In the Matter of:

ADMINISTRATORS, WAGE AND HOUR DIVISION AND OFFICE OF FOREIGN LABOR CERTIFICATION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 14-003-A** **ALJ CASE NOS. 2011-TNE-002** **2012-PED-001**
PROSECUTING PARTIES,	**DATE: February 26, 2014**

v.

PETER'S FINE GREEK FOOD, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Prosecuting Parties*:**
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; and Laura Moskowitz, Esq., *United States Department of Labor, Office of Solicitor*; Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER ON DEBARMENT

This case arises under the H-2B temporary employment program of the Immigration and Nationality Act (INA), as amended.[1] The Administrator of the Office of Foreign Labor

[1] 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), (14) (Thomson/West 2005 & Thomson Reuters Supp. 2013), as implemented by 20 C.F.R. Part 655, subpart A (2009). The Department of Labor (DOL) has provided notice of the continuing effectiveness of the 2008 H-2B rule, which consists of the regulations governing DOL's role in the H-2B temporary worker program. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 28,764, 28,765 (May 16, 2012). Thus, the 2008 H-2B rule regulations found at 20 C.F.R. Part 655, subpart A

Certification (OFLC Administrator) issued a Final Determination against Peter's Fine Greek Foods (Peter's), debarring Peter's from participating in the H-2B temporary employment certification program for two years for substantial violations of a material term or condition of its temporary labor certification. Peter's requested a hearing before an Administrative Law Judge (ALJ), and the ALJ held the hearing on December 12-13, 2012. In a Decision and Order (D. & O.) addressing the OFLC Administrator's debarment determination (2012-PED-001), the ALJ determined that Peter's committed a substantial violation of its certification subjecting it to debarment from the H-2B program, but its repeated failure to cooperate was not a "significant failure." Having considered various factors, the ALJ found that a one-year debarment for Peter's was appropriate rather than a two-year debarment. The Administrator timely filed a petition to the Board to review the ALJ's debarment decision.

The Administrative Review Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. §§ 1103(a)(6) and 1184(c)(1) and 20 C.F.R. § 655.31(e)(5)(iii) (2009).[2] The Board issued a notice accepting the OFLC Administrator's petition to review the ALJ's debarment decision on December 5, 2013. Pursuant to 20 C.F.R. § 655.31(e)(5)(iii)(D) (2009), the Board's final decision regarding debarment "must be issued within 90 days from the notice granting the petition." Concurrently with the ALJ's decision regarding debarment, the ALJ issued a separate Decision and Order (2011-TNE-002) addressing a determination of the Administrator of the Wage and Hour Division (WHD Administrator). The WHD Administrator determined that Peter's owed back wages to some of its former H-2B employees and assessed civil money penalties against Peter's for several violations of the INA and its implementing regulations,[3] including failing to cooperate with the Wage and Hour Division's investigation. The WHD Administrator has also timely petitioned the Board to review the ALJ's separate decision to reduce the civil money penalty assessment from $10,000 to $1,000, for Peter's failure to cooperate with the Wage and Hour Division's investigation. We note that the applicable regulation at 20 C.F.R. § 655.76(c) (2009) addressing the Board's review of the WHD Administrator's petition regarding the ALJ's separate civil money penalty decision does not set forth a time limit for issuance of the Board's decision.

Thus, to comply with the requirement at 20 C.F.R. § 655.31(e)(5)(iii)(D)(2009) that the Board's final decision regarding debarment "be issued within 90 days from the notice granting the petition," we issue this Final Decision and Order On Debarment. A Final Decision and Order addressing the petition of the WHD Administrator's for review of the ALJ's separate civil money penalty decision shall follow this order.

(2009), which became effective on January 18, 2009, *see* 73 Fed. Reg. 78,020 (Dec. 19, 2008), apply to this case.

[2] *See* Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, § 5(c)(19) (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

[3] 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), (14) (Thomson/West 2005 & Thomson Reuters Supp. 2013),), as implemented by 20 C.F.R. Part 655, subpart A (2009).

The OFLC Administrator argues that the ALJ improperly reduced the two-year debarment period by one year. The OFLC Administrator contends that the ALJ erred by considering Peter's post-investigation compliance for purposes of debarment, as the applicable debarment regulation at 20 C.F.R. § 655.31 (2009) does not expressly include consideration of a violator's current or future compliance. The OFLC Administrator focuses on the grounds and policy reasons requiring debarment, arguing that the 2008 H-2B rule regulations restrict the ALJ's discretion to reduce the length of debarment.

In contrast, relying on 20 C.F.R. § 655.31(e)(5)(ii) and 65(h) (2009), the ALJ held that the rules did not automatically require debarment even if the employer met the conditions of debarment. Because of this perceived discretion, the ALJ concluded that she could consider the employer's conduct after an investigation occurred. We partially agree with both the OFLC Administrator and the ALJ and ultimately affirm the ALJ's order of a one-year debarment.

