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Issue Date: 01 September 2015

Case No.: 2014-TAE-00003

In the Matter of:

EMPLOYMENT USA, LLC,

and

KEVIN OPP,

Respondents.

DECISION AND ORDER

This matter arises under the H-2A nonimmigrant guestworker provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188, and the implementing regulations promulgated by the U.S. Department of Labor (DOL) at 20 C.F.R. part 655, subpart B and 29 C.F.R. part 501 (collectively, "H-2A program"). Respondent Employment USA, LLC advises and assists employers in completing and filing the paperwork necessary to employ foreign workers under the H-2A—and other—guest worker programs. Respondent Kevin Opp is the operations manager of Employment USA, LLC. This case concerns the advice and assistance Respondents provided to two former clients and H-2A employers: Old Tree Farms, LLC and VerPaalen Custom Services, LLC (collectively, "Employer Parties").

By Notice of Debarment dated March 26, 2013, the Administrator of the Wage and Hour Division (WHD), through authorized representatives, initiated proceedings to debar the above-captioned Respondents from representing parties in matters related to the H-2A program for a period of three years. Respondents timely requested a hearing before an administrative law judge, and on January 22, 2014, the matter was referred to the Office of Administrative Law Judges (OALJ) in accordance with 29 C.F.R. § 501.37. Thereafter, the matter was assigned to the undersigned administrative law judge. A formal hearing was held in Sioux Falls, South Dakota from December 9-11, 2014, at which both the Administrator and Respondents were represented by counsel and provided a full and fair opportunity to present evidence and argument.[1]

[1] The transcript of the hearing will be cited "Tr." followed by the applicable page number. Exhibits entered into evidence by the Administrator and the Respondents will be cited "AX" and "RX," respectively. "JX" will refer to joint exhibits, and "ALJX" will refer to administrative law judge exhibits.

The findings of fact and conclusions of law that follow are based upon the evidence admitted into the record, the testimony at the hearing, the arguments of the parties, and the applicable law. Although every statement and exhibit may not be discussed in this opinion, in reaching my decision I have carefully reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

I. BACKGROUND

Before addressing the issues raised in this matter, I will provide a brief overview of the laws and regulations that govern the H-2A program, and the events leading up to the instant appeal.

a) The H-2A Program

i. *General Overview*

The H-2A program permits U.S. employers to bring foreign workers into the country on a temporary basis to perform agricultural labor or services of a temporary or seasonal nature. 8 U.S.C. § 1101(a)(15)(H)(ii)(a).[2] An employer seeking to employ foreign nationals under this program must obtain approval from two federal agencies: the Department of Labor (DOL) and the United States Citizenship and Immigration Service (USCIS), a component of the Department of Homeland Security (DHS). Prospective employers must first obtain a certification from DOL that: (1) 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 in the petition [that the employer will file with USCIS]; and (2) the employment of foreign workers 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); 20 C.F.R. § 655.100. DOL has delegated the authority to make this certification—known as a "temporary labor certification"—to the Employment and Training Administration (ETA), which in turn has delegated it to the Office of Foreign Labor Certification (OFLC). 20 C.F.R. § 655.101 (2014).

Before a prospective H-2A employer may apply to DOL for a temporary labor certification, it must test the labor market to determine whether able, willing, and qualified U.S. workers are available to fill the positions in which they seek to employ H-2A workers. The specifics of this labor market test are set forth in the regulations at 20 C.F.R. Part 655, Subpart B. Among other things, these regulations require a prospective H-2A employer to submit an *Agricultural and Food Processing Clearance Order* (Form ETA–790) to the State Workforce Agency (SWA) in the area of intended employment. 20 C.F.R. § 655.121. Upon receiving a Form ETA-790, the SWA will review the terms and conditions of employment that are reported on the Form ETA-790 for compliance with DOL regulations and, if it finds the employer's job opportunity to be acceptable, it will place an intrastate job order. 20 C.F.R. §§ 655.121, 655.122. Once the SWA places an intrastate job order, a prospective H-2A employer may file an *Application for Temporary Employment Certification* (ETA Form 9142) with DOL. 20 C.F.R. § 655.130. Among other things, this application requires an employer to report a description of the labor or services to be performed, the dates of intended employment, and a statement explaining

[2] Foreign nationals who enter the United States on an H-2A nonimmigrant visa will be referred to as "H-2A workers."

why its need for the labor or services is temporary or seasonal in nature. 20 C.F.R. § 655.130. Both the employer and its authorized attorney or agent (if the employer is represented by an attorney or agent) must sign the ETA Form 9142 and attest that the information contained therein is true and correct to the best of their knowledge. *Id*.

Once a prospective H-2A employer has obtained certification from DOL, it may file an I-129 petition with USCIS to classify the foreign workers whom it seeks to hire as H-2A nonimmigrants. 8 C.F.R. § 214.2(h)(2)(i)(a). Among other things, it must establish that the beneficiaries of this petition (*i.e.*, the proposed H-2A workers) will be employed in accordance with the terms and conditions described on the temporary labor certification, including, *inter alia*, that the principal duties to be performed are those described on the certification, and that any other duties are minor and incidental. 8 CFR § 214.2(h)(5)(iii)(A). It must also establish that the employment proposed in the temporary labor certification is of a temporary or seasonal nature. 8 C.F.R. § 214.2(h)(5)(iv)(A). Pursuant to applicable DHS regulations:

> Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

8 C.F.R. § 214.2(h)(5)(iv)(A). If USCIS approves the employer's petition, then the workers whom the employer seeks to hire may use the approved petition to apply for an H-2A visa at a U.S. embassy or consulate abroad. 8 U.S.C. §1202; 8 C.F.R. § 214.2(h)(9)(i); 22 C.F.R. § 41.53. After the workers obtain a visa, they may travel to the United States and work for the employer who filed the I-129 petition—but only that employer—under the terms and conditions specified in the petition. The workers may not work for any other employer unless that employer obtains its own temporary labor certification and files its own Form I-129 to adjust their nonimmigrant status and sponsor their employment as H-2A workers. 8 C.F.R. § 248.3. When an employer seeks to employ H-2A workers beyond the period granted in the I-129 petition approved by USCIS, it must file a second I-129 petition requesting an extension of their stay. 8 CFR § 214.1(c).

ii. *Temporary or Seasonal Need for Agricultural Labor or Services*

To qualify for the H-2A program, the employer must have a "need for agricultural services or labor to be performed on a temporary or seasonal basis." 20 CFR § 655.161(a). The applicable regulations define this need as follows:

> [E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 CFR § 655.103(d). In determining whether a job opportunity is temporary in nature, "[i]t is not the nature of the duties of the positions which must be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). Rather, it is the nature of the need for workers in that position that is controlling. *Id*. Accordingly, DOL and DHS will examine whether "the employer's needs are seasonal, not whether the duties are seasonal." *See, e.g., Sneed Farm*, 1999-TLC-7, slip op. at 4 (Sept. 27, 1999).

When evaluating an employer's application, it is necessary to establish when the employer's seasonal need occurs and how the need for labor or services during this time of the year differs from other times of the year. Employers seeking temporary labor certification should explain how seasonal differences lead to a differing seasonal need for labor. *See, e.g., The Fingerling Co.*, 2013-TLC-00017, slip op. at 5 (Jan. 18, 2013). Dairy farming does not usually fall with the regulatory definition of temporary or seasonal employment. In the preamble to the 2010 Final Rule, the Department explained:

> The determination of whether a particular dairy activity is eligible for an H-2A certification rests on a finding that the duration of the activity and the need for that activity is temporary or seasonal. The majority of activities encompassed by the dairy industry, and milk production in particular, are year-round activities and therefore cannot be classified as temporary. The Department has no legal authority, nor is there legislative precedent, that would allow for the inclusion of the entire dairy industry in the H-2A program.

Temporary Agricultural Employment of H–2A Aliens in the United States, 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010). Similarly, when promulgating its own regulations, DHS noted:

> [M]ost dairy farmer's needs are year-round and, therefore, may not be able to meet the requirements of the H–2A program. Dairy farmers that can demonstrate a temporary need for H–2A workers, however, are able to utilize the program. The applicable statute precludes DHS from extending the program to work that is considered permanent. *See* INA section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a).

73 Fed. Reg. 76891, 76895 (Dec. 18, 2008).

b) Factual Background[3]

i. *Employment USA*

Employment USA, LLC ("EUSA") serves as an agent to employers who wish to hire H-2A (and other nonimmigrant) workers. Kevin Opp is the Operations Manager of EUSA. Opp began working for EUSA in 2004 or 2005. (Tr. 490). He was hired as an entry-level assistant to Tina Andrew, who held an ownership interest in EUSA at that time and oversaw its operations.

[3] The account of the underlying facts in this case is drawn from the testimony of the witnesses at the hearing and the evidence submitted by the parties.

(Tr. 490-91). Tina Andrew retired at some point in 2009, at which time she promoted Opp to operations manager and gifted him a ten-percent ownership interest in the company, which he still holds today. (Tr. 491-92).

At all times relevant to this appeal, EUSA employed the following five individuals: Kevin Opp; Shelly Roemick; Adrian Webb; Jessica Martin; and Robert McCubbin. (Tr. 392; 396–97; 493-95). Opp managed the other employees and signed the documents submitted to various government entities; Roemick was the book keeper; Adrian Webb was in charge of marketing; and Jessica Martin and Robert McCubbin were Opp's entry-level office assistants. *Id.*[4] All but Webb, who was based in Las Vegas, Nevada, worked out of the EUSA office in Aberdeen, South Dakota. (Tr. 492).

ii. *Old Tree Farms*

Old Tree Farms LLC ("OTF") is owned and operated by a married couple, Johanna ("Sonja") and Frido Verpaalen. (Tr. 295; JX 2 at 4-5; AX 33). The Verpaalens immigrated to the United States from the Netherlands in 2001. *Id.* Shortly after they arrived, they began building a dairy farm on 50 acres of land that they owned in Volga, South Dakota. *Id.* They incorporated their dairy farm under the name OTF in 2007, and they still operate their dairy farm through OTF today. (Tr. 295). One-hundred percent of OTF's profits are derived from dairy cows. *Id.*

Sonya Verpaalen became interested in hiring farmworkers through the H-2A program in the fall of 2010, after she spoke to another South Dakota dairy farmer, Lynn Boadwine, about the H-2A program. (Tr. 43, 303, 476; JX 2 at 24). At that time, OTF had been having trouble finding and retaining farmworkers and the Verpaalens had recently entered into a lease for 875 acres of land on which they intended to grow feed for their cows. (Tr. 296, 303). When Verpaalen[5] discussed these issues with Boadwine, he suggested that she might be able to employ guest workers under the H-2A program now that she was renting land to grow feed for her cows, and he referred her to EUSA. (JX 2 at 14; Tr. 296, 303).

Verpaalen contacted EUSA at some point in December 2010 or January 2011. (AX 33; JX 2 at 20, 25). She testified that she first spoke with Kevin Opp about whether OTF would be a good fit for the H-2A program, (Tr. 304-05; JX 2 at 41), but Opp contends that he did not speak to her until after she spoke to Adrian Webb. (Tr. 474). Either way, after Verpaalen spoke to someone at EUSA, she filled out two forms: an Employer Application form (AX 3)[6] and an

[4] In 2011, Opp was the only EUSA employee who prepared ETA Forms 790 and 9142. (Tr. 576).

[5] Unless explicitly stated otherwise, "Verpaalen" refers to Sonya Verpaalen, and not to her husband Frido Verpaalen.

[6] At the hearing, Counsel for Respondents, Mr. Hall, objected to the admission of this exhibit as follows:

> JUDGE COLWELL: Okay. Any objection to Exhibit No. 3?
> MR. HALL: Well, we actually will object to Exhibit No. 3 because we had deposition testimony that this is not the form. I have the actual possession of the actual form which we were able to obtain that was submitted. We -- either we -- Your Honor, we can admit this and then

Employee Profile form (AX 2). (JX 2 at 37). Verpaalen testified that she completed these forms with some direction from Opp, who assisted her with the description of job duties. (Tr. 310; AX 34). Opp denies that he ever spoke with Verpaalen before she completed these forms. (Tr. 472).

On the Employer Application form, Verpaalen provided cursory information about OTF and its need for seasonal workers. (AX 3). For instance, under description of operation, she reported: "Started in 2002. Dairy with 1200 cows. Farming 1000 acres," and she described OTF's seasonal need as: "planting in spring; harvest in fall; manure hauling in spring & fall; calving in spring." She noted that OTF sought "10?" farmworkers to work 50-60 hours per week, at a rate of pay of $8-12 per hour, including housing, and listed the following job duties to be performed: farming; harvest; manure-hauling; and calving.[7] She also indicated that there were no minimum requirements for the position. On the Employee Profile form, Verpaalen provided similarly sparse information. (AX 2). Her responses indicate that OTF sought 10 workers, either male or female, between 20-40 years old; that previous experience was not required; and that she preferred workers who would also be willing to work the night shift. *Id*.

Opp testified that he reviewed OTF's Employer Application and spoke with Verpaalen over the phone before preparing a Form ETA-790 for 10 temporary farmworker positions at OTF. (Tr. 470, 498-99; AX 37). He recalled very little of this conversation, but said he would have asked questions for clarification and "tried to wrap his mind around" what was presented on the form. (JX 4 at 49).

On February 3, 2011, Opp emailed the ETA-790 and an associated cover letter to the South Dakota SWA. (Tr. 498-99; AX 37). The South Dakota SWA accepted the Form ETA-790 the next day, on February 4, 2011. (Tr. 499; AX 37). The cover letter that Opp sent to the SWA described OTF's need for farmworkers as follows:

> when Mr. Opp testifies, I can have him -- we can present the actual form or we -- I mean, I don't know if we want to handle it that way but this is not the actual form.
>
> MS. BOBELA: Is there issue with the clarity of the form or the substance of the form?
>
> MR. HALL: No. The issue is with the fact that this is not the form that was submitted. There was a date on top. There was -- and it's different.
>
> MS. BOBELA: Are there any differences with the substance of the information, the information contained on the Application?
>
> MR. HALL: Well, the issue is not that. The issue is, is it the document? You can go ahead -- I mean, I have no problem admitting it, using it with this witness but when Mr. Opp comes to testify, we'll admit the actual document, especially because it establishes an important piece of the chronology.
>
> JUDGE COLWELL: Okay. With that information, I'll admit Administrator's Exhibit Nos. 2 and 3, and I understand that Mr. Opp will present a similar form and with possibly more information tomorrow.

