UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.S. LAWN & LANDSCAPE, INC.

1107 Butterworth Court
Stevensville, MD 21666

Plaintiff,

v.

U.S. DEPARTMENT OF LABOR,

200 Constitution Ave NW
Washington, DC 20210

and JULIE A. SU, in her official capacity as Acting United States Secretary of Labor,

200 Constitution Ave NW
Washington, DC 20210

Defendants.

Civil Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL

INTRODUCTION

1. C.S. Lawn and Landscape, Inc. (CS Lawn)—a small landscaping business in Maryland founded by its sole owner Charles Saine—spent the last seven years defending itself against investigations and enforcement proceedings within the U.S. Department of Labor (DOL).

2. CS Lawn participated in DOL's H-2B visa program for temporary workers without incident for close to two decades. But DOL's in-house prosecutors charged CS Lawn with violating the program's regulations from 2013 to 2015 by, for example, allegedly violating a local zoning ordinance. After a three-day hearing before a DOL in-house judge, and later an

appeal to a DOL in-house appellate panel, CS Lawn was ordered to pay more than $43,000 for the technical zoning offense and around $10,000 for similarly minor violations.

3. CS Lawn never had the opportunity to make its case before a judge who was not employed by DOL, and all the fact-finding was performed by agency employees, not by a Seventh Amendment jury. A judge and jury should have determined whether temporary workers suffered any harm as a result of CS Lawn's alleged zoning violation—renting an apartment (with a full bathroom, kitchen, washer and dryer, and living space) for $200 per month per person to temporary workers (who chose to live there multiple years in a row) when the apartment was in a non-residential zone district (where migrant labor camps are a permitted use)—and, if so, what proportional relief would be. DOL agreed the zoning violation did not harm the workers, but its in-house agency judges imposed tens of thousands of dollars of liability anyway.

4. Not only did DOL appoint itself investigator, prosecutor, judge, and jury in this case, it also prosecuted CS Lawn under regulations that DOL did not have authority to issue. Congress assigned rulemaking authority for the H-2B program to the Department of Homeland Security, not DOL. But DOL promulgated regulations regardless, and then DOL's agency judges decided (over CS Lawn's objections) that DOL could investigate, prosecute, and collect against CS Lawn under those regulations.

5. In other words, DOL enacted its regulations without authority; decided it could enforce those regulations against CS Lawn; and then found the facts, applied the regulations to these facts, and decided the penalty, all without an independent judge or a jury.

6. This Complaint raises claims under the U.S. Constitution's Article III and the Seventh Amendment. If an agency wants to impose financial liability for back wages and civil penalties—remedies that historically were pursued in civil actions in the common law courts—

then the agency must proceed before a real federal judge in a real federal court where the right to trial by jury can be preserved.

7. The Complaint raises other claims as well. The imposition of tens of thousands of dollars in liability for a zoning violation violates the Excessive Fines Clause. Indeed, even under the Administrative Procedure Act's deferential standard of review, DOL's award is unsupported by substantial evidence, an abuse of discretion, and not in accordance with law. Nearly eight years after this administrative odyssey began, DOL's unconstitutional award should be set aside.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201, 2202 and 5 U.S.C. § 702.

9. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e). The U.S. Department of Labor is an agency of the United States and is located at 200 Constitution Ave. NW, Washington, DC 20210, which is within the vicinage of the United States District Court for the District of Columbia.

THE PARTIES

10. Plaintiff C.S. Lawn and Landscape, Inc. ("CS Lawn"), is a corporation organized under the laws of Maryland. Its founder, Charles Saine, is also CS Lawn's sole shareholder. Mr. Saine owns and operates the business, which specializes in landscape and hardscape design, installation, and maintenance for both residential and commercial clients in and around the Annapolis and Kent Island areas.

11. Defendant U.S. Department of Labor ("DOL") is a federal administrative agency responsible for bringing enforcement actions against employers for alleged violations of the H-2B program's rules and regulations. That authority was delegated to DOL by the Department of

Homeland Security ("DHS"). The enforcement proceeding at issue in this case was based on regulations DOL promulgated and was initiated by DOL personnel, tried by DOL attorneys, heard and decided by a DOL administrative law judge, and then affirmed by a panel of DOL appellate judges.

12. Defendant Julie Su is sued in her official capacity as the acting U.S. Secretary of Labor. In that capacity, she is responsible for the oversight, administration, and enforcement of the H-2B visa program.

REGULATORY BACKGROUND

The Statutory Framework

13. The H-2B visa program was created by Congress in 1986, as part of the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359. The H-2B program allows for employment of foreign nationals as temporary non-agricultural workers in circumstances where an employer's needs cannot be met out of the domestic labor pool. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b); 1184.

14. DHS and DOL jointly administer the H-2B program. For example, to participate in the H-2B program in a given year, an employer must file paperwork with both agencies months in advance.

15. The paperwork includes information about the employer's anticipated need for temporary workers, as well as information about the job itself and about related items like payroll deductions, whether the employer is furnishing meals or lodging, and so on.

16. Congress directed DHS (not DOL) to enforce H-2B regulations against employers if DHS "finds, after notice and an opportunity for a hearing," that a violation occurred, but, in 2008, DHS delegated that enforcement authority to DOL. *See* 8 U.S.C. §§ 1184(c)(14)(A), (B);

see 73 Fed. Reg. 78,020 (Dec. 19, 2008) ("Although Congress has conferred the statutory authority to enforce H–2B program requirements on the Department of Homeland Security (DHS), recent discussions between DHS and the Department have yielded an agreement for the delegation of H-2B enforcement authority from DHS to the Department."); *id.* ("effective January 18, 2009").

17. Congress also directed DHS (not DOL) to promulgate regulations to govern the H-2B program. *See* 8 U.S.C. § 1103(a). Nonetheless, in 2008, at the same time that DOL began enforcing compliance with H-2B regulations, DOL promulgated substantive regulations to govern the conduct of employers participating in the H-2B visa program. 73 Fed. Reg. at 78,020 (codified at 20 C.F.R. §§ 655-56 (2008)).

18. In February 2012, DOL again promulgated regulations to govern the conduct of employers participating in the H-2B visa program. 77 Fed. Reg. 10,038 (Feb. 21, 2012). Those regulations were challenged in federal court in April 2012 and ultimately were enjoined before ever taking effect on the ground that Congress did not delegate (or authorize DHS to delegate) rulemaking authority to DOL. *Bayou Lawn & Landscape Servs. v. Solis*, Case No. 3:12-cv-00183-MCR-CJK, ECF 24 (N.D. Fla. Apr. 26, 2012).

19. As a result of the 2012 regulations being enjoined, the 2008 regulations remained in effect until they also were enjoined for the same reason. *Perez v. Perez*, Case No. 3:14-cv-00682-MCR-EMT, ECF 14 (N.D. Fla. Mar. 4, 2015).

20. In 2015, DOL and DHS acted to replace the invalid 2008 and 2012 regulations with new regulations that were jointly issued by the two agencies. *See* 80 Fed. Reg. 24,042 (Apr. 29, 2015) ("Interim final rule" replacing, for example, provisions regarding deductions—e.g., 20 C.F.R. § 655.22(g)(1) (2008), replaced by 29 C.F.R. Part 531, 20 C.F.R. § 655.20(c)—or

enforcement—e.g., 20 C.F.R. §§ 655.23 (debarment) and 655.65 (civil monetary penalties and other remedies like back wages) (2008) with 29 C.F.R. §§ 503.23-24 (debarment and civil monetary penalties) and 503.20 (back wages)).

21. The federal court that had enjoined DOL's 2008 regulations later issued a one-line order to "clarif[y]" that its injunction "was not intended to, and does not, apply retroactively." *Perez*, Case No. 3:14-cv-00682-MCR-EMT, ECF 62 (N.D. Fla. Sept. 4, 2015).

22. DOL subsequently decided that even though the 2008 regulations were promulgated without any legal authority, the 2008 regulations would apply to any H-2B employer's paperwork submitted before April 29, 2015, while the 2015 regulations would apply to any such paperwork submitted after that date.

DOL's System of Administrative Adjudication

23. The Secretary of Labor promulgated regulations allowing DOL to impose remedies of debarment, civil monetary penalties, and back wages for violations of H-2B program regulations in its own in-house administrative courts, before its own in-house agency judges. 20 C.F.R. §§ 655.23, 655.65 (2008); 29 C.F.R. §§ 503.23, 503.24, 503.26.

24. Under these regulations, in order to impose liability, DOL's in-house judges must find that there was a "substantial failure" by the employer "to meet" the "terms and conditions" in the H-2B program paperwork, or that the paperwork contained a "[w]illful misrepresentation of a material fact," in order to impose liability. 29 C.F.R. § 503.19(a)(1)-(3); *see also* 20 C.F.R. §§ 655.60, 655.65 (2008).

25. A "substantial failure" is a "willful failure to comply that constitutes a significant deviation from the terms and conditions" in the H-2B paperwork. 29 C.F.R. § 503.19(a)(2); *see also* 20 C.F.R. §§ 655.60, 655.65 (2008).

26. Whether a violation is a "significant deviation" depends on a list of non-exhaustive "factors that [DOL] may consider." 29 C.F.R. § 503.19(c); *id.* § 503.19(c)(1)-(5) (listing factors); *see also* 20 C.F.R. §§ 655.60, 655.65 (2008).

27. The amount of back wages or penalties is determined in the first instance by the agency's enforcement personnel in the Wage and Hour Division. 29 C.F.R. § 503.20; *id.* § 503.41; *see also* 20 C.F.R. § 655.65(i) (2008).

28. As to civil penalties, DOL may set them at "the difference between the amount that should have been paid," the wages that "would have been earned," or an amount of DOL's choosing based on non-dispositive factors, but the penalties may not exceed $14,960 per violation. 29 C.F.R. § 503.23(b)-(e); *see also* 20 C.F.R. § 655.65 (2008).

29. Under DOL's regulation, "[e]ach . . . failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment . . . constitutes a separate violation." 29 C.F.R. § 503.23(a).

30. Once a penalty is assessed by DOL's enforcement personnel, that determination is reviewed at a hearing by DOL Administrative Law Judges ("ALJs"), who are employees of the agency. *See generally* 29 C.F.R. §§ 503.48-.50.

31. As DOL employees, ALJs are affected by the financial health of the agency as a whole. For instance, when DOL was forced to make budget cuts in 2013, the DOL's Office of Administrative Law Judges was forced to cut its budget by five percent and, as a result, furloughed DOL ALJs for multiple days.

32. ALJs enjoy some statutory protection against removal and can only be removed upon a finding of "good cause" by the Merit Systems Protection Board. 5 U.S.C. § 7521(a), (b).

Meanwhile, members of the Merit Systems Protection Board may themselves only be removed for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

33. At the same time, ALJs do not enjoy the far greater protection against removal that the Constitution provides for Article III judges.

34. A certain degree of agency influence is, in fact, part of an agency judge's job description, as "[i]t is the ALJ's *duty* to decide all cases in accordance with agency policy." Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges 136-37 (2004) (emphasis added). The Solicitor General has suggested that failure "to follow agency policies" constitutes good cause for removal of an ALJ. *See* Office of the Solicitor General, *Guidance on Administrative Law Judges* 9 (2018), https://perma.cc/SF66-UFGP.

35. After an ALJ issues a decision, DOL regulations allow an employer to appeal that decision to an internal agency appellate court called the Administrative Review Board ("ARB"). 29 C.F.R. §§ 503.51-.55.

36. The ARB is nowhere authorized by any statute. Rather, the Secretary of Labor created the ARB by executive order in 1996. *See* Secretary's Order 02-96, 61 Fed. Reg. 19,978 (May 3, 1996); *see also* Secretary's Order 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012).

37. The ARB consists of a maximum of five agency judges appointed by the Secretary of Labor. 77 Fed. Reg. at 69,379. The members of the ARB are appointed for a fixed term "of two years or less." *Id.*

38. The Secretary of Labor's Orders creating the ARB direct that "[t]he Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations which has been duly promulgated by the Department of Labor and shall observe the provisions

thereof, where pertinent, in its decisions." 61 Fed. Reg. at 19,979; *see also* 77 Fed. Reg. at 69,379.

DOL's H-2B Enforcement Activity

39. In recent years, the volume of enforcement activity under the H-2B program has significantly increased. From 2011, the first year for which DOL makes data available, to 2018, annual civil monetary penalties imposed by DOL for violations of the H-2B program averaged $335,802.33. From 2019 to 2022, that annual average was $1,737,054.42.[1]

40. From 2011 through April 2023, for alleged violations of the H-2B program, DOL has imposed more than $200,000 in civil monetary penalties against an employer on two occasions; between $100,000 and $200,000 on 14 occasions; between $10,000 and $100,000 on 365 occasions; and under $10,000 on 279 occasions. *See* U.S. Dep't of Labor, Wage and Hour Compliance Action Data (hereinafter, "DOL Data").[2]

41. In addition to imposing civil monetary penalties for H-2B violations, DOL's ALJs also assess back wages that are purportedly owed to employees of H-2B employers. From 2011 through 2018, DOL ordered H-2B employers to pay an average of $399,304.28 in back wages each year. From 2019 through 2022, that annual average was $1,645,992.64.[3]

42. From 2011 through 2022, DOL assessed a total of $9,634,636.29 in civil monetary penalties and $9,778,404.80 in back wages in connection with the H-2B program.[4]

[1] *Available at* https://www.dol.gov/agencies/whd/data/charts/industries-h2b-workers (XLS, "H2B Violations Only", "FY2011", "CMP Assessed").
[2] *Available at* https://enforcedata.dol.gov/views/data_summary.php.
[3] *See supra* n.1.
[4] *Id.*

43. Back wages are technically owed to the employees, but in many cases involving the H-2B program they are collected by the agency. Employees must then claim the funds from the government. If the funds go unclaimed for three years, the government keeps the money.

44. In 2015, the DOL's Office of Inspector General found that DOL "made minimal efforts to locate" employees who it was supposed to pay back wages. U.S. Dep't of Labor, Office of Inspector General, *Wage and Hour Division Needs to Strengthen Management Controls for Back Wage Distributions* (Mar. 2015).[5] As a result, between 2010 and 2014, the government kept $60 million in back wages that were collected by DOL and never paid to workers. *Id.*

FACTUAL BACKGROUND

C.S. Lawn and Landscape, Inc.

45. CS Lawn is a small landscaping business that specializes in landscape and hardscape design, installation, and maintenance for residential and commercial clients in the area of Annapolis and Kent Island, Maryland.

46. Charles Saine is the sole owner of CS Lawn, and he manages the business's day-to-day operations. He founded the company himself about 40 years ago. He is now on the cusp of retirement.

47. Landscaping and hardscaping involve difficult manual labor. Employees must often carry or haul equipment (e.g., lawn mowers, leaf blowers, rakes), supplies (e.g., mulch, sod), plants, and other items. They also often work, while kneeling or on hands and knees, to install and arrange landscaping and hardscaping materials.

48. CS Lawn depends on seasonal labor to service its clients, and it would be impossible to run the business without those workers. By 2015, with the help of a third-party

[5] *Available at* https://www.oig.dol.gov/public/reports/oa/2015/04-15-001-04-420.pdf.

contractor CS Lawn hired to help with compliance, CS Lawn had been participating in the H-2B program each year for two decades without incident.

49. During the times relevant to this case, CS Lawn's seasonal workers were paid above minimum wage: From 2013 to 2015, when the events at issue here occurred, CS Lawn paid its workers more than $9.79 per hour, well above the then-prevailing state minimum wage of $7.25 per hour (in 2013), $8.00 per hour (as of January 1, 2015), and $8.25 per hour (as of July 1, 2015). Moreover, unlike for domestic workers, those wages are not subject to tax withholding.

50. Temporary workers at CS Lawn were free to live where they chose, and CS Lawn was not obligated to offer lodging, but CS Lawn did rent conveniently located apartments to some of the workers. For example, CS Lawn rented one unit to five or six workers each year at $200 per person per month. At least two of the workers lived there all three years at issue here (2013-15), and one lived there two years in a row.

51. Working in landscaping and hardscaping is hard work, and doing that for CS Lawn was no exception. But it is also comparatively well-paid work. Given the wage rate, and the availability of convenient and affordable lodging, workers can make a good amount of money over a season, which is evidenced by the many temporary workers who returned in multiple years to work for CS Lawn via the H-2B program.

DOL's Investigation and Assessment

52. Early in 2015, a DOL inspector began investigating CS Lawn based on a complaint that workers there were being underpaid.

53. DOL's investigation focused on alleged violations of the regulations promulgated by DOL in 2008 to govern the H-2B program. As a result, the investigation was paused when a

federal judge enjoined DOL from enforcing those regulations on the ground that DOL did not have any authority to promulgate those rules. *See supra* ¶¶ 18-19.

54. The investigation started back up in November 2015, after the same federal court "clarified" that its injunction was not intended to apply retroactively. *See supra* ¶ 21.

55. The DOL inspector gathered documents and records, interviewed witnesses, contacted third parties, conducted site visits, and engaged in additional informal discovery via communications with CS Lawn and its retained counsel.

56. The investigation continued for more than two years before concluding in February 2018, when DOL sent CS Lawn a determination letter ordering CS Lawn to pay over $220,000 in back wages and civil penalties. A copy of that letter is attached as Exhibit A.

57. The letter stated that, if CS Lawn wanted to contest the assessment, it was required to do so in DOL's in-house agency courts. The letter warned that "[i]f C.S. Lawn & Landscape, Inc. does not make a timely request for a hearing, this determination letter will become a final order of the Secretary of Labor and may no longer be appealed."

AGENCY PROCEEDINGS

Before the Administrative Law Judge

58. As required by DOL regulations, CS Lawn requested a hearing to contest the agency's assessment of penalties and back wages, and to preserve its right to further appeals.

59. The Administrator of DOL's Wage and Standards Division referred the case to the DOL's Chief ALJ, who, in turn, referred the case to DOL ALJ Morris D. Davis.

60. ALJ Davis held a three-day hearing for this case in November 2018. The hearing involved telephonic and live testimony from multiple witnesses, including Charles Saine, two CS

Lawn employees, four former temporary workers for CS Lawn, and the DOL inspector who investigated CS Lawn from 2015 to 2018 and issued DOL's determination letter.

61. The ALJ's September 6, 2019, decision affirmed DOL enforcement personnel's conclusion that CS Lawn violated the county zoning code from 2013 to 2015 and made improper uniform deductions in 2015; affirmed two other minor violations; and assessed back wages and civil monetary penalties for each. A copy of the ALJ's decision is attached as Exhibit B.

62. While the ALJ did not impose the full amount of liability threatened in DOL's initial assessment letter, the ALJ nonetheless imposed significant liability totaling $57,000—$36,000 in back wages and $21,000 in civil monetary penalties. The basis for the ALJ's award is set forth in more detail below.

The County Zoning Code Violation

63. From 2013 to 2015, five or six temporary workers rented a converted apartment from CS Lawn.

64. The apartment was above CS Lawn's office, which was also conveniently located near grocery stores and other local businesses the workers might need to frequent. It had two small bedrooms, a living space, a full kitchen, washer and dryer, and a full bathroom. Each worker paid $200 per month in rent to stay there.

65. The apartment was located in the county's Suburban-Industrial District, which allows for migrant labor camps but is not otherwise zoned for residential use.

66. Neither DOL nor the ALJ considered the apartment unsafe or dangerous. Neither concluded the workers were overcharged or harmed by the $200 per month rent.

67. DOL's sole theory was that "C.S. Lawn & Landscape, Inc. or its agents/attorneys made impermissible deductions from the employees for . . . housing" because the property was

not in a residential zone, which meant the rent deductions were not "authorized" under DOL's (by-then enjoined and removed) regulations.

68. The ALJ concluded that CS Lawn's paperwork for the H-2B program stated that housing would "meet all applicable state and local codes for rental property," thus transforming the technical violation of the county zoning code into a violation of the federal H-2B program.

69. The assessment was not related in any way to any allegation that temporary workers were harmed by the deductions or by living in the apartment.

70. On the basis of that technical zoning violation, which was never shown to harm a single worker, the ALJ ordered CS Lawn to pay $43,500—back wages equal to the full amount of the rent paid by the workers for the apartment ($36,000 total) plus a $2,500 penalty for each year the violations occurred ($7,500 total).

The Uniform Deductions

71. Prior to 2015, CS Lawn provided uniforms to employees, and the employees were required to launder the uniforms themselves.

72. When it applied to participate in the program in 2015, CS Lawn decided to rent uniforms from an outside vendor for the first time. That arrangement included regular laundry service for the uniforms, which the temporary workers liked because landscaping and hardscaping can be a dirty business. For some of the workers, it meant fewer trips to the laundromat, and for others it simply meant having to do less laundry.

73. It is undisputed that CS Lawn accurately stated the amount that would be deducted from each paycheck when, in 2015, CS Lawn told the workers what the uniform charges would be and how those charges would be deducted (i.e., $18.62 per pay period).

74. However, the paperwork CS Lawn had submitted months earlier to DOL stated a lower deduction ($13.66), an amount that later became outdated because CS Lawn's vendor increased the price to launder the uniforms. DOL never contended or presented evidence that $13.66 was an incorrect price at the time CS Lawn submitted that deduction amount in its H-2B paperwork.

75. Solely because the deduction in the paperwork was different from the deduction in practice, the ALJ concluded these deductions also were "prohibited" and ordered CS Lawn to pay $2,083.20 in back wages (the $4.96 "over" deduction multiplied by 21 workers multiplied by 20 deductions) and a $1,000 penalty.

76. The assessment was not based on any allegation or evidence that the workers were overcharged or otherwise did not receive the value of the deductions.

The Remainder of the ALJ's Decision

77. The ALJ affirmed the agency's finding that CS Lawn overstated its need for temporary workers by applying for visas for two of the H-2B workers' wives so they could accompany their husbands to the U.S. in each year from 2013 to 2015. The women were not expected to perform landscaping or hardscaping services, but the women had in fact performed some work for CS Lawn over the years. CS Lawn employees also testified that these women had not factored into the calculation of the number of workers that CS Lawn applied for every year. Nonetheless, for this alleged violation, the ALJ ordered CS Lawn to pay $2,500 per year for a total civil monetary penalty of $7,500.

78. The ALJ also affirmed the agency's finding that CS Lawn violated DOL regulations by failing to fully advise potential domestic U.S. workers of the wages available on the job. According to the ALJ, when applying for the H-2B program in 2013 and 2014, CS Lawn

did not "inform potential U.S. workers that" they also could earn more than the advertised wages based on their experience, even though the relevant job order included the qualification that wages were "DOE (Depends on Experience)." For this alleged violation, the ALJ ordered CS Lawn to pay $2,500 per year for a total civil monetary penalty of $5,000.

Before the Administrative Review Board

79. As required by DOL regulations, CS Lawn appealed the ALJ's opinion to DOL's Administrative Review Board ("ARB").

80. On April 4, 2022, the ARB issued a decision affirming the ALJ in most respects. A copy of the ARB's decision is attached as Exhibit C.

81. The ARB first rejected CS Lawn's argument that DOL's 2008 regulations for the H-2B program were unenforceable because Congress assigned rulemaking authority to DHS and not DOL. The ARB relied on its prior decision concluding that the regulations were enforceable against any employer who, like CS Lawn, had applied to participate in the H-2B program before the March 2015 injunction.

82. The ARB affirmed the $7,500 civil monetary penalty and $36,000 in back wages based on CS Lawn's alleged violation of the county zoning code. It reasoned that the technical zoning violation meant "the housing was not 'customarily furnished'" under the Fair Labor Standards Act (which is incorporated by reference into the H-2B paperwork) and thus could not be a "reasonable" deduction.

83. The ARB also affirmed the award of penalties and back wages for the uniform deductions. The ARB justified this deduction on a breach of contract theory: In its view, CS Lawn had "disclosed a uniform deduction of $13.66 in the employment contract" and violated the contract when it altered the deduction to a higher amount.

84. Finally, the ARB next affirmed the ALJ's determination that CS Lawn was liable for two additional minor violations. As punishment for CS Lawn's overstating its need for workers in 2014 and 2015, the board affirmed the $5,000 civil monetary penalty. As to CS Lawn overpaying temporary workers in 2014, the ARB also affirmed the $2,500 penalty and reasoned that, "[a]lthough [CS Lawn] may have advertised the same wage information" to all workers, its "practice of paying a higher wage rate" to temporary workers based on their experience "may have misled U.S. workers into not applying for the positions."

85. The ARB modified the ALJ's opinion in only one respect. For both of the two minor violations discussed above, the DOL conceded (and the ARB thus concluded) that the claims were barred by the applicable statute of limitations for conduct occurring before 2013. Based on this concession, the ARB reduced CS Lawn's total civil penalties by $5,000 ($2,500 for each of these two violations in 2013).

86. Thus, after CS Lawn spent years and thousands of dollars defending itself in DOL proceedings prosecuted and presided over solely by DOL employees—under regulations DOL promulgated (and resuscitated)—it was ordered to pay $54,083.20 ($38,083.20 in back wages, $16,000 in civil monetary penalties) for violations that never harmed a single H-2B worker.

CLAIMS

Count I:

DOL's H-2B Enforcement Procedures Violate Article III

(5 U.S.C. § 706(2)(B))

87. The allegations of ¶¶ 1-86 are incorporated here in full.

88. Article III, Section 1 of the U.S. Constitution states that the "judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress

may from time to time ordain and establish." Article III further provides for various protections for the judges of these Article III courts in order to guarantee judicial independence.

89. Under Article III, this "judicial Power shall extend to *all* Cases, in Law and Equity, arising under . . . the Laws of the United States" (emphasis added).

90. Applying these provisions, the Supreme Court has held that cases implicating an individual's "private rights" must be tried before an Article III court.

91. The "private rights" inquiry calls for a historical analysis that asks whether a case involves issues of the sort that historically would have been adjudicated in the courts or whether, instead, it involves issues that historically could have been resolved by the executive without any need for judicial involvement.

92. An order to pay a civil monetary penalty implicates private rights because such a penalty would historically have been litigated in the common law courts. *See Tull v. United States*, 481 U.S. 412 (1987); *see also Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

93. An order to pay back wages implicates private rights because back wages are a form of damages that would historically have been sought through an action at common law. *See Chauffeurs Local 391 v. Terry*, 494 U.S. 558 (1990).

94. That is particularly true where, as here, liability is imposed on a breach-of-contract theory. DOL assessed liability here because it held that the zoning violation and the uniform deductions resulted in a breach of CS Lawn's contract with its H-2B workers. That type of breach of contract theory involves paradigmatic private rights.

95. More broadly, an order to pay money to the government—either in the form of a civil monetary penalty or in the form of back wages—affects a person's private rights because it results in the confiscation of their private property.

96. Because the proceeding here involved an attempt to force CS Lawn to pay money to the government, the proceeding implicated private rights and should have been brought before an Article III court.

97. Moreover, this violation of Article III is compounded by the fact that Congress has not authorized DOL to adjudicate these types of claims (and has only vested such authority in DHS). Such adjudication would violate Article III even if it *was* authorized by Congress, but an agency certainly cannot assume the authority to adjudicate private rights without Congressional authorization.

98. These violations are further compounded by DOL's position that interest begins to accrue on its award as soon as ARB issues its decision. It violates Article III for an agency court to issue a decision that is treated as if it were the equivalent of a final judgment of an Article III court.

99. Because DOL's adjudicatory procedures violate Article III, the decision below should be vacated and DOL should be enjoined from taking any action to enforce that decision.

100. Should the agency decide to pursue its claims against CS Lawn in federal court, then CS Lawn hereby invokes its right under the Seventh Amendment to a trial by jury on all issues so triable.

Count II:

DOL's H-2B Enforcement Procedures Violate The Seventh Amendment

(5 U.S.C. § 706(2)(B))

101. The allegations of ¶¶ 1-86 are incorporated here in full.

102. The Seventh Amendment to the U.S. Constitution provides that, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by

jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

103. As with Article III, the Supreme Court has held that this Seventh Amendment right to trial by jury applies to actions implicating a litigant's private rights. Thus, the Seventh Amendment right applies to those actions that historically would have been litigated before a jury at common law.

104. An order to pay a civil monetary penalty implicates the Seventh Amendment because such a penalty would historically have been litigated in the common law courts before a common law jury. *See Tull v. United States*, 481 U.S. 412 (1987); *see also Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

105. An order to pay back wages implicates the Seventh Amendment because back wages are a form of damages that would historically have been sought through an action at common law before a common law jury. *See Chauffeurs Local 391 v. Terry*, 494 U.S. 558 (1990).

106. More broadly, an order to pay money to the government—either in the form of a civil monetary penalty or in the form of back wages—affects a person's private rights because it results in the confiscation of their private property.

107. Because the proceeding here involved an attempt to force CS Lawn to pay money to the government in the form of civil monetary penalties and back wages, adjudication in an agency court without any jury right violated the Seventh Amendment.

108. At no point did a jury find any facts underlying DOL's decision below. Instead, DOL reached its decision based on allegations made by DOL investigators and prosecutors,

which became findings of fact after an agency ALJ reviewed and adopted them, and which became further insulated by the ARB's approval of the ALJ's decision.

109. Respect for the trial by jury in this type of case would not dismantle the statutory scheme (as these are classic employment issues), would not impede swift resolution of these claims (as the agency proceedings are in no sense swift), and does not involve issues unknown to the common law (as these are in fact remedies that historically were available at common law).

110. For the reasons stated above, this claim is not barred by the Supreme Court's rejection of a Seventh Amendment claim in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977). The decision in *Atlas Roofing* has been undermined by later cases and, in any event, can be distinguished. But, to the extent that this claim might instead be barred by *Atlas Roofing*, then *Atlas Roofing* should be overruled.

111. Because DOL's adjudicatory procedures violate the Seventh Amendment, the decision below should be vacated and DOL should be enjoined from taking any action to enforce that decision.

112. Should the agency decide to pursue its claims against CS Lawn in federal court, then CS Lawn hereby invokes its right under the Seventh Amendment to a trial by jury on all issues so triable.

Count III:

DOL's Agency Judges Enjoy Unconstitutional Protection From Removal

(5 U.S.C. § 706(2)(B))

113. The allegations of ¶¶ 1-86 are incorporated here in full.

114. In addition to violating the structural provisions of Article III, as well as the Seventh Amendment, provisions governing DOL's in-house ALJs *also* violate structural provisions governing the executive branch under Article II.

115. The Constitution vests "[t]he executive Power . . . in a President" who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1; *id.* § 3. The President is charged with overseeing executive officers and, to wield that authority, must have the ability to remove executive-branch officers. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

116. By contrast, DOL's ALJs enjoy unconstitutional dual-layer protection from removal. ALJs can only be removed for good cause, which must be found by the Merit Systems Protection Board, U.S.C. § 7521(a), (b), and members of the Merit Systems Protection Board can themselves only be removed upon a finding of "inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d).

117. This unconstitutional protection from removal necessarily harmed CS Lawn, insofar as CS Lawn was forced to adjudicate its case before an ALJ who was not removable as required by the Constitution, and the ALJ made numerous decisions and factual findings that affected CS Lawn's rights in large and small ways.

118. Because DOL's adjudicatory procedures violate the structural constitutional provisions of Article II, the decision below should be vacated and DOL should be enjoined from taking any action to enforce that decision.

Count IV:

The Penalty Imposed In This Case Is An Excessive Fine

(5 U.S.C. § 706(2)(B))

119. The allegations of ¶¶ 1-86 are incorporated here in full.

120. The agency imposed $7,500 in civil monetary penalties and $36,000 in back wages for alleged violations of a county zoning code.

121. DOL imposed the monetary award without any consideration for the actual amount of harm experienced by the employees. Instead, DOL concluded that *any* departure from

an employer's H-2B paperwork constitutes "harm," and the ARB concluded that these monetary awards were necessary to ensure compliance with the H-2B program.

122. The workers were not harmed at all by the county zoning code violation, which DOL conceded was the only reason the related rental deductions were improper. In fact, multiple employees lived in the apartment for multiple years, suggesting the temporary workers got good value for their money and were not harmed by the technical zoning violation.

123. Because this monetary award is justified on grounds of deterrence, these monetary awards are punitive and therefore subject to review under the Excessive Fines Clause.

124. The Supreme Court has held that monetary forfeitures are excessive if they are "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Moreover, the Supreme Court has held that punitive damages awards are generally excessive if they exceed the amount of the actual damages incurred. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008). In this case, the monetary award vastly exceeds any damages incurred by the workers and is, therefore, excessive.

125. As a remedy for this violation of the Excessive Fines Clause, the Court should hold a hearing, and empanel a Seventh Amendment jury, to determine the actual harm (if any) suffered by the employees and should reduce the size of the award to an amount no more than double the actual damages incurred as a result of the county zoning code violation.

Count V:

The Agency's Decision Is Not Supported By Substantial Evidence, Is An Abuse Of Discretion, And Is Not In Accordance With Law

(5 U.S.C. § 706(2)(A), (E))

126. The allegations of ¶¶ 1-86 are incorporated here in full.

127. Under the APA, agency action may be overturned if it is not supported by substantial evidence, if it is an abuse of discretion, or if it is otherwise not in accordance with law. As set forth above, CS Lawn disputes that any such standard should apply here. However, in the alternative, the agency decision in this case fails review even under that deferential standard.

128. First, DOL's entire decision below was not supported by substantial evidence, constitutes an abuse of discretion, and is not in accordance with law because the agency was prosecuting CS Lawn under invalid regulations that the agency promulgated without statutory authority in 2008. Congress assigned rulemaking authority to DHS, not DOL. The entire DOL decision then is premised upon faulty regulations and, thus, is not in accordance with law.

129. Second, the award of back wages and penalties for the county zoning code violation is not supported by substantial evidence, constitutes an abuse of discretion, and is not in accordance with law because no federal law or regulation allows DOL to enforce compliance with local zoning laws. A technical violation of a local zoning law certainly is not the kind of "substantial" or "willful" violation that can support liability under DOL's regulations.

130. Third, the award of $36,000 in back wages for the county zoning code violation is not supported by substantial evidence, constitutes an abuse of discretion, and is not in accordance with law because the evidence did not support a finding that the employees were actually owed $36,000 in back wages. If CS Lawn had not made any apartments available to temporary workers for rent, which CS Lawn was not required to do by any regulation or provision in the H-2B program, the employees would have been forced to find another place to live. So, the entire cost of the rental deductions cannot be counted as a loss to the employees.

131. Fourth, the $7,500 civil monetary penalty for the county zoning code violation is not supported by substantial evidence, constitutes an abuse of discretion, and is not in accordance

with law insofar as the monetary penalty vastly exceeds the amount of any harm to the workers and is also duplicative of the award of back wages.

REQUEST FOR RELIEF

In light of the foregoing, Plaintiff CS Lawn respectfully requests the following relief:

A. An injunction enjoining the Defendants from enforcing the decisions of the ALJ and the Administrative Review Board or commencing any action to collect the amounts claimed in the February 2018 Determination Letter from CS Lawn;

B. A declaration that the Department's procedures for imposing civil monetary penalties and back wages for alleged violations of the H-2B program violate Article III and the Seventh Amendment to the U.S. Constitution;

C. A declaration that the monetary award in this case violated the Excessive Fines Clause of the U.S. Constitution;

D. A declaration that the decision below was not supported by substantial evidence and was otherwise contrary to law;

E. An award of Plaintiff's costs and expenses of this action, together with reasonable attorneys' fees, under the Equal Access to Justice Act or otherwise; and

F. Any other legal or equitable relief to which Plaintiff may show itself to be justly entitled.

Dated: May 30, 2023

Respectfully submitted,

/s/ Robert M. Belden
Robert M. Belden
DC Bar No. 1035488
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
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Robert E. Johnson
DC Bar No. 1013390
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16781 Chagrin Blvd. #256
Shaker Heights, OH 44120
(703) 682-9320
rjohnson@ij.org

EXHIBIT A

U.S. Department of Labor

Wage and Hour Division
2 Hopkins Plaza Suite 601
Baltimore, MD 21201
Tel:(410) 962-6211
Fax: 443) 872-0168

CERTIFIED MAIL RETURN RECEIPT REQUESTED: # 7003 3110 0004 0672 4572

February 20, 2018

Charles Saine, Owner
C. S. Lawn & Landscape, Inc.
165 Log Canoe Circle Suite F
Stevensville, MD 21666

Subject: **Administrator's Determination Pursuant to Section 214(c)(14) of the Immigration and Nationality Act (INA) and Applicable Regulations Pertaining to Violations Involving H-2B Nonimmigrant Workers**

Reference #: 1749873

Dear Mr. Saine,

An investigation conducted by this office of C. S. Lawn & Landscape, Inc. under the H-2B provisions of the INA[1], as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) *et seq*., 1184(c)(14), and 20 C.F.R. Part 655, subpart A (2008) and applicable procedural regulations in 29 C.F.R. Part 503 (2015), covering the period from 2/15/13-12/15/15, disclosed that C. S. Lawn & Landscape, Inc. committed the following violations regarding the USCIS Form I-129, Petition for a Nonimmigrant Worker (I-129 Petition) and the Application for Temporary Employment Certification (ETA Form 9142 with Appendix B) (9142 Application) filed under the 2008 regulations:
substantial failure to comply with the recruitment and hiring of U.S. workers; terms and working conditions; and impermissible deductions requirements; and a willful misrepresentation of a material fact regarding the accuracy of temporary need. Any I-129 Petition or 9142 Application included in this investigation is listed.

The enclosed Summary of Violations and Remedies indicates the specific violations regarding the I-129 Petitions and 9142 Applications, which were discussed in the final conference, and the remedy imposed for each violation.

As a consequence of these H-2B violations, $147,200.84 in unpaid wages is owed to 3 U.S. workers and 28 H-2B nonimmigrant workers. The same violations also resulted in the assessment of civil money penalties in the total amount of $75,000.00. These amounts are

[1] This determination letter addresses only H-2B violations.

explained in detail on the enclosed Summary of Violations and Remedies. Please note that where C. S. Lawn & Landscape, Inc. violated both an I-129 requirement and the corresponding 9142 Application requirement, the associated back wages and civil money penalties are listed under each citation on the enclosed Summary of Violations and Remedies. However, the back wages and civil money penalties for such violations will be collected under only one citation.

C. S. Lawn & Landscape, Inc. is liable for any ongoing violations. C. S. Lawn & Landscape, Inc. must pay these civil money penalties and the back wage amount no later than 30 calendar days after the date of this determination unless C. S. Lawn & Landscape, Inc. requests an appeal as described below.

The civil money penalties must be paid by submitting a certified check or money order payable to "Wage and Hour Division - Labor" to the Wage and Hour Division, U.S. Department of Labor, The Curtis Center 170 S. Independence Mall West Suit 850 W, Philadelphia, Pa. 19106-3317.

C. S. Lawn & Landscape, Inc. must pay back wages in the amounts listed on the Summary of Unpaid Wages, Form WH-56, which is enclosed. The back wage payments must follow procedures as outlined in the Back Wage Disbursement and Pay Evidence Instructions enclosed with this letter C. S. Lawn & Landscape, Inc. is responsible for withholding the legally required deductions (*e.g.,* Federal and State income tax and FICA) and paying these amounts and C. S. Lawn & Landscape, Inc.'s contributions to the appropriate entities. A certified check or money order in the net amount of back wages should be made payable to the names of the individuals owed back wages or "Wage and Hour Division - Labor" and must be submitted to the Wage and Hour Division, U.S. Department of Labor, 2 Hopkins Plaza Suite 601, Baltimore MD 21201.

This debt is subject to the assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Improvement Act of 1996 and U.S. Department of Labor policies. Interest will be assessed at the Treasury Tax and Loan Account rate on any principal that becomes delinquent. The rate is currently 1%. Administrative cost charges will be assessed to help defray the Government's cost of collecting this debt. A penalty at the rate of 6% will be assessed on any portion of the debt remaining delinquent for more than 90 days. In order to avoid these charges, C. S. Lawn & Landscape, Inc. must forward payment of the back wages, and civil money penalties, as directed above, by the indicated due date. Please note that any pending bankruptcy action may affect the foregoing remedies. Where appropriate, the Department of Homeland Security and the Department of Labor's Office of Foreign Labor Certification (OFLC) will be notified about H-2B violations.

Additionally, pursuant to 20 C.F.R. § 655.31(d)(4) (2008), if C. S. Lawn & Landscape, Inc. fails to pay the back wages and/or civil money penalties by the indicated due date, OFLC may seek to debar C. S. Lawn & Landscape, Inc. from receiving future labor certifications for a prescribed period of time.

C. S. Lawn & Landscape, Inc. has the right to request a hearing on this determination. Such a request must be dated, be typewritten or legibly written, specify the issues stated in this notice of

determination on which a hearing is requested, state the specific reasons why the requestor believes this determination to be in error, be signed by the requestor or by an authorized representative, and include the address at which the requestor or the authorized representative desires to receive further communications relating to the hearing request.

The request must be made to and received by the Chief Administrative Law Judge (OALJ) at the following address no later than 30 calendar days after the date of this determination:

Chief Administrative Law Judge
U.S. Department of Labor
800 K Street NW, Room 400 North
Washington, DC 20001-8002

If C. S. Lawn & Landscape, Inc. does not make a timely request for a hearing, this determination will become a final order of the Secretary of Labor and may no longer be appealed.

The procedure for filing a request for a hearing is provided in 29 C.F.R. § 503.43. Please note that 29 C.F.R. § 503.43(f) requires that a copy of any such request for a hearing must also be sent to me and to those parties listed below. Due to the delayed delivery of mail in certain areas, you may wish to transmit your request to the OALJ via facsimile at 202-693-7365 to ensure timely receipt.

The fact that the above sanctions/remedies are being imposed for the H-2B violations found at this time does not preclude the taking of other enforcement action as is deemed appropriate by the Department of Labor or the assessment of back wages or civil money penalties for additional violations of the H-2B provisions found at some future time.

A copy of 20 C.F.R. Part 655 subpart A (2008) can be found at the following web address: https://www.foreignlaborcert.doleta.gov/pdf/H2BFinalRule.pdf and a copy of 29 C.F.R. Part 503 (2015) can be found at the following web address: http://www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09694.pdf

Sincerely,

Joseph Corbin
Assistant District Director

Enclosures: List of Applications and I-129 Petitions
WH-56
Summary of Violations and Remedies
Back Wage Disbursement and Pay Evidence Instructions

cc: Chief Administrative Law Judge
U.S. Department of Labor
800 K Street NW Room 400 North
Washington, DC 20001-8002

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

Francia Yops, Program Manager
Wage and Hour Division
U.S. Department of Labor
Philadelphia Regional Office
170 S. Independence Mall W., Ste. 850W
Philadelphia, PA 19106

Elspeth L. Doskey, Staff Attorney
Office of the Regional Solicitor
U.S. Department of Labor
170 S. Independence Mall W., Ste. 630E
Philadelphia, PA 19106

Wayne Pierce, Attorney
The Pierce Law Firm LLC
133 Defense Highway, Suite 201
Annapolis, MD 21401

Summary of Violations and Remedies

Please note that where C. S. Lawn & Landscape, Inc. violated both an I-129 requirement and the corresponding 9142 Application requirement, the associated back wages and civil money penalties are listed under each citation. However, the back wages and civil money penalties for such violations will be collected under only one citation.

Violation Name/ Description	Type of Violation	Applied Enforcement Document(s)	Affected 9142 Application and/or I-129 Petition	Violated Attestation and/or Requirement	Back Wages Assessed	Civil Money Penalty Assessed	Total(s) Due for Payment Regarding this Violation
Recruitment and Hiring of U.S. Workers: The job opportunity was not open to qualified U.S. workers; C. S. Lawn & Landscape, Inc. did not conduct the required recruitment or rejected U.S. workers who applied for other than lawful, job related reasons.	[X] Substantial Failure [ ] Willful Misrepresentation	9142	H-400-14009-076600 H-400-14346-661281	Attestation #3 & 20 CFR 655.22(c)	$17,701.80 $44,259.84	$10,000.00 $10,000.00	Back wages: $ 61,961.64 CMP: $ 20,000
Terms and Working Conditions: The offered terms and working conditions of the job were not normal to workers similarly employed in the area of intended employment or were less favorable than those offered to the foreign workers.	[X] Substantial Failure [ ] Willful Misrepresentation	9142	H-400-12331-486266 H-400-14009-076600	Attestation #4 & 20 CFR 655.22(a)	$0.00 $0.00	$5,000.00 $5,000.00	Back wages: $ 0.00 CMP: $ 10,000

Accuracy of Temporary Need: C. S. Lawn & Landscape, Inc. failed to accurately specify on the petition or 9142 Application the number of workers needed.	☐ Substantial Failure ☒ Willful Misrepresentation	9142	H-400-12331-486266 H-400-14009-076600 H-400-14346-661281	Attestation #13 & 20 CFR 655.22(n)	N/A N/A N/A	$5,000.00 $5,000.00 $5,000.00	Back wages: $ ____N/A___ CMP: $ 15,000.00
		I-129	EAC-13-056-51084 EAC-14-091-51805 EAC-15-064-51375	Part 5, Question 11	N/A N/A N/A	$5,000.00 $5,000.00 $5,000.00	
Impermissible Deductions: C. S. Lawn & Landscape, Inc. or its agents/attorneys made impermissible deductions from the employees for daily transportation, uniforms, and housing.	☒ Substantial Failure ☐ Willful Misrepresentation	9142	H-400-12331-486266 H-400-14009-076600 H-400-14346-661281	20 CFR 655.55(g)(1)	$25,239.20 $24,000 $36,000	$10,000.00 $10,000.00 $10,000.00	Back wages: $85,239.20 _____ CMP: $ 30,000 _____
		I-129	EAC-13-056-51084 EAC-14-091-51805 EAC-15-064-51375	H-Supplement, Section 2, Question 8-10	$25,239.20 $24,000 $36,000	$10,000.00 $10,000.00 $10,000.00	

Summary of Unpaid Wages

U.S. Department of Labor
Wage and Hour Division

Office Address:	Baltimore MD District Office 2 Hopkins Plaza Suite 601 Baltimore, MD 21201 410-962-6211	**Investigator:** Oscar Blanco	**Date:** 02/23/2018
		Employer Fed Tax ID Number: 52-1216474	

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
1. AREVALO CARREON, DAVID-CURRENT H2B	7 C HERITAGE CT Annapolis, MD 21401	02/20/2013 to 12/16/2015	FLSA H2B	$1,230.90 $2,619.60 $3,850.50	$1,230.90 $2,619.60 $3,850.50
2. BARRIENTOS BONILLA, CARLOS A		02/20/2013 to 12/16/2015	FLSA H2B	$1,204.10 $7,000.00 $8,204.10	$1,204.10 $7,000.00 $8,204.10
3. BARRIENTOS HERNANDEZ, FRANCISCO-CURRENT H2B J	1107 BUTTERWORTH CT Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA H2B	$899.74 $7,000.00 $7,899.74	$899.74 $7,000.00 $7,899.74
4. BARRIENTOS HERNANDEZ, ISAAC-CURRENT H2B	1107 BUTTERWORTH CT Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA H2B	$1,080.62 $7,000.00 $8,080.62	$1,080.62 $7,000.00 $8,080.62
5. BONILLA DE BARRIENTOS, MARCELINA		02/20/2013 to 12/16/2015	FLSA H2B	$982.24 $7,000.00 $7,982.24	$982.24 $7,000.00 $7,982.24
6. BONILLA JUAREZ, ALVARO		02/19/2014 to 12/16/2015	FLSA H2B	$769.24 $5,000.00 $5,769.24	$769.24 $5,000.00 $5,769.24

I agree to pay the listed employees the amount due shown above by **Signed:** _____ **Date:** _____	**Employer Name and Address:** C. S. Lawn & Landscape, Inc. C. S. Lawn & Landscape, Inc. 165 Log Canoe Circle Suite F Stevensville MD 21666	**Subtotal:**	$41,786.44	$41,786.44
		Total:	$182,416.57	$182,416.57

Summary of Unpaid Wages

U.S. Department of Labor
Wage and Hour Division

Office Address:	Baltimore MD District Office 2 Hopkins Plaza Suite 601 Baltimore, MD 21201 410-962-6211	**Investigator:** Oscar Blanco	**Date:** 02/23/2018
		Employer Fed Tax ID Number:	52-1216474

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
7. CARREON MORA, ERNESTO-CURRENT H2B	1504 MARION QUIMBY DR Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA	$1,105.11	$1,105.11
				$1,105.11	$1,105.11
8. DURAN TERESA, ANTONIO		02/20/2013 to 12/16/2015	FLSA	$1,167.05	$1,167.05
				$1,167.05	$1,167.05
9. FOWLER, DAVID-US WORKER	6726 EL DORADO RD APT. 2E Federalsburg, MD 21632	02/19/2014 to 12/17/2014	H2B	$17,701.80	$17,701.80
				$17,701.80	$17,701.80
10. HERNANDEZ AMADOR, FRANCISCO		02/20/2013 to 12/16/2015	FLSA	$318.70	$318.70
				$318.70	$318.70
11. HERNANDEZ BAEZ, JORGE A		02/20/2013 to 12/16/2015	FLSA	$527.40	$527.40
				$527.40	$527.40
12. HERNANDEZ BAEZ, PEDRO-FORMER H2B A	44 Durant Avenue Clifton, NJ 07011	02/20/2013 to 12/16/2015	FLSA H2B	$516.20 $4,000.00	$516.20 $4,000.00
				$4,516.20	$4,516.20

I agree to pay the listed employees the amount due shown above by **Signed:** _____ **Date:** _____	**Employer Name and Address:** C. S. Lawn & Landscape, Inc. C. S. Lawn & Landscape, Inc. 165 Log Canoe Circle Suite F Stevensville MD 21666	**Subtotal:** $25,336.26	$25,336.26
		Total: $182,416.57	$182,416.57

Summary of Unpaid Wages

U.S. Department of Labor
Wage and Hour Division

Office Address:	Baltimore MD District Office 2 Hopkins Plaza Suite 601 Baltimore, MD 21201 410-962-6211	**Investigator:** Oscar Blanco	**Date:** 02/23/2018
		Employer Fed Tax ID Number: 52-1216474	

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
13. HERNANDEZ HERNANDEZ, CARLOS-CURRENT H2B	1504 MARION QUIMBY DR Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA H2B	$1,213.54 $619.60	$1,213.54 $619.60
				$1,833.14	$1,833.14
14. HERNANDEZ HERNANDEZ, CIRILO-CURRENT H2B	143 MERRYMAN CT Annapolis, MD 21401	02/20/2013 to 12/16/2015	FLSA	$1,165.36	$1,165.36
				$1,165.36	$1,165.36
15. HERNANDEZ HERNANDEZ, FERNANDO-CURRENT H2B	7 C HERITAGE CT Annapolis, MD 21401	02/20/2013 to 12/16/2015	FLSA H2B	$1,175.40 $7,000.00	$1,175.40 $7,000.00
				$8,175.40	$8,175.40
16. JIMENEZ, JOSEFINA		02/20/2013 to 02/18/2015	FLSA	$982.24	$982.24
				$982.24	$982.24
17. KELLEY II, WALTER-US APPLICAN-10 DAY S	1713 CRAB ALLEY DR Chester, MD 21619	02/18/2015 to 12/16/2015	H2B	$22,129.92	$22,129.92
				$22,129.92	$22,129.92
18. LAURO BARRIENTOS HERNANDE, JOSE J		02/20/2013 to 12/16/2015	FLSA H2B	$987.55 $7,000.00	$987.55 $7,000.00
				$7,987.55	$7,987.55

I agree to pay the listed employees the amount due shown above by **Signed:** _____ **Date:** _____	**Employer Name and Address:** C. S. Lawn & Landscape, Inc. C. S. Lawn & Landscape, Inc. 165 Log Canoe Circle Suite F Stevensville MD 21666	**Subtotal:**	$42,273.61	$42,273.61
		Total:	$182,416.57	$182,416.57

Summary of Unpaid Wages

U.S. Department of Labor
Wage and Hour Division

Office Address:	Baltimore MD District Office 2 Hopkins Plaza Suite 601 Baltimore, MD 21201 410-962-6211	**Investigator:** Oscar Blanco	**Date:** 02/23/2018
		Employer Fed Tax ID Number:	52-1216474

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
19. LOPEZ BONILLA, JESUS-CURRENTH2B	1107 BUTTERWORTH CT Stevensville, MD 21666	02/18/2015 to 12/16/2015	FLSA H2B	$442.36 $3,000.00	$442.36 $3,000.00
				$3,442.36	$3,442.36
20. LUCAS BONILLA, PEDRO		02/20/2013 to 12/16/2015	FLSA H2B	$1,187.57 $5,000.00	$1,187.57 $5,000.00
				$6,187.57	$6,187.57
21. LUENGAS ROMAN, ORLANDO-CURRENT H2B	1504 MARION QUIMBY DR Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA	$975.97	$975.97
				$975.97	$975.97
22. LUNA HERNANDEZ, DEMETRIO		09/02/2015 to 10/21/2015	FLSA	$2,467.92	$2,467.92
				$2,467.92	$2,467.92
23. MARCOS HERNANDEZ FLORES, JOSE-CURRENT H2B D	143 MERRYMAN CT Annapolis, MD 21401	02/20/2013 to 12/16/2015	FLSA	$877.36	$877.36
				$877.36	$877.36
24. MARTINEZ HERNANDEZ, ELEAZAR		02/20/2013 to 12/16/2015	FLSA H2B	$478.17 $3,000.00	$478.17 $3,000.00
				$3,478.17	$3,478.17

I agree to pay the listed employees the amount due shown above by **Signed:** _____ **Date:** _____	**Employer Name and Address:** C. S. Lawn & Landscape, Inc. C. S. Lawn & Landscape, Inc. 165 Log Canoe Circle Suite F Stevensville MD 21666	**Subtotal:** $17,429.35 **Total:** $182,416.57	$17,429.35 $182,416.57

Summary of Unpaid Wages

U.S. Department of Labor
Wage and Hour Division

Office Address: Baltimore MD District Office
2 Hopkins Plaza
Suite 601
Baltimore, MD 21201
410-962-6211

Investigator: Oscar Blanco

Date: 02/23/2018

Employer Fed Tax ID Number: 52-1216474

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
25. PEARMAN, LESTER-US APPLICANT-10DAY A	P.O. BOX 91 Gambrills, MD 21054	02/18/2015 to 12/16/2015	H2B	$22,129.92	$22,129.92
				$22,129.92	$22,129.92
26. RAMIRO, RUFINO-FORMER H2B	76 HERITAGE CT Annapolis, MD 21401	04/29/2015 to 10/21/2015	FLSA	$7,129.17	$7,129.17
				$7,129.17	$7,129.17
27. RAMIRO HERNANDEZ, OCTAVIO		02/20/2013 to 12/16/2015	FLSA	$338.70	$338.70
				$338.70	$338.70
28. RIVERA HERNANDEZ, EDGARDO-CURRENT H2B	1107 BUTTERWORTH CT Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA H2B	$1,086.98 $4,000.00	$1,086.98 $4,000.00
				$5,086.98	$5,086.98
29. SOLIS RODRIGUEZ, CRISPIN-CURRENT H2B	143 MERRYMAN CT Annapolis, MD 21401	02/20/2013 to 12/16/2015	FLSA	$1,168.52	$1,168.52
				$1,168.52	$1,168.52
30. VAZQUEZ GARCIA, ARTURO		02/20/2013 to 12/16/2015	FLSA H2B	$1,106.17 $5,000.00	$1,106.17 $5,000.00
				$6,106.17	$6,106.17

I agree to pay the listed employees the amount due shown above by

Signed: _____

Date: _____

Employer Name and Address:
C. S. Lawn & Landscape, Inc.
C. S. Lawn & Landscape, Inc.
165 Log Canoe Circle Suite F
Stevensville MD 21666

Subtotal:	$41,959.46	$41,959.46
Total:	$182,416.57	$182,416.57

Form WH-56

Summary of Unpaid Wages

U.S. Department of Labor
Wage and Hour Division

Office Address:	Baltimore MD District Office 2 Hopkins Plaza Suite 601 Baltimore, MD 21201 410-962-6211	**Investigator:** Oscar Blanco	**Date:** 02/23/2018
		Employer Fed Tax ID Number:	52-1216474

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
31. VAZQUEZ MOLINA, ARTURO-CURRENT H2B	1107 BUTTERWORTH CT Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA	$443.94	$443.94
				$443.94	$443.94
32. VAZQUEZ TIRADO, JOSE-CURRENT H2B P	1107 BUTTERWORTH CT Stevensville, MD 21666	02/20/2013 to 12/16/2015	FLSA H2B	$1,016.63 $4,000.00	$1,016.63 $4,000.00
				$5,016.63	$5,016.63
33. VAZQUEZ TORRES, JOSE L		02/20/2013 to 12/16/2015	FLSA H2B	$1,170.88 $7,000.00	$1,170.88 $7,000.00
				$8,170.88	$8,170.88

I agree to pay the listed employees the amount due shown above by **Signed:** _____ **Date:** _____	**Employer Name and Address:** C. S. Lawn & Landscape, Inc. C. S. Lawn & Landscape, Inc. 165 Log Canoe Circle Suite F Stevensville MD 21666	**Subtotal:**	$13,631.45	$13,631.45
		Total:	$182,416.57	$182,416.57

U.S. Department of Labor

Wage and Hour Division
2 Hopkins Plaza
Suite 601

Baltimore, MD 21201
410-962-6211
443-872-0168

INSTALLMENT BACK WAGE DISBURSEMENT AND PAY EVIDENCE INSTRUCTIONS

As provided in the acts enforced by the Wage and Hour Division, the Administrator of the Wage and Hour Division is authorized to supervise the payment of back wages. This document provides specific instructions on how to provide evidence of payment to the Wage-Hour Division.

- Per our agreement, back wage payment will be made on or before each date listed on the attached payment schedule.
- Preliminary back wage payment evidence will be in the Baltimore MD District Office by 7 days from the date each of the payments is made.
- Preliminary back wage evidence will consist of a report that lists the employees' names, check numbers, gross and net amounts paid. This list will also include addresses and social security numbers if not already on the Back Wage Summary (WH-56).
- No later than 30 days after EACH payment is made, send the Baltimore MD District Office a list showing any employee who has not been paid (due to missing address or otherwise). The list should include the employee's last known address, social security number, and what attempts you have made to locate this person. **Do NOT send checks to the Wage and Hour Office shown above unless specifically instructed to do so.** *NOTE: Section 16(c) of the Fair Labor Standards Act also provides, in part: "Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States." Therefore, it is the policy of the Wage and Hour Division to deposit back wages due unlocated employees into the U. S. Treasury.*
- Send the Wage Hour copies of the signed WH-58 Receipt Form to the Baltimore MD District Office as they are returned to you.
- On or before **<Insert Data Here>** you will be contacted by the Wage Hour Division. At that time you will be informed of any employees who remain unlocated. You should send to the District Office a check in the total **NET** amount made out to "**Wage and Hour Division – Labor**". You also have the option to pay online by ACH transfer, credit card, debit card, or digital wallet by going to https://pay.gov/public/form/start/77689032 or by going to www.pay.gov and searching "WHD Back Wage Payment - NE Region". This check should be received in the District Office no later than **<Insert Data Here>.** Along with the check should be a listing of the Gross and Net amounts due each employee whose back wages are included in this check. If any employee is located within the statutory time period, the U. S. Department of Labor will process payments to such employee.
- Also with this check you should send copies of the front and back of the cancelled check(s) for any person you have paid but for whom you do not have a signed receipt.
- Any defaulted balance shall be subject to the assessment of interest and penalty interest at rates

determined by the U.S. Treasury as required by the Debt Collection Improvement Act of 1996 (Public Law 104-134) published by the Secretary of the Treasury in the Federal Register and other delinquent charges and administrative costs shall also be assessed.

- In the event of default, the Department intends to pursue additional collection action that may include, but is not limited to, administrative offset, referral of the account to credit reporting agencies, private collection agencies, referral to the U.S. Treasury's Debt Management Service, and/or the Department of Justice.

- All back wage pay evidence should be sent to:

Wage & Hour Division
2 Hopkins Plaza
Suite 601
Baltimore, MD 21201

Phone: 410-962-6211 FAX 443-872-0168

EXHIBIT B

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 06 September 2019

Case No.: 2018-TNE-00023

In the Matter of:

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

v.

C. S. LAWN & LANDSCAPE, INC.,
Respondent.

Appearances:

Wayne Pierce, Esq.
Pierce Law Firm, LLC
Annapolis, Maryland
For the Respondent

LaShanta Harris, Esq.
Leah A. Williams, Esq.
Office of the Solicitor
Arlington, Virginia
For the Prosecuting Party

Before: Morris D. Davis, Administrative Law Judge

DECISION AND ORDER

Procedural Background

This matter arises under the H-2B provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.*, and the implementing regulations at 20 C.F.R. Part 655, Subpart A (2008). The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States if there are not sufficient U.S. workers who are able, willing, qualified, and available at the place where the alien is to perform such services or labor.

The Administrator, ("Administrator" or "Complainant") Wage and Hour Division ("WHD") of the Department of Labor ("DOL"), issued a determination (Reference No.: 1749873) to C. S. Lawn & Landscape, Inc., ("Respondent") via letter on February 20, 2018, stating that Respondent was found to be in violation of certain H-2B provisions of the INA (regarding a Petition for Nonimmigrant Worker and an Application for Temporary Employment

Certification) covering the period from February 15, 2013 to December 15, 2015, by a substantial failure to comply with the recruitment and hiring of U.S. workers; unfavorable terms and working conditions; and impermissible pay deductions requirement; and a willful misrepresentation of a material fact regarding the accuracy of its need for temporary workers. The Administrator determined that Respondent owes $147,200.84 in unpaid wages to three U.S. worker and 28 H-2B nonimmigrant workers and $75,000.00 in civil money penalties. (CX 1).[1]

On March 20, 2018, Respondent objected to the Administrator's findings and requested a hearing. The case was docketed at the Office of Administrative Law Judges on March 22, 2018, and it was assigned to me on April 19, 2018. On April 26, 2018, I issued a Notice of Hearing and Prehearing Order and set this case for hearing on October 23, 2018 in Washington, D.C. (AX 1). By Order dated June 12, 2018, the hearing dates were expanded to include October 23-24, 2018. (AX 2). The parties each filed four prehearing motions that were addressed in an Order dated October 3, 2018 that also moved the hearing dates to November 5-6, 2018. (AX 3). Complainant filed a Motion for Summary Judgment on October 18, 2018 and Respondent filed a Response on October 22, 2018. I issued an Order on October 30, 2018 denying the motion. (AX 4).

I held an informal telephone conference with the parties on September 28, 2018, and a formal, on-the-record telephone conference on October 24, 2018, in an effort to facilitate resolution of discovery issues. The hearing was conducted on November 4-5 and November 26, 2018. Complainant objected to a number of Respondent's exhibits at the hearing and I directed Complainant to put its objections in writing and I afforded Respondent an opportunity to respond. Complainant submitted written objections to 37 of Respondent's exhibits on December 12, 2018 and Respondent submitted its response on December 17, 2018. I issued an Order on February 13, 2019 overruling the objections and I admitted the exhibits. (AX 5). The evidentiary record is closed. Both parties submitted final written briefs on March 15, 2019. The Administrator's party representative at the hearing was Oscar Blanco, a Wage and Hour Division investigator. (Tele. Conf. TR 17-18). Respondent's corporate representative at the hearing was Charles Saine, the President and sole owner of C. S. Lawn & Landscape, Inc. (TR 442-443).

Evidence and Evidentiary Issues

Complainant offered Complainant's Exhibits 1-56 (TR 9) and Respondent offered Respondent's Exhibits 1-99 (TR 10), which were admitted subject to later objections. (TR 20).

Octavio Ramiro Hernandez

Mr. Hernandez was Complainant's first witness and Ms. Castro served as the interpreter.[2] (TR 71-72). Mr. Hernandez heard about Respondent from his uncle in 2001 or 2002. (TR 73-74). He started working for Respondent in 2002 and he worked for Respondent for 13 or 14 years. He had a visa and worked steadily for Respondent. He returned to Mexico in 2015. Mr.

[1] Administrative Law Judge exhibits are designated "AX," Complainant's exhibits are designated "CX," Respondent's exhibits are designated "RX," joint exhibits are designated "JX," and citations to the transcript of the hearing are designated "TR" followed by the page number(s).

[2] Laura Castro was sworn and served as the interpreter for all of the witnesses who were not fluent in English.

Hernandez worked for Respondent doing landscaping work and mowing grass. He first lived at 76 Heritage Court in Annapolis and then he moved to 1504 Kent Island. He never went inside 1107 Butterworth Court. (TR 74). He believed that was a location in Crofton, Maryland. Respondent's workers stored their tools at Thompson Creek. (TR 75). There was another shop on the other side of the bridge and sometimes he picked up tools there, but he did not recall the address. A small apartment was built over the Thompson Creek shop four or five years ago and the Javier Barrientos Hernandez group lived there for one year. (TR 76). The area above the shop that was converted into an apartment was previously used as an office. They added a bathroom and put up walls to make bedrooms. Mr. Saine asked to do the renovations and after the renovations were done, people moved in and lived there. When Mr. Hernandez left, he believed there were some problems with the Thompson Creek apartment and the people that lived there were moving out. (TR 77). They moved to the Quimby neighborhood – 1504 Marion Quimby. (TR 78).

Mr. Hernandez said that his cousin, Jaime Barrientos, lived in an apartment at 7C Heritage Court and that he visited the apartment. It was in the basement of the building and it was very dark. There were beds in what was supposed to be a living room because people were sleeping there. (TR 78). The bathroom smelled of humidity and, because of the humidity, the walls were stained with something green. Mr. Hernandez said he knew what mold was; stains that are caused by humidity. He said he visited the Heritage Court apartment in 2012 or 2013. (TR 79). He recalled that the stains were bigger on the ceiling. When he was at the apartment in 2013, he only went into the living room area. (TR 80).

Mr. Hernandez knew Marcelina de Barrientos who is his cousin. She came to the United States on the C. S. Lawn list, but she did not work for the company; instead, she worked somewhere else at a hotel. (TR 80). The hotel was located across from a Home Depot and a Best Buy store in Annapolis. He did not know when Marcelina first started coming to the United States, but it was prior to him coming in 2002. She came to the United States when he did from 2002 to 2015. They would see each other at the embassy in Guadalajara. She came under the visa for C. S. Lawn workers along with her husband, Jaime Barrientos. (TR 81).

Mr. Hernandez knew Josefina Jimenez who is the wife of his uncle. His uncle is in charge of traveling with the people from Mexico to the United States. He said Josefina was in the United States at that moment. She started coming to the United States prior to 2000 and she came on the C. S. Lawn workers' visa. Mr. Hernandez said Josefina came to the United States the same years that he came and that she has only worked for Respondent during the current year. (TR 82). The other years she worked at a restaurant where she was a cook and she also cleaned houses. The house cleaning she did on her own and she did not work for a company, and the restaurant was in downtown Annapolis. The current year is the first year that she worked doing landscaping. Mr. Hernandez said that in the years he worked for Respondent Marcelina and Josefina did not work for Respondent and had jobs elsewhere. (TR 83).

In 2013, Javier Barrientos, Arturo Vasquez, Pedro Hernandez, Gerardo, Issac – about six people – lived in the Thompson Creek apartment. (TR 83-84). They also lived there in 2014 and 2015. There were about six people living at the 7C Heritage Court location in 2013. Mr. Hernandez did not see the bathroom walls in Heritage Court in 2014 or 2015 because he only went into the living room. He recalled it had the smell of humidity. (TR 84). The stains that he

saw on the bathroom walls is called mold in the United States, but he calls it humidity. Whenever he said he saw humidity he was referring to mold or fungus. (TR 86-87).

On cross-examination by Respondent, Mr. Hernandez said he left the United States in November 2015. (TR 87). He saw people living at the Thompson Creek location for many years. He lived at 1504 Marion Quimby. (TR 88). The workers on the western shore reported to the shop located in Davidsonville, Maryland, but Mr. Hernandez also went to the Thompson Creek shop. (TR 89). He said he had not heard of an H-4 visa, only an H-2B visa. The only thing he knew about Josefina coming into the United States was that she was traveling into the country with the group and was on the list of people coming to work for Respondent. He did not see Marcelina do any mowing or landscaping. (TR 90). He said the term "humidity" in Mexico meant a green stain that goes away when you touch it with your hand. That is how he describes the green and black spots he remembers seeing at 7C Heritage Court. (TR 91).

On re-direct examination by Complainant, Mr. Hernandez said Butterworth Court is the Thompson Creek location and he saw people living there in 2013 and 2014. (TR 91). He never saw Marcelina or Josefina doing any work for Respondent, but he knows that Josefina is for the first time currently working for Respondent. (TR 92).

Rufino Ramiro Hernandez

Complainant called Rufino Hernandez as its second witness. (TR 94). Mr. Hernandez is 38 years of age and attended high school in Mexico. (TR 94-95). He learned about Respondent from his uncle, Marcos Hernandez, who introduced him to Mr. Saine and helped him get a job. (TR 95). He first came to the United States to work for Respondent on March 21, 2000. He had to obtain a passport and a visa while he was in Mexico, and then his uncle picked him up in the United States and he started work the next day. He used a letter his uncle sent him from Mr. Saine in order to get his visa. (TR 96). He came to the United States on an H-2B visa to work for Respondent in 2000. He worked for nine months doing whatever the foreman told him to do – cleaning, cutting, landscaping, whatever was needed. (TR 97). He went back to Mexico after nine months to renew the visa so he could return the next year. He returned and worked for Respondent for two more years. He decided not to return in 2003 because a colleague said he was going to accuse him of something with Mr. Saine. His brother talked to Mr. Saine and he returned to work for Respondent in 2004. (TR 98-99). He continued working for Respondent for about six more years and he stopped working for Respondent for the second time in 2011. (TR 99). He came back in 2012 and continued working for Respondent until 2015. (TR 100).

Mr. Hernandez lived in Annapolis when he worked for Respondent. In 2013, he was paid $11.50 per hour. He believes his pay increased to $11.75 per hours in 2014 and to $13.50 in 2015. (TR 101). He went to the Heritage Court apartment once at the end of 2011 or beginning of 2012 to check the mail and take some boxes after some of the other workers left. Mr. Hernandez said "[t]here was a humidity in one of the bedroom," which he described as "like a fungus." (TR 102). He said it was green mold. It was in the bedroom where his cousin was staying. Mr. Saine and some other workers were with him inside the Heritage Court apartment. (TR 102). Mr. Hernandez testified that Mr. Saine saw the mold and said he would have someone clean the apartment. (TR 103). He said his cousin got pneumonia. There were six people living

in the apartment and they lived there in 2012, 2013, 2014 and 2015. He knew that because some of them were relatives and he knew the others. (TR 104).

Mr. Hernandez was familiar with the 1107 Butterworth Court location in Thompson Creek. (TR 105). The first time he was there it was an office with two floors. There was a secretary, file cabinets and three desks. He went there to drop off tools. (TR 106-107). Later, he helped to build a kitchen, bathroom and a laundry to convert it into an apartment. (TR 107). Mr. Saine asked him to do the work. In 2013, Javier, Isaac Barrientos, Ernesto, Pedro, Arturo Vazquez and another person whose name he did not recall lived there. The same people lived there in 2014 and 2015, except in 2015 more people were added downstairs. They were Eleazar and Antonio Hernandez, Carlos and others whose names he did not recall. (TR 108).

He knows Marcelina and Josefina. (TR 108-109). He knows Marcelina because she is married to his cousin. He first met her when he was about 10 years old. He remembers that when he was about 19 she traveled to the United States with her husband, Jaime Barrientos. (TR 109). When Mr. Hernandez came to the United States for the first time in 2000 to work for Respondent, Marcelina came too. (TR 109-110). Respondent brought her into the United States, but she did not work for Respondent. He knew that because she was never with the group when they left in the morning to go to work, but instead she was going to work at a different place, which he believed was a hotel in downtown Annapolis. Marcelina came to the United States every year that Mr. Hernandez worked for Respondent, which was through 2015. In 2015, she lived at 7C Heritage Court. (TR 110). That is the same place where she lived in 2013 and 2014. Everyone that lived there worked for Respondent except for the women. The last year – 2015 – Marcelina worked doing cleaning close to Riva Road in Annapolis. In 2014, she was working in the same area, but she was cleaning at the hospital. (TR 111). She also did cleaning in 2013 and she was sent to different locations. He did not recall her ever doing any work for Respondent. (TR 112).

Josefina is the wife of Mr. Hernandez's uncle. He first met her when he was about 10 years old. She came to the United States in 2013, 2014 and 2015 with his uncle. (TR 112). She lived at 1142 Merryman Court in 2013, 2014 and 2015. (TR 112-113). She did not work for Respondent in those years, but instead worked at a restaurant in Annapolis. (TR 113). Mr. Hernandez said that once, when he was working delivering pizzas, he went to the restaurant where she worked and he saw her there. That was in 2008 or 2009 and she worked at the restaurant for 7 to 10 years. Mr. Saine told him that the Marcelina and Josefina came to the United States to cook for the workers and clean the houses where they were living. (TR 114). Mr. Hernandez said that was true, but they were working outside the company and not within the company. (TR 114-115). Mr. Saine purchased uniforms in 2013, 2014 and 2015 that consisted of a t-shirt bearing the company's logo. (TR 115). Mr. Hernandez reviewed pages taken from CX 54, which he said showed where he got direct deposits. (TR 116). It shows deductions from his pay for uniforms. (TR 116-117). Every pay period in 2015 there was a deduction in the amount of $18.62 for uniforms. (TR 117).

Mr. Saine told Mr. Hernandez that if anyone tried to talk to him about the company he should decline to do so because there were people trying to deport him back to Mexico and Mr. Saine would protect him. He knew there were deductions for uniforms in 2015, but he did not know about 2013 and 2014 because they did not begin to get pay stubs until 2015. (TR 117-

118). The work he did on the renovations at Thompson Creek was in 2010 and people starting living there afterwards. People who lived at 7C Heritage Court told him there was a lot of mold there, especially in one of the bedrooms. All of the people who lived there complained about it many times. (TR 118). They were afraid to complaint about it to Mr. Saine because they were afraid of him. (TR 118-119). Mr. Hernandez reviewed the photographs at CX 20 and said they looked like the mold he saw inside 7C Heritage Court. The complaints he heard from other workers were in 2013 and 2014. (TR 119).

On cross-examination by Respondent, Mr. Hernandez agreed that he had sued Respondent. (TR 121). He said the suit was filed in March or April 2016 "because of what he tried to do to me." (TR 122). He alleged that Respondent failed to pay him $120,000.00 in overtime. (TR 123). He agreed that as part of the lawsuit Respondent alleged that he had taken its equipment to do side jobs. (TR 124). Mr. Hernandez disagreed that his side jobs were taking business away from Respondent and said it "wasn't something that was making a huge difference" and that he was "doing it just to make extra money." (TR 125). He denied that he was still competing against Respondent and said he had not done any landscape work in months. (TR 125-126). He said he works for Leckner Nissan, which is a car dealership. (TR 126). The dealership is in Ellicott City, Maryland. Mr. Hernandez agreed that he eventually dropped his lawsuit against Respondent. (TR 127). He agreed that he alleged that ADP, a commercial payroll company, was doing dual books that gave one set of earnings statements to workers and another set of earnings statement to Respondent. (TR 128).

Mr. Hernandez denied that he had ever secretly tape-recorded Mr. Saine. (TR 129). He agreed that in 2008 he purchased a housing unit from Mr. Saine – 76 Heritage Court – and that he has lived there ever since. (TR 130). Mr. Hernandez denied that during the lawsuit Respondent's counsel produced a stack of GPS data showing that the truck he was supposed to be using to do work for Respondent did not correspond with the overtime hours he claimed he had worked. (TR 132). He said he was told that all of the records, including the GPS data, burned up in a fire. (TR 134). When shown what counsel represented were GPS records, Mr. Hernandez denied that he had ever seen them before. (TR 137). He said that when Mr. Saine told him that he might be deported it was a one-on-one conversation and there were no witnesses to the event. (TR 139).

On re-direct examination by Complainant, Mr. Hernandez said he had a good relationship with Mr. Saine until the investigation started. (TR 139-140). He said that he always asked Mr. Saine's permission before using one of his vehicles, but sometime he used some of Mr. Saine's tools without permission. (TR 140).

On re-cross examination by Respondent, Mr. Hernandez said he was fired after the investigation began and Mr. Saine thought he had initiated the investigation. (TR 142). He said he was fired about the beginning of December in 2015. (TR 143).

Orlando Luencas

Complainant called Mr. Luencas as its third witness. Ms. Castro served as the interpreter. Mr. Luencas said that he worked for Respondent for 16 to 18 years beginning in 1997 or 1998. He heard about Respondent from Marcos Hernandez. (TR 146). He last worked for Respondent

in 2016. He believed he was not called back like Marcos and the others because he was part of the lawsuit alleging that Respondent paid 80 hours per week when they worked 99 hours per week. He lived at the western shore when he worked for Respondent and some of his colleagues still live there. (TR 147). The place where he lived was on Marion Quimby Drive. Respondent deducted $15 for uniforms and $30 for rides from his paycheck. (TR 148). Respondent provided a van for one of the workers to drive the others and $30 a week was deducted. The rent was $422.00 per month and it was paid to Respondent in cash. (TR 149).

Mr. Luencas knew Marcelina and Josefina. They traveled to the United States when he did, but they did not work for Respondent. They started traveling together in 1997 or 1998. Josefina is currently working in the United States. Mr. Luencas saw her three days prior to the hearing when she was back at home visiting in Mexico. (TR 150). He said Mr. Saine told the whole team not to say anything because if he got sued it would not work out well for them financially. Mr. Saine never said directly not to talk to the Department of Labor, he just insinuated not to talk to federal officers. (TR 151). The deductions Mr. Luencas discussed earlier were taken out in 2013, 2014 and 2015. (TR 152).

On cross-examination by Respondent, Mr. Luencas said he kept coming back for 18 years because he liked working for Respondent, although the pay was low. (TR 152-153). He agreed that where he lived on Marion Quimby was right across the street from the office and that he could walk to work in five minutes. (TR 154). He agreed that he was a friend of Rufino Ramiro and that in 2016 he went out and worked with Mr. Ramiro in the evenings because he needed the extra money. (TR 155). When Mr. Saine found out that he was working with Mr. Ramiro, Mr. Saine said he was not allowed to do so. (TR 155-156). Mr. Luencas said he did not know why Respondent did not call him back to work. (TR 157).

Pedro Hernandez Baez

Complainant called Mr. Baez as its fourth witness and Ms. Castro served as interpreter. (TR 166). Mr. Baez worked for Respondent for five years from 2010 through 2014. He said he quit because he did not like the way he was treated. He said he did not get pay stubs and he was not getting paid properly. (TR 167-168). The workers received information at the consulate on how much they would get paid per hour and for extra hours, but he was not getting paid that amount. He believed that he received new pay information each year. (TR 168-169). Mr. Baez knew Marcelina. She was not from the same town as him, but they met at the consulate and she was part of the group that traveled to the U.S. to work for Respondent. He also knew Josefina. (TR 169). He knew her for the same reasons. Both of the women traveled in the same group with him in all five years that he worked for Respondent. He did not believe either one ever worked for Respondent, but worked at other places instead. (TR 170). He knew that they did not work for Respondent during the five years when he was employed by Respondent. Mr. Baez knew Mr. Saine. He denied that Mr. Saine ever told him what to say or not say if the Department of Labor came around. (TR 171).

On cross-examination by Respondent, Mr. Baez said he was in Pachuca, Mexico, where he has been for five years. When he left working for Respondent in 2014, he went to work in New Jersey for four or five months. When he was informed that he could get in trouble for making the change, he quit work and moved back to Mexico. (TR 172). He recalled talking

with Investigator Oscar Blanco in March 2015. (TR 172-173). He agreed that he quit working for Respondent in July 2014. (TR 173). He believes that he left the United States and returned to Mexico in April 2015, which was four of five months after his visa had expired in December 2014. (TR 174).

On re-direct by Complainant, Mr. Baez said he spoke with Investigator Blanco while he was living and working in New Jersey. (TR 176). He knew that Investigator Blanco was from the Department of Labor and he told Mr. Blanco the truth. (TR 177).

Oscar Humberto Blanco

Complainant's fifth witness was Mr. Blanco. (TR 178). He has an associate's degree, a bachelor's degree, and a master's of business administration in management degree. He worked for the State of Maryland in wage enforcement before joining the Department of Labor in September 2009 as a wage and hour investigator. (TR 179-180). He completed a three week basic training course on the Fair Labor Standards Act in his first year and then another three week advanced course the second year that included training on the H-2B program. (TR 180).

Mr. Blanco said the H-2B program allows U.S. employers who are unable to fill their workforce needs from available U.S. workers to bring in foreign workers on H-2B visas. The program also includes protections for the interests of potential U.S. workers. (TR 182-183). There are 14 attestations an employer has to sign committing to follow the rules, which are intended to insure U.S. workers are not disadvantaged. (TR 183).

The first step in an investigation is to do some research on the employer – who owns the business, where is it located, what is the phone number? Next, he contacts the employer to let them know an investigation is beginning and he sends a letter with the items he needs from the employer. (TR 184). He visits the site and does interviews with management and workers, which results in written statements. He reviews the documents the employer provides. Once he has gathered all of the information that is required, he puts his findings and conclusions into a narrative, written report. Finally, he holds a final conference with the employer to go over the findings and conclusions. (TR 185).

Mr. Blanco was assigned to investigate Respondent in February or March 2015. His investigation covered from February 15, 2013 through the date in December 2015 when the contract with foreign workers ended. Respondent's usual H-2B period is from mid-March to mid-December of each year. (TR 186). Prior to this case, Mr. Blanco had done five or six H-2B cases. Respondent was alleged to have not paid its workers for all of the hours they worked, paid straight time for overtime work, made illegal deductions, and did not reimburse workers for inbound and outbound transportation costs. (TR 187). Mr. Blanco began by talking with the person who had filed the complaint, but then the case was put on hold due to an injunction. He contacted Respondent in November 2015 when the investigation resumed. Respondent provided most of the documents that Mr. Blanco requested. (TR 188).

Mr. Blanco met with Respondent on November 20, 2015, at its office in Stevensville, Maryland. He explained the process, reviewed the records he had requested and toured four housing units. He also interviewed 13 or 14 workers. (TR 189). The interviews were done at

1504 Marion Quimby in Stevensville, Maryland, which is on the housing units. (TR 189-190). The interviews were conducted in Spanish and Mr. Blanco summarized them and translated them into English. (TR 190). The person he interviews gets to review the statement, make any changes that are necessary, and sign it. (TR 191). The first page of CX 4 is a list of all the people Mr. Blanco interviewed and the following pages are the statements in both Spanish and English. (TR 192). Respondent had no objection to CX 4 and it was admitted.[3] (TR 193-194).

In an H-2B investigation the potential violations include a willful failure to comply with the required terms and conditions of the program and a substantial failure to comply with the required terms and conditions. (TR 195). In this case, Mr. Blanco identified four potential violations: (1) substantial failure to recruit U.S. workers in violation of Attestation 3; (2) preferential treatment for foreign workers, which is a substantial failure to comply with Attestation 4; (3) a willful failure to accurately state the need for foreign workers in violation of Attestation 13; and (4) impermissible deductions from workers' pay. (TR 196). The alleged violations were disclosed to Respondent's attorney at the final conference. The goal of the final conference is to discuss the alleged violations and try to enter into an agreement to resolve the matter. If that does not happen, a determination letter is issued and the employer has the right to appeal, which as Mr. Blanco explained is why we were having the hearing. (TR 197). Mr. Blanco identified CX 1 as the determination letter that was issued in this case. (TR 197-198). Mr. Blanco drafted the document and then it was reviewed and approved by management and the enforcement coordinator. (TR 198).

Mr. Blanco said that David Fowler is a U.S. worker that Respondent listed on its 2013 recruitment report as a hire. (TR 198-199). The recruitment report is at CX 13. Mr. Blanco interviewed Mr. Fowler in January or February 2015 and Mr. Fowler's statement is in CX 4A at Bates 339. (TR 199). Mr. Fowler told Mr. Blanco that he went to 1107 Butterworth Court and applied for a job that Respondent had advertised. He was hired and did snow removal for two weeks. He called in one day when he was unable to come to work and later he was fired. Attestation 3 required Respondent to hire any qualified individual and there were no work experience requirements noted. Mr. Fowler said he was ready, willing and able to work. (TR 200). Respondent was recruiting for landscape workers, not snow removal workers. Mr. Fowler worked for two weeks in the winter doing snow removal, but he never did any landscape work for Respondent. (TR 201). Respondent had other U.S. workers at the time Mr. Fowler applied, but they were previous employees and were not hired as part of the same recruitment effort. (TR 202). Mr. Fowler said he was ready, willing and able to work for Respondent doing landscape work for the February 2014 to December 2014 season. (TR 203-204). Mr. Fowler interviewed for the job as a landscaper that was supposed to begin in February 2014, but he started working in December 2013 doing snow removal because the H-2B workers had returned home to Mexico and Respondent needed workers to perform its snow removal work. (TR 204-205). The hourly rate for the 2014 season was $9.78 and that rate was used to calculate what Mr. Fowler would have earned. (TR 223). Mr. Blanco calculated Mr. Fowler's earnings for the 2014 season by taking the hours the H-2B workers worked and multiplying that number by the hourly rate. (TR 211). Mr. Blanco calculated that Mr. Fowler would have earned $17,701.80 for the season as

[3] CX 4 contains redactions. CX 4A are the same documents without the redactions. CX 4 is included in Complainant's evidence binder and CX 4A is in the sleeve in the back of the binder.

shown in CX 2. (TR 212-213). A civil money penalty of $10,000.00 was assessed for this alleged violation. (TR 213-214; CX 1).

Mr. Blanco was familiar with Walter Kelley and Lester Pearman. They are both listed on the recruitment report for the 2015 season at CX 34. (TR 214-215). Mr. Blanco interviewed Mr. Kelley in January or February 2016 and his witness statement is in CX 4. (TR 215). Mr. Kelley said he went to the shop at 1107 Butterworth Court, filled out an application, and was interviewed and told that someone would call him for a second interview, but he never got a call for the second interview. He applied for the job in November or December 2015 and said he was ready, willing and able to work for Respondent. (TR 216). Mr. Blanco calculated that Mr. Kelley would have earned $22,129.92 for the season. (TR 217-218; CX 35). To determine the number of hours Mr. Kelley would have worked, Mr. Blanco used the average of the hours the H-2B workers worked that season. (TR 218). Mr. Blanco said this was a willful violation and assessed a $10,000.00 civil money penalty. (TR 218-219).

Mr. Pearman was in the same situation as Mr. Kelley: He was told he would get a call for a second interview and he never got the call. (TR 219). Mr. Blanco interviewed Mr. Pearman on February 25, 2016, and his witness statement is in CX 4. (TR 220). Mr. Blanco calculated that Mr. Pearman would have earned $22,129.92 for the 2015 season had he been hired and he assessed a civil money penalty that was included in the $10,000.00 penalty cited above for Mr. Kelley. (TR 222; CX 36).

Mr. Blanco said the violation for treating H-2B workers more favorably than potential U.S. workers was based on Respondent paying foreign workers a higher rate than was advertised to potential U.S. workers. (TR 224). The advertisements Respondent ran in October 2012 for the 2013 season advised potential U.S. workers that the rate of pay was $9.01 per hour and overtime was $13.52 per hour, but it paid foreign workers from $9.01 to $12.41 per hour. (TR 225-227; CX 9-10). The payroll records Respondent provided showed that only two of the 23 H-2B workers were paid the rate advertised to potential U.S. workers and the 21 others were paid at higher rates. (TR 228-229; CX 16). Mr. Blanco said this was a substantial failure to comply with the requirements of the H-2B program. Respondent had been participating in the H-2B program for about 20 years. (TR 229). Respondent agreed in Attestation 4 that the terms offered to potential U.S. workers would be no less favorable than those offered to foreign workers. (TR 231-232; CX 6). Mr. Saine signed the ETA Form 9142, which included a clause that said he had read and reviewed the application and that it was true and accurate. (TR 232-233; CX 6).

The State Workforce Agency ("SWA") job order for 2014 is at CX 25. It is substantially similar to the newspaper advertisements and it is a requirement for participation in the H-2B program. (TR 233). The SWA job order for the February 2014 to December 2014 season stated that the rate of pay was $9.78 per hour. (TR 234; CX 25). The newspaper advertisements for the 2014 season ran in December 2013. (TR 235; CX 27-28). The newspaper advertisements and the SWA job order informed potential U.S. workers that the rate of pay was $9.78 per hour and that overtime was $14.67 per hour. In the 2014 season, Respondent paid six foreign workers the advertised rate for the first half of the season and only two at the same rate for the second half of the season. All of the other foreign workers were paid at a higher rate. (TR 236; CX 33). There were 24 H-2B workers in the 2014 season. (TR 237). Attestation 4 in the application for the 2014 season was the same as for the 2013 season and the failure to treat potential U.S workers at

least as favorably as foreign workers was a substantial failure to comply with the requirements of the program. (TR 238-239; CX 24). Attestation 3 – which is the same in the 2013, 2014 and 2015 applications – stated that U.S. workers who applied would only be rejected for lawful job-related reasons. This applied to the firing of Mr. Fowler and the failure to hire Mr. Kelley and Mr. Pearman. (TR 244; CX 24).

In Attestation 13, an employer is required to accurately state its need for temporary workers. It submits a temporary needs statement to the Department of Labor's Employment and Training Administration ("ETA"). If any U.S. workers are hired during the recruitment process there is a corresponding reduction in the number stated as a temporary need. (TR 245). For the 2013 season, Respondent said in its statement of temporary need that it needed 40 temporary workers. (TR 246; CX 8). It was authorized to bring in 39 temporary foreign workers. (TR 247; CX 14). According to the crossing report, Respondent brought 25 foreign workers into the United States for the 2013 season after stating that it needed 40 workers. (TR 247-249; CX 18). Attestation 13 in the ETA Form 9142 for the 2013 season said that Respondent truly and accurately stated the dates, reasons for the temporary need, and the number of workers needed, and Mr. Saine signed the form. (TR 250).

In the application for the 2014 season Respondent stated that it needed 55 temporary workers and ETA certified Respondent for 29 workers. (TR 251; CX 26). According to the presentation report, 24 workers entered the United States for the 2014 season. (TR 252-253; CX 50). Respondent signed committing to the same Attestation 13 when it submitted its 2014 application. (TR 253-254; CX 24).

In the application for the 2015 season Respondent stated that it needed 40 temporary workers and ETA certified Respondent for 36 workers. (TR 255; CX 41, CX 44). The crossing report shows that 23 workers entered the United States. (TR 255-256; CX 50). The two women – Marcelina and Josefina – were included as two of the workers in each of the three years. Mr. Blanco said over-stating the need and using two of the authorized slots for the two women who did not work for Respondent showed a reckless disregard for the truth of a material fact and constituted a willful violation of the H-2B regulation. (TR 256). He found during his investigation that Respondent had misrepresented the true state of its temporary need for at least 20 years. (TR 257).

Marcelina Bonilla de Barrientos is the wife of one of Respondent's H-2B workers named Jaime. During the investigation, an interviewee told Mr. Blanco that two women were in the United States, but they were not working for Respondent. (TR 257). The application for temporary employment states what Respondent said was its temporary need for workers. Attestation 13 represents that the stated need is accurate. (TR 257-258; CX 39)). Respondent said it had a temporary need for 40 workers in the SWA job order and statement of temporary need for 2015. (TR 259; CX 40, CX 41). Marcelina came to the United States in 2013 on an H-2B visa that said she was working for Respondent. She traveled with her husband, resided with him in the same housing unit, and paid rent to Respondent. (TR 259-260). An airline check-in receipt from 2013 with Respondent's email address on it says it is for Marcelina and her husband. (TR 260; CX 21). There are other ones for 2014 (TR 260-261; CX 38) and 2015 (TR 261; CX 46). Mr. Blanco obtained copies of the visa passports for Marcelina and Josefina from Respondent. (TR 261). There was no indication that Respondent had any intention of

employing Marcelina or Josefina in 2013, 2014 or 2015; they both worked for other employers under fictitious names. This had been going on for years and there was no indication that Marcelina ever worked for Respondent. (TR 262). Marcelina worked as a housekeeper at a Hilton Hotel in Annapolis and at an Anne Arundel County hospital. Her name was not on Respondent's payroll and interviews corroborated that she did not work for Respondent. Mr. Blanco printed out portions of Marcelina's posts from her Facebook page. (TR 263; CX 23). He did so because he wanted to interview Marcelina and Josefina, but Mr. Saine said they had already left the country and gone home. When he checked Marcelina's Facebook page, he found that she was still in the United States. It included pictures of her and her with her husband, Jaime. (TR 264). Respondent provided a list of its H-2B workers that said they departed the U.S. on December 5, but on December 10 Marcelina posted a picture of herself and Jaime at the airport with a message that said "God protect us on this trip today." (TR 264-265).

The other woman was Josefina Jimenez. She is the wife of another one of Respondent's H-2B workers named Marcos. Mr. Blanco was provided travel receipts showing she traveled into the United States. (TR 265). Respondent provided Mr. Blanco with e-ticket itineraries showing that Josefina and Marcos traveled to the U.S. together in 2014 and 2015. (TR 266; CX 37, CX 47). Payroll records and interviews showed that Josefina did not work for Respondent in 2013, 2014 or 2015. There is no indication that Respondent intended to employ Josefina in 2013, 2014 or 2015. She had been coming to the U.S. since at least 1999. (TR 267).

Respondent provided Mr. Blanco a list of its H-2B workers and when they supposedly left the United States. (TR 268; CX 48). The list said that Jose Jaime Hernandez – Marcelina's husband – departed on December 10 and that Marcelina had departed on December 5. Mr. Blanco said it did not make sense to him that Marcelina and Jaime would travel home to Mexico on different days, so he put a mark next to her name to check whether what Respondent's said was true. (TR 269). He had asked to speak with Marcelina during this period and Mr. Saine provided a false statement when he said she was not available because she had already left the United States and gone home. This is part of the willful misrepresentation of the temporary need violation. (TR 270). An employer has an obligation to provide accurate dates for when temporary workers are needed and an accurate number of temporary workers it needs. There are no back wages associated with this alleged violation, but there is a civil money penalty because it was a willful act and a reckless disregard for the truth of Respondent's representations. (TR 271). Respondent used 20 to 23 temporary workers in the 2013 to 2015 seasons, but represented that it needed from 40 to 55 temporary workers. A civil money penalty of $5,000.00 was assessed for each of the three years for a total of $15,000.00 for this alleged violation. (TR 272; CX 1).

Mr. Blanco said the final violation was for impermissible deductions. (TR 272). All deductions that are not required by law must be disclosed. In this case, Mr. Blanco found that Respondent deducted more for uniforms than it disclosed and took out deductions for rent and transportation. A deduction for transportation was only reflected in the payroll records in 2013 and the deduction reduced workers' pay below the offered wage. (TR 273). The deduction impacted two workers – Carlos Hernandez Hernandez and David Carvalo Carreon – for a total of $570.00 each. (TR 274). The deduction was not disclosed to the workers in the employment contract. (TR 275; CX 11).

The contract disclosed uniform and rent deductions. (TR 276). The rent deduction was $200.00 per month in 2013 and 2014, and then $300.00 in 2015. Mr. Blanco said the impermissible deductions only applied to 7C Heritage Court, where he observed what appeared to be mold, and 1107 Butterworth Court, which is the shop where Respondent stores tools and equipment. (TR 277). There were seven people living at Heritage Court in 2013 and six in 2014 and 2015. Part of the process for investigating a deduction for rent is to inspect the property to determine if the rent is reasonable, and when Mr. Blanco inspected Heritage Court he observed what he believed was mold. (TR 278). Mr. Blanco took photographs of what he believed was mold on the walls and ceiling on the bathroom at 7C Heritage Court when he visited it on November 20, 2015. (TR 280-281; CX 20). He said the mold covered about half of the ceiling and half of the walls, and that in interviews he was told that the mold was there from 2012 through 2015. He said Mr. Saine did not seem surprised to see the mold. (TR 281). In his opinion, the mold made the unit uninhabitable and he believed that a non-H-2B worker would have complained about it. (TR 281-282). The workers who lived at 7C Heritage Court in 2013 were Jose Torres, Pedro Bonilla, David Carreon, Carlos Bonilla, Jose Jaime Hernandez, Carlos Bonilla and Marcelina de Barrientos. The same people lived there in 2014 and 2015, except for Pedro Bonilla and David Carreon, and Alvaro Juarez who was added. (TR 283).

The unit at 1107 Butterworth Court is not really a housing unit, it is condo-type unit in a business park. (TR 283). In 2013, Pedro Baez, Jose Tirado, Francisco Hernandez, Edgardo Hernandez and Isaac Hernandez lived there. The same workers lived there in 2014, except Arturo Garcia was added. In 2015, Pedro Bonilla, Jesus Bonilla and Eleazar Hernandez moved in and Pedro Baez, Jose Tirado and Edgardo Hernandez moved out. Rent was not a permissible deduction because the county code said this location was not zoned for use as housing. (TR 284). Mr. Blanco checked with Holly Tompkins, a planner for the Queen Anne's County Department of Planning & Zoning, who said that a residential unit is not permitted in a location zoned for use as a business park.[4] (TR 284-285; CX 19). Mr. Blanco said this was a substantial failure, not a willful violation. (TR 285). The amount owed the workers for deduction for impermissible rent is $24,000.00 for 2013, $24,000.00 for 2014 and $36,000.00 for 2015 based on rent payments of $200.00 per month each in 2013 and 2014 and $300.00 per month each in 2015. (TR 286). The contract for 2013 said that charges for housing would not exceed $50.00 per person, per week. (TR 287; CX 11). The contract for 2014 and 2015 said the charge would not exceed $100.00 per person, per week. (TR 287; CX 29 and CX 42).

Uniform deductions were taken in 2013, 2014 and 2015. Respondent said that it deducted $18.62 per pay period for uniforms. (TR 289; CX 22). The contract provided to workers while they are still in Mexico said that $6.83 per week would be deducted for uniforms. (TR 290; CX 11). This impacted Antonio Duran Teresa and Carlos Hernandez Hernandez in 2013 because they were the only two workers paid at the advertised rate, so any deductions exceeding what was advertised reduced their pay below the required level. (TR 291). In 2014 there were six workers whose pay fell below the prevailing wage due to the uniform deduction: Jose Baez, Pedro Bonilla, Isaac Hernandez, David Carreon, Alvaro Juarez and Carlos Bonilla. (TR 291-292). In 2015 there were 21 workers adversely impacted by the uniform deduction, including all of the H-2B workers listed except for the two women who never worked for

[4] Complainant asked that I take official notice of the county code. (TR 288; CX 55, CX 56). Respondent had no objection. (TR 288).

Respondent. The prevailing wage rates for 2013, 2014 and 2015 are in CX 51, CX 52 and CX 53. (TR 293). The amount owed due to each of the affected workers totals $99.20 for 2013, $396.80 for 2014 and $2,083.20 for 2015. (TR 294). The amount due to each worker varies. (TR 296).

Mr. Blanco received payroll records for 2015 from the payroll company ADP. They only reflected the deductions for uniforms because rent was paid to Respondent in cash. (TR 297-298; CX 54). The payroll records for 2014 lists "miscellaneous deductions" and does not itemize what the deductions are for. (TR 298-299; CX 33). The same applies to the payroll records for 2013. (TR 299; CX 16).

On cross-examination by Respondent, Mr. Blanco agreed that he said in his deposition that he was not an expert on the H-2B program and was unaware that he was nominated to serve as the agency representative. (TR 300). He did not know whether employers spent 10 or 11 weeks applying for the H-2B program each year. (TR 302). He agreed that there had been issues with the H-2B program and that it is a complicated program. (TR 303, 305). He agreed that most H-2B employers hire professionals to prepare their paperwork and that shows a level of care on their parts to try and comply with the program. (TR 306-307). He agreed that the alleged violations were based solely on the 2008 regulation and that the hearing was solely for violating the requirements of the H-2B program. (TR 307, 309). He agreed that Mr. Saine signed the ETA Form 9142 on December 15, 2012, which was eight days after the labor certification was granted. (TR 311-312; RX 5). He agreed that the representation as to the need occurred after the labor certification was approved. (TR 314).

Mr. Blanco agreed with Respondent's counsel that § 655.22(n) of the regulation says that the "number of positions being requested for labor certification have been truly and accurately stated." (TR 316; RX 74 at 41). He also agreed that the same language appears in the attestation in the application and that this is the basis for the alleged violation. (TR 316). Mr. Blanco agreed that the instructions for completing the application said to enter the number of workers requested and that Mr. Saine did that. (TR 320). He agreed that he never ran a landscaping business or knew how bidding for landscaping business works. (TR 322). He agreed that Respondent had to begin the recruitment process 120 days before the season begins and that it had to account for that in the number of workers it requested. (TR 324). He agreed that in the 20 years Mr. Saine has been in the H-2B program there was no evidence that he was ever rejected for using an improper methodology for determining his temporary need for workers. (TR 329-330). Mr. Blanco said he was aware that the H-2B program has a statutory cap that limits admission into the country to 66,000 foreign workers. (TR 332).

Mr. Blanco agreed that in his narrative report the positions requested, certified, received and employed was for the 2013 season. (TR 334; RX 36 at 10). He agreed that in the same exhibit he listed the same information for 2014, but he said the number requested was actually 55 and not 30 as it states in the document. (TR 335; RX 36 at 18). Mr. Blanco said he had no knowledge that one of the women was properly brought into the U.S. on an H-4 visa. (TR 336-337). He said he did not work for USCIS and had no knowledge of how an H-2B visa versus an H-4 visa worked. (TR 337). He agreed that Mr. Saine turned over "plenty of records that indicated the women were not working for him." (TR 338).

With respect to Mr. Fowler, Mr. Kelley and Mr. Pearman, Mr. Blanco agreed that his position was that Respondent willfully rejected them. (TR 338). He agreed that he had no evidence that they were rejected for any reasons other than what they told him. (TR 339). He agreed that if an employee voluntarily quits there is no obligation to continue paying the employee. (TR 340). Mr. Blanco said that Mr. Fowler said he could not make it into work one day, so he called and spoke with the foreman and called and tried to speak with Mr. Saine, but he never got a call back and assumed he was fired. (TR 342-343). He did not indicate that he tried to call Mr. Saine more than once or that he left a message for Mr. Saine. (TR 343). Mr. Blanco agreed that he assumed that Mr. Fowler would work the entire season because he said he was willing to work. Mr. Blanco disagreed with Respondent's counsel that workers' hours "fluctuate wildly from one worker to the next, week after week after week." (TR 346). He said the hours for 2015 as reflected in RX 53 were pretty much in the 70 to 80 hours per pay period range. (TR 358-349; RX 53). He agreed that anyone who was getting paid for another job should not get paid twice through a back pay calculation. Mr. Blanco agreed that Mr. Kelley told him that he worked for months for another company and he could not recall the name of the company even though he left it seven months prior to the interview, and he did not recall how much he was paid. (TR 353-354). He agreed that if his calculations credited Mr. Kelley and Mr. Pearmen with two weeks that were after the H-2B workers had gone home that was an error. (TR 356). He agreed that when Mr. Fowler started work early for Respondent doing snow removal that was not part of the H-2B program, but he said he was hired for that job as a result of the landscaping recruitment process. (TR 358).

Mr. Blanco agreed that he alleged that Respondent discriminated against potential U.S. workers because it did not give them the same wage information that it gave H-2B workers; Attestation 4, preferential treatment for H-2B workers over U.S. workers. He agreed that in RX 1 – the SWA job order – and RX 2 – the newspaper advertisement – $9.01 was shown as the hourly wage and that in RX 9 – the employment contract – it shows $9.01 per hour. (TR 359). He agreed that in RX 11 – the SWA job order – it says $9.78 and in RX 19 – the employment contract – it says $9.78. (TR 360). He disagreed with Respondent's counsel that the phrase "Depends on Experience" in the pay comments of the SWA job order meant that potential U.S. workers were advised that more than the stated hourly rate was available. (TR 362-363; RX 1 at 4). Mr. Blanco said there was no experience requirement listed in the ETA Form 9142. (TR 363). He disagreed with Respondent's counsel that the phrase "at least" in the newspaper advertisements told prospective applicants that Respondent was going to pay a wage variance. Mr. Blanco said Respondent had to advertise that it was going to pay workers at different rates based on experience and that was not done in the newspaper advertisements. (TR 364).

Mr. Blanco said the housing deduction for the Butterworth Court location was improper because it was not zoned for housing. (TR 369). He said the deductions were not reasonable because one unit had mold and the other was not zoned for use as housing. (TR 370). Mr. Blanco said he is not a medical professional, but as a layman he determined that black mold growing in the unit made it uninhabitable. (TR 372). He agreed that he did not have the mold tested and did not know whether it was toxic. (TR 373). Mr. Blanco agreed that the 2008 regulation did not say that if U.S. workers would not live under the conditions he observed and would complain about it then an employer cannot charge rent. He said that the H-2B workers were intimidated by Mr. Saine and put up with the mold for years and did not complain where U.S. workers would have complained. He agreed there was nothing in the 2008 regulation that

said that. (TR 376). He agreed that the employment contract told the H-2B workers that they could make their own housing arrangements without suffering any prejudice by Respondent. (TR 378).

With respect to the housing unit at 1107 Butterworth Court, Mr. Blanco agreed that it was located in an area zoned "suburban industrial." (TR 379). He said that during the investigation he learned that the office moved out of that location because of the fumes from the machinery stored there. (TR 379). He agreed that there was no mention in his narrative report of the office staff moving due to gas fumes; instead, he said that was what he was told in a conversation. He agreed that permissible uses for sites in "suburban industrial" zones included daycare centers, migrant labor camps[5] and nurseries. (TR 380); RX 85). He agreed that there was nothing in the 2008 regulation that prohibited collecting rent based on unlicensed or improperly licensed housing. (TR 388). Mr. Blanco said the employee roster Respondent provided him that is marked RX 65 is the type of roster he relied upon to determine where workers lived and when they had lived there. His calculations of what is owed to workers for housing in 2013 is in RX 41, for 2014 in RX 44 and for 2015 in RX 46. (TR 390).

With respect to the deduction for commuting, Mr. Blanco agreed that any person who does not live where he or she works has to commute to and from home and incurs costs to do so. (TR 390). He said the transportation deduction was not disclosed to the workers. (TR 391). Instead, Respondent advertised to workers that transportation to and from worksites would be provided. There is nothing in the 2008 regulation that required an employer to provide transportation, but it did require them to give notice of all deductions and that the deductions had to be reasonable. (TR 392). While Respondent was not obligated to provide transportation to and from where the workers lived and where they reported for work, it was required to give notice in the job offer if it intended to deduct transportation costs from workers' pay. (TR 393). Mr. Blanco agreed that the term "job offer" is not clearly defined in the 2008 regulation. He agreed that the transportation deduction caused two workers to receive pay that was below the prevailing wage rate, so they are entitled to recover what was deducted. (TR 398-399). He agreed that he was not familiar with the preamble to the 2008 regulation. (TR 399-400).

With respect to the deduction for uniforms, Mr. Blanco agreed that the employment contracts each year said that uniforms were not provided and if they were provided the cost to the workers would be $6.83 per pay period. (TR 400; RX 30). He also agreed that the payroll records for 2013 and 2014 do not show deductions for uniforms and the only evidence he has that a deduction was taken is from what he was told during interviews. (TR 400-401). In 2015 the uniform deductions was reflected in the payroll records. (TR 401). For 2013 and 2014 the amount Mr. Blanco used to calculate how much was deducted for uniforms came from what he was told in interviews. (TR 402). There was nothing in the 2008 regulation that prohibited deductions for uniforms, but 20 C.F.R. § 655.22(g)(1) says that all deductions other than those required by law must be disclosed and must be reasonable. (TR 403). Mr. Blanco did not know whether anything in the 2008 regulation said you cannot go below the prevailing wage rate. He agreed that the civil money penalties were determined by his superiors. (TR 405).

[5] The term "migrant labor camp" is defined in § 18.1-54 of the Queen Anne County Code and only applies to migrant laborers in agricultural employment. (TR 381-385; CX 56).

On re-direct examination by Complainant, Mr. Blanco agreed that participation in the H-2B program is a choice and a privilege, and participation mandates compliance with the program's requirements. (TR 409). Participation is voluntary and his job as an investigator is to enforce the program's requirements. (TR 410). To calculate what is owed to U.S. workers that were not hired, Mr. Blanco said he looked at the payroll records for the H-2B workers and found a middle range for each pay period and multiplied that by the advertised hourly pay rate. (TR 412). The witness statements he prepared from interviews are summaries and they are not verbatim. He said he did not add or delete any facts from the statements. (TR 413). Each person that was interviewed was provided an opportunity to review his or her statement and to make any changes. (TR 414).

Mr. Blanco said an employer drafts a recruitment report to document all of the recruitment efforts it made to find U.S. workers before it can hire foreign workers. Mr. Fowler said he called his foreman. (TR 415). He called the foreman to let the foreman know that he could not make it in to work. He tried calling the owner to let him know he was ready to return to work, but he did not get a response. (TR 416). The recruitment report is to document all of the efforts to attract U.S. workers and it is provided to ETA before any foreign workers come in. The recruitment report for the 2014 season is CX 13 and it mentions Mr. Fowler. (TR 417-418). According to the recruitment report, Mr. Fowler was interviewed on December 17, 2013. The position he interviewed for doing landscaping work was supposed to start in February 2014 and end in December 2014. (TR 418-419). Mr. Blanco used that period to calculate Mr. Fowler's back wages. (TR 419).

Mr. Saine went with Mr. Blanco to 7C Heritage Court. Mr. Blanco said Mr. Saine did not seem surprised to see mold and he said that he was going to get it fixed. They used the word "mold" in their discussions that day. Mr. Blanco had statements that the mold existed prior to the day he visited with Mr. Saine. (TR 420). He said people he interviewed said the mold was present in 2013, 2014 and 2015. (TR 421).

The transportation deductions were impermissible because they were not disclosed and they brought the actual wage below the prevailing wage rate. (TR 421). The SWA job order said that Respondent would provide transportation to the work sites. It did not mention transportation from home to work, but workers could reasonably assume that was what was offered. (TR 422). Respondent did not tell H-2B workers before they accepted employment that they would have to pay for transportation. (TR 422-423). Workers were required to wear uniforms. The payroll records from 2013 had a place to show miscellaneous deductions. Respondent did not breakdown what all was included under that heading. (TR 423). Respondent provided the document that is CX 22 and it says they deducted $18.62 per pay period for uniforms. (TR 424). That is the same amount that is reflected in the 2015 payroll records. (TR 425). In the statement by Francisco Javier Barrientos, he said that $18 was deducted from his pay for uniforms. (TR 425; CX 4 at B-2). He said that was deducted from every check. Mr. Blanco believed he only asked workers about the 2015 season. The statement by Ernesto Mora says that $18 was deducted for uniforms. (TR 426; CX 4 at B-5). The same is reflected in the statement at B-10. A deduction that reduces the wage below the prevailing wage is not a reasonable deduction. (TR 427-428). The regulation at § 655.22(g)(1) requires an employer to guarantee a wage that meets or exceeds the prevailing wage rate. (TR 428-429). A deduction that brings the wage below the prevailing wage rate violates the requirement of the

regulation. (TR 429). Miscellaneous deductions are shown in the payroll records. (TR 429; CX 33). These are voluntary deductions that are not required by law, so they must be disclosed in order to comply with the regulation.

Charles Saine

Mr. Saine is the President and sole owner of C. S. Lawn. (TR 442-443). He started the company in 1979 and it provides landscaping and lawn maintenance services. He has been participating in the H-2B program for over 20 years. He normally gets workers from Mexico, although he has gotten workers from Canada, too. (TR 443). He agreed that he has to indicate in the I-129 document how many foreign workers he is requesting. (TR 444). He filled out and signed the forms in 2013 (CX 12), 2014 (CX 30) and 2015 (CX 43). (TR 445-446). He also had to complete an application for temporary employment certification, an ETA Form 9142, for 2013 (CX 6), 2014 (CX 24) and 2015 (CX 39). (TR 447-448).

Mr. Saine interviewed Mr. Fowler in November 2013 and hired him to do snow removal in December 2013. (TR 452). His intent was to have Mr. Fowler do landscape and lawn maintenance work, too. Instead, Mr. Fowler worked for Respondent for about two weeks. He said Mr. Fowler was not fired. (TR 453). Mr. Saine said Mr. Fowler stopped showing up for work and if he showed up now he would be able to work. (TR 454). He did not know whether Mr. Fowler called and spoke with a foreman about not being able to come to work. He said Mr. Fowler did not call and leave him a message. He wrote on the top of Mr. Fowler's application that he stopped showing up for work. (TR 455). Mr. Fowler had the telephone number for the office and he knew where the office was located, but he never showed back up for work. (TR 456). Mr. Fowler was not added to Respondent's payroll because snow removal is a separate business from landscaping. (TR 458).

Mr. Saine agreed that Mr. Pearman and Mr. Kelley were qualified to do lawn maintenance work. He said it is work that anyone off the street who is physically able could do. (TR 460). Mr. Pearman and Mr. Kelley were interviewed by Timmie Bell. Mr. Saine denied that they were told there would be a second interview; Mr. Saine said that in 40 years of doing business they never interviewed prospective employees twice. (TR 461). He said Mr. Pearman and Mr. Kelley were told to get back in touch if they were still available in February 2014. He said some U.S. workers last a long time working for Respondent and others do not. He cited Mr. Bell, who has worked for Respondent for 35 years, as an example. (TR 462). He agreed that U.S. workers hired for a position like the one Mr. Pearman and Mr. Kelley applied for do not last very long. Mr. Saine said that he walked behind a lawn mower for 25 years. He said U.S. workers today do not have the work ethic they once had. (TR 464). He depended upon a stable workforce to be successful and he said that both his U.S. and H-2B workers come to work. (TR 465).

Mr. Saine agreed that Attestation 4 – stating that terms offered to potential U.S. workers are no less favorable than those offered to foreign workers – was the same for 2013, 2014 and 2015. (TR 465-466). He said in 2013 and 2014 he paid his H-2B workers and his U.S. workers the same amount. (TR 466). In the newspaper advertisements in 2013, Respondent said it offered a wage of at least $9.01 per hour. (TR 467-468; CX 9-10). Mr. Saine agreed that he paid 21 of 23 H-2B workers more than $9.01 per hour. In the middle of the 2013 season the

Department of Labor informed Mr. Saine that he had to pay his workers $12.41 per hour. He agreed that the payroll records are accurate. (TR 469). He said he believed entry level workers started out the season making $9.01 per hour and then in July it increased to $12.41 per hour. (TR 4701-471). He agreed that in the ETA Form 9142 and the I-129 the job title is "laborers" and it does not say whether a worker is also a foreman. (TR 472). In 2014, Respondent advertised an hourly rate of $9.78. (TR 473). He agreed that he paid his returning H-2B workers $12.41 per hour. He said it would be hard to cut the pay of returning workers and pay them less than they earned the prior year. (TR 474). He agreed that he paid 20 of 22 H-2B workers more than $9.78 per hour. He said the 20 were returning workers who had experience in the job. (TR 475).

The document that lists where workers lived was prepared by Mr. Saine's secretary. The document at RX 65 is for the 2013 season. (TR 476; RX 65). The document at RX 69 is for the 2014 season. It indicates that five workers were at 1107 Butterworth Court. (TR 477; RX 69). Mr. Saine said the employees decide where they are going to live and they bounce back and forth from Merryman Court and Heritage Court. (TR 478). Mr. Saine's secretary took the address information from the payroll records, but the information may be inaccurate because the workers moved around. (TR 479). The information for 2015 is in RX 73. Mr. Saine said he personally owned the four housing units and that the H-2B workers paid rent for nine months, although they could leave their uniforms and supplies there until the next season. (TR 480-481). He clarified that the company owned 1107 Butterworth Court. (TR 481). The rent was $200.00 per person per month in 2013 and 2014 and the $300.00 per month in 2015. Mr. Saine disputed that some of the workers actually lived at the addresses shown in RX 65 and RX 73. (TR 482-483).

He said that Respondent's corporate office was presently at 1107 Butterworth Court and he agreed that it is zoned for suburban industrial use. He claimed that migrant workers are permitted to live at a location that is zoned suburban industrial. (TR 484-485). He agreed that the documents he submitted for certification said the start and end dates were February 15 to December 15. (TR 485). He agreed that was about 305 days and that the workers are not hired to do agricultural work. He said he purchased the Butterworth location to use as a shop and an office, but he added that the apartment was the nicest of the housing units. (TR 486). The renovation work to create an apartment was done by a contractor – Joe Dana – in 2014 or 2015 and Respondent's H-2B workers did not help do the work. (TR 488). Mr. Saine said he added a shower and a laundry room and expanded the kitchen a bit. (TR 489). He purchased the Butterworth and Heritage Court locations 10 to 15 years earlier. (TR 490). There were supposed to be six workers living at the Heritage Court unit in 2013, but it became seven because there was a falling out at the Merryman location and one person moved. (TR 491). He denied that there were eight people living at Heritage Court in 2014; it might have been their address, but they did not all live there. (TR 492).

Mr. Saine agreed that Marcelina was married to Jose Jaime Hernandez and they were listed as living at Heritage Court all three years, as well as their son, Carlos Alberto. Mr. Saine said he went to the Heritage Court apartment with Mr. Blanco and that he told Mr. Blanco he was going to see mold. (TR 493). Mr. Saine said he saw mold when he was there the day before. At the end of 2015 or early in 2016, he had a leak in the roof repaired, tore apart the bathroom and installed a bigger fan to keep up with the amount of humidity six people generated. He had a professional come out and look at the bathroom. The professional said

mold grows on drywall, but not on cinderblocks. Mr. Saines said he did the repair work himself. (TR 494). He also had the professional look at the Merryman unit and he found no mold there. (TR 495). When asked where his workers actually lived while they were employed by Respondent, Mr. Saine said, "I have no idea. They were living all over the place." (TR 496).

Mr. Saine said he believed they only made deductions for uniforms in 2015. (TR 497). The uniforms were rented from Cintas. In 2013 and 2014 he owned the uniforms and provided them to the workers. (TR 498). The miscellaneous deductions in 2013 was to repay money Mr. Saine loaned to workers, not for uniforms. (TR 498-499; CX 16). All of the deductions in 2013 and 2014 are listed as miscellaneous deductions. The employment contract for 2013, 2014 and 2015 referred to a uniform deduction of $6.83 per week. (TR 500-502; CX 11, CX 29 CX 42). Mr. Saine said the only year there was a uniform deduction was 2015 when they rented uniforms from Cintas. (TR 501). He said including it in the other years was likely just repeating over and over what had been included in prior years and "that was my mistake." (TR 502). The employment contract said the uniform deduction was $13.66 per pay period and the payroll documents show that $18.62 was deducted. (TR 503). Mr. Saine agreed that in 2015 the amount that was deducted for uniforms was more than the amount disclosed in the employment contract. (TR 504). In 2013 and 2014 they did not use Cintas; instead, Respondent provided uniforms and the workers had to wash their own. Concerning the uniform deductions in 2015, Mr. Saine testified: "Okay. But I will agree that they were higher in 2015 than they were supposed to be. Yes, I will agree to that. It's written on paper." (TR 505).

There was a transportation deduction in 2013 for two employees. (TR 505-506). They did not want to wait and ride in the van that Respondent provided, so the deduction was for gas costs. (TR 506). It also likely covered insurance and other operating costs. (TR 507). Mr. Saine said there was no place to disclose the transportation cost on the employment contract. (TR 508). He agreed that the documents provided to the H-2B workers before they come to the United States discloses the housing deduction and the uniform deduction, but not a transportation deduction. (TR 509-510). The transportation deduction applied to two workers who did not want to wait on the van and rode with other workers in their vehicles. It was agreed among them that the cost would be deducted from their paychecks and paid to the workers they rode with. (TR 510).

Mr. Saine agreed that he requested 40 foreign workers for the 2013 season and brought in 23 workers. (TR 512). For the 2014 season he requested 55 foreign workers and brought in 22 workers. (TR 513-514). Mr. Saine said the 55 number was a mistake and should have been 30 or 40 instead. (TR 514). For 2015, he asked for 40 foreign workers and brought in 21 workers. He said the larger number is the total number of workers he believed he needed for the season – U.S. and foreign workers combined – and the smaller number was the actual number of H-2B workers he employed and that he did not know exactly how many workers were required until the season got started. (TR 515). Mr. Saine said he had been involved in the H-2B program for 20 years, which was longer than the Department of Labor has been involved in the program. (TR 516). He added that it had probably been 25 years and that the type of paperwork that was required changed over time. He agreed that it was reasonable to expect him to be good at estimate the number of people he needed. (TR 517).

Mr. Saine disagreed that he got less accurate in estimating his temporary need over time. He said that in 2015 he had 18 U.S. workers and 21 H-2B workers, which is nearly the 40 total workers he estimated he needed that year. (TR 518). He agreed that he declared in the forms that the attestations were accurate and truthful, including the dates of the temporary need, the reason for the temporary need, and the number of foreign workers requested. He also agreed that the payroll records for 2013, 2014 and 2015 included everyone that worked for Respondent in those years. He agreed that in those years he brought over Marcelina Bonilla de Barrientos and Josefina Jimenez. (TR 519). He agreed that in those years he requested Marcelina and Josefina by name through the workforce company he used, requested them as part of the H-2B program, obtained visas for them, paid for their airfare into and out of the United States, and provided them housing with the other H-2B workers. (TR 520). Mr. Saine testified:

> But I am going to clarify it all. No, they did not work for me. They had worked for me previously in different years, but they did not work for me in 2013, '14 and '15, that is correct. So I want to make that – that's a true statement. . . I brought them in – it may be a mistake bringing them in on H-2b visa, because one of them had come in on an H-4 visa before. . . I didn't bring them in to work, so I didn't know they counted as worker that was working.

(TR 521-522). He agreed that the two women were not on his payroll and did not work for him in those years. (TR 522). He agreed that the women were listed on the crossing report to enter the U.S. and came in on visas with Respondent's name on the documents. (TR 525).

Mr. Saine said Pam Velez is his secretary and has worked for him for 25 years. (TR 527). She answers the phone, sends out invoices, collects money and makes deposits. (TR 528). He said they had a conversation one day where they joked about her turning off the lights and locking the doors if the Department of Labor came to ask her questions. He did not recall the exact date of the conversation, but it was since the hearing began in early November 2018. (TR 529). Mr. Saine said the he believed that all documents related to the 2013 to 2015 period had been turned over to the Department of Labor. (TR 530).

Pamela Valez

Complainant called Ms. Valez as a witness. She has worked for Respondent for 25 years. (TR 532). She is the office manager/secretary and performs clerical duties. (TR 533). She is the interface between Mr. Saine and Workforce Advantage, and she puts the paperwork together for the H-2B program. (TR 534). Workforce Advantage sends preliminary paperwork, gets the prevailing wage information and drafts the advertisements. They ask how many workers Respondent will need. (TR 535). Mr. Saine determines the number. Workforce Advantage sends the paperwork to Respondent and Ms. Valez fills it out with input from Mr. Saine. (TR 536). Workforce Advantage has been doing the paperwork for Respondent for 20 years and often the basic information – company name, address, job description, and the number of workers – does not change from year to year. (TR 537). She gives Mr. Saine the list of workers from the prior year and he will mark some as a yes, some as a no, and add news names, and Ms. Valez sends the list to Workforce Advantage. (TR 538).

Ms. Valez said that no one talked with her about what had gone on in the hearing room. (TR 538). Ms. Valez put together the paperwork requested when the investigation started. Most of the information she pulled from files, but some information she put into spreadsheets to make it more understandable. (TR 539). She gets a crossing report with all the names of the workers that are coming into the country. Mr. Saine gives her addresses for where the workers are living. (TR 541). If there was anything Ms. Valez could not find that the Department of Labor requested she contacted Fernando at Workforce Advantage and asked if he had it. (TR 542).

Ms. Valez did not know David Fowler, but she was familiar with his name. She knew that he interviewed for a job one of the years and he was hired. (TR 544). She denied that Mr. Fowler was fired; instead, she said her paperwork showed he stopped showing up for work. She said she had no knowledge of Mr. Folwer calling anyone and he did not call her. (TR 545). She did not know Lester Pearman, but she was familiar with his name. He was interviewed by Timmie Bell or Mr. Saine, but he was not hired. (TR 546). Ms. Valez said Mr. Fowler was not placed on the formal payroll, but there were checks issued to him. (TR 547). She recalled that Mr. Saine wrote a note on the top of Mr. Fowler's application saying he did not show up for work. That was in December or January, but she did not recall the year. (TR 548). The checks written to Mr. Fowler were not provided to the Department of Labor because they were not requested. Ms. Valez said she looked them up recently, within a few months of the hearing, and gave them to Respondent's counsel. (TR 550). She did not know Walter Kelley, but she was familiar with his name. He was interviewed for a job, but he never worked for Respondent. She believed he was interviewed in November or December for a job that would start in February of the following year. (TR 551). She believed he was told to call in February if he still wanted to work, but he did not call. She denied that Mr. Saine did not hire Mr. Kelley or Mr. Pearman because he preferred to hire H-2B workers. (TR 552).

