



Issue Date: 10 September 2013

In the matter of:

**EMPLOYMENT AND TRAINING ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,**

Claimant

v.

Case No. 2013-PED-00006

JBO HARVESTING, INC.,

Employer

ORDER OF DISMISSAL

On December 10, 2012, pursuant to 20 C.F.R. § 655.182, the Administrator, Office of Foreign Labor Certification, Employment and Training Administration, United States Department of Labor, issued a Notice of Debarment, informing the Respondent, JBO Harvesting, Inc. (“Employer”) of the Administrator’s intention to debar Employer from the H-2A labor certification program. The Notice of Debarment was based on Employer’s repeated failure to pay the required labor certification fee in a timely manner.

On July 11, 2013 Employer submitted a request to lift its debarment, or, in the alternative, to waive the applicable time limits for presenting rebuttal evidence. As the Notice of Debarment is dated December 10, 2012, Employer has missed the 30-day deadline to file rebuttal evidence or request a debarment hearing by six months. 20 C.F.R. § 655.182 provides that if a party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice will be the final agency action and the debarment will take effect at the end of the 30-day period. 20 C.F.R. § 655.182(f)(1).

Employer argues that provisions of the H-2A regulations afford the Administrator the opportunity to consider its petition and reinstate it to or lifts its debarment from participation in the program. Employer further argues that “The statutory law requiring avoidance of discrimination and even accommodation of disabilities in the administration of programs of Executive agencies, including those involving licensing requirements, further demonstrates that allowing JBO the relief it seeks is appropriate under the circumstances.” Brief at 10.

It is within my discretion to consider an untimely filed petition for review of a Notice of Debarment. *See Accord Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001, slip op. at 4 (ARB Nov. 17, 2010) (holding that a regulation limiting the period for filing a petition for review of decisions by ALJs issued under several whistleblower statutes is not jurisdictional and is therefore subject to equitable modification).

In determining whether to toll a statute of limitations, the Administrative Review Board (“The Board”) has recognized four principle situations in which an equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. *Kelly v. United States Enrichment Corp.*, ARB No. 12-063, ALJ No. 2012-ERA-015 (ARB Aug. 9, 2013). The Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to a claim. *See id.* The Board, however, like the courts, has “generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.” *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 4 (ARB Sept. 30, 2010).

Employer bears the burden of justifying the application of equitable tolling principles. *See Kelly, supra.* Although Employer did not cite to any of the four general bases for invoking tolling, it appears that Employer is arguing that the medical conditions and resulting disabilities (seizures, anxiety and depression) of its owner/operator qualified as extraordinary circumstances justifying tolling of the limitations period. According to Employer, the owner/operator suffers seizures from time to time that leave him with memory loss and inability to concentrate and focus. Employer states that the owner/operator was hospitalized in April 2009 and January 2012, and he takes prescription medications to control his anxiety and depression, which exacerbate his mental disability conditions. As a result, he is accompanied by someone to assist him in carrying out his daily activities. Employer claims that in both instances in which he failed to make the timely payments on which the debarment is based, he suffered seizures in such a way as to interfere with his ability to attend to written instructions, recall non-routine requirements, and maintain appropriate status under the applicable regulations. In addition to the missed payments, the owner/operator’s medical conditions “further resulted in him failing to meet otherwise applicable deadlines.”

Mental incapacity can qualify for tolling as an extraordinary reason that the petitioning party was prevented from filing, but the party must make a particularly strong showing. *Woods v. Boeing South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009 (ARB Dec. 10, 2012). Further, mental illness tolls the limitations period only if the illness in fact prevents the petitioning party from managing his affairs and thus from understanding his legal rights and acting upon them. *Id.*

After reviewing the materials submitted with Employer’s petition, I find that the evidence is insufficient to establish that the illness of Employer’s owner/operator prevented Employer from managing its affairs and thus understanding its legal rights and acting upon them. Employer attached to its brief affidavits from the owner/operator and his wife, a list of medications prescribed to the owner/operator over the last two years, printouts from a website with details about several of the medications (which are used to treat seizures, anxiety and depression), and record of hospitalization in April 2009 (which notes that the owner/operator suffers from seizure

disorder, anxiety and depression). However, there is no medical evidence, such as a medical report, showing that these conditions caused the owner/operator to be unable to understand and act upon his rights during the period between the date of the notice of debarment and the date on which Employer submitted this petition. Moreover, although Employer advises me that it will avoid future failures by enlisting the continuing assistance and monitoring of the owner/operator's wife, Ms. Barajas, Employer does not make clear why Ms. Barajas's assistance could not have been enlisted earlier.

Therefore, I find that Employer has not met its burden of justifying the application of equitable tolling principles.

ORDER

Accordingly, Employer's request to lift its debarment or waive the applicable time limits for presenting rebuttal evidence is **DENIED**.

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") within 30 calendar days of this decision with the Administrative Review Board ("ARB"). The Board's address is:

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

Copies of the petition must be served on all parties and on the ALJ. If the ARB declines to accept the petition or if the ARB does not issue a notice accepting a petition within 30 days after the receipt of a timely filing of the petition, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be stayed unless and until the ARB issues an order affirming the decision. Where the ARB has determined to review this decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which such presentation must be submitted.

