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OALJ Case No.: 2014-TAE-00006

In the Matter of:

SEASONAL AG SERVICES, INC. and
YIDA (BECVAR) WALKER
Respondents.

Appearances:

Traci Martin, Esq.
Megan McGinnis, Esq.
Office of the Solicitor
U.S Department of Labor
Kansas City, Missouri
For the Administrator, Wage & Hour Division

Yida Walker, pro se
Eldora, Iowa
For the Respondent

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER

This matter arises under the H-2A provisions of the Immigration and Nationality Act, 8 U.S.C. § 1188, *et seq*., as amended by the Immigration Reform and Control Act of 1986, ("the Act"), and the implementing regulations found at 20 C.F.R. Part 655 and 29 C.F.R. Part 501.

Background and Procedural History

Seasonal Ag Services ("Respondent" and "Seasonal Ag") participated as an employer in the H-2A visa program for non-immigrant alien agricultural labor in 2010 and 2011.[1] Respondent Yida Walker was (and is) Seasonal Ag's president. The Administrator, Wage & Hour Division ("WHD"),

[1] *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 8 U.S.C. § 1188(g)(2); 29 C.F.R. Part 501; 20 C.F.R. Part 655.

U.S. Department of Labor brings this action alleging that Respondents violated the H-2A program's regulatory requirements. In particular, the Administrator alleges violations during Respondent's employment of non-immigrant Mexican farm workers whom it hired to, among other tasks, harvest corn in and around Marshalltown, Iowa in 2010 and 2011. The WHD charges violations in several categories. First, WHD alleges that Respondent failed to reimburse workers a total of $12,899.74 for in-bound and out-bound transportation and sustenance, in violation of 20 C.F.R. § 655.122(h)(1); second, Respondent failed to pay corresponding workers the required rate of pay totaling $82,969.57 in violation of 20 C.F.R. § 655.122(l); third, Respondent required three workers to pay a $100 deposit as part of their applications to work, which Respondent did not return, and deducted $50 each from two workers for the cost of work boots, in violation of 20 C.F.R. § 655.122(f), and fourth, Respondent failed to provide a copy of the work contract to 213 workers, in violation of 20 C.F.R. § 655.122(q).

At a formal hearing held on June 11, 2014 in Cedar Rapids, Iowa, I admitted DOL Exhibits 1-27. (Tr. 25). Five witnesses, including Respondent, testified. The Administrator now seeks some $82,969.57 in back wages, reimbursement of $13,299.74 to workers for various regulatory violations[2] and $258,000.00 in civil monetary penalties.[3]

As will be discussed in somewhat greater detail below, I find the Administrator proved Seasonal Ag failed to pay in and out bound transportation costs and subsistence in 2010 and 2011, and required three workers to pay an application deposit in violation of the regulation and unlawfully deducted the cost of work boots for two other employees. I further find Seasonal Ag did give each worker a copy of the applicable work contract, even though most of them did not physically retain it. Finally, I find the Administrator has not proven that Seasonal Ag and Ludy Moreno Services ("LMS") were joint employers and, as such, Respondents are not liable for the failure by LMS to pay the required rate of pay to its local workers.

Positions of the Parties

Administrator, Wage and Hour Division. Seasonal Ag Services used the H-2A program to employ temporary workers from Mexico in 2010 and 2011. (DOL 1-4). Ms. Walker paid her H-2A workers and non-H-2A American employees the required Adverse Effect Wage Rate ("AEWR"). However, approximately 142 non-H-2A employees of Ludy Moreno Services, a company owned by Ms. Walker's mother, hired to do the exact same work on the exact same fields under the exact same conditions as the H-2A employees working for Seasonal Ag, were not. (DOL 26). The prosecuting party submits that, "by spinning off a new legal entity, Ms. Walker was able to import foreign labor

[2] The Administrator is not seeking payment of $101.32 for failure to pay the AEWR to two H-2A employees of Seasonal AG in 2010. (DOL 24).

[3] On April 10. 2012, the Wage and Hour Division initially assessed a total civil money penalty ("CMP") of $423,600.00 and back wages of $96,268.54. In its March 6, 2014 Order of Reference, the Wage and Hour Division "reduced its assessment of civil money penalties" to $258,000.00 as follows:

Violation	Number of Violations	CMP's per violation	Total CMPs
Failure to Pay for Inbound Transportation/ Sustenance	1	$900.00	$900.00
Failure to Pay for Outbound Transportation/ Sustenance	1	$900.00	$900.00
Failure to Pay Required Rates of Pay	142	$900.00	$127,800.00
Unlawful Cost Shifting	1	$600.00	$600.00
Failure to Provide Copy of Work Contract	213	$600.00	$127.800.00

while her mother was able to employ local workers at a lower rate." *Post-Hearing Brief of Administrator* at 4. Even though the Administrator concedes that Seasonal Ag Services generally paid its H-2A employees and non-H-2A employees the correct prevailing wage, the Administrator submits that Ms. Walker is nonetheless liable for payment of back wages to the local workers hired by Ludy Moreno Services under a theory that, because Seasonal Ag Services and LMS operations were so intertwined, they should be considered joint employers under the H-2A regulations. 20 C.F.R. § 655.122(a). Thus, Seasonal Ag owes over $82,000.00 in back wages to these corresponding employees who worked for Ludy Moreno Services in 2010 and 2011 and should be assessed a civil monetary penalty of $900 per worker, for a total of $127,800.00.

The Administrator also submits that Seasonal Ag failed to pay in and out bound transportation costs and subsistence in 2010 and 2011. When an H-2A worker completes half of the work contract, he or she is entitled to reimbursement for the cost of transportation from where he or she came from originally to the place of employment. The worker is also entitled to the cost of daily sustenance while traveling to the place of employment. If the H-2A worker completes the contract, the employer must pay for transportation costs and sustenance back to the worker's permanent home. 20 C.F.R. § 655.122(h)(1). Sustenance pay in 2010 was $10.64 and $10.73 in 2011. In 2010, 44 workers traveled from Arkansas to Marshalltown, Iowa. While Seasonal Ag provided them transportation, it did not give them $468.16 in sustenance pay (44 x $10.64). In 2011, 65 workers traveled to Marshalltown from Arkansas and an additional 14 from Mexico to Marshalltown without payment or reimbursement of $847.67 for daily sustenance. Seasonal Ag did provide transportation from Arkansas to Marshalltown and also provided several other workers transportation from the Mexican border to Marshalltown. However, 14 workers are entitled to $50.00 each to cover the cost of travel from their homes to the border. Regarding outbound travel, 44 workers in 2010 and 79 workers in 2011 were given $100.00 to cover the cost of the return trip. However, the most economical bus ticket was $150.00. As Seasonal Ag has already paid $100, it owes an additional $50 to each worker.

An employer cannot seek "payment of any kind from an H-2A worker for any activity relating to obtaining H-2A labor certification, including payment of attorney's fees, application fees or recruitment costs." 20 C.F.R. § 655.135(j). In the 2011 season, Seasonal Ag required workers interested in employment to pay a $100.00 deposit, which would be refunded at the end of the contract period. Three workers paid the deposit but did not work the entire season so they did not get the refund. This was an illegal payment and Seasonal Ag owes these three workers $100 each. As to the work boot deduction, an employer must disclose all deductions to be made from paychecks. 20 C.F.R. § 655.122(p)(1). In 2011, Seasonal Ag deducted $50 from two H-2A employees for work boots who did not stay the entire season. Because this deduction was not required by law and was not disclosed in the initial job offer, Seasonal Ag owes $50 each to two workers. 20 C.F.R. § 655.122(p)(2). Additionally, under 20 C.F.R. § 655.122(f), Employer "must provide to the worker, without charge or deposit, all tools, supplies and equipment required to perform the duties assigned."

In the final category, WHD alleges Seasonal Ag failed to provide a copy of the contract to each worker. H-2A and corresponding workers must be provided a copy of the work contract. 20 C.F.R. § 655.122(q). The Administrator submits that 213 workers in 2010 and 2011 did not receive a copy of the work contract and Seasonal Ag should be assessed a $600.00 civil money penalty for each individual who did not receive a copy, for a total penalty of $127,800.00.

Respondent. I may have unknowingly committed some minor regulatory violations when I charged a $100 application fee and withheld money for work boots from two workers who did not finish their

contract but I gave each worker the option of keeping a copy and most did not want one; and those that did, I gave them one. I also did not pay for meals because I thought I was only required to if the trip was longer than 24 hours, which none of them were. I also admit I did not pay for transportation costs from the worker's homes to the border and from the border to their homes at the end of the season. Finally, my mother's company and mine were different, even if workers were doing the same type of work. (DOL 9-13). So, I know I should have to pay something and tried to reach a settlement but the amount of the penalties is way too much; I only made about $50,000 in profit in 2010 and again in 2011. I was just waiting for the other side's attorney to call and discuss settlement, but they never called me. Seasonal Ag is no longer in business and I don't plan on entering the H-2A business ever again.

Testimony

Yida Becvar Walker (14-62)

I have been working at Shopko Hometown as a part-time floor associate since December 2012. (Tr. 14). For a year before that, I did not do anything. Before that, I was the owner and president of Seasonal Ag Services, which I incorporated in 2010. Seasonal Ag is an agricultural contract employment agency. (Tr. 16). I had contracts for counting seed but the majority of the work was detasseling[4] and sorting corn in and around Marshalltown, Iowa. Before that, I worked for about 20 years, for Ludy Moreno Services ("LMS"), owned by my mother. I was office manager and head crew supervisor. Seasonal Ag did not have any employees that worked all year round, given the work was seasonal. Seasonal Ag employed H-2A workers in 2010 and 2011. I first found out about the H-2A program in 2009 when I worked for my mom. LMS did the same type of work as Seasonal Ag, hiring and employing contract agricultural workers. I think LMS hired less than 50 H-2A workers to detassel and sort seed in 2009. (Tr. 19). We also hired local workers from Marshalltown, Iowa. They performed the same duties as the H-2A workers. LMS did not use the H-2A program in 2010. Seasonal Ag did, however, and I was responsible for the paperwork. (EX 1). I understood my requirements were to provide transportation from where the workers were at to the workplace, housing, and transportation to and from the field. I also had to advertise the job for local people. I also understood I had to pay their way back to Mexico when they were done working. (Tr. 26). I was approved to hire 44 workers in 2010, but I don't think I actually brought that many in. Seasonal Ag also employed non-H-2A workers in 2010. (Tr 27). They performed the same type of work as the H-2A workers, detasseling and harvest work. H-2A workers had to pay a deposit before working for Seasonal Ag. (Tr. 29-30). That was because when I worked for my mom I noticed a lot of people signed up but when it actually came down to working, they found better offers. So I thought it was being smart when I said "ok, if you want to come work for me, you have to give me $100. When you come work for me, I will give you the $100 back." I realize that was wrong. (Tr. 30). I did not do that in 2011. In 2010, I think there were three workers who did not get their money back. The H-2A workers we hired in July 2010 came from Arkansas. We drove in vans and took them back to Marshalltown. It took about 13 or 14 hours. I did not pay for any meals on the trip to Iowa. I did not think it was my responsibility because the trip was less than 24 hours. (Tr. 32). We paid Seasonal Ag workers $10.86/hour in 2010. Non-H-2A workers were paid the same rate. (Tr. 33). Other than federal and state taxes being withheld, the only other money I deducted in 2010 was for steel toe boots for two employees. (Tr. 33). They were required for some of the work. So, I

[4] "Detasseling" corn is removing the pollen producing flowers, the tassel, from the tops of corn plants and placing them on the ground. This is done either by having "detasselers" walk through the corn field removing the tassels or by having detasselers ride through the corn field on a detasseler carrier.

had a contract that said "I'm accepting this position. Seasonal Ag is providing me steel toe boots. But if I leave this positon, then I am responsible for paying that back." (Tr. 34). LMS was also in business in 2010 but they did not use any H-2A workers. I don't know if they performed the same tasks. EX 5 is a payroll summary for LMS.

At the end of the harvest, the H-2A workers returned to Mexico. Most took the bus. Others made arrangements to work elsewhere. I told them that two days after the work was done, they had to leave; their visas were no longer good. I paid $100 per person for the bus ticket. That is what I was told the charter came out to. But it looks like the actual cost of the bus was $150. (Tr. 44). I did not pay for meals on the way home because, again, I thought it was only more than 24 hours. I checked Mapquest and it showed the trip took between 18-22 hours.

