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,

PROSECUTING PARTY,

v.

GRAHAM AND ROLLINS, INC.,

RESPONDENT.

ARB CASE NO. 2021-0047

ALJ CASE NO. 2018-TNE-00022

DATE: December 22, 2022

Appearances:

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

***For the Administrator, Wage and Hour Division*:**
Seema Nanda, Esq.; Jennifer S. Brand, Esq.; Rachel Goldberg, Esq.; Sara A. Conrath, Esq.; *U.S. Department of Labor*, *Office of the Solicitor*; Washington, District of Columbia

For Amici Curiae Outdoor Amusement Business Association & Morton Concessions:
R. Wayne Pierce, Esq.; *The Pierce Law Firm*, LLC; Annapolis, Maryland

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL, and PUST, Administrative Appeal Judges; HARTHILL, Chief Administrative Appeals Judge, concurring in part, dissenting in part, and concurring in the judgment

DECISION AND ORDER AFFIRMING IN PART AND REVERSING IN PART

BURRELL, Administrative Appeals Judge:

This case arises under the Equal Access to Justice Act (EAJA), and its implementing regulations.[1] The merits of the original case were addressed by the Administrative Review Board (ARB or Board) in ARB Case Number 2019-0009 under the H-2B provisions of the Immigration and Nationality Act (H-2B, INA, or Act), as amended, and its implementing regulations.[2] On June 26, 2018, an Administrative Law Judge (ALJ) dismissed the case, and the Board affirmed. Respondent Graham and Rollins, Inc. (Respondent or Graham & Rollins) subsequently filed a motion for attorney's fees under EAJA. The ALJ awarded fees, and the Administrator (Administrator) of the United States Department of Labor's (Department of Labor, Department, or Agency) Wage and Hour Division (WHD) appealed to the Board. The Board **AFFIRMS** the ALJ's decision that EAJA applies to this matter but **REVERSES** the finding that the Agency's position was not substantially justified during the litigation. Accordingly, Respondent's request for fees under EAJA is **DENIED**.

BACKGROUND

This case originated when the Administrator brought an enforcement action on February 13, 2018, against Graham & Rollins.[3] On June 26, 2018, an ALJ found that the Administrator brought the action outside the five-year statute of limitations and dismissed the case. The Board issued a Decision and Order on November 16, 2020, affirming the ALJ's decision.[4]

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[1] 5 U.S.C. § 504; 29 C.F.R. Part 16.

[2] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(14). The statute's implementing regulations are found at 20 C.F.R. Part 655, subpart A. The original INA was enacted in 1952 and has been amended numerous times. Congress enacted the H-2B provision at issue in Section 404 of the Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005, Div. B, The Real ID Act of 2005, § 404, Pub. L. No. 109–13, 119 Stat 231 (codified at 8 U.S.C. § 1184(c)(14)).

[3] *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Graham & Rollins, Inc.*, ALJ No. 2008-TNE-00022, slip op. at 3 (ALJ June 26, 2018), *adopted and attached by the Administrative Review Board*, *Adm'r, Wage & Hour Div., U.S. Dep't of Labor v. Graham & Rollins, Inc.*, ARB No. 2019-0009, ALJ No. 2018-TNE-00022 (ARB Nov. 16, 2020).

[4] *Graham & Rollins, Inc.*, ARB No. 2019-0009, ALJ No. 2018-TNE-00022, slip op. at 2 (ARB Nov. 16, 2020).

Subsequent to the Board's decision, on December 16, 2020, Graham & Rollins filed a motion for attorney's fees pursuant to EAJA. The Administrator did not file a response to the motion. On May 19, 2021, the ALJ issued a Decision and Order awarding attorney's fees (Recommended Decision and Order) in the amount of $22,100, concluding that EAJA applied and that the Administrator had not carried her burden of showing that the Agency's enforcement position was substantially justified.[5] The Administrator filed a timely petition for review with the Board on November 8, 2021. Outdoor Amusement Business Association and Morton Concessions, Inc. (Amici) filed an amicus brief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated the authority to review this matter to the Board.[6] The Board acts with "all the powers [the Secretary] would have in making the initial decision."[7] Contrary to the standard applied in judicial appeals of final administrative action related to EAJA fees,[8] in this administrative appeal of the ALJ's EAJA award, the Board conducts a de novo review of the ALJ's findings of fact and conclusions of law.[9]

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[5] May 19, 2021 Recommended Decision and Order Awarding Attorney's Fees (R. D. & O.). On June 1, 2021, the Acting Administrator of WHD filed a Motion to Vacate the ALJ's Decision and Order. Graham & Rollins filed its Opposition to the Administrator's Motion to Vacate with the ALJ on September 15, 2021. On September 24, 2021, the ALJ issued an Order Denying Motion to Vacate (Denial Order).

[6] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 16.306.

[7] 5 U.S.C. § 557(b); *Zappala Farms*, ARB No. 2004-0047, ALJ No. 1997-MSP-00009-P, slip op. at 4 (ARB Apr. 28, 2006).

[8] As directed by the U. S. Supreme Court in *Pierce v. Underwood*, 487 U.S. 552 (1988), judicial courts apply the abuse of discretion standard of review upon appeal of final agency actions related to EAJA fees. *See Throckmorton v. U.S. Dep't of Health & Hum. Servs.*, No. 90-2011, 1990 WL 187131, at *4 (4th Cir. Aug. 15, 1990) (applying *Pierce*).

[9] *Lion Uniform, Inc., Janesville Apparel Div. v. Nat'l Lab. Rels. Bd.,* 905 F.2d 120, 123-24 (6th Cir. 1990), *cert denied*, 498 U.S. 992 (1990); s*ee also Becker v. Sullivan*, No. CIV. A. HAR-90-1889, 1991 WL 107857, at *4–5 (D. Md. June 12, 1991) (concluding that de novo standard first announced in *Lion Uniform* was properly applied in agency's independent review of internal administrative record).

DISCUSSION

This case presents an issue of first impression for the Board's consideration. While the Board has addressed EAJA in other circumstances, it has not addressed whether EAJA applies to H-2B enforcement matters before a Department of Labor ALJ.

Congress passed EAJA to allow prevailing parties that are not the United States to recover attorney's fees and costs from the federal government in cases involving an "adversary adjudication."[10] Because it allows a monetary claim against the federal government, EAJA constitutes a partial waiver of sovereign immunity, and we are mindful that such waivers are narrowly construed.[11] EAJA's statutory language provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.[12]

The Administrator does not dispute that Respondent is a prevailing party. Thus, we must determine whether: (1) EAJA applies to H-2B enforcement matters because they are "adversary adjudications" within the meaning of EAJA; and if so, (2) whether the government's position during the litigation was substantially justified.

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10 5 U.S.C. § 504(a)(1).

11 *Ardestani v. Immigr. & Naturalization Serv.*, 502 U.S. 129, 137 (1991); HELEN HERSHKOFF, WRIGHT & MILLER, 14 FED. PRAC. & PROC. JURIS. § 3660.1 (4th ed. 2022) ("With the enactment of the EAJA, the United States has waived its immunity, and that of its agencies and officers acting in their official capacity, to liability for attorney's fees and expenses . . . .").

12 5 U.S.C. § 504(a)(1).

1. An H-2B Proceeding Is an Adversary Adjudication

EAJA defines an "adversary adjudication" as "an adjudication under section 554 of [the Administrative Procedure Act] in which the position of the United States is represented by counsel or otherwise."[13] Neither party disputes that the United States was represented by counsel during this proceeding.

A proceeding is considered "under" Section 554 of the Administrative Procedure Act (APA) if it is "subject to" or "governed by" that "section."[14] Section 554 states that its provisions apply to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[15] Section 554 initiates the APA's formal adjudication procedures.[16] "Section 554 does not merely describe a type of agency proceeding; it also prescribes that certain procedures be followed in the adjudications that fall within its scope."[17] These formal procedures follow those found in judicial proceedings and can be located in Sections 556 and 557, which are cross-referenced in Section 554.

The Department of Labor's implementing EAJA regulations largely mirror EAJA's statutory language. Section 16.102(b) defines "adversary adjudication" as "an adjudication under 5 U.S.C. § 554 or other proceeding required by statute to be determined on the record after an opportunity for an agency hearing, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license."[18] The Department's EAJA regulations also contain a list of proceedings to which the regulations apply, but do not include H-2B

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13 *Id*. § 504(b)(1)(C)(i).

14 *Aageson Grain & Cattle v. U.S. Dep't of Agric.*, 500 F.3d 1038, 1042 (9th Cir. 2007) (citing *Ardestani,* 502 U.S. at 135).

15 There are some exceptions outlined in the statute that are not relevant to this case. 5 U.S.C. § 554(a).

16 *Ardestani*, 502 U.S. at 132–33 (1991); *see also* 5 U.S.C. §§ 556, 557. The APA's Section 555 covers informal adjudications.

17 *Ardestani,* 502 U.S. at 136.

18 29 C.F.R. § 16.102(b). The Agency regulations specifically exclude "an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license," "but proceedings to modify, suspend or revoke licenses are covered if they are otherwise adversary adjudications." 29 C.F.R. §§ 16.102, .104(a).

enforcement actions as the Department's EAJA regulations pre-date the Department's H-2B enforcement authority.[19]

As EAJA's statutory and regulatory definitions of "adversary adjudication"[20] refer to Section 554, we examine the three elements set forth in Section 554 in determining whether EAJA applies to H-2B enforcement proceedings. First, there must be an adjudication. Second, the adjudication must be required by statute to be determined "on the record." And finally, the statute must provide an "opportunity for an agency hearing."[21]

A. Agency Adjudications Under the H-2B Program Require Hearings if Requested

The H-2B program's enforcement provisions are contained in Section 404 of the 2005 Real ID Act[22]:

> **(14)(A)** If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 1101(a)(15)(H)(ii)(b) of this title or a willful misrepresentation of a material fact in such petition—
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> **(i)** the Secretary of Homeland Security may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation)

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[19] The current regulations were updated in 2007, prior to the Agency receiving authority over H-2B employment matters. *Infra* note 24.

[20] 5 U.S.C. § 504(b)(1)(C).

[21] The United States Court of Appeals for the Eighth Circuit applied a similar three-part test to determine whether EAJA applied to Farmer Home Administration National Appeal Division (NAD) proceedings. *Lane v. U.S. Dep't of Agric.*, 120 F.3d 106, 108 (8th Cir. 1997) (EAJA applies to NAD proceedings "because all three prerequisites for coverage [under § 554] have been satisfied. NAD proceedings are: 1) adjudications; 2) there is an opportunity for a hearing; and 3) the hearing must be on the record."); *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125 (7th Cir. 2008) (same).

[22] Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005, Div. B, The Real ID Act of 2005, § 404, Pub. L. No. 109-13, 119 Stat 231 (codified at 8 U.S.C. § 1184(c)(14)).

> as the Secretary of Homeland Security determines to be appropriate; and
>
> **(ii)** the Secretary of Homeland Security may deny petitions filed with respect to that employer under section 1154 of this title or paragraph (1) of this subsection during a period of at least 1 year but not more than 5 years for aliens to be employed by the employer.
>
> **(B)** The Secretary of Homeland Security may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security under subparagraph (A)(i).
>
> **(C)** In determining the level of penalties to be assessed under subparagraph (A), the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.
>
> **(D)** In this paragraph, the term "substantial failure" means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition.[23]

In 2009, the Department of Homeland Security delegated to the Department of Labor its investigative and enforcement authority under the H-2B program.[24] The H-2B statute, as delegated, directs the Department of Labor to investigate and impose administrative remedies if, after opportunity for hearing, the Department finds a substantial violation of the terms and conditions set forth in the employer's H-2B petition.[25]

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23 8 U.S.C. § 1184(c)(14).

24 Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78,046 (Dec. 19, 2008) (effective Jan. 18, 2009) (discussing delegation of H-2B enforcement from Department of Homeland Security to the Department of Labor). The authority was granted pursuant to 8 U.S.C. § 1184(c)(14)(A)(i), (c)(14)(B). The 2008 Rule was superseded by the Interim Final Rule that was published and took effect on April 29, 2015, but this case involved only violations of the 2008 Rule. 80 Fed. Reg. 24,042 (Apr. 29, 2015).

25 8 U.S.C. § 1184(c)(14)(A)(i).

For H-2B enforcement proceedings, prongs one (adjudication) and three (opportunity for hearing) of Section 554's test are met by examining the H-2B statutory language in the context of the APA's definitions. The APA defines an "adjudication" as an "agency process for the formulation of an order."[26] An "order" under the APA is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[27] Neither party disputes that H-2B enforcement proceedings involve an "adjudication."[28] The statute itself requires "notice and an opportunity for a hearing."[29] Because the Department's adjudication under the H-2B program requires a hearing if requested, the only remaining inquiry is whether the adjudication is "determined on the record."[30]

B. H-2B Enforcement Proceedings Are "On the Record"

We start our analysis with the statute's text.[31] The H-2B enforcement statute provides that if the Agency:

> finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions [and obligations of the program, it] may, in addition to any other

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26 5 U.S.C. § 551(7).

27 *Id.* § 551(6).

28 Upon determining that an employer has violated any of obligations and responsibilities under the H-2B program, 29 C.F.R. § 503.19, the Administrator may assess civil monetary penalties and order debarment pursuant to the H-2B program. *Id.* § 503.20. The party against whom civil monetary penalties, debarment, or other administrative remedies have been assessed will be notified in writing of such determination. *Id.* § 503.41. Such notification will inform the party of their right to request a hearing. *Id.* § 503.42(b). Under 29 C.F.R. § 503.43, "[a]ny party desiring review of a determination issued under § 503.41, including judicial review, must make a request for such an administrative hearing in writing to the Chief ALJ . . . ."

29 8 U.S.C. § 1184(c)(14)(A).

30 The H-2B enforcement provisions' statutory text provides an opportunity for hearing, and the implementing regulations provide the procedure for a party to request a hearing. This situation is distinguishable from another where the ALJ has the discretion to hold a hearing. *Smedberg Mach. & Tool, Inc. v. Donovan*, 730 F.2d 1089, 1092–93 (7th Cir. 1984) (concluding that the labor certification review proceeding was not an adjudication under Section 554 because "[t]he statutory provision regarding labor certification does not provide for any administrative review, and certainly not a hearing review, of the Secretary of Labor's decisions denying or granting the certifications").

31 *Ardestani*, 502 U.S. at 135.

> remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation) . . . .[32]

The Administrator argues that because the H-2B enforcement statute does not state that the hearing must be "on the record," EAJA does not apply.[33] Graham & Rollins and the Amici in this case argue that the statutory words "on the record" are not required, and that the analysis should focus on whether Congress intended for Section 554's "on the record" procedures to apply to the hearing at issue. For the reasons set forth below, we agree that express "on the record" language is not required and that Congress intended that H-2B enforcement proceedings be conducted on the record.

i. No "Magic Words" Are Required for an Adjudication to be "On the Record"

The Administrator relies on *St. Louis Fuel & Supply Co. v. Fed. Energy Regulatory Commission*, where the United States Court of Appeals for the D.C. Circuit found that EAJA did not apply to a Federal Energy Regulatory Commission (FERC) proceeding because "[s]ection 7193(c) of the DOE Organization Act affords 'an opportunity for a hearing' but does not expressly state that the hearing must be 'on the record' and does not cross-reference section 554."[34] Appellant St. Louis Fuel & Supply Co. entered into a consent order with the Department of Energy (DOE) settling the appellant's challenge to a DOE price regulation remedial order.[35] In *St. Louis Fuel & Supply Co.*, the D.C. Circuit reasoned that there were alternative hearing procedures outlined in the statute and that "what counts is whether the statute indicates whether Congress intended to *require* full agency adherence to all Section 554 procedural components."[36] The D.C. Circuit cited legislative history indicating that the procedure associated with remedial orders was "a little bit less" than the "full adjudicatory type hearing . . . afforded by the [APA]": "We do not grant quite as many procedural safeguards to the person subjected to agency action

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[32] 8 U.S.C. § 1184(c)(14)(A). The Agency can also order that employers be debarred from participating in the H-2B program.

[33] Acting Administrator's Opening Brief (Adm'r Br.) at 16–17.

[34] *St. Louis Fuel & Supply Co. v. Fed. Energy Regul. Comm'n*, 890 F.2d 446, 448 (D.C. Cir. 1989).

[35] *Id.* at 447.

[36] *Id.* at 448–49 (emphasis in original).

as does [sic] sections 554 and 556 of the Administrative Procedure Act."[37] Accordingly, the court concluded that Congress did not intend for formal APA procedures to apply to FERC proceedings, and therefore EAJA did not apply to the proceedings.

The D.C. Circuit's conclusion in *St. Louis Fuel & Supply Co.,* did not hinge on the absence of the words "on the record."[38] This has been the consistent position recognized in other circuits as well. In *Marathon Oil Co. v. Environmental Protection Agency*, the United States Court of Appeals for the Ninth Circuit concluded that formal APA procedures applied to EPA permits under Section 402 of the Federal Water Pollution Control Act[39] despite the absence of "on the record" language:

> The 79th Congress' purpose in limiting the APA provisions to determinations made 'on the record' after opportunity for a hearing was not to provide future Congresses with a talisman that they would use to signify whether or not sections 554, 556 and 557 of the APA should apply. It was to limit the [APA's formal procedures] to those types of adjudications, discussed above, needing special procedural safeguards.[40]

Other circuit courts uniformly agree that the words "on the record" are not required to ascertain whether formal APA procedures apply.[41] Rather, the inquiry focuses on whether Congress intended for the agency to adhere to the requirements of the APA.[42]

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37 *Id.* at 449.

38 *Id.* at 448–49 ("Our decision, we emphasize, does not turn, mechanically, on the absence of magic words").

39 33 U.S.C. § 1342.

40 *Marathon Oil Co. v. Env't Prot. Agency*, 564 F.2d 1253, 1263 (9th Cir. 1977).

41 *Five Points Rd. Joint Venture*, 542 F.3d at 1126 (stating "on the record" is not required in the enabling statute for EAJA to apply; "'those three magic words need not appear for a court to determine that formal hearings are required'") (quoting *City of W. Chi. v. U.S. Nuclear Regul. Comm'n*, 701 F.2d 632, 641 (7th Cir. 1983)).

42 See generally *St. Louis Fuel & Supply Co.*, 890 F.2d 446; *Lane*, 120 F.3d 106; *Dantran, Inc. v. U.S. Dep't of Lab.*, 246 F.3d 36 (1st Cir. 2001); *Aageson Grain & Cattle*, 500 F.3d at 1046; *Friends of the Earth v. Reilly,* 966 F.2d 690, 692–95 (D.C. Cir. 1992).

ii. The Legislative History of the APA Explains When "On the Record" Language is Needed

Neither the parties nor Amici have identified legislative history specifically addressing Congress's basis for choosing the hearing language that it included in the H-2B program statute. However, Congress enacted the H-2B enforcement provisions in the backdrop of the APA's governing framework on agency adjudication.[43] Expanding the scope of inquiry to include the broader structure of the APA, we agree that Congress intended for H-2B adjudications to be "on the record."[44]

The APA governs both agency rulemaking and agency adjudications. APA adjudications and rulemaking can be both formal and informal.[45] Recognizing the distinction between these two kinds of procedures is at the heart of the dispute in this case.

Use of statutory language "on the record," in the administrative context, is one way of referencing the APA's formal procedures set out in

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[43] See generally U. S. Dep't of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947); *Steadman v. Sec. & Exchange Comm'n*, 450 U.S. 91, 102 n.22 (1981) ("We have previously noted that the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) has been 'given some deference by this Court because of the role played by the Department of Justice in drafting the legislation,' and Justice Clark was Attorney General both when the APA was passed and when the Manual was published.") (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

[44] "Congress need only 'clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA.'" *Five Points Rd. Joint Venture*, 542 F.3d at 1126 (citing *City of W. Chi.,* 701 F.2d at 641).

The Department of Labor's administrative regulations for H-2B proceedings provide for formal APA adjudications. 29 C.F.R. §§ 503.44, 18.10(b). In determining whether an adjudication is "on the record," courts have stressed that Congress is the focus, not the agency's regulations. An agency's adherence to formal APA procedures, without Congress actually intending for APA adherence, is insufficient to find that EAJA applies. "An agency's interpretation of a statute, however, is not necessarily indicative of Congress's intent. Congress is frequently silent or ambiguous with respect to an issue." *Friends of the Earth,* 966 F.2d at 695.

[45] Formal APA adjudications are subject to Section 554 which cross-references the procedures outlined in Sections 556 and 557. Informal adjudications need only follow the procedures of Section 555. Rulemaking can also be formal, following Sections 556 and 557, or informal following Section 553(c). *United States v. Fla. East Coast Ry. Co.*, 410 U.S. 224, 236–37 (1973) (discussing APA); APA MANUAL at 31 (same).

Sections 554, 556, and 557.[46] In the United States Department of Justice's Attorney General's Manual on the Administrative Procedure Act (1947) (APA Manual), the Attorney General explained when and why "on the record" language is needed. Primarily, such language is needed to distinguish formal from informal agency action. Generally, rulemaking does not require formal procedure. Thus, to set aside those aspects of formal rulemaking from informal rulemaking, Congress uses the language: "required by statute to be made on the record after opportunity for an agency hearing" when it is intended for formal rulemaking to take place.[47]

The distinction between formal and informal procedure also reaches agency adjudications. The Attorney General explained that there are two types of adjudications: (1) those historically not regarded as adjudicatory but might inadvertently fit within the residual nature of the APA's broader definitions of "adjudication"; and (2) those that were inherently and historically adjudicatory in the traditional sense of quasi-judicial fact-finding. Addressing the former, the Attorney General explained that "on the record" language is required for the same reason it is required for all rulemaking statutes.[48] Like rulemakings, fringe adjudications not historically regarded as adjudicatory are traditionally not quasi-judicial, so if Congress intends for the agency to have formal adjudications, it needs to provide specific language indicating so. Otherwise, informal adjudication is acceptable, as in the case where Congress does not provide for a hearing or a hearing is discretionary.[49]

For those quasi-judicial adjudications that are inherently adjudicatory in nature, "on the record" language is not necessary because these are presumed to follow the formal procedures set out in APA Sections 554, 556 and 557.[50]

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46 5 U.S.C. § 554.

47 *Id.* § 553; APA MANUAL at 12–14, 26, 31–33.

48 APA MANUAL at 40–42.

49 *Marathon Oil Co.*, 564 F.2d. at 1263 ("The failure of Congress to provide for any hearing whatsoever within an administrative process may well be a valid indication that Congress either did not feel that it was providing for an "adjudication" in the traditional sense of the word or did not intend the APA procedures to apply."); *Smedberg Mach. & Tool, Inc.*, 730 F.2d at 1092–93 (discretionary hearings are not adversarial adjudications for purposes of EAJA).

50 APA MANUAL at 42 ("Other statutes authorizing agency action which is clearly adjudicatory in nature, such as the revocation of licenses, specifically require the agency to hold a hearing but contain no provision expressly requiring decision 'on the record'. . . .

Commenting on statutes requiring hearing before adjudication, the Attorney General stated:

> It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing. With respect to rule making, it was concluded, supra, that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record," but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication. In fact, it is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing. H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285).[51]

The Supreme Court has applied the reasoning set forth in the APA Manual when deciding whether agency action requires formal or informal APA procedures.[52]

[Agencies] ha[ve] always assumed that these orders must be based upon the evidentiary record made in the hearing, and the courts have held that upon review the validity of an order issued under the [enabling act] must be determined upon the administrative record. It seems clear that administrative adjudication exercised in this context is subject to sections 5, 7 and 8 [APA Sections 554, 556, 557].") (citations omitted).

[51] *Id.* at 42–43; *cf. id.* at 33 (certain statutes "rarely specify in terms that the agency action must be taken on the basis of the 'record' developed in the hearing;" however, when agency action follows a hearing required by statute, the "agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing.").

[52] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) ("The position the Secretary takes in this litigation [concerning retroactivity] is out of accord with the Government's own most authoritative interpretation of the APA, the 1947 Attorney General's Manual on the Administrative Procedure Act (AG's Manual), which we

In *United States v. Allegheny-Ludlum Steel Co.*, the Court examined the Esch Car Service Act[53] which authorized the Interstate Commerce Commission to engage in rulemaking "after hearing."[54] The statute did not provide for a hearing "on the record after opportunity for an agency hearing" as used in Section 553(c) to signify that the formal procedures of Sections 556 and 557 apply.[55] A party had challenged the Commission's factual basis and legal conclusions for a rule. In evaluating this challenge, the Supreme Court addressed whether the statute at issue required formal or informal procedures as part of the hearing. The Court held that the formal procedures of Sections 556 and 557 were not required because this case involved a rulemaking proceeding and "on the record" or equivalent language was not included. The Court explained:

> Appellees claim that the Commission's procedure here departed from the provisions of 5 U.S.C. §§ 556 and 557 of the Act. Those sections, however, govern a rule-making proceeding only when 5 U.S.C. § 553 so requires. The latter section, dealing generally with rulemaking, makes applicable the provisions of §§ 556 and 557 only '(w)hen rules are required by statute to be made on the record after opportunity for an agency hearing . . ..' The Esch Act, authorizing the Commission 'after hearing, on a complaint or upon its own initiative without complaint, (to) establish reasonable rules, regulations, and practices with respect to car service . . .,' 49 U.S.C. § 1(14)(a), does not require that such rules 'be made on the record.' 5 U.S.C. § 553. That distinction is determinative for this case.[56]

Following the same reasoning set forth in the APA Manual, the Court distinguished this analysis and disposition from what would have been the case if the matter had been an adjudication rather than a rulemaking.[57]

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have repeatedly given great weight."); *supra* note 43 (citing authority relying on APA Manual for meaning of APA).

53 49 U.S.C. § 1(14)(a) (1972) (subsequently repealed).

54 *United States v. Allegheny-Ludlum Steel Co.*, 406 U.S. 742, 756–57 (1972).

55 *Id.*

56 *Id.*

57 *Id.* at 757; *see also Fla. East Coast Ry. Co.*, 410 U.S. at 251 ("We recognized, however, that the precise words 'on the record' are not talismanic, but that the crucial question is whether the proceedings under review are 'an exercise of legislative rulemaking' or 'adjudicatory hearings.'") (discussing *Allegheny-Ludlum Steel* and reasoning that the

> Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings as in [*Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), and *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937)], and because 49 U.S.C. § 1(14)(a) does not require a determination 'on the record,' the provisions of 5 U.S.C. §§ 556 and 557 were inapplicable.[58]

The Court suggested that if the matter had been an adjudication it would have viewed the absence of "on the record" language differently when deciding whether formal APA procedures found in Sections 556 and 557 were required.[59]

As explained above, for adjudications such as those found in H-2B enforcement proceedings, courts do not require that Congress use express "on the record" language when ascertaining whether Congress intended that a hearing on the record to take place. Examining the H-2B statutory language in conjunction with the APA's governing structure, we conclude that Congress enacted the H-2B enforcement program intending for a formal agency adjudication "on the record."

C. Formal APA Procedures Apply to H-2B Proceedings Because They Are Quasi-Judicial and Involve Disputed Individual Rights

The discussion above explaining when and why Congress includes "on the record" language to trigger formal APA procedures dovetails with judicial application. Courts require formal procedure to satisfy due process concerns when adjudicative facts and individual rights are at issue.[60]

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formal adjudicatory provisions of Sections 556 and 557 did not apply as the statutory provision for rulemaking only required a hearing and not a hearing on the record).

58 *Allegheny-Ludlum Steel Co.*, 406 U.S. at 757.

59 *Id.* at 757; *see also Marathon Oil Co.*, 564 F.2d at 1261–64 (citing the APA's legislative history and the need for "on the record" language to exclude such procedures from run-of-the-mill non-adversarial adjudications).

60 Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 561 (2007) (discussing the distinction between quasi-legislative rulemaking and quasi-judicial adjudication).

Administrative action can be quasi-legislative or quasi-judicial.[61] Quasi-judicial proceedings involve traditional fact-finding based on an evidentiary record including witness testimony, cross-examination, and documentary evidence. This evidentiary record is required for appeals of administrative final decisions to the federal courts.[62] The APA was implemented, in part, to provide parties with appropriate process and protection when rights and liabilities involving past acts are at stake. The APA Manual provides:

> [A]djudication [under the APA] is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. […] In such proceedings, the issues of fact are often sharply controverted.[63]

Adjudicatory fact-finding often imposes immediate economic consequences on a party, in contrast to a legislative, policy-like determination with prospective effects. As explained above, for quasi-judicial proceedings steeped in traditional adjudicatory fact-finding, the Attorney General noted that formal procedures are assumed.[64]

Following the APA Manual's explanation for when and why "on the record" language is needed, several circuit courts have relied upon the nature of the rights at issue when evaluating the type of "hearing" Congress provided for and whether that hearing triggered formal APA procedures.[65] These two analyses go hand in hand.

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61 *Allegheny-Ludlum Steel Corp.*, 406 U.S. at 749.

62 APA MANUAL at 33–34, 41 (judicial review presumes "on the record"); *Marathon Oil Co.*, 564 F.2d at 1262–63. The APA provides a presumption favoring judicial review of agency actions. *See, e.g., Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Exceptions to judicial review exist where the statute expressly precludes review or the agency action was committed to the discretion of the agency. *Id.* § 701(a).

63 APA MANUAL at 14–15.

64 *Id.* at 42, 43.

65 *Marathon Oil Co.*, 564 F.2d at 1261–64 (noting difference between adjudication and rulemaking and citing the APA MANUAL for the point that adversarial proceedings are

In *Dantran, Inc. v. United States Department of Labor*, the United States Court of Appeal for the First Circuit considered the type of rights at issue in determining whether a hearing triggered formal APA requirements.[66] *Dantran* involved an appeal from this Board arising under the McNamara-O'Hara Service Contract Act of 1965.[67] The Court found that EAJA applied despite the absence of "on the record" language because of the nature of the dispute.[68] "[A]n adjudication such as this, which involves specific factual findings with potential for 'serious impact on private rights,' is 'exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended.'"[69]

In *Friends of the Earth v. Reilly*, the D.C. Circuit referenced the APA's formal adjudication when distinguishing adjudicatory facts from legislative facts.

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implied in cases of sharply disputed facts); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876–77 (1st Cir. 1978) (rejecting a requirement for "on the record" to appear in the text if Congress intended for a type of adversarial adjudication based on the nature of the hearing and the rights at issue), *superseded by Dominion Energy Brayton Pt. LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *City of W. Chi.*, 701 F.2d at 641, 644 n.11 ("Of course, if a formal adjudicatory hearing is mandated by the due process clause, the absence of the 'on the record' requirement will not preclude application of the APA.").

In *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 934-37 (9th Cir. 1998), the Department of Interior held a hearing to adjudicate the validity of a mining claim. The ALJ's decision was reversed by the agency. Because Collord was a prevailing party, Collord filed for attorney's fees under EAJA. The question for the Ninth Circuit was whether EAJA applied given the statute at issue did not require a hearing. Citing *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950), the Ninth Circuit went so far to say that EAJA applied because a formal APA adversarial adjudication under §§ 554, 556, and 557 was required even though Congress did not provide for a hearing.

In *Wong Yang Sung*, the Supreme Court considered whether administrative hearings in deportation cases must conform to the APA where the legislation did not provide for hearing. *Id.* at 48. The Court explained "[b]ut the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation." *Id.* at 49. We need not explore the merits of this analysis involving a statute that does not provide for a hearing as the statute at issue provides notice and opportunity for a hearing. *Smedberg Mach. & Tool, Inc.*, 730 F.2d at 1093 (discounting a due process argument underpinning "adversarial adjudication" where hearing was discretionary).

66 *Dantran, Inc.*, 246 F.3d at 46.

67 41 U.S.C. §§ 6701–6707 (formerly §§ 351–358).

68 *Dantran, Inc.*, 246 F.3d at 46.

69 *Id*.

> A section 554 hearing, with its attendant procedural protections, has as its primary purpose the determination of "adjudicative facts," i.e., those facts which "usually answer the questions of who did what, where, when, how, why, with what motive or intent ... [and] are roughly the kind of facts that go to a jury in a jury case." A section 554 hearing is, in short, like a trial proceeding. But it does not necessarily follow that the nature of the interests at stake in a [hazardous waste authorization] withdrawal proceeding requires a section 554 proceeding.[70]

Under the H-2B enforcement program, the Administrator is authorized, after notice and an opportunity for a hearing, to impose administrative remedies against the violator including civil monetary penalties and debarment.[71] These proceedings are quasi-judicial as the rights at issue in this case involve disputed adjudicatory facts decided on the basis of an evidentiary record, similar to those contemplated in *Dantran* and *Friends of the Earth*.[72]

D. Statutory Construction of EAJA's Waiver of Sovereign Immunity

For purposes of evaluating EAJA's waiver of sovereign immunity in this case, three statutes are in play: EAJA, the H-2B enabling statute, and the APA. EAJA's applicability to H-2B enforcement actions depends on characteristics of the H-2B enabling statute and the adjudications held thereunder. Both EAJA and the H-2B enforcement program are intertwined with the APA's governing framework. Because all three statutes are essential, we examine all three when applying the canons of statutory construction.

Waivers of sovereign immunity must be strictly construed in favor of the United States.[73] The canon of strict construction extends also to the scope of the

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70 *Friends of the Earth,* 966 F.2d at 693 (internal footnotes and citations omitted).

71 8 U.S.C. § 1184(c)(14)(A)–(B).

72 *Supra* note 28 (outlining administrative procedures facilitating the dispute between the Administrator's assessment of civil monetary penalties, back wages, or debarment against a party and the party opportunity to respond and request a hearing); *infra* note 80 (providing the procedure for the administrative record in an H-2B proceeding).

73 *Lane v. Pena*, 518 U.S. 187, 192 (1996).

waiver.[74] The Supreme Court has stated that strict construction is neither hostile nor hyper-technical. "[Courts] should not take it upon [them]selves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended."[75] The Supreme Court in *Chickasaw Nation v. United States*, noted that "canons are not mandatory rules" but rather "are designed to help judges determine the Legislature's intent as embodied in particular statutory language."[76] The Court in *Richlin Security Service Co. v. Chertoff*, an EAJA case, explained as follows:

> The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction. Indeed, the cases on which the Government relies all used other tools of construction in tandem with the sovereign immunity canon. . . . In this case, traditional tools of statutory construction and considerations of *stare decisis* compel the conclusion [paralegal fees are recoverable under EAJA]. There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.[77]

Applying the above guidelines to this case, we note that analyzing the scope of EAJA's waiver under strict construction principles is particularly difficult because of its conditional features. EAJA's statutory language provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. . . .[78]

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74 *Id.*

75 *Smith v. United States*, 507 U.S. 197, 203 (1993) (quoting *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979)).

76 *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

77 *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589–90 (2008) (internal citations omitted).

78 5 U.S.C. § 504(a)(1).

Prevailing parties may recover fees if certain conditions are met. A party must prevail in an "adversary adjudication." EAJA defines an adversarial adjudication as "an adjudication under section 554 of [the APA] in which the position of the United States is represented by counsel or otherwise."[79] Yet, it is not enough for a party to prevail against the government, represented by counsel, in an adversarial adjudication governed by formal APA procedures under Section 554. These prerequisites can take place through adjudications arising under agency regulations following formal APA procedure.[80] This is so because an agency's voluntary compliance with APA procedure is not credited in the typical EAJA-applicability analysis.[81] Congress must require these procedures.

The lynchpin language shifting the focus from EAJA's conditional elements back to Congress and the canons of statutory construction is Section 554's language that the section "applies, according to the provisions thereof, in every case of

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79 *Id.* § 504(b)(1)(C)(i).

80 The Department of Labor's implementing regulations provide for formal APA adjudication of H-2B enforcement proceedings by referencing Sections 556 and 557. "As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part." 29 C.F.R. § 503.44(b); *see also id.* § 18.12(b). ALJs keep a record of proceedings and forward that record to the ARB if the matter is appealed. *Id.* §§ 503.52, 5.6. Section 503.44 states that the ALJ Rules of Practice and Procedure at 29 C.F.R. Part 18 apply. The ALJ Rules provide that unless stated otherwise in the governing statute or regulation that ALJ's will follow Sections 551–559 of the APA. *Id.* § 18.10(b).

81 *Supra* note 44 (citing H-2B regulatory provisions providing for formal APA hearings and noting that Courts do not permit agency regulations to satisfy EAJA waivers because Congress's intent is the focus).

Courts' treatment of agency regulations differs in EAJA contexts. Outside of EAJA, agency regulations receive deference. After the seminal *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) decision, several circuits rejected initial positions concluding that formal APA procedures apply to agency adjudications. In light of *Chevron*'s holdings, courts defer to agency regulations providing for informal process. *Compare Union of Concerned Scientists v. U.S. Nuclear Regul. Comm'n*, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984) (pre-*Chevron* analysis discussing presumption for APA formal procedures for adjudications involving specific fact-finding affecting individuals) *with Chemical Waste Mgmt., Inc. v. U.S. Env't Prot. Agency*, 873 F.2d 1477, 1482 (D.C. Cir. 1989) (D.C. Circuit case revisiting the presumption for APA formal procedures in light of *Chevron* deference to agency regulations providing for informal processes); *Seacoast Anti-Pollution League*, 572 F.2d at 876–77 (pre-Chevron) *with Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006) (post-*Chevron* dismissal of presumption for APA evidentiary hearing in light of agency regulations). *See also William Funk, Slip Slidin' Away: The Erosion of APA Adjudication*, 122 PENN ST. L. REV. 141 (2017).

adjudication required by statute to be determined on the record after opportunity for an agency hearing."[82] Because Section 554's language is pivotal to EAJA's applicability, *its* background and legislative history as to when and why Congress uses "on the record" language is an essential part of the sovereign immunity and strict construction analysis, not just the text and background of the enabling statute.[83]

This interrelationship between the APA and the enabling statute is confirmed by the APA's history in the courts. The Supreme Court identified that the APA's remedial nature aimed to fix a variety of discordant agency procedures and apply widely to agencies and agency process.[84] Congress enacted the APA as a cross-cutting, interagency rulebook for standardized procedure.[85]

Congress's H-2B enforcement provision amends the INA. The INA was first enacted in 1952 in part because of the fallout from the APA's application to deportation proceedings.[86] Authored by the same members of Congress, the APA and INA have a colorful history, providing both a view into the meaning of the APA and also a means to evaluate the APA's applicability to the INA and other statutes.[87] As demonstrated by the flurry of legislative and judicial activity at the

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82 5 U.S.C. § 554(a).

