

**U.S. Department of Labor**

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**Issue Date: 25 September 2013**

Case No.: 2011-TNE-00002

In the Matter of

**ADMINISTRATOR,  
WAGE AND HOUR DIVISION**  
Prosecuting Party

v.

**PETER'S FINE GREEK FOOD, INC.**  
Respondent

Appearances: Molly K. Biklin, Esquire  
Susan B. Jacobs, Esquire  
Summer C. Smith, Esquire  
  
For Administrator

Paul De Camp, Esquire  
Robin C. Terry, Esquire  
Allan S. Rubin, Esquire  
JACKSON LEWIS, LLP  
For Respondent

Before: **THERESA C. TIMLIN**  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the Immigration and Nationality Act (“the Act” or “INA”) H-2B visa program, 8 U.S.C. § 1101(a)(15)(H)(ii)(B) and § 1182(n), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subpart A. Respondent, Peter’s Fine Greek Food, Inc. (“PFGF”), employs H-2B workers for its business selling Greek food at fairs and festivals throughout New York, Connecticut, New Jersey, Pennsylvania, and North Carolina. Peter’s Fine Greek Food’s sole shareholder and president is Pantelis (“Peter”) Karageorgis. Respondent’s regular course of business is to hire H-2B employees from Mexico for the fair season beginning in April and ending in October. The H-2B employees travel from fair to fair in trailers provided by PFGF. At the fairs, they set up “stands” or “posts” at which they cook and sell gyros, French fries and kabobs to fair patrons. During the fair, the employees live in trailers or, at times, in hotel rooms provided by PFGF. At the end of each fair, the employees tear down the stands and load the materials so they may travel to the next location. At the end of the fair season, the H-2B employees travel back to Mexico.

In 2010, PFGF submitted U.S. Department of Labor (“DOL”) Employment and Training Administration (“ETA”) Form 9142, also known as the *Application for Temporary Employment Certification* (“TEC”) to apply for the H-2B visas. Respondent’s former attorney filed the form

on behalf of Respondent and ETA approved the application. Following ETA approval, the Department of Homeland Security (“DHS”) also approved the request for H-2B visas and Respondent received permission to hire eighteen employees to work during the 2010 fair season. In the TEC, Respondent promised to pay a prevailing wage rate of \$10.71 per hour and to employ workers for forty hours per week. The Administrator, Wage and Hour Division (“WHD”), began investigating Respondent for violations on September 6, 2010 while Respondent was working at the New York State Fair in Syracuse, New York. Based on the investigation, the Administrator alleges that Respondent committed seven violations during the 2010 fair season, the subject matter of the instant litigation.

On March 18, 2011, Catherine Quinn-Kay, the Assistant District Director for the Syracuse Area Office of the Wage and Hour Division, issued the Administrator’s Notice of Determination, seeking to hold PFGF liable for seven violations under the Act and its regulations. Specifically, the Administrator found the following:

- 1) PFGF willfully misrepresented a material fact when it represented on the *Application for Temporary Employment Certification* that the hours of work would be forty per week with no overtime and a work schedule of 11 AM to 7 PM;
- 2) PFGF willfully misrepresented a material fact when it represented on the *Application for Temporary Employment Certification* that the rate of pay would be \$10.71 per hour;
- 3) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it failed to pay the wage that was actually offered;
- 4) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it failed to pay the outbound transportation for an employee;
- 5) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it failed to provide notice of early separation of employment of an H-2B worker to the Department and DHS within two work days;
- 6) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it placed H-2B workers at another employer’s work site without making a bona fide inquiry and/or without obtaining written confirmation from the other employer of non-displacement of U.S. workers when no layoff displacement had occurred; and
- 7) PFGF failed to cooperate in the investigation including failure to maintain and/or produce documentation as required.

(AX 1.)<sup>1</sup> The Administrator determined that Respondents owed back wages to employees to compensate their work during the 2010 fair season. Based on the testimony at hearing,

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<sup>1</sup> The following abbreviations will be used in this Decision: “AX” for Administrator’s Exhibits; “RX” for Respondent’s Exhibits; “Tr.” for the transcript of the hearing, which began on November 1, 2011 and concluded on December 7, 2011.

Administrator reassessed the back wages and determined that Respondent owes \$65,937.68 to nine H-2B employees. (Administrator's Brief at 21.) Respondent has already paid \$85,000.00 to employees in a settlement of a related charge alleged by the Department of Justice. (AX 47; RX 16.) The Administrator also assessed civil money penalties in the aggregate amount of \$50,500.00. (AX 1.) Respondent requested a hearing on the Administrator's determination. I held a hearing in New York over several days in November and December 2011, at which both parties presented witnesses and evidence. The Administrator and Respondent were both represented by counsel. The parties were afforded a full and fair opportunity to be heard.

At the hearing, I admitted the following Administrator's exhibits: AX 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 17-A, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 49-1, 49-3, 49-4, 49-5, 49-6, 49-7, 49-8, 49-9, 49-10, 49-12, 49-14, 49-15, 49-16, 50, 50-2, 50-3, 50-4, 50-5, 50-6, 50-7, 50-8, 50-9, 50-10, 50-12, 50-13, 50-14, 50-15, 50-16, 50-20, 50-21.

I admitted the following Respondent's exhibits: RX 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 27, 28, 30, 30A, 36, 37, 42, 43, 44, 51, 52, 54-A, 54-B, 54-C, 54-D, 54-E, 54-G, 54-H.

Some of Respondent's exhibits were admitted subject to an adverse inference or with excluded portions: RX 19; RX 27; RX 28; RX 30; RX 30A; RX 36; RX 51. At the hearing, the Administrator argued that the imposition of an adverse inference was appropriate based on Respondent's delay in producing the documents. (Tr. 998.) The Administrator averred that the documents, which had been repeatedly requested since the beginning of the Wage and Hour investigation, were not produced until three weeks before the hearing. (Tr. 992-93.) I considered the arguments of the parties. Respondent did not adequately explain why, despite the fact that the documents record events that took place in 2010 and the Administrator made several requests for their production, the documents were not produced until October 2011. Based on Respondent's delay in producing the documents, including at least one exhibit (RX 30A) which was not produced until the date of the hearing, I draw an adverse inference against the late-produced documents. See Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 112 (2d Cir. 2002) (holding that adverse inference sanctions can be applied pursuant to a finding of "purposeful sluggishness").<sup>2</sup> I find that the documents are entitled to some weight, but only in the absence of more reliable evidence.

In addition, the following exhibits were offered but excluded: AX 30, RX 50, RX 54-F.

The following witnesses testified at the hearing: Ruth Beltran, David An, Jorge Alvarez, Michael Lonesky, Catherine Quinn-Kay, Jose Luis Olmos Rodriguez, Horacio Tirado Ortiz, Ernesto Navarro Lopez, Armando Navarro Luna, Jonathan Dominguez Espinoza, Joaquin Moran Velazquez, Saul Galicia Aguilar, Delfino Cabrera Perez and Peter Karageorgis. The parties submitted post-hearing briefs. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

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<sup>2</sup> In addition, I note that the late production of the employee timesheets (RX 27) created an inference that the documents were created for purposes of litigation.

## I. STATUTORY FRAMEWORK

This matter arises under the H-2B visa provision of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and the applicable regulations at 20 C.F.R. Part 655, Subpart A.<sup>3</sup> The H-2B visa program provides for the admission of foreign workers to the United States to perform temporary non-agricultural work if there are not sufficient domestic workers to perform such services or labor. 20 C.F.R. § 655.1(a). To obtain employees on H-2B visas, an employer must obtain certification from the Department of Labor, Employment and Training Administration by filing an *Application for Temporary Employment Certification*. 20 C.F.R. § 655.20. An employer must demonstrate that (1) there are not sufficient U.S. workers who are capable of performing the temporary service or labor at the time of filing the petition for H-2B classification and at the place where the foreign worker is to perform the work; and (2) the employment of a foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1.

Among other things, an employer filing an application must obtain a prevailing wage determination, place a job order with a state workforce agency, and publish two print advertisements seeking domestic employees. 20 C.F.R. § 655.15. As part of the application, an employer seeking H-2B labor certification must attest that it will abide by the conditions outlined in 20 C.F.R. Part 655, Subpart A, including paying the offered wage and following the proper procedures for early separation of employment and for placing H-2B workers with other employers. 20 C.F.R. § 655.22. If certified, an employer then submits Form I-129 to the Department of Homeland Security, United States Citizenship and Immigration Services (“USCIS”) along with the certified application. 20 C.F.R. § 655.32; 8 C.F.R. § 214.2. “The employer’s acceptance of [the] obligations is re-affirmed by the employer’s submission of the petition (Form I-129), supported by the labor certification.” 20 C.F.R. § 655.65(f).

The Wage and Hour Division Administrator investigates and enforces the H-2B visa program under §§ 1101(a)(15)(H)(ii)(b), 103(a)(6), and 214(c) of the INA, pursuant to the delegation from the Secretary of Homeland Security to the Secretary of Labor. 20 C.F.R. § 655.50. When under investigation by the Administrator, an employer “shall make available to the WHD Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect.” 20 C.F.R. § 655.50(c). The Administrator determines whether an employer (a) filed a petition with ETA that willfully misrepresents a material fact, (b) substantially failed to meet any condition of the application or form I-129, or (c) misrepresented a material fact to the State Department during the visa application process. 20 C.F.R. § 655.60. Where an employer does not comply with the H-2B

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<sup>3</sup> The Department of Labor has announced the continuing effectiveness of the 2008 H-2B rule. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 28,764, 28,765 (May 16, 2012). Therefore, all references in this order are to the 2008 regulations, which went into effect in 2009. The interim rule issued on April 24, 2013 does not affect this decision; it concerns the vacated portions of the regulation relating to the determination of the applicable prevailing wage rate. The instant matter, on the other hand, concerns whether Respondent failed to pay employees at the prevailing wage to which he agreed in the *Application for Temporary Employment Certification*. Therefore, any change in the regulations about how prevailing wages are determined is immaterial. See 78 Fed. Reg. 24,047 (Apr. 23, 2013).

program, the Administrator may impose administrative remedies, including civil money penalties and back pay. 20 C.F.R. § 655.65. When determining whether an employer willfully failed in its obligation to pay wages, “a ‘willful failure’ means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or [subpart A].” 20 C.F.R. § 655.65(e) (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988); Trans World Airlines v. Thurston, 469 U.S. 111 (1985)). “[T]he highest penalties shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers.” 20 C.F.R. § 655.65(g). The regulations also provide a non-exhaustive list of seven factors which may be considered when determining the amount of civil money penalties to assess. 20 C.F.R. § 655.65(g)(1)-(7).

If the Administrator determines that an employer violated the program and owes back wages or civil money penalties, the Administrator must serve its determination on the employer. 20 C.F.R. § 655.70. Thereafter, if the employer disagrees with the Administrator’s determination, it may request a hearing. 20 C.F.R. § 655.71. In the instant matter, the Administrator issued a determination letter on March 18, 2011, informing Respondent that Wage and Hour determined that violations occurred for which it assessed \$115,900.88<sup>4</sup> in back wages and \$50,500.00 in civil money penalties. (AX 1.) Respondent requested a hearing and the matter is now before me for review.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Evidence

#### 1. Testimony

##### a. *Ruth Beltran*

Ruth Beltran, lead Wage and Hour investigator in this matter, testified that she held an initial conference with Karageorgis and conducted employee interviews on September 5 and 6, 2010 at the New York State Fair. (Tr. 22-25, 30-31, 104.) She individually interviewed ten employees in Spanish and wrote down their responses. (Tr. 30-31.)<sup>5</sup> Beltran stated that Spanish is her first language and that she learned English at age twelve or thirteen. (Tr. 215-16.) She testified that she wrote down everything related to the investigation, but left out small talk.

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<sup>4</sup> After the hearing, Administrator revised the back wages figure. The Administrator now assesses that \$65,917.68 remains due to nine employees. (Administrator’s Brief at 9.) The Administrator did not revise the assessment of civil money penalties.

<sup>5</sup> Respondent objected to the interview statements as hearsay. (Tr. 33, 59, 69, 74, 79, 83, 92, 96, 103.) Beltran admitted that the notes were in her handwriting and that she paraphrased and summarized. (Tr. 43, 48.) She stated she normally told employees that it was voluntary to speak to her. (Tr. 53-54.) I noted Respondent’s objection and admitted the interview statements. (Tr. 54, 59, 69, 74, 79, 83, 92, 96, 103.) According to 20 C.F.R. § 655.71(b), in hearings under this subpart, “The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 C.F.R. part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.” I find the interview statements to be relevant and probative without being unduly repetitive.

(Tr. 32.) She described how she reviewed the statement with each employee, allowed him to make corrections, and asked him to sign. (Tr. 33.) Afterward, she translated the statements from Spanish to English. (Id.)

At the hearing, Beltran testified about the initial conference with Karageorgis. (Tr. 104-08.) Beltran stated that Karageorgis told her that he paid some employees \$8.00 or \$9.00 per hour and the rest \$7.25 per hour in cash at the end of every fair. (Tr. 106.) Beltran recalled that she asked for documents, including a copy of the labor certification, a list of H-2B employees, and a record of hours and payments, but Karageorgis said he did not have them with him. (Tr. 107-08.)

Beltran identified various exhibits, including documents she received during her investigation. (Tr. 109, 111, 125.) She received some documents from PFGF via fax from attorney Malcolm Seheult<sup>6</sup>, but did not receive every document she requested. (Tr. 109, 111, 114.) She testified that attorney Chad Edgar e-mailed to inform her that he was representing Karageorgis and that he would take her request for records under advisement. (Tr. 115.) Beltran also received a file from USCIS and ETA with various documents pertaining to her investigation. (Tr. 125-26.) Nonetheless, she stated she never received documentation of payments or hours worked. (Tr. 114.)

From her investigation, Beltran concluded that many employees were paid “random amounts” after fairs and that many employees “had not been paid for at least a month.” (Tr. 65.) She found no correlation between the payments that employees reported and the \$10.71 per hour wage. (Tr. 65-66.) She also concluded that employees worked more than forty hours per week and generally worked every day of the fair from opening or earlier to closing or later. (Tr. 147.) She admitted that she did not have knowledge of any payments made to employees after the New York State Fair. (Tr. 168.)

*b. David An*

David An testified that he is a DOL Wage and Hour investigator in the Brooklyn, New York Area Office. (Tr. 378, 382.) He stated that he worked on the PFGF investigation, taking interview statements in Astoria, New York along with Wage and Hour investigator Jorge Alvarez. (Tr. 380-82.) He testified that he is fluent in Spanish, in which he has a Bachelor’s degree and which he studied for over nine years. (Tr. 383.) He explained that on September 9, he interviewed employees at a trailer parked next to a car wash owned by Karageorgis and at a hotel room across the street from the car wash. (Tr. 381, 387-88, 391.) In addition, he stated that he spoke to Karageorgis and arranged for Karageorgis to pay each employee \$300.00 on the night Investigator An conducted his employees interviews. (Tr. 386-87, 432.) He testified that while he was interviewing employees, agents from the U.S. Department of Homeland Security, Immigration and Customs Enforcement arrived. (Tr. 428.) He stated that he did not know the agents were coming and had no contact with them prior to that day. (Id.)

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<sup>6</sup> Karageorgis used attorney Seheult to prepare the 2010 TEC. Seheult also provided documents to WHD in the beginning of the investigation. At some point, Karageorgis switched to attorneys Dawn Cardi and Chad Edgar, who represented him during the settlement of the criminal complaint, and eventually switched to present counsel for representation in this matter.

Investigator An stated that he interviewed seven employees<sup>7</sup> and that the employees were gathered as a larger group for the first interviews and then dwindled in number as employees left after being interviewed. (Tr. 456-57, 385.) He testified that each employee he interviewed read and signed the statement which they went over together. (Tr. 390.) An stated that typically, employees told him they worked from 8:00 in the morning to 12:00 at night. (Tr. 389.) He concluded that “breaks were really hard to come by and they really did not get one, if at all.” (Id.) He found that the amount of payment varied by individual and all employees stated that they were owed money. (Tr. 389.) According to An, the employees were typically paid after each fair, but some of the employees said they had not been paid for the last four fairs, while other employees said they were paid after Buffalo, but not yet paid after Syracuse, which had just ended. (Tr. 470-75.) According to An, the employees expected to be paid on the day of the interview. (Tr. 459-60.) An recalled that some employees did not know how much they expected to be paid, while others seemed to have an expectation. (Tr. 476-77.)

An further testified that when he spoke to Karageorgis, Karageorgis told him he planned to pay the employees either that day or the day after. (Tr. 431.) An recalled that he contacted Karageorgis at home that evening to ask him to return with money to pay his employees. (Tr. 430.) He stated that Karageorgis returned and paid each available employee \$300.00 in cash that night. (Tr. 432.) An testified that he created a record of the \$300.00 payment and a previous \$100.00 payment, which employees told him they had received the day before from Karageorgis. (Tr. 414, 432.) An stated that Karageorgis was cooperative, provided information, and allowed An to do his interviews without interference. (Tr. 454-55.) He did not alert Karageorgis that ICE agents had arrived on the site because it was not his job to do so. (Tr. 436-37.)

*c. Jorge Alvarez*

DOL Wage and Hour investigator Jorge Alvarez testified that he interviewed employees in Spanish for the PFGF investigation on September 9, 2010. (Tr. 510-13.) Spanish, he explained, is his first language. (Tr. 513.) He stated that, after he and investigator An introduced themselves to the employees, some employees wanted to go to the laundromat, so he accompanied them and took statements there. (Tr. 513-14.) He said he took the statements one-on-one and had the employee sign the statement afterward. (Tr. 514.) Alvarez believed he interviewed six employees.<sup>8</sup> (Tr. 538.) He explained that he wrote down what the employees told him, but did not write down every word in the interview; rather he said he recorded “what I

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<sup>7</sup> Respondent objected to the interview statements as unreliable hearsay. (Tr. 400, 404, 410, 413, 418, 422, 426.) On voir dire, Investigator An admitted that the interview statements do not show the questions he asked, that he did not record answers he found impertinent or record some of the discussions amongst the employees. (Tr. 395-97.) He stated that he told employees that it was their choice whether to speak to him. (Tr. 410.) I noted Respondent’s objections and admitted the interview statements based on Section 655.72 as being relevant and probative without being unduly repetitive. (Tr. 400, 404, 410, 413, 418, 422, 426.)

<sup>8</sup> Employer objected to the interview statements as hearsay and as unreliable for the reasons argued previously. (Tr. 523, 527, 531, 535.) I noted the objections and admitted the interview statements based on Section 655.72. (Tr. 524, 527, 531, 535.)

thought was specifically relevant to the case.” (Tr. 517.) He left out small talk like what the employee did back home. (Id.)

He testified that the employees generally told him that they worked twelve hour days, more than forty hours in a week, and had no true meal breaks so they did not eat until nighttime. (Tr. 515.) He stated that employees told him that they received a lump sum cash payment for some fairs, but sometimes did not receive any payments for extended periods. (Tr. 516.) He recalled that the employees showed him their employment contracts which promised an hourly rate of \$10.71. (Id.) The employees mentioned being paid \$100.00 the day before the interviews, but they did not discuss whether they expected to be paid that day. (Tr. 545.)

Investigator Alvarez testified that the employees spoke of a coworker who was terminated due to a dispute with Karageorgis, causing the coworker to beg in the streets so he could buy a ticket back to Mexico. (Tr. 516-17.) However, Alvarez stated that he did not write down that information in the interview statements because it was said during the walk to the laundromat and he could not say who provided the information. (Tr. 548-50.)

*d. Michael Lonesky*

Wage and Hour investigator Michael Lonesky testified that he computed back wages for the PFGF investigation. (Tr. 565-66.) He explained that he relied on interrogatory responses, employee interview statements, and Karageorgis’ deposition to calculate the figures; he also said he used internet research and conversations with fair representatives to ascertain the fair dates. (Tr. 567.) He explained that he based his calculations on “a conservative estimate that everyone worked every day at every fair” and computed work days by using the fair dates with additional time for setup, preparation, cleanup, and teardown. (Tr. 574-78.) He stated that he assumed that all of the daily closing work occurred after the fair closed. (Tr. 636.) He testified that he used the prevailing wage rate from the TEC. (Tr. 580.) Due to the lack of records provided by PFGF, Lonesky testified, he did not give credit for breaks, meals, or housing. (Tr. 579.) However, he acknowledged that more than one employee stated that he took meal breaks. (Tr. 665-66.)

According to Lonesky, he determined “pay received” solely by employee statements because there were no records of other payments. (Tr. 580.) Consequently, he did not give credit for any payments to employees who were not interviewed; hence, those employees were (in the absence of other proof) presumed to have not been paid at all. (Tr. 587-88.) Once he calculated the back wage figure, he explained, he offset it by any payments in the settlement with the Department of Justice. (Tr. 593.) As a result, Lonesky determined that some employees were not owed any money, having been paid at least as much or more than they were due. (Id.) At the hearing, Lonesky agreed that if the information in RX 27, 28, 30, and 51 reflected payments that the employees received, it would affect his calculations of back wages. (Tr. 616.)

Lonesky testified that he did not use various facts from employee statements which would have lessened the amount of back wages due: for example, he did not give credit for days off when some employees stated that they had as much as one month off. (Tr. 616-25.) He stated that he calculated back wages for the full fair period despite some employees’ statements that they worked fewer days. (Tr. 637, 640, 651-52, 655-57, 660-61.) In addition, he

acknowledged that he disregarded a statement that an employee worked fewer daily hours than the calculations. (Tr. 629-30.) Lastly, Lonesky admitted that the back wage calculations do not include any time for breaks despite some employee statements that they took breaks. (Tr. 642-43, 648-49, 663.) He explained his various reasons for choosing not to credit parts of employee statements: some he found inconsistent with the employees' other statements (Tr. 619); others he found inconsistent with Karageorgis' statements (Tr. 637-38) or with the fair hours (Tr. 651-52); and some he could not verify without additional records (Tr. 651-52.) He explained that he had "no reason to believe that these employees [had] time off, days off, anything like that. So . . . [he] used the entire time the fair was open as the time they worked." (Tr. 662.)

*e. Catherine Quinn-Kay*

Catherine Quinn-Kay, Assistant District Director in the Syracuse Area Office of the Wage and Hour Division, testified that she has worked for Wage and Hour for thirty-five years and that she supervises Michael Lonesky and Ruth Beltran. (Tr. 691-92.) At the hearing, she explained the seven violations which Wage and Hour asserts against PFGF and the bases for those determinations. (Tr. 696-27.) She also testified about which records Wage and Hour received from PFGF and which requested records PFGF never provided. (Tr. 728-31, 749-55.)

Quinn-Kay explained that Wage and Hour found that PFGF committed seven violations: (1) PFGF willfully misrepresented a material fact when it represented on the *Application for Temporary Employment Certification* that the hours of work would be forty per week with no overtime and a work schedule of 11 AM to 7 PM. (Tr. 696); (2) PFGF willfully misrepresented a material fact when it represented on the *Application for Temporary Employment Certification* that the rate of pay would be \$10.71 per hour (Tr. 704-05); (3) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it failed to pay the wage that was actually offered (Tr. 712); (4) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it failed to pay the outbound transportation for an employee (Tr. 716-17); (5) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it failed to provide notice of early separation of employment of an H-2B worker to ETA/USCIS within two work days (Tr. 718); (6) PFGF substantially failed to meet a condition of the *Application for Temporary Employment Certification* when it placed H-2B workers at another employer's work site without making a bona fide inquiry and/or without obtaining written confirmation from the other employer of non-displacement of U.S. workers when no layoff displacement had occurred (Tr. 720-21); and (7) PFGF failed to cooperate in the investigation including failure to maintain and/or produce documentation as required (Tr. 727).

Quinn-Kay stated that Wage and Hour requested records from PFGF several times. (Tr. 728.) In particular, she recalled a records request which included bolded language to emphasize that it was Wage and Hour's second request and that failure to provide the records would be considered a failure to maintain or make available documents and a failure to cooperate with the investigation. (Tr. 729.) While PFGF did provide some documents (Tr. 730-31), PFGF did not provide form I-129 (Tr. 731) or contact information for the H-2B employees (Tr. 749). PFGF also did not provide actual hours of work, rates of pay, earnings, net pay, or a copy of payroll for all employees, as requested. (Tr. 750.)

Quinn-Kay testified that Wage and Hour assessed civil money penalties for the above violations and explained that she used the factors found at 20 C.F.R. § 655.65 to determine the amounts. (Tr. 701-04, 711, 715-18, 720, 726-27, 755-57.) She stated that PFGF's failure to produce the requested documentation made the investigation process more difficult because Wage and Hour had to reconstruct the hours and payments based on various sources including employee interviews and information about the fairs. (Tr. 757.) She stated that she was not aware of any payments to employees that were not reflected in the back wage calculations. (Tr. 793.) She stated that she did not have a strong belief in PFGF's future compliance based on its past compliance. (Tr. 796-97.)

*f. Jose Luis Olmos Rodriguez*

Jose Luis Olmos Rodriguez ("Olmos Rodriguez") testified that he worked for PFGF in 2010 on an H-2B visa. (Tr. 224.) He stated that he worked the Meadowlands Fair (Tr. 225), Orange County Fair (Tr. 232), New Paltz Fair (Tr. 238)<sup>9</sup>, disassembled a post at the Buffalo Fair (Tr. 242), and worked the New York State Fair (Tr. 242). He stated that he also worked for Karageorgis' friend for six days at a company he thought was called Demetri's. (Tr. 240.) He explained that his work for PFGF consisted of cutting vegetables, distributing sodas, ice, or meat, and cooking shish kabobs on the coal grill. (Tr. 226.) He also described how the employees had to set up and tear down the posts: "one had to wash everything almost, such as the tarp, tent tarps, level the ground, seek the water connections, gas connections, lights, electricity, assemble the post's structure, and set up everything like for instance the stoves, the refrigerators . . . ." (Tr. 233.) He estimated that it took approximately six hours to disassemble the stands at Orange County (Tr. 237), three hours at Buffalo (Tr. 242), and nine hours at the New York State Fair (Tr. 245-46). He estimated that daily preparation before the fair took about two hours at New Paltz and the Meadowlands. (Tr. 228, 239.) Clean up, he testified, began about an hour and a half prior to closing. (Tr. 239.) Overall, he estimated that employees worked about three hours each day beyond the fair hours. (Tr. 262.)

He stated that he had one day off in New Paltz. (Tr. 286.) He testified that he took breaks of no more than fifteen minutes to eat and also took bathroom breaks. (Tr. 229, 236, 245, 309, 310.) He described how, at one fair, when it was not crowded, he had time to buy food; but at other fairs, he did not have the time or money and so he only ate at the stand. (Tr. 310.) He was not charged for housing, food, or drink. (Tr. 315.) He stated that there were bed bugs in the trailers which returned after fumigation. (Tr. 231.)

Olmos Rodriguez testified that he gave an interview to a DOL investigator in Queens. (Tr. 247.) He testified that, in the interview statement, "some things had to be corrected because, when they gave me that interview . . . we were about five people around an interviewer, and we were talking more than one at the same time." (Tr. 319.) He stated that he signed the interview statement, but he did not read the statement, and the investigator did not read it to him at that time. (Id.)

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<sup>9</sup> The New Paltz fair was referred to as "New Paltz," "Newport" and "Ulster County" in materials contained in the record.

Olmos Rodriguez testified that Karageorgis paid him twelve hundred dollars in cash for his three weeks of work at the Meadowlands Fair. (Tr. 231.) He recalled that he sent part of the payment to Mexico. (Tr. 273.) He stated that other employees told him it would be difficult to send money at certain fairs. (Tr. 275.) However, he did not believe that any employees told him that they asked Karageorgis to hold their money and he did not ask Karageorgis to hold his. (Tr. 275, 239.) He stated that he was not paid for the Orange County Fair, the New Paltz Fair, or the New York State Fair prior to the criminal settlement. (Tr. 236, 239, 245.) He stated that he received \$100.00 before the Orange County fair (Tr. 287), \$300.00 the night the investigator came to Astoria (Tr. 327), and \$100.00 the day before the investigator's visit (Tr. 327). He received \$9,500.00, on top of his other payments, as a result of the criminal matter. (Tr. 314-15.)

*g. Horacio Tirado Ortiz*

Horacio Tirado Ortiz ("Tirado Ortiz") testified that he worked for PFGF under an H-2B visa in 2010, starting on June 17, 2010, the day he landed in the United States. (Tr. 332-33.) He stated that he worked at the Meadowlands Fair (Tr. 333), Orange County Fair (Tr. 336), New Paltz Fair (Tr. 338), Syracuse Fair (Tr. 341), helped to disassemble stands at the Buffalo Fair (Tr. 340) and also worked eight or nine days for Demetri's (Tr. 339-40). He estimated that he worked eleven to twelve hours each weekday and longer on the weekends while at the Meadowlands. (Tr. 334.) He stated that he worked twelve or thirteen hours each day at Syracuse. (Tr. 341.) He reported that assembling the stands sometimes took two or three days and as many as eleven to thirteen hours. (Tr. 336, 338, 363-64.) He related that it took about seven hours to disassemble the stands at Meadowlands (Tr. 335) and nine or ten hours to disassemble at Buffalo (Tr. 340-41). According to Tirado Ortiz, the employees began preparing about an hour and a half or two hours before the fair opened at various fairs. (Tr. 354, 360.) He testified that they sometimes stayed one hour after the fair closed to clean up, although sometimes they cleaned up during the last hour of the fair and finished by fair closing. (Tr. 355.) He stated that he did not work the last few days of the Orange County Fair because he was sick. (Tr. 337.) According to Tirado Ortiz, his meal breaks were between fifteen and twenty minutes long. (Tr. 337, 339, 341.) He stated that he was allowed to use the restroom if he informed Ernesto [Navarro Lopez], who was in charge of the stand. (Tr. 370.) He related that he could eat anywhere he chose, but he did not go elsewhere. (Tr. 371.)

Tirado Ortiz testified that he received \$1,300.00 after the Meadowlands Fair, then another \$100.00 sometime later in September. (Tr. 374.) When he was sick at the Orange County Fair, Karageorgis gave him \$150.00 for the doctor and \$50.00 for a prescription. (Tr. 346-47.) He said customarily, he wired money home to his family. (Tr. 357.) However, he said he never heard of PFGF employees asking Karageorgis to hold their pay until they were able to wire money home. (Tr. 372.) He testified that, prior to the [Department of Justice] settlement, he was not paid for his work at Orange County (Tr. 338) or New Paltz (Tr. 339). After the criminal case, he received an additional \$9,500.00 in payment. (Tr. 349.) He believes that, even after the criminal case, Karageorgis still owes him money, although he did not know how much. (Tr. 348.) He also stated that he remembers receiving some money and signing a document before a Wage and Hour investigator in Astoria, New York. (Tr. 376.)

He testified that a Wage and Hour investigator interviewed him in New York in Spanish and that he signed the statement which was accurate. (Tr. 342.) He also testified that while he was in Mexico, Armando [Navarro Luna] asked that he sign a paper “to say that I had no problem with [Karageorgis], that I was in good terms with that, that he had—which he had paid me so that I could return back to the U.S. with the same visa, and work for him.” (Tr. 342-43.) He did not sign the paper because, he explained, “I have given a statement previously with regards to the criminal case, and I did not want to contradict myself.” (Tr. 343.)

*h. Ernesto Navarro Lopez*

Ernesto Navarro Lopez (“Navarro Lopez”) testified that he worked for PFGF for nine years, including 2010. (Tr. 844-45.) He stated he planned to return next year to work for PFGF and he understands that he will need an H-2B visa. (Tr. 904.) Regarding his work in 2010, Navarro Lopez testified that setup took five or six hours although it could take seven or eight hours. (Tr. 864.) He stated that teardown took four or five hours. (Tr. 868.) According to Navarro Lopez, the employees started working one hour before the fair opened to prepare each day (Tr. 869) and cleaned up for one hour at the end of the day (Tr. 869). He stated that they waited until the fair closed before cleaning up. (*Id.*) He testified that he took breaks to eat twice a day for about one hour each. (Tr. 858.) The employees, he explained, had to stagger breaks so that there would be people at the stand, but there was no schedule. (Tr. 927.) When he took his breaks he would “just walk around the fair looking at all the stands, or go see the other coworkers at the other stands” or talk on the phone. (*Id.*) He stated that Karageorgis did not charge for food or drink at the stand. (Tr. 875.) Regarding days off, he explained, “The boss would say, hey, take your day off. And then one would say, okay, I’ll take today, the other one would say, okay, I’ll take tomorrow.” (Tr. 927.) He stated that he had one day off at every fair. (Tr. 927-28.)

Navarro Lopez testified that an investigator from the Department of Labor interviewed him. (Tr. 846-47.) However, he said the interview “was more like a conversation” between the investigator and three employees. (Tr. 850.) Navarro Lopez testified that he signed the interview statement without reviewing the whole document, that there were inaccuracies, and that the statement was not in his own words. (Tr. 852-58.) He also stated that the investigator did not ask him to read the statement and did not read the statement to him. (Tr. 862-63.)

Navarro Lopez testified that he was paid after each fair, except during the month of July. (Tr. 863.) He stated that sometimes he asked Karageorgis to hold his pay while they traveled because he had no means of depositing the money. (Tr. 863.) When he was paid, he explained, he would hold a little for himself and send the rest to Mexico. (Tr. 934.) He described how Karageorgis would call the employees together and hand out cash. (Tr. 863.) He stated that Karageorgis paid for travel at the end of the season, including in 2010. (Tr. 863-64.) He testified that, to his knowledge, he has been paid for all the time he worked for PFGF. (Tr. 897-98.) He stated that he expected to be paid in the days following the investigator’s visit. (Tr. 929-30.) He stated that he received payments of \$2,000.00, \$200.00, \$300.00, \$3,450.00, \$4,549.00, and \$445.10 as reflected on receipts. (Tr. 872-75.)

According to Navarro Lopez, each employee kept his own schedule. (Tr. 914.) He stated that he kept a written schedule which Karageorgis would check. (*Id.*) He did not know where his handwritten record of hours was or what he did with it. (Tr. 928-29.)

*i. Armando Navarro Luna*

Armando Navarro Luna (“Navarro Luna”) testified that he worked for PFGF for ten years including 2010. (Tr. 955.) He stated that he wants to return to PFGF and is aware that he will need an H-2B visa. (Tr. 1026-27.) When he is in Mexico, he and his wife sell small crafts and clothing two or three times a week, although he said they make only a little to support their household expenses. (Tr. 1040.) He did not believe that he ever worked for PFGF without being paid. (Tr. 956.)

Navarro Luna stated that, for every stand at every fair, four or five people set up for four or five hours. (Tr. 970-71.) He estimated that it took four or five hours to tear down a stand. (Tr. 971.) He testified that employees arrived an hour before the fair opened to prepare. (Tr. 973.) He also stated that it took a half-hour to an hour to clean up at the end of a night. (Tr. 974.) However, he explained, they began cleanup before the fair closed to save time. (*Id.*) According to Navarro Luna, the employees regularly left an hour after the fair closed. (Tr. 975.) He stated that he took three breaks of a half-hour to an hour each. (Tr. 977-78.) He testified that his coworkers took the same breaks. (Tr. 978.) He related that he ate and drank from the stand without restriction or charge. (Tr. 979.) He testified that he had days off during all of the fairs (Tr. 982-83, 1044-45) and days of rest in between fairs (Tr. 1045).

Navarro Luna believed he was paid \$10.71 an hour for all the hours he worked in 2010. (Tr. 983.) For payment in 2010, according to Navarro Luna, the employees would write their hours down on a piece of paper (although, he said, “the boss already knew the hours”) and then Karageorgis calculated their pay and paid them by the fair. (Tr. 984.) He estimated that he earned \$1,000.00 for a six day fair and about \$2,000.00 for a twelve day fair. (Tr. 985.) He stated that they were paid in cash with a receipt. (Tr. 986.) However, he admitted that Karageorgis did not use receipts before September 2010. (Tr. 1048.) For 2010, he said he made about \$12,000.00 or \$13,000.00 in total from working at PFGF. (Tr. 985.) However, Navarro Luna admitted that, at an earlier deposition, he had said both that he was paid by the day at \$120.00 to \$130.00 and that he was paid by the fair. (Tr. 1030.) At the deposition, he estimated that he would earn \$1,400.00 or \$1,500.00 for a ten day fair. (Tr. 1030-31.)

He stated that he and other employees asked Karageorgis to hold money for security. (Tr. 1004.) He testified that Karageorgis would give the employees money when asked. (Tr. 1005.) He related that he only asked for small payments until the end of the season when Karageorgis would pay him in full. (Tr. 1047-48.) He testified that, in 2010, he received payments of \$2,000.00, \$4,050.00, \$8,000.00, \$100.00, \$3,000.00, \$445.00 for his air ticket, and \$2,000.00. (Tr. 1002-18.) Lastly, Navarro Luna testified about coworkers Rafael Hernandez Alvarez, Artemio Hugo Pacheco Flores, and Victor Manuel Vazquez Garcia. He testified that Hernandez Alvarez departed due to family problems and was not, to his knowledge, terminated by PFGF. (Tr. 1019-20.) He testified that Pacheco Flores and Vazquez Garcia only worked for PFGF during the Syracuse Fair. (Tr. 1020-24.)

*j. Jonathan Dominguez Espinoza*

Jonathan Dominguez Espinoza (“Dominguez Espinoza”) testified that he worked five seasons with PFGF as an H-2B employee. (Tr. 1059.) He stated that he believes he was always paid for the hours he worked for PFGF, including for the hours in 2010. (Tr. 1060-61.) He would like to return to PFGF next year on an H-2B visa. (Tr. 1104.) In Mexico, he paints houses, performs masonry work, and does other jobs. (Tr. 1115.) Regarding his work in 2010, he stated that it took three to five hours to set up a post, depending on whether all employees assembled one post or four or five employees assembled one post. (Tr. 1063-65.) Teardown, he stated, took at the most four or five hours. (Tr. 1066.) He estimated that, in the mornings, the employees arrived a half-hour or an hour before opening to prepare. (Tr. 1067.) Cleanup, he said, took about a half-hour or an hour and sometimes began a half-hour before fair closing. (Tr. 1067-68.) He estimated that they left the fair a half-hour or an hour after closing. (Tr. 1069.) He testified that he received daily breaks at whatever time he wanted. (*Id.*) He recalled that he would take one break during shorter days and two or three breaks during longer workdays. (*Id.*) He stated that his breaks varied in length depending on the day, from a half-hour to an hour. (Tr. 1069-70.) He also testified that he took days off during fairs; he estimated that he could take a day every week or perhaps more and said that Karageorgis never denied his request for a day off. (Tr. 1070-71.)

Dominguez Espinoza testified that he asked Karageorgis to hold his pay “because otherwise I would spend it or else there were no place where to send it from.” (Tr. 1078.) He explained that when he needed money he asked Karageorgis who never denied his request. (Tr. 1079.) He stated he was paid in cash and by the fair. (Tr. 1077-80.) According to Dominguez Espinoza, Karageorgis began using receipts toward the end of 2010. (Tr. 1086-87.) At the hearing, he identified signed receipts for payments he received from PFGF. (Tr. 1088-10.) He remembered that he purchased his airfare ticket along with Armando, Ernesto, Joaquin, Delfino, and Saul and that Karageorgis reimbursed them. (Tr. 1101.)

He identified his signature on an interview statement, but said that he only remembered seeing the document about a week ago. (Tr. 1083-84.) He testified that after speaking with the investigator, she asked him to read it, but he was in a hurry, so “she said that’s fine, just sign over here.” (Tr. 1085.) When he read the interview statement, he thought it was inconsistent with what he had said: “I cannot speak that way about my boss. I had no reason to express myself like that. I have never had any problem with him. I have never complained about my work, and I have always had good friendship with him. . . . I been coming for different seasons, several seasons, and, frankly, I do not have reason to talk that way about him.” (*Id.*)

*k. Joaquin Moran Velazquez*

Joaquin Moran Velazquez (“Moran Velazquez”) testified that he worked for PFGF in 2010 and spoke with a Department of Labor investigator that year. (Tr. 1125.) He related that he wants to return to PFGF on an H-2B visa next year. (Tr. 1166.) Regarding his work in 2010, he estimated that it took six hours to set up a post over one to three days. (Tr. 1157.) He testified that he personally would spend five hours on setup and four or five hours on teardown.

(Tr. 1158.) He estimated that daily preparation took a half-hour or an hour and cleanup took twenty minutes to an hour. (Tr. 1158-59.) He said he would take two to three breaks of about a half-hour to an hour. (Tr. 1160-61.) He estimated that for fairs that were not busy, he would take two hours in total and for busier fairs he would take one hour or more for his breaks. (Tr. 1161.) He stated that fairs sometimes closed in 2010 due to weather. (Tr. 1176.) He testified that he received days off, either a whole or a half day, depending on the fair. (Tr. 1177.)

Moran Velazquez testified about his interview with the investigator: he stated that the investigator spoke to them in “English and Spanish a little. Not very well.” (Tr. 1129.) Moran Velazquez stated that his native language is Spanish and that he speaks a little English. (Tr. 1129.) He stated that the interviewer talked with the employees as a group, asking questions which were not directed at one person. (Tr. 1129.) He stated that the investigator asked him to read the statement before signing it, but he just signed it and left because he wanted to go. (Tr. 1132.) The investigator did not read the document to him. (Tr. 1133.) He testified that he can read Spanish, he attended college, and, in his opinion, the investigator’s Spanish in the interview statement is “not the way that one would write in Spanish correctly.” (Tr. 1134.) In the statement, he related, “there are things that were talked about during the conversation but not that he had asked me those to me personally [sic].” (Tr. 1135.) He also testified about inaccuracies in the document. (Tr. 1136-38.)

Moran Velazquez testified that he would ask Karageorgis for part of his pay and save the rest because he did not want to carry money in his bag and because he wanted to send the money to Mexico and not spend it. (Tr. 1140-41.) He did not believe that Karageorgis owes him money. (Tr. 1142.) When he met with the investigator, Karageorgis did owe him money for previous fairs; however, he understood that he would be paid the day the investigator arrived. (Tr. 1142-43.) He estimated that he was paid \$9,300.00 or more for 2010. (Tr. 1143.) He identified receipts showing payments he received: \$2,000.00, \$200.00 as a loan for shopping, \$3,150.00, \$500.00, and \$3,033.00. (Tr. 1145-51.) He related that he, Saul, Delfino, Ernesto, Armando and Jonathan purchased their airplane tickets and Karageorgis paid them back in cash. (Tr. 1153.) He believed he had received about \$3,000.00 in checks from Karageorgis in 2010 at the end of the season. (Tr. 1154.)

*l. Saul Galicia Aguilar*

H-2B employee Saul Galicia Aguilar (“Galicia Aguilar”) testified that he worked for PFGF for nine years, including 2010 and 2011. (Tr. 1192.) He estimated that setup took four to six hours and five or six employees (Tr. 1193); preparation took one hour to one hour and a half (Tr. 1195); cleanup took one hour or less if they started ahead of time (Tr. 1226); and teardown took three hours per stand and four or five employees (Tr. 1197-98). He estimated that he took about five bathroom breaks a day, whenever he needed, and breaks to eat, whenever he wanted. (Tr. 1199-00.) Sometimes, he explained, he took three meal breaks of about one half-hour each. (Tr. 1201.) On his breaks, he would rest, walk around the fair, and eat at a table. (Tr. 1201-02.) He testified that he had the food and drink from the stands, free of charge. (Tr. 1202-03.) In bad weather, he stated, they would close. (Tr. 1203.) Regarding days off, he said, “My boss would tell me whatever day I wanted off I could take off.” (Id.)

Galicia Aguilar stated that he was paid in cash by the fair. (Tr. 1206.) He testified that he found it complicated to carry money or to leave money around so he would have Karageorgis hold his earnings and ask for small sums like \$100.00 or \$200.00 for his expenses. (Tr. 1207.) When he was paid, he would send his earnings to Mexico, he explained. (*Id.*) He estimated that he was paid \$10,000.00 total for 2010. (Tr. 1206-07.) Galicia Aguilar testified via telephone and stated that he had copies of receipts in front of him. (Tr. 1211.) His copies of receipts corresponded with the receipts introduced by Respondent as RX 30. (Tr. 1212.) Galicia Aguilar testified that he had before him receipts for the following amounts: \$3,000.00, \$3,850.00, \$1,400.00, \$200.00, and \$445.10 for his plane ticket back to Mexico (Tr. 1212-20). He also remembered receiving being paid by check in 2010. (Tr. 1222.) He stated that he received a written receipt for the first time in his years with PFGF in September 2010. (Tr. 1243-44.) He believes he was paid for all of the hours he worked in 2010. (Tr. 1222.)

Galicia Aguilar described his interview in Syracuse with a DOL investigator. (Tr. 1204.) He stated that the investigator showed him her notes and that he read and signed the statement, which, he said, was accurate. (Tr. 1205-06.) Galicia Aguilar recalled that H-2B employee Rafael [Hernandez Alvarez] said he had some problems in Mexico with his wife or family and thus wanted to leave. (Tr. 1225.)

*m. Delfino Cabrera Perez*

Delfino Cabrera Perez (“Cabrera Perez”) testified that he worked for PFGF for two years, 2010 and 2011, under an H-2B visa. (Tr. 1247.) He stated that he would like to work for PFGF on an H-2B visa again. (Tr. 1266.) He explained that he returned to work for PFGF in 2011 because he likes the work and the way he was treated and because Karageorgis pays for everything, including his visa, rent, and food. (Tr. 1263.) He testified that he received his job with PFGF through Armando Navarro, with whom he has been friends for about thirty years. (Tr. 1264.) In Mexico, he works for a contractor in a government office, he stated, although he makes more money in the United States. (Tr. 1265-66.)

Cabrera Perez estimated that setup typically took four or five hours per stand. (Tr. 1248-49.) He testified that preparation took one hour before the fair opened. (Tr. 1249.) He stated that they would start to clean before the fair closed and would finish about a half-hour after closing. (Tr. 1252-53.) He testified that teardown took about four hours. (Tr. 1253-54.) He estimated that his workday ranged from six to twelve hours, depending on the fair. (Tr. 1252.) Regarding breaks, he stated, “If it was a long fair, we would take an hour [break in the morning]. And then later on in the afternoon we will take another hour break. After working four or five hours more, then we would take another one-hour break.” (Tr. 1250.) If he needed to use the restroom, he would let the person in charge know and then he would go, he explained. (Tr. 1251.) He stated that he did not pay for his food or drink at the stand and he could eat as much as he wanted; he also stated that sometimes he would get other food like Chinese, tacos, or a hamburger. (Tr. 1254.) He testified that they had one day off per week for longer fairs, but did not have days off for shorter fairs, only breaks. (Tr. 1255.) They knew when to take off, he explained, “because the boss would tell us which day to take off, each one of us.” (*Id.*)

According to Cabrera Perez, in 2010 they were paid in cash. (Tr. 1256.) However, he explained that he would only ask Karageorgis for small amounts, which he called “loans,” rather than his whole pay because he did not want to lose his money. (Tr. 1256-57.) When he was paid, he would send part of it to Mexico. (*Id.*) For the entire 2010 season, he recalled being paid between \$10,000.00 and \$11,000.00. (Tr. 1257.) Regarding the receipts, he testified: “We did sign some receipts because some kind of problem had happened. So only at the end of the [2010] is when we had to start signing receipts for our pay.” (*Id.*) He recalled receiving checks from Karageorgis at the end of the season, but did not recall the exact number. (Tr. 1258.) He believed he was paid for all the hours he worked for PFGF in 2010. (*Id.*)

*n. Peter Karageorgis*

Peter Karageorgis (“Karageorgis”) testified that he was born in Cyprus and immigrated to the United States at age twenty-five. (Tr. 1290-91.) He stated that he is the sole shareholder and president of his business, Peter’s Fine Greek Foods, which he opened in 2003. (Tr. 1299.) According to Karageorgis, PFGF first became involved with the H-2B program around 2003 or 2004. (Tr. 1305.) Karageorgis stated that, over the years, he hired various attorneys to file his applications for H-2B employees: attorney Notkin filed his petitions for four or five years, attorney Malcolm Seheult filed the petitions from 2008 to 2010, and he began using a new attorney in 2011. (Tr. 1308-10.)

Karageorgis hired attorneys to file his petitions and maintained that he was unaware of the promised wage and work hours in the 2010 TEC. (Tr. 1313-20.) Karageorgis testified that he had not heard of the term “prevailing wage” or discussed it with any lawyer prior to the investigation. (*Id.*) He stated that he had never seen PFGF’s 2010 form 9142, or TEC, and, furthermore, the handwriting and the signature on the form are not his. (Tr. 1314-16.) He stated that he did not supply the information about forty work hours with zero overtime and a schedule of 11:00 AM to 7:00 PM. (Tr. 1317.) In contrast, he admitted that the job description reflects information that he provided to Seheult during their first conversation. (Tr. 1318.) He explained that when he first met with Seheult, they discussed PFGF’s line of business and employment needs, but did not discuss the hours of work. (Tr. 1318-20.) He stated he only discussed rate of pay with Seheult in 2008 when he told Seheult he paid employees \$400-\$800 weekly. (Tr. 1319-20.)

However, on cross-examination, Karageorgis admitted that that the PFGF applications from various years consistently listed forty hours of work per week. (Tr. 1732-37.) He maintained that he did not write forty hours and that his lawyers did not ask him about it; yet, he acknowledged that he hired and paid lawyers to represent the company. (*Id.*) Karageorgis stated that PFGF employees at times worked more or less than forty hours a week and sometimes worked over sixty hours a week. (Tr. 1732.) He also acknowledged that the recruitment ad PFGF placed in the newspaper in 2010 shows the prevailing wage of \$10.71 per hour. (Tr. 1739-43.) He admitted that he received a copy of the ad. (Tr. 1741-43.)

Karageorgis testified about the payment system in 2010: he stated that he wrote down work hours in notebooks which he carried with him and then transferred the information to paper. (Tr. 1363, 1384.) Karageorgis testified that he threw out the original notebooks after he

wrote the hours on the paper. (Tr. 1363.) When not present at a fair, he stated, he would call employees to report their hours. (Tr. 1376-77.) Karageorgis stated that, prior to September 2010, PFGF did not pay by the hour and did not keep any records of payments other than the notebooks. (Tr. 1750-51.) He admitted that PFGF first used receipts in September 2010. (Tr. 1751.) He said he did not maintain payroll records before September 2010. (Id.)

Karageorgis testified about handwritten 2010 timesheets showing the employees, hours, and payments for fairs. He stated that he based the information contained in the timesheets on notes in his notebooks or information he obtained from PFGF employees. (Tr. 1356-1475; RX 27.) However, Karageorgis admitted that he did not know when he wrote the timesheets and sometimes wrote the timesheets after the fair concluded. (Tr. 1362, 1376, 1378, 1384, 1387-88, 1402, 1408, 1423-24, 1436, 1448, 1454-55, 1471-72; RX 27.) He admitted that he was not present every day of every fair and, on the days he was present, he left for short periods. (Tr. 1364-66, 1390, 1411, 1420-21, 1438, 1454; RX 27.) He stated that when he was absent from a fair, he would talk to employees to get their hours. (Tr. 1376-77, 1421; RX 27.) He admitted that the timesheets do not show any hours for setup, teardown, preparation, or cleanup, although employees did perform these tasks. (Tr. 1367-68, 1380-81, 1385-86, 1389-90, 1401, 1413-14, 1422-23, 1437-38, 1450, 1453-54, 1474-75; RX 27.) He stated that there are no receipts for some payments to employees. (Tr. 1368, 1424; RX 27.) For some fairs, he admitted, employees worked, but are not included on the timesheet. (Tr. 1380, 1384-86, 1409-13, 1436, 1441, 1448-50, 1453, 1474; RX 27.) Karageorgis admitted that he composed some timesheets after the investigation began in September 2010 as part of the litigation. (Tr. 1423, 1442; RX 27.)

At the hearing, Karageorgis also testified about payments he made to employees after the investigation began to compensate the employees up to \$10.71 per hour. (Tr. 1392.) According to Karageorgis, his attorney and accountant calculated the amounts owed to employees to reach the promised \$10.71 per hour and Karageorgis paid employees those amounts. (Tr. 1573-85.) At the hearing, an exhibit refreshed his recollection as to the following payment amounts: Saul Galicia Aguilar \$2,330.00; Delfino Cabrera Perez \$3,274.00; Jonathan Dominguez Espinoza \$3,343.00; Ernesto Navarro Lopez \$2,586.00; Joaquin Moran Velazquez \$3,147.25; and Armando Navarro Luna \$1,035.37. (Tr. 1534-40.) Karageorgis stated that he used a receipt book to record these payments. (Tr. 1542-44.) In addition, Karageorgis identified the PFGF bank statement for October 1, 2010 to October 29, 2010. (Tr. 1556-59.) He also identified W-2 forms from 2010 for PFGF employees and the 2010 PFGF tax return. (Tr. 1591-03.) Karageorgis testified that his criminal case settled after he paid \$85,000.00 in back wages to employees. (Tr. 1705.) He testified that after making the payments, he thought he was “done.” (Tr. 1706-07.) Karageorgis reviewed the Administrator’s back wage calculations for each employee and stated that there are inaccuracies in the fairs the employees purportedly worked and in the alleged work hours. (Tr. 1615-45.) He also stated that “pay received” was inaccurate for many employees because he fully compensated them at a rate of \$10.71 per hour after the investigation. (Tr. 1619-45.)

In addition to the circumstances of the hours and payments, Karageorgis testified regarding other alleged violations including the departure of one employee and the transfer of other employees to work for another vendor, Demetri’s. Regarding H-2B employee Rafael

[Hernandez Alvarez]'s departure, Karageorgis testified that Rafael told him he was having trouble with his ex-wife and his father. (Tr. 1606-12.) One day, Karageorgis recalled, he received an urgent phone call from Adonai [Guerrero Vazquez] that something had happened to Rafael. (Tr. 1607.) According to Karageorgis, when he arrived at the fairgrounds that day, Rafael was very upset and kept saying he wanted to go home. (Tr. 1611-12.) Karageorgis testified that Rafael grabbed his luggage, but Karageorgis thought he would only leave for a few hours. (Tr. 1611-13.) Karageorgis stated that, after leaving, Rafael would not pick up his phone and Karageorgis never saw Rafael again. (Tr. 1613.) Karageorgis testified that he called attorney Seheult who said that he was going to write a report about the departure. (Tr. 1717-18.) Regarding sending employees to Demetri's, he explained that Nick Strates,<sup>10</sup> who runs Demetri's, is a family friend who also hires H-2B employees for the same business. (Tr. 1653-54.) During the Syracuse fair, Strates sent PFGF two employees and during the Buffalo Fair, PFGF sent three employees to work for Strates. (Tr. 1654-55.) He stated that he and Strates never entered into an agreement and he never received compensation for loaning the employees. (Tr. 1655.)

Karageorgis stated that he first became aware of the DOL investigation on the penultimate day of the Syracuse Fair. (Tr. 1670.) He testified that he met investigator Ruth Beltran who asked him questions for over an hour and wrote down his answers. (Tr. 1672-73.) Karageorgis related that Beltran asked him whether she could interview his employees and he agreed. (Tr. 1674.) He said she also asked him for documents, but he told her he was going to Asheville, North Carolina soon and would need time to gather them. (Tr. 1679.) Karageorgis recalled that after the Syracuse Fair, he and his employees arrived in Astoria on Wednesday, September 8, 2010. (Tr. 1690-91.) He said he gave \$100.00 to each employee and told them he would see them the next day to pay them. (Tr. 1691.) The next day, he explained, he went to the car wash after receiving a phone call that DOL investigators had arrived. (Tr. 1692.) Karageorgis testified that he spoke to Investigator An, who told him that he was going to interview employees and that he wanted Karageorgis to wait until he finished. (Tr. 1692-94.) Karageorgis stated that he arrived around noon, stayed at the car wash during the afternoon, and "left after [An] give [him] permission to leave around either quarter to 8:00 the nighttime." (Tr. 1694.) As soon as Karageorgis got home, he related, An called him and told him that he had to go back to pay his employees. (Tr. 1696.) Karageorgis said he took a bag full of singles from the New York State Fair to the car wash. (Tr. 1698-99.) He and An then paid the employees \$300.00 each. (Tr. 1699.) Karageorgis then explained that Homeland Security arrested him around ten o'clock that night and he remained in custody until about six o'clock the next evening. (Tr. 1701.)

Karageorgis stated that he tried to improve PFGF's recordkeeping after the investigation by asking the employees to write down their hours for the remainder of 2010. (Tr. 1485.) Karageorgis testified that employees recorded their hours on a sheet that they signed and turned over to Karageorgis to calculate their pay for fairs at the end of the season. (Tr. 1475-05.) According to Karageorgis, in 2011, PFGF began to use a time clock, hired a payroll company, and required that employees punch in and out for breaks. (Tr. 1523-24.) He also related that, in 2011, the company paid the employees by check for regular hours and for overtime. (Tr. 1712-

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<sup>10</sup> Although the exhibits variously spell his name as "Straits" and "Strates," I will use "Strates" for the sake of consistency.

14.) He stated that he plans to continue the payment process he began in 2011 in the future. (Tr. 1714.) Additionally, he testified that he has changed his application process for the H-2B employees: he hired a new lawyer, asked to personally see and sign all papers, asked the lawyer to explain the process, and updated the prevailing wage to be the highest of the geographical minimum wages, \$8.26 per hour. (Tr. 1714-17.)

## 2. Documentary Evidence

### Determination Letter (AX 1)

On March 18, 2011 Catherine Quinn-Kay authored a letter informing Peter Karageorgis, Owner/President of Peter's Fine Greek Food, Inc., of the findings of Wage and Hour's investigation. The letter states that Wage and Hour has determined that violations occurred for which it assessed \$115,900.88 for back wages and \$50,500.00 in civil money penalties. Wage and Hour afforded thirty days for PFGF to pay the civil money penalties and back wages. The letter states that PFGF has the right to request a hearing on the determination. The determination letter attached a summary of violations and remedies and a summary of unpaid wages.

### Certified Application for Temporary Employment Certification, ETA Form 9142 (AX 2; RX 25)

The *Application for Temporary Employment Certification*, ETA Form 9142, contains an application and a declaration under perjury at Appendix B.1. The application seeks eighteen H-2B employees as short order cooks for the period of March 10, 2010 to November 10, 2010 for PFGF. The Job Offer section shows forty regular hours of work per week and zero hours of overtime with a schedule of 11:00 AM to 7:00 PM. The Rate of Pay section shows \$10.71 per hour. Next to a section which reads, "For H-2B Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in **Appendix B.1 §**," there is a box checked "yes." At the conclusion of Appendix B.1, the name "Peter Karageorgis" and the title "Owner" appears. Below the printed name, there is a signature reading "Karageorgis" dated January 25, 2010.

### Request for Further Information; PFGF's Response; Attachments and Shipping Labels (AX 3-5; RX 43)

By letter dated February 8, 2010, the U.S. Department of Labor, Employment and Training Administration notified PFGF that it was unable to render a final determination on the *Application for Temporary Employment Certification* because PFGF had not complied with all requirements of the H-2B program.

A February 9, 2010 letter from PFGF<sup>11</sup> explains the temporary nature of the employment. Among other things, the letter states that "continuing attempts have been made to recruit U.S. workers for this position at the prevailing wage and at prevailing working conditions . . . without success." The letter also states, "The seasonal temporary workers are paid all the time that they are with me regardless if they are working in the kitchen or not." Lastly, the letter assures, "In

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<sup>11</sup> Respondent introduced the same letter as RX 43. I note that the copy at AX 3, however, is signed and stamped received (February 16, 2010) while the copy at RX 43 is not.

conclusion, work is performed during the entire requested period of need and the workers are paid for the time they work.” The closing reads, “respectfully submitted” and is signed “Karageorgis” with a printed name reading “Peter Karageorgis” and a title “Owner” beneath the signature.

AX 3 also includes “Attachment A Deficiency Checklist for H-2B Application,” copies of license agreements between PFGF and various fairs from prior years, and pictures of PFGF mobile kitchens. There is a shipping label (AX 4) which shows that DOL sent correspondence to Peter Karageorgis at his home and business address in Astoria, New York on February 8, 2010. There is also a FedEx label (AX 5) which shows that Karageorgis mailed documents to “Malcom [sic]” in Bradenton, Florida on what appears to be February 9, 2010.

*File from ETA/USCIS (AX 6<sup>12</sup> including documents also in RX 44)*

Quinn-Kay testified that AX 6 is a complete attachment containing documents she received from the Northeast Regional Immigration Coordinator who works out of Philadelphia as part of the national immigration team. According to Quinn-Kay, the coordinator contacted USCIS and DHS on her behalf regarding PFGF to obtain the company’s file. The exhibit includes the e-mail correspondence that accompanied the exchange.

AX 6 is comprised of the following documents: 2010 G-28 Notice of Entry of Appearance as Attorney or Accredited Representative; Approved 2010 I-129 Petition for a Nonimmigrant Worker; Form I-907 Request for Premium Processing Service; February 18, 2010 Final Determination for Partial Certification and attached certified ETA Form 9142; February 24, 2010 letter in support of I-129 Petition from Peter Karageorgis; and 2010 route schedule.

I note that the LCA number on the I-129 Petition and the certified ETA Form 9142 match. Both forms show dates of intended employment between March 10, 2010 and November 10, 2010. The I-129 Petition states that the proposed employment is full-time with wages per week or per year at \$428.40 (which, I find, equals forty hours at \$10.71 per hour). The I-129 is signed above the printed name “Peter Karageorgis” and dated February 24, 2010. There is also a signature for Malcolm Seheult dated February 24, 2010, signifying that he prepared the form. The petition describes the temporary nature of the position and the company’s attempts to recruit U.S. workers.

Both Administrator and Respondent offered the document “Final Determination for Partial Certification.” (AX 6; RX 44.) In the determination, the Department of Labor reduces the number of workers from twenty to eighteen and certifies eighteen short order cooks from March 10, 2010 to November 10, 2010.

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<sup>12</sup> Employer objected to the exhibit on foundational grounds. Because Administrator included the e-mail correspondence to support the origins of the information, I overruled the objection. (Tr. 732-38.)

Approval Notice for H-2B Workers for PFGF (AX 7)

Administrator put forward a March 3, 2010 I-129 approval notice for H-2B employees from March 10, 2010 to November 10, 2010. The notice states that it is a courtesy copy sent to the PFGF address in Astoria, New York (original to Seheult, Malcolm).

Copies of H-2B Visas (AX 8; RX 1-15)

The record contains copies of 2010 H-2B visas for the following employees: Arturo Aguilar Hernandez, Jesus Aguilar Hernandez, Roberto Alfonso Cabrales Martinez, Jonathan Dominguez Espinoza, Luis Antonio Escarzaga Arevalo, Saul Galicia Aguilar, Manuel De Jesus Garcia Castaneda, Adonai Guerrero Vazquez, Joaquin Moran Velazquez, Ernesto Navarro Lopez, Armando Navarro Luna, Jose Luis Olmos Rodriguez, Samuel Rosales Rios, Jose Solorzano Ramirez, and Horacio Tirado Ortiz.

Employee Interview Statements (AX 9-17, 17-A, 18-21, 23-27, 29)

The record includes interview statements of the following employees recorded on the following dates:

Arturo Aguilar [Hernandez], September 5, 2010;  
Arturo Aguilar Hernandez, September 9, 2010;  
Jesus Aguilar [Hernandez], September 6, 2010;  
Jesus Aguilar Hernandez, September 9, 2010;  
Luis Antonio Arevalo Escarzago, September 9, 2010;  
Joaquin Benitez Perez, September 9, 2010;  
Roberto Alfonso Cabrales Martinez, September 6, 2010;  
Roberto Alfonso Cabrales Martinez, September 9, 2010;  
Manuel De Jesus Garcia Castanera [sic], September 9, 2010;  
Jonathan Dominguez [Espinoza], September 6, 2010;  
Saul Galicia Aguilar, September 5, 2010;  
Adonai Guerrero Vazquez, September 9, 2010;  
Joaquin Moran Velazquez, September 9, 2010;  
Ernesto Navarro [Lopez], September 9, 2010;  
Artemio Hugo Pacheco Flores, September 5, 2010;  
Samuel Rosales Rios, September 6, 2010;  
Samuel Rosales Rios, September 9, 2010;  
Jose Solorzano Ramirez, September 6, 2010;  
Jose Ramirez Solorzano [sic], September 9, 2010;  
Victor Manuel Vazquez Garcia, September 6, 2010.

The interview statements describe the work conditions, hours, and payments for the 2010 PFGF employment season. Each exhibit includes the interviewer's handwritten notes in Spanish, signed by the employee, and a typed translation of the Spanish.

Contracts Signed by Employees (AX 31, 32)

The record includes employment contracts purportedly between Peter's Fine Greek Food and various employees. The contracts are not fully filled-in; there are blank spaces for the date, employee's name, and the city in Mexico. However, employees and an "authorized agent" signed the documents, although Karageorgis did not. The documents show a wage of \$10.71 per hour less \$25.00 per week for housing, forty hours of work per week with a varying schedule, one hour lunch break, and restroom breaks as needed. I note that AX 31 is admitted for the limited purpose of representing a piece of paper handed to Ruth Beltran by Jesus Aguilar Hernandez, whose signature appears on the document; it is not admitted for the purpose of establishing a legally-binding contract. (Tr. 64.)

Investigator An's Notes from the Payments on September 9, 2010 (AX 33)

AX 33 consists of the employees' signed statements attesting that they received \$300.00 on the night Investigator An arranged for their payment and received \$100.00 prior to that night. The following names are printed and signed on the document: Jesus Aguilar, Jose Solorzano Ramirez, Roberto Cabrales Martinez, Horacio Tirado, Samuel Rosales Rios, Jose Luis Rodriguez, Arturo Aguilar, Luis A. Escarzaga, Adonai Guerrero, and Manuel Jesus Garcia Castaneda.

Photos of PFGF Stands (AX 34; RX 54A-E, RX 54G-H)

The Administrator and the Respondent provided photographs of the Respondent's stands. The pictures depict the operation of the stands from different vantage points and at different times of day.

Letter from Wage and Hour to PFGF Requesting Information (AX 35)

On September 9, 2010, Catherine Quinn-Kay wrote to PFGF informing that the Wage and Hour Division had not received the documents it requested. Bolded language in the letter states,

This is a second request for records. Please provide our office with the following records via fax, no later than Friday September 10, 2010, at 12:00 p.m. Failure to provide records as described below will be considered failure to maintain or make available documentation as required and failure to cooperate with the investigation.

AX 35 includes a list of documents sought and fax coversheets addressed to attorney Malcolm Seheult, accountant Joann Levantis, and Peter Karageorgis. There are three fax verification reports dated September 9.

Correspondence from PFGF to Wage and Hour (AX 36, 37, 38)

On September 9, 2010, Malcolm Seheult faxed documents to Wage and Hour investigator, Ruth Beltran. (AX 36; AX 37.) Specifically, he sent copies of newspaper ads PFGF placed in the *New York Post*; the Final Determination for Partial Certification dated February 18, 2010; ETA Form 9142; a letter dated January 23, 2010 from PFGF to ETA; the Prevailing Wage Determination dated December 22, 2009; ETA form 9141; and a notarized confirmation that an ad had been published in the *New York Post*.

AX 38 is an e-mail from attorney Chad L. Edgar to Ruth Beltran and David An dated September 14, 2010. The messages states that Edgar and attorney Dawn Cardi represent Karageorgis in the litigation regarding a criminal complaint filed in the Eastern District of New York. He asked that Beltran and An direct any communications to himself and attorney Cardi. The e-mail further states, "We understand that one or both of you have asked Mr. Karageorgis to produce documents. We will take your requests under advisement and get back to you as soon as possible."

NY, NJ, CT, and PA Recordkeeping Provisions (AX 39, 40, 41, 42)

Exhibits 39, 40, 41, and 42 contain statutory provisions from New York, New Jersey, Connecticut, and Pennsylvania regarding employers' recordkeeping requirements and minimum wage requirements.

Declaration of Absence of Entry in Public Records (AX 43)

A document entitled Declaration Pursuant to 28 U.S.C. § 1746, dated October 13, 2011 states that a Fraud Detection and National Security Immigration Officer of the United States Department of Homeland Security, United States Citizenship and Immigration Service determined that the Peter's Fine Greek Food, Inc. file did not include a separation or termination notice for any beneficiary.

License Agreements with Fairs (AX 44; RX 20-24)

AX 44 and RX 20-24 contains license agreements between PFGF and various fairs. The exhibits include copies of the following signed and dated agreements: 2009 Erie County Fair, 2007 Winston-Salem, 2007 New York State Fair, 2007 Ulster County, 2009 New York State Fair, 2010 Erie County Fair, 2010 Columbia Italian American Club of Union, New Jersey, 2010 Ulster County Agricultural Society, Inc., 2010 North Carolina Dixie Classic Fair, and 2010 New York State Fair.

Wage and Hour Back Wage Computations (AX 45-A, 45-B, 46)

The Administrator's back wage computations are split into two exhibits. AX 45-A shows the calculations of back wages for Arturo Aguilar Hernandez, Joaquin Benitez Perez, Delfino Cabrera Perez, Jonathan Dominguez Espinoza, Saul Galicia Aguilar, Rafael Hernandez Alvarez, Joaquin Moran Velazquez, Ernesto Navarro Lopez, Armando Navarro Luna, Artemio Hugh

Pacheco Flores, and Victor Manuel Vazquez Garcia. Similarly, AX 45-B shows the calculated back wages for Jesus Aguilar Hernandez, Roberto Alfonso Cabrales Martinez, Luis Antonio Escarzaga Arevalo, Manuel De Jesus Garcia Castanera [sic], Adonai Guerrero Vazquez, Jose Luis Olmos Rodriguez, Samuel Rosales Rios, Jose Solorzano Ramirez, and Horacio Tirado Ortiz. As aforementioned, investigator Michael Lonesky determined the fair dates and hours based on visa entrance dates, Karageorgis' interrogatories and deposition, and employee statements; he calculated back wages based on the prevailing wage of \$10.71 per hour. AX 46 is a summary of all back wages allegedly due for eleven total employees. The total due, as calculated by the Administrator, is \$99,199.91.

Settlement Back Wage Payments (AX 47; RX 16)

According to the schedule at AX 47 and RX 16, Peter's Fine Greek Foods paid ten employees back wages as part of its settlement with the Department of Justice. The schedule shows payments on November 5, 2010, November 26, 2010, and December 17, 2010. The total of all payments is \$85,000.00. The following ten employees received back wages, according to the exhibit: Adonai Guerrero Vazquez, Jesus Aguilar Hernandez, Arturo Aguilar Hernandez, Jose Luis Olmos Rodriguez, Horacio Tirado Ortiz, Luis Antonio Escarzaga Arevalo, Roberto Alfonso Cabrales Martinez, Jose Solorzano Ramirez, Samuel Rosales Rios and Manuel De Jesus Garcia Castaneda.

AX 47 also includes receipts for cashier's checks signed by the employees, wire tracking information from Chase Bank, a copy of a December 22, 2010 letter from attorney Chad Edgar to an Assistant United States Attorney, and a copy of a check made out to Jose Luis Olmos Rodriguez.

Respondent submitted the above documents, as well, in RX 16. In addition, Respondent submitted a second letter addressed to an Assistant U.S. Attorney from Respondent's former attorney Chad L. Edgar. On December 23, 2010, attorney Edgar wrote that Respondent has satisfied all the terms of the back wage payments. As such, Edgar expressed his hope that Karageorgis had fulfilled in full his obligations under the settlement and expressed that in his view it was a full and final settlement. The letter notes that a copy was sent to Pantelis Karageorgis by mail, including the supporting documentation described above.

Respondent's Answer to Administrator's First Request to Admit (AX 48)

On July 1, 2011, Respondent answered the Administrator's First Requests to Admit. Respondent by asserting that all employees received \$10.71 per hour for all hours worked as a result of a settlement with the Department of Justice. Respondent admitted in part and denied in part that its H-2B employees worked more than forty hours per week for some weeks; it maintained that not all employees worked over forty hours per week in any given week. Respondent asserted that it did not terminate the employment of Rafael Alvarez Hernandez because the employee quit. PFGF maintained that it notified its attorney about Rafael Alvarez Hernandez's departure and that the attorney failed in his duties to notify the appropriate agency. Respondent explained that it did not pay for Rafael Alvarez Hernandez's return travel because the employee fled before Respondent could do so. Respondent admitted that Adonai Guerrero Vazquez, Jose Luis Olmos Rodriguez, and Horacio Tirado Ortiz worked for Nick Strates for two

weeks at the New York State Fair. Respondent stated that it “failed to keep daily records of hours worked for certain fairs, save for the fair in Syracuse, NY during the time period in question.” PFGF denied that it failed to produce any records of hours worked to Wage and Hour Division during the investigation. Similarly, PFGF denied that it failed to produce any records of wages paid to employees to the Wage and Hour Division during the investigation. It stated, “Peter Karageorgis has produced all records within his custody and control.”

Deposition of Malcolm Seheult (AX 49; RX 52)

On July 20, 2011, Malcolm Seheult, the attorney who prepared PFGF applications for the 2010 visas, answered questions at a deposition. The Administrator submitted the direct-examination as AX 49 while Respondent submitted the cross-examination as RX 52. On direct examination, Seheult stated that Peter Karageorgis hired him to act as PFGF’s attorney for 2009 and part of 2010. (AX 49 at 8.) He explained that he has never met Karageorgis in person, but did correspond with him via phone, mail, and fax. (Id. at 8-9, 15-18.) According to Seheult, Karageorgis informed him about his company and its needs, including its involvement with the H-2B program. (Id. at 9-11.) Seheult stated that Karageorgis understood that “we had to go through the process, the Department of Labor approval, prevailing wage, the I-129 approval from Immigration, consulate approval, and getting the workers over.” (Id. at 11.) Seheult recalled that when he and Karageorgis first spoke, Karageorgis stated that he paid his workers between \$12.00 and \$17.00 per hour. (Id. at 12.) The first year that Seheult prepared the PFGF application, he stated, he used a prevailing wage of \$12.00 per hour. (Id.)

Regarding the 2010 prevailing wage, however, Seheult stated that Karageorgis resisted the idea of paying \$10.71 per hour. (Id. at 16-18.) Seheult maintained that he “had numerous discussions” with Karageorgis about offering \$10.71 per hour. (Id. at 16, 49.) Seheult testified that he explained to Karageorgis that the prevailing wage rate was based on the classification of specialty cook which would be higher than other types of jobs. (Id. at 59-60.)

At the deposition, Seheult answered questions about signatures on various forms he prepared for PFGF. He explained that sometimes he would send Karageorgis papers to sign and Karageorgis would send the papers back unsigned. (Id. at 27, 44.) According to Seheult, Karageorgis would instead authorize him to sign. (Id. at 27, 44.) Seheult stated that Karageorgis never explained why he would not sign the forms himself. (Id. at 28.) Seheult recalled that sometimes Karageorgis would send back one signed document along with others that he did not sign. (Id. at 51.)

Seheult stated that he and Karageorgis never discussed how PFGF paid employees or recorded hours. (Id. at 66-67.) He stated that Karageorgis informed him of an employee’s departure and that Seheult told Karageorgis to send in a letter. (Id. 72-73.) Seheult believed that he made it clear that he would not send the letter because he was not usually involved once the paperwork was complete and because he was sick and unable to perform the work. (Id. at 73.) He stated that he and Karageorgis never discussed the rules for placing an H-2B worker with another employer. (Id. at 73.) He believed he sent the 9141, 9142 and a copy of the contracts that he had to the Department of Labor, in response to the investigation. (Id. at 82.) Seheult recalled that he arranged for the ad in the *New York Post* to run and that Karageorgis received the tear sheets at his address and the draft document. (Id. at 20.)

On cross-examination, Seheult testified that two of Respondent's other lawyers (Fromm and Fiore) contacted him, but that he never spoke to Chad Edgar or Dawn Cardi. (RX 52 at 81.) He stated that he stopped providing active legal service years ago and has only helped a few clients with H-2B applications in the last few years. (Id. at 89.) He estimated that he began working in immigration law around 2004 or 2005. (Id. at 100.) He stated that he did not use an engagement letter to define the scope of the work he would do for Respondent. (Id. at 106.) Seheult stated that he understood that the 2008 regulatory changes in the H-2B program place affirmative responsibilities on legal counsel to ensure that clients understand the H-2B process. (Id. at 113-14.) Respondent's counsel asked Seheult about various former clients; Seheult stated that he knew some of them had legal trouble regarding the payment of wages after he filed their petitions. (Id. at 161-64, 167.)

Exhibits from the Deposition of Malcolm Seheult (AX 49-1, AX 49-3, AX 49-4, AX 49-5, AX 49-6, AX 49-7, AX 49-8, AX 49-9, AX 49-10, AX 49-12, AX 49-14, AX 49-15, AX 49-16)

AX 49-1 is a copy of the prevailing wage determination, ETA form 9141, the route schedule, a draft of an advertisement, and a December 29, 2009 memorandum that Seheult testified he prepared and sent by regular mail to Karageorgis regarding the prevailing wage determination of \$10.71 per hour. (AX 49 at 14-15.)

AX 49-3 contains a letter titled "Final Determination for Partial Certification" addressed to Peter Karageorgis, dated February 18, 2010 with ETA Form 9142 attached. According to Seheult at his deposition, Karageorgis sent the document to Seheult with the approval notice for temporary employment certification. Seheult stated that he completed the application in his handwriting. (AX 49 at 21-23.) He explained that ETA partially approved Form 9142. (Id. at 30.)

AX 49-4 is a one-page memorandum dated January 25, 2010. Seheult testified he prepared and sent the memo by regular mail to Peter Karageorgis, who, he said, acknowledged receipt on the phone when they discussed the \$10.71 wage. (Id. at 31.) The memo asks that Karageorgis read and sign the attached documents including the Form 9142. In addition, the memo informs, "As discussed on the phone, I am not well and will probably have to go into the hospital. Perhaps you can get your previous lawyer to assist you or get Mr. [Strates'] lawyer to assist."

AX 49-5 is a letter to the U.S. Department of Labor dated February 9, 2010 with attachments in response to a request for more information. The letter explains the temporary nature of the work and the date range. The following additional documents are included in the exhibit: Attachment A Deficiency Checklist, copies of contracts with various fairs, and pictures of the mobile kitchen. According to Seheult, he signed "Karageorgis" on the letter with Karageorgis' authorization. (AX 49 at 35-36.)

AX 49-6 is a February 24, 2010 letter to U.S. Department of Homeland Security seeking an I-129 Petition for Peter's Fine Greek Food, Inc. The letter explains the reasons supporting PFGF's request for non-immigrant employees, the temporary nature of the work, and asserts that

U.S. workers will not be affected. Attorney Seheult testified that he prepared the letter, discussed it with Karageorgis, and signed for Karageorgis. (AX 49 at 43-46.)

AX 49-7 includes copies of: G-28 Notice of Entry of Appearance as Attorney or Accredited Representative, I-129 Petition for a Nonimmigrant Worker including Attachment 1 and H Classification Supplement. At his deposition, Seheult testified that he typed form G-28 and signed where it says "signature of attorney." (AX 49 at 48.) However, Seheult stated that he did not sign Karageorgis' name on the form. (Id. at 48.) Seheult stated that he sent Karageorgis a copy of the I-129 form, although he signed for Karageorgis at part 6 because he was authorized. (Id. at 50.) According to Seheult, Karageorgis received a copy of the approved form I-129 at his address. (Id. at 52.)

AX 49-8 is a copy of an express mail slip which Seheult testified arrived at his address on February 25, 2010. (AX 49 at 52.) The slip shows that it was sent from Peter's Fine Greek Food at its address in Astoria, New York. According to Seheult, the package contained the immigration forms contained in AX 49-7 which Karageorgis returned to Seheult. (Id. at 53.)

AX 49-9 is a memorandum and a Contract for Temporary Employment. Seheult testified that he sent the March 4, 2009 memo to Karageorgis (AX 49 at 53-57); the memo asks that Karageorgis review and sign an attached contract which the agent in Mexico will go over with the prospective workers. The memo also advises that PFGF must pay for transportation and report if any worker is missing for two or more days. The contract is dated March 2009 and signed with the name "Karageorgis." The contract reads \$12.00 per hour, forty hours per week, and a varying schedule of 4:00 PM. to 1:00 AM.

AX 49-10 contains one page of handwritten notes and a typed transcription. Seheult testified that the handwritten notes are his from January 5, 2010. (AX 49 at 58.) The notes recount his conversation with Karageorgis about the ad in the *New York Post* and the recruitment report. (AX 49 at 58-59.) The note states, "Peter asked why salary is \$10.71 explained again about prevailing wage."

AX 49-12 includes handwritten notes and a transcription. Seheult stated that he wrote the notes on approximately February 25, 2010; describing conversations he had about the wages with Raul Hoffmann (the PFGF's former agent liaison and the person who recommended that Karageorgis use Seheult). (AX 49 at 68-69.) The note reads, in pertinent part, "call from Raul Hoffman he said Peter called him + asked about the \$10.71 per hr wage. Explained to Raul about prevailing wage and reminded him that Peter pd the men \$12 per hr last year."

AX 49-14 is comprised of a set of informational documents that Seheult stated he sent to Karageorgis around February or March 2010; Seheult said he told Karageorgis he did not have to do anything, but advised that he should know that if an employee leaves, he would have to report it. (AX 49 at 74-75.)

AX 49-15 is a one-page memorandum addressed to Peter Karageorgis from Malcolm Seheult dated February 23, 2010. The correspondence asks that Karageorgis review and sign forms for the workers to submit to immigration and that he review a draft contract. The memo

mentions that employers must report any worker who is absent more than two days. Seheult testified that he prepared the document and sent it to Karageorgis. (AX 49 at 76-77.)

AX 49-16 includes handwritten notes and a transcription. According to Seheult, he kept the notes in his file. (AX 49 at 79.) The document describes conversations occurring on dates from July to September. According to the exhibit, on July 28 Seheult “told Peter that Jorge has some men who are good cooks with experience he wanted to confirm the salary is \$10.71 per hr. –Peter said to go ahead and he asked me to help him get a flight for them to Buffalo.” There are then notes from August that state that workers are ready, processed at embassy, and traveling to Buffalo, followed by notes that read: “9/5 – Peter called to advise DOL is on site;” “9/9 – Peter called—told him I just had surgery + going in for another surgery he needs to get a lawyer locally – Peter said he was going to talk to David An to get the men pd;” “Sept 11 – Peter asked me to fax copy of contracts to Atty Fromm;” and “Sept 14 – called Peter for update—he said he was treated badly by DOL + ICE he admits making mistakes but he was severely dealt with – told him to have his atty follow up with them.”

Deposition of Peter Karageorgis (AX 50)

The Administrator submitted portions of Karageorgis’ deposition taken on July 6, 2011 as AX 50.<sup>13</sup> In pertinent part, Karageorgis testified that he did not pay his employees exactly by the hour. (AX 50 at 19, 130.) He estimated that employees earned between eight and ten or eleven dollars per hour. (*Id.*) When employees asked for money, Karageorgis explained, he would give them cash and record the payment in the notebooks he carried around. (*Id.* at 81.) He stated that when he no longer needed the notes in the notebooks, he threw them away to avoid confusion. (*Id.*) According to Karageorgis, he used his notebooks to inform his accountant about the payments, but he did not give his accountant copies of his notes. (*Id.* at 84.) Moreover, he stated that he did not deduct any money from the payments to his employees for taxes prior to September 2010. (AX 50 at 84-85.) He admitted that before September 8, 2010, he was not paying his employees \$10.71 per hour, but maintained that afterward he did pay them at that rate. (*Id.* at 95.) He also asserted, “whatever they say, allow me to say it’s a lie, that holding their money for months or whatever. That’s a lie. I never hold nobody’s money, never.” (*Id.* at 128.)

At the deposition, Karageorgis maintained that he had records of fairs, hours, and employees at his home. (*Id.* at 94-97, 104-05.) He believed he recorded hours using the time he told the employees to show up as a start time, so that his hours include the preparation work. (*Id.* at 97.) Karageorgis explained that he kept notes of the fair, the stand, the workers, and the start and close times, but did not keep track of breaks. (*Id.* at 103-04.) For the fairs at which Karageorgis was not present, Armando [Navarro Luna], Ernesto [Navarro Lopez], or Saul [Galicia Aguilar] took notes and gave them to Karageorgis. (*Id.* at 104.) At the deposition, Karageorgis also reviewed employees and the fairs they worked. (AX 50 at 93-94, 98-101, 107-11, 113-15, 117-19.)

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<sup>13</sup> Because only some pages of the deposition transcript are included in the exhibit, I will cite to the exhibit page number located at the bottom right of the page and not to the transcript page number located at the top right of the page.

He testified that there is no business relationship between himself and Nick Strates, but rather a good friendship stemming from being in the same business. (*Id.* at 133.) He stated that he sent three employees to Maryland to work for Strates. (*Id.* at 133.) He did not ask Strates any questions about whether he was going to lay off U.S. workers. (*Id.* at 134.) He stated that he did not tell Strates that he had to pay the employees any particular amount. (*Id.* at 102-03.) He testified that he did not call Homeland Security to notify it about H-2B employee Rafael [Hernandez Alvarez]'s departure; instead he called Seheult to have him call. (*Id.* at 137.)

*Exhibits from Deposition of Peter Karageorgis AX 50-2 through 50-10, 50-12 through 50-16, 50-20, 50-21*

Administrator submitted documentation of PFGF's involvement with the H-2B program in prior years. For example, there are copies of PFGF's Applications for Alien Employment Certification from January 2006, January 2007, and August 2008 and corresponding copies of Notice of Entry of Appearance for those dates. (AX 50-2, 50-7, 50-9, 50-4, 50-5, 50-8.) The record also includes a letter addressed to New York Department of Labor H-2B Unit from Karageorgis dated January 12, 2006 explaining the company's need for nonimmigrant workers. (AX 50-3.) Furthermore, on March 23, 2007, Pantelis Karageorgis wrote to Mr. Benito Aiza, New York Department of Labor, Alien Employment Certification "RE: H-2B Application." (AX 50-6.) The letter is in support of an application for ten workers and explains the temporary nature of the work, the fairs to be attended, and the measures to secure domestic employees. (*Id.*)

Additionally, Administrator offered further documentation of PFGF's involvement with the program for 2010. AX 50-10 is a Contract for Temporary Employment for PFGF describing employment for 2009 at \$12.00 per hour for forty hours per week and with a variable schedule of 4 PM to 1 AM. AX 50-12 is a copy of *Application for Temporary Employment Certification*, ETA Form 9142 for the 2010 season for PFGF. AX 50-12 also includes a 2010 route schedule. AX 50-13 is comprised of a February 8, 2010 DOL Request for Further Information addressed to Peter Karageorgis with Attachment A Deficiency Checklist. Administrator submitted as AX 50-14 a February 9, 2010 response to the Request for Further Information addressed to the U.S. Department of Labor and including Attachment A Deficiency Checklist, copies of fair contracts, and pictures of the PFGF stands.

AX 50-15 is a copy of the PFGF 2010 advertisements in the *New York Post*. There is a handwritten list of names and phone numbers at AX 50-16 which describe job applicants; most dates on the page are from January 2009 while one entry is dated January 10, 2010. AX 50-20 is a copy of G-28 Notice of Entry of Appearance as Attorney or Accredited Representative dated February 24, 2010 allegedly signed by Malcolm Seheult and Peter Karageorgis.

Finally, Administrator submitted AX 50-21, Respondent's Answer to Administrator's First Set of Interrogatories. In the Interrogatory Responses, PFGF provided the names and dates of employment for nineteen employees. Respondent stated he sponsored each individual identified as an employee for an H-2B visa in 2010 and each employee entered the United States

on or about the date his/her employment began.<sup>14</sup> Respondent identified twelve fairs and provided dates and hours of operation.<sup>15</sup> According to Respondent, “All employees worked each fair that occurred during the time in which they were employed by Respondent under an H2-B [sic] visa.” Respondent asserted that “Respondent and Joanne Levantis, CPA, have knowledge and information regarding Respondent’s timekeeping, payroll, bookkeeping, or accounting practices.” While no employees were terminated, Respondent stated, Rafael Hernandez Alvarez separated from employment on or about July 18, 2010. Respondent named Malcolm M. Scheult, Esq. as a person authorized to file material on behalf of Respondent and as a person who completed, reviewed, or signed ETA form 9142 and 9141 on behalf of Respondent. Jose Luis Olmos Rodriguez, Adonai Guerrero Vazquez, and Horacio Tirado Ortiz, according to Respondent, worked at a food concession operated or owned by Nick Strates d/b/a Demetri’s. The interrogatory responses include a signed Certification dated June 9, 2011, showing a signature for Peter Karageorgis. Mark A. Fiore, Esq. certified that the signature is the genuine signature of Peter Karageorgis.

#### Hotel Invoices (RX 19)

As evidence of the dates of various fairs, Respondent introduced hotel invoices for rooms in Danbury, CT and Liverpool, NY billed to Peter Karageorgis. I discuss the date ranges shown on the invoices in the section on fair dates, below.

#### Handwritten Notes of Employees’ Hours Worked (RX 27)

RX 27 includes handwritten timesheets and a typed transcription. The charts and calculations in the exhibit show fairs, date ranges, employees, hours, and payments. While I admitted portions of the exhibit with an adverse inference (which includes the inference that the documents were created for the purpose of litigation) (Tr. 1468-70, 1485, 1488-89, 1493-94, 1503), I rejected other portions because I found they had an inadequate foundation.<sup>16</sup> (Tr. 1503-1517, 1521-22.) The payroll figures for the North Carolina Mountain State Fair are admitted for the limited purpose of showing an effort to comply after the investigation began; the Administrator does not seek back wages for that fair and the employee who created the timesheet did not testify about its accuracy while he was on the stand. (Tr. 1475-85.) Lastly, the exhibit includes a note Karageorgis wrote explaining why H-2B employee Rafael [Hernandez Alvarez] left. (Tr. 1427-28.)

As aforementioned, Karageorgis admitted that he did not know when he wrote the timesheets; he was not present every day of every fair; the timesheets do not show any hours for setup, teardown, preparation, or cleanup; there are no receipts for some of the payments; sometimes employees worked, but are not included on the timesheet; and he composed some

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<sup>14</sup> I note that later testimony suggests that some of the employees that Respondent named in the interrogatory response were actually American and were not on an H-2B visa. (Tr. 583-85, 1761-62.)

<sup>15</sup> While all of the fairs for which Administrator seeks back wages are included in the interrogatory responses, Respondent attended other fairs, too, which are not included in his answer.

<sup>16</sup> I rejected the documents because they lacked an adequate foundation. Based on Karageorgis’ testimony, there was no clear date when they were prepared and there was inadequate information about the person who prepared the documents. Also, the pages were not timely produced to the Administrator, thus preventing the government from deposing the person who prepared them. (Tr. 1517.)

timesheets after the investigation began in September 2010 as part of the litigation. (Tr. 1362-1475; RX 27.)

Charts Showing Wages Paid to Employees (RX 28)

I admitted RX 28 with an adverse inference. (Tr. 1584-85.) The exhibit shows days worked, regular and overtime hours, total compensation owed, a spreadsheet of hours owed, total paid, and outstanding compensation owed. Each sheet bears a signature next to the typed employee name. Karageorgis testified that his lawyer, Edgar, and his accountant calculated the payments using the hours that Karageorgis compiled. (Tr. 1573-85.) Karageorgis stated that the calculations were meant to compensate the employees up to \$10.71 an hour. (Id.)

Receipt Book (RX 30-A, 30)

RX 30-A and RX 30 are receipts showing payments from Peter's Fine Greek Food to various employees between September and October 2010 which bear signatures for the employee. I admitted the exhibits with an adverse inference because the receipts were not timely produced during discovery.

Chase Bank Statement for PFGF for October 1, 2010 through October 29, 2010 (RX 36)

I admitted a Chase Bank Statement for October 2010 with an adverse inference. (Tr. 1559.) The checking summary shows a \$24,900.12 deduction for twelve checks and a \$7,990.05 deduction for electronic withdrawals. The account is named Peter's Fine Greek Food, Inc. The twelve checks are numbers 1274-1285 and were paid between October 18 and October 28 in various amounts. I note that I rejected Respondent's offer of RX 36 page 442 because I found that it was unreliable; the document does not show who created it, why these checks were chosen, and from where the information about the check came. (Tr. 1564-65.)

Documents Relating to Respondent's H-2B Application Process from Malcolm Seheult's File (RX 37)

RX 37 is a handwritten list of fairs and dates for the 2010 season. Karageorgis testified that he wrote the fair itinerary and sent it to his lawyer for inclusion in the H-2B application. (Tr. 1779-80.) There is a ten digit phone or fax number handwritten at the top and a directive, "Att Malcom" [sic] at the top of the first page. A typed date, September 29, 2009, is at the top which appears to be created as part of a fax transmittal. (Tr. 1323.) The list represents the fairs Karageorgis anticipated attending in 2010; there are a few fairs on the list that he did not attend. (Tr. 1324.) Specifically, he did not attend Belmont because the community promoter canceled the fair and PFGF did not attend Brookhaven because of a last-minute misunderstanding about his location. (Tr. 1324-25.) Instead of Belmont, PFGF attended the Bucks County Fair in Pennsylvania. (Tr. 1325-26.) Instead of Brookhaven, they attended the Kings County Fair in Brooklyn and the Merrick Fair on Long Island. (Tr. 1326.)

Application for Temporary Employment Certification ETA Form 9142 (RX 42)

This copy of ETA Form 9142 seeks twenty short order cooks for employment between March 10, 2010 and November 10, 2010. The job offer shows forty regular hours and zero overtime and a schedule of 11 AM to 7 PM. The rate of pay offered is \$10.71 per hour. There is

a signature that reads “Karageorgis” dated January 25, 2010. This version of the 9142 was not the version ultimately approved.

2010 Tax Returns and W-2 Transaction Journal for Peter’s Fine Greek Food, Inc. (RX 51)

Respondent offered RX 51, tax returns and W-2 transaction journal for 2010. Karageorgis testified that RX 51 is a record kept in the ordinary course of business and that his accountant prepared the tax returns. (Tr. 1597-03.) I note that the exhibit is not signed and does not have the preparer’s portion filled-out. I admitted RX 51, but I assigned an adverse inference to portions of it because Respondent did not produce those pages in a timely manner. (Tr. 1603, 1711.)

B. Legal Analysis

1. Misrepresentation of the Work Hours on the TEC

It is a violation for an employer to file a TEC that “willfully misrepresents a material fact.” 20 C.F.R. § 655.60(a). A willful failure is “a knowing failure or a reckless disregard with respect to whether the conduct was contrary to the law.” 20 C.F.R. § 655.65(e); see McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). The Administrator found that PFGF misrepresented the work hours when it submitted a TEC that stated the work week would consist of forty hours with a schedule of 11:00 AM to 7:00 PM, with no overtime. While there is no case law interpreting willfulness in the H-2B context, other federal employment statutes and regulations, such as the Fair Labor Standards Act, Davis Bacon Act, and H-1B program, employ the same definition of willfulness. 29 U.S.C. § 216(e), 29 C.F.R. § 587.3(c), 40 U.S.C. § 3145, 29 C.F.R. § 5.12, 8 U.S.C. § 1101(a)(15)(H)(i)(B) and § 1182(n), 20 C.F.R. § 655.805(c).

For example, in Cody-Zeigler, Inc. v. Administrator, ARB Nos. 01-014/015, slip op. at 31 (ARB Dec. 19, 2003) the Administrative Review Board (“ARB”) discussed the meaning of willfulness in the context of debarment under the Davis Bacon Act. The ARB explained that “although mere inadvertent or negligent conduct would not warrant debarment, conduct which evidences an intent to evade or a purposeful lack of attention to a statutory responsibility does. Blissful ignorance is no defense to debarment.” Id. (quoting LTG Constr. Co., WAB No. 93-15, slip op. at 7 (Dec. 30, 1994)). Other relevant examples of willful violations include (1) where employer admitted that he knew he was not going pay the salaries listed on the LCA (Administrator v. Kutty, ARB No. 03-022, slip op. at 16 (ARB May 31, 2005), aff’d, Kutty v. U.S. Dep’t of Labor, 2011 WL 3664476 (E.D. Tenn. Aug. 19, 2011), appeal filed, No. 11-6120 (6th Cir. 2011)); (2) where employer admitted that it “may have had some general knowledge of its obligations” to pay employees, notify INS upon separation, pay employees on the bench, and provide transportation, but failed to comply (Administrator v. Pegasus Consulting Group, Inc. ARB Case No. 03-032/033, slip op. at 11 (ARB June 30, 2005)); (3) where there was no showing that employer attempted to consult anyone as to the H-1B wage requirements or that he did his own research in reckless disregard of the program requirements (Administrator v. Prism Enters. of Cent. Fl., ALJ No. 2001-LCA-00008 (ALJ June 22, 2001), aff’d, ARB Case No. 01-080 (ARB Nov. 25, 2003)).

On the other hand, courts have determined that there was a lack of willful conduct (1) where there was no actual or constructive notice of the existence and general requirements of the law and employer was not reckless or deliberate in failing to learn of its legal obligations (Chao v. Self Pride, Inc., 232 Fed. Appx. 280, 287 (4th Cir. 2007)); (2) where an employer is simply mistaken or negligent about the terms of the law (Hanscom v. Carteret Mortg. Corp., 2008 WL 4845832, \*4 (M.D. Pa. Nov. 5, 2008)); and (3) where an employer reasonably believed its practices were actually legal (Id. at \*14-15).

After carefully reviewing the testimony and evidence in this matter, I find that Respondent willfully misrepresented a material fact in the TEC. The evidence establishes that Respondent's business practice of having employees work from before the opening of the fair to after the closing each day did not possibly allow for forty-hour work weeks during the 2010 season. Karageorgis himself stated that PFGF employees sometimes work much more than forty hours per week. (Tr. 1732.) The interview statements and employee testimony shows that the work week consisted of more than forty hours and that working from before opening to after closing was a regular business practice. Thus, I agree with Administrator that Respondent never intended to have employees work only forty hours with a schedule of 11 AM to 7 PM without overtime.

I find that the misrepresentation was willful because Karageorgis knew or recklessly disregarded the contents of the TEC. At deposition, Karageorgis acknowledged that he had seen PFGF's 2010 *Application for Temporary Employment Certification ETA Form*. (AX 50 at 130.) It is not credible to me that a businessperson with extensive experience in the H-2B program who has been represented by attorneys would never read or familiarize himself with the application unless he were acting recklessly. Furthermore, there is evidence in this matter that mailings were sent to Karageorgis at his home address. The 2010 ETA Final Determination for Partial Certification letter was sent to Respondent care of Peter Karageorgis in Queens, New York. (AX 49-3.) The ETA Final Determination included the TEC with its forty hour without overtime work week. Any failure by Karageorgis to read or acquaint himself with the TEC was more akin to acting in "blissful ignorance" evidencing willfulness than acting due to an excusable lack of actual or constructive notice. See Cody-Zeigler, Inc., ARB Nos. 01-014/015, slip op. at 31; Self Pride, Inc., 232 Fed. Appx. at 287.

The forty-hour work week was consistently reiterated in PFGF's H-2B paperwork including past applications, the newspaper ad, and the contracts provided to the employees. In addition, I do not find it credible that Karageorgis could have conversed with potential job applicants who called his personal cell phone and yet have remained unaware of the job description in the ad about which they spoke. Lastly, I am also not persuaded that the misrepresentation was not willful because attorney Seheult filed and signed the application for Karageorgis. Administrator v. Kutty, ARB No. 03-022, slip op. at 16 (ARB May 31, 2005), aff'd, Kutty v. U.S. Dep't of Labor, 2011 WL 3664476 (E.D. Tenn. Aug. 19, 2011), appeal filed, No. 11-6120 (6th Cir. 2011). At the ALJ level in Kutty, discussed in greater detail below, the administrative law judge determined that the fact that the employer hired an attorney to do the paperwork did not excuse him from complying with the agreements in his H-1B petition.

Administrator v. Kutty, 2001-LCA-00010 to 25 (ALJ Oct. 9 2002).<sup>17</sup> Taking all of the foregoing together, I find that PFGF willfully misrepresented a material fact.

“The Administrator may assess civil money penalties in an amount not to exceed \$10,000 per violation for any substantial failure to meet the conditions provided in the H-2B *Application for Temporary Employment Certification*” or “any willful misrepresentation in the application” or “a failure to cooperate with a Department audit or investigation.” 20 C.F.R. § 655.65(c). When determining the amount of civil money penalty, “the WHD Administrator shall consider the type of violation committed and other relevant factors.” 20 C.F.R. § 655.65(g). The highest penalties are reserved for willful failures to meet conditions of the TEC that involve harm to U.S. workers. (*Id.*) The regulations also list other factors which may be considered: (1) previous history of violation ; (2) the number of U.S. or H-2B workers employed by the employer and affected by the violation; (3) the gravity of the violation; (4) efforts made by the employer in good faith to comply with the INA and the regulations; (5) the employer’s explanation of the violation; (6) the employer’s commitment to future compliance; and (7) the extent to which the employer achieved a financial gain due to the violation, or the potential financial loss to the employer’s workers. 20 C.F.R. § 655.65(g)(1)-(7). An administrative law judge “may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator,” with the “reason or reasons for such order” to be stated in the decision. 20 C.F.R. § 655.75(b). This includes independently weighing the mandatory or discretionary factors used to assess civil money penalties. Administrator v. Prism Enters. of Cent. Fl., ALJ No. 2001-LCA-00008, slip op. at 13 (ALJ June 22, 2001), aff’d, ARB Case No. 01-080 (ARB Nov. 25, 2003) (ALJ revised the amount of civil money penalty based on her weighing of the factors in an H-1B matter).

