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CASE NO.: 2009-TAE-00002

In the Matter of:

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

DECISION AND ORDER

Appearances: Lawrence Brewster, Esq.
Bruce L. Brown, Esq.
Abigail G. Daquiz, Esq.
United States Department of Labor
Office of the Solicitor
for the Administrator, Wage & Hour Division

I. Randolph S. Shiner, Esq.,
for Respondents

Before: Steven B. Berlin
Administrative Law Judge

This is an old case. It concerns Global Horizons'[1] alleged violation of several regulations under the H-2A non-immigrant alien agricultural labor program.[2] The Wage & Hour Division asserts that these violations occurred on two work projects in Washington State. The first involved clearance to hire 121 workers at Green Acre Farms from March 3 to November 5, 2004. The second involved clearance for 62 workers at Valley Fruit Farms from August 15 through October 31, 2004. In all, Global Horizons employed 174 non-immigrant aliens at the two farms during the relevant times in 2004.[3]

[1] It appears that Respondent has operated under different names, such as Global Horizons, Inc. and Global Horizons Manpower, Inc. Respondent, through counsel, admitted as much at a status conference on May 25, 2011. *See* transcript of status conference at 6-7. I refer to this entity as "Global Horizons."

[2] *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 8 U.S.C. § 1188(g)(2); 29 C.F.R. Part 501; 20 C.F.R. Part 655.

[3] The total authorized was 183 (121 plus 62). It appears that Global Horizons hired somewhat fewer non-immigrant alien workers than were authorized.

On October 6, 2006, more than a year after its investigator completed an investigation, Wage & Hour served Respondents with a revised notice of determination, detailing the violations and dollar amounts assessed. Respondents timely requested a *de novo* hearing before an administrative law judge, but for reasons unclear on the record, the matter was not referred to OALJ until more than two years later, on February 10, 2009.

Initially the matter was assigned to Judge Torkington. After she allowed the parties repeated continuances, Judge Torkington retired. The matter was reassigned to me on November 9, 2010. I set a hearing for May 16, 2011 in Los Angeles, but additional delay occurred when federal authorities arrested Global Horizons' principal, Respondent Orian, on criminal charges and jailed him in Honolulu. The district court released Mr. Orian on bail, contingent on his complying with several conditions, including that he remain on the Island of Oahu. To accommodate Mr. Orian's conditions of release, I reset the matter for a hearing on June 6, 2011, in Honolulu. Well before trial, on December 17, 2010, I granted Mr. Orian's motion for summary decision as an individual respondent, leaving only the Company as a respondent party.

The Department's pursuit of this case raises some questions. During the past decade, the Solicitor has prosecuted more than thirty cases against Global Horizons entities at the OALJ level. Beginning years ago, ALJ orders have precluded Global Horizons' participation in the H-2A program. According to its counsel, Global Horizons is a defunct company, a "carcass" without assets. But, assuming a colorable case, Wage & Hour's continued pursuit of the matter could be appropriate, especially as Global Horizons has not sought bankruptcy protection.[4]

What brings the prudence of Wage & Hour's persistence into some question is that the State of Washington pursued a parallel investigation and six years ago obtained an order requiring Global Horizons to pay the workers all back wages owed them. State officials investigated most of the same allegations that Wage & Hour raises here, brought claims against Global Horizons, obtained wide-ranging admissions, and got an order requiring that Global Horizons (among other things):

1) repay the workers some $144,000.00 in improperly withheld federal and state income taxes and unreimbursed travel and subsistence expenses;
2) pay $10,500 in penalties;
3) pay nearly $40,000 in unpaid workers' compensation premiums;
4) correct deficiencies in housing offered workers;

[4] There is no evidence on the record to show Global Horizon's financial condition. Its counsel admits that it has not sought bankruptcy protection. Global Horizons and related companies are parties to a significant number of cases actively in litigation. It could be that the Company will recover some money through the litigation and be in a better position to pay an award ordered in the present case. Perhaps Global Horizons isn't really a "carcass" and has hidden assets. I make no finding that the Company is without sufficient resources to pay an award in the amount that Wage & Hour seeks.

5) recruit U.S. workers in a non-discriminatory fashion;

6) maintain proper documentation and provide it to state officials for review; and

7) cede to state officials unilateral discretion to bar from operations if it failed to comply with any of its obligations.

The state orders were issued in September 2005. Yet Wage & Hour continues to pursue essentially the same issues.

Wage & Hour does not assert that Global Horizons owes any back wages or other monetary compensation to the workers; that was all paid in the state case. Rather, it seeks only civil money penalties, mostly although not entirely, for conduct that the State of Washington addressed when it assessed a penalty of $10,500. The amount Wage & Hour seeks, however, is far more than the state law penalties to which Washington officials agreed: Wage & Hour assesses the penalties under federal law at $423,200.00.

Global Horizons effectively failed to oppose Wage & Hours' contentions on the merits. After considerable colloquy at a pre-trial conference on May 25, 2011, the parties, both represented by counsel, jointly waived a hearing and agreed to submit the matter on a written record. *See* 29 C.F.R. §18.39(a). Wage & Hour had recently submitted a motion for summary decision, which I had denied simply because it was submitted too close to the date of trial. *See* 29 C.F.R. §18.40(a). After the parties waived a trial, Wage & Hour stated that it would rely for its proof on the merits solely on the evidence that it had already submitted on the motion for summary decision, and that it would adopt as its closing arguments those arguments it had already advanced on the motion.[5]

Global Horizons stated that it would offer no evidence of its own.[6] *See* transcript of status conference (May 25, 2011) at 17-18, 21-22. When asked how long the Company would need for a closing brief, counsel initially requested 30 days. *Id.* at 22-23. He then reconsidered and asked for 60 days. *Id.* Given that the parties were going to trial in mid-June 2011 on another matter, I granted Global Horizons' request for this extended time for its opposition and set a filing deadline of July 22, 2011. *Id.*

Global Horizons failed to file an opposition by that date. Nor did it request additional time.

Nearly six weeks later, but before I'd issued a decision, Global Horizons requested leave to file a late opposition. Remarkably, however, it did not submit the proposed opposition with its

[5] As I stated at the pre-trial conference, I do not apply to this Decision and Order the standards of proof required on summary decision. I will disregard the Solicitor's arguments addressed to that standard and apply ordinary proof requirements applicable to a full record on the merits.

[6] Global Horizons had already admitted to most of the relevant facts in the State of Washington Office of Administrative Hearings proceeding. *See* Decl. of Daquiz, Exh. 1, Attachment C.

motion. Coming six weeks after the filing deadline, the motion to file late was wholly lacking in merit. Wage & Hour opposed.

Despite the absence of good cause, in the interests of justice and of assuring that Global Horizons received the fullest due process, on November 10, 2011, I faxed an order to counsel, allowing Global Horizons until November 21, 2011 to have its opposition brief on file. That deadline was four months after the original July 22, 2011 filing deadline, and more than six months after the Solicitor had served Global Horizons with its evidence and brief.

Global Horizons failed to file its opposition on or before November 21, 2011 and never did file a brief or raise objections to any of Wage & Hour's evidence.[7] Rather, four days after the filing deadline, Global Horizons submitted the declaration of its principal, Mordechai Orian.

