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Issue Date: 13 December 2011

CASE NO.: 2010-TAE-00002

In the Matter of:

GLOBAL HORIZONS, INC. and
MORDECHAI ORIAN,
Respondents.

DECISION AND ORDER

Appearances: Lawrence Brewster, Esq.
David Kahn, Esq.
Rose Darling, 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

Introduction and Procedural History

Respondent Global Horizons, Inc. participated as an employer in the H-2A visa program for non-immigrant alien agricultural labor.[1] Respondent Mordechai Orian was (and is) the Company's president. The Administrator, Wage & Hour Division, brings this action, alleging that in ten discrete areas, Respondents violated the H-2A program's regulatory requirements on a clearance order in 2004 and 2005.[2] In particular, the Administrator alleges violations during the Company's H-2A employment of 156 non-immigrant Thai farm workers, whom it hired to harvest pineapple at Maui Pineapple Company in Hawaii from November 13, 2004 to September 15, 2005. The Administrator seeks $459,257.66 in back wages and $350,800.00 in civil money penalties.

[1] *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.

[2] The Administrator's original determination found violations of eleven regulatory provisions; the order of reference amended this to ten and adjusted the back wages and civil money penalties accordingly. Order of Reference at 2.

On February 24, 2010, Respondent Orian filed a motion for summary decision as to himself individually. After full briefing, I granted the motion on April 5, 2010.[3] I found that the Administrator had failed as a matter of law to offer any evidence to tie Mr. Orian, acting as an individual, to any of the alleged misconduct.

On July 9, 2010, the Administrator filed a motion for partial summary decision addressed to seven of the ten categories of alleged regulatory violations.[4] She sought civil money penalties in connection with each violation. The parties briefed the motion, and on December 17, 2010, I granted it in part and denied it in part. As a matter of law based on the undisputed facts seen in the light most favorable to Global Horizons, I found the following violations of the implementing regulations:

- Global Horizons unlawfully deducted $75 from each of 73 workers' paychecks for damage to housing at which they resided during a previous, different work contract. As there was no notice in the job offer shown to the workers, this deduction violated the regulatory requirement that, "the job offer shall specify all deductions, not required by law, which the employer will make from the worker's paycheck." 20 C.F.R. § 655.102(b)(13) (2005).[5] I found that Global Horizons must pay $5,475 in back wages. I denied summary decision on civil money penalties because the Administrator sought too much. I stated that, if the parties offered nothing further on this issue at trial, based on the evidence already on the record, I would impose civil money penalties of $2,500.

- Global Horizons unlawfully deducted from workers' pay charges for meals without stating in the job offer the amount that would be charged. *See* 20 C.F.R. § 655.102(b)(4, 13) (2005).[6] The clearance order stated that Global Horizons would provide kitchen facilities and the employees would buy their own food, yet Global Horizons deducted $42 per week for food from each of 124 workers.[7] Backwages owed were $109,218. I denied civil money penalties because Global Horizons in fact did provide food, and as a

[3] I denied the Administrator's motion for reconsideration on May 3, 2010.

[4] The violations refer to the regulations as they existed in 2005, and I cite to those regulations. The regulations have since been renumbered with some changes.

[5] "In the absence of a separate written work contract incorporating the required terms and conditions of employment . . ., the work contract at a minimum will be the terms of the job order . . . ." 20 C.F.R. §655.103(b).

[6] The regulation provides: "Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals." 20 C.F.R. § 655.102(b)(4) (2005).

[7] Global Horizons did provide food to the workers and in fact charged them at favorable rates ($6.00 per day), well below the then-applicable regulatory maximum. But this doesn't negate the violation, as the deductions thwarted the regulatory scheme. By stating during the clearance process that it would provide kitchens rather than charge for meal service, changing the arrangement mid-performance, and then deducting charges from the workers' pay, Global Horizons circumvented the Department's review and approval of the amounts being deducted. That is an important step in assuring that Congress' prohibition of preferential treatment for the alien workers is enforced; it is necessary for a comparison to the wages and benefits paid U.S. workers.

result of the order that it must reimburse the meal deductions, it was already being penalized the entire cost of buying the food and paying cooks to prepare, serve, and clean up the meals. I stated that, if the parties offered nothing further at trial, I would deny civil money penalties following trial as well.

- Global Horizons failed to offer work to 22 workers on at least three-fourths of the workdays during the contract. *See* 20 C.F.R. § 655.102(b)(6) (2005).[8] Back wages owed totaled $81,668.79. Civil money penalties were assessed at $10,500.

- Global Horizons failed to keep records to show when each worker "began and ended each workday." 20 C.F.R. § 655.102(b)(7)(i) (2005). It also failed to "furnish to the worker on or before each payday" a paystub that included in the information provided, "the hours of employment which have been offered to the worker . . . ." 20 C.F.R. § 655.102(b)(8)(iii) (2005). Global Horizons therefore was ordered to comply with these provisions.

- Global Horizons failed to pay four cooks, a mechanic, and two drivers at proper wage rates for H-2A workers employed in these particular jobs. An H-2A employer must pay the highest of the adverse effect wage rate, the prevailing wage, the agreed-upon collective bargaining rate, and the federal or state minimum wage. *See* 20 C.F.R. § 655.102(b)(9)(i) (2005). Here, the Company paid the seven workers at the lower wage rate paid agricultural laborers rather than the higher rate pertaining to the work they were performing. Back wages were $56,047.56 to the cooks, $2,442.00 to the mechanic, and $775.50 to the drivers. Civil money penalties were assessed at $3,500.

- Global Horizons unlawfully withheld federal income tax from the workers' paychecks. *See* 20 C.F.R. § 655.102(b)(13) (2005) (not disclosing a deduction from pay not required by law); I.R.C. § 3121(b)(1); Treas. Reg. § 1.1441-4(b)(1)(ii) (no payroll withholding taxes for H-2A workers). Back wages owed were $77,163.36.

- Global Horizons failed to pay required overtime compensation to the agricultural workers.[9] *See* 20 C.F.R. § 655.103(b) (2005); Fair Labor Standards Act, 29 U.S.C. §§201, *et seq.*, 203(e); HAW. REV. STAT. § 387-3(a).[10] Back wages owed these workers totaled $98,720.43. Civil money penalties were assessed at $77,000.

[8] The 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 contract and all extensions are in effect . . . . A workday shall mean the number of hours in a workday as stated in the job order and shall exclude the worker's Sabbath and federal holidays." *Id.*

[9] I denied summary decision on similar claims related to the cooks.

[10] 20 C.F.R. § 655.103(b) provides that "the employer shall comply with applicable federal, State, and local employment related laws and regulations, including employment-related health and safety laws."

In all other respects, I denied the Administrator's motion for summary decision without prejudice to her pursuing all remaining issues at trial.

From the proceedings at trial and the Administrator's post-trial brief, it is evident that the Administrator was relying for trial on the findings that I made on summary judgment and offering those findings as established for the purpose of the trial. For example, if the Administrator sought civil money penalties on a violation established on summary decision, the Administrator did not prove again the underlying facts to show the violation or to establish for the trial its details and particulars.

On the other hand, Global Horizons offered no new evidence at trial to bring into dispute any of those findings on summary decision.

I therefore append a copy of the Order on Partial Summary Decision (December 17, 2010), and incorporate the findings of fact and conclusions of law in that Order into the present Decision. I adopt those findings for the present Decision and Order.

In a pre-trial conference on May 25, 2010, the parties made certain representations limiting the proof they intended to adduce at the trial. The Administrator stated that she would not be offering the Wage & Hour investigator's report as an exhibit but would offer the testimony of the investigator. Transcript of Pre-Trial Conf. (5/25/2010) at 13-14. Global Horizons stated that it would not call Mr. Orian as a witness, nor would it call any other witnesses.[11] *Id.* at 17-18, 21. The principal reason stated for not calling Mr. Orian was that he was then (and remains) a defendant in a criminal prosecution pending in the U.S. District Court (D. Hi.),[12] and that criminal case apparently implicates some of the same facts as those at issue here. The concern was with the possibility that, if he testified, Mr. Orian might be asked questions that would require him to assert (or waive) Fifth Amendment privilege.

On May 31, 2011, Global Horizons moved to stay the trial until the criminal case was concluded. Its primary argument (among others) was that, until that time, its principal, Mr. Orian, would refuse to testify based on Fifth Amendment grounds and that only a stay would allow it to present a full record at the time of trial. The criminal prosecution was then (and continues to be) set for trial in February 2012, more than eight months after the Company filed its motion to stay. Any stay in the present case would thus delay the trial almost a year, assuming no delays in the criminal case. The Administrator opposed and filed a cross-motion for sanctions to exclude the Company's witnesses and exhibits for failure to file the required pre-trial witness and exhibit lists.

[11] Global Horizons' attorney, who also represents Mr. Orian in the criminal case, stated that, if Mr. Orian were called as a witness, he would instruct Mr. Orian not to answer any questions based on the Fifth Amendment privilege against self-incrimination. *Id.* at 17-18. Absent Mr. Orian's testimony, Global Horizons could still have offered his deposition testimony given in the present case in April 2010. In any event, as I describe in the text below, Mr. Orian testified extensively at the trial regardless of any Fifth Amendment concerns.

[12] Case No. CR 10-00576 SOM-01 (D. Hi.)

After allowing oral argument on June 3, 2011, I denied the Company's motion for a stay as untimely. *See* transcript (6/3/2011) at 22-23. In the alternative, I addressed the Fifth Amendment concerns and concluded that they didn't provide the Company an adequate basis for a stay under the controlling Ninth Circuit authority.[13] *Id.* at 23-27.

On the Administrator's cross-motion, Global Horizons' counsel stated that, in the light of the Fifth Amendment considerations, the Company would not be calling Mr. Orian as a witness; neither would it call any other witnesses nor offer any exhibits.[14] *Id.* at 27-28, 31-32. I therefore denied the cross-motion as moot.

The matter proceeded to trial on the remaining issues on June 13, 2011 in Honolulu, Hawaii.

I admitted the Administrator's exhibits 1-18 ("Exh.") with two limitations. First, in response to defense objections, the Solicitor stated that Exhibit 17, which is a compilation of the Wage & Hour Investigators' interview notes, was offered, not for the truth of any matter asserted in it, but rather simply to show the investigative process. Tr. 19, 21. I admitted Exhibit 17 subject to that limitation. Second, Exhibit 18 purported to be a declaration, but was submitted unsigned. I admitted it, contingent on the Administrator's substituting a signed version. After the Administrator offered a substitute declaration, Global Horizons raised additional objections. I admitted the exhibit, noting that, to the extent that the exhibit includes the recorded statements, not of the declarant, but of a person whom the declarant said she interviewed, it is only an unsigned, unsworn, hearsay translated (from Thai) statement, and may be accorded only whatever weight is appropriate to such statements.

Global Horizons offered no exhibits.

The Administrator called a single witness, Philipda Modrakee, a senior wage & hour investigator. The Company called no witnesses as part of its case-in-chief. It did, however, offer Mr. Orian as a rebuttal witness. The Administrator objected, essentially renewing its motion for sanctions and arguing that the Company, not only didn't disclose Mr. Orian on a witness list as the Pre-Trial Order requires, but also expressly represented that he would not be testifying.

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[13] *See Keating v. Office of Thrift Supervision*, 24 F.3d 322, 326 (9th Cir. 1995); *Federal Savings & Loan Insurance Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989).

[14] I urged the Company to consider alternative witnesses. For example, to show that it paid withheld taxes over to the IRS and was unable to recover them when it discovered that the taxes shouldn't have been withheld, the Company could offer the testimony of its accountant or bookkeeper at the time. *Id.* at 28. I stated that such witnesses could also testify about reimbursing the workers' inbound and outbound transportation and subsistence costs. *Id.* at 28-29. Whoever inspected the housing to assess the $75 charge for damage could testify about that; as the Company admitted, Mr. Orian wasn't that person. *Id.* at 29.

A party is not required to disclose its rebuttal witnesses in a pre-trial witness list. I therefore concluded that the Administrator's prior motion for sanctions and the Company's prior statement that it would not call Mr. Orian did not preclude his testimony so long as it was limited to rebuttal. I allowed Mr. Orian to testify but only within the scope of the matters that the Administrator raised in her case.[15] Tr. 120.

At the conclusion of the trial, I closed the case and set a briefing schedule. Tr. 191-92. The Solicitor filed a timely closing brief. Global Horizons' brief was due on file no later than September 26, 2011. It never filed a closing brief. The time having run, I proceed to decide the matter.

Issues to Be Decided Based on the Trial Record

1. Should Global Horizons be required to pay $14,600 in civil money penalties in connection with charging 73 workers $75 each for damages to housing they alleging did on some prior work order?

2. Should Global Horizons be required to pay $24,800 in civil money penalties for charging workers $6.00 per day for the three meals they received, when the job offer did not disclose that this charge would be made?

3. Should Global Horizons be required to pay $62,000 in civil money penalties for not maintaining records showing the actual times of day that the workers work and for not including a statement on the paystubs of the hours of work offered?

4. Does Global Horizons owe four H-2A workers who worked as cooks $20,573.06 for unpaid overtime, and if so, should it pay an additional $1,000 in civil money penalties?

5. Does Global Horizons owe the workers $6,245.71 for unpaid subsistence while traveling inbound and outbound, and if so, should it pay an additional $31,200 in civil money penalties?

6. Should Global Horizons be required to pay $28,400 in civil money penalties for taking federal payroll withholding taxes from the workers, inconsistent with treasury regulations?

[15] I again warned Mr. Orian that his testimony could be used against him in the criminal trial and that, if he refused (based on the Fifth Amendment) to answer questions on cross-examination, I might draw an adverse inference or strike his testimony in its entirety. Tr. 123-25. After consulting with counsel, Mr. Orian was sworn and testified.

Findings of Fact and Conclusions of Law

In this section, I will address in order each of the six issues to be decided. But because three considerations apply to many of the issues, I will address these considerations at the outset. They are:

Burden of proof. "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). As it is the Administrator who seeks an order awarding back wages and civil money penalties, she bears the burden of proof on each claimed violation. She points to no statutory exception that relieves her of this burden.

Civil money penalties. The Administrator seeks civil money penalties for the alleged violations. "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) (2005). 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 . . .;
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) (2005). Penalties for interference or discrimination in a Wage & Hour investigation are limited to $1,000 "for each such act of discrimination or interference." *Id.*

Inferences from Global Horizons' failure to produce certain records that Wage & Hour requested. On some of the issues, the Administrator offers no direct evidence to support her allegations. Rather, she apparently is of the view that, if she requested records from the Company relevant to certain issues, and the Company failed to produce the records, it should be inferred that the records, if produced, would show a violation. Neither party offers authority or argument directed to such inferences.

A complicating factor is that Global Horizons was not the only party that failed to produce relevant documentation. To prove the Company's failure to produce records, the Administrator needs to show that she requested the records. At trial, Investigator Modrakee testified that on some of the issues, she requested the records, Global Horizons failed to provide them, and that she inferred from this alone that the Company violated the regulatory requirement.[16] The Administrator, however, did not offer any of the written requests into evidence; rather, Ms. Modrakee merely stated that they were in her file. Tr. 87.

Generally, the best evidence of the content of a writing is the writing itself. *See*, *e.g.*, Fed.R.Evid 1002-03.[17] Thus, in hearing that (unlike the present case) applied formal rules of evidence, other evidence of the content of a writing would be inadmissible except in certain limited circumstances.[18] *Id.* Ms. Modrakee didn't offer any explanation for not offering the records requests into evidence (such as that they were lost or unobtainable), nor did the Solicitor in the briefs. To the contrary, Ms. Modrakee testified that the requests were in her investigative file, Tr. 87, which means that, had the Administrator wished to offer them, they should have been available.

Looking at the record as a whole, I find Ms. Modrakee's testimony about the records request, standing alone, is insufficient to establish liability. I turn now to a discussion of why that is.

Most of the records requests were in 2005 to 2007. Tr. 92-93. Ms. Modrakee was testifying in mid-2011, some four to six years after the requests were made. The time lapse brings her ability to recall the specific items requested into question. This is especially the case for an investigator, who has undoubtedly been making scores of records requests to other employers in the intervening years.

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[16] This was Ms. Modrakee's analysis on inbound subsistence (Tr. 50, 88, 109), where there was some evidence about the cost of the subsistence but none about the Company's failure to pay it; on outbound subsistence (except as to 41 employees for which Global Horizons produced records showing payments of $10 to each) (Tr. 54-55; Ex. 12); and on paying over the withheld taxes to the IRS and refunding the withheld amounts to the workers (Tr. 60-61).

[17] Neither the Federal Rules of Evidence nor the evidentiary part of this Office's Rules of Practice and Procedure, 29 C.F.R. §18(b), applies to enforcement actions such as the present matter. 29 C.F.R. §501.35(b). Rather, "Principles designed to insure production of relevant and probative evidence shall guide the admission of evidence. The ALJ made exclude evidence which is immaterial, irrelevant, or unduly repetitive." *Id.*

I do not exclude Ms. Modrakee's testimony under the best evidence rule; on the contrary, the testimony is admitted. Rather, I weigh the evidence in the light of the passage of time between the events and the testimony; the presence or absence of her direct, first-hand knowledge of the matters asserted; the degree of specificity of the testimony; its consistency within Ms. Modrakee's testimony and with other evidence of record; and its corroboration by and consistency with documentary evidence and other testimony.

[18] Under the Federal Rules of Evidence, other evidence is allowed to show the contents of a writing when the original was lost, unobtainable, in the possession of the opposing party, or not closely related to a controlling issue ("collateral matters"). *See* Fed.R.Evid. 1004.

Worse, Ms. Modrakee is not the person who was requesting the records until well into the investigation. The case initially was assigned to Investigator Vicki Vilaylak as lead. Tr. 14. Ms. Modrakee was brought into the investigation in May 2005, primarily because she is fluent in Thai and could interview the Thai workers. Tr. 94. Her assignment focused on worker interviews, not interviews of Company officials or requests for records; Ms. Vilaylak did those things. Tr. 92-93, 103-04. Thus, on cross-examination, Ms. Modrakee was unable to estimate a date that Wage & Hour requested records on outbound subsistence because she couldn't recall whether she'd made the request or Ms. Vilaylak had done it. Tr. 91-92.[19]

Yet, to a degree, defense witness Mr. Orian supports a limited inference that the Company might not have provided some of the requested records. In his testimony, Mr. Orian explained that, at the time of Ms. Vilaylak's records requests, the Company had a substantial workforce and complied fully. Tr. 177. But, by the time Ms. Modrakee became lead investigator and started making the requests, the Company was dwindling because the Immigration & Naturalization Service had ordered it to stop using Thai workers and because in July 2006, the Department of Labor debarred it from the H-2A program. Tr. 177-78.

As a result, according to Mr. Orian, the Company essentially shut down in 2006. Tr. 184. The accounting manager lost her staff and had to find time to respond to the records requests when not occupied with many other tasks. *Id.* The demands were considerable, and she could only produce the records piecemeal as she found time to search for them. *Id.*

Mr. Orian stated that the accounting manager worked directly with Ms. Modrakee and tried diligently to supply what she requested, but he admitted that he had no direct knowledge that she sent every requested record before the business essentially ceased operations. Tr. 178, 185-86. I infer from this that Global Horizons might well have failed to comply with some of Ms. Modrakee's records requests, but that it had a legitimate, non-inculpatory explanation: the Company was devolving out of being an active business operation and lacked adequate staff to comply.

Generally, a party's offering only weak evidence when strong evidence should be available is a basis on which to draw an adverse inference: the suggestion is that the better grounded evidence would have been adverse.[20] This appears to be the Administrator's theory for liability

[19] I do not question Ms. Modrakee's effort to be as truthful as possible. I question only her ability to recall accurately the specifics of the facts in question.

[20] *See, e.g., Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 226 (1939) (holding that the production of weak evidence when strong is available implies that the strong evidence would be adverse: "[S]ilence then becomes evidence of the most convincing character"); *National Labor Relations Board v. Cornell California, Inc.,* 577 F.2d 513, 517 (9th Cir. 1978) ("'adverse inference rule' basically provides that 'when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him'"); *see also, Singh v. Gonzales,* 491 F.3d 1019, 1023-23 (9th Cir. 2007) (proper to draw adverse inference when party refuses access to relevant evidence).

when she can offer no facts to support her claim other than the Company's failure to produce the requested relevant records.[21]

But under these circumstances, I will draw no adverse inference against either party. I will not infer that the Administrator has failed to offer the written records requests because they do not exist or because they would not (or not completely) support her assertion that she demanded certain particular records. But neither will I infer that the Company failed to produce its records, either because they do not exist or because they would not support the Company's asserted defenses but would establish liability. I do not excuse the Company's failure to produce documents (if there was a failure). But, if that happened, I find it as because the Company lacked the resources to comply; I do not infer that it was because the Company wanted to hide something adverse.

I. Civil Money Penalties on Global Horizons' Deductions for Damage to Housing on a Prior Work Order.

When deciding the Administrator's motion for partial summary decision, I stated that, absent any additional evidence, I would assess civil money penalties at $2,500. The Administrator argues that, at trial, she offered in addition proof that Global Horizons was aware of its obligation to make proper deductions from the workers' earnings, citing pages 159-61 of the trial transcript.

But the Solicitor asked no questions in the referenced testimony (or elsewhere that I found) directed to the question of deducting a charge for damages to housing. In the referenced testimony, Mr. Orian stated that, when it got a certification to employ H-2A workers, it reviewed the Department of Labor's compliance list with the farmer, and it also included a list of the H-2A requirements in its contracts with the farmers. Tr. 159-60.

As an example, Mr. Orian stated that, if the farmer was providing the housing, she had to know the requirements of the applicable regulation. Tr. 160. As Mr. Orian explained:

> When we go to provide housing – then we have [the] issue of compliance with the farmers that need to be aware of the housing compliance . . . . [¶] There's certain square footage per person. There's certain shower per person. Sometime the worker[s] decide to move from one room to another because they argue with another guy . . . and now you've got five guys here and three guys [t]here. Now you're in violation. And I saw that a lot happening in Washington [where the Company had another H-2A contract].

[21] The Administrator nowhere offers any authority or argument to support the theory that, if a respondent employer fails to supply requested records, liability can attach without more. As the Company filed no brief, it didn't address the issue either.

> So we tried to educate the farmers . . . . We came up with training for our own supervisors. We came up with training of the clients . . . .

Tr. 160-61. Nothing in the referenced testimony shows that the Global Horizons manager who deducted the charges for damages knew at the time that it was unlawful, or that anyone at Global Horizons countenanced or later ratified it.

For the reasons stated in the Order on Partial Summary Decision (at pages 4-8), which I incorporate by reference, I assess civil money penalties of $2,500 for this violation. *See* Appendix attached.

II. Civil Money Penalties for Meal Charges Not Disclosed in the Certification Process and Not Authorized.

On the Order on summary decision, I stated that, if the parties offered no further evidence going to civil money penalties in connection with the Company's deducting $42 per week for meals during part of the contract period, I would not assess civil money penalties for this violation. The Administrator argues that she offered additional evidence at trial and cites the same testimony as she cited above on the deduction for damages to housing. That evidence is unrelated to Global Horizons' decision to provide meals rather than kitchen facilities and to charge the workers $6 per day for three meals. Civil money penalties for this violation are denied for the reasons stated in the Order on Partial Summary Decision (at 8-9). *See* Appendix attached.

III. Civil Money Penalties for Failure to Maintain Records.

Having reviewed the Administrator's evidence on summary decision, I stated in that Order that, all factors considered, I would be unlikely to impose penalties absent a showing of actual harm to the H-2A program or to the workers involved. Again, the Administrator cites only to Mr. Orian's testimony on cross-examination at pages 159-61 of the trial transcript. Nothing in that testimony addresses recordkeeping. Civil money penalties for this violation are denied for the reasons stated in the Order on Partial Summary Decision (at 11-12). *See* Appendix attached.

IV. Unpaid Overtime Wages Owed Four Cooks.

On summary decision, I found that Global Horizons paid four H-2A employees working as cooks at wage rates applicable to agricultural laborers, not the higher rates applicable to cooks. I found that the Company owed the cooks in total $56,047.56 for underpaid wages.

At trial, the Administrator asserted that Global Horizons also violated its regulatory obligation[22] to comply with applicable federal law when it failed to pay the cooks overtime wages mandated under the Fair Labor Standards Act. That Act generally requires that workers required to work more than 40 hours in a week be paid no less than time-and-one-half for the hours in excess of 40. 29 U.S.C. §207(a)(1).[23]

The Administrator asserts that the four cooks worked 73.5 hours per week over certain respective periods. She calculates the unpaid overtime pay at $20,573.06 and seeks civil money penalties of $1,000. Global Horizons does not dispute the obligation to pay overtime premiums for work in excess of 40 hours in one week, nor does it contend that it paid overtime premiums to the four cooks. Rather, it disputes that the cooks worked in excess of 40 hours per week.

To prove that the cooks worked 73.5 hours per week over a certain period, the Administrator relies on a statement from one of the cooks, Niphon Promsit. *See* Exh. 18. Mr. Promsit stated that, while working at Maui Pineapple as a cook, he worked from 1:00 a.m. to 5:30 a.m. or 6:00 a.m. to prepare breakfast and pack lunches for the farm workers; rested from 6:00 a.m. to 10:00 a.m.; and then worked from 10:00 a.m. to 5:40 p.m. to prepare lunch and dinner. *Id.* at 1. He worked on this schedule six days per week. *Id.* at 2. Two other cooks (Charat Khuphon and Sompon Seesuk) worked the same schedule, also six days per week. *Id.* He stated, "As a cook, we all work more than 40 hours a week, but they only pay us 40 hours every week."

As the Wage & Hour investigator, Ms. Modrakee, explained, the clearance order showed that Global Horizons would be providing kitchen facilities. Tr. 114-15. As it turned out, however, Maui Pineapple had only one large kitchen, and the farm owners didn't want 150 different people working in the kitchen at once. Tr. 114. Maui Pineapple therefore used its own cooks and provided meals to the H-2A workers for the first two months without charge. Tr. 115. The H-2A employees complained because they didn't like the Maui Pineapples' cooks' cooking. *Id.*

Global Horizons then took over responsibility for the cooking and began deducting $42 per week from the workers' pay for food. Tr. 117. As Mr. Orian explained, the Company bought the food wholesale and charged the workers about what the food cost; at $6 per day, these wholesale rates were less than the workers would have paid had they bought their own food at retail. They were also substantially less than the then-applicable maximum charge allowed under the regulations. Tr. 129-30.

[22] 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) (2005).

[23] As the FLSA provides: "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Mr. Orian testified that the Maui Pineapples cooks worked forty-hours when they were preparing the food, and for that reason, Global Horizons decided to pay the H-2A cooks for a flat 40-hour week. Tr. 132. Mr. Orian understood from some of the laborers that the cooks worked five or six days per week and slept a lot. Tr. 133.

Mr. Promsit apparently made his statement (Exh. 18) through a Thai-language interpreter. He neither signed it nor swore to it. Although it is a statement made to a federal investigator and thus subject to criminal sanctions for knowing falsehoods,[24] it is far from clear that Mr. Promsit is within U.S. jurisdiction.

Nonetheless, I find Mr. Promsit's statement generally credible. As Ms. Modrakee observed when she was at Maui Pineapple, the task of preparing, serving (or for some of lunches, packing), and cleaning up meals for 150 people is a major task for three.[25] The work hours that Mr. Promsit recites seem reasonably pegged to the farm workers' schedules. Mr. Orian's hearing that the workers slept a lot is consistent with Mr. Promsit's statement that the workers had a rest period (unpaid) from 6:00 a.m. to 10:00 a.m. daily. And perhaps most important is that Mr. Orian concedes in his testimony that the Company understood the cooks worked up to six days per week, and that the Company made no effort to tally or record the actual number of hours worked: It simply assumed that the workers worked forty hours per week because it understood that's what Maui Pineapple's cooks did.

I therefore conclude that the cooks worked six days per week from 1:00 a.m. to 5:30 a.m. and from 10:00 a.m. to 5:40 p.m. This totals approximately 12 hours per day and amounts to 72 hours per week. The workers were entitled to overtime premiums for 32 hours per week during the period each worked as a cook. The applicable straight-time pay rate established on summary decision was $13.98 per hour.

I already addressed on summary decision the Company's failure to pay straight time at the correct wage rate. Order on Partial Summary Decision at 12-13. The order on summary judgment included straight-time for all hours worked. The overtime premium owing is thus limited to the additional one-half time for the 32 hours per week, or $223.68 per week for each cook during the time that person worked as a cook. Global Horizons does not dispute the accuracy of Ms. Modrakee's summary of weeks of overtime worked, which (for all four cooks) totals 88. *See* Exh. 10. Unpaid overtime amounts to $19,683.84 (88 x $223.68).

Global Horizons utterly disregarded its statutory obligation to maintain records of the actual hours worked and to pay overtime for work in excess of 40 hours per week. Civil money penalties are imposed, as the Administrator requested, in the amount of $1,000.

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[24] *See* 18 U.S.C. §1001.

[25] Although four different H-2A workers were employed at different times as cooks, it appears that one substituted for another and that only three at most worked on any given day. *See* Exh. 18 at 1 (Promsit replaced Anucha). Mr. Orian testified that, on two occasions, he saw other workers helping out. I see no reason that this would substantially diminish the cooks' hours on any regular, ongoing basis.

V. Reimbursement of Transportation and Subsistence Expenses during Inbound and Outbound Travel.

H-2A employers must offer and pay their workers the cost of inbound transportation (including subsistence while in transit) to the worksite. 20 C.F.R. §655.102(b)(5)(i) (2005). 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) (2005). "The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment," or if the employer instead is providing kitchen facilities, then the amount paid must be no less than the regulatory maximum that the employer can charge for meals. *Id.*; 20 C.F.R. §655.102(b)(4) (2005). The daily subsistence rate by regulation, applicable in November 2004 to instances in which the employer was not charging for meals, was $8.78. Tr. 52.

Inbound. It is undisputed that all 156 H-2A workers completed at least 50 percent of the work contract period. Tr. 51-52. There is no dispute that the Company paid all costs of inbound transportation. The Administrator's claim is limited to unpaid subsistence, which she calculates at a total (for all of the workers together) of $2,730.36. In support of her claim, the Administrator offers only Ms. Modrakee's testimony that she requested documentation from the Company in 2006 to show that it had paid subsistence, and the Company supplied none.

Mr. Orian offered in rebuttal the testimony described above about the Company's responses to the records requests. On the specifics of the reimbursement for subsistence during inbound transit, he testified that Global Horizons' agreement with its agent in Thailand was that the agent would bring the workers to Bangkok on a bus and provide them with food until they left at the airport. Tr. 132. According to Mr. Orian, the workers thus had no inbound subsistence expenses.

The Company's explanation is incomplete. It fails to address that many of the workers did not fly in from Bangkok; they came from other U.S. domestic locations at which they had been working as H-2A workers, often for Global Horizons. *See, e.g.,* Exh. 18 (Mr. Promsit left Bangkok in June 2004 to work in Maryland, then took work in Washington State, and then took the job in Maui). The Company offered nothing to demonstrate that it paid subsistence to workers coming from domestic locations at which he had other operations.

Nonetheless, it is the Administrator who has the burden to demonstrate the Company's failure to pay subsistence. *See* 5 U.S.C. §556(d). As I stated, I am unwilling to draw an adverse inference based on the Company's failure (assuming that it did fail) to produce requested documents. Ms. Modrakee said that she was the person who requested the documentation

and said that she requested it in 2006. She was not involved in requesting documents until the summer of 2006. That places the request in time in the latter half of 2006.

The INS restricted Global Horizons from using Thai H-2A workers because too many absconded. By July 2006, the Department of Labor had debarred Global Horizons from the H-2A program. Tr. 141. As discussed above, the Company began to shut down that year. Tr. 184. Rather than draw an adverse inference that the Company failed to produce requested records because the records did not exist or were adverse, I conclude only that it became impracticable for the Company to comply with document requests at that time.

Just as I draw no adverse inference against the Administrator because she failed to offer into evidence the request for documents relevant to inbound subsistence, I similarly draw no adverse inference against the Company for failing to produce them under the circumstances that existed at the time. The Administrator also had an investigative staff that interviewed numerous of the H-2A workers. Ms. Modrakee was at Maui Pineapple for two weeks, mostly to interview workers. She spoke the same language. There was ample opportunity to take statements from the workers about any unreimbursed inbound subsistence expenses. Yet, the Administrator offered not a single statement from any worker that he was not reimbursed.

As the Administrator's claim depends entirely on an adverse inference from the Company's failure to produce documents, and as I reject that inference, the Administrator has failed to meet her burden. The claim based on inbound subsistence is denied.

Outbound. Because 21 of the workers did not complete the contract, the Administrator concedes that they were ineligible for outbound transportation or subsistence reimbursement. Tr. 54-55; Exh. 13. The Administrator's claim thus is limited to 136 workers. There is no dispute that Global Horizons paid all required airfare. Tr. 56.

The Administrator concedes that Global reimbursed 41 workers $10 each for outbound transportation and subsistence. Tr. 56; Exh. 12. Her claim is that, beyond these 41 payments of $10, Global Horizons failed to pay ground transportation expenses from the airport in Bangkok to the workers' respective homes on return to Thailand and failed to pay subsistence during that travel. The Administrator seeks a total of $3,506.35 in wages.

The Administrator's proof again is limited to an adverse inference. Ms. Modrakee requested documentation, and the Company produced nothing beyond the document showing the $10 payment to the 41 individuals. Tr. 56. Yet, the document request at issue is the exact request on which Ms. Modrakee admitted on cross-examination that perhaps she never made the request and that it was her predecessor as lead investigator, Ms. Vilaylak, who requested the records. Tr. 92. Testifying about these records, she stated:

> Let me explain. The case, it was not reassigned to me as a lead investigator until after Vicki Vilaylak had left. So that was summer of 2006. But I don't remember

> if Vicki Vilaylak had request for those records from Global or not. She might have requested before that. And I also might have request the same thing.

Id. This is flatly inconsistent with her initial testimony: "What I did was I also request for records. And Global had provided to me with a list of . . . 41 employees that Global actually provided $10 in cash." Tr. 56. In that testimony, she is unequivocally stating that it was she who requested the documents. It shows why the Administrator's failure to put the document requests on the record is crucial. Moreover, as I stated on the inbound reimbursements, if Ms. Modrakee was in fact the investigator who requested the documents, she would have done so no earlier than the summer of 2006, during the period in which the Company was collapsing. The circumstances tend to refute an adverse inference by supplying a reasonable explanation for not producing documents.

Mr. Orian's answer to the Administrator's theory was again that, once the workers arrive at the airport in Bangkok, Global Horizons' agent picks them up, takes them home, and provides food on the way. Tr. 143. For workers who left for other domestic H-2A work, Mr. Orian contended that the new employer was required under the program to provide the transportation and subsistence expenses, and Global Horizons was relieved of that responsibility.

With respect to the workers who remained in the U.S. for more H-2A work, the Company is correct that, assuming the next employer has contracted (as required under the H-2A program) to pay the cost of transportation and subsistence during transit, the outgoing employer is not required to pay those expenses. *See* 20 C.F.R. §655.102(b)(5)(ii). The Administrator has offered no proof of how many of the 136 workers who completed the Maui Pineapple contract returned to Thailand and how many took new H-2A work domestically. Again, despite having interviewed numerous workers, the Administrator offers not a single statement from one of the workers that he was not reimbursed for ground transportation or for subsistence while in transit.

The Administrator has not met her burden. The claim based on outbound transportation and subsistence is denied.

Civil money penalties. The Administrator seeks $31,200 in civil money penalties on the inbound and outbound claims. As she has failed to establish liability, civil money penalties are denied.

VI. Civil Money Penalties on Improper Payroll Withholding Deductions.

On summary decision, I concluded that Global Horizons had improperly deducted $77,163.36 in federal payroll withholding taxes from 142 workers' pay. Order on Partial Summary Decision at 13-14. *See* Appendix. The Administrator sought $28,400 in civil money penalties. Based on the record as it stood on the motion, I held that the amount requested was excessive and that summary decision in that amount was denied.

At trial, the Administrator renews the request for $28,400 in civil money penalties. Other than the evidence she adduced on summary decision, the Administrator offered only Ms. Modrakee's testimony she asked the Company in 2007 for the workers' IRS Form W-2's to see if there was an indication that the Company had reimbursed the employees for the withheld taxes, and she asked the Company for documentation that it forwarded the withheld taxes to the IRS. Tr. 60, 109. She added that she wasn't aware of anything in the file to show that Global Horizons had paid the money over to the IRS. *Id.* Ms. Modrakee admitted on cross-examination that, at some point during the work contract, Global Horizons stopped withholding payroll taxes.[26] Tr. 111.

To rebut this, Global Horizons offered Mr. Orian's testimony. Mr. Orian stated that a particular IRS agent, David Cropp, told Global Horizons' chief financial officer, Rob Rutt, that Global Horizons must deduct withholding taxes from the H-2A workers as "even aliens from the moon will pay taxes." Tr. 145. Withholding was to be calculated at "single plus one" rates. *Id.* The Company understood that this was an issue: an adviser (Dr. James Holt) had said that taxes shouldn't be withheld, and Mr. Cropp of the IRS and a Washington State official (Pamela Gaylord) said that withholding was required. Tr. 179-80. But, according to Mr. Orian, this was happening when the Company was first beginning H-2A operations, and they decided to withhold the payroll taxes. Tr. 145.

Once the withholding issue was fully developed during an investigation by state officials in Washington in 2005, the Company realized that it should not be withholding taxes. Tr. 146, 181. In the Washington case, it agreed to an order to reimburse the workers, but when it asked the IRS to refund the taxes that it had remitted, the IRS refused. Tr. 146-47. The IRS explained that the money could be refunded only to the workers. Tr. 147. The Company then started working with the United Farm Workers, who by then represented the workers, in an effort to get the refunds with the workers' cooperation. Tr. 147-48.

Mr. Orian stated that the Company paid all withheld payroll over to the IRS. Tr. 183. He explained that the records showing this are among those that the Department of Justice took in connection with the criminal case against him (and others). Tr. 184. He stated these are records of Millennium Funding, which sent the electronic money transfers to the IRS. *Id.* I find this testimony generally credible; there is nothing to rebut it, and it is consistent with the limited evidence in this case and the case involving the Washington State contracts, OALJ Case No. 2009-TAE-00002.

For the reasons stated above, I will not draw an adverse inference based on the lack of documentation supplied by the Company to show that it remitted the withheld taxes to the IRS. If the Administrator was having difficulty collecting the information from the Company, to meet its burden, she could have requested the information from the IRS. That could also have had

[26] Ms. Modrakee also admitted that she was present at Mr. Orian's deposition in 2010 and heard him testify that the IRS had advised the Company to deduct the payroll taxes. Tr. 108-09. Wage & Hour did not reopen the investigation to look further into that assertion. Tr. 109.

the salutary effect of alerting the IRS to a possible criminal violation, if the Company withheld taxes and did not remit them to the government. By 2007, when Ms. Modrakee apparently made the records request (assuming that her request was sufficiently specific and not just for W-2's), Global Horizons had ceased operations and can well explain how it couldn't adequately respond to document requests. Although that might not excuse it from a regulatory obligation to make certain records available for inspection and copying,[27] it does rebut an adverse inference because it shows a reason for the non-disclosure other than that the evidence would harm the Company's case.

Considering the factors going to civil money penalties, there is no indication of a history of Global Horizons' withholding payroll taxes once it knew that it was improper. The record reflects that Global Horizons was aware of the issue, got information from multiple sources, and ultimately followed the mistaken advice of an IRS agent. Once the Company learned of its error, it stopped withholding the payroll taxes. This occurred in the middle of performance of the work under scrutiny here. As the deducted payroll taxes were paid over to the IRS, there was no financial gain to the Company. Indeed, as this Order requires the Company to reimburse the workers for all withheld payroll taxes, if the Company's efforts with the United Farm Workers fail, it might be unable to get back (directly or indirectly) the taxes its remitted to the IRS while also being required to pay the same amount directly to the workers as a remedy under this Order. The result could eventually turn out to be that the Company will not just refund to the workers the money it improperly deducted from their pay, but it will lose any equal amount to the federal treasury.

Yet, there remains 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 have now waited many years for income they earned in 2005. 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 some $77,000 to the federal treasury 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 $14,200 ($100 per worker) are assessed.

Conclusion and Order

Global Horizons will pay the U.S. Department of Labor, Wage & Hour Division, $559,884.48 as follows:

1. For the improper payroll deduction for damage to housing, Global Horizons will pay $5,475 in back wages and will pay civil money penalties of $2,500.

[27] *See* 20 C.F.R. §655.102(b)(7)(iii) (2005).

2. For the improper payroll deduction for meals, Global Horizons will pay back wages of $109,218.

3. For the failure to offer sufficient hours of work, Global Horizons will pay back wages of $81,668.79 and will pay a civil money penalty of $10,500.

4. Global Horizons will comply with all recordkeeping requirements pertaining to the H-2A program.

5. For paying cooks, a mechanic, and drivers at deficient wage rates, Global Horizon will pay $56,047.56 for the cooks, $2,442 for the mechanic, and $775.50 for the drivers. Global Horizons will also pay a civil money penalty of $3,500.

6. For failure to pay the cooks overtime in violation of the Fair Labor Standards Act, Global Horizons will pay back wages of $19,683.84 and will pay civil money penalties of $1,000.

7. For the improper withholding of income taxes, Global Horizons will pay $77,163.36 in back wages and will pay $14,200 in civil money penalties.

8. For the failure to pay overtime to the agricultural workers, Global Horizons will pay back wages of $98,720.43 and will pay a civil money penalty of $77,000.

If this Order becomes final, Global Horizons must pay the civil money penalty portion of the Order by certified check or money order made payable to the Wage and Hour Division, United States Department of Labor, so that the Administrator, Wage & Hour Division receives the payment no later than 30 days after this Order becomes final. 29 C.F.R. §501.22.

The Administrator will take nothing further by reason of this claim.

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).

APPENDIX

See appended Order on Partial Summary Decision, which follows:

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 17 December 2010

CASE NO.: 2010-TAE-00002

In the Matter of:

GLOBAL HORIZONS, INC. and
MORDECHAI ORIAN,

Respondents.

ORDER ON PARTIAL SUMMARY DECISION

This is an action 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.*[1] The Administrator, Wage and Hour Division, alleges ten categories of violations of the applicable implementing regulations, 20 C.F.R. § 655, and seeks $459,257.66 in back wages and $350,800.00 civil money penalties.[2] All violations stem from a clearance order under which Respondent Global Horizons employed over 150 Thai-speaking nonimmigrant farm workers on H-2A visas to pick pineapple in Hawaii from November 15, 2004 to September 15, 2005.

On July 9, 2010, the Administrator filed a motion for partial summary decision addressed to seven of the ten categories of alleged regulatory violations. In support, the Administrator submitted a statement of undisputed facts; the declaration of counsel with eight exhibits (A.Ex. 1-8); the declaration of Investigator Modrakee with twenty-one exhibits (A.Ex. A-U); and the declaration of Assistant District Director Francisco Ocampo.

On August 30, 2010, Global Horizons submitted an opposition brief, along with a response to the Administrator's statement of undisputed facts.[3] The Company offered no evidence of its own.[4] The Administrator filed a reply on September 24, 2010.[5]

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[1] The implementing regulations for this statute are found at 20 C.F.R. Part 655 and 29 C.F.R. Part 501. These regulations were re-numbered after the initiation of the investigation that led to this case. I have cited to the current numbering; the text remains unchanged in pertinent part.

[2] The original determination of the Administrator found violations of eleven regulatory provisions; the order of reference amended this to ten and adjusted the back wages and civil money penalties accordingly. Order of Reference at 2.

[3] In Orders issued April 5, 2010 and May 3, 2010, I granted Respondent Orian's motion to for summary decision. Mr. Orian therefore filed no opposition to the present motion.

[4] The opposition refers to a declaration of Mordechai Orian, but none is attached. *See* R. Opp. at 6.

I will grant the motion in part and deny it in part.

I. Legal Requirements for Summary Decision.

On a motion for summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on its pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

II. Respondent's Cross-Motion or Other Defenses Based on Laches or the Like.

Global Horizons asserts that the Administrator waited over five years to pursue this action. It states that, at this late date, it is essentially defunct and without assets and cannot be expected to defend itself. It argues that the matter is barred by laches, is a denial of due process, or is the result of unfair delay that should preclude any remedy. For this, it relies on a regulatory provision that requires hearings to be set within 60 days after the matter is referred to this Office. *See* 29 C.F.R. § 501.38.[6]

Respondent's argument is without merit. The Wage and Hour Division began the relevant investigation of Global Horizons no later than May 2005, some three months before Global Horizons completed the work in September 2005. Modrakee Decl. ¶ 3. Investigator Modrakee visited the worksite in Hawaii and interviewed workers that same year (2005) and continued the investigation into 2006 with document requests. *Id.* ¶ 4-5; A.Ex. A. Global Horizons thus was on notice even before the workers completed their jobs that it was under investigation. It should have begun preserving documents and preparing its defenses at that time. Even if it neglected its defenses, it was required to preserve its records in any event, as the applicable regulations

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[5] Our rules do not permit reply briefs without prior leave. 29 C.F.R. §18.6(b). Here, the Administrator did not seek leave. On the other hand, Global Horizons did not object, and the reply is useful and not prejudicial to Global Horizons. For example, the Administrator corrects typographical errors that Respondent noted in its opposition. Under the circumstances, I will allow the reply.

[6] It appears that Global Horizons' assertion is that *the Administrator* took too long to process the case and that this unfairly prejudiced the Company. To the extent that Global Horizons is complaining, not about the Administrator, but that *this Office* did not schedule a trial expeditiously enough, that argument is without foundation. This Office received the reference in November 2009 and set a trial for January 2010. It was Global Horizons that moved on four separate occasions, either independently or jointly with the Administrator, for continuances. I granted each motion, most recently resetting the trial to begin on January 10, 2011, nearly a year after I first noticed it. The time that the matter has been pending in this Office resulted from requests that Global Horizons made, not from anything it opposed or to which it objected.

require employers to preserve records related to a clearance order until three years from the date of the certification.[7]

And that didn't end Global Horizons' recordkeeping obligations. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 118 (S.D.N.Y. 2003); *see Kronisch v. United States*, 150 F.3d 112, 126-27 (2d Cir. 1998) (the "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation . . . . [or] when a party should have known that the evidence may be relevant to future litigation"); *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Here, Global Horizons received notice on September 8, 2008, that that the Wage and Hour Division had concluded its investigation and found violations. A.Ex. 2. From September 8, 2008 onward, Global Horizons thus was under a continuing duty to preserve all records relevant to the potential litigation. Arguably this duty attached earlier, when the Department notified the Company of the investigation in 2005.

If Global Horizons did not see to its defenses and maintain its documents, it must look to itself for its failures, not blame them on the Administrator. Its arguments based on laches and the like are without merit.[8] Three years is a long time to complete an investigation and issue findings, but there is no proof of unfair prejudice to Global Horizons.

III. Factual Disputes

The Administrator submitted a detailed statement of 63 allegedly undisputed material facts. It cites for each fact to evidence on the record. Global Horizons raises objects to portions of the record evidence: paragraph 23 of the Modrakee declaration and Administrator's Exhibits J, K, M, and O. I discuss those objections in the relevant substantive sections below. I will find that I need not reach the objection to paragraph 23 of the Modrakee declaration because I am denying that portion of the Administrator's motion for other reasons. I will overrule the remaining objections and admit those exhibits. I admit the remainder of the Administrator's proffered evidence without objection.

[7] As the regulation provides: "The employer shall retain the records for not less than 3 years from the date of the certification." 20 C.F.R. § 655.122(j)(4).

[8] It appears that at least in some instances Global Horizons would rely on this argument to explain why it is unable to dispute some of the Administrator's proof at this time. Of the 63 alleged undisputed facts on which the Administrator relies, Global Horizons expressly concedes 39. It responds to six as "neither admit nor deny" (Facts 11, 13, 25, 26, 56 and 62); to two as "unable to admit or deny" (Facts 17 and 31); and to six as "unable to determine" (Facts 28, 31, 36, 42, 43, 48 and 49).

I reject these "neither admit nor deny" responses as inadequate to bring the asserted facts into dispute. Global Horizons cannot rely on pleadings alone at this stage, and to the extent that it is relying on the same argument as it asserted on laches, I reject it for the same reasons: it should have maintained its documents and prepared its defenses. Moreover, most of the documentation on which the Administrator relies is simply Global Horizons' own records; Global Horizons therefore has copies – through the Administrator – of many of the records it says it can't find.

Looking to the Administrator's list of 63 facts that it argues are undisputed, Global Horizons either concedes or does not dispute any but Facts 9, 10, 51, 52, 57, 59, 60 and 63. It does, however, assert that what the Administrator lists as Facts 39, 45, 51, and 60 are argument, not facts. I will discuss most of these contentions as I decide the separate alleged violations below. For the moment, I will address Facts 9, 52, and 57 in the margin and find them undisputed after the correction of typographical errors in the Administrator's opening papers.[9]

IV. Violations Alleged by Administrator

A. Improper Payroll Deductions for Damages to Housing

Liability. The Administrator asserts that certain deductions Global Horizons took from workers' paychecks for damage to their housing were improper because, to the extent the damage occurred, it was under a different clearance order. Employers must provide, without charge, housing to workers who "are not reasonably able to return to their residence within the same day" but may "require workers to reimburse them for damage caused to housing by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation." *See* 20 C.F.R. §§ 655.122(d)(1), (d)(3).

While the regulations do not specify whether an employer may require reimbursement on one labor contract for damage to housing during work on a different contract, the regulations do require that, "The job offer shall specify all deductions, not required by law, which the employer will make from the worker's paycheck." 20 C.F.R. § 655.202(b)(13).[10] A deduction for damages to housing is not legally *required*; rather, it is an action that the employer is *permitted* to do. Disclosure in the offer of employment therefore is required if the employer is going to exercise that right.

