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Issue Date: 13 October 2020

Case No.: 2020-TAE-00009

In the Matter of:

KLEM CHRISTMAS TREE FARM,
Respondent

DECISION AND ORDER MODIFYING ADMINISTRATOR'S DETERMINATION

This matter arises pursuant to the Immigration and Nationality Act's ("INA") Temporary Alien Employment H-2A visa program, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188(c), as implemented by regulations at 20 C.F.R. Part 655, subpart B, and 29 C.F.R. Part 501 (2020). The H-2A visa program permits employers to hire temporary non-immigrant workers to perform agricultural labor or services.

The Administrator ("Administrator") of the Wage and Hour Division ("WHD") enforces the regulations governing the H-2A program. 29 C.F.R. §§ 501.1(c), 501.15, 501.16. The Administrator may enforce the employee-protection provisions by imposing civil money penalties. 29 C.F.R. § 501.19. Upon imposition of a civil money penalty, an employer may request review of the penalty by an Administrative Law Judge. 29 C.F.R. §§ 501.33, 501.37.

I. Procedural History

On August 15, 2019, the Administrator issued a Notice of Determination of Wages Owed, Assessing Civil Money Penalties ("Determination") to Klem Christmas Tree Farm ("Respondent"). The Administrator imposed a total penalty of $4,684.50 on Respondent for several violations of the H-2A program regulations.[1] On September 4, 2019, Respondent requested a hearing to review the penalty. On February 12, 2020, this matter was assigned to me for adjudication.

On June 3, 2020, I held a pre-hearing teleconference, during which the parties requested a decision on the record in lieu of a hearing. *See* 29 C.F.R. § 18.21(b). Accordingly, I issued an Order Canceling Hearing, in which I set deadlines for the submission of evidence and briefs. Counsel for the Administrator timely filed a closing brief. Respondent did not submit a closing brief. Respondent is self-represented in these proceedings.

[1] The Administrator also determined Respondent must pay a total of $9,123.12 in unpaid wages to ten workers. Those wages have been paid, and that assessment is not at issue here. (Tr. 14.) "Tr." refers to the transcript of the June 3, 2020, conference call I held with the parties.

II. Evidence

The Administrator submitted forty-one exhibits, which I briefly describe below. Respondent raised no objection to the exhibits and agreed to treat them as joint exhibits. (AX[2] 41.) Therefore, I **ADMIT** AX 1–41 to the record. The parties also agreed to a substantial list of stipulations (Tr. 6; AX 40–41), which I address in more detail below. I have reviewed the entire record in this matter.

Exhibit	Description
1	WHD H-2A Narrative (July 16, 2019)
2	WHD H-2A CMP Computation Summary Sheet (July 2019)
3	Respondent Payroll Register Report (October 2017 to May 2019)
4	WHD Wage Transcription and Computation Sheet: Ira Campbell (May 23, 2019)
5	WHD Back wage computations for Respondent's H-2A employees (2019)
6	W-4 Forms for Respondent's H-2A employees (2019)
7	Respondent's H-2A Application for Temporary Employment Certification (2019)
8	ETA Notice of Acceptance Letter (February 13, 2019)
9	ETA Agricultural and Food Processing Clearance Order (2019)
10	Respondent's H-2A Application for Temporary Employment Certification (2018)
11	Respondent's quarterly tax returns and reconciliation report (2019)
12	ETA Agricultural and Food Processing Clearance Order (2018)
13	Respondent's H-2A employees' Memoranda of Agreement with H2A Contract (2019)
14	Respondent's H-2A employees' wage statements (May 2019)
15	Driver's license information
16	Respondent's Summary of Insurance and other vehicle information (May 2019)
17	Vehicle photographs (undated)
18	Respondent's H-2A employees' timesheets (undated)
19	Respondent's Employee Contact List (May 2019)
20	WHD Transportation Safety Checklist (May 2019)
21	WHD Memo to file regarding voicemail from Michael Klem (May 22, 2019)
22	Respondent's payroll paystubs (May 24, 2019)
23	Photograph of posters in Respondent's Benton office (undated)
24	WHD Wage Transcription and Computation Sheet: Gilberto Sanchez (2018)
25	WHD Wage Transcription and Computation Sheet: Julian Loyola (2019)
26	WHD Employee Personal Interview Statement: confidential witness (May 7, 2019)
27	WHD Employee Personal Interview Statement: confidential witness (May 7, 2019)
28	WHD Employee Personal Interview Statement: confidential witness (May 9, 2019)
29	WHD Employee Personal Interview Statement: confidential witness (June 18, 2019)
30	WHD Employee Personal Interview Statement: Karen Ellis (May 9, 2019)
31	WHD Employee Personal Interview Statement: Michael Klem (May 15, 2019)

[2] "AX" refers to the Administrator's exhibits.

32	WHD Employee Personal Interview Statement: confidential witness (May 7, 2019)
33	WHD Employee Personal Interview Statement: confidential witness (May 7, 2019)
34	WHD Employee Personal Interview Statement: Steven McKay (May 9, 2019)
35	WHD Employee Personal Interview Statement: William Morris (May 9, 2019)
36	WHD Employee Personal Interview Statement: Don Olsommer (May 22, 2019)
37	WHD Employee Personal Interview Statement: Brad Posey (May 8, 2019)
38	WHD Employee Personal Interview Statement: confidential witness (May 9, 2019)
39	Respondent's employment advertisements for farmworker/laborer (2019)
40	Stipulated Facts
41	Email from M. Klem to L. Harris (May 27, 2020)

III. Issue & Legal Standard

Respondent does not dispute that it committed the violations cited by the Administrator in the Determination. (Tr. 6–7; AX 40–41.) The parties agree the sole issue to be decided is whether the civil money penalties the Administrator imposed on Respondent are appropriate. (Tr. 27.)

On this point, I review the record de novo. *John Peroulis and Sons Sheep Inc.*, ARB No. 14-076 & -077, slip op. at 8–9 (Sept. 12, 2016) (affirming *John Peroulis and Sons Sheep Inc.*, ALJ No. 2012-TAE-00004 (June 2, 2014) ("[U]nder a *de novo* standard, I am to reassess and weigh the evidence [relating to the assessed penalties], arriving at my own independent assessment.")). I "may affirm, deny, reverse, or modify, in whole or in part, the [Administrator's] determination." 29 C.F.R. § 501.41(b).

In assessing a civil money penalty, the factors to consider include but are not limited to:

> (1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part;
> (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 this part;
> (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).

IV. Background

Respondent grows and sells evergreen and ornamental trees. (AX 1.) Mr. Michael Klem (hereinafter "Mr. Klem") owns Respondent, and his son Joe Klem operates the tree farm. (AX 31.) The business is located in Benton, Pennsylvania. (AX 3; AX 9; AX 12.)

In 2018, Respondent applied to hire four workers under the H-2A program. (AX 10.) Respondent hired H-2A workers who worked from September to December 2018. (AX 1; AX 31; AX 40 ¶ 12.) In 2019, Respondent applied to hire eight workers under the H-2A program. (AX 7.) Respondent hired H-2A workers who worked from March to December 2019. (AX 1; AX 31; AX 40 ¶ 13.)

WHD initiated an investigation of Respondent's compliance with H-2A program requirements on May 8, 2019. (AX 1 at 5.) The period covered by the investigation was from September 10, 2018, through June 8, 2019. (AX 1 at 12.)

V. Analysis

The Administrator assessed civil money penalties for five violations of H-2A regulations. (AX 1.) In assessing these penalties, the Administrator considered each of the factors set forth in the applicable regulation. *See* 29 C.F.R. §501.19(b). I address each penalty separately below.

A. Transportation

The Administrator assessed a civil money penalty because Respondent transported H-2A workers in vehicles that did not comply with "all applicable Federal, State or local laws and regulations," in violation of 20 C.F.R. § 655.122(h)(4). Specifically, the Administrator assessed a penalty of $1,214.50 because one H-2A worker drove other H-2A workers to the job site and to the grocery store in a pickup truck that was not covered by auto insurance.[3]

The record supports that Respondent committed this violation. The parties stipulated to (and the record supports) the following fact: "At some point between March 9, 2019 and December 15, 2019, the black GMC Sierra truck owned by Respondent and used to transport H-2A workers did not have auto insurance coverage." (AX 40 ¶ 37.)

The Summary of Insurance prepared by Respondent's insurance carrier reflect that, as of April 4, 2019, the GMC truck was not on Respondent's insurance. (AX 16 at 271–73.) On May 22, 2019, Mr. Klem left a voicemail with WHD acknowledging that, due to an oversight, the truck had not initially been added to Respondent's auto insurance policy, but Mr. Klem also indicated the truck had been added to the insurance policy as of May 22, 2019. (AX 21.) On May 22, 2019, the WHD investigator spoke with Mr. Don Olsommer, Respondent's auto insurance agent. He confirmed Mr. Klem "just called yesterday to add the 2005 GMC Sierra. That vehicle was not on the policy prior to 5/21/19." (AX 36.)

[3] The Administrator noted two other transportation-related violations—an expired inspection sticker on one vehicle and inadequate tire tread on another vehicle (AX 17; AX 20)—but did not impose civil money penalties for those violations (AX 1 at 11), so I do not address them here.

The statements given by Respondent's employees and gathered by WHD staff reflect that at least one H-2A worker drove other H-2A workers to the work site and to the grocery store in a black pickup truck in 2019. (AX 29; AX 31; AX 32; AX 33; *see also* AX 40 ¶¶ 20, 22.) Therefore, Respondent violated section 655.122(h)(4) by failing to ensure that a vehicle transporting H-2A workers was covered by auto insurance.

In calculating the amount of the penalty, the Administrator started with the maximum penalty amount of $1,735.00[4] and applied a 30% reduction because Respondent does not have a history of violations (factor 1); because Mr. Klem explained that he believed someone had added the truck to the insurance policy (factor 5); and because Respondent immediately came into compliance when informed of the violation and agreed to remain in compliance (factor 6). §501.19(b)(1), (5), (6). The Administrator did not believe the four remaining mitigation factors (factor 2, number of workers affected; factor 3, gravity of the violation; factor 4, good faith; and factor 7, financial gain) applied. (AX 1 at 10–11.) I agree with the Administrator that mitigation factors one, five, and six apply here. For the reasons set forth below, I agree with the Administrator that factor two does not apply here, but I also conclude factors three, four, and seven are applicable here.

Factor 2: Number of Workers Affected

In considering the number of workers affected (§501.19(b)(2)), the Administrator explained: "All H-2A workers who were transported in the uninsured vehicle (minimum of four H-2A workers) were affected by these violations." (AX 1 at 10.) I agree with the Administrator that this mitigation factor does not apply because Respondent's violation affected at least four H-2A workers and possibly more. *See James L. Brady Sr.*, 2018-TAE-00005, at 29–30 (Apr. 25, 2019) (finding the second factor to be aggravating, not mitigating, when a regulatory violation affected five H-2A workers); *see also Three D Farms LLC*, 2016-TAE-00003, at 29 (Aug. 18, 2016) (finding the second factor was not mitigating where a violation affected three U.S. workers).

Factor 3: Gravity of the Violation

The Administrator considered the gravity of the violation (§501.19(b)(3)) to be "potentially large; in the event the H-2A workers would have been involved in an auto accident while driving the uninsured vehicle, there may have been no insurance to cover any injuries." (AX 1 at 10.) This is true with respect to any trips to the grocery store, but it is incorrect with respect to driving to the job site. Respondent's insurance agent specified that Respondent "has workers compensation insurance through our agency, too. If the H2A workers got into an accident in the scope of their employment in an uninsured vehicle, the liability insurance under workers compensation would cover the workers. However, if the H2A workers got into an accident outside of their employment, such as going to the grocery store, that type of liability would have to come under the auto insurance." (AX 36.)

The Administrator argues this mitigation factor does not apply because the violation "concerns health and safety." (Brief at 17.) However, there is no evidence of any actual safety

[4] §501.19(c) (2019).

violation related to the pickup truck. Rather, the violation is an administrative one; Respondent simply (and, it appears, inadvertently) failed to effect a necessary change in its insurance policy. I recognize that, in the event the H-2A workers were involved in an accident on a trip outside the scope of their employment, the lack of auto insurance could have considerable consequences. However, considering there was no concern for the actual safety of the vehicle, and considering this violation was primarily an administrative error that affected only a weekly trip to the grocery store, I find the gravity of the violation was not substantial. Therefore, I conclude this mitigation factor does apply, and I will reduce the penalty by an additional 10%.

Factor 4: Good Faith

The Administrator determined the good faith mitigation factor (§501.19(b)(4)) did not apply because "Mr. Klem made no apparent effort to inquire about H-2A requirements so he could be in compliance with all H-2A requirements." (AX 1 at 11.). During the conference call I held with the parties, Mr. Klem asserted that Respondent acted reasonably and cooperated with WHD in resolving the issues that arose during the investigation. He contended Respondent was not "adversarial in any way in this because we wanted to do things correctly." (Tr. 7.) Mr. Klem did not "dispute that we've made mistakes but we're working with the Department of Labor all the way through them." (Tr. 8.) Mr. Klem explained that the WHD investigation was a "good process" and Respondent "got things corrected."[5]

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, Nov. 26, 2013). The record reflects that Respondent hired an agent to assist it in applying for the H-2A program. (AX 34.) The record reflects that Mr. Klem was cooperative and responsive throughout the investigation. (AX 16 at 269; AX 21; AX 31.) The record reflects that Respondent swiftly came into compliance for the cited violations and paid back wages due. (AX 1; Tr. 14.) None of the violations cited is particularly egregious. Each of the violations resulted from a misunderstanding of the H-2A program requirements and not any desire to circumvent those requirements. Moreover, the Administrator's reason for not applying this mitigation factor is vague and non-specific. I find sufficient evidence of Respondent's good faith efforts to comply with the H-2A regulations to warrant an additional 10% reduction of the penalty.

