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Issue Date: 06 May 2011

CASE №S:2005-TAE-00001, 2005-TLC-00006

In the Matter of:

GLOBAL HORIZONS, INC. *and*
MORDECHAI ORIAN,
Respondents.

Order Denying Motion to Dismiss Respondent Orian and Granting Summary Decision for the Wage and Hour Division

Table of Contents:

I. Introduction and Background

The Administrator of the Wage and Hour Division ("WHD"), brought these actions against Global Horizons, Inc. and Mordechai Orian ("Orian"), alleging 11 categories of violations. They stem from their employment of 88 Thai farm workers who they brought to Hawaii between February and March 2003 as non-immigrant temporary alien agricultural laborers under H-2A visas issued under the Immigration and Nationality Act ("INA").[1] To obtain them, the Respondents had applied for and received an agricultural labor certification from the Department for something very different: to employ 375 foreign agricultural workers in Arizona between September 9, 2002, and March 31, 2003. For their many violations of the regulations that implement the H-2A labor certifications program at 20 C.F.R. § 655 and 29 C.F.R § 501.4,[2] the Administrator seeks to recover $134,791.78 in back wages, $17,617.52 in illegal deductions on behalf of those Thai workers, plus $194,400.00 in Civil Money Penalties ("Penalties") and to deny any Temporary Alien Agricultural Labor Certifications to the Respondents for the next three years.

Extraordinary obstruction during the course of discovery plays a role in the disposition of this case. Two sanctions orders have limited the facts the Respondents might otherwise contest.[3] The Respondents' failure to timely or adequately respond to the Administrator's Requests for Admission ("RFAs") led to many other facts being deemed

[1] 8 U.S.C. § 1188, as amended in the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101, *et seq.*

[2] All 20 C.F.R. § 655 citations and all 29 C.F.R. § 501 citations are citations to the implementing H-2A regulations that were in effect in 2002–2003.

[3] Order Granting Discovery Sanctions (Aug. 25, 2008) [hereinafter "August Sanctions"]; Order Granting Discovery Sanctions (Dec. 31, 2008) [hereinafter "December Sanctions"].

admitted.[4] The litigation was so contentious that after Respondent Orian walked out of his deposition on October 21, 2008, ultimately a retired judge was appointed to serve as special master so that deposition could be completed.[5] Global even failed to follow the instructions in the sanctions order, which required resetting the reconvened deposition at which the special master presided.[6] The Respondents' scorched-earth tactics are neither new nor unique to this case.[7]

The Administrative Review Board ("ARB") recently affirmed another decision and order that granted judgment to the Administrator in a generally similar H-2A case in which Global Horizons and Orian were named defendants as a sanction for "flagrant abuse of pre-trial discovery" during discovery.[8] That judgment included back wages, debarment, and Penalties against both Global Horizons and Orian.[9] Three of the Respondents' key arguments here, that:

1. Orian as an individual couldn't be an employer within the meaning of the H-2A regulatory framework,
2. penalties cannot be against an individual, and
3. penalties cannot be assessed on summary decision are refuted by the ARB decision affirming the sanctions imposed in that earlier case.

On March 4, 2010, the Administrator moved for summary decision on all 11 categories of regulatory violations. The motion was

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[4] Order Granting the Department's Motions to Compel Further Discovery Responses and to Deem Matters Admitted, Denying Respondent's Motion for Protective Orders and Motion for Enlargement of Time to Answer the Department's Motion to Deem Matters Admitted (July 17, 2007) [hereinafter "July Order"].

[5] December Sanctions 17–20; Order Appointing Special Master (Feb. 4, 2009).

[6] Order Denying Discovery Sanctions 2 (Apr. 3, 2009) (denying the Administrator's motion for default and to bar Orian from testifying).

[7] *See Administrator WHD, U.S. Dep't of Labor v. Global Horizons Manpower, Inc.*, 2010 WL 5535813, ARB Case No. 09-016, ALJ Case No. 2008-TAE-00003, at *2 (Dec. 21, 2010) [hereinafter "*Global Horizons* 2010"] (affirming Decision and Order that granted relief against Global Horizons, Inc. and Mordechai Orian as a discovery sanction based on their willful "repeated and flagrant abuse of pre-trial discovery" in another H-2A visa case).

[8] *Global Horizons* 2010, at *2, *13.

[9] *Global Horizons* 2010, at *1–2; *see also Administrator WHD, U.S. Dep't of Labor v. Global Horizons Manpower, Inc.*, ALJ Case No. 2008-TAE-00003, slip op. at 16 (ALJ Sept. 15, 2008) (ALJ's order finding Global Horizons Manpower, Inc. and Mordechai Orian, *inter alia*, jointly and severally liable for the back wages and civil monetary penalties).

supported with a statement of undisputed facts,[10] the declarations of counsel for the Department of Labor and the Director of the WHD, and 61 exhibits.[11] This Decision refers to the facts alleged in the Administrator's statement as "Fact" or "Facts" followed by the number the Administrator assigned to the fact in his motion for summary decision.[12] The Administrator contends that there is no genuine issue of material fact about any of the violations alleged in this litigation because Respondents either have admitted the facts, or they were established through discovery sanctions.

In addition to summary decision finding liability, the Administrator requests that a summary decision also be granted on the relief the Administrator seeks—an order requiring that Respondents now pay the unpaid wages and return the moneys that should never have been deducted from the workers' pay, and requiring them to pay penalties for their violations. Lastly, the Administrator contends that undisputed evidence supports a three-year prospective denial of future H-2A applications from the Respondents. The Administrator is entitled to all the relief requested.

II. Summary of Contentions and Findings

The uncontested facts show Respondents Global Horizons Manpower, Inc., also known as Global Horizons, Inc. ("Global") and Mordechai Orian ("Orian"), an individual, are each employers under the INA and its implementing regulations at 20 C.F.R. §§ 655.90–.113 and 29 C.F.R. §§ 501.0–.47.[13]

On about July 23, 2002, the Respondents submitted an Application for Alien Employment Certification and an Agricultural and Food Processing Clearance Order to the Employment and Training Administration ("ETA") of the U.S. Department of Labor to employ 375 workers from September 9, 2002, to March 31, 2003, to harvest varieties of chili peppers in Arizona.[14] On or about August 19, 2002, Martin Rios, a certifying Officer for ETA, certified the Respondents to employ 375 workers from September 9, 2002, to March 31, 2003, for

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[10] Administrator's Statement of Uncontested Facts [hereinafter "Uncontested Facts"], Mar. 4 2010.

[11] The Administrator's exhibits submitted in support of his Motion for Summary Decision are referred to as "AX" followed by a number, while Respondent's exhibits in opposition are "RX" followed by a number.

[12] For example, the third fact from the Uncontested Facts is referred to as Fact 3; the 5th and 100th facts would be Facts 5, 100; and so on.

[13] *See* August Sanctions 22, 23, 50, 53, 59–61; Uncontested Facts at ¶ 3 [hereinafter "Fact" or "Facts" followed by the paragraph number].

[14] Fact 4.

the Arizona chili peppers harvest.[15] The case number ETA assigned to this certification was "6555/mal."[16]

The Respondents employed the Thai workers at issue in this litigation as H-2A workers in February and March, 2003.[17] These 88 Thai H-2A workers labored in Hawaii at Aloun Farms and Del Monte Farms, despite the labor certification 6555/mal that ETA issued on August 19, 2002 for employment in Arizona.[18]

The Administrator's Motion for Summary Decision contends that while the Respondents' employed the Thai workers under the H-2A visa program in Hawaii, the Respondents violated many of the H-2A program regulations—so many that they rise to the level of "substantial violations" under 20 C.F.R. § 655.111(a), that trigger a three-year prospective denial of any further Temporary Alien Agricultural Labor Certifications. The Administrator's 11 specific violations encompass determinations about wages that went unpaid, and impermissible deductions from the workers' wages that support an assessment of Penalties under the Administrator's Statement of Uncontested Facts. The Administrator requests that a summary decision find the violations alleged, assess back wages, reimburse the workers for impermissible deductions, impose the Penalties requested, and grant the three-year prospective denial of any certifications the Respondents may seek. The Administrator's 11 major contentions follow.

The Administrator first contends the Respondents failed to satisfy the Transportation and Subsistence ("T&S") requirements of 20 C.F.R. § 655.102(b)(5)(i)&(ii) when they failed to provide the inbound and outbound transportation and the subsistence payments the H-2A regulations require. As a result, the Administrator maintains that the Respondents owes the H-2A workers $56,520.96[19] in back wages and assessed $17,600[20] in Penalties for this violation.

Second, the Administrator contends the Respondents failed to satisfy the three-quarters guarantee requirement of 20 C.F.R. § 655.102(b)(6) by failing to provide 68 of the workers either employment or pay for no less than three-quarters of the contract

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[15] Fact 5.

[16] August Sanctions 28; Fact 5.

[17] August Sanctions 22; Fact 3, 6.

[18] Fact 3, 6, 7.

[19] Memorandum of Points and Authorities in Support of the Administrator's Motion of Summary Decision [hereinafter "Summary Decision Memo"], at Section IV(A)(3).

[20] *Id.* at Section IV(A)(4).

period. As a result, the Administrator maintains that the Respondents owes the H-2A workers $36,079.63[21] in back wages and assessed $32,500[22] in Penalties.

Third, the Administrator contends the Respondents failed to pay their H-2A Thai workers the wages due in violation of 20 C.F.R. § 655.102(b)(10) when they failed to pay four workers at Aloun Farms for 12 days in February 2003, and as many as 76 the workers at both Aloun Farms and Del Monte Farms for much of their March 2003 work. The Administrator determined the Respondents owe these workers $26,937.73[23] in back wages and assessed $4,400[24] in Penalties for these payment violations.

Fourth, the Administrator contends the Respondents failed to pay their Thai workers the correct hourly wage rate in violation of 20 C.F.R. § 655.102(b)(9), because they failed to pay all of them the hourly Adverse Effect Wage Rate ("AEWR") for Hawaii in effect when the work was performed, and failed to pay some of them the higher prevailing wage. The Administrator determined that the Respondents owe these workers $10,439.35[25] and 4,814.11 in back wages[26] and assessed $16,500[27] in Penalties for violations of the wage rate requirement.

Fifth, the Administrator contends the Respondents took impermissible deductions from the pay of the Thai H-2A workers by withholding federal income tax and deducting money for basic living supplies that were not specified in the job order to the ETA, in violation of 20 C.F.R. § 102(b)(13). The Administrator determined the Respondents should not have withheld $9,317.36[28] in federal income tax and deducted $4,150.08[29] for utilities, meals, and basic living supplies from the workers' pay. He assessed $17,200[30] in civil money penalties for these violations.

Sixth, the Administrator contends the Respondents charged their H-2A workers at Aloun Farms for housing-related expenses such as water, electricity, and sewage in violation of 20 C.F.R.

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[21] *Id.* at Section IV(B).

[22] *Id.*

[23] *Id.* at Section IV(C)(1)–(4).

[24] *Id.* at Section IV(C)(5).

[25] *Id.* at Section IV(D)(1).

[26] *Id.* at Section IV(D)(2).

[27] *Id.* at Section IV(D)(3).

[28] *Id.* at Section IV(E)(1).

[29] *Id.* at Section IV(E)(2).

[30] *Id.* at Section IV(E)(3).

§ 655.102(b)(1). The Administrator determined the Respondent took $4,150.08[31] in unlawful housing charges and so assessed $6,600[32] in Penalties for these forbidden housing-related expense deductions.

Seventh, the Administrator contends the Respondents violated 20 C.F.R. § 655.103(g) when they retaliated against those H-2A workers who asserted their rights by complaining about their pay. The Administrator assessed $5,000[33] in Penalties for this retaliation.

Eighth, the Administrator contends the Respondents violated 20 C.F.R. § 655.102(b)(7) by failing to maintain required payroll records and by failing to produce them when the WHD requested them. The Administrator assessed $35,200 in Penalties for these violations.[34]

Ninth, the Administrator contends the Respondents failed to provide accurate written wage statements to their H-2A workers on or before payday in violation of 20 C.F.R. § 655.102(b)(8). The Administrator assessed $6,600[35] in Penalties for the Respondents' inaccurate wage statements.

Tenth, the Administrator contends the Respondents asked the Thai H-2A workers they employed to waive their rights, in violation of 29 C.F.R. § 501.4, by asking them to agree to the deductions the Respondents' took from the workers' pay for federal income tax, meals and basic living supply deductions. The Administrator assessed $44,000[36] in Penalties because Respondents sought a waiver of rights from the H-2A workers.

Eleventh, the Administrator contends that the Respondents violated 29 C.F.R. § 655.10(b)(14) by providing their H-2A workers with an incomplete and inaccurate work contract. The Administrator assessed $8,800[37] in Penalties because the Respondents failed to provide the required contract to their H-2A workers.

Based on these violations, the Administrator found the Respondents committed at least three "substantial" violations under 20 C.F.R. § 655.110 of a material term or condition of their Temporary Alien Agricultural Labor Certification. The Administrator requests that the Respondents be debarred from the H-2A visa program for three years.

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[31] *Id.* at Section IV(F).

[32] *Id.*

[33] *Id.* at Section IV(G).

[34] *Id.* at Section IV(H).

[35] *Id.* at Section IV(I).

[36] *Id.* at Section IV(J).

[37] *Id.* at Section IV(K).

The Administrator's determinations are based on the ETA's February 23, 2005 Notice of Prospective Denial of Temporary Alien Agricultural Labor Certification to each Respondent, which set out the three substantial violations that involved: (1) the terms and conditions of employment, (2) worker benefits, and (3) workers' pay.

Respondent Orian opposes the Administrator's Motion for Summary Decision and simultaneously raised a Motion to Dismiss on grounds that he was never an "employer" of any Thai H-2A workers in these proceedings. He argues he should be dismissed from these matters because the applicable statute[38] and regulations[39] governing the H-2A program allow sanctions only against employers. Mr. Orian contends that Global Horizons was at all times the labor contractor and that he, as President and Chief Strategic Officer, never employed the Thai workers personally, so he is not subject to sanctions for any violations of the H-2A program.

The Respondents have failed to raise an issue of contested fact as to their joint liability under the Immigration and Nationality Act, 8 U.S.C. § 1188, as amended in the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101, *et seq.* and the applicable implementing regulations, 20 C.F.R. § 655 and 29 C.F.R. § 501.4. Having made numerous direct and judicially established admissions confirming his status as employer of the Thai H-2A workers in Hawaii, I find there is no basis for a dispute that Respondent Orian is an employer under the statute and applicable regulations that govern the H-2A visa program. Orian's Motion to Dismiss is denied.

Based on undisputed proof that the Respondents committed the violations, I grant the Administrator's Motion for Summary Decision on liability and the Administrator's request for $134,791.78 in back wages and $17,617.52 in illegal deductions. Pre-judgment interest runs on these amounts from the time the workers departed from the United States on May 1, 2003.[40] I also grant the Administrator's request for $194,400.00 in Penalties against Respondents because no genuine dispute exists about the Respondents' violation of three material terms or conditions of the temporary alien agricultural labor certification. The violations qualify as "substantial" ones.

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[38] 8 U.S.C. § 1188.

[39] 20 C.F.R. § 655.90(a), (b)(2), (b)(3).

[40] Setting individual dates for prejudgment interest to run from every deficiency the Respondents are responsible would be hellishly impracticable. 52 of the 88 Thai H-2A workers were deported on May 1, 2003. Exhibit 18 to Decl. Norman Garcia in Support of Administrator's Motion for Rule 37 Sanctions, October 4, 2007 [hereinafter "Sanctions AX" followed by the exhibit number] at DOL 1139. This fact was deemed admitted pursuant to the August Sanctions Order. August Sanctions 24.

The circumstances surrounding this case and the current motions are also noteworthy.

First, Respondents lost the right to contest many facts the Administrator has asserted under orders that imposed discovery sanctions. These sanctions, discussed in greater detail below, were imposed for the Respondents' failure to produce documents under applicable rules of procedure. These sanctions preclude Respondents from offering evidence to contest the Administrator's findings of facts and allegations of violations, as discussed in Section IV.B.4 *infra*.

Second, the Respondents have unduly and persistently contributed to these proceedings' extended length. The Respondents assert that the Department of Labor, "despite a statutorily imposed mandate to expedite hearings . . . allowed these matters to drag on for *seven years*" is both unwarranted and inaccurate.[41] The Respondents have impeded the resolution of this litigation through tactics that have included: their repudiation of their May 5, 2006, settlement agreement; the Respondents' continual substitution of counsel (seven law firms or lawyers have represented them in these proceedings[42]); the Respondents obstructed discovery process through this litigation; and the Respondents repeated failure to comply with discovery orders which led to the imposition of two sets of sanctions against them. This history of obstruction contributed to the Respondents' inability to meet

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[41] Respondents' Opposition to the Administrator's Motion for Summary Decision [hereinafter "Opposition to Summary Decision"], at 2 (emphasis in original).

[42] From March to November 2005, attorneys from the Law Offices of McGuiness Norris & Williams, LLP, a Washington, DC, firm, represented the Respondents. From August 2005 to June 2006, James A. Stanton, Esq., of Stanton Law Group in Honolulu, Hawaii, represented the Respondents. Overlapping Mr. Stanton's tenure as counsel, several attorneys from Berliner, Corcoran & Row, LLP, another Washington, DC, firm, represented the Respondents; their representation lasted from November 2005 to June 2006. Two attorneys from Jackson Lewis, LLP, a Los Angeles, California, firm, followed, representing the Respondents from August 2006 to July 2007. Following the end of Jackson Lewis's tenure, a series of in-house counsel represented the Respondents. First (and the fifth overall set of counsel for the Respondents) was Chrystal Bobbit, Esq., who served as counsel from August 2007 to September 2008. Ms. Bobbitt was replaced by Serena Spencer, Esq., who served from October 2008 to January 2010. Replacing Ms. Spencer, was Thomas Douvan, Esq., the counsel who filed Respondent Orian's Motion to Dismiss / Motion for Summary Decision and the responsive pleadings to the Administrator's Motion for Summary Decision. Mr. Douvan represented the Respondents from January to September 2010, when he petitioned to withdraw, because his employment with Global Horizons was terminated and he no longer had access to the Respondents' files. Letter of Thomas Douvan, Esq. to The Honorable William Dorsey (Sept. 14, 2010). I granted Mr. Douvan's request. Order Granting Request to Withdraw and Denying Request for Stay 1 (Sept. 20, 2010). The Respondents are currently unrepresented.

their evidentiary burden to raise disputed facts, and warrants granting the Administrator's Motion for Summary Decision.

III. Motion to Dismiss

Respondent Orian has moved to dismiss the Administrator's Notices of Determination ("NODs")[43] for failure to comply with federal pleading standards and, alternatively, for summary decision. Orian contends he is not an employer within the meaning of the Immigration and Nationality Act and implementing regulations,[44] cannot be liable, and must be dismissed from this case. The Administrator opposes the motion on the three grounds: (1) the Administrator's NODs are not subject to the pleading requirements of the Federal Rules of Civil Procedure; (2) Orian's status as an H-2A employer is an undisputed fact because of the Respondents' admissions and the sanctions that have been imposed; and (3) Orian's motion is procedurally defective.[45]

I deny Orian's motion to dismiss and motion for summary decision for the reasons set out below.

A. Legal Standard for Motion to Dismiss

Respondent Orian requests an order granting Respondent's Motion to Dismiss pursuant to Federal Rules of Civil Procedure ("F.R.C.P." or "Rules") 8, 12(b)(1),12(b)(2), 12(c) and / or 56, and 29 C.F.R. 18.40.[46] To decide I will first review the requirements for a

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[43] Two of the notices were issued by the WHD to each Respondent. These notices were entitled "Department of Labor's Notice of Determination of Back Wages and Civil Money Penalties to Global Horizons Manpower, Inc., dba Global Horizons Manpower Inc., and Mordechai Orian, an individual." They concerned a back wage and Penalty determination issued on February 10, 2005. The ETA issued two additional notices, both entitled "Department of Labor's Determination and Notice of Prospective Denial of Temporary Alien Agricultural Labor Certification for Three Year." These debarred both Respondents and were issued on February 23, 2005. The WHD and ETA notices collectively are the "NODs." Respondent has attacked the sufficiency of the pleadings for all of the NODs, while the WHD Administrator's response brief speaks only to sufficiency of the WHD's NOD under the F.R.C.P's pleading requirements. I do not differentiate between the WHD and ETA NODs, as both identified Respondents as "employers"—the identification that frames the pivotal issue on this Motion to Dismiss.

[44] 8 U.S.C. § 1188, 20 C.F.R. § 655 and 29 C.F.R § 501.4.

[45] Memorandum of Points and Authorities in Support of the Administrator's Opposition to Respondents' Motion to Dismiss Respondent Mordechai Orian [hereinafter "Administrator's Memo Opposing Motion to Dismiss"], at 2.

[46] While Orian grounds his motions on Rules 8, 12(b)(1), 12(b)(2), 12(c) and 56, F.R.C.P. and 29 C.F.R. § 18.40, the procedural rules generally applicable to matters under the INA and its regulations are those published at 29 C.F.R. part 18. They include the procedures for summary decision at 29 C.F.R. § 18.40. Respondent's remaining motions address the pleadings. The procedural rules in the regulations do

motion on each ground Orian relies on. Then I will discuss the parties' arguments and my reasons for denying Orian's motion.

A motion under Rule 8 challenges a pleading's specificity. Rule 8(a)(1) requires a litigant to state the grounds for federal jurisdiction, and Rule 8(a)(2) requires that pleadings give "a short and plain statement of the claim showing that the pleader is entitled to relief."

A motion under Rule 12(b)(1) challenges the forum's subject matter jurisdiction to hear a case. Article III federal courts, as courts of limited jurisdiction, adjudicate only cases the Constitution and Congress authorize them to consider.[47]

A Rule 12(b)(2) motion challenges a forum's personal jurisdiction over a party. Personal jurisdiction is limited by the Due Process Clause.[48] In order for a nonresident defendant to be hauled into court, due process requires the defendant must have certain "minimum contacts" with the forum so traditional notions "'of fair play and substantial justice'" are not offended.[49]

A Rule 12(c) motion challenges the legal sufficiency of the opposing party's pleadings. It provides a vehicle for summary adjudication on the merits, after the pleadings are closed, but before trial, that "may save the parties needless and often considerable time and expense which otherwise would be incurred during discovery and trial."[50] Judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law.[51]

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not expressly provide for such motions, although they do govern motion practice generally. Where the procedures in the Department's part 18 regulations are silent, the Federal Rules of Civil Procedure for the U.S. District Courts apply. I therefore look to the Federal Rules of Civil Procedure as instructive (but not controlling) and address directly the part 18 regulations on motions.

[47] Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 380–81 (1994); Finley v. United States 490 U.S. 545, 551–52 (1989).

[48] Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1110 (9th Cir. 2002).

[49] *See* Sher v. Johnson, 911 F.2d 1357, 1360, 1361 (9th Cir. 1990) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

[50] Miller v. Indiana Hosp., 562 F. Supp. 1259, 1268 (W.D. Pa. 1983); Alexander v. City of Chicago, 994 F.2d 333, 336 (7th Cir. 1993).

[51] Hal Roach Studio, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990); R.J. Corman Derailment Services, LLC v. Internat'l Union of Operating Eng'rs, Local Union 150, *AFL-CIO* 335 F.3d 643, 647 (7th Cir. 2003).

B. Analysis and Conclusions

1. Subject Matter Jurisdiction and Personal Jurisdiction

I reject Orian's argument that subject matter jurisdiction is lacking under F.R.C.P. 12(b)(1) because he is not an employer, and the INA's obligations extend only to employers. The Office of Administrative Law Judges ("OALJ") has jurisdiction to decide whether Orian violated this section of the Immigration and Nationality Act ("INA"), something Orian does not dispute.[52] Orian's argument goes to something other than subject matter jurisdiction: the adequacy of the Administrator's proof on the merits.[53]

As to Orian's F.R.C.P. 12(b)(2) challenge, he does not dispute that the Administrator served him with the NODs via certified mail. He does not dispute that he demanded a hearing on them. Again his argument challenges the Administrator's proof on the merits, not jurisdiction to hear this matter. Neither rule leads to dismissal of the charges against him.

2. Motion for Judgment on the Pleadings

Orian is not dismissed from this action for any alleged deficiency in the Administrator's NODs.

Orian's arguments that attack the sufficiency of the NODs fail because no statute or regulation requires the WHD Administrator to draft his charging documents as if they were complaints in a federal district court. Orian cites no authority for the argument, and none exists. The pleading standards of F.R.C.P. 8 and 12 do not apply here.

In issuing the NODs, the Administrator satisfied the applicable notice requirements, namely those found in the H-2A Regulations at 29 C.F.R. §§ 501.31[54] and 501.32.[55] These NODs contain clear, concise

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[52] 8 U.S.C. § 1188(g)(2) ("The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties . . . ."); *see also* 29 C.F.R. § 501.30, *et seq.*

[53] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006) (holding in a Title VII case whether a defendant came within the statutory definition of an employer—because it had sufficient numbers of employees—is an element of a plaintiff's claim for relief, not a jurisdictional issue).

[54] 29 C.F.R. § 501.31: Whenever the WHD Administrator decides to assess a civil money penalty, to debar, to increase a surety bond, or to proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. § 1188, 20 C.F.R. part 655, subpart B, or the regulations in this part, including for the recovery of the monetary relief, the person against whom such action is taken shall be notified in writing of such determination.

[55] 29 C.F.R. §501.32 reads:

> The notice required by § 501.31 shall:

statements that describe: (1) the determination of the Administrator, including the amount of back wages and Penalties owed; (2) Orian's right to request a hearing; (3) Orian's failure to request a hearing would make the Administrator's decision final and unappealable; and (4) the way to request a hearing and the time to do so.[56] These NODs satisfy what the H-2A regulations.

It is undisputed that on February 10, 2005, the Administrator sent identical notices addressed to Orian and Global Horizons, Inc. They stated the violations Orian and Global committed and include the back wages and Penalties Orian and Global must pay to correct them. In his motion, Orian claims the Administrator failed to issue the notice to Orian in his individual capacity. Yet, at the same time, Orian also asserts "[i]t is uncontroverted that the DOL Notices, on their faces, addressed, referred and treated Mr. Orian as an individual, an officer of Global, and not as an employer."[57] While Orian contests his status as an employer, his own motion shows he understood he was served as an individual. As discussed below, Orian's argument that individuals cannot be H-2A employers is contrary to the plain language of the H-2A regulations, which indicate persons can be employers.[58]

Finally, it is undisputed that after he received the NODs, Orian requested a hearing. Under 29 C.F.R. § 501.37, the NOD and the Respondents' requests for hearing are treated as if they are a complaint and answer that frame the issues for trial in this administrative forum. The NODs sent to Orian are sufficient to trigger these proceedings because they include the elements the regulations prescribe; Orian must participate in the hearing he requested or forfeit

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(a) Set forth the determination of the WHD Administrator including the amount of any monetary relief due or actions necessary to fulfill a contractual obligation or obligations under 8 U.S.C. 1188, 20 C.F.R. part 655, subpart B, or the regulations in this part, the amount of any civil money penalty assessment, whether debarment is sought and the term, and any change in the amount of the surety bond, and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the WHD Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

[56] 29 C.F.R. §§ 501.31, 501.32.

[57] Memorandum of Points and Authorities in Support of Mordechai Orian's Motion to Dismiss [hereinafter "Motion to Dismiss Memo"], Apr. 2, 2010, at 10.

[58] *See* 20 C.F.R. § 655.100(b).

his right to contest the Administrator's determination and accept it as the Secretary's final order.

3. Summary Decision on Employer Status

Orian's Motion to Dismiss and his Opposition to Administrator's Motion for Summary Decision also argue he is entitled to summary decision on the issue whether he is an employer. Orian claims there is no statutory or regulatory authority for an individual to be an employer.[59] He also claims "[t]here is no authority for the imposition of penalties and/or payment of back wages for H-2A violation[s] on a non-employer."[60] He also cites to Judge Berlin's April 5 ,2010, Order Granting Summary Decision as to Respondent Orian in OALJ Case 2010-TAE-00002 to assert that "[t]he underpinnings with respect to Mr. Orian's employership [sic] status in that matter are virtually identical here."[61] But nowhere in his motion does Orian acknowledge the regulatory definition of "employer," or explain through argument or evidence why he doesn't satisfy this definition.

Under the H-2A regulatory framework, an individual can be an employer and can be assessed back wages and Penalties. The pertinent part of the regulations[62] define an employer as:

> a *person*, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer relationship with respect to employees . . . as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. . . .[63]

The regulations also empower the Administrator to recover back wages and assess civil penalties against a person. The Secretary can "[i]nstitute appropriate administrative proceedings, including the

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[59] Motion to Dismiss Memo 4.

[60] *Id.*

[61] Opposition to Summary Decision 5; *see* RX A to Respondents' Notice of Ruling in Related Case.

[62] The Immigration and Nationality Act ("INA") and its amendment in the Immigration Reform and Control Act of 1986 do not define the term "employer." *See* 8 U.S.C. § 1101. Employer is instead defined in the INA's implementing regulations at 20 C.F.R. § 655.100 and 29 C.F.R. § 501.10. The INA authorized the Secretary of Labor to promulgate regulations to implement the H-2A program at 8 U.S.C. § 1188(g)(2).

[63] 29 C.F.R. § 501.10(i) (emphasis added).

recovery of unpaid wages . . . and the assessment of a civil money penalty against *any person* for a violation of the H-2A work contract obligations of the Act or these regulations."[64] Section 501.31 (captioned "Written notice of determination required") does not mention an "employer," it requires the Administrator to send the notice to "the person against whom such action is taken."[65]

Under the H-2A framework Orian can be an employer, and the Administrator may seek back wages and Penalties from him as an individual.

The undisputed (and overwhelming) evidence in this case shows both Global Horizons and Orian are employers because they employed the H-2A workers in Hawaii in 2003.[66] The Respondents—both Orian and Global Horizons—in 44 admissions, repeatedly acknowledged they employed this litigation's H-2A workers in Hawaii in 2003. The Respondents, in these admissions, either flatly admitted they employed the workers in Hawaii in 2003, or admitted they indirectly employed the workers by admitting Respondents *plural*, as opposed to just Respondent Global Horizons, signed the employment agreements, took deductions, failed to provide wage payments, etc. More importantly, I ordered numerous fact sanctions that establish the

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[64] 29 C.F.R. § 501.16(c) (emphasis added); *see also* 29 C.F.R. § 501.31 (indicating the Administrator's NOD must be sent to "*the person* against whom such action is taken" (emphasis added)).

[65] 29 C.F.R. § 501.3.

[66] The July Order deemed the Administrator's third set of Admissions admitted, with the exception of RFA 176, at 10, 27. Respondents admitted they employed the Thai H-2A workers in this litigation at RFAs 169–70, 174, 178–91, 193–05, 212–25, 230. Sanctions AX 19. *E.g.*, RFA 169 states: "Respondents have no records of any kind that reflect their payment of *Jatupong Somsri for the work he performed while employed by Respondents in Hawaii from March to April 2003*." (emphasis added). RFA 178 states: "Respondents did not change the hourly wage rate that they paid the *H-2A workers employed by Respondents in Hawaii in February 2003* in response to DOL's publication of a higher AEWR in the Federal Register in February 2003." (emphasis added). RFA 197 stated that "*Respondents took deductions* for cash advances from the pay of the H-2A workers when said deductions were not previously disclosed to these H-2A workers *in the employment agreements that Respondents signed with them*." RFA 213 stated: "Respondents executed a contract with Aloun Farms in 2003 that allowed Aloun Farms to deduct water expenses from the H-2A worker's pay." RFA 217 stated: "None of the H-2A workers that are listed under the 'KS 1ST GROUP (11)' heading on BSN 000070 *received wage payments from Respondents in Hawaii in 2003 for the work they performed at Aloun Farms in February 2003*." (emphasis added). RFA 219 stated: "The W-2 forms that Respondents provided at BSN GHI 0971—GHI 1014 reflect *all of the monies that Respondents paid the H-2A workers in relation to their employment by Respondents in Hawaii in 2003* . . . ."

Respondents employed the H-2A workers at issue in this litigation.[67] Lastly, Respondent Orian admitted in depositions that he was personally involved in deciding to move H-2A workers certified for Arizona to Hawaii and to pay these H-2A workers less than the Adverse Effective Wage Rate while they were in Hawaii[68]—the violations at issue. Orian's motion for summary decision on his employer status fails because of undisputed evidence he was an employer of the H-2A workers at issue in this litigation.

Lastly, the Respondents assert the facts in this case are virtually identical to the facts OALJ Case No. 2010-TAE-2002, a recent case involving Global Horizons and Orian in which Judge Berlin found the Administrator had failed to present evidence Orian was an employer. Judge Berlin's case involves workers from different farm locations, at different times, under different conditions, and under a different contract from the Thai H-2A workers involved in this case. More importantly, the fact sanctions already imposed in this case have conclusively established Orian's employer status in this litigation.[69] Second, Respondent Orian's reason for citing to Judge Berlin's case is unclear. Although Orian hints at a theory of collateral estoppel, he fails to frame the elements of an estoppel argument. Thus, I will not consider it here.

Furthermore, Judge Berlin is not the only adjudicator who has addressed this issue. In September 2008, two years before Judge Berlin's order that dismissed Orian as an employer, Judge Etchingham found for the Administrator on all issues (including liability, back pay,

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[67] August Sanctions 22, 23, 50, 53, 59–61. *E.g.*: "*Respondents continued to employ these [H-2A] workers in 2003* after their authorization to work in the United States had expired." *Id.* at 23 (emphasis added)."*Respondents took deductions from the gross wages of their H-2A workers whom they employed in 2003* but whom they did not pay until 2004." *Id.* at 53 (emphasis added). "Respondents made the $2,884 payment to the Thai Consulate for *seven H-2A workers that they employed in Hawaii in 2003* because Respondents, after reviewing their records, discovered that the payment they sent to the KS bank account via a wire transfer was not successfully completed, resulting in no payment to these KS workers that Respondents employed in Hawaii in February 2003."*Id.* at 60–61 (emphasis added).

[68] *See* AX 39, at 342:6–11. Q: "I'm not looking at your title or your position. I'm saying was Mordechai Orian involved and included in the group who made the decision to move the workers [from Arizona] to Hawaii?" Answer by Respondent Orian: "My answer would be that as Mordechai Orian, President of Global, *yes, I was involved*." (emphasis added); *see also* AX 22 at 329:7–10: Q: "And what did *you pay* the workers [the H-2A workers that Respondents employed at Aloun Farms]?" A. by Respondent Orian: "*I paid them* 8.33 an hour." Q: And why did you pay them 8.33 an hour?" A by Respondent Orian: "Because that's *what Alec paid us*. So that's *what we* paid them." (emphasis added).

[69] *See supra* at note 66, 67.

and Penalties) as a sanction for the Respondents' (both Global Horizons and Orian) extensive discovery misconduct.[70] Respondent Orian was named as and found liable as an employer in that case.[71] The ARB upheld that decision in December 2010, including Judge Etchingham's finding Respondent Orian was an employer and liable for back pay and Penalties.[72] Judge Etchingham's 2008 finding that Orian is an employer under the H-2A regulatory scheme predates Judge Berlin's decision; it casts serious doubt on whether Judge Berlin's holding could serve as the basis for even a well-pleaded collateral estoppel motion. It tends to show employer status depends on the facts of each case.

In conclusion, I deny Orian's Motion to Dismiss and alternative request for Summary Decision on the question of his employer status. His status as an employer is established in this evidentiary record.

IV. Summary Decision on Liability

A. The Legal Standard for Summary Decision

A Motion for Summary Decision is granted when the pleadings, affidavits, matters officially noticed, or materials obtained through discovery or otherwise frame "no genuine issue as to any material fact."[73] The moving party has the initial burden to show that there are no genuine issues of material fact. Once the moving party meets its burden, the nonmoving party may not rest upon the mere allegations or denials in its pleadings, it "must set forth specific facts showing that there is a genuine issue of fact for the hearing."[74] The judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial, viewing all evidence and factual inferences in the light most favorable to the nonmoving party.[75] An issue is genuine when there is enough evidence for a reasonable fact-finder to find in the nonmoving party's favor.[76] A material fact is one that would affect the outcome of the case and

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[70] *Administrator WHD, U.S. Dep't of Labor v. Global Horizons Manpower, Inc.*, ALJ Case No. 2008-TAE-00003, slip op. at 16 (ALJ Sept. 15, 2008) (*aff'd Global Horizons 2010*).

[71] *Id.* at 16.

[72] *Global Horizons 2010*, at *1, *13 (referring to Global Horizons and Orian collectively as "Global").

[73] 29 C.F.R. § 18.40(d); former Fed. R. Civ. P. 56.

[74] 29 C.F.R. § 18.40(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

[75] Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999).

[76] *See Anderson*, 477 U.S. at 252.

"factual disputes that are irrelevant or unnecessary will not preclude the entry of summary judgment."[77]

B. Overview of the Alleged Factual Disputes

The Administrator submitted a detailed statement of 145 allegedly uncontested facts, citing evidence on the record that supports each fact. The Respondents object to a number of these facts on various grounds that will be discussed in the relevant substantive sections below.

I treat the facts the Administrator relies on as undisputed for one of four reasons described below. A few of these facts merit further discussion, and all but one have been established. Fact 114 of the 145 allegedly uncontested facts isn't a fact, but a legal conclusion. Exclusion of this "fact" makes no difference; I reach the same legal conclusion after analyzing the 144 other undisputed facts. The Respondents have not raised a genuine dispute as to any of the Administrator's uncontested facts, so they failed to meet their burden to overcome the Administrator's motion for summary decision.

1. Facts Meriting Discussion

While the majority of the Administrator's 145 allegedly uncontested facts are indeed admitted as uncontested for the reasons stated in Sections IV.B.2, IV.B.3, IV.B.4, and IV.B.5, Facts 114, 134, 142, and 144, merit further discussion before they are admitted.

Fact 134 of the Administrator's Statement of Uncontested Facts states "Respondent Orian admitted that he was personally involved in the decision to move the Thai workers to Hawaii." Respondents contest this, claiming "Orian was not personally involved in anything."[78] The Administrator argues Respondents' claims fails for two reasons. First, because it is conclusory and unsupported by evidence, and thus cannot be used to dispute a fact under *Soremekun v. Thrifty Payless, Inc.*[79] Second, because Respondent Orian repeatedly testified under oath he was personally involved.[80] In support of its position, the Administrator cites to questions and answers from two depositions, one in 2009 and one in 2006. In 2009 in response to the question: "I'm not looking at your title or your position. I'm saying was Mordechai Orian involved in

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[77] *Id.* at 242, 248.

[78] Revised Contested Facts 134.

[79] 509 F.3d 978, 984 (9th Cir. 2007) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.").

[80] *See infra* at Section III.B.3, note 68.

and included in the group who made the decision to move the workers to Hawaii?" Respondent Orian stated: "My answer would be that as Mordechai Orian, President of Global, yes, I was involved."[81] The Administrator went on to highlight another set of deposition questions from a 2006, arguing:

> Respondent Orian admitted his personal involvement when he identified that he paid the H-2A workers. Q: "And what did you pay the workers [the H-2A workers that Respondents employed at Aloun Farms]?" A. by Respondent Orian: "I paid them 8.33 an hour." Q: "And why did you pay them 8.33 an hour?"A. by Respondent Orian: "Because that's what Alec paid us. So that's what we paid them."[82]

While Fact 134 is admitted because Respondents' claim of noninvolvement is unsupported and was previously admitted, Respondent Orian's statement ". . . as Mordechai Orian, President of Global, yes, I was involved," warrants additional discussion. At first blush, this statement suggests Orian was not personally involved. It seeks to contradict Orian's previous admissions and judicial findings confirming Orian's individual employer status in effort to create an issue of fact where none exists. This technique is an impermissible tactic known as a "sham affidavit." The Ninth Circuit recently explained that "the rationale underlying the sham affidavit rule is that a party ought not be allowed to manufacture a dispute with himself to defeat summary judgment."[83] Here, Mr. Orian similarly cannot manufacture such a dispute as to his employer status, which he previously admitted and cannot now contest.

Orian didn't raise this argument or contest his status as an employer until May 2010, five years into this litigation. Orian's seventh attorney of record raised the claim, which he contends deprives the Department of jurisdiction over him. Orian's creative legal theory doesn't overcome the more than 44 admissions about Orian's employer status found in the record before his newest lawyer appeared.

Another set of allegedly uncontested facts meriting additional discussion are Facts 29, 31, and 32. These facts use the testimony of six deposed Thai workers to calculate (1) the average cost of the ground

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[81] AX 39, at 342:6–11.

[82] Administrator's Response to Respondents' Statement of Contested Facts [hereinafter "Response to Contested Facts"], May 20, 2010, at 66. (citing AX 22: at 329:7–10).

[83] Van Asdale v. Int'l Game Tech., 577 F. 3d 989, 998–99 (9th Cir. 2009); Nelson v. City of Davis, 571 F.3d 924, 928 (9th Cir. 2009).

transportation from the workers' homes in Thailand to the Bangkok Airport, (2) the average travel time from the time the workers left their homes to the time they boarded a plane in Bangkok for travel to the United States, and (3) the average ground transportation cost from the Bangkok airport to the workers' home, respectively. The Respondents contest these findings on the ground it is inappropriate to determine cost and travel time using averages.[84] The Administrator responds that the objection fails because (1) it is unsupported and conclusory and (2) courts routinely use averages of the wages of similarly situated employees to determine back pay.[85]

The Administrator set the T&S costs for all 88 Thai workers using the testimony of six Thai workers who had been deposed about their individual T&S costs. In *Pythagoras General Contracting Corp. v. Administrator, Wage & Hour Division*,[86] the ARB upheld an ALJ's award of back wages calculated using the Administrator's average-based determination. The ARB's holding relied on *Anderson v. Mount Clemens Pottery Co.*,[87] which announced evidentiary principles requiring the Administrator to meet the initial burden of proving that employees performed work for which they were improperly compensated, and then shifting the burden to the employer to produce evidence of the precise amount of work performed or negating the reasonableness of the inferences drawn from the employee's evidence. When an employer fails to produce such evidence, "the court may then award damages to the employee, even though the result be only approximate."[88] *Pythagoras General* found these principles "permit[] an award of back wages to non-testifying employees based on the representative testimony of a small number of employees" and allow the Department to rely on estimates "to establish a prima facie case of a pattern or practice of violations."[89]

The Administrator met his initial burden by producing evidence that Respondents failed to provide or reimburse workers for T&S when they traveled to and from the worksite pursuant to the ETA 6555/mal

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[84] Respondent's Revised Statement of Contested Facts [hereinafter "Revised Contested Facts"] 6.

[85] Response to Contested Facts at 24 (citing Rhine v. Stevedoring Services of America, 596 F.3d 1161, 1164 (9th Cir. 2010); Rutti v. Lojack Corp., Inc., 596 F.3d 1046, 1058–59 (9th Cir. 2010); Duhagon v. Metropolitan Stevedore Co., F.3d 615, 618 (9th Cir. 1999); Cracchiola v. C. I. R., 643 F.2d 1383, 1385 (9th Cir. 1981).

[86] USDOL/OALJ Reporter (ARB 2011).

[87] 328 U.S. 680, 687–88 (1946).

[88] *Mt. Clemens Pottery Co.*, 328 U.S. at 687–88.

[89] *Pythagoras General* at 12.

H-2A certification.[90] The burden then shifted to the Respondents, who failed to timely provide any records of paying wages or T&S costs and were precluded from alleging to the contrary.[91] Under *Pythagoras General* and *Mt. Clemens*, the Respondents' failure to rebut the Administrator's proof of unpaid T&S warrants the Administrator's use of average T&S costs incurred by a few employees to establish the T&S costs all 88 Thai workers incurred. Similarly, the Administrator's use of averages is appropriate because evidence has established the Respondents' pattern of violating the H-2A program's T&S requirements. To calculate the back wages owed the other workers, Fact 29, 31, 32 are treated as uncontested.

Fact 114, 142, and 144 concern determination of the Administrator of the Office of Foreign Labor Certification's ("OFLC") that Respondents committed several substantial violations of different provisions of 20 C.F.R. § 655. Fact 114 contends that Respondents committed a substantial violation of the regulations about the terms and conditions of employment under 20 C.F.R. §§ 655.101–.103, § 655.102(b)(14), 655.103(g), 29 C.F.R. § 501.3, .4. Fact 142 contends that Respondents committed a substantial violation when they failed to provide the required worker employment benefits under 20 C.F.R. § 655.102(b). Fact 144 contends that Respondents committed a substantial violation when they failed to adhere to required pay practices in violation of 20 C.F.R. § 655.102(b). These facts are analyzed as a group because of the similar way they allege "substantial violations."

Respondents challenge Fact 114 on grounds that it could not verify the Administrator's quote "that there were no extenuating circumstances" in the pertinent violation cited in AX 50. Respondents challenge Facts 142 and 144 for the same reason: that there is no finding of substantial violation. The Administrator rebuts the challenge to Fact 114 by pointing to AX 18 as the correct supporting document and highlighting Respondents' inconsistency in failing to raise the same objection to Facts 142 and 144, which are similar in format to Fact 114. The Administrator rebuts Respondents' challenges to Facts 142 and 144 by pointing to the OFLC Administrator's determination of "substantial violations" in the record.[92]

While Respondents' stated grounds for challenging Fact 114 are immaterial, the challenge to Facts 114, 142 and 144 must stand because a finding that Respondents committed "substantial violations"

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[90] *See* Back Wages and Civil Money Penalties NOD.

[91] August Sanctions 19, 37, 63.

[92] Response to Contested Facts 71–72.

cannot treated as an uncontested fact. The Administrator correctly points out that the OFLC Administrator found substantial violations. But these findings must be reviewed *de novo.* The determination that the Respondents were guilty of substantial violations is a legal one. I make an independent determination about this in Section V.B.2.

These facts have been noted in Section IV.C below type 1 facts, and have been admitted for that reason.

2. Facts Wholly Uncontested

Eighty of the 145 facts submitted by the Administrator have not been contested by Respondents and are deemed wholly undisputed for the purpose of this proceeding. These facts have been noted in Section IV.C below type 2 facts, and have been admitted for that reason.

3. Facts Where the Respondents Offered no Record Basis for a Purported Dispute

Respondents claim to contest these facts, but never showed why. Despite the Order Requiring Respondents to Supplement their Statement of Genuine Issues That Opposes the Administrator's Motion for Summary Decision,[93] they failed to cite to the record to show the basis for a dispute. Having failed to provide a pinpoint record citation, these facts become uncontested. These facts have been noted in Section IV.C below type 3 facts, and have been admitted for that reason.

4. Facts Undisputed Because Respondents Rely on Evidence Excluded by Sanction

The facts admitted for this reason rely on evidence that has been precluded by the discovery order and two sets of discovery sanctions issued against Respondents. The July 17, 2007, order ("July Order") granted the Department's Motion to Compel Further Discovery Responses and to Deem Matters Admitted; required Respondent to serve better discovery responses to 33 of 47 discovery items; deemed admitted all but one matter in the Department's December 30, 2005, set of requests for admissions; and granted leave to depose five Global employees, including Orian for "extended" depositions.[94]

Having failed to comply with the July Order, Respondents' were sanctioned on August 25, 2008 ("August Sanctions"). In imposing the August Sanctions, I rejected Respondents' assertions that its failure to

[93] Issued May 24, 2010.

[94] July Order 26–27.

fully comply with the July Order was due to excusable neglect; I granted the Administrator's request for numerous factual and evidentiary sanctions, including factual findings establishing Respondent Orion's status as an employer.[95] The second sanctions order ("December Sanctions") was issued when Respondents broke off the video deposition of Global's chief executive officer, Respondent Orian. The December Sanctions ordered Orian to complete the deposition, denied Orian's various requests for sanctions against the Department, including his request for the termination of his deposition, and a protective order to limit the topics of questioning during deposition. A special master ultimately was appointed to oversee the deposition.[96]

Respondents' attempt to raise a dispute about any fact deemed admitted under the July Order, or any other sanctions order, fails. These facts have been noted in Section IV.C below type 4 facts, and have been admitted for that reason.

5. Facts Undisputed Because the Record Basis Creates No Dispute

The facts admitted for this reason do not create an issue of material fact that overcomes the Administrator's Motion for Summary Decision. Respondents attempt to dispute these facts by citing evidence with specificity. The problem is the evidence they cite does not actually create a dispute. This includes Respondents' objections to various misquotations from the record the Administrator has acknowledged and corrected. The corrected quotations do not impair the pertinent facts the Administrator relies on. This heading also includes the Respondents' attempts to explain their actions without actually denying the facts the Administrator relies on. These facts have been noted in Section IV.C below type 5 facts, and have been admitted for that reason.

C. Admitted Uncontested Facts

The following uncontested facts have been admitted for the reasons indicated in their attached footnotes.

1. The proceedings in case number 2005-TAE-00001 is brought by the Administrator of the Wage and Hour Division of the United States Department of Labor to assess back wages and Penalties for violations of provisions of the Immigration and Nationality Act, 8

[95] August Sanctions 14, 22, 23, 50, 53, 59–61.

[96] August Sanctions 17–18, 20–21.

U.S.C. § 1101, *et seq.*, as amended by the Immigration Reform and Control Act of 1986, Pub L. 99-603, § 301, 100 Stat. 3359, 341 and the implementing regulations, and the regulations issued pursuant thereto, 20 C.F.R. §§ 655.90–.113 and 29 C.F.R. §§ 501.0–.47.[97]

2. The proceedings in case number 2005-TLC-00006 is brought by the Regional Administrator of the Employment and Training Administration of the United States Department of Labor to debar Respondents for violations of provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101, *et. seq.* as amended by the Immigration Reform and Control Act of 1986, Pub L. 99-603, § 301, 100 Stat. 3359, 341 and the implementing regulations, and the regulations issued pursuant thereto, 20 C.F.R. §§ 655.90–.113.[98]

3. Respondent Global Horizons Manpower, Inc., also known as Global Horizons, Inc. ("Global") and Mordechai Orian are employers under the INA and its implementing regulations at 20 C.F.R. §§ 655.90–.113 and 29 C.F.R. §§ 501.0–.47. There are many admissions and findings of fact sanctions identifying Respondents (both Global Horizons Manpower, Inc. and Mordechai Orian) as employers of the H-2A workers at issue in this litigation.[99] [100]

4. On or about July 23, 2002, Respondents submitted an Application for Alien Employment Certification and an Agricultural and Food Processing Clearance Order to the United States Department of Labor, Employment and Training Administration ("ETA") to employ 375 workers from September 9, 2002, to March 31, 2003, to harvest various varieties of chili peppers in Arizona.[101] [102]

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[97] This is a type 2 fact and is deemed admitted for that reason.

[98] This is a type 2 fact and is deemed admitted for that reason.

[99] *See* Sanctions AX 13, at RFA 55; July Order at 10, 27; Sanctions AX 19, at RFAs 169–70, 174, 178, 193, 197, 212, 218–21, 225; August Sanctions at 22, 23, 50, 53, 59–61. *E.g.*: "Respondents continued to employ these [H-2A] workers in 2003 after their authorization to work in the United States had expired" *id. at* 23, "Respondents took deductions from the gross wages of their H-2A workers whom they employed in 2003 but whom they did not pay until 2004" *id.* at 53; "Respondents made the $2,884 payment to the Thai Consulate for seven H-2A workers that they employed in Hawaii in 2003 because Respondents, after reviewing their records, discovered that the payment they sent to the KS bank account via a wire transfer was not successfully completed, resulting in no payment to these KS workers that Respondents employed in Hawaii in February 2003,"*id.* at 60–61. Emphasis added.

[100] This is a type 4 fact and is deemed admitted for that reason; respondents are specifically precluded from offering any evidence on this matter under the August Sanctions 22, 23, 50, 53, 59–61.

[101] AX1; AX 2; AX 3, at 217:2–19; AX 22. The documents Respondents produced in this litigation prior to August 17, 2007, had two different sets of BSN: 000000–000918 and GHI 919–GHI1118. On August 17, 2007, Respondents produced some documents without any BSN. All of the documents that the Administrator produced

5. On or about August 19, 2002, Martin Rios, a certifying Officer for ETA granted a certification for Respondents to employ 375 workers from September 9, 2002, to March 31, 2003, to harvest chili peppers in Arizona.[103] [104]

6. "Respondents classified the Thai nationals that are at issue in this litigation as H-2A workers in Hawaii in February and March, 2003."[105] [106]

7. Respondents employed these Thai H-2A workers in Hawaii at Aloun Farms and Del Monte Farms, despite the fact that they were hired to work in Arizona pursuant to the 6555/mal labor certification that ETA issued on August 19, 2002.[107] [108]

8. Respondents are precluded from alleging that they provided travel advances because Respondents did not provide any records of the travel advance payments by August 17, 2007[109], and "Respondents will only be credited with paying wages, subsistence or travel costs to the H-2A workers they employed in Hawaii in 2003 for whom they can produce a canceled check or a receipt for cash that they had produced to Administrator on or before August 17, 2007."[110] Respondents are also precluded from alleging that they provided travel advances because Respondents did not provide any records of the workers signing anything acknowledging receipt of the travel advances by August 17, 2007[111] and "Respondents will only be credited with paying wages, subsistence or travel costs to the H-2A workers they employed in Hawaii in 2003 for whom they can produce a canceled

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in this case had a BSN with a DOL prefix. In the forthcoming text and footnotes, I shall remove the initial redundant zeros at the start of every BSN number as well as the letters "BSN" for brevity.

[102] This is a type 2 fact and is deemed admitted for that reason.

[103] Sanctions AX 24; August Sanctions 28, (imposing the following finding of fact sanction: "Respondents filed an H-2A application for 375 Vegetable Harvest Workers to work in Arizona picking chilies from September 9, 2002, to March 31, 2003, to which ETA assigned the '6555/mal' case number and ETA granted a certification for this application on August 19, 2002, when Respondents did not have any work in Arizona pursuant to this H-2A application when they filed this H-2A application.").

[104] This is a type 2 fact and is deemed admitted for that reason.

[105] August Sanctions 22.

[106] This is a type 5 fact and is deemed admitted for that reason.

[107] Sanctions AX 13, at RFA 45, 65.

[108] This is a type 2 fact and is deemed admitted for that reason.

[109] Declaration of Norman E. Garcia in Support of the Administrator's Motion for Summary Decisions (hereinafter "Garcia Decl."), March 4, 2010, ¶ 10.

[110] August Sanctions 63.

[111] Garcia Decl. ¶ 11.

check or a receipt for cash, containing the signature of the H-2A worker that they had produced to Administrator on or before August 17, 2007."[112] [113]

9. Respondents claimed that they provided a "reimbursement for airfare paid for their initial trip from Thailand to Los Angeles" in their October 14, 2005, and November 14, 2005, responses to Interrogatory No. 5.[114] [115]

10. Respondents further acknowledged that these alleged "reimbursement[s] of airfare for the initial trip from Thailand to Los Angeles were made to enable the workers to recoup that portion of the workers' payments to Thai recruiting agencies that had been used to pay for air transportation from Thailand to Los Angeles" in their October 14, 2005, and November 14, 2005, responses to Interrogatory No. 5.[116] [117]

11. Respondents repeatedly stated in the documents that they sent to the recruiting companies that they would reimburse the H-2A workers after they had completed 50% of the contract period.[118] In all of these documents, Respondents repeatedly stated that the H-2A workers will pay for their inbound air transportation and Respondents will provide the outbound air transportation.[119] Respondents also admitted to making these quoted statements in their admissions.[120] [121]

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[112] August Sanctions 37.

[113] This is a type 4 fact and is deemed admitted for that reason; respondents specifically are precluded from offering any evidence on this matter under August Sanctions 19.

[114] Sanctions AX 30, at 7, Sanctions AX 52, at 6.

[115] This is a type 2 fact and is deemed admitted for that reason.

[116] Sanctions AX 30 at ROG 5; AX 52 to Sanctions Motion at ROG 5; *see also* Respondents' response to ROG 7, item "(3)" in the same two interrogatory responses wherein they stated "workers . . . received reimbursements . . . to enable the workers to recoup that portion of the workers' payments to the Thai recruiting agencies that had been used to pay for air transportation from Thailand to Los Angeles. These reimbursements were made after it became clear that the Thai recruiting agencies had not paid for the workers' transportation out of the agencies' own funds."

[117] This is a type 5 fact and is deemed admitted for that reason.

[118] Sanctions AX 9.

[119] *E.g.*, *id.* at DOL 0254.27, 254.37–.38: "The candidate will pay ticket to USA; the employer will pay the ticket back home . . . ." *id.* at DOL 254.28–.29: "The candidate will pay the airfare to the U.S., which amount will be reimbursed to the worker after having completed 50% of the term of his contract. We will pay for the airfare home . . . ." *id.* at DOL 254.49–.50: "The candidate will pay the airfare to the U.S., which amount will be reimbursed to the worker after having completed 50% of the term of his contract. The employer (Global) will pay for the airfare home . . . ."

[120] July Order 10, 27; Sanctions AX 19, at RFAs 194–96.

12. The contracts that the H-2A workers that Respondents employed in Hawaii in 2003 entered into with the Thai recruiting companies to work for Respondents in 2003 mirror the inbound transportation statements that Respondents made to the Thai recruiting companies that were identified in Fact 11: "Workers must pay inbound one way and the worker will receive refund after completing half of the contract period."[122] In fact, because of the documents identified in Fact Nos. 10 and 11 and the nonproduction thereof, this Court imposed the following finding of fact sanction: "Respondents' contractual agreement with the H-2A workers at issue in this litigation was to reimburse them for transportation costs they incurred while traveling to the United States for the ETA 6555/mal H-2A certification after they completed 50% of this H-2A certification."[123] [124]

13. Respondents, in their May 5, 2004, correspondence to the United States Embassy in Thailand, stated that: "As the sole employer, if something goes wrong within the recruiting agencies, Global will accept full responsibility, no matter what."[125] The Court in its August Sanctions also imposed the following finding of fact sanction: "In correspondence with the Fraud Prevention Manager at the United States Embassy in Thailand in May 2004, in response to the Embassy's concerns about the actions of the Thai recruiting companies that Respondents were employing to recruit H-2A workers, Respondents' operations manager stated: 'As the sole employer, if something goes wrong within the recruiting agencies, Global will accept full responsibility, no matter what.'"[126] [127]

14 Respondents stated in the Clearance Order that they filed with ETA that they would reimburse the H-2A workers for the T&S costs the workers incurred while traveling from their homes to the place of employment after they completed 50% of the contract period.[128] [129]

15. In responses to Requests for Admissions, Respondents repeatedly admitted that they did not provide the workers with either

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[121] This is a type 2 fact and is deemed admitted for that reason.

[122] Sanctions AX 10.

[123] August Sanctions 19.

[124] This is a type 2 fact and is deemed admitted for that reason..

[125] Sanctions AX 28.

[126] August Sanctions 46.

[127] This is a type 2 fact and is deemed admitted for that reason.

[128] AX 2 at BSN 558.

[129] This is a type 2 fact and is deemed admitted for that reason.

inbound T&S while in Thailand[130] or inbound T&S while traveling from Bangkok, Thailand to Los Angeles, California.[131] [132]

16. Respondents cannot satisfy the reimbursement method of providing inbound transportation because this Court made the following findings of fact in its August Sanctions: "Respondents failed to reimburse the H-2A workers that are at issue in this litigation for any of the transportation expenses these H-2A workers incurred in February and March 2003 when they were traveling pursuant to the ETA 6555/mal H-2A certification after they had completed more than fifty percent of the contract period."[133] Respondents also admitted in their response to Administrator's Request for Admissions that all of the H-2A workers that they employed in Hawaii in 2003 completed at least fifty percent of the contract period.[134] [135]

17. Respondents did not produce any documents (e.g., cancelled checks or receipts signed by the H-2A worker), during discovery in this litigation prior to August 17, 2007, demonstrating that they made any inbound subsistence reimbursement to any H-2A worker for the worker's February and March 2003 travel to the United States.[136] As a consequence, Respondents are not credited with making any inbound subsistence payments.[137]

18. The H-2A workers repeatedly stated that they paid for their own inbound T&S.[138] [139]

19. Respondents committed to providing the inbound T&S reimbursements in the Clearance Order that was certified by ETA.[140] [141]

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[130] Sanctions AX 13, RFAs 23, 27.

[131] *Id.* at RFAs 24, 28.

[132] This is a type 3 and 4 fact and is admitted for those reasons; August Sanctions 19.

[133] August Sanctions 19.

[134] Sanctions AX 13, at RFAs 31, 40.

[135] This is a type 4 fact and has been established in uncontested Fact 3; respondents are specifically precluded from offering any evidence on this matter under August Sanctions 19, 22, 23, 50, 53, 59–61.

[136] Garcia Decl. ¶ 12.

[137] August Sanctions 37, 63; *see* Fact 8 for a quotation of the relevant findings of fact from the August Sanctions. This is a type 4 fact and is deemed admitted for that reason; August Sanctions 19.

[138] AX 4, at 61:1–63:25, 71:2–74:18, 77:2–24, 79:21–80:16; AX 5, at 36:1–40:13, 48:9–49:18, 62:3–14, 64:18–65:5, 69:23–71:7; AX 6, at 34:14–37:9, 64:2–73:3; AX 7, at 27:2–31:24.

[139] This is a type 4 and 5 fact and is deemed admitted for those reasons; August Sanctions 19.

20. The H-2A workers employed by Respondents in Hawaii in February–March 2003 were not employed by any subsequent H-2A employer because these workers were deported by the United States government as their visas and work authorizations were not extended.[142] [143]

21. In response to RFA 33, Respondents admitted that they "did not provide the H-2A workers with actual *transportation* from the Bangkok airport to their homes in May 2003."[144] Respondents admitted to not providing the outbound subsistence when they claimed in their discovery responses that they provided the workers with cash to purchase this subsistence while traveling home.[145] [146]

22. Respondents admitted that all of the Thai H-2A workers that they employed in Hawaii in 2003, worked until at least April 1, 2003.[147] [148]

23. Respondents did not produce any documents (e.g., cancelled checks or receipts signed by the H-2A worker), during discovery in this litigation prior to August 17, 2007, demonstrating that they made an outbound T&S payment to H-2A workers for the workers' May 2003 travel from the Bangkok Airport to their homes.[149] As a consequence, Respondents are not credited with making any T&S advance.[150] [151]

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[140] AX 2, at 558.

[141] This is a type 2 fact and is deemed admitted for that reason.

[142] Sanctions AX 18; August Sanctions 24 (imposing the following finding of fact sanction: "In May 2003, the United States government deported the H-2A workers that Respondents employed in Hawaii in February–March 2003 because these H-2A workers were out of legal immigration status.").

[143] This is a type 2 fact and is deemed admitted for that reason.

[144] Emphasis added; Sanctions AX 13, at RFA 33.

[145] Sanctions AX 13, RFA 39; Sanctions AX 30, ROG 5, at 6–7, 9; Sanctions AX 52, ROG 5, at 6, 7.

[146] This is a type 4 fact and is deemed admitted for that reason; respondents specifically are precluded from offering any evidence on this matter under August Sanctions 19, 22, 23, 50, 53, 59–61.

[147] Sanctions AX 13, at RFA 40.

[148] This is a type 3 fact and is deemed admitted for that reason.

[149] Garcia Decl. ¶ 13.

[150] August Sanctions, at 37, 63; see Fact 8 for quotations of the relevant findings of fact from the August Sanctions.

[151] This is a type 4 fact and is deemed admitted for that reason; August Sanctions 19.

24. The H-2A workers repeatedly stated that they paid for their own outbound T&S.[152] [153]

25 Respondents committed to providing either T&S or paying for the H-2A workers' T&S in the Clearance Order that was certified by ETA.[154] [155]

26. In their initial disclosures Respondents identified 88 Thai workers that they employed in Hawaii in 2003.[156] [157] [158]

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[152] AX 12, at 127:1–29:20, 131:10–12; AX 4, at 148:6–49:16. AX 5, at 36:1–38:11, 48:9–48:18, 62:3–14, 69:23–71:7, 108:13–10.25 (The Administrator notes "While Somjai Phobai did not identify the specific costs of his ground transportation from the Bangkok Airport to his home other than to note that it was provided by the recruiting company and their payment to the recruiting company included transportation. Somjai Phobai did identify that he paid for his own subsistence while traveling home from the Bangkok Airport.).

[153] This is a type 4 and 5 fact and is deemed admitted for those reasons; respondents specifically are precluded from offering any evidence on this matter under the August Sanctions, at 19.

[154] AX 2, at 558–59.

[155] This is a type 5 fact and is deemed admitted for that reason.

[156] Respondents served Employer's Rule 26(a)(1) Disclosures and the documents specified therein to the Administrator's counsel on August 18, 2005. Sanctions AX 57; Garcia Decl. ¶ 14. In Respondents' initial disclosures, they identified that the documents were grouped by category and one of the categories was "List of the Thai workers' names, dates of birth, I-94 numbers, arrival dates in the U.S., and extension of visa dates." Sanctions AX 57, at 3. In the documents provided with the document captioned as the Employer's Rule 26(a)(1) Disclosures at Sanctions AX 57 were the documents AX 8. The first page AX 8, labeled 0, is a cover page that states "List of the Thai workers' names, dates of birth, I-94 numbers, arrival dates in the U.S., and extension of visa dates." On pages 1–04, Respondents produced a document identifying the names of 86 Thai workers. On pages 5–07 Respondents produced a document identifying that 53 of these 88 workers worked at Del Monte Farms in 2003. On pages 08–09 Respondents produced a document identifying that 33 of these workers worked at Aloun Farms. Respondents also produced, in their initial disclosures, Employee Detail Reports alleging payroll information wherein the names listed therein match 85 of the names in 1–04 and 5–09. Respondents verified in their document production responses that the payroll documents listed at 14–232 were the documents that they were required to keep pursuant to the implementing regulations record requirements at 20 C.F.R. § 655.102(b)(7). AX 10, at RFP 9. *Compare* names in Sanctions AX 35, at 145-232 *to* AX 8, at 1–09; Garcia Decl. ¶ 15. The name that is located in 3 that is not listed in the Employee Detail Reports is Phairot Artjanthuk; however, Phairot Artjathuk's name is listed on Respondents' "Employee Earnings History Report" also produced with their initial disclosures. AX 9, at 143 (third name from the top); Garcia Decl. ¶ 16. The two Thai H-2A workers that Respondents employed in Hawaii in March 2003 that are not listed in the documents identified at 1–09 and 143–232 are Jatupong Somsri and Patiphon Pana. July Order 10, 27; Sanctions AX 19, RFAs 169, 170. Lastly, Respondents referred to the documents at 1–04 that list the arrival and extension dates in their amended document production response as being documents that related to their efforts to extend the expiration dates of their visas. AX 10, Request for Reproduction (hereinafter "RFP") 24.

27. In their initial disclosures Respondents produced documents showing that they provided outbound air transportation from Hawaii to Bangkok for 85 of the 88 Thai workers that they employed in Hawaii in February and March 2003. [159] [160]

28. In September 2005, the parties took *de bene esse* examinations of six Thai H-2A workers (Witthawat Sombun, Prasoet Hongsahin, Tee Kanjai, Anucha Homphet, Somjai Phobai and Suban Srisopha) employed by Respondents in Hawaii in 2003 who are identified in Fact 26.[161] [162]

29. According to the testimony of the workers identified in the preceding paragraph, the average cost of the ground transportation from the workers' homes in Thailand to the Bangkok Airport was 317.5 Baht. Witthawat Sombun testified that it cost 480 Baht to travel from his home to the Bangkok Airport.[163] Prasoet Hongsahin testified that it cost 450 Baht to travel from his home to the Bangkok Airport.[164] Tee Kanjai testified that it cost him 240 Baht to travel from his home to the Bangkok Airport.[165] Anucha Homphet testified that it cost 100 Baht for gas to travel to the recruiting company in Udon and that the recruiting company provided him with the rest of the ground transportation to the airport in Bangkok; he also testified that his recruiting fee payment to the recruiter included the provision of

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[157] The Administrator's Fact 26 noted that while 88 pages are provided at AX 8 for the 145–232 bates stamp range, there are only 85 different names because Respondents Bates stamped the same page twice. *E.g.*, BSN 154 & 155 for Siri Kaedkhamfu; BSN 187 & 188 for Sanan Prommala; and BSN 223 & 224 for Nattaphon Kraichan.

[158] This is a type 5 fact and is deemed admitted for that reason.

[159] In Respondents' initial disclosures, they identified that the documents were grouped by category and one of the categories was "Paid invoices from travel agencies showing payment by Global for the Thai workers' outbound transportation and related records. Sanctions AX 57, at 4. In the documents provided with the document captioned as the Employer's Rule 26(a)(1) Disclosures at Sanctions AX 57 were the documents at AX 11. The first page of the documents at AX 11, at 281, is a cover page that states: "Paid invoices from travel agencies showing payment by Global for the Thai workers' outbound transportation and related records." AX 11 also contains travel agency documents at 285–89, and 298–305 that list 85 of the Thai H-2A workers that were identified in Fact 26. The names of the three Thai H-2A workers who were identified in Fact 26 that are not listed in pages 285–89, and 298–305 are: Jakkaphan Kulakun, Jatupong Somsri and Patiphon Pana.

[160] This is a type 2 fact and is deemed admitted for that reason.

[161] Garcia Decl. ¶ 17.

[162] This is a type 2 fact and is deemed admitted for that reason.

[163] AX 12, at 82:11–84:14, 86:11–24.

[164] AX 7, at 29:21–31:20.

[165] AX 13, at 43:6–47:4.

ground transportation by the recruiter.[166] Somjai Phobai and Suban Srisopha did not testify as to the specific costs of their ground transportation from their homes to the Bangkok Airport other than to note that it was provided by the recruiting company and their payment to the recruiting company included this transportation.[167] Summing the Baht stated (1270) and dividing by the number of workers who provided testimony on this issue (4) yields an average of 317.5 Baht per person.[168]

30. The official Thai Baht to United States Dollar exchange rate in February 2003 was 43.10 Baht to 1 Dollar.[169] The official Thai Baht to United States Dollar exchange rate in March 2003 was 42.77 Baht to 1 Dollar.[170] Adding these two amounts together and dividing by two yields an average of 42.935 Baht to 1 Dollar.[171]

31. At their *de bene esse* examinations the Thai H-2A workers testified that the average travel time from the time they left their homes to the time they boarded a plane in Bangkok for travel to the United States was 2.33 days. Suban Srisopha testified that it took four days to travel from his home to the time when he boarded the airplane.[172] Anucha Homphet and Tee Kanjai testified that it took them three days to travel from their homes to the time when they boarded the airplane.[173] Somjai Phobai stated that it took him two days to travel from his home to the time when he boarded the airplane.[174] Prasoet Hongsahin and Witthawat Sombun stated that it took them one day or part thereof to travel from their homes to the time when they boarded the airplane.[175] Summing the days stated (14) and dividing by the number of workers (6) yields an average of 2.33 days per person.[176]

32. The average ground transportation cost from the Bangkok Airport to the workers' home was 276.67 Baht. Witthawat Sombun testified that it cost 530 Baht to travel from the Bangkok Airport to his

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[166] AZ 4, at 71:2–74:18, 77:2–78:25.

[167] AX 5, at 36:1–38:11, 48:9–18, 62:3–14, 69:23–71:7; AX 6, at 34:14–36:25.

[168] This is a type 1 fact and is deemed admitted for that reason.

[169] AX 14, at ¶ 4.

[170] *Id.* at ¶ 5.

[171] This is a type 3 and 5 fact and is deemed admitted for those reasons.

[172] AX 6, at 64:16–68:8.

[173] AX 4, at 79:21–80:10; AX 13, at 47:5–11, 49:7–51:24.

[174] AX 5, at 38:6–39:25.

[175] AX 7, at 29:12–14; AX 12, at 85:3–86:9.

[176] This is a type 1 fact and is deemed admitted for that reason.

home.[177] Anucha Homphet testified that it cost 300 Baht to travel from Bangkok to his home.[178] Somjai Phobai could not testify as to the specific costs of his ground transportation from the Bangkok Airport to his home other than to note that it was provided by the recruiting company and his payment to the recruiting company included transportation.[179] The remaining three *de bene esse* witnesses (Prasoet Hongsahin, Suban Srisopha, and Tee Kanjai) were not asked questions about their ground transportation from the Bangkok Airport to their homes.[180] Summing the Baht stated (830) and dividing by the number of workers who provided testimony on this issue (3) yields an average of 276.67 Baht per person. This 276.67 average actually understates the true amount of ground transportation paid because it included Somjai Phobai in the average as zero even though it cost him something for the ground transportation provided by the recruiter since his payment to the recruiter payments included the cost of this ground transportation.[181] [182]

33. The official Thai Baht to United States Dollar exchange rate in May 2003 was 42.77 Baht to 1 Dollar.[183] [184]

34. Only Somjai Phobai testified as to how long it took him to travel home which was eight hours or subsistence for one calendar day.[185] For the other workers, the minimum amount of time that they could have taken was one day or a portion thereof.[186] [187]

35. Respondents modified the regulatory requirement at 20 C.F.R. § 655.102(b)(6) in their Attachments to ETA 790—Agricultural and Food Processing Clearance Order by changing the start date from the day after the worker arrives at the work site to when "the worker is ready, willing, able and eligible to work."[188] [189]

36. Respondents admitted that the "H-2A workers that Respondents employed in Hawaii in 2003 were ready, willing, able, and

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[177] AX 12, at 127:1–29:8.

[178] AX 4, at 148:6–49:2.

[179] AX 5, at 36:1–38:11, 48:9–18, 62:3–14, 69:23–71:7, 108:13–09:9.

[180] Garcia Decl. ¶ 18.

[181] AX 5, at 48:9–18, 62:3–14, 69:23–71:7.

[182] This is a type 1 fact and is deemed admitted for that reason.

[183] AX 14, at ¶ 6.

[184] This is a type 3 fact and is deemed admitted for that reason.

[185] AX 5, at 109:10–17.

[186] AX 14, at ¶ 6.

[187] This is a type 3 fact and is deemed admitted for that reason.

[188] AX 2, at 549.

[189] This is a type 5 fact and is deemed admitted for that reason.

eligible to work in the United States when they arrived in Los Angeles in February and March 2003."[190] [191]

37. The H-2A workers that Respondents employed in Hawaii in February and March 2003 also testified that they were ready, willing, and able to work in the United States when they arrived in the United States.[192] [193]

37.1 Respondents admitted that they had "no communication with the State of Hawaii concerning the H-2A workers at issue in this case."[194] [195]

38. Respondents did not notify Hawaii's local job office in 2003 that any of their H-2A workers who were working in Hawaii voluntarily abandoned their employment with Respondents.[196] [197]

39. On February 2, 2005, the WHD initially issued a determination letter finding that Respondents owed $34,654.18 in back wages for their violations of the three quarters guarantee provisions of 20 C.F.R. § 655.102(b)(6) (2008).[198] Part of this three-quarters guarantee back wage determination was based upon the WHD reconstructing the number of hours that Respondents' H-2A workers worked at Aloun Farms in February 2003 because neither Respondents nor Aloun Farms provided time records for these workers for that month during the investigation.[199] [200]

40. During the course of the litigation in this case, new evidence was obtained and, the Administrator recomputed the amount of back wages due.[201] In their initial disclosures, Respondents provided a summary sheet denoting the number of hours that their H-2A workers worked at Aloun Farms in February 2003 that they did not

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[190] Sanctions AX 58, at RFA 153.

[191] This is a type 2 fact and is deemed admitted for that reason.

[192] AX 12, at 90:22–91:5; AX 4, at 88:10–24; AX 5, at 72:13–21; AX 6, at 74:6–20; AX 7, at 40:10–22; AX 13, at 52:7–19.

[193] This is a type 2 fact and is deemed admitted for that reason.

[194] Sanctions AX 30, at ROG 19; Sanctions AX 52, at ROG 19.

[195] This is a type 2 fact and is deemed admitted for that reason.

[196] Sanctions AX 13, at RFA 4.

[197] This is a type 5 fact and is deemed admitted for that reason.

[198] AX 15, last page.

[199] AX 16, at ¶ 4.

[200] This is a type 2 fact and is deemed admitted for that reason.

[201] This is a type 3 and 4 fact and is deemed admitted for those reasons; respondents specifically are precluded from offering any evidence on this matter under the August Sanctions 19.

produce during the initial investigation.[202] The Administrator recomputed the number of hours that Respondents' Thai H-2A workers worked at Aloun Farms in February 2003 based on this newly provided payroll record that was not produced during the Administrator's investigation of Respondents.[203] Additionally, because of the lack of payroll records provided during the investigation, it was not clear if all of Respondents' H-2A workers worked until the end of the March 31, 2003, contract period. Based upon Respondents' admissions during the investigation, the Administrator learned that all of Respondents' H-2A workers worked until at least April 1, 2003.[204] Re-computing the number of hours worked in February 2003 and including all of Respondents' H-2A workers changed the amount of back wages due for the three-quarters guarantee violation.[205]

41. Using this additional evidence, the WHD determined that Respondents violated 20 C.F.R. § 655.102(b)(6) because there was a difference in the number of hours offered and the number of hours that should have been offered for 68 workers and that Respondents owed $36,079.63 in back wages.[206] [207] The Administrator used the methodology listed below to determine the $36,079.63 back wage amount identified in AX 58:

The Administrator identified the dates that the Thai H-2A workers that Respondents employed in Hawaii in 2003 arrived in the United States.[208]

Starting with the day after the Thai H-2A workers arrived in the United States, the Administrator determined how many days remained in that month (February or March) for the worker to work.[209]

If the Thai H-2A worker was only in the United States for part of a month, the Administrator prorated the month to determine how many days a worker would be scheduled to work that month based on a worker working 24 days a month.[210]

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[202] AX 17, at 78; Garcia Decl. ¶ 19.

[203] AX 16, at ¶ 5.

[204] *Id.* at ¶ 6.

[205] *Id.* at ¶ 7.

[206] *Id.* at ¶¶ 8–15; AX 58.

[207] This is a type 3 and 4 fact and is deemed admitted for those reasons; respondents specifically are precluded from offering any evidence on this matter under the August Sanctions 19.

[208] AX 16, at ¶ 9.

[209] *Id.* at ¶ 10.

[210] *Id.* at ¶ 11.

If the Thai H-2A worker was in the United States for the entire month of March, then the WHD determined that the worker was scheduled to work 24 days in March 2003.[211]

The Administrator totaled the total number of days scheduled to work, multiplied this day total by 8 hours, and then multiplied this hour total by 0.75 to determine the number of hours that Respondents were obligated to provide under the three-quarters guarantee.[212]

Next, the Administrator identified the total number of hours in February and March 2003 that Respondents listed the workers as working and totaled these monthly hour totals.[213]

The Administrator then subtracted the hours worked from the total scheduled hours to be worked under the three-quarters guarantee to determine the total number of hours owed under the three-quarters guarantee.[214]

Finally, the Administrator multiplied the total number of hours owed total by the Adverse Effect Wage Rate ("AEWR") that was in effect on February 18, 2003 ($9.25).[215]

42. "Respondents have never paid 4 of these 11 H-2A workers for their February 2003 work in Hawaii.216 The names of these H-2A workers are: Asarin Nongphue; Chaiyong Wisarutkichaka; Chatchawan Suphawan; and Wanchai Nongphue."[217]

43. Aloun Farms supervised the Thai H-2A workers that Respondents employed at Aloun Farms.[218] In response to Interrogatory No. 10, which dealt with the responsibilities of Respondents' employees to the H-2A workers that were at issued in this litigation, Respondents admitted that Aloun Farms served as the supervisor of the H-2A workers that Respondents employed at Aloun Farms: "With respect to the supervision of the Aloun workers, the owners of Aloun Farms and/or their staff conducted most of the day-to-day supervision of those workers. Tom Pomvilie and John Helewa had the most contact with the

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[211] *Id.* at ¶ 11.

[212] *Id.* at ¶ 12.

[213] *Id.* at ¶ 13.

[214] *Id.* at ¶ 14.

[215] 67 Fed. Reg. 96, at 35151; AX 16, at ¶ 15.

[216] This is a type 2 fact and is deemed admitted for that reason.

[217] August Sanctions 32; *see also* July Order 10, 27; Sanctions AX 19, RFA 218 (deeming admitted that: "None of the documents that Respondents provided through initial disclosures and discovery demonstrate that Respondents paid the H-2A workers that are listed under the 'KS 1ST GROUP (11)' heading on BSN 000070 in Hawaii in 2003 for the work they performed at Aloun Farms in February 2003."). For a comparison of the names, see AX 34.

[218] This is a type 2 fact and is deemed admitted for that reason.

Aloun workers on behalf of Global, but did not supervise them on an ongoing, day-to-day basis."[219] Furthermore, the contract between Respondents and Aloun Farms regarding the employment of the H-2A workers that are at issue in this litigation that Respondents filed in Hawaii State Court in April 2005 that Respondents produced in this litigation had a provision that allowed Aloun Farms to exercise such supervision of the H-2A workers that Respondents employed at Aloun Farms.[220] Alec Sou of Aloun Farms confirmed during his deposition that Aloun Farms supervised the work of the H-2A workers that Respondents employed at Aloun Farms.[221] Lastly, Respondent Orian admitted that Aloun Farms supervised the workers that Respondents employed at Aloun Farms.[222]

43.1 Respondents employed these 4 workers for 12 days at Aloun Farms in February 2003.[223] This work record identifies that Asarin Nongphue; Chaiyong Wisarutkichaka; Chatchawan Suphawan; and Wanchai Nongphue all worked 12 units in February 2003. Respondents and Aloun Farms treated the "unit" specified in the previous sentence as a day of work.[224] [225]

43.2 The Administrator determined that Respondents owed these four workers $1,649.08 in back wages for this violation by adding the net wage amounts ($412.27 for each worker) in Respondents' payroll records for these four workers for their February work.[226] [227]

44. The names of these ten workers are Siri Kaekhamfu, Sarit Khantak, Natthawut Konwaen, Kharom Munnanad, Chaiwijit Munwaree, Thongyai Palamee, Patiphon Pana, Phian Phumkhokrak, Worachit Samerkarn, and Jatupong Somsri.[228] [229]

45. "The ten workers identified in Sanctions AX 14[230] worked at Aloun Farms for the days specified in Sanctions AX 14."[231] [232]

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[219] Sanctions AX 30, at ROG 10.

[220] AX 43 at Ex. 4 & 5, Section 3.e. The contracts at Section 3.e were both executed by Respondents. *See* AX 43 at Ex. B, 1385.

[221] AX 19, at 61:11–64:21, AX 19 at Ex. 6.

[222] AX 39, at 257:3–6.

[223] AX 34, at 70.

[224] AX 21, at 593:4–14.

[225] This is a type 3 and 5 fact and is deemed admitted for those reasons.

[226] AX 16, at ¶ 42; *see* AX 35, at 29 (showing the amounts owed for pay period ending on February 28, 2003 for these four workers).

[227] This is a type 2 fact and is deemed admitted for that reason.

[228] Sanctions AX 14, at DOL 298.5–.12.

[229] This is a type 2 fact and is deemed admitted for that reason.

[230] At DOL 298.5–.12

46. Respondents employed the ten workers specified in Fact 44 for three days at Aloun Farms in March 2003.[233] [234]

47. Respondents did not produce any payroll records for any work that the ten workers specified in Fact 44 performed at Aloun Farms in March 2003.[235] [236]

48. The Administrator determined that Respondents owed the 10 workers specified in Fact 44 $2,283.02 in back wages for their 3 days of work at Aloun Farms by multiplying the number of hours these workers worked by the $9.29 AEWR that was in effect for this time period.[237] [238] The Administrator used the methodology listed below to determine the $2,283.02 back wage amount identified in AX 60:

The Administrator determined the workers' starting "time in" times and ending "time out" times listed in AX 60 from the Aloun Farms timesheets and rounded these daily work times to the nearest quarter hour.[239]

The Administrator then determined the number of hours worked for each of the three dates by subtracting the starting time from the ending time and by also subtracting an hour for lunch.[240] The Administrator determined that an hour for lunch had to be subtracted

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[231] August Sanctions 20.

[232] This is a type 2 fact and is deemed admitted for that reason.

[233] Sanctions AX 14, DOL 298.5–.12; AX 19, at 145:13–46:14, AX 19 at Ex. 19.

[234] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[235] Garcia Decl. ¶ 20; *see also* AX 20, at 30–31 (The names of these ten workers are not listed on this Payroll Check Register.); Sanctions AX 58, at RFAs 83–85; July Order 10, 27; Sanctions AX 19, at RFAs 169, 170. While Respondents, in RFA 83, stated that no AACO-recruited worker worked at Aloun Farms, Respondent Orian admitted during the person-most-knowledgeable deposition that AACO-recruited workers worked at Aloun Farms. AX 21, at 572:16-574:3; AX 21, at Ex. 48–49; *see also* AX, at 326:12–28:12. When Respondents produced a deposition transcript, portions of which are located at AX 2, at Ex. 48 and 49, they, without explanation, only produced a rough transcript that did not contain the certification even though on the date of production, the deposition was certified. Garcia Decl. ¶ 23. The Administrator, at the Sou deposition, subsequently obtained a copy of the final version of the deposition listed at AX 21 which is included at AX 22. Garcia Decl. ¶ 23. The final version at AX 22 contains the certification for the deposition. Garcia Decl. ¶ 23.

[236] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[237] AX 16, at ¶¶ 16–19; AX 60.

[238] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[239] AX 16, at ¶ 17.

[240] *Id.* at ¶ 18.

from the amount of time listed based on Alec Sou's deposition testimony.[241]

The Administrator then summed the hour totals for the three days and multiplied this summation by the $9.29 AEWR that was in effect for these three dates.[242]

49. This Court established as a finding of fact that all ten of the workers specified in Fact 44 worked every available weekday from March 7, 2003 to March 31, 2003.[243] [244]

50. Respondents did not produce any payroll records for any work that the ten workers specified at Fact 44 performed from March 7, 2003, to March 25, 2003, save for payroll records for Natthawut Konwaen from March 20, 2003, to March 25, 2003.[245] [246]

51. The payroll records that Respondents produced for eight of the ten workers specified at Fact 44 for March 2003 demonstrates that they only received wages for the hours listed on a timesheet having Del Monte written on it.[247] [248] This is shown by multiplying the number of hours listed on Respondents' Del Monte timesheet by the hourly wage that Respondents paid their Del Monte workers ($9.25) and comparing these results to the gross wages listed on Respondents' Payroll Check Registers and Employee Detail Reports. The timesheets

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[241] *Id.* at ¶ 18.

[242] 68 Fed. Reg. 38, at 8929; AX 16, at ¶ 19.

[243] August Sanctions 35, 64, imposing the following finding of fact sanction: "All ten of the AACO-recruited H-2A workers that Respondents sent to Hawaii on March 6, 2003, (Jatupong Somsri, Thongyai Palamee, Worachit Samerkarn, Chaiwijit Munwaree, Sarit Khantak, Kharom Munnard, Phian Phumkhokrak, Natthawut Konwaen, Patiphon Pana, and Siri Kaekhamfu) worked every available weekday from March 7, 2003, to March 31, 2003."

[244] This is a type 4 fact and is deemed admitted for that reason.

[245] For the March 7 to 15, 2003, time period, *see* Fact 47. For the March 16, 2003, to March 25, 2003, time period, *see also* AX 20, at 30–31 (showing no record of these ten workers); AX 24, at 32–33 (showing no record of these ten workers); AX 25, at 17–20 (showing that of these ten workers, only Natthawut Konwaen is listed as working from March 20, 2003, to March 25, 2003). It should be noted that Respondents produced the timesheet at pages 17–20 and this time sheet is redacted without explanation for (1) three columns prior to the March 20, 2003, column and (2) the March 20, 2003 to March 25, 2003, dates for seven of the ten workers at issue in this violation (Thongyai Palamee, Worachit Samerkarn, Chaiwijit Munwaree, Sarit Khantak, Kharom Munnard, Phian Phumkhokrak, and Siri Kaekhamfu). Garcia Decl. ¶ 24.

[246] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[247] Respondents produced no payroll records for Jatupong Somsri and Patiphon Pana in this litigation. Sanctions AX 58, at RFAs 84–85; July Order 10, 27; Sanctions AX 19, at RFAs 169, 170.

[248] This is a type 3 and 4 fact and is deemed admitted for those reasons.

that Respondents produced for eight of these ten workers for their March 2003 Del Monte work identifies that (1) Natthawut Konwaen worked 74 hours from March 20, 2003, to March 31, 2003, and (2) 7 workers worked 34 hours during this time period (Thongyai Palamee, Worachit Samerkarn, Chaiwijit Munwaree, Sarit Khantak, Kharom Munnard, Phian Phumkhokrak, and Siri Kaekhamfu).[249] Respondents paid the H-2A workers that they employed at Del Monte, $9.25 an hour.[250] Multiplying the 74 hours for Natthawut Konwaen at page 17–20 by the hourly rate of $9.25 yields a total of $684.50 while multiplying 34 hours for the seven remaining workers at page 17–20 by the hourly rate of $9.25 yields a total of $314.50. The gross wages listed in the Payroll Check Registers and Employee Detail Reports for the March 16 to March 31, 2003, time period are $684.50 for Natthawut Konwaen and $314.50 for the other seven workers (Thongyai Palamee, Worachit Samerkarn, Chaiwijit Munwaree, Sarit Khantak, Kharom Munnard, Phian Phumkhokrak, and Siri Kaekhamfu).[251]

52. Counting March 7th, and not counting March 10th and March 11th, there are 7 weekdays between March 6, 2003, and March 20, 2003, and 11 weekdays between March 6, 2003, and March 26, 2003.[252] [253]

53. The Administrator determined that Respondents owed these ten workers $6,679.51 in back wages for their 7 or 11 days of work.[254] [255]

Since Respondents produced no payroll records for these workers for 7 or 11 days (Fact 50), the Administrator had to reconstruct the number of hours worked.[256] The issue was complicated by the fact that while it was known that the workers worked at one of

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[249] AX 25, at 17–20.

[250] AX 26, at 200:4–7; AX 21, at 388:2–4.

[251] *Compare* Sanctions AX 35, at 145, 147, 150, 154, 157, 161, 167 *with* AX 27, at 14–15.

[252] AX 28. The calendar demonstrates the aforementioned weekdays between March 6, 2003, to March 20, 2003, are: the 7th, 12th–14th, and 17th–19th. This calendar also demonstrates that the aforementioned weekdays between March 6, 2003, to March 26, 2003, are: the 7th, 12th–14th, 17th–21st, and 24th–25th.

[253] This is a type 3 fact and is deemed admitted for that reason.

[254] AX 16, at ¶¶ 20–24; AX 61. The Administrator used the methodology listed below to determine the $6,679.51 back wage amount identified in AX 61.

[255] This is a type 4 fact and is deemed admitted for that reason.

[256] AX 16, at ¶ 21.

the two farms, it was not known which farm they worked at during the days at issue.[257]

To reconstruct the hours worked, the Administrator compared the average daily number of hours these workers worked at Aloun Farms and Del Monte Farms in March 2003 and found that they worked fewer hours per day at Del Monte than they did at Aloun Farms.[258]

The Administrator computed the back wages due by using (1) the workers' Del Monte "Avg Hours Worked Per Day" figure since this was the lower average, and (2) the $9.29 AEWR since two AEWRs were in effect during the March 16–March 25, 2003, time period and the $9.29 AEWR was the lower hourly rate.[259]

The Administrator determined the amount of back wages due for this violation ($6,679.51) by multiplying the Del Monte average daily amount of hours per day, by the number of days worked (7 or 11), by the $9.29 AEWR.[260]

54. "Not counting the ten AACO-recruited workers listed in the previous paragraph [Fact 44], the remaining 44 AACO-recruited workers identified at Exhibits 15 and 45 (BSN 42–45) worked all weekdays from March 17, 2003, to March 19, 2003."[261] [262]

55. Additionally, Respondents admitted that the 44 workers specified in Fact 54 worked at one of the Hawaiian farms (Aloun Farms or Del Monte Farms) from March 17, 2003, to March 19, 2003.[263] [264]

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[257] *Id.* Respondents admitted that seven of the ten workers specified in Fact 44 worked at one of the Hawaiian farms (Aloun Farms or Del Monte Farms) from March 12, 2003, to March 25, 2003. July Order 10, 27; Sanctions AX 19, at RFAs 228 (deeming admitted that: "The H-2A workers that flew to Hawaii on March 6, 2003, that are identified in BSN 000277 to 000280 *did* work at one of the Hawaii Farms from March 12, 2003 to March 25, 2003."). The names of the workers identified at pages 277–280 are: Jatupong Somsri, Thongyai Palamee, Worachit Samerkarn, Chaiwijit Munwaree, Sarit Khantak, Kharom Munnard, and Phian Phumkhokrak." AX 62. The definitions section of The Secretary's Requests for Admissions Directed to Respondents (Third Set) defined "Hawaiian Farms" as "the two farms in Hawaii—Aloun Farms and Del Monte Farms—where Respondents employed H-2A workers in 2003." Sanctions AX 19, at 3.

[258] AX 16, at ¶ 22.

[259] Both of the $9.29 and $9.42 AEWRs were in effect during the March 16, 2003, to March 25, 2003, time period. *Compare* 68 Fed. Reg. 38, at 8929 ($9.29 rate for Hawaii) *with* 68 Fed. Reg. 53, at 13331 ($9.42 rate for Hawaii); *see also* AX 16 ¶ 23.

[260] AX 16, at ¶ 24.

[261] August Sanctions 64.

[262] This is a type 4 fact and is deemed admitted for that reason.

[263] July Order 10, 27; Sanctions AX 19, RFA 229 (admitting that: "The H-2A workers that flew to Hawaii on March 16, 2003, that are identified in BSN 000259 to

56. Respondents did not produce any payroll records for any work that the 44 workers specified in Fact 54 performed from March 17, 2003, to March 19, 2003.[265] [266] Lastly, the document at BSN 000014–15 that has an end payroll date of March 31, 2003, should have contained the wages that these workers earned from March 17, 2003, to March 19, 2003, because Respondents' pay periods ran from the first of the month to the 15th of the month and from the 16th of the month to the end of the month.[267]

57. The Administrator determined that Respondents owed these 44 workers $9,092.59 in back wages for their 3 days of work.[268] [269] The Administrator used the methodology listed below to determine the $9,092.59 back wage amount identified in AX 63.

Since Respondents produced no payroll records for these 44 workers for these three days, the Administrator had to reconstruct the number of hours worked. The names of these 44 workers are only listed as working for Del Monte Farms.[270] To reconstruct the hours, the Administrator determined the "Avg Hours Worked Per Day" figure for each H-2A worker by: (1) summing the number of hours listed for them on the Del Monte timesheet in March 2003, (2) dividing this summation by the number of days that the workers are listed as working on this timesheet, and (3) rounding this result to the nearest quarter hour.[271]

The Administrator determined that two different AEWRs were in effect ($9.29 and $9.42) during the March 17–19, 2003, time

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000270 *did* work at one of the Hawaii Farms from March 17, 2003 to March 19, 2003." (emphasis is original). The documents referenced in RFA 229 are located at AX 29.

[264] This is a type 2 fact and is deemed admitted for that reason.

[265] Garcia Decl. ¶ 21; *see also* Fact 51, which demonstrates that the hours listed in AX 25, when multiplied by the hourly wage, $9.25, that Respondents paid their Del Monte workers equals the gross wages listed at AX 27, that Respondents produced in this litigation for these workers. This demonstrates that the gross wages listed AX 27 are solely for the hours listed on the timesheets at pages 17–20 for the H-2A workers specified at Fact 54.

[266] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[267] AX 26, at 131:22–32:2.

[268] AX 16, at ¶¶ 25–27; AX 63.

[269] This is a type 4 fact and is deemed admitted for that reason.

[270] The names of the 44 workers specified at Fact 54 are only listed as working for Del Monte Farms. *Compare* names at AX 63 *to* names at AX 8 that Respondents produced in this litigation.

[271] AX 16, at ¶ 25.

period.[272] The Administrator used the lower $9.29 rate when calculating the amount of back wages due.[273]

The Administrator determined the amount of back wages due ($9,092.59) for this violation by multiplying the average daily amount of hours, by the number of days worked by the $9.29 AEWR.[274]

58. Respondents produced Employee Detail Reports in this litigation that, *inter alia*, identified the check number, check issue date and the net wages due.[275] [276]

59. Twenty-two of the check numbers listed in these Employee Detail Reports for March 2003 work are not listed on the bank statements or cancelled checks that Respondents produced in this litigation.[277] [278]

60. Respondents have not produced any documents in this litigation showing that any of the 22 workers named on 22 checks signed a receipt acknowledging payment of the monies listed on these 22 checks.[279] [280]

61. Furthermore, the H-2A workers that Respondents employed at Aloun Farms frequently complained to Alec Sou about not being paid.[281] [282]

62. The Administrator determined that Respondents owed the 22 workers who did not receive payment for 22 checks specified in Fact 60 $7,233.53 in back wages for their work in March 2003 by

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[272] 68 Fed. Reg. 38, at 8929; 68 Fed. Reg. 53, at 13331

[273] AX 16, at ¶ 26.

[274] *Id.* at ¶ 27.

[275] Sanctions AX 35.

[276] This is a type 3 fact and is deemed admitted for that reason.

[277] The fact that these 22 checks are for the March work is evidenced by the Payroll Check Registers that Respondents produced in this litigation. The information pertaining to the amount of wages (gross and net), worker's name, check number and check date that is listed in the Employee Detail Reports for check dates March 27, 2003, and April 8, 2003, also appears in these Payroll Check Registers. *Compare* Sanction AX 35, at 199–232 *to* AX 20, 24. These Payroll Check Registers, for check issue dates of March 27, 2003, and April 8, 2003, identify that the last day of the pay periods for these checks were March 15, 2003, and March 31, 2003. AX 20, 24,. AX 30 details the: employee's name, check number, check issue date, net wages due and BSN of Employee Detail Report containing this information; AX 31, 32.

[278] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[279] Garcia Decl. ¶ 22.

[280] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[281] AX 23, at 306:18–07:5.

[282] This is a type 3 fact and is deemed admitted for that reason.

summing the net wages due in the Employee Detail Reports for the 22 checks.[283] [284]

63. Respondents' 30(b)(6) deponent, testified that "nobody work by pieces, work by hours."[285] [286]

64. Respondents admitted in their discovery responses that the AEWR in effect in Hawaii from February 1, 2003, to March 31, 2003, was higher than Hawaii's or the federal minimum wage.[287] [288]

65. Respondents admitted that "Respondents did not pay any H-2A worker that they employed in Hawaii from February 1, 2003, to March 31, 2003, the AEWR that was in effect for Hawaii on the date that these H-2A workers performed work in Hawaii."[289] [290]

66. Respondent Orian admitted in deposition testimony that even though he knew he was obligated to pay the H-2A workers the AEWR, he did not pay them the AEWR.[291] [292]

67. The Administrator determined that Respondents owed their H-2A workers $10,439.35 in back wages because they failed to pay the correct AEWR.[293] [294] The Administrator used the methodology listed below to determine the $10,439.35 back wage amount identified in AX 64.

The Administrator identified the number of hours that Respondents' H-2A workers worked in February and March 2003.[295]

The Administrator determined the AEWR that was in effect at the time the work was performed and used the lower AEWR for the pay period if two AEWRs were in effect when the work was performed at one of the farms during a pay period.[296]

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[283] AX 30; Sanctions AX 35, at 199–232; AX 16, at ¶ 28.

[284] This is a type 4 fact and is deemed admitted for that reason.

[285] AX 26, at 83:20–84:22.

[286] This is a type 2 fact and is deemed admitted for that reason.

[287] Sanctions AX 13, at RFA 10.

[288] This is a type 2 fact and is deemed admitted for that reason.

[289] July Order 10, 27; Sanctions AX 19, at RFA 174.

[290] This is a type 2 fact and is deemed admitted for that reason.

[291] AX 22, at 329:12–16 (Q. You knew that you were obligated to pay the workers whatever the Adverse Effect Wage Rate was? A. You're right. Q. And why didn't you pay the workers that amount? A. Because that's what we got, that's what we paid.).

[292] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[293] AX 16, at ¶¶ 29-33; AX 64.

[294] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[295] AX 16, at ¶ 29.

[296] *Id.* at ¶ 30; 67 Fed. Reg. 96, at 35150; 68 Fed. Reg. 38, at 8929.

The Administrator multiplied the hours worked by their respective AEWRs and then summed these results to determine the total wages due.[297]

The Administrator identified the gross wages listed in Respondents' payroll records for February and March 2003 and placed the summation of them in the "Total Wages Paid" column of AX 64.[298]

The Administrator determined the amount of back wages due ($10,439.35) by subtracting the amount of wages listed in the "Total Wages Listed" column from the amount of wages listed in the "Total Wages Due" column.[299]

68. In the H-2A application that Respondents filed with ETA, Respondents "guarantee[d] that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."[300] [301]

69. "Respondents failed to take any actions to ensure that the wages they paid to their H-2A workers employed in Hawaii in 2003 would equal or exceed the prevailing wage that was applicable at the time the H-2A workers began work."[302] [303]

70. "Respondents employed some of the H-2A workers they employed in Hawaii in 2003 in mechanic and tractor driver occupations."[304] [305]

71. The name of the Respondents' employee who worked full time as a mechanic at Aloun Farms was Thanchot Hamphum.[306] The name of the Respondents' employee who drove a tractor in February and March 2003 during the onion harvest season at Aloun Farms was Somjai Phobai.[307] [308]

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[297] AX 16, at ¶ 31.

[298] *Id.* at ¶ 32.

[299] *Id.* at ¶ 33.

[300] AX 1.

[301] This is a type 2 fact and is deemed admitted for that reason.

[302] August Sanctions 49.

[303] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[304] August Sanctions 49–50.

[305] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[306] AX 6, at 89:3–90:5; 153:5–19.

[307] *Id.* at 82:15–87:16.

[308] This is a type 2 fact and is deemed admitted for that reason.

72. Respondents paid the workers that it placed at Aloun Farms either $66.67[309] or $66.76[310] a day. This $66.67 or $66.76 daily payments resulted in an hourly payment of either $8.33 or $8.35 per hour to the Thai H-2A workers.[311] [312]

73. The prevailing wage rate for tractor drivers and machinery maintenance mechanics in Hawaii in 2003 was $12.70 and $23.46 respectively.[313] [314]

74. The Administrator determined that Respondents owe these 2 workers $4,814.11 in back wages because they failed to pay the prevailing wage rate.[315] [316] The Administrator used the methodology listed below to determine the $4,814.11 back wage amount:

The Administrator determined the number of hours that Thanchot Hamphum and Somjai Phobai worked as a mechanic and a tractor driver. The Administrator determined that Thanchot Hamphum worked 312.5 hours as a mechanic in February and March 2003 since he worked full time as a mechanic.[317] The undisputed time that Somjai Phobai drove a tractor was for "some weeks" for "two or

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[309] AX 21, at 348:14–21. At AX 33, at 36 is a payroll record that identifies that Thanachot Hanphum worked 12 units and Somjai Phobai worked 3 units. Respondents and Aloun Farms treated the "unit" specified in the previous sentence as a day of work. AX 21, at 593:4–14. The Employee Detail Reports for these workers identify gross wages for this pay period of $800.04 for Thanachot Hanphum and $200.01 for Somjai Phobai. Sanctions AX 35, at 199,232. Lastly, 12 times $66.67 equals $800.04 and 3 times $66.67 equals $200.01.

[310] AX 34. The work record at page 70 identifies that 11 workers worked 12 units, had a unit rate of $66.76, and an amount of 801.12. *Id.* Respondents and Aloun Farms treated the "unit" specified in the previous sentence as a day of work. AX 21, at 593:4–14. The names at Sanctions AX 25, pages 127–37 match the names at AX 34, page70, and $801.12 is identified as gross wages at Sanctions AX 25, pages 127–37. *Compare* Sanctions AX 25, DOL 127-137 *with* AX 34, at 70. The names, check numbers, check issue dates and gross wages ($801.12) at the Employee Detail Reports at pages 220–26, 228–32 match the names, check numbers check issue dates, and gross wages ($801.12) of the checks and check stubs at 127–37. Lastly, 12 days of work times a unit rate of $66.76 equals $801.12. *Compare* Sanctions AX 35, at 220–26, 228–32 *with* Sanctions AX 25, at 127–37.

[311] AX 26, at 199:20–200:7; AX 2, at 345:25–47:10, 351:9–18; Sanctions AX 34, at 43.

[312] This is a type 2 fact and is deemed admitted for that reason.

[313] AX 16, at ¶ 34 (citing Wage Determination No. 94-2153 Rev (30) for Hawaii, Island-Wide, May 28, 2002, at 2, 4).

[314] This is a type 2 fact and is deemed admitted for that reason.

[315] AX 16, at ¶¶ 35–39.

[316] This is a type 3 fact and is deemed admitted for that reason.

[317] AX 16, at ¶ 35.

three hours."[318] As such, based on this testimony, the Administrator determined that Somjai Phobai drove a tractor for at least four hours (the minimum number of weeks (2) times the minimum number of hours per week (2)).[319]

The Administrator determined the amount of wages Thanchot Hamphum was due for working in the mechanic occupation by multiplying his prevailing wage rate by the number of hours that he worked as a mechanic.[320]

The Administrator determined that Respondents owed Thanchot Hamphum $4,796.71 for this violation. The Administrator determined this amount by subtracting the total wages listed in the payroll records for Thanchot Hamphum for February and March 2003, from the total wages that he was due.[321]

The Administrator determined that Respondents owed Somjai Phobai $17.40 for this violation by multiplying the difference in the hourly rates ($4.35) by the number of hours that he spent driving a tractor (4).[322]

74.1. Respondents admitted that pursuant to the United States Treasury Regulations § 1.1441–4(b)(1)(ii), "Global was exempt from all federal tax withholding requirements for its H-2A workers."[323] [324]

74.2. Respondents also admitted that federal income tax deductions were taken from the wages of the H-2A workers that Global employed in Hawaii.[325] [326]

74.3. Summing the federal income tax withholding amounts listed in the Payroll Check Registers that Respondents produced in this litigation demonstrate that Respondents withheld $9,317.36 in federal income tax deductions in February and March 2003.[327] [328] The $9,317.36 amount was determined by summing the federal income tax withholding totals ($3,334.24, $1,285.43, $2,049.27, and $2,648.42)

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[318] AX 5, at 148:7–49:5.

[319] AX 16, at ¶ 36.

[320] *See id.* at ¶ 37. *E.g.*, 312.5 hours * $23.46 = $7,331.25.

[321] AX 16, at ¶ 38. *E.g.*, $7,331.25–$2,534.54 = $4,796.71.

[322] AX 16, at ¶ 39.

[323] August Sanctions 17; July Order 10, 27; Sanctions AX 19, at RFAs 222–24; Sanctions AX 8, at 879.2. The full citation of the pertinent regulation is: 26 C.F.R. §§ 1.1441–4(b)(1)(ii).

[324] This is a type 4 fact and is deemed admitted for that reason.

[325] Sanctions AX 13, RFA 46.

[326] This is a type 4 fact and is deemed admitted for that reason.

[327] AX 20, 24, 27, 35, at 27–32.

[328]This is a type 4 fact and is deemed admitted for that reason.

from the Payroll Check Registers that Respondents produced in this litigation for the pay periods ending on February 28, 2003, March 15, 2003, and March 31, 2003.

74.4. The job order that Respondents submitted to ETA did not specify any deductions for meals or basic living supplies.[329] [330]

74.5. Aloun Farms, which acted as the supervisor of the H-2A workers that Respondents employed at Aloun Farms, provided a contract to these H-2A workers specifying that "Aloun Farms will also be deducting $200 from each employees [sic] month. This will be for the meal, utilities, water, and basis [sic] personal living supplies."[331] [332]

74.6. Aloun Farms' March time reporting documents showed deductions, *inter alia*, for "Meals & Personal Living Expenses."[333] [334]

74.7. Aloun Farms' April time reporting documents stated, "Begin April 1st. Workers are on their own for meals and GHMI will handle all advances."[335] [336]

74.8. The August Sanction ordered by this adjudicator, imposed the following finding of fact sanction: "Respondents took deductions from the gross wages of their H-2A workers that they employed in 2003 that they paid in 2004 for the same reasons they took deductions from the pay of these H-2A workers in 2003 for other pay periods in March and April 2003, e.g., federal income tax withholdings, basic living supplies, and housing charges (water, sewage, and electricity)."[337] [338]

74.9. Respondent Orian admitted in his deposition that deductions were taken from the pay of Thai H-2A workers for "food and all kinds of other stuff."[339] [340]

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[329] AX 1; AX 2, at 551.