Tr. 202. But on his direct examination of Opp, Mr. Hall did not seek testimony on the alleged differences between AX 3 and the document that he purports to be the "actual form." The exhibit Respondents offered into evidence as the Employer Application for OTF, RX 7, cannot be the "actual form," as it does not even relate to OTF. Rather, it is a copy of the Employer Application form for Verpaalen Custom Service, which is similar, but less legible, than the one submitted at RX 17. Because Mr. Hall did not specifically object to the content of AX 3 and failed to provide a suitable alternative, I will rely on AX 3 as the true and correct copy of the OTF Employer Application Form.

[7] It appears that an additional job duty was included on the form, but it is crossed out and illegible.

> Old Tree Farms, LLC is a commercial dairy, crop and cattle farming operation in eastern South Dakota, which has a need for additional temporary farmworkers between the months of April and December of each year. Workers are needed to begin in April by preparing equipment and grounds, followed closely by the planting of all alfalfa and corn crops in the spring and early summer months. After the planting is completed workers are needed to move cattle into summer grazing pastures, as well as complete general farm duties such as facility maintenance, equipment servicing, and general farm upkeep for the duration of the summer. In August the first of the crops are ready for harvest, and workers will commence to harvest and haul corn, silage and hay. After the harvest is completed workers have a short window of time to haul and spread manure over recently harvested fields before the winter sets in. Manure removal is mostly used to fertilize fields and can only be completed after crops are harvested and before the winter weather sets in and causes manure to freeze. Therefore, 80% of all manure is pumped, hauled and applied to fields between the months of October through early December. Finally, prior to the close of the season workers are needed to complete one final round of maintenance and equipment servicing in order to prepare facilities for the winter. Then by late December the crops have been harvested and stored, manure removal and application has been completed, cattle are moved into winter stalls, and the winter weather has fully set in, all causing a dramatic decrease in operations. Therefore, additional temporary farmworkers are no longer needed by Old Tree Farms, LLC until the following spring.

(AX 37). The Form ETA-790 reported an anticipated period of employment from April 10, 2011 to December 31, 2011, for 40 hours per week (8 hours a day, Monday through Friday), and listed the following job specifications:

> Set, operate and maintain equipment to harvest and haul grain crops. Harvesting, cutting and bailing hay. Planting cultivating and fertilizing corn and alfalfa. Chop and haul corn silage. Fix, repair and maintain pasture fences and facility structures. Move cattle to and from summer grazing pastures. General farm maintenance, equipment servicing and facility upkeep. Operate and maintain manure pumping equipment. Pump and haul manure into fields. 6 months experience required. No driver's license or education requirements.

Id. Opp did not ask Verpaalen to review the Form ETA-790 or cover letter before he emailed them to the SWA, and Verpaalen did not sign the Form ETA-790 until after it was approved by the SWA.[8]

[8] At the hearing, Opp was asked whether Verpaalen had the opportunity to review the draft Form ETA -790 before he sent it to the SWA. (Tr. 499). His response indicates that she did not. Specifically, he replied that he has a special relationship with the South Dakota SWA, and that he is able to email the Form ETA-790 to the SWA directly without including an employer signature. (Tr. 499).

After the Form ETA-790 was approved by the SWA, Opp used the information he had reported on that form to prepare an *Application for Temporary Employment Certification* (ETA Form 9142) for ten farmworker positions at OTF. (Tr. 501; AX 1). The statement of temporary need in the ETA Form 9142 he prepared is very similar to the cover letter that he drafted and sent to the SWA. Specifically, in pertinent part, it provides:

> Old Tree Farms is a commercial dairy, crop and cattle farming operation in eastern South Dakota, which has a need for additional temporary farmworkers between the months of April and December of each year. During these months we produce corn and alfalfa crops, as well as silage. This type of farming in South Dakota is a strictly seasonal business, as South Dakota weather prohibits an operator from producing these commodities during the winter months. Therefore, farming operations hire temporary workers in the spring, in time for preparation and planting work, and then let them go by the end of December, when the crops have been harvested and hauled, and farm equipment has been winterized. At that point temporary farmworkers are no longer needed by Old Tree Farms LLC until the following spring. Workers are also needed during this period to move cattle to and from different summer grazing pastures, as well as complete very important facility maintenance duties to the farm, which can only be done in the warm winter months. Manure pumping/ hauling/application is also a seasonal duty that is completed at this time, as 80% of all manure produced on the farm is applied to fields between the months of October and December, right after the harvest is completed and just prior to the manure freezing. This short window of time allows for manure to be applied and spread on fields for fertilizer. South Dakota is a very rural State with not much of a labor market to draw from. According to the Bureau of Labor Statistics December Monthly Unemployment Rate Report, the state of South Dakota has less than a 4% unemployment rate, which is the third lowest in the nation. With our current labor statistics, low population and rural locality, it becomes more difficult to secure seasonal farm help in South Dakota each year.

(AX 1). Likewise, the job duties in the ETA Form 9142 are identical to the job duties that Opp included in the job description on the Form ETA-790. *Compare* AX 1 *with* AX 37.

Opp testified that after he prepared the ETA Form 9142, he sent it to Verpaalen with, *inter alia*, a copy of the Form ETA-790 approved by the SWA and an orange instruction sheet instructing her to "review for accuracy, sign, and send on to the Chicago National Processing Center." (Tr. 501, 503). Verpaalen reviewed the materials, made corrections to her contact information, signed the areas designated for her signature, and sent the application and accompanying materials, including a cover letter signed by Opp (which was nearly identical to the cover letter that Opp sent to the SWA), to ETA's Chicago National Processing Center, as directed by Opp. (AX 1; JX 2 at 54).[9]

[9] Although witness testimony indicates that Opp and Verpaalen signed the ETA Form 9142 on different dates, the same date, February 9, 2011, is typed next to both of their signatures. (AX 1). The same date is noted on the Agency & Indemnity Agreement that Opp and Sonya Verpaalen signed on behalf of EUSA and OTF, respectively. (AX 10).

Verpaalen claimed that she contacted EUSA before she sent the application in order to inform Opp that OTF did not have summer grazing pastures. (Tr. 311-312). She recalled that she spoke about this issue with someone at EUSA—she was not sure whether it was Opp or Martin—and that Opp (or possibly Martin) told her to leave this information on the application anyway because "the more seasonal [duties] we have on your application, the better it is to get it approved." (Tr. 311-312, Tr. 445). Opp denied that he had any such conversation, and stated he did not think Jessica Martin would have told Verpaalen to leave inaccurate information on the application. (Tr. 502-03).

OTF presented the ETA Forms 790 and 9142 to DOL without any changes to the job duties and statement of temporary need that were prepared by Opp. On March 11, 2011, DOL certified the ETA Form 9142 and granted the requested temporary labor certification. (Tr. 506). At some point thereafter, Opp, Jessica Martin, and Robert McCubbin visited OTF to discuss the H-2A program with OTF's current employees. (Tr. 545). Opp then prepared an I-129 Petition for 10 unnamed H-2A nonimmigrant workers. (Tr. 506). This petition apparently got lost in transit, and USCIS did not receive it until May 2, 2011. (Tr. 506, 518-521; AX 19). USCIS issued a notice approving the petition on May 20, 2011. (RX 4).

There is some confusion about what happened after USCIS approved OTF's first petition, but for whatever reason, U.S. consular officials refused to issue visas to the Mexican nationals whom OTF sought to employ. (Tr. 317; JX 2 at 69-70; AX 43). When it appeared that the denials might be related to OTF, someone (either Lynn Boadwine or an employee of EUSA)[10] came up with a plan to get around these denials: EUSA could arrange for the workers to apply for a visa using an I-129 petition approved for Mooody County Dairy,[11] a South Dakota dairy farm that was owned by Lynn Boadwine and also happened to be a client of EUSA, and then, after the workers obtained visas and entered the country, EUSA could arrange to transfer them from Mooody County Dairy to OTF. (JX 2 at 70-73). Sonya Verpaalen decided to go through with this plan to transfer workers, and she selected three men—Juan Jose Canela Hernandez, Francisco Quirino Luin Victorio, and Juan Lopez Victoria—from a list of potential workers Jessica Martin sent to her via email. (Tr. 319, 321, 454).[12] EUSA helped these men obtain visas using an I-129 petition approved for Mooody County Dairy, and coordinated their travel to Sioux Falls, South Dakota. (Tr. 319-21; JX 73-74; AX 45).[13] All three of these men arrived in Sioux Falls, South Dakota on July 16, 2011. (Tr. 427-28; AX 40). [14]

[10] Opp alleges that this suggestion came from Lynn Boadwine and Sonya Verpaalen, (Tr. 609), but Verpaalen was "pretty sure" it came from Opp, because he had been helping her through the whole process and he was the one who was the expert in the H-2A program. (Tr. 319).

[11] Mooody County Dairy was previously named Helmer Dairy, and some documents in the record refer to Helmer Dairy instead of Mooody County Dairy. Tr. 326. For purposes of simplicity, I refer only to Mooody County Dairy, since it and Helmer Dairy are one in the same.

[12] Sonya Verpaalen testified that she picked out the workers from an email she "got from Employment USA," but she did not specify who sent this email.

[13] On July 13, 2011, Jessica Martin sent an email to Kevin Opp with the subject "Mooody County Dairy — 3 workers itinerary." (AX 45). In the body of this email, Martin listed a travel itinerary for Juan Jose Canela Hernandez, Francisco Quirino Luin Victorio, and Juan Lopez Victoria. The text in the body of this email indicates that all three men would fly from Mexico City to Juraez, Mexico on July 13, 2011, and then drive from Juraez to El

When the above-referenced men arrived in Sioux Falls, Verpaalen picked them up at the airport and they began working for OTF the next day, July 17, 2011. *Id*. The day after these men began working for OTF, July 18, 2011, Verpaalen emailed Jessica Martin (and copied Opp and Boadwine). (AX 40). In this email, Verpaalen questioned the logistics and legality of the plan to transfer the H-2A workers from Mooody County Dairy to OTF. In relevant part, this email states:

> Our new employees arrived Saturday as planned and they started working yesterday. I made copies of their papers and had them sign the I9 and W4. These I faxed over to Boadwine. Here are my questions:
>
> 1. First of all especially Franscico is worried about Old Tree Farms. He says he is not sure if he should do this, since it states in the contract that he and Boadwine signed that the visa is only for Helmer Dairy [the former name of Mooody County Dairy]. I told him we are going to fix him, but he says if the Embassy in Mexico revokes Old Tree Farms, how this would work with his tax-return. He doesn't want to get in trouble, since he wants to keep being a visa-worker. He has a point and I told him I would talk to you about this.
> 2. In my understanding these 3 workers are now as much illegal as the other ones, because they are not suppose to [sic] work for anybody else that [sic] Helmer Dairy. You told me you would fix this, but in the meantime should they not stay on Lyn's payroll until things are right in their passports?
> 3. Juan does not have a social security card. How and when do we fix this? Can you hire somebody without?
> 4. How many hours can these guys work? Is there a minimum and a max? How much do we pay per hour? Do we pay for meals? Do we have to provide an [sic] own car or can they drive along we [sic] someone else? If we give them money for meals do we need to provide transport to buy the meals? Do we have to pay them more per hour for weekends and nights?
> 5. You said you need a copy of the last paycheck, do you mean the paycheck they will get from Helmer Dairy?

Paso, Texas, where they would catch a flight to Sioux Falls, the next morning, July 14, 2011. The print copy of this email—which Respondent did not disclose until the second-day of the hearing and allegedly did not discover until after the hearing had commenced—bears a handwritten note stating: "Old Tree Farms — didn't work out with Moody [sic] County & were transferred shortly after arrival." Opp testified that he is not sure of the date that he wrote this note, but that he wrote it when he billed Old Tree Farms for the workers and then placed the document on which he wrote it in the billing section of OTF's file. (Tr. 617). If Opp placed this document in EUSA's file for OTF, one wonders why it was not "discovered" it until the hearing, and why Respondents did not disclose this email in response to the Discovery Order I issued on October 16, 2014. (ALJX 6). It is also noteworthy that the print copy of the email bears a bates stamp, since it allegedly was not discovered until the eve of trial, and that the bates stamp on this email bears a lower number than the bates stamps on other emails produced by Respondents months before the hearing.

[14] The workers were delayed by weather in El Paso and did not arrive until two days after their scheduled arrival. (Tr. 630).

> I tried to call you this morning, but got the answer-machine. I would like to get an answer shortly, because question 1 and 2 are really important, since this might change our thoughts on this whole deal. Could you call me sometimes today?

(AX 40). At the hearing, Verpaalen explained that she sent this email because one of the workers had expressed concern over working for an employer other than the employer named on his visa. (Tr. 330). Verpaalen said this made her think about the "gray area [they] landed into," and she did not want "to get into trouble," so she sought assurance from EUSA that it was okay to move forward with the plan. *Id*. And if they were going to move forward with the plan, she had questions about what she needed to do. (Tr. 329-30). For instance, she understood that EUSA needed payroll records from her to complete the transfer, but needed to know what type of check they needed and where it should come from. (Tr. 329).

Opp testified that he "became irate" when he received the above-referenced email and that he had asked Jessica Martin to "call Sonja Verpaaleen immediately and fix this situation." (Tr. 619). Martin recalled that Opp was "very upset" and had told her to call Verpaalen, but she did not remember what happened afterward and whether she had actually spoken to Verpaalen. (Tr. 402). Verpaalen does not recall receiving a response from Martin or Opp. (Tr. 330). In fact, she said she had a lot of trouble getting in touch with anyone at EUSA around this time, and that if she did get to speak with someone, it was Martin, not Opp, but she often heard a voice in the background advising Martin about what to tell her, and she assumed that this voice belonged to Opp. (Tr. 331).