Factor 7: Financial Gain

Finally, the Administrator determined that Respondent "achieved some financial gain as a result of the violation due to not paying insurance premium." (AX 1 at 11.) However, it is not clear whether Respondent actually did achieve any financial gain from this violation. *See* §501.19(b)(7). Mr. Klem indicated that the insurance for the GMC truck would be "back dated." (AX 21.) There is an insurance card for the GMC truck with an effective date of January 10, 2019. (AX 16 at 270.) If the insurance was backdated, Respondent likely would have made back payments and would not have achieved any financial gain. In any case, even if Respondent did not make back payments, the financial gain would be minimal. Therefore, I find Respondent's

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[5] Mr. Klem disputed that it was appropriate to fine Respondent "for not having a lid on a trashcan." (Tr. 8–9.) I note that no such fine was imposed.

financial gain resulting from this violation, if any at all, was small. I conclude this mitigation factor does apply and warrants an additional 10% reduction of the penalty.

Based on the foregoing analysis, I find six of the seven regulatory mitigation factors apply to this violation. Therefore, I will reduce the maximum penalty by 60% for a total penalty amount of $694.00.[6]

B. Rate of Pay

The H-2A program regulations specify:

> The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

20 C.F.R. § 655.122(a). Thus, it is of paramount importance that an employer treat equally all of its workers performing the same job, whether they are H-2A workers or U.S. workers.

Here, the Administrator assessed a penalty because Respondent failed to pay the required rate of pay, in violation of 20 C.F.R. § 655.122(l). That regulation mandates that an employer must pay each worker "at least the [Adverse Effect Wage Rate ("AEWR")], the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period." 20 C.F.R. § 655.122(l). The Administrator assessed a penalty of $867.50 specifically because Respondent paid one corresponding U.S. worker[7] less than its H-2A workers, and also because two H-2A employees performed driving duties for which they were not paid.

The record supports that Respondent committed this violation. The parties stipulated to (and the record supports) the following facts:

- Respondent did not pay Gilberto Gallegos Sanchez and Julian Duran Loyola for the time they spent driving H-2A workers to and from the worksites, and to and from the grocery store.
- At some point during the employment period set forth in the 2018 TEC, Respondent paid a corresponding worker Ira Campbell, $12.00 per hour.

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[6] $1,735.00 reduced by 60% equals $694.00.

[7] The regulations define "Corresponding employment" as: "The 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." 20 C.F.R. § 655.103(b).

- Ira Campbell performed the same agricultural work as the H-2A workers during the employment period covered by the 2018 TEC. Ira Campbell also performed the work listed in the job order related to the 2018 TEC during the period covered by the applicable job order.
- During the employment period set forth in the 2018 TEC, Respondent paid all H-2A workers $12.50 per hour.
- During the employment period set forth in the 2018 TEC, the Adverse Effect Wage Rate ("AEWR") for the work performed by H-2A workers and corresponding workers was $12.05.

(AX 40 ¶¶ 23, 27, 28, 29, 30.)

Respondent's payroll register report reflects that, from August to December 2018, Respondent paid Ira Campbell, a corresponding worker, $12.00 per hour and paid its H-2A workers $12.50 per hour. (AX 3 at 53–89.) The 2018 job clearance order indicates the applicable AEWR was $12.05. (AX 12 at 223.) WHD calculated the back wages owed to Mr. Sanchez (2018) and Mr. Loyola (2019), two H-2A workers, for the time they spent driving H-2A workers. (AX 24–25.) Therefore, Respondent violated sections 655.122(a) and 655.122(l) by paying a corresponding worker less than H-2A workers and by failing to pay H-2A workers for driving time.

