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Issue Date: 16 May 2014

OALJ Case No.: 2014-PED-00001
ETA No.: C-11083-54549

In the Matter of:

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

Prosecuting Party,

v.

MIDWAY RIDES OF UTICA,

Respondent.

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER DISMISSING APPEAL

This proceeding arises under the H-2B temporary nonagricultural guest worker provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184, and the implementing regulations set forth at 8 C.F.R. § 214.2(h)(6) and 20 C.F.R. Part 655, Subpart A (collectively H-2B program).¹ It is before the undersigned pursuant to the Respondent's request for a hearing on the Administrator's determination to debar

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008 ("2008 Rule"), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule ("2013 IFR") promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013), since the Department has postponed its implementation of the Final Rules promulgated in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 Wage Rule") and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012) ("2012 Rule"). See 79 Fed. Reg. 11450,11453 (Mar. 5, 2014) (announcing that until such time as the Department finalizes a new wage methodology, the current wage methodology contained in 20 C.F.R. § 655.10(b), as set by the 2013 IFR, will remain unchanged and continue in effect); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (ND FL Apr. 26, 2012) (enjoining DOL from implementing or enforcing the 2012 Rule), affirmed by *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing "the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation").

it from the H-2B program for a period of one year. For the reasons set forth below, the Respondent's request for a hearing in this matter is DISMISSED with prejudice.

BACKGROUND

The Respondent, Midway Rides of Utica (Midway Rides), is a traveling carnival business that operates amusement rides at fairs, festivals, and other outdoor events. Midway Rides has participated in the H-2B program since 2007.

The events leading to the instant appeal stem from an *Application for Temporary Employment Certification* that Midway Rides filed with the U.S. Department of Labor (Department), Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC) in 2011. On September 18, 2012, the OFLC sent a Notice of Audit Examination to Midway Rides and its agent, Mr. James Kendrick Judkins. Administrative File ("AF") 33-36. The Notice of Audit Examination stated that Midway Rides had been selected for audit and directed Midway Rides to submit certain documentation related to the *Application for Temporary Employment Certification* it filed in 2011, including earnings records for each worker employed during three specific months of the certification period. *Id.* Mr. Judkins responded on September 25, 2012, providing some, but not all, of the requested documentation. AF 22-24. Mr. Judkins stated that he was unable to complete the response at that time because it was his peak season, and Midway Rides was currently on the road and unable to access payroll records from prior years, which were in storage. AF 22. Mr. Judkins requested a 14-day extension, explaining Midway Rides needed this additional time to make arrangements to have the payroll records pulled from storage, shipped to their office on the road, and compiled for the audit. *Id.* The OFLC granted Mr. Judkins' request and extended the deadline to October 20, 2012. *Id.* Midway Rides did not submit any further documentation by the extended due date. Accordingly, on January 16, 2013, the OFLC sent a Request for Supplemental Information (RSI) to both Midway Rides and Mr. Judkins. AF 16-21. The RSI notified Midway Rides that the OFLC had not received a complete audit response and directed Midway Rides to provide the missing payroll documentation by January 30, 2013. AF 16-21. Mr. Judkins contacted the OFLC on the date the response was due, January 30, 2013, to request a thirty-day extension. AF 14-15. In an attempt to justify this request, he stated that he had been very ill with influenza and only able to put in a little time each day to cover immediate/emergency needs, and that Midway Rides had been attending state fair conventions and just returned to their home base on January 29, 2013. He also repeated one of the reasons he cited in September 2012, i.e., that Midway Rides kept their payroll records from prior years in a secure location and that they needed time to pull these records to prepare them for a full and complete response. The OFLC generously granted Mr. Judkin's request and extended the deadline for response to March 1, 2013. Neither Mr. Judkins nor Midway Rides filed a response by the extending deadline. The OFLC issued a second RSI on June 7, 2013, reiterating its request for the missing payroll records.

On September 18, 2013, having received no further communication from Midway Rides or Mr. Judkins, the Administrator sent a Notice of Intent to Debar (NOID) to Midway Rides and Mr. Judkins at the addresses listed on the *Application for Temporary Employment Certification*. AF 3-4. The NOID stated that the Administrator intended to debar Midway Rides from the H-2B program for a period of one year due to its repeated failure to respond to the OFLC's requests

for documentation. AF 3. Specifically, the NOID informed Midway Rides that the proposed debarment was based on the Administrator's determination that it had "committed a substantial violation by establishing a pattern or practice of acts of commission or omission, based on significant failure to comply with the audit process pursuant to 20 CFR § 655.24." AF 4. After identifying the basis of the proposed debarment, the NOID provided the following "important notice":

Important Notice: Under the Department's regulations at 20 CFR § 655.31(e), the employer may submit rebuttal evidence within 14 calendar days of the date the Notice of Intent to Debar is issued.

All documentation must be submitted together. NO extensions of time will be granted. Rebuttal evidence must be submitted to the following address:

...

Questions concerning this RSI can be directed via email to TLC.Chicago@dol.gov by including the words "H-2B RSI" followed by the Case Reference Number, or via telephone at (312) 886-1688.

Upon receipt of a timely response, the Department will review the information and notify the employer within 14 calendar days of its decision of whether the proposed debarment is upheld. If rebuttal evidence is not timely filed by the employer, the Notice of Intent to Debar will become the final decision of the Secretary and take effect immediately on **October 2, 2013**. See 20 CFR § 655.31(e)(2).

AF 4 (emphasis in original). To date, neither Midway Rides nor Mr. Judkins has submitted any rebuttal evidence.

On November 12, 2013, having received no rebuttal evidence from Midway Rides, the Administrator sent a "Final Agency Action on Notice of Intent to Debar" to both Midway Rides and Mr. Judkins. AF 2. It stated, in pertinent part:

In accordance with 20 Code of Federal Regulations (CFR) § 655.31(a) and (e)(2), Midway Rides of Utica (the employer) is hereby debarred from the H-2B labor certification program. The Department of Labor (Department) will not process or accept for processing any application filed by the employer under 20 CFR § 655, Subpart A for a period of one (1) year beginning October 2, 2013 and ending October 1, 2014.

On September 18, 2013, the Administrator of the Office of Foreign Labor Certification issued a Notice of Intent to Debar (NOID) letter to the employer based on significant failure to comply with the audit process pursuant to 20 CFR § 655.24. The NOID provided the employer with specific instructions to submit evidence in rebuttal of the Department's notice within 14 calendar days of the date

of the NOID was issued. As of October 2, 2013, the Department had not received evidence in rebuttal of the NOID.

The Department's regulation at 20 CFR § 655.31(e)(2) provides that if rebuttal evidence is not timely filed by the employer, attorney, or agent, the NOID will become the final decision of the Secretary of Labor (Secretary) and take effect immediately at the end of the 14-day period.

Therefore, the NOID is the final decision of the Secretary, and the employer is hereby debarred from the H-28 program for a period of one (1) year.

AF 2.

By letter dated December 11, 2013, Counsel for Midway Rides requested a hearing before an administrative law judge pursuant to 20 C.F.R. § 655.31. Counsel for the Administrator filed a Motion to Dismiss on March 7, 2014, arguing the debarment became the Final Decision of the Secretary on October 2, 2013, when Midway Rides failed to provide rebuttal evidence in response to the NOID, and urging the undersigned to dismiss the appeal for lack of jurisdiction. Counsel for Midway Rides responded on March 17, 2014, arguing the undersigned has the authority to modify or relax procedural rules in order to avoid manifest injustice, and asking the undersigned to excuse Midway Rides' failure to respond to the NOID within the 14-day timeframe because the owner and principal operator of Midway Rides, Mr. Dana Peck, was battling throat cancer and was unable to attend to business matters or consult with others about business matters.

The undersigned held a conference call with the parties on March 25, 2014, at which time he notified the parties of his decision that he had the authority to waive a party's failure to respond to a NOID within the 14-day period if the interests of justice so require. The undersigned issued a written Order to Show Cause the next day, March 26, 2014, directing Midway Rides to show cause as to why this matter should not be dismissed for failure to timely file evidence in response to the NOID, and to submit written evidence in support of its request for equitable relief.

Counsel for Midway Rides responded to the Order to Show Cause on April 9, 2014, urging the undersigned to waive or toll the 14-day deadline at 20 C.F.R. § 655.31(e) because Mr. Peck was incapacitated as a result of cancer treatment during this period and he was unable to carry on business activities or to effectively communicate with others about business matters. Specifically, Counsel for Midway Rides asserted:

Midway Rides is a traveling amusement business and following Mr. Peck's initial illness in early June 2013, he was unable to travel and other family members took over the operation of the business on the road. In 2013, Ms. Tesoriere, provided care to Mr. Peck, assisted as she was able with his personal and business affairs, and was also caring for her elderly mother.

The NOID was delivered to the front porch - not the mailbox - of Ms. Tesoriere's son's home. In a typical year Mr. Peck and Ms. Tesoriere are on the road and therefore Ms. Tesoriere's son's home address serves as the Midway Rides business address because he is home to receive business correspondence. Because of Mr. Peck's illness, however, Ms. Tesoriere's son was not at home and instead was on the road traveling with the business and performing many of Mr. Peck's usual duties. Because of Ms. Tesoriere's duties in caring for Mr. Peck, attending to his affairs, as well as caring for her mother, and because Ms. Tesoriere had no reason to be on the lookout for time sensitive correspondence from the Department of Labor (that would not arrive in the mailbox), she did not receive the NOID until after the time period for responding has passed.

The basis for the NOID is Midway Rides' failure to respond to a June 2013 Request for Supplemental Information ("RSI") relating to an audit that began in 2012. The RSI was sent in early June at the same time that Mr. Peck became ill and initially sought medical treatment for his cancer. Because of Mr. Peck's medical condition, and the business necessities at that time, no one was able to respond to the RSI with the requested payroll documentation from 2011. Mr. Peck and Ms. Tesoriere have both stated that if the Department will lift the debarment, Midway Rides will respond with a rebuttal to the NOID, including the payroll documentation requested by the Department.

(internal citations omitted). In response to the undersigned's request for evidence, Counsel for Midway Rides provided written declarations from Mr. Peck and Ms. Tesoriere, and medical records confirming that Mr. Peck was undergoing chemotherapy and radiation throughout September and early October 2013. He argued that waiving or tolling the deadline would "in no way prejudice the Department of Labor's interests" and stated that his client only seeks to have the present debarment rescinded and be provided the opportunity to submit the payroll records and evidence in rebuttal to the NOID.

Counsel for the Administrator responded on April 16, 2014, arguing equitable waiver is a limited doctrine that may only be applied in "exceptional circumstances," and Midway Rides failed to establish such exceptional circumstances. Counsel for Midway Rides filed a Reply to the Administrator's Response on April 23, 2014.

DISCUSSION

The regulations at 20 C.F.R. part 655, subpart A provide certain instances in which the Administrator of the OFLC may debar an employer from obtaining future labor certifications under 20 C.F.R. part 655, subpart A. The procedures governing this process provide, in pertinent part:

(1) The Administrator, OFLC will send to the employer, attorney, or agent a *Notice of Intent to Debar* by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed debarment. The employer, attorney, or agent may submit evidence in rebuttal within 14 calendar

days of the date the notice is issued. The Administrator, OFLC must consider all relevant evidence presented in deciding whether to debar the employer, attorney, or agent.

(2) If rebuttal evidence is not timely filed by the employer, attorney, or agent, the *Notice of Intent to Debar* will become the final decision of the Secretary and take effect immediately at the end of the 14-day period.

(3) If, after reviewing the employer's timely filed rebuttal evidence, the Administrator, OFLC determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment under § 655.31(d), the Administrator, OFLC will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination of debarment and of the employer, attorney, or agent's right to appeal.

(4) The *Notice of Debarment* must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and must offer the employer, attorney, or agent an opportunity to request a hearing. The notice must state that to obtain such a review or hearing, the debarred party must, within 30 calendar days of the date of the notice file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the Administrator, OFLC. The debarment will take effect 30 days from the date the *Notice of Debarment* is issued, unless a request for a hearing is properly filed within 30 days from the date the *Notice of Debarment* is issued. The timely filing of a request for a hearing stays the debarment pending the outcome of the appeal.

20 C.F.R. § 655.31(e). The fourteen-day period for filing rebuttal evidence is an internal procedural rule adopted to expedite debarment proceedings. *See* Labor Certification Process and Enforcement for H-2B Workers, Final Rule, 73 Fed. Reg. 78020, 78045 (Dec. 19, 2008) (stating the appeals process is “expedient enough so as to allow the Department to debar bad actors before they can cause any additional harm while also minimizing the period of uncertainty for employers in the case of a successful appeal”).

In interpreting an analogous procedural rule, the Board of Alien Labor Certification Appeals (BALCA) found that failure to provide rebuttal evidence within the required timeframe is not a jurisdictional prerequisite to obtaining review, but rather, a procedural rule that may be tolled for equitable reasons. *See Madeleine S. Bloom*, 88-INA-152 (BALCA Oct. 13, 1989). The Administrative Review Board (“ARB”) has similarly held that a party's untimely filing is not a jurisdictional prerequisite to obtaining review, but a procedural prerequisite that is subject to waiver when equity so requires. *See, e.g., Duncan v. Sacramento Metro. Air Quality Dist.*, ARB No. 99-011, ALJ No. 97-CAA-12 (ARB Sept. 1, 1999) (ten-day deadline for filing a petition for review of a recommended decision and order “is procedural in nature, comparable to a statute of limitations, which may be tolled for equitable reasons”); *In re Superior Paving & Materials, Inc.*, ARB No. 99-065, ALJ No. 98-DBA-11 (ARB Sept. 3, 1999) (40-day limit for filing petition for review of prevailing wage decision under the Davis-Bacon Act is not jurisdictional). In so holding, the ARB has explained that the procedural requirements an agency

uses to control administrative adjudications are presumptively subject to waiver, tolling, and equitable estoppel, *i.e.*, they are procedural prerequisites, but not jurisdictional prerequisites. *See, e.g., Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, slip op. at 9 (Oct. 31, 2005). This is consistent with federal court precedent stating that administrative agencies may waive procedural requirements in the interest of justice, provided that such a waiver will not prejudice the other party. *Amtcor, Inc. v. Brock*, 780 F.2d 897 (11th Cir. 1986). These principles extend to Administrative Law Judges (“ALJs”) in OALJ as well. *See Shirani*, supra, slip op. at 9. The Secretary of Labor has provided OALJ’s with broad and discretionary adjudicatory authority. Pursuant to 29 C.F.R. § 18.29(a), ALJs have “all powers necessary to the conduct of fair and impartial hearings,” including, *inter alia*, the authority to “[t]ake any action authorized by the Administrative Procedure Act” and “[e]xercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Secretary of Labor as are necessary and appropriate therefore.”

The issue currently before the undersigned is whether Midway Rides has demonstrated that its failure to timely respond to the Administrator’s Notice of Intent to Debar should be waived and its debarment lifted pending the Administrator’s review of rebuttal evidence. When determining whether it is appropriate to toll regulatory deadlines comparable to that at 20 C.F.R. § 655.31(e), the ARB has been guided by the discussion of equitable tolling in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, the court articulated three principal situations in which equitable tolling may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum. *Id.* at 20 (internal quotations omitted). Midway Rides has failed to demonstrate that any of these situations prevented it from timely filing a rebuttal to the NOID: the Department did not actively mislead Midway Rides about the time period in which it must respond to the NOID; Midway Rides has failed to demonstrate that it was in some extraordinary way prevented from responding to the rebuttal; and there is no contention that Midway Rides sent its rebuttal to the wrong party.

Midway Rides argues that extraordinary circumstances prevented it from responding to the NOID because its owner, Mr. Peck, was undergoing medical treatment during the 14-day period it was given to respond to the NOID. Although the undersigned empathizes with Mr. Peck’s medical condition, the NOID was directed at Midway Rides, and not Mr. Peck personally. The evidence of record indicates that the business was still operational in Mr. Peck’s absence and that Mr. Peck’s illness is not an extraordinary circumstance that justifies Midway Rides’ continuing failure to file a rebuttal to the NOID. Mr. Peck was aware of the Department’s audit request and the January 2013 RSI well before he became ill. He therefore had ample time to compile the documentation necessary to respond to these requests prior to his illness. Even if Mr. Peck himself was not able to respond to the NOID in September 2013, someone from the company should have been prepared to do so.

Mr. Peck’s medical condition does not excuse the failure of Mr. Judkins, Midway Rides’ agent, to contact the Administrator to request an extension of time to respond to the NOID in light of Mr. Peck’s condition. Midway Rides asserts that Mr. Judkins’ was not authorized to make such a request on its behalf, but the record before the undersigned indicates otherwise.

When Mr. Judkins filed an *Application for Temporary Employment Certification* on behalf of Midway Rides in 2011, he signed a statement certifying that he was “an employee of, or hired by, [Midway Rides],” and that he was “designated by [Midway Rides] to act on its behalf in connection with this application.” AF 47. The audit that led to the facts alleged in the NOID was initiated in connection with this application, and Mr. Judkins corresponded with the OFLC on Midway Rides’ behalf; he filed the initial incomplete audit response, as well as the January 2013 request for extension of time, and both times, he used the pronoun “we” to indicate that he was making this request on behalf of Midway Rides. Mr. Judkins does not deny that he received the NOID in a timely manner. It is thus clear that he was in a position to notify the Administrator of Mr. Peck’s circumstances yet failed to do so. The lack of response he received from Ms. Tesoriere does not constitute an extraordinary circumstance sufficient to excuse Midway Rides’ failure to seek an extension of the time to file a rebuttal. Mr. Judkins was aware of Mr. Peck’s illness and incapacitation and could have sought an extension on this basis even if he was unable to get in touch with Ms. Tesoriere.² Moreover, the record demonstrates that at the time Mr. Peck was ill, Ms. Tesoriere was addressing other time sensitive business matters on behalf of Midway Rides, such as submitting payroll to the accountant and arranging travel for workers. It is not clear why Mr. Judkins was unable to get in contact with her, or why, once she became aware of the NOID, she herself was unable to contact the Administrator to request an extension of time to file a rebuttal. Any contention that Midway Rides did not have adequate time to respond because the NOID was left on the porch, and not the mailbox, of Ms. Tesoriere’s son’s home is without merit. The Administrator sent the NOID by the same means the OFLC used to send the Notice of Audit Examination, the January 2013 RSI, and the June 2013 RSI. Midway Rides was thus on notice of the Department’s method of correspondence, and should have anticipated additional correspondence from the Department, as it had yet to complete the audit response despite the Department’s repeated warnings.

To date, Midway Rides has not made any attempt to file a rebuttal to the NOID or to submit the earnings records requested in the September 2012 Notice of Audit Examination, the January 2013 RSI, and the June 2013 RSI. In response to the Order to Show Cause, Counsel for Midway Rides asserts that “[a]ll [Midway Rides] seeks is to have the present debarment rescinded and an opportunity to provide a Rebuttal and the requested payroll records.” But Midway Rides does not require leave from this tribunal to file a rebuttal or to provide the requested payroll records. This documentation should have been filed, at a minimum, over six months ago. Midway Rides repeated failure to submit this documentation does not persuade the undersigned that it was unjustly denied the opportunity to file a response to the NOID. In effect, Midway Rides’ seeks a seven-month extension to the 14-day period to respond to the NOID.

Rescinding the current debarment and excusing Midway Rides’ continuing failure to file a rebuttal statement would unfairly prejudice the Administrator. The purpose of the audit process is to ensure compliance with the substantive provisions of the H-2B program and the terms and conditions of the certification, 73 Fed Reg. 78043 (Dec. 19, 2008), and the Administrator only has two years from the occurrence of a violation to issue a NOID. 20 C.F.R.

² Midway Rides argues that it believed it was futile to seek an extension because the text of the NOID stated that no extensions would be granted. Such an argument is unavailing, particularly in light of the fact that the language of the November 2013 “Final Agency Action on Notice of Intent to Debar” did not prevent Midway Rides from seeking an appeal before this tribunal.

§ 655.31(b)(2). Any earnings records submitted now from work performed in 2011 would be more than two years old. Midway Rides asks that I rescind the current debarment and allow them to submit these records almost two years after the Department originally requested them. Such an action would impede the Administrator from timely carrying out its duty to enforce the substantive protections of the H-2B regulations, and Midway Rides has failed to establish extraordinary circumstances to justify that such an action is warranted.

In light of the foregoing discussion, this matter is DISMISSED with prejudice.

SO ORDERED.

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party wishing review of this decision must, within 30 calendar days of this decision, file a Petition for Review (Petition) with the Administrative Review Board (ARB) at the following address:

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 the undersigned Administrative Law Judge. If the ARB declines to accept the Petition or does not issue a notice accepting the Petition within 30 days of receipt of the Petition, this decision shall be deemed the final agency action. If the ARB accepts the Petition, this decision shall be stayed unless and until the ARB issues an order affirming the decision. *See* 20 C.F.R. § 655.31(e)(5)(iii)(A).