U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 13 September 2021

Case No.: 2021-TAE-00003

In the Matter of:

RESENDIZ PINE STRAW, LLC
d/b/a RESENDIZ PINE STRAW AND TOBACCO,
Respondent.

DECISION AND ORDER

This matter arises from an enforcement action under the H-2A visa program of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1101 *et seq.*, as amended, and the regulations at 29 C.F.R. Part 501, as well as the Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. § 1801 *et seq.*, and its applicable federal regulations. It was docketed in the Office of Administrative Law Judges on December 23, 2020, and was assigned to me on January 26, 2021. A formal hearing was held telephonically at 9:00 a.m. EDT on June 23, 2021. At the conclusion of the hearing, the parties were granted leave to file post-hearing briefs. The Administrator timely submitted a brief; the Respondent did not file a brief. The record is now closed and this matter is ripe for decision.

Procedural History

Resendiz Pine Straw, LLC ("Respondent") is an H-2A Farm Labor Contractor operating in the area around Braxton, Georgia. Respondent contracts with several agricultural employers to secure the certification of agricultural nonimmigrant workers under the H-2A visa program. Respondent filed a Form ETA-9142A, H-2A Application for Temporary Employment Certification seeking certification for 120 Farmworkers and Laborers, for a period of intended employment of May 28, 2018 through December 31, 2018. Certification under the H-2A program was granted on June 13, 2018, and was valid through December 31, 2018.

The Administrator conducted an investigation of Respondent regarding his compliance with the H-2A program, covering the period from September 16, 2018 through December 31, 2018. The Administrator determined that "the Employer Parties failed to comply with Section 218 of the INA and applicable regulations at 20 C.F.R. part 655 and 29 C.F.R. part 501." The Administrator issued a *Notice of Determination of Wages Owed, Assessing Civil Money Penalties, and Debarment* dated June 18, 2019, setting forth the finding that as a consequence of the H-2A violations, "$136,971.55 in unpaid wages is owed to 110 workers," and "civil money penalties are hereby assessed in the amount of $34,006.00." A *Summary of Violations* was enclosed with the Notice, setting forth the specific violations found by the Administrator and the

"unpaid wages owed" and "civil money penalty" assessed for each violation. The violations found by the Administrator were:

> (1) Respondent failed to comply with recruitment requirements, because it unlawfully transported workers outside of the scope and geographic area of intended employment, in violation of 20 C.F.R. § 655.121(a);
> (2) Respondent failed to comply with the requirement that it provide a copy of the work contract to all workers, in violation of 20 C.F.R. § 655.122(q);
> (3) Respondent failed to fully reimburse 110 workers for their inbound transportation costs to the job site in violation of 20 C.F.R. § 655.122(h)(1);
> (4) Respondent failed to offer thirty-four (34) workers employment for at least three-fourths of the workdays during the time period between the workers' arrival at the jobsite and the expiration date of the contract, in violation of 20 C.F.R. § 655.122(i);
> (5) Respondent failed to pay all workers the required rate of pay of $10.95 for all hours worked, in violation of 20 C.F.R. § 655.122(l);
> (6) Respondent failed to reimburse fifty (50) of the workers for visa fees and legal fees, in violation of 20 C.F.R. §§ 655.135(j),(k);
> (7) Respondent failed to keep accurate and adequate records with respect to the workers' daily hours and earnings in violation of H-2A regulation 20 C.F.R. § 655.122(j)(1);
> (8) Respondent failed to comply with the pay statement requirements, in violation of 20 C.F.R. § 655.122(k);
> (9) Respondent failed to comply with all Federal laws and regulations by deducting a lunch break and two fifteen minute breaks from the daily-hours worked for workers in violation of 20 C.F.R. § 655.135(e).

The *Summary of Violations* sets forth the back wages owed and civil money penalty assessed for each violation, which resulted in a total of $136,971.55 in unpaid wages owed and $34,006.00 in civil money penalties owed altogether. The Notice also informed Respondent that as a consequence of the violations committed, the Administrator had determined that Respondent "shall be debarred from applying to the Department of Labor for H-2A certification for a period of 3 years …, unless an administrative appeal is properly filed."

In a separate Notice dated June 18, 2019, entitled *Determination of Civil Money Penalties for MSPA Violations Against Resendiz Pine Straw, LLC*, the Administrator stated that an investigation into Respondent's operation under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) covering the period September 17, 2018 through December 31, 2018, disclosed that Respondent had violated the MSPA. The Administrator assessed a civil money penalty of $5,010.00 "as a result of these violations and pursuant to Section 503(a) of the Act and 29 C.F.R. Part 500." The enclosed *Summary of Violations* listed three violations of the MSPA: failure to make/keep employer records; failure to provide wage statements to workers; and failure to renew Respondent's expired certification.

