U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 August 2016

Case No.: 2016-TAE-00003

In the Matter of:

THREE D FARMS, LLC,
d/b/a THREE D FARMS,

Respondents.

APPEARANCES: Jeremy K. Fisher, Esq.
On behalf of the Administrator

Andrew M. Jackson, Esq.
On behalf of the Respondents

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER

This action was filed pursuant to the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, U.S. Code, Title 8, §§ 1101(a) and 1188(c), and is governed by the implementing Regulations found at Code of Federal Regulations, Title 29, Part 501.

PROCEDURAL HISTORY

On May 19, 2016, the Administrator for the Wage and Hour Division (WHD), Employment Standards Administration, U.S. Department of Labor (Administrator), through counsel filed an "Order of Reference" with the Office of Administrative Law Judges pursuant to 29 CFR § 501.37. Included with the Order of Reference was a copy of the February 14, 2014, notice of assessment in WHD file number 1673006 for civil money penalties against Respondent in the amount of $7,500.00 for violations of the H-2A provisions of Section 218 of the Immigration Reform and Control Act of 1986 during the period of April 12, 2011 through December 31, 2012. In the "Order of Reference" the Regional Solicitor indicated that WHD "also seeks $9,930.38 in back wages as a relief for a United States worker not hired in violation of 20 C.F.R. § 655.135(d)."

Pursuant to the "Notice of Hearing and Scheduling Order" the Administrator's counsel filed "Administrator's Bill of Particulars" on June 15, 2016. The "Administrator's Bill of Particulars" set forth that –

> "The Administrator alleges that in February and March 2012, Respondent violated certain regulations under the H-2A guest worker program during its recruitment of domestic workers who would have been employed in corresponding employment" related to an Application for Temporary Employment Certification (ETA Form 9142) filed January 2012, "seeking certification for five positions for the period of March 29, 2012 through December 19, 2012" and that "three domestic workers [T. Durham, M. Langley and T. Saunders] were referred for corresponding employment by the State Employment Security Commission in February 2012, and none were hired."
>
> The Administrator alleges that "the job application that domestic workers were asked to complete by Respondent contained numerous questions about qualifications that were not included on the [ETA Form 9142]. Specifically, Respondent's application asked if each worker possessed a 'NC pesticide applicator license,' had 'worked with a Chemical Manual to figure ratios for Chemical Applications,' had 'knowledge of conservation methods so as to follow land curvatures to prevent land erosion,' and asked for each worker to provide explanation of what varieties of tractors they had operated in the past" in violation of 20 CFR §655.135 (d).
>
> "The Administrator determined that Respondent violated 20 CFR §655.135(d) and assessed a civil money penalty of $7,500."

On June 24, 2016, Respondent's counsel filed "Respondent's Motion for Summary Decision" with attachments. On June 28, 2016, the Administrator's counsel filed "Administrator's Response to Respondent's Motion for Summary Decision and Preliminary Counter-Motion for Summary Decision" with attachments. By Order of July 6, 2016 the motions for summary decision were both denied and the following sixteen findings of fact were entered in this case:

1. On January 27, 2012, the Respondent filed with the North Carolina Employment Security Commission (NC ESC) an "Agricultural and Food Processing Clearance [Job] Order" ETA Form 790, requesting 6 agricultural workers for the anticipated period of employment of March 29, 2012 through December 19, 2012 at 35 total hours per week, Monday through Saturday.

2. The NC ESC classified the requested position as O*NET number 45-2091, Agricultural Equipment Operator with no job order expiration date.

3. On February 9, 2012, the Respondent filed an "Application for Temporary Employment Certification" ETA Form 9142 with the National Processing Center, requesting 6 agricultural equipment operators for the period of intended employment from March 29, 2012 through December 19, 2012 at 35 total hours per week, Monday through Saturday.

4. On January 18, 2012, the Respondent certified in the ETA Form 9142 that "The job opportunity is and will continue to be open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted and will continue to conduct, the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons …"

5. On March 20, 2012, the National Processing Center certified the ETA Form 9142 for employment of 5 agricultural equipment operators for the period from March 29, 2012 through December 19, 2012 as ETA Case No. C-12040-32614.

6. On or about February 6, 2012, the Respondent accepted a Respondent generated three part "Application" from T. Saunders, who had been referred by NC ESC for the position described in the January 27, 2012 ETA Form 790.

7. On or about February 10, 2012, the Respondent accepted a Respondent generated three part "Application" from M. Langley, who had been referred by NC ESC for the position described in the January 27, 2012 ETA Form 790.

8. On or about February 16, 2012, the Respondent accepted a Respondent generated three part "Application" from T. Durham, who had been referred by NC ESC for the position described in the January 27, 2012 ETA Form 790.

9. On February 21, 2012, Respondent reported in its "Initial Recruitment Report (20 CFR 655.156(a))" that it had "not hired" two individuals referred to the certified agricultural equipment operator position by NC ESC (T. Durham and M. Langley) on the grounds that each "not able to operate 200 hp tractor – no experience."

10. The 2012 ETA Form 790 listed the job specifications in Item 15 as –[1]

    Cultivate and harvest corn, soybeans, cotton, flowers, sweet potatoes, watermelon, oats, and rye. Operate or tend equipment or machinery used in agricultural production, such as tractors, combines, and **sprayers**. Operate towed machines such as seed drills and sprayers to plant, fertilize, dust and spray crops. Observe and listen to machinery operation to detect problems. **Trouble shoot, repair** and perform minor maintenance on farm vehicles and equipment. Drive farm trucks and tow farm trailers to haul farm related materials, supplies, and harvested crops to designated locations as directed by the farm manager. The use or possession of being under the influence of illegal drugs or alcohol during working time is prohibited. Workers may be requested to submit to random drug or alcohol tests at no cost to the worker. Failure to comply with the request or testing positive may result in immediate termination. All testing will occur post-hire and is not part of the interview process. **Must be able to lift and carry 60 pounds. Minimum 3 months verifiable work experience operating 200+ h.p. farm equipment required. Basic literacy and mathematical ability required. Applicants must possess proper and current driver's license (minimum Class C or its foreign equivalent) to legally operate farm trucks on public highways in North Carolina.**

    Soybeans, corn, peanuts, cotton, rye, oats, and/or wheat: Workers will walk along rows as specified by employer and remove weeds and grass from soybean and corn fields by hand or using a hoe. Workers will cultivate by hand or with mechanical cultivator attached to farm tractor. Worker may operate mechanical combine to harvest these crops.

    Workers may be required to perform work, on the farm, that is incidental to farming the crops listed in the application, such as performing hand-cultivation tasks, weeding or hoeing various crops, cleaning and repairing farm buildings, seed beds, racks, grounds, setting up and moving irrigation pipes and equipment, gardening, weeding and shrubbing, etc. All other duties assigned under this [Job] Order will be those duties of Farm Worker, Diversified Crops, DOT code 407.687-010. This is a very demanding and competitive business in which quality specifications must be rigorously adhered to. Sloppy work cannot and will not be tolerated.

    Full Growing Season Commitment: The job offered requires that the worker be available for work six (6) hours per day Monday through Friday and five (5) hours on Saturday every day that work is available and for the full period of employment shown in Item 5, even though work may be slack for a brief period after tobacco planting. The worker agrees to be available for work and perform assigned tasks whenever work is available through the full period of employment shown in Item 5. Work available is defined as, no work

[1] **Bold** print is added to highlight differences between the 2012 ETA 790 entries and the 2011 ETA 790 entries.

required on the worker's Sabbath or Federal holidays, but work is required six (6) hours per day Monday-Friday, and five (5) hours on Saturday.

The worker understands that if he abandons this employment or is terminated for cause prior to the end of the period of employment shown in Item 5, the worker will forfeit the ¾ guarantee and reimbursement of certain transportation costs described elsewhere in this job order. Excessive absences and/or tardiness cannot be tolerated and may result in termination.

Daily individual work assignments, crew assignments, and location of work will be made by and at the sole discretion of the farm manager and/or farm supervisor as the needs of the farming operation dictate. Workers may be assigned a variety of duties in any given day and/or different tasks on different days. Workers will be expected to perform any of the listed duties and work on any crop as assigned by the worker's supervisor."

11. The 2012 ETA Form 9142 listed the job duties in Item F.a.5 as –[2]

Cultivate and harvest corn, soybeans, cotton, flowers, sweet potatoes, watermelon, oats, and rye. Operate or tend equipment or machinery used in agricultural production, such as tractors, combines, and **sprayers**. Operate towed machines such as seed drills and sprayers to plant, fertilize, dust and spray crops. Observe and listen to machinery operation to detect problems. **Trouble shoot, repair** and perform minor maintenance on farm vehicles and equipment. **Drive farm trucks and tow farm trailers to haul farm related materials, supplies, and harvested crops to designated locations as directed by the farm manager**.

Workers may be required to perform work, on the farm, that is incidental to farming the crops listed in the application, such as performing hand-cultivation tasks, weeding or hoeing various crops, cleaning and repairing farm buildings, seed beds, racks, grounds, setting up and moving irrigation pipes and equipment, gardening, weeding and shrubbing, etc. All other duties assigned under this [Job] Order will be those duties of Farm Worker, Diversified Crops, DOT code 407.687-010. This is a very demanding and competitive business in which quality specifications must be rigorously adhered to. Sloppy work cannot and will not be tolerated.

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The worker understands that if he abandons this employment or is terminated for cause prior to the end of the period of employment shown in Item 5, the worker will forfeit the ¾ guarantee and reimbursement of certain transportation costs described elsewhere in this job order. Excessive absences and/or tardiness cannot be tolerated and may result in termination.

Daily individual work assignments, crew assignments, and location of work will be made by and at the sole discretion of the farm manager and/or farm supervisor as the needs of the farming operation dictate. Workers may be assigned a variety of duties in any given day and/or different tasks on different days. Workers will be expected to perform any of the listed duties and work on any crop as assigned by the worker's supervisor."

[2] **Bold** print is added to highlight differences between the 2012 ETA 9142 entries and the 2011 ETA 9142 entries.

