



Issue Date: 30 September 2020

CASE NO.: 2018-TNE-00019

In the Matter of:

ADMINISTRATOR, WAGE & HOUR DIVISION,
Prosecuting Party,

v.

BUTLER AMUSEMENTS, INC. AND
MICHAEL BRAJEVICH, an individual,
Respondents.

DECISION AND ORDER

This matter arises under the H-2B provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) *et seq.*, 1184(c)(14), and 20 C.F.R. Part 655, subpart A (2008), and the applicable procedural regulations at 29 C.F.R. Part 503 (2015). Attorney Jeannie Gorman represented Administrator, Wage and Hour Division, U.S. Department of Labor (“Administrator”). Attorney P. Wayne Pierce represented Butler Amusements, Inc. (“Butler” or “Employer”) and Michael Brajevich (collectively “Respondents”).

On February 6, 2018, the Administrator, Wage and Hour Division of the U.S. Department of Labor, (“Administrator”) issued a Determination Letter finding that Butler Amusements, Inc. and Michael Brajevich (“Respondents”) substantially failed to comply with the proper job classification requirements of the H-2B program. The Administrator sought unpaid wages and assessed a civil monetary penalty (CMP). Respondents subsequently requested a hearing on the Administrator’s determination. *See* 29 C.F.R. § 503.43.

A hearing was held May 8 and 9, 2019, in San Francisco, CA. Administrator’s Exhibits A through Q were admitted into evidence, and Respondents’ Exhibits 1 to 24, 26 to 71, and 73 to 106 were also admitted. Respondents’ Exhibits 25 and 72 were withdrawn.¹ HT 12-13.² At the hearing, the Administrator and Respondents agreed the amount of back wages in RX 19 should read \$26,955.40. At the hearing, the Administrator made an oral motion for reconsideration on the inclusion of Ms. Zepeda, which I denied. HT 5 at 22-24; HT 8 at 15-17.

¹ I cite to Administrator’s Exhibits AX (letter) at (page) and Respondent’s Exhibits RX (number) at (page). Additionally, I cite to Administrator’s post-hearing brief as APB (page) at (line) and Respondents’ post-hearing brief as RPB (page).

² I cite to the hearing transcript HT (page) at (line).

For the reasons discussed below, Employer is ordered to pay \$26,786.00 in back wages and pay the amount of \$10,000 in civil money penalties.

Background

An H-2B employee is defined as “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country...” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The H-2B program permits employers to hire such nonimmigrant workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peak load, or intermittent basis, as defined by the Department of Homeland Security (“DHS”). 8 C.F.R. § 214.2(h)(6)(ii)(B).

DHS requires that employers petitioning for H-2B visas obtain a labor certification from the Department of Labor (“DOL”) before applying for H-2B visas through DHS. 8 C.F.R. § 214.2(h)(6)(iii)(A). To obtain the labor certification, employers first obtain a prevailing wage determination for the job opportunity from DOL’s Employment and Training Administration (“ETA”) by submitting ETA Form 9141. 20 C.F.R. § 655.10 (2009).^{3,4} Employers must offer and pay the H-2B workers the highest of the prevailing wage or the applicable federal, state, or local minimum wage. 20 C.F.R. § 655.22(e). After obtaining the prevailing wage determination, the employer submits an Application for Temporary Employment Certification (“ETA Form 9142B”) and recruitment report to the ETA. 20 C.F.R. § 655.20. In ETA Form 9142B, the employer must certify under penalty of perjury that the information contained on the application is true and accurate, and the employer’s signature constitutes its acknowledgment and acceptance of the obligations of the H-2B program. 20 C.F.R. § 655.65(f); AX C-9.

Section 214(c)(14) of the INA gives DHS the authority to impose administrative remedies where the Secretary of DHS finds “a substantial failure to meet any of the conditions of the petition to admit...a nonimmigrant worker under [8 U.S.C. § 1101(a)(15)(H)(ii)(b)] or...a willful misrepresentation of a material fact in such petition.” 8 U.S.C. § 1184(c)(14)(A). The DHS is authorized to delegate this enforcement authority to the Secretary of Labor, 8 U.S.C. § 1184(c)(14)(B), and has delegated to the Secretary of Labor its authority “to enforce compliance with the conditions of a petition and Department of Labor approved temporary labor certification to admit or otherwise provide status to an H-2B worker.” 8 C.F.R. 214.2(h)(6)(ix). This enforcement authority has been further delegated within DOL to the Administrator of the Wage and Hour Division. *See* Secretary’s Order 01-2014, 79 FR 77527-01 (Dec. 19, 2014).

Factual Findings

Respondents, Butler Amusements, Inc. and former CEO, Michael Brajevich, operated a traveling amusement carnival that provided rides, games, and concessions to fairs in California,

³ The 2008 H-2B regulations were promulgated on December 19, 2008, effective on January 18, 2009, and codified into the Code of Federal Regulations in 2009. *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. No. 245, 78,020 (Dec. 19, 2008).

⁴ References to 20 C.F.R. § 655 refer to the 2009 regulations unless otherwise specified.

Oregon, Washington, Idaho, Arizona, and Nevada. RX 20, AX C, APB 2 at 12-14. Butler Amusements is exempt from the Fair Labor Standards Act under § 13(a)(3). RX 13; RX 20-21; 29 U.S.C. § 213. Butler Amusements has participated in the H-2B program since 2000. HT 274 at 6. In October 2012, Butler Amusements initiated the process to request 246 workers to work as “Amusement and Recreation Attendants.” RX 7. Respondents’ agent, James Kendrick Judkins, filled out and submitted an ETA Form 9141 Application for a Prevailing Wage Determination (ETA Form 9141) and an ETA Form 9142B H-2B Application for Temporary Employment Certification (ETA Form 9142) on Respondents’ behalf. RX 7 at 1. Mr. Brajevich and Mr. Judkins both promised that the information on the application was true and accurate. AX C-8 and C-9.

ETA Form 9141

ETA Form 9141 included instructions for describing the job opportunity. RX 4 at 3. To enable ETA to make a prevailing wage determination (PWD), Respondents were to “[d]escribe the job duties, in detail, to be performed by any worker filling the job opportunity. Specify field(s) and/or product(s)/industry(ies) involved, any equipment to be used, and pertinent work conditions. The duties provided must be specific enough to be classified under a relevant SOC pursuant to the O*Net publication.” *Id.* The instructions also directed Employer to enter a Standard Occupational Code (SOC)/Occupational Net (ONET) code and job title for the occupation, which “most clearly describes the work to be performed.” ETA stated Respondents’ selection of an SOC might guide the determination; “however, the SOC issued with the determination may differ.” RX 4 at 3. The instructions also directed Employer to indicate the number of employees the H2-B workers would supervise and whether the supervised workers would be subordinates or peers. *Id.*

The SOC code system had an occupation search engine called O*NET, which permitted employers to determine which SOC code applied to any given job duties. APB 8 at 16-20. O*NET provided extensive information about any occupation, including ratings of how important certain tasks were to the position. APB 8 at 21-23.

On ETA Form 9141, Respondents entered “Amusement and Recreation Attendants – Traveling Carnival” as the job title, 39-3091 as the Suggested SOC (ONET/OES) code, and Amusement and Recreation Attendants as the Suggested SOC (ONET/OES) occupation title. RX 5 at 1. Under job duties, Respondents represented the H-2B workers would, “[p]erform a variety of attending duties at amusement facility (traveling carnival). Set up, tear down, operate amusement rides, food concessions and/or games.” *Id.* The attendants would work 40 hours per week from 1:00 pm to 10:00 pm and receive no overtime. *Id.* Respondents stated no experience, education, training, specific skills, or special licenses were required for the job, except for a drug and criminal background check. RX 5 at 2-3. Additionally, workers in the position would not supervise any other employees and would travel to multiple worksites. RX 5 at 2-3.

On October 18, 2012, Respondents posted a job advertisement online with Work Source that advertised 250 open positions for Carnival and Amusement and Recreation Attendants from February 1, 2013, to October 31, 2013. RX 1 at 1. The advertised job entailed performing “a variety of attending duties” at amusement facility, listed as, “[S]et up, tear down, operate amusement rides, food concessions and/or games.” *Id.* Workers would work typically 40 hours per week, Wednesday through Sunday, from 1:00 pm to 10:00 pm, make a weekly wage ranging from \$323.60 to 368.40 per week, and must travel with the carnival to Washington, California, Arizona, Nevada, Oregon, and Idaho. *Id.* Employer would pay the weekly wage for each week the worker was

employed, and make “available mobile housing valued at \$125.00 per week” and “transportation from venue to venue and scheduled transportation to laundry, shopping valued at \$25.00 per week.” *Id.* The advertisement also indicated the Employer was exempt from the Fair Labor Standards Act (FLSA) and not subject to Federal hourly wage, overtime, or recordkeeping requirements. *Id.* Respondents posted an identical advertisement with the Yakima Herald on October 21 and 24, 2012. RX 2 and 3.

In November 2012, the Department of Labor ETA issued a PWD of \$8.98 hourly, which was valid from November 2, 2012, to February 3, 2013, and based on SOC (O*NET/OES) code 39-3091 and Occupational Employment Statistics (OES) wage data. RX 5 at 4.

ETA Form 9142B

The instructions and information needed for ETA Form 9142B were similar to Form 9141 and its instructions. ETA Form 9142B instructions directed Respondents to enter the SOC/O*NET code for the occupation which most clearly described the work to be performed. RX 6 at 1. In Section F, Box 5, the instructions directed Respondents to “[d]escribe the job duties, in detail, to be performed by any worker filling the job opportunity and specify any equipment to be used and pertinent working conditions.” *Id.* at 5. The instructions and form also directed Respondents to indicate the hours, daily work schedule, and whether the workers would supervise any other employees. *Id.*

On ETA Form 9142B, Respondents represented a temporary need for 246 full-time seasonal “Amusement and Recreation Attendants” beginning on February 1, 2013, and ending on October 31, 2013. AX C-1.⁵ Under job duties, Respondents again described the position as “[p]erform variety of attending duties at amusement facility (traveling carnival). Set-up, tear-down, operate amusement rides, food concessions and/or games.” AX C-3. Respondents stated H2-B workers would work 40 hours per week for a weekly wage ranging from \$323.60 to \$368.40. AX C-3, C-5. The position required “no special skills, licenses/certifications” and the H-2B workers would not supervise the work of other employees. AX C-3 to C-4. In Section G, Box 3, Respondents stated, “FLSA exemption 13(a)(3) applies to this employer in State and Local venues that respect the FLSA exemption 13(a)(3). Employer follows prevailing practices for Traveling Amusement Industry in regards to housing, transportation and weekly salary for workers.” *Id.*

An Addendum to ETA Form 9142B contained additional information regarding the weekly wage, hourly work schedule, variable prevailing wage, housing and transportation credits, and worksites for the carnival. AX C-10 to C-29. In the Addendum, Respondents clarified that the “weekly wage [was] calculated based upon a standard 40-hour week using the methodology detailed in Section G.1.” AX C-10. Additionally, Respondents stated “the work schedule varies widely” and Employer would pay a “variable prevailing wage (\$323.60 to \$368.40, Average \$347.88)” in accordance with the ETA Form 9141 Determination “for each week the worker is employed.” AX

⁵ The exhibit also appears as RX 8 at 4. For ease of reference I cite only to AX C-1. Another version of ETA Form 9142B with attachments appears as RX 7. It is marked with the watermark “Not an Official DOL Labor Certification Document;” there is no table of contents explaining the significance of this document or a corresponding explanation, thus I did not consider it in my decision.

C-10, C-11. Respondents attached an addendum listing 71 worksites⁶ and stated if there were changes to the work locations, they would obtain a prevailing wage determination. AX C-7, C-11.

Finally, Employer again stated it “makes available mobile housing valued at \$125.00 per week” and transportation from venue to venue and scheduled transportation to laundry, shopping valued at \$25.00 per week.” AX C-12. At the time of certification DOL’s H-2B Wage Methodology was “subject to litigation” and Employer stated “[i]f the wage to be paid is higher than the Variable Prevailing Wage Determination, the employer reserves the right to charge a fee for housing and transportation, but effective rate of pay will not be lower than the Variable Prevailing Wage Determination.” AX C-12.

On ETA Form 9142 an employer must attest that it will abide by certain terms, assurances, and obligations as a condition for receiving a temporary labor certification. AX C-6. In Section I, Declaration of Employer and Attorney/Agent, Respondents checked “Yes” confirming they had read and agreed to all applicable terms, assurances, and obligations in Appendix B.1 of ETA Form 9142. *Id.* Mr. Judkins signed Appendix B.1 Section A, and Butler Amusements CEO, Michael Brajevich, signed Appendix B.1 Section B for Employer. AX C-8. By signing the Employer’s Declaration, Mr. Brajevich certified the job opportunity was a full-time temporary position and that “[t]he dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification has been truly and accurately stated on the application” (Attestation #13). AX C-9. Mr. Brajevich took full responsibility for the accuracy of any representations made by his agent or attorney and declared under penalty of perjury that he read and reviewed the application and that to the best of his knowledge it was true and accurate. *Id.*

On December 14, 2012, based on the attestations and documentation that Respondents provided, ETA certified Respondents’ application seeking temporary labor certification under the H-2B program. RX 8 at 1.⁷ In the Final Determination Certification Letter issued on December 14, 2012, the certifying officer (CO) directed Respondents to submit a Department of Homeland Security (DHS) Form I-129 and all required documentation. RX 8 at 1. The certification letter included an “Important Note” which stated—in part—regarding the “offered wage guarantee, this certification assumes that the employer will pay the certified weekly wage for 40 hours of work per week, as indicated in Section G of the employer’s ETA Form 9142” for the entire approved certification period. *Id.* at 2.