In calculating the amount of the penalty, the Administrator started with a the maximum penalty amount of $1,735.00 and applied a 50% reduction because Respondent does not have a history of violations (factor one); because the H-2A workers were not significantly impacted by this violation (factor three); because Mr. Klem explained he was unaware that Respondent had to pay H-2A workers for driving time and could not pay a U.S. worker less than an H-2A worker (five); because Respondent immediately came into compliance when he was informed of the violation and agreed to remain in compliance (factor 6); and because Respondent achieved minimal financial gain as a result of this violation (factor 7). §501.19(b)(1), (3), (5), (6), (7).

I agree with the Administrator that mitigation factors one, three, five, six, and seven apply here. I also agree that factor two (§501.19(b)(2)) does not apply here. The Administrator explained why it did not consider the number of workers affected to be a mitigating factor: "There were 3 workers in total affected by these violations which was 33% (2 out of 6) of total workers in 2018 and approximately 12.5% (1 out of 8) of total workers in 2019." (AX 1 at 8.) Though the absolute number of workers affected may be low, the percentage of workers affected is higher, both H-2A and corresponding U.S. workers were affected, and avoiding the unequal treatment of H-2A workers and U.S. workers is at the heart of the H-2A program.

The Administrator determined the fourth factor, good faith (§501.19(b)(4)), did not apply because "Mr. Klem made no apparent effort to inquire about H-2A requirements so he could be in compliance with all H-2A requirements." (AX 1 at 8.) Nonetheless, the Administrator acknowledges that this violation was "unintentional." (AX 1 at 7.) For the same reasons set forth above, I find that this mitigation factor does apply. The record adequately reflects that Respondent made good faith efforts to comply with the H-2A program requirements, and

Respondent also participated in the investigatory process in good faith. Because I find the good faith mitigation factor does apply here, I reduce the penalty by an additional 10%.

Based on the foregoing analysis, I find six of the seven regulatory mitigation factors apply to this violation. Therefore, I will reduce the maximum penalty by 60% for a total penalty amount of $694.00.[8]

C. Unlawful Deductions

The Administrator assessed a penalty because Respondent took unlawful deductions from the paychecks of H-2A workers, in violation of 20 C.F.R. § 655.122(p). That regulation provides in pertinent part: "The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable." 20 C.F.R. § 655.122(p)(1). The Administrator assessed a penalty of $867.50 here because Respondent deducted Social Security, Medicare, and Pennsylvania state taxes from the paychecks of H-2A workers.

The record does not support that Respondent committed this violation as cited by the Administrator. The parties stipulated to (and the record supports) the following facts:

- Between September 10, 2018 and December 15, 2018, the employment period set forth in the 2018 TEC, Respondent deducted Social Security, Medicare and Pennsylvania state taxes from H-2A workers' paychecks.
- Between March 9, 2019 and December 15, 2019, the employment period set forth in the 2019 TEC, Respondent deducted Social Security, Medicare and Pennsylvania state taxes from H-2A workers' paychecks.
- None of the H-2A workers requested Respondent deduct Social Security, Medicare or Pennsylvania state taxes from their paychecks.

(AX 40 ¶¶ 33–35.) Respondent's payroll records reflect that, from August to December 2018, and from March to May 2019, Respondent deducted Social Security, Medicare, and Pennsylvania state taxes from the paychecks of H-2A workers. (AX 3 at 53–89, 91–116; AX 22.) WHD calculated the back wages owed to several workers on the basis of these tax deductions. (AX 5.) Several H-2A workers authorized deduction of federal taxes from their paychecks (AX 6), but there is no evidence they authorized any other deductions.

In its brief, Administrator asserts: "the job order did not disclose Respondent's intent to make such deductions." (Brief at 17.) However, Respondent did in fact specify in both its 2018 and 2019 job orders that it would take deductions for state tax and Social Security. (AX 9 at 192; AX 12 at 223.) As set forth above, the applicable regulation provides: "The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck." 20 C.F.R. § 655.122(p)(1). Contrary to the Administrator's findings and arguments,

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[8] *See* Note 6, *supra*.

then, Respondent did disclose in its job orders its intent to deduct state tax and Social Security from each worker's paycheck.

I acknowledge Respondent did not disclose in the job orders that it would make Medicare deductions. Therefore, the Medicare deductions may still serve as the basis for a finding that Respondent violated section 655.122(p). However, because the record does not support the Administrator's findings as a whole, [9] and because the Medicare deductions make up only a very small portion (less than 15%) of the deductions for which this violation was cited,[10] I conclude the violation is marginal, and no penalty should be assessed.

D. Terms & Conditions of Employment

The Administrator assessed a penalty because Respondent failed to accurately state the terms and conditions of the H-2A employment in the job order, in violation of 20 C.F.R. § 655.121(a)(3). That regulation mandates: "The job order submitted to the SWA [state workforce agency] must satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F and the requirements set forth in §655.122." § 655.121(a)(3).

20 C.F.R. Part 653 provides that SWAs must ensure the job order includes several assurances, including: "The job order contains all the material terms and conditions of the job. The employer must assure this by signing the following statement in the clearance order: 'This clearance order describes the actual terms and conditions of the employment being offered by me and *contains all the material terms and conditions of the job*.'" 20. C.F.R. § 653.501(c)(3)(viii) (emphasis added).

The Administrator assessed a penalty of $867.50 because the job description did not accurately describe the work the H-2A workers performed, because the H-2A workers were "loaned out" to Posey's Tree Farm, because the H-2A workers worked on more job sites than described on Respondent's application for temporary labor certification, and because two H-2A workers performed driving duties, which were not included in the job description. (AX 1 at 8.) As set forth below, the record supports that Respondent committed this violation.

Worksite locations

The parties stipulated to (and the record supports) the following facts:

- Respondent completed an H-2A Application for Temporary Employment Certification ("TEC") for the period from September 10, 2018 through December 15, 2018.
- In the 2018 TEC, Respondent attested to the accuracy of all of the representations therein.

[9] "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof" in an administrative hearing. 5 U.S.C. §556(d); *see also Global Horizons Inc.*, ALJ No. 2010-TAE-00002 (Dec. 13, 2011.)

[10] For example, upon review of two paystubs for Julian Duran Loyola, an H-2A worker, the total amount deducted for Social Security ($36.04), Pennsylvania state taxes ($17.84), and Medicare ($8.43) was $62.31. (AX 3 at 58, 61.) Thus, the Medicare deductions made up only 13.5% of the deductions for which the Administrator cited Respondent. The numbers are similar for the other H-2A employees.

- On July 12, 2018, Respondent signed the Agricultural and Food Processing Clearance Order ETA Form 790.
- In signing the 2018 Form 790, Respondent certified that the "job order describes the actual terms and conditions of the employment being offered" and that it "contains all the material terms and conditions of the job."
- Respondent executed a second TEC for the period from March 9, 2019 through December 15, 2019.
- In the 2019 TEC, Respondent attested to the accuracy of all of the representations therein.
- Respondent signed the Agricultural and Food Processing Clearance Order ETA Form 790.
- In signing the 2019 Form 790, Respondent certified that the "job order describes the actual terms and conditions of the employment being offered" and that it "contains all the material terms and conditions of the job." [11]
- The 2018 TEC lists the worksite address as 229 S. 3rd Street, Benton, Pennsylvania.[12]
- The 2019 TEC lists the worksite address as 229 S. 3rd Street, Benton, Pennsylvania.
- Between March 9, 2019 and December 15, 2019, at least one of the H-2A worker brought to the United States by Respondent worked on a farm that was not owned or operated by Michael Klem, owner of Respondent Klem Christmas Tree Farm.
- Between March 9, 2019 and December 15, 2019, at least one of the H-2A workers worked on a farm that was owned or operated by Brad Posey, owner of Posey's Tree Farm, located at 82 Posey Hill Road, Orangeville, Pennsylvania.
- Neither the 2018 TEC nor the 2019 TEC listed Posey's Tree Farm as a location at which H-2A workers would perform work.

(AX 40 ¶¶ 3–10, 14–18.)

Mr. Klem explained that Respondent "share[s] the H-2A workers with Posey Tree Farms, owned by Brad Posey. We are sister farms. We are not the same company. They are a completely separate legal entity. There is no common ownership between Klem Tree Farm and Posey Tree Farm." He explained that three of Respondent's H-2A workers regularly work for Posey Tree Farm, but those workers remain on Respondent's payroll, and Posey Tree Farm pays the payroll expenses for those workers to Respondent. Mr. Klem also indicated he did not know why the locations of Respondent's fields were not included as worksites on their application. (AX 31.)

Mr. Brad Posey confirmed that he owns Posey Tree Farm, and in 2019 he "share[d]" Respondent's H-2A workers. He explained that Respondent and Posey Tree Farm "split the guys up," and Mr. Posey houses and supervises the workers who work on his farm. Respondent pays those workers, and Posey Tree Farm reimburses Respondent. (AX 37.)

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[11] The signature page from the 2019 job order (AX 9) is missing from the record. Nonetheless, I accept this stipulation because it is unlikely Respondent would have been authorized to participate in the H-2A program if this form were not signed and because the 2018 job order (AX 12 at 255), which is a nearly identical form, contains this language.

[12] The 2018 TEC does indicate that work will be performed at other worksites owned and controlled by Respondent. (AX 10 at 197.) In contrast, the 2019 TEC indicates that work will *not* be performed at any other worksites. (AX 7 at 179.)

The witness statements in the record also support that Respondent's H-2A workers performed work for Brad Posey in 2019. (AX 26 ("The employer is Brad. … Brad is the supervisor in the field."); AX 27 ("Brad the owner drives us to the field in a pickup truck."); AX 29 ("There are 6 persons in housing - 4 work for Mr. Klem and 2 work for his friend - Brad.").) The witness statements also reflect that the H-2A workers performed work for Respondent at more than one worksite. (AX 28; AX 32; AX 33.)

The TEC form itself requires an employer to answer whether the H-2A workers will perform work at multiple worksites and, if so, to submit a complete list of all anticipated worksites. (AX 7 at 179.) Respondent did not include Posey Tree Farm (or any other alternative location) as a worksite on its 2019 H-2A application. Instead, Respondent specifically indicated that work would not be performed at multiple worksites. (AX 7 at 179.) Likewise, the 2019 job order does not indicate that work will be performed at Posey's Tree Farm or any other location. (AX 9.) Therefore, Respondent violated section 655.121(a)(3) by failing to include all material terms and conditions of employment.

Driving Duties

The parties stipulated to (and the record supports) the following facts:

- Between September 10, 2018 and December 15, 2018, the employment period set forth in the 2018 TEC, Gilberto Gallegos Sanchez drove other H-2A workers to and from their housing to their work sites.
- Between March 9, 2019 and December 15, 2019, the employment period set forth in the 2019 TEC, Julian Duran Loyola drove other H-2A workers to and from their housing to their work sites.
- Between September 10, 2018 and December 15, 2018, the employment period set forth in the 2018 TEC, Gilberto Gallegos Sanchez drove other H-2A workers to do their weekly grocery shopping.
- Between March 9, 2019 and December 15, 2019, the employment period set forth in the 2019 TEC, Julian Duran Loyola drove other H-2A workers to do their weekly grocery shopping.

(AX 40 ¶¶ 19–22.)

The statements given by Respondent's employees and gathered by WHD staff reflect that H-2A workers drove other H-2A workers to the work site and to the grocery store. (AX 26; AX 27; AX 29; AX 31; AX 32; AX 33.) Neither the 2018 nor the 2019 TEC (or the associated job orders) lists driving as a job duty. (*See* AX 7; AX 9; AX 10; AX 12.) Therefore, Respondent violated section 655.121(a)(3) by failing to include all material terms and conditions of employment.

Machine operation

The parties stipulated to the following facts:

- Between September 10, 2018 and December 15, 2018, the employment periods set forth in the 2018 TEC, Respondent paid Julian Duran Loyola, Jose Guadalupe Martinez Flores, Ulysses Martinez Flores, and Gilberto Gallegos Sanchez the rate for "ag machine operator."
- Between September 10, 2018 and December 15, 2018, at least one of the H-2A workers did work tasks that were solely manual in nature.

(AX 40 ¶¶ 23–24.) However, it is the 2019 application that lists the job title as "ag machine operator." (AX 7 at 176.) Several H-2A workers indicated they did not operate machinery in 2019. (AX 26 ("I don't use machinery just manual work."); AX 27 ("In Mexico we got hired for manual farm labor not machine operator."); AX 32 ("I don't operate machinery.").) Mr. Klem explained:

> We do not expect the H·2A workers to operate a lot of machinery. We know they may not be all that experienced. We expect them to be able to mow and use a sprayer. But I would not feel comfortable with them using a skidsteer or any other expensive or potentially dangerous machinery.

(AX 31.)

Because of the date discrepancy in the record (2018 versus 2019), I find the record does not clearly establish the description of machine-related duties as failure to include all material terms and conditions of employment. In any case, the prior analysis adequately establishes Claimant's violation of section 655.121(a)(3) on other grounds.

Penalty

The Administrator started with a the maximum penalty amount of $1,735.00 and applied a 50% reduction because Respondent does not have a history of violations (factor 1); because the H-2A workers were not significantly impacted by this violation (factor 3); because Mr. Klem explained he was unaware Respondent could not loan H-2A workers out to another grower and had to pay workers for driving time (factor 5); because Respondent immediately came into compliance when he was informed of the violation and agreed to remain in compliance (factor 6); and because Respondent achieved no financial gain as a result of this violation (factor 7). §501.19(b)(1), (3), (5), (6), (7). (AX 1 at 8–9.)

I agree with the Administrator that mitigation factors one, three, five, six, and seven apply here. The Administrator did not consider the second factor, the number of workers affected (§501.19(b)(2)), to be a mitigating factor because all of Respondent's H-2A workers were affected. (AX 1 at 9.) It is not clear that the violation affected *all* of Respondent's H-2A workers. Nonetheless, I agree that this mitigating factor does not apply because this violation affected a high percentage of Employer's H-2A workers.

Again, the Administrator determined the fourth factor, good faith (§501.19(b)(4)), did not apply because "Mr. Klem made no apparent effort to inquire about H-2A requirements so he could be in compliance with all H-2A requirements." (AX 1 at 9.) For the same reasons set forth

above, I disagree. The record sufficiently reflects Respondent's good faith. Because I find the good faith mitigation factor does apply here, I reduce the penalty by an additional 10%.

Based on the foregoing analysis, I find six of the seven regulatory mitigation factors apply here. Therefore, I will reduce the maximum penalty by 60% for a total penalty amount of $694.00.[13]

E. Poster Requirement

The Administrator assessed a penalty because Respondent failed to "post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188." 20 C.F.R. § 655.135(l). Because Respondent failed to display the Department's required poster in English and Spanish (the language common to its H-2A workers), the Administrator assessed a penalty of $867.50.

The record supports that Respondent committed this violation. The parties stipulated to (and the record supports) the following fact: "Between September 10, 2018 and June 8, 2019 there was no H-2A poster posted in a conspicuous location." (AX 40 ¶ 26.) A photograph of the communal space at the work site does not depict the poster, though the photograph is undated. (AX 26.)

In calculating the penalty, the Administrator started with the maximum penalty amount of $1,735.00 and applied a 50% reduction because Respondent does not have a history of violations (factor 1); the H-2A workers were not significantly impacted by this violation (factor 3); because Mr. Klem explained he was unaware of the poster requirement (factor 5); because Respondent immediately came into compliance when he was informed of the violation and agreed to remain in compliance (factor 6); and because Respondent achieved no financial gain as a result of this violation (factor 7). §501.19(b)(1), (3), (5), (6), (7). (AX 1 at 9–10.)

Once more, I agree with the Administrator that mitigation factors one, three, five, six, and seven apply here. The Administrator did not consider the second factor, the number of workers affected (§501.19(b)(2)), to be a mitigating factor because all of Respondent's H-2A workers were affected. (AX 1 at 10.) Again, I agree. This violation affected all of Respondent's H-2A employees in both 2018 and 2019.

Finally, the Administrator determined the fourth factor, good faith (§501.19(b)(4)), did not apply because "Mr. Klem made no apparent effort to inquire about H-2A requirements so he could be in compliance with all H-2A requirements." (AX 1 at 10.) For the same reasons set forth above, I disagree. The Administrator acknowledged that WHD "provided Mr. Klem the poster in both English and Spanish and he came into compliance by posting it immediately thereafter." (AX 1 at 5.) The record reflects Respondent's good faith. Because I find the good faith mitigation factor does apply here, I reduce the penalty by an additional 10%.

[13] *See* Note 6, *supra*.

Based on the foregoing analysis, I find six of the seven regulatory mitigation factors apply here. Therefore, I will reduce the maximum penalty by 60% for a total penalty amount of $694.00.[14]

VI. Conclusion and Order

Respondent violated the H-2A program regulations by: failing to insure a vehicle in which H-2A workers were transported (20 C.F.R. § 655.122(h)(4)); failing to pay the required rate of pay to all workers (20 C.F.R. § 655.122(l)); failing to include the full terms and conditions of employment in its job orders (20 C.F.R. § 655.121(a)(3)); and failing to display the H-2A poster in a conspicuous location (20 C.F.R. § 655.135(l)). Civil money penalties are appropriate for those violations. I conclude no penalty should be assessed for the marginal violation of deducting Medicare taxes (20 C.F.R. § 655.122(p)).

Based on my de novo review of the record before me, I conclude the penalties should be reduced in accordance with the factors set forth at 29 C.F.R. §501.19(b). Therefore, I **MODIFY** the Administrator's Determination by reducing the penalties imposed upon Respondent. I **ORDER** Respondent to pay total civil money penalties of **$2,776.00** for violations of H-2A program regulations.

SO ORDERED.

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey

[14] *See* Note 6, *supra*.