U.S. Department of Labor

Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,

PROSECUTING PARTY,

v.

SEASONAL AG SERVICES, INC.,

and

YILDA WALKER,

RESPONDENTS.

ARB CASE NO. 15-023

ALJ CASE NO. 2014-TAE-006

DATE: September 30, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Prosecuting Party, Administrator, Wage and Hour Division:
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Laura Moskowitz, Esq.; and Katelyn Wendell, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

Before: E. Cooper Brown, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge.* Judge Brown, concurring. Judge Corchado, dissenting.

DECISION AND ORDER OF REMAND

The Immigration and Nationality Act permits foreign agricultural guestworkers to work temporarily in the United States on what are known as H-2A visas, and this case involves the

wage obligations imposed on employers who participate in the H-2A program.[1] As relevant here, those obligations require H-2A employers to pay what is known as the Adverse Effect Wage Rate (AEWR) to not only their H-2A workers but also their U.S. employees doing the same work. A Department of Labor Administrative Law Judge (ALJ) concluded, in relevant part, that Seasonal Ag Services, a contract agricultural employment agency that participated in the H-2A program, was not a joint employer with Ludy Moreno Services, a different contract agricultural employment agency that had no H-2A workers; the ALJ thus concluded that Seasonal Ag Services was not responsible for paying the Adverse Effect Wage Rate to U.S. workers who were on Ludy Moreno Services' payroll. Because the ALJ failed to apply the correct legal standard when determining whether those U.S. workers were employees of Seasonal Ag Services within the meaning of the H-2A program's regulations, we **REMAND** this case for the ALJ to apply the correct legal standard to the facts of this case.

BACKGROUND

1. Legal Background

The Immigration and Nationality Act has a visa program, known as the H-2A program, for foreign agricultural guestworkers: the law permits employers in the United States to "import" foreign nonimmigrant workers temporarily to "perform agricultural labor or services."[2] The statute authorizes the Secretary of Homeland Security[3] to approve H-2A petitions, but before the Secretary of Homeland Security can do so, the petitioning employer must seek a certification from the Secretary of Labor that (1) there are not enough U.S. workers "who are able, willing, . . . qualified" and available to do the work for which the employer seeks to hire the

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[1] 8 U.S.C. §§ 1188 (2014); 1101(a)(15)(H)(ii)(a); *see also* 20 C.F.R. Part 655, Subpart B (2016) (setting forth the labor certification process for H-2A employers); 29 C.F.R. Part 501 (2016) (setting for the enforcement provisions for the H-2A program's contractual requirements).

[2] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 1188(*i*)(2).

[3] Although the statute originally gave the responsibility to the Attorney General, *see* 8 U.S.C. § 1188(a)(1) (referencing the power of the Attorney General to approve an H-2A petition), the Secretary of the Department of Homeland Security has that power now. *See* 29 C.F.R. § 501.1(a)(1) (referencing the Secretary of the Department of Homeland Security (DHS) as the approver of H-2A petitions); *see also* 8 U.S.C. § 1103(a), (g) (2014); *see generally* Homeland Security Act of 2002, Pub. L. No. 107-296, sec. 1102(2), 116 Stat. 2135, 2273-74 (Nov. 25, 2002), as amended by Consolidated Appropriations Resolution, Pub. L. No. 108-7, sec. 105, 117 Stat. 11, 531 (Feb. 20, 2003).

H-2A workers,[4] and (2) hiring the H-2A workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed."[5]

The Secretary of Labor has delegated authority to issue or deny labor certifications under the H-2A program to a Department of Labor subagency, the Employment and Training Administration (ETA), which has in turn delegated that authority to the ETA's Office of Foreign Labor Certification.[6] The regulations to administer the program are found in Subpart B of Part 655 of Title 20 of the Code of Federal Regulations.

Those regulations flesh out the statute's mandate that the hiring of H-2A workers "not adversely affect the wages . . . of workers in the United States similarly employed."[7] In particular, the regulations establish what is known as the "Adverse Effect Wage Rate" and require that employers pay their H-2A employees at that rate.[8] Just as importantly for this case, the regulations also require that H-2A employers pay the Adverse Effect Wage Rate to their U.S. employees performing the same tasks.[9]

The regulations also contemplate the possibility of "[j]oint employment[] [w]here two or more employers each have sufficient definitional indicia of being an employer to be considered the employer" of a particular worker.[10]

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4 8 U.S.C. § 1188(a)(1); 20 C.F.R. § 655.100(a). The statute refers only to there not being "sufficient workers," 8 U.S.C. § 1188(a)(1), but the regulations make clear that this means "sufficient . . . *United States (U.S.)* workers." 20 C.F.R. § 655.100(a) (emphasis added). *See* 74 Fed. Reg. 45,906, 45,907 (Sept. 4, 2009) (misquoting the statute by inserting "U.S." into it); 75 Fed. Reg. 6884, 6884 (Feb. 12, 2010) (same).

5 8 U.S.C. § 1188(a)(1); 20 C.F.R. § 655.100(b).

6 29 C.F.R. § 501.1(b).

7 8 U.S.C. § 1188(a)(1); 20 C.F.R. § 655.100(b).

8 20 C.F.R. § 655.120(a). The Adverse Effect Wage Rate is the "annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey." 20 C.F.R. § 655.103(b). Strictly speaking, employers must pay the "highest of the [Adverse Effect Wage Rate], the prevailing hourly wage or piece rate, the agreed upon collective bargaining wage, or the Federal or State minimum wage." 20 C.F.R. § 655.120(a). In this case, though, there is no dispute that the "highest" of these for all of the relevant workers was the Adverse Effect Wage Rate.

9 20 C.F.R. § 655.122(a).

10 20 C.F.R. § 655.103(b).

The Department of Labor's Wage and Hour Division (Wage and Hour) enforces the H-2A program's labor conditions, including its wage obligations.[11]

2. Factual Background[12]

Ludy Moreno Services (LMS) is an employment agency for contract agricultural workers based in Marshalltown, Iowa. Ludy Moreno (Ms. Moreno) is the owner of LMS.[13]

Mycogen Seeds (Mycogen) breeds, develops, and produces seeds.[14] For the summer and fall of 2009, Mycogen contracted with LMS to provide it with contract agricultural workers.[15] The summer field work consisted primarily of corn detasseling, which involves "removing the pollen producing flowers, the tassel, from the tops of corn plants and placing them on the ground."[16] The fall harvest work included "sorting inside [a] seed plant."[17]

For 2009, LMS participated in the H-2A program and hired both H-2A and U.S. workers.[18]

Yida (Becvar) Walker (Ms. Walker) is Ms. Moreno's daughter and, prior to 2010, she had worked for LMS for about twenty years in various capacities.[19] Among Ms. Walker's responsibilities in 2009 was the handling of LMS's H-2A paperwork.[20]

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[11] *See* 29 C.F.R. § 501.1(c); *id.* § 501.17.

[12] The ALJ did not appear to make any explicit findings of fact, our description of the facts is based on a recitation of relevant evidence in the record.

[13] ALJ's Decision and Order (D. & O.) at 4; Hearing Transcript (Tr.) at 18, 21, 209.

[14] Mycogen is a division of Dow AgroSciences, which in turn is a wholly owned subsidiary of The Dow Chemical Company. *See* Administrator's Exhibit (Ex.) 21 at 1.

[15] *Id*. at 2.

[16] D. & O. at 4 n. 4.

[17] Ex. 21 at 2.

[18] D. & O. at 4; Tr. at 18-19, 21. When discussing the facts of this case, we use the term "U.S. worker" to refer to those who were *not* H-2A workers. They were either U.S. nationals/permanent residents or otherwise legally authorized to work in the United States without having an H-2A visa. *But cf.* 20 C.F.R. § 655.103(b) (slightly different definition of "U.S. worker").

[19] D. & O. at 4; Tr. at 15.

[20] D. & O. at 4-5; Tr. at 18; Ex. 1.

The following year, 2010, Ms. Walker established and incorporated Seasonal Ag Services (Seasonal Ag), which like Ludy Moreno Services is also an employment agency for contract agricultural workers.[21] Ms. Walker is the sole owner and president of Seasonal Ag, which is also based in Marshalltown, Iowa.[22] Seasonal Ag and Ms. Walker are the Respondents in this proceeding.

Getting agricultural work contracts with Mycogen is difficult, and so in 2010, when Seasonal Ag was just starting, Ms. Moreno helped Ms. Walker get a contract with Mycogen to do some of the work LMS had done the previous year.[23] The evidence is equivocal, however, as to exactly how the work was divided between the two companies, and in particular, whether the two companies worked different acres of land during the summer.[24]

In 2010, Seasonal Ag participated in the H-2A program, but LMS did not; Seasonal Ag hired both H-2A and U.S. workers, while LMS hired only U.S. workers.[25] During this same period, LMS paid Ms. Walker to be a supervisor, although Ms. Walker testified that this was because Mycogen wrongly believed that she was still working for her mother's company (as she had been in previous years) and had thus included Ms. Walker in LMS's contract.[26]

In 2011, Seasonal Ag had a Mycogen contract for the summer field work, but LMS did not.[27] Again, Seasonal Ag participated in the H-2A program that summer and had both H-2A and U.S. workers performing the work together.[28]

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[21] D. & O. at 4; Tr. at 16; Ex. 1.

[22] Tr. at 15-16, 26, 209.

[23] D. & O. at 5; Tr. at 58-59, 191.

[24] Compare Tr. at 58-59 (Mycogen provided Seasonal AG "some of my mom's [LMS's] acres," implying that the workers from the two companies worked different acres of land) with Tr. at 11, 141 (Wage and Hour investigator observed U.S. workers employed by LMS "working side-by-side" with Seasonal Ag H-2A workers).

[25] Tr. at 17, 21, 27, 40.

[26] Tr. at 40-41.

[27] Ex. 21 at 2; Tr. at 54-55, 204.

[28] Tr. at 45, 48, 52, 204.

For the fall 2011 harvest work, both companies had contracts with Mycogen.[29] As in 2010, LMS employed only U.S. workers, while Seasonal Ag had both H-2A and U.S. workers.[30]

Throughout 2010 and 2011, all of the workers on Seasonal Ag's payroll—both H-2A and U.S. alike—were paid the Adverse Effect Wage Rate.[31] In 2010, that rate was $10.86 per hour[32] and in 2011, it was $11.03 per hour.[33]

Over the course of 2010 and 2011, Ludy Moreno Services had 142 U.S. workers on its payroll who were paid less than the Adverse Effect Wage Rate and thus less than Seasonal Ag's workers.[34] Moreover, included among that group were seventeen U.S. workers on the LMS payroll for the fall 2011 harvest work, who had previously been on the Seasonal Ag payroll that summer.[35] During the 2011 summer, while on the Seasonal Ag payroll, those seventeen U.S. workers were paid the Adverse Effect Wage Rate of $11.03 per hour, but when they were on the Ludy Moreno Services payroll in the fall, they were paid $9.50 per hour.[36] This is despite the fact that all of the workers on the Seasonal Ag payroll continued to get paid the Adverse Effect Wage Rate of $11.03 per hour for the same 2011 fall harvest work and were allegedly "working side-by-side doing identical work."[37]

Ms. Walker testified that she did not know how much any of the workers on the LMS payroll were paid.[38] The two companies also had different workers' compensation policies,[39]

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29 Ex. 6, 25.

30 Tr. at 45, 48, 52, 141-142, 204.

31 Tr. at 141, 179-180.

32 Tr. at 146-147.

33 Tr. at 124.

34 D. & O. at 2; Ex. 26.

35 Post-Hearing Brief of the Administrator, Appendix A; Ex. 6, 25.

36 *Id.*; Tr. at 124.

37 D. & O. at 7; Tr. at 141, 179-180.

38 D. & O. at 5; Tr. at 60.

39 Tr. at 61.

and Ms. Walker also testified that she did not have any "authority to hire or fire employees in LMS,"[40] though she had, as noted above, been paid as a supervisor for LMS during 2010.

There is evidence that Seasonal Ag and LMS shared some office space: During 2011, Seasonal Ag rented office space to LMS, although the evidence is unclear as to whether the two companies had separate office space in 2010.[41] There is also evidence that in 2011, the two companies advertised together.[42]

More importantly, Wage and Hour Division investigators testified that workers told them that the workers from the two companies "were not broken out into separate crews. Both buses would go to the same field[,] and [the workers would] all work together."[43] A Wage and Hour Division investigator also testified that many of the workers they interviewed believed that Ms. Moreno was their boss and that Ms. Moreno "tracks [their] hours" and pays them.[44] Ms. Walker testified that there may have been confusion because "many had previously worked for [Ms. Moreno]" and "[i]n the Hispanic culture, it's always known that the older person is the one with the authority[,] . . . even though . . . it was in their contract that [Ms. Walker] was their boss."[45] One investigator also testified that "[s]ome of the workers also referred to [Ms.] Walker as the one in charge."[46] Another investigator testified that one worker said that he thought that "Ms. Walker kept track of the hours of work but his paycheck said Ludy Moreno Services."[47] Another said that he "worked for LMS in 2011 and identified both [Ms. Walker and Ms. Moreno] as his boss."[48]

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40 *Id.*

41 D. & O. at 5; Tr. at 61, 67, 142, 209.

42 Ex. 14; Tr. at 142, 171-72.

43 Ex. 18 at DOL00442 (Employee Personal Interview Statement of Abdiel Moreno, Ludy Moreno's nephew). *See also* Ex. 18 at DOL00456 (Employee Personal Interview Statement of Israel Moreno, Ludy Moreno's nephew, stating that "[t]he crews work together as one").

44 D. & O. at 6; Tr. at 74-75; Ex. 17 at DOL00344-DOL00345, DOL00385-DOL00386.

45 Tr. at 205.

46 D. & O. at 6; Tr. at 102.

47 D. & O. at 6; Tr. at 117; Ex. 18 at DOL00441-DOL00442 (Employee Personal Interview Statement of Abdiel Moreno, Ludy Moreno's nephew).

