No. 12-12569

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiffs-Appellees,

v.

HILDA L. SOLIS, Secretary of Labor, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Florida
3:12-cv-183-MCR-CJK, Chief Judge M. Casey Rodgers

DEFENDANTS-APPELLANTS' BRIEF

STUART F. DELERY
Acting Assistant Attorney General

DAVID J. KLINE
Director

GEOFFREY FORNEY
Senior Litigation Counsel
United States Department of Justice
Office of Immigration Litigation
District Court Section
450 5th Street, N.W.
Washington, D.C. 20001
202-532-4329
geoff.forney@usdoj.gov

Dated: July 9, 2012

Attorneys for Defendants-Appellants

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26-1, undersigned counsel believes that the certificate of interested persons contained in Defendants-Appellants' brief in support of its motion to stay is complete and does not require supplementing at this time.

/s/ Geoffrey Forney
Geoffrey Forney
Senior Litigation Counsel
United States Department of Justice

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants request oral argument because this appeal concerns the Department of Labor's ability to administer a nation-wide, foreign worker program through the use of legislative rules. The district court's preliminary injunction calls into question the ability of the Department of Labor to continue administering the program at issue.

/s/ Geoffrey Forney
Geoffrey Forney
Senior Litigation Counsel
United States Department of Justice

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DEFENDANTS-APPELLANTS' BRIEF

STATEMENT OF JURISDICTION

Defendants-Appellants Hilda L. Solis, Secretary of Labor, and Jane Oates, Assistant Secretary for Employment and Training Administration (collectively "Department of Labor" or "DOL"), appeal the order of the United Stated District Court for the Northern District of Florida granting Plaintiffs-Appellees' (collectively "Bayou") motion for a preliminary injunction. The order enjoined the implementation of DOL's new regulation governing the administration of the

temporary, non-agricultural, foreign worker program ("H-2B program"). The Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which grants jurisdiction to the Court over orders of district courts granting preliminary injunctions. The district court entered its preliminary injunction order on April 26, 2012, and DOL filed its appeal on May 11, 2012, which is within the sixty-day deadline specified under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

(1) Whether the district court erred in preliminarily enjoining DOL's regulation where Bayou failed to show a substantial likelihood of success on the merits of its claim that DOL lacks legislative rulemaking authority because Supreme Court precedent, DOL's longstanding use of legislative rules in the H-2B program, and the text, structure and object of the relevant statute show a congressional intent that DOL use legislative rules to administer the H-2B program.

(2) Whether the district court abused its discretion in preliminarily enjoining DOL's regulation where Bayou failed to show an immediate, irreparable harm in the absence of a preliminary injunction because its affidavits purportedly showing harm were speculative and hypothetical and lacked any allegation of immediate injury resulting from DOL's regulation.

(3) Whether the district court abused its discretion in preliminarily enjoining DOL's regulation where Bayou failed to show that the public and DOL would not be harmed as a result of the preliminary injunction that prohibits DOL from protecting the domestic labor market, reducing the incidents of fraud in the H-2B program, and mitigating the deleterious effects of foreign labor on the wages and working conditions of United States workers.

(4) Whether the district court abused its discretion in granting a nation-wide preliminary injunction where the broad scope of the injunction is not necessary to afford relief to Bayou, in the event it succeeds on the merits, and where a nation-wide injunction is inconsistent with the principle that the district court's decision is only binding between the parties.

STATEMENT OF THE CASE AND FACTS

Before 1986, the H-2 program included agricultural and non-agricultural temporary foreign workers, and was administered under regulations published by the Attorney General and the Secretary of Labor. *See* Immigration and Nationality Act of 1952 (INA) § 101(a)(15)(H)(ii), 66 Stat. 163 (June 27, 1952); H.R. Rep. No. 99-682, pt. 1, at 80-81 (1986); *see also* 33 Fed. Reg. 7570-71 (DOL) (May 22, 1968). DOL applied, by regulation, many of the same standards for making labor market determinations in the agricultural and non-agricultural contexts. *See* 20 C.F.R. §§ 621.3, 655.0(a), 655.1(a) (1979). Because Congress concluded these

regulations did not fully meet the need for an efficient, workable temporary foreign worker program, Congress amended the statute to provide for two separate programs: one for agricultural workers and another for non-agricultural workers. *See* H.R. Rep. No. 99-682, pt. 1, at 80; Immigration Reform and Control Act of 1986 (IRCA), Pub. Law No. 99-603, § 301(a) (Nov. 6, 1986). Congress provided very little guidance regarding the terms and conditions of the non-agricultural program. The statute merely provides that an H-2B nonimmigrant is an alien:

> having residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . .

8 U.S.C. § 1101(a)(15)(H)(ii)(b). The statute does not define the relevant terminology in this section. *See* 8 U.S.C. § 1101 (definitions section). Congress delegated broad discretion to the Secretary of Homeland Security to determine the terms and conditions for admitting H-2B nonimmigrants, *see* 8 U.S.C. § 1184(a)(1), but it directed the Secretary to consult with appropriate agencies of the government to determine whether to allow for the importation of temporary foreign labor, *see* 8 U.S.C. § 1184(c)(1).[1] In creating the H-2B program, members

[1] Under the Homeland Security Act of 2002, Congress transferred the enforcement of the immigration laws from legacy INS to the Secretary of Homeland Security. *See* Pub. Law No. 107-296, § 471 (Nov. 25, 2002). Congress did not determine which agency would continue to make labor market assessments under 8 U.S.C. § 1101(a)(15)(H)(ii)(b). *Id*. at § 451.

of Congress at the time sought to protect against depressed wages as a result of the influx of foreign labor, *see* Cong. Rec. S11263 (daily ed. Sept. 11, 1985) (statement of Sen. Kennedy), and Congress understood that the final bill established a policy of prioritizing the needs of domestic workers over the purported need of employers to import foreign workers, *see* H.R. Rep. No. 99-682, pt. 1 at 80.

A. DEPARTMENT OF LABOR'S ROLE IN THE H-2 PROGRAM

In 1968, as part of DOL's role in the H-2 program, it published regulations establishing standards and procedures for the certification of an employer's request to import non-agricultural foreign workers. *See* 33 Fed. Reg. 7570-71. As a condition for obtaining certification to import foreign workers, DOL's regulations required employers to recruit United States workers through the employment services system under the Wagner-Peyser Act of 1933. *Id*. at 7571 (codified at 20 C.F.R. § 621.3(b) (1979)). DOL filled in much of the regulatory text through informal guidance documents, including General Administration Letters and Training and Employment Guidance Letters. *See* 73 Fed. Reg. 29,942, 29,944 (DOL) (May 22, 2008).

In 2008, DOL engaged in more extensive legislative rulemaking to administer the H-2B program by publishing companion rules with the Department of Homeland Security (DHS). *Compare* 73 Fed. Reg. 29,942 (DOL) *with* 73 Fed.

Reg. 49,109 (DHS). During the companion rulemaking, DHS acknowledged that it lacked sufficient expertise to make labor market determinations in the H-2B program, and it stated that DOL would continue to determine whether an employer's proposal to import H 2B workers will adversely affect the wages and working conditions of United States workers. *See* 73 Fed. Reg. 78,104; 78,107; 78,110.

DOL's December 2008 regulation provided substantive rules governing, among other things, the wages that employers are required to pay and the standardized recruitment employers are required to complete in order to test the domestic labor market. 73 Fed. Reg. at 78056-57. DOL continues to require employers to recruit United States workers through the employment services system under the Wagner-Peyser Act. *Id*. at 78,057 (codified at 20 C.F.R. § 655.15(e) (2009)). The December 2008 rule also established an attestation system where employers are required to certify that they complied with program requirements. *Id*. at 78,059. DOL only enforces the substantive terms of the program through post-certification audits and enforcement actions. *Id*. at 78,060, 78,063-66.

On August 30, 2010, the District Court for the Eastern District of Pennsylvania invalidated several portions of DOL's December 2008 rule. *See Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 2010 WL 3431761 (E.D.

Pa. Aug. 30, 2010) (Pollak, J.) (CATA). The court found, among other things, that DOL improperly administered the program through a guidance document, which set prevailing wage levels, and that DOL failed to issue substantive rules in compliance with notice and comment rulemaking. *Id*. at *19. The court remanded the regulation to DOL and directed the agency to promulgate new rules "in compliance with the Administrative Procedure Act." *Id*. at *27.

B. DEPARTMENT OF LABOR'S H-2B COMPREHENSIVE RULE

On March 18, 2011, DOL published a proposed rule in the *Federal Register* with the goal of administering the H-2B program in a more effective and efficient manner. *See* 76 Fed. Reg. 15,130 (DOL) (Mar. 18, 2011). DOL indicated on the first page of the preamble that it was acting pursuant to statutory authorization under 8 U.S.C. §§ 1101(a)(H)(ii)(b), 1184(c)(1). *Id*. DOL proposed abandoning the new attestation-based system and reverting back to the compliance-based model because DOL uncovered evidence that over fifty percent of employers under the attestation system failed to comply with program requirements. *Id*. at 15,132. To ensure program integrity and to provide for expeditious processing of applications, DOL proposed dividing the labor certification process into two parts: the first phase requires an employer to register for participation in the program to allow DOL to make a determination whether the employer's job is temporary in nature. *Id*. at 15,133. The second phase requires employers to engage in

recruitment of United States workers to ensure that foreign workers are not taking jobs from domestic workers. *Id*. Employers are only required to complete the first phase every three years as long as the employer's need for workers does not materially change. This has the advantage of streamlining the adjudication process for repeat users of the program. *Id*. at 15,134.

In addition, DOL proposed introducing further protections for United States workers, including a new definition of "temporary" employment, and a guarantee that employers compensate H-2B workers for at least three-fourths of the work performed under the timeframe the employer identifies in the H-2B job order. *Id*. at 15,138, 15,143. DOL also proposed requiring that employers pay wages to United States workers equal to the wages of foreign workers in "corresponding employment." *Id*. at 15,135. It explained these new proposals in extensive detail over the course of nearly fifty pages in the preamble to the proposed rule. DOL offered legal and policy reasons for these proposals, based primarily on the interest of protecting United States workers from the influx of underpaid foreign labor. DOL also conducted an extensive cost-benefit analysis of the proposed rule, including a ten-page initial regulatory flexibility analysis of the potential costs to small entities under the proposed rule. *Id*. at 15,166-76.

On February 21, 2012, after receiving and considering public comments on the proposed rule, DOL published the final H-2B comprehensive rule in the

Federal Register with a one hundred ten page discussion of the basis and purpose of the rule along with a cost-benefit analysis of the final rule under the Regulatory Flexibility Act. *See* 77 Fed. Reg. at 10,038-10,148. DOL responded to significant comments, discussed alternatives to the rule, and even altered portions of the proposed rule in response to employer concerns about the feasibility of complying with the new requirements. *Id*. at 10,038-10,114.

On April 16, 2012, Bayou filed a complaint with the district court along with a motion for a preliminary injunction. *See* Record Excerpts, Tab B (ECF Nos. 1, 2). It sought review of DOL's comprehensive H-2B rule under the Administrative Procedure Act (APA), alleging that DOL lacks legislative rulemaking authority. *Id*. (ECF No. 1, ¶¶ 48). Bayou also alleges that DOL failed to explain its rulemaking and conduct a proper Regulatory Flexibility Act analysis. *Id*. (ECF No. 1, ¶¶ 51-52, 55).

On April 26, 2012, the district court preliminarily enjoined DOL from implementing the comprehensive H-2B rule. Record Excerpts, Tab G (ECF No. 24). The district court found that Bayou was likely to succeed on the merits of its claim that DOL lacks legislative rulemaking authority because "there is no language in the statutory provision upon which DOL relies from which the court can plainly infer legislative rule making authority." *Id*. (ECF No. 24 at 5-6). The district court also found that Bayou established injury because DOL's "rules will

have an immediate and significant impact on [Bayou], including their current bidding process, and will result in lost revenue, customers, and/or goodwill." *Id.* (ECF No. 24 at 7). In addition, the district court indicated that "DOL has not articulated any harm it will suffer as a result of a mere delay in the implementation of the rules." *Id.*

On June 25, 2012, the district court stayed the proceedings pending the outcome of this appeal. *See* Record Excerpts, Tab I (ECF No. 53).

SUMMARY OF THE ARGUMENT

The district court's entry of a preliminary injunction results from a fundamental misunderstanding of the relationship between DOL and DHS in the administration of the H-2B program. The statute directs DHS to consult with "appropriate agencies of the government" when determining whether to admit foreign workers to the United States in the H-2B classification. 8 U.S.C. § 1184(c)(1). Through regulation, DHS consults with DOL to determine whether to admit H-2B workers. *See* 73 Fed. Reg. at 78,110. Before employers may import foreign workers, DHS regulations require employers who file H-2B visa petitions to obtain certification from DOL that "qualified workers are not available and that the alien's employment will not adversely affect wage and working conditions of similarly employed domestic workers." 8 C.F.R. § 214.2(h)(6)(iv)(A). The DOL regulations at issue in this case create the

procedures by which DOL makes that labor market determination in consultation with DHS. *See* 77 Fed. Reg. at 10,038. DOL has authority to issue legislative rules to structure its consultative role under the relevant statute.

The district court's preliminary injunction was based on an incorrect legal standard for determining whether an agency has legislative rulemaking authority. An agency does not require an express grant of authority where the relevant statutory scheme shows a Congressional intention to grant rulemaking power, as it does in this case. In establishing a relationship between appropriate government agencies under the H-2 program, Congress granted DOL general rulemaking authority over the H-2 temporary foreign worker program through the Wagner-Peyser Act and the INA. Yet, even if the Wagner-Peyser Act did not grant DOL such rulemaking authority, Congress, through the INA, granted DOL rulemaking authority over the H-2B program. Further, Congress has acquiesced for decades in DOL's practice of promulgating legislative rules to administer the H-2B program and protect United States workers and the domestic labor market. Through its acquiescence, Congress recognized DOL's rulemaking authority over the H-2B program.

Moreover, the district court's preliminary injunction was also an abuse of discretion because the injunction causes DOL immediate and irreparable injury for two reasons. First, because the entire labor certification regime rests on DOL's

promulgation of legislative rules, any DOL effort to enforce the 2008 rule will be met by employer arguments that DOL lacked the authority to issue it. Second, because the purpose in issuing the 2012 rule is to protect United States workers and the domestic labor market, the preliminary injunction prevents DOL from adequately doing so. Similarly, the injunction is contrary to the public's interest because the new rule protects United States workers and the domestic labor market by reducing fraud and preventing employers' persistent abuse of the H-2B program.

Finally, the district court's preliminary injunction was an abuse of discretion because Bayou's allegations of harm resulting from DOL's implementation of the new H-2B rule are neither concrete nor immediate. Bayou's claims are speculative, undetermined, and remote, and they do not amount to a substantial threat of irreparable harm.

ARGUMENT

A. STANDARD OF REVIEW

A party seeking a preliminary injunction must establish that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest."

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (*en banc*). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *Am. Civil Liberties Union of Fla., Inc. v. Miami–Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) (internal quotations omitted). "The ultimate decision to grant or deny a preliminary injunction is reviewed for abuse of discretion, but the determinations of law the district court makes in reaching that decision are reviewed *de novo*." *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333, 1335 (11th Cir. 2002). The Court reviews related findings of fact for clear error. *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002). "This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous fact finding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

B. DOL HAS LEGISLATIVE RULEMAKING AUTHORITY

As a threshold matter, Bayou is incorrect that DOL did not cite statutory authority as a basis for its rulemaking. In the proposed and final rules, DOL cited 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1). *See* 76 Fed. Reg. at 15,130; 77 Fed. Reg. at 10,038, 10,043. Moreover, DOL has long maintained that the

Wagner-Peyser Act, 29 U.S.C. § 49, *et seq*., is a basis for its rulemaking authority in the H-2 non-agricultural program. *See* 42 Fed. Reg. 45,898, 45,900 (DOL) (Sept. 13, 1977); *see also* 20 C.F.R. Part 655 (authority section).

1. DOL has rulemaking authority under Supreme Court case law

The district court was incorrect when it found that DOL does not have rulemaking authority over the H-2B program. The Supreme Court has already stated that DOL's rulemaking authority in this area stems from the relationship between the Wagner-Peyser Act and the INA:

> [The employers'] obligations under the employment system established by the Wagner-Peyser Act stem from the Immigration and Nationality Act of 1952, insofar as it regulates the admission of nonimmigrant aliens into the United States. The latter Act authorizes the admission of temporary foreign workers into the United States only "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii). The Attorney General is charged with determining whether entry of foreign workers would meet this standard, "upon petition of the importing employer." 8 U.S.C. § 1184(c). He is to make this determination "after consultation with appropriate agencies of the Government." Ibid. The Attorney General has delegated this responsibility to the Commissioner of Immigration and Naturalization, 8 C.F.R. § 2.1 (1982), who, in turn, relies on the Secretary of Labor for the initial determinations. 8 C.F.R. § 214.2(h)(3) (1982). To meet this responsibility, the Secretary of Labor relies upon the employment referral system established under the Wagner-Peyser Act.

Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 595 (1982) (footnote omitted). Because DOL is involved in the H-2B program through the consultation specified under 8 U.S.C. § 1184(c)(1), DOL may use rulemaking to fulfill this

consulting role, which necessarily implicates the recruitment of domestic workers through the interstate clearance system under the Wagner-Peyser Act. *See* 77 Fed. Reg. at 10,154; *Snapp*, 458 U.S. at 595-96.

The Wagner-Peyser Act provides for the establishment and maintenance of a national system of public employment offices. *See* 29 U.S.C. § 49. To that end, DOL is required to assist in the coordination and development of a nationwide system of public labor exchange services. 29 U.S.C. § 49b(c)(1). The basic purpose of the employment service system is to improve the functioning of the Nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers. 20 C.F.R. § 652.2. DOL is "authorized to make such rules and regulations as may be necessary to carry out the provisions of [] chapter [4B of Title 29 of the United States Code]." 29 U.S.C. § 49k. In fulfilling its obligation to consult with DHS regarding the availability of unemployed persons in the United States, *compare* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) *with* § 1184(c)(1), DOL has historically relied upon the employment services system to ensure that employers are not importing foreign workers to the detriment of domestic workers, *see* 33 Fed. Reg. at 7571. DOL's use of legislative rules to ensure an adequate test of the domestic labor market under the H-2B program through the employment services system is authorized by the Wagner-Peyser Act. *See* 29 U.S.C. § 49k.

Bayou argued below that DOL is not authorized to issue legislative rules under 29 U.S.C. § 49k to fulfill its consulting role in the H-2B program because the rulemaking authority under Section 49k is limited to implementing Chapter 4B of the Wagner-Peyser Act. This argument fails because DOL is implementing Chapter 4B of the Wagner-Peyser Act by issuing regulations governing how H-2B employers are required to locate available United States workers through participation in the employment service system. *See* 77 Fed. Reg. at 10,154. For decades, DOL has directed, through implementing regulations, employers to engage in recruitment efforts through this system if they intend to import H-2 workers into the United States. *See* 33 Fed. Reg. at 7571. DOL also lists the Wagner-Peyser Act as authority to administer the H-2B program. *See* 20 C.F.R. Part 655 (authority section). In *Snapp*, the Supreme Court recognized DOL's authority under the Wagner-Peyser Act to impose substantive obligations on H-2B employers through participation in the employment service system. *See* 458 U.S. at 595-96.

Bayou mistakenly argued below that the Supreme Court never stated that DOL has legislative rulemaking authority in the H-2 program. But Bayou's attempt to distinguish the *Snapp* decision fails because the Supreme Court's detailed discussion of the "complicated statutory and regulatory framework" of the H-2 program was not a judicial aside or general expression lacking judicial

investigation, *see* 458 U.S. at 595-96, and therefore it was not *dicta*, *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C.J.). The Supreme Court's discussion of DOL's promulgation of binding regulations to ensure employer participation in the employment service system under the H-2 program was an essential part of the Court's reasoning in *Snapp*, which led to the ultimate holding regarding Puerto Rico's standing. *See* 458 U.S. at 609. The Supreme Court's discussion establishes that DOL has rulemaking authority. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which [the courts] are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). Moreover, the Court's discussion of DOL's use of binding regulations in the H-2 program is part of the Court's reasoning leading to the outcome of the case, and that reasoning is binding on this Court. *See Evans v. Secretary, Dept. of Corrections*, 681 F.3d 1241 (11th Cir. 2012), 2012 WL 1860802, *18-20 (using the Supreme Court's reasoning to frame the Court's holding); *Tate v. Showboat Marina Casio*, 431 F.3d 580, 582 (7th Cir. 2005); Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633, 645-51 (1995). Thus, the Court cannot set aside the discussion in the Supreme Court's *Snapp* opinion without rejecting binding and detailed guidance from the higher Court regarding the nature of DOL's participation in the H-2 program. *See Crawford–El v. Britton*, 523 U.S. 574, 590-93 (1998).

The *Snapp* decision specifically stated that DOL's H-2 regulations were published pursuant to the grant of rulemaking authority under the Wagner-Peyser Act. *See* 458 U.S. at 595-96. This discussion was an essential part of the Court's reasoning leading to the conclusion that "Puerto Rico does have *parens patriae* standing to pursue the interests of its residents in the Commonwealth's full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952." 458 U.S. at 609. If the employers in *Snapp* were not required to participate in the employment service system under DOL's binding regulations as a precondition for importing H-2 workers, then the Court could not have held that Puerto Rico had *parens patriae* standing. The Court specifically stated that the employer's obligations stemmed from DOL's regulations, authorized by the Wagner-Peyser Act. *Id*. at 595. Because the employers violated the regulations by denying Puerto Ricans the "benefits of access to domestic work opportunities that the Wagner-Peyser Act and the Immigration and Nationality Act of 1952 were designed to secure for United States workers," *id*. at 608, the Court found that Puerto Rico had *parens patriae* standing to advance the interests of its citizens under DOL's regulations, *id*. at 609.[2]

[2] Even if judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced, *see Watts v. BellSouth Telecommunications, Inc*., 316 F.3d 1203, 1207 (11th Cir. 2003), the Supreme Court in *Snapp* thoroughly

The Supreme Court's discussion of the relationship between the INA and the Wagner-Peyser Act still controls under the current H-2B program because Congress re-enacted the non-agricultural worker H-2 provision under IRCA without alteration. *Compare* INA § 101(a)(15)(H)(ii), 66 Stat. 163 (June 27, 1952) *with* IRCA, Pub. Law No. 99-603, § 301(a) (Nov. 6, 1986); H.R. Rep. No. 99-682, pt. 1 at 80 ("The bill makes no changes to the statutory language concerning non-agricultural H-2's"). Congress is presumed to be aware of settled interpretations, *see Saxbe v. Bustos*, 419 U.S. 65, 74 (1974), and "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," *Midlantic Nt'l Bank v. N.J. Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986). These presumptions are even stronger here where Congress specifically acknowledged DOL's role in administering the H-2 program through the use of regulations. *See* H.R. Rep. No. 99-682, pt. 1 at 80. If Congress disagreed with the Supreme Court's reading of the relationship between the INA and the Wagner-Peyser Act on the issue of DOL's rulemaking authority in the H-2B program, it would have specifically corrected the

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discussed the "facts" of DOL's use of legislative rules to administer the H-2B program, *see Snapp*, 458 U.S. at 595-96, and those facts define the scope of the *Snapp* decision. Nonetheless, if the discussion in *Snapp* regarding DOL's regulations were somehow *dicta*, it would still be binding on this Court, as "[c]arefully considered language of the Supreme Court, even if technically *dictum*, generally must be treated as authoritative." *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997); *see also Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994).

Court on that point. *See McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991) (Congress legislates with knowledge of the basic rules of statutory construction).

In an effort to avoid the language in *Snapp*, Bayou argued in the district court that DOL did not cite the Wagner-Peyser Act as the basis for its rulemaking authority, and therefore DOL's rulemaking must be vacated. This argument fails because DOL's jurisdiction over the H-2B program derives from 8 U.S.C. § 1184(c)(1) in relation to the Wagner-Peyser Act, so DOL's citation to section 1184(c)(1) was "sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule." Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* 29 (1947); *see also* 76 Fed. Reg. at 15,130.

Even if DOL's reference to section 1184(c)(1) were not sufficient, the agency's failure to cite the Wagner-Peyser Act is harmless error and cannot provide a basis for vacating DOL's rulemaking. *See Shinseki v. Sanders*, 556 U.S. 396, 408-10 (2009). As the party attacking the agency's action, Bayou had the burden of demonstrating harm as a result of this purported error, *id*. at 409, which it failed to do. Bayou cannot successfully claim that it did not know DOL had employed legislative rulemaking under the Wagner-Peyser Act because DOL has used the employment service system in the H-2B program for decades, *see* 33 Fed.

Reg. at 7571, and DOL currently lists the Wagner-Peyser Act as authority to administer the H-2B program under existing regulations, *see* 20 C.F.R. Part 655 (authority section). In addition, because Bayou pressed the issue of DOL's rulemaking authority in attendant litigation, *see Bayou v. Solis*, 11-445 (N.D. Fla.), it cannot claim lack of notice regarding DOL's rulemaking authority, *see Gardner v. Grandolsky*, 585 F.3d 786, 792 (3d Cir. 2009).

2. Congress intended DOL to have rulemaking authority

Even if the *Snapp* opinion did not conclusively resolve the issue of DOL's rulemaking authority, the text, structure and object of the INA indicate Congress's intention to grant rulemaking authority to DOL in its consultative role with DHS.

As a threshold matter, the district court misunderstood DOL's role under the H-2B program in relation to DHS and, as a result, the district court erroneously held that DOL did not have rulemaking authority to structure its consultation with DHS in the administration of the H-2B program. The statute directs DHS to consult with "appropriate agencies of the government" when determining whether to admit foreign workers to the United States in the H-2B classification. 8 U.S.C. § 1184(c)(1). Through regulation, DHS consults with DOL to determine whether to admit H-2B workers. *See* 73 Fed. Reg. at 78,110. Before employers may import foreign workers, DHS regulations require employers who file H-2B visa petitions to obtain certification from DOL that "qualified workers are not available

and that the alien's employment will not adversely affect wage and working conditions of similarly employed domestic workers." 8 C.F.R. § 214.2(h)(6)(iv)(A). The DOL regulations at issue in this case create the procedures by which DOL makes that labor market determination in consultation with DHS. *See* 77 Fed. Reg. at 10,038. Within the statutory framework, DOL has authority to issue legislative rules to structure its consultation with DHS. The fact that DHS's and DOL's jurisdictions overlap through the consultation process under 8 U.S.C. § 1184(c)(1) does not undercut DOL's authority to regulate in the area of H-2B labor market certifications. *See Massachusetts v. EPA*, 549 U.S. 497, 529-32 (2007).

Thus, the district court is incorrect that DOL must have a specific grant of rulemaking authority to adopt legislative rules. *See* Record Excerpts, Tab G (ECF No. 24 at 5-6). Although agencies lack authority to issue rules in an area that Congress specifically withholds from an agency, *see Gonzales v. Oregon*, 546 U.S. 243, 260 (2006), there is no presumption against rulemaking authority in general where Congress fails to address the issue. To the contrary, the Supreme Court has indicated that rulemaking authority may be implied. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Moreover, when Congress creates a program and appropriates funds for an agency to administer the program, courts presume that the funded agency will necessarily engage in the "formulation of policy and the

making of rules to fill any gap left, implicitly or explicitly[] by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). In this case, Congress specifically directed DOL to use appropriated funds to administer the H-2B program. *See* H.R. Rep. No. 112-284 (Conf. Rep.), 157 Cong. Rec. H7528 (Nov. 14, 2011) (stating that DOL should continue to use appropriated funds to administer the program under the 2008 H-2B rule). It follows that Congress intended and expected DOL to use legislative rules to formulate the policies and procedures necessary to administer the H-2B program.

Contrary to the district court's suggestion, *Bowen v. Georgetown Univ. Hos*p., 488 U.S. 204 (1988), does not stand for the proposition that the relevant statue must expressly grant rulemaking authority. The issue in *Bowen* was whether the agency could engage in *retroactive* legislative rulemaking without a specific and express grant of authority from Congress. 488 U.S. at 208. The Court's holding that agencies must have an express grant of rulemaking authority is limited to retroactive rulemaking, given the special presumption against retroactive rules, as reflected in the APA's definition of "rule." *Id*. at 224 (Scalia, J., concurring) ("Where quasi-legislative action is required, an agency cannot act with retroactive effect without some special congressional authorization"). Similarly, the district court's reliance on *Louisiana Public Services Commission v. FCC* is also misplaced because that case dealt with the FCC's attempt to preempt state law,

which was contrary to the "language, structure, and legislative history of the Act" indicating a congressional intent "den[ying] the FCC the power to dictate to the States . . ." 476 U.S. 355, 359 (1986). As discussed below, the text, structure, and object of the H-2B statute shows the congressional intention to grant rulemaking authority to DOL, so *Louisiana Public Services Commission v. FCC* does not undercut DOL's rulemaking authority in this case.

Moreover, Bayou's reliance on *Adams Fruit Company v. Barrett*, 494 U.S. 638 (1990), in the district court is misplaced because the limitation on DOL's authority in that case does not exist here. The issue in *Adams Fruit Company* was whether DOL had the authority to define the scope of a private cause of action where Congress specifically established the Judiciary as the adjudicator of private claims. *Id*. at 649-50. Unlike *Adams Fruit Company*, Congress did not establish a private cause of action under the H-2B program for the courts to adjudicate, so there is no issue in this case regarding DOL's entrenchment on the Judicial power. Similarly, Bayou's argument against DOL's rulemaking authority finds no support in *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362 (D.C. Cir. 1990). In that case, Congress specifically granted to the Department of Transportation jurisdiction to investigate violations, but not to impose safety standards for determining violations. *Id*. at 1368-69. Because the agency went beyond the limits of the investigatory power specified in the statute, the Court held that it

lacked authority under the statute to issue substantive rules setting standards for compliance. *Id*. at 1369. The statute in this case does not restrict DOL to any particular type of agency action, *see* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), so *Amalgamated Transit Union* does not undermine DOL's rulemaking authority.

The case law shows that the issue is not whether Congress specifically stated that DOL shall have rulemaking authority in the H-2B program, but whether Congress granted DOL jurisdiction over a specific subject matter. *See Production Tool Corp. v. ETA*, 688 F.2d 1161, 1166-67 (7th Cir. 1982) (DOL has rulemaking authority to issue permanent labor certification regulations even where Congress did not specifically grant authority to issue regulations); *Texas Rural Legal Aid v. Legal Serv. Corp.*, 940 F.2d 685, 691-92 (D.C. Cir. 1991) (LSC has rulemaking authority to publish redistricting regulations even where Congress did not specifically state that LSC had the power to issue rules). To determine whether an agency has jurisdiction over a subject matter, the Court looks to the text, structure, and object of the statute as a whole, *see Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990), which in this case indicate that Congress intended to give DOL authority over the H-2B program to protect the domestic labor market.

The INA provides that H-2B workers may enter the United States temporarily, but only "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The

statute does not indicate which agency is to administer the program. *Id*. Moreover, when Congress transferred the enforcement of the relevant part of the immigration laws from legacy INS to DHS, it did not address the issue, and was silent regarding jurisdiction over H-2B certifications. *See* Pub. Law No. 107-296, § 451. Nevertheless, the subject area addressed in section 1101(a)(15)(H)(ii)(b) – the availability of United States workers -- and the mandate to protect the domestic labor market falls within the special competence and expertise of DOL, which DHS fully recognizes. 73 Fed. Reg. at 78,104. DOL has been exercising authority in this area for decades, *see* 33 Fed. Reg. at 7571, which Congress fully acknowledged when it continued the H-2B program under IRCA, *see* H.R. Rep. No. 99-682, pt. 1 at 80. In addition, Congress expressed its desire in related areas that DOL should have control over the wages and working conditions of foreign workers to ensure the protection of United States workers. *See* 8 U.S.C. § 1182(a)(5) (permanent labor certification program); § 1182(n) (temporary skilled worker program); § 1188(a) (temporary agricultural worker program). Thus, the structure of the INA shows the Congressional intention to have DOL exercise its special competence in economic matters to regulate the employment of foreign workers.

Furthermore, DOL's jurisdiction over the H-2B program fulfills the goals and objectives of the INA to protect the United States against the deleterious

effects of foreign labor. The INA embodies the overarching policy to protect the domestic labor market against the importation of foreign labor, and DOL has a central role under the INA in achieving this purpose. *See Elton Orchards v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974); *Production Tool Corp. v. ETA*, 688 F.3d 1161, 1168 (7th Cir. 1982); H.R. Rep. No. 99-682, pt. 1 at 80.

Bayou attempted in the district court to negate the existence of Congressional intent to grant DOL rulemaking authority by relying on a flawed reading of *Production Tool Corporation v. ETA*, 688 F.2d at 1164 (7th Cir. 1982). Bayou was correct that the *Production Tool Corporation* Court discussed DOL's "interpretation" of the labor certification statute, but Bayou ignored the fact that the interpretation in that case took the form of a substantive rule imposing recruitment obligations on employers. *Id*. at 1166. Although the statute did not expressly grant DOL authority to impose substantive obligations on employers, the Court went out of its way to state, based on the legislative history, that "we may reasonably assume that Congress contemplated that the Secretary would issue regulations filling in the essential details" of the statute. *Id*. at 1167. The Court was clear that it was discussing a rule with a substantive effect, since the rule at issue in that case "was adopted only after all interested persons were given notice and an opportunity to comment pursuant to section 553 procedures." *Id*. Thus,

Bayou was wrong when it argued that DOL needed an express grant of rulemaking authority to issue legislative rules.

Because the Supreme Court does not require an express grant of rulemaking authority for an agency to publish legislative rules, and in this case the text, structure, and object of the statute indicate that Congress intended DOL to have rulemaking authority when consulting with DHS, the district court committed an error of law by finding that DOL lacks rulemaking authority.

3. Congress acquiesced in DOL's longstanding use of legislative rules

The history of DOL's involvement in the H-2B program also demonstrates that Congress has acquiesced in DOL's longstanding practice of administering the H-2B program through the use of legislative rules. Even if the INA lacks a specific authorization for DOL to use legislative rulemaking in the H-2B program, the long history of Congress's refusal to withdraw such authority indicates Congressional acquiescence and approval of DOL's legislative rulemaking power. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Since 1968, DOL has issued regulations governing the H-2 non-agricultural program, *see* 33 Fed. Reg. at 7570-71, and the legislative history of IRCA specifically acknowledges DOL's practice of issuing legislative rules, *see* H.R. Rep. No. 99-682, pt. 1, at 80. Congress also left DOL's rulemaking intact over the last twenty years. In 2005, Congress amended the H-2B program by authorizing

DOL's enforcement authority without abrogating DOL's use of legislative rules. *See* REAL ID Act, Pub. Law No. 109-13, § 404 (May 11, 2005) (codified at 8 U.S.C § 1184(c)(14)(B)). More recently, after DOL issued two legislative rules governing the H-2B program in 2008 and 2011, Congress withheld appropriations to implement the second legislative rule, but not the first. *See* Public Law No. 112-55, Div. B., Title V, § 546 (Nov. 18, 2011); Public Law No. 112-74, Title I, Div. F, § 110 (Dec. 23, 2011). The conference report accompanying the "minibus" appropriations bill explained that the drafters expected DOL to continue using the December 2008 legislative rule to administer the program. *See* H.R. Rep. No. 112-284 (Conf. Rep.), 157 Cong. Rec. H7528 (Nov. 14, 2011).

The courts have long recognized that the meaning of a statute may be inferred partly from the course of its implementation over time. In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the question was whether the President had the authority to withdraw tracts of public land from mineral exploration, in apparent contravention of statutes that provided for such exploration. *See* 236 U.S. at 466-69. The Court held that Congress had implicitly acquiesced in such withdrawals by failing to amend the relevant statutes over a period of decades during which many withdrawals had been made. *Id*. at 472. Congress watched the Executive at work, but at no point did it "repudiate the action taken," and such "silence was its acquiescence. Its acquiescence was equivalent to consent to

continue the practice until the power was revoked by some subsequent action by Congress." *Id*. at 481.

Similarly, the long history of Congressional silence regarding DOL's practice of issuing legislative rules in the H-2B program shows a Congressional consent to continue this practice. If Congress thought DOL's practice of using legislative rules to administer the program were *ultra vires*, it had the opportunity to express its view over the years, and most recently by withholding appropriations to administer the program through legislative rules. Congress withheld appropriations that allowed DOL to administer the January 2011 rule until October 1, 2012, but it did not prohibit DOL from administering the predecessor legislative rule. *See* Public Law No. 112-55, Div. B., Title V, § 546; Public Law No. 112-74, Title I, Div. F, § 110. In fact, Congress expressed its intention that DOL continue administering the H-2B program through the use of a legislative rule. *See* 157 Cong. Rec. H7528 (Nov. 14, 2011).

Congress's refusal to limit DOL's authority shows legislative acquiescence in, and a longstanding approval of, DOL's practice of issuing legislative rules. *See Boesche v. Udall*, 373 U.S. 472, 482-83 (1963).

4. The Court should defer to DOL's determination of the agency's jurisdiction

Even if the statutory structure and subsequent Congressional acquiescence did not resolve the issue of DOL's rulemaking authority, the Court should defer to

DOL's determination of its own jurisdiction in the face of statutory silence on the issue. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002). If a statute does not expressly address an issue, the Court must uphold an agency's reasonable construction of the statute. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Bayou erroneously argued in district court that DOL is not entitled to *Chevron* deference on the issue of whether it has jurisdiction over the H-2B program, because Bayou claimed that DOL is not the agency authorized to administer the H-2B program. This argument has no merit, as discussed above, but it also misses the essential point that *Chevron* deference applies precisely in the situation where it is unclear whether an agency has jurisdiction over an issue. In this case, the INA is silent on the fundamental question of DOL's jurisdiction, and, because silence imports ambiguity, the *Chevron* framework should structure the Court's inquiry. *See Walton*, 535 U.S. at 218.

The Supreme Court has long deferred to agencies' determinations of their own jurisdiction. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986) (applying *Chevron* to scope of agency's jurisdiction over counterclaims); *Coeur Alaska v. Southeast Alaska Conser. v. Council*, 129 S. Ct. 2458, 2469 (2009); *United States v. Eurodif*, 129 S. Ct. 878, 888 (2009). Following the Supreme Court's lead, lower courts have held that *Chevron*

deference is fully applicable to an agency's interpretation of its own jurisdiction. *See Puerto Rico Maritime Shipping Authority v. Valley Freight Systems*, 856 F.3d 546, 552 (3d Cir. 1988) (following *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986)).[3]

DOL's use of legislative rulemaking to administer the H-2B program is a reasonable interpretation of the statute because it comports with the judicial preference for filling the interstices of the law through a quasi-legislative enactment of rules of general applicability. *See SEC v. Chenery Corp*., 332 U.S. 194, 202 (1947). Courts encourage agencies to adopt legislative rules when seeking to establish norms of widespread application. *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1982). Notice and comment rulemaking provides important procedural protections to the public, allows agencies to apprise themselves of relevant issues and views, and promotes predictability. *See Int'l Union v. MSHA*, 626 F.3d 84, 95 (D.C. Cir. 2010). Without the use of this process,

[3] The Circuit Courts are divided on the issue. *Compare Tafas v. Doll*, 559 F.3d 1345, 1353 (Fed. Cir. 2009) (*Chevron* deference does not apply to the Patent and Trademark Office's determination that the agency has legislative rulemaking authority), *decision vacated*, 328 F. App'x 658 (Fed. 2009), *with Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (granting *Chevron* deference to FERC's determination that the transportation of natural gas through a pipeline falls within interstate commerce). The Seventh Circuit appears to have an inconsistent position. *Compare Northern Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 847 (7th Cir. 2002) (declining *Chevron* deference) *with Arnett v. CIR*, 473 F.3d 790, 792 (7th Cir. 2007) (suggesting in *dicta* that *Chevron* deference applies).

the public would be deprived of important protections that are unavailable in case-by-case adjudication. *See Nat'l Petroleum Ref. Ass'n v. FTC*, 482 F.2d 672, 683-84 (D.C. Cir. 1973).

C. DOL SUFFERS HARM BECAUSE OF THE INJUNCTION

The district court's injunction irreparably injures DOL because the injunction raises doubts about the underlying authority of DOL to fulfill its responsibilities under the statute and under Department of Homeland Security regulations to issue the labor certifications that are necessary predicates for the admission of H-2B workers. *See* 8 U.S.C. § 1184(c)(1). If the district court's analysis is correct, DOL will encounter huge difficulties in administering the H-2B program because the entire labor certification regime, which protects the United States economy from employers' overuse of foreign labor, rests on legislative rules that DOL has promulgated. *See* 73 Fed. Reg. at 78,052-53.

While the injunction assumes that DOL will administer the program under the 2008 rule, DOL will face enormous obstacles as a result of the ruling. When DOL moves to enforce the terms of the 2008 rule against employers with H-2B certifications, the employers will use the logic of the injunction in an attempt to avoid liability for violating the worker protections that exist under that 2008 rule. The employers will argue that DOL has no authority to enforce its rule because DOL's H-2B certifications are *ultra vires*. This harm to DOL's enforcement

authority has already occurred. Recently an employer challenged DOL's 2008 rule in administrative proceedings, based on the district court's preliminary injunction. The employer allegedly engaged in rampant and gross violations of the 2008 legislative rule, including material misrepresentations. *See* Addendum A. In administrative proceedings, the employer used the district court's preliminary injunction as authority for claiming that DOL lacks the authority to enforce the terms of the 2008 rule against the employer. *See* Addendum B. The employer's rejection of DOL's authority confirms that DOL is harmed by having its entire regulatory program called into question, as the district court's preliminary injunction order provides the basis for employers to resist DOL's enforcement of regulatory obligations.

The district court's injunction raises the specter of a program hiatus. Such a result is possible because without the authority to set appropriate standards for issuing H-2B labor certifications (which certify the unavailability of United States workers), DOL would be unable to issue the labor certifications necessary for the admission of H-2B workers into the United States. The district court's preliminary injunction disrupts the operation and legitimacy of the overall H-2B temporary worker program, which undermines the protections that Congress put in place for United States workers and the domestic labor market. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *see also U.S. v. Sec. of Kansas*, No. 03-1170, 2003 WL

22472226, at *2 (D. Kan. Oct. 30, 2003) (indicating that interference with governmental functions constitutes an irreparable injury).

There is a second reason that DOL is irreparably harmed. The injunction prevents DOL from adequately performing its duty of protecting domestic workers and the United States labor market. Through a random sampling of employers participating in the H-2B program operating under the 2008 rule, DOL discovered that fifty-two percent of employers failed to comply with the programs' terms. *See* 76 Fed. Reg. at 15,132. Further, DOL found evidence that some H-2B employers committed criminal violations. *Id.* After reviewing this evidence and the public's comments to its proposed new rule, DOL tailored the 2012 rule to combat this type of abuse and protect the domestic labor market by ensuring that employers who participate in the H-2B program adequately state their employment needs and efforts to recruit U.S. workers. 77 Fed. Reg. at 10,041. DOL's purpose in issuing the new H-2B rule is clear: to protect United States workers and the domestic labor market by preventing employers from persistently abusing the H-2B program as it operates under the 2008 rule. *See* 77 Fed. Reg. at 10,041. The district court's injunction prevents DOL from adequately performing its duties because any delay in DOL's implementation of the 2012 rule blocks the agency from upholding its mandate and performing its governmental function, thus causing irreparable injury.

See Sec. of Kansas, 2003 WL 22472226, at *2; *see also United States v. Poole*, 916 F. Supp. 861, 863 (C.D. Ill. 1996).

D. BAYOU FAILED TO SHOW THE REQUIRED HARM

The district court's grant of a preliminary injunction was also an abuse of discretion because Bayou failed to show the required, immediate irreparable injury in the absence of a preliminary injunction. The showing of a substantial likelihood of irreparable injury is the "sine qua non of injunctive relief," and without it, "preliminary injunctive relief is improper." *Siegel*, 234 F.3d at 1176. Bayou's allegations of harm are speculative, indeterminate, and in the rare instance where they actually allege a possible harm, the purported injury is too distant to qualify as immediate under this circuit's case law. *See Northeastern Fla. Chapter of Ass'n of General Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (irreparable injury "must be neither remote nor speculative, but actual and imminent").

For example, Mr. Allen states that he has already obtained the certification for 21 foreign workers, *see* Record Excerpts, Tab D (ECF No. 2-2 ¶ 4), but DOL has made clear that the new regulation does not apply to foreign workers already certified under the prior regulation, *see* 77 Fed. Reg. at 16,158. In addition, Mr. Allen states that he "will be filing an application for temporary labor certification later this year for the next season." Record Excerpts, Tab D (ECF No.

2-2 ¶ 5) (emphasis added). Even if Mr. Allen were harmed by the regulation "later this year," which he fails to establish in any concrete sense, the harm is too far in the future to warrant a temporary restraining order or preliminary injunctive relief pending this Court's determination on the merits of the regulatory action.

Ms. Hickman also fails to identify any concrete harm. She simply makes unsupported statements without any examples that her members will suffer some unidentified harm as a result of DOL's regulation. *See* Record Excerpts, Tab C (ECF No. 2-1). These vague statements fall far short of a plaintiff's duty to establish harm that is immediate and certain. *See Jacksonville*, 896 F.2d at 1285.

Similarly, the harm that the declarants allege because of the three-quarter guarantee rule[4] is based on nothing more than unvarnished surmise and conjecture about weather patterns in the future. For example, Mr. Price states that his work crews were idle for the month of January 2011 because of "snow and temperature." Record Excerpts, Tab E (ECF No.2-3 ¶ 7). Of course, Mr. Price cannot predict with any degree of certainty that this unfortunate, protracted period of down-time will occur again, but even if the contingencies of winter weather were somehow within his ability to predict, his predictions only relate to winter conditions many months from now, which is too distant in the future to constitute immediate harm.

[4] The three-quarter guarantee rule requires employers to pay H-2B workers for the total number of work hours equal to at least three-fourths of the workdays in each 12-week period beginning with the first workday after the arrival of the worker or the advertised work start-date, whichever is later. 77 Fed. Reg. at 10,157.

The same fundamental defect plagues his speculations about inclement weather this summer. *Id.* (ECF No. 2-3 ¶ 8). He cannot predict summer weather patterns, and even if he could, the summer months were far off when he filed his declaration. It is also significant to note that in complying with the three-quarter rule, employers "may count all hours the employee actually works, even if they are in excess of the daily hours specified in the job order," which will allow employers considerable flexibility in dealing with the type of weather related "down time" about which Mr. Price speculates. *See* 77 Fed. Reg. at 10,074.

For a different reason, Ms. Hickman and Mr. Allen fail to show the required harm arising out of the three-quarter guarantee rule, because they fundamentally misconstrue the scope and application of that rule. Both declarants allege that they will be responsible for paying wages under the three-quarter rule to foreign workers who depart the United States without completing their assigned work. *See* Record Excerpts, Tab C (ECF No. 2-1 ¶ 8); Tab D (ECF No. 2-2 ¶ 11). As DOL indicates in the preamble to the final rule, these assertions of wage liability are simply wrong. Under the three-quarter rule, employers "do not have to pay an employee who voluntarily chooses not to work." 77 Fed. Reg. at 10,074.

Moreover, the declarants' assertions regarding purported harm stemming from the "corresponding employment"[5] rule are speculative and otherwise based on a misrepresentation of the regulation. For example, Mr. Allen contends that his crew supervisors will be considered "corresponding workers" falling under higher wage rates if they are forced to perform the work of their H-2B subordinate employees who call out sick for a day. Record Excerpts, Tab D (ECF No. 2-2 ¶ 8). Mr. Allen's allegation of harm in this example rests on the unreasonable assumption that his supervisory staff earns less than his H-2B workers. *See* 77 Fed. Reg. at 10,048. It is unclear whether his claim even rests on this assumption, because in the next paragraph he claims that his crew leaders are "paid substantially more than H-2B workers." Record Excerpts, Tab D (ECF No. 2-2 ¶ 9). Thus, it is unclear exactly what possible harm he alleges. In any event, Mr. Allen is also incorrect in assuming that he must pay a United States worker under the concept of "corresponding employment" at a higher wage rate for performing the duties of an H-2B worker for one day. 77 Fed. Reg. at 10,048 (corresponding employment rule is triggered only when "the U.S. worker regularly

[5] The corresponding employment rule requires employers to pay wages to United States workers equal to the wages of foreign workers in "corresponding employment." 76 Fed. Reg. at 15,135. With certain exceptions, the rule requires employers to pay all United States workers the higher wages paid to H-2B foreign workers when the United States workers perform substantially the same work included in the H-2B job order or substantially the same work that the H-2B foreign worker actually performs. 77 Fed. Reg. at 10,149.

performs a significant number of the duties of the H-2B worker for an extended period of time"). Mr. Allen could be claiming, although it is entirely unclear, that his H-2B workers would need to be paid the rate of a supervisor in the event the supervisor fills in for the H-2B worker, but DOL flatly rejected this interpretation of corresponding employment in the preamble to the H-2B rule. *Id*. (corresponding employment "does not . . . require an employer to bump up the wages it pays to its landscape laborers to the supervisors' wage rate simply because the supervisor performed some of their landscaping laborer duties.").

Finally, Mr. Allen and Mr. Price make conclusory, unsupported assertions that the new H-2B procedures will result in processing delays similar to the H-2A program. Record Excerpts, Tab D (ECF No. 2-2 ¶ 15); Tab E (ECF No. 2-3 ¶ 9). These allegations rest on pure fiction and provide no basis for finding any harm, let alone immediate, irreparable harm. First, the H-2A program runs very efficiently; DOL processes eighty-five percent of all H-2A application within thirty-five days. *See* www.foreignlaborcert.doleta.gov/pdf/h_2a_selected_statistics.pdf. Second, the new H-2B procedures are designed to reduce processing times by bifurcating the adjudication of applications, which will allow DOL to avoid duplicating review of whether an employer's job opportunities qualify as temporary under the regulation. 76 Fed. Reg. at 15,134. Third, the bifurcated procedures do not even

go into effect for another year, so any alleged harm arising from these procedures is far too distant. 77 Fed. Reg. at 16,158.

E. THE PUBLIC IS HARMED BY THE PRELIMINARY INJUNCTION

The harm to the public interest caused by the district court's injunction against DOL mirrors the irreparable injury that DOL will suffer without a stay of the injunction. Any delay in DOL's implementation of the 2012 rule permits continued operation of the H-2B program in a manner that does not adequately protect United States workers and prevent program abuse. The district court's injunction harms the public's interest because the 2012 rule reduces fraud and abuse in the H-2B program, and protects United States workers and the domestic labor market. *See* 77 Fed. Reg. at 10,041.

F. A NATION-WIDE INJUNCTION WAS AN ABUSE OF DISCRETION

By its terms, the scope of the district court's injunction is nation-wide. *See* Record Excerpts, Tab G (ECF No. 24 at 8). The district court abused its discretion in granting a nation-wide injunction because the broad scope of the injunction is not necessary to afford relief to Bayou, in the event it succeeds on the merits, and a nation-wide injunction is inconsistent with the principle that the district court's decision is binding only between the parties.

This case is not a class action, and the only parties before the district court are plaintiffs challenging the application of DOL's rules to their individual

business interests. *See* Record Excerpts, Tab B (ECF No. 1). In a case involving a similar issue, the Fourth Circuit Court of Appeals held that the district court abused its discretion by issuing a nation-wide injunction preventing the Federal Election Commission from implementing its regulations outside the Fourth Circuit. *See Society for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). The court noted that an agency must be free to press its position in those circuits that have not yet ruled on the validity of the agency's regulation. *Id*. The court reasoned that allowing a district court to enter a nation-wide injunction against an agency is normally not permitted because it has the effect of freezing the first decision rendered on a particular legal issue by preventing other courts in other circuits from addressing the legal issue. *Id*.

Similarly, in this case, the district court imposed its view of the law on other circuits, which prevents the development of the law regarding DOL's rulemaking authority. Agencies must be permitted to engage in non-acquiescence in other circuits to allow for a full development of the law by giving rise to possible circuit disagreements that lead to Supreme Court review. *See Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002). By suppressing DOL's ability to engage in non-acquiescence in other circuits, the district court's nation-wide injunction in this case was contrary to prevailing judicial principles, and was an abuse of discretion.

CONCLUSION

Because the district court committed a legal error in concluding that DOL lacks legislative rulemaking authority when consulting with DHS to determine the terms and conditions of the H-2B program, the Court should vacate the district court's grant of the preliminary injunction. In addition, the district court abused its discretion by granting a preliminary injunction because it found that Bayou demonstrated immediate, irreparable harm, and because it found that neither DOL nor the public would suffer harm as a result of the preliminary injunction.

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Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

DAVID J. KLINE
Director

/s/Geoffrey Forney
GEOFFREY FORNEY
Senior Litigation Counsel
United States Department of Justice
Office of Immigration Litigation
District Court Section
450 5th Street, N.W.
Washington, D.C. 20001
(202) 532-4329
geoff.forney@usdoj.gov

Attorneys for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that Defendants-Appellants' Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because:

This brief is proportionally spaced, has a typeface of 14 points, and contains 10,002 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Geoffrey Forney
GEOFFREY FORNEY
Senior Litigation Counsel
United States Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2012, I electronically filed the foregoing DEFENDANTS-APPELLANTS' BRIEF with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to the following attorneys of record:

Gregory Scott Schell
Laura Metcoff Klaus
Kristi Lee Graunke
Robert Phillip Charrow
Michelle Lapointe
Meredith Blake Stewart

/s/ Geoffrey Forney
GEOFFREY FORNEY
Senior Litigation Counsel
United States Department of Justice

Addendum A

U.S. DEPARTMENT OF LABOR **Wage and Hour Division**
PO Box 7245
Federal Building, Room 1373
Syracuse, NY 13261
Telephone: (315) 448-0630
Fax: (315) 448-0632

SENT VIA : USPS CERTIFIED MAIL RECEIPT: # 7006 0810 0004 3379 6688, and USPS 1st CLASS MAIL

March 18, 2011

Peter Karageorgis, Owner/President
Peter's Fine Greek Food, Inc.
22-42 Steinway Street
Astoria, NY 11105

Subject: Administrator's Determination Pursuant to Regulations at 20 C.F.R. Part 655, Subpart A – H-2B Temporary Employment in Occupations Other Than Agriculture or Registered Nursing under the Immigration and Nationality Act (INA) administered by the U.S. Department of Labor
Reference #: 1594818

Dear Mr. Karageorgis:

Based on the evidence obtained in the recently concluded Wage and Hour Division investigation of Peter's Fine Greek Food, Inc., under the H-2B provisions of the INA, as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) et seq., it has been determined that your firm committed the following violations: willful misrepresentation of a material fact on the Application for Temporary Employment Certification, substantial failure to meet a condition of the Application for Temporary Employment Certification and failure to cooperate in the investigation. Any Application for Temporary Employment Certification (Application) (Form ETA 9142 with Appendix B) included in this investigation is listed or enclosed.

The specific violations and the remedy imposed for each violation are set forth on the enclosed Summary of Violations and Remedies. As a result of the violations, a civil money penalty in the total amount of $50,500.00 is assessed. Additionally, your firm owes back wages in the amount of $115,900.88 to 11 H-2B nonimmigrants and two U.S. workers. Your firm is liable for any ongoing violations.

You must pay the civil money penalty and the back wage amount as aforesaid no later than 30 days after the date of this determination, unless you request an appeal no later than 15 calendar days after the date of this determination, as instructed below. The civil money penalty must be paid by sending a certified check or money order payable to Wage and Hour Division, U.S. Department of Labor, Northeast Regional Office, The Curtis Center, Suite 850 West, 170 S. Independence Mall West, Philadelphia, PA 19106-3317. You must pay back wages in the

amounts listed on the Summary of Unpaid Wages that is enclosed with this letter. Your back wage payments must follow procedures as outlined in the Back Wage Disbursement and Pay Evidence Instructions enclosed with this letter. The employer is responsible for withholding the legally required deductions (*e.g.,* Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities. A check in the net amount of wages should be made payable to the [name of the individual owed back wages or "Wage-Hour Labor"] and must be submitted to the Wage and Hour Division, U.S. Department of Labor, PO Box 7245, 100 S. Clinton Street, Syracuse, NY 13261.

This debt is subject to the assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Improvement Act of 1996 and Department of Labor policies. Interest will be assessed at the Treasury Tax and Loan Account rate on any principal that becomes delinquent. The rate is currently 1%. Administrative cost charges will be assessed to help defray the Government's cost of collecting this debt. A penalty at the rate of 6% will be assessed on any portion of the debt remaining delinquent for more than 90 days. In order to avoid these charges, you must forward payment of the civil money penalties to the Wage and Hour Division, U.S. Department of Labor, Northeast Regional Office, The Curtis Center, Suite 850 West, 170 S. Independence Mall West, Philadelphia, PA 19106-3317 and back wage payments to Wage and Hour Division, U.S. Department of Labor, PO Box 7245, 100 S. Clinton Street, Syracuse, NY 13261, by the indicated due date. Please note that any pending bankruptcy action may affect the foregoing remedies.

Pursuant to 20 C.F.R. § 655.70(c) and 20 C.F.R § 655.80(a), the U.S. Department of Labor's Employment and Training Administration (ETA) and the Department of Homeland Security (DHS) shall be notified of the occurrence of this violation, when this determination becomes final. See 20 C.F.R. § 655.70(c)(5). The DHS, upon notification, may deny any petitions filed by your firm under 20 C.F.R. § 655.80(a) for a prescribed period of time beginning on the date of receipt of the notification. Upon receipt of the notification, ETA may disqualify your business for a prescribed period of time. See 20 C.F.R. § 655.65(h).

You have the right to request a hearing on this determination. Such a request must be dated, be typewritten or legibly written, specify the issues stated in this notice of determination on which a hearing is requested, state the specific reasons why the requester believes this determination to be in error, be signed by the requester or by an authorized representative, and include the address at which the requester or the authorized representative desires to receive further communications relating to the hearing request.

The request must be made to and received by the Chief Administrative Law Judge (OALJ) at the following address no later than 15 calendar days after the date of this determination:

U.S. Department of Labor
Chief Administrative Law Judge
800 K Street NW, Room 400 North
Washington, DC 20001-8002

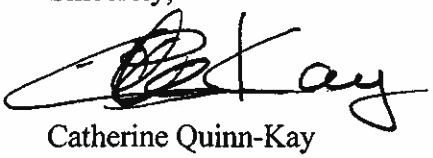
If you do not make a timely request for a hearing, this determination will become a final and

unappealable order of the Secretary of Labor.

The procedure for filing a request for a hearing is provided in 20 C.F.R. § 655.71. Please note that 20 C.F.R. § 655.71(e) requires that a copy of any such request for a hearing must also be sent to me and to those parties listed below who were provided a copy of this determination. Due to the delayed delivery of mail in certain areas, you may wish to transmit your request to the OALJ via facsimile at 202-693-7365 to ensure timely receipt.

A copy of 20 C.F.R. Part 655 subpart A can be found at the following web address: http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=21887.

Sincerely,



Catherine Quinn-Kay
Assistant District Director

Enclosures: Copy / List of Applications (Form ETA9142, Appendix B)
Summary of Violations and Remedies
Summary of Unpaid Wages
Back Wage Disbursement Instructions

cc: Chief Administrative Law Judge
800 K Street NW, Room 400 North
Washington, DC 20001-8002
(with enclosures per 20 C.F.R. § 655.70(b))

Associate Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-2716
Washington, DC 20210

Administrator
U.S. Department of Labor
Wage and Hour Division
200 Constitution Avenue, NW, Room S-3510
Washington, DC 20210

U.S. Department of Labor
Office of the Regional Solicitor
201 Varick Street, Room 983
New York, NY 10014

U.S. Department of Labor
Wage and Hour Division
Northeast Regional Office
The Curtis Center, Suite 850 West
170 S. Independence Mall West, #850 West
Philadelphia, PA 19106-3317

Dawn Cardi & Associates
Two Park Avenue, 19th Floor
New York, NY 10016

Administrator
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room C-4312
Washington, DC 20210

Summary of Violations and Remedies

Peter's Fine Greek Food, Inc.

Violation: Peter's Fine Greek Food, Inc. willfully misrepresented a material fact on the Application in violation of 20 C.F.R. § 655.60(a).

The violation includes willfully misrepresenting the following on the Application, Form ETA 9142: Section F: Job Offer – number of hours of work.

Remedy: A civil money penalty in the amount of $10,000.00 is assessed. See 20 C.F.R. § 655.65. Peter's Fine Greek Food, Inc. is ordered to comply with 20 C.F.R. § 655.60(a) in the future.

Violation: Peter's Fine Greek Food, Inc. willfully misrepresented a material fact on the Application in violation of 20 C.F.R. § 655.60(a).

The violation includes willfully misrepresenting the following on the Application, Form ETA 9142: Section G: Rate of pay – basic rate.

Remedy: A civil money penalty in the amount of $10,000.00 is assessed. See 20 C.F.R. § 655.65. Peter's Fine Greek Food, Inc. is ordered to comply with 20 C.F.R. § 655.60(a) in the future.

Violation: Peter's Fine Greek Food, Inc. substantially failed to meet a condition on the Application in violation of 20 C.F.R. § 655.60(b).

The violation includes substantial failure to meet a condition on the Application, Form ETA 9142, Appendix B: Wages – failure to pay the offered wage rate.

Remedy: A civil money penalty in the amount of $10,000.00 is assessed. See 20 C.F.R. § 655.65. Peter's Fine Greek Food, Inc. is ordered to pay back wages in the amount of $115,900.88 to 11 H-2B nonimmigrants and two U.S. workers. Peter's Fine Greek Food, Inc. must pay back wages by certified check made payable to the [name of the individuals owed back wages or "Wage-Hour Labor"] in the net amount after deduction of required taxes. (The employer is responsible for withholding the legally required deductions (*e.g.,* Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities.) Peter's Fine Greek Food, Inc. is ordered to comply with 20 C.F.R. § 655.22(e) in the future.

Violation: Peter's Fine Greek Food, Inc. substantially failed to meet a condition on the Application in violation of 20 C.F.R. § 655.60(b).

The violation includes substantial failure to meet a condition on the Application, Form ETA 9142, Appendix B: Wages - Transportation – failure to pay outbound transportation.

Remedy: A civil money penalty in the amount of $500.00 is assessed. See 20 C.F.R. § 655.65. Peter's Fine Greek Food, Inc. is ordered to pay back wages in the amount of $500.00 to one H-2B nonimmigrant worker. Peter's Fine Greek Food, Inc. must pay back wages by certified check made payable to the [name of the individual owed back wages or "Wage-Hour Labor"]. Peter's Fine Greek Food, Inc. is ordered to comply with 20 C.F.R. § 655.22(m) in the future.

Violation: Peter's Fine Greek Food, Inc. substantially failed to meet a condition on the Application in violation of 20 C.F.R. § 655.60(b).

The violation includes substantial failure to meet a condition on the Application, Form ETA 9142, Appendix B: ETA/USCIS Notification – failure to provide notice to ETA/USCIS of early separation of employment of H-2B worker within two workdays.

Remedy: A civil money penalty in the amount of $5,000.00 is assessed. See 20 C.F.R. § 655.65. Peter's Fine Greek Food, Inc. is ordered to comply with 20 C.F.R. § 655.22(f) in the future.

Violation: Peter's Fine Greek Food, Inc. substantially failed to meet a condition on the Application in violation of 20 C.F.R. § 655.60(b).

The violation includes substantial failure to meet a condition on the Application, Form ETA 9142, Appendix B: Job Contractor – placed H-2B workers at other employer's worksite without making bona fide inquiry and/or without obtaining written confirmation from other employer of non-displacement of U.S. workers when no layoff/displacement has occurred.

Remedy: A civil money penalty in the amount of $5,000.00 is assessed. See 20 C.F.R. § 655.65. Peter's Fine Greek Food, Inc. is ordered to comply with 20 C.F.R. § 655.22(k)(1) in the future.

Violation: Peter's Fine Greek Food, Inc. failed to cooperate in the investigation as required by 20 C.F.R. § 655.50(c).

The violation includes failure to maintain and/or produce documentation as required.

Remedy: A civil money penalty in the amount of $10,000.00 is assessed. See 20 C.F.R. § 655.65. Peter's Fine Greek Food, Inc. is order to comply in the future with 20 C.F.R. § 655.50(c).

Pursuant to 20 C.F.R. § 655.70(c) and 20 C.F.R § 655.80(a), the U.S. Department of Labor's Employment and Training Administration (ETA) and the Department of Homeland Security (DHS) shall be notified of the occurrence of this violation, when this determination becomes final. See 20 C.F.R. § 655.70(c)(5). The DHS, upon notification, may deny any petitions filed by your firm under 20 C.F.R. § 655.80(a) for a prescribed period of time beginning on the date of receipt of the notification. Upon receipt of the notification, ETA may disqualify your business for a prescribed period of time. See 20 C.F.R. § 655.65(h).

Summary of Unpaid Wages Peter's Fine Greek Food

File # 1594818

Last Name	First Name	ACT	From	To	Total Back Wages Due
Guerrero Vazquez	Adonai	H2B	04/16/2010	09/08/2010	
Pacheco Flores	Artemio Hugo	H2B	07/01/2010	09/08/2010	$9,510.51
Aguilar Hernandez	Arturo	H2B	04/16/2010	09/08/2010	$3,168.25
Navarro	Ernesto	H2B	04/16/2010	09/08/2010	$14,668.25
Tirado Ortiz	Horacio	H2B	06/17/2010	09/08/2010	$1,255.67
Aguilar Hernandez	Jesus	H2B	04/16/2010	09/08/2010	$168.25
Benitez Perez	Joaquin	H2B	05/01/2010	09/08/2010	$14,868.25
Moran Velazquez	Joaquin	H2B	04/16/2010	09/08/2010	$14,268.25
Dominguez	Jonathan	H2B	04/16/2010	09/08/2010	$14,218.25
Solorzano Ramirez	Jose	H2B	08/09/2010	09/08/2010	
Olmos Rodriguez	Jose Luis	H2B	06/26/2010	09/08/2010	
Arevalo Escarzago	Luis Antonio	H2B	08/09/2010	09/08/2010	$1,205.12
Garcia Castanera	Manuel De Jesus	H2B	08/09/2010	09/08/2010	
Hernandez Alvarez	Rafael	H2B	04/17/2010	07/18/2010	$8,725.28
Cabrales martinez	Roberto Alfonso	H2B	08/09/2010	09/08/2010	
Rosales Rios	Samuel	H2B	08/09/2010	09/08/2010	
Galicia Aguilar	Saul	H2B	04/16/2010	09/08/2010	$16,868.25
Grigoryan	Toma	H2B	08/26/2010	09/08/2010	$108.30
Vazquez Garcia	Victor Manuel	H2B	04/16/2010	09/08/2010	$16,868.25

Total Balance Due $115,900.88

Last Name	First Name	ACT	From	To	Amt Due	Amt Agreed	Paid Via Settlement	Balance Due	Remaining Balance
Guerrero Vazquez	Adonai	H2B	04/16/2010	09/08/2010	$14,168.25	$14,168.25	$15,000.00		
Pacheco Flores	Artemio Hugo	H2B	07/01/2010	09/08/2010	$9,510.51			$9,510.51	$9,510.51
Aguilar Hernandez	Arturo	H2B	04/16/2010	09/08/2010	$15,168.25	$12,000.00	$12,000.00	$3,168.25	$3,168.25
Navarro	Ernesto	H2B	04/16/2010	09/08/2010	$14,668.25			$14,668.25	$14,668.25
Tirado Ortiz	Horacio	H2B	06/17/2010	09/08/2010	$10,755.67	$9,500.00	$9,500.00	$1,255.67	$1,255.67
Aguilar Hernandez	Jesus	H2B	04/16/2010	09/08/2010	$14,168.25	$14,000.00	$14,000.00	$168.25	$168.25
Benitez Perez	Joaquin	H2B	05/01/2010	09/08/2010	$14,868.25			$14,868.25	$14,868.25
Moran Velazquez	Joaquin	H2B	04/16/2010	09/08/2010	$14,268.25			$14,268.25	$14,268.25
Dominguez	Jonathan	H2B	04/16/2010	09/08/2010	$14,218.25			$14,218.25	$14,218.25
Solorzano Ramirez	Jose	H2B	08/09/2010	09/08/2010	$4,999.53	$4,999.53	$5,000.00		
Olmos Rodriguez	Jose Luis	H2B	06/26/2010	09/08/2010	$8,472.81	$8,472.81	$8,500.00		
Arevalo Escarzago	Luis Antonio	H2B	08/09/2010	09/08/2010	$6,205.12	$5,000.00	$5,000.00	$1,205.12	$1,205.12
Garcia Castanera	Manuel De Jesus	H2B	08/09/2010	09/08/2010	$4,999.53	$4,999.53	$5,000.00		
Hernandez Alvarez	Rafael	H2B	04/17/2010	07/18/2010	$8,725.28			$8,725.28	$8,725.28
Cabrales martinez	Roberto Alfonso	H2B	08/09/2010	09/08/2010	$4,999.53	$4,999.53	$5,000.00		
Rosales Rios	Samuel	H2B	08/09/2010	09/08/2010	$3,532.97	$3,532.97	$5,000.00		
Galicia Aguilar	Saul	H2B	04/16/2010	09/08/2010	$16,868.25			$16,868.25	$16,868.25
Grigoryan	Toma	H2B	08/26/2010	09/08/2010	$108.30			$108.30	$108.30
Vazquez Garcia	Victor Manuel	H2B	04/16/2010	09/08/2010	$16,868.25			$16,868.25	$16,868.25
				Total Balance Due		$115,900.88			

U.S. DEPARTMENT OF LABOR Wage and Hour Division
P.O. Box 7245
Federal Building, Room 1373
Syracuse, NY 13261
Phone: (315) 448-0630 x25
Fax : (315) 448-0632

BACK WAGE DISBURSEMENT INSTRUCTIONS

As provided in the acts enforced by the Wage and Hour Division, the Administrator of the Wage and Hour Division is authorized to supervise the payment of back wages. This document contains specific instructions on providing payment for employees to the Wage-Hour Division for disbursement.

- Per the attached letter, your firm will make full back wage payment on or before: **04/18/2011.**

- Checks will be made out to each employee as follows: EMPLOYEE NAME **OR WAGE HOUR / LABOR.** The employer is responsible for withholding the legally required deductions (*e.g.*, Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities. These checks must be submitted to the Wage and Hour Division, U.S. Department of Labor, PO Box 7245, 100 S. Clinton Street, Syracuse, NY 13261.

- Please provide a list of the employees' names, check numbers, gross and net amounts paid. This list will also include the employees' addresses and social security numbers. *NOTE: Section 16(c) of the Fair Labor Standards Act also provides, in part: "Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States." Therefore, it is the policy of the Wage and Hour Division to deposit back wages due unlocated employees into the U. S. Treasury.*

- Any defaulted balance shall be subject to the assessment of interest and penalty interest at rates determined by the U.S. Treasury as required by the Debt Collection Improvement Act of 1996 (Public Law 104-134) published by the Secretary of the Treasury in the Federal Register and other delinquent charges and administrative costs shall also be assessed.

- In the event of default, the Department intends to pursue additional collection action that may include, but is not limited to, administrative offset, referral of the account to credit reporting agencies, private collection agencies, U.S. Treasury's Debt Management Service, and/or the Department of Justice.

- All back wage checks should be sent to:

  U.S. Department of Labor / Wage and Hour Division
  P.O. Box 7245
  100 South Clinton Street Room 1373
  Syracuse, NY 13261-7245

Addendum B

Representing Management Exclusively in Workplace Law and Related Litigation

jackson lewis
Attorneys at Law

Jackson Lewis LLP
10701 Parkridge Boulevard
Suite 300
Reston, VA 20191
Tel 703 483-8300
Fax 703 483-8301
www.jacksonlewis.com

ALBANY, NY
ALBUQUERQUE, NM
ATLANTA, GA
BALTIMORE, MD
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SAN DIEGO, CA
SAN FRANCISCO, CA
SEATTLE, WA
STAMFORD, CT
WASHINGTON, DC REGION
WHITE PLAINS, NY

MY DIRECT DIAL IS: 703-483-8305
MY EMAIL ADDRESS IS: DECAMPP@JACKSONLEWIS.COM

May 22, 2012

VIA FACSIMILE

Hon. Theresa C. Timlin
Administrative Law Judge
Office of Administrative Law Judges
Department of Labor
2 Executive Campus, Suite 450
Cherry Hill, New Jersey 08002

Re: *Administrator v. Peter's Fine Greek Food, Inc.*
Administrative Proceeding No. 2011-TNE-00002

Dear Judge Timlin:

The purpose of this letter is to alert you that on May 6, 2012, the Department of Labor ("the Department") issued a notice at 77 Fed. Reg. 28764 of a judicial order enjoining the Department from implementing and enforcing a Final Rule amending the H–2B regulations at 20 CFR part 655, Subpart A. 77 Fed. Reg. 10038, February 21, 2012. *See* Notice attached as Exhibit A. In light of this preliminary injunction, a stay in the above-captioned matter pending before this court is appropriate.

On April 16, several plaintiffs challenged the 2012 H–2B Final Rule seeking to preliminarily enjoin the Department from implementing the 2012 H–2B Final Rule on the basis that the Department lacked authority to issue the rule and that the rule violated both the Administrative Procedure Act and the Regulatory Flexibility Act. *Bayou Lawn & Landscape Servs. v. Solis*, 3:12–cv–00183–MCR–CJK N.D. Fla. filed Apr. 16, 2012). On April 26, 2012, the U.S. District Court for the Northern District of Florida issued an order temporarily enjoining the Department from implementing or enforcing the 2012 H–2B Final Rule pending ''the court's adjudication of the plaintiffs' claims.'' *See* Order Granting Preliminary Injunction attached as Exhibit B. The court, in its analysis of whether to grant the plaintiffs' motion for a preliminary injunction against the Department, states:

> [A]t this point in time, the court cannot find any indication that Congress intended 8 U.S.C. § 1103(a)(6) as authorization for the Secretary of DHS to delegate its legislative rule making authority – to the Secretary of DOL or otherwise. Even if the Secretary of DHS were authorized to delegate its rule making authority under the H-2B program, DOL has not cited any support for the proposition that such a delegation in fact has occurred. Unpersuaded by these arguments and finding no express grant of Congressional authority, the court finds that the plaintiffs have established a substantial

likelihood of success on the merits of their claim that DOL lacks authority to promulgate the rules at issue in this case.

Id.

The Department concluded in its May 16, 2012 Federal Register notice that "this preliminary injunction necessarily calls into doubt the underlying authority of the Department to fulfill its responsibilities under the Immigration and Nationality Act and DHS's regulations to issue the labor certifications that are a necessary predicate for the admission of H–2B workers." 77 Fed. Reg. 28765. Taking the foregoing into consideration, Respondent Peter's Greek Food, Inc. requests a stay in this proceeding pending an outcome in the *Bayou Lawn* matter.

Respectfully submitted,
JACKSON LEWIS LLP

Paul DeCamp

cc: Molly Biklen, Esq.
Susan Jacobs, Esq.

4843-2176-3343, v. 1