

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

IN THE MATTER OF: * ARB CASE NO. 14-003
*
ADMINISTRATORS, WAGE AND HOUR * ALJ CASE NOS. 2011-TNE-002
DIVISION AND OFFICE OF FOREIGN * 2012-PED-001
LABOR CERTIFICATION, *
U.S. DEPARTMENT OF LABOR, *
*
PROSECUTING PARTIES, *
*
V. *
*
PETER'S FINE GREEK FOOD, INC., *
*
RESPONDENT. *

**BRIEF OF THE ADMINISTRATORS
IN SUPPORT OF PETITION FOR REVIEW**

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**BRIEF OF THE ADMINISTRATORS
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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)(1), and 1184(c)(14), and the U.S. Department of Labor's ("Department's") H-2B regulations, 20 C.F.R. Part 655, subpart A.¹ On November 22, 2013, pursuant to

¹ The effective regulation for purposes of these matters is the Department's 2008 H-2B rule, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agricultural or Registered Nursing in the United States (H-2B Workers), 73 Fed. Reg. 78,020 (Dec. 19, 2008), 20 C.F.R. Part 655, subpart A. The Department's 2012 H-2B rule is not currently in effect, see 77 Fed. Reg. 28,764 (May 16, 2012), and the 2013 Interim Final Rule on wage methodology in the H-2B program, 78 Fed. Reg. 24,047 (Apr. 24, 2013), does not apply

20 C.F.R. 655.31(e)(5)(iii) and 655.76, the Principal Deputy Administrator of the Department's Wage and Hour Division ("WHD") and the Administrator of the Department's Employment and Training Administration Office of Foreign Labor Certification petitioned this Board to review two issues - a 90 percent reduction in civil money penalties ("CMPs") despite a failure to cooperate with WHD and consideration of post-investigation compliance for purposes of debarment - addressed in decisions issued by Administrative Law Judge ("ALJ") Theresa C. Timlin on September 25, 2013. On December 5, 2013, the Board accepted the Administrators' Petition for Review. The Administrators hereby submit this brief in support of their Petition for Review, requesting that the Board reverse the ALJ on these two issues that are critical to the Department's administration and enforcement of the H-2B program.

ISSUES PRESENTED

1. Whether the ALJ erred by reducing the CMP for Peter's Fine Greek Food's failure to cooperate with the WHD investigation by 90 percent despite finding that the company repeatedly failed to produce requested documents, including

here. All citations in this brief refer to the Department's 2008 H-2B rule, which does not appear in the current Code of Federal Regulations but can be accessed using the Federal Register citation above.

those that were in its possession, and that the company's reasons for failing to produce such records were not credible.

2. Whether the ALJ erred by considering Peter's Fine Greek Food's post-investigation compliance for purposes of debarment even though the debarment regulation does not include consideration of current or future compliance.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural labor or services in the United States if "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers seeking to bring in H-2B workers must file an Application for Temporary Employment Certification ("TEC") with the Department's Office of Foreign Labor Certification ("OFLC"), and obtain the Department's certification that there are not sufficient U.S. workers available and that employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. See 8 C.F.R. 214.2(h)(6)(iii); 20 C.F.R. 655.1(b). The employer must certify on the TEC, under penalty of perjury, that the information contained on the TEC is true and accurate and that the employer will abide by the terms and

conditions of the H-2B program. See Employment and Training Administration ("ETA") Form 9142, Appendix B. The employer is required to submit an approved TEC along with its Form I-129 petition to the Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), when it seeks approval to employ H-2B workers. See 8 C.F.R. 214.2(h)(6)(iv).

Effective in January 2009, DHS delegated to the Department of Labor its investigative and enforcement authority to assure compliance with the terms and conditions of employment under the H-2B program, pursuant to 8 U.S.C. 1184(c)(14)(B). In turn, the Secretary of Labor delegated to the WHD Administrator, and by Secretary's Order 4-2008 to the Deputy Administrator when an Administrator is not serving in that position, the authority to perform all of the Secretary's investigative and enforcement functions under sections 101(a)(15)(H)(ii)(b), 103(a)(6), and 214(c) of the INA. See 20 C.F.R. 655.1(c)(2), 655.50(a).

In accordance with the delegation of enforcement authority, the Department's 2008 H-2B regulations set forth employer obligations under the H-2B program, see 20 C.F.R. 655.22, as well as a WHD enforcement process, see 20 C.F.R. 655.50. Key to the WHD enforcement process is the requirement that H-2B employers cooperate at all times, including "mak[ing] available to the WHD Administrator such records, information, persons, and

places as the Administrator deems appropriate" within 72 hours following notice from an authorized Department representative. 20 C.F.R. 655.50(c). Failure to cooperate with a Department investigation may result in a CMP of up to \$10,000. See 20 C.F.R. 655.65(c); 8 U.S.C. 1184(c)(14)(A)(i).

The 2008 regulations also established a debarment process whereby the OFLC Administrator may not issue future H-2B labor certifications for up to three years if the Administrator finds that an employer "substantially violated a material term or condition of its temporary labor certification." 20 C.F.R. 655.31(a)(1). A "substantial violation" includes a "pattern or practice of acts . . . that . . . [a]re significantly injurious to the wages or benefits offered under the H-2B program or working conditions of a significant number of the employer's U.S. or H-2B workers" as well as a "significant failure to cooperate with a DOL investigation." 20 C.F.R. 655.31(d)(1)(i) and (d)(3).

B. Course of Proceedings and Statement of Facts

Peter's Fine Greek Food has extensive experience with the H-2B program, having utilized it since at least 2004, sometime after owner Peter Karageorgis opened his business which sells Greek food at fairs and festivals. See Administrators' Appendix ("App.") Tab 1, WHD Decision & Order ("WHD D&O") at 1, 17, 34.

In 2010, as it did in many previous years, Peter's Fine Greek Food submitted an Application for Temporary Employment Certification to OFLC, seeking certification to employ H-2B workers to prepare Greek food in a mobile food concession for a traveling carnival. See App. Tab 3 (WHD Administrator's Trial Exhibit ("AX") 2 (Application for Temporary Employment Certification, ETA Form 9142)). As part of its application, which was ultimately approved, Peter's Fine Greek Food agreed to abide by the conditions of the H-2B program. See *id.* at 8.

In March 2011, following an investigation, the WHD Administrator issued a determination letter finding that Peter's Fine Greek Food had committed seven violations, including willful misrepresentations of fact on its 2010 H-2B application and substantial failures to meet the conditions of the H-2B program, particularly with respect to payment of wages and failing to cooperate with the WHD investigation. See App. Tab 4, AX 1. WHD sought over \$100,000 in back wages and \$50,500 in CMPs based on these violations. See *id.* A hearing was held on the WHD matter in November and December of 2011 before ALJ Timlin.

On December 30, 2011, the OFLC Administrator issued a notice of intent to debar Peter's Fine Greek Food for two years for committing a pattern or practice of acts significantly

injurious to the H-2B wages or benefits of a significant number of the employer's U.S. or H-2B workers, and for significantly failing to cooperate with a Department investigation by failing to maintain and produce copies of records. See App. Tab 5, OFLC Administrator's Trial Exhibit ("AX") 51. After reviewing Peter's Fine Greek Food's rebuttal evidence, OFLC issued its Notice of Debarment in March 2012. See App. Tab 6, AX 52.

A hearing on the OFLC matter was held in December 2012 before ALJ Timlin. Prior to the debarment hearing, the ALJ denied the Administrator's motion in limine objecting to the admission of post-investigation evidence of compliance, finding that "nothing in the current regulations suggests that I may not consider future compliance when determining whether debarment is warranted." See App. Tab 7, Order Denying Administrator's Motion in Limine, slip op. at 1 (ALJ Nov. 15, 2012). The ALJ further found that evidence of future compliance was potentially relevant to whether the employer had the requisite willfulness for an H-2B violation. See *id.*

On September 25, 2013, the ALJ issued decisions and orders in the above-referenced matters that are now before the Board in this Petition for Review.²

² The ALJ largely affirmed the violations found by WHD, and ordered payment of \$31,000 in CMPs instead of the \$50,500

C. ALJ's Decisions

1. The WHD Decision

The ALJ found that Peter's Fine Greek Food failed to cooperate with the investigation because the employer "repeatedly failed to turn over documents to the Department of Labor despite the Administrator's multiple requests." WHD D&O at 46. These documents included lists of the H-2B employees, their dates and hours of employment, and payment records. See *id.* at 45. The ALJ found that the documents that Peter's Fine Greek Food provided were minimal. See *id.*

The ALJ noted that during the investigation and subsequent litigation and hearing, Karageorgis offered different accounts of what records he maintained and why he did not provide basic records requested by WHD. See WHD D&O at 29, 45. For example, during the investigation, Karageorgis stated that he did not have the records with him, implying that he would produce them

originally sought by WHD. See WHD D&O at 47; App. Tab 4, AX 1. After taking into account the \$85,000 Peter's Fine Greek Food paid in settlement of a related criminal matter brought by the Department of Justice, and other payments made post-investigation, the ALJ ordered payment of an additional \$14,422.32 in back wages. See WHD D&O at 39-40. Although all issues were not resolved in the Department's favor before the ALJ, the Administrators seek review only of what they consider to be the two most important issues - the reduction of the failure to cooperate CMP and the reduction of the two-year debarment to one year after considering current compliance. Thus, the other matters will not be addressed in this brief.

to WHD; however, he never did so, even after WHD sent a records request advising him that failure to produce available records would be considered a failure to cooperate with the investigation. See *id.* at 6, 9 (citing testimony of WHD witnesses). As the ALJ observed, Karageorgis, at his deposition, continued to state that he had records of fairs, hours, and employees at his home, though he had still not produced them to WHD; he also testified that he recorded employee payments in notebooks that he subsequently threw away. See *id.* at 29 (citing AX 50, portions of Karageorgis' deposition).

The ALJ found that Karageorgis' testimony regarding the timesheet and payment records he kept and the reasons why some documents were either not produced at all or not produced until shortly before the November 2011 hearing was "not credible." WHD D&O at 45.³ The ALJ found it more likely that these pay and time records did not actually exist, noting that the records

³ The ALJ drew an adverse inference against certain admitted documents relating to employee hours and earnings which had been repeatedly requested since the beginning of the WHD investigation in 2010 and which were not produced by Peter's Fine Greek Food until shortly before the hearing, including at least one exhibit that was not produced until the date of the hearing. See WHD D&O at 3. The ALJ further drew an adverse inference that the late-produced employee timesheets were created for purposes of the litigation. See *id.* n.2.

presented at the hearing were "clearly created after the fact, for the purposes of this litigation." *Id.* at 46. She also found that Peter's Fine Greek Food failed to provide WHD with other records that *did* exist, such as records of employees' names and required forms such as the I-129 and visa approval documents. *See id.*

Although WHD had assessed a \$10,000 CMP for failure to cooperate "because the failure affected all employees, evinced a lack of good faith effort, was not justified by a credible explanation, and made it more difficult for the Administrator to determine compliance which provided [Peter's Fine Greek Food] an opportunity for financial gain from noncompliance," the ALJ reduced the CMP to \$1,000. *See* WHD D&O at 46.⁴ The ALJ focused

⁴ The regulatory factors for assessing CMPs for H-2B violations are:

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

20 C.F.R. 655.65(g)(1)-(7). WHD Assistant District Director

on the gravity of the offense, noting that Karageorgis had allowed WHD to conduct interviews; that in one instance, he complied with a WHD investigator's request to give \$300 to workers who had not been paid; that some of the requested documentation was produced; and that the employer's failure to turn over all the records was partly due to the fact that some of the requested documents did not exist. See *id.* at 7, 46.

With respect to Peter's Fine Greek Food's violation regarding a substantial failure to pay wages, which was also the basis of the ALJ's finding of a substantial violation for debarment purposes, the ALJ concurred with the WHD Administrator that Peter's Fine Greek Food "substantially failed to pay the offered wage because it paid employees at irregular intervals and in lump sums that did not include payment for their time

Catherine Quinn-Kay testified that WHD considered these regulatory factors and determined that a \$10,000 CMP was appropriate. See App. Tab 8, WHD Hearing Transcript at 756:1-757:9. In addition to the factors mentioned by the ALJ, Quinn-Kay testified that, with respect to gravity, the failure to provide records to WHD "is certainly a serious violation." *Id.* at 756:22-23. Quinn-Kay further testified that the lack of records made the investigation process more difficult because WHD had to use a "drawn out" process of reconstructing hours worked through employee interviews and gathering other supporting information. *Id.* at 757:13-19; see WHD D&O at 8 (citing WHD investigator Michael Lonesky's testimony that he computed back wages based on employee interviews, interrogatory responses, Karageorgis' deposition, internet research, and conversations with fair representatives to ascertain the carnival dates).

during setup, teardown, preparation, and cleanup." WHD D&O at 37. For example, the ALJ calculated that some of the employees were paid effective wages of \$2.39, \$7.31, and \$8.24 per hour, well below the required wage of \$10.71 per hour. See *id.* at 38 & nn. 18, 19. The ALJ concluded that Peter's Fine Greek Food's "payment practices were a willful failure to pay the promised wage" and affirmed the WHD Administrator's \$10,000 CMP assessment for this violation. See *id.* at 39.

2. The OFLC Debarment Decision

The ALJ admitted the entire record from the WHD case at the debarment hearing. See App. Tab 2, OFLC D&O at 3. She concluded that "Respondent's pattern and practice of poor recordkeeping and haphazard payment of his H-2B employees in 2010 was significantly injurious to the wages of those employees." *Id.* at 15. The ALJ therefore concurred with OFLC that this was a "substantial violation" of a material term or condition of the temporary employment certification. *Id.* at 17.⁵

⁵ The debarment regulation provides that the Administrator, OFLC, "may not issue future labor certifications" to an employer or its successor in interest for a period of up to three years if the employer "substantially violated a material term or condition of its temporary labor certification." 20 C.F.R. 655.31(a)(1). As noted above, for purposes of debarment, a "substantial violation" includes "[a] pattern or practice of acts of commission or omission on the part of the employer or the employer's agent that: (i) Are significantly injurious to the wages or benefits offered under the H-2B program or working

The ALJ found that the failure to cooperate with the WHD investigation, however, was not significant and therefore did not constitute a "substantial violation." OFLC D&O at 16. Her reasoning was largely the same as the reasons she set forth for reducing the amount of the CMP in the WHD case; namely, that the failure to provide records was due in part to the fact that some of the records did not exist and because Karageorgis cooperated in some respects. *Id.* at 16.

The ALJ's analysis of whether debarment was warranted for the substantial wage violation was based on whether Peter's Fine Greek Food had come into compliance with the H-2B regulations. See OFLC D&O at 18-19. Thus, the ALJ considered evidence presented by Peter's Fine Greek Food that "[p]ost-investigation, Respondent hired new representatives to assist with its 2011 and 2012 *Application for Temporary Employment Certification*" and that the employer had "improved its recordkeeping through the use of timecards and a payroll company." *Id.* at 18.

The ALJ acknowledged that the WHD witnesses who testified in rebuttal, based on their review of the documents submitted by

conditions of a significant number of the employer's U.S. or H-2B workers[.]" 20 C.F.R. 655.31(d)(1)(i). A "substantial violation" also includes a "significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under this subpart." 20 C.F.R. 655.31(d)(3).

Peter's Fine Greek Food, raised concerns about whether the employer was actually in compliance. See OFLC D&O at 18. The ALJ was "troubled" by the fact that WHD witnesses noted how Peter's Fine Greek Food had changed the job description in the 2011 and 2012 TECs, resulting in a lower prevailing wage even though the job itself had not changed. See *id.* In addition, the ALJ was "troubled" by Peter's Fine Greek Food's failure to advertise opportunities to earn overtime wages in advertisements published to recruit U.S. workers. See *id.* However, the ALJ found that, "on the whole, it is clear that Respondent has taken significant steps towards coming into compliance with the regulations." *Id.* at 18.

The ALJ concluded that although Peter's Fine Greek Food's wage violation "was substantial and had a serious effect on its workers," this was balanced by its "status as a first time violator" and "greatly improved compliance with the H-2B regulations." OFLC D&O at 19. Accordingly, the ALJ found that only a one-year debarment period was appropriate and that "a longer period of debarment would not serve the underlying purpose of debarment, as Respondent has already come into substantial compliance with the regulations." *Id.*

STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's decisions. See 20 C.F.R. 655.31(e)(5)(iii), 655.76. The Board reviews the ALJ's decisions, including CMP assessments, de novo. See *Administrator v. Elderkin Farm*, ARB Case Nos. 99-033, 99-048, ALJ Case No. 95-CLA-31, 2000 WL 960261, at *9 (ARB June 30, 2000) (clarifying relationship between the ALJ's and the Board's decisions with regard to CMP assessments: "Because our review pursuant to the APA is *de novo*, we are free to substitute our judgment for that of the ALJ"); see also *Administrator v. American Truss*, ARB Case No. 05-032, ALJ Case No. 2004-LCA-12, 2007 WL 626711, at *1 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB Case No. 04-10, ALJ Case No. 2002-LCA-25, slip op. at 8 (ARB Jan. 31, 2007) for the proposition that the Board applies de novo review in INA cases). The Board acts with "all the powers which it would have in making the initial decision." 5 U.S.C. 557(b).

ARGUMENT

- I. THE ALJ ERRONEOUSLY REDUCED BY 90 PERCENT THE CMP FOR PETER'S FINE GREEK FOOD'S FAILURE TO COOPERATE WITH THE WHD INVESTIGATION BASED ON ONE OF MANY APPLICABLE REGULATORY FACTORS, DESPITE FINDING THAT THE COMPANY REPEATEDLY FAILED TO PRODUCE THE REQUESTED DOCUMENTS WITH NO CREDIBLE EXPLANATION

In reviewing the CMP for the failure to cooperate violation, the ALJ focused on the gravity of the violation, appearing to put the most weight on her finding that Peter's Fine Greek Food would have turned over additional records if they had existed. But this speculation is directly at odds with the ALJ's earlier finding that Peter's Fine Greek Food repeatedly did not turn over documents that *did* exist such as the list of employees and fairs attended. Further, it conflicts with the finding that Karageorgis was not credible in his various explanations for why the documentation was lacking. These factual and credibility findings support WHD's reasons for assessing a full CMP.

Moreover, in focusing on the gravity of the offense, the ALJ did not discuss the other regulatory factors in 20 C.F.R. 655.65(g). The Department's regulations state that the WHD Administrator "*shall* consider the type of violation committed and other relevant factors" and the regulation lists seven factors. 20 C.F.R. 655.65(g) (emphasis added). A 90 percent

reduction based on one factor of many improperly discounts the Administrator's concerns about Peter's Fine Greek Food's ability to profit from its failure to cooperate, lack of credible explanation for the violation, and lack of good faith effort to comply (all regulatory factors listed in section 655.65(g)). This employer was found to have given non-credible explanations about whether he maintained basic records. The employer was also found to have produced records on the eve of trial, warranting an adverse inference that they were created solely for the purpose of the litigation. In order to obtain redress for Peter's Fine Greek Food's H-2B employees who worked many hours without proper pay, WHD was forced to use considerable resources to reconstruct their hours through interview statements and various other sources. The lack of records impeded the investigation and raised concerns about the employer's financial gain due to noncompliance; without basic records WHD cannot easily determine the existence of certain program violations and the extent of wage violations. Thus, the regulatory factors WHD relied on support the greater CMP amount that WHD assessed for Peter's Fine Greek Food's failure to maintain and produce records.

Finally, a failure to cooperate violation does not lend itself to such a drastic reduction in the CMP. It is critical

for proper enforcement of the H-2B program that employers cooperate fully with WHD investigations. WHD must assess sufficient penalties when employers refuse to cooperate in order to create a meaningful deterrent for employers whose non-cooperation jeopardizes effective enforcement and drains WHD's limited resources. WHD properly exercised its discretion in assessing the appropriate CMP for this violation, and that assessment should be upheld. *Cf. Administrator v. Mohan Kutty, M.D.*, ARB Case No. 03-022, ALJ Case Nos. 01-LCA-010-025, 2005 WL 1359123, at *13 (ARB May 31, 2005) (holding that the WHD Administrator is "vested with discretion in calculating the amount of civil money penalties" under the H-1B program, which has virtually identical CMP regulations, and therefore where "the record demonstrates that she did not abuse that discretion, [the Board] will not modify the Administrator's assessment or the ALJ's determination").

II. THE ALJ ERRED BY CONSIDERING PETER'S FINE GREEK FOOD'S CURRENT OR FUTURE COMPLIANCE IN HER DEBARMENT ANALYSIS EVEN THOUGH THE DEBARMENT REGULATION DOES NOT ALLOW FOR CONSIDERATION OF POST-INVESTIGATION CONDUCT

The ALJ erred as a matter of law by importing consideration of the employer's behavior during post-investigation time periods into the debarment analysis. The regulation plainly does not allow for consideration of compliance outside the

investigatory period. Moreover, allowing such employer-side evidence for time periods that have not been subject to Department investigation risks inconsistent compliance standards in the H-2B program, in addition to creating significant additional burdens on the Department when it pursues debarment that are not required by the regulation.

- A. The plain language, structure, and purpose of the debarment regulation do not allow for consideration of current or future compliance.

The ALJ asserted that “nothing in the current regulations prohibits me from considering future compliance when determining whether debarment is warranted.” OFLC D&O at 18 n.4. This statement, however, ignores the plain language, structure, and purpose of the H-2B regulations.

1. Under the regulation, debarment is predicated on the finding of a substantial violation, not the weighing of various factors such as whether the employer has come into compliance with the H-2B program.⁶ Debarment can be initiated by the OFLC

⁶ As noted previously, debarment for up to three years may be warranted if the Administrator finds that an employer “substantially violated a material term or condition of its temporary labor certification.” 20 C.F.R. 655.31(a)(1). A “substantial violation” includes, among other things, a “pattern or practice of acts . . . that . . . [a]re significantly injurious to the wages or benefits offered under the H-2B program or working conditions of a significant number of the employer’s U.S. or H-2B workers” as well as a “significant

Administrator upon a finding that an employer substantially violated a material term or condition of its labor certification, 20 C.F.R. 655.31(a)(1), or upon the recommendation of the WHD Administrator if she finds a substantial failure or willful misrepresentation, 20 C.F.R. 655.65(h). Both avenues of debarment are based on the fact that an investigation into the employer's conduct has taken place. Thus, the debarment regulation is backward looking, and relates to an employer's conduct with respect to a specific temporary employment certification; in this case, the proper question as to whether debarment is appropriate is whether Peter's Fine Greek Food committed substantial violations relating to its 2010 temporary employment certification.

The regulation's reference to a "pattern or practice" of activity does not suggest that debarment applies to ongoing conduct but rather ensures that the debarment sanction is not triggered by one-time, minor violations of the rules. See 73 Fed. Reg. 78,020, 78,044 ("The Department will not debar for 'minor' violations. Rather, most of the violations that will be the basis of potential debarment actions require a pattern or practice of acts"). As the Department explained in the

failure to cooperate with a DOL investigation." 20 C.F.R. 655.31(d)(1)(i) and (d)(3).

preamble to the H-2B rule, the "debarment provision upholds the integrity of the H-2B labor certification and puts employers on notice of what violations are sufficiently serious that could result in potential debarment." *Id.* Thus, nothing in the language of the regulation suggests that the debarment inquiry considers acts other than those related to the specific temporary employment certification.

2. In fact, where an employer's current or future compliance is a mitigating factor, the Department's regulations expressly say so. The CMP provision for H-2B violations, for example, specifically mentions future compliance as a mitigating factor. See 20 C.F.R. 655.65(g)(6) ("The employer's commitment to future compliance"). Similarly, a contractor that violates the Service Contract Act will be subject to a three-year debarment absent "unusual circumstances," which may include "the contractor's efforts to ensure compliance [and] the nature, extent, and seriousness of any past or present violations." 29 C.F.R. 4.188(b)(3)(ii). And the Department included future compliance in the list of factors that may be considered in determining whether a violation is "so substantial so as to merit debarment" in the H-2A visa program. See 20 C.F.R.

655.182(e)(6), 29 C.F.R. 501.20(d)(2).⁷ Thus, it can be fairly assumed that the Department intentionally did not include current or future compliance as a mitigating factor for H-2B debarment because the Department knows how to consider future compliance as a mitigating factor and declined to do so in this particular program. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . We would not presume to ascribe this difference to a simple mistake in draftsmanship.”) (internal quotation marks omitted).

The structure of the H-2B regulation, where debarment is predicated on substantial violations and the regulation does not contemplate the consideration of any factors outside of those violations, is similar to the H-1B program, where a finding that

⁷ H-2B violations, compared with H-2A violations, are inherently substantial because the only violations that are recognized in the H-2B program are willful violations. See 8 U.S.C. 1184(c)(14)(A), (D) (“the term ‘substantial failure’ means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition”); 20 C.F.R. 655.60, 655.65(d), (e) (defining “willful” for purposes of the H-2B regulations 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” pursuant to the standard announced in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)).

an employer has committed a willful failure with respect to wages or benefits necessarily results in a debarment of at least two years. See 20 C.F.R. 655.810(d)(2).

Further, under the Davis-Bacon Act ("DBA") and Davis-Bacon Related Acts ("DBRA"), there are no mitigating factors in the debarment provisions for post-violation conduct, just as there are no such mitigating factors in the H-2B debarment regulation. See 29 C.F.R. 5.12(a)(1) (DBRA) ("whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor . . . shall be ineligible for a period not to exceed 3 years . . . to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1"); 29 C.F.R. 5.12(a)(2)(DBA) ("contractors or subcontractors . . . who have been found to have disregarded their obligations to employees . . . shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1"). In the Davis-Bacon context, the Board has held that, in light of the clear congressional intent regarding the period of debarment, evidence of mitigating

factors or extraordinary circumstances "should be objected to and excluded pursuant to 29 C.F.R 18.402 ('Evidence which is not relevant is not admissible.')." *G&O Gen. Contractors, Inc.*, WAB Case No. 90-35, 1991 WL 494740, at *2 (WAB Feb. 19, 1991).

Under both debarment regulations, the Board does not look to current compliance and has rejected consideration of events subsequent to the conduct giving rise to the DBA or DBRA enforcement action. *See, e.g., Thomas & Sons Bldg. Contractors, Inc.*, ARB Case No. 00-050, ALJ Case No. 96-DBA-37, 2001 WL 1031629, at *3 (ARB Aug. 27, 2001) ("[O]nce a [disregard for obligations] violation is established, the standard for debarment is a 'bright line' test, *i.e.*, a three-year debarment period is mandatory without consideration of mitigating factors or extraordinary circumstances."); *Gemini Constr. Co.*, WAB Case No. 91-23, 1991 WL 494766, at *2 (WAB Sept. 12, 1991) ("[P]rompt restitution of wage underpayments and subsequent compliance do not provide a basis for relieving a contractor from debarment"); *A. Vento Constr.*, WAB Case No. 87-51, 1990 WL 484312, at *1, 7 (WAB Oct. 17, 1990) (rejecting ALJ's reduction of DBRA debarment period from three years to one based on events subsequent to violation); *see also G&O Gen. Contractors, Inc.*, ALJ Case No. 86-DBA-88, 1990 WL 484325, at *3 (ALJ July 10, 1990) ("The fact that the Respondents may now be exercising current compliance,

or have done so in the interim between violation and this adjudication, does not dismiss the propriety of the debarment penalty in the first instance.").⁸

3. Moreover, the purpose of debarment is to ensure the integrity of the H-2B program by giving the employer a significant incentive to maintain compliance with the program requirements. See 73 Fed. Reg. 78,020, 78,043 ("Debarment from the program is a necessary and reasonable mechanism to enforce H-2B labor certification requirements and ensure compliance with the program's statutory requirements."). If employers are able to commit willful violations yet avoid debarment or a considerable debarment period by coming into compliance after a WHD investigation, they will have little incentive to comply with the program in the first instance. See *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84, 91 (2d Cir. 1987) (debarment "may be the only realistic means of deterring contractors from engaging in willful overtime pay violations

⁸ In her decision denying the Administrator's motion to preclude evidence of current or future compliance, the ALJ found that evidence of future compliance may be relevant to the determination of whether a violation is willful. See App., Tab 7 at 1. However, future compliance cannot negate the willful nature of a violation at the time it was committed. Regardless, in the context of the WHD proceeding, the ALJ found that Peter's Fine Greek Food's substantial failure to pay wages to its employees was willful and this finding supported her decision that debarment was appropriate.

based on a cold weighing of the costs and benefits of non-compliance"); *MAP Maintenance & Constr. Co.*, ALJ Case No. 86-DBA-0178, 1990 WL 484324, at *9 (ALJ July 6, 1990)(rejecting employer's argument that debarment was not appropriate because it had rectified the violations, finding that "allowing respondents to escape full liability for their violations of the Act because back wages have already been repaid would encourage employers to 'buy their way out of debarment' by paying past due wages when and if violations are discovered. In essence, a great disincentive to adhere to the obligations of the Act would result . . ."). Thus, under the H-2B regulatory scheme and the underlying purposes it serves, the fact that Peter's Fine Greek Food may or may not have committed violations with regard to its 2011 or 2012 certification, after it was found to have committed substantial violations following criminal and civil investigations in 2010, should have been deemed irrelevant to the debarment determination.

B. Considering current or future compliance in debarment proceedings risks inconsistency in H-2B compliance standards and imposes significant operational burdens on the Department's enforcement of the program.

Importing considerations of current compliance into the debarment analysis allows judges to make determinations about compliance in the H-2B program without the benefit of a full WHD

investigation, which would necessarily include, *inter alia*, interviews with workers and not just the representations of the employer. In this case, WHD has not investigated the employer since the 2010 investigation that formed the basis of the violation findings and debarment decision. Therefore, the OFLC Administrator was only able to put on rebuttal evidence, which raised serious concerns based on face-of-the-record analyses by WHD staff about Peter's Fine Greek Food's claim of current compliance. The ALJ noted that she "share[d] some of those concerns." OFLC D&O at 18. However, despite these concerns, the ALJ found Peter's Fine Greek Food had "come into substantial compliance with the regulations." *Id.* at 19. This conclusion, without an underlying WHD investigation and with expressed concern about the accuracy of Peter's Fine Greek Food's evidence as to current compliance, was unmoored from any objective standard regarding compliance.

Allowing the ALJ's decision to stand will create a significant burden on WHD whenever debarment is deemed to be an appropriate remedy for substantial violations in the H-2B program. WHD already devotes considerable investigatory resources toward H-2B cases because only willful violations may be charged, which often requires additional fact-finding, evidence gathering, and analysis. A judge-made rule that

effectively requires WHD to conduct a second full investigation - or even a partial investigation - to counter an employer's self-serving claims of current and future compliance in order to avoid debarment imposes a significant burden on WHD's investigatory resources, constrains the Department's ability to debar non-compliant employers by creating an unwarranted additional hurdle and, most significantly, does not comport with the plain language, structure, and purpose of the H-2B regulation.⁹

⁹ As discussed in Part I, *supra*, the failure to cooperate violation was significant. As such, the ALJ should have affirmed the OFLC Administrator's two-year debarment, which was based on the employer's significant failure to cooperate as well as the substantial failure to pay wages.

CONCLUSION

For these reasons, the Board should reverse the ALJ's decisions to reduce the CMP for failure to cooperate and to reduce the length of debarment, and it should reinstate the full CMP and two-year debarment as the appropriate sanctions for non-compliance in this instance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2014 I served the foregoing Administrators' Brief in Support of Petition for Review on the following by sending a copy via first-class mail to:

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