UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

PENSACOLA DIVISION

BAYOU LAWN & LANDSCAPE SERVICES, *et al.*, **Plaintiffs,** **v.** **THOMAS PEREZ, in his official capacity as United States Secretary of Labor, *et al.*,** **Defendants.**	**Case No. 3:12-cv-00183-MCR-CJK**

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS PARTIES DEFENDANT FOR THE LIMITED PURPOSE OF URGING THE COURT TO RULE ON THE PENDING SUMMARY JUDGMENT MOTIONS

Applicants for Intervention Juan Manuel Sanchez-Rivera and Daniel Cuellar-Aguilar file this memorandum in support of their motion for leave to intervene as defendants in this action for the limited purpose of urging the Court to rule on the pending motions for summary judgment. Each of the applicants has a substantial, legally protectable interest in this litigation that is distinct from the interest of the United States Department of Labor and warrants intervention as of right in accordance with Fed.R.Civ.P. 24(a)(2). In the alternative, the Applicants request that the Court grant them permissive intervention under Rule 24(b)(2). The

Applicants' interest in obtaining prompt judicial determination of this action is not being protected by the Department of Labor.

STATEMENT OF THE CASE

On February 21, 2012, the United States Department of Labor ("DOL"), following notice and comment, published final regulations relating to the temporary employment of nonagricultural aliens in the United States under the so-called H-2B program. *See* Revisions to 20 C.F.R. part 655, Subpart A, 77 Fed.Reg. 10038 (Feb. 21, 2012).[1] These regulations established a number of minimum job terms to be offered by employers of H-2B workers because of the "need for better worker protections." *Id.* Among the specific worker protections and benefits added by the regulations were the following:

- A guarantee that each worker will be offered work hours equal to at least three-quarters of the workdays in each 12-week period beginning with the first workday after the worker's arrival and ending on the expiration date of the job order. 20 C.F.R. §655.20(f);
- Provision of or reimbursement for transportation and subsistence from the worker's home to the place of employment for workers completing the first 50 percent of the period covered by the job order. 20 C.F.R. §655.20(j)(i);

[1] The H-2B program is "[n]amed for the statutory section [of the Immigration and Nationality Act] under which it is created." *Louisiana Forestry Ass'n. v. Sec., U.S. Dep't. of Labor*, 745 F.3d 653, 659 (3d Cir. 2014).

- Provision of or reimbursement for return transportation and subsistence from the place of employment for workers completing the period of employment covered by the job order. 20 C.F.R. §655.20(j)(ii); and
- Payment of visa, visa processing and border crossing fees incurred by the worker. 20 C.F.R. §655.20(j)(iii).

In addition, the explanatory text accompanying the regulations stated that H-2B employers could not treat as part of the wage paid to workers the cost of housing provided to H-2B workers employed with traveling carnivals.[2] The new rule became effective on April 23, 2012, *see* 77 Fed.Reg. 10038 (Feb. 21, 2012), and operational on April 27, 2012, *see* 77 Fed.Reg. 24137-38 (April 23, 2012).

On April 16, 2012, one week before the effective date of the new rules, the Plaintiffs filed this action, asking the Court to declare the 2012 Program Rules invalid and enter an order vacating them. *See* Complaint (Docket Entry 1), at 23, ¶ 57.[3] In addition, the Plaintiffs requested the Court to "[e]nter a temporary restraining order and preliminary injunction, pending a final decision on the merits" enjoining the DOL from implementing the Rules, *Id.*, at 23, ¶ 56.

The Court heard the Plaintiffs' preliminary injunction motion (Docket Entry 2) on April

[2] "The Department's long-standing position is that facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore may not be included in computing wages. The Department maintains that housing provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer's benefit and convenience." *See* 77 Fed.Reg. 10067 (Feb. 21, 2012).

[3] The Applicants for Intervention will refer to the final regulations published on February 21, 2012 at 77 Fed. Reg. 10038 as the "2012 Program Rules," as have the Plaintiffs and the Court throughout these proceedings.

24, 2012, one day after the effective date of the 2012 Program Rules. *See* Minute Entry, April 24, 2012 (Docket Entry 23). On April 26, 2012, the Court entered an order preliminarily enjoining "enforcement," but not implementation, of the 2012 Program Rules "pending adjudication of the plaintiffs' claims." *See* Order of April 26, 2012 (Docket Entry 24), at 8.[4] The Court's preliminary injunction order was affirmed by the Eleventh Circuit on April 1, 2013. *See Bayou Lawn & Landscape Services v. Sec. of Labor*, 713 F.3d 1080 (11th Cir. 2013). The matter was remanded to this Court for the final decisions on the merits referenced in the preliminary injunction order. It has now been two and one- half years since the preliminary injunction was issued and more than a year since the parties' cross-motions for summary judgment became ripe for decision.

The delay in resolving the merits of the Plaintiffs' claims has produced unusual and confusing results. While the Court's preliminary injunction has blocked DOL enforcement of the 2012 Program Rules, it neither invalidated nor vacated the regulations, which therefore remain in effect. In the intervening two and one-half years since the Court's preliminary injunction order, thousands of employers have applied for and received certification for employment of H-2B workers. As part of their H-2B applications, each of these employers has certified that "[t]he offered terms and working conditions of the job opportunity … are not less than the minimum terms and conditions required by Federal regulation at 20 CFR 655, Subpart A." *See, e.g.,* 2014 temporary labor certification application submitted by Bayou Lawn Services

[4] In its order denying an earlier motion to intervene in this case by U.S. and H-2B workers, the Court mistakenly stated that "[t]he rules have not yet been implemented…" *See* Order of June 11, 2012 (Docket Entry 50), at 9. In fact, the rules became effective on April 23, 2012. *See* 77 Fed,.Reg. 10038 ("This Final Rule is effective April 23, 2012"). The Court's preliminary injunction was issued three days later, on April 26. *See* Order of April 26, 2012 (Docket Entry 24).

Item B(4), Appendix B.1 (Exhibit A). For H-2B applications filed after April, 2012, the Federal regulations at 20 CFR 655, Subpart A referenced in the employer certifications are the 2012 Program Rules, which have never been vacated or declared invalid.

APPLICANTS FOR INTERVENTION

Applicants for Intervention Juan Manuel Sanchez-Rivera and Daniel Cuellar-Aguilar are citizens of Mexico who were each admitted as H-2B workers in 2013 or 2014.[5] As is the case with every H-2B worker admitted after April, 2012, the Applicants' respective employers certified that "[t]he offered terms and working conditions of the job opportunity … are not less than the minimum terms and conditions required by Federal regulation at 20 CFR 655, Subpart A," *i.e.*, the 2012 Program Rules.

Sanchez-Rivera and Cuellar-Aguilar were each denied numerous benefits due them under the 2012 Program Rules. *See infra,* n. 7. Ordinarily the Applicants would have complained to the DOL regarding this noncompliance. However, because the Court has enjoined the DOL from enforcing the 2012 Program Rules, the Applicants' sole remedy is to bring suit directly against their respective employers for these infractions which they have done or will be undertaking shortly. *See Cuellar-Aguilar v. Deggeller Attractions, Inc.*, Case No. 4:14cv00114-JM (E.D. Ark).

[5] Sanchez-Rivera worked in 2013 and 2014 under H-2B visas issued for landscaping work with Maryland Natives, Inc. of Perry Hall, Maryland. Cuellar-Aguilar worked as an H-2B amusement attendant in 2013 for carnival operator Deggeller Attractions, Inc.

ARGUMENT

I. The Applicants for Intervention are entitled to intervene as a matter of right pursuant to Fed.R.Civ.P. 24(a)(2).

To intervene as of right, the movant must demonstrate that:

> (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

See Order of June 11, 2012 (Docket Entry 5), at 6-7, *citing Stone v. First Union Corp.*, 371 F.3d 1305, 1308-09 (11th Cir. 2004).

A. The Application for Intervention is Timely.

The Applicants' motion to intervene is timely. The Applicants delayed intervening in this case because they anticipated that, in light of the Court's preliminary injunction finding that the Plaintiffs were likely to succeed on the merits of their claim, the Court would promptly rule on the cross-motions for summary judgment. As the delay in issuing a ruling grew longer, the Applicants expected the Department of Labor to take some affirmative steps to obtain a final judgment, such as writing the Court urging a prompt ruling or filing a petition for mandamus to compel a ruling. Neither of those events has happened and enough time has passed that the Applicants believe they must take action on their own to protect their interests by obtaining an appealable ruling from this Court. Intervention to urge the Court to issue a final ruling will in no way prejudice the current parties to the litigation. The Applicants do not seek to file further summary judgment arguments. They simply seek to urge the Court to issue a final, appealable ruling.

B. The Applicants have a legally protectable interest in the challenged regulations.

Intervention as of right requires a direct, substantial, legally protectable interest in the proceeding. *See* Order of June 11, 2012 (Docket Entry 50), at 7, *citing Athens Lumber Co. v. Fed. Election Com'n*, 690 F.2d 1364, 1366 (11th Cir. 1982). A legally protectable interest is something more than a "purely speculative" interest. *Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308, 1311 and n. 6 (11th Cir. 2005).

The Applicants' position is substantially different than that of the H-2B workers who initially sought to intervene in this case. The Applicants have pending legal claims which turn on the issues before the Court. When it previously denied other H-2B workers motion to intervene in this case, the Court noted that "[t]he [2012 Program] rules have not yet been implemented" and "[t]he applicants claim an interest in the *outcome* of this litigation, i.e., the wages and benefits the proposed rules will confer if implemented." *See* Order of June 11, 2012 (Docket Entry 50), at 9. However, the 2012 Program Rules are now in effect. The interests of the current Applicants for Intervention are neither theoretical nor generalized. They each have tangible claims that are or will soon be pending before other district courts based on the 2012 regulations, to which their employers agreed to comply. Many of the Applicants' legal claims could be extinguished if the 2012 Program Rules are ultimately declared invalid and vacated.[7]

Alternatively, if denied intervention here, the Applicants could collaterally attack an adverse ruling in the district courts in Maryland and Arkansas, where their claims are currently

[7] For example, Sanchez-Rivera will be suing to recover damages for his H-2B employer's failure to reimburse him for visa and visa processing costs, inbound and outbound transportation expenses, as well as its failure to offer him the amount of work guaranteed under the 2012 Program Rules, 20 C.F.R. §§655.20 (f) and (j) (2012).

or shortly will be pending. Concerns of judicial economy favor allowing intervention here to avoid such a result. *See Kleisser v. U.S. Forest Service*, 157 F.3d 964, 969 3d Cir. 1998) ("our policy preference … favors intervention over subsequent collateral attacks.")

C. The Plaintiffs' lawsuit will impair or impede the Applicants' ability to protect their interests.

Rule 24(a)(2) also requires the intervenors to demonstrate that the disposition of the action may as a practical matter impair or impede their ability to protect their interests. The question of impairment is closely akin to the question of existence of an interest." *See Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n,* 578 F.2d 1341, 1345 (10th Cir.1978). " 'To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.'" *Grutter v. Bollinger,* 188 F.3d 394, 399 (6th Cir.1999).

The Plaintiffs' lawsuit will impair the Applicants' ability to protect their interests in the current regulations, both with respect to work they have already performed in 2013 and 2014 and in future H-2B jobs. Many of the claims the Applicants are or will be pressing in other district courts are based on the 2012 Program Rules. If this Court invalidates and vacates the 2012 Program Rules, it is highly likely that the defendant H-2B employers in the Maryland and Arkansas cases will seek to dismiss the Applicants' claims based on those regulations. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1997) ("the potential *stare decisis* effect [of the main case] may supply the practical disadvantage that warrants intervention as of right").

In addition, the Applicants, both of whom are longtime H-2B workers, anticipate returning to the United States in 2015 and subsequent years on H-2B visas. If the Court

invalidates and vacates the 2012 Program Rules, these workers will lose the substantive rights extended by these regulations. The only way the Applicants can protect their interest in the continued vitality of these regulations is to intervene in this action. Otherwise, they will be left standing on the sidelines as important protections and benefits affecting their employment are litigated.

D. Applicants' interests are not adequately represented by the DOL.

An intervenor need only show that the existing representation of his interests "may be" inadequate, and "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538, n.10 (1972); *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999); *Chiles*, 865 F.2d at 1214-15. The language of Rule 24 "clearly suggests that now the intervenor is to be allowed in, if the other conditions of the rule are satisfied, unless the court is persuaded that the representation is in fact adequate." C. Wright, A. Miller & M. Kane, F*ederal Practice & Procedure* §1909; *Chiles*, 865 F.2d at 1214 (intervention should be allowed unless it is clear that the government will provide adequate representation).

When an applicant seeks to intervene as a defendant and the existing defendant is a governmental entity, the court starts with a rebuttable presumption that the government will defend adequately its action; this is so even if the governmental defendant itself consents to intervention. *Cotter v. Massachusetts Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir 2000); Order of June 11, 2012 (Docket Entry 50), at 11-12. However, this presumption imposes only a "minimal burden" on would-be interveners. *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir 2001); *Clark*, 168 F.3d at 461 ("the presumption is

weak; in effect, it merely imposes upon the proposed interveners the burden of coming forward with some evidence to the contrary.") Here the Applicants have overcome this presumption.

In proposing the regulations ultimately published as 2012 Program Rules, the DOL stated that it had concluded that the new regulations were needed because there were insufficient worker protections under the prior regulations, with over half of the H-2B employers failing to comply with their regulatory obligations to H-2B workers, including violations arising to the criminal level. *See* 76 Fed.Reg. 15132 (March 18, 2011) (notice of proposed rulemaking). Similarly, in the preamble accompanying the final rules, the DOL reiterated that the new rules were needed because of "evidence of violations of program requirements, some rising to a criminal level" and the "need for better worker protections." *See* 77 Fed.Reg. 10038 (February 21, 2012). Yet despite the acknowledged need for these revisions, the DOL has done little to push for their full implementation and enforcement.

The DOL could have overcome the Court's concerns regarding its rulemaking authority by re-promulgating the regulations jointly with the Department of Homeland Security. This is precisely the action the DOL took in 2013 when it republished the H-2B wage regulations that were enjoined by this Court in *Bayou I,* Case No. 3:11-cv-445. *See* 78 Fed.Reg. 24047 (April 24, 2013). Yet the DOL has allowed the 2012 Program Rules to languish for over 30 months without any apparent effort to undertake similar steps to reissue them jointly with DHS.

Likewise, in the current case, the DOL has failed to press for a timely resolution of the Plaintiffs' challenge. The preliminary injunction has remained in place for two and one-half years, in part because of DOL's tepid effort to obtain a final determination as to the validity of this rule. DOL moved for summary judgment in September, 2013 and has taken no further

action in this case since. It has even failed to bring to the Court's attention the decision in *Louisiana Forestry Ass'n, Inc. v. Sec., Dep't. of Labor*, in which the Third Circuit upheld the DOL's rulemaking authority with respect to the H-2B program. 745 F.3d 653, 674-75 (3d Cir. 2014). From all indications, the DOL is content to allow the Court's preliminary injunction to remain in effect indefinitely, rather than seeking a prompt disposition of the legal questions involved and, if appropriate, appellate review.

DOL's lethargy belies the agency's substantial interest in providing better worker protections. This may well be due to the DOL's role in balancing the interests of employers against those of workers. *See AFL-CIO v. Dole,* 923 F.2d 182, 187 (D.C. Cir. 1991) ("The Department is obligated to balance the competing goals of the statute --- providing an adequate labor supply and protecting the jobs of domestic workers"); *Louisiana Forestry Ass'n, Inc. v. Solis*, 889 F.Supp.2d 711, 735 (E.D. Pa. 2012). When the government is required to weigh competing interests in its administration of a program, it cannot always adequately represent these conflicting interests at the same time. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003), *cert denied* 541 U.S. 987; *Utah Ass'n of Counties*, 255 F.3d at 1255-56 ("the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor"); *In re Sierra Club,* 945 F.2d 776, 779–80 (4th Cir.1991) (although would-be intervenor and government entity share objectives, entity not adequate representative due to obligation to represent interests of general public

including those with conflicting views). For this reason, the would-be intervenor's burden in overcoming the presumption of adequacy of representation is "comparatively light" in instances when an agency's views are necessarily colored by the public interest rather than the intervenor's more parochial interests. *Kleisser*, 157 F.3d at 972.

The Applicants have a direct economic interest in the outcome of this litigation. Their claims for damages being pursued in the Maryland and Arkansas courts will undoubtedly be implicated if the 2012 Program Rules are invalidated and vacated. Courts have frequently found that representation by the government is inadequate when the government has no direct financial stake in the outcome of a suit. *See, e.g., Hardin v. Jackson*, 600 F.Supp.2d 13, 16 (D.D.C. 2011).

II. Alternatively, the Applicants should be allowed to permissively intervene

A party seeking permissive intervention pursuant to Rule 24(b)(2) must prove that his application to intervene is timely and that his claim or defense and main action have a question of law or fact in common. *See Chiles*, 865 F.2d at 1213. A court may also consider whether intervention will unduly prejudice or delay the adjudication of the rights of the original parties. *ManaSota 88, Inc. v. Tidwell*, 896 F.2d 1318, 1323 (11th Cir. 1990).

Applicants' action is timely because it is filed shortly after they commenced their respective suits in Maryland and Arkansas and because, until recently, Intervenors expected that the Court would issue a timely final ruling or that the Department of Labor would act to obtain a timely final ruling.

Neither will the Applicants' intervention unduly delay disposition of this matter. The

Applicants' sole concern is to have this matter promptly adjudicated on the merits so that the losing party or parties may appeal, an objective that should be shared by all parties. In fact, granting the Applicants permissive intervention is likely to expedite the final resolution of this action. The Court's "preliminary" injunction, entered on an emergency basis and without the benefit of the full administrative record and other relevant evidence, has been in effect for two and one-half years and has thereby on a nationwide basis blocked enforcement of the February 21, 2012 regulations. Until a final determination is made on the merits, the rights of workers such as the Applicants will remain in doubt, leaving the district courts in Georgia and Arkansas to adjudicate the Applicants' claims without the benefit of a final ruling from this Court as to the merits of the Plaintiffs' claims. If permitted to intervene, the Applicants will undertake all appropriate steps to jump start this stalled litigation, steps which the parties have heretofore been unwilling to take. Among other things, if prompt decision is not forthcoming, the Applicants will seek a writ of mandamus to force a final decision on the merits of this case.

The Applicants share many questions of law and fact in common with the DOL's defense of the merits of the regulation. The Plaintiffs claim that the DOL lacks rulemaking authority with respect to the H-2B program. The Applicants share the DOL's belief that the agency is empowered to issue regulations related to the H-2B program, as recently held by the Third Circuit. *See Louisiana Forestry Ass'n*, 745 F.3d at 674-75. Many of the Applicants' claims in the Maryland and Arkansas cases depend on the validity of the 2012 Program Rules.

CONCLUSION

For the foregoing reasons, the Court should grant the motion of Juan Manuel Sanchez-Rivera and Daniel Cuellar-Aguilar to intervene as of right, or, in the alternative, to permissively intervene to urge this Court to promptly issue a final, appealable judgment and thereby protect their substantial and legally cognizable interests in the Plaintiffs' challenge to the 2012 Program Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2014, a true and correct copy of the foregoing was electronically filed through the CM/ECF system. Notice of this filing will be sent by e-mail to the following parties by the Court's electronic filing system:

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