[330] This is a type 2 fact and is deemed admitted for that reason.

[331] Sanctions AX 34, at 57:9–60:12, 65:10–25, 107:6–18, Sanctions AX 34 at Ex. 6, 41; AX 3, at 31:10–16; AX 39, at 257:3–6, 268:6–14; *see also* AX 10, at RFP 20, wherein in response to a request of "Please produce any and all documents that refer or relate to the Respondents' supervising the work of each H-2A worker" Respondents stated "[pages] []683–[]686;" AX 36.

[332]This is a type 2 fact and is deemed admitted for that reason.

[333] AX 33.

[334] This is a type 2 fact and is deemed admitted for that reason.

[335] AX 37, 38.

[336] This is a type 2 fact and is deemed admitted for that reason.

[337] August Sanctions, at 53.

[338] This is a type 2 fact and is deemed admitted for that reason.

[339] AX 39, at 362:10–63:7.

[340] This is a type 2 fact and is deemed admitted for that reason.

75. Documents Respondents' produced in this litigation demonstrate that Respondents took $8,300.16 in utilities, meals and basic living supplies deductions from the pay of the Thai H-2A workers that they employed in Hawaii in March 2003.[341] [342] The net wage amounts listed in this Trial Payroll Check Register match, to the penny, the monetary amounts listed in the documents entitled "Employee Releases" which stated that the amount stated therein was for the "final payroll check."[343] The $8,300.16 total in the Trial Payroll Check Register was derived by summing the $251.52 amounts listed for each worker under the "Advances" column.[344] However, this deduction is not an advance because Respondents' 30(b)(6) deponent identified (1) Respondents did not give advances to the Thai workers in coins; and (2) Respondents gave advances in increments of $50.[345] Moreover, Respondents identified in their correspondence with Aloun Farms that they were seeking to recover the $8,300 in deductions from the Thai workers that Aloun Farms had billed Respondents for providing meals and basic living supplies to Respondents' H-2A workers in accordance with the March 7, 2003 contract.[346]

75.1. The Administrator determined that Respondents took $4,150.08 in illegal deductions and took $4,150.08 in housing charges by dividing the $8,300.16 amount the H-2A workers paid towards utilities, meals and basic living supplies in half.[347] [348] The Administrator divided it in half because a portion of this payment was for illegal housing-related utility charges and a portion of this payment was for illegal deductions and Respondents did not identify the split for these payments.[349]

75.2. The Clearance Order that Respondents provided to the ETA that Respondents produced in this litigation confirmed that

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[341] AX 40.

[342] This is a type 3 fact and is deemed admitted for that reason.

[343] *Compare* AX 40 *with* AX 41.

[344] AX 40.

[345] AX 26, at 241:13–42:16, 250:1–23.

[346] *Compare*: AX 19, at 163:16–64:6 *and* AX 19 at Ex. 32, 298.33 *and* AX 19, at Ex. 6 *to* AX 19, at 183:20–84:20 and AX 19, at Ex. 34, 396 (The original document at AX 19, at Ex. 34, 396 that was used at the deposition had a few letters cutoff on the left side. The Administrator has included a complete copy of 396 immediately behind the copy of 396 that had a few letters cutoff.).

[347] AX 16, at ¶ 40.

[348] This is a type 3 and 5 fact and is deemed admitted for those reasons.

[349] AX 16, at ¶ 40.

Respondents would not charge their H-2A workers "for employer-provided housing or utilities."[350] [351]

75.3 In communications between Respondents and Aloun Farms, Respondents expressed their awareness that it would be illegal for Respondents to charge H-2A workers for utilities, stating, "[p]er DOL regulation, housing and housing-related service such as water, electricity, sewage shall be provided to workers. Only telephone charge can be deducted from worker."[352] [353]

76. Respondent Orian also testified in a deposition that he was aware that charging H-2A workers for sewage, electricity and water would be an H-2A violation.[354] [355]

77. Respondent Orian executed a contract with Aloun Farms to charge the Thai H-2A workers that they employed at Aloun Farms for electricity, water and sewage.[356] [357] The March 27, 2003, contract between Respondents and Aloun Farms regarding the employment of the H-2A workers that are at issue in this litigation that Respondents filed in Hawaii State Court in April 2005 and produced in this litigation contains a provision stating "Grower [Aloun Farms] may deduct from the [H-2A] Workers [sic] pay such expenses of water, electricity, telephone, and sewage connections and other added services for such housing."[358] The contract at AX 43, Ex. 4 to the Mordechai Orian declaration was executed by Respondent Orian.[359]

78. Alec Sou testified that Respondents' H-2A workers complained to him about the deductions being taken for meals.[360] [361]

79. Respondents' 30(b)(6) deponent, in response to questions about the workers' complaints to Alec Sou, stated: "I heard that they're not willing to cooperate with Alec about his idea of buying them food and other necessities; and they want to get the money, buy their own

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[350] AX 2, at 556; Sanctions AX 58, at RFA 131.

[351] This is a type 2 fact and is deemed admitted for that reason.

[352] AX 42; Sanctions AX 58, at RFA 132.

[353] This is a type 3 and 5 fact and is deemed admitted for those reasons.

[354] AX 22, at 247:6–248:4.

[355] This is a type 2 fact and is deemed admitted for that reason.

[356] July Order 10, 27; Sanctions AX 19, at RFAs 213, 216, 230.

[357] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[358] AX 43, at Ex. 4, Section 3.c.

[359] *See* AX 43, at Ex. B, 1385; AX 43, at Ex 4.

[360] AX 23, at 445:4–46:19.

[361] This is a type 3 fact and is deemed admitted for that reason.

food. And I think they were talking to him and giving him all kind of trouble about it, and he called me to tell me about it."[362] [363]

80. Respondents' 30(b)(6) deponent also stated: "Alec Sou right in the beginning talked to the workers about giving them food and all kind of other thing [sic] that he wanted to give them as part of the $300 . . . . And some of the worker [sic] resisted.[364] They said they're going to do their own [food]. . . . I remember it was a lot of resistance and talking between Alec Sou and his family and the workers."[365]

81. Respondents' 30(b)(6) deponent also stated that the workers complained about the pay they received for working at Aloun Farms when he stated the following in response to a question about their complaints: "they all wanted to move to work for Del Monte, and nobody wanted to work for Alec Sou, because he paid them a little bit less than Del Monte . . . . I recall it was 8.33 instead of 9.25 that the Del Monte guys got."[366] [367]

82. Respondent Orian also noted that the H-2A workers were "upset" after Alec Sou tried to secure an agreement with them about taking $300 deductions from their pay and paying them a daily rate of $66.67 a day.[368] [369]

83. Respondent Orian likewise testified in the deposition taken by counsel for Aloun Farms that Respondents' Thai H-2A workers complained about Aloun Farms taking deductions from their pay because of food.[370] [371]

84. The "Global Horizons Work Contract" that Aloun Farms distributed to the H-2A workers whom Respondents employed at Aloun Farms stated: "Total deduction will be $300 per month. GHMI workers will have opportunity to review this cost and also to sign acceptance of this deduction."[372] [373]

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[362] AX 21, at 512:13–13:21.

[363] This is a type 2 fact and is deemed admitted for that reason.

[364] This is a type 2 fact and is deemed admitted for that reason.

[365] AX 26, at 198:12–99:4.

[366] AX 26, at 199:20–200:19.

[367] This is a type 2 fact and is deemed admitted for that reason.

[368] AX 22, at 327:1–6; *see also* AX 26, at 201:16–02:16; AX 53, ¶¶ 4, 7.

[369] This is a type 2 fact and is deemed admitted for that reason.

[370] AX 22, at 302:22–03:4.

[371] This is a type 2 fact and is deemed admitted for that reason.

[372] AX 19, at 57:9–60:12, 65:10–25, 107:6–18; AX 6; AX 41.

[373] This is a type 2 fact and is deemed admitted for that reason.

85. Respondents' 30(b)(6) deponent testified, when speaking about Alex Sou:

> The thing I am saying here is that I told him everything needed to be approved by the employees . . . . [E]verything need to be approved by the employees. That's what I said here . . . . Everything need to be approved by the employees. Whatever deduction need to be made. That's obvious . . . . 'He wanted to advance the employees $100, and at the same time advance them money for food. And we told him—it wasn't Mordechai or Aloun. 'We'—Global Horizons—'told him that everything need to be approved by employees.' . . . I don't recall who told him specifically. I know that this—everybody in the office had the same mindset about deductions, that everything needed to be approved; and if the workers are not approving that, it's not going to happen.[374] [375]

Respondent Orian testified in another deposition that:

> I remember that he—[Alec Sou] he wanted to advance the employees a hundred dollars, and at the same time advance them money for food. And we told him that everything needed to be approved by the employees, if they—whatever deduction need to be made . . . . No it was after the employees arrived to his operation. He came back and said that he talked to the employees, and he think that the best way is to advance them money every month, and plus, help them to buy food, because the food in Hawaii is very expensive. He have an access to all kind of places that can provide them cheaper food, and it will save them money, by doing so.[376] [377]

86. Subsequent to the distribution of the "Global Horizons Work Contract" dated March 7, 2003, that set forth the $300 in deductions, a majority of the H-2A workers at Aloun Farms signed a document that Respondents produced that, *inter alia*, states: "*I agree* to allow Global Horizon / ADP Payroll to deduct for my expenses that I received in advance and for the food total to $300 USD per month."[378] [379] The document at page 676 lists 22 names and the number of

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[374] AX 21, at 525:3–29:18.

[375] This is a type 2 fact and is deemed admitted for that reason.

[376] AX 22, at 290:21–91:11.

[377] This is a type 2 fact and is deemed admitted for that reason.

[378] Emphasis added; AX 44; AX 45, at ¶ 5.

[379] This is a type 2 fact and is deemed admitted for that reason.

workers that worked at Aloun Farms in March 2003 was 43,[380] and 22 is a majority of 43.[381]

87. The deduction agreement at AX 44 did not include the names or signatures of any of the ten AACO-recruited Thai H-2A workers that Respondents employed at Aloun Farms.[382] [383]

88. Respondent Orian, in deposition testimony, stated:

> he [Alec Sou] was upset about the [AACO] group. He didn't like them . . . . [W]hat's happened is that he was upset about them. I think, because they refused to cooperate with his letter that he wants them to sign. I remember there were [sic] a gap, that he [Alec Sou] didn't let them [the AACO recruited H-2A workers] work. And mainly, because they didn't want to sign those document."[384] [385]

89. Respondent Orian stated that there was only one document that the workers signed after Alec Sou tried to secure their signatures.[386]

> Q. [D]id Alec Sou ask the workers to sign any documents agreeing to accept the $300 deductions? . . .
> A. I recall that Alec Sou wanted the workers to sign something. I don't remember exactly what it was . . . .
> Q. Mr. Orian, so if I understand you correctly, you're saying that Global Horizons, other than the one document that you just mentioned, doesn't have any knowledge whether Alec Sou asked the Thai workers that Global placed at Aloun Farms to sign any other documents. Is that a correct understanding? . . .
> A. My answer is that, to the best of my recollection, *there was one incident of them signing*.[387] And in the end, the workers decided that they were going to buy their own food,

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[380] AX 8, at 8–09 identifies the names of 33 of Respondents' H-2A workers who worked at Aloun Farms; AX 19, at 145:13–46:14; AX 19, at Ex. 19, DOL 298.5–.12, identifies the 10 AACO-recruited workers that worked at Aloun Farms that are not listed at AX 8, 8–09.

[381] The 22 names at AX 44, at 676, also appear on the documents associated with Aloun Farms. AX 8, at 8–09; AX 20, at 30–31; AX 24, at 32-33; AX 33, at 36–37. AX 45, at ¶ 6.

[382] AX 44; AX 45, at ¶ 7.

[383] This is a type 2 fact and is deemed admitted for that reason.

[384] AX 22, at 326:19–28:11.

[385] This is a type 2 fact and is deemed admitted for that reason.

[386] This is a type 2 fact and is deemed admitted for that reason.

[387] Emphasis added.

and that's what eventually happened. And only a cash deduction would be happening, if at all.[388]

90. None of the documents that Respondents produced in this litigation identified the total number of hours worked, by worker, by pay period, for the 43 H-2A workers that Respondents employed at Aloun Farms in March 2003.[389] [390] Forty-three H-2A workers worked at Aloun Farms.[391]

91. Respondents have not produced any payroll records in this litigation for 44 workers for the period beginning March 17, 2003, through March 19, 2003, after they admitted that these workers worked during this time period.[392] [393]

92. The payroll documents that Respondents produced in this litigation for 33 H-2A workers that they employed at Aloun Farms identified an incorrect 1.0000 rate of pay.[394] [395] The 1.0000 rate of pay is incorrect because Respondents' 30(b)(6) deponent testified that the rate of pay that Respondents paid their H-2A workers at Aloun Farms was either $8.33 or $8.35 an hour while the rate of pay they paid their Del Monte workers was $9.25 an hour.[396]

93. The payroll documents that Respondents produced in this litigation identified an incorrect "1.0000" rate of pay for the 53 workers that they employed at Del Monte Farms in 2003 even though

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[388] AX 21, at 560:14–62:17

[389] Sanctions AX 58, at RFA 82 ("None of the documents that Respondents provided through initial disclosures and discovery identified the total number of hours worked, by worker, by pay period, by the H-2A workers employed by Respondents at Aloun Farms from March 1, 2003, to April 30, 2003.").

[390] This is a type 2 fact and is deemed admitted for that reason.

[391] See Fact 86, footnote 380.

[392] July Order 10, 27; Sanctions AX 19, at RFAs 229 wherein it is deemed admitted that: "The H-2A workers that flew to Hawaii on March 16, 2003, that are identified in BSN 000259 to 000270 *did* work at one of the Hawaii Farms from March 17, 2003 to March 19, 2003." The passenger receipts at AX 29 identify many names of which the only non-Thai name that is located therein and who is not on the Thai employee list at AX 8, at 5–07, for Del Monte Farms is John Helewa. *Compare* names at AX 29, at 259–70 *with* names at AX 8, at 5–07.

[393] This is a type 2 fact and is deemed admitted for that reason.

[394] Sanctions AX 35, at 199–232 (see bottom row, seventh column from left) and AX 26, at 106:18–22, 108: 15–20.

[395] This is a type 2 fact and is deemed admitted for that reason.

[396] Fact 72, 81.

Respondents admitted that the hourly wage they paid these workers was $9.25 an hour.[397] [398]

94. Respondents listed the nature of work of the Thai H-2A workers that they employed at Aloun Farms as "Pneapples [sic] boxing" even though none of their workers who worked at Aloun Farms worked with pineapples.[399] [400] The names of these 22 workers for the February and March time period that are listed at pages AX 29, at 259–70, and AX 46, at 269.1–.8, are also listed on the time cards that Aloun Farms kept for the March 1–15, 2003, pay period and the February and March 1–15, 2008, payroll records.[401] Respondents' 30(b)(6) deponent also testified that he identifies the H-2A workers that Respondents employed at Del Monte "[m]ainly by the words 'pineapple.' That's what I saw. When it says 'pineapple' it was for me, everybody that was pineapple was Del Monte."[402]

95. Respondents produced no records in this litigation for any of the work that the ten AACO-recruited workers did at Aloun Farms in March 2003.[403] [404] While Respondents, in their response to the 2005 Admission denied that any AACO-recruited workers worked at Aloun Farms in 2005, Respondent Orian in depositions in 2006 and 2008 subsequently admitted that they did.[405]

96. Respondents admitted in two discovery responses that "some of Global's [time and pay] records are incomplete and missing."[406] [407] Respondents admitted in another discovery response that "Global no longer has complete payroll records reflecting the pay."[408]

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[397] For incorrect 1.0000 rate of pay, *see* sanctions AX 35 at 145–98 (see bottom row, seventh column from left). For $9.25 rate of pay for Del Monte_workers, *see* Fact 81; Sanctions AX 13, at RFA 16.

[398] This is a type 2 fact and is deemed admitted for that reason.

[399] Sanctions AX 25; AX 46.

[400] This is a type 2 fact and is deemed admitted for that reason..

[401] AX 19, at 145:13–46:14; AX 19 at Ex. 19, 27, 28. Respondents' 30(b)(6) deponent testified that Aloun Farms harvested vegetables and did not harvest pineapples. AX 26, at 34:4–35:7, 80:4–83:19; AX 26 at Ex. 3, at 128–137.

[402] AX 26, at 122:1–6; AX 39, at 258:12–16 (Orian stating: "It says pineapple. Pineapple was Del Monte.").

[403] Sanctions AX 58, at RFA 83.

[404] This is a type 2 fact and is deemed admitted for that reason.

[405] Fact 47, footnote 235; AX 26, at 123:4–10; AX 21, at 532:18–33:9.

[406] Sanctions AX 30, at ROG 7; Sanctions AX 52, at ROG 7.

[407] This is a type 5 fact and is deemed admitted for that reason.

[408] Sanctions AX 13, at RFA 18. It should be noted that the above quoted admission is not in the request for admission, but in the response to RFA 18.

97. Respondents' 30(b)(6) deponent admitted in deposition testimony that the number of hours listed in Respondents' Employee Detail Reports were inaccurate.[409] [410]

98. Respondents failed to maintain or provide any payroll records for two workers (Patiphon Pana, Jatupong Somsri).[411] [412]

99. On April 30, 2003, the WHD, *inter alia*, requested payroll records from Respondents.[413] [414]

100. On or about May 5, 2003, Respondents produced to the WHD 24 pages of payroll information for their H-2A employees and represented that they provided all of the payroll information requested.[415] [416]

101. Respondents admitted that the terms and conditions of employment listed in their Employment Agreements differed from the terms and conditions of employment listed in the Application for Alien Employment Certification, Agricultural and Food Processing Clearance Order and associated attachments to these documents that Respondents submitted to DOL with respect to (1) the applicability of taking federal income tax deductions; (2) what deductions could be taken; (3) a five-day versus a six-day work week; (4) whether Saturday work was optional or mandatory; (5) the number of hours to be worked during a week day; (6) the length of the work contract; and (7) whether cash advance deductions could be taken.[417] [418]

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[409] AX 26, at 111:20–12:9, AX 26 at EX 5.

[410] This is a type 2 fact and is deemed admitted for that reason.

[411] July Order 10, 27; Sanctions AX 19, at RFAs 169, 170; Sanctions AX 58, at RFAs 84, 85.

[412] This is a type 2 fact and is deemed admitted for that reason.

[413] AX 47, at DOL 298.152; AX 48, at ¶ 4, AX 48, at Ex. 1.

[414] This is a type 2 fact and is deemed admitted for that reason.

[415] Respondents produced documents on May 5, 2003 and provided all of the payroll information requested: AX 39, at 428:23–29:15, AX 39, at Ex. 46 (stating in pertinent part: "All payroll records for KS, Siam & AACO are enclosed."); AX 48, at ¶ 7. Documents produced were only 24 pages: AX 48, at ¶¶ 5–7, AX 48, at Ex. 2, DOL 52–70, 261–64, AX 48, at Ex. 3, DOL 265 (detailing that in May 2003, Respondents only provided 24 pages of payroll information consisting of: a one-page sheet having a three-column matrix (columns identified the workers' employee number, workers' name and $412.27 for each worker for the February 18–28, 2003, pay period) and a copy of a Bank of America deposit slip dated March 20, 2003, for Respondents' H-2A workers working at Aloun Farms from February to May 2003, and 23 pages of payroll check registers, ranch reports and spreadsheets for the H-2A workers that worked at Del Monte Farms); AX 57, at DOL 52–70, DOL 261–65.

[416] This is a type 2 fact and is deemed admitted for that reason.

[417] July Order 10, 27; Sanctions AX 19 to, at RFAs 180–85, 197.

[418] This is a type 2 fact and is deemed admitted for that reason.

102. As a consequence of Respondents' failure to produce the records to the Administrator when requested in 2003, the Administrator had to seek payroll records from third parties such as Aloun Farms and reconstruct the number of hours worked.[419] [420] Additionally, the Administrator did not initially identify either the correct amount of back wages due (e.g., back wages associated with the illegal federal income tax deductions) or all of the violations (e.g., earning statement violation).[421]

103. The wage statements that Respondents provided to the H-2A workers that they employed at Aloun Farms did not properly identify the rate of pay since Respondents listed 1.000 for the pay rate and the workers earned at least $8.33 an hour.[422] [423]

104. Respondents' most knowledgeable deponent testified that he did not know what the 1.0000 number under the rate of pay meant on these wage statements.[424] [425]

105. Respondents' counsel stipulated and witnesses testified that the wage statements that Respondents provided to the H-2A workers that they employed at Aloun Farms were in error because they did not accurately identify the number of hours worked since they showed the H-2A workers as working over 733 hours in a pay period.[426] [427]

106. Respondent Orian, in his July 9, 2009, deposition admitted that the numbers listed under the hour or piece rate column

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[419] AX 16, at ¶ 41.

[420] This is a type 2 fact and is deemed admitted for that reason.

[421] AX 16, at ¶ 41.

[422] For 1.000 rate *see* Sanctions AX 25, at DOL 127–37, AX 46, at DOL 269.1–.8; AX 4, at 114:4–18, AX 4, at Ex. 8, AX 6, at 115:25–18:23, AX 6, at Ex. 8. Respondents' workers earned at least $8.33 an hour. AX 26, at 200:4–7, AX 4, at 114:16–18, AX 6, at 104:9–15. The workers that are listed at pages DOL 127–37 and 269.1–.8 worked for Aloun Farms in February and March 200. AX 34, at 70, AX 19, at 145:13–46:14, 150:23–52:8, AX 19, at Ex. 19–21; AX 4, at 90:19–23; AX 6, at 48:11–15; AX 5, at 73:8–76:2.

[423] This is a type 2 fact and is deemed admitted for that reason.

[424] AX 26: Deposition, at 83:20–84:2; AX 26, at Ex. 3.

[425] This is a type 2 fact and is deemed admitted for that reason.

[426] For stipulation of wage statement being in error when it listed 733 hours *see* AX 4, at 118:17–19:14, AX 4, at Ex. 8; for witnesses testifying that workers did not work 733 or 801 hours *see* AX 4, 118:17–20; AX 26, at 84:3–85:13, AX 4, at Ex. 3; for wage statements showing frequent listing of 733 or plus hours *see* Sanctions AX 25, at 127–37, AX 46, at DOL 269.1–.4.

[427] This is a type 3 fact and is deemed admitted for that reason.

heading on the earning statements were wages and not hours or pieces.[428] [429]

107. It was physically impossible for Respondents' H-2A workers to have worked 600.03, 733.37, 766.71, 800.12, 966.72 hours in a 15 or 16-day pay period that could have at most 384 hours if a worker worked 24 hours a day, 16 days straight.[430] [431]

108. The wage statements that Respondents provided to all of the H-2A workers that they employed in Hawaii in 2003 are also in error because they failed to identify the number of hours offered broken out by offers in accordance with and over the three-quarters guarantee.[432] [433]

109. The Employment Agreements that Respondents sent to the recruiters that the H-2A workers subsequently signed stated:

> Employee understands and agrees that ~~GMI~~ GHM shall be Responsible [sic] for all withholding of federal and state taxes from wages Earned [sic] by the EMPLOYEE and EMPLOYEE shall be responsible for making certain that EMPLOYER withholds such taxes. EMPLOYEE understands and agrees that EMPLOYER is responsible for the payment of these taxes.[434] [435]

110. Respondents provided the H-2A workers with contracts titled Employment Agreements that contained the terms and conditions of the H-2A workers' employment; these Employment Agreements were jointly signed by Respondents and the H-2A workers.[436] The evidence proving these statements are the same evidence that it listed for Fact 109.[437]

111. Specifically, the Employment Agreements specified in Fact Nos. 109 and 110 did not address the following terms and

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[428] AX 39, at 255:17–57:13, 263:15–65:13, 266:12–67:13; AX 39, at Ex. 11, 25 26.

[429] This is a type 5 fact and is deemed admitted for that reason.

[430] For wage statements having 600.03, 733.37, 766.71, 800.12, 966.72 hours see Sanctions 25, at 127–37, AX 46, at DOL 269.1–.8. For Respondents' Pay periods being 15 to 16 days long see AX 26, at 131:22–32:2.

[431] This is a type 2 fact and is deemed admitted for that reason.

[432] Sanctions AX 25, at DOL 127–37, AX 46, at DOL 268–69.8.

[433] This is a type 3 fact and is deemed admitted for that reason.

[434] Sanctions AX s58, at RFAs 129–30; July Order 10, 27; Sanctions AX 19, at RFA 193; AX 4, at 33:4–34:7, 37:4–41:4, AX 4, at Ex. 4; AX 5, at 27:23–31:6, AX 5, at Ex. 4; AX 6, at 39:2–41:25, AX 6, at Ex. 5; Sanctions AX 20, at DOL 249–52, 254.2–.5, 254.19–.22, 254.33–.36; AX 49, at 254.6–.13, 254.53–.60.

[435] This is a type 2 fact and is deemed admitted for that reason.

[436] This is a type 3 fact and is deemed admitted for that reason.

[437] *See* Fact 109.

conditions of employment specified in 20 C.F.R. §§ 655.102(a)&(b): (1) that the preferential treatment of aliens is prohibited—20 C.F.R. § 655.102(a); (2) workers' compensation—20 C.F.R. § 655.102(b)(2); (3) employer-provided items—20 C.F.R. § 655.102(b)(3); (4) three-quarters guarantee—20 C.F.R. § 655.102(b)(6); (5) the records the employer will maintain—20 C.F.R. § 655.102(b)(7); (6) hours and earning statements—20 C.F.R. § 655.102(b)(8); (7) abandonment of employment—20 C.F.R. § 655.102(b)(11); (8) contract impossibility—20 C.F.R. § 655.102(b)(12); and (9) copy of the work contract—20 C.F.R. § 655.102(b)(14).[438] [439]

112. Respondents admitted that the information in their Employment Agreements and the actual employment conditions of the H-2A workers in Hawaii differed in terms of the wage rate, principal system of payment (piece rates versus hourly wage), frequency of payment, work schedule, type of work, and deductions.[440] [441]

113. In February 2005, ETA issued a determination notice to each Respondent of a Prospective Denial of Temporary Alien Agricultural Labor Certification for three years ("Debarment Notice"). This Debarment Notice was "based on three substantial violations involving: (1) the terms and conditions of employment, (2) worker benefits, and (3) workers' pay."[442] [443]

114. The OFLC Administrator determined that Respondents committed a substantial violation regarding the terms and conditions of employment because he found: (1) Respondents failed to provide their H-2A workers with a copy of a contract related to their Hawaii work not later than the day the work commenced in violation of 20 C.F.R. § 655.102(b)(14); (2) Respondents had a pattern of activity of undermining the terms and conditions of employment (e.g., (a) securing a certification to employ workers in Arizona and then unilaterally employing H-2A workers in Hawaii in violation of 20 C.F.R. §§ 655.101–.103; (b) soliciting agreements from workers to decrease their wages in violation of 29 C.F.R. § 501.4; and (c) discriminating against workers by taking adverse action against those workers who asserted their rights in violation of 20 C.F.R. § 655.103(g)

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[438] *Compare* 20 C.F.R. §§ 655.102(a)&(b) *to* Sanctions AX 20, at DOL 249–52, 254.2–.5, 254.19–.22,254.33–.36; AX 49, 254.6–.13, 254.53–.60.

[439] This is a type 2 fact and is deemed admitted for that reason.

[440] July Order 10, 27; Sanctions AX 19, at RFAs 186–91; Sanctions AX 58, at RFA 95.

[441] This is a type 2 fact and is deemed admitted for that reason.

[442] AX 50 2–3.

[443] This is a type 2 fact and is deemed admitted for that reason.

and 29 C.F.R. § 501.3.); and (3) there were no extenuating circumstances involved with the aforementioned violations.[444] [445]

115. None of Respondents' H-2A workers have ever filed a workers' compensation claim during the many years that Respondents have employed them and Respondent Orian boasted about all of the money that Respondents saved in workers' compensation premiums because no workers' compensation claims were filed.[446] [447]

116. Respondent Orian personally signed the H-2A Application (ETA 750 Form), H-2A Clearance Order (ETA 790 Form), and the cover letter for Respondents' submission.[448] [449]

117. Respondents brought H-2A workers into the United States in February and March 2003, and employed them in Hawaii based on the certification that ETA approved on August 19, 2002 to employ workers in Arizona.[450] [451]

118. In its August 25, 2008, Order, this Court established the following findings of Fact on page 27: "Respondents did not have any contracts with any farmer in Arizona to provide any H-2A workers in 2003 for the ETA 6555/mal H-2A certification" and "Respondents did not have any communications with any farmer in Arizona to provide any H-2A workers in 2003 for the ETA 6555/mal H-2A certification."[452]

119. Instead of employing Thai H-2A workers certified for Arizona in Arizona, Respondents employed them in Hawaii in February and March 2003 despite the fact that Respondents had no certification or authorization by DOL to employ H-2A workers in Hawaii during that time period.[453] [454]

120. Respondents did not notify any DOL agency, to include ETA, prior to April 1, 2003, that Respondents were employing H-2A

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[444] AX 50 2–3; AX 18 ¶¶ 5–6.

[445] This is a type 1 fact and is deemed admitted for that reason.

[446] AX 51, at 152:2–12, 35:13–38:3.

[447] This is a type 5 fact and is deemed admitted for that reason.

[448] AX 26, at 58:15–59:16, 61:16–62:21, AX 26, at Ex.51, DOL 544–45, AX 26, at Ex.52, DOL 546–59; AX 3, at 217:2–19, AX 3, at Ex. 22.

[449] This is a type 3 and 5 fact and is deemed admitted for those reasons.

[450] Sanctions AX 13, at RFAs 3, 45, 65.

[451] This is a type 2 fact and is deemed admitted for that reason.

[452] This is a type 3 fact and is deemed admitted for that reason.

[453] AX 26, at 71:3–10, AX 26, at Ex. 51, DOL 544–45, AX 26, at Ex. 52, 546–59; Sanctions AX 13, at RFAs 1–3, 45, 65; *see also* judicial admission made by Respondents in Respondents' Opposition to Motion for Rule 37 Sanctions [hereinafter "R37 Sanctions Opposition"]; Memorandum of Points and Authorities, dated October 19, 2007 at 9 [hereinafter "Oct. 2007 Memo"].

[454] This is a type 2 fact and is deemed admitted for that reason.

workers in Hawaii who had been hired pursuant to a Temporary Labor Certification for the state of Arizona issued by the ETA on August 19, 2002.[455] [456]

121. Respondents continued to employ Thai workers hired pursuant to the ETA 6555/mal H-2A certification in Hawaii even after their 6555/mal certification had expired on March 31, 2003.[457] [458]

122. Respondents admitted in one of their briefs that they employed these Thai H-2A workers in Hawaii even though "U.S. DOL did not approve these workers to work in Hawaii."[459] [460]

123. Respondents admitted that they "did not solicit any corresponding United States workers pursuant to an Application for Alien Employment Certification and Agricultural and Food Processing Clearance Order to perform work in Hawaii during the February 17, 2003, to March 31, 2003, time period."[461] [462]

124. Respondents also admitted that they employed Thai H-2A workers in Hawaii pursuant to the 6555/mal certification in February and March 2003.[463] [464]

125. Respondents submitted an H-2A alien application and clearance order to ETA to employ workers in Hawaii from April 30, 2003, to December 15, 2003.[465] [466]

126. Respondents identified in the Clearance Order (ETA 790 form) for the April 30, 2003, to December 15, 2003, time period and its associated cover letter that the workers would work at Aloun Farms.[467] [468]

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[455] Sanctions AX 13, at RFA 3.

[456] This is a type 2 fact and is deemed admitted for that reason.

[457] Sanctions AX 13, at RFA. 40; AX 52; AX 53; AX 54.

[458] This is a type 2 fact and is deemed admitted for that reason.

[459] Respondents' Opposition to Motion for Rule 37 Sanctions; Memorandum of Points and Authorities, dated October 19, 2007 at 9.

[460] This is a type 2 fact and is deemed admitted for that reason.

[461] Sanctions AX 58, at RFA 80.

[462] This is a type 2 fact and is deemed admitted for that reason.

[463] Sanctions AX 13, at RFAs 3, 45, 46, 50, 51, 65.

[464] This is a type 2 fact and is deemed admitted for that reason.

[465] Sanctions AX 13, at RFA 14; Sanctions AX 32.

[466] This is a type 2 fact and is deemed admitted for that reason.

[467] Sanctions AX 32, at DOL 457, 545.

[468] This is a type 2 fact and is deemed admitted for that reason.

127. Respondents used radio and newspaper advertisements to advertise the work in this April-to-December H-2A application to United States workers from April 11–14, 2003.[469] [470]

128. At least 130 United States workers applied for the work opportunity described in Fact Nos. 125–27 and ETA determined on April 16, 2003, that 32 United States workers were deemed qualified for the work.[471] [472]

129. Respondents repeatedly stated in their interrogatory responses that they did not violate H-2A's wage provisions since the hourly wage they paid their workers in Hawaii was higher than what was certified for Arizona.[473] [474]

130. The difference between the hourly rate that Respondents paid the H-2A workers that they employed at Aloun Farms and the AEWR that was in effect in Hawaii, at times, was more than a dollar an hour.[475]

131. When Respondents submitted their H-2A application for Arizona for the September 9, 2002, to March 31, 2003, time period: (1) Arizona had the seventh lowest AEWR ($7.12) in the United States; (2) Hawaii had the highest AEWR ($9.25) in the United States; and (3) Respondents did not have any work in Arizona for the workers.[476] [477]

132. Respondents stated in their interrogatory responses that they illegally employed the H-2A workers in Hawaii because they learned, after these workers arrived in the United States, that no work was available in Arizona for them; Respondents made this claim in the

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[469] AX 21, at 295:16–98:17, AX 21, at Ex. 21.

[470] This is a type 2 fact and is deemed admitted for that reason.

[471] At least 130 workers applied for the April 30, 2003, to December 15, 2003, work. Ax 55. Thirty-two United States workers deemed qualified. AX 56 (letter from ETA to Mordechai Orian wherein ETA only certified Respondents' H-2A application for 68 workers instead of a 100 because ETA found that Hawaii's Workforce Agency referred 32 qualified workers for the April to December H-2A application).

[472] This is a type 2 fact and is deemed admitted for that reason.

[473] Sanctions AX 30 to, at ROG 7; Sanctions AX 52, at ROG 7. The rate certified for Arizona was $7.12 an hour. AX 2, at 548.

[474] This is a type 2 fact and is deemed admitted for that reason.

[475] *Compare* the $9.42 rate at 68 Fed. Reg. 53, at 13331, *to* the $8.33 or $8.35 rates at Fact 72. This is a type 2 fact and is deemed admitted for that reason.

[476] For numbers (1) and (2): 67 Fed. Reg. 96, at 35150; the states whose AEWR was lower than Arizona are as follows: Arkansas, Mississippi and Louisiana at $6.77, Kentucky at $7.05, and Tennessee and West Virginia at $7.07. For number (3) *see* August Sanctions 28.

[477] This is a type 3 fact and is deemed admitted for that reason.

first set of interrogatory responses that they answered in October and November 2005.[478] [479]

133. Respondents also claimed in their Opposition to Rule 37 Sanctions filed with this Court on October 19, 2007, that they illegally employed the H-2A workers in Hawaii because they learned, after these workers arrived in the United States, that no work was available for them in Arizona.[480] [481] The Administrator interpreted Respondents' statement that "the Arizona farmer suddenly canceled the contract before their arrival" to mean before the H-2A's workers' alleged arrival at the Arizona farm after they arrived in the United States because Respondents later stated in this Opposition that they tried to "avoid having to send these workers back to Thailand."[482]

134. Respondent Orian admitted that he was personally involved in the decision to move the Thai workers to Hawaii.[483] [484]

135. Respondents admitted that all ten of the Thai H-2A workers that are listed under the "'KS #2 Group (10)' heading on BSN 000077 left Thailand for the United States after Respondents started sending H-2A workers to Hawaii in February 2003."[485] [486]

136. Respondents also admitted that all of their AACO-recruited H-2A workers left Thailand for the United States after Respondents started sending H-2A workers to Hawaii in February 2003.[487] [488]

137. Respondents employed 55 AACO-recruited workers in Hawaii in 2003.[489] [490]

138. When Respondent Orian was confronted with the fact that his discovery responses indicated that over 70% of the Thai H-2A workers left Thailand for the United States after Respondents had started sending Thai H-2A workers to Hawaii, Respondent Orian admitted that the Thai H-2A workers were brought to the United

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[478] Sanctions AX 30, at ROG 2; Sanctions AX 52, at ROG 2.

[479] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[480] R37 Sanctions Opposition; Oct. 2007 Memo 9.

[481] This is a type 3 and 4 fact and is deemed admitted for those reasons.

[482] R37 Sanctions Opposition; Oct. 2007 Memo 9.

[483] AX. 39, at 341:10–42:11.

[484] This is a type 1 fact and is deemed admitted for that reason.

[485] July Order 10, 27; Sanctions AX 19, at RFA 225.

[486] This is a type 2 fact and is deemed admitted for that reason.

[487] Sanctions AX 58, at RFA 87.

[488] This is a type 2 fact and is deemed admitted for that reason.

[489] AX 22, at 327:7–28:21.

[490] This is a type 2 fact and is deemed admitted for that reason.

States for the benefit of Respondents, when he stated: "the company [Global] would be in bad shape because they couldn't take workers anymore from Thailand."[491] [492]

139. Respondent further stated that the reason why Respondents would not be able to bring any more workers from Thailand is "because [of] the bad experience of the first one [the 6555/mal certification] for sure [the Thai government] will deny everybody."[493] [494]

140. Respondent Orian repeatedly boasted how Respondents had an extensive profit margin with H-2A workers. Specifically, Respondent Orian stated: (1) "in H-2A our markup was just enormous. We made literally 20 percent not less profit on each account, not less than 20 percent;" (2) "it was great big difference;" (3) "I had a few advantages on H2-A that are amazing. We don't have matching taxes [e.g., social security];" (4) "Workers comp' went to the minimum of minimum because I had zero claims. People coming from overseas not looking to screw the systems;" and (5) "Yes, everything was much less expenses. That's why H-2A we are making more money."[495] [496] The response listed in (5) was in response to a question of: "Not only were you getting a better rate on the H-2A workers [than the U.S. workers], you had less expenses on the H-2A workers."[497]

141. Respondents' payroll records support Respondent Orian's testimony because they demonstrate that Respondents did not take any payroll deductions for social security and Medicare from the wages of the H-2A workers that they employed in Hawaii in 2003.[498] [499]

142. The OFLC Administrator determined that Respondents committed a substantial violation regarding Respondents' failure to provide the required worker benefits because he found: (1) Respondents committed a significantly injurious act of failing to reimburse their H-2A workers for their T&S costs while traveling from their homes to the United States after they completed fifty percent of the contract period; (2) Respondents had a pattern of activity of failing

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[491] AX 39, at 298:3–21, 307:23–08:10, 337:4–18.

[492] This is a type 5 fact and is deemed admitted for that reason.

[493] The actual quotation is at AX 39, at 308:2–4; however, the following portion of the deposition should be read to put this quote into context: 306:22–08:10.

[494] This is a type 2 fact and is deemed admitted for that reason.

[495] AX 51, at 150:15–23, 152:2–19.

[496] This is a type 3 and 5 fact and is deemed admitted for those reasons.

[497] AX 51, at 152:13–15.

[498] Sanctions AX 35.

[499] This is a type 2 fact and is deemed admitted for that reason.

to provide the required benefits to their H-2A workers (e.g., (a) charging workers for housing-related expenses such as water, sewage, and electricity in violation of 20 C.F.R. § 655.102(b)(1); (b) failing to pay the required T&S costs to the H-2A workers from the United States to their homes after they finished the contract period in violation of 20 C.F.R. § 655.102(b)(5)(ii); and (c) taking deductions from the H-2A workers' wages to pay for meals and basic living supplies even though these deductions were not identified in their Application for Temporary Alien Employment and related paperwork filed with, and approved by, ETA in violation of 20 C.F.R. § 655.102(b)(13).); and (3) there were no extenuating circumstances involved with the aforementioned violations.[500] [501]

143. The sum of $55,023.77 is a significant amount of money to the Thai H-2A workers given that it only costs 35 cents (U.S. currency) for a meal in Thailand.[502] [503] Prasoet Hongsahin traveled to the United States in February 2003.[504] The Dollar to Baht exchange rate in February 2003 was 43.10 Baht to 1 Dollar.[505] Using the 43.10 Baht to 1 Dollar means that 15 Baht is equivalent to 35 cents.

144. The OFLC Administrator determined that Respondents committed a substantial violation regarding Respondents' pay practices because he found: (1) Respondents committed a significantly injurious act in failing to honor the three-quarters guarantee to a significant number of workers; (2) Respondents had a pattern of violations related to paying the workers their monies due (e.g., (a) paying H-2A workers less than the applicable AEWR in violation of 20 C.F.R. § 655.102(b)(9); (b) failing to pay H-2A workers for all of the work performed in violation of 20 C.F.R. § 655.102(b)(10); (c) failing to maintain accurate payroll records in violation of 20 C.F.R. § 655.102(b)(7); and (d) failing to provide the required payroll records to DOL when requested in violation of 20 C.F.R. § 655.102(b)(7).); and (3) there were no extenuating circumstances involved with the aforementioned violations.[506] [507]

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[500] AX 50: 2–3; AX 18, at ¶¶ 5, 7.

[501] This is a type 1 fact and is deemed admitted for that reason.

[502] AX 7, at 30:2–31:1.

[503] This is a type 5 fact and is deemed admitted for that reason.

[504] AX 8, at 3.

[505] AX 14, at ¶ 4.

[506] AX 50 2–3; AX 18, at ¶¶ 5, 8.

[507] This is a type 1 fact and is deemed admitted for that reason.

145. The names of the 54 AACO-recruited workers at Sections D.1.c.ii and D.1.c.iii, *infra*, do not appear in Section D.1.c.iv, *infra*.[508] It should be noted that as specified in Fact 54, the 44 AACO-recruited workers identified in Section D.1.c.iii., by Court Order, are in addition to the ten AACO-recruited workers at Section D.1.c.ii.[509]

D. Legal Analysis and Conclusions

The Administrator met his burden under *Anderson v. Liberty Lobby* to show there are no genuine issues of material fact remain for trial through his detailed list of undisputed facts. All but three on that list qualify as undisputed; the excluded ones don't preclude summary disposition because they are legal conclusions that will be separately considered.[510] Respondents' attempt to contest other facts have failed for the reasons already explained: the Respondents either admitted those facts; sanctions prevent them from contesting the facts; they failed to cite to the record to show a dispute; or the evidence they cited doesn't create a genuine dispute.[511] The facts now established show that Respondents violated the Immigration and Nationality Act, 8 U.S.C. § 1188, as amended in the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101, *et seq.* and its applicable implementing regulations, 20 C.F.R. § 655 and 29 C.F.R. § 501.4. Relying solely on these facts the Administrator is entitled to summary decision for their 11 categories of violations of the H-2A program.[512] The analysis that follows assesses the Respondents' liability on summary decision[513] and lays out each violation before proceeding to the separate issue of back wages and penalties due.

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[508] *Compare* the names at Fact 42 and 59 *to* the names of the AACO workers in Fact 8, 29, 49 and 54.

[509] August Sanctions 64.

[510] *See* Section IV.B.1.

[511] *See* Section IV.B.

[512] *See Anderson*, 477 U.S. 242, 254 (1986).

[513] *See* Summary Decision Memo, Section IV.

1. Violations of the H-2A Program

a. Respondents Failed to Satisfy the Transportation and Subsistence Requirements of 20 C.F.R. § 655.102(b)(5).

i. **Respondents violated 20 C.F.R. § 655.102(b)(5)(i) because they failed to satisfy any of the inbound transportation and subsistence requirements of the H-2A regulations.**

An H-2A employer is required by 20 C.F.R. § 655.102(b)(5)(i),[514] to provide T&S from the foreign worker's travel from home to the work site in one of the following three ways: (1) advancing T&S costs to the worker; (2) providing the worker with T&S; or (3) reimbursing the worker for the T&S costs after the worker has completed fifty percent of the contract period. Respondents violated 20 C.F.R. § 655.102(b)(5)(i) because they met none of these T&S requirements.

They advanced no T&S funds.[515] In their interrogatory discovery responses, the Respondents repeatedly claimed that instead they provided "reimbursement for airfare paid for their initial trip from Thailand to Los Angeles."[516] Respondents acknowledged that these alleged "reimbursement[s] of airfare for the initial trip from Thailand to Los Angeles were made to enable the workers to recoup that portion of the workers' payments to Thai recruiting agencies that had been used to pay for air transportation from Thailand to Los Angeles."[517]

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[514] The applicable portion of the regulation says:

> The employer shall advance transportation and subsistence costs (or otherwise provide them) to workers when it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H-2A workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment.

20 C.F.R. § 655.102(b)(5)(i).

[515] August Sanctions 37, 63; Fact 8.

[516] Fact 8.

[517] Fact 10.

These reimbursements would comport with the statements that Respondents made in the documents that they sent to the recruiting companies they dealt with.[518] The Respondents accepted fully responsibility to reimburse the workers in the contracts they entered into with the Thai recruiting companies that found the H-2A workers employed in Hawaii in 2003.[519] The reimbursements were also in keeping with the statements the Respondents made in the Clearance Order they filed with ETA where they promised to reimburse the H-2A workers for the T&S costs they incurred while traveling from their homes to the place of employment after they completed 50% of the contract period.[520] The Respondents' consistent claims that they would and did provide T&S reimbursements negates any subsequent claim that they provided travel advances for T&S due. The Respondents also are precluded from claiming they provided travel advances because under the discovery sanctions imposed.[521]

Respondents failed the second method for providing the required inbound T&S as well. In response to Requests for Admissions, Global repeatedly admitted that it did not provide the workers with either inbound T&S while in Thailand or inbound T&S while traveling from Bangkok, Thailand to Los Angeles, California.[522]

Respondents cannot satisfy the final method of providing inbound transportation, when it already has been determined that: "Respondents failed to reimburse the H-2A workers that are at issue in this litigation for any of the transportation expenses these H-2A workers incurred in February and March 2003 when they were traveling pursuant to the ETA 6555/mal H-2A certification after they had completed more than fifty percent of the contract period."[523] Respondents likewise did not reimburse the H-2A workers for their subsistence costs because they did not provide any documents during discovery before August 17, 2007, demonstrating reimbursements. The Respondents have been precluded from asserting that they made a reimbursement payment unless they delivered to the Administrator

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[518] Fact 11.

[519] August Sanctions 19. The sanction imposed was: "Respondents contractual agreement with the H-2A workers at issue in this litigation was to reimburse them for transportation costs they incurred while traveling to the United States for the ETA 6555/mal H-2A certification after they completed 50% of this H-2A certification." Facts 12, 13.

[520] Fact 14.

[521] Fact 8.

[522] Fact 15.

[523] August Sanctions 19; Fact 16.

before August 17, 2007 a receipt a worker signed.[524] The H-2A workers repeatedly stated that they paid for their own inbound T&S.[525] Respondents never made the required inbound T&S reimbursements despite their commitment to do so in the Clearance Order certified by ETA.[526]

The Respondents violated 20 C.F.R. § 655.102(b)(5)(i) because they failed to meet any of the three T&S requirements after their workers completed 50% of the contract period.

ii. Respondents violated 20 C.F.R. § 655.102(b)(5)(ii) because they failed to satisfy the outbound transportation and subsistence requirements in Thailand.[527]

An H-2A employer is required by 20 C.F.R. § 655.102(b)(5)(ii)[528] to provide outbound T&S (from the work site to the worker's home) in one of two ways: provide the worker with T&S directly or pay for the worker's T&S costs after the worker has completed the contract period. Respondents did neither to provide outbound T&S. Respondents admitted in their discovery responses that they did not provide outbound T&S for the workers' travel in Thailand from the Bangkok Airport to their homes.[529]

First, Respondents cannot claim they paid for their H-2A workers' outbound T&S after the workers completed the contract period. The Respondents admitted that all of the Thai H-2A workers that they employed in Hawaii in 2003, worked until at least April 1, 2003,[530] which demonstrates that these workers completed the

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[524] August Sanctions 37, 63; Fact 17.

[525] Fact 18.

[526] Fact 19.

[527] The Administrator is only seeking the outbound T&S within Thailand because the evidence establishes that Respondents paid for the airfare for the H-2A workers to travel from Hawaii to Thailand.

[528] This regulation provides in pertinent part: "If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer." 20 C.F.R. § 655.102(b)(5)(ii). The subsequent employer provision in this regulation is not at issue in this litigation because a subsequent H-2A employer after Respondents did not exist as Respondents' H-2A workers were deported by the United States government since their visas and work authorizations were not extended. Fact 20.

[529] Fact 21.

[530] Fact 22.

certification's contract period which ended on March 31, 2003.[531] The Respondents did not produce any documents in discovery before August 17, 2007 to demonstrate that they paid the workers' T&S costs. Under a sanctions order the Respondents cannot now claim that they paid the workers' outbound T&S costs from the Bangkok Airport to their homes.[532] Second, the H-2A workers repeatedly claimed that they paid for their own outbound T&S from the Bangkok Airport to their homes in May 2003.[533] Lastly, Respondents failed to provide either the required T&S or T&S reimbursements even though they committed to do so in the Clearance Order that was certified by ETA.[534]

The Respondents violated the requirements of 20 C.F.R. § 55.102(b)(5)(ii) because outbound T&S was not provided by Respondents, nor did they pay those costs when the H-2A workers traveled from the Bangkok Airport back to their homes.

b. Respondents Failed to Satisfy the Three-Quarters Guarantee Requirements of 20 C.F.R. § 655.102(b)(6).

An H-2A employer is required by 20 C.F.R. § 655.102(b)(6),[535] to provide H-2A workers three-quarters of the work specified in the job contract, measured from the day after the worker's arrival at the work site to the end of the contract period. If the H-2A employer does not provide three-quarters of the work previously specified, then the H-2A employer is required to provide the H-2A workers the difference in pay between what the worker earned and what the worker would have earned if the H-2A employer provided the work for three-quarters of the aforementioned time period.[536] Respondents modified this

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[531] Fact 5.

[532] August Sanctions 37, 63; Facts 8, 23.

[533] Fact 24.

[534] Fact 25.

[535] This regulation provides in pertinent part:

> The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the expiration date specified in the work contract or in its extensions, if any. If the employer affords the U.S. or H-2A worker during the total work contract period less employment than that required under this paragraph (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

20 C.F.R. § 655.102(b)(6).

[536] 20 C.F.R. § 655.102(b)(6).

regulatory requirement in their Attachment to the ETA 790 Form—Agricultural and Food Processing Clearance Order—by providing a more stringent requirement by changing the start date from the day after the worker arrives at the work site to when "the worker is ready, willing, able and eligible to work."[537] ETA certified this more stringent requirement.[538]

Respondents admitted that the "H-2A workers that Respondents employed in Hawaii in 2003 were ready, willing, able, and eligible to work in the United States when they arrived in Los Angeles in February and March 2003."[539] The deposition testimony of the H-2A workers employed in Hawaii in February and March 2003 also indicated that they were ready, willing, and able to work i when they arrived in the United States.[540]

Respondents violated the three-quarters guarantee requirement by failing to offer 68 workers either employment or pay that would cover three-quarters of the contract period. This violation is evident from a payroll document that Respondents didn't produce during the Administrator's initial H-2A investigation[541] and Respondents' admission that all of their workers worked the entire contract period.[542] Using this evidence, the Administrator determined that Respondents violated 20 C.F.R. § 655.102(b)(6) because there was a difference in the number of hours offered and the number of hours that should have been offered for 68 workers.[543]

As the Administrator argues,[544] Respondents' cannot claim any of the defenses to the three-quarters guarantee such as impossibility, abandonment of employment, or worker termination for cause, under 20 C.F.R. § 655.102(b)(11) & (12). The Respondents admitted (1) their H-2A workers worked until the end of the March 31, 2003, contract period;[545] (2) Respondents had "no communication with the State of Hawaii concerning the H-2A workers at issue in this case";[546] and (3) Respondents did not notify Hawaii's local job office in 2003 that any of

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[537] Fact 35.

[538] Fact 5.

[539] Fact 36.

[540] Fact 37.

[541] Fact 40.

[542] Fact 22.

[543] Fact 41.

[544] Summary Decision Memo 13.

[545] Fact 22.

[546] Fact 37.1.

their H-2A workers who were working in Hawaii voluntarily abandoned their employment with Respondents.[547]

Respondents offer two defenses to the Administrator's three-quarters guarantee claim: a) it never became applicable because the Thai H-2A workers never traveled to Arizona; and b) even if it was triggered, Respondents satisfied it.[548] Respondents base their first defense on the quotation of the implementing regulations that the three-quarters guarantee applies "beginning with the first workday after the arrival of the worker at the place of employment . . . ."[549] Respondents support their second claim by asserting that (1) the workers worked the full contract period, and (2) the Administrator is making a technical argument that found a violation of the three-quarters guarantee because Respondents' employed the workers in Hawaii instead of Arizona.[550]

The Respondents' themselves changed the start date from the day after the worker arrives at the work site to when "the worker is ready, willing, and eligible to work."[551] ETA certified and approved this change[552] Consequently, the three-quarters guarantee was triggered, regardless of the workers' location, when the workers were "ready, willing, and eligible to work." In fact, Respondents admitted that the "H-2A workers [they] employed in Hawaii in 2003 were ready, willing, able, and eligible to work in the United States when they arrived in Los Angeles."[553] There is no evidence that the workers ever worked in Los Angeles during the contact period.[554] Likewise, the basis of this claim is not that the workers worked in different states; it is based instead on the time period when the workers were ready, willing and able to work, but not provided the required hours or pay.[555]

Respondents' claim that they satisfied the three-quarters guarantee is also unsupported. Respondents offered no evidence to establish what was required under the three-quarters guarantee, what they offered, how many hours they paid, and whether they actually

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[547] Fact 38.

[548] Opposition to Summary Decision 7–8.

[549] *Id.* at 8 (citing 20 C.F.R § 655.102(b)(6)).

[550] *Id.* at 8.

[551] Fact 35.

[552] Fact 5.

[553] Fact 36

[554] Garcia Declaration in Support of the Administrator's Reply to Respondents' Opposition to Administrator's Motion for Summary Judgment [hereinafter "Garcia Reply Decl."] ¶ 4.

[555] Summary Decision Memo12–14.

met the three-quarters guarantee by comparing the hours offered and worked to what was required. The Respondents instead cite to the regulation's requirements and make a conclusory claim that they satisfied it.[556] These conclusory claims don't defeat a summary judgment motion.[557]

Lastly, the Respondents' assertion that they satisfied the three-quarters guarantee is inconsistent with other proof. The Administrator relied on Facts Nos. 5, 22, 35–41 to determine this violation. Respondents contested Facts. Nos. 22, 35, 38, 40, and 41, but those facts have been deemed admitted.[558] The Respondent's violation of the three-quarters guarantee is undisputed.

c. Respondents Failed to Pay Their Thai H-2A Workers the Wages Due in Violation of 20 C.F.R. § 655.102(b)(10).

An H-2A employer is required by 20 C.F.R. § 655.102(b)(10),[559] to pay H-2A workers at least twice a month. Several H2-A workers were not timely paid.

i. Respondents failed to pay 4 workers any wages for their work at Aloun Farms for 12 days in February 2003.

The August Sanctions order found that: "Respondents have never paid four of these 11 H-2A workers for their February 2003 work in Hawaii."[560] Respondents employed these 4 workers for 12 days at Aloun Farms in February 2003.[561] The Administrator determined that Respondents owed these four workers $1,649.08 in back wages for this violation by adding the net wage amounts ($412.27 for each worker) in

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[556] Opposition to Summary Decision 8.

[557] *McSherry v. City of Long Beach*, 584 F.3d 1129, 1138 (9th Cir. 2009) ("Summary judgment requires facts, not simply unsupported denials or rank speculation."); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.").

[558] *See* Section IV.C.

[559] This regulation provides in pertinent part: "The employer shall state the frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least twice monthly whichever is more frequent)." 20 C.F.R. § 655.102(b)(10).

[560] The names of these four H-2A workers are: Asarin Nongphue; Chaiyong Wisarutkichaka; Chatchawan Suphawan; and Wanchai Nongphue." See August Sanctions 32; Fact 42.

[561] Fact 43.1.

Respondents' payroll records for these four workers for their February work.[562]

ii. Respondents failed to pay ten workers for much of their March 2003 work.

The violation for not paying ten workers[563] in March 2003 is broken into two parts because of the different factual circumstances and the sanctions entered. The first part includes from March 8 to 11, 2003, and the second part includes March 7, 2003, and the weekdays from March 12, 2003, to March 25, 2003.

The Respondents failed to pay 10 workers for their work at Aloun Farms during the March 8–11, 2003, time period. The August Sanctions found that "the ten workers identified in Exhibit 14 [to the 2007 Sanctions Motion] worked at Aloun Farms for the days specified in Exhibit 14."[564] The Respondents employed these ten workers for three days at Aloun Farms in March 2003.[565] The Respondents did not produce any payroll records showing any compensation paid to these workers for any work that they performed at Aloun Farms in March 2003.[566] Because the Respondents produced no payroll records that include a cancelled check or wage receipt with the H-2A workers' signatures, the Respondents failed to pay these ten workers any wages for their March 2003 work at Aloun Farms.[567]

Respondents also failed to pay these workers for 7 to 11 other days in Hawaii. It has already be determined that all 10 worked every available weekday from March 7, 2003, to March 31, 2003.[568] No payroll records were produced for any work that these 10 workers performed from March 7, 2003, to March 25, 2003, except for payroll records for Natthawut Konwaen from March 20, 2003, to March 25, 2003.[569] What the Respondents produced for eight of these 10 workers for March 2003 demonstrate that they only received wages for the

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[562] Fact 43.2.

[563] The names of these ten H-2A workers are Siri Kaekhamfu, Sarit Khantak, Natthawut Konwaen, Kharom Munnanad, Chaiwijit Munwaree, Thongyai Palamee, Patiphon Pana, Phian Phumkhokrak, Worachit Samerkarn, and Jatupong Somsri. Fact 44.

[564] August Sanctions 20; Fact 45.

[565] Fact 46.

[566] Fact 47.

[567] August Sanctions 37, 63; Fact 8.

[568] August Sanctions 35, 54; Fact 49.

[569] Fact 50.

hours listed on a time sheet having Del Monte written on it.[570] Counting March 7th, and not counting March 10th and March 11th, there were seven weekdays between March 6, 2003, and March 20, 2003, and 11 weekdays between March 6, 2003, and March 26, 2003.[571] The August Sanctions found the Respondents did not pay these workers all of their wages due, because Respondents did not produce evidence of payment via cancelled checks or cash receipts with the H-2A workers' signatures for these ten H-2A workers for the 7 or 11 additional days of work.[572]

iii. Respondents failed to pay 44 workers for 3 days of work in March 2003.

The August Sanctions found that: "Not counting the ten AACO-recruited workers listed in the previous paragraph[573], the remaining 44 AACO-recruited workers identified at Sanctions AX 15 and 45 worked all weekdays from March 17, 2003, to March 19, 2003."[574] Additionally, Respondents admitted that these 44 workers worked at one of the Hawaiian farms (Aloun Farms or Del Monte Farms) from March 17, 2003, to March 19, 2003.[575] Respondents did not produce evidence of payment via cancelled checks or cash receipts with the H-2A workers' signatures for any work that these 44 workers performed from March 17, 2003, to March 19, 2003.[576] Pursuant to the August Sanctions, as a consequence of the failure to produce records showing payment for this work, Respondents owe these 44 workers three days of pay for their March 2003 work.[577]

iv. Respondents failed to pay 22 workers for their work in March 2003.

Respondents produced Employee Detail Reports in this litigation that, *inter alia*, identified the check number, check issue date and the net wages due.[578] Twenty-two of the check numbers listed in these Employee Detail Reports for the March 2003 work are not listed on the bank statements or among cancelled checks that Respondents

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[570] Fact 51.

[571] Fact 52.

[572] August Sanction 37, 63; Fact 8.

[573] *See* Section IV.D.1.c.ii.

[574] August Sanctions 64; Fact 54.

[575] Fact 55.

[576] Fact 56.

[577] Fact 8.

[578] Fact 58.

produced in this litigation.[579] Respondents have not produced any documents to show that any of the 22 workers signed a receipt acknowledging cash payment of the monies these 22 missing checks should represent.[580] Furthermore, the H-2A workers that Respondents employed at Aloun Farms frequently complained to Alec Sou about not being paid.[581] Under the August Sanctions, the consequence of Respondents' failure to produce 22 cancelled checks or cash receipts bearing the workers' signature is a finding that the Respondents violated 20 C.F.R. § 655.102(b)(10) because they failed to pay these workers the wages these 22 missing checks should represent.[582]

d. Respondents Failed to Pay Their Thai H-2A Workers the Applicable Hourly Wage Rate in Violation of 20 C.F.R. § 655.102(b)(9).

An H-2A employer "shall pay the worker at least the adverse effect wage rate [AEWR] in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period" when the H-2A worker is paid by the hour.[583] See 20 C.F.R. § 655.102(b)(9).

The Administrator found the Respondents' actions violated 20 C.F.R. § 655.102(b)(9) in two distinct ways: (1) they did not pay the Thai H-2A workers at the AEWR in effect when the work was performed; and (2) Respondents did not pay some of their workers the higher prevailing wage for the hours worked.

i. Respondents failed to pay all of their H-2A workers the hourly AEWR in effect when the work was performed.

Respondents violated 20 C.F.R. § 655.102(b)(9) because they failed to pay their H-2A workers at least the hourly AEWR in effect when they worked. Respondents admitted in their discovery responses that the hourly AEWR for Hawaii from February 1, 2003, to March 31, 2003, was higher than Hawaii's minimum wage or the federal minimum wage.[584] I already found that "Respondents failed to pay any

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[579] Fact 59.

[580] Fact 60.

[581] Fact 61.

[582] August Sanctions 37, 63; Fact 8.

[583] The piece rate provisions of 20 C.F.R. § 655.102(b)(9) do not apply because Respondents' 30(b)(6) deponent, testified that "nobody work by pieces, work by hours." Fact. 63.

[584] Fact 64.

H-2A workers they hired under the ETA 6555/mal H-2A certification the Adverse Effect Wage Rate that was in effect at the time any of these H-2A workers performed work in Hawaii in 2003."[585] Finally, Respondent Orian acknowledged at his deposition that although he knew he was obligated to pay the H-2A workers the AEWR, he did not pay them the AEWR.[586] The Respondents violated 20 C.F.R. § 655.102(b)(9) because they failed to pay their workers at least the hourly AEWR that was higher than the state or federal minimum wage.

ii. Respondents failed to pay some of their H-2A workers the prevailing wage.

Respondents committed to pay the prevailing wage but failed to ensure that the workers received it. In the H-2A application filed with ETA, Respondents "guarantee[d] that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."[587] Despite this guarantee, the Respondents failed to ensure that the wages paid to their H-2A workers in Hawaii in 2003 equaled or exceeded the prevailing wage when the H-2A workers worked.[588]

Respondents violated 20 C.F.R. § 655.102(b)(9) because the hourly wage they paid two of their workers was less than the prevailing wage. It was already found that "Respondents employed some of the H-2A workers they employed in Hawaii in 2003 in mechanic and tractor driver occupations."[589] H-2A worker Thanchot Hamphum worked full time as a mechanic at Aloun Farms.[590] The Respondents' H-2A employee Somjai Phobai drove a tractor in February and March 2003 during the onion harvest season at Aloun Farms.[591] Respondents paid Thanchot Hamphum and Somjai Phobai either $66.67 or $66.76 for an eight-hour day, or $8.33 or $8.35 an hour.[592] The prevailing hourly wage rate for tractor drivers and machinery maintenance mechanics in Hawaii in 2003 was $12.70 and

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[585] August Sanctions 52; Fact 65.

[586] Fact 66.

[587] Fact 68.

[588] Fact 69.

[589] August Sanctions 49–50; Fact 70.

[590] Fact 71.

[591] Fact 71.

[592] Fact 72.

$23.46 respectively.[593] By paying Thanchot Hamphum and Somjai Phobai $8.33 or $8.35 hour instead of the prevailing wage rate for tractor drivers and mechanics in Hawaii in 2003, the Respondents violated 20 C.F.R. § 655.102(b)(9).

e. Respondents Took Illegal Deductions from the Thai H-2A Workers' Pay in Violation of 20 C.F.R. § 655.102(b)(13).

The pertinent portion of 20 C.F.R. § 655.102(b)(13) states: "The employer shall make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions shall be reasonable."

Respondents violated 20 C.F.R. § 655.102(b)(13) in two ways: (1) Respondents took federal income tax withholdings from the Thai H-2A workers in contravention of applicable Treasury Regulations that prohibit federal income tax withholdings from the pay of H-2A workers; and (2) Respondents took deductions from the workers' wages to pay for meals and basic living supplies.

i. Respondents violated 20 C.F.R. § 655.102(b)(13) when they withheld federal income tax from the H-2A workers' pay.

Respondents admitted that they were aware that under United States Treasury Regulations "Global was exempt from all federal tax withholding requirements for its H-2A workers."[594] Respondents also admitted in their response to a Request for Admissions that Global took federal income tax deductions from the wages of the H-2A workers that Global employed in Hawaii in 2003.[595] Summing the federal income tax withholding amounts listed in the Payroll Check Registers that Respondents produced in this litigation prove that Respondents took $9,317.36 in federal income tax deductions from the H-2A workers in February and March 2003.[596] The Respondents violated 20 C.F.R. § 655.102(b)(13) because they impermissibly withheld $9,317.36 in federal income taxes from the H-2A workers' pay.

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[593] Section IV(c), Fact 73.

[594] August Sanctions17; Fact 74.1.

[595] Fact 74.2.

[596] Fact 74.3.

ii. Respondents violated 20 C.F.R. § 655.102(b)(13) when they deducted money for meals and basic living supplies from the H-2A workers' pay not specified in the job order they submitted to ETA.

A deduction from the pay of an H-2A worker must either be required by law or stated in the job order.[597] The job order that Respondents submitted to ETA did not specify any deductions for meals or basic living supplies.[598] Aloun Farms, which acted as the supervisor of the H-2A workers that Respondents employed at Aloun Farms, provided a contract to these H-2A workers specifying that "Aloun Farms will also be deducting $200 from each employees [sic] month. This will be for the meal, utilities, water, and basis [sic] personal living supplies."[599] Aloun Farms' March time reporting documents showed deductions for, *inter alia*, for "Meals & Personal Living Expenses."[600] Aloun Farms' April time reporting documents stated, "Begin April 1st. = Workers are on their own for meals and GHMI will handle all advances."[601] One of the deductions that Respondents took from the H-2A workers' pay in March 2003 was for basic living supplies.[602] Respondent Orian admitted in his deposition that deductions were taken from the pay of Thai H-2A workers for "food and all kinds of other stuff."[603] Documents produced by the Respondents demonstrate that Respondents deducted $8,300.16 in utilities, meals and basic living supplies deductions from the pay of the Thai H-2A workers they employed in Hawaii in March 2003.[604] They violated 20 C.F.R. § 655.102(b)(13) because they took deductions for meals and basic living supply from the H-2A workers' pay that were neither required by law nor specified in the job order they submitted to ETA.[605]

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[597] 20 C.F.R. § 655.102(b)(13).

[598] Fact 74.4.

[599] Fact 74.5.

[600] Fact 74.6.

[601] Fact 74.7.

[602] Fact 74.8.

[603] Fact 74.9.

[604] Fact 75.

[605] There is no need to specify how much of the $8,300.16 deduction was for utilities, meals and basic living supplies in order to recover the full amount of this deduction, because, as will be demonstrated in the Section IV.D.1.f, Respondents' deductions for sewer, water, and electricity were illegal as well.

f. Respondents charged the H-2A workers at Aloun Farms for housing-related expenses such as water, electricity and sewage in violation of 20 C.F.R. § 655.102(b)(1).

Under 20 C.F.R. §655.102(b)(1): "The employer shall provide to those workers who are not reasonably able to return to their residence within the same day, housing, without charge to the worker." Moreover, H-2A employers are precluded from making housing-related deductions from H-2A workers' pay for things such as bedding and other housing incidentals.[606]

Evidence produced during discovery demonstrates that Respondents knew about these prohibitions both before the H-2A workers came to America and during their employment. The Clearance Order that Respondents provided to the ETA confirmed that Respondents would not charge their H-2A workers "for employer-provided housing or utilities."[607] In communications between Respondents and Aloun Farms, Respondents expressed their awareness that it would be improper for Respondents to charge H-2A workers for utilities, stating, "[p]er DOL regulation, housing and housing-related service such as water, electricity, sewage shall be provided to workers. Only telephone charge can be deducted from worker."[608] Respondent Orian also testified in a deposition that he was aware that charging H-2A workers for sewage, electricity and water would be an H-2A violation.[609]

Despite what he knew, Respondent Orian executed a contract with Aloun Farms to charge the Thai H-2A workers that Respondents employed at Aloun Farms for electricity, water and sewage[610] and deducted these housing-related costs from the workers' pay.[611] Documentary evidence the Respondents produced show they deducted $8,300.16 from the pay of the Thai H-2A workers that they employed in Hawaii in March 2003 for utilities, meals and basic living supplies deductions.[612] The Respondents violated 20 C.F.R. § 655.102(b)(1)

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[606] 20 C.F.R. § 655.102(b)(1)(v). This section provides, in pertinent part: "Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers by employers who provide housing for their workers." *Id.*

[607] Fact 75.2.

[608] Fact 75.3.

[609] Fact 76.

[610] Fact 77.

[611] August Sanctions 53; Fact 74.8.

[612] Fact 75.

because they deducted housing-related costs such as electricity, water and sewage from the workers' pay.

g. Respondents Retaliated Against H-2A Workers Who Asserted Their Rights, a Violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3.

Both 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3 prohibit an H-2A employer from discriminating against an H-2A worker who asserts rights (whether his own rights or those of others) under the INA or its implementing regulations.[613]

Respondents and Alec Sou of Aloun Farms testified that Respondents' H-2A workers complained to them about how they were being compensated for their work at Aloun Farms. Alec Sou testified that Respondents' H-2A workers complained to him about the deductions being taken for meals.[614] Respondents' Rule 30(b)(6) deponent, in response to questions about the workers' complaints to Alec Sou, stated, "I heard that they're not willing to cooperate with Alec about his idea of buying them food and other necessities; and they want to get the money, buy their own food. And I think they were talking to him and giving him all kind of trouble about it, and he called me to tell me about it."[615] On this subject, Respondents' Rule 30(b)(6) deponent also testified, "Alec Sou right in the beginning talked to the workers about giving them food and all kind of other thing that he wanted to give them as part of the $300 . . . . And some of the worker resisted. They said they're going to do their own . . . . I remember it was a lot of resistance and talking between Alec Sou and his family and the workers."[616] Respondents' Rule 30(b)(6) deponent also stated that the workers complained about the pay they received for working

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[613] 20 C.F.R. § 655.103(g) provides in pertinent part:

> the employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause: . . . Exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA.

Id. 29 C.F.R. § 501.3 provides in pertinent part: "No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has: . . . Exercised or asserted on behalf of himself or others any right or protection afforded by Section 216 of the INA or these regulations." *Id.*

[614] Fact 78.

[615] Fact 79.

[616] Fact 80.

at Aloun Farms, testifying that, "they all wanted to move to work for Del Monte, and nobody wanted to work for Alec Sou, because he paid them a little bit less than Del Monte . . . . I recall it was 8.33 instead of 9.25 that the Del Monte guys got."[617] Respondent Orian also knew that the H-2A workers were "upset" after Alec Sou tried to get them to agree that Sou could take $300 from their pay, and so pay them a daily rate of $66.67.[618] Respondent Orian likewise testified in the deposition taken by Aloun Farms that Respondents' Thai H-2A workers complained about Aloun Farms taking deductions from their pay for food.[619] The H-2A workers that Respondents employed at Aloun Farms asserted their rights under the INA by complaining about the low hourly wage and deductions.

It is also clear that the Respondents, themselves and through their agent Aloun Farms, retaliated against the AACO-recruited workers who worked at Aloun Farms for their complaints. Aloun Farms supervised the Thai H-2A workers that Respondents employed at Aloun Farms.[620] The "Global Horizons Work Contract" that Aloun Farms distributed to the H-2A workers the Respondents employed at Aloun Farms stated, "Total deduction will be $300 per month. GHMI workers will have opportunity to review this cost and also to sign acceptance of this deduction."[621] This statement was in keeping with Respondents' instructions to Alec Sou:

> [W]e told him that everything needed to be approved by the employees, if they—whatever deduction need to be made. And we told him—it wasn't Mordechai or Aloun. 'We'—Global Horizons—'told him that everything need to be approved by employees.' I don't recall who told him specifically. I know that this—everybody in the office had the same mindset about deductions, that everything needed to be approved; and if the workers are not approving that, it's not going to happen.[622]

Subsequently, a majority of the H-2A workers at Aloun Farms signed a document that stated, *inter alia*, "I agree to allow Global Horizon / ADP Payroll to deduct for my expenses that I received in advance and for the food total to $300 USD per month."[623]

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[617] Fact 81.

[618] Fact 82.

[619] Fact 83.

[620] Fact 43.

[621] Fact 84.

[622] Fact 85.

[623] Fact 86.

This deduction agreement doesn't include the names or bear the signatures of the 10 AACO-recruited Thai H-2A workers that Respondents employed at Aloun Farms.[624] Respondents' deposition testimony also highlighted how Alec Sou became so upset at the workers because of their resistance to his payroll policies that he did not let them work. Respondent Orian testified that:

> he [Alec Sou] was upset about the [AACO] group. He didn't like them. . . . [W]hat's happened is that he was upset about them. I think, because they refused to cooperate with his letter that he wants them to sign. . . . I remember there were [sic] a gap, that he [Alec Sou] *didn't let them [the AACO recruited H-2A workers] work. And mainly, because they didn't want to sign those document*.[625]

While Respondent Orian did testify that there was only one document that the workers signed after Alec Sou tried to secure their signatures, the deduction agreement specified above.[626]

Besides not allowing these ten AACO-recruited employees to work certain days, Respondents retaliated against them in other ways. As was shown in Section IV.D.1.c.ii, Respondents did not pay these workers for their work at Aloun Farms on March 8th, 10th and 11th and did not pay nine of them for their work from March 12, 2003, to March 25, 2003. The Respondents' H-2A workers exercised their rights to complain about deductions for their pay; some of them did not sign an agreement to allow $300 in payroll deductions. Respondents unlawfully retaliated against those workers by not providing them with work, and by not paying them for their work.

h. Respondents failed to maintain and make available the required payroll records in violation of 20 C.F.R. § 655.102(b)(7).

Employers are obligated to keep records by 20 C.F.R. § 655.102(b)(7), which says:

> i) The employer shall keep accurate and adequate records with respect to the workers' earnings including field tally records, supporting summary payroll records and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (b)(6) of this section); the hours

[624] Fact 87; *supra* note 382.

[625] Fact 88 (emphasis added).

[626] Fact 89.

> actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions made from the worker's wages;
>
> ii) If the number of hours worked by the worker is less than the number offered in accordance with the three-fourths guarantee at paragraph (b)(6) of this section, the records shall state the reason or reasons therefore.[627]
>
> iii) Upon reasonable notice, the employer shall make available the records, including field tally records and supporting summary payroll records for inspection and copying by representatives of the Secretary of Labor.

Respondents violated 20 C.F.R. § 655.102(b)(7)(i) & (ii) in a number of ways.

First, none of the documents that Respondents produced in this litigation identified the total number of hours worked, by worker, by pay period, for the 43 H-2A workers that Respondents employed at Aloun Farms in March 2003.[628]

Second, Respondents have not produced any payroll records in this litigation for the 44 workers who worked from March 17, 2003, to March 19, 2003, although they admit these workers worked during this period.[629]

Third, the payroll documents that Respondents produced in this litigation identified an incorrect "1.0000" rate of pay for the 33 workers that they employed at Aloun Farms in 2003 even though Respondents admitted that the hourly wage they paid their H-2A workers was either $8.33, or $8.35 an hour.[630]

Fourth, the payroll documents that Respondents produced in this litigation identified an incorrect "1.0000" rate of pay for the 53 workers that they employed at Del Monte Farms in 2003 even though Respondents admitted that the hourly wage they paid these workers was $9.25 an hour.[631]

Fifth, Respondents listed the nature of work of the Thai H-2A workers whom they employed at Aloun Farms as "Pneapples [sic]

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[627] 20 C.F.R. § 655.102(b)(7).

[628] Fact 90.

[629] Fact 91.

[630] Facts 72, 81, 92.

[631] Facts 81, 93.

boxing" when none of their workers at Aloun Farms worked with pineapples.[632]

Sixth, none of the records that the Respondents produced in this litigation identify "the time [any] worker began and ended each workday" at Del Monte Farms or Aloun Farms.[633]

Seventh, none of the records that the Respondents produced in this litigation identify "the number of hours offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee)" to any worker.[634]

Eighth, the Respondents produced no records in this litigation for any of the work that the ten AACO-recruited workers did at Aloun Farms in March 2003.[635]

Ninth, Respondents admitted in two discovery responses that "Respondents do not deny that some of Global's records are incomplete and missing" and in another discovery response that "Global no longer has complete payroll records reflecting the pay."[636]

Tenth, Respondents' Rule 30(b)(6) deponent admitted in testimony that the hours listed in Respondents' Employee Detail Reports were inaccurate.[637]

Eleventh, Respondents admitted in this litigation that they failed to maintain and produce any payroll records for Patiphon Pana and Jatupong Somsri even though they admitted that all of their H-2A workers worked until after the Certification ended on March 31, 2003.[638]

The Respondents violated the record keeping requirements at 20 C.F.R. § 655.102(b)(7)(i) & (ii).

Respondents also violated 20 C.F.R. § 655.102(b)(7)(iii) because they provided only limited payroll records when requested by the WHD in 2003. Part 20 C.F.R. § 655.102(b)(7)(iii) requires the employer to "make available the records, including field tally records and supporting summary payroll records for inspection and copying by representatives of the Secretary of Labor." On April 30, 2003, the WHD requested payroll records from the Respondents.[639] On or about May 5, 2003, Respondents produced 24 pages of payroll information for their

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[632] Fact 94.

[633] Garcia Decl. ¶ 4.

[634] *Id.* at ¶ 5.

[635] August Sanctions 35, 64; Fact 95.

[636] Fact 96.

[637] Fact 97.

[638] Facts 22, 98.

[639] Fact 99.

H-2A employees and represented that they provided all of the payroll information requested.[640] In August and October 2005, Respondents, through their initial disclosures and document production, produced over 330 pages of payroll records that hadn't been produced to Administrator; e.g., earning history reports, cancelled checks and associated bank statements, earning statements, employee detail reports, payroll check registers for all pay periods, sheets denoting time worked, billing statements between Respondents and the Hawaii farms, signed releases from 73 of the H-2A workers, and hours worked for Aloun Farms workers in February 2003.[641] In December 2005, Respondents produced in this litigation almost one hundred additional pages of checks, check stubs, bank statements, and W-2 forms and some of the check pages had 12 checks per page.[642] In January 2006, Respondents produced in this litigation over 50 more pages of bank statements and checks.[643] Other than the W-2 forms, the preceding hundreds of pages of documents that Respondents produced in this litigation were in Respondents' possession or control at the time the WHD requested documents in 2003.[644] As a consequence of Respondents' failure to provide the records when requested, the Administrator sought payroll records from third parties such as Aloun Farms, reconstructed the number of hours worked. This reconstruction did not initially identify the correct amount of back wages due (e.g., back wages associated with the illegal federal income tax deductions) or all of the violations (e.g., earning statement violation).[645] The Respondents failed to provide all of the payroll records in their possession that the WHD had requested in 2003.

i. Respondents Failed to Provide Accurate Written Wage Statements to Their H-2A Workers on or Before Payday in Violation of 20 C.F.R. § 655.102(b)(8).

Under 20 C.F.R. § 655.102(b)(8):

> The employer shall furnish to the worker on or before each payday in one or more written statements the following information:
>
> (i) The worker's total earnings for the pay period;

[640] Fact 100.

[641] Garcia Decl. ¶ 6.

[642] *Id.* at ¶ 7.

[643] *Id.* at ¶ 8.

[644] *Id.* at ¶ 9.

[645] Fact 102.

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily.[646]

Respondents frequently violated 20 C.F.R. § 655.102(b)(8) either because they failed to provide the required information, or the information provided was inaccurate. The wage statements that Respondents provided to the H-2A workers they employed at Aloun Farms did not properly identify the rate of pay since Respondents listed "1.0000" for the pay rate when the workers, in fact, earned at least $8.33 an hour.[647] The Respondents' Rule 30(b)(6) deponent testified that he did not know what the "1.0000" number under the "rate" heading meant on these wage statements.[648] Respondents' counsel stipulated and witnesses testified that the wage statements that Respondents provided to the H-2A workers that they employed at Aloun Farms were in error because they did not accurately identify the number of hours worked, since the statements showed individual H-2A workers as working over 733 hours in a pay period.[649] Respondent Orian, in his July 9, 2009, deposition also admitted that the numbers listed under the hour or piece rate column heading on the earning statements given to the H-2A workers that Respondents employed at Aloun Farms were wages and not hours or pieces.[650]

It was impossible for Respondents' H-2A workers to have worked 600.03, 733.37, 766.71, 800.12, 966.72 hours in a 15 or 16-day pay period as reflected in the wage statements that they provided to their H-2A workers.[651] The wage statements that Respondents provided to all of the H-2A workers that they employed in Hawaii in 2003 are also in error because they failed to identify the number of hours offered broken out by offers in accordance with and over the three-quarters

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[646] 20 C.F.R. § 655.102(b)(8).

[647] Fact 103.

[648] Fact 104.

[649] Fact 105.

[650] Fact 106.

[651] Fact 107.

guarantee.[652] The Respondents violated 20 C.F.R. § 655.102(b)(8) either because they failed to provide the required information, or the information provided was not accurate.

j. Respondents Repeatedly Asked H-2A Workers to Waive Their Rights, a Violation of 29 C.F.R. § 501.4.

H-2A employers are prohibited from asking their employees to waive their rights under H-2A. Part 29 C.F.R. § 501.4 says: "No person shall seek to have an H-2A worker, or other worker employed in corresponding employment by an H-2A employer, waive rights conferred under Section 216 of the INA or under these regulations. Such waiver is against public policy."

Respondents violated 29 C.F.R. § 501.4 because they asked their H-2A workers to agree to the federal income tax deductions the Respondents took from the workers' pay. As discussed in Section IV.D.1.e.i, *supra*, an H-2A employer is prohibited from deducting federal income tax withholdings from the pay of its H-2A workers.[653] The employment agreements that Respondents sent to the recruiters for the H-2A workers who subsequently signed these agreements, stated:

> Employee understands and agrees that ~~GMI~~ GHM shall be Responsible [sic] for all withholding of federal and state taxes from wages Earned [sic] by the EMPLOYEE and EMPLOYEE shall be responsible for making certain that EMPLOYER withholds such taxes. EMPLOYEE understands and agrees that EMPLOYER is responsible for the payment of these taxes.[654]

This language clearly shows that Respondents sought to obtain the agreement of the H-2A workers to income tax deductions even though the Respondents admitted they knew those deductions were impermissible.[655]

Respondents also violated 29 C.F.R. § 501.4 by instructing the supervisor of the H-2A workers they employed at Aloun Farms[656] to seek an agreement from the H-2A workers to take meals/basic living supply deductions from their wages, and Alec Sou sought these

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[652] Fact 108.

[653] 26 C.F.R. §§ 1.1441–4(b)(1)(ii).

[654] Fact 109.

[655] August Sanctions 17; Fact 74.1.

[656] See Fact 43 for evidence demonstrating that Aloun Farms acted as the supervisor for the H-2A workers that Respondents employed at Aloun Farms.

deductions in a document bearing the signature of 22 workers. Section IV.D.1.g, *supra*, described in detail how Respondent Orian repeatedly admitted to telling Alec Sou that, to take the meal/basic living supply deductions, Sou first had to obtain the workers' agreement to take these deductions.[657] Section IV.D.1.g of this Decision also demonstrated that (1) Alec Sou sought the workers' signatures to one document; (2) this document contained the signatures of 22 H-2A workers the Respondents employed at Aloun Farms; and (3) this document states in part: "I agree to allow Global Horizon / ADP Payroll to deduct for my expenses that I received in advance and for the food total to $300 USD per month."[658] Lastly, as was shown in Section IV.D.1.e it was impermissible for Respondents to take these deductions because they were not listed in the job order that ETA approved (nor would they have been approved if listed). The Respondents violated 29 C.F.R. § 501.4 because in these two instances, they sought agreement from the H-2A workers for Respondents to take authorized deductions from their pay.

k. Respondents Gave Their H-2A Workers Incomplete and Inaccurate Copies of Their Work Contract, a Violation Of 20 C.F.R. § 655.102(b)(14).

The employer must "provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. This work contract shall contain all of the provisions required by paragraphs (a) and (b) of this Section."[659]

The contracts the Respondents signed with workers they employed in Hawaii was incomplete under H-2A program regulations. The "Employment Agreement" form they used to set the terms and conditions of the H-2A workers' employment was signed by Respondents and the H-2A workers.[660] A discovery sanctions order found that the "Respondents violated 20 C.F.R. § 655.102(b)(14) by failing to provide any of the H-2A workers they employed in Hawaii in February and March 2003, with a work contract that contained all of the provisions required by 20 C.F.R. § 655.102(a) & (b)."[661]

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[657] Fact 85.

[658] Facts 86, 89.

[659] 20 C.F.R. § 655.102(b)(14).

[660] Fact 110.

[661] August Sanctions 25. These Employment Agreements did not address the following terms and conditions of employment that 20 C.F.R. §§ 655.102(a)&(b) require: (1) that the preferential treatment of aliens is prohibited—20 C.F.R. § 655.102(a); (2) workers' compensation—20 C.F.R. § 655.102(b)(2); (3) employer-

Respondents admitted that the terms and conditions in the Employment Agreements their H-2A workers signed were not the terms and conditions they had submitted to ETA in their Application for Alien Employment Certification, Agricultural and Food Processing Clearance Order and associated attachments to these documents. The differences included: (1) taking federal income tax deductions (which was improper); (2) what other deductions could be taken; (3) a five-day versus a six-day work week; (4) whether Saturday work was optional or mandatory; (5) the number of hours to be worked during a week day; (6) the length of the work contract; and (7) whether cash advance deductions could be taken.[662] These differences meant that, even if their form of Employment Agreement contained all of the required topics specified above, it still violated 20 C.F.R. § 655.102(b)(14).

Lastly, the Employment Agreement used did not represent actual the terms and conditions the Respondents imposed on the H-2A workers they employed in Hawaii. The Respondents admitted that they differed in terms of the wage rate, principal system of payment (piece rates versus hourly wage), frequency of payment, work schedule, type of work, and deductions.[663] The Respondents violated 20 C.F.R. § 655.102(b)(14) because the contract that they provided to their H-2A workers was both incomplete and inaccurate.

V. Summary Decision on Damages and Penalties.

A. Back Wages, Travel Expenses, and Other Nonpenalty Damages

1. Respondents owe the H-2A workers $56,520.96 in back wages for violations of the transportation and subsistence requirements of 20 C.F.R. § 655.102(b)(5)(i)&(ii).

Five elements are involved in computing the back pay the Respondents owe because they shortchanged the workers on T&S: (1) reimbursement to the workers for the cost of transportation from their homes in Thailand to the Bangkok Airport; (2) reimbursement to the workers for subsistence as they traveled from their homes to the

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provided items—20 C.F.R. § 655.102(b)(3); (4) three-fourths guarantee—20 C.F.R. § 655.102(b)(6); (5) the records the employer will maintain—20 C.F.R. § 655.102(b)(7); (6) hours and earning statements—20 C.F.R. § 655.102(b)(8); (7) abandonment of employment—20 C.F.R. § 655.102(b)(11); (8) contract impossibility—20 C.F.R. § 655.102(b)(12); and (9) copy of the work contract—20 C.F.R. § 655.102(b)(14). Fact 111.

[662] Fact 101.

[663] Fact 112.

Bangkok airport; (3) reimbursement to the workers for the costs of transportation from the Bangkok Airport to the United States; (4) payment to the workers for their transportation costs from the Bangkok airport to their homes in Thailand after the work was finished; and (5) payment to the workers for subsistence as they traveled from the Bangkok airport to their homes. As discussed in Section IV.D.1.a.i, all workers completed the contract period, so the regulation at 20 C.F.R. § 655.102(b)(5)(i) obligated the Respondents to pay the first three T&S elements.[664] In addition, as already discussed in Section IV.D.1.a.ii, by completing the contracts the Respondents became obligated to pay for the travel and subsistence costs from the Bangkok airport to their homes under 20 C.F.R. § 655.102(b)(5)(ii).[665]

The Respondents owe 88 Thai workers a total of $650.98 in back wages to reimburse them for ground transportation costs they incurred while traveling from their homes to the Bangkok Airport. In September 2005, the parties took *de bene esse* examinations of six Thai H-2A workers that Respondents employed in Hawaii in 2003.[666] The average ground transportation cost from their homes to the Bangkok Airport that these workers identified was 317.5 Baht.[667] Multiplying 88 workers by 317.5 Baht yields 27,940 Baht. The average Baht to United States dollar for the months of February and March 2003 is 42.92 Baht to 1 U.S. Dollar.[668] Dividing 18,626.96 Baht by the average Baht/Dollar exchange rate of 42.94 equals $650.98.

Respondents owe 88 Thai workers a total of $1,730.54 to reimburse them for the subsistence costs they incurred while traveling from their homes to the Bangkok Airport. The average number of days to travel in Thailand identified in the *de bene esse* examinations from the time the workers left their homes to when they boarded a plane at the Bangkok Airport for travel to the United States was 2.33 days.[669] Pursuant to the H-2A implementing regulations, the amount that can be charged for daily subsistence is $8.44 a day.[670] Multiplying 88

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[664] Fact 22, 26.

[665] Fact 27.

[666] Fact 28.

[667] Fact 29.

[668] Fact 30.

[669] Fact 31.

[670] Under 20 C.F.R. § 655.102(b)(5)(i): "[t]he amount of the subsistence payment shall be no less than the amount permitted under paragraph (b)(4) of this section." Under 20 C.F.R. § 655.102(b)(4), the amount varies each year through a publication in the Federal Register. The permissible charges was "no more than $8.44 per day, unless the RA approves a higher charge" when the Thai H-2A workers first flew to the United States in February 2003. 67 Fed. Reg. 96, at 35151.

workers by 2.33 days by the daily subsistence amount of $8.44 yields a result of $1,730.54.

Respondents owe the 88 Thai workers a total of $52,859.44 in back wages to reimburse them for their air transportation costs from the Bangkok Airport to the United States. "It cost each of the H-2A workers 25,740 Baht to fly from Bangkok, Thailand, to the United States in February and March 2003, when they were traveling pursuant to the ETA 6555/mal H-2A certification."[671] Multiplying 88 workers by 25,740 Baht yields 2,269,520 Baht. The average Baht to United States Dollar for these two months is 42.935 Baht to 1 Dollar.[672] Dividing 2,269,520 Baht by the average Baht/Dollar exchange rate of 42.935 equates to $52,859.44.

Respondents owe the 85 Thai workers a total of $549.85 for the ground transportation costs they incurred while traveling from the Bangkok airport to their homes. The average transportation cost that the *de bene esse* witnesses identified for their trip from the Bangkok airport to their homes was 276.67 Baht.[673] Multiplying 85 workers by 276.67 Baht yields 23,516.95 Baht. The official Thai Baht to United States dollar exchange rate in May 2003 was 42.77 Baht to 1 Dollar.[674] Dividing 23,516.95 Baht by the May 2003 Baht/Dollar exchange rate equals $549.85.

Respondents owe the 85 Thai workers a total of $730.15 in back wages to pay them for the subsistence costs they incurred while traveling from the Bangkok airport to their homes. It took the workers one day to travel home from the Bangkok Airport to their homes.[675] Pursuant to the H-2A implementing regulations, the amount of daily subsistence is $8.59 a day.[676] Multiplying 85 workers by one day by the $8.59 daily subsistence amount equals $730.15.

In summary, Respondents owe $56,520.96 for the following T&S components: ground inbound transportation in Thailand ($650.98), ground inbound subsistence in Thailand ($1,730.54), air inbound transportation from Thailand to the United States ($52,859.44), ground outbound transportation in Thailand ($549.85), and ground outbound subsistence in Thailand ($730.15).

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[671] August Sanctions 19.

[672] Fact 30.

[673] Fact 32.

[674] Fact 33.

[675] Fact 34.

[676] On February 26, 2003, DOL published a new minimum meal rate for 20 C.F.R. § 655.102(b)(4) in the Federal Register. 68 Fed. Reg. 38, at 8930. It was $8.59. *Id.*

2. Respondents owe 68 of their Thai workers $36,079.63 in back wages for failing to satisfy the Three-Quarters Guarantee requirements of 20 C.F.R. § 655.102(b)(6).

Having found that Respondents failed to offer 68 of their workers employment or pay that would cover the three-quarters guarantee, the Administrator's determination letter of February 2, 2005 found that the Respondents owed $34,654.18 in back wages for their violations of the three-quarters guarantee provisions of 20 C.F.R. § 655.102(b)(6).[677] The Administrator recomputed the amount due because the Respondents produced a payroll document during their initial disclosures that they did not produce during Administrator's initial H-2A investigation.[678] Also Respondents admitted that all of their workers worked the entire contract period.[679] With this additional evidence, the Administrator determined that Respondents violated 20 C.F.R. § 655.102(b)(6) because there was a difference in the number of hours offered and the number of hours that should have been offered for 68 workers and that Respondents owed $36,079.63.[680]

3. Respondents owe their H-2A workers $26,937.73 in back wages for failing to pay the wages due, a violation of 20 C.F.R. § 655.102(b)(10).

The Administrator determined that the Respondents violated 20 C.F.R. § 655.102(b)(10) by failing to pay some of the workers' wages for any of the work they performed during some pay periods. The Administrator determined that Respondents owe these workers $26,937.73 in back wages.

First, Respondents failed to pay 4 workers any wages for their work at Aloun Farms for 12 days in February 2003;[681] the Administrator determined that the Respondents owed these four workers $1,649.08 in back wages for this violation by adding the net wage amounts ($412.27 for each worker) in Respondents' payroll records for these four workers for their February work.[682] Second, Respondents failed to pay 10 workers for their work at Aloun Farms during from March 8 to 11, 2003.[683] The Respondents owe these

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[677] Fact 39.

[678] Fact 40.

[679] Fact 22.

[680] Fact 41.

[681] See *supra*, Section IV.D.1.c.i.

[682] Fact 43.2.

[683] See *supra*, Section IV.D.1.c.ii.

workers $2,283.02 in back wages for their 3 days of work at Aloun Farms; the Administrator calculated this amount by multiplying the number of hours they workers worked by the $9.29 AEWR in effect then.[684] Third, Respondents failed to pay ten workers for their work in Hawaii for 7 to 11 other days in March 2003,[685] and owe the ten workers an additional $6,679.51 in back wages.[686] Fourth, Respondents failed to pay 44 workers for 3 days of work in March 2003[687] and owe these 44 workers $9,092.59 in back wages.[688] Fifth, Respondents failed to pay 22 workers for their work in March 2003;[689] the Administrator determined that Respondents owed these 22 workers $7,233.53 in back wages for their work in March 2003 by summing the net wages due in the Employee Detail Reports for the 22 checks.[690]

4. Respondents owe their Thai H-2A workers $15,253.46 in back wages for failing to pay the applicable hourly wage rate, a violation of 20 C.F.R. § 655.102(b)(9).

Respondents violated 20 C.F.R. § 655.102(b)(9) in two separate ways, and owe their Thai H-2A workers $15,253.46 in back wages. First, Respondents failed to pay all of their H-2A workers using the hourly AEWR in effect when the work was performed;[691] so the Administrator determined that the Respondents owed their H-2A workers $10,439.35 in back wages.[692] Second, Respondents paid two of their workers less than the required prevailing wage;[693] the Administrator determined that the Respondents owe these two workers $4,814.11 in back wages.[694]

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[684] 68 Fed. Reg. 38, at 8929; Fact 48.

[685] See *supra*, Section IV.D.1.c.ii.

[686] Fact 53.

[687] See *supra*, Section IV.D.1.c.iii.

[688] Fact 57.

[689] See *supra*, Section IV.D.1.c.iv.

[690] Fact 62.

[691] See *supra*, Section IV.D.1.d.i.

[692] Fact 67.

[693] See *supra*, Section IV.D.1.d.ii.

[694] Fact 74.

5. Respondents owe their Thai H-2A workers $ 9,317.36 due to inappropriate tax withholding and $4,150.08 for inappropriate deductions for utilities, meals, and basic living supplies, violations of 20 C.F.R. § 655.102(b)(13).

Respondents violated 20 C.F.R. § 655.102(b)(13) by withholding federal income tax from the H-2A workers' pay and taking forbidden deductions for meals and living supplies (forbidden because they were not specified in the job order Respondents submitted to the ETA).

First, the federal income tax withholding amounts in Respondents' Payroll Check Registers show that Respondents took $9,317.36 in federal income tax deductions in February and March 2003.[695] Respondents are ordered to pay their Thai H-2A workers $9,317.36 to reimburse what they withheld for federal income tax.

Second, Respondents deducted $8,300.16 for utilities, meals and basic living supplies from the pay of the Thai H-2A workers they employed in Hawaii in March 2003.[696] Respondents are ordered to repay $4,150.08 in utilities, meals and basic living supplies. This amount was determined by dividing the $8,300.16 amount the H-2A workers paid towards utilities, meals and basic living supplies in half.[697] The Administrator divided it in half because a portion of this payment was for housing-related utility charges and a portion of this payment was for illegal deductions, and Respondents did not identify the split for these payments.[698]

6. Respondents owe the Thai H-2A workers $4,150.08 for deduction made for housing-related expenses, a violation of 20 C.F.R. §§ 655.102(b)(1), (b)(1)(v).

Respondents must pay $4,150.08 in housing-related costs such as electricity, water and sewage that they withheld improperly from the H-2A workers' pay under 20 C.F.R. § 655.102(b)(1).[699] The Administrator calculated that the Respondents took $4,150.08 in housing charges by dividing the $8,300.16 amount the H-2A workers paid towards utilities, meals and basic living supplies in half.[700] The Administrator divided it in half because a portion of this payment was for illegal housing-related utility charges and a portion of this payment

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[695] See *supra*, Section IV.D.1.e.i.

[696] Fact 75. See *supra*, Section IV.D.1.e.ii.

[697] Fact 75.1.

[698] Fact 75.1.

[699] Fact 75. See *supra*, Section IV.D.1.f.

[700] Fact 75.1.

was for illegal deductions, and Respondents did not identify the split for these payments.[701]

7. Respondents owe their Thai H-2A workers $8,962.53 in back wages for retaliating against them when they objected to the improper deductions, a violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3.

The Administrator has proven that the Respondents retaliated against a number of their Thai H-2A workers who complained about the payroll deductions and refused to sign an agreement that would permit the $300 monthly payroll deductions.[702] They were workers knowledgeable of their rights, who had been recruited to work for the Respondents by a Thai firm known as AACO. For those who wouldn't approve the payroll deductions, the Respondents provided them less work or did not pay them for work they had done. The H-2A workers would have received these wages but for the retaliation. There were days between March 8, 2003, to March 25, 2003 that (1) the workers should have worked but did not, and (2) the workers worked, but weren't paid. Section IV.D.1.c.ii documented that that ten workers worked at Aloun Farms from March 8, 2003, to March 11, 2003, and worked every weekday from March 7, 2003, to March 25, 2003. Section IV.D.1.c.ii also demonstrated that (1) ten of these H-2A workers were not paid for their three days of work at Aloun Farms from March 8, 2003, to March 11, 2003, (2) nine of these ten workers were not paid for eleven additional weekdays of work from March 7, 2003, to and including March 25, 2003, and (3) one of these ten workers was not paid for seven additional weekdays of work from March 7, 2003, to and including March 19, 2003. In total, these ten H-2A workers recruited through AACO are due $8,962.53 in back wages for work they did but were not paid for as retaliation for claiming their rights. *See* Section IV.D.1.c.ii for how the totals for these two time periods were derived. This back wage amount has already been included in the violation of failing to pay the wages when due.[703]

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[701] Fact 75.1.

[702] *Supra* at Section IV.D.1.g.

[703] *Supra* at Section V.A.3.

B. The Substantial Violations Merit Debarment

1. Debarment is Appropriately Determined on Summary Decision

Three or more "substantial violations" of H-2A program regulations cause the OFLC Administrator to deny the offender any Temporary Alien Agricultural Labor Certification for three years.[704] Once a finding of a substantial violation is made, the regulatory language implies that debarment is mandatory; if three or more violations are found, the regulations mandate a three year debarment.[705] For the reasons that follow, debarment can be imposed on summary decision, and is required on this record.

I cannot accept as an undisputed fact the Administrator's assertion that Respondents' violations of the pertinent regulations were "substantial" under 20 C.F.R. § 655.110(a), for the reasons stated in Section IV.B.1, *supra.* Whether a violation qualifies as "substantial" isn't a fact, but a legal conclusion that I reach independently. I conclude that the many violations Respondents committed amount to "substantial violations" that trigger mandatory debarment.

The Respondents say a district court decision supports the idea that an adjudicator cannot determine Penalties on summary judgment.[706] They cite no specific case that addresses the issue of debarment. They reason that both Penalties and debarment determinations use similar factors, and because Penalties cannot be assessed on summary judgment, then neither can debarment. The ARB has granted summary judgment to the United States in cases involving

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[704] 20 C.F.R. § 655.110(a).

[705] In pertinent part, the regulation reads:

> If after the investigation, the OFLC Administrator determines that a substantial violation has occurred, the OFLC Administrator, *shall* notify the employer that a temporary alien agriculture certification request will not be granted . . . . [and i]f multiple or repeated substantial violations are involved, the OFLC Administrator's notice to the employer *shall* specify that the prospective denial of the temporary alien agricultural labor certificate will apply . . . [for] three years for three or more violations or repetitions thereof.

Id. (emphasis added).

[706] United States v. Pacific Northwest Elect., Inc., 2003 WL 24573548 *31 (D. Idaho 2003).

civil money penalties, [707] so the argument fails both as to debarment and Penalties.[708]

They also claim that a debarment determination cannot be made on summary decision, because it requires the adjudicator to weigh evidence, which is impermissible under *Anderson v. Liberty Lobby*.[709] Whether the Respondents committed substantial violations of 20 C.F.R. § 655.110(a) does not require the weighing of evidence. I resolve it by applying the undisputed facts to the standard expressed in 20 C.F.R. § 655.110(a). If a substantial violation occurred, debarment is automatic and no weighing of evidence is necessary.

For the reasons below, I order Respondents debarred from the H2A program for three years.

2. Respondents Committed Three Substantial Violations

A "substantial violation" occurs under 20 C.F.R. § 655.110(a) when:

> (1) . . . the action is significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's . . . H-2A work force; . . . (2) the employer has engaged in a pattern or practice of actions which are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's . . . H-2A workforce; . . . [and (3)] there are no extenuating circumstances involved with the actions described in . . . [factors 1 and 2] as determined by the OFLC Administrator.[710]

In February 2005, ETA issued a determination notice to each Respondent of a Prospective Denial of Temporary Alien Agricultural Labor Certification for three years ("Debarment Notice").[711] This Debarment Notice was "based on three substantial violations involving: (1) the terms and conditions of employment, (2) worker benefits, and (3) workers' pay."[712] After *de novo* review of the

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[707] *Cyberworld Enterprise Technologies*, ARB No. 04-049, ALJ No. 2003-LCA-00017, 2006 WL 1516647 at *1 (ARB, May 24, 2006). *In re Secretary of Labor v. A-One Medical Services.*, ARB No. 02-067, ALJ No. 2001-FLS-00027, 2004 WL 2205227 (ARB Sept. 23, 2004); *see also infra* Section V.C.

[708] *See* discussion *infra* Section V.C.

[709] 477 U.S. at 249.

[710] 20 C.F.R. § 655.110(g)(1).

[711] Fact 113.

[712] *Id.*

Administrator's determinations, I agree with the Administrator and conclude that Respondents committed the three substantial violations.

a. Respondents Committed a Substantial Violation Regarding the Terms and Conditions of Employment for Their H-2A Workers.

The Respondents committed a substantial violation regarding the terms and conditions of employment because:

1. Respondents failed to provide their H-2A workers with a copy of a contract related to their work in Hawaii not later than the day the work commenced in violation of 20 C.F.R. § 655.102(b)(14);
2. Respondents demonstrated a pattern of activity of undermining the terms and conditions of employment by:
   a. securing a certification to employ workers in Arizona and then unilaterally employing the H-2A workers in Hawaii in violation of 20 C.F.R. §§ 655.101–.103;
   b. soliciting agreements from workers to decrease their wages, in violation of 29 C.F.R. § 501.4; and
   c. discriminating against workers who asserted their rights by taking adverse action against them, in violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3.); and
3. no extenuating circumstances are involved with these violations.[713]

i. The contract that Respondents provided to their H-2A workers caused significant injury because it was faulty in many respects.

The contract (Employee Agreement) the Respondents provided to all of their H-2A workers was a source of significant injury. It did not address the majority of the required terms and conditions of employment, and those the document addressed described something markedly different from what the workers actually experienced in Hawaii. Section IV.D.1.k of this decision, *supra*, discussed how the contract the Respondents used their H-2A workers did not address 9 of

[713] Fact 114.

the 15 required terms and conditions of employment.[714] The unaddressed terms and conditions were significant: the three-quarters guarantee and worker's compensation requirements were not addressed. If the workers had known that Respondents were obligated to pay them for three-quarters of the time they spent in the United States during the February to March 2003 time period, then 68 of them could have sought over $36,000 in back wages. Also, if the workers had known about the worker's compensation provision, then they may have filed a worker's compensation injury claim. This lack of notice may explain why none of the H-2A workers the Respondents employed ever filed a workers' compensation claim. The Respondent Orian boasted about the money the Respondents saved in workers' compensation premiums because their H-2A workers filed no claims.[715]

Additionally, Section IV.D.1.k of this decision established how the terms and conditions found in the contract differed substantially from the actual terms and conditions of employment that Respondents' H-2A workers experienced in Hawaii.[716] I already found that the "Respondents failed to employ the H-2A workers they employed in Hawaii in 2003 according to the Employment Agreements that Respondents and the H-2A workers jointly signed."[717] The contract that Respondents provided to their H-2A workers was significantly injurious to the working conditions of the H-2A workers in two ways. who asserted their rights

The ten percent threshold for a substantial violation is satisfied, and exceeded. Section IV.D.1.k of this decision demonstrated that the contract deficiencies applied to all 88 workers. The incomplete and inaccurate contract that the Respondents used caused significant injury to 100% of the work force.

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[714] *See supra*, note 661.

[715] Fact 115.

[716] *E.g.*, wage rate, principal system of payment (piece rates versus hourly wage), frequency of payment, work schedule, type of work, and deductions. Fact 112.

[717] August Sanctions 25.

ii. Respondents had a pattern of activity of undermining the terms and conditions of employment of United States Workers and H-2A workers.

1. Respondents undermined the terms and conditions of employment by seeking and securing a certification to employ H-2A workers in Arizona who they then employed in Hawaii, without notification or authorization.

(I) The INA and its implementing regulations protect the working conditions of workers by requiring the H-2A employer to proceed through a rigorous application process and to provide the workers with guaranteed terms and conditions of employment.

The H-2A application process is designed to provide important protections to the workers. An H-2A employer secures foreign H-2A workers only by certifying to the Department that:

> (A) there are not sufficient [United States] workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the [employer's H-2A] petition, and
> (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States.[718]

To implement this statute, the Department:

> requires employers to submit an application [ETA 750 Form] that includes a job offer, known as a "clearance order" [ETA 790 Form]. Essentially, the clearance order is a means by which the Department of Labor can ensure that employers

[718] 8 U.S.C. § 1188(a)(1).

> make comparable offers to domestic workers before recruiting temporary aliens. The purpose is to ensure that alien workers do not adversely affect the domestic workforce.[719]

To insure that the employment of alien workers does not adversely affect the terms and conditions of employment of United States workers,[720] the Department also requires (1) the H-2A employer's "job offer" include various terms and conditions of employment, and (2) the H-2A employer make various assurances.[721] One of these assurances is that the employer took positive steps to recruit American workers.[722] These positive recruitment efforts include assisting federal and state agencies "to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer [and p]lacing advertisements where the OFLC Administrator determines appropriate for job opportunities in newspapers . . . and/or on radio as required by the OFLC Administrator."[723] Furthermore, the INA's implementing regulations require the OFLC Administrator and state work force agencies to prepare local, intrastate, and interstate job orders to recruit United States workers; additionally, these regulations require the recruitment to be according to the terms and conditions of employment specified in the application and job order the Respondents submitted to ETA.[724] Lastly, the United States workers are further protected because the H-2A employer cannot provide preferential treatment to the H-2A workers, nor can the H-2A employer impose more onerous working conditions on United States workers than on the H-2A workers.[725] Summing up these protections, a court noted that "[t]he bedrock principle of the H-2A program [is] that the use of guest workers will not adversely affect domestic workers or work conditions."[726]

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[719] *Mitchell v. Osceola Farms Co.,* 447 F. Supp. 2d 1307, 1308 (S.D. Fla. 2006); *see also* 20 C.F.R. § 655.101.

[720] The implementing regulations define a United States worker as "any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at § 101(a)(38) of the INA (8 U.S.C. 1101(a)(38))." 20 C.F.R. § 655.100(b).

[721] 20 C.F.R. §§ 655.102 & .103.

[722] 20 C.F.R. § 655.103(d).

[723] *Id.*

[724] 20 C.F.R. §§ 655.104(a), .105(a), & .106(a).

[725] 20 C.F.R. § 655.102(a).

[726] *Mitchell v. Osceola Farms Co.*, 447 F. Supp. 2d at 1308; *see also Donaldson v. U.S. Dept. of Labor,* 930 F.2d 339, 341 (4th Cir. 1991) ("The net result of this complicated [H-2A] regulatory scheme is that U.S. workers are given preference over

United States workers are given preference over H-2A workers for jobs, but H-2A workers enjoy the same job protections. The minimum terms and conditions of employment are identical for both groups. Under 20 C.F.R. § 655.102(b), each job order submitted to ETA has to contain the terms and conditions of employment specified at 20 C.F.R. § 655.102(b), including the three-quarters guarantee and paying wages when due. Additionally, the work contract that an H-2A employer provides to either a United States worker or to an H-2A worker must contain all of the provisions required by 20 C.F.R. §§ 655.102(a) & (b).[727] This ensures that the H-2A worker receives at least the minimum terms and conditions of employment the job order specified. The INA and its implementing regulations were designed to protect the United States workers and to offer protection to the H-2A workers.

(II) Respondents undermined the terms and conditions of employment of United States workers when they filed an H-2A application to employ workers in Arizona when no such work existed, but used the H-2A certification granted to employ H-2A workers in Hawaii without first soliciting United States workers for the Hawaiian work.

Respondents filed an H-2A application and related paperwork to employ 375 workers in Arizona from September 9, 2002, to March 31, 2003, to harvest chili peppers.[728] Respondent Orian personally signed the H-2A Application (ETA 750 Form), H-2A Clearance Order (ETA 790 Form), and the cover letter for Respondents' submission.[729] ETA certified this application which it identified as the ETA H-2A

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foreign workers for jobs that become available and, to the extent temporary foreign workers are employed, their employment may not adversely affect the compensation and working conditions of U.S. workers.").

[727] 20 C.F.R. § 655.102(b)(14).

[728] Fact 4.

[729] Fact 116.

certification number 6555/mal on August 19, 2002. The Respondents brought H-2A workers into the United States in February and March 2003, based on that certification.[730]

I already found, however, that "Respondents did not have any work in Arizona to employ any H-2A workers pursuant to the ETA 6555/mal H-2A certification."[731] Not only did Respondents have no work for this ETA 6555/mal H-2A certification, they had no contracts or communications with any farmer in Arizona to provide H-2A workers for this ETA 6555/mal H-2A certification.[732] In short, "Respondents filed an H-2A application for 375 Vegetable Harvest Workers to work in Arizona picking chilies from September 9, 2002, to March 31, 2003, to which ETA assigned the 6555/mal case number and ETA granted a certification on August 19, 2002, when Respondents had no work in Arizona.[733]

The Thai H-2A workers certified for Arizona were instead employed in Hawaii in February and March 2003, with no certification or authorization by DOL to employ any H-2A workers in Hawaii for that time period.[734] Respondents did not notify any DOL agency, including ETA, before April 1, 2003, that Respondents were employing H-2A workers in Hawaii who had been hired pursuant to a Temporary Labor Certification for the state of Arizona issued by the ETA on August 19, 2002.[735] Additionally, Respondents continued to employ these Thai workers in Hawaii even after their 6555/mal certification had expired on March 31, 2003.[736] Respondents admitted in one of their briefs filed here that they employed these Thai H-2A workers in Hawaii even though "U.S. DOL did not approve these workers to work in Hawaii."[737]

Respondents undermined the terms and conditions of employment because they employed Thai H-2A workers in Hawaii in February and March 2003 without first soliciting United States workers to work in Hawaii during this time period. Respondents admitted that they "did not solicit any corresponding United States workers pursuant to an Application for Alien Employment Certification and Agricultural and Food Processing Clearance Order to perform

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[730] Facts 5, 7, 117.

[731] August Sanctions 28.

[732] August Sanctions 27; Fact 118.

[733] August Sanctions 28.

[734] Fact 119.

[735] Fact 120.

[736] Fact 121.

[737] Fact 122.

work in Hawaii during the February 17, 2003, to March 31, 2003, time period."[738] Respondents also admitted that they employed Thai H-2A workers in Hawaii pursuant to the 6555/mal certification in February and March 2003.[739] Respondents contravened the INA and its implementing regulations when they employed H-2A workers in Hawaii without first determining whether there were qualified United States workers who were interested in this employment.

When Respondents did advertise work in Hawaii at Aloun Farms to corresponding United States workers in April 2003, pursuant to another H-2A certification that would start on April 30, 2003, many United States workers applied for the job and were hired by Respondents. Respondents submitted an H-2A Alien Application and Clearance Order to ETA to employ workers in Hawaii from April 30, 2003, to December 15, 2003.[740]

Respondents identified in this Clearance Order (ETA 790 form) that the workers would work at Aloun Farms.[741] Respondents used radio and newspaper advertisements to advertise the work in this April-to-December H-2A application to United States workers from April 11–14, 2003.[742] At least 130 United States workers applied for this work opportunity and ETA determined on April 16, 2003, that 32 United States workers were deemed qualified for the work.[743]

These facts demonstrate several significant points. First, Respondents admit that they employed H-2A workers in Hawaii and failed to notify or seek permission from ETA beforehand. Second, they employed these H-2A workers without first offering the work to United States workers. Third, while Respondents employed these Thai H-2A workers at Aloun Farms, United States workers expressed an interest in a job at Aloun Farms that would start on April 30, 2003, and ETA determined that 32 workers were qualified for this job. Respondents violated a fundamental principle of the H-2A program by adversely affecting the working conditions of domestic workers when they offered foreign workers employment without first giving United States workers an opportunity to seek these jobs.[744]

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[738] Fact 123.

[739] Fact 124.

[740] Fact 125.

[741] Fact 126.

[742] Fact 127.

[743] Fact 128.

[744] *Mitchell v. Osceola Farms Co.*, 447 F. Supp. 2d at 1308.

(III) Respondents did not employ their H-2A workers in Hawaii in accordance with their job order with ETA, their employment agreements with the workers, or the INA's implementing regulations.

The Respondents also undermined the terms and conditions of employment of the H-2A workers because they employed them in Hawaii under terms and conditions of employment that differed from the job order that Respondents submitted to ETA and their employment agreements with the workers. Section IV.D.1.k of this decision demonstrated that the actual terms and conditions of the workers' employment differed markedly from the job order approved by ETA; Respondents admitted that they differed in terms of the wage rate, principal system of payment (piece rates versus hourly wage), frequency of payment, work schedule, type of work, and deductions.[745] Likewise, I already found that "Respondents failed to employ the H-2A workers they employed in Hawaii in 2003 according to the Employment Agreements that Respondents and the H-2A workers jointly signed."[746]

Lastly, the Respondents regarded themselves as free to ignore the implementing regulations' terms and conditions of employment once they employed H-2A workers in Hawaii. The Respondents repeatedly stated in their interrogatory responses that they did not violate H-2A's wage provisions since the hourly wage they paid their workers in Hawaii was higher than what was certified for Arizona.[747] Respondents made this contention even though: (1) they admitted that they never paid their H-2A workers the AEWR that was in effect in Hawaii at the time the work was performed;[748] (2) the difference between what Respondents paid and the AEWR, at times, was more than a dollar an hour;[749] and (3) the H-2A regulations require an H-2A employer to pay the AEWR in effect at the time the work is done.[750] When Respondents submitted their H-2A application for Arizona for

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[745] Fact 112.

[746] August Sanctions 25.

[747] Fact 129.

[748] August Sanctions 52; Fact 65.

[749] Fact 130.

[750] 20 C.F.R. § 655.102(b)(9).

the September 9, 2002, to March 31, 2003, time period: (1) Arizona had the seventh lowest AEWR in the United States ($7.12); (2) Hawaii had the highest AEWR ($9.25) in the United States; and (3) the Respondents did not have any work in Arizona for the H-2A workers.[751] The Respondents undermined the implementing regulations' terms and conditions of employment by filing a false H-2A application in a state with a significantly lower AEWR, moved the workers to the state with the highest AEWR, and paid the workers as little as it wanted, as long as it was at least the AEWR for the lower state. The Respondents acted as if an H-2A employer is not obligated to follow the posted AEWR in the state where the work was done. Respondents benefited from their illegal employment and movement of H-2A workers. Respondents' violated a fundamental principle of H-2A by adversely affecting the working conditions of domestic workers.[752] In doing so, the Respondents also failed to provide the minimum working conditions for the H-2A workers set forth in the implementing regulations.

The ten percent threshold is more than exceeded, because of the bait and switch. Employment conditions differed between what the Respondents applied for and how they treated all 88 of the Thai H-2A workers. At least 32 United States workers who indicated that they wanted work at Aloun Farms as of April 16, 2003 were disadvantaged too.

(IV) Respondents' rationale for moving the H-2A workers to Hawaii is unavailing because they never had any work in Arizona for these workers and over 70% of the Thai workers entered the United States after Respondents first moved Thai workers to Hawaii.

Respondents have repeatedly claimed that they employed the Thai H-2A workers in Hawaii because they learned, after these workers arrived in the United States, that no work was available for them in Arizona. Respondents made this claim in the first set of interrogatories responses that they answered in October and

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[751] August Sanctions 28; Fact 131.

[752] *Mitchell v. Osceola Farms Co.*, 447 F. Supp. 2d at 1308.

November 2005.[753] Respondents also made this same claim in their October 19, 2007, Opposition to the Administrator's Rule 37 Sanctions Motion.[754] Respondent Orian admitted that he was personally involved in the decision to move the Thai workers to Hawaii.[755]

The Respondents' claims have no merit because they never had any work in Arizona at any time for these Thai H-2A workers. As a result of Respondents' repeated failure to produce information requested during discovery, I entered sanctions[756] that found: (1) "Respondents did not have any work in Arizona at any time to employ any H-2A workers pursuant to the ETA 6555/mal H-2A certification;" (2) "Respondents did not have any contracts with any farmer in Arizona to provide any H-2A workers in 2003 for the ETA 6555/mal H-2A certification;" (3) "Respondents did not have any communications with any farmer in Arizona to provide any H-2A workers in 2003 for the ETA 6555/mal H-2A certification;" and (4) "Respondents filed an H-2A application for 375 Vegetable Harvest Workers to work in Arizona picking chilies from September 9, 2002, to March 31, 2003, to which ETA assigned the '6555/mal case number and ETA granted a certification for this application on August 19, 2002, when Respondents did not have any work in Arizona pursuant to this H-2A application when they filed this H-2A application."[757]

Although Respondents claim that there was no work in Arizona after the Thai workers arrived in the United States, the evidence establishes that there was no work when Respondents initially filed the H-2A application for Arizona and Respondents knew there was no work in even before the Thai workers left Thailand.

The Respondents' justification for sending workers to Hawaii is further undermined by the fact that at least 70% of the Thai H-2A workers arrived in the United States after the Respondents had allegedly learned that there was no work in Arizona and Respondents had already sent some of the Thai H-2A workers to Hawaii. Respondents admitted in discovery responses that (1) all ten of the Thai H-2A workers that are listed under the "'KS #2 Group (10) heading on BSN 000077 left Thailand for the United States after Respondents started sending H-2A workers to Hawaii in February 2003";[758] (2) all of their AACO-recruited H-2A workers left Thailand for

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[753] Fact 132.

[754] Fact 133.

[755] Fact 134.

[756] August Sanctions 3–5, 27–29.

[757] August Sanctions 27–29.

[758] Fact 135.

the United States after Respondents started sending H-2A workers to Hawaii in February 2003;[759] and (3) they employed 55 AACO-recruited workers in Hawaii in 2003.[760] Respondents have therefore admitted that 65 of their 88 Thai H-2A workers (or 73%) left Thailand for the United States after Respondents started sending Thai H-2A workers to Hawaii in February 2003; 65 of the 88 workers should have never left Thailand because Respondents knew before they left that there was no work in Arizona for them. Respondents claim that Thai H-2A workers came to the United States after Respondents learned that they had no work for them in Arizona has no merit.

Furthermore, Respondents claim that they did it for the workers is belied by Respondent Orian's own admissions during his deposition that Respondents brought the workers to the United States to benefit Respondents. At his July 9, 2009, deposition Orian stated: "the company [Global] would be in bad shape because they couldn't take workers anymore from Thailand."[761] Respondent further stated that the reason why Respondents would not be able to bring any more workers from Thailand is "because [of] the bad experience of the first one [the 6555/mal certification] for sure [the Thai government] will deny everybody" in subsequent H-2A applications.[762] In short, Respondents admitted that they brought the Thai workers to work in the United States, even though there was no work for them in Arizona, to benefit themselves, for it would allow them to bring in other Thai workers to the United States at a later date.

(V) Respondents profited from employing H-2A workers instead of United States workers.

In a February 2009 deposition, Respondent Orian repeatedly boasted about how the Respondents made a much larger profit margin by employing H-2A workers instead of United States workers. Specifically, Respondent Orian stated: (1) "in H-2A our markup was just enormous. We made literally 20 percent not less profit on each account, not less than 20 percent;" (2) "it was great big difference;" (3) "I had a few advantages on H2-A that are amazing. We don't have matching taxes;" (4) "Workers comp' went to the minimum of minimum because I had zero claims. People coming from overseas not looking to

[759] Fact 136.

[760] Fact 137.

[761] Fact 138.

[762] Fact 139.

screw the systems;" and (5) "Yes, everything was much less expenses. That's why H-2A we are making more money."[763] Respondents' payroll records support Respondent Orian's testimony because they demonstrate that Respondents did not take any payroll deductions for social security and Medicare from the wages of the H-2A workers that they employed in Hawaii in 2003.[764] Respondent Orian acknowledged that Respondents made a much greater profit margin when they employed H-2A workers instead of United States workers.

In sum, Respondents violated the terms and conditions of employment of both the United States workers and the H-2A workers when they employed H-2A workers certified for Arizona in Hawaii under different terms and conditions of employment. Respondents violated the INA and its implementing regulations by adversely affecting the working conditions of domestic workers. They did so, *inter alia*, by not offering this employment to United States workers before providing it to foreign workers and by paying the foreign workers less than the required wage rate in Hawaii. Respondents also undermined the H-2A workers' terms and conditions of employment by forcing them to work under different terms and conditions that were not authorized by the ETA and by paying them an hourly wage rate that was lower than the required wage rate. Respondents' reason for having certified Arizona workers in Hawaii was shown to be without merit because they knew when they filed their H-2A application with ETA and before the workers ever left Thailand that there was no work for them in Arizona. Finally, Respondents admitted that their employment of H-2A workers instead of United States workers enabled them to generate a much larger profit margin than they would have generated if they had only employed United States workers.

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[763] The response listed in (5) was in response to a question of: "Not only were you getting a better rate on the H-2A workers, you had less expenses on the H-2A workers." AX 51, at 150:15–23, 152:2–19; Fact 140.

[764] Fact 141.

2. Respondents undermined the terms and conditions of employment by soliciting agreements from workers to decrease their wages, in violation of 29 C.F.R. § 501.4, and by reducing workers' wages in accordance with these agreements.

Section IV.D.1.j of this decision discussed how the Respondents repeatedly tried to have the workers approve wage decreases. The first solicitation that Section IV.D.1.j addressed was when the Respondents, in their form Employment Agreements, sought to have their H-2A workers agree to federal income tax withholdings from their wages. Sections IV.D.1.e.i and IV.D.1.j. further demonstrated that after securing the H-2A workers' consent, Respondents took federal income tax withholdings from their wages that were unauthorized under the H-2A program. Section IV.D.1.j detailed how Respondents sought the H-2A workers' agreement to take deductions from their wages to pay for food, basic living supplies, and utilities. Sections IV.D.1.e.ii, IV.D.1.f and IV.D.1.j further detailed that after securing the workers' consent, the Respondents deducted money for food, basic living supplies, and utilities from their wages. These solicitations of consent are egregious because the H-2A workers had substantially unequal bargaining power.

The ten percent substantial violation threshold is met because Sections IV.D.1.e.i and IV.D.1.j explained that the Respondents solicited and deducted monies for federal income tax for 86 of their 88 workers. The ten percent H-2A worker substantial violation threshold is also met because Sections IV.D.1.e.ii, IV.D.1.f and IV.D.1.j explained that the solicitation and deductions for food/basic living supplies and utilities applied to 43 of the 88 workers. The Respondents seriously undermined the working conditions of a substantial number of H-2A workers asking the workers to agree to wages reductions and reducing their wages through these agreements.

3. Respondents also undermined the terms and conditions of employment by taking adverse action against those workers who refused to waive their wage rights.

Section IV.D.1.g of this decision recounted how the Respondents retaliated against those knowledgeable workers recruited through AACO who refused to waive their wage rights. Specifically, Section IV.D.1.g describes through the Respondents' admissions, how: (1) Alec Sou of Aloun Farms, who acted as the Respondents' supervisor for the H-2A workers that they employed at Aloun Farms, passed out a "Global Horizons Work Contract" with a lower hourly rate and $300 in monthly deductions; (2) Alec Sou, following the instructions of the Respondents, asked the H-2A workers to sign a document agreeing to the $300 in monthly deductions; (3) a majority of the H-2A workers who Respondents employed at Aloun Farms signed the document agreeing to the $300 in monthly deductions; (4) the ten AACO-recruited H-2A workers that Respondents employed at Aloun Farms did not sign the agreement; (5) Respondents' H-2A workers at Aloun Farms complained to Respondents about their low hourly rate of pay and the $300 in monthly deductions; and (6) Alec Sou became upset at the workers who refused to sign and retaliated against the ten AACO-recruited workers by not letting them work. The documentary evidence in Section IV.D.1.g also demonstrated that Respondents committed further retaliatory acts by not paying these ten AACO-recruited workers for the work that they did perform, and claiming that Respondents did not know what these workers did in Hawaii from March 7, 2003 to March 25, 2003.

Retaliating against workers who assert their rights undermines the terms and conditions of their employment; it has a chilling effect on employee complaints.[765] While the *Beliz* case involved domestic farm workers under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), the chilling effects retaliation has on vulnerable farm workers is the same. Workers who see fellow workers get no work or go unpaid for work after they complain become less likely to complain about violations of their rights. This is particularly true here where the Respondents retaliated against more than ten

[765] Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 & n.73 (5th Cir. 1985) ("[T]he crucial purpose of such anti-retaliation clauses is to help farm workers 'overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations.'").

percent of their workforce (10 employees out of 88) and retaliated in a very visible way by not providing work or wages for a substantial period of time.

In sum, the undisputed facts demonstrate that the Respondents caused significant injury to their H-2A workers because the contract the Respondents provided to them was insufficient and did not relate to their work in Hawaii. The contract did not address the majority of the required terms and conditions of employment, and the terms and conditions the Respondents' form contract did address differed markedly from what the workers actually experienced in Hawaii. The undisputed facts also established a pattern of activity by the Respondents that undermined the terms and conditions of the H-2A workers' employment in three respects. First, the Respondents undermined the working conditions of all 88 H-2A workers and 32 United States workers by employing Thai H-2A workers certified for Arizona in Hawaii without first offering this Hawaiian employment to United States workers. The Respondents also purposely paid them less than the required hourly wage rate. Second, Respondents undermined the terms and conditions of employment by seeking illegal waivers from the workers to reduce their wages still further. The federal income tax deduction waiver affected all of the 88 H-2A workers, while the illegal $300 food and basic living supplies deduction waiver affected 43 of them. Lastly, Respondents undermined the workers' terms and conditions of employment by retaliating against ten AACO-recruited H-2A workers (11% of the work force) who complained about the Respondents' illegal pay practices. The Respondents had a pattern of activity of undermining the terms and conditions of employment.

Finally, no extenuating circumstances justify Respondents' illegal actions. Respondents committed a substantial violation for the terms and conditions of employment.

b. Respondents' Failure to Provide the Required Benefits was a Substantial Violation.

Respondents were guilty of substantial violations of the H-2A program regulations because:

1. They committed the significantly injurious act of failing to reimburse their H-2A workers for their T&S costs while traveling from their homes to the United States after they completed fifty percent of the contract period;

2. They engaged in a pattern of activity by failing to provide required benefits to their H-2A workers when they:

a. charged workers for housing-related expenses such as water, sewage, and electricity in violation of 20 C.F.R. § 655.102(b)(1);

b. failed to pay the required T&S costs to the H-2A workers when they traveled from the United States to their homes after they finished the contract period in violation of 20 C.F.R. § 655.102(b)(5)(ii); and

c. took deductions from the H-2A workers' wages to pay for meals and basic living supplies even though these deductions were not identified in Respondents' Application for Alien Employment Certification and related paperwork filed with, and approved by, ETA in violation of 20 C.F.R. § 655.102(b)(13).); and

3. no extenuating circumstances mitigated their violations.[766]

i. Respondents caused significant injury to all of the Thai H-2A workers they employed in Hawaii in 2003 because they failed to reimburse any of them for their inbound transportation and subsistence costs.

Respondents failed to make any inbound T&S reimbursements to their Thai H-2A workers after they completed fifty percent of the contract period. Section IV.D.1.a.i of this decision identified how the Respondents admitted that all of their Thai H-2A workers met the fifty percent work requirement. Section IV.D.1.a.i likewise describes in detail that the Respondents violated 20 C.F.R. § 655.102(b)(5)(i) because they did not meet any of the three methods (advances for T&S, providing T&S, or reimbursing workers for their T&S costs) to compensate the workers who met the fifty-percent requirement. Section IV.D.1.a.i details how the Respondents failed to make any of the required T&S reimbursements despite their commitment to pay them in the Clearance Order they filed with ETA, in the letters the Respondent sent to the Thai recruiters, and in the contracts that the Thai H-2A workers signed with Respondents' agents, the Thai recruiters.

[766] Fact 142.

Section V.A.1 of this order illustrates how failing to provide the T&S reimbursement caused significant injury to the Thai H-2A workers. The Respondents failed to reimburse these amounts to any of the 88 Thai H-2A workers. This section also explained that the Respondents were required to provide $55,240.96 in inbound T&S reimbursement. This is a significant amount of money to the Thai H-2A workers, given that it only costs 35 cents (U.S. currency) for a meal in Thailand.[767] Respondents' failure to provide $55,240.96 in inbound T&S reimbursement caused significant injury to 100% of their work force.

ii. Respondents had a pattern of a failing to provide the required benefits to the H-2A workers they employed in Hawaii in 2003.

1. Respondents illegally charged over a third of their H-2A work force various housing-related expenses such as water, electricity and sewage.

Respondents violated 20 C.F.R. § 655.102(b)(1)(v) because they charged their H-2A workers at Aloun Farms for housing-related expenses such as water, electricity and sewage. Section IV.D.1.f of this decision describes how Respondents admitted they executed a contract with Aloun Farms to charge their H-2A workers for water, electricity and sewage. The Respondents actually charged their workers for "housing charges (water, sewage, and electricity)."[768] Section IV.D.1.f further detailed how the Respondents admitted that they executed the contract and took these deductions when they knew it was improper to charge their workers for water, electricity, and sewage. They had represented to ETA that they would not charge their H-2A workers "for employer-provided housing or utilities." Respondents failed to provide the free housing and utilities benefit to the H-2A workers whom they employed at Aloun Farms.

The ten percent substantial violation threshold is exceeded because Respondents took these improper housing charges from a significant portion of their work force. Section IV.D.1.f demonstrates that Respondents deducted these impermissible housing charges from the wages of 33 of the 88 H-2A workers they employed in Hawaii.

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[767] Fact 143.

[768] August Sanctions 53; Fact 70.

2. Respondents failed to provide T&S or compensate their workers for these costs while they traveled from the Bangkok airport to their homes.

Respondents violated 20 C.F.R. § 655.102(b)(5)(ii) when they failed to provide T&S to the H-2A workers while they traveled from the Bangkok airport to their homes, or to reimburse these workers for the T&S costs. Section IV.D.1.a.ii of this decision explains how the Respondents were responsible for the return T&S for each of their 88 H-2A workers because they all worked past the March 31, 2003, end date of the 6555 mal certification. Section IV.D.1.a.ii also describes that while the Respondents provided the air transportation from Hawaii to the Bangkok airport, Respondents did not provide the T&S from the Bangkok airport to the workers' homes. Section IV.D.1.a.ii further explains how the Respondents failed to reimburse these H-2A workers for the T&S costs they incurred while traveling from the Bangkok airport to their homes. Lastly, Section V.A.1 showed how the Respondents failed to provide the required T&S or its reimbursement, even though the Respondents committed to pay it in the Clearance Order that was certified by ETA.

The ten percent substantial violation threshold is exceeded because Respondents failed to provide the required T&S or its reimbursement to a significant portion of the work force. Section V.A.1 showed that the Respondents failed to provide the required T&S to 85 of the 88 H-2A workers that they employed in Hawaii in 2003.

3. Respondents further undermined the workers' benefits by taking deductions ETA never approved.

Respondents violated 20 C.F.R. § 655.102(b)(13) because they took impermissible deductions for meals and basic living supplies that ETA never authorized. Section IV.D.1.e.ii of this order explains that the job order Respondents submitted to ETA included no deductions for meals or basic living supplies. Section IV.D.1.e.ii further details how Aloun Farms, while supervising the workers for the Respondents, distributed a document to the H-2A workers informing them of deductions for meals and basic living supplies. Lastly, Section IV.D.1.e.ii established how the Respondents admitted they took deductions for food and I found that Respondents took deductions for meals and basic living supplies.

The ten percent substantial violation threshold is exceeded because Respondents took these illegal housing charges from a significant portion of the work force. Section IV.D.1.e.ii relates that Respondents took these illegal deductions from 33 of the 88 H-2A workers that they employed in Hawaii in 2003.

The Administrator has shown that Respondents caused significant injury to their H-2A workers because they failed to provide any of the required inbound T&S reimbursements to any worker. Furthermore, the amount of back wages involved, $55,023.77, is significant in two respects. Besides being a significant amount of money in its own right, it is especially significant for Thai workers since their standard of living enables them to buy a meal for just 35 US cents. The Administrator also established the Respondents' pattern of failing to provide the required benefits. First, the Respondents failed to provide the required housing free-of-charge. They charged for housing-related utilities such as electricity, water, and sewage. Second, the Respondents failed to provide the required outbound T&S from the Bangkok airport to the workers' homes. Third, Respondents took unauthorized deductions from the workers' wages for meals and basic living supplies that ETA had not approved. Lastly, the number of workers affected ranged between 37% and 97%. The Administrator's proof is sufficient evidence that the Respondents engaged in a pattern of failing to provide the required benefits.

Finally, I find no extenuating circumstances. Thus, failing to provide these benefits amounted to a substantial violation.

The OFLC Administrator's Notice of Prospective Denial is further supported by additional information that came to light after the prospective denial was issued on February 23, 2005. The Motion to Amend the Order of Reference[769] I granted on December 28, 2005, showed the Administrator found more deduction violations when Respondents produced hundreds of additional pages of payroll documents in response to initial disclosures and discovery in August and October 2005. Section IV.D.1.e.i of this decision demonstrates that the Respondents took over $9,000 in improper federal income tax deductions from 86 of the 88 Thai workers they employed in Hawaii in 2003.[770] Because of additional information produced during discovery, the proof of this substantial violation grew stronger.

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[769] Filed Nov. 18, 2005, at 2–3.

[770] The only reason why it is not 100% of the H-2A workers is because Respondents failed to maintain or provide any payroll records for the work of two workers (Fact 98) even though Respondents admitted that all of their H-2A workers worked until the end of the H-2A Certification, March 31, 2003 (Fact 22).

c. Respondents Pay Practices Amounted to a Substantial Violation.

The Respondents pay practices constituted a substantial violation because:

1. The Respondents significantly injured many of their workers by failing to honor the three-quarters work guarantee;

2. The Respondents exhibited a pattern of violations related to paying wages due by:

   a. paying H-2A workers less than the applicable AEWR in violation of 20 C.F.R. § 655.102(b)(9);

   b. failing to pay H-2A workers for all work performed in violation of 20 C.F.R. § 655.102(b)(10);

   c. failing to maintain accurate payroll records in violation of 20 C.F.R. § 655.102(b)(7);

   d. failing to provide the required payroll records to the Department when requested in violation of 20 C.F.R. § 655.102(b)(7).); and

3. there were no extenuating circumstances involved with these violations.[771]

i. Respondents caused significant injury to over 75% of their H-2A workers because they failed to provide them either work or pay to satisfy the three-quarters guarantee.

The Respondents failed to honor the requirement of the three-quarters guarantee for over 75% of their H-2A workers. Section IV.D.1.b of this order describes how the Respondents modified the starting point of the three-quarters guarantee from the day after the worker arrives at the work site to when "the worker is ready, willing, able and eligible to work" in the Clearance Order they filed with ETA. This section further identified how ETA certified this modification. Section IV.D.1.b also explains how Respondents admitted that all of their Thai H-2A workers were ready, willing, able and eligible to work when they arrived in Los Angeles. Section IV.D.1.b further explains that the Respondents failed to provide either the work or pay to 68 of the 88 H-2A workers for three-quarters of the time period that

[771] Fact 144.

extended from the day after the workers arrived in Los Angeles to March 31, 2003. Lastly, Section IV.D.1.b relates that none of the defenses to the three-quarters guarantee (impossibility, abandonment of employment, or worker termination for cause) applied because Respondents admitted in their discovery responses that (1) all workers worked past the March 31, 2003, certification end date and (2) Respondents did not notify Hawaii's local job office that any of their Hawaiian H-2A workers voluntarily abandoned the employment or quit.

Section IV.D.1.b also describes how this failure to fulfill the requirements of the three-quarters guarantee caused significant injury to the Thai H-2A workers. Section IV.D.1.b established how Respondents were required to pay $36,079.63 in additional wages to satisfy the three-quarters guarantee. This is a significant amount of money to the Thai H-2A workers.[772] Section IV.D.1.b also illustrates that this violation was significant because it applied to more than 75% of the work force. The Respondents failure to provide $36,079.63 in wages caused significant injury to more than 75% of the work force.

ii. Respondents engaged in a pattern of pay practices that adversely affected their workers' wages.

1. Respondents never paid any of their Thai H-2A workers the AEWR in effect at the time they worked in Hawaii in 2003.

The Respondents failed to pay their H-2A workers the AEWR in effect for Hawaii for their February and March 2003 work. Section IV.D.1.d.i of this opinion establishes how Respondents admitted that the AEWR for Hawaii was higher than either the state or federal minimum wage. Section IV.D.1.d.i also relates that for 86 of their 88 H-2A workers, the Respondents failed to pay the AEWR that was in effect in Hawaii at the time the H-2A workers worked in February and March. The Administrator could not claim 100% of the workers suffered because the Respondents failed to maintain and produce payroll records for two workers even though the Respondents admitted that all of their workers worked until the end of the H-2A certification period.[773] The Respondents' payroll practices resulted in at least 97% of their Thai H-2A work force not being paid the required AEWR.

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[772] Fact 143.

[773] Fact 22, 98.

2. Respondents frequently did not pay groups of workers for all work.

The Respondents did not pay four separate work groups for discrete periods of work. Section IV.D.1.c of this decision explains that the Respondents did not pay four workers for twelve days of work in February 2003. Section IV.D.1.c.ii also describes how Respondents did not pay ten additional AACO-recruited workers for three days of work at Aloun Farms and did not pay nine of them for eleven additional days work in March 2003. Section IV.D.1.c.iii likewise explains that Respondents did not pay 44 additional workers for 3 days of work in March 2003. Lastly, Section IV.D.1.c.iv explains that Respondents did not pay 22 workers for an entire 15-day or 16-day pay period in March 2003. Respondents therefore frequently did not pay wages to large groups of workers for work they performed.

The ten percent substantial violation threshold is exceeded because Respondents failed to make the required payment to 75 of the 88 workers. The four unpaid workers identified in Section IV.D.1.c also were identified as being unpaid for one of the March pay periods in Section IV.D.1.c.iv.[774] The names of the 54 AACO-recruited workers at Sections IV.D.1.c.ii & IV.D.1.c.iii do not coincide with the names of any of the workers in Section IV.D.1.c.iv.[775] The total number of workers identified in Sections IV.D.1.c.ii– is 76.[776] Therefore, Respondents failed to pay over 85% (76/88) of the Thai H-2A workers correctly for work performed in Hawaii in February and March 2003.

3. Respondents adversely affected the workers' pay by failing to maintain accurately the required payroll records.

Section IV.D.1.h of this decision recounts that the Respondents failed to accurately maintain the required records in 11 separate and distinct ways. For example, Section IV.D.1.h explains that: (1) none of the documents that Respondents produced in this litigation identified the total number of hours worked, by worker, by pay period, for the 43 H-2A workers that the Respondents employed at Aloun Farms in March 2003; (2) the Respondents have not produced any payroll records in this litigation for the 44 workers who worked from March

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[774] Facts 42, 59.

[775] Fact 145.

[776] Ten for Section IV.D.1.c.ii, 44 for Section IV.D.1.c.iii, and 22 for Section IV.D.1.c.iv.

17, 2003, to March 19, 2003, and for the 10 AACO-recruited workers who worked from March 8, 2003, to March 11, 2003; (3) the payroll documents that the Respondents produced in this litigation contained incorrect information related to rate of pay, number of pieces harvested, and the nature of the work performed; and (4) none of the payroll records that the Respondents produced in this litigation identified "the time the worker began and ended each day" and "the number of hours offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee)" to any worker. Section IV.D.1.h further showed that the Respondents repeatedly admitted in their discovery responses that they had incomplete payroll records. Respondents failed to maintain (1) the required records, and (2) accurate records for those records that they did maintain.

It is likewise clear that the ten percent H-2A worker substantial violation threshold is exceeded because the Respondents failed to maintain the required records for all 88 of its H-2A workers. All workers worked until at least April 1, 2003, and Respondents provided no records for any worker concerning their start and stop times and "the number of hours offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee)."[777]

4. Respondents negatively affected the workers pay by failing to provide the payroll records when requested by DOL.

Section IV.D.1.h relates that the Respondents produced almost a 20-fold increase in payroll records in this litigation compared to what they initially provided to the Wage and Hour Division (WHD) in May 2003. Respondents only produced 24 payroll records in May 2003 in response to the WHD's request for all payroll records.[778] Section IV.D.1.h also establishes that the Respondents produced nearly 480 additional pages of payroll records in this litigation from August 2005 to January 2006. The breadth and depth of the Respondents' violation is clear from their failure to produce six types of records in May 2003: earning history reports, cancelled checks, bank statements, earning statements, employee detail reports, and timesheets. Furthermore, Section IV.D.1.h identifies the serious problems associated with the

[777] Fact 22, Garcia Decl. ¶¶ 4, 5.

[778] Section IV.D.1.h.

Respondents failure to provide the requested payroll records. For example, the WHD had to seek payroll records from third parties such as Aloun Farms, reconstruct the number of hours worked, and WHD did not initially identify either the correct amount of back wages due (*e.g.*, back wages associated with the inappropriate federal income tax deductions) or all of the violations (*e.g.*, earning statement violation). The Respondents' failure to provide the required payroll records to the WHD when requested had an adverse effect on the WHD.

It is likewise clear that the ten percent substantial violation threshold is exceeded because the Respondents' failure affected all 88 workers. The Respondents failed to provide the required records for the entire work force, as demonstrated by their failure to provide any earning history reports, cancelled checks, bank statements, earning statements, employee detail reports, and timesheets for any worker.

In summary, the Respondents committed substantial pay violations in numerous ways. First, they caused significant injury to their H-2A workers by failing to honor the three-quarters guarantee to 75% of the workers. Furthermore, the amount of back wages involved, $36,079.63, is significant in two respects. This is a significant amount of money in its own right and also significant given the Thai workers' standard of living.

Second, Respondents engaged in a pattern of failing to pay their H-2A workers their correct wages. First, the Administrator established that the Respondents failed to pay the AEWR in effect in Hawaii at the time the work was done. This significant failure affected all workers for all hours worked. Second, the Administrator demonstrated that the Respondents failed to pay 75 H-2A workers for the work they performed. This failure to pay ranged from three days to fifteen or sixteen days. Third, the Administrator found that Respondents failed to maintain the required payroll records for all workers and that, for the records they did maintain, many were inaccurate. Fourth, the Administrator demonstrated that the Respondents only provided 5% of the payroll records in May 2003 and produced the bulk of the payroll records only in 2005. Lastly, for this pattern, the Administrator identified that the number of workers affected ranged between 85% and 100%.

The Administrator provided sufficient evidence to demonstrate that the Respondents had a pattern of adversely affecting the wages of their H-2A workers. Finally, no extenuating circumstances mitigate these violations. Respondents committed a substantial violation in terms of the benefits that it provided to the workers.

The OFLC Administrator's Notice of Prospective Denial is further supported by additional information acquired after the

February 23, 2005 prospective denial was issued. As shown in the Motion to Amend the Order of Reference,[779] the Administrator found earning statement violations when the Respondents produced hundreds more pages of payroll documents in response to initial disclosures and discovery in August and October 2005. Section IV.D.1.i explains that the earning statements that Respondents provided to the H-2A workers employed at Aloun Farms did not identify the correct pay rate nor the correct number of hours worked. Section IV.D.1.i further explains that these earning statements, for all of the H-2A workers that the Respondents employed in Hawaii in February and March 2003, did not identify "the hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the [three-quarters] guarantee." The additional information produced during discovery offers additional support for the determination of a substantial violation.

C. Civil Monetary Penalties Can be Assessed on Summary Decision and Need Not be Recalculated

As in their argument against debarment explained in Section V.B.1, the Respondents also contend that a Civil Monetary Penalty cannot be determined on a Motion for Summary Decision.[780] This argument fails for the same reasons discussed in Section V.B.1. Likewise, since the Respondents have failed to raise any specific objections to the calculation or amount of the Penalties, I need only confirm that the Administrator's explanation for the Penalty calculation is adequate; I do not need to independently evaluate the seven Penalty factors. The Administrator's Penalties calculations reasonable, so I assess $194,400.00 in Penalties against Respondents.

1. Civil Monetary Penalties Can be Assessed on Summary Decision.

Respondents point to *United States v. Pacific Northwest Electrical, Inc.*, to support their assertion that Penalties can't be assessed on summary decision because doing so would involve weighing facts. A closer look at the case shows that it's not particularly helpful. *Pacific Northwest Electrical* is an unpublished district court decision so it is of little, if any, precedential value.[781] The case involved a number of violations of the Fair Housing Act (FHA) for which the

[779] At 2–3 (filed in Nov. 18, 2005 and granted on Dec. 28, 2005).

[780] Opposition to Summary Decision 6.

[781] 2003 WL 24573548 at *31 (D. Idaho Mar. 21, 2003).

United States sought Penalties.[782] A Magistrate Judge first heard the case and issued a recommended ruling that the District Court reviewed, and "adopted to the extent it [was] not inconsistent with this Memorandum Decision and Order."[783] The District Court did discuss Penalties, but focused on how to calculate the statute of limitations for Penalties in order to determine whether the United States could seek them.[784] The portion of the opinion the Respondents quoted is found in the Magistrate Judge's original recommended order, and is taken out of context. Pointing to the House Judiciary Committee report on the specific statute giving rise to Penalties in the FHA context, the Magistrate Judge noted the factors listed in the statute "are to be considered '[w]hen determining the *amount* of a penalty.'"[785] The Magistrate Judge then went on to conclude "in order to determine whether a civil penalty should be imposed, and the amount thereof, the Court would have to weigh evidence, which is not the role of the Court in summary judgment proceedings" and recommended denying the *defendants'* motion for summary judgment with regard to that topic.[786] There is no discussion or analysis of why assessment of Penalties (both whether they are due and their amount) would necessarily require the judge to weigh evidence. Since the Magistrate Judge was not denying the availability of Penalties but leaving them open for resolution on further proceedings, the District Court didn't address this conclusory paragraph.

The Respondents have not indicated any other case that comes to the same conclusion. At least two recent ARB decisions have upheld Penalties that an ALJ assessed and calculated when granting a Motion for Summary Decision. But some of the cases the Administrator relies do not support its position.

The Administrator asserted, for example, that *In re Administrator; WHD v. Halsey*,[787] brought under the child labor provisions of the Fair Labor Standards Act, supports its position. In *Halsey* the ARB affirmed, on *de novo* review, the Penalties determined by the ALJ.[788] At first blush, *Halsey* looks quite analogous. The

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[782] *Id.* at *1, *3.

[783] *Id.* at *16.

[784] *Id.* at *3.

[785] *Id.* at *31 (quoting 1988 U.S.C.C.A.N. at 2201) (emphasis added by Magistrate Judge).

[786] *Id.*

[787] ARB No. 04-061, ALJ No. 2003-LCA-00005, 2005 WL 2415938 at *1 (ARB Sept. 29, 2005).

[788] *Id.*

regulation prescribing calculation and assessment of the Penalties was very similar to that governing Penalties related to violations of the H-2A visa program: the Penalties were discretionary, had a maximum (but no minimum) per violation, and required the evaluation of various factors, many of which were similar to the factors found in 29 C.F.R. § 501.19.[789] However, in *Halsey*, the ALJ bifurcated the proceedings into liability and penalty phases, and then determined liability on cross motions for summary judgment.[790] The parties then "*agreed* that the penalty phase be decided based on their written submissions."[791] Additionally, only one of the two Penalties was disputed.[792] The ALJ decided the amount of the penalty in dispute by independently considering all the factors.[793]

While the Penalties were affirmed, they weren't actually decided on summary decision. It's not clear how important it was to the ARB that the parties agreed the ALJ should determine the amount of Penalties based on written submissions. It's also not clear if the written submissions were the same documents the ALJ used in ruling on the cross motions for summary judgment in the liability phase, or if these were separate pleadings. Despite these distinctions, two other analogous cases support the Administrator's position.

Cyberworld Enterprise Technologies, Inc. d/b/a Teckstrom, Inc. v. Administrator, WHD,[794] affirmed Penalties awarded for various violations of the H-1B visa program in circumstances that support the Administrator's position. The ARB affirmed the ALJ's initial decision and order on summary decision that itself affirmed the Penalties the Administrator had assessed against the employer, Cyberworld.[795] The Penalties in question were governed by 29 C.F.R. § 655.810, a regulation very similar to 29 C.F.R. § 501.19: they are discretionary; they set a maximum penalty, but not a minimum; and the regulations provide a non-exhaustive list of factors to evaluate in determining the amount of the penalty to assess.[796]

The only factual distinction between this case and *Cyberworld* is that in *Cyberworld*, the employer and the Administrator had both

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[789] *Id.* at *9.

[790] *Id.* at *1.

[791] *Id.* (emphasis added).

[792] *Id.* at 2.

[793] *Id.*

[794] ARB No. 04-049, ALJ No. 2003-LCA-00017, 2006 WL 1516647 at *1 (ARB, May 24, 2006).

[795] *Id.* at *2.

[796] *See id.*

entered into joint stipulations of fact accompanied by cross motions for summary decision.[797] The ALJ based his decision (including the assessment of penalties) on the joint stipulations, but the questions of liability, whether or not to impose Penalties, and the calculation of the Penalties themselves were all determined through summary decision. The ARB found no fault with that.

Further undermining Respondents' contention is *In re Secretary of Labor v. A-One Medical Services*.[798] This case involved Penalties assessed on violations of the Fair Labor Standards Act for failure to pay overtime.[799] The relevant Penalties regulations were very similar to those involved in H-2A visa cases—the Penalties are discretionary, have maximums (but not minimums), and require the evaluation of various factors.[800] The ALJ granted summary judgment to the Department, and imposed the Penalties the Department initially assessed; the ARB affirmed both.[801] Taken together, *Cyberworld* and *A-One Medical Services* dispel any doubt about a judge's authority to conclude a case by summary judgment; both support the liability for and calculation of discretionary Penalties on a motion for summary judgment.

The other cases the Administrator cited[802] do involve summary decision and Penalties, but are factually distinguishable from this situation. In all of these cases the reviewing body upheld the Penalties, so they certainly don't contradict the Administrator's position. In light of the stronger precedent found in *Cyberworld* and *One Medical Services*, I find that I may assess Penalties on the Administrator's Motion for Summary Decision. I now proceed to the question of whether I can approve the Administrator's proposed Penalties without independently evaluating of the Penalties factors and recalculating the penalties.

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[797] *Id.*

[798] ARB No. 02-067, ALJ No. 2001-FLS-00027, 2004 WL 2205227 (ARB Sept. 23, 2004).

[799] *Id.* at *1.

[800] *Id.* at *2.

[801] *Id.* at *3.

[802] U.S. v. Eghbal, 548 F.3d 1281, 1285 (9th Cir. 2008), Yetiv v. U.S. Dep't of Housing and Urban Development, 503 F.3d 1087, 1088–89, 1090–91 (9th Cir. 2008), U.S. v. Mirama Enterprises, Inc., 387 F.3d 983, 985, 988–89 (9th Cir. 2004), Balice v. U.S. Dep't of Agriculture 203 F.3d 684, 687–89 (9th Cir. 2000).

2. An ALJ May Approve the Calculation of the Penalties Without Independent Evaluation of the Factors When Respondents Offer no Specific Objections

To refute the Respondents' argument that an ALJ may not assess Penalties on summary decision, the Administrator pointed out that the Respondents failed to object to the agency's calculation and assessment of Penalties.[803] [804] The Administrator argued that I do "not have to weigh any of the Penalty factors or any of the Penalties evidence because the Administrator's facts and The District Director of the Wage and Hour Division, Terrence Trotter's ("Trotter")[805] findings are undisputed."[806] One case, *A-One Medical Services*,[807] supports this contention to the extent that, if the party against whom Penalties would be assessed fails to object to the amount or calculation of the Penalties, the ALJ need do no more than review the Administrator's calculations for reasonableness.

In *A-One Medical Services*, the respondents challenged the assessment and amount of Penalties before the ALJ.[808] The ALJ didn't independently evaluated the Penalty calculation because the employer "had not raised [before the ALJ] any other issue as to the amount of the civil money penalty and the Administrator had shown that the amount of the penalty was appropriate for the violations."[809] On review the ARB affirmed the ALJ's evaluation of Penalties, as well as a separate issue of collateral estoppel. The employer hadn't raised any

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[803] The agency's assessment and calculation of Penalties is contained in the Declaration of the Wage and Hour Division, District Director, Terrance J. Trotter in Support of the Administrator's Motions for Summary Decision [hereinafter "Trotter Decl."], March 4, 2010. Terrence Trotter, at the time he assessed the Penalties, was an Assistant District Director. He has subsequently been promoted to District Director. Trotter Decl. ¶¶ 3, 4. This opinion uses his current title.

[804] Administrator's Reply to Respondents' Opposition to Administrator's Motion for Summary Decision [hereinafter "Reply to Opposition to Summary Decision"] 9.

[805] Because Trotter's assessments of the Penalties against Respondents have been wholly adopted by the OLFC Administrator, this opinion refers to those sets of assessments interchangeably.

[806] *Id.*

[807] This is the only known case involving an analogous fact scenario, and there are no known cases in which a federal court or the ARB overturned a Penalty assessment because the ALJ accepted the Administrator's reasonable calculation instead of independently re-calculating Penalties when there were no specific objections to the amount or procedure of the calculation.

[808] *In re Secretary of Labor v. A-One Medical Services*, ARB No. 02-067, ALJ No. 2001-FLS-00027, 2004 WL 2205227 (ARB Sept. 23, 2004).

[809] *Id.* at *3.

other issues about the appropriateness of the amount before the ALJ or ARB, and there were no genuine issues of material fact with regard to the Penalties themselves.[810]

Here the Respondents failed to object to District Director Trotter's declaration, which explains how he weighed, for each Penalty, the seven factors used to set Penalties under 29 C.F.R. § 501.19.[811] The Respondents also failed to raise any other objections to the amount or calculation of the Penalties. Respondents have objected to the assessment of Penalties themselves.[812] Under *A-One Medical Services*, I need only confirm that the Administrator has "shown that the amount of the penalty was appropriate for the violations"[813] and need not independently calculate the Penalties.

3. The Administrator's Assessment of Civil Money Penalties is Reasonable

Having reviewed the Administrator's assessment of each violation in light of the seven factors, I find that the Administrator made a reasonable determination of the amount of Penalties to be imposed for each of the eleven violations of the H-2A Program regulations.

The Administrator's Penalty assessment, relying on Trotter's calculations and analyses, explains that each of the eleven separate Penalties was calculated by multiplying the number of H-2A workers affected, by a base per-worker penalty amount. The range of workers affected may be as small as 10 workers,[814] or as large as 88 workers,[815] the latter number comprises the entire Thai H-2A work force at issue in this case. The per-worker penalty amount also ranges between $100[816] and $500.[817] I find Administrator's calculation method reasonable on several bases. First, the per-worker penalty amount, even at its highest rate of $500, does not exceed even half the

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[810] *Id.*

[811] *See generally* Trotter Decl.

[812] Opposition to Summary Decision 6–7.

[813] *One Medical Services*, ARB No. 02-067, ALJ No. 2001-FLS-00027, 2004 WL 2205227 at *3.

[814] Ten workers were affected by the Respondents' violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3. Section V.D.2.f.

[815]All 88 workers were affected by Respondents violations in Sections V.D.2.a, V.D.2.h, V.D.2.j, V.D.2.k.

[816] See Section V.D.2.k.

[817] See Sections V.D.2.b, V.D.2.d, V.D.2.f, V.D.2.j.

maximum statutory per-worker penalty amount of $1000.[818] Second, the Administrator's per-worker penalty amount varies according to the severity of the violation—with substantive violations of worker rights meriting the higher $500[819] per-worker penalty amount, and less severe procedural violations incurring the lesser penalty amounts of $200 or $100[820] per worker affected. The $100 and $200 penalty rates are nominal, and were assessed in seven out of the eleven Penalties. Last, in light of the number of workers affected, each of the eleven Penalties is individually modest, and it is only in aggregate that the sum of $194,400.00 becomes substantial.

Because the Administrator has "shown that the amount of each penalty was appropriate for the violations"[821] and because Respondents don't object to any flaw in the Administrator's Penalty calculations, I adopt the Administrator's assessment of the Penalties in whole.

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[818] 29 C.F.R. § 500.143(c) states: "A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed against each worker. A civil money penalty for discrimination or interference with Wage and Hour investigative authority will not exceed $1,000 for each such act of discrimination or interference.

[819] *E.g.*, the Respondents' violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3 by discriminating and retaliating against 10 H-2A workers who asserted their rights under the H-2A program incurred the stepped-up $500 per-worker penalty rate because this is a substantive violation of the workers' rights under the INA. Similarly, the Respondents' failure to satisfy the three-quarters requirement in violation of 20 C.F.R. § 566.102(b)(6) incurred the $500 per-worker penalty rate because this provision is a substantive protection of foreign agricultural workers whom the INA seeks to guarantee a specific amount of work when they travel to the United States on H-2A visas.

[820] The Respondents incurred the lower $100 per-worker penalty rate for their failure to provide all of their H-2A workers with a complete and accurate employment contract in violation of 20 C.F.R. § 655.102(b)(14). Because this violation does not severely infringe on the most crucial statutory protections of the H-2A Program, and is more along the lines of a procedural violation, the Administrator had reason to use the lower penalty rate. The Respondents are also assessed the $200 per-worker penalty rate for their failure to provide accurate written wage statements and for violating the transportation and subsistence requirements, wage rate requirements, and deductions requirements. And while these too are violations of substantive provisions, they are somewhat alleviated by granting back-wages in the appropriate amounts. *See* Section V.A.

[821] *One Medical Services*, ARB No. 02-067, ALJ No. 2001-FLS-00027, 2004 WL 2205227 at *3.

D. Civil Monetary Penalties

1. The Regulations on Civil Monetary Penalties

The H-2A implementing regulations require an analysis of seven factors in determining the amount of civil money penalties to assess for violations. 29 C.F.R. § 501.19. These are:

1. Previous history of violation(s) of this Act and its implementing regulations;
2. The number of workers affected by the violation(s);
3. The gravity of the violation(s);
4. Efforts made in good faith to comply with the INA;
5. Explanation of person charged with the violation(s);
6. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the INA; and
7. The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the workers.[822]

The H-2A implementing regulations also limit the amount of Penalties that can be assessed per worker to $1,000 per each violation or act committed against each worker.[823]

2. Penalties Granted

a. Respondents are assessed $17,600 in civil money penalties for violating the transportation and subsistence requirements of 20 C.F.R. § 655.102(b)(5)(i)&(ii).

Trotter assessed Respondents $17,600 in Penalties for their failure to provide T&S, after taking into account the assessment factors required by 29 C.F.R. § 501.19.[824] Trotter calculated this amount by multiplying the number of H-2A workers affected (88) by $200.[825] Trotter made this assessment based upon the following findings: (1) Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers

[822] 29 C.F.R. § 500.143(b).

[823] 29 C.F.R. § 500.143(c).

[824] Trotter Decl. ¶ 5.

[825] Trotter Decl. ¶ 5.

affected was high since the inbound T&S violations affected all 88 workers and the outbound T&S violations affected 85 of the 88 workers; (3) the gravity was likewise high because the regulation is designed to encourage workers to work at least fifty percent of the contract, if not the whole contract, and this purpose is undermined if the workers meet their obligation and Respondents do not compensate them accordingly; (4) the bad faith is also high since the Respondents, contrary to their regulatory and contractual duties and representations in their job order, failed to reimburse any worker for his transportation related expenses and failed to provide the required subsistence; (5) the Respondents failed to provide any explanation for why they failed to meet their T&S obligations; (6) the Respondents did not provide a commitment for future compliance; and (7) the Respondents obtained a significant financial gain because they avoided paying their workers over $45,000 in back wages.[826] Thus, since the Respondents met six of the seven H-2A Penalty factors, Trotter had ample reason to assess $17,600 in Penalties for Respondents' failure to meet the T&S requirements.[827]

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's decision to assess $17,600 in Penalties against the Respondents for their violations of the T&S requirements.

b. Respondents are assed $32,500 in civil money penalties for failure to satisfy the three-quarters guarantee requirement of 20 C.F.R. § 655.102(b)(6).

Trotter assessed the Respondents $32,500 in Penalties for their failure to meet the three-quarters guarantee requirements.[828] Trotter determined this amount by multiplying the number of H-2A workers the WHD initially determined were affected in the investigation for this violation (65) by $500.[829] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers initially affected when Trotter performed the Penalties assessments was high since the failure to pay violation affected 65 of the 88 workers; (3) the gravity was likewise high because the regulation is designed to provide protection in terms of the number of hours worked and paid; this purpose is undermined if the

[826] 29 C.F.R. § 501.19; Trotter Decl. ¶ 5.

[827] 29 C.F.R. § 501.19.

[828] Trotter Decl. ¶ 6.

[829] *Id.*

Respondents can unilaterally decide to abandon their statutory and contractual obligations and not provide the required hours or wage payments; (4) the bad faith is also high since Respondents, contrary to their regulatory and contractual duties and representations in their job order, failed to honor the three-quarters guarantee for a single worker; (5) Respondents failed to provide any explanation for why they failed to meet their three-quarters guarantee obligations; (6) Respondents did not provide a commitment for future compliance; and (7) the Respondents achieved significant financial gain because they avoided paying their workers over $34,650.00 in back wages.[830] The Respondents met six of the seven H-2A Penalty factors; Trotter had ample reason to assess $32,500 as a Penalty for the Respondents' failure to meet the three-quarters guarantee requirements.[831]

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $32,500 in Penalties against Respondents for violating of the three-quarters guarantee requirement.

c. Respondents are assessed $4,400 in civil money penalties for violating the payment requirements of 20 C.F.R. § 655.102(b)(10).

Trotter assessed Respondents $4,400 in Penalties for their failure to pay wages due.[832] Trotter determined this amount by multiplying the number of H-2A workers that the WHD initially had determined were affected (i.e., 22) by $200.[833] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers affected when Trotter initially assessed the Penalties was high, since the failure to pay violation affected 22 workers; (3) the gravity was likewise high because the regulation is designed to provide pay protection and this purpose is undermined if the Respondents do not pay the wages due; (4) the bad faith is also high since the Respondents, contrary to its regulatory and contractual duties and representations in their job order, failed to honor their commitments to pay the workers for all of their hours worked; (5) the Respondents did not provide any explanation for why they failed to pay for all hours worked; (6) the Respondents did not provide a commitment for future compliance; and (7) the Respondents

[830] 29 C.F.R. § 501.19; Trotter Decl. ¶ 6.

[831] 29 C.F.R. § 501.19.

[832] Trotter Decl. ¶ 7.

[833] Trotter Decl. ¶ 7.

achieved significant financial gain because they avoided paying their workers a significant amount of wages.[834] The Respondents met six of the seven H-2A Penalty factors, so Trotter had ample reason to assess $4,400 in Penalties for their failure to pay wages when due.[835]

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $4,400 in Penalties against Respondents for their failure to pay wages due.

d. Respondents are assessed $16,500 in civil money penalties for violating the wage rate requirements of 20 C.F.R. § 655.102(b)(9).

Trotter assessed the Respondents $16,500 in Penalties for failure to pay the applicable wage rate.[836] Trotter determined this amount by multiplying the number of H-2A workers that the WHD initially determined were affected (i.e., 33) by $500.[837] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers affected when Trotter performed the Penalties assessments was high since it affected 33 workers; (3) the gravity was likewise high because the regulation is designed to provide pay protection and this purpose is undermined if the Respondents do not pay the wages due; (4) bad faith is also high because the Respondents, contrary to their regulatory and contractual duties and representations in their job order, failed to honor their commitments to pay the workers the highest of the state and federal minimum wages, AEWR, or the prevailing wage; (5) the Respondents did not provide any explanation for why they failed to pay the proper wage rate; (6) the Respondents did not provide a commitment for future compliance; and (7) the Respondents achieved significant financial gain because they avoided paying their workers over $10,000.00 in back wages.[838] The Respondents met six of the seven H-2A Penalty factors, so Trotter had ample reason to assess $16,500 in Penalties for Respondents' failure to pay the required hourly rate.[839]

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $16,500 in Penalties against the Respondents for not paying the correct wage rates.

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[834] 29 C.F.R. § 501.19; Trotter Decl. ¶ 7.

[835] 29 C.F.R. § 501.19.

[836] Trotter Decl. ¶ 8.

[837] *Id.*

[838] 29 C.F.R. § 501.19; Trotter Decl. ¶ 8.

[839] 29 C.F.R. § 501.19.

e. Respondents are $17,200 in civil money penalties for violating the deduction requirements of 20 C.F.R. § 655.102(b)(13).

Trotter assessed the Respondents $17,200 in Penalties for taking illegal wage deductions.[840] Trotter determined this amount by multiplying the number of H-2A workers who were affected (i.e., 86) by $200.[841] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers affected was high since the failure to pay violation affected 86 of 88 workers; (3) the gravity was likewise high because the regulation is designed to provide pay protection and this purpose is undermined if the Respondents take illegal deductions; (4) bad faith is also high because the Respondents, contrary to their regulatory and contractual duties and representations in their job order, took illegal deductions and denied taking the deductions; (5) the Respondents provided an explanation for why they took the illegal deductions; (6) the Respondents did not provide a commitment for future compliance; and (7) the Respondents achieved significant financial gain because they avoided paying their workers over $13,400 in wages.[842] The Respondents met five of the seven H-2A Penalty factors, so Trotter had ample reason to assess $17,200 in Penalties.

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $17,200 in Penalties against Respondents for taking illegal deductions from their workers' pay.

f. Respondents are assessed $5,000 in civil money penalties for retaliating against H-2A workers in violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.3.

Trotter assessed the Respondents $5,000 in Penalties because Respondents discriminated against the H-2A workers who complained about the violations of their rights under the H-2A program.[843] Trotter determined this amount by multiplying the number of H-2A workers that were affected by this violation (i.e., 10) by $500.[844] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its

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[840] Trotter Decl. ¶ 9.

[841] *Id.*

[842] 29 C.F.R. § 501.19; Trotter Decl. ¶ 9.

[843] Trotter Decl. ¶ 11; *see also supra*, Section IV.D.1.g.

[844] *Id.*

implementing regulations; (2) the number of workers affected was significant since Respondents retaliated against ten separate workers, which is more than 10% of the work force; (3) the gravity was likewise high because Respondents retaliated against those workers who refused to accept the deductions and lower wage rates; (4) the bad faith is also high: Respondents knew of the requirements, made commitments to the ETA about what deductions would be taken, and that they would pay the AEWR for work performed, yet after making these commitments, the Respondents punished the workers either by not employing them or by not paying them for work performed after they complained and refused to sign a document accepting the deductions; (5) the Respondents did not provide any explanation for why they discriminated against the workers; (6) the Respondents did not provide a commitment for future compliance; and (7) while the Respondents achieved moderate financial gain because they avoided paying their workers over $8,962.53 in back wages, the potential impact of serious harm was great because of the chilling effect that this retaliation had when other H-2A workers learned of the consequences of complaining about illegal payroll practices.[845] Thus, since Respondents met six of the seven H-2A Penalty factors, Trotter had ample reason to support his $5,000 Penalties assessment.

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $5,000 in Penalties against Respondents because they retaliated against those H-2A workers who exercised their rights to complain about illegal practices.

g. Respondents are assessed $6,600 in civil money penalties for violating 20 C.F.R. § 655.102(b)(1) for unlawfully charging the Thai H-2A workers at Aloun Farms for housing-related expenses such as water, electricity, and sewage.

Trotter assessed the Respondents $6,600 in Penalties because they took housing-related deductions for items such as electricity, water and sewage from their workers' pay.[846] Trotter determined this amount by multiplying the number of H-2A workers that were affected by this violation (i.e., 33) by $200.[847] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations;

[845] 29 C.F.R. § 501.19; Trotter Decl. ¶ 11.

[846] Trotter Decl. ¶ 10.

[847] *Id.*

(2) the number of workers affected was high since the failure to pay violation affected 33 workers; (3) the gravity was likewise high because the regulation is designed to provide the workers free housing and this purpose is undermined if Respondents charge the workers for housing - elated costs; (4) the bad faith is also high since the Respondents, contrary to their regulatory and contractual duties and representations in their job order, signed a contract to charge the workers for housing and then charged them for these housing-related costs; (5) the Respondents did not provide any explanation for why they charged the workers for housing-related expenses; (6) the Respondents did not provide a commitment for future compliance ; and (7) the Respondents achieved moderate financial gain because they avoided paying their workers over $4,000 in wages.[848] Thus, since Respondents met six of the seven H-2A Penalty factors, Trotter had ample reason to support his $6,600 Penalties.

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $6,600 in Penalties against Respondents for their housing-related wage deductions.

h. Respondents are assessed $35,200 in civil money penalties for violating 20 C.F.R. § 655.102(b)(7) by failing to maintain and make available the required payroll records.

Trotter assessed the Respondents $35,200 in Penalties because the Respondents failed to maintain the required records and failed to produce documents in their possession to the WHD.[849] Trotter determined this amount by multiplying the number of H-2A workers who were affected by this violation (i.e., 88) by $400.[850] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers affected was significant since it affected all 88 workers; (3) the gravity was likewise high because the required records were not available to calculate the amount of back wages or three-quarters wages due and the degree of violation was widespread; (4) the bad faith is also high because the Respondents stated that they provided the required records when they did not provide them; (5) the Respondents did not provide an explanation for why the required records were not provided; (6) the Respondents did not provide a commitment for future compliance; and

[848] 29 C.F.R. § 501.19; Trotter Decl. ¶ 10.

[849] Trotter Decl. ¶ 12.

[850] *Id.*

(7) the Respondents' record keeping problems prevented the WHD from computing the amount of back wages due to the workers at the time it issued the determination letters and required the WHD to conservatively reconstruct the hours worked and the amount of back wages due.[851] Thus, since Respondents met six of the seven H-2A Penalty factors. Trotter had ample reason to support his $35,200 Penalties assessment because Respondents.

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $35,200 in Penalties against the Respondents for their failure to maintain and make available required payroll records.

i. Respondents are assessed $6,600 in civil money penalties for violating 20 C.F.R. § 655.102(b)(8) by failing to provide accurate written wage statements to their H-2A workers on or before payday.

Trotter assessed Respondents $6,600 in Penalties because the wage statements they maintained were inaccurate.[852] Trotter determined this amount by multiplying the number of H-2A workers at Aloun Farms who were affected for this violation (i.e., 33) by $200.[853] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers affected was high since the violation affected 33 workers; (3) the gravity was likewise high because the regulation is designed to provide pertinent and accurate pay information to the workers and this information was either not provided or was inaccurate; (4) the bad faith is also high as it appeared that the Respondents knowingly listed incorrect information since the workers' pay rate was at least $8.33 an hour, not 1.0000 an hour, and they could not have physically worked 600, 700, 800, or 900 hours in a 15 or 16-day pay period; (5) the Respondents stated that the hours information on the earning statements was incorrect; (6) the Respondents did not provide a commitment for future compliance; and (7) the Respondents caused significant injury to the workers because the wage statements were inaccurate and the workers could not use them to understand how they were paid.[854] Thus, since

[851] 29 C.F.R. § 501.19; Trotter Decl. ¶ 12.

[852] Trotter Decl. ¶ 13.

[853] Trotter Decl. ¶ 13.

[854] 29 C.F.R. § 501.19; Trotter Decl. ¶ 13.

Respondents met five of the seven H-2A Penalty factors, Trotter had ample reason to support his $6,600 Penalties assessment.

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $6,600 in Penalties for Respondents' failure to provide accurate and complete wage statements.

j. Respondents are assessed $44,000 in civil money penalties because Respondents repeatedly asked the H-2A workers they employed to waive their rights in violation of 29 C.F.R. § 501.4.

Trotter assessed Respondents $44,000 in Penalties because Respondents sought a waiver of rights from the H-2A workers.[855] Trotter determined this amount by multiplying the number of H-2A workers who were affected by this violation (i.e., 88) by $500.[856] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers affected was high since the waiver in the employment agreements affected all workers; (3) the gravity was likewise high because the regulation is designed to prevent an employer from taking advantage of a vulnerable worker by seeking to limit the rights afforded to the worker under the INA and its implementing regulations and, contrary to the regulation, the Respondents repeatedly sought waivers; (4) the bad faith is also high since Respondents had unequal bargaining power to secure the agreements, and had the power to not hire the worker or to limit the work of the workers if they refused to accept the waiver of rights; furthermore, Respondents sought to take deductions that were not identified in the job order to ETA nor were they approved by ETA; (5) the Respondents did not provide any explanation for why they sought the waivers; (6) the Respondents did not provide a commitment for future compliance; and (7) the Respondents achieved significant financial gain because they avoided paying their workers a significant amount of money.[857] Thus, the Respondents met six of the seven H-2A Penalty factors. Trotter had ample reason to support his $44,000 Penalties assessment.

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[855] Trotter Decl. ¶ 14.

[856] *Id.*

[857] 29 C.F.R. § 501.19; Trotter Decl. ¶ 14.

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $44,000 in Penalties against the Respondents for seeking waivers.

k. Respondents are assessed $8,800 in civil money penalties because Respondents failed to provide their H-2A workers with a complete and accurate employment contact in violation of 20 C.F.R. § 655.102(b)(14).

Trotter assessed Respondents $8,800 in Penalties because the Respondents failed to provide the required contract to their H-2A workers.[858] Trotter determined this amount by multiplying the number of H-2A workers that were affected by this violation (i.e., 88) by $100.[859] Trotter made this assessment based upon the following findings: (1) the Respondents did not have a previous history of violating the INA or its implementing regulations; (2) the number of workers affected was high since the violation affected all workers; (3) the gravity was likewise high because the regulation is designed to provide the H-2A workers with notice of the terms and conditions of employment and the employer failed to provide the requisite notice; (4) the bad faith is also high since in the form Employment Contract the Respondents used failed to include a majority of the subjects the regulations require the contract to address; (5) the Respondents did not provide any explanation for why they did not provide the required contracts; (6) the Respondents did not provide a commitment for future compliance; and (7) the injury to the workers was significant because the Respondents failed to provide them with sufficient information about important terms and conditions of their employment.[860] The Respondents met six of the seven H-2A Penalty factors. Trotter had ample reason to assess $8,800 in Penalties.

Using the seven factor framework of 29 C.F.R. § 501.19, I concur with the Administrator's assessment of $8,800 in Penalties against Respondents for failing to provide the required contracts to the workers.

VI. Conclusion and Order

Upon consideration of the Administrator's list of uncontested facts and Respondents' failure or inability to contest any such fact, I grant the Administrator's Motion for Summary Decision on

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[858] Trotter Decl. ¶ 15.

[859] *Id.*

[860] 29 C.F.R. § 501.19; *Id.*

Respondents' Global Horizons and Mordechai Orian's liability on eleven different violations of the H-2A program. I reject Respondent Orian's three main arguments against liability and the imposition of penalties upon summary decision. I likewise reject Respondent Orian's Motion to Dismiss him as a party from this case. It is hereby ORDERED:

1. Respondent Orian's April 2, 2010, Motion to Dismiss is denied;

2. The Administrator's March 4, 2010, Motion for Summary Decision is granted;

3. Orian and Global Horizons are jointly and severally liable as employers within the meaning of the H-2A regulatory framework;

4. Respondents must pay the Administrator, for delivery to the Thai H-2A workers, $134,791.78 in back wages;[861]

5. Respondents must pay must pay the Administrator, for delivery to the Thai H-2A workers, $17,617.52 in illegal deductions;[862]

6. Respondents are debarred from the H-2A program for three years for their three substantial violations of the H-2A program;

7. Respondents must pay the Administrator $194,400.00 in Civil Money Penalties;

8. Respondents must pay pre-judgment interest from May 1, 2003, and post-judgment interest at the Federal Short Term Interest rate plus 3%, as specified in 26 U.S.C. § 6621, compounded quarterly, and the Administrator shall make all necessary calculations;[863] and

9. The Administrator of the Wage and Hour Division, Employment Standards Division, DOL, shall make such calculations as may be necessary and appropriate with respect to all calculations of interest necessary to carry out this Decision and Order.

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[861] *See* 29 C.F.R. § 501.16.

[862] *Id.*

[863] *Amtel Group of Florida, Inc. v. Yongmahapakorn*, ARB No. 04-087, 2004-LCA-00006 PDF at 12–13 (ARB Sept. 29, 2006) (citing *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042,00-012; ALJ No. 89-ERA-22, slip op. at 18–21 (May 17, 2000)).

Notice of Appeal Rights

To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 501.42(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* Secretary's Order 1-2002, ¶ 4.c.(17), 67 Fed. Reg. 64272 (2002). The Respondent, Administrator, or any interested party desiring review of the administrative law judge's decision may file a Petition. *See* 29 C.F.R. § 501.42(a). Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties to the case as well as the administrative law judge. *See* 29 C.F.R. § 501.42(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final agency action. *See* 29 C.F.R. § 501.42(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 501.42(a).

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE
San Francisco, California