



Issue Date: 10 April 2015

CASE NO.: 2013-TNE-1

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party

v.

WADE SHOWS, INC.,
Employer

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART
ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT**

I. Procedural History

On September 26, 2012, Wage and Hour Division issued a report under the H-2B provisions of the Immigration and Nationality Act, ("INA"), 8 U.S.C. § 1101 (a)(15)(H)(ii)(b), as amended, and the implementing regulations at 20 C.F.R. § 655.700 *et seq.*, following its investigation of Respondent. The report cited Respondent with the following violations: (1) Respondent willfully misrepresented a material fact on its Application, ETA Form 9142, regarding the job offer – number of hours of work and work schedule; (2) Respondent willfully misrepresented a material fact on the Application, ETA Form 9142, Attestation No. 4 regarding terms and working conditions; (3) Respondent substantially failed to meet a condition of the Application, ETA Form 9142, Attestation No. 5 when it failed to pay the offered wage that equals or exceeds the highest of the prevailing wage, the applicable Federal, state, or local minimum wage; and (4) Respondent substantially failed to meet a condition on the Application, ETA Form 9142, Attestation No. 12, because it placed H-2B workers outside the certified area of intended employment. Wage and Hour Division assessed a \$4,500 penalty for Violation 1, a \$4,500 penalty for Violation 2, a \$10,000 penalty for Violation 3, and a \$4,500 penalty for Violation 4, and sought back wages. Respondent thereafter requested a hearing and submitted a lengthy brief setting forth its position which I consider part of the "pleadings." I was assigned the case on October 23, 2012. A hearing was scheduled for Detroit, Michigan set to begin on May 14, 2013.

On April 25, 2013, Respondent filed a motion arguing summary judgment should be granted because Respondent did not violate the H-2B provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Specifically, Respondent argues that (i) it did not act willfully because there are no Regulations defining "job offer," (ii) it did not offer

working terms and conditions to U.S. workers that were less favorable than those offered to H-2B workers, (iii) that any back wage calculations by the Administrator falsely assume that the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.* applies here, (iv) Respondent cannot be cited for not listing working locations that were unanticipated at the time of petitioning, and (v) the Department of Labor lacks rule making authority for its 2008 Regulations.

On May 8, 2013, the Administrator filed a Response in Opposition to Respondent’s Motion for Summary Judgment. The Administrator argues that (i) the Regulations required Respondent to accurately describe the hours of work and the work schedule in its Temporary Employment Certification (“TEC”); (ii) Respondent offered working terms and conditions to U.S. workers that were less favorable than those offered to H-2B workers; (iii) any back wage calculations do not rely on the application of the FLSA to Respondent; (iv) Respondent was prohibited from placing H-2B workers outside the area of intended employment; (v) the Department of Labor has rule making authority for its 2008 Regulations; and (vi) this Court lacks authority to rule on that issue.

The Administrator also filed a Cross Motion for Summary Decision on May 8, 2013 arguing Respondent (i) willfully misrepresented the number of hours of work and work schedule in the job offer on the TEC; (ii) Respondent willfully misrepresented Attestation No. 4 on the TEC by offering terms and conditions to U.S. workers that were less favorable than those offered to H-2B workers; (iii) Respondent substantially failed to meet Attestation No. 12 on the TEC by placing H-2B workers outside the area of intended employment; and (iv) the civil money penalties assessed are appropriate.

Following two lengthy conference calls on May 9, 2013 that established there was no genuine issue of material fact as to the salient legal issues, on May 10, 2013, I cancelled the hearing and ordered the parties to submit Stipulations and an Excel document calculating the lost wages for every effected employee by June 7, 2013. In addition, I provided Respondent with the opportunity to respond to the Administrator’s cross-motion for summary judgment and brief the FLSA issues, and provided Administrator with the opportunity to respond to any new legal arguments made by Respondent and brief the FLSA issues as well. What followed was a protracted series of extensions.

On March 14, 2014, I ordered a seventh extension to allow additional time for the parties to submit Stipulations and the lost wages spreadsheet. On April 14, I granted a joint motion to bifurcate the order to submit Stipulations and the back wage calculations given that the latter would be impacted by a ruling on the merits of the case. I extended the order to submit Stipulations twice more, to July 2, 2014. Shortly thereafter, I held a conference call with the parties to discuss my order to submit Stipulations and appointed a settlement judge on July 11, 2014 to assist the parties in the development of the evidence. On March 24, 2015, ALJ Swank issued a Notice of Conclusion of Settlement Judge Proceeding noting that he had been unable to assist the parties and ending his participation.

Given that the Settlement Judge Proceeding was unsuccessful, I ordered, on March 24, 2015, the parties to submit stipulations, if any, by close of business March 31, 2015. In my

Order, I noted that in the event that the parties are unable to submit joint stipulations, that I would resolve the cross motions for summary judgment based upon the evidence and pleadings initially submitted when those motions were filed. I further noted that this court interprets the recent stay issued in *Perez v. Perez* to permit enforcement of the 2008 regulations until and including at least April 15, 2015 (if not later), thereby resolving the outstanding legal issue with respect to rulemaking authority. *See Perez v. Perez*, Case No. 3:14cv682 at *3 (N.D. Fla., March 4, 2015).

The parties were unable to provide the court with joint stipulations. Accordingly, I will resolve the cross motions for summary judgment based upon the evidence and pleadings initially submitted when those motions were filed pursuant to the Order issued on March 24, 2015.¹

II. Law

This court interprets the recent stay issued in *Perez v. Perez* to permit enforcement of the 2008 regulations until and including at least April 15, 2015, if not later. *See Perez v. Perez*, Case No. 3:14cv682 at *3 (N.D. Fla., March 4, 2015).

Section (H)(ii)(B) of the INA provides:

(H) an alien . . . (ii) . . . (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country. . . .

8 U.S.C. § 1101(a)(15)(H)(ii)(b). The Code of Federal Regulations gives Wage and Hour the power to investigate and

determine whether an employer has-

- (a) Filed a petition with ETA that willfully misrepresents a material fact.
- (b) Substantially failed to meet any of the conditions of the labor certification application attested to, as listed in § 655.22, or any of the conditions of the DHS Form I-129. Petition for a Nonimmigrant Worker for an H-2B worker in 8 CFR 214.2(h).

20 C.F.R. § 655.60. A “willful failure” is a “knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).” § 655.65(e) (errors in original). A “substantial failure” means “willful failure that constitutes a significant deviation from

¹ In response to my Order for Submission of Joint Stipulations, the parties resubmitted evidence that was initially submitted several years ago, submitted in conjunction with their submission of cross motions for summary judgment. In addition, Respondent has submitted new evidence. As explained in the Order, parties were to submit joint stipulations, if any. Otherwise, I would decide the case on the evidence and pleadings initially submitted with the cross motions for summary judgment. Accordingly, new evidence submitted by the parties will not be considered.

the terms and conditions of the labor condition application or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or successor form.” § 655.65(d).

Standard for Summary Judgment

Summary judgment may be granted, “for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). “The burden is on the moving party ‘to demonstrate the absence of any material factual issue genuinely in dispute.’” *Elias v. Celadon Trucking Servs., Inc.*, ARB No. 12-0132 (ARB Nov. 21, 2012) (internal citations and quotations omitted). A material fact is one that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Additionally, “on summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). However, “a party opposing the motion may not rest upon the mere allegations or denials of such pleading.” 29 C.F.R. § 18.40(c). Rather, “such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.” *Id.* “If the moving party meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence showing the existence of a genuine issue for trial.” *Hammond v. Citrix Sys. Inc.*, ALJ No. 2008-SOX-0037 (ALJ June 11, 2008) (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

No genuine issues of material fact remain in this case; thus, the outcome turns on the application of law.

III. Discussion

Violation 1 - Job Offer

Respondent argues that it could not have willfully misrepresented a material fact in the job offer on Form 9142, because the Department of Labor has never clarified how a FLSA-exempt employer should describe a job offer. Resp’t Am. Mot. Summ. J. 2. Respondent asked a number of rhetorical questions in its motion so as to explain its confusion.² The Administrator responds that Respondent is covered by the FLSA, but it is exempt from the FLSA’s minimum wage and maximum hour (overtime) requirements. Admin. Resp. 13. Further, the Administrator argues that while Respondent claims that it is next to impossible for a traveling carnival to accurately complete the section of the TEC calling for the number of hours of work and work

² Respondent asked:

When the work schedule varies wildly from one week to the next, what is ‘required,’ and by whom is it required? What are ‘basic’ and ‘overtime’ hours of ‘required’ work, and what do these terms mean when the employer is FLSA exempt? When is overtime ‘applicable’ for an employer who is FLSA exempt?

Resp’t Am. Mot. Summ. J. 4.

schedule, it is clear Respondent was able to accurately state the expected hours of work in the 2010 employment contracts – “A typical week would involve approximately 40 to 60 hours in set-up, tear down and operation of rides/equipment . . . Hours worked are expected to be: 40 to 60 per week.” *Id.* at 14. Additionally, the Administrator notes that it is clear that Respondent’s H-2B workers actually worked between 31.5 and 67 hours per week during the covered period and that a 1:00 p.m. to 11:00 p.m. shift with a one-hour break was atypical. *Id.*

The Administrator filed a cross-motion for summary judgment raising the same arguments that she raised in her response, noting that Frank Zaitshik has owned Wade Shows since 1983 and has hired H-2B workers as ride attendants since at least 2007; thus, Respondent knew that its H-2B workers would be expected to work 40 to 60 hours per week, as it explicitly stated so in the employment contracts. Admin. Cross-Mot. Summ. J. 15. Further, the average hours worked per week was 47.41; the median hours worked per week was 46. *Id.* Respondent was additionally familiar with its own seasonal work pattern. *Id.* The Administrator further provided that Respondent willfully misrepresented the work schedule on the TEC – which described it as “Varies depending on event, but typically 1:00 PM START TIME 11:00 PM END TIME, 1 HOUR MEAL BREAK” – because, of the thirty-six carnival shows Respondent staged during the covered period, only five realized a start time of 1:00 p.m. and an end time of 11:00 p.m. *Id.* at 16.

On its Form 9142, under “number of hours of work per week,” Respondent recorded 40 basic hours and 0 hours of overtime. Additionally, on the same Form, Respondent recorded that the “hourly work schedule” “varies depending upon event,” but typically would be 1:00 p.m. to 11:00 p.m. with a 1 hour meal break.” The pleadings and evidence demonstrate that Respondent willfully misrepresented the number of hours of work in its ETA Form 9142 by reporting only 40 basic hours and 0 overtime hours, because in its employment contracts that same year, Respondent provided that employees would work approximately 40 to 60 hours per week. However, the pleadings and evidence demonstrate that Respondent did not willfully misrepresent its work schedule, because Respondent qualified its listed work schedule by saying it “varies depending upon event.” If anything, the Administrator’s evidence corroborates this fact, demonstrating the gross variability in the work schedule on Wednesdays alone. Thus, the Administrator has not shown a genuine issue of material fact.

Violation 2 - Terms and Working Conditions

Respondent asserts that it did not offer working terms and conditions to U.S. workers that were less favorable than those offered to H-2B workers. Resp’t Am. Mot. Summ. J. 4. Respondent opines that the Administrator wrongly assumes that Respondent was required to place all material terms and conditions in its recruitment advertising; however, it is clear that there is no such obligation for employers, especially an FLSA-exempt employer like itself. *Id.* at 5. Respondent asserts the advertising requirements of § 655.17 are satisfied even if the advertisement omits a substantive term so long as: (1) the advertisement meets the minimum requirements under § 655.17(a-h); (2) the advertisement does not contradict the approved job order; and (3) Americans are not discriminated against. Respondent further argues there is a continuum of time within which to “present” the “terms and working conditions of the job opportunity” that may extend well past the initial advertisement, as long as it results in *de facto*

“terms and working conditions” that are “not less favorable” for Americans it satisfies § 655.17. *Id.* at 5-6. Respondent analogizes the advertisement required by § 655.17 to a normal advertisement. *Id.* at 5. Respondent argues § 655.17 is premised on numerous assumptions. *Id.* at 6.

The Administrator asserts that Respondent’s argument that there is a “temporal component” makes no sense when one considers that potential H-2B employers must prove that they have attempted to recruit U.S. workers and that there is a lack of U.S. workers to meet its needs and recruitment of U.S. workers involves the submission of a job order with the State Workforce Agency and publishing two print advertisements. Admin. Resp. 16. The Administrator asserts that while 20 C.F.R. § 655.17 contains a list of eight items of information that the print advertisement must contain, the list is not exhaustive because the Regulation requires “[a]ll advertising . . . must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those to be offered to the H-2B workers.” *Id.* Respondent interprets this to mean that § 655.17 does not contain an exhaustive list of all terms and conditions that must be included and any term or condition that will be offered to H-2B workers, the omission of which would result in less favorable terms and conditions being offered to U.S. workers, must be disclosed in the required job order and print advertisements. *Id.* at 17. Applying this construction, the Administrator argues Respondent violated this provision by failing to disclose its per diem payments, its policy of providing free housing, and its policy of providing free transportation between work locations in either of its print advertisements. *Id.*

The Administrator reiterates many of its arguments in its cross-motion for summary judgment. Additionally, the Administrator asserts that the additional salary income, per diem payments, free housing, and free transportation, were disclosed to H-2B workers when they were presented with employment contracts, but were not included in Respondent’s advertising. Admin. Cross-Mot. Summ. J. 17. This resulted in terms and conditions of the job offer that were less favorable to potential U.S. workers. *Id.* at 17-18. The Administrator also asserts that the target of Respondent’s recruitment efforts were workers with no minimum education or prior experience; thus, a U.S. worker who saw the recruiting advertisement could have easily believed that he would have to provide his own transportation and housing during the entire carnival season. *Id.* at 18. Moreover, a potential U.S. worker who saw the recruiting advertisement would not know about the additional salary income of \$29 to \$148 per week – an additional 9 to 41 percent over and above the base weekly salary. *Id.* The Administrator concludes that it is entitled to summary decision because Respondent had a legal obligation to ensure that there was no disparity between job terms and conditions offered to U.S. workers and H-2B workers by stating all material terms and conditions in its recruiting efforts, Respondent failed to do so, and then attested that it had done so in Attestation No. 4 on the TEC. *Id.* Therefore, Respondent willfully misrepresented Attestation No. 4 on the TEC. *Id.*

Twenty C.F.R. § 655.17 explains the H-2B employer’s advertising requirement:

All advertising conducted to satisfy the recruitment steps under § 655.15 before filing the *Application for Temporary Employment Certification* must meet the requirements set forth in this section and must contain terms and conditions of

employment which are not less favorable than those to be offered to the H-2B workers. All advertising must contain the following information: . . .

(c) If transportation to the worksite(s) will be provided by the employer, the advertising must say so;

This poorly drafted Regulation is ambiguous and lends itself to two conflicting readings. The first, advocated by the Administrator, provides that the use of “and” in the above underlined section indicates an intent by the drafters to require H-2B employers to include in their advertisements all eight enumerated terms and conditions as well as any additional terms and conditions of employment that if excluded, would make the offer to local workers appear less favorable than the offer to H-2B workers. Thus, under the first construction, every beneficial material term or condition that would be found in a H-2B contract must be included in all newspaper advertisements. In other words, nearly the entire contents of the employment contract must be contained in the advertisement. The second, advocated by Respondent, places great emphasis on the “which are not *less favorable*” language of the Regulation. Under this construction, the employer’s advertisement must include all eight enumerated terms and conditions, and cannot include any provision that affirmatively states a term or condition that would be less favorable to local workers. In other words, “[t]he advertisement . . . must not contain terms and conditions of employment which are less favorable [to local workers].” Resp’t Mot. Summ. J. 5 (citing 73 Fed. Reg. 78020, 78033-34 (Dec. 19, 2008)). Given that the per diem payments and free housing are terms that are offered to both H-2B and local workers, i.e. they are terms and conditions which are not less favorable, section 655.17, under this construction, is not violated.

While this interpretation might yield unwarranted results, as an employer could tilt the application process in favor of H-2B workers by omitting a favorable term or condition that is not one of the eight required in its advertisement, this construction is still permitted on the face of the regulation and is partly supported by the Federal Register comments. Because there are two reasonable constructions of the Regulation, Respondent could not have “willfully” violated the statute provided that it met the minimum requirements of the second construction. To that end, Respondent did not affirmatively list the free transport in its advertisement. Admin. Ex. L. However, the advertisement states that “[t]ravel with the Carnival is required.” *Id.* It also lists more than fifteen worksites and states that those worksites include geographic locations as wide-ranging as Dade City, Florida to Oklahoma City, Oklahoma to Coldwater, Michigan. Additionally, the advertisement notes a salary of \$308.00 per week. Given that travel costs covering those distances would constitute a substantial portion of wages, a reasonable person reading Respondent’s advertisement would believe the travel required by Respondent would be paid by Respondent and the Administrator has not shown a genuine issue of material fact. Accordingly, the pleadings and evidence demonstrate respondent substantially complied with § 655.17(c). For these reasons, I grant summary judgment in favor of Respondent as to this issue.

Violation 3 - Back Wages

Respondent also argues that Wage and Hour’s back wage calculations falsely assume that the FLSA applies when Respondent is an FLSA-exempt amusement operator. Resp’t Am. Mot. Summ. J. 7. Specifically, the Administrator charges Respondent with willfully failing to pay

compensable work travel time and refraining from taking a credit for providing bunkhouse lodging but in doing so, the Administrator relies on FLSA Regulations, which are inapplicable to the instant case. *Id.* The Administrator responds that it is not asserting that Respondent's employees are covered by the minimum wage and overtime provisions of the FLSA and does not assert that any principles unique to the FLSA apply. Admin. Resp. 18. However, because there is no case law regarding the wage requirements of the H-2B program, it relies upon the principles developed under the FLSA case law by analogy for such non-unique issues, as well as upon common dictionary definitions of such terms. *Id.* The Administrator represents that it relied on the United States Supreme Court's definition of "work" in an FLSA case, which incorporated a dictionary definition as well as a "primary benefit" test, when it determined, in the instant case, that the time spent by Respondent's H-2B workers picking up uniforms and performing ride safety checks was compensable. *Id.* at 19-20. Applying the same primary benefit test, the Administrator argues the credit for lodging should be excluded, because the lodging was provided primarily for the benefit of Respondent, as it has an itinerant workforce and could not expect its employees to obtain housing at each worksite. *Id.* at 21. The Administrator argues because Respondent is incorrect that the Administrator applied the FLSA to Wade Shows in determining compensable work time, two days' worth of travel time, and its ineligibility for the lodging credit, Respondent is not entitled to summary decision on this issue. *Id.* at 21-22.

The Administrator also asserts Respondent "substantially failed" to meet a condition of the Application, ETA Form 9142, Appendix B, Attestation No. 5. Admin. Cross-Mot. Summ. J. 3. Its argument is predicated on its belief that FLSA's case law may be used to fill in any gaps of the INA. However, at the time Congress crafted the INA's implementing regulations, it should have been aware of the FLSA, its implementing regulations, and its case law. Thus, had Congress desired to incorporate the FLSA's case law into the INA's Regulations it could have done so, yet it chose not to.

Even assuming Congress' inaction means the FLSA's case law is applicable, the Administrator has not shown a genuine issue of material fact regarding "substantial failure," i.e. "willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or successor form." This is because the Administrator cannot establish there has been a significant deviation from the terms and conditions of Form 9142 when the Form itself does not inform Respondent that FLSA case law is applicable nor is there any requirement that the Form be completed by an attorney, who would be more likely to be aware of FLSA case law. Given that the Form does not inform Respondent of the applicability of FLSA case law, Respondent's attestation does not rise to the level of "willful failure." Accordingly, I grant summary judgment in favor of Respondent as to this issue as the Administrator cannot prove Respondent "substantially failed" to comply with ETA Form 9142, Appendix B, Attestation No. 5.

Violation 4 - Certified Area of Intended Employment

Respondent argues the Administrator cannot cite it for working at locations that were unanticipated at the time of petitioning. Resp't Am. Mot. Summ. J. 7. Respondent explains that some of its employees worked for a brief time in New York when an unanticipated opportunity

arose during the middle of the season and all of those workers were properly paid. *Id.* at 7-8. Further, the Department of Labor has admitted that it does not have any regulations that apply when a mobile operator adds immaterial work locations after the original certifications. *Id.* at 8. The Administrator responds that 20 C.F.R. § 655.22(l) governs this issue and that the list of worksites on Respondent's TEC did not include New York, where thirty-two H-2B workers worked at three different worksites for approximately two months, and Respondent failed to obtain a new labor certification or advise the Department of the change. Admin. Resp. 22. The Administrator's cross-motion for summary judgment includes all of the arguments in its Response as well as that Respondent specifically attested that it would not place H-2B workers outside of the locations listed on the TEC, but Respondent's H-2B workers were in New York 18% of its carnival season, which is approximately 28% of the covered period. Admin. Cross-Mot. Summ. J. 19-20.

The language in 20 C.F.R § 655.22(l) is clear and unequivocal. It provides:

An employer seeking H-2B labor certification must attest as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions of this subpart: . . .

(l) The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the *Application for Temporary Employment Certification* unless the employer has obtained a new temporary labor certification from the Department.

Id. (emphasis added). It is immaterial that the opportunity in New York was unanticipated at the time Respondent completed Form 9142. The Regulations explicitly require employers to obtain a new temporary labor certification from the Department if the employer intends to place any H-2B workers outside the intended area of employment listed on the TEC. The Administrator's Exhibit G, ETA Form 9142, contains Respondent's Attestation No. 12 as well as Respondent's list of intended employment locations, which does not include New York. Respondent, however, conducted its carnival for approximately two months in three separate locations in New York, but never obtained a new temporary labor certification from the Department. Accordingly, the pleadings and evidence demonstrate that Respondent substantially failed to meet a condition of the Application, ETA Form 9142, Appendix B, Attestation No. 12, because it placed H-2B workers outside the area of intended employment described on its TEC without obtaining a new temporary labor certification from the Department. Thus, the Respondent has not shown the existence of a genuine issue for trial.

ORDER

IT IS HEREBY ORDERED that a civil money penalty in the amount of \$4,500 is assessed to Wade Shows for violation of 20 C.F.R. § 655.60(a), i.e. willful misrepresentation of a material fact on the Application ETA Form 9142 regarding the job offer number of hours worked. IT IS FURTHER ORDERED that a civil money penalty in the amount of \$4,500 is assessed to Wade Shows for violation of 20 C.F.R. § 655.22(l), i.e. substantial failure to meet a condition of the Application, ETA Form 9142, Appendix B, Attestation No. 12: Place of employment. The remaining violations are dismissed.

Penalties are due for payment within 30 days upon the date of this decision. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. *See* 20 C.F.R. 655.65(j).

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision and order, including judicial review, shall file a Petition for Review ("Petition") with the Administrative Review Board ("ARB"). The ARB must receive the Petition within 30 calendar days of the date of this decision and order. 20 C.F.R. § 76(a). The ARB's address is:

U.S. Department of Labor
Administrative Review Board
Room S5220 FPB
200 Constitution Ave NW
Washington, DC 20210

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. 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 ARB in determining whether review is warranted.

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