ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of:	*	
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ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,	*	
	*	
Complainant,	*	ALJ CASE NO. 2019-TAE-00002
	*	
v.	*	
	*	
AZZANO FARMS, INC., and WASHINGTON FARM LABOR ASSOCIATION (aka WAFLA),	*	
	*	
Respondents.	*	

ADMINISTRATOR'S PETITION FOR REVIEW

Pursuant to 29 C.F.R. 501.42, the Administrator ("Administrator") of the Wage and Hour Division ("WHD") of the Department of Labor ("Department") files this Petition for Review of Administrative Law Judge ("ALJ") Christopher Larsen's October 2, 2019 Decision and Order in ALJ Case No. 2019-TAE-00002 ("D&O") (attached). The D&O arises out of a WHD investigation of Respondents' compliance with the terms and conditions of employment under the Immigration and Nationality Act's ("INA") H-2A program. *See* 8 U.S.C. 1188; 20 C.F.R. pt. 655, subpt. B; 29 C.F.R. pt. 501. As detailed below, the ALJ erred in reversing the Administrator's assessment of civil money penalties ("CMPs") against Respondents Washington Farm Labor Association ("WAFLA") and Azzano Farms, Inc., ("Azzano Farms") for violations of the H-2A program's requirements.

ISSUES

1. Whether the ALJ erred by concluding that WAFLA is not a joint employer under the H-2A program despite the fact that WAFLA voluntarily elected to a file a Master Application as a joint employer and accepted the benefits that the H-2A statute and regulations reserve solely for associations that file Master Applications as joint employers.

2. Whether the ALJ erred by failing to assess CMPs up to the regulatory maximum amount against both WAFLA and Azzano Farms for each violation of the terms and conditions of H-2A employment.

BACKGROUND

1. WAFLA is an agricultural association of over 500 agricultural and seasonal employers in the Pacific Northwest that guarantees a labor supply to its members through the INA's H-2A and H-2B temporary worker programs. For the 2017 fruit harvesting season, WAFLA filed a Master Application for an H-2A temporary labor certification to hire 37 H-2A workers as a joint employer with five member farms, including Azzano Farms. On the Master Application, WAFLA designated all of the terms and conditions of employment for all 37 workers to be hired under the application, including job duties, rates of pay, work schedules, and travel and housing arrangements. WAFLA identified itself as a joint employer, listed its account executive as the point of contact, listed its name and address as the "Employer" along with its five member farms, and signed the "Employer Declaration" accompanying the Master Application, attesting to comply with all terms and conditions of employment required of an employer under the H-2A program.

The Department issued a temporary labor certification to WAFLA based on its assurances on the Master Application as a joint employer. Pursuant to that certification, WAFLA advertised for and recruited domestic and H-2A workers, assisted H-2A workers in obtaining visas, designated the specific worksites for each worker, arranged and reimbursed travel for H-2A workers to the State of Washington, and controlled the workers' manner and means of work. In conducting all of these activities, WAFLA enjoyed the benefits of receiving a labor certification under a Master Application, and held itself out to be a joint employer.

2. In 2017, WHD conducted an investigation of Respondents' compliance with the H-2A program's requirements. WHD determined that Respondents had violated several terms and conditions of employment related to worker health and safety, recruitment, disclosures, and cooperation with the investigation. WHD assessed CMPs against each Respondent for each violation, factoring mitigating circumstances into the assessments where warranted.

3. Respondents appealed WHD's determination to the Office of Administrative Law Judges. After a hearing, the ALJ reversed WHD's imposition of all CMPs against WAFLA for two reasons. First, the ALJ concluded that, under the common law of agency, WAFLA is not a "joint employer" of Azzano Farms' workers for purposes of the alleged violations, despite WAFLA's election to file a Master Application as a joint employer with its members (including Azzano Farms). Second, in the alternative, the ALJ concluded that the imposition of CMPs against both WAFLA and Azzano Farms would exceed the regulatory maximum CMP "per violation." The ALJ also reversed two CMPs cited against Azzano Farms as improper, finding that Azzano Farms satisfied the regulatory requirements related to transportation safety and the workers' rights poster.

