U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 March 2014

In the Matters of

J.E. COOLEY FARMS,	**ALJ No. 2014-TLC-00054** ETA No. H-300-14037-080405
RANDY HARDIN FARMS,	**ALJ No. 2014-TLC-00055** ETA No. H-300-14031-958121
DIXIE BELLE PEACHES,	**ALJ No. 2014-TLC-00056** ETA No. H-300-14038-194546
C.S. MCLEOD FARMS,	**ALJ No. 2014-TLC-00057** ETA No. H-300-14037-956780
SHEPPARD FARMS,	**ALJ No. 2014-TLC-00058** ETA No. H-300-14050-510117
WALTER P. RAWL,	**ALJ No. 2014-TLC-00059** ETA No. H-300-14050-049075
MEADOW BROOK GAME,	**ALJ No. 2014-TLC-00060** ETA No. H-300-14050-294557
TRAIL FARM,	**ALJ No. 2014-TLC-00061** ETA No. H-300-14050-507166
GAGE TOBACCO,	**ALJ No. 2014-TLC-00062** ETA No. H-300-14050-118183

ELMWOOD STOCK FARM,	**ALJ No. 2014-TLC-00063** ETA No. H-300-14049-235371
BARRY JOE WRIGHT,	**ALJ No. 2014-TLC-00064** ETA No. H-300-14050-322543
RILEY BROS. FARM,	**ALJ No. 2014-TLC-00065** ETA No. H-300-14049-800470
PRODUCE OF CARROLL,	**ALJ No. 2014-TLC-00066** ETA No. H-300-14049-608395
ALLHAY FARM LLC,	**ALJ No. 2014-TLC-00067** ETA No. H-300-14049-415262
W W FARMS,	**ALJ No. 2014-TLC-00068** ETA No. H-300-14049-345319
GALLREIN FARMS,	**ALJ No. 2014-TLC-00069** ETA No. H-300-14049-944073
KAMMAN FARMS, INC.,	**ALJ No. 2014-TLC-00070** ETA No. H-300-14037-378475
COTTON HOPE ORCHARDS,	**ALJ No. 2014-TLC-00071** ETA No. H-300-14042-576168
DUTCHMAN TREE FARMS,	**ALJ No. 2014-TLC-00072** ETA No. H-300-14042-816041
AUTUMN RIDGE,	**ALJ No. 2014-TLC-00073** ETA No. H-300-14037-375147
WEST TEXAS CHILI,	**ALJ No. 2014-TLC-00074** ETA No. H-300-14049-915044

Employers

Appearances: Leon R. Sequeira, Esquire
Prospect, Kentucky
For the Employers

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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER DISMISSING HEARING REQUESTS

The Employers in these matters have requested de novo hearings before an administrative law judge based on the contention that the Certifying Officer constructively denied their applications under the H-2A non-immigrant temporary alien employment program by failing to meet statutory and regulatory deadlines for acceptance of the applications, and/or for rendering a decision on whether to grant or deny labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. Part 655. Because these hearing requests all involve the legal issue of constructive denial, and appear to involve two groups involving the same or substantially the same fact patterns, they have been consolidated under 20 C.F.R. § 18.11 to make an initial determination whether the Office of Administrative Law Judges (OALJ) should assert the authority to conduct such hearings.

POSITIONS OF THE PARTIES

Employers' Hearing Requests and Brief

In their requests for de novo hearings, the Employers in BALCA Case Nos. 2014-TLC-00054 through -00057, and -00070, alleged that the Department notified them that their applications were accepted and met the conditions for certification pursuant to 20 C.F.R. § 655.143, and that all that remains is for the Department to issue the labor certifications. The Employers allege that the Department has been in violation of the statutory and regulatory mandate to issue the certifications within 30 calendar days before the date of need. *See* Immigration and Nationality Act, 8 U.S.C. § 1188(c)(3)(A); 20 C.F.R. § 655.160.

In BALCA Case Nos. 2014-TLC-00058 through -00069, -00071 through -00073 the Employers alleged in their requests for de novo hearings that the Department failed to issue the required Notice of Acceptance within seven days of the filing of the applications as required by 8

U.S.C. § 1188(c)(2)(A) and 20 C.F.R. § 655.143(a), and failed to issue the certifications within 30 calendar days before the date of need as required by 8 U.S.C. § 1188(c)(3)(A); 20 C.F.R. § 655.160.

In their brief, the Employers noted that in *Plumley v. Federal Bureau of Prisons*, 1986-CAA-6 (ALJ Dec. 31, 1986)[1] and in *Newton v. State of Alaska*, 1996-TSC-10 (ALJ Oct. 25, 1996), the ALJs recognized constructive denial as a viable theory. In addition, in *Love v. Environmental Protection Agency*, 2008-CAA-5 (ALJ Aug. 27, 2008), the ALJ acknowledged that "Congress clearly anticipated that [action] by the Department of Labor would be prompt." The Employers noted that in those cases, the issue presented was the length of time in which the Department of Labor (Department) missed a regulatory deadline. In the instant matters, in contrast, the Department has missed statutory deadlines, which are "a bright line the Department cannot avoid or obscure." Employer's brief at 3. The Employers noted that in *Goel v. Indotronix International Corp.*, 2002-LCA-27 (ALJ Jan. 24, 2003), the ALJ found that the complained of delay did not constitute a constructive denial because the delay by the Administrator was "unintentional and not unreasonable." *Goel*, 2002-LCA-27 at 2. The Employers argued that "[i]n the present cases, the Department's delays are clearly unreasonable because the Department has failed to comply with a mandatory statutory deadline." Employer's brief at 3.

The Employer contended that the statutory mandates regarding the timing of the Department's decisions on H-2A applications are unambiguous and mandatory. *See* 8 U.S.C. § 1188(c)(2)(A) ("the employer shall be notified in writing within seven days of the date of filing if the application does not meet the standards ... for approval."); 8 U.S.C. § 1188(c)(3)(A) ("(t]he Secretary of Labor shall make, not later than 30 days before the date such labor or services are first required to be performed, the certification described .... ").

Anticipating that the Department's explanation for the delay in the matters relates to a directive by the Department for the Employers to verify these applications because of a criminal indictment involving the Employers' agent, the Employers argued that the statute and regulations clearly specify the prerequisites for certification, and that the Department has no authority to invent additional steps for certification, or to request completion of additional forms beyond what has been implemented through Notice and Comment rulemaking pursuant to the Administrative Procedure Act and the Paperwork Reduction Act. The Employers also contended that the agent had plead not guilty to the indictment's charges, and that mere allegations are not grounds for taking adverse action against the agent or the agent's clients. The Employers argued that "[t]he mandatory statutory deadlines for the Department to process H-2A applications does not contain an exception for those occasions when the Department wishes to collect duplicative information from some employers whose paperwork is filed by an agent accused of wrongdoing that the agent has denied." Employer's brief at 3 n.1.

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[1] The ALJ's Dec. 31, 1986 decision in *Plumley* only referred, in a discussion of exhaustion of administrative remedies, to an earlier, October 3, 1986 order in which the ALJ had determined that he had jurisdiction under a theory of constructive denial based on the Wage and Hour Division's failure to complete an investigation of a whistleblower complaint four months after the regulatory deadline. The October 3, 1986 order was not published.

The Employers noted that the statutory processing deadlines reflect Congress' intent that "processing of H-2A applications be expeditious because of the time-sensitive need of agriculture." Employer's brief at 4. The Employers also noted that the statutorily imposed expedited appeal process in the H-2A program is unique among programs administered by the Department, and again reflects Congress' intent that a decision on H-2A applications not be delayed. *See* 8 U.S.C. § 1188(e). The Employers argued that a denial of OALJ review of their applications would result in the additional delay and expense of suing the Department in federal district court, and the prospect of having to respond to a failure-to-exhaust-administrative-remedies defense by the Department. Thus, the Employers argue, they would be substantially prejudiced if OALJ declines to find inaction by the Department constitutes a constructive denial.

Certifying Officer's Brief

The Certifying Officer (CO) argued that OALJ should dismiss the Employers' requests for a de novo hearing because a prerequisite to invoking the OALJ's jurisdiction to conduct such hearings is a final determination from the CO. CO's brief at 7.

The CO also argued that he has taken no actions that could be properly characterized as an actual or constructive denial of the applications, but is continuing to process the applications and has in some instances already certified the applications. The CO explained that extenuating circumstances justify added scrutiny and the consequent delay in processing the Employers' applications. Specifically, each of the applications at issue was filed by the International Labor Management Corporation (ILMC). ILMC and two of its principals were indicted by a federal grand jury. The CO stated:

> The indictment alleges that the defendants have defrauded the United States by submitting false statements and signatures in several applications for H-2A and H-2B visas, and conspiring with others to bring workers into the country under the guise of working for an applicant-employer but having the workers work for other employers. The indictment further alleges that defendants had failed to inform their clients that ILMC would place a false signature of the officers of client employers onto applications for certifications, thereby falsely representing that the officer had reviewed the document and certified that it was accurate under penalty of perjury. Based on these allegations, the CO determined that the integrity of the H-2A and H-28 programs would be at risk unless the employers on whose behalf the applications were filed confirmed that they had signed the application s and that the applications contained accurate information.

CO's brief at 2.[2] The CO stated that a verification procedure was necessary because the regulations require it. In this regard, the CO cited 20 C.F.R. 655.100 (the application must contain attestations of the employer's compliance or promise to comply with program

[2] The brief was supported by an affidavit from the Administrator of the Office of Foreign Labor Certification, William Carlson, and by a copy of the indictment filed in U.S. District Court for the Middle District of North Carolina. *United States v. International Labor Management Corp*., Nos. 1:14-cr-39-1, -2 and -3 (filed Jan. 31, 2014).

requirements "); 655.130 (the application must bear the original signature of the employer); 655.135 (an employer must agree as part of the application to comply by all the requirements of the applicable regulations and specified additional assurances); 655.140 (DOL will review the application promptly for compliance with all applicable program requirements); 655.141 (if the CO determines that an application does not meet regulatory requirements, he will provide the applicant an opportunity to cure the deficiency); 655.161 (certification requires compliance with all applicable regulations); and 655.184 (where DOL discovers possible fraud or willful misrepresentation with respect to an application, it may refer the matter to DHS and DOL's OIG for investigation).

The CO contended that the Office of Foreign Labor Certification's (OFLC) actions in regard to the applications belie a claim of constructive denial. Specifically, the CO stated that OFLC continues to process the Employers' applications, in five of the cases certification has been granted,[3] and in the majority of the cases the CO has issued or will issue by March 18, 2014, notices of acceptance. CO's brief at 3, citing Administrator's declaration at ¶ 19.

The CO argued that the Employers' position depends on selective editing of the statutory and regulatory provisions, and ignores the CO's duty to ensure that the applications meet all statutory and regulatory requirements before certifying an application. The CO stated: "Properly viewed, what the employers want to see as plain and mandatory obligations are merely precatory, preserving the Certifying Officers' discretion to grant or deny certification, even after the 30th day before an employer's date of need has passed." CO's brief at 4. In this regard, the CO cited *Frey Produce & Frey Brothers #3*, 2011-TLC-404 (June 3, 2011), in which the ALJ found that the CO's failure to comply with timeliness requirements does not provide aggrieved employers with any specific procedural or substantive rights or remedies. The CO also argued that because of the CO's statutory obligation to certify to the Secretary of the Department of Homeland Security that [t]here are not sufficient U.S. 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 [that 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" the CO's function in processing H-2A applications is not merely ministerial as the Employer's position suggests.

The CO also noted that the Administrative Review Board (ARB)[4] has consistently rejected arguments that failures by Department officials to meet statutory deadlines invoke a right to relief by the aggrieved party. The CO cited *Lewis v. Metropolitan Transportation Authority*, ARB No. 11-070, OALJ No. 2010-NTS-3 (ARB Aug. 8, 2011); *Minthorne v. Commonwealth of Virginia*, ARB No. 09-098, ALJ Nos. 2009-CAA-4 and 6 (ARB July 19, 2011); *Administrator, Wage and Hour Division v. Integrated Informatics, Inc.*, ARB No. 08-127, ALJ No. 2007-LCA-26 (ARB Jan. 31, 2011); *Welch v. Cardinal Bankshares Corp.*, ARB No.

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[3] The five cases are *J.E. Cooley Farms*, 2014-TLC-00054; *Randy Hardin Farms*, 2014-TLC-00055; *Dixie Belle Peaches*, 2014-TLC-00056; *C.S. McLeod Farms*, 2014-TLC-00057; and *Kamman Farms, Inc.*, 2014-TLC-00070.

[4] The Administrative Review Board is an appellate agency that has been deleted authority and responsibility by the Secretary of Labor to review and decide appeals from decisions of ALJs and other Department adjudicators on a wide variety of program areas. *See* Secretary's Order 02-2012, *Delegation of Authority and Assignment of Responsibility to the Administrative Review Board*, 77 Fed. Reg. 69377 (Nov. 16, 2012).

04-054, ALJ No. 2003-SOX-15 (ARB May 13, 2004); *Administrator, Wage & Hour Division v. Beverly Enterprises, Inc.*, ARB No. 99-050, ALJ No. 1998-ARN-3 (ARB July 31, 2002); *The Law Company, Inc.*, ARB No. 98-107 (ARB Sept. 30, 1999); *U.S. Department of Labor, Administrator, Wage and Hour Division, Employment Standards Administration v. HCA Medical Center Hospital*, ARB No. 97-131, ALJ No. 94-ARN-1 (ARB June 30, 1999).

The CO also contended that, with a single exception, the ARB and ALJs have uniformly rejected efforts by litigants to enlarge jurisdiction. The CO cited *Graves v. MV Transportation, Inc.*, 2012-NTS-1 (Jun. 7, 2012) (dismissing for want of jurisdiction complaint that OSHA has constructively denied whistleblower complaint by failing to timely complete its investigation); *Surguladze v. UBS Investment Bank*, 2009-SOX-54 (Jan. 27, 2010) (same); *Love v. United States Environmental Protection Agency*, 2008-CAA-5 (Aug. 27, 2008) (same); *Bartsch v. The Regents of the University of California*, 2002-LCA-20 (Mar. 20, 2003), at 1-2 ("no default provision[exists] conferring jurisdiction on [OALJ] where the [agency] fails to issue a determination or does not timely investigate"); *Goel v. lndotonix International Corp.*, 2002-LCA-27 (Jan. 24, 2003) (recognizing possibility of constructive denial in an appropriate case, but denying relief because agency had begun investigating H-1B complaint and delay was reasonable); *Koger v. Directorate of Civil Rights, United States Department of Labor*, 1999-JTP-20 (Oct. 27, 1999) (dismissing for want of jurisdiction in absence of determination triggering appeal rights), *review denied*, ARB Case No. 00-014 (Dec. 3, 1999); *Watson v. Bank of America*, 2004-LCA-23 (Apr. 12, 2004), at 16 (dismissing action because neither the H-1B statute nor its implementing regulations confer jurisdiction on OALJ where agency fails to issue a determination or fails to timely investigate); *see Watson v. Chief Administrative law Judge*, No. 10-40411 (5111 Cir.) 2010 WL 4033991 (unpublished) (agency's decision to not investigate U.S. worker's claim that he was improperly displaced by an H-1B worker "was entirely discretionary"). The CO argued that the sole exception was *Plumley v. Bureau of Prisons*, 1986-CAA-6 (Dec. 31, 1986), which was apparently an unpublished interlocutory order.[5] The CO argued that *Plumley* is not binding precedent, and that "any persuasive value it may have is diminished by its interlocutory nature and the dismissal of the case before a hearing on the merits." CO's brief at 6, n.2, citing *Coupar v. Federal Prison Industries/UNICOR*, 1992-TSC-6, 1992-TSC-8 (June 11, 1992) (discussing *Plumley's* nonprecedential status).

The CO argued that even if OALJ determined that jurisdiction to conduct de novo hearings can be established under a claim of constructive denial, OALJ must consider the factual context and whether the CO's delays were unreasonable, citing *Mortensen v. First Fed Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. l977). The CO's brief cited the OFLC Administrator's declaration explaining why he determined that additional scrutiny of applications filed by ILMC was warranted and the consultative process that was undertaken by OFLC, the Office of the Solicitor, and the Office of the Inspector General, to fashion a means for verifying of the applications by employers without significantly burdening or delaying applications. The Administrator attested that he determined that he could not fulfil his responsibilities as the OFLC Administrator and the national Certifying Officer without ascertaining the bona fides of the attestations made in the applications, given the allegations made in the grand jury indictment. The CO also attested to his office's intention upon receipt of an attestation to the bona fides of the application, to process the applications as quickly as possible.

[5] *See* n.1, *supra*.

The CO argued in his brief that there can be no serious dispute that the CO may take action to prevent fraud in the certification process, citing several U.S. Supreme Court decisions. The CO argued that the approach he took was measured and appropriate to the risk posed to labor certification process.

Finally, the CO argued in his brief that although the Employers have portrayed the CO as dilatory, they had been provided a simple and speedy means to expedite processing of their applications – reading, completing and returning a short form confirming that it signed the application and that it contains accurate information.

Exhibit B to the CO's brief is a copy of a form Notice of Deficiency (NOD) in which the CO directs modifications to the application in the form of returning a letter entitled "Employer Sponsorship Questions for H-2A Applications." The letter explains why the CO is requesting verification of the application. The letter contains five questions relating to verification that require yes or no answers (or an explanation if the employer cannot answer yes or no), and a signature under penalty of perjury that the responses are true and accurate. The NOD states that the Employer had five business days to respond. The NOD also states notice of appeal rights under 20 C.F.R. § 655.142(c).

DISCUSSION

The United States Department of Labor, Office of Administrative Law Judges is an administrative tribunal of limited jurisdiction. *Entergy Services, Inc.*, 2013-OFC-1 (ALJ Nov. 27, 2012).[6] The Immigration and Nationality Act provides, in pertinent part, that Department of Labor "[r]egulations shall provide for an expedited procedure for the review of a denial of [H-2A labor] certification … or, at the applicant's request, for a de novo administrative hearing respecting the denial …." 8 U.S.C. § 1188(e). The H-2A regulations provide that "*[w]here authorized in this subpart*, employers may request an administrative review or de novo hearing before an ALJ of a decision by the CO." 20 C.F.R. § 655.171 (emphasis added). The H-2A regulations in Subpart B of 20 C.F.R. Part 655 provide an opportunity for expedited administrative review or a de novo hearing before an administrative law judges in three situations: an appeal from a notice of deficiency, 20 C.F.R. § 655.141, where the CO issued a Final Determination letter denying certification, 20 C.F.R. § 655.164, or where the CO issued a partial certification reducing either the period of need or the number of H-2A workers, 20 C.F.R. § 655.165. In the instant matters, the Employers' requests for a de novo hearing on their applications do not fit any of the three authorized situations that convey OALJ jurisdiction to conduct a de novo hearing. Thus, based on the unambiguous text of the H-2A regulations, OALJ is not authorized to conduct de novo hearings in these matters at this stage of the processing of

[6] An adjudicator is obligated to inquire sua sponte whenever a doubt arises as to the existence of its subject matter jurisdiction. Courts have jurisdiction to determine their jurisdiction, even if it is determined that it does not have jurisdiction over the merits. *See Pastor v. Dept. of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003).

the applications,[7] unless OALJ has the authority to assume jurisdiction based on a finding that the delay in the CO's appealable determinations in these matters constitutes a "constructive denial."

The ALJ decisions in *Plumley*, *Newton*, *Love*, *Goel* and *Surguladze* were based explicitly or implicitly on constructive denial based on lack of timely action by DOL official as a potential ground for OALJ taking jurisdiction over a matter. In those decisions, the ALJ merely assumed that constructive denial theory was a valid basis for OALJ jurisdiction. None of these decisions examined the jurisprudential basis for OALJ's exercise of jurisdiction based solely on a finding of constructive denial, and I entertain doubts about OALJ's authority to exercise such jurisdiction.

The Administrative Procedure Act authorizes a suit in federal district court to review ongoing agency proceedings to ensure resolution of matters within a reasonable time. *See Thompson v. U.S. Dept. of Labor*, 813 F.2d 48 (3rd Cir. Mar. 11, 1987). Similarly, a petition for a writ of mandamus in federal court is available to compel mandatory or ministerial agency actions. *See Thompson, supra; Lake Michigan College v. U.S. Dept. of Labor*, No. 1:09-cv-327, 2009 WL 1228906 (W.D. Mich. May 1, 2009) (unpublished). Clearly, OALJ does not have jurisdiction to conduct an APA suit or to conduct a hearing on a petition for a writ of mandamus. *See Constitution of the United States of America: Analysis, and Interpretation - Centennial Edition – Interim*, S.Doc. 112-9 at 703 (Congressional Research Service Library of Congress June 26, 2013)[8] (generally accepted that an act of Congress is necessary to confer judicial power to issue writs); *Lewis v. Metropolitan Transportation Authority*, ARB No. 11-070, OALJ No. 2010-NTS-3 (ARB Aug. 8, 2011) (National Transit Systems Security Act whistleblower case where the ARB denied a motion for writ of mandamus because the petitioner failed to establish that the ARB has the authority to issue such a writ, and because under the NTSA, if a complainant is dissatisfied with the length of time it is taking an ALJ to adjudicate the complaint, and the Secretary has not issued a final decision within 210 days of the filing of the complaint, the complainant may obtain de novo review in U.S. district court); *see also Surguladze, supra* (denying jurisdiction under constructive denial theory in part because the Sarbanes-Oxley Act includes a potential remedy for undue delay by the Department of Labor in the form of filing a complaint in the appropriate federal district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint). Given OALJ's limited jurisdiction, and the availability of an APA suit or a petition for a writ of mandamus in federal court to address delay in agency action, it is hardly clear that OALJ has the authority to take jurisdiction based solely on a finding of constructive denial by an agency. *See Frey Produce & Frey Brothers #3*, 2011-TLC-403 and -404 (June 3, 2011) (ALJ acknowledged that the facts of the cases before him appeared to present compelling arguments for equitable relief and *de jure* approval, but found that OALJ is not a forum of equity).

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[7] *See generally Rodrigo Gutierrez-Tapia*, 2013-TLC-36 (ALJ June 14, 2013) (a post-certification modification to the application is not a matter that the regulations authorize for a de novo hearing).

[8] Available online at www.gpo.gov/constitutionannotated.

I need not today decide, however, whether constructive denial is a viable legal principle in an H-2A administrative-judicial proceeding because, assuming arguendo that it is a viable means of obtaining OALJ jurisdiction over an H-2A case, I find that the circumstances of the instant matters do not warrant invocation of that principle. Almost all of the prior ALJ decisions on the subject note that exercising jurisdiction over a matter based on a finding of constructive denial is an extraordinary procedure and that caution must be exercised in granting such relief.

The regulatory scheme contemplates that the CO will determine whether to accept an application for processing,[9] and then whether to grant or deny certification. Although the statute and regulations impose deadlines on those decisions, they are silent as to any consequences associated with failure to meet those deadlines. Thus, the mere fact that the CO has not been able in these particular cases to meet the deadlines does not automatically deprive the CO of authority to complete his processing of the applications. Instructive is the ARB's discussion of this principle in *USDOL, Wage and Hour Div. v. HCA Medical Center Hospital*, ARB No. 97-131, ALJ No. 1994-ARN-1 (ARB June 30, 1999), about the statutory limitations period for conducting an investigation under the Immigration Nursing Relief Act of 1989, 8 U.S.C. §§1101(a)(15)(H)(i)(a) and 1182(m) (1994):

> The 180-day limitation for conducting investigations at issue in the instant case carries none of the indicia that would divest the Administrator of the authority to investigate after expiration of the limitation. While their language may be mandatory, the statutory and regulatory provisions imposing the investigatory time limitation nowhere specify the consequences of a failure to meet the limitation. Ordinarily, if there is congressional or administrative intent to foreclose action in the event that a time limitation is not met, the statute or regulations specify consequences that flow from the failure to meet the limitation. *Brock v. Pierce County*, 476 U.S. 253, 259 (1986) (parallel limitations without specified consequences in Comprehensive Employment and Training Act and implementing regulations were "intended to spur the Secretary to action, not to limit the scope of his authority"). Nothing in the legislative or regulatory history of the matters at issue here suggests an intent to bar agency action beyond the limitations period. Conducting an investigation and issuing a determination may pose unanticipated difficulties, and the ability of the Administrator to meet the limitation may be subject to factors beyond his control. Absent any statement of contrary intent, such a limitation provides a projected timetable for agency action on a given complaint, rather than curtailing the agency's authority to resolve complaints if the time limitation is not met. Mandatory language that an agency "shall" act within a limitations period, standing alone, "does not divest [the agency] of jurisdiction to act after that time." *Id.* at 266.

HCA Medical Center Hospital, ARB No. 97-131, USDOL/OALJ Reporter at 8. Similarly, I find that the CO's failure to meet the H-2A statutory and regulatory processing deadlines does not deprive the CO of authority to complete processing an application. And like the ALJ in *Frey*

[9] *See* 20 C.F.R. § 655.143 (if application and job order are complete and meet requirements of the subpart, CO issues a notice of acceptance providing "conditional access" to the interstate clearance system, and directing the employer to engage in positive recruitment).

Produce & Frey Brothers #3, supra, I find that the fact that the CO missed H-2A statutory and regulatory deadlines for action by the Department in determining whether to accept an application for processing and whether to grant or denial certification does not provide aggrieved employers with any specific procedural or substantive rights or remedies. The time frames are precatory, and absent an extreme delay (which has not occurred in these matters), the CO's failure to meet those deadlines does not constitute grounds for finding a constructive denial of certification.

Nor do the other circumstances of these matters suggest that anything extraordinary has occurred to merit a finding of constructive denial. Assuming the truth of the Employers' assertions that the deadlines have already been missed by days or weeks, and recognizing that H-2A applications are expedited because of the nature of agricultural labor needs, the OFLC Administrator stated in his declaration that the Employers all have at their disposal an easy means of easing the delay – return the signed verification forms provided by the CO. The Administrator assured in his declaration OFLC's intention to process the applications as quickly as possible upon receipt of assurances attesting to the bona fides of the application. Administrator's declaration at ¶ 21.

The Employers questioned the CO's authority to require signed verification forms. The Employers' challenge to the CO's authority to require verifications, however, is interlocutory in nature and premature for consideration on the merits. For purposes of determining whether extraordinary circumstances exist warranting OALJ taking jurisdiction over the matters, I find only that the CO's decision to require verifications was not so clearly improper as to support a finding of constructive denial.

Even if I were to find that a constructive denial of certification had occurred in these matters, it is not clear that what relief OALJ could provide or whether it could cause final decisions on the applications to be rendered any faster than could the CO. As noted above, the Employers are not entitled to any specific procedural or substantive rights or remedies based on the CO's missing of H-2A processing deadlines. Thus, OALJ taking jurisdiction over the matters would not necessarily lead to anything more than a remand for the CO to complete processing of the applications. To the extent that the Employers might be suggesting that OALJ could process the applications, it suffices to say that OALJ role is adjudicatory and that a de novo hearing is not a substitute for the initial processing of applications by a CO.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Employers' requests for de novo hearings on their H-2A applications are **DENIED** without prejudice as premature.

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge