



Act, called the Special Agricultural Worker Program, a seasonal agriculture worker employed for 90 days between May 1, 1985 and May 1, 1986 can gain legal status upon submission of the appropriate application and supporting documents, a personal interview, review of the evidence and the requisite approval. If the applicant is not fluent in English, the interviews are conducted in Spanish. If the applicant needs help in filling out the forms, the Catholic Family Services ("C.F.S.") provides assistance.

Hilarios-Martinez's application was supported by two affidavits. One was an "Affidavit Confirming Seasonal Agricultural Employment," which was signed by Gonzales. The second was a "Cash Affidavit," stating that Gonzales paid for Hilarios-Martinez's services in cash. J.C. White ("White"), an adjudicator at the Lubbock INS Legalization office during the summer of 1988, processed Hilarios-Martinez's application after his interview was complete. Hilarios-Martinez had received assistance by C.F.S. in filling out the application, and had already signed it when he brought it in to his interview. Directly above his signature was a penalty of perjury notice. White also signed the application, recommending that it be approved. After the interview, Hilarios-Martinez's photograph and fingerprints were taken. All documents and identification were placed in a file with the INS.

On June 4, 1993, Hilarios-Martinez was charged by Information with a violation of 8 U.S.C. § 1306(c). On August 24, 1993, a one-count indictment superseded the Information alleging that Hilarios-Martinez made a false statement on an immigration application in

violation of 18 U.S.C. § 1546(a).<sup>2</sup> Following a jury trial on November 2, 1993, he was found guilty. On November 29, 1993, he filed a Motion for Judgment of Acquittal, which was denied. On January 21, 1994, he was sentenced to a three year probationary period and a fine of \$500.00.

#### DISCUSSION

Hilarios-Martinez contends that the district court erred when it denied his motion for acquittal. He argues that there was a fatal variance between the indictment and the evidence produced at trial. According to Hilarios-Martinez, although the indictment charged that he did not work in seasonal agriculture work for at least 100 days between May 1, 1985 and May 1, 1986, the government merely proved that he had lied on the application form about working on a certain farm for 104 days.

In reviewing a claim of fatal variance, we will reverse "only if the evidence at trial in fact varied from what the indictment

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<sup>2</sup> The indictment reads as follows:

On or about August 4, 1988, in the Lubbock Division of the Northern District of Texas, and elsewhere, LAZARO HILARIOS-MARTINEZ, Defendant, an alien, did knowingly make under penalty of perjury under Title 28, United States Code, Section 1746, and did knowingly subscribe as true and present to the Immigration and Naturalization Service, a false statement with respect to a material fact in an application required by the immigration laws and regulations prescribed thereunder for registration as a Special Agricultural Worker under Section 210 of the Immigration and Nationality Act, to wit: that the Defendant LAZARO HILARIOS-MARTINEZ had worked in seasonal agriculture work for 100 days between May 1, 1985 and May 1, 1986, when in truth and fact, as the Defendant then and there well knew, said statement was false in that he had not been so employed.

alleged, and the variance prejudiced the defendant's substantial rights." *United States v. Faulkner*, 17 F.3d 745, 760 (5th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3066 (U.S. Jul. 18, 1994) (No. 94-100) (citing *United States v. Bruno*, 809 F.2d 1097, 1103 (5th Cir.), *cert. denied*, 481 U.S. 1057, 107 S.Ct. 2198, 95 L.Ed.2d 853 (1987)). "The extent or range by which proof may vary from indictment before prejudice arises is much narrower in a false statement case than in many other prosecutions." *United States v. Lambert*, 501 F.2d 943, 948 (5th Cir. 1974) (en banc). Nevertheless, a fatal variance does not automatically occur if the evidence is not *in haec verba* with the statement charged in the indictment. *Id.*

The Government argues that any discrepancy between the indictment and the proof at trial did not constructively amend the indictment because the Government proved the essential elements of the charged offense. In addition, Hilarios-Martinez's substantial rights were not prejudiced in any way because the language in the indictment specifying the false statement amounted to mere surplusage.

The testimonial and documentary evidence presented by the Government at trial established that Hilarios-Martinez lied on his INS application about working on the Wilhelm farm for 104 days between May 1985 and September 1985. The indictment alleged, however, that Hilarios-Martinez falsely stated on his application that he had "worked in seasonal agriculture work for 100 days between May 1, 1985 and May 1, 1986." The indictment, therefore,

does not refer precisely to the question in the application regarding "[f]ieldwork in perishable commodities from May 1, 1983 through May 1, 1986," or to Hilarios-Martinez's answer. Therefore, we find that a variance between the indictment and the evidence adduced at trial does exist.

We must next determine whether such a variance prejudiced Hilarios-Martinez's substantial rights. Specifically, we must decide whether the indictment notified him adequately to permit him to prepare his defense and whether the indictment leaves him vulnerable to later prosecution because the offense was not defined with particularity. *United States v. Hernandez*, 962 F.2d 1152, 1159 (5th Cir. 1992) (citing *United States v. Lokey*, 945 F.2d 825, 832-33 (5th Cir. 1991), and *United States v. Richerson*, 833 F.2d 1147, 1155 (5th Cir. 1987)).

After reviewing the testimonial and documentary evidence, we find that Hilarios-Martinez was adequately informed that the Government was challenging the one statement he made in response to the question on the INS application regarding "[f]ieldwork in perishable commodities from May 1, 1983 through May 1, 1986." Further, we find that the indictment is particular in that it does not leave Hilarios-Martinez vulnerable to later prosecution. The statement in the indictment regarding his false statement is short and succinct, and Hilarios-Martinez was not left to guess on what part of the statement the Government would rely. Therefore, he has failed to show any violation of his substantial rights.

Hilarios-Martinez next contends that his conviction was not

supported by sufficient evidence. Specifically, he argues that the Government failed to prove that it was he who made a false statement to the INS on his application.

In reviewing a challenge to the sufficiency of the evidence, we examine the evidence in the light most favorable to the prosecution, making all reasonable inferences and credibility choices in favor of the jury's verdict. *United States v. Vasquez*, 953 F.2d 176, 181 (5th Cir.), *cert. denied*, \_\_\_U.S.\_\_\_, 112 S.Ct. 2288, 119 L.Ed.2d 212 (1992). The evidence is sufficient if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *Id.*

The jury is solely responsible for determining the weight and credibility of the evidence. See *United States v. Martinez*, 975 F.2d 159, 161 (5th Cir. 1992), *cert. denied*, \_\_\_U.S.\_\_\_, 113 S.Ct. 1346, 122 L.Ed.2d 728 (1993). Therefore, we will not substitute our own determination of credibility for that of the jury. *Id.* The scope of appellate review remains the same regardless if the evidence is direct or circumstantial. *United States v. Lorence*, 706 F.2d 512, 518 (5th Cir. 1983).

Viewed in the light most favorable to the prosecution, making all reasonable inferences and credibility choices in favor of the verdict, we find that the evidence adduced at trial reflects that the Government proved by circumstantial evidence that it was Hilarios-Martinez who signed the false statement and presented it to the INS.

## CONCLUSION

Having determined that the variance between the indictment and the evidence presented at trial does not violate Hilarios-Martinez's substantial rights and having found that the evidence supports the conviction, we AFFIRM.