UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____

Security, and defendant United States Department of Homeland Security hereby allege as follows:

INTRODUCTION

1. This proceeding relates to the regulation and administration of the H-2B temporary non-agricultural worker program. The H-2 temporary labor program was initially created by the Immigration and Nationality Act (INA) of 1952. Prior to the Immigration Reform and Control Act of 1986 (IRCA), there were no separate H-2B non-agricultural temporary worker provisions in the Immigration and Nationality Act. Rather, there was simply one temporary worker program, the H-2 program. IRCA divided that program into a temporary agricultural worker program, designated H-2A, and a temporary non-agricultural worker program, designated H-2B.

2. The Secretary of Labor is required by 8 U.S.C. §1101 (a) (15)(H)(ii)(b) to determine prior to an employer being permitted to bring temporary H-2B workers into the country that "…unemployed persons capable of performing … service or labor cannot be found in this country."

3. The Secretary of Labor is required to establish effective procedures to determine and certify that: (1) there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested; and (2) that the employment of such foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. See, 8 U.S.C. §1182(a)(5)(A)(i), 8 U.S.C. §1184(c)(1), 8 CFR 214.2(h)(6), 20 CFR 655.0(a), and 73 Fed. Reg. 29942.

4. The Department of Labor (DOL) own Office of Inspector General's last annual report through March 31, 2008 noted that: "OIG investigations revealed that the foreign labor

certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others..." Other reports, investigations and Congressional testimony have documented increasing abuse of H-2B workers.

5. Despite explosive growth in employer demand for the H-2B program and documented abuse of H-2B workers, Secretary of Labor Chao has consistently failed to fulfill her duties to require employers seeking to employ H-2B workers to actively attempt to identify U.S. workers able willing and qualified to accept employment on terms that did not adversely affect the wages and working conditions of similarly employed workers.

6. Instead over the past years, in a series of regulatory actions particular since early in 2005 and culminating in Final Regulations taking effect on Sunday, January 18, 2009 (literally on the eve of the inauguration of a new President), the Secretary of Labor has arbitrarily, capriciously and contrary to law dismantled requirements and procedures previously established in order to lessen the adverse impact of a temporary guestworker program on the employment opportunities for U.S. workers and on the wages and working conditions of U.S. workers. The principal effect and intent of the January 2009 Final Regulations is, to a significant degree, to hamper the ability of a new Secretary of Labor to promulgate regulations and procedures which will effectively protect against adverse impact on employment, wages and working conditions of U.S. workers.

7.

that the employment of such foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8. This case challenges the Department of Labor's ("DOL") and the Secretary of Labor's procedures implemented in March 2005 without an opportunity for notice and comment which establish "prevailing" wage rates which are so low that they adversely affect the wages and working conditions of workers in the United States.

9. This case also challenges the Department of Labor's ("DOL") revised regulations of the H-2B non-agricultural guestworker program, which were promulgated on December 19, 2008, and go into effect on January 18, 2009. See, 73 Fed. Reg. 78020 – 78069 (December 19, 2008).

10. This case also challenges the related revised regulations promulgated by the Department of Homeland Security ("DHS") on December 19, 2008 and which will be effective January 18, 2009. Specifically, the new DHS regulations arbitrarily and contrary to law drastically change the long established definition of the "temporar

19, 2008. The DOL Defendants' policy will have immediate adverse impact on the Plaintiffs and their members. This policy further has an adverse impact generallDw"sages of U.S.ntiffs

26. The minimum wage provisions of the FLSA forbid employers from making certain deductions from workers' wages that would bring those wages below the minimum hourly wage mandated by the FLSA. 29 U.S.C. 203(m). In the preamble to the December 18, 2008 Federal Register promulgation of the H-2B regulations, DOL acknowledges that under the FLSA, "employment expenses incurred by the workers that are primarily for the employer's benefit cannot be counted as wages under 29 U.S.C. §203(m). 73 Fed. Reg. 78040. In the preamble, DOL further states that:

> " [u]nder the FLSA, pre-employment expenses incurred by workers that are properly business expenses of the employer and primarily for the benefit of the employer are considered ``kick-backs'' of wages to the employer and are treated as deductions from the employees' wages during the first workweek. 29 CFR 531.35. Such deductions must be reimbursed by the employer during the first workweek to the extent that they effectively result in workers' weekly wages being below the minimum wage.

29 CFR 531.36." 73 Fed. Reg. 78039.

27. The DOL language as stated above is consistent with the long

28. However, the preamble to the Final Rule actively seeks to undermine the minimum wage requirement by overriding the application of the FLSA wage provision to H-2B

own policy and deviating from the judgment

early 1990's. Between 1992 and 1996 there were only approximately 12,000 H-2B workers a year. However, beginning in the late 1990's the program exploded. See, Andorra Bruno, Congressional Research Service, Immigration: Policy Considerations Related to Guest Worker Programs, January 26, 2006, Order Code RL32044, at CRS-5. The CRS report notes:

> "… the number of H-2B visas issued by DOS [Department of State] dipped from 12,552 in FY1992 to 9,691 in FY1993 and then began to increase steadily."

See, ETA-2008-0002-0022.

37. The comparative scope of recent employer demand for H-2B workers in recent years is demonstrated by a historical review of DOL disclosure data for the period FY02 through FY07 which reveals the following.

44. These changes in methodology resulted in the drastic and continuing reduction in wages required to be paid to H-2B workers in many industries.

45. Among other things, that policy removed the requirement that Davis Bacon Act and/or McNamara-O'Hara Service Contract Act prevailing wage requirements should be applied when possible. Those wage rates were consistently higher than those under the new methodology adopted by DOL and the Secretary of Labor. DOL and the Secretary arbitrarily, capriciously and contrary to law failed to consider the adverse impact on wages of U.S. workers in jobs for which employers sought to utilize H-2B workers.

46. Since March 2005 the "prevailing wage" has been calculated using wage data calculated at local levels using an Occupational Employment Statistics (OES) survey performed by the DOL's Bureau of Labor Statistics (BLS) and the four "skill levels" artificially created by DOL rather than average or median "prevailing" wages. Under the formula used to calculate the skill levels, Level I is the average wage paid to the lowest one-third of workers in an occupation in a local area, or the 16.5th percentile. Level IV is the average wage paid to the remaining two-thirds, or the 66.66th percentile. Levels II and III are derived from the Level I and IV wages. The formula takes the difference between the Level IV

47. The result of the prevailing wage determination policy implemented for H-2B applications submitted for federal FY06 and thereafter has been that the approved "prevailing wage" for an employer seeking H-2B workers is usually far lower than the average hourly wage paid in the locality for that kind of work. See, Ross Eisenbrey Exhibits E, F, and G annexed to comment ETA-2008-0002-0088 (submitted July 7, 2008).

48. This problem is exemplified by the landscaping industry. In 2007, landscape laborer was the job category most often certified for H-2B employment. Despite this, the prevailing wage for 47 of 49 companies employing H-2B landscape laborers in two counties in New York was more than four dollars less per hour than the average hourly rate for landscaping workers in those counties. See Ross Eisenbrey, H-2B and the U.S. Labor Market, Economic Policy Institute (June 24, 2008, attached as Exhibit F to ETA-2008-0002-0088).

49. In an unpublished analysis of prevailing wage rates for 98 occupations in nine states and 27 different cities of employment, chosen randomly, all but three determinations set the prevailing wage rate below both the median hourly wage and the mean hourly wage prevailing in the area, sometimes by as much as 50%. See Exhibit G attached to ETA-2008-0002-0088, Ross Eisenbrey Unpublished Research Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage.

50. This policy change was arbitrary and capricious and contrary to law in that it was inconsistent with the requirements of 8 U.S.C. §1182, which requires that "[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that . . .there are not sufficient workers who are able willing, qualified. . . and available at the time of application for a visa and admission to the United States and at the place

where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. §1182(5)(A).

51. The policy change is also inconsistent with the regulations (initially of the Department of Justice and subsequently of the Department of Homeland Security) which impose upon employers the obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). Those regulations at 8 CFR 214.2(h)(6) require the Secretary of Labor to issue a certification "…stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers." 8 CFR 214.2(h)(6)(iv)(A)(1).

52. The policy change is also in conflict with the long established requirements of 20 CFR 655.0(a), which mandate:

> (1) . . . procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.
>
> (2) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S.

workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery, 531 F. 2d 299 (5th Cir. 1976).*

53. The March 2005 policy change has resulted in devastating wage reductions for H-2B workers in a manner contrary to law. In addition, contrary to law, U.S. workers in industries employing H-2B workers have been adversely affected by these wage reductions.

DOL 2008 Regulatory Action

54. DOL issued a Notice of Proposed Rulemaking ("NPRM"), publishing proposed rules on the Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers) and Other Technical Changes on May 22, 2008, with a Notice and Comment period ending July 7, 2008.

55. The record before the agency of comments and actions related to that proposed rulemaking has been posted under ETA-2008-0002 Docket at:

http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=ETA-2008-0002.

56. On June 4, 2008, the Honorable George Miller, Chair of the U.S. House Education and Labor Committee, submitted a request for more information and a request for an extension of the forty-five day Notice and Comment period. See: ETA-2008-0002-0014.

57. On June 17, 2008, the Southern Poverty Law Center requested that DOL extend its Notice and Comment period forty-five additional days. See: ETA-2008-0002-0036.

58. On June 24, 2008, the Brennan Center for Public Justice requested that DOL extend its Notice and Comment period forty-five additional days. See: ETA-2008-0002-0086.

59. On June 30, 2008, Friends of Farmworkers, Inc. requested that DOL extend its Notice and Comment period for an additional forty-five days. See: ETA-2008-0002-0087.

60. On July 2, 2008, Change to Win, a partnership of seven unions with six million members, requested that DOL extend its Notice and Comment period for an additional forty-five days. See: ETA-2008-0002-0023.

61. DOL abused its discretion and acted arbitrarily when it denied these requests for an extension of the public comment period. See: ETA-2008-0002-0092.

62. One hundred thirty-four (134) individuals and organizations submitted comments, of which "88 were unique and another 46 were duplicate form comments." 73 Fed. Reg. at 78023.

63. On December 18, 2008, DOL issued its final rule. 73 Fed. Reg. 78019-78069. The regulations go into effect on January 18, 2009.

64. The December 18, 2008 actions by DOL in promulgating its final rules are arbitrary and capricious and contrary to DOL's statutory obligations to protect workers. They further run contrary to the evidence before DOL in the administrative record, and are not explained and justified. In some cases, new policies were adopted without notice and comment.

65. These regulations will cause devastating harm to U.S. workers and to H-2B guestworkers by causing an adverse effect on U.S. workers' wages and working conditions and by eliminating labor protections.

Wages

66. Federal law requires the Secretary of Labor to establish effective procedures to "determine and certify" that the employment of H-2B workers foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

67. The Secretary of Labor's changes in policies for determination of H-2B prevailing wages beginning in March 2005 had a particularly devastating impact on the wages and working

conditions of U.S. workers beginning with applications for federal FY06 and FY07 because the H-2B program was temporarily expanded beginning in May 2005 through the creation of a "returning worker" exemption to the general statutory cap on the number of H-2B workers permitted to enter the country annually.

68. As the H-2B program has expanded its role in certain industries such as landscaping and into an increasing breadth of job classifications, the adverse impact of the DOL's establishment of lower required wage rates for H-2B employment has had an adverse economic impact on the wages and working conditions of U.S. workers, in violation of the Secretary of Labor's duties under the H-2B program.

69. Although the 2008 DOL NPRM offered the public its first opportunity to comment on the procedures to be utilized by DOL for determination of "prevailing wages," DOL and the Secretary of Labor arbitrarily and contrary to law continued in the final rule to use procedures for determination of "prevailing wages" which have a severe adverse impact on the wages of U.S. workers.

70. Despite the continuing failure of the Secretary of Labor to promulgate regulations for the H-2B program to establish a system for determining wage rates which will not adversely affect the wages and working conditions of U.S. workers, DOL arbitrarily and contrary to law rejected without good cause comments in response to its May 2008 NPRM addressing the failure of the existing prevailing wage rate policies to meet the statutory duties of the Secretary of Labor. See, for example, ETA-2008-0002-0022 at pp. 9-11 and Attachments E and F; ETA-2008-0002-0088 at pp. 31-337 and annexed Ross Eisenbrey

71.

the arbitrary refusal of DOL to reconsider its system for determination of prevailing wages was arbitrary and capricious and contrary to law.

73. The record before DOL reflected evidence of considerable reasons to be concerned about existing policies of accepting employer wage surveys to reduce the already low prevailing wage rates established by DOL for most H-2B workers. DOL arbitrarily and capriciously and without justification permitted employer surveys to be used for determining required prevailing wage rates without establishing procedures to safeguard against an adverse impact on the wages of U.S. workers.

Elimination of Role of State Workforce Agencies

74. During 2005, DOL and the Secretary of Labor, by administrative orders issued without an opportunity for public comment, dismantled the established structure for ETA Regional offices to review H-2B applications for their regions in consultation with the State Workforce Agencies (SWAs) within their region. The interaction of Regional Staff with local SWA staff over a period of years had created a shared level of expertise in reviewing employer applications for H-2B workers.

75. Comments submitted to DOL during the 2008 NPRM noted the effectiveness of the Philadelphia Regional Office in reviewing the wage and working conditions terms of applications for H-2B workers with that Region. ETA-2008-0002-0022 at p. 8. Those offices in conjunction with the SWAs also were able to evaluate what local publications might most effectively disseminate information about job opportunities, including whether Spanish language media should be required to be utilized for certain jobs. By mid-2005, those offices and their local expertise had been eliminated. The 2005 decision by the Secretary of Labor to eliminate those Regional offices role in the H-2B was arbitrary and capricious.

76. Under the existing regulations, SWAs are responsible for processing employer's application and job offer, which includes ensuring that the offered wage equals or exceeds the prevailing wage, that the applicant's need falls into one of the four categories for temporary need, supervising U.S. worker recruitment, and forwarding the completed applications to ETA for a final determination. In the new rule, DOL has eliminated the role of SWAs in accepting and reviewing H-2B labor certification applications. 73 Fed. Reg. 78034.

77.

78. The record before DOL reflects that numerous SWAs and other respondents to the NPRM submitted statements to DOL in opposition to the elimination of the role of the SWAs in reviewing H-2B applications submitted by employers. A preliminary review of the record before DOL in the NPRM indicates comments in opposition to the elimination of the role of SWAs as proposed by DOL were submitted by the following commentators:

Document ID	Commenter
ETA-2008-0002-0009	private citizen - BADGER, KEITH
ETA-2008-0002-0014	Committee on Education and Labor - Miller, George Chair
ETA-2008-0002-0018	Law Office of Michelle Skole retired from NJ Alien Certification - Skole, Michelle
ETA-2008-0002-0019	State of Oregon Employment Department - Johnson, Andrew
ETA-2008-0002-0024	Mount Washington Resort - Gruenfelder, Claire
ETA-2008-0002-0028	Ohio Vicinity Regional Council of Carpenters - Galea, Mark

Document ID	Commenter
ETA-2008-0002-0084	Amigos Labor Solutions - Wingfield, Bob
ETA-2008-0002-0088	Low Wage Worker Legal Network and Other Co-Signers
ETA-2008-0002-0090	Texas Workforce Commission
ETA-2008-0002-0091	Laborers' International Union of North America

79. DOL's final rule arbitrarily assumes that the only function which SWAs perform apart from referral of workers in response to local job orders is the ministerial calculation of required prevailing wage rates. The record before DOL reflected that SWAs have a broader role in the review of applications of applications submitted by prospective H-2B employers. In the absence of effective DOL Regional office review of terms and conditions of employment apart from the calculation of wage rates, the SWAs have been forced to assume that role by default.

80. DOL's justification for eliminating SWAs from the H-2B application process is arbitrary, capricious, and contrary to law in that it elevates its "commit[ment] to modernizing the application process" over the statutory mandate that it protect the wages *and working conditions* of U.S. workers. 73 Fed. Reg. 78034.

81. DOL relied on past complaints that it has allegedly received from employers that the existing system is "complicated, time-consuming, inefficient, and dependent upon the expenditures of considerable resources by employers," 73 Fed. Reg. 78022, and arbitrarily ignored arguments by the commenters that eliminating the SWAs from the application and certification process "would result in the loss of local labor market and prevailing practice expertise in the review process. . . would increase the potential for fraud," and that "the knowledge and expertise of local staff in reviewing and processing applications was essential to the integrity of the H-2B certification process." 73 Fed. Reg. 78034. See also: ETA-2008-0002-0022 at pp 1-5 and Attachments A and B thereto (as to the scope

82. DOL asserts that the elimination of SWAs is necessary because, "[t]he increasing workload of the Department and SWAs poses a growing challenge to the efficient and timely processing of applications," 73 Fed. Reg. 78022, but they provide no authority for this assertion. To the contrary, many of the SWAs that commented expressed their desire to continue processing and reviewing H-2B applications. See, e.g., ETA-2008-0002-0039 (Pennsylvania), ETA-0002-0040 (North Carolina), ETA-002-0063 (Maryland), ETA-0002-0078 (Nevada), ETA-0002-0090 (Texas), ETA-2008-0002-0019 (Oregon), ETA-2008-0002-0025

85.

89. In the preamble to the Final Rule, DOL states that the definition of full-time "should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week" and that "the parameters set forth in the definition of 'full-time' . . . are not a requirement that an employer offer a certain number of hours ..." 73 Fed. Reg. at 78024.

90. This new definition of full-time, coupled with the disclaimer that the employer does not even need to guarantee the 30 hour minimum, is a major, and wholly unexplained, change from the proposed rule and from the existing regulations

91. DOL has provided no empirical data, and no such data was submitted to DOL, to support its assertion that its new definition of full-time employment "reflects [its] experience in the administration of this program." 73 Fed. Reg. at 78038.

92. The definition of full-time as 30 hours per week is arbitrary, capricious and contrary to law in that it will materially adversely affect U.S. workers.

93. DOL's interpretation of the definition is also a major change from the existing interpretation, and represents a new policy. *See* Comments of Mid-Atlantic Solutions LLC, ETA-2008-0002-0071 (noting that some State Workforce Agencies have rejected applications offering fewer than 40 hours of work per week).

94. DOL's new interpretation of the full-time definition as not establishing a contractual obligation to actually provide a certain number of hours of work per week was not subject to Tojor.3 TD-0.00c.9(ent "ref noubject to Tol-)]TJ14p5 01 s Tc-0.005dnT2ould nppearefinitiorule and f

RECRUITMENT OF U.S. WORKERS

96. The Secretary of Labor is required by law to establish effective procedures to "determine and certify" that th

workers;

(d) employers must abide by the terms of the job offer they have submitted

100. Each employer who intends to hire H-2A workers have been required to prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). Those regulations required employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id. §655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

101. In addition to the requirements of the individualized recruitment plans, all H-2A employers have been required to:

a. Assist the ES in preparing job orders for posting locally and in the interstate system, *Id.* §655.103(d)(1);

b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator, *Id.* §655.103(d)(2);

c. Contact labor contractors, migrant workers, and other potential workers in other areas by letter and/or telephone, *Id.* §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans'

organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other

104. In addition to the requirements of the

comment on the appropriateness of measures to be required from employers for the recruitment of H-2B temporary workers.

107. The existing procedures for recruitment of U.S. workers for the H-2B program have never paralleled procedures for recruitment of H-2A workers and the limited extent of recruitment requirements under the existing H-2B procedures have not been adequate to meet the responsibilities of the Secretary of Labor pursuant to 8 U.S.C. §1182(a)(5)(A)(i).

108. DOL's December 19, 2008 provisions for recruitment of H-2B workers do nothing to overcome the historical failure of the Secretary of Labor to have met requirements of law for insuring that U.S. workers have access to job opportunities with H-2B employers. The new regulations provide as to recruitment as follows:

> Sec. 655.15 Required pre-filing recruitment.
>
> * * *
>
> (d) Recruitment Steps. An employer filing an application must:
>
> (1) Obtain a prevailing wage determination from the NPC in accordance with procedures in Sec. 655.10;
>
> (2) Submit a job order to the SWA serving the area of intended employment;
>
> (3) Publish two print advertisements (one of which must be on a Sunday, except as provided in paragraph (f)(4) of this section); and
>
> (4) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.
>
> (e) Job Order.
>
> (1) The employer mue job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA mu TDkeep the job order open fioa period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the

job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.

(2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in Sec. 655.17.

(f) Newspaper Advertisements.

(1) During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, the employer must publish an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement (except as provided in paragraph (f)(2) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer must, in place of a Sunday edition advertisement, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements contained in Sec. 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, then the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute permitted by paragraph (f)(2) of this section).

(g) Labor Organizations. During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, an employer that is already a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application must formally contact by U.S. Mail or other effective means the local union that is party to the collective bargaining agreement. An employer governed by this paragraph must maintain dated logs demonstrating that such organizations were contacted and notified of the

position openings and whether they referred qualified U.S. worker(s), including number of referrals, or were non-responsive to the employer's request.

(h) Layoff. If there has been a layoff of U.S. workers by the applicant employer in the occupation in the area of intended employment within 120 days of the first date on which an H-2B worker is needed as indicated on the submitted Application for Temporary Employment Certification, the employer must document it has notified or will notify each laid-off worker of the job opportunity involved in the application and has considered or will consider each laid-off worker who expresses interest in the opportunity, and the result of the notification and consideration.

(i) Referral of U.S. workers. SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

(j) Recruitment Fker(ym353 TD0.0006 Tc-0.00051rui.t the process for

> The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters who were opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late arrival of H-2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not suitable when serious job seekers are looking for temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further concerned that the U.S. workers who are hired that far in advance of the date of need are not reliable and will not report for work.

73 Fed. Reg. at 78031-78032

110. DOL arbitrarily failed without good cause to discuss or examine proposals for more effective recruitment of H-2B workers, including proposals that it:

> Require More Extensive Recruitment. In the H-2A program, employers are required to engage in the kinds of affirmative strategies that would be expected actually to locate and attract employees to the work. H-2B employers need only run three newspaper ads and list the job with the local SWA for ten days, many weeks before the job will actually become available.
>
> Require Recruitment in Areas of Labor Surplus. With U.S. unemployment rates rising in many parts of the country, efforts should be made to connect U.S. workers with job opportunities through interstate recruitment. This has been a staple of the H-2A program for many years.
>
> Require Employers to Provide Free Housing and Reimbursement of Transportation Expenses. Again, this is a requirement in agriculture.
>
> Adoption of the "50 % Rule." The Department has found that requiring employers to hire qualified U.S. workers who become available at any time up to 50% of the period of the job opportunity helps to locate available U.S. workers, and serves as an incentive to avoid over-recruitment of foreign workers and wrongful rejection of U.S. workers.

See, ETA-2008-0002-0088 at pages 27-32, and 64.

procedures to “determine and certify” that there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

114.

. . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. 1182(a)(5)(A)(i) (emphasis added).

118. Other regulations specifically require certification and not attestation. 8 C.F.R. §214.2(h)(ii)(D) ("An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. . .This classification requires a temporary labor ***certification*** issued by the Secretary of Labor or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.") (emphasis added).

119. DOL failed to consider substantial empirical evidence that the certification process had, in fact, resulted in the denial of a substantial number of H-2B applications which likely would be inappropriately approved under an attestation system. Analysis of data for FY07 that establishes that DOL denied certification of 105,532 positions which was 29.3% of the number of workers sought in employer applications for H-2B workers. See ETA-2008-0002-0022 at pp. 1-5 and Attachment A .

120. Significantly, under an attestation system, the Department will no longer review the recruitment system utilized by employers to ensure that there actually are no U.S. workers available to do the work prior to approving the applications for H-2B workers. 73 Fed Reg. 78057 (to be codified at 20 C.F.R. §655.15).

121. DOL failed to explain how a post hoc attestation system is consistent with its legal obligations to protect U.S. workers. In fact, empirical evidence submitted to DOL clearly

demonstrated that under the former certification regime, DOL did reject a large number of applications for H-2B certification. Under an attestation system, those employers would simply be approved by DOL, causing potentially enormous adverse effect to wages and working conditions of U.S. workers.

122. The arbitrariness of the DOL final rule in assuming that it can effectively satisfy its duties to determine and certify that there is a need for H-2B workers solely on the basis of employer attestations is demonstrated by the recent annual report of the DOL Office of Inspector General which was in the record before DOL pursuant to its NPRM. See, ETA-2008-0002-0088, Attachment A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf

ways that are serious and consequential and, contrary to law, are likely to result in an adverse effect on wages, working conditions, or employment opportunities for U.S. workers.

DHS 2008 Regulatory Action

124. Defendants Secretary of Homeland Security and DHS and issued a Notice of Proposed Rulemaking, publishing proposed rules on Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers on August 20, 2008, with a Notice and Comment period ending September 19, 2008. 73 Fed. Reg. 49109-49122.

125. One hundred nineteen individuals and organizations submitted comments.

126. The record before the agency of comments and actions related to that proposed rulemaking has been posted under USCIS-2007-0058 Docket at: http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCIS-2007-0058.

127. On December 19, 2009, USDHS issued its final rule entitled Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers. 73 Fed. Reg. 78104-78130. The rule goes into effect on January 18, 2009.

Definition of Temporary

128. Current DHS regulations define temporary need in relationship to H-2B

> as demonstrated by the employer's attestations, temporary need narrative, and other relevant information--is less than 3 consecutive years.

73 Fed. Reg. at 78025-78026.

132. DOL accomplishes this by reference to the December 19, 2008 change to 8 CFR 214.2(h)(6)(ii) in the new DHS regulations.

133. Defendant DHS substantially changes the definition of 8 CFR 214.2(h)(6)(ii)(B) to provide:

> (B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a onetime occurrence, a seasonal need, a peak load need, or an intermittent need.

73 Fed. Reg. 78104 at 78129.

134. In conjunction with the creation of a new definition in the revised DOL regulations definitions of a "job contractor" (discussed below), the new definition of "temporary" is arbitrary, capricious and contrary to law.

Definitions of Job Contractor and Employ

135. The definitions section of the DOL regulations at 20 CFR 655.4 as published on December 19, 2008 add a provision for a "Job Contractor" defined as follows:

> Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

73 Fed. Reg. at 78054.

136. The record before DOL reflected that such labor brokers have been identified by the DOL Office of Inspector General as a source of potential serious abuse. ETA-2008-0002-

0088, Exhibit A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf.

The introduction to that report notes:

> "OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others."

The reports summary of significant concerns noted:

> "… defendants also took advantage of the devastation caused by Hurricane Katrina by fraudulently obtaining certific

139. The DOL regulations are contrary to law in that they reflect a narrow restriction on "displacing" current U.S. workers rather than a broad commitment to positive recruitment of U.S. workers for all positions for which employers seek H-2B workers.

140. The DOL regulations arbitrarily fail to bind the "employer" to whom the "job contactor" supplies workers as a joint employer through usage of a narrow common law definition of "employee" rather than a broader protective definition such as used by the FLSA.

141. The DOL regulation at 20 CFR 655.4 of "employee" states:

> Employee means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

73 Fed. Reg. at 78054.

142. DOL arbitra la

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Enter a declaratory judgment that prevailing wage policies effective March 2005 are arbitrary, capricious, and contrary to law and therefore null and void;

(b) Enter a declaratory judgment that the final policy declaration interpreting the Fair Labor Standards Act, 29 U.S.C. §203(m) announced in 73 Fed. Reg. at 78039–78041, 78059 and 73 Fed. Reg. at 77148-77151 is arbitrary, capricious, and contrary to law and therefore null and void;

(c) Enter a declaratory judgment that the Final Rule promulgated by DOL effective January 18, 2009 is invalid as challenged herein under the Administrative Procedure Act and therefore null and void;

(d) Enter a declaratory judgment that the Final Rule promulgated by DHS effective January 18, 2009, is invalid as challenged herein under the Administrative Procedure Act and therefore null and void;

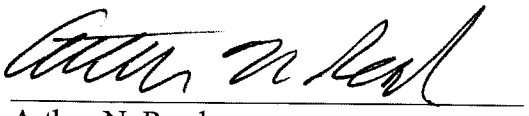
(e) Permanently enjoin the Secretary of Labor and the Secretary of Homeland Security, and the Department of Homeland Security and the Department of Labor from implementing the Final Rules as challenged herein;

(f) Award Plaintiffs their costs and expenses, including reasonable attorney's fees and expert witness fees; and

(g) Grant such further and additional relief as this Court may deem just and proper.

Dated: January 18, 2009

Respectfully submitted,



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