



In the Matter of:

ADMINISTRATOR, WAGE AND
HOUR DIVISION, UNITED STATES
DEPARTMENT OF LABOR,

ARB CASE NOS. 2016-0092
2016-0093

PROSECUTING PARTY,

ALJ CASE NO. 2016-TAE-00003

v.

DATE: FEB 12 2019

THREE D FARMS, LLC,
d/b/a THREE D FARMS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party, Deputy Administrator, Wage and Hour Division:

M. Patricia Smith, Esq.; Katherine E. Bissell, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; and Wilson Osorio, Esq.; U.S. Department of Labor, Office of the Solicitor; Washington, District of Columbia

For the Respondent:

Andrew M. Jackson, Esq.; Andrew Jackson Law; Clinton, North Carolina

Before: William T. Barto, Chief Administrative Appeals Judge; James A. Haynes and Daniel T. Gresh, Administrative Appeals Judges

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the H-2A temporary agricultural worker program of the Immigration and Nationality Act (INA) as amended by the

Immigration Reform and Control Act of 1986.¹ The INA's H-2A provisions permit foreign nonimmigrant workers to work temporarily in the United States provided that their employment does not adversely affect U.S. workers. As part of the H-2A program, participating employers are not permitted to engage in preferential hiring practices favoring H-2A workers, and employers are required to recruit and employ U.S. workers who are able, willing, qualified, and available to perform the agricultural services for which the employer seeks H-2A workers. 20 C.F.R. § 655.135.

On February 14, 2014, the Administrator of the Wage and Hour Division, Department of Labor (WHD) issued a Notice of Determination (NOD) that Three D Farms unlawfully gave preferential treatment to H-2A workers and unlawfully rejected U.S. workers for employment. The WHD assessed a \$7,500 civil money penalty (CMP) for the unlawful rejection of a qualified U.S. worker. Three D requested a hearing, and the WHD filed an Order of Reference to the Office of Administrative Law Judges for hearing and seeking \$9,930.38 in back wages as relief for a U.S. worker not hired in violation of 20 C.F.R. § 655.135(d). The Administrative Law Judge (ALJ) denied motions for summary decision from both parties. After holding a hearing, the ALJ concluded that Three D gave preferential treatment in its "hiring practices" to H-2A workers and unlawfully rejected the employment of a U.S. worker applicant. The ALJ determined that the Administrator's assessment of a \$7,500 CMP was appropriate, but dismissed the Administrator's request for \$9,930.38 in back wages because the U.S. worker applicant was not willing and available to work on the job start date. Both parties appealed the ALJ's decision to the Administrative Review Board (ARB or Board). We hereby consolidate the petitions for review and affirm the ALJ's decision in part and vacate it in part.

BACKGROUND

Three D Farms is owned and managed by Douglas Lee and is located in North Carolina. Decision and Order (D. & O.) at 6, 12; Respondent's Exhibit (RX) 4 (Lee's Affidavit). In 2011, Three D hired H-2A workers for the position of agricultural equipment operator. D. & O. at 7. In 2012, Three D sought H-2A workers for the same work. *Id.* The 2012 contract period was set for March 29, 2012, through December 19, 2012. Administrator's Exhibit (AX) 17, 18. Specifically, on January 27, 2012, Three D filed a job order, "Agricultural and Food Processing Clearance Order" ETA Form 790, with the North Carolina Employment Security Commission (N.C. ESC) requesting six full-time workers for thirty-five hours per week. D. & O. at 2. On February 9, 2012, Three D filed an Application for Temporary Employment Certification (TEC) ETA Form 9142, requesting six H-2A employees. *Id.*

Because the work was the same, the minimum job requirements contained in the 2012 ETA job order were largely the same as those in the 2011 job order, but there were a few additional requirements: the ability "to lift and carry 60 pounds," a minimum three months experience operating 200 horsepower (HP) farm equipment, basic "literacy and mathematical"

¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2014); 8 U.S.C. § 1188(g)(2) (2000); 29 C.F.R. Part 501 (2018); 20 C.F.R. Part 655 Subpart B (2018).

abilities, and a “proper and current driver’s license” or its foreign equivalent to operate farm trucks on North Carolina highways. D. & O. at 3, 5, 26-27.

In early February 2012, the N.C. ESC referred three U.S. workers seeking employment to apply for the Three D job. D. & O. at 20. But Three D then required the U.S. workers to also complete a job application that inquired about work experiences that did not align with the minimum job requirements contained in the 2012 ETA job order. D. & O. at 2, 9, 16, 28. The Three D job application also inquired about: (1) a willingness to work “70 hours per week;” (2) the ability to lift 100 pounds; (3) possession of a North Carolina pesticide applicator license; (4) chemical ratio proficiency; (5) knowledge of soil conservation methods; (6) familiarity with local roads; and (7) spray, hay baler, planter, and other types of specialized experience. AX 12-14. Lee testified that the application was a generic form that Three D had used for many years for applicants and it was in use before Three D began utilizing the H-2A program. Hearing Transcript (Tr.) at 38.

Three D interviewed T.S., one of the referred U.S. workers, on February 6, 2016. D. & O. at 15, 28; RX 4. T.S. testified at his deposition that he had the requisite three months of 200 HP equipment experience, which is not disputed by Three D. RX 5 at 15. Lee testified he told Saunders that he would have to have a North Carolina license by the time work started in order to operate equipment on North Carolina roads. Tr. at 50-52; RX 4. T.S. testified that Lee had informed him that Three D only employed Mexicans. RX 5 at 31 (T.S. Deposition). Lee testified that he wanted to fill his 2012 H-2A job order with the same 2011 H-2A workers he had employed if possible, but also that he preferred to hire locally when qualified applicants were available because of the cost of the H-2A program. Tr. at 70.

In February 2012, Three D informed N.C. ESC in a handwritten note on a referral reply report that T.S. was “not hired at this time—may call in for a second interview.” AX 5. T.S. testified at his deposition that he was called a few days after his interview and asked questions about age and knowledge of local roads but was never given a hiring commitment from Three D. D. & O. at 21; RX 5.

On February 20, 2012, Three D’s office manager e-mailed Three D’s counsel concerning the recruitment season. The office manager’s e-mail stated:

[T.S.]—not hired at this time. Qualifications are good; has farming experience; just moved here from Montana—therefore he is not familiar with Johnston County roads; which if he was would be a big plus; since this is a job with little supervision and the need to move from farm to farms without supervision. One question on the application is about continuous heavy lifting (repeatedly 100 lbs.). His answer was AGED. Since job does not start until April / May; [T.S.] was not hired at this time; could call him back at a later time for 2nd interview and discuss the lifting issues and limitations that would apply to him. . . .

As for [T.S.], if at a later time before the hiring time is up, if we were to call him back and hire him for one of the positions would this cut down on the number of H2A workers that we would get. [T.S.] [sic] is a veteran and seems to be very knowledgeable about farming.

AX 7; Tr. at 65-69.

Three D interviewed the other two U.S. applicants: M.L. on February 10 and T.D. on February 16, 2012. RX 4. These referrals were marked “not qualified.” D. & O. at 20; AX 6, 11. In its February 21, 2012 Initial Recruitment Report, Three D indicated that it did not hire M.L. and T.D. for lack of experience with 200 HP equipment. D. & O. at 3. However, Lee marked on the February 21 recruitment report that a “hiring commitment” was given to T.S. D. & O. at 14; AX 15.

On March 20, 2012, the N.C. ESC modified Three D’s H-2A job order request from six H-2A workers to five. AX 18; Tr. at 54-56. On that same day, the National Processing Center certified Three D’s amended TEC form for five H-2A workers. D. & O. at 2. Three D hired the same H-2A workers it had employed from its 2011 job order, who all had three months of 200 HP equipment experience. D. & O. at 7.

On the day that the contract was to begin, March 29, 2012, Francisca Rios, of the N.C. ESC, followed up with T.S., who informed Rios that he had already taken another job at K-mart. Rios marked him as “not hired” and considered him not available to work for Three D. D. & O. at 19, 30; Tr. at 117-19.

After the WHD received a complaint about a Three D crew leader, it investigated Three D in 2013. D. & O. at 17. The WHD was unable to locate or interview two of the referred U.S. workers and thus it focused on T.S. who was available. *Id.*

On February 14, 2014, the Administrator issued the NOD that Three D Farms unlawfully gave preferential treatment to H-2A workers and unlawfully rejected U.S. workers for employment, assessing a \$7,500 CMP for its refusal to employ T.S. The WHD also seeks \$9,930.38 in back wages, based on \$9.70 per hour for thirty-five hours per week for 3/4 of the contract period, as relief for T.S. not being hired as a qualified U.S. worker in violation of 20 C.F.R. § 655.135(d). D. & O. at 17-18.

The ALJ issued a D. & O. holding that the job requirement of three months of 200 HP equipment experience in the 2012 job order was not a bona fide requirement because it capitalized on the training and work experience the H-2A workers gained during the 2011 H-2A contract period and thus unlawfully gave preferential treatment to H-2A workers in 2012. D. & O. at 27. Similarly, the ALJ concluded that because Three D did not require all of the H-2A workers to have a North Carolina driver’s license, it was not a bona fide job requirement as applied to T.S. in 2012. D. & O. at 27-28. The ALJ concluded that Three D’s changes to the job requirements in the 2012 job order and the U.S. worker job application constituted a discriminatory hiring practice favoring H-2A workers. D. & O. at 28. The ALJ determined that

the Administrator's assessment of a \$7,500 CMP for the violations of the H-2A employee protection provisions was appropriate, but decided that T.S. was not entitled to back wages because he was employed in another job at the time the contract began and failed to reapply for the agricultural equipment operator position. D. & O. at 30. Both parties appealed the ALJ's D. & O. to the ARB.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from ALJ decisions in cases under the INA's H-2A provisions. *See* 8 U.S.C.A. § 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). Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C. § 557(b) (1976).

DISCUSSION

A. H-2A Statutory and Regulatory Framework

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 Employers desiring to employ foreign labor must petition for H-2A visas to admit nonimmigrant agricultural workers into the United States. 8 U.S.C. §§ 1184(a), (c); 8 C.F.R. § 214.2(h)(5)(i)(A). The INA, as amended, authorizes the Secretary of Homeland Security to approve H-2A visa petitions, but before the Secretary of Homeland Security can do so, the petitioning employer must seek a certification from the Secretary of Labor that there are not enough U.S. workers who are "able, willing, . . . qualified" and available at the time and place needed to do the agricultural work for which the employer seeks to hire the H-2A workers. 8 U.S.C.A. §§ 1188(a)(1)(A), (b)(4); 20 C.F.R. § 655.100(a).³

The Secretary of Labor has delegated authority to issue or deny labor certifications under the H-2A program to the Department of Labor's Employment and Training Administration (ETA) which in turn delegated that authority to the ETA's Office of Foreign Labor Certification (OFLC). Secretary of Labor Order No. 06-2010, 75 Fed. Reg. 66,268 (Oct. 27, 2010); 29 C.F.R. § 501.1(b). The OFLC administers the certification process including employer obligations and assurances and employer recruitment programs. 20 C.F.R. Part 655 Subpart B.

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

³ 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).

As part of the Temporary Employment Certification, Department of Labor regulations require that an employer make assurances that it does not engage in discriminatory hiring practices and that it will not reject able, willing, and qualified U.S. workers who have applied, except for lawful, job-related reasons. 20 C.F.R. § 655.135. The H-2A implementing regulations prohibit employers from engaging in preferential treatment in hiring practices adverse to U.S. workers, including imposing different restrictions or minimum job requirements on U.S. workers that are not also imposed on H-2A workers. Specifically, 20 C.F.R. § 655.122(a), Prohibition against preferential treatment of aliens, provides the following:

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

Congress has authorized the Department of Labor to enforce the employee protection provisions of the H-2A program. 8 U.S.C. § 1188(g)(2). The Secretary of Labor has delegated responsibility for the enforcement of worker protections to the Administrator of the Wage and Hour Division. *See* 29 C.F.R. §§ 501.1(c), 501.17. The WHD is authorized to investigate, inspect, and enforce the provisions of the H-2A program including any U.S. worker improperly rejected for employment. 29 C.F.R. § 501.15. As part of this enforcement, the WHD can assess unpaid wages and impose sanctions in the form of civil monetary penalties. 29 C.F.R. §§ 501.16, 501.19.

B. Three D Gave Preferential Treatment to H-2A Workers

The ALJ found that Three D gave preferential treatment in its hiring practices to H-2A workers and unlawfully rejected U.S. workers for employment.

1. 200 HP Requirement

Three D rejected two U.S. worker applicants for not having three months of 200 HP equipment experience. The ALJ found that the 200 HP equipment experience requirement was not a bona fide requirement because it capitalized on the training and work experience the H-2A workers gained during the 2011 H-2A work contract period and thus unlawfully gave preferential treatment to the H-2A workers in 2012.

On appeal, Three D claims that the ALJ incorrectly concluded “that prior work experience gained by H-2A workers while working for the employer cannot be used to establis[h] eligibility for the [current or future] job opportunities, unless it can be established that it is impractical to train new employees.” D. & O. at 27. Three D asserts that the statute and regulations do not require that an H-2A employer show that it would be impractical to train new

employees before it re-hires qualified H-2A workers based upon updated job qualification requirements derived from the training and work experience the H-2A workers gained in a job with the H-2A employer in a prior year. Three D Brief at 4-5. According to Three D, the statute requires that the Administrator evaluate the job qualifications Three D required for the job to determine if they are consistent with the qualifications that employers of non-H-2A workers require in the same or comparable occupations and crops. *See* 8 U.S.C. § 1188(c)(3); Three D Brief at 4, 6.

Neither the statute nor the regulations support the ALJ's analysis. Nothing in the INA's provisions regarding temporary H-2A foreign nonimmigrant workers prohibit an employer from modifying its minimum job requirements from year to year.⁴ If the 200 HP equipment requirement became a new minimum job requirement, but Three D did not discriminate against U.S. workers in applying the new minimum job requirement, Three D did not violate the INA's H-2A provisions.⁵

2. North Carolina License Requirement

Lee testified that T.S. was not hired after his interview because he did not have a North Carolina license. D. & O. at 28. Lee asked the three U.S. workers referred to him about their familiarity of local North Carolina roads when they were interviewed and Lee preferred a North Carolina driver's license so that workers could safely drive on North Carolina roads. D. & O. at 12-13. On appeal, Three D claims that it was lawful to reject T.S. for not having a required North Carolina license because of its need for drivers to legally drive on North Carolina public roads. Three D Brief at 7-8.

But the ALJ points out that Lee testified that none of the four H-2A workers who worked in 2012 had a North Carolina driver's license when the work began in 2012. D. & O. at 27. Thus, the ALJ concluded that because Three D did not actually require all the H-2A workers to have a North Carolina driver's license, it was not a bona fide job requirement as applied to T.S. *Id.* The ALJ also noted that North Carolina does not require a driver's license to operate slow-moving farm equipment on North Carolina roads. *Id.* Furthermore, T.S. had three Montana licenses: regular, commercial, and a bus license, D. & O. at 20; RX 5, which would have allowed him to drive on the North Carolina roads at the time of the 2012 contract, *see* D. & O. at 5, 7-8; RX 5. The ALJ concluded that Three D's North Carolina license requirement amounted to preferential treatment in favor of H-2A workers. D. & O. at 28.

The ALJ was correct. Three D does not dispute that the H-2A workers did not have North Carolina driving licenses when they were hired. Three D's application of the North

⁴ The Administrative Law Judge apparently employed an analysis that the Department of Labor uses during the basic labor certification process for permanent employment of aliens in the United States, *see* 20 C.F.R. § 656.17(i)(3) (2018), in contrast to the standard applicable to the temporary H-2A foreign nonimmigrant workers at issue in this case.

⁵ In fact, because T.S., a U.S. worker, did have the requisite three months of 200 HP equipment experience, *see* D. & O. at 13, 20; RX 5, he was not rejected for the agricultural equipment operator position on that basis.

Carolina driver license requirement to T.S., who had three licenses and was able to drive on North Carolina highways, constituted an unlawful preference for H-2A workers.

3. Increased Lifting Requirements for U.S. Worker Applicants

The INA's H-2A provisions prohibit Three D from applying higher or more stringent working conditions on U.S. worker applicants. The job application at Three D was used for the three U.S. worker applicants and asked if the applicant could lift up to 100 pounds repeatedly, in contrast to the 2012 H-2A job order which only listed a required ability to lift and carry 60 pounds. D. & O. at 13. On February 20, 2012, Three D's office manager e-mailed Three D's counsel concerning the recruitment season and referred to questions from the job application given to the U.S. worker applicants as consideration for T.S.'s employment. AX-7; Tr. at 65-69. The ALJ concluded that this was a factor supporting the Administrator's determination of preferential treatment given to the H-2A workers. D. & O. at 28. We agree.

For the above reasons, the ALJ's conclusion that Three D gave preferential treatment to the H-2A workers is supported by the record. In further support of the ALJ's conclusion, Lee testified that he wanted to hire his previous H-2A employees for the job if possible. D. & O. at 14. T.S. stated that Lee told him that because he was a Caucasian, he would not be a good fit. D. & O. at 21; AX 4. WHD Investigators also stated that Three D considered that the U.S. workers indicated that they did not possess pesticide and soil conservation licenses on the job application, but determined that the H-2A workers also did not possess these licenses. Tr. at 84; D. & O. at 19. This evidence further supports the ALJ's conclusion that the H-2A workers were given preferential treatment through the use of different and more onerous considerations and job requirements for U.S. worker applicants.

C. The ALJ Erred in Deeming T.S. Not Willing and Available to Work

The ALJ concluded that the Administrator's request for \$9,930.38 in back wages for T.S. failed because T.S. was not "willing and available" to work at the time that the contract began in March 2012 because he had taken another job at K-Mart. D. & O. at 30.

The Administrator filed a cross-petition for review, objecting to the ALJ's rejection of backwages for T.S. The Administrator claims that the right to back wages begins at the time that the U.S. worker applicant is unlawfully rejected for employment and does not require that the U.S. worker be unemployed when the contract begins in order to be considered available to work. Administrator's Brief at 12-14. As such, the Administrator asserts that a U.S. worker may seek alternate employment and still qualify for make whole relief or back wages due to the unlawful rejection of the U.S. worker's application for employment. *Id.* at 14-15. The Administrator points out that T.S.'s job at K-Mart was part-time, paid less, did not offer benefits, and offered fewer hours than the job that he applied for at Three D Farms. *Id.* at 5. Thus, the Administrator posits that if T.S. had been offered the agricultural equipment operator job or a different job at Three D, he might have left his lower paying job at K-Mart. *Id.* at 13.

The Administrator notes that the statute's implementing regulations require employers, before hiring H-2A workers, to affirmatively hire U.S. workers during the recruitment period and

until fifty percent of the period of the work contract has elapsed. *Id.* at 15; 20 C.F.R. § 655.135(d). T.S. testified at his deposition that an individual at Three D called him a few days after his interview and asked him questions about age and knowledge of local roads, but he was never offered a job commitment. D. & O. at 21; RX 5. Lee confirmed that he never personally gave a hiring commitment to T.S. but relied upon his staff and attorney to do so. D. & O. at 14. But Three D does not assert that any other Three D staff contacted T.S. to offer him the job.⁶

When Rios, of the N.C. ESC, followed up with T.S. on the contract start date, March 29, 2012, T.S. informed her that he had already taken another job. So Rios marked T.S. down as “not hired” and therefore considered him to be not available to work at Three D. D. & O. at 19; Tr. at 117-19. Rios testified that she never received an initial recruitment form indicating that a “hiring commitment” was given to T.S. from Three D. D. & O. at 19. The ALJ relied upon Rios’s characterization in her testimony of the fact that T.S. had taken another job as indicating that he was not available to work to find T.S. not willing and available to work. We conclude that the ALJ erred in relying upon the testimony of Rios as a substitute for Three D’s obligations to affirmatively offer T.S. a job.

By not formally offering T.S. a job, Three D failed to comply with its affirmative obligation to hire able, willing, and qualified U.S. workers. Accordingly, we vacate the ALJ’s order denying back wages and order that Three D pay \$9,930.38 in back wages as relief for a U.S. worker not hired in violation of 20 C.F.R. § 655.135(d).

D. Civil Money Penalty

The ALJ also determined that the Administrator’s assessment of a \$7,500 CMP as well for the unlawful rejection of T.S.’s application as a qualified U.S. worker in violation of 20 CFR § 655.135(d) was not an abuse of discretion and appropriate under the facts of this case pursuant to 29 C.F.R. § 501.19. D. & O. at 2, 5, 18, 29-30. 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(f) (2013), at the time of the Administrator’s assessment, a CMP of \$15,000 per violation per worker could be assessed

⁶ We note that there is some confusion as to whether Lee changed his mind about employing T.S. or employing him in an alternate job position. D. & O. at 14; *see also* AX 7; Tr. at 50-56, 65-69. Lee marked on a February 21, 2012 initial recruitment form that a “hiring commitment” was given to T.S. D. & O. at 14; AX 15. Further, the number of H-2A workers sought was changed from six to five on March 20, 2012. D. & O. at 2; Tr. at 54-56; AX 18. Lee testified that he assumed his “hire” indication on the internal form would result in N.C. ESC sending T.S. back to Three D for further consideration or action. D. & O. at 14. Because neither Lee nor his staff affirmatively communicated any such intent to T.S., we affirm the ALJ’s holding that Three D rejected T.S.’s application for employment.

for improperly rejecting a qualified U.S. worker who is an applicant for employment in violation of 8 U.S.C. § 1188 and its implementing regulations.⁷ After a WHD investigator considered mitigating factors in calculating the amount of the CMP to be assessed, *see* 29 C.F.R. § 501.19(b); D. & O. at 18, the Administrator assessed a CMP of \$7,500. D. & O. at 18.

After properly considering the factors under 29 C.F.R. § 501.19(b) and the evidence in this case, the ALJ determined that the Administrator's assessment of a \$7,500 CMP was not an abuse of discretion and is appropriate under the facts in this case. D. & O. at 29-30. The ALJ's determination that the Administrator's assessment of a \$7,500 CMP is unchallenged by any party on appeal, unrebutted, and uncontroverted by any evidence of record. Therefore, we decline to disturb, and therefore affirm, the Administrator's calculations and decision with respect to the CMP because it is neither arbitrary nor does it evidence an abuse of discretion.

CONCLUSION

For the reasons discussed above, the ALJ's Decision and Order concluding that Three D unlawfully gave preferential treatment to H-2A workers in violation of the INA's H-2A provisions is **AFFIRMED**. But the ALJ's finding that T.S. was not willing and available to work at the time the contract began is **VACATED** and we hereby **ORDER** that Three D pay \$9,930.38 in back wages as relief for a U.S. worker not hired in violation of 20 C.F.R. § 655.135(d). Finally, the ALJ's approval of the Administrator's assessment of a \$7,500 civil money penalty is **AFFIRMED**.

SO ORDERED.

⁷ We note that beginning in 2016 and on an annual basis since then, 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(f) has been increased. In fact, at the time of issuance of the ALJ's decision and contrary to the ALJ's statement that a civil money penalty of \$15,000 per violation per worker could be assessed pursuant to 29 C.F.R. § 501.19(f), *see* D. & O. at 28, the amount of a civil money penalty per violation per worker that could be assessed pursuant to 29 C.F.R. § 501.19(f) had increased to \$16,312. *See* 29 C.F.R. § 501.19(f) (2017); 81 Fed. Reg. 43450 (July 1, 2016). Moreover, by the time of issuance of our decision in this case, the amount of a civil money penalty per violation per worker that can be assessed pursuant to 29 C.F.R. § 501.19(f) has increased to \$17,344. *See* 29 C.F.R. § 501.19(f) (2019); 84 Fed. Reg. 218 (Jan. 23, 2019).