No.

In the Supreme Court of the United States

DEPARTMENT OF LABOR AND LORI CHAVEZ-DEREMER, SECRETARY OF LABOR, PETITIONERS

v.

SUN VALLEY ORCHARDS, LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The H–2A visa program grants U.S. employers the privilege of "import[ing]" foreign aliens into the United States for temporary agricultural work under special visas. 8 U.S.C. 1188(a)(1). As a condition of granting petitions to import foreign workers, federal law requires an employer to agree to comply with statutory and regulatory requirements governing workers' living and working conditions. Congress has authorized the Secretary of Labor to impose monetary remedies to assure employer compliance with those "terms and conditions." 8 U.S.C. 1188(g)(2). The question presented is:

Whether Article III of the Constitution precludes Congress from assigning to the Secretary of Labor the initial adjudication of proceedings to collect monetary remedies from employers who violate the terms and conditions of participating in the H–2A visa program.

RELATED PROCEEDINGS

United States District Court (D.N.J.):

Sun Valley Orchards, LLC v. *U.S. Department of Labor*, No. 21-cv-16625 (Dec. 8, 2025)

United States Court of Appeals (3d Cir.):

Sun Valley Orchards, LLC v. *U.S. Department of Labor*, No. 23-2608 (July 29, 2025)

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OPINIONS BELOW

The court of appeals' opinion court of appeals (App., *infra*, 1a-19a) is reported at 148 F.4th 121. The district court's opinion (App., *infra*, 20a-46a) is available at 2023 WL 4784204. The Administrative Review Board's decision and order (App., *infra*, 47a-76a), the administrative law judge's decision and order (App., *infra*, 77a-182a), and the Administrator's notice of determination (App., *infra*, 183a-199a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2025. A petition for rehearing was denied on October 15, 2025 (App., *infra*, 200a-201a). On December 23, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari to and in-

cluding February 12, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix. App., *infra*, 202a-212a.

INTRODUCTION

This case presents an important question about the constitutionality of a longstanding federal statute: whether Congress can authorize an executive agency, rather than a federal court, to assess monetary penalties against U.S. employers for violating the terms and conditions under which the federal government grants employers the privilege of "import[ing]" aliens to perform temporary work in the United States under the H–2A visa program. 8 U.S.C. 1188(a)(1). The Third Circuit below held that Article III of the Constitution prohibits Congress from assigning the initial adjudication of such penalties to an agency. That decision warrants this Court's review because it incorrectly invalidates an Act of Congress. Indeed, the court's reasoning casts doubt on all administrative adjudications of employers' violations of conditions of H–2A and related programs.

Such administrative adjudications are permissible because adjudicating the terms and conditions of an immigration-benefits program involves quintessential public rights. While Article III reserves cases involving private rights to courts, Congress may assign certain "historic categories of adjudications" involving public rights to executive agencies. *SEC* v. *Jarkesy*, 603 U.S. 109, 130 (2024). And if a case involves public rights, Congress may empower the Executive Branch to issue monetary penalties that Article III would otherwise generally reserve to courts. See, *e.g.*, *Passavant* v. *United States*, 148 U.S. 214, 221-222 (1893).

Whether to allow aliens into the country as part of a benefit program for employers, and on what conditions, falls in the heartland of public rights. "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by [the Court's] previous adjudications." *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895). Thus, Congress may impose "condition[s] to the right to bring in aliens," affix "a penalty" for violating those conditions, and authorize "executive officers" to assess such penalties "without the necessity of invoking the judicial power." *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339, 342 (1909). *Jarkesy* recognized that historical rule. See 603 U.S. at 129.

More broadly, the public-rights doctrine allows the Executive Branch to adjudicate matters involving "public benefits," because government-created privileges are classic public rights. See *Jarkesy*, 603 U.S. at 130. Thus, Congress can assign cases involving "payments to veterans," "pensions," and "patent rights" to administrative agencies—including cases involving the terms and conditions that beneficiaries must follow to obtain those privileges. *Ibid.*

Those precedents make this a straightforward case. Under the H–2A visa program, federal agencies grant U.S. employers' petitions to import foreign workers into the United States for temporary or seasonal agricultural work. The Executive Branch thereby exercises its broad power over the admission of aliens at the employers' request, to confer a special benefit on employers. In return, as a condition of granting employers' petitions and issuance of the visas, the statute requires em-

ployers to comply with federal requirements governing aliens' living and working arrangements and to accept agency procedures to enforce those requirements. Congress imposed those conditions to help ensure that, by importing foreign workers, U.S. employers do not "adversely affect the wages and working conditions of workers in the United States." 8 U.S.C. 1188(a)(1)(B). Congress has empowered the Secretary of Labor "to take such actions, including imposing appropriate penalties," "as may be necessary to assure employer compliance with [those] terms and conditions." 8 U.S.C. 1188(g)(2).

This case thus concerns the "terms and conditions on which [aliens] may come in" under the H–2A visa program —implicating immigration-related public rights. See *Oceanic Steam*, 214 U.S. at 335 (citation omitted). And this case further concerns employers' breaches of terms and conditions of a public benefit—the privilege of "import[ing]" foreign aliens for temporary work, subject to the program's conditions. 8 U.S.C. 1188(a)(1). Just as transportation companies that breach the conditions of bringing aliens to the United States can be subject to penalties imposed in administrative proceedings, see *Oceanic Steam*, 214 U.S. at 338-340; *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting*, 287 U.S. 329, 334-335 (1932), administrative agencies can impose penalties on employers who breach the regulatory conditions for obtaining visas for foreign workers.

The Third Circuit below instead held that Congress violated Article III because only federal courts can assess monetary remedies against an H–2A employer. The court acknowledged that "immigration is traditionally a matter of public rights" subject to Executive Branch adjudication. App., *infra*, 13a. But it concluded that this case falls outside the public-rights doctrine be-

cause it concerns "employment law" rather than "the admission and exclusion of aliens." *Id.* at 16a. That distinction is illusory. The public-rights doctrine encompasses not only the admission and exclusion of aliens, but also the enforcement of conditions of admission. And when the government grants an employer the privilege of bringing aliens to the United States to perform certain work, the government may impose and enforce conditions concerning the nature of that employment.

The court also emphasized that this case involves the imposition of civil penalties, which are traditionally legal remedies. App., *infra*, 10a-13a. But that is beside the point when a case involves public rights. As this Court has repeatedly held, executive agencies may assess monetary penalties in public-rights cases; those penalties do not in and of themselves transform the case into one that Article III courts must adjudicate. See, *e.g.*, *Lloyd Sabaudo*, 287 U.S. at 334-335; *Oceanic Steam*, 214 U.S. at 338-340; *Passavant*, 148 U.S. at 221-222.

The court of appeals' decision warrants this Court's review. This Court ordinarily grants certiorari when a court of appeals invalidates a federal statute, even absent a circuit conflict. That course is especially appropriate here because the decision below conflicts with this Court's public-rights jurisprudence. The significant practical consequences of the decision below likewise favor review. By one estimate, H–2A workers account for a sixth of the United States' agricultural workforce. The decision below deprives the government of an important tool for ensuring that employers comply with the conditions for employing those workers. The petition for a writ of certiorari should be granted.

STATEMENT

A. Statutory And Regulatory Background

The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, regulates the admission of aliens to the United States. As part of that statute, Congress created the H–2 visa program, "which governed the recruitment of unskilled workers for agricultural and non-agricultural jobs." *Louisiana Forestry Ass'n* v. *Secretary, U.S. Department of Labor*, 745 F.3d 653, 659 (3d Cir. 2014).

In 1986, Congress amended the INA to establish separate visa classifications for agricultural and non-agricultural workers. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, Tit. III, Pt. A, § 301, 100 Stat. 3411. Congress created the new H–2A visa program, under which federal agencies can authorize U.S. employers to "import" foreign nationals into the United States for temporary agricultural work. 8 U.S.C. 1188(a)(1); see 8 U.S.C. 1101(a)(15)(H)(ii)(a). To obtain an H–2A visa, a worker must have "no intention of abandoning" his permanent residence in a foreign country. 8 U.S.C. 1101(a)(15)(H)(ii)(a). The visa thus does not provide a path to permanent residency or U.S. citizenship. See *Hispanic Affairs Project* v. *Acosta*, 901 F.3d 378, 382 (D.C. Cir. 2018).

The ability to "import an alien as an H–2 worker," 8 U.S.C. 1184(c), is a privilege that the government confers upon employers through a multi-step petition process. First, the employer must obtain a certification from the Secretary of Labor that "there are not sufficient workers who are able, willing, and qualified, and who will be available," to perform the work, and that the employment of the worker "will not adversely affect the wages and working conditions of workers in the United

States similarly employed." 8 U.S.C. 1188(a)(1). Then, the employer must file a "petition to import an alien as an H–2A worker" with the Secretary of Homeland Security. *Ibid.*; see 8 U.S.C. 1184(c).[1] If the petition is approved, the alien generally must obtain a visa at a U.S. embassy or consulate and then travel to the United States. See 8 U.S.C. 1201.

As a condition of obtaining the privilege of bringing H–2A workers to the United States, federal law requires the employer to "compl[y] with criteria for certification," including those prescribed by the Secretary of Labor, and to offer workers certain minimum "terms and conditions" of employment established by the Secretary. 8 U.S.C. 1188(c)(3)(A). Employers also must "furnish housing in accordance with regulations." 8 U.S.C. 1188(c)(4). As relevant here, the regulations require the employer to provide suitable housing, 20 C.F.R. 655.122(d); access to a kitchen or meal plan, 20 C.F.R. 655.122(g); safe transportation to and from the worksite, 20 C.F.R. 655.122(h)(4); and guaranteed employment for at least three-quarters of the workdays included in the labor-certification period, 20 C.F.R. 655.122(i)(1). The employer may make certain reasonable deductions from a worker's pay, but deductions may not include a profit to the employer. 20 C.F.R. 655.122(p)(2). And when an employer provides meals to its workers, the "job offer must state the charge, if any, to the worker for such meals." 20 C.F.R. 655.122(g). Those requirements help "ensure that foreign workers will not appear more attractive" than domestic workers and undercut the domestic labor force. *Garcia-Celestino*

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[1] The applicable provisions refer to the Attorney General, but Congress has transferred enforcement of those provisions to the Secretary of Homeland Security. See, *e.g.*, 6 U.S.C. 202(3), 271(b).

v. *Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1285 (11th Cir. 2016).

The INA authorizes the Secretary of Labor "to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with the terms and conditions of employment under [the statute]." 8 U.S.C. 1188(g)(2). The Secretary has issued regulations establishing an administrative process to enforce program obligations, recover back wages, and impose civil penalties. See, *e.g.*, 29 C.F.R. 501.16.

If the Labor Department's Wage and Hour Division determines that an employer has violated the statute or the implementing regulations, it issues a written notice informing the employer of its findings and the remedies sought. See 29 C.F.R. 501.31, 501.32. The employer may then demand a hearing before an administrative law judge (ALJ), see 29 C.F.R. 501.33, who conducts an adversarial hearing and issues a decision, see 29 C.F.R. 501.34-501.41. Any party may appeal the ALJ's decision to the Administrative Review Board, see 29 C.F.R. 501.42, a multimember board of adjudicators appointed by the Secretary, see 85 Fed. Reg. 13,186, 13,188 (Mar. 6, 2020). The Secretary, in her discretion, may review the Board's decision. See *ibid.* The employer may seek judicial review of the agency's final order in federal district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

B. Facts

Respondent Sun Valley Orchards is a farm in New Jersey that grows fruits and vegetables. App., *infra*, 4a. It relied on the H–2A program to hire 96 foreign

workers, alongside 51 U.S. workers, to pick asparagus and peppers from April to October 2015. *Id.* at 4a, 50a.

The workers' shifts lasted for 12 hours each day, with only a single, one-hour break. App., *infra*, 50a. The workers lacked consistent access to drinking water and clean bathrooms while they worked in the fields. *Id.* at 50-51a. Respondent transported workers to and from the fields in buses that were driven by unlicensed drivers and that had worn, unsafe tires and a broken taillight. *Id.* at 51a.

Respondent provided housing that consisted of six bedrooms with 20 bunkbeds in each room. Administrative Record (AR) 1933.[2] The bathrooms were dirty and lacked sufficient hot water; the sinks were broken; the windows and doors lacked screens; and the lidless garbage cans attracted pests. App., *infra*, 51a.

Respondent's job posting promised workers "free cooking and kitchen facilities" so that they could "prepare their own meals," as well as "free transportation" to a nearby grocery store. App., *infra*, 4a-5a (citation omitted). But when the workers arrived at respondent's housing, they were told that they would need to pay $75 to $80 per week for a meal plan (deducted from their weekly pay of $451.60). *Id.* at 140a-141a; A.R. 2720. If workers wanted transportation to buy groceries, respondent would charge them $10 per trip. App., *infra*, 105a & n.123.

Though respondent's housing did have a kitchen, workers lacked access to it. App., *infra*, 62a. Instead, a supervisor used the kitchen to sell beer and soft drinks to the workers. *Id.* at 51a. The supervisor, who lacked a state license to sell alcohol and who did not

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[2] http://dol.gov/sites/dolgov/files/SOL/FOIA/Final-Administrative-Record-Sun-Valley-Orchards-v-DOL.pdf.

maintain records of the sales, "would take workers' checks to the bank to cash them and then return the money to the workers, minus any money owed for meals and beverages." *Id.* at 90a.

About a month after the work started, 19 workers met with respondent's owners and the supervisor to discuss their working and living conditions. App., *infra*, 51a. Workers testified that one of the owners became angry and said that the workers would be fired. *Id.* at 51a-52a. Respondent then gave the workers pre-filled departure forms to sign—forms that falsely stated that the workers were voluntarily leaving because of personal issues, "like a sick or dying loved one." *Id.* at 107a. Respondent submitted the signed forms to the Department of Labor. *Id.* at 52a.

In August 2015, respondent laid off 44 workers midseason after a crop failure—before respondent had met the three-fourths guarantee as to four of the workers. App., *infra*, 52a. The supervisor testified that he chose "troublemakers" to lay off. A.R. 1942. Respondent instructed all 44 laid-off workers to sign departure forms stating, "Work has slowed down, and I would like to return home." *E.g.*, A.R. 1610. One of respondent's owners later explained that he asked workers to sign those forms "to protect against this, this lawsuit." A.R. 3203. The owner also acknowledged, however, that the workers had been fired and that he had not given them a choice to continue working. A.R. 2484.

C. Proceedings Below

1. After an investigation, the Department of Labor's Wage and Hour Division issued a notice finding that respondent violated the H–2A program's requirements and owed civil penalties and back wages. App., *infra*,

183a-199a. Respondent requested a hearing before an ALJ. *Id.* at 7a.

After a multi-day hearing, the ALJ affirmed the Wage and Hour Division's findings in part and modified them in part. App., *infra*, 77a-182a. The Administrative Review Board affirmed the ALJ's decision. *Id.* at 47a-76a. The ALJ and Board found that respondent had committed the following violations:

- Respondent made false promises about kitchen access and failed to disclose its meal charges, see App., *infra*, 75a, in violation of regulations that require employers to furnish either free meals or free kitchen facilities, see 20 C.F.R. 655.122(g); to disclose paycheck deductions in the job offer, see 20 C.F.R. 655.122(p)(1); and to disclose the work contract, see 20 C.F.R. 655.122(q).
- Respondent deducted charges for drinks from workers' paychecks, see App., *infra*, 75a, in violation of a regulation that forbids deductions that include a profit to the employer, see 20 C.F.R. 655.122(p)(2).
- Respondent fired workers before they completed three-fourths of the workdays included in the labor-certification period, see App., *infra*, 75a-76a, in violation of a regulation requiring the employer to guarantee employment for that period, see 20 C.F.R. 655.122(i)(1).
- Respondent attempted to cause workers to waive the three-fourths guarantee, see App., *infra*, 76a, in violation of a regulation that forbids seeking to have a worker waive his rights under the H–2A program, see 29 C.F.R. 501.5.

- Respondent provided housing and transportation that violated the minimum standards set by the regulations. See App., *infra*, 76a; 20 C.F.R. 655.122(d) and (h)(4).

The ALJ and Board found respondent liable for a total of $211,800 in civil penalties and $344,945.80 in back wages. App., *infra*, 7a.

2. Respondent sued the Department of Labor and the Secretary of Labor in federal district court in New Jersey. App., *infra*, 7a. It raised several statutory and constitutional claims, including, as relevant here, the claim that the agency adjudication violated Article III of the Constitution. *Id.* at 7a-8a.

The district court granted the government's motion to dismiss respondent's claims, including its Article III claim. App., *infra*, 20a-46a. The court explained that, under this Court's cases, Congress has "significant latitude to assign adjudication of public rights to entities other than Article III courts." *Id.* at 31a (quoting *Oil States Energy Services, LLC* v. *Greene's Energy Services Group, LLC*, 584 U.S. 325, 334 (2018)). It held that this case involves public rights because it concerns immigration. *Id.* at 33a.

3. The Third Circuit reversed and remanded with instructions to enter judgment in favor of respondent. App., *infra*, 1a-19a. The court sustained respondent's Article III claim and did not reach its other claims. *Id.* at 19a n.6.

The court of appeals first concluded that this case involves private rights because it "is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." App., *infra*, 11a (quoting *SEC* v. *Jarkesy*, 603 U.S. 109, 128 (2024)). The court reasoned that the Department's claim is "like a suit for

breach of contract, which would have traditionally been heard in common law courts." *Id.* at 12a. The court added that the remedies that the agency sought, civil penalties and back wages, are "common law remedies." *Id.* at 13a.

The court of appeals then rejected the government's contention that this suit involves public rights because it concerns immigration. App., *infra*, 13a-14a. Though the court accepted that history permits "non-Article III adjudication for certain immigration-related matters," it concluded that this case falls outside that tradition. *Id.* at 14a. According to the court, "[r]ules about worker hours, housing, cooking, and transportation" concern "employment law" rather than immigration. *Id.* at 16a.

The government filed a petition for rehearing, which the court of appeals denied. App., *infra*, 200a-201a.

REASONS FOR GRANTING THE PETITION

The INA and its implementing regulations authorize employers to obtain special permission from the government to import aliens for temporary agricultural work only if the employers fulfill specified conditions regarding those aliens. Congress has authorized the Secretary of Labor "to take such actions, including imposing appropriate penalties," "as may be necessary to assure employer compliance with th[ose] terms and conditions." 8 U.S.C. 1188(g)(2). In the decision below, however, the Third Circuit held that the statute violates Article III of the Constitution. That decision conflicts with this Court's precedents interpreting Article III. Because it invalidates an important federal statute, it warrants this Court's review.

A. The Decision Below Is Incorrect

Article III allows Congress to assign adjudications involving public rights to executive agencies rather than

federal courts. Immigration-benefits cases such as this one lie at the core of that public-rights doctrine. The court of appeals' reasons for holding that this case falls outside the doctrine's scope lack merit.

1. Congress may assign adjudications involving public rights to executive agencies

Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. Congress may not confer the federal government's "judicial Power" on entities outside Article III. See *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011).

Not every adjudication involves the exercise of "the judicial Power." Executive officers, too, adjudicate—*i.e.*, "determine facts, apply a rule of law to those facts, and thus arrive at a decision." *Freytag* v. *Commissioner*, 501 U.S. 858, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment). They have done so since the beginning of the Republic; for instance, the Patent Board, an executive agency created by the First Congress, adjudicated disputes concerning the patentability of inventions. See *id.* at 910. Agency adjudications may take a "'judicial' for[m]," but they remain "exercises of * * * the 'executive Power.'" *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 17 (2021) (citation omitted).

The line between judicial power and executive power turns in part on the distinction between "private rights" and "public rights." See *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U.S. 325, 334 (2018). "Private-rights disputes * * * lie at the core of the historically recognized judicial power," *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion), and therefore

"may not be removed from Article III courts," *SEC* v. *Jarkesy*, 603 U.S. 109, 127 (2024). But Congress may decide whether to assign adjudications involving public rights to courts or instead to executive agencies. See *Oil States*, 584 U.S. at 334.

"This Court has not 'definitively explained' the distinction between public and private rights, and its precedents applying the public-rights doctrine have 'not been entirely consistent.'" *Oil States*, 584 U.S. at 334 (citations omitted). At its core, though, the concept of "public rights" includes privileges or benefits conferred by the government. See *Jarkesy*, 603 U.S. at 130.

The public-rights doctrine allows the Executive Branch to adjudicate disputes about the granting of governmental privileges—for example, disputes about eligibility for "pensions and payments to veterans." *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932). The doctrine likewise allows the Executive Branch to adjudicate disputes about the withdrawal of those privileges—for example, proceedings involving "reconsideration of the Government's decision to grant a public franchise," such as a patent. *Oil States*, 584 U.S. 334.

Particularly relevant here, the public-rights doctrine allows the Executive Branch to issue penalties that would otherwise be reserved to courts or juries. More specifically, the Executive Branch may assess monetary remedies for violating the terms and conditions of the conferral of a privilege. See, *e.g.*, *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 342 (1909). That is so even though such a remedy deprives the party of property. The executive power includes the power to assess penalties in the course of administering public rights. See, *e.g.*, *Passavant* v. *United States*, 148 U.S. 214, 221-222 (1893). And Congress "has the power to condition issuance" of a benefit on consent to "agency

procedures." *Thomas* v. *Union Carbide*, 473 U.S. 568, 589 (1985); see, *e.g.*, William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1579 (2020); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 Geo. L. Rev. 143, 183 (2019).

2. Immigration-benefits cases involve public rights

Immigration-benefits cases are the paradigmatic example of public-rights disputes. Founding-era history, this Court's cases, and the separation-of-powers principles underlying the public-rights doctrine establish that Congress may authorize the Executive Branch to adjudicate disputes about the granting of immigration benefits, the withdrawal of immigration benefits, and (most pertinent here) compliance with the conditions on which immigration benefits are conferred.

History. Founding-era history establishes that the ability of an alien to enter or remain in the United States is a privilege and that Congress may therefore assign decisions concerning the grant or withdrawal of that privilege to the Executive Branch. In 1798, the Fifth Congress enacted the Nation's earliest immigration laws: the Alien Friends Act, ch. 58, 1 Stat. 570, and the Alien Enemies Act, ch. 66, 1 Stat. 577. The Alien Friends Act, which expired in 1800, authorized the President to "order all such aliens as he shall judge dangerous to the peace and safety of the United States * * * to depart out of the territory of the United States." § 1, 1 Stat. 571 (emphases omitted). The Alien Enemies Act, which is still in effect, authorizes the President, in specified circumstances, to "apprehen[d], restrai[n], secur[e], and remov[e]" citizens of hostile foreign nations. § 1, 1 Stat. 577; see 50 U.S.C. 21. Each statute empowered the Executive Branch to adjudicate

disputes about whether aliens could be expelled from the United States.

In debates over the constitutionality of those laws, Federalists explained that disputes about the admission and expulsion of aliens involve public rights and so need not be assigned to courts. See *Sessions* v. *Dimaya*, 584 U.S. 148, 213-214 (2018) (Thomas, J., dissenting). John Marshall, for example, drafted an address arguing that the Alien Friends Act did not "transfer to the President powers belonging properly to the judiciary" because "the right of remaining in our country is vested in no alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn." *The Address of the Minority in the Virginia Legislature to the People of that State* 9-10 (1799). And a committee of the House of Representatives issued a report observing that aliens "remain in the country" "not as matter of right, but merely as a matter of favor and permission." 9 Annals of Cong. 2987 (1799).

That founding-era history establishes that aliens have no private right to enter or remain in the United States—and, by extension, that American employers have no private right to bring aliens into the United States. The ability to bring in aliens is instead a benefit, and Congress may require employers who seek that benefit to satisfy specified terms and conditions. The public-rights doctrine, in turn, allows Congress to authorize executive officers to enforce those terms and conditions, including by assessing monetary penalties.

Precedent. Congress enacted few laws concerning immigration in the decades after the Alien Acts. But when Congress reasserted its prerogatives to regulate immigration in the late 19th century, it began enacting statutes empowering executive officers to adjudicate immigration-benefits disputes. This Court has upheld

those statutes, rejecting claims that they improperly vested judicial power in the Executive Branch.

To start, Congress has long enacted laws that authorize the Executive Branch to adjudicate whether an alien is statutorily entitled to the privilege of entering the United States.[3] This Court upheld such a statute in *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892), explaining that, although "Congress may, if it sees fit, * * * authorize the courts to investigate and ascertain the facts on which the right to land depends," "the final determination of those facts may [also] be entrusted by Congress to executive officers." *Id.* at 660.

Congress also has long enacted statutes empowering executive officers to adjudicate which aliens to deport from the United States.[4] This Court approved that procedure in *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893), explaining that the "power * * * to expel, like the power to exclude aliens, * * * may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend." *Id.* at 713-714.

For over a century, Congress has likewise enacted, and this Court has upheld, statutes that authorize the Executive Branch to assess monetary exactions against companies that violate the terms and conditions of the

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[3] See, *e.g.*, Page Act of 1875, ch. 141, § 5, 18 Stat. 477-478; Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214; Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1085-1086.

[4] See, *e.g.*, Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566; Immigration Act of 1891, §§ 10-11, 26 Stat. 1086; Immigration Act of 1907, ch. 1134, §§ 20-21, 34 Stat. 904-905.

privilege of bringing aliens to the United States.[5] In *Oceanic Steam*, the Court upheld a law that authorized the Secretary of Commerce and Labor to impose monetary penalties on carriers that brought in aliens with certain contagious diseases, rejecting a claim that the imposition of such a penalty requires "the exertion of judicial power." 214 U.S. at 338; see *id.* at 331-332. The Court explained that Congress's "plenary power" over "the admission of aliens" includes the power "'to prescribe the terms and conditions on which they may come in.'" *Id.* at 335, 343. The Court then determined that Congress may secure the "enforcement" of those terms and conditions "by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Id.* at 339.

Similarly, in *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting*, 287 U.S. 329 (1932), the Court upheld a statute authorizing the Secretary of Labor to impose monetary penalties on transportation companies that brought in certain types of aliens, such as those suffering from insanity, chronic alcoholism, tuberculosis, or a physical disability affecting the alien's ability to earn a living. *Id.* at 331-332. The Court stated that, in exercising "its plenary power to control the admission of aliens," Congress "may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them." *Id.* at 334-335.

Congress has likewise authorized executive officers to assess penalties for violations of other conditions of

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[5] See, *e.g.*, Immigration Act of 1903, ch. 1012, § 9, 32 Stat. 1215-1216; Immigration Act of 1907, § 9, 34 Stat. 901; Immigration Act of 1917, ch. 29, § 9, 39 Stat. 880-881.

bringing aliens to the United States. For example, the Act in *Oceanic Steam* authorized executive officers to assess civil penalties against transportation companies that failed to provide manifests identifying the aliens on board. See Immigration Act of 1903, ch. 1012, § 15, 32 Stat. 1217. Similarly, the Act in *Lloyd Sabaudo* allowed executive officers to impose penalties on transportation companies that refused to bear the expense of returning aliens who had been excluded from the United States. See Immigration Act of 1917, ch. 29, § 18, 39 Stat. 887-888. The statute likewise allowed executive officers to impose penalties on companies that employed crew members with dangerous contagious diseases, § 35, 39 Stat. 896—illustrating that executive enforcement of conditions of transporting aliens to the United States may extend to conditions that do not directly concern the aliens themselves.

Congress, in short, may "exclude aliens from the United States," "establish regulations for sending out" aliens, "prescribe the terms and conditions on which [aliens] may come in," and "commit the enforcement of such conditions and regulations to executive officers." *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 289-290 (1904). This Court has reaffirmed those principles in a long line of cases. See, *e.g.*, *Department of State* v. *Muñoz*, 602 U.S. 899, 907 (2024); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950); *Zakonaite* v. *Wolf*, 226 U.S. 272, 275 (1912); *United States* v. *Ju Toy*, 198 U.S. 253, 261 (1905); *The Japanese Immigrant Case*, 189 U.S. 86, 97 (1903); *Lee Lung* v. *Patterson*, 186 U.S. 168, 175 (1902); *Fok Yung Yo* v. *United States*, 185 U.S. 296, 302 (1902); *Li Sing* v. *United States*, 180 U.S. 486, 495 (1901); *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548 (1895).

More broadly, this Court has consistently treated privileges granted by the government as public rights. It has stated that "[f]amiliar illustrations" of public rights include "pensions" and "payments to veterans," as well as "immigration." *Crowell*, 285 U.S. at 50. It has determined that the public-rights doctrine encompasses cases arising out of the "issuance of registrations and licenses." *Thomas*, 473 U.S. at 589. And it has explained that public rights include "public franchise[s]" granted by the government, such as "[p]atents," the privilege of "erect[ing] a toll bridge," and "permit[s]" to "build railroads or telegraph lines." *Oil States*, 584 U.S. at 337-338.

Although the Members of this Court disagreed in *Jarkesy* about the scope of the public-rights doctrine, all nine Justices agreed that the doctrine encompasses immigration and public-benefits cases. The Court explained that Congress could constitutionally "prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury," *Jarkesy*, 603 U.S. at 129, and that public rights include "public benefits such as payments to veterans, pensions, and patent rights," *id.* at 130 (citation omitted). Justice Gorsuch, joined by Justice Thomas, agreed that the class of public rights has "traditionally included" "immigration" and "the grant of public benefits." *Id.* at 152-153 (Gorsuch, J., concurring). And the dissenters noted that the public-rights doctrine permits executive officers to assess "fines for violation of immigration law barring entry of certain classes of individuals," *id.* at 178 (Sotomayor, J., dissenting), or to resolve matters concerning "public benefits," *id.* at 183 n.6. Under this Court's cases, in short, Congress may require that employers who seek the privilege of bringing in aliens comply with specified con-

ditions, and may authorize the Executive Branch to enforce those conditions through monetary penalties.

Separation-of-powers principles. The separation-of-powers principles underlying the public-rights doctrine confirm that Congress may commit the adjudication of immigration-benefits disputes to the Executive Branch. Immigration is a "distinctive are[a]," *Jarkesy*, 603 U.S. at 120, in which Congress possesses "extensive authority," *id.* at 160 (Gorsuch, J., concurring). That authority includes the power to impose "condition[s] to the right to bring in aliens" and enforce such conditions "by penalties [assessed] by administrative authority." *Oceanic Steam*, 214 U.S. at 340, 342.

Congress, moreover, shares the power to regulate immigration with the President. See *Knauff*, 338 U.S. at 542. The authority to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Ibid.*; accord *Trump* v. *United States*, 603 U.S. 593, 607 (2024). That matters because this Court has distinguished "between cases of private right and those which arise * * * in connection with the performance of the constitutional functions of the executive." *Crowell*, 285 U.S. at 50. The enforcement of the conditions of a visa program arises "in connection with" the Executive Branch's "constitutional functions" concerning immigration. *Ibid.*

Finally, allowing Congress to assign the adjudication of immigration-benefits cases to the Executive Branch would pose no threat to Article III. As explained above, courts historically have not possessed the exclusive power to administer immigration benefits or to enforce the conditions on which such benefits are conferred. Statutes assigning immigration adjudications such as this one to executive officers thus do not imperil "the constitutional birthright of Article III judges." *Well-*

ness International Network, Ltd. v. *Sharif*, 575 U.S. 665, 689 (2015) (Roberts, C.J., dissenting).

3. Contrary to the court of appeals' analysis, this case fits within the public-rights doctrine

Under the principles discussed above, this case is in the heartland of the public-rights doctrine. The H–2A visa program offers employers a package of valuable benefits. If the employer files a successful "petition to import an alien as an H–2A worker," 8 U.S.C. 1188(a)(1), the alien sponsored by the employer may obtain a visa that enables the alien to travel to the United States, enter the country, remain here for the duration of the visa, and perform agricultural work for the employer. Neither the employer nor the alien has a private right to those privileges.

As a condition of conferring those benefits, Congress has required employers to comply with requirements designed to ensure that the employment of H–2A workers "will not adversely affect the wages and working conditions of workers in the United States." 8 U.S.C. 1188(a)(1)(B). And employers who accept those benefits do so with the understanding that Congress has authorized the Secretary of Labor to "assure employer compliance with [those] terms and conditions" by "imposing appropriate penalties," 8 U.S.C. 1188(g)(2), and that the Secretary has established an elaborate administrative procedure, with hearings and appeals, to impose those penalties and to oversee compliance with program conditions, see 29 C.F.R. 501.30 *et seq.* Those provisions fit comfortably within Congress's power to "prescribe the terms and conditions" of bringing in aliens and "commit the enforcement of such conditions" "to executive officers." *Oceanic Steam*, 214 U.S. at 335 (citation omitted).

The court of appeals nonetheless concluded that this case "does not fit within" the public rights doctrine. App., *infra*, 17a. The court gave three reasons for reaching that conclusion, but none is sound.

Scope of the "immigration exception." The court of appeals principally reasoned that what it called the "'immigration' exception to Article III" is limited to matters that "directly address the admission and exclusion of aliens." App., *infra*, 15a-16a. In the court's view, this case "falls outside the immigration exception" because the H–2A program's regulations are designed to "vindicate the domestic national policy goal of preserving 'the wages and working conditions of workers,'" rather than to address the admission and exclusion of aliens. *Id.* at 16a (quoting 8 U.S.C. 1188(a)(1)(B)). The program's "[r]ules about worker hours, housing, cooking, and transportation," the court stated, concern "employment law," not immigration. *Ibid.*

That line of reasoning rests on an illusory distinction that contradicts this Court's cases. The executive power to adjudicate disputes over "the admission and exclusion of aliens," App., *infra*, 16a, includes the power to enforce the "terms and conditions on which they may come in," *Oceanic Steam*, 214 U.S. at 335, which are a critical aspect of federal immigration law. This Court has reiterated that settled principle many times. For instance:

- "The power of Congress * * * to prescribe the terms and conditions upon which [aliens] may come to this country," and to have those terms "enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." *Lem Moon Sing*, 158 U.S. at 547.

- "That Congress may * * * prescribe the terms and conditions upon which certain classes of aliens may come to this country * * * and commit the enforcement of such * * * conditions * * * exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this [C]ourt." *Japanese Immigrant Case*, 189 U.S. at 97.
- "Repeated decisions of this [C]ourt have determined that Congress has the power * * * to prescribe the terms and conditions on which [aliens] may come in * * * and to commit the enforcement of such conditions and regulations to executive officers." *Turner*, 194 U.S. at 289-290.[6]

Consistent with that principle, this Court held in *Oceanic Steam*, for example, that the Executive Branch could assess a penalty against a steamship company that had brought in passengers with contagious diseases, finding it "beyond all question constitutional" for Congress, "as a condition to the right to bring in aliens," to impose "a penalty for every alien brought to the United States afflicted with [a] prohibited disease." 214 U.S. at 342. In *Lloyd Sabaudo*, the Court similarly held that the Executive Branch could fine a steamship company that that brought in prohibited passengers, noting that Congress may "impose appropriate obligations" as a condition of the right to bring in aliens, "sanction their enforcement by reasonable money penalties," and "invest in administrative officials the power to impose and enforce" those penalties. 287 U.S. at 334. Just as the Executive Branch may enforce conditions on steamship companies designed to ensure that aliens entering the

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[6] Accord, *e.g.*, *Mandel*, 408 U.S. at 766; *Ju Toy*, 198 U.S. at 261.

United States (or crew members traveling with them, see p. 20, *supra*) do not spread contagious diseases, it may enforce conditions on employers designed to ensure that such aliens do not undermine the domestic labor market.

This case indisputably involves enforcement of the "condition[s] of the right" "to bring in aliens." *Oceanic Steam*, 214 U.S. at 342. The requirements at issue here apply only to employers who seek "to import an alien as an H–2A worker." 8 U.S.C. 1188(a)(1). An employer who does not participate in the program is free to hire domestic workers, such as U.S. citizens or permanent residents, without complying with the program's "[r]ules about worker hours, housing, cooking, and transportation." App., *infra*, 16a. Executive enforcement of the program's "terms and conditions," 8 U.S.C. 1188(g)(2), is thus fully consistent with Article III.

It makes no difference that the conditions here are designed in part "to vindicate the domestic national policy goal" of protecting the domestic labor force. App., *infra*, 16a. Immigration laws often serve domestic goals —including the goal of "protecting the domestic labor market." *Plyler* v. *Doe*, 457 U.S. 202, 208 n.5 (1982). Such a goal does not transform the ability to bring aliens to the United States into a private right. The law in *Oceanic Steam*, which forbade bringing in aliens with contagious diseases, was likewise designed to vindicate a domestic goal: protecting the public health. Yet this Court still held that the Executive Branch could assess penalties for violations of that law.

In distinguishing between foreign and domestic goals, the Third Circuit also failed to appreciate that the public-rights doctrine allows the Executive Branch to adjudicate matters arising out of "the granting of public benefits"—even domestic benefits such as "pensions,"

"payments to veterans," and "patent rights." *Jarkesy*, 603 U.S. at 130. An employer's ability to "import an alien as an H–2A worker," 8 U.S.C. 1188(a)(1), is such a benefit. Congress may therefore empower an agency to assess monetary penalties to enforce the conditions of receiving that benefit—regardless of whether those conditions serve domestic or foreign goals.

Nature of the claim. The court of appeals cited the "nature of [the Department's] claim" in concluding that this case falls outside the public-right doctrine. App., *infra*, 11a. The court was correct that the nature of the claim is a pertinent (though not dispositive) factor. One of the "hallmark[s]" of a suit concerning private rights is that it is made of "'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" *Jarkesy*, 603 U.S. at 127-128 (citation omitted). "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights." *Id.* at 128.

That factor, however, cuts against respondent. The traditional work of the courts at Westminster did not include adjudicating immigration disputes such as this one. That was instead the province of the Crown in England, see *Fong Yue Ting*, 149 U.S. at 709, and of the Executive Branch in founding-era America, see pp. 16-17, *supra*.

Contrary to the court of appeals' suggestion, this case is not "like a suit for breach of contract." App., *infra*, 12a. A contract claim seeks to enforce terms to which the parties have agreed, see *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197 (1819); this case, by contrast, involves the enforcement of terms imposed by the government as a condition of bringing aliens into the United States. A contract claim is typically brought by a party to the contract, see *Bank of the Republic* v. *Mil-*

lard, 10 Wall. 152, 156 (1870); the administrative proceeding here, by contrast, was filed by the government. And monetary penalties, one of the remedies the government sought here, generally are not available in contract cases. See *Tayloe* v. *Sandiford*, 7 Wheat. 13, 16-18 (1822).

Monetary remedies. Finally, the court of appeals found it "significant" that the government "sought common law remedies: civil penalties and back wages." App., *infra*, 13a. The court was correct that, in general, the imposition of such monetary remedies is the province of Article III courts. See *Jarkesy*, 603 U.S. at 123. But the public-rights doctrine is a well-settled "exception" to that general rule. *Id.* at 120. Applying that doctrine, *Oceanic Steam* explained that, "[a]s the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject," Congress may impose "restrictions on the coming in of aliens" and enforce those restrictions "by penalties [assessed] by administrative authority." 214 U.S. at 340. *Lloyd Sabaudo* reaffirmed that, in exercising its "plenary power to control the admission of aliens," Congress may "impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them." 287 U.S. at 334-335.

Immigration is not the only area in which the public-rights doctrine allows the government to "extract civil penalties in administrative tribunals." *Jarkesy*, 603 U.S. at 131 n.2. For instance, Congress, in exercising its plenary power over foreign commerce, may authorize customs officers to assess penalties against importers who undervalue their merchandise. See *Passavant* v. *United States*, 148 U.S. 214, 221-222 (1893); *Bartlett* v. *Kane*, 16 How. 263, 274 (1854). Similarly, Congress, in

exercising the taxing power, may empower the Internal Revenue Service to assess tax penalties. See *Helvering* v. *Mitchell*, 303 U.S. 391, 402 & n.7 (1938). The nature of the remedies sought thus does not overcome the rule that immigration is a matter of public right.

B. The Decision Below Warrants This Court's Review

1. This Court's review is warranted because the court of appeals held a federal statute unconstitutional. "[W]hen a lower court has invalidated a federal statute," the Court's "usual" approach is to grant certiorari. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). Indeed, the Court applies a "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay).

This Court has thus recently and repeatedly reviewed decisions invalidating federal statutes, even in the absence of a circuit conflict. See, *e.g.*, *Kennedy* v. *Braidwood Management, Inc.*, 606 U.S. 748, 759 (2025); *Fuld* v. *Palestine Liberation Organization*, 606 U.S. 1, 11 (2025); *Jarkesy*, 603 U.S. at 120; *United States* v. *Rahimi*, 602 U.S. 680, 690 (2024); *Vidal* v. *Elster*, 602 U.S. 286, 292 (2024); *Haaland* v. *Brackeen*, 599 U.S. 255, 272 (2023); *Torres* v. *Texas Department of Public Safety*, 597 U.S. 580, 586 (2022); *United States* v. *Vaello Madero*, 596 U.S. 159, 164 (2022). The same course is appropriate here, especially because, as discussed above, the court of appeals' decision conflicts with this Court's precedents on the public-rights doctrine. See pp. 17-22, *supra*.

The practical significance of the decision below underscores the need for this Court's review. In Fiscal

Year 2024, the most recent year for which statistics are available, the United States issued more than 315,000 H–2A visas. See U.S. Department of State, *Report of the Visa Office 2024,* Tbl. XV(B), *Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards): 2020-2024*.[7] According to one estimate, H–2A workers account for 16% of the United States' agricultural workforce. See Elizabeth Weber Handwerker, Cong. Research Serv., IF12979, *Work Authorization Among Hired Agricultural Workers* (Apr. 30, 2025).[8]

The H–2A program's terms and conditions balance "competing goals." *AFL-CIO* v. *Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991). On the one hand, Congress sought "to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on unauthorized workers." 73 Fed. Reg. 76,891, 76,891 (Dec. 18, 2008). On the other hand, Congress sought to ensure that foreign labor "will not adversely affect the wages and working conditions of workers in the United States." 8 U.S.C. 1188(a)(1)(B). The statutory and regulatory rules governing working and living conditions play a crucial role in promoting the latter objective. The imposition of monetary remedies, in turn, helps ensure that employers comply with those rules. By invalidating the provision authorizing the Secretary to assess those remedies in administrative proceedings, the court of appeals upset the careful "balance" that Congress struck between "providing an adequate labor supply" and "protecting the jobs of domestic workers." *AFL-CIO*, 923 F.2d at 187.

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[7] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2024.html

[8] https://congress.gov/crs-product/IF12979

Finally, this case would provide this Court with an opportunity to clarify the public-rights doctrine. The Court first recognized that doctrine 170 years ago. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). Yet the Court still "has not 'definitively explained' the distinction between public and private rights." *Jarkesy*, 603 U.S. at 131 (citation omitted). The Court has noted that its opinions on the public-rights doctrine "have not always spoken in precise terms" and that "[t]his is an 'area of frequently arcane distinctions and confusing precedents.'" *Id.* at 130 (citation omitted). Although resolving this case would not require the Court to adopt a grand unified theory of public rights, it would enable the Court to delineate the proper methodology for judging the doctrine's scope.

2. This case is a suitable vehicle for resolving whether the challenged statute complies with Article III. The government invoked the public-rights doctrine in both the district court and the court of appeals, and both courts squarely addressed that issue. See App., *infra*, 9a-17a; *id.* at 31a-33a.

No threshold procedural obstacle would preclude this Court from reaching the question presented. To be sure, the government argued below that, by failing to raise its Article III claim before the ALJ, respondent had either forfeited the claim or failed to exhaust it. See App., *infra*, 17a. But the court of appeals rejected those contentions, see *id.* at 17a-19a, and the government has not asked this Court to review that aspect of the court of appeals' decision. Because forfeiture and exhaustion do not implicate subject-matter jurisdiction in this case, moreover, this Court has no independent obligation to consider those issues.

3. This Court need not hold the petition for a writ of certiorari in this case pending the resolution of *FCC* v.

AT&T, Inc., cert. granted, No. 25-406 (oral argument scheduled for Apr. 21, 2026), and *Verizon Communications Inc.*, cert. granted, No. 25-567 (oral argument scheduled for Apr. 21, 2026). Those cases present the question whether a statutory scheme under which an agency may initially assess a civil penalty, but a party may obtain a de novo jury trial when the agency sues to recover the penalty, satisfies the Seventh Amendment and Article III. See Pet. at I, *AT&T*, *supra* (No. 25-406); Gov't Cert. Br. at I, *Verizon*, *supra* (No. 25-567). That issue is distinct from the question whether the public-rights doctrine allows Congress to assign an immigration adjudication such as this one to the Executive Branch rather than an Article III court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2608

SUN VALLEY ORCHARDS, LLC, APPELLANT

v.

U.S. DEPARTMENT OF LABOR;
UNITED STATES SECRETARY OF LABOR

Argued: Apr. 10, 2025
Filed: July 29, 2025

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1:21-cv-16625)
District Judge: Hon. Joseph H. Rodriguez

OPINION OF THE COURT

Before: HARDIMAN, PORTER, and SMITH, *Circuit Judges*.

HARDIMAN, *Circuit Judge*.

The United States Department of Labor (DOL) alleged that Sun Valley Orchards, a New Jersey farm, breached an employment agreement formed under the H-2A nonimmigrant visa program. Instead of pursuing its case in a federal district court, DOL imposed hun-

dreds of thousands of dollars in civil penalties and back wages through in-house administrative proceedings. Sun Valley challenged this order under the Administrative Procedure Act, but the District Court dismissed its claims. Following the Supreme Court's recent decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024), we hold that Sun Valley was entitled to have its case decided by an Article III court. We will reverse.

I

A

Under the H-2A nonimmigrant visa program, domestic employers may temporarily hire foreign laborers to perform seasonal agricultural work. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Because the program exists at the intersection of labor and immigration law, it is administered jointly by DOL and the Department of Homeland Security (DHS). Prospective H-2A employers must obtain two forms of authorization: a labor certification from DOL and a visa petition approval from DHS. *See id.* § 1188(a).

This case arises from regulations under the labor certification process. The Immigration and Nationality Act (INA) requires prospective H-2A employers to demonstrate that:

> (A) 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
>
> (B) 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.

Id. § 1188(a)(1).

To satisfy that statutory requirement, employers must first attempt to recruit U.S. workers. *See id.* § 1188(b)(4); 20 C.F.R. § 655.121(f). To that end, employers must offer U.S. workers "no less than the same benefits, wages, and working conditions" that the employer offers H-2A workers. 20 C.F.R. § 655.122(a). Regulations dictate what benefits H-2A workers—and therefore, corresponding U.S. workers—must receive. *See generally id.* § 655.122. Relevant here, employers must provide no-cost housing, *see id.* § 655.122(d)(1), access to a kitchen or meal plan, *see id.* § 655.122(g), and transportation to the work site, *see id.* § 655.122(h). These conditions are incorporated into a "job order," which is posted domestically before it is circulated to foreign workers. *Id.* § 655.121(f).

The job order functions as a work contract absent a written agreement, and DOL may enforce its terms. *See id.* § 655.122(q). Federal law authorizes the Secretary of Labor "to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under" the H-2A program. 8 U.S.C. § 1188(g)(2). Relying on that language, DOL has promulgated regulations authorizing its Wage and Hour Division to impose civil penalties and back wages on participating employers.[1] *See* 29 C.F.R. § 501.16; 20 C.F.R. § 655.101(b).

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[1] DOL may enforce contractual obligations on behalf of both H-2A workers and workers in "corresponding employment," which can include U.S. workers. 29 C.F.R. § 501.0; *see also* 20 C.F.R.

An employer targeted for enforcement may request a hearing before an Administrative Law Judge (ALJ). *See* 29 C.F.R. § 501.33. ALJs are removeable by the Secretary of Labor for cause, *see* 5 U.S.C. § 7521(a), and the Federal Rules of Evidence do not apply to their proceedings, *see* 29 C.F.R. § 501.34. ALJ decisions become final unless review is taken by the Administrative Review Board. *See id.* § 501.42.

B

Sun Valley is a farm in New Jersey. The farm grows fruits and vegetables, including asparagus, zucchini, cucumber, eggplant, peppers, and peaches. Sun Valley relies on seasonal workers hired through the H-2A program.

Sun Valley first participated in the program in 2015, hiring 96 foreign workers and 51 corresponding domestic workers. Through a job order, Sun Valley promised at least forty hours of work per week for twenty-six weeks of employment. Consistent with applicable regulations, Sun Valley guaranteed employment for "the hourly equivalent of 3/4" of the hours contemplated by the agreement. App. 203. It offered no-cost housing and free transportation to the worksite. And it promised to "furnish free cooking and kitchen facilities to those workers who are entitled to live in the employers' housing so that workers may prepare their own meals"

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§ 655.103(b) (defining "corresponding employment"). This "ensure[s] that foreign workers will not appear more attractive to the 'employer' than domestic workers, thus avoiding any adverse effects for domestic workers." *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1285 (11th Cir. 2016).

and to provide "free transportation" to the closest grocery store. App. 193.

According to DOL, Sun Valley did not keep those promises. After spending time at the farm in 2015, agency investigators identified several job order violations. DOL confirmed those violations in a letter to Sun Valley, assessing hundreds of thousands of dollars in civil penalties and back wages.

DOL first identified violations concerning housing. Sun Valley's job order had promised its employees no-cost housing satisfying "the full set of DOL Occupational Safety and Health Administration (OSHA) standards." App. 193; *see also* 20 C.F.R. § 655.122(d)(1). But the investigation found that "the housing facility provided for workers was missing window screens and had screen doors not in good repair," which contributed to an "insect infestation throughout the camp." App. 154. The investigation also revealed that "[s]everal bathroom sinks did not have hot water, refuse containers throughout [the] facility were missing fly tight lids and multiple mattresses used by occupants for sleeping purposes were directly on the floor without a bed frame." *Id.* DOL assessed $3,600 in civil penalties for these alleged violations.

DOL also found violations related to Sun Valley's meal plan. Sun Valley's job order had not mentioned a meal plan, instead promising to "furnish free cooking and kitchen facilities . . . so that workers may prepare their own meals" and to provide "free transportation" to nearby grocery stores. App. 193. The investigation revealed, however, that Sun Valley had failed to provide meaningful kitchen access in violation of the job order, instead deciding to charge workers for meals

without notice. The investigator also found that a supervisor regularly charged workers for drinks. Because Sun Valley did not provide kitchen access, failed to give notice of its alternative meal plan, and sold drinks at a profit, DOL assessed $198,450 in penalties and $234,079.28 in back wages.

DOL identified a violation related to transportation, as well. H-2A employers must provide workers with transportation to the job site that "compl[ies] with all applicable local, State, or Federal laws and regulations," including those governing "transportation safety standards, driver's licensure, and vehicle insurance." 20 C.F.R. § 655.122(h)(4)(i). Consistent with that requirement, Sun Valley promised its employees "free transportation" from the "housing facility both to and from the daily work site." App. 205. But DOL's investigation revealed that "three of the five vehicles used to transport workers had insufficient tread on the tires for safe operation and one had a non-functioning rear directional." App. 154-55. The investigation also revealed that "the five vehicles used to transport H-2A and corresponding [domestic] workers were operated by drivers who failed to possess valid, unexpired driver's licenses." App. 155. DOL assessed $7,500 in civil penalties for this violation.

Finally, DOL claimed that Sun Valley violated the "three-fourths guarantee." *Id.* Consistent with regulations, Sun Valley had guaranteed employment for "the hourly equivalent of 3/4" of the workdays contemplated by the job order. App. 203; *see also* 20 C.F.R. § 655.122(i). But DOL's investigation revealed that, following a dispute between workers and management, Sun Valley "constructively forced [some employees] to

return home prior to the end of the contract period," coercing them to "sign a form . . . stating that they were leaving early for 'personal reasons.'" App. 155-56. This action, DOL alleged, violated both Sun Valley's job order and a regulation prohibiting employers from "seek[ing] to have an H-2A worker . . . waive any rights conferred under" laws and regulations governing the program. 29 C.F.R. § 501.5. DOL assessed $2,700 in penalties and $135,623.94 in back wages for these violations.

All told, Sun Valley was assessed $212,250 in civil penalties and $369,703.22 in back wages, payable directly to DOL. DOL notified Sun Valley of its "right to request a hearing" before an ALJ to contest the assessment. App. 150; *see also* 29 C.F.R. § 501.33. But if the farm failed to request a hearing within thirty days, DOL's findings would become "the final and unappealable Order of the Secretary." App. 150.

C

Sun Valley timely requested a hearing before an ALJ. The ALJ affirmed in part and modified in part DOL's findings. In a lengthy written opinion, the ALJ agreed with DOL that Sun Valley violated a host of job order provisions. The ALJ parted with DOL's view only as to the amount of civil penalties and back wages owed, modifying those figures to $211,800 and $344,945.80, respectively. Sun Valley petitioned the Administrative Review Board for review, which affirmed the ALJ's decision in its entirety.

Sun Valley challenged DOL's decision in the District Court, seeking declaratory and injunctive relief under the Administrative Procedure Act. It alleged several statutory and constitutional defects in DOL's order, in-

cluding that: (1) it adjudicated private rights in violation of Article III of the Constitution, (2) the ALJ presiding over the case was appointed and insulated from removal in violation of Article II of the Constitution, (3) the penalties and back wages assessed by the order were excessive in violation of the Eighth Amendment, and (4) DOL lacked statutory authority to impose civil penalties and back wages through administrative proceedings.[2] DOL moved to dismiss, and both parties cross-moved for summary judgment.

The District Court granted DOL's motion to dismiss all of Sun Valley's claims. The Court first addressed Sun Valley's Article III claim, holding that agency adjudication was appropriate because DOL's action fit within the "public-rights doctrine." *Sun Valley Orchards, LLC v. Dep't of Lab.*, 2023 WL 4784204, at *6 (D.N.J. July 27, 2023). The Court next rejected Sun Valley's claim that DOL lacked statutory authority to impose civil penalties and award back wages in-house, reasoning that the "clear language of the statute" vested DOL with that authority. *Id.* at *7, 10-11. As for its Article II claims, the Court concluded that Sun Valley failed to exhaust the issue before the agency and dismissed on that basis. But it also explained that ratification cured any Appointments Clause defect, and that ALJs are shielded from removal by only one level of good-cause protection. Finally, the Court held that the civil penalty award did not violate the Excessive Fines Clause, explaining that it was "not grossly dispropor-

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[2] Sun Valley also alleged that DOL's order was "not supported by substantial evidence," "an abuse of discretion," or "otherwise not in accordance with law." App. 136. The District Court dismissed that claim as well, but Sun Valley does not raise it on appeal.

tionate to Sun Valley's offenses." *Id.* at *11. Sun Valley filed this appeal.

II

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. "A district court's order dismissing a complaint is subject to plenary review." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1197 (3d Cir. 1993). Under the Administrative Procedure Act, we must "hold unlawful and set aside" DOL's action if we find it to be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

III

We begin and end with Sun Valley's Article III argument. The Constitution vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. 3, § 1. The judges of those courts enjoy life tenure and salary protection, attributes that preserve an "independent spirit" that is "essential to the faithful performance" of their duty. The Federalist No. 78, p. 469 (C. Rossiter ed. 1961) (A. Hamilton). Because non-Article III tribunals lack these important qualities, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

On top of that rule, the Supreme Court has explained that certain "public rights" cases may be adjudicated outside Article III. *Id.* Because the public rights exception "has no textual basis in the Constitution," it must "derive instead from background legal principles." *Jarkesy*, 603 U.S. at 131. History therefore looms large in the public rights analysis, requiring courts to pay "close attention to the basis for each asserted application of the doctrine." *Id.* In evaluating whether a given case fits within the public rights exception, we look for "a serious and unbroken" history of non-Article-III resolution. *Id.* at 153 (Gorsuch, J., concurring).

With these principles in mind, we turn to Sun Valley's Article III challenge. The farm contends that DOL violated Article III by adjudicating its private rights through in-house proceedings. To resolve this claim, we must decide (1) whether DOL's action concerns private rights (that is, whether it is in the nature of a common law suit), (2) whether DOL's action fits within the public rights exception, and (3) whether Sun Valley waived its right to Article III adjudication.[3]

A

We first consider whether DOL's enforcement concerns private rights, asking if it "is made of the stuff of

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[3] Sun Valley argues on appeal that DOL's adjudication violates "Article III and, by extension, the Seventh Amendment." Sun Valley Br. 3. The Supreme Court has long recognized the close relationship between Article III and the Seventh Amendment. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989). And in *Jarkesy*, the Court appeared to confirm their analytical similarity. *See* 603 U.S. at 134. But because Sun Valley's complaint did not allege a violation of the Seventh Amendment, we consider only its challenge under Article III.

the traditional actions at common law tried by the courts at Westminster in 1789." *Id.* at 128 (majority opinion) (citation modified). As the Supreme Court's recent decision in *Jarkesy* explains, a party challenging enforcement under Article III need not match the agency's action to an exact historical comparator. *Id.* at 134. *Jarkesy* considered whether the SEC could, consistent with Article III and the Seventh Amendment, enforce federal antifraud statutes through in-house civil penalty proceedings. *Id.* at 120. The Court said no. *Id.* at 121. The SEC sought civil penalties, which traditionally "could only be enforced in courts of law." *Id.* at 134 (citation modified). And its action, though based on federal law, "target[ed] the same basic conduct as common law fraud, employ[ed] the same terms of art, and operate[d] pursuant to similar legal principles." *Id.* Because both the action and the remedies that the SEC pursued could be traced to English common law, Jarkesy's case presumptively "involve[d] a matter of private rather than public right." *Id.* (citation modified).

Those same considerations require Article III adjudication here. Start with the nature of DOL's claim. While regulations require H-2A employers to provide housing, meals, transportation, and guaranteed work, employee benefits are formalized in an employer's "job order." *See generally* 20 C.F.R. § 655.122. Where, as here, the employer does not pen another agreement with its employees, the job order functions as a "work contract" between them. *Id.* § 655.122(q). It is the violation of the terms of that work contract, rather than the regulations that shape it, that supports H-2A enforcement actions. *See* 29 C.F.R. § 501.0 (authorizing "the enforcement of all *contractual obligations* . . .

applicable to the employment of H-2A workers and workers in corresponding employment").[4]

Consistent with that scheme, DOL framed its enforcement action against Sun Valley in contractual terms. For instance, DOL told the ALJ that "Sun Valley's assurances formed part of the farm's contract with H-2A workers." A.R. 145. It then alleged that Sun Valley "violat[ed]" those "contractual obligations." *Id.* The ALJ's decision, too, sounded partially in contract. For example, the decision found that Sun Valley "breached a material term of the job order" when it failed to provide employees with kitchen access. App. 83-84. And it ordered penalties and back wages for Sun Valley's decision to terminate workers "before they worked the guaranteed three-fourths of the hours promised in their contracts." App. 92. DOL's action was therefore litigated like a suit for breach of contract, which would have traditionally been heard in common law courts. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment) (recognizing "breach of con-

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[4] This contractual framing distinguishes the enforcement action here from the one we recently considered in *Axalta Coating Systems LLC v. FAA*, --- F.4th ---, 2025 WL 1934352 (3d Cir. July 15, 2025). That case considered whether the Seventh Amendment permitted the Federal Aviation Administration to seek civil penalties from a paint supplier through in-house proceedings. *Id.* at *1. The action there involved "technical" hazardous materials regulations with no common law origins, which made it relevantly similar to the Supreme Court's decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977). *Axalta*, 2025 WL 1934352, at *5. The enforcement action in this case, by contrast, resembles common law breach of contract, so *Atlas Roofing* does not control.

tract" as "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789").

We also think it significant that DOL sought common law remedies: civil penalties and back wages. The Supreme Court has long maintained that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Tull v. United States*, 481 U.S. 412, 422 (1987); *see also Jarkesy*, 603 U.S. at 123. And to the extent that back wages are designed "to punish or deter the wrongdoer," they, too, are legal in nature. *Jarkesy*, 603 U.S. at 123 (citation modified). The ALJ here assessed back wages at least in part "[t]o deter such harm from occurring in the future." App. 88. The Administrative Review Board likewise cited the need to "deter other H-2A employers" when upholding the award.[5] App. 42. That DOL sought punitive remedies therefore only confirms that its action was "made of the stuff of the traditional actions at common law," presumptively entitling Sun Valley to adjudication before an Article III court. *Jarkesy*, 603 U.S. at 128 (citation modified).

B

DOL resists this conclusion. Despite the appearance of a common law contract action, it contends that this case is really about immigration. And because immigration is traditionally a matter of public rights, DOL insists that Sun Valley was not entitled to adjudication by an Article III court. We are unpersuaded. While

[5] In a different context, we recently described back wages as an equitable remedy. *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 96 (3d Cir. 2024). But because the back wages here were imposed to deter wrongdoers, rather than solely to provide restitution, they are properly characterized as legal. *See Jarkesy*, 603 U.S. at 123.

history does sanction non-Article III adjudication for certain immigration-related matters, this case falls well outside the heartland of that tradition.

The political branches have long asserted control over the Nation's borders. While the President has possessed some authority to remove aliens since the founding, *see Dep't of State v. Munoz*, 602 U.S. 899, 912 (2024), Congress first enacted general restrictions on immigration during the late nineteenth century, *see Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). From the beginning, these statutes empowered executive branch officials to adjudicate issues surrounding admission and exclusion. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 129-30 (2020) (collecting statutes).

Recognizing the political branches' "plenary power" over immigration, the Supreme Court largely endorsed this regime of administrative enforcement. *See Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422, 439-41 (3d Cir. 2016) (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). The Court observed long ago that exclusion was an "incident of sovereignty belonging to the government," so that issue was generally not appropriate "for judicial determination." *Chae Chan Ping*, 130 U.S. at 609. The "plenary power" doctrine has undergone changes since then, *see Castro*, 835 F.3d at 441-44, but the Supreme Court has consistently "recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," *Trump v. Hawaii*, 585 U.S. 667, 702 (2018) (citation modified).

This history provides the foundation for an immigration exception to Article III adjudication. *See Jarkesy*, 603 U.S. at 128-30 (listing "immigration" as an example of "public rights"). But it also suggests limitations. The public rights exception captures only matters that "historically could have been determined exclusively by the executive and legislative branches." *Id.* at 128 (citation modified). And the above historical discussion suggests that non-Article III adjudication was traditionally appropriate in cases closely related to the admission and exclusion of aliens.

The Supreme Court's decision in *Oceanic Steam Navigation Co. v. Stranahan* exemplifies this limitation. 214 U.S. 320 (1909). The plaintiff there, a steamship operator, was sanctioned under a statute authorizing the Secretaries of Labor and Commerce to impose penalties for "bringing into the United States alien immigrants afflicted with 'loathsome or dangerous contagious diseases.'" *Id.* at 332. The operator claimed that this order violated Article III, but the Court disagreed. Congress had "plenary power . . . as to the admission of aliens," so it could authorize executive branch officials to impose a penalty without Article III adjudication. *Id.* at 343. *Oceanic Steam*, the Court would later explain, stands for the proposition that Congress may "prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without" an independent judge or jury. *Jarkesy*, 603 U.S. at 129. So *Oceanic Steam* related closely to the admission and exclusion of aliens. *See Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 335 (1932) (observing that *Oceanic Steam* concerned the federal government's "plenary power to control the admission of aliens").

Sun Valley's case falls outside the immigration exception and the tradition that shaped it. Although the H-2A program facilitates temporary migration, its labor certification regulations do not directly address the admission and exclusion of aliens. Instead, the labor certification process is designed to vindicate the domestic national policy goal of preserving "the wages and working conditions of workers in the United States." 8 U.S.C. § 1188(a)(1)(B). Rules about worker hours, housing, cooking, and transportation regard employment law, not "Congress' plenary authority to control immigration." Dep't Br. 36. This is especially true considering that H-2A labor certification rules apply to foreign and domestic workers alike. *See* 29 C.F.R. § 501.0. So while H-2A labor certification regulations may ultimately serve immigration-related goals, extending *Oceanic Steam* to reach this case would allow "the exception [to] swallow the rule." *Jarkesy*, 603 U.S. at 131.

DOL disagrees. In its view, the H-2A program implicates "a variety of foreign-policy concerns" that situate it comfortably within the public rights exception. Dep't Br. 33. For example, the Secretaries of State and Homeland Security "determine which countries are eligible to participate in the program," using participation as leverage to achieve foreign and domestic policy objectives. Dep't Br. 8. Because of these quintessentially public interests, it says, adjudications under the H-2A program need not take place in an Article III court.

This argument proves too much. It is true that portions of the sprawling H-2A program implicate the President's unique power over foreign affairs. But at best, that shows that *some* H-2A-related actions may proceed

in agency tribunals. For example, DOL could use agency proceedings to bar Sun Valley from the program or to remove ineligible foreign workers from its employ. *See* 20 C.F.R. § 655.182. Those actions, to the extent they vindicate the federal government's critical interest in border control, likely fall within the immigration exception. But the fact that DOL has *some* authority to proceed in a non-Article III tribunal does not give it carte blanche to do so for *all* violations. Such a rule would eviscerate *Jarkesy*'s instruction that we "evaluate[] the legal basis for [DOL's] assertion [of the public rights] doctrine with care." 603 U.S. at 131.

In short, because the H-2A labor certification regulations mainly concern the federal government's local interest in domestic wages, DOL's action does not fit within the public rights exception to Article III adjudication.

C

DOL's last-ditch argument is that Sun Valley did not preserve its Article III objection during administrative proceedings. By failing to raise this issue before the ALJ, DOL says, Sun Valley "either waived any Article III claim [] or failed to exhaust it." Dep't Br. 41. We disagree.

For its waiver argument, DOL relies on *Wellness International Network, Ltd. v. Sharif*, 575 U.S. 665 (2015). That case addressed whether Article III permitted bankruptcy courts to hear non-core proceedings "with the consent of all the parties to the proceeding." *Id.* at 671 (quoting 28 U.S.C. § 157(c)(2)). The Supreme Court answered yes, holding that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge." *Id.* at 669.

Although knowing and voluntary consent could be implied, the Court explained, "the key inquiry [was] whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator." *Id.* at 685 (citation modified).

These preconditions for implied consent are not present here. DOL points to no evidence that Sun Valley "was made aware of the need for consent and the right to refuse it." *Id.* (citation modified). To the contrary, DOL's letter assessing civil penalties provided that "the determination of the Administrator shall become the final and unappealable Order of the Secretary" if "a request for a hearing [before an ALJ] is not received within the time specified." App. 150. So Sun Valley lacked any real choice about where it could challenge DOL's action, meaning that it "did not truly consent to" adjudication before an ALJ. *Wellness Int'l Network*, 575 U.S. at 681 (citation modified).

We also reject DOL's exhaustion argument. It is true that a party sometimes must exhaust issues it intends to raise during administrative, and later, judicial proceedings. *See Carr v. Saul*, 593 U.S. 83, 88 (2021). But even assuming Sun Valley failed to exhaust its Article III claim before the agency, we may still consider it here. That's because a "nonjurisdictional, mandatory exhaustion requirement functions as an affirmative defense, and thus can be waived or forfeited by the government's failure to raise it." *Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1099 (D.C. Cir. 2021); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 417 (2023) (explaining that "[e]xhaustion is typically nonjurisdictional"). Because DOL did not raise a failure-to-exhaust

defense before the District Court, we will "treat that argument as forfeited." *Simko v. United States Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021). DOL has not offered any exceptional circumstances to excuse this forfeiture, so we will not address its exhaustion argument. *Cf. Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 250 (3d Cir. 2013) ("The doctrine of appellate waiver is not somehow exempt from itself. This means that a party can waive a waiver argument by not making the argument below or in its briefs." (citation omitted)).[6]

* * *

An administrative tribunal ordered Sun Valley to pay civil penalties and back wages for breaching contractual obligations under the H-2A nonimmigrant visa program. Because Article III required the Department of Labor to instead proceed before a federal district court, we will reverse and remand with instruction to enter judgment in favor of Sun Valley.

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[6] Because we hold that DOL's enforcement action violated Article III, we need not reach Sun Valley's alternative statutory, Article II, and Eighth Amendment arguments.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 1:21-cv-16625

SUN VALLEY ORCHARDS, LLC, PLAINTIFF

v.

U.S. DEPARTMENT OF LABOR, ET AL., DEFENDANTS

Filed: July 27, 2023

OPINION

Plaintiff, Sun Valley Orchards, LLC ("Sun Valley"), moves for partial summary judgment to all claims that are susceptible to the decision based on the administrative record but not as to Sun Valley's additional claims seeking a *de novo* trial before the Court. The defendants, U.S. Department of Labor ("DOL"), move to dismiss and for summary judgment on all Sun Valley's claims.

Sun Valley is a New Jersey family farm owned and operated by Joe and Russell Marino. During the 2015 growing season, Sun Valley hired nineteen H-2A workers to harvest asparagus. The workers left the farm later that year and the Department of Labor investigated their departure and found several violations of the H-2A program requirements. Following adjudications against Sun Valley by the Administrative Law Judge

and the Administrative Review Board, Sun Valley filed the instant action.

The Court has considered the written submissions of the parties and the arguments advanced at the hearing on April 20, 2023. The record of that hearing is incorporated.

I. Background

a. The H-2A Visa Program

To appreciate the facts of this case, some legal background is necessary. The Immigration and Nationality Act of 1952 established the modern framework for regulation of immigration in the United States, including provisions for the admission of permanent and temporary foreign workers. *See* Immigration and Nationality Act of 1952 ("INA"), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101 et seq.). One such provision was the H-2 visa program, which governed the recruitment of foreign workers for agricultural and non-agricultural jobs. 8 U.S.C. § 1101(a)(15)(H)(ii). In 1986, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA"), which amended the INA by, among other things, bifurcating the H-2 visa program into the H-2A and H-2B programs,[1] which govern the admission of agricultural and non-agricultural workers, respectively. *See* Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411 (amending 8 U.S.C. § 1101(a)(15)(H)(ii)(a)-(b)).

The Immigration and Nationality Act provides temporary work authorization for foreign agricultural workers under the H-2A program. *See* 8 U.S.C.

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[1] The H-2A program is for agricultural workers, and the H-2B program is for non-agricultural workers.

§ 1101(a)(15)(H)(ii)(a); § 1184(c)(1). The H-2A program permits employers to temporarily hire foreign workers upon certification that "(A) 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 petitioner" and "(B) 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)(A)-(B).

"Congress directed the Secretary of Labor ("Secretary") to promulgate regulations that would set the parameters of the program, particularly for temporary workers coming 'to perform agricultural labor or services.'" *Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 980 (D.C. Cir. 2021) (quoting 8 U.S.C. § 1101(a)(15)(H)). Pursuant to this authority, the Secretary promulgated regulations[2] to protect American workers. Under these regulations, employers must first offer the job to workers in the United States. 20 C.F.R. § 655.121. Furthermore, the employer must offer domestic workers "no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." 20 C.F.R. § 655.122(a). Only if an American worker does not accept a position

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[2] The H-2A visa is also governed by regulations issued by the Immigration and Naturalization Service. *See* 8 C.F.R. § 214.2(h). H-2A workers are only admitted into the United States to work for the designated employer and for the duration of the certified period of employment, which cannot exceed one year. If the employment relationship ends, whether the employee quits or the employer terminates the employment, the H-2A visa expires, and the workers must leave the United States. *See* 8 C.F.R. § 214.2(h)(5)(viii), (h)(11)(iii)(A)(1), & (h)(13).

offered through this process can the employer submit an Application for Temporary Employment Certification (an "H-2A Application") to the Department of Labor ("DOL"). *See generally* 8 U.S.C. § 1188(a), (c)(3)(A).

Before submitting an Application for Temporary Employment Certification, an "employer must submit a completed job order." 20 C.F.R. § 655.121(a)(1). The job order lists the "[j]ob qualifications and requirements[,]" 20 C.F.R. § 655.122(b), and "[m]inimum benefits, wages, and working conditions[,]" 20 C.F.R. § 655.122(c). Once the DOL certifies an employer's petition, the employer can petition the Department of Homeland Security to designate foreign workers as H-2A workers. *See Overdevest Nurseries*, 2 F.4th at 980.

b. The H2-A Enforcement System

The Secretary of Labor is "authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment" of the H-2A program. 8 U.S.C. § 1188(g) (2); 29 C.F.R. § 501.1. The Secretary of Labor may also initiate administrative proceedings as necessary, or alternatively may petition "any appropriate District Court of the United States" for injunctive relief, or "specific performance of contractual obligations." 29 C.F.R. § 501.16. The Department's Wage and Hour Division Administrator ("Administrator") investigates possible H-2A violations. If the Administrator determines violations occurred, it may recover back wages, debar the employer from receiving future H-2A labor certifications, and impose civil money penalties. 29 C.F.R. §§ 501.15, 501.16(a)(1), 501.19(a), 501.20(a). The

Administrator may also impose civil monetary penalties for "each violation of the work contract, or the obligations imposed by 8 U.S.C. § 1188, 20 C.F.R. part 655." 29 C.F.R. § 501.19(a). "In determining the amount of penalty to be assessed for each violation, the Administrator shall consider the type of violation committed and other relevant factors." 29 C.F.R. § 501.19(b).

To institute administrative proceedings, the Administrator issues a written determination explaining the Wage and Hour Division's findings and imposes sanctions and remedies. 29 C.F.R. §§ 501.31, 501.32. An employer can request an administrative hearing before an Administrative Law Judge ("ALJ") to review the Administrator's determination. 29 C.F.R. §§ 501.33(a), 501.34, 501.35. The Federal Rules of Civil Procedure are generally applicable to litigation before the ALJ. In proceedings before the United States Department of Labor, Office of Administrative Law Judges, "[t]he Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a). The ALJ will prepare a decision on the issues referred by the Administrator. 29 C.F.R. § 501.41(a). Any party wishing review of the ALJ decision can petition the Administrative Review Board ("ARB"). 29 C.F.R. § 501.42(a).

c. Sun Valley's H-2A Violations

During the 2015 growing season, Sun Valley hired nineteen H-2A workers to harvest asparagus. In completing the H-2A paperwork, Sun Valley stated they would provide the workers access to a kitchen on the premises of the farm when instead, the workers' supervisor cooked out of the kitchen adjacent to the crew

quarters and charged the workers a flat rate of $75-$80 per week for food. The supervisor also sold beverages to the workers.

The contract with the nineteen workers entitled them to forty hours of work per week during the season, totaling 1,040 hours. However, if the workers left voluntarily or were fired for cause, they were not entitled to those hours. Fired for cause included a failure "to perform the work as specified," as well as failure "to meet applicable production standard." *See* Dkt. 19-1 at 5 (quoting A.R. 1516).

Upon a dispute between the workers and Russel Marino in May 2015, the workers left the farm. When the workers left Sun Valley, they had to complete paperwork stating their reason for departure. The contractor, whom the Marinos hired to assist them with the H-2A program, advised the workers would hamper Sun Valley's future employment opportunities if they stated they quit because they did not like the work. Instead, the contractor advised Sun Valley that the workers should state they left for personal reasons. Sun Valley then had the workers sign departure forms disclosing they resigned due to personal issues.

After an investigation in July 2015, the Administrator concluded Sun Valley violated various aspects of the H-2A program and assessed $369,703.22 in back wages and $212,250 in penalties. Sun Valley timely requested an ALJ hearing in July 2016, and Judge Theresa Timlin was assigned to the case, holding a four-day evidentiary hearing in July 2017. The Secretary of Labor ratified Judge Timlin's appointment "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Depart-

ment of Labor violate the Appointments Clause." *See* Dkt. 22-1 at 6 (quoting Ltr. To Hon. Theresa C. Timlin (Dec. 21, 2017)).

Almost two years later after the appointment on October 28, 2019, Judge Timlin issued the decision, finding numerous H-2A violations and imposing $344,945.80 in back wages and $211,800 in penalties, a reduction of over $25,000 from the Administrator's assessment. Sun Valley then appealed to the ARB, which affirmed the ALJ decision.

Sun Valley argues the DOL's adjudication of these claims in agency courts, before agency judges, violated Article III; the DOL's award must be vacated because the ALJ was neither appointed nor subject to removal as required by the Constitution; the DOL's award is contrary to law and cannot be sustained based on the evidence in the administrative record; and the DOL's award violates the Excessive Fines Clause.[3] The DOL argues the adjudication does not violate Article III; the ALJs do not violate the Appointments Clauses or the President's removal power; the adjudicatory system is authorized by the statute and Sun Valley is not entitled to a trial de novo; the imposition of back pay and penalties is fully supported by the record and is neither arbitrary nor capricious; and the DOL did not violate the Excessive Fines Clause.

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[3] Sun Valley states in addition to the claims presented in their motion for partial summary judgment, its complaint includes separate allegations seeking de novo review of the DOL's factual determinations after trial. Because Sun Valley cannot request summary judgment in its favor on those claims, they are not encompassed in the motion for partial summary judgment.

