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Issue Date: 25 August 2016

CASE NO.: 2014-TAE-0008

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

FERNANDEZ FARMS, INC., and
GONZALO FERNANDEZ, an individual,
Respondents.

DECISION AND ORDER

This matter arises under the H-2A provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188, and the U.S. Department of Labor implementing regulations found at 20 C.F.R. part 655, subpart B and 29 C.F.R. part 501 (collectively "H-2A program").

The Administrator, Wage and Hour Division, U.S. Department of Labor (hereafter "the Administrator") filed a Notice of Determination on July 31, 2013, alleging multiple violations of the H-2A program by Fernandez Farms, Inc.[1] The Administrator amended the Notice of Determination on December 4, 2013, to allege the same violations by Gonzalo Fernandez (hereafter "Respondent") in his individual capacity.[2] The Notice of Determination was amended again on May 4, 2015, to allege additional violations of the H-2A housing regulations. I held a formal hearing in Salinas, California from July 14 to 17, 2015, involving only Respondent in his individual capacity. Abigail Daquiz and Benjamin Botts, Attorneys at Law for the U.S. Department of Labor, Office of the Solicitor, represented the Administrator. Fenn Horton, III, Attorney at Law, represented Respondent.

At the hearing, I admitted the following into evidence: Administrator's Exhibits ("AX") 1 through 15, 21 through 29, 31 through 48, 51, 52, and 55 through 73; Respondents' Exhibits[3]

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[1] On December 2, 2014, I dismissed the Order of Reference as to Fernandez Farms, Inc., after it defaulted in this proceeding. I found that the Administrator's July 31, 2013, Notice of Determination as to Fernandez Farms, Inc., was the final decision of the Secretary. 29 C.F.R. § 501.32(c).

[2] On June 11, 2015, I issued an Order Granting Partial Summary Adjudication, finding that Respondent had pierced the corporate veil and was personally liable for the debts of Fernandez Farms, Inc.

[3] Respondent's exhibits were not sequentially numbered, and some exhibits were stamped at the bottom right hand corner with an identifier GF followed by a six digit number, but there were substantial gaps in the numbering. Where

("RX") A through I, K through N, and P through V, and X; and Administrative Law Judge Exhibits ("ALJX") 1 through 3. TR at 24-26, 956-58, 961. Administrator exhibits 13 and 15 were letters written in Spanish that had not been translated. I permitted Respondent and the Administrator to each translate and submit five of the letters, or more if they thought it was necessary. TR at 964-65. On August 14, 2015, the Administrator submitted two packets of translated copies of AX 13 and AX 15, which I marked as AX 13A and 15A respectively. Both packets are admitted into evidence.

The parties filed simultaneous closing briefs on October 23, 2015. The Administrator filed a permissible Reply brief on November 6, 2015, and Respondent filed his reply on November 9, 2015, thereby closing the record.[4]

The Administrator brings this action alleging that Respondent, in his individual capacity, violated multiple provisions of the H-2A program's regulatory requirements when operating Fernandez Farms, Inc., in 2010 and 2011. The Administrator seeks a total of $1,109,381.19 in back wages and owed overtime, impermissibly charged rent, impermissibly rejected domestic workers and unlawfully paid kickbacks, a civil money penalty in the amount of $1,294,550, and debarment of Respondent from participating in the H-2A program for the maximum penalty of three years. Administrator's Br. at 29-34. Based upon a thorough review of the record and consideration of the arguments of the parties, this Decision and Order grants the relief requested by the Administrator as to all charges and penalties, except the charge involving OSHA housing standards.

I. Issues for Hearing

A. Has the Administrator shown that Respondent committed the following violations of the H-2A program in 2010 and 2011:
   1. Required H-2A workers to pay unlawful kickbacks. Administrator's Br. at 3. The kickbacks owed to workers total $410,850. *Id.* at 20. 20 C.F.R. § 655.135(j); 20 C.F.R. § 655.105(o) (2008).
   2. Failed to provide free housing for H-2A workers, and collected rent from those workers who lived in the housing provided by Respondent. Administrator's Br. at 5. The rent owed to workers total $179,750. *Id.* at 30. 20 C.F.R. § 655.122(d)(1),
   3. Failed to pay the Adverse Effect Wage Rate ("AEWR") and contractually provided piece rate to H-2A and corresponding workers in 2010 and 2011. Administrator's Br. at 7, 12, 14. The total amount owed for unpaid wages totals $421,401.58. *Id.* at 29. 20 C.F.R. § 655.122(l); 20 C.F.R. § 655.104(l) (2008).
   4. Failed to pay state mandated overtime to workers. Administrator's Br. at 17. The total amount owed for unpaid overtime is $45,468.40. *Id.* at 30. 20 C.F.R. § 655.135(e).
   5. Threatened and coerced H-2A workers in order to deter them from reporting violations of the H-2A program. Administrator's Br. at 19-22. 20 C.F.R. § 655.103(g); 29 C.F.R. § 501.4.

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exhibits are paginated, I have used those page numbers. For exhibits of more than one page which are not numbered, I have numbered the pages sequentially for ease of reference.

[4] The record also remained open for Respondent to submit additional payroll records no later than the date on which closing briefs were due. ALJX 1; TR at 38. No additional payroll records were submitted.

6. Impeded the Administrator's investigation in 2011. Administrator's Br. at 22. 29 C.F.R. § 501.7.
7. Failed to provide H-2A and corresponding workers with a copy of the H-2A contract in 2011. Administrator's Br. at 24. 20 C.F.R. § 655.122(q).
8. Failed to provide the H-2A and corresponding workers with sufficiently detailed earnings statements. Administrator's Br. at 25. 20 C.F.R. § 655.122(k).
9. Failed to keep adequate records of the hours worked by H-2A and corresponding workers. Administrator's Br. at 26. 20 C.F.R. § 655.122(j).
10. Discriminated against domestic U.S. workers by improperly rejecting qualified workers and failing in 2011 to contact local workers from the previous season. Administrator's Br. at 26-27. The total amount owed to improperly rejected workers is $51,911.21. *Id.* at 30. 20 C.F.R. §§ 655.135(c), 655.153.
11. Failed to provide H-2A workers with housing that met Occupational Safety and Health Administration ("OSHA") standards. Administrator's Br. at 28. 20 C.F.R. § 655.122(d)(1)(i).

B. If the alleged H-2A violations occurred, should civil money penalties be assessed against Respondent in the amount of $1,295,150? Administrator's Br. at 32.
C. Should Respondent be debarred from participating in the H-2A program for the maximum three-year period permitted under the regulations? Administrator's Br. at 32.
D. Respondent's Defenses to the Charges:
   1. Respondent denies seeking or receiving any kickbacks from H-2A workers for activity related to obtaining H-2A labor certifications, and contends that the Administrator failed to demonstrate how it calculated the amount of $410,850 allegedly owed. Respondent's Br. at 5-6.
   2. Respondent denies charging any rent to H-2A workers. Respondent's Br. at 6.
   3. Respondent admits to failing to pay the proper AEWR and piece rates, but contends that the underpayment to H-2A workers and domestic workers was $19,960 in 2010 and $67,903 in 2011, not the $421,401.58 alleged to be owed. Respondent's Br. at 4.
   4. Respondent contends that 65 of the workers identified by the Administrator as corresponding workers were domestic workers not entitled to the H-2A contract wages. *Id.*
   5. Respondent concedes that he underpaid overtime to H-2A workers, but argues that the underpaid amount is only $299 in 2010 and $39,786 in 2011. Respondent's Br. at 5.
   6. Respondent argues that he underpaid the 65 domestic workers only $6 of overtime in 2010 and $2,122 of overtime in 2011. *Id.*
   7. Respondent denies threatening employees or impeding the Administrator's investigation. Respondent's Br. at 6.
   8. Respondent contends that H-2A workers were provided with a copy of the H-2A contracts in 2010 and 2011. Respondent's Br. at 3.
   9. Respondent admits that some violations of pay statement and earnings recordkeeping regulations may have taken place, but the Administrator has not shown that any penalties are appropriate. Respondent's Br. at 2.
   10. Respondent argues that the Administrator has not shown that he unlawfully rejected domestic workers, failed to contact prior domestic workers, or that the

housing offered to workers failed to meet safety and health requirements. Respondent's Br. at 1, 2, 4.

11. Respondent contests the assessment of any civil penalty, arguing that he has no history of violating H-2A regulations, did not achieve any financial gain from any violations, and made a good faith effort to comply with the H-2A program. Respondent's Br. at 6-7.

II. Stipulated Facts

At the hearing, the parties stipulated to the following facts:

1. Fernandez Farms, Inc., was in the business of cultivating strawberries in Watsonville and Salinas, California.
2. Fernandez Farms, Inc., cultivated strawberries in 2010 and 2011 at worksites located at:
   a. 279 C Maher Road, Watsonville, California 95076, known as "Royal;"[5]
   b. Blackie Road, Salinas, California;
   c. Zabala Road, Salinas, California;
   d. Old Stage Road, Salinas, California; and
   e. Encinal Road, Salinas, California.
3. Respondent and Gloria Fernandez own the property located at 279 C Maher Road.
4. Before starting Fernandez Farms, Inc., Respondent ran a strawberry farming business as a sole proprietorship, which did business as Fernandez Farms.
5. Fernandez Farms, Inc., recruited and hired temporary foreign workers from Mexico under the H-2A visa program during the 2009, 2010, 2011, and 2012 strawberry seasons.
6. Fernandez Farms, Inc., was certified by the Employment and Training Administration ("ETA") under Job Order C-10071-23873 ("2010 Job Order") to recruit and hire 120 foreign H-2A workers to plant and harvest strawberries from May 1, 2010, to December 1, 2010, at the property located at 279 C Maher Road, Watsonville, California.
7. The 2010 Job Order contained the following terms of pay:
   a. AEWR of $8.47 per hour;
   b. $.90 per box;
   c. weekly pay;
   d. 40 hours per week guaranteed.
8. The 2010 Job Order applied to all work performed by H-2A workers at Fernandez Farms, Inc. in calendar year 2010.
9. During the time period covered by the 2010 Job Order, Fernandez Farms Inc. payroll records reflect that it paid $.80 per box plus $5.00 per hour for work performed on a piece rate, among other rates.
10. During the time period covered by the 2010 Job Order, Fernandez Farms, Inc., issued paychecks to its employees based on a piece rate of $.80 per box plus $5.00 per hour for work performed on a piece rate, among other rates.

[5] The majority of the H-2A workers referred to this property as "Royal Ranch," which I also use in this Decision. TR at 45, 49-50.

11. Fernandez Farms, Inc., was certified by ETA under Job Order CA11461790 ("2011 Job Order") to recruit and hire 138 foreign H-2A workers to plant and harvest strawberries from April 30, 2011, to December 1, 2011, at the property located at 279 C Maher Road, Watsonville, California.
12. The 2011 Job Order contained the following terms of pay:
    a. AEWR of $10.25 per hour;
    b. $0.90 per box plus $4.90 per hour when working piece rate;
    c. weekly pay;
    d. 40 hours per week guaranteed.
    e. The applicable AEWR was $10.31 for the 2011 season.
13. The 2011 Job Order applied to all work performed by H-2A workers at Fernandez Farms, Inc., in calendar year 2011.
14. Fernandez Farms, Inc., used punch cards to keep track of the number of boxes of strawberries its workers picked.
15. Employees designated as "punchers" had job duties including punching holes in the numbers listed on punch cards to create a record of the number of boxes each employee picked.
16. Respondent did not hire Steven Andrews, Nelson Barraza Hernandez, Eliser Garcia, Jose Ramirez, or Antonio Cardoso in 2011.
17. In 2010 and 2011, Respondent hired H-2A foreign workers who did not have prior experience planting or harvesting strawberries.
18. In 2010 and 2011, the only requirements for employment as a strawberry picker at Fernandez Farms, Inc., were to maintain a minimum production standard, and a willingness and physical ability to do the work.
19. Fernandez Farms, Inc., housed H-2A workers in 2010 and 2011 in mobile homes located on the Fernandez' property at 279 C Maher Road, Watsonville, CA, 95076.
20. Respondent and Gloria Fernandez owned the mobile homes located on the Maher Road property.
21. Respondent signed the H-2A work contracts on behalf of Fernandez Farms, Inc., in 2010 and 2011.
22. Respondent was the person responsible for hiring the H-2A workers who were employed under the 2010 and 2011 certifications.
23. Respondent was the person responsible for determining the rate of pay for the H-2A workers who were employed under the 2010 and 2011 certifications.
24. Each year, Fernandez Farms, Inc., obtained loans to finance the yearly strawberry crops. The major lender was Cal Costal Bank.
25. Fernandez Farms, Inc., never held the title to any real property.
26. Respondent leased farmland in his own name from Allan and Dennis Johnson for use by Fernandez Farms, Inc., from the inception of Fernandez Farms, Inc., through 2011.
27. Respondent obtained loans from his brother-in-law, his mother, and a friend to finance Fernandez Farms, Inc. These loans were not secured by collateral, were not subject to interest, and were not formalized in written documents.
28. Respondent and Gloria Fernandez provided loans to Fernandez Farms, Inc., totaling more than $700,000. These loans were not secured by collateral, were not subject to interest, and were not formalized in written documents.
29. Respondent and Gloria Fernandez were the only two shareholders and the officers of Fernandez Farms, Inc., for the entire life of the corporation.

30. Rosa Iniguez was a crew supervisor and a supervisor of Fernandez Farms, Inc.'s H-2A workers in 2010, 2011, and 2012.
31. Juan Escobar was the Office Manager for Fernandez Farms, Inc., in 2010, 2011, and 2012.
32. Juan Escobar is Respondent's nephew.
33. Celia Fernandez was a crew supervisor for Fernandez Farms in 2010, 2011, and 2012.
34. Celia Fernandez is Respondent's sister.
35. Maria Nunez was an H-2A consultant for Fernandez Farms.
36. On March 21, 2013, Fernandez Farms, Inc., petitioned for bankruptcy under Chapter 12 of the Bankruptcy Code. The petition was later converted to Chapter 7. On April 30, 2015, the Chapter 7 Trustee issued a final report stating that the estate had been fully administered and no assets remained in the estate.

TR at 8-9; Administrator's Pre-Hr'g Statement at 4-7; ALJX 2. These unambiguous stipulations are supported by substantial evidence in the record, were freely entered into by the parties, do not create a manifest injustice and are therefore binding on the parties and accepted for all purposes. *See Admin'r, Wage and Hour Div. v. Advanced Prof'l Mktg., Inc.*, ALJ No. 2008-LCA-00017, slip op. at 4-5 (ALJ Apr. 3, 2012) (discussing when stipulations are binding).

III. Findings of Fact

1. In addition to the stipulated facts regarding the AEWR and piece rates in the 2010 and 2011 H-2A contracts, both contracts provided that Respondent would abide by California overtime rules for agricultural workers, which required that an employer pay 150% of the hourly wage rate after 10 hours of work per day or 60 hours per week. AX 1 at 6; AX 4 at 41.

2. In 2010, Fernandez Farms, Inc., employed 114 H-2A workers and 30 domestic workers. AX 31 at 2479. In 2011, Fernandez Farms, Inc., employed 135 H-2A workers and 227 domestic workers. *Id.*

Rosaura Gomez

3. Rosaura Gomez,[6] who currently worked as a foreman/supervisor for JC Harvesting, a strawberry harvester, worked for Fernandez Farms, Inc., from 2009 until the end of the 2013 season. TR at 44, 47. Ms. Gomez was employed as a foreman at Fernandez Farms, Inc., in 2009, and she was in charge of checking quality, hygiene, and the status of groups of employees. TR at 44-45. For the 2010 season onward, Ms. Gomez was employed as a supervisor and was in charge of four crews of H-2A workers. TR at 49-50. She worked at the Royal Ranch property located at 279 C Maher Road, which was owned by Respondent, and consisted of 48 or 58 acres of strawberries as well as a house, a shop, an office and three or four mobile trailers that house employees on the

[6] Ms. Gomez is also identified in the transcript as Rosa and Rosaura Iniguez, and some H-2A workers identified "Donia Rosa" as a supervisor for Fernandez Farms, Inc. *See* TR at 179, 486. I find that these references are all to the same person, Rosaura Gomez, who testified at the hearing. "Donia" or Doña is a formal term of address for women in Spanish. *See Definition of Dona*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/dona (last visited Aug. 17, 2016); *see also* TR at 145-46 (Yolanda Barcenas refers to "Donia Rosa and Juanito" who Respondent's counsel clarified was "Rosa and Juan.").

property. TR at 45-46. As a supervisor, Ms. Gomez also worked at a second property on Blackie Road in Salinas, California.[7] TR at 49.

4. Ms. Gomez said that Respondent was the owner of Fernandez Farms, Inc., and would check on plants and employees. TR at 47. Celia Fernandez was Ms. Gomez' supervisor, and Juan Escobar worked in the office organizing worker files and payroll. TR at 47. Ms. Gomez did not know how many other crews worked for Fernandez Farms, Inc., but said that Celia Fernandez supervised crews which included H-2A workers at a ranch in Salinas named "Home" and a ranch called "Cevala."[8] TR at 51.

5. The strawberry season typically starts in April and ends in November. TR at 51. In 2010, the H-2A workers at Fernandez Farms, Inc., began work in April. TR at 51. A typical work day in the 2010 and 2011 seasons began at 7:00 a.m. with the foremen signing in the workers and handing out punch cards on which the workers would write their name, their crew number, and the date, and then the workers would pick strawberries and load them into boxes. TR at 52. A full box of strawberries would weigh eight or twelve pounds depending on whether the box contained eight or twelve baskets. TR at 52-53. When a box was filled, the worker would take the box to a designated puncher, who would check to make sure that the box was ready. TR at 53. If it was, the worker would receive a punch on their punch card. TR at 53. Ms. Gomez did not remember how much the workers were paid per box, but thought it was $.80, $.90, or $1 per box, and thought that they were paid $5 per hour. TR at 53. As a supervisor, Ms. Gomez supervised the punchers. TR at 54. She was not aware of any policy which involved the workers receiving an extra punch after completing eight boxes of strawberries and it was not the practice. TR at 55. When there was a special order for a box with nine baskets of strawberries, the workers would receive an extra punch because they filled a ninth basket. TR at 55. Special orders with nine baskets were filled almost every morning, and once the order was complete the workers would fill regular eight basket boxes. TR at 89.

6. Workers at Fernandez Farms, Inc., were paid each Saturday. TR at 56. Celia Fernandez would give Ms. Gomez the checks for her crews, and she would in turn distribute the checks to the foremen of the crews. TR at 56. At lunch time, a catering person, who Ms. Gomez recognized as Juan Escobar's father, would cash the workers' checks at a cafeteria truck. TR at 57-58, 104, 108. Ms. Gomez remembered seeing Maria Gabrielle Ferrera, Seraphin Calderon, Hidalgo Calderon, Sergio Calderon, Arturo Arroyo, and other workers cash their checks at the cafeteria truck. TR at 105. She said that 10 to 12 workers cashed their checks at the cafeteria truck, but the workers were free to go elsewhere to cash their checks. TR at 106, 110. She did not remember workers ever getting two checks in one day. TR at 58. On one occasion at the end of the 2011 season, Ms. Gomez was given checks to be signed by the workers and returned to Mr. Escobar, but she did not know what the checks were for. TR at 60-61. Ms. Gomez had the checks signed, returned them to Mr. Escobar, and did not see the checks again. TR at 60-61. She thought that this incident occurred after the Department of Labor began its investigation, but was not certain. TR at 61.

7. In 2010, Respondent provided trailers for H-2A workers at the Royal Ranch property, and Ms. Gomez thought there were also some trailers at the Encinal Road property. TR at 62. In 2010

[7] The Hearing Transcript reads "Blakey Road." TR at 49. I find that this is a typographical error and refers to the Blackie Road property identified in the stipulated facts. *See* Stipulated Fact ¶ 2.b.
[8] This also appears to be a typographical error referring to the Zabala Road property. *See* Stipulated Fact ¶ 2.c.

and 2011, Ms. Gomez collected rent payments from workers who lived in the trailers at the Royal Ranch property. TR at 63-64. The workers paid $125 per month for each month they were in the trailers, starting the day they arrived. TR at 63-65. There was no set time for workers to give Ms. Gomez rent money, and they would bring her cash payments before work started at 7 a.m. TR at 65. In 2010, when she first received money from a worker, Ms. Gomez did not know what the money was for and workers would tell her that it was "rent money or money that [they] owed." TR at 65. She would take the money, make a handwritten list of the transactions, and give the money to Mr. Escobar in the office. TR at 66; AX 25 at 1875. Ms. Gomez gave the list of workers who had given her money to Respondent or Mr. Escobar. TR at 67. She did not discuss the money in detail with Respondent, but when Ms. Gomez asked him what to do with it, he told her to take it to the office. TR at 66-67. Later, Ms. Gomez recorded the rent payments on a form. TR at 64; AX 25 at 1873-74. Mr. Escobar made copies of the documents on which Ms. Gomez recorded payments and returned the originals to her. TR at 103.

8. On Saturdays and Mondays, Ms. Gomez also received money from workers for other purposes. TR at 68, 108. The office provided her a printed sheet with the names of workers which she could fill in with dates and amounts of money given to her. TR at 68. Mr. Escobar instructed her to use the list to record the amounts given to her and to bring him the money when she received it. TR at 69. Initially Ms. Gomez did not know what the money was for and did not ask workers why they were giving her money. TR at 69. Eventually, she began asking the workers what the money was for, and they would tell her that some was rent money and some was visa money. TR at 70. She did not know what the total payment for the season was, but thought it was around $1,600. TR at 71-70. In 2011, Respondent told Ms. Gomez that the amount to be collected from each worker was $1,650. TR at 71-72, 74. Ms. Gomez would record the amounts paid on her list, and once an employee reached a total of $1,650 she would mark that employee as "Pagado." TR at 74; AX 25 at 1868. When workers did not make weekly payments, Celia Fernandez would have Ms. Gomez remind the workers to pay. TR at 75. Other workers who were not in Ms. Gomez' crews made payments to Celia Fernandez, and Ms. Gomez indicated this by writing "Pagado a Celia" on her list. TR at 76. These workers included Andres Alejandro Gallego and Gustavo Orosco. TR at 75, 77; EX 25 at 1868, 1869. One employee, Hipolito Lopez, gave Ms. Gomez his paycheck instead of a cash payment, and Mr. Escobar approved Ms. Gomez deducting the payment from Mr. Lopez' check and returning the remainder to him in cash. TR at 78-79; AX 25 at 1869. Another employee, Rafael Tafoya,[9] had only paid $1,600 rather than $1,650 when he returned to Mexico, and Ms. Gomez does not remember seeing him in subsequent seasons. TR at 79-80. Ms. Gomez heard employees say that they would not be petitioned back by Respondent in the next season if they did not make payments. TR at 80.

