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Issue Date: 25 August 2021

CASE NO.: 2018-TAE-00013

In the Matter of:

WASHINGTON FARM LABOR ASS'N,
Respondent.

For the Administrator: Abigail Daquiz, Esq.
Office of the Solicitor, U.S. Department of Labor
Seattle, WA

For the Respondent: Leon Sequeira, Esq.
Prospect, KY

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER – AFFIRMING IN PART AND MODIFYING IN PART ADMINISTRATOR'S DETERMINATION

This matter arises under the H-2A provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188, and the U.S. Department of Labor implementing regulations found at 20 C.F.R. part 655, subpart B and 29 C.F.R. part 501 (collectively "H-2A program").

For the reasons below I find Respondent Washington Farm Labor Association ("WAFLA") liable for **$59,037.50** in civil penalties.

I. Background of the H-2A Program and Procedural History

"Under the H-2A program, immigrants may receive visas to work temporarily in the United States when domestic workers who are able, willing, and qualified are not available at the time and place where agricultural labor and services are needed." *Fernandez Farms, Inc.*, ARB No. 2016-0097, ALJ No. 2014-TAE-00008, slip op. at 2-3 (ARB Sept. 16, 2018) (citing 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(a), (c); 20 C.F.R Part 655 Subpart B).[1] "An employer participating in

[1] Such an immigrant worker has "a residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26, agriculture as defined in section 203(f) of title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

the H-2A program must arrange to house temporary foreign workers, provide them with coverage under workers' compensation insurance, provide necessary tools, meals, and transportation, guarantee a number of paid work days at the prevailing wage rates, pay workers at frequent intervals, and keep records to demonstrate compliance with all requirements." *Id.* (citing 20 C.F.R Part 655 Subpart B). The Secretary of Labor is charged with enforcement of these requirements, and does so through the Administrator. *See* 8 U.S.C. § 1188(g)(2); 29 C.F.R. § 501.l (c).

The Administrator, Wage and Hour Division, U.S. Department of Labor ("the Administrator" or "WHD") issued its first Notice of Determination on April 7, 2017, alleging multiple violations of the H-2A program by Sakuma Brothers Farms and WAFLA. The initial Notice of Determination sought $123,825 in civil money penalties from Sakuma Brothers Farms and $750 in penalties from WAFLA. Sakuma and WAFLA contested the violations and penalties, and the Administrator filed an Order of Reference initiating this case at OALJ on February 15, 2018. On March 29, 2018, I issued a scheduling order and notice of hearing setting, among other deadlines, a deadline to amend pleadings of April 27, 2018.

On April 25, 2018, the Administrator issued and served by overnight mail an Amended Notice of Determination, and filed with this office the same attached to an Amended Order of Reference. The Administrator amended its penalty assessments, opting to seek $106,800 in penalties from Sakuma and $124,575 from WAFLA, as well as $5,443.21 in calculated back wages.

I held a formal hearing in Seattle, Washington on October 15-16, 2018. Attorney Abigail Daquiz of the U.S. Department of Labor, Office of the Solicitor, Seattle, WA, represented the Administrator. Attorney Leon Sequeira of Prospect, KY, represented Respondent WAFLA. At the hearing, I admitted the following exhibits into evidence:

- Administrator's Exhibits ("AX") 1-18
- Respondent's Exhibits ("RX") A-D, F-I, K-W
- ALJ Exhibits 1-2

Hearing Transcript ("HT") 6-7.

In addition to the exhibits, the Administrator presented testimony from the principal Wage and Hour Investigator ("WHI") in this case, Amy Ward; and Assistant District Director Manuel Lucero. Respondent presented testimony from Dan Fazio, director of WAFLA. Respondent also called Jeanette Aranda, Wage and Hour District Director, as an adverse witness.

Both parties filed post-hearing opening and response briefs. The findings and conclusions below are based on a review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent. *E.g.* 20 C.F.R. Part 655; 29 C.F.R. Part 501; *see also* 5 U.S.C. §§ 554-57.

Sakuma reached a settlement with the Administrator, and did not participate in the hearing. I bifurcated the Sakuma and WAFLA cases *nunc pro tunc* by order dated November 9, 2018.[2]

II. Issues in Dispute

As alleged by the Administrator in the Administrator's Prehearing Statement, the following issues are in dispute:

1. Whether H-2A employer WAFLA violated the H-2A regulations in administering the H-2A program at Sakuma Brothers Farms, Inc., in 2013 in the following ways:

    a. WAFLA's foreign H-2A workers were given preferential treatment in violation of 20 C.F.R. § 655.122(a); 655.122(d)(3); and 655.122(h)(4) when foreign H-2A workers were not charged for a housing deposit, were provided with toiletries and amenities, and were provided with transportation to and from the fields.

    b. Worker housing failed to meet the applicable safety and health standards in violation of 20 C.F.R. § 655.122(d)(1).

    c. U.S. workers were rejected from employment under the H-2A contract due to lack of experience when foreign H-2A workers were not allowed to have any previous experience, in violation of 20 C.F.R. § 655.135(d).

    d. Foreign H-2A workers were not properly paid for their inbound transportation costs in violation of 20 C.F.R. § 655.135(c).

    e. U.S. workers who applied for work were rejected even though they were qualified; WAFLA failed to follow up with applicants and rejected workers because the farm had inadequate housing in violation of 20 C.F.R. § 655.135(c).

[2] The above-captioned cases were filed by the Administrator as a consolidated case by Order of Reference dated February 15, 2018. Each Respondent was issued a separate case number, but the cases were left consolidated at docketing by this Office. While Respondent Washington Farm Labor Association (WAFLA) expressed its intention in the parties' Joint Pre-Trial Plan to move to bifurcate the two cases, WAFLA never did so. The Administrator and Respondent Sakuma Brothers Farms later reached a settlement, and on October 4, 2018, filed proposed Consent Findings, which are discussed further below. WAFLA was not a party to the settlement and proposed Consent Findings. In turn, Sakuma took no part in the hearing in this matter, which I held in Seattle on October 15-16, 2018. In effect, these cases were bifurcated by consent when the Administrator and Sakuma filed proposed Consent Findings, and when Sakuma took no part in the hearing. The doctrine of *nunc pro tunc*, literally "now for then," authorizes a court, "after discovering that its records do not accurately reflect its actions, [to] correct[] the records to show what actually happened." *Sherman v. Harbin* (*In re Harbin*), 486 F.3d 510, 515 n.4 (9th Cir. 2007) (collecting cases). Under the OALJ procedural rules, "[f]or convenience, to avoid prejudice, or to expedite and economize, the judge may order a separate hearing of one or more issues." 29 C.F.R. § 18.43(b). In order to enter the proposed Consent Findings between the Administrator and Sakuma and accurately reflect the parties in the remaining dispute, I ordered on November 9, 2018, that *In re Sakuma Brothers Farms, Inc.*, No. 2018-TAE-00012, and *In re Washington Farm Labor Ass'n*, No. 2018-TAE-00013, were bifurcated *nunc pro tunc* to October 4, 2018.

2. Whether the Administrator's assessed civil money penalties should be upheld, applying the factors in 29 C.F.R. § 501.19(b).

III. Findings of Fact

1. Admissions by Sakuma Brothers Farms

As noted above, this case was originally consolidated with *Sakuma Brothers Farms*, OALJ No. 2018-TAE-00012. The Administrator reached a settlement with Sakuma Brothers, and on October 4, 2018, filed proposed Consent Findings signed by representatives of each. WAFLA was not a party to the settlement.[3] At the hearing, a copy of the signed proposed Consent Findings was introduced by the Administrator as an exhibit. AX 1. In most relevant part, the Consent Findings state:

> 6. Sakuma Brothers makes the following factual admissions:
>
> a. In May of 2013, Sakuma Brothers engaged the Washington Farm Labor Association (WAFLA) to facilitate the H-2A program for the farm, as Sakuma had never previously hired H-2A workers. Sakuma Brothers did so based on WAFLA's representations that it is qualified and experienced in bringing workers from outside of the United States using the H-2A program. Sakuma Brothers' primary contacts were: Dan Fazio, Roxana Macias, and Oscar Trevino.
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> b. WAFLA prepared and submitted all of Sakuma Brothers' documentation related to the H-2A program, including the ETA 790 and 9142A forms. Copies of those forms are attached hereto as Exhibits A and B.
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> c. WAFLA recruited 160 H-2A guest workers for Sakuma Brothers and facilitated the travel and logistics of transporting the workers from their home to the farm. Further, relying on WAFLA's advice, Sakuma Brothers implemented the H-2A program and provided housing and attempted to follow the requirements of the regulations.
>
> d. WAFLA requested 160 foreign workers to be employed by Sakuma Brothers, and was approved (Job Order No. WA2418813). This covered the period of August 5, 2013 through October 31, 2013 ("H-2A Work Period") for hand harvesting and field packing late season blueberries and blackberries in Burlington, WA. The number of foreign workers was reduced from 160 to 69 H2A workers.
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> e. Sakuma Brothers paid WAFLA $82,800 ($1200 per 69 workers) for its facilitation of the H-2A program to bring workers from outside the United States.
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> f. Under Sakuma Brothers' contract with WAFLA, WAFLA was responsible for reimbursing H-2A workers for their travel expenses and subsistence from the place of recruitment to the Sakuma Brothers' worker housing sites in Burlington, WA.

[3] I approved the proposed Consent Findings resolving OALJ No. 2018-TAE-00012 by order dated November 9, 2018.

g. Pursuant to the approved ETA 790, Sakuma Brothers' ETA-790 included a three-month experience requirement. As directed by WAFLA, Sakuma Brothers rejected and did not hire local applicants who did not have at least three months of prior work experience picking blueberries and blackberries. After the foreign H-2A workers arrived, Sakuma Brothers learned that many of them did not have the requisite three months of experience as required under the contract and upon discovery of this, Sakuma Brothers no longer rejected local applicants who did not have at least three months of prior worker experience picking blueberries and blackberries.

h. In early June 2013, Sakuma Brothers began employing migrant and seasonal U.S. workers as harvest pickers for the 21-day strawberry season. Employees were registered for work and attended Orientation. Sakuma provided worker housing to migrant workers who did not reside in Skagit County. This housing consisted of three worker housing locations: Camps 1, 2, and 5. Camps 1, 2, and 5 were not included in the H-2A ETA-790 and were not intended to be used for H-2A workers. Some cabins were furnished with bunk-style beds with mattresses, refrigerator, sink, stove or gas burners, table, chairs and storage bins for each occupant. Electricity and water were provided to each cabin, free of charge. Showers, lavatories, and laundry facilities are centrally located at each Camp location. Workers who lived in Sakuma Brothers' housing were required to pay a housing deposit of $400 that was deducted from their checks at a rate of $100/week. The workers received that deposit back at the end of the season.

i. Once the H-2A Work Period began, Camp 3 (located at 17400 Cook Rd., Burlington WA 98233) was opened and designated as H-2A housing. Pursuant to regulations, the foreign H-2A workers were not required to pay deposits to live in the housing. Workers living at Camp 3 were provided a packet of toiletries, household goods, bedding, and pots and pans. These items were not provided to the workers who lived at Sakuma Brothers' camps prior to the start of the H-2A contract.

j. Per WAFLA's instruction, Sakuma Brothers provided the ETA-790 and a "Notice of H-2A Employment Offer and Acknowledgement for Receipt of WH 516 and H-2A Contract, Declaration of Intent" to all U.S. workers.

k. U.S. workers already living in Camps 1 and 2 before the H-2A Work Period were offered housing in the H-2A designated housing in Camp 3, including all amenities provided in Camp 3. Many of the U.S. workers did not move and then went on to work under the H-2A contract in corresponding employment.

l. Per WAFLA's instruction, the U.S. workers who rejected Camp 3 housing were asked to sign an Acknowledgement of Employer's Offer of Housing. (Form: 2013 Acknowledgement of Employer's Offer of Housing).

m. Sakuma Brothers provided workers living in Camp 3 transportation in buses to and from the field sites. U.S. workers living in Camps 1 and 2 were not picked up or dropped off at those camp sites by the buses provided by Sakuma Brothers.

7. On or about August 2013, the Department of Labor, Wage & Hour Division (WHD) initiated an investigation of Sakuma Brothers and its H-2A program. The lengthy investigation concluded in October 2014 and WHD issued a back wage order in December 2015. As part of the 2015 settlement and at the request of WHD, Sakuma agreed to pay and/or refund designated workers' rental deposits, costs for housing amenities, and transportation costs. In addition, Sakuma agreed to pay a single back wage payment to Maria Renteria. Checks were issued to all of the designated workers and Sakuma has maintained a record of checks that were either returned as undeliverable or were not cashed. This list was provided to WHD along with copies of the checks that were returned.

Notably, the proposed Consent Findings are signed by a representative of Sakuma Brothers Farms, where the violations at issue took place, and admit that the conditions existed.

Except as discussed below, WAFLA introduced no evidence into the record in this hearing that disputes the facts stated in the proposed Consent Findings. I need not analyze whether the proposed (or adopted) Consent Findings in the Sakuma Brothers case operate as *res judicata* against WAFLA here, because of the rules of evidence in this case. "The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence." 29 C.F.R. § 501.34(b). "The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive." *Id.*

Moreover, the ALJ's duty is to weigh and credit or discredit evidence in light of the whole record, which includes evaluating the credibility of written out-of-court statements. *See Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-0054, slip op. at 13-14 & n.3 (ARB May 19, 2020) (FRSA).[4] The conditions described in the proposed Consent Findings are consistent with the testimony of WHI Ward, who led the inspection at Sakuma Brothers Farms. HT 18, 20-33. I find WHI Ward's testimony credible, as her knowledge of the facts arose from her personal involvement in the investigation; her demeanor was calm and straightforward; and her testimony was consistent with the other evidence of record. I also note her several years of experience and training in the programs that the WHD administers, and her experience and training as an attorney prior to becoming an investigator.[5]

[4] The Federal Railroad Safety Act regulations adopt the same flexible rule of evidence. *See* 29 C.F.R. § 1982.107(d).

[5] Credibility "has been termed as 'the quality or power of inspiring belief.'" *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51-52 (7th Cir. 1971) (citation omitted). "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Id.* at 52 *(quoting Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963)). Credible testimony must not only come from a truthful source but "be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it," as well as "meet[] the test of plausibility." *Id.* (internal quotations omitted). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *See, e.g., Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Contrary to its complaints, *see* R. Reply Br. at 3-4, WAFLA had a full and fair opportunity during a several-month discovery period to take discovery from witnesses, including workers and Sakuma Brothers employees, and to dispute the facts of the alleged and assessed violations on the merits at the hearing. Instead, with a few exceptions discussed below, WAFLA chose to litigate issues of law rather than contest the alleged violations with contradictory evidence.

I find the proposed Consent Findings highly persuasive evidence, and adopt the paragraphs listed above among these findings of fact. I note that Mr. Fazio contests, for several reasons, the facts set forth in the Consent Findings, HT 283-88, but I credit the Consent Findings as filed with this Office by Sakuma itself rather than Mr. Fazio's collateral attacks on them.

2. Additional Findings of Fact

WAFLA, an agricultural association, assists its roughly 800 members in participating in the H-2A program among other human resources and legal compliance functions. HT 18, 228-29. WAFLA has been investigated by the Administrator and has been cited for violations of the H-2A program on at least four prior occasions. *Id.*; *see also* HT 291-299; RX F-I, K-U.[6]

To bring in H-2A workers, an applicant must file an ETA Form 9142(a), "H-2A Application for Temporary Employment Certification." HT 20; AX 3. The application requires associations filing master applications to choose one of three options: "Sole Employer," "Joint Employer," or "Filing as Agent." AX 3, p. 2, Box 17. WAFLA selected the "Association-Joint Employer" option. *Id.*

Among the reasons for founding WAFLA was to enable growers in Washington to use the H-2A master application process, where WAFLA would file on behalf of multiple employer-members. HT 230-31; *see* 20 C.F.R. § 655.131(b). WAFLA's director, Mr. Fazio, consulted with WAFLA's counterpart organization in North Carolina, and its director Lee Wicker, to learn about the program.[7] Mr. Fazio was told that the North Carolina Growers Association had never been held responsible by the Administrator for violations by its members over the course of "thousands of applications over the last 20 years" and "hundreds of Wage and Hour audits." HT 234. Mr. Fazio believed that the regulations compelled that result.[8]

WAFLA's experience with Department of Labor enforcement actions involving its members over the prior 8 years supported Mr. Fazio's view that WAFLA could not or would not be liable for members' violations. HT 240-56 (discussing other cases involving WAFLA members). Overall, WAFLA has prepared about 1300 master applications, and been audited by

[6] Three of these resulted in settlements of the penalty amounts. The penalties may have been paid by the farms and not WAFLA in two instances, as Mr. Fazio only recalled WAFLA paying one penalty, in *Cal Farms*. HT 243. He rejected a settlement in *Northwestern Orchards*. HT 248-49. The fourth was the Azzano Farms case in which WAFLA's penalties were vacated. *See Azzano Farms*, 2019-TAE-00002 (Oct 2, 2019).

[7] By order on the Administrator's motion in limine, I barred Mr. Wicker from testifying, but I allowed Mr. Fazio to testify about what he learned from Mr. Wicker and how he applied that knowledge in Washington. HT 233.

[8] "A: Sure In the context of a master application, the investigator looks at all the different employers on that master application, and the association, and assesses liability based on the responsible party. So if there were five farmers and one farmer had a cracked windshield on the van that they were using to transport workers, that farmer would be found liable, not the four other farmers. Q: Is that true for the association, as well? A: Absolutely." HT 235.

the Administrator about 30 times as recalled by Mr. Fazio. HT 235. Before the Azzano Farms case in March 2018 and the second Notice of Determination letter in this case issued in April 2018, WAFLA was alleged to have violated the regulations in about 10 cases, and admitted liability and paid a fine in one case, as he recalled HT 236-37, 243.. Prior to early 2018, WAFLA had only heard references by WHD personnel about this new application of liability but could find no evidence of it ever having been announced or applied. HT 257-59. Mr. Fazio expressed concern that the new policy of liability would upend WAFLA's business model, result in millions of dollars in liability and put it at a competitive disadvantage in the marketplace. HT 262-792. A November 10, 2017 email from Mr. Fazio to DOL staff and copied to WAFLA's counsel discusses this change in penalty assessment practice and expresses similar concerns. RX W.

In connection with an application, applicants must also file an ETA Form 790, known colloquially as the "job order," for approval. HT 20; AX 2. The job order gives all of the relevant and required information about the temporary agricultural job, including "location of work, time of work . . . dates of need, hours of need, locations of housing, any kind of other costs involved such as potential meal costs, transportation costs, things like that." HT 20. As the approved job order is required to be given to applicants, it serves to directly "inform the workers of their basic working conditions." *Id.*[9] The job order is submitted to the relevant state's workforce agency – in Washington called Worksource, part of the Employment Security Department – for approval as part of the required attempt to recruit U.S. workers before an application to bring in temporary H-2A workers may be certified. *See* 20 C.F.R. §§ 655.121-22, .161. The Form 790 is also filed with DOL Employment and Training Administration (ETA). 20 C.F.R. § 655.130(a).

WAFLA prepared and filed the ETA Form 790 as the "Employer" as part of an "association application … on behalf of its member(s), using the joint employer format," AX 2 p. 1, 7, reiterating to both the State of Washington's Worksource and DOL ETA that it was a "joint employer" of the H-2A workers for which it was applying on behalf of Sakuma. AX 2 p. 7; HT 20-21. Roxana Macias, WAFLA's HR Program Manager, submitted all of Sakuma Brothers' documentation related to the H-2A program, including the ETA 790 and 9142A forms. AX 2, 3.

The regulations require certain content – "[m]inimum benefits, wages and working conditions" – to be included in any job order. 20 C.F.R. § 655.122(c); *see also* 20 C.F.R. § 655.122(d-q). In the job order it prepared and filed, WAFLA specified these benefits, wages and conditions to ETA, Worksource, and prospective workers, on behalf of Sakuma Brothers. AX 2. These included the dates, hours, and days of the week of the work; procedures for interviewing with either WAFLA (by phone) or Sakuma (in Bow, WA) for the jobs; the job duties; that three months of experience was preferred; exertional and postural requirements of the job duties; the rates of pay; and housing locations and rules, among other details. *Id.* WAFLA noted that it retained the right to inspect the housing provided at the farm by Sakuma. AX 2 p. 1, Box 3.

WAFLA also represented that the Employer would transport workers between the worker housing and the daily work site at no cost, and either provide or reimburse transportation costs and subsistence during transportation from the worker's departure point (i.e. home) to the Sakuma farm. AX 2, p. 5, Box 19.

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[9] As a practical matter, while copies of the full Form 790 are available to workers, most workers are given a summary prepared by the state workforce agency in order to save paper. HT 322-23.

WAFLA appended an attachment to the Form 790 at Worksource's request. AX 2 p. 7-21.[10] The attachment restates twice in the first two paragraphs that this is a joint employer application filed by WAFLA as an association on behalf of member(s), and states that throughout the attachment "'Employer' refers collectively to the association and the member(s)." Sakuma is not identified as the Member until the last line on the first page. AX 2 p. 7.