Respondent, through counsel,[1] filed a Request for Hearing dated July 15, 2019, challenging both notices.

Subsequently, the Administrator issued a *Notice of Debarment* dated November 14, 2019, which purported to "supersede previous Notice of Debarment in correspondence dated March 13, 2019." No reference was made to the *Notice of Determination of Wages Owed, Assessing Civil Money Penalties, and Debarment* dated June 18, 2019, upon which Respondent had requested a hearing. The "superseding" Notice purported to increase the "unpaid wages owed" on the violation for failure to comply with the three-fourths guarantee to $115,664.61 (from $36,356.45 in the June 18, 2019 Notice of Determination), and to increase the "unpaid wages owed" on the violation for failure to pay the offered wage rate to $40,772.50 (from $37,817.90 in the June 18, 2019 Notice).[2] Thus, the Administrator assessed a total of $219,184.31 in unpaid wages owed and $34,006.00 in civil money penalties owed altogether in this Notice. The November 14, 2019 Notice also imposed a three-year debarment from the H-2A program as a consequence of the violations committed, "unless an administrative appeal is properly filed." Respondent's counsel again filed a Request for Hearing, dated December 11, 2019.

For unknown reasons, an Order of Reference was not issued until December 23, 2020, referring this matter to OALJ for formal hearing. The case was docketed in the Office of Administrative Law Judges on December 23, 2020, and was assigned to me on January 26, 2021. I issued a *Notice of Assignment and Notice of Hearing and Scheduling Order* on January 26, 2021, which permitted discovery to commence and provided that "the parties shall respond to discovery requests within 14 days from the date of service," due to the expedited nature of the proceeding. The Administrator filed a motion to continue the hearing, which I granted by Order issued February 26, 2021. On April 19, 2021, Respondent's attorney moved to withdraw from the representation, which I granted by Order issued April 20, 2021. The Administrator filed a second motion to continue the hearing, to allow time for a motion for summary decision, which I granted by Order issued May 11, 2021. The hearing was rescheduled to commence telephonically at 9:00 a.m. on June 23, 2021, and the dial-in information was provided in the Order.

On May 20, 2021, the Administrator moved for partial summary decision, requesting a decision in the Secretary's favor based on admissions Respondent was deemed to have made by virtue of its failure to respond to the Secretary's *First Request for Admissions* propounded on April 6, 2021. The Administrator requested findings that Respondent violated the cited regulations under the H-2A program, that Respondent owes $136,971.55 in H-2A back wages, and that Respondent must pay $34,006.00 in H-2A civil money penalties as assessed by the Administrator. Respondent did not file a response to the Administrator's motion for partial summary decision.

[1] Respondent's counsel later withdrew from the representation, citing material breaches of the terms and conditions of the representation and a subsequent lack of communication to try to remedy the breaches.

[2] While the Administrator cited these increased figures in its *Request for Admissions* during discovery in this matter before OALJ, its motion for partial summary decision sought a total assessment consistent with the amounts assessed in the June 18, 2019 *Notice of Determination*.

On June 11, 2021, I issued an *Order Granting Partial Summary Decision Against Respondent*. As discussed in greater detail below, I found that Respondent did not respond to the *Request for Admissions*, and consequently the matters set forth in the *Request for Admissions* were admitted; and I found that the matters admitted established that Respondent violated several regulations under the H-2A program (see Admissions 3, 5, 7, 10, 13, 16, 19, 21, and 23), and further established that Respondent owes back wages in the requested amount of $136,971.55 (see Admissions 8, 11, 14, and 17) and civil money penalties in the amount of $34,006.00 (see Admissions 4, 6, 9, 12, 15, 18, 20, 22, 24), as assessed by the Administrator. Respondent was ordered to pay the back wages and civil money penalties assessed for the H-2A violations. I noted the MSPA violations remained at issue, and the hearing would proceed as scheduled.

On June 23, 2021, the telephonic hearing commenced. Respondent, through its representative Francisco Resendiz, was not present at the scheduled start time of 9:00 a.m. I went on the record and called the case at 9:30 a.m., and noted that Respondent/Mr. Resendiz had not appeared. (TR 5). I found that Respondent had notice of the hearing and had chosen to not appear, so the hearing would go forward as scheduled without Respondent's participation. (TR 5). The Administrator moved for a Decision and Order without further proceeding, in light of Respondent's non-appearance. (TR 6-7). I took the motion under advisement, to determine if there was good cause for Respondent's failure to appear, and the hearing went forward.[3] (TR 7).

Administrator's Exhibits 1 through 9 were admitted without objection. (TR 9). Witness testimony was taken from witnesses Michelle Garvey, Monique Perez, and Francisco Resendiz. After Ms. Garvey had completed her testimony and been excused, but before Ms. Perez had been sworn in, Mr. Resendiz joined the hearing. (TR 27-29). Mr. Resendiz stated that he joined the hearing late because he "just lost track of time" and because "the lady that works with me said, hey, it's today, it's today. And she thought it was tomorrow." (TR 29). I found that, as all recent orders had provided a hearing date and time of June 23, 2021 at 9:00 a.m., Mr. Resendiz had proper notice of the date and time of the hearing with no basis to believe the hearing was June 24.[4] I explained that exhibits had been received and the testimony of one witness had already been completed, and the hearing would proceed with his participation from the point that he joined, as his absence from the start of the hearing had been voluntary.[5] (TR 29-30). Testimony was taken from Ms. Perez and Mr. Resendiz, and the parties were granted leave to

[3] As Respondent/Mr. Resendiz eventually joined the hearing at approximately 10:15 a.m., the Administrator's motion is hereby denied.

[4] The *Order Granting Second Continuance and Canceling and Rescheduling Hearing*, which was issued on May 11, 2021, set this matter for a telephonic hearing at 9:00 a.m. on June 23, 2021, and provided the telephone number and participant passcode for joining the telephonic hearing. The Order was served on Respondent directly via email, following the withdrawal of Respondent's counsel in April 2021. Further, Respondent was directly served with the *Order Granting Partial Summary Decision Against Respondent* on June 11, 2021, which concluded with the statement that "the hearing scheduled to commence at 9:00 a.m. on June 23, 2021, will proceed as scheduled." Finally, an email was sent to Respondent by OALJ staff on June 23, 2021, after Respondent did not appear at the hearing, to reiterate that the hearing was going forward and Respondent should call in at once, and the telephone number and passcode were provided again. Despite these notices and communications, Respondent did not appear at the hearing until approximately 10:15 a.m. on June 23, 2021.

[5] Mr. Resendiz also voiced complaints about his previous attorney and stated he "just recently got in contact with" a new attorney who might help him. I found he had not requested time to find new counsel through any prehearing motion, despite his attorney having moved to withdraw more than two months prior, and found his request for such raised in the middle of the hearing was untimely.

submit written closing arguments. The Administrator filed a brief with its argument; Respondent did not submit a brief. The record is now closed.

Findings on Partial Summary Decision

As noted above, I previously issued an *Order Granting Partial Summary Decision Against Respondent* on June 11, 2021. In that Order, I found that Respondent failed to serve "a written answer or objection" to the Secretary's *Request for Admissions*, and consequently, pursuant to 29 C.F.R. § 18.63(a)(3), the matters set forth in the *Request for Admissions* are admitted. Thus, Respondent admitted the following:

1. Respondent is a Farm Labor Contractor within the meaning of the Immigration and Nationality Act (INA).
2. Respondent participated in the H-2A visa program, regulated by Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act (IRCA) (8 U.S.C. §§ 110l(a)(15)(H)(ii)(a), 1184(c) and 1186), to secure temporary agricultural labor and employed H-2A workers in Braxton, Georgia during the investigation period.
3. By transporting workers to Arcadia, Florida, Respondent unlawfully transported workers outside of the scope and geographic area of intended employment, in violation of 20 C.F.R. § 655.121(a).
4. As a result of the violation referenced in Request for Admission No. 3 above, Respondent owes $1,388.00 in in unpaid H-2A civil money penalties.
5. Respondent failed to provide a copy of the work contract to all workers in violation of 20 C.F.R. § 655.122(q).
6. As a result of the violation referenced in Request for Admission No. 5 above, Respondent owes $1,388.00 in in unpaid H-2A civil money penalties.
7. Respondent failed to fully reimburse workers for their inbound transportation costs to the job site in violation of 20 C.F.R. § 655.122(h)(1).
8. As a result of the violation referenced in Request for Admission No. 7 above, Respondent owes $48,400.20 in unpaid back wages to H-2A workers.
9. As a result of the violation referenced in Request for Admission No. 7 above, Respondent owes $1,388.00 in in unpaid H-2A civil money penalties.
10. Respondent failed to offer thirty-four workers employment for at least three-fourths of the workdays during the time period between the workers' arrival at the jobsite and the expiration date of the contract, in violation of 20 C.F.R. § 655.122(i).
11. As a result of the violation referenced in Request for Admission No. 10 above, Respondent owes $115,664.61 in unpaid back wages to H-2A workers.
12. As a result of the violation referenced in Request for Admission No. 10 above, Respondent owes $20,820.00 in in unpaid H-2A civil money penalties.
13. Respondent failed to pay all workers the required rate of pay of $10.95 for all hours worked, in violation of 20 C.F.R. § 655.122(l).
14. As a result of the violation referenced in Request for Admission No. 13 above, Respondent owes $40,772.50 in unpaid back wages to H-2A workers.

15. As a result of the violation referenced in Request for Admission No. 13 above, Respondent owes $1,388.00 in in unpaid H-2A civil money penalties.
16. Respondent failed to reimburse fifty of the workers for visa fees and legal fees, in violation of 20 C.F.R. §§ 655.135(j),(k).
17. As a result of the violation referenced in Request for Admission No. 16 above, Respondent owes $14,397.00 in unpaid back wages to H-2A workers.
18. As a result of the violation referenced in Request for Admission No. 16 above, Respondent owes $1,388.00 in in unpaid H-2A civil money penalties.
19. Respondent failed to keep accurate records showing the number of hours of work offered each day, the hours actually worked each day by the worker, and the time the worker began and ended each workday in violation of 20 C.F.R. § 655.122(j)(1).
20. As a result of the violation referenced in Request for Admission No. 19 above, Respondent owes $2,429.00 in in unpaid H-2A civil money penalties.
21. Respondent failed to provide accurate fixed-site information in its application in violation of 20 C.F.R. § 655.132(b)(1).
22. As a result of the violation referenced in Request for Admission No. 21 above, Respondent owes $1,388.00 in in unpaid H-2A civil money penalties.
23. Respondent failed to comply with all Federal laws and regulations by deducting a lunch break and two fifteen minute breaks from the daily-hours worked for workers in violation of 20 C.F.R. § 655.135(e).
24. As a result of the violation referenced in Request for Admission No. 23 above, Respondent owes $2,429.00 in in unpaid H-2A civil money penalties.

I found that the matters admitted established that Respondent violated several regulations under the H-2A program (see Admissions 3, 5, 7, 10, 13, 16, 19, 21, and 23), and further established that Respondent owes back wages in the requested amount of $136,971.55 (see Admissions 8, 11, 14, and 17) and civil money penalties in the amount of $34,006.00 (see Admissions 4, 6, 9, 12, 15, 18, 20, 22, 24), as assessed by the Administrator. I granted partial summary decision against Respondent, and found that Respondent committed the violations of the H-2A program set forth by the Administrator in the *Summary of Violations* enclosed with the June 18, 2019 *Notice of Determination of Wages Owed, Assessing Civil Money Penalties, and Debarment*. I ordered Respondent to pay $136,971.55 in H-2A back wages and $34,006.00 in H-2A civil money penalties as assessed by the Administrator in the June 18, 2019 *Notice* and its enclosures.

Issues

The following issues were identified for adjudication:

1. Whether Respondent was an agricultural employer as defined by 29 C.F.R. § 500.20(d) during the time of WHD's investigation;
2. Whether Respondent is subject to the requirements under the MSPA;
3. Whether Respondent failed to renew his Farm Labor Contracting Certification in violation of 29 C.F.R. § 500.40;

4. Whether Respondent failed to keep records of hours worked by each employee in violation of 29 C.F.R. § 500.80(a)(3);
5. Whether Respondent failed to provide wage statements to workers in violation of 29 C.F.R. § 500.80(d);
6. Whether Respondent should be debarred from participating in the Department of Labor's H-2A Program for a period of 3 years from the date of the Court's decision pursuant to 29 C.F.R. § 501.20; and
7. Whether Respondent should be assessed a total of $5,010.00 in civil money penalties for its violations.

(TR 7-8).

Summary of Evidence

I have reviewed and considered all of the evidence in the record. I have summarized the most pertinent evidence below.

Administrator's Exhibit 1

Administrator's Exhibit (AX) 1 is a copy of Respondent's July 15, 2019 request for a hearing, which enclosed copies of the Administrator's June 18, 2019 *Notice of Determination of Wages Owed, Assessing Civil Money Penalties, and Debarment* and the Administrator's June 18, 2019 *Determination of Civil Money Penalties for MSPA Violations Against Resendiz Pine Straw, LLC d.b.a. Resendiz Pine Straw, LLC and Tobacco*.

Administrator's Exhibit 2

AX 2 is a copy of the Administrator's June 18, 2019 *Determination of Civil Money Penalties for MSPA Violations Against Resendiz Pine Straw, LLC d.b.a. Resendiz Pine Straw, LLC and Tobacco*. As discussed above, the Administrator found three violations of the MSPA and assessed civil money penalties totaling $5,010.00.

Administrator's Exhibit 3

AX 3 is an MSPA Narrative Report written by investigators Monique Perez and Al Hernandez. The investigators described Respondent as "a registered Farm Labor Contractor, who for a fee, either recruited, solicited, hired, employed, furnished or transported (FRESH-T) migrant agricultural workers to rack and pack pine straw from various farmers." The report stated that while the majority of Respondent's workers were H-2A visa holders, the business had 2-3 seasonal workers and "is covered under Section 3(2) of the Migrant and Seasonal Agricultural Workers Protection Act." The investigators found that no MSPA exemptions applied. The report documented three MSPA violations and set out the calculations supporting an assessment of $5,010.00 in civil money penalties.

Administrator's Exhibit 4

AX 4 is a copy of Respondent's Farm Labor Contractor Certificate of Registration, which expired on September 16, 2018.

Administrator's Exhibit 5

AX 5 is a "Personal Interview Statement" of Mr. Resendiz on a DOL Wage and Hour Division (WHD) form. Mr. Resendiz stated that he is the President and only officer of the company. He buys pine straw from various farmers and provides labor for racking and packing pine straw. He employed H-2A workers but did not have enough work for them in Georgia in pine straw, and the tobacco season was over, so 57 of the workers were sent to Florida to work. Mr. Resendiz pays his workers in cash, and the workers do not get a pay stub. He did not know whether they got a copy of their contract in Mexico. He described the pay rates and break periods. He stated he had "about three migrant workers with me" who were paid the same rate as the H-2A workers. He stated he had not reimbursed any of the workers for their visas and transportation and meals; "[t]hey paid for everything." He acknowledged his Farm Labor Contractor card was expired and stated he was in the process of renewing it.

In a follow-up interview (in the same report), Mr. Resendiz stated he had started reimbursing his workers but had not reimbursed everyone yet. In another follow-up interview, he explained the roles and involvement of certain other people. Handwritten notes in response to typed and emailed questions also discussed the involvement of Colton Moran and payment and work arrangements for the H-2A workers. A typed statement dated 12/6/2018 detailed costs shared with Mr. Moran.

Administrator's Exhibit 6

AX 6 is a "Personal Interview Statement" of Julio Jimenez Perez on the WHD form. Mr. Perez worked for Mr. Resendiz and described a group of contractor workers that began in September 2018, and included two or three "that are locals that live around here." Mr. Perez supervised the workers and recorded the number of pine straw bales each worker packed. He did not pay the workers or record their hours. He is paid in cash, without a pay stub.

Administrator's Exhibit 7

AX 7 is 27 pages of handwritten work schedules, showing worker names, hours worked by day for each day of the week, and weekly totals for hours worked and wages earned.

Administrator's Exhibit 8

AX 8 is 8 pages of handwritten work schedules for four migrant workers: Imol, Velasquez, Jimenez, and Gutierrez. The pages cover dates from 9/24/18 to 12/15/18 and show hours worked by day and weekly total wages for each worker.

Administrator's Exhibit 9

AX 9 is an "MSPA CMP Computation Summary Sheet." It is an WHD form that sets out the calculation of civil money penalties by violation for the violations found in Respondent's case.

Hearing Testimony – Garvey

Michelle Garvey has worked for the U.S. Department of Labor and has served as a WHD investigator, assistant district director, and district director. She has received training on both the H-2A and the MSPA programs. She has supervised hundreds of MSPA investigations, and hundreds of H-2A investigations. She supervised the investigation of Respondent. She referenced AX 3, the MSPA Narrative Report written by investigators Monique Perez and Al Hernandez, and stated they found and cited violations of the MSPA by Respondent. They "cited some recordkeeping violations" because Respondent was "charging employees for taking a 15-minute break -- two 15-minute breaks" and was not recording that properly or paying the workers properly. Also, Respondent "was not providing employees with a paystub so they could see what their actual pay was." They also charged Respondent with "failing to file for his farm labor contract certification which is required of all farm labor contractors to have. His certification actually expired on 9/16/18. And he had not applied for a new certification."

WHD issued a determination letter to Respondent with regard to the MSPA violations (AX 2), and also issued a determination letter to Respondent regarding H-2A violations. The H-2A letter included a notice of debarment. Ms. Garvey reviewed the determination that Respondent should be debarred for three years based on violations of the H-2A program, and explained that the agency "chose to debar" because "there was a failure to pay or provide the required wages, benefits, working conditions to the Employer's H-2A workers. And we also debarred based on the fact that this particular Employer, Resendiz Pine Straw, LLC was employing H-2A workers outside the area of the intended employment," because Respondent sent workers to Florida after stating the work would be performed in Georgia. Those were the "major violations" that led to the decision to debar Respondent; in addition, "this particular case was very concerning because there were so many H-2A violations which is rather unusual for us. We do see violations. But there were just many, many violations under H-2A in this case so we were very concerned." They considered several factors, which Ms. Garvey described, and found several significant factors that led to the determination to debar Respondent.

Under the MSPA, the investigation found that Respondent committed the following violations: "failure to make or keep employer records per 29 C.F.R. 500.80(a)(3)(b)"; "failure to provide a wage statement to workers under 580 -- 500.80(d)"; and "failure to renew his expired certification" under section 500.40. All of the violations were substantiated.

