation. *U.S. Dep't of Labor v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-10 to 25 (ARB May 31, 2005) (not disturbing Administrator's or ALJ's calculations because "they are neither arbitrary nor do they evidence an abuse of discretion."). Here the Administrator properly considered the factors at 29 C.F.R. § 501.19(b) and explained its rationale in terms of each mitigating factor. As Administrator's calculations are reasonable and not arbitrary,[14] they are appropriate in this situation.

Conclusion

Summary decision in favor of the Administrator is appropriate as the Administrator has shown that there is no genuine dispute as to any material fact and that Respondent employed its domestic workers in corresponding employment with its H-2A workers without paying the requisite AEWR—thereby violating 20 C.F.R. § 655.122(*l*). Thus, despite all justifiable inferences drawn in favor of Respondent, Administrator is entitled to summary decision in its favor as a matter of law. Moreover, the Administrator's back wage calculations and Civil Money Penalties are upheld.

ORDER

Respondent's Motion for Summary Decision is hereby DENIED. Administrator's Motion for Summary Decision is hereby GRANTED as follows:

> For failure to pay the Adverse Effect Wage Rate to its domestic workers in corresponding employment to its H-2A employees in 2012 and 2013, Respondent will pay $92,984.22 in back wages owed to 69 domestic workers and $50,400 in civil money penalties.

SO ORDERED.

Digitally signed by LYSTRA HARRIS
DN: CN=LYSTRA HARRIS, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

[14] Indeed, Administrator chose not to increase the civil money penalties, despite the increase in number of violations and the resulting back wages reflected in Administrator's revised back wage calculations. More workers were affected than those initially identified and Respondent achieved greater financial gain than Administrator initially determined; thus, the gravity of the offense was greater. However, because of my own determination that a $50,400 civil penalty is appropriate given the factors at 29 C.F.R. § 501.19(b), I decline to further increase that amount.

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review ("Petition") with the Administrative Review Board ("ARB") within 30 days of the date of this decision. 29 C.F.R. § 501.42. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition, only one copy need be uploaded.

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. §501.42(a).