U.S. Department of Labor

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

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

Issue Date: 10 May 2021

CASE NO.: 2018-TAE-00034

In the Matter of:

G FARMS LLC and
SANTIAGO GONZALEZ,
Respondents.

For the Administrator: Susan Seletsky, Esq.
Office of the Solicitor, U.S. Department of Labor
Los Angeles, CA

For the Respondent: Richard K. Mahrle, Esq.
Camila Alarcon, Esq.
Gammage & Burnham
Phoenix, AZ

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER – AFFIRMING IN PART AND MODIFYING IN PART ADMINISTRATOR'S DETERMINATION

This matter arises under the employee protection provisions of the H-2A temporary agricultural worker program of the Immigration Reform and Control Act of 1986 and implementing regulations. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 8 U.S.C § 1188(g)(2); 29 C.F.R. Part 501; 20 C.F.R. Part 655 subpart B.

The Administrator ("Administrator") of the Wage and Hour Division ("WHD") of the Department of Labor ("DOL") enforces the regulations governing the H-2A program. 29 C.F.R. §§ 501.1(c), 501.15, 501.16. The Administrator may enforce the employee-protection provisions by imposing civil money penalties ("CMPs"), assessing unpaid travel and subsistence reimbursement costs, and imposing debarment for up to three years. 29 C.F.R. §§ 501.16, 501.19. Upon imposition of a CMP or debarment or assessment of unpaid costs, an employer may request review by an Administrative Law Judge of the imposition or assessment. 29 C.F.R. §§ 501.33, 501.37. The ALJ "may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator." 29 C.F.R. § 501.41(b).

For the reasons below, I affirm in part and modify in part the Administrator's Notice of Determination of Wages Owed, Assessing Civil Money Penalties. I assess a total of $385,268.40 in CMPs.

I. Procedural History[1]

On January 31, 2017, Respondents G Farms LLC ("G Farms") and Santiago Gonzalez ("Mr. Gonzalez") submitted an Application for Temporary Employment Certification, signed by Mr. Gonzalez, under the H-2A temporary agricultural worker program. AX 20. Following Notices of Deficiency and an amendment from Respondents, AX 21-23, the Employment and Training Administration ("ETA") issued a Notice of Acceptance on February 15, 2017. AX 26. On February 18, 2018, Respondents filed an amended H-2A application. AX 24. This amended application provided for hotel-based housing for 70 workers for a period from April 2, 2017 through July 31, 2017. *Id.* This amendment was ultimately approved.[2]

On May 4, 2017, WHD investigators inspected G Farms' onsite housing. Becky Benitez, an investigator at the Wage and Hour Division's Phoenix District Office, led the investigation. She was accompanied by Kristina Espinoza, Marco Verdugo, Laura Verdugo, Melanie Crouch, and Nick Fiorello. HT 243.

On May 10, 2017, the Secretary of Labor filed a complaint in the United States District Court for the District of Arizona alleging that Respondents violated their obligations under 8 U.S.C. § 1188(a), (c) and 20 C.F.R. §§ 655.122 & 655.167. AX 44. On May 19, 2017, the District Court entered an order granting a preliminary injunction pursuant to an agreement between the parties. *Id.* During the District Court proceedings, the parties took depositions. *See* RDX 1-11; ADX 1-2. The parties resolved the District Court case through a consent judgment.

On August 8, 2018, the Administrator issued a Notice of Determination of Wages Owed, Assessing Civil Money Penalties ("Determination") to Respondents. AX 1. On September 4, 2018, Respondents requested a hearing per 29 C.F.R. § 501.33 to review the Determination. On October 18, 2018, this matter was assigned to me for adjudication.

In an October 23, 2018 Notice of Hearing, I set hearing for April 22 to 23, 2019. The Administrator moved for partial summary decision by motion and supporting papers filed January 18, 2019. The Respondents, for the most part, opposed, by response served February 1, 2019 and timely received February 4, 2019. On April 1, 2019, I found undisputed and resolved a number of facts and conclusions by an Order Granting in Part and Denying in Part the Administrator's Motion for Partial Summary Decision ("April 2019 Order").

---

[1] In this Decision and Order, AX refers to Administrator's Exhibits, RX refers to Respondents' Exhibits, RDX refers to Respondents' supplemental deposition exhibits, and ADX refers to Administrator's supplemental deposition exhibits. HT refers to the transcript of the hearing held on July 22 to 23, 2019 in Phoenix, Arizona. I note that there are no Exhibits 49 to 64. The Administrator purported to submit two depositions as AX 49, but as the two separate depositions were submitted in separate documents, I find it less confusing to refer to them separately as ADX 1 and ADX 2.

[2] The workers arrived in two groups in mid-to-late April 2017. HT 249-50. *See* RX 95. There were 69 H-2A workers at the time of the WHD investigation.

Following a continuance for settlement negotiations, which proved unsuccessful, I held a hearing on July 22 to 23, 2019 in Phoenix, Arizona.

Both Respondents and the Administrator were represented by counsel at hearing. During the hearing, the Administrator submitted Exhibits 1 through 48. I admitted Exhibits 1 through 26, 28 through 42, and 44 through 48 without objection. I admitted Exhibit 27 over objection from Respondents. I excluded Administrator's Exhibit 43 because it was not timely produced. HT 206. Respondents submitted, and I admitted, Respondents' Exhibits 65 through 114 without objection. I also admitted transcripts of the District Court depositions, or portions thereof, of witnesses who the parties identified in their pre-hearing statements would be called as witnesses through their depositions. HT 238.

In accordance with the briefing schedule set at hearing, Respondents submitted Proposed Findings of Fact and Conclusions of Law on September 19, 2020, and I received these filings on September 20, 2020. On September 27, 2019, due to an error not the fault of either party, I extended the briefing schedule. On October 11, 2019, the Administrator filed a post-trial brief and Proposed Findings of Fact and Conclusions of Law. On October 24, 2019, Respondents submitted a response, which I received on October 25, 2019.

Respondents submitted copies of their exhibits as well as supplemental Respondents' Deposition Exhibits 1 through 11 on October 24, 2019, and I received them on October 25, 2019. The Administrator transmitted final copies of Administrator's Exhibits 1 through 42 and 44 through 48 on December 10, 2020.[3] The Administrator also transmitted to me a portion of the deposition of Fernando Felix and a portion of the deposition of Raul Leon, admitted at hearing and which I now mark as Administrator's Deposition Exhibits 1 and 2, respectively, as well as portions of the 2012 International Fire Code ("IFC").[4]

II. Statement of the Case

Respondents contend that the CMPs the Administrator assessed were unreasonably high, that it was unreasonable for the Administrator to debar Respondents for their violations, and that the Administrator has not shown that Respondents owe unpaid wages. Respondents argue that the Administrator should have applied all seven of the mitigation factors for most of the CMPs.

[3] I did not retain exhibits given to me at the hearing, and instead requested that the parties ship their exhibits to the OALJ office in San Francisco after the hearing. Counsel for the Administrator represents that they transmitted final copies of their exhibits to OALJ in 2019. As I was unable to locate Administrator's exhibits or a transmittal letter in the physical case file, and receipt of neither a transmittal letter nor the exhibits was reflected in the OALJ Case Tracking System, I requested that the Administrator transmit electronic copies of the Administrator's exhibits on December 3, 2020. Because the exhibits transmitted on December 3, 2020 did not exactly match those submitted at hearing, Administrator transmitted electronic copies of Administrator's Exhibits as admitted at hearing on December 10, 2020.

[4] The code sections were not admitted at hearing, but I may refer to them as legal authority to the extent that they are incorporated in Arizona law. *See* Arizona State Fire Code; Arizona State Fire Marshal, Notice: Adoption of 2012 IFC, https://dfbls.az.gov/ofm.aspx. *See also* 20 C.F.R. § 655.135(e) (incorporating by reference "Federal, State and local laws and regulations, including health and safety laws" into the H-2A regulations).

The Administrator contends that Respondents are liable for all of the penalties imposed, that the penalties imposed were reasonable, and that a three-year debarment is reasonable. More particularly, the Administrator argues that the mitigation factors that it applied to the CMPs—two to four, depending on the violation—were reasonable.

ISSUES

I. Stipulations

At hearing, the parties stipulated to the facts found in my April 2019 Order. The parties have thus stipulated that:[5]

A. Respondents' Application for the H-2A Program in 2017

1. On January 31, 2017, Respondents G Farms and Santiago Gonzalez ("Respondents") first applied for permission to use H-2A temporary agricultural workers ("H-2A workers" or "guest workers") for the 2017 season. Declaration of Kristina M. Espinoza ISO Administrator's Motion for Partial Summary Decision ("Espinoza Decl."), ¶ 3, Ex. A.

2. In their January 31, 2017 application, Respondents stated that the H-2A workers would be paid an hourly rate of $10.95 per hour, would work eight hours per day and five days per week for a total of 40 hours per week, and would be housed in mobile homes at the worksite. Espinoza Decl. ¶¶ 3 & 5, Ex. A.[6]

3. It was Respondent Gonzalez's idea to house the H-2A workers at a mobile camp at the farm. Deposition of Santiago Gonzalez, Aug. 25, 2017 ("Gonzalez Depo. Tr."), at 78:15-79:24 (excerpts attached as Exhibit A to Declaration of Nancy E. Steffan ISO Administrator's Motion for Partial Summary Decision ("Steffan Decl.")).

4. Mr. Gonzalez believed it would be safer, more convenient, and more comfortable for the workers to live at the farm rather than traveling between the workplace and apartment housing each day. Gonzalez Depo. Tr. at 78:15-79:24; 85:18-86:2; 90:2-8; 92:23-93:2.

5. The Arizona Department of Economic Security never approved the housing described in Respondents' January 31, 2017 application. Espinoza Decl. ¶ 6, Ex. C; see also Steffan Decl. Ex. B at 13 (Respondents' Interrogatory Responses acknowledging that "the mobile housing units were never inspected").

6. On February 18, 2017, Respondents filed a revised H-2A application. Espinoza Decl. ¶ 4, Ex. B.

7. In their revised application, Respondents stated that the H-2A workers would be housed in hotel rooms. Id.

8. The revised application reaffirmed that the H-2A workers would be paid an hourly rate of $10.95 per hour and that they would work eight hours per day, five days per week, for a total of 40 hours per week. Espinoza Decl. ¶¶ 4-5 & Ex. B.

---

[5] The stipulations incorporated from my April 2019 Order refer to the exhibits submitted with the Administrator's Motion for Partial Summary Decision and the Respondents' opposition to that Motion. *See also* AX 46. All other exhibit citations in this Decision refer to exhibits submitted at hearing. Certain of the facts set forth in the Administrator's Statement of Undisputed Facts were in fact disputed, and therefore summary decision was denied as to those facts. For purposes of this Decision, I have removed disputed paragraphs but retained numbering from the April 2019 Order.

[6] Regarding ¶ 2, 6, 7, and 8, Respondents acknowledge the initial and revised applications were filed but allege they were not aware of the contents. The fact of and any legal significance of Respondents' knowledge, or lack thereof, I found to be disputed issues for trial.

9. The revised application was approved. Espinoza Decl. ¶ 7 & Ex. B.

B. Respondents' prior experience with the H-2A program

10. Respondents also employed H-2A guest workers in 2016. Gonzalez Depo. Tr. at 43:23-25.

11. In 2016, Respondents housed their H-2A workers in apartments. Gonzalez Depo. Tr. at 56:20-25.

C. Respondents' H-2A Housing in 2017

a. Overcrowded and unsanitary sleeping quarters

12. In 2017, Respondents housed their H-2A workers in three yellow school buses and two semi-trailers. Declaration of Becky Benitez ISO Administrator's Motion for Partial Summary Decision ("Benitez Decl."), at ¶ 4; Espinoza Decl. ¶ 9; Steffan Decl. Ex. D (Consent Judgment) at 2, ¶ H; Steffan Decl. Ex. E (Proposed Joint Pretrial Plan) at 4 (stipulation that housing conditions violated applicable safety standards). (Use of a shed with a television as worker housing is disputed.)

13. The three buses and two semi-trailers in which workers slept were constructed after April 3, 1980. Benitez Decl. ¶ 6, Ex. A; Declaration of Marco Verdugo Bernal ISO Administrator's Motion for Partial Summary Decision ("Verdugo Decl.") at ¶ 6 & ¶ 4, Ex. F (photograph).

i. *The buses*

15. Respondents housed ten workers in each of the three school buses. Benitez Decl. ¶ 5.

16. Each school bus measured approximately 40 feet long by 8 feet wide. Benitez Decl. ¶ 5.

17. Respondents placed mattresses on two parallel platforms that ran the length of each bus. Respondents laid out the mattresses end-to-end, with only a 2-inch partition separating the foot of each mattress from the head of the next. Benitez Decl. ¶ 5; Verdugo Decl. Exs. A, C, & D (photographs).

ii. *Trailer # 1*

22. Respondents housed between twenty-four and twenty-eight workers in Trailer #1. Benitez Decl. ¶¶ 10-11; Verdugo Decl. ¶ 5.

23. Trailer #1 was a semi-trailer that measured approximately 42 feet long by 8 ½ feet wide. Benitez Decl. ¶ 18 & Ex. B.

24. Respondents lined each side of the trailer with bunk beds. Respondents stacked the bunk beds end-to-end, with a one-inch partition separating the foot of one bed from the head of the next and an aisle of roughly three feet separating the two rows of bunks. Benitez Decl. ¶ 12; Verdugo Decl. ¶ 5 & Ex. G (photograph).

28. The trailer had only one window-like opening that measured approximately 1 1/2 square feet. Benitez Decl. ¶ 16; Verdugo Decl. Ex. I (photograph).

29. The floor of the trailer was metal with deep ribs that created an uneven walking surface. Benitez Decl. ¶ 14; Verdugo Decl. Ex. H (photograph).

iii. *Trailer # 2*

31. Respondents housed twelve workers in Trailer #2. Benitez Decl. ¶ 19; Verdugo Decl. ¶ 6.

32. Trailer #2 was a semi-trailer, which measured 42 feet by 8 ½ feet. Benitez Decl. ¶ 19.

33. Respondents lined each side of Trailer #2 with bunk beds. An approximately four-inch partition separated the foot of one set of bunk beds from the head of the next. Benitez Decl. ¶ 19.

34. Trailer #2 had only one window which measured approximately 1 1/2 square feet. Benitez Decl. ¶ 20.

b. Electrical hazards in the sleeping quarters

42. To provide electricity in each bus and Trailer #1, Respondents strung extension cords along the ceiling. Benitez Decl. ¶ 27; Verdugo Decl. Exs. A, C, D, E, G & J (photographs).

43. There was no permanent electrical wiring in any of the buses or in the first trailer. Benitez Decl. ¶ 27.

44. Respondents ran the extension cords out the doors and/or windows of the buses and first trailer to connect to electrical outlets in the shed. Benitez Decl. ¶ 27.

45. Respondents hung light bulbs from these extension cords. Benitez Decl. ¶ 27; Verdugo Decl. Exs. A, C, D, E G, & J (photographs).

46. Additional extension cords were connected to the lighting extension cords and used to charge personal electronic devices. These extension cords and the attached electronic devices dangled from the ceiling. Benitez Decl. ¶ 27; Verdugo Decl. Exs. A, D, E, & G (photographs).

47. Respondents installed swamp coolers in the buses, which they also powered with extension cords. Benitez Decl. ¶ 28 & Ex. D (photograph).

c. Hazardous and unhygienic kitchen bus

50. Respondents used a fourth school bus as a kitchen where food for all 69 workers was prepared and served. Respondents parked the kitchen bus adjacent and perpendicular to the buses and trailers where workers slept. Benitez Decl. ¶ 29; Verdugo Decl. ¶ 3.

51. Respondents equipped the kitchen bus with one sink, a single refrigerator, one food preparation table, an oven with range, and a two-burner stove. There was no other food preparation or storage area in the camp. Benitez Decl. ¶ 30.

52. Cooked food was stored at room temperature in pots and pans on the floor of the bus, in the oven, and on the stove burners. Benitez Decl. ¶ 31 & Exs. F & G.[7]

53. Food, cooking oil, and utensils were stored on the floor of the bus. Benitez Decl. ¶ 31 & Exs. F & G.

54. There were no flame guards on the stove. Benitez Decl. ¶ 32.

55. Respondents fueled the stove with a propane tank located on the bus immediately next to the unguarded burners. Benitez Decl. ¶ 32; Crouch Decl. Ex. A (photograph).

56. Respondents fueled the range with gas canisters that were located outside the bus and connected to gas lines that ran into the bus through cracks in the windows. Benitez Decl. ¶ 32; Crouch Decl. Ex. B (photograph).

57. Respondents did not secure or bolt the gas canisters to prevent toppling. Benitez Decl. ¶ 32; Crouch Decl. Ex. B.

[7] Respondents stated that they contested ¶ 52, but stated facts that did not raise a bona fide dispute with ¶ 52 as it was written and supported with declaration testimony and photographs.

58. The gas canisters were not equipped with automatic shutoff valves. Verdugo Decl. ¶ 8.

59. Like the buses and first trailer, Respondents used an extension cord to provide electricity in the kitchen bus, connecting light bulbs to the extension cord. There was no permanent electrical wiring to provide electricity in the kitchen bus. Benitez Decl. ¶ 33 & Ex. H (photograph).

62. Respondents did not provide a fire extinguisher in the kitchen bus or in the surrounding areas. Benitez Decl. ¶ 47.

63. Respondents did not provide first aid supplies anywhere in the camp. Benitez Decl. ¶ 49.

64. Respondents' kitchen bus was constructed prior to April 3, 1980. Benitez Decl. ¶ 30 & Ex. E; Verdugo Decl. ¶ 7 & Ex. K.

d. Unsanitary and dangerous bathing facilities

65. The only bathing facility Respondents provided for their workers was a semi-trailer that Respondents had outfitted with seven shower heads. Benitez Decl. ¶ 35; Verdugo Decl. ¶ 9.

66. Respondents did not provide hot water for these showers. Benitez Decl. ¶ 39.

67. Respondents constructed the shower trailer so that all of the shower heads drained into a single drainage hole. Benitez Decl. ¶ 36.

68. Respondents separated the shower heads with plastic curtains that allowed waste water to flow from one shower stall to the next. Benitez Decl. ¶ 36; Verdugo Decl. Ex. L.

69. The floor that Respondents installed in the shower trailer consisted of a smooth vinyl-type material. Benitez Decl. ¶ 37.

71. The waste water from the shower trailer pooled directly underneath and around the trailer. Benitez Decl. ¶ 40; Verdugo Decl. ¶ 10 & Ex. N.