The Administrator and ALJ collapsed two questions into one in analyzing the issue of debarment. The first question focuses on whether the grounds exist for debarment. The second question focuses on the length of debarment once it is established that the grounds for debarment exist. We agree with the OFLC Administrator that the regulations mandate debarment once the OFLC Administrator proves that a substantial violation occurred. The mandate exists in 20 C.F.R. § 655.31(a)(1) and (2) (2009), which provide as follows:

> The Administrator, OFLC may not issue future labor certifications under this subpart to an employer and any successor in interest to the debarred employer, subject to the time limits set forth in paragraph (c) of this section, if:
>
> (1) The Administrator, OFLC finds that the employer substantially violated a material term or condition of its temporary labor certification with respect to the employment of domestic or nonimmigrant workers; and
>
> (2) The Administrator, OFLC issues a *Notice of Intent to Debar* no later than 2 years after the occurrence of the violation.

20 C.F.R. § 655.31(a)(1), (2)(italics original). We understand the phrase "may not" as a mandate.[4] Consequently, where a substantial violation occurs and timely notice is given, debarment must occur.

[4] *See United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895)("where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty, rather than conferring a discretion").

We disagree with the ALJ's inference that discretion to debar existed pursuant to 20 C.F.R. § 655.65(h) (2009), which provides:

> Where the WHD Administrator finds a substantial failure to meet any conditions of the application . . . , the [WHD] Administrator *may* recommend that ETA [Employment and Training Administration] debar the employer for a period of *no less than* 1 year, and *no more than* 3 years.

20 C.F.R. § 655.65(h) (2009) (emphasis added). In our view of the regulations, the fact that the WHD Administrator only had the discretion to *recommend* debarment, means that the WHD Administrator had no authority to *order* debarment. But the OFLC as part of ETA did have such authority and OFLC was required to debar employers upon finding a "substantial violation." 20 C.F.R. § 655.31(a)(1) (2009).

Turning to the second question, we agree with the ALJ that she had discretion to decrease the duration of the debarment, and she rationally explained her reasons for reducing the debarment period to one year. The 2008 H-2B rule regulations do not provide guidance but simply provide a range of one to three years. Consequently, the regulations establish one year as the minimum mandatory debarment period but provide no guidance for deciding whether to impose more than one year. 20 C.F.R. §§ 655.31(c), 655.65(h) (2009). We find that other similar departmental regulations may provide meaningful guidance, but the ultimate decision must rest on the reasonable exercise of discretion.

In this case, we find persuasive the ALJ's reasons for reducing the debarment to a one-year period. The ALJ found that the OFLC Administrator proved only one of the two alleged substantial violations. While Peter's failed to cooperate with the WHD Administrator's investigation efforts in some instances, it did cooperate in other instances and also failed to produce some records only because such records did not exist.[5] Therefore, the ALJ found that Peter's' failure was not a "significant failure," and we are not persuaded to rule otherwise. Moreover, the ALJ also considered Peter's compliance efforts after the 2010 investigation. We agree with the ALJ that nothing in the applicable regulations prohibits consideration of a violator's future compliance when determining whether debarment is warranted or the length of debarment.[6] In this regard, we note that the comments to the H-2B rule regulations indicate that "the Department has decided to modify the debarment provision so that it more closely parallels the debarment provision for the H-2A regulation at 20 CFR 655.118, given the similarity of the H-2A and H-2B labor certification programs."[7] As the OFLC Administrator has noted, both the

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[5] While we agree that the absence of records may be considered in determining whether an H-2B employer cooperated during an investigation, the reason for the absence should also be considered. Of course, the absence of records may provide a basis for civil money penalties apart from or in addition to debarment.

[6] *See* D. & O. (2012-PED-001) at 18, n.4; ALJ's Nov. 15, 2012 Order Denying Administrator's Motion *In Limine* at 1.

[7] 73 Fed. Reg. 78,020, 78,043 (Dec. 19, 2008).

INA's H-2A debarment regulations at 20 C.F.R. § 655.182(e)(6) (2013), as well as the INA's H-2B civil money penalty regulation at 20 C.F.R. § 655.65(g)(6) (2009), include "an employer's commitment to future compliance" as one of a number of suggested, but non-exclusive, factors the OFLC Administrator or an ALJ may consider. But we find that such alleged compliance must be considered cautiously where the WHD Administrator had no opportunity to investigate assertions of post-investigation compliance. In the end, we agree with the ALJ's determination that a one-year debarment for Peter's was appropriate.

CONCLUSION

We **AFFIRM** the ALJ's determination that Peter's Fine Greek Foods shall be debarred from participation in the H-2B program for a period of one year.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge