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, U.S. DEPARTMENT OF LABOR,	**ARB CASE NO. 2020-0022**
	ALJ CASE NO. 2019-TAE-00010
PROSECUTING PARTY,	**DATE: November 23, 2020**

v.

CTO/CHF PARTERNSHIP d/b/a CIDER HILL FARM,

RESPONDENT.

Appearances:

For the Respondent:
Ellen C. Kearns, Esq. and Jonathan D. Persky, Esq.; *Constangy, Brooks, Smith & Prophete, LLP*; Boston, Massachusetts

For the Administrator:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Sarah K. Marcus, Esq.; Rachel Goldberg, Esq.; and Katelyn J. Poe, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

BEFORE: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

This cases arises under the employee protection provisions of the H-2A temporary agricultural worker program of the Immigration and Nationality Act

(INA) as amended by the Immigration Reform and Control Act of 1986, and its implementing regulations.[1] The H-2A nonimmigrant worker visa program permits employers to employ foreign workers on a temporary or seasonal basis when insufficient U.S. workers are "able, willing, and qualified" to do the job, and when employing foreign workers will not "adversely affect the wages and working conditions of" similarly situated U.S. workers.[2]

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from ALJ final decisions in cases under the INA's H-2A provisions.[3]

DISCUSSION

Upon review of the ALJ's grant of dismissal, we conclude that it is a well-reasoned decision based on the undisputed facts and the applicable law. The ALJ properly concluded that J-1 visa holders do not fall under the "corresponding employment" definition at 29 C.F.R § 501.3(a) because the definition limits "corresponding employment" only to U.S. workers.[4] As noted by the Respondent, there is also a basic fairness issue raised in this case as the Department failed to provide clear guidance to employers that "corresponding employment" could extend beyond U.S. workers.[5] Thus, the ALJ properly reversed the Administrator's Determination as to the Respondent's 24 J-1 program participants.

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[1] 8 U.S.C. § 1188 (2000); 20 C.F.R. Part 655; 29 C.F.R. Part 501.

[2] 75 Fed. Reg. 6884 (Feb. 12, 2010); 8 U.S.C. §§1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188(a)(1); 20 C.F.R. Part 655.

[3] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); 20 C.F.R. § 655.845; 29 C.F.R. § 501.42. On January 8, 2020, the ALJ issued a Final Decision and Order Granting Joint Motion to Dismiss the remaining claims and the case in its entirety. The ALJ's Order incorporated the ALJ's Order Granting Motion to Dismiss issued on December 9, 2019.

[4] *Overdevest Nurseries, Inc., L.P.*, ARB No. 2016-0047, ALJ No. 2015-TAE-00008 (ARB Mar. 15, 2018).

[5] *Cf. Kisor v. Wilkie*, 588 U.S. __, 139 S.Ct. 2400, 2417-18 (2019) ("A court should decline to defer . . . to [an agency's] merely '"convenient litigating position"' . . . or to a new interpretation that creates 'unfair surprise' to regulated parties.") (citations omitted).

Accordingly, we **ADOPT** and **ATTACH** the ALJ's Order Granting Motion to Dismiss.

SO ORDERED.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 09 December 2019

CASE NO.: 2019-TAE-00010

In the Matter of:

CTO/CHF PARTNERSHIP dba CIDER HILL FARM,
Respondent.

ORDER GRANTING MOTION TO DISMISS

This matter arises under the "H-2A" provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a),[6] 1184(a) & (c),[7] and 1188,[8] and the implementing regulations set forth at 20 C.F.R. Part 655,[9] 29 C.F.R. Part 501,[10] and 8 C.F.R. § 214.2(h)(5) (Department of Homeland Security Regulations).[11]

SUMMARY

I conclude that, in the context of this case: (1) the "corresponding employment" regulations, *see* 20 C.F.R. 655.122, apply only to "U.S. workers;" and (2) the "J-1" program

[6] Defining temporary non-immigrant agricultural (H-2A) workers.

[7] Governing the admission of non-immigrants.

[8] Governing the approval or denial of H-2A labor certification petitions.

[9] "Temporary Employment of Foreign Workers in the United States."

[10] "Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 218 of the Immigration and Nationality Act."

[11] "Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H-2A)."

participants involved in this matter, *see* 22 C.F.R. Part 62 ("Exchange Visitor Program"),[12] are not "U.S. workers." Accordingly, the "corresponding employment" regulations under which Cider Hill is charged do not apply here, and the Notice of Determination will be *reversed* with respect to the J-1 program participants.[13]

I. PROCEDURAL HISTORY

A. The Notice of Determination

On March 21, 2017, the Administrator, Wage and Hour Division, U.S. Department of Labor ("Administrator"), issued a Notice of Determination of Wages Owed and Assessment of Civil Money Penalties ("Notice of Determination") against CTO/CHF Partnership dba Cider Hill Farm ("Cider Hill" or "Respondent"). According to the Administrator, Cider Hill "failed to comply with Section 218 of the INA and applicable regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 501."

In brief, the Administrator charged that Cider Hill failed to pay the "Adverse Effect Wage Rate" ("AEWR"), and to provide certain other required benefits, to its J-1 program participants, even though, the Administrator charged, it was required to do so by the "corresponding employment" regulations, *see* 20 C.F.R. §§ 655.103(b) ("Definitions"), 655.122 ("Contents of job offers").

Specifically, the Administrator determined that Cider Hill violated:

- 20 C.F.R. § 655.122(*l*), which requires employers of H-2A workers – who are non-immigrant agricultural laborers hired under the INA – to pay its hourly workers no less than the Adverse Effect Wage Rate ("AEWR"). This provision expressly applies to H-2A workers, and implicitly applies to non-H-2A workers in "corresponding employment."[14] According to the

[12] Cider Hill tends to refer to these individuals as "interns," while the Administrator tends to refer to them as "workers." Although this decision is informed by the briefs of both parties, I do not adopt their views, and accordingly avoid use of either term. Instead, I have opted for the more cumbersome, but I hope, more neutral term "J-1 program participants."

[13] Cider Hill's motion requested that the Order of Reference be dismissed. However, from the papers and argument, it is apparent that the requested remedy is to have the Notice of Determination reversed, pursuant to 29 C.F.R. § 501.41(b).

[14] *See In re Overdevest Nurseries, L.P.*, 2018 WL 2927669, 2018 DOL Ad. Rev. Bd. LEXIS 7 (March 15, 2018) (affirming back wages and civil money penalties for failing to pay the AEWR to workers in corresponding employment). As discussed below, this is so even though Section 655.122(*l*) itself makes no reference to

Administrator, the twenty-four (24) affected J-1 program participants at Cider Hill were "corresponding employees;"[15]

- 20 C.F.R. § 655.122(h)(1), which generally requires such employers to provide transportation and subsistence to H-2A workers and to other workers "in corresponding employment." The Administrator charges that Cider Hill failed to provide these benefits to the J-1 program participants and the H-2A workers;

- 20 C.F.R. § 655.122(d)(1), which requires such employers to provide housing meeting OSHA standards to H-2A workers and those workers in "corresponding employment" who cannot return to their residences within the same day;

- 20 C.F.R. § 655.122(m), which specifies the frequency that wages must be paid; and

- 20 C.F.R. § 122(j)(1), which requires accurate and adequate earnings records.

The Administrator accordingly assessed $186,374.14 against Cider Hill in unpaid wages[16] and $36,600.00 in penalties.[17]

B. The Appeal to the Office of Administrative Law Judges

Respondent appealed, and the Administrator filed an Order of Reference, bringing the matter before me. On April 20, 2017, Respondent filed a Request for Hearing. The matter was assigned to me on February 28, 2019, and on March 6, 2019, I issued a

"corresponding employment."

[15] The Notice does not allege that the H-2A workers were paid less than the AEWR.

[16] Based upon the alleged failures to provide the AEWR to the J-1 program participants, and to provide transportation and subsistence to the J-1 program participants and the H-2A workers.

[17] Of this amount, $32,400 is based upon the alleged failures to provide the AEWR to the J-1 program participants. The remainder is based upon the alleged failures to comply with the frequency of pay requirement, the recordkeeping requirements, and the housing requirements. As best I can tell, these latter alleged failures do not distinguish between H-2A workers and J-1 program participants.

Preliminary Order setting a telephone conference to discuss scheduling. During the conference, the parties waived the requirement for an expedited hearing. On March 8, 2019, I issued a Notice of Hearing ("NOH"), setting the matter for a September 17, 2019 formal hearing. The NOH also set deadlines for the filing and briefing of dispositive motions.

On April 29, 2019, Respondent filed its Motion To Dismiss, or in the Alternative, Motion *In Limine* Concerning Applicable Legal Standard ("Motion"). On October 3, 2019, I set the Motion down for an in-person hearing, and continued the formal hearing to May 12, 2020. I received briefs, and heard arguments on the Motion on October 17, 2019. Following the hearing, the Motion was taken under advisement.

II. THE ARGUMENTS

A. Cider Hill

Cider Hill's appeal brief offers two arguments for dismissing this case. First, its J-1 program participants are not covered by the "corresponding employment" regulations because they are not "U.S. workers." Second, the State Department has "primary regulatory jurisdiction over the compensation of J-1 interns."

B. The Administrator

The Administrator offers two arguments for denying the motion to dismiss. First, Cider Hill's J-1 program participants are engaged in "corresponding employment," and are therefore entitled to the regulatory protections for such workers, even if they are not "U.S. workers." Second, even if those protections are limited to "U.S. workers," Cider Hill's J-1 program participants *are* U.S. workers.

III. THE LAW

A. Dismissal Standard

The rules governing H-2A hearings permit a party to move to dismiss the proceeding. 29 C.F.R. § 18.70(c) ("Motion to dismiss"). However, they do not set forth the standard for doing so. *See* 20 C.F.R. § 655.171 ("Appeals"); 29 C.F.R. Part 18.70(c). Accordingly, I turn to Fed. R. Civ. P. 12(b)(6), which, in the federal district courts, governs motions to dismiss for failure to state a claim on which relief can be granted. *Gupta v. Jain Software*

Consulting, Inc., ARB No. 05-008, 2007 WL 1031365, at *2 (March 30, 2007) (H-1B visa case); *see* 29 C.F.R. § 18.10
(a).[13]

Under Fed. R. Civ. P. 12(b)(6), dismissal may be granted to Cider Hill, the moving party, only if it appears beyond doubt that the Administrator, the non-moving party, can prove no set of facts in support of the claim which would entitle her to relief. *Gupta*, 2007 WL 1031365, at *3. In deciding the motion, I assume that all the well-pleaded allegations of the charging document are true,[14] and I draw all reasonable inferences in favor of the Administrator, the non-moving party. *Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018).