72. The pooled water was not treated for mosquitoes. Benitez Decl. ¶ 41.

73. Respondents lit the shower container with a single flood light that Respondents connected to an extension cord. Benitez Decl. ¶ 38; Verdugo Decl. ¶ 9 & Ex. M.

74. Respondents ran the extension cord along the floor of the trailer and out the door that the workers used to enter and exit the showers. Respondents did not shield the extension cord from water. Benitez Decl. ¶ 38; Verdugo Decl. ¶ 9 & Ex. M.[8]

75. The shower trailer was constructed after April 3, 1980. Verdugo ¶ 11.

e. Inadequate toilet and laundry facilities

76. Respondents did not provide flush toilets in the camp. The only toilets provided were port-a-johns [chemical toilets].[9] Benitez Decl. ¶ 43; Espinoza ¶ 11.

77. Respondents did not provide artificial lighting in the area of the camp where the port-a-johns were located. Benitez Decl. ¶ 43.

78. Respondents did not provide lighting inside the port-a-johns. Espinoza Decl. ¶ 11.

82. The port-a-johns and portable sink were constructed after April 3, 1980. Benitez Decl. ¶ 45.

D. Respondents' Employment Practices

[8] Respondents stated that they contested ¶ 74, but stated facts that did not raise a bona fide dispute with ¶ 74 as it was written and supported with declaration testimony and photographs.

[9] Porta-John is a registered trademark for a brand of chemical toilet. I will leave the stipulations as they are written but refer below to "chemical toilets."

84. Respondents paid the majority of their H-2A workers on a piece rate basis, not at an hourly rate as stated in their clearance order. Espinoza Decl. ¶ 12; Benitez Decl. ¶ 53; Steffan Decl. Ex. E (Proposed Joint Pretrial Plan) at 4 ("Respondents admit that, prior to the entry of the preliminary injunction, they failed to pay the H-2A workers, as Respondents indicated they would in their application, on an hourly basis of $10.95 an hour, and instead paid the workers on a piece rate basis."); Steffan Decl. Ex. D (Consent Judgment) at 2, ¶ J (same).

85. Defendants admit that, prior to the entry of the preliminary injunction, they failed to keep daily records of the hours worked by these H-2A workers, as required by 20 C.F.R. § 655.122(j), during the workweeks beginning April 22 and April 29, 2017. Benitez Decl. ¶ 53 & Ex. K; Espinoza Decl. ¶ 12; Steffan Decl. Ex. D (Consent Judgment) at 2, ¶ I.[10]

86. Respondents had their H-2A workers work six days per week and eight to ten hours per day. Espinoza Decl. ¶ 13.

90. Respondents did not post any notice of worker rights at the worksite prior to May 5, 2017. Steffan Decl. Ex. C (Respondents' Responses to Administrator's First Set of Requests for Admission), at 6, RFA No. 12.

91. Respondent Santiago Gonzalez had the ability to hire, pay, fire, supervise, or otherwise control the work of Respondents' H-2A workers. Steffan Decl. Ex. B (Respondents' Responses to the Administrator's First Set of Interrogatories), at 23, Interrogatory No. 4.

E. Santiago Gonzalez's status as an employer

Santiago Gonzalez was an employer and joint employer of the H-2A workers, jointly with G Farms LLC.[11]

II. Issues in dispute

The following issues remain in dispute:

1. Whether Respondents fully reimbursed the H-2A workers for their travel expenses; and, if not, the amount that Respondents still owe;
2. Whether the civil money penalties imposed by the Administrator were reasonable, as follows:
    a. Whether the overall penalty was reasonable;
    b. Whether the Administrator assessed penalties for provisions that Respondents did not violate;
    c. Which mitigation factors apply to those penalties for which an assessment was proper;
    d. How agency principles apply, especially with respect to the filing of a false application with the Arizona Department of Economic Security; and,
3. Whether Respondents should be debarred from the H-2A program; and, if so, for how long?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[10] I adopt the language of the Findings of Fact in the 2018 Consent Judgment previously agreed to by the Respondents and entered by the District Court.

[11] I incorporate by reference the reasoning in my April 19 Order as to my finding that Santiago Gonzalez was an employer and joint employer of the H-2A workers employed by G Farms in 2017.

I. Introduction and Background

While I have considered all evidence of record, other than a brief overview I focus my findings of fact on the remaining disputed issues in this case. In addition, there are disputed facts and issues in this case that have no direct bearing on the remedies. In particular, Respondents argue that they are not liable for a number of violations for which the Administrator imposed no CMP. Because the parties agree as to these zero-CMP assessments, I do not necessarily make a finding about whether there was a violation that the Administrator could have imposed a penalty for but did not. However, I do make findings regarding alleged violations, and the underlying facts that support them, where doing so is relevant to the reasonableness of another CMP, the CMPs in aggregate, or debarment.

G Farms is one of two companies in which Santiago Gonzalez held an ownership interest at the time of the hearing. HT 75. Respondents, G Farms and Mr. Gonzalez, brought in H-2A workers for the first time in 2016, contracting with Foreman, a company associated with Raul Leon, to help with the application process. HT 353; RX 112. In 2017, Respondents again sought to bring in H-2A workers. *Id.* at 328, 355. This time, Respondents contracted with LeFelco, a separate company that Mr. Leon helped Fernando Felix form. *Id.* Two other companies, Lecker Foods, also associated with Mr. Leon, and Legistix were also involved in Respondents' application process and performance under the H-2A contract or preparation for housing workers. HT 100-101; RX 72 at DOL00027; RX 74; RDX 10 at 148, 153, 164.

Both Foreman in 2016 and LeFelco in 2017 sent certain H-2A application-related documents to Respondents, encouraging them to sign but not date those documents. AX 34; RX 66-67; RX 113; RDX 10 at 93-94, 97, 100-101, 140-42, 190-91; HT 80, 322-23, 325-26, 351-51. At times, the government documents that were sent over for signature were incomplete. *Id.*; *see also* RX 70. At times Foreman and LeFelco sent Respondents forms that had not been filled out, and on other occasions they sent Respondents only portions of a longer document. *Id.*; RX 73. With the help of Yolanda (Margie) Gonzalez, Mr. Gonzalez's wife and office manager at G Farms, and Adriana Sanchez, Mr. Gonzalez's niece and accountant/bookkeeper for G Farms, Mr. Gonzalez signed and returned those documents. *Id.* Mr. Gonzalez may never have seen a completed copy of certain documents prior to the WHD investigation. *Id.*

Respondents intended to house their H-2A employees on site in 2017. HT 81-84. Respondents, with help, constructed an encampment consisting of three sleeping buses ("Bus #1", "Bus #2", and "Bus #3"); two trailers used for sleeping ("Trailer #1" or "Container #1"; and "Trailer #2" or "Container #2); one bus used for cooking the H-2A workers' food ("kitchen bus"); one trailer with showers ("shower trailer"); chemical toilets; two sinks; and a warehouse shed. *See* AX 16 (partial diagram); AX 1 (assessments broken down by container); AX 3-15 (photographs and videos from WHD investigation); RX 96-104 (photographs of conditions at encampment); *see also* RX 114 (diagram of idea for mobile living quarters).

Respondents' initial 2017 H-2A application listed on-site housing. AX 20. However, after an initial Notice of Approval, LeFelco subsequently filed an amendment listing hotel-based housing, and the application was approved on that basis. AX 21-26. LeFelco also submitted confirmation from Woodspring Suites, a hotel, about the rooms reserved there for H-2A workers.

AX 27; *see also* RX 86; RX 88-90. The parties dispute Respondents' knowledge of and liability for the amended application. Generally, the applicable State Workforce Agency ("SWA") must investigate all housing listed in an H-2A job order before workers arrive. RDX 10 at 169-70; HT 184-85. However, in Arizona, the Department of Economic Security ("DES"), the applicable SWA, does not investigate hotel-based housing if DES receives proper confirmation from a hotel about reserved rooms with the H-2A job order. HT 185-86.

To recruit workers, Mr. Gonzalez sent Arturo Valdez-Castro to Mexico to compile a list. RDX 9 at 16, 28; *cf.* AX 19 (recruitment report); RX 75. Mr. Valdez-Castro sent this list back for use in the H-2A application. RDX 10 at 190. The parties dispute whether Mr. Valdez-Castro took money from the workers for inclusion on this list. Further, the parties dispute whether Mr. Valdez-Castro took money from the workers for other reasons, including to pay for a bus from Hermosillo, Mexico to Phoenix, Arizona.

The workers travelled from Mexico in two different groups. HT 249. To get to G Farms, the workers travelled to Hermosillo via bus, obtained visas, and then traveled to Phoenix via a different bus. *See* HT 249-65; AX 39; AX 45. Many workers had to pay expenses along the way, and workers were reimbursed between $200.00 and $350.00 after arriving at G Farms. *Id.*; RDX 1-8. The parties dispute whether the reimbursement was intended to cover, and whether the reimbursement did cover, the bus between Hermosillo and Phoenix in addition to other transportation and subsistence costs.

From May 4 through 6, 2017, after both groups of workers had arrived and begun work, investigators from WHD, including Becky Benitez, the lead investigator on this case, and Kristina Espinoza, came to G Farms to investigate the onsite housing. *See* HT 209-10. The investigation team took pictures and videos of the encampment. HT 211.

The Department of Labor obtained a temporary restraining order and later a consent judgment against Respondents in U.S. District Court based on the investigators' findings. AX 44. During proceedings in district court, a number of H-2A workers as well as others with knowledge about Respondents' 2017 H-2A program participation were deposed. *See* RDX 1-11; ADX 1-2.

As a result of the investigation, Ms. Benitez cited Respondents for violations of their obligations under the H-2A program. AX 1. The Administrator issued a Notice of Determination of Wages Owed, Assessing Civil Money Penalties. *Id.* The Administrator imposed a total CMP of $389,489.40 on Respondents for several violations of the H-2A program regulations, a $4,266.36 assessment for unpaid transportation and subsistence costs, and determined that Respondents should be debarred for a period of three years. *See id.*; AX 2.

The Administrator called Kristina Espinoza, Santiago Gonzalez, and Becky Benitez as witnesses at hearing. Respondents called Adriana Sanchez, Margie Gonzalez, and Santiago Gonzalez. The parties also called Fernando Felix, Raul Leon, Arturo Valdez-Castro, and eight of the H-2A workers through their depositions. RDX 1-11, ADX 1-2.

II. Credibility of the Witnesses and Authenticity of the Evidence

While, as above, the parties have stipulated to the facts found in my April 2019 Order, certain facts remain in dispute. Thus, I assess the credibility and weight of the testimony of the witnesses and of the evidence. While I have considered the credibility of all of the witnesses and all other individuals whose accounts are in the record, and the authenticity of and weight to be given to the documents, I only directly address the issues disputed by the parties.

Credibility "has been termed as 'the quality or power of inspiring belief.'" *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51-52 (7th Cir. 1971) (citation omitted). "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Id.* at 52 (quoting *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963)).

As the finder of fact in this matter, I am entitled to determine the credibility of witnesses, to weigh evidence, to draw my own inferences from evidence, and I am not bound to accept the opinion or theory of any particular witness or advocate. *See Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied,* 391 U.S. 929 (1968). Witnesses do not need to be, and indeed seldom are, equally credible on or knowledgeable about all matters about which they testify. I may believe a witness's testimony about one issue while discrediting or giving little weight to the witness's testimony about a different issue. *Id.* At the same time, in certain circumstances, a witness's testimony on one issue may undermine that witness's credibility generally, such that I discredit or give less weight to other aspects of that witness's testimony. *See Indiana Metal Products*, 442 F.2d at 52. In weighing the testimony of witnesses, the ALJ as fact-finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). Thus, to the extent that witnesses testified about issues that are no longer in dispute, I address their testimony on those issues to the extent that it speaks to their general credibility and thus affects my factual findings on issues still in dispute.

The ARB has stated a preference that ALJ's "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009).

A. Respondents' Knowledge and State of Mind

To some extent, the parties disagree about the knowledge and state of mind of Mr. Gonzalez (and, to a lesser extent, Ms. Gonzalez and Ms. Sanchez) in regard to regulatory compliance and violations. The parties also disagree about how much these states of mind matter to Respondents' liability.

Much of the dispute between the parties on these points relates to the conflicts between the testimony of Mr. Gonzalez (as corroborated, in parts, by Ms. Sanchez and Ms. Gonzalez) and the deposition testimony of Raul Leon. In particular, Mr. Leon testified that he and Cosme Velasquez, of the Arizona Department of Economic Security ("DES"), told Mr. Gonzalez more information

about the non-compliance of Respondents' on-site housing than Respondents testified that they received. *See* HT 128-30, 34; RDX 10 at 152-53. It is difficult to determine precisely who knew or said what, when, mainly because neither Mr. Leon nor Mr. Gonzalez appear to have been completely truthful with the government throughout the H-2A certification and inspection process.

1. Mr. Gonzalez

Respondents argue that Mr. Gonzalez lacks sophistication in business dealings. This defense is unconvincing, given that Mr. Gonzalez's history of ownership interests in a variety of businesses stretches back more than thirty years. HT 31-32. Even if Mr. Gonzalez was honest about his lack of business sophistication, Mr. Gonzalez admitted to having signed, *under penalty of perjury*, a statement that he had read a document without reading the document. *See, e.g.*, HT 40; AX 18 at 00383. And regardless of whether Mr. Gonzalez received the full versions of blank forms that he signed, he did receive the parts of the forms containing such statements, as such statements appear directly above the signature line. *Id.*

Additionally, Mr. Gonzalez admitted that G Farms' 2016 H-2A workers worked for hours and were paid in a manner that violated G Farms' approved 2016 H-2A application. HT 80-81, 86; AX 33. More generally, Mr. Gonzalez testified that he and his staff took a completely hands-off approach with respect to the H-2A process, neither reading any relevant documents nor attempting to learn anything about the regulations with which they would have to comply. *See* HT 57.

In turn, there are reasons to believe Mr. Gonzalez's representations about his own lack of knowledge about certain facts in this case. Based on the undisputed statements, depositions, and letters of workers, the workers generally liked Mr. Gonzalez and G Farms. RDX 1-8; RX 83-84. Further, some if not many of the workers had known Mr. Gonzalez for years. HT 117. Although gratitude toward an employer is one reason workers may tolerate labor standards violations,[12] on the whole, the H-2A workers' goodwill toward Mr. Gonzalez suggests that they did not believe he was intentionally endangering them.

2. Ms. Gonzalez and Ms. Sanchez

Ms. Gonzalez and Ms. Sanchez offered testimony consistent with Mr. Gonzalez's testimony, especially with respect to Foreman's and later LeFelco's signature process. I find Ms. Gonzalez and Ms. Sanchez credible to the extent that their testimony is consistent with each other's testimony, the testimony of Mr. Gonzalez as to procedures followed by Foreman and LeFelco, and documentary evidence. However, as Ms. Gonzalez and Ms. Sanchez are Mr. Gonzalez's relations and employees of Respondents, the degree to which Ms. Gonzalez's and Ms. Sanchez's testimony bolsters Mr. Gonzalez's testimony is limited. I discuss below the role their testimony plays in corroborating portions of the testimony of Mr. Gonzalez.

3. Mr. Leon

[12] *C.f. Kasten v. Saint-Gobain Performance Plastics*, 563 U.S. 1, 12 (2011) (Fair Labor Standards Act's "antiretaliation provision . . . prevent[s] fear of economic retaliation from inducing workers quietly to accept substandard conditions") (cleaned up).

Mr. Leon admitted to operating a tangled web of businesses; to hiring cooks for roles not supported by Respondents' H-2A application; to forming a new business to take on his H-2A clients when those clients no longer trusted his old business; to encouraging certain clients to sign but not date partial government documents; to failing to provide clients with completed versions of certain government documents; and to having no established practices for maintaining records related to clients' H-2A applications. *See* RDX 10 at 93-94, 97, 100-101, 140-42, 190-91. Further, Mr. Leon encouraged Mr. Gonzalez to pursue his idea of the mobile housing complex and, with respect to one of the trailers, warned Mr. Gonzalez, at most, about the possibility of a single violation. RDX 10 at 200. This lack of concern about formalities and the self-serving nature of Mr. Leon's testimony – in terms of apportioning blame between himself and Mr. Gonzalez – leads me to give little weight to his testimony except where corroborated. Because I have doubts about the reliability of both Mr. Leon's and Mr. Gonzalez's testimony, I address points of conflict between them below.

B. Alleged False Application

I find that Respondents did not come up with a scheme to falsely file documents with DES indicating that the workers would be housed in hotels. Mr. Gonzalez sought out Mr. Velasquez's involvement in the worker housing project. HT 51-52, 84, 384-85. Mr. Gonzalez's general support for DES involvement in the project makes it unlikely that he would knowingly file, or cause his agent to file, a false application with DES. Further, although some of Mr. Gonzalez's testimony about his lack of business sophistication appears to be overstated, it is unlikely that he knew enough about the H-2A regulations to know that he could evade inspection by falsely claiming that workers were housed in hotels.

I also find that there is insufficient evidence to support a finding that the application amendment listing hotel-based housing was filed as a result of a common scheme between Mr. Leon and Mr. Gonzalez to defraud DES, or that Mr. Gonzalez approved an idea to defraud DES originated by Mr. Leon or LeFelco. Mr. Leon's testimony, even in conjunction with the documents related to the Notice of Deficiency and the amendment that appears to be from Mr. Gonzalez, is not sufficiently reliable to establish that Respondents knew about the Notice of Deficiency and the amendment. Mr. Leon had a motive to shift blame away from himself and the companies with which he was associated. No one from G Farms was copied on the email exchanges with ETA about the deficiency and amendments. *See* AX 21-27. Although the February 10, 2017 response to the Notice of Deficiency purports to come from Mr. Gonzalez, the letter bears a plain typewritten signature. *See* AX 23. By contrast, the attachment to ETA Form 790 adding a hotel room does bear Mr. Gonzalez's signature. AX 24 at DOL686. In addition, Mr. Gonzalez consistently testified about signing blank forms without reading or dating them. Weighing all of this evidence, I find that Respondents, including Mr. Gonzalez, were not aware of the content of the amendment. Ms. Gonzalez and Ms. Sanchez appear to have been genuinely unaware of the reserved rooms at Woodspring Suites prior to the WHD investigation. *See* HT 107, 198-99, 340, 362.

