

1
2 I, Sabeena Hickman, declare under penalty of perjury as follows:

3
4 1. I am the Chief Executive Officer of the Professional Landcare Network (“PLANET”),
5 a not-for-profit membership corporation headquartered in Herndon, Virginia and a Plaintiff in the
6 above-captioned action. PLANET is an international association serving lawn care professionals,
7 landscape management, design/build/installation professionals, and interior plantscapers. PLANET
8 has approximately 3,800 members, including approximately 400 members who currently use the H-
9 2B program.

10
11 2. Part of my job as the CEO of PLANET is to assess the economic welfare of our
12 members, to educate them about economic issues, and to assess the impact of regulatory and
13 legislative changes on our sector. As such, I am intimately familiar with the H-2B program and
14 recent programmatic changes promulgated by DOL.

15
16 3. On February 21, 2012, DOL promulgated a new rule governing the temporary, non-
17 agricultural employment of aliens in the United States. *See* Employment and Training
18 Administration, “*Temporary Non-Agricultural Employment Of H-2B Aliens In The United States*,”
19 77 Fed. Reg. 10,038 (Feb. 21, 2012) (“Final Rule”). The Final Rule is scheduled to take effect on
20 April 21, 2012. The Final Rule comprehensively regulates the hiring, pay, and working conditions
21 of H-2B aliens in the United States as well as the hiring, pay, and working conditions of U.S.
22 workers in the same occupation of the H-2B aliens.

23
24 4. The economic impact of the green industry on the U.S. economy is significant.
25 According to a May 2011 report, *Economic Contributions of the Green Industry in the United States*,
26 2007, prepared by the University of Florida and Texas A & M University, the total economic
27 contributions for the United States Green Industry in 2007, including regional economic multiplier
28 effects, were estimated at \$175.26 billion in output (revenue), employment of 1.95 million fulltime

1 and part-time jobs, labor earnings of \$53.16 billion, and \$107.16 billion in value added (Table ES-1).
2 Total value added impacts represented 0.76 percent of U.S. Gross Domestic Product in 2007.
3 According to Dr. Alan W. Hodges with the University of Florida and Drs. Charles R. Hall and
4 Marco A. Palma with Texas A&M University, the largest sector of the green industry in terms of
5 value added impacts were landscaping services, the sector of the green industry that is most heavily
6 reliant on the H-2B program. They calculate that landscaping services account for 1,075,343 jobs
7 and \$50.28 billion in value added impacts. These jobs, as well as jobs in the entire vertically
8 integrated green industry, will be negatively impacted by the Final Rule. Without access to a
9 functioning H-B program, struggling landscape companies will purchase less plant material, seed,
10 fertilizer, pesticides, irrigation, mowing and trimming equipment, vehicles, and other products.
11

12 5. The green industry professionals that PLANET represents provide a variety of
13 services to their customers. These services include mowing, trimming, as well as designing and
14 installing irrigation systems, water features, retaining walls, rock work, surface and subsurface
15 drainage systems, decorative and safety nightlighting systems, and wood, brick, rock, and chain link
16 fences. Once installed, PLANET's members are called upon to maintain their work. This work is
17 skilled – requiring knowledge and experience to perform properly. Even the more manual work is
18 skilled in that improper work can cause safety problems, undermine proper plant growth, delay
19 project completion, and make providing high quality service inordinately difficult. The
20 overwhelming majority of our members and of our members that participate in the H-2B program
21 are small businesses within the meaning of the Small Business Act.
22
23

24 6. Hiring a qualified, legally-authorized workforce is a constant challenge for
25 PLANET's members. Because of inherent seasonal and weather-dependent nature of our members'
26 work, most of our members find it necessary to hire seasonal employees to meet normal market
27 demands. Yet, despite paying good wages and making extensive efforts to recruit domestic
28

1 employees, PLANET members have found it difficult to recruit enough qualified, legally-authorized
2 U.S. employees for their labor-intensive, seasonal positions. Increasing wages has not increased our
3 members' ability to recruit domestic, legally-authorized seasonal employees. Instead, our members'
4 inability to hire domestic employees is due to the limited duration and intermittence of the
5 employment. PLANET members have experienced and continue to experience recruitment
6 difficulties, even during these tough economic times. According to DOL's *Occupational Outlook*
7 *Handbook, 2010-11 Edition*, "[m]any grounds maintenance jobs are seasonal, available mainly in the
8 spring, summer, and fall, when most planting, mowing, trimming, and cleanup are necessary. Most
9 of the work is performed outdoors in all kinds of weather. It can be physically demanding and
10 repetitive, involving bending, lifting, and shoveling."^[1]

12 7. The H-2B program is essential to the survival of many of these small businesses. A
13 recent survey of approximately 500 H-2B employers by ImmigrationWorks USA found that 34% of
14 employers would close their businesses if they could not hire H-2B workers. An additional 25% of
15 employers said they would downsize or restructure the company. Landscape companies and other
16 seasonal employers that use the H-2B program not only help make local communities and green
17 spaces more beautiful, they also provide U.S. jobs and contribute to the local and national economy.
18 The Final Rule will force many seasonal employers to abandon the H-2B program, which will have
19 significant impacts on jobs and the economy.
20

21 8. The Final Rule requires a guaranteed offer of employment for a total number of work
22 hours equal to at least three-fourths of the workdays of each three-month period. The rule states that
23 a Certifying Officer can terminate an employer's obligations under the in the event of fire, flood, or
24 another Act of God that makes fulfillment of the job order impossible. This implies that if an
25 employer does not timely inform the CO, the employer is liable for payment. An employer should
26

27
28 ^[1] U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-2011 Edition (Washington, DC: U.S. Bureau
of Labor Statistics, 2010) 499.

1 not have to pay an employee if the employee does not or cannot work. Because PLANET's H-2B
2 members are heavily-dependent on good weather to do their work, the Final Rule essentially makes
3 them the guarantors of the weather. Not only do they bear the risk that they will lose income due to
4 weather-related work stoppages, they may have to pay their workers for the idle time. Moreover,
5 39% of PLANET members send their workers home on staggered departure dates as the busy season
6 winds down. By allowing the workers to depart voluntarily, these companies will be exposed to
7 liability to pay for any unworked hours up to three-fourths threshold for that period.
8

9 9. The Final Rule requires that employers provide to workers engaged in "corresponding
10 employment" at least the same protections and benefits as those provided to H-2B workers. With a
11 narrow exception, the DOL defines corresponding employment as the employment of non-H-2B
12 workers in substantially similar work included in the H-2B job order or any work performed by the
13 H-2B workers during the validity period of the job order. However, there is no clarity as to what
14 "substantially similar" means. This definition will significantly affect PLANET's H-2B members
15 where many employers have positions that combine duties. This will be especially problematic
16 because of overlap between a working supervisor's duties and those of the members of the crew.
17 For example, an H-2B worker's primary job may be mowing lawns. If that employee were to call-in
18 sick, it would not be uncommon in a small business for a supervisor or owner to assume mowing
19 duties for the day to make sure the job is completed on-time. Under the Final Rule, the H-2B
20 workers and the supervisor or owner would likely be considered "corresponding employees." The
21 corresponding employment requirement will result in mandatory payment of artificially high wages
22 and benefits to the majority, if not all, of PLANET members' workforces. Moreover, this
23 requirement takes away an employer's flexibility regarding its workforce. The increased economic
24 cost would be significant. A recent survey of PLANET's members found that a finding that a
25 supervisor and crew members had to be paid the same wages and benefits would impose and
26
27
28

1 additional cost of anywhere from \$50,000 to \$60,000 annually for small members and as much as a
2 \$1,000,000 annually for some larger ones. By whatever measure, the additional cost would be
3 devastating.