12. The 2012 ETA Form 9142 listed the minimum job requirements in Item F.d as no U.S. high school diploma or degree required; no training required for the job opportunity; no employment experience required; and "Special Requirements" of -[3]

    The use or possession of being under the influence of illegal drugs or alcohol during working time is prohibited. Workers may be requested to submit to random drug or alcohol tests at no cost to the worker. Failure to comply with the request or testing positive may result in immediate termination. All testing will occur post-hire and is not part of the interview process. **Must be able to lift and carry 60 pounds. Minimum 3 months verifiable work experience operating 200+ h.p. farm equipment required. Basic literacy and mathematical ability required. Applicants must possess proper and current driver's license (minimum Class C or its foreign equivalent) to legally operate farm trucks on public highways in North Carolina.**

13. By letter dated February 14, 2014, the Administrator notified Respondent that –

    a. a total civil money penalty was assessed against Respondent in the amount of $7,500.00 for failure to comply with Section 218 of the INA for the period covering April 12, 2011 through December 31, 2012 related to the unlawful rejection of U.S. workers (not willful or repeated); and,
    b. no civil money was assessed against Respondent for failure to comply with Section 218 of the INA for the period covering April 12, 2011 through December 31, 2012 related to giving preferential treatment to H-2A workers (not willful or repeated).

14. North Carolina General Statutes, Chapter 20: Motor Vehicles, Article 2 – Uniform Driver's License Act in effect at the pertinent times involved in this case provided at §20-7(a)(3) defined "Class C" driver's license as a class of regular driver's licenses that "authorizes the holder to drive any of the following:

    a. A Class C motor vehicle that is not a commercial vehicle.
    b. [Relates to fire, rescue and emergency medical service vehicles].
    c. A combination of noncommercial vehicles that have a GVWR of more than 10,000 pounds but less than 26,0001 pounds. This sub-division does not apply to a Class C license holder less than 18 years of age."

15. North Carolina General Statutes, Chapter 20: Motor Vehicles, Article 2 – Uniform Driver's License Act in effect at the pertinent times involved in this case provided at §20-8 provided: "Persons exempt from license. The following are exempt from license hereunder:

    (1) ….;
    (2) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;
    (3) A nonresident who is at least 16 years of age who has in his immediate possession a valid driver's license issued to him in his home state or country if the nonresident is operating a motor vehicle in this State in accordance with the license restrictions and vehicle classifications that would be applicable to him under the laws and regulations of his home state or country if he were driving in his home state or country. This exemption specifically applies to nonresident military spouses, regardless of their employment status, who are temporarily residing in North Carolina due to the active duty military orders of a spouse.
    (4) ……."

16. North Carolina General Statutes, Chapter 20: Motor Vehicles, Article 2 – Uniform Driver's License Act in effect at the pertinent times involved in this case provided at §20-51 that the following equipment was exempted from registration and certificate of title:

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[3] **Bold** print is added to highlight differences between the 2012 ETA 9142 entries and the 2011 ETA 9142 entries.

> (3) Any implement of husbandry, farm tractor, road construction or maintenance machinery or other vehicle which is not self-propelled that was designed for use in work off the highway and is operated on the highway for the purpose of going to and from such non-highway projects.
> (4) …
> (5) Farm tractors equipped with rubber tires and trailers or semitrailers when attached thereto and when used by a farmer, his tenant, agent, or employee in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor, implement of husbandry, and trailer or semitrailer while on any trip within a radius of 10 miles from the point of loading, provided that the vehicle does not exceed the speed of 35 miles per hour. This section shall not be construed as granting any exemption to farm tractors, implements of husbandry, and trailers or semitrailers which are operated on a for-hire basis, whether money or some other thing of value is paid or given for the use of such tractors, implements of husbandry, and trailers or semitrailers.
> (6) Any trailer or semitrailer attached to or drawn by a properly licensed motor vehicle when used by a farmer, his tenant, agent or employee in transporting unginned cotton, peanuts, soybeans, corn, hay, tobacco, silage, cucumbers, potatoes, all vegetables, fruits, greenhouse and nursery plants and flowers, Christmas trees, livestock, live poultry, animal waste, pesticides, seeds, fertilizers or chemicals purchased or owned by the farmer or tenant for personal use in implementing husbandry, irrigation pipes, loaders, or equipment owned by the farmer or tenant from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, and when not operated on a for-hire basis. The term "transporting" as used herein shall include the actual hauling of said products and all unloaded travel in connection therewith.
> (7) those small farm trailers known generally as tobacco-handling trailers, tobacco trucks or tobacco trailers when used by a farmer, his tenant, agent or employee, when transporting or otherwise handling tobacco in connection with the pulling, tying or curing thereof.
> (8) …"

A formal hearing was held on Friday, July 15, 2016. At the hearing official notice was taken of federal regulations at 20 CFR §655.122(a) and 20 CFR §655.135(d) (TR 7).[4] ALJ exhibits 1 through 6 were attached to the record for jurisdictional and review purposes (TR 5-6). Administrator's exhibits 1 through 7 and 9 through 19 were admitted (TR 15-19, 86); as were Respondent's exhibits 1 through 5 and 8 (TR 19)[5]. The sixteen findings of fact entered in the Order of July 6, 2016 were incorporated as findings of fact on the record (TR 6). Written closing argument and briefs were filed by each counsel on August 1, 2016.

STIPULATIONS OF FACT

The following oral stipulations were accepted as fact in this case (TR 6-7):

1. Respondent Three D Farms, LLC (d/b/a Three D Farms) is a fixed-site employer, within the meaning of 20 CFR §501.3(a), with a principal place of business located at 2775 Hockaday Road, Four Oaks, North Carolina 27524.

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[4] "TR" refers to hearing transcript page. "ALJX" refers to exhibits entered by the presiding Judge. "AX" refers to the Administrator's exhibits. "RX" refers to the Respondent's exhibits. AX 7 was admitted after testimony of the witnesses indicating that any attorney-client privilege had been waived by the client providing the e-mail exchange to the investigator. AX 8 and RX 6 and 7 were withdrawn by counsel. There were no objections to the remaining exhibits admitted.

[5] AX 7 was admitted after testimony of the witnesses indicating that any attorney-client privilege had been waived by the client providing the e-mail exchange to the investigator. AX 8 and RX 6 and 7 were withdrawn by counsel. There were no objections to the remaining exhibits admitted.

2. The following individuals were U.S. workers, within the meaning of 20 CFR §501.3(a), during the relevant periods involved in this matter:

   a. Matthew V. Langley
   b. Terry Durham
   c. Tommy M. Saunders

3. Throughout calendar year 2012, the Respondent did not hire Matthew V. Langley, Terry Durham or Tommy M. Saunders for a position of agricultural equipment operator as set forth in the January 18, 2012 ETA Form 790 and February 9, 2012 ETA Form 9142A in ETA case number C-12040-32614.

4. During the relevant period in 2012, the Respondent filled the 5 positions for agricultural equipment operator as set forth in the January 18, 2012 ETA Form 790 and February 9, 2012 ETA Form 9142A in ETA case number C-12040-32614, with the same H-2A temporary foreign workers employed by Respondent in 2011, who each had more than three months' experience operating 200 horsepower tractors on Respondent's farm and possessed at least a Class C North Carolina driver's license or foreign equivalent.

5. North Carolina General Statutes, Chapter 20: Motor Vehicles, Article 2 – Uniform Driver's License Act in effect at the pertinent times involved in this case at §20-7(a) provided:

   "(a) License Required – To drive a motor vehicle on a highway, a person must be licensed by the Division under this Article [2] or Article 2C of this Chapter [20] to drive the vehicle and must carry the license while driving the vehicle. The Division issues regular drivers licenses under this Article [2] and issues commercial drivers' licenses under Article 2C. A license authorizes the holder of the license to drive any vehicle included in the class of the license and any other vehicle included in a lesser class of license, except a vehicle for which an endorsement is required. To drive a vehicle for which an endorsement is required, a person must obtain both a license and an endorsement for the vehicle. A regular drivers' license is considered a lesser class of license than its commercial counterpart. … A person holding a commercial drivers' license issued by another jurisdiction must apply for transfer and obtain a North Carolina issued commercial drivers' license within 30 days of becoming a resident. Any other new resident of North Carolina who has a drivers' license issued by another jurisdiction must obtain a license from the Division within 60 days after becoming a resident. …"

6. North Carolina General Statutes, Chapter 20: Motor Vehicles, Article 1 – Division of Motor Vehicles in effect at the pertinent times involved in this case provided at §20-4 .01 "Definitions. …

   (2a) Class A Motor Vehicle. – A combination of motor vehicles that meets either of the following descriptions:
      a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
      b. Has a combined GVR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

   (2b) Class B Motor Vehicle. – Any of the following:
      a. A single motor vehicle that has a GVWR of at least 26,001 pounds.
      b. A combination of motor vehicles that includes as part of the combination a towing unit that has a GVWR of at least 26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.

   (2c) Class C Motor Vehicle. – Any of the following:
      a. A single motor vehicle not included in Class B.
      b. A combination of motor vehicles not included in Class A or Class B.

   (11) Farm Tractor. – Every motor vehicle designed and used primarily as a farm implement for drawing plows, moving machines, and other implements of husbandry.

(13) Highway. – The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.

(15) Implement of Husbandry. – Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(17) License. – Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including:

a. Any temporary license or learner's permit;
b. The privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and
c. Any nonresident's operating privilege.

(24) Nonresident. – Any person whose legal resident is in some state, territory, or jurisdiction other than North Carolina or in a foreign country.

(25) Operator. – A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms "operator" and "driver" and their cognates are synonymous.

(28) Person. – Every individual, firm, partnership, association, corporation, governmental agency, or combination thereof whatsoever form or character.

(34) Resident. – Any person who resides within this State for other than a temporary or transient purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that a person is not a resident of this State.

7. The "500 man-days of agricultural labor" described in 20 CFR §655.135(d)(1-3) does not apply in this case in determining whether a violation of 20 CFR §655.135(d) occurred regarding Respondent's obligation to "provide employment to any qualified, eligible U.S. worker."

8. Tommy M. Saunders was issued a Class C active driver's license by the North Carolina Division of Motor Vehicles on January 11, 2013.

ISSUES

The remaining issues are (TR 7-15):

1. Must the action be dismissed for untimely filing of the Order of Reference with the Office of Administrative Law Judges by the Solicitor under 29 CFR §500.224 ?

2. Whether Respondent rejected U.S. workers T. Saunders, M. Langley and/or T. Durham for the position of agricultural equipment operator for the period from March 29, 2012 through December 19, 2012 set forth in ETA Case No. C-12040-32614, for lawful reasons ?

3. Whether the $7,500.00 civil money penalty set forth for violations of the H-2A provisions of Section 218 of the Immigration Reform and Control Act of 1986 during the April 12, 2011 through December 31, 2012 period related to the unlawful rejection of U.S. workers was appropriate ?

4. Whether $9,930.38 in back wages are owed to T. Saunders?

POSITION OF THE PARTIES

Administrator's position:

The Solicitor argues that the Respondent used an additional job questionnaire for U.S. workers referred to it by the North Carolina Employment Security Commission that included questions not in the ETA Form 709 job order as a basis to not hire the referred U.S. workers. These questions included a willingness to work up to 70 hours per week (job order was 35 hours per week); ability to lift up to 100 pounds repeatedly (job order was 60 pounds); possession of a North Carolina pesticide applicator license (none in the job order); experience with pesticide chemical manual and ratios for applications (none in job order); knowledge of soil conservation measures (none in job order); experience with specific farm equipage and operations (not listed in job order); and familiarity with the roads in Johnson County, North Carolina (not in job order).

The Solicitor submits that Respondent originally used lack of soil conservation knowledge and pesticide licensing as a reason to reject referred U.S. workers. In a subsequent e-mail, Respondent used lack of knowledge of local roads and questionable ability to lift 100 pounds to not hire T. Saunders; and lack of experience with large tractors and knowledge of soil conservation to not hire M. Langley. The Solicitor argues that such decisions were based on material not in the minimal job requirements of the job order and were not job requirements placed on the H-2A workers hired by Respondent. He argues that by using the job application responses to not hire the three referred U.S. workers, the Respondent imposed work restrictions and obligations on U.S. workers that were not imposed on H-2A workers, thereby giving preferential treatment to H-2A workers to the detriment of qualified American applicants, a violation of program regulations at 20 CFR §655.122(a).

The Solicitor submits that Respondent's reasoning to not hire T. Saunders because he lacked a North Carolina drivers' license when interviewed on February 6, 2012, was factually and legally unsupportable. He acknowledged that there was a requirement to possess a North Carolina drivers' license in the ETA 790 job order. He argues that there is no information contemporaneous with the recruitment/hiring process that indicated not possessing a North Carolina drivers' license was an issue. He submits that Respondent admitted a drivers' license is not required to drive farm equipment on the farms owned and operated by Respondent but that he desired a Class C license to drive farm equipment on highways because other drivers do not respect slow moving vehicles and tractors. The Solicitor refers to North Carolina statutes that provide that a drivers' license is not required of "any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway." The Solicitor also argues that T. Saunders possessed a valid drivers' license from Montana and would not be required to obtain a North Carolina drivers' license under that state's statutes until May 2012 at the earliest, several months after the work period of the ETA 790 began. He argues that Respondent's argument concerning T. Saunders' lack of a North Carolina drivers' license is without merit and was not a lawful reason to reject T. Saunders' referral for work.

The Solicitor submits that Respondent testified that workers were expected to report to work at 2775 Hockaday Road but to actually work in as many as 50 to 60 multiple worksites within a 15

mile radius of the Hockaday address and that such multiple work sites is a misrepresentation of the certification in the ETA 790 of a fix-site operator under 20 CFR §655.132(a).[6]

The Solicitor argues that Respondent gave several changing reasons for not hiring T. Saunders and that the last change was that he intended to hire T. Saunders in a trial position that would give accommodations for heat exposure and lack of stamina for repeated lifting and manual work based T. Saunders' physical limitations due to age. He argues that the decision to not hire T. Saunders for the advertised ETA 790 job order was based on information gleaned from the interview process not required of H-2A applicants and was not based on the requirements set forth in the ETA 790 job order. Thus violating the provisions of 20 CFR §655.122(a).

The Solicitor argues that Respondent's failure to contact T. Saunders at any time after the interview belies his statement that he intended to hire T. Saunders for a modified position or any other position with Respondent and undermines the credibility to be given Respondent's statements and motives.

The Solicitor argues that Respondent first used the H-2A program for agricultural equipment operators in 2011 and did not require applicants to have experience in 200+ HP farm tractors; that he hired H-2A workers in 2011; that the H-2A workers gained training and experience in operating 200+ HP farm tractors with the Respondent; that Respondent wished to hire the same H-2A workers in 2012; and that Respondent added the requirement for experience in operating 200+ HP farm tractors to the H-2A program recruitment in 2012. He submits that Respondent intended to prioritize the 2011 H-2A workers at the expense of U.S. workers in violation of 20 CFR §655.122(a).

The Solicitor submits that the civil money penalty imposed in the amount of $7,500.00 was reasonable under the provisions of 29 CFR §502.19(b) for the 20 CFR §655.122(a) violations involving three rejected U.S. workers and that an adjustment of the civil money penalty upwards by the presiding Judge would be completely appropriate in light of the evidence in the record.

The Solicitor argues that T. Saunders should be paid $9,930.38 in back wages under 29 CFR §501.16(a)(1) to "make whole relief for any U.S. worker who has been improperly rejected for employment."

The Solicitor argues, in essence, that Respondent's Motion to Dismiss the cause of action for untimely referral to the Office of Administrative Law Judges was in itself untimely since it was not raised within the timeframe set forth for dispositive motions prior to trial in accordance with 29 CFR §18.70(c) and the court's time for said filings prior to trial. The Solicitor also argues that federal regulations at 29 CFR §501.37 (a) do not create a statute of limitations under the Temporary Nonimmigrant Agricultural provisions of the INA; but that 28 U.S.C. §2462 (Judiciary and Judicial Procedure; Fines, Penalties and Forfeitures) requires that a proceeding for enforcement of a civil money penalty must commence within 5 years from the date of the

[6] It is specifically noted that 20 CFR §655.132(a) applies to the filing requirements of an H-2ALC (labor contractor) which specifically excludes a fixed-site employer. See 20 CFR §655.103(b) Additionally, multiple farming sites owned and operated by a fixed-sire employer of which all are within 15 miles of the central job daily mustering site are with daily commuting distance and within the area of intended employment. See 20 CFR §655.103(b).

violation. He submits that the violations began in 2012; the Respondent was aware of the violations by the Administrator's Determination Letter of February 14, 2014 and Order of Reference filed May 19, 2016; and that the 5-year point of 28 U.S.C. §2462 is March 28, 2017, "five years after the beginning of Respondent's work contract." He also argues that the Respondent has failed to establish it suffered prejudice or was compromised by delay.

Respondent's position:

Respondent's counsel submits that any action by the Administrator to recover back wages for T. Saunders is untimely. He argues that the contract period involved ended December 31, 2012; that U.S. workers have a private cause of action for back wages under the H-2A program; that there is a 3 year statute of limitations under federal law for a U.S. worker to pursue back wages; that U.S. Government actions to enforce contract actions are time-barred after 3 years; and that the Administrator did not seek enforcement of the contract action of T. Saunders for back wages until after the 3-year period had passed. He also submits that T. Saunders had a duty to mitigate damages related to not being hired by Respondent and that Respondent is entitled to offset wages earned by T. Saunders period used by the Administrator to calculate back wages.

Respondent's counsel submits that referred U.S. workers M. Langley and T. Durham were lawfully rejected after being interviewed by Respondent's owner/manager because they "were not qualified based on their individual lack of experience operating 200+ hp farm equipment." He submits that referred U.S. worker T. Saunders was lawfully rejected because he could not legally operate farm trucks on public highways in North Carolina because "he was required to possess a N.C. drivers' license as a resident … Respondent] could not legally allow Saunders to operate farm trucks on public highways at any time during the employment period. Saunders was unable to perform all of the described job duties at the time the work was to be performed. Therefore Saunders was not qualified." He submits that T. Saunders took another job prior to commencement of the contract period and was thus unavailable for employment with Respondent at that time and did not come back to Respondent after the February 2012 interview to seek work. He argues that if there was a program violation, a civil money penalty should not exceed $3,000.00.

Respondent submits that the Administrator did not give full credit for mitigating factors under 29 CFR §501.19(b) when determining the civil money penalty assessed; specifically "Factors 3, 7 and 8."[7] He argues that T. Saunders is not entitled to back wages "because he has not suffered actual money damages. He got another job before the contract start date and was not available to work for [Respondent]."

[7] "Factors 3, 7 and 8" used by Respondent's counsel refer to the "Mitigating Factors" listed on page 2 of AX 3 that cite 29 CFR §502.19(b) (2008 Rule) and 29 CFR §501.19(b) (2010 Rule). AX 3 lists Factors 1 through 7 consistent with 29 CFR §501.19(b); however there is no "Factor 8"under the current regulations, although AX 3 lists "Factor 8: Other (not part of the regulatory language but allowed by regulatory language)."

SUMMARY OF RELEVANT EVIDENCE[8]

Testimony of Douglas Lee (TR 20-56, 61-80, 108-110)

On examination by the Solicitor's counsel, D. Lee testified that he is the member / manager of Respondent for approximately 10 years, including 2012, and has the sole authority to hire and fire employees. He reported that the Respondent farm grows sweet potatoes, grain crops, and watermelon. It also uses the business name of "Lee Farms."

D. Lee testified that AX 9 involved the ETA 9142 for the period April 16, 2011 through December 15, 2011, an application for 6 H-2A workers, and was the first time Respondent had utilized the H-2A program. He stated only 4 H-2A workers were hired. He agreed that the ETA 9142 did not require experience with 200 hp tractors. He stated that he trained some of the H-2A workers hired in 2011 on the 200 hp tractors and that "also some of these guys have been working here in the past 10 to 15 years also had previous experience with this equipment." He agreed that the ETA 9142 did not have a drivers' license requirement.

D. Lee testified that AX 10 involved the ETA 790 job order for the same jobs discussed in AX 9. He agreed that the ETA 709 did not mention requirements for a drivers' license or tractor driving. He testified that when the H-2A workers came in for the 2011 season they were equipment operators and were expected to work 200 hp tractors. He reported no U.S. workers responded to the 2011 ETA 790. He reported that 2 to 3 months was sufficient to train the H-2A workers to operate the 200 hp tractors; and 2 to 4 months to acclimate them to all the different pieces of farm equipment. He stated that if the employee has some experience in other small tractors, it is easier to train them on 200 hp tractor than if they had no experience at all. He reported that Respondent had 5 John Deere tractors exceeding 200 hp in 2012.

D. Lee testified that AX 17 was the ETA 790 for the 2012 period and that job specifications listed had several entries not in the 2011 ETA 790. Those additions included "must be able to lift and carry 60 pounds" which the 2011 H-2A workers could do; have "three months verifiable work experience with 200 horsepower plus tractors" which the 2011 H-2A workers could do from training Respondent provided; and "possession of a North Carolina Class C license." He testified that due to a change in the law H-2A workers could not renew North Carolina drivers' license and "so when the H-2As got here, that they had the ability to go straight to the DMV and get a license at that time" when they initially arrived at Respondent's location for work in 2012. He reported that at least 2 or 3 of the 2012 H-2A workers went and got a North Carolina drivers' license and "the other used Mexican licenses." He stated the drivers' license requirement was added to tighten up requirements based on safety concerns related to moving farm equipment up and down the highways "because the public, a lot of times, don't respect slow moving vehicles and tractors on the highway and sometimes they run into equipment … we don't want any

[8] The Respondent's "Agricultural and Food Processing Clearance Order" ETA Form 790 for the job of Agricultural Equipment Operator during the March 29, 2012 to December 19,2012 timeframe (AX 17, RX 1) and the Respondent's "Application for Temporary Employment Certification" ETA Form 9142 790 for the job of Agricultural Equipment Operator during the March 29, 2012 to December 19,2012 timeframe (AX 18, RX 2) are not separately summarized since the relevant sections were entered as Findings of Fact in the July 6, 2016 Decision and Order denying the respective Motions for Summary Decision and have been incorporated by reference as Findings of Fact in this case.

serious repairs because of mistakes made from abuse or hitting trees or light poles in the field and all kind of stuff." He also testified that the H-2A workers had to have transportation available and that sometimes workers were required to go back and forth to the tractors and fields and sometimes required to move chemicals, fertilizer and water tanks.

D. Lee testified that Respondent had several two-ton trucks and several pickup trucks requiring Class C drivers' license that they used on the farm for hauling material to the different 50 to 60 farm sites within a 15 mile radius of his farm.

D. Lee testified that AX 18 was the ETA 9142 for employment beginning March 29, 2012 that originally requested 6 H-2A; was subsequently modified to 5 H-2A workers; and resulted in 4 H-2A workers being hired. He testified that Respondent farmed thousands of acres and some of the acreage was in adjacent townships at multiple farm sites.

D. Lee testified that he received referrals of U.S. workers for the 2012 ETA 790 job order and that he had each referral complete an application that was created by Respondent and used "for many years with people coming in and looking for jobs before we even started with H-2A program. It's just a generic form that one of my secretaries made for us years ago." He reported the applicants filled out the application form before they were interviewed. He acknowledged the application form asked if the applicant could work up to 70 hours a week and lift up to 100 pounds repeatedly; asked for names of previous employers with years of employment, work performed and equipment operated; asked if they had worked with a chemical manual to figure out ratios for chemicals; asked if they had knowledge of soil conservation methods; asked about experience with specific tractor types; and asked about familiarity with roads in Johnson County, North Carolina. He acknowledged that the ETA 790 for the 2012 job order indicated work of 6 hours per day for Monday to Sunday and 5 hours on Saturday (35 hours total); had lifting and carrying for 60 pounds; did not mention previous employers with employment years and equipment used; did not ask about work with a chemical manual for ratios; did not ask about soil conservation knowledge; did not ask about specific tractor experience; and did not ask about knowledge of local county roads.

D. Lee testified that he personally interviewed the three U.S. workers referred to him by the North Carolina Employment Security Commission. He reported that neither M. Langley nor T. Durham had experience with tractors of 200 horsepower. He reported that T. Saunders had the experience necessary for the 200+ hp tractors but did not have a North Carolina drivers' license, though he had a Montana license and was in the process of liquidating his farm in Montana. He stated that he told T. Saunders he would have to have a North Carolina drivers' license for the job.

D. Lee testified that he did not offer T. Saunders a job after the interview was completed and that he did not call him later with a job offer. He stated that after the interview he believed T. Saunders was qualified to run the equipment but was concerned that he would have problems with the repeated lifting requirements for loading hay or bales of hay or straw or potato boxes in an 8-hour day, with running open tractors with the heat of the motors on 95 to 100 degree days, and with working in the open fields in heat all day. He acknowledged that working in the heat of day was not a requirement written into the ETA 790. He testified that at the time of T. Saunders'

interview it was a correct statement that T. Saunders was not hired because he could not legally operate farm trucks in North Carolina. He stated that in order to be hired, T. Saunders would have had to obtain a North Carolina drivers' license by the March 29, 2012 contract start date.

D. Lee testified that he signed the initial recruitment report, AX 15, completed on February 21, 2012, after the interviews of the U.S. workers referred to him by the North Carolina Employment Security Commission. He stated that the entry for T. Saunders states "hiring commitment given" but that he never gave a hiring commitment personally to T. Saunders and that he "relied on [my secretary] and my attorney to report the referrals as Mr. Saunders was hired and the other two [were] not hired." He reported that on February 21, 2012 he had concerns about the physical limitations of T. Saunders, discussed his concerns "with the other two women in the office … [and] decided we could give him an alternative, a ladder or minor work schedule than doing heavy lifting into work … he could do. He could haul water, he could run the trucks, he could haul fertilizer, plants, chemicals, whatever was needed. He could be out there to help move thing around from farm to farm … I decided to do that even though I didn't think he was physically able to do the work and on the assumption that he would go and get his North Carolina drivers' license." He testified that he assumed that "when this referral was sent, the North Carolina Employment Security Commission will have sent [T. Saunders] back out here at the time and date of the job when it starts" because the referral stated "hiring commitment given."

D. Lee testified that the e-mail address on AX 7 e-mail chain was that of Respondent and that his office employee, P. Wise, wrote Respondent's portion of the e-mail chain on February 20, 2012, after his discussions with her; but before the discussions involving the recruitment report on February 21, 2012. He testified that the February 20, 2012 e-mail states the reasons why the U.S. worker referrals were hot hired. He stated that it was an accurate entry that T. Saunders was not hired at that time but could be called back for a second interview because of his experience and qualification and to discuss his lifting issues and limitations. He reported he did not call T. Saunders back because he assumed that sending in the referral report the next day would cause the North Carolina Employment Security Commission to contact T. Saunders and send him back to Respondent. He testified that the e-mail accurately indicated M. Langley was not hired because he wasn't qualified for large tractors and he wasn't familiar with soil conservation measures and land curvatures to prevent land erosion. He testified that the e-mail accurately indicated T. Durham was not hired because he was not qualified for large farm tractors and other heavy equipment.

D. Lee testified that he wanted the same H-2A workers from 2011 "if it was possible." He stated that he preferred to hire local workers because "it's the right thing to do; but it also saves me a lot of money in bringing H-2A workers if I can find qualified people because of the expense of this program, of what I have to pay for transportation costs and the costs of getting their visas and their meals and their travel. It's much more economical for me to hire American workers." He reported that he did not hire U.S. workers for either the 2011 or 2012 ETA 9142 employment periods.

D. Lee testified that he made the entry on the Referral Reply Information section of AX 5 for T. Saunders, indicating "not hired at this time – may call in for second interview" sometime shortly after the February 6, 2012 interview with T. Saunders.

D. Lee examined the payroll report in AX 16 and identified A. Lara, A. Martinez, L. Mesa and L. Nieto as the four H-2A workers hired for the 2011 season and that they are the same H-2A workers who reported for work as H-2A workers for Respondent's 2012 season on or about May 25, 2012, because they were late in reporting for work and their first week of earnings was paid in June 2012. He reported he had no reason to doubt that the hours indicated as worked in AX 16 were accurate and that the pay rate was $9.70 per hour.

On examination by his counsel, D. Lee testified that he initially got into the H-2A program in 2011 because he was having trouble finding qualified people, especially tractor drivers. He reported that "because of that and these guys, while they worked for me years before, so we decided to try to bring a few of them back in to do this tractor work for me because we were having trouble finding and keeping enough people to do the job."

D. Lee testified that after he interviewed T. Saunders he did not speak with him again and that he did discuss T. Saunders with the two women in the office subsequently. He stated that they were all concerned over the physical limitations of T. Saunders but that they "were going to try and put him doing a lighter type job and go ahead and hire him because I felt like I would need somebody to do the job anyway and he would fit the situation okay." He stated he did not T. Saunders had the physical health to do all the job duties that were described in the ETA 790 job order and that the lighter weight type job for T. Saunders would not be the agricultural operator position being sought in the 2012 ETA 9142.

D. Lee testified that the AX 16 payroll indicated the H-2A workers received a reimbursement on May 25, 2012, "so that means they came in right around that date" when they need money to buy groceries and to get situated. He reported that he understood it would take three to four days of travel for the H-2A workers to arrive at the farm from their native homes.

Upon additional examination by the Solicitor, D. Lee testified that the e-mail in AX 7 was written after he completed interviews of the referred U.S. workers. He stated that he did not interview any of the H-2A workers.

Upon examination by his counsel, D. Lee testified that the H-2A workers that returned in 2012 had all worked for him in 2011 and did not need to be interviewed.

June 24, 2016 affidavit of Douglas Lee (RX 4)

By affidavit dated June 24, 2016, D.W. Lee stated that he is the member-manager of Three D Farms, LLC and has the sole authority to hire and fire. He averred he interviewed T. Duram on February 16, 2016 during which time T. Duram reported he did not have experience operating 200 horsepower tractors. He stated T. Duram "was not hired because he did not have the requisite experience operating 200+ hp farm equipment." D. Lee averred he interviewed M. Langley on February 10, 2016 during which time M. Langley reported he did not have experience operating 200 horsepower tractors. He stated M. Langley "was not hired because he did not have the requisite experience operating 200+ hp farm equipment." D. Lee averred he interviewed T. Saunders on or about February 6, 2016 during which time T. Saunders reported

he did not have a North Carolina driver license but that he had a Montana driver's license. He stated T. Saunders "was not put to work because he could not legally operate farm trucks on public highways in North Carolina."

February 6, 2012 Respondent application for T.M. Saunders (AX 14)

This exhibit indicates T. Saunders reported he had a Montana drivers' license with a clean driving record; had dependable transportation and willingness to work up to 70 hours per week and Saturdays when there was a demand; and had no frequent obligations that would interfere with work. He indicated "age" to questions regarding physical problems that would interfere with work and ability to lift up to 100 (60) pounds repeatedly. He listed his prior work as self-employed farmer in Montana where he used tractors and trucks. He indicated he did not have a North Carolina pesticide applicator license; had some knowledge of soil conservation measures; had experience with 60-foot sprayers, hay baler operations, big discs, and John Deere, Dietz-Alice and Kabuto tractors. He indicated he did not have knowledge of Johnson County roads. He indicated that he worked alone on his farm raising grass, alfalfa, market crops and flowers. The form was dated February 6, 2012.