ARGUMENT

I. The ALJ erred by concluding that WAFLA is not a joint employer under the H-2A program despite the fact that it voluntarily elected to file a Master Application as a joint employer and accepted the benefits of that election.

1. The H-2A statute and regulations permit an association to file a Master Application for temporary labor certification benefiting multiple association members, provided that the association is a joint employer of the workers hired under that labor certification. See 8 U.S.C. 1188(d)(2) (where association is a sole or joint employer, labor certification granted to association may be used by association members and workers may be transferred among members for certified job opportunities); 20 C.F.R. 655.103(b) (a "Master Application" is an application for H-2A temporary labor certification "filed by an association of agricultural producers as a joint employer with its employer-members"); 655.131(b) ("The master application is available only when the association is filing as a joint employer.").

An association's self-designation as a joint employer on a Master Application is much more significant than simply "check[ing] the boxes." D&O at 4-5 n.4. In addition to permitting associations the authority to transfer workers among their members, a power neither the statute nor regulations afford other H-2A employers, Master Applications and their resulting labor certifications provide associations and their members various other benefits and efficiencies, including streamlined filing, recruitment, and advertising. *Id*.; *see* 20 C.F.R. 655.121(a)(2) (single job order for multiple association members permitted if placed in connection with a future Master Application "filed by association of agricultural employers *as a joint employer*") (emphasis added); 655.130(d) (association may only sign application on behalf of its members if filing a Master Application "*as a joint employer*") (emphasis added); 655.152(a) (single

advertisement requirement for all job opportunities under Master Applications). In exchange for these benefits, the statute and regulations repeatedly and unequivocally require that an association filing a Master Application must do so as a joint employer of the workers hired under any resulting labor certification, with all of the attendant compliance obligations of joint employment. *Id*.

Should an association prefer *not* to accept the obligations of joint employment, it may choose instead to file applications on behalf of its members as an agent, thus limiting its obligations and liability. *See* 8 U.S.C. 1188(d)(1) ("Permitting filing by agricultural associations"); 20 C.F.R. 655.103(b) (permitting agricultural associations to "act as the agent of an employer, or [as] the sole or joint employer of any worker subject to 8 U.S.C. 1188"); 655.131(a) (association-as-agent application filing requirements). However, "so there is no doubt as to whether the association is subject to the obligations of an agent or an employer," an association must indicate on the application in which capacity it is filing. Preamble to Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6917 (Feb. 12, 2010) ("2010 Final Rule").

2. Here, WAFLA is a joint employer under the H-2A program because it voluntarily elected to file a Master Application as a joint employer with Azzano Farms (and four other members), specified the terms and conditions of employment on the application, identified itself as a joint employer on the application, signed the Employer Declaration without qualification, and agreed to comply with all terms and conditions of H-2A employment. Based on WAFLA's representations and agreements, the Department granted WAFLA a temporary labor certification as a joint employer of any workers hired under that labor certification. WAFLA thereafter

advertised for and recruited domestic and H-2A workers, assisted with visa processing, and arranged and reimbursed travel to Washington. WAFLA held itself out to be a joint employer while performing all of these activities, in exchange for the benefits afforded by the statute and regulations solely to joint employers under Master Applications and resulting labor certifications.

Moreover, WAFLA is estopped from now disclaiming joint employer status, having voluntarily declared itself to be a joint employer in order to accept all of the benefits afforded joint employers under the H-2A statute and regulations. This Board has long held that entities that voluntarily subject themselves to the requirements of the INA's temporary worker programs and accept the benefits available to employers under those programs, as WAFLA did here, are estopped from thereafter disclaiming employer status for purposes of compliance. *See*, *e.g.*, *WHD v. Dallas VA Med. Ctr.*, ARB Nos. 01-077, 01-081, 2003 WL 22495991, at *3-4 (ARB Oct. 30, 2003) (concluding that entity that "secured all the benefits available to an employer under the [INA's] H-1B program . . . is estopped from subsequently denying that it is an employer" for purposes of enforcement (citing *WHD v. Alden Mgmt.*, ARB Nos. 00-020, 00-021, slip op. at 9 (ARB Aug. 30, 2002) (entity that attained the benefits available to a "facility" under the INA's H-1A program cannot contest its status as a "facility" for purposes of liability)). Had WAFLA preferred to avoid the obligations of an employer, it could have filed applications on behalf of its members in the role of an agent. It chose instead to file a Master Application as a joint employer and enjoy the benefits of that election, but now seeks the protections afforded an agent. The H-2A statute and regulations, and this Board's longstanding precedent, clearly prohibit such a result.

The ALJ thus erred in ignoring WAFLA's status as a joint employer under the statute and regulations, dismissing WAFLA's election to file a Master Application as a joint employer as simply "check[ing] the boxes" at the direction of the Department, D&O at 4-5 n.4, and concluding instead that, under the common law of agency, WAFLA is a not joint employer for purposes of the violations here.[1] Accordingly, the ALJ's decision must be reversed.

II. The ALJ erred by reversing WHD's assessment of CMPs up to the regulatory maximum against both WAFLA and Azzano Farms for each violation of the terms and conditions of H-2A employment.

The H-2A statute confers broad authority on the Department to "impos[e] appropriate penalties . . . as may be necessary to assure employer compliance with terms and conditions of [H-2A employment]." 8 U.S.C. 1188(g)(2). Under this broad authority, the Department's H-2A regulations provide that WHD may assess CMPs up to a regulatory maximum amount per violation of the program's requirements, taking into account certain mitigating factors where appropriate. *See* 29 C.F.R. 501.19.

Here, the ALJ erred in reversing WHD's assessment of CMPs against both WAFLA and Azzano Farms for each violation of the H-2A program's requirements. Azzano Farms and WAFLA were each responsible for complying with all of the terms and conditions of H-2A employment. Each failed to do so, violating several requirements related to worker safety, health, disclosures, recruitment, and cooperation with investigations. Accordingly, WHD appropriately assessed the maximum CMPs available against both WAFLA and Azzano Farms

[1] Even if the common law of agency does control WAFLA's status as a joint employer, the above undisputed facts demonstrate that WAFLA had sufficient definitional indicia of employment to be considered an employer of the H-2A and corresponding workers located at Azzano Farms.

for each violation of those requirements, taking into account appropriate mitigating factors where warranted. The statute and regulations clearly permit such assessments, and the ALJ erred in reversing these assessments. *See*, *e.g.*, 29 C.F.R. 501.19(a) ("*Each failure* to pay an individual worker properly or to honor the terms or conditions of a worker's employment . . . constitutes a separate violation.") (emphasis added); 501.19(b) (factors to be considered in determining level of CMP clearly contemplate each joint employer's conduct).

Moreover, for CMPs to effectively deter violations and strengthen worker protections in the context of joint employment under Master Applications in the H-2A program, *see* Preamble to 2010 Final Rule, 75 Fed. Reg. at 6944, WHD must hold all joint employers accountable for failure to comply with the terms and conditions of H-2A employment. Doing so is consistent with the obligations that the joint employer assumes under the statute and regulations in return for the benefits it derives from filing a Master Application. The ALJ's flawed decision to the contrary thus undermines WHD's authority to assure compliance with the H-2A program's requirements in the context of joint employment under Master Applications, and must therefore be reversed.

CONCLUSION

The ALJ erred in reversing the Administrator's assessment of CMPs against both WAFLA and Azzano Farms as joint employers for their failure to comply with the H-2A program's requirements. The ALJ's decision permits associations such as WAFLA to enjoy only the benefits and shirk the responsibilities of joint employment, and undermines the Department's authority to effectively administer and enforce the H-2A program. Accordingly, the Administrator requests that the Board grant this Petition for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I served the foregoing Administrator's Petition for Review on the following by sending a copy via first-class mail to:

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