However, I find that the Administrator has shown by a preponderance of the evidence that Respondents were reckless as to compliance with the requirements of the H-2A program and as to the specific requirements imposed by G Farms' 2017 H-2A application. Mr. Gonzalez signed documents that he did not read, knowing that signing such documents obligated him to comply

with the requirements of the H-2A program. *See, e.g.*, HT 40, 46; AX 18 at 00383; RX 66-68; RX 113. Ms. Gonzalez and Ms. Sanchez had Mr. Gonzalez sign partial documents and sent them back to LeFelco, knowing that no one at G Farms had read the full documents. *See* HT 80, 326, 353; RX 66-68; RX 113. Mr. Gonzalez testified that he behaved the way he did because his interactions with Mr. Leon had raised no red flags in 2016. HT 48. However, the interactions about which Respondents testified should have, themselves, been red flags. *See id.*

C. Actions of Mr. Valdez-Castro

Given that numerous H-2A workers reported that Mr. Valdez-Castro asked them for money, I find Mr. Valdez-Castro did ask for, and receive, $65.00 to $66.00 from some of the H-2A workers.[13] RDX 9 at 40, 56-57. Mr. Valdez-Castro's representations that he did not request money from any of the workers is self-serving, and Mr. Valdez-Castro himself did not offer a clear or consistent story about who paid for the bus and when. *See* RDX 9 at 40. Further, Mr. Valdez-Castro appears to have impermissibly taken kickbacks from certain workers and to have collected money from, and in the process overcharged, others. *See* RDX 1 at 7; RDX 2 at 26, 29; RDX 8 at 13, 15. Despite the above, to the extent that Mr. Valdez-Castro's testimony is corroborated by documents in the record and uncontradicted, I give it some weight.

D. Authenticity of Documents

Respondents challenge the authenticity of certain documents. In particular, they challenge Mr. Gonzalez's signature on certain documents and whether certain emails, purportedly sent to members of the G Farms staff, were ever received by Respondents. Finally, they challenge whether the letterhead on certain documents purportedly coming from G Farms was actually G Farms letterhead. To be clear, this is not a challenge to the authenticity of these documents for admissibility purposes. Rather, the argument is raised as a defense to inferring Mr. Gonzalez's knowledge of the contents of the contested documents, or his intent, from the appearance of Mr. Gonzalez's signature on the contested documents.

Above, I found Mr. Gonzalez's admission that he signed certain documents and signature pages, without reading them, to be credible – reserving the question of how that affects G Farms' liability. However, Respondents also argue that they never even saw certain documents purportedly signed by Mr. Gonzalez. *See, e.g.*, AX 23; HT 88, 332. To the extent that these documents appear in email chains on which no one from G Farms was copied, I give some weight to Ms. Gonzalez's and Ms. Sanchez's testimony that they never saw these documents. *See* AX 29; RX 71; RX 78. More particularly, where documents are signed only by plain typewritten text, where neither Mr. Gonzalez nor any employee of G Farms is copied on the pre-investigation email chain, and where the testimony of Mr. Gonzalez, Ms. Gonzalez, and Ms. Sanchez does not conflict, I credit the statements that Respondents never saw these documents, even where they are

[13] It is possible that Mr. Valdez-Castro told the workers the per-person price of the buses, one worker gifted Mr. Valdez-Castro that amount of money voluntarily out of gratitude, and other workers, through miscommunication, erroneously believed that they were obligated to pay Mr. Valdez-Castro that amount of money. However, Mr. Valdez-Castro never acknowledged having received money from workers, which means that it is impossible to reconcile all of the narratives. RDX 9 at 40, 56-57.

purportedly signed by Mr. Gonzalez and where the deposition testimony of Mr. Leon indicates that Respondents were aware of the document.

E. Credibility of WHD Investigators

The testimony of the investigators, Ms. Benitez and Ms. Espinoza, is for the most part undisputed and corroborated by other undisputed evidence. However, while the investigators' testimony is highly credible, there are a few areas in which the weight of their testimony is in question because there are limitations on the investigators' knowledge or expertise. First, the investigators could not be completely sure whether certain of the conditions they observed at G Farms on May 4, 2017 were short-term or long-term conditions. *See* HT 298. Second, the investigators are, by their own admission, not experts on fire or electrical hazards. HT 285-86.

III. Violations Related to Travel Expenses

A. Issue

The Administrator assessed $4,266.36 for unpaid costs of transportation to the place of employment and daily subsistence.[14] AX 2; 20 C.F.R. § 655.122(h)(1). More particularly, the Administrator argues that the H-2A workers were not fully reimbursed for their travel and subsistence expenses. Respondents argue that they fully reimbursed the H-2A workers for all travel-related expenses.

The Administrator's $4,266.36 figure is the alleged cost to the 69 H-2A workers of: (1) bus travel from their homes to Hermosillo; (2) visa costs; (3) costs of the hotel in Hermosillo; (4) a border crossing fee; (5) meals; and (6) bus travel from Hermosillo to Phoenix, less reimbursement already paid to the workers by Respondents. AX 2. The dollar figure assessed is based on a uniform, approximate cost to each worker. *Id.*; HT 249-65. The reimbursement figure used in the calculation is the same for most of the workers, though there are adjustments for certain workers. *Id.*

B. Findings of Fact

i. Bus Travel to Hermosillo

It is undisputed that the workers initially paid for their transit from their homes, mostly in Sibalchui, to Hermosillo. RDX 9 at 35. Ms. Benitez found that the workers paid, on average, approximately $33.84 for this bus. AX 2. Per Mr. Valdez-Castro, the buses were approximately 15,000 pesos each, or approximately 30,000 pesos total for two buses. RDX 9 at 35; AX 38. This would amount to approximately 435 pesos per worker. However, workers testified to paying between 450 to 600 pesos for the bus. RDX 4 at 13:6 (450 pesos); RDX 1 at 7:8 (500 pesos); RDX 2 at 22 (600 pesos); RDX 3 at 23:22 (600 pesos); RDX 6 at 18:21 (600 pesos); RDX 7 at 20:17 (600 pesos); RDX 8 at 14:10 (600 pesos).

[14] The Administrator also assessed a civil money penalty related to the allegedly unreimbursed costs. AX 1. The reasonableness of that penalty is addressed in the section of this Decision considering CMPs.

ii. Visa Costs

Mr. Gonzalez testified that Respondents already paid LeFelco the money for all of the visas. HT 333-34; *see also* RX 76. However, the H-2A workers who were deposed for the District Court proceedings generally testified to having paid for their visa costs. *See* RDX 1-8. From talking with workers, Ms. Benitez determined that the workers paid, on average, 4,166.67 pesos for their visas. AX 2. A number of workers testified to having paid 4,000 pesos for the visas. RDX 1 at 7:10; RDX 3 at 24:19; RDX 6 at 18:15. Two workers testified that they paid 3,610 pesos for visa costs; this cost is supported by the Administrator's own evidence. RDX 4 at 13:10; RDX 5 at 9:6; AX 31 at DOL734. One worker testified that he paid 4,800 pesos for his visa. RDX 7 at 20:9. Another worker testified that he paid 4,600 pesos to Mr. Valdez-Castro for his visa. RDX 8 at 14:10.

iii. Costs of Hotel in Hermosillo

The workers generally paid for their hotel costs while in transit to G Farms. *See* RDX 1-8; AX 2. Ms. Benitez determined that the workers paid approximately 300.00 pesos a piece, or $16.21 dollars. One worker testified to having paid 700 pesos. RDX 2 at 22. Another worker testified to having paid 600 pesos. RDX 6 at 19:15. Two workers testified that they paid 200 pesos. RDX 3 at 24:9; RDX 8 at 15. One worker testified that he did not pay for a hotel. RDX 7 at 20:22-23.

iv. Border Crossing Fee

The workers paid a $6.00 border crossing fee. AX 31; HT 22; *see also* AX 2. Ms. Benitez found that all of the H-2A workers were required to pay such a fee. HT 263; AX 2. Respondents do not dispute this.

v. Meals

It is undisputed that the workers covered their own food expenses while traveling. *See* RDX 1-8. One worker testified that the workers paid approximately $12.00 per day for meals while living at G Farms. RDX 8 at 19; RX 87.

vi. Bus Travel from Hermosillo to Phoenix

I find that Mr. Valdez-Castro asked at least some of the H-2A workers to pay him for the bus from Hermosillo to Phoenix. Mr. Valdez-Castro testified that he did not ask anyone for money but that the cost to Respondents of the two buses from Hermosillo to Phoenix was approximately $65.00 per person. RDX 9 at 56-57. A number of workers testified at deposition that Mr. Valdez-Castro asked them for approximately $65.00 to $66.00 for bus transportation. *See* RDX 1-8; RDX 1 at 7 ($66.00); RDX 2 at 23:8 ($66.00); RDX 3 at 25:3; RDX 8 at 16 ($65). One worker testified that Mr. Valdez-Castro asked for this money approximately three weeks after he arrived at G Farms. RDX 8 at 15-16. One worker testified that Mr. Valdez-Castro asked him for $66.00 but that he never paid because he did not have the funds. RDX 5 at 12. One worker testified that Mr. Valdez-Castro did not ask him for money but told him that the per-person price of the bus from Hermosillo to Phoenix was approximately in the $64.00 to $66.00 range. RDX 3 at 25. Some

workers testified that Mr. Valdez-Castro never asked them for money. RDX 4 at 14; RDX 6 at 20; RDX 7 at 21.

A few workers testified to other payments that they made to Mr. Valdez-Castro in addition to bus fare. One worker paid Mr. Valdez-Castro to be put on the list of H-2A workers to be brought to G Farms as well as $66.00 for bus fare. RDX 1 at 7. Another worker voluntarily paid Mr. Valdez-Castro approximately 1500 pesos out of gratitude in addition to $66.00 for bus fare. RDX 2 at 26, 29. A third worker made two payments of 100 pesos each to Mr. Valdez-Castro in addition to $65.00 for bus fare. RDX 8 at 13, 15.

vii. Reimbursement

G Farms reimbursed at least some of the workers for travel expenses. *See* AX 2; *see also, e.g.*, RDX 3 at 9:15. While $300.00 was the most common reimbursement amount, *see* HT 264; AX 2; RDX 1-8, some of the workers testified that they were reimbursed more or less. In particular, two H-2A worker who worked as cooks while at G Farms under the supervision of Mr. Leon testified that Mr. Leon reimbursed them $200.00 for travel expenses. RDX 4 at 14:11; RDX 5 at 10:20. Another worker testified that he, his two sons, and two other H-2A workers were reimbursed $350.00 because they asked for additional money. RDX 1 at 17.

Mr. Valdez-Castro testified that that reimbursement did not include bus fare from Hermosillo to Phoenix. RDX 9 at 54.

C. Legal Framework

Under 20 C.F.R. § 655.122(h)(1), unless the employer advances the H-2A workers costs[15] or a worker completes less than 50 percent of the work contract period, the employer must reimburse an H-2A worker for "reasonable costs incurred . . . for transportation and daily subsistence" while in transit to the place of employment. 20 C.F.R. § 655.122(h)(1).

The transportation reimbursement must be at least, though need not be more, "than the most economical and reasonable common carrier transportation charges for the distances involved." *Id.* The "daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a)." *Id.*

As the prosecuting party, the Administrator bears the burden of proof. 5 U.S.C. § 556(d). However, for purposes of determining whether costs have been reimbursed to workers, ALJs have adopted a burden-shifting framework from the Fair Labor Standards Act. *See WHD v. Bald Eagle Farms*, 2019-TAE-00025 (Aug. 5, 2020). If the prosecuting party "produces sufficient evidence to show the amount [owed] . . . as a matter of just and reasonable inference," the burden then shifts to the employer to present evidence of the precise amount or evidence that negates the inference drawn from the prosecuting party's evidence. *In re Greater Mo. Med. Pro-Care Providers, Inc.*,

[15] In certain circumstances including "[w]hen it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so," the employer must advance costs. 20 C.F.R. § 655.122(h)(1). The Administrator did not argue that Respondents were required to advance the costs in this case. HT 311, 199.

ARB No. 12-015, 2014 WL 469269, at *16 (ARB Jan. 29, 2014) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)); *see also Pythagoras General Contracting Corp. v. DOL*, 926 F. Supp. 2d 490, 493-95 (S.D.N.Y. 2013). If the employer does not meet its burden, an ALJ may award damages, even if they are approximations. *See id.*; *Bald Eagle Farms*, 2019-TAE-00025. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements" of the relevant law. *Mt. Clemens Pottery*, 328 U.S. at 688.

D. Conclusions of Law

The Administrator's calculation of the transportation and subsistence expenses for which the H-2A workers were not reimbursed was just and reasonable in light of the evidence in its case in chief. AX 2; AX 32; HT 253, 257-266.

Respondents introduced some evidence contrary to the Administrator's calculations. *See* RDX 1-8. The Administrator assessed $33.84 per person. AX 2. Respondents introduced deposition testimony of workers, among whom the highest rate paid for the bus to Hermosillo was 600 pesos, or approximately $32.41 at an exchange rate of 18.51 pesos to the dollar. Respondents argue that even this rate is too high and that the true rate per person was 30,000 pesos, the cost for both of the buses to Hermosillo, divided by 69 workers. RDX 9 at 35; AX 38. However, the price of the buses is not a proper limitation because at least some of the workers made the payment through Mr. Valdez-Castro, *see* RDX 8 at 14, who does not appear to have been an honest broker. I find that the proper rate is $32.41 except with respect to those workers who specifically testified that they paid less: Alvarez, RDX 1 at 7 (500 pesos, or $27.01); and Gaxiola (450 pesos, or $23.31). Thus, in total, Respondents owe $111.84 less for this bus than the Administrator assessed.

The direct cost of the visas was 3,610 pesos per person. AX 31 at DOL734. However, the workers testified to having paid up to 4,800 pesos for the visa. RDX 7 at 20:9. Again, at least some of the workers who testified that they paid higher visa costs testified that they paid through Mr. Valdez-Castro. RDX 8 at 14:10. Thus, I find that Respondents have not rebutted the contention that the workers paid, on average, approximately 4,166.67 pesos, or $225.10 for the costs of the visas plus any kickbacks Mr. Valdez-Castro took.

Respondents argue that although the hotel expenses assessed by the Administrator were reasonable, I should adjust for the expenses of workers who testified to paying slightly different rates. Unsurprisingly, Respondents are more concerned with downward adjustments than upward adjustments. The Administrator's accounting of 300 pesos ($16.21) per room is an average. The testimony of individual workers supports considerably higher rates, *see, e.g.*, RDX 2 at 22, as well as lower rates. RDX 3 at 24:9; RDX 8 at 15. Because the Administrator's average of 300 pesos per worker accounted for both higher and lower payments, I find that an adjustment to this figure based on the individual testimony is not appropriate.

Respondents argue that the amount that the Administrator assessed as unpaid meal costs was reasonable but that there was no evidence that every worker incurred these costs. Pursuant to the burden-shifting framework from *Mt. Clemens*, 328 U.S. at 687-88, the Administrator does not have the burden to show that every worker incurred this expense once there arises a logical

inference that the workers did. Further, if every worker did incur these meal expenses during transit, this figure would be impermissibly low. *See* 20 C.F.R. § 655.122(h)(1). Given that all of the workers stayed in hotels for two to three nights, they were in transit for two to three days. This means that workers who did have to pay for their meals were due at least $24.00 to $36.00 for subsistence costs. *See id.*; RDX 8 at 19. I find that the Administrator's assessment of $13.51 per person for meal costs is based on "sufficient evidence to show the amount owed as a matter of just and reasonable inference," *Mt. Clemens*, 328 U.S. at 687-88, and Respondents have not rebutted the inference or proven the precise amount owed. *See* AX 2.

While Respondents admit that the bus fare from Hermosillo to Phoenix needs to be reimbursed and was appropriately assessed by the Administrator, they argue that I should not assess this bus fare for particular workers who testified that they did not pay it. While I generally find the workers credible, many of the H-2A workers were good friends with Mr. Valdez-Castro and I infer that these workers were either allowed to ride free as a favor from Mr. Valdez-Castro; or, inaccurately claimed not to have paid in order to avoid implicating Mr. Valdez-Castro in a violation. For example, one worker who testified that he did not pay for the bus also testified that he had been friends with Mr. Valdez-Castro for a long time. RDX 6 at 8, 19. Absent any evidence of coerced testimony, I will defer to the H-2A workers' testimony on this point and make the adjustment, but I do so with some reservations. Accordingly, I subtract bus fare from the amount owed Mr. Gaxiola, RDX 4 at 14, Mr. Leyva, RDX 5 at 12, Mr. Soto, RDX 6 at 19-20, and Mr. Vasquez, RDX 7 at 9, 21. This results in a subtraction of $260.00 (4*$65.00) from the Administrator's assessment. *See* AX 2.

Respondents also argue that I should credit them with having reimbursed Mr. Alvarez's sons and two others $350.00, consistent with Mr. Alvarez's testimony. RDX 1 at 17, 24. I will apply this credit to Mr. Alvarez's sons, Diego Arturo Gaxiola Valencia and Jesus Antonio Gaxiola Valencia only. Respondents did not introduce sufficient evidence to rebut the Administrator's position with respect to any of the other workers.

Respondents' evidence is not sufficient to rebut the inference that some travel and subsistence costs remained unreimbursed. In light of Respondents' evidence, however, I reduce the Administrator's award by $471.84. Thus, although the figure may not precisely assess the travel and subsistence costs paid by each employee, I award $3,794.52 to the H-2A employees. *See Mt. Clemens Pottery Co.*, 328 U.S. at 688; *Bald Eagle Farms*, 2019-TAE-00025.

IV. Civil Money Penalties

A. Civil Money Penalties Generally

The Administrator found that Respondents violated numerous regulations and assessed CMPs of $389,498.40 total, $377.654.40 of which were for violations related to the conditions of Respondents' onsite encampment for the workers. AX 1.

B. Violation Disputes – Factual and Legal

i. General Legal Framework

Respondents contest most of the CMPs imposed by the Administrator. I will first consider whether Respondents violated a given regulation. Where I find a violation, I will address the CMP amount below when I consider the reasonableness of the penalties.

The Administrator may assess a civil money penalty

> for each violation of the work contract, or obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501]. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501] constitutes a separate violation

29 C.F.R. § 501.19(a).

ii. Agency Law

1. Obligations Under H-2A Program

Respondents concede that there was an agency relationship between Respondents, as principals, and LeFelco and Leon, as agents. However, Respondents argue that by failing to bring Respondents into compliance with the regulations, LeFelco and Leon acted outside the scope of the agency relationship. *See, e.g.*, AX 17 ("By signing below each party signifies that they understand this Agreement and will abide by the terms and conditions described in it.").

The parties in this case elide the distinction between separate principles of agency law, in part because the Administrator cites to case law that conflates employees and agents, as well as direct and vicarious liability. *See Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 593-594 (W.D. Tex. 1999) (citing *Entente Mineral Co. v. Parker*, 956 F.2d 524, 526 (5th Cir. 1992) (addressing vicarious liability)). A principal is *vicariously* liable for the actions of an *employee*-agent if those actions are taken in the scope of employment. *See* Restatement (Third) of Agency §§ 2.04, 7.07(1). Whether an agent is an employee of the principal turns on the principal's control over the agent. *Id.* at § 7.07(2). While Mr. Leon and LeFelco were Respondents' agents, that does not mean they were Respondents' employees.[16] *See id.* Respondents appear not to have exercised much control over Mr. Leon, let alone over LeFelco and LeFelco's employees. *See, e.g.*, HT 80, 326, 353 (testimony that Respondents never reviewed forms LeFelco completed).

Setting aside the matter of vicarious liability, I focus on Respondents' *direct* liability for Mr. Leon's and LeFelco's actions. I find that Respondents were *directly* liable for many of Leon's and LeFelco's actions. As articulated in the Restatement (Third) of Agency § 7.06, "[a] principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent." *See* also Restatement (Second) of Torts § 409, comment b (non-delegable duties). Under the H-2A program, employers have a

[16] As a matter of semantics, there is a separate issue of whether LeFelco itself, as a business entity, may be excluded from the category of "employee." However, if Respondents did exercise sufficient control over LeFelco, LeFelco's employees could have been employees of Respondents for the purpose of the agency analysis.

duty to protect H-2A workers by complying with the regulations. *See* 20 C.F.R. § 655.135 ("An employer seeking to employ H-2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make" additional enumerated "assurances"). Respondents can delegate some aspects of compliance efforts, *see* 20 C.F.R. § 655.133, but they remain liable under 20 C.F.R. § 655.135 despite this delegation.

2. Filing of a False Application

The Administrator alleges that regardless of Respondents' knowledge about an amendment to their application, Respondents are liable for the false communications to DES that workers would be housed in hotels rather than on site. Respondents allege that LeFelco acted outside the scope of the agency relationship by filing an unauthorized amendment to the H-2A application that contained or resulted in the cited violations. As I explain here, Respondents are liable for violations of the obligations created by the amendment, and for their agents' act of filing that amendment. Respondents' argument to the contrary is unusual because a principal typically argues that a contract was outside the scope of an agent's authority when the principal seeks to avoid the contract. Here, though, the contracts entered into by LeFelco on Respondents' behalf are the H-2A program application and the Response to the Notice of Deficiency, the latter of which became necessary after the Notice of Deficiency. If Respondents succeeded in avoiding these contracts, the usual remedy, then they would never have had authority to employ H-2A workers at all—either they never actually applied, or they never submitted a response overcoming identified deficiencies. If LeFelco did not have the authority to bind Respondents, expressly or impliedly, Respondents did not have the authority to participate in the H-2A program by bringing in and employing foreign workers, acts which they indisputably took. That is not the result that Respondents want.

Respondents effectively argue for a contract existing under their purported understanding of the terms. But even if LeFelco did not have authority to bind Respondents to a contract on the terms of the application and supplemental application, the government agencies administering the H-2A program never, prior to the investigation, entered into a contract (so to speak) on the terms that Respondents argue that they communicated to LeFelco.

Even if Respondents' argument did not undermine the basis for their participation in the H-2A program, it would still be wrong as a matter of agency law. Under agency law, authority to enter into a contract can be express actual authority, implied actual authority, or apparent authority. Like non-delegable duties, apparent authority is another theory that makes a principal liable for the actions of its agents: "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of Agency § 2.03.

In this case, I need not decide whether LeFelco had actual authority to enter into a contract on behalf of Respondents, except to the extent that the presence or absence of authority is a mitigating factor for CMPs and debarment (both of which I consider below). It was reasonable for the government to believe that LeFelco had the authority to act on behalf of Respondents. Acting on actual express authority, LeFelco submitted paperwork to the government representing that

LeFelco was Respondents' agent. AX 17; AX 20; *see also* HT 328, 355. Mr. Gonzalez signed those documents, including a declaration "under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate." AX 18 at 00383; HT 40-41. Mr. Gonzalez trusted Mr. Leon (and LeFelco) to do "anything that was related to the government paperwork." HT 37. Thus, the manifestations of the principal, Respondents, acting by and through Mr. Gonzalez, created a reasonable belief in the relevant government officials that LeFelco had the authority to file paperwork on Respondents' behalf.

Further, there was nothing on the face of the H-2A application or amendment that indicated that LeFelco did not have authority to file the paperwork. *See* AX 20; AX 22-24. In fact, the amendment was necessary for the approval of Respondents' H-2A application—as Respondents were actually seeking approval of this application, government officials had no reason to believe that steps taken in pursuit of that goal were not approved by Respondents. As for the piece-rate and hourly terms, to the extent that the certifying official looked back to Respondents' past applications, they would have seen no irregularity. Respondents' 2016 application listed the same hours and hourly pay. AX 33; *see also* RDX 10 at 191; HT 80-81, 86. Thus, even if LeFelco did not have actual authority to bind Respondents to the terms in the H-2A application and amendment, they did have apparent authority, which binds Respondents to the terms both as a matter of agency law and under the regulations establishing the H-2A program. There is, after all, no question that Respondents were approved to bring in H-2A workers, did so, and employed H-2A workers in their business. Respondents gained the benefit of the bargain.

3. Fairness Concerns

Applying agency principles is not unfair to Respondents. Respondents repeatedly and explicitly took responsibility as principals for the acts of LeFelco, their agent in the H-2A process. *See, e.g.*, RX 67 at GF000613 ("I hereby acknowledge that the agent or attorney identified in section E (if any) of the Form ETA-9142A and section A above is authorized to represent me for the purpose of labor certification and, by virtue of my signature in Block 5 below, I take full responsibility for the accuracy of any representations made by my agent or attorney."); RX 69 at DOL00007 (listing LeFelco in section E of Form ETA-9142A); RX 66. Respondents' and LeFelco's agency relationship sounded in contract. *See* AX 17. To the extent that LeFelco's actions harmed Respondents, Respondents can perhaps seek recovery from LeFelco on a common law contractual theory or on a tort theory. I have no jurisdiction to adjudicate such claims. However, the fact that such means of recovery are available suggests that applying common law agency theory is appropriate.[17]

iii. Incorporation by Reference of Arizona State Fire Code (Incorporating Therein the 2012 International Fire Code)

1. Notice

[17] Gonzalez stated that he did not want to sue Leon. HT 60. However, the remedy is generally available notwithstanding Gonzalez's decision not to pursue it. If I did impose mitigation based on Gonzalez's choice not to sue Leon, he could still do so, despite his testimony to the contrary, unless barred by a statute of limitations, the terms of the contract, or some other reason. *See* AX 17 at DOL147.

Respondents argue that the Administrator's post-trial briefing was the first time Respondents had notice that the Administrator was assessing a violation of 20 C.F.R. § 655.135(e) based on the 2012 International Fire Code ("IFC") as incorporated by reference in the Arizona State Fire Code. *See* Az. State Fire Code; Arizona State Fire Marshal, Notice: Adoption of 2012 IFC, https://dfbls.az.gov/ofm.aspx.

This is incorrect. The Administrator's Memorandum of Points and Authorities in Support of Administrator's Motion for Partial Summary Decision, for example, cites the same provisions of the IFC cited in Administrator's post-hearing briefing.[18] Like the Administrator's post-hearing briefing, the Memorandum provides links to the Arizona State Fire Code and the notice of the adoption of the IFC as part of Arizona law.

2. Applicability

Under the Arizona State Fire Code, the IFC applies "[u]nless otherwise provided by law." Far from preempting other law, 20 C.F.R. § 655.135(e) itself explicitly incorporates state health and safety law. Further, Respondents, who, as I found above, were on notice of the Administrator's reliance on the IFC, advanced no argument as to provisions of federal or state law (or local law, to the extent that local law could, under Arizona law, create exclusions to the general state rule),[19] such that the IFC does not apply here.[20]

3. Violation

The Administrator cites to a provision of the IFC that prohibits: (1) the use of "[e]xtension cords and flexible cords" as "a substitute for permanent wiring[,]"; and (2) affixing extension cords and flexible cords "to structures extended through walls, ceilings or floors, or under doors or floor coverings[.]" IFC § 604.5. The Administrator cites a second provision of the IFC that requires that extension cords "be grounded where serving grounded portable appliances." IFC § 604.5.4. Respondents argue that G Farms hired a professional electrician, who installed a separate breaker box. HT 108.

Neither party offered much evidence as to whether the extension cords in this case were grounded. Ms. Benitez testified that she spoke with individuals at the Mirage Fire Department,

---

[18] Technically, neither in the pre-hearing nor the post-hearing documents did the Administrator cite to the correct section number of the IFC: the Administrator erroneously cited to IFC §§ 605.5 and 605.5.4 instead of IFC §§ 604.5 and 604.5.4. However, this error did not prejudice Respondents, as (1) the Administrator cited the correct statutory *language* both pre-hearing and post-hearing, and (2) the typographical error is readily apparent. The error is apparent because the Administrator cited the correct, plainly more relevant, statutory language; the two sections are right next to each other in the IFC; IFC § 605.5 is plainly inapplicable; and IFC § 605.5.4 does not exist.

[19] I have not read the entire United States Code, but the incorporation by reference of state codes in 20 C.F.R. § 654.417(a) and 29 C.F.R. § 1910.142(b)(11) suggests that application of state codes to federal temporary labor camps is not otherwise preempted by federal law.

[20] At hearing, I requested that the parties brief what state, federal, or local law I should apply with respect to violations under 29 C.F.R. § 1910.42(b)(11), as incorporated by reference in 20 C.F.R. § 655.122(d)(1). HT 233-34. The Administrator did not assess penalties under 29 C.F.R. § 1910.42(b)(11) as incorporated by reference. AX 1. By contrast the Administrator did assess penalties under 20 C.F.R. § 655.135(e), which also incorporates federal, state, and local law by reference, but does not do so through application of a regulation under the purview of OSHA.

who helped identify code provisions for citing the electrical hazards at G Farms. HT 286. The Administrator argues that there is a violation of IFC 605.5.4 because multiple extension cords were strung together to power appliances. Generally, the extension cords in the photos look like common hardware-store extension cords, which I am familiar with, and which typically are equipped with 3-prong plugs and receptacles, the third prong being the ground. *See, e.g.*, AX 4-5, 8. These types of extension cords typically have a third insulated conductor as a ground conductor, but the ground prong can become damaged, or be intentionally removed in order to plug a 3-prong extension cord into a 2-prong outlet, *but see* AX 8 (showing open three-prong outlet), leaving the portable appliance ungrounded. Also, it is generally an unsafe practice – if a common one – to daisy-chain extension cords. But my own knowledge cannot substitute for evidence on an element of a violation. Because the Administrator must prove the CMPs by a preponderance of the evidence, I find that the Administrator has not met its burden for a violation of IFC § 604.5.4 (as incorporated by reference).

By contrast, the Administrator has shown a violation of IFC § 604.5 (as incorporated by reference). The buses had no electric outlets, and, thus, extension cords attached to an external power source were used to power lights and other devices within the buses. HT 126, 145, 152. Similarly, an extension cord, connected to a power source in the warehouse shed, was attached to a light – the only source of light at the closed, and therefore dark, end of the shower trailer – that the investigators found in the shower trailer. HT 110. This extension cord passed through areas where water pooled due to the lack of proper drainage. *Id.*; 168-70; 289-90. The cord was not suspended out of the water. *Id.* I infer and find because the lights powered by the extension cords were the only lights in the buses and shower trailer, that these cords were acting as substitutes for permanent wiring. There is no indication that these lights were temporary, as in, taken down at the end of the evening each day in these living areas, as a worker might coil up and store an extension cord used to temporarily power a light or portable piece of equipment at the end of a work shift. Notwithstanding my finding about IFC § 604.5.4, I find that the Administrator reasonably imposed a CMP for a violation of IFC § 605.4 as incorporated by reference. I will consider separately whether the size of that CMP was appropriate.

iv. Incorporation by Reference of ETA and OSHA Standards

The regulations in 20 C.F.R. part 655, subpart B require employer-provided housing under the H-2A program to meet the 29 C.F.R. § 1910.142 standards, administered by the Occupational Safety and Health Administration ("OSHA") or the 20 C.F.R. §§ 654.404-.417 standards, which were adopted and are administered by the ETA. 20 C.F.R. § 655.122(d)(1)(i). The ETA standards apply to "[e]mployers whose housing was completed or under construction prior to April 3, 1980, or was under a signed contract for construction prior to March 4, 1980." 20 C.F.R. § 654.401; *see also* Workforce Innovation and Opportunity Act; Final Rule, 81 Fed. Reg., 56349, 56281 (Aug. 19, 2016) (declining to phase out ETA standards for pre-1980 housing). Otherwise, the OSHA standards apply. *See* 20 C.F.R. § 655.122(d)(1)(i).

Secretary's Order 1-90 delegated to OSHA sole interpretation authority of 29 C.F.R. § 1910.142. *See* Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration, 62 Fed. Reg. 107-11 (Jan. 2, 1997). However, in 1997, that authority was

transferred to the now-disbanded Employment Standards Administration, formerly the home of WHD. *Id.* While WHD and OSHA share enforcement authority under 29 C.F.R. § 1910.142, WHD retains sole interpretation authority. *See* Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58,393-94 (Sept. 18, 2020).

The term "housing" under 20 C.F.R. § 655.122(d)(1)(i) encompasses the temporary labor camp site where an employer houses workers, not just the areas where beds are located. *See* 29 C.F.R. § 1910.142; 20 C.F.R. §§ 654.404-.417. Per OSHA, which had interpretation authority at the time, "[t]he mobility of the units does not relieve the employer from complying with" "the general provisions of [29 C.F.R. § 1910].142." Interpretation of 29 C.F.R. 1910.142(b)(9) All Mobile Housing Units Without Exception Must Comply with the General Provisions for 1910.142 (June 21, 1991), https://www.osha.gov/laws-regs/standardinterpretations/1991-06-21.

In this case, the Administrator determined which standards applied by looking to the date on which the "container" (i.e., the bus, the trailer, or the chemical toilet) was manufactured. HT 278. The Administrator determined that all but one of the containers was manufactured after 1980 and thus applied the OSHA standards with respect to violations related to those containers. HT 278-79. However, the Administrator determined that the bus that Respondents used as "the kitchen bus" was manufactured before 1980. HT 278; AX 14 at DOL137. Thus, the Administrator applied the ETA standards for violations related to the kitchen bus.

Respondents do not contest the applicability of the ETA as opposed to the OSHA standards. While Respondents mentioned that the Administrator applied the ETA standards, they provided no argument against the application of these standards; in fact, they admitted to violations under these standards. Since Respondents waived any objection here, I need not decide whether the WHD's choice of which standards to apply must be given deference. *C.f. Wage & Hour Division v. John Peroulis and Sons Sheep, Inc.*, ARB Nos. 14-076, 14-077, 2016 WL 6024266 at *4 (2016) (affirming ALJ findings which applied an abuse of discretion standard to the WHD's interpretation of its regulations). In any event, I could find no conflicting policy guidance on the matter. *See id.* Thus, I apply the ETA standards with respect to the kitchen bus.[21]

[21] I note, however, that I find the Administrator's application of the ETA standards rather than the OSHA standards to be an odd fit with the policy underlying this regulation. The regulation at 20 C.F.R. § 654.401(a) grandfathers in buildings built or investments in housing that occurred before 1980. Housing for Agricultural Workers, 45 Fed. Reg. 14180 (March 4, 1980). In 1977, the Department purported to "rescind[] the ETA housing regulations . . . effective immediately." Id. However, after receiving "numerous complaints" from employers "who had constructed housing to conform to the ETA standards[,]" the Department proposed a revision of the prior rescission. *Id.* As promulgated, 20 C.F.R. § 654.401 allowed for "the continued application of the ETA standards to housing constructed in reliance on these standards" because doing so "would be fair to affected employers[.]" *Id.* Per the final rule, both ETA and OSHA would require "employers who undertake housing construction on or after April 3, 1980 to follow the OSHA standards in 29 CFR 1910.142." *Id.* The situation here is different: although the *bus* was constructed before 1980, neither the kitchen nor the "housing" more generally was "under construction" before 1980. The bus did not become a kitchen or bear any relation to kitchens or housing until it was purchased and Gabriel Gonzalez had the idea to convert it into a kitchen. RDX 10 at 162. It seems to me that the construction of the kitchen began in 2016 or 2017 even though the construction of the bus occurred much earlier. Notwithstanding this, I find the Administrator's decision to apply the ETA standards with respect to the kitchen bus reasonable, especially since the Administrator could have assessed all of the same penalties for the same conditions under the OSHA standards, as incorporated by reference in 20 C.F.R. § 555.122(d)(1). *See* 29 C.F.R. § 1910.142(b)(11); *see also generally* 29 C.F.R. § 1910.142.

The Administrator assessed a CMP of $1,353.60 (1*$1,692.00*(1-0.2)) for an alleged violation of the requirement that "[w]hen workers or their families are permitted or required to cook and eat in a common facility, a room or building separate from the sleeping facilities must be provided for cooking and eating." 20 C.F.R. § 654.413(b). Respondents argue that that penalty should be reduced to $507.60 (1*$1,692.00*(1-0.7)).[22] It is undisputed that the encampment did not contain such a room.

The Administrator also assessed two penalties related to the alleged fire hazard. The Administrator assessed a CMP of $1,353.60 (1*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $507.60 (1*$1,692.00*(1-0.7)) for an alleged violation of the requirement that "[f]ire extinguishing equipment shall be provided in a ready accessible place located not more than 100 feet from each housing unit" 20 C.F.R. § 654.417(f). The Administrator assessed a penalty of $93,398.40 (69*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $35,024.40 (69*$1,692.00*(1-0.7)) or less, for an alleged violation of the requirement that "[n]o flammable or volatile liquids or materials shall be stored in or adjacent to rooms used for living purposes, except those needed for current household use." 20 C.F.R. § 654.417(h).[23]

Because I affirm the Administrator's citations of Respondents for three violations related to the kitchen bus, I affirm the imposition of penalties for violations, reserving consideration of the reasonableness of the penalties for discussion below.

v. Meaning of "Building"

Respondents argue that the conditions in the kitchen bus that the Administrator cited and for which the Administrator assessed a penalty did not actually violate the ETA regulations. In particular, Respondents question whether the kitchen bus was a "building" within the meaning of the ETA regulations. However, of the three kitchen bus-related violations for which the Administrator assessed a non-zero penalty, only one refers to a "building." *See* 20 C.F.R. §

[22] A similar provision would apply under the OSHA standards: "[a] properly constructed . . . dining hall adequate in size, separate from the sleeping quarters of any of the workers or their families, shall be provided in connection with all food handling facilities." 29 C.F.R. § 1910.142(i)(2). I note, too, that the Administrator cited Respondents for a violation of 20 C.F.R. § 654.413(b), where a citation under Section 654.413(c) seems like a more natural fit. However, in light of the fact that it is unclear what type of facilities Respondents were trying to provide, the application of 20 C.F.R. § 654.413(b) is reasonable, and the kitchens and eating spaces would have violated either section.

[23] The fire hazards for which Respondents were cited also violated the OSHA standards. See 29 C.F.R. § 1910.142(b)(11) ("All heating, cooking, and water heating equipment shall be installed in accordance with State and local ordinances, codes, and regulations governing such installations."). Because the OSHA regulations incorporate, under these circumstances, the Arizona State Fire Code, that means that they incorporate the 2012 IFC as incorporated by reference in the Arizona State Fire Code. The IFC requires fire extinguishers "[i]n areas where flammable or combustible liquids are stored, used or dispensed." IFC § 906.1.3; see also IFC Chapter 2 (Definitions). Additionally, Chapter 61 of the IFC regulates liquefied petroleum gas ("LP-gas"), which includes propane. Respondents' use of the propane tanks violated a number of these provisions. See, e.g., IFC § 6109.2 ("LP-gas containers in storage shall be located in a manner that minimizes exposure to excessive temperature rise, physical damage or tampering."). Storing propane outside, in the Arizona sun during the late spring did not minimize exposure to excessive temperature rise or physical damage.

654.413(b). Further, that particular regulation requires a "room or building," the *absence* of which resulted in the assessment. *See id.*; *see also* AX 1. Thus, Respondents' argument has no bearing on whether the non-zero penalties that the Administrator imposed were appropriate.

vi. Specific Violation Disputes

1. Housing Violations

a. Toilets

The Administrator assessed CMPs for violations of the regulations governing the housing encampment's toilets. *See* 29 C.F.R. § 1910.142(d)(2), (d)(10). The Administrator assessed a CMP of $1,353.60 (1*$1,692.00*(1-0.2)) for an alleged violation of the requirement that "[t]oilet rooms shall have a window not less than 6 square feet in area opening directly to the outside area or otherwise be satisfactorily ventilated." 29 C.F.R. § 1910.142(d)(2). Similarly, the Administrator assessed a CMP of $1,353.60 (1*$1,692.00*(1-0.2)) for an alleged violation of the requirement that "[p]rivies and toilet rooms shall be kept in a sanitary condition. They shall be cleaned at least daily." 20 C.F.R. § 1910.142(d)(10). Respondents argue that they provided commercial chemical toilets that were serviced and cleaned daily. HT 334; RX 77.

I find that the chemical toilets were cleaned daily. Respondents have introduced receipts and testimony indicating that the toilet rooms were cleaned every day. RX 77; HT 108; *see also* 335. While I find that the toilets were dirty and smelly when the WHD investigators examined them, HT 172, a chemical toilet can become dirty and smelly in much less than twenty-four hours.

Whether there was a violation turns on whether chemical toilets could constitute "[t]oilet facilities adequate for the capacity of the camp" when they were the only toilet facilities present at the camp. 29 C.F.R. § 1910.142(d)(1). The OSHA regulations are not clear about the adequacy of chemical toilets. While they clearly contemplate chemical toilets, *see* 29 C.F.R. §§ 1910.142(d)(2), (9), they do not clarify whether chemical toilets alone can be "facilities adequate for the capacity of the camp." *Id.* § 1910.142(d)(1).

However, when OSHA still had interpretation authority, OSHA interpreted the regulations to allow the use of portable chemical toilets. Interpretation of 29 C.F.R. 1910.142(d)(2) and 1910.142(d)(8) Privies Lighting, Ventilation and Window Space Standards, OSHA Standards Interpretations, 1994 WL 16189833 (Aug. 24, 1994). As applied to portable toilets, OSHA stated that a violation of the ventilation provision of 29 C.F.R. § 1910.142(d)(2) requires "more than an admittedly unpleasant odor"; rather, "there must be a hazard to employees from the lack of ventilation." *Id.* OSHA expressed concern with citing employers for a technical violation for using equipment "similar to that provided in the field or on countless construction sites or for public gatherings." *Id.* As interpreted by OSHA, standard portable chemical toilets in sufficient number that are "serviced [daily] and kept sanitary" are adequate as a matter of law, though not ideal given their limitations. Although OSHA no longer has interpretation authority, I can find no indication that WHD ever abrogated this position. Accordingly, I find that it is an abuse of discretion to find a violation of 29 C.F.R. § 1910.142 merely because Employer only provided portable toilets with an admittedly unpleasant odor.

Here, in reference to the ventilation provisions, WHD has alleged no more than "an admittedly unpleasant odor." Respondents have contended that the toilets that they provided were standard portable toilets, and the Administrator has offered no evidence to the contrary (such as evidence that the factory-provided ventilation was covered over). Therefore, I thus find that the chemical toilets provided were "satisfactorily ventilated" and that there was no violation of 29 C.F.R. § 1910.142(d)(2).

For the above reasons, I reverse and vacate the penalty the Administrator imposed for the alleged violations of 29 C.F.R. § 1910.142(d)(2) and (d)(10).

b. Shower Trailer

The Administrator found that conditions in the shower trailer violated 29 C.F.R. §§ 1910.142(a)(1), (f)(2), and (f)(6). The Administrator assessed a CMP of $1,353.60 (1*$1,692.00*(1-0.2)) for a violation of the requirement that "[a]ll sites used for camps shall be adequately drained. They shall not be . . . located within 200 feet of swamps, pools, sink holes, or other surface collections of water unless such quiescent water surfaces can be subjected to mosquito control measures." 29 C.F.R. § 1910.142(a)(1). The Administrator assessed another CMP of $1,353.60 (1*$1,692.00*(1-0.2)) for a violation of the requirement that "[f]loors [of bathing facilities] shall be of smooth finish but not slippery materials . . . Floor drains shall be provided in all shower baths, shower rooms, or laundry rooms to remove waste water and facilitate cleaning . . . The walls and partitions of shower rooms shall be smooth and impervious to the height of splash." 29 C.F.R. § 1910.142(f)(2). Finally, the Administrator assessed a CMP of $1,353.60 (1*$1,692.00*(1-0.2)) for violation of the requirement that "[a]ll service buildings shall be kept clean." 20 C.F.R. § 1910.142(f)(6).

Respondents deny any violation of 29 C.F.R. §§ 1910.142(a)(1) and (f)(2). Respondents argue that they did not violate 29 C.F.R. § 1910.142(f)(6) because they took reasonable steps to keep the shower trailer clean.

I find that Respondents violated each of these provisions. The pooling of the wastewater from the shower trailer underneath and around the trailer showed that the trailer was not "adequately drained" regardless of whether Respondents were required to take measures to treat this water for mosquitos. 29 C.F.R. § 1910.142(a)(1); HT 167-68; AX 12. Furthermore, the pooling of the shower water *in* the shower trailer demonstrated that there were not sufficient "[f]loor drains . . . to remove waste water and facilitate cleaning." 29 C.F.R. § 1910.142(f)(2); AX 12; HT 167-70. Far from containing "partitions . . . impervious to the height of the splash," the showers were designed so that water flowed through the partitions toward a single drain. *Id.* Finally, the Administrator's findings that the shower trailer contained trash and that the floors had pooled waste water was sufficient for an assessment under 29 C.F.R. § 1910.142(f)(6), AX 12, even if the trailer was not always in such a condition. *See Rodriguez v. Carlson*, 943 F. Supp. 1263, 1275 (E.D. Wa. 1996). In particular, while waste water was not always present, *see* RX 101, I infer from the lack of a proper drainage system that it was a recurrent rather than one-time cleanliness issue. *See Rodriguez*, 943 F. Supp. at 1275.

c. Warehouse Shed

The Administrator assessed four CMPs for conditions in the warehouse shed. The Administrator assessed a penalty of $1,353.60 (1*$1,692.00*(1-0.2)) for violation of the requirement that "[t]he grounds and open areas surrounding the shelters shall be maintained in a clean and sanitary condition free from rubbish, debris, waste paper, garbage, or other rubbish." 29 C.F.R. § 1910.142(a)(3). The Administrator assessed a penalty of $5,414.40 (4*$1,692.00*(1-0.2) for an alleged violation of the requirement that "[b]eds, cots, or bunks, and suitable storage facilities such as wall lockers for clothing and personal articles shall be provided in every room used for sleeping purposes. Such beds or similar facilities shall be spaced not closer than 36 inches both laterally and end to end, and shall be elevated at least 12 inches from the floor." 29 C.F.R. § 1910.142(b)(3). The Administrator assessed a penalty of $1,353.60 (1*$1,692.00*(1-0.2)) for an alleged violation of the requirement that "[a]ll exterior openings shall be effectively screened with 16-mesh material." 29 C.F.R. § 1910.142(b)(8). Finally, the Administrator assessed a penalty of $1,353.60 (1*$1,692.00*(1-0.2)) for an alleged violation of the requirement that "[w]here electric service is available, each habitable room in a camp shall be provided with at least one ceiling-type light fixture and at least one separate floor- or wall-type convenience outlet. . . . [R]ooms where people congregate shall contain at least one ceiling- or wall-type fixture. Light levels in . . . storage rooms shall be at least 20 foot-candles 30 inches from the floor. Other rooms, including kitchens and living quarters, shall be at least 30 foot-candles 30 inches from the floor." 29 C.F.R. § 1910.142(g).

Respondents contest these assessments because Respondents argue that they did not assign any of the H-2A workers to sleep in the warehouse shed. *See* HT 107, 174, 284. However, the regulations at 29 C.F.R. §§ 1910.142(a)(3) and (b)(8) apply generally to "shelter," which, by the terms of 29 C.F.R. § 1910.142(b) applies not just to rooms used for sleeping purposes. By Respondents' own admission, the shed was at least a place to congregate and a storage room. HT 109. Additionally, 29 C.F.R. § 1910.142(g) regulates lighting in "rooms where people congregate" and "storage rooms."

Notwithstanding the above, by its terms, 29 C.F.R. § 1910.142(a)(3) applies to "grounds and open areas surrounding the shelters." 29 C.F.R. § 1910.142(a)(3); *see also DOL v. Urbina*, 2000-MSP-0010, slip op. at 12 (Dec. 12, 2001) (citing this provision in regard to outdoor conditions). However, the Administrator appears to cite this section for conditions *inside* the shed. *See* AX 3, 7. A separate provision requires that "[a]l service buildings" be "kept clean." 29 C.F.R. § 1910.142(f)(6). However while "service building" is not clearly defined, the other terms of 29 C.F.R. § 1910.142(f) imply that the term does not, or does not necessarily, encompass sleeping quarters. Thus, none of the provisions of 29 C.F.R. § 1910.142 appear to require the employer to keep the actual sleeping quarters uncluttered. For this reason, I find that the Administrator's assessment under 29 C.F.R. § 1910.142(a)(3) was inappropriate.

As to whether the warehouse shed was a "room used for sleeping purposes" pursuant to 29 C.F.R. § 1910.142(b)(3), I note that as part of the consent judgment in District Court, Respondents admitted to housing H-2A workers in the shed. AX 44, at 2 ¶ H. Even to the extent that Respondents did not initially intend to house workers in the shed, I find that Respondents knew (1) that the buses and trailers were overcrowded, either requiring or encouraging certain workers to seek out alternative sleeping arrangements, and (2) that workers were, in fact, sleeping in the

shed. *See* HT 139 (noting obviousness of overcrowding concern), 292-94; RDX 10 at 186. Thus, Respondents knew that the shed was a "room *used* for sleeping purposes" even if Respondents did not intend for the workers to use the shed for sleeping purposes. For this reason, the Administrator could appropriately cite Respondents for a violation of 29 C.F.R. § 1910.142(b)(3) based on conditions in the shed, and the Administrator could appropriately apply 29 C.F.R. § 1910.142(g) based on the standard for a "habitable room."

d. Laundry Facilities

The Administrator assessed a penalty of $1,353.60 (1*$1,692.00*(1-0.2)) for an alleged violation of the requirement that "Laundry . . . facilities shall be provided in the following ratio: [l]aundry tray or tub for every 30 persons." 29 C.F.R. § 1910.142(f)(1). Respondents argue that they provided sufficient laundry facilities by bringing the H-2A workers to the laundromat. HT 111; *see also* RX 111.

I find that this provision of off-site laundry facilities does not meet the requirements of 29 C.F.R. § 1910.142(f)(1). The plain language of this regulation is clear and mandatory. As an example to illustrate this point, the Administrator knows how to exempt worker housing from onsite laundry facility requirements. In a separate regulation, not applicable here, DOL has promulgated standards for mobile housing for a certain subset of H-2A workers. 20 C.F.R. § 655.235. As these standards cover only work related to livestock, they are plainly inapplicable to this case. *Id.* at § 655.200. Specifically with respect to "itinerant workers engaged in the animal shearing and custom combining occupations," DOL proposed amending that standard "to allow mobile housing units without certain facilities (e.g., showers and laundry facilities) as long as the employer otherwise supplements these facilities." Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36,168, 36,225-26 (July 26, 2019). However, no regulations exempt employers of H-2A workers engaged in harvesting from the requirement of providing onsite laundry facilities when workers are housed onsite. *See* 29 C.F.R. § 1910.142(f).

2. Wage-Related Violations

The Administrator alleges that Respondents violated 20 C.F.R. § 655.122(h)(1) and 20 C.F.R. § 655.135(j). The Administrator assessed a CMP of $1,184.00 (1*$1,692.00*(1-0.3)) for the violation of each provision. As discussed above with respect to the unreimbursed travel expenses, an employer must either advance H-2A workers travel or subsistence costs or reimburse workers' travel and subsistence costs if the workers complete half the contract period. 20 C.F.R § 655.122(h)(1). The employer must advance travel expenses "[w]hen it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so[.]" *Id.*

In this case, the Administrator did not argue that Respondents were required to advance subsistence costs. HT 311, 199. Thus, the right to reimbursement only vested in the H-2A workers at the half-way point of the H-2A contract. 20 C.F.R § 655.122(h)(1). Because the May 4 investigation occurred *before* the half-way point in the contract, *see* HT 208, the right to reimbursement had not yet vested in the workers (and hence Respondents' obligation had not come due). Nonetheless, as I found above, Respondents *never* fully reimbursed the workers. Thus, the Administrator properly found that Respondents violated 20 C.F.R § 655.122(h)(1) because some

of the reimbursement remains due and owing. Further, as I indicated above, the reason Respondents have not paid the reimbursement in full is, at least in part, because they never made adequate efforts to accurately keep track of or reconstruct the H-2A workers' expenses.

Under 20 C.F.R. § 655.135(j), "[t]he employer and its agents" may not seek or receive "payment of any kind from any" H-2A worker "for any activity related to obtaining H-2A labor certification, including application fees[] or recruitment costs." Payment "includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. This provision does not prohibit employers or their agents from receiving reimbursements 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). However, "[g]overnment-mandated costs, such as visa application, border crossing, and visa fees, are included within this prohibition." H-2A "Prohibited Fees" and Employer's Obligation to Prohibit Fees, Field Assistance Bulletin No. 2011-2, WHD (May 6, 2011) (citing 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010)).

I find that at least one worker paid Mr. Valdez-Castro in order to be added to the list of H-2A workers. RDX 1 at 7:4. I find that this alone is enough to support a violation of 20 C.F.R. § 655.135(j). I also found above that at least some of the workers paid Mr. Valdez-Castro for the bus from Hermosillo to G Farms, as well as other kickbacks. *See* RDX 1-8. While Respondents were not required to advance the workers the cost of this bus, 20 C.F.R § 655.122(h)(1), that does not mean that they or their agents could collect transportation costs from the workers unless the transport was "primarily for the benefit of the worker." 20 C.F.R. § 655.135(j).

3. Recordkeeping Violations

Under 20 C.F.R. § 655.122(j)(1), "[t]he employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to . . . the hours actually worked each day by the worker; the time the worker began and ended each work day." Finding that Respondents did not record the number of hours actually worked by the piece-rate workers and applying three mitigating factors, the Administrator assessed a CMP of $1,184.40 (1*$1,1692.00*(1-0.3)). *See* RX 107-110.

Respondents admit that they did not keep records of the actual hours worked for the twenty-two piece-rate workers, but rather recorded general start and stop times. RX 105; *see also* RX 106; AX 40-42. There is conflicting evidence around whether Respondents kept contemporaneous records of start and stop times for piece-rate workers. *See* AX 40; RX 105; HT 367 (start and end times recorded were not exact); HT 348 (hours recorded based on workers all starting and ending at the same time); HT 251-52 (hours ultimately recorded may have been a reconstruction). The regulation is phrased in terms of "the worker" singular, not "the workers" plural, and therefore requires that each worker's beginning and ending time be recorded each work day, so as to ensure timely and accurate payment of wages to each worker. Though there is some dispute, a preponderance of the evidence shows that this worker-specific recording of hours worked was not done on each day for each worker; otherwise, there would have been no need for reconstructions. Thus, Respondents violated the regulation under which the Administrator assessed the penalty.

C. Penalty Disputes

i. Civil Money Penalties Generally

The Administrator has the burden of proof regarding the reasonableness of the civil monetary penalty. *See* 5 U.S.C. § 556(d); *Three Chimneys Farms, LLC*, 2013-TAE-00011, slip op. at 16-17 (2015) (citing cases). The appropriateness of the penalty and application of mitigating factors is reviewed by the ALJ *de novo*. *Peroulis*, 2016 WL 6024266 at *7 (citing 29 C.F.R. § 501.41(b) (providing for "*de novo* hearing" before the ALJ)). *But see Azzano Farms, Inc.*, 2019-TAE-00002, slip op. at 16 (Oct. 2, 2019) (citing *Administrator, Wage & Hour Div. v. Kutty*, ARB No. 03-022, ALJ No. 2001-LCA-010, *21 (ARB May 31, 2005)) ("The Administrator is vested with discretion in calculating the amount of civil money penalties, but should not abuse that discretion.").

The Administrator may assess a civil money penalty

> for each violation of the work contract, or obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501]. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in [29 C.F.R. Part 501] constitutes a separate violation.

29 C.F.R. § 501.19(a). The maximum civil money penalty that can be assessed for each violation as applied to each worker is listed in the regulations. 29 C.F.R. § 501.19(c). At the time the Administrator assessed the CMPs in this case, the maximum per-worker CMP for a single non-willful violation that did not result in death or serious injury of any worker was $1,692.00. *See* 29 C.F.R. § 501.19(c) & Wage and Hour Division, Civil Money Penalty Inflation Adjustments.

Thus, at the time of the assessment, the maximum CMP that could be imposed for a single regulatory violation affecting 69 workers was 69 times $1,692.00, or $116,748. *Id.*; *see also Wage & Hour Division v. Tomarchio*, OALJ No. 2019-TAE-00025 at 10 (Aug. 5, 2020).

However, rather than automatically assessing the maximum penalty, in determining the penalty, the Administrator "shall consider the type of violation committed and other relevant factors . . . includ[ing], but . . . not limited to":

(1) Previous history of violations 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 penalty provisions of the H-2A regulations were adopted by notice-and-comment rulemaking, *See, e.g.*, Final Rule, Temporary Agricultural Employment of H–2A Aliens in the United States, 75 Fed. Reg. 6884, 6943-44 (Feb. 12, 2010) ("2010 Final Rule"). As noted above, they provide for a *de novo* hearing on penalties as well as a set of maximum penalties. However, as a matter of subregulatory penalty assessment policy, the Administrator starts with the maximum penalty for each violation or set of violations and works downwards in 10 percent intervals for mitigation, rather than from a base violation amount and working upward toward the maximum based on enhancements.[24]

The Board has agreed with the Administrator's approach in H-2A penalty cases and in doing so given some guidance to ALJs. *See generally Peroulis*, 2016 WL 6024266. Under *Peroulis*, the ALJ may use the Administrator's Order of Reference, and penalties assessed and alleged to be appropriate in that document, as a point of departure for a final "*de novo*" assessment. *See id.* The Administrator has also embedded some penalty guidance in the preamble to the 2010 Final Rule. The 29 C.F.R. § 501.19(b) factors are "safeguards are intended to ensure that inadvertent errors and/or minor violations are not unfairly penalized," and should be applied alongside "the facts of each individual case, and . . . common sense." 75 Fed. Reg. at 6944. The provision allowing for a per-worker violation assessment, *see* 20 C.F.R. 501.19(a), "is written so as to protect smaller employers and first-time unintentional violators while appropriately targeting repeat and willful violators and those who abuse or exploit large numbers of workers with the largest penalties." 75 Fed. Reg. at 6944.

ii. Analysis

[24] Arguably, if a hearing is truly *de novo* under the H-2A program, the Administrator needs to offer proof and argument as to why the assessed penalty is appropriate under the 29 C.F.R. § 501.19(b) factors by reference to case law and evidence admitted into the record, akin to how a litigant might prove compensatory or punitive damages, *see, e.g.*, *Raye v. Pan Am Rys., Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 8-10 (ARB Sept. 8, 2016) (FRSA); *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op at 32 (ARB Feb. 9, 2001) (FRSA), rather than litigating penalties by reference to the Administrator's own subregulatory assessment matrix and assessed amounts. As an alternative, the Administrator might adopt a penalty assessment policy and matrix by notice-and-comment rulemaking to place the penalty policy on equal footing with the regulation providing a *de novo* hearing. For example, under the Federal Mine Safety and Health Act of 1977 as amended, which the 2010 Final Rule preamble cites as an example of a recently amended penalty structure, see 75 Fed. Reg. at 6944, the Secretary of Labor has adopted by notice-and-comment rulemaking an elaborate penalty points matrix governing assessment of penalties based on a granular determination of facts and factors. See Final Rule, Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13592 (Mar. 22, 2007) (codified at 30 C.F.R. § 100.3). Based on the points totaled up for a given violation, a penalty may be as little as $137 or as much as $73,901 as of January 15, 2020. See 30 C.F.R. § 100.3(g) (2020).

Respondents agreed to one of the Administrator's non-zero CMP assessments. Administrator assessed $1,015.20 for Respondent's failure to post an H-2A poster.[25] In light of the facts found and analysis below, I affirm this CMP.

I affirm all of the Administrator's assessments of $0.00. *See* AX 1. Unsurprisingly, Respondents agree about all assessments of $0.00, though in places Respondents and the Administrator disagree about whether an assessment could have been made. The Administrator properly determined that such violations were cumulative of already-charged violations. *Id.*; HT 270. Nor was the overall penalty unduly lenient: the Administrator assessed per-worker penalties for the most serious violations, resulting in a $377,654.40 overall penalty for just the housing violations. AX 1.

In addition to the CMPs discussed above—which Respondents argue should be eliminated, or, upon a finding that there was a violation, reduced—the Administrator also imposed CMPs that Respondents did not dispute in full but that Respondents still argued should be reduced by applying additional 29 C.F.R. § 501.19(b) factors in mitigation. As discussed above, the evidence of record supports that there was a violation of each provision that Respondents admitted to violating.

The Administrator applied the factors at 29 C.F.R. §§ 501.19(b)(1) and (b)(6)—history of violations and commitment to future compliance—to mitigate all of the imposed CMPs. The Administrator applied four 29 C.F.R. §§ 501.19(b) factors to mitigate Respondents' failure to post the H-2A poster; three 29 C.F.R. §§ 501.19(b) factors to mitigate all of Respondents' other alleged violations not related to the housing site; and two 29 C.F.R. §§ 501.19(b) factors to mitigate all of Respondents' alleged violations related to the housing site.

1. Assessed Housing Penalties

a. Bus #1-3 (Sleeping Buses)

For each of the three sleeping buses, the Administrator assessed two CMPS. The Administrator assessed a CMP of $13,536.00 (10*$1,692.00*(1-0.2)) for *each* bus for a violation of the requirement that "[a]ll sites shall be adequate in size to prevent overcrowding of necessary structures." 29 C.F.R. § 1910.142(a)(2). Respondents argue that the Administrator should have assessed a CMP of $5,076.00 (10*$1,692.00*(1-0.7)) or less per bus for this violation.

The Administrator also assessed a CMP of $13,536.00 (10*$1,692.00*(1-0.2)) for *each* bus for a violation of the requirement that "the employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws." 20 C.F.R. § 655.135(e) (incorporating by reference the Arizona State Fire Code, which incorporates by reference IFC §§ 604.5 and 604.5.4). Respondents argue that the Administrator should have assessed a CMP of $5,076.00 (10*$1,692.00*(1-0.7)) or less per bus for this violation.

b. Toilets

[25] Using a base CMP of $1,692.00 for a single violation and four mitigation factors, each at a ten percent discount: 1*$1,692.00*(1 – 0.4) = $1,015.20.

The Administrator assessed two CMPs of $1,353.60 (1*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $507.60 (1*$1,692.00*(1-0.7)) for alleged violations under 29 C.F.R. § 1910.142(d)(8)("Each toilet room shall be lighted naturally, or artificially by a safe type of lighting at all hours of the day and night.") and 20 C.F.R. § 1910.142(f)(1) ("[H]andwashing facilities . . . shall be provided in the following ratio: . . . [h]andwash basin per six persons in shared facilities.").

Undisputedly, Respondents' handwashing station consisted of two sinks, and Respondents' chemical toilets were lit by no lights other than natural light.

c. *Shower Trailer*

The Administrator assessed a CMP of $1,353.60 (1*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $507.60 (1*$1,692.00*(1-0.7)) for violations of the requirement that "[a]n adequate supply of hot and cold running water shall be provided for bathing and laundry purposes. Facilities for heating water shall be provided." 29 C.F.R. § 1910.142(f)(3).

Additionally, the Administrator assessed a CMP of $93,398.40 (69*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $35,024.40 (69*$1,692.00*(1-0.7)) for an alleged violation of the requirements of 20 C.F.R. § 655.135(e) ("[T]he employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws."), incorporating by reference the Arizona State Fire Code and thereby IFC § 604.5.

d. Sleeping Trailer #1

The Administrator assessed four penalties related to trailer #1 where Respondents admitted the violation but disputed the amount. The Administrator assessed penalties of $32,486.40 (24*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $12,182.40 (24*$1,692.00*(1-0.7)) or less, for violations of the requirements under 29 C.F.R. § 1910.142(a)(2) ("All sites shall be adequate in size to prevent overcrowding of necessary structures.") and 20 C.F.R. § 655.135(e) ("[T]he employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws."). As above, the penalty assessed under 20 C.F.R. § 655.135(e) was based on the incorporation by reference of Arizona State Fire Code and thereby IFC § 604.5.

The Administrator also assessed penalties of $1,353.60 (1*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $507.60 (1*$1,692.00*(1-0.7)), for the violations of each of 29 C.F.R. § 1910.142(b)(4) ("The floors of each shelter shall be constructed of wood, asphalt, or concrete. Wooden floors shall be of smooth and tight construction.") and 29 C.F.R. § 1910.142(b)(7) ("All living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.").

e. Sleeping Trailer #2

The Administrator assessed a penalty of $16,243.20 (12*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $6,091.20 (12*$1,692.00*(1-0.7)) for a violation of the requirement that "[a]ll sites shall be adequate in size to prevent overcrowding of necessary structures." 29 C.F.R. § 1910.142(a)(2). Additionally, the Administrator assessed a penalty of $1,353.60 (1*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $507.60 (1*$1,692.00*(1-0.7)) for violation of the requirement that "[a]ll living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation." 29 C.F.R. § 1910.142(b)(7).

f. *Other Housing Violations*

The Administrator assessed a penalty of $1,353.60 (1*$1,692.00*(1-0.2)), which Respondents argue should be reduced to $507.60 (1*$1,692.00*(1-0.7))[26] for violation of the requirement that the employer "promptly notify the SWA in writing of [any] change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in accordance with the requirements of" 29 C.F.R. § 655.122(d), which incorporates by reference the ETA and OSHA standards. 20 C.F.R. § 655.122(d)(6); *see* AX 28.

2. Assessed Wage-Related Penalties

The Administrator assessed a penalty of $1,184.40 (1*$1,692.00*(1-0.3)), which Respondents argue should be reduced to $507.60 (1*$1,692.00*(1-0.7)) for the alleged failure to "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." 20 C.F.R. § 655.122(l). In particular,

> [i]f 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:
>
> (i) The 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 paid at the appropriate hourly wage rate for each hour worked.

20 C.F.R. § 655.122(l)(2) (emphasis added)

[26] In responding to the Administrator's Proposed Findings of Fact and Conclusions of Law, Respondents suggest that this penalty should be wholly eliminated. However, in responding directly to the Administrator's computation sheet, Respondents suggest that this penalty should be reduced. As I found above that Respondents are liable for the submission of the amended application to DES, I will consider only their argument as to the reduction of the penalty here. In line with my findings above, even if Respondents did not have actual knowledge of the deviation between the housing and the approved application, as amended, they are responsible for the deviation between the filings with government officials and the actual conditions of the location where the H-2A workers were housed.

3. Assessed Disclosure Penalties

Under 20 C.F.R. § 655.122(q), "[t]he employer must provide to an H-2A worker no later than the time at which the worker applies for the visa . . . a copy of the work contract between the employer and the worker in a language understood by the worker as necessary and reasonable." *See* AX 30. The Administrator assessed a penalty of $1,184.40 (1*$1,692.00*(1-0.3)) for the violation of this requirement; Respondents argue that the penalty should be reduced to $507.60 (1*$1,692.00*(1-0.7)).

4. Assessed Recordkeeping Penalties

The Administrator assessed a CMP of $3,553.20 (3*$1,692.00*(1-0.3)) for a violation of the requirement that

> [t]he employer must furnish to the worker on or before each payday in one or more written statements the following information:
> . . . .
> (4) The hours actually worked by the worker;
> . . . .
> (6) If piece rates are used, the units produced daily;
> . . . .
> (8) The employer's name, address and FEIN[.]

20 C.F.R. § 655.122(k). Respondents argue that they should have been assessed only $1,184.40 (presumably, 1*$1,692.00*(1-0.3)).[27] I find it was appropriate to assess a penalty under each of 20 C.F.R. §§ 655.122(k)(4), 655.122(k)(6), and 655.122(k) (8) separately. I find that the assessments under 20 C.F.R. §§ 655.122(k)(4) and 655.122(k)(6) are not cumulative because the first is particularly relevant to Respondents' hourly workers (although also applies to piece-rate workers), and the second applies particularly to piece-rate workers. Additionally, I find that the separate assessment under 20 C.F.R. § 655.122(k)(8) because that requirement exists for different reasons, e.g., tax liability, than the requirements under 20 C.F.R. §§ 655.122(k)(4) and 655.122(k)(6).

iii. Application of 29 C.F.R. § 501.19(b) Factors

In this case, the Administrator applied four factors to mitigate Respondent's failure to post the H-2A poster, three factors to mitigate certain CMPs, and two factors to mitigate the housing-related CMPs. The Administrator applied the (b)(1) and (b)(6) factors to mitigate every CMP imposed. Respondents argue that Administrator erred in not applying more mitigation factors.

The regulation itself does not clarify how the Administrator must apply the 29 C.F.R. § 501.19(b) factors in CMP assessments. However, the determination is a matter of national Wage and Hour Division policy. *Tomarchio*, OALJ No. 2019-TAE-00025 at 23 n.20; *see also Peroulis*, 2016 WL 6024266 at *7. First, the Administrator determines whether to assess a penalty for a

[27] Presumably Respondents arrived at this number by the same formula by which the Administrator arrived at this number for other penalties. However, Respondents do not appear to concede that only three mitigation factors apply to this penalty.

given violation. Then, the Administrator determines the maximum permissible penalty for the violation. Finally, to arrive at the final assessment, the Administrator mitigates that penalty by 10 percent for each 29 C.F.R. § 501.19(b) factor that applies. *See id.* Because the national policy has the Administrator begin with the maximum penalty and mitigate, the 29 C.F.R. § 501.19(b) factors are referred to as "mitigating factors" even though such language does not appear in the regulation itself. *Id.*; 29 C.F.R. § 501.19(b).

The Administrator followed the national policy in this case. *See* AX 1. I adopt the same approach. *See generally Peroulis*, 2016 WL 6024266. As developed below with respect to specific factors, this approach balances the gravity of many of the violations in this case with Respondents' compliance and lack of prior violations, and the overarching interest of consistency in penalty assessments and mitigation between different regions of the country.

The Administrator also used the factors – particularly, the number of workers affected and the gravity of the violation – to decide what constituted an individual violation. For the conditions that the Administrator found less grave, the Administrator assessed a single penalty for the violation ("per-regulation" penalty), regardless of whether it affected few or all of the workers. However, for the conditions that the Administrator found particularly grave, the Administrator assessed a penalty for each affected worker ("per-worker" penalty). As above, the Administrator is allowed to assess per-worker penalties, and I find this approach – employing this multiplier for and only for particularly grave violations – reasonable in this case.

1. History of Violations

As Respondents had no history of H-2A regulatory violations, the Administrator applied the mitigation factor in 29 C.F.R. § 501.19(b)(1) to all assessed CMPs. I do so as well. In combination with Respondents' compliance with the Administrator's investigation, this factor indicates that Respondents are likely to comply with regulations in the future. There are two countervailing considerations as to the weight I give this factor. G Farms first participated in the H-2A program in 2016. HT 77-78. On the one hand, G Farms does not have a long history of past compliance with regulations to put into perspective its 2017 violations.[28] On the other hand, this lack of history with the program supports Respondents' professed lack of institutional knowledge as to compliance. *See, e.g.*, HT 386. In light of these considerations, I affirm, and apply the same 10 percent reduction in penalties as the Administrator applied.

2. Number of Affected Workers

The Administrator did not apply the mitigation factor at 29 C.F.R. § 501.19(b)(2) to any of the violations except with respect to the application of per-worker versus per-regulation penalties. However, Respondents argue that I should apply this mitigation factor because, at most, 69

[28] Further, I am not entirely convinced that Respondents had no history of past violations: at hearing, Mr. Gonzalez admitted to payment and work conditions for Respondents' 2016 H-2A workers that violated the terms of Respondents' 2016 H-2A application. HT 80-81, 86; AX 33. However, 2017 was the first time that the Administrator assessed penalties for violation of the program, so I decline to make a finding that Respondents have a violation history to negate the history mitigation factor.

workers were impacted by the violations. In discussing why I should apply this factor, Respondents mostly address the qualitative effect of the violations on workers.

Respondents have, at times, pointed to other judgments under which smaller penalties were imposed for violations that affected more workers. *See, e.g.*, *WHD v. Global Horizons, Inc.*, ARB No. 11-058, 2005-TAE-001, 2005-TLC-006 (May 31, 2013) (affirming a grant of summary decision unrelated to the reasonableness of penalties in a case in which the Administrator assessed CMPs of $194,400 for violations affecting 88 workers); *WHD v. Seasonal Ag Services, Inc.*, ARB No. 15-023, 2014-TAE-006 (Sept. 30, 2016) (considering an appeal unrelated to penalty amount in a case where the CMPs assessed by the Administrator totaled $127,800 for violations affecting 142 workers).[29] Nowhere in these appeals did the Administrative Review Board assess the reasonableness of overall CMPs, let alone suggest that the Administrator could not have imposed higher CMPs. *See id.* Further, as is clear from 29 C.F.R. § 501.19(b) itself, overall CMPs turn on a variety of factors. An overall penalty is not presumptively unreasonable simply because it is higher than a penalty imposed in a different case for violations affecting more workers, especially since in this case I find several of the violations were of high gravity.

For the penalties assessed per-regulation, which affected between 4 and 69 workers, I find that the number of workers affected is not mitigating. *See, e.g.*, *In re Klem Christmas Tree Farm*, 2020-TAE-00009, slip. op. at 29-30 (Oct. 13, 2020) (finding no mitigation when there were four affected H-2A workers); *In re Brady*, 2018-TAE-00005, slip. op. at 29-30 (Apr. 25, 2019) (finding this factor to be aggravating when a regulatory violation affected five H-2A workers).

I decline to use the number of workers affected to mitigate penalties for the penalties that the Administrator assessed on a per-worker basis. Each of these per-worker penalties applies, by definition, to a single worker, but the per-regulation penalty for these violations applies to 4 to 69 workers, depending on the penalty. *See* AX 1. As per-worker penalties were applied here precisely because these violations were so grave, the Administrator's approach of not applying the Section 501.19(b)(2) mitigation factor for these penalties is supported by the record. Further, in assessing these per-worker penalties, the Administrator did consider the overall assessment related to, e.g., fire hazards and overcrowding, declining to charge certain violations so as not to assess a cumulative penalty. Thus, I affirm the Administrator's approach of declining to assess CMPs for certain violations but not mitigating by the number of workers affected by a per-worker penalty.

3. Gravity of Violations

The Administrator applied the 29 C.F.R. § 501.19(b)(3) gravity factor to mitigate Respondents' failure to post the notice of workers' rights, failure to pay the adverse effective wage

[29] Respondents have also cited a number of consent judgments imposing smaller penalties for violations affecting more workers. *See WHD v. Daniels Produce, LLC*, 2015-TAE-00009 (Mar. 31, 2016); *WHD v. J&R Baker Farms, LLC*, 2011-TAE-00001-2 (Apr. 4, 2012); *WHD v. Heldt Produce*, 2015-TAE-00001 (June 3, 2015); *Florida Farm Labor Contractor Pays $53,428 in Back Wages After Failing to Meet Requirements of U.S. Department of Labor's H-2A Visa Program*, WHD, 18-1928-ATL (Dec. 7, 2018). As consent judgments, these have limited effect on my weighing of reasonableness, *see Overdevest Nurseries, LP*, 2015-TAE-00008, slip op. at 11 n.11, and I have no indication that any involved housing conditions similar to the ones that resulted in the bulk of the CMPs in this case.

rate, and failure to keep accurate records of the hours the workers worked but not to the other violations. Respondents argue that this factor should be applied to the other assessed penalties.

I affirm the Administrator's application of this mitigation factor, both in applying it to certain violations and in not applying it to others. In this case, the lack of a posted notice of workers' rights, violation of the pay statement requirement, failure to keep accurate records, and failure to pay the adverse effective wage rate were not grave. Even though the H-2A workers were subjected to dangerous conditions, the workers were generally satisfied with Respondents, stated that they knew with whom to raise any concerns, were not underpaid due to purposeful exploitation by Respondents, and indicated that Respondents were responsive.[30] *See* RX 83-84; RDX 1-8.

I affirm the Administrator's decision to reject this factor with respect to the other non-housing CMPs because, especially in aggregate, these violations prevented workers from learning about their rights, violations thereof, or remedies to which they were entitled or prevented the Administrator from properly assessing Respondents' application. *See* AX 1.

In addition, I affirm the Administrator's decision that gravity is not a mitigating factor for all but one of the housing violations. To more precisely evaluate the gravity of a violation that could result in death or injury, particularly since the Administrator's housing regulations adopt by reference a set of OSHA regulations, I find persuasive the well-developed body of case law arising under the Occupational Safety and Health Act ("OSH Act") evaluating the gravity of health and safety violations.[31]

The Occupational Safety and Health Commission has long held that the gravity of a particular violation depends upon such factors as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *E.g. M.V.P. Piping Co., Inc.*, 24 BNA OSHC 1350, 2014 WL 289776 at *2 (OSHRC Jan. 22, 2014); *Capform, Inc.*, 19 BNA OSHC 1374, 2001 WL 300582 at *4 (OSHRC Mar. 26, 2001) (citing *J.M. Jones Const. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993)).[32]

---

[30] Such reasoning does not always support mitigation, though, as workers who are not aware of their rights may find working conditions satisfactory precisely because they do not know that they have a right to better conditions, and, as developed below, certain conditions can create risks not mitigated by worker satisfaction.

[31] Although, as discussed above, OSHA does not have interpretative authority over 29 C.F.R. § 1910.142, *see* Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58,393-94 (Sept. 18, 2020), cases arising before the Occupational Safety and Health Commission are persuasive here because OSHA has particular expertise in determining the gravity of health and safety-related conditions. I rely on OSHA and Occupational Safety and Health Commission ("OSHRC") authority only as persuasive authority on gaps left by WHD policy guidance.

[32] OSHA has also issued documents guiding inspectors in determining whether a violation is grave. To determine penalties, OSHA inspectors look to the "severity of the injury or illness would could result from the alleged violation" and the "probability that an injury or illness could occur as a result of the alleged violation." Field Operations Manual (OSHA Instruction CPL 02-00-163), Chapter 6.III (Apr. 14, 2020). As to severity, OSHA inspectors to use four factors to determine whether a violation is serious: (1) the type of hazard to which an employee is exposed; (2) "the most serious injury or illness that could reasonably be expected to result from" that hazard; (3) the likelihood of death or "serious physical harm" if there is an accident; and (4) whether the employer "knew, or with the exercise of reasonable diligence could have known" about the hazard, i.e., whether the employer was reckless as to the hazard. *Id.* at Chapter 4.II. In determining probability of injury, inspectors look to factors including: the "[n]umber of employees exposed;" the "[f]requency and duration of employee exposure to hazardous conditions . . .;"; "[e]mployee proximity to the

In violations arising under the OSH Act and its regulations, "[a] violation is 'serious' if there was a substantial probability that death or serious physical harm could have resulted from the violative condition." *Magnum Contracting Inc.*, OSHRC No. 18-0311, 2018 WL 7458663, at *8 (OSHRC ALJ Nov. 21, 2018) (citing 29 U.S.C. § 666(k)). The Secretary need not show that there was a substantial probability that an accident would occur; he need only show if an accident occurred, serious physical harm could result. *See Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *See id.*; *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010).

Here, G Farms exposed all 69 workers to the fire and electrical hazards of the substandard sleeping buses, sleeping trailer and shower trailer. These workers were exposed from the dates of their arrival in April to the dates of the Administrator's inspection on May 5, at which point Respondents moved the H-2A workers to a hotel. HT 107, 198-99, 340, 362. But for the intervention of the Administrator's investigators, the hazards would have existed for the entire harvesting season.

I find that a number of the housing violations at G Farms, separately and in aggregate, put workers at grave risk of dire consequences.

a. Fire Hazard

First, a number of factors combined to create a particularly dangerous fire hazard. The propane tanks inside or connected to the stove inside the kitchen bus were a fire hazard in their own right. HT 144, 147, 148, 288, 312.

The kitchen bus was a functioning bus converted into an on-site kitchen. HT 145; AX 14. Outside the kitchen bus and immediately in front of the sleeping buses, there were two large propane tanks for the kitchen bus stoves. HT 144; AX 14 at DOL031. The two propane tanks were standing unsecured. *Id.* The kitchen bus was within a few feet of one of the sleeping quarters. HT 313; *see also* AX 16 (diagram of camp).

Per Ms. Benitez,

> [t]he school bus was so closely placed to the living and sleeping quarters of the workers, under the awning, and there were propane tanks that weren't secured to anything, just hanging outside the bus, that could have been knocked over, could have caused some sort of fire, and essentially that would have . . . affected the entire encampment, because of the close proximity that bus had to the sleeping quarters.

HT 288; AX 16.

Furthermore,

---

hazardous conditions;" "[a]ge of employees;" "[t]raining on the recognition and avoidance of the hazardous condition;" and "[o]ther pertinent working conditions." *Id.* at Chapter 6.III.

> in addition to those propane tanks that were outside of that particular school bus, there were also propane tanks inside the school bus that were subject to open flames. So, the propane tanks outside were providing fuel to the range that was inside the school bus. In addition to that, there was an additional burner in the actual school bus, itself, that was being fueled by propane tanks. And . . . there was an extra canister in the actual school bus, itself. All of those could have easily been knocked down.

HT 312; AX 14. This situation created the "possibility of a fire" which could have affected "the vast majority" of the H-2A workers. HT 288; AX 14. Additionally, there were no working fire extinguishers in the kitchen bus. *Id.* at 287; AX 14. The sleeping quarters were overcrowded. HT 139, 282-83, 293; RX 96; RX 102-104; AX 4-5; AX 9-11. The overcrowding, as well as the lack of stepladders from the top bunk in most of the quarters, would have hindered evacuation if the trailers went up in flames as a result of a fire caused by the kitchen bus's unsecured propane tanks. HT 164-65. The daisy-chained extension cords and the extension cords powering the swamp cooler, the blades of which were uncovered, could also have created a spark within the sleeping quarters and near the fuel tanks, hence the prohibition of such an installation under the IFC. *See, e.g.*, AX 8-9; IFC § 604.5.

The fire hazard presented here is plainly serious. A fire can cause debilitating burns, respiratory illnesses, and death. Because of the proximity of the kitchens and the living structures, as described above, HT 288; AX 16, and because of the fuel sources present, HT 312; AX 14, serious harm could result to the workers in the event of a fire. The hazards existed from the workers' arrival in April until the date of inspection—as the hazard was a feature of how Respondents designed the camp, it would have existed throughout the entire work season had the investigators not intervened. Regardless of whether Respondents knew how hazardous the situation was, they knew of the situation giving rise to the hazard: indeed, they created this hazardous situation through the camp design. Additionally, the violation was probable: all employees were exposed to the fire hazard whenever they were in the sleeping quarters or near the kitchen, the sleeping quarters were in close proximity to the kitchen bus, and there were multiple ways in which an accident could have sparked a fire.

For the above reasons, the following violations were of high gravity: the violations under 29 C.F.R. § 1910.142(a)(2), applied per-worker, for overcrowding; the violations under 20 C.F.R. § 655.135(e), applied per-worker, for the violations in the sleeping quarters of IFC § 604.5 as incorporated by reference; the violation of 20 C.F.R. § 654.417(f), applied per-violation, for the lack of a fire extinguisher; the violation of 20 C.F.R. § 654.417(h), applied per-worker for the storage of flammable materials near sleeping quarters; and the violations of 29 C.F.R. § 1910.142(b)(7), applied per-violation, for violations of the window requirements in the two trailers.

b. Electric Shock Hazard

Additionally, there were fire and electric shock risks presented by exposed wires. *See, e.g.*, HT 110, 126, 152. The most acute electric shock risk was posed by the portable extension cord running through the shower trailer, which passed through pooled water. HT 110, 168-70; AX 12. Respondents contended that they did not install the light in the shower trailer, HT 110-11, and

instead provided showers with no lighting (and poor drainage). Contrary to Respondents' assertion that a shower light was unnecessary because the H-2A workers could shower while it was still light outside, HT 110-11, the fact that the light was installed suggests that electric light in the windowless trailer was necessary to usability and safety (though the installation of the light likely posed more risk than the danger it averted). Further, the light was still in the shower trailer when Respondents took their own pictures of the site, during daytime, reinforcing that it was necessary to use of the shower trailer as well as a semi-permanent installation. RX 101; HT 319.

An extension cord in standing water poses the risk of electric shock, resulting in severe injury or death, another serious hazard. Such an injury is likely in that it could be triggered by an event as small as damaged wire insulation. HT 289-90. All of the employees were exposed whenever using the showers. Respondents knew or should have known about the extension cord: the cord was open and obvious without entering the shower trailer, and Respondents knew that the shower trailer was not lit by any other light. While it is unclear exactly when the light was installed in the shower, as above, the light was reasonably necessary to use of the shower during hours of darkness, and the light remained in Respondent's shower trailer even after the investigation had started. RX 101; HT 290-91, 319.

For the above reasons, the following violations were of high gravity: the violation under 29 C.F.R. § 1910.142(f)(2), applied per-violation, for the lack of a drainage system for each shower head; the violation under 29 C.F.R. § 1910.142(f)(6), applied per-violation, for the uncleanly state, particularly with respect to the standing water, in the shower trailer; and the violation of 20 C.F.R. § 655.135(e), applied per-worker, for the extension cord in pooled water in the shower trailer.

c. Other Hazards

In addition to the citations for or related to the fire hazards (including risks created by overcrowding) and electrical hazards discussed above, the Administrator imposed penalties for the lack of a common facility for cooking and eating under 20 C.F.R. § 654.413(b); for citations under 29 C.F.R. §§ 1910.142(d)(2) and (d)(10), which I have already reversed; for a citation for the lack of lighting in the privies under 20 C.F.R. § 1910.142(d)(8); for a citation under 20 C.F.R. § 1910.142(f)(1) for the lack of adequate handwashing facilities; for a citation for water pooled outside of the shower trailer under 29 C.F.R. § 1910.142(a)(1); for a citation of 29 C.F.R. § 1910.142(f)(3) for the lack of hot water; for a citation of 29 C.F.R. § 1910.142(b)(4) for the uneven walking surface on the floor of Trailer #1; for a citation of 29 C.F.R. § 1910.142(a)(3) I have already reversed; for a citation of 29 C.F.R. § 1910.142(b)(3) related to the lack of adequate facilities in the warehouse shed; for a violation of 29 C.F.R. § 1910.142(b)(8) related to the lack of mesh screens on exterior openings of the warehouse shed; for a citation of 29 C.F.R. § 1910.142(g) relating to the lighting in the warehouse shed; and for a violation of 20 C.F.R. §1910.142(f)(1) related to the lack of on-site laundry facilities.

The Administrator considered all of these violations not as grave as the violations related to fire and electrical hazards: all of these violations affected multiple workers, but, other than the violation related to the lack of proper beds in the warehouse shed, the Administrator only imposed them per-violation rather than per-worker in recognition of their lesser gravity. This is consistent with the case law under the OSH Act, as all of these violations pose a lesser risk of death or bodily

injury than do the violations related to the fire hazards and electrical hazards. Further, the Administrator considered the lesser gravity of these violations by grouping violations for multiple conditions that the Administrator found violated the regulations. *See* AX 1.

The Administrator did not, however, find that these violations were sufficiently non-grave to apply the ten-percent mitigation factor on top of these other methods of mitigation. The lack of a common eating or mess facility was complete: Respondents did not merely violate technical requirements but rather simply did not have such an area other than the small eating area in Trailer #2. *See* HT 158, 164-65. In practice, the workers ate in various places including in the warehouse shed and at a picnic table in front of the shed. *Id.* at 158. The kitchen also did not have adequate food storage shelves or sinks. *See* AX 6; AX 14. The lack of adequate sinks in the kitchen posed a risk of illness to all of the workers. Respondents knew about the conditions because they had a role in the design. The conditions affected all of the workers for the time the workers were housed onsite.

Although I found the other citations for the toilet rooms not to apply to portable chemical toilets, I find that the lack of lighting in the toilets was sufficiently grave not to apply the 10 percent mitigation factor. Any bathroom needs to be available at all hours of the night, and the lack of lighting makes it harder to use this necessary structure and increases the risk of uncleanliness and exposure to biohazards. *See* AX 13. The lack of adequate hot water and lack of adequate handwashing facilities pose risks both as to infection and the spread of disease. The pooled water outside the shower trailer and the lack of mesh screens on the warehouse shed also pose risks related to the spread of infectious diseases, particularly as transmitted by insects. *See* HT 167-68; AX 12.

The uneven floor of Trailer #1 also posed a risk of injury: indeed, Ms. Espinoza actually hurt herself while walking in shoes, which she testified were not high heels, across this surface. HT 160-61; *see also* AX 10. The lack of adequate lighting in the warehouse shed also presented a risk of tripping: as workers were sleeping in the cluttered shed, workers might injure themselves if they needed to get up at night to, e.g., use the restroom. HT 173-75; AX 7; RX 99-100.

Provision of an adequate place to sleep for each H-2A worker is integral to the H-2A program's mandates. As discussed above, Respondents admitted housing workers in the shed, and knew that the shed was a "room *used* for sleeping purposes" even if Respondents did not originally intend for the workers to use the shed for sleeping purposes. The regulation requires that workers be provided with "[b]eds, cots, or bunks" for sleeping, not other furniture. RX 99-100. Further, I find that this violation was of sufficient gravity to affirm the assessment on a per-worker basis.

I do find, however, that the gravity mitigating factor applies to the violation of the 29 C.F.R. § 1910.142(f) requirement to provide laundry services. Respondents argue that they provided off-site laundry services on a regular and frequent basis, and the Administrator presents no evidence to the contrary. I find that providing off-site laundry services rather than onsite laundry services is not a grave violation.

Thus, I decline to apply the gravity mitigation factor for any of the violations for which I have affirmed a penalty, other than the laundry services violation.

d. Respondents' Arguments

Thankfully, no worker sustained a serious injury as a result of these violations. Such is the nature of risk – the worst consequences of an action do not always come to pass. The regulations I apply here exist in large part to *prevent* harm, not just to compensate for it. *See* 29 C.F.R. §§ 501.16. Thus, when an employer violates the regulations by putting workers in a situation where there is a likelihood of serious harm, that violation is of high gravity even when the workers are not harmed. *See, e.g., Administrator v. Sun Valley Orchards, LLC*, 2017-TAE-00003, slip op. at 53 (Oct. 28, 2019).

Respondents argue that the workers' expressions of support are evidence that the violations were not grave. *See* RDX 1-8; RX 83-84. This is not the case with respect to the vast majority of the housing violations. As discussed above, a number of the housing violations posed severe risks that fortunately did not lead to corresponding harms. Because the workers did not experience the harms, their perception of G Farms does not adequately price in the risk to which they were exposed. Even assuming the workers' appreciation for G Farms was based on the positive characteristics specific to Respondents, not just the opportunity to work at the provided wage rate, worker satisfaction cannot mitigate threats to health and safety. *See, e.g., MVP Piping*, 2014 WL 289776 at *3 (foreman "acted improperly in relying on his employees to tell him if they felt safe enough") (citing *Armstrong Cork Co.*, 8 BNA OSHC 1070, 1074 (OSHRC 1980) ("An employer cannot shift [its OSH Act] responsibility to its employees by relying on them to, in effect, determine whether the conditions under which they are working are unsafe.")).

Respondents also argue that the violations were not grave because they were not willful. While I agree that the Administrator has not alleged or proven willfulness, willfulness is a separate factor. *See, e.g., WHD v. Klem Christmas Tree Farm*, 2020-TAE-00009, slip op. at 5-6 (Oct. 13, 2020); *Sun Valley Orchards, LLC*, 2017-TAE-00003, slip op. at 53. Moreover, the Administrator did account for a lack of willfulness: willful violations have a higher maximum penalty cap than non-willful violations, and the Administrator uniformly applied the non-willful cap. *See* AX 1; 29 C.F.R. § 501.19(c) & Wage and Hour Division, Civil Money Penalty Inflation Adjustments.

4. Good Faith Efforts to Comply

Respondents argue that the fourth mitigation factor, whether they made good faith efforts to comply, should be applied to all of the CMPs, whereas the Administrator did not apply it to any of the CMPs. In particular, G Farms argues that it paid LeFelco $28,000 to ensure that Respondents complied with all of the H-2A requirements and that Respondents had no reason to doubt that LeFelco would bring them into compliance. HT 328, 355. The Administrator argues that the actions and inactions of LeFelco are attributable to Respondents.

Above, I found that Respondents could not avoid liability for compliance with H-2A requirements merely by delegating compliance-related tasks to an agent. However, the question of whether the role of Respondents' agents can support mitigation is a separate question.

I find that, on the facts of this case, Respondents' hiring of LeFelco for compliance-related functions does not support mitigation based on good faith efforts to comply. As I determined above, the Administrator is correct that Mr. Gonzalez's own actions were at least willfully blind. Mr. Gonzalez knowingly committed himself to compliance with regulations and made no attempts to learn how to comply with those regulations other than passing the matter off entirely to LeFelco at a cost of $28,000. HT 328, 355. Not only did Mr. Gonzalez sign documents that committed him to "full responsibility for the accuracy of any representations made by" his "agent or attorney," *see, e.g.*, RX 67 at GF000613; RX 68 at GF002035, as well as documents that committed him to the provisions of compliance with the H-2A program requirements, *see, e.g.*, RX 67 at GF000616, he also anticipated that an investigation would find violations. HT 52.

For the above reasons, I do not mitigate the penalties based on good faith efforts to comply.

5. Explanation

The Administrator applied the 29 C.F.R. § 501.19(b)(5) mitigation factor only to Respondents' failure to provide workers with completed work contracts. Respondents argue that the fifth mitigation factor should be applied to all of the violations.

With respect to the housing violations, while I agree that Respondents provided a compelling explanation for why they desired to move away from hotel- or apartment-based housing, *see* HT 81; *see also* AX 25 at DOL851 (noting advantages of employer-provided housing), I find that Respondents do not meet the fifth mitigation factor. It was reasonable for Respondents to put the H-2A workers in a situation where they did not face discrimination and where they could relax after the workday was done. *See* HT 81. However, it was not reasonable to provide makeshift accommodations that were overcrowded and that posed fire and electrical hazard risks, discussed at length above. Even if Respondents were as ignorant of the H-2A process and LeFelco's actions as they claim, they should have informed themselves about the H-2A process by actually reading the documents signed by Mr. Gonzalez. Moreover, any reasonable employer viewing the crowded housing, wired with portable extension cords and with gas ranges fed from unsecured portable gas bottles with flexible gas lines, would have had notice of the need to inquire into whether the housing complied with the applicable regulations or building code, even without knowledge of the specific provisions of regulations or code. In other words, this is negligence; Respondents should have known. Further, I find that Respondents actually knew at least that the housing was not fully compliant with the regulations. HT 52.

I also find that Respondents failed to provide adequate explanations with respect to the inbound transportation requirements, the earnings records requirements, the pay statement requirements, or the failure to pay the required rate of pay. While Respondents did provide reimbursements for the inbound transportation and subsistence costs, they (1) made little attempt to figure out or reimburse actual costs, except to workers who directly requested more than $300.00, and (2) had workers sign a paper saying that they had been paid but communicating no details to the workers. RDX 1 at 15-17. Respondents' explanations of their failure to meet the earnings records requirements and the pay statement requirements related to their lack of knowledge of the regulations and the limitations of the accounting software they used, HT 339,

which I find insufficient to support mitigation. Respondents claimed that they were in the process of adjusting the pay of piece-rate workers up to account for the proper hourly rate when the investigators arrived, but because Respondents were paying the workers weekly, that adjustment should have been made week by week. 20 C.F.R. § 655.122(l)(2)(i).

I also decline to apply the 29 C.F.R. § 501.19(b)(5) mitigation factor to the unlawful cost-shifting violation and the failure to notify the DES about where the workers were housed. Respondents allege that these violations were committed by their agents without their knowledge. However, in addition to the fact that Respondents took responsibility for all acts of their agents in the H-2A process, RX 67 at GF000613; RX 68 at GF002035, unlike the sending of the work contracts, these complete delegations without any oversight were unreasonable. With respect to the kickbacks, although Mr. Valdez-Castro was not a year-round employee of Respondents, he was directly under their supervision and control in recruiting workers. RDX 9 at 16, 28.

With respect to the failure to provide notice to the DES that workers were being housed onsite, even if Respondents never knew about the amendment, *see* AX 22 (Response to Notice of Deficiency purportedly signed by Mr. Gonzalez but only with a plain, typewritten signature); *but see* AX 24 at DOL686 (amendment with ink signature from Mr. Gonzalez dated February 17, 2017), they did know that their application was approved. Because Mr. Gonzalez should have read the documents that he signed and not signed documents before they were completed, Respondents should have known more about the housing requirements of the H-2A program. *See* AX 24 at DOL686. This would have alerted them to the fact, to the extent they were not already aware, that they could not house workers on-site without inspection before the workers arrived. RDX 10 at 169-70. Because such inspection never took place, Respondents thus should have at least known that there was something wrong with the application as approved.

6. Commitment to Future Compliance

The parties agree that Respondents are committed to future compliance, and the Administrator applied this mitigation factor to all penalties. *See* AX 1. I do so as well.[33] *See, e.g.*, RX 82. Respondents immediately worked with the WHD investigation team to correct violations. HT 107, 198-99, 340, 362. Respondents immediately moved the H-2A workers to hotels when instructed to do so. *Id.* While Respondents only produced piece-rate compensation records for most of the workers during their initial conference with Ms. Benitez, Respondents thereafter constructed hourly records and paid back wages, as approved by Ms. Benitez. HT 251-52. Respondents immediately admitted fault with respect to a number of violations. Further, Respondents did not discourage workers from cooperating with the investigation or speaking to the press. 114, 342, 364.

7. Financial Gain

[33] My only hesitance in doing so relates to Respondents' refusal to acknowledge the gravity of the violations. Mr. Gonzalez testified and I accept, for the most part, that the H-2A workers liked working for Respondents. *See* HT 61-64; RX 83-84; RDX 1-8. However, it is incumbent upon Respondents to understand that the workers' appreciation for the H-2A program and even for Mr. Gonzalez himself does not excuse dangerous conditions. Perhaps it is more litigation strategy than Mr. Gonzalez's lack of compunction, but some of Mr. Gonzalez's testimony downplayed the importance of regulatory compliance even while giving lip service to intentions to comply.

The Administrator applied the mitigation factor in 29 C.F.R. § 501.19(b)(7) only to the failure to post a notice of workers' rights. HT 278. Given that the workers were generally satisfied with their conditions and felt that they could raise any concerns with Respondents, RX 83-84; RDX 1-8, I find that the failure to post the notice was not financially motivated, and apply this mitigation factor.

Respondents argue that I should apply the "financial gain" mitigation factor to the other CMPs because Respondents sustained a financial loss from the investigation, lawsuit, and the resulting loss of good will. *See* RX 93-95; HT 112-14. This mitigation factor could be read in two ways, depending on whether Respondents' financial gain or loss is determined pre-enforcement or after investigation and enforcement. The two interpretations address different problems. Focusing on foreseeable gains or losses *pre*-enforcement focuses penalties on actions likely to be the intentional acts of a self-interested employer. By contrast, focusing on financial gains or losses taking into account enforcement and the ensuing consequences emphasizes disgorgement of ill-gotten gain.

I interpret the "financial gain" mitigation factor as focused on pre-enforcement gains and losses. The assessments contemplated by the regulations and imposed in this case are styled as "penalties." 29 C.F.R. § 501.16. This suggests a focus beyond mere disgorgement. As an example, if employers underpay employees, they can face CMPs *on top of*, not instead of, assessments to make the workers whole. *See* 29 C.F.R. § 501.19. Accounting for the financial implications of the press coverage of the investigation would also produce an odd result. Given that the high gravity or willfulness of a violation is likely directly correlated with the public reaction to news of the violation,[34] such an approach might mitigate CMPs precisely when—at least in the public eye—high CMPs are most fitting.

Having found that the proper interpretation of the regulations focuses on pre-enforcement financial implications, Respondents' argument for this mitigation factor fails.[35] However, there is an alternative argument for applying the "financial gain" mitigation factor. Respondents constructed on-site housing at least in part because they thought that the housing presented some advantages, both to the workers and to the employers. HT 81. In other words, the violations that most threatened the workers' health and safety were not, or were at least not wholly, intended to achieve financial gain. *See id.*

Nonetheless, on-site housing would be less expensive than hotel- or apartment-based housing if Respondents could use the onsite housing for multiple seasons. HT 53-55. Additionally, Mr. Leon testified that Lecker Foods and Legistix invested in the housing to test whether they could use the mobile housing concept for other clients. RDX 10 at 148, 153, 164. Thus, the cost to

[34] The "if it bleeds, it leads" phenomenon is well known in local news.

[35] Theoretically, I could apply both interpretations since the factors listed in 29 C.F.R. § 501.19(b) are non-exhaustive. I can imagine situations where it might be appropriate to consider gains or losses inclusive of losses from enforcement—e.g., where there is evidence that the penalties imposed would put the whole employing company out of business and where such a result is not warranted by the severity of the violation(s). However, in this case, I found the violations very grave, and Respondents have not introduced evidence that the financial repercussions of the penalties would be so severe as to put them out of business.

Respondents was partially subsidized, and the companies subsidizing the housing saw the strategy as "a big business opportunity." RDX 10 at 148:8.

Further, once Respondents decided to move to on-site housing, Respondents could have constructed housing that met all of the relevant regulations. I find that Respondents knew that the housing would not pass inspection but chose to house workers on-site anyway. HT 52-53 ("When they come out they're going to inspect them . . . and tell me you've got to fix . . . this, this and that."); *see also* HT 129-30, 372, 386; RDX 10 at 152-53. Respondents could have, prospectively, spent more money on obtaining advice about compliance and acting on that advice rather than waiting to see which violations were imposed once the housing was investigated. *See id.* Even if Respondents did not save money relative to compliant off-site housing, they saved money relative to compliant on-site housing. *See* AX 1 (addressing the problems with the housing, many of which would require expenditures to fix). Further, given the sunk costs Respondents already had once they realized the housing would be non-compliant, *see* AX 35-36; RX 91-92, the way they proceeded after that point—failing to invest more money to figure out where they were non-compliant and to bring the housing up to code—did result in immediate financial gain. *See* HT 52-53. Though there is no evidence in the record to precisely quantify how much, for example, it would have cost to wire the bus housing and shower trailer with electricity to code, to build safer kitchen facilities, and to provide large enough sleeping quarters for the number of workers, it surely would have been a substantial expense.

Outside of the housing and poster violations, all of the other violations related directly to either underpayment or under-reimbursement or would have left the workers unable to determine when they were underpaid or under-reimbursed. *See* AX 1. On balance, I do not apply the "financial gain" mitigation factor, except with respect to the posting of the notice of workers' rights.

8. Other Factors

As above, the factors listed in 29 C.F.R. § 501.19(b) are non-exhaustive. However, I find that all of the relevant considerations in this case are accounted for in the listed factors. More generally, I find that the overall penalty assessed is reasonable. I have reviewed the factors de novo, and find that in applying CMPs and mitigation factors, I agree with the balance the Administrator struck between the severe risks created by some of Respondents' violations – particularly in regard to the fire and electrical hazards and the overcrowding – and Respondents' commitment to future compliance and lack of willfulness, at least as a general matter. The Administrator reasonably declined to assess a penalty for violations when the assessment under a different regulation already sufficiently accounted for the harm. *See* AX 1.

Respondents argue that the penalty the Administrator imposed was unreasonable because businesses whose violations were more willful and more exploitative have been subject to lower penalties. But as discussed in consideration of the gravity mitigation factor, willfulness is just one factor to consider when determining the gravity of a violation. *See, e.g.*, *Sun Valley Orchards, LLC*, 2017-TAE-00003, slip op. at 53 (gravity of health and safety violation). A non-willful violation that nonetheless creates a substantial probability of death or serious physical harm warrants a significant penalty.

For the above reasons, except where otherwise noted, I affirm the assessed CMPs. I vacated the penalties that the Administrator imposed under 29 C.F.R. §§ 1910.142(a)(3), (d)(2), and (d)(10), as incorporated by reference in 20 C.F.R. § 655.122(d)(1). Further, I found that the penalty under 29 C.F.R. § 1910.142(f)(1), as incorporated by reference in 20 C.F.R. § 655.122(d)(1) should be mitigated by an additional 10 percent. Thus, I eliminate three penalties of $1,353.60 each, and reduce the penalty under 29 C.F.R. § 1910.142(f)(1) to $1,184.40.

In total, I affirm a CMP of $385,268.40.

D. Debarment

In light of the allegedly life-threatening housing conditions and the alleged attempts to conceal those conditions from the government, the Administrator imposed a three year period of debarment on Respondents. The Administrator also cited the additional wage rate, recordkeeping, and disclosure violations in support of this finding. Respondents argue that none of the violations, alleged or admitted, support debarment.

i. Legal Framework

The Immigration and Nationality Act provides that "[t]he Secretary of Labor may not issue a certification" under the H-2A program "with respect to the employer if "the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during" "the previous two-year period" "substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers." 8 U.S.C. 1188(b).

The H-2A implementing regulations further provide that "[t]he WHD Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications . . . if: the WHD Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers . . . by issuing a Notice of Debarment." 29 C.F.R. § 501.20(a). "For the purposes of this section, a violation includes: (1) [o]ne or more acts of commission or omission on the part of the employer or the employer's agent which involve[,]" most relevantly: (i) "[f]ailure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers;" and (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 in 29 C.F.R. § 501.19(b) "shall be considered." *Id.* at § 501.20(d)(2). Debarment from the H-2A program can last no "more than 3 years from the date of the final agency decision." *Id.* at § 501.20(c)(2).

ii. Analysis

1. Substantial Violations

I find that Respondents failed to provide the required working conditions and in doing so "substantially violated a material term or condition of the labor certification with respect to" 69 H-2A workers. In particular, the violations resulting in fire and electrical hazards, which I determined above were grave, were also substantial, as were the violations stemming from the overcrowded conditions of the encampment.

The Administrator asks me to also treat the alleged fraud on DES as a substantial violation. I decline to do so with respect to debarment. Above, I found Respondents liable for this violation and imposed penalties. However, not all violations are substantial violations. In this case, I found above that it was unlikely that Mr. Gonzalez knew enough about the H-2A regulations to know that the housing would not be inspected if he filed an amendment changing the housing to hotels.[36] I further found that the Administrator did not show by a preponderance of the evidence that Respondents were involved in or knew about the submission of the supplemental application to DES.

2. Period of Debarment

I find that, under the facts of this case, I affirm the imposition of the maximum, three-year period of debarment. Because the violations in this case were so grave, presenting so great a threat to health and safety, I find that the violations are "substantial" for the purposes of debarment determinations.

Debarment is a forward-looking remedy while penalties are largely backward-looking. Thus, it is notable that the Administrator mitigated every CMP to account for the likelihood of future compliance. Additionally, while Respondents have participated in the H-2A program after the 2017 season, there is no indication that they have failed to comply with the regulations since then. HT 316. Similarly, I also reduced penalties above based on an absence of a history of violations.

However, the presence of these two mitigation factors is not enough to overcome the gravity of the violations for the purposes of debarment. Although I reduced CMPs based on the absence of a history of violations, Mr. Gonzalez admitted that Respondents violated the terms of their H-2A contract in 2016, the only other time Respondents had participated in the program. HT 80-81, 86; AX 33. Further, given the facts of this case, the likelihood of Respondents' future compliance may depend on their willingness to take on more oversight over their agents.[37]

Nor do any of the other four factors support mitigation in the debarment considerations. The overcrowding, fire hazards, and electrical hazards at G Farms affected all 69 of the H-2A

[36] While I am generally skeptical that Mr. Gonzalez is as ignorant of the regulations as he claims, that is a narrow provision that he would not have had occasion to know about from his own dealings with the program: in 2016, his first year of participation, Respondents housed the workers in apartments, and in 2017, they intended to house them onsite. AX 33; HT 51-52.

[37] Even after the WHD investigation of G Farms, after Respondents moved the workers away from the worksite, they may have failed to properly communicate with DES. AX 37; AX 47-48; *see also* RX 79. *But see* RX 80 (LeFelco's general communications about changes); RX 81; RX 85.

workers. Respondents did not act in good faith with respect these conditions. The overcrowding, the risks from the use of portable extension cords in lieu of electrical wiring to code (especially in a wet shower trailer), and the use of gas ranges not plumbed to code, were apparent without detailed knowledge, or indeed any knowledge, of the regulations. *See* HT 59-60, 288, 289-90, 292-94, 312. Nor did I find any explanation Respondents offered as to these violations convincing. Their explanations relied on the actions of their agents and their own lack of knowledge of the regulations. However, as above, the underlying problems with the conditions should have been apparent even without detailed knowledge of the regulations. Further, Respondents would have had more knowledge about their obligations under the regulations if Mr. Gonzalez actually read documents that he represented that he had read. *See, e.g.*, AX 18 at 00383. And as I found above, the housing situation presented significant financial gains to Respondents, at least relative to the costs that would have been required to bring the initial investments into compliance.

For the above reasons, I find that the gravity of the violations related to Respondents' housing, especially in terms of the fire and electrical hazards and the overcrowding, support the maximum three-year period of debarment. Further, as detailed above, none of the other factors in 29 C.F.R. § 501.19(b) are sufficiently mitigating to support a shorter period of debarment.

ORDER

1. My Order Granting in Part and Denying in Part Administrator's Motion for Partial Summary Decision is hereby incorporated and **APPROVED** in its entirety;

2. The assessed violations under 20 C.F.R. §§ 655.135(e), 655.122(d)(6), 655.122(l), 655.122(j)(1), 655.122(k), 655.122(q), and 655.135(l) are **AFFIRMED**, including assessments for violations of other regulations and laws incorporated by reference therein;

3. The assessed violations under 29 C.F.R. § 1910.142(a)(3), 29 C.F.R. § 1910.142(d)(2), and § 1910.142(d)(10), as incorporated by reference in 20 C.F.R. § 655.122(d)(1) are **VACATED**;

4. The assessed violation under 29 C.F.R. § 1910.142(f)(1), as incorporated by reference in 20 C.F.R. § 655.122(d)(1) is **MODIFIED**, insofar as it is reduced to $1,184.40;

5. The assessed penalties under 20 C.F.R. §§ 654.413 and 654.417 as incorporated in 20 C.F.R. § 655.122(d)(1) are **AFFIRMED** as violations of 29 C.F.R. § 1910.142(b)(11) as incorporated in 20 C.F.R. § 655.122(d)(1).

6. Except as specifically noted in ¶ 3 to 5 of this Order, the assessed violations under 20 C.F.R. § 655.122(d)(1) and other regulations and laws incorporated by reference therein are **AFFIRMED**.

7. Respondent is **HEREBY ORDERED** to pay $3,794.52 in unpaid travel costs and daily subsistence to the Administrator for delivery to the 69 H-2A workers, for failing to comply with 20 C.F.R. § 655.122(h)(1).

8. Respondent is **HEREBY ORDERED** to pay a $385,268.40 civil money penalty to the Administrator for violating 20 C.F.R. §§ 655.135(e), 655.122(d)(1), 655.122(d)(6), 655.122(l), 655.122(j)(1), 655.122(k), 655.122(q), and 655.135(l), and the other regulations and laws incorporated by reference in these provisions.

9. The Administrator is **HEREBY ORDERED** to debar Respondents from receiving future labor certifications under 20 C.F.R. part 655, subpart B for a period of three years following the date of the final agency decision in this case.

EVAN H. NORDBY
Administrative Law Judge

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 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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide

at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact. If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.