ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:	)	
ADMINISTRATOR, WAGE & HOUR DIVISION,	)	ARB Case No. 2019-0009
Prosecuting Party,	)	ALJ Case No. 2018-TNE-00022
v.	)	
GRAHAM AND ROLLINS, INC.,	)	
Respondent.	)	

DEPUTY ADMINISTRATOR'S OPENING BRIEF

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DEPUTY ADMINISTRATOR'S OPENING BRIEF

This matter arises under the H-2B temporary foreign worker program of the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c)(14), and the U.S. Department of Labor's ("Department" or "DOL") H-2B regulations, 20 C.F.R. Part 655, subpart A (2009) (and applicable procedural regulations in 29 C.F.R. Part 503 (2015)). The Administrative Law Judge ("ALJ") dismissed the case as untimely after determining that, because in her view the Department's H-2B enforcement action sought penalties rather than back wages, the five-year statute of limitations set forth in 28 U.S.C. 2462 that addresses penalties applies. In addition to misinterpreting the nature of the action brought by the Department, the ALJ's

erroneous reading of 28 U.S.C. 2462 and the H-2B regulations limits the Department's ability to seek back wages, impeding enforcement and hampering the ultimate purposes of the H-2B program. Because that decision is incorrect as a matter of law, the Deputy Administrator ("Administrator")[1] of the Wage and Hour Division ("WHD") respectfully requests that the Administrative Review Board ("Board") reverse that decision and remand the case back to the ALJ for further proceedings.

ISSUE

Whether the ALJ erred in determining that the five-year statute of limitations set forth in 28 U.S.C. 2462, which addresses an action to recover penalties, applies to the Administrator's action in this case, which clearly sought to recover back wages under the H-2B program.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The H-2B program permits the employment of nonimmigrants to perform temporary, non-agricultural labor or services, but only if "unemployed persons capable of performing such service or

[1] As of January 5, 2019, the Deputy Administrator for Program Operations is the ranking official responsible for the U.S. Department of Labor's Wage and Hour Division.

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, 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) (2009).[2]

An employer must attest that it will abide by the terms and conditions set by the H-2B regulations and the attestations on the TEC. *See* 20 C.F.R. 655.20(a), 655.22. Those terms and conditions include, among others, the requirement to pay the offered wage; the requirement to notify the U.S. Citizenship and Immigration Services ("USCIS") and the Employment and Training Administration ("ETA") that H-2B workers have separated before the end of the work period stated on the TEC; and the requirement to pay the outbound transportation of workers if

[2] All references to 20 C.F.R. Part 655 in this brief are to the Final Rule published on December 19, 2008, which became effective on January 18, 2009, and which was in turn superseded by the Interim Final Rule that was published and took effect on April 29, 2015.

they are dismissed prior to the end of the work period. *See* 20 C.F.R. 655.22(e), (f), (m). The employer is required to submit an approved TEC along with its petition to the Department of Homeland Security ("DHS") 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). This delegation included the authority to "impose such administrative remedies (including civil monetary penalties . . .) as the Secretary . . . determines to be appropriate." 8 U.S.C. 1184(c)(14)(A)(i). This authority was delegated within the Department to the WHD Administrator. *See* 20 C.F.R. 655.50. 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(a). After investigation, WHD determines whether a violation has occurred: whether the employer willfully misrepresented a material fact on the H-2B petition or substantially failed to meet the conditions attested to on the TEC or the petition. *See* 20 C.F.R. 655.60.

In 2015, the Department's 2008 H-2B regulations were vacated and permanently enjoined by the U.S District Court for the Northern District of Florida. *See Perez v. Perez*, No. 14-cv-682, Doc. 14, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015). However, the *Perez* court later clarified this order, stating that "the permanent injunction was not intended to, and does not, apply retroactively." *Perez v. Perez*, No. 14-cv-682, Doc. 62. Therefore, in accordance with that clarification, the Department still enforces compliance with the 2008 H-2B rule for labor certifications issued pursuant to that rule before the district court's permanent injunction took effect on April 30, 2015, such as the certifications in this case. The Board has approved this approach. *See Adm'r v. Strates Shows, Inc.*, ARB Case No. 15-069, Amended Final Decision & Order, slip op. at 2-3 (Aug. 16, 2017) (reconsidering decision characterizing 2008 H-2B regulation as unenforceable and noting that the district court in *Perez v. Perez* "held that the permanent injunction did not apply retroactively — did not apply to past labor certifications approved under the 2008 H-2B regulations before the injunction").

B. Statement of Facts

Graham and Rollins, Inc. ("Graham and Rollins") operates a crab meat processing business in Newport News, Virginia, and

participated in the H-2B program. In 2011, the Department, acting on Graham and Rollins' Application for Temporary Employment Certification, certified the employer to bring in 93 H-2B workers as seafood processors for the period from April 1, 2011 through December 31, 2011. In 2012, Graham and Rollins was certified by the Department to bring in 87 H-2B workers as seafood processors for the period of April 1, 2012 through December 31, 2012.

WHD conducted an investigation of Graham and Rollins and determined that it committed the following violations of the H-2B program: a substantial failure to comply with the outbound transportation requirement and a substantial failure to comply with the notification to USCIS and ETA requirement. Specifically, Graham and Rollins failed to pay the full outbound transportation costs of its workers who were terminated prior to the end of the period of employment – it only provided outbound transportation from Newport News, Virginia, to Phoenix, Arizona. The H-2B employees at issue then had to pay for transportation from Phoenix to Sinaloa, Mexico (the place from which they were recruited) out of their own pockets. Graham and Rollins also failed to notify USCIS and ETA of the termination of those workers, as is required by the H-2B regulations. On February 13, 2018, WHD issued a determination letter citing these violations

of the H-2B program requirements. The determination letter and the enclosed Summary of Violations and Remedies stated that WHD had assessed a total of $16,560.00[3] in back wages and $0.00 in civil money penalties against Graham and Rollins.

C. Course of Proceedings

Graham and Rollins sought review of WHD's determination and requested a hearing. The employer filed a Motion to Dismiss based on untimeliness on June 4, 2018. *See* A20-30. The ALJ granted that motion on June 26, 2018, issuing a Decision and Order Granting Employer's Motion to Dismiss and Order Canceling Hearing and Order Dismissing Case ("Order Dismissing Case"). *See* A31-43. The Administrator filed a Motion for Reconsideration of that order on July 6, 2018. *See* A44-55. On October 25, 2018, the ALJ issued an Order Denying Administrator's Motion for Reconsideration ("Order Denying Reconsideration"). *See* A56-63. On November 21, 2018, the Administrator petitioned the Board for review of both ALJ decisions, and on November 28, 2018, the Board accepted this case for review and issued a briefing schedule.

[3] This figure is incorrect due to a clerical error. In the Administrator's Prehearing Statement, the back wage assessment was corrected to $10,640. *See* Appendix ("A") 8.

D. The ALJ'S Decisions

In her Order Dismissing Case, the ALJ held that 28 U.S.C. 2462, which provides that "[e]xcept 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 . . .," applied to this case. A36. The ALJ concluded that an H-2B administrative hearing is an "action, suit or proceeding" pursuant to section 2462 and, since in the ALJ's view the action here was one for penalties, the five-year limitations period applied. *See* A38-41. Because the violations occurred during the 2011 and 2012 seasons, that is, before December 31, 2012, and the determination letter was issued on February 13, 2018, the ALJ concluded that the Administrator untimely brought this case. *See* A41.

The ALJ specifically rejected the argument that the Administrator was seeking to recover unpaid back wages for workers and not civil money penalties. She determined that this case was "not an action for 'back wages,' notwithstanding the Administrator's characterizations." A38. The ALJ stated that the violations cited in the determination letter "are based on failures to comply with attestations and certifications," and

that "it is not clear that the amounts assessed against Employer in the Determination letter . . . represent a set amount the Administrator considered due to specific individual workers." A39. She recognized that the determination letter listed no civil money penalties, but stated that the Administrator has the authority to impose "other administrative remedies," including reinstatement of displaced U.S. workers and other legal and equitable relief as deemed appropriate under 20 C.F.R. 655.65(i). *See* A38.

The ALJ analyzed cases that address the assessment of a penalty and stated that the courts have interpreted penalties under section 2462 as "a sanction or punishment for violating public law that goes beyond compensation for injury caused by the defendant." Order Dismissing Case at A40 (citing *United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998)). Looking at the remedies sought in this case, the ALJ concluded that the violations listed in the determination letter were the failure to comply with attestations and certifications made to the government and determined that these were "public wrongs." A40. The ALJ also determined, using the erroneous figure from the determination letter, that the monetary amount the Administrator was seeking was not purely remedial because it did not bear a direct relation to the losses allegedly sustained by

the affected H-2B workers. *See* A40. Therefore, the ALJ held that the remedies assessed against Graham and Rollins constituted a penalty under section 2462 and were thus barred by the five-year statute of limitations. *See* A41.

The Administrator sought reconsideration, and the ALJ denied that motion in her Order Denying Reconsideration. In addition to rejecting the Administrator's argument that the ALJ had applied the wrong standard of review, the ALJ again rejected the Administrator's argument that the amounts assessed in this case were back wages and not a penalty. *See* A60-62. The ALJ concluded that, for similar reasons as set forth in her initial order, back wages could only be assessed for violations of 20 C.F.R. 655.22(e). *See* A62. Because the determination letter in this case did not cite section 655.22(e) or the prevailing wage, but instead cited a violation of 20 C.F.R. 655.22(m), the ALJ concluded that the Administrator could not prevail in the contention that this case involved back wages remedying a violation of the H-2B prevailing wage. *See* A62.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review an ALJ's decision and issue the final determination of the Secretary of Labor ("Secretary") under the H-2B program. *See* U.S. Dep't of Labor,

Sec'y's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378, 69,378 (Nov. 16, 2012), 2012 WL 5561513; 29 C.F.R. 503.51. The Board reviews an ALJ's decision de novo and acts with "all the powers [the Secretary] would have in making the initial decision." 5 U.S.C. 557(b); *see Adm'r v. Am. Truss*, ARB Case No. 05-032, slip op. at 2-3 (ARB Feb. 28, 2007) (citing *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB Case No. 04-100, slip op. at 8 (ARB Jan. 31, 2007) for proposition that "ARB applies de novo review in INA cases").

ARGUMENT

THE DEPARTMENT HERE SOUGHT BACK WAGES AND THERE IS NO STATUTE OF LIMITATIONS FOR H-2B BACK WAGE ENFORCEMENT ACTIONS BECAUSE CONGRESS HAS NOT SET ONE

A. Neither The INA Nor Any Other Statute Sets A Limitations Period for H-2B Back Wage Enforcement Actions.

Statutes of limitations do not run against the federal government unless Congress "explicitly expressed one." *United States v. Ward*, 985 F.2d 500, 502 (10th Cir. 1993) (citing *United States v. John Hancock Mut. Life Ins.*, 364 U.S. 301 (1960)). The Seventh Circuit, in a case addressing back wages under the Immigration Nursing Relief Act (which amended the INA), stated that "[u]nless a federal statute directly sets a time limit, there is no period of limitations for administrative

enforcement actions." *Alden Mgmt. Servs., Inc. v. Chao*, 532 F.3d 578, 582 (7th Cir. 2008).

The INA does not contain a statute of limitations period applicable to enforcement actions under the H-2B provisions; nor does it incorporate the limitation provisions of any other statute. If Congress had intended to include a statute of limitations applicable to H-2B enforcement actions by the Department or any other agency tasked with the responsibility of ensuring compliance with the H-2B program, it could have easily expressed that in the INA. *Cf.* 8 U.S.C. 1188(b)(2)(A) (setting a two-year statute of limitations for debarment actions in the H-2A temporary nonimmigrant worker program).

The ALJ has concluded that the broadly applicable 28 U.S.C. 2462 applies to this case. The Administrator does not dispute that this statute sets the limitations period for civil money penalties in the H-2B program. However, this case does not involve civil money penalties, as will be explained in greater detail below. Thus, because there is no statute that directly sets a limitations period for the Administrator's remedial enforcement authority for H-2B back wages, actions such as this one are not subject to any time-bar.

The Board has permitted back wage recovery without limitation in H-1B cases under the INA. In *Vojtisek-Lom v. Clean*

Air Technologies International, Inc., ARB Case No. 07-097, (ARB July 30, 2009) the Board upheld an award of five years of back wages in an H-1B case, stating that the INA "does *not* contain any language that limits the period for back pay recovery." *See Adm'r v. Ave. Dental Care*, ARB Case No. 07-101, slip op. at 10-11 (ARB Jan. 7, 2010) (finding H-1B back wage award for full employment period not time-barred). The ALJ concluded that these decisions are inapposite; in doing so, she distinguished between the period for recovery of back pay once a timely complaint has been filed (which these Board cases found to be unlimited), and the period in which to file such a timely complaint, and noted that the H-1B provisions of the INA include a 12-month statute of limitations period for the filing of a complaint. *See* A37-38; *see also* 8 U.S.C. 1182(n)(2)(A). However, the INA contains no such limitations period for the bringing of H-2B enforcement actions. The existence of such a limitations period in the INA for H-1B complaints suggests that Congress did not intend to include such a limitations period for H-2B enforcement actions. Because there is no statute of limitations for bringing an H-2B action, the Administrator's determination letter was timely.

B. The Five-Year Limitations Period for Civil Money Penalties in 28 U.S.C. 2462 Does Not Apply to H-2B Back Wage Enforcement Actions and the Administrator is Only Seeking to Recover H-2B Back Wages In This Case.

The ALJ held that the five-year limitations period set forth in 28 U.S.C. 2462, which provides that "[e]xcept 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 . . .," applied to this case. *See* A36. As noted above, the Administrator does not dispute that the broadly applicable 28 U.S.C. 2462 sets the limitations period for civil money penalties in the H-2B program. However, the Administrator is seeking back wages in this case, not civil money penalties.

The determination letter issued by WHD to Graham and Rollins clearly and repeatedly stated that it was seeking "unpaid wages" or "back wages" for H-2B nonimmigrant workers. *See* A1-2. The Summary of Violations and Remedies, which accompanied the determination letter, included two columns: "Back Wages Assessed" and "Civil Money Penalties Assessed," listing a total back wage amount of $16,560[4] in the "Back Wages Assessed" column, while the column for "Civil Money Penalties

[4] As explained in greater detail below, and in the Administrator's motions before the ALJ, this figure was a clerical error and was corrected in the Administrator's Prehearing Statement to $10,640. *See* A8.

Assessed" listed "$0.00." *See* A4. The Administrator thus could not have been clearer that it was seeking to recover back wages.

In 2008, the Department sought public comment on whether it could assess back wages under the H-2B program. *See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers)*, 73 Fed. Reg. 78,020, 78,047, 2008 WL 5262663 (Dec. 19, 2008). After reviewing the comments, the Department concluded in the Final Rule that "[a]warding back pay is unquestionably the most appropriate remedy for failure to pay the required wage. It is also consistent with the statutory grant of authority and will further the purposes of the H-2B program because it will reduce employers' incentives to bypass U.S. workers in order to hire and exploit H-2B foreign workers, and guard against depressing U.S. workers' wage rates." *Id.* In this case, Graham and Rollins failed to pay the full required wage by failing to cover the full cost of the H-2B workers' outbound transportation, as was required. Doing so lowered the cost of employing H-2B workers for Graham and Rollins, which is exactly the kind of employer incentive that the Department sought to remove when it made the determination that it could seek and would assess back pay for H-2B violations, as it did in this case.

1. The Administrator correctly assessed back wages for a violation of the requirement to provide outbound transportation costs.

The Administrator specifically charged Graham and Rollins with a failure to comply with the requirement that it was liable for the full outbound transportation costs for those H-2B workers terminated prior to the end of their period of employment, and assessed back wages due to the H-2B employees for the amount of the outbound transportation costs that Graham and Rollins did not cover. *See* A1-4. Graham and Rollins' failure to pay outbound transportation costs resulted in H-2B employees paying employment-related costs that the INA and the H-2B regulations require their employer to bear. *See* 8 U.S.C. 1184(c)(5)(A); 20 C.F.R. 655.22(m).

The Department has determined that travel and visa expenses for foreign workers recruited under the H-2B program primarily benefit the employer who certifies to DOL as part of the application process that there are no domestic workers to perform the work it requires. *See* DOL Field Assistance Bulletin No. 2009-2 (Aug. 21, 2009), *available at,* https://www.dol.gov/agencies/ebsa/employers-andadvisers/guidance/field-assistance-bulletins/2009-02; *see also generally Temporary Non-Agricultural Employment of H-2B Aliens in the*

United States ("2015 H-2B Rule"), 80 Fed. Reg. 24,042, 24,068, 2015 WL 1908169 (Apr. 29, 2015). The same conclusion has been reached by most courts that have considered the question in relation to the H-2A or H-2B programs. *See, e.g.*, *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1242-43 (11th Cir. 2002) (transportation costs from the country of origin for H-2A workers are for the benefit of the employer). The *Arriaga* court also recognized that "[a]n employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. . . . This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment." 305 F.3d at 1236. When Graham and Rollins' H-2B employees paid their own outbound transportation costs, it resulted in a deduction from the prevailing wage that they were owed.[5] Thus, reimbursement of outbound transportation expenses, which is what the Administrator is seeking in the

[5] As the Department stated in the preamble to the 2015 H-2B Rule, the substantive portions of which do not apply to this case, "[i]f employers were permitted to shift their business expenses onto H-2B workers, they would effectively be making a de facto deduction and bringing the worker below the H-2B required wages . . . ." 2015 H-2B Rule, 80 Fed. Reg. at 24,068.

present case, cannot reasonably be interpreted as anything other than back wages.

2. The Administrator can assess back wages for any H-2B violation that results in H-2B workers not receiving the full H-2B offered wage.

The ALJ interpreted 20 C.F.R. 655.65, which sets forth the remedies that the Administrator may seek for a violation of the H-2B program, to mean that the Administrator can seek back wages *only* in those cases in which a specific violation of 20 C.F.R. 655.22(e) is cited. *See* A38-39, A62. This was an incorrect reading of that provision. The relevant provision states:

> If the WHD Administrator finds a violation of the provisions specified in this subpart, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including reinstatement of displaced U.S. workers, or other appropriate legal or equitable remedies. If the WHD Administrator finds that an employer has not paid wages at the wage level specified under the application and required by §655.22(e), the Administrator may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of §655.22(e).

20 C.F.R. 655.65(i). Under the ALJ's interpretation of this provision, because the Administrator did not expressly cite a violation of section 655.22(e) in the Graham and Rollins determination letter, this case necessarily did not involve back wages.

However, that is not a fair interpretation of section 655.65(i). The provision states that if an employer has not

"paid wages at the wage level specified under the application and required by 655.22(e)," that is, if the employer has not paid the required wage, then the Administrator may seek back wages in an amount that would effectuate "compl[iance] with the requirements of 655.22(e)." The references to 20 C.F.R. 655.22(e) here are definitional, not limitational, because that is the provision that defines what the offered, or required, wage must be. Section 655.22(e) states only that "[t]he offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage, and the employer will pay the offered wage during the entire period of the approved H-2B labor certification." Thus, the disputed provision of section 655.65(i) simply means that if the employer does not pay the offered wage, *as defined by section 655.22(e)*, then the Administrator may seek back wages up to the amount that the employer would have paid the workers, had it paid the required wage.

As explained above, Graham and Rollins' failure to pay the required outbound transportation costs meant that H-2B workers bore a cost of the employer's, meaning that Graham and Rollins did not pay the offered wage. Therefore, the plain language of section 655.65(i) makes clear that the Administrator may seek to

recover such back wages to make up the difference and ensure that the H-2B workers are actually paid the offered wage.

3. The ALJ erred in relying on the erroneous back wage amount.

The ALJ concluded that the back wages assessed did "not bear a direct relation to the losses allegedly sustained by the affected H-2B workers" and thus was not purely compensatory. A40. The ALJ came to this conclusion by relying on an erroneous back wage amount ($16,050) that was listed on the determination letter. This amount was a clerical error, and was corrected in the Administrator's Prehearing Statement.[6]

The subsequently submitted Prehearing Statement clearly set forth the back wages that the Administrator was seeking and explained how the calculations were made:

- Graham and Rollins dismissed 61 H-2B workers early in the 2011 season and dismissed 72 H-2B workers early in the 2012 season;
- Graham and Rollins only paid to transport the workers from Newport News, Virginia, to Phoenix, Arizona, and not to

[6] The back wages assessed in the determination letter were an error because they inadvertently included the total for back wages for the 2010 season. *See* A50 n.1.

Sinaloa, Mexico, which was the place from which they were recruited;

- The average bus fare from Phoenix to Sinaloa was $80 per person in both 2011 and 2012;
- Therefore, the Administrator sought $10,640 in back wages for those workers: $80 x 61 = $4,880 for 2011, and $80 x 72 = $5,760 for 2012.

See A8-12. Thus, the Administrator's Prehearing Statement clarified that the amount being sought would only reimburse the workers for an employment cost that should have been borne by their employer.

Despite the fact that the Administrator acknowledged that the amount assessed in the determination letter was in error, and clearly laid out in the Prehearing Statement its calculations for the correct amount, the ALJ inexplicably continued to use the erroneous figure from the determination letter to conclude that the amount assessed could not be back wages. Specifically, the ALJ stated that, because the original assessment did not precisely correspond to the number of workers and cost of the bus fare, it "calls into doubt the Administrator's argument that the assessment of $8,280 against Employer for violations in 2011 and $8,280 for violations in

2012 represents straight 'back pay' and 'make-whole relief.'" A40. However, as noted above, the Administrator had *already* abandoned any argument that the figure of $16,560 represented the correct back pay and affirmatively acknowledged that that was an error. In the Order Denying Reconsideration, the ALJ again relied solely on the erroneous determination letter figure to claim that the Administrator's calculations were not supported. *See* A61-62. The ALJ referred to the Prehearing Statement in both decisions, so she was aware that the old figure had been rectified, and that the Administrator's revised calculation of $10,640 in back wages assessed was in fact supported by the facts presented by the Administrator.

It was thus improper for the ALJ to make a legal determination as to the applicable statute of limitations, or lack thereof, based upon an error that had already been corrected by the Administrator. In addition, despite the error, there was nothing in the Administrator's filings that obfuscated the fact that the Department was seeking to recover back wages and back wages only, as opposed to any penalty.

4. The Administrator's assessment of damages did not constitute a penalty.

The ALJ determined that the monetary remedies assessed against Graham and Rollins were a penalty.[7] She concluded that the monetary amount was not purely remedial not only because it did not "bear a direct relation" to the costs borne by the H-2B workers, which has been addressed above, but also because "the violations listed in the Determination Letter (for which remedies are imposed) are the failure to comply with attestations and certifications made to the government; that is, they are public wrongs." A40.

It was error for the ALJ to conclude that the remedies sought by the Administrator in this case fit within the definition of "penalty" in section 2462. As a threshold matter, "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of

[7] In the Order Denying Reconsideration, the ALJ chided the Administrator for not making certain arguments, such as that the assessment was based on a prevailing wage violation, during the initial briefing on the Motion to Dismiss. *See* A62. However, the Administrator did not specifically raise those arguments because Graham and Rollins did not argue in its Motion to Dismiss that the damages at issue were not back wages but were instead penalties. The Motion to Dismiss merely sought to borrow from multiple statutes of limitations outside the INA, including 28 U.S.C. 2462, and to apply them to the back wages at issue. *See* A23-29. The ALJ concluded that the damages at issue were penalties that triggered the limitations period of section 2462. *See* A41. As the Administrator had no way of anticipating this *sua sponte* ruling, the ALJ's refusal to entertain the Administrator's arguments in response to the holding of the Order Dismissing Case was unwarranted.

the Government." *Badaracco v. Comm'r*, 464 U.S. 386, 391 (1984) (quoting *E. I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456,462 (1924)). Here, the ALJ broadly and improperly interpreted section 2462 to cover the present case, an action for back wages.

Moreover, a penalty, as defined by section 2462, is "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson v. S.E.C.*, 87 F.3d 484, 488 (D.C. Cir. 1996). "[W]here a legal action is essentially private in nature, seeking only compensation for the damages suffered, it is not an action for a penalty." *Id.* at 487. Indeed, "courts have reaffirmed that a sanction which only remedies the damage caused by the defendant does not trigger the protections of [section] 2462." *Id.* at 488 (citing cases).

The amount sought by the Administrator was intended to recoup for the H-2B workers the wages they should have earned, had Graham & Rollins properly paid their outbound transportation costs. "[W]here the effect of the [federal agency's] action is to restore the *status quo ante*, such as through a proceeding for restitution or disgorgement of ill-gotten profits, [section] 2462 will not apply." *Johnson v. S.E.C.*, 87 F.3d at 491; *see*

United States v. Perry, 431 F.2d 1020, 1025 (9th Cir. 1970) (government's action to recover costs associated with illegal kickbacks under the Anti-Kickback Act were "designed to make the United States whole" and were not barred by section 2462). Therefore, the compensation owed to a party that restores it to the financial position it would have been in absent the violation is not a penalty.

Indeed, back wages by themselves are not a penalty. *See, e.g.*, *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583 (1942) (FLSA back wages and liquidated damages are "not a penalty or punishment by the Government"); *McClanahan v. Mathews*, 440 F.2d 320, 322-23 (6th Cir. 1971) (same). As explained above, the Administrator assessed a back wage amount against Graham and Rollins to remedy the compensation that was due to the H-2B workers as a result of their employer's failure to cover the outbound transportation costs, which brought them below the offered wage. The Administrator's claim merely seeks to restore the *status quo ante*.

Therefore, the ALJ erred in broadly interpreting section 2462 to conclude that the Administrator's assessment was a penalty and was governed by the five-year limitations period.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board reverse the decision of the ALJ and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of January 2019, a true copy of the foregoing Deputy Administrator's Opening Brief and Appendix was sent electronically to:

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