



Issue Date: 30 November 2006

Case No.: 2006-TLC-00013

In the Matter of:

GLOBAL HORIZONS, INC.,
GLOBAL HORIZONS MANPOWER, INC., and
MORDECHAI ORIAN, an individual,

RESPONDENTS.

Appearances:

Barbara A. Matthews, Esquire
Norman E. Garcia, Esquire
Office of the Solicitor of Labor
For the Administrator

Mindy S. Novik, Esquire
Dean A. Rocco, Esquire
Jackson Lewis LLP
For the Respondents

Before: WILLIAM DORSEY
Administrative Law Judge

Decision and Order Dismissing Untimely Request for Hearing

The parties have filed opening and supplemental arguments on the motion the Administrator of the Department's Office of Foreign Labor Certification, Employment and Training Administration, filed to dismiss the Respondents' request for hearing as untimely.¹ The Respondents' opposition to the dismissal includes exhibits and declarations, so the analysis is not confined to the Administrative Record the Department prepared.² I find that: (1) the request for hearing was filed late, (2) the doctrine of equitable tolling sets the standard for determining whether to accept it, and (3) the Respondents fail to satisfy that standard. The request for hearing

¹ The Order for Further Briefing entered on Oct. 4, 2006 asked the parties to broaden their research on the standard to be applied in deciding whether to accept a late filing.

² The certified copy of the administrative record the Department served, as 20 C.F.R. § 655.112(a)(1) (2006) requires, includes 157 pages.

is dismissed. Dismissal makes the Department's July 27, 2006 Determination and Notice of Prospective Denial of Temporary Alien Agricultural Labor Certification for Three Years (the Determination Notice) the Secretary of Labor's final order.

A. The Context: Congress Requires that H-2A Matters be Expedited

Agricultural workers have been admitted temporarily (*i.e.*, as nonimmigrants) to the United States for over 50 years. The H-2A visa program had its genesis in the Immigration and Nationality Act of 1952 (the Immigration Act). Subparagraph (H)(ii) of Section 101(a)(15) of the Immigration Act described an eligible foreign worker as:

(H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C.A. § 1101(a)(15)(H)(ii) .

A staff report prepared for the Committee on Education and Labor of the House of Representatives gave this summary of the objectives of the 1952 legislation:

In creating the H-2 program, Congress attempted to address the problems that DOL had documented pertaining to wage depression and job displacement caused by foreign agricultural workers. An explicit intent of the law, therefore, was to reserve American jobs for American workers. Thus the H-2 program allowed the admission of nonimmigrant workers into the U.S. to perform temporary services only if willing, able and qualified U.S. workers could not be found. Further to offset the adverse impact of foreign labor on the domestic agricultural labor market, the regulations required H-2 agricultural employers to pay an enhanced wage rate, known as the "adverse effect wage rate." Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3 (Comm. Print 1991)

The Immigration Reform and Control Act of 1986 amended the 1952 Immigration Act to create a new category of temporary agricultural worker (designated an "H-2A" worker), defined as:

(H) an alien . . . (ii)(A) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor . . . of a temporary or seasonal nature... 8 U.S.C.A. § 1101(a)(H)(ii)(A)

The House staff report gave this reason for the new category:

In response to complaints by the agriculture industry that the H-2 program was too burdensome and inflexible to meet its labor needs, Congress amended the program in 1986 to create separate agricultural and non-agricultural temporary foreign worker programs The new agricultural program is known as "H-2A," after the new subsection designation. The process of applying for temporary foreign workers has been greatly streamlined under the H-2A program. However, the amendment also has incorporated into the statute many of the protections for U.S. workers that previously had been established by regulation under the H-2 program. The H-2A statute continues to prohibit the admission of temporary foreign workers at wage rates or working conditions which will adversely affect similarly-employed United States workers. Report, *supra*, p.3, 4.

Today foreign nationals may be granted visas to work temporarily in the United States when there are not enough workers in this country who are able, willing, qualified and available at the time and place needed to perform agricultural labor or services. 8 U.S.C.A. §§1101 (a)(15)(H)(ii)(a), 1184(a), (c) (West 2005); 20 C.F.R. § 655.90(b)(1) (2006). Employers who need the labor (or their agents, such as the Respondent Global Horizons, Inc.) petition for the H-2A visas that will admit these agricultural workers to the United States. 8 U.S.C.A. § 1184(b), (c)(1) (West 2005); 8 C.F.R. § 214.2(h)(1)(i) (2006). Statements in the application and all interactions with the Department must be truthful. 29 C.F.R. § 501.7 (2006).³ The Secretary of Labor's regulations describe the process used to certify that qualified United States workers are unavailable for the jobs, and that the temporary employment of the foreign workers will not

³ That H-2A program regulation emphasizes the candor requirement, stating:

“Information, statements and data submitted in compliance with provisions of the [Immigration] Act or these regulations are subject to title 18, section 1001, of the U.S. Code, which provides:

Section 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”

adversely affect the wages⁴ and working conditions⁵ of similarly employed workers in that part of the United States. 8 C.F.R. § 214.2(h)(5)(ii); 20 C.F.R. §§ 655.90(b)-(d); 655.103.

The Secretary of Labor enforces both the attestations an employer makes in a temporary agricultural labor certification application, and the regulations that implement the H-2A program. 29 C.F.R. §§ 501.1, 501.5, 501.16 and 501.17 (2006). If foreign workers are paid sub-standard wages or subjected to sub-standard conditions, the market for farm laborers or services would prefer less costly temporary foreign workers, to the detriment of Americans.⁶ False or fraudulent assurances about the jobs, wages or working conditions, or the failure to abide by program regulations may result in (1) monetary penalties imposed by the Department's Employment Standards Administration, (2) debarment from filing other H-2A certification applications imposed by the Employment and Training Administration, and (3) proceedings for specific performance, injunctive or other equitable relief in U.S. District Court. 20 C.F.R. §§ 655.103; 655.110 (2006); 29 C.F.R. § 501.19, 29 C.F.R. § 501.16 (c) and (d) (2006). The authority for these various enforcement strategies is found in 20 C.F.R. § 655.90(b)(2)(2)(A) and 29 C.F.R. §§ 501.15 and 501.16. The Immigration Act forbids the Secretary of Labor to certify an employer's H-2A application when:

The employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers. 8 U.S.C.A. § 1188(b)(2)(A) (West 2005).

Temporary labor certifications require exceptionally swift handling so that farmers can harvest crops or breed farm and range animals as growing and breeding seasons dictate. *See generally*, 20 C.F.R. § 655.101(c), 64 Fed. Reg. 34957, 34961-34962. The employer may file an H-2A certification application just 45 days before the workers are needed. 8 U.S.C.A. § 1188(c)(1) (West 2005). The Department must tell the employer about any deficiencies in the application within seven days, and offer to let the employer make a "prompt resubmission of a

⁴ See 20 C.F.R. § 655.107 (2006) on the mandate to pay prevailing wages, and how those wages are computed.

⁵ The employer must arrange to house the temporary foreign workers; protect them from the economic consequences of job injuries with workers' compensation insurance; furnish necessary tools, meals, and transportation; guarantee the number of paid work days at the prevailing wage rates; pay the workers at frequent intervals; and keep records to demonstrate compliance with these requirements. 20 C.F.R. §§ 655.102(b)(1) through (14).

⁶ Two examples — insurance and labor disputes — illustrate how the Immigration Act inhibits employers from gaining an advantage through hiring temporary foreign agricultural workers. The employer must provide insurance benefits to H-2A workers, for any injury or disease that arises out of and in the course of the employment, that are no less generous than the benefits state law requires for similar workers. 8 U.S.C.A. § 1188(b)(3) (West 2005) and 20 C.F.R. § 655.102(b)(2) (2006). The employer also must attest that the jobs to be certified are not vacant because a former employee is on strike or is locked out in the course of a labor dispute. 8 U.S.C.A. § 1188(b)(1) (West 2005) & 20 C.F.R. § 655.103(a) (2006).

modified application.” 8 U.S.C.A. § 1188(c)(2)(A), (B) (West 2005). The modifications must come within five calendar days. 20 C.F.R. §§ 655.101(c)(2); 655.104(c)(2) (2006). The decision on the application (often denominated a Determination Notice) is due no fewer than 30 days before the employer says the workers are needed. 8 U.S.C.A. § 1188(c)(3) (West 2005).⁷ When an application is rejected on its merits or because it is incomplete, the employer may request an expedited review of the denial. 8 U.S.C.A. § 1188(e) (West 2005). At the employer’s request, an administrative law judge convenes a *de novo* hearing within five working days after the judge receives the case file, and the decision is due within 10 days after the hearing. 20 C.F.R. § 655.112(b)(1) (ii) & (iii) (2006). It becomes the "final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.” 20 C.F.R. § 655.112(b)(2). These accelerated time frames to advise an employer of any omissions, to permit a modification, to determine whether to grant the application, to offer review in an administrative hearing and to issue a final decision, implement the Congressional policy that the Secretary dispose of H-2A matters with dispatch.

B. *The Hearing Request*

The Respondents’ business is to obtain foreign agricultural workers for American farms that need them. They may apply for H-2A temporary alien agricultural labor certifications in their own name (for Global Horizons Manpower, Inc.) or as agents for employers they represent. 8 C.F.R. § 214.2(h)(5)(i)(A) & 20 C.F.R. §655.201(a)(2). Well-versed in H-2A program requirements and regulations, they have requested review of the Department’s determinations before administrative law judges in at least 18 cases since 2003.⁸ Global’s employees include an immigration attorney. *See*, the response to the Department’s motion to dismiss at pg. 2, and the declaration of Arik Ben-Ezra.

The Respondents have experience with debarment notices too. The Department brought an earlier proceeding to debar these Respondents, that sought additional relief as well. *In re: Global Horizons Manpower, Inc. and Mordechai Orien*, Cases No. 2005-TLC-00006 and 2005-TAE-00001. The Department alleged they had committed several substantial violations of the

⁷ The Secretary's regulations have not yet been updated, and continue to reflect an older 20-day requirement. 20 C.F.R. §§ 655.101(b)(1); 655.101(c)(2) (2006). Section 748 of Public Law 106-78, dated October 22, 1999, amended section 218(c)(3)(A) of the Immigration Act [8 U.S.C. § 1188(c)(3)] by changing "20 days" to "30 days."

⁸ *Global Horizons, Inc.*, 2006-TLC-14 (ALJ Sept. 19, 2006); *Global Horizons, Inc.*, 2006-TLC-10 (ALJ Sept. 19, 2006); *Global Horizons, Inc. (Creekside Mushrooms, Ltd.)*, 2006-TLC-6 (ALJ May 17, 2006); *Global Horizons, Inc.*, 2006-TLC-4 (ALJ Mar. 2, 2006); *Global Horizons, Inc.*, 2005-TLC-18 (ALJ Oct. 7, 2005); *Global Horizons, Inc.*, 2005-TLC-14 (ALJ June 21, 2005); *Global Horizons, Inc.*, 2005-TLC-12 (ALJ May 25, 2005); *Global Horizons, Inc. (Valley Fruit Orchard and Green Acre Farm)*, 2005-TLC-11 (ALJ June 8, 2005); *Global Horizons, Inc.*, 2005-TLC-10 (ALJ May 25, 2005); *Global Horizons, Inc. (Valley Fruit Orchards)*, 2005-TLC-9 (ALJ June 1, 2005); *Global Horizons, Inc.*, 2005-TLC-7 (ALJ Apr. 28, 2005); *Global Horizons Inc. (Zirkle Fruit Co.)*, 2005-TLC-1 (ALJ Oct. 18, 2004); *Global Horizons (Green Acre Farm)*, 2005-TLC-4 (ALJ Feb. 25, 2005); *Global Horizons (Zirkle Farms)*, 2005-TLC-3 (ALJ Feb. 25, 2005); *Global Horizons Inc. (Kauai Coffee Co.)*, 2004-TLC-13 (ALJ Sept. 27, 2004); *Global Horizons Inc.*, 2004-TLC-11 (ALJ July 30, 2004); *Global Horizons Manpower, Inc.*, 2003-TLC-9 (ALJ Aug. 4, 2003); *Global Horizons Manpower, Inc.*, 2003-TLC-5 (ALJ Apr. 11, 2003). *See* www.oalj.dol.gov/PUBLIC/INA/REFERENCES/CASELISTS/TLC_DECISIONS.HTM.

regulations that govern the terms and conditions of the H-2A workers' employment, the workers' benefits, and the workers' pay with respect to aliens who labored on farms in Hawaii. *See* the Department's February 23, 2005 Determination and Notice of Prospective Denial of Temporary Alien Agricultural Labor Certification for Three Years (Debarment Notice). The Department's Debarment Notice in that consolidated case was sent by certified mail, but addressed to the Respondents at 10474 Santa Monica Boulevard, Suite 403, Los Angeles, California 90025. Their former lawyers, McGuiness, Norris & Williams LLP of Washington, D.C., served the Respondents' request for hearing on March 2, 2005. The Respondents alleged in their hearing request that the Debarment Notice had been misaddressed, and that the Respondents' correct address was nearby at 11111 Santa Monica Boulevard, Suite 1440, Los Angeles, California 90025. The Hawaii debarment matter remains pending at the Office of Administrative Law Judges, after the Respondents withdrew from a settlement that had been approved.⁹

Based on that rather recent experience, there was no reason to believe that mailing another notice by certified mail – correctly addressed this time – would impair the Respondent's ability to request a hearing in a timely fashion. The Determination Notice from the Administrator of the Office of Foreign Labor Certification found, based on his investigation, that in a certification application for jobs in California for the period from August 1, 2003 to April 30, 2004, the Respondents (1) willfully and fraudulently misrepresented that Global Horizons Manpower Inc. had contracts with Taft Vegetable Farm for 200 workers when there was no contract and there were no jobs, and (2) knowingly gave false information, *viz.*, that H-2A workers brought into the country had been terminated for cause (poor performance), when they had been terminated because the Respondents had no work for them. Administrative Record (AR) at 14. The implication was that the Respondents brought those workers into the country without work, shopped them to farmers after they arrived, and when unsuccessful, fired them. AR at 3-4; 8; 13-14; 144. These willfully false statements, which are “substantial violations,”¹⁰ led the Administrator to impose the maximum penalty, barring the Respondents from submitting any other H-2A certification applications for three years.

The Administrator's July 27, 2006 Determination Notice explained how to contest the debarment. Tracking 20 C.F.R. § 655.110(a), it advised the Respondents that they:

ha[d] the right to request an expedited administrative review or a *de novo* hearing of this Determination before a United States Department of Labor Administrative Law Judge. If either of the [Respondents] makes such a request, the request must be in writing and dated, must specify whether an administrative review or *de novo* hearing is requested, and must be served on the Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Attention: Bill Carlson, 200 Constitution Avenue, N.W., Room C-4312, Washington, D.C.

⁹ The facts in this paragraph are based on the Notice of Intent to Take Official Notice issued on Oct. 4, 2006. No party objected to it.

¹⁰ See the definition of the term at 20 C.F.R. § 655.110(g)(1)(i)(E) (2006).

20210, within seven calendar days of the date of this Determination Notice.

The Respondents received the certified mail on August 3, 2006, 7 calendar days after it was mailed. AR at 5. Their request for a *de novo* hearing was sent by overnight delivery to the Administrator on Friday, August 11, 2006, eight days after the Determination Notice was delivered to them. They made no request to extend their time to respond, nor did they acknowledge that their request for hearing was late. The Administrator received their hearing request the next business day, on Monday August 14, 2006. AR 1; 2.

Through the declaration of Arik Ben-Ezra, the Respondents state that Global's Human Resources department provided the Determination Notice to its legal department "approximately a week after it was delivered," at which point the legal department "acted quickly" to send the hearing request by overnight delivery on Friday, August 11, 2006. The employee who had signed the receipt for the certified mail, Rob Rutt, says he delivered it on August 3, 2006 (a Thursday) to an administrator who gave it to an employee who scans mail into the computer system. Alejandra Rosales, who did the scanning, declares that she scanned it "in the late afternoon,"¹¹ and forwarded it on to the Human Resources Department.

The hearing request was late, not because the Respondents failed to mail it on August 3, 2006, but because it languished for eight calendar days before anyone did anything about it. Scanning obviates the need to shuffle paper around because correspondence becomes digitally available throughout the office network. The central question is why nobody dealt with the Determination Notice for over a week, not so much why the paper itself sat somewhere at the Human Resources department. The declarations offer no explanation.

C. *The Standard Used to Determine Whether to Accept Belated Requests for Hearing or Review at the Department of Labor*

1. Lateness as a Jurisdictional Defect

The short time available for what the statute's catchline calls "administrative appeals" is rooted in the statutory text requiring that the Secretary's "[r]egulations shall provide for an expedited procedure for . . . review." 8 U.S.C.A. § 1188(e)(1) (West 2005). Through rulemaking the Secretary set the period as "seven calendar days" from "the date of the notice." 20 C.F.R. § 655.110(a)(2006).

The only decision within the Department of Labor to consider the effect of a late request for an expedited review under the H-2A regulations involved the rejection of a facially unacceptable application, which is governed by a different regulation that also allows seven days to seek review. *See* 20 C.F.R. § 655.104(c) (2006).¹² That employer's hopelessly late request

¹¹ Exhibit B to her declaration fixes the time as 3:44 p.m.

¹² The pertinent regulation's text, which governs expedited review of a determination not to accept an H-2A application for consideration, requires that the notice the Department sends to the employer "state that in order to obtain such a review or hearing, the employer, *within seven calendar days of the date of the notice*, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor . . ." (emphasis added) 20 C.F.R. § 655.104(c)(3) (2006).

for review was submitted on November 3, 1998, when the determination served on August 21, 1998 informed him of the option to submit a modified application within five days, or to request a judge's review within seven. The administrative law judge held the overdue hearing request left him without jurisdiction, and dismissed it. *Mike Langley Farms, Inc.*, 1999-TAE-001 (ALJ Nov. 13, 1998).

Most administrative bodies and courts treat regulations that set the time to file a request for a hearing or for review not as grants of jurisdiction, but as limitations periods that are subject to equitable tolling. The jurisdictional ruling was never subject to review within the Department of Labor because a presiding administrative law judge's decision becomes the Secretary's final order. 20 C.F.R. § 655.112(2)(b).¹³ The Administrator has not argued that this hearing request must be dismissed for want of jurisdiction, and I regard the jurisdictional holding in *Mike Langley Farms, Inc.* as an error.

Whether the failure to file a timely request for a judge's review is considered a jurisdictional defect, or one that could be excused on a proper showing, the Respondents have failed to show that their late request for hearing should be accepted.

2. Standards Applied in H-1B Matters

The Secretary of Labor adjudicates other matters arising under the Immigration Act's visa programs that provide useful authority by analogy. Among these are complaints that an employer violated a labor condition application the employer filed to obtain an H-1B visa to admit a nonimmigrant alien to work temporarily in a specialty occupation.¹⁴ 8 U.S.C.A. §§1101(a)(15)(H)(i)(b); 1182(n)(2) (West 2005); 20 C.F.R. § 655.810 (2006). Administrative law judges have dismissed late requests for hearing under that program. *Alhames v. South Coast Auto Insurance Marketing Inc.*, 2006-LCA-8 (ALJ April 12, 2006) (dismissing an H-1B worker's untimely hearing request that sought to challenge the Department's calculation of the amount he had been underpaid); *U.S. Dep't of Labor v. Vibex, Inc.*, 2003-LCA-9 (ALJ March 25, 2003) (dismissing an H-1B employer's untimely hearing request that sought to review the Department's determination that it underpaid its H-1B workers almost \$81,000). Those decisions did not discuss the circumstances in which a late request might be accepted, however.

¹³ The contrary statement in the Order for Further Briefing entered on Oct. 4, 2006 at pg. 1 was an error. The Administrative Review Board has no jurisdiction to review this decision.

¹⁴ A "specialty occupation" is one that requires entry level employees to have mastered a body of highly specialized theoretical and practical knowledge by earning a baccalaureate or a more advanced degree. 8 U.S.C.A. § 1184(i)(1) (West 2005); 8 C.F.R. § 214.2(h)(4)(iii)(A) (2006); 20 C.F.R. § 655.715 (2006). Architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts are examples. 8 C.F.R. § 214.2(h)(4)(ii) (2006). The U.S. Citizenship and Immigration Services component of the Department of Homeland Security identifies and defines the occupations covered by the H-1B category and determines whether the alien qualifies to work in those occupations. 8 C.F.R. § 214.2(h)(4)(iv) (2006). The Secretary of Labor approves and enforces the labor condition applications the employers must make to obtain H-1B visas for those workers. 20 C.F.R. § 655.705; §§ 655.800-855 (2006); 59 Fed. Reg. 65,646 (Dec. 20, 1994).

The Administrative Review Board (Board) reviews administrative law judge decisions and issues final orders in H-1B matters on behalf of the Secretary of Labor.¹⁵ The Board takes an exacting approach when requests for its review are filed late. It dismissed, for example, an appeal from an administrative law judge's decision that an H-1B employer owed six workers about \$80,000 when the review petition arrived two days late. *Administrator v. Wings Digital Corp.*, ARB No. 05-090, ALJ No. 2004-LCA-30 (ARB July 22, 2005).

As it decides whether to accept untimely petitions, the Board applies the demanding standards for equitable tolling the federal courts have developed in decisions such as *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3rd Cir. 1981). The opinion in *Marshall* emphasizes how sparingly Article III courts dispense equitable relief. The Third Circuit held the requirement that an employee complain to the Secretary of Labor within 30 days of alleged employment discrimination, found in the whistleblower protection provision of the Toxic Substances Control Act,¹⁶ is not jurisdictional and might be extended by equitable tolling. It then reversed the Secretary's decision that permitted a teacher to complain about how his public employer treated him, because he failed to present the matter to the Secretary within that statutory 30-day window. The teacher wanted to investigate personally whether asbestos was present in school buildings on the district's campuses, but was allowed free access only to the campus where he taught. A state environmental resources agency had already investigated for asbestos on other campuses. The three acts of discrimination the teacher alleged (refusal to let him roam district buildings freely; questioning him about one of his lesson plans, allegedly as an act of retaliatory harassment; and not allowing him to take a second day of paid leave for personal convenience without giving a reason for his absence) all took place no later than April 5, but he waited to complain to the Department of Labor until May 29. As the court rejected the Secretary's decision to accept and to adjudicate the tardy complaint, it reminded the Secretary that the requirements for equitable tolling are to be "scrupulously observed." *Id.* at 19. To succeed, the teacher had to fit within the principal situations the case law recognized were justifications for tolling, which were that:

- (1) the district actively misled him about its rights to seek relief under the Toxic Substances Control Act, or
- (2) he had been prevented in some extraordinary way from asserting his rights, or
- (3) he mistakenly had presented the precise statutory claim in a timely manner in the wrong forum.

¹⁵ The Board's jurisdiction is set in Secretary's Order No. 1-2002, published at 67 Fed. Reg. 64,272 (Oct. 17, 2002).

¹⁶ 15 U.S.C.A. § 2622(b) (West 1998). Short complaint periods are found in several environmental whistleblower protection statutes, including the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (West 2003); the Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001); the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003); the Clean Air Act, 42 U.S.C.A. § 7622 (West 2003); and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (West 1995), all of which are implemented at 29 C.F.R. § 24.1(a) and § 24.3(b) (2006).

None applied. Under the *Marshall* court's approach, whether the school district was prejudiced in defending the whistleblower claims was not an independent factor; it would enter the calculus only if a traditional factor supporting equitable relief were present.¹⁷ The court rejected the Secretary's order that had extended the complaint period because the school district did not prove that doing so would have prejudiced its defense somehow (e.g., by showing that material evidence became unavailable because witnesses could no longer be located, or their memories had faded). *Id.* at 20. With a statutory 30-day limitation period, showings of that kind would be virtually impossible, so the whistleblower complaint period would be subject to routine extensions. Congress had balanced the employees' right to file retaliation complaints against the limited time their employers "would be exposed to liability." *Id.* at 21. It was not the Secretary's role to strike another balance. The court "set aside" the Secretary's decision as an action taken "in excess of statutory limitations," applying the judicial review standards of the federal administrative procedure act, 5 U.S.C.A. § 706(2)(C) (West 2005).

Here, in a variation on *Marshall's* theme, Congress insisted on expedited review in 8 U.S.C.A. § 1188(e) (West 2005), and the Secretary set the number of days for the procedural steps in H-2A matters through notice and comment rulemaking. I believe that the standards for equitable tolling also ought to be used in deciding whether to accept this late hearing request.

The Administrative Review Board has come to regard the three *Marshall* factors as nonexclusive, so equitable tolling is best conceived as having a fourth, catch-all factor that permits the adjudicator to consider any truly exceptional circumstances those three do not encompass. *Wings Digital Corp., supra*, ARB slip op. at 4. This fourth factor is not applied expansively, however.

The claim by the lawyer for *Wings Digital* that he couldn't file on time because he suffered from a "pounding headache and fever" in the last days of the filing period left the Board unmoved. The review petition itself was dated two days before the due date, so the Board reasoned that a lawyer well enough to draft it ought to have been able to fax it to Washington, or to contact the Board to request an enlargement of the filing time. He did neither. The lawyer's other argument, that he thought he had 30 days from receipt of the administrative law judge's decision to petition for review, was refuted by the decision's "unambiguous statement of the steps [any party] must take to perfect its appeal," which informed the parties that a "petition for review must be received by the [Board] within 30 calendar days of the date of the Decision and Order." *Id.* at 3, 5. The Board held that ignorance of legal rights is no basis to toll a statute of limitations. Neither the claim of illness nor the claim to have misunderstood the time available to seek review presented an "extraordinary circumstance that excuse[d] Wings Digital's failure to timely file its petition." *Id.* at 5.

¹⁷ The U.S. Supreme Court used similar language three years later when it held: "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin Co. Welcome Centr. v Brown*, 466 U.S. 147, 152 (1984).

3. Standards Applied in Whistleblower Protection Matters

a) Statutes related to transportation safety

The Board has affirmed an administrative law judge's dismissal of whistleblower protection claims a professional truck driver made under the Surface Transportation Assistance Act¹⁸ when he waited almost 10 months to request a hearing. Each time OSHA informed him that its investigations found no merit to any of the three claims he filed, he was told he had 30 days to request a hearing. *Tavares v. Swift Transportation Co.*, ARB No. 01-036, ALJ No. 2001-STA-13 (ARB Oct. 2, 2001). That Act states that "the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order [of OSHA], . . . and request a hearing on the record If a hearing is not requested within 30 days, the preliminary order is final and not subject to judicial review." 49 U.S.C.A. §31105(b)(2)(B) (West 2005).¹⁹ The administrative law judge found that the truck driver offered no reasons that justified equitable tolling of his time to request a hearing, so all claims were dismissed. *Id.* at 2.

The Board applies strictly the regulations that set short periods of 10 to 15 days²⁰ to petition for review when a whistleblower protection complaint involves an air carrier. In a matter filed under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,²¹ a petition for review sent by overnight delivery that arrived in Washington, D.C. one day late was dismissed, in part because the worker could have faxed it to the Board on the due date. *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-00012, slip op. at 6 (ARB May 23, 2003), *rev. denied*, 125 Fed. Appx. 102 (9th Cir. 2004) (unpublished).²² The Board's "internal procedural rule" setting the short filing time was adopted "to expedite the administrative resolution of cases,"²³ something equally true of the expedited final orders administrative law judges issue for the Secretary in H-2A matters. The worker in *Herchak* failed to carry his burden, for the opposing party had not misled him, he had not filed mistakenly in the wrong forum, and no *extraordinary* event precluded a timely filing. *Id.* at 6 (emphasis by the Board). A party's own negligence is not an extraordinary circumstance that qualifies for

¹⁸ 49 U.S.C.A. §31005 (West 1997).

¹⁹ The Secretary's regulation essentially repeats the Act, saying that: "[i]f no timely objection is filed with respect to either the findings or the preliminary order [made by OSHA after investigating a complaint], such findings or preliminary order, as the case may be, shall become final and not subject to judicial review." 29 C.F.R. §1978.105(b)(2) (2006).

²⁰ Under an interim regulation the time to file a petition for review in air carrier whistleblower matters had been 15 days from the date of the administrative law judge's decision. 67 Fed. Reg. 15454 (Apr. 2, 2002). The Secretary's final regulation now requires that a petition for review be filed within 10 business days. 29 C.F.R. § 1979.110(a), 68 Fed. Reg. 14100, 14106 (Mar. 21, 2003) (finding that ten days "is sufficient time to petition for review of an ALJ decision").

²¹ 49 U.S.C.A § 42121 (West Supp. 2005).

²² The Ninth Circuit's unpublished decision affirming the Secretary is not precedent. *See*, Ninth Cir. Rule 36-3 (b) ("Unpublished dispositions and orders of this Court may not be cited to or used by the courts of this circuit.") and *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (applying the no-citation rule).

²³ *Herchak, supra*, ARB slip op. at 4-5.

equitable tolling. *Miranda v. Castro*, 292 F.3d 1063, 1067 & n. 4 (9th Cir. 2002) (applying the standards for equitable tolling to reject a habeas corpus matter under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2244(d)(1)(A)).

b) Statutes related to financial markets

The equitable tolling standard has been applied to dismiss an appeal under whistleblower protection provisions of the Sarbanes-Oxley Act.²⁴ *Minkina v. Affiliated Physician's Group*, ARB No. 05-074, ALJ No. 2005-SOX-19, slip op. at 5 (ARB July 29, 2005) (finding the inability to retain counsel is not an extraordinary event that justified filing a review petition nearly two weeks late; the administrative law judge's decision gave the unrepresented party correct instruction about when a petition for review was due).

c) Statutes related to nuclear and environmental protection

These rigorous equitable tolling standards have been applied under the nuclear and environmental whistleblower protection statutes,²⁵ where a separate regulation²⁶ also requires that parties file their petition for review with the Board within 10 days of the date of administrative law judge's decision. *See e.g. Dumaw v. Int'l Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6 (ARB Aug. 27, 2002), *aff'd sub nom. Dumaw v. U.S. Dept. of Labor*, No. 02-73020 (9th Cir. 2003) (unpublished) (rejecting a late petition in a proceeding brought under the Energy Reorganization Act); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-14 & 15, slip op. at 4-5 (ARB Aug. 31, 2000) (similarly rejecting a petition for review filed in a Energy Reorganization Act matter 15 weeks out of time); and *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999) (accepting a late petition for review in a proceeding under the Clean Air Act that the *pro se* party had filed on time, at the Office of the Chief Administrative Law Judge rather than at the Board); *Gutierrez v. Regents of the University of California*, ARB Case No. 99-116, ALJ Case No. 98-ERA-19; Order Accepting Petition for Review and Establishing Briefing Schedule (ARB Nov. 8, 1999) (accepting a review petition in a proceeding under the Energy Reorganization Act filed by a party represented by counsel on time, but also at the Office of the Chief Administrative Law Judge). Petitions for review of whistleblower protection decisions under the Pipeline Safety Improvement Act²⁷ must be filed within 10 days as well. 29 C.F.R. § 1981.110(a) (2006).

²⁴ 18 U.S.C.A. § 1514A (West Supp. 2005).

²⁵ These include whistleblower retaliation claims made under the statutes listed in footnote 16, *supra*, and the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West Supp. 2005).

²⁶ 29 C.F.R. § 24.8(a) (2006), which reads: “[a]ny party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board (“the Board”), which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received *within ten business days* of the date of the recommended decision of the administrative law judge, and shall be served on all parties and on the Chief Administrative Law Judge. (emphasis supplied).

²⁷ 49 U.S.C.A. § 60129 (West Supp. 2005).

4. Standards Applied in Davis-Bacon Act Matters

Equitable tolling has been applied under the Davis-Bacon Act²⁸ to permit a late review petition when the administrative law judge's decision misinformed the parties about the time available to file it. *In re Tri-Gem Builders*, ARB No. 99-117, ALJ No. 1998-DBA-17, slip op. at 4-5 (ARB Nov. 22, 1999). The substantive portion of the trial decision had required a contractor to pay back wages to employees and debarred it from future government contracting. The Board's procedural ruling was a variation on the typical requirement for equitable tolling, that the opponent affirmatively mislead the party about his or her rights. The decision to accept the appeal exemplifies the catch-all fourth factor that the Board articulated more clearly in its later decision in *Administrator v. Wings Digital Corp.*, ARB No. 05-090, ALJ No. 2004-LCA-30 (ARB July 22, 2005), discussed above.²⁹ Ultimately the parties in *Tri-Gem Builders* settled, so the Board issued no decision on the merits. The Administrator's Determination Notice delivered to these Respondents was not misleading, however, so the basis for tolling *Tri-Gem Builders* articulated would not apply to them.

The Board did accept a review petition in a Davis-Bacon Act matter that was filed three days late because the lawyer miscalculated the due date when he added the five days for mailing that the procedural rules of the Office of Administrative Law Judges authorize. *Superior Paving & Materials*, ARB No. 99-065, ALJ No. 1998-DBA-11 (ARB Sept. 3, 1999). Those rules for the trial level do not apply before the Board. The Board seemed to have been impressed that the review petition would have been filed two days early if the way the lawyer computed time had been correct. It decided that the litigant had not "slept on his rights," and that the Department has not been prejudiced. The Board never mentioned that the administrative law judge's decision had correctly stated the procedure to obtain review, something it emphasized in its more recent *Minkina*, *Wings Digital Corp.*, *Herchak*, *Hemingway*, and *Tavares* decisions discussed above. Evidence that a party was informed correctly about how to protect his or her rights affects whether the failure to take those steps will be forgiven, even when the party acts only a few days late. *See Baldwin County Welcome Cntr. v Brown*, 466 U.S. 147 (1984) (denying equitable tolling for a Title VII claim and explaining that "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence," *id.* at 151).

D. *Standards Applied Under Federal Procurement-Related Debarment Programs*

The Administrator imposed a prospective refusal to accept temporary alien agricultural labor certifications from the Respondents for three years, something analogous to procurement-related debarments. The federal government has well-established processes to make businesses and individuals ineligible for procurement contracts or nonprocurement programs.³⁰ Debarment reduces the harm the government suffers by continuing to do business with entities or individuals

²⁸ 40 U.S.C.A. §276a *et seq.* (West 2001).

²⁹ It might also be viewed as a situation where the judge "led the [claimant] to believe that [he] had done everything required," which justifies tolling. *Baldwin Co. Welcome Cntr. v Brown*, 466 U.S. 147, 151 (1984).

³⁰ Nonprocurement programs include federal financial and non-financial assistance and benefits such as grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

who have shown themselves to be unethical or incompetent. *See generally, Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988). Those suspended or debarred are added to the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (EPLS) that the General Services Administration publishes at <http://epls/arnet.gov>. The substantive standards for suspension and debarment under procurement and nonprocurement programs differ from those the Administrator relied on in this Determination and Notice. I asked the parties to research how federal agencies have treated untimely responses to suspension, debarment or exclusion notices. Those decisions have not proven to be particularly helpful, unfortunately.

1. EPA

The EPA requires an entity that receives a debarment notice to file a petition challenging the basis for that adverse action within 30 days. 40 C.F.R. § 32.820(a) (2006); 40 C.F.R. § 32.313 (1996).³¹ It nevertheless allowed a contractor to participate in a debarment proceeding, when its lawyer filed a late response to the debarment notice. *In the Matter of: Danny's Custodial Care, Inc.*, EPA Case No. 93-0261-00, 1997 EPADEBAR 11, at *3-*4 (June 24, 1997). A second notice of proposed debarment was served on the contractor when it appeared that the EPA's original notice likely had omitted an important document that explained the factual basis for the debarment – the agency's Action Request Memorandum. The timely hearing request the contractor filed in response to the second notice mooted the timeliness issue. Ultimately a three-year government-wide debarment was imposed based on the guilty plea the contractor had entered to the crime of improper disposal of hazardous waste. The notice the Administrator sent the Respondents here was not deficient, so the EPA decision adds nothing to the analysis.

The decision in *In the Matter of: Commonwealth Laboratories, Inc.*, EPA Case No. 94-0059-01, 1995 EPADEBAR LEXIS 10 (Aug. 24, 1995) involves no late request for a hearing, so it is not relevant. The appellate authority within the EPA entertained the agency's untimely request to reconsider the length of the debarment imposed at the trial level.

³¹ Entitled **Opportunity to contest proposed debarment**, it read:

(a) Submission in opposition. Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(1) If the respondent desires a hearing, it shall submit a written request to the debarring official within the 30-day period following receipt of the notice of proposed debarment.

(2) [Reserved]

(b) Additional proceedings as to disputed material facts. (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

2. Department of Agriculture

The Department of Agriculture permitted a respondent additional time to respond to a debarment notice after the 30-day period to do so had expired. *In re: Luis C. Trigo-Vela*, 56 Agric. Dec. 731, 1997 USDA LEXIS 82 (Apr. 17, 1997). Two notices of the proposed debarment sent by certified mail had been returned unclaimed. The reviewing administrative law judge found that the agency should also have sent another notice by regular mail, because the agency knew the respondent “was receiving mail at its last known address.” *Id.* at *4. The respondent also had requested an opportunity to respond promptly after it accidentally learned of the debarment proceeding in the course of a bankruptcy proceeding, before the debarment became final. Here the Administrative Record shows, and the Respondents do not deny, that they received the Determination Notice by certified mail. They then failed to exercise due diligence in responding to it.

E. The Standards to Vacate A Default under the Federal Rules of Civil Procedure

Courts may vacate clerk’s defaults, and judgments entered on defaults, under the generous standards set in Rules 55(c) and 60(b) (1)–(6). Fed. R. Civ. P. They encompass “good cause,” “mistake inadvertence, surprise, or excusable neglect,” or “any other reason justifying relief from the operation of the judgment [entered on the default].”

The failure to respond to a Determination Notice bears a superficial resemblance to a failure to respond to a summons and complaint, but is more analogous to a failure to file a complaint within the statute of limitations. Equitable tolling governs the period in which to file a cause of action, to request a hearing or to apply for review, while standards such as “good cause” characteristically apply to deadlines that arise within the course of proceedings that were initiated within the prescribed time. In the alternative, agencies are free to adopt procedural rules and to enforce them strictly, so long as the rules are applied uniformly or exceptions are made only for good reasons the agency articulates. *Green Country Mobilephone v. FCC*, 765 F.2d 235, 237 (D.C.Cir. 1985). Agencies are not required to import their standards from Rules 55 or 60, Fed. R. Civ. P.

It is a mistake to regard equitable tolling as just one more manifestation of the general authority courts and administrative agencies enjoy “to relax or modify [their] procedural rules adopted for the orderly transaction of business before [them] when, in a given case, the ends of justice require it.” *American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532 (1970). No filing deadline to initiate a proceeding was involved in that case, where an applicant was seeking authority to operate a temporary shipping route. The unserved shipper was the Department of Defense, which urgently required the services. The Supreme Court approved the ICC’s decision to relieve the applicant from a requirement in the Commission’s rules that applications state the dates motor carriers with existing routes declined shipping requests. The application from the potential new shipper contained enough detailed information that existing carriers had been able to file lengthy, precise and informed objections with the Commission. The hearing request at issue here is a very different, and uniquely time-sensitive, type of filing.

F. *Agencies May Apply Procedural Deadlines Strictly*

The courts of appeals routinely affirm strict application of filing deadlines agency regulations impose, so long as they are applied consistently. The Respondents do not argue that the Secretary of Labor enforces hearing request deadlines haphazardly.

The D.C. Circuit recently upheld the U.S. Copyright Office's strict interpretation of its regulations that require copyright owners to file claims each July, to obtain a proportionate share of royalties cable and satellite broadcasters pay into a fund that Office administers. *Universal City Studios, LLP v. Peters*, 402 F.3d 1238 (D.C. Cir. 2005). Under the regulations, timely claims are ones that (1) the Office receives during July; (2) the Office receives through the Postal Service on August 1; or (3) the Office receives through the Postal Service on or after August 2, if they bear a July United States Postal Service mark (a) on the envelope or (b) on a certified mail receipt. For claims the Office receives after July 31, the regulation says that dates printed on envelopes by business postage meters do not qualify. 37 C.F.R. § 252.4(c) (2001). Copyright owners who could not produce a stamped postal receipt showing that their claims, which the Copyright Office received after August 1, had been mailed in July were denied any share in that year's royalties. The court of appeals upheld the agency's refusal to accept sworn statements from the employees responsible for mailing the royalty claims as proof they had mailed them on July 30, 2001, or declarations from Postal Service employees to prove that the normal delivery time for a letter sent from southern California to Washington, D.C. is three³² to five days, as evidence that their late-received claims had been posted in July. The court also upheld the agency's decision that there was no "special or unique circumstance . . . that would warrant a waiver" of the regulation's requirements, which the copyright owners had requested. *Id.* at 1240. The D.C. Circuit held that an "agency's strict construction of a general rule in the face of waiver requests is insufficient evidence of an abuse of discretion" (*id.* at 1242), relying on the judicial review standards found in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and *Omnipoint Corp. v. FCC*, 213 F.3d 720, 723 (D.C. Cir. 2000).

The Tenth Circuit upheld the Federal Labor Relations Authority's right to reject objections to an administrative law judge's decision that were not sent to the address the Authority's regulations designated, a requirement that the trial judge's decision repeated. The rejection of the exceptions had the additional effect of depriving the court of appeals of jurisdiction to consider the substantive error the exceptions sought to raise. "[T]he general rule is well established that reviewing courts will not overturn an agency's strict application of its own procedural regulations so long as the rule is applied uniformly or with reasoned distinctions." *Tinker Air Force Base v. FLRA*, 321 F.3d 1242, 1247 (10th Cir. 2002).

The Ninth Circuit found that the National Transportation Safety Board (NTSB) did not act arbitrarily and capriciously when it strictly applied its filing deadlines. *Gilbert v. NTSB*, 80 F.3d 364 (9th Cir. 1996). The NTSB had dismissed an appeal from an administrative law judge's decision upholding the FAA's 90-day suspension of a commercial pilot's license for careless or reckless flying. The pilot's brief to the NTSB was served out of time, due to

³² The Office likewise rejected evidence from an experiment in which 100 letters were posted from southern California to Washington. None arrived in fewer than three days, suggesting that a claim the Office received on August 3 must have been mailed by July 31.

problems his lawyer encountered in printing it. The lawyer neglected to serve a request for an extension of time before the time to serve the pilot's brief expired (which he could have written in longhand and mailed the day the brief was due), or when he filed the late brief at the NTSB. Like these Respondents, the lawyer merely filed the document late. When the FAA challenged the late filing, the pilot argued that his delay had not prejudiced the FAA. The Ninth Circuit found no due process violation in the NTSB's dismissal; the court denied the pilot's petition to review the NTSB's finding that the pilot had failed to show good cause³³ for his failure to serve an extension motion within the time available to file the brief. *Id.* at 368.

G. *Equitable Tolling in the Ninth Circuit*

According to the Ninth Circuit, the doctrine of equitable tolling excuses a claimant's failure to comply with time limitations when he or she "had neither actual nor constructive notice of the filing period." *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997). Relief also requires that the claimant act with "all due diligence" to preserve his or her cause of action. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000) (rejecting a claim for equitable tolling in a claim for invidious disability discrimination).

The court affirmed a summary judgment against a U.S. Postal Service employee who filed suit claiming that she was terminated in retaliation for complaining to her supervisors about sexual harassment by co-workers. *Johnson v. Henderson*, 314 F.3d 409 (9th Cir. 2002). Her Title VII action was dismissed because she had failed to exhaust administrative remedies within the agency, and failed to show her late filings within the agency qualified for equitable tolling. A federal employee who believes she has been subjected to sexual harassment must contact an EEO counselor with a request for counseling within 45 days of the discriminatory event. 29 C.F.R. § 1614.105(a) (2006). Thereafter she must file a formal complaint with the agency after she receives a "right to file letter" from the agency. 29 C.F.R. § 1614.106 (2006); *see also Brown v. Gen. Services Admin.*, 425 U.S. 820 (1976). In her June 24, 2000 written request for EEO counseling, Ms. Johnson gave August 8, 1999 as the harassment date (far more than 45 days before her request), although elsewhere she said it happened on October 12, 1999 (also more than 45 days before her request). The Postal Service responded to her counseling request with a certified letter mailed to her home, for which it obtained a signed receipt showing delivery on August 4, 2000. The letter told her she had 15 days in which to file a formal EEO complaint with the agency. By that time she also had retained a lawyer. Her EEO complaint was not filed with the Postal Service until September 8, 2000, once again out of time.

Ms. Johnson professed she knew nothing of the 45-day requirement to seek counseling, a claim the magistrate judge rejected because employees were put on notice of the required procedures by posters displayed at the work site, and by a "Learner's Workbook" given to new Postal Service employees that contained a chart setting out the time required to perfect each step in an EEO complaint. *Id.* at 415. The certified mail receipt proved the notice telling her when

³³ The decision does not discuss why the agency chose to adopt the "good cause" standard as its test, rather than some other one. But the agency had announced in an earlier adjudication that it would dismiss any appeal when a party failed to file a timely notice of appeal, appellate brief, or request for an extension (*Administration v. Hooper*, 6 N.T.S.B. 559 (1988)), and there was no proof that the agency enforced that policy inconsistently. *Gilbert*, 80 F.3d at 368.

any formal complaint was due had been delivered to her residence. The instruction in the letter was not crucial, however, for she was represented by a lawyer who should not have needed that prompting. *Id.* at 417. Because she missed multiple deadlines, each of which were dispositive, her claim was dismissed.

These Respondents had written instructions on how to request a hearing in the Determination Notice, and had legal counsel within the organization, who eventually responded on their behalf. They failed to act diligently when they waited for eight days to serve their response to a notice that required action within seven days of the date it had been issued.

H. These Facts Fail to Qualify for Equitable Tolling

Those who apply for temporary foreign agricultural labor certifications move in an environment of short deadlines for the applicant and the agency. The applicant's business practices must accommodate the 5-day response times available to modify a certification application. The Administrator's Determination Notice was properly addressed to familiar agency customers that employ experienced staff counsel, and instructed the Respondents on how to request a hearing. They recently and successfully had requested a hearing on another debarment matter (the Hawaii debarment proceeding) in a timely fashion. Delivering the Determination Notice by certified mail emphasized that it required prompt attention.

The arrival of the Determination Notice on the last day to request a hearing was an extraordinary circumstance justifying a prompt request to extend the time to serve the Respondents' request for a *de novo* hearing. No evidence had to be gathered or arguments developed; it was enough for the Respondents to write a letter identifying themselves, ask for a hearing, date it, sign it and mail or even fax it. It easily could have accompanied any motion to extend their time to request a hearing. But the Respondents neither requested an extension nor acknowledged that they filed their hearing request late. Even if they thought they had seven days from the date they received the Determination Notice – something inconsistent with the notice itself, and 20 C.F.R. § 655.110(a) – their response was untimely.

The Respondents have failed to offer any satisfactory explanation for their delay in responding to the notice. Their declarations struggle to put the best face on their negligence. After eight days they realized they needed to reply, and sent their response, when it was too late. AR 1. The facts required to qualify for equitable tolling are absent. The Administrator did nothing to mislead them, no extraordinary circumstance kept them from replying to the Determination Notice until eight days after they received it, and they had not filed their hearing request on time in some wrong place. *Marshall, supra*, 657 F.2d at 18; *see also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984) (dismissing the Title VII action a that *pro se* party attempted to initiate by filing her “right to sue” letter in district court. She had been informed several times of the date her complaint had to be filed, but she failed to follow those instructions. The Court held she was not entitled to equitable tolling because she failed to exercise due diligence).

I. Proportionality

Dismissal is a harsh result, but no more so than the results in *Baldwin County Welcome Center*³⁴ and *Johnson v. Henderson*,³⁵ where the plaintiffs lost their opportunity to present Title VII claims; in *Universal City Studios*,³⁶ where the copyright holders lost their annual share in the common royalty fund; in *Gilbert v. NTSB*,³⁷ where the pilot lost his opportunity to appeal his license suspension; in the many cases where litigants lost their right to review by the Administrative Review Board due to their delay in filing petitions for review; or in *Mike Langley Farms, Inc.*³⁸ where farmer lost the opportunity to use temporary foreign agricultural workers.

ORDER

The request for hearing is dismissed. This dismissal makes the Department's July 27, 2006 Determination and Notice of Prospective Denial of Temporary Alien Agricultural Labor Certification for Three Years the Secretary of Labor's final order.

A

William Dorsey
Administrative Law Judge

Notice: This Decision and Order constitutes the final order of the Secretary of Labor. 20 C.F.R. § 655.112(b)(2) (2006).

³⁴ 466 U.S. 147, 151 (1984).

³⁵ *Johnson v. Henderson*, 314 F.3d 409 (9th Cir. 2002).

³⁶ *Universal Studios, LLP v. Peters*, 402 F.3d 1238 (D.C. Cir. 2005).

³⁷ *Gilbert v. NTSB*, 80 F.3d 364 (9th Cir. 1996).

³⁸ *Mike Langley Farms, Inc.*, 1999-TAE-001 (ALJ Nov. 13, 1998).