II. Standard of Review

a. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of a claim based on "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A complaint should be dismissed pursuant to Rule 12(b)(6) if the alleged facts, taken as true, fail to state a claim. *Id.* In general, only the allegations in the complaint, matters of public record, orders, and exhibits attached to the complaint are taken into consideration when deciding a motion to dismiss under Rule 12(b)(6). *See Chester County Intermediate Unit v. Pa. Blue Shield*, 896 F.2d 808, 812 (3d Cir. 1990). It is not necessary for the plaintiff to plead evidence. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977). The question before the Court is not whether the plaintiff will ultimately prevail. *Watson v. Abington Twp.*, 478 F.3d 144, 150 (3d Cir. 2007). Instead, the Court simply asks whether the plaintiff has articulated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

"A claim has facial plausibility[4] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly,* 550 U.S. at 556). "Where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they

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[4] This plausibility standard requires more than a mere possibility that unlawful conduct has occurred. "When a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*

plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

The Court need not accept "'unsupported conclusions and unwarranted inferences,'" *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citation omitted), however, and "[l]egal conclusions made in the guise of factual allegations . . . are given no presumption of truthfulness." *Wyeth v. Ranbaxy Labs., Ltd.*, 448 F. Supp. 2d 607, 609 (D.N.J. 2006) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005) ("[A] court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss.")). *Accord Iqbal*, 556 U.S. at 678-80 (finding that pleadings that are no more than conclusions are not entitled to the assumption of truth).

Further, although "detailed factual allegations" are not necessary, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). *See also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Thus, a motion to dismiss should be granted unless the plaintiff's factual allegations are "enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 556. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the com-

plaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679.

b. Federal Rule of Civil Procedure Rule 56

Summary judgment shall be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, the Court will enter summary judgment in favor of a movant who shows that it is entitled to judgment as a matter of law and supports the showing that there is no genuine dispute as to any material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56 (c)(1)(A).

A fact is "material" only if it might impact the "outcome of the suit under the governing law." *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 261 (3d Cir. 2012). A "genuine" dispute of "material" fact exists where a reasonable jury's review of the evidence could result in "a verdict for the non-moving party" or where such fact might otherwise affect the disposition of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"[T]he party moving for summary judgment under Fed. R. Civ. P. 56(c) bears the burden of demonstrating the absence of any genuine issues of material fact." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074,

1080 (3d Cir. 1996). The moving party may satisfy its burden by producing evidence showing the absence of a genuine issue of material fact or by showing there is no evidence in support of the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.*; *Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254, 1258 (D.N.J. 1994). Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). "A nonmoving party may not 'rest upon mere allegations, general denials or . . . vague statements . . . .'" *Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs*, 982 F.2d 884, 890 (3d Cir. 1992) (quoting *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991)). Indeed,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322. That is, the movant can support the assertion that a fact cannot be genuinely disputed by showing that "an adverse party cannot produce admissible evidence to support the [alleged dispute of] fact." Fed. R. Civ. P. 56(c)(1)(B); accord Fed. R. Civ. P. 56(c)(2).

III. Analysis

a. The Department of Labor's Adjudication does not Violate Article III

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art III, § 1. Congress cannot "confer the Government's 'judicial Power' on entities outside Article III." *Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C.*, 138 S. Ct. 1365, 1373 (2018) (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

"When determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between 'public rights' and 'private rights.'" *Oil States Energy Servs., L.L.C.*, 138 S. Ct. at 1373 (quoting *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32 (2014)). "Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts." *Id.*

The Supreme Court has not "'definitively explained'[5] the distinction between public and private rights," *id.* (quoting *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 69 (1982)), and the Court's precedents "applying the public-rights doctrine have

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[5] *Crowell v. Benson*, 285 U.S. 22 (1932), attempted to list some of the matters that fall within the public-rights doctrine: "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.*, 285 U.S. at 51.

'not been entirely consistent.'" *Id.* (quoting *Stern*, 564 U.S. at 488). However, precedents have recognized that the public-rights doctrine covers matters "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell*, 285 U.S. at 50.

The Supreme Court continues to limit the public-rights doctrine to "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority." *Stern*, 564 U.S. at 490. Thus, the public-rights doctrine applies "when the right is integrally related to [a] particular Federal Government action." *Id.*

The public-rights doctrine applies to the DOL's case against Sun Valley for its H-2A violations because the H-2A involves immigration, which is a matter that falls within the doctrine. Under the Constitution, "control of the admission of aliens is committed exclusively to Congress, and . . . may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them." *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 334 (1932). "Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 450 (1977).

Sun Valley argues this is a private right case because it involves "claims that historically were the subject action at common law, and because imposing over half a million dollars in liability on a family farm (on a breach-of-contract theory) is an inherently judicial matter." Dkt. 19-1 at 14. However, the enforcement action here is by the federal government based on Sun Valley's DOL's violations, which arise under the public-rights doctrine. *See Stern*, 564 U.S. at 489 (The public rights exception arises "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" and private rights involve "the liability of one individual to another under the law as defined."). Because this matter is based on Sun Valley's violations of DOL's regulations, derives from a federal regulatory scheme under the federal government's immigration related powers, and is integrally related to a particular Federal Government action, the enforcement action is adjudicated outside Article III. Thus, the DOL did not violate Article III and the claim is therefore dismissed.[6]

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[6] Additionally, "Article III's guarantee of an impartial and independent adjudication by the federal judiciary is subject to waiver." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 834 (1986). "[A] party may impliedly consent through his "actions rather than [his] words." *In re Trib. Media Co.*, 902 F.3d 384, 394 (3d Cir. 2018) (quoting *Roell v. Withrow*, 538 U.S. 580, 589-90 (2003)). Here, Sun Valley impliedly consented to a non-Article III adjudication based upon the continued litigation through the DOL for four years and never objected to the agency's non-Article III status.

b. The Department of Labor's Adjudicatory System is Authorized by Statute

Sun Valley argues "Congress has not authorized the Agency adjudication in this case." Dkt. 19-1 at 25. However, by the plain language of the statute:

> The Secretary of Labor is *authorized* to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

8 U.S.C. § 1188(g)(2). Per the statute, the Secretary could have just decided to impose such penalties. However, the Secretary may "prescribe regulations for the government of his department" and "the distribution and performance of its business." 5 U.S.C. § 301. Here, the Secretary prescribed regulations for the government of its department and the distribution and performance of its business by allowing H-2A violators to challenge these assessments through an adjudicatory process where ALJs can consider testimony and evidence. If a party is dissatisfied with the ALJ's decision, they then may petition the ARB to review the decision. 29 C.F.R. § 501.42.

> Based on the clear language of the statute, Congress authorized the DOL to adjudicate

civil monetary penalties or back pay in administrative proceedings.

c. Sun Valley Bore the Responsibility to Develop Issues for the Adjudicator's Consideration

"Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question." *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021). "Where statutes and regulations are silent, however, courts decide whether to require issue exhaustion based on 'an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Id.* (quoting *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000)). When determining to impose an issue exhaustion requirement, the court "depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 1358 (quoting *Sims*, 530 U.S. at 109). Issue exhaustion is at its greatest where the parties are expected to develop the issues in an adversarial administrative proceeding. *Sims*, 530 U.S at 110.

The ALJ does not look into its own issues. The DOL's H-2A enforcement proceedings require "formal adversarial adjudications." 29 C.F.R. § 18.101. "Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing . . . ." 29 C.F.R. § 501.33(a). The request must "[s]tate the specific reason or reasons the person requesting the hearing believes such determination is in error[.]" 29 C.F.R. § 501.33(b)(3). Additionally, within the prehearing statement, it must state "[t]he issues of law to be determined with reference to the appropriate statute, regulation, or case law[.]" 29 C.F.R. §18.80(c)(2).

Because issue exhaustion was required and Sun Valley bore the responsibility to develop issues for the adjudicator's consideration and failed to raise its Appointments Clause and Removal Power objections in the agency proceedings, the claims are deemed forfeited and are hereby dismissed.

d. The Administrative Law Judge did not Violate the Appointments Clause

Despite, Sun Valley's procedural missteps. Sun Valley argues the DOL's award must be vacated because the ALJ was not constitutionally appointed. *See* Dkt. 19-1 at 28. However, "ratification can remedy a defect arising from the decision of 'an improperly appointed official . . . when . . . . a properly appointed official has the power to conduct an independent evaluation of the merits and does so.'" *Wilkes-Barre Hosp. Co. v. Nat'l Lab. Rels. Bd.*, 857 F.3d 364, 371 (D.C. Cir. 2017). There are three general requirements for ratification: (1) "the ratifier must, at the time of ratification, still have the authority to take the action to be ratified[,]" (2) "the ratifier must have full knowledge of the decision to be ratified[,]" and (3) "the ratifier must make a detached and considered affirmation of the earlier decision." *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 820 F.3d 592, 602 (3d Cir. 2016). Evidence of a detached and considered judgment can be "implied from subsequent conduct, [], such when a later act is necessarily an affirmation on an earlier act." *Id.* at 603. Ratification may be done by a properly appointed superior official or a properly appointed official is capable of ratifying their own decisions. *Id.* at 605. In determining whether ratification has occurred, agency officials are owed

"proper deference" under the "presumption of regularity." *Id.*

Here, Judge Timlin's appointment was ratified by the head of her department, the Secretary of Labor, after she held the hearing, but nearly two years before she decided Sun Valley's case. Upon her appointment, Judge Timlin then ratified all prior proceedings. The knowledge requirement is easily satisfied since Judge Timlin presided over Sun Valley's case and the four-day hearing. The detached and considered affirmation of all earlier decisions is also satisfied since Judge Timlin did not decide anything of substance for nearly two years after the Secretary ratified her appointment. Additionally, Judge Timlin's later decision was an affirmation of the validity of her earlier actions in conducting the case. Because Judge Timlin was a properly appointed inferior officer when she decided Sun Valley's case, there was no Appointment Clause Violation.[7]

e. The Administrative Law Judge did not Enjoy Impermissible Protections Against Removal

Sun Valley claims "[t]he ALJ who adjudicated Sun Valley's case [] was not subject to effective control by the President through the removal power." Dkt. 19-1 at 30. Article II provides "[t]he executive Power shall be vested in a President of the United States of America[,]" and "he shall take Care that the Laws be faithfully

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[7] Because Sun Valley does not allege its previous claim in its complaint that the ALJs who make up the Review Board violate the Appointments Clause because they qualify as principal officers of the United States insofar as their decisions are final decisions of the Labor Department and are not subject to review by a superior executive officer, the Court deems the alleged claim from Sun Valley's complaint abandoned.

executed[.]" U.S. Const. art. II § 1; *id.* at § 3. "The entire 'executive Power' belongs to the President alone." *Seila L. L.L.C. v. CFPB*, 140 S. Ct. 2183, 2197 (2020). However, lesser executive officers will assist and "remain accountable to the President, whose authority they wield." *Id.* The President's authority includes "the ability to remove executive officials, for it is 'only the authority that can remove' such officials . . . ." *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)).

As inferior officers, the DOL's ALJs are appointed by the Secretary of Labor, the Head of their Department. Such power of appointment of executive officers comes with it "necessary incident of removal." *Myers v. United States*, 272 U.S. 52, 126-27 (1926). In *Humphrey's Executor v. United States,* the Supreme Court held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Likewise, in *United States v. Perkins,* 116 U.S. 483 (1886), and *Morrison v. Olson,* 487 U.S. 654 (1988), the Court sustained similar restrictions on the power of principal executive officers, themselves responsible to the President, to remove their own inferiors. Congress has the power to limit and regulate removal of such inferior officers in the heads of departments. *Perkins*, 116 U.S. at 485.

The Supreme Court has upheld limited restrictions on the President's removal power where "only one level of protected tenure separated the President from an officer exercising executive power." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495, (2010).

When there is only one level of protected tenure separating the President from an officer, there is no removal problem because "[i]t [is] the President—or a subordinate he [can] remove at will—who decide[s] whether the officer's conduct merit[s] removal under the good-cause standard." *Id.*

Despite the Merit Systems Protection Board (the "Board") determining whether there is removal for "good cause," the action is taken by the agency which the administrative law judge is employed. 5 U.S.C. § 7521(a). The Board is simply there to make sure the agency properly invoked "good cause" for removal. Because ALJs may be removed by the Secretary of Labor for "good cause," there is no removal problem. *See id.* There is only one level of protected tenure separating the President from an officer since the Secretary of Labor is removable by the President.

Further, there is no removal problem when the Secretary of Labor does not need to use ALJs at all. Thus, "[t]he President has broad executive power to order the Secretary of Labor to change DOL's regulatory scheme and remove ALJs from the adjudicatory process under 30 U.S.C. § 932a." *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1134 (9th Cir. 2021). For the above reasons, Sun Valley's removal-power claim is hereby dismissed.

f. The Department of Labor's Imposition of Back Pay and Penalties was Neither Arbitrary nor Capricious

Sun Valley makes two arguments regarding the agency's award for the meal plan and beverage issues: (1) the ALJ and ARB did not adequately justify its imposition of monetary penalties, and (2) the DOL's award of back wages is not supported by substantial evidence.

"Judicial review under [the arbitrary-and-capricious standard] is deferential, and a court may not substitute its own policy judgment for that of the agency." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). "A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

First addressing the imposition of monetary damages. "In determining the amount of penalty to be assessed for each violation, the WHD Administrator shall consider the type of violation committed and other relevant factors." 29 C.F.R. § 501.19(b). "The decision [of the ALJ] shall [] include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator." 29 C.F.R. § 501.41(b). Further, the ALJ must state the reason or reasons for such order. *Id.*

Sun Valley complains that Judge Timlin deferred to the enforcement personnel instead of conducting a de novo review of the Administrator's determination. Dkt. 19-1 at 33. However, the ALJ only had to affirm, deny, reverse, or modify the determination of the WHD Administrator and state the reasons for such order. Such requirements were met by the ALJ when she affirmed the Administrator's assessment of penalties for meal and beverage violations and stated the reason for such order is to "deter other H-2A employers from making the same failure to disclose in a potentially exploitative way." *See* AR 4500-02.

Insofar as the regulatory factors considered by the WHD Administrator, the Administrator assessed one penalty for Sun Valley's combined meal and drink viola-

tions in the amount of $1,350 for each of Sun Valley's 147 workers, where instead, the Administrator had the discretion to assess the meal and drink penalties separately. Judge Timlin found the Administrator applied the factors appropriately and assessed the penalty in this way due to the seriousness of the violation and great impact on workers.

Secondly, addressing the award of back wages. "The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will take from the worker's paycheck." 20 C.F.R. § 655.122(p)(1). "A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be included in computing wages." 20 C.F.R. § 655.122(p)(2).

In this matter, Sun Valley deducted meal-plan and beverages charges from the workers' pay without prior disclosure in the job order. The undisclosed deductions from the meal-plan charges reduced the workers' wages below the required wages specified in the job order. Further, the meal-plan changed a material term of the job order, which harmed both the workers' reliance on the H-2A program to ensure the protection of workers' rights and the overall integrity of the H-2A program. It is evident Sun Valley profited from the sales of the meal-plan and beverages charges. Such profits are clearly prohibited in the H-2A regulations noted above. Thus, the award of back wages due to the unlawful deductions are not improper because it makes the workers' whole in compensation.

The ALJ reasonably considered the relevant issues of Sun Valley's H-2A violations and reasonably explained the imposition of back wages and penalties. Thus, such imposition of back wages and penalties in regard to Sun Valley's H-2A violations are neither arbitrary nor capricious.

g. Sun Valley Improperly Terminated Nineteen Workers

"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 . . . and ending on the expiration date specified in the work contract . . . ." 20 C.F.R. § 655.122(i)(1). The employer is not responsible for paying the three-fourths guaranteed if a "worker voluntarily abandons employment before the end of the contract period, or is terminated for cause . . . ." 20 C.F.R. § 655.122(n).

Sun Valley argues the agency's award for early termination is not supported by substantial evidence. *See* Dkt. 19-1 at 36. The ALJ and ARB affirmed that Sun Valley improperly fired nineteen workers after the May 2015 altercation. Judge Timlin relied on testimony of various workers to determine they were fired. When evaluating the witnesses' credibility, Judge Timlin found that "the [worker] witnesses were consistent in describing the heated events at the meeting while Joseph Marino was unable to remember specifically what was said." Dkt. 22-1 at 38; *see* AR 4343. Upon appeal, the ARB reviewed Judge Timlin's cited evidence and properly deferred to the credibility determinations, affirming the ALJ's ruling.

"[T]he ALJ must necessarily make certain credibility determinations, and this Court defers to the ALJ's assessment of credibility." *Zirnsak v. Colvin*, 777 F.3d 607, 612 (3d Cir. 2014); *see Diaz v. Comm'r,* 577 F.3d 500, 506 (3d Cir. 2009) ("In determining whether there is substantial evidence to support an administrative law judge's decision, we owe deference to his evaluation of the evidence [and] assessment of the credibility of witnesses . . . ."). However, the ALJ must specifically identify and explain what evidence it found not credible and why it found it not credible. *Adorno v. Shalala,* 40 F.3d 43, 48 (3d Cir. 1994) (citing *Stewart v. Sec'y of Health, Education and Welfare,* 714 F.2d 287, 290 (3d Cir.1983)); *see also Stout v. Comm'r,* 454 F.3d 1050, 1054 (9th Cir. 2006) (stating that an ALJ is required to provide "specific reasons for rejecting lay testimony"). An ALJ cannot reject evidence for an incorrect or unsupported reason. *Ray v. Astrue,* 649 F.Supp.2d 391, 402 (E.D. Pa. 2009) (quoting *Mason v. Shalala,* 994 F.2d 1058, 1066 (3d Cir. 1993).

Because the Court owes deference to the ALJ's evaluation of the evidence and assessment of the credibility of witnesses, the Court agrees with Judge Timlin's determination. Based on the workers' testimony and explanation for why the ALJ found the workers' testimony credible, the ARB reasonably affirmed that Sun Valley Improperly terminated nineteen workers in May 2015.

h. The Department of Labor is Authorized to Assess Back Wages

Sun Valley argues the "Agency's entire award of back pay (for all the various violations) must be vacated because the statute does not authorize back pay." Dkt. 19-1 at 38. "The Secretary of Labor is authorized to take

such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment . . . ." 8 U.S.C. § 1188(g)(2).

Nothing in the statute prevents the agency from awarding back wages. The statute merely includes a list of some actions the Secretary of Labor is authorized to take. *See generally* INCLUDE, Black's Law Dictionary (11th ed. 2019) ("The participle *including* typically indicates a partial list."). Additionally, when 8 U.S.C. § 1188 has been violated, actions including "the recovery of unpaid wages" may be taken. 29 C.F.R. § 501.16(a)(1).

i. The Labor Department did not Violate the Excessive Fines Clause

Sun Valley argues the "Agency's award for the meal plan and beverages violations also violates the Eighth Amendment's Excessive Fines Clause." Dkt. 19-1 at 39. The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment is applicable if the forfeiture constitutes a "fine" and is violated only if that fine is "excessive." *See Tillman v. Lebanon Cnty. Corr. Facility,* 221 F.3d 410, 420 (3d Cir. 2000). In *Bajakajian,* the Supreme Court held that the forfeiture of a sum of money grossly disproportionate to the defendant's offense constituted an Excessive Fines Clause violation and was therefore, unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

The DOL's award of penalties was not grossly disproportional to Sun Valley's meal plan and beverages viola-

tions. Sun Valley's violations harmed the workers' reliance and overall integrity of the H-2A program. Instead of imposing separate penalties for each of the meal and drink violations, the DOL only imposed one penalty of $1,350 per worker for Sun Valley's combined violations. The DOL also applied a ten percent reduction to the penalties due to Sun Valley not having a prior history with the H-2A program. Such reduction and imposition of one penalty is not grossly disproportionate to Sun Valley's offenses when the sum is less than legally permissible. *See Tillman*, 221 F.3d at 420-21.

Additionally, a reviewing court should evaluate "the sentences imposed for commission of the same crime in other jurisdictions." *United States v. Cheeseman*, 600 F.3d 270, 284 (3d Cir. 2010). "From 2005 through August 2021, the DOL [] imposed three civil monetary penalties over $1 million; fifty-two penalties between $100,000 and $1 million; 482 penalties between $10,000 and $100,000; and 1,850 penalties under $10,000 for alleged violations of the H-2A program." Dkt. 19-1 at 3. Thus, there is nothing out of the ordinary about Sun Valley's $198,450 penalties, and Sun Valley's Excessive Fine claim is dismissed.

IV. Conclusion

For the reasons stated above Defendants' Motion to Dismiss [Dkt. 22-1] is granted without prejudice, and Plaintiff's Motion for Partial Summary Judgment [Dkt. 19-1] and Defendant's Cross-Motion for Summary Judgment [Dkt. 22-1] are denied as moot.

An appropriate Order shall issue.

Dated: July 27, 2023

/s/ JOSEPH H. RODRIGUEZ
HON. JOSEPH H. RODRIGUEZ,
UNITED STATES DISTRICT JUDGE

APPENDIX C

U.S. DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
200 CONSITUTION AVE. NW
WASHINGTON, DC 20210-0001

ARB Case No. 2020-0018
ALJ Case No. 2017-TAE-00003

IN THE MATTER OF ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

SUN VALLEY ORCHARDS, LLC, RESPONDENT

Date: May 27, 2021
Filed: Sept. 8, 2021

DECISION AND ORDER

Appearances:

FOR THE COMPLAINANTS:

CHRISTOPHER J. SCHULTE, ESQ.
CJ Lake, LLC
Washington, District of Columbia

FOR THE RESPONDENT:

KATE S. O'SCANNLAIN, ESQ.
JENNIFER S. BRAND, ESQ.
SARAH K. MARCUS, ESQ.

RACHEL GOLDBERG, ESQ.; AND
AMELIA BELL BRYSON, ESQ.
Office of the Solicitor
U.S. Department of Labor
Washington, District of Columbia

Before: JAMES D. MCGINLEY, *Chief Administrative Appeals Judge*; JAMES A. HAYNES and STEPHEN M. GODEK, *Administrative Appeals Judges*

PER CURIAM. This case arises under the worker protection provisions of the H-2A temporary agricultural worker program of the Immigration and Nationality Act (INA) and the H-2A implementing regulations.[1] The Administrator of the Wage and Hour Division, United States Department of Labor (Administrator), filed a Notice of Determination, finding that Sun Valley Orchards, LLC (Respondent) violated multiple H-2A program regulations through the actions of its agent, Agustin Hernandez. The Administrator assessed back wages and civil money penalties (CMPs) against the Respondent for violating the governing H-2A regulations.

Respondent requested a hearing, and the Administrator referred the matter to the Office of Administrative Law Judges (OALJ). After a hearing, an Administrative Law Judge (ALJ) issued a Decision and Order Affirming in Part and Modifying in Part the Administrator's Findings (D. & O.). The ALJ found that Respondent violated several of the H-2A program requirements and owed a total of $344,945.80 in back wages and $211,800 in CMPs.

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[1] *See* 8 U.S.C. § 1188(c); 20 C.F.R. § 655, Subpart B; 29 C.F.R. § 501.

Respondent appealed the ALJ's findings to the Administrative Review Board (Board). After considering the record and the parties' arguments, we conclude that the ALJ correctly determined that Respondent committed serious violations of the H-2A program requirements and, as a result of these violations, the ALJ properly awarded back wages and assessed CMPs. Therefore, we affirm the ALJ's decision.

BACKGROUND

Respondent is a New Jersey farm owned by the Marino family, including brothers Russell and Joseph.[2] At all relevant times, Respondent employed Hernandez as its supervisor of the farmworkers.[3] Hernandez supervised the workers in every aspect of their lives and work. Hernandez oriented the workers, maintained their housing facilities, sold them meals and drinks, oversaw transportation, and distributed pay.[4] Workers paid Hernandez for meals, drinks, housing, and transportation.[5]

Respondent filed two job orders with the Department of Labor (Department) to hire H-2A workers to pick produce crops from April 13 to October 10, 2015.[6] It was Respondent's first time utilizing the H-2A program.[7] In these job orders, Respondent represented to the Department and the H-2A workers that it would "furnish free cooking and kitchen facilities to those

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[2] D. & O. at 3. Both brothers play a role in the events that give rise to this appeal.

[3] *Id.* at 4, 9-11.

[4] *Id.* at 9-11.

[5] *Id.* at 11.

[6] *Id.* at 3-4.

[7] *Id.* at 20.

workers who are entitled to live in the employer housing so that workers may prepare their own meals."[8]

During the 2015 growing season, the H-2A workers, and many of Respondent's domestic workers, lived at Respondent's housing facility.[9] However, the kitchen at the workers' housing facilities was not large enough to allow the workers to cook their own meals after returning from their shifts.[10] Instead, Hernandez managed a meal plan for the workers, as instructed by Respondent, in which Hernandez would provide cooked food for a fee of $75 to $80 per week.[11] All of the H-2A workers participated in the meal plan at some point.[12] Respondent owned the kitchen, paid its utility bills, and directed Hernandez to maintain records of meal purchases and not to make a profit from the meal plan.[13] The workers did not pay Respondent directly for the meal plan. Instead, Hernandez would take the workers' checks to the bank to cash them and then return the remaining money after deducting the amount owed for the meal plan.[14]

The farmworkers harvested asparagus and peppers. The workers' shifts lasted for twelve hours each day with only a single, one-hour, break.[15] Potable drinking water and clean bathroom facilities were not consist-

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[8] *Id.* at 15.

[9] *Id.* at 4.

[10] *Id.* at 12.

[11] *Id.* at 10.

[12] *Id.* at 4, 40.

[13] *Id.* at 8, 10.

[14] *Id.* at 8.

[15] *Id.* at 9.

ently available to the workers while working in the fields.[16]

Many other aspects of the workers' living and working conditions were inadequate. The workers' dormitories had dirty bathrooms without hot water and two broken sinks.[17] The windows and doors lacked screens and garbage cans lacked lids, which attracted flies and other pests.[18] Respondent transported the workers from the dormitories in unsafe school buses that were driven by workers who were not licensed drivers.[19] A Wage and Hour Division (WHD) investigator found that three of the five buses used by Respondent had worn, unsafe tires and one that had a broken rear turn signal.[20]

Hernandez sold non-alcoholic beverages to the workers in the kitchen and while he supervised them in the fields.[21] He also sold beer to the workers from the kitchen, though he did not have a state license to sell alcohol.[22] Hernandez did not maintain records of the drink sales.

In May 2015, nineteen workers sought a meeting with management to raise concerns about their living and working conditions.[23] Workers testified that Russell Marino was very angry at the meeting and fired the

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[16] *Id.* at 18-20.

[17] *Id.* at 6-7, 29.

[18] *Id.* at 46.

[19] *Id.* at 8, 21.

[20] *Id.* at 8.

[21] *Id.* at 16.

[22] *Id.* at 7.

[23] *Id.* at 14.

workers.[24] Respondent subsequently distributed worker departure forms that falsely stated the workers were resigning because of personal issues, such as a sick family member.[25] Respondent did not allow the workers to state on the forms that they were fired.[26] Respondent provided the forms to Department and other government agencies after the workers signed them.[27] Russell Marino testified that he listed a false reason for the workers' departure because he did not want to make it harder for the workers to find work later with a mark on their record but he also admitted it was to "protect against . . . this lawsuit."[28] Respondent replaced the workers with other H-2A workers.[29]

In August, Respondent laid off another group of forty-four workers because of a pepper crop failure.[30] Respondent had these workers also sign forms falsely stating their reasons for leaving.[31]

The WHD investigated Respondent to ensure compliance with H-2A regulations during the 2015 growing season.[32] On June 22, 2016, the Administrator issued a Notice of Determination after the investigation, alleging multiple violations of the H-2A program and assessing $369,703.22 in back wages and $212,250 in CMPs against

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[24] *Id.* at 14-15, 44.

[25] *Id.* at 19-20.

[26] *Id.* at 20.

[27] *Id.* at 20, 49.

[28] *Id.* at 19-20.

[29] *Id.* at 17.

[30] *Id.* at 12.

[31] *Id.* at 20-21.

[32] *Id.* at 6.

Respondent.[33] Respondent requested a hearing before an ALJ, and the Administrator referred the matter to the OALJ.[34]

ALJ DECISION

The ALJ held an evidentiary hearing on July 18 through 21, 2017 and issued her decision on October 28, 2019.[35] The ALJ made several narrative findings of fact, including that "[k]itchen access was unavailable or otherwise denied" to the workers and that Respondent informed the workers that they could purchase a meal plan for $75 to $80 a week.[36] The ALJ also found that potable water and clean bathroom facilities were only sporadically available, especially in the fields, and that the workers' housing was inadequate.[37] Further, the ALJ found that Respondent fired the nineteen workers in May 2015 after the contentious meeting and that Respondent provided the terminated workers with worker departure forms that gave false reasons for leaving.[38]

The ALJ then discussed the Administrator's violation findings and the back wages and CMPs assessed against Respondent. As an initial matter, the ALJ found that Hernandez acted as Respondent's agent at all relevant times with actual and apparent authority.[39] Under 20 C.F.R. § 655.122(p), the ALJ held that the Administrator properly found that Respondent unlawfully de-

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 2, 6.

[36] *Id.* at 20.

[37] *Id.*

[38] *Id.* at 20-21.

[39] *Id.* at 36.

ducted from the workers' wages for the meals, non-alcoholic beverages, and beer under 20 C.F.R. § 655.122(g), (p), and (q).[40] Under 20 C.F.R. § 655.122(p), Respondent could not make deductions from the workers' pay that provided a profit or violated any law.

The ALJ found that Respondent was required to remit back pay for the deductions made from the workers' wages for the meals and non-alcoholic beverages.[41] Under 20 C.F.R. § 655.122(p)(1), job orders must list any deduction not required by law. The ALJ found that Respondent failed to note the deductions for the meal plan in the job orders, depriving the workers of the wage promised to them in the job order.[42] The ALJ explained that the assessment of the entire amount deducted from the workers for the meal plan provided them their contractual right to the wage promised in the job orders and provided a deterrent effect to future employers who may also attempt to alter the terms of the job order upon the workers' arrival.[43] Thus, ALJ affirmed the Administrator's $128,285 back wage assessment for the amount that Hernandez deducted for the meal plan. The ALJ also upheld the Administrator's decision to assess one $1,350 CMP per affected worker for all of the meal and drink violations, totaling $198,450.[44]

The ALJ further found that Respondent profited from the sales of the nonalcoholic beverages to the work-

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[40] *Id.* at 35.

[41] *Id.* at 39-40.

[42] *Id.* at 39.

[43] *Id.*

[44] *Id.* Under H-2A regulations at the time of the assessment, CMPs may not exceed $1,500 per violation. 29 C.F.R. § 501.19(c) (2010).

ers. The ALJ approved of the WHD's use of the *Anderson v. Mt. Clemens Pottery Co.*,[45] method for calculating the back pay, in which an employee need only show a just and reasonable inference of the amount owed if the employer fails to keep records documenting the unpaid wages. However, the ALJ found the preponderance of the evidence established the workers purchased an average of 4 drinks a day rather than the Administrator's finding of 4.42.[46] Therefore, the ALJ modified the back wages from $71,790.08 to $64,960.[47]

The ALJ found that the beer sales were also unlawful deductions because Hernandez sold beer without a license in violation of New Jersey law[48] and ordered Respondent to remit the $8,972.61 of profits from the sales.[49]

The ALJ next found the Administrator properly found that Respondent discharged twenty-four workers before they had been offered work for at least three-fourths of the workdays specified in the job orders in violation of 20 C.F.R. § 655.122(i)(1).[50] For the nineteen workers who left after the meeting with management in May 2015, the ALJ recalled the workers' consistent testimony that Russell Marino became hostile to the work-

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[45] 328 U.S. 680 (1946).

[46] D. & O. at 41.

[47] *Id.* at 42.

[48] The parties stipulated that the beer sales violated New Jersey state law. *Id.* at 38.

[49] *Id.* at 42. Because Hernandez failed to maintain records for the beer sold to workers, the Administrator also employed the *Mt. Clemens* method in determining the profits from the beer sales, which the ALJ found to be reasonable. *Id.* at 41.

[50] *Id.* at 43.

ers and terminated their positions in anger.[51] The ALJ credited the workers' testimony over Joseph Marino's testimony regarding the meeting because he "was unable to specifically remember what was said" during the argument.[52] Therefore, the ALJ found that Respondent terminated the nineteen workers' employment before they worked the three-fourths of the hours promised in the job orders and was liable for any back pay because of the terminations.[53]

The ALJ further found that Respondent violated the three-fourths guarantee for four of the workers that were laid off in August 2015 because of a crop failure. The ALJ noted that counsel for Respondent agreed to the Administrator's calculations of the hours given to the four workers at the hearing and did not defend against the alleged violation in its post-hearing brief.[54] The ALJ also found that Respondent failed to satisfy its guarantee for one worker, Jose Islas Larraga, because the record contained no evidence that he abandoned his job.[55]

The ALJ affirmed the Administrator's $142,728.22 assessment of back wages for the three-fourths violations, noting that Respondent did not contest the calculations for the nineteen workers and Larraga and was unable to prove that the calculations for the four work-

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[51] *Id.* at 43-44.

[52] *Id.* at 44.

[53] *Id.* The ALJ also found in the alternative that Respondent constructively discharged the workers through the poor working and living conditions. *Id.* at 44-46.

[54] *Id.* at 47.

[55] *Id.*

ers were unreasonable.[56] The ALJ further found that the Administrator's assessment of one $1,350 CMP for the violations was reasonable.[57]

Next, the ALJ affirmed the Administrator's single $1,350 CMP for Respondent's unlawful attempts to cause the workers to waive their three-fourths guarantee.[58] The worker departure forms provided by Respondent to the Department falsely stated that the workers left voluntarily for personal reasons, which Respondent admitted was false.[59] Though the forms did not expressly state that they were giving up their three-fourths guarantee, the ALJ noted that the misrepresentation that they left voluntarily would proximately cause the workers to waive the guarantee under 20 C.F.R. § 655.122(n).[60]

The ALJ affirmed the Administrator's $3,150 CMP for Respondent's inadequate housing conditions, including the missing screens, uncovered garbage cans, and shortage of hot water, that violated § 655.122(d)(1).[61] The ALJ also affirmed the Administrator's $7,500 in

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[56] *Id.* at 47-48.

[57] *Id.* at 48. Respondent does not contest the back pay and CMP calculations on appeal.

[58] *Id.* at 49-50. Respondent does not contest the calculation of the CMP on appeal.

[59] *Id.*

[60] *Id.* at 49.

[61] *Id.* at 50. The ALJ did find that the Administrator's $450 CMP for a mattress found on the ground of the dormitories was unreasonable because the evidence did not establish that the mattress was unlawfully unclean. *Id.* at 51-52.

CMPs for Respondent's use of substandard transportation and unlicensed drivers in violation of § 655.122(h)(4).[62]

In total, the ALJ imposed $344,945.80 in back wages and $211,800 in CMPs against Respondent.[63] Respondent petitioned for review of the decision thereafter.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from ALJ final decisions in cases under the INA's H-2A provisions and its implementing regulations.[64] The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[65] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[66]

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[62] *Id.* at 52-53. Respondent does not contest the CMPs for the transportation violations on appeal.

[63] *Id.* at 53-54. The total back wages and CMPs included: $128,285 in back wages and $198,450 in CMPs for the meal-related violations; $64,960 in back wages for the soft drinks sold; $8,972.61 in back wages for the beer sold; $142,728.22 in back wages and $1,350 in CMPs for the three-fourths guarantee violations; $1,350 in CMPs for the attempted waiver; $3,150 in CMPs for the inadequate housing; and $7,500 for the substandard transportation and unlicensed drivers. *Id.* at 54-55.

[64] 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); 20 C.F.R. § 655.845; 29 C.F.R. § 501.42.

[65] *Adm'r, Wage and Hour Div. v. Fernandez Farms, Inc.*, ARB No. 2016-0097, ALJ No. 2014-TAE-00008, slip op. at 2 (ARB Sept. 16, 2019).

[66] *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

Respondent presents many arguments against several aspects of the ALJ's decision on appeal. Respondent contests the ALJ's finding that at all relevant times, Hernandez acted as Respondent's agent. Respondent also contests the ALJ's findings against it for the unlawful meal and drink deductions, the three-fourths guarantee violations, and the attempted waiver violation. We shall address each argument in turn.

1. Hernandez's Status as an Agent of Respondent

Respondent contests the ALJ's finding that Hernandez acted as Respondent's agent while operating the meal plan and selling the workers beer, thereby making Respondent liable for his unlawful actions. Respondent claims that the principles of agency do not apply because "the theory in this case is breach of contract" and that Hernandez acted independently when operating the meal plan by using the workers' payments to buy food and compensate kitchen staff. The ALJ found that Hernandez acted as Respondent's agent at all relevant times, with both actual and apparent authority over the workers and, therefore, his actions were "legally equivalent to the actions of Respondent."[67]

First, we conclude that the ALJ correctly held that common law agency principles apply to violations arising under the INA, including the H-2A regulations.[68]

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[67] D. & O. at 36.

[68] *See Ramos-Barrientos v. Bland*, 661 F.3d 587, 601 (11th Cir. 2011); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1245 (11th Cir. 2002) (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)) ("When applying agency principles to federal statutes, 'the Restatement (Second) of Agency . . . is a useful beginning point

Therefore, an H-2A employer is liable for its employee's unlawful actions while acting under actual or apparent authority of the employer.[69]

The ALJ found that Hernandez acted with actual authority when he administered the meal plan. An agent acts with actual authority "when at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[70] Here, Respondent told Hernandez to operate the same meal plan that Respondent had used for workers before engaging in the H-2A program. It had Hernandez attend Department training sessions concerning meal plans, and instructed Hernandez to maintain the records of the food and beverage sales and to comply with the H-2A program requirements.[71] Under these instructions, Hernandez operated the meal plan service and collected money from the workers for the food. Without Hernandez's services, Respondent would not have complied with its requirement to provide meals to its workers. This evidence demonstrates Hernandez reasonably believed that he was operating the meal plan under his employer's in-

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for a discussion of general agency principles'"); *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1289 (11th Cir. 2016) ("The common law principles of agency . . . dictate the parameters of the employment relationship under the H-2A program.").

[69] *See Arriaga*, 305 F.3d at 1244-45.

[70] Restatement (Third) Of Agency § 2.01 (2006); *see also Castillo*, 96 F. Supp. 2d at 593 ("*Express actual authority* exists 'where the principal has made it clear to the agent that he [or she] wants the act under scrutiny to be done.'") (quoting *Pasant v. Jackson Nat'l Life Ins. Co.*, 52 F.3d 94, 97 (5th Cir. 1995)).

[71] D. & O. at 22.

structions and not as his own business. Respondent points to no evidence that would support a legal conclusion to the contrary. Thus, we conclude the ALJ correctly found that Hernandez acted with actual authority.[72]

Though the ALJ found that Hernandez acted as Respondent's agent at all relevant times, the ALJ also found that Hernandez was an "affiliated person" of Respondent when selling beer to the workers. An H-2A employer may not make a deduction from an employee's wages that "includes profit to the employer or to any affiliated person."[73] WHD guidance describes an affiliated person as those "who furnish workers, any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship."[74] At the very least, Hernandez acted indirectly in Respondent's interest when selling the beer to the workers out of Respondent's kitchen. Therefore, the ALJ correctly found Respondent was liable for any unlawful profit that Hernandez made from the sale of beer to the workers.

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[72] The ALJ also correctly found that Hernandez acted with apparent authority when administering the meal plan because the workers reasonably believed that Respondent instructed Hernandez to implement the meal plan. D. & O. at 37-38; *see Arriaga*, 305 F.3d at 1245. However, we need not discuss this finding in detail because we affirm the ALJ's finding that Hernandez acted with actual authority.

[73] 20 C.F.R. § 655.122(p)(2).

[74] U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN NO. 2012-3 2 (May 17, 2012), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2012_3.pdf.

2. The Workers' Kitchen Facilities

For the period from June 1, 2015 through October 10, 2015, Respondent signed a job order submitted to the Department in which it promised to "furnish free cooking and kitchen facilities to those workers who are entitled to live in the employer's housing so that workers may prepare their own meals" and that "[o]nce a week the employers will offer to provide (on a voluntary basis by the workers) free transportation to assure workers access to the closest store where they can purchase groceries."[75]

Respondent contends the ALJ's finding that it failed to provide the kitchen facilities contractually promised to the workers is not supported by the evidence in the record. Respondent claims the testimony was "inconsistent" regarding how many workers could simultaneously use the kitchen and that some workers either used the kitchen or never asked to use it. However, Respondent's argument misses the point. Even if there were inconsistencies, they do not undercut the ALJ's finding that Respondent failed to meet its legal obligation to provide the workers with access to its kitchen to prepare meals on their own, nor would they provide an evidentiary basis to disturb the ALJ's findings on this issue. The Administrator points out that Hernandez testified that the kitchen was too small for the workers to prepare their own food. Hernandez's wife, who worked in the kitchen, further explained that workers were not allowed to use the kitchen.[76] Hernandez himself testified that workers were only allowed to store small items in

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[75] D. & O. at 15.

[76] Hearing Transcript (Tr.) at 175-76; Plaintiff's Exhibit (PX) 19 at 809.

the kitchen, and the workers who were able to cook for themselves purchased and used a hot plate in the dormitories.[77] Thus, we conclude that the ALJ's finding is supported by substantial evidence in the record.

3. The Back Wages and CMPs for the Undisclosed Meal Plan Deductions

Respondent contests the ALJ's order of $128,185 in back wages and $198,450 in CMPs for the deductions made from the workers' wages for the undisclosed meal plan under 20 C.F.R. § 655.122(p). Respondent argues that Hernandez did not deduct the meal plan costs from the workers' pay because the record demonstrated that the workers would pay him after they received their cash, and that the ALJ's decision to assess a per-worker CMP rather than a single CMP is excessive because there was only one violation of failing to disclose the meal charges.

As an initial matter, Respondent fails to accurately describe how the workers paid for the meal plan. As the ALJ observed, the workers never paid in cash for either the meals or the beverages Hernandez sold. Instead, Hernandez would cash the workers' checks at the bank and then return the money to them, minus what was owed for meals and beverages.[78]

Further, the manner in which Hernandez charged the workers for the meal plan is irrelevant because shifting a cost that Respondent could not deduct "constitutes an unlawful de facto deduction that impermissibly drives the employee's pay below the required prevailing

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[77] Tr. at 176; PX-19 at 1103-06.

[78] D. & O. at 8.

wage."[79] The Board has held that "there is no legal difference between an employer directly deducting a cost from a worker's wages, and shifting to the employee a cost that the employer could not lawfully directly deduct from wages."[80] Here, whether Hernandez took the money before or after providing the workers' pay is a distinction without a difference because the effect would be the same. The workers' would lose $75-80 of their earnings. Thus, the charges Hernandez took out of the workers' pay for the meal plans were deductions.

Respondent's contention that the Administrator can only assess one CMP for its failure to disclose the meal plan is incorrect. H-2A regulations permit the Administrator to assess a CMP "for each violation of the work contract" including each failure to "pay an individual worker properly or to honor the terms or conditions of a worker's employment."[81] Under each worker's job contract, Respondent falsely represented that an adequate kitchen would be provided. Further, Hernandez, act-

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[79] *Weeks Marine, Inc.*, ARB Nos. 2012-0093, -0095, ALJ No. 2009-DBA-00006, slip op. at 7 (ARB Apr. 29, 2015); *see also Arriaga*, 305 F.3d at 1236 (holding that the FLSA rule prohibiting deductions for the costs of facilities that primarily benefit the employer "cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment"). The H-2A regulations incorporate FLSA regulations for the permissibility of deductions. 20 C.F.R. § 655.122(p) ("The principles applied in determining whether deductions are reasonable . . . are explained in more detail in 29 CFR part 531.").

[80] *Weeks Marine, Inc.*, ARB Nos. 2012-0093, slip op. at 6-7 (considering a cost that the employer could not lawfully deduct from employee wages under Davis-Bacon Act regulations that also incorporate FLSA standards for the permissibility of deductions).

[81] 29 C.F.R. § 501.19(a) (2010) ("Each failure . . . constitutes a separate violation.").

ing as Respondent's agent, failed to pay each worker properly by subtracting deductions from each worker's pay that were not disclosed in the job orders. Therefore, Respondent failed to honor the terms of each worker's job contract, resulting in a violation for each worker Respondent employed.

The Administrator is granted discretion in "fashioning an appropriate remedy for a violation" within the limits of the H-2A regulations.[82] The regulations permit the Administrator to assess up to $1,500 per CMP.[83] The Administrator's decision to assess one $1,350 CMP for each worker that was misled by the job order was not an abuse of her discretion.

4. The Impact of the Failure to Disclose the Meal Plan

Respondent argues that the ALJ's order for $128,285 in back wages and $198,450 in CMPs for the unlawful meal plan deductions should be reversed because its failure to disclose the meal plan charges would not have impacted the Department's decision to approve Respondent's H-2A application or the workers' decision to accept the job orders. Respondent claims that the purpose of the H-2A disclosure requirements is: (1) to inform potential workers of the terms of conditions so they can decide whether to accept the job; and (2) to allow the Department to know whether the terms of the job might

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[82] *Overdevest Nurseries, LP*, 2015-TAE-00008, slip op. at 18 (OALJ Feb. 18, 2016) (citing *Wage & Hour Div. v. Kutty*, ARB No. 2003-0022, 2001-LCA-00010 to - 00025 (ARB May 31, 2005)); 29 C.F.R. § 501.19(a) (2010) ("A civil money penalty *may* be assessed by the WHD Administrator for each violation of the work contract.") (emphasis added).

[83] 29 C.F.R. § 501.19(c) (2010) (CMPs "will not exceed $1,500 per violation.")

adversely affect similarly-employed domestic workers. Respondent cites *Matter of Global Horizons*, in which an ALJ granted partial summary decision to the employer that had failed to accurately disclose meal charges because the employer did not exploit the workers by overcharging for meals.[84] Thus, Respondent claims that the back wages and CMPs are not warranted because Respondent did not profit off of the meal plan.

The deductions were unlawful because they were not disclosed, not because they provided a profit. The H-2A wage requirements are not "met where *undisclosed* or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required."[85] Here, the undisclosed deductions for the meal plan reduced the workers' wages below the required wages (*i.e.* the wages specified in the job orders). Therefore, the back pay award for all meal plan deductions allows the workers to receive the wages that they were contractually promised.[86]

Further, Respondent's citation to *Global Horizons* does not support its argument because the ALJ in that case ultimately awarded the workers back wages in the full amount of undisclosed meal plan deductions.[87] The

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[84] *Matter of Global Horizons*, ALJ No. 2010-TAE-00002, slip op. at 9 (OALJ Dec. 17, 2010).

[85] 20 C.F.R. § 655.122(p)(2).

[86] Respondent does not contest the Administrator's calculation of back wages for the meal plan deductions.

[87] *Matter of Global Horizons*, ALJ No. 2010-TAE-00002, slip op. at 2-3 (OALJ Dec. 13, 2011). The ALJ noted that the fact that the employer did not profit off the workers did not absolve it from liability for back wages because the failure to disclose the meal plan still "thwarted the regulatory scheme" and "circumvented the De-

ALJ in that case decided to grant summary decision to deny CMPs, not back wages, for the failure to disclose because the employer was "already being penalized the entire cost of buying food and paying cooks to prepare" the food.[88]

Last, whether providing a meal plan instead of cooking facilities would affect any of the workers' decisions to work for Respondent is irrelevant because all workers still received an inaccurate job order and had their wages reduced below the wage promised in the order. Further, Respondent provided inaccurate information to the Department that it relied upon in the application approval process. The Department depends on this information to ensure that the employment of the H-2A workers "will not adversely affect the wages and working conditions of" domestic workers.[89] Therefore, the Administrator appropriately assessed the back wages and CMPs both to provide the workers with the wages they were promised and to deter other H-2A employers from making the same failures to disclose in a potentially exploitative way.

5. The Back Wages for the Beverage Sales

Respondent contests the $64,960 back wages award for Hernandez's soft drink sales to the workers.[90] Re-

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partment's review and approval of the amounts being deducted," which is "an important step in assuring that Congress' prohibition of preferential treatment for the alien workers is enforced." *Id.* at 2 n.7.

[88] *Matter of Global Horizons*, ALJ No. 2010-TAE-00002, slip op. at 9 (OALJ Dec. 17, 2010).

[89] 8 U.S.C § 1188(a)(1)(B).

[90] Respondent does not contest the calculation of the back wages award.

spondent claims that testimony established that potable water was available to the workers at all times and that Hernandez's sales had no impact on Respondent's profits. Respondent adds that there was no testimony for why it was necessary for the workers to buy the soft drinks and that the H-2A regulations do not justify an award of free drinks to the workers.

We agree that the regulations generally do not require H-2A employers to provide soft drinks to its workers. However, if an employer or an "affiliated person" does sell them drinks, the regulations prohibit them from profiting from the sales.[91] If an employer or affiliated person does unlawfully sell the workers drinks, the employer is liable for the amount charged that reduced the employee's wages below the amount promised in the job orders.[92] Hernandez, who was acting as Respondent's agent when selling the drinks out of the kitchen or in the fields while supervising the workers, testified that he sold the beverages at a profit.[93] Thus, the soft drink sales were unlawful deductions from the workers' wages.

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[91] *See* 20 C.F.R. § 655.122(p)(2) ("A deduction is not reasonable if it includes a profit to the employer or to any affiliated person.").

[92] *Id.* ("The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions . . . reduce the wage payment made to the employee below the minimum amounts required."); 29 C.F.R. § 501.16(a)(1) ("Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B . . . have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including . . . the recovery of unpaid wages" and "the enforcement of provisions of the work contract.").

[93] D. & O. at 16; Tr. at 195 ("Q: You would pay 13 to $14 for a 24 -pack of soda? A: Yes. Q: Workers were charged $1 per soda? A: Seventy-five cents, I think.").

Further, although Respondent contends that evidence demonstrated that water was available at meals and at all times in the fields, the ALJ did not base her finding on the availability of potable water. Rather, the ALJ relied on her finding that drinkable water was sporadically available[94] to support her decision to award the full amount charged for the soft drinks. Even if Respondent had consistently provided its workers with clean, drinkable water at all times, Hernandez's sale of beverages for a profit still violated the regulations, and therefore, Respondent would be liable for the back wages.

Hernandez also sold beer to the workers from the kitchen, in violation of state law because he did not have a license to sell alcohol.[95] Hernandez did not maintain records of the drink sales, so the Administrator reconstructed the amount of drinks sold to the workers.[96] The Administrator determined that Respondent owed $8,972.61 in back wages for the profit Hernandez earned through his sale of beer in violation of state law.[97]

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[94] The ALJ found that workers did not have consistent access to potable water, based on workers' consistent testimony that clean water was not always available. D. & O. at 18-19.

[95] *Id.* at 7.

[96] *Id*. at 7-8, 24-25.

[97] *Id.* at 24. To calculate Hernandez's estimated profit from the beer sales, a WHD investigator used the price of $20.99 per thirty-pack of Coors Light, which is one brand of beer Hernandez sold, based upon the cost from a wholesale club similar to the one used by Hernandez to buy the beer. The investigator determined that he profited $1.30 per can because Hernandez sold the beer for $2 a can and each beer cost him $.70 to buy. The investigator determined Respondent profited $18.20 off each worker per week based on a reasonable estimation of how much beer each worker bought per week. *Id.* at 7-8.

Respondent claims that the Administrator's calculations of Hernandez's beer sales were incorrect because the investigator based the calculations off of a different brand of beer, store, and price used by Hernandez. However, because Respondent failed to keep records of the beer sold to the workers, the ALJ correctly applied the *Anderson v. Mt. Clemens Pottery Co.* burden shifting framework, in which the plaintiff only needs to produce sufficient evidence of the wages owed as a matter of just and reasonable inference.[98] The burden then shifts to the employer to produce evidence of the precise amount owed, and if the employer fails to do so, the court may award damages that need only be "approximate."[99]

Because Respondent could not rebut the Administrator's calculations with precise amounts, the ALJ was correct in awarding back wages that were an approximation of Hernandez's profits. The Administrator used the prices for beer at wholesale retailer Costco, while Hernandez had purchased the beer at Sam's Club, another wholesale club likely to sell products at similar prices.[100] Further, the Administrator used the price of Coors Light to calculate the profits, which is one of the brands of beer Hernandez sold.[101] The *Mt. Clemens* standard only requires estimates; precision is not required. Therefore, the ALJ's finding of $8,972.61 in profits from the beer sales was reasonable.

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[98] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

[99] *Id.* at 687-88.

[100] D. & O. at 42.

[101] *Id.* at 7-8.

6. The Three-Fourths Guarantee Violations and Waiver Attempts

Respondent contests the award of $142,728.22 in back wages and $1,350 in CMPs for the ALJ's findings that Respondent had violated the three-fourths guarantee for several workers.[102] H-2A employers must offer each worker "employment for a total number of work hours equal to at least three-fourths of the workdays" that are "specified in the work contract."[103] A worker that abandons employment or is terminated for cause is not entitled to the guarantee.[104]

For the nineteen workers that left in May 2015, Respondent disputes the ALJ's finding that Respondent terminated the workers without cause and the ALJ's credibility determination that favored the workers over Respondent's witnesses. Respondent cites one worker's uncorroborated testimony that Russell Marino tried to hit him as evidence that the workers' testimony lacked credibility and claims that it would have been illogical to fire the workers during harvest season.

The Board gives ALJ credibility determinations "great deference" if they are not "inherently incredible or patently unreasonable."[105] The Board affords such deference because the ALJ is able to observe the "witnesses' demeanor while testifying" and "the extent to which their testimony is supported or contradicted by

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[102] Respondent does not contest the calculation of the back wages award or CMPs.

[103] 20 C.F.R. § 655.122(i)(1).

[104] § 655.122(n).

[105] *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 2012-0002, ALJ No. 2006-WPC-00001, slip op. at 6 (ARB Aug. 29, 2012).

other credible evidence."[106] Here, the ALJ noted the consistency of the testimony of several of the workers' regarding the May 2015 meeting and that Joseph Marino's hearing testimony contradicted his deposition. Although one worker's uncorroborated testimony about an alleged assault does not bolster the ALJ's credibility finding, it does not make the determination "inherently incredible or patently unreasonable." The ALJ's credibility determination is substantial evidence that Respondent made "a rash, and perhaps illogical, decision" to fire the workers at that meeting and replace them in violation of their three-fourths guarantee.[107]

The Respondent also disputes the ALJ's finding that Respondent violated the three-fourths guarantee for four workers who were sent home after the pepper crop had become diseased.[108] Respondent claims that the four workers were offered the required hours but were unable to work them because they were sick or injured. However, Respondent waived this argument before the ALJ by agreeing to the Administrator's calculations regarding the three-fourths violations for the four workers and by failing to raise any argument against the alleged violation in its post-hearing brief.[109] Even if it did

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[106] *Id.* (quoting *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 2005-0101, ALJ No. 2003-SDW-00001, slip op. at 12 (ARB Oct. 31, 2008)).

[107] D. & O. at 44. The ALJ also found in the alternative that Respondent constructively discharged the nineteen workers. *Id.* at 44-46. Because we affirm the ALJ's finding that Respondent actually discharged the workers, we need not discuss the ALJ's alternative finding regarding constructive discharge.

[108] *Id.* at 12, 47.

[109] *Sandra Lee Bart*, ARB No. 2019-0004, ALJ No. 2017-TAE-00014, slip op. at 4-5 (ARB Sept. 22, 2020) ("Under our well-estab-

not waive the argument, Respondent does not cite to any evidence in the record demonstrating that the four workers were offered the required amount of work. Therefore, we affirm the ALJ's three-fourths violation finding concerning these four workers.[110]

Respondent contests the ALJ's finding that it attempted to waive the workers' three-fourths guarantees by falsifying their departure forms to say they left voluntarily.[111] Respondent argues that it was not attempting to have the workers waive their three-fourths guarantee because they never presented the forms to WHD investigators to explain their departures. However, H-2A regulations state that an employer may not "*seek* to have an H-2A worker . . . waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B."[112] Respondent had asked the workers to sign the falsified form. Whether Respondent presented the

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lished precedent, we decline to consider arguments that a party raises for the first time on appeal."). Counsel for Respondent withdrew an exhibit containing its own calculations of the hours worked and stated he "was wrong" about its contents. D. & O. at 47.

[110] The Administrator claims that Respondent appears to group one worker, Islas Larraga, who left in June 2015, in with the four workers who were dismissed in August. The ALJ made a separate finding that the record contained no evidence that he abandoned his job and that Respondent violated his three-fourths guarantee. D. & O. at 47. Even if he did abandon the job, Respondent still failed to report the end of his employment to the Department as required. 20 C.F.R. § 655.122(n) ("If the worker voluntarily abando ns employment . . . and the employer notifies [the Department,] . . . the worker is not entitled to the three-fourths guarantee.").

[111] Respondent does not contest the calculation of the $1,350 CMP for the violation.

[112] 29 C.F.R. § 501.5 (emphasis added).

forms to WHD investigators is irrelevant in this case. Substantial evidence supports the finding that it was attempting to waive their rights because Respondent admitted that no workers had sick or deceased family members and that the purpose of falsifying the forms was "to protect against . . . this lawsuit."

7. Remaining Arguments

Respondent contests the $3,150 in CMPs for the workers' inadequate living conditions, stating that the "condition of the housing resulted from lack of care by the workers living there, but more importantly, could have been remedied immediately if the WHD Investigator had been interested in the workers' living conditions rather than in assessing CMPs and raised the issue to Sun Valley in a timely manner." We are unable to discern any legal argument from this statement, nor do we see any abuse of discretion in the ALJ's order of CMPs for the workers' poor housing conditions.

Last, in a section titled "Estoppel/Laches/Mitigation," Respondent complains that the WHD improperly failed to raise concerns about the meal plan charges and bring an enforcement action in a timely manner. Respondent claims that the WHD knew of the meal plan in July 2015 but did not discuss any issue with Respondent until February 2016. This argument is without merit.[113]

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[113] We must make the point that participation in the H-2B visa program is voluntary. Respondent was under no compulsion to file a request for visas as a means to fulfill its projected employment needs. However, having received the benefit of government action, Respondent was obliged to tell the truth, and to meet the obligations it had undertaken both to its visa employees and to the federal government. We see no mitigating factors. On the contrary, Respondent appears to have simply violated the law.

Respondent admits that there is no case law that applies the doctrines of laches or estoppel to a government enforcement action and that H-2A employers are ultimately still responsible for complying with the regulations. Indeed, the Administrator notes that there is no regulatory requirement for the WHD to notify an employer the instant a violation is suspected and that the Supreme Court has long recognized that laches is not a defense to a government enforcement action.[114]

CONCLUSION

For the foregoing reasons, we agree with the ALJ's following findings, determination of back wages, and CMP assessments:

1. Respondent violated 20 C.F.R. § 655.122(g), (p), and (q) by making false promises about kitchen access and failing to disclose meal charges. As a result, it owes $128,285 in back wages, and $198,450 in CMPs.

2. Respondent violated 20 C.F.R. § 655.122(p) through the sale of drinks and other items at a profit or in violation of state law. As a result, it owes $64,960 in back wages for non-alcoholic drinks sold and $8,972.61 for the profit it made from the beer it sold.

3. Respondent violated 20 C.F.R. § 655.122(i) by discharging certain workers prior to such workers meeting the three-fourths guarantee. As a result, it owes $142,728.22 in back wages, and $1,350 in CMPs.

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[114] *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.").

4. Respondent violated 29 C.F.R. § 501.5 by attempting to cause workers to waive the three-fourths guarantee at 20 C.F.R. § 655.122(i). As a result, it owes $1,350 in CMPs.

5. Respondent violated 20 C.F.R. § 655.122(d) through the provision of inadequate housing. As a result, it owes $3,150 in CMPs.

6. Respondent violated 20 C.F.R. § 655.122(h)(4) through substandard transportation and unlicensed drivers. As a result, it owes $7,500 in CMPs.

Therefore, we **AFFIRM** the ALJ's Decision and Order Affirming in Part and Modifying in Part the Administrator's Findings.

SO ORDERED.

APPENDIX D

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 EXECUTIVE CAMPUS, SUITE 450
CHERRY HILL, NJ 08002
(856) 486-3800
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Case No.: 201-TAE-00003

IN THE MATTER OF ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

SUN VALLEY ORCHARDS, LLC, RESPONDENT

Issue Date: Oct. 28, 2019
Filed: Sept. 8, 2021

DECISION AND ORDER AFFIRMING IN PART AND MODIFYING IN PART THE ADMINISTRATOR'S FINDINGS

This matter arises under the H-2A provision of the Immigration and Nationality Act ("INA" or "the Act"), as amended, 8 U.S.C. §§ 1101(a) and 1188(c), and the U.S. Department of Labor's ("DOL") implementing regulations found at 20 C.F.R. Part 655, subpart B, and 29 C.F.R. Part 501 ("the H-2A regulations" or "the [governing] regulations").

PROCEDURAL HISTORY

The Administrator, Wage and Hour Division, U.S. Department of Labor ("Administrator") filed a Notice of Determination on June 22, 2016, alleging multiple violations of the H-2A program against Sun Valley Orchards, LLC's ("Respondent"). See JX 10 (December 23, 2006 Order of Reference and Summary of Violations). The Administrator assessed back pay and civil money penalties ("CMPs") totaling $564,026. See Administrator's Brief at 91.

On December 23, 2016, the Administrator issued an Order of Reference, which referred the matter to the Office of Administrative Law Judges ("OALJ"). On January 11, 2017, the undersigned received the assignment of this case. On January 18, 2017, the undersigned issued an Initial Notice of Hearing and Pre-Hearing Order scheduling the hearing to begin on February 16, 2017 in Cherry Hill, New Jersey. At a February 2, 2017 telephonic pre-hearing conference, the Parties petitioned the undersigned for a revised hearing schedule. A February 7, 2017 Order granted the Parties' joint motion for a revised hearing schedule, and scheduled the hearing to begin on July 18, 2017.

On May 23, 2017, by facsimile, Respondent's counsel filed an Emergency Motion for Revised Schedule proposing to move the filing of motions for summary decision deadline to June 9, 2017. By facsimile dated May 24, 2017, the Administrator filed her Opposition to Respondent's Motion for a Third Extension to the Summary Decision Deadline. Respondent submitted, by facsimile on May 24, 2017, Respondent's Reply in Further Support of Emergency Motion for Revised Schedule.

A May 25, 2017 Order Granting Respondent's Emergency Motion for Revised Schedule afforded the parties a one-week extension to file motions for summary decision. Further, the Order advised the parties that no other deadlines would change and the hearing remained scheduled for July 18, 2017 in Cherry Hill, New Jersey. The undersigned received both the Administrator's Motion for Partial Summary Decision and Respondent's Motion for Summary Decision on June 2, 2017.

On June 6, 2017, by facsimile, the Administrator filed a Joint Motion to Extend by One Week Certain Pre-Hearing Deadlines. The parties jointly requested that the undersigned set June 16, 2017 as the deadline to file summary decision oppositions, extend the deadline for pre-hearing disclosures and exchanges to June 19, 2017, and extend the deadline for the pre-hearing statements to June 23, 2017. A June 8, 2017 Order granted the parties' joint motion to extend the foregoing deadlines. A July 7, 2017 Order denied the parties' motions for summary decision.

On July 18, 2017, the hearing commenced in Cherry Hill, New Jersey. At the conclusion of the hearing, on July 21, 2017,[1] the undersigned directed the parties to meet and confer regarding a briefing schedule. On September 25, 2017, by facsimile letter, the parties filed

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[1] At the hearing, the undersigned admitted the following exhibits: Administrative Law Judge's Exhibit ("ALJX") 1; Joint Exhibits ("JX") 1-JX 10; Prosecuting Party's Exhibits ("PX") 1; PX 2; PX 3; PX 15-PX 15-2; PX 16; PX 16-1; PX 17-1; PX 17-2; PX 17-3; PX 19; PX 20; PX 21; PX 22; PX 23; PX 24; PX 25; PX 28; PX 29; PX 30; PX 32; PX 33; PX 34; PX 35; PX 36; PX 37; PX 39; PX 41; and PX 42; Respondent's Exhibits ("RX") 1; RX 2; RX 5; RX 7; RX 9; and RX 12-RX 19.

a Joint Motion to Set Post Hearing Briefing Schedule. An October 5, 2017 Order granted the parties' joint motion and extended the deadline to submit post-hearing briefs to December 15, 2017. Both parties submitted briefs on December 15, 2017.

ISSUES

1. Did Respondent violate 20 C.F.R. § 655.122(g), (p), and (q) by making false promises about kitchen access and failing to disclose meal charges?
    a. If so, did the Administrator properly assess $128,285 in back wages?
    b. If so, did the Administrator properly assess $198,450 in civil money penalties ("CMPs")?
2. Did Respondent violate 20 C.F.R. § 655.122(p) through Agustin Hernandez's sale of drinks and other items at a profit or in violation of state law?
    a. If so, did the Administrator properly assess $80,762.69 in back wages?
3. Did Respondent violate 20 C.F.R. § 655.122(i) by discharging certain workers prior to such workers meeting the three-fourths wages guarantee?
    a. If so, did the Administrator properly assess $142,728.22 in back wages?
    b. If so, did the Administrator properly assess $1,350.00 in CMPs?
4. Did Respondent violate 29 C.F.R. § 501.5 by attempting to cause workers to waive the three-fourths guarantee at 20 C.F.R. § 655.122(i)?
    a. If so, did the Administrator properly assess $1,350.00 in CMPs?

5. Did Respondent violate 20 C.F.R. § 655.122(d) by providing inadequate housing?

    a. If so, did the Administrator properly assess $3,600.00 in CMPs?

6. Did Respondent violate 20 C.F.R. § 655.122(h)(4) through providing substandard transportation and unlicensed drivers?

    a. If so, did the Administrator properly assess $7,500.00 in CMPs?

See Administrator's Brief at 91 (revising back wages owed); see, *e.g.*, JX 10 page 160 (the Administrator's originally submitted "Summary of Violations" table).

STIPULATIONS OF FACT

The Parties agree to the following stipulations, provided in full:[2]

1. Respondent, a New Jersey farm, employs both foreign nationals working on H-2A visas ("H-2A workers") as well as a number of non-H-2A employees, including non-H-2A employees engaged in corresponding employment ("domestic workers").[3] The workers' duties include picking asparagus, peppers, and other crops.

2. Respondent was founded as a limited liability corporation in 2012 and is owned by Russell Marino Jr.;

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[2] The undersigned has made minor grammatical changes to the Parties' stipulations.

[3] Where necessary and appropriate, the undersigned will use the term "farmworkers" to denote both H-2A workers and non H-2A domestic workers.

Joseph Marino, Harry Marino; and Russell Marino, Sr.

3. Respondent took over the farming operation formerly known as Marino Brothers, Inc.

4. Marino Brothers, Inc. did business under the trade name "Sun Valley Orchards."

5. Russell Marino, Sr.; Sebastien Marino; and Harry Marino owned Marino Brothers, Inc.

6. Marino Brothers, Inc. employed Agustin Hernandez ("Hernandez") and Russell Marino, Jr. (among others).

7. To obtain workers for the period of April 13, 2015 to October 10, 2015 (the "2015 growing season"), Respondent filed two applications for Temporary Employment Certification ETA Form 9142 ("TEC") and two Agricultural and Food Processing Clearance Orders (ETA Form 790) ("job orders").

8. Respondent filed a job order for the period of April 13, 2015 to October 10, 2015. The Department of Labor subsequently approved this job order. JX 1 contains a true and accurate copy of that job order.

9. Respondent also filed a TEC for this same time period. The Department subsequently approved this TEC. JX 2 is a true and accurate copy of that TEC.

10. Respondent also filed a job order for the period of June 1, 2015 to October 10, 2015. The Department subsequently approved this job order. JX 3 is a true and accurate copy of that job order.

11. Respondent also filed a TEC for the period of June 1, 2015 to October 10, 2015. The Department subsequently approved this TEC. JX 4 is a true and accurate copy of that TEC.

12. After the Department of Labor approved these TECs and job orders, Respondent hired H-2A workers.

13. During 2015, Respondent qualified as an employer within the definition of 20 C.F.R. § 655.103(b).

14. During 2015, Hernandez was not an employer within the definition of 20 C.F.R. § 655.103(b).

15. JX 5 is a chart listing the ninety-six H-2A workers and fifty-one domestic workers that Respondent employed during the 2015 growing season.

16. In the job orders, Respondent promised to pay these employees $11.29 per hour or at a piece rate, whichever was higher.

17. JX 6 is a true and accurate copy of Respondent's employee roster for the 2015 growing season.

18. During the 2015 growing season, Hernandez supervised Respondent's H-2A and domestic workers and selected the drivers to transport Respondent's H-2A and domestic workers from the housing facility to the agricultural fields.

19. During the 2015 growing season, Respondent's H-2A workers, and many of its domestic workers, lived at Respondent's housing facility, which is located at 1321 Route 45 South, Swedesboro, NJ 08085.

20. This housing facility was built before April 3, 1980, and includes (among other things) bedrooms, a

bathroom facility, and (in an adjacent building with a separate entrance) a kitchen.

21. During the 2015 growing season, Respondent paid for the utilities for this kitchen (including gas, electricity, and water), and provided various appliances for the kitchen, including stoves, freezers, a microwave, and refrigerators.

22. During the 2015 growing season, 139 of Respondent's H-2A and domestic workers purchased meals prepared in Respondent's kitchen and paid Hernandez between $75 and $80 a week for these meals.

23. During the 2015 growing season, many of Respondent's H-2A and domestic workers paid Hernandez for soft drinks, energy drinks, and snacks, among other things.

24. During the 2015 growing season, to the parties' knowledge, Respondent withheld no money from any H-2A or domestic worker's paychecks for meals, drinks, or any other items.

25. Other than payments to Hernandez, to the parties' knowledge, none of the H-2A workers or domestic workers paid Respondent for meals, drinks, or any other items.

26. During the 2015 growing season, Hernandez did not have a license to sell beer or cigarettes.

27. The chart at JX 7 lists workers who last worked at Respondent on or before May 7, 2015.[4]

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[4] The parties dispute whether the workers' employment ended because Respondent constructively discharged or terminated them, or because they voluntarily quit.

28. Jose D. Islas Larraga last worked for Respondent on June 9, 2015.[5]

29. On or about August 8, 2015, Respondent terminated the employment of Miguel A. Elizondo Soto, Luis A. Luna Gonzalez, Jose L. Silva Lopez, Dario Morales Acosta, and Rodrigo Raya Tapia. These workers' last day of work occurred on or before August 4, 2015.

30. Respondent asked workers whose work ended before the end of the season to complete a worker departure form.

31. The top half of this form was in English and the bottom half was in Spanish.

32. The workers were instructed to retain the bottom half and to return the top half.

33. JX 8 contains true and accurate copies of the English portions of the worker departure forms signed by Respondent's workers around the time that their work was ending.

34. Attached, as JX 9 is a true and accurate copy of a worker departure form, including English and Spanish portions, dated August 8, 2015.

35. Worker departure forms were distributed to H-2A workers who departed before the end of the season around the time that these workers' work ended.

36. During the 2015 growing season, the Wage and Hour Division of the U.S. Department of Labor, including Wage Hour Investigators ("WHI") John

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[5] The parties also dispute the reasons that this worker stopped working for Respondent.

Crudup and Jose Perez, investigated Respondent to determine (among other things) whether the farm was in compliance with H-2A regulations.

37. During their investigation, [the Administrator] inspected the housing facility and five of Respondent's buses, interviewed Respondent's workers and drivers, and met with Respondent's owners and with Hernandez.

38. On June 22, 2016, the Administrator issued a determination letter alleging that Respondent violated certain H-2A regulations and assessing $369,703.22 in back wages and $212,250.00 in CMPs against Respondent.

39. On July 20, 2016, Respondent filed a timely hearing request.

40. On December 23, 2016, the Administrator filed an Order of Reference referring the matter to OALJ. The Administrator also amended the determination letter by adjusting the amounts sought to $376,697.61 in back wages and $212,250.00 in CMPs, and added additional findings and bases for the Administrator's back wage and CMP assessment.

41. Attached, as JX 10 is a true and accurate copy of the Order of Reference, which includes true and accurate copies of the underlying determination letter and hearing request referenced in paragraphs 38-40.

42. During the course of discovery in this matter, the Administrator took depositions of six H-2A workers. In accordance with 29 C.F.R. § 18.55(a), the Parties stipulate that true and accurate transcripts or videos of the depositions, or portions thereof,

> may be used at the hearing to the extent that doing so would be admissible under the applicable rules of evidence as if the deponent were present and testifying at the hearing.

See ALJX 1 ("Joint Stipulation of Agreed Facts").

FINDINGS OF FACT[6]

Bathroom Conditions

The bathrooms at Respondent's dormitories lacked sufficient hot water.[7] Two of the sinks were completely broken.[8] The bathrooms contained windows without screens, which allowed entry to pests.[9] Relatedly, when workers first arrived, there were no bathrooms in the fields.[10]

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[6] For the sake of readability only, the undersigned has grouped the findings of fact in alphabetical order, and used footnote citations.

[7] See Tr. at 30, 60 (Maldonado's testimony), 103-04 (Gustavo Perez's testimony), 330 (WHI Perez's testimony); PX 7 at 189 (Silva Lopez recalling that, at times, he took cold showers); PX 11 at 288 (Garcia Dominguez stating on deposition that there was only enough hot water for ten people to shower before it ran out). *Cf.* Tr. at 203, 215 (Hernandez's testimony that workers had to "wait a little bit" for hot water).

[8] See Tr. at 200-01 (Hernandez's testimony).

[9] See Tr. at 202-03 (Hernandez's testimony).

[10] See Tr. at 17-19, 76 (Maldonado's testimony), 91 (Gustavo Perez's testimony), 139 (Cheguez's testimony); PX 9 at 216 (Cinta Tegoma's deposition testimony that workers had the option to "hold" their waste or "run towards the trees"); PX 11 at 274 (Dominguez's deposition testimony that bathrooms were not available).

Beer Sales

Hernandez sold beer to the farmworkers; however, he did not have a license from the State of New Jersey to do so.[11] Hernandez did not keep a record of the amount of beers sold to the farmworkers. As a result, WHI Perez created the reconstruction at PX 2, which attempted to calculate Hernandez's "estimated profit."[12] The evidence of record reasonably establishes that the workers bought three and three-quarter cans of beer per week; however, some workers bought more per week and some did not buy any beer at all.[13] To determine the price of beers, WHI Perez went to Costco and obtained a price of $20.99 for a thirty-pack of Coors Light.[14] The Administrator reasonably estimated that the wholesale

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[11] See ALJX 1 at ¶ 26 (Joint Stipulation of Agreed Facts).

[12] Tr. at 581, 637-38 (WHI Perez's testimony); Appendix C to the Administrator's brief titled "Revised Back Wage Computations as to Illegal Beer Sales at a Profit."

[13] See, *e.g.*, PX 13 at 345-47 (Dario Morales Acosta testifying that he bought around two and one-half beers per week, but other workers likely bought more); PX 3 at 80-82 (Cervantes Ramirez recalling that he purchased six beers per week with three other coworkers); PX 5 at 142 (Miguel Angel Elizondo Soto stating that he bought two beers a week); PX 11 at 281-83 (Garcia Dominguez recalling that he purchased seven beers a week, but some workers bought three to five beers per night); Tr. at 25-26 (Maldonado, who only worked for Respondent for two weeks, bought a twelve-pack of beer each week); PX 7 at 180-82 (Silva Lopez remembering that he bought one or two beers a day for three days a week, and that some workers bought more beer than he did). *Cf.* PX 9 at 219; Tr. at 98, 269 (Cinta Tegoma and Gustavo Marquez Perez, respectively, testifying that they did not purchase any beer; Pedro Zavala Almanza only ever purchased one beer).

[14] See Tr. at 450-51.

price for a can of beer was seventy cents.[15] WHI Perez went to Costco, because Elia Pinon, Hernandez's wife, told him that she and Hernandez bought their beer at another wholesaler, Sam's Club.[16] Hernandez sold Corona, Coors Light, Budweiser, Modelo, and Coors Light.[17] Thus, it was reasonable for WHI Perez to determine the per-can cost through comparison of Coors Light sold at a wholesale club, here Costco. The Administrator decided to reimburse those farmworkers who bought beer for the amount of Hernandez's profit, which it reasonably determined was $1.30 per can (the beers cost seventy cents and Hernandez sold the beers for $2).[18] Perez provided a reasonable calculation that Respondent owed each worker $18.20 per week in back wages.[19]

Buses

Respondent used buses to transport the farmworkers from its dormitory to the fields; one field was a fifteen-minute drive from the dormitory area.[20] Hernandez chose bus drivers from amongst its farmworkers.[21]

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[15] See Tr. at 374, 451-52, 627.

[16] See Tr. at 505-06.

[17] See Tr. at 359-60 (WHI Perez discussing the contents of Hernandez's refrigerator, as shown in PX 32, pages 1076 and 1078-79); Tr. at 580 (discussing the contents of PX 32, page 1077, showing a can of Coors Light).

[18] See Appendix C to Administrator's Brief.

[19] See Tr. at 626-27; PX 2.

[20] See Tr. at 204-05. *C.f.* 31-32 (Maldonado recalling that the trips were thirty-minutes each way).

[21] See Tr. at 31, 104.

Of the five buses WHI Perez inspected, three had worn, unsafe tires.[22] One bus had a broken rear turn signal.[23]

Deductions from Pay

The farmworkers never paid in cash for either the meals or the beverages Hernandez sold.[24] Hernandez would take workers' checks to the bank to cash them and then return the money to the workers, minus any money owed for meals and beverages.[25] Russel Marino, Jr. told Hernandez to keep track of the farmworkers' payments in this way.[26]

Drivers

Hernandez selected bus drivers from within Respondent's pool of workers.[27] Hernandez would allow any such worker to drive if the worker had a Mexican driver's license or driving experience.[28] In response to WHI Perez's request, none of the five workers WHI Perez observed driving the buses could provide him with a U.S. driver's license.[29] Hernandez only provided drivers' licenses to WHI Perez for three of the five drivers

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[22] See Tr. at 402-06, 607-08; PX 29 pages 1058-63 (showing three tires that are clearly unsafe for road use due to the condition of the tires as bald and cracked).

[23] See Tr. at 405; PX 29 at 1057 (showing that bus number 205 has a broken right rear turn signal).

[24] See Tr. at 42 (Maldonado's testimony), 100 (Gustavo Perez's testimony), 186-87, 211 (Hernandez's testimony that workers never paid Respondent).

[25] See Tr. at 100, 189, and 338-40.

[26] See Tr. at 187.

[27] See Tr. at 205.

[28] See Tr. at 205-06.

[29] See Tr. at 390-401.

WHI Perez observed.[30] Two had Mexican driver's licenses, one had an expired Mexican driver's license, and two had no licenses.[31] Russel Marino, Jr. told WHI Perez that he could not control who drives the bus on any given day.[32]

Hard Work

The farmworkers engaged in "hard work."[33] The workers worked twelve hours per day with only one one-hour break.[34] Some of the workers had prior experience working in a bent over posture.[35]

Hernandez's Working Relationship with Respondent

Hernandez has worked for Respondent or its predecessor companies for twenty-seven years.[36] His father worked for Respondent, his son currently drives a bus for Respondent, and his wife works in Respondent's kitchen.[37] Hernandez receives all of his pay from Respondent; Respondent provides him with an hourly pay rate plus commission for the amount of product that is

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[30] Tr. at 400.

[31] Tr. at 390-401; PX 30 at 1064-72.

[32] See Tr. at 456.

[33] See Tr. at 17 (Maldonado's testimony), 219 (Hernandez stating that cutting asparagus "is the toughest work we have), 256 (Almanza's testimony), 726 (Russel Marino, Jr. recalling that the workers at the May 2015 meeting complained of the difficulty of the work required).

[34] See Tr. at 17 (Maldonado's testimony), 90-91 (Gustavo Perez's testimony), 139 (Cheguez's testimony) 257 (Almanza's testimony).

[35] See, *e.g.*, Tr. at 125 (Gustavo Perez stating that he had experience harvesting beans and chili pepper which required "the same" posture as harvesting asparagus).

[36] See Tr. at 171.

[37] See id.

packaged.[38] For example, if the farmworkers packaged more asparagus, Hernandez would receive more money in the form of a commission.[39]

In 2015, Hernandez helped facilitate Respondent's engagement in the H-2A program.[40] Hernandez operated the meal plan that fed the farmworkers. Although Hernandez utilized Respondent's kitchen to do so, he paid the cooks, and bought groceries and certain appliances, as needed, to cook the meals.[41] Hernandez's wife, Elia Pinon, worked in the kitchen.[42] After Respondent decided to utilize the H-2A program in 2015, Respondent told Hernandez that he could keep charging for meals but that Hernandez—not Respondent—would be responsible for paying the kitchen staff's wages.[43]

Concerning kitchen access, Russel Marino, Jr. told Hernandez to "accommodate the guys however he had to."[44] Respondent paid the kitchen's utility bills.[45] Respondent did not pick the menu or otherwise tell Hernandez how to run the kitchen or set prices.[46] Hernandez told Respondent how much he planned to charge for the meals.[47] Respondent told Hernandez to keep track

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[38] See Tr. at 230.

[39] Id.

[40] See Tr. at 171-74, 806-07 (Russel Marino, Jr. recalling that in 2015, he asked Hernandez how many workers from the H-2A program he would need).

[41] See Tr. at 177-78, 229, 244, 252, and 793.

[42] Tr. at 171; PX 19.

[43] See Tr. at 177.

[44] Tr. at 743.

[45] See Tr. at 793.

[46] See Tr. at 247, 808.

[47] See Tr. at 187-88.

of the workers' payments for the meal plan.[48] Respondent took Hernandez to a meeting with the Department to ensure he understood the regulatory parameters concerning meal plans.[49] Respondent told Hernandez "for years" to keep his receipts, "because you cannot make a profit on the men."[50] Hernandez charged workers seventy-five to eighty dollars per week to participate in the meal plan and kept track of the workers' participation.[51] Hernandez also sold beverages, including beer, to the farmworkers.[52] Respondent did not receive money from Hernandez or otherwise tell him how much to sell the drinks.[53] Hernandez kept a "store" in Respondent's kitchen, where he would sell drinks, snacks, and beer.[54]

When workers arrived at the camp, Hernandez said that he would orient them about housing, the "rules of the camp," keeping the bathrooms clean, hours of work, pay, kitchen access, and cost of meals.[55] Hernandez

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[48] See Tr.at 186-87.

[49] See Tr. at 738, 742-43.

[50] See Tr. at 808.

[51] See Tr. at 179-80.

[52] See Tr. at 194-95, 638.

[53] See Tr. at 737.

[54] See Tr. at 51; PX 32 pages 1075-76, 1082 (showing items associated with a company store, including a cash register, stacks of instant soup, a coffee urn, a Coca-Cola branded glass door refrigerator stocked with sodas and Monster energy drinks, and a wire display rack stocked with chips and other snack foods), PX 32 page 1079 (showing the contents of a refrigerator full of beer).

[55] See Tr. at 61 (Maldonado stating that Hernandez was "in charge" and he never spoke with anyone from the Marino family); 174-75 (Hernandez's testimony); 773 (Russel Marino, Jr. stating that Hernandez "primarily" oriented the workers); 825 (Russel

told the workers when to work; the workers did not have a choice as to their hours.[56] Russel Marino, Jr. only "sometimes" was present for the workers' orientation.[57] "Several times a day," Russel Marino, Jr. would check in with Hernandez concerning the farm's "day-to-day happenings."[58] Russel Marino, Jr. did not explain the meal cost because "that's in the contract."[59] When the farmworkers paid Hernandez, the workers signed a form to indicate they "agreed that they received the meal and" paid for the meal plan; Respondent's name appears at the top of the form.[60]

Hernandez also maintained the sleeping quarters and bathroom facilities at Respondent's dormitory site.[61]

Marino, Jr. stating that the workers complained to Hernandez because Russel Marino, Jr. does not speak Spanish and "that's the chain of command"); PX 3 at 101 (Carlos Cervantes Ramirez stating on deposition that Hernandez was "in charge").

[56] See Tr. at 17 (Maldonado's testimony), 90-91 (Gustavo Perez's testimony), 139 (Cheguez's testimony), 257 (Almanza's testimony), PX 3 at 68-69 (deposition of Cervantes Ramirez); *cf.* JX 1; JX 3 (ETA Forms 790 telling the workers to "anticipate" working seven hours each weekday and five hours on either Saturday or Sunday (JX 1 says Saturday and JX 3 says Sunday), and informing the workers that they "may be requested to work 12+ hours per day . . . but will not be required to do so").

[57] PX 15 at 401.

[58] Tr. at 719.

[59] PX 15 at 403-04 (Russel Marino, Jr. stating that everything he said was true as of 2015).

[60] PX 17 at 764 (Hernandez's deposition testimony, discussing PX 17-2 at 799 (the meal payment form)); Tr. at 182-86 (Hernandez testifying he would use the form at PX 17-2—a document Respondent created in its office—to keep track of the workers who engaged in Respondent's meals program).

[61] See Tr. at 199-205.

Hernandez was responsible for transporting the farmworkers from the dormitory area to the fields.[62] Respondent tasked Hernandez with ensuring that the workers had water in the fields.[63] Workers paid Hernandez for meals, drinks, housing, and transportation; they did not pay Respondent directly.[64]

Kitchen Access

Although the dormitory-area had a kitchen, workers did not have access to the kitchen. The workers could not make their own meals.[65] Except for a refrigerator

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[62] See Tr. at 204-05.

[63] See Tr. at 213.

[64] See Tr. at 211, 233.

[65] See Tr. at 20-21 (Maldonado testifying "[s]ince they didn't have another kitchen to prepare our food, we had to consume the food that they sold us"), 93-94 (Gustavo Perez's testimony), 159 (Cheguez's testimony), 175-76 (Hernandez recognizing that the kitchen was not large enough "for everyone to cook" or to store food in the kitchen's refrigerators), 263-64 (Almanza's testimony that he could not cook in the kitchen, so he bought his own "stove"), 283 (Almanza's testimony that he never observed any of the farmworkers in the kitchen), 333, 337 (WHI Perez concluding that workers did not have access to the kitchen for the purpose of cooking their own meals), 500 (WHI Perez stating that workers had asked Hernandez to use the kitchen), 589-90 (WHI Perez discussing Pinon's statement at PX 19 page 809, that workers were not allowed to access the kitchen to cook their own food; sometimes Pinon gave workers permission to reheat food, but only under supervision); *cf.* Tr. at 771-73 (Russel Marino, Jr. recalling that in 2015, Respondent provided cooking "facilities" and kitchen access to the farmworkers "free of charge" and that Hernandez never prevented anyone from cooking in the kitchen), Tr. at 455 (WHI Perez recalling that Russel Marino, Jr. and Joseph Marino told him that workers had access to the kitchen facilities). Hernandez sold soft drinks, beer, and general provisions out of Respondent's kitchen. See Tr. at 190, 194, 357-60; PX 32 pages 1050, 1076, and 1078-79.

Hernandez added to keep cool the beverages he sold, Respondent owned the kitchen, all of its major appliances, and paid for all utilities.[66] The workers never asked to use the kitchen facilities.[67] Cheguez testified that the farmworkers "were sure that they were going to say no because . . . we couldn't . . . do our own cooking there."[68] The kitchen was large, but not large enough for "many workers to cook simultaneously."[69]

Layoffs and Three-fourths Guarantee

In August 2015, Respondent's pepper crop became diseased and Respondent had to lay off forty-four workers due to lack of work.[70] Hernandez chose "troublemakers" to lay off because no workers initially volunteered for the layoff.[71] The "troublemakers" were those employees who refused to work on the weekend.[72] Russel Marino, Jr. did not know the names of the laid-off workers.[73] Of the workers who left in August 2015,

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[66] Tr. at 745, 778, 793; ALJX 1 at ¶ 21.

[67] See Tr. at 592.

[68] Tr. at 159.

[69] Tr. at 744 (Russel Marino, Jr.'s testimony). See Tr. at 501 (WHI Perez agreeing it would be "close quarters" if 150 people attempted to use the kitchen at once), 175-76 (Hernandez's testimony that the kitchen was not large enough "for everyone to cook in the kitchen" or to store food in the kitchen's refrigerators).

[70] Tr. at 207, 238.

[71] See Tr. at 208 (Hernandez's testimony); *cf.* Tr. at 779 (Russel Marino, Jr. testifying that "troublemakers" were not selected because Respondent had no troublemakers).

[72] Id.

[73] Tr. at 216.

Respondent only failed to fulfill its three-fourths requirement concerning four such workers.[74]

Russel Marino, Jr. said that Lisa Justice, Respondent's payroll manager,[75] ensured that Respondent fulfilled the three-fourths guarantee for any laid off worker.[76] WHI Perez understood the H-2A regulations to mean that the employer is required to pay three-fourths of the hours offered, "based on the beginning and ending date" of the worker being available for work at the site.[77] Perez said that the "clock" starting running the day after the employee arrived at the property.[78]

Litter at the Dormitory

PX 33, page 1094, is a photograph of a pile of discarded cans of soda and beer.[79] The pile of discarded cans is located "directly across from the dormitory housing."[80] PX 33, pages 1095 through 1102, are more photographs of the discarded cans.[81] The photographs show discarded cans of Budweiser, Modelo, Monster, and

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[74] See Tr. at 642-44.

[75] Tr. at 681

[76] See Tr. at 779.

[77] Tr. at 610-11.

[78] Tr. at 610-11, 634-35; PX 1 (WHI Perez's calculations concerning which workers are owed back pay due to Respondent's three-fourths violation).

[79] See Tr. at 374-76, 603-04.

[80] Tr. at 375.

[81] See id.

Coors Light.[82] The dormitory area also had garbage cans without tight fitting lids; many without lids at all.[83]

Mattresses

PX 28, page 1056, shows mattresses on the floor with "worker belongings" on top of and beside the mattresses.[84] The mattresses were made-up with blankets.[85] During the course of his investigation, WHI Perez learned that workers slept on mattresses placed on the floor.[86] WHI Perez did not know how the mattresses came to rest on the floor.[87] He "assumed" that each worker had his or her own mattress.[88] WHI Perez did not recall if he observed any bunkbeds with missing mattresses.[89]

May 2015 Argument

In May 2015,[90] a meeting occurred between Respondent —represented by Hernandez, Russel Marino, Jr., and Joseph Marino—and nineteen of the farmworkers.[91] The nineteen workers were upset at the working and living

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[82] See PX 33 pages 1095-1102.

[83] See Tr. at 324.

[84] Tr. at 324, 329-30.

[85] PX 28 page 1056.

[86] Id.

[87] See Tr. at 492.

[88] See Tr. at 494-95.

[89] See Tr. at 599; see also Tr. at 493.

[90] Neither party proffered evidence as to when in May 2015 the argument occurred; however, the argument had to occur before the May 7, 2015 email from Warren Wicker of National Agriculture Consultants, which informed the Department of the departure of the nineteen workers.

[91] See, *e.g.*, Tr. at 407, 538-41, 723-27, 766, 809-11, 826-31.

conditions, and wanted to share their concerns with Respondent.[92] During the May 2015 meeting, Russel Marino, Jr. became angry with the workers.[93] A number

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[92] See, *e.g.*, Tr. at 33-40 (Maldonado's testimony that he and his coworkers were upset about the working conditions and so wanted to talk to Russel Marino, Jr.), 106-07 (Gustavo Perez's testimony that he and a group of his coworkers decided to talk to Russel Marino, Jr. because "of the conditions we were in, because we didn't have a place to cook, because of the bathrooms, because of the way the installations were, and because of the way [Hernandez] treated us"), 117 (Gustavo Perez saying that he first complained to Hernandez concerning the working conditions "about a week" after he began working for Respondent), 122 (Gustavo Perez stating his concern that he did not receive proper training), 138-39 (Cheguez recalling that Hernandez was a "bad" supervisor, and threatened the workers with deportation, and always required the workers to work faster), 148 (Cheguez recalling that the workers "wanted to work" but Respondent did not treat them well), 160 (Cheguez agreeing that the goal of the conversation was to work at a more "comfortable pace"); PX 5 at 125 (Elizondo Soto recalling Hernandez's threats to send the workers "back to Mexico"). *Cf.* Tr. at 220-24 (Hernandez recalling that workers thought the work was too hard and that they did not complain about housing), 726 (Russel Marino, Jr. testifying that the workers could not perform the job because it was too hard and was for "real men"), 810 (Joseph Marino stating that the workers felt the work was too hard).

[93] See, *e.g.*, Tr. at 39, 65, 81-83 (Maldonado recalling that Russel Marino, Jr. said that the workers "could leave" if they did not like the conditions and that Russel Marino, Jr. "practically fired [Respondent's H-2A workers]" during the argument, and that he felt like he "needed to leave"; he left due to problems "with [his] boss"), 107-08 (Gustavo Perez stating that, during the May 2015 argument, Russel Marino, Jr. was very upset and cursed at the farmworkers; Gustavo Perez believed he could not continue working for Respondent), 129-30 (Gustavo Perez remembering that Russel Marino, Jr. said that the workers were not "working out for him" and then apologized after the conversation), 147 (Cheguez remembering that Russel Marino, Jr. "scream[ed] and yell[ed] in an arrogant

of the nineteen workers left the argument thinking that Respondent had fired them.[94] Joseph Marino testified on deposition to his lack of awareness of what was said during the argument; however, at the hearing, he recalled, "part of what [Russel Marino, Jr.] said."[95] Joseph Marino's conflicting statements show a lack of credibility and his testimony merits little weight.

Meals

JX 1 is the ETA Form 790 Job Order, which requested forty workers for the period of April 13, 2015 to October 10, 2015. On December 12, 2014, Russel Marino, Jr. signed the Job Order.[96] The Job Order at JX 1 states:

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way"), 222 (Hernandez stating that Russel Marino, Jr. "was a little bit upset"), 728 (Russel Marino, Jr. remembering thinking that Respondent had exhausted all of its options, and "we're [either] going to let these guys go, or we're going to send them on their way, however we had to do it"); PX 3 at 101 (Cervantes Ramirez recalling that, during the argument, Russel Marino, Jr. said that the workers were fired); PX 9 at 232, 258 (Cinta Tegoma recalling that Russel Marino, Jr. tried to hit him and that Russel Marino, Jr. did not give him the option of staying because he "was fired"); PX 11 at 305 (Hector Mishel Garcia Dominguez stating that he left Respondent's employ not for personal reasons, but because Russel Marino, Jr. "decided that we were not worth for the job [sic])."

[94] See, *e.g.*, Tr. at 39-40, 65 (Maldonado stating that Russel Marino, Jr. had "practically fired us"), 80-81 (Maldonado saying that he understood he "needed to leave" due to the argument), 107, 125-29 (Gustavo Perez recalling that Russel Marino, Jr. said "we weren't necessary" during the argument, that he did not have the opportunity to continue working for Respondent due to the conversation, and that Hernandez told him he "must leave").

[95] Tr. at 826-29.

[96] See JX 1.

> Employers will furnish free cooking and kitchen facilities to those workers who are entitled to live in the employer's housing so that workers may prepare their own meals. . . . Once a week the employers will offer to provide (on a voluntary basis by the workers) free transportation to assure workers access to the closest store where they can purchase groceries.[97]

JX 3, the ETA Form 790 Job Order concerning the period June 1, 2015 to October 10, 2015, contained the same or substantially similar language.[98]

Respondent hired a company called National Agricultural Consultants to help complete the 2015 H-2A job orders.[99] Russel Marino, Jr. said that he conducted research and sought advice from other farmers concerning Respondent's participation in the H-2A program.[100]

Upon arrival at Respondent's dormitory, Hernandez informed the farmworkers about the existence of a meal plan, which cost between $75 and $80 per week.[101] Rus-

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[97] Id.

[98] See JX 3.

[99] See Tr. at 740-41; PX 40 (Respondent's Form I-129, "Petition for a Nonimmigrant Worker," which contains the signatures of Theresa Ward from National Agricultural Consultants and Russel Marino, Jr.).

[100] Tr. at 713.

[101] See Tr. at 20 (Maldonado's testimony), 92 (Gustavo Perez saying that he had no choice but to pay Hernandez for the meal plan, even though he would have rather prepared his own food), 140-41 (Cheguez's testimony of same), 176 (Hernandez stating that workers who did not wish to participate in the meal plan had to "eat outside or to order a delivery meal"), 178-80 (Hernandez discussing PX 17-1 and PX 17-2, where Hernandez tracked the workers who

sel Marino, Jr. testified that in 2015 Respondent indeed furnished the "facilities" to allow the farmworkers to cook their own meals.[102] Although in both 2015 and 2016, Respondent provided meals "at cost" to the farmworkers, Russel Marino, Jr. recognized that the 2015 job order failed to mention that fact.[103]

Non-alcoholic Beverages and Other Items Sold to the Farmworkers

Hernandez sold a variety of items to the farmworkers, including soda, energy drinks, beer, Gatorade, cookies, toilet paper, and soup.[104] The Administrator decided to enforce back wages and CMPs against Respondent only for the beverages it sold to the farmworkers; the Administrator did not enforce back wages and CMPs for any violations resulting from the selling of cookies, toilet paper, and soup. Hernandez sold the beverages in the fields and out of Respondent's kitchen.[105] The Administrator had to reconstruct the amount of non-alcoholic drinks sold because Hernandez either destroyed or otherwise could not produce his records as to the workers' purchase of drinks in the summer of 2015.[106] The preponderant evidence of record

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participated in the meal plans), 262 (Almanza's testimony), 334 (WHI Perez's testimony). WHI Perez did not learn why the meal plan cost $75 some weeks and other weeks cost $80. See Tr. at 600.

[102] Tr. at 772.

[103] Tr. at 763.

[104] See Tr. at 22-27, 96-97, 193-97, 266-67, and 502.

[105] See Tr. at 189-94, 266-67, 360.

[106] See Tr. at 209 (Hernandez's testimony), 361 (WHI Perez stating that Hernandez generally "did not have purchase receipts for drinks," even though he had such receipts for meals).

demonstrates that each farmworker purchased from Hernandez, on average, four non-alcoholic drinks per day.[107] By contrast, the Administrator considered a 4.4 drinks-per-day figure. The Administrator applied a price of $1.25 per drink, even though the Administrator determined that was likely a conservative estimate.[108]

Hernandez could not provide all receipts for the beverages sold because Russel Marino, Jr. told him he did not need to keep such receipts.[109] PX 36, page 1141, is a July 2015 receipt for thirty-six cans of Coke, which Pinon and Hernandez purchased for thirteen dollars. Pinon said that she and Hernandez purchased the sodas and energy drinks from a Sam's Club in Deptford, New Jersey.[110] When determining the prices of soda and

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[107] See Tr. at 360-61 (WHI Perez testifying that that Hernandez said he sold four soft drinks per day per worker), 143 (Cheguez testifying that he purchased "three to four" soft drinks per day), 97 (Gustavo Marquez Perez stating that he purchased between eight and nine soft drinks per day), 269 (Almanza recalling that he purchased three to four soft drinks per day), Tr. at 21-23 (Maldonado testifying that he purchased eight soft drinks per day); PX 3 at 72 (Cervantes Ramirez saying that he bought three to four soft drinks per day); PX 5 at 132-33 (Elizondo Soto testifying that he bought five or six soft drinks per day); PX 9 at 217 (Cinta Tegoma recalling that he bought four soft drinks per day); PX 11 at 276-77 (Garcia Dominguez saying that he bought four or five soft drinks every day); PX 13 at 341 (Morales Acosta testifying that he purchased three or four soft drinks per day).

[108] See PX 2; Tr. at 195-96 (Hernandez testifying that workers paid between $.75 and $1.00 for soda, and $1.50 for Monster and Red Bull); PX 19, page 809 (Pinon stating on an "Employee Personal Interview Statement" on the Department's letterhead that she charged $1.00 for soda and Gatorade, and $2.00 for Monster).

[109] See Tr. at 370-71.

[110] See Tr. at 448-49; PX 19.

Gatorade WHI Perez perused the website for the Deptford, New Jersey Sam's Club.[111]

Respondent's Business, Generally

The same family has owned Respondent's farm for four generations.[112] Respondent is owned in equal parts by Joseph Marino, Russel Marino, Jr., Russel Marino—their father—and Harry Marino—their uncle.[113] Russel Marino, Jr. and Joseph Marino perform most of the day-to-day operations. (Id.) In 2014, Respondent's I-129 petition stated a "gross annual income of $7,500,000."[114]

Labor is "essential" to Respondent's business.[115] Although Respondent always used migrant labor, after 2014, Respondent decided to participate in the H-2A program.[116] In May 2015, the farmworkers picked asparagus. The asparagus harvest occurs within a six to eight week period.[117] The workers perform other tasks during the asparagus harvest.[118] In May 2015, Respondent needed the workers' labor and did not want them to leave.[119] It cost Respondent $1,000 to bring in each H-2A worker.[120] Respondent replaced the nine-

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[111] See Tr. at 647.

[112] Tr. at 714-15.

[113] See Tr. at 787-88.

[114] Tr. at 822-24.

[115] Tr. at 715.

[116] See Tr. at 787-88.

[117] See Tr. at 774.

[118] See Tr. at 774-75.

[119] Id.

[120] See Tr. at 730.

teen workers who left after the May 2015 argument with other H-2A workers.[121]

Rides

JX 1 is the ETA Form 790 Job Order, which requested forty workers for the period of April 13, 2015 to October 10, 2015. It states, "[o]nce a week the employers will offer to provide (on a voluntary basis) free transportation to assure workers access to the closest store where they can purchase groceries."[122] However, Respondent either charged its farmworkers for transportation or did not offer such transportation.[123] Russel Marino, Jr. admitted the Respondent did not "formally" tell the farmworkers about transportation, but said "when the bus was getting ready to leave to go into the town, they said, okay, whoever wants to go, get on the bus, we're going to the town just like your contract says that every one of you have a copy of."[124]

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[121] See Tr. at 730-31.

[122] JX 1.

[123] See Tr. at 27-28 (Maldonado testifying that Respondent charged its workers $10 for transportation costs for each shopping trip), 100-02 (Gustavo Perez's testimony), 146 (Cheguez recalling that Respondent charged $10 for transportation costs per shopping trip), 266 (Almanza stating that Respondent did not provide free transportation and charged the farmworkers $10 per trip), 303 (Almanza stating that the Marinos told him to talk to Hernandez about rides to the store), 337, 501-02 (WHI Perez stating that his investigation revealed that Respondent charged the farmworkers between $10 and $15 for rides to town).

[124] Tr. at 765.

Screens

The screens on the windows of Respondent's dormitory were ripped or missing.[125] The windows of Respondent's bathroom were also missing screens.[126] Some garbage cans did not have lids and WHI Perez noted the presence of flies around such lidless garbage cans.[127]

Water

Water was available to workers during mealtime.[128] The water had "a bad taste to it."[129] Hernandez recognized that, in the past, the water had a bad taste to it; however, Respondent replaced the filter and fixed the problem.[130] At first, the water in the fields was either missing or dirty.[131] At the time of WHI Perez's first visit, water was available in the fields, and the water did

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[125] See Tr. at 201-03 (Hernandez's testimony); PX 28, pages 1049-55; Tr. at 323-28 (WHI Perez recalling the presence of flies in the dormitory).

[126] See Tr. at 331; PX 28 pages 1046-47.

[127] See Tr. at 332.

[128] See Tr. at 281 (Almanza's testimony), 567 (WHI Perez's testimony), 719-20 (Russel Marino, Jr.'s testimony).

[129] See Tr. at 23, 52 (Maldonado testifying that the water's taste made him buy beverages from Hernandez), 262 (Almanza's testimony), PX 9 at 216 (Cinta Tegoma testifying on deposition that water was not present in the fields).

[130] See Tr. at 233-34.

[131] See Tr. at 19 (Maldonado's testimony), Tr. at 91 (Gustavo Perez stating that water was only "sometimes" available in the fields); 139-40 (Cheguez's testimony), PX 5 at 134 (Elizondo Soto's deposition), PX 3 at 73 (Cervantes Ramirez's testimony that water would run out by the afternoon); PX 9 at 216 (Tegoma's deposition testimony that water was not available in the fields). But *cf.* Tr. at 213 (Hernandez testifying that workers had access to water "everyday"); PX 11 at 274 (Dominguez stating that the fields had water).

not have a smell.[132] Respondent provided the farmworkers with potable water, although not at all times.

Worker Departure Forms

Following the May 2015 argument about the working and living conditions at Respondent's farm, Hernandez handed out worker departure forms to the nineteen farmworkers who participated in that conversation.[133] The worker departure forms were written in both English and Spanish.[134] The worker departure forms stated that the workers were voluntarily leaving due to personal issues, like a sick or dying loved one.[135] The worker departure forms misrepresented the true reason for the workers' departure.[136] The worker departure

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[132] See Tr. at 546, 553.

[133] See Tr. at 108-10 (Gustavo Perez's testimony), 149 (Cheguez's testimony), 225 (Hernandez's testimony), 272-74 (Almanza's testimony); see, *e.g.*, JX 9.

[134] See Tr. at 38, 776; see, *e.g.*, JX 8 at 89-150; JX 9.

[135] See Tr. at 37 (Maldonado's testimony), 108-110 (Gustavo Perez's testimony), 149 (Cheguez's testimony), 225 (Hernandez's testimony), 272-74 (Almanza testifying that Hernandez gave the workers a form "and asked us to sign the paper because "there was no other choice" and "we couldn't do anything about it"), 409-10 (WHI Perez's testimony), 732-33 (Russel Marino, Jr. saying that he gave the workers "the option to check off the box that said they were returning home because of personal reasons"), and 769 (Russel Marino, Jr. recalling that he brought forms for the workers to sign stating that they were "resigning").

[136] See Tr. at 39-40 (Maldonado's testimony that he left due to the problems he had "with my boss" who told him "we should leave" after the May 2015 argument), 109-10 (Gustavo Perez recalling that Hernandez told Respondent's workers to sign next to the box indicating that the workers needed to return to Mexico for personal reasons because "that was the best option so that we wouldn't have [visa] problems and they wouldn't either"), 149-50, 155-56 (Cheguez's

forms stated that Respondent offered the farmworkers workers additional work for the remainder of the contract, but Respondent offered no such work.[137] Before handing the worker departure forms to the farmworkers, Russel Marino, Jr. signed the forms; he stated at his deposition that the purpose of the worker departure forms was to "protect against . . . this lawsuit."[138]

Russel Marino, Jr. testified that Theresa Ward, a manager with National Agricultural Consulting, created the form.[139] National Agricultural Consultants sent the false notification to the Department.[140] Ward advised Russel Marino, Jr. that the option was:

> the right thing to do for them for their future employment. Because fieldwork may not have been for them, they may have been able to do warehouse working or something else. And I didn't want to,

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testimony that Russel Marino, Jr. had already filled out the forms prior to distribution to the farmworkers so that the workers' "didn't have any problems when we returned back"; Cheguez signed the form "out of fear"), and 418-19 (WHI Perez's testimony that, based on his investigation, the forms "falsely reported that workers were leaving for personal reason when they were, in fact, leaving because they were terminated or for other circumstances").

[137] See Tr. at 280 (Almanza's testimony), 150 (Cheguez stating that he wished to continue working because he had a six-month contract).

[138] PX 15 at 475 (Russel Marino, Jr.'s deposition).

[139] See Tr. at 730-31, 776-80; JX 8.

[140] See Tr. at 409-10 (WHI Perez's testimony), 748 (Russel Marino, Jr. stating that he did not give the workers laid off in August 2015 a "choice" to stay because "work slowed down"), 753-54 (Russel Marino, Jr. discussed the contents of PX 39 at 1191, an August 21, 2015 email, sent by National Agricultural Consultants, copying Russel Marino, Jr., to the Department stating that the form listed "workers returned [home] for personal reasons").

> you know, put a little mark on their form, saying that, okay, this guy can't—I had to fire this guy. I didn't want to say that, not that I was firing them anyway. But I gave them the option to personal reasons [sic] for that reason just so in the future they wouldn't have any problem getting picked off a list for future work.[141]

Russel Marino, Jr. noted that the worker departure forms did not allow the farmworkers the possibility to suggest that the workers were fired.[142] He recognized, however, that "[a]s a technicality, I guess" the workers did not resign; "they were terminated."[143]

NARRATIVE FINDINGS OF FACT

Respondent is a large, family owned, agricultural producer located in southern New Jersey. Although Respondent always used migrant labor, 2015 was the first year that it decided to engage with the H-2A program. The job orders Respondent issued informed putative H-2A farmworkers that Respondent would provide the workers with kitchen access. Upon arrival at Respondent's dormitories, however, Respondent informed the farmworkers that rather than kitchen access, they could purchase a meal plan costing between $75 and $80 each week. Kitchen access was unavailable or otherwise denied. Along with the meal plan, Respondent sold the farmworkers drinks, including beer.

The farmworkers engaged in hard work, including, *inter alia*¸ the harvesting of asparagus and peppers. Potable water and clean bathroom facilities were only

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[141] Tr. at 733; see 781.

[142] Tr. at 734.

[143] Tr. at 748.

sporadically available, especially in the fields. The farmworkers were upset with these conditions and wanted Respondent to address their concerns. An argument occurred sometime in May 2015 between nineteen farmworkers and owners Russel Marino, Jr. and Joseph Marino and Respondent's foreman, Hernandez. This argument led directly to Respondent's firing of the nineteen workers. Respondent provided the affected farmworkers with worker departure forms that mischaracterized the reasons for their leaving as needing to return home to care for a sick or dying loved one. In August 2015, Respondent laid off another cohort of workers and had that group sign similar forms.

Respondent provided inadequate housing to the farmworkers. The dormitory included dirty bathrooms without hot water and screens on the windows, other windows with broken or missing screen, and uncovered garbage cans. Respondent transported the workers from the dormitory area to the fields in unsafe vehicles with unlicensed drivers.

After a full investigation, the Administrator found various violations of the Act, and assessed $351,775.90 in back wages and $212,250.00 in CMPs.

POSITIONS OF THE PARTIES

The Administrator's Brief

The Administrator argued that Respondent violated § 655.122(g), (p)(1), and (q), because it did not disclose the existence of the meal plan on the job order it provided to prospective H-2A workers; it otherwise did not provide kitchen access to the workers. See Administrator's Brief at 22 (citing JX 1 at 2). Respondent also allegedly made impermissible deductions to the farm-

workers' pay when it charged for meals. Id. The Administrator wrote that, to fulfill its duties under the job order, Respondent must have actually "furnish[ed]" kitchen access; the fact that Respondent did not affirmatively deny kitchen access to any employees' request is not enough. See Administrator's Brief at 24-25 (citing 20 C.F.R. § 655.122(g)).

As a corollary, the Administrator argued that because Respondent did not provide its farmworkers with kitchen access, it was responsible for providing workers with meals free of charge. See Administrator's Brief at 26. Additionally, because Respondent did not disclose the required meal charges, it violated § 655.122(g). It violated § 655.122(q) because it omitted from the job offer "one of the 'provisions required' by § 655.122(g), namely disclosure of the meal charges." (Id.) That Hernandez operated the meal plan does not absolve Respondent from liability, because Respondent was still the party responsible for disclosing the meal charges, which it failed to do. Allowing an employer to deflect liability in this way would open a loophole, which would "eviscerate" other aspects of the program's requirements, such as "prohibitions on excessive meal charges (§ 655.173(a)) and charges that include a profit (§ 655.122(p)(2)), and the obligation to provide [farmworkers] free housing (§ 655.122(d))." Id. n.16.

The Administrator continued, stating Respondent violated the regulations through the actions of its "agent Hernandez." See Administrator's Brief at 27. In order not to violate the regulations, the job order must have disclosed any "deductions" Hernandez made for the meal plan. See id. (citing § 655.122(q)). The law allegedly makes no distinction between a deduction from

wages and "shifting to the employee a cost that the employer could not lawfully directly deduct from wages." See id. (citing In re: Weeks Marine, Inc., ARB No. 12-093, 2015 WL 2172482, at *4 (Apr. 29, 2015)).

The Act's protections for migrant laborers do not exempt agricultural employers from common law agency principles. Therefore, the Administrator argued, Hernandez's act of charging workers for the meal plan was equivalent to Respondent charging its workers for the meal plan. See Administrator's Brief at 29 (citing Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 593 (W.D. Tex. 1999); Restatement (Third) of Agency ("Restatement") § 6.01) ("This section states the basic principle that when an agent enters into a contract on behalf of a disclosed principal, the principal and the third party are parties to the contract."). The Administrator stated that because Hernandez had either "actual authority," "apparent authority," or both, to act on Respondent's behalf to charge Respondent's farmworkers for the meal plan, Respondent violated "20 C.F.R. § 655.122(g), (p)(1) and (q) by constructively deducting the meal charges from workers' wages, without having disclosed the meal plan charges in the Job Orders." See Administrator's Brief at 30.

Section 2.01 of the Restatement posits that actual authority exists "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." See Administrator's Brief at 29. Due to the kitchen's size, Respondent's "longstanding practice" was to require farmworkers to purchase meal plans from Hernandez. See Administrator's Brief at

30 (citing Tr. 176-77, 186-87, 738, 742-43, 808). Respondent showed its authority over Hernandez by having Hernandez attend Departmental training sessions concerning meal plans, and following up with Hernandez to ensure compliance. See Administrator's Brief at 30-31 (citing PX 15 at 401-03; Tr. 51, 174-75, 773 (orientation), 187 (follow-up), 776).

Apparent authority exists when "a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." See Administrator's Brief at 30-32 (Restatement § 2.03). The Administrator argued that Respondent's workers held a reasonable belief that Hernandez had apparent authority to act on Respondent's behalf for several reasons. First, Russel Marino, Jr. told the workers that Hernandez would feed them "three squares a day". In addition, the workers recorded their payment for the meal plan using a form bearing Respondent's name. Finally, "Hernandez was the intermediary between workers and [Respondent] and [Hernandez] was their supervisor in every aspect of their lives." See Administrator's Brief at 32 (citing PX 7 at 173; PX 15 at 401-03; PX 17-2 at 799-800, Tr. at 51, 61, 172-75, 182, 211, 236-37, 773, 825).

The H-2A regulations prohibit profiteering, because such actions would improperly reduce workers' wages. See Administrator's Brief at 33 (citing 20 C.F.R. § 655.122(p)(2)). An H-2A employer or "any affiliated person" may deduct wages, but "all deductions must be reasonable." 20 C.F.R. § 655.122(p)(1), (2).

> The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to

> the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee.

20 C.F.R. § 655.122(p)(2). The term "'affiliated person' includes but is not limited to . . . any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship." See Administrator's Brief at 33 (quoting WHD Bulletin No. 2012-3). If a prohibited charge "reduce[s] the wage payment . . . below the minimum amounts required," an employer owes back wages to any effected farmworkers. See Administrator's Brief at 33 (citing 20 C.F.R. § 655.120 § 655.122(l), (p)(2); 29 C.F.R. § 501.16(a)(2)).

The governing regulations prohibit any charge or deduction that either: (1) "includes a profit to the employer or to any affiliated person," 20 C.F.R. § 655.122(p)(2); or (2) involves items sold in violation of any federal, state, or local law, see 29 C.F.R. § 531.31 (which § 655.122(p)(2) incorporates by reference). See Administrator's Brief at 33-34. The Administrator continued that it is Respondent's duty to prove that the products sold did not include a profit or were otherwise reasonable. See Administrator's Brief at 33 (citing Ortiz v. Paramo, No. 06-3062, 2008 WL 4378373, at *6 (D.N.J. Sept. 19, 2008)).

The Administrator argued that Hernandez fits the definition of an affiliated person. See Administrator's Brief at 34-35. As such, the regulations prohibit Hernandez from profiteering from Respondent's workers;

neither Respondent nor Hernandez kept receipts to determine whether Hernandez obtained any profit. Id. (citing Tr. at 209, 361, 371, 452-53). Hernandez also sold beer without a license. See Administrator's Brief at 36 (citing N.J. Stat. Ann. § 33:1-2(a) (requiring a license to sell beer in New Jersey)).

The Administrator asserted that Respondent owes $209,047.69 in back pay to the summer 2015 workers. See Administrator's Brief at 38. The $209,047.69 figure represents the full amount of improper charges made to Respondent's farmworkers for meals and drinks. Back pay for the full amount charged is appropriate, the Administrator asserted, because the regulations require disclosure of meal costs regardless of whether an employer profited, so absent a full back pay requirement, an employer would have no incentive to disclose meal costs. See Administrator's Brief at 38-39 (citing In re Global Horizons, Inc., No. 2010-TAE-00002, slip op. at 2 (OALJ Dec. 13, 2011). The job order Respondent issued told the prospective farmworkers that Respondent would pay either $11.29 per hour or the piece rate, whichever is greater. The piece rate or $11.29 per hour became the "minimum amount[] required" under 20 C.F.R. §§ 655.120, 122(l), and (p)(2). Therefore, Administrator argued, "any improper charges to workers pushed their wages below the promised rate." See Administrator's Brief at 38 n.21.

Concerning drinks, because Hernandez did not keep records as to the costs of and profits from the drinks he sold to Respondent's workers, such costs should not offset the back pay award. See Administrator's Brief at 39-40 (citing various cases arising under the Fair Labor Standards Act ("FLSA")). Calculating back wages for

drinks is appropriate here, the Administrator continued, because the water in the fields tasted bad, the work was long and hard, and the workers "had no practical alternative." See Administrator's Brief at 40-41.

When an H-2A employer fails to keep records of deductions, the Anderson v. Mt. Clemens Pottery Co. burden-shifting framework applies. See Administrator's Brief at 44 (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Hart v. Rick's Cabaret Int'l, Inc., 73 F. Supp. 3d 382, 390 (S.D.N.Y. 2014)). The Administrator argues here that, because the workers had no legal obligation to document such expenses, and were otherwise unable to document the expenses while working in the fields, the burden should fall on Respondent to account for all charges incurred. See Administrator's Brief at 44-45 (citing Tr. 22, 77-78, 209).

The Mt. Clemens standard requires the Administrator to produce sufficient evidence to show the amount of the improper charges or deductions "as a matter of just and reasonable inference." See Administrator's Brief at 45 (citing Weeks Marine II, slip op. at 19). At that point, the burden switches to Respondent to negate the reasonableness of any inferences drawn from the Administrator's evidence. See id. (citing Hart, 73 F. Supp. 3d at 390). If the Respondent is unable to negate the reasonableness, a court may award damages, though approximate. See Administrator's Brief at 45-46 (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946)); In re Greater Mo. Med. Pro-Care Providers, Inc., ARB No. 12-015, 2014 WL 469269 (ARB Jan. 29, 2014), at *16). Because the Administrator's evidence is reasonable, and Respondent is unable to negate that reasonableness, the undersigned should uphold the back

wage calculations for drinks Respondent sold in 2015. See Administrator's Brief at 46.

The Administrator also calculated that Respondent owed $128,285 in back wages to 139 workers for the unlawful meal deductions. See Administrator's Brief at 46-48. The Administrator discussed the calculations leading to the $128,285 back wage figure. PX 2 is a document the Administrator created to show Respondent's summer 2015 weekly payroll records. Based on these records, the Administrator determined that Respondent employed 148 separate workers during the 2015 growing season for at least one week. See Administrator's Brief at 46. Except for three weeks where Respondent charged $80 per week, the Administrator determined that Respondent charged $75 per week for the meals. See Administrator's Brief at 47 (citing Tr. at 443.) The Administrator reduced the back wages for those workers who did not pay for the meal plan. See Administrator's Brief at 47 (citing Tr. at 444-45.) The Administrator noted that the parties stipulated that the meal plan cost between $75 and $80 per week and that 139 workers paid for the meal plan each week. See Administrator's Brief at 47. The Administrator called the $128,285 back wage figure a "conservative reconstruction of the back wages owed." See Administrator's Brief at 48.

The Administrator further determined that Respondent owed $71,790.08 in back wages for improper soft drink charges. See Administrator's Brief at 48-51 (citing PX 2 at 32, 61). Respondent's farmworkers allegedly purchased an average of 4.42 drinks per day and paid $1.25 per drink, on average, for a total of $38.68 per week. See Administrator's Brief at 48 (citing Tr. at

427-28, 439, 443, 624). Hernandez's testimony allegedly supports the Administrator's determination that workers paid on average $1.25 per drink. See Administrator's Brief at 51 (comparing Tr. at 195-96, with PX 19 at 809). Hernandez did not keep records of the number of drinks the farmworkers purchased, and the Administrator said that Hernandez's estimate of three to four drinks per day was low and less credible than the workers' testimony. See Administrator's Brief at 49 (citing Tr. at 195, 209; Appendix A to Administrator's Brief).

The Administrator also sought back wages for $8,972.61 for the beer Hernandez sold to the farmworkers. See Administrator's Brief at 51-54. Hernandez allegedly sold beer for two dollars, $1.30 of which was profit. See Administrator's Brief at 51. The Administrator also argued that "almost all" workers bought beer. See Administrator's Brief at 52 (citing Tr. at 98, 145; PX 3 at 83; PX 7 at 202; PX 19 at 308; PX 9 at 223). The workers bought beer at an average rate of three and three-quarter cans per week. See Administrator's Brief at 52 (citing PX 7 at 180-81; PX 13, 345; PX 5 at 142; Tr. 25-26; PX 3 at 80-82; PX 11 at 281; Appendix C to Administrator's Brief). A local wholesaler sold beer at seventy cents per can. See Administrator's Brief at 53-54 (citing PX 27 at 1044; PX 32 at 1077; Tr. at 189, 625-27).

In addition to back wages, the Administrator assessed $198,450 in CMPs for unlawful deductions for undisclosed meals and drinks sold at a profit or in violation of state law, and explained how it assessed such penalties. See Administrator's Brief at 54-59. At the time of the assessment, the governing regulations allowed

the Administrator to assess $1,500 in civil money penalties for "[e]ach failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment." See Administrator's Brief at 54 (quoting 29 C.F.R. § 501.19(a),(c)(2016). The regulations also enumerate the following paraphrased mitigating factors:

> (1) previous history of violations, (2) number of workers affected by the violations, (3) the gravity of the violations, (4) efforts made in good faith to comply, (5) explanation from the person charged with the violations, (6) commitment to future compliance, and (7) the extent to which the violator achieved a financial gain or the potential financial loss or potential injury to the workers.

§ 501.19(b).

The Administrator argued that she reasonably considered the evidence of record and applied the foregoing mitigation factors concerning the allegedly unlawful deductions for the meal plan and drinks. See Administrator's Brief at 55 (citing District Director Rachor's testimony at Tr. at 849-54). Due to the "seriousness of the violation", concerning the false statement in the job order about kitchen access, the Administrator initially assessed a $1,500 CMP for each of the 147 affected workers. The Administrator did not assess a second set of CMPs for each worker for the purported drink violations. See Administrator's Brief at 56. Rather, the Administrator used her discretion to apply one CMP for all violations §§ 655.122(g), (p), and (q). The Administrator reduced the CMP based on mitigation factor one, because Respondent did not have a history of H-2A violations. See Administrator's Brief at 56-57. Thus,

the Administrator assessed a $1,350 CMP for the 147 affected farmworkers. The Administrator discussed why she did not apply the remaining mitigation factors. See Administrator's Brief at 57-58 (noting that the violation injured a large volume of workers, involved false statements to employees and so constituted a serious violation, was committed knowingly, and caused financial loss to the farmworkers).

The Administrator imposed additional CMPs and back pay because Respondent allegedly "terminated or constructively discharged" twenty-four workers, leaving them with a "wage shortfall." See Administrator's Brief at 59. The twenty-four workers allegedly discharged in violation of the three-fourths guarantee[144] included four workers terminated in August 2015 without cause, nineteen workers discharged in May 2015, and one worker for whom Respondent failed to notify government agencies of the reasons for his departure in June 2015.[145] See Administrator's Brief at 60-61. Concerning the first set of workers, Respondent has conceded it violated the three-fourths guarantee and

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[144] "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).

[145] The name of the lone worker is Jose Islas Larraga. See Administrator's Brief at 73-74. Respondent owes back pay to Islas Larraga in the amount of $2,751.94 because, contrary to the regulatory requirements, Respondent never provided notice that Islas Larraga no longer worked for Respondent. Id. (Tr. 419, 436; PX 39 at 1189-1216 (Islas Larraga absent from full set of notifications)).

owes that cohort $4,386.18 in total back pay. See Administrator's Brief at 63 (citing PX 1; Tr. at 426, 639, 642-44). The regulations only relieve employers from the three-fourths guarantee when a worker "voluntarily abandons employment" or is "terminated for cause," and the employer also timely and properly notifies the appropriate federal agencies. See Administrator's Brief at 62 (citing § 655.122(n)).

The Administrator argued that, despite what Respondent communicated to the Department on the worker departure forms, Respondent terminated the nineteen workers that left in May 2015. See Administrator's Brief at 63-64 (citing Tr. 39, 65, 80-81, 107-08, 125, 129; PX 3 at 101; PX 9 at 232-33, 258; PX 11 at 305). The Administrator asserted that Respondent could not defend itself through its "false notifications to government agencies" concerning the worker departure forms the workers signed stating that they had sick or injured family members. See Administrator's Brief at 64 n.43 (citing See JX 8 at 89-95, 102, 106, 107; PX 3-1 at 115; see also JX 8 at 98-100).

Even if Respondent did not terminate the nineteen workers in May 2015, the Administrator argued in the alternative that Respondent constructively discharged the workers. See Administrator's Brief at 64-68. Respondent constructively discharged the workers based on the "intolerable work and living conditions that they faced." See Administrator's Brief at 64 (citing Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996)). Constructive discharge operates under an objective standard: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" See Ad-

ministrator's Brief at 65 (quoting Pa. State Police v. Suders, 542 U.S. 129, 141 (2004)). The Administrator said that the asparagus picking conditions were unendurable, because Respondent required the pickers to work in a crouched position for ten to twelve hours most days without rest. See Administrator's Brief at 65 (citing Tr. 17, 90-91, 139, 238-39, 257; PX 3 at 68-71). The field conditions were also intolerable as, in May 2015, the fields lacked bathrooms or were in disrepair. See Administrator's Brief at 66 (citing Tr. 18-19, 91, 139; PX 3 at 91; PX 9 at 216, 220) and Administrator's Brief at 67 (citing PX 5 at 142-43; Tr. at 39, 103, 163). At times, the fields also lacked drinking water. See Administrator's Brief at 66 (citing Tr. 19, 139; PX 5 at 19; PX 9 at 216; PX 3 at 73).

The Administrator next described her back wages calculations and argued that such calculations were "reasonable." See Administrator's Brief at 68. The Administrator relied on Respondent's payroll records at PX 1 and PX 2, and noted that the undersigned admitted both exhibits as "summaries of voluminous records pursuant to Federal Rule of Evidence 1006 and 29 C.F.R. § 18.1006." See Administrator's Brief at 68 n.47 (citing Tr. at 584-85, 968).

First, the Administrator determined the "total period," § 655.122(i)(1), on which Respondent based its three-fourths guarantee. The Administrator determined the start date of the first weekly pay period in which a worker was paid in 2015. See Administrator's Brief at 69 (citing Tr. at 428; PX 1.) The Administrator calculated the length of the workdays (seven hours on weekdays and five hours on weekends), and used the length of the workdays to determine the ending date of

the guarantee period (October 10, 2015). See Administrator's Brief at 69 (citing Tr. 420, 523; see JX 1 at 1, 9 11; JX 3 at 42, 50). The Administrator then found the number of weeks (expressed as hours) from the start of the first pay period to the end of the guarantee period. See Administrator's Brief at 69 (citing Tr. at 428; PX 1).

To yield the data contained in the "total workday hours between first pay period and contract end" column of PX 1, the Administrator multiplied the "weeks" column and the "job offer hours per week" column; the Administrator then subtracted the "federal holiday(s) hours" column from this product. See Administrator's Brief at 70. The Administrator created the three-fourths guarantee column by multiplying the "total workday hours between first pay period and contract end" column by three-fourths. Id. The "variance" column shows the difference between the "3/4 guarantee" column and the "hrs wrked" column. Id. To determine the amount of back pay owed, the Administrator multiplied the figure in the "variance" column by $11.29, the minimum hourly wage the Respondent pledged to pay its farmworkers in 2015. See Administrator's Brief at 70. In this way, the Administrator calculated both the number of hours for each worker that Respondent violated the three-fourths guarantee and the back pay due. See id. Because Respondent did not keep any records of hours offered to the employees, in violation of § 655.122(j), the Administrator argued that the undersigned should not use hours offered as a relevant factor. See Administrator's Brief at 71-72 (citing In re: Global Horizons, Inc., No. 2005-TAE-00001 slip op. at 40-41, 63, 77, 88-92) ("Global Horizons III").

The Administrator also assessed a $1,350 CMP for Respondent's alleged violation of the three-fourths guarantee concerning twenty-four of the affected farmworkers. See Administrator's Brief at 74-75 (citing Tr. at 856-57 (allowing a ten percent reduction for Respondent's lack of H-2A history, but finding that reductions were not warranted for the number of workers involved, the gravity of the situation, the commitment for future compliance, or financial gain to the Respondent), 935-37). Mitigation factors four and five do not apply, because Respondent's hours tracking program did not track hours offered and because Respondent continues to deny liability for some of the three-fourths guarantee issues. Id.

The Administrator assessed an additional $1,350 CMP for Respondent's alleged violation of 29 C.F.R. § 501.5, which "prohibits any 'person' from 'seek[ing] to have' any H-2A worker waive rights pursuant to 20 C.F.R. part 655, subpart B," including the three-fourths guarantee at § 655.122(i). See Administrator's Brief at 75-78. The Administrator referred to this as a "coercion violation." See Administrator's Brief at 78. Respondent provided the workers who left in May and August worker departure forms stating that the workers "resign[ed]" their jobs. See Administrator's Brief at 76 (citing Tr. 83, 108-110, 149, 225, 274, 732, 768-69). Respondent allegedly violated 29 C.F.R. § 501.5 by first requiring the workers to sign worker departure forms stating that they resign; second, by having the workers falsely state that they have ill or deceased relatives. See Administrator's Brief at 76. Russel Marino, Jr. stated at deposition that the purpose of the worker departure forms was to protect against litigation. See Administrator's Brief at 77 (citing PX 15 at 475). Re-

spondent's agent, National Agricultural Consultants, also sent false notifications to the Department. See id. (citing PX 39 at 1191-95, 1198-1200; Tr. 409, 748, 753-54). The Administrator stated that Respondent is responsible for its agent's actions. See Administrator's Brief at 77 (citing JX 2 at 31, 39-41; JX 4 at 70; 20 C.F.R. § 655.135). On page 754 of the hearing transcript, the Respondent allegedly conceded the August workers were terminated without cause. Id. The Administrator considered all seven mitigation factors, and applied only the first one due to Respondent's lack of past noncompliance. See Administrator's Brief at 77-78 (citing Tr. at 858-61.)

The Administrator assessed $3,600 in CMPs for five alleged violations of 20 C.F.R. § 655.122(d)(1)(i), which concerns housing violations. See Administrator's Brief at 78-86. Specifically, the Administrator assessed the following CMPs:

> $900 for the unscreened bathroom windows; $900 for the faulty dormitory screen windows and doors; $900 for the uncovered garbage cans; $450 for the hot water shortage; and $450 for the unclean mattresses on the floor.

See Administrator's Brief at 84 (citing JX 10 at 160; Tr. 861-63, 938-39).

Because Respondent's dormitories were built prior to 1980, the applicable regulations are the Employment and Training Administration Housing Standards codified at 20 C.F.R. §§ 654.404-654.417. Section 654.408(a) mandates that "all outside openings . . . be protected with screening of not less than [sixteen] mesh." See Administrator's Brief at 78 (citing 20 C.F.R. § 655.122(d)(l)(i)). The Administrator argued that Re-

spondent violated this requirement because its dormitory contained ripped or missing window screens. See Administrator's Brief at 78-79 (citing Tr. at 202-03, 324, 330-31; PX 28 at 1046-47). The ETA regulations require that "[a]ll screen doors . . . be tight fitting, in good repair, and equipped with self-closing devices." 20 C.F.R. § 654.408(b). The Administrator averred that Respondent violated this requirement, as well; some screens were ripped and some doors did not close. See Administrator's Brief at 80-82 (citing PX 28 at 1048-52; Tr. 324-28). Respondent is obliged to maintain housing in compliance with federal standards throughout the growing season. See Administrator's Brief at 81 (citing JX 2 at 30-31, 39; JX 4 at 69-70, 78).

Concerning garbage receptacles, the ETA regulations require that Respondent maintain "fly-tight, clean containers in good condition" near the dormitory. 20 C.F.R. § 654.414(a). The Administrator argued that the condition of Respondent's refuse containers violated the regulations. It even kept open piles of refuse near the dormitory. See Administrator's Brief at 82 (citing Tr. at 324, 329, 332, 603-04; PX 28 at 1053-55; PX 33 at 1094).

Another alleged violation of 20 C.F.R. § 655.122(d)(1)(i) stemmed from Respondent's failure to provide its workers with adequate hot water for bathing and handwashing. See Administrator's Brief at 82-83. Section 654.412(a) requires Respondent to provide its workers with bathing and hand washing facilities with both hot and cold water. Two of the sinks in the bathroom were broken and workers went without hot water at times. See Administrator's Brief at 83 (citing Tr. 30, 103-04, 199-201, 330; PX 7 at 189; PX 11 at 288).

Finally, the Administrator alleged that Respondent failed to provide certain farmworkers with clean mattresses. See Administrator's Brief at 83-84 (citing 20 C.F.R. § 654.416(a)-(b)). The Administrator found that two workers were sleeping on mattresses on the ground in an unsanitary location. See id. (Tr. 324, 329-30; PX 7 at 187-88; PX 28 at 1056).

For each of the five housing violations, the Administrator considered all of the mitigation factors enumerated at § 501.19(b) to reduce the penalty below the $1,500 maximum. See Administrator's Brief at 84-86 (citing Tr. at 862-66, 937-45). The Administrator applied the first, sixth, and seventh mitigating factors. See Administrator's Brief at 84-85. Specific to the bathroom, dormitory screen, and garbage violations, the Administrator further reduced the CMP because there was no evidence that any worker contracted a communicable disease due to the cited issues. See Administrator's Brief at 85 (citing Tr. at 864). For the hot water and mattress violations, the Administrator also applied mitigation factors three, four and the final factor. Id. (citing Tr. at 865-66, 941). Additionally, mitigation factor two applied to the mattress violation, and mitigation factor five applied to the hot water violation. Id. (citing Tr. at 456, 865, 937, 941).

The Administrator assessed a $7,500 CMP for Respondent's alleged unsafe transportation of farmworkers in violation of § 655.122(h)(4). See Administrator's Brief at 86-90. Twenty C.F.R. § 655.122(h)(4) requires "[a]ll employer-provided transportation" to "comply with all applicable Federal, State or local laws and regulations." The Administrator first cited Respondent for the use of unlicensed drivers. The laws of the State

of New Jersey prohibit driving on "public highways" without a driver's license. See Administrator's Brief at 86 (citing N.J. Stat. Ann. § 39:3-10). Additionally, the H-2A regulations require drivers to hold a "valid permit qualifying the driver to operate the type of vehicle driven by him in the jurisdiction by which the permit is issued." Id. (citing 29 C.F.R. § 500.105(b)(1)(iii) (incorporated by reference in 20 C.F.R. § 655.122(h)(4)). New Jersey also prohibits the transportation of migrant farmworkers by drivers who are not licensed in the United States or Canada. See Administrator's Brief at 86-87 (citing N.J. Admin. Code § 13:21-13.2). Here, the Administrator avers that of the five drivers interviewed by WHI Perez, two had Mexican driver's licenses, one had an expired Mexican driver's license, and two had no licenses, whatsoever. See Administrator's Brief at 87 (citing 383-400; PX 30 at 1064-66, 1070-71).

In addition to the purported driver's license issue, the Administrator alleged that CMPs are due because Respondent operated vehicles with worn tires and one vehicle had a broken rear tail light. See Administrator's Brief at 88-89 (citing Tr. 404-06; PX 29 at 1057). This broken tail light showed that Respondent was in violation of both federal laws and state laws. See id. (citing 29 C.F.R. § 500.105(b)(3)(ii); 49 C.F.R. § 393.11; N.J. Stat. Ann. § 39:3-61(a)). Three of the buses had worn tires. See Administrator's Brief at 88-89. The Administrator argued that the tires fell below minimum federal and state standards. Such standards prohibits the operation of vehicles with "tires which have been worn so smooth as to expose any tread fabric or which have any other defect likely to cause failure." Id. (citing 29 C.F.R. § 500.105(b)(3)(v); N.J. Admin. Code § 13:21-13.11(b)). The Administrator said that the in-

vestigator used "a common sense instrument," a pen, to illustrate the depth of the tread. See Administrator's Brief at 89.

The Administrator argued that it was reasonable for the Administrator to impose CMPs, as follows: $750 for each of three bald tires, $900 for each of five unlicensed drivers, and $750 for the broken rear turn signal. See Administrator's Brief at 89-90 (citing JX 10 at 160; Tr. 867, 870-72). The Administrator reduced the CMPs in light of the seven mitigation factors at § 501.19(b). See id. The Administrator applied the first, second, sixth, and seventh mitigation factors to each of the transportation violations; it did not apply the fourth or fifth factors. Id. The Administrator found the third mitigation factor applicable to the tire and rear turn signal issues, but not to the unlicensed drivers. Id.

The Respondent's Brief

In its "statement of the case," Respondent recognized that the Administrator assessed "nearly $600,000" in back wages and CMPs for the 2015 growing season. See Respondent's Brief at 4. Three-fourths of the back wages relate to allegations of Employer's failure to comply with the requirements at 20 C.F.R. § 655.122(g) (*i.e.*, meal charges); $135,000 in back wages relates to the allegations of Employer's violations of the three-fourths guarantee. The remaining assessment involves various CMPs. Id. Respondent professed its "innocence" to such "charges" and asked the undersigned "to dismiss the claims outright or, at the very least, significantly reduce the amounts requested." Id. Respondent noted that the penalties "dwarf those" assessed in the Global Horizons cases, 2005-TAE-0001 and 2010-TAE-0002, which involved "rampant wage theft" and employers re-

ceiving kickbacks from the workers. Id. Respondent asked the undersigned to "look past the overheated and intentionally outrageous rhetoric from the Administrator and consider the testimony of the workers themselves and the pure facts of the case, and then to dismiss these claims and allow this farm to put this nightmare behind it and go back to producing food." See Respondent's Brief at 7.

Concerning meals, Respondent argued that many of the farmworkers never asked to use the kitchen facilities, and Respondent never denied them permission. See Respondent's Brief at 7-8 (citing 50-51, 176, 213-14). Respondent argued that the hearing testimony was "inconsistent" as to the number of workers who could cook at once or whether it was feasible to cook in shifts. Id.

Respondent's farmworkers paid Hernandez, not Respondent. Hernandez took a loss on the meal plans early in the season and recouped it later. See Respondent's Brief at 8 (citing Tr. at 234-37). Hernandez used any surplus from the meal plan to purchase food, pay the kitchen staff, and to buy additional appliances for the kitchen. Id. Respondent did not "profit based on what the workers did or did not pay [Hernandez]." Id.

Respondent continued that the Administrator's case relies on the position that the inaccurate job order misled Respondent's farmworkers. See Respondent's Brief at 9-12. Respondent countered that some of the workers still would have worked if the job order had described the meal charge and otherwise did not object to the meal plan. See Respondent's Brief at 9 (citing Tr. at 62). The Administrator allegedly failed to show that "all" of the farmworkers would have made a different

decision if Respondent had disclosed the meal plan in the job order. See Respondent's Brief at 10 (emphasis in the original).

Respondent argued that the regulations do not disclose a remedy for "non-disclosure of meal charges." Id. Respondent attempted to distinguish the current case from the Global Horizons case, where "the employer itself collected the meal charge, purchased the food, and provided the meals to the [farmworkers]." See Respondent's Brief at 10 (citing 2010-TAE-00002 (Dec. 17, 2010) (Order on Part. Summ. Dec. at 8)). Respondent quoted from Global Horizons for the principle that an employer profiting from meal charges is equivalent to paying the employees below-market wages. Id. Because Respondent did not profit from the meal charges, and Respondent did not reduce the farmworkers' wages below market level, the rationale applied in Global Horizons does not control. See Respondent's Brief at 10-11. Here, Respondent neither deducted money from the farmworkers' paychecks, nor did the farmworkers pay Respondent for meals. See Respondent's Brief at 11. Thus, "the integrity of the wage setting process remain[ed] perfectly intact." See Respondent's Brief at 12. Respondent again compared the current case to Global Horizons, where the administrative law judge granted summary decision in favor of the employer because "there [was] no indication that the Company in fact exploited the workers . . . by overcharging for meals." See Respondent's Brief at 12-13 (citing Global Horizons, at 9). Because Respondent "had nothing at all to do with the preparation and sale of the food," and because Respondent did not profit from the meal plan, Respondent argued that Global Horizons

did not provide controlling authority. See Respondent's Brief at 13.

The Administrator's argument that Hernandez acted as Respondent's agent "makes no sense," according to Respondent. See Respondent's Brief at 13-16. Agency theory does not apply to a breach of Respondent's contract with the government and the farmworkers. See Respondent's Brief at 13 (citing Young v. Bethlehem Area Vo-Tech Sch., 2007 U.S. Dist. LEXIS 13531, *39 (E.D. Pa. Feb. 28, 2007) for the principle that *respondeat superior* does not apply in breach of contract claims)). Hernandez and Respondent were not the farmworkers' joint employers, either. See Respondent's Brief at 14-15 (discussing Ramos Ortiz v. Paramo, Civ. Action 06-3062, 2008 U.S. Dist. LEXIS 72387 (D.N.J. Sept. 19, 2008). Because Hernandez did not fit under the regulatory definition of the term "employer," 20 C.F.R. § 655.103(b), the Administrator allegedly could not show that Respondent "received any payments from workers for meals nor for anything else." See Respondent's Brief at 16. Such payments went to Hernandez "in his individual capacity." Id. Respondent did not direct Hernandez to collect the money, did not approve of Hernandez's actions, and Respondent did not "even [know] that this was happening." Id. Thus, the Administrator is unable to attribute any "employer-agent theory" of liability to Hernandez.

Respondent continued that Hernandez's meal plan was "reasonable." See Respondent's Brief at 16-18 (citing 80 FED. REG. 9482 (Feb. 23, 2015)) for the principle that the "DOL-allowed daily meal charge for H-2A workers is $83.02 per week). Repayment of "100% of the meal charges is not warranted" here because it "vastly

overstates any claimed 'harm' to the workers in 2015."[146] See Respondent's Brief at 16. Additionally, Respondent argued that but for the meal plan, the workers would still have to pay their own money and spend their own time preparing their food. Id. According to the U.S. Department of Agriculture, the weekly cost of food ranges from $43.10 to $86.30. Id. Respondent requested "credit for the full amount" of what the workers would have paid if they prepared their own food. See Respondent's Brief at 17-18.

Respondent continued that "absolutely nothing in the H-2A regulations" supports the Administrator's decision to charge CMPs and back pay concerning the drinks and beer sold to the farmworkers. See Respondent's Brief at 19. Respondent said that water was available "at all times" in the fields. Id. (citing Tr. at 236-37, 265). The water was tested for potability early in 2015 and passed inspection. Id. (citing Tr. at 717-18). Hernandez sold soft drinks and beer to the farmworkers, but no money transferred to Respondent; Respondent did not run a company store. See Respondent's Brief at 19-20 (citing Tr. at 162, 561). "Nothing about [Hernandez's] drink sales had any impact on [Respondent's] bottom-line, either profit or loss." See Respondent's Brief at 20. Respondent emphasized that WHI Perez said that "the workers weren't purchasing the drinks from [Respondent]." Id. (citing Tr. at 561.) WHI Perez, according to Respondent, was unable to explain why the Administrator required Respondent to remit the full

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[146] Respondent further requested application of the doctrines of estoppel and laches, because the Administrator knew of the meals situation on July 21, 2015, but did not "raise any concerns" until early 2016. See Respondent's Brief at 18-19.

costs of non-alcoholic drinks, but only Hernandez's profit from the beer. Id. (citing Tr. at 566.) Respondent reiterated that the H-2A regulations do not require free soft drinks and asked the undersigned to dismiss all back pay and CMPs based on the drinks Hernandez sold to the farmworkers. See Respondent's Brief at 21.

Respondent called WHI Perez's back wage calculations "creative." See Respondent's Brief at 21-22. The Administrator allegedly had an "unreliable estimate" of the amount paid to Hernandez for the drinks, because the estimate relied on "post hoc recollections." Id.; see Respondent's Brief at 22 n.6 ("Investigator Perez's use of spreadsheets and calculations implies a degree of precision that is not supported by the underlying information on which his calculations rest."). The Administrator also relied on prices obtained from Costco, even though the record establishes that Hernandez shopped at Sam's Club. See Respondent's Brief at 22 (citing Tr. at 430, 508-09, 627). Additionally, the Administrator used prices for Coors Light when "nobody bought" it. See Respondent's Brief at 22-23.

The Respondent recognized that the Administrator assessed two separate three-fourths guarantee violations against Respondent. One violation involved the group of nineteen workers who left in May 2015; one involved a group who Respondent "let go in August after wet weather and bacteria ruined the pepper harvest." See Respondent's Brief at 23.

Concerning the former group, Respondent argued that voluntary abandonment of work voids the three-fourths guarantee. See Respondent's Brief at 23-28. As Respondent put it, the workers decided together that harvesting asparagus was "more difficult than they

wished, [and] stopped working *en masse*." See Respondent's Brief at 23. Because the asparagus harvest would otherwise be ruined, Joseph Marino and Russel Marino, Jr. pleaded for the workers to stay. Id. Respondent noted witness testimony that the asparagus crop was difficult to harvest. See Respondent's Brief at 24-25 (citing Tr. at 49, 50, 122-16, 723-27, 809-12). Additionally, Respondent never told the nineteen workers they "must" leave work and that the workers were terminated without cause. See Respondent's Brief at 25-26 (citing Tr. at 66-67) (emphasis in the original). For purposes of calculating the three-fourths guarantee, the regulations "draw[] a crucial distinction between a worker terminated without cause and a worker voluntarily abandoning employment." See Respondent's Brief at 26. The latter employee does not deserve back pay for violations of the three-fourths guarantee. Id. Respondent argued that the workers in question voluntarily abandoned their employment. Id. It was "simply preposterous" that Respondent would fire the workers, since asparagus requires such a quick harvest. Id.

Additionally, the Administrator is allegedly unable to establish the objective standard constituting constructive discharge. See Respondent's Brief at 26-27 (citing Stucke v. City of Philadelphia, 685 Fed. Appx. 150, 155 (3d Cir. Apr. 12, 2017); Duffy v. Paper Magic Group, 265 F.3d 163, 169 (3d Cir. 2001)). Because a "reasonable person" would not have felt compelled to resign, the Respondent argued that Respondent did not constructively discharge the nineteen-workers. See Respondent's Brief at 27. As proof, Respondent asserted that the "vast majority" of farmworkers that worked under the same

conditions did not feel "so compelled to walk off the job." Id. (citing Tr. at 65, 817-18).

Concerning the group that left Respondent's employ in August 2015, Respondent said that the Administrator did not account for the hours Respondent offered this cohort. See Respondent's Brief at 28-30. Twenty C.F.R. § 655.122(i) requires only that an employer offer the worker employment; it does not require the employee to have actually worked to meet the three-fourths guarantee. See Respondent's Brief at 28. The P.E.T. Tiger technology Respondent used to track the farmworkers' work would not capture if a worker were sick, injured, or otherwise declined work because the worker was not "scanned in" to start the day. See Respondent's Brief at 29 (citing Tr. at 683-84, 833-34). WHI Perez allegedly did not ask Respondent about hours that it offered the farmworkers. Id. (citing Tr. at 554-58, 649). Respondent argued that the three-fourths guarantee did not apply to Islas Larraga because he had "absconded" from the job mid-season, and so voluntarily quit. See Respondent's Brief at 29-30.

Respondent next discussed the $1,350 CMP for Respondent's alleged attempt to have the workers waive their rights on the worker departure forms. See Respondent's Brief at 30-31. Respondent explained that Theresa Ward of National Agriculture Consultants told Russel Marino, Jr. that workers were concerned that if they could not perform a job and abandoned employment, it would reflect badly on their ability to secure future employment. See Respondent's Brief at 30 (citing Tr. at 731-33, 812). Hernandez provided the blank worker departure forms to the workers. Id. (citing Tr. at 225, 227). Respondent conceded that the workers

did not have sick or deceased family members, as the form indicates, but said, "that decision was between the group of workers and between the workers and their contact back in Mexico." See Respondent's Brief at 31. Respondent did not coerce the workers to give up any right, because "none of the forms purport to surrender a right held by any of the workers." See id.

Respondent continued that the undersigned should reduce the $3,600 CMP for the housing violations. See Respondent's Brief at 31-33. Respondent allegedly made "immediate repairs and corrections," but WHI never followed up to account for those remedies. See Respondent's Brief at 32 (citing Tr. at 497-99). Hernandez inspected housing conditions twice per week and Russel Marino, Jr. said that workers could raise concerns about housing and then Respondent would make the necessary repairs. Id. (citing Tr. at 176, 782). As to the $450 mattress violation, District Director Rachor allegedly "conceded" that the requirement was to provide a bed, "not to prevent workers from moving mattresses from a provided bed onto the floor." See Respondent's Brief at 33 (citing Tr. at 923; 20 C.F.R. § 654.416(a)). Respondent emphasized that the New Jersey Department of Labor certified the dormitory for 136 workers and the housing population never exceed 118 during the 2015 season. Id. (citing Tr. at 803-04; RX 2 at 13).

Respondent further stated that the alleged transportation violations do "not support the full CMP assessment pursued by the Administrator in this case." See Respondent's Brief at 33-34. Respondent allegedly "resolved" the driver's license issue through the addition of internal protocols. See id. Concerning the tire

tread, Respondent argued that the Administrator merely used "eyeball measurement" to determine that the tire was "bald." See Respondent's Brief at 34. WHI Perez reviewed the pictures he took and purportedly "admitted that there were 'tread marks' on the tires in question." See Respondent's Brief at 34 (citing Tr. at 533-36). Because Respondent has generally addressed and remediated the issues for which the Administrator seeks CMPs, Respondent requested the undersigned to "set[] any remaining CMPs at a reasonable level commensurate with the facts of the case." Id.

DISCUSSION

The modern H-2A visa program arose out the 1986 amendment to the INA. See generally Staff of House Comm. On Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3-4 (Comm. Print 1991). The Administrator enforces the attestations an employer makes in a temporary agricultural labor certification application, as well as the regulations that implement the H-2A program. See 29 C.F.R. §§ 501.1, 501.5, 501.16, 501.17. An "employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." 20 C.F.R. § 655.122(a). Thus, the H-2A regulations prohibit any discrimination between H-2A workers and domestic workers. Id. The Administrator may penalize an employer who fails to abide by the governing H-2A regulations through the imposition of monetary penalties, debarment from filing other H-2A certification applications, and instituting proceedings for specific performance, injunctive, or other equitable relief. See In

re: Global Horizons, Inc., 2006-TLC-00013, slip op. at 4 (ALJ Nov. 30, 2006).

The Administrator may assess CMPs against a violating employer for each violation of the work contract or the governing regulations. 29 C.F.R. § 501.19(a) (2010). In determining the amount of such penalty, "the WHD Administrator considers the type of violation committed and other relevant factors[,]" including:

1. Previous history of violation or violations of the H-2A provisions of the Act and these regulations;
2. The number of workers affected by the violation or violations;
3. The gravity of the violation or violations;
4. Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;
5. Explanation of person charged with the violation or violations;
6. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provision of the Act; 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).

A party has a right to a *de novo* hearing before an administrative law judge, who may affirm, deny, reverse, or modify in whole or in part the decision of the Administrator. See, *e.g.*, Three D. Farms, LLC d/b/a Three D Farms, 2016-TAE-00003 (Aug. 18, 2016); Seasonal Ag

Services, Inc., 2014-TAE-00006, slip op. at 12 (Dec. 5, 2014).

I. The Administrator properly found violations of 20 C.F.R. § 655.122(g), (p), and (q) concerning improper deductions Respondent's agent, Hernandez, made concerning meals, non-alcoholic beverages, and alcoholic beverages. Back pay and the imposition of CMPs, therefore, are warranted.

Twenty C.F.R. § 655.122(g) requires an employer to provide H-2A workers either "three meals a day or [to] furnish free and convenient cooking and kitchen facilities." If the employer requires workers to pay for their meals, the employer must state the charge on the job offer. (Id.) The regulations also require the employer to provide a prospective H-2A worker a copy of the work contract prior to the worker's application for a visa. § 655.122(q). The work contract must contain, *inter alia*, terms concerning whether the employer will provide meals or kitchen access, as stated in § 655.122(g). Here, Respondent filed two job orders. The first concerned the period April 13, 2015 to October 10, 2015; the second concerned June 1, 2015 to October 10, 2015. See JX 1; JX 3 (respectively). Section 14 of the job order requires the employer to "describe how [it] intends to provide either [three] meals to each worker or furnish free and convenient cooking and kitchen facilities." In both JX 1 and JX 3, Respondent informed the Department —as well as prospective H-2A workers—that it "will furnish free cooking and kitchen facilities . . . so that workers may prepare their own meals." Russel Marino, Jr. signed both forms in his role as Respondent's "owner/manager." (Id.) Despite Respondent's assurances, however, the workers who arrived at Re-

spondent's New Jersey dormitory were greeted with news that Respondent planned to feed them not with free kitchen access, but through a meal plan costing each worker $75 to $80 per week.[147] In this way, Respondent immediately breached a material term of the job order; the contract that cemented the working relationship between Respondent and farmworkers who traveled often thousands of miles to work in Respondent's fields.

Respondent's counterargument that none of the workers requested access to Respondent's kitchen facilities and some did not object to the meal plan, see Respondent's Brief at 7-9, is unavailing. The express terms of the job orders at JX 1 and JX 3—the employment contracts between the farmworkers and Respondent—were clearly not in line with the realities facing the farmworkers upon arrival at Respondent's dormitory. Respondent, therefore, violated 20 C.F.R. §§ 655.122(g), and (q).

Respondent also attempts to deflect liability concerning its violation of the regulations concerning proper deductions from the farmworkers' pay. See 20 C.F.R. § 655.122(p) ("The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. . . . A deduction is not rea-

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[147] See Tr. at 20 (Maldonado's testimony), 92, 140-41 (Gustavo Perez saying that he had no choice but to pay Hernandez for the meal plan, even though he would have rather prepared his own food), 176 (Hernandez stating that workers who did not wish to participate in the meal plan had to "eat outside or to order a delivery meal"), 178-80 (discussing PX 17-1 and PX 17-2, where Hernandez tracked the workers who participated in the meal plans), 262 (Almanza's testimony), 334 (WHI Perez's testimony). Respondent never explained to WHI Perez why the meal plan cost $75 some weeks and other weeks cost $80. See Tr. at 600.

sonable if it includes a profit to the employer or to any affiliated person."). Respondent argues that all deductions from pay, if any, occurred due to the actions of Hernandez, not Respondent. Therefore, to the undersigned must first determine whether Hernandez acted as Respondent's agent, and second if any deductions occurred.

A. At all relevant times, Hernandez acted as Respondent's agent.

Hernandez held both actual authority and apparent authority over the farmworkers. The actions of Hernandez, therefore, are legally equivalent to the actions of Respondent. See Restatement (Third) Of Agency Intro. (2006). Contrary to Respondent's assertion, see Respondent's Brief at 13-16, common law agency principles do apply to violations arising under the INA. See Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 593 (W.D. Tex. 1999) (citing Montelongo v. Meese, 803 F.2d 1341, 1349 (5th Cir. 1986)); Escobar v. Baker, 814 F. Supp. 1491, 1503-04 (W.D. Wash. 1993); Bueno v. Mattner, 829 F.2d 1380, 1384 (6th Cir. 1987). The Restatement (Third) of Agency, therefore, is instructive as to the definitions of actual authority and apparent authority.

Hernandez acted with Respondent's actual authority. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) Of Agency § 2.01 (2006). An agent's belief is reasonable where it is "grounded in a manifestation of the principal." Restatement (Third) Of Agency § 2.02 cmt. c (2006).

Here, Respondent had a legal duty to feed the farmworkers it hired and housed in its dormitory. Although Respondent promised kitchen access to the farmworkers, see JX 1 and JX 3, it tasked Hernandez with operation of the meal plan that ultimately fed the farmworkers. Although Hernandez utilized Respondent's kitchen to do so, he paid the cooks, bought the groceries, and appliances as needed to cook the meals. See Tr. at 177-78, 229, 244, 252, and 793. For its part, Respondent owned the kitchen, all of the major appliances therein, and paid for the kitchen's utilities. See ALJX 1 at ¶ 21. After Respondent decided to utilize the H-2A program in 2015, Respondent told Hernandez that he could keep charging for meals but that Hernandez—not Respondent—would be responsible for paying the cooks' wages. See Tr. At 177. Respondent spoke with Hernandez concerning the amount he intended to charge the farmworkers for meals, and Respondent took Hernandez to a meeting with the Department to ensure he understood the regulatory limits of the meal plan. See Tr. at 187-88, 738, and 742-43. Russel Marino, Jr. told Hernandez "for years" to keep his food and beverage receipts, "because you cannot make a profit on the men." See Tr. at 808. Russel Marino, Jr. told Hernandez to keep track of the farmworkers' payments through deductions of their pay. Respondent also allowed Hernandez to choose the drivers that operated Respondent's busses, which transported the farmworkers from the dormitory to the fields. See Tr. at 205, 390-401. Hernandez has worked for Respondent for twenty-seven years, and receives an hourly rate plus commission based on the amount of crops harvested. See Tr. at 171, 230. Finally, the parties stipulated that during the 2015 growing season, Hernandez supervised the farmworkers. See ALJX 1

at ¶ 18. The preponderant evidence establishes, therefore, that, in all of his duties—and especially concerning the operation of the meal plan—Hernandez acted with Respondent's actual authority. Hernandez also reasonably believed that the Respondent wished him to operate the meal plan; Respondent's statements to Hernandez and actions in taking him to a meeting with the Department demonstrate that Hernandez's belief was reasonable. Hernandez, therefore, acted with the actual authority of the Respondent, and served as Respondent's agent at all relevant times.

Assuming, *arguendo*, Hernandez did not act under Respondent's actual authority, he acted with Respondent's apparent authority. Put another way, the farmworkers reasonably believed that Hernandez was Respondent's agent. Therefore, his actions are imputed to Respondent. See Restatement (Third) Of Agency § 2.03 cmt. c. Restatement (Third) Of Agency § 2.03 defines apparent authority as, "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." At all relevant times, Hernandez supervised the farmworkers. See ALJX 1 at ¶ 18. When workers arrived at the camp, Hernandez said that he would orient them about housing, the "rules of the camp," keeping the bathrooms clean, hours of work, pay, kitchen access, and cost of meals.[148] When the farmworkers paid

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[148] See Tr. at 61 (Maldonado stating that Hernandez was "in charge" and he never spoke with anyone from the Marino family); 174-175 (Hernandez's testimony); 773 (Russel Marino, Jr. stating that Hernandez "primarily" oriented the workers); 825 (Russel

Hernandez, the workers signed a form to indicate they "agreed that they received the meal and" paid for the meal plan; Respondent's name appears on the top of the form.[149] Russel Marino, Jr. only "sometimes" attended the workers' orientation. (PX 15 at 401.) "Several times a day" Russel Marino, Jr. would check in with Hernandez—not the workers—concerning the operation of the farm. (Tr. at 719.) If workers had problems, they would tell Hernandez because, according to Russel Marino, Jr., that was the "chain of command." (Tr. at 825.) Hernandez told the workers when to work; the workers did not have a choice as to their hours. (Tr. at 17, 90-91, 139, 257; PX 3 at 68-69.) Hernandez also chose the drivers who transported the workers from the dormitory to the fields. See Tr. at 205, 390-401. When work slowed, Hernandez chose the "troublemakers" in determining which workers to lay off. (Tr. at 208.) Finally, Hernandez maintained the sleeping quarters and bathroom facilities at Respondent's dormitory site. (Tr. at 199-205.) In all of these aspects, the farmworkers held reasonable beliefs that Hernandez had authority to act on Respondent's behalf. Because Hernandez acted under Hernandez's apparently authority, he worked as Respondent's agent, and any legal effect of his actions are imputed to Respondent.

Marino, Jr. stating that the workers complained to Hernandez because Russel Marino, Jr. does not speak Spanish and "that's the chain of command"); PX 3 at 101 (Cervantes Ramirez stating on deposition that Hernandez was "in charge").

[149] PX 17 at 764 (Hernandez's deposition testimony, discussing PX 17-2 at 799 (the meal payment form); Tr. at 182-86 (Hernandez testifying he would use the form at PX 17-2—a document Respondent created in its office—to keep track of the workers who paid for meals).

B. Respondent unlawfully deducted or otherwise profited from the farmworkers' payments for meal and beverage costs; its agent, Hernandez, also sold beer in violation of state law. Back pay, therefore, is required for the meals, non-alcoholic drinks, and beer the farmworkers purchased.

As Respondent's agent, Hernandez was an "affiliated person." See WHD Bulletin No. 2012-3 ("The term 'affiliated person' includes but is not limited to agents. . . . any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship."). The regulations therefore prohibit Hernandez from charging any deduction not listed on Respondent's job order. See 20 C.F.R. § 655.122(p)(2). The regulations separately prohibited Hernandez from profiting off any items sold in violation of any law. See id. (specifically incorporating the FLSA regulations at 29 C.F.R. Part 531). To determine whether an employer has met the FLSA's minimum wage requirements, 29 C.F.R. § 531.27 credits an employer for "the reasonable cost . . . of board, lodging, or other facilities customarily furnished . . . to his employees when the cost of such board, lodging, or other facilities is not excluded from wages paid to such employees." The regulations define the term "facilities customarily furnished" and exclude from that definition "[f]acilities furnished in violation of any Federal, State or local law." § 531.31. "Items such as alcohol and cigarettes constitute 'other facilities' under the law." Ortiz v. Paramo, No. CIV. 06-3062 RBK/AMD, 2009 WL 4575618, at *3 (D.N.J. Dec. 1, 2009) (citing Leach v. Johnston, 812 F. Supp. 1198, 1204 (M.D. Fla. 1992), disapproved of on other grounds by Aimable v.

Long and Scott Farms, 20 F.3d 434, 441 (11th Cir.1994)). Therefore, Hernandez and Respondent were unable to make deductions not contemplated by the job order; they were also unable to profit from the selling of any illegal facilities. Concerning the latter prohibition, the parties stipulate that Hernandez sold beer to the farmworkers without a license to do so in violation of New Jersey law. See ALJX 1 at ¶ 26; N.J. Stat. Ann. § 33:1-2(a) (mandating that a license is required to sell beer)). Thus, Respondent was unable to profit from the sale of beer, an illegal activity, warranting the remittal of back pay in the amount of Hernandez's profit.

The undersigned must also determine whether Respondent made impermissible deductions when it collected money for the meal plan and non-alcoholic beverages, which were not included in the job order.

1. Respondent's failure to provide kitchen access or otherwise to disclose meal charges constituted violations of 20 C.F.R. § 655.122(g), (p), and (q). The Administrator properly assessed $128,285 in back wages for the meals the farmworkers purchased.

Because Respondent made deductions of the farmworkers' pay for the meals and non-alcoholic beverages, Respondent is required to provide back pay to the effected farmworkers. See § 655.122(p)(1) (requiring the job offer to include *any* deduction "not required by law which the employer will make form the worker's paycheck); Global Horizons, Inc., OALJ Case No.: 2010-TAE-00002, slip op. at 2 n.7 (ALJ Dec. 13, 2011) (recognizing that, although the meals deduction of $6.00 per day was a "favorable rate[]," it does not "negate the violation, as the deductions thwarted the regulatory

scheme."). That Hernandez did not allow the farmworkers to pay him in cash, but took money out of their pay, does not establish that a deduction did not occur. Regardless of the mechanism by which Hernandez deducted the meal and drink purchases, deductions of the farmworkers' pay—constructive or actual—still occurred, and so Respondent is required to reimburse the farmworkers. See In re: Weeks Marine, Inc., ARB No. 12-093, 2015 WL 2172482, at *4 (Apr. 29, 2015) (citing Arriaga v. Fl. Pacific Farms, 305 F.3d 1228, 1236 (11th Cir. 2002); Salazar-Martinez v. Fowler Bros., 781 F. Supp. 2d 183, 191 n.5 (W.D.N.Y. 2011)).

A less severe consequence would deny the farmworkers their contractual right to the $11.29 per hour minimum wage promised on the job order. See JX 1; JX 3; 20 C.F.R. §§ 655.120, 122(l), (p)(2). A less severe consequence, furthermore, would provide a decreased deterrent effect to future employers who may also attempt to alter the terms of the job order upon the workers' arrival. The violation consists of the deduction itself—not the purported reasonableness of the deduction—so Respondent's argument concerning the "reasonable" price of meals, see Respondent's Brief at 16-18; RX 5; RX 7; RX 8, is inapposite.

Respondent's argument that some of the workers approved of the meal plan, see Respondent's Brief at 9-12, is also unavailing; the operative job orders—the contracts between Respondent and its workers—allow for kitchen access only. See JX 1, JX 3. The governing regulations require the "job offer [to] specify all deductions not required by law which the employer will make from the worker's paycheck." 20 C.F.R. § 655.122(p), (g), (q). Respondent's unilateral substitution of the

meal plan for the agreed upon kitchen access is in violation of the regulations, *per se*. Respondent's reliance on Global Horizon as negative authority is not compelling, because, contrary to Respondent's assertion, Hernandez acted as Respondent's agent. The practical effect of this agency relationship is that when the workers paid Hernandez for the meal plan, it was as if they paid Respondent. See Respondent's Brief at 11. In other words, "the integrity of the wage setting process" in fact, did not remain "perfect intact." Id. at 12. Respondent's additional argument that, unlike the employer in Global Horizons, Respondent did not profit from the meal plan is also unavailing. See id. at 13. Profit can take many forms. Although some profit was certainly quantifiable—like the profit Hernandez made for the beers and non-alcoholic beverages he sold, and the fact that Pinon, Hernandez's wife, received employment in Respondent's kitchen—some forms of profit are less quantifiable. For example, Hernandez's meal plan made unnecessary any costly expansion of Respondent's kitchen facilities, which Respondent would have had to undertake to fulfill the terms the job orders at JX 1 and JX 3. See Tr. at 175-76 (Hernandez testifying that the kitchen was not large enough "for everyone to cook"). To argue, therefore, as Respondent does, that it did not profit from the meal plan because no ready financial gain is apparent is not persuasive. Respondent did in fact profit from the sale of meals, so back pay is required. See Admin. v. Global Horizons, 2010-TAE-00002, slip op. at 9 (ALJ Dec. 17, 2010); see also PROFIT, Black's Law Dictionary (11th ed. 2019) ("The excess of revenues over expenditures in a business transaction.")

Finally, Respondent's argument that the Administrator's back pay award "overstates any claimed 'harm'" misses the point. See Respondent's Brief at 16. When Respondent provided a meal plan to its workers, rather than kitchen access, Respondent changed a material term of the job order. This contractual agreement codified a working relationship, which involves one party traveling sometimes thousands of miles from home, often with limited language skills. See "Temporary Agricultural Employment of H-2A Aliens in the United States," 29 FED. REG. 6884, 6894 (Feb. 12, 2010) ("There is ample evidence that agricultural workers are a particularly vulnerable population.") A material change to the terms of that contract necessarily provides "harm" to both the workers' reliance on the H-2A program to ensure that their rights are protected, as well as the overall integrity of the program itself. To deter such harm from occurring in the future, the equities of the case require back pay at the meal plan's full amount.

The Administrator, therefore, reasonably imposed a $128,285 back pay requirement, see PX 2, for the meal plan violations outlined above. WHI Perez authored the back wage assessment in PX 2; he is highly qualified to do so and credibly testified to the methodology he used in arriving at the $128,285 back pay figure. See Tr. at 305-08, 439-61. Respondent improperly deducted meals concerning ninety-six of its H-2A workers and fifty-one of its domestic workers.[150] For each worker,

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[150] WHI Perez reasonably testified that the H-2A regulations do not allow an employer to discriminate between the treatment of H-2A workers and domestic workers. This explains why the Administrator charged Respondent for any meal plan violations concern-

PX 2 lists the week worked ("payroll week ending" date) and how much the worker paid for, *inter alia*, meals. The parties stipulated that Hernandez charged between $75 and $80 per week; the Administrator accounted for this variance in her calculations in PX 2. The Administrator also subtracted those workers that did not engage in the meal plan from the back wage calculation. The Administrator's calculations, as expressed in PX 2, are reasonable and support her requirement for Respondent to provide back pay in the amount of $128,285.

2. Although back pay is required, the Administrator did not reasonably calculate the back pay owed to Respondent's workers for non-alcoholic drinks purchased during the summer of 2015. Respondent is liable to pay $64,960 in back wages for the non-alcoholic drinks the farmworkers purchased.

Hernandez—Respondent's agent—sold workers non-alcoholic drinks throughout the day; either in the fields or at the company store. See ALJX 1 at ¶ 23; Tr. at 22-23, 24-27, 96-97, 189-90, 193-97, 266-67, 360, 502. The money paid for the non-alcoholic drinks was an unlawful deduction, because it reduced the workers' pay below the required $11.29 per hour threshold. ALJX 1 at ¶ 16; 20 C.F.R. §§ 655.120, 122(l), (p)(2). Because the farmworkers' access to clean water was sporadic—and the farmworkers had no other access to drinks aside

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ing both the domestic and H-2A workers Respondent employed during the summer of 2015. See 20 C.F.R. § 655.122(a) ("The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers.").

from Respondent—it is appropriate to calculate back wages for the various drinks Hernandez sold.

Contrary to Respondent's argument, see Respondent's Brief at 20, allowing Hernandez to profit from non-alcoholic drink sales, indeed, would affect Respondent's "bottom-line," since such profit is reasonably viewed as a fringe benefit for Hernandez's continued employment. In other words, Respondent may have had to pay more to Hernandez absent the profits accrued from the non-alcoholic drinks he sold, thereby affecting Respondent's "bottom-line."

The Administrator attempted to reconstruct the amount of non-alcoholic drinks sold; Hernandez either destroyed or otherwise could not produce his records as to the workers' purchase of drinks in the summer of 2015. See Tr. at 209 (Hernandez's testimony), 361 (WHI Perez stating that Hernandez "did not have purchase receipts for drinks," even though he had such receipts for meals). In doing so, the Administrator reasonably followed the standard propounded in Anderson v. Mt. Clemens Pottery Co., where the Supreme Court determined that, in an action to recover unpaid wages under the FLSA, an employee is required to provide exact evidence of unpaid wages. 328 U.S. 680, 686-89 (1946); see Administrator v. Fernandez Farms, Inc., 2014-TAE-00008, slip op. at 35 (ALJ Aug. 25, 2016) (applying the Mt. Clemens standard within a TAE context)). Rather, where an employer fails to keep records documenting unpaid wages, the Supreme Court applies a burden-shifting standard, which first requires the employer to account for the charges. Id. at 687. If an employer does not provide accurate records, the burden shifts to the employee to provide "sufficient evi-

dence to show the amount and extent of that work as a matter of just and reasonable inference." Id. At that point, the burden shifts back to the employer to rebut the scope and size of the alleged violations. Id. at 687-88.

The Mt. Clemens standard applies here, as the FLSA has similar records retention requirements as the H-2A program. Twenty C.F.R. § 655.122(j), titled "Earnings Records," requires employers under the Act "to keep accurate and adequate records with respect to the workers' earnings, including but not limited to . . . records showing . . . the rate of pay (both piece rate and hourly, if applicable); the workers' earnings per pay period . . . ." *Cf.* 29 U.S.C.A. § 211 (c); 29 C.F.R. Part 516 (providing similar requirements under the FLSA). From a prudential standpoint, application of the Mt. Clemens test is reasonable here because, in both the FLSA and H-2A contexts, "[e]mployees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy." 328 U.S. at 687. Accordingly, the Mt. Clemens burden-shifting construct applies to determine the amount of back pay owed to Respondent's workers for the sale of non-alcoholic drinks.

Here, the Administrator reviewed the entirety of the record and concluded that each of Respondent's workers purchased, on average, 4.42 drinks per day. The preponderant evidence of record, however, establishes that the workers purchased an average of only four, not 4.42, non-alcoholic drinks per day. It was reasonable, however, and likely in Employer's favor, to assume that Respondent sold the drinks for an average of $1.25 per

can.[151] The weekly cost to an average worker for drink purchases in the summer of 2015 was $35.00.[152] The Administrator considered 1,856 separate weeks[153] in finding the total amount of non-alcoholic drinks consumed in the summer of 2015. Thus, Respondent owes $64,960 —not $71,790.08, as the Administrator recommended— in back pay for non-alcoholic drinks.[154]

3. The Administrator reasonably calculated the back pay owed to the farmworkers for beer purchased during the summer of 2015. Respondent, therefore, owes $8,972.61 in back pay for the profit Hernandez made on beer.

Similar to the non-alcoholic drinks issue, Hernandez did not keep accurate records as to the amount of beer sold to Respondent's workers. Therefore, the Mt. Clemens burden-shifting standard, again, applies. Appendix C to the Administrator's brief titled "Revised Back Wage Computations as to Illegal Beer Sales at a Profit." The Administrator revised her initial back pay assessment for the illicit beer purchases, see JX 10 (Order of Reference), after taking witness testimony at the hear-

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[151] Because the Mt. Clemens standard only requires estimates, it is irrelevant whether the Administrator calculated prices using numbers derived from Costco rather than Sam's Club, where Hernandez shopped. See Respondent's Brief at 22. Both are wholesale clubs and likely sell products at similar prices; precision is not required.

[152] Four drinks per day bought at $1.25 per drink over a weekly period of seven days.

[153] The total amount of non-alcoholic drinks the Administrator found was $71,790.08. That figure divided by the weekly amount it considered ($38.68) shows the total number of weeks (1,856 weeks) the Administrator considered. See PX 2.

[154] $35.00 per week multiplied by 1,856 separate weeks.

ing. Appendix C lists the worker's name, the number of weeks they were on Respondent's payroll during the summer of 2015, as well as the total profit Respondent obtained from selling the worker beer. For most workers (some did not imbibe), the Administrator utilized a profit per week of $4.87, based on its conclusion that the workers drank 3.75 beers per week and Hernandez made $1.30 profit per can. Because Hernandez unlawfully sold alcohol without a license, ALJX 1 at ¶ 26, the regulations do not permit him to make a profit off such sales. See 29 C.F.R. § 531.31. Therefore, the Administrator reasonably charged Respondent for Hernandez's profit. Respondent is unable to rebut the Administrator's calculations as unreasonable. As discussed, *supra*, the Administrator's estimates as to the number of beers consumed per week and Hernandez's profits were reasonable.

4. The Administrator reasonably assessed $198,450 in CMPs concerning Respondent's violations of 20 C.F.R. §§ 655.122(g), (p), and (q).

Although it was likely within the Administrator's reasonable discretion to assess separate CMPs for each violation of 20 C.F.R. §§ 655.122(g), (p), and (q), the Administrator decided to assess one $1,350 CMP for the entirety of the violations of § 655.122. The Administrator reasonably assessed the $1,350 CMP for each of the 147 effected workers, which amounts to a $198,450 CMP. District Director Rachor explained that the Administrator assessed the CMP in this way due to the seriousness of the violation and the "large amount of workers affected." (Tr. at 849.) The Administrator's assessment of a $1,350 CMP for each worker was reasonable, be-

cause she reviewed each of the mitigation criteria at 29 C.F.R. § 501.19(b). (Tr. at 849-54) The Administrator allowed a ten percent reduction in the CMP, due to the fact that Respondent had no prior history with the H-2A program. (Tr. at 852.) That assessment is accurate and reasonable. Because of the large amount of workers affected, the Administrator reasonably did not allow a reduction for the second mitigation factor. The Administrator rationally viewed the violation as serious, and so appropriately did not provide a reduction for the third factor. Concerning the fourth factor, whether Respondent made good faith efforts to comply, the Administrator reasonably did not make a reduction; even throughout the hearing, Russel Marino, Jr. continued to argue that Respondent complied with its requirement to provide the workers with kitchen access. See Tr. at 772. The Administrator did not allow for a reduction for factor five because Respondent never provided a good explanation for not abiding by the job order. That consideration was rational. Because Respondent did not commit to future compliance, the Administrator reasonably did not apply the sixth factor. Finally, the Administrator appropriately recognized the financial gain to Respondent from the meal plan and other items sold to the farmworkers and declined to apply the final mitigation factor. Because the Administrator rationally considered all of the § 501.19(b) mitigation factors, the $198,450 CMP for violations of 20 C.F.R. §§ 655.122(g), (p), and (q) is appropriate.

Respondent violated 20 C.F.R. § 655.122(i)(1) in discharging twenty-four total workers before they had worked for at least three-fourths of the workdays of the total period specified in the work contract. The Ad-

ministrator properly found that $142,728.22 in total back wages are due and reasonably assessed $1,350 in CMPs.

The H-2A regulations require employers "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 . . . specified in the work contract." 20 C.F.R. § 655.122(i)(1). The Administrator assessed back wages and CMPs concerning Respondent's violation of the three-fourths requirement to three discrete groups of workers. The first set involves the nineteen workers that Respondent terminated after the May 2015 argument. See Administrator's Brief at 63-73. The second set concerns four workers—Luna Gonzales, Elizondo Soto, Raya Tapia, and Morales Acosta—whom Respondent laid off in August 2019. See Administrator's Brief at 63. The final set concerns a single worker, Islas Larraga, who last worked for Respondent on June 9, 2015. See Administrator's Brief at 73. Application of the governing law establishes that Respondent terminated or otherwise constructively discharged each of the twenty-four workers, and that the Administrator reasonably assessed back wages and CMPs for violation of the § 655.122(i) three-fourths requirement. After the May 2015 argument, Respondent terminated nineteen workers without cause. Back pay is therefore due.

Upon arrival at the camp, Hernandez was openly hostile to the workers. Cheguez testified that Hernandez was a "bad" supervisor and threatened the workers with deportation if they did not work faster. (Tr. at 138-39.) Elizondo Soto's deposition testimony supports Cheguez's recollection. See PX 5 at 125. Additionally, the workers arrived at the camp and encountered the working and housing conditions from which the current litigation

arises. As discussed throughout this Decision and Order, those conditions were oftentimes in violation of the governing federal regulations, state law, or both. It was within this context that the nineteen workers engaged with Hernandez and Russel Marino, Jr., which lead to the May 2015 argument that ended in their termination. *Cf.* Tr. at 106-7 (Gustavo Perez stating that the argument represented the workers' attempt at fixing the foregoing problems with Respondent). During the conversation, Russel Marino, Jr. became upset and became verbally and, perhaps even, physically abusive. See Tr. at 107-08 (Gustavo Perez stating that Russel Marino, Jr. was very upset and cursed at the farmworkers, and feeling like he could not continue working), 147 (Cheguez remembering that Russel Marino, Jr. "scream[ed] and yell[ed] in an arrogant way"), 222 (Hernandez stating that Russel Marino, Jr. "was a little bit upset"); PX 9 at 232, 258 (Hugo Leonel Cinta Tegoma recalling during deposition that Russel Marino, Jr. tried to hit him). In his anger, Russel Marino, Jr. terminated the nineteen workers. See Tr. at 39-40, 65 (Maldonado stating that Russel Marino, Jr. had "practically fired us"), 80-83 (Maldonado recalling that Russel Marino, Jr. said that the workers "could leave" if they did not like the conditions and that Russel Marino, Jr. "practically fired [the farmworkers]" during the argument, and that he felt like he "needed to leave"; he left due to problems "with my boss"), 107-08, 125-29 (Gustavo Perez recalling that Russel Marino, Jr. was upset at the farmworkers and said "we weren't necessary" during the argument, that he did not have the opportunity to continue working for Respondent due to the conversation, and that Hernandez told him he "must leave"). Respondent argues that, given the status of the asparagus crop as ripe for

harvesting, it makes no logical sense for Russel Marino, Jr. to fire the nineteen workers. See Respondent's Brief at 24-26.

However, the employee witnesses were consistent in describing the heated events at the meeting while Joseph Marino was unable to remember specifically what was said. During his deposition, Joseph Marino testified that he that he did not recall what was said at the argument; at the hearing, Joseph Marino said he recalled "part of what [Russel Marino, Jr.] said." (Tr. at 825-29.) Joseph Marino's testimony, compared to the employees, lacks credibility. The facts, as presented at the hearing, are that the employees arrived at the worksite to find a difficult supervisor in Hernandez, grueling work picking asparagus, and living conditions that were not as promised in their contract. They asked for a meeting to try to address the issues with management; this angered management, who felt pressure to get their crop harvested. Management made a decision, albeit a rash, and perhaps illogical, decision, to terminate this group of workers and then quickly replace the terminated workers. See JX 2, JX 6 (showing a number of H-2A workers hired at the end of May 2015). Considering the entirety of the evidence, Respondent terminated the nineteen workers that left in May 2015 before they worked the guaranteed three-fourths of the hours promised in their contracts, and is liable for any back pay due because of such termination.

1. Assuming, *arguendo*, Respondent did not terminate the workers in May 2015; it constructively discharged such workers. Back pay, therefore, is due.

To find constructive discharge, a plaintiff must "show working conditions so intolerable that a reasonable person would have felt compelled to resign." Pennsylvania State Police v. Suders, 542 U.S. 129, 147 (2004); WHD Bulletin No. 2012-1 (Feb. 28, 2012) ("If a worker departs employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute a constructive discharge and not abandonment"). The Administrative Review Board emphasizes that the analysis turns on the employee's "reasonable inferences" drawn from the statements and conduct of the employer. Jackson v. Protein Express, 95-STA-38 (Jan. 9, 1997). The Third Circuit[155] instructs finders of fact to review the following nonexclusive factors: "(1) a threat of discharge; (2) suggestions or encouragement of resignation; (3) a demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; (6) unsatisfactory job evaluations." Nuness v. Simon & Schuster, Inc., 325 F. Supp. 3d 535, 560 (D.N.J. 2018) (summarizing Clowes v. Allegheny Valley Hosp.,

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[155] As this case arose in New Jersey, the undersigned will apply the law of the U.S. Court of Appeals for the Third Circuit. In a case arising within the State of California, an administrative law judge applied Ninth Circuit law. Without passing specific judgment on the ALJ's decision to do so, the Administrative Review Board affirmed in full the administrative law judge's Decision and Order. See Global Horizons, ARB Case No. 09-016, ALJ Case No. 2008-TAE-00003, 11 (Dec. 21, 2010); Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 FED. REG. 69378, 69378-80 (Nov. 16, 2012) (declining to provide any discussion as to which circuit law applies to the Administrative Review Board's review of an administrative law judge's decision and order in a TAE matter).

991 F.2d 1159, 1161 (3d Cir. 1993)); WHD Bulletin No. 2012-1 ("the terms and conditions of the worker's employment must have been effectively altered by the employer's conduct," and intolerable housing and working conditions can demonstrate a constructive discharge claim). In Clowes, the Third Circuit reversed a finding of constructive discharge, in part, when the plaintiff "was never threatened with discharge; nor did her employer ever urge or suggest that she resign or retire." 991 F.2d at 1161. The Wage and Hour Division advises that a worker who quits because the worker is "unhappy with the general nature of work assignments" is not constructively discharged.

Assuming it did not fire the workers outright, the preponderant evidence demonstrates that Respondent constructively discharged the nineteen workers who left in May 2015. The first Clowes factor is satisfied. Hernandez threatened the workers with discharge, and Russel Marino, Jr. likely fired the workers during the May 2019 argument. See *supra*. Therefore, unlike the plaintiff in Clowes, here Respondent actually threatened the workers with discharge, or the workers reasonably inferred such a threat, or both. 991 F.2d at 1161. Indeed, Respondent likely outright fired the nineteen farmworkers. The first Clowes factor weighs considerably toward a finding of a constructive discharge; the deplorable situation in which the workers found themselves upon arrival at Respondent's farm compounds the significance of this consideration.

Another Clowes factor fulfilled here is that Respondent's actions materially reduced the workers' benefits. Despite the assurances Respondent made on the job order —the employment agreement both sides agreed upon

prior to the summer 2015 growing season—the workers arrived at Respondent's camp to learn not only that they did not have kitchen access, but also that Employer expected them to pay for a meal plan costing between seventy-five and eighty-dollars per week. This arrangement caused a quantifiable reduction in the benefits the workers reasonably relied upon when agreeing to travel to the United States to work in Respondent's fields.

Finally, Hernandez changed the terms and conditions of the workers' responsibilities. Contrary to the job order, the workers regularly worked twelve-hour days in extreme weather conditions. The job order stated that they would work between five and seven hours per day (except one day per week), see JX 1 and JX 3; however, the workers testified to regularly working twelve-hour days. Although the job orders stated that workers "may be requested" to work additional hours, see id., the corroborative testimony of numerous workers establishes that Hernandez told the workers where, when, and how long to work and that he often directed them to work twelve hour days. This was a material change to the workers' responsibilities as listed on the job orders, and so the fifth Clowes factor applies.

Thus, the evidence of record establishes many of the Clowes factors, including threat of discharge, reduction of benefits, and alteration of job responsibilities. Although the other factors—suggestions or encouragement of resignation, involuntary transfer, and unsatisfactory job evaluations—are not satisfied, those factors do not necessary apply to the exigencies of the working situation at Respondent's farm. Weighing the Clowes factors in the totality, the Administrator has preponderantly es-

tablished that Respondent constructively discharged nineteen farmworkers after the May 2015 argument.

Aside from the Clowes factors, the WHD Bulletin provides additional guidance that compels a finding that Respondent constructively discharged the workers who left in May 2015. See WHD Bulletin No. 2012-1 ("Constructive discharge may exist when a worker leaves the job because the housing conditions in which the worker is required to live are intolerable and violate applicable safety and health standards (*i.e.*, grossly inadequate heating during the winter, lack of running water, exposure of bare electrical wires)." As demonstrated, *infra*, Respondent is liable for numerous violations of the regulations concerning the proper housing and transportation of H-2A workers. The workers' housing conditions involved broken screens, which allowed in flies and other pests. The dormitory area also had litter strewn on the ground and trashcans without lids; the bathrooms lacked sufficient hot water. Respondent also provided unsafe transportation to its workers. When the workers initially arrived, the fields lacked bathrooms and access to water. All of these violations further demonstrate that Respondent committed a constructive discharge of the nineteen workers who left after the May 2015 argument.

The nineteen terminated or otherwise constructively discharged workers, therefore, did not abandon their positions. See 655.122(n) (providing that the three-fourths guarantee does not apply to workers who voluntarily abandon their jobs); WHD Bulletin No. 2012-1 (stating that a constructively discharged worker does not commit the act of abandonment). Although the WHD Bulletin states that constructive discharge does

not apply to workers who are merely unhappy with their work assignment; that provision does not apply here. The facts establish that the workers engaged with Hernandez and Russel Marino, Jr., because the workers wanted to work but were unhappy with the working and living conditions. The workers' concerns were not subjective; they related to the actual living and working conditions they faced while working for Respondent. The fact that other workers stayed while the nineteen workers left, see Respondent's Brief at 27, does nothing to dispel the unacceptable—and at times unlawful—conditions to which Respondent subjected the farmworkers. Because Respondent terminated or otherwise constructively discharged the nineteen workers after the May 2015 argument, the Administrator has established a three-fourths violation concerning such workers.

2. Respondent violated the three-fourths guarantee concerning four of the forty-four workers it laid off in August 2015. Therefore, back pay is warranted.

Respondent laid off forty-four workers in August 2015 due to inclement weather and lack of work. Respondent did not meet the three-fourths guarantee for four such workers: Luna Gonzalez, Elizondo Soto, Raya Tapia, and Morales Acosta. See PX 1; Tr. at 702-04. At the hearing, Respondent withdrew RX 4, which —according to "Respondent's Exhibit List"—contained a "calculation of hours worked for [six] workers." See "Respondent's Exhibit List; see also Tr. at 702-04. Respondent's counsel stated "I was wrong" about the contents of RX 4, and agreed that the Administrator provided accurate calculations as to Respondent's three-

fourths violations concerning Luna Gonzalez, Elizondo Soto, Raya Tapia, and Morales Acosta. (Tr. at 704.) In its brief, Respondent did not discuss or otherwise defend against the alleged three-fourths guarantee violation concerning these four workers. Accordingly, the undersigned finds that Respondent does not controvert the violation of the three-fourths guarantee concerning Luna Gonzalez, Elizondo Soto, Raya Tapia, and Morales Acosta. Review of the evidence of record further establishes that fact.

3. Respondent violated the three-fourths guarantee concerning Jose Islas Larraga, and he deserves back pay.

According to the information Respondent provided to the Administrator, Islas Larraga last worked for Respondent on June 9, 2015. See PX 1. The regulations only absolve an employer from liability for a worker's three-fourths guarantee when the worker abandons the job or is otherwise terminated for cause. 20 C.F.R. § 655.122(n). The record contains no evidence to establish that Islas Larraga abandoned his job. Assuming, *arguendo*, he did abandon his job, the regulations would only relieve Respondent of three-fourths guarantee liability if it provided timely notice to the Department. See id. (referring to the DOL Notification Process at 76 FED. REG. 21,041). Respondent provided no notice to the Department concerning the end of Islas Larraga's employment. Therefore, Respondent violated the three-fourths guarantee concerning Islas Larraga, as well.

4. The Administrator reasonably computed back wages for the twenty-four workers discussed in this section.

WHI Perez has worked as an investigator for U.S. Department of Labor, the Wage and Hour Division for six years. (Tr. at 305-06.) Of the 200 cases he has helped investigate during his tenure with the Department, WHI Perez has worked on between five and ten cases concerning violations of the H-2A regulations. (Tr. at 306.) WHI Perez created the table at PX 1, which calculated the three-fourths guarantee for the twenty-four workers for whom Respondent is required to remit back pay. The undersigned admitted PX 1 as a summary of voluminous records under 29 C.F.R. § 18.1006. The voluminous records that PX 1 summarizes are Respondent's weekly payroll records, which are contained in the record at PX 23. See Tr. at 420-21. Charlene Rachor is the "District Director of the Southern New Jersey District Office for the Wage and Hour Division." (Tr. at 845.) In that capacity, District Director Rachor oversees investigations, supervises investigators, and issues letters regarding findings of investigations including H-2A determination letters. (Id.) Although District Director Rachor was not WHI Perez's supervisor, she supported the quality of WHI Perez's work product and stated that "he would do the back wages as accurately as possible." (Tr. at 897-98.) District Director Rachor said that WHI Perez's supervisor would have reviewed his back wages calculations. (Tr. at 898.) WHI Perez described the methodology he employed to determine back wages due, (Tr. at 420-30); his testimony was reasonable based on the evidence of record. Aside from arguing that voluntary abandonment voids the three-fourth guarantee, Respondent did

not criticize WHI Perez's calculations or the methodology he applied in PX 1 concerning either the nineteen workers terminated in May 2015 or Islas Larraga. See Respondent's Brief at 23-28. Review of PX 1 shows that WHI Perez reasonably determined not only that a three-fourths violation occurred, but also the back wages Respondent owes, because of such underpayment.