The Final Determination cited the relevant regulations at 20 C.F.R. § 655.22 (e) and continued “[p]lease remember...the employer is required to pay the H-2B workers...recruited in connection with an H-2B application the certified offered wage during the entire period of the approved H-2B labor certification. AX B-2. Finally, the requirement to pay is independent of any applicable exemption from the provisions of Fair Labor Standards Act (FLSA). AX B-2.

On December 17, 2012, Respondents submitted DHS Form I-129 requesting H-2B visas for 246 unnamed workers to be employed, full-time as “Amusement and Recreation Attendants.” AX D-3, D-4, D-8, D-12. By signing the I-129 Mr. Brajevich declared Employer would pay the variable

⁶ The 71st worksite location is cutoff on the copy and illegible.

⁷ The exhibit also appears as AX B-1. For ease of reference, I cite only to RX 8.

prevailing wage per ‘ETA 9142...and the itemized itinerary.’ AX D-6; AX D-14. DHS approved the application on January 4, 2013. RX 11 at 1.

Wage and Hour Division Investigation

The Administrator subsequently opened an investigation for the period from February 1 to April 24, 2013. AX A-1. On April 23 and 24, 2013, Wage and Hour Division (WHD) and Wage and Hour Investigator (WHI) Carrie Aguilar visited Butler Amusements onsite in Santa Barbara, CA. AX F. Ms. Aguilar and her WHD team observed Employer’s operations and interviewed employees. HT 63.

Determination Letter

On November 11, 2013, WHD found that nine H-2B workers were employed outside of the approved job title of Amusement and Recreation Attendants (ARA); the investigator determined that these workers had worked as drivers, maintenance workers, and supervisors. These positions have different SOC codes and a different prevailing wage. Based on the investigation, WHD sent Employer a Summary of Unpaid Wages which listed ten employees with varying amounts of unpaid wages for the period from February 2, 2013, to April 27, 2013, totaling \$25,946.80. RX 14 at 1. On February 25, 2014, WHD recalculated the back wages for nine employees to be \$24,987.60. RX 16 at 3. On February 6, 2018, WHD issued the Determination Letter finding that Respondents substantially failed to comply with Attestation #13—which requires the Employer to accurately state the dates of temporary need, reason for temporary need, and number of workers for temporary need. RX 19. WHD found Respondents owed \$26,955.40⁸ in back wages and \$10,000 in CMPs. RX 19.

Respondents disputed the findings of the investigation on multiple grounds, including that that the identified workers only worked outside the approved job code for a few hours each week and that they worked “substantially less than 40 hours per week” during the investigation period. RX 15 at 1-2.

Butler Amusements’ Employment Practices

Butler Amusements runs several units of workers contemporaneously at different fairgrounds and carnival sites. HT 270-71. The nine employees involved in this case were part of Butch’s Unit. AX E-1. On April 23 and 24, 2013, WHD took written statements from 24 Butler employees and interviewed four applicants by phone. AX F. Additionally, WHD collected field notes from Bill Truax (manager), Gina Tuttle (payroll clerk), and Kurt Vomberg (general manager). *Id.*

Respondents’ pay slips were not contemporaneously recorded time cards and did not include time spent driving. In the past, Employer gave workers timecards to record their hours, but in 2013 the employees did not record their own hours.⁹ AX F-135;¹⁰ AX F-096; AX F-114. Instead,

⁸ The original amount cited in the February 6, 2018 Determination Letter was \$24,987.20 in unpaid wages to nine H-2B workers, and \$10,000 in CMPs. RX 19. This Court’s May 2, 2019 Order amended the unpaid wages to \$26,955.40.

⁹ The employees reported they did not have timecards. *See* AX F.

carnival supervisors would record and report employees' hours to Gina Tuttle, Employer's payroll clerk. AX F-002; AX F-135; F-003;¹¹ F-021. Ms. Tuttle maintained a spreadsheet with hours for each employee and would report to supervisors if someone was approaching the cap (38-39 hours). *Id.* Each week, employees countersigned a pay slip that noted their hours and their weekly pay—which they received in cash and did not vary by location or hours worked. AX F-003; AX F-009; AX F-135; AX F-046; AX F-101. Ms. Tuttle then sent summaries of hours and the countersigned pay slips to headquarters. AX F-135.

The hours on Respondents' pay slips did not always reflect the hours H-2B employees worked because Employer did not report time spent driving. Employer paid the employees who drove the vans extra,¹² but did not record hours spent driving.^{13,14,15} AX F-135. The undocumented driving time depended on the distance between fairs—but could be two to eight hours. AX F-049.¹⁶

Employees' weekly hours varied depending on the distance between the fairs and the hours of the various fairs; employees credibly reported working an average of slightly over 40 hours a week.^{17,18} The hours and days varied—some weeks employees would work two days and other weeks they would work every day.¹⁹ AX F-027, AX F-108.

When the fair was open, employees started working one hour before the fair opened and stopped working when it closed, and when the fair was closed, hours were based on the time of the “work call.”²⁰ AX F-135. Typically, employees worked a six-hour day over 12 hours.²¹ For

¹⁰ AX F-135 is a statement from Gina Tuttle taken by Wage and Hour Investigator Carrie Aguilar on April 23, 2013.

¹¹ “They write the hours on the inspection sheet when we begin and end...Someone comes to check how many people are working on a ride and they write down the hours of work.” AX F-003.

¹² “Last year I received \$200...They give me the bonus for driving.” AX F-054.

¹³ “They do get paid extra for driving, but the drive time hours are not on the timecards I didn’t know we had to do that, but we probably should.” AX F-135 (Gina Tuttle’s statement.)

¹⁴ “I receive an envelope, and everyone signs for them and the hours worked are there but it does not include the time for driving, just the time for operating the rides.” AX F-054.

¹⁵ One employee did remark that the pay slips were accurate, “...the manager writes down the hours we work...up until now it has always been correct...” AX F-021. However, the majority of employees reported working more hours and one employee explicitly stated his hours were underreported, “They put the hours worked on the paper and we sign that it is correct. That I have seen, sometime she [sic] hours are less than what we have worked in reality.” AX F-003.

¹⁶ “I just drove two times, first: 1.5 hours and second: 8 hours.” AX F-049.

¹⁷ Employees reported working: 38-40 hours (AX F-003); 36-42 hours (AX F-8, AX F-101); 40-60 hours (AX F-0017); 60-70 hours (AX F-027); 40-42 hours (AX F-063); 40 to 45 hours (AX F-086); 40-50 hours (AX F-092); average of 40 hours, but sometimes as little as two hours (AX F-107); 40-42 hours per week (AX F-063); “Normally I am working 40 to 45 hours each week. The workers who are working with me work the same hours.” (AX F-086).

¹⁸ Although employees reported working a range of hours from 36-70 hours per week, the higher numbers likely included break times. *See* AX F. For example, an employee reported working up to 70 hours a week, but also explained that he worked from 10 am until 10 pm or 12 noon until 12 midnight with 2 hour breaks every two hours. Thus, a typical workday (without set-up, tear down, or driving) would be six hours. *See* AX F-027-028.

¹⁹ One H-2B worker reported working 17 days straight in Sacramento, but this was in a prior year. AX F-108. Another reported working for 12 days with one day off during the period of investigation. AX F-114. The length of these workdays was not specified and likely varied. *See generally* AX F.

²⁰ Weekdays were sometimes shorter shifts because some fairs were open to the public for fewer hours on weekdays. *See generally* AX F.

²¹ “On the days when the fair is open, I work 6-8 hours per day. I also work 6-8 hours the day before the first day of the fair to prepare everything.” (AX F-045); “When the fair is open we usually work 5-10 hours.” (AX F-053); “...maximum six hours in one shift...” (AX F-008); “I work six hours during my work shift each day.” (AX F-101).

example, during a workday, employees usually worked one or two hours, took a break for one or two hours, returned to work for one or two hours, and so on until the carnival closed. AX F-007.

On the last day in a location, employees would typically disassemble rides immediately after the fair closed. AX F-117. Assembling and disassembling the rides took two to eight hours, depending on the ride and whether they were assembling or disassembling it.^{22,23} For example, one ride took six hours to set up but only two hours to tear down. AX F-035. Whereas another took six hours to take down. AX F-053. Employees worked long hours on the last day of the fair because they would work a full shift and then disassemble the rides.²⁴ AX F-008. On Mondays, the fair would typically travel to the next location, and employees would be given the rest of the day off. AX F-086; AX F-092. On the days they assembled rides, employees would “start at 8 am ...leave for lunch at 12:00 pm....return at 1 pm and ...work until 5 pm.” AX F-092.

Employer provided free housing in trailers, transportation from venue to venue, and local transportation to run errands. AX F-009; AX F-022; AX F-028; AX F-035; AX F-046. No employee reported deductions for housing, transportation between fair venues, or local transportation to run errands. *See* AX F. The only deductions were cash advances. AX F-135.

The occupancy of the trailers varied; some employees shared with four people, some had one roommate, and some had private rooms. AX F-002; AX F-022; AX F-054. Not all of the employees stayed in the provided trailers. For example, one H-2B employee had worked for Employer since 2007; she traveled with the fair in her personal vehicle and stayed in an RV she purchased. AX F-129. Saul Estadillo Herrera—one of the nine employees who the Administrator alleged was working outside of the job certification—slept in “a big space in the back” of his truck. AX F-041. Jose Ivan Ortega—another H-2B worker employed outside of the job classification—also lived and slept in his “semi;” Employer did not charge him for his living accommodations. AX F-079. Employees pooled their money together to make communal meals; this was optional. AX F-028.

There was no evidence that employees who did not stay in the Employer-provided lodging received higher wages for not using the trailers. *See* RX 26. Employer provided a payroll spreadsheet listing the location, date, employee name, social security number, and date of birth. It included columns named: gross, draws, uniforms, ID, bunk, and net. AX E. None of the employees had a deduction for “bunk.” *Id.* Likewise, the employee who traveled with the carnival in an RV that she owns, and thus did not live in the employer-provided housing, did not have a

²² “The days of tearing down are long days. It can take four hours to tear down a ride.” (AX F-016); “We take about six hours to disassemble the ride, it takes a lot less to disassemble.” (AX F-068); “When we arrive to a new city and we are setting up the rides, I usually work 8 hours.” (AX F-053); “It takes about 5 or 6 hours to tear down the ‘Fireball.’ Maybe an entire day to put up the ‘Fireball’ and sometimes I help on the other rides as well...[t]he time tearing down the ride I have no rest breaks.” AX F-085.

²³ One employee stated he did receive breaks on the day of tearing down. However it is unclear whether he was referring to his shift during the fair or his shift and the “tearing down” time. “Maybe the day of tearing down and travel is lot hours—but still I have two hours of work and then two hours of rest and two more hours of work, etc.” AX F-092.

²⁴ An employee estimated the last day of a fair they would typically work 12 hours. AX F-008. This was accurate in light of other employee statements estimating 6 hour shifts and 2-8 hours for disassembling rides.

credit under “bunk.” AX E-3. Similarly, Mr. Estadillo and Mr. Ortega did not have a credit under “bunk.” *Id.*

The workers who drove the rides from venue to venue had time cards and kept Department of Transportation log books. AX F-135. Some would stay with the fair, but others drove rides to other units operating on other fairgrounds. AX F-129; *see also* AX F-131.

Butler Employee Duties/Classifications

Every spring, the general manager, Mr. Vomberg, interviewed employees to determine their work history and how to place them. AX F-134.²⁵

Supervisors

Butler employed Antonio Mendez and Omar Lopez as supervisors. A roll sheet listing which employee worked each ride, listed both Mr. Mendez and Mr. Lopez as supervisors. AX G-4. In 2013, Butler had employed Mr. Mendez for 12 years, and Mr. Mendez had been a supervisor for six years. AX F-137; AX F-075. Multiple employees stated they reported to their supervisor—Mr. Mendez. AX F-009; AX F-016; AX F-086. In that role, he walked around to make sure employees were doing their jobs, dealt with customer complaints, responded to ride operators when something was broken, and filled out the ride roster. AX F-075. Mr. Mendez was the general manager’s “left hand,” and a supervisor.²⁶ Antonio Mendez gave WHIs the tour, a roll which, in Ms. Aguilar’s experience, supervisors typically assume. HT 61.

Butler also employed Omar Lopez as a supervisor. Mr. Lopez worked under Benny Hill—who was in charge of Kiddie Land. AX F-137. Like Mr. Mendez, Mr. Lopez filled out the ride roster. AX F-075. Mr. Lopez supervised 16 employees, and in their statements multiple employees confirmed Mr. Lopez was their supervisor and told them when to start each day. AX F-059; AX F-028; AX F-101; AX F-114.

Shop workers

Butler employed Jaime Hernandez and Felipe Villegas as shop workers. These employees exclusively worked in the “shop” (or “spare parts trailer”) cleaning parts and supplies, welding, doing inspections, and repairing rides. AX G-3, AX F-137²⁷, AX F-123, AX F-134, and AX F-022. Ms. Aguilar visited the shop—an enclosed area, with parts and grease, like a repair shop—where Mr. Hernandez and Mr. Villegas indicated they worked all day. HT 60 at 18-22. Previously Mr. Villegas operated rides, but for the last two years he had exclusively worked in the shop. AX F-123. He worked when the fair was open—on average 38 to 40 hours for \$395 a week. *Id.*²⁸ He did not have a timecard, but Mr. Mendez recorded his hours. *Id.* To receive his pay, he signed the pay slip which

²⁵ WHI Miljoner’s notes from a meeting with Bill Truax and Antonio Mendez on April 23, 2013.

²⁶ “My left hand I guess would be Antonio Mendez. He’s been coming here for 12 years. He’s in charge of the spectaculars; he’s the supervisor.” AX F-137

²⁷ Carrie Aguilar’s notes from a meeting with Kurt Vomberg’s on April 23, 2013.

²⁸ Mr. Villegas’ first day working in 2013 was February 2, 2013. RX 26 at 20. The following week he worked 38 hours, but was only paid \$320 dollars. RX 26 at 56. For the rest of the time in question, he was paid \$395 weekly. RX 26.

the office kept. *Id.* Mr. Villegas had a company shirt, but stated “for me it is not necessary to have a company shirt.”²⁹ *Id.* Based on Jamie’s [Jaime] work history, the general manager placed him as a machinist. AX F-134.

Drivers

Butler employed Saul Estadillo,³⁰ Sergio Guzman, Jose Ivan Ortega,³¹ Gustavo Gamero, and Fernando Preza as truck drivers. The CDL [Commercial Driver’s License] drivers only drove tractor trailers; they did not operate rides. AX F-137. Ms. Aguilar observed the semi-trucks arriving and other WHIs interviewed the drivers and confirmed the trucks were “semi-trucks.” HT 60 at 22-25.

Multiple records refer to these H-2B employees as drivers. For example, two handwritten notes in Butler’s payroll records list: Jose Ivan [Ortega], Sergio Guzman, and Fernando Preza as drivers who were all paid \$500 for the week ending April 7, 2013, in Yuma.³² RX 26 at 771 and 792. A payroll spreadsheet for “Butch’s Unit” lists Jose Ivan, Fernando Preza, and Sergio Guzman as drivers. RX 26 at 793. While Saul Estadillo and Gustavo Gamero are not listed as drivers, the pay slips regularly showed that they did not work on weekends—which were the longest and busiest days for ride operators, and also typically days the drivers would not transport rides. *See* RX 26. When the fair stopped for longer periods, the drivers would do maintenance. AX F-130.

Saul Estadillo worked for Employer as a driver for three years and drove the trailers³³ with rides, but not the vans. AX F-041. Due to Department of Transportation regulations, he did not drive more than 10 hours per shift and kept a transportation logbook of his hours, which ranged from 20-60 hours per week. *Id.* His pay was the same regardless of his hours, and he did not wear a uniform. *Id.* When he was not driving, he inspected the trailer truck and was on standby for whatever the manager needed. *Id.*

Jose Ivan Ortega drove semi-trucks to transport the rides; he did not drive the vans to transport people. AX F-078. He drove a maximum of 10 hours per shift, and his hours varied—sometimes he worked up to 60 hours a week, and sometimes he only worked two days. AX F-078. He kept his hours driving in a logbook, which he submitted to Butler. *Id.* Employer provided the truck and paid for “diesel, tires, etc.” *Id.* He lived and slept in his semi and the company did not charge him for his living accommodations.” AX F-079.

Unreliability of Employer’s Payroll Records

Employer argued the Administrator ignored evidence that the nine employees worked fewer than 40 hours per week during the period under investigation, and that the Administrator should

²⁹ Mr. Villegas did not need to wear the company uniform, which strongly suggests that he had few or no interactions with the public as a Recreation Attendant. Rather his duties were exclusively related to working in the repair shop as a mechanic.

³⁰ His name is sometimes spelled Estudillo.

³¹ He is sometimes referred to as Jose Ivan.

³² The note did not include the year 2013, but is reasonable to assume it was 2013 because Butch’s unit was in Yuma during that time period in 2013.

³³ Mr. Estadillo referred to the vehicles he drove as trailers. It is not clear whether these are distinct from the “semi-trucks” to which Mr. Ortega referred.

have calculated back wages based on actual hours worked. The Administrator found Employer's payroll records did not represent the hours H-2B workers actually worked, and concluded the dollar amounts on the pay slips were likely accurate, but the documented hours were unreliable.

Employer submitted 1,132 pages of payroll records and photocopied pay slips. RX 26. Accompanying these records Respondents submitted their own summary of the hours that each of the nine employees worked.³⁴ RX 45 and 46.

The errors in Respondents' payroll records (as well as errors in the summary exhibit, RX 45) make both documents unreliable. The submitted pay slips omitted amounts paid, contained duplicate pay slips for the same person for the same period, and were inexplicably missing records for some employees. For example, for the week of February 24 to March 3, Respondents recorded that Fernando Preza worked 37 hours, but no pay was documented. RX 26 at 313. Additionally, records are missing for several of the nine employees. For example, Mr. Gamero, Mr. Guzman, Mr. Preza, Mr. Ortega, and Mr. Estadillo had no pay slip with hours for April 1 to April 7.

There were also duplicate pay slips that could not be reconciled.³⁵ For example, for March 25 to March 31, there were duplicate pay slips for Mr. Estadillo.³⁶ The first pay slip indicated Mr. Estadillo worked 17.5 hours and the second indicated he worked 38.5 hours. RX 26 at 798 and 816. The pay slips show different hours and breaks for the same days. *Id.* Both records show that on Wednesday, March 27, he worked from 9 am to 5 pm. *Id.* On the first timesheet, during that period he worked for 6 hours and took 2 breaks. RX 26 at 798. On the second timesheet during that same time period he worked 5.5 hours and took 2.5 breaks. RX 26 816. These records cannot be reconciled; one is accurate and the other is not, but we have no means of determining which is accurate. Additionally, it is unclear which—if any—of the hours on other days are duplicative.

During the same period, March 25 to March 31, there are duplicate pay slips for Mr. Gamero. The first pay slip indicated Mr. Gamero worked 17.5 hours and the second indicated he worked 17 hours. RX 26 at 811 and 820. While the discrepancy is small, again there is an irreconcilable error. Both records show that on Tuesday, March 26, he worked from 9 am to 5 pm. *Id.* On the first timesheet, during that period he worked for 6.5 hours and took 1.5 breaks. RX 26 at 811. On the second timesheet during that same time period he worked 6 hours and took 2 breaks. RX 26 820. Again, there is no way of determining which pay slip is accurate.

³⁴ RX 45 cites page numbers above 1132 (for example: 001216, 001217, 001218) unfortunately, these pages were not included in any exhibit. RX 26 ends at 001132 and RX 1 begins at 001236. Additionally, the last 21 pages of RX 26 are spreadsheets with cut-off names and locations. Because the pages are cut-off it is unclear how the names fit with locations and dates.

³⁵ For the week of March 11 to March 18, there were duplicate pay slips for Mr. Villegas, but both pay slips indicated the same number of hours and it was likely an inadvertent duplicate photocopy. RX 26 at 480, 490.

³⁶ Respondents' summary of the hours lists them under the wrong week (March 18-24). RX 45. Respondents' counsel argued the Administrator could have gone through the pay slip records and used this reference guide with citations to look up the actual hours worked. Unfortunately, this error—as well as references to records that were not included in the RX 26—appears to occur for all nine employees. Given the shortcomings of the reference exhibit (RX 45) combined with the actual errors in the pay slips and missing records (RX 26), the Administrator reasonably decided to calculate back wages using a 40-hour week the Employer attested to in ETA 9142B. AX C.

Finally there are conflicting records for Mr. Lopez from April 1 to 7. RX 26 at 836 and 849. A payroll spreadsheet summarizing employee hours shows that Mr. Lopez worked 38 hours for the week ending April 7, 2013. RX 26 at 849. Yet his pay slip for that same period shows that he worked 35.5 hours. RX 26 at 836. Again, there is no way of determining which record is accurate.

In the summary exhibit, RX 45, Respondents referred to pages that were not included in the exhibit, attributed hours to the wrong pay periods, and made questionable conclusions regarding employee duties. For example, RX 45 attributes 19 hours and 17.5 hours to Mr. Preza for the week of March 18 to March 24, but Mr. Preza actually worked 17.5 hours the week of March 25 to March 31. Additionally, without any supporting evidence, the summary stated during March 18 to 24, Mr. Preza and Mr. Ortega did not work as drivers. RX 45 at 1. The payroll summary that Respondents reference is actually for April 1 to 7, and it does not reference Mr. Preza or Mr. Ortega at all. RX 26 at 847. The omission of these workers on one payroll spreadsheet among a disorganized selection of payroll records is not sufficient to show they were not working as drivers that week. Additionally, Respondents state Mr. Gamero and Mr. Estadillo did not work as drivers the week of April 8 to 14 because on the payroll sheet it does not say “driver” next to their names. RX 45 at 2; RX 26 at 1036. I find the mere absence of a “driver” annotation insufficient to prove Mr. Gamero and Mr. Estadillo were not working as drivers that week.

Finally, although it is outside of the period of investigation, a payroll summary for late April says “see log” for the hours for drivers. RX 26 at 1091. Employees who drove the trucks could not drive more than 10 hours per shift and kept driver logs. AX F-135. These logs might have shown an accurate accounting of the time spent driving, but Respondents did not produce them.

Administrator did not credit the hours documented on Respondents’ pay slips because it suspected the hours were inaccurate. Based on my review of the employee interviews and the pay slips, I find this decision reasonable. Administrator reasonably reconstructed hours worked based on the attestation in ETA Form 9142B rather than relying on incomplete and questionably accurate pay slips.

Weekly Wages Paid the Nine Employees

According to the payroll records for Butch’s Unit, Respondents paid the nine H-2B workers as follows for the week ending on April 14, 2013, in Maricopa (AX E):

H-2B Employee Name	“Gross”
Saul Estudillo (Estadillo)	\$500
Jaime Hernandez	\$475
Gustavo Gamero	\$500
Sergio Guzman	\$500
Omar Lopez	\$525 (minus \$40 in “draws”)
Antonio Mendez	\$745 (minus \$100 in “draws”)
Jose Ortega (Jose Ivan Ortega)	\$500
Fernando Preza	\$500
Felipe Villegas	\$395

All nine employees except Mr. Jose Ivan Ortega arrived by February 2, 2013. RX 24. Mr. Ortega arrived February 11, 2013. *Id.* at 3. All nine employees received a consistent weekly wage during the period of investigation, with the exception of Mr. Felipe Villegas and Mr. Hernandez. *See generally* RX 26. A pay slip for the pay period from February 4, 2013, to February 10, 2013, shows that Mr. Villegas worked every day for a total of 38 hours, but only received \$320 dollars for the week, and a paystub for Mr. Hernandez during the same time period shows he worked 38.5 hours, but only received \$320. RX 26 at 53, 56. In subsequent weeks, Mr. Villegas and Mr. Hernandez were consistently paid a weekly wage of \$395 per week. *See generally* RX 26. To calculate the back wages, the Administrator credited Respondents as having paid \$395 and \$475 for 11 weeks for both workers; however, Respondents owe Mr. Villegas and Mr. Hernandez an additional \$75 and \$155, respectively, for the pay period from February 4, 2013, to February 10, 2013.³⁷ AX I-3.

Location of the Employees

Based on the pay slips it is reasonable to conclude that during the period of investigation all nine employees traveled from Riverside County, to Maricopa County, to Yuma County, to Santa Barbara County. RX 26 and 27.

WHD Determination

On February 6, 2018, the Administrator issued the Determination Letter finding that Respondents substantially failed to comply with the requirement to provide proper job classification information on the Form 9142 and DHS Form I-129. RX 19. Specifically, the Administrator found that Respondents “placed workers in occupation(s) other than listed on the I-129 Petition or the 9142 Application.” *Id.* The Administrator based the finding on the substantive provisions of the 2008 H-2B regulations and the procedural provisions of the 2015 H-2B regulations, and determined that Respondents violated Attestation #13 and 20 C.F.R. § 655.22(n) (2009) as well as the Form I-129’s part 5, question 1. *Id.* The Administrator asserted that \$24,987.60 in back wages were due, and assessed \$10,000 in civil money penalties. *Id.* On February 28, 2018, Respondents contested finding and remedies of the Determination Letter and requested administrative review. AX K

Regulatory Framework

On March 4, 2015, the United States District Court for the Northern District of Florida vacated the DOL’s 2008 H-2B regulations and enjoined the DOL from enforcing these regulations. *Perez v. Perez*, No. 3:14-cv-00682, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015). On April 29, 2015, DOL and DHS jointly issued an Interim Final Rule (“the 2015 H-2B regulations”). *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24,042 (Apr. 29, 2015). The effective date of the district court’s injunction was April 30, 2015. On August 28, 2015, the plaintiff in *Perez* filed an unopposed motion to clarify that the *Perez* injunction “was not intended to deprive DOL of its authority to enforce compliance with the substantive work terms contained in labor certifications issued pursuant to the 2008 Regulation prior to the entry of the Court’s permanent injunction.” The plaintiff argued that “[a]n injunction invalidating the work terms of previously issued labor certifications would be tantamount to giving employers *carte blanche* to mistreat U.S. and foreign workers and to ignore the sworn promises they made in order to obtain the right to import

³⁷ \$395 - \$320 = \$75 (Mr. Villegas) and \$475 - \$320 = \$155 (Mr. Hernandez).

foreign workers ...” The court granted the plaintiff’s motion and clarified that “the permanent injunction was not intended to, and does not, apply retroactively.” (“*Perez* Clarifying Order”).

In other words, the *Perez* injunction does not apply retroactively to preclude enforcement actions of labor certifications that were issued pursuant to the 2008 H-2B regulations prior to the injunction’s effective date of April 30, 2015. *See also Adm’r v. Drew’s Lawn & Snow Serv., Inc.*, No. 2017-TNE-00001, slip op. at 3 (ALJ Apr. 10, 2018) (“DOL may enforce the [2008 H-2B regulations] for labor certifications issued before the injunction took effect...”). Here, Respondents’ labor certification was issued before April 29, 2015, and therefore the *Perez* injunction does not preclude enforcement of the 2008 H-2B regulations. *See Order Denying Summary Decision*, November 14, 2018.

The 2015 H-2B regulations provide that with respect to determinations to enforce provisions of the job order or provisions under 8 U.S.C. § 1184(c), the procedures and rules contained in 29 C.F.R. § 503, Subpart C “will apply regardless of the date of violation.” 29 C.F.R. § 503.40(b).

Legal Standard

This matter is governed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, found at 29 C.F.R. Part 18. 29 C.F.R. § 503.44(a). The standard of review for this matter is de novo as stated in this Court’s May 2, 2019 Order Following Prehearing Conference.

I. ISSUES IN DISPUTE

The matter presents the following disputed issues:

1. Does the doctrine of laches preclude liability if the Administrator unjustifiably delayed filing the determination letter to the prejudice of Respondents?

Respondents’ argument that the equitable doctrine of laches precludes liability fails. Respondents contend the enforcement action should be dismissed because the Administrator’s delayed prosecution substantially prejudiced Respondents. RPB 24. Respondents allege the Administrator allowed the case to languish for well over five years without explanation before filing a determination letter. *Id.* 24-25. Respondents claim they no longer employ anyone from the management team for the implicated Butch’s Unit, and thus could not refute the Administrator’s case. *Id.* at 25. Although Ms. Aguilar interviewed one of the managers, Respondent’s claim without a witness statement, the manager’s statements are “filtered through Ms. Aguilar’s bias.” *Id.* Additionally, Respondent’s argue that six of the nine nonimmigrant employees no longer work for Employer. *Id.* Finally, Respondents’ claim they lost many of their files during a move, and the 2008 H-2B regulations only require them to retain files for three years. *Id.*

Administrator—citing *United States v. Ruby Co.*, 588 F.2d 697, 705, n.10 (9th Cir. 1978)—argued that traditionally the doctrine of laches is not available against the government, but even if it were, Respondents must meet the standard for estoppel and make a showing of affirmative

misconduct. *See* Administrator’s Opposition to Respondents’ Amended Motion for Summary Judgment, July 25, 2018; *see also* *Ruby*, 588 F.2d at 705, n.10.³⁸

Discussion

Laches is an equitable defense that may apply when a plaintiff “unreasonably delays in filing a suit and as a result harms the defendant.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002). The doctrine “requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Costello v. United States*, 365 U.S. 265, 282 (1961). Further, “laches is not a doctrine concerned solely with timing. Rather, it is primarily concerned with prejudice.” *In re Beaty*, 306 F.3d 914, 924 (9th Cir. 2002).

The traditional rule is that the doctrine of laches is not available against the government in a suit to enforce a public right or protect a public interest. *United States v. Ruby Co.*, 588 F.2d 697, 705, n.10 (9th Cir. 1978); *but cf. Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355, 383 (1977), (noting in dicta, “discretionary power to locate a just result in light of the circumstances peculiar to the case can also be exercised when the EEOC is the plaintiff.”) Courts have applied the doctrine of laches against the government in three limited circumstances: (1) “only the most egregious instances;” (2) when there is no statute of limitations to confine suits; and (3) to distinguish cases in which the government is suing on behalf of private parties for private rights. *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005).

In dicta, the Ninth Circuit stated if the doctrine were to apply against the government, like the “analogous estoppel situation,” the party asserting the defense must show “affirmative misconduct.” *Id.* Affirmative misconduct in the context of estoppel “must be more than negligence” and “mere unexplained delays.” *Jaa v. U.S. I.N.S.*, 779 F.2d 569, 572 (9th Cir. 1986).

Here, on March 22, 2013, Wage and Hour Inspector—Ms. Carrie Aguilar—notified Respondents she would inspect their operations to determine compliance with the H-2B program. AX A-1. WHD investigated Respondents’ on-site operations in Santa Barbara, California on April 23 and 24, 2013. AX F. On November 22, 2013, Ms. Aguilar made a recommendation assessing back wages and CMP to remedy Respondents noncompliance with the H-2B program. RX 14 at 1; HT 75-77. Between February 2014 and early 2018 there was no communication between WHD and Respondents. *See* HT 94. On February 6, 2018, WHD issued a final determination letter alleging Respondents’ noncompliance with the H-2B program and assessing back wages and CMP. RX 19.

Here, none of the circumstances to apply laches to the government exist, and Respondents did not show affirmative misconduct. First, a delay of approximately four to five years was not egregious. *Cf. Cayuga Indian Nation of N.Y.*, 413 F.3d at 279 (holding that a suit based on events that occurred 200 years ago was egregious). In its 2008 H-2B regulations, the Department of Labor initially contemplated a document retention period of five years before adopting a three-year policy to avoid unnecessarily burdening small businesses; finding an “unnecessary burden” falls far short of egregious.³⁹ Second, the government issued the final determination within the applicable catch-all statute of limitations—while adhering to a statute of limitations is not dispositive, the applicability of

³⁸ Administrator did not address the issue in its post hearing brief. *See* Administrator’s Post Hearing Brief, July 23, 2019.

³⁹ 73 Fed. Reg. 245, 78,023.

a statute of limitations removes the justification for imposing the doctrine against the government. 28 U.S.C. § 2462; *See Cayuga Indian Nation of N.Y.*, 413 F.3d at 279. Third, the Administrator acted to protect the public interest and certify compliance with the H-2B program—which aims to ensure that employing foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See Cayuga Indian Nation of N.Y.* at 279; *see also* 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1). Although Respondents would owe back wages to individual employees, the U.S. intervenes in the public interest to enforce compliance.

Finally, Respondents did not show affirmative misconduct, which must be more than mere negligence or unexplained delay. *See Jaa*, 779 F.2d at 572. As stated at the hearing, WHD did not communicate with Respondents for four years and delayed issuing the Final Determination because the H-2B program was in an unsettled state. HT 166-167. The H-2B program enforcement was interrupted by various court cases outside of WHD's control. HT 167 at 9-11. The Administrator did not engage in misconduct, but rather an understandable delay due to pending litigation.

Furthermore, even if the standard rule for the doctrine of laches defense applied, Respondents still would not prevail because they failed to show unreasonable delay due to lack of diligence and prejudice. *See Costello*, 365 U.S. at 282. As stated above, the Administrator delayed because of pending litigation outside of its control. Respondents argue they were prejudiced because (1) they no longer employ anyone from the 2013 management team and six of the nine employees are no longer with Butler; (2) the manager's statements are "filtered through Ms. Aguilar's bias" because they could not take witness statements; and (3) they claim they lost many of their files during a move. RPB at 24.

Regarding Respondents' first and second objections, the witness statements that WHI took are primarily dictated, neutral notes describing Employer's operations. Based on the recorded language there was very little editorializing. For example, Kurt Vomberg's witness statement is written in the first person and states, "my right hand is Bill Truax...my left hand I guess would be Antonio Mendez. He's been coming back for 12 years." Mr. Vomberg's voice and straightforward answers to WHI's questions come through. AX F-137. There is no evidence of argumentation or editorializing in the witness statements. Additionally, WHD asked the H-2B employees to give written statements, which were later translated. AX F. Thus, the statements were not filtered through WHI's "biases." Generally, the Administrator was similarly prejudiced by its inability to follow up with employees to clarify their responses. Regarding Respondents' third objection, they made a vague assertion that they lost documents in a move but did not state which documents were lost. Furthermore, the Administrator gave Respondents no reason to believe that they had dropped the case. After corresponding with WHD and receiving notice of potential back wages and CMPs due, Respondents had a responsibility to maintain their own records for their defense at least until the statute of limitations passed. *See* 28 U.S.C. § 2462.

Finally, Respondents cite to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) for support. RPB 24. In *Logan*, the appellant was fired and filed a timely state employment discrimination complaint. *Logan*, 455 U.S. 426. After the responsible state agency failed to convene a fact-finding conference within the statutorily-mandated time-frame, the Illinois Supreme Court held that the state agency could not convene a conference because it failed to do so within the allotted time, thus denying appellant an opportunity to be heard. *See Logan*, 455 U.S. 426. The Supreme Court reversed stating "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Id.* at 433. The Court held the 14th Amendment required the state to

grant appellant a hearing “appropriate to the nature of the case” at a meaningful time and in a meaningful manner. *Id.* at 437. Here, unlike *Logan* where the appellant was denied a hearing, Respondents have been heard. Furthermore, the hearing is still within a “meaningful time” because nothing has occurred that would render the outcome of the hearing irrelevant. *Logan* provides no additional support for Respondents’ argument that the doctrine of laches precludes liability.

Respondents did not show that the doctrine of laches should apply to the government in this case. Furthermore, Respondents failed to show the Administrator engaged in an unreasonable delay, or that they have been prejudiced the delay. Thus, I rule the doctrine of laches does not preclude liability here.

2. Did Respondents violate 20 C.F.R. § 655.22(n) (2009) when they compensated nine nonimmigrant workers as recreation and amusement attendants who were not performing recreation and amusement attendant job duties during the 2013 season?

For the reasons stated in this Court’s November 14, 2018 Order Denying Summary Decision, the Department of Labor’s 2008 H-2B regulations apply substantively, and the 2015 H-2B regulations apply procedurally. Respondents submitted the operative labor certification application under the 2008 H-2B regulations, and the enforcement of Respondents’ obligations under those regulations is not foreclosed by the promulgation of new regulations or the *Perez v. Perez*, No. 3:14-cv-00682, slip op. at 7-8 (N.D. Fla. Mar. 4, 2015) injunction. The 2015 H-2B regulations provide that with respect to determinations to enforce provisions of the job order or provisions under 8 U.S.C. § 1184(c), the procedures and rules contained in 29 C.F.R. § 503, Subpart C “will apply regardless of the date of violation.” 29 C.F.R. § 503.40(b). Thus, the 2008 H-2B regulations apply substantively, and the 2015 rules apply to procedural issues.

*Did Respondents substantially fail to comply with the 2008 Rules?*⁴⁰

In 2008, the DOL proposed and instituted an attestation-based filing system for the H-2B program to reduce application “processing times while maintaining program integrity.”⁴¹ RX 76 at 17. The “information and attestations on the application form” were to provide the Department with “the necessary assurances ... to initially verify program compliance.” *Id.* The Department would further confirm compliance with audits. *See* 20 C.F.R. § 655.24.

An audit can identify three types of violations: (1) a willful misrepresentation of a material fact on a petition, (2) a substantial failure to meet any conditions of the labor certification or DHS Form I-129, or (3) a misrepresentation of a material fact to the State Department on a visa application. *See* 20 C.F.R. § 655.60. Here, the Administrator alleged that Butler substantially failed to meet conditions of the labor certification application. *See* APB 14 at 15-20. For this type of

⁴⁰ In the prehearing conference call, Respondents presented for hearing the questions: *Did Respondents willfully misrepresent its application or substantially fail to comply with the 2008 Rules?* And “*Did Respondents willfully misclassify certain H-2B workers in knowing and substantial violation of the 2008 rules?*” Because the Administrator did not allege a willful misrepresentation of a material fact on Respondents’ petition under 20 C.F.R. § 655.60(a), I do not address the misrepresentation issues.

⁴¹ *Lab. Certification Process and Enft for Temp. Em’t in Occupations Other Than Agric. or Registered Nursing in the US (H-2B Workers); Final Rule*, 73 Fed. Reg. 245, 78,035. (December 19, 2008) (Codified at 20 C.F.R. §§ 655 and 656.)

violation, the Administrator determines whether the employer has “substantially failed to meet any of the conditions of the labor certification application attested to as listed in § 655.22, or any of the conditions of the DHS I-129, Petition for a Nonimmigrant Worker for an H-2B worker in 8 CFR 214.2(h). 20 C.F.R. § 655.60(b).

Substantial failure in the context of the 2008 H-2B regulations means a knowing failure or reckless disregard whether conduct was contrary to Section 214(c) of the INA, or this subpart [20 C.F.R. 655 Subpart A], which results in a significant deviation from the terms and conditions of the labor condition application or the DHS I-129. *See* 20 C.F.R. § 655.65(d)-(e); *see also* 8 U.S.C. § 1184(c)(14)(A)). A substantial failure violation occurs after the workers are in the U.S. RX 40 at 18.

The INA defines substantial failure as “the willful failure to comply” [with this section which] constitutes a significant deviation from the terms and conditions of a petition.”⁴² 8 U.S.C. § 1184(c)(14)(D). The 2008 H-2B regulations define “willful failure” as a “knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *see also Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).”⁴³ *See* 20 C.F.R. § 655.65(e).

Section 655.65(e) references *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) and *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) for guidance on “willful failure.” Under this standard, “willful” refers to conduct that is “voluntary,” “deliberate,” or “intentional,” and “not merely negligent.” *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 133. A violation is willful if the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited.” *Id.* An act is not “willful” if the employer simply knew potential violations were “in the picture.” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 127.

⁴² Section 214(c)(14) of the INA states that if DHS finds “a substantial failure to meet any of the conditions of the petition to admit . . . a nonimmigrant worker under [8 U.S.C. § 1101(a)(15)(H)(ii)(b)] or . . . a willful misrepresentation of a material fact in such petition,” it may impose such administrative remedies, including civil monetary penalties, as it determines to be appropriate. 8 U.S.C. § 1184(c)(14)(A). The statute continues: “In this paragraph, the term ‘substantial failure’ means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition.” 8 U.S.C. § 1184(c)(14)(D). In addition, “the highest penalties shall be reserved for willful failure to meet any of the conditions of the petition that involve harm to United States workers.” 8 U.S.C. § 1184(c)(14)(C).

⁴³ Although the definition of “substantial failure” is unclear from merely examining the regulations, it is logical to assume that Section 655.65(d)-(e) defines “substantial failure” in Section 655.60(b). Section 655.65, “Remedies for Violations,” define “substantial violation” and “willful” as follows:

(d) Substantial failure in paragraph (b) of this section shall mean a willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or successor form.

(e) For purposes of this subpart, “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 this subpart. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *see also Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

20 C.F.R. § 655.65 (2009). Section 655.65(d), states that “substantial failure in paragraph (b) of *this section* shall mean . . .” but paragraph (b) of “*this section*” does not mention “substantial failure.” *See* 20 C.F.R. § 655.65(b) (2009) (discussing the remedies for termination by layoff). However, because no other definition is provided, it is logical to assume Section 655.65(d)-(e) defines “substantial failure” for Section 655.60(b), which is within the same subpart.

In *Thurston*, the record showed that the airline acted reasonably and in good faith. *Trans World Airlines v. Thurston*, 469 U.S. at 113. Airline officials met with lawyers, determined that their existing policy violated the Age Discrimination in Employment Act (ADEA), and proposed and adopted a new policy. *Id.* at 129. The Court held that the airline did not show willful or reckless disregard for whether its conduct violated the ADEA. *Id.*

Here, I find the Administrator established that Butler Amusements substantially failed to comply with the 2008 H-2B regulations by employing nine H-2B workers as amusement and recreation attendants (ARA) who did not perform recreation and amusement attendant job duties. These employees were instead employed as drivers, shop workers, and supervisors of amusement and recreation attendants. AX F.

Respondents Showed Reckless Disregard for Whether They Were in Compliance with the INA

Employer acted with reckless disregard for whether it was in compliance with the INA and its implementing regulations by ignoring the regulations and instructions accompanying the temporary employment certification application and employing nine H-2B workers outside of its job certification. At the hearing, Mr. Brajevich admitted he had never read or referenced the 2008 H-2B rules. HT 347.

As stated above, Employer has participated in the H-2B program since 2000. HT 274 at 6. On December 17, 2012, Employer submitted an Application for Temporary Employment for 246 nonimmigrant employees to work as “Recreation and Amusement Attendants. AX C-1. Employer stated it had a temporary need for employees from February 1, 2013, to October 31, 2013 to “perform a variety of attending duties at amusement facility (traveling carnival). Set up, tear down operate amusement rides, food concessions and/or games.” AX C-3. During a WHD investigation in the spring of 2013, WHD found Respondents substantially failed to meet conditions of the labor certification application by employing five H-2B workers as drivers, two H-2B workers as shop workers, and two H-2B workers as supervisors.

The Administrator argued “[t]he H-2B program does not permit an employer to advertise and solicit for one job but actually employ nonimmigrant workers to perform a different job.” APB 15 at 11-13. Respondents countered that given the lack of guidance, the Administrator failed to show that Respondents willfully or recklessly disregarded its obligations under the H-2B program. RPB 14.

Respondents Ignored Regulatory Guidance

Respondents’ arguments that they did the best they could in the absence of a clear directive and guidance are unconvincing. Respondents’ counsel argued that the 2008 H-2B regulations “say nothing about what an Employer must do to stay within their job code.” HT 124. Counsel inquired whether there is a “regulatory requirement for how many job tasks...need to be identified” and how Employer could comply when there was not an established rule dictating what it should do. HT 127-129. The regulations and instructions accompanying the certification application provided ample notice and guidance for Employer to comply with the INA and the terms of its certification.

An agency must provide notice of its interpretation of what is prohibited before it may impose penalties. *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995). But “[i]f, by

reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform,” the agency has provided notice. *Gen. Elec. Co.*, 53 F.3d at 1329.

Here, several sections of the 2008 H-2B regulations would have given Employer notice of its obligations. Most importantly, the 2008 H-2B regulations dictated that the employer must truly and accurately state, “the dates of temporary need, reason for temporary need, and number of positions being requested for labor certification...on the application.” 20 C.F.R. § 655.22(n). Employer thus should have known that it was supposed to employ the number of ARA workers it had truly and accurately requested.

The content and purpose of the advertising requirements also should have given Respondents notice of the level of specificity required for the job description. Before receiving a temporary labor certification for H-2B workers, an employer must ensure that there are not enough interested and able US workers to fill the positions. *See* 20 C.F.R. § 655.17. Employers must advertise the job with enough specificity “to apprise applicants ... where [they] will likely have to reside to perform the services or labor” and describe the “opportunity (including the job duties) ... with sufficient detail to apprise applicants of services or labor to be performed ...” as well as, “[t]he job opportunity’s minimum education and experience requirements....” 20 C.F.R. § 655.17. Furthermore, the job description in the advertisement and the temporary employment certification application had to be similar because employers cannot place “less favorable” job requirements on U.S. workers. 20 C.F.R. § 655.17.

Employer stated workers would “perform a variety of attending duties at amusement facility (traveling carnival). Set up, tear down operate amusement rides, food concessions and/or games.” AX C-3. Employer should have known it was to describe the job duties with enough specificity to apprise workers of the labor to be performed, but despite its representations on the temporary employment certification, it placed workers in positions where they were supervising other employees, exclusively driving semi-trucks, or working in a repair shop—all duties which were not listed on ETA Form 9141, 9142B, or the I-129.

Sections 655.20 and 655.34(b) also should have put Employer on notice that its strategy of concentrating duties to promote efficiency violated the 2008 H2-B regulations. *See* HT 353. Section 655.20 (d) allows “certification of more than one position on the application as long as all H–2B workers will perform the *same services or labor on the same terms and conditions, in the same occupation....*” (italics added). Section 655.34(b) states “[a] temporary labor certification is only valid for the ...specific services or labor to be performed....” 20 C.F.R. § 655.34(b).

Had Mr. Brajevich read the regulations, these requirements would have put Employer on notice that all workers within a certification should perform the same labor, under the same conditions, and in the same occupations and that the certification was only valid for the services or labor specified in the application. Employer’s strategy to “just put [workers] wherever we can get them to be efficient,” was expedient, but clearly violated this explicit requirement. HT 353. Employer took advantage of this provision by submitting a temporary employment certification for 246 workers, and then showed reckless disregard for complying with the statute and regulations when it did not review the implementing regulations and employed some of its certified H-2B workers exclusively in occupations outside of the certification.

Respondents ignored instructions on the temporary employment certification application

Even though Mr. Brajevich did not read the 2008 H-2B rules, the instructions accompanying ETA Form 9141, 9142B, and the I-129 also informed Respondents of their obligations. Respondents argued the regulations do not specify how a FLSA-exempt employer is to complete ETA Form 9142 of the I-129. RPB at 19. They contend the Administrator has abandoned the practice of issuing opinion letters and prohibited investigators from giving advice in writing. RPB 14. But Respondents seemingly ignored the instructions they did receive with their temporary employment certification.

For example, to enable ETA to make a prevailing wage determination (PWD), Respondents were to “[d]escribe the job duties, in detail, to be performed by any worker filling the job opportunity.” RX-4. The instructions stated, “specify field(s) and/or product(s)/industry(ies) involved, any equipment to be used, and pertinent work conditions.” *Id.* The duties provided must be specific enough to be classified under a relevant SOC pursuant to the O*Net publication.” *Id.* The instructions also directed Employer to indicate the number of employees the H-2B workers would supervise and whether the supervised workers would be subordinates or peers. *Id.* The ETA Form 9142B has similar instructions. RX 6 at 1.

Despite this guidance, Respondents did not include in the description any mention of needing a commercial driver’s license, driving a semi-truck to transport rides, working in a repair shop, or supervising other employees. Despite this guidance, Respondents employed H-2B workers in positions dramatically different from the job description used to generate a prevailing wage determination, the position advertised to U.S. workers, and certified for H-2B workers.

Respondents should have submitted separate applications for the various jobs they sought to fill. Instead, Employer exerted minimal effort to comply with the INA and the 2008 H-2B regulations, which demonstrated more than mere negligence, but a reckless disregard for whether its actions violated the statute and regulations. If Respondents had reviewed the regulations and other documents in good faith, they could have ascertained what actions to take to comply. *See Gen. Elec. Co.*, 53 F.3d at 1329.

Did Respondents reasonably or in good faith rely upon professional counsel? Did Respondents reasonably or in good faith believe that they had committed no violation?

Respondents argue that because they relied on an agent with expertise in the H-2B program, they could not have willfully violated the regulations. *See* RPB 8. Respondents cite *McLaughlin* and *Trans World* to support their contention that “employers are entitled to rely upon legal advice and professional agents to properly handle H-2B applications.” RPB 8.

This argument is a nonstarter. In the Notice of Proposed Rulemaking, the Department confirmed “[i]n the H-2B program, the agent simply represents the employer in the labor certification process. The employer is ultimately responsible for its obligations under the program....” RX 76 at 17; 73 Fed. Reg. 245, 78035 (December 19, 2008). By signing the Employer’s Declaration on ETA Form 9142B, Mr. Brajevich certified the job opportunity was a full-time temporary position and that “[t]he dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification has been truly and accurately stated on the application” (Attestation #13). AX C-9. Mr. Brajevich took full responsibility for the accuracy

of any representations made by his agent or attorney and declared under penalty of perjury that he read and reviewed the application and that to the best of his knowledge it was true and accurate. *Id.*

Additionally, Mr. Brajevich testified that Mr. Judkins acted on Butler's authority. HT 276. The RESTATEMENT (THIRD) OF AGENCY, § 2.01 (2006) states "[a]n agent acts with actual authority when at the time of taking action that has legal consequences for the principal, the agent reasonably, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Thus, Mr. Judkins acted with actual authority and Butler Amusements is bound to the legal consequences of his actions. APB 27.

Unlike the airline in *Thurston*, Respondents did not act reasonably and in good faith. *See Trans World Airlines v. Thurston*, 469 U.S. at 113. Despite adequate notice of their obligations, Butler Amusement made convenient decisions and exerted minimal effort to comply. In *Thurston*, the airline did not just consult counsel, they engaged with the process, and changed their plan of action based on counsel's advice. *Id.* at 129. Consulting counsel is not sufficient to show that one acted in good faith nor is pleading ignorance.

Respondents also argue "an employer may legitimately rely upon the [WHD] agency's affirmative advice or interpretations, as well as failure to issue citations in similar circumstances. RPB 8. Respondents, however, did not cite any advice, interpretations, or a pattern a failure to issue citations to support its argument. I conclude that Respondents did not reasonably rely on counsel and believe they had not committed a violation.

Respondents' reckless disregard resulted in a significant deviation from the terms and conditions of their petition

Respondents' reckless disregard for the regulations and their lack of a good faith effort resulted in a substantial failure to meet conditions of the labor certification. Furthermore, their failure to place workers in ARA positions was a significant deviation from the conditions of the labor certification. On ETA Form 9141 and 9142B, Respondents entered "Amusement and Recreation Attendants – Traveling Carnival" as the job title, 39-3091 as the Suggested SOC (O*NET/OES) code, and Amusement and Recreation Attendants (ARA) as the Suggested SOC (O*NET/OES) occupation title. RX 5 at 1. Under job duties, Respondents represented the H-2B workers would, "[p]erform a variety of attending duties at amusement facility (traveling carnival). Set up, tear down, operate amusement rides, food concessions and/or games." *Id.* Respondents stated no experience, education, training, specific skills, or special licenses were required for the job. RX 5 at 2-3. Additionally, workers in the position would not supervise any other employees and would travel to multiple worksites. RX 5 at 2-3. Employer advertised 250 open Amusement and Recreation Attendants positions, and ETA certified a temporary employment certification for 246 ARA. AX C-1.

As stated above O*NET provided extensive information about any occupation, including ratings of how important certain tasks are to the position. APB 8 at 21-23. For ARA positions the core tasks are: selling tickets; collecting fees; selling refreshments; recording details of attendance, sales, receipts, reservations, or repairs; providing information about facilities; directing patrons, monitoring safety; cleaning rides; staying informed of safety measures. RX 51 at 1.

Respondents insisted that employing workers exclusively in supplemental activities was not a significant deviation from the job certification. HT 134. The O*NET description lists: inspecting

equipment to detect wear and tear and making minor repairs as a supplemental activity. RX 51 at 2. Similarly, an ARA might spend some time maintaining inventories of equipment and assembling and disassembling equipment. *Id.* According to Respondents, because cargo trucks are listed in O*NET as a tool of ARA workers, employing workers to drive semi-trucks was not a significant deviation. RX 51 at 2. Respondents claimed their strategy of concentrating approved duties in a small number of H-2B workers made them more efficient and was acceptable under the H-2B regulations. HT 303-304, 318-319. This argument is unconvincing because none of the nine employees performed the core duties associated with an ARA position, and they rarely performed the supplemental duties. *See* AX F.

The five drivers spent their time almost exclusively transporting rides on semi-trucks. They self-identified as drivers and were listed as drivers.⁴⁴ Additionally they slept in their trucks, had commercial drivers' licenses, and kept logbooks to comply with US Department of Transportation regulations. AX F-41, 54, 78, 135. The two shop workers labored solely in the maintenance shop cleaning parts and supplies, welding, doing inspections, and repairing rides. AX G-3, AX F-137, AX F-123, AX F-134, and AX F-022. Mr. Villegas did not need his company shirt because he spent so little time working with the public. *See* AX F-123. Finally the supervisors described themselves as supervisors, and other employees, as well as Butler Amusements' management, corroborated this. AX F-137. The supervisors walked around to make sure employees were doing their jobs, dealt with customer complaints, responded to ride operators when something was broken, and filled out the ride roster. AX F-075. The nine employees did not perform core ARA duties and only minimally performed supplemental ARA duties. RX 51 at 2.

At the hearing, Respondents' counsel asserted that the 2008 H-2B Regulations did not require an Employer to employ H-2B workers only in the job code that was requested. HT 115 at 21-25. This argument seems disingenuous; to allow employers to select a job code, receive a prevailing wage determination, advertise the job to US workers, hire H-2B workers after certifying that no US workers wanted the position, and then employ H-2B workers to perform a different job entirely, undermines the purpose of the INA to protect U.S. workers.

Respondents also argued that new language in the 2012 and 2015 regulations prohibiting placing workers outside of the certified job classification demonstrated that the 2008 regulations did not prohibit the practice. Specifically, counsel questioned Ms. Aguilar, "did you know that 2012 and 2015 [H-2B regulations] actually inserted the language that the Employer may not place someone in a job opportunity not listed on the 9142 application." HT 119 at 14-18. He continued, "[i]f I took the time to show you the preamble language associated with that change, did you know that it was proposed because it didn't exist in the 2008 regulations?" The preambles for the 2012 and 2015 H-2B regulations actually say, the modification "clarif[ies] that an H-2B worker is only permitted to work in the job and in the location that OFLC approves unless the employer obtains a new labor certification. Clarifying language indicates that the requirement existed, but was not explicit. Thus, contrary to Respondents' claim, the requirement is not new. Additionally, language added to clarify the requirement does not excuse Respondents' noncompliance due to ignorance. As shown above, there was ample language in the regulations and guidance to put Respondents on notice of their obligations.

⁴⁴ RX 26 at 792, 1036 (Guzman, Ortega, and Preza); RX 26 at 793 (Guzman and Ortega and Preza); RX 26 at 823 (Preza and Ortega).

Respondents failed to advertise the nine positions to US workers and adequately compensate the nine employees. Drivers, shop workers, and supervisors all have different SOC codes and corresponding prevailing wage rates, which are higher than the PWR for ARA. *See* AX J. Because Employer placed these nine employees outside of ARA positions, but paid them as if they were ARA employees, Employer significantly deviated from its certification and owes back wages. RPB 12. Their reckless disregard resulted in a significant deviation from the terms and conditions of their petition. 8 U.S.C. § 1184(c)(14)(D). Thus, Respondents violated 20 C.F.R. § 655.22(n) (2009).

Does the Administrator have an enforceable regulation advising Fair Labor Standards Act-exempt employers how to complete Form ETA 9142 or I-129?

Neither party cited an enforceable regulation specific to FLSA-exempt employers. However, the 2008 H-2B rules apply to all employers whether or not the employer is FLSA-exempt. Furthermore, Employer's FLSA-exempt status does not come into play here. Employer put H-2B workers in jobs outside of the job description on its temporary employment certification. *Compare* AX B *with* AX E and F. Due to its inconsistent and inaccurate timekeeping, WHD had to reconstruct wages based on the 40-hour week Employer described in its ETA Form 9142B and I-129. AX B and D. Employer is exempt from the FLSA under Section 13(a)(3) and thus is not required to maintain timekeeping records. In this case, a lack of reliable time-keeping records disadvantaged Employer. As Ms. Aguilar stated, if Respondents wanted to show the actual hours that employees worked, they needed to keep better records. HT 169. The lack of instructions or guidance for FLSA-exempt employees did not influence Respondents decision to place workers outside of its job certification.

3. To remedy the violations, should Respondents pay \$26,955.40 in back wages as calculated by the Administrator?

Respondents owe back wages to the nine employees; however, the Administrator should have used the information in RX 26 and 27 to infer the actual pay and location of the employees. The recalculated back wages are included below.

If the Administrator finds that an employer has not paid wages at the wage level required by § 655.22(e), the Administrator may require the employer to pay back wages. 20 C.F.R. § 655.65(i). Back wages further the purposes of the H-2B program because it reduces the employer's incentive to bypass US workers to hire H-2B workers who are more easily exploited. 73 Fed. Reg. 78,020, 78,047 (Dec. 19, 2008). The Administrative Review Board acknowledges the necessity and authority of the WHD to reconstruct hours worked and payments to determine back wages when the employer's records are unreliable. *Administrator v. Peter's Fine Greek Food, Inc.*, 2014 WL 4966168, *4 (ARB September 17, 2014.)

WHD reconstructed the back wages based on a 40 hours week (temporary employment certification), the itinerary in the temporary employment certification, and SOC job codes for drivers, first-line supervisors, and maintenance and repair workers. AX J; AX I. Respondents argued that the nonimmigrant workers employed as drivers were only drivers for a few hours each week and that the two supervisors and the two machine shop mechanics did not work 40 hours per week in these roles. RX 15 at 2. Additionally, Respondents stated they gave WHD the location information; WHD just had to do the work to reconstruct each employees' location. HT 187.

The Administrator did not rely on Respondents’ pay slips because it found the weekly wages on Employer’s pay slips credible, but not the hours worked. HT 110; HT 40. Ms. Aguilar opined typed timecards are less reliable than handwritten timecards because the employee does not contemporaneously document when he or she starts and stops working. HT 40. Furthermore, the hours listed on the pay slips did not align with employee accounts. HT 71. For the reasons stated above, I find the pay slip hours were unreliable and could not have been used to reconstruct employee back wages.

Regarding the location of the workers, however, I find that the data in RX 26 is reasonably reliable. To calculate back wages, Ms. Aguilar gave Respondents credit for the weekly salaries documented on various spreadsheets and pay slips. HT 49-51. Butch’s Unit traveled from Riverside County, to Maricopa County, and then to Santa Barbara County. RX 27. Three employees—Mr. Ortega, Mr. Preza, and Mr. Villegas—likely traveled to Yuma County and then returned to Maricopa County, while the others remained in Maricopa County. See RX 26. Although Ms. Aguilar could have inferred the actual location for most of the nine H-2B workers during the period of investigation, she used the locations listed in the carnival itinerary included in the temporary employment certification. AX C-13; HT 65; HT 99; RX 27. During the hearing, Ms. Aguilar acknowledged the PWR could have been based on just the four counties where Butch’s Unit traveled. HT 100. Using SOCs that described the work H-2B workers were actually performing, she used FLC data to determine the rate of pay in each locality. HT 63-64. Ms. Aguilar then averaged the “mean wage (H-2B) values for each of the localities on the itinerary to determine a PWR. HT 69. Based on the hours per week the Employer listed on the temporary employment certification, she then multiplied that wage by 40 hours of work. HT 68. Ms. Aguilar’s method for calculating the back wages is sound with the exception of using the projected itinerary to determine the average of the mean H-2B wages. She found Respondents owed the following:

Name	Occupation	Amount Due
Gustavo Gamero	Driver	\$3,229.60
Sergio Guzman	Driver	\$3,229.60
Jaime Hernandez	Shop Worker	\$3,297.80
Saul Estadillo Herrera	Driver	\$3,229.60
Omar Lopez	Supervisor	\$3,051.40
Antonio Mendez	Supervisor	\$574.00
Jose Ivan Ortega	Driver	\$2,936.00
Fernando Preza	Driver	\$3,229.60
Felipe Villegas Quijano	Shop Worker	\$4,177.80
Total Back Wages		\$26,955.40

Based on my recalculation of back wages using the mean H-2B wage for each worker as it could be best determined from the locations available in RX 26, I find Employer owes \$26,786.00 in back wages. To calculate the back wages, I relied on data from RX 26, AX H, and AX J. I inferred the location and the weekly rate paid from pay slips in RX 26. I based the hourly wage rate on the

FLC wage data in AX J, specifically the mean (H-2B) rate, for the respective location and occupation of the H-2B worker. Table 1 summarizes the back wages Employer owes each employee, and Tables 2 through 10, attached as an Appendix to this Decision, show the calculations for each employee.

Table 1: Summary of Back Wages Owed

Saul Estadillo Herrera	Driver	\$3,621.60
Gustavo Gamero	Driver	\$3,621.60
Jose Ivan Ortega	Driver	\$3,108.00
Fernando Preza	Driver	\$3,446.00
Sergio Guzman	Driver	\$3,446.00
Omar Lopez	Supervisor	\$2,728.60
Antonio Mendez	Supervisor	\$308.60
Felipe Villegas Quijano	Shop Worker	\$3652.80
Jaime Hernandez	Shop Worker	\$2,852.80
	TOTAL:	\$26,786.00

Does the Administrator have an enforceable regulation that precludes the Respondents from meeting its prevailing wage obligations through non-cash value or facilities? Did the Administrator improperly calculate back wages by failing to include full-value credit for non-cash value or facilities provided to the employees, such as bunkhouses, local convenience travel, in and out of country travel, income taxes, a prepayment plan, variations in the prevailing wage from one location to another, bonuses, reimbursement of employee expenses, and food?

In the 2008 H-2B regulations, “[t]he Department [continued] to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make deductions from a worker’s pay for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees....” RX 76 at 21. Regarding deductions, the 2008 H-2B regulations stated, “[t]he employer must make all deductions from the worker’s paychecks that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker’s paycheck. All deductions must be reasonable.” 20 C.F.R. § 655.22(g)(1). This regulation applies regardless of FLSA exemptions. *See id.*

Respondents claim they are entitled to credits for providing housing (\$1290 to \$1555 per employee), local transportation (\$581.46 per employee), relocation expenses (\$200 per employee), employee taxes (\$356 to \$1198 per employee), and reimbursement for a prepayment plan because employees did not reach 40 hours a week during the period of investigation. RPB 21; RX 47. Respondents claimed the average value of the mobile housing provided was \$134.39 per week and the incidental travel offset was \$52.25 per week. RX 31 at 6; RX 35 and 36. Respondents only seek credits for the nine employees to whom they owe back wages. RX 47 at 1; APB 25 at 12-13; HT 331-32.

Respondents cite no authority in support of these credits. Instead they submitted a joint statement signed by employees in 2019 who worked for Employer in 2013. RX 39 at 1. The letter stated the employees received “valuable benefits” such as housing, transportation, food, relocation, visa processing fees, “and so on.” *Id.* The letter continues, “I knew that the value of these benefits

meant I receiving more than the prevailing wage and that Butler Amusements would be entitled to receive a credit for paying those expenses because they were paying more than they had agreed to pay.” *Id.* I give this statement no weight as I have no context for the circumstances in which it was signed. Notably, there are inconsistencies between this letter, employee statements in 2013, and Respondents’ claims for credits. For example, Respondents do not mention taxes or the prepayment plan in the letter, but claim a credit for them for 2013 in RX 47 (Respondents Recalculation of Back Wages with Credits Applied). Additionally, all employee statements in 2013 stated that housing was free and they independently pooled their money for food. *See generally* AX F. Finally “and so on” does not pass muster as a specific valuable benefit to deduct. *See* 20 C.F.R. § 655.22(g)(1)

Respondents are not entitled to any credits. In Respondents’ job offer it stated, Employer would make “available mobile housing valued at \$125.00 per week” and “transportation from venue to venue and scheduled transportation to laundry, shopping valued at \$25.00 per week.” RX-1. This language is ambiguous; it is not clear whether employer is deducting this benefit from the worker’s pay or providing a free perk. In 2013, all of the employees who lived in the trailers stated that housing was free. AX F. Respondents’ temporary employment certification application stated “Employer follows prevailing practices for Traveling Amusement Industry in regards to housing, transportation and weekly salary for workers.” AX-C. This statement is also vague; it does not clearly specify all, or any, of the deductions the employer will make. *See* 20 C.F.R. § 655.22(g)(1). Finally, Employer inserted language in an addendum to its ETA Form 9142B “reserving the right to charge a fee for housing and transportation,” but this attempt to reserve a deduction just in case fails to comply with § 655.22(g)(1). AX C-12.

Finally, WHD documented that at least two of the drivers did not live in the trailers. AX F. A deduction of \$1290 to \$1555 per employee for sleeping in a semi-truck cab is unreasonable. *See* 20 C.F.R. § 655.22(g)(1).

4. Should Respondents be ordered to pay \$10,000 in civil money penalties for violating 20 C.F.R. § 655.22(n) (2009)?⁴⁵

The implementing regulations contemplate three different bases to assess CMPs. The first concerns an employer’s willful failure to pay an employee’s wages or willful requirement that an employee pay fees or prohibited expenses, where the Administrator may assess CMPs that are equal to the difference between the amount that should have been paid and the amount actually paid to the worker(s), up to \$10,000. 20 C.F.R. § 655.65(a). The second contemplates that the Administrator may make an assessment of up to \$10,000 in CMPs for an employer’s termination or layoff of an H-2B worker within the designated work period. 20 C.F.R. § 655.65(b). The third dictates that the Administrator may assess CMPs of up to \$10,000 for an employer’s substantial failure to meet a condition of the Temporary Employment Certification or the DHS Form I-129, a willful misrepresentation in the application, or a failure to cooperate with a Department of Labor (“DOL”) investigation. 20 C.F.R. § 655.65(c).

The Administrator’s CMP determination shall set forth the reasons for its findings. 20 C.F.R. § 655.70(c)(1). To determine an appropriate CMP, the Administrator “shall consider the type

⁴⁵ The Administrator is not seeking debarment.

of violation committed and other relevant factors.” 20 C.F.R. § 655.65(g). “[T]he highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.” 8 U.S.C. § 1184(c)(14)(C); 20 C.F.R. § 655.65(g). Under the INA, a “willful failure” means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to Section 214(c) of the INA. 20 C.F.R. § 655.65(e); *see McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

In addition to considering the willfulness of the violation, the Administrator may also consider other discretionary factors to determine the CMP, which include but are not limited to the following:

- (1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;
- (2) The number of U.S. or H-2B workers employed by the employer and affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);
- (5) The employer's explanation of the violation or violations;
- (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). After the Administrator assesses CMPs, a party may seek an administrative law judge’s (“ALJ’s”) review of the assessment of CMPs. 20 C.F.R. § 655.71(a). The ALJ “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 CMPs. *Admin. 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).

Here, the Administrator assessed a \$10,000 CMP for the substantial failure to pay employees for the work they actually performed. RX 19 at 5. Where an employer willfully fails to pay wages, the Administrator may assess CMPs equal to the difference between the amount that should have been paid and the amount of wages actually paid up to \$10,000. 20 C.F.R. § 655.65(a). As Administrator found that back wages in excess of \$26,000 were owed, per the regulations, it had authority to levy a CMP of up to \$10,000.

Based on the mitigating factors, I find that Administrator’s assessment of a \$10,000 CMP was reasonable. First, although Butler Amusement does not have a history of violations, in its brief, the Administrator convincingly cited other ways in which Employer likely failed to comply with its certification, including incorrect entry and departure dates as well as nearly 400 individuals returning

to Mexico at the end of the season, even though only 187 workers entered. RPB 6 at fn. 3; RPB 15 at fn. 10. Although the Administrator did not charge Employer with these violations, they were documented in Respondents' records and evince a broader lack of adherence to H-2B rules. *See* RX 24 at 1-4; *see also* RX 33 and 34. Thus, the first factor weighs against Respondents.

Although the violation affected just nine employees, the second factor does not mitigate the assessed CMP because the Administrator convincingly argued that the violations were likely not limited to the nine employees in this case. APB 7 at fn. 4. WHD only audited one Butler Amusement crew and the Administrator reasoned that the same practices were used throughout Respondents' operation. *See id.* The Administrator highlighted an additional H-2B employee who Respondents employed as a driver. *Id.* It is likely Butler Amusements committed more similar violations in 2013; however, because these additional violations were not investigated or charged this factor does not weigh for or against Respondents.

Respondents' violation undermined objectives of the INA, thus the third factor favors assessing a large CMP. The Administrator charged Respondents with a substantial failure to comply with their obligations, not a deliberate misclassification. While the Administrator did not allege that Respondents had a history of lying or deliberately misleading the government and is not seeking debarment, the violation is serious. Respondents hired a large number of H-2B workers and through their substantial failure, H-2B workers lost wages and U.S. workers were denied an opportunity to apply to positions as supervisors, shop workers, or drivers. Thus, although the violation was not a willful misclassification, the violation was serious and undermined the objectives of the INA.

The fourth and fifth factors weigh against Respondents. Although they hired a consultant, Respondents put minimal effort into compliance as described above. The fifth factor also weighs against Respondents. Respondents maintain they are not in violation (HT 366 9-16). They seem to believe they should be able to "agree to comply with a scheme, receive the benefit of that scheme, fail to comply with it, and then blame someone else for their noncompliance." RPB 27. The H-2B system relies on employers promising to follow the rules. *Id.* Respondents argued they did not have to employ workers within their job certification and that regulations and guidance do not apply to them because they are FLSA-exempt. Butler Amusements' explanation of its violation is wanting, and its delegation of work to a consultant is insufficient to show a good faith effort.

The sixth factor does not weigh for or against Respondents. Respondents refused to state they would comply in the future because they were unwilling to admit they were out of compliance. HT 364-365. Additionally, based on Mr. Brajevich's testimony, it seemed likely that they not have changed their business practices in response to the Administrator's finding that they committed a violation. *See* HT 363-365. Respondents indicated they would "know how to go forward" based on my ruling, and they would follow the regulations "as spelled out." HT 363 at 8-10. Despite Respondents' ability to find ambiguity where little or none exists, I find it is likely they will comply.

Finally, the last factor weighs against Respondents because they gained financially by using ARA classifications that have lower prevailing wages than the other classifications. Contrary to Respondents' claim, the nine H-2B workers were not "handsomely overpaid." RPB 24. Instead, by placing H-2B workers outside of their job classification, Respondents were able to maintain their operations while paying H-2B workers less than their job duties warranted.

On balance, the discretionary factors favor imposing a high CMP. Only two factors neither weigh for or against Respondents. Because Respondents owe more than \$26,000 in back wages, the Administrator had the authority to impose a CMP up to \$10,000. *See* 20 C.F.R. § 655.65(a). Therefore, given the back wages owed and my assessment of the discretionary factors, the assessed \$10,000 CMP is appropriate in this instance.

5. Was Respondent Michael Brajevich properly charged in his individual capacity and therefore liable for any violations in his individual capacity?

“A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). The corporate veil shields individual shareholders from liability for the corporation’s debt; to hold a shareholder personally liable for corporate debt, a court must pierce the corporate veil. *See Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 523 (9th Cir. 1984). In appropriate cases, courts may pierce the corporate veil and hold an individual responsible for violations of the INA committed by the employer corporation. *See United States v. Bestfoods*, 524 U.S. 51, 62 (1998); *Administrator v. Kutty*, ARB No. 03-022, 2005 WL 1359123, at *13-14 (May 31, 2005) (holding a shareholder personally liable for violations of H-1B visa program provisions committed by corporations), *aff’d sub nom., Kutty v. US Dep’t of Labor*, 764 F.3d 540, 551 (6th Cir. 2014), *cert. denied* 135 S. Ct. 1162 (2015). The INA is silent on personal and corporate liability, so common law principles apply. *Kutty*, 764 F.3d at 550 (*citing Bestfoods*, 524 U.S. at 63).

In deciding whether to pierce the corporate veil, the court should apply federal law but may look to state law for guidance. *Board of Trustees of Mill Cabinet Pension Trust Fund for Northern Cal. v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 772 (9th Cir. 1989)(*quoting Uriarte*, 736 F.2d at 523). “The traditional rule demands that individuals incorporate in good faith, with adequate capital, and observe a minimum of corporate formalities.” *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1111 (9th Cir. 1979). In the Ninth Circuit, the test for whether shareholders are personally liable for corporate conduct rests on three factors: “the amount of respect given to the separate identity of the corporation by its shareholders, the fraudulent intent of the incorporators, and the degree of injustice visited on litigants by the recognition of the corporate entity.” *Uriarte*, 736 F.2d at 524. The moving party must demonstrate the first threshold factor of separate identity and then one of the other two factors. *UA Local 343 United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1475 (9th Cir. 1994).

Here, Ms. Aguilar stated WHD named Mr. Brajevich personally because he signed the ETA Form 9142B. HT 181 at 24. The Administrator did not address the issue of Mr. Brajevich’s personal liability in its post-hearing brief, and presented no evidence that Mr. Brajevich did not respect the separate identity of Butler Amusement, Inc. Thus, I do not reach the question whether Mr. Brajevich acted with fraudulent intent or whether the parties would suffer injustice if the corporate veil is not pierced. *See Uriarte*, 736 F.2d at 52. I hold Mr. Brajevich is not personally liable for Butler Amusement, Inc.’s corporate debts.

6. Should a non-retaliation order be included if the Administrator prevails in this matter?

The Administrator seeks a non-retaliation order for any employee who receives back wages or who contacts the Administrator to discuss their rights under the H-2B program. Three of the

nine employees were still working for Respondents in 2019. RX 37. Respondents have no objection to a non-retaliation provision. HT 357-58. Thus, I find a non-retaliation provision is warranted.

7. ORDER

For the reasons stated above, the following order is made:

1. Butler Amusements, Inc. substantially failed to comply with the H-2B program. For its violation of 20 C.F.R. § 655.22(n) (2009), Butler Amusements, Inc. shall pay reduced back wages the nine affected workers in the amount of \$26,786.00. Specifically, Respondent shall pay the nine H-2B workers as follows:

1. Saul Estadillo Herrera	\$3,621.60
2. Gustavo Gamero	\$3,621.60
3. Jose Ivan Ortega	\$3,108.00
4. Fernando Preza	\$3,446.00
5. Sergio Guzman	\$3,446.00
6. Omar Lopez	\$2,728.60
7. Antonio Mendez	\$308.60
8. Felipe Villegas Quijano	\$3652.80
9. Jaime Hernandez	\$2,852.80
TOTAL	\$26,786.00

2. For the substantiated violations of the H-2B program, Butler Amusements, Inc. is assessed civil money penalties in the amount of \$10,000, which must be paid to the Administrator.
3. The allegations against Michael Brajevich in his individual capacity are dismissed.
4. The Administrator shall verify all calculations and make any changes, including calculating interest owed and any required deductions, necessary to implement this order and repay the monies owed to the affected workers.
5. The parties shall promptly notify this Office if an appeal is filed in this matter.

SO ORDERED.

Richard M. Clark
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision and order, including judicial review, shall file a Petition for Review (§Petition§) with the Administrative Review Board (§ARB§). The ARB must receive the Petition within 30 calendar days of the date of this decision and order. 20 C.F.R. § 76(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. 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 ARB in determining whether review is warranted.

If filing paper copies, you must file an original and four copies of the petition for review with the Board. If you e-File your petition, only one copy need be uploaded.

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

APPENDIX

Table 2: Saul Estadillo (Estudillo) Herrera Back Wages Due

Work Week	Employee Name	Job Performed	Location	Wage rate ⁴⁶	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013	Saul Estadillo Herrera	Driver	Riverside MSA (Indio, CA) ⁴⁷	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/11/2013-2/17/2013	Saul Estadillo Herrera	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/18/2013-2/24/2013	Saul Estadillo Herrera	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/25/2013-3/3/2013	Saul Estadillo Herrera	Driver	Maricopa MSA (El Mirage, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/4/2013-3/10/2013	Saul Estadillo Herrera	Driver	Maricopa MSA (Chandler, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/11/2013-3/17/2013	Saul Estadillo Herrera	Driver	Maricopa MSA (Desert Sky Mall)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/18/2013-3/24/2013	Saul Estadillo Herrera	Driver	Maricopa MSA (Desert Sky Mall)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/25/2013-3/31/2013	Saul Estadillo Herrera	Driver	Maricopa MSA (AZ Mills)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/1/2013-4/7/2013	Saul Estadillo Herrera	Driver	Maricopa MSA (AZ Mills)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/8/2013-4/14/2013	Saul Estadillo Herrera	Driver	Maricopa MSA (Maricopa, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/15/2013-4/21/2013	Saul Estadillo Herrera	Driver	Santa Barbara MSA (Lompoc)	\$18.75	40	\$750.00	\$500.00	\$250.00	\$3,621.60

⁴⁶ FLC Data for the drivers is found at AX J-3, J-7, J-11, and J-12.

⁴⁷ There was no pay slip for Mr. Estadillo for this week. His location and wage paid are based on the location of the rest of the unit and what Butler paid him in other weeks.

Table 3: Gustavo Gamero Back Wages Due

Work Week Ending	Employee Name	Job Performed	Location	Wage Rate	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013	Gustavo Gamero	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/11/2013-2/17/2013	Gustavo Gamero	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/18/2013-2/24/2013	Gustavo Gamero	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/25/2013-3/3/2013	Gustavo Gamero	Driver	Maricopa MSA (El Mirage)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/4/2013-3/10/2013	Gustavo Gamero	Driver	Maricopa MSA (Chandler)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/11/2013-3/17/2013	Gustavo Gamero	Driver	Maricopa MSA (Desert Sky Mall)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/18/2013-3/24/2013	Gustavo Gamero	Driver	Maricopa MSA (Desert Sky Mall)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/25/2013-3/31/2013	Gustavo Gamero	Driver	Maricopa MSA (AZ Mills)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/1/2013-4/7/2013	Gustavo Gamero	Driver	Maricopa MSA (AZ Mills)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/8/2013-4/14/2013	Gustavo Gamero	Driver	Maricopa MSA (Maricopa, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/15/2013-4/21/2013	Gustavo Gamero	Driver	Santa Barbara MSA (Lompoc, CA)	\$18.75	40	\$750.00	\$500.00	\$250.00	\$3621.60

Table 4: Jose Ivan Ortega (sometimes Jose Ivan) Back Wages Due

Work Week Ending	Employee Name	Job Performed	Location	Wage Rate	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013 ⁴⁸	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2/11/2013-2/17/2013	Jose Ivan Ortega	Driver	Riverside MSA	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/18/2013-2/24/2013	Jose Ivan Ortega	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/25/2013-3/3/2013	Jose Ivan Ortega	Driver	Maricopa MSA (Goodyear)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/4/2013-3/10/2013	Jose Ivan Ortega	Driver	Maricopa MSA (Chandler, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/11/2013-3/17/2013	Jose Ivan Ortega	Driver	Maricopa MSA (Desert Sky Mall)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/18/2013-3/24/2013	Jose Ivan Ortega	Driver	Maricopa MSA (Desert Sky)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/25/2013-3/31/2013	Jose Ivan Ortega	Driver	Maricopa MSA (AZ Mills) ⁴⁹	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/1/2013-4/7/2013	Jose Ivan Ortega	Driver	Yuma MSA (Yuma, AZ)	\$16.53	40	\$661.20	\$500.00	\$161.20	
4/8/2013-4/14/2013	Jose Ivan Ortega	Driver	Maricopa MSA (Maricopa, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/15/2013-4/21/2013	Jose Ivan Ortega	Driver	Santa Barbara MSA (Lompoc)	\$18.75	40	\$750.00	\$500.00	\$250.00	\$3,108.00

⁴⁸ Mr. Ortega did not arrive until February 11, 2013. RX 24 at 3.

⁴⁹ Mr. Ortega was likely in AZ Mills for the week ending 3/31 and Yuma for the week ending 4/7. RX 26 at 793; RX 26 at 815.

Table 5: Fernando Preza Back Wages Due

Work Week	Employee Name	Job Performed	Location	Wage rate	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/3/2013-2/10/2013	Fernando Preza	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/11/2013-2/17/2013	Fernando Preza	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/18/2013-2/24/2013	Fernando Preza	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/25/2013-3/3/2013	Fernando Preza	Driver	Maricopa MSA (Goodyear)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/4/2013-3/10/2013	Fernando Preza	Driver	Maricopa MSA (Chandler, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/11/2013-3/17/2013	Fernando Preza	Driver	Maricopa MSA (Desert Sky Mall)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/18/2013-3/24/2013	Fernando Preza	Driver	Maricopa MSA (AZ Mills) ⁵⁰	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/25/2013-3/31/2013	Fernando Preza	Driver	Maricopa MSA (AZ Mills) ⁵¹	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/1/2013-4/7/2013	Fernando Preza	Driver	Yuma MSA (Yuma, AZ)	\$16.53	40	\$661.20	\$500.00	\$161.20	
4/8/2013-4/14/2013	Fernando Preza	Driver	Maricopa MSA (Maricopa, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/15/2013-4/21/2013	Fernando Preza	Driver	Santa Barbara MSA (Lompoc, CA)	\$18.75	40	\$750.00	\$500.00	\$250.00	\$3,446.00

⁵⁰ Mr. Preza was likely in AZ Mills for the week ending 3/24. RX 26 at 797-98.

⁵¹ Mr. Preza was likely in AZ Mills for the week ending 3/31 and Yuma for the week ending 4/7. RX 26 at 819; RX 26 at 793.

Table 6: Sergio Guzman Back Wages Due

Work Week	Employee Name	Job Performed	Location	Wage rate	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013	Sergio Guzman	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/11/2013-2/17/2013	Sergio Guzman	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/18/2013-2/24/2013	Sergio Guzman	Driver	Riverside MSA (Indio, CA)	\$20.95	40	\$838.00	\$500.00	\$338.00	
2/25/2013-3/3/2013	Sergio Guzman	Driver	Maricopa MSA (El Mirage, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/4/2013-3/10/2013	Sergio Guzman	Driver	Maricopa MSA (Chandler, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/11/2013-3/17/2013	Sergio Guzman	Driver	Maricopa MSA (Desert Sky)	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/18/2013-3/24/2013	Sergio Guzman	Driver	Maricopa MSA (AZ Mills) ⁵²	\$20.92	40	\$836.80	\$500.00	\$336.80	
3/25/2013-3/31/2013	Sergio Guzman	Driver	Maricopa MSA (AZ Mills)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/1/2013-4/7/2013	Sergio Guzman	Driver	Yuma MSA (Yuma, AZ) ⁵³	\$16.53	40	\$661.20	\$500.00	\$161.20	
4/8/2013-4/14/2013	Sergio Guzman	Driver	Maricopa MSA (Maricopa, AZ)	\$20.92	40	\$836.80	\$500.00	\$336.80	
4/15/2013-4/21/2013	Sergio Guzman	Driver	Santa Barbara MSA (Lompoc, CA)	\$18.75	40	\$750.00	\$500.00	\$250.00	\$3,446.00

⁵² Mr. Guzman was likely in AZ Mills for the week ending 3/24. RX 26 at 797-98.

⁵³ Mr. Guzman was likely in AZ Mills for the week ending 3/31 and Yuma for the week ending 4/7. RX 26 at 819; RX 26 at 793.

Table 7: Omar Lopez Back Wages Due

Work Week	Employee Name	Job Performed	Location	Wage rate ⁵⁴	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013	Omar Lopez	Supervisor	Riverside MSA (Indio, CA)	\$19.11	40	\$764.40	\$525.00	\$239.40	
2/11/2013-2/17/2013	Omar Lopez	Supervisor	Riverside MSA (Indio, CA)	\$19.11	40	\$764.40	\$525.00	\$239.40	
2/18/2013-2/24/2013	Omar Lopez	Supervisor	Riverside MSA (Indio, CA)	\$19.11	40	\$764.40	\$525.00	\$239.40	
2/25/2013-3/3/2013	Omar Lopez	Supervisor	Maricopa MSA (El Mirage, AZ)	\$19.31	40	\$772.40	\$525.00	\$247.40	
3/4/2013-3/10/2013	Omar Lopez	Supervisor	Maricopa MSA (Chandler, AZ)	\$19.31	40	\$772.40	\$525.00	\$247.40	
3/11/2013-3/17/2013	Omar Lopez	Supervisor	Maricopa MSA (Desert Sky)	\$19.31	40	\$772.40	\$525.00	\$247.40	
3/18/2013-3/24/2013	Omar Lopez	Supervisor	Maricopa MSA (Desert Sky)	\$19.31	40	\$772.40	\$525.00	\$247.40	
3/25/2013-3/31/2013	Omar Lopez	Supervisor	Maricopa MSA (AZ Mills)	\$19.31	40	\$772.40	\$525.00	\$247.40	
4/1/2013-4/7/2013	Omar Lopez	Supervisor	Maricopa MSA (AZ Mills)	\$19.31	40	\$772.40	\$525.00	\$247.40	
4/8/2013-4/14/2013	Omar Lopez	Supervisor	Maricopa MSA (Maricopa, AZ)	\$19.31	40	\$772.40	\$525.00	\$247.40	
4/15/2013-4/21/2013	Omar Lopez	Supervisor	Santa Barbara MSA (Lompoc, CA)	\$20.09	40	\$803.60	\$525.00	\$278.60	\$2,728.60

⁵⁴ FLC wage rate data for the supervisors is found at AX J-19, J-27, and J-31.

Table 8: Antonio Mendez Back Wages Due

Work Week	Employee Name	Job Performed	Location	Wage rate	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013	Antonio Mendez	Supervisor	Riverside MSA (Indio, CA)	\$19.11	40	\$764.40	\$745.00	\$19.40	
2/11/2013-2/17/2013	Antonio Mendez	Supervisor	Riverside MSA (Indio, CA)	\$19.11	40	\$764.40	\$745.00	\$19.40	
2/18/2013-2/24/2013	Antonio Mendez	Supervisor	Riverside MSA (Indio, CA)	\$19.11	40	\$764.40	\$745.00	\$19.40	
2/25/2013-3/3/2013	Antonio Mendez	Supervisor	Maricopa MSA (El Mirage, AZ)	\$19.31	40	\$772.40	\$745.00	\$27.40	
3/4/2013-3/10/2013	Antonio Mendez	Supervisor	Maricopa MSA (Chandler, AZ)	\$19.31	40	\$772.40	\$745.00	\$27.40	
3/11/2013-3/17/2013	Antonio Mendez	Supervisor	Maricopa MSA (Desert Sky Mall)	\$19.31	40	\$772.40	\$745.00	\$27.40	
3/18/2013-3/24/2013	Antonio Mendez	Supervisor	Maricopa MSA (Desert Sky Mall)	\$19.31	40	\$772.40	\$745.00	\$27.40	
3/25/2013-3/31/2013	Antonio Mendez	Supervisor	Maricopa MSA (AZ Mills)	\$19.31	40	\$772.40	\$745.00	\$27.40	
4/1/2013-4/7/2013	Antonio Mendez	Supervisor	Maricopa MSA (AZ Mills)	\$19.31	40	\$772.40	\$745.00	\$27.40	
4/8/2013-4/14/2013	Antonio Mendez	Supervisor	Maricopa MSA (Maricopa, AZ)	\$19.31	40	\$772.40	\$745.00	\$27.40	
4/15/2013-4/21/2013	Antonio Mendez	Supervisor	Santa Barbara MSA (Lompoc, CA)	\$20.09	40	\$803.60	\$745.00	\$58.60	\$308.60

Table 9: Felipe Villegas Quijano Back Wages Due

Work Week	Employee Name	Job Performed	Location	Wage Rate ⁵⁵	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013	Felipe Villegas Quijano	Shop Worker	Riverside MSA (Indio, CA)	\$18.41	40	\$736.40	\$320.00 ⁵⁶	\$416.40	
2/11/2013-2/17/2013	Felipe Villegas Quijano	Shop Worker	Riverside MSA (Indio, CA)	\$18.41	40	\$736.40	\$395.00	\$341.40	
2/18/2013-2/24/2013	Felipe Villegas Quijano	Shop Worker	Riverside MSA (Indio, CA)	\$18.41	40	\$736.40	\$395.00	\$341.40	
2/25/2013-3/3/2013	Felipe Villegas Quijano	Shop Worker	Maricopa MSA (El Mirage, AZ)	\$17.63	40	\$705.20	\$395.00	\$310.20	
3/4/2013-3/10/2013	Felipe Villegas Quijano	Shop Worker	Maricopa MSA (Chandler, AZ)	\$17.63	40	\$705.20	\$395.00	\$310.20	
3/11/2013-3/17/2013	Felipe Villegas Quijano	Shop Worker	Maricopa MSA (Desert Sky Mall)	\$17.63	40	\$705.20	\$395.00	\$310.20	
3/18/2013-3/24/2013	Felipe Villegas Quijano	Shop Worker	Maricopa MSA (Desert Sky Mall)	\$17.63	40	\$705.20	\$395.00	\$310.20	
3/25/2013-3/31/2013	Felipe Villegas Quijano	Shop Worker	Maricopa MSA (AZ Mills)	\$17.63	40	\$705.20	\$395.00	\$310.20	
4/1/2013-4/7/2013	Felipe Villegas Quijano	Shop Worker	Maricopa MSA (AZ Mills)	\$17.63	40	\$705.20	\$395.00	\$310.20	
4/8/2013-4/14/2013	Felipe Villegas Quijano	Shop Worker	Maricopa MSA (Maricopa, AZ)	\$17.63	40	\$705.20	\$395.00	\$310.20	
4/15/2013-4/21/2013	Felipe Villegas Quijano	Shop Worker	Santa Barbara MSA (Lompoc, CA)	\$19.43	40	\$777.20	\$395.00	\$382.20	\$3,652.80

⁵⁵ FLC wage rate data for the shop workers is found at AX J-55, J-59, and J-63.

⁵⁶ RX-26 at 56 shows Respondents paid Mr. Villegas \$320 from 2/4/2013 to 2/10/2013.

Table 10: Jaime Hernandez Back Wages Due

Work Week	Employee Name	Job Performed	Location	Wage rate	Hours	PWR Due	Weekly Rate Paid	Total Owed for Each Week	Total Back Wages
2/4/2013-2/10/2013	Jaime Hernandez	Shop Worker	Riverside MSA (Indio, CA)	\$18.41	40	\$736.40	\$320.00 ⁵⁷	\$416.40	
2/11/2013-2/17/2013	Jaime Hernandez	Shop Worker	Riverside MSA (Indio, CA)	\$18.41	40	\$736.40	\$475.00	\$261.40	
2/18/2013-2/24/2013	Jaime Hernandez	Shop Worker	Riverside MSA (Indio, CA)	\$18.41	40	\$736.40	\$475.00	\$261.40	
2/25/2013-3/3/2013	Jaime Hernandez	Shop Worker	Maricopa MSA (El Mirage, AZ)	\$17.63	40	\$705.20	\$475.00	\$230.20	
3/4/2013-3/10/2013	Jaime Hernandez	Shop Worker	Maricopa MSA (Chandler, AZ)	\$17.63	40	\$705.20	\$475.00	\$230.20	
3/11/2013-3/17/2013	Jaime Hernandez	Shop Worker	Maricopa MSA (Desert Sky Mall)	\$17.63	40	\$705.20	\$475.00	\$230.20	
3/18/2013-3/24/2013	Jaime Hernandez	Shop Worker	Maricopa MSA (Desert Sky Mall)	\$17.63	40	\$705.20	\$475.00	\$230.20	
3/25/2013-3/31/2013	Jaime Hernandez	Shop Worker	Maricopa MSA (AZ Mills)	\$17.63	40	\$705.20	\$475.00	\$230.20	
4/1/2013-4/7/2013	Jaime Hernandez	Shop Worker	Maricopa MSA (AZ Mills)	\$17.63	40	\$705.20	\$475.00	\$230.20	
4/8/2013-4/14/2013	Jaime Hernandez	Shop Worker	Maricopa MSA (Maricopa, AZ)	\$17.63	40	\$705.20	\$475.00	\$230.20	
4/15/2013-4/21/2013	Jaime Hernandez	Shop Worker	Santa Barbara MSA (Lompoc, CA)	\$19.43	40	\$777.20	\$475.00	\$302.20	\$2,852.80

⁵⁷ RX-26 at 53 shows Respondents paid Mr. Hernandez \$320 from 2/4/2013 to 2/10/2013.