48 D. & O. at 6; Tr. at 117-118; Ex. 18 at DOL00446-DOL00448 (Employee Personal Interview Statement of Israel Moreno, Ludy Moreno's nephew).

Seasonal Ag's profits in 2010 and 2011 were approximately $50,000 per year.[49] The company is no longer in business, and Ms. Walker stated that she would not hire H-2A workers again.[50]

3. Procedural Background

In July 2011, Wage and Hour conducted what is known as a "directed" investigation of Seasonal Ag, an investigation that was unprompted by any complaint of wrongdoing and was initiated out of the national office in Washington, D.C.[51] Wage and Hour investigators visited Seasonal Ag's offices, spoke with Ms. Walker, observed the workers in the field, and interviewed about three dozen of them, both H-2A and U.S. workers.[52]

Based on its investigation, Wage and Hour determined that Seasonal Ag had committed four different types of violations of the H-2A regulations. Among those was a determination that Seasonal Ag and LMS were joint employers of both the H-2A and the U.S. workers, and that 142 U.S. workers on LMS's payroll were paid less than the Adverse Effect Wage Rate. For that alleged violation, Wage and Hour (1) concluded that Seasonal Ag owed $82,969.57 in back wages to those 142 U.S. workers on LMS's payroll, and (2) assessed an additional $127,800 in civil money penalties, based on $900 for each of the 142 U.S. workers.[53]

Seasonal Ag sought review of Wage and Hour's determinations by requesting an administrative hearing.[54] An ALJ held a hearing on June 11, 2014 in Cedar Rapids, Iowa.[55]

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[49] D. & O. at 4; Ex. 13 at DOL00019.

[50] D. & O. at 4, 8; Tr. at 208.

[51] D. & O. at 6; Tr. at 110, 162. Wage and Hour has authority to conduct directed investigations. *See* 29 C.F.R. § 501.6(a) (authorizing Wage and Hour to conduct investigations to determine compliance with the H-2A program "by complaint or otherwise"); *Adm'r, Wage & Hour Div. v. Alden Mgmt. Servs.*, ARB No. 00-020, ALJ No. 1996-ARN-003, slip op. at 4 (ARB Aug. 20, 2002) (interpreting the "by complaint or otherwise" language to authorize directed investigations under a similar immigration program for nurses, the H-1A program).

[52] D. & O. at 5-6; Ex 15.

[53] D. & O. at 2; Administrator's Order of Reference at 2; Administrator's Pre-Hearing Submission at 2, 4.

[54] 29 C.F.R. § 501.33.

[55] D. & O. at 2.

On December 5, 2014, the ALJ issued a Decision and Order. In relevant part, he concluded that Seasonal Ag and LMS were not joint employers and that Seasonal Ag could thus not be held liable for the back wages and civil money penalties Wage and Hour had assessed for the alleged failure to pay the Adverse Effect Wage Rate to the 142 U.S. workers on LMS's payroll.

The Administrator filed a petition for review before this Board on January 5, 2015, challenging only the ALJ's conclusion that Seasonal Ag was not legally responsible for paying the Adverse Effect Wage Rate to the 142 U.S. workers on LMS's payroll. We accepted the petition on January 21, 2015. The Administrator then filed a brief supporting its petition on May 11, 2015. Seasonal Ag has not filed any opposition brief.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in cases under the H-2A provisions of the Immigration and Nationality Act.[56] The Board has plenary power to review an ALJ's legal conclusions de novo,[57] and our decision in this case turns solely on questions of law.

DISCUSSION

1. Seasonal Ag Must Pay the Adverse Effect Wage Rate to All of Its "Employees," as the Term "Employee" Is Understood in the Common Law of Agency

A. If Seasonal Ag is an employer of any of the 142 U.S. workers who were on Ludy Moreno Services' payroll, Seasonal Ag would be liable for paying those workers the Adverse Effect Wage Rate of $10.86 per hour for 2010 and $11.03 per hour for 2011

An employer of H-2A workers must pay the Adverse Effect Wage Rate to its H-2A employees.[58] It must also pay the Adverse Effect Wage Rate to those of its U.S. employees who are in what is known as "corresponding employment," those who are performing the same tasks

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56 *See* 8 U.S.C. § 1188(g)(2); 29 C.F.R. § 501.42; *see also* Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377, 69,378 (Nov. 16, 2012).

57 *Adm'r, Wage & Hour Div. v. Bedi & Datalink Comput. Prods., Inc.*, ARB No. 14-096, ALJ No. 2012-LCA-057, slip op. at 2 (ARB Feb. 29, 2016).

58 20 C.F.R. §§ 655.122(*l*); 655.120(a).

during the same time period as the H-2A workers.[59] Seasonal Ag employed H-2A workers during 2010 and 2011 to do agricultural fieldwork and harvest work.[60] Thus, Seasonal Ag was required to pay both its H-2A employees and its U.S. employees doing that work the Adverse Effect Wage Rate of $10.86 per hour for 2010 and $11.03 per hour for 2011.[61] It is undisputed that Seasonal Ag paid the Adverse Effect Wage Rate to all of the H-2A employees and U.S. employees on its own payroll.[62] Thus, the only question is whether any of the 142 U.S. workers on Ludy Moreno Services' payroll were Seasonal Ag's employees for purposes of Seasonal Ag's H-2A wage obligations.

B. To determine whether Seasonal Ag is an employer of any of the 142 U.S. workers on Ludy Moreno Services' payroll requires applying the definition of "employee" under the "general common law of agency" to the relationship between Seasonal Ag and those workers

The standard for determining whether an employer-employee relationship exists for purposes of the H-2A program is found in the definitions subsection of the Department of Labor's H-2A regulations.[63]

The definition of "joint employment" makes clear that a worker can be deemed an "employee" of more than one "employer" for purposes of the employer obligations in the H-2A regulations.[64] Thus, the fact that the 142 U.S. workers were on Ludy Moreno Services' payroll does not preclude them from being "employees" of Seasonal Ag too. The definition of "joint employment" states that to be deemed an employer in a "joint employment" context, a putative employer must have "sufficient definitional indicia" of being an employer.[65]

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[59] 20 C.F.R. §§ 655.103(b) (defining "corresponding employment"); 655.122(a) (in subsection entitled "[p]rohibition against preferential treatment of aliens," noting that [t]he employer's job offer must offer to U.S. workers no less than the same . . . wages . . . that the employer . . . provide[s] to H-2A workers").

[60] D. & O. at 2, 4-5.

[61] 20 C.F.R. §§ 655.122(*l*); 655.120(a); 655.103(b) (definition of "Adverse effect wage rate"); 655.122(a); 655.103(b) (definition of "[c]orresponding employment").

[62] Tr. at 141, 179-180.

[63] 20 C.F.R. § 655.103(b).

[64] 20 C.F.R. § 655.103(b) (definition of "joint employment").

[65] 20 C.F.R. § 655.103(b).