Ms. Valez said she made payroll deductions one year for uniforms and for transportation, but she never made deductions for housing. She said housing was handled by Mr. Saine. (TR 553). She was aware that some of the H-2B workers lived in housing provided by Respondent, but she was not involved in collecting rent. She was involved in the other deductions where she entered the information into the payroll system. The information she entered into the computer she got from Mr. Saine. (TR 554). She said the deductions for uniforms and transportation were done in some years, but not every year. She was not familiar with CX 22, but she said the name of the company, federal tax identification number, company officer, the addresses where workers lived and an $18.62 deduction per pay period for uniforms were all accurate. (TR 555-556). She believed the uniform deduction was only for one year and that it was 2015. She said she prepared some of the documents that were provided to the Department of Labor, but she did not recall preparing CX 22. She agreed that the information in CX 22 was accurate. (TR 556-557).

Ms. Valez believed the uniform deduction was only in 2015 and she said she had looked up recently in the payroll records on ADP and QuickBooks. (TR 557). She said CX 16 are payroll summaries taken from QuickBooks, which listed deductions as miscellaneous and did not break them down further. (TR 558). She believed the miscellaneous deduction was for transportation because it was an even number and the uniform deduction was an odd dollars and cents number. (TR 558-559). The deduction for airfare was not taken out in a lump sum, but instead was taken out $50.00 to $100.00 per pay period. A deduction for airfare and for local transportation may have been combined under the heading miscellaneous deduction. Ms. Valez

said she prepared a chart that explained the various deductions and provided it to Mr. Blanco during the investigation. (TR 560-561). She said she was "100 percent positive it doesn't include uniforms." (TR 562). In 2013 workers – both U.S. and H-2B – received paychecks, but not paystubs, and the paychecks did not itemize deductions. (TR 562). She added that when she looked at the payroll records there were a number of workers that had no deductions, so if there was a uniform deduction it would have applied to all of the workers. (TR 563). When there was a uniform deduction it was for Cintas uniform service. Cintas provided clean uniforms each week, picked up the dirty ones, and took them back and cleaned them. That was in 2015. (TR 565).

Ms. Valez said 1107 Butterworth Court is where some H-2B workers lived and it is currently where Respondent has an office and shop. (TR 565-566). In the past as well as at present, that location was used as an office and a shop where Respondent stored equipment. (TR 566). She believed the renovations that added a kitchen and bathroom so it could function as a residence were done in late 2014 or early 2015. She never visited 7C Heritage Court. (TR 567). She never visited any location where workers lived other than Butterworth Court. She was familiar with Marcelina Bonilla de Barrientos and Josefina Jimenez, and she said their husbands worked for Respondent. (TR 568).

Ms. Valez said she created RX 65 in late 2015 or early 2016 during the initial investigation. (TR 569). She obtained names and dates of birth from H-2B records, addresses and telephone numbers came from Mr. Saine or from payroll records, and arrival dates came from crossing reports or airplane tickets. The document was created specifically for the investigation. It covers 2013. (TR 570; RX 65). The same applies to RX 69, which covers 2014, and RX 73, which covers 2015. (TR 570-571; CX 69, CX 73). Ms. Valez said she probably made the airline ticket purchases online for the H-2B workers, including Marcelina and Josefina. (TR 572-573).

On cross-examination by Respondent, Ms. Valez said the front part of the first floor of the Butterworth Court location is the office, the back part is the shop, and upstairs is storage and an apartment. There are two front doors; one that goes to the office and another that goes to the upstairs. (TR 575). The renovations to add the apartment were done in 2015 by Joe Dana and RX 91 shows where he was paid for doing the work. (TR 576-577; RX 91). Ms. Valez said RX 55-57 and 100 are payroll figures taken from ADP or QuickBooks. (TR 577-579). She said the documents were prepared for Fernando Saenz from Workforce Advantage who needed the information to support the peak load request for USCIS. (TR 578-580). She said she believed the charts were submitted to USCIS as part of the applications and they were accepted without anyone having to obtain additional data. (TR 581). Ms. Valez said she has worked with Fernando Saenz for at least 15 years and he was knowledgeable about the H-2B program. He never expressed any reservations to her about the number of workers Respondent requested. (TR 581-582). Ms. Valez agreed that Respondent's workload goes up and down, it bids on contracts and wins some and loses some, and the demand for workers fluctuates. She said Mr. Saine told her how many workers were needed and she was not involved in calculating that number. (TR 584-585).

Ms. Valez said she prepared the document in RX 94 and it lists contracts Respondent bid on, which is part of the basis for determining how many workers are needed. The contracts and

the contract dollar amounts were taken from the documents in RX 95-97. (TR 588). Ms. Valez said she prepared the document in RX 94 based on information in RX 98-99. (TR 589). She said most contracts run from January through December, so a contract for 2013 would have been bid in 2012. (TR 590). Ms. Valez identified the documents in RX 87 as checks written to David Fowler in December 2013 and January 2014. She said she mans the office telephone and if Mr. Fowler called the office she would have been the one who would have answered the phone. (TR 591). She said she has no recollection of interacting with Mr. Fowler. Mr. Saine wrote a note on Mr. Fowler's application saying "left without notice on 1/3 or 1/2/14." (TR 592; RX 13). Ms. Valez said she received a child support notice related to Mr. Fowler dated January 6, 2014 and on January 15, 2014 she wrote a note in the upper right corner saying "mailed 1/15/14 … last day showed up to work was 12/31/13." She marked on the form that Mr. Fowler no longer worked for the company and he was terminated on 1/2/14. (TR 593-594; RX 92 at 9, 12).

Ms. Valez said that in her experience it was unlikely a new U.S. worker would last an entire year. (TR 594-595). She said Respondent is chronically short of help. Ms. Valez said she was not involved in interviewing Mr. Kelley or Mr. Pearman. (TR 595). She had no recollection of either one calling the office to inquire about their employment opportunities. Ms. Valez prepares the final recruitment reports based on information she gets from Mr. Saine. The final recruitment report dated November 26, 2014 says that Mr. Kelley was hired. (TR 596; RX 24 at 1). The report states that Mr. Pearman was not hired because he never sent in a completed application. (TR 597; RX 24 at 2). With respect to Mr. Pearman, Mr. Saenz from Workforce Advantage told Ms. Valez that she needed to follow up with him, so she called Mr. Pearman on December 1, 2014 and he said he would send in his completed application. (TR 597-598; CX 93 at 1). Ms. Valez said she did not recall Mr. Kelley or Mr. Pearman ever calling back to check on employment. (TR 599).

Ms. Valez said she did not know whether the rental units where workers lived were owned by Respondent or by Mr. Saine personally. (TR 600). She did not attend the initial meeting Mr. Saine held with the workers at the start of each season, so she did not hear what was said about transportation or a transportation deduction. They started using ADP in 2014 and continued using it in 2015. Ms. Valez said she prepared RX 42 showing payroll deductions and she believed it was prepared at the request of Mr. Blanco. (TR 602). The document shows $570.00 next to the names Carlos Hernandez and David Arevalo Carreon and indicates that it reflected "[t]ransporation paid to Jaime." (TR 603; RX 42 at 1). Ms. Valez said that means the two men were riding with Jaime rather than in the company van and the money was added into his paycheck for providing them with transportation.

Ms. Valez said if there was a payroll deduction for uniforms in 2013 and 2014 it would have been reflected in the ADP or QuickBooks payroll records in RX 63, RX 64, RX 66 and RX 68. She knew that because she was the one who kept the books. (TR 603-604). A uniform deduction would be under miscellaneous deduction in QuickBooks. (TR 604-605). When there was a uniform deduction in 2015 it was shown as a uniform deduction in the ADP payroll system. (TR 605; RX 72). The receipts for payments to Cintas for uniforms are in RX 88 and the deduction for each worker was the average of what it cost. (TR 605).

On re-direct examination by Complainant, Ms. Valez said RX 91 shows that Joe Dana was paid in April 2015 after he had completed the renovation work to create the apartment. Mr.

Dana was a contractor and not one of Respondent's employees. Ms. Valez did not know whether any building permits were required for the renovation project. She knows Mr. Dana did the work because she was downstairs in the office while he was working on the floor above. He has done other carpentry work for Respondent. (TR 605-609; RX 91).

Ms. Valez said the information she wrote on RX 92 about Mr. Fowler's last day at work came from what Mr. Saine had previously written on Mr. Fowler's application. (TR 609-610). She denied that she had testified that Mr. Pearman was rejected because his application was incomplete and she said that she does not review applications and would have no way of knowing whether the application was or was not complete. (TR 610-611). She said that sometime after the initial recruitment report was done in November and the final report was prepared in December, she called Mr. Pearman and he sent in his application. (TR 611). She would have no way of knowing if someone called Mr. Saine directly on his cell phone. She has no role in hiring workers. (TR 612). All of the information she gets about who is hired or fired comes from Mr. Saine. (TR 613). Mr. Saine gives her the number of workers that will be needed for the season and she gives that information to Workforce Advantage. (TR 613-614).

Ms. Valez agreed that in the ETA Form 9142 Mr. Saine signed the form taking full responsibility for the accuracy of the representations made by him, his attorney or his agent. His agent was Fernando Saenz from Workforce Advantage. (TR 614-615; CX 6). Ms. Valez said that she prepared the payroll summary charts in RX 55-57. (TR 615). Mr. Saine owned 7C Heritage Court and Respondent owned 1107 Butterworth Court, and Ms. Valez believed that was true for 2013, 2014 and 2015. (TR 617-618). She confirmed that all of the workers listed in CX 16 received paychecks in 2013 and all the workers listed in CX 33 received paychecks in 2014. (TR 618). She agreed that Mr. Kelley and Mr. Pearman never received a paycheck because they were hired but never came to work. (TR 619). Ms. Valez did not recall anyone living at Butterworth Court in 2013 or 2014, but some workers may have used it as a mailing address. (TR 620).

Timmie Bell

Respondent called Mr. Timmie Bell as a witness. Mr. Bell has worked for Respondent for 32 years and moved up from a worker, to a foreman to a manager. (TR 628-629). He "vaguely remembered" Mr. Fowler. (TR 629-630). Mr. Bell reviewed RX 93 and said it was his handwriting on the forms for Mr. Kelley and Mr. Pearman. He interviewed Mr. Kelley and Mr. Pearman and he said that if they left applications then they were hired. He said he would have been the one who would have told them they were hired. The job would have started in mid-February and they were told to call the office at that time. Mr. Bell was unaware of anyone every getting a second interview. (TR 631-637; RX 93). New hires are told that if for some reason they are unable to come to work they should call the office. He was familiar with Marcelina and Josefina, and he said they worked for Respondent for several years in the 2013 to 2016 period, but he was not sure when. (TR 637-638). New workers are told that they can ride in the company van or they can arrange their own transportation. (TR 638). They also talk about uniforms at the initial meeting. They are told that they are responsible for keeping their living quarters clean. (TR 639).

Mr. Bell said he has known Rufino Ramiro for 10 to 15 years. He worked with him in the early years. In his opinion, Mr. Rufino "has a tendency to lie a little bit." (TR 639-641). Mr. Bell estimated that he has worked with about 50 U.S. workers during his 32 years with Respondent. He said most of them last about a week. (TR 641-642). Mr. Bell said over the past five years, Respondent has been short on workers and that he has to fill in and constantly moves back and forth from crew to crew. (TR 642).

On cross-examination by Complainant, Mr. Bell said that in 2013, 2014 and 2105 he worked out of the Rossback Road office in Davidsonville, Maryland. (TR 642-643). He interviewed Mr. Fowler, Mr. Kelley and Mr. Pearman at the Stevensville office, which is about 20 to 30 minutes away. (TR 643). Mr. Bell said that he saw Marcelina and Josefina working for Respondent operating blowers and doing some weed whacking. They worked out of the Davidsonville office. He did not remember what year he saw them working for Respondent and could not say if they worked there in 2013, 2014 or 2015. (TR 650-651).

Charles Saine

Mr. Saine returned to the witness stand as witness for Respondent. (TR 654). He said he has a degree in psychology from Bowie State University. He has been involved in lawn care and landscaping since he was in high school; a total of 39 or 40 years. He created C. S. Lawn in 1981. (TR 655). He has been involved in the H-2B program for 20 to 25 years. The regulations got to be difficult in 2007 or 2008, and that is when he decided he needed assistance. He turned to the H-2B program because of the lack of local help. He said about 95 percent of the H-2B workers come back every year. (TR 656). Mr. Saine is out with them on the job sites and he said morale is very high. (TR 657). Complaints from his H-2B workers are infrequent while most Americans workers do not stay long, although he noted that he has an American worker who has been with him for 10 years. He said he has been short on help consistently for 15 to 20 years. He depends on Mr. Saenz from Workforce Advantage to keep him informed about the H-2B program. (TR 658).

In November or December of each year, Mr. Saine talks with Ms. Valez about the proposals they have submitted and the responses they have received in order to try and estimate the number of workers he will need for the upcoming season. (TR 659). The method for determining the number of workers needed has not changed substantially in 20 to 25 years. (TR 665). Over the years, he had never had USCIS or the Department of Labor notify him that the way he was determining his temporary need was wrong. (TR 666, 668). It is generally January or February before he knows exactly how many contracts he will have for the season. (TR 669).

Mr. Saine said Jose Marcos Hernandez Flores is married to Josefina. His statement is RX 90 and in he said that in the past he brought his wife and a child into the U.S. on an H-4 visa. (TR 670-671). Mr. Saine said that he did not believe there was any substantive difference between an H-4 and an H-2B visa. He said he did not try and hide Marcelina or Josefina from Mr. Blanco. (TR 671). Mr. Saine said he was unaware that either of the women were working for other employers. (TR 672).

Mr. Saine said he heard that Mr. Luencas was working with Rufino Hernandez. He said that in the initial meeting each year he tells the workers that they can only work for Respondent

and if they do not want to do so they can go back to Mexico. (TR 672-673). He said he told Mr. Luencas he could not work with Mr. Hernandez, but he continued to do so anyway. In addition, Mr. Saine said Mr. Luencas's production as a manger was not up to par with his peers and he believed Mr. Luencas was intentionally slowing down in order to log more hours. Mr. Saine said he did not think the two women were capable of doing the work, but one of them was working for him in the current season and did a fantastic job. (TR 673). He denied that he willfully failed to retain Mr. Fowler; instead, he said that Mr. Fowler just never showed up again to work. (TR 673-674). He denied that he willfully failed to hire Mr. Kelley or Mr. Pearman. He said he never met either one of them and they did not show up for work. He said he never heard from Mr. Fowler and that new hires are told to call the office, call him or call Mr. Bell if there are any problems. (TR 674). He said there is never a second interview for prospective employees.

Mr. Saine reviewed RX 49, 51 and 53 and identified them as calculations of what Mr. Fowler, Mr. Kelley and Mr. Pearman would have earned if they had worked for Respondent. (TR 675). He identified RX 50 and 52 as the calculation Mr. Blanco made. Mr. Saine said he assumed Mr. Blanco's figures were higher because he included the U.S. workers and the H-2B workers together. (TR 676). He said $9.78 per hour was the introductory rate for new hires with no experience for anyone that was hired. If someone came in and had prior experience then they would sit down and talk about the wage rate. (TR 677).

Mr. Saine said he did not know how long mold had been present at Heritage Court. He said he went into the unit the day before he went there with Mr. Blanco. He inspects the units in January or February each year before the workers return and corrects anything that needs repair. He did not know what kind of mold was present or whether it rendered the unit uninhabitable. (TR 678). Jaime was considered "the main man in the unit" and it was his people living there. He said the Maryland housing code says a tenant is responsible for keeping a house clean. (TR 679). Workers were not required to live in the housing units Mr. Saine made available. (TR 680).

Mr. Saine said he acquired the Butterworth Court property 10 or 15 year ago. At first, they only used the shop area and not the office or the upstairs parts. Around 2010, he decided that he did not need to spend money on office space when there was an office area in Crofton. (TR 680). There was no one living there at the time. Mr. Saine said that there is another unit two doors down from him where people live upstairs and that there are still two units operating that way at present. (TR 681-682). The addresses that Ms. Valez used in the charts came from payroll documents. Workers were charged rent for nine month even though they were there for ten months. (TR 682).

Mr. Saine said he was not aware of any requirement to provide transportation for workers. They had the option of securing their own vehicles, making arrangements to ride with someone else, or riding in the company van. Mr. Saine said he did not put anything in the employment contract about transportation because there was not a place for it. (TR 684). Those that chose to ride with someone else paid $15.00 through Respondent's payroll. (TR 685). He said that was an agreement the workers reached among themselves and he agreed to take it out of their paychecks at their request. He added: "It looks to me like it's a mistake, but it wasn't an intentional one. It wasn't my intention to do anything wrong." (TR 686). He said he was not

aware of any H-2B regulation that prohibits him from being the middleman in such a transaction. (TR 686).

The decision to rent uniforms was a mutual decision after discussion with the workers. Some of them had a hard time keeping their uniforms clean, so it was decided to try renting them from a uniform service for a year. They thought it would be cheaper than having to wash the uniforms themselves. (TR 687). The $18.62 per pay period deduction was the average of the cost to rent uniforms for the western shore and eastern shore operations. Mr. Saine "was kind of shocked" when he was told that the deduction could not cause the wage to dip below the prevailing wage. He is not aware of any regulation that imposes that requirement. (TR 688). He said there were no uniform deductions in 2013 or 2014 because he bought the uniforms and the workers were responsible for washing them. (TR 689).

In the document Mr. Blanco prepared tabulating the deductions, he indicated that rent was paid for ten months, but Mr. Saine said it was only nine months and that was if the worker stayed the whole season. (TR 689; RX 41). Mr. Saine said that since Marcelina was not employed by Respondent she was not covered by H-2B protections. He said he knew that Jaime and Marcelina lived at 7C Heritage Court, but he did not know who else lived there because "I don't keep track of who lives where." (TR 690). No one lived at Butterworth Court in 2013, only in 2015, and Pedro Baez never lived there, he lived at 1504 Quimby. (TR 691). Mr. Saine said he did not know what the $49.60 shown on lines 8 and 13 represented, but he agreed that it represented $4.96 per paycheck for 20 paychecks. (TR 691). The $570.00 shown on lines 1 and 13 are the two workers who paid for transportation with another worker and had it deducted from their paychecks. In RX 44, which is for 2014, Mr. Saine agreed that there was the same ten months versus nine month rent issue and he did not keep track of who lived where. (TR 692). There was no information to suggest that anyone lived at the Butterworth location that year. Pedro Baez lived at the Quimby address and "he skipped town in 2014. So I don't know where they got the $2,000 and 10 months." (TR 693). Mr. Saine agreed that the 2014 calculations had assumed there was a uniform charge that year. (TR 694). Mr. Saine said he believed that Pedro and Jorge Baez, who are brothers, left in July of 2014. The document also assumes that Marcelina had employee status. Mr. Blanco's calculations for 2015 are in RX 46 and Mr. Saine said there were the same ten months versus nine month issue and treating Marcelina as an employee. (TR 695).

On cross-examination by Complainant, Mr. Saine agreed that he did not bring Marcelina and Josefina into the United States using H-4 visas. (TR 698-699). He denied that Orlando Luengas was fired after the Department of Labor investigation began; instead, Mr. Saine said "I just didn't bring him back." (TR 699). That decision was made two years after the investigation began. (TR 699). Mr. Saine said the $9.01 hourly rate was for someone without experience and that he hired experienced workers at higher rates that year. (TR 700). He agreed that his advertisements did not say that a prospective employee could earn a higher rate based on experience. (TR 701). Mr. Saine said there are no documents that show workers only paid rent for nine months and he did not give the workers receipts for their rent payments. The only year there were transportations deductions was in 2013 and that was only for two workers. (TR 703). He agreed that the transportation deduction was not disclosed in any of the paperwork he gave the workers. (TR 704).

In response to a question from me, Mr. Saine said that he interviewed Mr. Fowler and told him that if he had any problems to contact him and he said that Mr. Fowler knew where the office was located. (TR 704).

Oscar Blanco

Complainant called Mr. Blanco as a rebuttal witness. He said that the document at CX 22 was provided to him by Mr. Saine at the initial conference. (TR 706-707).

Legal Analysis and Discussion

The H-2B visa program permits employers to hire nonimmigrant foreign workers to perform temporary nonagricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Such workers may be granted temporary work visas when not enough U.S. workers are able, willing, qualified and available to perform such services or labor. An employer who wishes to employ H-2B workers submits an Application for Temporary Employment Certification and, if the application is approved, the employer submits an I-129 Petition for H-2B visas that will admit the foreign workers into 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 employers who violate the H-2B visa program requirements. 8 U.S.C. §§ 1184(c)(14)(A)(i) and (B). Under 8 U.S.C. § 1184(c)(14)(A)(i), "civil money penalties in an amount not to exceed $10,000 per violation" for a "substantial failure to meet any of the conditions" of an H-2B petition or "a willful misrepresentation of a material fact in such petition." The applicable implementing regulations are set forth in 20 C.F.R. Part 655 (2008).

As this matter involves alleged violations related to an Application and I-129 Petition filed for the 2013 to 2015 seasons, the 2008 H-2B regulation apply. In 2014, the United States District Court for the Northern District of Florida issued an order ("Injunction") vacating and permanently enjoining DOL from enforcing the 2008 Rule. *Bayou Lawn & Landscape Services v. Perez*, 81 F.Supp.3d 1291 (N.D. Fla. 2014). In a September 2015 Clarifying Order, the District Court clarified that the Injunction "was not intended to, and does not, apply retroactively."

The burden is on the Complainant to establish by a preponderance of the evidence that a violation occurred. 5 U.S.C. § 556(d). *See OFCCP v. Florida Hospital of Orlando*, ARB Case No. 11-011, OALJ Case No. 2009-OFC-00002, slip op. at 20 n.60 (ARB July 22, 2013).

The Administrator alleges that Respondent committed four violations (see CX1):

(1) A substantial failure to comply with the requirements of the H-2B program to open the job opportunity to qualified U.S. workers, to conduct the requirement recruitment effort in accordance with the requirements of the program, and to only reject U.S. workers for lawful, job related reasons as required by Attestation 3 and 20 C.F.R. § 655.22(c). The Administrator deemed this a substantial failure and contends that a

total of $61,961.64 in back wages are due to three U.S. workers and assessed a $20,000.00 civil money penalty.

(2) A substantial failure to comply with the requirements of the H-2B program by failing to offer U.S. workers terms and working conditions, including wages, that were no less favorable than the terms and working conditions offered to H-2B workers as required by Attestation 4 and 20 C.F.R. § 655.22(a). The Administrator deemed this a substantial failure and assessed a $10,000.00 civil money penalty.

(3) A willful failure to comply with the requirements of the H-2B program by misrepresenting the number of workers Respondent needed as required by Attestation 13 and 20 C.F.R. § 655.22(n). The Administrator deemed this a willful misrepresentation and assessed a $5,000.00 civil money penalty for each of the three years for a total of $15,000.00.

(4) A substantial failure to comply with the requirements of the H-2B program by impermissible deductions from workers' pay for transportation, uniforms and housing as required by 20 C.F.R. § 655.55(g)(1). The Administrator deemed this a substantial failure and contends that $85,239.20 in back wages are due to 30 H-2B workers and assessed a $10,000.00 civil money penalty for each of the three years for a total of $30,000.00.

Violation of Attestation 3 – Failure to open the job opportunity to U.S. workers and to only reject U.S. workers for legitimate, job-related reasons.

Complainant contends that Respondent failed to hire U.S. workers David Fowler for the 2014 season and Walter Kelley and Lester Pearman for the 2015 season. (Compl. Brief at 11-12). Respondent contends that it hired all three of the U.S. workers, but none of them showed up to work when the lawn care and landscaping seasons began. (Resp. Brief at 8-12). I find that Complainant has not met its burden to establish these alleged violations by a preponderance of the evidence.

(1) David Fowler

Mr. Saine interviewed Mr. Fowler at Respondent's office and not only offered him a job doing lawn care and landscaping beginning in February 2014, but hired him to start work sooner doing snow removal in December 2013. Mr. Fowler accepted the offer and worked for Respondent for about two weeks. According to his statement to Investigator Blanco, Mr. Fowler was unable to come work one day and called his foreman, who did not speak English, to let him know he would not be in. He also said he left a message for Mr. Saine. He said no one ever called him back and he assumed he was fired. (CX 4A at Bates. 339). Mr. Saine said he never received a message from Mr. Fowler and Ms. Valez had no recollection of Mr. Fowler calling the office. (TR 454-456, 544-548). Ms. Valez said she received a child support notice concerning Mr. Fowler in January 2014 and she responded back on January 15, 2014 that Mr. Fowler had not shown up for work since December 31, 2013. (TR 591-592; RX 14 and 92).

The evidence establishes that Respondent hired Mr. Fowler and employed him for a brief period of time doing snow removal work. It is clear that Mr. Fowler knew where Respondent was located because he went there for the job interview and reported there for work with Respondent until he simply stopped showing up. It is not clear whether he communicated with

someone the day that he was unable to come to work, but assuming he did, it is unreasonable to conclude that from that point forward he could simply do nothing and wait for Respondent to contact him. A reasonable person who wanted to work would have followed up by telephone or in-person to ascertain his employment status. The chain of events as described by Mr. Saine and Ms. Valez are corroborated in part by the correspondence with the Talbot County Department of Social Services in January 2014 stating that Mr. Fowler had stopped coming to work, which was long before Respondent was notified of Mr. Blanco's investigation in November 2015. (RX 92 and 32).

(2) Walter Kelley and Lester Pearman

Mr. Blanco interviewed Mr. Kelley on January 29, 2016, and Mr. Kelley said:

> I RESPONDED TO A LANDSCAPING AD BY THE EMPLOYER SOMETIME AROUND NOV OR DECEMBER OF 2014. I FILLED OUT AN APPLICATION AT THEIR SHOP IN THOMPSON CREEK BUSINESS PARK. I WAS INTERVIWED BY THE FOREMAN. I DO NOT RECALL THE NAME OF THE FOREMAN. THE FOREMAN TOLD ME THAT I WOULD RECEIVE A FOLLOW UP CALL FOR A SECOND INTERVIEW WITH THE MAIN BOSS. I NEVER RECEIVED THAT CALL. IF I RECEIVED THAT CALL AND IF HIRED, I WOULD OF ACCEPTED THE JOB AND WORKED AS A LANDSCAPER.

(CX 4A at Bates 350).

Mr. Blanco interviewed Mr. Pearman on February 25, 2016, and Mr. Pearman said:

> I RESPONDED TO A LANDSCAPING AD BY THE EMPLOYER SOMETIME AROUND NOV OR DECEMBER OF 2014. I FILLED OUT AN APPLICATION AT THEIR SHOP IN A BUSINESS PARK. I WAS INTERVIWED BY THE FOREMAN. I DO NOT RECALL THE NAME OF THE FOREMAN. THE FOREMAN TOLD ME THAT I WOULD RECEIVE A FOLLOW UP CALL FOR A SECOND INTERVIEW WITH THE MAIN BOSS. I NEVER RECEIVED THAT CALL. IF I RECEIVED THAT CALL AND IF HIRED, I WOULD OF ACCEPTED THE JOB AND WORKED AS A LANDSCAPER.

(CX 4A at Bates 360).

Timmie Bell, Respondent's manager, interviewed Mr. Kelley and Mr. Pearman and he said if they left applications then they were hired. Mr. Bell said he would have been the one who would have told them they were hired. The job would have started in mid-February and they were told to call the office at that time. Mr. Bell was unaware of any job applicant every getting a second interview. (TR 631-637; RX 93).

Mr. Saine said that Mr. Pearman and Mr. Kelley were interviewed by Timmie Bell. Mr. Saine denied that they were told there would be a second interview and added that in 40 years of

doing business they never interviewed job applicants twice. (TR 461). He said Mr. Pearman and Mr. Kelley were told to get back in touch if they were still available to work in February 2014. (TR 462).

Ms. Valez said she was not involved in interviewing Mr. Kelley or Mr. Pearman. She was not aware of a job applicant getting interviewed twice. (TR 595). She had no recollection of either Mr. Kelley or Mr. Pearman calling the office to inquire about their employment status. Ms. Valez prepared the final recruitment reports based on information she got from Mr. Saine. The final recruitment report dated November 26, 2014 says that Mr. Kelley was hired. (TR 596; RX 24 at 1). The report states that Mr. Pearman was not hired because he never sent in a completed application. (TR 597; RX 24 at 2). With respect to Mr. Pearman, Mr. Saenz from Workforce Advantage told Ms. Valez that she needed to follow up with him, so she called Mr. Pearman on December 1, 2014 to remind him to send in a completed job application. Mr. Pearman said that he would send in a completed application. (TR 597-598; CX 93 at 1). Ms. Valez said she did not recall Mr. Kelley or Mr. Pearman ever calling the office to check on their employment status. (TR 599).

The November 26, 2014 recruitment report states that Mr. Kelley would be offered a position contingent upon his availability in February 2015 when the season began. It said that Mr. Pearman was instructed to return a completed job application and, as of the date of the report, it had not been returned. There is a note written by Ms. Valez in the margin of the report stating that on December 1, 2014, she spoke with Mr. Pearman and he said he was sending an application back to Respondent. (RX 24).

Neither Mr. Kelley nor Mr. Pearman testified at the hearing. Their version of events are told through the summarized statements Mr. Blanco prepared, which end up with the two statements being virtually identical. While I have no reason to doubt that the two men told Mr. Blanco similar stories, I am unable to afford their summarized statements full evidentiary weight. In particular, the statement attributed to Mr. Pearman says he filled out a job application while he was at Respondent's shop for the interview with Mr. Bell. (CX 4A at Bates 360). The recruitment report states that Mr. Pearman had not returned a completed application and Ms. Valez placed a telephone call to him on December 1 to remind him to send in his application. (RX 24 at 2; CX 93 at 1; TR 597-598). Mr. Bell, Ms. Valez and Mr. Saine testified that job applicants are not interviewed twice, which contradicts with what Mr. Kelley and Mr. Pearman are alleged to have told Mr. Blanco. At best, whether the two men were in fact told to await a call to schedule a second interview is in equipoise. These unresolved discrepancies do not help Complainant in its effort to meet its burden of proof.

The greater weight of the evidence shows that Respondent made a good faith effort to hire Mr. Kelley and Mr. Pearman for the season starting in February 2015.[6] I find that Complainant failed to meet its burden to establish a violation with respect to Mr. Fowler, Mr. Kelley or Mr. Pearman by a preponderance of the evidence.

[6] Instructing a job applicant to contact an employer in two months at the start of the season if he or she still wants a job may not be sufficient to establish a good faith effort to hire a U.S. worker. *See generally Avenue NU Donuts, Inc.*, BALCA Case No. 2015-PER-00470 (March 31, 2017) (what constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case and in some instances may require more than a single type of attempted contact).

Violation of Attestation 4 – Failure to offer U.S. workers terms and working conditions no less favorable than the terms and working conditions offered to H-2B workers.

Complainant contends that Respondent offered prospective U.S. workers less favorable terms – a lower wage rate – than it did some of its H-2B workers in the 2013 and 2014 seasons. (Compl. Brief at 17-21). Respondent denies the allegation. (Resp. Brief at 12-14).

20 C.F.R. § 655.22(a) requires an employer to attest that it will offer terms to potential U.S. workers that are not less favorable than those offered to H-2B workers. (RX 74 at 40). In the application for the 2013 season, Respondent stated that the basic rate of pay was $9.01 per hour. (CX 6 at Bates 976). In the SWA job order, it stated that the minimum salary and the maximum salary were both $9.01 per hour, and in the "pay comments" added "DOE (Depends on Experience)." (CX 7 at Bates 1009). In its newspaper advertising, it said the rate of pay was "at least $9.01 /hr." (CX 9-10). The employment information provided to H-2B workers before they traveled to the U.S. said the pay rate was $9.01 per hour. (CX 11). Payroll records show that Respondent paid its H-2B workers more than $9.01 per hour during the 2013 season. In the application for the 2014 season, Respondent stated that the basic rate of pay was $9.78 per hour. (CX 24 at Bates 695). In the SWA job order, it stated that the minimum salary and the maximum salary were both $9.78 per hour, and in the "pay comments" added "DOE (Depends on Experience)." (CX 25 at Bates 729). In it newspaper advertising, it said the rate of pay was $9.78 per hour. (CX 28). The employment information provided to H-2B workers before they traveled to the U.S. said the rate of pay was $9.78 per hour. (CX 29). Payroll records show that Respondent paid its H-2B workers more than $9.78 per hour during the 2014 season. (CX 33).

According to payroll records that Respondent submitted, the only workers that were paid $9.01 during the 2013 season were Carlos Hernandez Hernandez and David Arevalo Carreon, who were paid that rate at the beginning of the season. (RX 63 at 10-11). In August, however, the wage rate for both increased to $12.41 per hour. (RX 63 at 65-66). In 2014, a number of workers started the season earning $9.78 per hour (RX 67 at 1, 3, 4, 5, 7, 8, 11 and 16); however, by the end of the season everyone except for Isaac Barrientos Hernandez was earning more than the $9.78 hourly rate. (RX 67 at 610). The same records show that experienced H-2B workers who were returning to work for Respondent were paid at higher rates throughout both of the seasons. (RX 63 and 67).

Neither party cited any legal authority where this precise question has been addressed by the Administrative Review Board or a court. Likewise, I was unable to find any binding authority that was squarely on point. The certification program for the permanent employment of foreign workers contains nearly identical requirements for employers to recruit U.S. workers and to fully and accurately inform them of the terms and conditions of employment, including wages. In *Broadside Financial Solution, Inc.*, BALCA Case No. 2012-PER-01834 (Oct. 28, 2016), the SWA job order listed a salary range that was less than the salary offered to the alien. The Board of Alien Labor Certification Appeals affirmed the certifying officer's denial of certification because under-reporting the salary in the SWA job order "materially misinform potential applicants about the job opportunity."

The same rationale applies here. Respondent advertised that the positions required no experience and no special skills, and stated a specific hourly wage rate: In the SWA job order for the 2013 season the minimum salary and maximum salary were both $9.01 per hour and in the job order for the 2014 season the minimum and maximum were both $9.78 per hour. While both contained a comment saying "DOE (Depends on Experience)," that language is meaningless where the minimum and maximum rates – the lower and upper ends of the wage range – are exactly the same. Respondent's newspaper advertisements suffered from similar deficiencies and clearly did not inform potential U.S. workers that Respondent's practice was to increase the wage rate during the season and to pay experienced workers a higher rate throughout the season. Accordingly, I find that Complainant met its burden to establish that there was a substantial failure to comply with the requirements of Attestation 4 and 20 C.F.R. § 655.22(a).

Violation of Attestation 13 – Willful failure to accurately state the number of workers needed.

Complainant contends that Respondent willfully misrepresented the actual number of temporary workers it needed in 2013, 2014 and 2015 by overstating the number of workers requested and by bringing in two aliens – Marcelina Bonilla de Barrientos and Josefina Jimenez – knowing that they would not be working for Respondent. (Compl. Brief at 13-17). Respondent contends that the number of workers it requested each year was a good faith estimate of its anticipated need at that point in time and that including the two women did not show that its need for workers was overstated. (Resp. Brief at 19-25).

Attestation 13 and § 655.22(n) state, in pertinent part, that the "number of worker positions being requested for certification have been truly and accurately stated **on the application**." (CX 24 at Bates 700) (emphasis added). The regulation – at 20 C.F.R. § 655.4 – defines "Application for Temporary Employment Certification" as the "the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary nonagricultural labor certification determination from DOL."

The evidence shows that on the application for the 2013 season, Respondent requested 39 workers, was certified for 39 workers, and brought in 23 workers (including Marcelina and Josefina). (CX 6, 8 and 18). On the application for the 2014 season, Respondent requested 29 workers, was approved for 29 workers, and brought in 22 workers. (CX 24, 31 and 33). On the application for the 2015 season, Respondent requested 36 workers, was approved for 36 workers, and brought in 23 workers. (CX 39, 44 and 48).

While Respondent represented in other documents that the number of temporary workers it needed was greater than the number shown on the ETA Form 9142 in each of the three years, the alleged violation cites a specific attestation and a specific paragraph in the applicable regulation that both focus exclusively on the truth and accuracy of the number of worker positions listed **on the application**. Complainant has not cited any authority that shows an employer is required to articulate the number of workers required to meet its temporary need with absolute precision. Mr. Saine testified that he has been consistently short of workers for 15 to 20 year, which suggests that if he could hire more workers he would do so. Accordingly, I find that Complainant has not met its burden to establish that the difference between the number

of workers Respondent attested that it needed and the number of H-2B workers that it later brought into the country constitutes a violation of Attestation 13 or § 655.22(n).

On the other hand, Mr. Saine was crystal clear that throughout the H-2B process for the 2013, 2014 and 2015 seasons he included Marcelina and Josefina in the tally knowing that they would not be working for Respondent to meet its temporary need for workers. While his underlying intentions may not have been bad, he could not "truly and accurately" state that any number of worker positions requested for H-2B certification was in fact true and accurate when it always included a plus-two for the women he knew were not coming into the United States to work for Respondent as he represented they would be doing. Therefore, the evidence establishes that including the two women in the number of worker position requested for certification in each of the three years was a willful violation of Attestation 13 and § 655.22(n).

Violation of 20 C.F.R. § 655.55(g)(1) – Undisclosed deductions.

Complainant contends that Respondent failed to comply with the requirements of 20 C.F.R. § 655.22(g) by taking deductions from workers' pay for transportation, uniforms and housing. (Compl. Brief at 21-29). The regulation requires that all deductions from a worker's pay that are not required by law must be disclosed in the job offer and must be reasonable. Respondent contends that Complainant either (1) failed to prove that some of the alleged deductions occurred and (2) that the deductions that did occur were disclosed and reasonable. (Resp. Brief at 14-19).

(1) Transportation

After arriving in the United States for the 2013 season, two H-2B workers – Carlos Hernandez Hernandez and David Carvalo Hernandez – decided that they did not want to wait around to ride in the van Respondent provided for workers get to and from work, but instead wanted to ride with co-workers in their personal vehicles. According to Mr. Saine's undisputed testimony, the workers came to an agreement amongst themselves on transportation to and from work, and then asked him if money could be deducted from the pay of the two riders and added to the pay of the drivers. (TR 505-510). Mr. Saine said that it may have been a mistake on his part to have agreed to facilitate the $15.00 a week ride-sharing transactions, but it was not an intentional mistake and he was just trying to accommodate the workers' desires by being the middle man. (TR 685-686).

I do not find that this constitutes a deduction that falls within the purview of the regulation. First, there was no way for Respondent to disclose the deduction in the job offer when it resulted from an ad hoc agreement amongst a few of the workers that they made themselves after they were hired and had entered the United States. Second, there was no evidence that Respondent benefitted in any way from the deduction, but instead only facilitated the workers' request to help them carry out their intent with respect to their voluntary ride-sharing plan.

(2) Uniforms

Complainant alleges that Respondent made improper pay deductions for uniforms in 2013, 2014 and 2015; however, Complainant's own investigator – Mr. Blanco – admitted that the payroll records for 2013 and 2014 did not show any uniform deductions and the only evidence was statements during some worker interviews. (TR 400-401). Mr. Saine testified that Respondent provided uniforms to the workers in 2013 and 2014, and there were no uniform deductions taken from their pay. (TR 497-498). His testimony was corroborated by Ms. Valez. (TR 555-557). Accordingly, I find that Complainant failed to establish that there were uniform deductions in 2013 and 2014.

On the other hand, it is undisputed that uniform deductions were taken in 2015 when instead of buying uniforms for the workers, Respondent rented them from Cintas. Mr. Saine agreed that the employment contract informed workers of a uniform deduction of $13.66 per pay period and that $18.62 was actually deducted. With respect to the uniform deduction in 2015, he testified: "Okay. But I will agree that they were higher in 2015 than they were supposed to be. Yes, I will agree to that. It's written on paper." (TR 505).

The difference between the uniform deduction that was disclosed and the uniform deduction that was taken is $4.96 per pay period. According to Mr. Blanco, the overage in 2015 impacted all 21 workers and equaled $99.20 per worker for a total of $2,083.20. ($4.96 x 20 pay periods x 21 workers). (TR 294-297; RX 47).

I find that Complainant has established by a preponderance of the evidence that Respondent improperly deducted more than the disclosed amount for uniforms in 2015 and owes back wages of $2,083.20 to the 21 workers (see RX 47 for the list of names) that were impacted in the amount of $99.20 per worker.

(3) Housing

Complainant contends that the deductions for rent, while disclosed, were not reasonable deduction because the unit at 7C Heritage Court was uninhabitable due to mold and the unit at 1107 Butterworth Court was not zoned for use as a residence. Respondent denies both allegations and argues that the housing deductions were reasonable and proper.

(a) 7C Heritage Court

It is undisputed that when Mr. Blanco and Mr. Saine visited the Heritage Court unit on November 20, 2015, there was mold in the bathroom. (TR 280-281, 493-494; CX 20). It is also undisputed that Mr. Saine had the mold remediated and a larger bathroom fan installed to provide better ventilation in the future. (TR 493-494; CX 36 at Bates 071).

Several current and former workers said there had been mold in the bathroom at 7C Heritage Court for a number of years. On the other hand, Mr. Saine said he inspected the housing units early in each year prior to the arrival of the H-2B workers and made any repairs that were necessary. (TR 678). There was no evidence presented that anyone had ever reported the mold problem to Mr. Saine or complained that the unit was uninhabitable. Workers continued to move into and live at 7C Heritage Court year after year despite the employment

contract stating that workers were free to make their own housing arrangements. There was no evidence presented that any agency with legal responsibility for public health for the area where the unit was located ever issued a health code violation or received a complaint. Mr. Blanco agreed that he did not have the mold tested and that his opinion about the unit being uninhabitable was based on his perspective as a layman, not as a medical professional. (TR 372-373).

Weighing all of the relevant evidence that bears on these issues, I find that at best it is in equipoise on whether mold was present prior to 2015 and whether mold in the bathroom in 2015 made the unit uninhabitable, and that it is insufficient to satisfy Complainant's burden to establish a violation by a preponderance of the evidence.

(b) 1107 Butterworth Court

The employment contract Respondent presented to H-2B workers each year said that it would make housing arrangements "which shall meet all applicable state and local codes for rental property." (CX 11, 29 and 42). The evidence shows that the business park where 1107 Butterworth Court is located is zoned "suburban industrial," which does not permit it to be used as a residential living quarters. (CX 19, 55 and 56). Accordingly, Respondent failed to comply with the terms and conditions of the employment contract and could not reasonably collect rent from workers to live in a facility that could not lawfully be used for living quarters.

Mr. Saine testified that while the H-2B workers lived at 1107 Butterworth Court for ten months, they only paid rent for nine months. (TR 480-481). He said that when workers first arrived in the country, they usually did not have any money, so he gave them a few weeks to earn enough money to live on before they had to pay rent. (TR 682-683). There was no evidence that contradicts Mr. Saine's testimony on that point.

The workers who were reported to live at 1107 Butterworth Court in 2013 were Pedro Baez, Jose Tirado, Francisco Hernandez, Edgardo Hernandez and Isaac Hernandez. (TR 284; RX 43). The workers who were reported to live there in 2014 were Pedro Baez, Jose Tirado, Francsico Hernandez, Edgardo Hernandez, Isaac Hernandez and Arturo Garcia. (TR 284; RX 45). The workers who were reported to live there in 2015 were Pedro Bonilla, Jesus Bonilla, Arturo Garcia, Francisco Hernandez, Isaac Hernandez and Eleazar Hernandez. (TR 284; RX 47). The rent in 2013 and 2014 was $200.00 per month and in 2015 it was $300.00 per month. (TR 286, 481-482). Back wages due to workers for the improper rent deduction for 1107 Butterworth Court in 2013, 2014 and 2015 are as follows:

	2013	2014	2015	Total
Francisco Barrientos Hernandez	$1,800.00	$1,800.00	$2,700.00	$6,300.00
Isaac Barrientos Hernandez	$1,800.00	$1,800.00	$2,700.00	$6,300.00
Pedro Hernandez Baez	$1,800.00	$1,800.00		$3,600.00
Edgardo Rivera Hernandez	$1,800.00	$1,800.00		$3,600.00
Jose Vazquez Torres	$1,800.00	$1,800.00		$3,600.00
Artueo Vazquez Garcia		$1,800.00	$2,700.00	$4,500.00

Jesus Lopez Bonilla			$2,700.00	$2,700.00
Pedro Lucas Bonilla			$2,700.00	$2,700.00
Eleazar Martinez Hernandez			$2,700.00	$2,700.00
				$36,000.00

Civil Money Penalties

The Administrator assessed a total of $75,000.00 in civil money penalties for the four violations listed in the letter of notification. (CX 1). Based upon the findings set forth above, some of the alleged violations were not supported by a preponderance of the evidence and no civil money penalty can be assessed for the violations that were not proven.

In assessing what constitutes an appropriate civil money penalty, § 655.65(g) states:

> In determining the amount of the civil money penalty to be assessed pursuant to paragraphs (b) and (c) of this section, the WHD Administrator shall consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers. Other factors which may be considered 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.

There was no evidence presented that Respondent had violated the provisions of the H-2B program before. The improper uniform deduction in 2015 had an impact on most if not all of Respondent's workers, both U.S. and H-2B, for that year. The improper housing deduction had an impact on several, but not all, of the H-2B workers. The failure to offer the same terms and conditions as those offered to H-2B workers had an impact on an undetermined number of potential U.S. workers in 2013 and 2014 who may have applied for jobs if they had been provided accurate wage information. The gravity of the violations that were proven I assess as moderate. I find that Respondent did make a good faith effort to comply with the requirements of the H-2B program, most notably it retained an agent and an attorney who are experienced in this area to assist in meeting the requirements of the program. Respondent's explanations for the violations were not compelling, but I did not infer that Mr. Saine was deliberately trying to game the system for his own pecuniary advantage. I believe he will give these matters closer attention going forward in order to comply with the requirements of the H-2B program.

When I weigh all of the factors, I find that the appropriate amount for civil money penalties are as follows:

Proven Violations:	2013	2014	2015	Total
Terms and conditions less favorable than offered to H-2B workers	$2,500.00	$2,500.00		$5,000.00
Failure to truly and accurately state the number of worker positions required by including Marcelina and Josefina	$2,500.00	$2,500.00	$2,500.00	$7,500.00
Improper deductions for uniforms in 2015 and for housing at Butterworth Court in 2013, 2014 and 2015	$2,500.00	$2,500.00	$3,500.00	$8,500.00
				$21,000.00

ORDER

It is hereby ordered that:

1. Respondent will pay a total of $2,083.20 ($99.20 per worker) in back wages for the improper uniform deduction in 2015 to the 21 workers listed in RX 47.
2. Respondent will pay a total of $36,000.00 in back wages for the improper housing deduction to the workers reported to have lived at 1107 Butterworth Court in 2013, 2014 and 2015 as set forth in the chart above.
3. Respondent will pay a civil money penalty in the amount of $21,000.00.
4. The Administrator of the Wage and Hour Division, U.S. Department of Labor, shall make such calculations with respect to back pay and interest necessary to carry out this order.

SO ORDERED.

MORRIS D. DAVIS
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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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.

If filing paper copies, you must file an original and four copies of the petition for review with the Board. If you e-File your petition, only one copy need be uploaded.

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).

EXHIBIT C

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.

C.S. LAWN & LANDSCAPE, INC.,

RESPONDENT.

ARB CASE NO. 2020-0005

ALJ CASE NO. 2018-TNE-00023

DATE: April 4, 2022

Appearances:

For the Prosecuting Party:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah Kay Marcus, Esq., Rachel Goldberg, Esq.; Sara A. Conrath, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
R. Wayne Pierce, Esq.; *The Pierce Law Firm, LLC*; Annapolis, Maryland

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the H-2B provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(14), and the implementing regulations at 20 C.F.R. Part 655, Subpart A (2009). On September 6, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) finding C.S. Lawn & Landscape, Inc. (Respondent) violated the provisions of the INA covering the period from February 15, 2013, to December 15, 2015. Respondent

appealed to the Administrative Review Board (ARB or Board). For the following reasons, we affirm in part and vacate and modify in part.

BACKGROUND

Respondent C.S. Lawn & Landscape is a residential and commercial landscaping company based in Maryland and has participated in the H-2B program for over 20 years. Charles Saine is the president and sole owner. There are three ETA Form 9142 Temporary Employment Certification (TEC) Applications at issue in the present action, covering the periods of February 15, 2013, through December 2013 (2013 season); February 15, 2014, through December 15, 2014 (2014 season); and February 15, 2015, through December 15, 2015 (2015 season).

A complainant filed a complaint with the Department of Labor (Department) Wage and Hour Division (WHD), alleging several violations of the INA. In February or March 2015, the matter was assigned to a WHD investigator.[1]

On March 4, 2015, while the WHD was investigating the complaint, the U.S. District Court for the Northern District of Florida vacated Part 655, Subpart A, of the 2008 H-2B regulations because the Department lacked rulemaking authority to promulgate the 2008 rules under the relevant statutes.[2] The District Court also permanently enjoined the Department from enforcing the H-2B regulations at Subpart A.[3] As a result, the WHD paused its ongoing H-2B investigations, including this matter. In September 2015, the District Court issued a Clarifying Order that stated, "the permanent injunction was not intended to, and does not, apply retroactively."[4]

The WHD subsequently resumed the investigation.[5] On February 20, 2018, the WHD Administrator issued a determination letter citing Respondent for several violations of the INA and attestations found in the TECs spanning the period from February 15, 2013, to December 15, 2015. These violations included a substantial failure to comply with the recruitment and hiring of U.S. workers, unfavorable terms and working conditions, impermissible pay deductions, and a willful misrepresentation of a material fact regarding the accuracy of its need for

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1 D. & O. at 8.

2 *Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015) (vacating the 2008 H-2B regulations).

3 *Id*.

4 *Perez v. Perez*, No. 14-cv-682, Doc. 62 (N.D. Fla. Sept. 4, 2015).

5 D. & O. at 8 (citing Tr. at 188).

temporary workers. The WHD determined Respondent owed $147,200.84 in unpaid wages and $75,000 in civil money penalties (CMPs).[6]

On March 20, 2018, Respondent requested a hearing before an ALJ with the Office of Administrative Law Judges (OALJ). The hearing was held on November 4, 5, and 26, 2018.

On September 6, 2019, the ALJ issued a D. & O. finding several violations of the INA. First, the ALJ determined Respondent substantially failed to comply with Attestation 4 of the TEC and 20 C.F.R. § 655.22(a) during the 2013 and 2014 seasons because it offered prospective U.S. workers less favorable terms than it did some of its H-2B workers. The ALJ found that Respondent's advertisements listed a minimum and maximum salary of $9.01 per hour in 2013 and $9.78 per hour in 2014, but paid several H-2B workers at a higher rate than what was advertised.[7] Although the ALJ noted the job orders for the 2013 and 2014 seasons stated "DOE (Depends on Experience)," the ALJ found the language was meaningless because the minimum and maximum rates were identical.[8]

Second, the ALJ determined Respondent willfully failed to comply with Attestation 13 and 20 C.F.R. § 655.22(n) during the 2013, 2014, and 2015 seasons because it inflated the requested number of H-2B workers by two.[9] The ALJ found Respondent brought in the wives of two of Respondent's H-2B workers knowing it would not employ them. The ALJ determined Respondent's conduct was a willful failure based on Mr. Saine's testimony that he included the wives knowing they would not work for Respondent.[10]

Third, the ALJ determined Respondent substantially failed to comply with 20 C.F.R. § 655.22(g)(1) because of improper uniform cleaning deductions during the 2015 season, and improper deductions for housing during the 2013, 2014, and 2015 seasons. Regarding the uniform cleaning deduction, the ALJ found that Respondent deducted an incorrect amount. The ALJ noted Mr. Saine agreed that the employment contract informed workers of a uniform deduction of $13.66 per pay period but deducted $18.62 per pay period instead.[11]

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6 *Id.* at 1-2.

7 *Id.* at 33.

8 *Id.* at 34.

9 *Id.*

10 *Id.* at 35.

11 *Id.* at 36.

Regarding the housing deduction, the ALJ found that housing unit 1107 Butterworth Court was not zoned for residential use.[12] The ALJ noted the employment contract stated the housing arrangements would "meet all applicable state and local codes for rental property."[13] However, the ALJ found 1107 Butterworth Court was zoned as "suburban industrial," and the unit was not legally permitted to be used as a residential living quarters.[14] The ALJ ordered Respondent to pay $2,083.20 in back wages to 21 workers for improper uniform deductions and $36,000 in back wages for improper housing deductions.

In light of these violations, the ALJ ordered Respondent to pay a CMP. In determining the appropriate amount of the CMP, the ALJ made the following findings[15]:

- There was no evidence Respondent previously violated provisions of the H-2B program;
- Respondent made a good faith effort to comply with the program requirements and did not deliberately attempt "to game the system" for its own pecuniary advantage;
- Respondent made improper uniform deductions during the 2015 season that impacted most, if not all, of Respondent's workers;
- Respondent made improper housing deductions that impacted several, but not all H-2B workers; and
- Respondent failed to offer to potential U.S. workers the same terms and conditions as those offered to H-2B workers, which impacted an undetermined number of potential U.S. workers during the 2013 and 2014 seasons who may have applied for jobs if they had been provided accurate wage information.

Based on these findings, the ALJ determined the gravity of the violations was moderate and reduced the CMP from $75,000 to $21,000.

Respondent filed a timely appeal with the Board. Both parties filed briefs.

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12 *Id.* at 37.

13 *Id.*

14 *Id.*

15 *Id.* at 38-39.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the Immigration and Nationality Act, as amended.[16] The Administrative Procedure Act (APA) provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ."[17]

DISCUSSION

The H-2B classification applies to a non-agricultural worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country."[18]

The Administrator has been delegated the enforcement responsibility for ensuring that H-2B workers are employed in compliance with statutory and regulatory labor certifications.[19] This includes the power to impose administrative remedies, including civil money penalties, on employers who violate the H-2B program requirements.[20]

1. Applicability of the 2008 Regulations

On appeal, Respondent contends the 2008 regulations are no longer enforceable in light of the permanent injunction issued in the initial *Perez* decision. Respondent states that the issue of whether the 2008 regulations are unenforceable remains viable, and it wishes to preserve this argument on appeal. We note the same District Court subsequently issued a decision in February 2019, holding that

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16 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

17 5 U.S.C. § 557(b).

18 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

19 The Secretary of Homeland Security delegated authority to the Department of Labor pursuant to 8 U.S.C. § 1184(c)(14)(B). The Secretary of Labor delegated authority to the Administrator pursuant to Secretary's Order 01-2014, 79 Fed. Reg. 77,527 (Dec. 24, 2014).

20 8 U.S.C. § 1184(c)(14)(A)(i).

the 2008 regulations are still enforceable as a result of its prior Clarifying Order.[21] Consequently, the 2008 regulations apply to labor certifications issued before the permanent injunction was issued on March 4, 2015.

Specifically, Respondent contends the Board has previously determined in *Adm'r v. Strates Shows, Inc.* that the 2008 regulations are not enforceable.[22] However, the Board subsequently vacated this decision.[23] Respondent maintains that the Board's initial interpretation is correct because it did not reverse the findings of its initial decision. We disagree. The Board recently issued a decision in *Deggeller Attractions, Inc.* in which we rejected the exact same argument before us here for the exact same reasons previously articulated in *Strates Shows, Inc.*[24] Respondent has not advanced any legal or factual basis for the Board to reach a contrary conclusion in the present matter. Accordingly, the Board reaffirms its holding in *Deggeller Attractions, Inc.* that the 2008 H-2B regulations apply to TEC certifications issued prior to the injunction in *Perez*.

This action involves certifications for three years. The TEC for the 2013 season was certified on December 7, 2012.[25] The TEC for the 2014 season was certified on February 3, 2014.[26] The TEC for the 2015 season was certified on December 24, 2014.[27] All TECs were certified before the permanent injunction was issued. Therefore, we conclude the 2008 regulations apply in this matter.

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[21] *Drew's Lawn & Snow Serv., Inc., v. Acosta, Sec'y of Labor*, No. 18-cv-00979, Doc. 14, slip op. at 6 (N.D. Fla. Feb. 11, 2019) (dismissing a case with prejudice, stating, "based on the Court's clarification, the permanent injunction in *Perez* does not apply retroactively to prevent DOL from enforcing the conditions of labor certifications issued under the 2008 Regulations prior to the entry of the injunction.").

[22] *Adm'r v. Strates Shows, Inc.*, No. 2015-0069, ALJ No. 2014-TNE-00016, slip op. at 6 (ARB June 30, 2017) ("vacatur of the 2008 H-2B regulations rendered the Administrator's legal authority for pursuing the present action null and void.").

[23] *Adm'r v. Strates Shows, Inc.*, No. 2015-0069, slip op. at 2-3 (ARB Aug. 16, 2017) (Amended Final Decision and Order) (noting the Court's holding that the permanent injunction does not apply retroactively to labor certifications issued under the 2008 regulations before the injunction).

[24] *Deggeller Attractions, Inc.*, ARB No. 2020-0004, ALJ No. 2018-TNE-00008, slip op. at 4 n.11, 5 (ARB Jan. 25, 2022) (concluding the 2008 regulations apply to a TEC that was certified on December 20, 2012, well before the permanent injunction was issued in *Perez*).

[25] RX 5.

[26] RX 17.

[27] RX 28.

2. Statute of Limitations

A. Which Statute of Limitation Applies

The ALJ did not make any findings regarding the statute of limitations. On appeal, Respondent contends there are several statutes of limitation that could apply in this case. We address each of Respondent's arguments in turn below.

First, Respondent contends the ALJ could have applied the 28 U.S.C. § 1658(a) four-year "catch-all" statute of limitations provision for actions arising under an act of Congress enacted after 1990. Respondent asserts this statute of limitations could apply in this case because there was no mechanism for imposing back wages or civil money penalties under the H-2B program before 1990. In the alternative, Respondent contends the two-year statute of limitations in the H-2A program could apply. Finally, Respondent contends the FLSA statute of limitations, which is two years for less-than-willful violations and three years for willful violations, could apply.

The INA is silent as to the statute of limitations for H-2B enforcement actions.[28] However, in *Deggeller Attractions, Inc.*, the Board recently determined that neither the 28 U.S.C. § 1658(a) four-year statute of limitations nor the H-2A two-year statute of limitations for debarment actions applies to H-2B enforcement actions.[29] Rather, the Board applied the five-year statute of limitations found at 28 U.S.C. § 2462, which states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.[30]

Notably, in *Deggeller Attractions, Inc.*, the employer was exempt from the provisions of the FLSA.[31] Here, Respondent contends the FLSA statute of limitations could apply because the ALJ's finding of a violation of 20 C.F.R. § 655.22(g)(1) was based on a provision of the FLSA. Section 655.22(g)(1) states: "an

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28 *See* 8 U.S.C. § 1101 *et seq.*

29 *Deggeller Attractions, Inc.*, ARB No. 2020-0004, slip op. at 18-19.

30 28 U.S.C. § 2462.

31 *Deggeller Attractions, Inc.*, ARB No. 2020-0004, slip op. at 19.

employer subject to the FLSA may not make deductions that would violate the FLSA."[32] However, this incorporation is narrowly tailored to whether a deduction is permissible pursuant to the FLSA and does not incorporate the FLSA's statute of limitations.

Thus, as this matter includes the assessment of a civil money penalty, we conclude that the five-year statute of limitations found at 28 U.S.C. § 2462 controls.

B. When the Claims Accrued

The WHD issued its determination letter to Respondent on February 20, 2018. The Administrator determined that the violations assessed during the 2014 and 2015 seasons fall within the five-year statute of limitations. Regarding the violations assessed during the 2013 season, Respondent and the Administrator agree that the violations of Sections 655.22(a) (less favorable terms to U.S. workers) and 655.22(n) (inflating number of workers by two) are barred by the statute of limitations because both claims accrued during 2012.

Respondent contends the Section 655.22(g)(1) housing deduction claim is also barred by the statute of limitations because the claim accrued either when workers were notified of the rental charge, or when H-2B workers arrived on February 19, 2013.

We disagree. We agree with the ALJ's findings that the claim did not accrue until Respondent actually took the housing deduction from H-2B workers' paychecks.[33] The ALJ credited Mr. Saine's testimony that he charged rent for nine out of the ten months during the 2013 season, and he began deducting rent several weeks after workers arrived to give them time to earn money first.[34] Based on this, the ALJ awarded back wages amounting to nine months of rent, dating back to March 2013.[35] The ALJ's findings are supported by the record.[36] Because each housing deduction was made after February 20, 2013, we conclude that Administrator's finding is not barred by the five-year statute of limitations found at 28 U.S.C. § 2462.

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[32] 20 C.F.R. § 655.22(g)(1).

[33] Respondent fails to point to a concrete discrete event, such as a lease, from which the rent deductions flow. The mere notice of the amount of the deduction upon arrival is not such an event.

[34] D. & O. at 37-38.

[35] *Id.*

[36] Tr. at 682-83 (testimony indicating Respondent took housing deductions for nine months).

3. Violations

The Administrator shall determine whether an employer has willfully misrepresented a material fact or substantially failed to meet any of the conditions of the labor certification attested to, or any of the conditions of the DHS Form I-129, Petition for a Nonimmigrant Worker.[37] A "willful failure" is defined as a "knowing failure or reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart."[38] A substantial failure is defined as a "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."[39] In addition, an employer's submission and signature on the TEC constitutes the employer's representation that the statements are accurate and its acknowledgement and acceptance of the obligations of the program.[40]

A. Substantial Failure to Comply with Attestation 4 and 20 C.F.R. 655.22(a)

On appeal, Respondent contends the antidiscrimination clause requires an employer to not discriminate against U.S. workers by providing more favorable information to H-2B workers. Respondent asserts that, while it paid H-2B workers higher wages based on experience, U.S. workers were not disadvantaged because both prospective U.S. and H-2B employees were provided the same information in the job offer and advertising.[41]

Attestation 4 states:

> The offered terms and working conditions of the job opportunity are normal to workers similarly employed in the area(s) of intended employment and are not less favorable than those offered to the foreign worker(s) and are not less than the minimum terms and conditions required by Federal regulation at 20 C.F.R., Subpart A.[42]

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37 20 C.F.R. § 655.60.

38 *Id*. at § 655.65(e).

39 *Id.* at § 655.65(d).

40 *Id*. at § 655.65(f).

41 Resp. Br. at 45.

42 RX 17.

Section 655.22(a) requires that employers not offer terms to U.S. workers that are "less favorable than those offered to the H-2B worker(s) and are not less than the minimum terms and conditions required by this subpart."[43] In addition, all advertisements must contain "[t]he wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers."[44]

We agree with the ALJ's finding that Respondent's TEC and job advertisements for the 2014 season listed a lower hourly rate of pay than what most H-2B workers were paid.[45] The TEC listed $9.78 as the basic rate of pay and $14.67 as the overtime rate of pay.[46] Additionally, although the job order states "DOE (Depends on Experience)," the minimum and maximum wage rates were both $9.78.[47] Further, job ads list $9.78 as the hourly rate of pay, and do not disclose a range of the rate of pay.[48] However, as the ALJ correctly found, most of Respondent's H-2B workers were paid more than this rate.[49] By the end of the season, all but one H-2B worker earned a higher hourly rate.[50]

Although Respondent may have advertised the same wage information to both prospective U.S. and H-2B applicants, Respondent's practice of paying a higher wage rate than what was listed supports a reasonable inference that it may have misled U.S. workers into not applying for the positions. This practice contradicts Respondent's attestation that the job opportunity was clearly open to U.S. workers on the same terms and conditions offered to its H-2B workers. In addition, Respondent did not disclose the multiple wage offers as Section 655.17(g) requires. Thus, we affirm the ALJ's finding that Respondent substantially failed to comply with Attestation 4 and Section 655.22(a) in 2014.

B. Willful Failure to Comply with Attestation 13 and 20 C.F.R. 655.22(n)

On appeal, Respondent contends the ALJ erred in determining it improperly included the two wives of H-2B workers for the 2014 and 2015 seasons.[51] Specifically, Respondent contends it is only required to accurately state the number

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43 20 C.F.R. § 655.22(a).

44 *Id.* at § 655.17(g).

45 As noted above, the claim for the 2013 season was barred by the statute of limitations.

46 RX 17.

47 RX 11.

48 RX 12.

49 D. & O. at 33, RX 63, CX 33.

50 D. & O. at 33, RX 67 at 610.

51 The statute of limitations for 2013 TEC violation expired.

of workers it needed in its request. Respondent asserts there is no evidence it knew the two wives would not work there, and that it was undisputed that they previously worked for Respondent and could do so in the future. Respondent also asserts that the two women were entitled to enter the country as dependents on H-4 visas and contends there is no practical difference regarding which visa they used to enter the country.[52] Respondent also notes the ALJ's finding is undercut because he credited testimony from Respondent's witness that it was always shorthanded and looking for more workers.[53] Respondent further contends any failure to comply with Attestation 13 and Section 655.22(n) is not willful as the discrepancies between the job order and ads are not a significant deviation from its obligations.

Attestation 13 states that "[t]he dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification have been truly and accurately stated on the application."[54] Section 655.22(n), requires that the "number of positions being requested for labor certification have been truly and accurately stated on the application."[55]

We agree with the ALJ's finding that Respondent willfully inflated the number of workers it purportedly needed by two to account for the two wives. Although they were former employees, it is undisputed that neither woman worked for Respondent during the dates in question.[56] As the ALJ stated, while Respondent's intentions may not have been bad, it could not "truly and accurately" state its number of worker positions it requested when that number "always included a plus-two for the women [it] knew were not coming into the United States to work for Respondent as [it] represented they would be doing."[57] In addition, Respondent's argument that there is no practical difference between an H-2B and an H-4 visa lacks merit because the H-2B program is capped at 66,000 visas per year.[58]

Thus, we affirm the ALJ's finding that Respondent willfully violated Attestation 13 and Section 655.22(n).

C. Substantial Failure to Comply with 20 C.F.R. 655.22(g)(1)

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52 Resp. Br. at 43.

53 D. & O. at 34-35; Resp. Br. at 42.

54 RX 17, RX 28.

55 20 C.F.R. § 655.22(n).

56 D. & O. at 11-12, 21, 35; Tr. at 519-22.

57 D. & O. at 35.

58 8 U.S.C. § 1184(g)(1)(B).

An employer's "job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA."[59] The 2008 rule does not define "job offer." In *Deggeller Attractions, Inc.*, the Board discussed the distinction between the TEC, the "job order," and the "job offer," and remanded the case for the ALJ to determine whether a housing deduction had properly been disclosed to potential employees prior to hiring them.[60]

i. Uniform Cleaning Deduction

On appeal, Respondent contends it disclosed the full uniform-cleaning deduction when its H-2B workers arrived at the worksite. Respondent notes this issue concerns the legal question of the meaning of "job offer," which is undefined by the statute. Respondent asserts the H-2B program was based on the H-2A program, which permits deductions to be disclosed upon arrival at the worksite. Respondent submits that the same reasoning should extend to this matter.[61] Lastly, Respondent contends it could not have violated a regulation that does not exist.

We agree with the ALJ that Respondent substantially failed to comply with 20 C.F.R. 655.22(g)(1) because it improperly deducted more than the amount it disclosed in its job offer.[62] While Respondent contends workers being informed of the accurate amount upon arrival was a sufficient disclosure, the Board's holding in *Deggeller Attractions, Inc.* focuses "job offer" on what the employer disclosed to potential employees prior to hiring them, not what employees were informed of upon arrival. Here, Respondent disclosed a uniform deduction of $13.66 in the employment contract.[63] However, $18.62 was deducted.[64] Mr. Saine acknowledged this discrepancy, and agreed the deduction was higher than it should have been.[65]

Thus, we affirm the ALJ's finding that Respondent substantially failed to comply with 20 C.F.R. 655.22(g)(1) when it improperly deducted more than the amount disclosed in the job offer.

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59 20 C.F.R. § 655.22(g)(1).

60 *Deggeller Attractions, Inc.,* ARB No. 2020-0004, slip op. at 10-14.

61 Resp. Br. at 39 (citing 20 C.F.R. § 655.104(q)(200) (must provide job contract no later than the first day of work)).

62 D. & O. at 36.

63 *Id.*

64 *Id.*

65 *Id.*; Tr. at 505.

ii. Housing Deduction

Respondent contends there is no regulation that requires housing to comply with local ordinances.[66] Respondent also contends that the regulations prohibit neither reimbursements for non-compliant housing, nor rental deductions for housing where a tenant cannot reside due to zoning ordinances. Respondent further contends the term "reasonable" applies to the cost of housing, not its condition, and asserts the housing here was a good value for the rent. Respondent claims it was unaware that the housing conditions violated the local zoning ordinance. In addition, Respondent contends the Administrator is attempting to recover the deduction based on the FLSA's prohibition on deductions for housing that violates a local ordinance, which was never part of the case.

However, the Administrator has consistently maintained that Respondent violated Section 655.22(g)(1), which incorporates a provision of the FLSA regarding permissible deductions.[67] Section 655.22(g)(1) states, in relevant part, that "[a]ll deductions must be reasonable" and "an employer subject to the FLSA may not make deductions that would violate the FLSA."[68] Section 531.31 of the FLSA similarly states that "[f]acilities furnished in violation of any Federal, State, or local law, ordinance, or prohibition will not be considered facilities 'customarily' furnished."[69] In addition, Respondent's own employment contract states housing would "meet all applicable state and local codes for rental property."[70]

The ALJ correctly found that the housing unit at 1107 Butterworth Court was zoned "suburban industrial" and was not permitted to be used as a residential living quarters.[71] Respondent used 1107 Butterworth Court as a residential unit, in violation of local law. Thus, the housing was not "customarily furnished" pursuant to Section 531.31 of the FLSA, which in turn violated Section 655.22(g)(1).

Moreover, the housing deduction also violated the provision of Section 655.22(g)(1) requiring the deduction to be reasonable. We agree with the ALJ's finding that it is unreasonable to collect rent for a premises in which residential use is prohibited.

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66 Resp. Br. at 40.

67 D. & O. at 2.

68 20 C.F.R. § 655.22(g)(1).

69 29 C.F.R. § 531.31.

70 D. & O. at 37, CX 11, CX 29, CX 42.

71 CX 19, CX 55, CX 56.

Finally, while Respondent argues it was unaware of the zoning ordinance, an employer's failure to know the H-2B program's requirements does not excuse a violation.[72]

Thus, we affirm the ALJ's finding that Respondent substantially failed to comply with Section 655.22(g)(1) by impermissibly deducting the cost of housing at 1107 Butterworth Court.

iii. Back Wages

Respondent contends the ALJ erred in ordering it to pay back wages for the improper uniform and housing deductions. Specifically, Respondent contends that back wages are not an appropriate remedy for violations of Section 655.22(g)(1) because Section 655.65(i) provides that back wages are permissible for violations of Section 655.22(e) and does not mention any other category.

Respondent is correct that Section 655.65(i) specifies that back pay applies to Section 655.22(e) violations.[73] However, this same regulation also provides that appropriate legal or equitable remedies may be imposed for all other violations.[74]

Here, the ALJ ordered Respondent to reimburse $2,083.20 to the 21 H-2B workers who were affected by the improper uniform deductions. The ALJ also ordered Respondent to reimburse $36,000 to the H-2B workers who lived at 1107 Butterworth Court for the improper rent deductions. Both deductions were improperly taken in violation of the applicable regulations. As a result, we conclude that the ALJ's order to reimburse workers for the entire amount of these deductions is a legally appropriate remedy.[75]

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[72] *Adm'r v. Avenue Dental Care*, ARB No. 2007-0101, ALJ No. 2006-LCA-00029, slip op. at 13 (ARB Jan. 7, 2010) (An employer's ignorance of the INA's requirements does not excuse noncompliance.); *Adm'r v. Home Mortg. Co. of Am.*, 2004-LCA-00040, slip op. at 15 (ALJ Mar. 6, 2006) (An employer's failure to read the terms of the TEC or properly learn about the H-2B program requirements amounts to "reckless disregard.").

[73] 20 C.F.R. § 655.65(i).

[74] *Id.*

[75] Notably, in *Deggeller Attractions, Inc.,* the Board remanded the matter to the ALJ to determine whether a housing deduction was properly disclosed, and, if not, what the appropriate remedy would be for a failure to properly disclose a deduction in the job offer under the 2008 regulations. *See Deggeller Attractions, Inc.*, ARB No. 2020-0004, slip op. at 15. However, we distinguish the present case from *Deggeller* because this matter involves an improper deduction in violation of applicable housing and zoning codes.

Thus, we affirm the ALJ's order that Respondent pay $2,083.20 for the improper uniform deduction to the 21 workers listed in RX 47, and $36,000 for the improper housing deduction to the workers reported to have lived at 1107 Butterworth Court.

4. Civil Money Penalties

On appeal, Respondent contends that CMPs are not available for willful misrepresentations. Respondent submits that CMPs may be imposed only for a substantial failure to comply with the provisions of the INA.

We disagree. Respondent's argument is flawed because it quotes only part of 20 C.F.R. 655.65(c). Rather, Section 655.65(c) states:

> The Administrator may assess civil money penalties in an amount not to exceed $10,000 per violation for any substantial failure to meet the conditions provided in the H-2B Application for Temporary Employment Certification or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or successor form, or any *willful misrepresentation* in the application or petition.[76]

Thus, contrary to Respondent's argument, CMPs may be assessed for willful misrepresentations in the application or petition.

The regulations provide several discretionary factors that may be considered when assessing the amount of the CMP. These factors include: 1) the previous history of violations by the employer, 2) the number of U.S. or H-2B workers employed by the employer who are affected by the violation; 3) the gravity of the violation; 4) efforts made by the employer in good faith to comply with the INA and its corresponding regulations; 5) the employer's explanation of the violation; 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 loss to the employer's workers.[77]

Because the claims that Respondent violated Section 655.22(a) and 655.22(n) during the 2013 season are barred by the statute of limitations, we vacate the ALJ's order that Respondent pay a CMP of $2,500 for the 2013 substantial failure to comply with Attestation 4 and Section 655.22(a) and $2,500 for the 2013 substantial failure to comply with Attestation 13 and Section 655.22(n).

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[76] 20 C.F.R. § 655.65(c) (emphasis added).

[77] *Id*. at § 655.65(g).

Regarding the remaining violations, we agree with the ALJ's assessment for the reasons stated in the relevant sections above and need not be repeated here. We conclude that the ALJ considered the relevant regulatory factors, and his findings are supported by the record. Thus, we affirm the ALJ's assessment of the CMPs as follows:

- $2,500 for the 2014 substantial failure to comply with Attestation 4 and 20 C.F.R. § 655.22(a) for offering terms and conditions less favorable than those offered to H-2B workers;
- $2,500 for the 2014 willful failure to comply with Attestation 13 and 20 C.F.R. § 655.22(n) for the failure to truly and accurately state the number of H-2B positions needed;
- $2,500 for the 2015 willful failure to comply with Attestation 13 and 20 C.F.R. § 655.22(n) for the failure to truly and accurately state the number of H-2B positions needed;
- $2,500 for the 2013 substantial failure to comply with 20 C.F.R. § 655.22(g)(1) for the improper housing deduction;
- $2,500 for the 2014 substantial failure to comply with 20 C.F.R. § 655.22(g)(1) for the improper housing deduction; and
- $2,500 for the 2015 substantial failure to comply with 20 C.F.R. § 655.22(g)(1) for the improper housing and uniform cleaning deductions.

Therefore, Respondent is ordered to pay a CMP of $16,000.

CONCLUSION[78]

Accordingly, we **AFFIRM** the ALJ's Decision and Order in part and **VACATE** and **MODIFY** in part.

SO ORDERED.

[78] In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).