WAFLA's attachment further statess that "[t]he Employer (Association and Member collectively) agrees to abide by the assurances provided at 20 CFR Part 655, Subpart B, and 20 CFR 653.501, including the employer obligations set forth at 20 CFR 655.135." Though WAFLA would have preferred to word any attachment differently – identifying the "Employer" as the farmer rather than WAFLA as it has in other years, for one example – WAFLA agreed to submit this attachment. HT 321. The attachment includes, in great detail, information about the worksite, housing, pay, job duties, tools, other conditions of employment such as progressive discipline, and codes of conduct. AX 2 p. 7-21.

WAFLA was not involved in the day-to-day functions at Sakuma during the summer of 2013. No representative of WAFLA supervised work or set day-to-day work start and stop times for H-2A workers at Sakuma. HT 56. Nor did anyone from WAFLA distribute buckets, instruct workers how to pick, or issue payroll checks. *Id.*

However, though WAFLA did not assert control over some aspects of employment, that does not mean that it could not have. WAFLA continued to provide services and guidance to Sakuma Brothers about the recruitment rules during the first half of the contract, and after certification. HT 279-81; 281-83; 287; 311-12. WAFLA could have arranged to continue to monitor the H-2A program at Sakuma Brothers. HT 312-13.

Regarding transportation and related expenses, WAFLA reimbursed, on behalf of the employer, the standard reimbursement amount to each worker. HT 25-27; 239. WAFLA acknowledged to the Administrator during the audit that it (WAFLA) was responsible for reimbursing workers for their travel expenses. HT 56.

However, WHI Ward found that WAFLA failed to reimburse the correct transportation costs, due to unexpected delays for some workers at the Mexico-U.S. border. HT 25. Also, she testified: "they were charged by the bus contractor that transported them from their home to the border . . . very specific fees, but they were only reimbursed . . . the average cost had they taken public transportation." *Id.* In WHI Ward's view, "they should have been reimbursed for the exact amount that they had paid. *Id.* As far as determining the amount the workers were owed, "[S]ome employees had kept receipts, but did not turn them in. And some of them didn't keep them." HT 26. In WHI Ward's view, the employer is expected to reimburse extra costs due to delays at the border. HT 27. WHI Ward determined that 69 individual H-2A workers were affected.

Due to the lack of receipts, WHI Ward did not determine how much any of the 69 affected workers were shorted. She calculated how much the workers were paid by WAFLA, which

[10] In the record at AX 2, this "ETA-790 Attachment" is separately paginated as Page 1-11, with four more pages of housing and work rules unnumbered.

included one night in a hotel at the border in Tijuana. AX 8. The WHD-created spreadsheet at Administrator's Exhibit 8 addresses 31 workers, and states "Processed 8/12, Visa's issued 8/13, Crossed 8/13 @ Tijuana," and does not therefore reflect any extra hotel nights at the border. *Id.*

Mr. Fazio testified that WAFLA provided its reimbursement records to the investigator. HT 239-40. He testified in detail that Oscar Trevino, a field services employee of WAFLA, offered at least the initial group of 31 H-2A workers the opportunity to either accept the average reimbursement or to provide receipts for actual-cost reimbursement. HT 239. Mr. Trevino made a record reflecting this choice for the 31 workers, who signed the record. *Id.* WAFLA's reimbursement records are not in the hearing record.

Regarding recruitment, as outlined in the application that WAFLA prepared and filed, the Job Order included a preference for three months of experience. WHI Ward described this a requirement in practice, as at least one worker was turned away. HT 31. AX 17 (email regarding rejected U.S. candidate, Maria Renteria); AX 18. As noted as part of the Sakuma consent findings above, after the foreign H-2A workers arrived, Sakuma Brothers learned that many of them did not have three months of experience and stopped rejecting local applicants without three months experience. Mr. Fazio described the background to his email at AX 17; essentially, he believed that Ms. Renteria may not have been actually interested in employment when she went to the WAFLA office on August 6, but had advised Sakuma to offer to hire her anyway. HT 279-80; AX 17. He explained further his view that "the labor union had brought Ms. Renteria down to Olympia, where our offices are, and told her, you know, to set up Sakuma, basically." HT 312. He testified that he told Sakuma if they were not going to hire her, to document the reasons in a letter. HT 279-80. Laura Tinoco and Baldo Guerrero were also rejected on September 16 and 17, 2013, for lacking three months of berry picking experience. AX 18.

Several factual findings related to housing are included within the Sakuma consent findings above. As noted, Sakuma housed H-2A workers at Camp 3, which is part of the same complex where Camp 1 is located, both accessible by Sakuma Brothers' office parking lot. HT 28; *see also* AX 10; AX 13-14. Overall, Camp 3 was newer, which meant better construction and newer mattresses and stoves. HT 30. While H-2A workers were not required to pay security deposits to live in the housing, corresponding U.S. workers[11] who lived in the housing next door were required to pay deposits of $400 (deducted from paychecks at $100/week). AX 5-6. As a result, the H-2A workers received their wages without this housing deduction, while at least 207 U.S. workers had this deduction made from their pay. AX 5-6; HT 23-24. The workers received that deposit back at the end of the season, and many signed for those checks. *Id.*, AX 4.

While workers living at Camp 3 were provided bins that included blankets, shampoo, detergent, toothbrushes, and similar household items, these items were not provided to

[11] "Corresponding employment" is a term of art under the H-2A program. *See* 20 C.F.R. § 655.103. "Corresponding employment" is "[t]he employment of workers who are not H-2A workers by an employer who has an approved H-2A Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof." *Id.* "Corresponding" workers is a shorthand term for workers in corresponding employment.

corresponding U.S. workers who also lived in Sakuma housing, as noted above. The items are pictured in photos in the record. AX 7.

On August 12, 2013, WHI Ward and other WHD investigators conducted a housing safety and health inspection at the Sakuma housing. During their inspection of Camp 2, where U.S. workers in corresponding employment (not H-2A workers) were living, the investigators found a refrigerator that was not keeping food cold; and, outside the men's bathroom, a full garbage can with flies as well as a piece of feces on the ground. HT 28-29; AX 11,12.

IV. Conclusions of Law

1. WAFLA is a joint employer of the H-2A workers it brought to the United States and placed at Sakuma Brothers Farms

WAFLA's defense to the penalties rests largely on issues of law. WAFLA first argues that it is not a joint employer with the H-2A workers who were employed at Sakuma Brothers. WAFLA cites, for example, *Administrator v. Seasonal AG Services, Inc.*, ARB No. 15-023, ALJ No. 2014-TAE-006, 16-17 (ARB Sept. 30, 2016), which addressed joint employment between two alleged joint employers in the H-2A context.

I find that WAFLA is a joint employer of the H-2A workers it brought to the United States on behalf of Sakuma Brothers and who worked at Sakuma Brothers. To understand why – and why the Administrator's decision to charge WAFLA with these violations along with Sakuma did not violate any cognizable reliance interest, *see infra* – it is essential to understand the history of the H-2A program.

The origins of the H-2A program date to the passage of the Immigration and Nationality Act of 1952, which created an H-2 visa for foreign temporary workers. *See* Pub. L. No. 82-414, 66 Stat. 163, 166 (defining as a non-immigrant "an alien having a residence in a foreign country which he has no intention of abandoning . . . who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country"). From the passage of the 1952 INA, the "importing employer" of a non-immigrant worker has had the obligation to petition for such a worker and establish that the statutory and regulatory conditions for "importing" that worker are and will continue to be met. *See id.* at 189 ("The question of importing any alien as a nonimmigrant under section 101(a)(15)(H) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe."). *See also generally* 8 U.S.C. § 1188.

The Immigration Reform and Control Act of 1986 split the H-2 visa category into two subcategories, including the H-2A category for agricultural workers. Following the 1986 legislation, the Secretary of Labor adopted regulations implementing the new H-2A program in 1987. *See* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg.

6883, 6884 (Feb. 12, 2010) (hereinafter "2010 Final Rule"; discussing regulatory history). The H-2A regulations were amended in 2008, and again in 2010. *Id.*

The 2010 Final Rule continued the policy established in the 1986 legislation and the 1987 rules allowing agricultural associations to file master applications on behalf of multiple employer-members. *See* 8 U.S.C. § 1188(d); 75 Fed. Reg at 6917. Both the INA as amended and the regulations reflect a balance between the interests of associations and their members in flexibility in obtaining H-2A workers, and the interests of domestic workers and workers' rights advocates in meaningful enforcement of the requirements of the H-2A program.

Repeatedly in the preamble to the 2010 Final Rule, the Secretary discussed the obligations of an association filing a master application on behalf of multiple member-employers: in doing so the association was assuming the obligations of a joint employer with its members.

> The [Notice of Proposed Rulemaking] clarified the role of associations as filers (sole employer, joint employer or agent), in order to assist the association and employer-members in understanding the obligations each party is undertaking with respect to the Application. As in the past, an association will be required to identify in what capacity it is filing, *so there is no doubt as to whether the association is subject to the obligations of an agent or an employer (whether individual or joint)*. This requirement is a continuation from both the 1987 Rule and 2008 Final Rule that required an association of agricultural producers to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members.

Id. (emphasis added). The Secretary further explained:

> The Department's changes to the regulatory requirements are not intended to discourage employers from utilizing master applications but are rather designed to preserve program integrity and foremost, aim at greater protections for U.S. and foreign workers. In addition, the Final Rule continues to require a single date of need as a basic element for a master application, as well as a longstanding requirement that *master applications may only be filed by an association acting as a joint employer with its members. The Department highlights joint responsibility of the association and its employer-members by requiring that the association identify all employer-members that will employ H-2A workers.* The Application must demonstrate that each employer has agreed to the conditions of H-2A labor certification.

Id. at 6918 (emphasis added).

The 2010 Final Rule expressly allows associations to file master applications on behalf of workers in two contiguous states. *Id.* But in explaining why a greater number of contiguous states was not authorized, the Secretary explained that the two-state limit

> strikes a balance between the programmatic goals of protecting job opportunities for U.S. workers and ensuring uniform enforcement of the terms and conditions and the need to provide flexibility for employer associations. *Monitoring program compliance becomes*

> *more difficult and the potential for violations increases when workers under a single application are dispersed across several States.* Limiting the area of intended employment to two contiguous States will make it more likely that employers under the same application will learn of and have the ability to correct potential problems *and avoid liability*.

Id. (emphasis added) In short, under the 2010 Final Rule, agricultural associations filing master applications as joint employers opt into all of the same obligations to ensure compliance with the terms of the H-2A program as their member employers, including penalty liability. The 2010 Final Rule assumed they would monitor compliance, and made it easier for them to do so by limiting to two contiguous states the applications they could file.

Relatedly, both the INA and the 2010 Final Rule contain a key protection for associations limiting when an association may be debarred from use of the H-2A program due to violations. Violations by a member resulting in debarment "shall apply only to that member of the association unless the Secretary determines that the association or other member participated in, had knowledge of, or reason to know of, the violation." 8 U.S.C. § 1188(d)(3)(A). Conversely, "an individual producer-member of a joint employer association will not be debarred if the association commits a substantial violation unless the member participated in, had knowledge of, or reason to know of the violation." 75 Fed. Reg at 6936; *see* 8 U.S.C. § 1188(d)(3)(B)(i). Neither the Final Rule nor the INA contain similar language specially prohibiting or limiting the assessment of civil penalties by the Administrator against associations; by implication, therefore, no such limitation exists. *C.f. Christensen v. Harris County*, 529 U.S. 576, 582-83 & n.4 (2000) (applying the "expressio unius est exclusio alterius" canon of construction in wage-hour context). Again, this careful crafting presumably reflects Congress's and the 2010 DOL leadership's interest in balancing the interests of U.S. agricultural employers, U.S. workers, and foreign H-2A workers: penalties yes, debarment no.

WAFLA cites *Seasonal AG Services* in support of its position that it is not a joint employer. But *Seasonal AG Services* is distinct on the facts and law. The two putative joint employers in *Seasonal AG Services* were each employment agencies bringing in H-2A workers, and did not have an association-member relationship. *See* ARB No. 15-023 at 4-5. The two agencies – run by a mother and daughter, sharing an office and contracting workers side-by-side to the same farms, *see id.* at 4-7 – argued that they were separate employers. *Id.* The Administrator argued they were joint employers as to the pool of workers employed by each under the "suffer or permit to work" test found in case law under the Fair Labor Standards Act. *Id.* at 15-19 & n. 81-92 (collecting cases; citing, *e.g.*, *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). On appeal by the Administrator (as the ALJ found no joint employment), the Board found that the ALJ had analyzed the joint employment issue incorrectly; under the 2010 Final Rule, the joint employment standard is the common law of agency test adopted in cases such as *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322-324 (1992) (ERISA). *See id.* at 10-15 & n. 63-80; *see also generally Garcia-Celestino v. Ruiz Harvesting, Inc. [Garcia II],* 843 F.3d 1276 (11th Cir. 2016) (distinguishing *Darden* and the FLSA "suffer or permit" standard in the H-2A context; discussing 2008 and 2010 regulations adopting *Darden* test).

The Board highlighted, however, that the 2008 Final Rule gives special treatment to the joint employment issue where an association is petitioning for H-2A workers on behalf of its members, and the 2010 Final Rule left that treatment unchanged. *See* ARB No. 15-023 at 11-12 &

n.67, 74. Under the 2008 Rule, "[t]he Department agrees that agricultural associations play a vital role in the H-2A program and seeks to minimize potential confusion about their role and responsibilities. The regulation has been revised to clarify that agricultural associations may indeed serve as sole employers, joint employers, or as agents." Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77109, 77115 (Dec. 18, 2008). "Both the current and proposed regulations require an association of agricultural producers filing an application to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members." *Id.* at 77122. As the two employers at issue in *Seasonal AG Services* were two employment agencies, and not an association filing on behalf of a member-employer, the Board set aside this issue of how associations may opt into joint employer status on the ETA Form 9142 as "inapplicable" to the facts and posture of *Seasonal AG Services.* ARB No. 15-023 at 11 n.67.

Therefore, in my view as a matter of law, I need not evaluate the nonexhaustive list of *Darden* factors as to employer status. In order to be approved to import H-2A workers *at all*, a petitioner must apply and meet all of the standards set under the INA and the 2010 Final Rule, which includes completing the ETA Form 9142 and identifying the status under which the petitioner is applying. Since Respondent identified itself on its ETA Form 9142 as a "joint employer" with Sakuma Brothers of the requested workers, I view that as dispositive. In other words, checking the Association-Joint Employer box on the ETA Form 9142 is sufficient, but not necessary, to find that Respondent was a joint employer. The regulatory definition of "joint employer" and the requirement to elect status on the ETA Form 9142 displaces definitions such as those found in *Darden* for associations petitioning for H-2A workers on behalf of their members. I find Respondent to be what it promised ETA and the State of Washington that it was: a joint employer of the workers at Sakuma Brothers.

But if there is any doubt about this conclusion, whether as a matter of law or a matter of the equities of this situation for WAFLA, in addition I find as follows: WAFLA has "sufficient definitional indicia of being an employer" along with Sakuma Brothers so as to meet the regulatory definition of "joint employer" and "employer." In addition to having checked the "joint employer" box on its ETA form, WAFLA is an association with a place of business and means to be contacted. *See* 20 C.F.R. § 655.103(b) (defining "Employer"). Second, WAFLA, prepared the job order and the contract governing the duties, terms, and conditions of employment of the H-2A workers with its members, thereby "otherwise control[ling] the work." *Id.* Third, WAFLA recruited the workers and then transported the workers from their homes abroad through U.S. immigration to its members' farms. *Id*. Finally, WAFLA has an FEIN. *Id*.

It is for all of these reasons, of course, that WAFLA rightly and correctly identified itself to the Administrator as a "joint employer," *in addition to* the advantages as far as workforce flexibility that joint employer status brings with it under the 2010 Final Rule.

WAFLA also relies on *Garcia-Celestino v. Ruiz Harvesting, Inc. [Garcia I]*, 898 F.3d 1110 (11th Cir. 2018), in which an Eleventh Circuit panel found no joint employment as between a farm labor contractor's H-2A workers on a farm and the farm itself, under the common law of agency applicable through Florida common law as well as the H-2A regulations. Again, the facts here differ. Reviewing the *Garcia I* opinion, it appears that the farm did not identify itself to the

Secretary and to the H-2A workers on the ETA Form 9142 as an employer or joint employer of the farm labor contractor's H-2A workers. The plaintiffs sought to impose joint employer liability through litigation, arguing the *Darden* factors, but at no point had the farm held itself out as a joint employer or obtained its H-2A workforce by representing itself as a joint employer. *See* 898 F.3d at 1115-30.

Here, WAFLA seeks a ruling where it could retain the benefits of master applications for itself and its members without the concomitant burden of the joint employer status it elected and represented to the Administrator in gaining approval to import H-2A workers. An association filing a master application with joint employer gains the substantial benefit of being able to move workers among the member-employers on the application during the harvest season. It would make no sense to allow an association to hold itself out as a joint employer to gain the benefits of joint employer status, neglect its compliance obligations, then wash its hands of that status after the fact if called to account.[12] This principle remains true even if WAFLA as a joint employer did not exercise all of the flexibility available to it, or as in this particular case, filed a master application as joint employer with only a single employer, Sakuma Brothers. As I discussed above, this tradeoff between joint employer status and greater flexibility, under which an association accepts duties *and potential liability* in exchange for flexibility, was expressly made by the Secretary in adopting the 2010 Final Rule. For associations, with great power comes great responsibility.[13]

Moreover, the 2010 Final Rule went through full notice and comment rulemaking under the Administrative Procedure Act. Without conducting an extensive review of the regulatory record, I am confident that this was a considered bargain between the agriculture industry and the Secretary. Even the 2008 Final Rule, which provided more flexibility to the agriculture industry than the 2010 Final Rule, included the same tradeoff.

WAFLA further argues that "[t]he Administrator has not explained why or how WAFLA is allegedly liable for civil money penalties resulting from each of the violations but is not liable for the back wages resulting from the violations." The explanation is straightforward: the back wages were paid by Sakuma under the Consent Findings, *see infra*, and since back wage liability (unlike penalty liability) is joint and several, *see Administrator v. Global Horizons Inc.*, ARB Case No. 11-058, OALJ No. 2005-TAE-001, 2005-TLC-006, May 31, 2013, p. 1, 11 (affirming summary decision finding joint and several liability), there is no additional wage liability for WAFLA to shoulder.

As an aside, even if WAFLA and Sakuma had a principal-agent relationship as far as compliance at the Sakuma farm, WAFLA is still liable for violations. As articulated in the Restatement (Third) of Agency § 7.06, "[a] principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent." *See* also Restatement (Second) of Torts § 409, comment b (non-delegable duties). Under the H-2A program, employers have a duty to protect H-2A workers by complying

[12] I note, without applying and analyzing, the common-law doctrine of equitable estoppel. *See Greany v. W. Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821 (9th Cir. 1992); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1096 (9th Cir. 1985).

[13] I reviewed and considered my colleague's decision in *Azzano Farms*, 2019-TAE-00002 (Oct 2, 2019), and for all of the reasons I explain here I respectfully disagree as to the joint employer issue.

with the regulations. *See* 20 C.F.R. § 655.135 ("An employer seeking to employ H-2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make" additional enumerated "assurances"). Respondents can delegate some aspects of compliance efforts, *see* 20 C.F.R. § 655.133, but they remain liable under 20 C.F.R. § 655.135 despite this delegation.

2. WAFLA had no cognizable reliance interest in the Administrator's previous practice of non-assessment of civil penalties against associations

WAFLA argues strenuously that even if it is a joint employer, it cannot be liable for penalties here because the "the Department's prior policy clearly 'engendered serious reliance interests' by WAFLA that the Department should have taken into account before changing its interpretation." R. Br. at 16 (citation omitted). As much as any issue can be a hot issue of administrative law, the question of exactly what creates a cognizable "reliance interest" of which a federal agency must take account, when adopting a new policy or changing an existing policy, is such a hot issue.[14]

Here, I find that WAFLA had no cognizable reliance interest in the Administrator's prior discretionary practice of non-assessment of civil penalties against associations that filed master applications as joint employers. The reason is embedded in the history of the H-2A program discussed above, which has consistently – in writing – placed associations filing master applications as joint employers in a position of responsibility for ensuring compliance with the terms of the program by their members. Reviewing the most relevant case law, it is apparent that the *unwritten* exercise of discretion to not enforce elements of a regulation does not create a cognizable reliance interest as against a *written* regulation.

Smiley v. Citibank (S. Dakota), N.A., 517 U.S. 735 (1996), expressly relied on by WAFLA, *see* R. Br. at 16, does not help its position. In *Smiley*, the Supreme Court rejected the argument that a new regulation issued by notice and comment rulemaking by the Office of the Comptroller of the Currency was "not entitled to deference because it is inconsistent with positions taken by the Comptroller in the past." 517 U.S. at at 739-42.[15] The Court went on to find that the two prior position statements of the OCC, though they were 32 and 8 years old as of the ruling in *Smiley* and both in writing, were not sufficiently formal to trigger more searching review for potential reliance

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[14] There is another hot issue of administrative law that WAFLA does not raise here: whether the non-assessment practice was a substantive rule, requiring Administrative Procedure Act process to alter. *See generally, e.g., Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015).

[15] Justice Scalia explained the Court's thinking in affording deference to agency interpretations:

> [A]gency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist. But neither antiquity nor contemporaneity with the statute is a condition of validity. We accord deference to agencies under Chevron, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

517 U.S. at 740–41 (citations omitted).

interests under the Administrative Procedure Act. *See id.* at 742-43. The court found "good reason for the Comptroller to promulgate the new regulation, in order to eliminate uncertainty and confusion." *Id.* at 743.

Here, I read *Smiley* to favor the Administrator. The H-2A regulations, of long standing and updated in 2010, established by notice and comment rulemaking the "Association-Joint Employer" filing status that WAFLA used, and the benefits and burdens associated with that status. As under *Smiley*, the 2010 Final Rule would preclude a cognizable reliance interest in even a *written* informal policy contrary to the regulation, an unwritten practice could not create such an interest either.

WAFLA also cites *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), in which the court refused deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." 488 U.S. at 212. I agree that *Bowen* – and a fundamental principle of fairness – forecloses announcing a new policy as a "convenient litigating position," 488 U.S. at 213, and demanding compliance and administrative law deference. But here, there has been a written policy in place dating back to 1987 that employers – including joint employers, and including associations – were responsible for compliance and could be liable for penalties. Moreover, only three years passed between the Secretary's reaffirmation of penalty liability for employers and joint employers, including associations, in the 2010 Final Rule, and the investigation leading to the penalties in this case. WAFLA had an opportunity to "conform [its] conduct to an agency's interpretations," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012), when it applied for and administered the H-2A application on behalf of Sakuma following the 2010 Final Rule.

In *Christopher*, a private plaintiff sought to have the Court grant administrative law deference to a new position announced by WHD in a series of *amicus curiae* briefs. 567 U.S. at 153-54. Specifically, WHD changed its position on whether pharmaceutical sales representatives were required to be paid overtime wages, or were exempt from payment of overtime under the "outside sales" exemption. *See id.* The position that WHD sought to establish through amicus briefing – that pharmaceutical sales representatives were not exempt from payment of overtime premium pay, commonly called "time and a half" – was contrary to a general position on what constitutes a "sale" for purposes of the outside sales exemption that had been held by WHD for many years. *See id.* at 148-50, 153-59.

In the most relevant passage here, the Court wrote:

> Even more important, despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully. We acknowledge that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (noting that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise"). But where, as here, an agency's announcement of its interpretation is preceded by a very

> lengthy period of conspicuous inaction, the potential for unfair surprise is acute. As the Seventh Circuit has noted, while it may be "possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing," the "more plausible hypothesis" is that the Department did not think the industry's practice was unlawful. *Dong Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510–511 (2007). There are now approximately 90,000 pharmaceutical sales representatives; the nature of their work has not materially changed for decades and is well known; these employees are well paid; and like quintessential outside salesmen, they do not punch a clock and often work more than 40 hours per week. Other than acquiescence, no explanation for the DOL's inaction is plausible.

567 U.S. at 157–58.[16]

Again, though, the problem for WAFLA's position here is that the regulation under which WAFLA was cited in this was adopted by notice-and-comment rulemaking. It was not announced for the first time in an amicus brief, or when the Administrator amended the Order of Reference in this case. Indeed, notice-and-comment rulemaking under the Administrative Procedure Act, resulting in a written policy, provides fair notice to a regulated community as a matter of law *and* results in deference to that policy by the federal courts, even where an agency *does* adopt a new interpretation of a statute.[17] *See Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170–171 (2007); *Smiley*, 517 U.S. at 739-43.[18] And as discussed above, the 2010 Final Rule unambiguously reiterating that associations *could* be jointly liable with members, consistent with the 2008 and 1987 H-2A regulations, was adopted by notice-and-comment only three years prior to WAFLA's H-2A application on behalf of Sakuma. In *Christopher*, the Court leaned heavily on the DOL's "very lengthy period of conspicuous inaction" regarding pharmaceutical sales representatives, tracing this inaction back though the 1940's with *zero* expression of policy that they might not be

[16] Most decisions *not* to bring an administrative enforcement action are unreviewable under the "committed to agency discretion" exception to the Administrative Procedure Act. *See Heckler*, 470 U.S. at 828-35; *but see generally Dunlop v. Bachowski*, 421 U.S. 560 (1975) (Labor Management Reporting and Disclosure Act removes DOL discretion and compels lawsuit for enforcement upon a finding of violation); *Chao v. Allied Pilots Ass'n*, No. 4:05-CV-338-Y, 2007 WL 518586 (N.D. Tex. Feb. 20, 2007) (denying summary judgment in DOL suit to vacate and re-run union officer election conducted by non-secure Internet-based voting in violation of the LMRDA, though no evidence was presented that election result was affected), *order vacated pursuant to settlement*.

[17] This assumes the agency has been granted broad regulatory authority and an "intelligible principle" to guide its rulemaking. *See, e.g., Gundy v. United States*, 588 U.S. ___, 139 S. Ct. 2116, 2129 (2019); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

[18] *Coke* discussed a hypothetical change in overtime interpretation as if it actually happened, which was then discussed in misleading shorthand in *Christopher*. As is clear in a close reading (informed by some background familiarity with the regulations at issue), in *Coke*, the Court found that a recent, informal, non-notice-and-comment, Advisory Memorandum interpreting the relevant overtime regulation was entitled to deference in part because that informal document did *not* change the ineligibility of the plaintiff employee for overtime, causing surprise to her employer. *See Coke*, 551 U.S. at 162-64; 170–171. In doing so, the Court noted that WHD had repeatedly proposed to *change* its interpretation over the prior years, in a way that would have made Ms. Coke eligible for overtime, using notice-and-comment rulemaking in order to more securely cement its change into law. *See id.* In *Christopher*, the author of the opinion appears to have misinterpreted *Coke*, in citing and explaining it as "deferring to new interpretation that 'create[d] no unfair surprise' because agency had proceeded through notice-and-comment rulemaking." 567 U.S. at 156. That was not the case, as the new Advisory Memorandum was not the result of notice and comment. And its appearance might well have surprised Ms. Coke. One might compare *Christopher* and *Coke* and note that "unfair surprise" is judged from the perspective of employers.

overtime exempt under the outside sales rule until 2009. 567 U.S. at 147-57. *Christopher* does not help WAFLA here, either.

In *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009), cited by WAFLA, the Court rejected the TV stations' view that the FCC needed to issue a more detailed justification under the Administrative Procedure Act for its decision to begin fining stations for broadcasting "fleeting expletives," noting that it *had* issued a public statement that it would do so. 556 U.S 515-16, 520-22; Implicitly, the Court found no reliance interest that even the informal FCC statement did not overcome; here, we have the notice-and-comment 2010 Final Rule. Similarly, in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 579 U.S. __ (2016) (*Encino I*), the Court found that WHD's explanation for a change in an overtime exemption through notice-and-comment rulemaking was insufficient, because of reliance interests, but did not question WHD's authority to make the change if sufficiently explained. *Id.* at 2124-27. Here, to reiterate, there was *no* change in the substance of the notice-and-comment regulation, as far as association liability, which was adopted in 1987 and readopted in 2008 and 2010.

It is not completely unheard of for the non-exercise of enforcement authority to result in a substantive change to the law. But this is only in extreme cases, i.e., those in which the doctrine of desuetude operates to eliminate the possibility of enforcement of long-dormant laws. *See, e.g., Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1146 (9th Cir. 2000) (en banc) (O'Scannlain, J., concurring) (citing, *e.g.*, *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (seventy-five years)).

Mr. Fazio's testimony was credible so far as it reflected his beliefs and experience. I find that Mr. Fazio, as WAFLA's director, did subjectively believe that WAFLA would not be held liable for violations committed by its members. But that belief, in light of the plain language of the governing regulations and WAFLA's own application to bring in the H-2A workers in this case, was not a reasonable belief, and does not absolve WAFLA of liability. *C.f. United States v. Connolly*, No. 16 Cr. 370 (CM), 2019 WL 2125044, at *13 (S.D.N.Y. May 2, 2019) ("'[E]verybody is doing it' is not a defense to the crime of wire fraud or conspiracy to commit wire fraud; just as 'everybody speeds' is not a defense if your car happens to get picked up on the radar."). Nor am I empowered to re-write the balances struck between associations' rights and responsibilities, and potential liability, in the 2010 Final Rule, even in light of Mr. Fazio's belief.

For these reasons, I find that WAFLA held no cognizable reliance interest that precludes assessment of penalties in this case.

3. Findings of violation and CMP assessments

WAFLA contests the fact of violation and the CMPs imposed by the Administrator. I will first consider whether WAFLA violated a given regulation. Where I find a violation, I will address the reasonableness of the CMP.

As an initial matter, WAFLA questions why liability for H-2A program penalties is not joint and several, noting that Sakuma Brothers agreed to pay penalties in the proposed Consent Findings. The purpose of civil money penalties is to deter and punish violations of law. Unlike

back wage liability, which is properly joint and several to properly compensate – but not overcompensate – underpaid workers, civil penalty liability runs to each employer as an incentive for each employer to comply with the law. To draw a deterrence- and punishment-related analogy from another area of law, each individual convicted in a criminal conspiracy goes to prison for his or her own sentence. A federal district court does not sentence the co-conspirators to a total of years to be served and then allocate them among members of the conspiracy, as that would under-deter wrongdoing and encourage larger conspiracies.

The Administrator has the burden of proof regarding the reasonableness of the civil monetary penalty. *See* 5 U.S.C. § 556(d); *Three Chimneys Farms*, *LLC*, 2013-TAE-00011, slip op. at 16-17 (2015) (citing cases). The appropriateness of the penalty and application of mitigating factors is reviewed by the ALJ *de novo*. *Peroulis*, 2016 WL 6024266 at *7 (citing 29 C.F.R. § 501.41(b) (providing for "*de novo* hearing" before the ALJ)). *But see Azzano Farms, Inc.*, 2019-TAE-00002, slip op. at 16 (Oct. 2, 2019) (citing *Administrator, Wage & Hour Div. v. Kutty*, ARB No. 03-022, ALJ No. 2001-LCA-010, *21 (ARB May 31, 2005)) ("The Administrator is vested with discretion in calculating the amount of civil money penalties, but should not abuse that discretion.").

The Administrator may assess a civil money penalty

> for each violation of the work contract, or obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501]. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501] constitutes a separate violation.

29 C.F.R. § 501.19(a). The maximum civil money penalty that can be assessed for each violation as applied to each worker is listed in the regulations. 29 C.F.R. § 501.19(c); *see also Wage & Hour Division v. Tomarchio*, OALJ No. 2019-TAE-00025 at 10 (Aug. 5, 2020).

However, rather than automatically assessing the maximum penalty, in determining the penalty, the Administrator "shall consider the type of violation committed and other relevant factors . . . includ[ing], but . . . not limited to":

> (1) Previous history of violations of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501];
> (2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
> (3) The gravity of the violation(s);
> (4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in [29 C.F.R. Part 501];
> (5) Explanation from the person charged with the violation(s);
> (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. 1188.
> (7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

29 C.F.R. § 501.19(b).

The penalty provisions of the H-2A regulations were adopted by notice-and-comment rulemaking, as part of the 2010 Final Rule. As noted above, they provide for a *de novo* hearing on penalties as well as a set of maximum penalties. However, as a matter of subregulatory penalty assessment policy, the Administrator starts with the maximum penalty for each violation or set of violations and works downwards in 10 percent intervals for mitigation, rather than from a base violation amount and working upward toward the maximum based on enhancements.[19]

The Board has agreed with the Administrator's approach in H-2A penalty cases and in doing so given some guidance to ALJs. *See generally Peroulis*, 2016 WL 6024266. Under *Peroulis*, the ALJ may use the Administrator's Order of Reference, and penalties assessed and alleged to be appropriate in that document, as a point of departure for a final "*de novo*" assessment. *See id.* The Administrator has also embedded some penalty guidance in the preamble to the 2010 Final Rule. The 29 C.F.R. § 501.19(b) factors are "safeguards are intended to ensure that inadvertent errors and/or minor violations are not unfairly penalized," and should be applied alongside "the facts of each individual case, and . . . common sense." 75 Fed. Reg. at 6944. The provision allowing for a per-worker violation assessment, *see* 20 C.F.R. 501.19(a), "is written so as to protect smaller employers and first-time unintentional violators while appropriately targeting repeat and willful violators and those who abuse or exploit large numbers of workers with the largest penalties." 75 Fed. Reg. at 6944.

The regulation itself does not clarify how the Administrator must apply the 29 C.F.R. § 501.19(b) factors in CMP assessments. However, the determination is a matter of national WHD policy. *Tomarchio*, OALJ No. 2019-TAE-00025 at 23 n.20; *see also Peroulis*, 2016 WL 6024266 at *7. First, the Administrator determines whether to assess a penalty for a given violation. Then, the Administrator determines the maximum permissible penalty for the violation. Finally, to arrive at the final assessment, the Administrator mitigates that penalty by 10 percent for each 29 C.F.R. § 501.19(b) factor that applies. *See id.* Because the national policy has the Administrator begin with the maximum penalty and mitigate, the 29 C.F.R. § 501.19(b) factors are referred to as "mitigating factors" even though such language does not appear in the regulation itself. *Id.*; 29 C.F.R. § 501.19(b).

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[19] Arguably, if a hearing is truly *de novo* under the H-2A program, the Administrator needs to offer proof and argument as to why the assessed penalty is appropriate under the 29 C.F.R. § 501.19(b) factors by reference to case law and evidence admitted into the record, akin to how a litigant might prove compensatory or punitive damages, *see, e.g., Raye v. Pan Am Rys., Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 8-10 (ARB Sept. 8, 2016) (FRSA); *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op at 32 (ARB Feb. 9, 2001) (FRSA), rather than litigating penalties by reference to the Administrator's own subregulatory assessment matrix and assessed amounts. As an alternative, the Administrator might adopt a penalty assessment policy and matrix by notice-and-comment rulemaking to place the penalty policy on equal footing with the regulation providing a *de novo* hearing. For example, under the Federal Mine Safety and Health Act of 1977 as amended, which the 2010 Final Rule preamble cites as an example of a recently amended penalty structure, see 75 Fed. Reg. at 6944, the Secretary of Labor has adopted by notice-and-comment rulemaking an elaborate penalty points matrix governing assessment of penalties based on a granular determination of facts and factors. See Final Rule, Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13592 (Mar. 22, 2007) (codified at 30 C.F.R. § 100.3). Based on the points totaled up for a given violation, a penalty may be as little as $137 or as much as $73,901 as of January 15, 2020. See 30 C.F.R. § 100.3(g) (2020).

The Administrator followed the national policy in this case. *See* AX 1. I adopt the same approach. *See generally Peroulis*, 2016 WL 6024266.

The Administrator also used the factors – particularly, the number of workers affected and the gravity of the violation – to decide what constituted an individual violation. For the conditions that the Administrator found less grave, the Administrator assessed a single penalty for the violation ("per-regulation" penalty), regardless of whether it affected few or all of the workers. However, for the conditions that the Administrator found particularly grave, the Administrator assessed a penalty for each affected worker ("per-worker" penalty). As above, the Administrator is allowed to assess per-worker penalties, and I find this approach – employing this multiplier for and only for particularly grave violations – reasonable in this case.

A. WAFLA's foreign H-2A workers were given preferential treatment

The H-2A program prohibits employers from giving foreign workers preferential treatment over U.S. workers. *See* 20 C.F.R. § 655.122(a). The Administrator alleged three violations, and grouped them as a single violation for purposes of assessing a penalty. The Administrator alleges:

- U.S. workers did not receive the same toiletry items, bedding, cooking utensils, housing, and transportation as H-2A workers. *See* 20 C.F.R. § 655.122(d)(3);
- U.S. workers were charged a housing deposit when H-2A workers were not; and
- the employers provided buses from Camp 3, where the H-2A workers lived, to the fields, while no other employees were offered transportation to and from the fields. *See* 20 C.F.R. § 655.122(h)(4).

I find WAFLA violated these provisions. Per the Sakuma consent findings document that I credited above:

> h. In early June 2013, Sakuma Brothers began employing migrant and seasonal U.S. workers as harvest pickers for the 21-day strawberry season. Employees were registered for work and attended Orientation. Sakuma provided worker housing to migrant workers who did not reside in Skagit County. This housing consisted of three worker housing locations: Camps 1, 2, and 5. Camps 1, 2, and 5 were not included in the H-2A ETA-790 and were not intended to be used for H-2A workers. Some cabins were furnished with bunk-style beds with mattresses, refrigerator, sink, stove or gas burners, table, chairs and storage bins for each occupant. Electricity and water were provided to each cabin, free of charge. Showers, lavatories, and laundry facilities are centrally located at each Camp location. Workers who lived in Sakuma Brothers' housing were required to pay a housing deposit of $400 that was deducted from their checks at a rate of $100/week. The workers received that deposit back at the end of the season.
>
> i. Once the H-2A Work Period began, Camp 3 (located at 17400 Cook Rd., Burlington WA 98233) was opened and designated as H-2A housing. Pursuant to regulations, the foreign H-2A workers were not required to pay deposits to live in the housing. Workers living at Camp 3 were provided a packet of toiletries, household goods, bedding, and pots and pans.

> These items were not provided to the workers who lived at Sakuma Brothers' camps prior to the start of the H-2A contract.
>
> . . .
>
> m. Sakuma Brothers provided workers living in Camp 3 transportation in buses to and from the field sites. U.S. workers living in Camps 1 and 2 were not picked up or dropped off at those camp sites by the buses provided by Sakuma Brothers.

AX 1

The Administrator proposed a penalty calculated as follows. First, these violations affected at least 207 out of 532 workers. AX 5 (List of Employees in Employer Housing); AX 6 (List of H-2A Workers); HT 23-24. The Administrator argues for a per-worker calculation of penalties here because each U.S. worker was affected, in a sense, by preferential treatment for the H-2A workers. HT 130. The base penalty for this violation in the year it was cited was $1,500. When multiplied by the number of affected employees, 207, the total base penalty would be $310,500.

The Administrator first mitigated the assessed penalty by 30 percent; 10 percent for each of three applicable factors. HT 136-37.

- Factor 5, the Respondent's explanation of the violations, because Sakuma, not WAFLA, was the direct provider of housing, toiletries, or other amenities;
- Factor 6, WAFLA's commitment to future compliance, crediting Mr. Fazio's commitments;
- Factor 7, the extent to which WAFLA may have achieved a financial gain, or the extent of any financial loss or injury to workers; while workers were deprived of earnings for unlawful deductions for housing, there is no question that the workers received a full refund of those housing deposits.

Those three reductions would have resulted in a penalty of $217,350. In addition, because the housing deposits were fully refunded and the employer quickly changed its practice the Administrator further mitigated the remaining assessed penalty by 50 percent, to $108,675. HT 133. This was in essence a supercharged Factor 4 "good faith" reduction in the proposed penalty.

As noted above, I review each factor *de novo*. Factor 1 addresses violation history. I found above that WAFLA has a history of violations, albeit a very modest history of one confirmed instance[20] in light of their involvement totaling hundreds of applications to the H-2A program. I will apply a 5 percent mitigation factor for the limited violation history, rather than the 10 percent that the Administrator would apply for having no violation history, but did not.

Factor 2 addresses the number of affected employees. Because 207 U.S. workers were affected, I will not apply mitigation here. Furthermore, I affirm the Administrator's assessment of a per-worker penalty owing to the broad scope – the large number of affected workers – and the

[20] I am subtracting *Azzano Farms* here.

fact that these violations did identifiably affect each of the 207 workers individually rather than the workers as a group.

Factor 3 addresses gravity. "[T]he 'gravity' of the violation can only be determined in relation to other potential violations, including the thirteen listed in 20 C.F.R. § 655.182(d) such as failing to pay wages, failing to offer a job to a qualified U.S. worker for the H-2A job vacancy, refusing to comply with a sanction, impeding investigations, committing a 'heinous act' or "'fraud.'" *Castro Harvesting*, ARB No. 13-082, ALJ No. 2013-PED-002, slip op. at 12 (Nov. 26, 2013). Here I disagree with the Administrator's implicit finding that this was a grave violation, precluding mitigation. Regarding the household supplies, recall that the U.S. workers were already living in adjacent camps at Sakuma when the H-2A workers arrived. Reviewing the Camp #2 photos in the record, AX 12, these workers appear to have had at least some of these items already. I agree it was a violation, but cannot say it was grave to not provide them in the same way that it would be, for example, to not provide them to H-2A workers who had just traveled from Mexico to live in the camp. Similarly, the U.S. workers' housing deposits, which were always refundable deposits in any case, were promptly refunded by Sakuma once it was pointed out that the H-2A workers had not been charged deposits.[21] Finally, failing to provide comparable transportation is a clear violation, but compared to wage theft or fraud,[22] again, not of the highest gravity. I will apply a 10 percent mitigation factor for the relatively moderate gravity of these violations.

Factor 4 is the "good faith" factor. There is little authority on what "good faith" means in the H-2A context. The ARB has observed that "the regulatory fourth factor goes beyond the violation in question and asks about [a respondent's] good faith efforts under the immigration laws in general." *Castro Harvesting*, ARB No. 13-082, slip op. at 13. But as far as what good faith *is*, one must sift through various facts cited in the case law. *See, e.g., Klem Christmas Tree Farm*, 2020-TAE-00009, slip op. at 6 (Oct. 13, 2020) (cooperated in investigation, promptly complied, violations resulted from misunderstanding vs. intentional violation). *Three Chimneys Farms*, 2013-TAE-00011, slip op. at 16-17 (retained an attorney, asked questions regarding compliance). A related statute, the Fair Labor Standards Act, contains an affirmative defense to damages based on an employer's good faith. *See Bratt v. Cty. of Los Angeles*, 912 F.2d 1066, 1072 (9th Cir. 1990). "To satisfy the subjective 'good faith' component, the [County was] obligated to prove that [it] had 'an honest intention to ascertain what [the FLSA] requires and to act in accordance with it." *Id.* In that case, the court found good faith based on similar factors as those applied by the ALJ's in *Klem Christmas Tree Farm* and *Three Chimneys Farms*; namely, an "objective . . . study" of possible overtime-exempt job classifications, and "no evidence that the County attempted to evade its responsibilities." *Id.* I will affirm the Administrator's application of a 50 percent mitigation factor for good faith after applying the other mitigation factors, for the reasons advanced by the Administrator.

Factor 5 addresses the explanation for the violations. WAFLA relied on Sakuma to carry out the obligations to the H-2A workers and corresponding U.S. workers created by the terms of the program and of WAFLA's approved H-2A application on Sakuma's behalf. WAFLA did continue to support Sakuma and participate in recruiting and referring workers, though apparently

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[21] Indeed, the H-2A workers could not be charged deposits. 20 C.F.R. § 655.122(h)(3)

[22] Or providing housing with obvious fire and electrical shock hazards affecting dozens of workers. *See G Farms LLC et al.*, ALJ No. 2018-TAE-00034 (May 10, 2021).

not to the extent of inspecting at the Sakuma farm – and, of course, not to the extent of preventing the violations in the case. Given that Sakuma had not previously employed H-2A workers, this was perhaps not the wisest decision; though on the other hand, Sakuma is a large and well-established growing operation capable of administering compliance, rather than a very small family farm that might struggle. HT 287. Above, I discussed at length why as a matter of law WAFLA is liable as a joint employer for the violations. Here, however, I recognize the fact that WHD's longstanding practice was to hold solely farms, and not WAFLA as a joint employer, liable for penalties arising out of most types of violations. One way in which WAFLA could have complied with the letter of the H-2A regulations was to apply as Sakuma's agent for purposes of filing the application, and then wash its hands of compliance obligations once the application was approved.[23] Given WAFLA's experience providing compliance assistance to farms, that outcome might not be in the best interest of H-2A workers. I will apply a 30 percent mitigation factor here for WAFLA's explanation for the violations.

For Factor 6, commitment to future compliance, I will affirm WHD's application of a 10 percent mitigation factor.

Factor 7 addresses financial gain by the employer or loss by the workers. "It is important to note that this factor focuses on the 'extent to which' there was financial gain." *Castro Harvesting*, ARB No. 13-082, slip op. at 13-14. WAFLA's only possible financial gain was the extent to which failing to participate alongside Sakuma in administering the H-2A program obligations saved WAFLA money in the form of travel reimbursements or staff time; there is no concrete evidence of these savings. I will affirm the Administrator's application of 10 percent mitigation here.

I therefore calculate the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty ($1,500 x 207)	--	$310,500
Factor 1	5 percent	-$15,525
Factor 2	0 percent	-$0
Factor 3	10 percent	-$31,500
Factor 5	30 percent	-$94,500
Factor 6	10 percent	-$31,500
Factor 7	10 percent	-$31,500
SUBTOTAL	--	$105,975
Factor 4	50 percent	-$52,987.50
TOTAL	--	**$52,987.50**

B. Worker housing failed to meet the applicable safety and health standards

The regulations in 20 C.F.R. part 655, subpart B require employer-provided housing under the H-2A program, constructed since 1980, to meet the 29 C.F.R. § 1910.142 standards, which are

[23] This is apparently what WAFLA began to do for subsequent years. HT 277.

administered by the Occupational Safety and Health Administration ("OSHA"). *See* 20 C.F.R. § 655.122(d)(1)(i).

Here, the Administrator alleges and assessed penalties for two serious violations of safety and health regulations, along with other, less-serious violations at each of the housing locations, based on the August 12, 2013, inspection. During their inspection of Camp 2, the investigators found a refrigerator that was not operating properly to keep food at the appropriate temperature. AX 11 (Camp #2 inspection form, at Box 85); AX 12 (photographs and diagrams); Second, the investigators found an "infestation of flies near full garbage by men's bathroom [and] [a]lso [a] piece of feces located on ground outside men's bathroom." AX 11 (Camp #2 inspection form, at Box 93).

I found WHI Ward credible for the reasons discussed above. I also note that Respondents did not provide any contradictory evidence or even seriously challenge WHI Ward's conclusions, during cross-examination, as to this alleged violation. Therefore, I affirm the finding of a violation.

The Administrator proposes a penalty of $1,800 for these two safety and health violations, which the Administrator characterizes as "serious." The base penalty was $1,500 each, totaling $3,000. AX 11 (Camp #2 inspection form); AX 12 (photos); HT 137. The Administrator proposed a reduction of 40 percent overall, 10 percent for each of four mitigation factors:

- Factor 4, regarding good-faith compliance efforts;
- Factor 5, the Respondent's explanation; WAFLA had relied on Sakuma Brothers to maintain the housing and living quarters as WAFLA is not the direct provider of housing;
- Factor 6, WAFLA's commitment to future compliance, crediting Mr. Fazio's commitments;
- Factor 7, financial gain, or financial loss or injury to workers; the violations were quickly remedied.

WHI Ward testified that these two violations could have been charged as severe violations, in her view, and been assessed by the Administrator at a much higher base penalty. HT 138. However, while the cited conditions were described by WHI Ward in her testimony and in the inspection form, there is insufficient evidence in the record to substantiate the alleged serious gravity of *both* of the violations. I carefully reviewed the photos of Camp 2 taken by WHI Ward and her colleagues, AX 12, and I do not see any photos reflecting full outdoor garbage, any flies or any feces. WHI Ward's testimony was limited to the bare facts of her finding of a violation, tracking her language in the form at AX 11, and lacked any elaboration on the degree of violation. Also, while such a violation is disgusting and plainly needed to be cleaned up, it does not present the same sort of imminent threat to worker health as a malfunctioning camp kitchen refrigerator, which could lead directly to food poisoning of workers and their families.

For the refrigerator, I find as follows: Factor 1, I will apply a 5 percent mitigation factor for the limited violation history. For Factor 2, I apply no mitigation, as all of the workers using that Camp #2 kitchen were affected. For Factor 3, I apply no mitigation, due to the direct threat to worker health. For Factor 5, I apply a 30 percent mitigation factor for WAFLA's explanation, as

discussed above under the preferential treatment violation. For Factors 4, 6 and 7, I affirm the Administrator's application of 10 percent mitigation for each.

I therefore calculate the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty	--	$1,500
Factor 1	5 percent	-$75
Factor 2	0 percent	-$0
Factor 3	0 percent	-$0
Factor 4	10 percent	-$150
Factor 5	30 percent	-$450
Factor 6	10 percent	-$150
Factor 7	10 percent	-$150
TOTAL	--	**$525**

For the garbage and related conditions, I find as follows: Factor 1, I will apply a 5 percent mitigation factor for the limited violation history. For Factor 2, I apply no mitigation, as all of the workers using that Camp #2 kitchen were affected. For Factor 3, I apply 10 percent mitigation, due to the lack of imminent threat to worker health. For Factor 5, I apply a 30 percent mitigation factor for WAFLA's explanation, as discussed above under the preferential treatment violation. For Factors 4, 6 and 7, I affirm the Administrator's application of 10 percent mitigation for each.

I therefore calculate the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty	--	$1,500
Factor 1	5 percent	-$75
Factor 2	0 percent	-$0
Factor 3	10 percent	-$150
Factor 4	10 percent	-$150
Factor 5	30 percent	-$450
Factor 6	10 percent	-$150
Factor 7	10 percent	-$150
TOTAL	--	**$375**

C. U.S. workers were rejected from employment under the H-2A contract due to lack of experience when foreign H-2A workers were employed who did not have any previous experience, in violation of 20 C.F.R. § 655.135(d).

An H-2A employer must hire any qualified U.S. worker who applies for a job until 50 percent of the period of the work contract has elapsed. 20 C.F.R. § 655.135(d). One U.S. worker applicant was denied employment because of the requirement in the Job Order that experience in this particular kind of agricultural harvesting was required – a requirement that not all of the foreign H-2A workers met. AX 17 (Fazio Email regarding Maria Renteria); HT 61-62.

As found above:

> g. Pursuant to the approved ETA 790, Sakuma Brothers' ETA-790 included a three-month experience requirement. As directed by WAFLA, Sakuma Brothers rejected and did not hire local applicants who did not have at least three months of prior work experience picking blueberries and blackberries. After the foreign H-2A workers arrived, Sakuma Brothers learned that many of them did not have the requisite three months of experience as required under the contract and upon discovery of this, Sakuma Brothers no longer rejected local applicants who did not have at least three months of prior worker experience picking blueberries and blackberries.

Specifically, one worker, Maria Renteria was rejected for an improper reason; she lacked recent agriculture experience when, as it turned out, so did at least some of the H-2A workers. Both Mr. Fazio's testimony as well as his email at AX 17 suggest that a labor-management dispute may also have played a role in Sakuma's decision not to hire her even after he became involved and encouraged Sakuma to hire Ms. Renteria. I also find that WAFLA and Sakuma improperly rejected other candidates, and WHI Ward described how U.S. workers were getting the "run-around" between WAFLA and Sakuma. HT 64.

I affirm the finding of a violation. In addition to WHI Ward's testimony, Mr. Fazio acknowledged in testimony that Ms. Renteria was not hired in spite of his encouraging Sakuma to hire her. WAFLA does not contest the rejection of Ms. Tinoco and Mr. Guerrero. AX 18.

The base penalty for a violation of 20 C.F.R. § 655.135(d) is $15,000. HT 133-34. The Administrator proposed a reduction of 20 percent overall, 10 percent for each of two applicable mitigation factors.

- Factor 2, the number of affected employees, one;
- Factor 6, WAFLA's commitment to future compliance, crediting Mr. Fazio's assurances.

The Administrator declined to apply Factor 5 in mitigation, arguing that recruitment and working with the State Workforce Agency is what WAFLA is responsible for in carrying out its duties under the contract. HT 136-37. Therefore, the Administrator assessed $12,000.

I find as follows: Factor 1, I will apply a 5 percent mitigation factor for the limited violation history. For Factor 2, I affirm the Administrator's application of a 10 percent mitigation factor.

Regarding Factor 3, in *Castro Harvesting*, the ARB noted that "failing to offer a job to a qualified U.S. worker for the H-2A job vacancy," is one of the listed higher-gravity violations listed that can justify debarment. ARB No. 13-082, slip op. at 12. I will not apply a mitigation factor here.

Regarding Factor 4, good faith, and Factor 5, the explanation, I find that Mr. Fazio did encourage Sakuma to comply with the regulations and job order, by giving Ms. Renteria some

benefit of the doubt that she had sufficient experience in agriculture to qualify even before the H-2A workers arrived on or about August 13, 2013, and it was discovered some of them had no experience. The Administrator presented no evidence contradicting Mr. Fazio's account.[24] In any event, Ms. Renteria was not hired, not when she first requested work on August 6, 2013, or at any time later during the season. No documentation of precisely why Ms. Renteria was not hired (the stated reason or the true reason), or what individual made the final decision, is in the record. Both WAFLA and Sakuma are employers and joint employers under the job order and the regulations, and therefore both responsible. I considered whether, much as my colleague did in *Azzano Farms*, to vacate the penalty as to WAFLA here due to Mr. Fazio's compliance assistance efforts, i.e., to encourage Sakuma to put Ms. Renteria to work in their fields. Under the regulations and analysis above, I cannot, but I will apply mitigation to reflect WAFLA's lower degree of culpability.[25] I will apply a 10 percent mitigation factor for Factor 4 and 30 percent as above for Factor 5.

I affirm the Administrator's 10 percent mitigation under Factor 6.

Since Ms. Renteria lost out on a season's worth of wages, until the issue was litigated, I decline to mitigate under Factor 7.

I therefore calculate the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty	--	$15,000
Factor 1	5 percent	-$750
Factor 2	10 percent	-$1500
Factor 3	0 percent	-$0
Factor 4	10 percent	-$1500
Factor 5	30 percent	-$4500
Factor 6	10 percent	-$1500
Factor 7	0 percent	-$0
TOTAL	--	**$5,250**

D. WAFLA failed to follow up with applicants, and rejected workers because the farm had inadequate housing in violation of 20 C.F.R. § 655.135(c).

I find that this violation occurred, as discussed above, but I find that this penalty assessment regarding referral is duplicative of the 20 C.F.R. § 655.135(d) violation as to hiring discussed and assessed above. I will vacate the separate penalty.

E. Foreign H-2A workers were properly paid for their inbound transportation costs.

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[24] To be clear, it is apparent from Mr. Fazio's comment regarding the union, his testimony and his email at AX 17 that his motivation was to defuse a growing dispute, not that he believed that Ms. Renteria should be or deserved to be hired on the merits.

[25] As a practical matter, WAFLA has no berry fields, so it was Sakuma that was in a position to decide whether Ms. Renteria was actually employed.

I find that foreign H-2A workers were properly paid for their inbound transportation costs; I will vacate the alleged violation of 20 C.F.R. § 655.122(h)(1).

Under 20 C.F.R. § 655.122(h)(1), unless the employer advances the H-2A workers costs[26] or a worker completes less than 50 percent of the work contract period, the employer must reimburse an H-2A worker for "reasonable costs incurred . . . for transportation and daily subsistence" while in transit to the place of employment. 20 C.F.R. § 655.122(h)(1).

The transportation reimbursement must be at least, though need not be more, "than the most economical and reasonable common carrier transportation charges for the distances involved." *Id.* The "daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a)." *Id.* Similarly, "the amount an employer must pay for . . . lodging, must be no less than (and is not required to be more than) the most economical and reasonable costs." Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2013 Allowable Charges for Agricultural Workers' Meals and Travel Subsistence Reimbursement, Including Lodging, 78 Fed. Reg. 15741, 15742 (Mar. 12, 2013).

As the prosecuting party, the Administrator bears the burden of proof. 5 U.S.C. § 556(d). However, for purposes of determining whether costs have been reimbursed to workers, ALJs have adopted a burden-shifting framework from the Fair Labor Standards Act. *See WHD v. Bald Eagle Farms*, 2019-TAE-00025 (Aug. 5, 2020). If the prosecuting party "produces sufficient evidence to show the amount [owed] . . . as a matter of just and reasonable inference," the burden then shifts to the employer to present evidence of the precise amount or evidence that negates the inference drawn from the prosecuting party's evidence. *In re Greater Mo. Med. Pro-Care Providers, Inc.*, ARB No. 12-015, 2014 WL 469269, at *16 (ARB Jan. 29, 2014) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)); *see also Pythagoras General Contracting Corp. v. DOL*, 926 F. Supp. 2d 490, 493-95 (S.D.N.Y. 2013). If the employer does not meet its burden, an ALJ may award damages, even if they are approximations. *See id.*; *Bald Eagle Farms*, 2019-TAE-00025. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements" of the relevant law. *Mt. Clemens Pottery*, 328 U.S. at 688. This case law suggests that alleging a violation of this regulation will necessarily involve calculating monies due, along with calculating and assessing a civil money for the violation.

Pursuant to the burden-shifting framework from *Mt. Clemens*, 328 U.S. at 687-88, the Administrator does not have the burden to show that *every* worker received an insufficient reimbursement once there arises a logical inference that workers did, to sustain a violation for civil money penalty purposes. But, the Administrator must still provide "sufficient evidence to show the amount owed as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687-88.

[26] In certain circumstances including "[w]hen it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so," the employer must advance costs. 20 C.F.R. § 655.122(h)(1). The Administrator did not argue that Respondents were required to advance the costs in this case.

The Administrator alleges that WAFLA failed to properly reimburse 69 H-2A workers traveling from Mexico for their travel expenses and subsistence from original place of recruitment to the worker housing in Burlington, WA. According to the Administrator, some workers incurred delays and costs while having to stay at the border to await visa processing. The Administrator also alleges that the workers were charged by a charter bus service hired by WAFLA for transportation from their home to the border, but only reimbursed an average common carrier expense. Respondent argues that it satisfied its obligations under the regulation and that the Administrator has not raised any inference otherwise.

While the Administrator alleged that this violation affected 69 workers, the Administrator proposed a single $750 penalty, applying mitigating factors as follows:

- Factor 2, assessed as a single violation instead of per worker
- Factor 3, the gravity, as the workers did receive some expenses reimbursed.
- Factor 4, good faith. as WAFLA did provide some reimbursement
- Factor 5, the Respondent's explanation, as again WAFLA did provide some reimbursement
- Factor 6, future compliance, crediting Mr. Fazio's commitment to such.

The Administrator acknowledged in briefing that using average amounts for reimbursement of inbound transportation is acceptable," but argued that "where there are delays that are not the fault of the worker and specific costs incurred, the employer is expected to reimburse for specific amounts." I agree, to a point.

I have to rely on the evidence in the record. While I have credited WHI Ward's testimony elsewhere, here she did not specify either a number of workers who suffered an unexpected delay or how much any of the workers were owed.

Moreover, in WHI Ward's view, reimbursing an average transportation and lodging cost amounts to a violation, which is an incorrect statement of the law and undercuts the weight I give her testimony on this issue. The Administrator acknowledged that using an average cost is acceptable; also, reimbursement of "the most economical and reasonable common carrier transportation charges for the distances involved" is all that is required by the plain language of the regulation. *See* 20 C.F.R. § 655.122(h)(1). And Mr. Fazio explained that WAFLA did offer employees the option of reimbursement based on receipts vs. an average, kept a record of those choices, and gave that record to WHI Ward. WHI Ward acknowledged that some employees did not turn in their receipts. She did not speak to or rebut Mr. Fazio's assertion that he gave her the record. Due to the specificity of Mr. Fazio's testimony on this point, I find it credible. I also credit Mr. Fazio's description of the reimbursement process and how the record was created. (Ideally that record would have been submitted as an exhibit at the hearing.)

Finally, there is no evidence that WAFLA representatives were made aware of any delay at the border for some workers; the only record in the file is Administrator's Exhibit 8, which documents 31 H-2A workers admitted after one overnight, and reimbursement for that overnight. Were any workers delayed, I credit Mr. Fazio's testimony that they had the opportunity to tell WAFLA and claim reimbursement.

It is common knowledge that an express nonstop trip, whether by bus, train or plane, commands a premium price. I want to be clear that if an H-2A employer induced or required its H-2A workers to take a private charter bus, which charged workers a premium rate, and then only reimbursed a lower "most economical and reasonable common carrier rate" rather than the full cost (or just paying the bus company directly) I would find a violation. Specifically, under those circumstances I would find the cost of the private charter bus fare to be the proper reimbursement, i.e., the *only* economical and reasonable cost, regardless of what a public bus ticket might cost. *See* 20 C.F.R. § 655.122(h)(1). Adopting such a scheme would effectively shift a portion of the transportation cost from the H-2A employer to the workers, which is forbidden by the regulation. *See id.* ("employer must pay the worker for reasonable costs incurred by the worker for transportation"). While it could well be argued that such an express bus trip is for the workers' benefit, it is also clearly for the employer's benefit, as the employer knows who is traveling, where, and when; and when they will arrive to begin work.

WHI Ward's testimony suggests that something like this happened, but there is not sufficient evidence or explanation in the record documenting that that *is* what happened. The undisputed fact that the Administrator declined to make calculations of any reimbursement monies owed to the workers, finding it *de minimis*, suggests that at least in this case WAFLA followed the spirit of the transportation rule if possibly not the letter of the rule down to the penny. Also, again, Mr. Fazio testified that workers were invited to turn in receipts for actual-cost reimbursement.

For these reasons, I vacate the finding of a violation related to transportation reimbursements.

F. The employers provided transportation to foreign H-2A workers that was not provided to U.S. workers in violation of 20 C.F.R. § 655.122(h)(4)

While transportation was provided to H-2A workers at Camp 3, but not U.S. workers, the Administrator addressed this violation through the unlawful preferential treatment violation discussed above, and assessed no separate penalty. I affirm.

ORDER

For these reasons, I affirm in part and modify in part the Administrator's findings of violation and penalties, as follows:

20 C.F.R. cited regulation	Description	Penalty
§ 655.122(a)	Preferential treatment given to H-2A workers	$52,987.50
§ 655.122(d)(1)	Housing safety and health	$800
§ 655.135(d)	Unlawful rejection of U.S. workers	$5,250
§ 655.135(c)	Referrals	$0
§ 655.122(h)(1)	Inbound transportation reimbursements	No violation found
§ 655.122(h)(4)	Local transportation	$0
TOTAL	--	**$59,037.50**

Respondent WAFLA is hereby ORDERED to pay **$59,037.50** in civil penalties to the Administrator.

EVAN H. NORDBY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review ("Petition") with the Administrative Review Board ("ARB") within 30 days of the date of this decision. 29 C.F.R. § 501.42.

The petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. § 501.42(a).

<u>IMPORTANT NOTICE ABOUT FILING APPEALS</u>:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact. If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

> Administrative Review Board
> U.S. Department of Labor
> 200 Constitution Avenue, N.W., Room S-5220,
> Washington, D.C., 20210

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If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

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After an appeal is filed, all inquiries and correspondence should be directed to the Board.

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Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.