The "definitional indicia" of being an employer are found in the regulatory definition of "employee," which makes clear that any employer-employee relationship for purposes of the H-2A program must be determined by the "general common law of agency": "Employee" is specifically defined as "[a] person who is engaged to perform work for an employer, as defined under the general common law of agency."[66]

The history of the H-2A regulations further supports our conclusion that the determination of whether an employer-employee relationship exists under the H-2A program is based on the common law of agency. Prior to January 17, 2009, the regulations had no definition of "joint employment" or "employee," and the definition of an "employer" was, in relevant part, "a person, firm, corporation or other association or organization which *suffers or permits a person to work* and . . . which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee."[67] This is known as the "suffer or permit to work" standard.

In February 2008, the Department proposed a major overhaul of the H-2A program and among its proposed changes were several that changed the criteria for being deemed an employer. The Department proposed adding a new definition of "employee" to the regulations—defining it as an "'employee' as defined under the general common law of agency"—and changing the definition of "employer" slightly as well.[68] The rationale for this change was apparently "to conform [the definitions of employee and employer] to those used in other Department-administered programs," and in particular, "to remove any confusion that may exist for agricultural employers who have compliance obligations under [the Fair Labor Standards Act (FLSA)], [the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)] and the H-2A

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[66] 20 C.F.R. § 655.103(b). While the regulation also has a definition of "employer," that definition is less helpful in part because the relevant portions of it have an almost built-in circularity. To be an "employer" requires, among other things (and of relevance here), that the putative employer have "an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment." 20 C.F.R. § 655.103(b). So, an "employer" must have an "employer relationship" but the notion of an "employer relationship" is not specifically defined; rather it is merely suggested in a parenthetical as being connected to "the ability to hire, pay, fire, supervise or otherwise control the work of [an] employee." The use of the phrase "such as" before the list of ways in which the putative employer can have an "employer relationship" suggests that these are not the exclusive ways in which an "employer relationship" can be established.

[67] 20 C.F.R. § 655.100(b) (**2008**) (emphasis added). Although the definition of "employer" did reference the possibility of "joint employment," it did so solely in the context of an "association" of "employer members" (which would have been inapplicable here), and there was no separate definition of "joint employment." *Id.*

[68] 73 Fed. Reg. 8538, 8563 (Feb. 13, 2008).

program."[69] In the Final Rule issued in December 2008, the Department adopted, effective January 17, 2009, the definition of "employee" for purposes of the H-2A program that it had proposed,[70] and made clear that the "suffer or permit to work" standard should not apply in the H-2A program.[71] It also added the definition of "joint employment" currently in effect.[72]

In September 2009, a mere eight months later and with a new Secretary of Labor in office, the Department proposed a reconsideration of the December 2008 Final Rule. Although the Department proposed numerous changes to the December 2008 Final Rule, it proposed no changes to the definition of "employee."[73] The Department did modify the definition of "employer" a bit, but this did not affect the fact that whether someone was an "employee" was determined based on the test in the common law of agency. In February 2010, the Department then adopted these definitions without change.[74] In short, the Department consciously changed the definition from what is known as the "suffer or permit to work" standard to the common law of agency standard effective January 2009, reaffirming that change once again effective March 2010.

C. The "general common law of agency" requires consideration of a nonexhaustive list of factors

To determine whether someone is an "employee" under the common law of agency requires consideration of a number of factors. The H-2A regulations contain a nonexhaustive list: "[t]he hiring party's right to control the manner and means by which the work is

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[69] *Id.* at 8555.

[70] 73 Fed. Reg. 77,110, 77,210 (Dec. 18, 2008).

[71] *See* 73 Fed. Reg. 77,197 (Dec. 18, 2008) (noting that "the use of *suffer or permit to work* is precluded by the Supreme Court opinion in *Nationwide Mutual Ins. v. Darden,* 503 U.S. 318, 322-323 (1992)," the case articulating the definition of "employee" under the common law of agency).

[72] 73 Fed. Reg. 77,210-77,211.

[73] 74 Fed. Reg. 45,906, 45,909-45,910 (Sept. 4, 2009) ("The Department has retained the definition of 'employee' from the 2008 Final Rule. This definition is based on the common law definition, as set forth in the Supreme Court's holding in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322-324 (1992), which is more consistent with the statute than the definition contained in the 1987 Rule."); *see also id.* at 45,940-41. The Department did tweak it slightly. Rather than an "employee" being, in a somewhat circular fashion, an "*'employee'* as defined under the general common law of agency," the new definition said that an "employee" was "*a person who is engaged to perform work for an employer,* as defined under the general common law of agency."

[74] 75 Fed. Reg. 6884, 6960 (Feb. 12, 2010); *see also id.* at 6,885 ("Any definitions that did not receive comments have been retained as proposed without further changes, unless otherwise noted.").

accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party."[75]

The Supreme Court of the United States has also compiled an overlapping, but lengthier, list:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; *the duration of the relationship between the parties*; *whether the hiring party has the right to assign additional projects to the hired party*; the extent of the hired party's discretion over when and how long to work; *the method of payment*; *the hired party's role in hiring and paying assistants*; whether the work is part of the regular business of the hiring party; *whether the hiring party is in business*; *the provision of employee benefits*; and *the tax treatment of the hired party*."[76]

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[75] 20 C.F.R. § 655.103(b).

[76] *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (emphasis added to show the additional factors not mentioned in regulation); *see also Darden*, 503 U.S. at 323-324 (1992) (quoting *Reid*); Restatement (2d) of Agency § 220(2) (1958) (nonexhaustive factors include "(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business"); Restatement (3d) of Agency § 7.07 cmt. f (2006) (noting that the "factual indicia . . . relevant to whether an agent is an employee . . . include . . . the extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent's work is part of the principal's regular

These factors are not exclusive. As the Supreme Court has put it, "Since the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'"[77] Moreover, "how the parties label their relationship, while relevant to the inquiry, is not determinative of the employment status of an individual."[78]

Of course, some of the factors may not be relevant to the inquiry in an H-2A case, especially as here when the issue is a question of "joint employment." So, for example, the "hired party's role in hiring and paying assistants" is unlikely to play a role where the workers are contract agricultural workers.

Moreover, some of the factors may take on a different salience in the context of a joint-employment situation than they would in determining whether a worker is an employee or an independent contractor, the context in which the common-law test developed.[79] For example, given that the workers did agricultural work such as detasseling and seed sorting, the "skill required" factor would likely favor a finding that a worker is an employee rather than an independent contractor.[80] But here, it is unlikely to play any role at all, since the issue is not whether the workers are employees or independent contractors, but instead whether they are employees of both LMS and Seasonal Ag or just LMS. Or, consider the "tax treatment of the hired party" factor, which might still be important, but for different reasons: when determining

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business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business" and further noting that "the extent of control that the principal has exercised in practice over the details of the agent's work" is also relevant).

[77] *Reid*, 490 U.S. at 752 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S., 254, 258 (1968)); *cf.* 20 C.F.R. § 655.103(b) (noting that "[o]ther applicable factors may be considered and no one factor is dispositive").

