ARB No. 2020-0013

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

ADMINISTRATOR, WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Petitioner,

v.

AZZANO FARMS, INC., and WASHINGTON FARM LABOR ASSOCIATION (aka WAFLA), Respondents.

On Appeal from the
Office of Administrative Law Judges
ALJ No. 2019-TAE-0002

ADMINISTRATOR'S REPLY BRIEF

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In her Brief in Support of Petition for Review ("Brief"), the Administrator ("Administrator") of the Department of Labor's ("Department") Wage and Hour Division ("WHD") demonstrated that the Administrative Law Judge ("ALJ") erred in concluding that WAFLA is not a joint employer under the H-2A program despite WAFLA's voluntary election to a file a Master Application as a joint employer and acceptance of the benefits that the H-2A statute and regulations

reserve solely for joint employer associations. The H-2A statute, regulations, and Board precedent make clear that associations that elect to file Master Applications are joint employers under the H-2A program as a matter of law, regardless of the common law criteria for employment and, having accepted the benefits of that election, are estopped from disclaiming joint employer status for purposes of compliance. *See, e.g.*, 8 U.S.C. 1188(d)(2); 20 C.F.R. 655.131(b); *WHD v. Alden Mgmt. Servs., Inc.,* ARB Nos. 00-020, 00-021, ALJ No. 96-ARN-3 (ARB Aug. 30, 2002); *WHD v. Native Techs., Inc.*, ARB No. 98-034, 1999 WL 377285 (ARB May 28, 1999).

The Administrator also demonstrated that the ALJ erred in reversing WHD's assessment of civil money penalties ("CMPs") against both WAFLA and Azzano Farms for their failure to comply with the H-2A program's housing and poster requirements. The statute and regulations permit the assessment of CMPs against each joint employer up to the regulatory maximum amount for each violation, *see* 8 U.S.C. 1188(g)(2); 29 C.F.R. 501.19(a), and such assessments are necessary to deter future violations and strengthen worker protections in the context of Master Applications. Pursuant to this authority, the Administrator appropriately assessed CMPs against both WAFLA and Azzano Farms for their failure to comply with the housing standards and poster requirements.

In their Response Brief, Respondents do not address the statutory and regulatory provisions governing WAFLA's status and liability as a joint employer under a Master Application. Instead, among other allegations, Respondents argue that WAFLA is not a joint employer under the common law of agency, and that WAFLA cannot be estopped from disclaiming its joint employer status because it allegedly receives no benefit from filing Master Applications. Respondents' arguments are wholly without merit. The following points in particular warrant a reply.

A. WAFLA is a joint employer under the H-2A program because it filed a Master Application as a joint employer, regardless of whether it satisfies the common law criteria for an employer.

As detailed in the Administrator's Brief, the H-2A statute and regulations permit an association to receive a temporary labor certification as a joint employer pursuant to a Master Application, which confers on the association and its members various benefits and efficiencies not otherwise afforded employers under the H-2A program. *See* Br. 11-12. In exchange for these benefits, the statute and regulations repeatedly and unequivocally require that an association filing a Master Application and receiving the resulting labor certification must do so as a joint employer with its members, accepting all of the attendant obligations of joint employment. *Id*. 13-14. Pursuant to these authorities, WAFLA is a joint employer under the H-2A program as a matter of law because it voluntarily elected to file a

Master Application as a joint employer with Azzano Farms and four other members, regardless of whether it satisfies the common law criteria for an employer. *Id*. 14-16.

In their Response Brief, Respondents do not refute or even address the statutory and regulatory provisions that clearly establish that associations such as WAFLA that file Master Applications are joint employers with their employer members, regardless of whether they satisfy the common law test for employment. Indeed, Respondents only acknowledge that WAFLA filed a Master Application as a joint employer on two pages, in order to dispute that WAFLA received any benefits by doing so. *See* Resp. Br. 16-17. Instead, Respondents argue at length that WAFLA is not a joint employer because it does not satisfy the definition of "employer" under the common law of agency. *Id*. 1-8.[1]

Respondents' only support for their argument that the common law controls based on the text of the regulations is their reliance on the H-2A regulations that define "employer" and "joint employment." *See* Resp. Br. 4-8. This reasoning

[1] As noted in the Administrator's Brief, even if an employment relationship were required, the record demonstrates that WAFLA had sufficient indicia of employment to be considered an employer. *See* Br. 20 n.2. In their response, Respondents attempt to distance WAFLA from the activities it conducted to recruit, hire, and transport the workers, *see* Resp. Br. 8, 12, 17, despite the ALJ's attribution of these activities to WAFLA. *See* D&O 3-5 (describing WAFLA's role in filing the application and in the recruitment and transportation of the workers).

ignores that the regulations explicitly provide that an association that files a Master Application is necessarily a joint employer under the resulting labor certification. *See, e.g.*, 20 C.F.R. 655.103(b) (defining "Master Application" as an application for H-2A temporary labor certification "filed by an association of agricultural producers *as a joint employer* with its employer-members" (emphasis added)); 20 C.F.R. 655.131(b) ("The master application is available only when the association is filing *as a joint employer*." (emphasis added)). The regulatory definitions of "employer" and "joint employment," applying the common law of agency, instead are relevant for other purposes. For example, the Board applied the common law test to determine whether an H-2A employer jointly employed a group of non-H2A workers that appeared only on another company's payroll. *See WHD v. Seasonal Ag Servs., Inc.*, ARB No. 15-023, 2016 WL 5887688, at *5-8 (ARB Sept. 30, 2016). But these generally applicable regulations do not apply here, given the regulatory provisions that specifically address the role of associations under Master Applications as joint employers. *Cf. Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228–29 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." (internal quotation marks omitted)).

Respondents' arguments based on caselaw are also unpersuasive. Respondents cite to and rely on two decisions in which the courts applied the

common law of agency to determine whether an entity was a joint employer under the H-2A program. *See* Resp. Br. 2-7 (citing *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 898 F.3d 1110 (11th Cir. 2018) (*Garcia II*) and *Seasonal Ag*, 2016 WL 5887688). But neither of these decisions purport to address the question at issue here, i.e., whether an association that files a Master Application as a joint employer is a joint employer regardless of the common law of agency. Respondents make a bare assertion that the facts in *Garcia II* are similar to the facts of this case, despite the obvious distinction that WAFLA here filed a Master Application as a joint employer and the grower in *Garcia II* did not. Moreover, Respondents offer no explanation as to how these cases could control over the clear statutory and regulatory requirements outlined in the Administrator's Brief that demonstrate that WAFLA is a joint employer as a matter of law because it filed a Master Application as a joint employer.

Respondents also attempt to diminish the relevance of the cases cited by the Administrator that in fact demonstrate that WAFLA is a joint employer as a matter of law. *See* Resp. Br. 8-13 (discussing *Little v. Solis*, 297 F.R.D. 474 (D. Nev. Jan. 27, 2014); *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055 (E.D. Wash. June 7, 2013); *Martinez-Bautista v. D & S Produce*, 447 F. Supp. 2d 954 (E.D. Ark. Aug. 25, 2006); and *Native Techs., Inc.*, 1999 WL 377285).

Respondents first argue that *Native Technologies,* decided under the H-1B program, is distinguishable because the Department's H-1B regulations do not define "employer" or "joint employment," unlike the Department's H-2A regulations. *Id.* 9-10. As Respondents concede, however, the Board in *Native Technologies* did not even note the lack of a Departmental regulation defining "employer" in its decision, *see* Resp. Br. 9, and there is no indication in the Board's decision that it would have decided the matter differently had the Department's regulations included one. Instead, the critical inquiry was whether the entity had applied and petitioned to hire foreign workers as an "employer" as required by the controlling statute and regulations. *See Native Techs.*, 1999 WL 377285, at *6. Specifically, the Board noted that the statute governing the H-1B program requires that an "employer" file a labor condition application with the Department and then to file a petition with the Department of Homeland Security ("DHS") for the ability to hire the worker. *Id*. The Board also looked to DHS's regulations implementing the H-1B program that "[view] the entity which files a Labor Condition Application with DOL and an I-129 petition with the INS for the purpose of obtaining a foreign worker [as] the H-1B *employer*" of the worker. *Id.* In light of these statutory and regulatory requirements, the Board concluded that the entity that had applied and petitioned for the worker was the "employer" by "operation of law." *Id.* As the Board explained, "if [the entity] had not

represented that it would employ [the worker] for the period stated on the LCA, [the worker] would not have been permitted to enter the country on the H-1B visa." *Id*.

Native Technologies therefore supports, rather than calls into question, the Administrator's position in this case. Here, as in *Native Technologies*, the INA provisions governing the H-2A program require that petitions and applications for labor certification be filed by "employers," and more specifically, that Master Applications be filed by associations as "joint employers." 8 U.S.C. 1184(c)(1), 1188(a), (d)(2). Likewise, the governing implementing regulations, as in *Native Technologies*, view the association filing a Master Application as a joint employer. *See, e.g.*, 20 C.F.R. 655.103(b) (definition of Master Application requiring association to file as a joint employer); 655.131(b) (permitting an association to file a Master Application "only when the association is filing as a joint employer"). Pursuant to these authorities, WAFLA filed a Master Application for and received a temporary labor certification as a joint employer; had WAFLA *not* represented that it would jointly employ the workers, it would not have been granted a temporary labor certification with its members. Thus, like the employer in *Native Technologies*, WAFLA is a joint employer of the workers hired under that labor certification by operation of law.

Respondents next attempt to distinguish the "H-2A-related cases" cited by the Administrator because, it argues, these cases addressed distinct legal issues. *See* Resp. Br. 10-13. While these cases ultimately addressed the relevant entity's status as an employer under different legal frameworks, they all support the conclusion that an association that files a Master Application as a joint employer is a joint employer under the H-2A program as a matter of law. Specifically, in *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055 (E.D. Wash. June 7, 2013), the court examined whether an association that had filed a Master Application was a joint employer under the Fair Labor Standards Act ("FLSA"). The plaintiffs in *Ruiz* urged the court to consider the association's status as joint employer under the H-2A program to be dispositive of its joint employer status under the FLSA. *Id.* at 1072. In support of this argument, the plaintiffs cited to the Fifth Circuit's decision in *Salazar–Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985).

In *Salazar-Calderon*, decided under the H-2A's predecessor H-2 program, the Fifth Circuit held that an association that filed a petition on behalf of its members to hire foreign workers was a joint employer of the workers hired under the petition. *Salazar-Calderon*, 765 F.2d at 1344. In reaching this holding, the Fifth Circuit noted that the association "cannot seriously challenge [the district court's finding of joint employer status] since it repeatedly represented itself to be

the plaintiffs' employer when applying to the INS for the H–2 visas." *Id.* at 1346. The Fifth Circuit further noted that, as here, the association's "employer status was necessary to obtain the H–2 workers' visas since the visas could be granted only on the petition of the importing employer." *Id.* (internal quotation marks omitted). The court also examined the association's role in the employment of the workers, similar to WAFLA's role here, including that the association was formed specifically to create a pool of workers that its members could share, that the association determined the terms of employment, and the association was listed on the petition as the employer. *Id.*

The *Ruiz* court, in turn, found *Salazar* persuasive with respect to the association's status as a joint employer under the H-2A program given the similarity of the relationship between the associations and workers in both cases. *Ruiz*, 949 F. Supp. 2d at 1071. The court, however, correctly explained that the association's joint employer status under the H-2A program, while relevant to, is not dispositive of, its status as a joint employer under the separate test for employment under the FLSA. *Id*.

In *Little v. Solis*, 297 F.R.D. 474 (D. Nev. Jan. 27, 2014), the Department of Labor and an association agreed that, for purposes of the H-2A program, the association assumed the status of a joint employer by the filing of a Master Application, but disagreed as to the import of that status for purposes of recovery

under the Equal Access to Justice Act. *Id*. at 478. And in *Martinez-Bautista v. D & S Produce*, 447 F. Supp. 2d 954 (E.D. Ark. Aug. 25, 2006), the court rejected two growers' assertions that they were not joint employers under the H-2A work contract because the growers had repeatedly declared themselves to be joint employers when filing an application for H-2A labor certification. *Id.* at 962.

Accordingly, these cases reflect that an entity that files an application for temporary labor certification as a joint employer is a joint employer of the workers hired pursuant to that application as a matter of law under the H-2A program, without consideration of whether any other test of employment is satisfied.

B. WAFLA is estopped from disclaiming its joint employer status because it represented itself to be a joint employer to obtain a benefit and received that benefit.

As set forth in the Administrator's Brief, under longstanding Board precedent, WAFLA is estopped from disclaiming its joint employer status for purposes of enforcement under the H-2A program after having declared itself to the Department to be a joint employer with its members in order to obtain the benefits of a labor certification issued pursuant to a Master Application. *See* Br. 16-18.

In response, Respondents first argue that WAFLA's representations to the Department on the Master Application that it is a joint employer are legally inconsequential and amount only to a label without legal effect. *See* Resp. Br. 13-

15.[2] Respondents concede only that WAFLA "checked a box" on the Master Application, seemingly ignoring its other repeated representations to the Department that it was a joint employer, including signing the "Employer Declaration" accompanying the Master Application, i.e., attesting that it would comply with all terms and conditions of employment required of an employer under the H-2A program. *See* Adm'r Exs. 1, 2 (Job Order and Master Application on which WAFLA also 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" declaring under penalty of perjury that all information included on the application was true and correct).

More importantly, Respondents' argument ignores that an association's voluntary election to file a Master Application as a joint employer has legal import, conferring on the association both rights and obligations. In so filing, the association accepts the status of a joint employer and its attendant obligations in exchange for the benefits of the ability to hire foreign workers under conditions not otherwise afforded H-2A employers. The checking of the box is just one measure the Department has implemented "so there is no doubt as to whether the

[2] Respondents here invoke FLSA principles to dispute WAFLA's responsibility as a joint employer. *See* Resp. Br. 14; *see also* Resp. Br. 12 (arguing that WAFLA

would not be a joint employer under the FLSA). As detailed in the Administrator's Brief and in this Reply, WAFLA's status as a joint employer is governed by its filing of Master Application for temporary labor certification as a joint employer. Accordingly, neither the FLSA nor the common law are relevant to determining WAFLA's status as a joint employer in this case.
association is subject to the obligations of an agent or an employer." Preamble to Final Rule, U.S. Dep't of Labor, Emp't & Training Admin., *Temp. Agric. Emp't of H-2A Aliens in the U.S.*, 75 Fed. Reg. 6884, 6917, 2010 WL 471437 (Feb. 12, 2010) ("2010 Final Rule").

Respondents also argue that WAFLA is not estopped from disclaiming its joint employer status because "[WAFLA] receives no benefits from filing [M]aster [A]pplications," in particular asserting that WAFLA does not itself employ any of the workers hired under the resulting labor certifications at its own premises. Resp. Br. 16-18. This position defies logic and strains credulity.

WAFLA plainly benefits from filing Master Applications for H-2A labor certifications. Employers wishing to hire foreign workers pursuant to the H-2A program to meet their labor needs must first obtain a labor certification from the Department, at which point they are permitted to petition DHS to hire foreign workers. *See* 8 U.S.C. 1188(a). The receipt of a labor certification is thus inherently beneficial in that it grants the recipient access to a labor pool not otherwise available to American employers. And the benefits of a labor certification issued pursuant to a Master Application, as here, exceed those of a

typical labor certification, as they grant associations and their members the ability to hire foreign workers under conditions not otherwise afforded H-2A employers.

In addition, Respondents' theory that estoppel may only apply where the putative employer has enjoyed the benefits of an employment relationship with the relevant workers is based on a distortion of the case law. *See* Resp. Br. 10 (citing *WHD v. Mohan Kutty*, ARB No. 03-022, 2005 WL 1359123 (ARB May 31, 2005); *WHD v. Fargo VA Med. Ctr.*, ARB No. 03-091, 2004 WL 2205231 (ARB Sept. 30, 2004); *WHD v. Dallas VA Med. Ctr.*, ARB Nos. 01-077, 01-081, 2003 WL 22495991 (ARB Oct. 30, 2003); *Alden Mgmt. Servs., Inc.,* ARB Nos. 00-020, 00021).

In *Alden Management*, the Board explained that the respondent there was estopped from disclaiming its status as a "facility" (analogous to an employer here) because it declared itself to the Department to be a facility and "as a consequence of these actions, AMS *secured the benefits which the Act makes available to a 'facility,'* namely, the permission for alien registered nurses to provide services as its employees." *Alden Mgmt. Servs., Inc.,* ARB Nos. 00-020, 00-021, slip op. at 9. The Board thus found compelling the securing of benefits reserved for a particular group, not the specific nature of those benefits. *Id*. And in any event, the relevant benefit there was the *permission* to hire foreign workers, *id.*, which is the same benefit granted to WAFLA and its joint employer members here.

The other estoppel cases cited by the Administrator, *Mohan Kutty*, *Fargo VA Medical Center*, and *Dallas VA Medical Center*, similarly reflect that entities that declare themselves to be an employer and as a consequence secure a benefit reserved for employers, such as the ability or permission to hire foreign workers, may not thereafter disclaim its employer status for purposes of compliance with H2A program requirements. None of these cases require that the putative employer have actually enjoyed the benefits of an employment relationship with the relevant workers.[3]

Therefore, having represented itself to the Department as a joint employer with its members, and having accepted the benefits of that status, WAFLA is estopped from arguing that it is not liable as a joint employer for violations of H-2A program requirements.[4]

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[3] Respondents also take the position that WAFLA receives no benefit from filing Master Applications because it would make more money in fees from its members if they filed individual applications. This argument is entirely unconvincing. First, by its own admission, WAFLA's entire business model is structured on assisting its members in obtaining a reliable H-2A labor force through Master Applications. *See* Resp. Br. 26*,* Tr. 224-27, 267-68. Indeed, many of its smaller growers could not afford to participate in the program without the benefits of a Master Application, and so would have no need of WAFLA's services, i.e., would pay WAFLA no fees at all, in the absence of this option. *Id.* Second, the relative amount of potential income WAFLA earns based on its choice to file Master Applications cannot reasonably be the measure of whether WAFLA benefits from doing so.

[4] Respondents attempt to import legal significance where none is warranted into the Administrator's decision not to appeal the ALJ's findings with respect to

C. The statute and regulations permit WHD to assess CMPs against WALFA as a joint employer.

The Administrator acted well within her authority by assessing CMPs against both Azzano Farms and WAFLA. 8 U.S.C. 1188(g)(2) authorizes the Secretary of Labor "take such actions, including imposing appropriate penalties . . . as may be necessary to assure employer compliance with terms and conditions of employment under [8 U.S.C. 1188]." The Department issues CMPs pursuant to this authority. *See* 29 C.F.R. 501.1(a)(2) (citing section 1188(g)(2) in support of the Department's enforcement authority). Those CMPs may be assessed against employers for "[e]ach failure" to comply with the statutory and regulatory requirements of the H-2A program, i.e., where relevant, against more than one employer. 29 C.F.R. 501.19(a).

Here, as joint employers, Respondents were jointly responsible for complying with each required term and condition of H-2A employment. Each failed to do so, and therefore both are responsible for each violation. The Administrator thus appropriately assessed CMPs up to the regulatory maximum

clear, the Administrator unequivocally disputes the ALJ's overarching conclusion that WAFLA is not a joint employer. *See* Br. 2 n.1. The Administrator's decision not to pursue certain issues on appeal is not dispositive of a legal question directly

certain violations. Respondents argue that this exercise of discretion amounts to a concession that WAFLA is not responsible for those violations, undermining the Administrator's theory of liability. Rather, as the Administrator's Brief makes

presented by the Administrator and cannot possibly amount to a concession on that issue. *See, e.g.*, *Wheatley v. JPMorgan Chase Bank, N.A.*, 860 F.3d 629, 631 (8th Cir. 2017) ("The choice to let an adverse ruling stand on a particular claim while appealing others does not constitute a binding concession that the district court was right about every (or any) legal issue wrapped up in the unappealed holding."). amount, as permitted by 29 C.F.R. 501.19(a), against each joint employer for each violation, taking into account mitigating factors where warranted.

Respondents ignore these directly relevant sources of law, relying instead on 8 U.S.C. 1188(d)(3) and its implementing regulations to argue that WAFLA should not be responsible for the CMPs assessed here on the theory that these provisions related solely to debarment govern the allocation of liability among associations and their members under Master Applications for *all* violations and penalties. *See* Resp. Br. 22-23. To the contrary, section 1188(d)(3) and the Department's implementing regulations further demonstrate that WAFLA is responsible for CMPs assessed for violations under the Master Application.

> As relevant here, section 1188(d)(3)(A) provides:
>
> > If an individual producer member of a joint employer association is determined to have committed an act that under *subsection (b)(2) results in the denial of certification* with respect to the member, the denial shall apply only to that member of the association unless the Secretary determines that the association or other member participated in, had knowledge of, or reason to know of, the violation.

8 U.S.C. 1188(d)(3)(A) (emphasis added). Subsection 1188(b)(2), in turn, permits the Department to debar employers for "substantia[l]" violations. *Id.* 1188(b)(2). In other words, section 1188(d)(3)(A) explicitly applies only to the penalty of

debarment. Section 1188(g)(2), on the other hand, grants the Department authority to impose other penalties without including any limitation on the liability of joint employers.

Section 1188(d)(3) thus illustrates that WAFLA is responsible as a joint employer for the CMPs assessed here: if associations were not presumed to be responsible as joint employers for violations under a Master Application, subject to resulting penalties, Congress would have had no need to limit their liability for purposes of debarment. *Cf. Nat'l Fed. of Republican Assemblies v. United States*, 148 F. Supp. 2d 1273, 1280–81 (S.D. Ala. May 31, 2001) ("Congress would not have felt it necessary to create a section which mandates that certain I.R.C. penalties to be treated as taxes, if they were already considered as such.").

Section 1188(d)(3) also illustrates that Congress considered the issue of when to provide exceptions to liability for joint employer associations under Master Applications, and chose to do so only with respect to debarment for substantial violations under section 1188(b)(2) and not with respect to penalties assessed under section 1188(g)(2). The rationale supporting such a choice is evident, given the significance of the debarment remedy in excluding parties from participating in the H-2A program. Respondents' attempts to extend that exception to liability for CMPs, issued under section 1188(g)(2), would subvert Congress's intent and so reflects an incorrect reading of the statute. *See United States v.*

Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

In addition, the Department's regulations governing debarment and the assessment of CMPs further demonstrate that WAFLA is responsible as a joint employer for the CMPs assessed here. The debarment regulations, implementing 8 U.S.C. 1188(d)(3)(A), explicitly limit the circumstances under which a joint employer association may be debarred. *See* 20 C.F.R. 655.182(i), 29 C.F.R. 501.20(h) (reiterating that associations that are joint employers may only be debarred when their members face such punishment if the association participated in or knew of the violation). The regulations governing the assessment of CMPs, implementing in part 8 U.S.C. 1188(g)(2), contain no similar limitations. *See* 29 C.F.R. 501.19. In other words, the regulations do not apply the limitation relevant to debarment to the assessment of CMPs against joint employer associations. This distinction in the regulatory text further illustrates that joint employer associations, such as WAFLA, are responsible as joint employers for each violation and subject to CMPs.

Respondents also argue that the assessment of CMPs up to a regulatory maximum amount against each joint employer are impermissible because they will

result in a "double recovery" to the Government. Resp. Br. 20-21. Respondents apparently misunderstand the concept of a double recovery. The term relates to damages for actual loss, and where prohibited, prevents a party from recovering more than the actual or maximum recoverable loss sustained. *See, e.g.*, *Recovery (double recovery)*, Black's Law Dictionary (11th ed. 2019) ("1. A judgment that erroneously awards damages twice for the same loss, based on two different theories of recovery. 2. Recovery by a party of more than the maximum recoverable loss that the party has sustained."). The Administrator here seeks only CMPs and not back wages. CMPs under the H-2A program are intended to deter future violations of the program and strengthen worker protections, and do not reflect an effort to "recover" suffered losses. *See* Preamble to 2010 Final Rule, 75 Fed. Reg. at 6944. Accordingly, the assessment of CMPs against each joint employer for its failure to comply with the program's requirements does not result in any recovery at all. Rather, holding each joint employer accountable for their failure to comply with the terms and conditions of employment is necessary and appropriate to ensure compliance with the terms and conditions of H-2A employment in the context of joint employment under a Master Application. This case provides an excellent illustration as to why such accountability is necessary; in its absence, and should the ALJ's decision stand, joint employers may simply ignore their responsibilities and then point the finger at their fellow joint employers

as the more culpable parties deserving of a CMP. The H-2A statute and regulations do not permit such a result.

D. Respondents' unfair surprise argument has no legal or factual support.

Respondents' argument that WAFLA may not be held liable as a joint employer because it justifiably relied on the Department's prior interpretation and assessment of liability among associations and members, *see* Resp. Br. 24-29, fails as a matter of law and fact.

First, Respondents attempt to impose on the agency's exercise of enforcement discretion an inapposite body of case law concerning the reasonableness or level of deference to be granted an agency's new interpretation or enforcement policy under an ambiguous statute or regulation. *See* Resp. Br. 24-27. For example, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Supreme Court declined to grant *Auer* deference to the Department's new interpretation, announced in a pair of amicus briefs, of an ambiguous FLSA regulation regarding the exemption from overtime requirements for outside salesmen, for which the statute and regulations provided no clear notice. *Christopher*, 567 U.S. at 159. The Court's concern for the potential of "unfair surprise" to the regulated community was thus pinned on the lack of notice to the community of the potential for liability, and the inference that may be drawn from an agency's inaction in the absence of such notice. *Id.* at 158. Consequently, the

Supreme Court declined to defer to the Department's newly announced interpretation in that case. In *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Court held that the F.C.C.'s latest interpretation and expansion of its enforcement policy implementing a statutory requirement was not arbitrary and capricious, in part, because the regulated community had notice of the potential for liability. *Id.* at 517-18.

Here, there are no similar concerns or potential for unfair surprise.[5] As detailed above and in the Administrator's Brief, the statute and regulations at issue here very clearly provide notice to the regulated community that an association that files a Master Application does so as a joint employer. And the Department has repeatedly made explicit the legal status and obligations that associations accept when filing Master Applications as joint employers.

For example, the Department explained in the preamble to the 2008 Final Rule that "the status of an employer under the H-2A program is *defined by the labor certification and visa petition processes*." Preamble to Final Rule, U.S. Dep't of Labor, Emp't & Training Admin., *Temp. Agric. Emp't of H-2A Aliens in the U.S.*; *Modernizing the Labor Certification Process & Enf't*, 73 Fed. Reg. 77,110, 77,115, 2008 WL 5244078 (Dec. 18, 2008) ("2008 Final Rule") (agreeing

[5] Even if WAFLA may have itself been "surprised," that fact does not per se make the surprise "unfair." Regardless, as detailed below, WAFLA cannot credibly claim to have been surprised by the enforcement action in this case.

with a comment by association National Council of Agricultural Employers ("NCAE") (emphasis added)).[6] The Department also explained "[t]he basic theory behind master applications is that agricultural associations should be able to file a single H-2A application on behalf of all their employer members in essentially the same manner that a single employer controlling all the work sites and all the job opportunities included in the application would." *Id.* at 77,123.

In promulgating the 2010 Final Rule, applicable here, the Department again reiterated the legal status and responsibilities of associations filing Master Applications as joint employers. *See, e.g.*, Preamble to 2010 Final Rule, 75 Fed. Reg. at 6916 ("As in the past, an association will be required to identify in what capacity it is filing, *so there is no doubt as to whether the association is subject to the obligations of an agent or an employer (whether individual or joint)*." (emphasis added)); *id.* at 6918 ("The Department highlights *joint responsibility* of the association and its employer-members by requiring that the association identify all employer-members that will employ H-2A workers." (emphasis added)); *id.* at

[6] NCAE is, notably, one of the largest national agricultural trade associations. In its comment supporting the use of Master Applications, NCAE went on to explain that under Master Applications, associations "serve as joint employers thereby spreading the risk in the event of a lawsuit or other enforcement actions." NCAE, Comment to 2008 Final Rule, RIN 1205–AB55 (submitted April 16, 2008), *available at* https://www.regulations.gov/document?D=ETA-2008-0001-0847.

6928 ("Master applications can only be filed by associations who will be joint employers with their members.").

Respondents cite no instance where the Department ever proclaimed to the public, or to WAFLA specifically, that an association filing a Master Application as a joint employer is not responsible for compliance as a joint employer. Respondents simply cite to WAFLA's own "understanding" that it would not be subject to enforcement and to its own enforcement experience. *See* Resp. Br. 2527.[7] WAFLA's mistaken understanding of the law, however, is no excuse from compliance or liability, nor is the Department's prior exercise of enforcement discretion to not pursue WAFLA for violations as a joint employer. *See, e.g.*, *Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 63 (1984) (those who deal with the Government are expected to know the law and may not claim estoppel against the Government absent affirmative misconduct). Moreover, the Department's exercise of its enforcement discretion here is not subject to judicial review, particularly given the aforementioned notice to the regulated community of the potential for liability. *See, e.g.*, *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d

[7] WAFLA describes its own understanding of its potential liability as the "traditional understanding" without pointing to any evidence that it had any reason for presuming it was not subject to enforcement other than its own enforcement history. Resp. Br. 25. As indicated previously, however, at least one other association has clearly understood the legal obligations of associations filing Master Application as joint employers. *See supra,* n.6.

533, 538 (D.C. Cir. 1986) (declining to interfere with Secretary's exercise of enforcement discretion, "an area in which the courts have traditionally been most reluctant to interfere," under an enforcement policy "replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit").

And even if an agency's exercise of discretion to enforce the plain language of a statute and regulations could implicate any legally cognizable claim of unfair surprise, Respondents have no such credible claim here. Before filing the job order and Master Application at issue in this case, the record (including Respondents' own records) demonstrates that WAFLA was fully on notice that it would be held responsible as a joint employer for violations under a Master Application. Specifically, on February 10, 2017, WAFLA and its counsel were told by a WHD investigator in another case that associations filing Master Applications as joint employers are subject to liability for all violations. *See* Resp. Ex. R, "wafla notes 2-10-17 Northwestern closing call," at 6 ("After today if filing as a joint employer on any contract. Then wafla as a joint employer association – WHD will assess any and all violations, backwages and penalties against both the association and any employer members."). WAFLA and its counsel confirmed that they understood. *See* Adm'r Suppl. Br. Supp. Mot. Quash, App. A, Decl. Katherine Walum, at 2 ("At that [Feb. 10, 2017] final conference, I also explained to all parties present that for H-2A cases involving joint employment between an association that files

as a joint employer with its member-employers, WHD would assess all violations, back wages, and penalties against both the association (that filed as a joint employer) and each of the employer-members under investigation. Mr. Fazio and

Mr. Sequeira stated that they understood."). After that conversation, on March 28, 2017, WAFLA filed the job order in connection with its future Master Application as a joint employer in this case. *See* Adm'r Ex. 1, ETA Form 790 (Job Order). On May 15, 2017, WAFLA filed its Master Application as a joint employer. Adm'r Ex. 2, ETA Form 9142A (Application for Temporary Employment Certification). WAFLA therefore had actual notice of its potential liability prior to filing the Master Application as a joint employer with Azzano Farms and four other members in this case.

E. Respondents failed to post the required H-2A poster at a conspicuous location at the place of employment.

As the Administrator demonstrated in her Brief, the ALJ erred in concluding that Respondents satisfied the H-2A poster requirement, which provides that H-2A employers must post a notice of workers' rights "in a conspicuous location at the place of employment," 20 C.F.R. 655.135(l), by hanging H-2A posters on a central signboard outside one of the two H-2A worker housing sites, visible only to some of Respondents' H-2A workers. *See* Br. 22-24. Such a posting, located neither conspicuously nor at the place of employment, fails to satisfy the plain language of

the regulation. *See* 20 C.F.R. 655.135(l). In support of her argument, the Administrator cited language from the preamble to the regulation that further clarifies the intent and requirements of the poster requirement. *See* Br. 23-24.

In their response, Respondents offer no defense of how these posters were conspicuously located at the place of employment. Instead, Respondents argue only that the Administrator relied in error on language from the preamble to the regulation to convert "conspicuous location" to "conspicuous location*s*." *See* Resp. Br. 29. This is incorrect. The Administrator clearly argued that Respondents failed to satisfy the plain language of the regulation, that the poster be *conspicuously* located at the place of *employment*, by posting the posters only at one housing site occupied by only a portion of Respondents' covered workers. *See* Br. 22-24. The Administrator cited to the preamble to the 2010 Final Rule in support of her argument to clarify compliance with the regulation. *Id*. And more importantly, the Administrator did not and does not argue that the regulation *requires* posters in multiple locations, but simply that the location selected here was plainly insufficient. *See* Br. 23-24.

CONCLUSION

For the above reasons, and those stated in the Administrator's Brief, the Administrator respectfully requests that the Board reverse the ALJ's decision that WAFLA is not a joint employer under the H-2A program, and affirm the

Administrator's assessment of CMPs against both WAFLA and Azzano Farms for their failure to satisfy the poster and housing standards requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, I served the foregoing Administrator's Reply Brief on the following by sending a copy via first class mail and electronic mail where indicated to:

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