Here, the job offer stated nothing to alert workers that, if they took the job, they would be required to reimburse Global Horizons for damages to housing during their work *during a different period of employment.* The offer stated: "The employer will make the following deductions: . . . repayment of loans (if any); recovery of any loss to the employer due to damage (beyond normal wear and tear) or loss of equipment, housing or furnishings caused by the worker (if any); and deductions expressly authorized by the worker in writing (if any)." A.Ex. C at 9. Fairly read, the language in the offer refers to the terms and conditions of the *offered*

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[9] Fact 9 is undisputed on the record. In the reply papers, the Administrator corrected an incorrect citation; looking to the correct citation, the Fact is substantiated. See A.'s Resp. to R.'s Stmt. of Contested Facts ¶ 9; A.Ex. C at 14.

Fact 52 is undisputed as corrected. The Administrator stated that the determination letter found that Respondent owed $60,193.32 in back wages for failure to pay the proper wage rate to cooks, shuttle bus drivers, and a mechanic. *Id.* at 28-29. The determination letter actually differs slightly. There is no dispute that the amount stated in the letter is $60,257.90. *Id*. at 29.

There is also a typographical error to which Global Horizons refers on Fact 57, but this goes to a citation to law, not to a fact. The Administrator incorrectly cited a regulation concerning income tax withholding but acknowledged and corrected this in the reply. *Id*. at 31.

[10] "In the absence of a separate written work contract incorporating the required terms and conditions of employment . . ., the work contract at a minimum will be the terms of the job order . . . ." 20 C.F.R. §655.103(b).

employment, not some previous employment, and cannot extend to a recovery of loss from damage to housing during an earlier employment.

Respondent offers nothing to the contrary. *See* R. Opp. at 7-8. Rather, Global Horizon's chief executive officer, Mordechai Orian conceded the Administrator's contentions at his deposition:[11]

> Q: Was it Global's understanding that it could deduct from the H-2A earnings the cost of any damage caused by the worker to housing or furnishings that the worker occupied while they were at Maui Pineapple?
>
> A: If it's malicious damage, yes.
>
> Q: So damage that's, as stated here, "beyond normal wear and tear"?
>
> A: Yes.
>
> Q: And was it Global's understanding that that damage had to be done to furnishings or equipment specifically at Maui Pineapple housing?
>
> A: Of course, related to that contract.
>
> Q: So it was Global's understanding that it could deduct from the H-2A workers' earnings the cost of any damage caused to any furnishings or housing that the worker occupied under another contract?
>
> A: No. Every clearance is specific to that clearance order.

A.Ex. 8 at 67-68.

I therefore find Global Horizons liable on this claim.

Back wages. Global Horizons admits that, as to 73 workers, it deducted $75 each for damage to housing that occurred during work on a different work contract. R. Stmt. Contested Facts ¶ 12. It raises no objections to the payroll records that the Administrator placed on the record. *Id.* ¶¶ 13-14; R's Opp. 7-8. Accordingly, I find that the undisputed evidence on the record shows that Respondent improperly deducted a total of $5,475 ($75 times 73 workers) from the paychecks of 73 workers for damage allegedly done to housing under a different work contract. The Administrator is entitled to summary decision in this amount.

Civil money penalties. The Administrator may assess a civil money penalty of up to $1,000 for each violation of the regulations governing H-2A work contracts, consistent with a non-exhaustive list of seven factors. 29 C.F.R. §§ 501.19, 501.19(b). On appeal to this forum, an

[11] Although Global Horizons disputes the Administrator's characterization of Mr. Orian's testimony (*see* Fact 10), there is no dispute about what that testimony was.

administrative law judge may "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 29 C.F.R. § 501.41(b).

Global Horizons argues that it is inappropriate to award penalties on summary decision. It contends that awards of penalties "necessarily involve the Court's weighing of certain evidentiary factors," and that such weighing is not permitted on summary decision. *Id.* This argument is without merit.

Reaching determinations through the weighing of undisputed facts as a matter of law is appropriate on summary decision. *See Cyberworld Enterprise Technologies, Inc. v. Administrator, Wage & Hour Division*, ARB No. 04-049, ALJ No. 2003-LCA-00017, 2006 WL 2205227 (ARB May 24, 2006) (affirming award of penalties on summary decision in an H-1B visa case); *In re Secretary of Labor v. A-One Medical Services,* ARB No. 02-067, ALJ No. 2001-FLS-00027, 2004 WL 2205227 at *5 (ARB Sept. 23, 2004) (same; willful violation under the Fair Labor Standards Act); *see also, Noriega-Perez v. United States,* 179 F.3d 1166 (9th Cir. 1999) (affirming ALJ's imposition on motion of civil money penalties in an immigration case).[12] Were Global Horizons to raise a genuine dispute as to a fact relevant to one of the seven factors that guide the setting of penalties, that would defeat summary decision. Failing that, however, summary decision is proper: there is no factual dispute to be resolved at a trial, and I will apply the legally mandated factors on summary decision exactly as I would on a decision following any trial.[13]

The factors that "may be considered [when assessing penalties] include, but are not limited to, the following:

1. Previous history of violation or violations of the H-2A provisions of the Act and these regulations;
2. The number of workers affected by the violation or violations;
3. The gravity of the violation or violations;
4. Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;
5. Explanation of person charged with the violation or violations;
6. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provision 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 workers."

29 C.F.R, § 501.19(b).

[12] The question is an easier one in non-jury cases such as this: The same judge would weigh the same undisputed facts after trial as before.

[13] Global Horizons misplaces its reliance on an unpublished magistrate judge's recommended, but not adopted, decision in a district court case, *United States v. Pacific Northwest Electric, Inc*., 2003 WL 24573548 (D. Idaho Mar. 21, 2003) (Fair Housing Act). The district court there found only that penalties were time-barred, nothing more. *Id.* at *3-10.

On the issue of the payroll deduction for damage to housing during a different contract period, the Administrator argues that a penalty should be assessed, and that it should be set at $200 for each of the 73 affected workers, for a total of $14,600. *See* Ocampo Decl. ¶ 5. Considering the factors, I find the Administrator is not entitled to summary decision for penalties in that amount.

Although the Administrator contends that Global Horizons has a history of H-2A violations, it points only to previous allegations, not to any final decisions with findings of violations and certainly none adjudicated prior to Global Horizons' conduct in the present case in 2005.[14] *See* Ocampo Decl. ¶ 5 n.1.

The violation affected a considerable number of workers (nearly half of those hired under the contract) but not to a monetary extent that I consider grave. The contract was for work over ten months at about $400 per week. For a worker who worked throughout the contract, earnings would be somewhat over $17,000. It could well be that some of the 73 affected workers earned somewhat less than $17,000, but regardless, a $75 charge, while not *de minimis*, is not grave.

It appears, and I conclude, that Mr. Orian knew the deductions would be proper only if they were for damage done during the current contract. But the Administrator doesn't show that Mr. Orian knew that these deductions were made or that they were made for damage done during a prior contract. Nor does the Administrator show that the person who made the deductions knew they were improper. The Administrator has not established for purposes of this motion that Global Horizons lacked good faith when it made these deductions.

I reject the Administrator's contention that Global Horizons' refusal to participate in a final conference with Investigator Modrakee shows recalcitrance about future compliance. *See* Modrakee Decl. ¶ 34; A.Ex. T. To be sure, Global Horizons missed an opportunity at which it might have given assurances of future compliance, but that falls short of recalcitrance.

Finally, the Administrator offers nothing to show that the workers who sustained the payroll deductions had not damaged Global Horizons' property, or had not damaged it to the extent of $75. It appears highly suspect that 73 different people would each damage their housing to the exact same extent, but the Administrator offers no proof at this stage to the contrary.[15] I am left to conclude for purposes of this motion that Global Horizons was not unjustly enriched in the sense of a windfall, but rather that it collected only enough to come within the regulatory allowance of requiring workers to pay for damage, except that the damage was something these workers did during an earlier period of employment.

[14] Mr. Ocampo cites to six cases: 2005-TAE-00001 (case still pending), 2005-TLC-00001 (Respondent withdrew appeal of denial of a H2-A clearance order); 2008-TAE-00003 (case decided against Respondent, but as a sanction for failure to comply with discovery, not as a decision on the merits); 2005-TAE-00013 (I could find no such case); 2005-LI-0056 (I could find no such case); 2005-ES-0001 (I could find no such case). (The last three of these appear to be before state agencies in California or Washington State.)

[15] As often happens in landlord/tenant disputes, there might be a question whether the "damage" was wear and tear and thus not collectible under the regulation. The parties do not address that question on the present motion.

This cannot justify a penalty more than three times as much as the total amount of money involved; it scarcely justifies a penalty at all. If the parties offer no further evidence on this point at trial, I will assess a penalty on this allegation of $2,500 following trial.

B. Improper Payroll Deductions for Meals

Liability. "The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals." 20 C.F.R. § 655.122(g). "Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. . . ." *Id.*[16]

Here, as Global Horizons does not dispute, the clearance order stated that the employees would buy their own food (which, of course, requires Global Horizons to provide cooking and kitchen facilities). A.Ex. C. Nonetheless, as again Global Horizons does not dispute, it deducted for food $42 per week from 124 workers.[17] Modrakee Decl. ¶ 15-16; A.Exs. B, F.

Rather than dispute these facts, Global Horizons cites evidence that the workers authorized the meal deductions in writing, A.Ex. 8 at 131-33, and that in the job offer it stated: "The employer will make the following deductions: . . . deductions expressly authorized by the worker in writing (if any)." A.Ex. C at 9.

I find that the offer letter's general provision that the employer will make deductions that workers expressly authorize in writing is insufficient to circumvent the regulatory requirement that any deduction for meals be specifically stated in the offer letter. The purpose of the disclosure is to allow the regulating federal agencies to assure that foreign workers are not being brought into the country to do work at wages below the prevailing wage that would be paid to U.S. citizens and others living in this country with the right to work here. *See generally* 20 C.F.R. § 655.103(a) (ensure that U.S. workers are not adversely effected); *see also,* 20 C.F.R. §655.122(a) (preferential treatment of aliens prohibited). If workers agree to meal prices that afford a profit to the employer, the effect is the same as if the employer paid below-market wages.

A private agreement between employers and foreign workers does nothing to assure that opportunities are preserved for American workers; that is the job of the regulatory agencies, and for that reason the meal charges must be disclosed to those agencies. Allowing the regulatory agencies to know of the amount of meal charges also allows the government to protect the foreign workers against exploitation. The workers' written assent to the deduction therefore is irrelevant to liability, and the Company is liable for the violation.

[16] "The amount of meal charges is governed by [20 C.F.R.] §655.173." 20 C.F.R. §655.122(g).

[17] Global Horizons' statement that it doesn't know if the correct number of workers involved was 124 is insufficient to raise a genuine issue of material fact on summary decision. Although Global Horizons argues that "the Administrator has not proven that Global deducted over $100,000 for food," it offers no evidence to the contrary. The payroll records support the Administrator's contention.

Back wages. The Administrator submits extensive payroll records, a spreadsheet showing calculations, and the declaration of Investigator Modrakee to show that the improper meal deductions totaled $109,218.00. Modrakee Decl. ¶ 15-16; A.Ex. B, F. Respondent does not dispute the payroll records or the calculations based on them from which the Administrator derived this figure. The Administrator therefore is entitled to summary decision that Global Horizons must pay $109,218.00 in back wages for improper meal deductions.

Penalties. The Administrator moves for assessment on summary decision of $24,800 in civil money penalties for the improper meal deduction, which amounts to $200 per affected worker. Ocampo Decl. ¶ 6. The Administrator argues: (1) 79% of workers were affected; (2) $42 per week represented a "significant portion" of the workers' earnings (of $400 per week); (3) Respondent failed to disclose the deductions in the clearance order, suggesting bad faith; (4) Respondent didn't submit the alleged written authorizations from the workers; and (5) Global Horizons gained $109,218 as a result of the conduct.[18] *Id.*

Through Mr. Orian's testimony, Global Horizons offers evidence that it was acting at the workers' request and in good faith. *See* A.Ex. 8 at 129-37. According to Mr. Orian, Respondent began the meal deductions only after a group of workers proposed that the workers pool their resources to buy food for communally prepared meals. *Id.* They felt this would be less expensive and would save time for the workers. *Id.* Mr. Orian testified that Global Horizons gave the workers a choice whether to participate, and the workers themselves selected the four cooks. *Id.* As noted above, he said each worker who chose to participate signed an authorization for payroll deductions written in Thai. *Id.*

Taking these statements as true, as I must on a motion for summary decision, I find that the Administrator has failed to offer sufficient undisputed evidence to support the imposition of civil money penalties on the meal deduction allegation. Although the Company's practice is inconsistent with the Congressional framework and cannot be excused, there is no indication that the Company in fact exploited the workers (or gained an advantage by hiring them rather than U.S. workers) by overcharging for meals. Providing cooked food for $42 per week is hardly excessive, especially with Hawaii's high cost of living. The fact that the workers requested the program and agreed to it individually and in writing is inconsistent with any finding of a lack of good faith, especially given the price. Most important is that Global Horizons will have to refund the full amount that it collected, despite having paid for the food and the cost of preparing it; the Administrator's contention notwithstanding, nothing on the record shows that Global Horizons profited[19] from the preparation and sale of the food.[20] If the parties offer nothing further at trial, I will deny penalties on this portion of the claim.

[18] Administrator also cites the same past violations and lack of commitment to future compliance discussed above on the housing damage deductions. I disregard these for the same reasons as before.

[19] A deduction is *per se* unreasonable and thus unlawful if the employer profits by it. *See* 20 C.F.R. §122(p)(1, 2).

[20] The Administrator goes too far in the contention that Global Horizon's failure to disclose the meal charges on the application establishes bad faith. What appears to have initiated the practice was a request from the workers, and that came after the application had been approved and the workers started working.

C. Failure to Offer Sufficient Hours of Work

> The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

20 C.F.R. 655.122(i)(1). A "workday" is "the number of hours . . . stated in the job order and excludes worker's Sabbath and Federal holidays." *Id.* If "the employer affords the . . . worker less employment than that required . . ., the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days." *Id.*

Here, the Administrator alleges that Respondent failed to meet this requirement for 22 workers. Modrakee Decl. ¶¶ 17-18; A.Ex. B; A.Ex. G; *see* R. Stmt. Contested Facts ¶¶ 24-27. Global Horizons refers to its inability to find its documents but raises no dispute with the sufficiency of Administrator's evidence or calculations of the wages owed. The undisputed evidence shows that Respondent owes these 22 workers a total of $81,668.79 in back wages, in the amounts identified by the Administrator in Exhibit G. Thus, I grant Administrator's motion for summary decision as to this count.

On this allegation, the Administrator seeks summary decision that Global Horizons must pay $10,500 in civil money penalties, which is $500 for each of the twenty-two affected workers. Ocampo Decl. ¶ 7. The Administrator argues: (1) the violation affected 14% of the workers; (2) violations of this sort are serious in light of the purpose of the Act because they make the position less appealing and discourage U.S. workers from applying; (3) Respondent acted in bad faith, as it stated in its clearance order that it would comply with the three-fourths requirement; (4) Respondent has offered no explanation of its violation; and (5) Respondent realized significant financial gain as a result of its violation.[21] *Id.*

I find especially troubling Global Horizon's lack of explanation for neither supplying sufficient work nor paying wages for the guaranteed minimum number of workdays. The Administrator is correct that this results in Global Horizon's enrichment at the expense of these workers. When an employer asks to bring foreign workers into the country, one of the risks it takes is that it will find insufficient work for those whom it hires. This has the salutary effect of discouraging unnecessary reliance on foreign labor. I conclude that the Administrator is entitled to summary decision on this point, and Global Horizons must pay an additional $10,500 in civil money penalties for this violation.

[21] On this and each of the other claims discussed below, the Administrator again advanced the unfounded arguments about past violations and lack of commitment to future compliance discussed in the text above. I reject these arguments in each instance.

D. Recordkeeping Violations

An employer must keep records to show when each worker "began and ended each workday." 20 C.F.R. § 655.122(j)(71). The employer must also "furnish to the worker on or before each payday" written statements showing, among other information, "the hours of employment offered to the worker . . . ." 20 C.F.R. § 655.122(k)(3, 4). The Administrator alleges that Global Horizons violated both of these requirements.

In support, the Administrator offers a review of the records it received from Respondent, which should have but do not include this information, and the Declarations of Modrakee and counsel stating that they received no other relevant records from Respondents. A.Ex. B (payroll register); A.Ex. C (clearance order); A.Ex. H (Respondent's spreadsheet identifying all hours worked by all workers); A.Ex. I (earnings statements Respondent provided to workers); Modrakee Decl. ¶¶ 9-10; Darling Decl. ¶¶ 3-4.

Other than its continuing assertion that it can no longer find its records (a defense that I rejected above), Global Horizons offers nothing to bring into question the inference that it failed to comply with these two recordkeeping requirements. The Administrator has therefore established the violations.

On the other hand, the Administrator does not assert that Global Horizon failed to comply with any of the numerous other related recordkeeping requirements, such as providing a pay stub showing the worker's total earnings and hours worked for the pay period, hourly rate (or piece rate), an itemization of deductions, the beginning and ending dates of the pay period, and the employer's name, address, and federal employer identification number. Nor does the Administrator contend that Global Horizons failed to maintain accurate and adequate summary payroll records; records showing the nature and amount of work done; the pay rates; the workers' hours worked per day; the workers' earnings per day; the amount of any deductions taken from the pay; and certain other required records.

The Administrator's evidence, in the absence of any evidence to the contrary, is sufficient to support an inference that Global Horizons failed to maintain records that show the time of day that each worker started and stopped working and failed to supply the workers with a written statement each pay period of the hours of work it offered them. The Administrator is entitled to summary decision on the point.

The Administrator seeks on summary decision an order that Global Horizons pay a civil money penalty of $78,000, which is $500 for each of the 156 affected workers. Ocampo Decl. ¶¶ 8-9. *Id.* ¶ 9. The Administrator states that all workers were affected and that Global Horizons offered no explanation for the failures. More important, the Administrator views the violations as severe because, without accurate records, it is difficult to determine what the workers are lawfully owed or how much Global Horizons might have profited through its compliance failures.

Although the Administrator's contentions are correct, they neglect Global Horizons' overall general compliance with its recordkeeping obligations. And, as I've found on the Administrator's other claims, the records that Global Horizons did keep in fact were adequate for

the Administrator to make out undisputed showings of several violations. The amount of penalties sought cannot be justified on this record, and summary decision on penalties for these violations is denied. Following trial, I will be unlikely to impose penalties absent a showing of actual harm to the H-2A program or to the workers involved.

E. Improper Wage Rates for Cooks, Mechanic and Drivers

In the H-2A program, an employer must pay the highest of the adverse effect wage rate, the prevailing wage, the agreed-upon collective bargaining rate, and the federal or state minimum wage. 20 C.F.R. § 655.122(l). The Administrator identifies seven employees – four who worked as cooks, one who worked as a mechanic, and two who worked as shuttle bus drivers – whom the Administrator alleges were improperly paid the adverse effect wage rate for agricultural laborers rather than for the respective job each did. *Id.*

Respondent acknowledges that the identified individuals performed work as cooks, mechanics and shuttle bus drivers as the Administrator contends. R's Stmt. Contested Facts ¶¶ 35, 41, 47. It also admits that these workers were paid the adverse effect wage rate for agricultural workers. *Id.* ¶¶ 33, 38, 44, 50.

The Administrator offers evidence of the adverse effect wage rate for each of these jobs.[22] *See* Facts 43, 49, A.Ex. K. Respondent offers nothing to dispute this evidence other than to object that the Administrator's evidence fails to show whether it "pertains to the relevant time frame." On the contrary, the Administrator's evidence, Exhibit K, expressly states that the adverse effect wage rates listed were adopted on September 27, 2004, which is shortly before the start of the work contract at issue. Respondent's objection is overruled, and the wage rates are established as undisputed.

Finally, Respondent objects to the Administrator's reliance on payroll records to show the amount of unpaid wages, allegedly disputing Facts 39, 45 and 51.[23] But Respondent does not object to the authenticity or accuracy of the payroll records; it merely argues that the calculation of unpaid wages is incorrect because, in its view, the Administrator has failed to show that these workers are entitled to more than agricultural workers. This is insufficient to place the facts into dispute. It is also legally deficient to avoid an order to pay back wages.

In particular, Respondent argues that it was not required to pay the identified workers the adverse effect wage rate for cooks, mechanics, or drivers because the work they performed was

[22] On the cook job, the Administrator characterized the job as a Cook II within the definition of the Directory of Occupations, and used a wage rate appropriate to that job in the calculations. Respondent objects that the cooks should be in the Cook I category. R. Opp. 11. But, as the Administrator correctly argues, the job duties here involved cooking for more than 150 people, three meals per day, six days per week, and this more closely fits the definition of a Cook II. A Cook I performs "moderately difficult tasks in preparing small quantities of quickly prepared food." A.Ex. J.

[23] Global Horizons also objects to the evidence underlying Facts 36, 42, and 48. It challenges the authenticity of job descriptions the Administrator excerpted from the DOL Service Contract Act Directory of Occupations. I have taken official notice of the Directory, compared the excerpts with the Directory, and found them true and correct. The objections are overruled.

"incidental to and integral to agricultural work." R. Opp. 11. This neglects the Act's core concern to ensure that the program doesn't depress the wages of U.S. workers. *See supra.* This is reflected in the regulatory requirement that the employer pay the *highest* comparative wage. *See* 20 C.F.R. § 655.122(l). Agricultural work doesn't require the skills necessary for the work of cooks, mechanics, or drivers; that's why those jobs pay more. Moreover, the work of cooking for over 150 people, three meals per day, six days per week is not a mere incidental related to some other job.

Respondent raises no objections to Administrator's summary of the payroll records or to the calculations used to determine back wages. *See* Modrakee Decl. ¶¶ 21-27; Ex. B; Exs. J-P. I therefore find that Respondent owes a total of $56,047.56 in back wages to the cooks, $2,442.00 in back wages to the mechanic, and $775.50 to the drivers, as set forth in Administrator's calculations.

On these violations, the Administrator seeks summary decision for a civil money penalty of $500 for each affected worker, Ocampo Decl. ¶ 10, and gives evidence of seven affected workers. The Administrator argues that the failure to pay correct wages provided a significant financial gain to Respondent, given the relatively small number of workers involved. Ocampo Decl. ¶ 10. As the Administrator argues, wages for U.S. workers are likely to be adversely affected, "if employers are permitted to pay H-2A workers far less than the local prevailing wage rate for the type of work performed." *Id.*

Given the significant financial windfall to Global Horizons, the obviousness of the underpayment of wages, the inadequacy of the Company's explanation that the work was merely incidental to agricultural work, and the negative impact on the program's core concerns, I readily allow the Administrator's request for summary decision on this point in the sought amount of $500 per worker, for a total of $3,500.

F. Improperly Deducted Federal Income Tax

The Administrator contends that Respondent improperly withheld federal income tax from the workers' paychecks in violation of 20 C.F.R. § 655.122(p)(1) and the relevant provisions of the Internal Revenue Code, *citing,* I.R.C. § 3121(b)(1) and Treas. Reg. § 1.1441-4(b)(1)(ii). Respondent does not deny that it withheld the tax in the amounts the Administrator asserts or that the withholding was improper under the applicable tax laws. R. Opp. at 12; R.'s Stmt. Contested Facts ¶¶ 54-57. Rather, it argues that it deducted the tax on the advice of federal tax authorities, and that it both forwarded the withheld taxes to the IRS, and also repaid the improperly deducted taxes back to the workers. R. Opp. at 12.

In support, however, Respondent offers no proof of its own. The Administrator concedes that Mr. Orian testified at a deposition that Global Horizons withheld the taxes on the advice of an IRS employee. *See* Ocampo Decl. ¶11(e). But there is no evidence on the record that Global Horizons returned the withheld funds to the employees. At summary judgment, an evidentiary showing is required. Respondent's reliance on an IRS employee's advice is relevant to penalties, but not to liability, and Respondent makes no other evidentiary showing. I therefore find that the Administrator has established, based on undisputed facts, that Global Horizons improperly

withheld from the workers' pay $77,163.36 in federal income taxes. The Administrator is entitled to summary decision in that amount.

The Administrator also seeks on this motion $200 in penalties for each of the 142 affected workers, for a total of $28,400. For purposes of this motion, I must assume that the Company withheld the taxes on the advice of an IRS official. Looking to the factors for assessing penalties, including the employer's explanation, indications of good faith, and any history of similar violations, the penalty sought is excessive on this record. Summary decision on penalties is denied.

G. Failure to Pay Required Overtime Compensation

The final claim on which Administrator moves for summary decision is a failure to pay required overtime compensation, in violation of 20 C.F.R. § 655.103(b) and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, *et seq.*, 203(e), and Hawaii's wage and hour law, HAW. REV. STAT. § 387-3(a). Section 655.135(e) requires that H-2A employers comply with all applicable laws. The FLSA and Hawaii's wage and hour law require the payment of overtime for the cooks and agricultural workers, respectively.[24]

The Administrator relies on Respondent's payroll records, the declaration of Investigator Modrakee, and the investigator's summary of her calculations. A.Ex. B; Modrakee Decl. ¶¶ 22-23, 30-31; A.Ex. R.

Respondent objects that the Administrator's evidence is inadmissible hearsay: Investigator Modrakee's recitation of information learned in interviews with the cooks to determine their hours worked per week.[25] R. Opp. 12-13. This argument, however, fails as to the agricultural workers because the Administrator relies only on Respondent's payroll records for those workers. *See* Modrakee Decl. ¶¶ 32-33.

As to the agricultural workers, Respondent raises no other objections to the Administrator's evidence, calculations, or total back wages owed. R. Opp. 12-13. The Administrator's evidence is substantial and undisputed, and I therefore grant Administrator's motion for summary decision as to the agricultural workers, and find that Respondent owes $98,720.43 in unpaid overtime to them.

As to the cooks, the Administrator does rely on interviews of the workers to establish work hours. Global Horizons states that it requested copies of the interview notes during discovery, and the Administrator refused to produce them based on an asserted "informant's privilege."[26]

[24] Hawaii's overtime law permits modification of the overtime requirements for certain agricultural employers for up to twenty work weeks in each year if the employer designates the particular weeks. Global Horizons doesn't assert that this is relevant here or that it designated any weeks under Hawaii law.

[25] Respondent also objects to the overtime calculations for the cooks inasmuch as they are based on the Cook II AEWR rather than the agricultural rate. This argument is without merit, as discussed above in section IV.5.

[26] The Administrator states that he produced a redacted version of the investigator's notes, but the redactions are not on the record for consideration.

Global Horizons did not move to compel, but generally, when a party relies on a summary of records in lieu of producing the records themselves, it must make the records available to other parties for examination and photocopying, and the judge may order that they be produced at the hearing. *See* 29 C.F.R. §1006.[27]

Here, the Administrator did not put the investigator's interview notes on the record; only the investigator's summary is offered. Were I to grant summary decision, it would preclude an order requiring the production of the underlying investigator's notes at the hearing, a production to which Global Horizons might be entitled. The parties have not briefed the "informant's privilege," and I make no ruling about it. Nor do I rule on whether the Administrator may offer evidence indirectly when it has asserted privilege on the underlying documents during discovery.[28]

Rather, I will deny summary decision as to the cooks for other reasons: The Administrator concedes that there are discrepancies between Respondent's payroll records and the information obtained from the cooks about the number of hours they worked. A.'s Stmt. Uncontested Facts ¶58-59; Modrakee Decl. ¶ 23. After a trial, I might or might not accept the investigator's reports of the cooks' hearsay statements, but on the present record the facts are in dispute, and summary decision as to the cooks therefore is denied.

The Administrator seeks penalties on summary decision calculated at $500 per affected worker, which would amount to $77,000 for the 154 agricultural workers.[29] Modrakee Decl. ¶ 33. The Administrator relies on the large number of workers affected, the significant loss of wages to the workers, the fact that Respondent offered no explanation for its failure, and the significant financial gain to Respondent. Ocampo Decl. ¶ 12. All of these factors support the imposition of the amount sought, and I grant summary decision on the Administrator's claim that $77,000 in penalties should be imposed for the failure to pay overtime to the agricultural workers.[30]

Order

For the reasons stated above, the Administrator's motion for partial summary decision is GRANTED in part and DENIED in part. The motion is GRANTED as to the following:

[27] Our general rules of evidence apply. *See* 29 C.F.R. §501.34, incorporating 29 C.F.R. Part 18 for these purposes.

[28] Global Horizons objects that the investigator's summary is hearsay. *See* 29 C.F.R. §§18.801, *et seq.* The exceptions for records of regularly conducted activity, for public records and reports, or other exceptions might well apply. *See, e.g.*, 29 C.F.R. §18.803(a)(6, 8). To the extent that the cooks are no longer in the country and are unavailable, an exception might apply because their statements were made to a federal investigator with attendant criminal sanctions for false statements. *See* 29 C.F.R. §18.804(b)(1, 5). But, as I will find the Administrator's showing as to the cooks insufficient, I do not reach the question.

[29] This number (154) apparently includes some of the cooks as well, but for hours they worked as agricultural laborers. *Compare* A.Ex. S (calculations for affected cooks) *with* A.Ex. R (calculations for affected agricultural workers).

[30] As I have denied summary decision on the alleged failure to pay overtime to the cooks, the predicate for penalties as to the cooks is lacking, and the motion is denied in that regard as well.

9. For the improper payroll deduction for damage to housing, Global Horizons will pay $5,475 in back wages.

10. For the improper payroll deduction for meals, Global Horizons will pay back wages of $109,218.

11. For the failure to offer sufficient hours of work, Global Horizons will pay back wages of $81,668.79 and a civil money penalty of $10,500.

12. On the recordkeeping allegation, I find Global Horizons liable and GRANT summary decision.

13. For paying cooks, a mechanic, and drivers at deficient wage rates, Global Horizon will pay $56,047.56 to the cooks, $2,442 to the mechanic, and $775.50 to the drivers. Global Horizons will also pay a civil money penalty of $3,500.

14. For the improper withholding of income taxes, Global Horizons will pay $77,163.36 in back wages.

15. For the failure to pay overtime to the agricultural workers, Global Horizons will pay back wages of $98,720.43 and a civil money penalty of $77,000.

In all other respects, the Administrator's motion for partial summary decision is DENIED. All parties may offer evidence and argument at trial as to all claims and issues other than those on which I have granted relief above in the present motion. On the claims on which I denied the motion as to civil money penalties, the denial is without prejudice to the Administrator's seeking such remedies at trial.

SO ORDERED.

/s/

STEVEN B. BERLIN
Administrative Law Judge