[78] *Yearous v. Pacificare of Calif.*, 554 F. Supp. 2d 1132, 1139 (S.D. Cal. 2007); *see also Sharkey v. Ultramar Energy Ltd., Lasmo plc, Lasmo (AUL Ltd.)*, 70 F.3d 226, 232 (2d Cir. 1995) (noting that "the employment status of an individual [under the common law of agency test] is not determined solely by the label used in the contract between the parties").

[79] *See* Restatement (2d) of Agency § 220(2) (factors are to be used for "determining whether one acting for another is a servant or an independent contractor"). Here, of course all 142 U.S. workers on LMS's payroll were "employees," not independent contractors; the only question is whether they were "employees" of two different employers.

[80] *Cf. Brock v. Chevron U.S.A., Inc.*, 976 F.2d 969, 972-973 (5th Cir. 1992) (holding that manual labor performed by contract workers generally does not require "a degree of skill, training, experience, education and/or equipment not normally possessed by those outside the contract field").

whether someone is an employee or independent contractor, one might look to see *whether* the person received a W-2 and had taxes withheld or deducted. Here, though, if, as seems to be the case, the 142 U.S. workers were paid by Ludy Moreno Services, it seems likely that for tax purposes, they were treated as *only being* Ludy Moreno Services' employees. That factor would thus almost certainly cut against a finding that the 142 U.S. workers were "employees" of Seasonal Ag.

D. Other tests, such as the one applicable for determining an employer-employee relationship under the Fair Labor Standards Act and used in the past for joint employment in H-2A cases, do not apply.

Questions about whether there is an employer-employee relationship arise in numerous other contexts, as do questions about "joint employment." For example, when determining whether an entity is an employer under the Fair Labor Standards Act (FLSA),[81] courts use a different test from the test under the common law of agency. The FLSA test is based on the "'circumstances of the whole activity'"[82] and the "economic reality" of the situation.[83] The test has four factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[84] In the past, courts have also applied that four-part FLSA test when determining joint-employment questions under the pre-January 2009 H-2A regulations.[85]

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81 29 U.S.C. Chapter 8

82 *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

83 *Bonnette*, 704 F.2d at 1470 (*quoting Goldberg v. Whitaker House Coop., Inc*., 366 U.S. 28, 33 (1961)).

84 *Bonnette*, 704 F.2d at 1470 (citation omitted); *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1064-1071 (E.D. Wash. 2013) (in case involving H-2A workers, applying the four-part test to determine whether an entity was a joint employer for purposes of the FLSA); *Ramos-Barrientos v. Bland*, 728 F. Supp. 2d 1360, 1380-1381 (S.D. Ga. 2010) (in case involving H-2A workers, using an Eleventh Circuit eight-factor test for determining whether there is joint employment under the FLSA); *cf. Little v. Solis*, 297 F.R.D. 474, 478-481 (2014) (in case involving H-2A workers, using same four-part test to determine whether an entity was an employer under the Equal Access to Justice Act).

85 *Sejour v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1216, 1226-1232 (N.D. Fla. 2014) ("The Courts have held that the definition of 'employ' under the H-2A regulations is similar to the definition provided by the FLSA."); *Guijosa-Silva v. Roberson*, 2012 WL 860394, *19 (M.D. Ga. Mar. 13, 2012) ("Federal regulations defining the employer/employee relationship under H-2A are almost identical to the standards set by the FLSA. An H-2A employer is defined as one who "suffers

The definition of "employ" in the FLSA includes "to suffer or permit to work,"[86] a phrase with, as the United States Supreme Court has put it, "striking breadth"; and courts have relied on this more "expansive[]" language when developing the four-part test.[87] The "suffer or permit to work" phrase "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[88] But, "suffer[] or permit[] to work" is precisely the language used in the H-2A regulations prior to the amendments that took effect in January 2009,[89] language that the Department changed in the December 2008 Final Rule. It is thus clear that the change in regulatory definitions was a conscious rejection of the previous standard in the context of the H-2A program.[90] When the Department maintained that definition the following year while comprehensively revamping the

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or permits" a person to work. Such an employer is characterized by his ability to "hire, pay, fire, supervise or otherwise control the work of such employee. These factors are almost identical to the factors that are used to determine whether an employer falls within the FLSA definitional scope" (citations omitted).); *Hernandez v. Two Bros. Farm, LLC*, 579 F. Supp. 2d 1379, 1383 & n.3 (S.D. Fla. 2008) (noting that both the FLSA and the H-2A regulations define employer in a similar way, as one who "suffers or permits a person to work"); *cf. Little v. Solis*, 297 F.R.D. 474, 478-481 (2014) (analysis of whether entity that was conceded to be an employer for purposes of the H-2A program was also an employer under the Equal Access to Justice Act).

[86] 29 U.S.C. § 203(g). In contrast to the Immigration and Nationality Act, the FLSA itself includes statutory definitions of "employer," "employee," and "employ." *Id.* § 203(d), (e), (g).

[87] *Darden*, 503 U.S. at 326; *see also Bonnette*, 704 F.2d at 1470 (*citing Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir.1979)) ("The definition of 'employer' under the FLSA is not limited by the common law concept of 'employer,' and is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.").

[88] *Darden*, 503 U.S. at 326.

[89] 20 C.F.R. § 655.103(b) (**2008**).

[90] As we explained above, the avowed rationale for this change was "to conform [the definitions of employee and employer] to those used in other Department-administered programs," and in particular, "to remove any confusion that may exist for agricultural employers who have compliance obligations under FLSA, MSPA and the H-2A program." 73 Fed. Reg. 8555; *see supra* text accompanying note 69. But the definition under the FLSA is the "suffer or permit to work" standard, *see* 29 U.S.C. § 203(g); *see also id.* § 203(e), (d), and the Migrant and Seasonal Agricultural Worker Protection Act incorporates this same definition, *see* 29 U.S.C. § 1802(5), making this "conform[ance]" rationale somewhat baffling. The change made the definition of "employee" for the H-2A program—based as it is on the common law of agency—*different* from the definition of "employee" under the FLSA and MSAWPA, whereas before the change, it was the same.

H-2A rules a second time, it specifically noted that the common law definition "is more consistent with the statute than the [previous] definition."[91]

Therefore, cases applying a standard other than the common law of agency test are no longer applicable for determining whether an employer-employee relationship, joint or otherwise, exists for purposes of the H-2A program.[92]

Of course, factors considered in other employer-employee or joint employer tests are not irrelevant: facts in evidence that might be relevant for some of the factors considered in other tests might also be relevant for assessing the common-law definition. Thus, to the extent that facts relevant to some of the factors in the FLSA standard might be relevant to some of the factors in the common law standard, those *facts* can be considered in the analysis. However, those facts must be analyzed in light of the common law of agency.

In sum, to determine whether a "joint employment" relationship exists between Seasonal Ag and LMS with respect to the 142 U.S. workers on LMS's payroll requires consideration of whether Seasonal Ag has "sufficient definitional indicia of being an employer," where the relevant indicia are determined "under the general common law of agency."

