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

THE LOUISIANA FORESTRY ASSOCIATION, INC., *et al.* Plaintiffs, v. HILDA A. SOLIS, in her official capacity as United States Secretary of Labor, *et al.* Defendants.	Civil Action No. 11-CV-01623 Judge Drell Magistrate Kirk

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS

John Butler Rosenquest, IV
La. Bar Roll No. 30207
MORGAN, LEWIS & BOCKIUS LLP
200 South Biscayne Boulevard, Suite 5300
Miami, FL 33131-2339
(305) 415-3423

Howard M. Radzely (*Pro Hac Vice* pending)
David M. Kerr (*Pro Hac Vice* pending)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 739-5996

Robin S. Conrad (*Pro Hac Vice* pending)
Shane B. Kawka (*Pro Hac Vice* pending)
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS

Pursuant to the concurrently filed Motion for Leave, the Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief in support of Plaintiffs' Motion for Preliminary Injunction (ECF No. 15).

INTRODUCTION

Employers in the United States may petition to obtain alien workers to perform temporary non-agricultural employment in the United States under the H-2B program, named after the statutory provision which provides employers the right to use non-immigrant labor. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). To obtain an H-2B visa under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* ("INA" or the "Act"), an employer must file a petition with the Department of Homeland Security ("DHS"). 8 U.S.C. § 1184(c)(1). "After consultation with appropriate agencies of the Government," such as the Department of Labor ("DOL"), the

Secretary of DHS must determine eligibility to import temporary non-immigrant labor. *Id.* Under the Act, H-2B status is only available "if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

To determine if there are U.S. workers "capable of performing such service or labor", DHS's regulations require that employment of an H-2B worker will "not adversely affect[ ] the wages and working conditions of United States workers." 8 C.F.R. § 214.2(h)(6)(i)(A). To ensure that an H-2B worker will not have an "adverse affect" on the wages of U.S. workers, employers using H-2B workers have to pay an H-2B worker the prevailing wages for the particular work in question.

In January 2011, the DOL published a final rule revising the methodology used to calculate the "prevailing wage" which must be offered to H-2B workers in order for the alien worker to be eligible for temporary non-agricultural employment in the United States.[1] To give employers sufficient time to plan for their labor needs, and to minimize the disruption to their operations, DOL set January 1, 2012 as the effective date for its new methodology for calculating "prevailing wage." 76 Fed. Reg. at 3462. Thus, all work performed by an H-2B worker on or after January 1, 2012 would have to be paid under the new prevailing wage methodology. *Id.* The United States District Court for the Eastern District of Pennsylvania, however, ruled that the Department of Labor may not consider employer hardship in setting the effective date of its new methodology. *Comite de Apoyo a los Trabajadores Agricolas* ("CATA"), *et al v. Solis, et al.*, No. 09-240, 2011 WL 2414555, *14 (E.D. Pa. June 16, 2011). Based on this decision, the Department of Labor, after a ten-day comment period over the July

[1] Wage Methodology for the Temporary Non-agricultural Employment H-2B Program, 76 Fed. Reg. 3452 (January 19, 2011) (Wage Methodology I").

4th holiday weekend, issued a new final rule setting the effective date of the new methodology as September 30, 2011.[2]

According to DOL in both of its Wage Methodology Rules, the new methodology will apply to existing H-2B visas that had been approved under the prior rule that DOL was changing. 76 Fed. Reg. at 3462 (col. 3) (stating that the new prevailing wage methodology applies "to wages paid for work performed on or after [the effective date]"); *id.* ("This is a final rule, *without a phase in period*." (emphasis added)); *see also* 76 Fed. Reg. at 45670. That is, employers who have previously received H-2B visas based on the then-established prevailing wage will be required to substantially increase the wages paid to their H-2B workers on the effective date of the new rule, notwithstanding DHS's prior approval of the employer's petition under the DOL's old wage methodology.