9. In 2012, Ms. Gomez continued to collect payments from the H-2A workers in her crews, and thought the total amount per worker was the same as in 2011. TR at 83. In 2012, however, Ms. Gomez had fewer H-2A workers in her crews as Celia Fernandez was supervising more H-2A workers. TR at 83. In 2013, Ms. Gomez remained a supervisor for the farm but worked for Angel Carrasco, a contractor, who did not give any direction or guidance regarding her job and she saw only a few times in the office and once in the field. TR at 84-85. Mr. Carrasco was in charge and wrote paychecks, but Respondent told Ms. Gomez what to do with her workers, and when she had questions about the crop or workers, she contacted Respondent. TR at 86-87. She said that the

[9] The name on the list is Rafael Taoila, but it appears to be the same person identified by Ms. Gomez. AX 25 at 1871; TR at 79.

type of work did not change in 2013, and many of the same workers returned, but she had only two crews to supervise and worked sometimes on a different ranch in San Juan. TR at 86-87. Celia Fernandez continued to work as a supervisor for other crews and Mr. Escobar continued to work in the office while Mr. Carrasco was in charge. TR at 88. If Ms. Gomez had questions about paychecks or payroll, she would bring them to Mr. Escobar. TR at 88.

10. Ms. Gomez was not expecting to return to Fernandez Farms, Inc., in 2014, and said that she had made the decision not to work there anymore. TR at 102. She currently works for Jorge Castro as a crew foreman. TR at 106-107.

11. Ms. Gomez was deposed on November 28, 2011, in connection to a lawsuit brought by Oscar Chavez Rodriguez against Fernandez Farms, Inc. in the Superior Court of the State of California. TR at 80; RX L at 5. At the time, Ms. Gomez was working for Respondent and was hoping to continue working for him during the next season. TR at 81. During the deposition, Ms. Gomez said that she had not collected money from any workers. TR at 81; RX L at 89-90. During this hearing, she explained that, at the time of the deposition, she thought that the question was whether she had kept any of the money given to her. TR at 82. She also said during the deposition that she did not know how the H-2A workers cashed checks, and that no one ever offered to cash checks in her presence. RX L at 88-89. At the deposition, Ms. Gomez said that she and Celia Fernandez were even, but at the hearing said that Celia Fernandez was her head supervisor. TR at 96-96; RX L at 90. Ms. Gomez said that a week and a half before the hearing in this matter, Respondent called her and asked if she was planning on attending the hearing; he offered to help her, but did not specify with what. TR at 89-90, 92-93.

Yolanda Cruz Barcenas

12. From 2009 to 2012, Yolanda Cruz Barcenas worked initially as a picker and later as a puncher for Fernandez Farms, Inc., on an H-2A visa for all four years. TR at 113-15. In 2009, she worked as a picker, and was a picker and puncher in 2010. TR at 142. In 2011 and 2012, she worked only as a puncher. TR at 141. In 2012, she moved to Santa Maria. TR at 140. From 2009 to 2011, Ms. Barcenas obtained her H-2A visa in Nogales, Mexico, and in 2012, obtained it in Tijuana, Mexico. TR at 115. In 2009, Fernandez Farms, Inc., provided a bus to transport Ms. Barcenas from her home in Mexico to the border. TR at 116. In 2010, Ms. Barcenas paid Mex$1,850 for a bus ticket to Nogales, which was never reimbursed to her. TR at 116. In 2011, she bought a Mex$2,000 bus ticket which was not reimbursed. TR at 116.

13. In 2011, Ms. Barcenas met with Mr. Escobar, Ms. Gomez, Respondent, and a man named Angel in Nogales along with about 80 other people who had H-2A visas. TR at 120. Ms. Gomez instructed the workers to say at their visa interviews that they were not paying for the visas. TR at 121-22. At that time, the workers signed a work contract but did not have an opportunity to read the contract, did not have the contract explained, and were not given copies to keep. TR at 122. The contract was translated into Spanish, and she had the employment contract in her hands for approximately one and a half hours during the meeting, while the representatives from Fernandez Farms, Inc., were speaking, before signing it. TR at 143, 144-45. A similar meeting occurred in 2010 in Nogales. TR at 145. At a meeting on May 21, 2011, with Celia Fernandez and Respondent present, Ms. Gomez instructed Ms. Barcenas to write out and sign a document in Spanish which stated that she had been reimbursed $1500 for expenses. TR at 117-119; AX 15 at 1687. Ms.

Barcenas said that she was not reimbursed that amount, and that she was told to write out the document or she would not be brought back the next season. TR at 117, 119.

14. When Ms. Barcenas worked for Fernandez Farms, Inc., she lived in Salinas in 2009 and 2010, and at the Royal Ranch in 2011 and 2012. TR at 123. In 2009 and 2010, Ms. Barcenas paid $250 per month to a private landlord, and was never offered free housing at Fernandez Farms, Inc. TR at 25-26. At Royal Ranch in 2011, Ms. Barcenas lived in a room below the office, and in 2012 she lived in a trailer. TR at 123. During both seasons, she paid $125 in cash per month rent to either Ms. Gomez or Mr. Escobar. TR at 123-24. Ms. Barcenas was told that she was expected to pay rent by Celia Fernandez and Ms. Gomez when she arrived. TR at 124. She was never given a receipt, but saw the payment being written down on a pad. TR at 124-25. Ms. Barcenas said that all of her co-workers at Fernandez Farms, Inc., paid the same amount of rent. TR at 125.

15. In 2009, Celia Fernandez was Ms. Barcenas' supervisor, but in 2010 to 2012 she was supervised by Ms. Gomez. TR at 126. In addition to the rent payments, Ms. Barcenas said that she paid Fernandez Farms, Inc., for the cost of her visa. TR at 127. In 2009 and 2010, she paid $1,500 per year, and in 2011 and 2012, she paid $1,650 per year. TR at 127. She was told upon arrival at Fernandez Farms, Inc., that she would have to pay for the visa at a meeting held by Celia Fernandez, Mr. Escobar, Respondent, and Ms. Gomez. TR at 128. 130. Celia Fernandez was the primary speaker at those meetings. TR at 129, 130. She was also told that the amount increased in 2011 from 2010 because things had gotten more expensive. TR at 129. Ms. Barcenas paid Ms. Gomez in cash, usually on Monday mornings when she arrived at work, but the amounts differed based on her paycheck. TR at 127-28, 130. Ms. Barcenas knew that the payments were not permitted because the consulate officials told her each year when she received her visa that her employer was not allowed to take payments. TR at 133. Ms. Barcenas made the payments because if she did not pay, she would not be brought back for the next season. TR at 133. Additionally, when a worker did not pay, Ms. Barcenas said that Celia Fernandez would "get really mad afterwards." TR at 134.

16. Ms. Barcenas received a paycheck every Saturday, and did not remember ever receiving more than one paycheck per week or a paycheck on a day that was not Saturday. TR at 134-35. She would cash her check at the catering truck at work on Saturday, and would not wait to cash the check since she needed money to send to her two children in Mexico. TR at 135-36. She was aware that she could cash her check elsewhere, but said that all places, including the catering truck, charged the same 1% fee. TR at 142. Ms. Barcenas remembered investigators from the Department of Labor coming to Fernandez Farms in 2011. TR at 136. After the first day of investigations, Respondent, Celia Fernandez, and Ms. Gomez held a meeting with 85 or 90 H-2A workers where they asked the workers who had been questioned what the investigators had said. TR at 137. Celia Fernandez and Ms. Gomez told the workers that, if asked, they had to say that they did not have to pay for their visa or rent. TR at 138. They told the workers that it would benefit them more than it would benefit Fernandez Farms, Inc., and that the government would make promises and not deliver on them. TR at 138-39. The workers were told that if they said anything about the payments they would not be brought back the next year. TR at 139. Before the meeting, Celia Fernandez told the workers to put their cell phones on top of a car so no one could record the meeting. TR at 139-40.

Rosaura Chavez

17. Rosaura Chavez worked for Fernandez Farms, Inc., as a picker from May to November 2011, and is Yolanda Cruz Barcenas' sister-in law. TR at 149-50, 165. Ms. Chavez lived in Michoacán, Mexico, and was employed on an H-2A visa, which she obtained in Nogales. TR at 150. When she arrived in Nogales, Ms. Chavez met at a hotel with attorneys and Maria Nunez, who she thought was an assistant at Fernandez Farms, Inc., to discuss what Ms. Chavez would say about her visa at the consulate and immigration, and to sign papers given to her by Ms. Nunez. TR at 151-53. Ms. Chavez did not know what the papers meant, did not have time to read them, was not given copies, and Ms. Nunez did not explain the papers to her. TR at 153-54. During this process, Ms. Chavez saw a document signed by Leonardo Espinoza which stated that the differential checks to be given to the workers should be given at the end of each month, and that the punchers should punch one box after each eight boxes punched. TR at 166-167; RX H at GF026160. Ms. Chavez did not remember reading the document, and she did not remember hearing that she would receive more than one punch per box. TR at 168-69. She also authenticated her signature on a separate sheet of paper purporting to be a crew list for Mr. Espinosa acknowledging the pay differential. TR at 168; RX H at GF026161.

18. While working for Fernandez Farms, Inc., Ms. Chavez lived at the Royal Ranch property in the office building in a room with five other people, who shared two bunk beds, and that they were "in very tight." TR at 154-55. Ms. Nunez paid $125 per month rent, and was told that she would have to pay rent at meetings held by Celia Fernandez and Ms. Gomez, who she identified as supervisors. TR at 155-56. Ms. Chavez paid rent in cash and never received a receipt, but saw Ms. Gomez writing something down when she made payments. TR at 157. Ms. Chavez said that the other women with whom she lived also paid the same amount of rent, and they often paid rent one after another. TR at 157.

19. When picking strawberries, the number of boxes Ms. Chavez picked was tracked through the use of a punch card, which was punched once for each box she filled; she did not remember getting more than one punch per box and did not remember anyone telling her that she would receive more than one punch per box. TR at 158-59. Ms. Chavez was paid weekly on Saturdays, and was never paid on a different day, and never received more than one check per week. TR at 159. She cashed her checks at a store within a day or two of receiving them, and did not receive any extra checks at the end of the season. TR at 159-60.

20. In addition to her rent, Ms. Chavez paid $1,550 to Fernandez Farms, Inc., through weekly cash payments to Ms. Gomez. TR at 160-61. Celia Fernandez and Ms. Gomez told her at meetings that the payments were for the cost of her visa and for the attorneys to bring her to the U.S. TR at 161. Ms. Chavez knew that the payments were not allowed from reading a pamphlet given to her at the consulate, but paid because she was afraid that she would not be brought back the next season and would not be able to buy food. TR at 161-62. She did not think that the payments were a requirement of her job, but thought that she would not be hired back if she did not make them. TR at 162. Ms. Chavez saw her co-workers making the same payments and they discussed the payments. TR at 163.

21. Ms. Chavez did not remember anyone from Fernandez Farms, Inc., discussing the Department of Labor's investigation, but attended meetings, along with 80 other workers, held by Celia Fernandez and Ms. Gomez, who wanted to know if Ms. Chavez and the other workers were

asked by investigators if they had made any payments. TR at 163-64. Celia Fernandez and Ms. Gomez told the workers to deny making any payments. TR at 163. Celia Fernandez also told the workers that if they talked about the fees they would not be brought back, and Ms. Chavez said that she did not feel comfortable saying anything about the payments to the investigators after the meetings. TR at 164-65. Respondent also attended the meeting, but Celia Fernandez spoke. TR at 164.

Ana Teresa Cruz Barcenas

22. Ana Teresa Cruz Barcenas worked at Fernandez Farms, Inc., from May to November 2011 on an H-2A visa. TR at 170-71. She is the oldest sister of Yolanda Cruz Barcenas. TR at 188. She obtained her visa in Nogales, though she initially said she obtained it in Tijuana. TR at 171, 174. Ms. Cruz Barcenas' was not reimbursed for her bus ticket to the border, which cost around Mex$ 300. TR at 172. She wrote and signed a document which stated that Respondent reimbursed her travel expenses to Nogales, but said that she was told to write it by Respondent and Ms. Gomez at a meeting with 80 other workers after the Department of Labor investigation began. TR at 172-75. At the meeting, she was also told to say that she had not made any payments, including rent, to Fernandez Farms, Inc. TR at 186. Respondent said at that meeting that it would be damaging for him if the workers said anything, and that the workers would not be brought back the next season if they admitted to paying fees. TR at 187. After hearing what Respondent said, Ms. Cruz Barcenas felt that she could not tell the truth about making payments. TR at 187.

23. When Ms. Cruz Barcenas arrived in Nogales in 2011, she met with Respondent and a person she described as a lady attorney, though Ms. Cruz Barcenas said that the woman did not identify herself as an attorney. TR at 175-76. Ms. Cruz Barcenas said that Respondent and the woman told the workers to sign paperwork, but the workers did not have a chance to read the documents and were not given copies to keep. TR at 177-78. She did not remember being told what to say at her visa interview. TR at 178. She did not remember seeing a document signed by Leonardo Espinoza which stated that the differential checks to be given to the workers would be given at the end of each month, and that the punchers should punch one box after each eight boxes punched. TR at 188; RX H at GF026160. She said that no one told her not to read the paperwork, but that there was no time to read any of the documents because she only had it right before signing. TR at 192.

24. Ms. Cruz Barcenas lived in a trailer at the Royal Ranch property for $120 per month, which she paid in cash to her supervisor, Ms. Gomez, who made a note of her payment. TR at 179. Ms. Cruz Barcenas lived with five people in a room which she described as overcrowded and not comfortable, though no one in her room had to share a bed, and they all paid rent on the same day. TR at 180. In addition to rent, she paid $1,650 to Fernandez Farms, Inc., for the cost of getting into the U.S. and her visa in weekly payments to Ms. Gomez at Royal Ranch and she would sometimes give the payments to Mr. Escobar at the office. TR at 182-84. Ms. Cruz Barcenas knew that the payments were not permitted under the H-2A program because of a pamphlet she received at the visa interview from consulate employees. TR at 184-85. When Ms. Cruz Barcenas arrived at Fernandez Farms, Respondent and Ms. Gomez told her at a meeting that she had to make payments and told her how much to pay. TR at 185. She made the payments because she needed to work and thought that if she did not pay she would not be brought back for the next season. TR at 186.

25. Ms. Cruz Barcenas said that she was given one punch for each box of strawberries, and did not recall ever getting more than one punch for a box; she did not remember any agreement

regarding extra punches. TR at 181. She received her paycheck every Saturday, and sometimes cashed it at the catering truck and sometimes in Salinas, but she would never wait more than a day or two to cash the check. TR at 181-82. She never received an extra check per week or at the end of the season. TR at 182.

Jose Manuel Reyes

26. Jose Manuel Reyes worked as a picker for Fernandez Farms, Inc., on H-2A visas from 2009 to 2012. TR at 355-56. He lives in Michoacán, Mexico, and obtained two visas in Nogales and two visas in Tijuana. TR at 357. Respondent provided a bus from Michoacán to Nogales in 2009 only, but in all other years, Mr. Reyes bought his own bus tickets to the border and did not receive reimbursement. TR at 357. He thought Respondent met him in Nogales in 2011, and did not remember Respondent or a representative telling him anything about the visa process in 2010 or 2011. TR at 383.

27. In 2009, Mr. Reyes lived in a trailer on Fernandez Farms, Inc., property in Watsonville, and paid $140 or $150 in rent each month in cash to Ismael, Respondent's brother. TR at 358-59. He was aware that other workers paid rent and he was never offered free housing at Fernandez Farms, Inc. TR at 359-60. From 2010 to 2012, Mr. Reyes lived in a house in Salinas with relatives and paid $150 per month in rent. TR at 358, 359. Had he been offered free housing at Fernandez Farms, Inc., he would have lived there. TR at 360.

28. Mr. Reyes paid $1,400 to Respondent for his visa in 2009 and $1,600 for his visa in 2010 through 2012. TR at 360. He was told that he had to pay for the visa expenses when he arrived in California, but did not remember who told him that. TR at 364. He paid cash to Ms. Gomez, the supervisor, in the parking lot at work, usually on Mondays, and he never received a receipt for the payments, but saw Ms. Gomez writing down the payments on a pad. TR at 361-62. He was told that the payments were for his expenses to travel from Michoacán. TR at 361. Mr. Reyes recognized the document on which Ms. Gomez wrote down the payments and his name on the document. TR at 362; AX 25 at 1870. Mr. Reyes knew from reading a pamphlet given to him at the U.S. Consulate that payments were not permitted under the H-2A program, but said that if a worker did not pay, Respondent would not hire them again. TR at 363-64.

29. Respondent and Ms. Gomez held several meetings at work after the 2011 investigation where they told approximately 90 H-2A workers that, if they did not want the program to fall apart, they should not say anything about payments or wages. TR at 365-66. Respondent told the workers that, if they wanted to attend the meeting, they would have to leave their cell phones on the hood of a car. TR at 366.

30. Mr. Reyes received an extra punch after every eighth box while working for Fernandez Farms, Inc., in 2011 only when filling boxes which contained nine baskets of strawberries. TR at 370-71. Orders with nine basket boxes were unusual, and Mr. Reyes said that most of the time he was filling eight basket boxes and did not receive an extra punch. TR at 388-89. He did not remember receiving any extra paychecks to make up the difference between the AEWR and the piece rate, but was told that Respondent would "fix the checks, so that it would appear that they were paying [the workers] on the H-2A." TR at 370. He never received any checks to make up the differential, and did not know if any other employees received extra checks. TR at 387, 389. At the end of the 2011 season, Respondent and Ms. Gomez told him to sign a blank check in order to

prove that he had been reimbursed for his travel expenses; he gave the signed check to Ms. Gomez or to Respondent's brother in law, but he did not receive any payment when he returned the check. TR at 368.

31. Around the midpoint of the 2011 season, Ms. Gomez instructed the crews to elect a leader as a representative to whom the crew could make complaints about working conditions, and Mr. Reyes was elected as leader of crew number 3. TR at 372-76; RX H at 026164. The crew had only one complaint about the catering truck arriving late for lunch, and did not lodge any other complaints with Respondent. TR at 376-77.

Depositions of Additional H-2A Workers

32. The Administrator offered the depositions of the following individuals who were employed by Respondent in 2010 or 2011: Leonel Gonzalez Ayala, AX 38 (worked in 2011); Orlando Lopez Rosiles, AX 39 (worked in 2010); Alejandro Bermudez Ayala, AX 40 (worked from 2008 to 2012); Efrain Cruz Alcantar, AX 41(worked from 2009 to 2012); Roberto Lopez Vasquez, AX 42 (worked from 2009 to 2011); Luis Alfredo Quijano Nunez, AX 43 (worked from 2009 to 2012); Victor Hugo Barragan Nunez, AX 44 (worked in 2011 and 2012); Mauro Andres Quijano Nunez, AX 45 (worked from 2009 to 2011); Juan Carlos Ruiz Calderon, AX 59[10] (worked in 2010 and 2011); and Luis Enrique Avalos Tapia, AX 60 (worked in 2010). The most relevant portions of their testimony are included below.

33. Leonel Ayala, Luis and Mauro Nunez, and Juan Calderon did not receive or were not allowed to keep a copy of the H-2A contract. AX 38 at 2763; AX 43 at 2911; AX 45 at 2928; AX 59 at 3956. Alejandro Ayala said that when Respondent came to recruit in Mexico in 2008 he said that each worker would be charged $1300 to work. AX 40 at 2795.

34. Leonel Ayala, Alejandro Ayala and Luis Nunez were not provided with free housing by Respondent but would have taken it if it had been made available. AX 38 at 2763; AX 40 at 2801; AX 43 at 2911-12. Orlando Lopez Rosiles was not offered free housing in 2010. AX 39 at 2786. Efrain Cruz Alcantar was charged $125 per month by Respondent to live in a trailer at Royal Ranch in 2011 and 2012. AX 41 at 2843-44. Roberto Lopez Vasquez paid $150 per month in 2009 and 2011 for bad, crowded housing, at Royal Ranch, which had lots of bugs and cockroaches. AX 42 at 2874-76. Victor Nunez was charged $100 per month by Respondent to live in a trailer at Royal Ranch. AX 44 at 2920. Mauro Nunez paid $140 to $150 per month in 2011 to stay in a trailer at Royal Ranch. AX 45 at 2928. Juan Calderon paid $100 per month to Respondent's brother to stay in a field on Respondent's property. AX 59 at 3956-57. Luis Tapia was never offered free housing by Respondent in 2010, and chose to stay with an uncle in Salinas because he had heard that he would be charged rent at the farm. AX 60 at 3995-96.

35. Each worker except Mr. Rosiles said that they did not receive extra punches for the boxes of strawberries they picked. AX 38 at 2764; AX 40 at 2804; AX 41 at 2847; AX 42 at 2878; AX 43 at 2912; AX 44 at 2921; AX 45 at 2929; AX 59 at 3960; AX 60 at 3997. Each worker said that they had to pay money to Respondent for expenses related to their transport and hiring in order to work, saw other workers make payments, and saw the payments collected and recorded by Ms. Gomez or

[10] The Administrator also provided a declaration from Juan Calderon, which was consistent with his deposition, except that he said he paid $1200 rather than $1400 in 2010 for his visa. AX 59 at 3960-62; AX 66 at 4583.3.