2. The ALJ Erred by Not Properly Determining Whether the 142 U.S. Workers on Ludy Moreno Services' Payroll During 2010 and 2011 Were "Employees" of Seasonal Ag as that Term Is Understood under the Common Law of Agency

The ALJ concluded that Seasonal Ag and LMS were not "joint employers" based on what appear to be two factors: (1) the fact that Seasonal Ag had its own U.S. workers who were paid the Adverse Effect Wage Rate undermined any claim that Ms. Moreno and Ms. Walker were colluding to avoid paying the Adverse Effect Wage Rate to the U.S. workers on LMS's payroll; and (2) the two companies were formally separate entities, including having separate workers'

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[91] 74 Fed. Reg. 45,909-45,910 ("The Department has retained the definition of ''employee'' from the 2008 Final Rule. This definition is based on the common law definition, as set forth in the Supreme Court's holding in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322-324 (1992), which is more consistent with the statute than the definition contained in the 1987 Rule.").

[92] *See supra* cases cited in note 85. Cases applying that same standard under the FLSA would likewise be inapplicable in the context of the H-2A program. *See supra* cases cited in note 84; *see also*, *e.g.*, *Barfield v. N.Y. City Health & Hosps. Corp,*, 537 F.3d 132, 140-148 (2d Cir. 2008) (applying four-part test under FLSA); *Zheng v. Liberty Apparel Co*., 355 F.3d 61, 66, 71-72 (2d Cir. 2003) (same); *Charles v. Burton*, 169 F.3d 1322, 1328-1334 (11th Cir. 1999) (applying the same test under the Migrant and Seasonal Agricultural Workers Protection Act); *Matrai v. DirecTV, LLC,* ____ F. Supp. 3d ____, 2016 WL 845257, at *3-7 (D. Kan., Mar. 4, 2016) (applying a six-part test under FLSA).

compensation policies and "separate responsibilities for hiring and firing of their respective employees."[93]

The ALJ committed legal error by failing to consider the factors in the common law of agency to decide whether the 142 U.S. workers on LMS's payroll during 2010 and 2011 were "employees" of Seasonal Ag. For one, there is no requirement that two companies "collude" for both to be considered employers of a particular worker under the H-2A program. Second, the ALJ failed to consider any number of facts that could be relevant to the analysis under the common law of agency test. Finally, the ALJ failed to focus on the crucial aspect of the question, which is whether the 142 U.S. workers on LMS's payroll were "employees" of Seasonal Ag, not whether Seasonal Ag and LMS were "joint employers" in some abstract sense of that term. It is only Seasonal Ag, not LMS, whose actions are at issue here.

On appeal, the Administrator argues that Seasonal Ag and LMS were "joint employers," raising a number of facts, some of which are undoubtedly relevant to the common law of agency test. The Administrator argues that "Ms. Walker, as an H-2A employer, exercised a sufficient degree of control over the LMS corresponding non-H-2A workers' work performance and employment conditions to be considered their joint employer"[94]; that the two companies "twice worked under a shared contract, which reinforced their overlapping control over the workers";[95] that "as the sole contract holder for the 2011 fieldwork, [Seasonal Ag] inherently held ultimate authority" to decide whom to hire and fire;[96] that, as a supervisor for LMS in 2010, Ms. Walker had authority to hire and fire;[97] that Ms. Walker signed or gave some of the LMS employees their paychecks;[98] that other factors in the common law of agency test favor a finding of joint employment of the non-H-2A workers on LMS's payroll;[99] and that other evidence suggests that the two companies "were closely associated and interrelated operations in a number of other ways."[100]

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[93] D. & O. at 11.

[94] Administrator's Brief (Admin. Br.) at 16.

[95] *Id.* at 19.

[96] *Id.*at 21.

[97] *Id.*

[98] *Id.* at 22.

[99] *Id.* at 22-23.

[100] *Id.* at 23.

Before the ALJ, however, the Administrator did not argue that the common law of agency was the proper test. While the Administrator's brief on appeal to us correctly states the standard, the Administrator below wrongly argued that the test was the four-part FLSA test.[101] We thus think it best to give the ALJ the opportunity to analyze the question under the proper legal standard.

3. We Remand for the ALJ to Consider the Question under the Correct Legal Standard

We therefore **REMAND** this case for the ALJ to determine whether, under the common law of agency, any of the 142 U.S. workers on Ludy Moreno Services' payroll were also "employee[s]" of Seasonal Ag. In particular, the ALJ's focus should be on Seasonal Ag's relationship with those 142 U.S. workers and not on the abstract question of whether Seasonal Ag and Ludy Moreno Services are joint employers in general.

This focus on Seasonal Ag might make some of the factors discussed by the ALJ in his Decision and Order irrelevant. For example, the Administrator does not appear to claim that Ludy Moreno Services was an H-2A employer at all and thus does not appear to claim that any of the workers on Seasonal Ag's payroll, H-2A or otherwise, were "employees" of LMS.[102] Thus, it is irrelevant that some of Seasonal Ag's employees apparently believed that *Ms. Moreno* was their boss, whether because of "the tendency in the Hispanic culture to consider the elder the one in charge"[103] or for some other reason, because it doesn't speak to the question of whether the 142 U.S. workers on Ludy Moreno Services' payroll believed that *Ms. Walker* was their boss. The ALJ should be focused on *Seasonal Ag*'s liability for U.S. workers who were on Ludy Moreno Services' payroll.

4. The Administrator May Reconsider the Civil Money Penalty on Remand

One other issue may arise on remand. If the ALJ were to determine on remand that Seasonal Ag was in fact an employer of any of the 142 U.S. workers on Ludy Moreno Services' payroll, the ALJ may permit the Administrator to reconsider the civil money penalties he initially

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[101] *See* Post-Hearing Brief of the Administrator at 11 (describing the four-part test); Administrator's Pre-Hearing. Submission. at 4 & n.6 (simply stating that the "two enterprises were joint employers under federal law," but citing only the circular definition of "employer" in the H-2A regulations and also referencing the FLSA regulations).

[102] *Cf.* D. & O. at 7 (investigator testifying that "under the H-2A rules, we could not bring an action against Ludy Moreno for back wages; the action could only be brought against Seasonal Ag under a theory that Seasonal Ag and LMS were joint employers of the corresponding workers"); Tr. at 171.

[103] D. & O. at 11.

assessed. The Administrator assessed a civil money penalty of $127,800, based on $900 per worker, for the corresponding employment violation. Yet, at the hearing, even the Wage and Hour Division's Assistant District Director, who assessed the civil money penalties, expressed some misgivings about the amount.[104] Under 29 C.F.R. § 501.19, the Administrator may consider "the type of violation committed and other factors" in determining how large a penalty to impose. The regulation then provides a nonexhaustive list of factors: (1) previous history of H-2A violations; (2) number of workers affected by the violation; (3) the gravity of the violations; (4) good faith efforts to comply with the law; (5) explanation from the person charged with the violation; and (6) commitment to future compliance.[105] Several facts might be relevant to the amount of penalty here, including evidence that Ms. Walker apparently did not even know how much the workers on LMS's payroll were earning;[106] Seasonal Ag's financial situation; the fact that Seasonal Ag's corresponding employment violations, if any, were not malicious or willful; and the fact that Seasonal Ag is no longer in business (and is thus not going to participate in the H-2A program any longer).[107]

CONCLUSION

For the reasons discussed above, we hereby **REMAND** this case to the Office of Administrative Law Judges for a determination of whether the 142 U.S. workers on Ludy Moreno Services' payroll were "employees" of Seasonal Ag within the meaning of the common law of agency.

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

Judge Brown, *concurring*:

The issue presented on appeal is whether Seasonal Ag and Ludy Moreno Services were joint employers of any or all of the 142 U.S. workers on LMS's payroll engaged in

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104 D. & O. at 7-8; Tr. at 186, 194, 200-202.

105 29 C.F.R. § 501.19(a).

106 Tr. at 60.

107 *See generally* D. & O. at 8 (testimony of Assistant District Direct Richard Tesarek).

corresponding employment to that undertaken by Seasonal Ag's H-2A employees, thereby obligating Seasonal Ag to pay the LMS employees the Adverse Effect Wage Rate. I concur with the majority's ruling that the ALJ committed reversible error in failing to apply the appropriate test for determining whether or not Respondents were joint employers of LMS's employees, and thus join in ordering remand for reconsideration of whether the Respondents were joint employers of the 142 U.S. workers employed by LMS. I write separately because I believe the H-2A regulatory history by which the Department of Labor has embraced the common law test for determining the existence of an employment relationship merits further explication.

As Judge Desai correctly points out, the standard for determining whether an employer-employee relationship existed under the Immigration and Nationality Act, and thus whether Seasonal Ag was a joint employer of any or all of the 142 U.S. workers on Ludy Moreno Services' payroll for purposes of the H-2A program, is found in the definitions subsection of the Department of Labor's H-2A regulations.[108]

The regulatory definition of "joint employment" makes clear that the employer obligations under 8 U.S.C.A. § 1188 and the H-2A regulations can apply to more than one employer of an H-2A employee or an employee engaged in corresponding employment. Thus, the mere fact that the 142 U.S. workers were on Ludy Moreno Services' payroll does not preclude finding that Seasonal Ag was their joint employer. To be considered their joint employer, there needs to exist "sufficient definitional indicia" of Seasonal Ag being an employer of the LMS employees within the meaning of the H-2A regulations.[109]

The "definitional indicia" of being an employer are found in the regulatory definitions of "employer" and "employee" found at 20 C.F.R. § 655.103(b), which are based on the general common law.[110] "Employer" is defined to require, *inter alia*, the existence of "an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment."[111] "Employee" is specifically defined as "[a] person who is engaged to perform work for an

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[108] 20 C.F.R. § 655.103(b).

[109] *Id.*

[110] 74 Fed. Reg. 45,906, 45,909-10, 2009 WL 2824683 (Sept. 4, 2009); 73 Fed. Reg. 77,110; 77,197; 2008 WL 5244078 (Dec. 18, 2008) (noting that 29 C.F.R. Part 501, the H-2A enforcement regulations, incorporates the definitions found in 20 C.F.R. § 655.103(b) and that the terms "employer" and "employee" are "defined in terms of the common law test").

[111] 20 C.F.R. § 655.103(b). (The five factor test of whether the employer "hires, pays, fires, supervises, or otherwise controls the work of an employee" has been referred to as the "control test" for assessing whether there is an "employer-employee relationship." *See, e.g., Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 242 (D.D.C. 2010).)

employer, as defined under the general common law of agency,"[112] and as the regulatory history explains, identifies additional indicia of what constitutes an "employment relationship."[113]

As the regulatory history documents, the Department of Labor's H-2A regulations remained largely unchanged from 1987 until 2008. During this period, the definition of "employer" encompassed the "suffer or permit to work" test.[114] That definition also contained the additional requirement that there exist "an employer relationship with respect to employees . . . as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee." The 1987-2008 regulations did not contain definitions for "employee" or "joint employment."

In 2008 the Department significantly revised the H-2A regulations. By regulations published December 18, 2008, effective January 17, 2009, the common law criteria for determining the existence of an employer-employee relationship was codified. In addition to adding definitions for "employee" and "joint employment" based on the common law of agency, the then-existing definition of "employer" was amended to also conform to the common law by deleting the "suffer or permit to work" test.[115] The express criteria of "the ability to hire, pay, fire, supervise or otherwise control the work of employee" for determining the existence of an employment relationship was also removed from the definition of "employer" because, the regulatory history explains, the applicable criteria were spelled out in greater detail in the new definition of "employee."[116]

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112 *Id.*

113 *See* 73 Fed. Reg. 77,110, 77,115.

114 *See* 52 Fed. Reg. 20,496, 20,510 (June 1, 1987). Under the "suffer or permit to work" test, an entity will be deemed the employer of an individual "if, as a matter of economic reality, the individual is dependent on the entity." *Antenor v. D & S Farms,* 88 F.3d 925, 929 (11th Cir.1996) (citing *Goldberg v. Whitaker House Coop., Inc.,* 366 U.S. 28, 34 (1961)).

115 73 Fed. Reg. 8538, 8563, 8555 (Feb. 13, 2008).

116 73 Red Reg. at 77,110, 77,115 (Dec. 18, 2008). At the same time, the new 2008 regulations amended the definitions found in the enforcement provisions of 29 CFR Part 501. 29 CFR § 501.10 defined both "employee," "employer" and "joint employment" in conformity with the new definitions set forth under then-20 CFR § 655.100(b). See 73 Fed. Reg. 77,232. A definition of "employ" as meaning "to suffer or permit to work" was initially proposed for inclusion under 29 CFR § 501.10 (see 73 Fed. Reg. 8580) but subsequently deleted in its entirety in the final adopted rule. See 73 Fed. Reg. 77,232. The explanation for this deletion: "[T]he definition of employ in proposed 29 CFR 501.10 was defined as to suffer or permit to work, whereas the terms employer and employee were defined in terms of the common law test. Since the two concepts are different and the use of suffer or permit to work is precluded by the Supreme Court opinion in *Nationwide Mutual*

In February of 2010, further amendments to the H-2A regulations were adopted, including clarification of the definition of "employer" in order "to conform the definition to that used in most other Department-administered programs."[117] Specifically, the requirement within the definition of "employer" of the existence of an "employer relationship" was clarified to include the five elements of the common law "control test" that had previously been removed by the 2008 regulations, *i.e.*, "the ability to hire, pay, fire, supervise or otherwise control the work of employee."[118] The definition of "employer" under 29 C.F.R. § 501.3 was similarly clarified.[119]

The focus upon remand is whether or not the evidence establishes the existence of an employer-employee relationship by and between Seasonal Ag and any or all of the 140 U.S. employees of Ludy Moreno Services under the criteria set forth in the H-2A regulatory definitions of "employer" and, secondarily "employee." Judge Desai has more than adequately detailed that criteria, its somewhat overlapping nature, the relative importance of certain factors depending on the nature of the case, and the fact that the factors identified are not necessarily exclusive. It is important to further note that in determining whether or not Seasonal Ag is a joint employer of LMS's employees, Seasonal Ag need not have the same amount or degree of indicia of being an employer of LMS's employees as LMS may have; Respondent "merely must have 'sufficient' indicia."[120] Should the ALJ find, upon remand, that the test for finding Seasonal Ag to be a joint employer of LMS's employees is met, thereby establishing Seasonal Ag's liability for paying Adverse Effect Wage Rate wages to any employees engaged in corresponding employment, the civil monetary penalties originally levied by the Administrator

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Ins. v. Darden, 503 U.S. 318, 322-323 (1992), the reference to suffer or permit to work has been removed." 73 Fed. Reg. 77,197.

117 74 Fed. Reg. 45,909-45,910.

118 *See* 75 Fed. Reg. 6960-6961. The five factor test of whether the employer "hires, pays, fires, supervises, or otherwise controls the work of an employee" has been referred to as the "control test" for assessing whether there is an "employer-employee relationship." *See e.g., Broadgate Inc.*, 730 F. Supp. 2d at 242. *Accord, Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 448 (2003) (control is the principal guidepost in a common law employee analysis).

119 *See* 75 Fed. Reg. 6979-6980.

120 *Little v. Solis*, 297 F.R.D. 747, 481 (D. Nev. 2014).

against Respondents pertaining to this violation should be reassessed, although I would leave to the ALJ's determination whether that reassessment is properly within the jurisdiction of the ALJ to conduct or whether that determination should be returned to the Administrator.

E. COOPER BROWN
Administrative Appeals Judge

Judge Corchado, dissenting:

I dissent and briefly explain my reasons. I appreciate the cautiousness of a remand for further analysis, but I completely oppose a reversal of the ALJ's order. As a preliminary matter, it is important to highlight the nature of the sole violation at issue in this case, an alleged failure to pay the AEWR to domestic workers.

The "violation" at issue on appeal is not that Ms. Yida Walker's company (Seasonal Ag) paid its domestic workers less than it paid its H-2A workers. In fact, it is undisputed that Seasonal Ag paid its domestic and H-2A workers consistent with the H-2A AEWR law. The alleged violation is that Ms. Walker's mother's separate corporation ("Ludy Moreno Services, Inc." or "LMS") paid LMS's domestic workers less than the AEWR and Ms. Walker, and now defunct Seasonal Ag, should be held liable through the ambiguous concept of "joint employer." Neither the H-2A statute nor the implementing regulations contain any helpful definition of "joint employer" for the common business person. As the majority opinion discusses, the courts have suggested a non-exhaustive list of relevant factors but no mandatory factors or formulas for deciding "employee" status under the common law. Typically, these factors have arisen in cases where the issue is "employee vs. independent contractor" status.[121] Given the ambiguous and flexible tests for deciding who is an "employee," it seems the Board should cautiously[122] analyze whether an ALJ considered "irrelevant" factors and committed *reversible* error in resolving the question of "joint employer" status. I now briefly explain the reasons I would affirm the ALJ.

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[121] *See, e.g.*, *Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 322-323 (1992)(articulating the definition of "employee" as opposed to independent contractor under the common law of agency).

[122] Just as relevant (or irrelevant) as the Court's *Darden* test for "employee vs. independent contractor" are the Court's cautionary statements about ignoring corporate formalities in *U.S. v. Bestfoods, Inc.*, 524 U.S. 51, 55 and 63 (1998) (Court refused to impose derivative liability on a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary, without more, unless the corporate veil could be pierced and despite the fact that the plaintiff relied on a federal environmental statute).

First, I am not convinced that the Department sufficiently articulated the source for its authority to select Ms. Walker or Seasonal Ag for investigation. There was no complaint or other indicia of a rational basis for the "directed investigation"[123] in this matter.[124] It seems the Department should have explained some criteria it used for this particular investigation, even if it was pursuant to a pre-established plan for "random" investigations.

Second, the undisputed facts and the ALJ's fact findings in this matter convince me that we should affirm the ALJ, especially in light of the Administrator's post-hearing arguments. The Administrator expressly asked the ALJ to consider four factors to determine whether Seasonal Ag jointly employed LMS's employees.[125] In short, those four factors focus on (1) hiring/firing, (2) supervision, (3) the rate/method of payment, and (4) the maintenance of employment records. The ALJ expressly rejected the first factor in ruling that the two companies had separate responsibilities for hiring and firing. D. & O. at 11. Regarding the second factor, the ALJ discounted the evidence that suggested Ms. Walker supervised LMS's employees by finding that, for at least three reasons, the workers were confused about who was in charge. Those reasons were familial relationship, Hispanic culture, and past employment relationships. *Id.* As to the third factor, several ALJ findings cause me to infer that the ALJ found that Seasonal Ag had nothing to do with the rate and method of LMS's payment to its workers. Those reasons were that Seasonal Ag (1) did not collude with LMS on the issue of wages, (2) was a separate entity, (3) drew its paychecks on separate accounts, (4) only on occasion handed out LMS checks when Ms. Moreno was out of town, and (5) had separate responsibilities as to the employment arrangements. *Id.* As to the fourth factor, I infer that the ALJ found that the companies separately maintained their own respective employment records in finding that checks were drawn on separate accounts and worker's compensation policies were separate.

Now, on appeal, the Administrator wants a second bite of the apple by arguing that the ALJ should reconsider this matter with additional factors in mind, many factors that are used in determining whether an employee is an employee or independent contractor.[126] But, given the ALJ's rulings, it seems futile to send this matter back simply for the ALJ to consider additional factors where major factual issues collectively weigh heavily against joint employer status, especially where much of the Administrator's evidence was based on hearsay. Moreover, where Ms. Walker worked as an individual for her mother's company for 20 years as a subordinate employee, it seems odd to hold her liable for the actions of her mother's company.

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[123] *See* D. & O. at 6; Tr. at 110, 162; Admin. Br. at 10.

[124] While not a binding decision in H-2A cases, the United States Court of Appeals for the Eighth Circuit has closely scrutinized the extent of the Department's investigative power. *See Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132 (8th Cir. 2015).

[125] *See* Administrator's Post-Hearing Brief at 11.

[126] *See* note 1.

Lastly, given that we have some latitude on appeal to resolve H-2A appeals, the record and circumstances permit us to consider the additional factors and reject “joint employer” liability. The evidence in the hearing transcript is limited, as few witnesses testified and much of the Department’s testimony is hearsay. The ALJ made findings on numerous core factual issues and some relevant facts are undisputed. We are not required to apply a “substantial evidence” review, but the Board could adopt a hybrid standard of review. Perhaps, the hybrid review would grant some deference to the ALJ mixed with Board findings on factual issues where (1) the ALJ’s findings are insufficient and (2) the record evidence and briefing by the parties permits such additional findings on appeal. But this is an issue for another day. In the end, I would affirm or find that the record evidence fails to establish “joint employer” liability for the wages paid by LMS.

LUIS A. CORCHADO
Administrative Appeals Judge