B. The H-2A Visa Program

> The INA has a visa program, known as the H-2A program, for foreign agricultural guestworkers: the law permits employers in the United States to "import" foreign nonimmigrant workers temporarily to "perform agricultural labor or services."[15] The statute authorizes the Secretary of Homeland Security to approve H-2A petitions, but before the Secretary of Homeland Security can do so, the petitioning employer must seek a certification from the Secretary of Labor that (1) there are not enough U.S. workers "who are able, willing, ... qualified" and available to do the work for which the employer seeks to hire the H-2A workers,[16] and (2) hiring the H-2A workers "will not adversely affect the wages and working conditions of workers in the United States similarly

[13] The Administrator also offers a standard for dismissing the matter for lack of subject matter jurisdiction. Cider Hill's jurisdictional argument, to the degree it makes one, applies to the argument that only the State Department has "primary jurisdiction" over the matters alleged here. Since I do not address this argument, I will consider only the motion to dismiss for failure to state a claim.

[14] Cider Hill has submitted thirteen (13) exhibits with its motion to dismiss. In accordance with Rule 12(b)(6) standards, I will not consider Exhibit A ("Affidavit of Glenn Cook"), as it presents facts outside the Notice of Determination, outside the Order of Reference, and outside of other matters I can consider in my role as Administrative Law Judge on this motion.

[15] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(i)(2).

[16] 8 U.S.C. § 1188(a)(1)(A); 20 C.F.R. 655.100(a). The employer has the burden of establishing this fact. 20 C.F.R. § 655.103(a).

> employed."[17]
>
> The Secretary of Labor has delegated authority to issue or deny labor certifications under the H-2A program to a DOL subagency, the Employment and Training Administration (ETA) that in turn delegated that authority to the ETA's Office of Foreign Labor Certification ["OFLC"].[18] The regulations establishing the AEWR require that employers pay their H-2A employees at that rate,[19] and also require that H-2A employers pay the AEWR to their U.S. employees performing the same tasks.[20] The DOL's Wage and Hour Division (Wage and Hour) enforces the H-2A program's labor conditions, including its wage obligations.[21]

Administrator v. Overdevest Nurseries, L.P., ARB No. 16-047, 2018 WL 2927669 at *1-2 (March 15, 2018) (footnotes omitted).[22] Employers who participate in the H-2A program are required to provide their H-2A workers with certain benefits and working conditions, in addition to the AEWR.[23] Pertinent here are the requirements to provide certain housing, subsistence and transportation benefits, to pay employees according to a specified frequency, and to keep accurate earnings records.[24]

Critical to this proceeding is the requirement that such employers provide the AEWR and the other benefits to their employees in "corresponding employment." *Overdevest*, 2018 WL 2927669 (AEWR); 20 C.F.R. § 655.122(d) (housing), (h) (transportation and subsistence).

I pause to note that the requirement to pay the AEWR to employees in "corresponding employment" appears nowhere in the regulation requiring the payment of the AEWR to H-2A workers. Only the requirements to provide housing, transportation and subsidence actually specify that they must be provided to workers in "corresponding employment." *See* 20 C.F.R. § 655.122(d) (housing), (h)(1) (transportation and subsistence).[25]

Instead, the Administrative Review Board ("ARB"), by which I am bound, *adds* the term "corresponding employment" to the AEWR regulation, as follows:

[17] 8 U.S.C. § 1188(a)(1)(B); 20 C.F.R. 655.100(b).

[18] 29 C.F.R. § 501.1(b).

[19] 20 C.F.R. § 655.120(a).

[20] 20 C.F.R. § 655.122(a).

[21] *See* 29 C.F.R. §§ 501.1(c), 501.17.

[22] 2018 DOL Ad. Rev. Bd. LEXIS 7.

[23] 20 CFR § 655.122(c) ("Minimum benefits, wages and working conditions").

[24] 20 C.F.R. § 655.122(d)(1) (housing), (h)(1) (transportation and subsistence), (j)(1) (record keeping), (m) (frequency of pay).

[25] Also, 22 C.F.R. § 655.122(q) ("Disclosure of work contract"), but this provision is not at issue in this case.

> "Corresponding employment" is now defined under 20 C.F.R. § 501.3 (2017) and 29 C.F.R. § 655.103(b) as "[t]he employment of workers who are not H-2A workers ... in any work included in the job order, or in any agricultural work performed by the H-2A workers." *An employer of H-2A workers must pay the AEWR to those of its U.S. employees who are in "corresponding employment"* with its H-2A workers, *see* 20 C.F.R. § 655.122(a)
> (in subsection entitled "[p]rohibition against preferential treatment of aliens," noting that [[t]he employer's job offer must offer to U.S. workers no less than the same ... wages ... that the employer ...
> provide[s] to H-2A workers").

Overdevest Nurseries, 2018 WL 2927669 at *4 (emphasis added). Thus the ARB reads "corresponding employment" into 20 C.F.R. 655.122(a), which otherwise makes no mention of "corresponding employment," and instead refers only to "U.S. workers" who must receive "no less than the same benefits, wages and working conditions" that the H-2A workers receive. Accordingly, since the other relevant benefits are housing, transportation and subsistence, accurate earnings records, and frequency of pay, *see* 20 C.F.R. § 655.122(c) (identifying all the applicable benefit, wage, and working condition

provisions), I must consider them to apply to "corresponding employment," whether they specifically mention that term or not.[18]

C. The J-1 Visa Program

The U.S. State Department has established a program known as the Exchange Visitor Program ("EVP"), to implement the Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. §§ 2451-64. *See* 22 C.F.R. Part 62. Its stated purpose "is to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges." 22 C.F.R. § 62.1. Foreign nationals who participate in this program are considered to be "nonimmigrant aliens," and they receive a "J-1" visa. The applicable legal provision states that for purposes of the INA, a person is a
"nonimmigrant alien" if he resides in a foreign country:

> which he has no intention of abandoning who is a *bona fide* … trainee … or other person of similar description, [and] who is coming to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of … receiving training ….

8 U.S.C. § 1101(a)(15)(J). The specific program at issue here – the "trainee" and "intern" program – permits "foreign nationals with significant experience in their occupational field [to] have the opportunity to receive training in the United States in such field." 22 C.F.R § 62.22(a)
("Trainees and interns"). The program is administered by "sponsors" who are organizations designated by the U.S. State Department. 22 C.F.R. § 62.22(c).

A "primary objective" of the trainee and intern program is to:

> enhance the skills and expertise of exchange visitors in their academic or occupational fields through participation in structured and guided work-based training and internship programs and to improve participants' knowledge of American techniques, methodologies, and technology.

[18] The parties before me have taken it for granted that H-2A employers must provide the AEWR and the other benefits to their employees in "corresponding employment." Cider Hill argues that the J-1 program participants are not in corresponding employment, and the Administrator argues that they are. But neither argues that employees in corresponding employment need not be paid the AEWR, nor receive any of the other benefits paid to H-2A workers.

22 C.F.R. § 62.22(b)(1)(i). Critically, the regulations stress that the trainee and intern program:

> must not be used as substitutes for ordinary employment or work purposes; nor may they be used under any circumstances to displace American workers. The requirements in these regulations for trainees are designed to distinguish between *bona fide* training, which is permitted, and merely gaining additional work experience, which is not permitted.

22 C.F.R. § 62.22(b)(1)(ii).

While the applicable regulations do discuss the academic side of the training and internship experience, they also plainly anticipate that the interns will engage in "work" of some kind. Thus, the regulations state that the purpose of the program is to enhance the skills of program participants through, among other things, "work-based training." 22 C.F.R. § 62.22(b)(1)(i). They specifically state that "work-based learning" is permitted. *Id.* § 62.22(b)(1)(ii). They provide for a 12-month period to gain "practical work experience." *Id.* § 62.22(b)(2). Moreover, the organization sponsoring the intern in the field of agriculture, as here, must certify that the program meets:

> all the requirements of the Fair Labor Standards Act, as amended (29 U.S.C. 201 *et seq.*) and the Migrant and Seasonal Agricultural Worker Protection Act, as amended (29 U.S.C. 1801 *et seq.*).

22 C.F.R. § 62.22(f)(2)(vi).

The sponsoring organization is subject to sanctions by the State Department if it violates the EVP regulations, or otherwise behaves inconsistently with the letter and spirit of the regulations. *See* 22 C.F.R. § 62.50 ("Sanctions"); *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th Cir. 2015) (reviewing State Department's imposition of sanctions for alleged violations of EVP regulations).

IV. ANALYSIS

A. Allegations of the Charging Documents, and the Facts I May Consider

Cider Hill is an employer that employs H-2A workers, and also hosts twenty-four (24) J1 program participants.[19] The J-1 program participants, whether as part of their training (as Cider Hill asserts), or otherwise (as the Administrator asserts), have engaged in the same work as the H-2A workers.[20] The Wage and Hour Division of the U.S. Department of Labor conducted an investigation of Cider Hill "relating to the requirements applicable to the employment of H-2A and other workers" at Cider Hill.[21] The Administrator found that Cider Hill did not provide the following benefits to its J-1 program participants: (1) the AEWR; (2) transportation and subsistence; (3) housing; (4) compliance with frequency of pay regulations; and
(5) compliance with record-keeping requirements.[22]

B. The J-1 Program Participants Are Not in "Corresponding Employment"

The Administrator alleges that Cider Hill must provide the benefits – AEWR, housing, transportation, subsidy and the like – to the J-1 program participants because they are in "corresponding employment." For purposes of this motion only, and as discussed above, I will assume that these benefits must be paid to all employees in corresponding employment, even though only some of the regulations expressly require it.

I turn to the regulatory definition of "corresponding employment." The Administrator's notice of violation was made under 29 C.F.R. Part 501, and the Order of Reference to this court was submitted under that Part. That regulation governs the Wage and Hour Division's
"Enforcement of Contractual Obligations" for H-2A workers. It defines "corresponding employment" as follows:

[19] Motion at 1 & Exh. D (chart; at the hearing, both parties confirmed that the twenty-four (24) numbered names represented J-1 program participants); Opposition at 2. All of the following allegations are assumed to be true solely for the purpose of this Motion to Dismiss.

[20] That is, even if, as Cider Hill asserts, they are (understandably) slower, and are not held to any production standard, as the H-2A workers presumably are.

[21] Notice of Determination at 1.

[22] Notice of Determination Attachment ("Summary of Violations"). According to Cider Hill's brief, the J-1 program participants were paid stipends, and provided room and board and other non-monetary benefits. *See* Motion at 6 n.18.

> *Corresponding employment.* The employment of workers who are not H-2A workers … in any work included in the job order, or in any agricultural work performed by the H-2A workers.

29 C.F.R. § 501.3(a). The regulation governing the labor certification process for H-2A workers contains the identical definition of "corresponding employment." *See* 20 C.F.R. § 655.103(b).

The Administrator argues that because the definition uses the term "workers," a plain text interpretation leads to the conclusion that the term is not limited to "U.S." workers. Further, the Administrator argues, the term "U.S. workers" is elsewhere used in the disjunctive with "workers," so there must be a distinction between "U.S. workers" and "workers." The Administrator's interpretation is appealing, but following binding authority from the Administrative Review Board, I must find that that "workers in corresponding employment" refers to "U.S. workers" only.[23]

For our purposes, the term "corresponding employment" first appeared in a "final" regulation in 1987, promulgating 29 C.F.R. § 501.0:[24]

> These regulations [29 C.F.R. Part 501] cover the enforcement of all contractual obligations provisions applicable to the employment of H-2A workers …. These regulations are also applicable to the employment of *other workers* hired by employers of H-2A workers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H-2A certification, including any extension thereof. *Such other workers* hired by H-2A employers are hereafter referred to as engaged in *corresponding employment*.

[23] As discussed more fully below, "U.S. worker" is a defined term, and does not refer only to U.S. citizens. Foreign nationals can be "U.S. workers." *See* 20 C.F.R. § 655.103(b) (the term includes aliens "lawfully admitted for permanent residence in the U.S.," certain aliens admitted as refugees or asylum grantees, and certain other aliens and immigrants, including aliens who are not "unauthorized alien[s]," *see* 8 U.S.C. § 1324a(h)(3), respecting the work they are engaged in, as discussed below).

[24] The Administrator argues that I should not delve into regulatory history because the meaning of the term "corresponding employment" is subject to a "plain meaning" interpretation. Unsurprisingly, Cider Hill also says the term has a plain meaning, but that meaning differs dramatically from the one given by the Administrator. I reject the argument that the term has a plain meaning.

52 Fed. Reg. 20,524 (June 1, 1987) ("Interim final rule") (my emphasis).[25] Although that rule only makes reference to "other workers," the ARB interpreted that phrase to mean other "U.S. domestic" workers:

> From 1987 to January 17, 2009, the relevant H-2A regulations stated "[t]hese regulations are also applicable to the employment of other *[U.S. domestic]* workers hired by employers of H-2A workers in the occupations and for the period of time set forth in the job order" and "*[s]uch other workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment*."

Overdevest Nurseries, 2018 WL 2927669 at *4 (March 15, 2018) (brackets in original) (my emphases).

Since I am bound by the ARB's interpretation, I must conclude that the rule defining corresponding employment means "U.S. workers" when it refers to "other workers." In fact, the very regulation that sets forth the authority to conduct the investigation underlying this proceeding refers to "corresponding employment" only in the context of U.S. workers:

> Where any employer (or employer's agent or attorney) using the services of an H-2A worker does not cooperate with an investigation concerning the employment of H-2A workers *or U.S. workers hired in corresponding employment*, the WHD shall report such occurrence to ETA ….

29 C.F.R. § 502.5(b) (my emphasis).[34]

1. The Regulatory History Indicates that Corresponding Employment is Limited to U.S. Workers.

In 2008, the Wage and Hour Division replaced the 1987-2009 version of the regulations when it promulgated new versions of 20 C.F.R. Parts 501 & 655. *See* 73 Fed. Reg. 77,110 (December 18, 2008) (Final Rule). The new rules were explicit that "corresponding employment" was limited to U.S. workers. The Introduction to the new 29 C.F.R. Part 501 read, at 29 C.F.R. § 501.0:

[25] Although it was entitled an "interim" final rule it was the rule that persisted from 1987 until 2009.

> These regulations are … applicable to the employment of *United States (U.S.)* workers newly hired by employers of H-2A workers in the same occupations as the H-2A workers during the period of time set forth in the labor certification approved by ETA as a condition for granting H-2A certification, including any extension thereof. *Such U.S. workers* hired by H-2A employers are hereafter referred to as engaged in *corresponding employment*.

73 Fed. Reg. at 77,230 (my emphases). Since the ARB had already determined that corresponding employment was limited to "U.S. workers," the addition of that phrase into the regulation effected no change. Rather, it simply codified the law as it then stood.

In addition, the new 29 C.F.R. Part 655 was also explicit that only U.S. workers in corresponding employment, and H-2A workers, had to be paid the AEWR. The new 29 C.F.R.
§ 655.100(c) ("Definitions"), read:

> Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator, OFLC has determined must be offered and paid to every H-2A worker employed under the DOL-approved Application for Temporary Employment Certification in a particular occupation and/or area, as well as to *U.S. workers hired by employers into corresponding employment* during the H-2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

[34] And, there is this from *Overdevest*:

> The statute [8 U.S.C. § 1188(a)(1)(A)] refers only to there not being "sufficient workers," 8 U.S.C. § 1188(a)(1), but the regulations make clear that this means "sufficient ... *United States (U.S.)* workers." 20 C.F.R. § 655.100(a) (emphasis added). See 74 Fed. Reg. 45,906, 45,907 (Sept. 4, 2009) (misquoting the statute by inserting "U.S." into it); 75 Fed. Reg. 6884, 6884 (Feb. 12, 2010) (same).