The declaration is stricken *sua sponte.* Global Horizons waived a hearing and stated that it would not offer testimony or other evidence from any witness, including specifically evidence from Mr. Orian. Transcript of status conference (May 25, 2011) at 17-18, 21-22. If Mr. Orian wanted to testify on the merits, his testimony should have been at the hearing that, as Global Horizons' principal, he chose to waive. At the hearing, Mr. Orian would have been subject to cross-examination.

Thus, the declaration not only is untimely and filed without leave; it also is unreliable hearsay offered in derogation of Global Horizons' representation at the pre-trial conference that it would not offer evidence and would limit its case to argument in a closing brief and objections to Wage & Hour's evidence. Wage & Hour relied on this representation when it waived the trial and abandoned its opportunity to cross-examine Mr. Orian. To allow the declaration into evidence would be unduly prejudicial to Wage & Hour.

Nonetheless, having stricken the declaration of Orian (filed November 25, 2011), I will address it below in the alternative and conclude that it makes no difference in the result.[8]

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[7] As Global Horizons has not objected to any of the evidence that Wage & Hour offers, all of that evidence is admitted.

[8] The declaration contains repetitions of Global Horizons' arguments on earlier motions for continuances in this and a companion case, OALJ Case No. 2010-TAE-00002. I rejected these arguments when previously raised, and I reject them now.

For example, Mr. Orian argues that the FBI seized records he needs to defend this case and has returned none of them. Global Horizons has never identified any particular document or record that it asserts it needs for its defense and the FBI took. In any event, the Company's argument fails for the following many reasons:

In earlier motions for continuances in Case No. 2010-TAE-00002 – made before the FBI seized any records – Global Horizons and Mr. Orian argued that Wage & Hour had taken so long to prosecute the case that the Company had lost its records with the ordinary passage of time. The evidence in that case consists of the same kinds of documents and records relevant in this case except that the evidence here is even older. Assuming Global Horizons' representation that it lost these documents with the routine passage of time, it suggests that the Company more likely than not lost the same kinds of documents in the present case, and that there was nothing (or little) relevant left for the FBI to seize. Con't . . .

Although Wage & Hour's arguments are thus unopposed, as it is Wage & Hour that seeks the order awarding penalties, it has the burden to establish its case.[9] I will therefore review its proof to be certain that it is adequate. I will find that some, but not all, of Wage & Hour's assessments of civil money penalties are sufficiently grounded on the record. I will therefore allow civil money penalties but reduce the amount to $62,100.00. I will then conclude in the alternative that Mr. Orian's declaration, even were it considered, would not change the result.

Applicable Legal Principles

"A civil money penalty may be assessed by the Administrator for each violation of the work contract or [the applicable] regulations." 29 C.F.R. §501.19(a) (2004).[10] In determining the amount of the penalty, "the Administrator shall consider the type of violation committed and other relevant factors." 29 C.F.R. §501.19(b). A non-exclusive list of factors that may be considered is:

1. Previous history of violation . . .;

To the extent that Global Horizons lost the documents because of the passage of time, it is responsible for not maintaining all documents arguably relevant to the pending litigation. It was on notice of Wage & Hour's investigation as early as 2004, knew of Wage & Hour's adverse determination by 2006, and knew that it was going to hearing as of the time it requested a hearing that same year. It had to preserve the documents.

Global Horizons' argument neglects that on February 14, 2011, the district court in which Mr. Orian's criminal prosecution is pending advised him that, if he sought return of the records from the FBI, he needed to file a motion in the Central District of California, where the records had been seized; the district court there could order the documents' return. As of the time the issue arose in the present case, neither Mr. Orian nor Global Horizons had filed such a motion. Transcript of status conference (May 25, 2011) at 11. If anything, this suggests that the Company knows there are no useful documents to be retrieved.

The Company's argument neglects that, at the pre-hearing conference, when Global Horizons made the same argument about these "unavailable" documents, the Solicitor stated that Global Horizons said it had produced its relevant documents to Wage & Hour years ago, and that the Solicitor could make copies immediately available to the Company for use at trial. *Id.* at 16. Again, Global Horizons did not pursue this, which again suggests that the Company was looking for an excuse for delay more than it needed the documents for its defense.

The argument neglects that Global Horizons produced significant amounts of documentation to the State of Washington, Labor & Industries, and could have obtained copies from that agency. Again, it did not do that.

Finally, it neglects that by several months ago, the FBI had returned a considerable amount of Global Horizons' computer and paper records (according to records at the district court in the criminal case).

I conclude that the FBI's seizure of some of Global Horizons' records in connection with the criminal prosecution of Mr. Orian has not deprived the Company of a full opportunity to defend itself in the present case.

[9] "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof" in an administrative hearing. 5 U.S.C. §556(d).

[10] The conduct under scrutiny occurred in 2004. Wage & Hour therefore correctly cites to the regulations as they existed at that time to determine whether civil money penalties are properly imposed, and if so, in what amount. Most changes in the regulations consist merely of renumbering the same provisions without substantive modification.

2. The number of workers affected . . .;
3. The gravity of the violation . . .;
4. Efforts made in good faith to comply . . .;
5. Explanation of the person charged . . .;
6. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provisions of the Act;
7. The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the worker.

Id. Civil money penalties are limited to $1,000 "for each violation committed against each worker." 29 C.F.R. §501.19(c). Penalties for interference or discrimination in a Wage & Hour investigation are limited to $1,000 "for each such act of discrimination or interference." *Id.*

Findings

Preferential treatment of H-2A workers. An employer participating in the H-2A visa program may not engage in the preferential treatment of the alien workers. 20 C.F.R. §655.102(a) (2004). The employer may not offer U.S. workers less in benefits, wages, or conditions of employment, nor may it impose restrictions or obligations on U.S. workers not imposed on the H-2A workers. *Id.*

Wage & Hour contends that Global Horizons violated this regulation in two ways. First, Wage & Hour offers evidence that Global Horizons notified the involved H-2A employees that, when its employment agreement referred to overtime wages, this "is defined as 50% above the hourly wage ($8.71/hour X 1.5 = $13.06/hour)." *See* Decl. of Dinsmore, ¶15, Exh. 10. Wage & Hour contends that Global Horizons did not provide the same statement to U.S. workers.

Second, Wage & Hour contends that Global Horizons subjected U.S. workers to production quotas, while it placed no similar requirements on H-2A workers. It offers evidence that the Company terminated the employment of fourteen U.S. workers for low production. *Id.* ¶¶16-17, Exh. 11.

Although Wage & Hour relies on the declaration of its investigator, Seward Dinsmore, I am unable to credit the declaration sufficiently to support these contentions. In the fall of 2004, Mr. Dinsmore was assigned to investigate Global Horizons' compliance with the H-2A program's requirements at these Washington farms. *Id.* ¶4. He reported findings in a 24-page narrative report, dated August 9, 2005. *Id.* ¶14, Exh. 8. Contrary to the current contentions, his narrative report expressly concludes: **"Preferential treatment given to H2A workers/ 655.102(a): No violation."** *Id.* at page 18 (emphasis in original). Mr. Dinsmore's explicit reference to section 655.102(a) makes certain that he was stating his conclusion of "no violation" about the same regulation.

Entirely inconsistent with this, in a declaration apparently signed[11] nearly six years later (on May 17, 2011), Investigator Dinsmore states, without citation to any evidence, that Global Horizons did not tell the U.S. workers about overtime rates and did not impose production quotas on H-2A workers. He says he concluded this from reviewing documents. He offers no citation to any particular document that he reviewed.

Given the inconsistency between the report Mr. Dinsmore signed at the time of the investigation and his bald conclusions years later without citation to supporting evidence, I give no weight to the more recent conclusory statements in the declaration. I accept Mr. Dinsmore's initial conclusion at the time of his investigation that there was no preferential treatment given to H-2A workers.

Moreover, Wage & Hour does not offer evidence that Global Horizons actually assigned more (or any) overtime work to the H-2A employees, treated the H-2A workers preferentially in assigning overtime work, or paid U.S. workers at any lesser pay rate when they were assigned overtime. Simply informing aliens that overtime is compensated at time-and-one-half is not preferential without some showing that the actual wages paid, wage rate, or opportunities to work overtime differed. On the production quotas, Wage & Hour offers no evidence that it investigated whether the Company terminated the employment of any of the alien workers for inadequate production or in practice held alien workers to lesser standards.

I therefore find that Wage & Hour has not established a violation of this regulation.

Violation of housing standards. To avoid discrimination against U.S. workers, an H-2A application must include a provision that "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, which may be, at the employer's option, rental or public accommodation type housing." 20 C.F.R. §655.102(a)(1). Housing must meet either OSHA standards or the specific regulatory standards of the Employment Service System found at 20 C.F.R. §654.404-.417. 20 C.F.R. §655.102(a)(1)(i). Excepting housing for workers engaged in livestock production on the open range, the housing supplied must also meet local (or absent local, then State) housing standards for similar habitation. 20 C.F.R. §655.102(a)(1)(ii, iii).

Global Horizons identified the housing that it was going to use, and Washington state officials inspected and approved it. Decl. of Dinsmore at ¶18. The housing was to be at a Quality Inn in Yakima, Washington for Green Acres and at a Clarion Hotel & Conference Center, also in Yakima, for Valley Fruit. *Id.*, Exh. 8 at 8.

[11] As Global Horizons has not questioned the authenticity of Mr. Dinsmore's declaration, I will admit it. I note, however, that the signature is not an original, the typeface on the signature page and the quality of the lettering differ from all of the other pages of the declaration, none of the pages in the declaration is numbered, and the signature page contains no text other than the verification language for a declaration, which means that it could have been appended to anything.

But, as it turned out, Global Horizons did not house the workers in the locations that it had designated. Decl. of Dinsmore at ¶18. Instead, it housed the workers in substandard facilities. *Id.* at ¶¶ 18, 19, Exh. 8 at 2-9, Exh. 13. In particular:

- A State of Washington inspection of the El Corral Motel in Toppenish, Washington on August 2, 2004, showed that about 45 employees had been housed there over 30 days in 11 rooms. The facility was an unlicensed migrant farm housing site. The water was on a private well, not approved by the local health department for drinking, cooking, bathing, or laundry. Only 21 beds were provided for the 45 workers. Some workers shared beds; others slept on the floor. There was less than 50 square feet per person in the sleeping areas. Because there was no space for food storage, the workers put food and cooking items on the floors and in dressers. Each worker was allowed less than the minimum required 2 cubic feet of refrigerator space, and most of the refrigerators did not keep food at 45 degrees or below. There was inadequate space for personal storage, and clothes were hanging from drapery rods and piled on the floors. Rather than provide laundry facilities, Global Horizons provided two garbage cans for the 45 workers to use for laundering their clothes. A week after the inspection, Global Horizons had moved the workers to another housing location. Decl. of Dinsmore, Exh. 8 at 2-3.

- A State of Washington inspection of Buena Double Wide Mobile Home in Buena, Washington, on August 3, 2004, showed that 31 workers had been housed there over 30 days in inadequate conditions. It too was an unlicensed migrant farm housing site. The water was similarly deficient. The septic system was designed for six people, not the 31 housed there. Because the square footage was adequate for at most 18 people, the workers each had less than 50 square feet of sleeping area. The refrigerator space was about one-fourth of the minimum requirement. Because there were only two stove burners operable for the 31 workers rather than three full stoves as minimally required, workers cooked in rice cookers on bedroom floors. There was no laundry; workers laundered their clothes in 5-gallon buckets outside. Emergency egress was blocked with bunk beds. Beds also blocked an exterior door and windows that could have been used as exits. There was an infestation of wasps along the roof eaves. Trash containers were not emptied when full, and a manager admitted that garbage was removed only once weekly. Thirteen days after the inspection, Global Horizons had moved 15 of the 31 workers elsewhere. Decl. of Dinsmore, Exh. 8 at 3-5.

- An inspection of the Mabton Apartment Building in Mabton, Washington on August 3, 2004 revealed 24 workers living in four rooms. Again, the workers were overcrowded into less than 50 square feet sleeping areas. There were no emergency exits from the rooms. The windows could not be used for egress, as they were 17 feet above the ground surface. Refrigerators were inadequate to maintain safe temperatures (*viz.*, 45 degrees or below). Lighting was inadequate in some rooms and hallways. The Global Horizons manager involved in the inspection admitted that better housing was needed. By August 11, 2004, Global Horizons had moved all of the workers elsewhere.

- Describing an inspection of Sun Country Inn in Yakima, Washington on August 3, 2004, Mr. Dinsmore reports this as a "proposed" site; I am uncertain if Global Horizons was using it. The report is unclear as to how many workers were living in how many rooms. It appears that some rooms served multiple purposes, such as cooking, living, and sleeping, and in Mr. Dinsmore's opinion were too small, given the number of habitants and the multiple uses. (Mr. Dinsmore referred to a standard of 100 square feet per person for such housing, citing 29 C.F.R. §1910.142(b)(9)). There were two cooking burners in each kitchenette; three were minimally required. On re-inspection, deficiencies were minimal. Decl. of Dinsmore, Exh. 8 at 6-7.

- Another "proposed" site was Mesa Apartments, also in Yakima. An inspection there, also on August 3, 2004, does not specify the number of rooms or workers involved. There was a need for more beds, dining tables and chairs, and personal storage space. Within eight days, only dining chairs and tables were lacking. Decl. of Dinsmore, Exh. 8 at 7.

- Mr. Dinsmore describes the inspection at Zillah House #1 in Zillah, Washington as "pre-occupancy" and inadequate.

I find that the housing at the El Corral Motel, Buena Double Wide Mobile Home, and the Mabton Apartment Building was substantially hazardous in violation of the applicable regulations.[12] The living conditions affected each of 76 workers for at least 30 days as well as an additional 24 workers for an indeterminate period of time. The hazards to the workers' health and safety were grave and very real. The number of people involved was considerable.

In mitigation, there is no showing of a history of similar violations, and Global Horizons appears to have remedied these housing conditions by promptly moving most of the affected workers after inspectors discovered the violations.

Wage & Hour assessed $9,900 in civil money penalties for these violations, giving a detailed analysis of the computation. *See* Decl. of Dinsmore, Exh. 8 at 2-8; Decl. of Hart, ¶¶7-8. The record is more than adequate to support these penalties. Given the living conditions, more could be justified. However, as Wage & Hour sought only this amount, and Global Horizons might have defended the case differently had Wage & Hour sought a larger amount, due process requires that I limit the award to affirming the Administrator's determination.[13]

[12] Washington State authorities also found only conditions at these three locations to be in violation. *See* Decl. of Daquiz, Exh. 1, ¶8.

[13] Although there is no showing that Global Horizons benefitted financially from using this substandard housing, I infer that adequate housing, which would require far more space, more likely than not would have cost Global Horizons more. But, as the other factors going to civil money penalties justify more than the $9,900 that Wage & Hour seeks, I need not consider financial benefit in aggravation and disregard it.

Failure to reimburse travel-related expenses. Another minimum benefit that H-2A employers must offer their workers is the cost of transportation (including subsistence while in transit) to the worksite. 20 C.F.R. §655.102(b)(5)(i) (2004). The employer must pay these expenses no later than when the worker completes 50 percent of the work contract period. *Id.* In addition, if the worker completes the work contract period, the employer must pay his return transportation unless the worker has contracted with a subsequent employer and has that employer's agreement to pay the outbound travel expenses. 20 C.F.R. §655.102(b)(5)(ii).

Investigator Dinsmore states that his interviews of unidentified persons, "reviews" of his colleague's interviews,[14] and review of unspecified payroll and travel documents showed that (1) "some" of the workers traveled to the worksite directly from Thailand; and (2) all of the H-2A workers at both locations completed at least 50 percent of the work contract. Decl. of Dinsmore, ¶20. Without citation to any evidence, Investigator Dinsmore states in his 2011 declaration that, at the time of his investigation in 2005, Global Horizons owed 146 workers a total of $1,632.28 for the cost of transportation to the airport in Bangkok; it owed 144 workers a total of $64,985.30 for airfare from Bangkok to the worksite; it owed 113 workers a total of $1,223.70 for outbound travel expenses (an average of less than $11 each); and it owed 114 workers a total of $2,000.84 (about $17.50 each) for subsistence while on outbound travel.

At the conclusion of the state investigation, Washington officials stipulated with Global Horizons that "Global told its workers that they would be reimbursed the cost of airfare between Thailand and the United States once they completed 50% of their contract, as required by federal law." Decl. of Daquiz, Exh. 1, ¶18. State officials thus were satisfied that Global Horizons at least had acknowledged to the workers that it owed them the travel costs, which in time, Global Horizons did pay, although well after 50 percent of the contract was complete.[15] Consistent with this, Wage & Hour doesn't contend that any travel expenses remain unreimbursed. It seeks only civil money penalties, which it sets at $33,000. But the evidence Wage & Hour presents is inadequate to support these penalties.

A search through Mr. Dinsmore's narrative report reveals that Mr. Orian stated the Company's defense. He explained at a conference with Wage & Hour that the recruiting companies in Thailand paid the inbound air and ground transportation expenses and, for that reason, Global

[14] I'm not certain what a "review" of someone else's interview means. It is possible that one of Mr. Dinsmore's co-workers went to Thailand, interviewed some number of former workers using a Thai language interpreter, and wrote a report, which Mr. Dinsmore read. Were that the case, the layers of hearsay are numerous, and the reliability decreases with each layer. It would have been more helpful for Mr. Dinsmore to provide a copy of his colleague's report or whatever notes he "reviewed." The depth of the hearsay diminishes the weight that I give Mr. Dinsmore's conclusions.

[15] Washington officials and Global Horizons stipulated that (1) between May 20, 2005 and June 3, 2005, Global Horizons reimbursed 86 of the workers, (2) Washington officials were satisfied that 70 of these payments fully covered the airfare, and (3) eventually (by September 22, 2005) Global Horizons had completed reimbursement on the remaining 16. Decl. of Daquiz, Exh. 1, ¶18. There is no indication that any other workers had to travel from Thailand; the implication is that Washington investigators were satisfied that the other workers were already in the United States.

Horizons had not reimbursed the workers. *See* Decl. of Dinsmore, Exh. 8 at 10-13. This turns out to be generally consistent with the facts that Mr. Dinsmore found, except Mr. Dinsmore found something more: that the recruiters were charging a fee to the workers that included the airfare. Decl. of Dinsmore, Exh. 9.

Mr. Dinsmore based this finding on what some of the interviewed workers said they believed. *Id.* Without stating how many workers believed this or why, Mr. Dinsmore concluded that the recruiters' payments of the transportation costs came out of the fees they collected from the workers, and that the workers were thus essentially paying their own transportation costs through the recruiter. *Id.* An analysis of this conclusion based solely on some workers' reported beliefs shows that it is insufficiently supported.

As to the specifics of the fees, Mr. Dinsmore reports that "the workers" said they paid a recruitment fee of 65,000 baht ($1,690.90 US per Mr. Dinsmore). Having reported that this is what "the workers . . . stated they paid," Mr. Dinsmore states in the next sentence, "Some stated that they paid 375,000 baht . . ." ($9,755.21 US). *Id.* This is less than fully persuasive: The two different amounts are widely divergent without explanation; a recruiting fee of $9,755.21 would leave little incentive for a Thai worker to take a temporary job paying $8.71 per hour; and only so many foreign migrant agricultural workers have almost $10,000 in the bank to spend on a recruiting fee. *See* Decl. of Dinsmore, Exh. 9. There was no documentation to verify that any worker paid a recruiter's fee.

A greater detraction from Mr. Dinsmore's conclusion is that, elsewhere in his narrative as part of a different discussion, he acknowledges that some of the workers said they did not pay a recruiting fee at all. These workers said they'd paid a recruiting fee when they worked on earlier contracts and thus were not required to pay again. Decl. of Dinsmore, Exh. 8 at 11. In particular, of sixteen workers who traveled from Bangkok to Seattle on March 22, 2004, three of them had not been required to pay a fee.

If the recruiting fee included trans-Pacific airfare, a practice of not charging it to workers who previously had worked through the same recruiter makes no sense. The recruiter would incur the cost of a plane ticket each time he sent a worker across the ocean. How could he pay for multiple tickets without someone repaying him for any but the first? It brings into greater doubt Mr. Dinsmore's theory that the recruiters' fees included airfare.

There are additional problems in Mr. Dinsmore's calculations because he appears to have made unfounded assumptions. For example, he discovered eight workers whose travel records showed that they were flown from Thailand to Georgia (U.S.A.) on May 27, 2004. As there was a record that each of them traveled to Washington two weeks later on June 11, 2004, Mr. Dinsmore assumed that the first records, showing the travel to Georgia, must be erroneous, and the workers must have traveled from Thailand (not Georgia) to Seattle on June 11, 2004. Mr. Dinsmore then concluded that these workers were owed reimbursement for the assumed travel from Thailand to Seattle.

Mr. Dinsmore's inference lacks foundation. It is equally plausible that the travel records are correct and the Company paid for the workers to travel from Thailand to Georgia, then transferred them to Washington two weeks later and paid for that second airfare. To reach his conclusion, Mr. Dinsmore needed to inquire further. He could have asked the involved workers or Global Horizons what happened and sought documentation. The investigation was incomplete in this regard and led to an unwarranted inference.

I accept as plausible Global Horizons' statement that it understood the recruiter would be paying the inbound transit costs. Wage & Hour has the burden of persuasion and could have obtained the recruitment contracts to disprove that contention. It did not do that. Nor did Wage & Hour establish that the workers paid fees to the recruiter that included a payment for travel expenses. Mr. Dinsmore's narrative is too vague, lacks documentation, neglects the implication of some workers not being required to pay the fee, and accepts a few workers' statements when, on their face, the statements (such as paying a recruiting fee of nearly $10,000 U.S.) are dubious enough to require further verification.

On the question of bad faith, I must consider that Global Horizons paid all but a *de minimis* portion of the outbound transportation and subsistence expenses. This at least suggests that Global Horizons believed it was complying with its obligation to pay transportation costs.[16] Wage & Hour has shown no history that Global Horizons knew at the time of this labor contract that its recruiters in Thailand were charging back travel expenses to the workers, even if they were. And, as I stated, it is not altogether certain that the recruiters were doing that.[17]

In all, I make no finding that Global Horizons complied with the travel and subsistence reimbursement requirements in the regulations. I do not find that it acted innocently or in good faith. Rather, I find only that Wage & Hour has not met its burden of persuasion sufficiently to justify the imposition of civil money penalties.

Failure to provide records on demand. Employers participating in the H-2A program are required to "keep accurate and adequate records with respect to the workers' earnings including . . . supporting summary payroll records . . . and the amount of and reasons for any and all deductions made from the worker's wages ." 20 C.F.R. §655.102(b)(7)(i) (2004). "Upon reasonable notice, the employer shall make available the records . . . for inspection and copying by representatives of the Secretary of Labor . . . ." 20 C.F.R. §655.102(b)(7)(iii).

[16] Of course, it is possible that Global Horizons, in bad faith, let the recruiters collect the inbound transportation cost from the workers and thereby knowingly limited its expenses in violation of the regulation while still paying the outbound cost of transportation. I conclude only that Wage & Hour failed to meet its burden, not that Global Horizons was acting in good faith.

[17] Global Horizons' ultimate decision, while under the pressure of the Washington State investigation, to reimburse travel expenses, doesn't necessarily establish a violation sufficient to impose civil money penalties. To some extent, it could have been a business decision to concede the point to avoid further investigation and litigation. It appears that the travel reimbursement cost Global Horizons about $51,000. (The rest of the $144,000 paid the employees was for improperly withheld taxes.) The Company could have decided that it was better to settle with the state and maintain its license to do its business there than take the risk and pay the expense of litigation.

In November 2004, Mr. Dinsmore requested of Global Horizons that it produce: "(1) payroll information, (2) transportation and subsistence information for workers traveling to and from the work site, and (3) deductions taken from workers' paychecks." Decl. of Dinsmore, ¶23. Some of the requests were written; some were oral. *Id.* The written requests were: on November 1, 2004, Mr. Dinsmore requested "an updated wage-hour report" for both Washington worksites for September 24 through November 5, 2004. *Id.*, Exh. 14. He also asked for an explanation of certain deductions showing on payroll reports as "state deduction." On November 4, 2004, he requested an "accounting" listing each worker and stating where that worker went after he or she left Global Horizons (whether back to Thailand or to another job). *Id.* Finally, on November 17, 2004, he repeated the previous requests and added that, as the Company contended that it had reimbursed workers for the "state deduction," it produce proof of that. *Id.*

Mr. Dinsmore states that, at some undisclosed date, he obtained the requested records from Washington State investigators and was able to "perform" the investigation using those copies. *Id.* ¶24.

Wage & Hour contends that the Company failed to meet its obligation to make records available for inspection and copying and that this subjects the Company to civil money penalties of $2,000.

To some extent, Wage & Hour misplaces its reliance on the regulation it cites, 20 C.F.R. §655.102(b)(7)(i). That regulation does not require a company to maintain records related to travel expenses or about where employees went after leaving the employment. Also, it is impossible to comply on November 1, 2004 with a demand for payroll records through November 5, 2004; obviously there would be no payroll records for time periods that had not yet occurred.

There is too little here from which to infer bad faith. Wage & Hour admits in its closing brief that "Global committed to future compliance and took action to provide the documents requested." Closing brief at 16. As Mr. Dinsmore was requesting "an update" on the payroll information, I infer that Global Horizons had been complying with previous requests for payroll information going through September 23, 2004. Global Horizons wasn't hiding the information: It supplied it to state investigators.

What is perhaps most lacking are the details about Mr. Dinsmore's obtaining the documents from state officials. When did he get them? Did he tell the Company that he'd obtained them from the State and that the Company no longer needed to produce them? If so, when?[18] Once Mr. Dinsmore told Global Horizons that he'd received the documents from the state, the Company no longer was under any obligation to produce them, and Wage & Hour hasn't

[18] If Mr. Dinsmore obtained the documents from state officials and did not tell Global Horizons but instead persisted the requesting records he already had, that would raise other questions.

established when that happened. That means that Wage & Hour hasn't established how long Global Horizons was allowed to gather the documents for production; it might have been under 30 days.[19]

Wage & Hour has not shown any established history of violations of this requirement; how the workers were affected; that there was any failure to commit to future compliance; or that there was financial gain. Although there is no doubt that failing to maintain or failing to produce required records can pose a grave obstacle to the enforcement of the H-2A program requirements, in this particular case, the effect was not grave. That is because Global Horizons produced all of the requested information to investigating state officials, who in turn supplied them to the Wage & Hour investigator. The Wage & Hour investigator conceded that his work was unimpaired.

Accordingly, civil money penalties are denied on this violation.

Failure to provide timely wage statements with required information. On or before each payday, an H-2A employer must furnish to each worker certain payroll information in one or more statements. 20 C.F.R. §655.102(b)(8) (2004). Included in the information, among other items, must be "The hours of employment which have been offered to the worker (broken out by offers in accordance with and over and above the [three-fourths] guarantee)." 20 C.F.R. §655.102(b)(8)(iii).

Investigator Dinsmore reported that, based on worker interviews, three of the 174 workers said they didn't get some or all of their paystubs, and about sixteen said they got them late. Decl. of Dinsmore, Exh. 8 at 15.[20] In addition, at some point, Global Horizons adopted a practice of paying workers on Friday and not giving them pay stubs until the following Tuesday. Decl. of Dinsmore, ¶26. A company manager explained that the workers were getting the stubs four days after an electronic deposit of their wages.[21] *Id.*, Exh. 8 at 15. Finally, Mr. Dinsmore

[19]Given Wage & Hour's admission that Global Horizons took some unspecified action to provide the documentation, I am only marginally persuaded that there was a violation. Mr. Dinsmore first requested the additional records on November 1, 2004. If he received copies from state officials at the end of that month and told the Company as much, I could not find that the Company violated the regulation: it wasn't even afforded 30 days to produce the records before being told that it was unnecessary. This is especially the case, given that the initial request on November 1, 2004 included records that couldn't yet have existed: payroll records going four days into the future. Respondent, however, has failed to produce any evidence on this point, and I find Wage & Hour's showing sufficient to meet its burden to show an underlying violation.

[20] Mr. Dinsmore states in his May 17, 2011 declaration that seven workers couldn't figure out what they were paid or how many hours they were being paid for. Decl. of Dinsmore, ¶25. (He stated nothing about this is his report done immediately after the investigation in 2005. *Id*., Exh. 8 at 15.) The allegation is irrelevant. The regulation does not guarantee that alien agricultural workers will be able to understand their pay stubs; it requires only that the paystub be furnished timely and include certain information.

[21] From Wage & Hour's brief, it appears that Global Horizons FedEx'd the pay stubs to the workers' location at about the same time as it made the electronic wage deposit on Friday. The stubs arrived for distribution the following Tuesday. *See* Closing Brief at 18.

reported that his investigation showed that the pay stubs failed to state the number of hours of work that Global Horizons offered to the worker, broken out into amounts in accordance with or over and above the three-fourths guarantee. *Id.*

The point of a pay stub is to allow workers to know what hours they were paid for, at what pay rate, what deductions were taken from the pay, and the total pay they were supposed to receive. With this information, a worker may determine whether his pay is accurate and consistent with the employment contract. In H-2A cases, additional information is required, such as the information about work hours offered. The worker needs this to determine whether he is entitled to more wages under the three-fourths guarantee.

When it comes to the imposition of civil money penalties, the determination should be associated with the regulatory purpose. Providing a pay stub on Tuesday for pay electronically deposited on the preceding Friday is plainly inconsistent with the regulation. But it has little impact on the regulation's purpose. The worker gets a pay stub for each wage payment; she gets the stub close enough in time to understand what pay stub relates to which pay period; she gets the information she needs to confirm that she is being paid consistent with her contract.

Of more concern is an employer's failure to include required information on the pay stub. That is what Global Horizons did when it failed to include a statement of the work hours offered for the pay period. The worker cannot know if she is being paid correctly without this information. Even if she keeps her own account of the hours offered, she still doesn't know if the employer reached the same tally.

Looking to an amount of civil money penalties, Wage & Hour shows no history to demonstrate that, by 2004, Global Horizons had been notified that its pay stubs failed to include the required information about hours worked or for the other alleged violations. Wage & Hour admits that "Global did not hide the violation and freely admitted that it violated the regulation." There is no proof that Global Horizons benefitted financially by being four days late in supplying pay stubs. But the omission of the crucial information about hours of work offered has some significant gravity to the H-2A program's function. The program fails if alien workers can be brought into the country and then assigned only sporadic work. Given a payroll of about 174 workers per pay period, Wage & Hour has justified the civil money penalties it seeks of $100 per worker, or $17,400.

Unlawful deductions of federal and state withholding taxes. In its stipulations with Washington officials, Global Horizons conceded that it improperly deducted from employee pay $93,864.32 in federal withholding taxes and $6,401.66 in Washington state withholding. Decl. of Daquiz, Exh. 1, ¶¶6-7. As the parties to the state action agreed, H-2A workers are exempt from all federal tax withholding (including FICA and Medicare), Treas. Reg. § 1.1441-4(b)(1)(ii); IRC §3121(b)(1), and Washington has no income tax. But the parties also agreed that Global Horizons paid over the withheld federal taxes to the Internal Revenue Service. *Id.*, ¶8. They acknowledged that, during and following the state investigation, Global Horizons reimbursed

the workers in full for the improperly withheld federal and state taxes. Consistent with this, Wage & Hour does not contend that any further reimbursement is owing.[22]

For the improper tax deductions, Wage & Hour seeks civil money penalties of $46,000. This amount neglects the absence of any showing of bad faith or unjust enrichment. In Case No. 2010-TAE-00002, Mr. Orian testified at a deposition that the Company withheld the federal taxes based on advice it received from a telephone representative of the Internal Revenue Service. As there is no dispute that the funds were properly paid over to the federal treasury, Global Horizons gained nothing financially. There is no evidence that Wage & Hour had previously corrected this practice; every indication is that Global Horizons acted in simple ignorance of the applicable treasury regulations. And, to the extent that Global Horizons had to reimburse the workers and also has been unable to recover the taxes from federal and state authorities, the Company has lost an amount equal to the entire amount it withheld.

What is left for consideration is the gravity of the violation and the financial harm to the workers. This I find to be very considerable. These improper payroll deductions impose a very real burden on the workers whose paychecks were significantly diminished. The workers might have been paid in full in 2005 under Global Horizons' agreement with the State of Washington, but that was of no use to them in 2004, when they earned the income. If Global Horizons had developed a record to show that, in some final way, it would never be able to recover from federal and state tax authorities the amounts it incorrectly remitted, I might find that the loss of nearly $100,000 to the federal and state treasuries took the place of civil money penalties. But that evidence is not on the record.

Given the gravity of the violation and the financial harm to the workers, as mitigated by the Company's good faith and the absence of any financial gain to it, civil money penalties of $17,400 ($100 per worker) are assessed.[23]

Failure to provide workers with a copy of the H-2A employment contract. If there is a work contract, it must contain a statement of all the minimum benefits, wages, and working conditions required under the regulations (as set out in 20 C.F.R. §655.102(b)), as well as a statement that preferential treatment of the H-2A workers is not permitted (per 20 C.F.R. §655.102(a)). 20 C.F.R. §655.102(b)(14) (2004). The employer must provide a copy of the contract to each worker no later than the date on which the work begins. *Id.* Absent a separate, written work contract, "the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract." *Id.*

[22] If an employer plans to take payroll deductions other than those required by law, it must disclose that in the proposed job order submitted to ETA. 20 C.F.R. §655.102(b)(13) (2004). Global Horizons, apparently believing that the tax withholding was required by law, did not include the withholding in its application as a deduction other than those required by law.

[23] Global Horizons was aware of an issue about whether the payroll taxes should be deducted; that's why it called the IRS for advice. It should have done more, such as consult an attorney. The issue was too important to rely on whoever might answer the phone at the Internal Revenue Service.

Wage & Hour contends that the contracts shown to the workers were deficient in that they did not contain certain of the information required about minimum benefits, wages, and working conditions as set out in 20 C.F.R. §655.102(b). A copy of the form of contract that Global Horizons used is on the record. Decl. of Dinsmore, Exh. 9. Much as Wage & Hour argues, the contract did not include information about an employer's obligation to pay transportation costs, what records it was required to maintain, the information required on pay stubs, the deductions allowed from workers' pay, and the workers' right to a copy of the contract. Closing Br. at 20.[24]

Washington State stipulated with Global Horizons in the state case that the Company provided workers a copy of the ETA 790 Clearance Orders. Decl. of Daquiz, Exh. 1, ¶10. But this doesn't meet the regulatory requirement, for the option to provide the job order and application is available only "in the absence of a separate, written work contract." 20 C.F.R. §655.102(b)(14). Here, Global Horizons used a separate, written work contract; that foreclosed the option of providing the Clearance Order.

The items of information found missing in the written contract are among those enumerated in 20 C.F.R. §655.102(b).[25] The applicable regulation thus required the inclusion of this information in the written contract that is provided to the workers. *See* 20 C.F.R. §655.102(b)(14). Global Horizons violated this regulatory requirement.

Wage & Hour seeks civil money penalties of $34,900, calculated at $100 for each worker involved. The missing information was important to the workers' understanding of some fundamental aspects of their H-2A employment. Especially when some workers seem to have been under the impression that they'd paid the cost of their inbound transportation, notice that the employer must pay this could have alerted these workers at least to question what had happened. If told what information was required on pay stubs, workers might have questioned the absence of a statement of hours of work offered. The violation extended beyond *pro forma* or merely technical requirements. This points to the factor of gravity in the regulations.

Worse, several workers reported to the investigator that, purportedly for "safekeeping," the Company took away their copies of the contract once they reached the worksite. Decl. of Dinsmore, Exh. 8 at 17. Requiring the workers to give back their copies of the contract meant they couldn't review it if questions arose during contract performance (*i.e.*, while they were working). It defeats the purpose of the workers' having copies of the contract and suggests bad faith.

[24] Wage & Hour also argues that Global Horizons admitted that it failed to provide the worker agreement in the Thai language to the Thai workers at Green Acre Farms. But Wage & Hour fails to cite to any regulation that requires the contract to be translated into the alien workers' native language.

[25] *See* 20 C.F.R. §655.102(b)(5, 7, 8, 13, and 14).

Civil money penalties are justified, and Wage & Hour's setting the penalties at $100 per worker is proper. The only question on this record is the number of workers involved. Wage & Hour's arguments, stated in its brief, define the scope of the alleged violations as limited to the work at Green Acre Farms and Valley Fruit Farm. *See* Closing br. at 4. The Solicitor asserts that Global Horizons employed a total of "approximately 230 H-2A workers *and local employees* at Green Acres and Valley Fruit" at the relevant times. *Id.* at 5 (emphasis added). As the 230 workers included some local employees not part of the H-2A program, the number of H-2A workers would have to have been fewer.

In his declaration, Investigator Dinsmore states: "Global employed 174 H-2A workers at Green Acres and Valley Fruit farms with various employment periods within the range February 2, 2004 through November 29, 2004." Decl. of Dinsmore, ¶11. Mr. Dinsmore's narrative report following his investigation states that Global Horizons employed "approximately 165 non-resident temporary alien agricultural workers" under the program in 2004. Decl. of Dinsmore, Exh. 8 at 1. Elaborating further, he states that the Washington State Employment Security Department referred 159 workers to these two worksites. *Id.* (76 at Green Acre Farms and 83 at Valley Fruit). The order to which Global Horizons consented with state officials required reimbursement to 160 workers. Part of the order was to reimburse improperly withheld payroll taxes. As there is no indication that Global Horizons withheld taxes for some, but not all, H-2A workers, the suggestion is that the H-2A workforce totaled about 160 employees. Generally consistent with this, Director Hart stated that Global Horizons violated the regulations when it offered 174 H-2A workers preferential treatment. *See* Decl. of Hart, ¶5. It seems unlikely that preferential treatment would be offered to some, but not all, of the H-2A workers. On another violation (seeking a waiver to allow the Company to deduct federal income taxes), she calculated based on 175 affected employees. *Id.* ¶21.

Yet, when it came to the violations related to pay stubs and the provision of contract copies, Director Hart calculated civil money penalties based on 349 affected employees. *Id.* ¶¶ 13, 17. Wage & Hour's brief offers nothing to explain this much higher workforce count. I will not speculate about the source. I reject the count of 349 workers as unsubstantiated. I accept Mr. Dinsmore's sworn statement that Global Horizons employed a total of 174 H-2A workers at the two worksites at various times during the relevant period.

Civil money penalties are assessed in the amount of $17,400, calculated at $100 per worker.

Failure to comply with employment laws. As part of the labor certification application, an H-2A employer must agree that, during the work contract period, it will "comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws." 20 C.F.R. §655.103(b) (2004). Wage & Hour relies on Global Horizons' stipulation with the State of Washington, which contains an admission that the Company violated state law in four ways: (1) providing inadequate housing; (2) taking deductions for state income tax; (3) failing to obtain a state farm labor contractor's license; and (4) failing to provide certain information on pay stubs.

The stipulations support a conclusion that Global Horizons failed to comply with applicable State law. *See* Decl. of Daquiz, Exh. 1, Attachment C at ¶¶1, 4-6, 9, 13. Wage & Hour seeks $500 in civil money penalties for this regulatory violation. But, because Wage & Hour's argument is limited to violations of Washington state law, and because state authorities already imposed a monetary penalty of $10,500, Global Horizons has already been penalized for these state law violations. Moreover, I am elsewhere imposing separate civil money penalties for the inadequate housing, taking improper withholding taxes, and not providing information on pay stubs. Adding $500 is excessive and would have little impact. The penalty is denied.

Seeking an improper waiver of the immigration laws so that the Company could deduct federal income taxes. The regulations provide that, "No person shall seek to have an H-2A worker . . . waive rights conferred under section 216 of the INA or under these regulations." 29 C.F.R. §501.4 (2004). Wage & Hour contends that Respondent sought a waiver to allow it to deduct federal withholding taxes, which "Department of Treasury regulations prohibit." Closing Br. at 23.

Global Horizons' employment agreement with the workers contains the following language:

> EMPLOYEE understands and agrees that [Global Horizons] shall be responsible for all withholding of federal and state taxes from wages earned 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.

Decl. of Dinsmore, Exh. 9.

Wage & Hour's argument fails for two reasons. First, the applicable regulation includes only two sources for rights that employers may not seek to avoid by waiver: section 216 of the Immigration and Nationalities Act and "these regulations," which refers to the regulations found at 29 C.F.R. §§500, *et seq*. The covered regulations were issued by the U.S. Department of Labor to implement to Migrant and Seasonal Agricultural Worker Protection Act. But Wage & Hour cites to nothing to establish that either of these sources confers on H-2A workers a right not to pay withholding taxes. On the contrary, Wage & Hour cites as the source of this right regulations of the Department of Treasury. Seeking a waiver of rights conferred by regulations of the Treasury Department is not a violation of 29 C.F.R. §501.4 (2004).

Second, the language in the employment contract Global Horizons used does nothing more than inform the employees that their checks would reflect ordinary payroll tax deductions. To the extent that Global Horizons believed that these deductions were required, a finding that I reached above, they were not seeking a waiver; they merely were reciting for the employees' information what they believed to be a legally mandated payroll practice.

Third, Wage & Hour addressed the withholding of payroll taxes as a separate violation. This is merely redundant.

Civil money penalties for this alleged violation are denied.

Providing false information to the Department of Labor. "Information, statements and data submitted in compliance with provisions of the Act [or its implementing regulations] are subject to the criminal provisions of title 18, section 1001, of the U.S. Code," which (according to the regulation) then provided:

> Whoever, in any matter within the jurisdiction of any department of agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than five years, or both.

29 C.F.R. §501.7 (2004).

Wage & Hour contends that Global Horizons' representations in its H-2A program application about housing at the Quality Inn and the Clarion Hotel & Conference Center were false, and that Global Horizons never intended to house the workers at these locations. Wage & Hour also contends that the Company made a false statement when it offered as an explanation for the change to different locations that the Quality Inn and Clarion were overbooked. Wage & Hour seeks civil money penalties of $87,500.

The regulation on which Wage & Hour relies does no more than alert people to already existing criminal sanctions for knowingly false representations to federal officials. The regulation does not, in itself, require anything. If the Secretary was publishing a regulation that was intended to prohibit and punish false statements, she would have used language addressed to that purpose. For example, the regulation could read: "Persons are prohibited from making knowing and willful false or fraudulent statements to this Department or any of its agencies when submitting information in compliance with the provisions of the Act." This would create a specific obligation, and would implicate the Act's civil money penalties provision. But the regulation states no more than that persons submitting information "are subject to" the already existing, generally applicable criminal sanctions for knowing and willful false statements to federal officials.[26]

Enforcement of the criminal provisions of title 18 of the U.S. Code is vested in the federal courts and the Department of Justice; it exceeds the jurisdiction of the Department of Labor and of this Office. If the Secretary wishes to pursue criminal sanctions, she must refer the matter to

[26] The Secretary's statements at the time the regulations were published for comment offer no additional gloss. *See* 52 FR 16795-01(May 5, 1987); 52 FR 20524-01 (June 1, 1987).

the Department of Justice or the appropriate United States Attorney.[27] Civil money penalties are unavailable under this regulation.