Nevertheless, at some point after Verpaalen sent this email, Opp prepared an I-129 petition to transfer all three H-2A workers from Mooody County Dairy to OTF. (AX 4). By cover letter dated July 21, 2011, Opp submitted the petition and supporting documentation (including pay stubs from Mooody County Dairy) to USCIS. (AX 4). In this petition, Opp described OTF's temporary need for the workers as follows:

> Old Tree Farms is a commercial dairy, crop and cattle farming operation in eastern South Dakota, which has a need for additional temporary farmworkers between the months of April and December of each year. During these months we produce corn and alfalfa crops, as well as silage. This type of farming in South Dakota is a strictly seasonal business, as South Dakota weather prohibits an operator from producing these commodities during the winter months. Therefore, farming operations hire temporary workers in the spring, in time for preparation and planting work, and then let them go by the end of December, when the crops have been harvested and hauled, and farm equipment has been winterized. *At that point temporary farmworkers are no longer needed by Old Tree Farms LLC until the following spring*. Workers are also needed during this period to move cattle to and from different summer grazing pastures, as well as complete very important facility maintenance duties to the farm, which can only be done in the warm winter months. Manure pumping/hauling/application is also a seasonal duty that is completed at this time, as 80% of all manure produced on the farm is applied to fields between the months of October and December, right after the harvest is

> completed and just prior to the manure freezing. This short window of time allows for manure to be applied and spread on fields for fertilizer.

Id. (emphasis added). USCIS evidently approved the petition, and all three men continued to work for OTF.

Almost two months later, by cover letter dated September 15, 2011, Opp submitted another I-129 petition, which was nearly identical to the one described, to transfer two more H-2A workers—Miguel Angel Hernandez Garcia and Juan Antonio Juarez Gamez—from Mooody County Dairy to OTF. (AX 5; Tr. 72). Like the three H-2A workers who came before them, both men entered the country on H-2A visas sponsored by Mooody County Dairy. (Tr. 72, 322).

iii. *Verpaalen Custom Service*

In August 2011, the Verpaalens established a new company named Verpaalen Custom Service ("VCS"). (AX 33). At the hearing, Verpaalen explained that they established this company "to try to get a second Application for H-2A program." (Tr. 333). When questioned further, she clarified that she and her husband created VCS for two reasons: (1) to circumvent the issues prospective OTF employees were experiencing at the U.S. embassy in Mexico; and (2) to extend the time period during which H-2A workers could stay and work on their farm. (Tr. 333-34). Verpaalen contends she was specifically advised by EUSA staff that she could employ the H-2A workers for a longer period if she created a second business entity to sponsor their employment. (Tr. 333-34; AX 31). She is not sure whether she first discussed this idea with Jessica Martin or Kevin Opp, but she is certain she discussed it with Opp before she and her husband established VCS. (Tr. 338).

Opp denies that he or anyone at EUSA spoke to, encouraged, or advised the Verpaalens to sponsor H-2A workers during the winter months under a different business entity, and he disavows any knowledge that the Verpaalens established VCS as a shell company for purposes of applying for workers under the H-2A program. (Tr. 477). However, contemporaneous emails between Verpaalen, Martin, and Opp indicate that Opp was not only aware that the Verpaalens were using VCS to extend the employment of H-2A workers on their dairy farm, but that Opp and the EUSA staff whom he supervised were the architects of this scheme.

For instance, in July 2011, Verpaalen sent an email to Opp stating: "Jessica [Martin] told me that we need to set up a 2nd business for transferring visa between 1 and the other. Could you give me more information about this?" (AX 41; Tr.335-36). Opp replied a week later, informing Verpaalen he had been out of town and that it would be much easier to discuss Verpaalen's questions over the phone. (AX 41). At the hearing, Verpaalen recalled that she called EUSA the Monday after she received this response email and that she spoke with someone about establishing a second company—she was not sure whether it was Opp or Martin, but she was sure that she spoke to Opp about setting up a second company "at a certain point" before she and her husband established VCS. (Tr. 338; AX 33).

Moreover, in August 2011, Jessica Martin sent an email to Verpaalen (and copied Opp) with the subject line "Winter application." (RX 11). Martin attached an employer application

form and asked for a copy of "the worker's [sic] compensation insurance policy as soon as possible so we can get started." *Id*. Verpaalen replied to this email (and copied Opp) the next day, stating:

> We are going to work hard to start the new company beginning this week. When this is done we will get the worker's [sic] compensation for this company. Do you need contracts for housing too? This period will be from Jan 1 to April 1, right? Or does it have to start earlier and end later to have overlap? We are going to stick with the 2 employees that I selected. Probably October 1st we will need 2 more.

Id. A few weeks later, Martin sent another email to Verpaalen (and again copied Opp) with the same subject line. (RX 11). In this email, Martin informed Verpaalen that she received "the fax," and it was not very clear, but she thought she would be able to understand everything and would call if she had any questions. She also repeated her request for a workers' compensation insurance policy "that covers the dates for the winter application" as soon as possible "in order to star [sic] this application . . . ." RX 14. *Id*.

On September 20, 2011, Verpaalen emailed Martin (and copied Opp) a scanned copy of a completed Employer Application for VCS. (AX 20). In the body of this email, Verpaalen asked Martin to "let [her] know if [she] did something wrong again," stating: "It is clear that you don't want custom service, but I am not sure that I am the contact person since Kevin wanted my husband to sign this application." (AX 20). On the Employer Application attached to this email, Verpaalen listed herself—and not her husband—as the employer contact for VCS. (AX 7). The information Verpaalen provided on this form is even less detailed than the information she provided on the Employer Application for OTF. For example, in the section soliciting a detailed description of VCS' operation, Verpaalen simply listed the following job duties, without further explanation: Manure pumping; hauling solid manure; make fields ready for spring; snow removal. *Id*. In the section below this, which seeks the job duties to be performed, she stated "see above." *Id*. And in the section requesting a description of VCS' seasonal need, she wrote: Manure in fall (oct-dec); farming (spring early); snow (dec-mar). *Id*.

Kevin Opp prepared the ETA Forms 790 and 9142 for VCS, as he had for OTF. (Tr. at 576, 605-06; AX 6; AX 38). Opp sent the Form ETA-790 to the South Dakota SWA on September 20, 2011, the same day that Sonya Verpaalen emailed Martin (and copied him) a copy of the Employer Application for VCS. (AX 38). The Form ETA-790 reported that VCS sought to fill ten temporary farm worker positions from November 20, 2011 to May 1, 2012, for 8 hours a day, 40 hours a week, and directed applicants to contact Fanciscus Verpaalen.[15] It also listed the following job specifications:

> Pumping manure. Hauling solid manure. Ready fields for spring planting. Remove snow from roofs and farm site. Care for calves and nursing mothers

[15] On the Employer Application form Verpaalen emailed to Martin and Opp that same day, Verpaalen listed herself as the employer-contact for VCS, and the text of her email calls attention to the fact that she named herself, and not her husband, despite the fact that Opp wanted to her husband to sign the application. *Compare* AX 7, *with* AX 20; AX 38.

> during the winter and spring months. General farm maintenance and equipment servicing duties. 1 month experience required. No drivers license requirements. No educational requirements.

Id. In the cover letter that Opp prepared to accompany this form, he described VCS' need for temporary farm workers as follows:

> Verpaalen Custom Service, LLC is a large scale commercial dairy, cattle, grain & custom service operation in northeastern south Dakota, which has a need for additional temporary farmworkers between the months of November and May of each year. Please keep in mind that although the employer does also perform some minor custom services for regional dairy farms throughout the winter months, this temporary labor certification is only being filed for seasonal work which needs to be performed at the employer's own farm site, and therefore the employer is not filing this application as an H-2ALC. During this time of the year the majority of the employer's calves will be born, as most dairy and cattle operations in the Dakota's have a fixed breeding/calving season in the fall, winter and spring months. Sickness runs rampant during this period of time and therefore calves and nursing mothers are in need of additional care during this vulnerable stage. Also, approximately 80% to 90% of all manure is pumped and removed in the fall and winter months, as there are local road restrictions in the spring and crops in the fields in the summer, both of which prohibit manure removal in the spring and summer months. Workers are also needed throughout the season to remove excessive amounts of snow that regularly drifts and piles up on buildings and roads, as well as complete general farm maintenance duties and equipment servicing, which generally takes place in the winter months when farm equipment lies dormant. The workers will also by [sic] preparing fields for planting in the spring months, which takes a large amount of labor to help pick rocks and complete other preparation duties. By early May these duties all come to a close and therefore additional temporary farmworkers are no longer needed by Verpaalen Custom Service, LLC until the following season.

(AX 38). The same information appears on the *Application for Temporary Employment Certification* (ETA Form 9142) that Opp prepared for VCS, which was signed by both Opp and Frido Verpaalen. (AX 6; Tr. 338, 605). DOL certified VCS' application and issued a temporary labor certification for ten temporary farmworker positions from November 20, 2011 to May 1, 2012.

Opp used the temporary labor certification to prepare an I-129 petition to adjust the status of the five H-2A workers employed by OTF and transfer their employer to VCS. (AX 8).[16] Before the transfer was complete, Verpaalen sent Opp an email, dated December 5, 2011, asking: "What happens if we are not done processing by the 13th? Do I have to pay them again out of

[16] The I-129 petition that Opp prepared sought to extend the nonimmigrant status of five H-2A workers based on a subsequent offer of employment from VCS. The beneficiaries listed in this petition are the same five men who Opp arranged to have transferred from Mooody County Dairy to OTF. The supporting documentation that Opp submitted with this petition included copies of the H-2A workers' most recent pay stubs from OTF.

another pocket?" (AX 21). At the hearing, Verpaalen explained that she sent this email because she was not sure what she should do if the certification for OTF expired before the workers were transferred to VCS, and wanted to make sure that she did not have to create additional payroll records like she had when the workers were transferred from Mooody County Dairy to OTF.

Opp also assisted the Verpaalens in finding a sixth H-2A worker who came to work for VCS. Verpaalen admitted that the H-2A workers who worked for VCS milked the same cows, with the same equipment, in the same milking parlor as the H-2A workers who worked for OTF, and that five of the six H-2A workers had in fact worked for OTF. (Tr. 334-35, 343). As Verpaalen put it, VCS "just exists on paper." (Tr. 334).

Prior to the end of VCS' certification period, OTF obtained another certification to employ H-2A workers for the spring, fall, and winter months of 2012, and EUSA arranged to have the same H-2A workers transferred back to OTF. (Tr. at 46-52; AX 32). WHD did not include the second OTF 9142 Application (from 2012) in its investigation period as the investigators arrived at OTF just days after that certification became valid. (Tr. 46; AX 15).

iv. *WHD Investigation & Notice of Debarment*

On April 25, 2012, WHD officials visited OTF to conduct an unannounced onsite investigation. (Tr. 37-39). The investigation was led by Brian Mundahl, a WHD investigator, who was accompanied by his supervisor, Assistant District Director Janet Wilson ("ADD Wilson"), and another WHD investigator, Christine Gorham-Hacker. (Tr. 37). All three WHD officials were in South Dakota as part of a national office initiative to investigate H-2A employers for compliance with program requirements. (Tr. 38-39). When they arrived at OTF, they did not know about VCS. (Tr. 39).

When they first arrived, Mundahl noticed a private residence off to the right, and very long milking barns and a parlor off to the left. (Tr. 39). He and his colleagues were greeted by Sonya Verpaalen, who showed them around—first to the office building, which was attached to the parlor where they milk the cows, then around the parlor and outside the milking barns, where they were able to look into windows. (Tr. 40). Verpaalen pointed out the H-2A workers, whom the WHD investigators observed working side-by-side next to U.S. workers, milking cows and moving cows around in the barns. (Tr. 40-41, 165-66). After this tour, Mundahl and his colleagues began gathering documents related to OTF's participation in the H-2A program, and after creating a list of missing documents, they decided to return the next day, April 26, 2012. (Tr. 41).

The next morning, Mundahl interviewed Sonya Verpaalen. (Tr. 42). During this initial interview, Verpaalen spoke with Mundahl about the issues OTF had encountered with the H-2A program the year before, including the difficulties that their prospective workers faced when trying to obtain visas from the U.S. embassy in Mexico, and she told Mundahl that the H-2A workers whom OTF eventually hired had been transferred to the farm from Mooody County Dairy. (Tr. 43-45; AX 30). Verpaalen told Mundahl that OTF did not have the same problems in 2012 because the H-2A workers whom OTF employed in 2011 stayed in the United States to work for "another H-2A farmer" after they left OTF, and they were able to return to OTF on

April 21, 2012 "with no problems." (Tr. 45-46; AX 30). After this interview, Mundahl spoke to ADD Wilson, who had interviewed two H-2A workers while he spoke to Verpaalen, and she had received conflicting information about when the H-2A workers arrived and where they had worked before OTF. (Tr. 47; 163-64). After lunch, Mundahl conducted a follow-up interview with Verpaalen, at which point Verpaalen admitted that the H-2A workers never left her dairy farm after they arrived the year before, and that they continued to work on her dairy farm during the winter months as employees of VCS, a second company at the same location. Verpaalen told Mundahl that she created VCS at the suggestion of Kevin Opp, who proposed that she create a second company when she asked how she could keep H-2A workers on her farm for a longer period of time. (AF 47-51; AX 31).[17] Verpaalen did not have copies of the Forms ETA-790 and ETA-9142 that VCS filed with DOL, so ADD Wilson contacted Kevin Opp, who indicated that they could obtain copies of this documentation at EUSA's office in Aberdeen, South Dakota. *Id*.

On April 27, 2012, ADD Wilson and Christine Gorham-Hacker drove to the EUSA office in Aberdeen, South Dakota and spoke with Opp. (Tr. 194; AX 12). According to the notes that Gorham-Hacker took during this meeting, Opp denied that he played any role in advising OTF to create a second company, or that he had anything to do with transferring workers from Mooody County Dairy to OTF. (AX 12). ADD Wilson recalls that when they discussed Opp's role in preparing the ETA Forms 790 and 9142 and placing the newspaper advertisements, which inaccurately described the actual job opportunity, Opp indicated that all of the information on the forms and advertisements was given to him by Sonja Verpaalen. (Tr. 199).

ADD Wilson's recollection is consistent with an email that Opp sent her, Gorham-Hacker, and Mundahl the same day as the visit, in which Opp expressed how "upsetting it [was] that [OTF]stated that we made up the job descriptions and they just signed it and didn't read it, as it is simply not the truth." (AX 13). Opp went on to state that "[a]ll job descriptions and dates were presented to DOL by our agency solely from the information that they provided to us," and that he and his staff "mimicked everything we placed on their ETA forms based upon this information, which was signed by them and then sent onto [DOL]." He concluded: "There is no way that they can maintain that the job descriptions and dates were not formulated by themselves." *Id*.

After Mundahl concluded the investigation, he prepared a narrative report summarizing his findings. (Tr. 84; AX 15). ADD Wilson reviewed this report and ultimately determined that OTF and VCS (collectively, "Employer Parties") committed several substantial violations of the H-2A program, and that Respondents participated in one of these violations, namely, the employment of H-2A workers in activities not listed in the job order and outside the validity period of employment.

On March 26, 2013, ADD Wilson issued a Notice of Debarment detailing Respondents' alleged participation in Employer Parties' substantial violation and notifying Respondents that

[17] Mundahl drafted the statement that Verpaalen signed after the interview. At the hearing, he testified that the statement is a result of clarifying statements between himself and Verpaalen, and that at points during their conversation, he would suggest a word or phrase to Verpaalen, who was not a native English speaker, if she appeared to be searching for a word, and that Verpaalen appeared to understand the meaning of the words or phrases he suggested. (Tr. 51).

they would be debarred from the H-2A labor certification program for a period of three years unless they timely requested a hearing before an administrative law judge. (AX 14). The Notice of Debarment described Employer Parties' substantial violation as follows:

> The subject *Applications for Temporary Employment Certification* (ETA Form 9142) and Job Orders included job title and activity descriptions that were inaccurate. The workers performed dairy activities that were not listed in the Applications or Job Orders. Employer Parties intentionally misrepresented this information on the Applications and Job Orders for the purpose of obtaining approval to procure H-2A workers to perform dairy work, which was not included in the Applications, Job Orders, recruiting advertisements or information submitted to the SWA. The subject Applications also misstated the reasons for temporary need. Old Tree Farms and VCS operate a commercial dairy on the same property and each represented the nature of temporary need as seasonal when in practice the workers were employed to perform dairy work on a year-round basis. Employer Parties created and used the two entities to keep and maintain the same H-2A workers year-round. Employer Parties also participated in a scheme to procure H-2A workers for whom visas had not been approved by the Department of State. Through their agent, Employment USA, LLC, Employer Parties had another farmer apply for certification and approval of H-2A workers that such farmer had no intent to employ, and the H-2A workers were immediately transferred to Employer Parties to perform dairy work that was not provided for in the Applications and Job Orders.

It states that Opp, as Employer Parties' agent through EUSA, advised and assisted Employer Parties in committing this violation by certifying the subject *Applications for Temporary Employment Certification*, which misstated the Employer Parties' period of intended employment, statement of temporary need, and job duties, in a deliberate effort to obtain certification for H-2A workers to perform dairy work on a year-round basis. *Id*. In addition, it states that Respondents advised and assisted another H-2A employer-client, Mooody County Dairy, L.P., in obtaining approval for H-2A workers for the sole purpose of transferring such workers to Employer Parties to perform activities that were not listed in the Employer Parties' job orders. *Id*.

Respondents timely requested a hearing before an administrative law judge, and on January 22, 2014, a Regional Solicitor referred this matter to the Office of Administrative Law Judges ("OALJ") for a final determination on the findings in the Notice of Debarment, specifically: (1) the violations alleged in the Notice of Debarment; and (2) the appropriateness and reasonableness of the debarment penalty assessed. (ALJX 1).

A formal hearing was held in Sioux Falls, South Dakota from December 9-11, 2014, at which both the Administrator and Respondents were represented by counsel and provided a full and fair opportunity to present evidence and argument. After the hearing, the parties submitted post-hearing briefs. The findings of fact and conclusions of law that follow are based upon the evidence admitted into the record, the testimony at the hearing, the arguments of the parties, and the applicable law.

II. ISSUES FOR DECISION

This matter was referred to OALJ for a final determination on the findings in the Notice of Debarment. ALJX 1. The Notice of Debarment alleges Respondents participated in Employer Parties' substantial violation of employing H-2A workers in activities not listed in the job order and outside the validity period of employment of the job order, and seeks to debar Respondents from the H-2A temporary labor certification program for a period of three years. I must therefore review the record de novo to determine whether Employer Parties' committed the alleged violation and if so, whether this violation is substantial. Because I ultimately find that Employer Parties committed the substantial violation alleged in the Notice of Debarment, I must also determine whether Respondents participated in this substantial violation, and if so, I will evaluate the factors set forth in 29 C.F.R. § 501.19(b) to determine whether their participation merits debarment. Prior to these determinations, I will make some general observations about the credibility of Kevin Opp and Sonya Verpaalen, and address Respondents' threshold arguments that Kevin Opp is not an agent subject to debarment under 29 C.F.R. § 501.20(b), (ALJX 1),[18] and that the three-year statute of limitations precludes me from considering some of the events at issue in this appeal.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

a) Credibility Determinations

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence – analyzing and assessing its cumulative impact on the record.

At the outset, I note that I found Sonya Verpaalen to be a generally credible witness and that I did not find Opp to be a credible witness. Verpaalen did not have a significant interest in the outcome of this litigation. When she testified at the hearing, she had already entered into a

[18] In their request for review, Respondents also allege that the debarment was unlawful because the INA does not authorize the Department to debar agents or attorneys. (ALJX 1). DOL considered and rejected this argument when promulgating the regulation authorizing debarment. 75 Fed. Reg. 6959, 6936-37 (Feb. 12, 2010). The authority to debar an agent or attorney is not derived from the Immigration and Nationality Act (INA), but rather, the general authority of an agency to prescribe its own rules of procedure and to determine who may practice and participate in administrative proceedings before it. *See id*. I defer to DOL's interpretation of its own authority in a duly promulgated regulation, and I presume this regulation to be valid. I also note that the United States Court of Appeals for the Second Circuit rejected an argument similar to the one raised by Respondents, albeit in the context of a different statute administered and enforced by DOL. *See Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987).

In addition, Respondents later alleged that the Notice of Debarment issued by ADD Wilson was void because it was not issued by the WHD Administrator. (ALJX 7). I addressed this argument in my November 24, 2014 Order Denying Summary Decision. *Id*. I generally presume agency officials have acted within their authority unless there is reason to believe otherwise. The record here demonstrates no reason to believe that ADD Wilson was not an authorized representative of the WHD Administrator, or that the procedural requirements set forth in 29 C.F.R. § 501.20(e) were somehow not met.

settlement agreement with WHD in which she agreed to pay significant civil money penalties and back wages and accepted a 3-year debarment from the H-2A program. As part of this agreement, she agreed to testify in the instant proceeding, but she made no agreement as to the content of her testimony.[19] If anything, the inclusion of this provision in the settlement agreement provides reason to believe that WHD was concerned she is so disinterested in the outcome of this litigation that she would not appear to testify if she was not legally required to do so. I am unpersuaded by Respondents' implication that Verpaalen had an incentive to lie because she was frustrated and disappointed by Respondents' service. (Tr. at 413-16).

When evaluating Verpaalen's credibility, I have considered the evasive and misleading responses that she initially provided to WHD investigators. I do not find these responses to significantly impact her testimony at the hearing, because ever since she disclosed the existence of VCS to WHD, she has been cooperative and forthcoming, and her accounts of the underlying events at issue in this matter have been consistent, except for understandable lapses in memory about whom exactly she spoke with and when.

Kevin Opp's testimony, on the other hand, was often evasive, self-serving, and inconsistent with his previous statements or testimony. One particularly egregious example of this is his testimony about the information he used to prepare Employer Parties' applications. When Opp met with ADD Wilson in April 2012, he insisted that the job descriptions and statements of temporary need in Employer Parties' ETA forms were based solely on information reported to him by Employer Parties. (AX 12; Tr. 199). After the meeting, Opp sent ADD Wilson an email in which he stated it was "very upsetting" that Employer Parties would say ESUA made up the job descriptions in their applications and that they signed them without reading them, "as it is simply not the truth." *Id.* Opp maintained that "all job descriptions and dates were presented to DOL by our agency *solely* from the information that [Employer Parties] provided to us." *Id.* (emphasis added). As an example, Opp attached a copy of EUSA's Employer Application form for VCS, which he claimed "state[ed] the job description and dates of need for this entity [VCS]," and that EUSA "mimicked everything [they] placed in [VCS'] ETA forms based upon this information, which was signed by them and then sent onto the CNPC." *Id.* He went on to assert: "there is no way that they can maintain that the job descriptions and dates were not formulated by themselves." *Id.* A cursory review of the ETA Forms 790 and 9142 that Opp prepared on behalf of VCS reveals that Opp did not mimic the information that Verpaalen reported on the Employer Application form. *Compare* AX 6, AX 38, *with* AX 7. Likewise, the ETA Forms 790 and 9142 that Opp prepared on behalf of OTF do not mimic the information that Verpaalen reported on the Employer Application form for OTF. (*Compare* AX 1 and AX 37, *with* AX 3).[20]

[19] There is no reason to believe that any deal was made with WHD regarding the content of her testimony or that anyone at DOL discussed the content of that testimony with Verpaalen outside of the context of her deposition, at which Respondents' counsel was present. (Tr. at 459-60).

[20] In fact, in some instances, the information that Opp included on OTF's ETA Forms 790 and 9142 contradicts the information that Sonya Verpaalen provided to EUSA on the Employer Application form or the Employee Profile form. For instance, Opp told ADD Wilson that the work hours he reported on the job order and in the advertisements—Monday through Friday 8:00 am to 5:00 pm—were the work hours that Sonya Verpaalen had reported to him. (Tr. 199). But the Employer Application provides a work schedule of 5 am to 5 pm and guarantees 50-60 hours per week. (AX 1). And the Employee Profile form clearly indicates that OTF was seeking employees willing to work the night shift. (AX 2). Moreover, both the Employer Application and the Employee

When Opp was deposed in July 2014, he again claimed that he prepared OTF's ETA Forms 790 and 9142 using only the information in the Employer Application form and a single conversation he had with Sonya Verpaalen (JX 4(a) at 55, 59-60, 64, 68). His testimony conflicted with Verpaalen's account; she claimed that neither she nor her husband provided all of the information that appeared in the Employer Parties' ETA forms. (JX 2 at 60; *see also* Tr. 310-13, 341-42). Verpaalen's testimony was supported by documentary evidence, which indicated that Opp used the same job descriptions and statements of temporary need in Employer Parties' applications as he had in applications that he submitted to DOL on behalf of other employer-clients in the dairy industry. (*See* AX 24; AX 25; AX 26; AX 27; AX 28; AX 29; Tr. at 98-115). When WHD confronted Opp with one of these applications, he fortuitously remembered that he had also relied on information from similar businesses in the industry when he prepared Employer Parties' ETA Forms 790 and 9142. (JX 4 at 286-89).

Opp further tweaked his testimony at the hearing. He emphasized that he completed H-2A applications based on an employer application, a conversation with the employer, and his understanding of industry practices based on previous experience with other employers in the industry, and that he relies "heavily" on an employer-client to correct errors in their application when he forwards it to them for their signature and review. (Tr. 470, 504, 508, 576, 593). It is noteworthy that Opp only remembered the third and significant source of information *after* he was confronted with other applications that contained nearly identical job descriptions and statements of temporary need.

Opp's hearing testimony is difficult to reconcile with his initial insistence that he based the job descriptions that he prepared for Employer Parties' ETA forms "solely" on information he obtained from Employer Parties. For instance, at the hearing, Opp stated:

> [W]hat I've stated is, we start every application based off of three factors: a conversation with the employer, the vaguely-filled out Employer Application form, and our experience with previous employers. And then we rely heavily on the employer to correct the application once it's submitted with our instructions saying, "Review for accuracy. Let us know if there are any mistakes."

(Tr. 593). But this assertion is incompatible with Opp's initial insistence that the ETA Form 9142 "mimicked" the responses EUSA received from Employer Parties in their Employer Application. The stark contrast between these two accounts significantly compromises Opp's credibility. Opp could not have sincerely found it "very upsetting" that Employer Parties said he made up the job descriptions on their applications if he frequently used the same job descriptions on his clients applications and then "rel[ied] heavily" on his clients to correct any misstatements.

Profile forms indicate that OTF did not require any experience for the position, but the ETA Forms 790 and 9142 both list a six month experience requirement. Verpaalen provided the Employer Application and the Employee Profile forms to EUSA before Opp prepared the ETA Forms 790 and 9142. *Compare* AX 2 (dated January 26, 2011), *with* AX 37 (dated February 3, 2011) and AX 1 (dated February 9, 2011). The reason for these discrepancies was never adequately addressed by Opp, whose only explanation was that he only reviewed the Employer Application, and did not review the Employee Profile.

It is also noteworthy that Opp only backtracked from his initial account *after* he was on notice that WHD discovered he had used the same job descriptions and statements of temporary need in applications for other employers. It is suspicious that it was not until Opp was confronted with this finding that he suddenly remembered he had relied on a third source of information to prepare the Employer Parties' applications: his experience with other employers in the industry and common industry practices. This sudden change in memory is highly improbable, particularly given Opp's initial outrage over Employer Parties' allegation that he made up the information that was presented on the application. It is far more likely that Opp copied previously tested job descriptions and statements of temporary need into Employer Parties' ETA Forms 790 and 9142, and that he did this in order to improve the likelihood that Employer Parties obtained a temporary labor certification from DOL.

For these reasons and others discussed later in this opinion, I found Verpaalen's testimony to be significantly more credible than that of Kevin Opp.

b) Respondents are Agents Subject to Debarment

The WHD Administrator (or his or her authorized representative) may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B or 29 CFR part 501, if he or she finds that the agent or attorney participated in an employer's substantial violation, by issuing a Notice of Debarment. 29 C.F.R. § 501.20(b); *see also* 29 C.F.R. § 501.3 (defining WHD Administrator). The applicable regulations define an "agent" as:

> A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that: (1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes; (2) Is not itself an employer, or a joint employer, as defined in this section with respect to a specific *Application for Temporary Employment Certification;* and (3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

29 CFR § 501.3. EUSA stipulated that it was authorized to act on behalf of OTF and VCS for purposes of the temporary labor certifications at issue in this appeal. (Tr. 8). I therefore find that EUSA is an agent subject to debarment under 29 CFR § 501.20(b).

Respondents contend that Kevin Opp is not an "agent" subject to debarment under 29 C.F.R. § 501.20(b) because:

> OTF and VCS did not retain Kevin Opp. They did hire Employment USA, LLC to act as a filing agent. They hired Employment USA, LLC for help with the filing process and Employment USA provided services related to gathering information, preparing forms, and filing the forms as well as monitoring the Application process after the forms were filed.

