In the Matter of:

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

PROSECUTING PARTY,

v.

CASTRO HARVESTING,

EMPLOYER.

ARB CASE NO. 13-082

ALJ CASE NO. 2013-PED-002

DATE: November 26, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Gary M. Buff, Esq.; Harry L. Sheinfeld, Esq.; Vincent C. Costantino, Esq.; *U.S. Department of Labor, Office of Solicitor,* Washington, District of Columbia

For the Employer:

Monte B. Lake, Esq.; Wendel V. Hall, Esq.; *CJ Lake, LLC,* Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

This case arises under the H-2A temporary agricultural employment program of the Immigration and Nationality Act (INA), as amended.[1] The Administrator of the Office of Foreign Labor Certification (Administrator) issued a Final Determination against Castro Harvesting (Castro) debarring Castro from participating in the H-2A temporary employment certification program for its failure to timely pay a certification fee. Castro requested a hearing before an Administrative Law Judge (ALJ). The parties filed cross-motions for summary decision. The ALJ determined that there was no genuine issue of material fact that Castro failed to timely pay the certification fee and that such failure constituted a substantial violation of its certification, subjecting it to debarment from the H-2A program. In addition, the ALJ determined that Castro's withdrawal of its application did not entitle it to refund of the certification fee. Castro appealed the ALJ's decision. As we explain below, we affirm the ALJ's determination that (1) Castro was required to pay a certification fee and (2) Castro's payment was untimely and constituted a violation of the INA. We reverse the ALJ's determination that Castro's late payment constituted a substantial violation and, therefore, reverse the debarment order.

BACKGROUND

Castro Harvesting is a farm labor contracting business based in Vidalia, Georgia.[2] On September 28, 2012, Castro filed an Application for Temporary Employment Certification, requesting certification for 99 temporary agricultural workers to work starting on November 1, 2012, to plant onions in Georgia.[3] On November 14, 2012, the Office of Foreign Labor Certification (OFLC) in Chicago granted Castro certification for 99 temporary agricultural workers, and enclosed a bill for fees "assessed relative to the *approval* of your H-2A temporary alien agricultural labor certification request" (the "certification fee") pursuant to 20 C.F.R. § 655.163(a) (emphasis added).[4] The bill indicated that:

> In accordance with 20 CFR 655.163(b), payment must be received no more than thirty (30) calendar days after the date of certification

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1 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(a), 1188 (Thomson/West 2005 & Thomson Reuters Supp. 2013), as implemented by 20 C.F.R. Part 655 (2013).

2 *See* Castro Harvesting's Motion for Summary Decision and for Return of Erroneous Payment, Exhibit 2, Apr. 28, 2013 Declaration of J.C. Castro.

3 *See* Administrative File (AF) at 310-318. On its application, Castro confirmed that it agreed "to all the applicable terms, assurances and obligations contained in Appendix A-2" of the application. AF at 315. One of the "conditions of employment" Castro certified in Appendix A-2 was that "[a]ll fees associated with processing the temporary labor certification will be paid in a timely manner." AF at 316.

4 AF at 100-105.

> or the payment will be considered untimely. Non-payment or untimely payment may be considered a substantial violation subject to debarment procedures under 20 CFR 655.182.[5]

The OFLC issued the certification almost two weeks after the first day that workers were needed. Consequently, one week later, on November 21, 2012, Castro sent to the OFLC in Chicago a letter "requesting to withdraw its Application for Temporary Employment Certification."[6] On November 27, 2012, the OFLC in Chicago informed Castro that its "request for withdrawal has been granted."[7] The OFLC letter "Granting of Request to Withdraw the Application of Castro Harvesting" further stated "[y]ou are reminded that, in accordance with Departmental regulations at 20 C.F.R. sec. 655.172(b), you are still obligated to comply with the terms and conditions of employment contained in the Application for Temporary Employment Certification with respect to workers recruited in connection with that application."[8]

Having received no payment for the certification fee, the Administrator issued Castro a Notice of Debarment on January 17, 2013, for Castro's "failure to pay the required certification fee in a timely manner."[9] The notice informed Castro of its right to "submit evidence to rebut the grounds stated in the Notice to" the mailing address for the OFLC's National Certifying Officer in Washington, D.C., or to "request a debarment hearing" before an ALJ. On January 22, 2013, Castro's agent sent an e-mail to the OFLC in Chicago with the heading "Attention: National Certifying Officer," stating that "[i]n reply to the Notice of Debarment," "[p]lease amend the debarment notice as this application was withdrawn" and the OFLC "granted the withdrawal."[10] Two days later, on January 24, 2013, a Castro representative, Maria Hernandez, e-mailed a further response to the OFLC in Chicago, asking "if I overnight payment today will that take care of the Debar."[11]

In January and February 2013, some confusion in the OFLC occurred during its processing of Castro's failure to pay the Certification Fee. In response to Castro's reply to the Notice of Debarment, an OFLC employee generated an internal e-mail dated January 23, 2013,

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5 AF at 57, 100 (emphasis in original).

6 AF at 42, 85.

7 AF at 40-41, 83-84.

8 AF at 40, 83.

9 AF at 38-39.

10 AF 35-36.

11 AF at 34.

asking "[w]ill the N.O. [National Office] handle the response?"[12] Then, on February 28, 2013, the Administrator issued a Notice of Debarment – Final Agency Action, informing Castro of a one-year debarment.[13] The Administrator issued this notice upon the mistaken belief that Castro failed to submit rebuttal evidence. A subsequent OFLC internal e-mail dated March 7, 2013, was sent noting that the withdrawal of Castro's application for certification was granted and that Castro's reply to the Notice of Debarment was "kicked up to the N.O. [National Office] to see if they would handle the response/treat it as rebuttal evidence" but that "[w]e did not receive a reply."[14]

On March 14, 2013, the Administrator issued a Final Determination, rescinding the February 28 Notice.[15] In addition, after considering Castro's rebuttal evidence, the Administrator held that "the fee must be paid regardless of any post-determination to withdraw the certified" application, and Castro was still obligated to pay the fee within 30 days from the date of certification.[16] Accordingly, the Administrator held that "there is no basis to reverse the debarment decision."[17]

On April 5, 2013, Castro submitted a check to the OFLC in Washington to pay the Certification Fee.[18] By letter the same day, Castro filed a request for a hearing on debarment with the Office of Administrative Law Judges.[19] Before the ALJ, Castro filed a Motion for Summary Decision and the Administrator filed a Cross-Motion for Summary Decision.

The ALJ issued an order denying Castro's motion for summary decision and granting the Administrator's motion for summary decision. Specifically, the ALJ found that Castro's payment of the certification fee for its application was untimely, as it violated the requirement at 20 C.F.R. § 655.163(b) to pay the fee within 30 days of certification.[20] In addition, the ALJ

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12 AF at 36.

13 AF at 32.

14 AF at 27.

15 AF at 24.

16 AF at 25-26.

17 AF at 26.

18 AF at 14, 18.

19 AF at 2-3.

20 Order Denying Employer's Motion for Summary Decision, Granting Administrator's Motion for Summary Decision, and Affirming Administrator's Determination (Order) at 8.

determined that Castro's withdrawal of its application after certification did not excuse its obligation to pay the required certification fee and, because the fee is non-refundable under 20 C.F.R. § 655.163, Castro is not entitled to a refund of the fee.[21] Next, because Castro failed to timely pay the certification fee, the ALJ determined that Castro was subject to debarment pursuant to 20 C.F.R. §§ 655.163(b) and 655.182(d)(2).[22] The ALJ concluded that Castro's failure to timely pay the fee constituted a substantial violation of its certification and, therefore, Castro should be debarred pursuant to 8 U.S.C.A. § 1188(b)(2) and 20 C.F.R. § 655.182(e).[23] Castro appealed the ALJ's summary decision order to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the H-2A program.[24] Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[25] We review a grant of summary decision de novo, i.e., under the same standard that the ALJs apply. This standard is set forth at 29 C.F.R. § 18.40(d) and is derived from Rule 56 of the Federal Rules of Civil Procedure. The ALJ is permitted to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision."[26]

DISCUSSION

1. The H-2A Statutory and Regulatory Framework

For decades, the United States has temporarily admitted non-immigrants as agricultural workers pursuant to the H-2A visa program.[27] Employers who need the labor petition for H-2A

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21 *Id.* at 8, 11.

22 *Id.* at 9.

23 *Id.* at 9-12.

24 Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 20 C.F.R. § 655.112.

25 5 U.S.C.A. § 557(b) (Thomson/West Supp. 2013).

26 29 C.F.R. § 18.40(d).

27 *Administrator v. Global Horizons, Inc.*, ARB No. 11-058, ALJ Nos. 2005-TAE-001 and 2005-TLC-006, slip op. at 5 (ARB May 31, 2013).

visas to admit these agricultural workers to the United States.[28] Congress authorized the Department of Labor (DOL) to enforce the employee protection provisions for those workers admitted under the program.

> The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.[29]

The Secretary of Labor enforces both the attestations an employer makes in a temporary agricultural labor certification application and the wages and working conditions under the H-2A program.[30] The DOL's Employment and Training Administration (ETA) has assigned authority to the OFLC Administrator to enforce the certification process.[31] The Administrator is a national certifying officer, but there may also be other local certifying officers.[32] Pursuant to 20 C.F.R. § 655.172(b), employers may withdraw a certification application "once it has been formally accepted," but are:

> still obligated to comply with the terms and conditions of employment contained in the Application for Temporary Employment Certification with respect to workers recruited in connection with that application.

The INA provides:

> The Secretary of Labor may require by regulation, as a condition of *issuing* the certification, the payment of a fee to recover the reasonable costs of processing applications for certification.[33]

Thus, 20 C.F.R. § 655.163 provides:

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28 8 U.S.C.A. § 1184(a), (c)(1).

29 Section 218(g)(2) of the INA, as amended, codified at 8 U.S.C.A. § 1188(g)(2).

30 20 C.F.R. § 655.102; 29 C.F.R. § 501; *Global Horizons, Inc.*, ARB No. 11-058, slip op. at 6.

31 *See* 20 C.F.R. Part 655 Subpart B.

32 *Global Horizons, Inc.*, ARB No. 11-058, slip op. at 6, n.4.

33 8 U.S.C.A. § 1188(a)(2) (emphasis added).

> A determination . . . to grant an Application for Temporary Employment Certification . . . will include a bill for the required certification fees. Each employer of H-2A workers under the Application . . . must pay in a timely manner a non-refundable fee upon issuance of the certification granting the Application.

The regulation further provides that such fees must be received "no more than 30 days after the date of the certification" and that "non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182."[34]

2. Withdrawal of an Application for Temporary Employment Certification after Issuance of a Certification Granting the Application Does Not Excuse the Obligation to Pay the Required Certification Fees

Castro argued before the ALJ and now argues on appeal that after OFLC granted its withdrawal of its application for temporary employment certification, it no longer was obligated to pay the certification fee. On that basis, it seeks a refund of the certification fee that it has paid in this case. The ALJ determined that Castro's withdrawal after OFLC granted certification of its application did not excuse its obligation to pay the required certification fee and, because the fee is non-refundable under 20 C.F.R. § 655.163, Castro is not entitled to a refund of the fee.[35] We agree.

The INA specifically states that the "Secretary of Labor may require by regulation, as a condition of *issuing* the certification, the payment of a fee to recover the reasonable costs of processing applications for certification."[36] In accordance with the INA, 20 C.F.R. § 655.163 requires an employer to pay "in a timely manner a non-refundable fee upon *issuance* of the certification granting the Application."[37] Thus, 20 C.F.R. § 655.163 is consistent with the INA in requiring payment of a fee once a certification granting an application for H-2A workers has been issued. The key to determining whether the fee is owed, therefore, is whether a certification granting an application for H-2A workers has been issued. It is undeniable that 20 C.F.R. § 655.163 nowhere discusses whether the fee could be obviated if the employer quickly withdrew the application. The regulation that expressly addresses the effect of a withdrawal, 20 C.F.R. § 655.172, speaks about obligations related to "workers recruited." It is undisputed that no workers were recruited in this case. Consequently, the regulations create some ambiguity. Ultimately, we agree with the Administrator that the phrases "upon issuance of the certification"

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[34] 20 C.F.R. § 655.163(b). *See also* 20 C.F.R. § 655.182(d)(2).

[35] Order at 8, 11.

[36] 8 U.S.C.A. § 1188(a)(2) (emphasis added).

[37] 20 C.F.R. § 655.163 (emphasis added).

and "non-refundable" mandate that the certification fee cannot be avoided by withdrawing the application shortly after the Administrator issues the certification.

In this case, the undisputed facts establish that Castro submitted its request to withdraw its Application for Temporary Employment Certification on November 21, 2012,[38] after the OFLC issued the certification granting Castro's application for H-2A workers on November 14, 2012.[39] Consequently, once the OFLC issued the certification granting Castro's application for H-2A workers, Castro was obligated to pay the fee to recover the costs of processing its application for certification. Accordingly, we affirm the ALJ's determination that Castro's withdrawal after issuance of the certification granting its application for H-2A workers does not excuse its obligation to pay the certification fee. In addition, as the ALJ noted, because payment of the required fee is "non-refundable" under 20 C.F.R. § 655.163, Castro is not entitled to a refund of the required fee it has paid.

3. Castro's Payment of the Certification Fee Was Untimely under 20 C.F.R. § 655.163(b) and Constituted a Violation of its Certification

Pursuant to 20 C.F.R. § 655.163(b) (emphasis added), required certification fees must be received "no more than 30 days after the date of the certification" and "non-payment or untimely payment *may* be considered a substantial violation subject to the procedures in § 655.182." Under 20 C.F.R. § 655.182(a) and (d)(2), an "employer's failure to pay a necessary certification fee in a timely manner" constitutes a "violation" of a "temporary labor certification."[40] The Administrator "*may*" debar an employer, *see* 20 C.F.R. § 655.182(a) (emphasis added), only if the Administrator determines that the "violation is *so substantial* as to merit debarment" in accordance with, but "not limited to," the factors set forth at 20 C.F.R. § 655.182(e) (emphasis added).[41] Therefore, an untimely payment of certification fees is not automatically considered a substantial violation; the Administrator must prove that the untimely violation was a substantial violation.

The undisputed facts in this case establish that Castro paid the certification fee late. OFLC issued the certification granting Castro's application for H-2A workers on November 14, 2012,[42] but Castro did not submit its payment of the certification fee for its application until April 5, 2013.[43] The ALJ correctly determined that Castro's payment of the certification fee was

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38 AF at 42, 85.

39 AF at 100-105.

40 20 C.F.R. § 655.182(a), (d)(2).

41 20 C.F.R. § 655.182(a), (e).

42 AF at 100-105.

43 AF at 14, 18.

untimely as a matter of law under 20 C.F.R. § 655.163(b).[44] Therefore, we affirm the ALJ's finding that Castro's untimely payment constituted a violation under 20 C.F.R. § 655.182(a) and (d)(2). The next question is whether the violation was a "substantial violation" under 20 C.F.R. § 655.182(e).[45]

4. Castro's Untimely Payment of the Certification Fee Did Not Constitute a Substantial Violation, as a Matter of Law, and did not Justify Debarment under 20 C.F.R. § 655.182

The INA provides that the Secretary of Labor "may not issue a certification" to an employer seeking to hire H2A workers if:

> [t]he employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined . . . that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.

8 U.S.C.A. § 1188(b)(2)(A). We interpret the phrase "may not issue" to be a mandatory prohibition rather than granting discretionary authority.[46] The Secretary implements this mandatory prohibition through the debarment process set forth in the regulations at 20 C.F.R. § 655.182. Specifically, the Administrator may debar an employer if the Administrator finds that the employer "substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced."[47]

To determine whether a violation is "so substantial" as to merit debarment, 20 C.F.R. § 655.182(e) lists seven non-exclusive factors that the Administrator "may consider." The listed factors are:

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[44] Order at 8.

[45] *Id.* at 9.

[46] We base our conclusion on the context of subsection 1188(b)(2)(A), as well as the prohibitive use of "may not" in subsections 1188(a)(1) and 1188(c)(1). *See United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895)("where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty, rather than conferring a discretion").

[47] 20 C.F.R. § 655.182(a).

> (1) Previous history of violation(s) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;
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> (2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
>
> (3) The gravity of the violation(s);
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> (4) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;
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> (5) Explanation from the person charged with the violation(s);
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> (6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188;
>
> (7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

In weighing these seven non-exclusive factors, the Administrator must keep in mind that the ultimate question is whether the factors taken as a whole demonstrate the violation is so substantial that it "merits debarment," an obviously severe penalty.[48] Nothing in the regulations indicates that each individual factor considered necessarily weighs the same as every other factor in every case. Nor do the regulations suggest that "substantial violation" can be determined solely by mathematically tallying the factors for and against debarment. Instead, the statute and regulations implicitly allow for flexibility to determine the question of "substantial factor." After assessing all the factors and fairly assessing the weight of each factor, the overall weight of the factors supporting debarment must outweigh the overall weight of the factors against debarment.

After considering the factors set forth at 20 C.F.R. § 655.182(e), the ALJ determined by summary decision that "[f]our of the seven factors militate against" Castro.[49] Based on this calculation, the ALJ concluded that Castro's failure to timely pay the fee constituted a "substantial" violation of its certification and, therefore, Castro should be debarred.[50] We are not

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[48] *See, e.g.*, 75 Fed. Reg. 6884, 6935-6936 (Feb. 12, 2010)(DOL's intent is "not to debar employers for minor errors or circumstances beyond the employer's control," but only "when circumstances warrant it.").

[49] Order at 10-11. Because no evidentiary hearing was held, neither the ALJ nor the Board can resolve genuinely disputed issues of fact.

[50] *Id.* at 11.

convinced that the material facts were sufficiently undisputed on each of the factors to allow for a decision as a matter of law, normally requiring a remand of the ALJ's decision.[51] But, as we explain below, even if we credited all of the Administrator's factors weighing in favor of debarment, we find as a matter of law that the Administrator cannot prove that Castro committed a "substantial" violation. Accordingly, we reverse the order of debarment.

In considering the first factor (previous history of violations), the ALJ determined that the evidence established that Castro "clearly has a history of violating" the regulations as, "a mere two months before filing the instant application," Castro had "failed to pay timely a certification fee for its previous application for temporary employment certification."[52] But the parties dispute whether Castro sent a timely check that was lost in transition, an issue that was not resolved and cannot be resolved by summary decision. Given this unresolved fact, we respectfully disagree with the Administrator that the record is "clear" that Castro had previously made an untimely payment of a certification fee.[53] On the other hand, Castro did not dispute the Administrator's assertions that the Administrator sent a demand letter dated May 9, 2012,[54] followed by a Notice of Debarment dated July 12, 2012.[55] The Administrator acknowledged that (1) Castro paid the certification fee on July 20, 2012,[56] and (2) the Administrator rescinded the Notice of Debarment and warned Castro that subsequent violations would be considered a "substantial violation."[57] With respect to other H-2A applications, the Administrator did not dispute Castro's evidence that Castro was granted two prior certifications for H-2A workers in 2008 and no apparent violations were indicated.[58] In the end, as to factor number one, the

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[51] In addition, where the parties file cross-motions for summary decision, the ALJ and the Board must address each motion separately and view the facts in the light most favorable to the non-moving party, mindful of which party carries the ultimate burden of proof at a hearing. *See generally Saporito v. Exelon Generation Co.*, ARB No. 12-034, ALJ No. 2010-ERA-012, slip op. at 4 (ARB Aug. 22, 2013); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (stating that summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

[52] Order at 10.

[53] Administrator's Brief in Opposition to the Employer's Request for Reversal (Administrator's Brief) at 14.

[54] AF at 67-68.

[55] AF at 65-66.

[56] AF at 64.

[57] AF at 63.

[58] AF at 302.

Administrator presented evidence of one debated violation in Castro's three previous H-2A applications.

Turning to the second factor (injury to domestic and non-immigrant workers), the ALJ found that "no workers were affected by [Castro's] violation" of failing to timely pay its certification fee in this case.[59] No evidence exists in the record contradicting the ALJ's finding or otherwise showing that Castro recruited any workers connected to the certification in this case. The lack of injury to domestic or immigrant workers bears great significance, given the number of violations in the debarment regulations pertaining to domestic and non-immigrant workers.[60]

Moving on, the ALJ determined that the third factor "militates against" Castro, considering the "gravity of the violation" at 20 C.F.R. § 655.182(e)(3). The ALJ determined that Castro's violation "is a relatively serious one" as the comments to the regulations note that the DOL does "not believe that it is an effective use of our limited resources to track down employers who fail to pay fees."[61] But the "gravity" of the violation can only be determined in relation to other potential violations, including the thirteen listed in 20 C.F.R. § 655.182(d) such as failing to pay wages, failing to offer a job to a qualified U.S. worker for the H-2A job vacancy, refusing to comply with a sanction, impeding investigations, committing a "heinous act" or "fraud." We agree that the violation in this case was a serious violation. We also appreciate the Administrator's concern that applicants must understand that they cannot ignore their obligation to pay a certification fee. But this case is not simply a case about non-payment or a late payment of a certification fee. In this case, because the OFLC issued the certification after the first day workers were needed, Castro mistakenly believed that it could quickly withdraw the application and avoid paying the certification fee. We previously addressed the slight ambiguity in the regulations. More importantly, the regulations make it clear that untimely payment is not per se a "substantial violation;" this point must be proven. Moreover, given that the certification fee is $100 plus $10 for each H-2A worker (with a $1,000 cap),[62] and the fee is not required from unsuccessful applicants or for applications withdrawn before issuance of the certification, we are not convinced that the untimely payment of a certification fee lies at the "severe" end of the spectrum of "serious" to "most severe" violations. To conclude that the certification fee is "essential to maintain program integrity and to enforce compliance with statutory requirements," as the Administrator argues, requires fact findings from the ALJ based on more evidence in the record.

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59 Order at 10.

60 *See* 20 C.F.R. § 655.182(d).

61 Order at 10; *see* 75 Fed. Reg. 6884, 6936 (Feb. 12, 2010).

62 20 C.F.R. § 655.163(a).

As for the fourth factor (history of good faith efforts), the record does not support the ALJ's *summary* finding that Castro made no good faith attempts to comply with the INA and its regulations. Understandably, the ALJ found troubling that "[d]espite being explicitly advised several times that it must pay the certification fee, [Castro] failed to do so."[63] However, evidence also exists of Castro's repeated efforts to resolve the certification dispute after the OFLC granted a certification on November 14, 2012: (1) Castro withdrew its application only seven days after the OFLC granted a certification with the belief that the certification fee was obviated; (2) three business days after the January 17, 2012 Notice of Debarment, Castro submitted rebuttal evidence based on the withdrawn application; (3) in a January 24, 2013 e-mail, Castro asked "if [it] overnight[ed] payment [would] that take care of the Debar"; (4) the Administrator issued and then rescinded a February 28, 2013 final notice of debarment and stayed the debarment because it failed to consider the rebuttal evidence; and (5) by letter dated April 5, 2013, Castro paid the certification fee under reservation of rights after the Final Determination of March 14, 2013. To determine whether this evidence proves good faith requires an evidentiary hearing. More importantly, the regulatory fourth factor goes beyond the violation in question and asks about Castro's good faith efforts under the immigration laws in general. We see no evidence in the record of Castro's bad faith with respect to any other aspects of the INA.

The ALJ effectively discounted the effect of the fifth (Castro's explanation) and sixth factor (commitment to future compliance). He found the fifth factor neutral and we agree that no summary conclusion can be drawn given the record before us. In fact, we have previously explained that Castro understandably found some ambiguity in the regulations with respect to applications that were quickly withdrawn. The ALJ chose not to rule on the sixth factor because of disputed facts in the record. On appeal, the Administrator did not argue that this factor supported debarment and, given that, we conclude that it does not.[64]

Finally, we turn to the seventh and last factor listed, "the extent to which the violator achieved a financial gain" due to its violation.[65] It is important to note that this factor focuses on the "extent to which" there was financial gain. The ALJ determined that Castro's "failure to pay the certification fee" did "at least temporarily" result in a financial gain for Castro in retaining the $1,000 certification fee until it paid the fee on April 5, 2012. On this basis, the ALJ held that "this factor militates against" Castro, although "it does so weakly."[66] The ALJ's conclusion is critical because it suggests that he places very little weight on this factor, and we agree with that assessment. The evidence in the record only supports a conclusion that Castro held onto $1,000 for a few months longer than it should have (from December 14, 2012, to April 5, 2013). While

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63 Order at 10.

64 See Administrator's Brief at 14, n. 5.

65 20 C.F.R. § 655.182(e)(7).

66 Order at 11.

arguably a factual issue, it is difficult to imagine that Castro reaped a more than negligible benefit from holding $1,000 for an extra three or four months, especially given that Castro's application said that its gross annual revenue was $500,000.[67] Again, on appeal, the Administrator did not argue that this factor supported debarment.

In the final analysis, after considering the list of regulatory factors for debarment, we find that the record contains insufficient evidence as a matter of law to support debarment or to remand this matter on that issue. As we previously indicated, the violation before us stems from a mistaken belief that the certification fee could be avoided by withdrawing an application shortly after issuance of a certification. The attempt to withdraw the application arose because the first day of need for workers had passed when the OFLC granted the certification. We agree that the violation at issue in this case is a serious one, but the late payment of the certification fee in this particular case falls far below the gravity of many other potential violations that threaten the health, safety, and welfare of domestic and non-immigrant workers. If Castro had withdrawn its application eight days earlier, it would have not owed the certification fee. Significantly, the violation harmed no domestic or non-immigrant workers. There is some evidence of one debated violation in the history of Castro's three previous H-2A applications. Apart from the current violation and one debated violation, there is no other evidence supporting debarment. To allow a debarment on this basis would essentially eliminate the meaning of "substantial violation" as the regulations define that term. We do not suggest that a late payment of a certification fee can never support debarment; only that it does not under the undisputed facts of this case.

CONCLUSION

We **AFFIRM** the ALJ's determination that Castro Harvesting's withdrawal of its application for H-2A workers after OFLC granted the certification of its application does not excuse its obligation to pay the required certification fee and, therefore, the ALJ's determination that Castro is not entitled to a refund of the fee is **AFFIRMED**. But the undisputed facts in this case demonstrate that there is insufficient evidence, as a matter of law, to establish that Castro's failure to timely pay its certification fee constituted a substantial violation of its certification. Consequently, the ALJ's determination that Castro should be debarred is **REVERSED**.

SO ORDERED. .

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[67] AR at 311.