



In the Matter of:

**OVERDEVEST NURSERIES, L.P.,
HOUR DIVISION,

RESPONDENT.**

ARB CASE NO. 16-047

ALJ CASE NO. 2015-TAE-008

DATE: March 15, 2018

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.; and Katelyn Poe, Esq.; U.S. Department of Labor, Office of the Solicitor; Washington, District of Columbia

For the Respondent:

Monte B. Lake, Esq. and Christopher J. Schulte, Esq.; CJ Lake, LLC; Washington, District of Columbia

Before: Joanne Royce, Administrative Appeals Judge; and Leonard J. Howie III, Administrative Appeals Judge

FINAL DECISION AND ORDER

The Immigration and Nationality Act (INA) permits foreign agricultural guestworkers to work temporarily in the U.S. on H-2A visas. This case involves the wage obligations imposed on employers who participate in the H-2A program.¹ Those obligations require H-2A employers to pay the Adverse Effect Wage Rate (AEWR) to not only their H-2A workers but also to their U.S. employees doing the same work in “corresponding employment.” Overdevest Nurseries, L.P., appeals a Department of Labor (DOL) Administrative Law Judge’s (ALJ) Decision and

¹ 8 U.S.C. §§ 1188 (2014); 1101(a)(15)(H)(ii)(a); *see also* 20 C.F.R. Part 655, Subpart B (2017) (setting forth the labor certification process for H-2A employers); 29 C.F.R. Part 501 (2017) (setting forth the enforcement provisions for the H-2A program’s contractual requirements).

Order (D. & O.) Granting Administrator’s [Wage and Hour Division] Motion for Summary Decision and Denying [Overdevest’s] Cross Motion for Summary Decision. In the D. & O., the ALJ concluded that Overdevest employed its U.S. domestic workers as “production workers” in “corresponding employment,” as defined under 29 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b), with its H-2A workers, employed as “order pullers,” but did not pay the domestic workers the same requisite AEWR, in violation of 20 C.F.R. § 655.122(l). The ALJ also upheld the Administrator’s back wage calculations, awarding \$92,984.22 in back wages to 69 Overdevest domestic workers, and assessment of \$50,400 in civil money penalties for the violations. For the following reasons, we affirm the ALJ’s D. & O.

BACKGROUND

1. Legal Background

The INA 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 Security³ 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 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

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).

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

The Secretary of Labor has delegated authority to issue or deny labor certifications under the H-2A program to a DOL subagency, the Employment and Training Administration (ETA) that in turn delegated that authority to the ETA's Office of Foreign Labor Certification.⁶ The regulations establishing the AEWL require that employers pay their H-2A employees at that rate,⁷ and also require that H-2A employers pay the AEWL to their U.S. employees performing the same tasks.⁸ The DOL's Wage and Hour Division (Wage and Hour) enforces the H-2A program's labor conditions, including its wage obligations.⁹

2. Factual Background

The parties do not dispute the facts in this case. Overdevest is a wholesale nursery located in New Jersey that has participated in the H-2A program since 1999.¹⁰ For 2012 and 2013, the years at issue in this case, Overdevest filed an application to employ H-2A workers each year for the "order puller" position and the DOL certified its applications. For each year, Overdevest submitted an Application for Temporary Employment Certification (TEC, ETA Form 9142) and a "job order" (Agricultural and Food Processing Clearance Order, ETA form 790).¹¹ Overdevest's 2012 job order lists the period of intended employment as extending from February 8, 2012, to November 29, 2012, and its 2013 job order lists the period of intended employment as extending from February 11, 2013, to November 30, 2013.¹²

The job orders listed the job qualifications for the "order puller" position Overdevest wished to fill with H-2A workers as requiring three months of recent nursery experience, including familiarity with plant names to be able to accurately and timely complete orders, as

⁶ 29 C.F.R. § 501.1(b).

⁷ 20 C.F.R. § 655.120(a). The AEWL 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 AEWL, 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 AEWL.

⁸ 20 C.F.R. § 655.122(a).

⁹ See 29 C.F.R. § 501.1(c); *id.* § 501.17.

¹⁰ D. & O. at 3.

¹¹ See 20 C.F.R. § 655.103(b); Administrator's Exhibits (AX) A-D.

