



Issue Date: 01 July 2013

Case No.: 2013-PED-00002
ETA Case No.: C-12272-35688

In the Matter of:

ADMINISTRATOR,
OFFICE OF FOREIGN LABOR CERTIFICATION,
EMPLOYMENT AND TRAINING ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,
Prosecuting Party,

v.

CASTRO HARVESTING,
Employer.

**ORDER DENYING EMPLOYER'S MOTION FOR SUMMARY DECISION,
GRANTING ADMINISTRATOR'S MOTION FOR SUMMARY DECISION, AND
AFFIRMING ADMINISTRATOR'S DETERMINATION**

This matter arises from a request for review of a Final Determination issued by the Administrator of the Office of Foreign Labor Certification against Employer Castro Harvesting, advising Employer that the Administrator had determined that Employer should be debarred from participating in the H-2A temporary employment certification program. By letter dated April 5, 2013, Employer requested a hearing in accordance with 20 C.F.R. § 655.182(f)(3).

On April 29, 2013, Employer filed by e-mail a Motion for Summary Decision and Return of Erroneous Payment. On May 9, 2013, the Administrator filed by facsimile a Cross Motion for Summary Decision and Opposition to the Employer's Motion for Summary Decision.

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.

574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett*, *supra*.

Findings of Fact

The parties do not dispute the facts. Based on their submissions, I find:

Present Application for Temporary Employment Certification

1. On September 28, 2012¹, the Chicago National Processing Center (CNPC) received Employer's ETA Form 9142, Application for Temporary Employment Certification, requesting certification for 99 temporary farmworkers and laborers for the period from November 1, 2012 through January 30, 2013. [AF² 310-348.] The application included a request for emergency handling. [AF 348.]
2. Employer, a farm labor contractor, intended to place the workers at two different farms in Georgia. [AF 278, 281.]
3. On October 4, 2012, the Certifying Officer (CO) issued a Notice of Deficiency, informing the Employer that its application failed to meet the criteria for acceptance, identifying numerous deficiencies and allowing the Employer five days to submit modifications to its application. [AF 257-267.]
4. On October 9, 2012, the Employer submitted the modifications requested by the CO to the CNPC. [AF 191-256.]
5. On October 11, 2012, the CNPC sent an email to Employer's agent, informing her that the application could not be processed without original signatures on Appendix A.2. Employer's agent responded with a promise to send the signatures by overnight mail for delivery on October 12, 2012. [AF 190.]
6. On October 17, 2012, the CNPC sent an email to Employer's agent identifying additional discrepancies and requesting authorization to make written changes to Employer's application. Employer's agent responded with such authorization within 3 hours of the CNPC email. [AF 187-189.]
7. On October 23, 2012, the CO informed Employer's agent that Employer's application had been accepted for processing, and detailed certain additional recruitment efforts that Employer was required to take before the application could be certified. [AF 180-186.]
8. On October 29, 2012, Employer's agent submitted Employer's initial and subsequent recruitment reports as required by the October 23 notification from the CO. [AF 142-173.]

¹ Although the application is stamped "Received" by the Chicago National Processing Center on September 28, 2012, the signatures by the Employer and the Employer's agent are dated October 8, 2012. The parties have not explained this discrepancy, but it is immaterial to this decision.

² Citations to the 348-page Administrative File will be abbreviated as "AF" followed by the page number.

9. On November 5, 2012, Employer submitted newspaper tear sheets showing that the positions for which it sought certification had been advertised in several newspapers. [AF 119-126.]
10. On November 6, 2012, the CNPC informed Employer's agent that it had not received the proper surety bond, and reminding her that Employer had been informed of that requirement in the October 4, 2013 Notice of Deficiency. Employer's agent responded on the same day, promising delivery of the surety bond by the next day. [AF 114.]
11. On November 9, 2012, Employer's agent submitted a copy of the surety bond by email and again promised delivery of the original bond by the next day. [AF 110-113.]
12. On November 14, 2012, the CO informed Employer's agent that Employer's application had been certified for 99 farmworkers and laborers, and enclosed a bill for a certification fee of \$1,000.00. [AF 100-105.] The CO's letter stated:

Enclosed is a bill for fees assessed for the H-2A certification. Nonpayment or untimely payment may be considered a substantial violation subject to the procedures in 20 C.F.R. § 655.182.

[AF 101.]

13. On November 23, 2012, the CNPC received Employer's letter dated November 21, 2012, in which Employer requested withdrawal of its application for temporary employment certification. Employer stated that it no longer had need of the workers, because it had lost contracts due to the lengthy DOL certification process. [AF 85-99.]
14. By letter dated November 27, 2012, the CO granted Employer's request to withdraw its application for temporary employment certification. The CO informed Employer:

You are reminded that, in accordance with Departmental regulations at 20 C.F.R. sec. 655.172(b), you are still obligated to comply with the terms and conditions of employment contained in the Application for Temporary Employment Certification with respect to workers recruited in connection with that application.

[AF 83-84.]

15. On January 17, 2013, the CO issued a Notice of Debarment to Employer, proposing to debar Employer from the H-2A labor certification program for a period of one year, due to Employer's failure to pay the \$1,000.00 certification fee. [AF 38-39.] The Notice of Debarment also informed Employer of its right to request either reconsideration by the CO or a hearing before an administrative law judge. [*Id.*]
16. On January 22, 2013, Employer's agent submitted a request by email to the CNPC that it amend its debarment notice because the CO had previously granted Employer's request to withdraw its application. Employer's agent included a copy of the CO's letter granting Employer's request to withdraw its application. [AF 36.]

17. On January 24, 2013, Maria Hernandez emailed the CNPC to inquire whether immediate payment of the certification fee would stop the debarment action. [AF 34.] The CNPC responded on the same day with instructions on requesting reconsideration of debarment, as well as payment instructions. [*Id.*]
18. On February 28, 2013, the CO issued a Notice of Debarment – Final Agency Action, informing Employer that because it had neither requested reconsideration nor requested a hearing, the debarment decision was final, and Employer was debarred from participating in the H-2A program for a period of one year. [AF 32.]
19. On March 4, 2013, Employer’s agent emailed the CO with a request to reverse the debarment, based on (1) its having paid the certification fee, and (2) its having withdrawn the application for temporary employment certification. [AF 30-31.]
20. Staff of the Employment and Training Administration investigated the allegations in the email of March 4, 2013, and determined that the Employer had responded to the January 17 Notice of Debarment, but that the CO had not considered Employer’s response before taking the Final Agency Action. The staff also determined that Employer had not paid the \$1,000.00 certification fee; the checks referred to by the Employer pre-dated its application in this case, and ETA staff concluded that they could not have been submitted for payment of the certification fee. [AF 27-30.]
21. On March 14, 2013, the Administrator issued a Final Determination, acknowledging that he had not considered the January 22, 2013 request from Employer’s agent that the debarment be amended or his own decision to grant Employer’s request to withdraw its application. [AF 24-26.] The CO then reconsidered the debarment decision, including consideration of Employer’s January 22 request, and imposed a one-year debarment from participation in the H-2A program based on Employer’s failure to pay the certification fee. [*Id.*]
22. On April 5, 2013, Employer submitted a check for \$1,000.00 to the ETA as payment of the certification fee related to the instant temporary employment certification. [AF 14-18.]

Previous Application

23. On February 24, 2012, Employer submitted a Form 9142, requesting certification for 99 farmworkers and laborers for the period April 18 – August 31, 2012. [AF 74-82.]
24. On March 20, 2012, the CO informed Employer’s agent that Employer’s application had been certified for 99 farmworkers and laborers, and enclosed a bill for a certification fee of \$1,000.00. [AF 69-73.] The CO’s letter stated:

Enclosed is a bill for fees assessed for the H-2A certification. Nonpayment or untimely payment may be considered a substantial violation subject to the procedures in 20 C.F.R. § 655.182.

[AF 69.]

25. On May 9, 2012, the CNPC sent Employer a Demand Letter, requesting immediate payment of the certification fee associated with the application that was certified on March 20, 2012. [AF 67-68.]

26. On July 12, 2012, the CO sent a Notice of Debarment to Employer, expressing his intent to debar Employer from the H-2A program for failure to pay the \$1,000.00 certification fee associated with its February 24, 2012 application. Employer was given the option either to (1) submit evidence to rebut the grounds stated for debarment in the Notice of Debarment, or (2) request a hearing before an administrative law judge. [AF 65-66.]
27. Employer submitted a check for \$1,000.00 dated July 20, 2012 to the CO. [AF 64.]
28. On August 8, 2012, the CO issued a Final Determination rescinding the debarment of Employer that was based on failure to pay the certification fee associated with the application that was certified on March 20, 2012. The Final Determination informed Employer that:

...the Employer's future nonpayment or untimely payment of H-2A labor certification fees will be considered a substantial violation subject to debarment pursuant to 20 C.F.R. § 655.182.

[AF 63.]

Conclusions of Law

Under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., as amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986), the Secretary of Labor may grant certification for temporary employment when s/he determines that:

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1). The Secretary has promulgated regulations under which an employer seeking temporary employment of non-U.S. workers may apply for certification at 20 C.F.R Part 655. Compliance with those regulations is required before an employer's application for temporary employment certification is granted. Specific to this case, 20 C.F.R. § 655.163 provides:

A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part will include a bill for the required certification fees. Each employer of H-2A workers under the *Application for Temporary Employment Certification* (except joint employer associations, which may not be assessed a fee in addition to the fees assessed to the members of the association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the *Application for Temporary Employment Certification* (in whole or in part), as follows:

(a) *Amount.* The *Application for Temporary Employment Certification* fee for each employer receiving a temporary agricultural labor certification is \$100 plus \$10 for each H-2A worker certified under the *Application for Temporary Employment Certification*, provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than \$1,000. There is no additional fee to the association filing the *Application for Temporary Employment Certification*. The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its H-2A employer members, the aggregate fees for all employers of H-2A workers under the *Application for Temporary Employment Certification* must be paid by one check or money order.

(b) *Timeliness.* Fees must be received by the CO no more than 30 days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182.

Thus, an employer whose application is certified is required to pay the certification fee; failure to do so, or untimely payment of the fee, brings into play 20 C.F.R. § 655.182, which provides in pertinent part:

(a) *Debarment of an employer.* The OFLC Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Debarment of an agent or attorney.* The OFLC Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501, if the OFLC Administrator finds that the agent or attorney participated in an employer's substantial violation. The OFLC Administrator may not issue future labor certifications under this subpart to any employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of limitations and period of debarment.*

(1) The OFLC Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

- (i) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or workers in corresponding employment;
- (ii) (Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
- (iii) Failure to comply with the employer's obligations to recruit U.S. workers;
- (iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;
- (v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;
- (vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180 of this subpart;
- (vii) Employing an H-2A worker outside the area of intended employment, in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;
- (viii) A violation of the requirements of § 655.135(j) or (k);
- (ix) A violation of any of the provisions listed in 29 CFR 501.4(a);
or
- (x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) The employer's failure to pay a necessary certification fee in a timely manner;

(3) Fraud involving the *Application for Temporary Employment Certification*; or

(4) A material misrepresentation of fact during the application process.

(e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial so as to merit debarment, the factors the OFLC Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

- (2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
- (3) The gravity of the violation(s);
- (4) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;
- (5) Explanation from the person charged with the violation(s);
- (6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188;
- (7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

20 C.F.R. § 655.182(e).

Employer Untimely Paid the Certification Fee

Under the circumstances of this case, the Employer became obligated to pay the certification fee upon certification of its application by the CO. 20 C.F.R. § 655.163. The Employer was required by 20 C.F.R. § 655.163(b) to pay the fee within 30 days of certification. Employer did not pay the fee until April 5, 2013, over a year after certification. That payment was untimely. Accordingly, it is clear, and I find, that Employer violated Section 655.163.

Withdrawal of Application Does Not Excuse the Obligation to Pay the Certification Fee

Employer argues that it was no longer obliged to pay the certification fee after its withdrawal of the application for temporary employment certification. That argument is without merit.

The applicable regulation does not require payment of a certification fee unless and until the application is certified. 20 C.F.R. § 655.163. Withdrawal of an application before certification, then, may mean that no certification is granted and no certification fee is due. In this case, however, Employer withdrew its application after certification was granted. By the express language of the regulation, the certification fee was due as of the date of certification (November 14, 2012), and is non-refundable. In light of those regulatory requirements, it is clear that Employer's withdrawal of its application after certification did not excuse its obligation to pay the required certification fee.³

In its motion, Employer made certain factual allegations tending to show that malfeasance by the CNPC caused it to lose contracts, thereby obviating its need for temporary workers. It is unclear whether Employer is arguing that such malfeasance excuses its failure to

³ The Administrator argues that even after withdrawal of an application, the certification fee is required because 20 C.F.R. § 655.172 provides that, after withdrawal, "the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* with respect to workers recruited in connection with that application." I am not convinced that the Administrator's reading is correct because of the regulation's limitation to "workers recruited"; however, because my decision is based upon the explicit regulatory requirements that the certification fee is payable upon the grant of certification and is non-refundable, I need not address this argument.

pay the certification fee. If so, that argument is without merit. Whether, in a particular case, agency delays may relieve an employer of its burden to pay a required fee is a question that I need not resolve, because any delays in this case were due to Employer's actions and not those of the CNPC. Employer argues that the CNPC issued four separate Notices of Deficiency, only one of which was timely. In fact, the CNPC issued only one Notice of Deficiency, on October 4, 2012. The remaining communications from CNPC to Employer were attempts by CNPC to assist Employer in curing the deficiencies noted in the October 4 Notice.

Unconstitutional Taking

Employer argues that imposition of the certification constitutes an unconstitutional taking in violation of the 5th Amendment under the circumstances of this case.

It is well settled that an administrative law judge does not have the authority to determine constitutional issues. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958); *see also Oestereich v. Selective Service Board*, 393 U. S. 233, 242 (1968) (Harlan, J., concurring in result).

Employer, however, argues that the recent Supreme Court decision of *Horne v. Department of Agriculture*, ___ U.S. ___, 2013 WL 2459521 (June 10, 2013) permits an administrative law judge to entertain constitutional challenges to the imposition of a fee such as that involved here. In so arguing, Employer quotes a single sentence out of context: "A takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under 7 U.S.C. § 608(c)(14)." *Id.*, 2013 WL 2459521 at *1. Contrary to Employer's argument, the Supreme Court did change the long-standing rule that an ALJ may not determine the constitutionality of a statute. The quoted sentence was in the context of determining whether a district court could hear the constitutional challenge to the USDA civil penalty assessment on appeal from the agency, and not in the context of an ALJ's determination of such a challenge in the first instance. It seems obvious that the Supreme Court would not change long-standing precedent in such an offhand manner, and I conclude that it did not in *Horne*. Accordingly, I find that I have no authority to decide the constitutional issue raised by Employer here.

Employer is Subject to Debarment

Under 20 C.F.R. § 655.163(b), failure to pay the certification fee within 30 days of certification "may be considered a substantial violation subject to the procedures in § 655.182." Section 655.182(d)(2), in turn, explicitly provides for debarment for failure to pay the certification fee. Thus, Employer is subject to debarment.

Debarment is Appropriate

The Administrator determined that Employer should be debarred from participating in the H-2A program for a period of one year. Under 8 U.S.C. § 1188(b)(2), the Secretary may deny H-2A certification to an employer for up to three years when the employer has "substantially violated a material term or condition of the labor certification with respect to the employment of

domestic or nonimmigrant workers.” The Secretary has, in 20 C.F.R. § 655.182(d)(2), defined a violation to include the untimely payment of the certification fee.

Additionally, the Secretary has published the seven factors to be considered when determining whether the violation is substantial at 20 C.F.R. § 655.182(e). Those factors are set forth *supra*.

With respect to a factor (1), “this subpart” refers to Subpart B of 20 C.F.R. Part 655. Employer clearly has a history of violating Subpart B: between March and August of 2012 – that is, only 2-6 months before Employer filed the application that is the subject of this proceeding – Employer failed to pay timely a certification fee for its previous application for temporary employment certification. Only after being threatened with debarment did Employer pay the required fee, and did so a mere two months before filing the instant application. This factor militates against the Employer.

With respect to factor (2), no workers have been actually affected by Employer’s violation. This factor favors the Employer.

With respect to factor (3), the violation is a relatively serious one. As the Administrator points out, the Department has stated succinctly the reasons for including a failure to pay a certification fee as a violation:

The Department must take very seriously the failure to pay the required certification fees in a timely manner simply because we do not believe that it is an effective use of our limited resources to track down employers who fail to pay fees. By defining the late payment of certification fees as a substantial violation in the Final Rule, we intend to impress upon employers that the timely payment of such fees is their responsibility which we expect them to fulfill if they choose to participate in the H-2A program.

75 Fed. Reg. 6883, 6896 (February 12, 2010). This factor militates against the Employer.

With respect to factor (4), Employer made no good faith attempts to comply with Subpart B. Despite being explicitly advised several times that it must pay the certification fee, Employer failed to do so. Employer made its argument that it was not obligated to pay the fee on several occasions after withdrawing its application, but its position was rejected; yet Employer did not pay the certification fee. Only after the Administrator made a final determination to debar Employer for failure to pay the fee did Employer send a check. This factor militates against Employer.

With respect to factor (5), Employer’s explanation for failure to pay the certification fee was that withdrawal of its application eliminated the requirement to pay the certification fee. Employer first made that argument to CNPC on January 22, 2013. The CO, the CNPC, and the Administrator did not directly respond to that argument until the Administrator rejected it in the March 14, 2013 Final Determination. Arguably, Employer believed its position was correct due

to the Department's failure to address it. Nevertheless, after its position was rejected, the Employer still did not submit payment for another month. I find that factor (5) is neutral.

With respect to factor (6), Employer's president, in the declaration attached to its motion for summary decision, has stated that Employer is committed to "continuing to comply in full with all applicable laws in the future." On the other hand, Employer continues to argue that it was not required to pay the fee, and has demanded return of the fee it did pay, and Employer has a history of a prior violation. Thus, there is a dispute of material fact as to whether Employer has made a commitment to future compliance, and I will not consider this factor in reaching my conclusions.

With respect to factor (7), failure to pay the certification fee resulted in no financial loss to workers. It did, however, at least temporarily, result in a financial gain to Employer in that Employer retained \$1,000.00 it had no legal right to keep. Although this factor militates against Employer, it does so weakly.

Taking into account all the factors listed under 20 C.F.R. § 655.182(c), I find that the violation was a substantial violation. Four of the seven factors militate against Employer, one favors Employer, one is neutral, and one will not be considered. Even if I were to find that Employer has made a commitment to future compliance (factor (6)), the weight of the factors that militate against Employer, compared to those that favor Employer, lead to the conclusion that the violation was a substantial one.

Under 20 C.F.R. § 655.182(f)(4), I must affirm, reverse, or modify the Administrator's determination. In light of my finding that Employer has committed a substantial violation, I decline to reverse it. Upon a thorough review of the entire Administrative File, the arguments of the parties, and the declaration of Employer's president, I find no reason to modify the Administrator's determination that Employer should be debarred from the H-2A program for a period of one year. Accordingly, the Administrator's determination will be affirmed.

Employer is Not Entitled to a Refund of the Certification Fee

As discussed above, the certification fee is non-refundable. Assuming that I have the authority to address Employer's motion to return the fee⁴, I find that the regulations bar its return.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. Employer Castro Harvesting's Motion for Summary Decision and Return of Erroneous Payment is DENIED;
2. The Administrator's Cross Motion for Summary Decision is GRANTED; and

⁴ The Administrator's argument that my authority in this matter is limited to the issue of whether Employer should be debarred from participation in the H-2A program is well taken. Solely for purposes of this decision, however, I will assume that I have the authority to address Employer's motion for return of the certification fee.

3. The Administrator's Determination debarring Employer Castro Harvesting from participation in the H-2A program for a period of one year is AFFIRMED.

SO ORDERED.

PAUL C. JOHNSON, JR.
Associate Chief 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.