February 16, 2012 Respondent application for T. Durham (AX 13)

This exhibit indicates T. Durham reported he had a North Carolina drivers' license with a clean driving record; had dependable transportation and willingness to work up to 70 hours per week and Saturdays when there was a demand; had no physical problems that would interfere with work; no frequent obligations that would interfere with work; and could lift up to 100 pounds repeatedly. He listed 3 prior employers and work duties and equipment used over a 13 year period. He indicated he did not have a North Carolina pesticide applicator license; had worked with chemical manuals to figure chemical ratios; had knowledge of soil conservation measures; did not have experience with 60-foot sprayers or hay baler operations; did have experience with planters, big discs, and Ford and John Deere tractors; and had knowledge of Johnson County roads. He indicated that he knew how to operate most big and small tractors, loading plow, disc land, use a rolling cultivator and bush hog and operate an excavator. The form was dated February 16, 2012.

February 10, 2012 Respondent application for M. Langley (AX 12)

This exhibit indicates M. Langley reported he had a North Carolina drivers' license with a clean driving record; had dependable transportation and willingness to work up to 70 hours per week and Saturdays when there was a demand; had no physical problems that would interfere with work; no frequent obligations that would interfere with work; and could lift up to 100 pounds repeatedly. He listed 5 prior employers and work duties and equipment used over a 10.5 year period. He indicated he did not have a North Carolina pesticide applicator license; had worked with chemical manuals to figure chemical ratios; did not have knowledge of soil conservation measures; had experience with 60-foot sprayers, hay baler operations, planters, big discs, front-end loaders and regular and medium sized tractors; and had some knowledge of Johnson County roads. He indicated that he grew up on a farm from a baby to 21 years old. The form was dated February 10, 2012.

February 20-21, 2012 e-mail chain on referrals from North Carolina Employment Security Commission (AX 7)

By e-mail dated February 20, 2012, Respondent notified the National Processing Center that it "had three referrals at this time" and that T. Saunders was "not hired at this time. Qualifications are good; has farming experience; just moved here from Montana – therefore he is not familiar with Johnson County roads; which if he was would be a big plus; since this is a job with little supervision and the need to move from farm to farms without supervision. One question on the application is about continuous heavy lifting (repeatedly 100 lbs.) His answer was AGED. Since job does not start until April/May; Mr. Saunders was not hired at this time; could call him back at a later time for 2nd interview and discuss the lifting issues and limitations that would apply to him." The Respondent also stated that M. Langley was "not qualified – for large tractors and not familiar with soil conservation methods (land curvatures to prevent land erosion) and that T. Durham was "not qualified for large tractors or other heavy equipment." Respondent also asked if the total number of requested H-2A workers would be reduced if T. Saunders was hired "at a later time before the hiring time is up."

Testimony of Yaimara Esquivel (TR 81-108)

Upon examination by the Solicitor's counsel, Y. Esquivel testified that she is an investigator for the U.S Department of Labor, Wage and Hour Division working out of the Raleigh, North Carolina office for seven years. She reported that she performs 30 to 40 investigations each year, with an average of 5 H-2A investigations each year. She is a native speaker of Spanish.

Y. Esquivel testified that she investigated Respondent after receiving a complaint against a crew leader. She was assisted by investigators K. Park and A. Delgado. Her initial interview contact was A. Dodd and P. Wise and subsequently with D. Lee. H-2A workers were interviewed as part of the investigation. The investigation revealed "that U.S. workers that were referred to the farm were not hired and they were qualified to do the job."

Y. Esquivel testified that the investigators were told that the U.S. workers were not hired because they did not have full cultivation licenses and land erosion. Drivers' licenses and physical restrictions were not mentioned. She stated that when an investigation is done, the investigators "request a lot of records [so] that we have at least the records that we need. We always ask for referrals and whether or not any U.S. workers were hired, and we request those documents." She stated the document with the e-mail chain (AX 7) was one of the documents provided by Respondents employees, either S. Dodd or P. Wise, "who were the ones who gave us all the records."

Y. Esquivel identified AX 2 as a summary for unpaid wages for T. Saunders. She stated that the investigators "found there were three U.S. workers were not hired and were qualified to do the job; but we were only able to get ahold of Mr. Saunders, so we only computed [unpaid wages] for him." She stated that the unpaid wages were computed by taking the 39 week work period of the ETA 9142 and other hours paid during that period, multiplied the number of hours by ¾ for the guaranteed contract time, multiplied by the hourly rate of pay of $9.70 per hour. She also

reported that the payroll record of AX 16 was reviewed to make sure H-2A workers were reimbursed for inbound travel the current season and outbound travel the previous season as well as being actually paid the right wage rate currently.

Y. Esquivel testified that AX 3 was a penalty computation sheet. The violation was with preferential treatment of H-2A workers in violation of 20 CFR §655.122(a) and unlawful rejection of U.S. workers in violation of 20 CFR §655.135. No civil money penalty was assessed for the 20 CFR §655.122(a) violations and a $7,500.00 civil money penalty was assessed for the 20 CFR §655.135 violations. She testified that as to "the H-2A workers given preferential treatment, we didn't assess anything because the Department's position was that since these two violations, one happened because of the other one … we felt that if we assess penalties on both violations we will just assess them the penalties for the same violations. So we decided to zero one and then assess only one." The $7,500.00 civil money penalty assessed "was meant to capture just that one violation; but we decided not to assess penalties on the other one since these two violations were related to each other." She stated that the maximum civil money penalty for the violation was $15,000.00 and that a civil money penalty was only assessed for the violation involving T. Saunders. The migrating factors considered were "the lack of previous history; the number of workers affected was less than 10 percent … of all the other migrant workers that Mr. Lee was employing at the time; good faith; … [and] commitment to future compliance."

On cross-examination, Y. Esquivel testified that three factors were not considered as mitigation. One factor was the gravity of the violation since a U.S. worker was adversely affected by being unlawfully rejected and not being employed. She stated that violations of regulations involving wages are grave violations. Another factor was the extent the violating employer achieved a financial gain or there was the potential financial loss or potential for injury of the U.S. worker. In this case U.S. worker had a financial loss because the U.S. worker was not hired and the investigators did not look into whether the Respondent had a financial gain. She stated that she was not aware that T. Saunders became employed elsewhere, so that was not considered. She reported that the last factor "other" is not seen applied "in cases in which we find wages owed or when we find egregious housing violations or transportation violations and things like that. In cases in which the violations are more about record keeping and things like that … I usually apply that ["other"] mitigating factor." She reported that she reduced the maximum civil money penalty for the violation involving T. Saunders by 10 percent for each mitigating factor applicable to the case.

Y. Esquivel testified that originally she sought back wages for all three rejected U.S. workers referred to the Respondent for the position involved and that the back wage computation for all three workers was originally presented to D. Lee. She stated that when she looked at the job application, there was no indication that M. Langley and T. Durham could not to the job but that the investigators were unable to contact them as part of the investigation. She reported that she did not talk to anyone from the North Carolina Employment Security Commission and she did not know if any of the three rejected U.S. workers filed a complaint with Wage and Hour Division. She reported that the referral card in AX 11 was given to her by Respondent and not the North Carolina Employment Security Commission.

Y. Esquivel testified that her investigations involving violations of the H-2A program have all been in North Carolina. From her observations it is common for the H-2A workers to report to a central location and the employer then providing transportation to take the workers to the work areas throughout the farm area. She stated that if the work was in different counties, that would usually be listed on the Temporary Employment Certification by checking a "yes" box on the certification. She stated that she believed Respondent's work areas covered several different counties and "they have many, many acres of land ... in the surroundings of [the listed] address."

On re-direct examination, Y. Esquivel testified that they interviewed the H-2A workers on site after receiving the reasons the referred U.S. workers were not hired. She stated the H-2A workers interviewed "did not possess the [North Carolina soil conservation] license … We specifically asked the question after we obtained e-mails listing the reasons why the workers were not hired, the U.S. workers were not hired. We went out again and we interviewed the H-2A workers to ask them whether or not they possessed these licenses, specific pesticide and soil conservation licenses, and also whether or not they had previous knowledge of this machinery, if they knew the roads within the county, which was another issue that [arose] during the investigation."

Testimony of Francisca Rios (TR 111-120)

F. Rios testified that she is currently the State Monitor Advocate with the North Carolina Department of Commerce and that in 2012 she was an Agricultural Employment Consultant. As an Agricultural Employment Consultant, she assisted a U.S. worker by the name of T. Saunders. She identified RX 8 as employment referral cards that are printed out when a job referral is made for an applicant worker. One copy is given to the applicant and another is sent to the prospective employer to notify them that a referral has been done. RX 8 indicates T. Saunders was referred to 6 different employers and that she had indicated on each referral card that he had not been hired. She reported that she only followed up with T. Saunders on one referral and that other staff members in the office followed up on the other referrals and posted the referral results.

F. Rios testified that she followed up on the referral of T. Saunders to Respondent employer and she made the handwritten notes on the RX 8 referral card involved. She assisted in arranging an interview on February 6, 2012 for T. Saunders with Respondent. She reported that she did not follow up on the referral with T. Saunders until the start date of March 29, 2012, "to verify whether he was hired or not." She testified that T. Saunders "explained to me that he had found another job, and that's what I have on my notes as well. … I put 'not hired' [on the referral card] because if he had found another job he was not going to take this other job. But I never followed up with the employer to find any other result." She identified page 8 of RX 8 as "a Form 795. At that time we were supposed to complete these to give a description of the referral that was done and then distribute to the office manager and the Agricultural Services Program Manager." She testified that she did not receive any complaints from T. Saunders during the follow up conversation and that she considered T. Saunders finding another job as an indication that he was not available to work for Respondent.

On cross-examination by the Solicitor's counsel, F. Rios testified that she did not recall receiving an Initial Recruitment Report from Respondent and that she does not usually get that information

from employers. She testified that in 2012 she did not do actual hiring for employers and did not notify applicants that an employer had decided to hire them. It was up to the employer to decide whether to hire an applicant.

