In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,

PROSECUTING PARTY,

v.

FERNANDEZ FARMS, INC and GONZALO FERNANDEZ,

RESPONDENTS.

ARB CASE NO. 2016-0097

ALJ CASE NO. 2014-TAE-00008

DATE: September 16, 2019

Appearances:

***For the Respondents*:**
Fenn C. Horton III, Esq., and Servando R. Sandoval, Esq.; *Pahl & McCay*; San Jose, California

For the Prosecuting Party, Administrator, Wage and Hour Division:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; and Katelyn J. Poe, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Thomas H. Burrell, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the H-2A temporary agricultural worker program of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of

1986.[1] The Administrator, Wage and Hour Division (the Administrator), urges the Administrative Review Board (Board) to reverse the Order Denying Request for Relief Against Celia Fernandez, Lucia Fernandez, Juan Escobar, CFE Farms, Incorporated (CFE Farms) and Royal Berry Farms, Incorporated (Royal Berry Farms) of the Administrative Law Judge (ALJ). The ALJ denied the Administrator's request to debar Celia Fernandez, Lucia Fernandez, Juan Escobar, CFE Farms, and Royal Berry Farms as successors-in-interest to Fernandez Farms, Incorporated (Fernandez Farms) and Gonzalo Fernandez, concluding that the Administrator did not give the named individuals and entities proper notice of the action or an adequate opportunity to be heard.[2] The Administrator appealed to the Board,[3] and we now affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions in review or on appeal of matters arising under the INA's H-2A provisions and its implementing regulations at 29 C.F.R. Part 501.[4] The Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.

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[1] 8 U.S.C. § 1101(a)(15)(H)(ii)(a)(2014); 8 U.S.C. § 1188(g)(2) (2000); 29 C.F.R. Part 501 (2018); 20 C.F.R. Part 655 Subpart B (2018).

[2] The ALJ confirmed his findings and rejected the Administrator's Motion for Reconsideration in an Order Denying Reconsideration dated October 30, 2015.

[3] We agree with the Administrator that the ALJ's interlocutory decisions regarding the requested relief became ripe for review as of his final decision and order in this matter on August 25, 2016.

[4] *See* 8 U.S.C. § 1188(g)(2); 29 C.F.R. § 501.42; *see also* Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019).

LEGAL AND PROCEDURAL BACKGROUND

Under the H-2A program, immigrants may receive visas to work temporarily in the United States when domestic workers who are able, willing, and qualified are not available at the time and place where agricultural labor and services are needed.[5] An employer participating in the H-2A program must arrange to house temporary foreign workers, provide them with coverage under workers' compensation insurance, provide necessary tools, meals, and transportation, guarantee a number of paid work days at the prevailing wage rates, pay workers at frequent intervals, and keep records to demonstrate compliance with all requirements.[6]

The Secretary of Labor, through the Administrator, enforces the wages and working conditions required for workers in the H-2A program.[7] Failure to comply with the applicable regulations may result in enforcement proceedings by the Administrator for specific performance and injunctive or other equitable relief, as well as civil money penalties and—most significantly for the instant facts—temporary debarment from participating in the H-2A program. *Administrator v. Global Horizons, Inc.*, ARB No. 11-058, ALJ Nos. 2005-TAE-001, -006, slip op. at 4 (ARB May 31, 2013).

The Administrator filed a Notice of Determination in this matter on July 31, 2013, alleging multiple violations of the H-2A program by Fernandez Farms.[8] The Administrator amended the Notice of Determination on December 4, 2013, to allege the same violations by Gonzalo Fernandez in his individual capacity. The Notice of Determination was amended again on May 4, 2015, to allege additional violations of

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5 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(a), (c); 20 C.F.R Part 655 Subpart B.

6 29 C.F.R. Part 655 Subpart B.

7 8 U.S.C. § 1188(g)(2); 29 C.F.R. § 501.1(c).

8 The ALJ dismissed the order of reference as to Fernandez Farms, Inc., after it failed to appear and pursue its appeal. Thus, the Administrator's Notice of Determination filed on July 31, 2013, is the final order of the Secretary as to Fernandez Farms.

the H-2A housing regulations. The ALJ held a formal hearing in July 2015, involving only Respondent in his individual capacity. The ALJ observed during the hearing that the Administrator was also seeking relief for the first time against three employees of Fernandez Farms, Inc., specifically Celia Fernandez, Juan Escobar, and Lucia Fernandez, as well as two businesses, CFE Farms, Inc., and Royal Berry Farms, Inc., as "successors in interest" to Fernandez Farms, Inc.

The ALJ allowed the parties to brief the issue of what relief could be granted against the individuals and businesses that had not been named in the original complaint or amendments thereto. After considering the parties' positions, the ALJ concluded that relief would not be granted against parties that were not listed in the complaint as they did not have notice that they would be subject to debarment in the proceeding.[9] The ALJ also denied the Administrator's Motion for Reconsideration, and the Administrator then appealed to the Board. The Respondents have filed a response brief, and the Administrator filed a rebuttal brief.

DISCUSSION

On appeal, the Administrator contends that the H-2A regulations provide the Administrator with broad authority to debar an employer, and any successor in interest to the employer, from receiving future H-2A labor certifications where the employer has "substantially violated" a term or condition of its H-2A labor

[9] In a separate Decision and Order issued on August 25, 2016, the ALJ found that Respondent Gonzalo Fernandez violated provisions of the H-2A program and ordered him to pay to the Administrator a total of $1,109,381.19 for distribution to the affected workers. However, the ALJ found that Respondent did not violate 20 C.F.R. § 655.122(d)(1)(i) related to providing H-2A workers with housing that met OSHA standards. For the substantiated violations of the H-2A program, the ALJ assessed Respondent civil money penalties in the amount of $1,293,950, to be paid to the Administrator. In addition, the ALJ found that due to his substantial violations of the H-2A program, Respondent was debarred from participating in the H-2A program for the period of three years from the date of the Order. That decision was not reviewed by the ARB and is the final agency decision in that matter. 29 C.F.R. § 501.41(d)(2010).

certification.[10] We do not disagree with this assertion, but nevertheless conclude that the proper procedures, as outlined in the implementing regulations, apply to any party the Administrator seeks to debar from receiving future labor certifications. In reaching this holding we have reviewed the applicable regulations giving weight to the plain language of the rules. The same rules of interpretation that are generally applicable to statutes may also be used to interpret administrative regulations.[11] If the plain language of a statute or regulation is clear, "there is no need for further inquiry and the plain language of the statute will control its interpretation."[12]

While the Board and other reviewing entities will often defer to agencies in the interpretation of their own regulations, this deference is based on the agency's technical expertise about the subject matter being regulated, but it does not apply to an agency's "interpretation" of procedural requirements written in plain

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[10] *See* 29 C.F.R. § 501.20(a). The Administrator also contends that "requiring a written notice of debarment to the successors in interest in this case would prove futile due to these successors' evasive and deceptive conduct—by the time the Administrator fully uncovered the facts regarding Fernandez Farms' ongoing operations, issuing a new notice of debarment would simply have permitted these successor entities to reconstitute themselves once more." Administrator's Reply Brief at 2. Despite obvious efficiency benefits American law has never adopted a "futility standard" when considering the need for substantive or procedural safeguards in litigation. We are not insensitive to the difficulties of the often competitive enterprise of ferreting out unlawful conduct. The government cannot, however, ignore the requirements of existing regulations and then ask the administrative judiciary to approve that conduct. We observe that had the Administrator complied with current agency regulations after the discovery of the putatively "evasive and deceptive conduct," any arguments regarding the statute of limitations established under § 501.20(c) would have been adjudicated before an ALJ. We presume that necessary findings of fact and conclusions of law would have been made as to whether the statute of limitations could be tolled in light of the evidence. Alternatively, we observe that the regulatory time limitations and administrative requirements could be amended through the rule-making process to provide explicitly for handling situations such as those presented in this case.

[11] *See Administrator v. Advanced Professional Marketing, Inc.*, ARB No. 12-069, ALJ Case No. 2008-LCA-017, slip op. at 10 (ARB June 3, 2014).

[12] *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039 (ARB June 29, 2007) (citing *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002)).

language.[13] Contrary to the Administrator's contentions on appeal, the ALJ did not add a requirement of written notice of debarment and an opportunity to be heard. Rather, the implementing regulations promulgated (in part) by the Wage and Hour Division found in 29 C.F.R. Part 501 establish such a requirement.

The regulations in 29 C.F.R. Part 501 cover the enforcement of all contractual obligations applicable to the employment of H–2A workers under 8 U.S.C. § 1188.[14] Section 501.16(a)(2) provides that the remedies referenced in the regulations may be sought directly from the employer, or from its successor in interest, as appropriate, and § 501.20(e) provides the procedural requirements for the Administrator when seeking debarment of an employer, or any successor in interest to that employer, from receiving future labor certifications, subject to the time limits set forth in the section. Specifically, § 501.20(e) requires that the Notice of Debarment be in writing, that it must state the reason for the debarment finding, and must identify appeal opportunities and a timeframe under which such rights must be exercised.[15] The requirement for a written notice of debarment is further emphasized in § 501.31, which states plainly that "whenever the WHD decides . . . to debar . . . the person against whom such action is taken shall be notified in writing of such determination," and § 501.32 specifies the requirements of the notice, including the right of the affected party to request a hearing.

In the proceedings below, the Administrator followed these requirements in the pursuit of disbarment of Fernandez Farms, and subsequently when seeking to debar Gonzalo Fernandez as an individual. A Notice of Determination was issued against Fernandez Farms on July 31, 2013. This notice included the violations found in the investigation, the remedies sought, including debarment for three years, and the proper procedure to request a hearing before the OALJ. Fernandez

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[13] *See, e.g., OFCCP v. Keebler Co.*, ARB No. 97-127, ALJ No. 1987-OFC-020, slip op. at 14 (ARB Dec. 21, 1999); *see generally Puri v. Univ. of Alabama Birmingham Huntsville*, ARB No. 10-004, ALJ Nos. 2008-LCA-008, -043 (ARB Nov. 30, 2011).

[14] This section delegates to the Secretary of Labor the authority to take such actions as may be necessary to assure employer compliance with terms and conditions of employment under the INA.

[15] Similar language is also found in 20 C.F.R. § 655.182(f), which prescribes the procedure for the Office of Foreign Labor Certification (OFLC) Administrator must follow to debar an employer, attorney or agent from receiving future labor certifications.

Farms filed a request for hearing on August 26, 2013. Subsequently, on December 4, 2013, after further investigation, the Administrator filed a Notice of Determination against Gonzalo Fernandez finding that he was personally liable for the violations described in the July 31, 2013 letter. This notice also listed the remedies sought, including a three year debarment, and explained the right for and procedures to request a hearing. On December 31, 2013, Gonzalo Fernandez requested a hearing before the OALJ, and objected to the Administrator's finding that he should be held personally liable for the violations found with regard to Fernandez Farms. In an Order dated June 11, 2015, the ALJ found that the Administrator presented sufficient evidence warranting piercing the corporate veil of Fernandez Farms and holding Gonzalo Fernandez personally liable for the debts of the corporation in this case. In May 2015, just prior to the July 2015 hearing, the Administrator filed a motion seeking to amend the determination order to include claims for violating the "no cost" housing provisions of the Act. The ALJ permitted amendment of the Notice of Determination as it was within the scope of the original complaint and involved the same parties. *See* Order Granting Leave to Amend at 2.

Given the Administrator's knowing failure to follow the requirements of the implementing regulations concerning the non-Respondent entities, we affirm the ALJ's finding that the minimal regulatory notice requirements were not met, and reject the Administrator's contention that sufficient constructive notice was given to the named individuals and two businesses for them to be on notice that they would be subject to the debarment proceedings.[16] As the regulations plainly provide that "the person against whom such action is taken shall be notified in writing of such determination," 29 C.F.R. § 501.31, and it is not disputed that a Notice of Debarment was not issued against Celia Fernandez, Lucia Fernandez, Juan Escobar, CFE Farms, and Royal Berry Farms.[17] Therefore, we affirm the ALJ's

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[16] As the parties were not given a Notice of Debarment stating the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and identifying appeal opportunities, it is not clear for which particular violations the Administrator is pursuing debarment as to each non-Respondent entity.

[17] We also note that the regulations provide the following:

conclusion that these non-Respondent entities and individuals were not properly before the ALJ for debarment at the hearing.[18]

CONCLUSION

The ALJ correctly declined to grant the relief requested by the Administrator. Accordingly, the ALJ's Order Denying Request for Relief against Celia Fernandez, Lucia Fernandez, Juan Escobar, CFE Farms and Royal Berry Farms and the ALJ's Order Denying Reconsideration are **AFFIRMED.**

SO ORDERED.

> Where an employer has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, **and has ceased doing business or cannot be located for purposes of enforcement**, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances.

29 C.F.R. § 501.3. Although Fernandez Farms has declared bankruptcy, we note that the Administrator zealously pursued remedies against Gonzalo Fernandez in his individual capacity and does not allege that he cannot be located for purposes of enforcement.

[18] Given our disposition of this case, we decline to address the Administrator's contentions regarding whether the named individuals and businesses may be considered successors in interest of Fernandez Farms.