In 2011, Seasonal Ag again used the H-2A program using workers that came from the same location in Arkansas. I also hired workers directly from Mexico in 2011. (Tr. 45; EX 2). We were certified for 82 workers, and we hired close to that amount. This time I hired a charter bus to take the workers from Arkansas to Marshalltown. I did not pay for meals because it did not exceed the 24 hour period. We also hired workers from Mexico (EX 3). While we were authorized to bring 15 employees, I did not have the full 15 because a couple did not pass the interviews. (Tr. 48). The workers we did hire came to Marshalltown in a van. I think we picked them up in Laredo. It took about 20 hours to drive to Marshalltown. The H-2A workers were responsible for getting themselves to Laredo, Texas. I think it was on average about $50 for each person to get to Laredo from their homes. But I admit I said the bus tickets were $75. (Tr. 50). Seasonal Ag also hired non-H-2A workers in 2011. Both did the same type of work and I paid both the same rate - $11.03/hour. (Tr. 52-3). At the end of the season, I think I gave each worker $100 to pay for their return to Mexico. I did not pay for meals. (Tr. 57). Again, since the trip did not take more than 24 hours, I did not think I had to pay.

I started my company in 2010 with my mother's help. I separated from my now ex-husband in 2009 so I went to live with my mom because I did not have any other resources. I told her that I could not support myself on a part time job and she suggested I start my own company so I could support myself year round. When my mom saw all the work I did in 2009 on the H-2A program, she decided not to do it again in 2010 and 2011. Also, with me, I hired both H-2A workers and local workers. My mom only hired local workers. I don't know what she paid them. I wanted to make clear that I was separate from my mom and I started my own company. (Tr. 59). I had my own offices apart from LMS; we used different workers compensation policies; we had our own crew leaders and checkers; and we transported our own employees in separate buses. I was the only one to hire and fire Seasonal Ag workers. (Tr. 61; EX 11). I did not have any authority to hire or fire any employee in LMS. (Tr. 61).

Meghan Vesper (62-91)

I am an investigator with the U.S. Department of Labor, Wage and Hour Division. Part of my duties includes conducting H-2A program investigations. I typically go on site visits to observe the type of work the workers and employers are doing. I try and determine who are the supervisors, who is directing the work, things like that. I assisted Tom Phelan and Jose Serano with the investigation of Seasonal Ag in July 2011. (Tr. 65). We visited a couple different places and I met with Yida Walker in her office. It was a house that had been converted into office space. It appeared to me that Ludy Moreno and Yida Walker were sharing office space. While each had their individual workspaces, there was one communal room. I also interviewed about 13 workers and reduced them

to interview statements. (EX 17). Several said that "my boss is Ms. Moreno or Ludy is my boss" and "she tracks my hours, she pays me." (Tr. 74-5). I did not see a clear delineation between the H-2A and corresponding workers.

Some of the worker statements just refer to the boss as "Moreno". I can't say whether they meant Miss Walker or Ludy Moreno.

Jose Serrano (94-105)

I worked for Wage and Hour Division, U.S. Department of Labor from September 2009 to February 2014. I did compliance reviews for the H-2A program. I assisted Tom Phelan in the Seasonal Ag investigation in the summer of 2012. I was able to observe the workers detasseling corn. To my knowledge, they were both H-2A and corresponding workers. I identified Dona Ludy as their supervisor. (Tr. 97). From my observations, she was the one directing the workers. I also met Yida Walker. She appeared to be handling the paperwork. I interviewed about 10 of the workers. (EX 16). Several indicated that Dona Ludy was the one that paid them, that gave them their check, though they did not say that Ludy Moreno was the boss or hired them. "Dona" refers to a form of respect for someone in charge. Some of the workers also referred to Yida Walker as the one in charge. (Tr. 102).

Thomas F. Phelan (105-182)

I am a federal investigator for the wage and hour division based in Omaha, Nebraska. My primary duty is enforcement, to include the Migrant and Seasonal Worker Protection Act and the Immigration and Nationality Act, of which the H-2A provisions are a part. In this case, the investigation was initiated out of the national office in Washington, D.C. In other words, it was a directed investigation, there was no complaint. EX 8 is the statement we took from Ms. Walker. Before speaking with Ms. Walker, I had not heard of Ludy Moreno Services. (Tr. 113). But Ms. Walker explained that was her mother's company and it was a different company than hers. We also interviewed the workers and took their written statements. (EX 15). I spoke to Israel Moreno, Abdiel Moreno, and Eduardo Rodriquez. Abdiel is Ludy Moreno's nephew. Abdiel worked for Seasonal Ag in 2010 for about a month and had been there about a week in 2011. He said both Ms. Walker and Aunt Ludy were his boss. (Tr. 116). Ms. Walker kept track of the hours of work but his paycheck said Ludy Moreno Services. Israel is Abdiel's brother. He worked for LMS in 2011 and identified both as his boss. Finally, Mr. Rodriquez was a corresponding worker and, in 2010, it was Yida who would assign and keep track of where he went to. Later he said either one could assign work. (Tr. 119). I also had a chance to look at the workers in the field. It struck me that Ludy seemed to be the one in control. (Tr. 122). I also determined the local workers were getting paid less than the H-2A workers. They had no knowledge that they were supposed to get the Adverse Effect Wage Rate, which in 2011 as $11.03/hour. Workers didn't really know who their boss was. At the conclusion of my investigation, I determined that Seasonal Ag had committed several violations – failure to pay inbound and outbound travel, unlawful deductions for work boots, unlawful cost shifting for requiring worker to pay for visas, failure to pay the adverse effect rate to corresponding workers and not providing workers a copy of the contract.

H-2A employer must transport workers at no cost to them and feed them along the way or provide subsistence and reimburse the workers for costs incurred to them from the place from where they came to the employer's place of business. In 2010, all H-2A workers came from Arkansas and were provided transportation by Ms. Walker. However, in 2011, some H-2A workers came from

Arkansas and some from Mexico. While Ms. Walker picked up the Mexican workers at the border and provided transportation to Iowa, she should have reimbursed the workers for the cost of travelling from their homes to the border. As to the cost of this in-bound travel, Ms. Walker estimated $75 but a worker said it cost $50. So I used $50. On outbound travel, the work statements said they were given $100 but the average cost was $180.

To make sure the workers stayed through the entire season, Ms. Walker required prospective employees to give a $100 deposit, which would be kept if they left early. The regulations do not allow for this. In addition, Ms. Walker deducted the cost of work boots for two employees who left before the season was over, without initially informing them of this requirement.

Paying the required rate of pay ensures employment of a foreign national will not adversely affect the employment of a corresponding worker here in the United States. So, an H-2A employer is required to pay the higher rate to the U.S. employees it hires to work alongside H-2A employees. In other words, an Employer has to offer the same terms and conditions so foreign workers do not work for less than U.S. workers. Seasonal Ag did not pay some of its non-H-2A workers the AEWR in 2010. I found that the corresponding workers who were paid through Seasonal Ag were paid the AEWR in 2011. But those that had shifted to LMS were not. In other words, though working side by side doing identical work as the H-2A workers, the corresponding workers working for LMS were being paid less than the H-2A visa holders. My back wage calculations are at Tab 23.

In 2011, the AEWR was $11.03/hour. Seasonal Ag paid the correct rate for all work done in 2011. (Tr. 146). In 2010, the AEWR was $10.66/hour. 7 Season Ag local employees were paid $9.50 an hour. This is less than the AEWR and a technical violation. But we have a de minimus policy in DOL. If the total back wages owed are less than $20.00, we tell the employer but do not make a backwage assessment because it is de minimus. (Tr. 147). EX 24 is a summary of the back wages I think are due. EX 25 is the payroll records for LMS. Some of the workers were being paid less than the AEWR and I calculated the back wages. Tab 27 is a summary of the unpaid wages – it is for all the workers, H-2A visa holders and corresponding. I don't know if any other contractors in the area were paying the AEWR. (Tr. 164).

The bottom line is that, in 2010, all H-2A workers were paid the correct rate. In 2011, all employees paid through Seasonal Ag were paid the AEWR. (Tr. 180).

LMS did not hire any H-2A workers in 2010 or 2011, only local workers. LMS did not pay the local workers the required rate of pay but, under the H-2A rules, we could not bring an action against Ludy Moreno for back wages; the action could only be brought against Seasonal Ag under a theory that Seasonal Ag and LMS were joint employers of the corresponding workers.

Richard Tesarek (182-203)

I am the assistant director for the U.S. Department of Labor, Wage and Hour Division, Omaha, Nebraska. I direct the investigators and ultimately decide the disposition of the cases. As part of dispositions, Wage and Hour can seek civil money penalties. I determine the amount. I base the amount on the reports of the investigators. I also talk with people and consider 7 or 8 mitigating factors. If it is a minimal violation, the penalty can be waived altogether. (Tr. 185). In this case, I considered any history of violations of the employer, the gravity of the violation, how many employees were involved, how important the violation was, the perceived effect on future

compliance; for example, if I knew Ms. Walker was subsequently going to go out of the H-2A business, I would have treated her differently than an ongoing employer. (Tr. 186).

EX 28 is a copy of the mitigating factors contained in 29 C.F.R. § 501.19(b). I assessed penalties in the amount of $258,000 in this case. The largest was because each worker did not get a copy of the contract so they did not know the wage rate they were entitled to. I did not find any of the violations willful or malicious. (Tr. 194). If Ms. Walker had not hired any H-2A workers in 2011, then all she was required to pay each worker was the wage under the Fair Labor Standards Act, which was $7.25 in 2011. If Ms. Walker were to give a copy of the contract to each worker but they did not keep it, then she would be in compliance with the regulations. (Tr. 199). But Ms. Walker said she "provided the H-2A workers with a contract, but I did not give them a copy of the contract." (Tr. 200). To me this suggests noncompliance. At the time of the CMP assessment, I did not realize that Ms. Walker was no longer in the H-2A business. I also consider the company's profits in assessing a CMP. I was not aware that Seasonal Ag profits in 2010 and 2011 were only $50,000.

Yida Becvar Walker (recalled) (204-210)

In 2010, my mom had her own buses, workers and I would have mine. In 2011, the detasseling crew only worked for Seasonal Ag services, so all workers worked together. If I could find enough local workers for this work, I would not have obtained any H-2A workers - the cost, headache, etc. Both Ludy and I were bosses. She handed out paychecks when I was in Minnesota and she stayed with the Iowa group. However, all my paychecks for my workers were drawn from the Seasonal Ag account and signed by me. Everyone I hired was told they worked for me. I think the confusion was because many had previously worked for my mom. In the Hispanic culture, it is always the older person who has the authority so they called her "Patrona," which is boss and me "Patroncita, little boss." That is their mentality, even though it was in their contract that I was their boss. (Tr. 205). My company was only operating in 2010 and 2011 so it probably confused them when the workers were asked who was the boss? Regarding the contracts, in 2010, everyone got a contract. I noticed they threw them away so, in 2011, I decided to be smart. I handed them a contract. If they wanted it, they could keep it; if not, they would return it to me. (Tr. 207). So, it is true that for some workers, I did not give them a copy because they did not want one. I did give each worker a contract in 2010. In 2011, I gave each H-2A and U.S. worker a copy of a contract. If they wanted to keep it, they could. If not, they could return it to me. Very few actually wanted one. They were mostly the older workers. (Tr. 208-9).

Regarding bus tickets home, there was a certain cost for the actual bus ticket and then extra fees for baggage. That's why the prices were different. Some people took boxes of stuff home. I now realize I should have paid for a bus ticket back to their home and not just to the border.

Seasonal Ag has since closed. I do not intend to submit any H-2A applications in the future.

Discussion

Overview

The H-2A visa program arose out of the Immigration and Nationality Act of 1952. An eligible foreign worker is an alien having a residence in a foreign country, which he has no intention of abandoning, who is coming temporarily to the United States to perform temporary services or

labor if unemployed persons capable of performing such service or labor cannot be found in this country.[5]

Congress amended the program in 1986 to create separate agricultural and non-agricultural temporary foreign worker programs, leading to the H-2A program.[6] The Secretary of Labor enforces the attestations an employer makes in a temporary agricultural labor certification application and the regulations that implement the H-2A program.[7] Failure to abide by program regulations may result in monetary penalties, debarment from filing other H-2A certification applications, and proceedings for specific performance, injunctive, or other equitable relief.[8] A civil money penalty may be assessed by the Administrator for each violation of the work contract or [the applicable] regulations.[9]

In determining the amount of such penalty, "the WHD Administrator considers the type of violation committed and other relevant factors[,]" including: previous history of violations, the number of workers affected, the gravity of the violations, efforts made in good faith to comply with the H-2A program, explanation of person charged with the violation, commitment to future compliance, and the extent to which the violator achieved a financial gain due to the violation or the potential financial loss or injury to the workers.[10]

A party has a right to a *de novo* hearing before an Administrative Law Judge, who may affirm, deny, reverse, or modify in whole or in part the decision of the WHD Administrator.

Specific Violations

Transportation/Subsistence Costs

20 C.F.R. § 655.122(h)(1) requires an employer to pay for reasonable costs incurred by the worker for transportation from the place from which the worker has come to work for the employer. I find no in-bound transportation costs were incurred in 2010 as Seasonal Ag transported all H-2A workers by van from Arkansas to Marshalltown Iowa at no expense to the worker. In 2011, however, workers came from both Arkansas and Mexico. Those that came from Arkansas were again transported by Seasonal Ag at no expense to the worker so no in-bound costs were incurred for these workers. Seasonal Ag did transport 14 workers from the Mexican border by van to Marshalltown, Iowa in 2011, at no expense to them. However, these workers were still entitled to reimbursement of the reasonable cost of transportation from their homes to the border, which I estimate at $50.00 each, for a total in-bound transportation cost of $700.00.

20 C.F.R. § 655.122(h)(2) also requires an employer to pay for a worker's transportation from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. Here, Seasonal Ag was required to pay outbound transportation costs from Marshalltown, Iowa to the place of residence in Mexico, not just to the border. I estimate the cost of travel from Marshalltown to the place of residence was $150. Since

[5] 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2013).
[6] Staff of House Comm. On Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3-4 (Comm. Print 1991).
[7] 29 C.F.R. §§ 501.1, 501.5, 501.16, 501.17 (2010).
[8] *See In the Matter of Global Horizons, Inc*., 2006-TLC-00013 at slip op. 4 (ALJ Nov. 30, 2006).
[9] 29 C.F.R. § 501.19(a) (2010).
[10] 29 C.F.R. §501.19(b) (2010).

Seasonal Ag paid each H-2A worker $100.00 for the cost of a return bus ticket to the border, 41 workers in 2010 and 79 workers in 2011 are owed $50.00 each, for a total of $6,000.00.

20 C.F.R. 655.122(h)(1) and (2) also requires the employer to pay daily subsistence to each worker while being transported to and from place of employment. There is no requirement that this subsistence start only if the period of travel exceeds 24 hours, as Respondent alleges. Consequently, Respondents failed to pay $10.64 in daily subsistence costs to a total of 85 workers in 2010 (44 in-bound and 41 out-bound) and $10.73 to 158 workers in 2011 (79 in-bound and 79 out-bound) for a total of $2,599.74.

Regarding the civil monetary penalty for these violations, given the company's small profit margin, that Seasonal Ag is no longer in business, and the reasonable, albeit incorrect, belief that H-2A workers were only entitled to daily subsistence if travel exceeded 24 hours and were entitled to payment of travel costs to and from the border to Marshalltown and not their homes, I find a $1,200.26[11] civil monetary penalty appropriate.

Unlawful Fee Shifting and Deductions

An H-2A employer cannot seek or receive payment from any employee for any activity related to obtaining H-2A labor certification, including payment of application fees. 20 C.F.R. § 655.135(j). An H-2A employer must provide a worker without charge or deposit all tools, supplies and equipment required to perform the duties assigned. 20 C.F.R. § 655.122(f). Here, Ms. Walker admits she required a $100.00 application fee for prospective employees, three of whom did not receive a refund. Ms. Walker also admits charging two employees $50 each for the cost of required work boots without initially advising them of the requirement in the job offer. Accordingly, Ms. Walker owes $300.00 for the wrongful deposit and $100.00 for the cost of the work boots for a total of $400.00.

Regarding the civil money penalty assessed for the fee shifting violations, given the small number of affected workers, the de minimus nature of the violation, no prior history of violations, Ms. Walker's sincere efforts to comply with the spirit of the rules, that she freely admitted fault, and that Seasonal Ag is no longer in business, I find a $100.00 penalty reasonable and appropriate under the circumstances.

Disclosure of Work Contract

An employer must provide an H-2A worker a copy of the work contract between the employer and the worker in a language understood by the worker. 20 C.F.R. § 655.122(q). The Administrator essentially argues that "provide" means each worker must have their own personal copy of the contract with them during the pendency of the contract and that Seasonal Ag violated this provision because most workers did not have a copy of the contract in their possession. I disagree. I find Ms. Walker did give each H-2A employee a copy of the contract in 2010. She found, however, that many simply threw the contract away. To save money in 2011, she gave each H-2A employee a copy of the work contract and asked whether they wanted to keep it. If not, they could return it to her. Most did not retain the contract and returned it to Ms. Walker. Those that asked were allowed to keep it. In other words, I find Ms. Walker was in compliance with the regulations in 2011 because

[11] This amount is reduced from the amount assessed by the Administrator and reflects a 60% mitigation of the total possible penalty. *See also* fn 12.

she did "provide" each employee a copy of the applicable contract, albeit most chose not to retain it. That she may have used the same copy of a contract to give to multiple employees does not mean she did not "provide" each worker with a copy of the contract. Since I find no violation, the CMP assessment in the amount of $127,800.00 is disapproved.

Failure to Pay the AEWR

In accordance with 20 C.F.R. § 655.103(b), non-H-2A workers who perform any work included in the job order or in any agricultural work performed by the H-2A worker are termed "corresponding" and are entitled to, at a minimum, the wages received by H-2A workers. 20 C.F.R. 655.122(a). Here, the Administrator concedes that Seasonal Ag paid its local and H-2A workers the required AEWR rate in 2010 and 2011. While LMS did not hire any H-2A workers in 2010 or 2011 and only used local workers, who were paid a lower rate than the AEWR, the Administrator argues that Seasonal Ag is nonetheless liable for an underpayment of wages to these workers under a theory that LMS and Seasonal Ag were joint employers of these corresponding non-H-2A workers. I disagree.

Seasonal Ag and LMS were not joint employers. If they did collude, as the administrator implicitly suggests, to not pay the AEWR rate to local employees in order to save money, then it would make sense that all corresponding non-H-2A workers hired to work in 2010 and 2011 would be on LMS' books, who would then be paid a lower wage rate, given that LMS did not hire any H-2A workers in 2010 or 2011. However, the evidence clearly demonstrates that Seasonal Ag did hire both local and H-2A workers in 2010 and 2011 and it is undisputed that they were paid the same rate as the H-2A workers. In other words, if Yida Walker and Ludy Moreno conspired to avoid paying the AEWR to local workers working for LMS, then Yida Walker would not have hired any local workers in 2010 and 2011. That she did, and paid them the same rate as the H-2A workers, belies the Administrator's argument that the two women spun off a new legal entity to employ local workers at a lower rate.

Furthermore, the evidence demonstrates the two companies were separate entities. The checks to pay the Seasonal Ag employees were drawn on Seasonal Ag accounts, not LMS. Each incorporated company had separate workers compensation policies and separate responsibilities for hiring and firing of their respective employees. While the field interviews of the workers did reveal some confusion as to who may have been in charge, this is understandable given the familial relationship between the two women, the tendency in the Hispanic culture to consider the elder the one in charge and the fact that many of the H-2A workers employed by Seasonal Ag had previously worked for LMS, which did not participate in the H-2A program in 2010 or 2011. Finally, while Ludy Moreno may have, on occasion, physically handed Seasonal Ag workers their paychecks, it was because Ms. Walker was out of town.

Accordingly, I find Seasonal Ag and LMS were not joint employers in 2010 or 2011 and neither Seasonal Ag nor Yida Walker is liable for the alleged nonpayment of AEWR wages to the local workers employed by LMS in 2010 and 2011. As I find Respondents did not violate the regulations by failing to pay the AEWR, it is not subject to the $127,800.00 CMP assessed by the Administrator.

ORDER

IT IS HEREBY ORDERED:

1. That Respondents Seasonal Ag Services and Yida Walker are jointly and severally liable for the payment of $400 for the improper deduction for the cost of work boots and requiring an application deposit, and an additional civil money penalty of $100 for unlawful cost shifting, and shall pay these amounts;

2. That Respondents Seasonal Ag Services and Yida Walker are jointly and severally liable for the payment of $9,299.74 for failing to pay in and out bound transportation costs and daily subsistence, and an additional civil money penalty of $1,200.26, and shall pay these amounts;

3. In all other respects, that the Wage and Hour Division's determination of Respondent's violations of the H-2A program regulations in 2010 and 2011 and assessment of wage liability and fines is DENIED.

SO ORDERED:

Digitally signed by STEPHEN R. HENLEY
DN: CN=Stephen R. Henley, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN R. HENLEY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 501.42(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. The Respondent, Administrator, or any other party desiring review of the administrative law judge's decision may file a Petition. 29 C.F.R. § 501.42(a). Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties to the case as well as the administrative law judge. 29 C.F.R. § 501.42(a).

If no Petition is timely filed, or the ARB does not accept the Petition for review, the administrative law judge's decision becomes the final agency action. *See* 29 C.F.R. §501.42(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 501.42(a).