UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

BAYOU LAWN & LANDSCAPE SERVICES, *et al.,*

Plaintiffs

v. No. _____

HILDA L. SOLIS, *et al.*

Defendants.

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Rule 65, Federal Rules of Civil Procedure, Plaintiffs in the above noted matter move this Court for Orders temporarily and preliminarily restraining the Defendants from implementing the Final H-2B Program Rules titled "Temporary Non-Agricultural Employment of H–2B Aliens in the United States," (77 Fed. Reg. 10,038 (Feb. 21, 2012)) ("Final Program Rules") because (i) neither Defendant is authorized by statute to issue those rules, (ii) the rules fail to comply with the Regulatory Flexibility Act, and (iii) the rules are arbitrary and capricious.[1] The Final Program Rules are scheduled to go into effect on April 23, 2012. This motion is based on the Complaint and Exhibits attached thereto, the Memorandum in Support of Preliminary Relief, and the declarations attached to this Motion.

[1] Pursuant to N.D. Fla. Loc. R. 7.1(B), undersigned counsel states that this motion has been filed contemporaneously with service of process and the Complaint in this matter and that, because counsel for defense has not made an appearance, undersigned counsel has not been able to resolve by agreement the issues raised in the motion.

Plaintiffs will suffer imminent and irreparable harm should the *status quo* be altered by the Final Program Rules. Plaintiff Bayou Lawn & Landscape Service, like many landscaping businesses, is a small business under the Small Business Act, that is labor intensive with low margins and operating under long-term contracts with their customers. *See* Declaration of Sabeena Hickman at ¶ 12, ("Hickman Decl.") (attached as Exhibit 1); Declaration of James Allen at ¶¶ 1, 2, 14 ("Allen Decl.") (attached as Exhibit 2). Plaintiff Silvicultural Management Associates, Inc. also operates pursuant to long-term contracts. Declaration of John M. Price at ¶¶ 3, 10 ("Price Decl.") (attached as Exhibit 3). The members of the Plaintiff Associations *(i.e.*, National Hispanic Landscape Alliance ("NHLA"), Professional Landcare Network ("PLANET"), Florida Forestry Association ("FFA") and the Chamber of Commerce of the United States of America ("Chamber") also include small businesses with similar labor, cost, and operating constraints. *See* Hickman Decl. at ¶ 5.

Each of the Plaintiffs rely on the H-2B program for temporary seasonal workers because they have been unable to recruit U.S. workers for those positions. *See* Allen Decl. at ¶¶ 3 & 10, Price Decl. at ¶ 4. The Plaintiffs and the members of the Plaintiff Associations hire between 20 and 90 H-2B foreign employees. *See* Allen Decl. ¶ 4, Price Decl. at ¶ 4. The small business members of the Plaintiff Associations are similarly dependent on the H-2B program. *See e.g.*, Hickman Decl. ¶ 6-7. A recent survey of small landscaping businesses revealed that 34 percent of those businesses would cease operating if they could not hire H-2B workers. *See id*. at ¶ 7. Plaintiffs have each reviewed the impact that the various aspects of the new Final Program Rules will have on their respective businesses and have concluded that the Final Program Rules will imminently and irreparably injure those businesses by significantly increasing costs, eroding goodwill, increasing the likelihood that customers will look

elsewhere and decreasing labor-force predictability.

The Final Program Rules will require employers to guarantee that their H-2B employees are paid for three-quarters of the hours in each three-month period. Because landscaping and forestry businesses, as well as many others, are heavily weather dependent, the "three-fourths" guarantee essentially makes employers guarantors of the weather. *See* Hickman at ¶ 8; Price at ¶¶ 6-8. The fact that DOL can waive this requirement in the event of an Act of God does not temper the rule's adverse effect. One of the Plaintiffs estimates that due to weather alone, the three-fourths guarantee will increase his costs by 17 percent. *See* Price at ¶ 17. In bidding for projects, a prudent business must take into account the legal requirements as they exist and must now factor in weather as an added cost.

The Final Program Rules also require employers, subject to certain limitations, to pay an H-2B worker's roundtrip transportation and living expenses while traveling. The transportation costs alone are estimated by the Department of Labor to average $929 per H-2B employee. This too imposes significant added costs.

The "corresponding employee" provision of the Final Program Rules requires employers, subject to a narrow exception, to provide workers engaged in "substantially similar" work at least the same pay and benefits as those provided to H-2B workers. This provision will injure the Plaintiffs and members of Plaintiff Associations because, among other things, in small businesses there is significant job overlap especially between a supervisor and his or her crew. Inasmuch as the rules provide certain unusual benefits to H-2B employees (*e.g.*, three-fourths guarantee, transportation and subsistence), under the corresponding employee rules, if the value of these benefits caused an H-2B worker's pay to be more than a corresponding employee's pay, then the difference would have to paid

over to the corresponding employee, thereby increasing their effective rate of pay. *See* Hickman Decl. at ¶ 9. This will dramatically multiple the adverse impact of the Final Program Rules by effectively extending many of its requirements to the entire workforce. A recent survey of PLANET members revealed that the "corresponding employee" requirement would cost small members an additional $50,000 to $60,000 per year and as much as a $1,000,000 per year for large members. *See id*. These additional costs "would be devastating." *Id. See also* Allen Decl. at ¶ 8.

The Final Program Rules define "temporary need" as less than nine months. In many areas in the country and in many sectors, the need for continuous employment extends to ten months. Imposing a nine-month limit would make the H-2B program impractical for those businesses with ten-month needs. PLANET's recent survey revealed that 27 percent of its members will be adversely affected by this new limitation because many would be unable to complete existing contracts or bid on new contracts, resulting directly in economic loss, loss of goodwill and damage to business reputations. *See* Hickman Decl. at ¶ 10.

The new and burdensome application process will also increase business costs and reduce certainty and predictability, thereby adversely affecting Plaintiffs and members of Plaintiff Associations. *See id.* at ¶ 11; Price Decl. at ¶ 9; Allen Decl. at ¶ 15.

The added costs of the Final Program Rules cannot be passed on to customers either because the Plaintiffs and the Plaintiff Associations' members are operating under long-term contracts or face competition from businesses that use undocumented aliens. *See* Allen Decl. at ¶ 16; Hickman Decl. at ¶¶ 12, 15. As a result, Plaintiffs and Plaintiff Associations' members have a number of options, all bad. First, they can cease participating in the H-2B program and operate with much smaller workforce, but if they do, they will be unable to meet the production

requirements under their long-term contracts and will lose customers and goodwill. *See* Allen Decl. at ¶¶ 10, 15. Second, they can retain their workforce, but inevitable losses to their workforce caused by the impact of the Final Program Rules will force them out of business. *See id.* at ¶ 16.

The increased costs will also make it difficult if not impossible for Plaintiffs to compete against companies that use undocumented aliens. *See* Allen Decl. at ¶ 16; Hickman Decl. at ¶ 15.

Respectfully submitted,
s/Robert P. Charrow

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