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	)	No.3:12-cv-00183 MCR
v.	)	
THOMAS E. PEREZ,* et al., Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO INTERVENE

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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 Jane Oates who had in turn been acting as Secretary after Ms. Solis resigned.

I. INTRODUCTION

The Court should deny Applicants' untimely Motion to Intervene. Just like a previous set of putative intervenors, Applicants have not met the criteria for intervention established in either Federal Rule of Civil Procedure 24(a)(2) or 24(b)(2). Like their predecessors, Applicants lack a legally protectable interest that is inadequately represented by the current parties. Nor are they federal or state officials who are allowed to seek permissive intervention under Rule 24(b)(2). More importantly, Applicants readily concede that their sole purpose for intervening is to "urge the Court to issue a final, appealable ruling," and acknowledge that they want to intervene to enable them to petition the Eleventh Circuit to issue a writ of mandamus against this Court. Intervention at this late stage on such questionable grounds only serves to delay and complicate a matter that has been fully briefed and is ripe for determination. Intervention by these Applicants is neither appropriate nor warranted.

II. BACKGROUND

A. Statutory Background.

In 1986, Congress enacted legislation reforming the Immigration and Nationality Act of 1952. That law, known as the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445 (Nov. 6, 1986) ("IRCA"), divided the nation's temporary nonimmigrant worker program into two parts: H-2A for agricultural occupations; H-2B for other occupations. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), (b) & 1188.

Congress gave "overall responsibility, including rulemaking authority, for the H-2B program to [the Department of Homeland Security ("DHS")]. The Department of Labor ("DOL") was designated a consultant." *Bayou Lawn & Landscape Servs. v. Oates*, 713 F.3d 1080, 1084 (11th Cir. 2013). The Eleventh Circuit could not have been clearer: Congress gave

the Department of Homeland Security, not DOL, legislative rulemaking authority for the H-2B program.

B. The Current Litigation On The Merits.

In 2012, DOL tried to supplant DHS as the congressionally designated policymaker for the H-2B program by promulgating a complicated and costly set of regulations for the H-2B program. *See* Temporary Non-Agricultural Employment of H-2B Aliens in the United States, Part II, 78 Fed. Reg. 10,038 (Feb. 21, 2012) ("2012 Program Rule"). DOL's purpose in promulgating the 2012 Program Rule was to import the statutory and regulatory framework for the H-2A program into the H-2B program. *See* Doc. 62-1, pp. 14-16.

Not only was that policy choice at odds with Congress' decision to treat agricultural occupations differently from non-agricultural occupations, it threatened to wreak havoc upon small businesses throughout the country who relied on the H-2B program to meet labor shortages. Facing irreparable injury if the 2012 Program Rule took effect, Plaintiffs timely sought and received emergency injunctive relief from this Court. *See* Docket Nos. [1]-[5] (papers related to Motion for Temporary Restraining Order and Preliminary Injunction); Docket No. [24] (Order).

DOL appealed this Court's order, but the Eleventh Circuit panel unanimously affirmed. *See Oates*, 713 F.3d at 1085. The panel held that Plaintiffs were likely to succeed on their claim that DOL acted contrary to law because Congress had not given DOL legislative rulemaking authority over the H-2B Program; that Plaintiffs would suffer irreparable injury if the 2012 Program Rule took effect; and that the balance of the equities and the public interest favored the issuance of a preliminary injunction. *Id.* at 1085.

The Eleventh Circuit remanded for further proceedings. The parties filed cross-motions for summary judgment, *see* Docket Nos. [62]-[67], which are pending before the Court.

C. Motions To Intervene

After this Court issued a preliminary injunction, one union, an association, and four individuals moved to intervene. The Court denied their motion because those applicants lacked a legally protectable interest in enforcing a regulation that had yet to be implemented and because their participation in the proceedings would generate delay and unnecessary complications. *See* Order of June 11, 2012, p. 2 n. 3.

The current Applicants are Juan Manuel Sanchez-Rivera and Daniel Cuellar-Aguilar. They assert that they are pursuing "claims for damages" against employers in federal courts in Georgia, Maryland, and Arkansas. *See* Docket No. [68-1], pp. 5, 7, 8, 12, 13. Applicants move to intervene pursuant to Federal Rules of Civil Procedure 24(a)(2) and 24(b)(2). They argue that unless they are allowed to intervene in this matter, their interest in enforcing the as-yet-to-be implemented 2012 Program Rules will be adversely impaired.

III. ARGUMENT

The Court articulated the requirements for intervention as of right under Rule 24(a)(2) in its Order of June 11, 2012:

> The Eleventh Circuit has interpreted the rule to require a party seeking to intervene as of right to demonstrate the following:
>
> > (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.
>
> *Stone v. First Union Corp.*, 371 F.3d 1305, 1308-09 (11th Cir. 2004) (internal marks omitted).

Order of June 11, 2012, p. 7.

Permissive intervention under Rule 24(b)(2) authorizes "a federal or state governmental officer or agency" to intervene permissively if a party's claim or defense is based on:

> (A) a statute or executive order administered by the officer or agency; or
>
> (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Fed. R. Civ. P. 24(b)(2). Applicants clearly do not satisfy this provision, but their arguments appear to track the standards of Rule 24(b)(1)—and perhaps they merely cited the wrong provision. Again, this Court has already set forth the well-established standard for intervention under that provision:

> Permissive intervention under Fed. R. Civ. P. 24(b) is appropriate where a party's claim or defense and the main action have a question of law or fact in common and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties." *Mt. Hawley*, 425 F.3d at 1312. The court has broad discretion to decide a motion for permissive intervention. *Id.* at 1312 n.7; *United States v. Dallas Cnty. Com'n, Dallas Cnty., Ala.*, 850 F.2d 1433, 1443 (11th Cir. 1988).

Order of June 11, 2012, p. 15-16.

B. Applicants Have Not Carried Their Burden Under Rule 24(a)(2) To Support Intervention As Of Right.

1. Applicants Do Not Have A Legally Protectable Interest Sufficient To Support Intervention.

The Applicants claim that they have a legally protectable interest in enforcing the yet-to-be implemented 2012 Program Rule. They do not. As the Court explained in the course of rejecting a similar argument from Applicants' predecessors:

> Because the rules have not yet been implemented, the court also rejects the applicants' argument that they have a legally protectable interest in this matter because they have a legal right to enforce the regulations through the filing an administrative complaint with DOL or a legal action against their employers. To

> the extent the applicants would have the right to enforce the regulations, such right would not arise unless and until the rules are implemented.

See Order of June 11, 2012, p. 9 n. 12. Applicants do not have a legal right to enforce the 2012 Program Rules because they have not been implemented and Applicants lack a private cause of action for enforcing them in "a legal action against their employers." *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 717 (E.D.N.C. 2009) ("An H-2B worker . . . has no employment contract or work guarantee."); *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 253 (M.D.N.C. 2007) ("An H-2B worker must pay for housing and transportation, and has no employment contract or work guarantee."). Indeed, the Eastern District of Arkansas dismissed Applicant Cuellar-Aguilar's suit for failure to state a claim on October 29, 2014. *See Cuellar-Aguilar v. DeGeller Attractions, Inc.*, Case No. 4:14-cv-00114-JM, Docket No. [28] (Order of Oct. 29, 2014), p. 5 (dismissing Applicant Cuellar-Aguilar's breach of contract claim for failure to state a claim upon which relief may be granted) (attached as Exhibit 1). Accordingly, under this Court's previous Order and established precedent, the Applicants do not have a legally protectable interest at stake in this litigation sufficient to support intervention as of right.

2. Disposition Of This Lawsuit Will Not Impair Or Impede Any Interest Of Applicants.

Applicants argue (Mem., p. 8) that if they are not allowed to intervene, "it is highly likely that the defendant H-2B employers in the Maryland and Arkansas cases will seek to dismiss to Applicants' claims based on those regulations."

But Applicant Cuellar-Aguilar's lawsuit was already dismissed on other grounds on October 29, 2014. *See* Ex. 1. And a PACER search for civil cases with a plaintiff named Juan Manuel Sanchez-Rivera did not turn up any. Accordingly, there do not appear to be any pending

cases where Applicants' purported interest in enforcing the void 2012 Program Rule is still at issue. Nothing in the ultimate disposition of this litigation will impair or impede any interest of Applicants.

3. Applicants' Desire To Enforce The Void 2012 Program Rule Is Adequately Represented By DOL.

In the view of Plaintiffs, Applicants have not presented any reason DOL does not adequately represent their interests in defending the legality of the 2012 Program Rule. They do not contend that DOL's opposition to the issuance of preliminary injunctive relief or to Plaintiffs' motion for summary judgment was inadequate, nor could they do so plausibly. Their only arguments are that DOL has not sufficiently pestered this Court to issue a decision on the pending cross-motions for summary judgment, and that DOL has not conceded defeat in this litigation and attempted to re-promulgate the 2012 Program Rule. But there is no legal basis for either argument, and neither provides any warrant for granting intervention here.

Applicants lack a legally protectable interest in this litigation and DOL fully represents any alleged interest that they might have. The Court should deny intervention as of right.

C. Applicants Have Not Demonstrated The Permissive Intervention Should Be Granted Under Rule 24(b)(2).

Applicants moved to be allowed to intervene under Rule 24(b)(2). They plainly do not qualify, as that rule authorizes permissive intervention only by "a federal or state governmental officer or agency." Applicants are none of these. Rule 24(b)(2) is therefore inapplicable and their motion should be denied.

Although Applicants did not move for leave to intervene under Rule 24(b)(1), their arguments appear to track (in part) the standards of that subsection. Plaintiffs are therefore

addressing Rule 24(b)(1) in order to assist the Court should it wish to treat Applicants' motion as having invoked that subsection.

Applicants have no basis for intervention under Rule 24(b)(1)(A) because no federal statute grants them a conditional right to intervene. Applicants appear to base their claim for permissive intervention on Rule 24(b)(1)(B), on the assertion that they and DOL share the same litigation position and same desired outcome. *See* Memorandum, p. 13. In doing so, they undermine the rationale for intervention at all. This proceeding does not need another party defending the validity of the 2012 Program Rule—particularly because the Eleventh Circuit already has affirmed the entry of preliminary injunctive relief against the Rule and briefing on the cross-motions for summary judgment is complete. There is nothing more that Applicants would do to aid in the Court's resolution of the parties' dispute.

Indeed, allowing them to intervene in this action at this late stage would serve only to "unduly delay … the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Applicants make this clear on page 13 of their Memorandum when they state that, "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 the case." In short, unless this Court decides the pending motions promptly enough for Applicants, they "will"—"among other things"—open satellite litigation in an attempt to "force a final decision on the merits of the case." *Id.* Threatening additional time-consuming litigation in order to seek expedition of a pending ruling is hardly an appropriate basis for intervention. Just as this Court concluded with respect to the prior putative intervenors, the Applicants' "participation in this matter would cause (and, in fact, already has caused) undue delay." Order of June 11, 2012, p. 15-16.

IV. CONCLUSION

For foregoing reasons, Plaintiffs respectfully request that the Court deny Applicants' Motion to Intervene.

Dated: November 19, 2014

Respectfully submitted,

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