Overdevest, 2018 WL 2927669 at *1 n.4 (emphasis in text).

73 Fed. Reg. at 77,209 (my emphases). These rules became effective on January 17, 2009. 73 Fed. Reg. at 77,110.

On May 29, 2009, the WHD suspended the rules in 20 C.F.R. Part 655 & 29 C.F.R. Part 501 that had just gone into effect on January 17, 2009. 74 Fed. Reg. 25,972. In their place, the WHD was "republishing and reinstating the regulations in place on January 16, 2009 for a period of 9 months, after which the Department will either have engaged in further rulemaking or lift the suspension." *Id.* at 25972. The re-instated 1987 rules went back into effect on June 29, 2009. *Id.* They lasted until March 15, 2010.

On February 12, 2010, the WHD promulgated a Final Rule replacing 20 C.F.R. Part 655 & 29 C.F.R. Part 501. 75 Fed. Reg. 6,884. This rule went into effect on March 15, 2010, and is the current rule. This rule "returns to the requirements of the 1987 Rule," with an exception not relevant to this proceeding. *Id.* at 6885. I therefore give the rule the same interpretation the ARB gave the nearly identically worded 1987 rule.[26] Specifically, "workers" in corresponding employment refers to "U.S. workers" in corresponding employment.

2. The Disjunctive Language of "Workers" versus "U.S. Workers" Is Consistent with the Limitation of "Correspondent Employment" to U.S. Workers.

The Administrator points out that the current regulations often speak of "workers" and "U.S. workers" in the disjunctive, indicating that they must refer to different sets of persons. For example:

> A person may not seek to have an H-2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced[,] waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in these parts.

29 C.F.R. § 501.5.[27] The Administrator's explanation for the disjunctive form, while sensible from a plain English perspective, is not persuasive in this regulatory context.

[26] The relevant difference in language is that the 1987 rule refers to "other workers," while the 2010 rule omits the word "other." There is no indication that this reflects a relevant change of meaning.

[27] This disjunctive phrasing appears in several places. *See, e.g.*, 20 C.F.R. §§ 501.9(b), 501.15, 501.19(b)(2), 501.20(a), 501.21(b), 655.182.

In context, a "worker in corresponding employment" is already limited to U.S. workers, for the reasons stated above. There is therefore no need to add "U.S." to that phrase. However, the worker referred to in "U.S. worker improperly rejected …" is *not* limited to workers in corresponding employment, but *is* limited to U.S. workers. Therefore the addition of "U.S." before "worker" is needed to define who is included and who is excluded from this group.

In other words, the regulation's inclusion of the phrase "U.S." clarifies that the regulation applies to *any* "U.S." worker who was improperly rejected, laid off or displaced – whether or not they were in corresponding employment. This broader group of U.S. workers in this context makes sense, because the referenced statute, 8 U.S.C. § 1188, refers to "United States workers," without any restriction to those who are in corresponding employment.[37]

3. ETA's Own Non-Litigation Position is that Corresponding Employment Refers to U.S. Workers.

In February 2010 the Wage and Hour Division issued "Fact Sheet #26." *See* Motion Exh. G.[38] The parties refer to this as "sub-regulatory guidance." It is perhaps a complicated matter to figure out what deference, if any, I should give to this document.[39] So I simply note for whatever it may be worth, that outside of the litigation context, the Administrator offered guidance to the public – including, presumably, Cider Hill – that only U.S. workers could be in "corresponding employment." Moreover, this guidance was timed to coincide with the effective date of the newly amended applicable regulations, March 15, 2010. The guidance states:

> The Immigration and Nationality Act (INA) authorizes the lawful admission of temporary, nonimmigrant workers (H-2A workers) to perform agricultural labor or services of a temporary or seasonal nature. The Department of Labor's regulations governing the H2A Program also apply to the employment of *U.S. workers* by an employer of H-2A workers in any work included in the ETAapproved job order or in any agricultural work performed by the H-2A workers during the period of the job order. *Such U.S.*
> *workers are engaged in corresponding employment*.

Fact Sheet #26 (my emphases).[40]

Given the overwhelming, and binding, guidance provided by the actual regulations, and the ARB, I need not concern myself with this Fact Sheet. But even if it is entitled to *no deference* as a legal matter, it would present troubling fairness issues to permit the Administrator to proceed against an employer after the Department of Labor had issued express guidance that

[37] *See, e.g.*, 8 U.S.C. § 1188(c)(3)(B)(v) ("United States workers referred or transferred pursuant to clause (iv) of this subparagraph [permitting the referral or transfer of workers] shall not be treated disparately").

[38] Available at https://www.dol.gov/whd/regs/compliance/whdfs26.pdf. (Last visited by the court on November 18, 2019.)

[39] Normally, *Auer v. Robbins*, 519 U.S. 452 (1997), "calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). But here, the Administrator seems to be arguing *against* the agency's interpretation of its own regulation.

[40] In addition, when similar regulations use the phrase "corresponding employment" in other contexts, it limits the phrase to U.S. workers:

> Corresponding employment means the employment of U.S. workers who are not CW-1 workers by an employer who has an approved CW-1 Application for Temporary Employment Certification in any work included in the approved job offer, or in any work performed by the CW-1 workers.

20 C.F.R. § 655.402 (regarding temporary employment in the Northern Marianas Islands).

the regulations at issue did not apply to them.

C. J-1 Program Participants Are Not "U.S. Workers"

The Administrator argues that the J-1 program participants are "U.S. workers."[28] "U.S. worker" is defined in the regulations to be, among other things:

> An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

[28] I note that although the Administrator argues that the J-1 program participants are "U.S. workers," she did not charge a violation of 22 C.F.R. § 655.122(a). That provision specifically – and directly – requires employers to provide "U.S. workers" the same or better "benefits, wages and working conditions" that it provides its H-2A workers, apparently without the need to separately determine whether the workers are in "corresponding employment." However, this is a charging decision which I presume is wholly within the Administrator's discretion.

20 C.F.R. § 655.103(b). In turn, an "unauthorized alien" means:

> with respect to the employment of an alien at a particular time, that the alien is not at that time … (B) authorized to be so employed by this chapter [Chapter 12] or by the Attorney General.

8 U.S.C. § 1324a(h)(3). The Administrator argues that the J-1 program participants are "authorized" to engage in the work they are doing because they "are approved to participate in a structured and guided work-based training and internship program," citing 22 C.F.R. § 62.22(b)(1)(i). The Administrator's argument seems to be that because the word "work" appears in the phrase "work-based training," the J-1 program participants are (or could be, for purposes of this motion) engaged in employment authorized by that regulation.

But that is not so. The Administrator's argument attempts to unravel the finely-tuned regulatory scheme set forth in the Exchange Visitor Program. Those regulations specifically *prohibit* J-1 program participants from engaging in the type of employment the Administrator now argues they are engaged in:

> The requirements in these regulations for trainees are designed to distinguish between *bona fide* training, which is permitted, and merely gaining additional work experience, which is not permitted. The requirements in these regulations for interns are designed to distinguish between a period of work-based learning in the intern's academic field, which is permitted (and which requires a substantial academic framework in the participant's field), and unskilled labor, which is not.

22 C.F.R. § 62.22(b)(1)(ii).

Indeed, the Administrator's argument contradicts itself. Specifically, the Administrator concedes ("presumes" for purposes of this motion) that the J-1 program participants are, in fact, proper J-1 program participants who are "operating within the scope of their visas," and moreover that "the J-1 employer has appropriately engaged any such J-1 visa holders." Opposition at 11 n.9. If that is so, then they cannot also be *employed* to do a job as the Administrator argues, rather, they are being *trained* on how to do the job, or gaining expertise in the field. *See* 22 C.F.R. § 62.22(b)(1)(ii). The regulations are clear that this is the whole point of the program:

> These regulations include specific requirements to ensure that both trainees and interns receive hands-on experience in their specific fields of study/expertise and that they do not merely participate in work programs.

Id. § 62.22(a).

Therefore, accepting the Administrator's concession, the work-based (or "on-the-job") training is for *learning*, not for *employment*. Specifically, the regulations require that sponsors or the host organization:

> Ensure that trainees and interns obtain skills, knowledge, and competencies through structured and guided activities such as classroom training, seminars, rotation through several departments, *on-the-job training*, attendance at conferences, and similar *learning* activities, as appropriate in specific circumstances.

Id. § 62.22(f)(2)(iii) (emphases added).

Finally, the requirement that "U.S. workers" receive the AEWR, and be provided housing and subsistence, would make no sense if J-1 program participants are U.S. workers. That is because the regulations provide that sponsors must ensure that:

> Trainees and interns have sufficient finances to *support themselves* for their entire stay in the United States, including housing and living expenses.

Id. § 62.22(e)(2) (emphasis added). If the J-1 program participants and Cider Hill are complying with the regulations, then by definition, the participants are separately able to support and house themselves. The Administrator offers no explanation for why the regulation would then require that they be provided the AEWR, housing or subsistence.[29]

[29] On the other hand, if I reject the Administrator's concession, and believed that the J-1 program participants *were* engaged in agricultural *employment*, then I must conclude that those interns would be doing what the regulations prohibit – engaging in "ordinary employment or work." Since they are not authorized to do so, they would be "unauthorized" aliens under 8 U.S.C. § 1324a(h)(3), and therefore they, again, would not be "U.S. workers." Of course, I do not find that anyone involved here actually is an unauthorized alien.

It seems worth noting also, that Cider Hill identifies no language in the regulation or governing authorities that specifically states that non U.S. workers *cannot* be in "corresponding employment." However, given the history of the regulation, its interpretation by the ARB, and its interpretation by the DOL itself, it would not be a faithful exercise of regulatory interpretation to say that non U.S. workers can be in corresponding employment. All the history and binding interpretation of the term exists in the context of a basic assumption – that the term refers to U.S. workers. There is no indication that any other type of worker was even contemplated wherever the term was used. And indeed, the Administrator has not identified a single instance where the term has been used to refer to any person other than a "U.S. worker."

In short, the J-1 program participants are not authorized to be "employed" in the areas covered by their work-based training.[30] Accordingly, they do not qualify for the exemption from the definition of "unauthorized alien" set forth at 20 C.F.R. 655.103(b) and 8 U.S.C. § 1324a(h)(3), and therefore are not "U.S. workers."[31]

D. Policy Argument

The Administrator very sensibly warns of the consequences if the Department of Labor does not enforce the corresponding employment regulations against employers who improperly use J-1 program participants to displace U.S. workers. The Administrator points out that there are examples of employers taking advantage of J-1 program participants in just this way. She asserts that the State Department remedy – sanctioning the sponsoring organization – does not provide a remedy for the injured J-1 program participant.

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[30] I therefore do not delve into the deep meaning of "employment" as invited to do by the parties. The regulations themselves make clear the distinction, in this context, between employment and training, and that what J-1 program participants are *authorized* to do is training, not employment.

[31] The Administrator points out that an "employee's status under Title VII," and presumably under other statutes, "must be determined by the 'actual circumstances of the person's relationship' with the defendant and not just the label." *Lopez v. Massachusetts*, 588 F.3d 69, 86 (1st Cir. 2009). I note again, however, that the Administrator *concedes* that the J-1 program participants involved in this case are "operating within the scope of their visas," and moreover that "the J-1 employer has appropriately engaged any such J-1 visa holders." Opposition at 11 n.9. Accordingly, they *are* J-1 interns – and *not* H-2A workers – for purposes of this Motion To Dismiss. Thus, I have decided only that the Administrator may not *incorrectly* label a J-1 intern as an employee in corresponding employment, and then boot-strap an H-2A employment charge against a respondent based upon that label. My decision does not preclude the Administrator from charging a respondent with violations of the regulations, if a respondent has brought in actual employees in violation of the INA, by for example, hiring them as H-2A workers without complying with the H-2A regulations.

However, I simply do not have the authority to re-write the regulations, or to ignore the guidance of the ARB, as the Administrator is essentially asking me to do. If a *regulatory* solution is needed here, I cannot provide it.

V. CONCLUSION & ORDER

For the reasons set forth above, pursuant to 29 C.F.R. § 501.41, **IT IS HEREBY ORDERED** that:

1. The Administrator's Determination of March 21, 2017, is **REVERSED** with regard to the twenty-four (24) J-1 program participants listed in the Notice of Determination (Motion, Exh. D);[32]

2. The Motion To Dismiss is **GRANTED** with regard to the twenty-four (24) J-1 program participants listed in the Notice of Determination;

3. The alternative Motion *In Limine* Concerning Applicable Legal Standard, to the degree it is a separate motion, is **DENIED as MOOT**; and

4. The Order of October 3, 2019, setting the matter for formal hearing to commence Tuesday, May 12, 2020, is **CONFIRMED**, to the degree a formal hearing is needed to address any remaining claims regarding the H-2A workers.

SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts

[32] The Motion does not address the charges as they relate to the H-2A workers. Accordingly, I construe the Motion to be a request to dismiss the charges relating to the J-1 program participants only.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 08 January 2020

CASE NO.: 2019-TAE-00010

In the Matter of:

CTO/CHF PARTNERSHIP dba CIDER HILL FARM,
Respondent.

FINAL DECISION AND ORDER GRANTING JOINT MOTION TO DISMISS

On January 6, 2020, the parties filed a Joint Motion To Dismiss Remaining Claims ("Joint Motion"), setting forth the grounds for dismissing the remainder of this case. Good cause having been shown, **IT IS HEREBY ORDERED** that:

1. The Joint Motion, filed January 6, 2020, is **GRANTED**, and this case is **DISMISSED** in its entirety;

2. The December 9, 2019 Order Granting Motion To Dismiss, which dismissed certain claims in this case, is **INCORPORATED** into this Final Decision and Order, my intention being to enter a final order from which an appeal may be taken; and

3. The May 12, 2020 formal hearing is **CANCELLED**.

SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

CASE NAME : ***Administrator, WHD v. CTO/CHF Partnership***

ARB CASE NO. : 2020-0022

ALJ CASE NO. : 2018-TAE-00010

DOCUMENT : ORDER

A copy of the above-referenced document was sent to the following person on

November 23, 2020.

Aubrey Gordon

CERTIFIED MAIL and INTEROFFICE MAIL:

Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, D.C. 20210

Associate Solicitor
Division of Fair Labor Standards
U.S. Department of Labor
Room N-2716
Washington, D.C. 20210
200 Constitution Avenue, N.W
Washington, D.C. 20210

Katelyn J. Poe, Esq.
U.S. Department of Labor
Office of the Solicitor
Room N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210

Regional Administrator
U.S. Department of Labor/ESA
Wage and Hour Division
The Curtis Center, Room 850 West
170 S. Independence Mall West
Philadelphia, PA 19106

Free State Reporting, Inc.
1378 Cape St. Clair Road
Annapolis, MD 21409

Mark A. Pedulla, Esq.
Sheila A. Gholkar, Esq.
Office of the Solicitor
JFK Federal Bldg. Room E-375
Boston, MA 02203

Ellen Kearns, Esq.
Jonathan Persky, Esq.
Constangy, Brooks, Smith
& Prophete, LLP.
535 Boylston Street, Ste. 902
Boston, MA 02116

Jonathan M. Kronheim, Esq.
Counsel for Trial Litigation
Office of the Solicitor
Room N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210

Glenn Cook
Cider Hill Farm
45 Fern Avenue
Amesbury, MA 01913

Hon. Noran J. Camp
Administrative Law Judge
Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway St
Boston, MA 02222

Hon. Stephen R. Henley
Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002