

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 19 March 2013**

CASE NO.: 2012-TNE-00010

*In the Matter of:*

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

v.

5 STAR FORESTRY, LLC,  
Respondent.

Before: Richard M. Clark  
Administrative Law Judge

**DECISION AND ORDER ASSESSING CIVIL MONEY PENALTIES**

This case arises under the H-2B provisions of the Immigration and Nationality Act (“INA”), as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(B) and 1184(c)(1), and the implementing regulations promulgated under 20 C.F.R. Part 655, subpart A. Jeannie Gorman, Attorney at Law, represented Administrator, Wage and Hour Division, U.S. Department of Labor (“Administrator”). Erik Thorleifson, Attorney at Law, represented 5 Star Forestry, LLC (“Respondent”).

On March 23, 2012, Administrator issued a Summary of Violations to Respondent, assessing \$20,809.89 in back wages owed to H-2B visa workers and civil money penalties (“CMPs”) in the amount of \$56,000 for six separate violations it found based on Respondent’s H-2B visa application. Administrator’s Trial Exhibits (“ATX”) at 117. On April 4, 2012, Respondent objected to the Administrator’s findings and requested a hearing under 20 C.F.R. § 655.71. ATX at 124-25. The Administrator later dismissed one of the violations, and now seeks a total of \$46,000 in CMPs for five violations.

On October 11, 2012, the parties entered into a written stipulation whereby Respondent agreed to pay the \$20,809.89 in back wages owed to the H-2B visa workers, and stipulated that the violations occurred, but the parties agreed to have me decide the appropriate amount of CMPs to be assessed. Thorleifson Decl. ¶ 8.

On November 8, 2012, I received simultaneous briefing on the issue of the Administrator's assessment of CMPs from Administrator and Respondent. Administrator, in addition to its closing briefing, attached Exhibits A-G and the Declarations of Donna Hart, Manuel Lucero, Ramon Huaracha, David Miljoner, and Gerardo Huaracha. Respondent submitted the Declarations of Mike Dominguez and its attorney Mr. Thorleifson, along with supporting exhibits. All exhibits and declarations are admitted into evidence.

For the reasons discussed below, Respondent is ordered to pay reduced CMPs in the amount of \$32,000.

## **I. ISSUES IN DISPUTE**

The matter presents the following disputed issue:

Whether the \$46,000 in CMPs assessed by the Administrator against Respondent were appropriate, in light of the remaining violations to which Respondent stipulated.

## **II. STIPULATIONS**

The parties agreed to the following stipulated facts in this matter:

1. Respondent willfully misrepresented a material fact on the Application for Temporary Employment Certification (TEC), Form ETA 9142, it filed on January 7, 2010, specifically Section B: #9 and Appendix B.1: Attestation 13, when it misrepresented its temporary need for H-2B workers, in violation of 20 C.F.R. § 655.60(a).
2. Respondent willfully misrepresented a material fact on the TEC, specifically Appendix B.1: Employer Declaration, when it misrepresented its certification of Attestation No. 3 regarding recruitment and hiring of U.S. workers, in violation of 20 C.F.R. § 655.60(a).
3. Respondent substantially failed to meet a condition on the TEC, specifically Appendix B.1: Employer Declaration regarding the offered wage rate, in violation of 20 C.F.R. § 655.60(b).
4. Respondent substantially failed to meet a condition on the TEC, specifically Appendix B.1: Employer Declaration regarding notification of the U.S. Department of Homeland Security of H-2B employees' early separation, in violation of 20 C.F.R. § 655.60(b).
5. Respondent substantially failed to meet a condition on the TEC, specifically Appendix B.1: Employer Declaration regarding the geographic location of intended employment of H-2B workers, in violation of 20 C.F.R. § 655.60(b).

6. Administrator withdrew original violation #4 from the original summary of violations (failure to meet a condition of application, ETA Form 9142, Appendix B, Attestation No. 7: Compliance with other laws during the period of employment – failure to comply with Federal, State, and/or local employment-related laws and regulations including all health and safety laws during the period of employment, in violation of 20 C.F.R. § 655.60(b)) and is not seeking a CMP on for this violation.

The foregoing stipulations are accepted for all purposes in this matter.

### III. ANALYSIS

#### A. Legal Framework

The H-2B visa program provides for the admission of nonimmigrants to the United States to perform temporary non-agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(B). Such workers may be granted these temporary work visas where not enough workers in this country are able, willing, qualified, and available to perform these services. *Id.*; see 20 C.F.R. Part 655, subpart A. Employers who desire H-2B workers submit a labor petition for H-2B visas that will admit these workers to the United States. 8 U.S.C. § 1184(c)(1). The Administrator has been delegated enforcement responsibility for ensuring that H-2B workers are employed in compliance with the statutory and regulatory labor certification requirements. 8 U.S.C. §§ 1184(c)(14)(A)-(B), 1103(a)(6). This includes the power to impose administrative remedies, including civil money penalties, on violators of the H-2B visa program. *Id.* §§ 1184(c)(14)(A)(i), (B). The applicable implementing regulations are set forth in 20 C.F.R. Part 655.<sup>1</sup>

#### B. Civil Money Penalties

A civil money penalty may be assessed by the Administrator for each violation of the work contract or regulations. 8 U.S.C. §§ 1184(c)(14)(A)(i); 20 C.F.R. § 655.65(a)-(c). The Administrator's determination of CMPs shall set forth the reasons for its findings. 20 C.F.R. § 655.70(c)(1). Civil money penalties for H-2B violations are not to exceed \$10,000 per violation. 8 U.S.C. §§ 1184(c)(14)(A)(i); 20 C.F.R. § 655.65(a)-(c).

The implementing regulations contemplate three different bases to assess CMPs. The first concerns an employer's willful failure to pay an employee's wages or willful requirement that an employee pay fees or prohibited expenses, where the Administrator may assess CMPs that are equal to the difference between the amount that should have been paid and the amount

---

<sup>1</sup> The regulations became effective on January 18, 2009. In 2012, the Department of Labor updated the regulations governing H-2B workers. Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10038-01 (Feb. 21, 2012). However, "[o]n April 26, 2012, the U.S. District Court for the Northern District of Florida issued an order temporarily enjoining the Department from implementing or enforcing the 2012 H-2B Final Rule pending 'the court's adjudication of the plaintiffs' claims.'" Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 28765; see *Bayou Lawn & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, slip op. at 8 (Apr. 26, 2012). In light of this pending injunction, all H-2B labor certification applications must be filed under the 2008 regulations. 77 Fed. Reg. 28765. Therefore, all references in this order are to the 2008 regulations, which went in effect in 2009.

actually paid to the worker(s), up to \$10,000. 20 C.F.R. § 655.65(a). The second contemplates that the Administrator may make an assessment of up to \$10,000 in CMPs for an employer's termination or layoff of an H-2B worker within the designated work period. 20 C.F.R. § 655.65(b). The third dictates that the Administrator may assess CMPs of up to \$10,000 for an employer's substantial failure to meet a condition of the Temporary Employment Certification ("TEC"), a willful misrepresentation in the application, or a failure to cooperate with a Department of Labor ("DOL") investigation. 20 C.F.R. § 655.65(c).

In determining an appropriate CMP, the Administrator "shall consider the type of violation committed and other relevant factors." 20 C.F.R. § 655.65(g). "[T]he highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers." 8 U.S.C. § 1184(c)(14)(C); 20 C.F.R. § 655.65(g). Under the INA, a "willful failure" means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to Section 214(c) of the INA. 20 C.F.R. § 655.65(e); *see McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The term "substantial failure" is also defined under the implementing regulations, and means a "willful failure to comply with the requirements of [the H-2B program] that constitutes a significant deviation from the terms and conditions of a petition." 8 U.S.C. § 1184(c)(14)(D); *accord* 20 C.F.R. § 655.65(d).

In addition to considering the willfulness of the violation, in determining the amount of the civil money penalty to be assessed, the Administrator may also consider other discretionary factors, which include but are not limited to the following:

- (1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;
- (2) The number of U.S. or H-2B workers employed by the employer and affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);
- (5) The employer's explanation of the violation or violations;
- (6) The employer's commitment to future compliance; and
- (7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss to the employer's workers.

20 C.F.R. § 655.65(g).<sup>2</sup>

---

<sup>2</sup> In its "H-2B CMP Computation Summary Sheet," Administrator included a list of these seven discretionary factors and its guidelines in adjusting the CMP according to these factors. ATX at 116. It noted for factor 1, if employer had a previous history of violations, the CMP should be increased up to 50%. For factor 2, the instructions were to

After the Administrator assesses CMPs, a party may seek an administrative law judge's ("ALJ's") review of the assessment of CMPs. 20 C.F.R. § 655.71(a). The ALJ "may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator," with the "reason or reasons for such order" to be stated in the decision. *Id.* § 655.75(b). This includes independently weighing the mandatory or discretionary factors used to assess CMPs. *Admin. v. Prism Enters. of Cent. Fl.*, ALJ No. 2001-LCA-00008, slip op. at 13 (ALJ June 22, 2001), *aff'd*, ARB Case No. 01-080 (ARB Nov. 25, 2003). Respondent has sought review of the Administrator's assessment of CMPs, contending they were excessive, arbitrary, and capricious. Respondent's Brief at 3. The appropriateness of the CMPs is discussed below.

## 1. The Violations

The Administrator assessed CMPs on five violations admitted by Respondent. In its assessment of CMPs, the Administrator noted that the purpose of its enforcement of the H-2B visa program is to (1) protect displaced U.S. workers and (2) ensure that foreign workers in the program are not treated adversely or unfairly so as to permit an employer to gain a competitive advantage by employing them. Administrator's Brief at 10. It asserts that Respondent was approved for an H-2B visa work program in Mississippi that never occurred, fabricated a list of affected domestic workers, and did not make any effort to notify the DOL when conditions affecting the application changed. *Id.*; Hart Decl. ¶ 10; Lucero Decl. ¶ 14; R. Huaracha Decl. ¶ 12. The Administrator explained that serious penalties are appropriate for misuse of the program, and serve as a deterrent for future violators. Administrator's Brief at 10. Generally, the Administrator contends that the penalties were applied consistently with its authority, policies, procedures, and the regulatory guidelines. *Id.*

The investigative process began in August 2010, when Wage and Hour Investigator ("WHI") Gerardo Huaracha was assigned to investigate Respondent's compliance with the H-2B visa program and recommended charging Respondent with several violations and suggested CMPs. G. Huaracha Decl. ¶ 5, 16; Hart Decl. ¶ 5. In December 2010, he met and discussed the matter with Ramon Huaracha, Regional Enforcement Coordinator, Manuel Lucero, Assistant District Director, as well as District Director Donna Hart, who agreed with WHI G. Huaracha's conclusions, and found they were consistent with Wage and Hour policy and procedures; they recommended that District Director Hart impose a total penalty of \$56,000, of which \$46,000 remains disputed.<sup>3</sup> Lucero Decl. ¶¶ 9, 12-13; R. Huaracha Decl. ¶ 8-9. Mr. R. Huaracha wrote that since Respondent stipulated the violations were willful or substantial, the Administrator's

---

increase or decrease the CMP up to 50% depending on the number of workers affected by the violation. For factor 3, the instructions were to increase or decrease the CMP up to 50% depending on the nature and severity of the violation. For factor 4, where employer made a reasonable, good faith effort to comply with the H-2B visa provisions, the instructions were to decrease CMPs by 10%. For factor 5, where the employer made a plausible explanation for the violations, the instructions were to decrease CMPs by 10%. For factor 6, where employer made a commitment to future compliance, the CMP was to be decreased 10%. For factor 7, the instructions were to increase CMPs up to 50% where the employer enjoyed financial gain from the violation or there was a potential financial loss to employer's workers. *Id.* Based on the CMP Computation Summary Sheet and Mr. R Huaracha's declaration, R. Huaracha Decl. ¶ 14, Administrator began all CMPs at a baseline of \$5,000 and the CMPs were increased or reduced according to these factors.

<sup>3</sup> The original violation 4 and the accompanying CMP of \$10,000 was dropped by Administrator as part of the stipulations.

policy dictated that a base CMP of \$5,000 should be assessed for each violation, but could be increased or decreased taking into account the seven discretionary factors set forth above. R. Huaracha Decl. ¶ 14.

a. Violation #1: willful misrepresentation of material fact

The Administrator assessed a \$5,000 penalty for Respondent's willful misrepresentation of a material fact on its TEC Application when it misrepresented its temporary need for H-2B workers in violation of 20 C.F.R. § 655.60(a).

Respondent wrote in the TEC that it had a temporary need for 63 tree planters to work in Jones, Jefferson Davis, and Forrest Counties, Mississippi. Administrator's Brief at 6-7; ATX at 1, 19. Respondent admitted that its H-2B workers ultimately never performed work in Mississippi, ATX at 133; instead, the workers arrived in Missoula, Montana, where they were split into two groups and conducted work in Montana, Idaho, and Washington. G. Huaracha Decl. ¶ 10. Respondent initially told its work recruiter in Mexico that the workers were not able to work regularly in Mississippi on account of inclement weather, but later said that the work was no longer available in Mississippi due to the unilateral revocation of a contract for services in that state with Diversified Forestree Management. Administrator's Brief, Ex. C, D; *see* ATX at 135. In its request for a hearing with this Office, Respondent wrote that at the time of its H-2B visa application, the facts, as stated in the TEC regarding the need for workers in Mississippi, were true, but that subsequently, after approval of the application, "conditions changed." ATX at 124, 136. Given these facts, Administrator contended, and Respondent stipulated, that it willfully misrepresented its temporary need for H-2B workers.

Administrator offered several reasons in support of a \$5,000 CMP for this violation. First, the District Director described willful misrepresentation violations as "the most serious violations possible." Hart Decl. ¶ 10. Of the seven discretionary factors listed above, Administrator found that factors 2, 3, 4, and 7 weighed in favor of a strong CMP. 20 C.F.R. § 655.65(g). Administrator noted that 42 H-2B workers were affected by the misrepresentation of the working location. G. Huaracha Decl. ¶ 9; Hart Decl. ¶ 12; Lucero Decl. ¶ 17. Administrator argued that the gravity of the violations were very serious, because they were willful and the "entire scheme of work," including the location, "was misrepresented." Lucero Decl. ¶ 17; Thorleifson Decl., Ex. B at 13. It also argued that Respondent did not act in good faith, as it never attempted to amend its TEC application or notify the DOL once it realized the work was no longer available in Mississippi. Lucero Decl. ¶ 19; *see* Thorleifson Decl., Ex. B at 13. Respondent admits that it did not properly amend its TEC to encompass the new geographic regions. Respondent's Brief at 4. The District Director also noted that the loss of work in Mississippi resulted in a financial loss to the H-2B workers. Hart. Decl. ¶ 18.

There are, however, mitigating factors present. Administrator conceded that discretionary factors 1, 5, and 6, as numbered above, weighed against a higher CMP. 20 C.F.R. § 655.65(g); Hart. Decl. ¶ 19. Specifically, it was not aware of any prior history of violations by Respondent. Hart Decl. ¶ 12; Lucero Decl. ¶ 16; R. Huaracha Decl. ¶ 15; Thorleifson Affidavit, Ex. B at 12. Administrator also conceded that Respondent attempted to explain this violation by citing a breached contract by Diversified Forestree, which obviated the need for workers in

Mississippi as planned. 20 C.F.R. § 655.65(g)(5); Hart Decl. ¶ 16; Lucero Decl. ¶¶ 21-22; Respondent's Brief at 2, 4. Although Respondent initially indicated that Diversified Forestry verbally breached the contract, Lucero Decl. ¶ 21, the contract, as attached in Exhibit C, was signed by Respondent's President Mr. Dominguez on September 1, 2009, and by the contractor, presumably of Diversified Forestry, on October 26, 2009, which suggests there was a binding contract for Respondent's work in Mississippi that was ultimately not fulfilled. Administrator's Brief, Ex. C; *see* Hart Decl. ¶ 16 n. 1; Miljoner Decl. ¶ 10; Dominguez Decl. ¶ 4. On the other hand, Respondent, somewhat inconsistently, also cited inclement weather for the lack of regular work, Administrator's Brief, Ex. D, but even so, Administrator conceded that Respondent's plausible explanation weighed against the imposition of a higher CMP. Hart Decl. ¶ 16; Lucero Decl. ¶ 22; R. Huaracha Decl. ¶ 19; Thorleifson Decl., Ex. B at 13. Furthermore, Respondent expressed a commitment to future H-2B visa compliance, and Mr. Dominguez informed Administrator that he hired a consultant to advise him about federal regulatory requirements and future compliance, which Administrator conceded weighed against a higher CMP. Hart Decl. ¶ 17; Lucero Decl. ¶ 23; R. Huaracha Decl. ¶ 20; Thorleifson Decl., Ex. B at 13. With respect to the last discretionary factor, although Administrator contended that the H-2B workers suffered a financial loss on account of this misrepresentation, it also admitted that there was no analysis as to whether Respondent received a financial gain due to the violation. Lucero Decl. ¶ 24; Thorleifson Decl., Ex. B at 13. On the whole, however, Mr. Lucero and Mr. R. Huaracha wrote that "the discretionary factors did not overwhelmingly tip in favor of recommending a lower CMP." Lucero Decl. ¶ 26; R. Huaracha Decl. ¶ 22.

Respondent requests that the \$5,000 penalty for this violation be reduced to \$1,000. Respondent's Brief at 5. In support of the proposed reduction, it relied on Administrator's admissions that this was Respondent's first violation, that there was no finding that Respondent achieved a financial gain on account of the violation, and that it committed to future compliance. *Id.* at 4. Respondent also emphasized that the only reason for the violation was that the contract Respondent thought was in place for work in Mississippi was breached. *Id.* at 4. It also generally takes issue with Administrator's reasoning for the CMP amount, arguing that Administrator's assertion that willful violations or substantial failures to comply are, by definition, serious, is circular reasoning that would justify high CMPs for any violation, as the violations must be willful or substantial failures to comply in order to warrant CMPs in the first place. Respondent's Brief at 4; *see* 20 C.F.R. § 655.65(a), (c). It also contends that Administrator's reasoning that willful or substantial failures to comply are, by their nature, serious, makes the third discretionary factor, "the gravity of the violation or violations," set forth 20 C.F.R. § 655.65(g)(3), mere surplusage. Respondent's Brief at 5. However, although Mr. Dominguez offered an explanation for the violation by writing that during the several months that the H-2B visa application was pending, its contract in Mississippi "fell through," he also brought in the workers despite the change of plans. Dominguez Decl. ¶ 7. Mr. Dominguez explained that it was too late to amend the application and still obtain workers for the season. *Id.* ¶ 8. The strong implication from his statement is that during the H-2B visa application process, he became aware that the TEC contained erroneous information as to the need for workers, but did not seek to amend the application or notify the DOL. Dominguez Decl. ¶ 10.

In light of the foregoing discussion, I affirm the Administrator's assessment of a \$5,000 CMP for this violation. Respondent stipulated it willfully misrepresented its temporary need for H-2B workers. As mitigating factors, I find that Respondent had no history of previous violations, committed to future compliance, offered a plausible explanation for the violation based upon the breached contract, and there was no evidence that Respondent benefitted financially from this particular violation. On the other hand, Respondent did not act in good faith once it learned that the work was no longer needed in Mississippi. Rather than alert the DOL or submit an amended H-2B visa application, President Dominguez conceded that he was told it was too late to amend the application and still obtain workers, so no notification of the changed conditions was given. As a result, there was no longer a temporary need for workers in Mississippi, and the workers had to travel to other locations, thereby altering the purported scheme for the temporary work. I find this violation to be serious, as the purpose of the H-2B visa program is to provide the admission of temporary foreign labor only where there is a need for such labor, which, at the time the H-2B visa workers entered the United States in this case, was no longer present as represented in the TEC. All 42 workers who entered the States and worked for Respondent were affected by this violation, as none ultimately worked in Mississippi as planned, and each temporary worker worked fewer hours than originally planned.

In sum, a CMP of \$5,000 is consistent with Administrator's stated policy of issuing a base CMP of \$5,000 for each willful violation or substantial failure to comply, which can be adjusted upward or downward by taking into account the discretionary factors. R. Huaracha Decl. ¶ 14; *see* 20 C.F.R. § 655.65. Here, as the discretionary factors split fairly evenly for and against a higher CMP, a resulting CMP of \$5,000 appears appropriate and reasonable.

b. Violation #2: willful misrepresentation of a material fact

The Administrator assessed a \$6,000 penalty for Respondent's willful misrepresentation of a material fact on the TEC Application when it misrepresented its certification regarding the recruitment and hiring of U.S. workers, in violation of 20 C.F.R. § 655.60(a).

As part of the TEC, Respondent verified that the jobs for which H-2B workers were sought were open to any qualified U.S. worker, and that it conducted the required recruitment, but was unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job. ATX at 7; *see* 8 U.S.C. § 1101(a)(15)(H)(ii)(B). Respondent submitted a Recruitment Report which was accepted by the DOL, ATX at 25, but according to the Administrator's investigation, of the 20 U.S. applicants listed in the Recruitment Report, WHI G. Huaracha was only able to contact 6 of these applicants, and determined that the information these applicants provided was factually inconsistent with the information contained in Respondent's report. G. Huaracha Decl. ¶ 14. For example, Administrator included a statement from Marcus Duncan, who said he applied for a tree planting position with Respondent, and called to follow up, but was never contacted by Respondent, whereas the Recruitment Report said it left two messages with Mr. Duncan and did not receive a call back. *Compare* ATX at 97 *with* ATX at 25. It also included a statement from Christopher Hardy, who told WHI G. Huaracha that he did not recall ever applying for a position with Respondent, although the Recruitment Report indicated Mr. Hardy was not accepted because he lived too far from the worksite. G. Huaracha Decl. ¶ 14; *compare* ATX at 101 *with* ATX at 25. It included a statement from Carolyn Jones, who told

Administrator that she applied but was never called by Respondent, whereas Respondent's Recruitment Report indicated that Ms. Jones was accepted for the job. G. Huaracha Decl. ¶ 14; *compare* ATX at 103 *with* ATX at 25. Respondent stipulated that it willfully misrepresented a material fact regarding the recruiting and hiring of U.S. workers.