Respondent, however, alleged that WHI Perez failed to account for the hours Respondent offered to the four workers whom it laid off in August 2015, and for whom the Administrator asserted violations of the three-fourths guarantee. See Respondent's Brief at 28-30. Respondent noted that its tracking system was incapable of capturing any time, for example, where Respondent offered hours to a worker, but the worker was sick or otherwise unable to take the hours. Id. Respondent's argument is unpersuasive, as the governing regulations require it to "keep accurate and adequate records with respect to the workers earnings, including but not limited to . . . records showing . . . the number of hours of work **offered** each day . . . ." 20 C.F.R. § 655.122(j)(1) (emphasis added); see § 655.122(j)(3). Although Respondent took ample testimony about the immoderate costs and general capabilities concerning its record keeping system, see Tr. at 682-86, 706, 798, Respondent is unable to argue persuasively that the Administrator's calculations are unreasonable when Respondent's tracking system does not comport with the regulatory requirements. The Administrator, therefore, reasonably calculated the back wages owed to the four workers laid off in August 2015.

In sum, the Administrator reasonably assessed a combined $142,728.22 in back wages for Respondent's three-fourths guarantee violations concerning the nineteen farmworkers terminated in May 2015, the four farmworkers laid off in August 2015, and Islas Larraga.

5. The Administrator reasonably assessed a single $1,350 CMP for the violations discussed in this section.

Additionally, the Administrator assessed a reasonable CMP of $1,350,[156] total, for Respondent's various three-fourths guarantee violations. The Administrator reasonably considered all of the mitigation factors. See Tr. at 856-58, 935-37. District Director Rachor explained the importance of the three-fourths guarantee:

> Well, as I said, we have a situation where, you know, workers are—H-2A allows an employer to bring over farmer workers, non-immigrant workers by laying out terms and conditions of employment basically in the form of a contract. The workers are provided a copy of that so they can see, okay, this is the money I'm going to earn. If they come here and they are terminated, forced to resign, and they don't receive that three-[fourths] guarantee, now that's wages that they've lost and perhaps they wouldn't have come.

(Tr. at 858.) The undersigned finds compelling District Director Rachor's explanation of the rationale behind the Administrator's decision to apply CMPs for the

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[156] At the time of the assessment, the governing regulations allowed the Administrator to assess $1,500 in civil money penalties for "[e]ach failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment." 29 C.F.R. § 501.19(a), (c) (2016).

three-fourths guarantee violations. District Director Rachor also rationally explained the Administrator's decision to apply only the mitigation factor concerning Respondent's lack of a history of violations. See Tr. at 856-57. The undersigned agrees with the Administrator's decision not to apply the remaining mitigation factors. The Administrator, therefore, reasonably assessed one $1,350 CMP for Respondent's twenty-four three-fourths guarantee violations.

III. The Administrator reasonably decided to assess a $1,350 CMP for Respondent's attempt to cause its workers to waive the three-fourths guarantee.

A $1,350 CMP for Employer's attempt to cause its workers to waive the three-fourths guarantee is reasonable. Twenty-nine C.F.R. § 501.5 mandates, "[a] person may not seek to have an H-2A worker . . . or a U.S. worker . . . waive any rights conferred under 8 U.S.C. 1188, 20 C.F.R. part 655, subpart B." Under 20 C.F.R. § 655.122(i), employers are required "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 . . . ." Here, Employer provided worker departure forms to the nineteen farmworkers that left in May 2015. The worker departure forms stated that the farmworkers voluntarily left their jobs due to personal issues.[157] The regulations consider such an act

[157] See Tr. at 37 (Maldonado's testimony), 108-110, 149-50 (Cheguez's testimony), 225 (Hernandez's testimony), 272-74 (Almanza testifying that Hernandez gave the workers a form "and asked us to sign the paper because 'there was no other choice'" and "we couldn't do anything about it"), 409-10 (WHI Perez's testimony), 732-34 (Russel Marino, Jr. saying that he gave the worker "the option to check off the box that said they were returning home be-

"abandonment," the practical effect of which is to forego a farmworker's three-fourths guarantee." See § 655.122(n). The worker departure forms Respondent provided did not allow the farmworkers to state the true reasons they left. Respondent affirmatively provided the worker departure forms to the Department and other government agencies. This was a misrepresentation, as Respondent terminated or otherwise constructively discharged the workers. Further, Respondent admitted in its brief that the workers had no sick or deceased family members. See Respondent's Brief at 31; PX 15 at 475 (Russel Marino, Jr. stating that the purpose of the worker departure forms was to "protect against . . . this lawsuit"). That a third party may have advised the workers to sign the form as written does not absolve Respondent's liability from first, affirmatively providing forms with false information to the workers and second providing such documents to the Department.

Although the worker departure forms do not specifically state that the workers would give up their three-fourths guarantee, a proximate result of the misrepresentation is that the workers would forfeit their right to the three-fourths guarantee. The forms averred that

Respondent offered the worker additional work sufficient to complete the three-fourths guarantee; however, Respondent never made such a representation to the workers. Russel Marino, Jr. said that he did not want to have the workers sign a form saying that they were terminated, so he "gave them the option" to say

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cause of personal reasons"), 769 (Russel Marino, Jr. recalling that he brought forms for the workers to sign stating that they were "resigning").

that they quit for personal reasons. (Tr. at 733.) The fact that Respondent did not allow the workers to attest to the exact reason they left Respondent's employ renders moot Respondent's argument that it did not seek to have the employees waive any right. See Respondent's Brief at 31. Here, the worker departure forms effectively waived the farmworkers' right to the three-fourths guarantee; Respondent coerced the farmworkers into doing so.

To arrive at the $1,350 CMP, the Administrator decided against instituting the penalty per violation; rather the Administrator applied one $1,500 CMP, which included a $150 deduction because Respondent had no prior violations. See Tr. at 856-58. The Administrator made the $150 deduction after reviewing all mitigation factors. (Id.) Based on review of the record and the findings of fact made herein—including Respondent's limited experience with the H-2A program—the Administrator's decision to impose a $1,350 CMP for Respondent's violation of 29 C.F.R. 501.5 is reasonable.

IV. Respondent violated 20 C.F.R. § 655.122(d)(1) by providing inadequate housing, but the Administrator did not impose a reasonable $3,600 CMP. Rather, a $3,150 CMP is reasonable to assess.

As discussed below, the Administrator has successfully established violations for the bathroom windows with missing or broken screens, dormitory windows with missing or broken screens, uncovered garbage cans, and a shortage of hot water. However, the Administrator is unable to demonstrate that Employer committed a violation due to the provision of any unclean mattresses. A separate CMP for any mattress violation, therefore, is not warranted.

A. The Administrator assessed a reasonable $3,150 CMP resulting from Respondent's housing violations concerning missing or broken screens, uncovered garbage cans, and a shortage of hot water

The Administrator assessed $3,150 in CMPs for four violations of 20 C.F.R. § 655.122(d)(1), as follows: $900 for the unscreened bathroom windows; $900 for the faulty dormitory screen windows and doors; $900 for the uncovered garbage cans; and $450 for the hot water shortage. See Administrator's Brief at 84 (citing JX 10 at 160; Tr. 861-65, 938-39). Because Respondent's dormitories were built prior to 1980, the applicable regulations are the Employment and Training Administration Housing Standards codified at 20 C.F.R. §§ 654.404 through 654.417. The Administrator assessed reasonable CMPs because of Respondent's four discrete violations of § 655.122(d)(1). First, the record clearly shows unscreened bathroom windows. See Tr. at 331; PX 28, pages 1046-47. Section 654.408(a) mandates that "all outside opening . .. be protected with screening of not less than [sixteen] mesh." The Administrator, therefore, has successfully established a violation of § 655.122(d)(1). Second, the record shows obviously broken screens on the windows and doors of the dormitory in violation of § 654.408(a). See Tr. at 201-03 (Hernandez's testimony); PX 28, pages 1049-55. WHI Perez recalled the presence of flies in the dormitory. (Tr. at 323-28.) Third, the grounds surrounding Respondent's dormitory also contained uncovered trash cans. Section 654.414 requires employers to provide "fly tight, clean containers . . . adjacent to each housing unit for the storage of garbage or other refuse." Here, some of the garbage cans surrounding the dormitory did

not have lids and WHI Perez noted the presence of flies around such lidless garbage cans. See Tr. at 324, 332. PX 33, page 1094, is a photograph of an open pile of discarded cans of soda and beer. See Tr. at 374-75, 603-04. The pile of discarded cans is located "directly across from the dormitory housing." (Tr. at 375.) PX 33, pages 1095 through 1102, are more photographs of the discarded cans. (Id.) The Administrator, therefore, has established a violation of § 654.414. Fourth, the Administrator reasonably assessed $450 in CMPs for the shortage of hot water. According to § 654.412, "[b]athing and hand washing facilities, supplied with hot and cold water under pressure, must be provided for the use of all occupants." Here, the bathrooms at Respondent's dormitory lacked sufficient hot water. See Tr. at 30, 59-60 (Maldonado's testimony), 103-04 (Gustavo Perez's testimony), 330 (WHI Perez's testimony that he had to wait two to three minutes "to determine that there was no hot water present"); PX 7 at 189 (Silva Lopez recalling that, at times, he took cold showers); PX 11 at 288 (Hector Mishel Garcia Dominguez stating in his deposition that there was only enough hot water for ten people to shower before it ran out). *Cf.* 203, 215 (Hernandez's testimony that workers had to "wait a little bit" for hot water). Respondent, therefore, violated the hot water requirement at § 654.412. The Administrator reviewed and applied the various mitigation factors at 29 C.F.R. § 501.19(b) to the facts surrounding the violation and reasonably reduced the CMPs to $3,150.[158] See Tr. at 862-66.

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[158] Concerning the bathroom screens, screen doors, and garbage cans, the Administrator applied the same mitigation factors and for the same reasons. The Administrator allowed a ten percent re-

Finally, Respondent argued that the Administrator did not attempt to determine whether Respondent addressed the housing violations WHI Perez observed. See Respondent's Brief at 31-33. This argument is unavailing, because the record does not establish that Respondent ever contacted the Administrator to inform her that it made such repairs. Therefore, the Administrator reasonably reviewed the mitigating factors at 29 C.F.R. § 501.19(b), and rationally assessed CMPs for the foregoing housing violations.

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duction because Respondent lacked a history of violations. However, the Administrator did not allow a reduction due to the number of workers affected, because of the gravity of the violation, because Respondent did not correct the violations immediately, and because Respondent provided no good explanation for the violations. See Tr. at 863-64. The Administrator applied the various mitigation factors at 29 C.F.R. § 501.19(b) to the facts surrounding the violation and reasonably reduced the CMP from a base penalty of $1,500 to $450. See Tr. at 865-66. The Administrator applied a ten percent deduction due to Respondent's commitment to future compliance and another ten percent deduction because the profit and loss component did not apply. Id.

Concerning the hot water violation, the Administrator did not apply mitigation factor number two, because the lack of hot water affected a large number of workers. The Administrator applied the mitigation factors for the gravity of the violation, because nobody was injured; she applied mitigation factor number five because Respondent provided a good explanation in that it did not know of the violation. The Administrator also applied mitigation factor six for a commitment to future compliance and another ten percent reduction because the Respondent did not stand to make any financial gain. Tr. at 865-66; see also Tr. at 937 (stating that the Administrator applied the same mitigation factors for the hot water and purported mattress violations, except the Administrator did not apply mitigation factor two). All of the Administrator's decision are reasonable based on the factual record.

B. The CMP assessed for the unclean mattress violation is unreasonable.

The Administrator assessed a $450 CMP for unclean mattresses, which WHI Perez observed and photographed. See Administrator's Brief at 84 (citing JX 10 at 160; Tr. 862-66, 938-39). The CMP is unreasonable. The Administrator assessed the CMP due to a purported violation of 20 C.F.R. § 654.416, which requires an employer to "provide[]" H-2A workers with facilities consisting of, *inter alia*, "bunks, provided with clean mattresses." Here, WHI Perez assessed the violation, even though he "assumed" each worker had a mattress, and he could not recall if he observed any bunkbeds that were missing mattresses. See Tr. at 599; see also Tr. At 493. WHI Perez observed and photographed mattresses on the floor. See Tr. at 329; PX 28 at 1056. However, the photograph and WHI Perez's testimony does not preponderantly establish that Employer was in violation of § 654.416. The mattresses in the photograph are covered in bedsheets and other belongings, and so do not reasonably show the cleanliness of the employer-provided mattress. Although it is possible that the floor is unclean, thereby making the mattress unclean, neither the photographic nor the testimonial evidence proves this point. The Administrator did not successfully establish that Respondent did not "provide[]" its workers with "clean mattresses." § 654.416. Accordingly, the $450 CMP for unclean mattresses is not a reasonable penalty.

V. Respondent violated 20 C.F.R. § 655.122(h)(4) through its use of substandard transportation and use of unlicensed drivers. The Administrator imposed a reasonable $7,500 in CMPs.

Twenty C.F.R. § 655.122(h)(4) requires "[a]ll employer-provided transportation" to "comply with all applicable Federal, State or local laws and regulations." The Administrator reasonably assessed CMPs against Respondent because it used drivers without proper licenses, and because it transported its farmworkers using buses that fell below state and federal safety standards.

A. The $7,500 total CMP the Administrator imposed for transportation violations (20 C.F.R. § 655.122(h)(4)) was reasonable considering Respondent's violation for using unlicensed bus drivers.

The laws of the State of New Jersey prohibit driving on "public highways" without a driver's license. See N.J. Stat. Ann. § 39:3-10). New Jersey also prohibits the transportation of migrant farmworkers by drivers who are not licensed in the United States or Canada. See Administrator's Brief at 86-87 (citing N.J. Admin. Code § 13:21-13.2). Additionally, the H-2A regulations require drivers to possess a "valid permit qualifying the driver to operate the type of vehicle driven by him in the jurisdiction by which the permit is issued." 29 C.F.R. § 500.105(b)(1)(iii) (incorporated by reference in 20 C.F.R. § 655.122(h)(4)).

Here, in response to WHI Perez's request, none of the five workers WHI Perez observed driving the buses provided him with acceptable driver's licenses. See Tr. at 393, 399-400. Hernandez only provided driver's li-

censes to WHI Perez for three of the five drivers WHI Perez observed. (Tr. at 400.) Two had Mexican driver's licenses and one had an expired Mexican driver's license; the other two drivers had no licenses. See 390-401; PX 30 at 1064-72. The Administrator, therefore, has reasonably proven a violation of § 655.122(h)(4). The Administrator reviewed the mitigation factors at 29 C.F.R. § 501.19(b), and reasonably assessed reductions of the CMPs. See Tr. at 868-70.[159]

B. The $7,500 total CMP the Administrator imposed for transportation violations (20 C.F.R. § 655.122(h)(4)) was also reasonable considering Respondent's violation for using unsafe vehicles.

The Administrator reasonably found two violations concerning the vehicles Respondent used to transport its farmworkers. One of the buses Respondent used to transport its farmworkers had a broken rear tail light. See Tr. at 405; PX 29 at 1057 (showing that bus number 205 has a broken right rear turn signal). The obviously broken tail light put Respondent in violation of federal and state motor vehicle laws. See, *e.g.*, 29 C.F.R.

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[159] The Administrator reasonably allowed a ten percent reduction due to Respondent's lack of history with the H-2A program; her decisions to allow additional ten percent reductions due to the number of workers involved, and Respondent's commitment to future compliance, financial gain to the Respondent, and the catch all factor were also correct based on the record. (Tr. at 868-69.) The Administrator reasonably explained why it did not provide reductions for the gravity of the violation—unlicensed drivers are a safety hazard—as well as Respondent's efforts to comply in good faith and its explanation for the violation. (Id.) Respondent's practice of using unlicensed drivers demonstrates its general disregard for the safety and wellbeing of not only the guest farmworkers in its employ, but also for other motorists.

§ 500.105(b)(3)(ii) (incorporating the lighting devices required under 49 U.S.C. 3102(c)); 49 C.F.R. § 393.11 (titled "Parts and Accessories Necessary For Safe Operation," specifically concerning commercial vehicles); N.J. Stat. Ann. § 39:3-61(a) (titled "Lamps and Reflectors Required on Particular Vehicles."). The CMP was reasonable, as it took into account the violation and the Administrator's review of the mitigation factors at 29 C.F.R. § 501.19(b).

The Administrator also rationally proved that the Respondent committed a violation by operating three buses with worn tires. Regardless of the instrument by which the investigator measured the tread on the tires, it is plainly evident that the Respondent operated buses with bald, unsafe tires. See Tr. at 402-06, 607-08; PX 29, pages 1058-63 (showing three tires that are clearly unsafe for road use due to the condition of the tire as worn, cracked, or both). Respondent did so in violation of federal and state laws. See 29 C.F.R. § 500.105(b)(3)(v); N.J. Admin. Code § 13:21-13.11(b) (prohibiting motor vehicles from transferring migrant workers with "tires which have been worn so smooth as to expose the tire fabric or which shall have any other defect likely to cause failure of the tire."). Respondent's actions also put lives at risk. The Administrator reviewed the mitigation factors at 29 C.F.R. § 501.19(b) and reasonably assessed a CMP of $750 per vehicle. See Tr. at 870-71. The gravity of the violation—involving a threat to the health and safety of Respondent's workers—is such that the Administrator's decision to apply any of the mitigation factors whatsoever represents a lenient decision. See Tr. at 868-74.

VI. Conclusion

This Decision modifies, in part, the Administrator's findings. Nevertheless, the preponderant evidence of record establishes that Respondent must remit $344,945.80[160] in back wages and $211,800[161] in civil money penalties. The undersigned found the Administrator's assessments to be reasonable and accurate, except for the back wages owed for non-alcoholic drinks, and the CMP assessed for the non-existent mattress violation.

In its brief, Respondent noted that the penalties "dwarf those"[162] assessed in the Global Horizons cases, 2005-TAE-0001 and 2010-TAE-0002, which involved "rampant wage theft" and employers being paid kickbacks from the workers. Respondent's Brief at 4. There, the Administrator sought $350,000 in civil money penalties. Here, the Administrator has established

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[160] $128,285 in back wages for meals; $64,960 in back wages for non-alcoholic drinks; $8,972.61 for beer; $142,728.22 for the various three-fourths guarantee violations.

[161] $198,450 for violations of 20 C.F.R. §§ 655.122(g), (p), (q); $1,350 for the three-fourths guarantee violations; $1,350 for coercing the waiver of the three-fourths guarantee; $3,150 for the various housing violations; and $7,500 for violations concerning the use of unsafe vehicles.

[162] Respondent's laches and estoppel arguments, see Respondent's Brief at 18-19, are also denied as there is no indication that the Administrator engaged in a prolonged delay in enforcement. WHI Perez arrived at Respondent's dormitory in July 2015 in an investigatory capacity, only. ALJX 1 ¶ 36. The Administrator did not make a formal conclusion as to whether Respondent committed any violations until the June 22, 2016 determination letter. See ALJX 1 at ¶ 38. Because any delay was not unreasonable, the undersigned denies Respondent's estoppel and laches arguments.

$212,250.00 in CMPs. The scale of the CMPs is due to no reason aside from the sheer numbers of farmworkers affected by Respondent's violations. Additionally, the Administrator utilized conservative estimates to calculate the required back pay. The Administrator showed further restraint when deciding to apply one CMP for all of the violations of §§ 655.122(g), (p), and (q); she was well within her rights to have required Respondent to pay for each violation separately. Moreover, the governing regulations allow the Administrator to debar the Respondent from further certification, among other penalties. The Administrator showed further restraint in her decision not to apply those remedies, as well.

The Administrator's findings, modified in part herein, illustrate the truism that serious violations call for serious penalties. Respondent engaged in serious violations of the Act, and committed such violations against 147 farmworkers who in good faith engaged with the H-2A program.

THEREFORE, the undersigned finds:

1. Respondent violated 20 C.F.R. § 655.122(g), (p), and (q) by making false promises about kitchen access and failing to disclose meal charges. As a result, it owes $128,285 in back wages, and $198,450 in CMPs.

2. Respondent violated 20 C.F.R. § 655.122(p) through the sale of drinks and other items at a profit or in violation of state law. As a result, it owes $64,960 in back wages for non-alcoholic drinks sold and $8,972.61 for the profit it made from the beer it sold.

3. Respondent violated 20 C.F.R. § 655.122(i) in discharging certain workers prior to such workers meeting the three-fourths guarantee. As a result, it owes $142,728.22 in back wages, and $1,350 in CMPs.

4. Respondent violated 29 C.F.R. § 501.5 by attempting to cause workers to waive the three-fourths guarantee at 20 C.F.R. § 655.122(i). As a result, it owes $1,350 in CMPs

5. Respondent violated 20 C.F.R. § 655.122(d) through the provision of inadequate housing. As a result, it owes $3,150 in CMPs.

6. Respondent violated 20 C.F.R. § 655.122(h)(4) through substandard transportation and unlicensed drivers. As a result, it owes $7,500 in CMPs.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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).

APPENDIX E

United States Department of Labor
Wage and Horu Division
3131 Princeton Pike
Building 5, Room 216
Lawrenceville, New Jersey 08648
Tel. (609) 538-8310
Fax (609) 538-8314

Date: June 22, 2016

CERTIFIED MAIL RETURN RECEIPT REQUESTED: 7013 1710 0001 5882 0376

To: **Sun Valley Orchards, LLC**
Attn: Mr. Russell J. Marino, Jr.
29 Vestry Road
Salem, New Jersey 08085

Subject: Notice of Determination of Wages Owed and Assessing Civil Money Penalties

Case Reference Number: 1765359

Dear Sir(s):

An investigation conducted by this office of Sun Valley Orchards, LLC d/b/u Sun Valley Orchards, relating to the requirements applicable to the employment of H-2A and other workers under the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act (IRCA) (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c) and 1186) in Flemington, New Jersey, covering the period from April 13, 2015 through October 10, 2015, disclosed that Sun Valley Orchards, LLC failed to comply with Section 218 of the INA and applicable regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 501.

As a consequence of these H-2A violations, $369,703.22 in unpaid wages are owed to one hundred forty seven workers. The specific violations and the wages owed associated with them are set forth in the attached matrix entitled *Summary of Violations*.

In addition, pursuant to Section 218(g)(2) of the INA and its implementing regulations at 29 C.F.R. Part 501, civil money penalties are hereby assessed in the amount of $212,250.00. The specific violations are the civil money penalties associated with them are set forth in the attached matrix entitled *Summary of Violations.*

The full amount(s) reflected above $581,953.22 is due and payable within 30 days to **"Wage and Hour Division, U.S. Department of Labor."** Payments by certified check or money order should be delivered or mailed to:

U.S. Department of Labor
Wage and Hour Division
The Curtis Center, Suite 850 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317

The fact that the above sanctions/remedies are being imposed for the H-2A violations found at this time does not preclude the taking of other enforcement action as is deemed appropriate by the Department of Labor, or the additional assessments of back wages or civil money penalties for violations of the H-2A provisions found at some future time . . . Such other enforcement action may include the pursuit of unpaid wages, injunctive action, specific performance of the work contract, and denial or revocation of temporary alien agricultural labor certification.

The dollar amount(s) reflected above constitute a debt owed to the Federal government. This debt is subject to the assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Act of 1982, and departmental policies. Interest will be assessed at the Treasury Tax and Loan Account Rate on any balance outstanding from the date of this notice, accruing from the notice date. Administrative cost charges will be assessed to help defray the Government's cost of collecting this debt. A penalty at the rate of 6% will be assessed on any portion of the debt remaining delinquent for more than 90 days. In order to avoid these charges, forward payments to the office listed above by the indicated due date.

You have the right to request a hearing on the determination that any or all of the violations occurred. Such request must be dated and in writing; must contain specific reasons why you believe that the violations for which you have been charged did not occur; and must be received within 30 days from the date of this letter by the Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-3502, Washington, D.C. 20210, with a copy to this office. The procedure for requesting a hearing is provided in Section 501.33 of Regulations, 29 CFR 501. If a request for a hearing is not received within the time specified, the determination of the Administrator shall become the final and unappealable Order of the Secretary.

We would like to call to your attention that when a request for a hearing is filed with the Wage and Hour Administrator, the matter is referred to the Chief Administrative Law Judge. A formal hearing is then sched-

uled for a final determination with respect to the alleged violations. At such hearing you may, by yourself or through an attorney retained by you, present such witnesses, introduce such evidence and establish such fuels as you believe will support your position.

Copies of Section 218 of INA and Regulations, 20 CFR Part 655 and 29 CFR Part 501 can be viewed at www.dol.gov.

Finally, we wish to point out that there may be a question as to the deductibility of civil money penalties paid as a business expense under the Internal Revenue Code. In this regard, you may wish to contact the Internal Revenue Service.

Sincerely,

/s/ CHARLENE RACHOR
CHARLENE RACHOR
District Director

cc: Regional Administrator, Mark Watson, Jr.

Enclosures: Summary of Violations

Summary of Violations

Regulatory Requirement Violated	Summary of Description	Unpaid Wages Owed	Civil Money Penalty
20 C.F.R. § 655.122(d)(1)	**Employer failed to provide for or secure housing for those workers who are not reasonably able to return to their permanent residence at the end of the work day, without charge to the worker, that complies with the applicable housing safety and health standards.** Specifically, the investigation disclosed that	$0.00	$3,600.00

	the housing facility I provided for workers was missing window screens and had screen doors not in good repair contributing to the insect infestation throughout the camp. Several bathroom sinks did not have hot water, refuse containers throughout facility were missing fly tight lids and multiple mattresses used by occupants for sleeping purposes were directly on the floor on the		

	floor without a bed frame.		
20 C.F.R. § 655.122(g)	**Failure to comply with "meals" requirement(s).** Specifically, the investigation disclosed that the employer failed to provide I free and convenient cooking and kitchen facilities to the workers that would enable them to prepare their own meals. The job offers for these contracts specifically stated that these facilities would	$234,079.28	$198,450.00

	be provided to workers. When the employer provides a meal plan, the job offer for the contract must state the charge for such meals, including drinks. The job offer for these contracts does not contain disclosure of meal charges and as such all meal and drink charges must be returned to the workers resulting in back wages being due to 147 affected workers.		

20 C.F.R. § 655.122(h)4)	**Failure to provide transportation in compliance with all applicable Federal, State, or local laws and regulations between the worker's living quarters and the employer's worksite without cost to the worker**. Specifically, the investigation disclosed that three of the five vehicles used to transport workers had insufficient tread on the tires for safe operation and one had a non- func-	$0.00	$7,500.00

	tioning rear directional. Additionally, the five vehicles used to transport H-2A and corresponding workers were operated by drivers who failed to possess valid, unexpired driver's licenses recognized by the State of New Jersey for operation of same.		
20 C.F.R. § 655.122(i)	**Failure to comply with the three-fourths guarantee.** Specifically, the investigation disclosed that 19 of the H-2A workers	$135,623.94	$1,350.00

	on the first contract of 2015 did not meet the ¾ guarantee since they were constructively forced to return home prior to the end of the contract period due to the myriad of misrepresentations on the contract, poor housing conditions, lack of transportation and general mistreatment by the employee, and or his farm labor contractor. Additionally, 6 other workers employed in		

	2015 did not meet the ¾ guarantee based on a review of payroll records.		
20 C.F.R. § 655.122(q)	**Failure to comply with requirement to disclose the work contract.** Specifically, the investigation disclosed that the employer provided a copy of the worker contract that did not contain the actual conditions of employment. The contracts do not address the "meal plan" charges and	$0.00	$0.00

	misrepresent that free cooking facilities will he provided to the workers along with free transportation to purchase food. The kitchen facilities were locked, workers had no access to the kitchen for preparation of meals and transportation to purchase food was not provided.		
20 C.F.R. § 655.122(p)	**Failure to comply with "deductions" requirement(s).** Specifically, the investi-	$0.00	$0.00

	gation disclosed that the job offer did not specify "all" the deductions not required by law which the employer will make from workers' pay checks. The "meal plan" was not disclosed in the job offer or the contract. The back wages associated with this violation and penalty for same are addressed above in 20 CFR 655.122(g).		

29 C.F.R. § 501.5	**The investigation disclosed that Russell J. Marino sought to have covered workers waive rights conferred under sec. 218 of the INA, regulations at 29 C.F.R. § 501.** Specifically, the investigation disclosed that the employer and or his farm labor contractor coerced workers leaving the contracts prior to the ending date to sign a form created by Sun Valley Orchards,	$0.00	$1,350.00

	LLC slating that they were leaving early for "personal reasons" in an attempt to have them waive their ¾ guarantee rights as parry to the contracts. Workers left the job, early due to the conditions stated above in 20 CFR 655.122(i) and/or because of misrepresentations by the employer and/or his farm labor contractor.		

Total		**$369,703.22**	**$212,250.00**

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2608

SUN VALLEY ORCHARDS, LLC

v.

U.S. DEPARTMENT OF LABOR, ET AL.

Filed: Oct. 15, 2025

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE, and SMITH,[1] *Circuit Judges*.

The petition for rehearing on behalf of Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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[1] The vote of Judge Smith is limited to panel rehearing.

BY THE COURT,

/s/ THOMAS M. HARDIMAN
THOMAS M. HARDIMAN
Circuit Judge

Dated: October 15, 2025
Tmm/cc: All Counsel of Record

APPENDIX G

8 U.S.C. 1188 provides:

Admission of temporary H-2A workers

(a) Conditions for approval of H-2A petitions

(1) A petition to import an alien as an H-2A worker (as defined in subsection (i)(2)) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—

(A) 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

(B) 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.

(2) The Secretary of Labor may require by regulation, as a condition of issuing the certification, the payment of a fee to recover the reasonable costs of processing applications for certification.

(b) Conditions for denial of labor certification

The Secretary of Labor may not issue a certification under subsection (a) with respect to an employer if the conditions described in that subsection are not met or if any of the following conditions are met:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment un-

der this paragraph shall terminate on the date the H-2A workers depart for the employer's place of employment.

(c) Special rules for consideration of applications

The following rules shall apply in the case of the filing and consideration of an application for a labor certification under this section:

(1) Deadline for filing applications

The Secretary of Labor may not require that the application be filed more than 45 days before the first date the employer requires the labor or services of the H-2A worker.

(2) Notice within seven days of deficiencies

(A) The employer shall be notified in writing within seven days of the date of filing if the application does not meet the standards (other than that described in subsection (a)(1)(A)) for approval.

(B) If the application does not meet such standards, the notice shall include the reasons therefor and the Secretary shall provide an opportunity for the prompt resubmission of a modified application.

(3) Issuance of certification

(A) The Secretary of Labor shall make, not later than 30 days before the date such labor or services are first required to be performed, the certification described in subsection (a)(1) if—

(i) the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) the employer does not actually have, or has not been provided with referrals of, qualified eligible individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.

In considering the question of whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A-employers in the same or comparable occupations and crops.

(B)(i) For a period of 3 years subsequent to the effective date of this section, labor certifications shall remain effective only if, from the time the foreign worker departs for the employer's place of employment, the employer will provide employment to any qualified United States worker who applies to the employer until 50 percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide benefits, wages and working conditions required pursuant to this section and regulations.

(ii) The requirement of clause (i) shall not apply to any employer who—

(I) did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in section 203(u) of title 29,

(II) is not a member of an association which has petitioned for certification under this section for its members, and

(III) has not otherwise associated with other employers who are petitioning for temporary foreign workers under this section.

(iii) Six months before the end of the 3-year period described in clause (i), the Secretary of Labor shall consider the findings of the report mandated by section 403(a)(4)(D) of the Immigration Reform and Control Act of 1986 as well as other relevant materials, including evidence of benefits to United States workers and costs to employers, addressing the advisability of continuing a policy which requires an employer, as a condition for certification under this section, to continue to accept qualified, eligible United States workers for employment after the date the H-2A workers depart for work with the employer. The Secretary's review of such findings and materials shall lead to the issuance of findings in furtherance of the Congressional policy that aliens not be admitted under this section unless there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or service needed and that the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. In the absence of the enactment of Federal legislation prior to three months before the end of the 3-year period described in clause (i) which addresses the subject matter of this subparagraph, the Secretary shall immediately publish the findings required by this clause, and shall promulgate, on an interim or final basis, regulations based on his findings which shall be effective no later than three years from the effective date of this section.

(iv) In complying with clause (i) of this subparagraph, an association shall be allowed to refer or transfer workers among its members: *Provided*, That for purposes of this section an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(v) United States workers referred or transferred pursuant to clause (iv) of this subparagraph shall not be treated disparately.

(vi) An employer shall not be liable for payments under section 655.202(b)(6) of title 20, Code of Federal Regulations (or any successor regulation) with respect to an H-2A worker who is displaced due to compliance with the requirement of this subparagraph, if the Secretary of Labor certifies that the H-2A worker was displaced because of the employer's compliance with clause (i) of this subparagraph.

(vii)(I) No person or entity shall willfully and knowingly withhold domestic workers prior to the arrival of H-2A workers in order to force the hiring of domestic workers under clause (i).

(II) Upon the receipt of a complaint by an employer that a violation of subclause (I) has occurred the Secretary shall immediately investigate. He shall within 36 hours of the receipt of the complaint issue findings concerning the alleged violation. Where the Secretary finds that a violation has occurred, he shall immediately suspend the application of clause (i) of this subparagraph with respect to that certification for that date of need.

(4) Housing

Employers shall furnish housing in accordance with regulations. The employer shall be permitted at the employer's option to provide housing meeting applicable Federal standards for temporary labor camps or to secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation: *Provided*, That in the absence of applicable local standards, State standards for rental and/or public accommodations or other substantially similar class of habitation shall be met: *Provided further*, That in the absence of applicable local or State standards, Federal temporary labor camp standards shall apply: *Provided further*, That the Secretary of Labor shall issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock: *Provided further*, That when it is the prevailing practice in the area and occupation of intended employment to provide family housing, family housing shall be provided to workers with families who request it: *And provided further*, That nothing in this paragraph shall require an employer to provide or secure housing for workers who are not entitled to it under the temporary labor certification regulations in effect on June 1, 1986. The determination as to whether the housing furnished by an employer for an H-2A worker meets the requirements imposed by this paragraph must be made prior to the date specified in paragraph (3)(A) by which the Secretary of Labor is required to make a certification described in subsection (a)(1) with respect to a petition for the importation of such worker.

(d) Roles of agricultural associations

(1) Permitting filing by agricultural associations

A petition to import an alien as a temporary agricultural worker, and an application for a labor certification with respect to such a worker, may be filed by an association of agricultural producers which use agricultural services.

(2) Treatment of associations acting as employers

If an association is a joint or sole employer of temporary agricultural workers, the certifications granted under this section to the association may be used for the certified job opportunities of any of its producer members and such workers may be transferred among its producer members to perform agricultural services of a temporary or seasonal nature for which the certifications were granted.

(3) Treatment of violations

(A) Member's violation does not necessarily disqualify association or other members

If an individual producer member of a joint employer association is determined to have committed an act that under subsection (b)(2) results in the denial of certification with respect to the member, the denial shall apply only to that member of the association unless the Secretary determines that the association or other member participated in, had knowledge of, or reason to know of, the violation.

(B) Association's violation does not necessarily disqualify members

(i) If an association representing agricultural producers as a joint employer is determined to have committed an act that under subsection (b)(2) results in the denial of certification with respect to the association, the denial shall apply only to the association and does not apply to any individual producer member of the association unless the Secretary determines that the member participated in, had knowledge of, or reason to know of, the violation.

(ii) If an association of agricultural producers certified as a sole employer is determined to have committed an act that under subsection (b)(2) results in the denial of certification with respect to the association, no individual producer member of such association may be the beneficiary of the services of temporary alien agricultural workers admitted under this section in the commodity and occupation in which such aliens were employed by the association which was denied certification during the period such denial is in force, unless such producer member employs such aliens in the commodity and occupation in question directly or through an association which is a joint employer of such workers with the producer member.

(e) Expedited administrative appeals of certain determinations

(1) Regulations shall provide for an expedited procedure for the review of a denial of certification under subsection (a)(1) or a revocation of such a certification

or, at the applicant's request, for a de novo administrative hearing respecting the denial or revocation.

(2) The Secretary of Labor shall expeditiously, but in no case later than 72 hours after the time a new determination is requested, make a new determination on the request for certification in the case of an H-2A worker if able, willing, and qualified eligible individuals are not actually available at the time such labor or services are required and a certification was denied in whole or in part because of the availability of qualified workers. If the employer asserts that any eligible individual who has been referred is not able, willing, or qualified, the burden of proof is on the employer to establish that the individual referred is not able, willing, or qualified because of employment-related reasons.

(f) Violators disqualified for 5 years

An alien may not be admitted to the United States as a temporary agricultural worker if the alien was admitted to the United States as such a worker within the previous five-year period and the alien during that period violated a term or condition of such previous admission.

(g) Authorization of appropriations

(1) There are authorized to be appropriated for each fiscal year, beginning with fiscal year 1987, $10,000,000 for the purposes—

(A) of recruiting domestic workers for temporary labor and services which might otherwise be performed by nonimmigrants described in section 1101(a)(15)(H)(ii)(a) of this title, and

(B) of monitoring terms and conditions under which such nonimmigrants (and domestic workers

employed by the same employers) are employed in the United States.

(2) The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

(3) There are authorized to be appropriated for each fiscal year, beginning with fiscal year 1987, such sums as may be necessary for the purpose of enabling the Secretary of Labor to make determinations and certifications under this section and under section 1182(a)(5)(A)(i) of this title.

(4) There are authorized to be appropriated for each fiscal year, beginning with fiscal year 1987, such sums as may be necessary for the purposes of enabling the Secretary of Agriculture to carry out the Secretary's duties and responsibilities under this section.

(h) Miscellaneous provisions

(1) The Attorney General shall provide for such endorsement of entry and exit documents of nonimmigrants described in section 1101(a)(15)(H)(ii) of this title as may be necessary to carry out this section and to provide notice for purposes of section 1324a of this title.

(2) The provisions of subsections (a) and (c) of section 1184 of this title and the provisions of this section preempt any State or local law regulating admissibility of nonimmigrant workers.

(i) Definitions

For purposes of this section:

(1) The term "eligible individual" means, with respect to employment, an individual who is not an unauthorized alien (as defined in section 1324a(h)(3) of this title) with respect to that employment.

(2) The term "H-2A worker" means a nonimmigrant described in section 1101(a)(15)(H)(ii)(a) of this title.