UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Comité de Apoyo a los Trabajadores Agrícolas,
Pineros y Campesinos Unidos del Noroeste,
Northwest Forest Worker Center,
Saul Arreguin Ruiz, Jesus Martin Sauceda Pineda,
and Héctor Hernández Gomez

Plaintiffs

v.

Thomas E. Perez, in his official capacity as United States Secretary of Labor;
United States Department of Labor;
Eric M. Seleznow, in his official capacity as Acting Assistant Secretary for Employment and Training,

Defendants.

Civil No.

Complaint – Class Action

COMPLAINT – CLASS ACTION

PRELIMINARY STATEMENT

1. This is an Administrative Procedure Act (APA) challenge to certain actions of the United States Department of Labor (DOL) and the Department of Labor's Board of Alien Labor Certification Appeals (BALCA) acting on behalf of the Secretary of Labor. Specifically, Plaintiffs allege that the BALCA exceeded its authority and acted contrary to law in declaring certain actions, policies, and rules of the Secretary of Labor governing the H-2B program to be unlawful, including, *inter alia*, the Secretary of Labor's interpretation of the March 21, 2013 Order of the Court in *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 933 F. Supp. 2d 700, 711-12 (E.D. Pa. 2013).

2. Plaintiffs Saul Arreguin Ruiz, Jesus Martin Sauceda Pineda and Héctor Hernández Gomez bring this action as a Fed. R. Civ. P. 23(b)(2) class action for declaratory and injunctive relief on behalf of the in excess of 50,000 U.S. and H-2B non-agricultural workers whose wages have been adversely affected by the unlawful actions of BALCA and the Department of Labor.

3. Plaintiffs seek:

a. A declaration that the actions of BALCA in its December 3, 2013 *Matter of Island Holdings LLC* appeal decision (BALCA Case No.: 2013-PWD-00002) are unlawful and an order vacating that decision;

b. An order enjoining the Secretary of Labor from applying that BALCA decision to any of the 3,095 other H-2B cases in which the National Prevailing Wage Center (NPWC), Office of Foreign Labor Certification (OFLC), Employment and Training Administration (ETA), United States Department of Labor issued supplemental prevailing wage determinations pursuant to the Department of Labor's April 24, 2013 Interim Final Rule (IFR) at 78 Fed. Reg. 24,047 (Apr. 24, 2013) and this Court's March 21, 2013 Order; and

c. A declaration that H-2B workers and similarly employed U.S. workers are lawfully entitled to be paid at the supplemental prevailing wage rates issued by the Secretary of Labor pursuant to the U.S. Department of Labor's April 24, 2013 Interim Final Rule and this Court's March 21, 2013 Order.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346 over this suit for review of final agency action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1946), and 28 U.S.C. §2201 (declaratory relief).

5. This Court has venue pursuant to 28 U.S.C. §1391(e).

PARTIES

Plaintiffs

6. Plaintiff Comité de Apoyo a los Trabajadores Agrícolas (CATA), known in English as the "Farmworkers Support Committee," is a membership organization open to farmworkers, members of the immigrant worker community, and their supporters. Members live and work primarily in southeastern Pennsylvania, southern New Jersey, Delaware and eastern Maryland. Members include U.S. landscaping workers and construction workers. Through its work, CATA strives to improve the working and living conditions of its members and member communities. CATA seeks to protect its members' interest in ensuring DOL is enforcing the H-2B regulations, complying with the relief they obtained in *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700, 711-12 (E.D. Pa. 2013), and operating in accordance with the APA by challenging the Secretary's unlawful actions. CATA has members, an office and staff in the Eastern District of Pennsylvania.

7. Plaintiff Pineros y Campesinos Unidos del Noroeste (PCUN) is a union of farmworkers, nursery, agricultural, food processing and reforestation workers in Oregon. PCUN has more than 5,000 registered members. PCUN's mission is to empower its membership to recognize and take action against worker exploitation. Reforestation workers are subject to regulation under the H-2B program. Regulation of the H-2B program affects PCUN members' wages, working conditions, and ability to obtain and retain jobs. PCUN seeks to protect its members' interest in ensuring DOL is enforcing the H-2B regulations, complying with the relief they obtained in *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 933 F. Supp. 2d 700, 711-12 (E.D. Pa. 2013), and operating in accordance with the APA by challenging the Secretary's unlawful action.

8. The Northwest Forest Worker Center (Center), which was formerly known as the Alliance of Forest Workers and Harvesters, is a multicultural membership organization promoting social, environmental, and economic justice for forestry workers in the Pacific Northwest. Its membership consists of both U.S. workers and H-2B workers who labor in forests. The Center's mission is to advocate for and improve the lives of forestry workers. Forestry workers may be subject to the H-2B regulations, and those regulations affect the Center's members' wages, working conditions, and ability to obtain and retain jobs. The Center seeks to protect its members' interests in ensuring DOL is enforcing the H-2B regulations, complying with the relief they obtained in *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 933 F. Supp. 2d 700, 711-12 (E.D. Pa. 2013), and operating in accordance with the APA by challenging the Secretary's unlawful actions.

9. Saul Arreguin Ruiz ("Plaintiff Arreguin") is a citizen of Mexico and has his permanent residence in Celaya, Guanajuato, Mexico. He has received annual H-2B visas to work in the landscaping industry in southeastern Pennsylvania since 2002. Plaintiff Arreguin entered the United States on an H-2B visa in March 2013 to work in Pennsylvania in Bucks and Montgomery counties for a landscaping industry employer who was certified by DOL for 50 H-2B "Landscaping and Groundskeeping Workers" (Soc Code 37-3011) to be employed from March 2013 until December 15, 2013 at a minimum prevailing wage rate of $9.22 per hour. The employer received a "Supplemental Prevailing Wage Determination" (SPWD) notice from the National Prevailing Wage Center (NPWC) of the Office of Foreign Labor Certification (OFLC) of the Department of Labor's Employment Training Administration (ETA) issued on July 5, 2013, stating that the required prevailing wage rate applicable to its H-2B and similarly employed U.S. workers in the counties where the employer operated would be $14.04 per hour

as of that date because of the Court's order in *CATA I* and the IFR issued by the Secretary of Labor on April 24, 2013. Plaintiff Arreguin's employer through its H-2B agent attorney requested "redetermination" of this SPWD by letter dated July 9, 2013. The NPWC certifying officer reaffirmed the original SPWD on September 4, 2013. The employer sought further review from the NPWC Center Director on September 4, 2013. Plaintiff Arreguin earned less than $14.04 for the duration of the season until he ceased working as a result of a family emergency in late September 2013. He was paid below the required prevailing wage rate for 12 weeks after July 5, 2013.

10. Jesus Martin Sauceda Pineda ("Plaintiff Sauceda") is a citizen of Mexico and has his permanent residence in Guadalcázar, San Luis Potosi, Mexico. Plaintiff Sauceda entered the United States in March 2013 on an H-2B visa for an employer who was certified by DOL for 38 H-2B "Forest and Conservation Workers" (Soc Code 45-4011) in Calhoun and Jackson counties in northern Florida for employment from April 1, 2013 to November 29, 2013 at $9.90 per hour. The employer received a SPWD notice from the ETA on June 12, 2013, stating that the prevailing wage rate applicable to its H-2B and similarly employed U.S. workers in the counties where the employer operated would be $17.14 per hour as a result of the Court's order in *CATA I* and the IFR issued by the Secretary of Labor on April 24, 2013. Based upon information supplied by DOL in response to Freedom of Information Act (FOIA) requests as of September 2013, Plaintiff Sauceda's employer did not seek redetermination of the $17.14 per hour prevailing wage rate. Plaintiff Sauceda's employer failed to pay the higher pay rate to Plaintiff Sauceda and all of the H-2B workers. Plaintiff Sauceda continued to earn a rate below S17.14 for 7 weeks until late July 2013 when he ceased working and returned to Mexico. On October 26, 2013, Florida Legal Services filed a complaint with the U.S. Department of Labor, Wage and

Hour Administration on behalf of Plaintiff Sauceda and his co-workers, alleging the employer violated the H-2B prevailing wage regulation by failing to pay the new wage rate issued pursuant to the IFR and the Court's order.

11. Héctor Hernández Gomez ("Plaintiff Hernández") is a citizen of Mexico and has his permanent residence in Zacatecas, Mexico. Plaintiff Hernández entered the United States to work in the St. Louis, Missouri area in April 2013 on an H-2B visa for a landscaping industry employer who was certified by DOL for 35 H-2B "Landscaping and Groundskeeping Workers" (Soc Code 37-3011) to be employed from March 2013 until December 15, 2013 at a minimum prevailing wage rate of $8.78 per hour. The employer received a SPWD notice from the ETA issued on July 3, 2013, stating that the required prevailing wage rate applicable to its H-2B and similarly employed U.S. workers in the counties where the employer operated would be $12.15 per hour as of that date because of the Court's order in *CATA I* and the IFR issued by the Secretary of Labor on April 24, 2013. Plaintiff Hernández's employer through its H-2B agent attorney requested "redetermination" of this SPWD by letter dated July 3, 2013. Plaintiff Hernández earned less than $12.15 per hour until he ceased his employment in mid-July 2013.

Defendants

12. Defendant Thomas E. Perez is the United States Secretary of Labor. The Secretary is responsible for all functions of DOL, including administration of the H-2B program. Secretary Perez is sued in his official capacity, pursuant to 5 U.S.C. §703.

13. Defendant United States Department of Labor is responsible for issuance of prevailing wage determinations as a part of the process of granting labor certifications for the H-2B program.

14. Defendant Eric M. Seleznow is the Acting Assistant Director of the United States Employment and Training and in that capacity directs DOL's Employment and Training Administration (ETA). He is sued in his official capacity pursuant to 5 U.S.C. § 703.

CLASS ACTION ALLEGATIONS

15. Plaintiffs Arreguin, Sauceda and Hernández bring this action as a Fed. R. Civ. P. 23(b)(2) class action on behalf of a class defined as:

> All H-2B and similarly employed U.S. workers whose employers received supplemental prevailing wage determinations (SPWDs) from DOL pursuant to the April 24, 2013 Interim Final Rule.

16. This class is so numerous that it is impractical to bring all its members before this Court. On information and belief, the class is believed to include in excess of 50,000 individuals employed pursuant to 3,098 ETA H-2B cases. DOL public disclosure data suggests that as many as 3,360 affected H-2B workers were employed in Pennsylvania in a total of 209 ETA H-2B cases.

17. There are questions of law and fact common to the class including the central question posed by this suit – whether the BALCA exceeded its lawful authority in declaring the Department of Labor's supplemental prevailing wage determinations to be unlawful and the other challenged actions of the Department of Labor.

18. The representative Plaintiffs' claims are typical of the claims of the other class members.

19. The representative Plaintiffs will fairly and adequately protect the interest of the class.

20. This class action is properly brought under Fed. R. Civ. P. 23(b)(2) because the challenged actions of BALCA, acting on behalf of the Secretary of Labor, and of the Department of Labor apply generally to all members of the class, so that final injunctive and declaratory

relief, including invalidating and vacating BALCA's decision in *Matter of Island Holdings LLC,* is appropriate for the class as a whole.

FACTS

Statutory and Regulatory Framework

21. The H-2 temporary labor program was initially created by the Immigration and Nationality Act of 1952. Immigration Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), c. 477, 66 Stat. 166, § 101 (June 27, 1952) (INA). Visas for temporary workers in non-agricultural jobs were re-designated H-2B visas after enactment of the Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, 100 Stat. 3359, § 301(a) (Nov. 6, 1986) (IRCA).

22. Congress permits employers to import foreign workers to perform temporary non-agricultural services or labor only if "…unemployed persons capable of performing … services or labor cannot be found in this country." 8 U.S.C. § 1101 (a)(15)(H)(ii)(b).

23. The statute broadly charges the Attorney General – now the Department of Homeland Security (DHS)[1] – with determining, "upon petition of the importing employer," whether to grant an H-2B visa, but only "after consultation with appropriate agencies of the Government." 8 U.S.C. § 1184(c)(1). The Attorney General, in turn, has designated the United State Department of Labor (DOL) to provide the required consultation in the form of a "temporary labor certification" stating that (1) qualified workers in the United States are not available to fill the employer's job and (2) the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers. 18 Fed. Reg. 4925 (Aug. 19, 1953); 8 C.F.R. § 214.2(h)(6)(iv)(A) (2009) (current language).

[1] The Homeland Security Act of 2002 transferred the authority of the Attorney General for administering certain immigration functions to the new Department of Homeland Security. 6 U.S.C. §§ 202, 236.

24. Pursuant to this statutory and regulatory mandate, the Secretary of Labor has established rules and procedures governing the issuance of temporary labor certifications. 20 C.F.R. § 655.0(a); 73 Fed. Reg. 29,942 (May 22, 2008).

The H-2B Prevailing Wage Rule

25. Among other requirements for the issuance of a temporary labor certification, DOL has, for over half a century, required employers to offer wages no less than the prevailing wage in the occupation and location where the work is to be performed. This prevailing wage requirement is designed both to ensure accurate testing of the availability of U.S. workers and to ensure that if permission is granted to employ foreign H-2B workers, their employment will not adversely affect the wages of similarly employed U.S. workers. *See* 16 Fed. Reg. 9142 (Sept. 7, 1951).

26. From the 1960s until 2005, DOL required the prevailing wage rate for the H-2 program generally to be at least the average wage rate paid to similarly employed U.S. workers in the area of intended employment. *See Comité de Apoyo a los Trabajadores Agrícolas, et al., v. Solis*, et al., No. 09-240, 2010 WL 3431761, at *2 (E.D. Pa. Aug. 30, 2010) ("*CATA I*"); 20 C.F.R. § 655.40(a)(2)(i) (1978).

27. In 2005, DOL issued its 2005 Wage Guidance, which abandoned DOL's prior policy of establishing the prevailing wage at the average wage of similarly employed U.S. workers in the area of intended employment and instead arbitrarily subdivided the wage survey data for similarly employed workers into two parts from which four different, so-called "skill level" wages were generated. *CATA I*, 2010 WL 3431761, at *2 & *18. The vast majority of H-2B employers only paid Skill Level I or II wages – both of which were far below the average prevailing wage for the occupation in the area of intended employment. *See* 76 Fed. Reg. 3452-0176, 3463 (Jan. 19, 2011) (stating that nearly 75% of DOL prevailing wage determinations are for

Level I wages—wages based on the mean of the bottom one-third of all reported wages in a given occupation).

28. In 2008, DOL promulgated H-2B regulations that codified the "skill level" policy provided in its 2005 Wage Guidance. 73 Fed. Reg. 78,020, 78,056 (Dec. 19, 2008) ("2008 wage rule"); 20 C.F.R. § 655.10(b)(2) (2008).

29. H-2B workers and organizations representing H-2B and U.S. workers (including Plaintiffs CATA, PCUN, and the Center), challenged the 2008 skill level wage rule under the APA in *CATA I v. Solis*. *See* 2010 WL 3431761, at *1. On August 30, 2010, Judge Pollak of the Eastern District of Pennsylvania granted summary judgment to the plaintiffs in *CATA I*, finding that the "at the skill level" language used in the prevailing wage regulation at 20 C.F.R. § 655.10(b) (2008) was arbitrary and that the 2005 wage methodology used to implement it was unlawful because it was a legislative rule that had never been subject to notice and comment rulemaking. *Id.* at *25.

30. In response to Judge Pollak's Order, DOL published a new wage rule on January 19, 2011 with an effective date of January 1, 2012. 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 wage rule"). In the rulemaking, DOL made a factual finding that the use of skill level wages was adversely affecting U.S. workers because it "artificially lowers [wages] to a point that [they] no longer represent[] a market-based wage for the occupation." 76 Fed. Reg. at 3463.

31. Upon motion by the *CATA I* plaintiffs, the court invalidated the January 2012 effective date for the wage rule and ordered DOL to announce a new effective date within 45 days of the order "because of the critical importance of avoiding the depression of wages paid to U.S. and to H-2B workers." *Id.* at *5. After notice and comment rulemaking, DOL set a new effective date of September 30, 2011. 76 Fed. Reg. 37,686 (June 28, 2011) (NPRM); 76 Fed. Reg. 45,667 (Aug. 1, 2011) (final rule).

32. On April 14, 2011, in anticipation of the implementation of the 2011 wage rule, DOL published a Notice Modifying the ETA Form 9142 Appendix B.1 in the Federal Register, which all employers seeking certification for H-2B workers must sign. *See* 76 Fed. Reg. 21,036 (Apr. 14, 2011) ("Notice"). The Notice clarified that the prevailing wage employers must attest to pay is the wage that "is or will be" issued by DOL during the period of the certification. *See* 76 Fed. Reg. at 21,036.

33. Throughout the 2011 rulemaking process, DOL provided notice and an opportunity to comment on the fact that when the 2008 wage rule was replaced by a new wage rate employers currently certified for H-2B workers would be issued supplemental prevailing wage determinations and would be required to pay the new wage rate immediately. *See* 76 Fed. Reg. at 3462 (stating the new wage rule applies to work performed *on or after* the effective date); 76 Fed. Reg. at 37,688 (discussing the SPWD process in light of the proposed change in the rule's effective date); 76 Fed. Reg. at 45,669 (noting the NPWC will have to issue 4,000 SPWDs pursuant to the new wage rule). Employers submitted comments on the SPWD process and the requirement to pay the new wage rate upon the wage rule's implementation and DOL considered those comments in its rulemaking. *See* 76 Fed. Reg. at 3452 (soliciting comments); 76 Fed. Reg. at 37,687 (same); 76 Fed. Reg. at 45,670-71 (discussing several employer comments on the SPWD process).

34. DOL delayed implementation of the 2011 wage rule numerous times in response to parallel lawsuits filed by employers and employer associations challenging the validity of the rule and repeated congressional appropriations measures barring DOL from using funding to implement the rule. *See* 76 Fed. Reg. 59,896 (Sept. 28, 2011); 76 Fed. Reg. 73,508 (Nov. 29, 2011); 76 Fed. Reg. 82,115 (Dec. 30, 2011), 77 Fed. Reg. 60,040 (Oct. 2, 2012), 78 Fed. Reg.

19,098 (Mar. 29, 2013). DOL ultimately delayed the 2011 wage rule indefinitely on August 30, 2013. 78 Fed. Reg. 56,643 (Aug. 30, 2013). A continuing resolution passed by Congress on October 15, 2013 delays funding for the 2011 wage rule until January 15, 2014. Continuing Appropriations Act, 2014 (Pub. L. 113-46; H.R. 2775).

35. As a result of the repeated delays on the implementation of the 2011 wage rule, DOL continued to rely on the invalidated 2008 wage rule's "skill level" methodology to calculate prevailing wage determinations.

36. On September 27, 2012, plaintiffs in *CATA I* moved this Court for a temporary restraining order and permanent and preliminary injunctive relief against DOL's continued use of the invalid 2008 skill level methodology. On March 21, 2013, this Court granted the plaintiffs' motion for permanent injunctive relief and vacated the "at the skill level" language from the 2008 regulations, thereby effectively terminating use of the skill level methodology. *See Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 933 F. Supp. 2d 700, 711-12 (E.D. Pa. 2013) ("*CATA II*"). According to the Court, all labor certifications issued under the 2008 wage rule exceed DOL's delegated authority because they certify employers at prevailing wages rates that adversely affect U.S. worker wages and working conditions, contrary to DOL's mandate in the INA and in DHS regulations. *See id.* The Court remanded the rule to DOL and ordered DOL to come into compliance with the Order within 30 days.

The April 24, 2013 Interim Final Wage Rule

37. On April 24, 2013, DOL and DHS promulgated an Interim Final Wage Rule (IFR) in the Federal Register. 78 Fed. Reg. 24,047 (Apr. 24, 2013). The IFR sets prevailing wages for the H-2B program based on the mean Occupational Employment Statistics ("OES")

wage for a given occupation without skill levels in compliance with this Court's *vacatur* and remand.

38. In the IFR, DOL made it clear that compliance with the Court's March 21, 2013 order required that the IFR apply immediately to "all requests for prevailing wage determinations and applications for temporary labor certification in the H-2B program issued on or after the effective date of this interim rule" and to "all previously granted H-2B temporary labor certifications for any work performed on or after the effective date of this interim rule," - *i.e.*, the IFR would immediately apply to all employers who had previously been certified at the unlawful skill level wage rate. *See id.*

39. In addition to publishing its policy of applying the new IFR wage rule to all currently certified employers, DOL reiterated the policy in a "Frequently Asked Questions" Document posted on its website shortly after the IFR was issued, *see* ETA, OFLC, "Frequently Asked Questions" (Apr. 25, 2013), http://www.foreignlaborcert.doleta.gov/pdf/faq_final_rule_april_2013.pdf, and in the SPWD notices sent to employers. *See* Ex. A, May 6, 2013 Supplemental Prevailing Wage Determination (SPWD) Issued to Island Holdings, LLC.[2]

40. The IFR rulemaking indicated that these employers would be informed of their new IFR wage rate through the issuance of a SPWD to each such employer. The IFR stated the new wage rate was effective immediately upon receipt of the SPWD based on the employers' agreement in their H-2B applications to pay the "prevailing wage that is or will be issued by the

[2] Exhibits A, B, and C relate to Island Holdings LLC's SPWDs issued for the position of "Housekeeping Worker" (Soc 37-2012). SPWDs similar in format were also issued on May 6, 2013 for the positions of "Server" (Soc 35-3031) and "Cook" (Soc 35-2014). The challenged December 3, 2013 en banc BALCA decision (Ex. E) principally referenced the Administrative File ("AF") for "Housekeeping Worker" as did the briefs of the parties.

Department to the employer for the time period the work is performed." *See* ETA Form 9142, Appendix B.1.

41. In early May 2013, the DOL Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC), National Prevailing Wage Center (NPWC) began the process of issuing SPWD notices of the new IFR wage rates to H-2B employers who had received DOL H-2B labor certifications prior to April 2013. According to DOL, the NPWC completed this process in early August 2013.

42. DOL has indicated that the NPWC issued SPWD notices in 3,098 ETA cases. Information available from DOL's public disclosure database indicates that as many as 58,000 H-2B workers may have been employed in jobs subject to the SPWDs.

43. The SPWD notices stated that the IFR prevailing wage rate specified in the SPWD would be effective as of the date indicated on the SPWD. The notices stated that an employer could request a "redetermination" of the IFR wage rate listed in its SPWD within thirty (30) days from the date of the determination's issuance. The notices stated that such requests for redeterminations would be considered in accordance with procedures in 20 C.F.R. § 655.10(g)(1), which allows employers to submit "supplemental information" to the NPWC, but the SPWD notice limited the categories of supplemental information which would be appropriate to such requests for redetermination of the IFR prevailing wage rate. *See* 20 C.F.R. §655.10(g)(1); Ex. A.

44. The calculation of the IFR prevailing wage rate by the NPWC for each SPWD issued involved a purely ministerial act of identifying the published ETA OES mean wage rate under the ETA OES "All Industries database for 7/2012 - 6/2013" for each geographic area of work identified by the employer in its initial application for prevailing wage determination for

the standard occupational classification (SOC Code) previously assigned to that position. The mean H-2B OES wage rate for each geographic area for each SOC code has been available to the public at http://www.flcdatacenter.com since July 1, 2012. *See* http://www.flcdatacenter.com/ChangeHistory.aspx.

45. Under the terms of the SPWD notices issued by the NPWC, the IFR prevailing wage rate specified in the SPWD became final agency action if no request for redetermination was filed within 30 days after the date of the issuance of the SPWD. *See* Ex. A. As of August 23, 2013 DOL reported that in 1,400 out of the 3,098 ETA cases in which SPWDs were issued, employers had filed requests for redeterminations. As of that date, in 1,698 ETA cases employers had not filed requests for redeterminations. In each case where no timely request for redetermination was received by the NPWC, the IFR prevailing wage rate specified in the SPWD was required to be paid by the H-2B employer for all work performed after the date specified on the SPWD.

46. The NPWC has reviewed all 1,400 ETA cases in which employers requested redetermination, considered any information offered in support of such requests, and issued decisions on those requests for redetermination affirming the initial SPWD determinations in all cases.

47. Despite having determined in each case reviewed by the NPWC on requests for "redetermination" that employers had not submitted relevant supplemental information establishing an alternative basis to the IFR OES wage rate (such as a valid employer provided wage survey, or wage rate computed under the Service Contract Act or Davis Bacon Act), the DOL through the NPWC failed to treat the NPWC decision on the request for redetermination as final agency action.

48. On the contrary, since July 26, 2013 DOL through the NPWC has included in determinations rejecting employer submissions of "supplemental" information and requests for redetermination of prevailing wages pursuant to 20 C.F.R. § 655.10(g) the following statement:

> **Request for Center Director Review**
>
> Should the employer seek further review of this SPWD, the employer may submit a request for review by the center director within 10 days of the date of this letter in accordance with the Department's regulations at 20 CFR § 655.11. Employers cannot seek review of issues related to the identification of the proper occupational classification since that issue could have been raised when the original prevailing wage determination was issued. The review request must clearly identify the prevailing wage determination for which review is sought and the grounds on which review is sought….
>
> * * *
>
> *Should the center director review not result in a change in the prevailing wage determination*, the employer will be expected to pay at least the wage(s) identified in the SPWD from the date of receipt of the SPWD.
>
> In the alternative, the employer may submit a new ETA 9141, Application for Prevailing Wage Determination, requesting use of an acceptable alternative prevailing wage source survey /SCA/OBA/CSA).

[*Underlined Emphasis Added*]. *See* Ex. B.

49. DOL has not provided information to Plaintiffs as to the number of ETA cases in which employers did not file timely requests for review by the NPWC Center Director within 10 days after the date on the NPWC rejection of the request for redetermination. In at least some of the 1,400 ETA cases, employers failed to file requests for Center Director reviews and such determinations became final agency action under the terms of the notices issued to individual employers. *See* Ex. B.

50. Upon information and belief, between 1,000 and 1,400 ETA cases have requests for review by NPWC Center Director which are pending as of this date.

51. DOL permitted all employers that filed a timely request for redetermination to continue to pay the prevailing wage established pursuant to the invalid 2008 skill level wage rule

during the pendency of the employer's request for redetermination. DOL has also permitted employers who requested further review by the NPWC Center Director after their request for redetermination was denied to continue paying the invalid 2008 wage rate pending review by the NPWC Center Director.

Island Holdings LLC Appeals

52. On May 6, 2013 DOL issued three SPWDs to Island Holdings LLC, an H-2B employer located in Massachusetts, for housekeepers, cooks, and servers. *See* Ex. A.

53. In accordance with the instructions in the May 6, 2013 notice, Island Holdings LLC filed requests for redetermination of the SPWD on May 13, 2013. Island Holdings Housekeeper AF 1356-1357.[3]

54. Thereafter, on May 23, 2013 Island Holdings LLC filed an Emergency Motion before the Department of Labor's Board of Alien Labor Certification (BALCA) requesting direct review by BALCA of the three SWPDs. Island Holdings LLC argued that regulations at 20 C.F.R. §655.10(g) and 655.11 did not apply to the SPWDs issued by the NPWC pursuant to the IFR.

55. On June 6, 2013 the NPWC filed a Request for En Banc Consideration by BALCA urging the Board to review this matter en banc "because [it] involves a matter of exceptional importance which could impact a significant number of additional cases and expose the Department to sanctions from a U.S. District Court."

56. On June 20, 2013 BALCA issued an order granting en banc review and permitting participation by *amici curiae.* *See* Ex. D. On July 2, 2013, BALCA remanded the request for

[3] Plaintiffs request the Defendants file the record from the three Island Holdings LLC appeals to the BALCA with this Court and are therefore not attaching as exhibits documents in the record before BALCA.

review of the three Island Holdings LLC SPWDs to the NPWC for further review before consideration by BALCA.

57. On July 26, 2013, the NWPC denied the requests for redetermination and affirmed Island Holding LLC's SPWDs as having been correctly issued in conformity with the IFR. *See* Ex. B. Island Holdings LLC sought review of this decision by the NPWC Center Director. On August 20, 2013 three NPWC Center Director decisions were issued on cases involving Island Holdings, LLC upholding the initial SPWDs. *See* Ex. C.

58. In no other cases have such NPWC Center Director determinations been issued and all other employers who sought review of denials of their requests for redetermination remain pending before the NPWC Center Director.

59. The NPWC Center Director determinations issued on August 20, 2013 to Island Holding, LLC stated that:

> Should the employer disagree with this determination, the employer may ... request review by the Board of Alien Labor Certification Appeals (BALCA) under 20 CFR § 655.11 within 30 days of the date of this letter by sending the request to U.S. Department of Labor-ETA, Foreign Labor Certification, National Prevailing Wage Center, Attn: PWD Appeal, 1341 G Street, Suite 201, Washington D.C. 20005-3105.

60. In accordance with that notice on August 30, 2013, Island Holdings filed an appeal of the NPWC Center Director decision to BALCA.

BALCA's December 3, 2013 Decision

61. The BALCA was initially established by 20 C.F.R. Part 656. *See* 52 Fed. Reg. 11,217-19 (Apr. 8, 1987). BALCA consists of Administrative Law Judges ("ALJs") whose authority is limited by regulation and the delegation of authority granted by the Secretary of Labor, *see* 20 C.F.R. §§ 656.26-27, and the APA, 5 U.S.C. § 556(c). *See* also 20 C.F.R. §§ 655.11(e) and 655.33.

62. In the context of 20 C.F.R. §655.11(e) appeals of H-2B prevailing wage determinations, BALCA's limited authority allows it to (1) affirm a certifying officer's (CO) affirmation of a prevailing wage determination; (2) overrule the affirmation of the prevailing wage determination; or (3) remand to the CO for further action. *See* 20 C.F.R. §§ 655.11(e), 655.33.

63. BALCA's decisions in these delegated matters are considered the decision of the Secretary and final agency action. *See* 5 U.S.C. § 557(b); 29 C.F.R. § 18.58.

64. Island Holdings LLC's appeal challenged its SWPDs principally on legal grounds. Among other things, Island Holdings LLC asserted that DOL had no legal authority to issue SPWDs and, even if such authority existed, the SPWDs were factually insufficient (*i.e.*, improperly calculated). *See* IH BALCA brief, at 1-2. Island Holdings also asserted that BALCA had jurisdiction to evaluate the legality of DOL's issuance of the SPWDs. *See* IH BALCA Brief, at 8.

65. BALCA lacked jurisdiction to hear the appeals of the SPWDs because the regulations that the NPWC cited as authorizing Island Holding LLC's appeals – 20 C.F.R. §§ 655.10(g) and 655.11 – were not applicable to the implementation of the IFR prevailing wage rates which merely required the ministerial calculation of the applicable OES mean prevailing wage rate. The decision of the NPWC to permit limited submission of supplemental information as to an alternative to the OES IFR prevailing wage rate consistent did not establish a right to review of the IFR OES prevailing wage rate determination where an employer failed to submit supplemental information as to an alternative wage source for calculating the required minimum prevailing wage rate.

66. On December 3, 2013 BALCA issued an en banc decision in the Island Holdings LLC matter, determining that DOL had misinterpreted the *CATA II* Court's March 21 Order and that DOL did not have authority to require an employer to increase the wage rates of its H-2B workers pursuant to the new IFR after DOL had already certified the employer's Application for Temporary Employment. *See* Ex. E.

67. This BALCA decision invalidates the Secretary of Labor's interpretation of the *CATA II* Court Order as well as the Secretary's policy, as stated in the IFR, regarding an employer's obligation to comply with the SPWDs issued pursuant to the court-mandated IFR.

68. The en banc BALCA decision, by declaring the entire SPWD process to be invalid and contrary to law, retroactively purports to invalidate all of the final SPWDs issued to employers by DOL, not only in the 1,400 cases where employers sought redetermination of their SPWDs, but in the estimated 1,698 ETA cases where the employers did not seek redeterminations of their SPWDs. By invalidating all of the SPWDs issued by NPWC to implement the IFR, BALCA has retroactively reduced the required minimum prevailing wages of thousands of H-2B and similarly employed U.S. workers that DOL determined were required to be paid in order to comply with the *CATA II* Court order and avoid an adverse effect as required by 8 U.S.C. § 1101(a)(15)(h)(ii)(B), and that employers specifically promised to pay when they signed their Forms 9142, including the wages of Plaintiffs Sauceda, Arreguin and Hernandez.

69. As a result of BALCA's decision in *Matter of Island Holdings LLC*, the Secretary of Labor, acting through its delegate BALCA, has now taken final agency action that Plaintiffs and the class of workers they represent are no longer entitled to wage increases to the level set forth in the SPWDs, which employers specifically promised to pay when they signed their Form

9142 labor certification applications. This remains true even though the Secretary of Labor may not agree with the decision of BALCA because the decision of BALCA constitutes the final agency action of DOL.

70. In issuing its decision on behalf of the Secretary of Labor BALCA exceeded its authority. The Secretary of Labor does not have the legal authority to invalidate substantive policy decisions regarding compliance with the SPWDs without engaging in any procedure aimed at appraising the regulated public of the change.

71. Under the APA, the Secretary of Labor may only make substantive policy changes by engaging in proper procedures to inform the regulated public and provide an opportunity for notice and comment. 5 U.S.C. § 553.

72. Even if the Secretary of Labor does have the authority to make this national policy change, which he does not, he has not and cannot delegate this authority to BALCA.

73. As a matter of law, BALCA does not have the authority to rule on matters of agency law and policy.

74. Likewise, BALCA cannot wholesale invalidate a substantive agency policy or regulation.

75. Even if BALCA had authority to declare the NPWC's SPWDs to be invalid, the Secretary's interpretation of the Court's March 21, 2013 Order and its action in response in issuing the IFR and the SPWDs were lawful and valid, and BALCA's final agency action on behalf of the Secretary holding those actions to be invalid was arbitrary, capricious and contrary to law.

76. In addition, even if BALCA could lawfully declare the Secretary's actions to be unlawful, neither the Secretary nor his delegate BALCA, had authority to declare retroactively

invalid an employer's obligation to comply with the promises made in the Form 9142 pursuant to which the employer received H-2B workers, including the promise to pay any prevailing wage that "is or will be issued" by DOL during the period of certification. BALCA's actions in doing so were arbitrary, capricious, and contrary to law.

77. As a result of the abrupt and unlawful action of the Secretary, taken by his delegate BALCA, H-2B worker plaintiffs and the worker class, who were entitled to increased wages as a result of a lawfully promulgated regulation and policy, which is mandated by the INA and court order, will suffer irreparable and immediate harm.

CAUSE OF ACTION

VIOLATIONS BY DEFENDANTS SECRETARY OF LABOR, DOL, AND ACTING ASSISTANT SECRETARY OF ETA OF 5 U.S.C. § 706(2)

78. The actions by the Defendants as set forth above are in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A),(C), (D).

79. DOL did not have authority to stay implementation of the IFR after completing the ministerial act of calculating the OES wage rate required for H-2B employers pursuant to the IFR and providing notice of the OES wage rate required under the IFR. The failure by Defendants to treat the SPWDs issued by the NPWC as final agency action absent the submission of an alternative wage source authorized by DOL's regulations such as a valid employer provided wage survey or wage rate computed under the Service Contract Act or Davis Bacon Act was arbitrary, capricious and contrary to law.

80. The Secretary of Labor, through BALCA as his delegate, exceeded his authority by invalidating a substantive policy without engaging in any procedure to inform the regulated public of this substantial change in the agency's course of action.

81. Even if BALCA had delegated authority from the Secretary of Labor to review and invalidate DOL's SPWD policy, BALCA's decision invalidating that policy on behalf of the Secretary of Labor was arbitrary, capricious, and contrary to law.

82. The Secretary's policy change has an impermissible retroactive effect on the regulated public.

83. The Secretary of Labor's actions are contrary to law because they violate its Congressional mandate to protect U.S. workers and this Court's March 21, 2013 order requiring a complete *vacatur* of the 2008 wage rule.

PRAYER FOR RELIEF

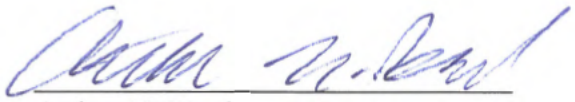
WHEREFORE, Plaintiff respectfully request that this Court:

1. Enter a declaratory judgment that the notices issued by DOL through the NPWC as to the OES prevailing wage rate required to be paid under the IFR constituted binding final agency action unless the employer submitted an alternative wage source authorized by DOL's regulations such as a valid employer provided wage survey or wage rate computed under the Service Contract Act or Davis Bacon Act
2. Enter a declaratory judgment that BALCA's December 3, 2013 Matter of Island Holdings LLC appeal decision (BALCA Case No.: 2013-PWD-00002) is invalid as ultra vires and contrary to law and vacate that decision
3. Permanently enjoin Defendants from implementing BALCA's December 3, 2013 decision.
4. Permanently enjoin the Secretary of Labor from applying that BALCA decision to any of the 3,095 other H-2B cases in which the ETA's NPWC issued supplemental prevailing wage determinations pursuant to the Department of

Labor's April 24, 2013 Interim Final Rule (IFR) at 78 Fed. Reg. 24,047 (Apr. 24, 2013) and this Court's March 21, 2013 Order.

5. Enter a declaratory judgment that H-2B workers and similarly employed U.S. workers are lawfully entitled to be paid at the supplemental prevailing wage rates issued by the Secretary of Labor pursuant to the U.S. Department of Labor's April 24, 2013 Interim Final Rule and this Court's March 21, 2013 Order.
6. Award Plaintiffs their costs and expenses, including reasonable attorney's fees; and
7. Grant such further and additional relief as this Court may deem just and proper.

Dated: December 11, 2013



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