(AX 35). In support of this argument, Opp relies on the Agency and Indemnity Agreements that Employer Parties entered into with EUSA. (AX 10; AX 11). These agreements only define EUSA as the agent authorized to act on behalf of Employer Parties for purposes of temporary labor certification. (AX 10; AX 11). But they were both signed by Kevin Opp, and both agreements indicate that Opp is the Operations Manager of EUSA. Opp also prepared and signed the *Application for Temporary Employment Certification* (ETA 9142) that resulted in the certification of 10 H-2A positions at OTF from April 10, 2011 to December 13, 2011. (AX 1). In two separate sections of this application—Section E and Appendix A.2—Opp indicated that he was the attorney or agent who assisted the employer (OTF) in the filing of the application. *Id*. Opp personally signed the Attorney or Agent Declaration in Appendix A.2, which begins: "I hereby certify that I am an employee of, or hired by, the employer listed in Section C of the ETA Form 9142, and that I have been designated by that employer to act on its behalf in connection with this application." *Id*. And in the cover letter accompanying this application, Opp informed DOL officials that they should contact him if they require any additional information. (AX 1). The same is true of the *Application for Temporary Employment Certification* (ETA 9142) and cover letter that resulted in the certification of H-2A positions at VCS from November 20, 2011 to May 1, 2012. (AX 6). Opp signed both ETA Forms 9142 before forwarding them to Employer Parties, who signed the applications and thereby acknowledged that Opp was authorized to act on their behalf. This finding is also supported by the testimony of Sonya Verpaalen, who confirmed that she authorized Opp to act on behalf of OTF for purposes of temporary labor certification. (JX 2 at 61; Tr. 316-17).

Respondents appear to allege that Opp is not an agent because the Agency and Indemnity Agreement only authorized EUSA, and not Opp, to act on Employer Parties' behalf. Under Respondents' interpretation, DOL could never hold an individual acting as an agent liable for his or her participation in a substantial violation as long as he or she did not personally enter into an agency agreement with that employer; only an agent's corporation could be disbarred. As applied to this case, Opp could never be held personally liable for his participation in Employer Parties' substantial violation —even if I find that he held himself out to be Employer Parties' agent and personally participated in Employer Parties' commission of a substantial violation. Such an interpretation would allow unscrupulous agents employed by disbarred corporations to incorporate a new entity under which they could continue to represent employers seeking temporary labor certification, and would provide individuals who work for agent-entities little incentive to comply with H-2A program requirements. I decline to adopt this interpretation, as it is not compelled by the regulations.

While the definition of an "agent" at 29 CFR § 501.3 is not entirely clear, in a case such as this, where Opp held himself out as a person who was authorized to act on behalf of Employer Parties, I need not determine whether Opp had actual (as opposed to apparent) authority to act on behalf of Employer Parties. In Employer Parties' filings with DOL and the South Dakota SWA, Opp represented that he was Employer Parties' agent and that he was authorized to act on their behalf for purposes of those filings. The regulation that defines "agent" does not require explicit authorization in the parties' agency and indemnity agreement. Nor does it preclude simultaneous representation by two or more "agents." The record in this case indicates that Employer Parties authorized both EUSA *and* Opp (individually, as the Operations Manager of EUSA) to act on their behalf, and that Opp held himself out to be authorized to act on Employer Parties' behalf in

the filings that he prepared and submitted to DOL and USCIS. *See, e.g.*, AX 1; AX 4; AX 6. Accordingly, I find that EUSA and Opp are both "agents" subject to debarment under 29 CFR § 501.20(b).

c) Applicable Limitations Period

Prior to the hearing, Respondents filed Consolidated Motions in Limine arguing that I should "exclude documentary evidence or testimony relating to alleged occurrences prior to March 26, 2011," because any evidence preceding that date is time-barred by the two-year limitations period in the Immigration and Nationality Act or 29 C.F.R. § 501.20(c)(1). I decline to adopt Respondents' interpretation of the limitations period.

The authority to debar an agent or attorney is not derived from the Immigration and Nationality Act (INA), but rather, the general authority of an agency to prescribe its own rules of procedure and to determine who may practice and participate in administrative proceedings before it. *See* 75 Fed. Reg. 6884, 6937 (Feb . 12, 2010). Accordingly, the two year statute of limitations in the INA regarding the debarment of employers is not applicable to the debarment of agents or attorneys. The limitations period in 29 C.F.R. § 501.20(c), however, is applicable. This section provides: "The WHD Administrator must issue any Notice of Debarment no later than 2 years after the *occurrence of the violation*." 29 C.F.R. § 501.20(c) (emphasis added). The two year period begins to run from the date of the occurrence of the violation identified in the Notice of Debarment. In this case, the WHD Administrator seeks to disbar Respondents from acting as agents due to their participation in Employer Parties' substantial violation of employing H-2A workers outside the validity period of employment and in activities not listed in the job order. Accordingly, the Notice of Debarment must have been issued "no later than two years after the occurrence of the violation" in which Respondents allegedly participated, i.e. the *employment* of H-2A workers in activities not listed in the job order and outside the validity period of employment. This violation did not even begin to occur until July 2011, when the H-2A workers arrived at OTF and OTF actually *employed* the H-2A workers in activities not listed in the job order in July 2011, and it continued to occur until the end of the certification period for VCS.[21]

Section 501.20(c)(1) does not require that evidence related to Respondents' acts of participation in this violation occur within a two-year period of the Notice of Debarment. In other words, only the underlying "substantial violation" committed by Employer Parties—the employment of H-2A Workers in activities not listed on the job order and outside the validity period of employment — must have occurred within the two-year period prior to the issuance of the Notice of Debarment. Because the Notice of Debarment in this case was issued on March 26, 2013—less than two years after the substantial violation at issue began to occur—-it was issued in accordance with the time period required by 29 C.F.R. § 501.20(c). I will not exclude evidence of Respondents' actions prior to March 26, 2011, as they do not change the date on which the alleged violation occurred. I consider Respondents' actions prior to this date because they are helpful in providing context for Respondents' alleged participation in Employer Parties' substantial violation, but as discussed in detail below, many of Respondents actions and

[21] I do not consider OTF's second certification period, as it was not raised as an issue in the Notice of Debarment.

omissions related to their participation in Employer Parties' substantial violation occurred after March 26, 2011, and Respondents actions within this two year period alone would lead me to conclude that they participated in Employer Parties' substantial violation.

d) Employer Parties' Committed A Substantial Violation

The violations that may warrant debarment are set forth at 29 C.F.R. § 501.20(b). Pursuant to this section, a "violation" includes: "[o]ne or more acts of commission or omission on the part of the employer or the employer's agent which involve . . . [e]mploying an H–2A worker . . . in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof . . . ." 501.20(d)(1)(vii). In determining whether a violation is substantial, the factors set forth at 29 C.F.R. § 501.19(b) must be considered. 29 C.F.R. § 501.20(d)(2).

The Administrator alleges that the Employer Parties committed a substantial violation by employing H-2A workers in activities not listed in the job order and outside the validity period of employment of the job order. As discussed below, I find that the Administrator has demonstrated by a preponderance of the evidence that Employer Parties did commit this violation and that the violation was in fact substantial.

i. *Employer Parties Employed H-2A Workers in Activities Not Listed in the Job Order*

The record establishes that Employer Parties employed H-2A workers in activities not listed on the job order. Sonya Verpaalen credibly testified that the work assigned to H-2A workers at OTF included milking cows, moving cows into the parlor, and scraping the fence. (Tr. 332; 307-308).[22] None of these activities are listed in the Form ETA-790 that Opp filed with the SWA. (AX 37). Because job orders are based on the information that is reported in the Form ETA-790, it is reasonable to assume that none of these activities were listed on the job order posted by the SWA. (Tr. 62, 175).[23]

In fact, at the hearing, Verpaalen admitted that the H-2A workers employed by OTF did not perform *any* of the activities that were listed in the Form ETA-790 that Opp submitted to the South Dakota SWA. (Tr. 313).[24] This is consistent with reports from WHD investigators, who made observations and spoke with Sonia Verpaalen and the workers at OTF over the course of the investigation, and learned that the H-2A workers at OTF were not engaged in the work

[22] This testimony is consistent with Sonya Verpaalen's previous testimony in connection with these proceedings, as well the observations of Mundahl and ADD Wilson during their onsite investigation in April 2012. (AX 1; AX 6; AX 37; AX 38; Tr. 52-53, 64-65, 67-68, 76-79, 175)

[23] *See also* 20 C.F.R. § 655.103 (defining a job order as "[t]he document containing material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter- and intra-state job clearance systems based on the employer's Agricultural and Food Processing Clearance order (Form ETA-790), as submitted to the SWA").

[24] Verpaalen testified that the H-2A workers did not perform any of the job duties on the ETA Form 9142. Tr. 313. The job duties that Opp listed on this form are identical to the job duties that he listed in the Form ETA-790, which, as explained above, forms the basis of the job order posted by the SWA.

described on the ETA forms 790 or 9142, but rather were milking cows, scraping manure, feeding cows, and doing other year-round jobs associated with a dairy operation. (AX 1; AX 6; AX 37; AX 38; Tr. 52-53, 64-65, 67-68, 76-79, 175). Verpaalen acknowledged that the H-2A workers who worked for VCS milked cows, moved cows to the parlor, and scraped the fence after they were transferred from OTF to VCS, just as they had when they worked for OTF. (Tr. 343). None of these dairy-related job duties were listed on the Form ETA-790 that Opp submitted to the SWA on behalf of VCS. *See* AX 38. Nor, consequently, would they have been listed in the job order posted by the SWA. (Tr. 62, 175). Accordingly, I find that Employer Parties employed H-2A workers in activities that were not listed on either of the respective job orders.

Respondents concede that OTF employed H-2A workers outside of the certified job order; however, they argue that VCS did not because, according to Respondents, VCS' job order "included milking and WHD has not proven that any milking that it observed was not the milking described in VCS' job order." (Respondents' Brief at 9). The Form ETA-790 that VCS filed with the SWA did not *list* "milking," at least not explicitly. (AX 36). Respondents did not specify why they believe milking was "included" in the job order, so I can only assume that Respondents believe milking is included in an activity that was actually listed in the Form ETA-790. The only activity that this could be is "car[ing] for calves and nursing mothers during the winter and spring months." (AX 36). I need not decide whether this activity "includes" milking,[25] because even if it does, VCS still employed H-2A workers in activities that were not listed in the Form ETA-790, such as moving cows around the barn and scraping the fence. Tr. 343. Consequently, regardless of whether "milking" was "included" in an activity that was actually listed in the job order, the record nevertheless establishes that VCS employed H-2A workers in activities that were not listed in the job order, namely, moving cows into the parlor and scraping the fence.

ii. *OTF Employed H-2A Workers Outside the Validity Period of Employment of the Job Order*

The Administrator argues that OTF employed H-2A workers outside the validity period of employment because the H-2A workers who were employed by VCS were actually employed by OTF, since VCS was a sham corporation that was, for all intents and purposes, OTF. The record supports this allegation. OTF was certified to employ H-2A workers from April 10, 2011 through December 13, 2011. (AX 1). On December 14, 2011, when OTF's H-2A workers were transferred to VCS, they worked in the same position and performed the same job duties as they had when they worked for OTF. (Tr. 168, 343). Their employment and living arrangements remained exactly the same. (Tr. 343).

[25] I note, however, that this activity does not appear to include milking. At the hearing, Sonya Verpaalen explained that calves and nursing mothers need increased medical attention in the winter, not increased milking: "[T]he winter season is harder on our calves and on our fresh cows. These are the cows that just gave a baby. They need more attention during the cold winter months. They're more likely to have problems. They need more care." (Tr. 346). During Respondents' cross examination, Verpaalen acknowledged that cows need to be milked after they've given birth, but she again confirmed that care for nursing mothers is more intense during the winter months because the cows are weaker in the winter and there is more work related to their health issues, not more work related to milking, which occurs on a year-round basis. (Tr. 447).

Employer Parties' attempt to extend the validity period of employment by placing a second job order under a second entity, VCS, does not negate the fact that the H-2A workers were still employed by the same dairy farm, in the same positions, performing the same job duties. Verpaalen acknowledges that she and her husband created VCS so that OTF could continue to employ H-2A workers for a longer period than they could have under the original temporary labor certification and I-129 petition. (Tr. 333-35). By her own admission, VCS exists "only on paper," and was not independent of OTF's pre-existing dairy farm at the same location. (Tr. 334-35). Because the H-2A workers who were "transferred" to VCS were, for all intents and purposes, still employees of OTF, I agree with the Administrator that OTF employed H-2A workers outside the validity period of employment on the job order.

iii. *The Above-Referenced Violations Are Substantial*

In order to determine whether a violation is so substantial as to merit debarment, I must consider the factors set forth in 29 C.F.R. § 501.19(b). 29 C.F.R. § 501.20(d)(2).[26] Upon considering these factors as a whole, I find that Employer Parties committed a substantial violation.

1) Previous history of violations

Employer Parties have no history of previous violations. But this factor, in of itself, does not lead me to conclude that the violation was not substantial.

2) Number of workers affected

It does not appear as though the H-2A workers employed by Employer Parties were negatively affected by the violation, unless these workers would have preferred to perform the job duties described in the job order, as opposed to the duties that they were actually assigned. Corresponding U.S. workers in the region may have been affected, since Employer Parties only advertised part-time farmworker positions, but then employed H-2Aworkers in permanent, full-time positions that do not qualify for the H-2A program. This may have negatively affected the wages and employment opportunities of U.S. workers in corresponding employment in the region.

3) Gravity of the violations

The gravity of Employer Parties' violation weighs strongly in favor of finding that their violation was substantial. OTF filed applications and petitions with federal immigration authorities that did not accurately describe the nature of the services that would be performed by H-2A workers or the anticipated period of employment. Sonya Verpaalen signed these applications and petitions even though she knew they contained inaccuracies. She also created a second company, VCS, for the sole purpose of filing additional applications to employ H-2A

[26] Employer Parties' have settled with WHD and accepted debarment. My review of the substantiality of Employer Parties' violations does not consider this settlement. I only review whether the violations themselves merit debarment under the factors set forth in § 501.19(b).

workers. Tr. 333–34. She then followed Opp's advice to conceal the connection between OTF and VCS by activating a new address, asking her husband to sign the paperwork for VCS, and approving of different, yet inaccurate, position descriptions and statements of temporary need. Verpaalen did this to extend the time period in which OTF could employ H-2A workers in non-seasonal, non-temporary positions, and that is precisely what OTF did: when the H-2A workers at OTF were transferred "on paper" to VCS, they performed the same, non-seasonal duties that they had when they worked for OTF. (Tr. 343). Verpaalen used VCS to evade the statutory requirement that H-2A workers perform agricultural labor or services "of a temporary or seasonal nature." Given her complete disregard for this requirement and the excessive lengths that she and her husband went through in order to evade it, I find that the gravity of the violation weighs in favor of finding that Employer Parties committed a substantial violation.

4) Efforts made in good faith to comply

Employer Parties' lack of good faith effort to comply with the H-2A program weighs in favor of finding that their violation was substantial. The Verpaalens attested to the truthfulness of applications and petitions that presented materially inaccurate information about the job duties that would be performed by H-2A workers and the nature of Employer Parties' temporary need for workers. And despite the misleading statements in these applications and petitions, the Verpaalens allowed them to be presented to federal immigration authorities. The fact that Opp and his staff at EUSA may have downplayed the gravity of these misrepresentations does not change the fact that the Verpaalens knew that their filings contained these misrepresentations and they nevertheless attested to their truthfulness. Nor does it justify the Verpaalens' decision to assign duties to H-2A workers that they knew were not included in the job order. Because the record reveals that Employer Parties did not make a good faith effort to comply, I find that this factor weighs in favor of finding that Employer Parties' committed a substantial violation.

5) Explanation from the person charged with the violation(s)

For many of the same reasons that are discussed above, Employer Parties' explanation of the violation does not lead me to believe that the violation was not substantial. Their explanation largely boils down to Verpaalen's allegations that she relied on the advice of Opp and his staff at EUSA, and that it was Opp and his staff who devised and executed all of the maneuvers that allowed them to employ H-2A workers in activities other than those listed in the job order and outside the validity date of employment. (Tr. 390, 452). As discussed below, I find Verpaalen's testimony to be credible, but her reliance on Opp's advice does not excuse her knowing failure to comply with the requirement that H-2A workers only perform labor or services that are temporary or seasonal in nature. Accordingly, this factor also weighs in favor of finding that Employer Parties committed a substantial violation.

6) Commitment to future compliance

Verpaalen appeared to be remorseful, but this does not negate the fact that she knowingly disguised the positions on her farm in order to employ H-2A workers in full-time, permanent positions that she knew were not appropriately filled under the H-2A program. Thus, even

though Verpaalen has expressed a commitment to future compliance, this commitment does negate the gravity of the violation or her earlier deceit.

7) Extent to which the violator achieved financial gain due to the violation, or the potential financial loss or potential injury to the workers

ADD Wilson determined that the violation may have resulted in a financial gain for the Employer Parties, who, as a result of having a steady workforce of H-2A workers, did not incur recruitment costs and did not have to worry about employment gaps. I agree with this finding, since the violation permitted OTF to employ H-2A workers in full-time, year-round positions without resorting to other measures to attract and retain workers for these positions, such as increasing the wage rate or offering additional benefits. Accordingly, this factor also weighs in favor of finding that the violation was substantial.

When weighed as a whole, these factors lead me to conclude that the violation described above was substantial in nature. Employer Parties have accepted liability for their involvement in this scheme, and they have agreed to accept a three-year debarment, and to pay back wages and civil money penalties for violations related to their employment of H-2A workers in 2011 and 2012. ALJX 8.

e) Respondents Participated in Employer Parties' Substantial Violation

The credible evidence of record indicates that Respondents devised a scheme that enabled Employer Parties to employ H-2A workers in the same non-seasonal positions, on the same dairy farm, on a year-round basis. Opp, and the EUSA employees whom he supervised, aided and abetted Employer Parties in successfully carrying out this scheme by: (1) preparing and submitting applications to DOL and DHS, with knowledge or in reckless disregard of the fact that the application contained false and materially inaccurate information, in a deliberate attempt to help Employer Parties obtain approval to employ H-2A workers in positions, which if described accurately, would not qualify for the H-2A program; and (2) advising Employer Parties to create a shell company as a means to continue to employ H-2B workers on a year-round basis. Respondents assisted in helping Employer Parties carry out this scheme, which foreseeably led to the employment of H-2A workers in activities that were not listed in the job order and outside the validity date of employment on OTF's job order.

At the hearing, it was readily apparent that Verpaalen did not have enough knowledge or experience with the H-2A program to devise or carry out this scheme without significant assistance from Respondents. By assisting Verpaalen in successfully carrying out this scheme, Respondents knowingly enabled Employer Parties to obtain permission to employ H-2A workers in positions for which Employer Parties would not have otherwise been able to obtain certification. Employer parties then foreseeably employed H-2A workers in activities not listed in the job order, and on the same dairy farm, in the same positions, on a year-round basis (and thus outside the validity date of employment on the job order). Based on Opp and his staff's willful actions and omissions in the commission of this scheme, I find that Respondents

participated in Employer Parties' violation of employing H-2A workers in activities that were not listed in the applicable job order and outside the validity period of employment.

Before providing specific details about this finding, however, I must address an issue Respondents raised about the meaning of "participation." In their Closing Brief, Respondents alleged that the Administrator must prove that Employer Parties and Respondents were "consciously committed to a common scheme to employ H-2A workers unlawfully." (Respondent's Brief at 14; *see also* Respondent's Brief at 11-14). In support of this standard, Respondents compare the preamble to the 2010 H-2A Final Rule to the preamble to the 2008 H-2A Final Rule and cite case law defining the meaning of "conspiracy" in the context of the Sherman and Clayton Acts. *Id.*[27] Although the 2010 H-2A Final Rule did change the standard for which an agent may be debarred, it did not change it in the way that Respondents contend. Under the 2008 Rule, an agent could be debarred if the agent "participated in, had knowledge of, or had reason to know of, an employer's substantial violation," but this rule required a substantial violation to be willful. 73 Fed. Reg. 77110, 77227 (Dec. 18, 2008). The 2010 Rule eliminated "had knowledge of, or had reason to know of," from this standard, but it also eliminated the willfulness requirement. *See* 75 Fed. Reg. 6884, 6937 (Feb. 12, 2010). DOL explained this revision as follows:

> The Department does not intend to debar attorneys who obtain privileged information during the course of representation regarding their client's violations. We asserted authority to debar attorneys, like the authority to debar agents, to ensure that we are able to address substantial violations committed by the attorneys or agents themselves, or committed in concert with the employers. The Department is not seeking to debar attorneys who, while working to assist their clients in complying with the H–2A program, make an error. Nor are we seeking to debar attorneys whose clients disregard their legal advice and commit substantial violations; the appropriate party to be debarred in that situation would be the employer-client. However, the Department is asserting its authority to debar attorneys who work in collusion with their employer-clients to commit substantial violations. Therefore, in response to the comments, we have modified the Final Rule to allow for the debarment of attorneys only if the OFLC Administrator finds that the attorney has participated in a substantial violation.

Id. As explained above, the 2010 H-2A final rule merely eliminated an attorney or agent's knowledge of, or reason to have knowledge of, a substantial violation as an independent ground for debarment. The meaning of the remaining term—"participation"—is not as limited as Respondents allege, nor is it completely open-ended. An agent's "participation" in an employer's violation must consist of "[o]ne or more acts of commission or omission on the part of the . . . employer's agent which involve . . . [one of the enumerated violations]." 29 C.F.R. § 501.20(d)(1). When an agent or attorney's "participation" is considered in conjunction with the factors that must be considered in § 501.19(b), there is no possibility that agents who represent employers will be held strictly liable for their clients' violations. *See* 75 Fed. Reg. at 6937. It is

[27] Respondent goes to great lengths to establish the meaning of "conspiracy" in this context, but I need not address this because it has no relevance to this matter.

only when agents participate in the commission of a substantial violation with their employer-client that they will be held liable. And such participation must include an agent's preparation and submission of applications to federal immigration authorities with knowledge or in reckless disregard of the fact that the applications contain false or materially misleading information about its client's business operations.

i. *Respondents Participated in the Employment of H-2A Workers in Activities Not Listed in the Job Order*

After carefully reviewing the testimony and evidence submitted in this matter, I find that Respondents participated in Employer Parties' substantial violation by providing Employer Parties the means to employ H-2A workers in activities that were not listed in the applicable job orders. I find that Respondents did so by knowingly providing materially inaccurate and misleading information on the Form I-129 and Forms ETA 790 and 9142 in a deliberate effort to obtain temporary labor certification for positions that would not otherwise qualify for the H-2A program.

It is undisputed that Kevin Opp prepared the job descriptions that appeared in the job orders at issue in the instant case. (Tr. 499-500). At the hearing, Opp testified that he prepared the ETA forms for the positions at OTF using the information Verpaalen provided in the Employer Application form, information he obtained from a phone conversation with Verpaalen (including a statement by Verpaalen that she wanted to use the H-2A program like Lynn Boadwine), and his experience with other employers in the dairy industry. (Tr. 504, 508). Likewise, Opp testified that he prepared the ETA forms for VCS using the Employer Application form, the information that Jessica Martin relayed to him from her conversations with Verpaalen, and his understanding of VCS' business based on those conversations. (Tr. 602, 605–06). In both cases, the resulting applications presented job descriptions and statements of temporary need that are nearly identical to those in other applications that Opp filed on behalf of different employers and, in the case of Employer Parties, applications that did not accurately reflect his clients' need for agricultural labor or services. *See* AX 24; AX 25; AX 26; AX 27; AX 28; AX 29; Tr. at 98-115.

It is also clear that Opp submitted Employer Parties' Form ETA-790s to the South Dakota SWA without ever asking Employer Parties (a) whether they actually intended to employ H-2A workers in the activities that were listed in his boilerplate job descriptions, or (b) whether they intended to employ H-2A workers in activities that were not listed in his boilerplate job descriptions.[28] He then used these boilerplate job descriptions to prepare ETA Forms 9142, which he signed and forwarded to Employer Parties for their signature. When Opp signed the ETA Form 9142s, he certified that the information contained therein was true and correct to the best of his knowledge. Opp made this certification even though he had never asked Employer Parties whether the information in these forms—much of which was based on Opp's experience with "industry practice," rather than information that Employer Parties provided to Opp—

[28] At the hearing, Opp was asked whether Verpaalen had the opportunity to review the draft Form ETA -790 before he sent it to the SWA. (Tr. 499). His response indicates that she did not. (Tr. 499-501).

actually applied to their businesses. This omission is significant, as both agents and employers are responsible for the accuracy and veracity of the information and documentation submitted to DOL in connection with an *Application for Temporary Employment Certification* (ETA Form 9142). *Cf. Temporary Non-Agricultural Employment of H–2B Aliens in the United States*, 80 Fed. Reg. 24042, 24057 (Apr. 28, 2015) (Reminding agents and employers that when filing an *Application for Temporary Employment Certification* under the H-2B program "each is responsible for the accuracy and veracity of the information and documentation submitted, as indicated in the ETA Form 9142B and Appendix B, both of which must be signed by the employer and its agent"). At the time Opp certified Employer Parties ETA Form 9142s, he had no reasonable basis to believe that the job descriptions and statements of temporary need on the forms actually reflected Employer Parties' need for agricultural labor or services, given that he had never contacted Employer Parties to ask whether his boilerplate job descriptions were consistent with the positions for which they sought to hire H-2A workers or whether his boilerplate statements of temporary need were consistent with their temporary need for H-2A workers in these positions.

Respondents disclaim any liability for inaccurate information on the ETA Forms and argue that "EUSA did its job and the fact that OTF later violated the regulations does not justify an inference that EUSA colluded or 'participated in' OTF's violation." (Respondent's Brief at 19). But, as discussed above, the record reveals that Opp copied the job descriptions and statements of temporary need in Employer Parties' ETA Forms 790 and 9142 from applications that he had successfully filed on behalf of other dairy farms. Because Opp copied and pasted this information without ever asking Employer Parties if the information actually applied to their business operations, it is reasonable to infer that Opp prepared the ETA forms without regard for whether the job descriptions and statements of temporary need actually described Employer Parties employment needs. Rather, it is reasonable to infer that Opp was more interested in getting Employer Parties' applications approved.

In an attempt to deflect liability, Respondents allege that Employer Parties should have corrected any false or misleading information before they signed their applications. I do not disagree that Employer Parties should have done so. But Employer Parties' failure to make these corrections does not absolve Opp of his responsibility to submit applications that are, to the best of his knowledge, accurate and complete. Moreover, Opp's alleged reliance on Employer Parties to correct inaccurate information is dubious and misplaced. Opp sent the applicable Form ETA-790s to the South Dakota SWA without Employer Parties' signature or review.[29] Respondents defend this action by arguing that it is not difficult for an employer to correct information if it is inaccurate or incorrect. But the process of amending the job order and/or application is more complicated than they make it out to be. According to Opp, there are several means by which an employer can make a change: (1) an employer could make a "hand amendment" on the ETA Form 9142, which he said happens quite often; (2) an employer could call EUSA and ask for new forms, which he said happens from time to time; or, if the incorrect information is caught after the application has been submitted to DOL (3) an employer could amend the form while its processing before DOL. (Tr. 501). Opp's explanation disregards the fact that the information in

[29] At the hearing, Opp was asked whether Verpaalen had the opportunity to review the draft Form ETA -790 before he sent it to the SWA. (Tr. 499). His response indicates that she did not. (Tr. 499-501).

the ETA Form 9142 must match the information in the job order posted by the SWA (which is based on the information reported to the SWA in the Form ETA-790). And although an employer may request a modification to a job order before filing an ETA Form 9142 with DOL, it may not amend the job order on or after the date it files the ETA Form 9142. 20 C.F.R. § 655.121(e). Given the difficulty that it takes to modify a job order, it is doubtful that Opp actually intended to request such a modification for either of Employer Parties applications if he did not even take the time before he submitted the ETA 790 to ask them whether the information on the form accurately reflected their employment needs. The time and effort it would take Opp to go through the process of amending a job order to make a modification is much greater than the time and effort it would have taken to just ask Employer Parties if it was correct in the first place. Consequently, I find that Opp did not seriously intend to make revisions to the job descriptions or statements of temporary need on the ETA Forms 790 or 9142, despite his testimony that this would be feasible.

Verpaalen agrees that Opp sent her the ETA Form 9142 for review and signature before it was forwarded to DOL. (Tr. 311). Their accounts differ dramatically thereafter. Verpaalen testified that she spoke to Opp both before and after she received the ETA Form 9142 that Opp prepared for OTF. (Tr. 307, 311–12). She maintained that during these conversations, Opp told her multiple times that it would be okay to use H-2A workers to milk cows at her farm. (Tr. 315, 388, 409–10). She specifically remembered that Opp told her "what happens in real life doesn't have to be on paper" and that as long as DOL did not investigate her farm she would be fine. (Tr. 314–15, 463). She also recalled that she specifically reached out to EUSA to let Opp know that OTF did not have the summer grazing pastures that Opp included in the job description and statement of temporary need on the ETA Form 9142. (Tr. 311-312, 314). She remembered that she discussed this issue with someone at EUSA—she thought it was Opp but she could not be sure after so much time had passed—and that she was advised to leave the information about summer grazing pastures on the application because "the more seasonal [duties] we have on your application, the better it is to get it approved." (Tr. 311-312, Tr. 445). Opp denies that he spoke with Verpaalen about OTF's lack of summer grazing pastures or that he advised her to leave inaccurate information on the application. (Tr. 471, 502-03; Respondents Brief at 3). Opp also denies that he told Verpaalen that it would be okay to employ H-2A workers in non-seasonal duties—specifically milking—if OTF did not have enough seasonal duties to keep the H-2A workers busy, or that she could use the H-2A workers to milk cows as long as DOL did not investigate her farm. (Tr. 561–62, 564-66, 577–78).

My review of the entirety of the record demonstrates that Verpaalen's testimony is credible. The email evidence of record indicates that Verpaalen frequently communicated with both Opp and his assistant, Jessica Martin, throughout her participation in the H-2A program, and that she was candid about her questions and concerns. The advice Verpaalen alleges she received from Opp—that she could employ H-2A workers in activities not listed on the job order, specifically milking cows—is consistent with Opp's practice of using undifferentiated template language on H-2A applications for multiple different employers. Opp cannot reasonably expect each employer in the same "industry" to employ H-2A workers in identical job duties. Verpaalen's account, on the other hand, is entirely plausible. Opp contends that he would never tell her to leave inaccurate information on the application because listing more seasonal duties on an application does not increase the likelihood of certification. But I see no

reason for Verpaalen to make this up, and given that Opp used the same template language in applications for multiple dairy farms, it reasonable to infer that he used this template because it had been effective in the past.

Opp's attempt to shift all of the blame for the inaccuracies in Employer Parties' applications and to minimize his own liability only serves to diminish his credibility. Throughout the hearing, Opp acted as though he had no reason to distort the truth when he completed Employer Parties' applications. But it is not lost on this tribunal that Opp received a fee for each H-2A worker that Employer Parties ultimately employed. (JX 4 at 46; AX 33). This fee structure provided Opp with a monetary incentive to ensure that Employer Parties obtained permission to employ H-2A workers. Opp also has a significant interest in the outcome of this litigation: he makes a living as an agent and has a 10% equity interest in EUSA, so the debarment of himself or EUSA from the H-2A program would economically affect him.

Verpaalen, on the other hand, does not have a significant interest in the outcome of this litigation, and as discussed in the credibility section above, I found her to generally be a credible witness. Based on her credible testimony, I find that Opp knew Employer Parties intended to employ H-2A workers in activities that were not listed in the job order. Verpaalen testified "with certainty" that Opp knew she sought to employ H-2A workers in at least some activities that were not listed on the job order. (Tr. at 314). Among other things, Verpaalen stated that she "talked to Kevin Opp about the option about they might be milking and he said that would be just fine," (Tr. 410), and that she "questioned many times if milking would be an issue and Employment USA made it pretty clear to me it was not going to be an issue," (Tr. at 388). She explained: 'Because with the … seasonal work we have at our farm, it is not consistent between the month[s] of the [a]pplication[,] which is April to December. There's going … to be a time, where for sure, we don't have seasonal work. And I asked [Opp] if it was okay to the put [the H-2A workers] in the parlor at that time…. [H]e told me, 'It doesn't – what happens in real life doesn't have to be on paper.' So as long as I was not going to have to be checked out, it would be just fine." (Tr. at 314-15, 463). When asked to elaborate, Verpaalen said that Opp indicated she would be fine "as long as nobody comes to your farm and actually sees what the H-2A workers are doing on your farm," which, according to Opp, was not very likely to happen. (Tr. at 316, 463). Verpaalen also testified that other EUSA employees knew that H-2A workers would be performing non-seasonal work at OTF. *See* Tr. at 316 ("I have sent a lot of e-mails back and forth with Jessica Martin. And I have been very up front with them from the beginning.")

Respondents' attempts to disavow any knowledge of Employer Parties' intentions fail under the weight of the probative evidence presented at hearing. Neither Opp nor Martin recalled any details of any of their conversations with Verpaalen, and although Opp denied that Verpaalen ever told him that OTF did not have enough seasonal jobs to employ H-2A workers from April to December (among other things), his denial was based entirely on his purported business practices and not his actual recollection of the matter. (Tr. at 405, 577-78). This and other self-serving denials only serve to further discredit Opp's testimony. By contrast, Verpaalen credibly recalled specific advice that she had received from Respondents.

Based on Verpaalen's credible testimony and the corroborating documentary evidence in the record, I find that Opp participated in Employer Parties' substantial violation by preparing ETA Forms 790 and 9142 with boilerplate job descriptions and statements of temporary need without regard for Employer Parties' actual employment needs, and that Opp signed these forms and attested to the truthfulness of their contents even though, at a minimum, he had serious reasons to doubt that the information reported in these applications was accurate. I find it more likely than not that at the time he signed these applications, Opp knew Employer Parties intended to employ H-2A workers in activities that were not listed in the job order and that he concealed this fact in a deliberate attempt to obtain temporary labor certification for positions that would not otherwise qualify for the H-2A program. Had Opp accurately described Employer Parties' need for agricultural labor or services in their ETA Forms 790 and 9142, it would have been apparent that Employer Parties had a year-round need for farmworkers, and DOL would not have issued a temporary labor certification.[30] Therefore, Opp's preparation of the ETA Forms 790 and 9142, using misleading information, enabled Employer Parties to obtain temporary labor certifications for positions that would not otherwise meet the requirements of the H-2A program.

By helping Employer Parties obtain temporary labor certifications for year-round, non-seasonal positions, when he knew they intended to employ the H-2A workers who filled these positions in activities that were not listed in the job order, Opp knowingly provided Employer Parties the means to employ H-2A workers in activities that were not listed in the job order. Respondents allege that "knowledge is not participation as a matter of law." (Respondent's Brief at 15). But the regulations broadly define a violation that may warrant debarment as "one or more acts of commission *or omission on the part of* the employer or *the employer's agent which involve* . . . (vii) [e]mploying an H–2A worker outside the area of intended employment, or in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof . . . " 29 C.F.R. § 501.20(d)**.** Opp participated in Employer Parties' substantial violation by committing numerous acts of commission and omission that foreseeably lead to the employment of H–2A workers in activities not listed in the job order. I find that these actions are more than sufficient to constitute "participation" in Employer Parties' substantial violation of employing H-2A workers in activities that are not listed in the job order. Moreover, as the Operations Manager for EUSA, I find that Opp's actions are attributable to EUSA and sufficient to demonstrate that EUSA, as an entity, participated in Employer Parties' substantial violation.

ii. *Respondents Participated in Employer Parties' Employment of H-2AWorkers Outside the Validity Period of the Job Order*

Verpaalen testified that EUSA advised her that she would be able to keep H-2A workers on her farm longer if she created a second business entity. (Tr. at 333-34; AX 31). Among other things, she recalled that Opp had advised her to make sure VCS and OTF did not appear to be connected, (Tr. 339), and that she could achieve this by getting a second address for VCS and having her husband sign the paperwork for VCS. (Tr. 339–41). She specifically recalled that Opp told her that the name she had selected, VCS, was not a good idea because the reference to "Verpaalen" might cause officials to connect it with OTF. (Tr. 339–41).

[30] *See* discussion on *Vermillion Ranch infra.*

At his deposition, Opp denied he had any knowledge of or participation in the Verpaalens' creation of a second entity, and that he was not even aware that they had created a second entity until the paperwork for VCS came across his desk. (JX 4 at 110, 113). At the hearing, however, Opp testified that his recollection had changed since the time of his deposition, after he reviewed emails that reflected that the VCS entity "was discussed to some degree" before the paperwork for VCS would have come across his desk. (Tr. at 583).[31] Nevertheless, he continued to deny that he or anyone else at EUSA gave Verpaalen any advice about transferring H-2A workers between OTF and VCS, input regarding the name of VCS, or any instruction about who should sign documents for VCS. (Tr. at 558, 580-81). He also denied that he or anyone at EUSA had any reason to believe that VCS "wasn't a legitimate, independent company with a separate temporary need from Old Tree Farms" or that VCS "didn't serve a legitimate business purpose." (Tr. at 559).

I do not find Opp's denials to be credible. For the most part, they consisted of evasive answers based on Opp's assumptions about what Employer Parties needed or the information that they provided. *See, e.g.*, Tr. at 552 ("What I assume took place here . . ."); Tr. 555 ("I assume, given the nature of how this took place…,"). Opp's speculations fail to account for Verpaalen's specific testimony regarding Respondents' involvement in the creation of VCS, which is corroborated by numerous emails and other documentary evidence of record. This evidence reveals that it was Opp, and not Verpaalen, who decided to list Frido Verpaalen as the employer-contact and signatory for VCS.[32] Given Sonya Verpaalen's testimony that Opp advised her to do this to evade a connection between OTF and VCS, it is reasonable to infer that Opp changed the employer contact because he thought it would be beneficial to the success of VCS' application.

[31] It is noteworthy that once again, Opp's recollection did not change until after WHD discovered documentary evidence that contradicted his previous testimony. Specifically, the record reflects that Verpaalen exchanged numerous emails about the creation of a second "winter company," and that Verpaalen sought and received advice from Opp and Martin about what she needed to do to apply for H-2A workers under this second company. (AX 19; AX 20; AX 41; AX 42; RX 11; RX 13). For instance, in an email dated July 22, 2011, Verpaalen asked Opp for more information about setting up a second business for transferring workers on H-2A visas. (AX 41). About a month later, on August 20, 2011, Verpaalen sent an email to Martin stating: "we are going to work hard to start the new company beginning this week." (RX 11). And on September 12, 2011, she informed Martin and Opp: "we are still waiting for an EIN-number for the new company." (RX 13). Verpaalen's continuous email updates, which were sent to both Martin and Opp, belie Opp's testimony that he was not even aware of VCS's existence before the H-2A application came across his desk. (Tr. 582–83).

[32] On September 20, 2011, Verpaalen emailed Martin and Opp with a single file attached saying, "Let me know if I did something wrong again. It is clear that you don't want custom service, but I am not sure if I am the contact person, since Kevin wanted my husband to sign this application." (AX 20). The file attached to this email was VCS's employment application form, which is identified in the record as AX 7. This Employer Application form has the word "service" crossed out, indicating that Verpaalen was told to remove the word "service" from her application and resend it to Martin as referenced in the email above. *See* RX 13 and RX 14 (establishing that Verpaalen emailed the application to Martin at an earlier date). Verpaalen listed herself as the contact person for VCS in this application and expressed uncertainty about whether she should have done this because Opp wanted her husband to sign the application. (AX 7; AX 20). That same day, Opp filed a Form ETA-790 for VCS with the South Dakota SWA and listed Frido Verpaalen as the contact. (AX 38). It is therefore apparent that Sonja Verpaalen represented herself as the employer-contact for VCS up until the very last hour before Opp filed the Form ETA-790 with the SWA, and that Opp independently decided to list Frido Verpaalen as the employer-contact for VCS.

The probative evidence of record reveals that Opp knowingly enabled Employer Parties to employ H-2A workers in positions that were not temporary or seasonal in nature and for which Employer parties had a permanent, year-round need. When Opp filed the I-129 transferring H-2A workers from VCS back to OTF in April 2012, he was on notice that at least five of the H-2A workers on the petition had been working at the same dairy farm since July 2011, since he had filed the I-129 petitions transferring these workers from Mooody County Dairy to OTF, and then from OTF to VCS. This finding is further supported by Verpaalen's testimony that it was Respondents' idea to establish a second company, and by EUSA's history of filing "summer" and "winter" applications for other dairy farms.[33] Given this history and the numerous emails between Verpaalen, Opp, and Martin regarding the creation of a second "winter company," which indicate that Opp and Martin played a significant role in the creation of VCS, I do not find Opp's denial that he did not provide any advice regarding the creation of VCS to be credible.

Opp conceded that it would be problematic if, for all intents and purposes, VCS was the same company as OTF. (JX 4 at 128). But he maintained that he believed VCS was a legitimate company with legitimate seasonal work needs. (Tr. at 559). This contention is not credible because it is at odds with Opp's earlier concession that he "had no idea" why the Verpaalens created VCS and that he had no idea what VCS did that OTF did not do. (JX 4 at 131). It is noteworthy that Opp could not say what type of company VCS was, what made it "separate" and "independent" from OTF, or what "legitimate business purpose" it served. (JX 4 at 180). Opp's inability to answer these basic questions about a company for which he prepared and certified applications to federal immigration authorities significantly detracts from his credibility. When Opp signed VCS' H-2A labor certification application and petition, he certified that the information contained therein was true and correct to the best of his knowledge. As discussed above, Opp could not have known whether the information contained in Employer Parties' applications was true and correct given that he, and not his client, was the source of much of the information. Moreover, Opp could not have possibly thought that VCS was a legitimate company with "independent" and "legitimate" seasonal needs, because he prepared the paperwork for Employer Parties and knew that Employer Parties employed the same H-2A workers, on the same farm, on a year round basis.

To justify Opp's knowledge of the connection between OTF and VCS, Respondents maintain that there is "nothing inherently wrong with employing H-2A workers year-round on a particular farm." (Respondents' Brief at 9). The case on which Respondents rely in making this argument, *Vermillion Ranch Limited Partnership* ("*Vermillion Ranch*"), 2014-TLC-2 (Dec. 5,

[33] In particular, the Administrator presented evidence establishing that in 2011 and 2012, Opp filed H-2A applications similar to those he filed by Employer Parties but on behalf of two different employers: Frey-View Dairy Farms and Sara L. Frey. (AX 25; AX 29). Sarah L. Frey and Frey View Dairy Farms have the same address. (AX 25; AX 29). Sarah Frey signed the forms for Sara L. Frey, whereas Mike Frey signed the forms for Frey View Dairy Farms. *Id*. The statement of temporary need in the application for Sara L. Frey is identical to the statement of temporary need that Opp prepared for OTF. *Compare* AX 1 *with* AX 25. And the statement of temporary need in the application for Frey View Dairy Farms is nearly identical to the statement of temporary need that Opp prepared for VCS. *Compare* AX 6 *with* AX 29. The combined certification period for Sarah L. Frey and Frey View Dairy Farms' covers the entire year from June 2011 to June 2012. (AX 25; AX 29). It is also noteworthy that the applications for Sarah L. Frey and Frey View Dairy Farms have different signatories.

2013), does not justify the employment of the same H-2A workers, in the same position, on a year-round basis. Rather, *Vermillion Ranch Limited Partnership* only held that a single employer may employ H-2A workers year-round on separate labor certifications if the employer has separate seasonal or temporary needs for workers with distinct skills, and each period of seasonal or temporary need requires labor levels far above those necessary for ongoing operations. Respondents' focus on the seasonal nature of the duty performed by H-2A workers—and not the employer's need for the workers to perform that duty—is unjustified and contrary to the federal government's long-established view that "[i]t is not the nature of the duties of the positions which must be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). Moreover, Respondents' reliance on *Vermillion Ranch* is disingenuous. *Vermillion Ranch* addressed whether *a single employer* could obtain temporary labor certifications for two different positions that together spanned a 12-month period. In the instant case, Opp did not advise OTF to apply a second time under its own name and have DOL and USCIS evaluate whether it had a need for two, separate positions that spanned a 12-month period. This is likely because OTF employed the same H-2A workers, who did not require separate skill sets, and were in fact employed in the same position. Rather, Opp assisted OTF in creating a second sham company to conceal the fact that it sought to obtain a second temporary labor certification during the same year that would enable it to employ H-2A workers on the same farm on a year-round basis.

Based on the credible testimony of Verpaalen, which is corroborated by contemporaneous documentary evidence in the record, I find that Opp crafted job descriptions and statements of temporary need that were designed to reflect an alternating seasonal and temporary need for workers at what appeared to be two separate entities, OTF and VCS, even though Opp knew that VCS was, for all intents and purposes, the same dairy farm as OTF, and that the Verpaalens created VCS solely as a means of obtaining H-2A workers on a year-round basis. Opp's actions successfully enabled OTF to conceal its identity from federal immigration officials and reduce the chances that federal officials would notice that OTF sought to employ the same H-2A workers, on the same dairy farm, on a year-round basis. Opp's actions thus foreseeably enabled Employer Parties to employ H–2A workers under false pretenses, and thus outside of the validity date of OTF's job order. I find that these actions are more than sufficient to constitute "participation" in Employer Parties' substantial violation of employing H-2A workers in activities outside of the validity date of the job order. I further find that Opp's actions are attributable to EUSA and sufficient to demonstrate that EUSA, as an entity, participated in Employer Parties' substantial violation.

f) Respondents Participation in Employer Parties' Substantial Violation Merits Debarment

To determine whether a "violation is so substantial as to merit debarment, the factors set forth in § 501.19(b) shall be considered." § 501.20(d)(2). The Administrator alleges that Respondent's participated in Employer Parties' substantial violation thereby meriting debarment of Respondents as agents under § 501.20(b). Respondents' participation in Employer Parties' substantial violations still must be analyzed under the factors set forth in § 501.19(b) to determine whether debarment of Respondents is appropriate because the regulations treat

Respondents' participation in Employer Parties' substantial violation as itself a violation of § 501.20(d)(1)(vii). § 501.20(d)(1) (defining a violation as acts by an agent involving employing workers outside listed job activities and validity dates from job order). Accordingly, I have reviewed Respondents' participation in Employer Parties' substantial violations under each of the seven factors set forth in § 501.19(b) in determining that Respondents' participation is so substantial as to merit debarment for a three-year period.

1. Previous History of Violations

The record contains no documented or verifiable evidence establishing that either Respondent has committed previous violations. But this factor, in of itself, does not lead me to conclude that the violation was not substantial.

2. Number of Workers Affected

I find that the H-2A workers brought to OTF and VCS by Opp were not negatively affected by the violations, but that all U.S. workers in corresponding employment in the region were. Opp facilitated the hiring and filed the paperwork for six H-2A workers to fill positions that were not within the scope of the H-2A program. (Tr. 343). In doing so, Respondents negatively affected the wages and employment opportunities of U.S. workers in corresponding employment in the region. Because the harm of the violation was not contained to Employer Parties' farm, and instead extended to all corresponding employees in the region, I find it affected workers in the United States who are similarly employed, and that this factor weighs in favor of debarment.

3. Gravity of the Violations

The record establishes that Respondents encouraged, guided, and enabled Employer Parties' to violate H-2A regulations. While Verpaalen testified that she was not entirely sure how she wanted to use the H-2A workers at the time she contacted Opp, (Tr. 410), she also made it explicitly clear to him that there was not enough seasonal work at OTF to keep the workers busy and inquired whether it would be okay to have the workers milk her dairy cows. (Tr. 314–16). Opp answered affirmatively, *id*, but declined to include this activity on the job order. (Tr. 307). He then proceeded to complete ETA forms for OTF that provided misleading job descriptions and statements of temporary need and presented these applications to USCIS, knowing that they contained misleading information, in order to increase the chance that they would be approved by federal immigration officials. The applications were indeed approved, and Employer Parties went on to employ H-2A workers in activities that were not listed in the job order and for periods outside the period of employment listed on the job order. Opp's actions were in blatant disregard of the requirements and spirit of the H-2A program in which he purports to be an expert. By encouraging OTF to employ workers in activities not listed in the job order that he prepared, he helped them to evade the statutory requirement that H-2A workers perform only agricultural labor or services that is temporary or seasonal in nature.

When OTF was then unable to receive workers from Mexico, Respondents coordinated the entrance of H-2A workers into the United States on visas obtained through a petition filed by Mooody County Dairy, even though they must have known that the workers were destined for OTF. (Tr. 319–22; Tr. 326). Opp then filed an I-129 transfer petition with paystubs that he knew or should have known were fabricated. *Id.; see also* AX 40. Again, Respondents made extraordinary efforts to intentionally deceive immigration authorities.

Finally, in Opp's most egregious disregard of program requirements, he advised Verpaalen to take a number of steps to manipulate DOL's certification process to ensure that Verpaalen could extend her already illegitimate H-2A certification via a fictitious company, VCS. Not only did Opp advise Verpaalen to create the second fictitious company, Tr. 337–39, but he specifically advised her on how to avoid scrutiny by DOL during the certification process. *Id*. Opp's recommendations included how to name the company, to create a second address, and to use a new signatory. (Tr. 339–42). Opp then prepared ETA forms for this new company with information that he did not obtain from VCS, and which had no reason to believe actually applied to VCS' need for H-2A workers. He did this in order to increase the likelihood that VCS would receive a temporary labor certification. Upon receiving this certification, Opp then facilitated the transfer of H-2A workers back and forth between OTF and VCS, which enabled Employer Parties to employ the same H-2A workers year-round in non-seasonal positions. *Id*. Each time the workers were transferred between OTF and VCS, Respondents' collected a fee. (JX 4 at 46).

Opp's efforts to defy H-2A program requirements and aid Employer Parties' in breaking the law are exceptional. Instead of working within the bounds of the law, Opp prepared and filed documents with the U.S. government in which he knowingly provided materially false or inaccurate information. He did so in an effort to mislead immigration officials and to circumvent a requirement imposed by Congress—*i.e.*, that H-2A workers only perform agricultural labor or services of a seasonal or temporary nature. Therefore, I find the gravity of his participation in Employer Parties' violation significant and that it weighs strongly in favor of debarment.

4. Efforts Made in Good Faith to Comply

I find that Respondents did not make a good faith effort to ensure that their clients, Employer Parties, complied with the H-2A program. If Respondents had made such an effort, it would have likely prevented the occurrence of the substantial violation at issue in this matter. Specifically, if Respondents' had taken the time to speak with Verpaalen about Employer Parties' actual needs for agricultural labor, they would have learned that OTF had a year-round need for farmworkers and that OTF did not have an increased need for agricultural labor tied to a specific season or event. Upon learning this information, Respondents should have counseled Verpaalen that OTF likely did not qualify to employ farmworkers under the H-2A program because its need for the farmworkers was not temporary or seasonal in nature. But this is not what happened. As discussed above, Opp filed ETA forms on behalf of Employer Parties that did not reflect his actual knowledge of Employer Parties' operations, and he assisted OTF in creating a second sham company so that the Verpaalens could employ H-2A workers on their dairy farm in non-seasonal positions on a year-round basis. The probative and credible evidence in the record indicates that Opp worked in collusion with employer parties to evade the statutory

requirement that agricultural labor or service performed by an H-2A worker be temporary or seasonal in nature. Given Opp's efforts to evade a statutory requirement and intentionally deceive federal immigration authorities about the work to be performed by H-2A workers, I find that this factor weighs strongly in favor of debarment.

5. Explanation from the Person(s) Charged with the Violation(s)

Opp's story from the initial investigation up to the hearing was not consistent on many issues and other parts of his testimony are easily disproved by evidence in the record, thereby impairing the credibility of his entire testimony. I found Opp's attempts to minimize his participation in the scheme and to justify his actions to be disingenuous. Opp takes no responsibility for the preparation of ETA Forms and I-129 petitions that contain materially inaccurate and misleading information, even in the face of evidence that contradicts his account of the events. When Opp was confronted with evidence that conflicted with his account of events, he blatantly changed his earlier testimony. It appeared he was willing to say anything in order to evade any appearance of liability for his participation in the scheme, even if it directly conflicted with his previous testimony. Such explanations are not credible. Accordingly, I find that this factor weighs strongly in favor of debarment.

6. Commitment to Future Compliance

The record suggests that Opp has a similar history with other employers, demonstrated by the Frey-View Dairy Farms and Sarah L. Frey applications filed by Opp that mirror the OTF and VCS applications. *Compare* AX 1, 6, *with* AX 25, 29. Coupled with his complete lack of effort to comply and denial of wrongdoing, I find no indication that Opp is committed to future compliance. As an agent, Opp is responsible for filing many more H-2A applications than a typical employer and his demonstrated commitment to compliance is therefore a greater concern in determining the appropriateness of debarment. I do not exclude the possibility that Opp may demonstrate a commitment to future compliance at a later point in time, but his actions in this proceeding indicate that he is not committed to future compliance. I therefore find that this factor weighs in favor of debarment as well.

7. Extent to Which the Violator Achieved Financial Gain Due to the Violation

Opp achieved financial gain as a result of Employer Parties' violations. As a 10% shareholder in EUSA, Opp received a portion of the profits derived each time a client hired an H-2A worker. (JX 4 at 6, 46). Opp's efforts to deliver H-2A workers to OTF therefore resulted in a collection of fees from which he personally profited. By instructing the Verpaalens to set up a second business and then transferring the workers to VCS, Opp was able to collect a second round of fees. Finally, by transferring the workers back to OTF again, Opp collected a third round of fees. The system that Opp put into place at OTF, which enabled the employment of H-2A workers in non-seasonal duties year-round at the same farm through separate companies, resulted in the collection of significantly more fees than had he made a good faith effort to comply with the regulations based on his actual knowledge of the Verpaalen's dairy operations. Therefore, I find that this factor weighs in favor of debarment.

8. Totality of the Factors

After reviewing the above factors, I find that Respondents' participation in Employer Parties' violation was so substantial as to merit debarment for the maximum three-year period. Only one of the seven factors proved mitigating, while the remaining six factors weighed in favor of debarment. In particular, I find that the gravity of the violation in which Respondents' participated and Respondents' lack of a good faith effort to comply with the H-2A program weigh strongly in favor of debarment. These factors, in conjunction with Respondents' denial that they played any role in the violation and Respondents' ongoing financial incentives to help other employers use sham business entities to employ H-2A workers in year-round, non-seasonal positions, leads me to find that debarment for the maximum three-year period is justified.

IV. CONCLUSION

The preponderance of the probative evidence in this matter indicates that Kevin Opp, and the EUSA employees whom he supervised, participated in Employer Parties' violations by preparing applications that presented false and materially misleading information in an effort to make federal immigration officials believe that Employer Parties' need for H-2A workers was seasonal or temporary in nature. Opp's efforts to mislead federal immigration authorities succeeded, and thus enabled Employer Parties to employ H-2A workers in permanent, non-seasonal positions on the same dairy farm on a year-round basis. The success of the H-2A program largely relies on the good faith efforts of agents to lead employers through the regulatory process and in obtaining and employing H-2A workers. Opp's position that he is merely a conduit for which employers submit forms is not credible nor is it acceptable. The record reveals that Opp enabled and encouraged Employer Parties' to report inaccurate information and that he and his employer, EUSA, profited from Employer Parties' violation. Such behavior by an agent should not be tolerated by DOL.

As Operations Manager of EUSA, Opp's participated in Employer Parties' substantial violation by providing Employer Parties the means to employ H-2A workers in activities that were not listed in the applicable job orders, by knowingly providing materially inaccurate and misleading information in a deliberate effort to obtain temporary labor certification for positions that would not otherwise qualify for the H-2A program. Respondent's participation merits debarment because six of the seven factors weigh in favor of debarment. Therefore, when weighed as a whole, these factors lead me to conclude that the violation was substantial in nature, which merits debarment.

ORDER

For the foregoing reasons, the WHD's Notice of Debarment, dated March 26, 2013, detailing Respondents' alleged participation in Employer Parties' substantial violation and notice that they are debarred from the H-2A labor certification program for a period of three years, is hereby **AFFIRMED**.

SO ORDERED.

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

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. 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).

For paper filing, the Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. 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.

Alternatively, the Board offers an Electronic File and Service Request (EFSR) system (eFile). 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.