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

BAYOU LAWN & LANDSCAPE SERVICES, et al.,	)	
Plaintiffs,	)	
v.	)	**CIVIL NO. 12-183-MCR**
THOMAS E. PEREZ, et al.,	)	
Defendants.	)	

FEDERAL DEFENDANTS' RESPONSE TO
MOTION FOR LEAVE TO INTERVENE

Federal Defendants take no position on the applicants' motion for leave to intervene filed on November 5, 2014. *See* ECF No. 68. Although the government takes no position on whether the applicants should be permitted to intervene, it agrees with their general assessment that the Court's preliminary injunction has been improperly converted into a de facto impermissible permanent injunction because the Court has failed to rule on the parties' cross-motions for summary judgment, which were fully briefed nearly fourteen months ago. *See* ECF Nos. 60, 62, 65, 66.

The underlying legal issues in this case have been joined and are ripe for disposition. The purpose of a preliminary injunction is to hold the parties in status quo until a trial on the merits can be held. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). But the preliminary injunction in this case is no longer preliminary because it has effectively held up the implementation of an entire Federal program indefinitely despite the fact that the issues in this case have been ripe for disposition for

nearly fourteen months. The government will not reiterate all of the reasons why the plaintiffs' challenge to the Department of Labor's (DOL's) comprehensive H-2B regulation cannot overcome insurmountable jurisdictional obstacles, *see* ECF No. 60, because the fundamental point at this stage in the litigation is that the parties are entitled to a ruling one way or another on the underlying issues. If the Court rules against DOL, the government has an interest in appealing any adverse decision based on intervening case law, *see Louisiana Forestry Ass'n v. Sec'y of Labor*, 745 F.3d 653, 669-75 (3d Cir. 2014), which the government plans to use for calling into doubt the Eleventh Circuit's cursory analysis of the issues in the *Bayou* decision, *see DeLong Equip. Co. v. Wash. Mills Electro Minerals Corp*., 990 F.2d 1186, 1196 (11th Cir. 1993) (The law-of-the-case doctrine "is not an inexorable command that rigidly binds the court to its former decisions."); *This That and the Other Gift and Tobacco v. Cobb County*, 439 F.3d 1275, 1283 (11th Cir. 2006) (The court may free itself from a former decision if, since its entry, "new and substantially different evidence is produced, or there has been a change in the controlling authority" or "the prior decision was clearly erroneous and would result in a manifest injustice."). Therefore, in the interest of resolving the important legal issues in this case, and related cases in the H-2B program, the Court should now rule on the parties' cross-motions for summary judgment.

The delay in ruling on the parties' cross-motions for summary judgment has created hardship for United States workers and leaves the H-2B program in a state of harmful uncertainty. The Court should make a final decision in this case because DOL spent time and resources issuing through notice and comment proceedings a final rule that it believes will advance the program by significantly reducing fraud and protecting United States workers from wage depression. *See* 77 Fed. Reg. 10,038 (Feb. 21, 2012). The government and the public have

a right to know whether this regulation will go into effect after more than two years of delay, and even if this Court rules against DOL on the merits, the government has a right to appeal the decision to obtain a final resolution on the legal issues with the Eleventh Circuit.

Although the government agrees with the applicants' assessment of the harmful delay in this case, it must take issue with their characterization of the preliminary injunction. *See* ECF No. 68-1 at 4. The applicants contend that this Court preliminarily enjoined DOL from *enforcing* the 2012 rule, but somehow allowed DOL to *implement* the rule while the injunction is in place. *Id*. The applicants' interpretation of the preliminary injunction order turns on a distinction without a difference.

In granting the plaintiffs' motion for a preliminary injunction, the Court ordered that DOL is "hereby enjoined from enforcing the subject rules pending the court's adjudication of the plaintiffs' claims." ECF No. 24 at 8. It is an established principle of law that once a court issues an injunction, those subject to it are compelled to obey the terms of the order as long as it remains in effect. *See Howat v. Kansas*, 258 U.S. 181, 189-90 (1922). Even proper objections to an injunctive order do not provide sufficient grounds for disobeying it. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980). In this case, there is no way for DOL to implement or administer the 2012 H-2B rule without enforcing it, so the applicants' suggestion that DOL is free to implement the rule without violating the preliminary injunction fails.

DOL's 2012 H-2B rule contemplates a comprehensive overhaul of the H-2B labor certification regime by eliminating, among other things, the current attestation based model of adjudication. *See* 77 Fed. Reg. at 10,038-40. If implemented, the new rule will operate through a revised application and registration process that requires employers to conduct a more rigorous type of recruitment and agree to additional obligations that will protect the domestic labor

market, which DOL evaluates through a front-end enforcement of these obligations. *Id*. at 10,152-65. Because the entire system under the 2012 H-2B rule turns in large part on a front-end adjudication, DOL is only able to impose these new obligations by enforcing the revised application and registration process at the outset of the process for obtaining certification. There is no mechanism for imposing the new standards on employers without putting the new rules in place and enforcing the new application process, which the preliminary injunction precludes. Thus, DOL is unable to implement the 2012 H-2B comprehensive rule unless and until the Court dissolves or vacates the preliminary injunction prohibiting the enforcement of the rules.

Although Federal Defendants dispute the applicants' characterization of the preliminary injunction, the government agrees that the delay in ruling on the parties' cross-motions for summary judgment has caused, and continues to cause, hardship and confusion to the detriment of the domestic labor market. In any event, the government takes no position on whether the applicants' motion to intervene should be granted.

Respectfully submitted this 19th day of November, 2014:

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CERTIFICATE OF SERVICE

I certify that on November 19, 2014, I electronically filed the foregoing FEDERAL DEFENDANTS' RESPONSE TO MOTION FOR LEAVE TO INTERVENE 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:

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