On account of the willfulness of this misrepresentation, Administrator argues that this violation was very serious and eligible for the "highest penalty" pursuant to 20 C.F.R. § 655.65(g). Administrator's Brief at 8; Hart Decl. ¶ 10; Thorleifson Decl., Ex. B at 14. It argues that Respondent did not act in good faith, as it misrepresented its need for foreign workers with what it called a "fabricated recruitment report." Thorleifson Decl., Ex. B at 14. It contends that Respondent failed to explain the inadequacy of its recruitment report. *Id.* Mr. Lucero and Mr. R. Huaracha wrote that "the discretionary factors did not overwhelmingly tip in favor of recommending a lower CMP." Lucero Decl. ¶ 27; R. Huaracha Decl. ¶ 23.

Respondent argued that the Administrator's findings with respect to this violation are "questionable." Respondent's Brief at 5. Respondent notes, for example, that according to the Administrator, Mr. Gordon Pierrelus never heard of or applied to Respondent, Thorleifson Decl., Ex. C at 1, ATX at 107-08, yet Respondent received a copy of Mr. Pierrelus' resume in December 2009, before it submitted its H-2B visa application in January 2010. Thorleifson Decl., Ex. C at 1; Dominguez Decl. 15, Ex. A; *see* ATX at 1. Respondent also contends that another worker, Shelley McKeen, was contacted by Respondent and told Administrator that she did not want to perform the job because of the heavy manual labor required, which is not necessarily inconsistent with Respondent's Recruitment Report, which indicated that Ms. McKeen was accepted for the position. Respondent's Brief at 5-6; Thorleifson Decl., Ex. D; *compare* ATX at 105-06 *with* ATX at 25. On account of these discrepancies, Respondent contends that Administrator's evidence is unreliable, and that at the very least, the evidence demonstrates that Respondent made a "good faith effort" to comply with the recruiting of U.S. workers requirement at the time its TEC was submitted. Respondent's Brief at 6; *see* 20 C.F.R. § 655.65(g)(4). It also contends it was never given the chance to explain its side of the Recruitment Report to Administrator. Respondent's Brief at 6. Respondent added that the absence of a history of prior violations, Administrator's circular reasoning as to the gravity of the violation because of its willfulness, its commitment to future compliance, and the fact that Administrator made no finding of financial gain on account of this violation all weigh in favor of a reduction of the CMP to \$1,000. *Id.* at 6-7.

In light of the above discussion, I find a reduction of Administrator's CMP of \$6,000 to \$2,500 is warranted. Although Respondent conceded that it willfully misrepresented its recruitment of U.S. workers, that, in itself cannot justify the CMP of \$6,000; 20 C.F.R. § 655.65(c) merely states that the Administrator "may assess" CMPs in an amount of up to \$10,000 per violation for any willful misrepresentation in the application. As CMPs may only be assessed in instances of willful violations or substantial failures to comply with the program, *see* 20 C.F.R. § 655.65(a)-(c), the Administrator's logic that the violation was very serious on account of its willfulness is somewhat circular. Furthermore, Mr. R. Huaracha indicated that, as a matter of policy, Administrator begins at a base \$5,000 CMP for willful violations, which can then be increased or decreased by considering the discretionary factors set forth in the regulations. R. Huaracha Decl. ¶ 14; 20 C.F.R. § 655.65(g).

In this instance, the seven discretionary factors favor a reduction of the CMP. As mitigating factors, I find that Respondent had no history of previous violations and committed to future compliance with the program. Moreover, I do not find that Respondent clearly acted in bad faith or submitted a “fabricated recruitment report” as Administrator argues, as it provided an alternative explanation that was reasonable for several of its recruitment assertions. Respondent made job postings seeking tree planters in various classifieds sections in December 2009 in an attempt to recruit U.S. workers. ATX at 27-31. While Administrator could only reach 6 of the 20 workers listed on the Recruitment Report in its investigation, the mere failure to contact the remaining workers should not be held against Respondent. Furthermore, Respondent highlighted one instance in which Administrator asserted that Mr. Pierrelus never heard of Respondent’s company, but Respondent submitted evidence showing that Mr. Pierrelus indeed submitted a resume to the company, which casts doubt on Administrator’s assertions. In addition, the Administrator’s report of contact with Shelley McKeen stated that she did not accept the job because it was “back breaking,” which is not necessarily inconsistent with Respondent’s recruitment report, which stated that Ms. McKeen was accepted for the position. ATX at 106. In his report, Mr. Lee Greene also described the work as “back breaking,” and declined the position, which could be consistent with Respondent’s recruitment report. *Compare* ATX at 25 *with* ATX at 99. Administrator also produced an interview report of Hermilio Angeles, who later signed the report attesting that it was not his statement. Dominguez Decl., Ex. B. Although Administrator did take reports from Mr. Duncan and Ms. Jones that were inconsistent with Respondent’s recruitment report, *compare* ATX at 25 *with* ATX at 97, 103, these other instances create doubt as to the veracity of Administrator’s assertions relating to the Recruitment Report, and mitigate against the potential gravity of Respondent’s conduct here. I find that there is evidence suggesting Administrator misstated or exaggerated the gravity of this particular violation, given the disputed facts of the case. There are several indications Respondent made a good faith effort, through the posting of ads and the contact of applicants, to recruit U.S. workers for its forestry work. Given these mitigating factors, I find that a reduction of this CMP from \$6,000 to \$2,500 is appropriate.

c. Violation #3: substantial failure to meet condition on TEC

The Administrator assessed a \$10,000 CMP for Respondent’s substantial failure to meet a condition on the TEC regarding Respondent’s attestations about the offered wage rate, in violation of 20 C.F.R. § 655.60(b).

Specifically, in its TEC, Respondent wrote that it needed tree planters for 40 hours of work per week at a base rate of \$13.27 per hour and overtime rate of \$19.90 an hour. ATX at 3, 5, 21. In signing the TEC, it pledged to pay the offered wage during the entire period of the approved labor certification. *Id.* at 7. Administrator found that Respondent failed to pay its H-2B workers the offered wage rate and failed to employ the workers at the listed 40 hours per week. *Id.* at 3-5. WHI G. Huaracha reviewed the payroll records, but found that the workers in fact worked from 0 to 35 hours per week, that only 8 worked consecutive 40 hour workweeks from April to December 2010, and that the workers were paid between \$10.60 and \$17.91 per hour. G. Huaracha Decl. ¶ 11; *see* ATX at 41-82. WHI G. Huaracha computed back wages owed, and Respondent ultimately agreed to pay \$20,809.89 in back wages. G. Huaracha Decl. ¶ 11. It stipulated that it substantially failed to meet the offered wage rate.

In large part, the Administrator based the imposition of the maximum CMP for this violation based on the “considerable harm in lost wages to foreign workers,” which it described as a “vulnerable population.” Lucero Decl. ¶ 28. Mr. R. Huaracha also explained that the total CMP shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to such H-2B workers, up to an amount of \$10,000.<sup>4</sup> R. Huaracha Decl. ¶ 26. Here, since the violation resulted in an assessment of \$20,809.89 in back wages due to the workers, Mr. R. Huaracha found that this weighed heavily in favor of assessing the maximum CMP for this violation, while no discretionary factors overwhelmingly tipped in favor of a reduction of this amount. *Id.* Administrator considered the failure to pay the specific certified wages to be serious because it represented a substantial failure to comply with the provisions of the H-2B program, and found that Respondent’s failure to pay the appropriate wages was not a good faith effort to comply with the program. Thorleifson Decl., Ex. B at 15. Administrator did admit, however, that Respondent had no prior history of a back wages violation, and committed to future compliance. Thorleifson Decl., Ex. B at 15. It also did not know, but assumed Respondent had a financial gain as a result of this violation. *Id.*

Respondent argued that, under 8 U.S.C. § 1184(c)(14)(C) and 20 C.F.R. § 655.65, “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.*” (emphasis added). It therefore, contends the plain language of the statute and regulations requires harm to U.S. workers, and that Administrator has failed to show how back wages owed to foreign workers harmed U.S. workers. Respondent’s Brief at 7. It also contends that Respondent agreed to pay, and did pay, the entire sum of back wages owed to the foreign workers, and that the CMP should be reduced to \$1,000. *Id.* at 8.

Based on the seriousness of this violation, I find that the \$10,000 CMP for this violation was appropriate. Although Respondent argued that “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*” (emphasis added), 20 C.F.R. § 655.65(a) dictates that where an employer willfully fails to pay wages, the Administrator may assess CMPs equal to the difference between the amount that should have been paid and the amount of wages actually paid up to \$10,000. As Administrator found that back wages in excess of \$20,000 were owed, per the regulations, it had authority to levy a CMP of up to \$10,000, and this amount was reasonable in light of the back wages owed. Although Respondent had no prior history of violations, and committed to future compliance, I agree with Administrator that this particular violation was quite serious. As Administrator discussed, a primary purpose of the H-2B visa program is to ensure that foreign workers are not treated adversely or unfairly by an employer. Administrator’s Brief at 10. Here, the workers were promised work of 40 hours per week at the rate of at least \$13.27 per hour. However, when they arrived, they were not paid these wages, nor were they given regular, full-time work. Although Respondent attempted to explain its inability to assign full-time work based on the breach of contract and inclement weather, it did not explain why the H-2B workers did not receive at least \$13.27 per hour for all hours worked. This practice resulted in considerable harm in lost wages to foreign workers, who are particularly vulnerable to such exploitation. All or nearly all of the 42 H-2B workers were affected. *See* ATX at 41-82. It is reasonable to infer that this practice also resulted in financial gain for Respondent, who was able

---

<sup>4</sup> Assessing CMPs equal to the difference of the wages paid and wages owed is set forth at 20 C.F.R. § 655.65(a), not (g) as noted by Mr. R. Huaracha.

to pay the foreign workers less than the prevailing wages for similar work that would be paid to U.S. workers. Given these considerations, I find that the maximum CMP of \$10,000 is appropriate for this violation.

d. Violation #4: substantial failure to meet condition on TEC

The Administrator assessed a \$5,000 penalty for Respondent's substantial failure to meet a condition of the TEC regarding giving notice to the Department of Homeland Security ("DHS") of two H-2B employees' early separation from the program, in violation of 20 C.F.R. § 655.60(b).

Respondent initially applied for 175 H-2B workers; the Department approved 63 H-2B workers, and 44 workers entered the United States on April 22, 2010, but Respondent referred to only 42 H-2B workers in its wage records. G. Huaracha Decl. ¶¶ 9-10; ATX at 1, 6, 18. As part of the TEC, Respondent agreed that upon the early separation of any foreign workers, it would notify the DOL and the DHS in writing not later than 48 hours after such separation was discovered. ATX at 8. Respondent contended in its request for hearing that the U.S. Citizenship and Immigration Services ("USCIS") was notified when 2 H-2B workers left employment prior to the end of the H-2B visa agreement. ATX at 124. However, Administrator contends that the Respondent notified the DOL, but not DHS of the employees' early separation. Administrator's Brief at 9; *see* Ex. E. Indeed, in replying to a request for admissions ("RFA"), Respondent admitted that DHS was not notified of the early separation, and according to WHI G. Huaracha, Mr. Dominguez did not explain why DHS was not contacted. ATX at 133; G. Huaracha Decl. ¶ 15. Respondent stipulated that it substantially failed to meet the condition of providing proper notice to the DHS of the early separation of H-2B workers.

Administrator found these violations serious because they represented a substantial failure to comply with the provisions of the H-2B visa program. Thorleifson Decl., Ex. B at 16. It explained that it relies on employers in the program to advise enforcement agencies of timely out-of-status conditions, which Respondent failed to do here. *Id.* Administrator did concede that Respondent had no prior history of violations, and committed to future compliance with the program. Thorleifson Decl., Ex. B at 16. Mr. Lucero and Mr. R. Huaracha wrote that "the discretionary factors did not overwhelmingly tip in favor of recommending a lower CMP." Lucero Decl. ¶ 29; R. Huaracha Decl. ¶ 24.

Respondent argues that the CMP for this violation should be reduced to \$500, because it properly notified the DOL's Chicago National Processing Center that two workers terminated employment early. Respondent's Brief at 8; *see* Administrator's Brief, Ex. F. Respondent contends that, unbeknownst to it, the National Processing Center does not communicate directly with the DHS, which is why DHS was never directly notified in this case. Respondent's Brief at 8. Respondent therefore questions whether there was a substantial failure to notify DHS of early separation, although it stipulated that it had committed this violation. It instead called the violation a "technical failure." *Id.*

Given these circumstances, I find that a reduction of the \$5,000 CMP to \$2,500 is appropriate. Respondent, as part of the TEC, agreed to notify both the DOL and the DHS in the event of early separation. ATX at 8. Respondent did act promptly when it learned that 2 H-2B workers were missing, and notified the DOL's Chicago Processing Center of both workers' absence, but did not notify DHS. Administrator's Brief, Ex. F. I do not believe Respondent acted in bad faith in this matter. However, Respondent had an affirmative duty to notify both agencies, and should not have assumed one agency would notify the other when the documents it signed specifically stated Respondent was to notify both. While Administrator argues that this is a serious violation because it represented a substantial failure to comply with the provisions of the H-2B visa program, that logic is somewhat circular, as a substantial failure justifies a potential CMP, but if all substantial failures to comply were by their nature serious, the range of CMPs from \$0 to \$10,000, and the discretionary factor ascertaining the "gravity of the violation" would be obviated. *See* 20 C.F.R. § 655.65(c), (g)(3). I agree that the failure to notify the proper authorities of separated foreign workers is a serious offense, but in this case, mitigating factors are present for Respondent. Respondent committed to future compliance, and partially complied by notifying the Chicago Processing Center. In addition, there is no indication Respondent benefitted financially from this violation, Respondent had no history of prior violations, and the violation involved only 2 of the 44 H-2B workers who entered the United States. *See Prism Enters.*, ALJ No. 2001-LCA-00008, slip op. at 13, *aff'd*, ARB Case No. 01-080 (finding two mitigating factors of lack of prior violations and amount of workers involved in violation to be most important in assessing penalties, and reducing CMP accordingly). Given these factors, I find that a reduction of the CMP from \$5,000 to \$2,500 is appropriate.

e. Violation #5: substantial failure to meet condition on TEC

The Administrator assessed a \$20,000 penalty for Respondent's substantial failure to meet a condition on the TEC regarding the location of intended employment of H-2B workers, in violation of 20 C.F.R. § 655.60(b).

In its TEC, Respondent wrote that work would be performed at various locations in Jones, Jefferson Davis, and Forrest County, Mississippi, and pledged not to place any H-2B workers outside of those areas. ATX at 4, 8. In responding to an RFA, Respondent admitted that the H-2B workers never performed work in Mississippi; it instead employed the workers in Idaho County, Idaho; Flathead County, Montana; Stevens County, Washington; and Clearwater County, Idaho. *Id.* at 122, 133; G. Huaracha Decl. ¶ 10. Administrator argues that Respondent's placement of workers in these counties potentially displaced U.S. workers, and because it cannot demonstrate that no U.S. worker was displaced in each unauthorized location, Respondent should be assessed a separate violation and \$5,000 CMP for each of the 4 locations for which Respondent employed H-2B workers without approval. Administrator Brief at 10.

As a matter of policy, District Director Hart, Assistant Director Lucero, and Regional Enforcement Coordinator Huaracha all noted that the Wage and Hour Division treats each actual location where H-2B workers are improperly placed as a separate violation, because for each improper location the effect on recruitment and hiring of U.S. workers is not contemplated, which explains the \$5,000 penalty for each of the four geographic violations. Hart Decl. ¶ 23; Lucero Decl. ¶ 30; R. Huaracha Decl. ¶ 25. Without a penalty for each improper violation, Mr.

Lucero and Mr. R. Huaracha explained that there would be an incentive for employers to commit violations in more than one location, as such conduct would not increase the penalty. Lucero Decl. ¶ 30; R. Huaracha Decl. ¶ 25.

With respect to the discretionary factors, Mr. R. Huaracha noted that because Respondent employed H-2B workers improperly in four locations, there was no assessment of harm to U.S. workers in those areas, and no demonstration that harm did not result to U.S. workers from the improper importation of H-2B workers in these areas. R. Huaracha Decl. ¶ 16. Mr. R. Huaracha also noted that the change in location of employment harmed the H-2B workers in that they expected when travelling from Mexico that they would have full-time work in the States, but instead received fewer hours in these locations. R. Huaracha Decl. ¶ 16. Mr. R. Huaracha wrote that “[Respondent’s failure to conduct any recruitment or hiring of domestic workers in the locations where the H-2B employees were actually placed provided them with a financial incentive because they could treat H-2B workers far less favorably than domestic workers.” R. Huaracha Decl. ¶ 21. However, Administrator wrote in its pre-hearing interrogatories that “[i]t is unknown whether Respondent achieved a financial gain as a result of this violation,” but that “this factor is assumed given that Respondent had work available in Washington, Idaho, and Montana.” Thorleifson Decl., Ex. B at 17. Administrator further considered that Respondent did not appear to make a good faith effort to comply with the INA, because at the time the workers entered the United States, it knew they would not be placed in the area of intended employment, but proceeded anyway. *Id.* It considered this violation to be serious because it represented a substantial failure to comply with the H-2B visa program. *Id.* Administrator did note that there was no prior history of this type of violation by Respondent, and that it did commit to future compliance at the final conference. *Id.*

Respondent argues that the \$20,000 penalty imposed for this violation was “grossly improper.” Respondent’s Brief at 9. It contends that the Administrator can only assess a CMP of \$10,000 per violation, and adds that it stipulated to a substantial and not a willful failure for this violation. *Id.* Furthermore, it contends that the Administrator made no finding that Respondent’s conduct was indeed harmful to U.S. workers. *Id.* It requests that this CMP be reduced to \$5,000. *Id.*

I find that after a review of the mandatory and discretionary factors, Administrator’s assessment of \$20,000 in CMPs for this violation was excessive and reduce the CMP to \$12,000. In Administrator’s favor, Respondent stipulated that it substantially failed to comply with this condition of the TEC, and a substantial failure means a “willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application.” 20 C.F.R. § 655.65(d). Respondent’s argument that this violation was not willful, therefore, lacks merit. In addition, it is a serious violation to send H-2B workers to improper locations, first because there is no analysis as to whether these unplanned work locations lack able U.S. workers to necessitate the temporary, foreign H-2B labor, and second because of the changed conditions, the workers in this instance were required to travel from Mexico to the Pacific and Mountain West, rather than the closer intended location of Mississippi. In these more remote locations, all or nearly all of the workers received less hours of work, which led to a financial loss.

However, although Administrator's rationale for its policy of treating each separate location where H-2B workers are improperly placed as a separate violation has merit, in that it deters reckless violators from hiring H-2B workers in several improper locations and receiving the same penalty, I find that the implementation of four separate \$5,000 CMPs here is overly harsh, given the circumstances of this case. While Respondent stipulated to this violation, and admitted in the RFA that it employed workers in wrongful locations, to penalize Respondent \$20,000 for this violation, when it failed to pay the workers a total of \$20,000 in back wages, cannot be justified. *See Admin. v. Global Horizons*, ALJ No. 2010-TAE-00002, slip op. at 11, 27-28 (ALJ Dec. 13, 2011) (expressing concern in H-2A visa case with penalty that was three times more than total amount of money involved in the claim). Additionally, there are mitigating factors present here, in that Respondent does not have a history of prior violations and committed to future compliance with the program. Although Mr. R. Huaracha suggested that this violation led to financial gain for Respondent, Administrator wrote in its pre-hearing declarations that this was unknown, and I find the claim that Respondent received a financial gain by employing the H-2B workers in Idaho and Montana rather than Mississippi to be unsubstantiated. Respondent also provided a plausible explanation for the shift in locations due to a breached contract in Mississippi, although it should have notified the DOL of these changes before deploying the H-2B workers to locations outside of the TEC application, and CMPs were assessed for those violations. Respondent also accepted a 3 year debarment from the program as a penalty for this violation. Respondent's Brief at 9. Given these mitigating factors, I find that the total CMP for this violation should be reduced to \$12,000, or \$3,000 for each of the four improper locations for which Respondent employed H-2B visa workers. The reduction in CMP reflects the serious nature of the violation, but also considers the competing mitigating factors, and the equities of this specific case, in which Respondent owed about \$20,000 in actual back wages.

#### **IV. ORDER**

For the reasons stated above, IT IS ORDERED that Respondent pay reduced civil money penalties to Administrator in the amount of \$32,000, as follows: for violation number 1, a CMP of \$5,000; for violation number 2, a CMP of \$2,500; for violation number 3, a CMP of \$10,000; for violation number 4, a CMP of \$2,500; and for violation number 5, a CMP of \$12,000.

**RICHARD M. CLARK**  
Administrative Law Judge

*San Francisco, California*

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) that is **received** by the Administrative Review Board (“Board”) within thirty calendar days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 655.76(a). The Board’s address is:

Administrative Review Board  
U.S. Department of Labor  
Room S-5220  
200 Constitution Ave, NW  
Washington, DC 20210

At the time you file the Petition with the Board, you must serve it on all parties to the case as well as the administrative law judge. 20 C.F.R. § 655.76(a).

No particular form is prescribed for the Petition, however, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

20 C.F.R. § 655.76(b). If the Board determines that it will review the ALJ's decision and order, it will issue a notice specifying (1) The issue or issues to be reviewed; (2) The form in which submissions shall be made by the parties (e.g., briefs); and (3) The time within which such submissions shall be made. When filing any document with the Board, the party must file an original and two copies of the document. 20 C.F.R. § 655.76(e).