

**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.)	No.3:12-cv-00183 (MCR-
)	EMT)
THOMAS PEREZ, <i>et al.</i> ,)	
)	
Defendants.)	

**PLAINTIFFS’ LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Rule 56.1, Plaintiffs set forth below the material facts as to which there is no genuine dispute:

A. Final Rule

1. On February 21, 2012, Defendants issued a final rule entitled: Employment and Training Administration, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States, Part II*, 78 Fed. Reg. 10038 (Feb. 21, 2012) (“H-2B Comprehensive Rule” or “Rule”).

B. Plaintiffs

2. Plaintiffs are two businesses that would be affected by the Rule and four trade associations whose members would be affected by the Rule. See Complaint, ¶¶ 9-

14; Declaration of Sabeena Hickman (“Hickman Decl.”), ¶ 12; Declaration of James Allen (“Allen Decl.”), ¶ 12; Declaration of John M. Price (“Price Decl.”) ¶ 10.

3. Plaintiff Bayou Lawn & Landscape Services (“Bayou”) is a family-owned small landscape, irrigation and lawn maintenance business located in Valparaiso, Florida within Okaloosa County. *See* Allen Decl. ¶ 1.¹ Bayou is a small business within the meaning of the Small Business Act. *See* Complaint at ¶ 9. Bayou is a member of the Professional Landcare Network, a co-plaintiff in this action. *See* Supplemental Declaration of James Allen (“Supp. Allen Decl.”), ¶ 9.

4. There are an insufficient number of U.S. employees willing to work in Bayou’s occupational and geographic area and therefore, Bayou relies on temporary employees hired through the H-2B program to meet its outstanding contractual commitments. Allen Decl., ¶¶ 3-4.

5. Plaintiff Silvicultural Management Associates, Inc. (“SMA”), located in Heber Springs, Arkansas, operates under contracts with public utilities to clear brush and trees from their utility lines. Price Decl., ¶¶ 1-2. SMA is a member of the Chamber of Commerce of the United States of America, a co-plaintiff in this action. Supplemental Declaration of John M. Price (“Supp. Price Decl.”), ¶ 8.

6. The quality and timeliness of SMA’s work is regulated by the Federal Energy Regulatory Commission which oversees interstate transmission lines in the United States and can impose fines of up to \$1 million per day on SMA’s utility customers if the lines are not appropriately clear of brush and trees. Price Decl., ¶ 2.

¹ Mr. Allen’s Declaration was included as an Exhibit to [2] Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction. It is also included, and incorporated by reference in, Mr. Allen’s Supplemental Declaration attached hereto.

7. SMA depends on the H-2B program and has employed and expects to employ H-2B employees in the States of Arkansas, Texas, Louisiana, and Alabama in the upcoming season. SMA's work is heavily weather dependent; workers cannot climb trees or power lines in inclement weather. Price Decl., ¶¶ 6-8.

8. Plaintiff Chamber of Commerce of the United States of America ("Chamber") is a not-for-profit membership corporation headquartered in Washington, D.C. and employing less than 500 individuals. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Chamber members transact business throughout the United States and a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber is a small organization within the meaning of the Regulatory Flexibility Act and more than 96% of its members are small businesses with 100 or fewer employees. Based on the Chamber's experience and knowledge, many of its members rely on the H-2B program as a source of temporary seasonal labor in various sectors. Complaint, ¶ 13.

9. Plaintiff Professional Landcare Network ("PLANET") is a not-for-profit membership corporation headquartered in Herndon, Virginia with more than 3,000 members. PLANET is a small organization within the meaning of the Regulatory Flexibility Act and approximately 400 of its members use the H-2B program, most of which are small businesses as that term is defined in the Small Business Act. Complaint, ¶ 12. Plaintiff Bayou is a member of PLANET. Hickman Decl., ¶ 1.

10. Plaintiff National Hispanic Landscape Alliance (“NHLA”) is a trade association located in South Miami, Florida, that facilitates and promotes the advancement of Hispanics as landscape industry professionals and leaders and provides Hispanic landscaping professionals a voice in the national dialogue on environmentally responsible landscape practices, and a means through which to advance the interests of their businesses, the livelihood of their employees, and the quality of life in the communities in which they live and work. A growing number of Hispanic-Americans are becoming partners, buying firms, or starting new companies. Today, more than half a million Hispanic-American families depend on the landscape industry for their livelihood. NHLA members rely on foreign nonimmigrant employees under the H-2B program. Complaint, ¶ 11.

11. Plaintiff Florida Forestry Association (“FFA”) is Florida's only statewide conservation organization which brings together those who grow and those who use Florida's forests. FFA has approximately 1,300 members, 400 of which are non-industrial private landowners. Its mission is to promote the responsible use of Florida's forest resource. Many of its members are small businesses (site preparation contractors, landowners, tree planting companies, and forest operations) that use the H-2B Program. Among other things, H-2B workers are employed to prepare sites for reforestation. Complaint, ¶ 14.

C. Impact of Final Rule on Plaintiffs

12. The H-2B Comprehensive Rule will require Plaintiffs and members of Plaintiff Associations to pay their H-2B employees for three-quarters of the hours in each three-month period Whether or not those hours are worked. Because landscaping and

forestry businesses, as well as many others, are heavily weather dependent, the “three-fourths” guarantee essentially makes employers guarantors of the weather. *See* Hickman Decl. at ¶ 8; Price Decl. at ¶¶ 6-8. SMA estimates that due to weather alone, this three-quarters guarantee will increase its costs by 17 percent. *See* Price Decl. at ¶ 17.

13. The “corresponding employee” provision of the H-2B Comprehensive Rule requires employers, subject to a narrow exception, to provide workers engaged in “substantially similar” work at least the same pay and benefits provided to H-2B workers. This provision will injure Plaintiffs and members of Plaintiff Associations because, among other things, in small businesses there is significant job overlap especially between a supervisor and his or her crew. Inasmuch as the Rule provides certain unusual benefits to H-2B employees (*e.g.*, three-fourths guarantee, transportation and subsistence), the corresponding employee provision will dramatically multiply the adverse effect of the H-2B Comprehensive Rule by extending many of its requirements to the entire workforce. *See* Hickman Decl. at ¶ 9.

14. A survey of PLANET members revealed that the “corresponding employee” requirement would cost small members an additional \$50,000 to \$60,000 per year and as much as a \$1,000,000 per year for large members. *See* Hickman Decl. at ¶ 9. These additional costs “would be devastating.” *See* Hickman Decl. at ¶ 9; *see also* Allen Decl. at ¶ 8.

15. The H-2B Comprehensive Rule defines “temporary need” as less than nine months. In many areas in the country and in many sectors, the need for continuous employment extends to ten months. Imposing a nine-month limit would make the H-2B program impractical for those businesses with ten-month needs. A recent survey by

PLANET revealed that 27 percent of its members will be adversely affected by this new limitation because many would be unable to complete existing contracts or bid on new contracts, resulting directly in economic loss, loss of goodwill and damage to business reputations. *See* Hickman Decl. at ¶ 10.

17. The new and burdensome application process will also increase business costs and reduce certainty and predictability, thereby adversely affecting Plaintiffs and members of Plaintiff Associations. *See* Hickman Decl. at ¶ 11; Price Decl. at ¶ 9; Allen Decl. at ¶ 15.

18. The added costs of the H-2B Comprehensive Rule cannot be passed on to customers either because the Plaintiffs and the Plaintiff Associations' members operate under long-term contracts or face competition from businesses that use undocumented aliens. *See* Allen Decl. at ¶ 16; Hickman Decl. at ¶¶ 12, 15. As a result, Plaintiffs and Plaintiff Associations' members have a number of options, all bad. First, they can cease participating in the H-2B program and operate with much smaller workforces, but if they do, they will be unable to meet the production requirements under their long-term contracts and will lose customers and goodwill. *See* Allen Decl. at ¶¶ 10, 15. Second, they can retain their workforce, but economic losses due to the Rule would force them out of business. *See* Allen Decl. at ¶ 16. The increased costs would also make it difficult if not impossible for Plaintiffs to compete against companies that employ undocumented aliens. *See* Allen Decl. at ¶ 16; Hickman Decl. at ¶ 15.

19. Plaintiffs face the same certainty of irreparable injury today as they did when they described the impact of the H-2B Comprehensive Rule at the beginning of this litigation. Supp. Hickman Decl., ¶ 7; Supp. Allen Decl., ¶ 7; and Supp. Price Decl., ¶ 7.

Respectfully submitted,

/s/ Monte B. Lake

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