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

BAYOU LAWN & LANDSCAPE SERVICES, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL HISPANIC LANDSCAPE ALLIANCE, PROFESSIONAL LANDCARE NETWORK, SILVICULTURAL MANAGEMENT ASSOCIATES, INC., FLORIDA FORESTRY ASSOCIATION,

Plaintiffs

v.

THOMAS E. PEREZ,* *et al.*,

Defendants.

No.3:12-cv-00183 MCR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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* Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Thomas Perez, the new Secretary of Labor, is substituted for Hilda Solis, the former Secretary of Labor.

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56(a), Plaintiffs respectfully request that this Court enter an Order granting them summary judgment on Counts I, II, and III of their Complaint, vacating and permanently enjoining Defendants from enforcing or implementing the challenged regulation, and declaring that no provision of the challenged rule has the force and effect of law.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In the Immigration and Nationality Act of 1952 ("INA"), Pub. L. No. 82-414, 66 Stat. 163, Congress established a channel through which U.S. employers facing labor shortages could legally hire foreign nationals to meet their needs. In 1986, Congress created a temporary nonimmigrant worker program for agricultural employers and workers, now known as the H-2A Program. Congress did not change the then-existing temporary nonimmigrant worker program for non-agricultural employers, now known as the H-2B Program. *See* Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, § 300.

The INA gives DOL no authority over the H-2B program. *Bayou Lawn & Landscape Servs. v. Oates*, 713 F.3d 1080, 1084 (11th Cir. 2013) ("DHS was given overall responsibility, including rulemaking authority, for the H-2B program. DOL was designated a consultant. It cannot bootstrap that supporting role into a co-equal one.").

On February 21, 2012, DOL issued the program rules that are at issue in this case. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States,* 78 Fed.

Reg. 10,038 (Feb. 21, 2012) ("H-2B Comprehensive Rule" or "Rule"). In the H-2B Comprehensive Rule, DOL revamped almost every aspect of the H-2B Program to make the H-2B Program more like the H-2A Program for agricultural temporary worker program. Among other things, the Rule included a redefinition of the term of "temporary need" from ten months to nine months, established a bifurcated application process to evaluate an employer's need for temporary employees by requiring the filing of a registration that must be approved prior to the filing of an application for temporary employment certification, expanded obligations of employers to recruit U.S. workers and expanded DOL recruitment oversight, required that H-2B employers guarantee payment of three-quarters of the anticipated hours of work to each H-2B employee irrespective of whether the hours were actually worked, required that H-2B employers pay employees' transportation, subsistence and housing costs, and required that H-2B employers pay the same wages and benefits to both H-2B employees and a newly created group of U.S. workers engaged in "corresponding employment." *See id*.

The Rule was scheduled to go into effect on April 26, 2012.

B. Plaintiffs' Challenge to the H-2B Comprehensive Rule

On April 16, 2012, Plaintiffs Bayou Lawn & Landscape Services, the Chamber of Commerce of the United States of America, the National Hispanic Landscape Alliance, Silvicultural Management Associates, Inc., Professional Landcare Network ("PLANET"), and the Florida Forestry Association instituted this action and sought a preliminary injunction. Plaintiffs alleged that DOL lacked rulemaking authority to issue the H-2B Comprehensive Rule (Count I), that its Regulatory Flexibility Act

analysis was legally improper (Count II), and that the H-2B Comprehensive Rule was arbitrary and capricious (Count III). They sought declaratory, injunctive, and any other relief that was just. *See* Complaint ¶¶ 55-60.

Following a hearing, this Court preliminarily enjoined DOL from enforcing the challenged Rule on April 26, 2012. This Court first concluded that Plaintiffs had Article III standing to seek injunctive and declaratory relief. *See* Preliminary Injunction Order at 4 ("PI Order") ("The court finds that both the individual and associational plaintiffs have pled facts sufficient to demonstrate their standing to bring the causes of action asserted in their complaint."). The Court held that entry of preliminary injunctive relief was proper, noting that even DOL acknowledged that Congress had expressly delegated rulemaking authority to DHS. *See id.* at 5 ("DOL acknowledges that it has no express Congressional grant of authority to engage in legislative rule making under the H-2B Program and that such authority was vested instead in the Secretary of the Department of Homeland Security ("DHS")."). DOL's argument that Congress wanted it to exercise such legislative authority foundered because "there [was] no language in the statutory provisions upon which DOL relies from which the court can plainly infer legislative rule making authority." *Id.* at 5-6. This Court therefore concluded:

> 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. at 6.

This Court also found that Plaintiffs would suffer irreparable injury. Plaintiffs' uncontroverted declarations detailed this imminent and certain injury. *See* PI Order at 7 ("The plaintiffs, however, have demonstrated that the rules will have an immediate and significant impact on them, including their current bidding processes, and will result in lost revenue, customers, and/or goodwill."). The Court found that the remaining elements favored Plaintiffs and preliminarily enjoined the H-2B Comprehensive Rule. *Id.* at 6-8.

DOL appealed to the Eleventh Circuit. The Eleventh Circuit rejected DOL's attempt to bootstrap its status as a consultant into rulemaking authority and affirmed this Court's preliminary injunction in its entirety. *Bayou Lawn & Landscape Servs. v. Oates*, 713 F.3d 1080.

On remand from the Eleventh Circuit, the case is now before this Court on cross motions for summary judgment.

SUMMARY STATEMENT OF FACTS[1]

Plaintiffs and Plaintiff Associations' members include small family-owned businesses with low margins, high labor costs, and long-term contracts with their customers. These businesses depend on the H-2B Program for seasonal workers. The Rule that is the subject of this action will add substantial additional costs to Plaintiffs and Plaintiff Associations' members. DOL does not deny this. DOL estimated that some of the Rule's requirements would cost the business community more than $100 million in the first year. This is a low estimate in that DOL acknowledges that it lacked the time

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[1] A complete statement of the material facts as to which there is no genuine dispute is set forth in Plaintiffs' Local Rule 56.1 Statement.

and clearances to conduct a full analysis of the rules' impact on the regulated community. Plaintiffs and Plaintiff Associations' members cannot survive these increases without foregoing bidding on various long-term contracts, terminating employees or curtailing or even ceasing production. Such a course will inevitably lead to loss of customers and goodwill, and in some cases, loss of their businesses.

SUMMARY OF ARGUMENT

The Eleventh Circuit has already determined that DOL lacked rulemaking authority to issue the Comprehensive Rule. That finding should be dispositive with respect to Count I and that should end this case.

Also, DOL's Regulatory Flexibility Act analysis was legally infirm because according to the Small Business Administration and the findings of other courts in other cases, the agency used the incorrect denominator when assessing the Rule's impact on small businesses. Therefore, summary judgment should be entered with respect to Count II.

Finally, the Rule is arbitrary and capricious for three reasons. First, DOL did not explain its rationale for importing the H-2A Program Rules into the H-2B Program when Congress had expressly declined to do so. Second, the Rule is not justified by the evidence available to the agency. Third, certain provisions of the Rule are inconsistent with rules issued by DHS, the agency with rulemaking authority. Therefore, summary judgment should be entered with respect to Count III.

As this Court initially concluded and the Eleventh Circuit agreed, the equities favor granting injunctive relief. Defendants have acknowledged that the Rule will

impose significant[2] costs on the regulated community, including Plaintiffs and members of Plaintiff Associations. Plaintiffs have presented uncontroverted evidence that this Rule will adversely and imminently affect their continued existence and goodwill. In contrast, Defendants have not and cannot articulate any genuine harm that would accrue to them should they be compelled to follow the law.

Nothing has changed since this Court issued its preliminary injunction on April 26, 2012, other than the Eleventh Circuit's decision affirming this Court's preliminary injunction. As a result, summary judgment is appropriate.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) permits this Court to dispose of cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This rule applies to cases seeking relief under the Administrative Procedure Act ("APA") and the Regulatory Flexibility Act just as it does to cases seeking relief under other statutes. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (APA); *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 469 (7th Cir. 2009) (Regulatory Flexibility Act).

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[2] Significant costs are those that exceed $100 million per annum. *See, e.g.*, Regulatory Flexibility Act, 5 U.S.C. § 601(f) (defining "significant regulatory action" as "any regulatory action that is likely to result in a rule that may . . . [h]ave an annual effect on the economy of $100 million or more[.]"); Congressional Review Act 5 U.S.C. § 804 (defining "major rule"). Defendants have acknowledged that the Program Rules are subject to both the RFA and the Congressional Review Act (*see* 77 Fed. Reg.10,132; 77 Fed. Reg. 24,137 (April 23, 2012)).

ARGUMENT

I. The H-2B Comprehensive Rule Is Unlawful

Under the APA, the courts shall "hold unlawful and set aside" agency action that is "not in accordance with law," 5 U.S.C. § 706(2)(A), or that is "in excess of statutory jurisdiction, authority, or limitations," *id.* § 706(2)(C). In addition, courts shall vacate agency action that is "arbitrary" or "capricious," *id.* § 706(2)(A), such as where the agency has failed to offer reasoned explanations, *see Motor Vehicle Mfgs. Ass'n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

As both this Court and the Eleventh Circuit have correctly concluded, DOL does not have statutory authority to promulgate the H-2B Comprehensive Rule. In addition, the DOL's Regulatory Flexibility Act analysis was incorrect as a matter of law, and the Rule is arbitrary and capricious.

A. The H-2B Comprehensive Rule Exceeds DOL's Statutory Authority

"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). "Thus, if there is no statute conferring authority, a federal agency has none." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). DOL has no authority to issue rules governing the H-2B Program.

DOL claims that two statutes--the INA and Wagner-Peyser Act of 1933, 29 U.S.C. § 49 *et seq.*-- give it rulemaking authority over the H-2B Program. The Eleventh Circuit rejected both claims of authority and that should end this matter. *Bayou Lawn & Landscape Servs.*, 713 F.3d at 1083, 1085 & n.3. The Eleventh Circuit found no explicit

grant of rulemaking authority to DOL in the INA and rejected DOL's fallback that the "text, structure and object" of the INA suggested Congress' intent to grant DOL rulemaking authority the H-2B program. The Eleventh Circuit stated: "This would be a more appealing argument if Congress had not expressly delegated that authority to a different agency. Even if it were not axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegate to it by Congress, … we would be hard-pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency." *Id.*, 713 F.3d at 1083. As for Wagner-Peyser, the Eleventh Circuit explained that reliance on the Act was waived but in any event, the Act was "limited to the funding, operation and coordination of state unemployment offices" and could not be "stretched to authorize DOL to issue rules to implement a visa program committed by law to the governance of another agency." *Id.,* 713 F.3d at 1085 n.3.

Because DOL has no rulemaking authority over the H-2B Program, it follows that the H-2B Comprehensive Rule was promulgated "in excess of [its] statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), and was "not in accordance with law," *id.* § 706(2)(A). DOL's action was thus "plainly contrary to law and cannot stand." *Michigan*, 268 F.3d at 1081. The Court should therefore grant Plaintiffs' motion for summary judgment as to Count I.

B. The H-2B Comprehensive Rule Violates the Regulatory Flexibility Act

Even if the Secretary of Labor had the authority to issue regulations under the INA and even if those regulations were consistent with the INA, DOL failed to

conduct a proper regulatory flexibility analysis as required by the RFA. Congress enacted the RFA to require agencies to consider the potential impact of their regulations on small businesses such as Plaintiffs and Plaintiff Associations' members in this case. *See* RFA, Pub. L. No. 96-354, 94 Stat. 1164, § 2 (1980). In enacting the RFA, 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub. L. No. 114-121, Title II, 110 Stat. 847, 857-74, §§ 201-253 (1996), Congress expressly recognized that agency rules frequently had a disproportionate adverse impact on small businesses, not-for-profit organizations, and small governmental entities. These entities face practical difficulties in complying with federal rules that differ significantly from those encountered by their larger counterparts, including "their limited access to capital," that "small concerns must borrow heavily to make modifications[,]" and that costs of complying cannot be easily absorbed or spread by small entities as they can by larger entities. S. Rep. No. 878, 96th Cong., 2d Sess. 4 (1980). Small entities lack access to the equity markets and "[e]ven if small businesses can afford additional debt, banks and other lenders are often reluctant to loan money for improvement purposes not related to productivity." *Id.* This lack of access to financing--whether debt or equity--has become particularly acute since the onset of the recession in September 2008, and has only worsened since then.

In the RFA, Congress therefore required agencies, as part of the rulemaking process, to conduct initial and then final regulatory analyses to ascertain the economic impact that a rule would have on small entities, to set out the less onerous alternatives considered by agency, and to discuss the agency's rationale for declining to adopt these

less costly alternatives. *See* 5 U.S.C. §§ 603-604. If DOL had rulemaking authority in this area, there is no dispute that the RFA applies here. *See* 76 Fed. Reg. at 15,166.

DOL failed to conduct a proper regulatory flexibility analysis in both its proposed and final H-2B Comprehensive Rule. In its initial analysis, DOL declared that its proposed rules were "not likely to impact a substantial number of small entities and, therefore, an Initial Regulatory Flexibility analysis is not required by the RFA." 76 Fed. Reg. at 15,166 (col. c). This conclusion was based on DOL's belief that employment in the H-2B program represented a "very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H-2B program." *Id.* at 15,167 (col. a). It looked to the "top five industries" that hired H-2B employees in FY 2007 to FY 2009--(1) landscaping services (78,027); (2) janitorial services (30,902); (3) construction (30,242); (4) food services and drinking places (22,948); and (5) amusement, gambling, and recreation (14,041). *See id.* According to DOL, "the H-2B program represents a small fraction of the total employment even in each of the top five industries in which H-2B workers are found." *Id.* at (col. b). These same conclusions and same data were repeated in the final rule. *See* 77 Fed. Reg. at 10,132 (col. b) ("this rule is not likely to have a significant impact on a substantial number of small entities and, therefore, a Final Regulatory Flexibility Analysis (FRFA) is not required by the RFA.")

As SBA pointed out in its letter to DOL concerning this rule, DOL used the wrong denominator in its substantive analysis. *See* Exhibit 3 to Complaint (SBA Letter dated May 17, 2011) ("SBA Letter") at 4. DOL's reliance on a pool of over one

million small businesses as the denominator minimized the economic impact of the rule; the universe of potentially affected entities for RFA purposes should have included only those small entities in the regulated community, *i.e.,* the entities that use the H-2B program. *Id.*

As SBA commented, two courts had rejected RFA analyses conducted by the Department of Commerce that relied on a similar attempt to lessen the economic impact of a proposed rule by using too great a universe to measure the economic impact. *S. Offshore Fishing v. Daley,* No. 97-1134-CIV-T-23C (M.D. Fla. Oct 16, 1998); *N. Carolina Fisheries Ass'n, Inc. v. Daley,* 27 F. Supp. 2d 650 (E.D. Va. 1998). In *Southern Offshore Fishing,* the court faulted the agency's initial RFA analysis of a rule which imposed harvest quotas for various types of sharks because the agency assessed the impact of the rule using the entire pool of permit holders (about 2,000) as the denominator rather than the number of permittees who had actually caught at least one shark (about 350). The court explained: "Of course, electing the 2,000-plus permit holders as the operative universe enables NMFS to disperse arithmetically the statistical impact of the quotas on shark fishermen." *Id., quoted* in *S. Offshore Fishing Ass'n v. Daley,* 55 F. Supp. 2d 1336, 1339 (M.D. Fla. 1999). There, the Secretary of Commerce at least made some effort, albeit incorrectly, to measure the rule's effect against the entire regulated sector. Here, no such effort was even made. The court rejected a similar approach in *North Carolina Fisheries,* when the agency used the total number of vessels that had received a permit to analyze a proposed quota on flounder fishing. The court found the analysis "utterly lacking in compliance with the requirements of the RFA

because it did not consider a community any smaller than the entire state," the Secretary ignored readily available data which showed the impact of its rule, and, in using the total number of permit holders as the "universe" of participants, displayed "willful blindness" in consciously ignoring its own data and selecting a "flawed methodology." *N. Carolina Fisheries,* 27 F. Supp. 2d at 659. In the final rule, DOL inferred that use of a regulated community-specific denominator is not required by SBA (*see* 77 Fed. Reg. at 10,133 (col. a)); the SBA "strongly disagrees with DOL." SBA Letter at 4.

To the extent DOL purported to conduct analyses to assess the impact of its regulation on small entities, those analyses were of limited validity because, by the agency's own admission, "pursuing a statistically valid survey would not only have been prohibitively time-consuming given the Department's time constraints, but also would have required a lengthy clearance process under the Paperwork Reduction Act." 77 Fed. Reg. at 10,134 (col. b). So while Defendants are more than willing to impose further bureaucratic requirements on the H-2B community, those same Defendants refused to conduct valid studies because those studies would be inconvenient and would have required clearance. Nor did Defendants make any effort to assess the cross-effects of the various requirements (*e.g*., the impact of three-fourths hours guarantee on corresponding employment requirement).

As for alternatives to many of the Rule's new requirements, all that DOL came up with was the notion that "applying to hire H-2B workers is voluntary, and any employer (small or otherwise) may choose not to apply." *Id*. at 10,144. The Department added:

> Although applying to hire H–2B workers is voluntary, and any employer (small or otherwise) may choose not to apply, an employer, whether it continues to participate in the H–2B program or fills its workforce with U.S. workers, could face costs equal to or slightly greater than 1 percent of annual revenue. However, in the Department's view, increased employment opportunities for U.S. workers and higher wages for both U.S. and H–2B workers provide a broad societal benefit that outweighs these costs.

Id. This statement misses the point. The concern was not that DOL had overestimated the number of potentially affected businesses; the problem was that it underestimated the impact of the Rule. DOL did not correct this error.

C. DOL's H-2B Comprehensive Rule Is Arbitrary and Capricious

Even if DOL had the authority to issue some rule governing the H-2B program, this Rule is arbitrary and capricious, for three reasons. First, the options selected by DOL have been expressly rejected by Congress. Second, DOL has failed to provide the requisite rationale to support the Rule. And third, the certain provisions of the Rule are inconsistent with the rules issued by the DHS, the agency with actual rulemaking authority.

1. DOL Lacks Authority to Adopt Provisions that Have Been Rejected by Congress

DOL has imported the H-2A Program Rule into the program for non-agricultural H-2B workers, even though Congress declined to do so. In the early 1980s, when Congress first proposed the creation of two subcategories for the H-2 worker program, neither the Senate nor the House bill passed. *See* S. 2222 and H.R. 6514 (97th Cong.). The next year, Congress tried again. This time, the bills proposed the two subcategories for H-2 workers, but included certain provisions applicable only to the certification of H-

2A workers, including recruitment requirements and timelines, requirements as to working conditions and compliance provisions. H.R. 1510 and S. 529 (98th Cong.). Again, the bills failed final passage. On the third try, the bills that were introduced did not retain the statutory framework for the admission and certification of H-2B non-agricultural temporary workers. All of those provisions were removed, reflecting a deliberate choice to distinguish the requirements and procedures for admission of agricultural workers from those for non-agricultural workers. *See* S. 1200 and H.R. 3080 (99th Cong.). The legislation that ultimately passed and was enacted as the Immigration Reform and Control Act, Pub. L. No. 99-103 (1986), included the current statutory H-2A Program. *See* 8 U.S.C. § 1188. In 2006, when Congress again tackled comprehensive immigration reform, it did not incorporate the H-2A provisions into the H-2B program. Its avowed goal was to protect "the jobs of citizens" by protecting the economic viability of the small and seasonal businesses that employed them. *See* 152 Cong. Rec. S 2699, 2709, 2711, 2712 (daily ed. April 3, 2006) (statements of Sens. Mikulski, Warner, and Sarbanes). When Congress considered legislation governing the H-2B program again in 2009, the proposed legislation that mirrored the changes promulgated by DOL in the Final Rule did not even reach the House floor for substantive consideration. *See* H.R. 4381 (111th Cong. 2009).

Where, as here, Congress makes a conscious decision to provide a detailed statutory structure for one program but not another, an administrative agency lacks the power to implement what Congress has declined to implement. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 147-48; *Michigan v. EPA*, 268 F.3d

at 1081. It goes without saying that a rule which has no legal basis is arbitrary and capricious.

2. DOL Has Failed to Provide a Rational Basis for the Rule

Where, as here, the agency has not identified let alone examined the relevant data and explained its action or provided a "rational connection between the facts found and the choice made," the Court may set aside the agency's action as arbitrary or capricious. 5 U.S.C. § 706(2)(A); *see Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 43; *Owner-Operator Indep. Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007). The court must be able to discern the connection between the facts relied on and the choices made from the record and the agency decision. *See City of Brookings Mun. Tel. Co. v. FCC*, 822 F.3d 1153, 1165 (D.C. Cir. 1987). That explanation cannot be supplied after the fact. *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883 (D.C. Cir. 1987) (rejecting "a post hoc rationalization … to buttress agency action.").

DOL's rationale is not explained and its Rule is not justified. DOL "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnotes omitted). *See also Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 42 (when an agency changes its prior position, it "is obligated to supply a reasoned analysis for the change."). Here, DOL abandoned the current system for the H-2B Program for

reasons which are not supported by the record before it. Nor has the Department attempted to reconcile its admittedly costly Rule and its acknowledged loss of jobs with the Administration's efforts to create jobs by lessening the regulatory burden on the business community. The rulemaking record is devoid of evidence to support the overhaul of the H-2B program.

DOL determined that new rules were necessary to expand opportunities for U.S. workers by ensuring that there was an adequate test of the U.S. labor market to determine whether U.S. workers were available for jobs, protect workers by increasing the number of hours per week required for full-time employment, require that U.S. workers deemed to engage in "corresponding employment" receive the same wages and benefits as H-2B workers, and prevent violations of program requirements. 77 Fed. Reg. at 10,038-39. According to DOL, there were insufficient worker protections in the current attestation-based model due to a pattern of noncompliance by employers. 76 Fed. Reg. at 15,132. DOL believes that its new Rule presents employers with a decreased opportunity to defraud the program while increasing the efficiency of the program by addressing potential violations before recruitment or certification. *Id.*

The underlying data, however, demonstrate that DOL's new Rule will reduce the number of job opportunities available to everyone by increasing the cost of employing H-2B workers. *See* 76 Fed. Reg. at 15,162; 77 Fed. Reg. at 10,131. *See also* http://www.flcdatacenter.com/CaseH2B.aspx (last viewed April 13, 2012); http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm (certification statistics for FY 2006 through Q2 2011) (last viewed April 13, 2012) (showing DOL's own regulatory

experience that U.S. workers are hired first, but additional employees still are needed to meet seasonal demands). Testimony presented to Congress similarly disclosed that limiting the availability of H-2B workers will result in significant losses both in terms of the number of jobs and the effect on small and seasonal businesses. *See The Economics of Mandating Benefits for H-2B Workers: The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers*, Domestic Policy Subcomm., House Oversight and Government Reform Comm. (April 23, 2009) (testimony of Patrick A. McLaughlin); 152 Cong. Rec. S2699, 2710 (daily ed. April 3, 2006) (statement of Sen. Mikulski).

The reduction in H-2B workers that DOL seeks will result in fewer jobs as small businesses are forced to reduce the size and scope of their operations or close altogether. These data were available to DOL, some of it was DOL's own data, yet DOL failed to respond to it or to comments that raised this concern. DOL's failure to respond is a violation of the APA. *See Lloyd Noland Hosp. and Clinic v. Heckler*, 762 F.2d 1561, 1566 (11th Cir. 1985).

3. Provisions of the Rule Are Inconsistent with the Rule Issued by DHS, the Agency with Rulemaking Authority

The justification for the new Rule is not only unexplained, the Rule is inconsistent with a rule adopted by DHS, the agency that is authorized to issue rules. This too violates the APA. DOL's Rule defines "temporary" employment as nine months or less. DHS' rule, 8 C.F.R. § 214.2(h)(6)(ii)(B), adopted in 2008, defines "temporary" as "a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year." DHS proposed the rule (which was adopted as

proposed without alteration) because USCIS had "determined that the general one-year limit contained in the [prior] definition ... coupled with the 'extraordinary circumstances' restriction," were "unnecessarily limiting on the employment opportunities that may otherwise qualify for H-2B classification." 73 Fed. Reg. 49,109, 49,115 (Aug. 20, 2008). Accordingly, DHS adopted an approach that would "explicitly provide[] that such a period could last up to three years" to create "a more flexible rule …." *Id.* *See also* 73 Fed. Reg. 78,104, 78,118 (Dec. 19, 2008) (noting the definition would "allow U.S. employers and eligible foreign workers the maximum flexibility allowed under this program"). DHS further explained that, "[u]nder the final rule, the validity period of an H-2B petition will therefore be tied to the nature and period of the employer's temporary need and not to any specific time period." *Id.*

DOL's Rule, limiting the time period to nine months, cannot be reconciled with the final rule DHS adopted in 2008. Whereas DHS created a "more flexible definition" of "temporary" that would give employers "maximum flexibility," DOL's restriction of the time period to nine months provides minimal or no flexibility. Whereas DHS' rule was not tied "to any specific time period," and that the outer limit was "possibly as long as three years," DOL's redefinition of temporary to mean only nine months or less is tethered to a specific time period, and a much shorter one than contemplated by DHS. DOL's rule thus not only lacks any resemblance to the DHS rule, it is incompatible with it. DHS has rulemaking authority; DOL has none.

II. PLAINTIFFS AND THEIR MEMBERS ARE ENTITLED TO INJUNCTIVE RELIEF

A. Plaintiffs' Nationwide Irreparable Harm Has Not Been Disputed

Plaintiffs will suffer irreparable harm without an injunction. They will lose customers, goodwill, and many will be forced to close their doors if the H-2B Comprehensive Rule is implemented. The uncontradicted evidence establishes how the injury will occur and that it is irreparable. As James Allen, Bayou's owner, explained:

> These rule changes will be devastating to our small business and will have similar effects on all lawn and landscape companies in this area using the H-2B program. Landscaping is an inherently labor-intensive and price-sensitive industry, with fixed contracts and no real opportunity to pass increased costs on to customers. Most contracts for lawn and landscaping work for commercial customers are won through a bid process. With these new burdens, we would not be able to bid successfully against companies using the H-2B program for new projects and would lose money on our existing contracts. A large number of our residential customers are retirees on a fixed income. We would not be able to pass along increased costs under our existing contracts and would not be able to enter into new contracts with these customers or others similarly situated.

See Supplemental Declaration of James Allen, ¶ 7 (quoting Declaration of James Allen, ¶ 12). If Bayou tried to pass along the new costs, it would lose customers and if it tried to bear the cost, it would lose money and would be threatened as a going concern. *Id.* The H-2B Comprehensive Rule would inflict irreparable injury on Bayou Lawn and Landscape Services.

Plaintiff Silvicultural Management Associates ("SMA") also faces irreparable injury caused directly by the H-2B Comprehensive Rule. In addition to labor cost pressures, the H-2B Comprehensive Rule will irreparably injure SMA by erecting a

lengthy, cumbersome "registration" process so that DOL can enforce a limitation on the length of a "temporary" need not found in DHS' regulations. John Price, SMA's owner, declared:

> These rule changes will be devastating to our small business and will have similar effects on all silviculture and forestry companies using the H-2B program. Our work is entirely subject to the weather and requires an experienced workforce that is willing to travel thousands of miles through all kinds of terrain for months at a time. Given the additional elements of the FERC regulations that govern our work and the multiyear contract between SMA and Entergy, we have no margin for error in completing our work. Any delays in obtaining workers, any unanticipated additional costs or expenses, or any other factor that impedes our work in maintaining these power lines will be disastrous—for SMA, for Entergy, and for millions of homes throughout the South.

Supplemental Declaration of John M. Price, ¶ 7 (quoting Declaration of John M. Price, ¶ 10). The delays that Mr. Price anticipates, which DOL has not disputed, would devastate not only SMA but all other H-2B Program participants in the forestry and silviculture industries. As a result of these anticipated delays, SMA "will not be able to meet our contractual duties to our clients and we will lose customers." *Id.* Like Bayou, SMA faces the certain loss of customers and associated revenue as a direct result of the H-2B Comprehensive Rule. Such injuries are sufficient to support the entry of permanent injunctive relief. *Bayou Lawn & Landscape Servs.*, 713 F.3d at 1085; *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC,* 425 F.3d 964, 970 (11th Cir. 2005).

Ms. Sabeena Hickman, the Chief Executive Officer of PLANET, documented the injury that the H-2B Comprehensive Rule will cause PLANET and its members (including, Bayou) on a nationwide scale. Ms. Hickman declared that the rule will

increase costs and lead to lost bids and therefore lost customers. She declared that once lost, a customer is unlikely to return:

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

See Supplemental Declaration of Sabeena Hickman, ¶ 7. This constitutes irreparable harm on nationwide basis supporting entry of a nationwide injunction. *See, e.g.*, *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) ("The Supreme Court has held that federal agency is not necessarily entitled to confine any ruling of a court of appeals to its immediate jurisdiction.").

B. The Balance of Hardships and Public Interest Favor a Permanent Injunction

The balance of hardships weighs in favor of permanent injunctive relief for a variety of reasons. First, an injunction would stop DOL from exercising or attempting to exercise lawmaking power that it does not have. That promotes the public interest. *See Bayou Lawn & Landscape Servs.*, 713 F.3d at 1085 ("On appeal, DOL argues that it is harmed by having 'its entire regulatory program called into question.' This is not an appealing argument. If the 'entire regulatory program' is *ultra vires*, then it should be called into question."). It is in the public interest that H-2B regulations are issued only by an agency authorized by Congress to do so. *See In re Medicare Reimbursement Litig.*, 414 F.3d 7, 12 (D.C. Cir. 2005) ("As the district court noted, moreover, even if the delay

increased HCFA's administrative burden, the additional "burden [would] not outweigh the public's substantial interest in the Secretary's following the law.").

Conversely, DOL will not be harmed by being forbidden to exercise authority that Congress did not give it. DOL has claimed, however, that this Court should allow it to exercise this authority or it will not be able to perform its statutory duty under the H-2B Program. DOL is wrong. It will be able to perform its statutory duty exactly as Congress intended—without legislative rulemaking power and as a subordinate to both Congress and DHS. DOL did so without a problem from 1952 through 2008, and can do so again. Accordingly, both the balance of harms and the public interest favors the entry of permanent injunctive relief.

CONCLUSION

Plaintiffs challenged a comprehensive set of rules that DOL issued without authority. They were preliminarily enjoined by this Court, a decision which the Eleventh Circuit has affirmed. Plaintiffs now respectfully request that this Court enter summary judgment in their favor and that the Court vacate and set aside the H-2B Comprehensive Rule, enjoin the implementation of the Rule, and declare that DOL has no legislative rulemaking authority with respect to the provisions of the challenged rule.

Respectfully submitted,
s/Monte B. Lake

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