Ms. Garvey explained the calculation of the civil money penalties, and the fact that the penalty amounts were mitigated down in this case because Respondent did not have a prior history of violations, and with the MSPA violations, there were only a few affected workers and the violations were recordkeeping in nature. They also mitigated the amounts because Respondent committed to future compliance, and there wasn't a significant financial gain.

Respondent violated the rules for making and keeping employer records because the workers received two 15-minute breaks, and Respondent was not paying them for that 30 minutes of time, which it was required to do. As a result of erroneously treating the breaks as unpaid, the hours of work were inaccurately stated, and thus, Respondent's records were not accurate. Regarding the violation for failure to provide wage records to workers, the investigation substantiated that allegation, and in fact, Mr. Resendiz admitted it in his statement (AX 5). The violation for failure to renew the farm labor contractor certificate was substantiated by their regional office, which reported that Mr. Resendiz's certificate expired on September 16, 2018, and there was no application pending at that time. AX 4 is Mr. Resendiz's certification, showing that it expired on September 16, 2018. Ms. Garvey discussed the consideration of factors and calculation of the civil money penalty for this violation as well. AX 9, the civil money penalty computation form, also shows how the penalties were calculated.

Hearing Testimony – Perez

Monique Perez is an investigator for the U.S. Department of Labor's Wage and Hour Division (WHD). She has worked for DOL for 24 years. She described her job duties and stated she had both received and given trainings on the MSPA and H-2A programs.

Ms. Perez was assigned to the investigation in this case on October 15, 2018. She initially "determined that [Respondent] had H-2A workers who were working in Florida instead of Atlanta." She later learned that Respondent also had another group of workers at a different location in Florida that "was a combination of seasonal workers and H-2A workers." AX 6 documents her interview of Mr. Julio Jimenez Torres, who worked as a supervisor for Respondent and "was supervising a group of H-2A and seasonal workers on behalf of Mr. Resendiz." Ms. Perez also interviewed Mr. Resendiz, as documented in AX 5, and he confirmed that he employed approximately three migrant workers. The handwritten work schedules in AX 8 were for the seasonal workers supervised by Mr. Jimenez Torres, working for Respondent.

Her investigation revealed that Respondent had committed violations of the MSPA. The first violation was the Respondent failed to make and keep accurate records, because Respondent was deducting 15-minute breaks from the hours worked, as shown in notations on the handwritten work schedules. It was incorrect for Respondent to deduct those breaks, because "under the law, any breaks that are less than 30 minutes, it's compensable."

The second violation she found was failure to provide wage statements to workers. Mr. Resendiz admitted to her that he did not provide pay stubs to workers.

The third violation she found was his failure to renew his farm labor contractor registration. The farm labor contractors are required to have licenses "to perform the main activities such as recruit, solicit, hire, employ, furnish, transport migrant and seasonal workers." Mr. Resendiz was working as a farm labor contractor, but when she asked him for his current registration, he provided her with an expired certificate (AX 4).

Hearing Testimony – Resendiz

Francisco Resendiz is the president of Resendiz Pine Straw, LLC. In September of 2018, he employed both seasonal and H-2A workers in Branford, Florida. He had three seasonal workers. He did not provide pay stubs to his workers. The break time did come out of the workers' pay, but they were paid for eight full hours each day.

Mr. Resendiz's farm labor contracting registration expired in September of 2018. He stated that the application was normally done for eight months, but this time, it was only done for three months; that's when it expired.

Regarding the lack of pay stubs, Mr. Resendiz stated that "since this was my first time, I guess it was a misinformation from the person that got all the paperwork ready for me of the way that we are supposed to keep records for the people that work here." He paid the workers in cash.

Mr. Resendiz stated that the fines imposed by DOL are "very high," and his previous attorney did not explain the fines to him. This was his first time bringing in H-2A workers, and this is all new to him. "[T]hey didn't give me more information in order to be completely organized." Mr. Resendiz apologized and stated he wanted to fix the problems.

Mr. Resendiz stated that he is located in Atlanta, and half the workers were in Southern Georgia, "[b]ut the ones that were in Southern Georgia were moved. The person that was in charge of the tobacco workers moved them to Florida." That was Colton Moran. Mr. Resendiz doesn't know what happened in Branford, Florida, with the people there.

Mr. Resendiz "gave all the information to Ms. Perez about the payments for the whole week for everyone."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA or the Act), 29 U.S.C. § 1801 *et seq.*, protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping. The MSPA also requires farm labor contractors to register with the U.S. Department of Labor (DOL).

The stated purposes of the MSPA include "to require farm labor contractors to register under this chapter; and to assure necessary protections for migrant and seasonal agricultural workers …." 29 U.S.C. § 1801. To those ends, the Act and the regulations issued thereunder establish various requirements that must be followed. The Administrator found that Respondent committed three violations of the MSPA, and assessed civil money penalties for those violations. Respondent challenged those determinations. The contested issues are addressed below.

Whether Respondent was an agricultural employer as defined by 29 C.F.R. § 500.20(d) during the time of WHD's investigation

> The MSPA defines an "agricultural employer" as follows:
>
> > The term "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

29 U.S.C. § 1802(2); *see also* 29 C.F.R. § 500.20(d). Respondent does not meet this definition, because while it hired and employed seasonal agricultural workers, it does not own or operate a farm, ranch, or other listed facility. However, Respondent comes within the scope of the MSPA, because it operates as a farm labor contractor. As stated in 29 C.F.R. § 500.1(c):

> **Any farm labor contractor, as defined in the Act, is required to obtain a Certificate of Registration issued pursuant to the Act from the Department of Labor** or from a State agency authorized to issue such certificates on behalf of the Department of Labor. Such a farm labor contractor must ensure that any individual whom he employs to perform any farm labor contracting activities also obtains a Certificate of Registration. The farm labor contractor is responsible, as well, for any violation of the Act or these regulations by any such employee whether or not the employee obtains a certificate. **In addition to registering, farm labor contractors must comply with all other applicable provisions of the Act when they recruit, solicit, hire, employ, furnish or transport or, in the case of migrant agricultural workers, provide housing.**

(Emphasis added). A "farm labor contractor" means "any person - other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association - who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity." 29 C.F.R. § 500.20(j). "Farm labor contracting activity means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker." 29 C.F.R. § 500.20(i). Respondent admitted it was a farm labor contractor, and there is no question on this record that Respondent's business involved hiring and employing seasonal agricultural workers. Accordingly, Respondent was engaged in farm labor contracting activity and acted as a farm labor contractor. Consequently, under 29 C.F.R. § 500.1(c), it is subject to the registration requirement of the MSPA and also must comply with all other applicable provisions of the Act when employing seasonal agricultural workers.[6]

Whether Respondent is subject to the requirements under the MSPA

As stated above, Respondent is subject to the requirements of the MSPA pursuant to 29 C.F.R. § 500.1(c).

[6] The WHD investigation pertained to the period from September 16, 2018 to December 31, 2018. (AX 2; AX 3). Respondent employed seasonal agricultural workers during this time period. (AX 8).

Whether Respondent failed to renew his Farm Labor Contracting Certification in violation of 29 C.F.R. § 500.40

As set forth above, 29 C.F.R. § 500.1(c) requires a farm labor contractor "to obtain a Certificate of Registration issued pursuant to the Act from the Department of Labor." The regulations further provide:

> Any person who desires to engage in any activity as a farm labor contractor, as defined in the Act and these regulations, and is not exempt, is required first to obtain a Certificate of Registration authorizing each such activity. Any employee of a registered farm labor contractor who performs farm labor contracting activities solely on behalf of such contractor, and who is not an independent contractor, must obtain a Farm Labor Contractor Employee Certificate of Registration authorizing each such activity. The employee's certificate must show the name of the farm labor contractor for whom the activities are to be performed. **The contractor whose name appears on the employee's certificate must hold a valid Certificate of Registration covering the entire period shown on the employee's certificate.**

29 C.F.R. § 500.40 (emphasis added). Mr. Resendiz acknowledged, both in his interview with Ms. Perez (AX 5) and in his hearing testimony (TR 48), that his certificate expired on September 16, 2018. Ms. Perez and Ms. Garvey also provided credible testimony that the certificate was expired without timely renewal, and the expired certificate is in the record. Because Respondent failed to timely renew his certificate, and it instead expired on September 16, 2018, Respondent violated the regulation at 29 C.F.R. § 500.40.

Whether Respondent failed to keep accurate records of hours worked by each employee in violation of 29 C.F.R. § 500.80(a)(3)

The MSPA requires farm labor contractors to "make and keep the following records with respect to each worker including the name, permanent address, and Social Security number:

> (1) The basis on which wages, are paid;
> (2) The number of piecework units earned, if paid on a piecework basis;
> (3) The number of hours worked;
> (4) The total pay period earnings;
> (5) The specific sums withheld and the purpose of each sum withheld; and
> (6) The net pay.

29 C.F.R. § 500.80(a).

Respondent kept handwritten records of the hours worked by the seasonal employees. (AX 8). The records were not accurate, however, because Respondent erroneously excluded two 15-minute break periods per work per day. The records reflect a work day from 8:00 a.m. to 5:00 p.m. – a nine-hour period of time. The records further reflect (and Mr. Resendiz testified) that the employees worked and were paid for 8.0 hours per day. The remaining hour consisted of

the 30-minute lunch break, plus the two 15-minute breaks. The 15-minute breaks were compensable, however, and thus they were incorrectly excluded from the total of the hours worked in Respondent's records. Consequently, Respondent did not accurately make and keep a record of the hours worked by the seasonal workers, in violation of 29 C.F.R. § 500.80(a)(3).

Whether Respondent failed to provide wage statements to workers in violation of 29 C.F.R. § 500.80(d)

The regulation at 29 C.F.R. § 500.80 also requires a farm labor contractor to "provide each migrant or seasonal agricultural worker employed with an itemized written statement of [the records required by subsection (a)] at the time of payment for each pay period which must be no less often than every two weeks (or semi-monthly)." *Id.* § 500.80(d). Thus, Respondent was required to provide the workers with a pay statement every two weeks showing the basis on which wages are paid; the number of piecework units earned (if paid on a piecework basis); the number of hours worked; the total pay period earnings; the specific sums withheld and the purpose of each sum withheld; and the net pay.

Mr. Resendiz paid his employees in cash, and admitted that he did not provide pay stubs to his workers. (TR 47); (AX 5). Thus, Respondent did not comply with the requirements of 29 C.F.R. § 500.80(d).

Whether Respondent should be assessed a total of $5,010.00 in civil money penalties for its MSPA violations

As discussed above, Respondent violated the requirements of the MSPA by not maintaining his farm labor contractor certification, by not providing pay statements to his seasonal workers, and by not making and keeping accurate records of the hours worked by the employees. "A civil money penalty may be assessed for each violation of the Act or these regulations." 29 C.F.R. § 500.143(a). Because Respondent violated the Act and its regulations, civil money penalties were warranted.

In determining the amount of penalty to assess, several factors must be considered. *See* 29 C.F.R. § 500.143(b). Ms. Garvey explained in her hearing testimony how the civil money penalties for the MSPA violations were calculated in this matter. Her testimony established that the appropriate factors were considered. She also explained that the penalty amounts were mitigated down in this case because Respondent did not have a prior history of violations, there were only a few affected workers, and the MSPA violations were recordkeeping in nature. Additionally, Respondent committed to future compliance, and there was not a significant financial gain.

Upon consideration of Ms. Garvey's testimony and the other evidence of record regarding the penalty amounts, I find the penalties are appropriate and the total civil money penalty of $5,010.00 for the MSPA violations is proper.

Whether Respondent should be debarred from participating in the Department of Labor's H-2A Program for a period of 3 years from the date of the Court's decision pursuant to 29 C.F.R. § 501.20

Under 29 C.F.R. § 501.20, the Administrator may debar an employer from receiving future labor certifications under the H-2A program 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 …." The Notice of Debarment must be issued within two years of the occurrence of the violation, and the maximum length of the debarment is three years. 29 C.F.R. § 501.20(c).

Here, the Notice of Debarment was timely issued on June 18, 2019. The regulation lists nine violations of the H-2A program which may merit debarment. 29 C.F.R. § 501.20(d). As the Administrator argued in its post-hearing brief, Respondent committed three of the nine qualifying violations: Respondent failed to provide required wages to H-2A workers in the amount of $136,971.55; Respondent employed H-2A workers outside of the intended area of employment (when numerous workers were sent to Florida to work), and in activities not listed in the job order; and Respondent violated 20 C.F.R. § 655.135(j) and (k) by requiring employees to pay fees for recruitment, visa fees, and traveling. *See* 29 C.F.R. § 501.20(d)(1)(i), (vii), (viii). Because Respondent committed several significant violations that qualify for debarment under the regulations, I find that debarment is appropriate, and the three-year debarment period is warranted.

ORDER

Based on the foregoing, and upon the previously issued *Order Granting Partial Summary Decision Against Respondent*, IT IS ORDERED:

Respondent committed the violations of the H-2A program set forth by the Administrator in the *Summary of Violations* enclosed with the June 18, 2019 *Notice of Determination of Wages Owed, Assessing Civil Money Penalties, and Debarment*.

Respondent committed the violations of the MSPA set forth by the Administrator in the *Determination of Civil Money Penalties for MSPA Violations Against Resendiz Pine Straw, LLC*, dated June 18, 2019.

Respondent owes and is ORDERED to pay $136,971.55 in H-2A back wages and $34,006.00 in H-2A civil money penalties as assessed by the Administrator in the June 18, 2019 *Notice of Determination of Wages Owed, Assessing Civil Money Penalties, and Debarment* and its enclosures.

Respondent owes and is ORDERED to pay $5,010.00 in civil money penalties assessed by the Administrator for the violations of the Migrant and Seasonal Agricultural Worker Protection Act.

Respondent is DEBARRED from applying to the U.S. Department of Labor for H-2A certification for a period of three years.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, Virginia

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.