



**Issue Date: 10 May 2013**

CASE NO.: 2013-TNE-1

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,  
Prosecuting Party

v.

WADE SHOWS, INC.,  
Respondent

**SECOND DISCOVERY ORDER - CORRECTED**

A hearing, under the H-2B provisions of the Immigration and Nationality Act, (“INA”), 8 U.S.C. § 1101 (a)(15)(H)(ii)(b), as amended, and the implementing regulations at 20 C.F.R. § 655.1 *et seq.*, in the above-captioned matter, is scheduled for Tuesday, May 14, 2013, and continuing as necessary, in Detroit, Michigan.

On April 10, 2013, counsel for the Administrator, Wage and Hour Division (“WHD”), the Prosecuting Party, filed a Motion for a Protective Order, under 29 C.F.R. § 18.15. The Prosecuting Party represented that Respondent had requested discovery of information and/or documents and persons providing information which the former considered privileged, under 20 C.F.R. § 655.50(d)(informers’ privilege), attorney-client privilege, attorney work-product privilege, and the governmental “deliberative process” privilege. Because the information was being sought for a deposition to be held on April 17, 2013, a telephone conference call was held with counsel and the undersigned on April 12, 2013. That resulted in the issuance of a Discovery Order, on April 12, 2013. Both parties have complied with the requirements of that Order. The Prosecuting Party provided the Respondent with redacted versions of the materials sought and me with unredacted versions and an Affidavit. The Respondent has contested the claims of privilege. Respondent has moved to shorten the time for the Prosecuting Party to further respond, but I find no further response necessary. Given the imminent pendency of the hearing and the multitude of documents, I address the matter generally except where specific materials necessitate mention.

*General Discovery Principles*

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, specifically the rule at 29 C.F.R. § 18.14, “provide for” and “control” the resolution of this discovery dispute. Thus, the Federal Rules of Civil Procedure (“FRCP”), specifically Rule 26(b), do not apply, although they provide useful guidance.

Moreover, there are no inconsistent rules or regulations of “special application” which would preclude the application of §18.14. See 29 C.F.R. § 18.1.<sup>1</sup>

Part 18 provides for the following discovery methods: depositions; written interrogatories; production of documents; and, requests for admissions. 29 C.F.R. § 18.13. Discovery may be had into any relevant matter not privileged, regardless whether it may be ultimately admitted into evidence, if reasonably calculated to lead to the discovery of admissible evidence. 29 C.F. R. § 18.14(a) and (b). The OALJ Rules of Evidence define relevancy as “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 29 C.F.R. § 18.401.<sup>2</sup>

Parties may seek the production of documents describing each item with reasonable particularity which the party served may either comply with or object to, giving the reasons for any objection. 29 C.F.R. § 18.19(a)-(e). If a party fails to answer or produce matters sought, objects, or fails to respond adequately, the discovering party may move for an order compelling discovery. 29 C.F.R. § 18.21. When a Motion to Compel Discovery is made, under 29 C.F.R. § 18.21, the judge may make and enter a protective order. A judge, for good cause shown, may enter such an order “. . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .” 29 C.F.R. § 18.15.<sup>3</sup> Once relevancy is shown, the party seeking to prevent discovery has the burden of raising and sustaining any objections to discovery based on attorney-client privilege, work product, harassment, and undue burden. Fed. R. Civ. P. 26(b)-(c). If the written objections to discovery are not plain and specific to show a basis in fact for the motion’s conclusory (*sic*) statements as to the burden, the trial court in its discretion may deny relief. *See* 4 Moore, Federal Practice, §§ 33, 20; *White v. Wirtz*, 402 F.2d 145 (C.A. Okl. 1968); and, *see also Chubb Integrated Sys. Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 58 (D.D.C. 1984) (“General objections are not useful to the court ruling on a discovery motion. Nor does a general objection fulfill [a party’s] burden to explain its objections.”) That is so unless the request is over-broad on its face.

A party may obtain discovery of relevant matters prepared in anticipation of a hearing by or for the opposing party’s representative, including consultants or lawyers, only upon showing that: (1) the former has substantial need for the materials in the preparation of his or her case; and, (2) he or she is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. 29 C.F.R. § 18.14(c). The required showing of “substantial need” and “undue hardship” applies whether or not the documents prepared in anticipation of litigation are entitled to the additional work product protection. If disclosure of such documents would reveal the mental impressions, conclusions, opinions, or legal theories of an attorney, they are then protected by the work product privilege. 29 C.F.R. § 18.14(c).

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<sup>1</sup> 20 C.F.R. § 655.72 provides that, except as provided otherwise by Subpart A, the Rules of Practice and Procedure, 20 C.F.R. Section 18, apply, but not the Rules of Evidence, found in Subpart B.

<sup>2</sup> While the FRCP do not define “relevancy,” the Federal Rules of Evidence (“FRE”) defines it as, “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FRE Rule 401.

<sup>3</sup> The Prosecuting Party has properly sought relief.

### *Privilege Generally*

Except as otherwise required by law, “privilege” is governed by “the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.” 29 C.F.R. § 18.501. When allegedly privileged materials are sought, it is the burden of the party claiming protection to establish privilege. 23 American Jurisprudence (Second Edition, 2004), Section 48, Depositions and Discovery, II. Scope of Discovery, C. Work Product Rule. If a privilege is established, the burden then shifts to the seeker to show substantial need and inability to obtain the substantial equivalent by other means without undue hardship.<sup>4</sup> *Id.* It is recognized that, in contrast to relevance determinations, claims of privilege are to be narrowly construed with the burden of establishing its existence on the party asserting it. JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 26.60[1] (1989). Thus, as pointed out in MOORE’S, a “bald assertion of privilege is insufficient. . . since a trial court must be provided with sufficient information so as to rule on the privilege claim” and the privilege must be invoked as to specific questions or documents. *Id.*<sup>5</sup>

Like the Federal Rule, 29 C.F.R. § 18.14 appears to follow this scheme. Subsection (a) permits discovery of “any matter not privileged, which is relevant”. Subsection (c) refines the general rule of subsection (a) when documents or tangible things prepared in anticipation of litigation are sought. The § 18.14 process would require the party from whom disclosure is sought to raise a claim that the material was prepared in anticipation of litigation before subsection (c) would be applicable. Once the party from whom disclosure is sought makes the claim, the burden falls upon the seeker to show substantial need and undue hardship, etc.

### *Informant Confidentiality*

“The WHD Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under [20 C.F.R. subpart 655].” 20 C.F.R. § 655.50(d)(2011).

I conclude from the Acting Deputy Administrator’s Declaration that complainants, employees or former employees who have provided the government information that their employer (or former employer) paid wages below those required by a prevailing wage determination (in an approved H-2B application) face the potential for possible retaliation if their identities are disclosed and the government could potentially lose the possibility of other employees coming forward with future information needed to enforce the wage and hour laws.<sup>6</sup> Informers’ testimony, in such cases, is generally insignificant because the employer’s books, bookkeeper’s testimony, or the testimony of other employees will establish the wages actually

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<sup>4</sup> Cases find lapse of time and faulty witness memory and eye-witness statements may qualify under the “undue hardship/substantial equivalent” test, but not simply that the production might lead to documents useful to impeach a witness or pleas that the seeker wishes to ensure it has not overlooked anything. WRIGHT, *supra*.

<sup>5</sup> My *in camera* review cures any alleged deficiency in the privilege log submitted by the Prosecuting Party.

<sup>6</sup> Vol 3, Weinstein’s Federal Evidence, Section 510.09[1], page 510-20 (2<sup>nd</sup> Ed (1997)).

paid. Thus, courts general refuse to compel disclosure in these instances.<sup>7</sup> Moreover, the Acting Deputy Administrator properly invoked the privilege.

In *Wirt, Secretary of Labor v. Moore*, 41 F.R.D. 231 (U.S. Dist. Ct., W.D. Penn., 1966, an employer, in an analogous “wage” case, asked the court to compel discovery of the identity of the sources of the complaints against it, copies of their statements, and copies of other statements and investigations. The Court, citing *Mitchell v. Roma*, 265 FG.2d 633 (C.A. 3, 1959), agreed with the government’s argument that those matters were privileged and confidential. The Court pointed out that “simply because the Government is a party in a civil action should not give it rights superior to those of any other party unless Congress so provides by law.” *Moore* at 232. However, as in *Moore*, “the issue in the case was (is) whether the defendants failed to pay proper wages to its employees, not whether there was a statutory failure in regard to persons, employees or not, who have given written statements.” The central question was then whether the disclosure sought was essential to a fair hearing. The Court found the defendant’s interest was not strong enough to overcome the privilege. In *Walling v. Comet Carriers, Inc.*, 3 F.R.D. 442, 7 FR Serv 34.42 Case 2 (SD NY1944), the court held the files and records of the Wage-Hour Division, consisting of “affidavits, statements and transcripts of interviews and interrogatories by employees of the defendant” were privileged from discovery.

District Courts, in the First and Second Circuits, have considered and upheld the assertion of the Department of Labor’s “confidentiality” privileges in two Fair Labor Standards Act cases. In the first, the court relied on the privilege to withhold a Department list of witnesses and statements of employees and witnesses until ten days before trial and to totally deny the defendant the opportunity to ask the employees whether they had ever provided the Department any information because the defendant did not demonstrate a substantial need for them and a less intrusive method was available to obtain substantially identical information. *Brock v. J.R. Sousa & Sons, Inc.*, 113 F.R.D. 545 (U.S. Dist. Court, E.D. Mass. 1986). In the second, the court held the informer’s privilege protected forms recording two individuals’ formal complaints originating the Department’s investigation, a list of employees or former employees interviewed by the Department, and employee interview statements, but did not protect sheets on which the Department investigator recorded statements of over 100 employees. *Reich v. Great Lakes Collection Bureau, Inc.*, 172 F.R.D. 58 (U.S. Dist. Court, W.D. NY 1997). The Fifth Circuit Court of Appeals, following its own and other circuits’ precedents, also upheld the Secretary’s claim of privilege for informers. The Court observed that to require the production of witness statements would make each such witness a suspect informer. *Wirtz, Secretary of Labor v. Robinson & Stephens, Inc.*, 368 F.2d. 114 (5<sup>th</sup> Cir. 1966).

In *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 at 309 (5th Cir. 1972), the Fifth Circuit stated the controlling principles:

The law is clearly established that the privilege asserted here is a qualified one, not absolute, limited by the underlying purpose of the privilege as balanced against fundamental requirements of fairness and disclosure in the litigation process . . . In broad terms the interests to be balanced here are the public's interest in efficient enforcement of the Act,

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<sup>7</sup> Id. At 510-21.

the informer's right to be protected against possible retaliation, and the defendants' need to prepare for trial.

A demonstrated, specific need for material may prevail over a generalized assertion of privilege. *Black v. Sheraton Corp. of America*, 564 F.2d 531 (D.C. Cir. 1977). However, the burden of proving that the material sought is essential to a fair determination of the issues rests with the party seeking disclosure. *Hodgson, supra*. In balancing the conflicting interests, whether the public policy favoring non-disclosure will be outweighed by a party's interest in obtaining disclosure, will depend upon the particular circumstances of each case. *Roviaro*. The privilege has been upheld in a variety of administrative cases. See *U.S.D.O.L. v. Jacksonville Shipyards, Inc.* 89-OFC-1 (July 19, 1990); *Secretary of Labor, Mine Safety and Health Administration v. ASARCO, Inc.* 12 FMSHRC 2548 (December 26, 1990); *Cardinal Contracting Company, Inc.*, 83-DBA-37 (June 28, 1994); and, *General Painting Co., Inc.*, 88-DBA-8 (September 21, 1988).<sup>8</sup>

In this case, the Prosecuting Party provided the Respondents with redacted versions of all interview statements. The Prosecuting Party did not indicate whether it had sought consent from any informant to disclosure of his or her identity. Of the one hundred employees or former employees involved, the Prosecuting Party has disclosed it only has thirty-three statements (of "ride attendants. Of course, should any one of this latter group testify, their full statement must be disclosed."<sup>9</sup> However, unlike the typical case, it does not appear a representative sample of employees will be called to testify.

Upholding invocation of the Prosecuting Party's claim of privilege, in this case, requires balancing the need for an informers' privilege against the right of the Respondents to a fair trial. First, I find the identity of persons, employees or not, irrelevant to some of the issues in this case, i.e., whether the Respondents mispaid its employees or willfully misrepresented materials facts in the application; that can be established other means, e.g. business records. The issue is a violation of H-2B wage rules, not of the Respondent's obligation to its employees. However, should the Prosecuting Party wish to establish: employees worked more hours than the Respondent's records show; the Respondent substantially failed to adhere to the regulations by having employees work in areas outside those mentioned in the application; or the employer provided untaxed per diem and free housing, by means of the statements in question, then due process requires that confidentiality will not apply to each such statements proffered and they must be fully disclosed. Certainly, the affected employees have a pecuniary interest in the outcome of this proceeding. The Respondent points out that: none of the statements were taken by the lead WHD investigator designated to testify; some are inconsistent; there is no independent evidence to corroborate them.

Secondly, while I find disclosing the identity of any informants here potentially might reduce the government's ability to enforce H-2B cases in the future because it might discourage others from coming forward for fear of retribution, I observe that no specific facts have been tendered by the Prosecuting Party to establish more than a "potential" likelihood. Thirdly, the

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<sup>8</sup> Here, I liberally borrow from Judge Jansen's excellent Discovery Order, in *D & R BUILDING & REMODELING*, 1999-DBA-4 (ALJ 2000).

<sup>9</sup> The Prosecuting Party has left the door open to this possibility, this week before the hearing. See Administrator's Supplemental response to Discovery Order, Paragraph 1(a)(4).

informer's privilege is firmly rooted in both codified and federal common law.<sup>10</sup> Fourth, none of the Respondent's arguments or allegations convinces me that some potential for possible retribution or interference with the government's information-gathering ability does not exist. Fifth, I find the Prosecuting Party's disclosure of redacted informant statements sufficiently protects the Respondent's right to a fair hearing under the parameters I have set forth. Sixth, I find the Prosecuting Party is not merely seeking back wages, but also seeking penalties based on allegations of "willful" violations. Finally, although it goes without saying that the Respondent is entitled to a fair hearing, I find disclosure of information sought concerning the identity of informants, except for the limited instances noted, is not necessary to ensure a fair hearing.<sup>11</sup>

### *Deliberative Process Privilege*

The deliberative process privilege is qualified; it balances a party's need for the information against the government's interest in confidentiality, frank discussion of legal and policy matters being essential to the decision-making process. The privilege contemplates a particular means of assertion. Three requirements must be met. First, there must be a formal claim of privilege lodged by the head of the department that has control over the matter, after actual consideration by that officer. Second, the responsible agency official must provide precise and certain reasons for asserting the confidentiality over the information or documents. Third, the government information or documents sought to be shielded must be identified and described. 6 James Wm. Moore *et al.*, Moore's Federal Practice §26.52[5] (3d ed. 2001). *United Tribes of Kansas, et al, v. United States Department of Labor, Employment and Training Administration, et al*, ARB CASE NO. 01-026, ALJ CASE NO. 00-WIA-3 (August 6, 2001), page 12 n. 5. I find all three criteria largely met.

"Whether the deliberative process or attorney client privileges apply to particular witnesses or documents is a mixed question of fact and law. For neither privilege is it enough simply to assert that disclosure may have "chilling effects" on agency personnel or attorneys and their clients. . ." *Midwest Farmworker v. U.S. Dep't of Labor*, ARB Case No. 98-144, ALJ Case Nos. 97-JTP-20/21/22, slip. Op. at 2 (ARB Jul. 23, 1998)(*See, e.g., In re Subpoena Duces Tecum*

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<sup>10</sup> These confidentiality provisions have been strengthened by their specific inclusion in the applicable regulation of special application, i.e., 20 C.F.R. § 655.50 (d).

<sup>11</sup> I note that in its Prehearing Submission, the Prosecuting Party has listed the redacted witnesses' statements as evidence it intends to proffer. While these redacted statements might be admitted to show that 33 individual employees were interviewed and made statements, it is unlikely such redacted statements would be admitted for consideration of the truth of the matters contained in them. Nor would the investigator's summary of what he learned be sufficient in and of itself. *See, Cody-Ziegler, Inc. v. Administrator*, ARB No. 01-014, 2003 DOL Ad. Rev. Bd Lexis 130, \*19 (ARB Dec. 19, 2003)(Under Davis Bacon Act).

Despite the liberal application of hearsay rules in administrative proceedings, admission of such unredacted statements would deprive the Respondent of a meaningful opportunity to defend the case. *See, Cofield v. City of LaGrange*, 913 F.Supp. 608 (D.D.C. 1996)("the privilege is not absolute and must yield based upon a showing that the identity of the informer is essential to the requestor's case")(citing *Rovario*, 353 U.S. at 60; *U.S. v. Brodie*, 871 F.2d 125, 127-28 (D.C. Cir. 1989). The Prosecuting Party was only able to contact one informant/witness regarding disclosure of his or her identity as I had asked. None of the unredacted witness statements I have read reflect any concern on the latter's part concerning potential retaliation or disclosure of their identities. Finally, given its concern for confidentiality, the Prosecuting Party might consider merely offering a well-refined representative subset, i.e. three or four statements, and thus avoid revealing identities.

*Served on the Office of the Comptroller of the Currency*, 1998 WL 336518 (D.C. Cir. June 26, 1998); *Swidler & Berlin v. United States*, 118 S.Ct. 2081, 66 U.S.L.W. 4538 (June 25, 1998)).

Here, disclosure would reveal the internal deliberations of the Wage & Hour personnel as well as recommendations, opinions and advice on legal and policy matters. I find that all the internal WHD emails within the WHD and WHD hand-written notes related to the case development are privileged. However, I do not find the “written summaries of factual evidence” so privileged and thus, they must be fully disclosed to the extent confidential informants’ identities are not revealed to the extent noted above. I do not find the privilege applicable to: portions of the H2-B and FLSA Narrative Report which are purely factual summaries or recitation of the facts. It is not established that the WHD Training materials, which appear to be largely a recapitulation of the regulations, were deliberative and thus they must be disclosed.

#### *Attorney Client Privilege*

The attorney-client privilege protects confidential communications and “is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice.’” *Swidler & Berlin v. U.S.* 524 399, 403 (1998)(citing *Upjohn Co. v. U.S.*, 499 U.S. 383, 389 (1981)). It applies to all confidential communication between attorneys and the client’s attorney that occurs in connection with legal representation. FEDERAL CIVIL RULES HANDBOOK, Baicker-McKee, Janssen, Corr, Thompson-West (2008) at 654 and cases cited therein. “It does not protect documents or other physical evidence provided to the attorney (other than written communications provided to the attorney) or the underlying facts, nor does it protect information or evidence gathered by the attorney from other sources or notes . . .” *Id.* at 654.

While the Prosecuting Party has established the privileged nature of the majority of the documents for which this privilege is sought, I do not find it applicable to the H2-B and FLSA Narrative Report (which is privileged in part otherwise, as set forth above). Nor does the privilege (alone) shield emails or other documents on which the solicitor was merely “copied” as opposed to corresponded/consulted with or purely “factual” portions thereof, i.e., recapitulating or summarizations of facts contained therein. It is not established that the WHD Training materials were prepared by counsel and thus neither this privilege nor the work product doctrine protect them from disclosure. Documents provided to the attorney, not otherwise privileged, must therefore be disclosed.

#### *Attorney Work Product*

“The work product doctrine does not provide the absolute immunity from discovery that the attorney-client privilege and other privileges provide. . . (and) is sometimes referred to as a ‘qualified privilege’ or ‘qualified immunity.’” 39 AMERICAN JURISPRUDENCE 1(3d Edition, 2004), Proof of Facts, Section 7. “Like the attorney-client privilege, the work product doctrine stems from a desire to protect the integrity of our adversary system (not to preserve confidentiality).” JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 26.64[4] (1989). “Subject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved, rather than to the underlying evidence, is protected

regardless of the discovery method employed.” JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 26.64[1] (1989).

In a manner consistent with other Circuits, in *Connecticut Indemnity Co. v. Haulers, Inc., et al*, 197 F.R.D. 564 (2000), the District Court reiterated the Fourth Circuit work product doctrine codified in FRCP 26(b)(3):

An attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation. . . Fact work product is discoverable only upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. Opinion work product is even more carefully protected, since it represents the (inviolable) thoughts and impressions of the attorney. . . As a result, opinion work product enjoys an nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.

*Connecticut Indemnity* at page 6 (internal citations omitted), citing *Chaudhry v. Gallerizzo*, 174 F.3d 394 at 403 (4<sup>th</sup> Cir.) cert. den., 528 U.S. 891, 120 S.Ct. 215, 145 L.Ed.2d 181 (1999). The Court distinguishes between “fact” work product and “opinion” work product with the latter given near “absolute” immunity.<sup>12</sup>

While the Prosecuting Party has established the privileged nature of the majority of the documents for which this privilege is sought, I do not find it applicable to the H2-B and FLSA Narrative Report (which is privileged in part otherwise, as set forth above). Nor does the privilege (alone) shield emails or other documents on which the solicitor was merely “copied” as opposed to corresponded/consulted with or purely “factual” portions thereof, i.e., recapitulating or summarizations of facts contained therein. It is not established that the WHD Training materials were prepared by counsel and thus neither this privilege nor the attorney client privilege protect them from disclosure.

#### *“Substantial Need” and “Undue Hardship”*

A determination of “substantial need” depends on the facts and circumstances of the individual case. 39 American Jurisprudence 1(3d Edition, 2004), Proof of Facts, Section 7. “A ‘substantial need’ for the materials sought requires a showing of: (1) the importance of the materials to be discovered; (2) inadequate alternative means of discovery; and (3) lack of the substantial equivalent of the documents sought.” 23 American Jurisprudence (Second Edition, 2004), Section 48, Depositions and Discovery, II. Scope of Discovery, C. Work Product Rule, citing *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974) and *Kennedy v. Senyo*, 52 F.R.D. 34 (W.D. Pa. 1971).

Some courts have held and commentators written that a mere showing of “relevancy” is insufficient to overcome the work product privilege. James WM. Moore, Moore’s Federal

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<sup>12</sup> As in many of the reported decisions, the Prosecuting Party here fails to distinguish between the two, claiming an all-encompassing privilege.

Practice, § 26.64[3.-1] (1989). According to Moore, the clearest case for ordering production is when crucial evidence is in the exclusive control of the opposing party, for instance with respect to test results which cannot be duplicated. *Id.* “While cost is a factor in determining whether obtaining the substantially equivalent information will create undue hardship, it is usually not sufficient, in and of itself, to compel discovery.” Moore § 26.64[3.-1] (1989), *see also* Wright (expense or inconvenience not undue hardship), *supra*, and 23 American Jurisprudence (Second Edition, 2004), Section 48, Depositions and Discovery, II. Scope of Discovery, C. Work Product Rule, and cases cited therein. Nor is a mere showing of “helpfulness”.<sup>13</sup>

The Respondent has not generally demonstrated substantial need or undue hardship, other than as I have noted. However, substantial need or undue hardship is established in the event that the Prosecuting Party proffers the redacted witness statements to establish the truth of the matters contained therein with respect to issues apart from the alleged material misrepresentations in the application and whether the Respondent mispaid its employees. In those instances, the Respondent has its own records and witnesses to address the issue. For the remaining issues, I recognize the current and or former employees all have addresses in Mexico and are presumably beyond the Respondent’s reach.

#### *Protective Order*

Certain materials which must be disclosed to the Respondent for which privilege has been asserted may be subject to a Protective Order by the undersigned. Any such designated document shall at all times remain under the control of the attorney for the Respondent, used by him solely for purposes of this litigation, not be duplicated, and shall not be otherwise disclosed without the express permission of the undersigned. Such documents may be shown to the party, the party’s experts, representatives, witnesses, and court reporter. Upon conclusion of the proceedings, the documents shall either be destroyed or returned to the producing party, whichever is requested by the latter. Should the parties agree that a document which I have made subject to a Protective Order need not be so protected, then their agreement will prevail.

### **RULING AND ORDER**

IT IS ORDERED THAT:

1. On all documents submitted for discovery pursuant to this litigation, the witness’ Social Security number, if any, shall be redacted;
2. No passport or visa documentation shall be disclosed;
3. The Training Manual(s) to be disclosed are subject to the Protective Order herein;
4. The WHD history of assessing and enforcing H-2B penalties; its reasons for not enforcing all potential violations; its contentions regarding the statute of limitations; its contentions as to positions taken by the Respondent, in its position Statement; the basis of its suspicions of potential violations; case diaries; case compliance reports;

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<sup>13</sup> *In Re Grand Jury Subpoena*, 478 F.Supp 368 (E.D. Wis. 1979)(“helpfulness” of material not substantial need).

civil monetary penalty computation worksheet; H-2B CMP Computation Summary Sheet; WHISARD Case Registration/Investigator Assignments; WHISARD Complaint Information; and, JRC Information Sheets; are all subject to privilege and not subject to disclosure;

5. Nor, other than as otherwise excepted, need the Prosecuting Party's witnesses respond to questions specifically requesting information from the privileged documents or addressing: violations considered but not charged; date of any initial complaint; identity of other allegedly underpaid employees not listed among the 100; location and dates of interviews; carnival industry compliance issues; identify communications with employees or former employees; and, identify witnesses other than those named in the Prehearing Submission; and,
6. Any required disclosures herein must be delivered to the Respondent by the close of business, on Friday, May 10, 2013. No further motions related to the discovery addressed herein may be filed prior to the hearing.

RICHARD A. MORGAN  
Administrative Law Judge