Celia Fernandez. AX 38 at 2764 (Leonel Ayala paid $1650 in 2011) AX 39 at 2779-80 (Mr. Rosiles paid $1650 in 2010) AX 40 at 2804-07 (Alejandro Ayala paid $1300 in 2010 and 2011 and $1750 in 2012); AX 42 at 2838-42, 2879-82 (Mr. Alcantar paid$1400 in 2009 and $1600 in 2010 and 2011); AX 43 at 2912-13 (Luis Nunez paid $1300 to $1600 from 2009 to 2012); AX 44 at 2921-22 (Victor Nunez paid $1500 to $2000 in 2011 and 2012); AX 45 at 2929-30 (Mauro Nunez paid $1600 to $1700 in 2009 to 2011); AX 59 at 3960-62 (Juan Calderon paid $1400 in 2010 and $1600 in 2011); AX 60 at 3997-99 (Mr. Tapia paid $1200 in 2010).

36. Mr. Rosiles said Celia Fernandez made him a foreman, and that he moved portable toilets in addition to picking strawberries. AX 39 at 2781. Mr. Vasquez said that at a meeting with Respondent, Celia Fernandez, Ms. Gomez, and Mr. Escobar, the workers were told they would be fired if they told Department of Labor investigators about being charged money or mistreated. AX 42 at 2884-85. He also said that Ms. Gomez selected the workers to be interviewed, and that Respondent gave Leonardo Calderon $50 to speak to the investigators. AX 42 at 2886. Mr. Vasquez also said that every week he and other workers were asked to sign blank checks. AX 42 at 2888-89. Luis, Victor, and Mauro Nunez and Juan Calderon said that before Department of Labor investigators came to the farm, they were informed that if they told the investigators about the payments they would be reported to immigration and sent back to Mexico. AX 43 at 2913-13; AX 44 at 2922; AX 45 at 2931; AX 59 at 3964-65.

Statements of Additional H-2A Workers

37. The Administrator also offered statements from the following individuals who harvested strawberries under the H-2A program for Respondent in 2010 or 2011: Anahi Macedo Alonso, AX 63 (worked in 2011 and 2012); Hugo Osvaldo Montano Barragan, AX 64 (worked in 2011 and 2012); Juan Miguel Montano Ortega, AX 65 (worked in 2011); Gustavo Tafolla Alvarado, AX 67 (worked from 2010 to 2012); J. Jesus Valencia Chavez, AX 68 (worked in 2010 and 2012); and Samuel Zamora Montano, AX 69 (worked in 2010 and 2011).

38. Mr. Alonso, Mr. Barragan, and Mr. Montano were not allowed to keep copies of the H-2A contract. AX 63 at 4566.2; AX 64 at 4575.3; AX 69 at 4602.2. Mr. Barragan paid $125 per month to live in a trailer belonging to Respondent in 2011. AX 64 at 4575.4. Mr. Ortega was never offered free housing in 2011, and paid $125 per month to Respondent to stay in a house at Royal Ranch, where there were 18 workers in three bedrooms. AX 65 at 4578.2. Mr. Alvarado paid Respondent $125 per month in 2010, 2011, and 2012 to stay in a trailer which had exposed electrical wires and no gas. AX 67 at 4592.2. Mr. Chavez paid $120 or $125 in rent to Respondent each month to stay in a trailer. AX 68 at 4597.2. Mr. Montano paid $125 per month to Respondent's brother to live in a trailer owned by Respondent in 2010 and 2011. AX 69 at 4602.2-3. None of the workers received extra punches for boxes of strawberries. AX 63 at 4566.3; AX 64 at 4575.4; AX 65 at 4578.2; AX 67 at 4592.3; AX 68 at 4597.2; AX 69 at 4602.3. All of the workers paid money to Respondent for expenses related to their transport and hiring in order to work, made cash payments to Ms. Gomez or Mr. Escobar and saw other workers making similar payments. AX 63 at 4566.4 (Mr. Macedo paid approximately $1700 in 2011); AX 64 at 4575.4 (Mr. Barragan paid $1750 in 2011); AX 65 at 4578.3 (Mr. Ortega paid $1650 in 2011); AX 67 at 4592.3-5 (Mr. Alvarado paid $1400 in 2010 and $1630 in 2011); AX 68 at 4597.3 (Mr. Chavez paid $1400 in 2010); AX 69 at 4602.4-5 (Mr. Montano paid $1650 in 2010 and 2011). The workers, except for Mr. Chavez and Mr. Montano, also said that, when the Department of Labor investigated Fernandez Farms in 2011, Respondent and Ms. Gomez

instructed them to tell the investigators that Respondent was not charging fees. AX 63 at 4566.5; AX 64 at 4575.5; AX 65 at 4578.3; AX 67 at 4592.5-6.

Froilan Leon Garcia

39. Froilan Leon Garcia, who was also known as Bandaras, worked as a strawberry picker for Fernandez Farms, Inc., under the H-2A program from 2009 to 2011. TR at 578, 591, 595, 604-05. At the time of the hearing, he worked for Mr. Escobar at Royal Berry Farms picking strawberries at a ranch near Chular. TR at 605-06. Mr. Escobar paid Mr. Garcia for his time while testifying, but he could not remember who told him he would be testifying. TR at 606-07

40. Mr. Garcia first heard about Fernandez Farms, Inc., through a friend, and applied for a visa in Nogales but did not speak with anyone from Fernandez Farms, Inc., prior to crossing the border. TR at 579-80. Mr. Garcia's wife received a call from someone at Fernandez Farms, Inc., instructing him to be at the Hacienda Del Rio hotel in Nogales, but Mr. Garcia did not know the name or gender of the person who called. TR at 580-81. Mr. Garcia did not remember whether he traveled by plane or bus from his home in Michoacán to Nogales, but said that he paid with his own money and that Respondent reimbursed him with a check. TR at 581-82, 586. He did not know who paid for the two nights he spent at the hotel, but did not pay for it himself. TR at 582, 583. Mr. Garcia first said that someone gave him money to buy meals in Nogales, then said that he was reimbursed for meals purchased in Nogales when he arrived in Watsonville and provided a receipt. TR at 582-83. He said he received a Spanish language copy of the H-2A contract in Nogales and had time to read it, but did not sign it at the time. TR at 584. After Mr. Garcia received his visa in Nogales, he crossed the border, received a work permit, and boarded a bus which took him and a number of other workers to 279 Maher Road; he did not pay for the bus or meals while heading to Maher Road. TR at 584-86. Mr. Garcia followed the same process for traveling to Fernandez Farms in 2010 and 2011, and said he was reimbursed for his expenses with a check in both years. TR at 591. At the hearing, he said he received checks from his supervisor, Rosa, but at a prior deposition, said that Ms. Nunez reimbursed him in cash in Nogales, Arizona, in 2010 and 2011, and at another point in the same deposition said that Celia Fernandez had reimbursed him in cash for travel expenses. TR at 614-15; RX P at 5, 7, 15. He later denied receiving reimbursement from Ms. Gomez. TR at 621. He explained that the cash he received from Celia Fernandez was different from travel expenses, and was to allow Mr. Garcia to buy clothes and toiletries, but later said that the cash was a reimbursement for what he had spent on the trip. TR at 617, 620.

41. Mr. Garcia started working the day after he arrived at 279 Maher Road after a woman named Maria told him and the other workers that they needed to start working but did not tell them anything else about their employment; he denied signing any paperwork when he arrived at Fernandez Farms. TR at 587. Mr. Garcia stayed one night at Fernandez Farms, and then moved in with his son in Prunedale, California. TR at 588. He said that the building in which he stayed at Fernandez Farms was comfortable, not dirty, and that he did not see any rats. TR at 588. He said that Respondent told him and the other workers that they did not have to pay rent if they stayed in the housing provided by Fernandez Farms, Inc., and that they would not be charged for the ride from the border. TR at 589. He did not remember hearing any other H-2A workers say they were being charged rent, and said that he never paid any money to Ms. Gomez or anyone else from Fernandez Farms in 2010 or 2011. TR at 289-90. He did not recognize the document on which Ms. Gomez recorded amounts received, though he acknowledged his name appearing on it. TR at 619;

AX 25 at 1869. He also said that he did not borrow any money from Respondent, and did not hear of any other employees borrowing money from him. TR at 591.

42. Mr. Garcia said that Celia Fernandez did not supervise him in 2010 or 2011, but in a previous deposition said that Celia Fernandez supervised him in both years. TR at 612; RX P at 14. Mr. Garcia said that he recorded his hours while working for Fernandez Farms, Inc., on a daily punch card, and also signed in to work each day. TR at 593-94. He sometimes signed the sheets as a foreman when the foreman did not show up, which was often; when he acted as a foreman, he was not paid a piece rate. TR at 608, 610-11. He recalled receiving an extra punch after picking eight boxes in 2009, 2010, and 2011, and also said he received an extra paycheck at the end of the season, which he understood to be for the extra punches after eight boxes, but he did not receive extra paychecks monthly. TR at 595-96. Payroll records show that Mr. Garcia received multiple makeup checks in 2011. TR at 613-14; AX 71 at 4623-25. He signed the 2011 agreement to receive differential checks monthly rather than weekly and to receive an extra punch after eight boxes, and he remembered electing Mr. Espinoza as a crew chief. TR at 597-98; RX H at GF026160-61. Mr. Garcia's name appears on the list of Crew One workers. RX H at GF026161. He did not see any mistakes regarding his boxes picked, hours, or pay on his pay stubs, and felt able to complain if there had been a mistake. TR at 598-99.

43. Mr. Garcia went to a meeting in Michoacán during the six months before the hearing, where women told him and 30 to 35 other people, including one named Orlando and another called "El Pato," that they would be paid to join a lawsuit against Respondent. TR at 600-601. He said he was told that there would be "a lot of money for all of [them]" if the lawsuit succeeded. TR at 602-03. Some of the people at the meeting were people he saw while working at Fernandez Farms. TR at 602. Mr. Garcia stayed at the meeting for about five minutes, and left after hearing that the women holding the meeting worked for the U.S. Department of Labor, and he thought one of the women was named Julia. TR at 602, 618. He thought the meeting lasted about half an hour, and no one asked any questions while he was there, but several people stayed after he left. TR at 603, 618.

Christian Cruz Silva

44. Christian Cruz Silva, who lives in Jalisco, Mexico, worked for Respondent in 2011 as an H-2A strawberry picker, and at the time of the hearing was a strawberry picker for Celia Fernandez at CFE Farms; he was not paid for testifying. TR at 624-26. He worked for Angel Carrasco in Salinas in 2013 picking strawberries. TR at 646. Mr. Silva first learned about Fernandez Farms, Inc., through a friend, and then was contracted by Ms. Nunez who took Mr. Silva's information. TR at 626. Mr. Silva purchased his own bus ticket from Jalisco to Nogales in 2011, and a woman named Daniella told him in Nogales that he would be paid for the trip. TR at 629-30. He paid for his hotel in Nogales, but that Fernandez Farms, Inc., hired a driver and paid for meals. TR at 630. When he arrived in Watsonville, Mr. Silva said he was reimbursed in cash upon providing receipts, but he did not remember who reimbursed him. TR at 630-31. He said he signed a note stating that "[t]he expenses in my case for Nogales were $1,100 pesos, and [Respondent] has reimbursed me for this, when I got here, in dollars, and the amount was $110.00." TR at 649-50, RX C at GF001080.[11] The note was dated May 3, 2011, and Mr. Silva started working for Respondent in mid-May. TR at 649-50.

[11] At the hearing, the translation read into the record states the amount "$1,100.00" dollars. TR at 650. However, the note itself clearly reads "$110 dolores." RX C at GF001080. I find that the amount was $110 dollars.

45. Mr. Silva did not remember being told what to say in the visa process. TR at 632. Mr. Silva initially received a copy of the H-2A contract from Daniella, who worked for Ms. Nunez, in Tijuana, where he crossed the border, but later said that he came through Nogales in 2011 and Tijuana in 2012. TR at 627-29; AX 5 at 49-61. He said that a packet containing "the rules regarding the home, [and] the work" was in his possession for a day, and that Daniella provided additional explanation on the second day. TR at 637. Daniella read the contract to Mr. Silva and other workers, and they asked questions about the hourly and piece rates. TR at 638. Mr. Silva understood from Daniella's explanation that, if he did not meet the piece rate requirement, he would still be paid the hourly rate in the contract. TR at 638. He said that Daniella gave him a copy of the H-2A contract to keep, but he no longer had it at the time of the hearing. TR at 643. He acknowledged marking on a form that he did not need housing, but said that it had been a mistake. TR at 654-55; RX I at GF026269.

46. Mr. Silva lived in a trailer at Royal Ranch, with three rooms and four people per room; he was comfortable, did not have to share a bed, had a clean place to cook, and did not pay any rent. TR at 632-33. He denied making any payments to anyone who worked at Fernandez Farms, and did not know of any other workers making payments. TR at 633-34. He did not remember seeing the document on which Ms. Gomez said she kept track of payments. TR at 652-53; AX 25 at DOL1785. He said his supervisor was Ms. Gomez, and he was never supervised by Celia Fernandez. TR at 634. Mr. Silva remembered signing in each day, and thought he was part of Crew One, but did not remember who the crew leader was. TR at 634-35. Mr. Silva recognized his signature on the list for Crew One, and remembered seeing the piece rate and differential agreement document. TR at 636; RX H at GF026160-61. He did not remember who his foreman was, but said that Froilan Leon would supervise his crew as a substitute foreman. TR at 640, 647-48. In a 2011 deposition, Mr. Silva identified a "Froylán" as his foreman. TR at 648, RX M at 46.

47. Mr. Silva was paid each Saturday, and remembered receiving extra paychecks to make up the wage difference when he picked less than five boxes per hour. TR at 641. He remembered receiving six extra paychecks during the 2011 season, and said he sent them to Mexico; however, at his deposition in 2012, Mr. Silva did not remember getting an extra paycheck at the end of the season. TR at 641, 651; RX M at 67. He said that if there was an error on his paycheck, he would report it to Mr. Escobar who would correct the problem. TR at 642.

48. In May of 2015, Mr. Silva received a phone message from a woman named Julia who said that he should call her about a lawsuit. TR at 644. He heard that the suit involved $800,000, but he did not return the call or attend any meeting because Julia did not come to his home in Jalisco. TR at 644-45.

Luis Antonio Aguilar Gomez

49. Luis Antonio Aguilar Gomez worked for Fernandez Farms, Inc., in 2011, and at the time of the hearing, worked for CFE Farms. TR at 659-60. Mr. Gomez first heard about a job with Respondent through an uncle who also recommended him to Respondent. TR at 660-61. Mr. Gomez was then contacted by Mr. Escobar, who took his information over the phone and told him to go to Nogales on May 5, 2011, to receive the H-2A contract. TR at 661-62. Mr. Gomez bought a plane ticket from Jalisco to Nogales using his own money, and said that he was reimbursed for the ticket and his other expenses by either Mr. Escobar or Respondent when he arrived at Royal Ranch. TR at 662-63, 669. When Mr. Gomez arrived in Nogales, Mr. Escobar told him to meet with

Daniella, who gave Mr. Gomez some paperwork, which he recognized as the H-2A contract. TR at 663-64. He said he had a chance to read the contract before signing it and was permitted to keep a copy. TR at 665. He identified his signature dated May 3, 2011, on what he said was the last page of the contract. TR at 664-65; RX I at GF026250. He acknowledged that the page indicated that he would not accept housing, and that on May 3, 2011, he was still in Mexico and had not yet traveled to Nogales or met anyone from Fernandez Farms, Inc. TR at 690-91. He said the Daniella did not give him any instructions on what to say to consulate officials except to tell the truth. TR at 666. He remembered seeing Mr. Silva in Nogales, but said that he did not see anyone else from Fernandez Farms, Inc. TR at 667. He said that he did not pay for his visa expenses and was not charged by Respondent for any expense related to his employment in 2011. TR at 671-72.

50. After Mr. Gomez crossed the border in May of 2011, a van took him and five or six other H-2A workers to Royal Ranch; he did not pay for the van trip, and the driver paid for meals. TR at 668-69. Mr. Gomez denied meeting with Ms. Nunez in 2011, denied paying any money or being asked to pay money to anyone from Fernandez Farms, Inc., and denied ever seeing anyone from Fernandez Farms, Inc., take money from H-2A workers. TR at 670-71, 672-73. Mr. Gomez said that he borrowed $100 from Respondent when he first arrived at Maher Road, which he paid back. TR at 673-74.

51. Mr. Gomez stayed in a trailer at Royal Ranch for the entire 2011 season, did not have any complaints about the condition of the trailer or overcrowding, and did not have to share a bed. TR at 672, 674. He remembered signing in each day, and remembered getting an extra punch after eight boxes. TR at 677-78. At a 2014 deposition, Mr. Gomez said that he got an extra punch after seven boxes. TR at 692; RX Q at 39. He remembered electing a crew leader in 2011 and thought that the foreman of his crew was named Jose or Joche. TR at 683-84. Mr. Gomez recalled getting an extra paycheck occasionally, but not often, in 2011, but did not know why. TR at 679. Mr. Gomez usually cashed his paychecks at a catering truck, and he thought the truck charged $1 per $100 to cash checks. TR at 679-80. He also cashed paychecks at La Princess, a market in Watsonville. TR at 680. He usually waited to cash the extra checks until he returned to Mexico because the checks were small. TR at 693. He said that if the checks were larger he would have cashed them if he needed the money. TR at 694. He received pay stubs showing his hourly rates and hours worked, but did not verify the accuracy of the stubs. TR at 680.

Leonard Espinosa Calderon

52. Leonard Espinosa Calderon was a team leader and H-2A worker for Respondent in 2010 and 2011, and worked at the Royal Ranch and Blackie Road fields. TR at 782-83. At the time of the hearing, he worked for Juan Escobar at Royal Berry Farms. TR at 786-87. In 2011, his foreman was "Banderas," but the foreman of his crew changed during the season. TR at 792. He denied making any payments to Respondent, Celia Fernandez, or Mr. Escobar, and did not know anything about payments to Respondent. TR at 784, 792. He lived in housing provided by Respondent in 2010 and 2011, and said he did not pay rent in either year and did not know of any other employees who paid rent. TR at 786.

Celia Fernandez

53. Celia Fernandez worked for Fernandez Farms, Inc., and Respondent as a field supervisor from 2010 through 2013 supervising strawberry pickers, punchers, and foremen; she is Respondent's

sister. TR at 290, 295. The workers supervised by Celia Fernandez were domestic workers who did the same types of work as the H-2A workers. TR at 291. Celia Fernandez said that she never supervised an H-2A worker at Fernandez Farms, Inc., and that she did not know anything about the H-2A program. TR at 293. The domestic workers she supervised in 2010 and 2011 worked at farms at Zabala[12] and Old Stage Road, approximately 20 to 25 minutes from Royal Ranch. TR at 313-14. She thought that most of the H-2A workers in 2010 and 2011 were at the Blackie farm near Prunedale, but was not certain. TR at 314. She denied knowing Andres Alejandro Gallegos and Gustavo Orosco and ever accepting payments from either. TR at 347.

54. Celia Fernandez said she never took money from other workers, and denied ever taking money which she understood to be reimbursements for visa expenses, and never told any workers that they were required to reimburse Fernandez Farms, Inc., for visa expenses. TR at 306-07. She also denied taking money for rent payments. TR at 306. Celia Fernandez said that she never saw Ms. Gomez take money from workers or tell workers that they were required to reimburse Fernandez Farms, Inc. for visa expenses or rent, and no worker ever told her that they were making payments to Ms. Gomez for visa expenses or rent. TR at 306-08. Celia Fernandez also said that she never worked with Ms. Gomez at Fernandez Farms, Inc., since Celia Fernandez worked in Salinas and Ms. Gomez worked in "Blackie." TR at 307.

55. Celia Fernandez denied having any contact with H-2A workers in 2010 or 2011, denied meeting with H-2A workers at the border in Nogales, and denied explaining anything to H-2A workers about their contracts or terms of employment while working for Respondent in 2010 or 2011. TR at 308-09. She remembered the Department of Labor investigation in 2011, and said that she had no warning about the investigation. TR at 310. Celia Fernandez denied meeting with any employees before investigators spoke with them and denied telling employees what to say to investigators, and said that she was not aware of any meetings where workers were told what to say to investigators. TR at 309-12. She never saw Ms. Gomez or Respondent tell any H-2A workers what to say and Respondent did not conduct any meetings with domestic workers regarding the Department of Labor investigation. TR at 312. Celia Fernandez also said that Mr. Escobar, who is her nephew, did not have any meetings with any workers to talk about the investigation. TR at 296, 313.

56. Since November 2013, Celia Fernandez has been the president and operator of CFE Farms, which grew 50 acres of strawberries at Royal Ranch in Salinas during the 2014 season, but is not currently growing any strawberries at that location. TR at 295, 316, 319, 346-47. Celia Fernandez does not grow strawberries because Driscoll, a fruit company, has a contract with CFE Farms and does not permit crops to be grown on the same land in consecutive years. TR at 295, 316, 319, 346-47. In 2015, CFE Farms also grew 34 acres of strawberries at a farm owned by Respondent on Encinal Road, which CFE Farms rents from Respondent for $1,600 or $1,700 per year. TR at 317-18. CFE Farms also grows strawberries at another farm by River Street in Chular, California, on 13.8 acres of land owned by a man named Mo for which CFE Farms pays rent of $1,700 per year. TR at 319-20. Celia Fernandez said that she had a contract with Driscoll to grow 48 acres of strawberries which is why CFE Farms needed to rent 14 acres of land in addition to the 34 it was renting at Encinal Road. TR at 321. CFE Farms also operates a business office at the Royal Ranch property office, which Respondent lends to CFE Farms. TR at 295. Mr. Escobar runs the business

[12] Celia Fernandez spelled this property Zavala at the hearing, but it corresponds to the Zabala Road property identified in the stipulations. TR at 313; *see* Stipulated Fact ¶ 2.c.

office, issues checks for CFE Farms, and pays bills for the company along with Lucia Fernandez, Respondent's daughter. TR at 296. Celia Fernandez said that she did not know if Mr. Escobar was the office manager for Fernandez Farms, Inc., but she knew that he worked at its office, issued paychecks and paid bills, and performed the same job for Fernandez Farms, Inc., as he does for CFE Farms. TR at 297. In 2014, CFE Farms hired Angel Carrasco to bring in workers on H-2A visas because she was losing fruit and did not have enough workers. TR at 298-99. She said that Mr. Escobar actually hired and communicated with Mr. Carrasco. TR at 299.