Administrator, using the factors at § 655.65(g), assessed \$10,000.00 for the willful misrepresentation of the work hours because it found that the violations affected all workers and was serious because there were many work weeks during which the employees worked more than forty hours. Administrator states that there was no effort to comply because PFGF did not keep accurate time records to track the hours. In addition, the Administrator argues that PFGF achieved a substantial financial gain by paying less and receiving more work. (Administrator’s Brief at 36-37.)

I agree that all workers were affected, that the violation was serious, and that Respondent did not show a good faith effort to comply, failed to offer a reasonable explanation, and achieved financial gain from the violation. While I note that this is Respondent’s first violation, I do not afford much weight to that factor because all testimony in this matter confirms that PFGF used the same business practices in the past and attended many of the same fairs with the same schedules. Similarly, while I found Karageorgis’ testimony about his commitment to future compliance credible, I do not find that it outweighs the gravity of the violation. Nevertheless, I disagree with the Administrator that this violation warrants the highest civil money penalty allowed. The clearly stated policy in the regulations is that that the highest penalties shall be reserved for willful failures to meet conditions that involve harm to U.S. workers. I find that

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<sup>17</sup> In their briefs, the parties discussed the law of agency concerning the relationship between Seuhelt and Respondent in filling out the TEC. (Administrator’s Brief at 32-34, Respondent’s Brief at 25-28.) Regardless of the agency discussion, I find that given the reckless disregard for the contents of the TEC, Respondent’s violation is willful.

Respondent's misrepresentation of the work hours does not involve harm to U.S. workers and, accordingly, I reduce the civil money penalty for this violation to \$9,000.00.

## 2. Misrepresentation of the Rate of Pay on the TEC

Similar to the misrepresentation of the work hours, here, Administrator must show that Respondent willfully misrepresented a material fact when it stated the rate of pay would be \$10.71 per hour. 20 C.F.R. §§ 655.60(a), 655.65(e). As above, Administrator assessed a civil money penalty of \$10,000.00 after weighing the factors at § 655.65(g) and determining that the violation affected all employees, PFGF showed no effort to comply because it did not track payments, and PFGF received substantial financial gain by paying employees less for more hours of work. (Administrator's Brief at 36-37.)

The testimony and evidence establishes that Respondent misrepresented the rate of pay in the TEC. PFGF's business practice was to pay employees sporadically in round, lump sums without the benefit of accurate time records. His payment system does not possibly allow for consistent, accurate payments of \$10.71 per hour for all hours worked during the 2010 season. Karageorgis admitted that he did not pay employees by the hour and did not keep records of payments other than his destroyed or discarded notebooks prior to the investigation. (Tr. 1750-51.) According to Ruth Beltran, Karageorgis told her that he pays some employees \$8.00 or \$9.00 per hour and the rest \$7.25 per hour. (Tr. 106.) The employee testimony and the post-hoc records of payments also do not suggest that Karageorgis paid \$10.71 per hour. Indeed, the fact that the timesheets produced do not show any hours for setup, teardown, preparation, or cleanup combined with the fact that he paid employees in variable lump sums establishes that they were not accurately paid the hourly wage attested to in the TEC before the investigation. Thus, I find that Respondent misrepresented a material fact on the TEC because he never intended to pay the wage as listed.

I find that the misrepresentation of the rate of pay was willful because Karageorgis knew or recklessly disregarded the contents of the TEC. I base that finding on the same reasons that I found the misrepresentation of the work hours was willful. The evidence in this matter is that Karageorgis participated in the H-2B program and used attorneys to file his applications for many years. He received documents at his home address. The rate of pay was similar to those used in the past on PFGF's H-2B paperwork and it was included in the newspaper ad and the contracts provided to the employees. As above, I do not find it credible that Karageorgis could have conversed with potential job applicants who called his personal cell phone and have remained unaware of the hourly wage. Again, I am also not persuaded that the misrepresentation was not willful because attorney Seheult filed and signed the application for Karageorgis. Especially given attorney Seheult's deposition testimony about having had several conversations with Karageorgis regarding why the wage rate was being set as \$10.71. (AX 49 at 12, 16-18, 49, 59-60.) Although Karageorgis denied having conversations about the \$10.71 wage rate (Tr. 1319-20), I find attorney Seheult's deposition testimony more credible, given that it is accompanied by contemporaneous notes made by Seheult of these conversations and specifically referencing Karageorgis' questions about the rate of pay. (AX 49-10, 49-12.) If Respondent was unaware of the contents of the TEC it was through a reckless disregard. Administrator v. Prism Enters. of Cent. FL., ALJ No. 2001-LCA-00008 (ALJ June 22, 2001), aff'd, ARB Case No. 01-

080 (ARB Nov. 25, 2003). The misrepresentation of a material fact on the TEC was, therefore, willful.

I agree with the Administrator that this failure affected all employees who should have been paid more than they were for their work and that Karageorgis made no attempt to comply with the regulations because he did not keep accurate time and payment records. Respondent received great benefit from extra hours of work that he did not intend to compensate at the rate to which he agreed. I note that this is a first violation and that Respondent has demonstrated a commitment to future compliance, but, on balance, I find that the other factors weigh heavily toward a serious civil money penalty. Because I do not find that the misrepresentation harmed U.S. workers, however, I do not find that the highest penalty, \$10,000.00, is appropriate. I reduce the civil money penalty to \$9,000.00.

3. Substantial Failure to Meet a Condition of the TEC, Payment of the Offered Wage

It is a violation for an employer to substantially fail to meet any of the conditions of the labor certification application attested to, as listed in § 655.22 (obligations of H-2B employers). 20 C.F.R. § 655.60(b). Section 655.65(d) defines a substantial failure as a “willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I-129.” Administrator argues that PFGF substantially failed to pay the offered wage because it paid employees at irregular intervals and in lump sums that did not include payment for their time during setup, teardown, preparation, and cleanup. (Administrator’s Brief at 38.) Based on the evidence summarized above, I agree.

Based on my review of the evidence, I find that the Respondent failed to pay the offered wage of \$10.71 per hour. First, Investigator Beltran credibly testified that Karageorgis informed her that he paid some employees \$8.00 or \$9.00 per hour and the rest \$7.25 per hour in cash at the end of every fair. (Tr. 106.) Further, at deposition, Respondent admitted that before September 8, 2010, he did not pay his employees \$10.71 per hour. (AX 50 at 95.) Second, the Respondent’s recordkeeping did not allow Respondent to accurately compensate employees for all hours worked. Several employees stated that Respondent did not record their hours during the season. (AX 11; AX 17A.) The timesheets which were produced have serious deficiencies. (RX 27.) Karageorgis testified that he did not include time for setup, teardown, daily preparation, or daily cleanup and that some employees worked fairs but are not included in the timesheets which he used to calculate payments. (Tr. 1367-68, 1380-81, 1384-86, 1389-90, 1401, 1409-14, 1422-23, 1436-38, 1441, 1448-50, 1453-54, 1474-75; RX 27.) Testimony at the hearing and the interview statements establish that employees spent significant time on those activities which are not included in Respondent’s timesheets. Thus, even if Respondent had paid employees the offered wage for the hours listed in Respondent’s timesheets, Respondent would effectively be paying the employees a significantly lower wage.

Third, Karageorgis admitted that he did not pay employees by the hour until after the investigation began in September 2010. (Tr. 1750-51.) Instead, he paid employees in lump sum payments which did not approach the offered wage. (Tr. 231; AX 9; AX 10; AX 11; AX 17A;

RX 27 at 000185, 000190.)<sup>18</sup> Further, based on the findings contained in the Appendix, excluding the back wages paid to employees in the Department of Justice settlement, employees were paid effective hourly wages significantly below the offered wage.<sup>19</sup> Thus, I find that Respondent failed to pay the offered wage of \$10.71, a condition contained in the Respondent's labor certification application.

I find that Respondent's failure was a willful failure that constitutes a significant deviation from the terms and conditions of the TEC. Respondent's actions are similar to those of other employers who have been found willful. For example, the Administrative Review Board affirmed an ALJ's finding of willfulness when the respondent admitted that he was not going to pay the salaries listed on the LCAs. Administrator v. Kutty, ARB No. 03-022, slip op. at 16 (ARB May 31, 2005), aff'd, Kutty v. U.S. Dep't of Labor, 2011 WL 3664476 (E.D. Tenn. Aug. 19, 2011), appeal filed, No. 11-6120 (6th Cir. 2011).

The arguments in the instant matter are analogous to the arguments in Kutty at the ALJ level. In Kutty, the ALJ summarized,

Respondents suggested that the fact "that Respondents hired an attorney to do the paperwork . . . obviates against a finding of a knowing or reckless disregard with respect to whether the conduct was contrary to law." Dr. Kutty admitted that he knew he was not going to pay the doctors the amounts listed in the LCAs . . . despite having signed a declaration that the information on the LCAs was correct, and despite having signed an agreement to abide by the terms of the LCAs when he signed the H-1B petitions. The fact that he hired an attorney to do the paperwork did not excuse him from living up to those agreements. When he received specific written advice from attorneys about the requirement that he pay the higher of the actual or prevailing wage rate, the requirement that he pay workers without licenses regardless of their inability to work, and the requirement of making the LCAs and other documents available for public inspection, he ignored it. . . . He knew he was failing to pay the promised wage rates, and he showed reckless disregard of the requirements of the Act when he failed to read forms he was signing or written advice he was given. I conclude that Dr. Kutty's failure to pay the required wage rates to any of the 17 H-1B doctors was willful under the definition contained in the regulations.

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<sup>18</sup> Assuming *arguendo* that Respondent made the lump sum payments listed at RX 27, page 000190 for the Meadowlands fair, the effective wages paid to individual employees would not match their offered wage. Respondent alleged that Jonathan Dominguez Espinoza was paid \$1,600 for the Meadowlands fair. In the Appendix, I found that Dominguez Espinoza earned 219 compensable hours at the Meadowlands fair. Effectively, he would have been paid \$7.31 per hour. Respondent alleged that Saul Galicia Aguilar was paid \$2,200 for the Danbury fair. In the Appendix, I found that Galicia Aguilar earned 267 compensable hours at the Danbury fair. Effectively, he would have been paid \$8.24 per hour.

<sup>19</sup> For example, I calculated that Jose Luis Olmos Rodriguez earned 711 compensable hours during the investigation period. However, excluding his payment pursuant to the Department of Justice settlement, Olmos Rodriguez only received \$1,700.00. Effectively, Olmos Rodriguez was paid \$2.39 per hour.

2001-LCA-00010 to 25 (ALJ Oct. 9 2002). As in that case, Respondent has admitted that the company did not pay by the hour prior to the investigation. If Karageorgis failed to read or review the documents sent to the Department of Labor, it was reckless for him to do so. His failure to keep any accurate records that show all hours worked by all employees shows his willful failure to pay the offered wage. Indeed, the most reasonable conclusion based on the totality of the evidence in this matter is that Karageorgis haphazardly paid employees a sum that seemed reasonable to him without the benefit of any reliable record of hours worked and without regard for the requirement that he pay \$10.71 per hour. While he claims that he did not sign the TEC or authorize Seheult to sign the TEC for him, he also received documents at his home address, interviewed applicants who responded to a job advertisement which stated that the pay was \$10.71 per hour, and faxed a copy of the Request for Further Information to Seheult. Seheult testified at length that he and Karageorgis discussed the prevailing wage requirement many times. Moreover, Respondent's own receipts, which show payments made after the investigation began, support the government's argument that Karageorgis was not paying the employees throughout the summer. Thus, I find that PFGF's payment practices were a willful failure to pay the promised wage.

Administrator assessed \$10,000.00 for the substantial failure to pay the wage rate offered in the TEC because it found that the failure affected all of the workers and because PFGF received a financial gain from the violation. (Administrator's Brief at 55-56.) Weighing the factors, I agree with Administrator's assessment because I find that the factors cited by the Administrator are weightier than the mitigating factors such as Respondent's commitment to future compliance and the fact that this is a first violation. Unlike the violations discussed above, this violation also had an effect on American workers. Respondent's failure to pay the wage allowed him pay foreign laborers sums that were at times lower than the minimum wage.<sup>20</sup> This violation strikes at the core purpose of the H-2B regulations, to protect American citizen laborers: "the purpose of the INA [is] that U.S. workers rather than aliens be employed whenever possible. . . . Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed." 20 C.F.R. § 655.0 (citations omitted). I find the highest penalty of \$10,000.00 is appropriate for this violation.

### Back Wages

The regulations at 20 C.F.R. § 655.65(i) provide that "[i]f the WHD Administrator finds that an employer has not paid wages at the wage level specified under the application and required by §655.22(e),<sup>21</sup> the Administrator may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of §655.22(e)." Above, I found that Respondent substantially failed to pay the offered wage. Accordingly, back wages are appropriate in this matter. I note that Respondent has paid \$85,000.00 in settlement of

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<sup>20</sup> The New York and New Jersey minimum wage is \$7.25 per hour. Minimum Wage Laws in the States, U.S. Dep't of Labor, <http://www.dol.gov/whd/minwage/america.htm> (last visited Aug. 6, 2013). The Connecticut minimum wage is \$8.25 per hour. (*Id.*)

<sup>21</sup> Section 655.22(e) requires that the employer "will pay the offered wage during the entire period of the approved H-2B labor certification."

the Department of Justice matter. Administrator assessed that \$65,937.68 remains due to nine H-2B employees for the 2010 season. (Administrator's Brief at 21.)

As previously discussed, the Administrative Law Judge "may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD." § 655.75(b). As outlined in the Appendix to this Decision, I have thoroughly considered all of the evidence of record concerning the hours worked by PFGF employees, and payment to those employees. In sum, I find that the Respondent owes \$14,422.32 in back wages, to be paid to eight employees.

### Interest

The Administrator's initial determination stated that Respondents' back wage liability was subject to the assessment of interest and administrative fees and penalties. (AX 1 at 2.) As of the date of the Administrator's initial determination, in March 2011, the rate of interest to be assessed on any delinquent payment was one percent, and a penalty at the rate of six percent was to be assessed on any portion of debt remaining after ninety days.

Further, the Administrative Review Board has held that, notwithstanding that the Immigration and Nationality Act does not specifically authorize an award of interest on back pay, interest shall be paid on awards of back pay, with compound interest to be paid prejudgment. Innawalli v. Am. Info. Tech. Corp., Case No. 05-165, slip op. at 8-9 (ARB Sept. 29, 2006); Amtel Group of Florida, Inc., v. Yongmahapakorn, Case No. 04-087, slip op. at 12-13 (ARB Sept. 29, 2006).<sup>22</sup> The Board also has set the rate of interest at the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2). Mao v. Nasser, Case No. 06-121, slip op. at 11-12 (ARB Nov. 26, 2008). In addition, the Board has applied the procedures for the calculation of interest due on back pay awards announced in Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 99-042, 00-012, (ARB May 17, 2000), to cases arising under the INA. See Innawalli, Case No. 05-165, slip op. at 9; Mao, Case No. 06-121, slip op. at 11.

Based on the foregoing, I find that prejudgment compound interest is due on the back wages owed, to be calculated in accordance with the procedures outlined in Doyle. Post-judgment interest is due on all back wages until paid or otherwise satisfied.

#### 4. Substantial Failure to Meet a Condition of the TEC, Payment of Outbound Transportation

According to 8 U.S.C. § 1184(c)(5)(A) and 20 C.F.R. § 655.22(m) employers must provide return transportation to workers who are dismissed by the employer prior to the end of the period of employment. However, the evidence in this matter does not establish that Karageorgis terminated Rafael Hernandez Alvarez. Respondent's witnesses, Ernesto Navarro Lopez (Tr. 898-01), Armando Navarro Luna (Tr. 1019-20), Jonathan Dominguez Espinoza (Tr. 1080-81), Joaquin Moran Velazquez (Tr. 1164), Saul Galicia Aguilar (Tr. 1225), and Peter Karageorgis (1606-13) each testified that Rafael quit of his own volition due to family troubles.

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<sup>22</sup> There is no authority for the charging of interest on civil money penalties. See, e.g., Innawalli, slip op. at 9.

This account is also expressed in a note written by Karageorgis which has a fax stamp showing that it was sent on October 7, 2010. (RX 27 at 000192.) Lastly, Seheult testified at a deposition that Karageorgis told him that Hernandez Alvarez left (AX 49 at 72-73), which may not establish the truth of it, but tends to confirm the consistency with which Karageorgis represented that Hernandez Alvarez left of his own volition.

In contrast, Jose Luis Olmos Rodriguez testified that he did not ask Karageorgis for his money because one employee who asked was fired. (Tr. 288.) Similarly, WHD investigator Jorge Alvarez testified that employees told him about a coworker who was terminated early due to a dispute with Karageorgis, causing the employee to beg in the streets for money so he could buy his ticket back to Mexico. (Tr. 516-17.) Alvarez stated that he did not record that information in any interview statements because the employee said it while they were walking to the laundromat; he was not able to say which employee told him that information. (Tr. 548-49.) I find that these statements from the Administrator's witnesses are not specific enough to outweigh the consistent testimony of Respondent's witnesses and do not establish preponderant proof that Hernandez Alvarez was indeed terminated.

Accordingly, I find that PFGF did not substantially fail in its obligation to provide outbound travel because that requirement only applies to terminated employees. The Administrator's assessment of a \$500.00 civil money penalty on this count is not justified.

#### 5. Substantial Failure to Meet a Condition of the TEC, Notice of Separation

Related to the alleged violation based on the failure to pay Rafael Hernandez Alvarez's outbound transportation is the alleged violation for substantially failing to meet a condition of the TEC by failing to notify the appropriate authorities within two days of the early separation of H-2B employee Rafael Hernandez Alvarez. The regulations at 20 C.F.R. § 655.22(f) mandate that employers take certain action upon early separation of an H-2B employee:

Upon the separation from employment of H-2B worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing (or any other method specified by the Department or DHS in the Federal Register or the Code of Federal Regulations) of the separation from employment not later than 2 work days after such separation is discovered by the employer. An abandonment or abscondment shall be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive days without the consent of the employer. Employees may be terminated for cause.

The evidence clearly demonstrates that PFGF did not notify the Department of Labor and DHS based on the absence of the notification in public record. (AX 43.) In addition, Karageorgis testified that he did not personally notify the agencies (Tr. 1717-18) and Seheult testified at his deposition that he did not notify the agencies (AX 49 at 72-73).

Respondent argues that Administrator has nonetheless failed to show a willful failure because Karageorgis believed that attorney Malcolm Seheult would report the separation.

(Respondent's Brief at 59-60.) In response, Administrator submits that it is not credible that Karageorgis believed Seheult would notify; Administrator asserts that Karageorgis knew of the requirement and failed to comply, thus demonstrating a willful failure. (Administrator's Brief at 58.) I find that Respondent's conduct is similar to the willful conduct in Administrator v. Pegasus Consulting Group, Inc., ARB Nos. 03-032, 03-033, slip op. at 11 (ARB June 30, 2005). In that case, the Administrative Review Board stated that employer "effectively admitted its willful non-compliance when it said that it, 'may have had some general knowledge'" of its obligations to pay employees, notify the INS upon the cessation of an H-1B worker, pay H-1B employees while on the bench, and provide transportation upon cessation of employment. (Id.) The Administrative Review Board found that the employer was aware of its obligation, but failed to follow it, thereby demonstrating a willful violation. (Id.)

In the instant case, it is undisputed that Karageorgis called Seheult upon Hernandez Alvarez's departure, showing that he was aware of the requirement to notify the government when an H-2B employee abandons the job. Karageorgis further testified that he thought Seheult would notify, again showing his awareness that notice was required. The evidence is not conclusive as to whether Seheult agreed to notify the agencies and failed to do so (as Karageorgis asserts) or if Seheult told Karageorgis that he would not notify the agencies and gave Karageorgis directions how to proceed (as Seheult asserts). I am more persuaded by Seheult's testimony on this matter, especially because there is no testimony that Karageorgis ever followed up with Seheult to confirm that notice had been sent. I find that the failure was willful because the agencies were never notified at all despite Karageorgis' knowledge that Hernandez Alvarez left and his recognition that he had obligations in that event.

For this violation, the Administrator assessed a civil money penalty of \$5,000.00, which it considered reasonable because PFGF made no effort to comply, but the failure did not affect all employees. In my estimation, the mitigating factors also include that this is a first violation which affected only one employee and involved no financial gain for Respondent or financial loss to the employee. I found Karageorgis' testimony about his commitment to future compliance credible and I do not find the violation grave. Additionally, the explanation that Karageorgis was relying on his attorney to notify the government was plausible although contradicted by Seheult's testimony at his deposition. Thus, I find that the civil money penalty should be reduced to \$2,000.00 because it is only justified by Respondent's lack of effort in complying.

6. Substantial Failure to Meet a Condition of the TEC, Placement of Employees at an Alternate Work Site without Confirmation of Non-Displacement of American Workers

Administrator asserts that PFGF substantially failed to meet a condition of the TEC when it placed three employees at another employer's work site without obtaining assurance of non-displacement of American workers. Specifically, Administrator refers to when Karageorgis sent Jose Luis Olmos Rodriguez, Adonai Guerrero Vazquez and Horacio Tirado Ortiz to work for Nick Strates for one week. Respondent has admitted that Karageorgis sent three employees.

The regulations require that job contractors receive assurance from the other employer that the H-2B worker will not displace an American worker:

If the employer is a job contractor, it will not place any H-2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless: (1) The employer applicant first makes a written bona fide inquiry as to whether the other employer has displaced or intends to displace any similarly employed U.S. workers within the area of intended employment within the period beginning 120 days before through 120 calendar days after the date of need, and the other employer provides written confirmation that it has not displaced and does not intend to displace such U.S. workers, and (2) All worksites are listed on the certified *Application for Temporary Employment Certification*, including amendments or modifications.

20 C.F.R. § 655.22(k). As aforementioned, Respondent admitted in its interrogatory responses and at the hearing that it did not make any inquiry. However, Respondent argues that 20 C.F.R. § 655.22(k) applies only to "job contractors" and that Respondent is not a "job contractor" as defined in the regulations. (Respondent's Brief at 55.)

According to 20 C.F.R. § 655.4, a job contractor is

[A] person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch, or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

The language in 20 C.F.R. § 655.4 defining a job contractor as an employer that "contracts services . . . on a temporary basis to one or more employers, which is not an affiliate, branch, or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services . . . other than hiring, paying, and firing the workers" does not contemplate PFGF's relationship to Demetri's. The evidence in this matter shows that Karageorgis and Nick Strates were friends who work in the same business. At times, they would casually swap workers when one had greater need than the other, depending on how busy the fairs were. Various explanations of the job contractor definition from the Department of Labor's Final Rule and Proposed Rule support the conclusion that PFGF was not a job contractor.<sup>23</sup>

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<sup>23</sup> As an initial matter, I must note that the United States District Court for the Eastern District of Pennsylvania invalidated the definition of a job contractor on the ground that DOL provided no rational explanation for its policy changes; the District Court did not vacate the definition, but rather remanded to DOL. *Comite de Apoyo a Los Trabajadores Agricolas v. Solis*, Civ. A. No. 09-240, 2010 WL 3431761 at \*16, \*25 (E.D. Pa. Aug. 30, 2010). The District Court invalidated the definition because the new definition was "precisely the opposite" of the explanation given for the change: DOL's reason to change the definition was to "make clear that the job contractor, rather than the contractor's client, must control the work of the individual employee" (73 Fed. Reg. 78020, 78024 (Dec. 19, 2008)), yet, the definition at

First, the Final Rule describes the relationship between the job contractor and the other employer as that of a contractor to its *client*: “The Department acknowledges that [the bona fide inquiry] imposes an additional level of inquiry between job contractors and their *clients* where the contractor will be providing H–2B workers at a client site. 73 Fed. Reg. 78020, 78042 (Dec. 19, 2008) (emphasis added). Second, the Final Rule generally envisions the job contractor setup as one in which “an H–2B worker [is] performing duties at company X, for which company Y has hired him and pays him.” 73 Fed. Reg. 78020, 78042 (Dec. 19, 2008).<sup>24</sup> Thus, I find that when Section 655.4 states that a job contractor is an employer who contracts services to one or more employers, it denotes a contractor-client relationship which is very unlike the relationship that Karageorgis had with Nick Strates. Karageorgis did not apply for H-2B employees to then send those employees to work for his clients. Rather, Karageorgis applied for H-2B employees to work at his own establishment. On occasion, he had his employees fill in at Demetri’s when the PFGF stands were not busy and his friend had more work than he could handle.

For further support, I look to the Proposed Rule dated May 22, 2008. In that publication, DOL elaborated on the definition of a job contractor:

Job contractors, which typically supply labor to one or more clients under contract, may file applications as employers. However, the Department recognizes that job contracting entities may seek large numbers of H–2B workers without providing a defined temporary need for such workers. A job contractor will by definition have an ongoing need on behalf of all of its clients. Therefore, the Department’s position continues to be that the temporary or permanent nature of the work of a job contractor will be determined by examining the job contractor’s need for such workers, rather than the needs of its *employer customers*.

73 Fed. Reg. 29942, 29956 (May 22, 2008) (emphasis added). As above, the Department of Labor explained that the other employer is to the job contractor a “client” or “customer.” In the instant matter, Karageorgis testified that Strates is a family friend who needed extra workers at one fair. (Tr. 1654-55.) He stated that he and Nick Strates never entered into an agreement about the workers and he never received compensation for it. (Tr. 1655.) I, therefore, agree with Respondent that PFGF does not meet the definition of a job contractor.

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Section 655.4 mandates that “the job contractor will not exercise any supervision or control in the performance of the services.” Putting aside the invalidation of the rule, the explanation in the Final Rule and Proposed Rule still supports my conclusion that Respondent is not a job contractor.

<sup>24</sup> I do acknowledge that the preamble to the Final Rule states: “Finally, an industry association commented that H–2B workers employed by carnivals and circuses are constantly being placed on job sites of other employers as they travel the circuit and that this requirement is too difficult to comply with. It is difficult for the Department to discern, from the manner in which this comment was written, whether the H–2B workers are being paid by one petitioning employer throughout the itinerary or whether these H–2B workers are placed on the payroll of the fixed-site employer at each location. The Department has not made any changes to this section, as no compliance challenge was clearly communicated.” 73 Fed. Reg. 78020, 78042 (Dec. 19, 2008). However, I agree with the Department of Labor that it is too difficult to discern the sort of arrangement described in the comment and whether it is at all analogous to PFGF’s situation.

Because the provision at 20 C.F.R. § 655.22(k) begins, “If the employer is a job contractor,” and I have found that Respondent is not a job contractor, I find that § 655.22(k) does not apply in the instant matter. The Administrator has not established a substantial violation and PFGF does not owe a civil money penalty.

7. Failure to Cooperate

According to 20 C.F.R. § 655.50(c):

An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the WHD Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative.

The evidence demonstrates that WHD investigator Ruth Beltran requested records when she spoke to Karageorgis at the New York State Fair. Karageorgis acknowledged that Beltran asked for records including “the payroll and the hours and any payments you did with workers.” (Tr. 1679, 1772.) According to Karageorgis he told her that he would provide the records, but he needed time as he was scheduled to attend a fair in Asheville. (*Id.*) Karageorgis also recognized that Beltran informed him that records were to be turned over within two to three days. (Tr. 1679.) While Seheult faxed some documents on September 9, 2010, only minimal records were provided. (AX 36; AX 37.) Lists of Respondent’s H-2B employees, their dates and hours of employment and payment records were not provided.

A second request for records was faxed to Karageorgis, attorney Seheult and Joann Levantis, identified by Respondent as PFGF’s accountant (AX 50-21) on September 9, 2010. (AX 35.) Again, employee information, hours and dates and payment records were requested. Throughout Karageorgis’ testimony, he repeatedly referenced that he recorded such information in notebooks throughout the fair season and later transferred the information onto timesheets and destroyed the notebooks. (Tr. 1359, 1363, 1384.) Some of the timesheets include fax timestamps dated October 7, 2010. (RX 27.) Catherine Quinn-Kay testified that the Wage and Hour Division never received hours and earnings records for PFGF’s employees. (Tr. 750.) Beltran also testified that she did not receive any documents from Respondent beside the documents represented by Administrator’s Exhibits 36 and 37. (Tr. 113-14.)

Although Karageorgis offered explanations for why documents were not provided at certain times during the investigation, such as during his arrest, he did not provide a credible response explaining why the documents from the 2010 fair season were either never produced or not produced until shortly before the November 2011 hearing. In fact, I find Respondent’s contention that he recorded hours in notebooks which he then transferred onto timesheets before destroying the notebooks not credible. Given the cash nature of Respondent’s business, the

haphazard cash payments made to workers, and the fact that Respondent was not always on site while PFGF's employees worked, I find it more likely that Respondent kept no written records of employee hours. The records presented at the hearing were clearly created after the fact, for the purposes of this litigation. Although, Respondent's payroll and timesheets did not exist, other records which were in existence at the time of the Department of Labor's request were not turned over. Such records include a list of Respondent's H-2B workers, Respondent's 2010 Form I-129 and Department of Homeland Security's approval of Respondent's H-2B workers. (Tr. 731, 748, 749). Accordingly, I find that, as Respondent's repeatedly failed to turn over documents to the Department of Labor despite the Administrator's multiple requests, Respondent failed to cooperate with the Department investigation.

The Administrator assessed a \$10,000.00 civil money penalty for the failure to cooperate because the failure affected all employees, evinced a lack of good faith effort, was not justified by a credible explanation, and made it more difficult for the Administrator to determine compliance which provided PFGF an opportunity for financial gain from noncompliance. (Administrator's Brief at 66.) However, in assessing the gravity of Respondent's failure to cooperate, I acknowledge that Respondent did comply with the investigation in several important ways. WHD investigators testified that Karageorgis was cooperative and allowed them to interview himself and his employees during fair hours. Attorney Seheult sent two faxes to WHD on September 9, 2010 containing some of the requested documentation. Karageorgis complied with Investigator An's request that he return to the trailers to pay his employees on the night of his arrest. I find it likely that, had payroll records existed before the investigation, Respondent would have turned them over to the Administrator, as Respondent did turn over the records that he had. Thus, I find that the civil money penalty should be reduced to \$1,000.00 because although Respondent failed to turn over all of the documents requested by the Administrator, in part that was due to the fact that some of the requested documents did not exist.

### **ORDER**

For the foregoing reasons, I find that Respondents violated the H-2B wage laws. It is hereby ORDERED:

- 1) Respondents must pay \$14,422.32 in back wages to the following former H-2B employees: Delfino Cabrera Perez (\$3,669.72), Jonathan Dominguez Espinoza (\$2,033.00), Saul Galicia Aguilar (\$168.79), Rafael Hernandez Alvarez (\$3,702.45), Ernesto Navarro Lopez (\$1,952.28), Armando Navarro Luna (\$550.38), Artemio Hugo Pacheco Flores (\$1,172.85), and Victor Manuel Vazquez Garcia (\$1,172.85).
- 2) Respondent has fully compensated and owes no back wages to the following former H-2B employees: Arturo Aguilar Hernandez, Jesus Aguilar Hernandez, Roberto Alfonso Cabrales Martinez, Luis Antonio Escarzago Arevalo, Manuel de Jesus Garcia Castaneda, Adonai Guerrero Vazquez, Joaquin Moran Velazquez, Jose Luis Olmos Rodriguez, Samuel Rosales Rios, Jose Solorzano Ramirez and Horacio Tirado Ortiz.

- 3) The Administrator's assessment of \$10,000.00 in civil money penalties for Respondent's willful failure to pay the offered wage is affirmed.
- 4) The Administrator's assessment of a willful violation for Respondent's misrepresentation of the work hours on the TEC is affirmed. The civil money penalty assessment is reduced to \$9,000.00.
- 5) The Administrator's assessment of a willful violation for Respondent's misrepresentation of the work hours on the TEC is affirmed. The civil money penalty assessment is reduced to \$9,000.00.
- 6) The Administrator's assessment of \$500.00 in civil money penalties for Respondent's failure to pay outbound transportation is reversed.
- 7) The Administrator's assessment of a willful violation for Respondent's failure to notify the appropriate authorities within two days of the early separation of an H-2B employee is affirmed. The civil money penalty assessment is reduced to \$2,000.00.
- 8) The Administrator's assessment of \$5,000.00 in civil money penalties for Respondent's alleged placement of employees at an alternate work site without confirmation of non-displacement of American workers is reversed.
- 9) The Administrator's assessment of a violation for Respondent's failure to cooperate is affirmed. The civil money penalty assessment is reduced to \$1,000.00.
- 10) Respondents are responsible for pre-judgment compound interest on the aforementioned back wage assessments. I also find they are responsible for post-judgment interest on all back wage assessments, until satisfied.

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within thirty calendar days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 655.76(a). The Board’s address is:

Administrative Review Board  
U.S. Department of Labor  
Room S-5220  
200 Constitution Ave, NW  
Washington, D.C. 20210

At the time you file the Petition with the Board, you must serve it on all parties to the case as well as the administrative law judge. 20 C.F.R. § 655.76(a).

No particular form is prescribed for the Petition, however, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
- (5) Be signed by the party filing the petition or by an authorized representative of such party;
- (6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
- (7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

20 C.F.R. § 655.76(b). If the Board determines that it will review the Administrative Law Judge’s decision and order, it will issue a notice specifying (1) The issue or issues to be reviewed; (2) The form in which submissions shall be made by the parties (e.g., briefs); and (3) The time within which such submissions shall be made. When filing any document with the Board, the party must file an original and two copies of the document. 20 C.F.R. § 655.76(e).