UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Comité de Apoyo a los Trabajadores Agrícolas, Pineros y Campesinos Unidos del Noroeste, Alliance of Forest Workers and Harvesters, and Salvador Martinez Barrera, Plaintiffs v. Elaine L. Chao, in her official capacity as United States Secretary of Labor; United States Department of Labor; Alexander J. Passantino, in his official capacity as Acting Administrator of the Wage and Hour Division of the United States Department of Labor; Michael B. Chertoff, in his official capacity as United States Secretary of Homeland Security; and United States Department of Homeland Security, Defendants	: : : : : : : : :	Civil No.

COMPLAINT

Plaintiffs Comité de Apoyo a los Trabajadores Agrícolas ("CATA"), Pineros y Campesinos Unidos del Noroeste ("PCUN"), Alliance of Forest Workers and Harvesters ("Alliance"), and Salvador Martinez Barrera for their Complaint against defendant Elaine L. Chao in her official capacity as United States Secretary of Labor, defendant United States Department of Labor, defendant Alexander J. Passantino in his official capacity as Acting Administrator of the Wage and Hour Division of the United States Department of Labor, defendant Michael B. Chertoff in his official capacity as United States Secretary of Homeland

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. This case challenges the Secretary of Labor's promulgation of regulations and administrative procedures which violate the Secretary of Labor's legal duty 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.

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 "temporary" employment eligible for the H-2B temporary non-agricultural worker program, and thus significantly expand the scope of the H-2B program. See specifically, 8 CFR 214.2(h)(6)(ii)(B), as modified at 73 Fed. Reg. 78104 at 78120 (December 19, 2008).

11. Finally, this case challenges an arbitrary, capricious, and drastic change without any opportunity for prior notice or comment by Defendants DOL, the Acting Wage and Hour Administrator, DOL and the Secretary of Labor (the "DOL Defendants") to the long-established policy under the Fair Labor Standards Act (FLSA) at 29 U.S.C. Sec. 203(m) and related regulations announced as part of the December 19, 2008 rule making and as part of the discussion of separate rule making for the H-2A program on December 18, 2008. See, 73 Fed.

Reg. 78020 at 78039–78041, 78059 (December 19, 2008) and H-2B final rule at 20 CFR 655.22(g)(2). See also, 73 Fed. Reg. 77110 at 77148-77151 (December 18, 2008). The DOL Defendants arbitrarily and contrary to law used the opportunity of the publication in the Federal Register of the H-2B regulations and the H-2A regulations to reverse longstanding DOL policy under the FLSA relating to reductions in required minimum wages as a result of pre-employment expenses for the "convenience of the employer."

12. The DOL Defendants specifically stated disapproval of the application of the FLSA to pre-employment expenses incurred by workers traveling to accept employment with H-2B employers, as examined by this Court in a January 7, 2008 opinion by the Honorable Louis Pollak, in *Rivera v. Brickman Group, Ltd.*, United States District Court, Eastern District of Pennsylvania, Civil No. 05-1518. See, DOL Defendants citation to "*Rivera v. Brickman Group*, 208 WL 81570 (E.D. Pa. Jan. 7, 2008)" at 73 Fed. Reg. 78039. This Court in *Rivera v. Brickman Group* ruled that such pre-employment transportation costs (and other pre-employment expenses for the "convenience of the employer") were required to be repaid at the time of payment of the first week of wages by H-2B employers to the extent that such costs reduced wages below the minimum wage.

13. Unlike the H-2A program, neither DOL nor DHS has promulgated regulations relating to repayment of pre-employment transportation costs to workers employed through H-2B employers. In enunciating the new policy related to pre-employment transportation costs, the Secretary of Labor and DOL arbitrarily, capriciously, and in violation of law failed to appropriately determine if the application of this policy to H-2B employers would have an adverse impact on the wages and working conditions of U.S. workers, which was the appropriate purpose of the H-2B rulemaking proceeding for which DOL published final rules on December

19, 2008. The DOL Defendants' policy will have immediate adverse impact on the Plaintiffs and their members. This policy further has an adverse impact generally on the wages of U.S. workers prepared to travel from places of permanent residence to accept temporary employment with H-2B employers.

JURISDICTION AND VENUE

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

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

PARTIES

PLAINTIFFS

16. 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, and eastern Maryland. Members include U.S. landscaping workers and construction workers, and in the recent past have also included H-2B workers in those industries. Through its work, CATA strives to improve the working and living conditions of its members and member communities. The challenged changes to the H-2B program would adversely affect CATA members' wages, their working conditions, and their ability to obtain and retain jobs. CATA seeks to protect its members' interests by challenging these regulations. CATA has members, an office and staff in the Eastern District of Pennsylvania.

17. 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 and the regulation under that program affect PCUN's members' wages, their working conditions, and their ability to obtain and retain jobs. PCUN seeks to protect its members' interests by challenging these regulations.

18. The Alliance of Forest Workers and Harvesters (the "Alliance") is a multicultural membership organization promoting social, environmental, and economic justice for forest workers in the Pacific Northwest. Its membership consists of both U.S. workers and H-2B workers who labor in the forests. The Alliance's mission is to advocate for and improve the lives of forest workers. Forestry workers may be subject to the H-2B regulations and the regulations under that program affect the Alliance's members' wages, their working conditions, and their ability to obtain and retain jobs. The Alliance seeks to protect its members' interests by challenging these regulations.

19. Plaintiff Salvador Martinez Barrera is a citizen of the Republic of Mexico with his permanent residence in Acambaro, Guanajuato, Mexico. He has been employed as an H-2B worker in the Eastern District of Pennsylvania in each of the years 2003, 2004, 2005, 2006, and 2007. He was employed as an H-2B worker outside of Pennsylvania in 2008. He is seeking re-employment as an H-2B worker for 2009. In July 2008 Plaintiff Martinez Barrera was certified as one of the class representatives for a F.R.C.P. Rule 23(b)(3) settlement class in *Rivera, et al. v. The Brickman Group, Ltd. et al.*, United States District Court, Eastern District of Pennsylvania, Civil No. 05-1518. That class action settled claims for a nation wide class of approximately

2,500 persons employed through an H-2B employer that had failed to comply with requirements of the Fair Labor Standards Act to repay pre-employment costs that took wages below minimum wage. Plaintiff Barrera is directly affected by the regulations governing the employment of H-2B workers.

DEFENDANTS

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

21. Defendant Passantino is the Acting Administrator of the Wage and Hour Division of the United States Department of Labor. The Acting Wage and Hour Administrator is sued in his official capacity, pursuant to 5 U.S.C. §703.

22. Defendant Chertoff is the United States Secretary of Homeland Security. The Secretary is responsible for all functions of DHS and its component organizations, including the issuance of visas for H-2B workers. Secretary Chertoff is sued in his official capacity, pursuant to 5 U.S.C. §703.

23. Defendant United States Department of Labor is responsible for administration of the H-2B program.

24. Defendant United States Department of Homeland Security is responsible for the issuance of visas for H-2B workers.

ALLEGATIONS

THE DOL DEFENDANTS' NEW FLSA POLICY IS CONTRARY TO LAW AND WAS ISSUED CONTARY TO THE ADMINISTRATIVE PROCEDURE ACT

25. Plaintiffs repeat and reallege ¶¶1-24 above.

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-standing policy of the Department of Labor and a substantial long body of case law regarding pre-employment expenses. See: *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), (holding that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses and visa and immigration fees paid by the workers employed by the growers under the H-2A program.); *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); *De Leon-Granados v. Eller & Sons Trees Inc.*, 2008 WL 4531813 (N.D. Ga., Oct. 7, 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. Feb. 11, 2008); *Castellanos-Contreras v. Decatur Hotels, LLC*, 488 F. Supp. 2d 565 (E.D. La. 2007); *Recinos-Recinos v. Express Forestry Inc.,* 2006 WL 197030 (E.D. La. Jan. 24, 2006).

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 workers. The preamble to the Final Rule sets forth a final “interpretation” of 29 U.S.C. 203(m) and the regulations promulgated thereunder that conflicts with both the FLSA and the DOL’s regulations implementing the law.

29. The preamble provides that the Department believes that ‘the costs of relocation to the site of the job opportunity generally is not an ``incident'' of an H-2B worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H-2B employer. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.’ 73 Fed. Reg. 78041

30. The DOL’s new policy as enunciated in the preamble to the Final Rule is contrary to law and is arbitrary and capricious because it conflicts both with (1) the FLSA and DOL’s own regulations implementing the FLSA and (2) with the statutory requirement that DOL regulate the H-2B program to ensure that the wages and working conditions of similarly employed U.S. workers are not adversely affected.

31. The DOL’s statement in the preamble is also arbitrary and capricious because it was a legislative rule which was a substantial change to and repudiation of a longstanding rule and policy, and it was issued without notice or comment. The DOL failed to include notice that this issue would be addressed in its proposed regulation. The commentators submitting comments generally did not address this issue at all because they were not on notice that the DOL was considering a modification of its longstanding policy. However, in the preamble to the Final Rule, DOL issued a lengthy discussion of this issue, proposing a substantial change in its

own policy and deviating from the judgment of a substantial body of federal law without providing any opportunity for notice and comment.

DOL'S FINAL RULEMAKING IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

32. The H-2B program is designed to allow employers to bring foreign workers into the United States on temporary work visas when the DOL certifies that the employer will experience a labor shortage, that United States workers will not be displaced, and that the job terms offered will not negatively affect the wages and working conditions of U.S. workers.

33. After the creation of the H-2B program through the IRCA in 1986, the Secretary of Labor carried forward previously existing limited general regulations of prior H-2 workers in 20 CFR Part 655, Subpart A. See, 20 CFR 655.2 and 655.3. Similarly, prior regulations for forestry H-2 workers were carried forward in 20 CFR Part 655, Subpart C.

34. The Secretary of Labor has engaged in no further significant rulemaking following notice and comment for the H-2B program after creation of the H-2B program in 1986 until the published DOL regulations for H-2B workers with an effective date of January 18, 2009.

35. Since 1986, the Department of Labor has failed to promulgate substantive regulations beyond the minimal general provisions under the previous H-2 program for non-agricultural workers in order to protect U.S. workers and the H-2B temporary workers, ("guestworkers") despite a huge growth in that program in recent years. See, 20 CFR Part 655, Subpart A (December 2008).

36. At the time of the creation of the separate H-2B program and throughout the first ten years of the program, demand for the program was relatively low. The H-2B program was capped by statute at 66,000 persons (INA §214(g)(1)(B)) and was very small in the 1980's and

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.

	FY02 Certified	FY03 Certified	FY04 Certified	FY05 Certified	FY06 Certified	FY07 Certified	Increase 02 -07	Increase 04 -07
Number Workers	121,665	144,333	168,471	134,837	199,732	254,583	132,918	86,112

See, ETA-2008-0002-0022.

38. As the H-2B temporary worker program has grown in recent years, guestworkers have been subjected to increasingly well-documented abuses by their employers. The failure to prevent these abuses adversely affects the wages and working conditions of U.S. workers.

39. The policies established by DOL for the administration of the H-2B program over the past six years have, contrary to law, had an increasingly adverse impact on the wages and working conditions of U.S., and have interfered with employment opportunities for U.S. workers.

40. Virtually all internal procedures for administration of the H-2B system have been set forth by DOL without opportunity for public notice and comment through Employment and Training Administration "General Administration Letters" ("GAL"), "Field Memorandum", "Employment Service Program Letters," and "Training and Administration Guidance Letters

("TEGL") including: General Administration Letter No. 01-95 "Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations" (November 10, 1994) which superseded GAL's predating the establishment of the separate H-2B program; General Administration Letter No. 2-98 "Prevailing Wage Policy for Nonagricultural Immigration Programs" (October 31, 1997); Field Memorandum No. 25-98, "H-2B Temporary Non-Agricultural Labor Certification Program Requirements" (April 27, 1998).

41. Beginning in 2005, the Secretary of Labor and DOL sought to escape and evade their legal responsibility to protect the wages, working conditions, and employment opportunities for U.S. workers where employers sought to employ H-2B workers by changing the methodology for calculating the wages to be paid to those workers. .

March 2005 Changes in Determination of Wage Rates for H-2B Employment

42. By policies adopted without notice and comment, effective March 2005, Defendants Chao and DOL arbitrarily and capriciously and without providing an opportunity for public notice and comment changed the established procedures for determining wages required to be paid by employer's seeking H-2B workers in a manner that has had, and continues to have, a severe adverse impact on the wages and working conditions of U.S. workers, in violation of the requirements of law and the Secretary of Labor's duties in relationship to the H-2B program.

43. In policy guidances with an effective date of March, 2005, the Defendant DOL changed the methodology for calculating the required prevailing wage rate. This policy guidance superseded prior procedures for determining "prevailing" wage rates and was applied to H-2B workers. See Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised May 9, 2005, available at: http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

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 wage and the Level I wage and divides that number by three. The Level II wage is determined by taking this result and adding it to the Level I wage. The Level III wage is determined by taking this result and subtracting it from the IV wage. Thus, in this formula, the Level III wage is also equal to the average wage. As a result, Level III and IV wage rates will be the only wages at or above the average wage in a local area. The Level I wage has been the most common wage level offered by H-2B employers and thus H-2B employers have been permitted to pay wage rates lower than those currently received by 84% of workers in the job classification.

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 Exhibits E, F, and G annexed to comment ETA-2008-0002-0088.

71. In its preamble to the December 19, 2008 promulgation of H-2B rules DOL acknowledged:

> Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H-2B workers at or above the wage (presumably the adverse effect wage rate) for H-2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders.
>
> The Department appreciates these suggestions and concerns. However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking. The Department notes that the proposed procedures that were retained in the Final Rule already cover the use of wages specified in a collective bargaining agreement. Similarly, these procedures provide that an employer may use the Davis-Bacon wage and that such use is at the employer's option unless the employer is a Federal construction contractor. There is a similar provision that applies to Service Contract Act wage rates.
>
> Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

73 Fed. Reg. at 78031.

72. In the face of the overwhelming evidence that the March 2005 changes to the DOL prevailing wage rate system for H-2B workers had failed to meet the statutory duty of the Secretary of Labor to prevent adverse impact on wages and working conditions of U.S. workers,

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. Data in the record before DOL established that the level of SWA activity in relationship to the H-2B program. See, ETA-2008-0002-0022, Attachment D. For example, the date for the Pennsylvania SWA reflected the following for federal FY07:

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2b Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
PENNSYLVANIA	10,210	1,337	13.1%	8,873	650	549	84.5%	75	18	8

Other SWAs that processed applications for more than 10,000 H-2B workers during FY07 included the following:

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2b Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Partial Certified	Cases Remand to SWA
TEXAS	53,831	18,744	34.8%	35,087	1,598	1,103	69.0%	437	57	1
LOUISIANA	39,372	21,046	53.5%	18,326	673	380	56.5%	261	30	2
FLORIDA	31,893	8,307	26.0%	23,586	1,333	953	71.5%	323	49	8
COLORADO	19,584	3,951	20.2%	15,633	803	608	75.7%	173	20	2
ALABAMA	12,399	6,563	52.9%	5,836	152	60	39.5%	78	14	
MARYLAND	12,339	2,717	22.0%	9,622	429	293	68.3%	115	19	2
MISSISSIPPI	12,225	3,432	28.1%	8,793	143	83	58.0%	40	20	
VIRGINIA	11,889	1,789	15.0%	10,100	514	367	71.4%	112	34	1
MISSOURI	10,308	2,034	19.7%	8,274	336	265	78.9%	48	23	
ARKANSAS	10,116	2,669	26.4%	7,447	114	66	57.9%	26	18	4

See: ETA-2008-0002-0022, Attachment D.

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
ETA-2008-0002-0029	Arizona Department of Economic Security - Ufford, C.
ETA-2008-0002-0030	Outdoor Amusement Business Association - Johnson, Robert
ETA-2008-0002-0035	Virginia Employment Commission - Esser, Dolores
ETA-2008-0002-0037	Federation of Employers and Workers of America (FEWA) - Evans, Scott
ETA-2008-0002-0038	Vermont Department of Labor - Seckler, Cynthia
ETA-2008-0002-0039	PA Department of Labor and Industry - Mead, Andrea
ETA-2008-0002-0041	President/Save Small Business - Lavery, Hank (representative form letter, 41)
ETA-2008-0002-0045	American Federation of State, County & Municipal Employees, (AFSCME) - Korpi, Kerry
ETA-2008-0002-0046	Maine Department of Labor - Fortman, Laura A.
ETA-2008-0002-0047	Sharp's Landscaping, Inc. - Sanborn, Tina
ETA-2008-0002-0048	American Hotel & Lodging Association - McBurney, Shawn
ETA-2008-0002-0049	Emory University - Eiesland, Terry
ETA-2008-0002-0050	H-2B Workforce Coalition - McBurney, Shawn
ETA-2008-0002-0052	International Union of Bricklayers & Allied Craftworkers - Flynn, John
ETA-2008-0002-0053	University of Wisconsin-Madison - Ahlstedt, Deborah
ETA-2008-0002-0055	Building and Construction Trades Department, AFL-CIO - Ayers, Mark
ETA-2008-0002-0058	Massachusetts Executive Office of Labor and Workforce Development - James, Jennifer
ETA-2008-0002-0062	Olathe Corn Company, LLC - Fishering, Nancy
ETA-2008-0002-0063	Maryland Department of Labor, Licensing and Regulation - Perez, Thomas
ETA-2008-0002-0067	U.S. Senate - Kennedy, Sen. Edward M.
ETA-2008-0002-0068	private individual - Lang, Erik
ETA-2008-0002-0069	California State Government Agency - Marquez, Jose Luis
ETA-2008-0002-0073	Alliance of Forest Workers and Harvesters - Smith, Denise
ETA-2008-0002-0075	National Employment Law Project - Smith, Rebecca
ETA-2008-0002-0076	Oversight and Government Reform - Domestic Policy, Subcommittee
ETA-2008-0002-0077	Beaver Run Resort and Conference Center - Brennan, Stephanie
ETA-2008-0002-0078	State of Nevada, Department of Employment training and Rehabilitation - Jones, Cynthia
ETA-2008-0002-0083	The Law Office of Robert Kershaw, P.C. - Kershaw, Robert

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 of denial of H-2B employer applications); ETA-2008-0002-0088 at pp. 16-21.

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 (Washington), ETA-2008-0002-0029 (Arizona), ETA-2008-0002-0038 (Vermont), and ETA-2008-0002-0046 (Maine). DOL's assumption that this change will help SWAs, despite the fact that all of the SWAs that commented on this issue were opposed to the change, is arbitrary and capricious.

Definition of Full-time

83. Under the prior regulations, employers have a dual 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). The Secretary of Labor must certify that these two requirements have been met. 8 CFR 214.2(h)(6)(iv)(1).

84. Since at least 1994, DOL has directed State Workforce Agencies not to accept, and DOL would not certify, Clearance Orders that do not provide for full-time employment. See General Administration Letter I-95 (November 10, 1994); Training and Employment Guidance Letter 21-06 (April 4, 2007); Training and Employment Guidance Letter 21-06, Change 1 (June 25, 2007).

85. In the preamble of its Notice of Proposed Rulemaking, DOL acknowledged that it has "always required that the positions offered be . . . *full-time* in nature." 73 Fed. Reg. at 29951 (emphasis added).

86. The definition of full-time which was published for Notice and Comment was "35 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence." Proposed 20 CFR 655.4. The proposed rule also specifically required that an employer establish a need for full-time employees, as part of the showing of temporary need. Proposed 20 CFR 655.6(a).

87. As the commentators on the proposed rule made clear, this proposal, which effectively shortened the length of time that DOL would consider full-time, would have adversely affected U.S. workers by making it substantially less likely that U.S. workers, who need full time employment, could compete for the jobs. At the same time, the proposal would allow employers access to foreign workers to fill less-than-full-time-jobs because the lower costs and standards of living in foreign countries make it easier for foreign workers to accept part-time jobs. See Comments of Low Wage Worker Legal Network, ETA-2008-0002-0088 (p. 27); former National Monitor Advocate Erik Lang, ETA-2008-0002-0068; Alliance of Forest Workers and Harvesters, ETA-2008-0002-0073; National Employment Law Project, ETA-2008-0002-0075 .

88. The Final Rule changes the proposed definition of full-time employment from 35 or more hours per week (with exceptions) to 30 hours or more per week (with exceptions). 20 CFR 655.22(h); 655.4. It no longer includes a requirement that an employer establish a need for full-time employees as part of the showing of temporary need. 20 CFR 655.6.

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 notice and comment, as this interpretation did not appear in the proposed regulation when it was published in the Federal Register. See Notice of Proposed Rulemaking.

95. DOL has offered no basis for its interpretation of the full-time requirement as not establishing a contractual obligation.

RECRUITMENT OF U.S. WORKERS

96. The Secretary of Labor is required by law to establish effective 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.

Historical Regulatory Requirements for H-2A Temporary Agricultural Employers

97. On December 18, 2008, the Secretary of Labor promulgated drastically revised regulations for the H-2A program which would strip the program of many of its important provisions. Those changes are being challenged in *United Farm Workers, et al. v. Chao*, United States District Court, District of Columbia, Case No. 1:09-cv-00062-RMU.

98. Prior to the December 18, 2008 changes to the H-2A program, the H-2A agricultural worker regulations required recruitment of U.S. workers for agricultural labor and to protect such U.S. workers from adverse impact have included requirements that:

(a) employers must recruit U.S. workers through both the interstate job clearance order process and through "positive recruitment," which is the active recruitment by the employer in areas of potential labor supply and in the area where the employer's establishment is located;

(b) U.S. workers who apply for work with an H-2A employer in the first half of the H-2A contract period must be hired if they are qualified and accept the DOL-approved job terms (this is the so-called "50 percent" rule);

(c) employers may not fire or refuse to hire a U.S. worker for other than a lawful job-related reason and may not discriminate against U.S. workers by providing wages or benefits to H-2A workers that the employer does not provide also to the U.S.

workers;

(d) employers must abide by the terms of the job offer they have submitted and that have been approved by DOL, which become an enforceable work contract between the employer and the workers;

(e) employers must pay workers the highest of one of three DOL-mandated wages including an "adverse effect" wage rate;

(f) employers must provide workers with an opportunity to work at least three-fourths of the workdays in the season or must reimburse the workers (absent an Act of God) (this is the so-called "3/4 guarantee");

(g) employers must provide free housing that meets substantive health and safety standards to H-2A workers and migrating U.S. workers;

(h) employers must reimburse inbound transportation costs for workers who work at least one-half of the season and provide return transportation costs for workers who work the entire season; and

(i) H-2A program employers may not discriminate against U.S. workers in hiring or job terms.

(j) Employers must comply with all federal, state and local laws including the Fair Labor Standards Act.

99. Under the previously established regulations for H-2A employers, recruitment efforts for U.S. workers are required to be "no less than (1) the recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers." 20 CFR 655.105(a).

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 potential labor supply areas in order to enlist them in helping to find U.S. workers, *Id.* §655.103(d)(4).

102. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to "provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." Id. §655.105(b).

103. Each employer who intends to hire H-2A workers must 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). The plan must also describe how the employer will utilize farm labor contractors where it is the prevailing practice to do so. See Id. The prior regulations require 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.

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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 farm 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 potential labor supply areas in order to enlist them in helping to find U.S. workers, *Id.* §655.103(d)(4).

105. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to "provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." *Id.* §655.105(b).

<u>Requirements for Recruitment of U.S. Workers for H-2B Positions</u>

106. The May 2008 NPRM was the first occasion since the inception of the H-2B program in 1986 in which DOL and the Secretary of Labor sought input through notice and

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 must place an active 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 must keep the job order open for a 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 Report.

(1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H-2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.

(2) The recruitment report must:

(i) Identify each recruitment source by name;

(ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;

(iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

(3) The employer must retain resumes (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

73 Fed. Reg. at 78057-78058

109. In its December 19, 2008 preamble to the adoption of the proposed regulations, DOL acknowledged that it had received comments opposing its proposed system for recruitment of U.S. workers by prospective H-2B employers. DOL acknowledged:

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.

Impact of Requirements for SWAs to Complete I-9 Before Referral of Workers

111. DOL acknowledged considerable criticism by State Workforce Agencies (SWAs) of the new regulatory provision requiring that SWA staff would have to complete I-9 verifications of the employment status of U.S. workers before referring such workers to jobs with employers seeking H-2B workers. See 73 Fed. Reg. at 78033. DOL also failed to acknowledge statements of Congressional opposition to this proposal. ETA-2008-0002-0067. Opposition to this rule included comments from the following states:

Document ID	Commenter
ETA-2008-0002-0029	Arizona
ETA-2008-0002-0069	California
ETA-2008-0002-0046	Maine
ETA-2008-0002-0063	Maryland
ETA-2008-0002-0058	Massachusetts
ETA-2008-0002-0078	Nevada
ETA-2008-0002-0040	North Carolina
ETA-2008-0002-0019	Oregon
ETA-2008-0002-0039	Pennsylvania
ETA-2008-0002-0090	Texas
ETA-2008-0002-0035	Virginia
ETA-2008-0002-0025	Washington

112. At least some of the SWAs comments raise issues as to the legality of requiring SWAs to complete I-9's before referral of prospective U.S. workers to positions for which employers seek to bring I-9's. These included the potential that SWAs could be liable for discrimination in the application of such requirements only to certain referrals as well as the impact of other laws on such requirements. Amongst the states raising concerns about the legal appropriateness of requiring them to complete I-9's or e-verify employment was the Pennsylvania Department of Labor and Industry.

113. DOL arbitrarily failed to consider the adverse impact of such a rule on U.S. workers seeking employment and the Secretary of Labor's obligation to establish effective

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. Instead of requiring employers to widely disseminate information about potential H-2B jobs, DOL arbitrarily, capriciously, and contrary to law removed a requirement which had been in the NPRM for employers to notify unions in areas of employment about H-2B positions. See 73 Fed. Reg. 78032-78033.

115. The final regulations arbitrarily, capriciously, and contrary to law fail to require employers seeking to utilize H-2B workers to actively recruit able, willing and qualified workers to jobs for which foreign temporary non-agricultural H-2B workers are requested.

Attestation Provisions

116. In the new regulations, DOL replaces the existing pre-hiring certification process required by regulation with a process based entirely on attestation. In so doing, DOL has transformed the process from one requiring meaningful review and approval by DOL to a *post hoc* system that dramatically weakens DOL oversight of the H-2A program. Fed Reg. 78060 and 780540 (to be codified at 20 C.F.R. §655.22 and 20 C.F.R. 655.24) This proposed transformation is arbitrary and capricious.

117. An attestation system does not comply with the DOL's statutory and regulatory mandate that it certify compliance with H-2B requirements. Congress has stated that labor certification is required for workers entering the U.S. to perform unskilled labor. "Any 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(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. The OIG annual report makes a legislative recommendation in relationship to the H-1B program, "Provide Authority to Ensure the Integrity of the Foreign Labor Certification Process." *Id* at p. 39. That recommendation states:

> "If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, DOL is statutorily required to certify such applications unless it determines them to be "incomplete or obviously inaccurate." Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analysis and investigations that show the program is susceptible to significant fraud and abuse, particularly by employers and attorneys. The OIG also recommends that ETA should seek the authority to bar employers and others who submit fraudulent applications to the foreign labor certification program."

Id at 39. See, ETA-2008-0002-0088

DEFINITIONS ADOPTED IN DHS AND DOL FINAL RULEMAKING ARE ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

123. The DOL and DHS regulations arbitrarily, capriciously, and without adequate justification change definitions of terms relating to the administration of the H-2B program in

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 employment as follows:

> 8 CFR 214.2(h)(6)(ii) Temporary services or labor —
>
> (A) Definition. Temporary services or labor under the H–2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
>
> (B) Nature of petitioner's need. <u>As a general rule, the period of the petitioner's need must be a year or less,</u> although there may be <u>extraordinary circumstances</u> where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:

> (1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.
>
> (2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.
>
> (3) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.
>
> (4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

129. Available evidence in response to the DOL and DHS NPRMs indicated that a high number of applications for temporary H-2B labor certifications are likely denied because of a determination that such positions are not temporary. See, ETA-2008-0002-0022 at pp. 1-5, Attachments A and B (analyzing by occupational code those jobs for which certification was denied); ETA-2008-0002-0088 at pp. 17-19, 24-27).

130. Both the May 2008 DOL NPRM and the August 2008 DHS NPRM proposed to significantly change this definition so as to permit a “one-time” occurrence to include “temporary” employment of up to three years.

131. In the December 19, 2008 preamble to the DOL regulations, DOL states that:

> … the Department will consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need--

> 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, <u>but in the case of a one-time event could last up to 3 years</u>. 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.

<u>Definitions of Job Contractor and Employ</u>

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 certification from the Department for nearly 250 H-2B temporary foreign workers, purportedly on behalf of four New Orleans hotels. We will continue to aggressively pursue those who seek to defraud the Department's foreign labor certification programs."

Id at p. 4. The same OIG annual report has an article "Conspirators of Florida Labor Leasing Company Sentenced to Pay $1 Million" discussing DOL OIG joint investigation with DOS Diplomatic Security Service (DSS) and the U.S. Immigration and Customs Enforcement (ICE). *United States v. Anna Czerwien* and *United States v. Aleksander Berman et al.* (N.D. Florida). See also, I*d* at p. 24. See, ETA-2008-0002-0088, Exhibit A.

137. By adopting its definition of a labor broker as eligible to apply for H-2B temporary foreign workers, DOL arbitrarily and capriciously authorizes "job contractors" to obtain H-2A visas in direct violation of its statutory mandate to protect U.S. workers.

138. As structured by the new regulations, there is no guarantee that the employer with whom the job contractor will place workers has any obligation to abide by the regulatory controls designed to protect U.S. workers' wages and working conditions. Nor is there any mechanism to evaluate the employer's statement that the job contractor's workers will not displace U.S. workers. See 73 Fed. Reg. at 78042.

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 arbitrarily and without justification specifically declined to include a broader definition "employ" which would more adequately operate to protect U.S. workers against job brokers and others claiming to need temporary H-2B workers without regard to the recruitment efforts of the joint employer to whom the workers are assigned. See. 73 Fed. Reg. at 78024.

143. DOL further arbitrarily defined "agent" for an H-2B employer in order to permit persons to file H-2B applications for employers without any licensing or other qualifications for such persons. Doing so despite a demonstrated history of abuse by many such agents is arbitrary and capricious and contrary to law. See, ETA-2008-0002-0088, Exhibit A. See also, ETA-2008-0002-0074 at pp. 5-8 reflecting comments of American Immigration Lawyers Association (AILA) at

144. The actions of DOL and DHS as described above are arbitrary and capricious and contrary to law.

CAUSES OF ACTION

FIRST COUNT
VIOLATION BY DOL DEFENDANTS OF 5 U.S.C. §706(2)

145. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

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

147. The actions of the DOL Defendants as set forth above are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in accordance with 5 U.S.C. §706(2)(a).

SECOND COUNT
VIOLATION BY DEFENDANTS SECRETARY OF HOMELAND SECURITY AND DHS OF 5 U.S.C. §706(2)

148. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

149. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are in violation of the Administrative Procedure Act in violation of 5 U.S.C. §706(2).

150. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in accordance with 5 U.S.C. §706(2)(a).

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;

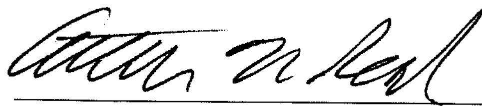
(e) Permanently enjoin the Secretary of Labor and the Secretary of Homeland Security, and the Department of Homeland Security and the Department of Labor from implementing the Final Rules as challenged herein;

(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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