Alternative holding. In the discussion above, I assess civil money penalties for violations in the following areas: (1) housing; (2) wage statements; (3) withholding taxes; and (4) provision of a copy of the employment agreement. Global Horizons filed no closing brief despite having had some six months to do so. I have stricken Mr. Orian's declaration. But, in the alternative, I will consider the facts averred (and argument) in Mr. Orian's declaration with respect to the four areas for which I assess civil money penalties. For each, Mr. Orian's declaration fails to support any change in the determinations discussed above.

On housing, Mr. Orian offers several arguments. First, he argues that the places at which the workers were housed were public accommodations and thus did not require inspection under the regulations. Decl. of Orian, ¶22. This argument misses the mark. Wage & Hour is not asserting a violation based on an alleged failure to pass inspection. It is asserting a violation because the housing neither met OSHA standards (29 C.F.R. §1910.142), nor (in the case of public accommodations) met local standards applicable to such housing (or State standards if there are no local standards). *See* 20 C.F.R. §655.102(b)(1)(i, iii).

Second, Mr. Orian argues that the workers were housed for at most 24 hours at the two places that were not public housing and moved as soon as Mr. Dinsmore found that the housing failed to meet standards. Decl. of Orian at 23. But I did not assess civil money penalties based on conditions at these two accommodations (Mesa Apartments and Zillah House #1). I assessed penalties based only on conditions at three public accommodations. Investigator Dinsmore reported that, as to at least two of the three, the workers had been housed at each more than 30 days.[28]

Third, Mr. Orian argues in mitigation that Global Horizons moved the affected workers within 24 hours of Mr. Dinsmore's telling it that the conditions did not meet standards. Decl. of Orian ¶24. This contention is not entirely correct: the evidence shows that thirteen days after inspection, Global Horizons had moved only 15 of the 31 workers at Buena Double Wide Mobile Home. Decl. of Dinsmore, Exh. 8 at 3-5. But in any event, my analysis considers in mitigation Global Horizons' moving the workers promptly. *See* discussion, *supra*.

Finally, Mr. Orian argues that the housing Global Horizons used instead of the Quality Inn and the Clarion Hotel cost more than those accommodations and that there was no financial benefit to the Company. Id. ¶27. Mr. Orian offers no proof of this or explanation of how he knows it,

[27] The Department of Justice (Civil Rights Division) in fact is currently prosecuting Mr. Orian and other defendants for alleged conduct related to Global Horizons' H-2A activities. *See United States v. Orian*, Case No. CR 10-00576 SOM-01 (D. Hi.).

[28] Mr. Dinsmore did not state how long the workers had been housed at the third location.

and it is highly doubtful on its face.[29] In any event, I did not take financial gain into account when setting civil money penalties because Wage & Hour sought so little under the circumstances that the penalties were justified based on other factors. *See* footnote 13, *supra.*

On the tax withholding, Mr. Orian states that Global Horizons withheld state taxes for only one day and immediately returned the withheld funds to the workers. Decl. of Orian, ¶7. Even assuming this,[30] the civil money penalties assessed are justified by the Company's withholding federal taxes, which accounts for more than 90 percent of the funds withheld.

On the pay stubs, Mr. Orian states in his declaration: "I am aware that every worker got pay stubs on a regular basis with all the information that was required." Decl. of Orian, ¶40. First, this does not address the timeliness requirement. Second, it is a conclusory statement without any evidentiary support and appears to lack competence: Mr. Orian was not present at the worksites and gives no explanation of how he would be "aware" of just when or how regularly workers got pay stubs. Third, Mr. Orian does not respond directly to the specific allegation that the hours of work offered were not stated on the pay stub. Mr. Orian could have attached to his declaration a copy of the form of pay stub that was used, but he didn't. I credit Wage & Hour's specific proof over Mr. Orian's conclusory, generalized statement.[31]

On taxes, Mr. Orian states that Ann Gaylord, an IRS officer in Oregon, "ordered" Global Horizons to "deduct single +1" and said that, if the Company didn't take deductions, it would "not get the license to operate in Washington State." Decl. of Orian, ¶44. He adds that Global Horizons paid the money over to the federal treasury, that it reimbursed the workers, and that the government has never returned the money to Global Horizons. *Id.*, ¶¶ 44, 47.

I reject as not credible Mr. Orian's statement that Ms. Gaylord "ordered" Global Horizons to withhold taxes. Individual agents generally don't have the authority to "order" taxpayers. Mr. Orian doesn't suggest that he spoke personally with Ms. Gaylord or how he found out about whatever conversation did occur. It is not credible that a representative of the Internal Revenue Service would advise a company about what effect a failure to deduct federal payroll taxes would have on a company's ability to get state licensure; IRS officials are not involved in state licensure. Ms. Gaylord might have advised a representative of Global Horizons that the

[29] This is but one example of why I struck the declaration. Mr. Orian's representation about the cost of overcrowded, unsanitary, unsafe for purposes of fire safety (means of egress in emergency), and otherwise substandard housing costing more than several more rooms at a Quality Inn shouts out for cross-examination. By representing at the pre-trial conference that Global Horizons would not be offering any witness testimony, the Company avoided a trial at which Mr. Orian would be cross-examined. That's an example of why his declaration cannot be admitted into evidence.

[30] Mr. Orian's statement about state withholding is dubious. Global Horizons appears to have been deducting federal tax for all of the workers for much (if not all) of the work period. They totaled $93,864.32. State withholding would have been at a considerably lower rate and still totaled $6,401.66. It's very unlikely that this would have been for only one day. Again, cross-examination is needed.

[31] Again, Mr. Orian's conclusory statement about what he was aware of shouts out for the cross-examination that Mr. Orian evaded.

rate for withholding (as per an IRS Form W-4) should be "single plus one." It is even possible (although not established on this record) that Ms. Gaylord (mistakenly) advised a Global Horizons representative that the Company should deduct payroll taxes for the H-2A workers. I accept (for failure of proof to the contrary) that the IRS has not repaid Global Horizons. Given the Washington state consent order, I also accept that Global Horizons repaid the workers in compliance with that order. But these facts do not alter the analysis above; I already took them into account.

On the failure to supply a copy of the contract to the workers, Mr. Orian states that Global Horizons supplied a copy of the clearance order and that the contract to which Wage & Hour refers "is [the] State of Washington contract, and . . . this was provided to [Global Horizons] on [a] later date and as a consequence was provided late to the workers." Decl. of Orian at 48.

I reject this explanation. The notary date on the sample contract on the record is January 21, 2004. *See* Decl. of Dinsmore, Exh. 9. This was before the contract period began, not after. It also fails to refute that the Company took the contracts away from the workers "for safekeeping." It does nothing to alter the determination stated above.

Conclusion and Order

During the course of the H-2A work at Green Acres Farm and Valley Fruit Farm in Washington State in 2004, Global Horizons violated multiple applicable regulations. Four of these violations specified above justify the imposition of civil money penalties. Accordingly,

Global Horizons Manpower, Inc. a/k/a Global Horizons, Inc. will pay the U.S. Department of Labor, Wage and Hour Division, civil money penalties in the amount of $62,100.00. The Department of Labor will take nothing from Mordechai Orian as an individual by reason of these claims.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge

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. The Respondent, Administrator, or any other party desiring review of the administrative law judge's decision may file a Petition. 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. 29 C.F.R. § 501.42(a).

If no Petition is timely filed, or the ARB does not accept the Petition for review, 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).