4 10. The Final Rule defines “temporary need” as less than nine months as a matter of law.
5 However, for the landscape industry, the length of a season generally corresponds to geography. For
6 example, due to the weather, a landscape company in the northeast will likely have a shorter season
7 than a landscape company in the southeast. Temporary need depends on the business situation facing
8 a particular company at a particular time. By arbitrarily defining “temporary” as less than nine
9 months, the Final Rule prohibits employers with longer needs from meeting their need for workers
10 through the H-2B program. A recent survey of PLANET’s members who use the H-2B program
11 showed that 27% would suffer concrete financial harm because of this restriction. Many of
12 PLANET’s members will either be unable to provide services to their current customers or forced to
13 forego the opportunity to acquire new customers. Not only would the economic loss be devastating,
14 so too would the loss of goodwill and damage to their business reputations.
15

16
17 11. There are several other elements of the Final Rule that will directly, certainly, and
18 adversely affect PLANET’s H-2B members. They range from increased recruiting and advertising
19 costs and a more complicated and burdensome application process. PLANET members face
20 substantially increased business costs as well as complex, inflexible regulations. In short, the Final
21 Rule will significantly, immediately, and adversely affect PLANET and its members that participate
22 in the H-2B program.
23

24 12. PLANET and its H-2B members will be immediately affected by the Final Rule even
25 if they plan to file applications for temporary labor certification later in the year. Most landscape
26 companies get most of their business through competitive bidding. If a bid is successful, the
27 company and the customer will then enter into a long-term contract. Such contracts lock in prices
28

1 for the landscape company and costs for the customer. They also assure the landscape company a
2 “book of business” which helps the company to estimate its expenses and profits in advance.
3 Because the current contracts were bid well before DOL issued the Final Rule, PLANET’s H-2B
4 members have no realistic option to recover the additional costs required by the Final Rule from
5 their customers. They must either perform the contract at a loss or cancel it. If they seek to
6 renegotiate with the customer, price-sensitive customers will cancel and re-bid the project. No
7 matter what option PLANET’s members choose, the Final Rule will cause them severe and
8 immediate economic injury.
9

10 13. Not only will PLANET’s H-2B members lose current customers, they are unlikely to
11 be able to replace them. From a consumer perspective, landscape services are discretionary. There
12 is a limit to how much consumers will pay for professional landscaping services before they choose
13 to simply forgo them. By increasing the price that PLANET’s H-2B members have to charge for
14 their services, the Final Rule will lose businesses and good will as others who do not participate in
15 the H-2B program underbid them.
16

17 14. The Final Rule will be devastating to PLANET’s H-2B members as well as the public
18 generally. Congress has determined that the public interest is best served when employers can
19 access foreign labor markets to meet their temporary, non-agricultural labor needs. This policy
20 judgment has been an element of this Nation’s immigration law since the 1950’s. The experience of
21 PLANET’s H-2B members shows that the H-2B program achieves Congress’ goal and supports a
22 large number of jobs for U.S. workers. The Final Rule rejects Congress’ judgment that access to
23 foreign labor markets serves the public interest and actively seeks to discourage participation in the
24 H-2B program.
25

26 15. The Final Rule grants a large competitive advantage to employers who do not pay a
27 premium to hire legal workers. PLANET’s H-2B members already pay additional costs to ensure
28

1 that they are complying with our Nation's immigration laws. Encouraging less than complete
2 compliance with the immigration laws by the competitors of PLANET's H-2B members does not
3 protect the jobs of U.S. workers. The Final Rule places them at a severe competitive disadvantage
4 and works against this objective by punishing them for their compliance. The Final Rule will stunt,
5 if not reverse, the growth of PLANET's H-2B members' businesses and the career opportunities of
6 their year-round, U.S. workers.
7

8 I declare under penalty of perjury that the foregoing is true and correct.
9
10
11

12 

13 _____
Sabeena Hickman
14
15

16 Executed April 16, 2012
17
18
19
20
21
22
23
24
25
26
27
28