ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of: ADMINISTRATOR, WAGE & HOUR DIVISION, Prosecuting Party, v. DEGGELLER ATTRACTIONS, INC., Respondent.	ARB Case No. 2020-0004 ALJ Case No. 2018-TNE-00008

ADMINISTRATOR'S RESPONSE BRIEF

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STATEMENT OF JURISDICTION

This matter arises under the H-2B temporary foreign worker program of the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c)(14), and the U.S. Department of Labor's ("Department") H-2B regulations, 20 C.F.R. Part 655, subpart A (2009) (and applicable procedural regulations in 29 C.F.R. Part 503 (2015)). In 2017, the Administrator ("Administrator") of the Wage and Hour Division ("WHD") brought an H-2B enforcement action against Deggeller Attractions, Inc. ("Respondent" or "Deggeller"). Respondent sought review of the Administrator's determination, and requested a hearing before an Administrative Law Judge ("ALJ"). The ALJ issued a decision on August 6, 2019.

The Administrative Review Board ("Board" or "ARB") has jurisdiction to review an ALJ's decision and issue the final determination of the Secretary of Labor ("Secretary") under the H-2B program. *See* U.S. Dep't of Labor, Sec'y's Order No. 02-2012 (Oct. 19, 2012), Delegation of Auth. and Assignment of Responsibility to the Admin. Review Bd., 77 Fed. Reg. 69,378, 69,378, 2012 WL 5561513 (Nov. 16, 2012); *see also* 29 C.F.R. 503.51. The Board reviews an ALJ's decision de novo and acts with "all the powers [the Secretary] would have in making the initial decision." 5 U.S.C. 557(b); *see Adm'r v. Am. Truss*, ARB Case No. 05-032, slip op. at 2-3 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of*

Veterans Affairs, ARB Case No. 04-100, slip op. at 8 (ARB Jan. 31, 2007) for proposition that "ARB applies de novo review in INA cases").

STATEMENT OF THE ISSUES

1. Whether the ALJ correctly determined that the Administrator's enforcement action was not time-barred.

2. Whether the ALJ appropriately held that Respondent violated the offered wage requirement of the 2008 H-2B regulations by failing to pay overtime pursuant to North Carolina law, because the state law provided the highest applicable wage under the regulatory definition of "offered wage."

3. Whether the ALJ correctly held that Respondent violated the offered wage requirement of the 2008 H-2B regulations by taking an undisclosed deduction for housing that reduced workers' pay below the offered wage.

4. Whether the ALJ correctly determined that Respondent's violations of the offered wage requirement were willful.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

The H-2B program permits the employment of nonimmigrants to perform temporary, non-agricultural labor or services, but only if "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers seeking to bring in H-2B workers must

file ETA Form 9142, the Application for Temporary Employment Certification ("TEC" or "9142") with the Department's Office of Foreign Labor Certification, and obtain the Department's certification that there are not sufficient U.S. workers available and that employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See* 8 C.F.R. 214.2(h)(6)(iii); 20 C.F.R. 655.1(b) (2009).[1]

An employer must attest that it will abide by the terms and conditions set by the H-2B regulations and the declarations on the TEC. *See* 20 C.F.R. 655.20(a), 655.22. The employer must certify, under penalty of perjury, that the information contained on the TEC is true and accurate, and it must acknowledge and accept each obligation of the H-2B program. *See* RX7; 20 C.F.R. 655.65(f). Those obligations include, among others, the requirement to pay the offered wage. *See* 20 C.F.R. 655.22(e). The purpose of the offered wage requirement is to ensure that employers using the H-2B program do not adversely affect the wages of U.S. workers or undercut those workers by hiring H-2B workers at a lower rate. *See* 20

[1] All references to 20 C.F.R. Part 655 in this brief are to the regulations as codified by the Final Rule published on December 19, 2008, which became effective on January 18, 2009. *See Labor Certification Process and Enf't for Temp. Emp't in Occupations Other Than Agric. or Registered Nursing in the U.S. (H–2B Workers), and Other Tech. Changes*, 73 Fed. Reg. 78,020, 78,047, 2008 WL 5262663 (Dec. 19, 2008) (hereinafter "2008 Rule"). The 2008 Rule was superseded by the Interim Final Rule that was published and took effect on April 29, 2015, but—as explained below—only the 2008 Rule applies to this case.

C.F.R. 655.1(b). The employer is required to submit an approved TEC along with its petition to the Department of Homeland Security ("DHS") when it seeks approval to employ H-2B workers. *See* 8 C.F.R. 214.2(h)(6)(iv).

Pursuant to 8 U.S.C. 1184(c)(14)(B), effective in 2009, DHS delegated to the Department of Labor its investigative and enforcement authority to assure compliance with the terms and conditions of employment under the H-2B program. *See* 2008 Rule, 73 Fed. Reg. at 78,046. The delegation included the authority to "impose such administrative remedies . . . as the Secretary . . . determines to be appropriate." 8 U.S.C. 1184(c)(14)(A)(i). This authority was delegated within the Department to the WHD Administrator. *See* 20 C.F.R. 655.50. In accordance with the delegation of enforcement authority, the Department's 2008 H-2B regulations set forth employer obligations under the H-2B program, *see* 20 C.F.R. 655.22, as well as a WHD enforcement process, *see* 20 C.F.R. 655.50.[2]

[2] In 2015, the Department's 2008 H-2B regulations were vacated and permanently enjoined by the U.S. District Court for the Northern District of Florida. *See Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015). However, the *Perez* court later clarified this order, stating that "the permanent injunction was not intended to, and does not, apply retroactively." *Perez v. Perez*, No. 14-cv-682, Doc. 62 (N.D. Fla. Sept. 4, 2015). In 2018, an H-2B employer brought a contempt action in the same court, seeking sanctions against the Department for violating the *Perez* injunction by continuing to enforce the 2008 regulations. *See Drew's Lawn & Snow Serv., Inc.*, No. 18-cv-979, Doc. 14 (N.D. Fla. Feb. 11, 2019). The court dismissed the case with prejudice, and stated clearly, "based on the Court's clarification, the permanent injunction in *Perez* does not apply retroactively to prevent DOL from enforcing the conditions of labor

After conducting an investigation, WHD determines whether a violation has occurred: whether the employer willfully misrepresented a material fact, or substantially failed to meet the conditions attested to, on the TEC or the petition. *See* 8 U.S.C. 1184(c)(14)(A); 20 C.F.R. 655.60. A substantial failure is defined in the INA as a "willful failure to comply with the [H-2B provisions] that constitutes a significant deviation from the terms and conditions of the petition." 8 U.S.C. 1184(c)(14)(D). The H-2B regulations define a "willful failure" as "a knowing failure or reckless disregard with respect to whether the conduct was contrary" to the INA. 20 C.F.R. 655.65(e). After determining that an employer has violated the requirements of the H-2B program, WHD may asses the following remedies for

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certifications issued under the 2008 Regulations prior to the entry of the injunction." *Id.*, slip op. at 6.

Therefore, in accordance with that clarification, the Department still enforces compliance with the 2008 Rule for labor certifications issued pursuant to that rule before the district court's permanent injunction took effect on April 30, 2015, such as the certification in this case. The Board has approved this approach. *See Adm'r v. Strates Shows, Inc.*, ARB Case No. 15-069, Amended Final Decision & Order, slip op. at 2-3 (ARB Aug. 16, 2017) (reconsidering decision characterizing 2008 H-2B regulation as unenforceable and noting that the district court in *Perez v. Perez* "held that the permanent injunction did not apply retroactively—did not apply to past labor certifications approved under the 2008 H-2B regulations before the injunction").

In light of the rulings of both the U.S. District Court for the Northern District of Florida and the ARB in favor of the Department's continued authority to enforce the 2008 Rule, Respondent's persistent attempts to argue—or even to preserve the argument—that the 2008 Rule is unenforceable, *see* Resp't Br. 44-45, borders on frivolous.

violations: civil money penalties, reinstatement of displaced U.S. workers, back wages, or other appropriate legal or equitable remedies. *See* 20 C.F.R. 655.65. The Department has explained that awarding back pay for failure to pay the offered wage "further[s] the purposes of the H-2B program because it will reduce employers' incentives to bypass U.S. workers in order to hire and exploit H-2B foreign workers, and guard against depressing U.S. workers' wage rates." *See* 2008 Rule, 73 Fed. Reg. at 78,047.

II. Statement of Facts

Deggeller Attractions, Inc. is a mobile amusement operator and longtime participant in the H-2B program that operates from Florida to Pennsylvania. *See* August 6, 2019 Decision & Order ("D&O") 12; Hearing Transcript ("Tr.") 291:10-292:1. In 2012, Respondent filed an Application for Temporary Employment Certification with the Department seeking to bring in Amusement and Recreation Attendants for a period from February 1 to November 27, 2013. *See* D&O 2. Respondent was certified to bring in 42 H-2B workers. *See* RX9.

Respondent provided inconsistent information on the TEC regarding the hours the H-2B workers would work and the wages they would receive. On the TEC, Respondent listed the offered wage as ranging from $7.93 to $8.25 per hour, wrote "N/A" in the section for overtime rate, and, in the "Additional Wage Information" section, stated "see Addendum." *See* D&O 25. Respondent also

wrote on the TEC that the number of hours worked per week was 30 and "Overtime: N/A." *See id.* Respondent's Addendum stated that the hours of work were "30-40, overtime varies" but that "extra work hours are available in some weeks and vary" and "work schedule and total hours worked are subject to industry practice." RX7. On the Addendum, Respondent listed the overtime wage rate as ranging from $11.90 to $12.35 but also stated "[o]vertime is defined by and paid in accordance with prevailing law." D&O 25. Respondent's payroll records showed that its workers were paid $420 for a 50-hour week, and that the employer took a $60 weekly deduction for housing not mentioned on the TEC. *See* D&O 6.

WHD conducted an investigation of Deggeller and determined that it committed violations of the H-2B program: specifically, WHD determined that Respondent committed a substantial failure to comply with the offered wage requirement by failing to pay overtime at the rate listed on the TEC and by failing to disclose a $60/week deduction for housing.[3] *See* D&O 2, 6-7.

On December 15, 2017, after a delay caused by litigation challenging DOL's authority to issue and enforce the 2008 Rule, *see supra* at 4-5 n.2, WHD issued a determination letter to Respondent citing these violations of the H-2B program

[3] WHD also determined that Respondent committed a substantial failure to comply with the requirement to offer terms and conditions to U.S. workers that are not less favorable than those offered to H-2B workers by failing to disclose to U.S. workers seeking the job that a potential recruitment and/or retention bonus may be available. *See* D&O 2, 5.

requirements. *See* D&O 1-2. The determination letter and the enclosed Summary of Violations and Remedies stated that WHD had assessed a total of $150,205.77 in back wages and $15,500 in civil money penalties against Respondent. *See id.* at 2.

III. Course of Proceedings

Deggeller timely sought review of WHD's determination by an ALJ. Respondent filed a Motion for Summary Judgment on August 23, 2018, contending, among other arguments, that the Administrator's Determination was barred by the statute of limitations. The ALJ denied that motion on September 20, 2018. A hearing was held on October 4-5, 2018. The ALJ issued his Decision and Order on August 6, 2019. Respondent moved for reconsideration, which the ALJ denied on September 6, 2019.

On October 4, Deggeller petitioned the Board for review of both the August 2019 and September 2019 decisions. The Board accepted the petition on October 22, 2019, and issued a Notice of Appeal and Order Establishing Briefing Schedule. Respondent filed its opening brief on December 3, 2019.

IV. The ALJ's Decisions

The ALJ's Order Denying Respondent's Motion for Summary Judgment[4] addressed numerous arguments from Respondent. *See* Sept. 20, 2018 ALJ Order Denying Resp't's Mot. for Summ. J. ("Summ. J. Order"). The ALJ first rejected Respondent's arguments that WHD lacked authority to enforce the 2008 Rule. *See id.* at 4. The ALJ also rejected Respondent's arguments that this action was time-barred. *See id.* at 6. The ALJ concluded that the five-year statute of limitations in 28 U.S.C. 2462 was applicable.[5] *See id.* at 5. The ALJ then determined that the claim accrued "at the earliest" when workers were scheduled to begin work in February 2013, noting that "[a]ny violation would only be apparent once the

[4] The Administrator notes that Respondent did not seek review of the ALJ's summary decision order, but did state in its Petition for Review that it was seeking review for the reasons included in its motion for summary judgment. *See* Resp't Pet.

[5] The ALJ concluded that 28 U.S.C. 2462 applied to H-2B actions for back wages as well as those for CMPs, based on his belief that back wages sought in an H-2B enforcement action are a penalty. *See* Summ. J. Order 5 n.3. The Administrator did not appeal that conclusion because it was not determinative in this case—it did not limit the amount of back wages awarded—and thus any petition for review would not be seeking to change the outcome, but merely requesting an advisory opinion. The Board has a "well-established policy against issuing advisory opinions." *See Hoffman v. NetJets Aviation, Inc.*, ARB Case No. 09-21, slip op. at 17-18 n.85, (ARB March 24, 2011) (listing cases). However, as explained in greater detail below, *see infra* at 21-23, the Administrator does not agree that section 2462 applies to H-2B enforcement actions for back wages. The Administrator has appealed a decision more directly presenting this issue in another H-2B case, which is currently pending before the Board. *See Adm'r v. Graham & Rollins, Inc.*, ARB Case No. 2019-09.

workers arrived" and thus the Administrator's determination was timely. *Id.* at 6. Finally, the ALJ also rejected Respondent's arguments regarding the specific violations charged, notice, and the Administrator's proof of violations as being inappropriate for the summary decision stage. *See id.*

After the hearing, the ALJ issued a Decision & Order holding that Respondent violated the offered wage requirement of the H-2B program in two ways: by failing to pay overtime for hours worked while in North Carolina, in violation of state law, and by failing to disclose that rent for mobile bunkhouses would be deducted from H-2B workers' pay. *See* D&O 27, 29, 31.

In addressing the offered wage violation, the ALJ began with the alleged violation regarding overtime pay. The H-2B regulations require the employer to "offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage." 20 C.F.R. 655.10(a)(3). The employer must pay at least that offered wage, which is defined as equaling or exceeding the "highest of" the prevailing wage, or the applicable federal, state, or local minimum wage, during the entire work period listed on the TEC. 20 C.F.R. 655.22(e). Respondent's TEC stated that overtime was "N/A," but on its Addendum, Deggeller stated that "overtime varies," that the overtime rate was $11.90 to $12.38 per hour, and that "overtime is defined by and paid in accordance with prevailing law." *See* D&O 25. The Administrator argued that Respondent was obligated to pay the wage actually

offered to workers, which included overtime at the rate listed on the TEC for hours worked over 40. *See* D&O 26. Respondent argued that it was exempt from overtime under the FLSA and was not required to pay overtime. *See id.*

The ALJ analyzed Respondent's statements on the TEC regarding overtime and found them to be "unclear and confusing." D&O 26. In light of this confusion and the fact that the Department certified the TEC with the muddled language included, the ALJ determined that the question of Respondent's obligation to pay overtime should be governed by the regulatory requirement to pay the prevailing wage or according to the applicable federal, state, or local law. *See id.* The ALJ thus rejected the Administrator's argument that Respondent should be required to pay the overtime rate that it listed on the TEC. *See id.*

The ALJ found that there were no overtime requirements imposed by federal or local law, but that there was evidence in the record of a state overtime requirement for work performed while Respondent operated in North Carolina. *See* D&O 26. The ALJ stated that he had taken judicial notice of the following North Carolina wage statutes, which during the applicable period required seasonal amusement operators to pay workers time and a half for hours worked in excess of 45 hours per week: 2017 North Carolina Laws Session Law 2017-185 (S.B. 82) and N.C Gen. Stat. § 95-25.4 and -25.14(c)(8). *See id.*

The ALJ found that Respondent had notice of this violation because Respondent's counsel inserted the language regarding the definition of overtime "in accordance with prevailing law" into the TEC to address state laws. *See* D&O 26-27. Furthermore, the ALJ stated that the determination letter issued by the Administrator accurately provided notice that an offered wage violation included the requirement to pay the highest of the prevailing wage, or federal, state, or local minimum wage. *See id.* at 27.

The ALJ stated that when Respondent operated four events in North Carolina during the 2013 season, it was required to pay overtime for hours worked in excess of 45 in order to comply with the relevant state law, which was higher than the prevailing wage. *See* D&O 27. Since the pay records submitted by Respondent represented that its workers worked 50 hours per week at the same rate of pay per hour,[6] the ALJ found that the failure to pay overtime for hours over 45

[6] The Administrator objected to the admission of Respondent's time records and time summaries, because Respondent produced them to the Administrator just days before the hearing. *See* D&O 2. The ALJ admitted the records but gave the Administrator 60 days to review and submit a rebuttal report. *See id.* The Administrator reviewed these records and found them to be "incomplete," "inaccurate," and to have "almost no probative value." Adm'r's Report on Resp't's Time Records 2, 3, 5; *see also* D&O 25.

The ALJ also reviewed Respondent's records and "afford[ed] them little weight." D&O 25. The ALJ noted that the Administrator was able to "substantiate[] an average of about 49 hours work hours per week based upon its review of the incomplete records Respondent provided." *Id.* Ultimately, the ALJ concluded that

worked in North Carolina in 2013 was a substantial failure to comply with the terms and conditions on the TEC. *See id.* The ALJ then ordered the parties to identify those workers who worked in North Carolina during the relevant weeks and determine the amount of overtime due, as that was not clear from the record before him. *See id.* at 27-28, 31.

The ALJ then turned to the issue of the undisclosed housing deduction. The ALJ noted that one of the employer obligations under the 2008 Rule was that "[t]he job offer must specify all deductions not required by law that the employer will make from the worker's paychecks. All deductions must be reasonable." D&O 28; 20 C.F.R. 655.22(g)(1). The ALJ analyzed the use of the term "job offer" in regulation and the preamble to the 2008 Rule and concluded that "it is clear that it refers to the proposed terms and conditions of employment and that the job offer predates approval or disapproval of the application for certification." *Id.* at 28-29. The ALJ further concluded that the 2008 Rule required deductions other than those required by law to be disclosed as part of the TEC application process. *See id.* at 29. Therefore, Respondent's failure to disclose the housing deduction on the TEC was a substantial failure to comply with the requirements of the regulation. *See id.*

"50 hours per week—the figure Respondent used for its payroll—is the figure best supported by the evidence of record." *Id.*

The ALJ rejected Respondent's arguments regarding the value and reasonableness of the housing deduction, stating that "the reasonableness of the housing deduction is irrelevant since the deduction was not disclosed on the job offer as required . . . ." D&O 29. The ALJ further rejected Respondent's argument that it had provided other benefits to its workers which should have offset the housing deduction, noting that such benefits were also not disclosed on the job offer. *See id.* The ALJ reviewed the pay records and, making a few adjustments to the Administrator's calculations related to this violation, assessed $81,960 in back wages against Respondent. *See id.* at 29-30.

The ALJ awarded $5,000 in civil money penalties against Respondent based on the offered wage violations, reducing the amount initially assessed by the Administrator. *See* D&O 30-31.[7]

[7] As noted above, the Administrator had also charged Respondent with a violation of the requirement to offer terms and conditions to U.S. workers that are not less favorable than those offered to H-2B workers because Respondent did not advertise to U.S. workers that a recruitment or retention bonus were potentially available. *See* D&O 5. The ALJ found that the evidence did not support those violations. *See id.* at 22-24. The ALJ credited the testimony of Andrew Deggeller that the recruitment bonus was "at best a remote possibility even for [the] most seasoned workers" and also noted that the Administrator did not raise the issue of the retention bonus until the hearing. *See id.* at 23. The ALJ also dismissed the civil money penalty assessed for this violation. The holdings related to the terms and conditions violation are not at issue in this appeal.

SUMMARY OF ARGUMENT

The Administrator timely brought this action for H-2B back wages and civil money penalties against Respondent. Actions for H-2B back wages are not subject to a statute of limitations, and actions for H-2B civil money penalties are governed by the five-year limitations period of 28 U.S.C. 2462. The Administrator charged Respondent with substantial failures to comply with the requirements of the H-2B program that occurred beginning in February 2013. The Administrator issued its determination on December 17, 2017, less than five years after the violations occurred, and thus the action is not time-barred.

Respondent attempts to find any other limitations period to apply to this action, but none of Respondents' arguments are supported by the facts or the law. The Administrator did not cite Respondent for a willful misrepresentation on the labor certification, and thus the date that the TEC was submitted is irrelevant to a determination of when the violation occurred. The four-year limitations period in 28 U.S.C. 1658(a) does not apply to administrative enforcement actions such as this one. And finally, in cases brought by the government where the cited statute does not include a limitations period, it is not appropriate to "borrow" a statute of limitations from another law.

All of Respondent's attempts to shorten the limitations period endeavor to undermine the Administrator's ability to appropriately enforce the requirements of

the H-2B program. Application of these limitations periods would frustrate the purpose of the of the H-2B provisions of the INA: to reduce incentives by employers to bypass American workers by using the H-2B program and to guard against depressing U.S. workers' wages.

Furthermore, ALJ did not err in concluding that Respondent violated the offered wage provision of the H-2B program—both by failing to pay overtime as required by the relevant state minimum wage law, and by failing to disclose a weekly housing deduction that brought workers' wages below the offered wage—and the Board should affirm that holding. As explained above, the requirement to pay the offered wage is necessary to promote of the purposes of the H-2B program.

H-2B employers are legally obligated to pay the offered wage that they have listed on the TEC. *See* 20 C.F.R. 655.10(a)(3); 20 C.F.R. 655.22(e). The offered wage is defined as equaling or exceeding the "highest of" the prevailing wage, or the applicable federal, state, or local minimum wage. 20 C.F.R. 655.22(e). Respondent, which claims that it is exempt from the overtime obligations of the Fair Labor Standards Act, listed an overtime rate on the TEC and stated that such rate would be paid "in accordance with prevailing law." *See* D&O 25. Under the H-2B regulations, where a state minimum wage is the highest relevant wage, employers are obligated to pay that rate.

Respondent paid its workers the same rate for all hours worked. *See* D&O 6. The ALJ determined that under relevant North Carolina law, seasonal amusement operators such as Respondent must pay overtime for hours worked over 45 in a workweek and concluded that this state law applied to Respondents. *See id.* at 27. The ALJ properly concluded that North Carolina's state requirement counted as the "highest" of the wages listed under the offered wage definition, and therefore held that Respondent's failure to pay in accordance with that state law constituted a violation of the offered wage requirement. *See id.* The Board should not permit Respondent to evade the wage obligations imposed on H-2B employers by claiming that it had no notice of such a violation when state minimum wage laws are part of the regulatory definition of the offered wage, and both Respondent and its counsel testified that it intended to pay overtime in certain states.

Respondent also charged its workers a $60 weekly deduction for housing, which reduced workers' wages by nearly 15 percent. The ALJ properly held that this was another violation of Respondent's offered wage requirement, because the deduction was undisclosed and brought workers below the offered wage. *See* D&O 29. The 2008 Rule stated that an employer's "job offer must specify all deductions not required by law." 20 C.F.R. 655.22(g)(1). Respondent did not list the deduction on the 9142, on which H-2B employers are required to set forth the accurate terms and conditions of the offered job. Respondent also offered no credible evidence

that the deduction was disclosed to H-2B workers in any other manner. The Administrator has the authority under the 2008 Rule to seek remedies for impermissible deductions in violation of section 655.22(g)(1) and to recover back wages that brought workers below the offered wage. The Board should affirm the ALJ's conclusion that Respondent's undisclosed housing deduction constituted a violation of the H-2B offered wage requirement.

Finally, the Administrator may only charge an employer with a violation in the H-2B program if the violation is willful, meaning that the employer knowingly failed to comply with the terms and conditions of the labor certification or recklessly disregarded whether its conduct was in compliance with the H-2B requirements. *See* 20 C.F.R. 655.65(e)-(f). The evidence at the hearing demonstrated that Respondent had knowledge of the offered wage requirements, or at a minimum was reckless in its disregard of those requirements. The Board should not reward such disregard for the requirements and obligations of the H-2B program by overturning the ALJ's decision.

For all of these reasons, the Board should affirm the ALJ's holding that Respondent violated the offered wage provision of the H-2B regulations.

ARGUMENT

I. THE ADMINISTRATOR'S CASE IS NOT TIME-BARRED

The Administrator determined that Deggeller substantially failed to comply with two provisions of the H-2B regulations and assessed both back wages and civil money penalties against Respondent. *See* D&O 2. The broadly applicable 28 U.S.C. 2462 sets a five-year limitations period for civil money penalties ("CMPs"), and applies to the assessment of H-2B civil money penalties. There is no limitations period in the INA for H-2B enforcement actions seeking to collect back wages.[8] Because the Administrator sought CMPs in this case, the five-year limitations period of section 2462 applies.

WHD cited Respondent with two substantial failure violations of the 2008 H-2B regulations. *See* D&O 2. A substantial failure is defined by the INA and the H-2B regulations as a "significant deviation" from the terms and conditions listed on the H-2B TEC and petition. 8 U.S.C. 1184(c)(14)(D); 20 C.F.R. 655.65(d). An

[8] Statutes of limitations do not run against the federal government unless Congress "explicitly expressed one." *United States v. Ward*, 985 F.2d 500, 502 (10th Cir. 1993) (citing *United States v. John Hancock Mut. Life Ins.*, 364 U.S. 301 (1960)). The Seventh Circuit, in a case addressing back wages under the Immigration Nursing Relief Act (which amended the INA), stated that "[u]nless a federal statute directly sets a time limit, there is no period of limitations for administrative enforcement actions." *Alden Mgmt. Servs., Inc. v. Chao*, 532 F.3d 578, 582 (7th Cir. 2008).

employer cannot "significantly deviat[e]" from the terms and conditions of employment that it swore to uphold in an H-2B labor certification and petition until such time as that employment begins. Deggeller's employees did not begin their employment with Respondent until February 2013, and as the ALJ correctly noted, "[a]ny violation would only be apparent once the workers arrived." Summ. J. Order 6. Because the violations thus occurred at the earliest in February 2013, less than five years before the issuance of the Administrator's determination on December 15, 2017, this action is not time-barred.

A. The Five-Year Limitations Period in 28 U.S.C. 2462 Does Not Bar This Action

1. The Administrator did not cite a willful misrepresentation and brought this action within five years of the substantial failure violation.

Respondent argues that the Administrator's representative "contended at trial for the first time that [Respondent] had engaged in a willful misrepresentation . . . ." Resp't Br. at 3, 15. A willful misrepresentation violation would necessarily accrue when the misrepresentation was made; that is, when the TEC was signed. Respondent submitted its TEC on December 10, 2012, more than five years before the date of the determination letter. *See id.* at 3. Therefore, Respondent argued the determination letter was time-barred. *See id.* at 3-4, 24.

However, the Administrator has always clearly identified Respondent's violations as a substantial failure to comply. The determination letter issued by the

Administrator states that "Deggeller Attractions, Inc. committed the following violations . . . : a *substantial failure to comply* with the terms and working conditions and offered wage requirements." RX34 (emphasis added). The Summary of Violations and Remedies, which accompanied the determination letter, includes a column labeled "Type of Violation" and for both violations cited, the "Substantial Failure" box is checked. *See id.* In the Administrator's case in chief, the WHD investigator testified that WHD determined that the violations were substantial failures to comply. *See* Tr. 95:2-6, 103:22-104:1, 115:5-10. The Administrator's post-hearing brief also stated – in section headings, no less – that the violations cited were substantial failures. *See* Adm'r Post-Hr'g Br. at 8, 12. The Administrator thus could not have been clearer that it was citing Respondent for substantial failures to comply with the two relevant H-2B requirements. To the extent that the Administrator's witness may have misspoken while on the stand and referenced a misrepresentation, that does not change the type of violation cited by the Administrator. The Administrator charged Respondent with substantial failures to comply with the H-2B program and brought this enforcement action within the appropriate limitations period, as explained in greater detail above.

2. The Administrator's assessment of H-2B back wages did not constitute a penalty.

Respondent also argues that back wages are a "penalty" and are governed by section 2462. *See* Resp't Br. 22-23. Even if a five-year limitations period applied

to H-2B enforcement actions for back wages, which the Administrator disputes, the Administrator's action would be timely. However, back wages do not constitute a penalty for the purposes of section 2462. A penalty, as defined by section 2462, is "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson v. S.E.C.*, 87 F.3d 484, 488 (D.C. Cir. 1996). Indeed, "courts have reaffirmed that a sanction which only remedies the damage caused by the defendant does not trigger the protections of [section] 2462." *Id.* at 488 (citing cases).

The amount of back wages sought by the Administrator was intended to recoup for the H-2B workers the wages they should have earned, had Deggeller properly paid the offered wage. "[W]here the effect of the [federal agency's] action is to restore the *status quo ante*, such as through a proceeding for restitution or disgorgement of ill-gotten profits, [section] 2462 will not apply." *Johnson v. S.E.C.*, 87 F.3d at 491; *see United States v. Perry*, 431 F.2d 1020, 1025 (9th Cir. 1970) (government's action to recover costs associated with illegal kickbacks under the Anti-Kickback Act were "designed to make the United States whole" and were not barred by section 2462). Therefore, the compensation owed to a party that restores it to the financial position it would have been in absent the violation is

not a penalty. The Administrator's offered wage claim merely seeks to restore the *status quo ante*.

Furthermore, analogous case law is clear that back wages by themselves are not a penalty. *See, e.g.*, *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583 (1942) (FLSA back wages and liquidated damages are "not a penalty or punishment by the Government"); *McClanahan v. Mathews*, 440 F.2d 320, 322-23 (6th Cir. 1971) (same). Therefore, the Board should reject Respondent's arguments to the contrary.

B. 28 U.S.C. 1658(a) Does Not Apply to This Case Because It Does Not Apply to Administrative Actions

Respondent also argues that the Board should apply the four-year limitations period set forth in 28 U.S.C. 1658(a), which governs "civil action[s] arising under an Act of Congress enacted after" 1990. Resp't Br. at 13-18. However, as the Federal Communications Commission recently recognized, "[t]he text, context, purpose, and history of Section 1658(a) make clear that it governs court actions, not agency proceedings . . . ." *Sandwich Isles Comms., Inc.*, FCC18-172, 2019 WL 105385, at *39 (F.C.C. Jan. 3, 2019); *see also Garvey v. Hale*, 1997 WL 566262, at *1 (N.T.S.B. Aug. 29, 1997) (stating that 1658(a) applies to "certain civil actions in federal court" and not to proceedings before National Transportation Safety Board).

The term "action," as used in federal statutory provisions, most frequently refers to judicial proceedings. Analyzing 28 U.S.C. 2415(a), another federal limitations statute, the Supreme Court stated that the term "action" is "ordinarily used in connection with judicial, not administrative, proceedings." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). The Fourth Circuit analyzed the term "civil action" in 28 U.S.C 1658(a) and held that it did not apply to a civil commitment hearing, noting that such a proceeding was distinct from a civil action, which is one that "seek[s] to enforce or protect a private civil right." *United States v. Searcy*, 880 F.3d 116, 124 (4th Cir. 2018). An administrative enforcement action such as this does not seek to enforce or protect a private civil right.

Respondent's purported examples of the term "civil action" being applied to administrative proceedings do not support Respondent's claims. *See* Resp't Br. 16-17. The reports and manuals cited instead mainly discuss the Administrative Procedure Act, a federal statute that provides a cause of action for review of administrative actions *in federal court*, and thus involves a judicial proceeding. *See id.*

Finally, the FCC's analysis of the legislative history of section 1658(a) clarifies that it applies only to suits brought in federal court:

> Section 1658 was enacted as part of the Judicial Improvements Act of 1990. Title III of that Act, in which Section 1658 was enacted, is the Federal Courts Study Implementation Act of 1990. As those names would suggest, where the term "action" appears in the enacting law, it refers to formal

> judicial proceedings or other action by the judiciary . . . . 'The primary goals of [the Judicial Improvements] Act [were] to decrease delays in the federal court system . . . .' The purpose of Section 1658 specifically was to eliminate the need for federal courts to "borrow" the most analogous state or federal law limitations period for federal claims that lacked their own designated limitations period. . . . In other words, the legislative concerns that animated the enactment of Section 1658, and the goals of Judicial Improvements Act of 1990 as a whole, related to proceedings in federal court, not administrative proceedings.

Sandwich Isles Comms., Inc., 2019 WL 105385, at *39. The FCC concluded by noting that it could find no instance of case where section 1658(a) was used to set the limitations period for an administrative proceeding. *See id.* at *40. Therefore, it is clear that the limitations period set forth in 28 U.S.C. 1658(a) does not apply to this administrative enforcement action.

C. Statutes of Limitations Should Not Be Borrowed from Other Statutes in Suits Brought by The Government

Respondent further argues that the ALJ erred by failing to "borrow" a statute of limitations from either the Fair Labor Standards Act or the H-2A program.[9] *See* Resp't Br. at 18-21. However, in cases brought by the government, such borrowing principles do not apply. *See, e.g., Alden*, 532 F.3d at 581-82 (noting that "nothing in the [INA] establishes a period of limitations for the Secretary's proceeding" and

[9] Respondent claims that the H-2A program has a two-year statute of limitations. *See* Resp't Br. 20. However, the two-year limitations period in the INA only applies to H-2A debarment actions; otherwise the INA sets no limitations period for H-2A enforcement actions. *See* 8 U.S.C. 1188(b); *see also, e.g.*, *Three D Farms, LLC*, slip op. at 25-26, 2016-TAE-03 (OALJ Aug. 18, 2016); *Three Chimneys Farm, LLC*, slip op. at 6 n.10, 2013-TAE-11 (OALJ Feb. 2, 2015).

stating that "a borrowing approach . . . does not apply to administrative proceedings initiated by the national government"); *Dole v. Local 427*, 894 F.2d 607, 614-15 (3d Cir. 1990) (rejecting argument that an analogous federal statute of limitations should apply to Secretary of Labor's suit brought under the Labor Management Reporting and Disclosures Act); *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260, 263 (10th Cir. 1980) (refusing to apply state statute of limitations to Secretary of Labor's action under the Occupational Safety and Health Act).

Indeed, the borrowing principles relied upon by Respondent apply to private actions brought under a federal statute that does not itself specify a statute of limitations – not, as here, where the enforcement action is brought by the government itself. *See, e.g.*, *Lampf v. Gilbertson*, 501 U.S. 350, 356 (1991) (discussing borrowing principles in the context of a private action); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 488 (1980) (same).

Applying any of the shorter limitations periods that Respondent seeks to the Administrator's enforcement would frustrate the purpose of the H-2B provisions of the INA. In particular, importing a short, two-year statute of limitations into a statutory scheme involving temporary foreign workers would interfere with the Administrator's ability to ensure that employers pay their H-2B workers properly, which is necessary to prevent adverse effects on the wages and working conditions

of similarly employed U.S. workers. For this reason, as well as those above, the Board should reject all of Respondent's arguments that this action is time-barred.

II. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED THE OFFERED WAGE REQUIREMENT

A. The ALJ Did Not Err in Requiring Respondent to Pay Overtime for Hours Worked in North Carolina

1. The ALJ concluded that Respondent violated the offered wage requirement of the H-2B program by failing to pay overtime for hours worked over 45 pursuant to North Carolina law. *See* D&O 27.[10] The H-2B regulations require the employer to pay at least the offered wage, which is defined as equaling or exceeding the "highest of" the prevailing wage, or the applicable federal, state, or local minimum wage. 20 C.F.R. 655.22(e).

Respondent certified on its TEC that "[o]vertime is defined by and paid in accordance with prevailing law." D&O 25. Although the ALJ correctly described this language combined with Respondent's other overtime-related entries on the TEC and Addendum as a "garbled mess," Andrew Deggeller testified that this language was intended to mean that "if there's laws to pay overtime, I'm going to pay overtime." D&O 26; Tr. 280:8-9. Respondent's counsel explained in his

[10] The Administrator argued below that Respondent should pay overtime at the rate it certified on the TEC for all hours worked over 40; the ALJ concluded that Respondent was liable for a much narrower violation: the failure to pay overtime for hours worked over 45 in North Carolina, pursuant to North Carolina state law.

opening argument that this language meant that if Respondent operated in a state that requires overtime for mobile amusement operators, then "it means that we're going to comply with state law." Tr. 15:4. The ALJ appropriately held that Respondent must do just that. *See* D&O 27.

2. It is absurd for Respondent to claim that it had no notice of this violation. Respondent argues that it was not on notice of this violation because the North Carolina statute did not specifically come up in pretrial submissions. *See* Resp't Br. 34-35. However, the regulatory definition of the offered wage requirement includes the requirement to pay the state minimum wage if it is the highest wage. *See* 20 C.F.R. 655.22(e). The offered wage attestation signed by Respondent included a reference to the state minimum wage and Deggeller's signature constituted Respondent's representation that it accepted the H-2B program's obligations. *See* RX7; 20 C.F.R. 655.65(f). The Administrator's determination—which assessed more extensive remedies for the overtime offered wage violation than the ALJ ultimately found Deggeller responsible for—described the offered wage violation as "[o]ffered wage did not equal or exceed the highest of the prevailing wage, Federal, *State* or local minimum wage . . . ." D&O 27 (emphasis added). Finally, Deggeller testified that he intended to pay pursuant to applicable state law by including the disputed "overtime" language on the TEC. *See* Tr. 280:4-9. Taken together, Respondent cannot reasonably or fairly claim that it did

not have notice of the regulatory requirement to pay state minimum wage in certain circumstances, and that the offered wage violation cited by the Administrator encompassed this requirement.

Respondent appears to be trying to use its "garbled" overtime language on the TEC to avoid paying any overtime whatsoever. In the proceeding below, Deggeller first claimed that it could not be held accountable for its failure to pay the specific overtime rate that the employer itself included as part of the offered wage on its TEC, arguing that by inserting the phrase "in accordance with prevailing law," it had conditioned its obligation to pay that rate on the applicability of a state or local law requiring the payment of overtime. But when, pursuant to the language added by Respondent itself, the ALJ required Deggeller to comply with a state's overtime law, Respondent now claims that this, too, cannot be applied because it had no notice. Respondent cannot use such contortions to avoid paying the offered wage that it swore under penalty of perjury that it would pay.

3. Respondent also argues that the ALJ erred by finding that there was an "implicit" requirement to keep time records. *See* Resp't Br. at 31-34. While the Administrator acknowledges that there was no requirement for employers to keep time records under the 2008 Rule, the ALJ's determination that Respondent violated the offered wage requirement by failing to pay overtime as required by the

North Carolina statute did not actually rely on an implicit obligation to keep records. Instead, the ALJ reviewed the records created by Respondent and provided to the Department; took into account that the Administrator's review of Respondent's incomplete time and break records indicated that the workers' hours ranged from 45 to 55 hours per week while in North Carolina, for an average of approximately 49 hours, *see* Adm'r's Report on Resp't's Time Records 4; and determined that the most credible (or perhaps, more accurately, the least incredible) source of information were the payroll records that stated that Deggeller's workers worked for 50 hours per week at the same rate of pay. *See* D&O 25. Specifically, the ALJ stated "I find that 50 hours per week—the figure Respondent used for its payroll—is the figure best supported by the evidence of record." *Id.*[11]

Therefore, despite the ALJ's statement in a footnote about an implicit recordkeeping duty, the ALJ's factual finding regarding the offered wage violation

[11] Respondent also argues that it should receive credit for "overpayments" because in some weeks, the workers worked fewer than 50 hours. *See* Resp't Br. 4-6. However, the ALJ found, based on the evidence before him, that 50 hours per week was the most reasonable figure supported by that evidence. *See* D&O 25. Even if Respondent's questionable premise that wages paid in a certain workweek can be counted toward wages owed in another were correct, based on the ALJ's finding, there is no overpayment available with which to credit Respondent for amounts owed.

did not rest on an inference or implicit requirement, but on his review of records actually provided by Respondent. The Board should uphold the ALJ's finding.

B. The ALJ Correctly Held That the Housing Deductions Violated the Offered Wage Requirement Because They Were Not Disclosed and Thus Were Impermissible

The ALJ also concluded that Respondent had failed to pay the full offered wage because it charged its workers an undisclosed $60 per week for housing in bunkhouses that traveled with the carnival from location to location. *See* D&O 29. H-2B employers must disclose all deductions not required by law on the job offer pursuant to 20 C.F.R. 655.22(g)(1). Because Respondent's workers were paid near (or below, when they were in North Carolina) the offered wage, the undisclosed housing deductions brought the workers below the offered wage, which was therefore a violation of 20 C.F.R. 655.22(e). *See* D&O 7.

1. Respondent argues that the 2008 Rule did not state that deductions could not bring workers' wages below the offered wage. *See* Resp't. Br 41.[12] However,

[12] To the extent that Respondent is relying upon the Department's statement in the preamble that it did not need to "clarify that costs paid directly to workers are de facto deductions for the purpose of calculating compliance with the offered wage," this was not a rejection of that principle but instead a recognition of the Department's belief that "the statutory requirements, which are based on decades of administration of the Federal wage and hour laws, are clear." *See* 2008 Rule, 73 Fed. Reg. at 78,038. The Department has long held that a deduction that brings a worker's hourly pay below the minimum wage is not permissible. *See, e.g.*, 29 C.F.R. 531.35.

the regulations are crystal clear that all deductions must be disclosed, *see* 20 C.F.R. 655.22(g)(1) ("The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck."), and that the offered wage must be paid, *see* 20 C.F.R. 655.22(e) ("[T]he employer will pay the offered wage during the entire period of the approved H-2B labor certification."). In fact, the regulation setting forth the remedies for violations states that the civil money penalty for an "impermissible deduction from pay" as provided in 655.22(g)—the provision that requires that all deductions not required by law must be disclosed—shall be equal to the amount of money that "should have been paid" to the H-2B worker. 20 C.F.R. 655.65(a). Therefore, the 2008 Rule recognizes that an *impermissible* deduction cannot bring the workers below the offered wage. That same regulatory provision permits the Administrator to seek back wages as a remedy if "an employer has not paid wages at the wage level . . . required by § 655.22(e)." 20 C.F.R. 655.65(i). Read in context, the 2008 Rule prohibits undisclosed deductions that erode workers' pay below the offered wage.

To the extent that Respondent is relying upon the discussion of an H-2B worker's relocation expenses in the preamble of the 2008 Rule for the argument that that rule permitted any deductions to erode a workers' pay below the offered wage, that section of the preamble was withdrawn in March 2009. *See* Field Assistance Bulletin 2009-2 (Aug. 21, 2009), *available at* www.dol.gov/agencies/whd/field-assistance-bulletins/2009-2.

2. The term "job offer" is not defined in the 2008 Rule, and so the ALJ analyzed how the term was used in both the regulatory text and preamble in order to determine how the regulations require deductions to be disclosed. *See* D&O 28-29. The ALJ noted that in addition to the reference in section 655.22(g)(1), the 2008 Rule used the term "job offer" in 20 C.F.R. 655.34. *See* D&O 28. That provision is titled "Validity of temporary labor certification – Amendments to Application" and addresses the process for an employer to submit amendments to a TEC, stating that "[o]ther amendments, including the elements of the job offer . . . may be requested." 20 C.F.R. 655.34(c)(3). Thus an employer must include "the elements of the job offer" on the TEC. The ALJ's analysis of the term "job offer" in the 2008 Rule concluded: "[t]he term 'job offer' is used consistently in the 2008 regulation and in the preamble, and it is clear that it refers to the proposed terms and conditions of employment, and that the job offer predates approval or disapproval of the application for labor certification." D&O 29. Ultimately, the ALJ determined that any deductions not required by law had to be included in the job offer, which must itself be included on the TEC. *See id.* Because Respondent failed to include the housing deduction on the TEC, the ALJ found a violation. *See id.*

Respondent argues that the ALJ erred because the regulations contain no express requirement to disclose deductions on the TEC. *See* Resp't Br. 37-41.

However, there is an obligation for employers to disclose the terms and working conditions of the job and to attest under penalty of perjury that they are accurate. *See* 20 C.F.R. 655.22(a); 20 C.F.R. 655.65(f). If an employer later discloses different terms of the job than those included on the TEC (such as this housing deduction), it would have falsely certified that the information on the TEC was accurate. Therefore, the ALJ correctly determined that "job offer" consists of the terms and conditions of the job, and those terms and conditions must be included on the TEC. Respondent did not include the weekly $60 housing deduction, which reduced the workers' pay significantly, on the TEC and therefore it did not accurately disclose the terms and conditions of the job as required by the H-2B regulations.

Respondent argues that it disclosed the deduction before the workers arrived, but provided no evidence beyond speculation as to what recruiters might have told H-2B workers. *See* Resp't Br. 9-10, 42-43; Tr. 318:13-319:22. In fact, when Andrew Deggeller was questioned as to how Respondent disclosed the housing deduction, he answered "it's in their paycheck"—practically an admission that the deduction was not disclosed prior to that time. Tr. 365:24-366:1. The evidence is clear that Respondent did not accurately disclose the housing deduction as part of the job offer when it submitted the TEC, contrary to the requirements of the H-2B regulations. Because that undisclosed deduction brought the workers below the

offered wage, the ALJ properly concluded that the undisclosed housing deductions constituted another violation of the offered wage requirement.[13]

C. The ALJ Properly Determined That Respondent Willfully Violated the Offered Wage Requirement

In order to determine an employer has violated the H-2B requirements, the Administrator must show that the violation is willful. *See* 8 U.S.C. 1184(c)(14); 20 C.F.R. 655.60. The ALJ properly determined that Deggeller's violations of the offered wage requirement were substantial failures to comply with the H-2B regulations and requirements. *See* D&O 27, 29. A substantial failure is defined as a willful failure—that is, a knowing failure or reckless disregard with respect to whether the conduct is contrary to the H-2B program requirements—that constitutes a significant deviation from the terms and conditions certified on the TEC or H-2B petition. *See* 20 C.F.R. 655.65(d), (e). Respondent had knowledge of the H-2B program's requirements, and its violations constituted a significant deviation from the terms and conditions that it certified, under penalty of perjury, that it would offer to its H-2B workers.

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[13] Respondent also argues that these deductions were voluntary. *See* Resp't Br. 8, 42. The ALJ correctly dismissed Respondent's arguments regarding the purported reasonableness of the housing deduction as irrelevant because it was not disclosed. *See* D&O 29. The same principle applies to the purported voluntariness of the housing deduction: it is irrelevant because there is no evidence that the deduction was actually disclosed. It is also not consistent with other evidence in the record; the Administrator noted that all 42 of the H-2B workers were charged the housing deduction. *See* RX32.

1. Respondent demonstrated knowledge or reckless disregard for the H-2B program requirements.

Respondent argues that it did not willfully violate the requirements of the offered wage violation for a variety of reasons: because the employer relied upon the advice of counsel, because the employer was unaware that the North Carolina overtime statute would apply, because it was unclear when the disclosures needed to occur. *See, e.g.*, Resp't Br. 28-31, 34-37, 42-44. To the extent that these arguments can be summarized as Respondent's failure to properly learn about the requirements of the H-2B program, that does not negate a finding of willfulness. An employer's failure to read the terms of the 9142 submitted on its behalf to the Department or to become educated concerning program requirements prior to signing or submitting an application is conduct that exhibits "a 'reckless disregard' for which penalties and disqualification are warranted." *Adm'r v. Home Mortg. Co. of Am.*, slip op. at 15 (OALJ Mar. 6, 2006) (interpreting the willful standard under the H-1B program); *see also* 20 C.F.R. 655.65(e) (defining a "willful failure" as a "knowing failure or a reckless disregard").

In addition, contrary to these arguments, the testimony of Andrew Deggeller demonstrated his actual knowledge of both the requirement to pay overtime in accordance with state law, and that the housing deduction was not disclosed to the workers until they received a paycheck. *See, e.g.*, Tr. 280:4-9, 365:24-366:1.

Therefore, the Board should not credit Respondent's arguments that its violations were not a knowing, willful failure.

2. Respondent's violations constituted a significant deviation from the terms and conditions on the TEC.

Respondent failed to pay overtime as required by North Carolina's law and failed to disclose the weekly $60 housing deduction, both of which constituted significant deviations from the terms and conditions Respondent certified on the TEC. With regard to the housing deduction, a $60 weekly deduction reduces the workers' pay by almost 15 percent, which certainly was a significant deviation from the offered wage. Regarding the North Carolina statute, Respondent went out of its way to insert language on the TEC in an attempt to avoid paying overtime except in certain states, and yet still failed to pay the overtime wage required by one of those states. That failure constitutes a significant deviation from the terms and conditions the Respondent itself listed on the TEC. Respondent's workers were paid no overtime at all for hours worked over 45 while they were in North Carolina. Therefore, the ALJ properly held that these violations met the statutory and regulatory definition of a willful violation, as is required.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board affirm the decision of the ALJ, including the ALJ's award of back wages related to the undisclosed housing deduction and CMPs for the offered wage violations, and remand for a final determination of back wages owed to workers for the offered wage violation stemming from Respondent's failure to pay the overtime rate for hours worked in North Carolina.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This document complies with the word limit of FRAP 32(a)(7)(B)(i) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 9,299 words.

I certify that on this 6th day of February 2020, a copy of this Administrator's Response Brief was sent electronically to:

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