83 Courts evaluate whether sovereign immunity is waived by examining not only express text but also the statute's legislative history. *Ardestani*, 502 U.S. at 135–36; *St. Louis Fuel & Supply Co.*, 890 F.2d at 449 (examining legislative history to support position that Congress intended less than full APA procedure to apply to DOE remedial orders).

84 *Wong Yang Sung*, 339 U.S. at 36–42 (examining APA background and need for comprehensive administrative procedure act applicable across the agencies); APA MANUAL at 9 ("*Coverage of the Administrative Procedure Act*: The Administrative Procedure Act applies, with certain exceptions to be discussed, to every agency and authority of the Government."), 139 ("However, the act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary.").

85 Because of its standardized procedure across the administrative state, the APA has been referred to as a superstatute. Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1359-60 (2019).

86 *Wong Yang Sung*, 339 U.S. 33; *Marcello v. Bonds*, 349 U.S. 302 (1955).

87 See generally *Marcello*, 349 U.S. 302. The dissent cites other amendments to the INA providing for formal APA procedure (Dissenting Opinion at 40–42) for the position that Congress's omission of similar language in the 2005 amendments codified at 8 U.S.C. § 1184(c)(14) should be deemed intentional and meaningful, citing *Russello v. United States*,

inception of the INA in 1952, Congress knows how to exclude formal APA procedures from agency procedure.[88] When determining whether Congress intended to exclude the APA from applicable agency procedure, courts carefully examine the APA alongside the statute. This careful analysis is necessary because the APA is presumed to apply to agencies.[89] Because the Court found clear intent excluding the APA's formal procedures from deportation proceedings, the Court explained there

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464 U.S. 16, 23 (1983). *Russello* is built on a presumption of careful draftsmanship, but courts have recognized exceptions and reasons not to apply the *Russello* presumption. *Kapral v. United States*, 166 F.3d 565, 579-80 (3d. Cir. 1999) (Alito, J., concurring) (noting reasons to limit the *Russello* presumption). The *Russello* presumption has traction when the disparity occurs in the same legislation. "'[N]egative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 175 (2009), *quoting Lindh v. Murphy*, 521 U.S. 320, 330 (1997).

[88] *Marcello*, 349 U.S. at 308–09 (observing that Congress followed the APA as a model in INA deportation proceedings because it is useful for some deportation procedure but also noting that deportation varied in specific points; because it was both similar and different from APA procedure, Congress clarified that the INA's deportation procedure was the "sole and exclusive procedure" applicable to avoid confusion).

[89] *Id.*; *Cisternas-Estay v. Immigr. & Naturalization Serv.*, 531 F.2d 155, 163 (3d Cir. 1976) (Gibbons, J., dissenting):

> [T]he Court in *Marcello v. Bonds* did not discuss the relationship between the APA and other immigration proceedings besides deportation hearings. What the Court did establish in that decision, however was a method of analysis to employ in discovering the interrelationship between the two acts. A court must compare the INA with analogous provisions of the APA to determine if Congress meant to adapt the procedural safeguards of the APA to the particular needs of the INS. In cases of doubt the court should refer to the legislative history of both acts for guidance. But the fundamental presumption underlying this analysis is that where Congress has not specifically deviated from the APA by either adaptations of its provisions within the INA itself or statements in the legislative history, the APA should govern. This presumption is consistent with the language and policy of [section] 12 of the APA, 5 U.S.C. § 559, which states in relevant part that a subsequent statute like the INA 'may not be held to supersede or modify this subchapter (which includes s 5(c)) . . . except to the extent it does so expressly.'

Id. (citations omitted). The Attorney General did not examine Section 12 (as amended, Section 559) of the APA in detail as part of the main discussion but did provide a summary at page 139 of the APA Manual.

was no need for "magical passwords in order to effectuate an exemption from the Administrative Procedure Act . . . ."[90]

The history between the APA and INA indicates that courts do not examine the enabling statute in isolation. While the H-2B statutory text "after notice and an opportunity for a hearing,"[91] does not reference Section 554 or provide for a hearing "on the record," we conclude, for the above stated reasons, that Congress nevertheless intended for formal APA procedures to apply to H-2B enforcement hearings. Courts have consistently held that specific words "on the record" are not required when determining whether Congress intended for an adversarial adjudication. The Attorney General in the APA Manual explained when and why Congress uses "on the record" to provide for formal APA procedure. Courts have credited these explanations when determining that a statute that provides for a hearing in a quasi-judicial proceeding is an adversarial adjudication on the record.[92]

Taken as a whole, we conclude that Congress intended for formal APA procedures identified in Sections 554, 556, and 557 to apply to H-2B enforcement proceedings. Thus, H-2B enforcement proceedings are adversarial adjudications for purposes of EAJA's applicability and waiver of sovereign immunity. Accordingly, a prevailing party may be entitled to fees if the government is not substantially justified in its position.

2. The Administrator's Position Was Substantially Justified

Having found that EAJA applies to H-2B enforcement matters, we turn now to determining whether attorney's fees were appropriately awarded in this case. When EAJA applies, a party is eligible for an award of attorney's fees if: (1) the party is a prevailing party; (2) the agency's position was not substantially justified; (3) an award of fees would not be unjust; and (4) EAJA's timeliness requirements

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90 *Marcello*, 349 U.S. at 310; *see also Ardestani*, 502 U.S. 129. In the 2005 amendment to the INA providing for H-2B enforcement, Congress excluded formal APA procedure from several sections of the Real ID Act to allow for faster agency implementation of the statutory language. Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, And Tsunami Relief, 2005, Div. B, The Real-ID Act, § 407, Pub. L. No. 109–13, 119 Stat. 231.

91 8 U.S.C. § 1184(c)(14); *supra* note 23.

92 *Supra* Parts 1.A–C; notes 43, 52 (identifying Supreme Court precedent relying on the APA Manual as authoritative).

are met.[93] There is no dispute that Graham & Rollins was the prevailing party below and submitted its request for EAJA fees in a timely manner. Because the ALJ found that no special circumstances made an award of EAJA fees unjust, the only remaining issue for determination is whether the Administrator's position was substantially justified. The government bears the burden on this issue.[94]

As addressed below, we find that the Administrator's position was substantially justified. We further find that the Administrator did not waive its argument on substantial justification by failing to timely respond to the fee application before the ALJ. Based on a full evaluation of the Administrator's position during the course of the litigation, we conclude that the Administrator's position was reasonable, and thus was substantially justified.

A. The Administrator Did Not Waive the Argument on Substantial Justification

At the outset, we address Respondent's contention that the Administrator waived any argument regarding the substantially justified issue by failing to respond to the EAJA petition below. It is undisputed that the Administrator did not oppose Respondent's EAJA fee petition filed before the ALJ.[95] Citing a miscommunication as the reason for her inaction, the Administrator subsequently included arguments in opposition to EAJA fees in a motion to vacate.[96] In her order denying the motion to vacate, the ALJ addressed some of the Administrator's arguments in concluding that "nothing that the Administrator has presented in the motion to vacate identifies an intervening change in the law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."[97]

In a civil action where an agency files no response to a petition for EAJA fees, courts applying EAJA's parallel provisions at 28 U.S.C. § 2412 have found the petition to be uncontroverted and the agency's burden unmet such that fees are

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93 5 U.S.C. § 504(a)(1)–(2); R. D. & O. at 1.

94 *Zappala Farms*, ARB No. 2004-0047, slip op. at 5; *Lively v. Bowen,* 858 F.2d 177, 180 (4th Cir. 1988).

95 R. D. & O. at 1.

96 Denial Order.

97 *Id.* at 4.

properly awarded.[98] However, even without the aid of a filing in opposition to Respondent's petition for fees, under 5 U.S.C. § 504 the ALJ was required to examine the record to determine whether the government's position was substantially justified. The statute provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, *unless the adjudicative officer of the agency finds that the position of the agency was substantially justified* or that special circumstances make an award unjust. *Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole*, which is made in the adversary adjudication for which fees and other expenses are sought.[99]

Thus, it fell to the ALJ to determine whether the government's position was substantially justified. The government's failure to respond to Respondent's application for EAJA fees in a timely manner did not relieve the ALJ of this required task.[100]

Respondent next cites longstanding case law in support of its additional argument that the ARB historically does not, and in the present case should not, consider arguments first raised on appeal. Respondent correctly notes that the Board generally requires that a party raise an argument before the ALJ in order to

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98 28 U.S.C. § 2412; *see, e.g.*, *Cedo-Trabal v. Comm'r of Soc. Sec.*, No. 19-1676 (GLS), 2021 WL 2596785, at *3 (D.P.R. June 23, 2021) (finding agency position not substantially justified given agency's failure to contest motion for fees); *McKenzie v. Astrue*, No. 1:10cv02036 AWI DLB, 2012 WL 1345756, at *1 (E.D. Cal. Apr. 16, 2012) (finding that failure to oppose the request constituted failure to establish position was substantially justified).

99 5 U.S.C. § 504(a)(1) (emphasis added); *see also Jackson v. Bowen,* 807 F.2d 127, 129 (8th Cir. 1986) (citing *Campbell v. Bowen,* 800 F.2d 1247, 1249 (4th Cir. 1986) (noting that formal opposition is not a precondition for a denial of EAJA fees if the record demonstrates that agency's position was substantially justified)).

100 Respondent cites 29 C.F.R. § 16.302(a) for the position that failure to file an answer within the thirty-day period may be treated as a consent to the award requested. In light of the statutory language, and for other reasons set out below, we do not find the permissive regulation militates in favor of a finding of consent.

preserve it for review.[101] However, the Board does not always require that an issue be fully litigated below in order to maintain reviewability; raising the issue can suffice in appropriate circumstances.[102] The Board has also considered waived or forfeited arguments when "necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding."[103]

In evaluating whether to consider the Administrator's argument on appeal, we note that this case presents a novel issue of law, and there is no need for additional fact-finding. This exact legal issue—the availability of EAJA awards in H-2B proceedings—is also relevant to other cases currently pending in the Office of Administrative Law Judges. Accordingly, we find that the unique circumstances of this case, combined with the statutory requirement that the adjudicative officer determine the issue of substantial justification, warrant our considering the Administrator's arguments in this appeal.

B. The Agency's Position Is Substantially Justified if a Reasonable Person Could Find It Appropriate

Having decided that the ALJ did not err in evaluating the unopposed EAJA fee application and that the ARB will consider the Administrator's position on appeal, we turn to the standard for evaluating whether the Administrator's position was substantially justified.

The United States Supreme Court has defined "substantially justified" to mean "justified in substance or the main—that is, justified to a degree that could

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101 *Mancinelli v. E. Air Ctr.*, Inc., ARB No. 2006-0085, ALJ No. 2006-AIR-00006, slip op. at 4–5 (ARB Feb. 29, 2008).

102 *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 2009-0065, ALJ No. 2006-WPC-00001, slip op. at 6 (ARB Dec. 17, 2010) (citing *Rose v. Dole,* 945 F.2d 1331, 1334 (6th Cir. 1991) (an argument may be preserved for appeal even if not forcefully raised below)).

103 *Avlon v. Am. Express Co.*, ARB No. 2009-0089, ALJ No. 2008-SOX-00051, slip op. at 5 (ARB Sept. 14, 2011) (internal quotations omitted).

satisfy a reasonable person."[104] To meet this test, "the government must show that its position had a reasonable basis in both law and fact."[105]

Applying this test, courts have articulated a set of guardrails to guide the analysis as to whether a government agency's position is substantially justified. The fact that the government did not prevail in the underlying litigation does not create a presumption that its position was not substantially justified.[106] "[T]he government's case need not be frivolous to support an award of fees, but, on the other hand, the litigation need not be a cliffhanger to be sufficiently justified."[107] Agency actions that are "flatly at odds with the controlling case law," or pursued in "the face of an unbroken line of authority" or against a "string of losses" suffer from "defects common to positions that are not substantially justified."[108] When questions of law are not settled, there is more leeway for the government when arguing its position.[109] A decision on the merits in litigation, on its own, is insufficient to determine the substantial justification issue.[110]

Evaluating whether the agency's position was substantially justified does not require "an issue-by-issue analysis" but instead involves an examination of "the totality of circumstances."[111] EAJA provides in relevant part that "[w]hether or not the position of the agency was substantially justified shall be determined on the

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104 *U.S. Dep't of Lab., Emp. & Training Admin., Div. of Foreign Lab. Certification v. Barry's Ground Cover*, ARB No. 2012-0079, ALJ Nos. 2012-TLC-00011, -00023, -00026, -00030, -00032, -00034, -00035, -00037 to -00039, -00042, -00046, -00050, slip op. at 4 (ARB Jan. 16, 2014) (citing *Pierce,* 487 U.S. at 565).

105 *Id.* at 4 (citing *Fed. Election Comm'n v. Pol. Contributions Data, Inc.,* 995 F.2d 383, 386 (2d Cir. 1993)).

106 *Dantran, Inc.*, 246 F.3d at 40–41 (citing *Pierce,* 487 U.S. at 569)).

107 *Id.* at 41 (citing *Pierce*, 487 U.S. at 566); *see also United States v. Paisley*, 957 F.2d 1161, 1165 (4th Cir. 1992).

108 *Hill v. Gould*, 555 F.3d 1003, 1008 (D.C. Cir. 2009) (internal citations and quotations omitted).

109 *Hanover Potato Prods. v. Shalala*, 989 F.2d 123, 131 (3rd Cir. 1993) ("We do not believe it is unjustified for a government agency to assert a position in one court merely because it has been rejected in another. Such a rule would tend to give undue authority to the first appellate court to decide an issue and chill advocacy.")

110 *Paisley*, 957 F.2d at 1167.

111 *Strong v. Comm'r of Soc. Sec. Admin.,* 461 F. App'x 299, 301 (4th Cir. 2012) (citing *Roanoke River Basin Ass'n v. Hudson,* 991 F.2d 132, 139 (4th Cir. 1993)).

basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought."[112] The agency's "position" includes both "the position taken by the agency in the adversary adjudication" itself and "the action . . . by the agency upon which the adversary adjudication is based."[113] The Supreme Court has stated that the government's position is singular, even though there can be degrees of justification on individual issues in a case: "EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items."[114] The statute itself also refers to the government's position in the singular.[115] Overall, the agency's position can be found to be substantially justified "if there is a 'genuine dispute' such that 'reasonable people could differ as to [the appropriateness of the contested action].'"[116]

C. The ALJ Erred in Her Analysis of the Issue of Substantial Justification

Applying these standards, we have independently assessed the "administrative record, as a whole" de novo,[117] including the Administrator's conduct leading up to this enforcement action as well as the substantive legal positions taken throughout the litigation.[118] Due to the uncertain nature of the legal question at hand, the merits of the Administrator's argument, and the Administrator's mixed results when taking this position in other matters, we conclude that the Administrator's position was substantially justified.

In her Recommended Decision and Order, the ALJ found that the Administrator's position was not substantially justified. First, the ALJ found that the Administrator's positions during discovery and briefing "were not reasonable or even entirely professional," and that throughout litigation the Administrator's

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112 5 U.S.C. § 504(a)(1).

113 *Id.* § 504(b)(1)(E).

114 *Comm'r, Immigr. & Naturalization Serv. v. Jean*, 496 U.S. 154, 161–62 (1990).

115 5 U.S.C. § 504(b)(1)(E); *see also Jean*, 496 U.S. at 159.

116 *Pierce*, 487 U.S. at 565 (alteration in original) (internal quotation marks omitted).

117 *Supra* notes 9, 99; *see also Ndiaye v. CVS Store No. 6081*, ARB No. 2005-0024, ALJ No. 2004-LCA-00036, slip op. at 4 (ARB Nov. 29, 2006) ("Under a de novo standard of review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court.").

118 5 U.S.C. § 504(a)(1).

positions were "combative and unreasonable in nature."[119] Next, the ALJ found that the Administrator's legal positions were also not substantially justified. The ALJ highlighted that the Administrator's position that no statute of limitations applied to H-2B enforcement proceedings would place a significant burden on employers participating in the H-2B program.[120]

In support of her legal position, the Administrator argues that the position was not seeking to penalize—which would place the action within the purview of the catch-all five-year statute of limitations at 28 U.S.C. § 2462.[121] Rather, the Administrator took the position that the assessed amount reflected unpaid outbound transportation costs that constituted back wages[122] owed to former H-2B employees, which the Administrator had authority to impose against Respondent as "other administrative remedies" permitted by 20 C.F.R. § 655.65(i).[123] Further, as back wages, no recovery limitation period was stated in applicable statutes or regulations, and so none applied.[124]

Respondent counters that the Administrator fails to accurately frame the issue by calling an enforcement proceeding for civil monetary penalties as one for back wages.[125] Before the ALJ, Respondent argued that the assessments constituted not "wages" but a "penalty" and so were barred by the five-year limitation period of 28 U.S.C. § 2462.[126] In this appeal, Respondent highlights that "there was nothing unsettled or novel about the applicability of 28 U.S.C. § 2462 to actions seeking civil money penalties."[127]

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119 R. D. & O. at 5.

120 *Id*.

121 Adm'r Br. at 28–29.

122 "Graham and Rollins Inc. must pay back wages in the amounts listed on the Summary of Unpaid Wages [that has been] provided." Administrator's Determination Letter at 1.

123 *Graham & Rollins, Inc.*, ALJ No. 2008-TNE-00022, slip op. at 8 (ALJ June 26, 2018).

124 "[S]tatutes of limitations do not run in administrative proceedings initiated by the federal government, unless a federal statute directly sets a time limit." *Id*. at 6 (quoting Administrator's Brief in Opposition to the Motion to Dismiss).

125 Respondent's Response Brief (Resp. Br.) at 24.

126 *Graham & Rollins, Inc.*, ALJ No. 2008-TNE-00022, slip op. at 4 (ALJ June 26, 2018). Graham & Rollins also argued that other statutes of limitations apply.

127 Resp. Br. at 25.

The ALJ agreed with Respondent and found that the Administrator sought "penalties" which were untimely and unenforceable, having been assessed outside the five-year limitation period set out in Section 2462.[128] The ARB summarily affirmed the ALJ's determination on the merits.[129]

We conclude that the ALJ committed two errors: (1) the ALJ hyper-focused on the conduct of the Agency's counsel with respect to specific procedural matters and in so doing failed to properly analyze the Agency's position for bringing the assessment against Respondent; and (2) the ALJ recycled the underlying merits analysis in place of the required analysis as to whether the Administrator's position was substantially justified.

i. The ALJ's Analysis Inappropriately Focused on Counsel's Attitude Rather than the Challenged Agency Position

First, the ALJ examined the Agency's counsel's actions, finding such to be "combative and unreasonable" in certain instances.[130] Specifically, the ALJ noted that counsel had refused to review a settlement proposal prior to receiving discovery responses, moved for a motion deadline extension due to unresolved discovery issues after earlier stating that such would not be necessary, and refused to agree to a short motion response extension necessitated by opposing counsel's having suffered a home fire. Labeling these actions as "not reasonable or even entirely professional," the ALJ concluded that the Administrator's position "could not be said to be substantially justified" given these procedural actions of the Agency's counsel.[131]

The record is too sparse for us to thoroughly examine the reasons precipitating counsel's actions. Even so, we disagree with the ALJ's finding that these three limited instances of an attorney's litigation demeanor or procedural

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128 *Graham & Rollins, Inc.*, ALJ No. 2008-TNE-00022, slip op. at 11 (ALJ June 26, 2018).

129 *Graham & Rollins, Inc.*, ARB No. 2019-0009, ALJ No. 2018-TNE-00022 (ARB Nov. 16, 2020). The ARB did not discuss recent and subsequent court cases relevant to the issue. *Infra* note 148.

130 R. D. & O. at 5.

131 *Id*.

choices constitute the required analysis or establish a sufficient basis for deeming the Agency's position not substantially justified.

EAJA directs the ALJ, and the Board on appeal, to determine whether the Agency's "position" was substantially justified, not to simply judge the procedural cooperativeness of Agency's counsel. The critical issue is whether "there is a 'genuine dispute' such that 'reasonable people could differ as to [the appropriateness of the contested action].'"[132] The contested action is the "position" that is the subject of examination. In this case, the contested action is the Agency's position citing Respondent for nonpayment of outbound transportation expenses incurred more than five years in the past. This is the position which Respondent challenged below, and this is the challenged action that forms the essential "position" that must be substantially justified to avoid an award of EAJA fees.

Instead of focusing on this position, the ALJ incorrectly allowed the perceived unprofessionalism of counsel to become the "agency action" subject to scrutiny. Rather than examining the Administrator's position as a whole, the ALJ catalogued the Administrator's errors and isolated procedural errors. The error in this approach is well illustrated in *Morgan v. Perry*.[133] In *Morgan*, the United States Court of Appeals for the Third Circuit found in favor of a former servicemember on the merits of his claim that the U.S. Marine Corps (Corps) and various federal agencies violated his procedural due process rights when they refused to allow him to withdraw his earlier request for an other-than-honorable (OTH) discharge and proceed to trial by general court-martial. During the proceedings, a prosecutor for the Corps engaged in unprofessional and unethical conduct. When ruling upon the servicemember's subsequent petition for EAJA fees, the Court noted, correctly, that though it was required to scrutinize both the government's prelitigation and litigation position in determining if the government was substantially justified, consideration of alleged attorney misconduct may not substitute for the required focus on the specifically challenged action:

> Although we in no way minimize the gravity or impropriety of [the prosecutor's] conduct, it is clear to us that [his] conduct is not the issue before us. Rather, the issue is [the Corps'] refusal to allow Morgan to withdraw his request of an OTH discharge and proceed to a general court martial.

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132 *Pierce*, 487 U.S. at 565.

133 142 F.3d 670, 686–87 (3d Cir. 1998).

> The fact that Morgan's request was triggered by [the prosecutor's] conduct does not elevate that conduct to the level of agency action under the facts before us nor transform his conduct into the decision that was challenged in court. Morgan challenged [the Corp's] decision [not to allow him to withdraw his request for an OTH discharge], and that is the agency action that must be substantially justified if Morgan is to be denied fees under the EAJA . . . .[134]

Likewise, in the present case the Administrator issued a determination that Respondent owed $16,560 in outbound transportation costs from more than five years past. This is the Agency action that Respondent challenged and this is the Agency action that must be found to be substantially justified to avoid the award of EAJA fees.

ii. The ALJ Failed to Properly Analyze the Agency's Position for Substantial Justification as Required by EAJA

EAJA "is not a 'loser pays' statute."[135] Correct application of the statute requires that the ALJ look beyond the fact that the government lost on the merits and separately analyze whether the government's position was substantially justified.[136] The ALJ must "do more than explain, repeat, characterize, and describe the merits . . . decision."[137] Instead, the ALJ must "analyze *why* the government's position failed in court: if, for example, the government lost because it vainly pressed a position 'flatly at odds with the controlling case law,' that is one thing; quite another if the government lost because an unsettled question was resolved unfavorably."[138]

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134 *Id.*

135 *Id.* at 685.

136 *Cooper v. U.S. R.R. Ret. Bd.,* 24 F.3d 1414, 1416 (D.C. Cir. 1994) ("[T]he inquiry into reasonableness for EAJA purposes may not be collapsed into [the] antecedent evaluation of the merits, for EAJA sets forth a distinct legal standard." (internal quotations omitted)).

137 *Halverson v. Slater,* 206 F.3d 1205, 1209 (D.C. Cir. 2000).

138 *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (quoting *Am. Wrecking Corp. v. Sec. of Labor,* 364 F.3d 321, 326–27 (D.C. Cir. 2004) (internal quotation marks omitted)).

In the present case, the ALJ failed to "reexamine the legal and factual circumstances of the case from a different perspective"[139] but instead merely restated her merits analysis to find that that Administrator's position was not substantially justified. Other than relying on the conduct of agency counsel as noted above, the ALJ's legal analysis of the substantial justification issue is set forth in total below:

> Furthermore, with regard to the issue on which this proceeding was ultimately dismissed—the untimeliness of the H-2B enforcement action against Employer—the Administrator's position was similarly unreasonable. The Administrator essentially took the stance that in the absence of a statute of limitations directly applicable to H-2B proceedings, they are not subject to any statute of limitations at all. However, as discussed in my dismissal order, the five-year catch-all statute of limitations in 28 U.S.C. § 2462 clearly applied, in the absence of another specific statute, and the Administrator's arguments against Employer's motion were misplaced and not "substantially justified." The burden that no statute of limitations would place upon employers is extreme; at some point, defendants must have some expectation of the cessation of remote obligations.[140]

In essence, the ALJ found that the Administrator's substantive legal position regarding the inapplicability of the five-year limitations period was not persuasive and would impose an undue burden on employers.

This analysis was insufficient to support the ALJ's legal conclusion that the Administrator's assessment was not substantially justified. The ALJ failed to analyze "why" the Administrator lost below and instead merely restated her conclusion that that the Agency's arguments were "misplaced" and "unreasonable."[141] While the ALJ's ultimate conclusion that the Administrator's assessments were penalties and thus barred by Section 2462's five-year limitations period prevailed before the ARB, that legal conclusion is not determinative of the issue of whether the position was substantially justified currently before the ARB.

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139 *United States v. Hallmark Constr. Co.,* 200 F.3d 1076, 1080 (7th Cir. 2000) (cited in *Taucher*, 396 F.3d at 1174).

140 R. D. & O. at 5.

141 *Id.* at 5-6.

We are required, as was the ALJ, to assess the reasonableness of the Administrator's position at the time the challenged action was taken.[142] Stated more directly, we must examine whether a reasonable person could agree that requiring an employer to compensate its former H-2B employees for legally required outbound transportation expenses could reasonably be considered as imposing owed "wages" and not "penalties," such that no limitations period would bar the action. That was the position espoused by the Agency throughout this proceeding.

We answer this question in the affirmative for several reasons. First, it is important to note that this issue—the proper limitation period, if any, for imposition of outbound transportation costs on employers—had never before been determined by any court. In fact, until this Board ruled that the five-year catch-all statute of limitations of 28 U.S.C. § 2462 applied to H-2B enforcement proceedings, no other direct guidance existed to aid the Administrator in charting the Agency's position.[143] This is not a case where existing case law mandated a clear answer that the Agency chose to ignore. This is a case of first impression, which is the type of case in which "courts are more likely to find that the Government's position was substantially justified."[144]

Respondent continues to argue that the law was clear and that the Administrator refused to follow it. We agree with Respondent that the law was clear that a penalty cannot be assessed beyond the five-year window set by Section 2462. What was not clear was whether outbound transportation expenses owed to former H-2B employees were to be properly categorized as "wages" not subject to any limitation period or as "penalties" barred after five years.

Just as the Administrator's position was not taken in contravention of binding case law, neither was her position taken without any support. The Administrator had taken this exact same position in other matters presented to the

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142 *Taucher,* 396 F.3d at 1173 (In considering substantial justification under EAJA, "as in other areas[,] courts need to guard against being subtly influenced by the familiar shortcomings of hindsight judgment." (internal quotations omitted)) (cited in *Johnson v. McDonald*, 28 Vet. App. 136, 146–50 (U.S. Ct. of Vet. Claims 2016), *aff'd sub nom. Butts v. Wilkie*, 721 F. App'x 988 (Fed. Cir. 2018)).

143 *Graham & Rollins, Inc.*, ARB No. 2019-0009, ALJ No. 2018-TNE-00022 (ARB Nov. 16, 2020).

144 *Johnson*, 28 Vet. App. at 147.

Department's Office of Administrative Law Judges, with a mixed record of success and failure.[145]

In support of the Agency's position, the Administrator relied on longstanding case law to establish that there is no binding limitations period for administrative actions unless a federal statute creates one.[146] Without a statutory limit, the government is permitted to act without time constraint.[147] The ALJ rejected that argument, not because the case law had been overruled or was otherwise inapplicable but because the ALJ rejected the underlying premise that unpaid outbound transportation expenses were owed wages. Whether or not the relief the Administrator was seeking was the type to which the catch-all five-year statute of limitations applied was and remains an unsettled issue.[148] After finding that the assessments constitute penalties instead of wages, the ALJ correctly relied upon the five-year limitations period applicable to penalty assessments. Doing so required a detailed analysis and factual differentiation of the Administrator's cited authorities,

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[145] Adm'r Br. at 30 (citing, among others, *Adm'r v. JML Landscape Mgmt.*, ALJ No. 2017-TNE-00008, slip op. at 7–8 (ALJ Oct. 22, 2018) ("Congress has imposed no explicit time limitation on an H-2B enforcement action such as the instant matter."). *But see Adm'r v. Butler Amusements, Inc.*, ALJ No. 2018-TNE-00019, slip op. at 15–17 (ALJ Nov. 14, 2018) (five-year limitations period for 28 U.S.C. 2462 applies to H-2B enforcement actions for improper job classification in the form of unpaid wages); *Adm'r v. Deggeller Attractions, Inc.*, ALJ No. 2018-TNE-00008, slip op. at 5 (ALJ Sept. 20, 2018) (same, alleged failure to specify deductions in job offer); *Adm'r v. Hotelmacher*, *LLC*, ALJ Nos. 2017-TNE-00001,-00011, slip op. at 4–5 (ALJ May 17, 2018).

[146] Adm'r Br. at 29–30 (citing cases); *see also BP Am. Production Co. v. Burton,* 549 U.S. 84, 95–96 (2006) (identifying canon of construction that no time runs against the sovereign).

[147] "Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *Badaracco v. Comm'r,* 464 U.S. 386, 391 (1984) (quoting *E. I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456 (1924)).

[148] The Board affirmed the ALJ's analysis on 28 U.S.C. § 2462 without discussion. Neither the ALJ nor the ARB discussed recent Supreme Court case law on penalties and § 2462. *Kokesh v. Sec. & Exchange Comm'n*, 137 S. Ct. 1635, 1642 (2017) (holding that SEC disgorgement enforcement proceedings imposed penalties such that § 2462's limitations period applies) and *Liu v. Sec. & Exchange Comm'n*, 140 S. Ct. 1936 (2020) (clarifying that *Kokesh* did not foreclose disgorgement actions in equity, which historically excluded punitive sanctions); *see also Sec. & Exchange Comm'n v. Sharp*, No. 21-11276-WGY, 2022 WL 4085676, at *8–13 (D. Mass. Sept. 6, 2022) (summarizing *Kokesh* and *Liu* and analyzing congressional amendments to the statute of limitations for SEC disgorgement proceedings). Given these developments and in light of the fact that our summary affirmance of the ALJ's decision on the merits is now part of the law of this case and not challenged on this appeal, our opinion today is limited to the relevant EAJA issues and does not constitute or indicate an affirmance of the ARB's 2020 opinion on the merits.

the complexities of which serve as further evidence that reasonable people could have appropriately reached contrary conclusions. As such, this too supports our conclusion that the Administrator's position was substantially justified.

Overall, the importance and novelty of the legal issue presented and the lack of contrary binding precedent sufficiently establish that the Administrator's position on outbound transportation costs was substantially justified. Reversing the ALJ's finding on this issue, we conclude that an award of attorney's fees under EAJA is not warranted.

CONCLUSION

Accordingly, this appeal is **AFFIRMED IN PART AND REVERSED IN PART**. The application for fees under EAJA is **DENIED**.

SO ORDERED.

[redacted]
THOMAS H. BURRELL
Administrative Appeals Judge

[redacted]
TAMMY L. PUST
Administrative Appeals Judge

HARTHILL, Chief Administrative Appeals Judge, concurring in part, dissenting in part, and concurring in the judgment:

I concur with the majority's ultimate holding that Respondent is not entitled to fees under EAJA. However, I write separately because, unlike the majority, I do not believe that EAJA applies to administrative H-2B enforcement proceedings under the INA.[149]

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[149] To the extent I assume that EAJA applies to these proceedings, I agree with my colleagues' opinion in Section 2, above, that the Administrator's position was substantially justified, and that Respondent is therefore not entitled to recover fees and costs under

As relevant to this case, for EAJA to apply, Respondent must establish that these H-2B enforcement proceedings constitute an "an adjudication under section 554 of" the APA.[150] Section 554 of the APA, in turn, applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[151] Thus, APA section 554 applies when three distinct prerequisites are met: (1) there must be an "adjudication"; (2) the adjudication must be determined "on the record"; and (3) there must be an opportunity for an agency hearing.[152] Congress must have "intended to *require* full agency adherence" to each of these three procedural components for APA section 554 and, consequently, EAJA to apply.[153]

When deciding whether Congress intended these H-2B enforcement proceedings to constitute an adjudication under APA section 554 and EAJA, we must remain mindful that EAJA constitutes a partial waiver of sovereign immunity because it renders the United States liable for attorney's fees and costs which it would otherwise not be obligated to pay.[154] A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed,"[155] and "[a]ny such waiver must be strictly construed in favor of the United States."[156]

EAJA. However, I do not think it is necessary to reach this issue, given my conclusion with respect to the precursory issue of the applicability of EAJA.

150 5 U.S.C. § 504(a)(1), (b)(1)(C).

151 *Id.* § 554(a).

152 *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125 (7th Cir. 2008) (citations omitted); *Aageson Grain & Cattle v. U.S. Dep't of Agric.*, 500 F.3d 1038, 1043 (9th Cir. 2007) (citations omitted); *Lane v. U.S. Dep't of Agric.*, 120 F.3d 106, 108 (8th Cir. 1997).

153 *See St. Louis Fuel & Supply Co. v. Fed. Energy Regul. Comm'n*, 890 F.2d 446, 448–49 (D.C. Cir. 1989) (emphasis original) (citations omitted); *accord City of W. Chi. v. U.S. Nuclear Regul. Comm'n*, 701 F.2d 632, 641 (7th Cir. 1983) (citations omitted) ("Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA.").

154 *Ardestani v. Immigr. & Naturalization Serv.*, 502 U.S. 129, 137 (1991).

155 *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95 (1990) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)).

156 *Ardestani*, 502 U.S. at 137 (citations omitted). The majority, Respondent, and Amici challenge, to varying degrees, the applicability of the principles concerning the waiver of sovereign immunity in the context of this case. Majority Opinion (Maj. Op.) at 18–23; Resp. Br. at 22–23; Brief of Amicus Curiae Outdoor Amusement Business Association & Morton Concessions Supporting Employer and Affirmance (Amici Br.) at 19–25. In *Ardestani*, the

As explained by the majority, there is no dispute that the H-2B enforcement proceedings at issue in this case constitute an "adjudication" as defined by the APA,[157] and that the proceedings offer the opportunity for a hearing. Nevertheless, the Administrator argues that these proceedings do not fall under APA section 554 and EAJA because the statute does not require these proceedings to be determined "on the record." Considering the fundamental principles identified above, I agree with the Administrator, and conclude that nothing in the language, context, or history of the H-2B enforcement provisions indicates that Congress intended to require these proceedings to be determined "on the record" under APA section 554.

I begin, as I must, with the text of the statute.[158] The INA's H-2B enforcement provisions provide, in relevant part, that the Secretary of Labor, by delegation from the Secretary of Homeland Security, may impose administrative remedies and take other action against an employer if he "finds, **after notice and an opportunity for a hearing**, a substantial failure to meet any of the conditions

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Supreme Court relied, in part, on the presumption against waivers of sovereign immunity to narrowly construe whether the administrative adjudicatory proceedings at issue in that case were required to be conducted under APA section 554 and, thus, subject to EAJA. *Ardestani*, 502 U.S. at 138 ("But we cannot extend the EAJA to administrative deportation proceedings when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise."); *see also Friends of the Earth v. Reilly*, 966 F.2d 690, 696 (D.C. Cir. 1992) (considering the presumption against waiver of sovereign immunity when resolving whether Congress intended administrative adjudication to fall under APA section 554). The Board should do the same here. To be sure, I agree with the majority that the canon calling for strict construction of waivers of sovereign immunity is not inalienable and will not apply where Congress has clearly expressed its intent to waive sovereign immunity. However, as set forth below, Congress has not expressed such intent with respect to the specific provisions at issue in this case. Accordingly, the well-established convention that waivers of sovereign immunity must be strictly construed is a valid and important principle in this case, and reinforces my conclusion as to congressional intent with enacting INA section 1184(c)(14)(A). *See Ardestani*, 502 U.S. at 137 (relying on the canon as "reinforce[ment]" for the independent "conclusion that any ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language"), *cited in Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008).

[157] The APA defines "adjudication" as an "agency process for the formulation of an order." 5 U.S.C. § 551(7).

[158] *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (stating that "our inquiry begins with the statutory text," because "[t]he preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there" (internal quotations and citations omitted)).

of the petition to admit or otherwise provide status to a nonimmigrant [H-2B] worker . . . ."[159] Noticeably, the text of the statute does not explicitly require the proceedings to be determined or conducted "on the record," or otherwise reference or incorporate APA section 554. I agree with my colleagues that Congress need not necessarily explicitly state in the statute that proceedings must be "on the record" to invoke the APA.[160] However, the absence of such language from the H-2B enforcement provisions is notable, at least because we cannot deduce, from the face of the statutory text alone, that Congress clearly intended to require adherence to the full panoply of section 554's procedural components in these proceedings.[161]

Congress's omission of any indication in the statute itself that H-2B enforcement proceedings must be conducted "on the record" or otherwise pursuant to APA section 554 is also significant when considered in the context of other provisions within the INA. Unlike the H-2B enforcement provisions, several of the other enforcement provisions Congress added elsewhere to the INA, both before and after the 2005 enactment of the H-2B enforcement provisions, expressly invoke and incorporate APA section 554.[162] Likewise, Congress expressly invoked APA section

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159 8 U.S.C. § 1184(c)(14)(A) (emphasis added).

160 Maj. Op. at 9–10; *see St. Louis Fuel & Supply Co.*, 890 F.2d at 448–49 ("Our decision, we emphasize, does not turn, mechanically, on the absence of magic words. What counts is whether the statute indicates that Congress intended to *require* full agency adherence to all section 554 procedural components." (emphasis original) (internal citations and quotations omitted)).

161 *City of W. Chi.*, 701 F.2d at 644 ("Thus even in adjudication, the 'on the record' requirement is significant at least as an indication of congressional intent.").

162 Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3366 (codified as amended at 8 U.S.C. § 1324a(e)(3)(B) ("The hearing shall be conducted in accordance with the requirements of section 554 of title 5, United States Code."); Immigration Act of 1990, Pub. L. No. 101-649, § 544, 104 Stat. 4978, 5060 (codified as amended at 8 U.S.C. § 1324c(d)(2)(B)) ("The hearing shall be conducted in accordance with the requirements of section 554 of title 5, United States Code."); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 833, 119 Stat. 2960, 3074 (codified as amended at 8 U.S.C. § 1375a(d)(5)(A)(ii)) (". . . after notice and an opportunity for an agency hearing on the record in accordance with subchapter II of chapter 5 of title 5 (popularly known as the Administrative Procedure Act)"). Other enforcement provisions in the INA, including some that were added shortly before the H-2B enforcement provisions, also explicitly incorporate APA section 556, which describes in detail the hearings required by APA section 554. Immigration Act of 1990 § 205 (codified as amended at 8 U.S.C. § 1182(n)(2)(B)); United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, § 402, 117 Stat. 909, 942 (2003) (codified as

554, or expressly dictated that agency determinations must be made "on the record," in numerous other enforcement and whistleblower statutes entrusted to the Secretary of Labor and, by delegation, to the Board.[163] Basic tenets of statutory construction dictate that the omission of any reference to APA section 554 or "on the record" proceedings in the H-2B enforcement provisions, in light of the inclusion of such language elsewhere in the INA, was an intentional and meaningful choice by Congress.[164] As the Supreme Court stated in *Russello v. United States*, "where

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amended at 8 U.S.C. § 1182(t)(3)(B)); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 424, 118 Stat. 2809, 3355 (codified as amended at 8 U.S.C. § 1182(n)(2)(G)(viii)).

[163] *E.g.,* 42 U.S.C. § 7622(b)(2)(A) (Clean Air Act) ("An order of the Secretary shall be made on the record after notice and opportunity for public hearing."); 42 U.S.C. § 5851(b)(2)(A) (Energy Reorganization Act) ("An order of the Secretary shall be made on the record after notice and opportunity for public hearing."); 29 U.S.C. § 216(e)(4) (Fair Labor Standards Act) ("[F]inal determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5 . . . ."); 33 U.S.C. § 1367(b) (Federal Water Pollution Control Act) ("Any such hearing shall be of record and shall be subject to section 554 of title 5."); 29 U.S.C. § 1813(b)(1) (Migrant and Seasonal Agricultural Worker Protection Act) ("In such hearing, all issues shall be determined on the record pursuant to section 554 of title 5."); 42 U.S.C. § 300j-9(i)(2)(B)(i) (Safe Drinking Water Act) ("An order of the Secretary shall be made on the record after notice and opportunity for agency hearing."); 42 U.S.C. § 6971(b) (Solid Waste Disposal Act) ("Any such hearing shall be of record and shall be subject to section 554 of title 5."); 49 U.S.C. § 31105(b)(2)(B) (Surface Transportation Assistance Act) ("[T]he complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record."); 15 U.S.C. § 2622(b)(2)(A) (Toxic Substances Control Act) ("An order of the Secretary shall be made on the record after notice and opportunity for agency hearing."); 49 U.S.C. § 42121(b)(2)(A) (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21)) ("[E]ither the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record."). Other statutes also incorporate the procedural requirements of statutes that explicitly refer to APA section 554 or require "on the record" determinations. 29 U.S.C. § 20109(d)(2) (Federal Railroad Safety Act) (incorporating AIR-21's procedural requirements); 18 U.S.C. § 1514A(b)(2) (Sarbanes-Oxley Act) (same).

[164] *See Russello v. United States*, 464 U.S. 16, 22–23 (1983); *see also Friends of the Earth*, 966 F.2d at 694 ("We think it also significant that while Congress, in enacting [the enforcement provision at issue], merely required a 'public hearing,' it required a hearing 'subject to section 554' in enacting [another provision in the same act]."); *St. Louis Fuel & Supply Co.*, 890 F.2d at 449 (finding it "significant" that unlike the enforcement provision at issue, "other prescriptions in the [same act] expressly invoke the APA" (citations omitted)); *In the Matter of Dominion Concepts, Inc.*, FAA Order No. 2005-4, 2005 WL 916050, at *4 (F.A.A. Mar. 8, 2005) ("Further, where Congress expressly invokes the APA in one part of the statute, the absence of any reference to Section 554 in the statute's hearing

Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[165]

The majority disputes the applicability of the *Russello* presumption in this case because these disparate provisions were enacted at different times and were not part of the same legislation.[166] Even if *Russello*'s selective inclusion presumption may be *strongest* if the disparate provisions are enacted at the same time, the fact that the disparate provisions here were enacted at different times does not render the presumption inapplicable in the context of this case.[167] "Courts presume that Congress legislates against the backdrop of existing statutes," and that "Congress understood the statutory framework into which it legislate[d]" the disparate provisions.[168]

Congress's frequent practice of clearly and explicitly requiring several of the INA's enforcement provisions to be adjudicated under the APA, both before and after it enacted the H-2B enforcement provisions without the same requirement, should, consistent with *Russello*, be considered purposeful, rather than a careless, one-off oversight by Congress. This is especially true because, as emphasized herein, there is no expression of contrary congressional intent anywhere in the H-2B enforcement provisions, in their legislative history, or in the broader INA statute.[169] Consequently, in context, the absence of such language in the H-2B

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provision indicates that Congress intentionally rejected any requirement that the APA govern the hearings." (citations omitted)).

165 *Russello*, 464 U.S. at 23 (internal quotations and citation omitted).

166 Maj. Op. at 21 n.87 (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("[N]egative implications raised by disparate provisions are strongest when the provisions were considered simultaneously when the language raising the implication was inserted." (internal quotations and citation omitted))).

167 *See Orton Motor, Inc. v. U.S. Dep't of Health & Human Servs.*, 884 F.3d 1205, 1214 (D.C. Cir. 2018) (applying *Russello* presumption even though the disparate provisions were enacted at different times).

168 *Id.* (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010)).

169 *See id.* ("While that [*Russello*] presumption may be overcome by specific language that is a reliable indicator of congressional intent, the [provisions at issue] included no such clear language distinguishing the new [ ] provisions from the rest of the [act] into which they were incorporated." (internal quotations and citation omitted)).

enforcement provisions indicates that Congress did not "intend[ ] to *require* full agency adherence" to APA section 554's procedural requirements.[170]

Nevertheless, the majority assumes that Congress intended for H-2B enforcement proceedings to be conducted under APA section 554 because of the quasi-judicial nature of the proceedings. For this proposition, the majority principally relies on the 1947 APA Manual.[171] As quoted by the majority, the APA Manual states "[i]t is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing."[172] Respondent and Amici similarly argue that a statutorily required hearing is the "*sine qua none*" for triggering applicability of the APA's adjudication

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[170] *St. Louis Fuel & Supply Co.*, 890 F.2d at 448–49. It is also telling that Respondent and Amici have not identified any legislative history in connection with the enactment of the H-2B enforcement provisions indicating that Congress intended these proceedings to be conducted under APA section 554. *See City of W. Chi.*, 701 F.2d at 641 ("We find no such clear intention [to trigger APA section 554] in the legislative history of the AEA, and therefore conclude that formal hearings are not statutorily required . . . ."); *cf. St. Louis Fuel & Supply Co.*, 890 F.2d at 449 ("Most directly opposing the conclusion that APA section 554 governs DOE remedial order hearings are the remarks of the legislators instrumental in the enactment of the DOE provisions" indicating that the provisions were intended to afford something less than the APA procedural requirements).

[171] Maj. Op. at 11–16. The majority contrasts agency adjudication—where the majority asserts it is assumed that Congress intended the proceedings to be conducted "on the record" under the APA—with agency rulemaking—where the majority asserts the same assumption does not apply. In addition to the APA Manual, the majority cites *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), for this distinction. In that case, the Supreme Court stated that "[b]ecause the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings . . . and because the [statute] does not require a determination 'on the record,' the provisions of [the APA] were inapplicable." *Id.* at 757. From this, the majority extrapolates that the Supreme Court suggested that it "would have viewed the absence of 'on the record' language differently when deciding whether formal APA procedures . . . were required." Maj. Op. at 15. I disagree with the majority's reading of *Allegheny-Ludlum Steel*. Although the Supreme Court made passing reference to the distinction between agency rulemaking and agency adjudication, the Court did not indicate that the distinction was essential to its decision, did not definitively hold that it would have reached a different result if the proceedings at issue had been adjudicatory in nature, and did not state that adjudicatory proceedings are presumed to be "on the record" and subject to the APA even absent a clear expression of congressional intent to that effect.

[172] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42 (1947); *see* Maj. Op. at 13. It is notable that the Attorney General hedged in the APA Manual, stating that he "believed" this assumption to hold true.

rules, absent a clear expression of congressional intent to the contrary.[173] Yet, contrary to the majority's, Respondent's, and Amici's conclusions, several Courts of Appeals have made clear that the statutory obligation to provide a hearing and the statutory obligation to make a determination "on the record" are independent, discrete procedural components of adversarial adjudication under the APA, each of which is required for APA section 554 to apply to the proceedings.[174]

The majority's, Respondent's, and Amici's interpretation also runs afoul of the rule against surplusage, which requires courts to give each word and clause in a statue operative effect, if possible, and to avoid interpreting a statutory provision in any way that would render terms superfluous, redundant, or inoperative.[175] If, as the majority, Respondent, and Amici suggest, the obligation to provide a hearing is the operative or determinative element for applicability of APA section 554, the phrase "on the record" would be rendered superfluous.

Furthermore, even accepting the general validity of the APA Manual's proposition that it might ordinarily be assumed that Congress intends for quasi-judicial adjudicatory proceedings to be conducted "on the record," the APA Manual goes on to provide a critical caveat: "Of course, the foregoing discussion [regarding the assumption of an "on the record" hearing] is inapplicable to any situation in which the legislative history or the context of the pertinent statute indicates a contrary congressional intent."[176] As set forth above, the context of the INA

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173 Resp. Br. at 10-12; Amici Br. at 5–10.

174 *Five Points Rd.*, 542 F.3d at 1125; *Aageson Grain & Cattle*, 500 F.3d at 1043; *Lane*, 120 F.3d at 108; *see also Friends of the Earth*, 966 F.2d at 692–96 (finding proceedings did not require "on the record" determination pursuant to APA section 554, despite statutory obligation to provide a hearing); *St. Louis Fuel & Supply Co.*, 890 F.2d at 448–49 (same).

175 *Barton v. Barr*, 140 S.Ct. 1442, 1458 (2020) (describing the rule against surplusage, and counting the rule "[a]mong the most basic interpretative canons" (internal citations and quotations omitted)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . . We are thus reluctant to treat statutory terms as surplusage in any setting." (internal citations and quotations omitted)); *see also* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 31 (2022).

176 APA MANUAL at 43. The majority did not include this caveat in its quotations of the APA Manual. *See* Maj. Op. 13. The majority also cites the dissenting opinion in *Cisternas-Estay v. Immigration & Naturalization Service* for the proposition that "the APA is presumed to apply to agencies." Maj. Op. at 22 & n.89 (citing *Cisternas-Estay v. Immigr. & Naturalization Serv.*, 531 F.2d 155, 163 (3d Cir. 1976) (Gibbons, J., dissenting)). Consistent with the caveat articulated in the APA Manual, the dissenting judge in *Cisternas-Estay*

indicates that Congress did not intend for APA section 554 to apply to these H-2B enforcement proceedings. Whereas several enforcement provisions within the INA expressly invoke APA section 554, the H-2B enforcement provisions, conspicuously, do not.[177] Consistent with basic tenets of statutory construction, I regard this as sufficient to overcome the APA Manual's proffered assumption, particularly because of the sovereign immunity issues at stake with the application of EAJA.[178]

Respondent and Amici also cite several cases in support of the proposition that the quasi-judicial nature of the proceedings dictates that the hearing must necessarily be "on the record" under the APA. However, in most of the cases, there was some affirmative indication of congressional intent, beyond the mere quasi-judicial nature of the proceedings, that contributed to the courts' conclusions that APA section 554 applied. For example, in *Dantran, Inc. v. United States Department of Labor*, the statute at issue incorporated by reference the enforcement authority of another statute that expressly required adherence to the APA.[179] In *Seacoast Anti-Pollution League v. Costle* and *Marathon Oil Co. v. Environmental Protection Agency*, the courts observed that the statute at issue expressly provided that the agency's adjudicatory determinations were subject to judicial review, and the judicial review provision, as written, implied that the agency's determination had to be made "on the record."[180] The court in *Seacoast* also relied on the context of the act

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recognized that the general rule of thumb upon which the majority relies is not applicable where "Congress has [ ] specifically deviated from the APA by either adaptations of its provisions within the INA itself or statements in the legislative history." *Cisternas-Estay*, 531 F.2d at 163 (citations omitted).

177 The fact that Congress has so often explicitly made clear that certain enforcement provisions are governed by the APA's formal adjudication rules tends to undermine the majority's position that such explicit pronouncements are unnecessary and assumed.

178 The APA Manual does not discuss sovereign immunity, or how a tribunal's obligation to narrowly construe waivers of sovereign immunity impacts the Attorney General's analysis and assumptions regarding congressional intent. *Cf. Friends of the Earth*, 966 F.2d at 696 ("Friends' argument that recovery under the EAJA is precluded only if 'Congress explicitly provided that something less than full formal procedures would be made available under the statute in question,' erroneously inverts the presumption against waiver of sovereign immunity.").

179 *Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 47 (1st Cir. 2001).

180 *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 n.6, 878 n.10 (1st Cir. 1978); *Marathon Oil Co. v. Env't Prot. Agency*, 564 F.2d 1253, 1263 (9th Cir. 1977). *But see City of W. Chi.*, 701 F.2d at 643-44 (distinguishing *Seacoast* and *Marathon Oil Co.* because of the fact that the statute in those cases included a provision providing for judicial review, the language of which implied that the adjudicatory proceedings had to be determined "on the record."). Although the court in *Seacoast* found it "significant" that the statute at issue

at issue, which, according to that court, suggested that the agency adjudication was intended to be conducted under APA section 554.[181] Finally, in *Five Points Rd.*, *Aageson Grain & Cattle*, and *Lane*, the act at issue made repeated references to the administrative record and provided for trial-type procedures consistent with the APA.[182] No such affirmative indication of congressional intent exists in this case.

Relatedly, the majority opines that due process concerns, the nature of the interests and rights involved, and the immediate economic consequences that could result from these H-2B enforcement proceedings weigh in favor of concluding that Congress intended to require these proceedings to be conducted under APA section 554.[183] I agree with the Administrator that these circumstances do not evince congressional intent or necessitate full compliance with APA section 554's procedural components. As the Administrator correctly observes, Congress permits the Secretary of Labor to impose monetary penalties, debar violators, and impose other administrative remedies in other enforcement proceedings without even conducting a hearing, let alone an adversarial adjudication conducted in compliance with the full range of procedures required by the APA.[184] Likewise, the

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expressly provided for judicial review of the agency's adjudicatory decision, it nevertheless concluded that the opportunity for judicial review was insufficient, on its own, to "satisfy[y] an 'on the record' requirement" under the APA. 572 F.2d at 876 n.6. The court recognized that the APA "makes it clear that in some cases review of agency action can be had though the action was not on the record." *Id.* The court's rationale in *Seacoast* stands in contrast to the majority's assertion that an "evidentiary record [consistent with the APA] is required for appeals of administrative final decisions to the federal courts." Maj. Op. at 16 & n.62.

181 *Seacoast*, 572 F.2d at 878 n.10.

182 *Five Points Rd.,* 542 F.3d at 1126; *Lane*, 120 F.3d at 109; *see also Aageson Grain & Cattle*, 500 F.3d at 1044.

183 Maj. Op. at 15–18. The majority also cites to the Department's ALJ regulations and H-2B enforcement regulations as examples of adversarial procedure (*id.* at 18 n.72), but as the majority also recognizes (*id.* at 11 n.44), regulatory enforcement procedures that track the APA are not relevant in sovereign immunity cases; what we are required to examine is what Congress intended.

184 *See Cody-Ziegler, Inc. v. Adm'r, Wage & Hour Div., U.S. Dep't of Labor*, ARB Nos. 2001-0014, -0015, ALJ No. 1997-DBA-00017, slip op. at 15 (ARB Dec. 19, 2003) (citations omitted) ("The ARB has held that administrative proceedings under the DBA and Related Acts are not subject to the attorney's fee and costs provisions of the EAJA, 5 U.S.C.A. § 504, as they are not 'adversarial adjudications' within the meaning of the EAJA, because there is no statutory requirement for an administrative proceeding conducted pursuant to the APA and as DBA proceedings are not listed in the enumerated types of DOL administrative proceedings subject to the EAJA."); *Roderick Constr. Co.*, No. 1988-39, slip op. at 10 (WAB Dec. 20, 1990) ("Accordingly, since the Davis-Bacon Act does not set forth a hearing

Administrator is correct that a litigant's right to due process does not necessarily require a formal adversarial adjudication of the type contemplated by APA section 554 in all instances.[185]

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requirement, a Davis-Bacon Act administrative proceeding is not an 'adversary adjudication' within the meaning of the EAJA and the EAJA is not applicable to such proceedings.").

[185] *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (recognizing the "truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" and that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." (internal quotations and citations omitted)); *2-Bar Ranch Ltd. P'ship v. U.S. Forest Serv.*, 996 F.3d 984, 994–95 (9th Cir. 2021) (concluding that due process does not necessarily require administrative proceedings to adhere to APA section 554); *see also Smedberg Machine & Tool, Inc. v. Donovan*, 730 F.2d 1089, 1093 (7th Cir. 1984) ("Plaintiffs argue that the labor certification review proceedings is [sic] compelled by the due process clause of the Fifth Amendment (U.S. Const., Amend. V) [and, therefore, is an adjudication under APA section 554] even if the proceeding is not mandated by statute . . . . In urging an expansive reading of that clause, however, plaintiffs fail to recognize that the EAJA is a waiver of the sovereign's traditional immunity from claims for attorneys fees." (citation omitted)). The majority cites the Seventh Circuit's statement in a footnote in *City of West Chicago v. U.S. Nuclear Regulatory Commission* that "if a formal adjudicatory hearing is mandated by the due process clause, the absence of the 'on the record' requirement will not preclude application of the APA." *City of W. Chi.*, 701 F.2d at 645 n.11 (citations omitted); Maj. Op. at 17 n.65. However, the fact that the statutory language does not explicitly call for the proceedings to be conducted 'on the record' does not *preclude* application of the APA when due process mandates such proceedings does not mean that due process requires, in all instances, that adjudications be conducted under the APA. Indeed, the Seventh Circuit went on to state that even if due process concerns were implicated by the nature of the adjudicatory proceedings in that case, the procedures afforded to the litigants, though not necessarily in compliance with APA section 554, nevertheless constituted sufficient process. *Id.* at 645–46 (citing *Mathews*, 424 U.S. 319). The majority also references *Wong Yang Sung v. McGrath*, in which the Supreme Court determined that the APA applied to deportation proceedings, even though the statute at issue did not expressly require any hearing or adjudication in such proceedings. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48–51 (1950), *superseded by statute*, Supplemental Appropriation Act, 1951, Pub. L. No. 81-843, 64 Stat. 1044, 1048, *as recognized in Ardestani*, 502 U.S. at 133; Maj. Op. at 17 n.65. The Supreme Court reasoned that due process under the Constitution required the agency to conduct hearings in accordance with the APA. Similarly, the majority references *Collord v. United States Department of the Interior*, which cited *Wong* for the broad proposition that "hearings necessitated by the Constitution are included in the scope of hearings that are covered by § 554 of the APA." *Collord v. U.S. Dep't of the Interior*, 154 F.3d 933, 936 (9th Cir. 1998); Maj. Op. at 17 n.65. Yet, as the cases cited above, including *Mathews*, make clear, due process does not necessarily require a formal hearing and the full range of other procedural requirements dictated by the APA in all instances. In any event, the majority seems to acknowledge that *Wong* and *Collord* may not be useful for their analysis in this case: "We need not explore the merits of this [*Wong*/*Collord*] analysis involving a statute that does

Finally, the majority cites a statutory note included with the 2005 amendments to the INA as evidence that Congress intended for the APA's formal adjudication provisions to apply to these H-2B enforcement proceedings.[186] That note, identified as section 407, "Exemption from Administrative Procedure Act," provides that certain new provisions added to the INA with the 2005 amendments concerning the limitations on the number of H-2B visas that could be issued each year (section 402), a fraud prevention and detection fee for employers applying for H-2B workers (section 403), and rules allocating H-2B visas over the fiscal year (section 405), were exempt from the APA's formal rulemaking requirements.[187] The statutory note does not mention the H-2B enforcement provisions (section 404 of the 2005 amendments), or the applicability of the APA's formal adjudication rules thereto.

The majority appears to suggest that because Congress expressly exempted other sections of the 2005 amendments from the APA's rulemaking requirements, without making reference to the H-2B enforcement provisions, Congress intended for the APA's formal adjudication provisions to apply to these H-2B enforcement proceedings. I disagree. It is clear that with the creation of section 407, Congress was singularly focused on ensuring that the new provisions concerning numerical limits, allocation, and the anti-fraud fee were exempted from the APA's *rulemaking* requirements.[188] Congress wanted to ensure that the new legislation could be

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not provide for a hearing as the statute at issue provides notice and opportunity for a hearing [citing *Smedberg*, 730 at 1092–93]." Maj. Op. at 17 n.65.

186 *Id.* at 23 n.90.

187 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 407, 119 Stat. 231, 321.

188 *Id.* (exempting the enumerated provisions from the APA "or any other law relating to rulemaking, information collection or publication in the Federal Register"). Although section 407 exempts certain provisions from the "Administrative Procedure Act," generally, the subsequent, more specific enumeration of "or any other law relating to rulemaking, information collection or publication in the Federal Register" clarifies that the exemption is from the APA's rulemaking rules, specifically. *See Yates v. United States*, 574 U.S. 528, 543–46 (2015) (describing the interpretive cannons of *noscitur a sociis*—pursuant to which the tribunal should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress"—and *ejusdem generis*—providing that "[w]here general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (internal quotations and citations omitted)); *see also* 5 U.S.C. § 553 (governing APA rulemaking).

immediately and efficiently implemented, free of incumbrances and delays that might result from formal rulemaking requirements under the APA.[189] In contrast, this case concerns the applicability of the APA's *adjudicatory* requirements. It is inappropriate to conclude that by explicitly excluding certain provisions from the APA's rulemaking requirements, Congress also implicitly meant to indicate that the H-2B enforcement provisions were subject to the APA's distinct adjudicatory requirements.[190]

In sum, considering the absence of any indication—either in the H-2B enforcement provisions themselves, in the context of the broader INA, or in the legislative history of the H-2B enforcement proceedings—that Congress intended to require these proceedings to comply fully with APA section 554, and constrained as we are by the strict construction of waivers of sovereign immunity, the Board should not hold that EAJA applies in this case.

[redacted]

SUSAN HARTHILL
Chief Administrative Appeals Judge

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189 Emergency Supplemental Appropriations Act § 407 (giving the agency the power to eschew the APA and other rulemaking requirements if such requirements would "impede the expeditious implementation of" the new legislation.). The statements of Senators sponsoring the 2005 amendment bear out that Congress only intended section 407 to address the applicability of APA rulemaking rules and to ensure the prompt implementation of the new legislation. 151 Cong. Rec. S4833 (statement of Sen. Mikulski), S4843 (statement of Sen. Gregg). Conversely, there does not appear to be any indication in the legislative history surrounding the 2005 amendments that Congress intended section 407 to render the H-2B enforcement provisions subject to the APA's adjudication rules.

190 Indeed, my colleagues and Amici take great care to distinguish between the considerations and expressions of congressional intent that should lead a tribunal to conclude that the APA applies to agency adjudication and the considerations and expressions of congressional intent that should lead a tribunal to conclude that the APA applies to agency rulemaking. Maj. Op. at 11–15; Amici Br. at 6–7. It seems incongruous, then, that the majority suggests that Congress's pronouncement regarding the inapplicability of APA rulemaking rules to certain provisions gives some indication of Congress's intent concerning the applicability of APA adjudication rules to a different provision.