North Carolina Employment Security Commission referral for T.M. Saunders (AX 5)

This exhibit indicates that T.M. Saunders was referred to Respondent in February 2012 by the Smithfield office of the Employment Security Commission of North Carolina for the position of agricultural equipment operator. Hand written on the form was "Applicant's phone # …." and "7:15 Monday Feb 6." At the bottom of the form under the "Referral Reply Information" section was handwritten "Not hired at this time – may call in for second interview. DL"

North Carolina Employment Security Commission referral reply for T. Durham (AX 6)

This exhibit indicates that T. Durham was referred to Respondent in 2012 by the Smithfield office of the Employment Security Commission of North Carolina for the position of agricultural equipment operator. Hand written at the bottom of the form under the "Referral Reply Information" section was a mailing address, a post office box address, telephone numbers and "7 - 7:30 – Thurs. 2-16." The line "Not Qualified" is marked with a check mark to indicate the results of the referral.

North Carolina Employment Security Commission referral reply for M. Langley (AX 11)

This exhibit indicates that M.V. Langley was referred to Respondent in 2012 by the Smithfield office of the Employment Security Commission of North Carolina for the position of agricultural equipment operator. A telephone number was handwritten in the top portion of the page. The line "Not Qualified" is marked with a check mark to indicate the results of the referral.

June 24, 2016 deposition of T.M. Saunders (RX 5)

In his June 24, 2012 deposition testimony T. Saunders testified that he moved from Montana after the sale of his farm and livestock and relocated in Salem, North Carolina in the June or July 2011 timeframe. He received a Class C, North Carolina driver's license on January 11, 2013. Prior to that time, he had a driver's license, commercial driver's license, and a bus driver's license issued by Montana. He stated that he was referred to Respondent by the NC ESC for a tractor driver position. T. Saunders testified that he "went to Three D Farms probably three different times" but did not remember the date. He stated that at the time when he applied for the job he could quite easily lift and carry 60 pounds and that he had multiple years of work experience operating 200 horsepower farm equipment. He stated that when he quit working he sold two Deutz-Allis Chalmers tractors. He testified that he was not hired by Respondent and did not know why he was not hired. "There was nothing offered at Three D." He testified that he filled out the application at RX 6 while at the NC ESC, though it was possible that he filled out the application at Respondent's farm. He testified that all the tractors listed on the application he filled out, except the Kabota, are over 200 horsepower. T. Saunders testified that "at my age, I'm not going to get out and do manual labor full bore 40 hours a week … He runs a potato farm. I can't go into his shed and throw 60-pound bags of spuds all day long. I can't,

physically, I can't at that age." He denied being told by Respondent that he had to have a specific pesticide license, know soil conservation methods, have knowledge of local roads, or have knowledge on how to figure chemical ratios from chemical manuals. On cross-examination, T. Saunders testified he had been farming all his life, his major crops were hay and alfalfa; had seven hoop houses raising tomatoes, cucumbers and eggplants using hand cultivation, was experienced in irrigation, combines, sprayers, driving farm trucks, and towing trailers. He stated the first two times to the Respondent's farm the interviewer did not show up. He testified that the last trip to Respondent's farm he was in a room with a younger man and a secretary when the interviewer showed up, looked at his application, and stated "We employ Mexicans"; at which time he testified he "thanked [the interviewer] very much, turned around and left. That was my total interview, my total time with Three D Farms." He stated he was not asked about a North Carolina driver's license and was not told he did not get the job because of lifting restrictions. He testified that he was never offered a job commitment from Three D Farms. He stated that an individual from Three D Farms called him on the telephone a few days after his interview to discuss age and knowledge of local roads.

February 14, 2013 telephonic statement of T.M. Saunders (AX 4)

This exhibit indicates that T. Saunders was interviewed by Wage and Hour Division investigator Delgado on February 14, 2013 as related to employment with Respondent. The exhibit indicated T. Saunders reported:

> "I saw an advertisement for a job last year and I applied. I was interviewed at the farm, but they never called me back to start working for them. I believe that I applied around February and the job was supposed to start around March or April. I found another job at K-Mart taking care of their garden section.
>
> I worked on farms my entire life and currently I am 70 years old, so that tells how many years I had experience driving all tractor sizes for farm work. During the interview the person who conducted the interview never said it, about my age. He mentioned that because I was Caucasian I won't be a good fit due to the fact that they are all Hispanics working there. I personally believe that they didn't call me for the job because of my age. There's not much to say, because they just didn't call me back for the job."

North Carolina Division of Motor Vehicles record for T.M. Saunders (RX 3)

This exhibit indicates that T. Saunders was issued a Class C North Carolina drivers' license on January 11, 2013. The exhibit indicates T. Saunders was involved in an accident in Johnson County, North Carolina on December 21, 2013 and had no other accidents or convictions of record indicated.

February 15, 2011 Application for Temporary Employment Certification, ETA Form 9142 (AX 9)

This exhibit is a copy of the ETA 9142 submitted by the Respondent on February 15, 2011 for the hire of 6 H-2A workers as "Farmworkers and Laborers, Crop" O*Net Code 45-2092.02. The period of intended employment was from April 16, 2011 to December 15, 2011.

The ETA Form 9142 listed the job duties in Item F.a.5 as –[9]

> "Cultivate and harvest corn, soybeans, cotton, flowers, sweet potatoes, watermelon, oats, and rye. Operate or tend equipment or machinery used in agricultural production, such as tractors, combines, and **irrigation equipment**. Operate towed machines such as seed drills and sprayers to plant, fertilize, dust and spray crops. Observe and listen to machinery operation to detect problems. **Operate** and perform minor maintenance on farm vehicles and equipment. **Soybeans, corn, rye, oats and/or wheat. Workers will cultivate by hand or with mechanical cultivators attached to farm tractor. Worker may operate mechanical combine to harvest these crops.**
>
> Workers may be required to perform work, on the farm, that is incidental to farming the crops listed in the application, such as performing hand-cultivation tasks, weeding or hoeing various crops, cleaning and repairing farm buildings, seed beds, racks, grounds, setting up and moving irrigation pipes and equipment, gardening, weeding and shrubbing, etc. All other duties assigned under this [Job] Order will be those duties of Farm Worker, Diversified Crops, DOT code 407.687-010. This is a very demanding and competitive business in which quality specifications must be rigorously adhered to. Sloppy work cannot and will not be tolerated.
>
> Full Growing Season Commitment: The job offered requires that the worker be available for work six (6) hours per day Monday through Friday and five (5) hours on Saturday every day that work is available and for the full period of employment shown in Item 5, even though work may be slack for a brief period after tobacco planting. The worker agrees to be available for work and perform assigned tasks whenever work is available through the full period of employment shown in Item 5. Work available is defined as, no work required on the worker's Sabbath or Federal holidays, but work is required six (6) hours per day Monday-Friday, and five (5) hours on Saturday.
>
> The worker understands that if he abandons this employment or is terminated for cause prior to the end of the period of employment shown in Item 5, the worker will forfeit the ¾ guarantee and reimbursement of certain transportation costs described elsewhere in this job order. Excessive absences and/or tardiness cannot be tolerated and may result in termination.
>
> Daily individual work assignments, crew assignments, and location of work will be made by and at the sole discretion of the farm manager and/or farm supervisor as the needs of the farming operation dictate. Workers may be assigned a variety of duties in any given day and/or different tasks on different days. Workers will be expected to perform any of the listed duties and work on any crop as assigned by the worker's supervisor."

The ETA 9142 stated in Item F.d indicated that no job training or minimal level of education was required for the job and that 1 month of experience as a Farm Equipment Operator was required.

February 14, 2011 Agricultural and Food Processing Clearance Order, ETA Form 790 (AX 10)

This exhibit is a copy of the ETA 790 submitted by the Respondent on February 14, 2011 for the recruitment of 6 H-2A workers as "Farmworkers and Laborers, Crop" O*Net Code 45-2092. The period of intended employment was from April 16, 2011 to December 15, 2011.

The ETA Form 790 listed the job specifications in Item 15 as –[10]

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[9] **Bold** print is added to highlight differences between the 2011 ETA 9142 entries and the 2012 ETA 9142 entries.
[10] **Bold** print is added to highlight differences between the 2011 ETA 790 entries and the 2012 ETA 790 entries.

"Cultivate and harvest corn, soybeans, cotton, flowers, sweet potatoes, watermelon, oats, and rye. Operate or tend equipment or machinery used in agricultural production, such as tractors, combines, and sprayers. **Operate or tend equipment or machinery used in agricultural production, such as tractors, combines, and irrigation equipment**. Operate towed machines such as seed drills and sprayers to plant, fertilize, dust and **spray crops**. Observe and listen to machinery operation to detect problems. **Operate** and perform minor maintenance on farm vehicles and equipment. The use or possession or being under the influence of illegal drugs or alcohol during working time is prohibited. Workers may be requested to submit to random drug or alcohol tests at no cost to the worker. Failure to comply with the request or testing positive may result in immediate termination. All testing will occur post-hire and is not part of the interview process. **May be required to lift or move heavy objects. Requires one month prior experience as a farm equipment operator**.

Soybeans, corn, peanuts, cotton, rye, oats, and/or wheat: Workers will walk along rows as specified by employer and remove weeds and grass from soybean and corn fields by hand or using a hoe. Workers will cultivate by hand or with mechanical cultivator attached to farm tractor. Worker may operate mechanical combine to harvest these crops.

Workers may be required to perform work, on the farm, that is incidental to farming the crops listed in the application, such as performing hand-cultivation tasks, weeding or hoeing various crops, cleaning and repairing farm buildings, seed beds, racks, grounds, setting up and moving irrigation pipes and equipment, gardening, weeding and shrubbing, etc. All other duties assigned under this [Job] Order will be those duties of Farm Worker, Diversified Crops, DOT code 407.687-010. This is a very demanding and competitive business in which quality specifications must be rigorously adhered to. Sloppy work cannot and will not be tolerated.

Full Growing Season Commitment: The job offered requires that the worker be available for work six (6) hours per day Monday through Friday and five (5) hours on Saturday every day that work is available and for the full period of employment shown in Item 5, even though work may be slack for a brief period after tobacco planting. The worker agrees to be available for work and perform assigned tasks whenever work is available through the full period of employment shown in Item 5. Work available is defined as, no work required on the worker's Sabbath or Federal holidays, but work is required six (6) hours per day Monday-Friday, and five (5) hours on Saturday.

