



In the Matter of:

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

ARB CASE NO. 13-056

ALJ CASE NO. 2012-TNE-010

PROSECUTING PARTY,

DATE: November 6, 201

v.

5 STAR FORESTRY, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Quinn Philbin, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; U.S. Department of Labor, Office of Solicitor; Washington, District of Columbia

For the Respondent:

Erik H. Thorleifson, Esq.; Campbell & Bissell, PLLC, Spokane, Washington

Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge

FINAL DECISION AND ORDER ON CIVIL MONEY PENALTY

This case arises under the employee protection provisions of the Immigration and Nationality Act (INA) H-2B temporary nonagricultural worker program, 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations promulgated under 20

C.F.R. Part 655, subpart A.¹ The Administrator issued a Notice of Determination on March 23, 2012, charging Respondent 5 Star Forestry, LLC, (5 Star) with several violations based on 5 Star's H-2B visa application. The Administrator initially assessed back wages and civil monetary penalties (CMPs) covering a number of separate violations of the H-2B regulations. 5 Star paid the back wages and stipulated that five of the charged violations occurred. The parties disputed only the *amount* of civil monetary penalties the Administrator assessed and submitted these determinations to a Department of Labor (DOL) Administrative Law Judge (ALJ) for review. The ALJ significantly lowered the total amount of civil money penalties originally assessed by the Administrator. 5 Star's appeal to the Administrative Review Board (ARB) challenges the ALJ's determination only in part, for the limited purpose of determining whether the ALJ correctly held that the Administrator properly assessed civil money penalties against 5 Star for four separate violations of 20 C.F.R. § 655.60(b) for having failed to identify on its Application for Temporary Employment Certification (TEC) the four different locations where 5 Star ultimately placed its H-2B visa workers. For the reasons that follow, we affirm the ALJ's ruling.

BACKGROUND

On its Temporary Employment Certification (TEC), 5 Star requested approval for 63 H-2B workers and attested that the work would be performed in Jones, Jefferson Davis, and Forrest Counties, Mississippi. Decision and Order (D. & O.) at 6. 5 Star further certified that no H-2B workers would work in other locations. ATX-1, at 4, 8; D. & O. at 13. 5 Star also made several attestations concerning 40-hour work weeks and the wages that it would pay the H-2B workers. The DOL approved sixty-three H-2B workers.

5 Star admitted that none of its H-2B workers ever performed work in Mississippi. Instead, workers were sent to Idaho County, Idaho; Clearwater County, Idaho; Flathead County, Montana; and Stevens County, Washington. D. & O. at 6. Only eight workers worked 40-hour weeks for the duration. Workers were paid less than the attested amount of \$13.27 per hour. *Id.* at 10.

On March 23, 2012, the Administrator issued a Summary of Violations assessing \$20,809.89 in back wages and \$56,000 in civil money penalties covering six separate violations. *Id.* at 1. 5 Star objected and requested a hearing. Prior to hearing, the Administrator dismissed one violation and reduced its assessed penalties to \$46,000. 5 Star agreed to pay the back wages and stipulated to all of the violations. The only remaining dispute before the ALJ concerned the *amount* of the penalties. *Id.* The ALJ reduced the total penalties to \$32,000.

¹ As noted at footnote 4, *infra*, the H-2B regulations at 20 C.F.R. Part 655, subpart A, applicable to this case are those in effect prior to the Department of Labor's update of the regulations in 2012.

Although the ALJ's decision addressed the appropriateness of all of the CMPs the Administrator assessed, 5 Star's appeal to the ARB is limited to the CMPs attached to workplace location violations.² Because 5 Star assigned the H-2B workers to work in four unauthorized locations in Montana, Idaho, and Washington, the Administrator assessed \$5,000 in penalties for each of the four outside locations, totaling \$20,000. The ALJ however concluded that the Administrator's assessment was excessive and reduced the penalty from \$20,000 to \$12,000—\$3,000 for each location.

The only issue before the ARB is whether the ALJ properly charged 5 Star with four separate H-2B violations of 20 C.F.R. § 655.60(b) for placing H-2B workers in four different locations not identified on its TEC.

JURISDICTION AND STANDARD OF REVIEW

The ARB is authorized to review appeals under the H-2B program.³ It has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), (14), and 20 C.F.R. § 655.76(c) (2009).⁴

DISCUSSION

The H-2B visa program provides for the admission of nonimmigrants to the United States to perform temporary nonagricultural labor or services. 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b). Such workers may be granted these temporary work visas when not enough workers in this

² Violation 5 (violation 6 in the March 23, 2012 Administrator's determination): "The Administrator assessed a \$20,000 penalty for Respondent's substantial failure to meet a condition on the TEC regarding the location of intended employment of H-2B workers, in violation of 20 C.F.R. § 655.60(b)." D. & O. at 13.

³ See Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA). See also 5 U.S.C.A. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule . . .").

⁴ DOL has provided notice of the continuing effectiveness of the 2008 H-2B rule, which consists of the regulations governing DOL's role in the H-2B temporary worker program. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 28,764, 28,765 (May 16, 2012). Thus, the 2008 H-2B rule regulations found at 20 C.F.R. Part 655, subpart A (2009), which became effective on January 18, 2009, see 73 Fed. Reg. 78,020 (Dec. 19, 2008), apply to this case. See also D. & O. at n.1.

country are able, willing, qualified, and available to perform these services. *Id.*; see 20 C.F.R. Part 655, subpart A. Employers who wish to employ H-2B workers submit a labor petition for H-2B visas that will admit these workers to the United States. 8 U.S.C.A. § 1184(c)(1). The Administrator has been delegated enforcement responsibility for ensuring that H-2B workers are employed in compliance with the statutory and regulatory labor certification requirements. 8 U.S.C.A. §§ 1184(c)(14)(A)-(B), 1103(a)(6). This includes the power to impose administrative remedies, including civil money penalties, on violators of the H-2B visa program. *Id.* §§ 1184(c)(14)(A)(i) and (B). Under 8 U.S.C.A. § 1184(c)(14)(A)(i), “civil money penalties in an amount not to exceed \$10,000 per violation” “may” be imposed for a “substantial failure to meet any of the conditions” of an H-2B petition or “a willful misrepresentation of a material fact in such petition.” The applicable implementing regulations are set forth in 20 C.F.R. Part 655.

As with all the nonimmigrant worker statutes, there are several LCA and attestation requirements found in Part 655. In this case, the parties stipulated to the Administrator’s violations. This appeal involves only one of the penalties the Administrator assessed concerning 5 Star’s failure to meet a condition on the TEC regarding the location of intended employment of its H-2B workers. As explained above, the ALJ lowered the amount of the assessed CMP from \$20,000 to \$12,000 but upheld the Administrator’s authority to assess separate violations for each different location where an H-2B worker was improperly placed.

The Administrator may assess a civil money penalty for each violation of the work contract or regulations. 8 U.S.C.A. §§ 1184(c)(14)(A)(i); 20 C.F.R. § 655.65(a)-(c). In determining the penalty, the Administrator “shall consider the type of violation committed and other relevant factors.” 20 C.F.R. § 655.65(g). “[T]he highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.” 8 U.S.C.A. § 1184(c)(14)(C); 20 C.F.R. § 655.65(g). Civil money penalties for H-2B violations are not to exceed \$10,000 per violation. 8 U.S.C.A. § 1184(c)(14)(A)(i); 20 C.F.R. § 655.65(a)-(c).

After the Administrator assesses civil money penalties, a party may seek an ALJ’s review of the assessment. 20 C.F.R. § 655.71(a). The ALJ “may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator,” with the “reason or reasons for such order” to be stated in the decision. *Id.* § 655.75(b).

The sole issue on appeal is whether 5 Star’s placement of its H-2B workers at multiple locations constitutes one violation of 20 C.F.R. § 655.60(b) as 5 Star argues, or four violations as the Administrator determined. Resolution of this issue is dependent upon interpretation of 20 C.F.R. § 655.60(b) in conjunction with 20 C.F.R. § 655.22(l), which together require, as a condition of the operative labor certification application, that the employer not place the workers “outside the area of intended employment listed on the Application for Temporary Employment Certification unless the employer has obtained a new temporary labor certification from the Department.”

5 Star disputes the ALJ's rationale that the \$12,000 penalty was permissible because there were four separate locations. It claims that the violation is only one violation despite the fact that H-2B workers were placed in multiple unauthorized locations. 5 Star claimed that workers were not able to work in Mississippi because of inclement weather and a unilateral revocation of a contract. D. & O. at 6.

The Administrator argues in response to 5 Star's petition that it is DOL policy to find a violation for each of the locations because employers have a responsibility to ensure that there are no U.S. workers adversely affected for each of the locations and U.S. workers could have been displaced in each of the different undisclosed locations. Principal Deputy Administrator's Amended Brief (Admin. Br.) at 8. The Administrator reasoned that without a separate penalty for each location, the employer would have an incentive to manipulate the location rules. *Id.* at 8-9. Having a violation per location is a necessary deterrent. The ALJ agreed with the Administrator's rationale for assessing four separate violations but ultimately reduced the amount of each violation.⁵

We affirm the ALJ's holding that 5 Star's placement of workers outside the area of intended employment listed on the TEC application in the absence of obtaining a new temporary labor certification constitutes four violations: one for each of the locations the H-2B workers actually worked. 5 Star does not cite any law to the contrary other than the regulation permitting the "Administrator [to] assess civil money penalties in an amount not to exceed \$10,000 *per violation*" and suggesting that the regulation authorizes a maximum of \$10,000 total for violations pertaining to intended location. 20 C.F.R. § 655.65(c).

Neither the H-2B statutory provisions nor the implementing regulations explicitly address the issue of whether a separate penalty may be assessed for unauthorized placement of H-2B workers at multiple locations. Nevertheless, as the Administrator argued, WHD's policy is directly tied to the statutory and regulatory policy of avoiding the displacement of U.S. workers at the work location.

Under 8 C.F.R. § 214.2(h)(6)(iii), the DOL is required to advise the Department of Homeland Security (DHS) of the following:

Whether or not United States workers capable of performing the temporary services of labor are available and whether or not the

⁵ See 20 C.F.R. § 655.65(g). The ALJ found that 5 Star's failure to accurately identify the work locations on its TEC was a substantial violation and therefore willful but that mitigating factors were present. D. & O. at 14. The ALJ observed that the total amount of the back wages was approximately \$20,000 and it would be disproportionate to award \$20,000 in penalties for these violations. Further, the ALJ noted that there was no history of past violations and that 5 Star was committed to future compliance. *Id.* at 15. The ALJ considered 5 Star's reason for the location switch to be plausible and that there was no substantial evidence that 5 Star gained financially from the location change.

alien's employment will affect the wages and working conditions of similarly employed United States workers.

DOL can so advise DHS only if the employer accurately names each place of employment and conducts the necessary recruitment measures to confirm the absence of domestic workers in each location. When applying for temporary employment certification, Department regulations require H-2B employers to abide by certain well-delineated conditions including the following:

The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the Application for Temporary Employment Certification unless the employer has obtained a new temporary labor certification from the Department.

20 C.F.R. § 655.22(l) (2009).

To ensure the unavailability of qualified U.S. workers in the area of intended employment, the regulations also require the employer to conduct recruitment activities as specified in 20 C.F.R. § 655.15 and § 655.17, including advertising in a newspaper serving the area of intended employment, notifying the local union if the employer is a party to a collective bargaining agreement covering the intended occupation, determining the prevailing wage, and preparing a recruitment report. 20 C.F.R. § 655.22(c).

5 Star failed to undertake any of these recruitment measures at each of the four different locations where it placed its H-2B workers. Consequently, no assessment of the impact of H-2B employment on U.S. workers was conducted at any location. These failures constitute four substantive deviations from the H-2B regulations. The Administrator reasoned that “[t]he Department employs this approach because, for each location, the employer has failed to conduct the recruitment and hiring efforts necessary to ensure that there are no workers in the U.S. available to perform the work. By holding employers financially accountable for each location (rather than assessing a single violation regardless of the number of unidentified employment areas), the policy also intends to diminish employers’ motivation to commit multiple employment area violations.” Admin. Resp. Br. at 8. The ALJ agreed with the Administrator’s reasoning (D. & O. at 13, 15). The ARB agrees as well. This interpretation of the regulation advances the INA’s goals to protect both domestic and foreign workers by assuring proper enforcement of the INA’s H-2B provisions.

CONCLUSION

The ALJ's March 19, 2013 Decision and Order Assessing Civil Money Penalties is **AFFIRMED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge