ARB No. 2020-0022

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ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

v.

CTO/CHF PARTNERSHIP dba CIDER HILL FARM
Respondent.

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On Appeal from the
Office of Administrative Law Judges
ALJ No. 2019-TAE-00010

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# ADMINISTRATOR'S OPENING BRIEF

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**ADMINISTRATOR'S OPENING BRIEF**

This case concerns the scope of "corresponding employment" under the Department of Labor's ("Department") regulations governing the Immigration and Nationality Act's ("INA") H-2A temporary labor certification program. Under the H-2A program, an employer may hire foreign workers to perform temporary agricultural work only where the Department has certified that there are not sufficient able, willing, qualified and available workers to fill these jobs and that the hiring of such workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. Pursuant to the

Department's implementing regulations, an H-2A employer must pay certain minimum wages and transportation costs to its H-2A workers and to its workers engaged in corresponding employment. This requirement implements the statute's mandate that the hiring of H-2A workers not adversely affect the wages and working conditions of workers in the United States similarly employed. Under the plain language of the regulations defining "corresponding employment," any worker who is not an H-2A worker and who is performing the requisite work for an H-2A employer is engaged in corresponding employment. Thus, "corresponding employment" is not limited to U.S. workers.

After an investigation by the Department's Wage and Hour Division ("WHD"), the WHD Administrator ("Administrator") determined, in relevant part, that Respondent, an H-2A employer, failed to pay the required wage rate and transportation costs to its non-H-2A workers for time spent engaged in corresponding employment. Respondent appealed and requested a hearing on the determination before an Administrative Law Judge ("ALJ"). The ALJ dismissed the Administrator's claims against Respondent with respect to its non-H-2A workers, holding that corresponding employment is limited to "U.S. workers" only, and that Respondent's non-H-2A workers were not U.S. workers because they were J-1 visa holders participating in an internship program. As detailed herein, the ALJ's holding that corresponding employment is limited to U.S.

workers contravenes the language and structure of the statute and implementing regulations, and misapplies Administrative Review Board ("ARB") precedent and the regulatory history of corresponding employment. Accordingly, the Administrator respectfully requests that the ARB reverse the ALJ's decision dismissing the Administrator's claims against Respondent with respect to its non-H-2A workers.

## STATEMENT OF THE ISSUE

Whether the ALJ erred in holding that the Department's H-2A corresponding employment requirements apply only to U.S. workers.

## JURISDICTION STATEMENT

This case arises under the H-2A temporary agricultural worker provisions of the INA and the Department's implementing regulations. 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1188; 20 C.F.R. pt. 655, subpt. B; 29 C.F.R. pt. 501. The ARB has jurisdiction to review an ALJ's decision and issue the final determination of the Secretary of Labor under the H-2A program. U.S. Dep't of Labor, Sec'y's Order 01-2020, *Delegation of Auth. & Assignment of Responsibility to the Admin. Review Bd.*, 85 Fed. Reg. 13,186, 2020 WL 1065013 (Feb. 21, 2020); 29 C.F.R. 501.42. On February 7, 2020, the Administrator timely filed a Petition for Review of ALJ Noran J. Camp's December 9, 2019 Decision and Order ("D&O") in ALJ Case No. 2019-TAE-00010, as rendered final and ripe for appeal by the ALJ's

January 8, 2020 Final Decision and Order Granting Joint Motion to Dismiss. The ARB issued a Notice of Intent to Review this matter on March 5, 2020.

## STATEMENT OF THE CASE

### A. Relevant Statutory and Regulatory Framework

1. H-2A Visa Program. Under the H-2A provisions of the INA, an employer seeking to hire foreign workers to perform temporary agricultural labor or services must first apply for and obtain from the Department a certification that: (1) there are not sufficient workers available who are able, willing, and qualified to perform the work; and (2) the employment of [H-2A workers] will not "adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. 1188(a)(1)(A) and (B). The statute thus imposes two independent requirements that the Department must certify before an employer may hire H-2A workers, each intended to serve unique purposes. The first finding, under section 1188(a)(1)(A), requires a retrospective certification that considers whether, at the time of certification, there are sufficient able, willing, and qualified workers available to perform the employer's needed labor or services. The second finding, under section 1188(a)(1)(B), considers prospectively whether the hiring of H-2A workers will adversely affect the wages and working conditions of workers in the United States similarly employed.

Pursuant to its statutory authority, the Department has implemented regulations governing the procedures and standards for obtaining this temporary labor certification. 20 C.F.R. pt. 655, subpt. B; 29 C.F.R. pt. 501. To satisfy the statute's first requirement under 8 U.S.C. 1188(a)(1)(A) that H-2A workers may only be hired where there are insufficient workers available to perform the work, the Department's regulations require a prospective H-2A employer to engage in certain activities to recruit able, willing, and qualified U.S. workers. *E.g.,* 20 C.F.R. 655.121-655.122 (job order requirements); 655.150-655.158 (post-acceptance recruitment requirements). For example, the employer must recruit and offer to U.S. workers no less than the same terms and conditions of employment as will be offered to H-2A workers, *id*. at 655.122(a), contact and solicit the return of former U.S. workers, *id*. at 655.153, and may not layoff U.S. workers employed in the occupation within a certain timeframe before or during the work contract period, *id*. at 655.135(g). The regulations define "U.S. worker" to include U.S. citizens and residents, as well as a number of categories of foreign workers authorized to work in the United States. *Id*. at 655.103(b).

The statute's second, distinct requirement under 8 U.S.C. 1188(a)(1)(B), requires that the employment of H-2A workers not adversely affect "workers in the United States similarly employed." Even if this requirement is intended to protect U.S. workers from adverse effect, providing such protection requires the

imposition of obligations as to more than just U.S. workers. Thus, the Department's regulations require H-2A employers to pay workers at least a minimum wage rate, known as the "Adverse Effect Wage Rate" ("AEWR"). 20 C.F.R. 655.120(a) (offered wage rate); 655.122(l) (wage payment requirements). This obligation extends to both the employer's H-2A workers and to its workers engaged in "corresponding employment" for time so spent. *Id.*; *see also id.* at 655.103(b) (definition of "corresponding employment"); *Administrator v. Overdevest Nurseries, L.P.*, ARB No. 16-047, 2018 WL 2927669 (ARB Mar. 15, 2018) (employer's failure to pay the AEWR to workers engaged in corresponding employment violated 20 C.F.R. 655.122(l)), *aff'd Overdevest Nurseries, L.P. v. Scalia*, No. 1:18-CV-01347, 2020 WL 1873491 (D.D.C. Apr. 15, 2020).[1] "Corresponding employment" is defined as "[t]he employment of *workers who are not H-2A workers* . . . in any work included in the job order, or in any agricultural work performed by the H-2A workers . . . during the validity period of the job order." 20 C.F.R. 655.103(b) (emphasis added); 29 C.F.R. 501.3(a) (same). The

[1] Certain agricultural occupations, not relevant here, are subject to special procedures for the approval of H-2A temporary labor certifications that provide exceptions to the minimum hourly AEWR requirements. 20 C.F.R. 655.120(a). For example, workers in herding occupations must be paid at least a monthly, rather than hourly, AEWR. *Id*. at 655.210(g), 655.211. Regardless of occupation, however, all H-2A workers and workers in corresponding employment (for time spent so employed) must be paid at least the minimum required H-2A wage rate. *Id*. at 655.103(b), 655.122(l), 655.210(g), 655.211.

Department has explained that paying at least the AEWR to both H-2A workers and all workers in corresponding employment is a critical measure "to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce." U.S. Dep't of Labor, *Temporary Agricultural Employment of H-2A Aliens in the United States* (Final Rule), 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010) ("2010 Rule"). Thus, the AEWR is a "wage floor" that "is intended to supplement wage rates that have been depressed by the presence of H-2A and other foreign workers." *Id*. at 6886, 6891.

Additionally, among other minimum terms and conditions of employment, an H-2A employer must provide to H-2A workers and workers in corresponding employment transportation and subsistence costs to travel to the place of employment. 20 C.F.R. 655.122(h).

2. J-1 Visa Program. Under the Department of State's "Exchange Visitor Program" authorized by the INA, 8 U.S.C. 1101(a)(15)(J), 1182, 1184, and the Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. 2451 *et seq.*, commonly referred to as the J-1 visa program, nonimmigrant foreign nationals may come to the United States temporarily for "teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training." 8 U.S.C. 1101(a)(15)(J). Pursuant to this authority, the Department of State has implemented through regulations the specific

requirements of 13 different J-1 visa programs, 22 C.F.R. pt. 62, including, as relevant here, work-based internship/trainee programs in agriculture, *id*. at 62.22.

## B. <u>Statement of Facts</u>

1. Respondent is an H-2A employer. D&O 7. For each season Respondent participated in the H-2A program, including the 2013 through 2015 seasons as relevant here, it filed with the Department's Employment and Training Administration ("ETA") a Form ETA-9142, Application for Temporary Employment Certification, and Form ETA-790, Agricultural and Food Processing Clearance Order. Notice of Determination of Wages Owed and Assessment of Civil Money Penalties (Mar. 21, 2017) ("DL"); *see also* 20 C.F.R. 655.121, 655.130. By filing these documents, Respondent agreed to comply with the H-2A program's requirements, including paying the required H-2A wage rate, and providing inbound transportation and subsistence costs, to its H-2A workers and to its workers engaged in corresponding employment. *See* 20 C.F.R. 655.135.

2. During the 2013 through 2015 seasons, Respondent also hosted J-1 visa holders participating in the J-1 internship program. D&O 7-8. Respondent's J-1 visa holders at times performed agricultural work listed in Respondent's H-2A job orders. *Id*. at 8; *see also* DL 4.

3. WHD conducted an investigation to determine Respondent's compliance with the H-2A program's requirements during the 2013 through 2015 seasons.

D&O 8; DL 4. WHD found several H-2A violations involving both H-2A workers and non-H-2A workers engaged in corresponding employment. *Id*. As relevant here, WHD found that Respondent's J-1 visa holders at times performed the same agricultural work as Respondent's H-2A workers and as listed in the job orders, working 9.25 hours per day on average. *See Resp't's* Mot. to Dismiss, or in the Alt., Mot. *in Limine* Concerning Applicable Legal Standard, Ex. E ("Cider Hill Farm Summary of Back Wages"); DL 4. WHD also found that Respondent paid its H-2A workers at least the AEWR, which was $11.00 per hour for 2013, $11.22 per hour for 2014, and $11.26 per hour for 2015, but paid its J-1 visa holders lower wages for the same work, between $5.55 and $6.99 per hour. *Id*.

Accordingly, the Administrator determined that Respondent's J-1 visa holders, i.e., non-H-2A workers, were engaged in corresponding employment with Respondent's H-2A workers when they performed the same work for Respondent as the H-2A workers during the job order periods. D&O 8; DL 4. The Administrator determined that Respondent failed to pay these workers the required minimum wage rate for the time spent engaged in corresponding employment in violation of 20 C.F.R. 655.122(l) and failed to provide these workers the required inbound transportation and subsistence costs in violation of section 655.122(h). D&O 8; DL 4. On March 21, 2017, WHD notified Respondent of these determinations and required payment of $186,374.14 in back wages owed to

twenty-four (24) non-H-2A workers and $36,600.00 in civil money penalties ("CMPs"). *Id*.

### C. Course of Proceedings and ALJ Decision

1. Respondent appealed the Administrator's determination and the matter was referred to an ALJ for hearing. D&O 3. On April 19, 2019, Respondent filed a Motion to Dismiss, or in the Alternative, Motion *in Limine* Concerning Applicable Legal Standard ("Motion"), seeking dismissal of the Administrator's claims with respect to Respondent's non-H-2A workers. Mot. 1. In its Motion, Respondent agreed that H-2A employers must pay workers in corresponding employment the required H-2A wage rate and transportation costs, but disputed that the Department's H-2A corresponding employment regulations apply to Respondent's non-H-2A workers. *Id.* at 7, 9-10. Specifically, Respondent argued that only U.S. workers may be engaged in corresponding employment and thus entitled to the H-2A wage rate and transportation costs. *Id*. at 10-11. Respondent further argued that its non-H-2A workers were not U.S. workers under the H-2A program because they were J-1 visa holders participating in an internship program and therefore were not entitled to the protections afforded workers in corresponding employment. *Id*. Respondent also argued that WHD lacked authority to enforce the H-2A regulations with respect to Respondent's J-1 visa holders because the Department of State has jurisdiction over the J-1 visa program.

*Id*. at 10-24. In the alternative, Respondent moved for an order *in limine* declaring that the Department's "primary beneficiary" test under the Fair Labor Standards Act ("FLSA") would apply to determine whether Respondent's J-1 visa holders in this case were Respondent's "employees." *Id*. at 1.

2. The Administrator opposed Respondent's Motion on the ground that the Department's H-2A regulations include within corresponding employment non-H-2A workers performing the requisite work for an H-2A employer, not only U.S. workers. Adm'r's Opp. Mot. Dismiss, or in the Alt., Mot. *in Limine* Concerning App. Legal Standard 7-11. Accordingly, the Administrator explained that Respondent's J-1 visa holders may be engaged in corresponding employment if they were employed by Respondent to perform the pertinent type of agricultural work at the pertinent time, and thus owed the H-2A wage rate for time spent engaged in corresponding employment and inbound transportation costs, regardless of whether they qualified as U.S. workers. *Id*.[2] In the alternative, the

[2] "Employment" under the H-2A regulations is defined by the common law of agency. 20 C.F.R. 655.103(b) (defining employee and addressing "the factors relevant to the determination of employee status"); 29 C.F.R. 501.3(a) (same). Here, the issue before the ALJ on Respondent's motion to dismiss, and now before the ARB, is purely one of law, i.e., whether any J-1 visa holder participating in a J-1 visa internship program can ever be engaged in corresponding employment. Whether a particular J-1 visa holder labeled an "intern" for purposes of the J-1 visa program is in fact "employed" under the common law of agency will depend on the facts and circumstances of the particular case. *Id*. Based on WHD's investigation, the Administrator concluded that the J-1 visa holders were "employed" by Respondent under the common law of agency. *See* DL 4. Given

Administrator explained that even if corresponding employment were limited to U.S. workers, Respondent's J-1 visa holders satisfied the definition of U.S. workers under the H-2A regulations. *Id*. at 11-12. In response to Respondent's jurisdictional argument, the Administrator noted that this action is brought pursuant to the Administrator's authority to enforce the terms and conditions of employment under the H-2A program with respect to Respondent's H-2A workers and non-H-2A workers engaged in corresponding employment. *Id*. at 12-17. Respondent, as an H-2A employer, voluntarily agreed to comply with these obligations, irrespective of its independent obligations under the J-1 visa program. *Id*. Finally, with respect to Respondent's alternative motion *in limine*, the Administrator noted that, although the motion was procedurally inappropriate, the H-2A regulations apply the common law of agency, rather than the FLSA's "primary beneficiary" test, to determine a particular worker's employee status. *Id.* at 18 n.12.

3. After a hearing, the ALJ granted Respondent's Motion, holding that the Department's H-2A corresponding employment regulations do not apply in this case. D&O 1. The ALJ first held that corresponding employment is limited to

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the ALJ's ruling on Respondent's Motion, however, the Administrator has not yet had the opportunity to conduct discovery nor to present to the ALJ the facts and circumstances surrounding the employment relationship between Respondent and its J-1 visa holders.

U.S. workers, based on his interpretation of the regulatory history and the ARB's decision in *Administrator v. Overdevest Nurseries, L.P.*, ARB No. 16-047, 2018 WL 2927669 (ARB Mar. 15, 2018). D&O 8-13. The ALJ next concluded that Respondent's J-1 visa holders were not U.S. workers as defined in the Department's H-2A regulations because they were participating in an internship and not authorized for ordinary employment. *Id*. at 15. Accordingly, the ALJ held that the Department's H-2A requirements for workers in corresponding employment do not apply to Respondent's J-1 visa holders, and reversed and dismissed the Administrator's claims relating to these workers. *Id*. at 15-16. Having thus held, the ALJ did not address Respondent's jurisdictional arguments and denied the Motion in *Limine* Concerning the Applicable Legal Standard as moot. *Id*. at 4 n.13, 16.

4. On January 6, 2020, the parties filed a Joint Motion to Dismiss the remaining claims in this matter relating only to H-2A workers and involving comparatively minor wage and CMP amounts ($319.04 and $1,950.00, respectively). Joint Mot. to Dismiss ("Joint Motion") 1-3. On January 8, 2020, pursuant to the parties' Joint Motion, the ALJ issued a final order dismissing all remaining claims with prejudice, rendering the ALJ's December 9, 2019 D&O ripe for appeal. Final Decision and Order Granting Joint Motion to Dismiss (Jan. 8, 2020).

5. On February 7, 2020, the Administrator filed a Petition for Review seeking reversal of the ALJ's December 9, 2019 decision. Adm'r's Pet. Rev. 1-9.[3] The ARB accepted the petition for review on March 5, 2020. Notice of Intent to Review (Mar. 5, 2020). The Administrator now files this opening brief in support of her Petition for Review.

## ARGUMENT

### THE ALJ ERRED IN HOLDING THAT THE DEPARTMENT'S H-2A REGULATIONS LIMIT CORRESPONDING EMPLOYMENT TO U.S. WORKERS

The Department's H-2A regulations require an H-2A employer to provide at least the AEWR and inbound transportation costs to both H-2A workers and workers engaged in corresponding employment. *See* 20 C.F.R. 655.103(b) (definition of "corresponding employment"); 655.120(a) (offered wage rate); 655.122(l) (wage rate requirements); *Administrator v. Overdevest Nurseries, L.P.*, ARB No. 16-047, 2018 WL 2927669, at *12 (ARB Mar. 15, 2018) (employer failed to pay workers in corresponding employment the AEWR in violation of 20 C.F.R. 655.122(l)); *Overdevest Nurseries, L.P. v. Scalia*, 1:18-CV-01347, 2020 WL 1873491, at *2 (D.D.C. Apr. 15, 2020) (the Department's regulations require "employers to pay H-2A workers and workers engaged in corresponding

[3] The back wages and CMPs at issue on appeal relate only to Respondent's non-H-2A workers, amounting to $186,055.10 and $34,650, respectively. Joint Mot. at 3.

employment 'a wage that is the highest of the [adverse effect wage rate], the prevailing hourly wage or piece rate, the agreed-upon collecting bargaining wage, or the Federal or State minimum wage[.]' 20 C.F.R. 655.120(a); *see id*. 655.122(l)" (brackets in original)).[4] Workers in corresponding employment include any non-H-2A worker performing the requisite work for an H-2A employer during the job order period. 20 C.F.R. 655.103(b); 29 C.F.R. 501.3(a). As detailed below, the ALJ's decision that corresponding employment is instead limited to U.S. workers misconstrues the text and structure of the regulations, and is based on an erroneous application of the ARB's decision in *Overdevest* and of the regulatory history relating to the term corresponding employment.

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[4] Although ultimately not relevant to the issue on appeal, the ALJ appeared to misread *Overdevest* regarding the source of the H-2A program's wage requirements. While the parties agreed before the ALJ that workers engaged in corresponding employment must be paid the AEWR (but disagreed as to the scope of workers that may be so engaged), the ALJ "pause[d] to note" that the wage regulations make no reference to corresponding workers. D&O 5. The ALJ concluded that the ARB in *Overdevest* read the term "corresponding employment" into 20 C.F.R. 655.122(a). D&O 6. Thus, it appears that the ALJ interpreted *Overdevest* and section 655.122(a) as the source of authority for the requirement that H-2A employers pay the AEWR to workers in corresponding employment. In fact, the liability at issue here is pursuant to the longstanding wage payment requirements of section 655.122(l) and the scope of corresponding employment defined under 655.103(b) and 29 C.F.R. 501.3(a), rather than the distinct regulatory prohibition on preferential treatment found in 20 C.F.R. 655.122(a). The ARB's decision in *Overdevest*, as affirmed by the United States District Court for the District of Columbia, reflects these longstanding requirements, holding that the employer violated section 655.122(l) in failing to pay corresponding workers the AEWR. *Overdevest*, 2018 WL 2927669, at *12.

### A. **The ALJ's Decision Contravenes Both the Plain Language and Structure of the Regulations that Include within Corresponding Employment Any Worker Who Is Not an H-2A Worker and Who Is Performing the Requisite Work.**

1. The Department's regulations define corresponding employment as "[t]he employment of workers *who are not H-2A workers* . . . in any work included in the job order, or in any agricultural work performed by the H-2A workers . . . during the validity period of the job order[.]" 20 C.F.R. 655.103(b) (emphasis added); 29 C.F.R. 501.3(a) (same). The regulations provide that corresponding employment applies to any "workers who are not an H-2A workers," rather than to any "U.S. workers who are not H-2A workers." Thus, by their plain language, the regulations include within corresponding employment *any* non-H-2A worker performing the requisite work, not just U.S. workers. *Id*.

Because the language of the regulation "has a plain and ordinary meaning," the ALJ should have "look[ed] no further and [applied] the regulation as it is written." *Textron Inc. v. C.I.R.*, 336 F.3d 26, 31 (1st Cir. 2003). As the Department and federal courts have recognized, the text of a statute or regulation should be given its plain and ordinary meaning "unless a clearly express legislative intent is to the contrary or unless the plain meaning would lead to absurd results." *Smith v. Littenberg*, Sec'y Case No. 92-ERA-52, 1993 WL 832042, at *3 (Sec'y June 30, 1993); *see also U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242

(1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." (internal citation omitted)); *Textron*, 336 F.3d at 31 (citing federal authority for applying plain meaning rule to statutes and regulations). "If, after engaging in this textual analysis, the meaning of the regulations is clear," the court's "analysis is at an end," and it "must enforce the regulations in accordance with their plain meaning." *Jake's Fireworks Inc. v. Acosta*, 893 F.3d 1248, 1261 (10th Cir. 2018) (internal citation omitted).

Here, giving effect to the regulations' plain meaning—i.e., that corresponding employment applies to *any* non-H-2A worker performing the requisite work—presents no risk of an absurd result or conflict with the Department's express intent in drafting the regulations. Rather, it is entirely consistent with the intent and purpose of corresponding employment under the H-2A regulations. As noted above, the Department views the requirement to pay the AEWR to both H-2A workers and all workers in corresponding employment for those hours spent engaged in corresponding employment as critical to prevent a depressive effect on the wages of workers in the United States similarly employed, as required by the INA. 2010 Rule, 75 Fed. Reg. at 6885, 6891; *see also Overdevest Nurseries, L.P. v. Scalia*, No. 1:18-CV-01347, 2020 WL 1873491, at

*2 (D.D.C. Apr. 15, 2020) (H-2A wage "protections are extended to workers engaged in corresponding employment, as well as to H-2A workers, to ensure that '[t]he employment of . . . [an H-2A worker] will not adversely affect the wages and working conditions of workers in the [United States] similarly employed.' 8 U.S.C. § 1188(a)(1)(ii)." (brackets in original)). A broad definition of corresponding employment reflects and implements this statutory mandate by requiring H-2A employers to pay the requisite wage rate to all workers employed to perform the same work as H-2A workers. To permit otherwise, as under the ALJ's decision, could potentially undermine this critical protection by creating a loophole for employers to circumvent the protections of the AEWR. In other words, taken to its extreme, the ALJ's decision could permit an H-2A employer to supplement its H-2A workforce by employing non-U.S. workers, but pay such workers substantially lower wages, despite performing the same work, in contravention of the statutory and regulatory framework detailed above.

2. Had the Department intended to limit workers in corresponding employment to U.S. workers, it could have done so explicitly. The Department defined the term "U.S. worker" in its H-2A regulations, 20 C.F.R. 655.103(b) (definition of "U.S. worker"); 29 C.F.R. 501.3(a) (same), and expressly used the term in numerous places, particularly where addressing an employer's recruitment obligations, but the Department did not use the term "U.S. workers" in the

definition of corresponding employment. For example, under 20 C.F.R. 655.122(a), the Department prohibits the preferential treatment of H-2A workers over U.S. workers during an employer's recruitment efforts by requiring an employer to offer to "U.S. workers" at least the same wages and benefits as will be offered to, and impose no greater restrictions than will be imposed on, H-2A workers. *Id.* at 655.122(a). In addition, an employer may not reject a qualified "U.S. worker" for the job opportunity except for lawful, job-related reasons, *id*. at 655.135(a), and must contact and solicit the return of former "U.S. workers" for the job opportunity, *id*. at 655.153. That the Department referenced U.S. workers explicitly in these instances, but did not do so when defining workers in corresponding employment, thus further demonstrates that corresponding employment is not limited to U.S. workers. *E.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (referring to "the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended'" (citation omitted)).

The regulations also refer repeatedly in the disjunctive to "U.S. workers" and "workers in corresponding employment," further demonstrating that the Department did not intend to limit corresponding employment to U.S. workers. *E.g.*, 20 C.F.R. 655.182(d)(1)(iv), (e)(2); 29 C.F.R. 501.5, 501.9(b), 501.15, 501.19(b)(2), 501.20(a), 501.21(b). If, as the ALJ concluded, corresponding

employment were limited to U.S. workers, there would be no need to refer to workers in corresponding employment in these provisions, as they would necessarily be included within the larger group of "U.S. workers" also addressed in these provisions. For example, 20 C.F.R. 655.182 sets forth the standards for debarment of an H-2A employer by the Department's Office of Foreign Labor Certification. Included within debarrable offenses and the considerations for imposing debarment are the "improper layoff or displacement of U.S. workers or workers in corresponding employment," 20 C.F.R. 655.182(d)(1)(iv), and the "[t]he number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s)[,]" *id*. at 655.182(e)(2). *See also* 29 C.F.R. 501.19(b)(2) (directing the Administrator, when assessing CMPs, to consider, in relevant part, "[t]he number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s)"). Interpreting "corresponding employment" to be limited to U.S. workers would render superfluous the term "workers in corresponding employment" in these provisions. Such a result contravenes the fundamental principle of textual construction that a court should interpret a regulation so that, "'if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*,

524 F.3d 54, 59 (1st Cir. 2008) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

3. In his decision, the ALJ recognized that the plain language of the regulations was “appealing,” D&O 8, but nonetheless rejected that plain language, based on an erroneous interpretation of ARB precedent and regulatory history that corresponding employment is limited to U.S. workers (as detailed below). *Id*. at 8-11. After so concluding, the ALJ then attempted to reconcile his conclusion with the plain language and structure of the regulations by addressing only one of these disjunctive phrases: “an H-2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced[.]” *Id*. at 11-12 & n.36; *see also* 29 C.F.R. 501.5, 501.9(b), 501.15, 501.20(a), 501.21(b); 20 C.F.R. 655.182(a)).[5] The ALJ posited that this particular disjunctive phrase does not refer to “U.S. workers in corresponding employment” because “workers in corresponding employment” is already limited to U.S. workers and so reference to “U.S. worker” here would be unnecessary. D&O 11-

[5] The ALJ’s analysis was thus performed in reverse. Rather than starting with the regulations’ plain language and structure, as required, the ALJ erroneously let the regulatory history and dicta from the ARB’s decision in *Overdevest* control its interpretation of the plain regulatory text. *See, e.g.*, *El Comite Para El Beinestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008); *Wy. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999); *cf. Spinner v. Landau*, ARB Nos. 10-111, 10-115, 2012 WL 1999677, at *6 (ARB May 31, 2012).

12. The ALJ found the Administrator's "explanation for the disjunctive form, while sensible from a plain English perspective," not persuasive in context. *Id*. at 11. The ALJ further reasoned that "the regulation's inclusion of the phrase 'U.S.' clarifies that the regulation applies to any 'U.S.' worker who was improperly rejected, laid off or displaced – whether or not they were in corresponding employment." *Id*. Thus, the ALJ reasoned that U.S. workers improperly rejected, laid off, or displaced is a broader group of U.S. workers than those who work in corresponding employment (even though, in the ALJ's opinion, both groups are limited to U.S. workers).

The ALJ's interpretation requires implication and ignores that the plain language of this regulatory phrase does not itself refer to "U.S. worker in corresponding employment," but instead refers explicitly to U.S. workers only with respect to those impermissibly rejected, laid off, or displaced. Had the Department intended to limit both groups of workers to U.S. workers, it could have done so explicitly, and more naturally, by referring to "any H-2A worker or U.S. worker in corresponding employment or improperly laid off, rejected, or displaced." *Id.* It did not do so.

Further, even if the ALJ's interpretation of this particular disjunctive phrase were a permissible construction, the ALJ failed to examine the other regulatory provisions that refer in the disjunctive, using different wording, to workers in

corresponding employment and U.S. workers, for which no harmonious, non-superfluous reading can stand under the ALJ's conclusion. *Supra,* 20 C.F.R. 655.182(d)(1)(iv) ("Improper layoff or displacement of U.S. workers or workers in corresponding employment[.]"), (e)(2) ("The number of H–2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s)[.]"); 29 C.F.R. 501.19(b)(2) (same). As discussed above, the only non-superfluous reading of these provisions, as well as the provisions referring to "a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced[,]" that gives each provision "operative effect" such that "no clause, sentence, or word shall be superfluous, void, or insignificant," *Morales*, 524 F.3d at 59, is that corresponding employment is not limited to U.S. workers.

4. The ALJ further compounded his errors by citing to 29 C.F.R. 502.5(b) and 20 C.F.R. 655.402 in support of his conclusion that corresponding employment is limited to U.S. workers. D&O 10. Neither regulation is controlling or even relevant here. Citing 29 C.F.R. 502.5(b), the ALJ found compelling that the "very regulation that sets forth the authority to conduct the investigation underlying this proceeding refers to 'corresponding employment' only in the context of U.S. workers." D&O 9-10. But all of the regulations at 29 C.F.R. part 502, including section 502.5(b), are inoperative and do *not* set forth the authority for the

underlying investigation here, as these regulations were suspended in 2009 and then superseded by the 2010 Rule, as discussed in more detail below. U.S. Dep't of Labor, *Temporary Employment of H-2A Aliens in the United States* (Final Rule), 74 Fed. Reg. 25,972, 26008 (May 29, 2009) (redesignating 29 C.F.R. pt. 501 as 29 C.F.R. pt. 502, and at the same time, suspending newly-designated 29 C.F.R. pt. 502). The ALJ also found persuasive that the Department explicitly limits corresponding employment to U.S. workers in its regulation at 20 C.F.R. 655.402, governing temporary foreign labor certification in the Northern Mariana Islands. D&O 12 n.40. This regulation, however, implements a distinct temporary labor certification program under a statute that explicitly prohibits adverse effect on "similarly employed United States workers," 48 U.S.C. 1806(d)(2)(A)(i)(II), unlike the H-2A statute which prohibits adverse effect on "workers in the United States similarly employed," 8 U.S.C. 1188(a)(1)(B). Thus, 29 C.F.R. 502.5 and 20 C.F.R 655.402 are inapposite here.

### B. The ALJ Erred in Concluding that the Regulatory History and the ARB's Decision in *Overdevest* Limit Corresponding Employment to U.S. Workers.

1. Although the ALJ's inquiry should have begun and ended with a textual reading of the regulations—a reading which the ALJ recognized was "appealing," D&O 8—he nevertheless rejected this reading based primarily on his misapplication of the regulatory history of the term "corresponding employment."

*Id*. at 9-11. But given the plain language of the controlling regulations, as detailed above, it was error for the ALJ to consider the regulatory history at all because regulatory history cannot control over the plain language of the regulation. *See, e.g.*, *El Comite Para El Beinestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008) ("[T]he preamble language should not be considered unless the regulation itself is ambiguous."); *Wy. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (language in the preamble to a rule cannot control over the language of the rule itself); *cf. Spinner v. Landau*, ARB Nos. 10-111, 10-115, 2012 WL 1999677, at *6 (ARB May 31, 2012) (looking to legislative history *after* determining that the statutory provision was ambiguous). This is true even if that regulatory history may conflict with the regulatory text (which it does not here). *See Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014) (to the extent a preamble conflicts with the text of a regulation, the regulation controls). In any event, the regulatory history of the term "corresponding employment" does not support the ALJ's conclusion. Indeed, this regulatory history reflects that the term is not limited to U.S. workers.

The Department first promulgated regulations governing the H-2A program in 1987. U.S. Dep't of Labor, *Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted under Section 216 of the Immigration and Nationality Act* (Interim Final Rule), 52 Fed. Reg. 20,524 (June 1,

1987) (codified at 29 C.F.R. pt. 501); 52 Fed. Reg. 20,496 (June 1, 1987) (codified at 20 C.F.R. pts. 654 and 655) (together, "1987 Rule"). The 1987 Rule broadly defined corresponding employment as "the employment of *other workers* hired by employers of H-2A workers in the occupations and for the period of time set forth in the job order." 52 Fed. Reg. at 20,527 (emphasis added) (codified at 29 C.F.R. 501.0). The plain language of this regulation thus applied to any "other workers;" it was not limited to U.S. workers. Moreover, in the preamble to the regulation, the Department explained that the regulations applied to "enforcement of the contractual obligations of an employer of H-2A workers to the workers, including *U.S.* and H-2A *workers and other workers engaged in corresponding employment* employed by the employer." *Id.* at 20,524 (emphasis added). The explicit reference to both U.S. workers and "*other workers* engaged in corresponding employment" reflected that "other workers engaged in corresponding employment" was not coextensive with "U.S. workers." If the 1987 Rule had limited corresponding employment to U.S. workers, as the ALJ concluded, D&O 9-10, the reference to U.S. workers and *other workers* here in the preamble would be meaningless. Corresponding employment under the 1987 Rule thus applied to both U.S. and *other workers* performing the requisite work for an H-2A employer.

In 2008, the Department issued new regulations governing the H-2A program, which became effective in 2009. U.S. Dep't of Labor, *Temporary*

*Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement* (Final Rule), 73 Fed. Reg. 77,110 (Dec. 18, 2008) ("2008 Rule"). The 2008 Rule explicitly limited corresponding employment to newly-hired U.S. workers:

> These regulations are … applicable to the employment of United States (U.S.) workers newly hired by employers of H-2A workers in the same occupations as the H-2A workers during the period of time set forth in the labor certification. Such U.S. workers hired by H–2A employers are hereafter referred to as engaged in corresponding employment.

*Id.* at 77,230 (codified at 29 C.F.R. 501.0 (2010)).

On May 29, 2009, the Department suspended the 2008 Rule and reinstated the 1987 Rule, pending additional rulemaking. 74 Fed. Reg. 25,972, 26,008.[6] The Department then issued the 2010 Rule, controlling here. 2010 Rule, 75 Fed. Reg. 6884. As noted above, the 2010 Rule defines corresponding employment as "the employment of workers who are not H–2A workers . . . in any work included in the job order, or in any agricultural work performed by the H–2A workers." 20 C.F.R. 655.103(b); 29 C.F.R. 501.3(a) (same). In the 2010 Rule, the Department thus removed the 2008 Rule's limitation on corresponding employment to newly-hired U.S. workers, removing any reference to U.S. workers at all from the definition of

[6] The Department moved the 2008 Rule regulations from 29 C.F.R. part 501 to part 502 in order to reinstate the 1987 Rule regulations in part 501 pending rulemaking. At the same time that it moved the 2008 Rule regulations to part 502, it suspended newly-designated part 502. 74 Fed. Reg. 25,972, 26,008.

corresponding employment. *Id*. Although the preamble discussion to the 2010 Rule primarily repudiated the 2008 Rule's limitation on corresponding employment to newly-hired workers, the Department was unequivocal in its wholesale rejection of the 2008 Rule's definition of corresponding employment and the agency's intent to return to the 1987 Rule's broader definition, with one exception not relevant here. 2010 Rule, 75 Fed. Reg. at 6885. Had the Department intended to limit corresponding employment under the 2010 Rule to U.S. workers, it could have simply removed only the limitation to newly-hired workers, retaining the limitation to U.S. workers. It did not. Instead, the Department removed any reference to U.S. workers from the definition of corresponding employment. The 2010 Rule thus includes within corresponding employment all workers performing the requisite work, consistent with the 1987 Rule's definition of this term. *Id.* ("In the definition of corresponding employment, the Department proposed that *all workers* employed by H-2A employers doing work performed by H-2A workers be considered engaged in corresponding employment. The proposal returns to the requirements of the 1987 Rule." (emphasis added)).[7]

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[7] In some instances, the preamble to the 2010 Rule refers to U.S. workers in corresponding employment. *E.g.*, 75 Fed. Reg. at 6885 ("The effect of the proposed definition [of corresponding employment] which would require U.S. workers to be paid the same wages and conditions that H–2A workers receive when performing the same work is not new."). These references describe one

Thus, the current definition of corresponding employment, omitting any reference or limitation to U.S. workers, reflects an intention to return to the definition of that term under the 1987 Rule, which was similarly applicable to any non-H-2A worker performing the requisite work. The regulatory history thus further demonstrates that the controlling definition of corresponding employment is not limited to U.S. workers.

2. In his decision, the ALJ erred by concluding instead that the regulatory history indicates that "workers" in corresponding employment refers only to U.S. workers in corresponding employment, which in turn was based on his flawed interpretation of the ARB's decision in *Overdevest*, which summarized the regulatory history. D&O 9-11. The issue before the ARB in *Overdevest* was whether the employer's non-H-2A workers were engaged in corresponding employment based on the work performed by these workers: the workers performed work included in the H-2A job order and the Administrator maintained

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group of workers that may be engaged in corresponding employment, rather than limit corresponding employment to only U.S. workers. Other language throughout the preamble to the 2010 Rule reflects the full scope of corresponding employment. *Id*. ("*all workers*" employed by H-2A employers doing work performed by H-2A workers are considered engaged in corresponding employment (emphasis added)); *id*. (returning to 1987 Rule definition of corresponding employment which "made specific reference to workers in corresponding employment hired by H-2A employers as well as to *any other* worker employed in corresponding employment" (emphasis added)).

that these workers were therefore engaged in corresponding employment; the H-2A employer contended that the workers were not engaged in corresponding employment because, despite performing several duties included within the job order, they were allegedly not qualified to perform *all* of the work included in the job order. *Overdevest*, 2018 WL 2927669, at *3-6. Thus, *Overdevest* concerned solely the duties that qualify for corresponding employment rather than the type of workers that may be engaged in corresponding employment.

The ARB affirmed the Administrator's position, holding that the non-H-2A workers were engaged in corresponding employment under the "plain language of the definition of 'corresponding employment'" in the 2010 Rule because they performed the requisite work, regardless of the workers' qualifications. *Overdevest*, 2018 WL 2927669, at *8, 10. Given the plain language of the definition of corresponding employment in the 2010 Rule, the regulatory history of the term "corresponding employment" was thus not determinative of whether the non-H-2A workers in *Overdevest* were, based on their work duties, engaged in corresponding employment. *Id.* at *8-9.

As part of its analysis, however, the ARB set out the regulatory history of the term "corresponding employment" as defined in prior iterations of the Department's H-2A regulations. *Overdevest*, 2018 WL 2927669, at *4. It quoted the 1987 Rule, but added the clause "U.S. domestic"—a term not found in the prior

or current regulations—in brackets to modify the type of "workers" that could be engaged in corresponding employment under the 1987 Rule. *Id*. This unexplained modification was not necessary or even relevant to the issues presented in *Overdevest*, and instead simply reflected the facts presented in the case. Indeed, throughout the decision, the ARB referred to the employer's non-H-2A workers interchangeably as "U.S. domestic workers," "domestic workers," "domestic U.S. workers," and "domestic production workers," among other variations. *Id*. at *2, 3, 6. These various references most likely served as useful expedients to distinguish between the two groups of workers at issue in that case—the H-2A workers and the non-H-2A workers. The ARB did not purport to hold or even consider whether corresponding employment is limited to "U.S. domestic" workers.

Here, the ALJ erroneously concluded that the ARB's insertion of the term "U.S. domestic" before "workers in corresponding employment" in its discussion of the 1987 Rule created binding precedent regarding the regulatory history of the term corresponding employment. D&O 9, 11. As explained above, the ARB's insertion of "U.S. domestic" in *Overdevest*, and in fact its entire discussion of the 1987 Rule itself, was not necessary to support the ARB's holding in *Overdevest*, and thus amounts to dicta. The ALJ thus erred in ascribing undue weight to this reference and concluding that the regulatory history, as viewed through dicta in the

ARB's decision in *Overdevest*, indicates that corresponding employment is limited to U.S. workers.[8] Instead, as detailed above, the regulatory history further underscores that corresponding employment under the controlling 2010 Rule applies to any non-H-2A worker performing the requisite work for an H-2A employer.

**C. The ALJ Erred in Concluding that WHD Fact Sheet 26 Indicates that Corresponding Employment Is Limited to U.S. Workers.**

In his decision, the ALJ also cited to a portion of WHD Fact Sheet 26 in support of his holding that corresponding employment is limited to U.S. workers. D&O 12. Fact Sheet 26 provides a general overview of the H-2A program's requirements. Fact Sheet 26. The ALJ found persuasive that the Fact Sheet states, in part, that the H-2A program's requirements "'apply to the employment of U.S. workers by an employer of H-2A workers in any work included in the ETA-approved job order or in any agricultural work performed by the H-2A workers during the period of the job order. Such U.S. workers are engaged in corresponding employment.'" D&O 12 (quoting Fact Sheet 26). The ALJ thus found compelling that "the Administrator offered guidance to the public –

[8] Likewise, any references to the payment of the AEWR to "U.S." or "American" workers in corresponding employment in the district court's decision in *Overdevest Nurseries, L.P. v. Scalia*, No. 1:18-CV-01347, 2020 WL 1873491 (D.D.C. Apr. 15, 2020), similarly amount to dicta, as the district court's decision concerns only the scope of duties included within corresponding employment.

including, presumably, Cider Hill – that only U.S. workers could be in 'corresponding employment.'" *Id*.

However, the Fact Sheet does *not* state that only U.S. workers can be engaged in corresponding employment. The Department did not purport to address the scope of corresponding employment in this Fact Sheet, and the language cited by the ALJ may be reasonably read to reflect that U.S. workers are included within the broader scope of workers that may be engaged in corresponding employment, rather than that other workers are excluded. Other language in the same Fact Sheet, not cited by the ALJ, may be reasonably read to reflect the broader scope of corresponding employment. Fact Sheet 26 (noting under "Rates of Pay" that H-2A wage rate must be paid to "all covered workers" and under "Written Disclosure" that such disclosure must be provided to "workers in corresponding employment").

But even if this Fact Sheet is read, as the ALJ did, to conflict with the regulation, it is the regulation that controls employers' obligations. *Jake's Fireworks Inc.*, 893 F.3d at 1262 (policy statements generally are not binding on regulated parties and "do not require an agency's compliance with their pronouncements to find a violation of a regulation"); *cf. Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014) (to the extent a preamble conflicts with the text of a regulation, the regulation controls). And as detailed above, the plain language of the regulation provides that corresponding employment applies

to any worker who is not an H-2A worker, and is not limited to U.S. workers. The ALJ thus erred in looking to and relying on the Fact Sheet to support his conclusion that corresponding employment is limited to U.S. workers alone.

## CONCLUSION

For the above reasons, the ALJ erred in granting Respondent's Motion and dismissing the Administrator's claims against Respondent with respect to Respondent's non-H-2A workers. The ALJ's decision that corresponding employment is limited to U.S. workers is contrary to the plain language and structure of the Department's H-2A regulations, and it misapplies ARB precedent and the H-2A regulatory history. Accordingly, the Administrator respectfully requests that the ARB reverse the ALJ's December 9, 2019 decision and order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2020, I served the foregoing Administrator's Opening Brief on Respondent solely via electronic mail as follows, with agreement of opposing counsel and in light of the shift in operations resulting from the COVID-19 pandemic:

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