

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 30 November 2006**

**CASE NUMBER: 2007-TLC-00001**

*In the Matter of:*

**GLOBAL HORIZONS, INC.,  
Complainant,**

**vs.**

**U.S. DEPARTMENT OF LABOR,**

**Respondent.**

Appearances:

Arik Ben-Ezra, Esq., Los Angeles, California, for the Complainant.

R. Peter Nessen, Esq., Gary M. Buff, Associate Solicitor For Employment Training Legal Services; Harry L. Sheinfeld, Esq., (Counsel for Litigation), Washington, D.C. for the Respondent .

Before: Gerald M. Etchingham, Administrative Law Judge

**FINAL DECISION AND ORDER**

***I. Statement of the Case***

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (the "INA"), and its implementing regulations, found at 20 C.F.R. Part 655 ("the Regulations"), based upon a request filed on September 26, 2006 by Global Horizons, Inc. ("Global") pursuant to section 218(e) of the INA, 8 U.S.C. § 1188(e), and section 655.112(b) of the INA's implementing regulations, 20 C.F.R. § 655.112(b), for a *de novo* hearing by the Office of Administrative Law Judges ("OALJ") regarding the decision of the Employment and Training Administration ("ETA") of the United States Department of Labor ("Respondent") to deny Global's request for acceptance of its application for a temporary alien labor certification. The matter is subject to expedited hearing and decision rules. 20 C.F.R. § 655.112.

A telephone conference was conducted with the attorneys representing Global and Respondent on October 31, 2006, at which time it was agreed that the two sides would allow Global one more opportunity to modify its application by November 7, 2006 or another telephone conference would be had on November 9, 2006 to set a hearing date the following

week in Long Beach, California. The parties agreed to waive the expedited time restraints for hearing under the regulations and to obtain a decision within five (5) working days after the ALJ's receipt of the case file.<sup>1</sup>

By orders issued on October 27 and November 9, 2006, the parties were ordered to file pre-hearing statements, witness lists, and exhibit indexes no later than 24 hours before hearing or the evidence or testimony would be disallowed. At hearing on November 15, 2006, Global appeared with 22 exhibits two of which were objected to by Respondent. Respondent relied on the administrative record which comprised of tabbed exhibits CX 1-17, 54 pages through Global's October 20, 2006 request for a *de novo* hearing as well as ALJX 10. The record is now closed.<sup>2</sup>

Upon review of the record and the parties' arguments, I find that Respondent's decision not to accept for consideration Global's temporary alien, agricultural labor certification application ("Global's H-2A application") was consistent with the INA and its implementing regulations. Accordingly, I affirm the administrative determination. The stipulated facts, my findings of fact and conclusions of law are set forth below.

## **II. Stipulations**

The parties stipulated as follows:

1. The issue is whether Global has proven that there is an actual temporary need for a specific number of workers over a specific period of time.
2. On September 26, 2006, an application was filed by Global and received on September 28, 2006 by the RA.
3. Global's application was for 30 poultry workers, for employment at Delta Egg Farm for the period of time of November 11, 2006, through September 7, 2007.
4. October 5, 2006, the RA issued a non-acceptance letter and requested Global to make several modifications to the application.
5. One modification requested payroll records which would demonstrate in the RA's opinion at that time that a peak load need exists.

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<sup>1</sup> Some confusion may have been created by my reference during the October 31, 2006 conference call to a deadline for issuing my decision after the parties waived their right to an expedited hearing under section 655.112(b) of the Regulations. In this case, Global has requested a *de novo* hearing and an opportunity to offer additional evidence in contrast with section 655.112(a) which prohibits the ALJ from admitting any additional evidence. *De novo* hearings are governed by section 655.112(b) which provides for an ALJ decision "within ten working days after the hearing." 20 C.F.R. section 655.112(b)(iii).

<sup>2</sup> The record consists of the administrative file which I included as administrative law judge exhibit ("ALJX") 10 which was submitted to OALJ on October 30, 2006 by ETA's Regional Certifying Officer ("RA") and the supporting documentation submitted by Global which has been admitted into evidence with no objections as Complainant exhibits ("CX") 1-19 and 21. These exhibits included three new exhibits, CX 20, 21, and 22, two of which (CX 20 and 22) had never been seen by Respondent. Objections were made to Global's exhibits 20 and 22 which are addressed in the body of this decision. Also, I submitted additional ALJX's 1-10 which were offered and admitted into evidence with no objections. The transcript from hearing is referred to as "TR."

6. October 10, 2006, Global responded to the October 5 non-acceptance letter.
7. October 13, 2006, the RA issued a second non-acceptance letter with its explanation that the temporary need had not been established.
8. Also on October 13, 2006, the RA's refusal to accept Global's application included the wording that was based on the fact that Global was given the opportunity to prove that a peak load need existed by submitting payroll records but had failed to do so. This refusal also informed the applicant (Global) that it could appeal and gave Global notice that they could file either for an administrator ruling or decision or a request for a trial *de novo*.
9. October 16, 2006, Global responded to the second non-acceptance letter with an attached October 13, 2006 Delta Egg letter stating that historically they have an increased demand for labor from July to April of the following year and that their season is supported by a nationwide egg industry-standard which is provided in the US Department of Agriculture Poultry Statistics of National Laying Hen Numbers and charts of the dozens of eggs sold by Delta in 2005.
10. Also October 16, 2006, Global's application was revised down to 16 workers and the dates were shortened to November 12, 2006 through April 30, 2007.
11. October 17, 2006 the RA, via an e-mail to Global, once again declined to accept the application and explained that Global's recourse at that time was simply to either ask for an administrative decision or request a trial *de novo*.
12. October 20, 2006, Global requested a *de novo* hearing with the OALJ.
13. On November 7, 2006, Global submitted additional evidence in the form of a further modification of its application.
14. Also on November 7, 2006, the RA issued a new denial of the acceptance of the certification.
15. By November 7, 2006, the RA had denied acceptance of Global's application three times.  
TR at 31-36; CX 1-19; ALJX 10.

### ***III. Findings of Fact and Conclusions of Law***

#### ***A. The H-2A Program and Global's Application***

On September 26, 2006, Global, on its own behalf based on a contractual relationship with Delta Egg, filed an Application for Alien Employment Certification with ETA for thirty (30) poultry farm-worker positions. CX 7-17 at 34-54; ALJX 10 at 34-54. The application was made

under the INA's H-2A program which permits an employer to seek certification from Respondent for the employment of foreign agricultural labor on a temporary or seasonal basis. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The H-2A program was established by Section 301(a) of the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, § 301(a), 100 Stat. 3411, 3416 (1986), which amended the INA's temporary alien labor provisions by establishing separate administrative certification programs, one for temporary agricultural labor ("H-2A") and another for temporary nonagricultural labor ("H-2B"). See *Sweet Life v. Respondente*, 876 F.2d 402, 406 (5th Cir. 1989). As set forth in the regulations implementing the INA's H-2A provisions, an employer seeking to employ foreign agricultural labor must apply to Respondent for certification 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); 20 C.F.R. § 655.90(b).

Even before certification is considered, the RA must decide whether to accept or deny acceptance of the application. 20 C.F.R. section 655.100(c). Here, the RA denied acceptance of Global's application on three (3) separate occasions after reviewing evidence submitted by Global. Stips. 2-15. In Global's initial application filed on September 26, 2006, it requested approval to hire 30 poultry farm-workers, for employment at Delta Egg Farms, LLC. ("Delta Egg") for the period of November 11, 2006, through September 7, 2007. On October 5, 2006, the RA issued a non-acceptance letter and requested Global to make three modifications to the application. One modification requested Delta Egg's payroll records which demonstrated whether in the RA's opinion, a peak load need exists. CX 6-17 at 31-54; ALJX 10 at 31-54.

On October 10, 2006, Global responded to the October 5 non-acceptance letter and ignored the request for Delta Egg's payroll records. On October 13, 2006, the RA issued a second non-acceptance letter with its explanation that the temporary need had not been established. Also on October 13, 2006, the RA's refusal to accept Global's application stated that the rejection was based on the fact that Global was given the opportunity to prove that a peak load need existed by submitting payroll records but had failed to do so. This refusal also informed the applicant (Global) that it could appeal and gave Global notice that they could file either for an administrator ruling or decision or a request for a trial *de novo*. CX 4-5 at 20-30; ALJX 10 at 20-30.

On October 16, 2006, Global responded to the second non-acceptance letter with an attached October 13, 2006 Delta Egg letter stating that historically they have an increased demand for labor from July to April of the following year and that their season is supported by a nationwide egg industry-standard which is provided in the US Department of Agriculture Poultry Statistics of National Laying Hen Numbers and charts of the dozens of eggs sold by Delta in 2005. Also October 16, 2006, Global's application was revised down to 16 workers and the dates were shortened to November 12, 2006 through April 30, 2007. The October 13 letter from Scott

Patton, Delta Egg's General Manager, also states that "[i]n an effort to show seasonality, Global had requested us to provide payroll records for the calendar years 2004, 2005, and 2006. Unfortunately, our payroll records are not a good measurement of our seasonality or workforce needs." CX 3 at 11-19; ALJX 10 at 11-19.

On October 17, 2006 the RA, via an e-mail to Global, once again declined to accept the application and explained that Global's recourse at that time was simply to either ask for an administrative decision or request a trial *de novo*. October 20, 2006, Global requested a *de novo* hearing with the OALJ. CX 1-2 at 1-10; ALJX 10 at 1-10.

On October 31, 2006, I conducted a telephone conference and the parties agreed to waive the expedited time restraints of an expedited hearing so that Global could be afforded one more chance to modify its application due to the unique circumstances of this case which involves Respondent's transition period in 2005 which ultimately led to the approval of a separate H-2A application in 2005-2006 for Global and Delta Egg. TR at 90-92, 105-110, 116-117; CX 19 at 74; ALJX 2.

On November 7, 2006, Global submitted additional evidence in the form of a further modification of its application. This new evidence included a declaration from Delta Egg's general manager who declared in general terms that there is a seasonal increase in the demand for eggs and that in Millard County, Utah, where Delta Eggs is located, there is a low unemployment rate and an apparent lack of available workers. The other new evidence was also nonspecific to Global's revised request for 16 foreign workers. Also on November 7, 2006, the RA issued a new denial of the acceptance of the certification because the newly submitted documents "fail to demonstrate Global Horizons' alleged need of 16 workers from November 12, 2006 through April 30, 2007." The denial goes on to state that Global's exhibits B, C, and D are:

"entirely inapposite to whether Delta Egg (and therefore Global Horizons) actually needs the workers for the stated period of time. They all discuss the demand for eggs produced by Cal-Maine Foods, Inc., and Cal-Maine Foods' partial ownership of Delta Egg. None addresses an actual seasonal need for additional labor. In fact, Exhibit B explains an increased egg demand due to the popularity of the Atkin's Diet in 2003 and 2004, followed by a decreased demand. Exhibit B also points out that Cal-Maine Foods purchased an additional egg producer, Hillendale Eggs, which could be presumed to lessen the pressure of Delta Egg to increase production. Exhibit B's only discussion of an increased seasonal need is a reference to 'higher egg demand' in the 'fall and winter.' But increased egg demand does not necessarily translate to increased labor need, and 'fall and winter' does not translate to November through April."

CX 18 at 56-57. Respondent's November 7 denial letter goes on to address Mr. Patton's declaration as Exhibit A of Global's newly submitted documents. Respondent states that Mr. Patton's declaration does not, however, solve the deficiencies in Global's application as it does not explain why there is a specific need for 16 additional workers for the specific months requested and contains conflicting information that the need is for the school year of September to June and not November to April. It further states that the information is inconsistent with the graphs submitted with the declaration that shows demand for egg sales and minor percentage

increases in egg production. CX 18 at 57. The denial concludes that the newly submitted evidence “raises more questions than answers” and references Global’s continued “refusal to submit payroll records that would be the best evidence of their actual labor needs during the course of the year.” *Id.* By November 7, 2006, the RA had denied acceptance of Global’s application three times. CX 18-19 at 55-74; ALJX 3 and 4.

### *B. The INA and “Agricultural Labor or Services”*

As discussed above, Respondent rejected all three attempts by Global to comply with the statutory requirements to show that Global has an actual, temporary, labor need for 16 foreign poultry farm-workers from November 12, 2006 to April 30, 2007. The rejections were based on insufficient evidence to support its alleged temporary need for 16 foreign poultry farm-workers from November 12, 2006 to April 30, 2007.

Thus, the issue in this case is whether Global has proven that there is an actual temporary need for a specific number of workers over a specific period of time. Stip. 1.

### *C. Global’s Arguments and Evidence*

Global advances multiple arguments in support of its appeal. Initially, it acknowledges that its initial position was that Delta Egg’s payroll records were useless to this proceeding but later Global apparently realized that its counsel had been confused and that the payroll records are the key evidence to show Delta Egg’s temporary labor need which is what Dr. Holt relied on to create his report and testify at hearing. TR at 12-13, 122-23. Global points to Mr. Holland’s testimony as an example of the confusion that available payroll records were now required. TR at 67-83, 123. On this point, Global states there is nothing in the INA, its legislative history or the Regulations to suggest that only payroll records can satisfy the requirement that it prove Delta Egg’s temporary labor need. TR at 123.

Second, Global charges that Respondent alleges that Global’s application changed seven times when, in fact, it was changed just once because Delta Egg wanted to reduce the number of requested foreign workers from 30 to 16 and reduce the time period from November to September to November to April. TR at 123; CX 3 at 11-19.

Third, Global states that, contrary to Respondent’s contentions, it has produced substantial documentary evidence showing that it was Respondent’s longstanding practice prior to 2006 to certify Global’s H-2A applications without the need for payroll records. Global points to the fact that in 2005 a virtually identical certification application for 20 poultry farm-workers was approved by the RA for poultry farm-workers at Delta Egg without any request that Global submit payroll records or have its application rejected. TR at 90-92, 105-110, 116-117; CX 21. Global mentions that the applicable regulations do not mention a requirement of submitting payroll records. Global also argues that Respondent’s prior practice of approving H-2A applications which did not require the submittal of payroll records demonstrates that Respondent exercised its discretion to interpret the INA to permit routine certification of applications without

the need for payroll records, and it submits that Respondent can now only resort to rulemaking with new regulation or an act of Congress if it desires to change existing policy. TR at 107, 123; CX 1, 3, 7-17, 19 and 21.

Global also argues that Dr. Holt's testimony was clear, to the point, and it was not in any way challenged. TR at 44-66, 124.

Finally, Global charges that Respondent's own RA agreed that Global met its burden and has shown that there is an increase in demand for eggs and a corresponding need for labor during the "high holidays," and that Mr. Patton's declaration also supports this. TR at 124; CX 19 at 64-65.

#### *D. Respondent's Position*

Respondent first makes evidentiary objections to Global's newly produced exhibits CX 20 and CX 22, arguing that at first Global told them that the requested payroll records were unavailable and unhelpful. Global had two chances to produce the payroll records and refused to do so. Even by November 7, 2006, after extraordinary circumstances gave Global a third and final chance to produce the requested payroll records, Global still refused to produce them. In addition, Respondent argues that it is highly prejudicial to allow CX 20 and CX 22 as they have not had any time to review them as they were produced at the morning of the hearing yet available to Global all along. In addition, this evidence was not before the RA at any time when she denied acceptance of Global's application yet Global could have produced this evidence sooner. In sum, Respondent argues that the payroll records could have been produced to Respondent before the hearing and Global should not be given four pitches when it has struck out with three to finally decide to produce this evidence. Finally, Global initially took the position that this evidence was not going to be produced as it was unnecessary given the prior year's application approval or because the records were irrelevant. Now, Global completely reverses its prior position and says they are the crux of their case here. This is inappropriate and Global should be estopped from presenting CX 20 and CX 22 as its new evidence because Global's bad faith or gross negligence should not be condoned as Global said all along until the morning of trial that the payroll records were unavailable. Consequently, these exhibits, CX 20 and CX 22 should be inadmissible. TR at 9-12, 123-127.

Regarding Global's "past practice" argument and the fact that Global's application for 20 poultry farm-workers for Delta Egg for the time period of November 7, 2005 to September 1, 2006 (CX 21) was approved without the submittal of payroll records, Respondent admits that there has recently been a period of "transition" when Respondent consolidated its ETA offices from several regions to two national offices in Chicago and Atlanta. TR at 90-92, 105-110, 116-117; CX 19 at 74; CX 21. During this transition period, Respondent stated that it merely relied on the statements made by employers as to their temporary need for H-2A workers but that starting August 6, 2006, that practice stopped and payroll records have been required prospectively. *Id.* Respondent further replies that its past practice "does not matter" because if Global's position is accepted, the RA would never be allowed to change its procedures to guarantee temporary need because every year Global and others would come back and say that because you did not ask for specific verification documents last year, that practice must carry

over to the next year and each year in continuum. Respondent believes it is not bound by such draconian logic. TR at 126.

Furthermore, Respondent continued to deny acceptance of Global's application because Global's story kept changing with each submission and modification. They started asking for 30 foreign workers for ten months and changed that to 16 workers over 5 months which raised more questions about the propriety of approving Global's application in 2005-2006 when Respondent admits its policy was less strict. Later evidence was submitted pointing to the alleged high demand for eggs in first quarter 2005 in support of this application yet there was evidence from Delta Egg's parent company that egg demand declined quickly in September 2004 as the Atkin's Diet fad subsided and the parent company's egg subsidiaries were left with an over supply of eggs spilling over to 2005. CX 19 at 68. This also raised additional question for the RA while Global continued to refuse to produce Delta Egg's payroll records.

The alleged inconsistencies do not stop here, however, as Respondent argues that while the dates for alleged increased labor need have changed in 2006-2007 from November to September to November to April and the number of workers down from 30 to 16, Global submitted evidence which says that the slowest demand for eggs is in May and June as part of the 2005 application where peak demand extended from July to April. In addition Global submitted a chart showing the biggest demand for egg sales to be from January to March of each year and then in Mr. Patton's declaration he states that the increase in egg demand correlated to the school year which is traditionally September to May/early June. Mr. Patton's declaration makes no mention of any peak, a slow peak, or any differentiation in peak load labor needs. Later Cal-Main, Inc., Delta Egg's parent company, submitted documentation saying that the peak labor need is following winter where in a different Cal-Main press release the peak demand is from November to April with the slowdown from April to August. Consequently, there is no specific consistent admissible evidence that proves Delta Egg's peak load need for 32 workers, 30 workers, 16 workers, or no foreign workers. This was true when the RA made her three decisions to deny acceptance of Global's pending application and this should remain the case here for a fourth time as per Respondent. TR at 127-28.

Respondent further argues that Dr. Holt could not be properly challenged on cross-examined because Respondent did not have the payroll records, or his report that is based almost exclusively on the payroll records, until the morning of trial. In addition the RA has not had a chance to review the payroll records despite repeated requests for them. TR at 125-127.

Respondent also adds that when the payroll records are properly excluded, Global is left with inadequate evidence to support its cause as Mr. Holland admitted that there was no clear correlation between increased egg sales or demand and an increased labor need in this case. While commonsense might support this theory in general, Respondent has no way of knowing in this specific case what that correlation is, how it works, and why 16 foreign workers are needed from any increased demand for eggs at Delta Eggs. TR at 127.

*E. Discussion and Conclusions*

(1) *Admissibility of Newly Offered Delta Egg Payroll Records and Dr Holt's Report*

"A trial *de novo* means a trial on the merits not *de novo* review of an administrative record. [Citations omitted.]" *Greenlaw v. Garrett, III*, 59 F. 3d 994, 999 (9<sup>th</sup> Cir. 1995). In addition, while 20 C.F.R. section 655.112(a) specifically prohibits the receipt of new evidence for administrative review, the same language has been removed from 20 C.F.R. section 655.112(b) for review by way of a *de novo* hearing. As a result, I reject Respondent's argument that Delta Egg's payroll records are irrelevant because my review is based solely on what was in front of the RA which does not include Delta Egg's payroll records or Dr. Holt's report, CX 20 and CX 22, respectively. See TR at 11. In a trial *de novo*, admission of an administrative record by no means precludes the taking of additional evidence or even rehearing the testimony of key witnesses. *Abrams v. Johnson*, 534 F.2d 1226, 1228 (6th Cir. 1976).

Even in the event of a trial *de novo*, however, the evidence received is subject to objections with respect to admissibility. *Abrams, supra.* at 534 F.2d 1226, as cited in *Carreathers v. Alexander*, 587 F.2d 1046, 1049 (10<sup>th</sup> Cir. 1978).

Global offers Delta Egg's payroll records for the first time on the morning of the expedited trial despite previously ignoring the RA's request for these same records and later stating that they were unhelpful, irrelevant, and useless to the case. See TR at 12-13; ALJX 10 at 7, 12, 23. Global's lawyers take the blame for not producing the payroll records sooner as requested by the RA in her first non-acceptance letter to Global of October 5, 2006 as Mr. Holland, the Human Resources Director at Delta Egg's parent company, testified that had he been aware that Respondent demanded the payroll records he would have gotten them to Respondent immediately. See TR at 12-13, 67, 70-72, 80-81; ALJX 10 at 31-33.

Considering the admission of newly offered evidence not presented in the underlying determination before the RA, but raised for the first time before me in a hearing *de novo* review proceeding, I find that in the exercise of a sound discretion I may permit this newly offered evidence only after considering whether there was suppression, bad faith, or gross negligence on the part of Global in failing to offer the newly offered evidence before the RA, or whether, on the other hand, the evidence was not reasonably available to Complainant. See *Standard Oil Co. v. Montedison, S.p.a.*, 540 F2d 611, 616-17 (3d Cir. 1976)(Court of Appeals allowed new fraud issue in *de novo* review proceeding in a civil action brought under 35 U.S.C. section 146.) After considering all relevant factors in this case, I find that manifest injustice to Respondent in this case and the public in future cases due to an ever increasing ALJ docket if I were to allow the admission of the newly submitted payroll records where there is no good cause for the delay in submitting them. In essence, administrative law judges would take the place of RA's if other parties were allowed 3<sup>rd</sup> or 4<sup>th</sup> bites at the apple as Global attempts with its late submission of evidence here.

Generally, "[t]he purpose of the trial *de novo* is to aid the employee in discovering and presenting evidence in aid of his claim of discrimination. The law thus

recognizes that the administrative record may not have developed all of the relevant facts. In the several cases in which a trial *de novo* has been granted, there existed a need to establish the existence of discrimination. {Citations omitted.}]”

*Carreathers*, 587 F2d supra. at 1049. In this case, however, the administrative record is adequate and only Global’s stubborn refusal to produce easily obtainable payroll records in a timely manner has forced a *de novo* hearing.

I find that the decision to consider the admissibility of new evidence like the decision to consider an issue not raised below before the RA is discretionary under the unique circumstances of this case. I further find that either Global’s bad faith or gross negligence delayed the submission of the newly offered payroll records and has caused undue prejudice to Respondent who had insufficient time to review CX 20 and CX 22 and prepare for their introduction prior to trial under the expedited time periods of the H-2A application process. *See Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir 1996) as cited in *Veenstra Dairy v. USDOL*, 2006-TLC-15 (ALJ November 27, 2006) at 2 (Decision to consider new issues is discretionary and limited where no prejudice accrues to other party). I take administrative notice that Global and its counsel are “seasoned players” in H-2A proceedings and quite familiar with the procedural time restraints in the H-2A program, as Global has requested the review of the Department’s determinations before administrative law judges in at least 19 cases since 2003.<sup>3</sup> Global could have faxed or personally delivered the payroll records to Respondent when they were offered to Dr. Holt at least 3 days before trial or during any of Global’s prior three modifications of its application. Global even could have made a request to extend the time for Respondent to respond to the new evidence but they refused to do that too.

As a result, I find that CX 20 and CX 22 are inadmissible.

## (2) *Merits of the Case*

Congress designed the H-2A program to balance two competing interests, that is, “to assure an adequate labor force on the one hand and to protect the jobs of citizens on the other.” *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir.1977) (footnote omitted), *cert. denied*, 439 U.S. 803 (1978). Where these interests collide, courts are guided by “a given, that it has always been a Congressional policy to prefer domestic workers in all fields . . . [and] in case of conflict, wide leeway favoring domestic workers is given the U.S. Secretary [of Labor].” *Flecha v. Quiros*, 567 F.2d 1154, 1155 (1st Cir.1977), *cert. denied*, 436 U.S. 945 (1978). Accordingly, Global’s argument that Congress intended an expansive treatment of the H-2A program is rejected, and I find that Global has not shown that Respondent’s position that the current scheme established by the INA and regulations precludes acceptance of Global’s H-2A application for failing to prove a specific temporary need is erroneous. In addition, I find that Respondent’s explanation that its transition period standards can be tightened once employers are familiar with the new national filing system is entirely reasonable and strikes an appropriate balance between the competing interests of employers and the domestic workforce.

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<sup>3</sup> *See Global Horizons, Inc., et. al v. USDOL*, 2006-TLC-13 (ALJ November 30, 2006), fn.8 at p.5 for a list of the 18 additional prior cases involving Global at the OALJ.

As for the claim that Respondent has established through “past practice” an interpretation of the INA that permits an H-2A application to avoid an RA’s request for payroll records, I find that Global has not met its burden of proof under section 291 of the INA because it has failed to introduce evidence that any H-2A application that Respondent considered after August 6, 2006 must follow an earlier standard where requesting payroll records was not utilized.<sup>4</sup> Moreover, acceptance of Global’s “past practice” argument would necessitate a determination that Respondent is estopped from disapproving its 2006 H-2A applications because it approved similar applications in the past. However, estoppel against the government, if available at all, can only be invoked in extreme cases, and a party seeking to avail itself of the doctrine “must, at the very least, demonstrate that government agents have been guilty of affirmative misconduct.” *Dantran, Inc. v USDOL*, 171 F.3d 58, 66-67 (1st Cir.1999) (affirmative misconduct requires more than simple negligence, and failure of prior Wage and Hour investigator to challenge employer’s wage practice does not amount to affirmative misconduct necessary to equitably estop the government from later prosecuting employer for the wage practice). *See also U.S. v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985) (vagueness or lack of artistry by government bureaucrats not affirmative misconduct). Global has neither alleged nor shown that the Wage and Hour employees’ failure to request payroll records in the past amounted to affirmative misconduct. Therefore, any suggestion that Respondent is estopped by past action or inaction from denying Global’s H-2A application is without merit.

In addition, Global’s presentation of over five different scenarios for Delta Egg’s peak load needs through its three different modifications and the 2005 approved certification contain inconsistent evidence that does raise more questions than satisfy Global’s burden of proof. Most telling is Global’s inexplicable refusal to produce the requested payroll records in a timely manner and Global’s abrupt reversal as to the relevance of these records. The fact remains that Global should not be rewarded with an accepted certification when its conduct in this case has been grossly negligent or in bad faith.<sup>5</sup>

There was also conflicting evidence and testimony that Global, for Delta Egg, needed 30, 16, or no temporary foreign workers in 2006-2007. See TR at 60-64, 75-78; CX 8 at 19; CX 10 at 39; CX 17 at 54. Moreover I agree with Respondent that Global’s evidence is vague and confusing as to the exact time periods for peak load need for workers and it is completely missing as it applies specifically to Delta Eggs rather than to one of Cal-Main’s other 29 egg-producing companies owned by Cal-Main. See TR at 81.

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<sup>4</sup>INA section 291, in relevant part, provides:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant; immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be.

8 U.S.C. § 1361. -

<sup>5</sup> Global was recently found negligent in another H-2A visa case which dismissed Global’s late-submitted request for hearing, effectively debarring Global and its related companies from the use of the temporary alien worker program for three years. *See Global Horizons, Inc, et. al v. USDOL*, 2006-TLC-13, supra at 18-19.

Even if I were to allow Dr. Holt's testimony which he based almost exclusively on the rejected payroll records, I do not find him credible as he testified in generalities, not once testifying credibly about Delta Egg's specific temporary labor need as it related to 30, 16, or no foreign workers. He testified generally about production correlating with increases in labor demand and agricultural economics. In fact, Dr. Holt testified that he had no prior training or experience in the egg industry and did not know of Delta Egg's specific set-up, but made conclusory opinions without credibly explaining how he arrived at his opinions to the specific number of workers requested or the specific time periods as revised by Global. Nor did Dr. Holt clarify the inconsistencies of Global's submitted evidence as referenced above. See TR at 44-67. Dr. Holt provides consulting work for various agricultural companies and has previously participated in another H-2A *de novo* hearing at OALJ's Boston Office in a case styled *Carlson Orchards, Inc. v. USDOL, 2004-TLC-9* (ALJ July 23, 2004) at p. 4. Dr. Holt, as complainant's consultant, in that case, submitted a letter asserting that (1) it has been Respondent's longstanding practice to permit cider pressing and bottling functions in H-2A applications irrespective of the source of the fruit, (2) the INA does not prohibit agricultural workers from performing nonagricultural duties that are customarily part of an otherwise agricultural occupation, (3) pressing apples into cider is a common and ordinary activity performed by the seasonal work force on New England apple farms, and (4) denying growers H-2A certification if they purchase apples for pressing into cider will have a significant adverse impact on New England Fruit growers. Dr. Holt's letter did not persuade the administrative law judge in that case as he affirmed the Respondent's decision denying the complainant's H-2A application. *Carlson, 2004-TLC-9, supra* at 12.

Mr. Holland's testimony confirmed that there was an unexplained inconsistency with the specific number of temporary workers requested by Global. He also confirmed that the payroll records for Delta Eggs were always available for production if it had been communicated that Respondent had requested them. His testimony did not add much more to the record as much of his other testimony was hearsay. See TR at 67-83.

I found Ms. Gonzalez to be credible and quite frank in her description and rationale for Respondent's transition period, which justified Global's unusual third opportunity to provide sufficient evidence to have its application accepted. She credibly testified that since August 6, 2006, her department consistently requests payroll records from all applicants in the H-2A program even though the regulations do not specify this.

Finally, Global's policy and adverse economic impact claims are irrelevant since the RA is not empowered to make policy and is required to follow the procedures and rules laid out by the INA and the implementing regulations. In this case, the RA correctly concluded that the INA and the implementing regulations required her to deny acceptance of Global's H-2A application. I conclude that Global's policy and economic impact arguments exceed the scope of *de novo* consideration of whether Global's H-2A application comports with the INA and H-2A program regulations. Such arguments are more appropriately addressed in a request for rulemaking by Respondent or to the Congress.

Based on the foregoing, I conclude that the RA properly denied acceptance of Global's H-2A application because it failed to provide sufficient evidence justifying Delta Egg's need to employ 16 poultry farm-workers from November 12, 2006 to April 30, 2007.

*IV. Order*

The Respondent's decision denying acceptance of Complainant's H-2A application is **AFFIRMED**.

**SO ORDERED.**

**A**

GERALD M. ETCHINGHAM  
Administrative Law Judge

*San Francisco, California*

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