¹² AX A, C.

well as the ability to complete written reports.¹³ In addition, the job specifications included a broad “catch-all” provision that the H-2A workers would also “[p]erform other general nursery tasks as necessary,” when they’re not performing “order puller” tasks.¹⁴ The domestic U.S. workers who did not have the requisite skills listed in the job order only perform general nursery tasks or production activities, and were known as “production workers.”¹⁵

Overdevest paid the AEW in New Jersey to its H-2A “order puller” workers in 2012 (\$10.34) and 2013 (\$10.87), but concedes that it paid its U.S. domestic “production workers” less than the AEW, \$9.00 per hour in 2012 and \$9.25 per hour in 2013.¹⁶

Overdevest concedes that its H-2A “order puller” workers did occasionally perform the lesser-skilled duties also listed in the job orders that were performed by its domestic “production workers,” so all of its lower-skilled domestic “production workers” engaged in work activities that were also listed in the job orders that could be performed by its higher-skilled H-2A “order puller” employees.¹⁷

3. Procedural Background

In 2013, Wage and Hour conducted an investigation and audit of Overdevest to determine its compliance with the H-2A program.¹⁸ On September 25, 2013, the Wage and Hour Administrator issued a Notice of Determination letter finding that Overdevest violated 20 C.F.R. § 655.122(l) by failing to pay its U.S. domestic workers, who were engaged in “corresponding employment” as defined under 29 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b) with its H-2A workers, the same required AEW that it paid its H-2A workers.¹⁹ Thus, the Administrator determined that Overdevest owed its domestic workers back wages and assessed a total of

¹³ AX B, D.

¹⁴ *Id.*

¹⁵ D. & O. at 3.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 4.

¹⁸ Wage and Hour has authority to conduct directed investigations, even unprompted by any complaint of wrongdoing. *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).

¹⁹ D. & O. at 4.

\$50,400 in civil money penalties for its failure to pay the AEW to its domestic workers in “corresponding employment.” The Administrator later revised its Notice of Determination to find that \$92,984.22 in back wages were owed to 69 Overdevest domestic workers.²⁰

Overdevest sought review of Wage and Hour’s determinations by requesting an administrative hearing.²¹ Prior to a hearing, Overdevest submitted a Motion for Summary Decision, asserting that it complied with the H-2A regulations, including the “corresponding employment” provisions, and therefore requested a decision in its favor as a matter of law. Overdevest also contended that the Administrator incorrectly calculated the back wages owed and civil money penalties assessed in this case. The Administrator also submitted a Motion for Summary Decision, arguing that there is no genuine issue of material fact and that as Overdevest failed to pay its domestic workers the required rates of pay in violation of the regulations, the ALJ should issue a decision in the Administrator’s favor as a matter of law. Thus, the Administrator requested that back wages owed be awarded and civil money penalties be assessed against Overdevest.

On February 18, 2016, the ALJ issued the D. & O., and Overdevest filed a petition for review.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from ALJ final decisions in cases under the INA’s H-2A provisions.²² The Board has plenary power to review an ALJ’s legal conclusions de novo, and the decision in this case turns solely on questions of law.²³

The ARB reviews an ALJ’s grant of summary decision de novo, applying the same standard that ALJ’s employ under 29 C.F.R. Part 18.4. Pursuant to 29 C.F.R. § 18.72, an ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact

²⁰ *Id.* at 4-5.

²¹ 29 C.F.R. § 501.33.

²² *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. 69,378 (Nov. 16, 2012).

²³ *Adm’r, Wage & Hour Div. v. Seasonal AG Servs., Inc.*, ARB No. 15-023, ALJ No. 2014-TAE-006, slip op. at 8 (ARB Sept. 30, 2016).

and that a party is entitled to summary decision.²⁴ In assessing this summary decision, we view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party.²⁵

DISCUSSION

1. History of relevant regulations defining “corresponding employment”

1987 Regulation

From 1987 to January 17, 2009, the relevant H-2A regulations stated “[t]hese regulations are also applicable to the employment of other [U.S. domestic] workers hired by employers of H-2A workers in the occupations and for the period of time set forth in the job order” and “[s]uch other workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.”²⁶ Overdevest has participated in the H-2A program since 1999,²⁷ but prior to the investigation at issue here, the Wage and Hour Division had never charged it with a “corresponding employment” violation.²⁸ The Wage and Hour Division did conduct an investigation in 2007 of Overdevest regarding any possible “corresponding employment” violation under the 1987 regulation in 2007, but “no determination” of a violation was made at that time, as the Wage and Hour Division “did not have guidance on” “corresponding employment.”²⁹

2008 Regulation

The Wage and Hour Division amended the definition of “corresponding employment” in 2008, which became effective on January 17, 2009.³⁰ The 2008 amended H-2A regulations stated, “[t]hese regulations are also applicable to the employment of United States (U.S.) workers newly hired by employers of H-2A workers in the same occupations as the H-2A workers during

²⁴ *Stallard v. Norfolk S. Ry. Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149, slip op. at 4 (ARB Sept. 29, 2017).

²⁵ *Id.*

²⁶ 29 C.F.R. § 501.0 (2009).

²⁷ D. & O. at 3.

²⁸ *Id.* at 5.

²⁹ *Id.*

³⁰ 73 Fed. Reg. 77110, 77117-77118, 77191 (Dec. 18, 2008).

the period of time set forth in the labor certification” and “[s]uch other workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.”³¹

In addition, the definition of “agricultural labor or services” that H-2A workers could perform was amended to state “[o]ther work typically performed on a farm that is not specifically listed on the Application for Temporary Employment Certification and is minor (i.e., on the job duties and activities that are listed on the Application for Temporary Employment Certification) and incidental to the agricultural labor or services for which the H-2A worker was sought.”³²

Thus, 1) only “newly hired” U.S. workers could engage in the “same occupations” as H-2A workers and, therefore, in “corresponding employment” with H-2A workers, and 2) H-2A workers could perform other “minor” or “incidental” job duties not listed on the H-2A job order without violating the regulations, as the Administrator explained in the comments to the new amended regulation that it is “difficult if not impossible to list all potential minor and incidental job responsibilities of H-2A workers on the Application for Temporary Employment Certification.”³³ So under the 2008 regulation, Overdevest was permitted to list in its job orders for H-2A workers only the job specifications for the “order puller” position, but its H-2A workers could also perform other “minor” tasks that its U.S. domestic “production workers” performed, without having to include a broader “catch-all” provision in the job order that the H-2A workers would also “perform other general nursery tasks.”

Current 2010 Regulation at issue in this case

But the 2008 amended definition of “corresponding employment” lasted only just over a year before Wage and Hour again amended the definition of “corresponding employment” in 2010, which became effective on March 15, 2010.³⁴ “Corresponding employment” is now defined under 20 C.F.R. § 501.3 (2017) and 29 C.F.R. § 655.103(b) as “[t]he employment of workers who are not H-2A workers . . . in any work included in the job order, or in any agricultural work performed by the H-2A workers.” An employer of H-2A workers must pay the AEW to those of its U.S. employees who are in “corresponding employment” with its H-2A workers, *see* 20 C.F.R. § 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”).

³¹ 29 C.F.R. § 502.0 (2009).

³² 29 C.F.R. § 502.10(b)(1)(vi) (2009).

³³ *See* 73 Fed. Reg. at 77118.

³⁴ 75 Fed. Reg. 6884-6886, 6888-6889 (Feb. 12, 2010).

The Administrator explained in the comments to the latest amended regulation that it was changed “to address the adverse impact on U.S. workers when . . . H-2A workers [engage] in agricultural work outside the scope of work found in the approved job order, including work impermissibly performed outside the area of intended employment,”³⁵ and removed having “H-2A protections [apply] only to newly-hired [U.S.] workers” and applied “wage depression” protections to “longtime” U.S. employees as well.³⁶

Thus, 1) any U.S. workers, not just “newly hired” U.S. workers, could engage in “corresponding employment” with H-2A workers, and 2) H-2A workers could not perform any other job duties than those specifically listed on the H-2A job order without violating the regulations, as the Administrator explained in the comments to the new amended regulation that “an [H-2A employer] applicant must demonstrate that there are not sufficient [U.S.] workers to perform the labor or services involved in the petition” or job order, so “[i]t is incongruous to claim that such a broad degree of flexibility is needed to encompass work that has not yet been identified [in the job order], while representing in the Application for H-2A workers that there are not enough U.S. workers available to perform such work” listed in the job order.³⁷