Plaintiffs brought the present action seeking a preliminary injunction and to permanently enjoin enforcement of the new wage methodology on numerous grounds. (ECF No. 15-1). The Chamber believes that Plaintiffs have clearly established their entitlement to a preliminary injunction, and that each of their substantive arguments requires vacating DOL's Wage Methodology I and II. (*Id.*) In order to assist the Court and not parrot the arguments of the parties, this amicus brief will focus on three specific ways that the DOL Wage Methodology Rules violate the Administrative Procedure Act, 5 U.S.C. §§ 553 and 701, *et seq.* ("APA").[3]

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[2] Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Amendment of Effective Date, 76 Fed. Reg. 45667 (August 1, 2011) ("Wage Methodology II").

[3] The Chamber fully agrees with the other arguments raised in Plaintiffs' motion. For example, the Chamber believes that Wage Methodology I and II violate the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* ("RFA"). *See* Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, ECF No. 15-1 at 16-17. As pointed out by the Chief Counsel for Advocacy, Small Business Administration ("SBA"), DOL "offered no data or other analysis in support of the factual basis used to support the certification as required by the RFA." 76 Fed. Reg. at 45671.

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The Chamber will provide a different perspective than Plaintiffs by focusing on a broad view of how the regulatory scheme is inconsistent with the statutory scheme set forth by Congress in the INA. First, the Chamber demonstrates that DOL's regulations are invalid because Congress did not authorize DOL to issue Wage Methodology I and II. Second, even if Congress had given the Secretary of Labor authority to promulgate a wage methodology rule, there is clearly no statutory basis for DOL to apply its new methodology to workers employed under H-2B visas approved by DHS prior to the effective date of the new rule. Third, the new methodology adopted by DOL is inconsistent with the INA's requirement to use a tiered wage system.

STATEMENT OF INTEREST

The Chamber is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region throughout the country. More than 96% of the U.S. Chamber members are small businesses with 100 employees or fewer. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases, like this one, involving issues of vital concern to the nation's business community.

ARGUMENT

I. CONGRESS DID NOT DELEGATE AUTHORITY TO THE DEPARTMENT OF LABOR TO ADMINISTER THE H-2B VISA PROGRAM

A. The Legal Framework

Regulations not consistent with the organic statute passed by Congress must be set aside. 5 U.S.C. § 706(2)(A) & (C). "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v.*

Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). The Court's initial inquiry in analyzing a regulation, therefore, is whether the rule was "promulgated pursuant to authority Congress has delegated to the official." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). "The starting point for this inquiry is, of course, the language of the delegation provision itself." *Id.* "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). In short, the Court must determine congressional intent "independent from subsequent administrative or judicial constructions of a statute." *Texas v. United States*, 497 F.3d 491, 504 (5th Cir. 2007).

B. The Statutory Scheme

The INA provides a number of visa programs employers may use to bring alien workers to the United States to perform work under certain circumstances. The H-2B visa classification under the INA is available for workers "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than agricultural] 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).[4]

Under the INA, the Secretary of DHS[5] has the duty to decide whether an H-2B visa should be issued: "The question of importing any alien as a nonimmigrant under subparagraph (H) . . . in any specific case or specific cases *shall be determined* by the [Secretary of DHS], after consultation with appropriate agencies of the Government, upon petition of the importing

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[4] H-2A visa classification is available for nonimmigrant workers temporarily employed in agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

[5] The Homeland Security Act of 2002 transferred the duty and authority to carry out the H-2B program to the Secretary of the Department of Homeland Security. 6 U.S.C. § 236(b).

employer." 8 U.S.C. § 1184(c)(1) (emphasis added). To fulfill this duty under the INA, Congress gave the Secretary of DHS rulemaking authority: "The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary of DHS] may by regulations prescribe." 8 U.S.C. § 1184(a)(1).

The statute also provides the DHS Secretary with the authority to penalize any failure to meet a condition of an H-2B petition or willful misrepresentations therein by: (i) imposing administrative remedies; or (ii) denying future petitions. 8 U.S.C. § 1184(c)(14)(A)(i) & (ii). Congress explicitly authorized the DHS Secretary to delegate her authority with regard to the first enforcement mechanism to DOL: "The Secretary of Homeland Security may delegate to the Secretary of Labor . . . any of the authority given to the Secretary of Homeland Security *under subparagraph (A)(i)*." 8 U.S.C. § 1184(c)(14)(B) (emphasis added). Neither DHS in its rules, nor DOL in its rules, has ever claimed that its authority to issue Wage Determination I or Wage Determination II is provided by Section 1184(c)(14)(B).

C. The Regulatory Scheme

In order to obtain a worker under an H-2B visa, the regulations promulgated by DHS require an employer to apply for a temporary labor certification from the Secretary of Labor before filing a petition with the Director of U.S. Citizenship and Immigration Services, an agency within DHS. 8 C.F.R. § 214.2(h)(6)(iii)(A). According to DHS's regulations, "[t]he labor certification shall be *advice* to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." *Id.* (emphasis added).

DHS's regulations further provide, however, that a "petitioner *may not* file an H-2B petition unless it has obtained a favorable labor certification determination" from DOL. 8 C.F.R.

§ 214.2(h)(6)(iii)(C) (emphasis added). "An H-2B petition for temporary employment in the United States . . . shall be accompanied by an approved temporary labor certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers." 8 C.F.R. § 214.2(h)(6)(iv)(A). DHS also purports to delegate to and authorize the Secretary of Labor to "separately establish procedures *for administering* the temporary labor certification program under his or her jurisdiction." 8 C.F.R. § 214.2(h)(6)(iii)(D) (emphasis added).

D. DHS's Attempt to Delegate Implementation of the H-2B Program to DOL Contradicts the Plain Statutory Language

It is undisputed that DHS has attempted to delegate its authority under the Act to DOL. DHS's "consultation" with DOL occurs according to a "regulatory requirement that an employer first obtain a temporary labor certification from the Department of Labor." 76 Fed. Reg. at 3452. DHS regulations provide that the Department of Labor shall "establish procedures for *administering* the temporary labor certification program." 8 C.F.R. § 214.2(h)(6)(iii)(C) (emphasis added). DOL clearly is no longer just being consulted for advice, it is, by DHS's own terms, "administering" the H-2B program. Indeed, DHS's regulations expressly provide that a precondition to obtaining an H-2B is that the employer first *must* "obtain[] a favorable labor certification determination" from DOL. 8 C.F.R. § 214.2(h)(6)(iii)(C).[6]

This delegation violates the clear intent of Congress as expressed in the plain text of the INA. Congress unequivocally imposed a mandatory duty on the *Secretary of DHS* to carry out

[6] DHS has not always abdicated its authority to DOL. For example, for many years DHS's regulations provided: "If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence *may be filed with the director* [of CIS]." 8 C.F.R. §214.2(h)(6)(iv)(D)-(E) (2008) (emphasis added). *See* 73 Fed. Reg. 78104, 78110-11 (December 19, 2008) (deleting the provision).

the H-2B program. Specifically, the Act requires that upon receipt of a petition, eligibility for an H-2B visa "*shall be determined* by the [Secretary of DHS], after consultation with appropriate agencies of the Government." 8 U.S.C. § 1184(c)(1). And the visa *shall* be issued under such conditions as the Secretary of Homeland Security *may* by regulations prescribe. 8 U.S.C. § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant *shall* be for such time and under such conditions as the [DHS Secretary] *may* by regulations prescribe . . . ." (emphasis added)). Congress's use of the word "shall" in the INA, especially in light of its concurrent use of the word "may," shows that Congress imposed a mandatory duty on the *Secretary of DHS* to determine H-2B visa eligibility in accordance with *its* regulations. *Cf. Manatee County, Florida v. Train*, 583 F.2d 179, 182 (5th Cir. 1978) ("[F]act that . . . Congress distinguished 'shall' from 'may' shows that . . . Congress used 'shall' in its everyday sense, as imposing a mandatory duty."); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' . . . contrasts with the legislators' use of a mandatory 'shall' in the very same section."); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").

That DOL lacks authority to promulgate and impose its mandatory Wage Methodology Rules is confirmed by the fact that Congress expressly authorized DHS to delegate to DOL authority over specific, limited portions of the *enforcement* of the H-2B visa program, namely to impose administrative remedies for willful misrepresentations and failure to meet any of the conditions of a petition. 8 U.S.C. § 1184(c)(14)(A) & (B) ("The Secretary of Homeland Security may delegate to the Secretary of Labor . . . any of the authority . . . *under subparagraph [1184(c)(14)](A)(i)*."). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (quoted in *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also, e.g.*, *Clay v. United States*, 537 U.S. 522, 528-29 (2003) (quoting *Russello*, 464 U.S. at 23); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (same); *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same).[7]

Somewhat ironically, DOL itself recognized it lacked authority to issue the mandatory Wage Methodology Rules by expressly noting that labor certifications on the one hand, and enforcement of certain aspects of H-2B requirements, on the other hand, are carried out by two separate agencies within DOL. DOL cited the express statutory authority to engage in the latter, but no such statutory authority to support the former:

> The Secretary[of Labor's] responsibility for the H-2B program is carried out by two agencies within the Department. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in the Employment and Training Administration (ETA), the agency to which the Secretary [of Labor] has delegated those responsibilities *described in the USCIS H-2B regulations*. Enforcement of the attestations and assurances made by employers in H-2B applications for labor certification is conducted by the Wage and Hour Division (WHD) *under enforcement authority delegated to it by DHS. 8 U.S.C. 1184(c)(14)(B)*.

76 Fed. Reg. at 3452 (col. 2) (emphases added).

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[7] DOL's total absence of authority under the H-2B program is even starker when compared to other visa programs in the INA. Unlike in the H-2B program at issue here, in another part of the INA Congress expressly granted the Secretary of Labor rulemaking authority to implement portions of the H-2A visa program. *See* 8 U.S.C. §§ 1188(a)(2), 1188(c)(3)(B)(iii), 1188(c)(3)(C)(4). These provisions of the INA further demonstrate that Congress knows full well how to grant the Secretary of Labor authority to promulgate rules and to administer portions of the INA. As the D.C. Circuit aptly noted, "[I]f there is no statute conferring authority, a federal agency has *none*." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (emphasis added).; *cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (noting that "A precondition to deference under *Chevron* [*U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)] is a congressional delegation of administrative authority.").

Congress designed the temporary visa programs to strike a balance between two goals: "The common purposes are to assure (employers) an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals." *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). Congress explicitly directed DHS to manage the H-2B visa program and, in effect, strike this balance in consultation with "appropriate agencies." DHS, however, has improperly delegated its decision-making responsibility to an agency who has considered only on one side of the equation. Both DHS's regulations that impermissibly delegate authority to DOL and DOL's mandatory regulations that usurp DHS's authority are inconsistent with the INA. Because the Wage Methodology Rules were promulgated without authority and because they seek to impose mandatory duties on employers that have been delegated to DHS, the Wage Methodology Rules must be set aside.

II. CONGRESS DID NOT AUTHORIZE RETROACTIVE CHANGES IN PREVAILING WAGES AND THUS DOL LACKS AUTHORITY TO RAISE WAGES FOR EXISTING H-2B EMPLOYEES

Even if DOL had general authority to issue the Wage Methodology Rules, neither DOL nor DHS has any authority to apply DOL's new Wage Methodology Rules retroactively to existing H-2B visas previously approved by DHS under the then-existing wage methodology. In its latest rulemaking, DOL asserts that the new prevailing wage rates will apply to existing H-2B visas: "[W]e have authority to require employers to pay wages other than those issued in a prevailing wage determination" at the time the visa was issued. 76 Fed. Reg. at 45670. DOL, however, provided no authority for this assertion.

In determining the validity of Wage Methodology II, whether the Act authorizes DOL to raise wages for existing H-2B employees is a threshold question. *See, e.g.*, *Bowen*, 488 U.S. at 208 ("In determining the validity of the Secretary's retroactive cost-limit rule, the threshold

question is whether the Medicare Act authorizes retroactive rulemaking."). "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect *unless their language requires this result*." *Id.* (emphasis added); *I.N.S. v. St. Cyr*, 533 U.S. 289, 315-16 (2001) (quoting *Bowen*, 488 U.S. at 208); *see also, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264, 265 (1994) (discussing the deeply rooted presumption against retroactive legislation in American jurisprudence). DOL fails to identify the statutory source of this alleged authority to apply its wage rate methodology to H-2B visas that have been issued by DHS before DOL's rule takes effect.

Congress clearly did not grant such authority to DOL or DHS under the Act. As explained above, Congress granted DHS, not DOL, authority to administer and carry out the H-2B program. Thus, as an initial matter, there is no authority for DOL to change the conditions of an H-2B visa issued *by DHS* under the existing wage methodology. DOL is effectively asserting that it has the authority to override DHS, the congressionally authorized decision-maker. Plainly DOL has no such authority and it should not be allowed to "bootstrap itself into an area in which it has no jurisdiction by repeatedly violating [the] statutory mandate." *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

In any event, DOL's attempt to apply its new methodology to all visas granted by DHS before the effective date of the new methodology fails for an even more basic reason – there is no clear Congressional authority to apply the rule retroactively. "A statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless *that power is conveyed by Congress in express terms*." *Bowen*, 488 U.S. at 208 (emphasis added); *see also, e.g.*, *Brimstone R. Co. v. United States,* 276 U.S. 104, 122 (1928). "Retroactive rules alter[] the *past* legal consequences of past actions."

Mobile Relay Assocs. v. F.C.C., 457 F.3d 1, 11 (D.C.Cir. 2006) (alteration and emphasis in original; internal quotation marks omitted). Clearly DOL's attempt to alter the terms of a petition previously granted by DHS is an impermissible retroactive application of the Wage Methodology Rules. Accordingly, even if DOL had the general authority to promulgate the Wage Methodology Rules, there is no authority to apply the new methodology to visas issued before the effective date of the new rule.

III. DOL'S WAGE METHODOLOGY RULES ARE INVALID BECAUSE THEY ARE INCONSISTENT WITH THE INA

Regulations that go "beyond the pale of statutory authority" are "null and void." *Merchants Nat'l Bank v. Ward Rig No. 7*, 634 F.2d 952, 957 (5th Cir. 1981). "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Griffon v. U.S. Dep't of Health and Human Services*, 802 F.2d 146, 155 (1986) (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)). "Nothing . . . permits or implies support for the proposition that an administrator can call black white, nor that the courts are rendered impotent to prevent administrative mysticism." *Id.*

The new method for determining the "prevailing wage" rate adopted by DOL in January 2011, is the sort of administrative magic rejected by the Fifth Circuit in *Griffon*. 802 F.2d at 146 ("[C]onjury cannot be permitted to overwrite the administration of government."). Under the new method for calculating "prevailing wage" rate, DOL would adopt the "highest of all applicable wages" without regard to experience, education, and other factors. Instead of a graduated four-level scale to determine wages of employees similarly situated, therefore, DOL

seeks to simply apply the highest of following three wage rate indicators: (1) a survey produced by the Department of Labor pursuant to the Davis-Bacon Act ("DBA"); (2) a survey produced by the Department of Labor pursuant to the Service Contract Act ("SCA"); and (3) the median wage for the occupation from the Occupational Employment Statistics ("OES") Survey by the Bureau of Labor Statistics. 76 Fed. Reg. at 3455.

By using the highest wage rate available as a single-level "prevailing rate," DOL's regulation has gone beyond the pale of the statutory authority. The plain text of the INA requires DOL to use a four-level approach any time it uses surveys to determine a prevailing wage rate, as it has plainly done in its Wage Methodology Rules:

> Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

8 U.S.C. § 1182(p)(4).

In Wage Methodology I, DOL rejected the plain language of the statute by reasoning that in DOL's view Congress enacted Section 1182(p)(4) in 2005 in a series of amendments focused on the H-2B visa program: "The H-2B program is obviously distinguishable from the H-1B program that was the focus of the Consolidated Appropriations Act of 2005." 76 Fed. Reg. at 3461 (col. 2). However, the plain language of Section 1182(p)(4) is clearly not so limited. This provision is clear on its face, there are no limits or qualifiers, and thus no basis for not applying this provision only to the H-2B visa program: "[W]hen the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain

meaning of that language." *United States v. Clayton*, 613 F.3d 592, 596 (5th Cir. 2010) (internal quotation marks omitted). "If the language is clear, then 'the inquiry should end.'" *In re Greenway*, 71 F.3d 1177, 1179 (5th Cir. 1996) (quoting *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989)).

DOL's contention that the Court should read into Section 1182(p)(4) a limitation to only the H-1B program—language that was not included in the congressional enactment—is even more strained because the other subsections within Section 1182(p) are expressly limited to certain visa programs and occupations. For example, Section 1182(p)(2) is limited to professional athletes. 8 U.S.C. § 1182(p)(2). And, the immediately preceding subsection expressly includes prevailing wages for purposes of the H-2B program. 8 U.S.C. § 1182(p)(3). As the Supreme Court noted last term, "In interpreting a statute, '[o]ur inquiry must cease if the statutory language is unambiguous,' as we have found, and 'the statutory scheme is coherent and consistent.'" *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); *see also*, *e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters' Bank, N.A.*, 530 U.S. 1, 6 (1942) ("It is well established that 'when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citing *Rubin v. United States,* 449 U.S. 424, 430 (1981) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'")).

Even if the statute did not expressly require the use of a tiered prevailing wage system, DOL's enactment would still be inconsistent with the INA. DOL plainly adopted the "highest

available rate" to attract U.S. employees: explaining that its wage methodology "ensure[s] there is no adverse effect by offering a wage *that would be acceptable to U.S. workers*." 76 Fed. Reg. at 3455. However laudable that goal may be, it is not the statutory program that Congress enacted. The Fifth Circuit, for example, has held that DOL is not permitted to set a wage rate to attract U.S. workers: "Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers." *Williams v. Usery*, 531 F.2d 305, 306 (5th Cir. 1976); *see also Flecha*, 567 F.2d at 1156.[8]

In short, DOL's new methodology for establishing the "prevailing wage" is inconsistent with the INA and thus the regulation should be declared null and void.[9]

CONCLUSION

For the foregoing reasons and all the reasons set forth in Plaintiffs' brief, the Court should grant Plaintiffs preliminary and permanent injunctive relief.

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[8] Somewhat ironically, DOL noted that its new wage methodology might actually harm U.S. workers:

> We do not dispute that the implementation of the Wage Rule, whether on the amended or original timeframe, regrettably may result in the layoffs of H–2B workers and possibly U.S. workers in positions that support those that are currently filled by H–2B workers.

76 Fed. Reg. at 45668 (col. 3).

[9] The Chamber also agrees with the other APA arguments raised by the Plaintiffs, (ECF No. 15-1 at 5-15), but will not repeat those arguments herein.

Respectfully submitted,

/s/ John Butler Rosenquest IV

John Butler Rosenquest, IV
La. Bar Roll No. 30207
MORGAN, LEWIS & BOCKIUS LLP
200 South Biscayne Boulevard, Suite 5300
Miami, FL 33131-2339
(305) 415-3423

Howard M. Radzely (*Pro Hac Vice* pending)
David M. Kerr (*Pro Hac Vice* pending)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 739-5996

Robin S. Conrad (*Pro Hac Vice* pending)
Shane B. Kawka (*Pro Hac Vice* pending)
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of
Commerce of the United States of America

Dated: September 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2011, a true and correct copy of the foregoing pleading was filed electronically. Notice of this filing will be sent by e-mail to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ John Butler Rosenquest IV
John Butler Rosenquest, IV
La. Bar Roll No. 30207
MORGAN, LEWIS & BOCKIUS LLP
200 South Biscayne Boulevard, Suite 5300
Miami, FL 33131-2339
(305) 415-3423