57. Celia Fernandez said that Mr. Escobar also runs a company called Royal Berry Farms, which he registered in her name. TR at 302. Royal Berry Farms uses H-2A workers and purchased tractors and other farming equipment from Fernandez Farms, Inc., during its bankruptcy liquidation. TR at 302-03, 304. Royal Berry Farms uses the same office at the Royal Ranch property used by Fernandez Farms, Inc. TR at 305. Both CFE Farms and Royal Berry Farms employ some of the same H-2A workers who worked for Fernandez Farms, Inc. TR at 305.[13]

58. Celia Fernandez identified from a list individuals who she said were domestic employees of Fernandez Farms, Inc., in 2010 and 2011, and did not pick strawberries. TR at 841-56. At a January 23, 2015, deposition, she said that she did not remember the names of any punchers who worked for her in 2010, and remembered the names of only two in 2011. TR at 858, 860. She said that since she did not work at the Royal Ranch or Blackie Road, she did not know who the punchers, weeders, or foremen there were, and would be surprised if H-2A workers held those positions. TR at 862-63.

Juan Escobar

59. Juan Escobar was the office manager for Fernandez Farms, Inc., and worked there through its bankruptcy until January 2013. TR at 484-85. He began working for Fernandez Farms, Inc., in 2010, doing paperwork and HR tasks, including giving out I-9 and W-4 forms and performing safety training. TR at 483. He began doing payroll in 2011, and said that in 2010, Jorge Durantes, a CPA, was doing payroll. TR at 484. Mr. Escobar has worked with H-2A employees since 2010, when he began assisting Maria Nunez with the H-2A process for Fernandez Farms, Inc. TR at 478. Ms. Nunez helped with H-2A paperwork and applications, and Mr. Escobar believed that she also met with applicants in Mexico. TR at 478. Ms. Nunez stopped working for Fernandez Farms, Inc., in May 2011, but continued to update the H-2A files until the season ended in December 2011. TR at 574. Mr. Escobar helped to complete paperwork and call applicants for additional information. TR at 479. Mr. Escobar also worked with an attorney whose name he believed was Jean Mallets. TR at 479. In addition to completing paperwork for H-2A workers, Mr. Escobar provided training to workers regarding their rights and provided basic information. TR at 480. He printed out copies of the H-2A contract but said that Ms. Nunez handled all of the paperwork for H-2A workers. TR at 486-87. He said that he never met with H-2A applicants in Mexico, has never been to Nogales, and

[13] At the hearing, the Administrator sought to develop evidence against Celia Fernandez, Juan Escobar, and Lucia Fernandez and CFE Farms, Inc., and Royal Berry Farms, Inc., but never added them as parties or gave them notice that relief would be sought. On July 31, 2015, the Administrator filed a post-hearing motion seeking relief against those previously named individuals and entities, alleging complicity in Respondent's H-2A violations and/or continuing the business of Respondent and Fernandez Farms, Inc. I denied the Motion on September 25, 2015, finding that the Administrator had not provided proper notice and an opportunity to be heard to those individuals and businesses for which it was now seeking relief at hearing. I also denied the Administrator's Motion for Reconsideration and Motion to Allow Post-Hearing Amendment.

did not regularly interact directly with H-2A workers on the farms. TR at 486. Mr. Escobar said that Ms. Gomez performed most of the interaction with H-2A workers. TR at 486.

60. Mr. Escobar said that Ms. Nunez handled recruitment of domestic employees and candidates referred by the EDD. TR at 487-88, 554. Under the name Juan Fernandez, he was listed as a contact person for job referrals for the H-2A program at Fernandez Farms, Inc., and took one or two calls, but Ms. Nunez took most of the referral calls. TR at 555. Celia Fernandez and Respondent were responsible for recalling previous year workers. TR at 488. Mr. Escobar did not remember whether or not domestic corresponding workers received copies of the H-2A contract in 2011. TR at 543-44.

61. Mr. Escobar also helped with inspections of the H-2A housing, and was responsible for making sure that the housing met H-2A requirements. TR at 485, 488. He said that the California EDD would inspect the H-2A housing twice per season, once before the workers arrived and again three months into the season. TR at 489, 490. After each inspection, the EDD inspector would give Mr. Escobar a report listing repairs or changes which were needed. TR at 490; RX S at DOL1421-46. After EDD identified a deficiency, Fernandez Farms, Inc., had a five day window to correct the deficiency, and the inspector would return to make sure that the issue was corrected. TR at 490-91. A failure to address a deficiency identified by EDD would prevent an H-2A application from succeeding. TR at 491. Mr. Escobar said that he would either make necessary repairs himself or hire contractors to do the work, but that all issues found in the EDD inspections were fixed. TR at 494. Mr. Escobar said there were no complaints about the housing offered by Fernandez Farms, Inc., and that he would address any problems which workers brought to his attention. TR at 495. He also said there were no complaints about overcrowding from the workers, and that there were rooms with four beds where only two workers were living. TR at 503-04. In some of those rooms, the workers were sleeping on bottom bunks and using top bunks, which did not have mattresses, for storage. TR at 504. He thought that Respondents always provided 50 square feet per worker in its housing. TR at 504.

62. Mr. Escobar said that a U.S. Department of Labor agent named Lonnie, who was in charge of housing inspections, told him that the EDD was subcontracted by the Department of Labor to perform the inspections. TR at 501. He said that in 2011 Lonnie inspected the housing at Royal Ranch and suggested some improvements or repairs, which Mr. Escobar made. TR at 501-02. Mr. Escobar said that in a subsequent conversation Lonnie told him that the kitchen was in acceptable condition. TR at 503.

63. Mr. Escobar reviewed two pictures of the housing at Royal Ranch, recognized the property, and acknowledged that the property looks the same today except that it is cleaner. TR at 496, 499. Mr. Escobar said that the first picture he reviewed at the hearing was not of the main entrance to the housing and only showed 10% of the building. TR at 502; AX 23 at 1864. He said that the pictures did not actually show the kitchen, which had a closing door and was not open to the elements. TR at 496-7; AX 23 at 1864-5. Mr. Escobar explained that a screen door was present at the base of the stairs shown in the second picture, but no solid door was in place. TR at 498-99. The kitchen was not missing a wall in 2010 or 2011, and the EDD had not noted any missing walls in its reports. TR at 500-01. Mr. Escobar said that the second picture, which showed stairs and a refrigerator, was behind an enclosed building which he identified as a laundry room, which he said had a screen door and not a solid door. TR at 498-99; AX 23 at 1865.

64. Mr. Escobar did not handle travel reimbursement, but said that Respondent would usually give the H-2A workers cash to reimburse their travel expenses. TR at 505. He also thought that Ms. Nunez would sometimes provide reimbursements. TR at 505. He denied ever taking any payments or any cash at all from H-2A workers while working for Fernandez Farms, Inc. TR at 505. He denied seeing Ms. Gomez or Celia Fernandez take any payments from H-2A workers, and said that he never saw Ms. Gomez make any entries on a payment chart, but also said that he did not see either of them often as they worked in the fields while he was in the office. TR at 505-06. Mr. Escobar created and used the form with the names of H-2A workers on it to record the paperwork turned in for each H-2A worker. TR at 507; AX 25 at 1868. The form also assigned a number to each H-2A worker for identification purposes. TR at 507-08. Mr. Escobar provided copies of the form to Ms. Gomez, but did not know what she used it for, and he did not save the copies of the form he used. TR at 508, 510. He did not create or use a similar form for domestic workers, which he explained was because there was less paperwork involved with domestic workers. TR at 509. Mr. Escobar did not recognize the form on which Ms. Gomez recorded rent payments. TR at 511; AX 25 at 1873.

65. Mr. Escobar kept track of all documentation of H-2A workers at Fernandez Farms, Inc., and that Ms. Nunez handled the personnel files. TR at 512, 572. He did not see Respondent take cash from any employee. TR at 512. He did not remember any employees complaining to him that they were required to give money to Respondent, Ms. Gomez, or Celia Fernandez, and did not recall Ms. Gomez telling him that she was taking money from employees. TR at 512. He said that Ms. Gomez told him in 2010 that she owed the IRS over $200,000. TR at 512.

66. Mr. Escobar did not remember what the pay rates were at Fernandez Farms, Inc., in 2010 or 2011, but understood that workers received an extra punch after each eighth box because of an informal wage agreement between local farmers to avoid luring domestic workers away from other farms while still complying with H-2A wage requirements. TR at 514-15, 568-69. Hours for workers were tracked both on time sheets and on punch cards; he regularly worked with punch cards but did not inspect them closely to determine whether there were extra punches. TR at 516, 573. He saw the agreements regarding differential checks and extra punches, but was not involved with explaining the agreements or collecting signatures. TR at 517-18; RX H at GF026159. He said that Mr. Espinosa was the crew chief of Crew One, and he remembered the names of many of the workers listed as being in Crew One. TR at 517-18; RX H at GF026159, GF026161. He also said that Ricardo Vega and Jose Manuel Reyes were crew chiefs, but did not remember of what crew, and was familiar with names listed on the crew lists related to both workers. TR at 519-21; RX H at GF026162-65. The crews came up with the idea to have each crew elect a crew chief or representative, and that Mr. Espinosa was one of the major proponents of having crew representatives. TR at 521. Mr. Escobar did not remember having any H-2A workers who worked as punchers or who were women. TR at 552.

67. Mr. Escobar identified certain workers at Fernandez Farms, Inc., as domestic workers for the purpose of this matter at Celia Fernandez' request. TR at 536, 537. Some of the workers Mr. Escobar identified because he knew them personally, while others he identified by reviewing payroll records. TR at 536. He said that any workers on the payroll records with only straight hours and no piece rates would not be pickers and were therefore domestic. TR at 536. Mr. Escobar also relied in some cases on the hourly rates of pay listed on payroll records. TR at 537.

68. Mr. Escobar said paychecks were issued to H-2A workers every Saturday, and that makeup checks for the differential amount would be issued a few days later. TR at 544-45. He said that he was asked by H-2A workers to hold differential paychecks during the season, and that the differential checks were given on a monthly basis at the workers' request. TR at 538-39. He said that the workers wanted to use the extra checks as a savings account and did not want to cash them because there was a fee for cashing checks and because there were some limits on how much money the workers could send to Mexico. TR at 539, 551. He thought that the majority of H-2A workers in 2010 and 2011 asked to have their differential checks held. TR at 539-40. He identified copies of checks as being for differential amounts, and confirmed that, in at least one case, Luis Antonio Aguilar received two makeup payments for June 2011 which totaled over $1,000. TR at 547-50; AX 71 at 4618-19. Mr. Escobar said when a worker was paid a piece rate and was not being paid by the hour, the paystubs given to workers would not include the number of hours they worked; that information was on a sign-in sheet or punch cards, which would have to be reviewed to see the hours worked. TR at 557-59, 572-73. Mr. Escobar did not know where the sign-in sheets were. *Id.* He did not know if the employees ever cashed their checks, despite being the office manager and reviewing the accounts for Fernandez Farms, Inc. TR at 562. In at least one situation, Respondent gave cash to local groceries where H-2A workers cashed their checks, and the groceries returned the checks to Respondent. TR at 564-66. This was during a period when a lien on Respondent's bank account caused checks to bounce. TR at 563. Mr. Escobar said that, while the checks cashed in this manner did not pass through any bank, Fernandez Farms, Inc., retained copies of the checks. TR at 565, 575.

Maria Nunez

69. Maria Nunez worked for Fernandez Farms, Inc., from May to December of 2010. TR at 700. She had prior experience with H-2A compliance as an H-2A specialist at a company named Diaz and Sons, and as an outreach coordinator for the State of Arizona, where she gave orientations to workers after they crossed the border. She also inspected worker housing. TR at 703, 704. In April 2010, Ms. Nunez held meetings in Michoacán, Guadalajara, and San Luis, Mexico to recruit for Fernandez Farms, Inc. TR at 706. She said that 100 to 120 people attended the meeting in Michoacán, which was held at the home of a relative of Respondent. TR at 707. Ms. Nunez said that most of the workers had been hired for the H-2A program at Fernandez Farms, Inc., the previous year. TR at 708. At the meetings, she went over the H-2A contract, safety forms, HR forms, and wage hour regulations with prospective workers. TR at 706-07. On May 3, 2010, she met the workers in Nogales, and gave each applicant a folder of documents, including the H-2A contract, and explained each document which the workers were to sign. TR at 708-11. The workers kept the folders, and she told them to take the folders into their visa appointments because she "wanted the consulate to see that [Fernandez Farms, Inc., was] in compliance." TR at 711. Ultimately, the workers had a copy of the contract in their possession from the night before the visa appointments until they arrived at the farm. TR at 753. The workers went to their visa interviews on May 4, 2010, and Ms. Nunez denied telling the workers what to say in the interviews. TR at 711. She said that Respondent was also there, and told the workers not to be nervous. TR at 712.

70. Ms. Nunez returned to Nogales later in May to meet with eight additional workers after some H-2A applicants were rejected. TR at 714. Two of those workers were rejected, and Ms. Nunez had to make a third trip to Nogales, which she completed in mid-June. TR at 714, 720. At these subsequent meetings, Ms. Nunez provided the same information to the workers about the H-2A contract, and that no one else came to the later meetings. TR at 714-15. For all three meetings,

Ms. Nunez said that she paid for workers' hotels, transportation, and meals, and told them that they would be reimbursed for their expenses. TR at 715. She said Respondent paid for a bus to take the workers from Nogales to the border at San Luis, Arizona. TR at 716-17. Ms. Nunez said that Respondent paid a $6.00 fee for 80% of the workers, and did not know if the workers who paid their own fees were reimbursed. TR at 717. Once the workers crossed the border, a bus, which was paid for by Respondent, took them to Watsonville. TR at 718.

71. After the workers arrived in Watsonville, Ms. Nunez collected the file folders from them, including the contracts. TR at 719. When she was initially hired by Fernandez Farms, Inc., Ms. Nunez anticipated spending two to three days a week in the fields with the H-2A workers and the rest of her time in the office. TR at 720. In 2010, however, she said that she stayed in the office "99 percent" of the time working on compliance and HR issues. TR at 720. She was also responsible for taking calls from workers referred by the EDD. TR at 722. She said that she created a spreadsheet to keep track of the referral calls in 2010. TR at 722; RX R at GF002730. Ms. Nunez did not recognize another spreadsheet which listed some referral information. TR at 724; RX R at GF003264. Ms. Nunez established a practice at Fernandez Farms, Inc., of following-up with each referral call, and sent any contracts which were requested by certified mail. TR at 725. In 2010, Ms. Nunez said she had no more than 10 referrals from the EDD, and only one of them came to work at Fernandez Farms, Inc. TR at 728. She also created a document listing domestic workers from the previous year, but did not contact them herself and she said Mr. Escobar, Celia Fernandez, and Ms. Gomez made the calls. TR at 729. She also said that she did not keep any record of contacts made with workers from the prior year, and that Fernandez Farms, Inc., had not kept such records in the past. TR at 737. When a domestic worker contacted her, Ms. Nunez first offered the worker the opportunity to work in the same position and fields as the H-2A workers. TR at 734. If the worker declined, they could do the same work at a different rate of pay and not under the H-2A contract. TR at 735, 736. Of the five individuals identified by the Administrator as having been improperly rejected in 2011, Ms. Nunez recognized only the name of Steven Andrews, which she remembered because he had asked if not speaking Spanish would be a problem. TR at 727-29.

72. Ms. Nunez said that she was involved in payroll, and found a way to adapt the accounting system used by Fernandez Farms, Inc., to create a detailed check stub, and said that she did not recall any paychecks being distributed in addition to weekly paychecks. TR at 731-32. Ms. Nunez also helped to monitor the status of the employee housing at Fernandez Farms, Inc., and said that no employees were charged rent for housing. TR at 729-30. She did not see anyone from Fernandez Farms, Inc., collect payments from H-2A workers in 2010, and said that she had no knowledge of practices in 2011. TR at 730, 741-42. She said that while the contract specified that H-2A workers would work only at Royal Ranch, in 2010, half of the H-2A workers were also at the Blackie Road location, and that Ms. Gomez was the supervisor for both locations. TR at 754-55; AX 1 at 1.

73. In May of 2011, Ms. Nunez was employed for one week by Fernandez Farms, Inc., as a consultant. TR at 701. Respondent and Angel Carrasco drove Ms. Nunez to Nogales where she spent four days providing orientation to H-2A workers, collected files with contracts, made sure that the employee's personnel files were complete, and performing essentially the same tasks that she had in 2010. TR at 702, 721, 742-43. Ms. Nunez said that there were less than 100 workers at the orientation in Nogales in 2011. TR at 721. She signed the H-2A contracts, and explained that in 2010 and 2011, she would backdate the contracts based on her memory of when the worker crossed the border if the signature page was given to her undated. TR at 740, 749; RX I. Ms. Nunez

engaged in this practice even if she did not get the signature pages until after the workers had begun working. TR at 750-51. She said that many of the dates would be May 3, May 4, May 19, and June 2, since those were the dates of her trips to Mexico. TR at 752. When she returned to Watsonville, she gave all of the materials she had collected to Mr. Escobar. TR at 721. Mr. Escobar ran the H-2A program at Fernandez Farms, Inc., in 2011, and Ms. Nunez said that she taught him about the H-2A program but was not sure if he was paying attention. TR at 735. When she visited Fernandez Farms, Inc., in 2011, she noticed that the H-2A files were not being kept up properly. TR at 739.

Respondent

74. Respondent has been in the business of growing strawberries since 1989, incorporated Fernandez Farms, Inc., in 2007 or 2008, and was the president of Fernandez Farms, Inc., in 2010 and 2011. TR at 765, 767. His duties included checking the land on which crops would grow, checking on plants and planting, and overseeing the application of fertilizers and pesticides. TR at 767. He said that he cannot read. TR at 829. He made the decision to begin using H-2A workers in 2008, and was audited by the Department of Labor for 2008 and 2009, and was told that his practices in re-hiring H-2A workers and offering jobs to prior domestic workers were satisfactory. TR at 767, 772. Respondent said he would call prior year domestic workers or their families and tell them that work would be available on a certain date. TR at 773. He did not keep any written records of his contacts, and said that the Department of Labor auditors were aware of this practice and did not object. TR at 773. He followed the same practices in 2010 and 2011. TR at 773. Respondent sent letters, which he signed, to the U.S. Department of Labor Employment and Training Administration which outlined the additional recruiting efforts taken through the point at which the H-2A contract period was 50% complete. AX 21, 22. The August 15, 2011, letter attested that print ads were published in Arizona, Oregon, and Washington newspapers. AX 22 at 1858. According to the letter, Respondent received 16 referrals and one call in applicant, and only one applicant applied for a job. AX 22 at 1859-60. The letter also attested that Respondent had contacted the prior year workers by word of mouth and by a written request one week prior to the date of need, and included a list of the names and addresses of workers contacted. AX 22 at 1859, 1861-63. There was no indication whether any prior workers had returned in 2011, contacted Respondent or provided reasons for not returning. A similar letter sent in 2010 indicated that 70% of the prior year workers had returned that season. AX 21 at 1845.

75. Respondent denied traveling to Mexico to recruit H-2A workers, but said that he travelled to Nogales in 2010 and 2011 to meet with H-2A workers. TR at 798-99. Respondent denied saying anything to the workers before their visa interviews, claiming that he did not know the procedures. TR at 799. Respondent said that he paid the visa and travel expenses for the H-2A workers in 2010 and 2011, and did not receive any reimbursements or instruct Ms. Gomez, Celia Fernandez, or Mr. Escobar to collect any reimbursements. TR at 799-800, 831.

76. In 2010 and 2011, H-2A workers were stationed at Royal Ranch and at Blackie Road, and no domestic workers were stationed at either location. TR at 768. Mr. Fernandez said that housing in 2010 and 2011 was located at Royal Ranch, Encinal, a place called Holly, located in William, and a fourth location which Mr. Fernandez could not recall. TR at 797. He did not know whether Ms. Gomez, Celia Fernandez, or Mr. Escobar had collected rent from any H-2A workers, and that he did not authorize any of them to collect rent. TR at 797-98, 831.

77. Respondent said that the extra punch was proposed by Manuel Reyes and other H-2A workers, who told him that other ranchers were complaining that Respondent was paying more and suggested the extra punch as a way to mollify the other ranchers. TR at 801-02. Respondent said that the workers were concerned that other ranchers were saying negative things about him due to the higher wages he was paying. TR at 828-29. He also said that in early 2011 that the H-2A workers suggested electing crew representatives, and requested that the differential check be given at the end of each month as a means of saving the money. TR at 803-04. He said that the differential checks were mostly for amounts of less than $100, and that the workers wanted to save on check cashing fees and usually cashed the differential checks when they were about to return to Mexico. TR at 823-24. Some of the differential checks were cashed by his friend Jorge Castro, some workers did not cash any check during an entire season, and some returned to Mexico and left their checks for someone else to cash on their behalf. TR at 824-25.

78. During the Department of Labor investigation in 2011, Respondent was present in the fields while the investigators spoke with employees. TR at 807. The investigators identified the worker with whom they wanted to speak and Ms. Gomez would bring the worker. TR at 807. The investigators spoke to the workers separately away from other workers. TR at 807. Respondent denied telling the workers what to say to the investigators, and said that he did not think that Ms. Gomez, Celia Fernandez, or Mr. Escobar told the workers what to say. TR at 808. Respondent said that he initially thought that the investigators were inquiring into how the H-2A workers were treated and paid. TR at 809. After the first day of the investigation, he said that three workers who were interviewed told him and Ms. Gomez that they had been offered money by the investigators and asked whether they had been charged to come to Fernandez Farms or charged for rent. TR at 809. Respondent identified one of the workers as Audelel Zamora, and said that Mr. Zamora told him that the investigators had said that if Mr. Zamora were to tell them that he was being charged rent or other expenses he would receive money. TR at 810. Fernandez Farms, Inc., does not have any record of an H-2A worker named Audelel Zamora. TR at 832. Respondent said that most of the workers did not want to speak with the investigators, and that after the first day of the investigation some of the workers told him that the investigators spoke to them "in a strong manner" told them not to be afraid and not to cover up anything, and were being treated like liars. TR at 812, 814. There were no complaints from workers on the subsequent days of the investigation. TR at 814. Respondent asked Mr. Eastwood, who was a Department of Labor investigator at that time, why the investigators were treating the workers badly and offering them money, but Mr. Eastwood denied mistreating the workers or offering them money. TR at 814.

79. After the first day of the investigation, Respondent held a meeting with the workers, and asked them how they were treated, and the workers said that they were treated fine. TR at 812. Respondent denied requesting letters praising his character from former workers, and said that he had not seen or heard of them prior to his February 13, 2015, deposition in connection with this matter. TR at 815-16; AX 13, 13A; AX 15, 15A; AX 48 at 3225-26. In the letters pertaining to Respondent's character, former H-2A workers praise Respondent's kindness and responsibility, and thank him for providing work. *See, e.g.*, AX, 13, 13A; AX 14 at 1561, 1566, 1571, 1581, 1586, 1591; AX 15, 15A.[14] The letters describe Respondent as a friendly and down to earth boss. *E.g.* AX 14 at 1564, 1568, 1617. A number of the letters also express hopes that the H-2A program continues. *E.g.*, AX 14 at 1588.

[14] I reviewed all of the translated letters and find them to consistently attest to Respondent's good qualities as an employer, but do not address any of the alleged violations of the H-2A program.

80. Respondent said that the IRS mistakenly applied a lien to his bank accounts three times, all related to an erroneous refund. TR at 817. Because of the liens, stores would not cash checks from Fernandez Farms, Inc., so an IRS representative, whose name Respondent could not remember, told him to find out which stores had cashed Respondent's checks and to reimburse the stores in cash for taking the paychecks. TR at 818. After paying the stores in cash, Respondent would take the checks, and the checks would not go through any bank. TR at 818-19. Respondent had this arrangement with three or four stores and with Mr. Castro. TR at 819. He said that the problem with the tax lien continued for three years, and that between 2010 and 2011, several employees told him that their paychecks had bounced. TR at 820. Respondent kept the checks he redeemed from the stores and Mr. Castro, and as of the hearing thought that he still had them. TR at 821, 833. He did not provide the checks to the Department of Labor because he understood that only records from the bank were requested. TR at 833.

81. Respondent said that Ms. Gomez told him in 2010 that the IRS was demanding a payment of $30,000 from her, and that at the end of 2011 she told him that the problem was fixed. TR at 822. He said that in 2012, Ms. Gomez asked to borrow money from him while she was going through a divorce. TR at 822.

Lucia Fernandez

82. Lucia Fernandez, Respondent's daughter, testified that two or three times a week for up to three years Respondent brought in stacks of un-cashed paychecks which were stored in several large boxes in the garage. TR at 866-67. She said that, after a purported break-in 2013, she decided to shred the checks out of fear that someone would steal and try to cash the checks, which had been endorsed by the workers. TR at 867, 870. There was no police report filed after the break-in, or signs of forced entry. TR at 870. She said that she was not aware of the Department of Labor investigation when she destroyed the checks. TR at 869-70. She did not tell anyone else before shredding the checks, but her mother saw her shred them and thought that it would be okay. TR at 872-73.

Alberto Raymond-Wage and Hour Division Investigator

83. Alberto Raymond, who, at the time of the hearing was an Assistant District Director at the U.S. Department of Labor Wage and Hour Division, San Francisco Office, worked as an investigator for the Wage and Hour Division from 1997 through 2010 before becoming an Assistant District Director. TR at 196. Mr. Raymond supervised the investigation of Respondent, and in the course of doing so, went out in the field with investigators, spoke with stakeholders, conducted interviews, toured facilities, and met with the State Workforce Agency. TR at 197. He also relied on reports, interviews, and exhibits prepared by field investigators. TR at 244. Mr. Raymond assessed the civil money penalties after he considered seven factors listed in 29 C.F.R. § 501.19(b), which mitigate the severity of the violations. TR at 198, 200. For all of the violations, he determined that the first factor, whether the employer had a history of prior violations, was mitigating. TR at 200, 205. For all violations except for those related to housing, he found that the sixth factor, commitment to future compliance, was not mitigating. TR at 202-03, 207-08, 211.

84. The Administrator determined that there were five U.S. workers rejected in 2011 harvest season, and were owed $51,911.21 in back wages. Mr. Raymond also assessed a civil money penalty with a base amount of $5,000 multiplied by five employees affected, and thought that $45,000 was

an appropriate amount based on mitigating factors which included the lack of history of violations, the number of workers affected, and the direct effect on workers' wages. TR at 200-04; AX 72. Mr. Raymond initially thought Respondent's commitment to future compliance was a mitigating factor, but he no longer considered that factor mitigating because there was no actual effort made to comply. TR at 202-03.

85. The Administrator found that deficient housing at Fernandez Farms, Inc., affected workers' safety and health. TR at 204. It identified a makeshift kitchen inside the shop [15] at Royal Ranch without a wall to protect it from the elements, as well as overcrowding and issues with screens and ditches. TR at 204. Mr. Raymond assessed a civil money penalty of $1,500 base rate, which was reduced to $600 after finding mitigation, including lack of prior violations, the number of workers affected, and Respondent's agreement to remedy the situation, Respondent's explanation that the State Workforce Agency had done a preoccupancy approval review of the housing, and had taken actual steps to remedy the situation to be mitigating factors. TR at 205-09; AX 72.

86. The Administrator found that Respondent failed to comply with earning records requirements that employer record piece rate earnings and other hours worked by H-2A employees. TR at 209. Mr. Raymond assessed a civil money penalty of $1,500 base rate, which was reduced to $600 after finding mitigation for the lack of prior violations. TR at 205, 209-12; AX 72.

87. The Administrator found that Respondent failed to comply with requirements that pay statements account for all hours worked and for piece rate earnings. TR at 213. Mr. Raymond assessed a civil money penalty of $1,500 base rate, which was reduced to $600 after finding that the lack of prior violations was the only mitigating factor. TR at 205, 214-16; AX 72.

88. The Administrator found that Respondent failed to provide workers with a copy of the job order at the time of visa issuance and failed to provide copies of the job order to corresponding workers. TR at 216. He found that 362 workers were affected in the 2011 season, and that the lack of prior violations, the good faith effort of Respondent to comply by providing a copy of the job order to workers when they arrived at the farm, and the explanation that Respondent did not understand which positions constituted corresponding employment were mitigating factors. TR at 205, 216-19. Mr. Raymond calculated a civil money penalty against Respondent using the $1,500 base amount of the penalty for 362 violations was $543,000, and, taking into account mitigating factors, assessed a civil money penalty of $217,200 for that violation. TR at 216-17, 219-20; AX 72.

89. The Administrator found that Respondent failed to pay its workers the proper rates guaranteed by the 2010 and 2011 contracts and owed $421,401.58 in back wages. TR at 220-21. Mr. Raymond assessed a civil money penalty using the base penalty rate in 2010 of $1,000 per worker for 119 workers affected, giving a penalty of $119,000. TR at 224. Mr. Raymond also assessed a civil money penalty using the base penalty rate in 2011 of $1,500 per worker for 330 employees affected, giving a penalty of $495,000. TR at 224; AX 72. He found that the lack of history of previous violations was the only mitigating factor. TR at 205, 221-23. The total civil money penalty assessed, after taking into account mitigating factors, for 2010 and 2011 combined was $368,400. TR at 224; AX 72.

[15] Mr. Raymond and the EDD refer to this building as a barn, while Respondent and the H-2A workers generally call it the "shop." For consistency, I refer to this Royal Ranch structure as the "shop."

90. The Administrator found that Respondent failed to contact 92 prior U.S. workers for the 2011 contract. TR at 225. Mr. Raymond assessed a civil money penalty using the base penalty of $1,500 per worker, for a total base fine of $138,000 for the 92 affected workers. TR at 228. He found that the only mitigating factor was the lack of history of prior violations. TR at 205, 225-28. The total penalty assessed, taking into account the mitigating factors, was $96,600. TR at 228-29; AX 72.

91. The Administrator found that Respondent failed to comply in 2010 and 2011 with California overtime laws, and owed $45,468.40 in back overtime wages. TR at 229. Mr. Raymond assessed a civil money penalty using the base penalty of $1,000 in 2010 and $1,500 in 2011, for a base penalty of $2,500 for both years. TR at 232. Mr. Raymond found mitigating factors including the lack of history of prior violations, good faith efforts to comply by paying overtime on the $5 per hour wage paid to employees, and Respondent's explanation that he did not understand how to calculate the proper overtime rate to be mitigating factors. TR at 205, 229-31. Considering the mitigating factors, the total civil money penalty assessed was $1,250. TR at 232; AX 72.

92. The Administrator found that Respondent failed to comply with the prohibition against requiring H-2A workers to pay fees to their employers, and the workers unlawfully paid kickbacks to Respondent in the form of visa fees for 2010 and 2011 totaling $410,850. TR at 232, 242. Mr. Raymond assessed a civil money penalty for the violation using the base penalty in 2010 of $1,000 per employee totaling $114,000 for the 114 affected employees. TR at 235. He assessed a base civil money penalty using the base penalty in 2011 of $1,500 per employee totaling $202,500 for the 135 affected employees. TR at 235. Mr. Raymond found a lack of history of previous violations was the only mitigating factor. TR at 205, 233-35. The total civil money penalty assessed, taking into account mitigating factors, for 2010 and 2011 was $284,850. TR at 235.

93. The Administrator found that Respondent failed to provide no cost housing to H-2A workers and required them to pay rent for housing in 2010 and 2011. TR at 236. The workers were owed $76,625 in 2010 and $103,125 in 2011, for a total of $179,750 for improperly collected rent. TR at 236. Mr. Raymond assessed a civil money penalty for the violation using the base penalty in 2010 of $1,000 per employee totaling $111,000 for the 111 affected employees. TR at 241. He assessed a base civil money penalty using the base penalty in 2011 of $1,500 per employee totaling $199,500 for the 133 affected employees. TR at 241. Mr. Raymond found that the lack of history of previous violations was the only mitigating factor. TR at 205, 237-41. The total civil money penalty assessed for 2010 and 2011, taking into account mitigating factors, was $279,450. TR at 235.

94. The total amount owed to the affected workers is $1,109,381.19.[16] AX 72. The total amount assessed in civil money penalties was $1,293,950.[17] AX 72.

Michael Eastwood-Assistant District Director, Wage and Hour Division

95. Michael Eastwood is currently an Assistant District Director for the U.S. Department of Labor Wage and Hour Division, and worked as an Investigator from 2005 to 2012, and as a Senior Investigator Advisor from 2012 to 2013. TR at 265-66. He conducted investigations of Respondent

[16] $421,401.58 + $45,468.40 + $410,850.00 + $179,750.00 + $51,911.21 = $1,109,381.19. F.F. ¶¶ 84, 89, 91-93.
[17] $1,294,550 Administrator penalties (F.F. ¶¶ 84, 86-93) - $600 OSHA housing penalty (F.F. ¶ 85) = $1,293,950.

in 2010 and 2011, including reviewing payroll records, pay stubs and records of information from pay stubs, time sheets, contracts, and job orders. TR at 270-71.

96. Mr. Eastwood prepared summaries of Respondent's payroll records for 2010 and 2011, which showed that 16 corresponding workers and 23 H-2A workers had at least one pay stub which did not show their hours. TR at 272; AX 7-8; AX 9 at 1535. Mr. Eastwood also concluded that 119 workers in 2010 and 330 workers in 2011 were subject to pay violations which support civil money penalties. TR at 274-75; AX 10 at 1537. He included only instances where a worker was paid entirely based on a piece rate with no hours shown on a paycheck. TR at 400. Mr. Eastwood also prepared summaries of the alleged housing and visa violations, and concluded that 111 housing and 114 visa violations occurred in 2010 and 133 housing and 134 visa violations occurred in 2011. TR at 275; AX 11 at 1552.

97. Mr. Eastwood said that his investigation of Respondent's payroll records showed that in some cases where a special piece rate was being paid, the records did not show the number of hours worked. TR at 397. Some records showed that, at times, a pay period would include days with special piece rates and no hours worked, as well as days paid at the normal piece rate and showing the hours worked. TR at 400. When calculating violations, Mr. Eastwood did not include work weeks which listed only some hours. TR at 400. He explained that he calculated the amount of overtime not paid by determining the overtime premium on the AEWR, which he said was $5.15 per hour. TR at 424. He also calculated an overtime premium for hours when a worker earned more than the AEWR, since he thought that the overtime rate to be paid should have been based on the worker's actual earnings. TR at 423. He calculated an overtime premium for a wage which was higher than the AEWR only when a worker's average hourly earnings during a given week were higher than the AEWR. TR at 425. Mr. Eastwood relied on Respondent's records, which marked certain hours as overtime, to determine overtime hours. TR at 426. He noted that in some circumstances, where employees worked more than 60 hours per week but were improperly marked as not having performed overtime work, his methodology could lead to an underpayment of overtime pay. TR at 426. He used California overtime rules when calculating overtime owed, which pay 100 percent of the hourly wage rate after 10 hours of work per day or 60 hours per week. TR at 394.

98. In the course of inspecting housing at Royal Ranch, Mr. Eastwood found a number of issues, including standing water, missing door and window screens, and overcrowding, but did not cite those problems as serious. TR at 440. He said that he did find a failure to provide protection from the elements for rooms and spaces, including a kitchen and seating area, on the first floor on the "shop." TR at 441. Further, the inside areas of the Royal Ranch shop containing those areas was not closed off from the outside and was not suitable for keeping out pests or providing protection from heat or cold. *Id.*

99. Mr. Eastwood also interviewed five local workers who had been referred to Fernandez Farms, Inc., by the EDD for the 2011 season. TR at 407. The five workers were Steven Andrews, Nelson Barraza Hernandez, Antonio Cardoso, Eliser Garcia, and Jose Ramirez. AX 29 at 1918-22. Except for Mr. Ramirez, all of the workers were referred to Fernandez Farms, Inc., prior to the start of the season and would have been available to start work on May 1, 2011 AX 29 at 1918-22. Mr. Eastwood spoke to a job placement coordinator at EDD who said that when the EDD contacted Respondent, the person answering the phone would at first confirm that he or she represented Fernandez Farms, Inc., but claim that it was the wrong number after the party seeking employment

clarified that they were a local worker. TR at 407. The outreach worker verified that multiple attempts had been made to reach Fernandez Farms, Inc. TR at 407.

100. Mr. Eastwood said that Mr. Andrews submitted an application to Fernandez Farms, Inc., through an EDD outreach worker, and that EDD records show that Respondent was contacted and were expected to call with a start date. TR at 408; AX 26 at 1881. Mr. Eastwood calculated that, based on the average hours of workers who completed the 2011 season, Mr. Andrews was owed $17,521.14. TR at 408-10; AX 29 at 1918, 19, 33.

101. EDD records showed that Mr. Barraza Hernandez was referred to Fernandez Farms, Inc., and told that the representative was not in, but would contact him for an interview. AX 26 at 1880. Mr. Barraza Hernandez told Mr. Eastwood that he filled out an application in person at Royal Ranch, and was able to describe the trailers there, but was told that Respondent already had enough workers for the growing season. TR at 410. Based on the average number of hours worked in 2011, but also taking into account Mr. Barraza Hernandez' earnings of $6,825.00 from other work during the 2011 season, Mr. Eastwood calculated that Mr. Barraza Hernandez was owed $10,696.14. TR at 411; AX 29 at 1919.

102. Mr. Cardoso told Mr. Eastwood that he applied to Fernandez Farms, Inc., but did not hear anything back. TR at 411-12. EDD records state that Fernandez Farms, Inc., was contacted on Mr. Cardoso's behalf, and Mr. Cardoso should expect a call. AX 26 at 1879. Mr. Eastwood calculated that Mr. Cardoso was owed back wages of $881.143, based on the average number of hours worked in 2011 and Mr. Cardoso's earnings of $16,640. TR at 412, AX 29 at 1920.

103. Mr. Garcia told Mr. Eastwood that he called Fernandez Farms, Inc., multiple times and was eventually told that they only wanted outside workers, which Mr. Eastwood assumed meant H-2A workers. TR at 412. EDD records show that Mr. Garcia contacted Fernandez Farms, Inc., and was told to complete and return a form which he did not receive. AX 26 at 1883. Mr. Eastwood calculated that Mr. Garcia was due back wages of $8,971.14, based on the average hours worked in 2011 and Mr. Garcia's earnings of $8,550. TR at 412; AX 29 at 1921.

104. Mr. Ramirez told Mr. Eastwood that he attempted to contact Fernandez Farms, Inc., multiple times and was told to expect an application but never received one. TR at 412-13. EDD records indicate that Mr. Ramirez was referred to Fernandez Farms, Inc., on June 6, 2011. AX 26 at 1884. Mr. Ramirez had no other earnings in 2011, so, based on the average number of hours worked in 2011 and a June 15, 2011, start date, Mr. Eastwood calculated that Mr. Ramirez was owed $13,841.65 in back wages. TR at 413; AX 29 at 1922. The total amount owed to the rejected domestic workers is $51,911.21.

Brian Minns-Forensic Accountant for Respondent

105. Brian Minns, Respondent's expert, is a licensed CPA and the director at Dolan Xitco Consulting Group, a forensic accounting and economic consulting firm. TR at 875. He has worked in forensic accounting since 2000. TR at 876. To prepare his report, Mr. Minns reviewed and relied on payroll records, employment contracts, the application and certification for H-2A regulated compensation, statements from Respondent and Mr. Escobar, a Dole sales summary from 2011, the Department of Labor's calculation of damages, and a list of 65 individuals not entitled to H-2A compensation provided to him by Respondent. TR at 878.

106. To determine whether Respondent paid workers the correct amounts, Mr. Minns compared what workers were actually paid, including payments allegedly made to meet the AEWR, with what workers would have been paid based on the AEWR. TR at 879-81. Based on his calculations, Mr. Minns concluded that the net amount paid to all H-2A workers by Fernandez Farms, Inc., in 2010 and 2011 was greater than the required minimum. TR at 882; RX O, Ex. M. This calculation offset underpayments to some employees with overpayments to others, and Mr. Minns performed the calculation to demonstrate that Respondent did not financially benefit. TR at 882-83. Calculating on a weekly basis for each employee, with underpayments and overpayments in different weeks not setting off each other, Mr. Minns concluded that in the 2010 and 2011 seasons, H-2A workers were underpaid by a cumulative $45,324. TR at 886-87. Using the same methodology, he calculated that domestic workers were underpaid $92,739 in 2010 and 2011 combined. TR at 888-89. Mr. Minns produced an example calculation using his methodology for Leo Abrego. TR at 892; RX O, Ex. O. Mr. Minns, relying on Respondent's statement, determined the number of boxes actually picked by adjusting downward the number of boxes paid to account for the extra punch after eight boxes. TR at 895. Applying a weekly calculation, Mr. Minns determined that Mr. Abrego was paid $266.77 more than the AEWR minimum for his work in 2010 and 2011, combined. TR at 902. Mr. Minns determined that if the 65 workers identified as not entitled to H-2A compensation were included in the total, an additional $103,203 in unpaid wages would be owed. TR at 904-05. In total, and inclusive of overtime and exclusive of the 65 workers, Mr. Minns concluded that on a weekly basis, Respondent underpaid $138,063 in wages. TR at 907.

107. Mr. Minns counted piece rate amounts of more than 90 cents per box against any deficiency in wages. TR at 915. He excluded weeks where only a piece rate and no hours were shown in the wage records. TR at 916. He did not exclude pay periods where a special piece rate was in effect for part of the time and the regular rate for the rest of the time. TR at 930. He admitted that, in one such week, his methodology would yield an hourly rate of $434.07,[18] with 1.5 hours worked and 239 boxes picked. TR at 930-36. Mr. Minns assumed that workers received an extra punch after eight boxes, and adjusted the number of boxes picked by each worker downwards to 88.89% of the total listed on the payroll records. TR at 895. He then compared the total number of boxes picked and paid for in 2011, according to the payroll, with the number of boxes sold to Dole that same year, and found that the number of boxes picked was 82% of the number of boxes sold. TR at 945-46, 49; RX G at GF06157. The Dole Sales Summary which Mr. Minns reviewed indicated that Respondent sold 693,579 units of Dole Strawberry 1#, 149,579 units of Dole Strawberry 2#, 105,257 units of Dole Strawberry 4#, 717 units of Dole Strawberry Stem, 28 units of Dole Strawberry Half Flat, and 26,008 units of Dole Strawberry 12 Pint. AX G at GF026157. The Dole Sales Summary showed a total of 975,168 units sold, and a total crate equivalent of 984,512 units sold. *Id.* Mr. Minns used 88.89% as a conservative estimate because it corresponds to a one-ninth reduction. TR at 950, 952-53. Mr. Minns said that he has no particular expertise in strawberry production, did not know whether Dole and Respondent counted units in the same manner, and did not know to what the various categories of strawberries on the Dole Summary referred. TR at 950-51.

[18] This point made by the Administrator was particularly convincing. By not taking into account the special piece rates, for which no hours were ever recorded, Mr. Minns' calculations were skewed.

California EDD Housing Inspection Reports

108. An August 15, 2011, Luz Marie Juarez of the California EDD inspected a double-wide trailer at Royal Ranch used by H-2A workers and found that Respondent had too many bunk beds in one room. RX S at DOL 1421. The inspection also found that a permanent trailer had exposed wiring, no ceiling light, too many bunk beds in one room, workers cooking inside of one bedroom with a portable stove, and torn screens. RX S at DOL 1423. The shop had an inflatable bed downstairs and too many beds in rooms upstairs. RX S at DOL 1426-27. The inspection did not note any issues with the kitchen. A hand drawn floor plan of the shop showed no wall or door closing off the inside of the shop, but with the kitchen in a separate room with a door, bedrooms that were also closed off with doors, and the downstairs shop space up to a staircase is marked as "open storage." RX S at DOL 1424.

109. On October 20, 2011, Lonnie Holmes and Mike Tumbaga, inspectors for the Wage and Hour Division, inspected the H-2A housing at Royal Ranch and identified inadequate drainage in the back of one unit, ditches which needed to be filled, garbage and other debris on the ground, a lack of storage space for workers, inadequate separation of beds and bunkbeds, missing window screens and a complete absence of screen doors, as well as food left out in the open, including uncooked chicken. RX S at DOL 1404-1418. The inspection included whether cooking facilities used in common were provided in an enclosed and screened shelter, and the inspection report had only "N/A" marked regarding that issue. RX S at DOL 1408. A picture of the Royal Ranch shop, which Mr. Eastwood said was taken during the October 2011 investigation, showed a low wooden building with an open wall partly covered by a ragged blue tarp. TR at 441; AX 23 at 1864. A second picture showed a staircase leading upward with a refrigerator visible to the right. AX 23 at 1864. In the second picture, a chair and doorway are visible to the left of the staircase. *Id.* The pictures are consistent with the hand drawn floor plan attached to the EDD report.

IV. Legal Conclusions and Analysis

The H-2A visa program arose out of the Immigration and Nationality Act of 1952, which was amended in 1986 to create separate agricultural and non-agricultural temporary foreign worker programs. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). An H-2A worker is an alien "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services." 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Under the H-2A program, aliens may receive visas to work temporarily in the United States when domestic workers who are able, willing, and qualified are not available at the time and place where agricultural labor and services are needed. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(a), (c); 20 C.F.R Part 655, Subpart B. An employer participating in the H-2A program must arrange to house temporary foreign workers, provide them with workers' compensation insurance, provide necessary tools, meals, and transportation, guarantee a number of paid work days at the prevailing wage rates, pay workers at frequent intervals, and keep records to demonstrate compliance with all requirements. 29 C.F.R. Part 655 Subpart B.

The Secretary of Labor, through the Wage and Hour Administrator, enforces the wages and working conditions which implement the H-2A program. 8 U.S.C. § 1188(g)(2); 29 C.F.R. §§ 501.1(c). Failure to abide by the regulations may result in proceedings for specific performance and injunctive or other equitable relief, as well as civil money penalties and debarment from participating in the H-2A program. *In the Matter of Global Horizons, Inc.*, ALJ No. 2006-TLC-00013, slip op. at 4

(ALJ Nov. 30, 2006). When it determines that there has been a violation of the H-2A program, the Administrator shall institute enforcement actions, including administrative proceedings to recover unpaid wages, enforce provisions of the H-2A contract, assess a civil money penalty, make whole a person who has been discriminated against, make whole or reinstate any U.S. worker who has been improperly rejected, laid off, or displaced, or debar an employer or person for up to 3 years. 29 C.F.R. § 501.16. The decision of an Administrative Law Judge following review of the Administrator's determination may affirm, deny, reverse, or modify, in whole or in part, the determination, and shall constitute the final agency order unless the Administrative Review Board elects to review the decision. 29 C.F.R. § 501.41(b), (d).

On March 15, 2010, revised regulations governing the H-2A program went into effect and apply to the 2011 contract. 75 Fed. Reg. 6884, 6959 (Feb. 12, 2010). The prior regulations went into effect on January 17, 2009. 73 Fed. Reg. 77110, 77207 (Dec. 18, 2008). The 2010 H-2A contract in this matter is controlled by the 2008 regulations, while the 2011 H-2A contract is controlled by the 2010 regulations.

A. *Burden of Proof*

In *Anderson v. Mt. Clemens Pottery Co.*, the Supreme Court determined that, in an action to recover unpaid wages under the Fair Labor Standards Act ("FLSA"), an employee need not provide comprehensive and exact evidence of unpaid wages. 328 U.S. 680, 686-89 (1946). The FLSA requires an employer "to keep proper records of wages, hours and other conditions and practices of employment" and the employer is in a much better position than the employee to maintain such records. *Id.* at 687. When an employer has not kept accurate records, the Court determined that placing the burden of proving damages with exactness would be an "impossible hurdle for the employee." *Id.* Instead, the employee need only show that they performed work for which they did not receive proper wages, and provide "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* The burden then shifts to the employer to rebut the existence or extent of violations. *Id.* at 687-88. Testimony from some employees may be sufficient to create a "just and reasonable inference" that non-testifying employees were also subject to violations under the *Mt. Clemens Pottery* standard. *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988).

The Board has applied the *Mt. Clemens Pottery* standard in non-FLSA contexts where labor statutes require the payment of specific wages. In *Pythagoras General Contracting Corp v. Administrator, Wage & Hour Division*, a case arising under the Davis-Bacon Act, the Board upheld the ALJ's calculation of back wages based on an average, citing *Mt. Clemens Pottery Co.* ARB Nos. 08-107, 09-007, ALJ No. 2005-DBA-014, slip op. at (ARB Feb. 10, 2011) (reissued Mar. 1, 2011). The Board has also applied the *Mt. Clemens Pottery* standard in cases arising under the H-1B provisions. *Admin'r, Wage & Hour Div. v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 033, ALJ No. 2001-LCA-29, slip op. at 7-8 (ARB June 30, 2005). When a statute requires an employer to "maintain sufficient and accurate documentation to demonstrate that they are abiding by the contours of the governing law," employees should not be penalized because the employer has failed to maintain truthful documentation. *Admin'r, Wage & Hour Div. v. Greater Missouri Medical Pro-Care Providers, Inc.*, ARB No. 12-015, ALJ No. 2008-LCA-026, slip op. at 22 (ARB Jan. 29, 2014).

While the Board has not specifically applied the *Mt. Clemens Pottery* scheme to H-2A enforcement actions, the same considerations which support its usage in FLSA, Davis-Bacon Act,

and H-1B actions apply here. The H-2A program requires that participating employers maintain documentation of hours worked and wages paid. 20 C.F.R. § 655.122(j). H-2A employees are no more likely to maintain their own wage records than domestic workers. Like the FLSA, Davis Bacon Act, and H-1B programs, the H-2A program provides protections to workers. Therefore, the *Mt. Clemens Pottery* standard is the appropriate burden of proof and will be applied in this matter.

B. *Credibility Determinations*

After a comparison of the entire record, I find that the Administrator's witnesses are entitled to more weight and were more credible than the witnesses offered by Respondent.

Respondent's arguments that he did not commit the violations alleged by the Administrator are largely based on the testimony of Respondent, Ms. Nunez, Celia Fernandez, Mr. Escobar, Mr. Calderon, Mr. Garcia, Mr. Silva, and Mr. Gomez. Except for Ms. Nunez, all are currently employed by or involved with Royal Berry Farms or CFE Farms, which are operated by Mr. Escobar and Celia Fernandez, respectively. CFE Farms rents land from Respondent, Royal Berry Farms uses an office at the Royal Ranch with Respondent's permission, and both use workers who were formerly employed by Fernandez Farms, Inc. F.F. ¶¶ 55, 56. Additionally, Mr. Escobar is Respondent's nephew, and Celia Fernandez is Respondent's sister. Stipulated Facts ¶¶ 32, 34. The substantial business, economic, and social ties between Mr. Escobar, Celia Fernandez, and Respondent demonstrate a significant bias and call into question their credibility in this matter.

Further, Mr. Escobar also denied having much contact with H-2A workers, yet still claimed to remember their duties and the identities of crew chiefs and other workers. F.F. ¶¶ 58, 65. His testimony that he had no knowledge of payments from workers conflicted with the testimony of Ms. Gomez and Yolanda Barcenas. *Compare* F.F. ¶¶ 60-61, 64-65, 68 *with* F.F. ¶¶ 7, 8, 14. His testimony tended to minimize his role in Respondent's business, even though the evidence strongly established that he was the office manager and played an active role with the H-2A workers. He was not candid or forthright in this testimony. I find his testimony entitled to significantly less weight than the individual workers, which tended to be better supported in the record.

I find the same is true for Celia Fernandez. She denied having ever supervised H-2A workers, which is contrary to testimony from Ms. Gomez and several H-2A workers. *Compare* F.F. ¶ 53 *with* F.F. ¶¶ 4, 15, 18, 36. Her testimony was not as credible as the individual workers, whose testimony was better supported in the record. Her blanket denial of involvement with the workers and operations at Fernandez Farms, Inc., was contrary to the evidence in the record, and simply not believable. Given her bias, and the contradiction between her testimony and other more credible witnesses, I find her testimony entitled to significantly less weight than the other witnesses.

I find that the testimony of Mr. Escobar and Celia Fernandez, given their conflicting interests in this matter and the contrary testimony of Ms. Gomez and the H-2A workers offered by the Administrator, which was more persuasive and found independent support in the record, is less credible, and to the extent that their testimony conflicts with other witnesses, I find that their testimony is entitled to less weight and I believe the other witness.

Respondent denied taking or instructing others to take payments from H-2A workers, which directly contradicts the testimony of Ms. Gomez and the H-2A workers offered by the Administrator. F.F. ¶¶ 75, 76. Respondent also said that differential checks were issued but that he

held them for workers until the end of the season to save on check cashing fees and to save money. F.F. ¶ 77. The testimony of H-2A workers established that a flat rate of 1% was generally charged to cash checks, so there would be no advantage in waiting until the end of the season to be paid. F.F. ¶¶16, 51. It is a stretch of the imagination to credit Respondent's claim that H-2A workers, some of whom arrived at Royal Ranch needing to borrow money for clothes and toiletries, would wait to cash paychecks for months at a time. *See* F.F. ¶ 40. Respondent alleged that, in the course of the Wage and Hour Division investigation in 2011, investigators offered money to workers to make statements. F.F. ¶ 78. No other evidence corroborates this testimony. Respondent remembered the name of one worker, named Audelel Zamora, who he said was offered a payment by the investigators, but no individual by that name has been identified in any other record in this matter. F.F. ¶ 78. The letters from Respondent's former H-2A employees, taken at face value, indicate that he was friendly with his workers and did not actively abuse them. F.F. ¶ 79. They appear grateful for the opportunity to work. *Id.* A number of the letters also showed a concern about the future of the H-2A program, which the Administrator's H-2A witnesses testified Respondent had relied on during the 2011 investigation. *See* F.F. ¶ 16, 22, 29. These letters may speak to Respondent's personal qualities, but they do little to enhance his credibility as a witness. Given Respondent's interest in this matter, the credible contradictory testimony, and his implausible or unsupported statements, I find Respondent to be not credible and give his testimony little weight.

Lucia Fernandez, Respondent's daughter, testified that she shredded pay-checks in Respondent's possession in 2013, which was allegedly witnessed by her mother, after an un-reported burglary. F.F. ¶ 82. This narrative was recounted for the first time at the hearing, despite those checks having been discussed during at least one of Respondent's prior depositions. AX 46 at AX 47 at 3148-56. Lucia Fernandez' story is unverified, unlikely, unbelievable and not credible. Moreover, if true, constitutes spoliation of evidence. I find her not credible. Due to the timing of her story, her bias as Respondent's daughter, and her current employment in the strawberry business with her cousin and aunt, I give the testimony of Lucia Fernandez no weight.

The H-2A workers who testified on behalf of Respondent, namely Mr. Calderon, Mr. Garcia, Mr. Silva, and Mr. Gomez, were all current employees of Royal Berry Farms or CFE Farms. F.F. ¶¶ 39, 44, 49, 52. The Administrator's witnesses testified that Respondent has a history of threatening to not re-hire H-2A workers or to have them deported for reporting violations of the H-2A program. F.F. ¶¶ 16, 21, 22, 29. Since Mr. Calderon, Mr. Garcia, Mr. Silva, and Mr. Gomez are each dependent on members of Respondent's family for their continued employment and temporary residence in this country, the credibility of their testimony is suspect. *See McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (determination that rebuttal testimony regarding unpaid overtime from current employees was not credible was not error). As temporary workers, these four men are particularly vulnerable to coercion. Additionally, there are various contradictions between their hearing testimony and prior depositions. *See* F.F. ¶¶ 40, 42, 46, 51. Therefore, I do not find the testimony of Mr. Calderon, Mr. Garcia, Mr. Silva, and Mr. Gomez to be credible and give each little weight.

Respondent addresses the credibility of the Administrator's witnesses only through blanket denials that the events which they describe occurred and one specific statement that Ms. Gomez' testimony was unreliable due to inconsistencies between her hearing testimony and deposition testimony. Respondent's Reply at 1. Even taking Respondent's argument into account, I found Ms. Gomez' testimony to be credible. Unlike most other parties, including the H-2A workers, Ms. Gomez did not have a significant interest in the outcome of this litigation. She no longer works for

Respondent or for any of the companies owned and operated by his family members. F.F. ¶ 3. As a supervisor, Ms. Gomez would not be entitled to repayment of lost wages or kickbacks if Respondent was found liable. While Ms. Gomez' testimony at the hearing was inconsistent at times with her prior deposition, when she gave the deposition, she was still employed by an entity related to Respondent. F.F. ¶ 11. For the reasons noted previously with regards to current H-2A workers, the contradictions are understandable, and Ms. Gomez also offered the explanation that, during the deposition, she thought that she was being asked whether she had kept any of the kickbacks or rent money paid to her. Her explanations made sense and were consistent with the record. Respondent did not offer any other convincing reason to disbelieve or discount Ms. Gomez' testimony. Respondent attempted to insinuate that she had martial and financial issues, F.F. ¶¶ 65, 81, but there was no credible evidence that either situation was true, and, even if they were, that the situations would have impacted the reliability of her testimony in this case. Additionally, Ms. Gomez appeared to have a good memory of the facts and events to which she testified, and her testimony was corroborated by other evidence in the record. I found MS. Gomez credible and did not find any bias in her testimony against Respondent. Therefore, I find Ms. Gomez' testimony to be entitled to significant weight.

The Administrator also offered the testimony of a number of former H-2A employees of Fernandez Farms, Inc., as well as depositions and statements from additional former employees. While there are discrepancies in the individual testimony, depositions, and statements provided by the Administrator, particularly regarding when the H-2A workers were told that they were expected to pay kickbacks and the individuals to whom the kickbacks were paid, the evidence is substantially consistent. *See* F.F. ¶¶ 14-16, 18-20, 24-25, 27-28, 30, 34, 35, 37. Apart from general denials of wrongdoing and the opposing testimony of his witnesses, Respondent did not identify any specific grounds on which to discount the testimony of the Administrator's witnesses in either his closing Brief or Reply. Respondent did not specifically address the credibility of the former workers who gave evidence only through depositions or statements. Since the testimony, deposition transcripts, and statements provided by the Administrator are generally consistent with each other and with other corroborating evidence, particularly the Ms. Gomez' handwritten log of payments which was authenticated by several witnesses, I find it to be, on the whole, credible and probative. I gave the information substantial weight. Moreover, I found the individual workers who testified on behalf of the Administrator were each credible and there was nothing about their demeanor or manner while testifying that detracted from the believability of the information recounted. For the same reasons, I found the testimony of Mr. Eastwood and Mr. Raymond to be credible, professional, and supported by the weight of the evidence in the record. I gave each of their testimony significant weight.

While I have no reason to doubt Mr. Minns' truthfulness, the methodology he used to compute back wages has manifest flaws which severely undermine the reliability of his results. First, his yearly, monthly, and bi-weekly AEWR calculations are irrelevant. No party or witness has contended that Respondent's workers were paid yearly or monthly, or that their AEWR make-up checks should have been computed on those periods. While the H-2A contract in 2011 specifies that workers would be paid bi-weekly, the practice at Fernandez Farms, Inc., in 2011 was to issue weekly paychecks. *See, e.g.*, F.F. ¶ 68. The actual payment practice should be the basis for the AEWR shortfall calculation, and therefore the calculation should be made weekly without overpayments and underpayments in subsequent weeks cancelling each other out. More distressingly, Mr. Minns included in his calculations all weeks during which some number of hours worked were recorded. Respondent correctly notes that Mr. Minns and Mr. Eastwood treated weeks for which no hours were recorded in the same manner, that is, discounting those weeks

entirely. Respondent's Reply at 2. However, Mr. Eastwood also discounted the weeks where some hours were recorded and other hours were not, due to a special piece rate being in effect. F.F. ¶ 97. By including the weeks where as few as one hour was listed on the worker's pay stub, Mr. Minns' calculations yielded high hourly rates with no relationship to the employee's actual hourly earnings. F.F. ¶ 107.

Additionally, Mr. Minns calculated earnings based on incorrect piece and hour rates. When calculating piece rate compensation for 2010, Mr. Minns used an hourly rate of $4.90 and a piece rate of $.90 per box. RX X at 9. The actual wage rate in 2010 was $5.00 per hour and $.80 per box. Stipulated Facts ¶¶ 9, 10. He also did not take into account special piece rates or overtime pay. *Compare* RX X at 9-10 *with* AX 7 at 473. Since Respondent did not offer Mr. Minns' actual report as evidence, I have no way to determine the extent to which these decisions impacted his ultimate conclusions. While Mr. Eastwood's full report also is not in evidence, it appears that in his calculations he at least attempted to account for overtime and special piece rates. *See* AX 73. Therefore, I find that Mr. Eastwood's back wage calculations are more reliable that Mr. Minns' and discount the testimony from Mr. Minns accordingly.

C. *Kickbacks*

An H-2A employer may not seek or receive payment, including kickbacks, wage concessions, or other monetary payments, from any employee for any activity related to obtaining H-2A labor certification, including payment of application fees, attorneys' fees, or recruitment costs. 20 C.F.R. § 655.135(j); 20 C.F.R. § 655.105(o) (2008). Employers may receive reimbursement "for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees." 20 C.F.R. § 655.135(j). The Administrator alleges that Respondent required H-2A workers to pay kickbacks in the sum of $1600 to $1700 per season which were intended to cover the cost of visas and other travel costs. Administrator's Br. at 3-5. The Administrator contends that these kickbacks, which H-2A workers paid in installments, were unlawful, and seeks $410,850 based on $1650 per worker per season for 114 workers in 2010 and 135 workers in 2011. Administrator's Br. at 4, 30; AX 11 at 1552. Respondent denies that they sought or received any improper payments. Respondents' Br. at 5.

The Administrator's provided credible and persuasive evidence that improper kickbacks were collected by Respondent. In particular, Ms. Gomez established that she collected kickbacks, which she understood to be payments to reimburse Respondent for obtaining H-2A visas. F.F. ¶¶ 7-9. Former H-2A workers for Respondent identified the document on which Ms. Gomez said she recorded the payments given to her in 2011, and consistently stated that they made payments in 2010 and 2011 and were told, or at least understood, that the payments were for their visas and that if they did not make the payments they would not be hired the next year. F.F. ¶¶ 14, 15, 18, 20, 24, 28. The evidence cited by Respondent, namely the testimony of Respondent, Mr. Escobar, Ms. Nunez, Mr. Calderon, Mr. Garcia, Mr. Silva, and Mr. Gomez, Respondent's Br. at 5-6, is not credible regarding the kickbacks, and does not provide any alternate explanation for why payments would have been collected. Ms. Gomez was more credible and her testimony was corroborated by the other witnesses who said they paid kickbacks. Therefore, I find that Respondent improperly collected kickbacks to cover the cost of visa and other travel expenses from H-2A workers in 2010 and 2011.

The testimony from the few workers, as well as Ms. Gomez and the additional depositions and declarations in the record are sufficient to establish a practice under the *Mt. Clemens Pottery Co.* standard. Respondent, who bears the burden of rebutting the Administrator's showing, has not met that burden. The information Respondent provided was not credible, inconsistent with the evidence that had greater probative weight, and often contradicted earlier statements or depositions that the Respondent's witnesses gave. I find that in 2010 and 2011 Respondent collected kickbacks from their H-2A employees in violation of the H-2A program.

The Administrator based its calculation of the amount owed for unlawful kickbacks on a payment of $1650 from each H-2A employee in 2010 and 2011. Administrator's Br. at 30. Ms. Gomez collected $1650 from each employee in 2011, and her handwritten notes bear that out. F.F. ¶ 8. Ms. Gomez, however, thought the amount collected per employee in 2010 was only $1600, even though other employees testified that the amount in 2010 was as low as $1400. F.F. ¶¶ 8, 35. Most testified that the amount collected increased from 2010 to 2011. F.F. ¶¶ 15, 28, 35, 37. Given this evidence, I am persuaded that Respondent collected at least $1600 from each worker in the 2010 season. This amount is supported by the log kept by Ms. Gomez. Therefore, Respondent shall repay $182,450 for the 2010 kickback violations and $222,750 for the 2011 violations, for a total of $405,150.

D. *Failure to Offer Free Housing*

Under 20 C.F.R. § 655.122(d)(1), "[t]he employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day." The 2008 regulations, which were in effect during the 2010 season, require that "[t]he employer shall provide to those workers who are not reasonably able to return to their residence within the same day, housing, without charge to the worker." The Administrator contends that Respondent failed to offer free housing to H-2A workers and instead charged workers to stay in trailers and buildings on Respondent's property. The Administrator established the violation using testimony from Ms. Gomez and Respondent's former H-2A workers, as well as a table into which Ms. Gomez entered rent payments made to her. Respondent contends that they did not charge any rent in 2010 or 2011. Respondent's Br. at 6.

The Administrator has provided sufficient and credible evidence to show that Respondent failed to provide H-2A employees with free housing. I am persuaded by the convincing weight of the evidence from former workers, Ms. Gomez, and the rent logs that Respondent engaged in the prohibited practice of collecting rent from the workers. The record contains substantial testimony attesting to Respondents' practice of collecting rent payments from H-2A workers, and that testimony is corroborated by the handwritten spreadsheets in which Ms. Gomez testified she recorded the payments. F.F. ¶ 8. The evidence offered by Respondent, specifically from Mr. Calderon, Mr. Garcia, Mr. Silva, and Mr. Gomez that they did not pay rent to Respondent and did not know of other workers who did, was not credible and was discounted by their ongoing relationship with Respondent's family.

A number of the former workers whose depositions or statements the Administrator offered into evidence said that they chose not to live in the housing provided by Respondent. F.F. ¶ 34. Instead, these workers elected to pay rent for housing elsewhere in the area for the duration of the season, but would have stayed in free housing had it been offered. F.F. 27, 34. While H-2A workers are free to decline the housing required by the H-2A program, there is substantial evidence

that Respondent did not offer such housing to most or all of the H-2A workers and corresponding workers in 2011. I find that Respondent failed to offer free housing in 2010 and 2011. Ms. Gomez' handwritten chart and the testimony of former H-2A employees is substantial, consistent, and credible evidence that the amount of rent charged by Respondent was $125 per month. Therefore, I find that Respondent shall repay to their workers $179,750 in improperly collected rent.

E. *Failure to pay the AEWR and Piece Rate*

An employer utilizing H-2A workers in an hourly paid position

> must pay the worker at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time the work is performed, whichever is highest, for every hour or portion thereof worked during a pay period. . . . If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate . . .[t]he worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked.

20 C.F.R. § 655.122(l); 20 C.F.R. § 655.104(l) (2008). Workers in corresponding employment, that is, domestic workers of H-2A employers who perform any work included in the job order or any agricultural work performed by H-2A workers during the period of the job order, 29 C.F.R. § 501.3(a), must be paid at least the same wage rate as H-2A workers. 20 C.F.R. §§ 655.122(a), (l).

The Administrator contends that Respondent failed to pay H-2A and corresponding domestic workers at the appropriate rate, which was the higher of the piece rate or the AEWR. Administrator's Br. at 7. Respondent admits to paying improper rates, but argues that, based on Mr. Minns' calculations, the underpayment was substantially less than that alleged by the Administrator. Respondents' Br. at 3-4. Respondent also contends that the Administrator improperly included 65 workers in its calculations who should have been categorized as domestic and not corresponding, and therefore not subject to the H-2A rate. Respondents' Br. at 3-4. Respondent does not address the status of any other domestic workers it employed, or whether they were paid the AEWR.

i. Corresponding Workers

Respondent's argument that the 65 workers identified as domestic are not subject to the H-2A rate is not convincing. Respondent relies on the testimony of Celia Fernandez and Mr. Escobar that certain domestic workers did not engage in the same tasks as H-2A workers and so were not corresponding workers under the H-2A program. F.F. ¶¶ 63, 58, 66-67. Mr. Escobar said that he remembered some of the workers, but that for others he relied instead on payroll statements, which listed those employees as purely hourly workers. F.F. ¶ 67. This assumes the very facts which are at issue, namely, whether Respondent properly classified the domestic workers. Mr. Escobar's testimony is probative only in regards to the individuals who he recognized from his own personal

acquaintance. However, Mr. Escobar did not specifically identify those individuals, or even state how many of them existed. F.F. ¶ 67. Celia Fernandez identified the workers who she said were domestics, but those workers, however, were by and large weeders, punchers, truck drivers, and foremen, all of which were jobs also performed by H-2A workers. F.F. ¶¶ 53, 58. Since corresponding employment includes, in addition to the tasks specifically included in the job order, "any agricultural work performed by the H-2A workers," 29 C.F.R. §501.3, and since weeding, punching the cards of strawberry pickers, driving trucks on a farm, and acting as the foreman of a strawberry picking crew constitute agricultural work, and was work performed by the H-2A workers during the validity period of the H-2A order, I find that the 65 employees identified by Respondent as domestic are corresponding workers and therefore subject to the AEWR. Respondent did not dispute that the 30 domestic workers in 2010 and the remaining 162 domestic workers in 2011 were corresponding workers, and testimony from Celia Fernandez confirmed that the domestic workers did the same type of agricultural work as the H-2A workers. F.F. ¶ 53. Further, Ms. Nunez testified that domestic workers who did the same tasks as H-2A workers were paid at a different rate. F.F. ¶ 71; *see* F.F. ¶ 1. Therefore, I find that the 30 domestic workers in 2010 and 277 domestic workers in 2011 worked in corresponding employment and were therefore entitled to be paid at no less than the same rates as the H-2A workers.

ii. AEWR

There is no dispute that Respondent underpaid its workers. The Administrator contends that Respondent failed to provide make-up checks to most workers and that the agreement between Respondent and the H-2A workers that the make-up checks should be issued at the end of each month rather than each week was a sham. Administrator's Br. at 8-10. As the Administrator points out, it is difficult to accept Respondent's argument that H-2A workers, who testified to their need for money to support families and purchase basic necessities, would voluntarily postpone receipt of their make-up checks. *See* Administrator's Br. at 9-10. Even if I were to credit the dubious agreement and accept that the H-2A workers agreed to postpose the issuance of their make-up checks, there remains the uncontested fact that some of the make-up checks were never cashed. Additionally, the former H-2A workers established that they did not receive make-up checks weekly, monthly, or at the end of the season. F.F. ¶¶ 6, 16, 19, 25, 30. I find this evidence to be the most credible.

Mr. Eastwood calculated the AEWR underpayment by determining the effective hourly rate for each employee for each week for which hours worked were recorded, based on the amount paid to that employee, and then comparing that to the AEWR. F.F. ¶ 97. He adjusted the amount to reflect a $.90 per box rate so as not to double count the piece rate shortfall. F.F. ¶ 97. If the AEWR was higher, the worker was underpaid for that week. If that was the case, he then multiplied the hours worked by the AEWR and found the difference between the amount paid and the AEWR amount that should have been paid. F.F. ¶ 97. That amount was the underpayment for that week. Mr. Eastwood used that methodology to calculate the AEWR shortfall for the entire year, throwing out any week with a special piece rate because that rate would not include all of the hours worked by the employee. F.F. ¶ 97. I find this method to be reasonable and to adequately consider the relevant information so as not to over-estimate the amounts owed.

Mr. Minns applied a similar method of computation, but arrived at drastically different results. He threw out all weeks in which no hours were listed, but included weeks in which an employee had some hours listed. F.F. ¶¶ 106-107. This resulted in extremely high hourly wages in

some cases. Mr. Minns also adjusted the total number of boxes picked by each worker downward to 88.89% of the listed total to account for the claimed extra punch after eight boxes. F.F. ¶ 107. This adjustment was not appropriate for several reasons. Respondent did not address Ms. Gomez' testimony that, when workers were assigned to pick special order boxes which contained nine baskets each instead of the usual eight, the workers were given an extra punch after picking eight of the nine basket boxes. *See* F.F. ¶ 5. Ms. Gomez said that the special orders were usually picked in the morning, and that in the afternoon the crews packed regular, eight basket boxes for which they did not receive an extra punch. F.F. ¶ 5. Mr. Reyes also received an extra punch on occasion when picking nine basket boxes, and said that usually he was picking eight basket boxes and did not receive an extra punch. F.F. ¶ 30. These special boxes would account for some of the discrepancy Mr. Minns identified between the number of boxes sold by Respondent and the number of boxes paid to workers. Mr. Minns admitted that he was not familiar with the strawberry harvesting business, and did not know what the categories in the Dole Sales Summary meant. F.F. ¶ 107. Since whether the Dole Sales Summary numbers correspond to the payroll numbers is not clear, and no one is able to explain what the categories mean, Mr. Minns' use of the Dole Sales Summary does not lend any additional weight to his decision to adjust the number of boxes picked downward. His adjustment is otherwise based only on the statement of Respondent and Respondent's counsel that an extra punch was given after eight boxes, but does not consider the more persuasive evidence that an extra punch was given only when special ordered nine basket boxes were being picked. I find that Mr. Minns' 88.89% adjustment was not appropriate and, therefore, give his testimony less weight than that of Mr. Eastwood. Given the generally unreliable assumptions and inclusions made by Mr. Minns, I find that Mr. Eastwood's calculations of the AEWR shortfall were more reliable, and adopt his results.

iii. Piece Rate

There is no dispute that Respondent did not pay the contract rate of $.90 per box and $4.90 per hour to H-2A and corresponding workers. The applicable AEWR was $8.47 in 2010 and $10.31 in 2011. Stipulated Facts ¶¶ 7, 12. In 2010, Respondent paid an hourly rate of $5 per hour and a piece rate of $.80 per box, and also paid at other special rates. Stipulated Facts ¶¶ 9, 10. The 2011 job order required Respondent to pay an hourly rate of $4.90 and a piece rate of $.90 per box. Stipulated Fact ¶ 12. Respondent contends that in order to avoid conflict with neighboring strawberry growers, who paid a lower piece rate, he paid an actual rate of $.80 per box in 2011 and gave workers credit for an extra box after each eight picked by adding an additional punch to their cards in order to make up the difference.[19] The bulk of the evidence, however, shows that this extra punch was not given. Ms. Gomez and the former H-2A workers established that, when picking standard boxes of strawberries, workers did not receive any extra punches unless a special rate was in effect. Some had seen or were aware of the purported agreement to receive an extra punch, but still did not remember receiving extra punches. F.F. ¶ 17, 23. The H-2A workers currently employed by Royal Berry and CFE Farms said they received extra punches, but, as discussed above, I do not find their testimony credible. Mr. Minns' analysis of the number of boxes paid to workers

[19] Neither party appears to have noted that offering a ninth punch after eight is both not in strict compliance with the terms of the H-2A contract and also systematically underpays the workers. While picking a total number of boxes in a pay period which is a multiple of 8 would result in an equivalent payment under either system, under the extra punch system picking a non-multiple would result in increasing underpayments. For example, a worker who picked one box would be underpaid by a total of $.1, and a worker who picked 7 boxes would be underpaid by $.70 under the extra punch system, though a worker who picked 8 boxes would be paid the same under either system.

and the number of boxes sold to Dole is, as explained above, unreliable as evidence that workers actually received an extra punch. Respondent has not provided any convincing evidence to rebut the testimony of Ms. Gomez and the former H-2A workers. Therefore, I find that Respondent failed to pay the contractually mandated piece rate of $.90 per box and instead paid only $.80 per box, entitling each H-2A and corresponding worker to an additional $.10 per box.

Respondent did not provide an alternative calculation for the piece rate shortfall, while the Administrator provided a total amount owed for the piece rate violation. Administrator's Br. at 29. As discussed above, Mr. Minns' calculation of the AEWR shortfall is not reliable as it was based on an unwarranted reduction in the numbers of boxes picked, while the Administrator provided individual calculations for the amounts of piece rate shortfall and AEWR owed to each worker. *See* AX 62. Respondent did not contest those calculations, which I find comport with the weight of the evidence and testimony from the workers. I find that the H-2A and corresponding workers shall be repaid $51,232.93 in 2010 back wages and $370,168.65 for 2011 back wages. AX 62 at 4050. The total owed for back wages is $421,401.58. *See* F.F. ¶ 89.

F. *Failure to Pay Overtime Premiums*

When utilizing H-2A labor, an "employer must comply with all applicable Federal, State and local laws and regulations." 20 C.F.R. § 655.135(e). The Administrator contends that Respondent failed to pay overtime at the rate of time and a half the regular rate of pay, as required by state law. Under California law, the regular rate of pay includes both the hourly rate and piece rate, while Respondent paid overtime only on the hourly rate given in the H-2A contract. Administrator's Br. at 17. The Administrator contends that Respondent underpaid workers by a total of $45,468.40 for both 2010 and 2011. Respondent does not deny that overtime was not paid properly, but argues that only $40,085 was not paid, or $42,213 was not paid if the 65 domestic workers are included. Respondent's Br. at 5. As explained above, I do not agree that the 65 workers were domestic rather than corresponding workers.

California law provides that workers in agricultural work must be paid at one and a half times their regular rate of pay for any hours worked in excess of 60 hours in a workweek or 10 hours in a workday. Cal. Code Regs. tit. 8, § 11140(3)(A). At the hearing, Mr. Minns did not explain how he calculated overtime, and his report is not in evidence. Therefore, I cannot determine if his calculations are reliable. Mr. Eastwood explained how he calculated the amounts of unpaid overtime, and the method he used is consistent with the primary method endorsed by the California Division of Labor Standards Enforcement. F.F. ¶ ¶ 1, 97; *see* Cal. Div. of Labor Standards Enforcement Manual, § 49.2.1.2 (2006).[20] The Administrator's calculations appear to be in accord with California law and the H-2A program. Therefore, I find that the H-2A and corresponding workers are entitled to unpaid overtime in the sum of $48,468.40.

[20] "Compute the regular rate by dividing the total earning for the week, including earnings during overtime hours, by the total hours worked during the week, including the overtime hours. For each overtime hour worked, the employee is entitled to an additional one-half the regular rate for hours requiring time and one-half and to an additional full rate for hours requiring double time. This is the most commonly used method of calculation." Cal. Div. of Labor Standards Enforcement Manual, § 49.2.1.2 (2006).

G. *Intimidation of Workers and Interference With the Investigation*

Employers are prohibited from intimidating, restraining, coercing, blacklisting, discharging, or in any manner discriminating against any person who asserts a right or protection accorded by the H-2A program. 20 C.F.R. § 655.103(g); 29 C.F.R. § 501.4. "All persons" must cooperate with officials assigned to perform an investigation under the H-2A program regulations, and failure to cooperate may result in debarment proceedings, injunctions, and civil money penalties. 29 C.F.R. §§ 501.7, 520(d)(vi). The Administrator contends that Respondent intimidated and threatened workers to deter them from complaining about or discussing violations of the H-2A program with Department of Labor investigators. Administrator's Br. at 20, 22. The Administrator admits, however, that retaliation was not alleged in the Notice of Determination and that no additional penalties are sought for the alleged retaliation. Administrator's Br. at 20 n. 42. Also, the Administrator does not appear to seek any specific penalty related to the allegation of interference with the investigation other than a potential alternate basis for debarment. *See* AX 73; Administrator's Br. at 22, 32. Respondent denies impeding the investigation, and did not address the allegations of intimidation. Respondent's Br. at 6.

The Notice of Determination did not contain any allegation which could reasonably be construed to constitute either retaliation or interference with the investigation. Despite that omission, the parties agreed to address the allegation at the hearing and I included it in the list of issues for hearing in my July 8, 2015, Order Following Pre-Hearing Conference, and I address the interference allegation below.

The H-2A workers established that Respondent held meetings of H-2A workers before and during the 2011 investigation, where workers' cell phones were confiscated. F.F. ¶ 16, 29. Workers were asked what they had discussed with the investigators, and told that they should not discuss kickbacks and other violations of the H-2A program with the investigators. F.F. ¶ 16, 21, 29, 36, 37. Respondent made it clear to the workers that if they did disclose violations, there would be repercussions, and told the workers that the investigators would not follow through on any promises. *Id.*

The Administrator also alleges that Respondent impeded the investigation by destroying paychecks and falsifying documents. Administrator's Br. at 23. Specifically, the Administrator alleges that Respondent falsified the agreement to have makeup payments paid every month and to give an extra punch after each eight boxes, payroll records which show supplemental payments as having been made, receipts for travel expenses, and documents showing receipt of H-2A contracts. *Id.* The Administrator contends that the shredding of paychecks in Respondent's possession also impeded the investigation. *Id.* Mr. Reyes and other H-2A workers remembered seeing and signing the agreement which provided that makeup payments would be paid monthly, but I am not satisfied that the evidence established the agreement is fabricated, though it is highly suspicious. The evidence does show that Respondent added dates to documents, as Ms. Nunez admits. F.F. ¶ 73. Respondent also had workers endorse blank checks and write out statements with which they attempted to show that payments had been made. F.F. ¶¶ 6, 30, 36. Lucia Fernandez provided an explanation for the shredding of the paychecks which had allegedly been held by Mr. Fernandez, saying that she was worried about the checks being stolen following a break-in. F.F. ¶ 82. She claimed to have been unaware of the ongoing investigation at the time. *Id.* Her story was not convincing and appeared to be contrived. She did not tell anyone what occurred until nearly the

final day of hearing. She currently works for he aunt in the strawberry business, and I find her story not credible.

I am more persuaded by the evidence that Respondent and his supervisors actively attempted to prevent H-2A workers from making truthful and forthright statements to investigators. Ms. Nunez admitted that she forged dates on some contracts. Workers said that Respondent had workers endorse blank checks. I find that the overwhelming evidence shows that Respondent took steps to interfere with the investigation. Since the Administrator has not sought any specific penalty for this violation, I consider it only as an alternative basis for debarment.

H. *Failure to Provide 2011 Workers With the H-2A Contract*

An employer must provide each H-2A worker and worker in corresponding employment with a copy of the H-2A contract in a language understood by the worker. 20 C.F.R. § 655.122(q). H-2A workers must be provided with a copy of the contract no later than the time at which the worker applies for the H-2A visa, while corresponding employers must be provided with the contract no later than the time at which work begins. 20 C.F.R. § 655.122(q). The Administrator contends that Respondent did not provide H-2A and corresponding works with copies of the H-2A contract in 2011. Administrator's Br. at 24. Respondent contends that the preponderance of the evidence shows that he did provide each H-2A worker with a copy of the contract. Respondent's Br. at 3. Respondent does not deny that he failed to provide corresponding workers with copies of the contract.

The testimony of the former H-2A workers shows that they were not permitted to keep a copy of the contract or to retain a copy for a substantial period of time. F.F. ¶¶ 13, 17, 23, 37, 71. The H-2A workers were given a copy of the contract in Nogales, and returned the contract either before crossing the border or upon arrival at Respondent's property in Watsonville. F.F. ¶¶ 71. Ms. Chavez and other H-2A workers established that, in Nogales, they signed papers without having an opportunity to read them. F.F. ¶¶ 13, 17, 23, 37. Ms. Nunez said that she collected the contracts from the workers after they arrived in Watsonville. F.F. ¶¶ 71. While an H-2A employer need not force workers to keep a copy of the contract, they must make it available to those employees who wish to retain a copy. *See In Re Seasonal Ag Servs., Inc.*, ALJ No. 2014-TAE-00006, slip op. at 10-11 (ALJ Dec. 5, 2014) (finding no violation where an employer retrieved the H-2A contract from workers who did not want to keep a copy). The H-2A workers called as witnesses by Respondent testified that they had kept a copy of the contract, F.F. ¶¶ 41, 45, 49, but, as previously discussed, I discount their credibility. I find the greater evidence shows that the H-2A workers were not allowed a copy of the contract.

I. *Failure to Provide Adequate Earnings Statements and Keep Adequate Records*

Under the H-2A program, Employers are obligated to

> keep accurate and adequate records with respect to the workers' earnings, including but not limited to: field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer . . .; the hours actually worked each day by the worker; the time the worker began and ended each

> workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

20 C.F.R. § 655.122(j). Additionally, the employer must provide each worker on or before every payday a written statement or statements which include the following information:

> (1) The worker's total earnings for the pay period;
> (2) The worker's hourly rate and/or piece rate of pay;
> (3) The hours of employment offered to the worker . . .;
> (4) The hours actually worked by the worker;
> (5) An itemization of all deductions made from the worker's wages;
> (6) If piece rates are used, the units produced daily;
> (7) Beginning and ending dates of the pay period; and
> (8) The employer's name, address, and FEIN.

20 C.F.R. § 655.122(k).

The Administrator contends that Respondent failed to properly record or list on workers' pay stubs the hours worked when special piece rates were in effect. Administrator's Br. at 25-26. Respondent admits to having committed what he characterizes as "minor violations" of 20 C.F.R. § 655.122(j) and (k), but denies that any unpaid wages are due or that any penalty is appropriate. Respondent's Br. at 2.

Both 20 C.F.R. § 655.122(j) and (k) specifically require that the hours actually worked by each worker be recorded. Mr. Escobar admitted that, when a special piece rate was in effect and workers were not being paid by the hour, the paystubs given to workers would not include the number of hours they worked. F.F. ¶ 68. In his review of Respondent's payroll records, Mr. Eastwood observed that the records did not list the hours worked during special piece rate periods. F.F. ¶ 97. Mr. Escobar said that the punch cards would show the hours for each worker even when a special piece rate was in effect, and the hours could be determined by reviewing each card. F.F. ¶ 68. However, those cards were not preserved and the hours worked during special piece rate periods do not appear in the records provided by Respondent. F.F. ¶ 68; *see, e.g.*, AX 34 at 1327 (showing no hours worked and 174 boxes picked by Jose Aguilar when a $2.75 per box piece rate was in effect). Since Respondent did not keep an accurate tally of hours worked, there is no way to verify that workers made at least the AEWR and were properly paid for overtime. It is the employer's burden to keep and provide wage records, and the fact that hours could have been determined from the punch cards does not meet that burden when the punch cards are not available. I find that Respondent failed to keep accurate records and provide workers with complete and accurate paystubs in violations of the H-2A program. In doing so, Respondent undermined the worker protection purpose of the H-2A program. The Administrator seeks only a civil money penalty for this violation, which shall be addressed below.

J. *Improper Rejection of U.S. Workers*

In order to ensure that qualified, eligible domestic workers are not deprived of jobs, an employer of H-2A workers must accept referrals of all U.S. workers who apply and independently

conduct recruitment activities until the date on which the H-2A workers depart for their place of work. 20 C.F.R. § 655.135(c). Even after the H-2A workers depart for their place of employment, the employer must provide employment to any eligible, qualified U.S. worker who applies until 50% of the period of the work contract has elapsed. 20 C.F.R. § 655.135(d).

The Administrator alleges that Respondent rejected five domestic applicants who applied or attempted to apply to work at Fernandez Farms, Inc., before the first 50% of the contract season had elapsed. Administrator's Br. at 26-27. The identified workers are Steven Andrews, Nelson Barraza Hernandez, Antonio Cardoso, Eliser Garcia, and Jose Ramirez. *Id.* Respondent argues that the Administrator did not provide sufficient evidence to show this violation. Respondents' Br. at 1. Respondent also asserts that the workers referred by the EDD did not follow through on initial contacts with Respondent, did not seem interested in working for Fernandez Farms, Inc., or did not report for work. *Id.*

Records kept by the EDD and Mr. Eastwood's interviews with the five identified workers established that each worker was referred to Fernandez Farms, Inc., for the 2011 season, but Respondent did not follow up with the workers or offer jobs to the workers. F.F. ¶¶ 99-104. Respondent contends that Exhibit RX R shows that the referred workers did not pursue their applications. Respondents' Br. at 1. Exhibit RX R, however, contains only information regarding applicants for the 2010 season, and none of the workers identified by the Administrator appear in the exhibit. RX R at GF002730, GF003264. It is therefore of no probative value to the alleged conduct which took place in 2011. Ms. Nunez did not recognize the names of any of the identified domestic workers except for Steven Andrews. F.F. ¶ 71. Additionally, she only worked for Respondent for a single week in 2011, and said that she spent most of that week in Nogales, and would not likely have been involved in responding to referrals in 2011. F.F. ¶ 73. Respondent testified only that he was audited by the Department of Labor in 2008 and 2009 and was told that his practices when contacting past workers were acceptable. F.F. ¶ 74. He did not testify about any specific referred domestic workers or about his practices regarding those workers.

Based on the testimony of Mr. Eastwood, the corroborating records of the EDD, and the lack of rebutting evidence, I find that Respondent violated 20 C.F.R. § 655.135(d) by rejecting five domestic workers who applied or attempted to apply for agricultural work at Fernandez Farms, Inc., in 2011. Mr. Eastwood established how he calculated the wages due to the workers, which I find is reasonable and supported by the evidence in the record. F.F. ¶¶ 95-97. Therefore, I find that the workers are entitled to back wages in the following amounts: Mr. Andrews, $17521.14; Mr. Barraza Hernandez, $ 10,696.14; Mr. Cardoso, $881.14; Mr. Garcia; $8,971.14; and Mr. Ramirez, $13,841.65. F.F. ¶¶ 99-104.

K. *Failure to Contact Prior Season U.S. Workers*

Before hiring H-2A workers, an employer must "contact, by mail or other effective means, its former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job." 20 C.F.R. § 655.153. The employer must also maintain documentation of the contact against the event of an audit. *Id.*

The Administrator alleges that Respondent failed to maintain the required documentation of its contacts with 92 prior season domestic workers in the 2011 season. Administrator's Br. at 27;

AX 72. Respondent contends that the Administrator did not provide sufficient evidence that Respondent failed to contact or offer jobs to the former workers, or that the former workers were available for hire. Respondents' Br. at 5.

Respondent's argument that the Administrator did not meet its evidentiary burden rests on the proposition that the Administrator must prove that contact did not occur. However, Respondent had an affirmative duty to maintain documentation adequate to show that the required contact occurred. 20 C.F.R. § 655.153. No such documentation was produced, and Respondent's Brief cites only to the testimony of Respondent that he contacted past workers, which is unsupported by any documentation. Respondents' Br. at 5. I find Respondent's testimony is insufficient to establish the contacts took place, particularly since his memory of the contacts was spotty and lacking in specifics. Respondent provided a letter sent on August 15, 2011, which listed the steps he took to contact past workers. F.F. ¶ 74. However, that letter does not list the results of any contacts, or provide any documentation that contacts were actually made. A similar letter for the previous year indicated that 70% of the prior season workers had returned. F.F. ¶ 74. It is unlikely that Respondent had absolutely no contacts from prior year domestic workers in 2011 after seeing such a high percentage return the previous year. Given the paucity of detail, the August 15, 2011, letter does not constitute the documentation of contacts required by the H-2A program. I further do not find Respondent credible regarding the contacts.

When an employer is specifically tasked with maintaining sufficient documentation to show that it adhered to the law, and does not do so, it is fair to infer that it did not do so. *See Greater Missouri Medical Pro-Care Providers*, ARB No. 12-015, slip op. at 22. Moreover, the failure to keep the required documentation is in of itself a violation of the H-2A program regulations. For the foregoing reasons, I find that Respondent violated the 20 C.F.R. § 655.153 requirement that it contact 92 prior season domestic workers in 2011. The Administrator seeks only a civil money penalty for this violation, which shall be addressed below.

L. *Violations of Health and Safety Requirements*

In addition to being provided at no cost, housing provided by an H-2A employer must meet Occupational Safety and Health Administration ("OSHA") standards as set forth at 29 C.F.R. § 1910.142. 20 C.F.R. § 655.122(d)(1)(i). These standards provide, in part, that "[e]very shelter in the camp shall be constructed in a manner which will provide protection against the elements." 29 C.F.R. § 1910.142(b)(1). The Administrator alleges that "the employee kitchen offered to H-2A workers at Fernandez's [Royal Ranch] property was missing a wall and was open to the elements." Administrator's Br. at 28. Respondent contends that the evidence offered by the Administrator did not meet the burden of proof, and that the housing at Royal Ranch was inspected and approved by the EDD. Respondent's Br. at 2.

A number of health and safety violations were recorded during the EDD inspection on August 15, 2011, and the Wage and Hour Division inspection on October 20, 2011, but the specific issue of the missing door or wall at Royal Ranch was not noted by the investigators. F.F. ¶¶ 108-109. In the box where this type of violation would be expected to have been recorded, the Wage and Hour Division investigators wrote "N/A." F.F. ¶ 109. The pictures of the building provided by the Administrator consist of a building with an open wall and a ragged tarp, and an interior shot of a stairwell with a refrigerator to the right and a chair and a doorway to the left. F.F. ¶ 109. The space under the shop's roof up to the stair case is marked "open storage" on the floor plan. F.F. ¶¶

108-109. Mr. Eastwood said that the inside portion of the property was not closed off from the outdoors. F.F. ¶ 98. The floor plan shows that the area around the stairwell was open to the elements, but that walls and doorways protected the kitchen and bedrooms from the elements. F.F. ¶ 108. Mr. Escobar said that a screen door was present at the entrance to the shop to keep out flies and provide ventilation. F.F. ¶¶ 61-63. Mr. Eastwood and the Administrator declined to cite Respondent for any of other health and safety violations. F.F. ¶¶ 98, 109.

Shelter is not defined in 29 C.F.R. § 1910.142. The pictures and floor plans of the Royal Ranch shop show only that a screen door closed off the "open storage" from the elements, and there were doors sectioning off the kitchen and bedrooms. The interior area of the shop contained a few tables and chairs and a refrigerator, and was not used for preparing food or sleeping. I find, overall, that the evidence from the Administrator is insufficient to establish a violation of 29 C.F.R. § 1910.142. The evidence showed that the inside section of the Royal Ranch shop did not have a door or wall, and so could be said to be exposed to the elements, but the area which was not enclosed did not act as a living space and appeared to be more of a storage space or a garage than a shelter. Respondent provided bedrooms and a kitchen which had doors. Moreover, the reports prepared by the EDD and the initial inspectors do not list any issue or deficiency in this particular element of the housing at Royal Ranch. The Administrator has also not provided any authority for an expansive interpretation of "shelter" which would require the entire shop to be fully enclosed. I therefore find that the Administrator has not carried its burden on this count.

M. *Civil Money Penalties*

The Administrator may assess a civil money penalty for each violation of the work contract or the applicable regulations. 29 C.F.R. § 501.19(a). A separate violation occurs and a separate penalty is assessed for "[e]ach failure to pay an individual worker properly or to honor the terms and conditions of a worker's employment." 29 C.F.R. §501.19(a). When determining the amount of each penalty, the Administrator must consider seven factors, and may consider additional factors. The mandatory factors are:

> (1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR. part 655, subpart B, or the regulations in [29 C.F.R. Part 501];
> (2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
> (3) The gravity of the violation(s);
> (4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in [29 C.F.R. Part 501];
> (5) Explanation from the person charged with the violation(s);
> (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. 1188;
> (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).

The Administrator seeks to impose civil money penalties against Respondent totaling $1,295,150 for violating the H-2A program regulations. Administrator's Br. at 32. The Administrator argues that the penalties as assessed are conservative given the extent and nature of the violations. Administrator's Br. at 33. In particular, the Administrator notes that the penalties were reduced based on Respondent's professed commitment to future compliance, and that the full scope of Respondent's infractions under the H-2A program indicate that his commitment to compliance was illusory. Administrator's Br. at 33.

Respondent contends that no civil money penalty should be assessed in this matter. Respondents' Br. at 6. Since Respondent is no longer in the strawberry business, and had no prior record of H-2A violations, Respondent argues that the first and sixth factor of 29 C.F.R. § 501.19(b) do not apply. Respondents' Br. at 7. Additionally, Respondent contends that he did not achieve any financial gain based on the conclusions of Mr. Minns that he overpaid his workforce in both 2010 and 2011. Respondents' Br. at 7. Finally, Respondent argues that he made a good faith effort to comply with H-2A regulations by hiring H-2A consultants, maintaining time and payroll records, paying travel and visa related expenses, providing free and safe housing, and training H-2A workers. Respondent' Br. at 7.

Reviewing the factors in 29 C.F.R. § 501.19(b), only the first factor, the history of violations of the H-2A program, weighs in favor of Respondent for each of the categories of civil money penalty sought by the Administrator. There is some indication that Respondent had been engaging in prohibited H-2A practices prior to 2010, but they were not thoroughly investigated or found to be in violation of the regulations. Therefore, I find that the first factor is mitigating.

The second factor, regarding the number of impacted employees, weighs in Respondent's favor only in the case of the rejection of domestic workers in 2011. The Administrator identified only five domestic workers who sought employment at Fernandez Farms, Inc., in 2011 and were rejected. This is not a significant number of workers, particularly considering that 277 other domestic workers were hired in 2011. Therefore, I find that the second factor weighs in Respondent's favor as to that specific violation.

The remainder of the violations impacted numerous H-2A and non-H-2A workers. In 2010 and 2011, substantially all H-2A and domestic workers at Fernandez Farms, Inc., were impacted by Respondent's failure to keep accurate records of earnings, issue accurate pay statements, provide copies of the H-2A contract, pay required rates, comply with overtime law, and comply with the prohibition against charging rent and kickbacks. Additionally, Respondent failed to contact 92 prior season workers in 2011. These are substantial numbers of impacted works, and I find that the second factor related to the number of impacted workers does not weigh in Respondent's favor for these violations.

The third factor, concerning the gravity of the violations, does not weigh in Respondent's favor for any violation. Through his actions, Respondent deprived domestic workers of paying work, stole wages and took kickbacks from and abused vulnerable H-2A workers, undermined the purposes of the H-2A program by failing to disclose information about the H-2A contract to domestic workers, failed to provide no-cost housing, failed to accurately inform workers of their earnings and deductions, and failed to properly document their activities. In light of the worker

protection principles embedded in the H-2A program, Respondent's violations are grave and I find that the third factor does not mitigate in Respondent's favor.

The fourth factor, concerning good faith efforts to comply with the program, also does not weigh in Respondent's favor. Although the Administrator initially found this factor to be mitigating for some violations, the entirety of Respondent's conduct does not evidence good faith efforts to comply with H-2A program regulations. Merely hiring specialists to handle the H-2A certification and recruiting process does not constitute good faith when those specialists have an incorrect understanding of H-2A regulations, as Ms. Nunez does, and participated in violations of those regulations. Respondent's actions in violating the H-2A regulations go above and beyond mistaken interpretations and show an intent to undermine, collude and then to hide the violations. Therefore, I find that the fourth factor is not mitigating for any of the violations.

The fifth factor, which considers any explanation offered by the persons charged with violations, also is not mitigating for any violation. While Respondent offered a number of explanations and excuses for the violations which were admitted, and reasons why the remaining alleged violations did not occur, the information is not convincing and inconsistent with the great weight of the evidence in the record, and does not warrant a reduction in civil money penalties. The explanations range from Mr. Escobar's testimony that he tried to accurately produce paystubs and records, to the complicated nature of the H-2A regulations, Respondents' Br. at 7, to outright denials that prohibited conduct took place. None of the explanations amount to mitigating evidence or convince me that Respondent is less culpable. Overall, I find that the evidence showed a systematic and extensive disregard by Respondent of the H-2A program, his obligations under the program, and, when confronted with the extensive violations, an outright attempt to hide the violations, interfere with the investigation, intimidate the vulnerable employees, and fabricate evidence. Therefore, I find that the fifth factor was not mitigating.

Respondent argues that the sixth factor, which considers commitment to future compliance, should way in their favor as Respondent has no history of violating the H-2A regulations and are no longer involved in the strawberry business. Respondents' Br. at 7. I have already considered Respondent's history of prior violations under the first factor, and I see no reason that it should be taken into account again. Respondent's other argument, that he cannot violate the H-2A regulations in the future and therefore factor six should be mitigating, is absurd. Exiting the strawberry market is not equivalent to a commitment to compliance. Respondent will not be able to violate the H-2A regulations because the regulations will not apply to their activities, and not because they are scrupulously adhering to the rules. Furthermore, there is persuasive evidence that he remains closely linked to the strawberry business through his sister and nephew and the businesses they run, which also employ H-2A workers and use his land. Therefore, I find that the sixth factor is not mitigating.

Finally, the seventh factor, which Respondent argues shows that he did not profit from the violations, is not convincing in light of the extensive record in this matter and is does not mitigate in his favor. Mr. Minns conclusion that Respondent overpaid its workforce is based in part on the assumption that Respondent issued make-up checks when employees did not meet the minimum hourly rate guaranteed by the H-2A contract. However, this assumption is not supported in the record, and, as explained above, Respondent failed to issue some or all of these checks. Mr. Minns' analysis also did not account for workweeks where hours were inaccurately recorded, yielding facially absurd hourly rates in excess of those billed by top attorneys. Additionally, Respondent's benefitted financially by taking kickback and rent payments from the H-2A workers. Moreover, the workers

upon whom Respondent preyed were particularly vulnerable and suffered a significant financial hardship related to the violations. Therefore, I find that the seventh factor is not mitigating.

While I found that the first factor was mitigating for all violations, and the second factor was mitigating for the rejection of domestic workers, the Administrator determined that several additional factors were mitigating. Since this matter is a de novo review, I am not bound by the Administrator's assessment of civil money penalties. The Administrator showed great restraint in its assessment of the violations in this matter, particularly in light of much of the conduct which could be considered outrageous and aggravating.

On the whole, I find that the penalty assessed by the Administrator sufficiently reflects the gravity and extent of Respondent's violations. I concur with and adopt the Administrator's assessment for all violations, except unsafe housing. I found that the Administrator did not carry its burden on that count. Additionally, the Administrator calculated penalties for the failure to pay proper wages and provide no-cost housing, and Respondent's solicitation of kickbacks, based on Mr. Eastwood calculation of the number of workers impacted, which are less than the total numbers of workers in the classes affected.[21] In this calculation as well, I concur with the Administrator's assessed penalty as I find it to be sufficient and fair. I find that Respondent is liable for civil money penalties in the amount of $1,293,950 as reflected in the table below:

Violation	Base Penalty	Number of Violations	Base total	Penalty Assessed with Mitigating Factors
Rejection of U.S. Workers	$15,000	5	$75,000	$45,000, F.F. ¶ 84
Failure to Keep Accurate Earnings Records	$1,500	1	$1,500	$600, F.F. ¶ 86
Failure to Provide Accurate Pay Statements	$1,500	1	$1,500	$600, F.F. ¶ 87
Failure to Provide Copies of the H-2A Contract to H-2A and Corresponding Workers	$1,500	362	$543,000	$217,200, F.F. ¶ 88
Failure to Pay Proper Wages	$1,000 (2010 season) $1,500 (2011 Season)	144 (2010 season 362 (2011 season)	$119,000 (2010 season) $495,000 (2011 season)	$368,400, F.F. ¶ 89

[21] The Administrator assessed penalties: for failing to pay proper wages for 119 employees in 2010 and 330 employees in 2011; for soliciting kickbacks for 114 employees in 2010 and 135 employees in 2011; and for failing to provide no cost housing for 111 employees in 2010 and 133 employees in 2011. AX 72. In 2010, Respondent employed 114 H-2A workers and 30 corresponding domestic workers, while in 2011 they employed 135 H-2A workers and 227 corresponding domestic workers. AX 31 at 2479.

Failure to Comply with Overtime Rules	$1,000 (2010 season) $1,500 (2011 Season)	1 (2010 season) 1 (2011 season)	$1,500 (2010 season) $1,000 (2010 season	$1,250, F.F. ¶ 91
Solicitation of Kickbacks	$1,000 (2010 season) $1,500 (2011 Season)	114 (2010 season) 135 (2011 season)	$114,000 (2010 season) $202,500 (2011 season)	$284,850, F.F. ¶ 92
Failure to Provide No-Cost Housing	$1,000 (2010 season) $1,500 (2011 Season)	111 (2010 season) 135 (2011 season)	$111,000 (2010 season) $119,500 (2011 season)	$279,450, F.F. ¶ 93
				$1,293,950

N. *Debarment*

The Administrator seeks to debar Respondent for the maximum period of three years, and asserts that any one of the violations warrants such a finding. Administrator's Br. at 32. Respondent objects to debarment, but did not advance any reason why he should not be debarred. Respondents' Br. at 8. Presumably, Respondent relies on the same arguments advanced against the imposition of civil money penalties.

An employer, or any successor in interest to an employer, may be debarred from future labor certification under the H-2A program for up to three years from the date of the final agency decision if the employer "substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment." 29 C.F.R. §§ 501.19(a), (c). The violations which could subject an employer to debarment include:

> (i) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or workers in corresponding employment;
> (ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
> (iii) Failure to comply with the employer's obligations to recruit U.S. workers;
> (iv) Improper layoff or displacement of U.S. Workers in corresponding employment;
> (v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 118, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501];

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501];
(vii) Employing an H-2A worker outside of the area of intended employment, or in an activity/activities not listed in the job order or outside the validity period of employment in the job order, including any approved extension thereof;
(viii) A violation of the requirements of 20 CFR 655.135(j) or (k);
(ix) A violation of any of the provisions listed in §501.4(a) of this subpart; or
(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

29 C.F.R. § 501.20(d)(1). "In determining whether a violation is so substantial as to merit debarment, the factors set forth in §501.19(b) shall be considered." 29 C.F.R. § 501.20(d)(2); *see* pp. 50, *supra*, listing the §501.19(b) factors.

The factors to be considered in determining whether debarment is appropriate are the same as are considered in assessing a civil money penalty. As I have already addressed those factors at length for the bulk of Respondent's violations, I will not do so again here. Overall, as discussed above, Respondent's violations of the H-2A program are substantial, aggravated, and show an overall disregard for the program and the rules he agreed to follow to participate in the program. Further, Respondent engaged in activity that impeded or attempted to impede the Wage and Hour Division's investigation. As I previously found, Respondent attempted to intimidate workers by threatening their continued employment, had workers sign blank checks and other documents in an attempt to make it seem as if the workers had been properly paid, and attend meeting where phones were confiscated and the employees urged not to cooperate with the investigation. In addition, Respondent conspicuously destroyed evidence and documents in his possession despite the ongoing investigation. This conduct constitutes an independent ground for debarment, which must taking into account the seven factors noted in 29 C.F.R. § 501.19(b).

Every factor in 29 C.F.R. § 501.19(b) warrants debarment for the maximum period based upon Respondent's attempt to impede the investigation, and I find no mitigating information in the record. The first factor, previous history of violation, is not applicable, as the conduct was an attempt to cover up past violations of the H-2A program. Respondent's actions impacted all of its H-2A and corresponding workers, whose protections under the H-2A program were compromised by his conduct, and therefore the second factor does not mitigate. There is no mitigation under the third factor because Respondent's attempts to impede the investigation were particularly grave and evidence a flagrant disregard for the H-2A program. Respondent did not make a good faith effort to comply with the investigation of the H-2A program, and instead attempted to cover up the violations; the fourth factor does not mitigate. The fifth and sixth factors do not mitigate because Respondent has not offered an explanation for his attempted cover-up, and no assurances that he would comply with the H-2A program in the future. Finally, the seventh factor is not mitigating. Had Respondent's attempts to impede the investigation been successful, the H-2A and corresponding workers would have suffered significant financial loss. But for the diligence of the Administrator, Respondent would have withheld significant money owed to the workers.

For the above reasons, Respondent shall be debarred from participation in the H-2A program for the maximum period of three years from the date this order becomes the final agency order.

ORDER

1. As listed below, I find that Respondent committed the following violations of the H-2A program and is ordered to pay to the Administrator a total of $1,109,381.19 for distribution to the affected workers:

    a. Required H-2A workers to pay unlawful kickbacks in violation of 20 C.F.R. § 655.135(j) and 20 C.F.R. § 655.105(o) (2008). Respondent shall pay the amount of $410,850 to the affected workers.
    b. Failed to provide free housing for H-2A workers, and collected rent from those workers who lived in housing provided by Respondent in violation of 20 C.F.R. § 655.122(d)(1). Respondent shall pay the affected workers the amount of $179,750 for the collected rents.
    c. Failed to pay the Adverse Effect Wage Rate and contracted piece rate to H-2A and corresponding workers in 2010 and 2011, in violation of 20 C.F.R. § 655.122(l) and 20 C.F.R. § 655.104(l) (2008). Respondent shall pay the affected workers the amount of $421,401.58 owed for unpaid wages.
    d. Failed to pay state mandated overtime to workers in violation of 20 C.F.R. § 655.135(e). Respondent shall pay the affected workers the total amount of $45,468.40 owed for unpaid overtime.
    e. Threatened and coerced H-2A workers in order to deter them from reporting violations of the H-2A program in violation of 20 C.F.R. § 655.103(g) and 29 C.F.R. § 501.4.
    f. Impeded the Administrator's investigation in 2011 in violation of 29 C.F.R. § 501.7.
    g. Failed to provide H-2A and corresponding workers with a copy of the H-2A contract in 2011 in violation of 20 C.F.R. § 655.122(q).
    h. Failed to provide the H-2A and corresponding workers with sufficiently detailed earnings statements in violation of 20 C.F.R. § 655.122(k).
    i. Failed to keep adequate records of the hours worked by H-2A and corresponding workers in violation of 20 C.F.R. § 655.122(j).
    j. Discriminated against domestic U.S. workers by improperly rejecting Steven Andrews, Nelson Barraza Hernandez, Eliser Garcia, Jose Ramirez, or Antonio Cardoso who were qualified workers in 2011, and failed in 2011 to contact local workers from the previous season in violation of 20 C.F.R. § 655.135 and 20 C.F.R. § 655.153. Respondent shall pay Mr. Andrews, $17,521.14; Mr. Barraza Hernandez, $10,696.14; Mr. Cardoso, $881.14; Mr. Garcia; $8,971.14; and Mr. Ramirez, $13,841.65. The total amount owed to the domestic workers is $51,911.21.

2. Respondent did not violate 20 C.F.R. § 655.122(d)(1)(i) related to providing H-2A workers with housing that met OSHA standards.

3. For the substantiated violations of the H-2A program, as explained in the chart at pps. 53-54, *supra*, Respondent is assessed civil money penalties in the amount of $1,293,950, which must be paid to the Administrator.

4. Pursuant to 20 C.F.R. § 501.20, for his substantial violations of the H-2A program, Respondent is debarred from participating in the H-2A program for the period of three years from the date of this Order.

5. The Administrator shall make all calculations, including calculating interest owed and any required deductions, necessary to implement this order and repay the monies owed to the affected workers.

6. The parties shall promptly notify this Office if an appeal is filed in this matter.

Digitally signed by Richard M.Clark
DN: CN=Richard M.Clark, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review ("Petition") with the Administrative Review Board ("ARB") within 30 days of the date of this decision. 29 C.F.R. § 501.42. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition, only one copy need be uploaded.

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. §501.42(a).