U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 2021-0069**
	ALJ CASE NO. 2018-TAE-00013
PROSECUTING PARTY,	**DATE: March 31, 2023**

v.

WASHINGTON FARM LABOR ASSOCIATION,

RESPONDENT.

Appearances:

For the Administrator, Wage and Hour Division:
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Megan E. Guenther, Esq.; Rachel Goldberg, Esq.; and Shelley E. Trautman, Esq.; *U.S. Department of Labor*, *Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
Leon R. Sequeira, Esq.; *LRS Law*; Prospect, Kentucky

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL and PUST, Administrative Appeals Judges; BURRELL, Administrative Appeals Judge, Concurring in Part and Dissenting in Part

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the H-2A provisions of the Immigration and Nationality Act (INA), as amended,[1] and the U.S. Department of Labor (Department) implementing regulations found at 20 C.F.R. Part 655, Subpart B and 29 C.F.R. Part 501 (collectively, the H-2A program).[2] The INA's H-2A program allows employers to hire foreign, nonimmigrant workers to temporarily fill agricultural positions in the United States.

On August 25, 2021, a Department Administrative Law Judge (ALJ) issued a Decision and Order – Affirming in Part and Modifying in Part Administrator's Determination (D. & O.). In the D. & O., the ALJ determined that Respondent Washington Farm Labor Association (WAFLA) was responsible for H-2A program violations as a joint employer and was liable for civil money penalties (CMPs). For the reasons set forth below, we **AFFIRM** the ALJ's D. & O.

BACKGROUND

WAFLA is an agricultural association that provides H-2A program assistance, human resources support, and legal compliance functions to its roughly 800 members.[3] In May 2013, Sakuma Brothers Farms (Sakuma) engaged WAFLA to apply for and obtain H-2A workers for hand harvesting and field packing late season blueberries and blackberries at Sakuma's farm in Burlington, Washington.[4] Sakuma had never before hired H-2A workers and engaged WAFLA based on WAFLA's representations regarding its experience with the H-2A program.[5]

WAFLA prepared and submitted to the Department all required documentation to obtain H-2A workers for Sakuma, including, among other things,

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1 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188.

2 This case arises under the H-2A regulations that were in effect from 2010 to 2020, and all cites herein are to the 2010 regulations. 20 C.F.R. §§ 655.100-.185; Temporary Agricultural Employment of H-2A Aliens in the United States (2010 Final H-2A Rule), 75 Fed. Reg. 6884 (Feb. 12, 2010). The Department proposed new regulations for the H-2A program in 2019, with new final regulations taking effect in 2020 and 2022.

3 D. & O. at 7

4 *Id.* at 4.

5 *Id.*

a master application on ETA Form 9142A and a job order on ETA Form 790.[6] In the master application and job order, WAFLA certified under the penalty of perjury that it was a joint employer with Sakuma and that it agreed to comply with all terms and conditions of H-2A employment.[7] Based on the documentation submitted by WAFLA, the Department approved WAFLA and Sakuma to recruit and hire H-2A workers for the period of August 5, 2013, through October 31, 2013.[8] WAFLA ultimately recruited 69 H-2A workers for Sakuma and facilitated the travel and logistics of transporting the workers from their homes outside the United States to Sakuma's farm.[9]

In or around August 2013, the Department's Wage and Hour Division (WHD) initiated an investigation of Sakuma and its H-2A program compliance.[10] On April 7, 2017, the Administrator of the WHD (Administrator)[11] sent Sakuma and WAFLA a Notice of Determination of Back Wages and Assessment of Civil Monetary Penalties (Notice of Determination).[12] The Notice of Determination charged Sakuma and WAFLA with several violations of the H-2A program regulations and assessed CMPs of $123,825 against Sakuma and $750 against WAFLA.[13] Sakuma and WAFLA contested the violations and penalties, and the matter was referred to the Department's Office of Administrative Law Judges on February 15, 2018.[14]

On April 25, 2018, the Administrator issued an Amended Notice of Determination of Back Wages and Assessment of Civil Money Penalties (Amended Notice of Determination), amending its assessment of CMPs against Sakuma and

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6 *Id.*

7 *Id.* at 7-9; Administrator's Hearing Exhibit (Adm'r Hearing Ex.) 2 at 7; Adm'r Hearing Ex. 3 at 2, 7-9.

8 D. & O. at 4.

9 *Id.* at 4.

10 *Id.* at 6.

11 In recognition of the fact that the person holding the position of Administrator has changed over time, we use plural pronouns when referring to the Administrator in this decision.

12 *Id.* at 2; WAFLA Hearing Exhibit (WAFLA Hearing Ex.) A.

13 WAFLA Hearing Ex. A. at 1, 6-9. The Notice of Determination also assessed $9,599.58 in unpaid wages owed to 61 workers. *Id.* at 1.

14 D. & O. at 2.

WAFLA.[15] In the Amended Notice of Determination, the Administrator assessed CMPs of $106,800 against Sakuma and $124,575 against WAFLA.[16] The table below summarizes each alleged violation and the CMPs assessed by the Administrator against WAFLA, including any percentage reduction the Administrator applied based on mitigation factors.[17]

Regulation	*Violation*	*Penalty*
20 C.F.R. § 655.122(a), (d)(3), (h)(4)	H-2A workers were given preferential treatment over domestic workers	$108,675 ($310,500 base penalty, 30% mitigation, plus 50% further mitigation)
20 C.F.R. § 655.122(d)(1)	Housing failed to meet the applicable safety and health standards	$1,800 ($3,000 base penalty, 40% mitigation)
20 C.F.R. § 655.135(d)	U.S. workers were rejected from employment due to lack of experience when H-2A workers without experience were hired	$12,000 ($15,000 base penalty, 20% mitigation)
20 C.F.R. § 655.122(h)(1)	H-2A workers were not properly paid for their inbound transportation costs	$750 ($1,500 base penalty, 50% mitigation)
20 C.F.R. § 655.135(c)	U.S. workers were rejected even though they were qualified; WAFLA failed to follow up with applicants and rejected workers because the farm had inadequate housing	$1,350 ($1,500 base penalty, 10% mitigation)
Total		**$124,575**

[15] *Id.*; WAFLA Hearing Ex. B.

[16] WAFLA Hearing Ex. B at 6. The Amended Notice of Determination also reduced the assessed back wages to $5,443.21 owed to 19 workers after previous payments had been made. *Id.*

[17] The H-2A regulations identify several factors that the Administrator may consider in determining the amount of penalty to be assessed for each violation, commonly referred to as "mitigation factors." 29 C.F.R. § 501.19(b); *infra* footnote 132.

Sakuma and the Administrator subsequently agreed to a settlement of the CMPs assessed against Sakuma and filed proposed Consent Findings with the ALJ on October 4, 2018.[18] WAFLA was not a party to the settlement or the Consent Findings.[19]

The ALJ conducted a formal hearing on the Administrator's charges against WAFLA on October 15 and 16, 2018.[20] On August 25, 2021, the ALJ issued the D. & O. The ALJ determined that WAFLA was a joint employer with Sakuma as a matter of law because it certified itself as a joint employer on its master application for the H-2A workers. Thus, the ALJ held that WAFLA was legally responsible for violations of the H-2A program.[21]

The ALJ also determined that the following H-2A program violations occurred:

(1) H-2A workers were given preferential treatment over domestic workers in corresponding employment;
(2) workers were not provided with housing meeting the applicable safety and health standards;
(3) domestic workers were rejected from employment due to lack of experience when H-2A workers were employed who did not have any previous experience;
(4) applicants were not followed up with and workers were rejected because the farm had inadequate housing; and
(5) transportation was provided to H-2A workers that was not provided to domestic workers.[22]

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[18] D. & O. at 4.

[19] *Id.* at 3 n.2, 4. The cases against Sakuma and WAFLA were originally consolidated with the ALJ. *Id.* at 3 n.2. In light of Sakuma's settlement, to enter the proposed Consent Findings between the Administrator and Sakuma, and to accurately reflect the parties in the remaining dispute, on November 9, 2018, the ALJ ordered that Sakuma's case (ALJ No. 2018-TAE-00012) and WAFLA's case (ALJ No. 2018-TAE-00013) were bifurcated *nunc pro tunc* to October 4, 2018. *Id.*

[20] *Id.* at 2. Having reached a settlement with the Administrator, Sakuma did not participate in the hearing. *Id.* at 3.

[21] *Id.* at 11-16.

[22] *Id.* at 22-29, 32. The ALJ determined that violations (4) and (5) were duplicative of other violations, and, therefore, did not assess any CMPs for those violations. *Id.* at 29, 32.

Contrary to the Administrator's Amended Notice of Determination, the ALJ determined that H-2A workers were properly paid for their inbound transportation costs and so that charge was not established.[23]

Having found WAFLA responsible as a joint employer for H-2A violations at Sakuma's farm, the ALJ assessed CMPs against WAFLA. After thoroughly analyzing the regulatory mitigation factors found in 29 C.F.R. § 501.19(b), the ALJ reduced the assessments levied by the Administrator for each violation such that they totaled only $59,037.50, rather than $124,575.[24] The table below summarizes each violation and the assessed CMP determined by the ALJ, including any percentage reduction the ALJ ordered based on mitigation factors.

Regulation	*Violation*	*Penalty*
20 C.F.R. § 655.122(a), (d)(3), (h)(4)	H-2A workers were given preferential treatment over domestic workers	$52,987.50[25] ($310,500 base penalty, with 65% mitigation, plus 50% further mitigation)
20 C.F.R. § 655.122(d)(1)	Housing failed to meet the applicable safety and health standards	$800[26] ($3,000 base penalty, with 70% mitigation)

Neither party disputes the ALJ's conclusions regarding these duplicative violations. Therefore, we need not consider them in this appeal.

[23] *Id.* at 29-32.

[24] *Id.* at 22-32. The ALJ erroneously calculated the total assessment as $59,037.50 due to two computation errors, explained *infra* footnotes 25 & 26. The corrected total assessment, using the ALJ's percentage reductions, is $60,487.50.

[25] The ALJ erred in his calculation for this violation. The ALJ stated that he would apply a 10% reduction from the base penalty of $310,500 for each of three mitigation factors. *Id.* at 23-25. The ALJ erroneously calculated 10% of the base penalty as $31,500, when it is in fact $31,050. *Id.* at 25. Likewise, the ALJ stated that he would apply a 30% reduction for another mitigation factor. *Id.* at 24-25. The ALJ erroneously calculated 30% of the base penalty as $94,500, when it is in fact $93,150. *Id.* at 25. The corrected assessment for this violation, using the ALJ's percentage reductions, is $54,337.50. Therefore, the ALJ mistakenly understated the assessment against WAFLA for this violation by $1,350.

[26] In the ALJ's summary of damages, the ALJ stated his assessment for this violation was $800. *Id.* at 32. However, the ALJ's calculations show the assessment should have been $900 ($525 for a refrigerator-related violation plus $375 for a garbage-related violation). *Id.*

20 C.F.R. § 655.135(d)	U.S. workers were rejected from employment due to lack of experience when H-2A workers without experience were hired	$5,250 ($15,000 base penalty, with 65% mitigation)
20 C.F.R. § 655.135(c)	U.S. workers were rejected even though they were qualified; WAFLA failed to follow up with applicants and rejected workers because the farm had inadequate housing	$0 (duplicative of other violations)
Total		**$59,037.50**[27]

WAFLA timely filed a Petition for Review with the Administrative Review Board (ARB or Board) on September 24, 2021. The Board accepted for review WAFLA's assertions that the ALJ erred:

- By determining that WAFLA is a joint employer with Sakuma of the H-2A employees at Sakuma's farm in 2013.
- By determining that WAFLA is liable for violations of the H-2A program that occurred at Sakuma's farm in 2013.
- In determining that WAFLA had no cognizable reliance interest in the Administrator's prior interpretation and application of the H-2A statute and regulations.
- In calculating civil money penalties based on violations attributed to WAFLA in the Amended Notice of Determination.

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at 27. Therefore, the ALJ's order mistakenly understated the assessment against WAFLA for this violation by $100.

[27] The correct total assessment is $60,487.50. The ALJ mis-calculated the assessment by $1,450 ($1,350 for the preferential treatment violation and $100 for the housing violation).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of the Department of Labor has delegated the authority to review this matter to the Board.[28] The regulations governing H-2A enforcement allow a party to appeal to an ALJ for a *de novo* review of the Administrator's action, and appeal to the ARB for review of the ALJ's decision.[29] The ARB, on review from the ALJ, reviews the record *de novo*, including the CMP assessments.[30]

DISCUSSION

On appeal, WAFLA argues that the ALJ erred by concluding it was a joint employer as a matter of law because it certified itself as a joint employer in its master application. Despite its sworn certification, WAFLA argues that it cannot be deemed a joint employer for H-2A program purposes absent adequate indicia of employment under the common law of agency, which, it asserts, do not exist in this case. WAFLA also argues that it is entitled to rely on what it alleges to be the Administrator's previous interpretation and application of the H-2A statute and regulations to not hold agricultural associations like WAFLA liable for H-2A program violations by their members.

Additionally, WAFLA contends that, even if it did jointly employ the H-2A workers at Sakuma's farm, it was not involved in, and is therefore not responsible for, the H-2A program violations committed by Sakuma. WAFLA also argues that assessing CMPs against both Sakuma and WAFLA for the alleged H-2A violations constitutes the imposition of an improper double penalty that exceeds the maximum penalty permitted under the H-2A program regulations. Finally, WAFLA asserts that the amount of penalties assessed by the ALJ was erroneously calculated and is grossly disproportionate to the nature of the violations involved.

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[28] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[29] 29 C.F.R. §§ 501.41(b), (d), 501.42.

[30] 5 U.S.C. § 557(b); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Three D Farms, LLC*, ARB Nos. 2016-0092, -0093, ALJ No. 2016-TAE-00003, slip op. at 5 (ARB Feb. 12, 2019); *see Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Pegasus Consulting Grp., Inc.*, ARB No. 2005-0086, ALJ No. 2004-LCA-00021, slip op. at 7 (ARB Apr. 28, 2009) (citations omitted); *see also Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Elderkin Farm*, ARB Nos. 1999-0033, -0048, ALJ No. 1995-CLA-00031, slip op. at 12 (ARB June 30, 2000) (clarifying that *de novo* review means the Board may substitute its judgment for the ALJ's on CMPs).

The Board recently considered and resolved many of these precise arguments and issues in another case to which WAFLA was a respondent: *Administrator, Wage and Hour Division, U.S. Department of Labor v. Azzano Farms, Inc.*[31] The material facts in the instant case and in *Azzano Farms* are, in many respects, the same. In that case, WAFLA filed a master application for H-2A nonimmigrant workers for member farms, including co-respondent Azzano Farms, Inc,[32] just as it did with respect to Sakuma in the present case. In both cases, WAFLA represented that it was the joint employer of the H-2A workers and swore to comply with the H-2A program requirements.[33] In both cases, the Administrator sought to impose CMPs against WAFLA as a joint employer for violations of the H-2A program at its member's farm.[34]

Upon considering the history and purpose of the H-2A program and the language and structure of the H-2A regulations, we concluded in *Azzano Farms* that an agricultural association that applies and certifies itself as a joint employer on a master application will be treated as a joint employer as a matter of law.[35] Further, we concluded that WAFLA was estopped from disclaiming liability as a joint employer after accepting the benefits of the program, and that WAFLA could not establish justifiable reliance on the Administrator's alleged previous interpretation and application of the H-2A statute and regulations to avoid liability.[36] We also concluded that when an agricultural association is a joint employer under the H-2A program, the association assumes responsibility to ensure compliance with H-2A regulations and may, therefore, be liable for CMPs when violations of the H-2A program occur.[37]

Consistent with our decision in *Azzano Farms*, and for the reasons set forth in that case and discussed more fully below in the present case, we conclude that WAFLA was a joint employer with Sakuma under the H-2A program. We also conclude that WAFLA is estopped from disclaiming liability as a joint employer, cannot establish justifiable reliance to avoid liability, and is liable for the H-2A

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31 ARB No. 2020-0013, ALJ No. 2019-TAE-00002 (ARB Mar. 30, 2023).

32 *Id.* at 2-3.

33 *Id.* at 2-3, 15.

34 *Id.* at 3-4.

35 *Id.* at 7-16.

36 *Id.* at 16-18.

37 *Id.* at 18-19.

program violations identified by the ALJ. Finally, we conclude that the CMPs ordered by the ALJ are appropriate in the circumstances of this case.

1. WAFLA is a Joint Employer as a Matter of Law

As we explained in *Azzano Farms*, the H-2A program permits an agricultural association, like WAFLA, to recruit, solicit, and hire H-2A nonimmigrant workers on behalf of its member farms.[38] When applying under the H-2A program, an agricultural association must certify whether it is filing as an agent of, or as a joint employer with, its member farms.[39] The agricultural association receives different benefits and carries different legal responsibilities depending on whether it is an agent or a joint employer.

As an agent, an agricultural association must file individual Applications for Temporary Employment Certification on ETA Form 9142A for each member farm.[40] The agricultural association's role as an agent is limited, and it may assist its member farms navigate the H-2A application process without assuming the obligations of an employer under the program.[41]

Alternatively, an agricultural association may file a master application as a joint employer, which provides additional benefits that are not available for agents. For example, an agricultural association may file a single master application on behalf of multiple members, may sign the master application on behalf of its members, and may transfer workers among the members identified in the master application.[42] To apply using a master application, the agricultural association must

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38 *Id.* at 8.

39 *Id.* at 12; Adm'r Hearing Ex. 3 at 2; 20 C.F.R. § 655.103(b) (defining "agricultural association" and stating that "[a]n agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188"); Dep't of Labor Form, ETA-9142A, H-2A Application for Temporary Employment Certification, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/eta_form_9142a.pdf. The agricultural association may also certify that it is filing as a "sole employer" of the H-2A workers. Adm'r Hearing Ex. 3 at 2; 20 C.F.R. § 655.103(b). Neither party argues that WAFLA was a sole employer here.

40 *See* 20 C.F.R. § 655.131(a).

41 *Id.* § 655.103(b) (defining "agent").

42 8 U.S.C. § 1188(d)(2) ("If an association is a joint or sole employer of temporary agricultural workers, the certifications granted under this section to the association may be used for the certified job opportunities of any of its producer members and such workers

certify that: (1) it is a joint employer with each of its members identified in the application; (2) it will comply with specific H-2A program obligations, including those identified as being violated in this case; and (3) it will "comply with applicable Federal, State and local employment-related laws and regulations."[43]

As we explained in *Azzano Farms*, "associations must choose one status or the other, and that choice controls."[44] In that case, we conducted a thorough review of the H-2A statute, regulations, and implementing materials, and explored in depth the history and purposes of the H-2A program.[45] From this review, we ultimately concluded that, by operation of law, an agricultural association like WAFLA which elects to file a master application on behalf of one or more members accepts the designation of, and certifies itself as, a joint employer.[46] In doing so, it incurs the incumbent responsibility of any other joint employer under the H-2A program.[47]

The facts presented in the instant case are materially identical to those presented in *Azzano Farms*. As in *Azzano Farms*, here WAFLA filed a master application on behalf of its member. WAFLA certified on the H-2A program application, Form ETA 9142A, that it was a "Joint Employer" with its member for purposes of the H-2A program, identified itself in the section for "Employer

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may be transferred among its producer members to perform agricultural services of a temporary or seasonal nature for which the certifications were granted."); 20 C.F.R. §§ 655.103(b) (defining "master application"), 655.130 ("An association filing a master application as a joint employer may sign on behalf of its employer members. An association filing as an agent may not sign on behalf of its members but must obtain each member's signature on each [ETA Form 9142A]."), 655.131(b) ("An association may file a master application on behalf of its employer-members. The master application is available only when the association is filing as a joint employer. An association may submit a master application covering the same occupation or comparable work available with a number of its employer-members . . . .").

43 20 C.F.R. § 655.103(b) (defining "master application"); Adm'r Hearing Ex. 3 at 2, 7-9.

44 *Azzano Farms*, ARB No. 2020-0013, slip op. at 9.

45 *Id.* at 7-12.

46 *Id.* at 14-15; *see also* 8 U.S.C. § 1188(d)(2); 20 C.F.R. §§ 655.103(b) (defining "master application" and "agricultural association"), 655.131(b) (setting forth the requirements for filing a master application, including that it is "available only when the association is filing as a joint employer"); Temporary Agricultural Employment of H-2A Aliens in the United States (2009 Proposed H-2A Rule), 74 Fed. Reg. 45906, 45916 (proposed Sept. 4, 2009); 2010 Final H-2A Rule, 75 Fed. Reg. at 6917, 6918.

47 *Azzano Farms*, ARB No. 2020-0013, slip op. at 14-15, 19.

Information," and included its own employee's information as the "Employer Point of Contact."[48] Likewise, WAFLA's representative signed the form under the "Employer Declaration" section.[49] In an addendum to the master application, WAFLA also identified itself as the "Main Employer" of the requested H-2A workers.[50]

With its application in this case, as in *Azzano Farms*, WAFLA also filed an ETA Form 790, known as a "job order," which includes all the relevant and required information about the temporary agricultural job, including job duties, working hours, and housing and transportation information.[51] Like was done with respect to the ETA Form 9142A, a WAFLA employee signed under the "Employer's Certification" section of the ETA Form 790.[52] Likewise, in the addendum to the ETA Form 790, WAFLA reiterated that it was filing "an association application . . . on behalf of its member(s), using the joint employer format," and that "Employer" as repeatedly used therein "refers collectively to the association and the member(s)."[53]

The ALJ regarded WAFLA's use of a master application, in which it repeatedly certified its status as a joint employer with Sakuma and its acknowledged responsibility to ensure compliance with the H-2A program requirements, as "dispositive" and, in and of itself, "sufficient . . . to find that [WAFLA] was a joint employer."[54] The ALJ conducted a thorough, thoughtful, and well-reasoned analysis that is consistent with *Azzano Farms*. Based on this analysis, the ALJ found that WAFLA was a joint employer as a matter of law by virtue of its use of the master application and self-identification and certification as a joint employer therein.

Despite the foregoing, WAFLA contends that it cannot be a joint employer with Sakuma, regardless of its certifications or use of the master application, unless

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48 Adm'r Hearing Ex. 3 at 2.

49 *Id.* at 9. In contrast, WAFLA left the "Attorney or Agent Declaration" fields blank. *Id.*

50 *Id.* at 10.

51 Adm'r Hearing Ex. 2; Dep't of Labor Form, ETA-790, Agricultural Clearance Order, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA_Form_790.pdf.

52 Adm'r Hearing Ex. 2 at 6.

53 *Id.* at 7.

54 D. & O. at 14.

it satisfies the definition of "employer" under the common law of agency.[55] In support of this proposition, WAFLA primarily relies on the regulatory definitions of employer and joint employment, which incorporate common law agency principles.[56]

We considered and rejected this same argument in *Azzano Farms*. As we explained there, and as the Administrator and the ALJ recognized in the instant case, the common law of agency, as adopted by the regulatory definitions cited by WAFLA, provide an independently sufficient basis to find that an agricultural association is a joint employer for purposes of the H-2A program, in addition to, but separate from, the agricultural association's use of, and certifications in, a master application.[57] Stated another way, while an agricultural association may be found to be a joint employer under the common law of agency, it will also be considered a joint employer for H-2A purposes as a matter of law when, like WAFLA, it uses a master application and designates and certifies itself as a joint employer.[58]

For these reasons, we agree with the ALJ that WAFLA was a joint employer with Sakuma as a matter of law for purposes of the H-2A program.

2. Estoppel Prevents WAFLA from Disclaiming Joint Employer Liability

As we did in *Azzano Farms*, we also conclude that principles of estoppel preclude WAFLA from disclaiming its status as a joint employer. As we explained in that case, "[t]he Board has long held that entities cannot take advantage of the benefits of temporary workers and subsequently claim that they are not liable for the consequences of their violations, even when they may have erroneously been granted the benefits of the program to begin with."[59] By certifying itself as a joint employer with Sakuma and using a master application, WAFLA benefited from the H-2A program by being approved to recruit nonimmigrant workers for its member,

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55 WAFLA's Brief in Support of Petition for Review (WAFLA Br.) at 7-11.

56 *Id.* at 12-13.

57 *Azzano Farms*, ARB No. 2020-0013, slip op. at 14-15.

58 *Id.*; *see also id.* at 32-34 (Burrell, J., concurring in part, dissenting in part). We do not intend this decision, or our decision in *Azzano Farms*, to suggest that an agricultural association that elects to file as an agent on ETA Form 9142A will never be held liable as a joint employer for H-2A program violations. An agricultural association that files an ETA Form 9142A as an agent may nevertheless be a joint employer for H-2A program purposes under the common law of agency.

59 *Id.* at 16 (citations omitted).

Sakuma.[60] WAFLA charged Sakuma for these services, receiving $1,200 for each of the 69 workers it brought from outside of the United States to Sakuma's farm, for a total of $82,800.[61] Thus, WAFLA clearly benefited from its representations and its participation in the program. Consistent with our past holdings including *Azzano Farms*, we find that WAFLA is estopped from disclaiming its status as a joint employer after reaping the benefits of the H-2A program.

WAFLA insists that it should not be estopped from disclaiming its status as a joint employer because it could have received similar benefits, including participation in the H-2A program, by filing as an agent of Sakuma on an individual ETA Form 9142A instead of as a joint employer on a master application.[62] WAFLA has not identified any legal support for the proposition that its ability to receive similar benefits through some other means precludes the application of estoppel principles. The fact remains that WAFLA enjoyed the benefits of its representations and certifications as a joint employer. Additionally, as we explained above, filing as a joint employer on a master application offered additional benefits to WAFLA and Sakuma that would not have been available had WAFLA filed as an agent. For example, agricultural associations filing as joint employers are able to file a single master application on behalf of multiple members,[63] transfer workers among the members identified in the master application,[64] and sign the master application on behalf of its members.[65] Thus, we find no basis to alter our conclusion in *Azzano Farms* that WAFLA is estopped from disclaiming its status as a joint employer.

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60 *See id.* at 16-17.

61 D. & O. at 4.

62 WAFLA's Reply Brief (WAFLA Reply Br.) at 4.

63 8 U.S.C. § 1188(d)(2); 20 C.F.R. §§ 655.103(b) (defining "master application"), 655.131(b).

64 8 U.S.C. § 1188(d)(2); 20 C.F.R. §§ 655.103(b) (defining "master application"), 655.131(b).

65 20 C.F.R. § 655.130(d). WAFLA asserts that because Sakuma was the only member identified on the master application in this case, it could not have enjoyed the benefit of filing on behalf of, and transferring employees between, multiple member farms. WAFLA Reply Br. at 4-5. Even so, it is undisputed that, at the very least, WAFLA enjoyed the additional benefit of signing on behalf of its member, which it could not have done had it filed as an agent. *See* 20 C.F.R. § 655.130(d). WAFLA discounts this benefit as a mere "administrative convenience," but it is a convenience and benefit for WAFLA and its member nonetheless. WAFLA Reply Br. at 5.

3. Justifiable Reliance is Insufficient to Avoid Liability

WAFLA next argues that it cannot be held liable for violations of the H-2A program because it had a "cognizable reliance interest in the Administrator's longstanding prior interpretation and application of the H-2A statute and regulations to not hold associations liable for the conduct of their members."[66] We rejected this same argument in *Azzano Farms*, and we do so again in the instant case.

As it did in *Azzano Farms*, WAFLA accuses the Administrator of adopting a "convenient litigating position" to hold an agricultural association responsible for H-2A program violations when they certify themselves as a joint employer.[67] According to WAFLA, the "Administrator was unable to produce any evidence demonstrating any time in the entire history of the H-2A program prior to March 2018, that she had ever articulated or applied the H-2A regulations in such a way as to assert an association was liable for violations by its members."[68]

To the contrary, we agree with the ALJ that the Department "has consistently—in writing—placed associations filing master applications as joint employers in a position of responsibility for ensuring compliance with the terms of the program by their members."[69] When the Department sought to promulgate new H-2A regulations in 2009, it stated in the notice of proposed rulemaking:

> The Department proposes to retain the long-standing requirement that a master application may be filed only by an association acting as a joint employer with its members; the Proposed Rule reiterates this joint responsibility by requiring that the association identify all employer-members that will employ H-2A workers. The Application

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66 WAFLA Br. at 23.

67 *Id.* at 25.

68 *Id.*

69 D. & O. at 16. Conversely, WAFLA did not produce any evidence that the Department or the Administrator announced that agricultural associations that certify themselves as joint employers on a master application *would or could never be* held responsible for violations of the H-2A program requirements.

> must demonstrate that each employer has agreed to the conditions of H-2A eligibility.[70]

Thus, as we stated in *Azzano Farms*, "the Department was clear that the proposed rule would continue the 'long-standing' requirement that associations filing a master application do so as a joint employer and agree to the H-2A program's requirements."[71]

Upon subsequently issuing the final H-2A regulations in 2010, the Department again reiterated that an agricultural association utilizing a master application as a joint employer is jointly responsible with its members for compliance under the H-2A program:

> In addition, the Final Rule continues to require a single date of need as a basic element for a master application, as well as a longstanding requirement that master applications may only be filed by an association acting as a joint employer with its members. The Department highlights joint responsibility of the association and its employer-members by requiring that the association identify all employer-members that will employ H-2A workers.[72]

The Department went on:

> The Department proposed to continue allowing associations to file on behalf of their members. The [notice of proposed rulemaking] clarified the role of associations as filers (sole employer, joint employer or agent), in order to assist the association and employer-members in understanding the obligations each party is undertaking with respect to the Application. As in the past, an association will be required to identify in what capacity it is filing, so there is no doubt as to whether the association

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70 2009 Proposed H-2A Rule, 74 Fed. Reg. at 45916 (emphasis added).

71 *Azzano Farms*, ARB No. 2020-0013, slip op. at 10.

72 2010 Final H-2A Rule, 75 Fed. Reg. at 6918 (emphasis added).

> is subject to the obligations of an agent or an employer (whether individual or joint). This requirement is a continuation from both the 1987 Rule and 2008 Final Rule that required an association of agricultural producers to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members.[73]

Thus, dating back to at least 2009—four years before WAFLA elected to file a master application as a joint employer with Sakuma, eight years before the Administrator issued its Notice of Determination, 12 years before the ALJ issued the D. & O., and 14 years before we issued this decision—the Department has proclaimed, in writing associated with formal rulemaking, its long-standing position that an agricultural association filing a master application as a joint employer is subject to joint responsibility with its members for compliance with the H-2A program requirements.[74] WAFLA fails to address these repeated, consistent statements as to the Department's position on an agricultural association's responsibility as a joint employer, which undercut the assertion that the Administrator "change[d] its interpretation and application of the regulations" as a

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[73] *Id.* at 6917.

[74] *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 67-68 (D.C. Cir. 2002) (recognizing "the basic principle that an agency's interpretation of one of its own regulations commands substantial judicial deference," and deferring to an interpretation that was consistent with the position the agency took in its notice of proposed rulemaking (citations omitted)); *cf. Halo v. Yale Health Plan, Dir. of Benefits & Records Yale Univ.*, 819 F.3d 42, 52 (2d Cir. 2016) (stating that since Congress, through the Administrative Procedure Act, directs agencies to incorporate preambles into regulations, "'it does not make sense to interpret the text of a regulation independently from its'" preamble) (quoting Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 361 (2012)); Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016). Judge Burrell, in his opinion concurring in part and dissenting in part in the instant case (Concurring and Dissenting Opinion), construes the Department's statements in the preambles to the proposed and final 2010 H-2A regulations that associations and members are "jointly responsible" for H-2A program compliance to mean that each association and each member is responsible only for its own conduct and bears no responsibility for violations that can be attributed to the actions of the other. Concurring and Dissenting Opinion at 48-49. We believe this ignores the ordinary meaning of the word "joint," defined as "common to or **shared by** two or more persons or entities." BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). Because of this *joint* or *shared* responsibility, both the association and the member are responsible when a violation occurs.

"convenient litigating position" for the first time for purposes of the litigation here and in *Azzano Farms*.[75]

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[75] WAFLA Br. at 25-26. Judge Burrell agrees with WAFLA that there was a "change in interpretation or agency practice in the late 2017 or early 2018 time frame." Concurring and Dissenting Opinion at 46. In support of their position, WAFLA and Judge Burrell rely on cases in which the Supreme Court and other federal courts analyzed the deference to be given to agency interpretations of statutes or regulations that were different from or conflicted with prior interpretations, or which constituted new and novel interpretations on issues which did not reflect the "fair and considered" judgment of the agency. *E.g., Kisor v. Wilkie*, 139 S.Ct. 2400, 2417-18 (2019) (explaining that deference may not be appropriate "when an agency substitutes one view of a rule for another"); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 217-18, 221-23 (2016) (declining to defer to a new agency interpretation where the agency abandoned its "decades-old" interpretation and "said almost nothing" about the reasons for the change); *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009) (deferring to a new agency interpretation even though it "broke[ ] new ground"); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (deferring to an agency interpretation although "the Department may have interpreted these regulations differently at different times in their history"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (declining to give deference to a new agency interpretation that was "contrary to the narrow view of that provision advocated in past cases," and was "wholly unsupported by regulations, rulings, or administrative practice"); *Nat'l Org. of Veterans' Advoc., Inc. v. Sec'y of Veterans Aff.*, 48 F.4th 1307, 1314-16 (Fed. Cir. 2022) (declining to defer to a new agency interpretation that conflicted with past interpretations set forth in cases decided by the Board of Veterans' Appeals); *Romero v. Barr*, 937 F.3d 282, 296 (4th Cir. 2019) (declining to defer to a new agency interpretation that broke from decades of precedential agency decisions interpreting the regulations differently); *United Farm Workers of Am. v. Chao*, 227 F. Supp. 2d 102, 107-08 (D.D.C. 2002) (concluding that the agency's new interpretation was "at odds with the governing statute and regulation," and conflicted with past comments accompanying the regulations and the agency's handbook).

These cases are inapposite in the context and circumstances of the instant case. Unlike the cases cited by WAFLA and Judge Burrell, the Administrator did not change their interpretation or offer a new and novel interpretation in this case, nor did the Administrator's decision to enforce the H-2A program rules come as an unreasonable and unfair surprise to WAFLA. For the reasons explained herein and in *Azzano Farms*, the Administrator's position on WAFLA's responsibility for H-2A program violations is consistent with the text of the H-2A program regulations, the long-standing position reaffirmed by the Department during formal rulemaking, and the certifications and obligations to which WAFLA committed itself on the master application. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("While it is true that an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view, that maxim does not apply here because petitioner fails to present persuasive evidence that the Secretary has interpreted the [provision at issue] in an inconsistent manner." (internal quotations and citations omitted)). Indeed, Judge Burrell appears to acknowledge at times in his

Additionally, WAFLA's own attestations on its H-2A application materials show that WAFLA swore to comply with H-2A program requirements as an "employer" of the workers hired under the job order. On its master application, after repeatedly declaring and certifying itself as an "employer" of the nonimmigrant workers it sought to recruit, WAFLA swore to "comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws."[76] WAFLA committed itself to similar responsibilities in the ETA Form 790 job order, stating that "[t]he Employer (Association and Member collectively) agrees to abide by the assurances provided at 20 CFR Part 655, Subpart B, and 20 CFR 653.501, including the employer obligations set forth at 20 CFR 655.135."[77] WAFLA also certified in the master application that it would meet various obligations and conditions of employment required of employers by the H-2A program, including that:

- "[t]he job opportunity is and will continue to be open to any qualified U.S. worker,"
- "[t]here are no U.S. workers available in the area(s) capable of performing the temporary services or labor in the job opportunity,"

Concurring and Dissenting Opinion that, at most, the issue in this case is whether the Administrator changed their *enforcement policy* regarding agricultural association liability, and not that they changed their entire interpretation of the H-2A program regulations as was the case in many of the decisions upon which WAFLA and Judge Burrell principally rely. Concurring and Dissenting Opinion at 46 ("Central to this dispute is whether there was a change in **WHD's enforcement policy**." (emphasis added)).

[76] Adm'r Hearing Ex. 3 at 8.

[77] Adm'r Hearing Ex. 2 at 7. Judge Burrell states that the ETA Forms 9142A and 790 are "one-size-fits-all forms," and, as a result, he asserts that few conclusions should be drawn from WAFLA's self-certification as a joint employer therein. Concurring and Dissenting Opinion at 49-50. Nothing on the forms compelled WAFLA to certify itself as a joint employer, and the ETA Form 9142A gave WAFLA the option of instead certifying itself as an agent of its member. Adm'r Hearing Ex. 3 at 2, 7. Further, WAFLA did not merely check the "joint employer" box on the forms; instead, it added its own express language in the addendum to the Form 790 that it was "using the joint employer format," that "'Employer' refers collectively to the association and the member(s)," and that "[t]he Employer (Association and Member collectively) agrees to abide by the assurances provided in" the H-2A program regulations. Adm'r Hearing Ex. 2 at 7. This was not default or one-size-fits-all language automatically populated in the forms.

- "[t]he job opportunity offers U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering . . . to H-2A workers and complies with the requirements at 20 CFR 655, Subpart B,"
- it "[w]ill provide for or secure housing for workers who are not reasonably able to return to their permanent residence at the end of the work day that complies with the applicable local, State, or Federal standards and guidelines for housing without charge to the worker," and
- it "[w]ill provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters . . . and the employer's worksite without cost to the worker."[78]

These are, of course, the precise guarantees and obligations which the Administrator charged WAFLA and Sakuma with violating. As we stated in *Azzano Farms*, the H-2A application process is not one in which "an association could fail to realize what it was attesting to in the course of correctly completing it."[79] Considering these attestations, WAFLA was not caught unaware when the Administrator ultimately held WAFLA responsible for violating the obligations to which it explicitly committed itself by signing the master application.

In support of its argument that WAFLA believed it would not be held responsible for H-2A violations and that the Administrator adopted a new interpretation of the H-2A regulations for the first time in the instant case, WAFLA relies almost exclusively on testimony presented at the hearing before the ALJ. Specifically, WAFLA points to evidence that the Administrator, in their enforcement discretion, had previously elected not to pursue CMPs against agricultural associations for H-2A violations committed by their members.[80] In the circumstances of this case, we hold that evidence of the Administrator's past discretionary enforcement choices does not establish a change in the Department's position as to agricultural associations' responsibility as joint employers or create a reasonable or cognizable reliance interest for WAFLA.

As the Supreme Court has recognized many times over many years, "an agency's decision not to prosecute or enforce, whether through civil or criminal

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78 Adm'r Hearing Ex. 3 at 7-8.

79 *Azzano Farms*, ARB No. 2020-0013, slip op. at 15.

80 WAFLA Br. at 24; *accord* Concurring and Dissenting Opinion at 47.

process, is a decision generally committed to an agency's absolute discretion."[81] The Supreme Court explained:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.[82]

Even if the Administrator had traditionally chosen, in the exercise of their enforcement discretion, not to seek penalties from agricultural associations signing master applications as joint employers for violations of the H-2A program occurring at the associations' members' farms, the fact that they did so in the instant case and in *Azzano Farms* does not mean that they changed their interpretation or position on agricultural association responsibility under the H-2A program or that WAFLA justifiably and reasonably believed it could or would never be held responsible for such violations.[83] Neither WAFLA nor Judge Burrell point to any evidence of any

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81 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *accord* 5 U.S.C. § 701(a)(2) (precluding judicial review of agency action "committed to agency discretion by law"); *see also Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 156-57 (D.C. Cir. 2006) (recognizing the discretion afforded to the Secretary of Labor with respect to administrative charging and enforcement decisions for the statutes under his or her purview, which are generally unreviewable by a tribunal); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (same).

82 *Chaney*, 470 U.S. at 831-32; *accord Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). The Supreme Court equated agency enforcement decisions with prosecutorial decisions in criminal cases, which have long been regarded as committed solely to the discretion of the Executive Branch. *Chaney*, 470 U.S. at 832.

83 *See United Airlines, Inc. v. Brien*, 588 F.3d 158, 174 (2d Cir. 2009) (recognizing the "broad discretion [an agency has] in how it enforces statutory and regulatory law," even when the agency shifts enforcement policy); *cf. Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("The mere fact that an agency interpretation contradicts a prior agency position is not fatal.").

written or other express enforcement policy from the Administrator, WHD, or the Department on this issue, let alone any express indication from the Administrator explaining the reasons for the Administrator's past enforcement choices.

As we have emphasized herein, the Department has consistently stated in writing, in both its preambles associated with formal rulemaking and in the H-2A application materials themselves, that an agricultural association can be held responsible for H-2A program violations when it declares and certifies itself as a joint employer on a master application. These pronouncements provided clear notice and fair warning to agricultural associations like WAFLA that enforcement actions are possible, regardless of the discretionary enforcement choices the Administrator may have made for a myriad of reasons in the past.[84]

As the ALJ recognized, WAFLA may have subjectively believed, based on its experiences with past enforcement actions, that it would not be held responsible or penalized as a joint employer with its members.[85] Even so, we agree with the ALJ's ultimate conclusion that WAFLA's subjective belief was unreasonable and does not give rise to a cognizable reliance interest.[86]

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[84] Judge Burrell asserts that "[i]n light of long-standing practice to the contrary, regulated agricultural associations like WAFLA require notice that they may be liable for the full amount of a member farm's violation regardless of any ownership, knowledge, participation, or control the association may have had in the violation." Concurring and Dissenting Opinion at 58. To the extent such notice is required, the regulatory history and the H-2A application materials discussed at length herein provide such notice.

[85] D. & O. at 19.

[86] *See id.* at 16 ("Reviewing the most relevant case law, it is apparent that the *unwritten* exercise of discretion to not enforce elements of a regulation does not create a cognizable reliance interest as against a *written* regulation." (emphasis original)), 19 (stating that WAFLA's subjective belief "in light of the plain language of the governing regulations and WAFLA's own application to bring in the H-2A workers in this case, was not a reasonable belief, and does not absolve WAFLA of liability" (citations omitted)); *Azzano Farms*, ARB No. 2020-0013, slip op. at 18 (explaining that WAFLA's argument that "the mere fact that it has not been held liable for past violations, despite being party to past investigations . . . without more, is far from a sufficient ground to find that WAFLA should be relieved of liability in this case"). As we stated in *Azzano Farms*, WAFLA's reliance on *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), is misplaced. *Azzano Farms*, ARB No. 2020-0013, slip op. at 17-18. In that case, the Supreme Court declined to give deference to the Department's interpretation that pharmaceutical sales representations were not exempt "outside salesmen" under the Fair Labor Standards Act. *Christopher*, 567 U.S. at 150-51, 155-56. For decades, the Department had acquiesced in the pharmaceutical industry's treatment of pharmaceutical sales representatives as exempt

Aside from the Administrator's discretionary enforcement choices, the only other evidence WAFLA cites in support of the notion that the Administrator changed their interpretation of the H-2A regulations as a "convenient litigating position" in the instant case is the fact that the Administrator revised their initial Notice of Determination.[87] In the original Notice of Determination, the Administrator assessed a penalty of $750 against WAFLA for one H-2A program violation—failure to comply with inbound transportation requirements—and did not assess CMPs against WAFLA as a joint employer for the other violations the Administrator sought to enforce against Sakuma.[88] In the subsequent Amended Notice of Determination, the Administrator held WAFLA responsible for the other H-2A program violations as well and increased the CMPs assessed against WAFLA to $124,575.[89] According to WAFLA, this amendment evidences a "change in [the Administrator's] interpretation and application of the statute and regulations."[90]

Once again, we conclude that this evidence does not reflect a change in the Administrator's or the Department's interpretation of the H-2A program regulations concerning agricultural association responsibility. The fact that the Administrator originally chose, in the exercise of their enforcement discretion, to not hold WAFLA responsible for H-2A violations which occurred at Sakuma's farm does not mean that the Administrator believed WAFLA could not be held responsible for such violations, or that the Administrator would or could not revise their position to later hold WAFLA responsible. Indeed, the original Notice of Determination explicitly stated that the Administrator reserved the right, consistent with their discretionary authority, to "tak[e] other enforcement action as

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under the FLSA, without ever announcing a contrary interpretation until doing so for the first time in an amicus brief in pending litigation. *Id.* at 157-58. Even if in the instant case the Administrator and WHD had not traditionally sought to collect assessments from agricultural associations for H-2A program violations committed by their members, unlike in *Christopher*, "the regulations, statute, and the Department's statements consistently support WHD's position" that agricultural associations can be held responsible and penalized as joint employers. *Azzano Farms*, ARB No. 2020-0013, slip op. at 17.

87 WAFLA Br. at 26; *accord* Concurring and Dissenting Opinion at 52-53.

88 WAFLA Hearing Ex. A at 1-3, 6-9.

89 WAFLA Hearing Ex. B at 5-10.

90 WAFLA Br. at 26; *accord* Concurring and Dissenting Opinion at 51 ("The timing, amount, and financial consequence of the change [from the original Notice of Determination to the Amended Notice of Determination] clearly weighs against the position that there was not a change [in the interpretation of the H-2A regulations] underlying the amendment.").

is deemed appropriate by the Department of Labor, or the additional assessments of back wages or civil money penalties for violations of the H-2A provisions found at some future time."[91] The WHD Assistant District Director who issued the Amended Notice of Determination also testified that he had, on occasion, issued revised determination letters, just like he did in this case.[92]

Consistent with this reservation, after initiating the enforcement action against WAFLA and Sakuma, engaging in discovery, entering into settlement negotiations with Sakuma, and reexamining the facts of the investigation, the Administrator ultimately decided to assess additional penalties against WAFLA.[93] As discussed above, these are precisely the type of enforcement decisions committed to the Administrator's discretion, which tribunals should not second-guess.[94]

For the foregoing reasons, we agree with the ALJ that WAFLA did not have a cognizable reliance interest that was violated by the Administrator's discretionary decision to hold WAFLA responsible as a joint employer for violations of the H-2A program at Sakuma's farm.

4. Joint Employer Status Renders WAFLA Liable for CMPs

WAFLA next argues that, while the ALJ found it to be a joint employer of the H-2A nonimmigrant workers at issue here, several of the violations for which the ALJ held it responsible only affected domestic workers employed by Sakuma.[95]

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91 WAFLA Hearing Ex. A at 2.

92 Hearing Transcript (Tr.) at 207-11; *accord id.* at 108-10 (WHD District Director testifying that it was normal for an Assistant District Director to issue a revised determination letter).

93 Acting Administrator's Response Brief (Adm'r Br.) at 41; Administrator's Post Hearing Brief in Response at 4 n.4; Tr. at 211-12. Judge Burrell asserts that "the Administrator has not adequately explained the agency's decision-making process in the change from $750 in CMPs to $124,575 in CMPs" and that "[t]here were no new factual developments stemming from the investigation to explain the 16,500% change." Concurring and Dissenting Opinion at 51, 53. To the extent the Administrator needs to justify their decision to issue the Amended Notice of Determination in light of their broad discretion to make these types of enforcement decisions, we believe these facts offer sufficient justification for the decision to amend.

94 *See Chaney*, 470 U.S. at 831-32.

95 WAFLA Br. at 19. Specifically, WAFLA attributes the preferential treatment, housing safety and health, and unlawful rejection of domestic workers violations solely to Sakuma's actions. *Id.* at 16-17, 20-23.

WAFLA asserts that it had no control over, and therefore had no responsibility for, violations related to those domestic workers.[96]

We rejected a similar argument made by WAFLA in *Azzano Farms*.[97] As we observed in that case, the H-2A regulations provide that employers of H-2A workers must agree, as part of the application process, "that [they] will abide by the requirements" of the H-2A regulations, and otherwise "comply with all applicable Federal, State and local laws and regulations, including health and safety laws."[98] These requirements cover obligations and responsibilities owed not only to the H-2A nonimmigrant workers covered by the application, but also to the domestic workers in "corresponding employment."[99] Consistent with the regulations, WAFLA swore in its application materials filed with the Department that, as a joint employer, it would ensure compliance with *all* H-2A program requirements, including those with respect to domestic workers.[100] Specifically, as outlined above, WAFLA committed itself to ensuring that:

- "[t]he job opportunity is and will continue to be open to any qualified U.S. worker,"
- "[t]here are no U.S. workers available in the area(s) capable of performing the temporary services or labor in the job opportunity,"

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96 *Id.* at 19-20.

97 In *Azzano Farms*, WAFLA asserted that it had no control over the violations committed by its member, whereas in the instant case WAFLA argues, more specifically, that it had no control over the domestic workers whose rights were violated under the H-2A program. *Azzano Farms*, ARB No. 2020-0013, slip op. at 18-19; WAFLA Br. at 19-23. Although the specifics of the arguments differ to a degree, the substance of the arguments—that WAFLA cannot be held responsible for a violation that resulted from the actions of its member—is materially the same.

98 *Azzano Farms*, ARB No. 2020-0013, slip op. at 19; 20 C.F.R. § 655.135.

99 20 C.F.R. §§ 655.122, 655.135; *cf.* 2009 Proposed H-2A Rule, 74 Fed. Reg. at 45907-08 (stating that with the 2010 changes to the H-2A program, the Department's purpose was to expand protections and incentives for U.S. workers). Domestic workers in "corresponding employment" are those who engage "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).

100 *Id.* §§ 655.122, 655.135; Adm'r Hearing Ex. 2 at 7; Adm'r Hearing Ex. 3 at 7-9.

- "[t]he job opportunity offers U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering . . . to H-2A workers and complies with the requirements at 20 CFR 655, Subpart B," and
- it "[w]ill provide for or secure housing for workers who are not reasonably able to return to their permanent residence at the end of the work day that complies with the applicable local, State, or Federal standards and guidelines for housing without charge to the worker."[101]

These are the precise obligations from which WAFLA attempts to escape legal responsibility in this case.

As we summarized in *Azzano Farms*, by virtue of its position as a joint employer under the H-2A program and its attestations in its application materials, WAFLA "had an obligation to aid in compliance of its member-farms."[102] Accordingly, even if, as WAFLA argues, several of the violations here resulted from Sakuma's actions or concerned the benefits and working conditions provided to domestic workers, WAFLA violated its own affirmative obligation to ensure the H-2A program requirements were met and that violations did not occur at Sakuma's farm, including those pertaining to domestic workers in corresponding employment. For this reason, we disagree with WAFLA's assertion that the "Administrator simply sought to hold wafla liable for the violations committed by Sakuma," for which it had absolutely no responsibility.[103] Instead, WAFLA is responsible, and can be penalized, for its failure to fulfill its own statutory and regulatory compliance obligations.[104]

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[101] Adm'r Hearing Ex. 3 at 7-8. We agree with the ALJ and the Administrator that, if WAFLA wished to avoid these obligations, it could have acted solely as an agent for Sakuma. D. & O. at 25; Adm'r Br. at 31. Having instead elected to file as a joint employer with Sakuma, it was incumbent on WAFLA to ensure that it had the ability to fulfill the compliance obligations to which it committed itself, including through appropriate oversight of the H-2A program at Sakuma's farm.

[102] *Azzano Farms*, ARB No. 2020-0013, slip op. at 19.

[103] WAFLA Br. at 17; *accord* Concurring and Dissenting Opinion at 48, 50 (expressing concern with what Judge Burrell believes to be the undue imposition of "strict" or "vicarious" liability on an association for a violation resulting from the actions of one of its members).

[104] To be clear, the fact that WAFLA can be held responsible and penalized for violations that it alleges can be attributed to the actions of its members does not mean that WAFLA's alleged lack of "culpability" is irrelevant. *See* Concurring and Dissenting Opinion

In support of its position that it cannot be assessed CMPs for violations that resulted from Sakuma's actions, WAFLA also cites to the H-2A statutory and regulatory provisions concerning debarment from the H-2A program.[105] WAFLA observes that the statute and regulations circumscribe when an agricultural association may be debarred for violations that resulted from the actions of its members. Specifically, an agricultural association may only be debarred if it "participated in, had knowledge of, or reason to know of, the violation."[106] WAFLA contends that, as with debarment, an agricultural association should only be assessed CMPs for violations that resulted from a member's actions if it participated in, or had knowledge of, the violation.[107]

WAFLA's reliance on the debarment provisions is misplaced. Unlike the debarment provisions, the H-2A statutory and regulatory provisions granting the Administrator the authority to impose CMPs do not limit association liability only to those situations in which the association participated in, knew of, or reasonably should have known of, the violation.[108] The conspicuous absence of limiting

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at 59-60 (discussing the role Judge Burrell believes the association's culpability should have in the CMP analysis). As we stated in *Azzano Farms*, and as discussed in Section 6.b.i, *infra*, to the extent WAFLA disputes its level of culpability given its role (or lack thereof) with respect to the violations, that is an issue addressed in the analysis of the appropriate amount of penalties to be assessed under the mitigation factors identified in 29 C.F.R. § 501.19(b). *See Azzano Farms*, ARB No. 2020-0013, slip op. at 16 n.62, 19.

105 WAFLA Reply Br. at 10-14; *accord* Concurring and Dissenting Opinion at 48; *see also* 8 U.S.C. § 1188(b)(2); 29 C.F.R. § 501.20. WAFLA raised its argument concerning the debarment provisions for the first time in its Reply Brief. Accordingly, WAFLA waived this argument. *Palisades Urban Renewal Entp.*, ARB No. 2007-0124, ALJ No. 2006-DBA-00001, slip op. at 8 (ARB July 30, 2009). However, we granted the Administrator the opportunity to file a sur-reply, and have considered WAFLA's argument for the sake of completeness.

106 8 U.S.C. § 1188(d)(3)(A) (emphasis added); *accord* 29 C.F.R. § 501.20(f). The statutory and regulatory provisions similarly provide that a member will not be debarred for an agricultural association's violations of the H-2A program requirements unless it "participated in, had knowledge of, or reason to know of, the violation." 8 U.S.C. § 188(d)(3)(B)(i); *accord* 29 C.F.R. § 501.20(h).

107 WAFLA Br. at 11-13.

108 *See* 8 U.S.C. § 1188(g)(2); 29 C.F.R. § 501.19. WAFLA appears to suggest that the Administrator may not have the authority to assess monetary penalties at all under the H-2A program provisions. WAFLA Reply Br. at 12 ("As noted, the statute does not even specifically authorize monetary penalties . . . ."). The H-2A statute and regulations expressly provide for the imposition of penalties on offending employers. 8 U.S.C.

language in the CMP provisions reflects a purposeful choice by Congress and the Department to treat the imposition of CMPs and the imposition of a debarment sanction differently regarding the allocation of responsibility and liability between agricultural associations and their members.[109] Therefore, we conclude that the additional limitations identified in the debarment provisions do not apply to the assessment of CMPs.

5. The ALJ Did Not Err by Relying on the Consent Findings to Determine that the Alleged Violations Occurred

In concluding that violations of the H-2A program requirements occurred in this case, the ALJ relied, in significant part, on Sakuma's admissions of fact in the Consent Findings.[110] Although WAFLA does not dispute in this appeal that the

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§ 1188(g)(2) ("The Secretary of Labor is authorized to take such actions, including imposing **appropriate penalties** . . . ." (emphasis added)); 29 C.F.R. § 501.19(a) ("A **civil money penalty** may be assessed by the WHD Administrator for each violation . . . ." (emphasis added)).

[109] *See Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations and citation omitted)). WAFLA questions why the assessment of a debarment penalty would carry more limitations or be more circumscribed than the assessment of a monetary penalty. WAFLA Reply Br. at 13. As the Administrator correctly observes, debarment is a severe sanction and has been reserved by Congress for substantial violations of the H-2A program. Adm'r Sur-reply at 4-5; 8 U.S.C. § 1188(b)(2)(A); *Adm'r, Off. of Foreign Lab. Certification, Emp. & Training Admin., U.S. Dep't of Lab. v. Castro Harvesting*, ARB No. 2013-0082, ALJ No. 2013-PED-00002, slip op. at 10 (ARB Nov. 26, 2013) (stating that debarment is "an obviously severe penalty" (citation omitted)). Given the significance and particular severity of debarment, it is natural that the circumstances in which it can be ordered are more limited or circumscribed as compared to purely monetary penalties. WAFLA also observes that, pursuant to 29 C.F.R. § 501.20(d)(2), the same regulatory mitigation factors are used to determine the amount of CMPs to be assessed for a violation and to determine whether a violation is so "substantial" as to merit debarment. WAFLA Reply Br. at 14. WAFLA appears to suggest that, because of this overlap, the CMP and debarment analyses should be treated as coextensive, and, therefore, the additional limitations concerning when an agricultural association will be debarred for the actions of its members should extend to the assessment of CMPs as well. The question of whether a violation is "substantial" and merits debarment is different than the question of whether the debarment should extend from a member to the agricultural association that had no knowledge of, or participation in, the violation. While the former question shares some regulatory overlap with the CMP assessment, the latter question, according to the plain language of the H-2A statutory and regulatory provisions, does not.

[110] D. & O. at 4-6, 22-29.

violations identified by the ALJ occurred, it nevertheless asserts that the ALJ erred by relying on the Consent Findings because WAFLA was not a party to them.[111] We find no basis to conclude that the ALJ erred in his review and consideration of the admissions in the Consent Findings.

First, WAFLA asserts that its Executive Director testified that "certain characterizations about wafla in the proposed Consent Findings were factually incorrect or misleading and appeared to be self-serving for Sakuma's benefit, including pointing out that documentary evidence in the record materially contradicted some [of] Sakuma's representations."[112] WAFLA does not explain to the Board what was mischaracterized or misleading in the Consent Findings, how the documentary evidence in the record contradicted the Consent Findings, why it believes the alleged mischaracterizations or misleading statements affected the outcome of this case, or otherwise elaborate on this broad and conclusory allegation. Accordingly, we deem the argument waived.[113]

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[111] WAFLA Br. at 14-16.

[112] *Id.* at 14.

[113] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Global Horizons, Inc.*, ARB No. 2011-0058, ALJ Nos. 2005-TAE-00001, 2005-TLC-00006, slip op. at 7 (ARB May 31, 2013) (citations omitted) (rejecting a party's "one or two sentences" challenging an ALJ's sanctions award, finding such "insufficient for an appeal" of the order); *Walker v. Am. Airlines*, ARB No. 2005-0028, ALJ No. 2003-AIR-00017, slip op. at 17 (ARB Mar. 30, 2007) (citations omitted) (rejecting argument about which complainant made only "passing references and commentary" on appeal); *Dev. Res., Inc.* ARB No. 2002-0046, slip op. at 4 (ARB Apr. 11, 2002) (disregarding an argument upon which a party did not elaborate, and quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001), for the "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). Even if we considered WAFLA's conclusory argument, we would still find no basis to conclude that the ALJ erred in his consideration of the evidence. ALJs have broad discretion in evidentiary determinations, and the Board will only overturn such determinations upon a showing that the ALJ abused his or her discretion. *Rathburn v. The Belt Ry. Co. of Chicago*, ARB No. 2016-0036, ALJ No. 2014-FRS-00035, slip op. at 3, 5-6 (ARB Dec. 8, 2017) (citations omitted). The ALJ considered the sworn admissions of fact from Sakuma in the Consent Findings and found them consistent with the credible testimony offered at the hearing by the WHD investigator who led the investigation at Sakuma's farm. D. & O. at 6; *see also Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 13 n.3 (ARB May 19, 2020) (recognizing the ALJ's power to consider written out-of-court statements, which "increase the ALJ's access for probative evidence"). The ALJ explained his reasons for finding the WHD investigator credible, and WAFLA has not challenged that credibility finding in this appeal. D. & O. at 6; s*ee Riddell*, ARB No. 2019-0016, slip op. at 13 ("The Board gives considerable deference to an ALJ's credibility determinations and defers to such

WAFLA also contends that the ALJ erred by "suggest[ing] that if wafla disagreed with the content of the Consent Findings then wafla could have taken discovery from Sakuma employees regarding the proposed consent findings."[114] According to WAFLA, the "ALJ failed to recognize that the Consent Findings were agreed to by the Administrator and Sakuma just days before the hearing began and more than three months after discovery in the case closed on July 20, 2018."[115] Thus, WAFLA asserts that "[t]he D. & O. does not explain how Sakuma could have possibly taken discovery about statements by Sakuma in the Consent Findings more than three months before the Consent Findings existed."[116]

Although WAFLA is correct that the Consent Findings themselves were signed and submitted after discovery closed, WAFLA had sufficient opportunity to conduct discovery on the factual matters contained in the Consent Findings. The specific facts asserted in the Consent Findings concerned the violations about which WAFLA has had notice since it was issued the Amended Notice of Determination at the outset of the proceedings before the ALJ. WAFLA had the opportunity to take discovery on the facts underlying the violations (and thus underlying the Consent Findings), and use that discovery to challenge the factual predicates for the ALJ's conclusion that H-2A violations occurred in this case. Instead, as the ALJ notes, WAFLA chose, "with a few exceptions . . . to litigate issues of law rather than contest the alleged violations with contradictory evidence."[117]

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determinations unless they are inherently incredible or patently unreasonable." (internal quotations and citation omitted)). The ALJ also considered WAFLA's Executive Director's testimony challenging certain paragraphs of the Consent Findings, but found the testimony insufficient to discredit or override the admissions in the Consent Findings. D. & O. at 7. Again, aside from vaguely asserting that the Executive Director disagreed with some assertions of fact in the Consent Findings, WAFLA has not explained how or why the ALJ abused his broad discretion in considering the Consent Findings over the Executive Director's conflicting testimony.

114 WAFLA Br. at 15 (citing D. & O. at 7).

115 *Id.*

116 *Id.* at 16.

117 D. & O. at 7.

For these reasons, WAFLA has not presented a sufficient basis for the Board to conclude that the ALJ erred by accepting and relying on the admissions of fact identified in the Consent Findings.[118]

6. The ALJ Properly Assessed CMPs

A. The CMPs Against WAFLA Do Not Constitute a Double Penalty

WAFLA argues that by penalizing both Sakuma and WAFLA, the Administrator improperly "assess[ed] a penalty twice for the same violation."[119] Under WAFLA's theory, because Sakuma has already paid its penalties, the violations at issue have been "resolved," and the assessment against WAFLA constitutes an unlawful "double penalty" that exceeds the regulatory maximum permitted for each violation.[120]

In *Azzano Farms*, we held that the Administrator may properly penalize each joint employer separately for their violations of the H-2A program.[121] The H-2A regulations permit the Administrator to assess penalties "for each violation" of the H-2A program.[122] Importantly, the regulations explain that "[e]ach failure" to comply with the H-2A program requirements "constitutes a separate violation."[123] "Each," in this context, does not "require[ ] splitting the CMP maximum between employers when there is a joint employment situation."[124] "Instead, CMPs are assessed per violation which, in the instance of joint employment, means that each

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118 Judge Burrell appears to discount the admissions in the Consent Findings because WAFLA did not sign the Consent Findings. Concurring and Dissenting Opinion at 60. He does not explain why an ALJ may not accept a sworn out-of-court statement, merely because one party did not sign off on or accept the assertions therein. He also fails to address the ALJ's assessment that the assertions in the Consent Findings were consistent with the WHD investigator's credible testimony.

119 WAFLA Br. at 30.

120 *Id.* at 30-31.

121 *Azzano Farms*, ARB No. 2020-0013, slip op. at 20-21.

122 29 C.F.R. § 501.19(a).

123 *Id.*

124 *Azzano Farms*, ARB No. 2020-0013, slip op. at 20.

joint employer committed a violation, rendering each joint employer liable for the violation it committed."[125]

As we have explained in the instant case, WAFLA and Sakuma, as joint employers, were each obligated to ensure compliance with the H-2A program.[126] Consistent with our holding in *Azzano Farms*, each entity's failure to fulfill its obligations constitutes a separate violation and exposes each entity to separate penalties. Thus, the ALJ correctly concluded that the penalty against WAFLA was not an unlawful "double penalty," and that Sakuma's penalty assessment, and its satisfaction thereof, does not affect the penalty that can be assessed against as a joint employer under the H-2A program.

B. The CMPs Assessed by the ALJ Were Appropriate

Finally, WAFLA contends that, even if it is liable for violations of the H-2A program, "the penalties assessed by the ALJ are erroneous even considering the reductions applied."[127] We disagree.

The INA authorizes the Secretary "to take such actions, including imposing appropriate penalties . . . as may be necessary to assure employer compliance with terms and conditions of employment under" the H-2A program.[128] Pursuant to this authority, the Administrator is authorized to assess CMPs up to a maximum prescribed amount for each violation by each joint employer.[129]

In determining the monetary amount that should be assessed against an offending employer, the regulations direct the Administrator to consider "the type of violation committed and other relevant factors," including, but not limited to: (1) previous history of violation(s); (2) the number of H-2A workers, workers in

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125 *Id.* We analogized in *Azzano Farms* that the imposition of CMPs is like the imposition of sentences for criminal conduct. *Id.* "Criminal courts do not look at sentencing guidelines and allocate the sentence among the parties who are found guilty. Instead, each party is sentenced for its participation in the crime." *Id.* This contrasts with assessment for back wages, where a total amount may be appropriately allocated between parties. *Id.*

126 *See supra* Section 1, "WAFLA is a Joint Employer as a Matter of Law," and Section 4, "Joint Employer Status Renders WAFLA Liable for CMPs."

127 WAFLA Br. at 31.

128 8 U.S.C. § 1188(g)(2).

129 29 C.F.R. § 501.19(a), (c)-(d).

corresponding employment, or U.S. workers who were and/or are affected by the violation(s); (3) the gravity of the violation(s); (4) efforts made in good faith to comply with the H-2A program requirements; (5) explanation from the person charged with the violation(s); (6) commitment to future compliance; (7) the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.[130] "[T]he assessment of a particular penalty (or of an enhanced penalty for a repeat or willful violation) is not mandatory, but guided by consideration of the seven [mitigation] factors listed in paragraph (b), the facts of each individual case, and by common sense."[131] Thus, as we explained in *Azzano Farms*, the Administrator has discretion in assessing CMPs in any individual case.[132]

The ALJ determined that the H-2A program requirements were violated in three ways in this case. First, the ALJ determined that domestic workers in corresponding employment did not receive the same benefits and working conditions as did the H-2A workers employed at Sakuma's farm.[133] The H-2A workers were not charged housing deposits, were given basic housing supplies, and were provided transportation to their worksites.[134] The domestic workers did not receive the same treatment. Although domestic workers were given access to housing at Sakuma's farm, they were charged a deposit for that housing.[135] Domestic workers also did not receive the same basic housing supplies and were not

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130 *Id.* § 501.19(b).

131 2010 Final H-2A Rule, 75 Fed. Reg. at 6944.

132 *Azzano Farms*, ARB No. 2020-0013, slip op. at 22. As the ALJ notes, in exercising this discretion, as a matter of national policy the Administrator typically begins by determining the maximum regulatory penalty for a given violation. The Administrator then considers the seven regulatory factors identified above as mitigation factors, typically reducing the maximum penalty by 10% for each mitigation factor which they determine applies in the circumstances of the case. D. & O. at 21. The ALJ adopted the same approach below. *Id.* at 22. WAFLA has not challenged this approach to determining the amount of CMPs to be assessed under the H-2A program.

133 The H-2A regulations prohibit giving H-2A workers preferential treatment over domestic workers, stating that "[t]he employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." 20 C.F.R. § 655.122(a).

134 D. & O. at 22-23.

135 *Id.* at 22.

provided with transportation.[136] On appeal, WAFLA does not dispute that these violations occurred.

The Administrator assessed a base penalty of $1,500 against WAFLA for each of the 207 domestic workers who did not receive the same benefits and working conditions as the H-2A workers employed at the farm, for a total of $310,500.[137] After applying the regulatory mitigation factors, the Administrator reduced the penalty to $108,675.[138]

Conducting a de novo review, the ALJ determined that the mitigation factors warranted further reducing the assessments levied by the Administrator.[139] The ALJ calculated the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty ($1,500 x 207)	--	$310,500
Factor 1 – history	5 percent	-$15,525
Factor 2 – workers affected	0 percent	-$0
Factor 3 – gravity	10 percent	-$31,500
Factor 5 – explanation	30 percent	-$94,500
Factor 6 – commitment	10 percent	-$31,500
Factor 7 – financial gain	10 percent	-$31,500
SUBTOTAL	--	$105,975
Factor 4 – good faith	50 percent	-$52,987.50
TOTAL	--	**$52,987.50**[140]

Second, the ALJ determined that worker housing did not meet applicable health and safety standards.[141] Specifically, WHD investigators found a refrigerator that was not operating properly and an "infestation of flies near full garbage by men's bathroom [and] [a]lso [a] piece of feces located on ground outside men's

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136 *Id.* at 22-23.

137 *Id.* at 23.

138 *Id.*

139 *Id.* at 23-25.

140 As noted above in footnote 25, the ALJ erred in his calculations. The corrected assessment for this violation, using the ALJ's percentage reductions, is $54,337.50.

141 The H-2A regulations require employers to provide housing at no cost to H-2A workers and those workers in corresponding employment who are not able to return to their residence within the same day. 20 C.F.R. § 655.122(d)(1). The housing must meet the safety standards identified in 29 C.F.R. § 1910.142. 20 C.F.R. § 655.122(d)(1)(i).

bathroom."[142] Once again, WAFLA does not dispute on appeal that these violations occurred.

The Administrator assessed a base penalty of $1,500 for each of these two violations, for a total of $3,000.[143] After applying the regulatory mitigation factors, the Administrator reduced the penalty to $1,800.[144]

The ALJ again determined that the mitigation factors warranted further reducing the assessments levied by the Administrator.[145] For the refrigerator-related violation, the ALJ calculated the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty	--	$1,500
Factor 1 – history	5 percent	-$75
Factor 2 – workers affected	0 percent	-$0
Factor 3 – gravity	0 percent	-$0
Factor 4 – good faith	10 percent	-$150
Factor 5 – explanation	30 percent	-$450
Factor 6 – commitment	10 percent	-$150
Factor 7 – financial gain	10 percent	-$150
TOTAL	--	**$525**

For the garbage-related violation, the ALJ calculated the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty	--	$1,500
Factor 1 – history	5 percent	-$75
Factor 2 – workers affected	0 percent	-$0
Factor 3 – gravity	10 percent	-$150
Factor 4 – good faith	10 percent	-$150
Factor 5 – explanation	30 percent	-$450
Factor 6 – commitment	10 percent	-$150
Factor 7 – financial gain	10 percent	-$150
TOTAL	--	**$375**

142 D. & O. at 26.

143 *Id.*

144 *Id.*

145 *Id.* at 26-27.

Finally, the ALJ determined that domestic workers were rejected from employment due to lack of experience, while H-2A workers were employed without experience.[146] The job description prepared by WAFLA imposed a three-month experience requirement for applicants.[147] Many of the H-2A workers ultimately employed at Sakuma's farm did not meet the experience requirement, while at least one domestic applicant was denied employment based on a lack of experience.[148] WAFLA, again, does not dispute on appeal that this violation occurred.

The Administrator assessed a base penalty of $15,000 for this violation.[149] After applying the regulatory mitigation factors, the Administrator reduced the penalty to $12,000.[150]

Once again, the ALJ determined that the mitigation factors warranted further reducing the assessments levied by the Administrator.[151] The ALJ calculated the penalty as follows:

	Mitigation Factor	Dollar amount
Base penalty	--	$15,000
Factor 1 – history	5 percent	-$750
Factor 2 – workers affected	10 percent	-$1500
Factor 3 – gravity	0 percent	-$0
Factor 4 – good faith	10 percent	-$1500
Factor 5 – explanation	30 percent	-$4500

146 The H-2A regulations require an employer to hire any qualified and eligible U.S. worker who applies for a job advertised under a job order, until 50% of the period of the work contract has elapsed. 20 C.F.R. § 655.135(d).

147 D. & O. at 27-28.

148 *Id.* at 28. WAFLA appears to concede that at least one domestic worker was denied employment based on the experience requirement. WAFLA Br. at 23 ("There can be no reasonable dispute that Sakuma's actions resulted in the violations."). The ALJ found that other domestic workers were also rejected based on a lack of experience. D. & O. at 10, 28. WAFLA asserts that the ALJ "provides no details on the identity of those individuals or the circumstances resulting in those candidates not being hired." WAFLA Br. at 22 n.8. To the contrary, the ALJ identified both other applicants by name and cited the evidence in support of his finding. D. & O. at 10 (citing Adm'r Hearing Ex. 18). Additionally, WAFLA's Executive Director also testified that records reflected that these two other domestic applicants were rejected based on the experience requirement. Tr. at 285.

149 D. & O. at 28.

150 *Id.*

151 *Id.* at 28-29.

Factor 6 – commitment	10 percent	-$1500
Factor 7 – financial gain	0 percent	-$0
TOTAL	--	**$5,250**

The ALJ's analysis is detailed, well-reasoned, and adequately supported by the record. The ALJ reviewed the evidence in support of each violation, reasonably considered each regulatory mitigation factor, and thoroughly and cogently explained the basis for his CMP assessments.

On appeal, WAFLA does not challenge the bulk of the ALJ's CMP analysis, or application of the regulatory mitigation factors. Rather, WAFLA presents two narrow arguments. First, WAFLA contends that its lack of culpability with respect to the violations warrants further mitigation.[152] Second, WAFLA contends that the ALJ erred in assessing a separate penalty for each of the domestic workers who did not receive the same benefits and working conditions as the H-2A workers employed at Sakuma's farm.[153] As explained in more detail below, we reject both arguments.[154] Accordingly, we find no basis to disturb the ALJ's assessments, and

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[152] As we have explained, WAFLA argues that its lack of involvement in or control over the H-2A violations resulting from Sakuma's actions precludes liability for the violations entirely. *See supra* Section 4, "Joint Employer Status Renders WAFLA Liable for CMPs." WAFLA does not expressly argue in its briefs to the Board that, short of precluding liability entirely, its alleged lack of culpability should at least be considered as a mitigating factor to further reduce the amount of the CMPs assessed against it. *Compare* WAFLA Br. at 20-23 (explaining why WAFLA believes it should not be liable for the violations) *with id.* at 30-31 (challenging the CMP assessment). Even so, the ALJ considered WAFLA's alleged lack of culpability as a mitigating factor for each violation under regulatory factor 5 (the "[e]xplanation from the person charged with the violation(s)"). D. & O. at 24-25, 26-27, 28-29; *see* 29 C.F.R. § 501.19(b)(5). Judge Burrell, in his separate opinion hereto, also considers WAFLA's culpability as a factor in the CMP assessment for each violation. Concurring and Dissenting Opinion at 58-64. For the sake of completeness, we have considered WAFLA's argument in the context of mitigation as well.

[153] WAFLA Br. at 31.

[154] WAFLA also vaguely argues that "the penalties assessed by the ALJ are erroneous even considering the reductions applied. In particular, the $52,987.50 penalty assessed by the ALJ for the alleged preferential treatment, even with the reduction applied by the ALJ, is grossly disproportionate to the nature of the violation and is contrary to law." *Id.* at 31. WAFLA does not elaborate or explain any basis to reduce or mitigate the assessed CMPs, other than the two arguments specifically identified above. Accordingly, we limit our review to WAFLA's specific arguments. *See supra* footnote 113.

adopt the penalties assessed by the ALJ.[155]

i. WAFLA's Asserted Lack of Culpability Does not Warrant Further Mitigation

In reviewing and analyzing the regulatory mitigation factors, the ALJ considered WAFLA's argument that it was not culpable for the violations at issue in this case because each of the violations were under the control of, and were primarily attributable to the actions of, Sakuma. Specifically, in analyzing factor 5—the "[e]xplanation from the person charged with the violation(s)"—the ALJ noted with respect to the preferential treatment and health and safety violations that "WAFLA relied on Sakuma to carry out the obligations to the H-2A workers and corresponding U.S. workers . . . ."[156] Similarly, with respect to the failure to hire violation, the ALJ noted that WAFLA "did encourage Sakuma to comply with the regulations and job order," but appears to have been rebuffed because, ultimately, "it was Sakuma that was in a position to decide whether [the applicant] was actually employed."[157] As a result, the ALJ determined that a 30% reduction in the base penalty was appropriate for mitigation factor 5, which was significantly greater than the 10% reduction applied by the Administrator.[158] However, the ALJ declined to reduce the assessment any further, noting that, ultimately, WAFLA remained responsible with Sakuma under the H-2A program, but did not take the steps necessary to ensure the requirements of the program were met.[159]

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155 *See Adm'r, Wage & Hour Div. & Office of Foreign Lab. Certification, U.S. Dep't of Lab. v. Peter's Fine Greek Food, Inc.*, ARB No. 2014-0003-B, ALJ No. 2011-TNE-00002, 2012-PED-00001, slip op. at 2 (ARB Sept. 17, 2014) (stating that the Board will accept the ALJ's findings concerning the assessment of CMPs if they are reasonable).

156 D. & O. at 24, 26-27.

157 *Id.* at 28, 29 n.25. The ALJ noted, however, that "[n]o documentation of precisely why [the applicant] was not hired (the stated reason or the true reason), or what individual made the final decision, is in the record." *Id.* at 29. Although this lack of evidence makes it difficult to assess WAFLA's relative culpability for the violation, the ALJ appears to have given WAFLA the benefit of the doubt that Sakuma ultimately made the decision not to hire the applicant. *Id* at 29 n.25.

158 *Id.* at 24, 26-27, 29.

159 *Id.* at 24-25 (observing that WAFLA did not engage in compliance efforts "to the extent of inspecting at the Sakuma farm—and, of course, not to the extent of preventing the violations in the case"), 29 (recognizing that although WAFLA encouraged compliance with respect to the failure to hire violation, it ultimately remained responsible with Sakuma for the violation).

We agree with the ALJ that a 30% reduction is appropriate based on WAFLA's relative culpability with respect to the violations. As WAFLA asserts, the violations at issue here are primarily attributable to Sakuma's actions. Yet, as we have explained, WAFLA, as a joint employer, was still obligated to ensure program compliance at Sakuma's farm. As the ALJ correctly observed, WAFLA did not take the steps necessary to fulfill its obligations and ensure that violations did not occur. Instead, WAFLA effectively concedes that, having recruited and transported the H-2A workers to Sakuma's farm, it did not undertake any additional steps to ensure that the H-2A program requirements were met at the farm. This was contrary to WAFLA's statutory and regulatory duties and, as the ALJ noted, was unwise in the circumstances of this case given that Sakuma was a first-time participant in the program.[160] Accordingly, we decline to reduce the CMP assessment any further.[161]

ii. The ALJ Did Not Err by Assessing a Per-Worker Penalty for the Preferential Treatment Violation

As stated above, the ALJ determined that 207 domestic workers were unlawfully denied certain benefits and working conditions provided to the H-2A workers at Sakuma's farm.[162] The ALJ agreed with the Administrator's decision to separately penalize WAFLA for each of the 207 affected workers (a "per-worker" penalty), rather than to assess a single penalty encompassing the entire violation (a "per-regulation" penalty).[163]

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160 *Id.* at 4, 25.

161 It appears Judge Burrell would reduce the penalty to zero based on his view of WAFLA's relative lack of culpability in the violations. Concurring and Dissenting Opinion at 58-64. We respectfully disagree with our colleague, who we believe ignores the continuing obligations to which WAFLA committed itself as a joint employer. The H-2A statute and regulations do not permit a joint employer to completely denounce its obligations in the way WAFLA attempts to do in this case. While WAFLA may have relatively less culpability for the violations than Sakuma based on their relative roles in the violations, WAFLA nevertheless retained a duty to ensure compliance at the farm, and is therefore culpable for having failed to take the appropriate steps to do so. As we have explained, the regulation provides ample flexibility for the Administrator (and upon review, the ALJ and the Board) to take an employer's role in the violations into account when assessing penalties.

162 D. & O. at 22-23.

163 *Id.* at 22, 23-24.

The ALJ's and the Administrator's approach is consistent with the H-2A regulations. As explained above, the Administrator has the discretion to assess CMPs "for each violation" of the H-2A program requirements, including "[e]ach failure . . . to honor the terms or conditions of a worker's employment required by [the H-2A statute or regulations]."[164] Pursuant to this regulation, each instance in which a domestic worker was denied the same benefits and working conditions as the H-2A workers constitutes a separate violation.[165] Thus, it was appropriate for the Administrator, and, in turn, the ALJ, to assess 207 separate penalties against WAFLA and Sakuma, one for each employee whose rights were violated.[166]

As the ALJ noted, though, the Administrator, in the exercise of the discretion granted to them to determine the appropriate penalty in any given case, may elect to assess a per-regulation penalty instead of a per-worker penalty, even in instances in which the violation extends to multiple workers.[167] WAFLA objects to the Administrator's and the ALJ's decision to apply a per-worker penalty, rather than a per-regulation penalty, in this case.[168]

In support of its argument, WAFLA asserts that the ALJ's reasoning for applying a per-worker penalty is contradictory and flawed. WAFLA notes that the ALJ first found that a per-worker violation was appropriate because the preferential treatment was "particularly grave,"[169] but later in his discussion of the mitigation factors for the preferential treatment violations appeared to contradict himself, stating that he "disagree[d] with the Administrator's implicit finding that this was a grave violation, precluding mitigation."[170] Based on these statements, WAFLA asserts that "the violation should have resulted in a per-regulation penalty according to the very standard the ALJ cites for determining whether penalties are applied on a per-worker or per-regulation basis."[171]

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164 29 C.F.R. § 501.19(a).

165 *See id.* ("Each failure . . . constitutes a separate violation.").

166 *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Sun Valley Orchards, LLC*, ARB No. 2020-0018, ALJ No. 2017-TAE-00003, slip op. at 13 (ARB May 27, 2021) (recognizing the Administrator's discretion to assess a per-worker penalty).

167 D. & O. at 22.

168 WAFLA Br. at 31.

169 D. & O. at 22.

170 *Id.* at 24.

171 WAFLA Br. at 31.

Although a surface reading of the ALJ's analysis may appear to reveal contradictory statements, a close reading of the D. & O. reveals that the word "grave," as used by the ALJ, had different meanings based on the context in which it was used. In the context of determining whether a per-worker penalty was appropriate, the ALJ determined that the violations were "grave" or severe in *scope*. Specifically, the ALJ reasoned that a particularly large number of workers were affected, and that the violations "identifiably affect[ed] each of the 207 workers individually rather than the workers as a group."[172] In contrast, in the context of reviewing the regulatory mitigation factors, the ALJ determined that the violations were not particularly "grave" in *nature* as compared to other types of H-2A violations.[173] For example, the ALJ found the violations at issue—failing to provide housing supplies to domestic workers, charging domestic workers a housing deposit, and not transporting domestic workers to the worksite—were "not of the highest gravity" as compared to, for example, wage theft or fraud.[174]

Although the ALJ may have been imprecise in his use of the term "grave," his analysis, when viewed carefully, was reasonable and sound. Although the preferential treatment violations at issue here were not, both individually and in isolation, particularly grave in nature, the violations identifiably affected 207 workers. Accordingly, in the aggregate the violations were sufficiently significant and severe as to justify a per-worker penalty assessment.[175] We find no basis to overturn the ALJ's determination that a per-worker penalty—which, as explained above, is consistent with the H-2A regulatory language—was appropriate in the circumstances of this case.[176]

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172 D. & O. at 23-24.

173 *Id.* at 24.

174 *Id.*

175 We note that the ALJ analyzed the grave scope of the violations—and the appropriateness of a per-worker penalty—under the second regulatory mitigation factor (the number of workers affected), and analyzed the grave nature of the violations under the third regulatory factor (gravity of the violations). *Id.* at 23-24. This underscores that the ALJ attached a different meaning to the word "grave" depending on the context in which he used it.

176 Significantly, although WAFLA suggests that the ALJ's analysis was contradictory based on his imprecise use of the word "grave," WAFLA does not actually challenge on appeal the ALJ's specific reasoning for determining that the scope of the violation was so significant as to justify a per-worker penalty.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's D. & O., and order WAFLA to pay civil money penalties of $60,487.50.[177]

SO ORDERED.

[redacted]
SUSAN HARTHILL
Chief Administrative Appeals Judge

[redacted]
TAMMY L. PUST
Administrative Appeals Judge

BURRELL, Administrative Appeals Judge, concurring in part, dissenting in part:

Respectfully, I concur with the majority opinion that WAFLA is a joint employer under the 2010 regulations but otherwise dissent from the majority's affirmance of the ALJ's opinion. As explained in further detail below, I would remand the matter back to the ALJ with instructions to consider WAFLA's culpability in the violations underlying the Administrator's assessment of civil monetary penalties (CMPs).

BACKGROUND

1. The Administrator's Notices of Determination

Sakuma participated in the H-2A program beginning in June 2013, and WHD initiated its investigation in August 2013.[178] In an April 7, 2017 Notice of Determination, the Administrator assessed Sakuma $123,825 in CMPs and

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177 *See infra* footnote 27.

178 D. & O. at 5-6, 22, 26; Administrator's Post-Hearing Brief at 3, 15, 20.

$9,599.58 in back wages for six violations.[179] The Administrator assessed WAFLA $750 for a reimbursement violation.[180] Both Sakuma and WAFLA disputed the claim, and the Administrator referred the matter to the OALJ for a hearing.[181]

On or about April 25, 2018, the Administrator amended the Notice of Determination to charge both Sakuma and WAFLA for the violations.[182] Sakuma's assessment was modified to $106,800. WAFLA's assessment was modified from $750 to $124,575 in CMPs and $5,443.21 in back wages.[183]

Through settlement and consent findings, Sakuma settled with the Administrator and did not participate in the hearing. The case proceeded against WAFLA for the six violations.[184]

2. The ALJ's Decision and WAFLA's Appeal

The ALJ applied Sakuma's admissions to WAFLA.[185] The ALJ rejected WAFLA's contention that the Administrator's amendment from $750 to $124,575 created unfair surprise because there was no change in policy, only an exercise of discretion to enforce.[186] Evaluating the Administrator's Determinations and application of mitigating factors, the ALJ agreed with some assessments and mitigating factors but modified others.[187] Ultimately, the ALJ found WAFLA liable for $59,037.50 in civil penalties.[188]

WAFLA appealed the ALJ's decision to the ARB, objecting to the ALJ's finding that it was a joint employer, and even if it were a joint employer, that it was

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179 D. & O. at 2; WAFLA's Hearing Ex. A; WAFLA Br. at 3.

180 D. & O. at 2.

181 *Id.*

182 *Id.*; WAFLA's Hearing Ex. B.

183 D. & O. at 2. The assessment of back wages was not specific to Sakuma or WAFLA.

184 *Id.* at 3.

185 *Id.* at 4-7.

186 *Id.* at 16-19.

187 *Id.* at 22-32. WAFLA actually prevailed over the subject of its initial appeal. The ALJ rejected the CMP against WAFLA for the reimbursement violation. *Id.* at 29-32.

188 *Id.* at 32.

liable for the violations.[189] WAFLA contests the ALJ's conversion of Sakuma's admissions into WAFLA admissions as WAFLA was not a party to the consent findings.[190] WAFLA contends that even if WAFLA were a joint employer with Sakuma's H-2A employees, this would not extend to the assessments concerning U.S. employees.[191] WAFLA appeals the ALJ's decision that it had no justifiable reliance on prior agency interpretation of respective liability between associations and member farms.[192]

On a more general basis, WAFLA argues lack of control, participation, and responsibility for Sakuma's violations.[193] For each of the violations except reimbursement of inbound transportation, it is undisputed that Sakuma was the party that committed the violation, not WAFLA.[194] WAFLA objects to being held vicariously responsible for Sakuma's actions.[195]

In response, the Administrator defends its assessment and generally supports the ALJ's decision that WAFLA was a joint employer and was liable for every violation committed by Sakuma.[196] The Administrator argues that WAFLA is estopped from arguing that it is not a joint employer because it declared itself to be a joint employer in application forms and accepted the benefits of this status.[197] The Administrator rejects WAFLA's argument of reliance interests because the Administrator's interpretation of the regulatory scheme concerning joint employer has been consistent throughout.[198] Thus, WAFLA's citation to reliance and "new

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189 WAFLA Br. at 7, 19.

190 *Id.* at 14-17.

191 *Id.* at 19.

192 *Id.* at 23.

193 *Id.* at 19-23, 27-29. This follows the litigation in *Azzano Farms*. *See Azzano Farms*, ARB No. 2020-0013, ALJ No. 2019-TAE-00002, slip op. at 43-44, 46-47 (ARB Mar. 30, 2023) (Burrell, J., concurring and dissenting).

194 WAFLA Br. at 14-17, 19-23.

195 *Id.* at 23.

196 Adm'r Br. at 17-22, 28-32.

197 *Id.* at 26.

198 *Id.* at 34.

interpretation" case law is inapposite.[199] Rather, it was within the Administrator's exercise of discretion to enforce the regulations.

DISCUSSION

The Administrator has the burden of proof regarding the reasonableness of the CMP.[200] Under 29 C.F.R. § 501.19, the Administrator may consider "the type of violation committed and other relevant factors" in determining how large a penalty to impose.[201] Section 501.19(b) provides a non-exhaustive list of factors to consider when imposing a CMP.[202] On appeal, the ARB has all the power the Secretary has and reviews the ALJ's findings of fact and conclusions of law de novo.[203]

1. Joint-Employer Status

Regarding WAFLA's argument concerning its status as a joint employer under the 2010 H-2A regulations, I refer to the discussion in *Azzano Farms*.[204] The regulations—though murky[205] and containing a regulatory definition of joint employer that speaks to common-law "indicia of employment"—set out, when considered in full context, that agricultural associations filing master applications are joint employers for purposes of the certification.[206] This conclusion requires

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199 *Id.* at 36-43.

200 See 5 U.S.C. § 556(d); *Zappala Farms*, ARB Nos. 2001-0054, -0096 to -0098, ALJ No. 1997-MSP-00009-P, slip op. 9-10 (ARB Aug. 29, 2001).

201 *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Three D Farms*, ARB Nos. 2016-0092, -0093, ALJ No. 2016-TAE-00003, slip op. at 9 (ARB Feb. 12, 2019).

202 *Id.*

203 5 U.S.C. § 557(b); *Three D Farms*, ARB Nos. 2016-0092, -0093, slip op. at 5.

204 *Azzano Farms*, ARB No. 2020-0013, slip op. at 32-34 (Burrell, J., concurring and dissenting).

205 The confusion is validated by the fact that the WHD personnel generating and signing the determination in this case also applied the regulatory definition and testified that "joint employer" for associations filing as joint employers required examining common-law principles. *Infra* at footnotes 259-63 and accompanying text.

206 *Azzano Farms*, ARB No. 2020-0013, slip op. at 32-34 (Burrell, J., concurring and dissenting).

looking at the 2010 regulations holistically rather than just the actual regulatory definition of "joint employer."[207]

2. The Administrator Did Not Explain the 2017-2018 Change in Policy, Which Created an Unfair Surprise for WAFLA

A. There Was a Change in Policy

Central to this dispute is whether there was a change in WHD's enforcement policy. The ALJ concluded that there was not. For the following reasons, I would reverse the ALJ on this point and find that there was such a change in interpretation or agency practice in the late 2017 or early 2018 time frame.[208] As applied in this case, that change took place in an amendment to an existing enforcement action.[209]

Sakuma participated in the H-2A program in 2013, and WHD initiated its investigation in 2013.[210] Several years later, in an April 7, 2017 Notice of Determination, the Administrator assessed WAFLA $750 for a reimbursement violation. WAFLA objected to the assessment. WAFLA acknowledged that it was responsible for reimbursement but denied that it violated the regulations because it fulfilled its obligations.[211] The matter was referred to the OALJ for hearing. Before the ALJ, the Administrator filed an amended Determination on April 25, 2018, changing WHD's assessment from $750 for failure to reimburse to $124,575 in CMPs and $5,443.21 in back wages for all violations at Sakuma Farms.[212]

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207 Regulation 20 C.F.R. § 655.131(b) provides that "[t]he master application is available only when the association is filing as a joint employer."

208 D. & O. at 2, 7-8; Tr. at 240-60 (comparing applications and assessments before and after change and WAFLA's testimony that previously assessments were determined on the basis of culpability), 259-79 (WAFLA's testimony concerning conversations with WHD personnel on new policy and impact of policy on WAFLA's operations; WAFLA testified that the Wage and Hour Investigator indicated the change would begin with Azzano Farms but WAFLA had already filed the Azzano Farms application); *see also Azzano Farms*, ARB No. 2020-0013, slip op. at 38 & n.154 (Burrell, J., concurring and dissenting) (recounting WHI and WAFLA testimony that there was a change in internal guidance).

209 D. & O. at 2.

210 *Supra* footnote 178.

211 D. & O. at 9.

212 *Id.* at 2.

WAFLA understandably rejects the notion that there was no change in policy. WAFLA's Executive Director testified that for "thousands of applications over the last 20 years" and "hundreds of Wage and Hour audits," the policy was that associations were not held liable for violations by member farms that the association did not commit.[213] WAFLA's Executive Director testified to the long-standing practice that inspectors charge the party responsible for the violation.[214] WAFLA participated in more than 1,000 applications and an estimated thirty to forty audits by the Wage and Hour Division. For some of these audits involving farms, WAFLA's Executive Director testified that WAFLA was not even contacted.[215] In one instance, WAFLA was found responsible for an advertising violation.[216] In another case, the member farm was charged roughly $186,000 in back wages and $534,000 in CMPs for various violations.[217] WAFLA was assessed $100 for a transportation violation, which it objected to.[218] Consistent with the litigation in *Azzano Farms*, WAFLA's Executive Director testified that the change in policy occurred in the 2017-2018 time frame.[219]

The ALJ found credible WAFLA Executive Director's testimony that he believed WAFLA would not be held liable for actions it was not responsible for but also found that that belief was not reasonable "in light of the plain language of the governing regulations and WAFLA's own application to bring H-2A workers" to the U.S.[220] As explained in *Azzano Farms*, I disagree that the regulations are clear on this point.[221] The 2010 H-2A regulations provide a definition for joint employer that speaks to common-law principles, which, if applied to associations, would greatly ameliorate the confusion because of common-law control and agency tests.[222] Joint-

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213 *Id.* at 7.

214 Tr. at 234-52.

215 *Id.* at 252.

216 *Id.* at 237.

217 *Id.* at 248.

218 *Id.* at 244-49.

219 D. & O. at 7-8; Tr. at 253-60, 276.

220 D. & O. at 19.

221 See *Azzano Farms*, ARB No. 2020-0013, slip op. at 34-38 (Burrell, J., concurring and dissenting). The lack of clarity is reinforced by the multiple times the DOL has had to issue regulations refining and clarifying "joint employer" in the H-2A regulations. *Id.* at 38 n.153.

222 *Id.* at 34-39.

employer status established by checking a box without any control or agency test in the H-2A master application context, with multiple entities engaging in multiple roles, creates a vexing question of respective responsibility.[223] The only H-2A statutory language discussing violations disavows strict liability for respective violations of the association and member farms unless the counterpart participated in or had knowledge of the violation.[224] This provision is applicable to debarment and does not discuss qualifications on the Secretary's enforcement.

The majority opinion emphasizes the preamble's "joint responsibility" language,[225] but this fails to clarify the issue:

> The Department highlights joint responsibility of the association and its employer-members by requiring that the association identify all employer-members that will employ H-2A workers. The Application must demonstrate that each employer has agreed to the conditions of H–2A labor certification.[226]

Rather than covertly imposing strict liability on the association filing the application, the preamble's instruction that member farms be identified as employers is consistent with an interpretation of responsibility of each employer committing a violation respectively, especially in light of the Administrator's pre-2018 practice. The H-2A statute authorizes the Secretary to enforce obligations only

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223 *Id.* at 37-38.

224 8 U.S.C. § 1188(d)(3); *Azzano Farms*, ARB No. 2020-0013, slip op. at 36 (Burrell, J., concurring and dissenting).

225 The preamble is not a transparent means of conveying vicarious liability for agricultural associations. *Nat'l Wildlife Fed'n v. Env't Prot. Agency*, 286 F.3d 554, 569-70 (D.C. Cir. 2002) ("The preamble to a rule is not more binding than the preamble to a statute. A preamble no doubt contributes to the general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.") (cleaned up).

226 Temporary Agricultural Employment of H-2A Aliens in the United States (2010 Final H-2A Rule), 75 Fed. Reg. 6884, 6918 (Feb. 12, 2010).

against employers.[227] Thus, any entity with a role in the H-2A program must be identified as an employer to fall under the Secretary's enforcement powers.

The number of entities involved and their respective activities could vary from one application to the next. A master application filed by an association may govern multiple farms,[228] allowing workers to shift among the farms to more efficiently match resources with need.[229] In this case, as in *Azzano Farms*, WAFLA filed the application and was responsible for recruiting and transporting the H-2A employees to Sakuma Farms. WAFLA acknowledged responsibility for any violations occurring in these activities. Once the farmers were at the farm, however, the member farm controlled all aspects of H-2A employment, including hiring the workers, providing and maintain housing, and providing transportation.[230]

Because there may be multiple entities engaging in multiple activities, the forms involved in the master application do not remove the confusion for

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227 8 U.S.C. § 1188(g)(2) ("The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.").

228 The Administrator characterizes the master application as a benefit to WAFLA, but as stated in *Azzano Farms*, the master application is a benefit to the member farms, not to WAFLA. *Azzano Farms*, ARB No. 2020-0013, slip op. at 37 n.151 (Burrell, J., concurring and dissenting). Using the association allows the farms to share the cost of the application fee and utilize WAFLA's expertise on certain shared processes such as filing requirements, recruitment, advertising, and transportation. WAFLA has no economic incentive to use the master application format when filing an application on behalf of member farms. It would benefit financially from collecting a fee from every farm by filing individual applications. Further, WAFLA objects to the characterization of its collection of $82,800 as if it were a fee to WAFLA. The collection of this money was largely if not entirely for reimbursement of costs associated with pre-farm activities. Tr. at 286 (WAFLA's Executive Director taking issue with this characterization: "That is such a broad misstatement that it borders on a false statement. What Sakuma does, and what all did, if the workers elect this type of a program that we offer, they give WAFLA the money and then WAFLA pays the recruiters, the government, the reimbursement, the hotels and the transportation" for all of the employees.).

229 *Supra* Majority Opinion at 10. In a given application, an association may be involved in actual employment or housing of H-2A workers, which would expand its activities and obligations. In *Azzano Farms*, for example, WAFLA employed a small number of H-2A workers. *Azzano Farms*, ARB No. 2020-0013, slip op. at 35 n.144 (Burrell, J., concurring and dissenting).

230 *Infra* Sections 4, "WAFLA's Role in Sakuma's Housing and Transportation," and 5, "WAFLA's Role in Failing to Hire a U.S. Corresponding Employee".

prospective applicants. As discussed in *Azzano Farms*, WAFLA's Form 790 and Form 9142 application are one-size-fits-all forms, applicable to all participating member farms and the association filing the application, whether as an agent, sole employer, or as a joint employer.[231] The majority opinion notes that Form 790 has language "Employer (Association and Member collectively). . . ." The Form also explains that WAFLA completed it as "an association application filed by WAFLA on behalf of its member(s)."[232] WAFLA points out that the Form has language that the "employer"—referring to the applicable member farm—retains "ultimate responsib[ility] for ensuring compliance" for housing.[233]

In this application, Sakuma was the only member farm. The same forms, however, would be used for master applications involving multiple member farms. The Department explains in recent H-2A regulations that a non-active member farm, though an "employer" in a master application with multiple farms, is not responsible for the violations of an active member farm currently employing H-2A workers.[234] Member farms are liable only for violations when they are employing H-2A employees. Likewise, it is not apparent whether a member farm, though an "employer" under the forms, would be responsible for violations arising out of the pre-farm activities the association is responsible for such as advertising, recruitment, and transportation of H-2A workers to the farms.

For the above reasons, I disagree with the ALJ and the majority that the regulations and the application forms are clear on the point of vicarious liability and thus undermine WAFLA's testimony concerning pre-2018 practice.

In its response brief, the Administrator states that:

> [T]he Administrator did not change her interpretation of the statute and regulatory text. WAFLA does not and cannot point to any instance where the Department or the Administrator announced to the public, or to WAFLA, an

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231 *Azzano Farms*, ARB No. 2020-0013, slip op. at 35 (Burrell, J., concurring and dissenting).

232 Adm'r Hearing Ex. 2 (790 Form, Box 1).

233 *Id.* at Box 3.

234 *Azzano Farms*, ARB No. 2020-0013, slip op. at 45 n.187 (Burrell, J., concurring and dissenting) (citing the explanation from the 2022 H-2A regulations).

> interpretation that associations that file Master Applications as joint employers would not be held responsible for compliance with all H-2A requirements.[235]

The Administrator overstates the principle. A change in interpretation need not be in the form of explicit rulemaking or agency guidance.[236] Changes in policy can take place, for example, in amicus briefs.[237] The agency need not issue a formal statement announcing the policy. "[A]n agency may—instead of issuing a new interpretation that conflicts with an older one—set forth an interpretation for the first time that is contrary to an established practice to which the agency has never objected."[238]

The ALJ claims that there was no change in policy, only a discretionary choice whether to enforce or not to enforce.[239] A change might be characterized as prosecutorial discretion to enforce if there were a history of no audit and assessment in any form followed by a decision to begin enforcing a regulation.[240] Here, as explained below, we have clear inconsistency in the form of a pattern of positive enforcement one way in terms of respective liabilities and then another way in the form of vicarious liability. Moreover, the Administrator increased its CMP by 16,500% in an existing enforcement action. The timing, amount, and financial consequence of the change clearly weigh against the position that there was not a change underlying the amendment. The imposition of CMPs is not the kind of statutory or regulatory authority that is committed to agency discretion because it so broad that reviewing courts have no meaningful substance to review.[241]

B. <u>The Administrator Did Not Explain the Change in Policy</u>

As noted above, the Administrator has not adequately explained the agency's decision-making process in the change from $750 in CMPs to $124,575 in CMPs.

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235 Adm'r Br. at 34-35.

236 *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

237 *Id.*

238 *Romero v. Barr*, 937 F.3d 282, 291 (4th Cir. 2019).

239 D. & O. at 16-19.

240 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

241 *Id.* at 830.

The Administrator has not provided any citation to a written policy or written internal guidance or even testimony acknowledging a change.

Before analyzing specific facts, it is necessary to identify the roles of individuals within Wage and Hour Division. Collectively, the "Administrator" is referred to as the person taking the action on behalf of the Wage and Hour Division. The Administrator does not personally engage in all of the activities of the Division. The investigation is carried out by the Wage and Hour Investigator (WHI). The WHI recommends violations and CMPs to the Assistant District Director (ADD), who prepares the notice of determination letter. Wage and Hour's determination letters can be signed by the District Director (DD) or the ADD.[242]

In the 2017 assessment against WAFLA, WAFLA testified that the WHI, in the closing conference with WAFLA, recommended liability only for WAFLA's alleged failure to reimburse.[243] WHI provided her recommendation to the ADD.[244] In evaluating the WHI's recommendation, the ADD considered the culpabilities of the entities as well as the factors in 29 C.F.R. § 501.19(b).[245] For the April 2017 assessment, the ADD forwarded the Determination letter to the DD, who signed the letter.[246] The first time the DD saw the 2017 Determination letter was the day she signed it; she did not read it before signing.[247] She did not know who prepared it, but the standard practice was for the ADD to prepare it.[248]

After the DD had signed the 2017 Determination assessing WAFLA $750, the ADD, apparently without input from the DD, created the amended April 25, 2018 Determination letter and signed it.[249] The DD testified that she was not involved in the 2018 amended Determination letter; that was handled by the ADD.[250] The DD

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242 Tr. at 73, 77-78.

243 *Id.* at 238-39.

244 *Id.* at 82.

245 *Id.* at 150.

246 *Id.* at 72, 75, 142.

247 *Id.* at 75.

248 *Id.* at 77.

249 *Id.* at 75-76.

250 *Id.* at 75-76, 104.

could not explain why or how the ADD could amend a signed DD determination that changed the amount from $750 to $124,575 without the DD's input.[251]

The ADD also could not explain the change from $750 to $124,575.[252] The ADD had issued between ten to one hundred determinations in his tenure but could not recall having issuing an amended determination, especially an amendment that took place five years after the initial audit.[253] The ADD denied that there was a change in policy[254] but admitted that the Determination letter that he signed on March 15, 2018, for Azzano Farms, a month or so before the amended determination in this case, was the first time that CMPs were applied to both the association and the member farm jointly for violations that took place at the farm.[255]

Before this change in the 2017-2018 time frame, there was no change in departmental guidance or in the Wage and Hour Division's Field Handbook.[256] There were no new factual developments stemming from the investigation to explain the 16,500% change.[257] There was no Supreme Court decision, statutory change, or a regulatory change.[258]

One component of the confusion is the fact that the specific regulatory definition of "joint employer" does not identify or explain the agricultural association and master application process but refers generically to "indicia" of employment and common law principles.[259] Critically, the ADD who generated the

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[251] *Id.* at 84-85, 104-12.

[252] *Id.* at 125, 150-56, 163.

[253] *Id.* at 156, 207, 209.

[254] *Id.* at 145-48, 185, 199, 213-14.

[255] *Id.* at 189-90; *see also id.* at 253-57.

[256] *Id.* at 185, 202.

[257] *Id.* at 200-16. The Administrator claims in briefing to the Board that she learned through discovery following the 2017 Notice of Determination that Sakuma was new to the H-2A program and relied upon WAFLA's expertise. *See* Majority Opinion at footnote 93.

[258] Tr. at 200-16.

[259] The regulatory definition of "joint employer" was altered to include agricultural associations filing master applications in the 2022 amendments to the H-2A regulations. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61794, 2022 WL 6741769 (Oct. 12, 2022).

2017 Determination for the DD and who generated and signed the 2018 amended Determination testified that merely filing a master application **does not** create joint-employment status; there are other factors that determine whether an association is a joint employer. Counsel for WAFLA examined the ADD:

> Q So, you're saying that the simple fact of filing an H-2A master application doesn't make an association a joint employer, that there are other factors that determine whether an association is a joint employer?
> A Yes, sir.[260]

The ADD identified those other factors as the common law or control factors such as the ability to hire and fire the employee.[261] Counsel for WAFLA followed up with an example of an association filing a master application as a joint employer with other member farms and asked the ADD if all three, the association and the farms, were joint employers. The ADD testified the master application is just one of the factors to joint employment. The ADD would have to consider other factors to determine whether the association was a joint employer.[262] This is a 180-degree opposite

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260 Tr. at 166.

261 *Id.* at 165:

> Q And it's the Wage and Hour Division's contention in this case that when an association files a master application, on behalf of its members, that the association is a joint employer, that's the Wage and Hour Division's contention, correct?
>
> A There are factors to a joint employment relationship, that can be one of the factors.
>
> Q What factors determine a joint employment relationship?
>
> A. First of all, you have to have an employment relationship, and that can be, you know, when a person, okay, it can be an association, it can be an individual, and they go ahead and they -- for H-2A purposes, okay -- they have a place, a physical place in the U.S., okay where employees or applicants can go ahead and seek employment, okay. Another factor is the employment relationship, okay, such as over the work, such as, you know, pay, the hiring, firing, that kind of stuff is usually you know, important to us.

262 *Id.* at 175-76 (the association's checking the box on the 9142 Form is not in itself determinative of whether or not a joint employment relationship actually exists), 187 (same, the ADD would have to review other factors).

position from the central premise of the Administrator's assessment of WAFLA's liability as an agricultural association for all of Sakuma's violations solely because it filed the master application as a joint employer.[263]

C. *The Administrator's Unexplained Change in Policy Created Unfair Surprise and Was Unreasonable*

Further, I agree with WAFLA that the change in policy here created an unfair surprise as applied to WAFLA because it occurred without notice and during pending litigation. It is not clear from the agency's inconsistent positions whether an agricultural association will be held responsible for none of the farm's housing, transportation, or hiring violations or all of them, and what goes into that determination.

Reviewing courts defer to agency interpretations of regulations but limit or withhold that deference when agency interpretation conflicts with prior agency interpretation.[264] "[Courts] owe deference to an agency's interpretation advanced during litigation regarding the meaning of an ambiguous regulation, if the position is not inconsistent with the agency's prior statements and actions regarding the disputed regulation."[265]

A change in interpretation without explanation reflects on the reasonableness of agency action.[266] Agency action will be set aside as arbitrary and

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263 Adm'r Br. at 17-26. The ADD's perception is, however, consistent with the regulatory definition of joint employer following common-law principles of joint employer.

264 *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *Decker v. Northwest Env't Def. Ctr.*, 568 U.S. 597, 614 (2013) (interpretive consistency over time reinforces the case for *Auer* deference to agency's position); *Sioux Valley Hosp. v. Bowen*, 792 F.2d 715, 719 (8th Cir. 1986) ("Deference is due when an agency has developed its interpretation contemporaneously with the regulation, when the agency has consistently applied the regulation over time, and when the agency's interpretation is the result of thorough and reasoned consideration.").

265 *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 67 (D.C. Cir. 2002); *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 157 (1991) (whether the Secretary has consistently applied the interpretation embodied in the citation is a factor bearing on the reasonableness of the Secretary's position).

266 *Road Sprinkler Fitters Local Union No. 669*, ARB No. 2010-0123, slip op. at 6 (ARB June 20, 2012) ("In matters requiring the Administrator's discretion, the Board generally defers to the Administrator as being 'in the best position to interpret [applicable

capricious if the agency fails to provide a reasoned explanation for its decision.[267] Neither the DD nor the ADD explained the change from the 2017 assessment to the 2018 assessment.[268] Without any explanation or change in law or fact, the WHI, ADD, and DD found WAFLA responsible for none of Sakuma's violations in 2017 then the ADD found WAFLA responsible for all of them in 2018. The agency's inconsistent positions taken in 2017 and 2018, without explanation, highlight the unreasonableness of the amended Determination.[269] The Supreme Court in *Christopher v. SmithKline Beecham Corp*. wrote:

> [A reviewing court] accord[s] the [agency's] interpretation a measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.[270]

Courts decline to give deference to an agency's reversal of interpretation when such reversal upsets expectation and reliance on prior interpretation. The Court in *Kisor v. Wilkie* wrote:

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regulations] in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside.'") (citation omitted); *Miami Elevator Co. & Mid-American Elevator Co., Inc.*, ARB Nos. 1998-0086, 1997-0145, slip op. at 16 (ARB Apr. 25, 2000) (same); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.") (citation omitted).

267 *See, e.g.*, *Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 534 (2007); *SmithKline Beecham Corp.*, 567 U.S. at 155 ("deference is likewise unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997))).

268 *Supra* Section 2.b, "*The Administrator Did Not Explain the Change in Policy.*"

269 *Thomas Jefferson Univ.*, 512 U.S. at 515 ("an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view") (internal citations omitted); *Encino Motorcars LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("The agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. That requirement is satisfied when the agency's explanation is clear enough that its path may reasonably be discerned. But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.") (cleaned up).

270 *SmithKline Beecham Corp.*, 567 U.S. at 159 (cleaned up).

> That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. Or the upending of reliance may happen without such an explicit interpretive change.[271]

"[E]ven the absence of prior agency action can cause a new interpretation to be an 'upending of reliance,' preventing that interpretation from receiving *Auer* deference."[272] An agency is free to change its mind.[273] But this normally takes place through more transparent means[274] to avoid "unfair surprise."[275] The Court in *Long Island Care at Home, Ltd. v. Coke* wrote:

> [A]s long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-

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271 *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (internal citation omitted); *see also Romero*, 937 F.3d at 291 ("[T]he upending of reliance may happen without such an explicit interpretive change. Rather, an agency may—instead of issuing a new interpretation that conflicts with an older one—set forth an interpretation for the first time that is contrary to an established practice to which the agency has never objected.") (internal citation omitted).

272 *Nat'l Org. of Veterans' Advocs., Inc., v. Sec'y of Veterans Affs.*, 48 F.4th 1307, 1316 (Fed. Cir. 2022).

273 *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015) (identifying various means of interpretative rulemaking); *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (agencies are free to change their existing policies as long as they provide a reasoned explanation for the change).

274 *Martin*, 499 U.S. at 157 ("[Less formal means of interpretating regulations] include the promulgation of interpretive rules, and the publication of agency enforcement guidelines. . . . A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position.") (cleaned up); *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 941 F.3d 1200, 1210 (9th Cir. 2019) (dissenting from denial of rehearing en banc) (criticizing deference to litigation positions because "[a] litigating position is not promulgated in the exercise of Congressionally delegated authority because it is not adopted through any relatively formal administrative procedure. Rather, an agency's litigating position can ordinarily be changed from one case to another via internal decisionmaking not open to public comment or determination.") (cleaned up).

275 *Kisor*, 139 S. Ct. at 2417-18 (citations omitted) ("[A] court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties."); *SmithKline Beecham Corp.*, 567 U.S. at 155 (same).

> comment rulemaking in an attempt to codify its new interpretation, makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation . . . .[276]

In light of long-standing practice to the contrary, regulated agricultural associations like WAFLA require notice that they may be liable for the full amount of a member farm's violation notwithstanding the association's lack of ownership, knowledge, participation, or control in the violation.[277] This is especially so when the agency's position changes during the litigation and the change results in significant financial consequences for the party without notice.[278] WAFLA's Executive Director "expressed concern that the new policy of liability would upend WAFLA's business model, result in millions of dollars in liability and put it at a competitive disadvantage in the marketplace."[279] Following WHD's change in policy, WAFLA had to change its business model.[280]

3. Culpability Underlying 29 C.F.R. § 501.19 CMP Analysis

The Administrator's CMPs are assessed according to 29 C.F.R. § 501.19. The non-exhaustive factors at § 501.19(b) might be characterized as mitigating in some circumstances, but this does not exclude an underlying assessment of culpability in whether to assess a CMP at all. As discussed in *Azzano Farms* (concurring and dissenting opinion) the preamble to the 2010 H-2A regulations

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276 *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (citations omitted).

277 *Martin*, 499 U.S. at 158 (identifying "adequacy of notice to regulated parties" as one factor relevant to the reasonableness of the agency's interpretation).

278 *Nat'l Lab. Rels. Bd. v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 295 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding when doing so would impose "new liability ... on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements" or in a case involving "fines or damages").

279 D. & O. at 8; WAFLA Post-Hearing Brief at 2 ("As a result [of the change in policy], wafla is exposed to massive liability, which it had no opportunity to avoid by changing its conduct because the new policy was not announced in advance. In fact, the Administrator applied the new policy for the first time in early 2018 resulting in retroactive liability for wafla for alleged violations that occurred some 5 years ago.").

280 Tr. at 264-65, 277, 314-15.

indicates that the 501.19(b) factors and "common sense" address concerns of excessive liability:

> Contrary to the assumptions of some commenters, the assessment of a particular penalty (or of an enhanced penalty for a repeat or willful violation) is not mandatory, but guided by consideration of the seven factors listed in paragraph (b), the facts of each individual case, and by common sense. For example, before assessing any penalty, the WHD Administrator must consider the type of violation, its gravity, the number of workers affected, and several mitigating and/or aggravating factors including, but not limited to, the explanation offered by the employer (if any), its good faith or lack thereof, any previous history of violations, and any financial loss, gain or injury as a result of the violation. These safeguards are intended to ensure that inadvertent errors and/or minor violations are not unfairly penalized.[281]

The principle of culpability underpins the CMP analysis.[282] "Culpable" is defined as blamable; purposely, recklessly, knowingly; involving the breach of a legal duty or the commission of a fault.[283] The ADD testified that he looks at culpability when determining whether to assess a CMP.[284] This is intuitive as the CMP is a penalty. The Supreme Court in *Kokesh v. Securities & Exchange Comm'n* explained that a "'penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws.'"[285] "[A] pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to

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281 2010 Final H-2A Rule, 75 Fed. Reg. at 6944 (emphasis added).

282 Though not applicable to this enforcement action, the 2022 preamble, as part of an effort to clarify the joint-employer issue, uses the term "culpable" five times in reference joint employers and limiting liability under 501.19(b) factors. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61674-77, 2022 WL 6741769 (Oct. 12, 2022).

283 BLACK'S LAW DICTIONARY 385 (7th Ed.).

284 Tr. at 150-51. The ADD added all joint employers are culpable.

285 *Kokesh v. Secs. & Exch. Comm'n*, 581 U.S. 455, 461 (2017) (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)).

compensating a victim for his loss."[286] As examined in *Azzano Farms*, § 501.19(b) factors punish intentional, willful, or repeated conduct but not innocent, inadvertent conduct.[287] "Inadvertent" means unintentional or "an accidental oversight."[288] "Good faith" is defined as "a state of mind consisting of honesty in belief or purpose."[289]

The ALJ walked through the factors on the premise that WAFLA committed the violations and then tacked on mitigation while simultaneously analyzing the Administrator's mitigation analysis.[290] I disagree that mitigation is the limit of 501.19's culpability analysis. Rather, consistent with prior agency practice, the evaluation of culpability reaches into whether the agricultural association is liable in the first place, not just whether it is eligible for a mitigation discount. As discussed below, the ALJ's analysis under § 501.19 does not adequately distinguish between the activities WAFLA was directly responsible for and those that occurred at Sakuma Farms outside of the knowledge, control, supervision, and direction of WAFLA.

4. WAFLA's Role in Sakuma's Housing and Transportation

For the general category of housing and transportation violations, the ADD's assessment against WAFLA went from $0 in 2017 to $108,675 in 2018.[291] On review by the ALJ, the ALJ affirmed but modified the Administrator's assessment. At the outset, the ALJ referred to several Sakuma activities in hiring as "directed by WAFLA" or "per WAFLA's instruction."[292] The ALJ applied Sakuma's admissions to WAFLA.[293] As WAFLA notes on appeal, the consent findings were signed by Sakuma and the Administrator, not by WAFLA.[294]

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286 *Id.* (citations omitted).

287 *Azzano Farms*, ARB No. 2020-0013, slip op. at 40-43 (Burrell, J., concurring and dissenting).

288 BLACK'S LAW DICTIONARY 762 (7th Ed.).

289 *Id.* at 701.

290 D. & O. at 22-29.

291 *Id.* at 23; Tr. at 192-93.

292 D. & O. at 4-5, 28; *see also* Tr. at 283-86 (WAFLA taking issue with misstatements and mischaracterizations in the consent findings).

293 D. & O. at 4-7.

294 *Id.* at 4.

Based on Sakuma's consent findings, the ALJ found that WAFLA violated several H-2A housing regulations.[295] These violations consist of unlawfully deducting housing deposits from U.S. corresponding workers' paychecks but not from H-2A workers' paychecks; providing toiletries and amenities to H-2A workers but not to U.S. corresponding workers; and providing bussing services for H-2A workers but not for U.S. corresponding employees.[296]

Subtracting Sakuma's consent admissions, the testimony confirms WAFLA's lack of responsibility for the violations at issue. The ALJ confirms that the housing was provided by Sakuma.[297] The ALJ stated: "WAFLA was not involved in the day-to-day functions at Sakuma during the summer of 2013. No representatives of WAFLA supervised work or set day-to-day work start and stop times for H-2A workers at Sakuma."[298] WAFLA had no supervision, control, or ownership of Sakuma's housing or any role in transportation from the housing to the fields.[299] WAFLA was not involved in deducting housing deposits from workers' paychecks.[300] WAFLA's checks were for reimbursements; Sakuma's checks were for payroll.[301] WAFLA did not hand out toiletry packets or household items to the H-2A employees at Sakuma's housing.[302]

Countering WAFLA's position, the ALJ stated that because WAFLA did not assert control over aspects of Sakuma's employment did not mean that WAFLA could not have as it continued to provide services and guidance to Sakuma about recruitment during the first half of the contract.[303] As stated in *Azzano Farms*, an

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295 *Id.* at 22.

296 *Id.*

297 *Id.* at 5, 22. The ALJ stated: "WAFLA noted that it retained the right to inspect the housing provided at the farm by Sakuma." *Id.* at 8, citing AX-2, Box 3. WAFLA counters that "employer" here refers to Sakuma, not WAFLA. WAFLA Br. at 17-18.

298 D. & O. at 9; see also *id.* at 4-5; Tr. at 45-46.

299 D. & O. at 4-5; Tr. at 51, 58.

300 Tr. at 51, 216-18.

301 Tr. at 45-46.

302 *Id.* at 51, 216-18.

303 D. & O. at 9; Tr. at 279-81, 281-83, 287, 311-12. Further, providing information or counseling to the owner and operator, as demonstrated by assessments against WAFLA in both *Azzano Farms* and in this case, was not enough to prevent the Administrator's

entity's potential to influence or encourage the compliance of another is "a far leap from the type of ownership or control courts require to hold an employer vicariously liable" for the misdeeds of others.[304]

The same analysis carries over to the Administrator's assessment against WAFLA for unclean and unsafe conditions at Sakuma Farms. According to the Administrator, WAFLA violated 20 C.F.R. § 655.122(d) and 29 C.F.R. § 1910.142 because of unsafe and unhealthy conditions at Sakuma Farms.[305] These violations include improper garbage storage, pest infestation, and a malfunctioning refrigerator.[306] For the infestation and unclean conditions, the ALJ cited a lack of proof as the photos did not reflect improper outdoor garbage collection, flies, or the presence of feces.[307] For garbage and related violations, the ALJ assessed $375 against WAFLA.[308] For the malfunctioning refrigerator, the ALJ assessed $525 against WAFLA.[309]

As with the housing deposits, toiletries, and amenities, Sakuma owned and operated the housing and was the party in control of maintenance and monitoring refrigerators, garbage control, and pest infestation. WAFLA did not possess legal ownership or control over Sakuma's housing or manage its repair or upkeep.[310]

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assessment against WAFLA. WAFLA counseled Azzano Farms against the substance underpinning a violation for failure to cooperate but was assessed the full amount for failing to cooperate. *Azzano Farms*, ARB No. 2020-0013, slip op. at 50 (Burrell, J., concurring and dissenting). In this case, WAFLA recommended that Sakuma hire the U.S. employee but was still assessed a CMP for Sakuma's failure to do so. *Infra* at page 63 and footnote 317; D. & O. at 9, 29; WAFLA Br. at 22.

304 *Azzano Farms*, ARB No. 2020-0013, slip op. at 48 (Burrell, J., concurring and dissenting).

305 D. & O. at 25-27.

306 *Id.*

307 *Id.* at 26.

308 *Id.* at 27.

309 *Id.*

310 *Id.* at 4-5; WAFLA Br. at 21-22; Tr. at 216-18. The housing standards applicable to Sakuma Farms are found in 29 C.F.R. § 1910.142. They provide minute detail for employers to follow. As stated in *Azzano Farms*, compliance with these regulations may be reasonable if you are the owner or operator of the farm. WAFLA, however, provides application, wage and hour compliance, ADA compliance, and anti-harassment services to over 800 farms. Tr.

5. WAFLA's Role in Failing to Hire a U.S. Corresponding Employee

The H-2A regulations require that an H-2A employer hire qualified U.S. workers throughout the first 50% of the work contract.[311] Sakuma's initial plan was for workers to have three months' experience.[312] Sakuma initially rejected workers without the requisite experience. But then it learned that some employees that it had hired also lacked experience, so it discontinued the policy of rejecting employees for lack of experience.[313] In the 2017 assessment, Sakuma was charged with unlawfully rejecting one U.S. employee for lack of experience.[314] In the 2018 amendment, WAFLA was assessed a penalty of $12,000 for Sakuma's failing to hire the employee, which the ALJ reduced to $5,250.[315] As with the other violations, WAFLA was not the entity that rejected the U.S. employee's employment.[316] WAFLA actually encouraged Sakuma to hire the U.S. worker.[317]

In sum, the preamble to the 2010 H-2A regulations indicates that the Administrator assigns CMPs based on common sense to avoid excessive fines and unfairness to parties. The "common sense" component is missing in the 2018 amendment to the Determination. WAFLA had no ownership, control, or supervision of Sakuma's housing or transportation and was not the entity that

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at 228; *see Azzano Farms*, ARB No. 2020-0013, slip op. at 49 (Burrell, J., concurring and dissenting). Even if WAFLA became a "shadow management agency" of its member farms (quoting the ALJ in *Azzano Farms*), it is difficult to see how it could logistically manage ultimate compliance with third-party housing, for example, as compliance would involve much more than a one-time inspection. It would have to inspect the properties of member farms daily to manage such things as the presence of flies or a full garbage can or whether the farm is handing out toiletry packages, or cooking utensils to all employees equally. Compliance would extend to hundreds of buildings and thousands of vehicles and employees. Tr. at 314.

311 20 C.F.R. § 655.135(d).

312 D. & O. at 28.

313 *Id.* at 5, 10, 28. *But see* Tr. at 285.

314 Tr. at 52-53.

315 D. & O. at 27-29.

316 Tr. at 53.

317 D. & O. at 28-29; Tr. at 279-82.

rejected the employment of the U.S. worker. I agree with WAFLA that the Administrator's change in policy to hold it responsible for Sakuma's acts in light of a long-standing practice to the contrary created an unfair surprise and was unreasonable as applied to WAFLA in this case. I would remand for the ALJ to re-evaluate WAFLA's culpability in the underlying violations in determining whether WAFLA is liable for CMPs under 29 C.F.R. § 501.19.

THOMAS H. BURRELL
Administrative Appeals Judge