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Issue Date: 31 January 2014

In Matter of:

F 3 S PARTNERSHIP, LLC (ETA Case No: H-300-13336-869969), and	OALJ Case No: 2014 TLC 6
ROBERT J. WUESTE, LLC (ETA Case No: H-300-13338-454800), and	OALJ Case No: 2014 TLC 7
R BAR N RANCH, LLC (ETA Case No: H-300-13331-795696), and	OALJ Case No: 2014 TLC 8
HUNTSMAN RANCH CO. (ETA Case No: H-300-13325-475069), and	OALJ Case No: 2014 TLC 9
GEORGE STOLTZ (STOLTZ LAND AND CATTLE CO), (ETA Case No: H-300-13340-772175), and	OALJ Case No: 2014 TLC 10
SANTANA RANCH (ROBERT DIXON) (ETA Case No: H-300-13331-262707), and	OALJ Case No: 2014 TLC 11
5 L RANCH CORP. (ETA Case No: H-300-13351-400078), and	OALJ Case No: 2014 TLC 14
MCCOY CATTLE, LLC (ETA Case No: H-300-13357-517591), **Employers**	OALJ Case No: 2014 TLC 16

Certifying Officer: Mr. John Rotterman

BEFORE: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER –
REVERSING CERTIFYING OFFICER'S
NOTICES OF DEFICIENCY

The above-captioned cases involve a request for certification of nonimmigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing 20 C.F.R. Part 655.

Background

Between November 21 and December 23, 2013, the Employers filed with the U.S. Department of Labor ("DOL") multiple Employment and Training Administration ("ETA") Forms 790 (Agricultural and Food Processing Clearance form), and ETA Forms 9142A (H-2A Application for Temporary Employment Certification), with attachments, for a "Farm/Irrigation/Livestock Worker." On December 9, December 23, and December 30, 2013, DOL issued Notices of Deficiency ("NOD") for failure to offer the required wage under 20 C.F.R. § 655.120(a). On December 13, 2013, December 27, 2013, and January 2, 2014, through counsel, the Employers requested a *de novo* hearing.

Pursuant to the stated availability of counsel, and under the provisions of 20 C.F.R. §655.171(b), I conducted a telephonic *de novo* hearing on January 10, 2014, with Mr. Wendel V. Hall for the Employers and Mr. Jonathan R. Hammer for the Certifying Officer ("CO"). Post-hearing, Mr. Matthew Brent entered an appearance on behalf of the Certifying Officer and submitted the CO's post-hearing brief. My decision in this case is based on the sworn testimony presented at the hearing and the following documents admitted into evidence: EX 1 to EX 10, and CO 1 to CO 10.[1]

Issue[2]

Whether the CO's determination to issue Notices of Deficiencies for the Employers' H-2A Applications for Temporary Employment Certification with offered hourly wages of $10.00 to $10.19 for general farmworkers in the state of Montana due to a failure to offer the December 2, 2012 prevailing wage of $12.50 for general farmworkers in the state of Montana as set out in the Agricultural Online Wage Library should be affirmed, reversed, or modified.

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[1]The following notations appear in this decision: EX – Employer exhibit; CO – Certifying Officer exhibit; and TR – Transcript. Prior to the hearing, CO 1 to CO 7 were in my possession. On January 14, 2014, I received CO 8 and EX 1 to EX 10. On January 17, 2010, I received CO 9 and CO 10.

[2]At the January 10, 2014 hearing, Employer's counsel withdrew the issue regarding the area of intended employment notice of deficiency in 2014 TLC 16. Employer's counsel also observed that the issue regarding the irrigator prevailing wage notice of deficiency had been resolved with a change in the CO's determination to "no finding" for the irrigator prevailing wage in all eight cases. TR, pp. 10-12. Finally, during the January 10, 2014 hearing, Employers' counsel raised a new issue concerning the issuance of second NODs in three cases (R Bar N Ranch, 2014 TLC 8; Huntsman Ranch, 2014 TLC 9; and Santana Ranch, 2014 TLC 11). At the close of the hearing, Employers' counsel's expressed some uncertainty whether he would continue to pursue the issue. And, in his closing brief, Employers' counsel did not address the second NODs issue. Consequently, in the absence of a stated post-hearing position from Employers' counsel, I will not address the issuance of second NODs, including the second NOD issued in 2014 TLC 9, after the employer had received a Notice of Acceptance.

Parties Positions

Employers[3]

The CO's decision to issue NODs was based on an invalid prevailing wage rate determination for general farmworkers in the state of Montana and should be vacated and reversed. The Employers' certification applications, offering between $10.00 and $10.19, would have been accepted but for the CO's belief that since the prevailing wage was $12.50, the Employers were not offering the highest of the wage rates required under the applicable standard. However, that belief is unsupported by fact. There was an insufficient basis for the prevailing wage rate determination. As a result, the highest of the four regulatory wage rates was the AEWR (Adverse Employment Wage Rate) of $9.99, and the Employers' offered wages exceeded that amount.

For a *de novo* on-the-record hearing conducted under 29 C.F.R. Part 18, and the Administrative Procedures Act, case law establishes that while employers bear the burden of proof and must produce sufficient credible evidence to support a finding in their favor, the burden shifts to the CO to rebut that proof.

The procedures for establishing a prevailing wage for the purposes of the H-2A program have been known since 1981, and been accepted by employers, workers' advocates, and DOL. The established and mandatory methodology set out in DOL's Handbook No. 385 ("Handbook") protects both employers and employees, as well as the public, by obtaining a valid prevailing wage rate in which all parties can have confidence. Under its federal grant agreement, the state of Montana's State Workforce Agency ("SWA") is required to follow and use the data collection methodologies in the Handbook. However, the SWA did not follow the Handbook in terms of appropriate sample size, timing of survey, use of occupation rather than crop activity, duration of the survey, 10% verification, and universe size of only 195 workers in an agricultural state of a million people. When viewed through the prism of generally applicable survey standards, due to these multiple deficiencies, the prevailing wage survey prepared by the Montana SWA is simply unreliable, invalid and should not have been used. As a result, the Employers have satisfied their burden of "advancing a *prima facie* case."

Finally, the CO has failed to provide credible evidence to rebut the Employers' *prima facie* case. No dispute exists that the Montana SWA in preparing the prevailing wage survey departed from the Handbook's methodology for establishing a reliable prevailing wage. These deviations were not insignificant and instead represent serious issues of non-compliance which led to a prevailing wage determination "far less reliable and probative" than intended by the Handbook. And, the CO's ad hoc justifications to find the faulty survey to be still reliable would render the Handbook's prevailing wage determination "standardless." Consequently, the CO's reliance of a prevailing wage determination that materially fails to comply with the Handbook represents insufficient rebuttal.

[3]Opening statement, TR, pp. 17-20, and 22-33, and January 21, 2014 post-hearing brief.

Certifying Officer[4]

The CO's NODs should be affirmed. The issue in this case is simple – is the general farmworkers wage survey produced by the Montana SWA representative of the wages for that position in that state? Although the SWA and DOL may have departed a little from the Handbook guidance and methodology, the survey remains valid because the guidance is not regulatory and consequently departure from non-regulatory guidance is not fatal in terms of the validity of the prevailing wage determination. As a result, the CO's NODs, issued on the basis that the Employers' labor certification applications with offered hourly wages of $10.00 to 10.19 were deficiency since the applicable prevailing hourly wage for general farm workers was $12.50, must be affirmed.

According to the regulations, the purpose of establishing a prevailing wage is to ensure that domestic workers are not harmed by the H-2A Program; in other words, to ensure that domestic workers are not kept from taking jobs they want by artificially low wages due to employers' use of foreign labor. Part of the prevailing wage determination requires a finding of what domestic workers are commonly paid in the field. Regardless of whether the state strictly adhered to the Handbook, the Montana SWA's prevailing wage survey in this case accomplished that purpose. Specifically, the SWA contacted as many employers in the occupation as time and money allowed; "approximately 2/3's of the 360 Employers." They received responses from 43 of those Employers, which provided wage data on almost 200 employees, with a wide range of wages from $20 to $8. "Not surprisingly," the prevailing wage rate of $12.50 the survey produced was somewhere in between, and evidence in the record demonstrates that the survey was representative of the prevailing wage rate for general farmworkers in the state of Montana.

In this case, the Employers have the burden to show that "Mr. Orona's decision regarding the prevailing wage, and thus the Certifying Officer's (CO) ultimately [sic] determination to require payment of the prevailing hour wage, was arbitrary and capricious in light of relevant law and fact." In that regard, the Employers are unable to show that departure from the Handbook during the development of the survey was "so fatally flawed that it must be declared invalid," such that "the CO's decision to rely on that prevailing wage rate survey was arbitrary and capricious." This applicable review standard is a "high bar," and can not be met by "picking out and criticizing minutiae and non-essential departures from the guidance" or by showing that the sampling levels in the Handbook were not met. "It can only be met by showing that the serious belief that the survey was representative of wages in the field was so off base as to be arbitrary and capricious." The evidentiary record developed during the hearing establishes that the prevailing wage survey was "of sufficient validity" considering that the SWA had limited resources, the deviations from the Handbook were harmless, the use of the category of general farmworker was appropriate, and Ms. Harris' estimated the actual employee population to be 500. Consequently, the CO's decision to issue the NODs based on the prevailing wage determination was "reasonable."

[4]Opening statement, TR, pp. 20, 31, and 38-40, and January 21, 2014 post-hearing brief.

Evidence

Sworn Testimony of Dr. Stephen Bronars
(TR, pp. 40-78)

[Direct examination] Dr. Bronars has a PhD in economics from the University of Chicago, with specialization in labor economics. He taught at the University of Texas for 18 years, eventually becoming a tenured professor in, and chairman of, the economics department. Part of his academic training and teaching included a focus on applied statistics. His specialty included familiarity in empirical labor economics, including the use of wage surveys for empirical analysis.[5]

Dr. Bronars recently reviewed the Montana SWA wage rate survey on the ETA Forms 232 and 232A. He also consulted the Handbook and the U.S. Census Bureau Census of Agriculture, and read the depositions of Mr. Orona and Ms. Harris (formerly Ms. Betz).

Dr. Bronars learned that general farmworkers in Montana engage various activities, including work with cattle and irrigation. In his opinion, the occupation title of general farmworker was generic enough to also include crop activities such as harvesting and bailing hay.

After reviewing the survey, Dr. Bronars concluded that he did not have enough information to be assured that the sample was representative of the population of workers in the general farm worker category in the State of Montana. In particular, there was an inadequate sample size and a lack of evidence demonstrating that the sample was representative. Consequently, he does not believe the prevailing wage determination "would be a reliable indicator of the prevailing wage in the State of Montana for . . . general farmworker jobs."

The Handbook is a DOL publication that sets out the prevailing wage finding process and the procedures for the associates wage rate surveys. The Montana SWA did not follow those procedures. Specifically, the sample of size of employees that were surveyed was "inadequate" according to the Handbook unless the 195 workers provided by 43 employers represented "100% of the workers in this category in the state." In particular, "the number of workers that need to be included in the sample depends on the population number of workers in the crop activity in the state."

The failure to comply with this procedure made the finding "unreliable" because "anytime a sample is smaller, it's going to be less precise." The Handbook emphasizes the need to make sure the sample is representative of geographic areas in crop activities. Neither Mr. Orona nor Ms. Harris expressed any attempt to make the sample representative. Instead, the only thing they discussed was making sure that not all of the responses were from the same geographic area.

[5] I accepted Dr. Bronars as an expert witness in labor economics.

Under the Handbook, if you have 3,000 or more employees, you could rely on sample of only 15% of the employees. However, Dr. Bronars found no information in the case that indicated the size of the population of general farmworkers. "There was nothing in the guidelines about what fraction of employers should be surveyed . . . so all I know is that they were able to get information from 43 of the 360 employers that they say were in the universe and that's 195 employees short of what's set out in Handbook 385." And, those 43 employers on average had five to six workers. Additionally, when Dr. Bronars reviewed the most recent census date from 2007, "there were 393 employers in agricultural with 10 or more employees; and 816 employers that had 5 to 9; and there were over 20,000 hired farmworkers." While Dr. Bronars recognized that the census farmworkers could be in different occupations than the general farmworker in the wage survey, he nevertheless believes the sample size of 195 employees is too small to be reliable.

Dr. Bronars also opined that the timing of the survey in February and March of 2013 may have affected the reliability of the SWA wage survey. In comparison, the USDA survey of farm workers that is used to set the AEWR is conducted four times a year and the January and April assessment have about half as many employees, working half as many hours, than in July. "So, clearly in Montana, this is at best an unusual time to be surveying farm workers." Additionally, the Handbook states the survey should be conducted during "peak time." Further, Ms. Harris was unable to verify that the reported number of workers were actually employed at the time of survey, which is required by the Handbook. This is an issue because the employers have two types of workers, seasonal and year round, which means the composition of the workforce is "pretty different" between the early spring and summer; and there may be higher paid workers in the early spring. So, the sampled workers may not be representative of the workers who would be employed in the summer. At the same time, Dr. Bronars stated, "I don't know without studying the problem further."

Contrary to the Handbook requirement of conducting the survey in three days, the SWA wage survey was conducted from February 11 to March 4, 2013. That may also be a secondary issue.

Next, the SWA survey did not conduct personal interviews of 10% of the workers as required by the Handbook. This requirement "appears to be a safeguard" because an employer may be providing approximate wages whereas taking to individual employees can confirm whether the employer's reported wage is an approximate or an actual wage.

The Handbook may distinguish between crop activities for wage surveys because wages may differ based on the different activities associated with each crop. Thus, failure to conduct a wage survey based on crop activity would "muddle" the wage information by grouping disparate workers together. At the same time, Dr. Bronars indicated, "I don't know if that would be an adequate way to treat it or not. It's clear to me from reading the Handbook that that is the intention of Handbook 385 is to say, we need to do this by crop activity." On the SWA's wage worksheet, the number of workers are listed for each wage rate, "so it was hard to tell from that form whether there were different wages for the different crop activities or the same workers engaged at different times of year and the different activities or maybe even during the survey period they were doing different things on the same day." And, any time you include workers

from different occupations who aren't really general farm workers, the prevailing wage rate is biased, with higher wage occupations inflating the wage rate.

Finally, Dr. Bronars noted the determined wage rate of $12.50 represented a 25% increase in one year. Specifically, in 2012, the prevailing wage rate was $10.00 and the AEWR was $9.99. A year later, while the prevailing wage rate was $12.50, the AEWR went up to $10.69, which raises questions whether the 2012 prevailing wage is actually representative. At the same time, "I don't think you can look at the outcome alone and say that makes it a bad survey."

In terms of general survey methodology, a very small percentage of employees were surveyed in the Montana SWA wage survey in comparison to the number of workers who could have been surveyed. And, the survey lacks assurances that the sample is actually a representative subset of the overall general farmworker population. These two characteristics of this survey, sample size and representativeness, are "red flags" since they need to be sound if you're going to rely on a survey. For example, the bigger the sample, the more reliable the survey will be. For this prevailing wage survey, given the size of the population and considering the high non-response rate, Dr. Bronars has a low degree of confidence in the sample. He would not rely on that survey to make a business decision if he had an alternative.

The Handbook permits a result of "no finding" which provides an alternative to an unreliable finding.

[Cross examination] Assuming the total survey universe is 349 employees, a representative sample size could be something less than 100%, even though the Handbook indicates that for a population of between 100 and 349 employees requires 100%. That number doesn't have to be hit exactly. In that situation, the Handbook is being "overly maybe cautious to have a more reliable outcome than I think you would find in a statistics book that was talking about this." Since 100% requires the entire population to be in the sample, it's a "high bar." Dr. Bronars normally doesn't see a 100% sample size requirement because eventually you reach a point of diminishing returns. So, a 100% sample size is not necessary in order for a survey to be valid or representative?

Dr. Bronars agreed that in order to determine whether a sample size is representative a person needs to know the universe of what you're sampling. And, since he didn't know the universe in the Montana SWA prevailing wage survey, he couldn't determine whether the sample was representative or not.

The Census of Agriculture does not break farmworkers down by occupation. Based on that information, he still doesn't know the employee universe in this prevailing wage survey.

Dr. Bronars observed that the survey universe was actually obtained from just 43 of the 360 employers and the survey provided no information about how many farmworkers the remaining 317 employers have had employed.

[Redirect examination] The ETA Handbook sets standards, which may be more rigorous than a person may see in other places. And, the ETA determined that for an occupation population of 0 to 350, 100% had to sampled.

[Recross examination] The Handbook sets out sample sizes and the wage setting process. In regards to adherence, the Handbook says, "The following general guide should be observed. And, then it lists the sample sizes. That sounds like mandatory language."

Sworn Testimony of Mr. Benito ("Ben") Orona
(TR, pp. 80-123 and 151-180)

[Direct examination] Mr. Orona is an H-2A analyst in OFLC (Office of Foreign Labor Certification) in the DOL National Office. In that capacity for the past 13 years, he reviews the results of prevailing wage surveys. EX 2 is the final ETA Form 232 for the prevailing wage for general farmworkers in the state of Montana, dated June 24, 2013.

The H-2A program requires the Secretary, DOL, to make certification regarding the employment of foreign, non-immigrant workers in the United States. Part of the certification is a representation that such employment will not have an adverse effect on U.S. workers. And, one of the means to enable that representation is to require an employer to offer a particular wage rate to the foreign, non-immigrant workers. By regulations, the offered wage must be the highest of the AEWR, prevailing wage, agreed-upon collective bargaining wage, or the minimum Federal/State wage.

An SWA is an agency designated to work with the DOL on foreign labor certification. The SWA is funded by a federal grant and conducts prevailing wage surveys. DOL requires the SWAs to follow the Handbook because it is essential that the prevailing wage be determined accurately. If the determined prevailing wage is too low there might be an adverse effect on domestic workers. And, if the prevailing wage is too high than employers are required to pay more than necessary to eliminate the adverse effect on similarly employed U.S. workers.

Once an SWA completes the prevailing wage survey, it is transmitted to Mr. Orona, who then reviews and validates the survey. His job is to make sure the form is completed correctly. After review and validation, Mr. Orona prepares a recommendation memorandum for the National CO who either approves or disapproves his recommendation. Upon approval, the prevailing wage then is sent to the Chicago National Processing Center for use in evaluating temporary labor certifications. The prevailing wage is also posted on-line in the Agricultural Online Wage Library ("AOWL").

In his validation process, Mr. Orona ensures the prevailing wage survey complies with the Handbook. If there is a non-compliance issue, he reaches out to the SWA about the issue before anything is elevated to the National CO. "If it is brought to our attention that a discrepancy existed on the form after it was validated and approved by the Certified Officer, National Certified Officer, then we would definitely, you know, raise the issue, you know, to -- I would raise the issue immediately to my supervisor who, in turn, would elevate that to upper management." If based on a "collective decision," the non-compliance issue was significant,

"the actions would follow accordingly," and may include withdrawing the prevailing wage finding. For example, DOL has already withdrawn the prevailing wage determination for irrigators in Montana based on a non-compliance issue. Specifically, although Mr. Orona had previously reviewed the Montana SWA prevailing wage survey for irrigators, which established a prevailing wage of $15.00 per hour, and found it "fully compliant," in response to the present litigation challenge, the survey was again reviewed and a determination was made that there was an issue with the employee universe on the survey form. "Because [there] was such a small number of workers both in the universe and in the sample, it was decided that it was too small of a survey response for us to move forward with . . . and we decided to revise that from a $15 per hour wage finding to a 'no finding.'" As a result, the labor certification "applications would be then be processed without the $15.00 wage rate requirement and, in essence, it would default to the adverse effect wage rate."

The Handbook specifies how the wage data is to be collected and evaluated.

EX 2, the Montana SWA prevailing wage survey form, has several sections. The first numbered section is titled, "Number of Domestic Hired Workers in Sample Size Range," which is further broken down into "total, in-state, and interstate." According to the Handbook, for a prevailing wage finding to be made for the in-state column and "it must surpass 25% of the total number of workers in the survey; that the 25% also applies to the interstate column." The "17" for interstate workers is no more than 25% of 195. At the same time, "the 25% rule is no longer applicable on the new forms that OMB (Office of Management and Budget) recently approved back in November." However, Mr. Orona acknowledged this prevailing wage determination preceded the elimination of the 25 % rule, so the rule still applied. He also agreed that if the number of workers either category, in-state and interstate, was less than 25%, a prevailing wage determination cannot be made. So, there should not have been a $12.00 per hour prevailing wage determination for interstate workers. Mr. Orona explained, "Item No. 2, the "All Worker" category was established as $12.50. And that's what we went out as the prevailing wage rate. In this instance, both the "In-State" and the "Total" columns came in at exactly the same prevailing wage rate, at $12.50 per hour. Even though the survey noted $12.00 for the interstate, we didn't take that into account."

Mr. Orona is aware that the June 24, 2013 Montana SWA prevailing wage survey form, EX 2, was subsequently changed to show "no finding" for the interstate workers.[6] The forms "are identical except for 1(c) wherein the document that we had before us just momentarily it has $12.00 per hour. The new document that I have before me now shows a no finding." Mr. Orona doesn't know who changed the document. However, EX 2 was the document upon which the prevailing wage determination was made, and the change to interstate workers does not change the $12.50 determination.

The first step in the process to generate a wage survey involves a state submitting a grant proposal to DOL to specify what resources it needs to conduct prevailing wage surveys. The state is expected to negotiate for the amount it needs.

[6] *See* EX 8.

The Handbook term "crop activity" means either a crop or an activity associated with a crop. The Handbook also requires the state to ensure that its survey samples are representative. A wage reporting area is an area where the state believes that there are different wage patterns, and the state determines whether to conduct the survey by wage reporting areas or a statewide survey. For wage reporting areas, a state petitions DOL to subdivide the state into a new wage reporting area or delete a certain wage reporting area. The particular survey area in Montana for general farmworker is statewide. The Handbook specifies sample sizes. However, they are not mandatory. Instead, the sample size is a "general guide that should be observed" because it's important to get accurate results.

In the Montana SWA wage survey for general farmworkers, the form indicates that 100% of the overall population in the general farmworker occupation was sampled. "The state of Montana indicated in their 232 form in Section 2(c) that the estimated domestic hired workers was 195." Mr. Orona did not verify that number because "I take the information provided by the State at face value." Mr. Orona acknowledged, that his determination based on the state's representation is only as valid as the state's representation. In this case, Mr. Orona "took what was provided to me on its face and . . . determined that it did comport with the requirements of the ETA 385."

The comment on EX 5, which was the first Form 232 submitted by the state in March 2013, under number six only tells Mr. Orona that workers doing fertilizing were getting paid more in 2013. During his initial review of the survey, he "found it to be deficient and I identified some of the concerns that I had with it." In particular, the wage rate was $12.46 per hour but in reviewing the attachment, he did not see any wage listed as $12.46. So, he asked Ms. Harris for clarification by e-mail (EX 6). They also had conversations over the telephone.

In August 2011, DOL conducted training for SWAs. EX 9 is the PowerPoint presentation for that training on determining prevailing wages.

The Handbook has been in place for 32 years and represents "the only methodology, if you will, for conducting the wage surveys. So since it's been out there since 1981, that is the only document that state holders and interested parties have seen." The Handbook as withstood the test of time and remains the authority for conducting prevailing wage surveys. It is accepted as the benchmark normal by all parties involved in agriculture, including employers and employees.

To the "best of my knowledge," Mr. Orona believes the state of Montana complied with the Handbook. At the same time, without approval, rather than the three days stated in the Handbook, this survey took three weeks. However, that discrepancy does not affect the validity of the survey because "we'd rather have the states conduct a thorough survey than to rush their process to obtain the wage data and submit their data in the period outlined in the timeframe, outlined in the 385 Handbook." Mr. Orona acknowledged the Handbook does not contain any language about taking as long as necessary to obtain a valid survey.

The state also did not conduct personal interviews, but that requirement is "obsolete." The survey was done telephonically. Recently, in November 2013, OMB approved updated changes to the forms, which essentially represent a revision to the Handbook. And, during training, DOL advises that "certain items in the Handbook have been supplanted by more modern methods."

Mr. Orona only finds deficiencies based on the Handbook's recommendations when the "deficiency impacts the data obtained through the survey."

Mr. Orona acknowledged that the state of Montana did not interview an average of 10% of the workers involved, which represents non-compliance with the Handbook.

In regards to the peak season requirement, the state was surveying an occupation rather than a crop. Mr. Orona further testified, that "the peak season is usually done when there are piece rates associated with a prevailing wage. The State of Montana surveyed the general farm worker, which is an occupation and it's paid on an hourly basis. There is no peak season where that wage rate would go up and down." At the same time, the Handbook "speaks to" a survey of crop activity.

Mr. Orona does not have a background in mathematics and statistics. He does not have an academic background in survey methodology or labor economics.

Mr. Orona has "no reason to believe" the inclusion of fertilizer workers in this occupational survey impacted the $12.50 per hour wage rate because in Montana the duties of a general farmworker include fertilizing, dealing with crops, and handling livestock.

Upon his initial review of the Form 232, Mr. Orona had "no probable cause to dispute the data" that was submitted. In particular, the "survey as submitted to me on its face led me to believe, showed me by the numbers themselves, that Montana had complied by surveying 100% of the worker universe."

If the workers universe was 500, an issue would be raised since that number affects the correct sample size that need to be obtained. The transmitted data showed that "the state was fully compliant with their sample size." Everything looked valid on the face of the survey so "I did not ask for further clarification." At the time the survey was submitted, Mr. Orona did not ask whether the worker universe was 195 or 500.

[Cross examination] If the population size was 500 and not 195, the survey would not explicitly meet the general sample guide in the Handbook. For a population of 500, the threshold sample size would be 250 workers. However, the Handbook sample size is not a fixed number. The Handbook indicates that the 'following guide should be observed.'"

In that situation, Mr. Orona considered that "the survey had 17 different wages being paid to 195 workers . . . We had 43 employers providing us with wage information. Those factors would be taken into consideration in determining whether if the survey lacked the appropriate

sample size; whether it would still be considered a valid survey for making a prevailing wage determination."

In Mr. Orona's experience, occupations have been a part of the prevailing wage process since "long before I arrived at the Department of Labor." There has never been a time since he arrived that general farmworker was not a survey category.

[ALJ examination] The June 2013 wage survey showed a worker population of 195; "we have on the form that the estimate of total domestic hired workers was 195." If that population was 500, the survey sample size did not reach 50% sample size called for by the Handbook. In that event "we go back to the state and ascertain as to the fact that if the 500 worker universe they claim would be true." At the same time, Mr. Orona's recommendation would be there was "enough information there to be able to come up with a prevailing wage, even though it didn't meet the 250. There were what -- we were lacking 55 workers to have met the sample size." The sample size is a general guide, and this survey would still "provide adequate information for us to determine whether a prevailing wage could be derived from that."

According to Mr. Orona, the actual calculation of the prevailing hourly rate of $12.50 occurred as follows:

> We had 17 different wages paid to 195 workers. We take the total number of workers, 195. The first principle is that we apply the 40% rule. Forty percent of 195, if my memory serves me correctly, would be like 78 workers. Then we would look at the specific array. Do we have 78 or more workers earning a specific wage? And I reviewed that. We did not have 78 or more workers earning a specific rate. Therefore, the 40% rule does not apply. We now default to the 51% rule, which means that you take the 195 and you look at the wages being paid in descending order, with the $20.00 being at the very top. We begin at the lowest array, which was $8.00 being paid to a group of workers. We count up until we get to 51% of 195. That is the threshold. In the instant case, the prevailing wage was based on 100 workers being paid $12.50.

The premise in that calculation is that 195 is a valid figure because the sampling size is good. That's why a sample size is required.

If the population size had been 1,000 when the survey only showed 195 workers, Mr. Orona would "definitely" change his mind about the validity of the Montana SWA prevailing wage survey.

However, Mr. Orona is unable to identify at what level of population between 500 and 1000 when the sampling error would make a difference regarding the validity of the wage survey.

The figure Mr. Orona used was 195 to apply the 40% and 50% rules when he evaluated the wage survey.

Sworn Testimony of Ms. Jennifer A. Harris (formerly Ms. Jennifer A. Betz)[7]
(TR, pp. 125-148)

[Direct examination] Ms. Harris works in the Montana Department of Labor, which is the SWA for Montana for the purpose of conducting prevailing wage surveys for DOL foreign labor certification. As part of her duties, Ms. Harris conducted the prevailing wage survey in 2013 related to the occupation of general farm workers. She started the survey in February 2013 pursuant to a cost reimbursable federal grant. One of the requirements of the grant is that the state of Montana comply with the Handbook in conducting the prevailing wage survey.

The survey she conducted did not involve a substantial number of personal employer interviews. Instead, she used telephone interviews. The survey was conducted over the course of three weeks from February 11 to March 4, 2013. In regards to peak season, some employers were calving about that time. The state didn't survey 10% of the workers in the associated universe; no worker was interviewed. The state did not survey 100% of the employers who employed general farm workers. Instead, the state obtained responses concerning a subset of the employed people in the occupation of general farm workers. Although some of the employers did not have any current employers and were entered as non-response, the state did not speak with all the employers and the state did not ensure that employers who were not contacted didn't differ in some systematic way from the employers who were contacted.

Ms. Harris did not complete the first survey correctly. So, she worked with Mr. Orona "to organize the data in the way it should be on the form. And then I resubmitted it to him" on June 24, 2013.

The state did not comply with all the requirements of the Handbook in performing its prevailing wage survey.

[Cross examination] Ms. Harris didn't do personal interview because the size of the state precludes such travel, and they have limited funds. In the prior year, the survey was done by mail. However, due to a low response rate, Ms. Harris used a phone survey to get a higher response rate from the employers. Her efforts were successful. She attempted to contact 220 employers. Some employers responded, others did not.

Ms. Harris conducted the survey over the course of three weeks "in order to get more data to base the wage rate on. To do it in three days to one week, the response rate that we would have gotten would have been very low and would not have been very reliable information."

The handwriting on EX 8 is Ms. Harris' handwriting and it was probably done in June 2013.

[7]During Ms. Harris' testimony, Mr. Mark Cadwallader, state special assistant attorney general with the Montana Department of Labor and Industry, was present at her side.

When Ms. Harris put 195 in Section 2(c) of the Form 232, she thought "I was supposed to fill in the total number of domestic hired workers that we got a response from" and "that is what I did." Since then, she has learned that Section 2(c) is suppose to be "the total domestic hired workers in Montana for general farm workers." When asked what that number should have been in her deposition, Ms. Harris didn't know. However, upon further thought, and based "my first hand experience" with employers and employees for the past three years, unemployment insurance numbers, and Department of Revenue numbers for reported wages, she estimates that number should be "roughly 500." Ms. Harris doesn't know what the Handbook recommends for obtaining that number.

Ms. Harris believes the June 2013 wage survey is valid and representative of the wage paid to domestic hired general farm workers in Montana.

[Redirect examination] Ms. Harris did not know the percentage of employers who employed people in the occupation of general farmworkers was covered by the survey, but she believes "it was less than 40%." She does not know the percentage of workers that were covered by the survey

ET Handbook Number 385 ("Handbook") Extracts[8]
(EX 1)

The Handbook, published by ETA in August 1981, is sub-captioned "Employment Service Forms, Preparation Handbook."

According to the Handbook, "[a]ccurate farm wage data are essential to the effective operation of the Public Employment Service in serving farm employers and farm workers and in implementing the Secretary's regulations on the intra/interstate recruitment of farm workers." The wage data is collected through surveys of wages paid to workers within a specified wage reporting area working in the same crop activity, and used to develop a prevailing wage rate for the specific crop activity in the agricultural reporting area.[9] This prevailing wage rate finding is "made after adequate wage data have been collected and the prevailing wage has been determined."

In planning the survey, the state agency should review seasonal crops "well in advance of the anticipated farm labor needs." Usually, when foreign workers were employed in the previous season and employers are expected to request foreign workers in the current season, a wage rate survey should be conducted at least once per season. "Surveys should normally be complete within 3 days unless there is prior regional office approval, the survey period should not exceed 1 week."

[8]Handbook, pp. I – X, 97, 99 – 124, 172, 173, 175 – 179, 181 – 183, 185 – 187, 189 – 191, 193, 195 – 203, 205, 207, 209, and 211 – 213.

[9]The geographic division within a State that is reasonably integrated in terms of farm characteristics and has a significant demand for seasonal hired farm workers.

Before conducting a wage rate survey, "the State agency should assure itself that the planned sample will yield data which will be representative of the wages paid in the crop activity." In constructing a wage rate survey sample size, "the following guide should be observed." Specifically, for 100 to 349 workers in the crop activity in the area, the sample size should be 100% of the workers; for 350 to 499 workers, the sample size should be 60% of the workers; for 500 to 799 workers, the sample size should be 50% of the workers; for 800 to 999 workers, the sample size should be 40% of the workers; and, for 1,000 to 1,299 workers, the sample size should be 35% of the workers.[10]

The wage survey must "include a substantial number of personal employer interviews." These interviews may be supplemented "to a limited extent" by telephone or mail contacts. "Under certain conditions, employer contacts by mail or by telephone may be made, in lieu of personal field contacts, but the State agency must assure itself that the information . . . is representative of the rates being paid in the crop activity." Additionally, to verify the supplied employer wage data, "10 percent of the workers included in the sample for each wage survey must be interviewed." These workers "should be drawn from as many as possible" of the interviewed employers.

Upon completing the survey, the State agency will make a prevailing wage rate finding based on the collected wage information by applying two methods in order. First, under the "40 percent rule," if a single wage rate is paid to 40% or more of the workers in the crop activity, then that rate is the prevailing wage rate. Second, if no singe wage rate accounts for 40% or more of workers, the workers and their associated rates are arrayed in descending order. Then, starting with the lowest rate, the workers are cumulatively counted until 51% of the workers in the survey are covered. The rate at that point in the count becomes the prevailing wage rate.

Under 20 C.F.R. Part 655, this prevailing wage rate is used in part in determining the wage rate an employer must offer to and pay to domestic and alien workers under the Immigration and Nationality Act.

Finally, if a survey does not result in a prevailing wage finding, "another survey should be made at the earliest appropriate time." At the same time, "a report must be submitted for each survey whether or not it results in a finding."

In-Season Wage Report, ETA Form 232
(EX 2)

On June 24, 2013, Ms. Harris completed an ETA Form 232 for a wage survey of the state-wide reporting area for general farm workers. The survey was conducted from February 11 to March 4, 2013, with a March 8, 2013 date of finding.

[10]The general guide continues in increments up to 3000 or more workers, in which the sample size is 15% of the workers.

Under Section 2, captioned "Estimated Numbers of Employers and Employees in Crop Activity," Subsection 2a indicated the estimated total number of employers in the crop activity was "360." In Subsection 2c, the estimated total of domestic hired workers was "195,"[11] consisting of "178"[12] local and intrastate workers and "17" interstate workers. Forty-three employers were "contacted," which represented 12% of the estimated 360 employers with general farm workers in the state. Based on the following survey data, Ms. Harris determined the prevailing hourly wage rate for all general farmworkers in Montana was $12.50, with $12.50 for intrastate workers, under the 51% rule, and "$12.00 per hour for interstate," under the "41%" rule. The prevailing wage the previous season was $10.00.

Wage Rate	**All U.S. Workers**	**Instate U.S. Workers**	**Interstate U.S. Workers**
Total	195 (194)	178 (177)	17
$20.00	2	2	
$16.00	11	11	
$15.62	1	1	
$15.50	3	3	
$15.00	16	15	1
$14.58	1	1	
$14.50	8	8	
$14.00	7	7	
$13.75	5	5	
$13.00	13	13	
$12.50	33 / 51% rule	30 / 51% rule	3
$12.00	37	24	13 /41% rule
$11.50	2	2	
$11.00	12	12	
$10.00	38	38	
$9.50	1	1	
$8.00	4	4	

[11]The actual number is 194 based on the wage calculations and associated ETA Forms 232A.

[12]The actual number is 177.

Interview Records – ETA Form 232A
(EX 3)

As set out on separate interview forms, 43 employers responded with wages information regarding 204 domestic general farmworkers. Several of the employers specified varying rates of pay based on job activity, including 10 supervisors earning between $16.00 and $27.50 per hour, and 41 individuals engaged in fertilizing operations with hourly wages ranging from $10.00 to $20.00.

In-Season Wage Report, ETA Form 232
(EX 4)

On June 24, 2013, Ms. Harris completed an ETA Form 232 for a wage survey of the state-wide reporting area for irrigators. The survey was conducted from February 11 to March 4, 2013.

The estimated number of employers in the crop activity (general farm worker) was 150, with 92 employers using contract foreign workers. The estimated number of domestic hired workers in the state was 15, representing 15 local and intra state workers. There were no interstate workers. Eight employers were interviewed, which represented 5% of the estimated number of employers with irrigators. Based on the following survey data, Ms. Harris determined the prevailing hourly wage rate for all irrigators was $15.00 under the 41% rule. No prior survey had been conducted.

Wage Rate	**All Workers** (15)	**Instate Workers** (15)	**Interstate Workers** (0)
$15.00	7 /41% rule	7 / 41% rule	
$12.00	2	2	
$10.93	1	1	
$10.00	4	4	
$5.25	1	1	

In-Season Wage Report, ETA Form 232
(EX 5)

On March 8, 2013, Ms. Harris completed an ETA Form 232 for a wage survey of the state-wide reporting area for general farmworkers. The survey was conducted from February 11 to March 4, 2013.

The estimated number of employers in the crop activity (general farm worker) was "42."[13] The estimated number of domestic hired workers in the state was 201,[14] consisting of 184 intrastate workers and 17 interstate workers. Based on an attached schedule, which included wages for 191 workers, varying between $8.00 and $20.00, and 10 supervisors, who earned

[13]The actual number was 43. *See* EX 2 and EX 3.
[14]The actual number based on the associated ETA Forms 232 A was 204 workers, including 10 supervisors

between $16.00 and $27.50 an hour, Ms. Harris determined the prevailing wage for all general farmworkers was $12.46 per hour. The prevailing wage rate the previous season was $10.00. However, Ms. Harris explained, "We had a lot more fertilizer this year and they got paid more."

E-Mail Exchange
(EX 6)

On May 20, 2013, Mr. Ben Orona asked Ms. Harris several questions regarding the wage surveys for Montana. Concerning the general farmworker wage survey, Mr. Orona asked for the survey questionnaire that was used, and indicated that a separate survey would be needed for supervisors. He additionally asked how she arrived at the $12.46 hourly wage rate.

On May 22, 2013, in regards to the general farmworker wage survey inquiry, Ms. Harris provided a supervisor wage survey report and addressed the questionnaire issue. Concerning the wage rate calculation, Ms. Harris indicated that she added the 30 wage rate responses and divided by 30.

OMB Revision Approval Request
(EX 7)

In 2013, when seeking approval from OMB for revisions to the In-Season Wage Report and Wage Survey Interview Record, in an effort to streamline the wage survey process, DOL proposed moving instructions for completing the forms and calculating the prevailing wage from the Handbook to the two forms, ETA Form 232 and ETA Form 232A. In the background discussion concerning various revisions, DOL observed that in the number of workers in either the intrastate or interstate categories is less than 25%, then a wage rate determination "cannot be made." DOL proposed to eliminate the worker interview requirement "because most states no longer conduct field surveys due to reduced funding." Instead, the interviews were conducted by mail, fax, or phone.

The two forms represent DOL's "uniform administrative procedure for collecting information that will permit it to determine and publish prevailing wages rates for agricultural employment to the used in administration of the H-2A program." The State agency obtains information concerning domestic employees, including the number of employees and the wages paid. The State agency then evaluates, summarizes, and arrays the information onto the ETA Form 232 and finally computes the prevailing hourly wage. The prevailing wage and analysis is then transmitted to DOL's OFLC "for approval."

In regards to the annual requirement for wage survey, DOL also observed that "the use of wage data from earlier surveys would result in inaccurate determinations, wage distortions, and potential legal issues form the farmworker advocacy groups and the employer community."

In-Season Wage Report, ETA Form 232
(EX 8)

On January 9, 2014, counsel for the certifying office provided the Employers' counsel a copy of an ETA Form 232 that was provided to him by OFLC, which appeared identical to EX 2 that he been furnished by the State agency with one exception. Instead, of "$12.00" in Section 1c for interstate workers, this version contained the following, "No Finding."[15]

PowerPoint Presentation Slides
(EX 9)

According to the PowerPoint slides, titled "H-2A Program: Prevailing Wage and Prevailing Practice Training," dated August 2011, one of the purposes of the TLC process is to ensure the employment of non-immigrant foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. In turn, 20 C.F.R. § 655.122(l) requires an employer to offer, advertise, and pay a wage that is the highest of the AEWR, prevailing hourly wage, agreed-upon collective bargaining wage, or the Federal or State minimum wage.

The regulations do not establish how the prevailing wage is to be determined. Instead, those procedures are governed by ETA policy documents, as well as practices that have been developed and adopted by Federal, state, or local officials over time. The primary source document is the Handbook, "which was issued in 1981."

Approximately 400 annual wage surveys are conducted yearly by SWAs and the ETA National Office makes final determinations base on these surveys. Under 20 C.F.R. § 655.120, "in the event that a prevailing wage findings results in a higher wage rate than was previously certified, the employer is obligated to offer and pay the higher wage rate upon notification by the OFLC." DOL "will examine the results of the SWA wage surveys conducted throughout the year to determine if the hourly wage rate . . . is the highest" of the five possible wage rates under the regulation.

The presentation ends with a DOL web link on how to determine the prevailing wage rate.

PowerPoint Presentation Slides
(EX 10)

According to the PowerPoint slides, titled "Foreign Labor Certification Training for SWAs," dated November 28-29, 2006, the SWA plans and conducts prevailing wage surveys; the ETA NPC (National Processing Center) approves survey plans and monitors progress; and, the ETA National Office makes final determinations. The prevailing wage determination procedures in the Handbook have "withstood the test of time," and the Handbook "remains the

[15]Ms. Harris indicated it was her handwriting. As later explained by Mr. Orona, under the Handbook instructions (see EX 7), the 17 interstate workers represented less than 25% of the sample and thus precludes a wage rate determination.

authority for conducting prevailing wage surveys." The Handbook is "accepted as the benchmark/norm by all parties in the agricultural industry, including growers and workers."

In creating an estimated survey universe, state labor market information, state agricultural representatives, state unemployment data base, the state department of agricultural, and job orders both open and closed should be considered.

The wage survey should be conducted during peak season or at the request of the NPC or National Office.

Wage survey information may be obtained by person, mail, telephone or e-mail.

In calculating the prevailing wage rate, the 25%, 40%, and 51% rules should be followed.

In one prevailing wage rate survey, the total number of domestic hired workers is 364. The sample size developed from 44% of total number employers in the crop activity is 201.[16] In another example, the total number of domestic hired workers is 3,900. Based on information from 7% of all employers in the crop activity, a sample size of 171 was developed.[17] Finally, in a third wage survey the total number of employees is 134. Based on information from 45% of the employers in the crop activity, the sample size is the same number, 134 workers.[18]

F 3 S Partnership
(CO 1)

On December 2, 2013, through its agent, the Employer filed with the DOL an ETA Form 790 (Agricultural and Food Processing Clearance form), and ETA Form 9142A (H-2A Application for Temporary Employment Certification), with attachments, for a "Farm/Irrigation/Livestock Worker" with seasonal employment from February 1 to December 1, 2014, 48 hours a week. In one attachment, the Employer set out the anticipated duties for a general farm worker, which included a variety of work related to the production of cattle, wheat, barley, alfalfa, and hay.[19] In the same attachment, the Employer guaranteed to pay the highest of

[16]Nearly consistent with the Handbook's guidance for 350 to 499 workers of a sample size of 60%. In this case, 60% of 364 is 216. Neither the slide presentation nor the evidence in the record indicates whether this wage survey was approved or disapproved.

[17]Inconsistent with the Handbook's guidance for 3,000 workers or more of a sample size of 15%. In this case, 15% of 3,900 is 585. Neither the slide presentation nor the evidence in the record indicates whether this wage survey was approved or disapproved.

[18]Consistent with the Handbook's guidance for 100 to 349 workers of a sample size of 100%. However, since the only 45% of the employers were contacted, the total number of workers in the crop activity of 134 appears to be understated. Neither the slide presentation nor the evidence in the record indicates whether this wage survey was approved or disapproved.

[19]Specifically, the various tasks included operating, maintaining, and repairing farm vehicles and equipment; removing undergrowth and rock; engaging in general clean-up; painting and repairing farm structures; repairing and replacing fencing; operating and maintaining irrigation systems; and, feeding and caring for livestock.

the AEWR, prevailing hourly wage, agreed upon collective bargaining agreement wage, or Federal/State minimum wage for new employees. The Employer also indicated that or workers with two to 18 years of continuous seasonal years, the offered hourly wage rate would be $10.19.

Initially, during the processing of the application, on December 2, 2013, a DOL analyst (Ms. B. R.) filled out a worksheet to evaluate the application wage rate of "$10.00."[20] On the form, the prevailing wage rate from the Agricultural Online Wage Library was listed as $10.00 The minimum wages were $7.25 (Federal) and $7.50 (State). The AEWR was $9.99.[21] And, there was no collective bargaining agreement. As a result, the appropriate offered wage rate was "$10.00."

However, on December 6, 2013, the same DOL analyst annotated, "Decision changed to NOD per TL (team leader)" based on "new PW (prevailing wage) in Montana." The attached extract for Foreign Labor Certification, AOWL, contained the following three entries: a) "Farmworkers, General - $10.00 Per Hour - 06/26/2012," b) "General Farm Worker - $12.50 Per Hour - 12/02/2013," and c) "Irrigators - $15.00 - 12/02/2013."

On December 9, 2013, the DOL analyst sent by e-mail a NOD indicating that the application for temporary employment certification and/or job order failed to meet the criteria for acceptance in regards to the required wage under 20 C.F.R. § 655.120(a). The specific deficiency was the offered wage of $10.19 for the job opportunity which included duties for general farm work, irrigation, and livestock when "the prevailing wage surveys in Montana for General Farm Worker and Irrigators are $12.50 and $15.00 per hour, respectively." As a result, in order to comply with 20 C.F.R. § 655.120(a), the Employer had to offer, advertise in recruitment, and pay workers between $12.50 and $15.00 per hour, depending on the specific job duties.[22] The notice further indicated that a modification could be submitted within five business days. The Employer was also notified of its right to request a *de novo* hearing within five business days.

On December 13, 2013, through counsel, the Employer requested a *de novo* hearing.

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[20]The application wage rate was actually $10.19.

[21]78 Fed. Reg. 1259 (January 8, 2013).

[22]As previously noted, the portion of the notice of deficiency regarding the irrigator prevailing wage has been resolved in all eight cases.

Robert J. Wueste
(CO 2)[23]

On December 4, 2013, DOL received the Employer's ETA Forms 790 and 9142A, with attachments for a "Farm/Irrigation/Livestock Worker" with seasonal employment from February 1 to November 30, 2014, 48 hours a week, at an offered hourly wage of $10.19.

On December 5, 2013, a DOL analyst (Mr. S. F.) filled out a worksheet to evaluate the application wage rate of $10.19. The prevailing wage rates from the Agricultural Online Wage Library were listed as $12.50 - farm worker and $15.00 - irrigator. The Federal minimum wage was $7.25. The AEWR was $9.99. And, there was no collective bargaining agreement. Consequently, the highest of these wages were the prevailing wage rates of $12.50 and $15.00.

On December 5, 2013, the DOL analyst annotated, "NOD1 - Employer offering wage below recent surveys for farmworkers ($12.50) and irrigators ($15.00)." The analyst discussed the situation with the CO and was instructed to issue the NOD to give the Employer's agent an opportunity to specify a wage range of $12.50 to $15.00 and place the burden on the Employer to ensure the workers are being paid the appropriate hourly rate for their specific duties.

On December 9, 2013, after the CO's approval, the NOD was issued. The specific deficiency was a failure to comply with 20 C.F.R. § 655.120(a) by offering an hourly wage of $10.19 for workers engaged in general farm work, irrigation, and livestock when the prevailing hourly rates for general farm workers and irrigators were $12.50 and $15.00.

On December 13, 2013, through counsel, the Employer requested a *de novo* hearing.

R Bar N Ranch
(CO 3)

On November 27, 2013, DOL received the Employer's ETA Forms 790 and 9142A, with attachments for a "Farm/Irrigation/Livestock Worker" with seasonal employment from February 1 to October 1, 2014, 48 hours a week, at an offered hourly wage of $10.00.

On November 29, 2013, a DOL analyst (Mr. J. L.) filled out a worksheet to evaluate the offered wage rate of $10.00. The prevailing wage rate from the Agricultural Online Wage Library was $10.00 for general farmworker. The Federal minimum wage was $7.25; the State minimum wage was $7.65. The AEWR was $9.99. And, there was no collective bargaining agreement. Consequently, the highest of these wages were the offered and prevailing hourly wages of $10.00.

On December 2, 2013, the DOL analyst annotated, "NOD for incorrect SOC code, incomplete contract impossibility language, and incomplete Section H.3."

[23]Since most portions of the administrative files are duplicative, I will only highlight the notable differences and associated dates.

On December 2, 2013, after the CO's approval, the NOD was issued. The specific deficiencies were noncompliance with 20 C.F.R. § 655.141(a) for an incorrect SOC code since the job opportunity involved working with cattle, and failure to complete Section H, Item 3 of the ETA Form 9142.

On December 5, 2013, in response to the NOD, the Employer submitted an amended ETA Form 790, noted that the workers' livestock duties were very minor, and completed the Section H deficiency.

On December 5, 2013, another DOL analyst (Mr. R. M.) indicated, "issue 2nd NOD for wage range in Montana."

On December 9, 2013, after the CO's approval, the second NOD was issued. The specific deficiency was a failure to comply with 20 C.F.R. § 655.120(a) by offering an hourly wage of $10.00 for workers engaged in general farm work, irrigation, and livestock when the prevailing hourly rates for general farm workers and irrigators were $12.50 and $15.00,

On December 13, 2013, through counsel, the Employer requested a *de novo* hearing.

Huntsman Ranch
(CO 4)

On November 21, 2013, DOL received the Employer's ETA Forms 790 and 9142A, with attachments for a "Farm/Irrigation/Livestock Worker" with seasonal employment from January 14 to September 15, 2014, 48 hours a week, at an offered hourly wage of $10.00.

On November 25, 2013, a DOL analyst (Ms. T. S.) indicated, "NOD for inconsistent SOC code/title." After the CO's approval, the NOD was issued on November 26, 2013 for failure to comply with 20 C.F.R. § 655.141(a) due to the use of inconsistent SOC codes in the application.

On November 26, 2013, the Employer responded with an amendment correcting the inconsistency.

On November 27, 2013, after accepting the modification, the same DOL analyst issued a NOA.

On December 5, 2013, the DOL analyst noted a wage increase for irrigator to $15.00. A December 5, 2013 offered wage worksheet showed no values for "Step 4 - Prevailing Wage" and "Step 7 – Offered Wage."[24]

[24]The worksheet in the administrative file appears to be a copy of two different work sheets taped together with the separation cut in the "Step 4 - Prevailing Wage Rate" row, which contains no value. Likewise, as noted above, "Step 7 - Offered Wage" is blank.

On December 9, 2013, the DOL analyst annotated, "There is a new wage survey with a higher wage. Therefore, an NOD after Acceptance must be issued." After the CO's approval and his observation, "resetting to allow NOD to be issued for new wage," the second NOD was issued. The specific deficiency was a failure to comply with 20 C.F.R. § 655.120(a) by offering an hourly wage of "$10.19"[25] for workers engaged in general farm work, irrigation, and livestock when the prevailing hourly rates for general farm workers and irrigators were $12.50 and $15.00,

On December 13, 2013, through counsel, the Employer requested a *de novo* hearing.

George Stoltz (Stoltz Land and Cattle Co.)
(CO 5)

On December 6, 2013, DOL received the Employer's ETA Forms 790 and 9142A, with attachments for a "Farm/Irrigation/Livestock Worker" with seasonal employment from February 1 to November 1, 48 hours a week, at an offered hourly wage of $10.00.

On December 11, 2013, the DOL analyst (Ms. E. I.) completed her review of the application, prepared an NOA and forward the NOA to "Leads." On the same day, another DOL analyst (Mr. C. F.) annotated, "There is a new PW in MT for general farm worker of $12.50/hour. This will have to be a NOD."

On December 12, 2013, the wage worksheet was completed. The prevailing wage rates from the Agricultural Online Wage Library were listed as $12.50 - farm worker and $15.00 - irrigator. The Federal minimum wage was $7.25. The AEWR was $9.99. And, there was no collective bargaining agreement. Step 7 - Offered Wage indicated $10.00.[26]

On December 13, 2013, after the CO's approval, the NOD was issued. The specific deficiency was a failure to comply with 20 C.F.R. § 655.120(a) by offering an hourly wage of "$10.19"[27] for workers engaged in general farm work, irrigation, and livestock when the prevailing hourly rates for general farm workers and irrigators were $12.50 and $15.00,

On the same day, through counsel, the Employer requested a *de novo* hearing.

[25]The Employer's actual offered hourly wage was $10.00.

[26]Since the instructions for Step 7 state, "Highest of Step 3, Step 4, Step 5, and Step 6," the actual values should have been $12.50 and $15.00.

[27]The Employer's actual offered hourly wage was $10.00.

Santana Ranch
(CO 6)

On November 27, 2013, DOL received the Employer's ETA Forms 790 and 9142A, with attachments for a "Farm/Irrigation/Livestock Worker" with seasonal employment from February 1 to December 1, 2014, 48 hours a week, at an offered hourly wage of $10.19.

On December 4, 2013, an NOD was issued. The specific deficiencies were noncompliance with 20 C.F.R. § 655.141(a) for inconsistent SOC codes and failure to complete Section H, Item 3 of the ETA Form 9142.

On December 9, 2013, the Employer amended and corrected the noted deficiencies.

However, on December 10, 2013, a DOL analyst (Ms. T. S.) noted, "The employer has made all requested amendments. However, this will be a second NOD because the wage has changed due to a new survey." In the wage worksheet completed the same day, the application rate was $10.19; the Federal minimum wage was $7.25; the AEWR was $9.99; and, the prevailing wages were $12.50 for farmworker and $15.00 for irrigator. There was no collective bargaining agreement. Consequently, the application hourly rate of $10.19 was "TOO LOW" which required an NOD since the appropriate hourly wages were $12.50 and $15.00

Also, on December 10, 2013, after the CO's approval, the second NOD was issued. The specific deficiency was a failure to comply with 20 C.F.R. § 655.120(a) by offering an hourly wage of $10.19 for workers engaged in general farm work, irrigation, and livestock when the prevailing hourly rates for general farm workers and irrigators were $12.50 and $15.00.

On December 13, 2013, through counsel, the Employer requested a *de novo* hearing.

5 L Ranch Corp.
(CO 7)

On December 17, 2013, DOL received the Employer's ETA Forms 790 and 9142A, with attachments for a "Farm/Irrigation/Livestock Worker" with seasonal employment from February 1 to November 14, 2014, 48 hours a week, at an offered hourly wage of $10.00.

The December 19, 2013 wage application worksheet contained the following: application rate - $10.00; AEWR - $9.99; prevailing wage for farmworker - $12.50; Federal minimum wage - $7.25; State minimum wage - $7.80; and appropriate offered rate - $12.50. There was no collective bargaining wage rate. A DOL analyst (Mr. R. M.) noted that an NOD was necessary due in part to an incorrect wage rate for farmworkers in Montana. The next day, a team leader also observed that since the application included irrigation duties, the prevailing wage for irrigators needed to be included in the NOD.

On December 23, 2013, after the CO's approval, the NOD was issued. The specific deficiency was a failure to comply with 20 C.F.R. § 655.120(a) by offering an hourly wage of $10.00 for workers engaged in general farm work, irrigation, and livestock when the prevailing hourly rates for general farm workers and irrigators were $12.50 and $15.00,

On December 27, 2013, through counsel, the Employer requested a *de novo* hearing.

McCoy Cattle
(CO 8)

On December 23, 2013, DOL received the Employer's ETA Forms 790 and 9142A, with attachments for a "Farm/Irrigation/Livestock Worker" with seasonal employment from February 8 to December 8, 2014, 48 hours a week, at an offered hourly wage of $10.00.

The December 27, 2013 wage application worksheet contained the following: application rate - $10.00; AEWR - $9.99; prevailing wage for farmworker - $12.50; Federal minimum wage - $7.25; State minimum wage - $7.80; and appropriate offered rate - $10.00.[28] The was no collective bargaining wage rate. A DOL analyst (Ms. V. S.) noted two deficiencies. First, three of the seven worksites were more than one mile from the first worksite. Second, the Employer offered $10.00 an hour when the prevailing wages were $12.50 for general farm work and $15.00 for irrigation work.

On December 30, 2013, after the CO's approval, the NOD was issued. The specific deficiencies were failures: a) to meet the regulatory requirement of area of intended employment, and b) failure to comply with 20 C.F.R. § 655.120(a) by offering an hourly wage of $10.00 for workers engaged in general farm work, irrigation, and livestock when the prevailing hourly rates for general farm workers and irrigators were $12.50 and $15.00.

On December 27, 2013, through counsel, the Employer requested a *de novo* hearing.[29]

State of Montana Application for Federal Assistance
(CX 9)

On July 22, 2013, the state of Montana filed an application for Federal Assistance in the form of an Alien Labor Certification Grant for Fiscal Year 2013 (October 1, 2012 through September 30, 2013) in the amount of $80,722.00. The foreign labor certification workload included 412 H-2A temporary labor certifications processed with 60 applications pending. The number of prevailing wage surveys completed was 151. The prevailing wage surveys were to be conducted in accordance with ET Handbook No. 385. The average cost associated with the prevailing wage survey was $42.77. The grant would fund "1" Full Time Equivalent staff member.

[28]Since the instructions for Step 7 state, "Highest of Step 3, Step 4, Step 5, and Step 6," the actual value should have been $12.50.

[29]As previously noted, Employer's counsel did not contest the area of intended employment deficiency.

Attachment 1 – Grant Solicitation
(CX 10)

The grant solicitation attachment sets out the procedures, and requirement for the grant application process. As a condition of the grant, the SWA agrees to "carry out responsibilities supporting the Federal administration of foreign labor certification programs in accordance with all applicable regulations, policies, procedures, handbooks, manuals, and other directives." Additionally, regarding the agricultural prevailing wage survey report, a critical component of OFLC's ability to grant a labor certification under the H-2A program is the determination concerning an appropriate wage rate. As part of that process, the "SWAs collect and provide vital information to the OFLC with respect to whether a prevailing hourly wage . . . exists for the occupation or crop in the area of intended employment." This prevailing wage information is "collected through survey instruments designed by the SWA, conducted in accordance with the ETA Handbook No. 385, and transmitted to OFLC."

Stipulation of Fact

The parties stipulated that CO's determination that the Employers are not offering the prevailing wage rate in their applications for temporary labor certification is based solely on the information provided by Mr. Orona in the Office of Foreign Labor Certification. TR, p. 21.

Discussion

As an initial step in this case, I must determine the applicable standard, of proof in this case. Following that determination, I will address the specific issue before me.

Standard of Proof

As demonstrated by their respective closing briefs, the parties disagree on the standard of proof the Employers must meet to satisfy their burden of proof. According to counsel for the certifying officer, the Employers must demonstrate that the CO's decision to issue the NODs in this case was arbitrary and capricious. Employers' counsel asserts the Employers need only present sufficient evidence to establish a *prima facie* case supporting their position which then must be rebutted by the CO.

In considering this conflict, I first turn to the 20 C.F.R. § 655.171, which is captioned "appeals." Under its provisions, an employer may request an administrative review of a CO's decision for the purpose of obtaining administrative relief from that decision through reversal, modification, and or remand. Consequently, as the party seeking administrative relief, an employer bears the burden of proof.

Next, in terms of the applicable standard, the parties' disparate positions are essentially based on the two separate means by which an employer may obtain administrative relief - administrative review under subsection (a) or a *de novo* hearing under subsection (b). Based on an administrative law judge decision,[30] the CO's attorney asserts the Employers must establish the CO's use of the prevailing wage determined by Mr. Orona was arbitrary and capricious. Employers' counsel maintains that the high arbitrary and capricious standard of proof that has been applied by other administrative law judges during administrative reviews[31] is not applicable when an employer elects to proceed with a *de novo* hearing. In that situation, based on other administrative law judge decisions,[32] and the Supreme Court decision in *Director, OWCP v. Greenwich Collieries, et al*., 512 U.S. 267 (1994), counsel asserts that the proof standard under the Administrative Procedures Act ("APA") applies, and that standard only requires a *prima*

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[30]*Zirkle Fruit Co.*, 2008 TLC 35 and 36 (July 7, 2008). Following his *de novo* hearing, the administrative law judge indicated that he would apply the legal sufficiency standard used in an administrative review proceeding. At the time of his decision, the regulatory provision for an administrative review proceeding, then 20 C.F.R. § 655.112(a), limited an administrative law judge's decision to a review for "legal sufficiency," while the *de novo* hearing provision, 20 C.F.R. § 655.112(b), was silent regarding the standard of proof Notably, however, in the current regulation, neither the administrative review provision, 20 C.F.R. § 655.171(a), nor the *de novo* hearing subsection, 20 C.F.R. § 655.171(b), specifies a standard of proof or references legal sufficiency.

[31]*See Bolton Spring Farm*, 2008 TLC 28 (May 16, 2008); *Jay R. Debadts & Sons Fruit Farm*, 2008 TLC 38 (July 10, 2008). Again, I note that at the time of these decisions, the regulatory provision for an administrative review proceeding, then 20 C.F.R. § 655.112(a), limited the review to legal sufficiency, which led the administrative law judge to apply an arbitrary and capricious standard of proof. The present administrative review provision, 20 C.F.R. § 655.171(a), no longer limits the review to legal sufficiency.

[32]*See Barry's Ground Cover*, 2012 TL 11, *et al*. (Feb. 23, 2012).

facie showing of credible evidence.[33] However, with due difference to predecessor and contemporary administrative law judges,[34] I believe the only significant difference between an administrative review and a *de novo* hearing relates to evidentiary record upon which an employer may base its appeal under 20 C.F.R. § 655.171. That is, in an administrative review, for the purpose of expediency, the evidentiary record is limited to the administrative file; whereas, with a *de novo* hearing, the evidentiary record consists of documents and testimony offered by both parties and admitted into the record during the course of the proceeding.

Consequently, from my perspective, regardless of how the evidentiary record is acquired, as the proponent party seeking DOL acceptance of its labor certification application, an employer must prove by the preponderance of the probative evidence that its labor certification application is sufficient for acceptance under the criteria established by 20 C.F.R. §§ 655.161 because the CO's NOD was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, and/or the CO's conclusions and resulting deficiency determination were inconsistent with the underlying established facts and/or legally impermissible. If an employer meets that standard of proof, the CO's NOD must be reversed, modified, or remanded. Otherwise, the CO's NOD must be affirmed.

Certifying Officer's NODs

Background

The H-2A labor certification program was established to ensure that the pay, conditions, and terms of the employment of foreign, nonimmigrant workers does not disadvantage domestic workers in the United States. One means to achieve that purpose is to require an employer who seeks to employ foreign, nonimmigrant works to demonstrate that the wage offered and paid to a foreign, nonimmigrant worker is <u>not less</u> than the wage a similarly situated domestic worker would be expected to receive. As a result, under 20 C.F.R. §655.161(a), an employer bears the burden of establishing eligibility for temporary labor certification under the Act and must in part comply with offered wage rate criteria in 20 C.F.R. §655.120.

According to 20 C.F.R. §655.120, an employer "must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage, the agreed-upon collective bargaining wage or the Federal or State minimum wage . . ." Four of these five wages are readily determined through regulatory determination – AEWR; legislation – Federal or State minimum wage, and collective bargaining agreement. However, the fifth type of wage, the prevailing wage, must be determined locally through the collection and analysis of information

[33]In *Director, OWCP, v. Greenwich Colleries, et al.*, 512 U.S. 267, 275 (1994), the court determined that under Section 7 of the APA, which indicates that unless otherwise provided by statute the proponent of a rule or order has the burden of proof, claimants in black lung and longshoreman disability compensation claims bear the burden of proof/persuasion. The court also indicated that under the APA, if the proponent establishes a *prima facie* case supported by credible evidence, it must either be rebutted or accepted as true. *Id.* at 280. However, subsequent cases have clarified that under this shifting burden of production process, if evidence is presented in response to the *prima face* case, the proponent retains the ultimate burden of proof/persuasion.

[34]Some administrative law judges have also applied an abuse of discretion standard in a *de novo* proceedings. *See Greenbank, Inc.*, 2013 TLC 35 (July 22, 2013).

from local employers of the wages they actually pay to domestic workers engaged in a specific crop activity within a defined agricultural area.

For decades, that process for determining an applicable prevailing wage has been guided by the Handbook promulgated by DOL because "[a]ccurate farm wage data" is "essential to the effective operation of the Public Employment Service in serving farm employers and farm workers and in implementing the Secretary's regulations on the intra/interstate recruitment of farm workers." Although not a published regulation, the Handbook "remains the authority for conducting prevailing wage surveys," and is "accepted as the benchmark/norm by all parties in the agricultural industry, including growers and workers." The wage data is collected locally through SWAs under federal grants. According to Mr. Orona, and as set out in the federal grants, the SWAs are required to follow the Handbook procedures in order that the prevailing wage may be determined accurately because an understated prevailing wage adversely affects domestic workers, while an overstated prevailing wage requires employers to pay more than necessary to eliminate any adverse effect on similarly employed domestic workers. In other words, foreign non-immigrant workers, domestic workers, employers and the public all have a stake in the determination of an accurate prevailing wage.

As set out in the Handbook, the principal component for establishing an accurate prevailing wage is a survey sample of worker wages of sufficient size to produce a representative prevailing wage for the U.S. domestic workers engaged in the particular crop activity upon which the respective parties may place their confidence. And, the key factor for ensuring a survey sample is actually representative is knowing the total number of workers in the crop activity population being sampled because as Dr. Bronars testified due to the direct correlation between the sample size and the universe population, as the sample size increases in comparison to the universe population, confidence that the sample is representative of the universe population also increases up to a point of diminishing returns.

Prevailing Wage Determinations Guidelines

Under the Handbook's provisions and according to the training provided by DOL, determination of a prevailing wage for a particular crop activity requires several steps by local SWAs and DOL employees.

First, the wage data upon which a prevailing wage is based for a specific crop activity in a particular agricultural reporting area, which may be state-wide, or a subdivision of a state is collected through a survey of wages paid to U.S. domestic employees working in the same crop activity. In planning the survey, the SWA should review seasonal crops "well in advance of the anticipated farm labor needs." Usually, when foreign workers were employed in the previous season and employers are expected to request foreign workers in the current season, a wage rate survey should be conducted at least once per season. The survey should be conducted during peak season, usually at least once a year, or at the request of the Chicago NPC or the National Office, and "normally" completed "within 3 days unless there is prior regional office approval, the survey period should not exceed 1 week."

Since the accuracy of the prevailing wage in terms of being a representative prevailing wage depends on obtaining wage information from a sufficient sample of workers as defined by the Handbook, after determining the number of employers in the agricultural reporting area who have employees working in crop activity to be surveyed, the SWA must calculate the total number of U.S. domestic workers who are employed in the crop activity, in both in-state and interstate categories. In creating an estimated survey universe, state labor market information, state agricultural representatives, state unemployment data base, the state department of agricultural, and job orders both open and closed should be considered.

After the total workers universe established, the SWA then is required to survey employers to obtain actual wages of its employees at the time of the survey. Although the 1981 Handbook indicates the survey must "include a substantial number of personal employer interviews," in recent SWA training, DOL has updated that requirement and instructs that wage information may be obtained by person, mail, telephone or e-mail.

The wage information gathering process continues until the SWA has wage information for the number of workers in the appropriate sample size. Specifically, the SWA "should assure itself that the planned sample will yield data which will be representative of the wages paid in the crop activity." As a result, in gathering wages for the survey sample size, the SWA should observe the following "guide": for 100 to 349 workers in the crop activity in the area, the sample size should be 100% of the workers; for 350 to 499 workers, the sample size should be 60% of the workers; for 500 to 799 workers, the sample size should be 50% of the workers; for 800 to 999 workers, the sample size should be 40% of the workers; for 1,000 to 1,299 workers, the sample size should be 35% of the workers, and continuing in increments up to 3,000 or more workers, in which the sample size is 15% of the workers.

At this stage, in order to verify the wage information furnished by the employers, the SWA must also interview "10 percent of the workers included in the sample." These workers "should be drawn from as many as possible" of the interviewed employer.

In the second step of the prevailing wage determination process, upon completion of the survey, the SWA will make a prevailing wage rate finding based on the collected wage information by applying two methods in order. First, under the "40 percent rule," if a single wage rate is paid to 40% or more of the workers in the crop activity, then that rate is the prevailing wage rate. Second, if no singe wage rate accounts for 40% or more of workers, the workers and their associated rates are arrayed in descending order. Then, starting with the lowest rate, the workers are cumulatively counted until 51% of the workers in the survey are covered. The rate at that point in the count becomes the prevailing wage rate. And, until November 2013, if the number of workers in either category of in-state and interstate is less than 25% of the sample size, then a prevailing wage for that category can not be made and result is annotated as "No Finding."

The third, and final, step involves the participation of Chicago National Processing Center which monitors the wage data collection and analysis process, and the DOL OFLC which approves the determined prevailing wage and publishes the prevailing wage in the AOWL.

Montana General Farmworker Prevailing Wage Determination

Between February 11 and March 4, 2013, Ms. Harris conducted a prevailing wage survey for the occupation of general farmworker in Montana, state-wide agricultural reporting area. After determining that 360 employers employed general farmworkers, she attempted to obtain wage information for the U.S. domestic workers employed at that time from 220 out of the 360 employers. Subsequently, 43 employers responded and provided their respective wages for 204 domestic general farmworkers. Several of the employers specified varying rates of pay based on job activity, which included 10 supervisors who earned between $16.00 and $27.50 per hour, and 41 individuals engaged in fertilizing operations with hourly wages ranging from $10.00 to $20.00.

On March 8, 2013, after assembling the wage information from the employer interviews, ETA Form 232A, EX 3, Ms. Harris calculated the prevailing wage by first excluding supervisors and then "adding the 30 wage responses" and dividing the sum by 30, which produced a prevailing wage rate of $12.46. The prior year prevailing wage was $10.00. In regards to variables affecting rates, Ms. Harris noted that a lot more fertilizing was conducted "this year" which led to higher wages.[35] Upon completion, Ms. Harris forwarded the ETA Form 232, EX 5, to the National Office.

On May 20, 2013, Mr. Orona responded to the submitted ETA Form 232. After requesting the survey questionnaires, he noted that the 10 supervisors would have to go on a different survey. Mr. Orona also inquired about how she calculated the $12.46 hourly prevailing rate.

On May 22, 2013, Ms. Harris indicated that the ETA Form 232A was used as the questionnaire, provided a separate survey for supervisors, and explained how she calculated the prevailing wage rate of $12.46.

Subsequently, Ms. Harris worked with Mr. Orona to put the wage data in the manner specified on the ETA Form 232 and recalculate the prevailing wage rate as $12.50, EX 2. Specifically, Ms. Harris indicated that the estimated number of employers with domestic general farmworkers was 360. Of those employers, 43 were "contacted," which represented 12% of the estimated number of employers in the crop activity. Then, in Subsection 2c, Ms. Harris entered 195 as the estimated total of domestic hired workers, consisting of 178 local and intrastate workers and 17 interstate workers. Then, based on the 51% rule, Ms. Harris concluded that the prevailing hourly wage rate for all U.S. workers was $12.50. Likewise, under the 51% rule, $12.50 was the prevailing wage rate for intrastate U.S. workers. Finally, using the 40% rule, and based on the 17 interstate workers in the survey, Ms. Harris determined that the prevailing wage rate for interstate U.S. workers was $12.00. Finally, without comment, Ms. Harris noted the prevailing wage the previous season was $10.00.

On June 24, 2013, Ms. Harris forwarded the revised prevailing wage determination, ETA Form 232, EX 2 and EX 8, to Mr. Orona.

[35]Of the 41 workers engaged in fertilizing, all but three of the individuals received an hourly wage greater than $10.00, EX 3.

Sometime later, because the number of interstate workers in the survey, 17, was less than 25% of the 195 surveyed workers, Ms. Harris changed the prevailing wage finding for interstate general farmworkers from $12.00 to "no finding," EX 8.

Eventually, as part of his capacity in OFLC, and based on his review of the revised ETA Form 232, EX 2 and EX 8, which showed a survey sample size of 195, which was 100% of estimated workers in the state's general farmworkers population, Mr. Orona determined the Montana prevailing wage determination of $12.50 for general farmworkers was valid, which led to the publication of that prevailing wage rate in the AOWL on December 2, 2013.

Handbook Deviations

In support of their labor certification applications, and to establish that the CO's NODs were based an invalid and inaccurate prevailing wage $12.50, the Employers have highlighted numerous deviations from the Handbook during determination of that prevailing wage rate for Montana general farmworkers, relating to the timing and duration of the prevailing wage survey, collection methodology/verification, crop activity/occupation designation, and survey sample size.

Timing/Duration

According to the Handbook, and associated training, a prevailing wage determination for a crop activity should be conducted during peak season and completed with three days, absent prior regional office approval. Even with approval, the survey should not exceed one week.

Ms. Harris conducted the prevailing wage survey in February and March of 2013, over the course of three weeks.

In terms of timing, Dr. Bronars opined that the timing of the prevailing wage determination for general farmworkers in Montana during February and March may have affected the reliability of the SWA prevailing wage survey because according to the USDA survey of farmworkers which is conducted quarterly and used to set the AEWR for the employment of temporary or seasonal non-immigrant foreign workers for agricultural labor or services, about half as many workers work half as many hours in the winter than in the summer. Further, the composition of the farming workforce is "pretty different" between the early spring and summer. There may be higher paid workers in the early spring such that the sample workers may not be representative of the workers who would be employed in the summer. As a result, conducting the Montana general farmworker survey in Montana in the middle of winter "at best, is an unusual time to be surveying farm workers."

On the other hand, Ms. Harris testified that several of the functions of a general farmworker in Montana involve livestock. Consequently, in the winter months, including February and March, many of the ranch workers who fall within the category of general farmworker would be busy with calving. Mr. Orona also noted that use of a peak season survey was usually more appropriate when the workers' wage are based on piece rates for a specific crop.

Upon consideration of the peak season issue, and in addition to Ms. Harris' explanation, I first note that almost all of the Employers' labor certification applications cover an employment period from January/February 2014 to the late fall of 2014.[36] So, the prevailing wage survey Ms. Harris conducted falls within the period of intended employment. Second, and more significant, Dr. Bronars based his critique on the peak season issue and associated possible errors in accuracy on a brief review of the USDA survey and acknowledged a lack of certainty without further study about the actual effects of conducting the prevailing wage survey in February and March. As a result, Dr. Bronars' concerns about peak season lacks sufficient probative force to establish that the determined prevailing wage was invalid or inaccurate due to the timing of the survey.

As to the three week duration of the survey, the record contains little probative evidence about any detrimental effect on the accuracy of this prevailing wage survey due to its three week duration. To the contrary, Ms. Harris provided a justifiable explanation for the additional two week departure from the Handbook's guideline for the duration of a prevailing wage survey. Notably, during the first week of the survey, only 17 employers had responded, EX 3. Due to this low response rate, and in order to develop additional wage information, Ms. Harris understandably extended the duration of the prevailing wage survey in an effort to acquire more employer responses. And, that two week extension produced another 26 employer responses, EX 3. Additionally, Mr. Orona indicated that the duration of a survey does not adversely affect a prevailing wage survey and DOL would prefer that SWA not rush a survey just to meet the Handbook criteria. Consequently, the three week duration of the Montana general farmworkers' prevailing wage survey, appears to have actually enhanced its potential for accuracy.

Collection Method/Verification

According to the Handbook, apparently in order to ensure the wage information being provided is representative of the wages actually being paid to U.S. domestic workers in a particular crop activity, the prevailing wage survey "must include a substantial number of personal employer interviews," with limited use of the telephonic contacts and the mail. The Handbook also requires personal interviews of 10% of the workers in the survey sample as an apparent safeguard against an employer providing approximate, rather than actual, wages.

In her prevailing wage determination survey, Ms. Harris relied on wage information obtained during telephonic responses from employers. No personal interviews of workers were conducted.

As the evidentiary record makes clear, departure from the Handbook's use of personal interviews in this case is <u>not</u> a significant issue for two reasons. First, since at least 2006, in recognition of changing communication technology, and increasing fiscal constraints, DOL no longer trains SWAs to use personal interviews, EX 10. Instead, as recently incorporated into instructions for the wage survey forms, wage survey information may now be obtained by person, mail, telephone or e-mail. Second, as Ms. Harris reasonably explained, the size of

[36]F 3 S: February 1 to December 1 (CO 1); Wueste: February 1 to November 30 (CO 2); R Bar N: February 1 to October 1 (CO 3); Huntsman: January 14 to September 15 (CX 4); Stoltz: February 1 to November 1 (CO 5); Santana: February 1 to December 1 (CO 6); 5 L: February 1 to November 14 (CO 7); and McCoy: February 8 to December 8, (CO 8).

Montana renders personal interviews of employers throughout the state impractical in terms of time, effort, and funding.

Concerning the 10% verification guideline, Dr. Bronars described its use in general terms as means to establish the accuracy of employer-furnished wage information. However, Dr. Bronars did not also state this Handbook deviation adversely affected general farmworkers' prevailing wage determination, and the evidentiary record contains no probative evidence that the employers actually provided estimated, rather than actual, wages. To the contrary, most of the ETA Forms 232A, contained specific wage rates that were: a) paid according to the workers' function (general worker - $10.00; fertilizer worker - $12.00; grain harvester - $14.00; and grain elevator worker - $16.00), and b) at times detailed down to the half dollar ($11.50 and $14.50), EX 2 and EX 3. Consequently, I find insufficient probative evidence to establish that the lack of verification through contact with 10% of workers employed by the sampled employers adversely affected the validity of the general farmworkers' prevailing wage determination.

Occupation/Crop Activity

In general terms, the Handbook provides guidelines for conducting prevailing wage determinations by crop activity in an identifiable agricultural reporting area.

Ms. Harris conducted her survey based on the occupation of general farmworkers which encompassed a wide array of functions, such as handling livestock, and was not limited to a specific crop.

Dr. Bronars expressed concern over this Handbook deviation because distinctions based on crop activity are appropriate given the different activities associated with each crop. The failure to make such a distinction would "muddle" the collected wage information by grouping disparate workers together. Specifically, with the use of occupation as a survey category, a person would find it difficult to determine from a wage survey whether the collected wages reflected different wages for the different crop activities or that the same workers engaged at different times of year in different activities. As a result, it was possible the Montana general farmworkers prevailing wage survey may have included workers doing work outside of usual farm activities, which might have inflated the wage rate.

Mr. Orona responded that for more than a decade, occupations have been a part of the prevailing wage process. Based on his experience at OFLC, there has never been a time when general farmworker was not a prevailing wage survey category.

In determining whether DOL's apparent practice of conducting prevailing wage rate surveys for the occupation of general farmworkers in contrast to the Handbook's guidance to use crop activity had a material adverse effect on the validity of the Montana prevailing wage survey, I simply note that Dr. Bronars' expressed concerns have diminished probative value in light of his acknowledgement that he didn't know if using the occupation of general farmer workers in departure from the Handbook's guidance was "adequate or not."

Survey Sample Size

As previously discussed, in order to ensure that a prevailing wage determination is reliable and representative, which are the key factors for acceptance of a prevailing wage by all the parties involved in the process, the Handbook establishes specific survey sample sizes which are based on the total population of the employee universe. By incorporation in the Handbook, DOL has determined that these specified survey sample sizes will provide a sufficient level of confidence that the survey will indeed produce a reliable and representative prevailing wage. In estimating the total worker population upon which the appropriate Handbook sample size will be determined, DOL trains SWAs to use state labor market information, state agricultural representatives, state unemployment data, state department of agriculture information, and job orders.

In preparing the ETA Form 232 for the general farmworker prevailing wage survey, Ms. Harris reported that the total worker population was 195.

In addressing the Employers' challenge to the prevailing wage determination based on this survey sample size of 195 workers, I must consider the hearing testimony of Ms. Harris, Mr. Orona, and Dr. Bronars, assess the associated probative value of that testimony, review the June 24, 2013, ETA Form 232 under the Handbook's guidelines, and determine the preponderance of the probative evidence.

Ms. Harris

Ms. Harris testified that she thought Section 2c on ETA Form 232 was asking for the number of workers in the sample size.[37] As a result, the number "195" in Section 2c was not the total number of U.S. workers in the general farmworkers population in Montana at the time of survey. Instead, it was the number of employees working for the 43 employers who responded.

At the hearing, having learned that Section 2c was suppose to be the "total domestic hired workers in Montana for general farmworkers," Ms. Harris estimated that the actual number of general farmworkers in the state at the time of the survey was "roughly 500." She based this estimate on her first hand experience with employers and employees for the past three years, unemployment insurance numbers, and the State Department of Revenue numbers for reported wages. Based on her estimate of the total worker population, Ms. Harris believed that the June 24, 2013 prevailing wage survey was valid and the prevailing wage was representative of the wage paid to domestic hired general farm workers in Montana at that time.

[37]She thought she "was supposed to fill in the total number of domestic hired workers that we got a response from" and "that is what I did."

Mr. Orona

According to Mr. Orona, DOL requires the SWAs to follow the Handbook in conducting prevailing wage surveys because it is essential that the prevailing wage be determined accurately. And, an OFLC H-2A analyst, during his review and validation of prevailing wage surveys, he ensures the surveys are conducted in compliance with the Handbook, which includes specific sample sizes.

Upon his review of the Montana prevailing wage determination in the fall of 2013, Mr. Orona had "no probable cause" to question the information on the ETA Form 232. Yet, Mr. Orona also agreed that if the total worker population was actually 500, rather than the 195 workers indicated on the form, the survey would not explicitly meet the Handbook's sample survey size of 50%, or 250 workers. However, the Handbook sample size is not a fixed number and represents a "general guide." Considering that the Montana prevailing wage survey contained 17 different wage rates from 43 employers for 195 domestic workers, and even though the survey sample size was less than the recommended 250 workers, Mr. Orona concluded that the June 24, 2013 prevailing wage rate survey contained "enough information" to support the determined prevailing wage rate determination of $12.50.

Dr. Bronars

Consistent with the Handbook's specific guidance about survey sample size, Dr. Bronars stressed the importance of determining a statistical sample size that will provide a sufficient level of confidence that the prevailing wage calculated from the wage information in that sample size will actually be representative of the usual prevailing wage paid to similarly situated domestic workers. In that regard, "the number of workers that need to be included in the sample depends on the population number of workers in the crop activity in the state." For example, if the total population is 3,000 or more workers, the Handbook indicates that a sample size consisting of 15% of the total worker population will produce a reliable and representative prevailing wage determination for the entire population.

However, the Montana prevailing wage survey used the number of workers employed by the 43 employers who were contacted as the figure for the total worker population being sampled. Not only does the Handbook not base the appropriate survey sample size on the number of employers surveyed, the 43 sampled employers had an average of five to six workers, while the most recent census date from 2007 for Montana indicated "there were 393 employers in agricultural with 10 or more employees; and 816 employers that had 5 to 9; and there were over 20,000 hired farmworkers." Additionally, the sample of 195 employees was "inadequate" according to the Handbook unless the 195 workers provided by 43 employers represented "100% of the workers in this category in the state." Consequently, under the Handbook's guidelines, Dr. Bronars believed the sample size of 195 employees was too small to be reliable. At the same time, since only hypothetical population sizes were available, Dr. Bronars was unable to definitively state that the $12.50 prevailing wage was not representative for the total population of general farmworkers in Montana.

Finally, Dr. Bronars observed that the determined prevailing wage rate of $12.50 represented a 25% increase over the prior year's prevailing wage of $10.00. In comparison, the AEWR only increased from $9.99 to $10.69. While the 25% increase in the prevailing wage alone didn't establish the general farmworkers prevailing wage was based on an inadequate survey, the substantial increase in one year does raise a question about whether the determined prevailing wage was actually representative.

Testimony Probative Value

Due to the somewhat conflicting testimony, I must assess the respective probative value of the testimony of Dr. Bronars, Ms. Harris, and Mr. Orona in terms of supporting documentation, reasoning, and recognized expertise.

As an expert in labor economics, Dr. Bronars provided very probative testimony on the importance of having a statistically sound survey sample size to produce a reliable and representative prevailing wage. His credible testimony also supports the importance of, and compliance with, the Handbook's survey methodology and specified survey sample sizes based on the total population of the workers in a specific crop activity.

However, Dr. Bronars' conclusion that the sample size of 195 workers in the general farmworkers prevailing wage survey was inadequate has diminished probative value because Dr. Bronars also acknowledged that without knowing the actual total population of general farmworkers, he could not definitively state that the prevailing wage of $12.50 based on a sample size of 195 workers was not representative or reliable.

As the individual in the Montana SWA who conducted the general farmworker prevailing wage survey, Ms. Harris was well positioned to provide a probative assessment on the reliability of the prevailing wage determination. However, while recognizing the fiscal constraints facing Ms. Harris and her considerable workload in the SWA, and noting her deliberative and thoughtful responses during the telephonic hearing, I nevertheless find her conclusion that the prevailing wage survey is valid, and the resulting prevailing wage rate of $12.50 is representative of the wage rate paid to domestic hired general farm workers in Montana, suffers a loss of probative value for several reasons.

First, Ms. Harris provided insufficient specificity regarding the underlying documentary support for her conclusion. That is, to support her estimate of roughly 500 workers in the total population, Ms. Harris only indicated that she recently reviewed workers numbers from unemployment insurance and the State Department of Revenue, and did not provide the actual numbers of general farmworkers those two sources disclosed. This shortfall is significant given Dr. Bronars' testimony that his review of recent census data showed over 1,200 employers with over 20,000 hired farmworkers in the state. Even though the general farmworkers covered in the prevailing wage survey represents only a subset of all agricultural workers in Montana, Dr. Bronars' referenced 2007 census figure of 20,000 hired farmworkers certainly suggests that Ms. Harris' estimation of 500 general farmworkers is understated.

Second, Ms. Harris' reliance on her three year work experience with general farmworkers and their employers is not an adequate substitute for a statistically sound survey process that is based on a sample size which is sufficient in relation to a specific total worker population to establish a reasonable degree of confidence in the resulting prevailing wage.

Third, even if her "rough" estimation of a total general farmworker population of 500 is accurate, the Handbook indicates that appropriate sample size is 50% for that total population, or 250 workers; whereas, the June 24, 2013 prevailing wage determination only contained 195 workers, about 39% of Ms. Harris' estimated total population. Given this sample size deviation for 500 workers in the total population, Ms. Harris did not explain why she nevertheless believed the prevailing wage survey remained valid.

In his capacity as an H-2A analyst at OFLC who reviews and validates prevailing wage determinations, Mr. Orona was also well positioned to provide a probative assessment concerning the validity of the survey and representative nature of the $12.50 prevailing wage. Yet, although he provided credible testimony regarding the importance of determining an accurate prevailing wage, and his hearing responses were generally straightforward and earnest, his testimony supporting the sufficiency to the Montana prevailing wage survey and the reliability of the associated prevailing wage of $12.50 has diminished probative value on multiple grounds.

During the initial portion of his testimony, Mr. Orona emphasized the importance of both determining an accurate prevailing wage and compliance with the Handbook's guidance. He also stated, that he only finds a prevailing wage survey deficient if the "deficiency impacts the data obtained through the survey." In finding the general farmworker prevailing wage survey still valid if the total population of the general farmworkers was 500 rather than the indicated 195, Mr. Orona implicitly concluded that the difference between Handbook recommended sample size of 250 workers for a total population of 500 workers, and the actual sample size of 195 was not a deficiency that impacted the survey data. However, the difference between the recommended and actual sample sizes becomes significant upon consideration that: a) the sample size of 195 actually represents only about 40% of the total population of 500, and b) the Handbook only permits a 40% level of sampling to establish a sufficient level of confidence in the prevailing wage developed from the sampled workers if the total worker population is at least greater than 800 workers. From that perspective, I consider the absence of 55 wage data points when the total population is only 500 workers to be a deficiency that adversely impacts the prevailing wage survey data – the determined prevailing wage.

Mr. Orona's acceptance of the June 24, 2013 prevailing wage survey is also specifically predicated on the assumption that the total population of general farmworkers is exactly 500. Yet, Ms. Harris actually estimated the number was "roughly 500," which undermines Mr. Orona's conclusion. Specifically, Mr. Orona was unable to state at what level of total worker population above 500 he would be able to conclude the sample size of 195 became insufficient. Similarly, if the total worker population was less than 500, than the Handbook's sample size becomes 100%, causing the Montana prevailing wage survey sample size of 195 to fall well

short of the Handbook's recommendation.[38] And, most significantly, for reasons previously discussed, I do not consider Ms. Harris' estimate of the total number of general farmworkers to be particularly probative. Consequently, Mr. Orona's ad hoc determination that the prevailing wage of $12.50 remains reliable and representative based on a speculative estimation of, rather than probative empirical data for, a total worker population of 500 is clearly inconsistent with the Handbook's stated purpose of requiring the SWAs to use survey methodology that will consistently establish a representative prevailing wage upon which all parties may rely.

Finally, and closely related, as Dr. Bronars acknowledged, in order to determine whether a prevailing wage survey sample size is of sufficient size to produce a representative prevailing wage, the total number of workers in the universe that is being sampled has to be known. In his testimony, Mr. Orona never represented that he knew the actual, total number of domestic workers in the state of Montana. And, without knowing the actual number of general farmworkers employed in Montana, Mr. Orona had no reasonable basis upon which to determine that the 195 farmworker wage data points in the prevailing wage survey were sufficient to have confidence that $12.50 is an accurate prevailing wage for general farmworkers in the state of Montana. As a result, Mr. Orona's testimony does not support a finding that the survey sample size in the June 24, 2013 prevailing wage survey was sufficiently valid to determine a reliable and representative prevailing wage for general farmworkers in Montana of $12.50.

June 24, 2013, ETA Form 232

Upon review, I find that on its face the June 24, 2013 ETA Form 232, EX 2 and EX 8, is a significantly, and given the importance of the deficient areas, fatally flawed prevailing wage survey. As a starting point, Section 2a indicates that the total number of employers with domestic workers in the general farmworker occupation is 360. Next, Section 3a discloses that of those 360 employers, 43 employers responded, and according to Section 4 provided wage information regarding 195 general farmworkers. Then, the form's glaring flaw appears in Section 2c which indicates that "TOTAL Domestic Workers" is "195"; a sum clearly derived from the 43 employers who responded to the survey, and not based on the sources set out in the SWA training for determining the total workers population to be sampled. Further, the entry of "195" in Section 2c could not possibly be correct because the 43 responding employers only compromised 12% of the 360 employers who have hired general farmworkers.[39] And, due to the absence of an accurate estimate of the total number of domestic workers in the general farmworker occupation in Montana at the time of the survey, the sufficiency of the ETA Form 232's sample size can not be determined under the Handbook's guidelines, which in turn precludes validation of the survey for use in determining a reliable and representative prevailing wage rate for Montana general farmworkers. In other words, absent information about the total number of domestic general farmworkers who might be working for the other 317 employers in the state at the time of the survey, the number of "Total Domestic Hired Workers" in Section 2c

[38]For example, if the actual total worker population was 475 workers, the Handbook survey sample size would be 475, significantly more than the 195 workers in the Montana prevailing wage survey sample.

[39]As recently discussed, Ms. Harris confirmed at the hearing that the "195" in Section 2c are not the total number of domestic workers.

is actually unknown.[40] And, without an accurate number for the whole state population of domestic general farmworkers in Section 2c, the June 24, 2013, ETA Form 232 is not sufficiently valid to demonstrate that $12.50 is a reliable and representative prevailing wage for the entire population of general farmworkers in Montana in February/March 2013.

Preponderance

For diverse reasons, the opinions and conclusions of Dr. Bronars, Ms. Harris, and Mr. Orona regarding the sufficiency and validity of the June 24, 2013 prevailing wage survey based on survey sample size, and reliability and representative nature of the resulting $12.50 prevailing wage have diminished probative value. The remaining probative evidence in the evidentiary record on survey sample size essentially consists of the Handbook, EX 1, and the June 24, 2013, ETA Form 232, EX 2 and EX 8. Consequently, for the reasons previously discussed, I find the preponderance of the probative evidence establishes that June 24, 2013 prevailing wage survey is not valid due to the absence of an accurate estimate of the size of the total population of general farmworkers in Montana at the time of survey which is required to establish the Handbook's survey sample size for the determination of a reliable and representative prevailing wage determination. The invalidity of the June 24, 2013 prevailing wage survey establishes that the survey's prevailing wage determination of $12.50 for general workers in Montana is not reliable or representative.

Conclusion

Several deviations from the Handbook guidelines occurred during the course of the Montana prevailing wage survey in the spring of 2013 and the preparation of the associated ETA Form 232. The preponderance of the probative evidence demonstrates that the variances associated with the timing/duration of the survey, the collection method, employee wage verification, and use of occupation rather than crop activity did not adversely affect the validity of the survey and the prevailing wage determination.

Regarding the remaining deviation, the preponderance of the probative evidence establishes that the Montana prevailing wage survey is invalid due to the absence of an accurate determination of the total population of general farmworkers upon which a sufficient sample size may be established. The invalidity of that survey in turn establishes that the prevailing wage determination of $12.50 is not reliable or representative. As a result, the Employers have proven by the preponderance of the probative evidence that their labor certification applications were sufficient for acceptance under the criteria established by 20 C.F.R. §§ 655.161 because the CO's determination to issue Notices of Deficiencies for their H-2A Applications for Temporary Employment Certification with offered hourly wages of $10.00 to $10.19 for general farmworkers in the state of Montana was based on a prevailing wage determination of $12.50 that is not reliable or representative. Accordingly, the CO's NODs for the eight labor certification applications must be reversed.

[40]Ms. Harris also testified that in the process of attempting to obtain wage information from 220 employers, some employers did not have any current workers and were entered as a non-response. However, Ms. Harris could not provide an actual number of "no responses," and acknowledged that she did not hear back from many employers and did not attempt to contact all the employers in the state.

ORDER[41]

The CO's eight Notices of Deficiencies concerning the named Employers are **REVERSED** and the associated labor certification applications are **REMANDED** for further processing.

SO ORDERED:

Digitally signed by RICHARD STANSELL-GAMM
DN: CN=RICHARD STANSELL-GAMM, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: January 29, 2013
Washington, D.C.

[41]Under 20 C.F.R. 655 § 655.171 this order represents the final determination of the Secretary, U.S. Department of Labor.