Furthermore, the Administrator explained that permitting H-2A workers to perform other “minor” or “incidental” job duties not listed in the job order allowed H-2A employers to assign its H-2A workers job duties not listed in the job order “that would have been sufficient to support the hiring of additional U.S. workers.”³⁸ Finally, the Administrator noted that “the Department does not intend to debar” an employer if its “H-2A workers perform an insubstantial amount of agricultural work not listed in the Application,” as “the debarment regulations require that the violation be substantial.”³⁹

Apparently, in response to the new definition of “corresponding employment,” Overdevest drafted its H-2A 2012 and 2013 job orders broadly to list not only the job specifications for the “order puller” position, but also included a broad “catch-all” provision that the H-2A workers could also “perform other general nursery tasks, as necessary,” that are performed by its U.S. domestic “production workers” as well.⁴⁰ Thereby, Overdevest’s H-2A workers could continue to perform the potential minor and incidental job duties that were allowed under the 2008 regulation’s definition.

³⁵ *Id.* at 6885.

³⁶ *Id.* at 6886.

³⁷ 75 Fed. Reg. at 6889.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ AX B, D.

2. ALJ's relevant holdings

The ALJ noted that Overdevest conceded that the H-2A job orders included all of the work duties that its U.S. domestic production workers performed, and the U.S. domestic production workers also performed agricultural work that the H-2A workers performed.⁴¹ Thus, the ALJ held that the U.S. domestic workers met the definition of working in “corresponding employment” with the H-2A workers and, therefore, Overdevest should have paid the U.S. domestic workers AEW rates for all hours that they worked.⁴²

3. Overdevest's U.S. production workers were in “corresponding employment” with its H-2A order puller workers under the requirements at § 1188(a)(1) and 20 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b)

On appeal, Overdevest reiterates its argument, made before the ALJ, that its U.S. production workers were not as “qualified” as its H-2A order puller workers, which the statute at 8 U.S.C. § 1188(a)(1) requires for approval of H-2A applications, and, therefore, they were not “similarly employed” under § 1188(a)(1). Consequently, Overdevest contends that the Administrator's position and the ALJ's conclusion that Overdevest's U.S. production workers were in “corresponding employment” with its H-2A order puller workers is contrary to the plain language of the definition of “corresponding employment” under 20 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b) and the statute's requirements at § 1188(a)(1). Specifically, Overdevest argues that Wage and Hour determined that its H-2A workers are more qualified than its U.S. workers when it approved its application for certification, but subsequently ignored its previous determination when Wage and Hour required Overdevest to pay its less qualified U.S. workers the same wage as its H-2A workers during the period of H-2A employment.

The ALJ held:

that the “qualifications” of the U.S. domestic production workers are not relevant in determining whether they worked in corresponding employment and that the statutory language regarding the process for approval of H-2A petitions at § 1188(a)(1) referring to “qualifications” is “inapposite,” as the definition of “corresponding employment” at 655.103(b) does not refer to “qualifications” to perform the job duties of the H-2A worker as listed in the job order.^[43]

⁴¹ D. & O. at 7.

⁴² *Id.*

⁴³ D. & O. at 8.

To expound on the ALJ's holding, the relevant "qualifications" of the U.S. domestic production workers compared to the H-2A workers are not relevant in determining whether they worked in "corresponding employment" in regard to the "general nursery tasks" or work duties that they both performed during the period of H-2A employment. In this case, the H-2A workers also performed the same "general nursery tasks" or work duties requiring no unique qualifications that the U.S. domestic production workers performed and, therefore, the U.S. workers were "similarly employed" to the H-2A workers when doing those tasks. The H-2A workers are not any more qualified than the U.S. workers to perform those "general nursery tasks" and, therefore, the U.S. workers should be paid the same wage to perform those duties as the H-2A workers are paid to perform those duties during the period of H-2A employment.

Otherwise, as the Administrator explained in the comments to the current regulation, there is an "adverse impact on U.S. workers" when H-2A workers engage in agricultural work "outside the area of intended employment" for which the H-2A workers have been determined to have more qualifications to perform.⁴⁴ For if Overdevest's H-2A workers did not also perform the "general nursery tasks" requiring no unique qualifications, that would "support the hiring of additional U.S. workers" to perform those "general nursery tasks."⁴⁵

While Overdevest was permitted under the 2008 regulation to have its H-2A workers perform other "minor" job duties or "general nursery tasks" not listed on the H-2A job order, the current 2010 regulation was amended "to address the adverse impact on U.S. workers" when H-2A workers did so. Under the amended 2010 regulation, H-2A employers are therefore required to either restrict its H-2A workers to perform only the work duties that the H-2A workers are determined to have more qualifications to perform or pay its U.S. workers the same wage as its H-2A workers for the same work duties that they both perform.

Apparently, to have its H-2A workers continue to perform the "minor" job duties or "general nursery tasks" that were permitted under the 2008 regulation without having to be listed or included in the job order, but to now comply with the amended 2010 regulation, Overdevest included a broad job order with a "catch-all" provision that the H-2A workers would also perform other "general nursery tasks as necessary." But in doing so, Overdevest was required to pay its U.S. workers the same wage as its H-2A workers for those same work duties that they both performed to protect against "the adverse impact on U.S. workers" when H-2A workers did so, consistent with the purpose of the Act to prevent the hiring of H-2A workers having an adverse effect on the wages or working conditions of U.S. workers.

Alternatively, Overdevest could have drafted a narrow job order restricting its H-2A workers to perform only the work duties that the H-2A workers were determined to have more qualifications to perform and hire additional U.S. workers to perform "general nursery tasks,"

⁴⁴ 75 Fed. Reg. at 6885.

⁴⁵ See 75 Fed. Reg. at 6889.

which is also consistent with the purpose of the Act to prevent the hiring of H-2A workers from having an adverse effect on the wages or working conditions of U.S. workers.

Overdevest contends on appeal that a narrow job order, restricting its H-2A workers to perform only the work duties that the H-2A workers were determined to have more qualifications to perform, does not provide any allowance for an H-2A employer to use its H-2A workers to perform “general nursery tasks” during an emergency or similar unforeseen situation. But if an emergency or other contingency arises requiring additional “general nursery tasks” to be performed, an H-2A employer such as Overdevest could then hire additional less qualified U.S. workers to perform those tasks, consistent with the statute’s purpose to protect against such an emergency or contingency having an “adverse impact on U.S. workers.”

Thus, we reject Overdevest’s contention that the Administrator’s position and the ALJ’s conclusion that Overdevest’s U.S. production workers were in “corresponding employment” with its H-2A order puller workers is contrary to the plain language of the definition of “corresponding employment” under 20 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b) and the statute’s requirements at § 1188(a)(1).

4. The 2010 definition of “corresponding employment” is applicable in this case

Overdevest also reiterates on appeal its argument made before the ALJ that because the comments to the 2010 amended definition of “corresponding employment” state that the new definition was a “return to the 1987 Rule definition,”⁴⁶ the Administrator’s current interpretation of the definition is inconsistent with its prior 1987 definition, when Overdevest was not found to have violated the 1987 rule as a result of the Administrator’s 2007 investigation.

But as the ALJ held, the Administrator actually made “no determination” of a violation under the 1987 definition regulation as a result of the 2007 investigation, due to the lack of “guidance” at that time regarding the definition, which “does not necessarily mean that the [Administrator] . . . endorsed [Overdevest’s] practices at that time.”⁴⁷ Moreover, as the ALJ pointed out, the 2010 definition was not “a complete return” to the 1987 definition, as it holds that U.S. domestic workers that perform “any work included in the job order, or in any agricultural work performed by the H-2A workers” are in “corresponding employment” with the H-2A workers.⁴⁸

The ALJ held that the current 2010 definition is “clear and unambiguous” and as it has been in effect since 2010, it is applicable to this case involving Overdevest’s employment of H-

⁴⁶ See 75 Fed. Reg. at 6885, 6888.

⁴⁷ See D. & O. at 5, 9, 11 n.11.

⁴⁸ D. & O. at 11; 20 C.F.R. § 501.3(a), 29 C.F.R. § 655.103(b) (2017).

2A workers in 2012 and 2013.⁴⁹ So, the ALJ reiterated that because Overdevest employed its domestic production workers in work included in the job order and they performed agricultural work that was performed by its H-2A workers as well, Overdevest's domestic production workers engaged in corresponding employment under the unambiguous and applicable 2010 regulatory definition.⁵⁰

Consistent with the ALJ's holding, 20 C.F.R. § 655.135 holds that "[a]n employer seeking to employ H-2A workers must agree as part of the Application for Temporary Employment Certification and job offer that it will abide by the requirements of" the H-2A regulations that includes the 2010 definition of "corresponding employment" at 29 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b).⁵¹

5. H-2A regulations do not put H-2A employers in a "Catch-22"

Finally, Overdevest also reiterates on appeal its argument that the Administrator's interpretation of "corresponding employment" places an employer in a "Catch-22" situation, by requiring an employer to either:

- 1) draft a broad job order describing the job duties of its H-2A workers broadly (as Overdevest did in this case), so as to comply with or avoid violating the "Three-Fourths Guarantee" requirement to pay wages for three-fourths of the contract period at 20 C.F.R. § 655.122(i)(1)⁵² if it does not have enough "order puller" work during the contract period, but risk having its U.S. domestic workers being determined to be in "corresponding employment" with its H-2A workers under a "broad interpretation" of the definition at 655.103(b), as in this case; or

⁴⁹ D. & O. at 11.

⁵⁰ *Id.* at 11-12.

⁵¹ See AX A, C (Overdevest's 2012 and 2013 Applications for Temporary Employment Certification, in which Overdevest confirmed that it "agree[d] to all the applicable terms, assurances and obligations contained in Appendix A-2" that states that "the employer [w]ill comply with applicable Federal . . . regulations.").

⁵² An employer must guarantee the H-2A worker employment for at least three-fourths of the workdays during the contract period. 20 C.F.R. § 655.122(i)(1). If the employer provides less than the required amount, the employer must nevertheless pay the worker what he or she would have earned had he or she worked the guaranteed number of days. 20 C.F.R. § 655.122(i)(1)(iv).

2) draft a narrow job order describing the job duties of its H-2A workers narrowly, so as to avoid violating the H-2A regulation at 29 C.F.R. § 501.20(d)(1)(vii) (and, therefore, possible debarment),⁵³ which holds that it is a violation under § 501.20(d)(1)(vii) for an H-2A employer to employ “an H-2A worker outside the area of intended employment, or in an activity/activities not listed in the job order,” but risk being unable to have its H-2A workers “perform other general nursery tasks” as necessary due to an emergency or unforeseen circumstances.

Overdevest asserted before the ALJ that it drafted its job orders describing the job duties of its H-2A workers broadly, to be able to also “perform other general nursery tasks as necessary,” to avoid having its H-2A workers perform only “order puller” duties if it drafted its job orders narrowly but yet still have to pay them in accordance with the “Three-Fourths Guarantee” requirement even when there were no “order puller” duties to perform.⁵⁴

The ALJ properly rejected Overdevest’s assertion that complying with the regulations requiring the “Three-Fourths Guarantee” or not having H-2A workers perform duties not listed in the job order “necessitates a violation of the other.”⁵⁵ As the ALJ held, the regulations are not “rigid” but provide “a middle ground” to allow an employer to provide an “artfully drafted job order” “to include enough activities that H-2A workers do not perform activities outside the job order or sit idly, while not crafting the job order too broadly so that almost all of its agricultural workers are in corresponding employment (e.g., including a catch-all job duties provision).”⁵⁶

Overdevest again contends on appeal that a narrow job order, restricting its H-2A workers to perform only the work duties that the H-2A workers were determined to have more qualifications to perform, does not provide any allowance for an H-2A employer to use its H-2A workers to perform “general nursery tasks” during an emergency or similar situation. But to reiterate, if an emergency or other contingency arises requiring additional “general nursery tasks” to be performed, an H-2A employer such as Overdevest could then hire additional less qualified U.S. workers to perform those tasks, consistent with the statute’s purpose to protect against such an emergency or contingency having an “adverse impact on U.S. workers.”

In addition, Overdevest’s contention on appeal that a broad job order describing the job duties of its H-2A workers broadly is required to comply with or avoid violating the “Three-

⁵³ The Administrator may debar an H-2A employer if the Administrator finds that an H-2A employer “substantially violated” this provision. 29 C.F.R. § 501.20(a).

⁵⁴ See D. & O. at 13.

⁵⁵ *Id.*

⁵⁶ *Id.*

Fourths Guarantee” is also misplaced. Consistent with the ALJ’s holding, an H-2A employer such as Overdevest faced with the same factual circumstances that are at issue in this case can draft a job order for the hiring of H-2A workers reflecting a shorter, more specific or more accurate period of employment for when the more qualified H-2A workers’ skills are needed or required to satisfy the “Three-Fourths Guarantee.”⁵⁷

The ALJ held that Overdevest’s:

broadly written job order reflected its desire to employ its H-2A workers . . . in tasks performed by its domestic production workers, while simultaneously wishing to avoid paying those workers in corresponding employment the AEW. The regulations do not permit Employer to do so, and the domestic workers here should have been paid the AEW rates for all hours worked. *See* 20 C.F.R. § 655.103(b).^[58]

The ALJ’s holding complies with the applicable definition of “corresponding employment” at 29 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b) (2017) and is supported by the undisputed facts that all of the work duties that Overdevest’s U.S. domestic production workers performed were included in the H-2A job orders. Accordingly, the ALJ’s holding that the U.S. domestic workers met the definition of working in “corresponding employment” with the H-2A workers and, therefore, Overdevest should have paid them the AEW rates for all hours they worked, is affirmed.

6. Validity of regulations

Alternatively, Overdevest contends that the regulation defining “corresponding employment” at 20 C.F.R. § 655.103(b) is invalid, as its issuance was arbitrary and capricious in light of the statute, regulatory history, other regulations and the DOL’s prior interpretations. While recognizing that the Board lacks the authority to rule on its argument, Overdevest notes it still raises the argument for purposes of preserving it for subsequent review.

⁵⁷ As the ALJ also pointed out, the “Three-Fourths Guarantee” “necessarily allows for some flexibility . . . (e.g., the H-2A workers would not be paid to be idle unless employer is unable to offer ‘employment for a total number of work hours equal to at least three-fourths of the workdays of the total period’). D. & O. at 13; *see* 20 C.F.R. § 655.122(i)(1). In addition, the ALJ noted that the regulations provide for a reduction for the period covered by the “Three-Fourths Guarantee” to the time of the contract’s termination for “reasons beyond the control of the employer.” D. & O. at 13; *see* 20 C.F.R. § 655.122(o). Moreover, the ALJ reiterated the Administrator’s statement in the comments to the regulations regarding debarment, that “the Department does not intend to debar” an employer if its H-2A workers perform an “occasional or sporadic” and “insubstantial amount” of agriculture activities outside of those listed in the job order due to “unplanned and uncontrollable events.” D. & O. at 13; *see* 75 Fed. Reg. at 6884, 6889.

⁵⁸ D. & O. at 13.

As the Board held in *Adm’r, Wage & Hour Div., USDOL v. John Peroulis & Sons Sheep, Inc.*, ARB Nos. 14-076, -077; ALJ No. 2012-TAE-004, slip op. at 7 (ARB Sept. 12, 2016), the “ARB is not permitted to rule on the validity of” the DOL’s H-2A regulations,” (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); Secretary’s Order 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.”)). Accordingly, Overdevest’s claim is not properly before the Board.

7. Back wage calculations correctly determined

Finally, Overdevest contends on appeal that the ALJ’s back wage calculations were incorrect, “pursuant to when H-2A workers were actually present.” Whenever the INA’s H-2A provisions or the implementing regulations are found to have been violated, the Administrator is authorized to take such actions “as deemed appropriate, including . . . the recovery of unpaid wages, the enforcement of any other contractual obligations, and the assessment of a civil money penalty against any person for a violation of the H-2A work contract obligations of the Act or these regulations.”⁵⁹

The ALJ upheld the Administrator’s back wage calculations, awarding \$92,984.22 in back wages to 69 Overdevest domestic workers. The ALJ noted that the Administrator’s back wage calculations included 27 U.S. domestic workers, who were hired on a temporary basis during the 2012 period of intended H-2A employment, dating from February 8, 2012, to November 29, 2012.⁶⁰ Moreover, the ALJ pointed out that while Overdevest’s 2012 H-2A job order “became valid on February 23, 2012”⁶¹ and Overdevest began hiring temporary U.S. domestic workers on February 27, 2012, its H-2A workers did not arrive until the end of March 2012.⁶²

The ALJ properly relied on the definition of “corresponding employment” that states that “[t]o qualify as corresponding employment the work [of the U.S. domestic workers] must be performed *during the validity period* of the job order,” see 20 C.F.R. § 655.103(b) (emphasis added).⁶³ Thus, the ALJ properly held that because the temporary domestic production workers were employed in work included in the job order during the validity period of the job order, they

⁵⁹ 29 C.F.R. §§ 501.16, 501.19.

⁶⁰ D. & O. at 3, 14-15.

⁶¹ *Id.* at 8.

⁶² *Id.* at 8-9.

⁶³ D. & O. at 8.

were engaged in “corresponding employment” with the H-2A workers and “nothing in the Act or regulations” waives Overdevest’s “obligations during that time” to pay them the same wage as the H-2A workers “simply because the H-2A workers had not yet began working.”⁶⁴

Consequently, the ALJ’s finding that Overdevest is liable for back wages owed to its domestic production workers for their work in “corresponding employment” during the validity period of Overdevest’s 2012 H-2A job order, even for work they performed before the arrival of its H-2A workers, is affirmed as it is in accord with the definition of “corresponding employment” at 20 C.F.R. § 655.103(b). Thus, having rejected Overdevest’s only challenge to the ALJ’s backpay award, the ALJ’s upholding of the Administrator’s back wage calculations, awarding \$92,984.22 in back wages to 69 Overdevest domestic workers is affirmed as consistent with the H-2A program’s statutory and regulatory scheme and as supported by the record evidence.

8. Civil money penalties

The ALJ also upheld the Administrator’s assessment of \$50,400 in civil money penalties for the violations pursuant to 29 C.F.R. § 501.19. Under 29 C.F.R. § 501.19(b), the Administrator may consider “the type of violation committed and other relevant 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; (6) commitment to future compliance; and (7) the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers. Under 29 C.F.R. § 501.19(c)(2015), at the time of the Administrator’s assessment and the ALJ’s decision, a civil money penalty of \$1,500 could be assessed for each violation of 8 U.S.C. § 1188 and its implementing regulations.⁶⁵

The ALJ noted that the Administrator assessed a \$1,500 civil money penalty for each of the domestic workers determined to be owed back wages, but after properly considering the factors under 29 C.F.R. § 501.19(b), the Administrator reasonably reduced the assessment.⁶⁶ Thus, the ALJ upheld the Administrator’s calculations as reasonable, not arbitrary, and appropriate.⁶⁷ The ALJ’s upholding of the Administrator’s assessment of \$50,400 in civil money penalties is unchallenged by any party on appeal, unrebutted, and uncontroverted by any

⁶⁴ *Id.* at 8-9.

⁶⁵ The amount of a civil money penalty that can be assessed for a violation of 8 U.S.C. § 1188 and its implementing regulations under 29 C.F.R. § 501.19(c) has subsequently been amended twice to \$1,631, *see* 29 C.F.R. § 501.19(c) (2016) and now \$1,658, *see* 29 C.F.R. § 501.19(c) (2017).

⁶⁶ D. & O. at 17-18.

⁶⁷ D. & O. at 18.

evidence of record. Therefore, we decline to disturb, and therefore affirm, the Administrator's calculations and decision with respect to the civil money penalties because they are neither arbitrary nor do they evidence an abuse of discretion.

CONCLUSION

For the reasons discussed above, the ALJ's Decision and Order holding that Overdevest employed its U.S. domestic workers as "production workers" in "corresponding employment" as defined under 29 C.F.R. § 501.3(a) and 20 C.F.R. § 655.103(b) with its H-2A workers, employed as "order pullers," without paying them the same requisite AEW in violation of 20 C.F.R. § 655.122(l) is **AFFIRMED**. In addition, the ALJ's upholding of the Administrator's back wage calculations, awarding \$92,984.22 in back wages to 69 Overdevest domestic workers, and assessment of \$50,400 in civil money penalties for the violations is also **AFFIRMED**.

SO ORDERED.

LEONARD J. HOWIE III
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge