In the Matter of:

ADMINISTRATOR, WAGE & HOUR, DIVISION, U.S. DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

GLOBAL HORIZONS, INC.,

and

MORDECHAI ORIAN,

RESPONDENTS.

ARB CASE NO. 11-058

ALJ CASE NOS. 2005-TAE-001
2005-TLC-006

DATE: May 31, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Laura Moskowitz, Esq.; Paul L. Frieden, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq., *U.S. Department of Labor, Office of Solicitor*, Washington, District of Columbia

For the Respondents:
I. Randolph, S. Shiner, Esq., San Diego, California

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

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the H-2A temporary agricultural worker program of the Immigration Reform and Control Act of 1986.[1]

The Administrator of the Wage and Hour Division (WHD), representing the former Employment Standards Administration (ESA or Administrator), sent Notice on February 10, 2005, that Global Horizons Manpower, Inc. and Mordechai Orian (collectively "Respondents," "Global," or "Orian") were found jointly and severally liable for back pay, impermissible deductions, and civil penalties. On February 23, 2005, the Employment and Training Administration (ETA) also brought debarment proceedings.

Global appealed the Administrator's claim, and the Administrative Law Judge (ALJ) assigned to the case scheduled a hearing. During the course of the proceedings below, the ALJ consolidated the WHD Administrator's action seeking back pay, compensation for impermissible deductions, and civil penalties (2005-TAE-001) with the ETA Administrator's debarment action (2005-TLC-006).

During the pre-hearing discovery phase, the Administrator requested several sets of discovery. Failing to receive adequate responses, the Administrator filed three motions to compel, followed by motions for sanctions due to Global's obstructive tactics during discovery. The ALJ granted the motions to compel and awarded sanctions, deeming several allegations admitted. By the end of 2008, the ALJ had granted three sets of sanctions and deemed many factual allegations admitted.

Thereafter, the Administrator moved for summary decision. With most of the allegations admitted, and Global's failure to create a genuine issue of material fact for the other allegations, the ALJ granted the Administrator's motion for summary decision and awarded $134,791.78 in back pay, $17,617.52 in impermissible deductions, and $194,400 in civil penalties damages, along with pre- and post-judgment interest. Summary Decision Order (S. D. O.) at 13. Global appealed the ALJ's decision to the Administrative Review Board (ARB or Board). Having reviewed the record and Global's appeal, we affirm the ALJ's award of summary decision and damages.

[1] 8 U.S.C.A. § 1101(a)(15)(H)(ii)(a) (Thomson Reuters 2005); 8 U.S.C.A. § 1188(g)(2) (Thomson Reuters 2005); 29 C.F.R. Part 501 (2005); 20 C.F.R. Part 655 subpart B (2005). In 2010, the Department of Labor (DOL) amended the regulations at 29 C.F.R. Part 501 and 20 C.F.R. Part 655 Subpart B. The implementing regulations provide that the 2010 changes will take effect for temporary labor applications filed after March 15, 2010. 29 C.F.R. § 501.1(d) (2010). Global Horizons filed its application in June 2003, and therefore the 2010 amendments do not affect this case.

BACKGROUND

Global, is or formerly was, an employment agency and labor contractor headquartered in Los Angeles, California. On July 23, 2002, Global filed an application for 375 temporary agricultural workers to work between September 9, 2002, and March 31, 2003, harvesting chili peppers in Arizona under the H-2A program. S. D. O. at 7; Mot. for Summary Decision. Ex. 1, 2.

On or about August 19, 2002, after reviewing Global's attestations for compliance with its regulations, the Department of Labor accepted Global's application for alien employment in Arizona. S. D. O. at 9-10, Mot. for S.D. Ex. 2. Eighty-eight H-2A workers entered the U.S. between February and March 2003 and began working in Hawaii for Del Monte and Aloun Farms shortly thereafter. The workers stopped working in April or May 2003 and left the U.S. shortly thereafter.

After the project began, the Administrator claimed that Global violated its attestations concerning wages and working conditions. In a February 10, 2005 Notice, the Administrator alleged that Global committed eleven categories of violations of both its certification and the rules and regulations implementing the H-2A program. Mot. for S.D, Ex. 15, 50. The Administrator alleged that Global did not pay correct wages, did not reimburse workers for impermissible deductions, did not provide accurate and complete wage data to H-2A workers, did not provide H-2A workers with a complete and accurate contract, and requested that H-2A workers waive their rights under H-2A rules and regulations. S. D. O. at 10-12. The workers were certified to work in Arizona but actually worked in Hawaii at Aloun Farms and Del Monte Farms. S. D. O. at 10. Alec Sou and or his brother supervised the H-2A workers at Aloun Farms.

The Administrator alleged that Global owed back pay in the amount of $134,791.78, $17,617.52 in impermissible deductions, $194,400 in civil penalties, and associated pre- and post-judgment interest. S. D. O. at 7, 145. Based on the foregoing violations, the ETA Administrator also contended that Global engaged in "substantial" violations and issued a Notice of Debarment. February 23, 2005 Notice.

Global requested a hearing and the case was assigned to an ALJ. Thereafter, the parties began discovery. During the pre-hearing discovery phase, Global submitted discovery responses asserting privileges and objections on various grounds. The Administrator filed a motion to compel Global to respond to discovery. The Administrator also requested that the ALJ deem matters admitted. On July 17, 2007, the ALJ granted the motion to compel and also deemed several allegations admitted. The ALJ ordered Global to deliver more complete discovery responses. Upon non-compliance with the July 17, 2007 Order, the Administrator then moved for, and the ALJ awarded, additional sanctions on August 25, 2008. These sanctions deemed many additional allegations admitted. After Orian walked out of a deposition on October 21, 2008, the Administrator sought additional sanctions, which the ALJ granted on December 31, 2008. The ALJ ordered that Global pay for another deposition and for a special master to preside over it.

With most or all of the Administrator's 145 factual allegations deemed admitted, on March 4, 2010, the Administrator filed a motion for summary decision alleging that there was no genuine issue of material fact because the allegations were admitted or established as admitted by sanction. S. D. O. at 11. Global responded with a motion to dismiss and a cross-motion for summary decision alleging deficient pleading standards and moving for summary decision as to Orian's status as an employer. Global also responded to the Administrator's motion for summary decision with a table listing its contentions to several of the Administrator's alleged facts. The Administrator in turn filed a reply to Global's response.

In a lengthy and detailed order, the ALJ granted the Administrator's motion for summary decision. The ALJ categorized the Administrator's 145 allegations into several categories. (1) The ALJ found that eighty allegations were wholly uncontested. S. D. O. at 27, 71. (2) The ALJ concluded that Global did not offer any record basis to avoid summary decision for several allegations. *Id.* at 27. (3) The ALJ found that facts were undisputed because Global relied on evidence excluded by sanction. *Id.* (4) The ALJ also found that several alleged facts were undisputed because Global offered evidence that failed to create a genuine issue of material fact. *Id.* at 28, 71. The ALJ further concluded that these remaining issues did not preclude a grant of summary decision to the Administrator because they involved legal conclusions. *Id.* at 71. Global appealed the summary decision order to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the H-2A program. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 20 C.F.R. § 655.112; 29 C.F.R. § 501.42. Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (Thomson/West Supp. 2010). In reviewing the ALJ's award of discovery sanctions against Global, we must determine whether the ALJ abused his discretion. *See Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014, slip op. at 3-4 (ARB Sept. 30, 2002).

For the other matters, we review a grant of summary decision de novo, i.e., under the same standard that the ALJs apply. This standard is set forth at 29 C.F.R. § 18.40(d) and is derived from Rule 56 of the Federal Rules of Civil Procedure. The ALJ is permitted to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision."

DISCUSSION

1. H-2A Statutory and Regulatory Framework

For several decades, the United States has temporarily admitted non-immigrants as agricultural workers. The H-2A visa program had its genesis in the Immigration and Nationality Act of 1952 (the Immigration Act). *Global Horizons, Inc*., ALJ No. 2006-TLC-013, slip op. at 2-3 (Nov. 30, 2006) (describing the background of the H-2A temporary agricultural worker program). The Immigration Reform and Control Act of 1986 amended the 1952 Immigration Act to create a new category of temporary agricultural worker (designated an "H-2A" worker), defined as:

> (H) an alien . . . (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations . . . .

8 U.S.C.A. § 1101(a)(15)(H)(ii)(a).

Under the INA, as amended, foreign workers may receive visas to work temporarily in the United States when there are not enough workers in this country who are able, willing, qualified, and available at the time and place needed to perform agricultural labor or services.[2] Employers who need the labor (or their agents, such as Respondent Global Horizons, Inc.) petition for H-2A visas to admit these agricultural workers to the United States. 8 U.S.C.A. § 1184(a), (c)(1).

Congress authorized the Department of Labor to enforce the employee protection provisions for those workers admitted under the program.

> The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

Section 218(g)(2) of the INA, as amended, codified at 8 U.S.C.A. § 1188(g)(2).

The Secretary of Labor enforces both the attestations an employer makes in a temporary agricultural labor certification application and the wages and working conditions under the H-2A

---

[2] 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(a), 1184(a), (c); 20 C.F.R. Part 655 subpart B (§ 655.90-.113); 29 C.F.R. § 501.0-.47; *Global Horizons, Inc*., ALJ No. 2006-TLC-013, slip op. at 2-3.

program.[3] The ETA enforces the certification process.[4] At the time of Global's certification and Notice, ESA enforced the monitoring of the wages and working conditions of the H-2A program.[5] According to DOL regulations, false or fraudulent assurances about the jobs, wages, working conditions, or the failure to abide by program regulations may result in: (1) monetary penalties imposed by the Department; (2) debarment from filing other H-2A certification applications imposed by the ETA; and (3) proceedings for specific performance, injunctive, or other equitable relief in U.S. District Court. 29 C.F.R. §§ 501.16, 501.19.

2. Global's Appeal of the ALJ's Sanctions Award

In 2005, the parties set a discovery schedule and began the discovery process. The Administrator served several sets of discovery requests including requests for admissions, requests for production, and interrogatories. Global responded that the Administrator's requests were overbroad, duplicative, and overly burdensome. On January 13, 2006, the Administrator moved to compel production. The Administrator argued that Global's responses consisted entirely of objections that the documents sought were irrelevant or duplicative. ALJ's July 17, 2007 Order at 3-4.

After failed settlement negotiations, on July 17, 2007, the Administrator renewed its motion to compel and the ALJ granted the Administrator's request to compel and deem allegations admitted. The ALJ found that Global resisted the Administrator's discovery efforts, made tardy and evasive discovery productions, failed to deliver promised documents, and abused the assertion of privilege. ALJ's July 17, 2007 Order at 2. The ALJ agreed with the Administrator that Global's repetitive objections were too general and did not comply with the requirement that objections be stated with specificity. ALJ's July 17, 2007 Order at 6. The ALJ rejected all of Global's general objections and deemed admitted many of the Administrator's allegations. The ALJ also granted the Administrator leave to depose five Global employees including Orian. As part of the July 17 Order, the ALJ directed Global to file amended and more complete responses to remaining requests within 30 days of the July 17 Order. The ALJ warned that in the absence of such production, he would deem Global to have admitted additional allegations. ALJ's July 17, 2007 Order at 26-27.

---

[3] 20 C.F.R. § 655.102; 29 C.F.R. § 501; *Global Horizons, Inc*., 2006-TLC-013, slip op. at 4 (summarizing requirements).

[4] 20 C.F.R. Part 655 Subpart B (ETA assigns authority to the OFLC Administrator). The OFLC Administrator is a national certifying officer, but there may also be other local certifying officers. Parties can appeal the denial of a certification. Both the OFLC Administrator and the WHD may debar an employer from receiving future certifications under 20 C.F.R. § 655.182 (2010); 29 C.F.R. § 501.20 (2010).

[5] In 2010, the DOL amended the 29 C.F.R. Part 501 regulations to reassign the ESA's responsibilities to the Wage and Hour Administrator. As we stated above, *supra* n. 1, the 2010 regulations do not affect Global's claim.

On August 17, August 22, and August 29, 2007, Global supplemented its discovery responses. The Administrator claimed that Global did not submit several items listed in the July 17 Order and served insufficient or evasive answers to other discovery requests. Aug. 25, 2008 Sanctions Order at 1. The Administrator contends that the responses were not bates stamped, were confusing, and added new legal theories. Aug. 25, 2008 Sanctions Order at 4. The ALJ agreed and found many of Global's supplementations evasive and convoluted. The ALJ concluded that Global's failure to comply with the July 17, 2007 Order was inexcusable and granted further sanctions. The ALJ granted numerous additional admissions, including the factual questions underlying Orian's status as an employer. S. D. O. at 20-21.

The Administrator indicated that it first tried to depose Orian in 2006. But Global delayed such a deposition with a host of substitutions, delays, and a protective order that was denied. Parties formally sat down for Orian's deposition on October 21, 2008. Orian left the deposition approximately sixty minutes after it had begun on the objection that Global was going to file a protective order. Global never filed a qualifying protective order. Dec. 31, 2008 Sanctions Order at 15-16.

On or about November 5, 2008, the Administrator moved for sanctions on the grounds that Orian unilaterally walked out of the deposition without cause and obstructed the Administrator's deposition with groundless objections. On December 31, 2008, the ALJ issued a Sanctions Order identifying Global's frivolous objections and baseless claims of privilege. The ALJ ordered Global to pay the costs for a substitute deposition.

On appeal, Global generically claims that the ARB "should review" the ALJ's sanctions findings. Global Br. at 11-12. Orian claims that he left the deposition because the Administrator's counsel badgered and harassed him.[6]

The Administrator responds that there is no genuine issue of material fact that the allegations against Global and Orian have been admitted or even if not admitted, are still otherwise supported. Moreover, the Administrator argues that Global did not preserve the appeal of the ALJ's sanctions in the petition for review, and the Board did not accept the issue of sanctions for review. Admin. Br. at 23.

We agree with the Administrator that Global did not properly appeal the ALJ's sanctions awards in its petition for review. Furthermore, Global's brief only devotes one or two sentences to the ALJ's sanctions orders, suggesting that ARB "should review" the award. These few sentences are insufficient for an appeal of the ALJ's detailed sanctions orders.[7]

---

[6] Global Br. at 12. Orian also claims that his deposition lasted more than twenty-seven hours but does not connect this claim to the ALJ's decision or provide authority for the ALJ's alleged error. *Id.*

[7] *See Dev. Res., Inc.*, ARB No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) (citing *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (noting that in the Federal Courts of Appeals, it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived")); *United States v. Hayter Oil Co.*, 51 F.3d 1265,

3. Global's Appeal of the Motion to Dismiss and the Summary Decision Order

Global appeals only a handful of the ALJ's conclusions in the summary decision order. Global begins by facially attacking the ALJ's summary decision order and the DOL's "lawfare" against Global.

Like the attempted appeal of the ALJ's three sanction orders, many of Global's specific assignments of error are one-to-two sentences without citation to authority. Global focuses its appeal mostly on the claim that Orian is not an employer under 20 C.F.R. § 655.100 and 29 C.F.R. § 501.10 and is not personally liable for the awarded damages. Global also challenges the ALJ's finding that no genuine issue of material fact exists concerning the Administrator's charge of back pay for corrected wages and impermissible deductions. Global further claims that the ALJ erred in finding no genuine issue of material fact as to whether Global paid transportation and subsistence payments. Global also challenges the ALJ's ruling for the Administrator on waiver and retaliation. As we explain below, Global has not raised any assignment of error that motivates the Board to overturn the ALJ's summary decision or the assessment of damages and penalties.

A. Orian's Status as a Personal Employer

The H-2A violation notices were mailed in February 2005 to both Global and Orian individually. Also in February 2005, the ETA Administrator sent, by certified mail, prospective debarment notices to both Global and Orian as individual Respondents. The Administrator's posture of the case, from the initial notices and throughout the pleadings, has been one of joint and several liability against both Orian and Global through allegations in the form of plural "Respondents."

With three successive sanction orders deeming most of the allegations admitted against both Respondents, on March 4, 2010, the Administrator moved for summary decision against both Respondents for the numerous violations of the H-2A program. In her statement of uncontested fact, the Administrator moved that both Global and Orian were employers under the H-2A statutory and regulatory framework.

On April 2, 2010, Global moved to dismiss Orian because he was not an employer. Global argued that Orian was an officer of Global and an individual, not an employer. Global claimed that the H-2A regulatory and statutory framework only covered employers. Global argued that the DOL regulations defining employer to include individuals cannot exceed the authority of the statute and the statute only covers employers. Global's Motion to Dismiss also relied on the method and content of the Administrator's form of addressing Orian in the notices

---

1269 (6th Cir. 1995) ("It is not our function to craft an appellant's arguments."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim [for appellate review] . . . . Judges are not like pigs, hunting for truffles buried in briefs.").

of violations. Global stated that Orian was addressed in connection with Global and did not use a separate Employer Identification Number for Orian as a unique employer.

On April 9, 2010, the Administrator responded to Global's motion to dismiss. The Administrator defended that an individual can be an employer and can be assessed penalties and fines. The Administrator explained that Orian's status as an employer is undisputed because of the Respondents' admissions and fact sanctions. The Administrator relied on the use of plural "Respondents," fact sanctions, joint decision-making, and Orian's admissions in his deposition.

On or about April 16, 2010, Global responded to the Administrator's motion for summary decision against both Respondents. Global referred to its April 2, 2010 motion to dismiss, which it asked to be incorporated by reference. The only remaining response in opposition to the Administrator's motion for summary decision against both Respondents was a reference to another DOL case, 2010-TAE-002, in which the judge found that the Administrator did not present enough evidence as to Orian's personal status to avoid Global's motion to dismiss. Global argued that the disposition in the earlier case precluded the Administrator from raising it in this case. Global also argued that the question of employer status is a mixed question of law and fact and cannot be found by sanction and admission.

Under the H-2A program, the ALJ concluded that an individual can be an employer and can be assessed wages and penalties. S. D. O. at 19-20. The ALJ rejected Global's motion to dismiss Orian and granted the Administrator's motion for summary decision. The ALJ claimed that Orian's status as a personal employer was undisputed. This is partly due to sanction and partly due to previous statements and decision-making by Orian. *Id.* at 20-21. The ALJ found no genuine issue of material fact concerning Orian's status as an employer and rejected Orian's motion to dismiss this claim. *Id.* at 13, 22.

The ALJ granted summary decision largely on the fact that the ALJ had already issued sanctions against both of the Respondents, on Orian's decision-making, and on statements that he made in his deposition. The ALJ held that Global's argument that Orian is not a personal employer is inconsistent with previous admissions and the previous five years of litigation. The ALJ also rejected Global's argument for issue preclusion, noting that the former case involved different workers, different locations, a different contract, and different conditions of employment.[8]

Global appeals the ALJ's decision. Global claims that the ALJ's sanction unfairly grouped Orian with Aloun Farms in the deemed-admitted decision-making. Global Br. at 12-13. Orian claims that there was no communication between him and the H-2A workers since he did not speak Thai. *Id.* at 4. Orian further claims that the workers were under the complete supervision of the Sou Brothers who made decisions to hire, fire, pay, house, transport, and

[8] In the previous matter, ALJ Berlin concluded that Orian was not an employer and was not personally liable. Global Br. at 5; ALJ No. 2010-TAE-002. ALJ Berlin held that the Administrator submitted insufficient evidence that Orian was an employer and thus failed to carry a burden to defeat Global's motion for summary decision on Orian's status as a personal employer.

assign work. *Id.* Global claims that the ALJ erroneously credited Orian's deposition testimony. Global states that Orian was acting in his capacity as a Global employee and that Orian has presented evidence that at all times he was acting in his capacity as a Global officer. *Id.* at 5, 9-11. Global claimed that the ALJ twisted Orian's loose, non-legal words to mean something contrary to the obvious meaning that Orian was acting as the President of Global Horizons at all times. Orian claims that he would never have discarded the corporate shield and assumed personal liability. Global also appeals the ALJ's rejection of its argument that the issue of Orian's personal-employer status was previously litigated and thus precluded as a matter already decided.[9] Global states that the pertinent fact is that the previous litigation involved both Global and the Administrator and personal liability was an issue in that case and in this case. *Id.* at 6-7.

While Global's appeal raises disputes with the fact-matter sanctioned, Global does not adequately dispute the ALJ's sanctions orders themselves, which were central to the ALJ's finding of Orian's coverage. Because it did not raise this critical issue in its petition for review, we find that Global has waived the issue of Orian's coverage as a respondent-employer as far as that finding relies on several sanction orders against both Respondents.

In addition to the fact that Global did not raise the issue in its petition for review, in its brief, Global only makes a conclusory, one-to-two sentence appeal concerning the phrasing "Respondents" in Global's numerous admissions. Global Br. at 3-4. Global, who is represented by counsel, provided no legal argument as to the ALJ's error. We find that Global has failed to substantiate these claims of error. As we have said above, the Board has held that it must be able to discern cogent arguments in an appellate brief. When, as here, a party fails to develop the factual basis of a claim on appeal and, instead, merely draws and relies upon bare conclusions, the argument is deemed waived.

We also find that Global waived the issue of Orian's status as an employer because he waited several years to raise the issue. Orian was a named employer and respondent in both the Notice of Determination and Notice of Debarment, which were mailed separately to both Respondents in 2005. The Administrator made each allegation against both Respondents. The Administrator moved for and the ALJ granted sanctions against each of the Respondents in 2007-2008. Only after all of this did Global in 2010 raise the issue that Orian was not a proper Respondent because he was not an employer.

Because we find no abuse of discretion in the ALJ's award of sanctions against both Respondents, which Global does not properly appeal, and because we agree with the ALJ's rejection of Global's issue-preclusion argument, we affirm both the ALJ's rejection of Global's motion to dismiss and the ALJ's grant of the Administrator's motion for summary decision as to Orian's status as an employer-respondent.

---

[9] As a preliminary point, the Administrator counters that Global did not make the issue-preclusion argument below and thus was prohibited from making it on appeal. Admin. Br. at 21. We see that Global made the argument in its response to the Administrator's Motion for S.D at 5.

B. Correct and Complete Wages

The Administrator alleged that Global failed to pay wages in violation of 20 C.F.R. § 655.102(b) because it failed to pay Hawaii's Adverse Effect Wage Rate (AEWR), failed to satisfy the three-quarters guarantee, and failed to pay complete wages for the workers.[10] The circumstances and dates of employment as well as facts concerning wages were found by sanction. DOL regulations provide that the company had the statutory obligation to keep complete and accurate records, provide records to the employees, and produce those records to regulatory authorities when asked. The ALJ affirmed that Global failed to produce evidence demonstrating proper payment. S. D. O. at 88-92. Accordingly, the Administrator assessed Global back pay and penalties. *Id.* at 11, 98-99, 136-38.

On appeal, Global argued that the ALJ exaggerated the significance of the "computer error" or "faulty recordkeeping," attributing too heavy a significance to Global's payroll mistake instead of relying on the evidence showing that Global paid a rate of $8.33-$9.25.[11]

We find that Global failed to adequately raise an argument on appeal concerning the ALJ's assessment of wages and penalties.

C. Deduction for Food Expenses

The work contract for the Thai H-2A workers submitted to the ETA did not specify deductions for basic living expenses. Nonetheless, Global, through its subcontractor, deducted costs for basic living supplies. S. D. O. at 84, 85. The ALJ deemed this allegation admitted in the August 25, 2008 Sanctions Order. Accordingly, the Administrator alleged that Global owed back pay for utilities, meals, and basic living supplies. *Id.* at 100-101. The Administrator also assessed civil penalties. *Id.* at 11, 139-41.

Global claims that it was not unreasonable for it to charge the workers for food. Global Br. at 13. The workers needed adequate food because they did not like the quality of the food that Aloun Farm was providing. *Id.* Global also refers to litigation from another case concerning similar deductions.

We find that Global failed to adequately raise an argument concerning the ALJ's assessment of impermissible deductions and penalties. As we stated above, we do not find the fact-finding or summary-decision analysis from another H-2A case with different workers under a different H-2A certification relevant to this case.

---

[10] Mot. for S.D. at 19-23; S. D. O. at 75-83. The Adverse Effect Wage Rate (AEWR) for Hawaii in or around April 2003 was $9.42. Aug. 25, 2008 Sanctions Order at 43; see also 20 C.F.R. § 655.100 (definition AEWR).

[11] Global Br. at 14-16. The Administrator responds that scienter was not a requirement of the statute and that mistake is not a defense. Admin. Br. at 35. Moreover, the Administrator argues that the ALJ found that Global violated this provision in a number of ways.

D. Inbound and Outbound Transportation and Subsistence

The Administrator alleges that Global violated 20 C.F.R. § 655.102(b)(5) when it failed to provide the required inbound and outbound transportation and subsistence payments to the H-2A workers. Mot. for S.D. at 4-12; S. D. O. at 72-75. The Administrator alleged, and the ALJ affirmed, that Global did not provide adequate documentation supporting the inbound and outbound payments through acceptable modes of payment. Eventually, Global was precluded from proving it did so under the ALJ's sanctions. S. D. O. at 72-75. Accordingly, the Administrator contends that Global owes the H-2A workers back pay and penalties. *Id.* at 10, 95-97, 135.

Global contends that it paid the proper inbound and outbound transportation and subsistence payments. Global Br. at 14. Global does not cite to record evidence other than a general claim that the record is replete with such evidence.

We find that Global failed to adequately raise an argument concerning the ALJ's assessment of transportation and subsistence payments and accompanying penalties.

E. Waiver and Sanction Fine

The Administrator alleges that Global asked Thai workers to waive their rights by asking them to agree to deductions that Global was not allowed to deduct. 29 C.F.R. § 501.4; Mot. for S.D. at 39-41; S. D. O. at 93-94. Accordingly, the Administrator assessed penalties. S. D. O. at 143.

Global claims that specific language about withholding should not be construed as it asking for a waiver of H-2A employees' rights. As evidence supporting that claim, it offers the fact that another ALJ ruled that similar language was not a request for a waiver. Global Br. at 15-16.

For the same reasons stated above, we find that the ALJ's legal conclusions are supported and the disposition of other cases is irrelevant because this case involves different workers and a different H-2A contract.

F. Retaliation

The Administrator alleges that Global retaliated against workers in violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3 when the workers complained about wages. Mot. for S.D. at 28-32. Section 655.103(g) provides that an H-2A employer shall not "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against . . . any person who has with just cause . . . [e]xercised or asserted on behalf of himself/herself or others any right or protection" under this subpart. The Administrator cited statements by Alec Sou of Aloun Farms that H-2A workers complained about compensation and deductions for food. Mot. for S.D. at 28-29. As evidence of the retaliation, the ALJ cited Orian's testimony that Global's

subcontractor or agent, Aloun Farms, was so upset about the H-2A workers' complaints that it did not let them work several days and did not pay them for several days. S. D. O. at 86-88. Accordingly, the Administrator assessed penalties. Mot. for S.D. at 32; S. D. O. at 139-40.

Global argues that the ALJ erred in finding that Global retaliated against the H-2A workers. Global argues that the record is bare of any factual support for a finding that Global or Orian did not allow the workers to work or did not pay them. Global Br. at 12-13. Citing the dispute in 2010-TAE-002, Global claims that it was attempting to resolve the issue by letting the employees go to the store to buy food. Global finally argues that the fact that Sou or Aloun Farms became upset and did not let them work did not constitute retaliation under the statute and could not be concluded on summary decision. *Id.* at 14.

The Administrator responds by reiterating Orian's testimony of Sou's reaction to the workers refusing to sign the $300 deduction agreements. Admin. Br. at 32. The Administrator alleges that Sou was an agent of both Global and Orian and that the Respondents ratified Sou's action after Sou had complained to Global about the employees and relayed the associated conversations. *Id.* at 33. The Administrator also claims that Global handled the payroll and thus it would be liable because it actually carried out the retaliation. *Id.*

We find, based on insufficient evidence and sanctions, that Global failed to create a genuine issue of material fact below. Therefore, we find that the ALJ did not err in granting summary decision on the Respondents' retaliation and assigned penalties.

CONCLUSION

The Administrator brought eleven categories of violations of the rules and regulations implementing the H-2A program. The Administrator moved for summary decision because the factual allegations underlying the eleven categories were either admitted as sanctions or undisputed or disputed in a manner insufficient to avoid summary decision. Global responded. The ALJ found no genuine issue of material fact and awarded summary decision. As we explained above, we affirm.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge