UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

THE LOUISIANA FORESTRY ASSOCIATION, INC., OUTDOOR AMUSEMENT BUSINESS ASSOCIATION, INC., CRAWFISH PROCESSORS ALLIANCE, INC., AMERICAN SHRIMP PROCESSORS ASSOCIATION, FOREST RESOURCES ASSOCIATION, INC., AMERICAN HOTEL & LODGING ASSOCIATION, and AMERICAN SUGAR CANE LEAGUE OF THE U.S.A., INC.

Plaintiffs

v.

HILDA L. SOLIS, in her official capacity as United States Secretary of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, and

JANE OATES, in her official capacity as United States Assistant Secretary of Labor, Employment and Training Administration 200 Constitution Avenue, NW, Washington, DC 20210, and

THE UNITED STATES DEPARTMENT OF LABOR, 200 Constitution Avenue, NW, Washington, DC 20210, and

JANET NAPOLITANO, in her official capacity as United States Secretary of Homeland Security, Washington, DC 20528, and

THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Washington, DC 20528

Defendants.

CIVIL ACTION NO: _____

JUDGE _____

MAGISTRATE _____

ORAL ARGUMENT REQUESTED
on Motion for Preliminary Injunction or TRO to be separately filed

1539848

COMPLAINT

Plaintiffs The Louisiana Forestry Association, Inc., Outdoor Amusement Business Association, Inc., Crawfish Processors Alliance, Inc., Forest Resources Association, Inc. American Shrimp Processors Association, American Hotel & Lodging Association, and American Sugar Cane League of the U.S.A., Inc. (collectively the "H-2B Alliance") hereby bring this Complaint against Defendants Hilda L. Solis, in her official capacity as Secretary of the U.S. Department of Labor, Jane Oates, in her official capacity as Assistant Secretary of the U.S. Department of Labor, Employment and Training Administration, the U.S. Department of Labor ("DOL" or "the Department"), Janet Napolitano, in her official capacity as Secretary of the U.S. Department of Homeland Security, and the U.S. Department of Homeland Security ("DHS"), alleging as follows:

INTRODUCTION

1. The Plaintiffs bring this action for declaratory and preliminary or temporary injunctive relief before September 30, 2011, and permanently, related to *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,* Final Rule, 76 Fed. Reg. 45667 (Aug. 1, 2011) ("Wage Rule II"); *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,* Notice of Proposed Rulemaking, 76 Fed. Reg. 37686 (June 28, 2011) ("Wage NPRM II"); *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,* Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("Wage Rule I"); *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,* Notice of Proposed Rulemaking, 75 Fed. Reg. 61578 (Oct. 5, 2010) ("Wage NPRM I"). The Wage Rule II imposes immediate retroactive, substantive, and burdensome changes to the current wage obligations, requirements and relied upon expectations of employers who employ H-2B foreign

and certain similarly employed U.S. workers (20 C.F.R. § 655.10(b)(6)) in calendar year 2011, and thereafter pursuant to the regulatory requirements for certifications and issuance of visas based on such certifications promulgated by DOL in *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*, Final Rule, 73 Fed. Reg. 78020 (Dec. 19, 2008) ("2008 DOL Final Rule") and by DHS in *Changes to Requirements Affecting H-2B Nonimmigrants and their Employers*, Final Rule, 73 Fed. Reg. 78104 (Dec. 19, 2008) ("2008 DHS Final Rule"). The Plaintiffs contend that the Wage Rule II should be enjoined before it goes into effect on September 30, 2011, leaving the current status under the 2008 DOL Final Rule and the 2008 DHS Final Rule still in effect until lawful changes are made in accordance with legally required procedures. They ask that Wage Rule II be declared to be in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. ("APA"); the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq*. ("RFA"); the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* including the Immigration Reform and Control Act of 1986, ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986); and the Takings Clause of the Fifth Amendment to the United States Constitution. Plaintiffs contend that Wage Rule I also violates these requirements and should be enjoined and declared invalid. In addition to enjoining the Wage Rule I and Wage Rule II, the Plaintiffs seek a declaratory judgment that employment of both foreign guestworkers pursuant to H-2B Labor Certifications that were approved by the Department of Labor on or before September 29, 2011, and affected U.S. workers who remain employed on or after September 30, 2011, remain governed by the regulatory provisions of the 2008 DOL Final Rule and the 2008 DHS Final Rule. Approvals of Labor Certifications and Petitions based on the

currently effective wage rates for each such employment should mean that the Wage Rule I and Wage Rule II are inapplicable to employment pursuant to each of those Labor Certifications and Petitions for the remainder of the validity periods of the Labor Certifications and Petition.

JURISDICTION AND VENUE

2. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331, as this action arises under the Constitution and the laws of the United States, including judicial review of agency action pursuant to the APA, 5 U.S.C. §§ 553 and 701, *et seq.*, the RFA, 5 U.S.C. § 601, and the Fifth Amendment to the U.S. Constitution.

3. Venue is proper in the Western District of Louisiana. Plaintiff The Louisiana Forestry Association, Inc. is a citizen of Louisiana, its principal place of business is located in the Western District of Louisiana, and a substantial part of the events or omissions giving rise to the claim occur with this District. 28 U.S.C. § 98(c). Defendants are officers of the United States and are sued in their respective official capacities. 28 U.S.C. § 1391(e)(3)

PARTIES

4. Plaintiff Forest Resources Association, Inc. ("FRA") is a national forest and paper industry trade association whose members are wood-using companies, independent logging and forestry contractors who plant trees and harvest timber, and forest landowners. These members are both employers that hold current H-2B labor certifications, based on wages previously approved and relied upon by the employers, and users of the services of these H-2B certified employers. All affected have relied upon the current wages under which H-2B employers were certified in setting tree planting prices, bids, capital expenses and the like. Wage Rule II to go into effect September 30, 2011, will negatively affect FRA members who are H-2B employers and members who are users of these services and members that are wood-users. To the extent that users can curtail planting operations on and after September 30, they will do so. If

implemented September 30, the Wage Rule II will significantly reduce the annual level of U.S. reforestation. It will cause job losses among members' U.S. employees employed in jobs that are not covered within the H-2B certifications and who cannot work and enjoy livelihoods if their employers are not engaged in tree planting. The FRA members' industry will lose skilled, experienced employees and good will and reputation among each other and among all of those who use wood products.

5. FRA member landowning companies cannot absorb the greatly increased H-2B Wage Rule I and II reforestation labor costs and will postpone, reduce, or stop reforestation. In the long run this will hurt their chances of continuing to qualify for one of the forest management certification standards (Tree Farm, Sustainable Forestry Initiative, or Forest Stewardship Council). These Wage Rules will also have negative economically effects on the Seeding Nurseries that are growing the seedlings now for tomorrow's forests throughout the U.S.

6. FRA member wood consuming companies will eventually have the greatly increased reforestation labor costs passed along in the price of purchased wood, to the extent there are reforestation companies that for now are able to pay them. Many FRA member wood consuming companies are currently hanging on by their financial fingernails…an eventual 10+% increase in wood fiber costs could represent the "nail in the coffin" for these pulp and paper companies. Its U.S.-based companies are already facing competition from overseas competitors. Increasingly, pulp, paper and wood products are being imported into the U.S. from countries where the employers do not have onerous tree planting costs to absorb. Wage costs are a variable cost around the world that can make the difference for the U.S. forestry

industry and American jobs in a negative and permanent way. Once these U.S. jobs are lost, the infra-structure to sustain them cannot be replaced.

7. The H-2B Wage Rule II to go into effect on September 30 raises wages of current H-2B foreign guestworkers and certain affected U.S. workers, similarly employed in reforestation jobs, by as much as 129% - for example, in many Louisiana parishes from the 2010-2011 planting season wage rate now in effect of $9.60/hour to $16.31/hour starting September 30. That wage requirement means that tree planters' regular hourly wage rate will suddenly be more than their current overtime wage rate. Moreover, the overtime wage rate will go up from $14.40/hour to $24.47/hour for overtime hours worked. FRA member forestry (reforestation) firms that will be subject to these higher H-2B mandated prevailing wage rates will not be able to pass these reforestation labor costs of on to forest landowners. Most contracts were set based on a price per acre planted and reforestation companies set their prices based on current rates, not on rates that they are just now learning about and that, in some cases, DOL has not even yet told them about based on DOL's new, untested and unreasonable wage setting methodology.

8. The H-2B Wage Rule prevailing wage rate increases to go into effect on September 30 in other states that are as yet known about are also extraordinary wage and cost increases, in some cases putting landowners, reforestation contractors, seedling nurseries, and wood consuming companies under even more dire economic stress than those in Louisiana. The following chart shows how much FRA's members' regular hourly mandated wage rates for H-2B tree planters will be increased overnight based on what is now known:

State	Old Rate/New OES Wage rate	Percent Increase
Alabama	$10.40 to $21.16	104% increase
Arkansas	$10.16 to $16.32	61% increase
Louisiana	$ 9.60 to $16.31	70% increase
Mississippi	$ 9.52 to $17.66	86% increase
North Carolina	$ 7.36 to $16.86	129% increase
South Carolina	$ 9.24 to $16.86	83% increase
Tennessee	$ 9.85 to $12.09	23% increase
Texas	$ 9.90 to $13.54	37% increase

9. FRA member forestry (reforestation) firms that will be subject to these significantly higher H-2B wage rates cannot pass reforestation labor costs on to forest landowners. Both groups have made their business plans and contracts based on substantially lower prices that would otherwise be charged by the reforest firms, in turn based on existing H-2B wage requirements.

10. Plaintiff The Louisiana Forestry Association, Inc. ("LFA") is a state-wide private non-profit association based in Alexandria, Louisiana and is made up of more than 3,500 members. Its members are reforestation companies whose employees are hired under the H-2B program plant and who replant trees in the forests of the State, large and small landowners who plant and maintain forests within the State, employees of forest products companies, wood suppliers, loggers and wood-using businesses as well as wood-using businesses themselves. Louisiana reforesters who have been informed of their new wage rates to become effective September 30 are faced with an immediate jump in their planned-for wage rates for tree planters from $9.60 per hour to $16.31 per hour, an unplanned for, unrecoverable 70% increase

between the wage rate under which their H-2B guestworker tree planting employees were certified to work and on which their employers had relied and the rate that starting September 30 the Department of Labor says must be paid, their certifications by DOL and approvals by DHS notwithstanding. Under currently effective DOL and DHS regulations, once set and approved by DOL and DHS, H-2B employers are entitled to rely on being able to pay the wage rate under which they were certified for the full employment certification period. The H-2B alliance Plaintiffs have relied on these regulatory promises by DOL and DHS.

11. These employers will suffer substantial, immediate, and irreparable harm if Wage Rule II is allowed to go into effect on September 30, 2011. These reforestation contractors (the "tree planters") will be faced with significantly higher rates above their contractual commitments adopting Wage Rule I methodology for rate setting. They have planned their budgets and relied on the existing wage rates in setting up all business planning, capital expenses, and the fixed price contracts at which they plant seedlings at a price per acre. These rates were set under the employers' current H-2B certifications and the current effective wage methodology and rates. They will be forced to lay off other American employees, make other cost cuts, and possibly their businesses will not tolerate the dramatic increased costs being forced upon them by the H-2B program. They will face the loss of skilled, experienced employees in other jobs on top of wages that will not be recoverable should this wage rate methodology and the increased rates ultimately be held to have been set invalidly and improperly in violation of law. They will have lost good will among their customers as they curtail expenses every way they can.

12. These higher rates will adversely affect the economic activity in the locales where LFA members bring H-2B employers' employees to work because of the loss of revenues from

fuel, living expenses, and other supplies and equipment, all of which will be cut to the bone. The landowners and tree farmers who depend on the reforesting contractors to replant after harvest will face either unrecoverable increases in reforestation costs or they will postpone, reduce, or stop reforestation. Such a change will interrupt the landowners' and tree farmers' established reforestation schedules and impair their forest management certification standards that require scheduled replanting. Wood consuming companies also will bear some of the burden in the form of increased prices for their wood raw materials. For struggling pulp and paper companies that are already facing intense global competition from overseas competitors, the increased price of their most important raw material could be fatal and will certainly cause irreparable damage. For these business to remain in the U.S., wood products must be produced at a cost competitive level, global prices considered.

13. These wage increases for H-2B foreign guestworker tree planters and the few U.S. workers who are willing and available to perform these jobs, will ripple throughout the economy, not only adversely affecting the businesses that plant trees and their U.S. employees in other jobs, the U.S. employees and owners of their suppliers but also the forest owners and wood- use companies and their U.S. employees that depend on American wood products as their raw materials.

14. Plaintiff Outdoor Amusement Business Association, Inc. ("OABA") is the national non-profit trade association that represents carnivals, circuses, food/game concessionaires, independent amusement ride owners, and others associated with the mobile amusement industry. Many of OABA's member employers depend on the availability of temporary foreign guestworkers under the H-2B program to assemble and operate amusement rides, food operations and games for some 500 million patrons at county and state fairs and

festivals, community, civic, and other non-profit charitable events, *i.e.*, churches, volunteer fire departments, Lions Clubs, Shriners, and others. The revenue created from these fairs, sponsors, and other events buys ambulances, fire fighting equipment, and health care for young people; supports America's agricultural industry; and provides scholarships for our future leaders. Many of the members are almost completely dependent on the availability of H-2B guestworkers to perform the assembly and operation of rides, games, and cooking and service of food at these events, and few are able to find U.S., workers who are willing to take and stay in these temporary jobs that require travel from locale to locale. The wage structures relied on by the employers, under which they hold current DOL certifications will be upset should the Final Wage Rules I and II become effective. They relied on existing wage structures when they set up the contracts, tours and other business operations under which they currently operate. OABA members' services are a vital driver for the national economy. According to one study of data from 2002, the fair business in California alone (which represents approximately 12% of the national population) generated economic impact of more than $2,500,000,000, taxes and fees of more than $136 million, and jobs for more than 28,000 United States citizens. http://www.cdfa.ca.gov/fe/Documents/SWEReport/FairsReport.pdf p. 1. Most OABA members are small, family businesses, many in their third generation of ownership. Their family livelihoods and the incomes and jobs of their U.S. employees who supervise the workers whose wages are here in issue, staff their offices, provide their accounting services, make their travel arrangements, sell them fuel and equipment, and perform other business functions are also dependent on affordable wage rates for H-2B employees and those few available similarly employed U.S. employees. OABA represents over 5,000 members, 200 carnivals, 15 circuses, and hundreds of traveling food/game concessionaires in North America.

15. Plaintiff the Crawfish Processors Alliance, Inc. (CPA) is one of the Louisiana small business groups that rely heavily on a viable and cost-effective H-2B program to sustain its contribution to the Louisiana economy. CPA has 28 members who provide approximately 80% of the production of commercial crawfish. Crawfish picked tailmeat is a staple food source in Louisiana and its members sell to the nation. U.S. crawfish producers and processors compete in a world market, however, and the industry faces severe competition from Chinese exporters. The number of processing plants has decreased dramatically, largely as a result of the competition from the Chinese. Its processors depend on the H-2B workers to support the farmers who raise their crawfish in paddies and fishermen to process this highly variable seafood harvest. The downstream restaurants, grocers, and wholesale seafood purveyors also are dependent on the output from the processing operations. The prevailing wages paid in 2010 were from $7.25-$9.05 per hour in Louisiana. The prevailing wages certified in 2011 were $7.25-$9.25 per hour. We understand that the new wages to go into effect on under the new methodology will be substantially more.

16. For CPA members, anywhere from 30% to 100% of production will be affected if H-2B workers are not part of the affordable workforce. Many CPA members are in rural, low population areas. For example, one of the leading suppliers of crawfish would lose at least 85% production without the H-2B peelers, and one of the leading crab and crawfish processors relies on H-2B workers for one-third of its workforce.

17. The new H-2B prevailing wage rate will cripple Louisiana employers while many of their domestic competitors, who use undocumented, illegal workers, and their foreign competitors (especially China), who do not face such labor costs, are already operating at a significant advantage.

18. Any increase in wages will allow the Chinese even greater opportunity to capture the domestic U.S. market for crawfish. Once the market is lost, it will be impossible to recapture all of it because commercial buyers will lack confidence that U.S. producers can sustain production at prices that can be competitive. Crawfish processors currently provide many jobs for U.S. employees, and those jobs will be lost to our economy and the U.S. workers in these non-H-2B jobs will be severely affected if these new wage increases for predominantly only H-2B foreign guestworkers are not stopped before September 30.

19. The American Shrimp Processors Association (ASPA) is a nonprofit association of U.S. domestic shrimp processors dedicated exclusively to the promotion and preservation of the culture and economic contribution of the U.S. domestic shrimp supply. ASPA members are located throughout the Gulf South from Texas across to Florida, with the majority of its members clustered in Louisiana and Mississippi. Shrimp is one of the most widely consumed seafood products in the world. The demand for shrimp in the U.S. alone is so large that the U.S. domestic shrimp industry can only produce and satisfy approximately 10% of U.S. demand. Unfortunately, the remainder of the market is served by imported shrimp produced in aquaculture ponds around the world and often sold into the U.S. at unfairly low prices. Unfairly low priced imported shrimp steadily drove domestic prices down beginning in 2000 and eventually became so severe that the U.S. domestic industry petitioned the International Trade Commission and U.S. Department of Commerce in 2004 for a trade remedy relief as a result of the unfairly dumped imports. The domestic industry prevailed and imported shrimp from five (5) countries are currently subject to antidumping orders to remedy their unfair trade practices. Before the antidumping orders could take full effect, the Gulf South was struck by a series of devastating hurricanes beginning with Katrina in 2005. After five years of rebuilding the

industry after the hurricanes, the domestic shrimp industry was on the verge of a full recovery when the worst environmental disaster in U.S. history occurred. The Deepwater Horizon disaster occurred just off the coast of Louisiana in April 2010, spewing millions of gallons of oil into pristine and productive shrimping grounds, resulting in massive fishing closures and a crisis in consumer confidence.

20. As the one year anniversary of the oil disaster passed in April 2011, the domestic shrimp industry looked forward to a bountiful white shrimp season beginning in late August or early September 2011. The white shrimp season is particularly important because once the season ends in December, the fishing grounds are closed and ASPA members must retain their market and sales throughout the offseason through inventory.

21. The H-2B workers are absolutely essential to allow ASPA members to process sufficient shrimp to make it through the offseason and hold their market during the winter months when the shrimping grounds are closed but when imports continue to flood the market. Just as the white shrimp season opened in 2011, and well after ASPA members had already made budgetary plans, commitments and accommodations for their H2-B workforce and all other operations, its members began receiving notices from the DOL demanding unexpected, unplanned for and extraordinary wage increases for their H-2B employees and for the U.S. workers hired in connection with the H-2B recruitment.

22. The changes being implemented are material and will have immediate and severely detrimental effects on ASPA members who depend on a reliable and cost-effective H-2B program and wage requirements to sustain their operations. ASPA members are one part of the interconnected chain that sustains tens of thousands of U.S. jobs starting upstream at the shrimp boat, ice house, oil and gas station, and grocery/bait supply shops and then moves

downstream through shrimp docks, trucking companies, processing plants, cold storage facilities, refrigerator and freezer service men and women, wholesalers, brokers, and retail outlets, including both large-scale institutional trade and restaurant retail.

23. ASPA members would suffer particular irreparable harm by the implementation of higher wage rates as of September 30 because their white shrimp season runs into December 2011. They would not have been directly affected this year by the rule change that until only weeks ago was to have taken effect on January 1, 2012. ASPA members have already begun receiving notices from DOL describing crippling wage rate increases that become effective on September 30 in various Louisiana parishes. These rates include ASPA members who are currently paying $8.07/hr being required to pay $14.77/hr - an increase of 83%. Others who currently pay $7.63 will be required to pay $12.52/hr - a 64% increase. Others who currently pay $9.05/hr will be required to pay $13.65/hr - a 51% increase. The prevailing wage rate increases are significant and material and if not enjoined will not only cause serious detrimental harm to ASPA members relying on H-2B workers, but also other ASPA members and the entire chain of production and sale who will bear the heavy burden of increased import competition due to the likely closure of domestic U.S. shrimp processing plants. Once these businesses close or curtail their operations because of these wage increases, mostly going to foreign H-2B guestworkers because there are so few U.S. workers willing and available to take these jobs, domestic shrimpers will not recapture the market they lose, the non-H-2B covered America supervisors and professional staff they are forced to lay off, or the customer and supplier good will they will lose.

24. Plaintiff American Hotel and Lodging Association (“AH&LA”) is the is a national association and the only association that represents all sectors and stakeholders in the

U.S. lodging industry. Its membership includes individual hotel property members, hotel companies, student and faculty members, and industry suppliers. The H-2B program is and has been of extreme importance to AH&LA and AH&LA has for years monitored it and has given input where appropriate and necessary. Its interest is this: Many of AH&LA's member employers depend on the availability of temporary foreign guest workers under the H-2B program to fill temporary positions created by peak or seasonal fluctuations in business. Personal service is the lifeblood of the lodging industry; it cannot be automated and it cannot be outsourced. Without an adequate number of workers during all times, a hotel or resort simply cannot operate efficiently, if at all. During the peak season, hotels and resorts must increase their workforces with temporary staff in order to support their full-time staff and provide service to the increased number of guests. These temporary workers are crucial to their ability to serve their guests and hence to operate properties during peak seasons while still retaining full-time American staff year round.

25. Plaintiff American Sugar Cane League of the U.S.A., Inc. is a nonprofit association whose members include the eleven sugar mills that operate in the State of Louisiana and farmers and others associated with this industry that provides employment to approximately 7,000 mill and farm employees. The farm tractor operators as well as the farm owners and the mills are dependent on available workers in the short approximately 100 day harvest period from about October 1 until about January 1. They all depend on H-2B workers who are willing to work these seasonal and essential jobs. Some of the jobs these H-2B workers perform because there are not U.S. workers who are available and willing take these jobs include the essential duties of sugar boilers. H-2B workers perform maintenance of the mills and burn bagasse in the steam boilers of the mills that provide electricity for the mills. H-2B employers

of these critical sugar mill employees had not known until after the publication of the new wage rule methodology and requirements on August 1, 2011, that they would be required to begin paying these employees at the new wage rates this season. Essentially all of their planning and budgeting was performed with the expectation that their work season at the mills would be completed before the new wage rates and methodology would become effective on January 1, 2012. They are critically and immediately adversely affected by the changes to become effective September 30, 2011, that will affect their whole wage and cost structures.

26. Defendant Hilda L. Solis ("Solis") is Secretary of the U.S. Department of Labor. The Secretary of Labor is responsible for all functions of the DOL, including the Office of Foreign Labor Certification within the Employment and Training Administration, which asserts jurisdiction over the administration of the H-2B program. Solis is sued in her official capacity, pursuant to 5 U.S.C. § 703.

27. Defendant Jane Oates ("Oates") is Assistant Secretary, the U.S. Department of Labor, Employment and Training Administration. The H-2B DOL Wage Rule I and Wage Rule II were issued by the Assistant Secretary. Oates is sued in her official capacity, pursuant to 5 U.S.C. § 703.

28. Defendant DOL asserts that it is responsible for administration of the H-2B program.

29. Defendant Janet Napolitano ("Napolitano") is Secretary of the U.S. Department of Homeland Security ("DHS"). The Secretary of Homeland Security is responsible for all functions of DHS and its component organizations, including the U.S. Citizenship and Immigration Service (USCIS), which approves employer Petitions to allow visa issuance for H-2B workers, as authorized by the Immigration and Nationality Act, 8

U.S.C.§§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1) and 1184(c)(5). Napolitano is sued in her official capacity, pursuant to 5 U. S. C. § 703.

30. Defendant DHS is responsible for certifying employer Petitions so that foreign workers can obtain H-2B visas to come to work in the United States.

FACTS

Overview of the H-2B Program

31. The H-2B program was created in 1987 upon the enactment of the Immigration Reform and Control Act ("IRCA") amendments to the Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.* ("INA") in 1986. The name "H-2B" comes from the statutory provision that created the program, 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The specific purpose of the H-2B program is to provide nonimmigrant alien labor for non-agricultural employers in the United States. The H-2B program replaced the prior H-2 program that had also provided a legal means by which employers could obtain the temporary services of foreign guestworkers in non-agricultural jobs when U.S. workers were unavailable. A special program for the temporary employment of foreign workers in agriculture was created by IRCA under 8 U.S.C. § 1101(a)(15)(H)(ii)(a) and is known as the H-2A program. Before the creation of the H-2A and H-2B programs, the so called H-2 temporary foreign worker program existed for both agricultural and non-agricultural employment. Under the same statutory authority, the text of the law governing what is now the H-2B program was not changed by IRCA except to add the "b" designation. (There are currently other temporary "H" guestworker programs under 8 U.S.C. § 1101(a)(15)(H) for aliens "of distinguished merit and ability" and for "specialty occupations" and nursing that are not in issue in this case.) Under the H-2B program, here in issue, DHS requires employers to apply for and receive a "Labor Certification" from DOL before the employer can file a petition with DHS and receive approval to hire nonimmigrant

alien guestworkers and for individual foreign workers to apply for H -2B visas. Each guestworker must independently qualify for and receive an H-2B visa issued by the United States Department of State ("DOS") before the worker is permitted to enter the U.S. The wages the employer was certified to pay for the period of the Labor Certification become part of the Petition filed with and approved by DHS. The H-2B program was not designed to replace willing and available U.S. workers with H-2B workers but to balance the needs of employers (and the U.S. economy as a whole) with the interests of U.S. workers similarly employed by making legal temporary foreign workers available when U.S. workers are not willing and available. Under DOL's current operation of the H-2B program under the 2008 DOL Final Rule, an employer must meet a number of stringent regulatory requirements and terms. As a prelude to hiring an H-2B worker, employers must make specific efforts to find willing and qualified U.S. workers at a specified wage rate, must advertise to hire U.S. workers, and must follow detailed and lengthy recruitment processes. 20 C.F.R. § 655.15 (d) and (f). Before an employer may hire H-2B workers, DOL must certify that there are insufficient numbers of U.S. workers willing and available. Therefore, employers currently employing H-2B foreign guestworkers have already advertised for and hired any willing and available U.S. workers. Most of the extraordinary wage increases to go into effect under Wage Rule II will therefore necessarily go to foreign guestworkers, not to U.S. workers because U.S. workers chose not to take these jobs. Specific purposes and intent expressed through the statutory authorization for the H-2 program are to protect the interests of both U.S. employers and the U.S. economy as a whole through the preservation of jobs, work opportunities, and employers in the United States. The H-2B program provides employers with access to legally authorized employees for their difficult-to-fill positions, is intended to provide stability and security to the employment

relationship, and supports the employment of countless other U.S. workers that rely on the work performed by temporary foreign workers to enable them to have jobs, as found by numerous federal courts over the years, both in the pre-IRCA H-2 program as well as under the post-IRCA H-2A program. *See, e.g., Rogers v. Larsen*, 563 F.2d 617, 624 (3d Cir. 1977) ("temporary alien workers were economically essential…"). *A.F.L.-C.I.O. v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) ("The Department is obligated to balance the competing goals of the statute - providing an adequate labor supply and protecting the jobs of domestic workers.") The statute requires that the Department serve the interests of both farmworkers and growers in the context of the H-2A program and non-agricultural workers and their employers in the context of the H-2B program. The interests of affected employers clearly must be taken into account by DOL. *See also Orengo Caraballo v. Reich*, 11 F.3d 186, 190 (D.C. Cir. 1993) In promulgating the regulatory schemes challenged here, DOL expressly said it would not consider the effect of its regulations on H-2B employers.

32. Employers are required by DOL to file H-2B applications no more than 120 days before the date they expect to need H-2B workers. 20 C.F.R. § 655.15 (e). Once DOL issues a Labor Certification, the employer must also complete additional processes, including, for example, the filing and processing of a Petition with USCIS based on the DOL Labor Certification pursuant to regulations published at 8 C.F.R. § 214.2(h) *et seq.*, so that workers can apply to the U.S. Department of State (DOS) for H-2B visas in their home countries. "The approval of the petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act [8 USC § 1101(a)(15)(H)(ii)(b)] shall be valid for the period of the approved temporary labor and certification." 8 CFR § 214.2(h)(9)(iii)(B)(1). DOL has no authority under DHS

regulations or the Act to change the visa terms that DHS has approved. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c)(1) and 1184(c)(5)(A).

33. The H-2B program has been governed, at DOL and DHS, by regulations promulgated in 2008 that are described in Paragraph 1 of the Complaint.

34. From the time the H-2B program was created by Congress in 1986, until the 2008 DOL Final Rule, DOL governed the H-2B program and imposed generally applicable substantive obligations and requirements upon employers through a series a administrative policy guidance letters referred to as General Administrative Letters ("GALs") and Training and Employment Guidance Letters ("TEGLs") that were not issued pursuant to public notice and comment procedures required by the Administrative Procedure Act.

35. Since at least 1996, in the H-2B program, DOL has utilized wage data from DOL's Bureau of Labor Statistics' Occupational Employment Statistics ("OES") survey to determine the applicable prevailing wage rate for a specific job opportunity listed in an H-2B application unless the job opportunity was covered by an applicable wage determination issued under the DBA or SCA. In addition, the employer could also submit a public or private wage survey to determine the prevailing wage in the absence of other sources. DOL explained that it used OES wage data because that data produced the most consistent and accurate prevailing wages.

36. In 2005, DOL updated its previous guidance governing the determination of prevailing wage rates to include the use of four tiers of wages tied to skill level in the OES data, in addition to the other sources, if applicable.

37. In 2008, DOL for the first time promulgated regulations through notice and comment rulemaking to govern the H-2B program, including the determination of prevailing

wage rates. As part of that rulemaking, DOL adopted its longstanding prevailing wage practice as a regulatory requirement, but it did not specifically take public comment on the selection of that longstanding methodology.

The CATA I Litigation

38. Shortly after the 2008 DOL Final Rule was issued, the Comité de Apoyo a Los Trabajadores Agricolas ("CATA") filed suit in the Eastern District of Pennsylvania alleging the Final Rule was promulgated in violation of the APA in a case styled as *CATA v. Solis*, CA. No. 09-240 (E.D. Pa.).

39. On August 31, 2010, the court rejected *CATA's* challenges to most provisions in the 2008 DOL Final Rule, but the court did find some provisions of the rule violated the APA. It found that DOL had not adequately explained in the rulemaking the reason it had formally adopted skill levels as part of H-2B prevailing wage determinations, a practice it had been following under TEGL-based administrative program, and that DOL had refused to accept comments on its use of the OES data set.[1] *See CATA v. Solis*, No. 09-240, 2010 WL 3431761, slip op. at 37-8, 49 (E.D. Pa., Aug. 31, 2010).

40. The *CATA* court did not vacate the wage methodology but rather directed DOL to correct the deficiencies by promulgating prevailing wage methodology provisions in accordance with the APA. *See CATA v. Solis*, No. 09-240, 2010 WL 3431761, slip op. at 50 (E.D. Pa., Aug. 30, 2010).

41. The *CATA* court did not dictate to DOL the content of the H-2B wage methodology and did not prohibit DOL from proposing the same wage methodology that was adopted in the 2008 DOL Final Rule.

[1] The *CATA* court invalidated, and even vacated, a few other select provisions within the 2008 DOL Final Rule that were not implicated by the DOL rulemakings at issue here.

42. The decision by the *CATA* court did not require or even contemplate that DOL would issue the entirely new prevailing wage methodology regulations here in issue.

The Wage NPRM I

43. Following the *CATA* decision of August 31, 2010, and instead of pursuing notice and comment rulemaking that included a more complete explanation of the reasons DOL had selected (and had continued to use for nearly 15 years) the OES prevailing wage methodology, DOL embarked upon an entirely new substantive rulemaking to make a fundamental change to the definition of "prevailing wage" and to change the process for the assignment of wages in the H-2B program.

44. On October 5, 2011, DOL published a Notice of Proposed Rulemaking for Wage NPRM I in the *Federal Register* with a 30-day public comment period. 75 Fed. Reg. 61578 (Oct. 5, 2010). The comment period was subsequently extended for an additional 8 days. 75 Fed. Reg. 67662 (Nov. 3, 2010).

45. The Wage NPRM I proposed to change the methodology for calculating "prevailing wages" in the H-2B program from one in which the prevailing wage was assigned based on the most applicable job title and description and the most accurate wage data, to one that simply selected the highest possible wage from any wage survey, without regard to reliability or accuracy, and that mentioned virtually any job duty or task contained in the employer's job position description.

46. DOL claimed in the Wage NPRM I that it had "grown increasingly concerned that the current [prevailing wage] calculation method does not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H-2B workers." 75 Fed. Reg. 61578, 61579 (Oct. 5, 2010).

47. DOL provided in Wage NPRM I no evidence of any adverse affect on any U.S. workers resulting from the current prevailing wage methodology that had been in use for more than a decade.

48. In addition, DOL implied in the Wage NPRM I that it was proposing a completely new wage methodology because it was required to do so by court order in *CATA*. In reality, the *CATA* decision found that DOL had failed to comply with the APA by not adequately explaining its use of four skill levels as part of the prevailing wage determination and by failing to accept comments from the public about appropriate reference sources of wage data for making prevailing wage determinations. The *CATA* decision and order required only that DOL promulgate rules "concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act." The *CATA* decision did not require DOL to change the methodology that had been used by DOL for more than a decade.

49. Rather than follow the Department's longstanding practice of determining the applicable prevailing wage from the single most appropriate and accurate data source based on the job title and full task and duty description, the Wage NPRM I proposed a new prevailing wage scheme that is not tethered to the most relevant or statistically valid data source for the job title and description, but rather is simply the highest wage the DOL can locate from among any possible data source that mentions any job task and duty associated with the employer's position. The Department then assigns the highest wage to the employer and calls it the "prevailing wage" that must be paid to all H-2B workers and any U.S. workers recruited in conjunction with the H-2B job order.

50. The Wage NPRM I proposed that employers pay as the "prevailing wage" the highest wage found from among four different sources: a collectively-bargained union wage; a

wage rate established under the Davis-Bacon Act ("DBA"); a wage rate established under the McNamara-O'Hara Service Contract Act ("SCA"); or a wage determined from the arithmetic mean of OES data, which DOL described as being the wage rate "that is at the point between the current Level II and III wages" for the relevant occupation.

51. The Wage NPRM I did not contain any indication of the length of time that would elapse between the rule being finalized and the rule becoming effective.

52. The Wage NPRM I failed to provide any notice that when the rule was finalized it would be adopted to have a retroactive effect upon employers who had already been issued their Labor Certifications, and who had DHS Petitions already granted, and who had hired H-2B employees (and affected U.S. workers) in 2011, and who had made other irrevocable financial investments and commitments based on the wage terms of their DOL Labor Certification and DHS approved Petition.

53. DOL received approximately 300 comments on the Wage NPRM I with most commenters objecting to the DOL proposal.

The Wage Rule I

54. Despite the overwhelming number of comments opposing the Wage NPRM I, on January 19, 2011, DOL finalized the rule with content nearly identical to what had been proposed in Wage NPRM I.[2] It still gave no notice that DOL intended to apply the new wage requirements to employers that had already made financial commitments, obtained certifications, had workers obtain visas, etc. in reliance on their existing wage rates.

55. DOL replaced the commonly-understood definition of "prevailing wage" and the prevailing wage requirement applicable to H-2B workers, and in its place DOL imposed a "highest possible wage" scheme that mandates employers pay the absolute highest wage DOL can find associated with any survey and without regard to the accuracy or statistical validity of the survey or its applicability to the employer's job title and position description.

56. DOL specified that H-2B employers would, beginning on January 1, 2012, be assigned a prevailing wage determined to be the highest possible wage DOL could locate for that occupation in that area of employment, and potentially in another geographic area, pursuant to a collectively-bargained union wage, the DBA, the SCA, or arithmetic mean wage from OES, regardless of whether the employer applying to hire H-2B workers is even covered by the DBA or the SCA and regardless of the skill level of any applicant for a job.

57. The Department specified that, after considering the disruption that could occur to numerous employers, including small businesses, by imposing this new wage methodology change during the existing year, the Wage Rule I would be effective on January 1, 2012, in an effort to minimize the effect on employers, as required by law, including on the small business

[2] The one significant difference being that the NPRM proposed elimination of all employer-provided surveys and the Final Rule allows the use of employer-provided surveys in very limited circumstances. See 76 Fed. Reg. 3452, 3466-67.

employers that rely on the H-2B program. *See* 76 Fed. Reg. 3452, 3462. Even then it was not clear that DOL intended for the new wage rates and new methodology to apply to certifications that had been obtained before January 1, 2012.

58. Accompanying the publication of the Final Wage Rule I, the Department also requested additional comments for 60 days on ways in which the Department could phase-in the requirements of Wage Rule I in 2012, in an attempt to minimize the disruptive impact on employers, including small businesses, resulting from the unprecedented changes to the program.

59. The Department has not released any details on a phase-in process resulting from those comments.

The CATA II Litigation

60. Following publication of Wage Rule I, the plaintiffs in the *CATA* litigation challenged the effective date contained in the Rule, alleging the date violated the APA and INA. On June 16, 2011, the *CATA* court invalidated the January 1, 2012, effective date of Wage Rule I as being in violation of the APA, saying that in setting the effective date, DOL impermissibly considered the effect on employers resulting from the new mandates imposed by Wage Rule I and directed DOL to engage in a new rulemaking to establish a new effective date. *See CATA v. Solis,* No. 09-240, 2011 WL 2011 U.S. Dist. Lexis 64440, at 19-20 (E.D. Pa., June 16, 2011),

61. DOL did not appeal the *CATA* court's decision of June 16, 2011.

The Wage NPRM II

62. Although DOL did not address any of the comments it received in response to its request about an extended phase-in period for the Wage Rule I, the Department announced on June 28, 2011, a Notice of Proposed Rulemaking to accelerate drastically, rather than phase-in

the previously announced effective date of Wage Rule I by making the Rule's requirements, including new methodology and drastically higher wage rates - some are more than 100% increases - effective on or about October 1, 2011, rather than January 1, 2012.

63. DOL claimed that it was pursuing Wage NPRM II because it was required to do so by the *CATA* court and DOL failed to consult or consider other relevant and binding legal requirements that govern its rulemaking efforts under 8 U.S.C. §§ 1101(a)(H)(15)(ii) and 1184(c)(1), among others.

64. DOL relies on the *CATA* court's decision and the District Court for the District of Columbia's 1983 unappealed decision in *NAACP v. Donovan*, 566 F. Supp. 1202, for the proposition that DOL cannot consider "the economic hardship on small business" in determining how to implement its prevailing wage methodology.

65. The *CATA* court and DOL, however, fail to acknowledge statutory requirements enacted by Congress after the *NAACP v. Donovan* decision, which mandate that agencies specifically consider the economic impact of regulatory proposals on small business. *See e.g.*, Small Business Regulatory Enforcement Fairness Act, as amended, Pub. L. 104-121, 5 U.S.C. § 601 et seq.

66. DOL also fails to acknowledge other relevant authority, including authority from the Courts of Appeal for the Third Circuit and for the District of Columbia that govern its administration of any H-2 program. In *Rogers v. Larson*, 563 F.2d 617 (3rd Cir. 1977), the Court considered the purposes of the temporary guestworker program established at 8 U.S.C. § 1101(a)(15)(H)(ii). Specifically, looking at the requirements of 8 U.S.C. 1101(a)(15)(H)(ii), of which H-2B is now a part, the *Rogers* Court concluded that although the federal statutory

provision here in issue and the pertinent legislation of the Virgin Islands had some common purposes, they were also "in direct conflict." *Id.* at 626.

> The common purposes are to assure an adequate labor force on the one hand and to protect the jobs of citizens on the other. (footnote omitted) Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force.

Rogers v. Larson, 563 F.2d 617, 626 (3rd Cir. 1977), *cert. denied*, 439 U.S. 803 (1978).

67. The Court of Appeals for the Third Circuit could not have been more clear in the *Rogers* opinion that any regulation of the temporary guestworker program authorized under 8 U.S.C. § 1101(a)(15)(H)(ii) must consider more than the interests of workers who may receive higher wages. Protecting workers is simply not the end of the matter as the Court further explained: "The conflict arises because the Virgin Islands and the United States strike the balance between these two goals differently." The Court invalidated a statute of the Virgin Islands that failed to give adequate consideration to the needs of its employers who needed the services of guestworkers to meet their workforce needs. *Id.* at 626. Therefore, DOL is required to "strike a balance" between the aims and requirements of workers who are similarly situated to the proposed H-2B employees and employers who rely on an available foreign guestworker labor force to supplement their U.S. workforce. In *Rogers*, the Court further recognized that the guestworkers' contributions to the larger economy were "economically essential." *Id.* at 563 F.2d at 624. The guestworkers performed many jobs that U.S. workers did not want, thereby permitting other U.S. jobs and economic activity to exist. DOL has also failed to consider the effect on the local economies where H-2B workers are needed and the effect on the broader U.S. economy of these huge and unexpected wage increases.

68. The dual purposes of what was previously known as the H-2 program have been recognized by other courts besides the Court of Appeals for the Third Circuit. For example the Court of Appeals for the First Circuit in adopting the *Rogers* rationale and quoting its findings noted that 8 U.S.C. § 1101(a)(15)(H)(ii) has two statutory purposes:

> The statute [that provides for protection to U.S. workers], however, is not a one-way street. The Court of Appeals for the Third Circuit, recently faced with a somewhat similar situation in the Virgin Islands, recognized that there are two statutory purposes. "The common purposes are to assure (employers) an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force." *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977).

Flecha v. Quiros, 567 F.2d 1154, 1156 (1st Cir. 1977), *cert denied*, 436 U.S. 945, 98 S.Ct. 2846, 56 L.Ed.2d 786 (1978)(*quoting Rogers*). *See also, Orengo Caraballo v. Reich*, 11 F.3d 186, 190 (D.C. Cir. 1993) (quoting *Rogers* and citing to both *Rogers* and *Flecha*).

69. Protecting workers is simply not the end of the matter as the *Flecha* Court further explained. "The purpose of the statute and regulations relating to temporary workers . . . [is] to provide a manageable scheme . . . that is fair to both sides." *Flecha*, 567 F.2d at 1157. Thus, DOL must, in the development of regulations governing the H-2B program, including those related to wage rates and wage-setting mechanisms, take into account both statutory purposes.

70. DOL claimed that the Wage NPRM II proposed only to change the effective date of its previously published Wage Rule I.

71. In retrospect, it is clear that in the Wage NPRM II the Department intended substantive and retroactive changes to the existing legal obligations, terms, and requirements

applicable to H-2B employers for calendar year 2011, and thereafter that will impose legal, financial, and other obligations on them to which they were not otherwise subject.

72. The Wage NPRM II did not provide notice to the public that DOL intended the proposed requirements to have retroactive effect on employers with existing valid Labor Certifications, approved Petitions from DHS, and H-2B employees currently working.

73. DOL claimed in the Wage NPRM II, in contravention of applicable statutory and judicial precedents, that it could not consider the effect of its regulation on employers in selecting an effective date. DOL never considered the effect of the new prevailing wage methodology and resulting mandatory wage rate increases on employers who had already been approved to hire, who already employ, and who will employ H-2B workers on and after September 30, 2011 for the remainder of the term of a currently valid labor certification .

74. DOL issued the Wage NPRM II just before the July 4 holiday weekend and unreasonably limited the amount of time the public would be permitted to comment on the proposal to only 10 days - - requiring filings by Friday, July 8, despite the wide-ranging substantive changes the proposal would make to H-2B employers' existing legal, economic, and contractual obligations, and despite the ripple effects beyond the economic viability of these employers that affect many other American jobs and businesses, as well as the jobs of non-H-2B regulated employees.

75. DOL imposed an unreasonable restriction on the public's ability to comment on the proposed substantive changes by refusing to accept or consider comments on any issue except for the effective date contained in the proposed rule, despite the wide-ranging substantive changes the proposal would have on H-2B employers' existing legal obligations and despite

ripple effects beyond the economic viability of these employers that affect many other American jobs and businesses, as well as the jobs of non-H-2B regulated employees.,

76. Many employers subject to the regulations would have commented on the effects of the proposed substantive changes in their legal obligations, the effects on their ability to continue operations, the likely resulting layoffs of non-H-2B regulated American employees that will be required, and many other substantial and irreparable harms if the DOL would have considered those comments.

77. Many employers subject to the regulations would have commented on the effects of the proposed substantive changes in their legal obligations, the effects on their ability to continue operations, the likely resulting layoffs of non-H-2B regulated American employees that will be required, and many other substantial and irreparable harms if the DOL would have provided an adequate comment period.

The Wage Rule II

78. With the artificially shortened comment period and unreasonable restriction on the content of comments, the Department received just 42 unique comments on the Wage NPRM II, just 16% of the total number of unique comments submitted in response to Wage NPRM I.

79. Again, without addressing any of the comments DOL received in response to its earlier proposal that accompanied the Wage Rule I about how to mitigate the impact of Wage Rule I through a phased-in effective date after January 1, 2012, DOL replaced Wage Rule I with Wage Rule II, which contains an effective date of September 30, 2011, and which clearly makes the new wages and new methodology effective on that date to existing H-2B guestworkers and the handful of U.S. workers who by regulation must be paid the same wage rate as the rate paid to the foreign guestworkers.

80. Given that all workers who are working in H-2B certified jobs on September 30 will have been hired under existing wage requirements, the vast majority of those persons who will be paid these new drastically higher wages, will be foreign guestworkers, not U.S. workers because the positions subject to these new higher wage rates have already been filled. Therefore, the increased wage paid beginning September 30 to H-2B workers already working in the U.S. will in no way prevent adverse effect on U.S. workers because they will not be eligible to fill those positions.

81. Wage Rule II requires that employers receiving a Labor Certification on or after September 30, 2011, will be required to pay the new wage rates, determined pursuant to Wage Rule I and Wage Rule II to all foreign guestworkers and to the U.S. workers who are covered by the H-2B regulatory requirements.

82. Wage Rule II also requires H-2B employers with existing valid Labor Certifications to begin paying new wage rates determined pursuant to Wage Rule I and Wage Rule II on September 30, 2011, which is a retroactive application of new substantive legal obligations to which these employers were not previously subjected.

83. Previous Department of Labor rulemakings effectuating changes in the H-2A and H-2B programs have had only prospective effect. That is, employers with valid Labor Certifications were subject to the standards governing their Labor Certification at the time of certification application and approval, and any changes in program rules applied only to Labor Certifications for which application was made after the effective date of the program rule changes. *See, e.g., 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*, Final Rule, 73 Fed. Reg. 78020 (Dec. 19, 2008);

Temporary Agricultural Employment of H–2A Aliens in the United States; Final Rule, 73 Fed. Reg. 77110 (Dec. 18, 2008).

84. Employers who previously received a Prevailing Wage Determination ("PWD") from DOL specifying the wage that must be paid to H-2B workers, who received an approved Labor Certification from DOL granting authority to employ H-2B workers, and who received an approved Petition notice from DHS granting authority to import temporary foreign workers with H-2B visas, will on and after September 30, 2011, if DOL is not enjoyed from this action, be subject to substantive requirements, obligations, and terms governing the employment of H-2B workers that differ in significant and burdensome respects from the requirements, obligations, and terms imposed by the government at the time the employer's application was filed, as well as when the Labor Certification was approved and when the Petition was approved. These new requirements, obligations and terms impose dramatic additional costs upon employers that were not foreseeable and that violate the terms of the government's approval of the employers' applications and petitions, causing them irreparable harm.

85. DOL did not merely change the effective date for compliance with the regulatory requirements of the Wage Rule I. Rather, by issuing Wage Rule II, DOL imposes on thousands of employers, including Plaintiffs, new and costly regulatory requirements that are wholly inconsistent with the terms and obligations associated with the employers' approved Labor Certifications and Petitions governing their participation in the H-2B program as well as inconsistent with governing law. Plaintiffs and other employers made financial and business plans in reliance on the requirements and standards contained in their approved Labor Certifications and Petitions and the existing regulatory structure governing their participation in the H-2B program.

86. Wage Rule II was adopted after an inadequate 10 day comment period that prevented employers from having a meaningful opportunity to comment on the costly proposed changes in Wage NPRM II. Employers in the amusement industry were particularly affected by the short 10-day comment period over the 4th of July holiday because that is their busiest time of the year.

87. Wage NPRM II explicitly stated that the DOL would not consider any comments regarding the substance or merits of any regulatory provisions DOL proposed to implement sooner than the January 1, 2012 date it had previously announced in Wage Rule I on January 19, 2011. This restriction prevented the DOL from receiving information from the public directly relevant to the decision about what regulatory provisions should govern which H-2B employers and when, and it had a chilling effect on interested parties who would otherwise have submitted comments on those and other issues related to this rulemaking. Moreover, views about the merits of individual requirements and the applicability of those requirements in Wage Rule I and Wage NPRM II to particular employers are inextricably intertwined. Therefore, it is impossible to submit meaningful separate comments on the merits of the requirements without at the same time also commenting on the timing of imposing the requirements and to whom those requirements will be applicable.

88. In the Preamble to the Wage Rule II, DOL says that it received comments that that it deemed to be outside the scope of the rulemaking and that were not considered, including comments relating to the merits and applicability of the Wage Rule I, as well as the impact of the Wage NPRM II on employers. *See* 76 Fed. Reg. 45668-69. Upon information and belief, the DOL applied this vague criterion to limit arbitrarily the comments it would consider and to give disproportionate consideration to comments that favored its regulatory proposal while appearing

to be even-handed. Moreover, in so stating, DOL expressly admitted that it had not followed applicable court cases that require it in each and every H-2 rulemaking to balance the needs of employees and employers, also recognizing the limits of DOL authority in such matters as the Court of Appeals for the Fifth Circuit delineated in *Williams v. Usery*, 531 F.2d 305, 306-307 (5th Cir.) *cert. denied* 429 U.S. 1000 (1976).

Implementation of Wage Rule II

89. Plaintiffs and other employers who are expected to employ H-2B workers on and after September 30, 2011, pursuant to a previously approved Labor Certification, have received, or will receive, a PWD from DOL assigning new wage rates that the DOL requires must be paid to H-2B and certain similarly situated U.S. workers on and after September 30, 2011.

90. Plaintiffs and other employers who were originally assigned a prevailing wage rate based on OES wage data at skill level I have received, or will receive new PWDs from DOL assigning OES wage rates that equal or exceed the OES Level III wage, despite the fact that the Wage Rule I stated that employers would be required to pay an arithmetic mean wage rate, defined by DOL as being the wage rate "that is at the point between the current Level II and III wages." 76 Fed. Reg. 3462. Moreover, a worker whose skill is at a skill level I is not similarly situated to a worker whose skill level is at level III. By adopting a new single universal skill level-based wage, DOL violates legal requirements applicable to the H-2 program, including its own regulations and those of DHS. An employer's position that requires only the amount of skill classified as skill level 1 cannot reasonably pay wages for that position that are associated with skill level 3.

91. Employers who were originally assigned a prevailing wage rate based on OES wage data, and who are not otherwise subject to the requirements of the DBA, have received or

will receive new PWDs assigning a DBA-required wage when that is the highest available wage rate for a job shown in DOL's databases that contains any task or job responsibility included in the H-2B employers job description, without regard to whether the job description associated with the DBA wage is the most complete match to the employer's available position description.

92. Employers who were originally assigned a prevailing wage rate based on OES wage data, and who are not otherwise subject to the requirements of the SCA, have received or will receive new PWDs assigning a SCA-required wage if that is the highest available wage rate for a job shown in DOL's databases that contains any task or job responsibility included in the H-2B employers job description, without regard to whether the job description associated with the SCA wage is the most complete match to the employer's available position description.

93. Employers who were originally assigned a prevailing wage rate based on SCA wage rates and/or were required to pay a specific SCA wage rate specified by the entity with which they contracted, have received or will receive new PWDs assigning OES wage rates that equal or exceed the OES Level III wage and that differ from the terms of the employer's fixed price contract governed by the SCA.

94. Employers who were originally assigned a prevailing wage rate based on the employer's job title and description of the available position and that was included within the terms of an already approved Labor Certification, have received or will receive new PWDs assigning a new wage rate for a different job title and description from that for which the employer was approved in Labor Certification. Some employers that filed identical job descriptions for jobs in identical geographical areas have received or will receive widely different "prevailing wage" determinations of the rates they must pay, suggesting that DOL did not take the time to determine if its new wage methodology would result, as it has in fact

resulted, in arbitrary and capricious wage determinations that are also unreasonable under the analyses of *Florida Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455, 1460 (11th Cir. 1985) and *Rowland v. Marshall*, 650 F.2d 28, 30 n. 3 (4th Cir. 1981).

95. Wage Rule II requires that Plaintiffs and other employers make significant pay adjustments in the middle of their certification validity periods, and in some cases in the middle of a pay period, that could lead to significant workplace employee morale problems and strife resulting from workers performing similar work, yet being subject to differing wage standards and rates of pay, depending on their status as an H-2B worker or a U.S. worker hired as part of the H-2B recruitment or as a U.S. worker who is not subject to these wage requirements. Some of the wage rates that have been issued as mandatory "prevailing wage rates" under the methodology of Wage Rule I and Wage Rule II will result in foreign H-2B guestworkers and a small number of covered U.S. workers being paid more than their American supervisors and managers, as well as more than professional engineers and other skilled employees of the affected H-2B employers.

FIRST CAUSE OF ACTION

Violation of the Administrative Procedure Act, 5 U.S.C. §§ 553 and 701, et seq.

96. The Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-94 of the Complaint as if fully set forth herein.

97. The Department cites no statutory authority for it to engage in rulemaking governing the H-2B program.

98. Upon information and belief, the DOL prejudged the issue, ignored substantive comments that opposed the proposed regulatory change, ignored relevant legal precedent governing the H-2 programs under 8 U.S.C. § 1101()(15)(H)(ii) and 1184(c)(1), failed to

adequately deliberate before issuing Wage Rule I and Wage Rule II, and failed to demonstrate a rational connection between the alleged problem cited and its regulatory solution.

99. DOL adopts interpretations and regulatory requirements in Wage Rule I and Wage Rule II that are not supported by the record and that depart from the agency's prior positions without a rational or reasoned explanation.

100. DOL placed unreasonable restrictions on the content of public comments that could be offered to Wage NPRM II, which was finalized as Wage Rule II, and that discouraged and prevented the public, including Plaintiffs and others directly affected by the regulations, from having a meaningful opportunity to comment on the substance of the proposed rule.

101. By placing unreasonable restrictions on the content of the public comments to the Wage NPRM II, DOL effectively decided in advance the action it would take on the proposal without deliberating on the substantive impact of the proposal, the substantive comments it received, and without considering the application of legal precedent.

102. DOL cites contradictory reasoning in support of Wage Rule I and Wage Rule II.

103. DOL fails to provide a rational basis for the mandates contained in Wage Rule I and Wage Rule II, and those mandates lack any reasonable relation to remedying any adverse effect on U.S. workers that DOL has alleged exists.

104. DOL fails to provide any evidence of adverse effect on U.S. workers resulting from the H-2B program or the prevailing wages paid pursuant to the current H-2B program, and as such has prevented the public from having a meaningful opportunity to comment on the factual or evidentiary basis giving rise to this rulemaking.

105. The authority of the Secretary to establish wage rates is strictly limited under the principles of *Williams v. Usery*, 531 F.2d 305, 306-307 (5th Cir. 1976), and that limitation was

not considered in these rulemakings. Furthermore, by making the new wage rates and new methodology applicable to existing H-2B workers under existing certifications, DOL has arbitrarily determined that to the extent existing, affected H-2B employers can even pay these wages, the money to pay these new wages will be at the costs of non-H-2B American workers' jobs, deferred or cancelled pay raises, promotions and other benefits to American non-H-2B employees, deferred capital improvements, deferred maintenance on equipment, loss of customers' and suppliers' goodwill, and many other adverse effects that were not even considered by DOL.

106. DOL in Wage Rule I and Wage Rule II claims, without any evidence whatsoever, that U.S. workers are currently being adversely affected by the employment of H-2B workers. In each of those rulemakings, DOL arbitrarily and capriciously ignores relevant data that casts doubt the validity of its conclusions, including failing to consider that H-2B employment in the U.S. is limited to 66,000 H-2B visas per year and that in 2010, just 47,403 H-2B visas were issued and in 2009, just 44,847 H-2B visas were issued by DOS, while private sector employment in the U.S. is approximately 139 million workers according to DOL's own Bureau of Labor Statistics as of August 2011.

107. DOL notes in Wage NPRM I that employment in the H-2B program is miniscule, yet it nonetheless arbitrarily and unreasonably concludes that this miniscule employment, as compared to the entire U.S. workforce, results in adverse effect on U.S. workers' wages. DOL has failed to consider in these rulemakings that employers that rely on H-2B employees to perform certain jobs or to supplement their U.S. workforce would be unable to operate without these H-2B workers, upon which other Americans' jobs depend, as well as their local economies and the larger U.S. economy.

108. In reaching its arbitrary conclusion about adverse effect resulting from the employment of workers with H-2B vias, DOL ignores the highly relevant fact that H-2B workers are already paid a wage rate mandated and heavily audited by DOL that DOL itself has determined will not result in an adverse effect on U.S. workers. Thus, DOL is arbitrarily maintaining diametrically opposed positions in this rulemaking. On the one hand, DOL mandates a wage rate employers must pay H-2B workers in order to avoid adverse effects on U.S. workers, and on the other hand, DOL claims (without evidence) as the basis for these rulemakings that wage rates being paid to H-2B workers may be having an adverse effect on U.S. workers.

109. In reaching its conclusion about adverse effect resulting from H-2B workers, DOL fails to consider and indeed completely ignores important aspects of the alleged problem, including other possible, and more likely, explanations for such adverse effect, including the presence of unauthorized workers in the workforce, estimated to be about 10 million, and who are more susceptible to working for substandard wages than legal H-2B workers who must be paid a mandated wage rate and other benefits. The 47,403 H-2B visas that were issued in 2010 amount to just 0.004 percent of the estimated number of illegal workers in the economy. Thus, DOL's failure to consider even the possibility that illegal workers are the most likely explanation for any adverse effect on U.S. wage rates caused by foreign workers is arbitrary, as is DOL's conclusion that substantial increases in wages for H-2B workers will address adverse effect resulting from the employment of unauthorized workers. Indeed by enacting the Immigration Reform and Control Act of 1986 and continuing the temporary guestworkers programs at 8 U.S.C. § 1101(a)(15)(H)(ii) and 8 U.S.C. § 1184(c)(1), Congress demonstrated its intent to provide employers with reasonable access to a legal guestworker program and to discourage

employment of illegal workers in the United States. DOL's failure to follow applicable substantive law under the INA, including case law governing the H-2B program, is arbitrary and capricious.

110. The Wage NPRM II applied to a different universe of employers (those with H-2B employees on the job in 2011) than did Wage Rule I. Despite application to differently situated employers, Wage NPRM II specifically prohibited the public from offering comments relating to the merits or substance of the proposal, which included the mandates of a prevailing wage methodology to which the employers had not been previously subject. *See* 76 Fed. Reg. 37687 ("While the Department is soliciting comments on the proposed effective date of the Wage Rule, we are not seeking comments relating to the merits of the provision contained in the Wage Rule . . . .We will deem any such comments out of scope and will not consider them.").

111. DOL admits in Wage Rule II that it did not consider comments on the substantive provisions to which employers would be subject and that DOL arbitrarily deemed to be "out of the scope" of the rulemaking . *See* 76 Fed. Reg. 45668 ("Among the comments that we deemed out of scope were comments that challenged the merits of the Wage Rule and asserted that the Wage Rule and/or the proposed effective date of the Wage Rule would result in employer hardship, including inadequate time to plan or prepare for the change in wages, cancellation of contracts, lower profits, and financial insolvency.") Thus, DOL foreclosed public comment on issues integral to any reasoned decision about the timing, reach, and effect of the substantive changes DOL proposed to apply to employers in 2011. DOL also demonstrated its disregard of governing federal case law that requires DOL to balance the needs of employers and similarly situated U.S. workers, taking into account the public's interest in maintaining employment opportunities with the United States.

112. The unreasonable restriction on comment subject matter in Wage NPRM II had a chilling effect on comments relating to the relative merits of the particular regulatory provisions DOL proposed to impose on employers, as well as comments in opposition to DOL's regulatory action. Although the restriction adversely affected members of the regulated community who were opposed to the DOL regulatory proposal, it did not adversely affect their counterparts who were in favor of DOL's proposal. Upon information and belief, the DOL had, in advance, made up its mind on the outcome of the regulatory proposal and thus restricted the scope of comments in order to achieve its desired regulatory result. This restriction prohibiting the public from commenting on the substantive merits of an agency's proposed regulatory provisions violates §553(e) of the APA ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.")

113. Upon information and belief, the DOL did not adequately consider the impact on employers of a substantive rule change to take effect in the middle of the validity period of approved Labor Certifications and visas, including but not limited to the impact of the mid-season/mid-visa rule change on the employers' pre-existing contractual obligations, staffing in other job titles, and other obligations resulting from Wage Rule II.

114. DOL's reliance solely on the *CATA II* decision as the basis for Wage NPRM II and Wage Rule II and the failure to consider other relevant and binding legal authority that contradicts the *CATA II* decision resulted in DOL misinterpreting and/or ignoring applicable governing law. As a result Wage Rule II is materially deficient, arbitrary, capricious, and contrary to law.

115. DOL's prevailing wage methodology described in Wage Rule I and Wage Rule II results in DOL arbitrarily and capriciously assigning different wage rates for the same job

descriptions in the same locales and does not meet applicable DHS requirements under 8 C.F.R. § 214.2(h).

116. DOL's prevailing wage methodology described in Wage Rule I and Wage Rule II arbitrarily results in jobs with the same title and containing essentially the same range of tasks and responsibilities being arbitrarily and capriciously assigned different wage title "codes" by DOL, thereby resulting in the assignment of substantially different wage rates. Such wide differences in resulting wage requirements for the same jobs demonstrate the methodology adopted by DOL in Wage Rule I and Wage Rule II was not fully considered and is arbitrary and capricious under the principles discussed in *FFVA* and *Rowland*.

117. Upon information and belief, the requirement contained in Wage Rule I and Wage Rule II to select the highest possible wage, rather than a statistically valid and neutral prevailing wage, is designed solely to create an above market wage rate in an attempt to attract U.S. workers to the position and is unlawful and contrary to case authority.

118. DOL's claim that the single highest possible wage it can find among varying wage data sources is the "prevailing wage" arbitrarily ignores the plain language meaning of "prevailing" and arbitrarily departs from the Department's longstanding definition and application of the term.

119. DOL's assignment of the highest possible wage derived from one of multiple wage surveys that produce widely differing wage rates for the same or similar jobs in the same or similar geographic areas is arbitrary because it is a results-oriented process that disregards crucial factors bearing on the quality of each survey such as applicability, reliability, consistency and accuracy of data.

120. DOL's wage methodology is arbitrary insofar as it assigns without any rational basis wildly different wage increases - in absolute dollar amounts and on percentage bases - both to similarly situated employers in the same industry and the same geographic area, as well as to employers in different industries. This application of remedial measures for the alleged adverse effect caused by the employment of H-2B workers is applied to H-2B employers on an arbitrary basis that fails to account for differences in employer, industry, past wage rate, and geographic location in any meaningful or proportional way that is consistent with each employer's past contribution toward the alleged adverse effect.

121. Because some employers, in reliance on the content of Wage Rule I and its effective date of January 1, 2012, had already entered into binding and irreversible contractual and other obligations for 2011, as of June 28, 2011, when the Wage NPRM II was issued, the Wage Rule II has an impermissible retroactive effect even if it were otherwise permissible, which it is not.

122. The Regulatory Flexibility Act /Small Business Regulatory Enforcement Fairness Act ("RFA/SBREFA"), 5 U.S.C. §601, *et seq.*, requires agencies to consider the impact of their regulatory proposals on small entities, analyze alternatives to minimize that impact, and make the analyses available for public comment. In lieu of preparing the analysis required under 5 U.S.C. § 603(a), the RFA/SBREFA permits an agency to certify that the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities and include such certification at the time of publication of the proposed rule or the final rule, along with the factual basis for such certification. 5 U.S.C. § 605. Although such certification was included in the Wage NPRM II, the certification lacked a good faith factual basis and/or supporting analysis, as evidenced by DOL's illogical explanation that although the proposal

would "change the period in which the total cost burdens for small entities would occur, the Department believes the amount of the total cost burdens themselves would not change" even though the terms of Wage Rule I would apply to scores of employers in the fourth quarter of 2011 who otherwise would not have been subject to its costly mandates. 76 Fed. Reg. 37689.

123. Because of many of the specific deficiencies stated above by themselves and because of all of them together, the Wage Rule I and the Wage Rule II in their entirety violate the Administrative Procedure Act, are arbitrary, capricious and contrary to law, and should be set aside. *See* 5 U.S.C. § 706(2)(A), (C), and (E).

SECOND CAUSE OF ACTION
Violation of the Regulatory Flexibility Act,
5 U.S.C. § 601, et seq.

124. The Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-122 of the Complaint as if fully set forth herein.

125. The Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601, et seq., requires agencies to consider the impact of their regulatory proposals on small entities, analyze alternatives to minimize that impact, and make the analyses available for public comment.

126. The DOL Certified that Wage NPRM II and the Wage Rule II will not have a significant economic impact on a substantial number of small entities.

127. As part of the Wage NPRM I and Wage Rule I, the DOL failed to conduct a good faith, reasonable economic analysis regarding the impact of the proposal, as required by the RFA. DOL failed to provide the public with a sufficient opportunity to comment on that analysis, and DOL failed to conduct a good faith, reasonable economic analysis regarding the impact of the Wage Rule II, as required by the RFA.

128. The Certification submitted to the Chief Counsel, Office of Advocacy, SBA, regarding the impact Wage NPRM II and Wage Rule II failed to provide any good faith, reasonable factual basis or analysis supporting such a certification, and it failed to provide the public with an opportunity to comment on any factual basis and analysis supporting such a certification. DOL acknowledges in the Wage NPRM II and Wage Rule II, that changing the effective date of the Wage Rule I will change the period in which the total cost burdens for small entities will occur, but DOL inexplicably concludes that the total cost burdens on those entities will not change. 76 Fed. Reg. 37689; 76 Fed. Reg. 45672. DOL has acted as though all of the increased wages to be paid in the fourth calendar quarter this year to H-2B foreign guestworker employees and their limited U.S. worker co-workers amount to $0 when in fact H-2B employers can show catastrophic results and irreparable damages from these mandatory increases.

129. The Wage NPRM II and Wage Rule II violate the RFA because the Certification was made without any good faith, reasonable factual basis and because each Rule (i) fails to include an analysis of the impact of the changed effective date on small entities; (ii) fails to include an analysis of the impact of the retroactive application of the changed effective date on small entities; (iii) ignores readily available information about the number of small entities affected by Wage Rule I and Wage Rule II; (iii) falsely claims that the total cost burdens on small entities will not change as a result of the Wage Rule II; (iv) falsely claims that the rule will not have a significant impact on a substantial number of small entities; (v) fails to provide the public with an opportunity to comment on DOL analysis in arriving at its conclusions; (vi) fails to provide any good faith basis or analysis supporting such a Certification; (vii) fails to provide the public with an opportunity to comment on the factual basis and analysis supporting such a

Certification; and (viii) fails to consider less burdensome alternatives that would minimize the significant economic impact on small entities.

130. Despite certifying that the Wage NPRM II and Wage Rule II would not have a significant economic impact on a substantial number of small entities, the Department claimed in Wage NPRM I and Wage NPRM II that it did not know how many H-2B employers were small entities but that it did not believe that it constituted a substantial number.

131. DOL acknowledges in Wage Rule I, that in fact the regulatory changes will have a significant impact on small entities. DOL, however, attempts to characterize the number of small entities affected as not being "substantial." DOL did not adequately consider less burdensome alternatives, including delaying implementation of some or all portions of the Wage Rule II until the end of the H-2B season by industry, or end of the calendar year, or end of the employers' certification, as a means of mitigating the impact on employers. The Wage Rule II will now take effect in the middle of H-2B certification periods for many H-2B employers and as a result will cause substantial irreparable costs and other damages, confusion, and uncertainty for affected employers, including those with pre-existing contractual obligations and the rest of their U.S. workforces, their suppliers and customers who will be harmed by DOL's requirement that the employers immediately begin paying higher wages to H-2B foreign guestworkers.

132. DOL finalized Wage Rule I and Wage Rule II without correcting deficiencies cited by the Chief Counsel, Office of Advocacy, Small Business Administration, relating to DOL's failure to comply with the RFA in Wage NPRM I and Wage NPRM II, despite the fact that Congress has vested the Chief Counsel, Office of Advocacy, Small Business Administration, with statutory authority to oversee Federal agency compliance with the RFA.

133. Because of these deficiencies, Wage Rule I and Wage Rule II violate the RFA and should be set aside.

THIRD CAUSE OF ACTION

Violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution

134. The Plaintiffs re-allege and incorporate by reference the allegations of Paragraphs 1-132 of the Complaint as if fully set forth herein.

135. The Government, through Wage Rule II, imposes wage increases on Plaintiffs and other employers that have a retroactive effect and, as such, amount to a taking of private property without just compensation.

136. The Government, through Wage Rule II, requires Plaintiffs and other employers to pay substantially higher wages than were required by the Labor Certification approved by DOL and the Petition approved by DHS, which included a specific wage rate specified by the government that had to be paid for a predetermined validity period that has not ended.

137. The Government, through Wage Rule II, has interfered with investment- backed expectations of Plaintiffs and other employers who have entered into contracts and made purchases in the reasonable expectation that their labor costs for H-2B workers will remain as described in the terms of their approved Labor Certifications and visa Petitions throughout the validity period of the Labor Certifications and visa Petition approvals that will extend into the months after September 30 and January 1, 2012.

138. The Government, through Wage Rule II, has imposed upon Plaintiffs and other employers a regulatory scheme with retroactive effect that requires the payment of substantial wage increases in an alleged attempt to protect U.S. workers from competition by foreign labor without consideration for the effect of such action on Plaintiffs. The result is that to the extent

that employers are not forced to shut down or drastically curtail operations and to pay for the return of foreign workers to their homes, as permitted under 8 U.S.C. § 1184(c)(5)(A), the vast number of persons who will benefit from the increased wages will actually be foreign H-2B guestworkers lawfully working and hired under existing wage requirements, not American workers who rejected these jobs, thereby allowing H-2B foreign workers to be hired. Thus, DOL's requirement to begin paying these wage rates effective September 30 lacks a rational connection to DOL's stated aim, another reason the taking should be enjoined and not permitted.

139. The Government, through Wage Rule II, has imposed upon Plaintiffs and other employers a regulatory scheme with retroactive effect that requires the payment of substantial wage increases without affording Plaintiffs and other employers due process and a meaningful opportunity to comment on or shape the content of the regulatory regime to which they are now subject.

PRAYER FOR RELIEF

For the reasons set forth in this Complaint, the Plaintiffs pray the Court for the following relief:

1) That *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 76 Fed. Reg. 45667 (Aug. 1, 2011) ("Wage Rule II") be held unlawful and is null and void; and

2) That *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("Wage Rule I") be held unlawful and is null and void; and

3) That a temporary restraining order and/or a preliminary injunction be granted, pending a decision on the merits, that enjoins the Defendants from giving effect to or implementing in any manner, *Wage Methodology for the Temporary Non-Agricultural*

Employment H-2B Program, Final Rule, 76 Fed. Reg. 45667 (Aug. 1, 2011) ("Wage Rule II"); and

4) That a temporary restraining order and/or a preliminary injunction be granted, pending a decision on the merits, that enjoins the Defendants from giving effect to or implementing in any manner, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("Wage Rule I"); and

5) That a permanent injunction be issued, enjoining the Secretary of Labor and the Secretary of Homeland Security, and the DOL and the DHS, from implementing *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 76 Fed. Reg. 45667 (Aug. 1, 2011) ("Wage Rule II"); and

6) That a permanent injunction be issued, enjoining the Secretary of Labor and the Secretary of Homeland Security, and the DOL and the DHS, from implementing *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("Wage Rule I"); and

7) That in addition to the injunctive relief sought, that a declaratory judgment be issued, declaring that *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("Wage Rule I") and *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, Final Rule, 76 Fed. Reg. 45667 (Aug. 1, 2011) ("Wage Rule II") are not applicable to, nor enforceable against, any employer of an employee with an H-2B visa issued pursuant to an approved Labor Certification issued on or before September 29, 2011, or in the alternative on or before January 1, 2012, and that such employer shall not be required to pay any wage other than that required by

the terms of the applicable Labor Certification that was issued on or before September 29, 2011, or in the alternative on or before January 1, 2012; and

8) That the Plaintiffs be awarded their costs in pursuing this action, including reasonable attorneys' fees; and

9) That the Court award such other relief as it may deem just and proper.

Respectfully submitted, this 7th day of September 2011.

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