The worker understands that if he abandons this employment or is terminated for cause prior to the end of the period of employment shown in Item 5, the worker will forfeit the ¾ guarantee and reimbursement of certain transportation costs described elsewhere in this job order. Excessive absences and/or tardiness cannot be tolerated and may result in termination.

Daily individual work assignments, crew assignments, and location of work will be made by and at the sole discretion of the farm manager and/or farm supervisor as the needs of the farming operation dictate. Workers may be assigned a variety of duties in any given day and/or different tasks on different days. Workers will be expected to perform any of the listed duties and work on any crop as assigned by the worker's supervisor."

The ETA 790 also included the following provisions –[11]

"Transportation between living quarters and worksite. For those workers living in housing provided or secured by the employer, employer will provide transportation between such housing and the employer's daily worksite at no cost to the worker. Such transportation will comply with all applicable federal, State and local laws and regulations, in accordance with 20 CFR §655.122(h)(4). The use of this daily transportation is voluntary, no worker is required as a condition of employment to use the daily transportation to the worksite offered by the employer."

[11] These transportation and training provisions are identical to the transportation and training provisions included in the 2012 ETA 790 (AX 17, RX 1)

"TRAINING: Training will be provided for one day and workers will be allowed one day to reach the production standards of the activity."

DISCUSSION

Under the H-2A program, U.S. employers are permitted to bring foreign non-immigrant workers into the country on a temporary basis to perform agricultural labor of a temporary or seasonal nature. 8 U.S.C. §1101(a)(15)(H)(ii)(a). Prospective U.S. employers are required to test the labor market to determine whether able, willing and qualified U.S. workers are available to fill the positions in which the employer seeks to employ H-2A workers. 20 CFR Part 655, Subpart B. This is accomplished by filing a job order form ETA 790 with the state workforce agency (SWA) that satisfies the requirements for agricultural clearance orders in 20 CFR Part 653 and the content requirements of 20 CFR §655.122. 20 CFR §655.121(a)(3). When the ETA 790 job order is cleared, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers for the approved job. 20 CFR §655.121(c). The SWA must refer to the employer each U.S. worker who applies for the job opportunity. 20 CFR §655.121(d). However, the SWA may only refer for employment those individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that they are qualified, able, willing, and available for employment. 20 CFR §655.155.

Pursuant to 20 CFR §655.122 - "(a) *Prohibition against preferential treatment of aliens*. The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job orders may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. … (b) *Job qualifications and requirements*. Each job qualification and requirement list in the job order must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops."

Pursuant to 20 CFR §655.130, an employer who desires to employ H-2A workers must file an "Application for Temporary Employment Certification" Form ETA 9142 with the Department of Labor, National Processing Center, along with a copy of the ETA 790 submitted to the SWA; and must certify that it will abide by the requirements of 20 CFR Part 655, Subpart B and additional assurances set forth in 20 CFR §655.135. Under 20 CFR §655.135(a) the employer assures that "*Non-discriminatory hiring practices*. The job opportunity is, and through the period set forth [as 50% of the contract period from the date of need] open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired."

I. <u>The Order of Reference filed with the Office of Administrative Law Judges by the Solicitor under 29 CFR §500.224 was timely filed</u>.

Enforcement of all contractual obligations arising under 8 U.S.C. §1188 and 20 CFR Part 655, Subpart B applicable to the employment of H-2A workers is governed by the Federal regulations

set forth in 29 CFR Part 501. Under 29 CFR Part 501 the Department of Labor "is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR Part 655, Subpart B, or the regulations in this Part, including the imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations." 29 CFR §501.1(a)(2). Where the Administrator has determined to impose a civil money penalty based on the improper rejection for employment of a U.S. worker under 29 CFR §501.16, the employer may request a hearing before an administrative law judge within 30 days of issuance of the Administrator's written Notice of Determination. 29 CFR §501.33. "Upon receipt of a timely request for a hearing filed pursuant to and in accordance with §501.33, the WHD Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, will, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing …, to the Chief ALJ for a determination in an administrative proceeding as provided herein." 29 CFR §501.37(a).

In this case the Respondent argues that the action must be dismissed because the Administrator did not promptly refer the request for hearing to the Chief Administrative Law Judge when the request for hearing was filed on March 13, 2014 (ALJX 1) and the referral to the Office of the Chief Judge was filed on May 19, 2016 (ALJX 1), a period of 2 -2/12 years.

Respondent argues that the action for back wages had to be commenced within two years of when the contract period ended on December 19, 2012 because the U.S. Government cannot take action to enforce a contract action after 3 years have passed and the Administrator did not commence enforcement action by filing the Order of Reference until after December 19, 2015. He makes this argument by comparing the Administrator's actions as standing in the shoes of the employee seeking to enforce a private right of action and that the Order of Reference filed by the Solicitor with the Office of the Chief Administrative Law Judge is the equivalent of filing a complaint in U.S. District Court. He asserts that the INA does not articulate an explicit limitation period so that North Carolina's "most analogous statute of limitations" must be applied, which he asserts is a 3-year period for enforcement of contract claims. He submits that the requirement for H-2A employers to hold employment records for 3 years after the end of temporary employment certification further supports a 3-year limitation period.[12] He does not set forth how Respondent was prejudiced by the time delay between the Respondent's request for hearing and the Order of Reference being filed.

The enforcement of all contractual obligations under the H-2A program are governed by Federal regulations at 29 CFR Part 501. 29 CFR §501.0. Whenever the Administrator believes 8 U.S.C. §1188 has been violated, 20 CFR Part 655, Subpart B has been violated, or 29 CFR Part 501 has been violated, the Administrator is directed to take such actions and institute such proceedings the Administrator deems appropriate, which may include recovery of unpaid wages; assessment of a civil money penalty; make whole relief for any U.S. worker who has been improperly rejected for employment; and debarment of offending employers for up to 3 years. 29 CFR §510.16. The ability to obtain back wages for a U.S. worker improperly rejected for employment by an H-2A employer is a specific cause of action extended to the Administrator by

[12] Citing 20 CFR §655.167.

Federal law and is not based on the stand-in-the-shoes of an employee under general contract law as argued by Respondent's counsel. Under 29 CFR Part 501, only actions involving debarment have a provision requiring that the Notice of Debarment be issued within 2 years of the violation. No other permitted action of proceeding deemed appropriate by the Administrator has a specific period of time in which to initiate appropriate actions and proceedings. However, under 28 U.S.C. Chapter 163 "Fines, Penalties and Forfeitures", §2462 "Time for commencing proceedings", an action or proceeding for enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued …" In this case the Administrator commenced enforcement with the Determination Letter of February 14, 2014, less than 2-years after the rejection of the three referred U.S. workers. Indeed, five years has yet to pass since the rejection of the three referred U.S. workers occurred.

After deliberation on the evidence of record this presiding Judge finds that the Respondent has failed to establish by a preponderance of the evidence that the Order of Reference was untimely. Accordingly, Respondent's Motion to Dismiss for untimeliness must be denied.

II. <u>Respondent unlawfully rejected the respective application of U.S. workers T. Saunders, M. Langley and T. Durham for the position of agricultural equipment operator for the period from March 29, 2012 through December 19, 2012 set forth in ETA Case No. C-12040-32614, in violation of 20 CFR §655.122</u>.

As noted above, Federal regulations for the H-2A program at 20 CFR §655.122 prohibits preferential treatment of aliens over U.S. workers and requires H-2A employers offer to U.S. workers positions described in ETA 790 at no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers and may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers through the ETA 790 job order.

Analysis of whether there was preferential treatment given to non-immigrant aliens over U.S. workers in the H-2A program begins with the minimum requirements of the position for which workers are sought. Here the 2012 temporary work position is classified as Agricultural Equipment Operator, O*Net 45-2091. The 2011 temporary work position involved was classified as Farmworkers and Laborers, Crop, O*Net Code 45-2092.02.

D. Lee testified that the work to be performed during the 2012 work period was the same work performed by the same H-2A workers in the corresponding 2011 period. Other than the minimal change of "irrigation equipment" to "sprayers" and "operate" to "trouble shoot, repair" in paragraph one of the 2011 and 2012 ETA 790 job orders, the work performed in 2011 was the same described in 2012, with the following major changes in 2012:

a. changing "May be required to lift or move heavy objects" to "Must be able to lift 60 pounds"
b. changing "Requires one month prior experience as a farm equipment operator" to "Minimum 3 months verifiable work experience operating 200+ h.p. farm equipment required."

c. Adding “Basic literacy and mathematical ability required.”
d. Adding “Applicants must possess proper and current drivers’ license (Class C or its foreign equivalent) to legally operate farm truck on public highways in North Carolina.”

D. Lee testified that he hired 4 H-2A workers in 2011 and wanted the same workers in 2012 if it was possible. He stated that he did not require experience with 200 hp tractors in 2011 and that he trained some of the 2011 H-2A workers in operating the 200 hp tractors. He reported that 2 to 3 months was sufficient to train workers to operate 200 hp tractors, and 2 to 4 months was adequate to acclimate workers to all the different pieces of farm equipment. In establishing basic experience/training requirements under the INA, training and experience gained by non-immigrant workers while in the employ of the entity seeking to employ non-immigrant workers cannot be used to establish eligibility for the advertised position, unless the seeking entity can establish that it is impracticable to train new employees. Here the training provided the H-2A workers in 2011 cannot be considered a bone fide job qualification and requirement in the 2012 job order. The Respondent demonstrated by hiring the same H-2A workers it employed in 2011 without the qualifying 200 hp tractor experience and by providing appropriate training to those H-2A workers, that a “minimum 3 months verifiable work experience operating 200 hp farm equipment” was not necessary for the actual job as performed. Respondent’s subsequent inclusion of a 3 month experience requirement for operating 200 hp farm equipment and hiring of the same H-2A workers demonstrated misplaced understanding about crediting foreign nonimmigrant workers with experience acquired on the job while employed by Respondent and also demonstrated that Respondent intended to give preferential treatment to the 2011 H-2A foreign workers. D. Lee completed the ruse when he rejected referred U.S. workers M. Langley and T. Durham from the position because they did not have experience with 200 hp tractors.[13] Such action amounted to the preferential treatment of foreign workers and the unlawful rejection of U.S. workers under 20 CFR §655.122 and 20 CFR §655.135.

D. Lee testified that there was no requirement for a North Carolina drivers’ license in 2011 and that none of the four 2012 H-2A workers had North Carolina drivers’ license when they reported to work in 2012 and that only 2 or 3 of the four H-2A workers hired in 2012 obtained a North Carolina drivers’ license. He stated the rationale for the North Carolina drivers’ license was “because the public, a lot of times, don’t respect slow moving vehicles and tractors on highways and sometimes they run into equipment” and “we don’t want any serious repairs because of mistakes made from abuse or hitting trees or light poles in the field and all kind of stuff.” It is noted that the advertised “farm truck on public highways” is not necessarily a slow-moving vehicle, thus undermining D. Lee’s rationale for requiring a North Carolina drivers’ license. Because the Respondent did not actually require all the 2012 H-2A workers to have a valid North Carolina drivers’ license, this added 2012 requirement is not a bone fide job requirement. Additionally, North Carolina does not require any drivers’ license at all to operate slow-moving farm equipment, tractors, and tractors with towed equipment, when the farm equipment is being operated to move farm equipment from one farm location to another or to market farm product or to obtain farm supplies. Finally, the regulations controlling the H-2A program require the Respondent to provide daily transportation for the workers from provided housing to the

[13] D. Lee also testified to the lack of soil conservation measures and land erosion measures figured into his decision not to hire M. Langley. Such requirements were not set forth in the ETA 790 under which the H-2A workers were hired and M. Langley was rejected.

worksite, at no cost to the worker. In view of all the foregoing, requiring applicants to have valid North Carolina drivers' license is not a bone fide job qualification / requirement in the 2012 job order. D. Lee testified that immediately after the February 6, 2016 interview, T. Saunders was not hired because he did not have a North Carolina drivers' license. He also testified that T. Saunders would have to have a North Carolina drivers' license at the time of any hiring for a different modified job with Respondent. In view of all the foregoing, the rejection of referred U.S. worker T. Saunders for having a Montana drivers' license and not a North Carolina drivers' license amounted to preferential treatment of foreign workers and the unlawful rejection of a U.S. worker under 20 CFR §655.122 and 20 CFR §135.

Changing the lift requirement from heavy objects to a more specific weight of 60 pounds amounted to a clarifying statement by Respondent. However, when the Respondent engaged in discussing with referred U.S. workers if they could repeatedly lift 100 pounds, Respondent effectively engaged in a discriminatory hiring practice by placing on referred U.S. workers a requirement of repeatedly lifting 100 pounds vice the job offer requirement of "must be able to lift 60 pounds" placed on the H-2A workers who were not similarly treated.

After deliberation on all the credible evidence of record, this presiding Judge finds that Respondent gave preferential treatment to 2011 H-2A workers hired in 2012 over the three referred U.S. workers, M. Langley, T. Durham, and T. Saunders in violation of 20 CFR §655.122 and rejected employment to the three referred U.S. workers, M. Langley, T. Durham, and T. Saunders for unlawful reasons in violation of 20 CFR §655.135.

III. <u>The $7,500.00 civil money penalty imposed on Respondent for violations of the H-2A provisions of Section 218 of the Immigration Reform and Control Act of 1986 during the April 12, 2011 through December 31, 2012 period related to the unlawful rejection of U.S. workers is appropriate</u>.

Pursuant to Federal regulations at 29 CFR §501.19 a civil money penalty may be imposed by the Administrator for each violation of the work contract or obligations imposed by 8 U.S.C. §1188, 20 CFR Part 655, Subpart B, or 29 CFR Part 501. "A civil money penalty for improperly rejecting a U.S. worker who is an applicant for employment, in violation of 8 U.S.C. [§]1188, 20 CFR Part 655, Subpart B, or the regulation in [29 CFR Part 501], shall not exceed $15,000 per violation per worker." When determining an appropriate civil money penalty to impose for violations of 20 CFR Part 655, Subpart B, the Administrator is required to "consider the type of violation committed and other relevant factors." 20 CFR §501.19(b) The relevant factors may include (1) the employer's prior history of violations of the H-2A program; (2) number of workers affected by the violation; (3) the gravity of the violations; (4) good faith efforts to comply with the H-2A program; (5) explanation given by the employer for occurrence of the violations; (6) the employer's commitment to future compliance with the H-2A program; and (7) financial gain to the employer and/or potential financial loss to the effected workers.

Y. Esquivel testified that the Administrator considered the violations of 20 CFR §655.122 and 20 CFR §655.135 to be duplicitous for the purposes of determining an appropriate civil money penalty. This presiding Judge accepts that concept under the facts of this case such that the

maximum civil money penalty imposable for the violations committed by Respondent is $45,000.00 and not $90,000.00.

a. the employer's prior history of violations of the H-2A program

In this case the violations occurred in the 2012, the second year Respondent chose to participate in the H-2A program. There were no previous violation of H-2A program requirements in 2011 that were entered into evidence in this case. Accordingly, this factor is a mitigating factor in this case.

b. number of workers affected by the violation

Here three referred U.S. workers were directly affected by Respondent's direct actions in the application process and recruitment process of the H-2A program. Accordingly, this is not a mitigating factor in this case.

c. the gravity of the violations

Giving preferential treatment in hiring practices to non-immigrant workers over U.S. workers who apply for the job offered and who meet the minimum requirements of a bone fide job offer defeats the very purpose of the H-2A program. Violations of 20 CFR §655.122 and 20 CFR §655.135 are most grave violations of the H-2A program. Accordingly, this is an aggravating factor in this case.

d. good faith efforts to comply with the H-2A program

The credible evidence of record established that Respondent made a concerted effort to rehire the H-2A workers from 2011 by manipulating the ETA 790 and SWA classification and recruitment process. These deliberate actions by Respondent were not in keeping with the good faith requirements of the H-2A program to offer bone fide jobs to U.S. workers before non-immigrant labor is employed under the H-2A program. Accordingly, this is an aggravating factor in this case.

e. explanation given by the employer for occurrence of the violations

Respondent has provided an ever evolving explanation of why he did not hire T. Saunders for the 2012 ETA 790 job offer. He gave one controlling reason for not hiring M. Landry and T. Durham. The explanations given did not amount to mitigating factors in this case.

f. the employer's commitment to future compliance with the H-2A program

The testimony of Respondent's managing member was not sufficient to demonstrate a firm commitment to future compliance with the H-2A program. Accordingly, this is not a mitigating factor in this case.

g. *financial gain to the employer and/or potential financial loss to the effected workers*

The Parties speculated if T. Saunders suffered a financial loss because to Respondent's actions. However, the Parties did not address the potential financial loss to referred U.S. workers M. Langley or T. Durham. The issue involving T. Saunders and financial loss is address below. The potential financial loss to the other referred U.S. workers does not permit this factor to be considered mitigating.

After deliberation on the credible evidence in this case, this presiding Judge finds that the Administrator's determination that the imposition of a $7,500.00 civil money penalty was not an abuse of discretion and is appropriate under the facts of this case.

IV. The Solicitor has failed to establish that the payment of $9,930.38 in back wages to T.M. Saunders is appropriate.

While the Solicitor has established that referred U.S. worker T. Saunders was not hired for inappropriate reasoning by the Respondent, the Solicitor has failed to establish by a preponderance of the evidence that T. Saunders is entitled to back pay in any amount.

F. Rios testified that when she followed up with T. Saunders on the SWA referral to Respondent's 2012 ETA 790 on the job start date of March 29, 2012, T. Saunders stated he had taken a job with K-Mart in the garden section. F. Rios testified that this meant he was not available to begin work under 2012 ETA 790 job order and she marked his referral card as "not hired" for SWA reporting purposes. By indicating he had found another job on March 29, 2012, T. Saunders is considered not "willing and available" to work the 2012 ETA 790 job offer.

Since T. Saunders was not "willing and available" to begin work for Respondent on March 29, 2012 because he had another job, and there is no evidence that T. Saunders subsequently applied and was denied employment for the 2012 ETA 790 job offer during the first half of the intended work period, the Solicitor has failed to establish by a preponderance of the evidence that T. Saunders suffered a financial loss, or potential financial loss, due to the Respondent's conduct. Accordingly, the Respondent does not owe back wages to U.S. worker T. Saunders for any of the work period March 29, 2012 through December 19, 2012. The Solicitor did not seek back wages for either M. Langley or T. Durham.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the credible evidence of record, this presiding Judge incorporates as findings of fact those 16 findings of fact entered in the Order of July 6, 2016 as set forth above, accepts the 8 stipulations of fact entered into by the Parties during the formal hearing, and enters the following additional findings of fact and conclusions of law –

1. The Order of Reference filed with the Office of Administrative Law Judges by the Solicitor under 29 CFR §500.224 was timely filed.

2. The Respondent gave preferential treatment to non-immigrant 2011 H-2A workers over the referred U.S. workers T. Saunders, M. Langley and T. Durham for the position of agricultural equipment operator for the period from March 29, 2012 through December 19, 2012, set forth in ETA Case No. C-12040-32614, in violation of 20 CFR §655.122.

3. The Respondent rejected the respective application of U.S. workers T. Saunders, M. Langley and T. Durham for the position of agricultural equipment operator for the period from March 29, 2012 through December 19, 2012, set forth in ETA Case No. C-12040-32614, in violation of 20 CFR §655.135.

4. The $7,500.00 civil money penalty imposed on Respondent for violations of the H-2A provisions of Section 218 of the Immigration Reform and Control Act of 1986 during the April 12, 2011 through December 31, 2012, period related to the preferential treatment given to non-immigrant H-2A workers and the unlawful rejection of U.S. workers is appropriate under the Federal regulatory provisions of 20 CFR Part 655 and 29 CFR Part 501.

5. The Solicitor has failed to establish that the payment of $9,930.38 in back wages to T. Saunders is appropriate.

6. The Respondent does not owe back wages to U.S. worker T. Saunders for any of the work period March 29, 2012 through December 19, 2012.

ORDER

The Respondent is hereby Ordered to pay a civil money penalty in the amount of $7,500.00 in the form of certified check or money order made payable to the "Wage and Hour Division, United States Department of Labor" **within 30 days of the date of this Order**.

The Respondent is directed to indicate "Case ID: 1673006 Three D Farms, LLC d/b/a Three D Farms / EIN 01-0713277" on the payment document and mail or deliver said payment of the civil money penalty to the following:

Southeast Regional Office
U.S. Department of Labor – Wage and Hour
61 Forsyth Street SW, Room 7M40
Atlanta, GA 30303

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia