COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, ALLIANCE OF FOREST WORKERS AND HARVESTERS, and SALVADOR MARTINEZ BARRERA,

Plaintiffs

v.

HILDA SOLIS, in her official capacity as United States Secretary of Labor; UNITED STATES DEPARTMENT OF LABOR; ALEXANDER J. PASSANTINO, in his official capacity as Acting Administrator of the Wage

his successor Janet Napolitano in their official capacities as United States Secretary of Homeland Security, and defendant United States Department of Homeland Security hereby allege as follows:

1. This proceeding relates to the regulation and administration of the H-2B temporary non-agricultural worker program. The H-2 temporary labor program was initially created by the Immigration and Nationality Act (INA) of 1952, 8 U.S.C. §1101 ***et seq***. Prior to the Immigration Reform and Control Act of 1986 (IRCA), there were no separate H-2B non-agricultural temporary worker provisions in the Immigration and Nationality Act. Rather, there was simply one temporary worker program, the H-2 program. IRCA divided that program into a temporary agricultural worker program, designated H-2A, and a temporary non-agricultural worker program, designated H-2B.

29(l)-2.53658(i)-2.53658(t)-12.5557(y)19.0819( )-0.479431(A)0.621304(c)3.15789(t)-2.53658t seq

4. The Department of Labor (DOL) Office of Inspector General's annual report through March 31, 2008 noted that: "OIG investigations revealed that the foreign labor

perform labor for which foreign temporary non-agricultural H-2B workers are requested; and (2) that the employment of such foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8. This case challenges the Department of Labor and the Secretary of Labor's procedures announced in March 2005 without an opportunity for notice and comment which establish "prevailing" wage rates for H-2B workers which are so low that they adversely affect the wages and working conditions of workers in the United States. That action as applied to H-2B workers was the enactment of a rule within the meaning of the APA at 5 U.S.C. §551(4).

9. In so far as DOL's March 2005 new prevailing wage policy for H-2B workers relied upon changes made to regulations at 20 CFR 656.40 governing prevailing wage determinations for permanent labor certification (the "PERM Regulation") as published at 69 Fed. Reg. 77326 (Dec. 27, 2004), this case challenges the decision of DOL to apply that regulation and other new Congressionally mandated requirements for H-1B employers to H-2B employers as contrary to the requirements of the APA.

a. The PERM Regulation Notice of Public Rule Making (NPRM) published at 67 Fed. Reg. 30466 (May 6, 2002) provided no notice of an intent to apply substantive

d. The information contained in those publicly available prevailing wage electronic databases and any supporting data which DOL relied upon in promulgating those wage rates including special generation for DOL of underlying data in the Occupational

13. This case also challenges the related revised regulations promulgated by the

relating to reductions in required minimum wages as a result of pre-employment expenses for the "convenience of the employer."

15. The DOL Defendants specifically stated disapproval of the application of the FLSA to pre-employment expenses incurred by workers traveling to accept employment with H-2B employers, as examined by this Court in a January 7, 2008 opinion by the Honorable Louis Pollak, in ***Rivera v. Brickman Group, Ltd.***, United States District Court, Eastern District of Pennsylvania, Civil No. 05-1518. See, DOL Defendants citation to "***Rivera v. Brickman Group***, 208 WL 81570 (E.D. Pa. Jan. 7, 2008)" at 73 Fed. Reg. 78039. This Court in ***Rivera v. Brickman Group*** ruled that such pre-employment transportation costs (and other pre-employment expenses for the "convenience of the employer") were required to be repaid at the time of payment of the first week of wages by H-2B employers to the extent that such costs reduced wages below the minimum wage.

16. Unlike the H-2A program, neither DOL nor DHS has promulgated regulations relating to repayment of pre-employment transportation costs to workers employed through H-2B employers. In enunciating the new policy related to pre-employment transportation costs, the Secretary of Labor and DOL arbitrarily, capriciously, and in violation of law failed to appropriately determine if the application of this policy to H-2B employers would have an adverse impact on the wages and working conditions of U.S. workers, which was the appropriate purpose of the H-2B rulemaking proceeding for which DOL published final rules on December 19, 2008. The DOL Defendants' policy will have immediate adverse impact on the Plaintiffs and their members. This policy further has an adverse impact generally on the wages of U.S. workers prepared to travel from places of permanent residence to accept temporary employment with H-2B employers.

A

17. This Court has jurisdiction pursuant to 28 U.S.C. §1331 over this suit for review of final agency action under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1946), and 28 U.S.C. §2201 (declaratory relief).

18. This Court has venue pursuant to 28 U.S.C. §1391(e).

A

LA

19. Plaintiff Comité de Apoyo a los Trabajadores Agrícolas ("CATA"), known in English as the "Farmworkers Support Committee," is a membership organization open to farmworkers, members of the immigrant worker community, and their supporters. Members live and work primarily in southeastern Pennsylvania, southern New Jersey, and eastern Maryland. Members include U.S. landscaping workers and construction workers, and in the recent past have also included H-2B workers in those industries. Through its work, CATA strives to improve the working and living conditions of its members and member communities. The challenged changes to the H-2B program would adversely affect CATA members' wages, their working conditions, and their ability to obtain and retain jobs. CATA seeks to protect its members' interests by challenging these regulations. CATA has members, an office and staff in the Eastern District of Pennsylvania.

20. Plaintiff Pineros y Campesinos Unidos del Noroeste ("PCUN") is a union of farmworkers, nursery, agricultural food processing and reforestation workers in Oregon. PCUN has more than 5,000 registered members. PCUN's mission is to empower its membership to recognize and take action against worker exploitation. Reforestation workers are subject to regulation under the H-2B program and the regulation under that program affect PCUN's

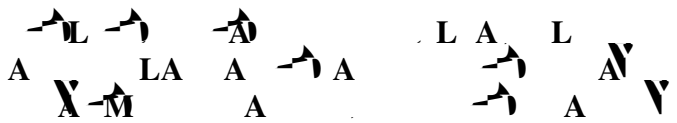
members' wages, their working conditions, and their ability to obtain and retain jobs. PCUN seeks to protect its members' interests by challenging these regulations.

21. The Alliance of Forest Workers and Harvesters (the "Alliance") is a multicultural membership organization promoting social, environmental, and economic justice for forest workers in the Pacific Northwest. Its membership consists of both U.S. workers and H-2B workers who labor in the forests. The Alliance's mission is to advocate for and improve the lives of forest workers. Forestry workers may be subject to the H-2B regulations and the regulations

23. Defendant Elaine L. Chao at the time of the filing of this lawsuit was the United States Secretary of Labor. The Secretary is responsible for all functions of DOL, including administration of the H-2B program. Secretary Chao is sued in her official capacity, pursuant to 5 U.S.C. §703. On February 24, 2009 Hilda L. Solis became Secretary of Labor. Pursuant to

United States Department of Homeland Security shall be collectively referred to herein as "DHS" or the "DHS Defendants."

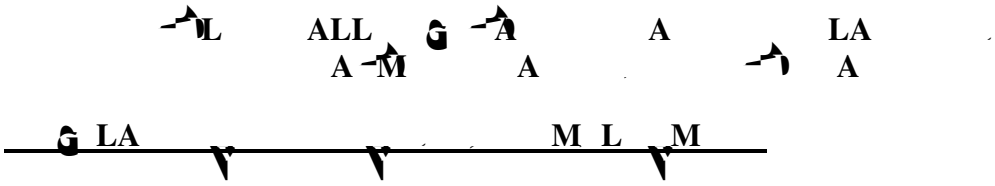
ALL GA



28. Plaintiffs repeat and reallege ¶¶1-26 above.

29. The minimum wage provisions of the FLSA forbid employers from making certain deductions from workers' wages that would bring those wages below the minimum hourly wage mandated by the FLSA. 29 U.S.C. 203(m). In the preamble to the December 18, 2008 Federal Register promulgation of the H-2B regulations, DOL acknowledges that under the FLSA, "employment expens2 Tf 0.99809 0 0 1 71.9995 709.2253536(i)-2.5353.7465(i)-2.53658(o)-0.956417(n)

this issue would be addressed in its proposed regulation. The commentators submitting comments generally did not address this issue at all because they were not on notice that the DOL was considering a modification of its longstanding policy. However, in the preamble to the Final Rule, DOL issued a lengthy discussion of this issue, proposing a substantial change in its own policy and deviating from the judgment of a substantial body of federal law without providing any opportunity for notice and comment.



35. The H-2B program is designed to allow employers to bring foreign workers into the United States on temporary work visas when the DOL certifies that the employer will experience a labor shortage, that United States workers will not be displaced, and that the job terms offered will not negatively affect the wages and working conditions of U.S. workers.

36. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §10.621304(.)-0.479431(S)7( )-0.4

> nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title) in any specific case or specific cases shall be determined by the Attorney General, ***after consultation with appropriate agencies of the Government,*** upon petition of the importing employer."

[Emphasis added]. The Department of Homeland Security is now responsible for this former function of the Attorney General**.** ***See***, Homeland Security Act of 2002, 6 U.S.C. §§101, et seq. (Nov. 25, 2002).

41. 8 C.F.R. Part 214.2(h) currently provides in relevant part:

States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964).

43. The history of the Secretary of Labor's establishment of "adverse effect wage rates" for temporary foreign agricultural workers, which began under the Braceros program in 1961 and under the H-2 program in 1963, was reviewed by the Department of Labor, Employment Training Administration in the context of a rulemaking proceeding to determine adverse effect wage rates for H-2A temporary agricultural workers in the Federal Register of July 5, 1989 at 54 Fed. Reg. 28037, 28039-28040 (July 5, 1989).

44. Under the Bracero program prior to 1961, Mexican workers were required to be paid "prevailing wage rates." The requirement to pay an "adverse effect wage rate" was added by treaty agreement with the Mexican government in 1961. 54 Fed. Reg. 28039. Only "prevailing wages" were required to be offered under the H-2 program until the requirement to determine an "adverse effect wage rate" for H-2 agricultural workers was added in 1963. 54 Fed. Reg. 28040.

45. In November 1966, the Secretary of Labor gave notice of a proposed rulemaking process to review the 1964 H-2 regulations. 31 Fed. Reg. pr t

4

2A agricultural workers prior to January 18, 2009 were set forth at 20 CFR 655, Subpart C, 20 CFR 655.200 et seq. General references herein to DOL's regulatory treatment of H-2B workers will not include logging workers who were subject to 20 CFR 655, Subpart C unless specifically specified otherwise.

46. On March 16, 1968, the Secretary of Labor proposed the first regulations specifically for employers seeking temporary workers for employment ***other*** than in agriculture or logging. 33 Fed. Reg. 4629 (Mar. 16, 1968). On May 22, 1968 the Secretary of Labor adopted those proposed regulations as final regulations effective June 22, 1968. 20 CFR Part 621 (1968) — Certification of Temporary Foreign Labor For Industries Other Than Agriculture or

> (ii) Who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

The basis for the admission of nonimmigrant aliens into the United States is set by section 1184(a), 8 U.S.C. which provides in pertinent part:

> (a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe * * *.

Section 1184(c), 8 U.S.C., directs the Attorney General to consult with "appropriate agencies of the Government" prior to a determination on the petition of an employer for the importation of temporary nonimmigrant alien workers:

> (c) The question of importing any alien as a nonimmigrant under section 1101(a)(15) (H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

(c) The INS regulations. The Attorney General, through the Immigration and Naturalization Service (INS), has promulgated regulations to implement the Attorney General's responsibilities regarding the admission of temporary foreign workers. These regulations, which are codified at 8 CFR 214.2(h)(3), [illegible] . They also provide employers the right to an adjudicatory review before the INS whenever the Secretary has advised the INS that one or both of the factual determinations cannot be made. 8 CFR 214.2(h)(3)(i) requires:

> * * * [A] certification from the Secretary of Labor * * * stating that qualified persons in the United States are not available (see 8 U.S.C. 1182(a)(14)(A)) and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed (see 8 U.S.C. 1182(a)(14)(B)) or a notice that such a cert

Under the authority of the INA and the INS regulations the Secretary of Labor has promulgated the regulations in this part. They set forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers. They provide the Secretary's methodology for the two-fold determination of availability of domestic workers for, and of any adverse effect which would be occasioned by, the use of foreign workers for particular temporary jobs in the United States.

(d) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. ***Florida Sugar Cane League, Inc. v. Usery***, 531 F. 2d 299 (5th Cir. 1976).

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in thi

arisen from: 43 Fed. Reg. 10312 (Mar. 10, 1978), as amended at 52 Fed. Reg. 20507 (June 1,

56. At all times DOL has utilized rulemaking notice and comment procedures to establish procedures for determining prevailing wage rates for positions for which employers seek permanent labor certification. See 20 CFR 656.40.

57. At no time since the administrative creation of the H-2 non-agricultural labor regulations in 1968 has DOL utilized rulemaking notice and comment procedures to establish procedures for determining prevailing wage rates for H-2 or H-2B temporary foreign labor Between 1986, when the H-2 program was divided into H-2A (agricultural jobs) and H-2B (non-agricultural jobs) and January 30, 2005, the Department of Labor did not propose to enact any new regulations governing the H-2B program apart from some transitional provisions for logging workers, despite extensive promulgation of regulations relating to other temporary worker programs. In 1990 the Secretary of Labor re-designated the very limited pre-IRCA labor regulations used for certifying H-2 nonimmigrant aliens in occupations other than agriculture, logging and registered nurses from 20 CFR Chapter 655, Subpart 621 to Part A at 20 CFR 655.1 through 655.4. 55 Fed. Reg. 50510 (Dec. 6, 1990) codified at 20 C.F.R. § 655 Subpart A.

58. The Homeland Security Act of 2002, 6 U.S.C. §§101, et seq. (Nov. 25, 2002), transferred the prior authority of the Attorney General and the INS for administering certain immigration functions to the new Department of Homeland Security. 6 U.S.C. §§ 202, 236. However, the savings provisions of that Act make clear that the underpinnings of the authority and duties of the Secretary of Labor to protect U.S. workers and their wages and working conditions, under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h), were unaffected by this transfer of authority. 6 U.S.C. § 552.

59. At the time of the creation of the separate H-2B program and throughout the first ten years of the program, demand for the program was relatively low. The H-2B program was

63. At times the various internal procedures for administration of the H-2, H-2A and H-2B programs have been published by DOL in tsnt

replacing GAL 10-84 and previous changes to that GAL. That document spelled out procedures for determining the temperature nature of a job opp

The job related education, training and experience requirements of an occupation are factors to be considered in making prevailing wage determinations. A prevailing wage survey and/or determination should distinguish between entry level positions and those requiring several years of experience. At a minimum, a distinction should be made based on whether or not the occupation involved in the employer's job offer is entry level or at the experienced level.

To establish uniformity among SESAs in conducting surveys and making prevailing wage determinations within the resources available for immigration programs, prevailing wage rates for the skill levels described below should be determined in an

71. On October 1, 1996, DOL ETA issued General Administration Letter No. 02-97 (GAL 2-97) "Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997." GAL 2-97 indicated that it was determined that the most efficient way to develop consistently accurate prevailing wages would be to use the Bureau of Labor Statistics' expanded Occupational Employment Statistics program effective federal Fiscal Year 1998 and provided for interim procedures to be used pending the availability of that data. GAL 2-97 is available on the DOL website at: http://wdr.doleta.gov/directives/attach/GAL2-97.cfm. A minor correction thereto was issued as General Administration Letter No. 02-97, Change 1 (GAL 2-97, Change 1) "Correction Concerning Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997." GAL2-97, Change 1 is available on the DOL website at: http://wdr.doleta.gov/directives/attach/GAL2-97_Ch1.cfm.

72. On October 31, 1997, DOL ETA issued General Administration Letter No. 2-98 (GAL 2-98) "Prevailing Wage Policy for Nonagricultural Immigration Programs." GAL 2-98 stated:

> Over the past two years, the Employment and Training Administration (ETA) has been considering proposals for reengineering the process used by the States to determine prevailing wages in order to increase the timeliness of responses to employer requests, insure the use of a consistent methodology by all States, and to maximize the accuracy of the determinations. As a result of this activity, it was determined that the most efficient and cost effective way to develop consistently accurate prevailing wage rates is to use the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program. Effective January 1, 1998, State Employment Security Agencies (SESAs) are to implement the attached prevailing wage policy for nonagricultural immigration programs.

GAL 2-98 is available on the DOL website at: http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942. The primary content thereof is in an attachment thereto which is available on the DOL website at: http://wdr.doleta.gov/directives/attach/GAL2-98_attach.pdf.

73. The Attachment to GAL 2-98 DOL ETA stated

a. The level 1 wage was calculated as the mean of the first lowest paid one-third of workers.

b. The level 2 wage was calculated as the mean of the highest paid upper two-thirds of workers.

76. The Bureau of Labor Statistics OES wage survey does not purport to actually determine skill levels of workers doing different kinds of jobs. See:

http://www.bls.gov/oes/oes_ques.htm#Ques4

77. At not time did DOL ETA establish procedures to determine by occupational classification the percentage of workers within that occupational classification with greater than entry level skills prior to distributing Occupational Employment Statistics survey data into level

80. For occupational codes in which there was a Service Contract Act (SCA) wage rate, the Service Contract Act comparable wage rate established a higher prevailing wage rate than did the DOL ETA methodology adopted at the time of implementation of GAL 2-98.

81. At all times following the issuance of GAL 2-98 until March 2005, 20 CFR 656.40 continued to require DOL ETA to be determining the wage rate in accordance with 20 CFR 656.40(a)(2) and (b) where there was no SCA or Davis-Bacon wage rate. At all times through March 2005, DOL ETA continued to assert that 20 CFR 656.40 established the requirements for payment of prevailing wages to H-2B workers.

82. Procedures outlined in GAL 2-98 were applied by DOL to H-2B applications through March 2005. The above calculation procedure continues to determine the entry level 1 wage based on DOL ETA instructions to the Bureau of Labor Statistics which have not been made publicly available by DOL.

83. The administrative record before DOL in the 2008 rulemaking proceeding for H-2B workers included data as to the growth of the H-2B program. ETA-2008-0002-0022 included the following chart reflecting the explosion in employer demand for H-2B workers after federal FY1998.

FY	H-2B Applications DOL *	Dept. of State Visas**	
1992		12,552	
1993		9,691	
1994		11,000	***est. graphic
1995		12,000	***est. graphic
1996		12,500	***est. graphic
1997	35,773	17,000	***est. graphic
1998	41,270	20,000	***est. graphic
1999	63,079	31,000	***est. graphic
2000	103,971	45,000	***est. graphic
2001	109,004	58,000	***est. graphic
2002	140,755	63,000	***est. graphic
2003			

FY	H-2B Applications DOL *	Dept. of State Visas**	
2004	203,450	76,169	
2005	151,182	87,492	

* Source US DOL ETA Database

** Source Congressional Resarch Service

Andorra Bruno, Specialist in Social Legislation Domestic Social Policy Division, Congressional Research Service, The Library of Congress, Immigration: Policy Considerations Related to Guest Worker Programs (January 2006) Order Code RL32044, available at: http://fpc.state.gov/documents/organization/62664.pdf

90. The effect of ESPL 01-01 and subsequent revisions and extensions, including TEGL 12-02 and 12-03, was to remove most wage determinations for applications for H-2B landscaping workers from the wage rates governing such positions under the Service Contract Act (SCA) as required by 20 CFR 656.40 where SCA rates existed for such jobs. This rule was adopted by DOL ETA without an opportunity for public notice and comment in violation of the APA.

91. The administrative record before DOL in the 2008 rulemaking proceeding for H-2B workers contains data reflecting the explosive demand for DOL ETA labor certifications for the H-2B program for "landscape laborers" after ESPL 01-01 and subsequent revisions removed the applicability of higher prevailing wage rate determinations under the SCA. See, ETA-2008-0002-0022 at 114. DOL-CATA at 200.

> proposing to § 656.40 of the regulations governing the determination of prevailing wages for the permanent labor certification program.

67 Fed. Reg. at 30478-9.

95. The Service Contract Act mandates DOL's Employment Standards Administration, Wage and Hour Division ("DOL Wage and Hour") to determine:

> … the minimum monetary wages to be paid the various classes of services employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary [of Labor], or her authorized representative, in accordance with prevailing rates for such employees in the locality or where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in

99. In its subsequent actions in March 2005 DOL, without opportunity for prior notice and comment, applied the December 27, 2004 changes to the PERM regulation to the H-2B program. As a result the record of comments submitted in response to the 2002 PERM NPRM as to prevailing wage determinations is appropriately a part of the administrative record in this case. Although that record is not available in electronic format on Regulations.gov, Defendants have supplied an electronic copy of the administrative record to counsel for plaintiffs. That record is now available at: http://www.friendsfw.org/H-2B/PermRecord/default.htm.

100. Comments submitted in 2002 in response to the PERM NPRM do not reflect that any of the labor organizations objecting to the proposal for elimination of the Service Contract Act and Davis Bacon Act wages and objecting to the utilization of the DOL ETA application of the BLS OES survey to level 1 wages were aware of the methodology adopted by DOL ETA to determine Level 1 wages. See comments: AFL-CIO Building and Construction Trades Council, PERM Comment 050, http://www.friendsfw.org/H-2B/PermRecord/050_00001_AFL-CIO_Building_Trades.pdf); International Union of Bricklayers and Allied Craftworkers, PERM Comment 065, http://www.friendsfw.org/H-2B/PermRecord/065_00001_Bricklayers.pdf; Laborers International Union of North America, PERM Comment 088, http://www.friendsfw.org/H-2B/PermRecord/088_00001_Laborers.pdf; International Union of Operating Engineers, PERM Comment 141, http://www.friendsfw.org/H-2B/PermRecord/141_00001_Operating_Engineers.pdfl ; American Federation of Labor and Congress of Industrial Organizations, PERM Comment 175, http://www.friendsfw.org/H-2B/PermRecord/175_00001_AFL-CIO.pdf.

101]TJ ET Q q 2

to the proposed elimination of the Service Contract Act and Davis Bacon prevailing wage requirements as follows:

> 4. Collective Bargaining Agreement, Davis Bacon Act, and Service Contract Act
>
> The proposed rule eliminated the mandatory use of DBA and SCA wages, where applicable. Several commenters, including some SWAs and AILA, supported this proposal. These commenters felt the DBA and SCA were suitable for government contracts but not for other situations, and the OES

coverage for more occupations, particularly in domestic service, SCA determinations should continue.

Two commenters agreed with the provision in the proposed rule that employers be allowed to use DBA and SCA wage rates as alternatives to OES wages. AILA asked the final rule specify that SCA and DBA wages be prima facie evidence of the prevailing wage, should the employer choose to rely on either of these two sources.

We have concluded that, while the use of DBA and SCA as wage data sources of first resort should be eliminated as proposed, employers should have the option of using this data at their discretion. We believe the continued mandatory use of SCA and DBA determinations would continue to complicate the operation of the prevailing wage system because of the differing occupational taxonomies between OES and DBA/SCA.

The suggestion that SCA determinations be retained because SCA wages are more "accurate" is not compelling. In many instances SCA determinations are based upon data from the NCS. While the NCS is an excellent, albeit very expensive, source of wage data based on on-site data collection by trained staff, it is limited in scope. Only about 450 occupations in approximately 85 geographic locations are covered, and not all occupations are included in each geographic area. Thus, the NCS is inadequate as a sole source for prevailing wages for the permanent labor certification program, which must deal with a myriad of occupations across the nation. In addition, SCA wage determinations start with data from the NCS, but also incorporate OES data. The SCA also uses a concept known as "slotting" when determining a wage for an occupation/area combination for which they have no data. In slotting, wage rates for an occupational classification are based on a comparison of equivalent or similar job duties and skill characteristics between the classification studied and those for which no survey data is available. It would be difficult, if not impossible, to segregate those SCA surveys that are "better;" i.e., purely NCS-based from those that use slotting. We do not believe retaining this level of complexity in the prevailing wage determination process is warranted.

We have adopted AILA's recommendation that if an employer chooses to rely on a SCA

e1.to adi(e)26.38(c)3.15789(c)3.15789(5)-0.956417(7)-0.478208(6.11 -13.8 Td [n)-0.9( )250]TJ -240.956417((c)3.157895208(p)-0.9564(e)3.157803(e)3.15789(v)-10.97O(7(t)-2.53)-0.478208(6.11 -13.8 Td [

was initially February 28, 2005, which DOL extended by Federal Register noticed published on March 9, 2005 through April 8, 2005. 70 Fed. Reg. 11592 (Mar. 9, 2005).

107. On or about March 8, 2005, , DOL issued a "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs" that implemented the prevailing wage methodology proposed in the January 27, 2005 NPRM as to H-2B workers and applied all changes to the PERM regulations to H-2B workers without comment, explanation of discussion as to the appropriateness thereof. This included the elimination of the prior requirement to pay Davis Bacon or Service Contract Act wages to H-2B workers. The March 2005 "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs" is available at http://www.flcdatacenter.com/download/PW_Guidance_2005_Mar_01_Full.pdf.

108. On March 8, 2005, DOL ETA posted on its website at http://www.flcdatacenter.com new calculations of prevailing wages for all Occupational Codes for employers utilizing H-2B workers reflecting four different pay levels for each occupational code. At no time prior to this did DOL ETA publicly disclose or provide an opportunity for notice and comment on the now primary methodology for determining wage rates for H-2B workers through calculation of level 1 wages based upon the mean wage paid to the lowest one-third paid workers in each OES surveyed occupational classification.

109. The DOL ETA calculated wages for all periods from M

http://www.flcdatacenter.com/CaseH2B.aspx. That downloadable data demonstrates that in fiscal year FY2005 the most commonly requested occupational code for which H-2B labor certification was sought from DOL ETA was for

408.687-014	Laborer, Landscape	51,626

111. DOL ETA on its websites and in its downloadable data files provides a cross walk to the Standard Occupational Classification ("SOC") codes which were utilized by it to generate wage data at four levels for each Occupational Code. That cross walk establishes that the SOC code for DOT Occ. Code 408.687-014 was to SOC Code 37-3011 "Landscaping and Groundskeeping Workers."

112. The DOL ETA cross walk for FY2005 identified occupational codes for which certifications for H-2B workers were sought during FY2005 as based on OES data for SOC Code 37-3011 or on SOC Code 37-3012 (First-Line Supervisors/Managers of Landscaping, Lawn Service, and Groundskeeping Workers).

113. The DOL ETA wage rates established in March 2005 for the Philadelphia Standard Metropolitan Statistical Area for SOC Code 37-3011 "Landscaping and Groundskeeping Workers" were as follows:

CNTYTWN	SOC_Code	LVL1WG	LVL2WG	LVL3WG	LVL4WG
Philadelphia County, PA	37-3011	8.39	9.82	11.24	12.67

114. The March 2005 DOL ETA wage rates were computed from the November 2004 DOL Bureau of Labor Statistics survey data. That data is available for download at: http://www.bls.gov/oes/oes_dl.htm.

115. The November 2004 DOL Bureau of Labor Statistics published survey data for the Philadelphia area for Soc Code 37-3011 shows the following surveyed wage rates:

AREA_NAME	OCC CODE	OCC_TITLE	H MEDIAN	H PCT10	H PCT25	H MEAN	H PCT75	H PCT90
Philadelphia	37	Landscaping and				11.83	13.84	16.94

prevailing wage and thus adversely affects the domestic labor market." ETA-2008-0002-0087 at 59-81. DOL-CATA 900-922.

120. In response to the January 2005, NPRM comment were submitted on behalf of the United Food & Commercial Workers International Union, dated April 8, 2005. Those are in the DOL record ETA-2008-0002-0087 at 82-87. DOL-CATA 00923-28. Those comments stated:

> The proposed changes center on using the OES for prevailing wage determinations. The OES is conducted by the Bureau of Labor Statistics and gives detailed wage information for about 770 occupations in specific geographic areas. Wages reported are straight-time gross pay, exclusive of premium pay, but do include additions such as on-call pay and tips. Benefits are not included. These wages are reported in segments from surveyed employers as well as an overall average. The published segments are structured at intervals of 10%, 25%, 50%, 75%, and 90%. For example, the 10% rate is a rate where 10% of the workers are making less and 90% are making more. The 50% is the median. The 75% rate indicates 75% make less and 25% make more, and soon.
>
> The DOL uses OES data on its web site to provide prevailing wage information. When a wage rate is requested for a specific job in a specific area, it will currently provide four levels of wages "commensurate with experience, education, and the level of supervision." These four levels of wages are also characterized in DOL documents as "four skill levels."
>
> The level one (1) wage, derived from unpublished OES data, is equal to the mean of the bottom third of wages surveyed, and the level four (4) wage is the mean of the top two-thirds of wages surveyed. Levels two (2) and three (3) are derived by an arithmetic formula that uses level one (1) and four (4) as base points respectively. Coincidentally, level three (3) is the mean or average wage for the specific occupation.
>
> There are a number of serious problems with this structure. [illegible] Second, the OES survey essentially reports only straight time wages. It does not include benefits such as health insurance, retirement plans, or vacation pay. Consequently, overall compensation may be seriously understated. Third, the OES survey understandably lags behind current labor market conditions. The most recent data is from November 2003. This may also contribute to understating wage levels.

> (typically "Job Zone" 1 or 2), it is clear that the DOL's process for determining the proper wage level will almost always result in a level one (1), or at best, level two (2) wage.

DOL-CATA-000926. Emphasis Added.

121. At no time has DOL ETA responded to the comments in response to the January 2005 NPRM or discussed them in subsequent administrative guidance or rulemaking.

122. On May 9, 2005, DOL issued a modification of the March 2005 "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs," with technical changes to instructions which re-affirmed the March 2005 implementation of a new prevailing

sample size and source, sample selection procedures, and survey job descriptions, to allow the Chicago NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA OFLC national office.

(3) The survey submitted to the Chicago NPC must be based upon recently collected data:

(i) The published survey must have been published within 24 months of the date of submission to the Chicago NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submit-ted to the Chicago NPC.

(4) If the employer-provided survey is found not to be acceptable, the Chicago NPC must inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for the Chicago NPC's consideration is not acceptable, may file supplemental information as provided in paragraph (g) of this section, file a new request for a PWD, appeal under § 655.11, or, if the initial PWD was requested prior to submission of the employer survey, acquiesce to the initial PWD.

(g) Submission of supplemental information by employer.

(1) If the employer disagrees with the skill level assigned to its job opportunity, or if the Chicago NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the Chicago NPC.

(2) The Chicago NPC must consider one supplemental submission about the employer's survey or the skill level as-signed to the job opportunity or any other legitimate basis for the employer to request such a review. If the Chicago NPC does not accept the employer's survey after considering the supplemental information, or af [( )-0.4799.ematsus sutermination abnsiptit a5he skill level

73 Fed. Reg. at 29962-3.

128. DOL received comments from interested parties expressing serious concern with the adoption through the regulations of the March 2005 prevailing wage determination procedures.

129. The Low Wage Workers Legal Network submitted comments on behalf of a large coalition of organizations. Those comments and other documentation submitted in support of them directly challenged the DOL ETA methodology for calculation of wage rates as failing to meet the Secretary of Labor's duty to prevent adverse impact on U.S. workers. See, ETA-2008-0002-0088 at 32-41. DOL-CATA 00963-72. As to the DOL ETA methodology for calculation of wages those comments noted:

> It appears that the current Bureau of Labor Statistics Occupational Employment Survey (BLS OES) wage-setting process does not correspond to the Foreign Labor Certification Data Center's procedure for assigning wage levels. DOL sets the Level 1 wage based on the average of the wages paid to the workers earning in the bottom one-third of the wage distribution range of wages in an occupation and geographic area (for example, if there are 99 forestry workers in a region, Level 1 is the average of the lowest-paid 33 workers). The Level IV wage is the average wage paid to the workers earning in the top two-thirds of the distribution (not the top one-third). The two intermediate levels are created by dividing the difference between the first and fourth levels by three, and adding the quotient to the first level and subtracting it from the fourth level. Level 3 is equivalent to the average wage.
>
> This arithmetic formula for setting the wage levels is not appropriate in setting the prevailing wage to choose a wage that is lower than the average. It is especially inappropriate to allow an employer claiming a labor shortage to offer a wage rate (such as Level 1 and Level 2) that is at or just above the average of the lowest one-third of workers. Difficulty attracting job applicants should be solved by competing for workers through better job terms, not by offering wage levels that are paid to the lowest group of workers in the occupation.
>
> In any event, the wages listed by the BLS OES are two years out of date. The BLS apparently uses a six "panel" time period that it adjusts for inflation but apparently is not capable of preparing the survey results fast enough to be issued for the coming year. H-2B employers should not be offering wage rates that are two years out of date, particularly when wage rates have been increasing modestly overall during the past decade, and especially during a period of increasing inflation in the cost of living. A wage rate that is two years out of date is inappropriate because it allows employers to

132. DOL refused to consider comments submitted in response to the NPRM challenging the methodology for determination of prevailing wages, DOL responded that the methodology used to calculate the PWD was outside the scope of the proposed rulemaking. 73 Fed. Reg. at 78031. Specifically, DOL responded as follows:

> 5. General Process or Data Integrity Concerns
>
> Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H-2B workers at or above the wage (presumably the adverse effect wage rate) for H-2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders. The Department appreciates these suggestions and concerns. [illegible]

73 Fed. Reg. at 78031. [Emphasis added].

133. The final regulation for determining the prevailing wage for temporary labor certification purposes largely mirrored the regulation in the NPRM. 20 C.F.R. 655.10. The regulation provides, in pertinent part:

> (b) Determinations. Prevailing wages shall be determined as follows:
>
> (1) Except as provided in paragraph (e) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S.

workers, that is, it is considered the “prevailing wage” for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics SurveyS/()2.3678(O)0.621304(E)-0.166333(S)-15.0899())2.3678( )-

third of workers in a Standard Occupational Code ("SOC code") occupation in a local area.

g. Level IV is the average wage paid to the highest paid two-thirds of workers in a Standard Occupational Code ("SOC code") occupation in a local area.

h. Level II and Level III wage rates are derived from the Level I and IV wages. The formula takes the difference between the Level IV wage and the Level I wage and divides that number by three. The Level II wage is determined by taking this result and adding it to the Level I wage. The Level III wage is determined by taking this result and subtracting it from the IV wage.

i. Level III and IV wage rates are the only wages at or above the average surveyed wage reported by OES data for a SOC Code in a local area.

142. DOL ETA assigns Dictionary of Occupational Title ("DOT Codes") to employer applications for H-2B (and other foreign labor certification wage categories) and utilizes a "cross walk" between DOT codes and BLS SOC Codes.

143. In many cases, more than one DOT code is cross referenced to the same BLS SOC code. In some cases one DOT Code can be cross referenced to more than one SOC Code.

144. The Prevailing Wage Memorandum procedure adopted by DOL in May 2005, requires that all wage calculations begin as Level 1 wages and are only increased if the requested position has particular job skills requiring a higher job level. See, ***In Reed Elsevier, Inc., Employer***, BALCA No. 2008-Per-00201, USDOLCNPC No. 07-0021, Ohio Tracking No. 2007-2319, Department Of Labor, Board of Alien Labor Certification Appeals, 2009 BALCA Lexis 99, April 13, 2009.

145. The four wage levels supposedly correspond to the skill level of an occupation.

150.

upon employers the obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). Those regulations at 8 CFR 214.2(h)(6) require the Secretary of Labor to issue a certification "…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 CFR 214.2(h)(6)(iv)(A)(1).

154. The policy change is also in conflict with the long established requirements of 20 CFR 655.0(a), which mandate:

> (1) . . . procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.
>
> (2) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opport3.15789(r)2.36842(s)-1.7465(e)3

164. One hundred thirty-four (134) individuals and organizations submitted comments,

170. As the H-2B program has expanded its role in certain industries such as landscaping and into an increasing breadth of job classifications, the adverse impact of the DOL's establishment of lower required wage rates for H-2B employment has had an adverse economic impact on the wages and working conditions of U.S. workers, in violation of the Secretary of Labor's duties under the H-2B program.

171. Although the 2008 DOL NPRM offered the public its first opportunity to comment on the procedures to be utilized by DOL for determination of "prevailing wages," DOL and the Secretary of Labor arbitrarily and contrary to law continued in the final rule to use procedures for determination of "prevailing wages" which have a severe adverse impact on the wages of U.S. workers.

172. Despite the continuing failure of the Secretary of

construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter su

179. Data in the record before DOL established that the level of SWA activity in relationship to the H-2B program. See, ETA-2008-0002-0022, Attachment D. For example, the date for the Pennsylvania SWA reflected the following for federal FY07:

WORK AREA	Total Wrks Requested	Total Workers Denied	% Workers Denied	FY07 Workers Certified	Number H-2b Cases	Nmbr Cases Certified	% Cases Certified	Cases Denied	Cases Parta

Document ID	Commenter
ETA-2008-0002-0018	Law Office of Michelle Skole retired from NJ Alien Certification - Skole, Michelle
ETA-2008-0002-0019	State of Oregon Employment Department - Johnson, Andrew
ETA-2008-0002-0024	Mount Washington Resort - Gruenfelder, Claire
ETA-2008-0002-0028	Ohio Vicinity Regional Council of Carpenters - Galea, Mark
ETA-2008-0002-0029	Arizona Department of Economic Security - Ufford, C.
ETA-2008-0002-0030	Outdoor Amusement Business Association - Johnson, Robert
ETA-2008-0002-0035	Virginia Employment Commission - Esser, Dolores
ETA-2008-0002-0037	Federation of Employers and Workers of America (FEWA) - Evans, Scott
ETA-2008-0002-0038	Vermont Department of Labor - Seckler, Cynthia
ETA-2008-0002-0039	PA Department of Labor and Industry - Mead, Andrea
ETA-2008-0002-0041	President/Save Small Business - Lavery, Hank (representative form letter, 41)
ETA-2008-0002-0045	American Federation of State, County & Municipal Employees, (AFSCME) - Korpi, Kerry
ETA-2008-0002-0046	Maine Department of Labor - Fortman, Laura A.
ETA-2008-0002-0047	Sharp's Landscaping, Inc. - Sanborn, Tina
ETA-2008-0002-0048	American Hotel & Lodging Association - McBurney, Shawn
ETA-2008-0002-0049	Emory University - Eiesland, Terry
ETA-2008-0002-0050	H-2B Workforce Coalition - McBurney, Shawn
ETA-2008-0002-0052	International Union of Bricklayers & Allied Craftworkers - Flynn, John
ETA-2008-0002-0053	University of Wisconsin-Madison - Ahlstedt, Deborah
ETA-2008-0002-0055	Building and Construction Trades Department, AFL-CIO - Ayers-7.00239(a)0.713207(t)0.356603(

(Washington), ETA-2008-0002-0029 (Arizona), ETA-2008-0002-0038 (Vermont), and ETA-2008-0002-0046 (Maine). DOL's assumption that this change will help SWAs, despite the fact that all of the SWAs that commented on this issue were opposed to the change, is arbitrary and capricious.

185. Under the prior regulations, employers have a dual obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). The Secretary of Labor must certify that these two requirements have been met. 8 CFR 214.2(h)(6)(iv)(1).

186. Since at least 1994, DOL has directed State Workforce Agencies not to accept, and DOL would not certify, Clearance Orders that do not provide for full-time employment. See General Administration Letter I-95 (November 10, 1994); Training and Employment Guidance Letter 21-06 (April 4, 2007); Training and Employment Guidance Letter 21-06, Change 1 (June 25, 2007).

187. In the preamble of its Notice of Proposed Rulemaking, DOL acknowledged that it has "always required that the positions offered be . . . ***full-time*** in nature." 73 Fed. Reg. at 29951 (emphasis added).

188. The definition of full-time which was published for Notice and Comment was "35 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence." Proposed 20 CFR 655.4. The proposed rule also specifically required that an employer establish a need for full-time employees, as part of the showing of temporary need. Proposed 20 CFR 655.6(a).

193. DOL has provided no empirical data, and no such data was submitted to DOL, to support its assertion that its new definition of full-time employment "reflects [its] experience in the administration of this program." 73 Fed. Reg. at 78038.

194. The definition of full-time as 30 hours per week is arbitrary, capricious and contrary to law in that it will materially adversely affect U.S. workers.

195. DOL's interpretation of the definition is also a major change from the existing interpretation, and represents a new policy. ***See*** Comments of Mid-Atlantic Solutions LLC, ETA-2008-0002-0071 (noting that some State Workforce Agencies have rejected applications offering fewer than 40 hours of work per week).

196. DOL's new interpretation of the full-time definition as not establishing a contractual obligation to actually provide a certain number of hours of work per week was not subject to notice and comment, as this interpretation did not appear in the proposed regulation when it was published in the Federal Register. See Notice of Proposed Rulemaking.

197. DOL has offered no basis for its interpretation of the full-time requirement as not establishing a contractual obligation.

M

198. The Secretary of Labor is required by law to establish effective procedures to "determine and certify" that there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

c y n A y A c y

199. On December 18, 2008, the Secretary of Labor promulgated drastically revised regulations for the H-2A program which would strip the program of many of its important

provisions. Those changes are being challenged in ***United Farm Workers, et al. v. Chao***, United States District Court, District of Columbia, Case No. 1:09-cv-00062-RMU.

200. Prior to the December 18, 2008 changes to the H-2A program, the H-2A agricultural worker regulations required recruitment of U.S. workers for agricultural labor and to protect such U.S. workers from adverse impact have included requirements that:

(a) employers must recruit U.S. workers through both the interstate job clearance order process and through "positive recruitment," which is the active recruitment by the employer in areas of potential labor supply and in the area where the employer's establishment is located;

(b) U.S. workers who apply for work with an H-2A employer in the first half of the H-2A contract period must be hired if they are qualified and accept the DOL-approved job terms (this is the so-called "50 percent" rule);

(c) employers may not fire or refuse to hire a U.S. worker for other than a lawfulheey ey er thly pedv53536(h431(D)k656417(d)-w)0.622527(f789( )-10.4908863(244.066 0 Td [(n
3(u)-0.956417(l)-2.53658(e)3.15789())2.3678(;)-2.53585( )]TJ -205.713 -27.6 Td [(()2.36903(c)3.15789())333]TJ /R18 12 Tf 13

§655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

203. In addition to the requirements of the individualized recruitment plans, all H-2A employers have been required to:

a. Assist the ES in preparing job orders for posting locally and in the interstate system, ***Id.*** §655.103(d)(1);

b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator, ***Id.*** §655.103(d)(2);

c. Contact labor contractors, migrant workers, and other potential workers in other areas by letter and/or telephone, ***Id.*** §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers, ***Id.*** §655.103(d)(4).

204. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to

"provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." Id. §655.105(b).

205. Each employer who intends to hire H-2A workers must prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). The plan must also describe how the employer will utilize farm labor contractors where it is the prevailing practice to do so. See Id. The prior regulations require employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id. §655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

206. In addition to the requirements of the individualized recruitment plans, all employers are also required to:

a. Assist the ES in preparing job orders for posting locally and in the interstate system, ***Id.*** §655.103(d)(1);

b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job oppoiely lo

law for insuring that U.S. workers have access to j

employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer must, in place of a Sunday edition advertisement, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements contained in Sec. 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication

> (1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H-2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.
>
> (2) The recruitment report must:
>
> (i) Identify each recruitment source by name;
>
> (ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;
>
> (iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.
>
> (3) The employer must retain resumes (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

73 Fed. Reg. at 78057-78058

211. In its December 19, 2008 preamble to the adoption of the proposed regulations, DOL acknowledged that it had received comments opposing its proposed system for recruitment of U.S. workers by prospective H-2B employers. DOL acknowledged:

> The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters who were opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late arrival of H-2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not suitable when serious job seekers are looking for temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further

Document ID	Commenter
ETA-2008-0002-0029	Arizona
ETA-2008-0002-0069	California
ETA-2008-0002-0046	Maine
ETA-2008-0002-0063	Maryland
ETA-2008-0002-0058	Massachusetts
ETA-2008-0002-0078	Nevada
ETA-2008-0002-0040	North Carolina
ETA-2008-0002-0019	Oregon
ETA-2008-0002-0039	Pennsylvania
ETA-2008-0002-0090	Texas
ETA-2008-0002-0035	Virginia
ETA-2008-0002-0025	Washington

214. At least some of the SWAs comments raise issues as to the legality of requiring SWAs to complete I-9's before referral of prospective U.S. workers to positions for which employers seek to bring I-9's. These included the potential that SWAs could be liable for discrimination in the application of such requirements only to certain referrals as well as the impact of other laws on such requirements. Amongst the states raising concerns about the legal appropriateness of requiring them to complete I-9's or e-verify employment was the Pennsylvania Department of Labor and Industry.

215. DOL arbitrarily failed to consider the adverse impact of such a rule on U.S. workers seeking employment and the Secretary of Labor's obligation to establish effective procedures to "determine and certify" that there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

217. The final regulations arbitrarily, capriciously, and contrary to law fail to require employers seeking to utilize H-2B workers to actively recruit able, willing and qualified workers to jobs for which foreign temporary non-agricultural H-2B workers are requested.

A n n

218. In the new regulations, DOL replaces the existing pre-hiring certification process required by regulation with a process based entirely on attestation. In so doing, DOL has transformed the process from one requiring meaningful review and approval by DOL to a ***post hoc*** system that dramatically weakens DOL oversight of the H-2B program. 73 Fed Reg. 78060 and 780540 (codified at 20 C.F.R. 655.22 and 20 C.F.R. 655.24) T-0.956417( )-0.478208(f0.-0.4)-0.955194(0)-

persons capable of performing such service or labor cannot be found in this country. . .This classification requires a temporary labor ***certification*** issued by the Secretary of Labor or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.") (emphasis added).

221. DOL failed to consider substantial empirical evidence that the certification process had, in fact, resulted in the denial of a substantial number of H-2B applications which likely would be inappropriately approved under an attestation system. Analysis of data for FY07 that establishes that DOL denied certification of 105,532 positions which was 29.3% of the number of workers sought in employer applications for H-2B workers. See ETA-2008-0002-0022 at pp. 1-5 and Attachment A .

222. Significantly, under an attestation system, the Department will no longer review the recruitment system utilized by employers to ensure that there actually are no U.S. workers available to do the work prior to approving the applications for H-2B workers. 73 Fed Reg. 78057 (codified at 20 C.F.R. 655.15).

223. DOL failed to explain how a post hoc attestation system is consistent with its legal obligations to protect U.S. workers. In fact.688 0 Td [(.688 0 Td [(.6.956417(l)-o)-78(s)-1.7467(p)-0.9588

General which was in the record before DOL pursuant to its NPRM. See, ETA-2008-0002-0088, Attachment A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The OIG annual report makes a legislative recommendation in relationship to the H-1B program, "Provide Authority to Ensure the Integrity of the Foreign Labor Certification Process." ***Id*** at p. 39. That recommendation states:

> "If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, DOL is statutorily required to certify such applications unless it determines them to be "incomplete or obviously inaccurate." Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analysis and investigations that show the program is susceptible to significant fraud and abuse, particularly by employers and attorneys. The OIG also recommends that ETA should seek the authority to bar employers and others who submit fraudulent applications to the foreign labor certification program."

Id at 39. See, ETA-2008-0002-0088.

[illegible]

225. DOL's adoption of 20 C.F.R. § 655.22(g)(2) regarding reimbursement of travel costs, such as visa and passport expenses, is significantly different from the rule proposed by DOL in the NPRM and was not properly subject to notice and comment.

226. The rule which was published for notice and comment would require employer's seeking H-2B certification to attest to the following:

> (h) The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, biweekly, or monthly basis that equals or exceeds the prevailing wage. [illegible] items such as tools of the trade, and other items not expressly permitted by law.

. . .

233. The record before the agency of comments and actions related to that proposed rulemaking has been posted under USCIS-2007-0058 Docket at: http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCIS-2007-0058.

234. On December 19, 2009, USDHS issued its final rule entitled Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers. 73 Fed. Reg. 78104-78130. The rule goes into effect on January 18, 2009.

235. The final DHS regulations are arbitrary and capricious and were adopted in violation of the APA. While DHS states that its intention is to protect workers from economic hardship and unscrupulous employer and recruiter practices, the new regulations 1) penalize H-2B workers who have been victimized by these practices by providing for the termination of employment for workers who have been made to pay im

unauthorized fees only as an alternative remedy to be selected at the employer's discretion. The regulations provide:

> If USCIS determines that the petitioner has collected, or entered into an agreement to collect, [unauthorized] fee[s] or compensation, the H-2B petition will be denied or revoked on notice, unless the petitioner demonstrates that, prior to the filing of the petition, either the petitioner reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary. 8 C.F.R. § 214.2(h)(6)(i)(B)(1).

241. DHS acknowledged that "[f]orty-seven out of 57 commenters" who commented opposed the revocation scheme. 73 Fed. Reg. at 78112. Commenters opposing the revocation scheme included observations that "the proposed rule will likely punish the affected workers far more than the unscrupulous recruiters," (DHS comments at 525) and, similarly, that the "petition revocation system will punish H-2B workers for their US employer's bad behavior." (DHS Comments at 400).

242. DHS arbitrarily and capriciously adopted this proposed rule as a final rule without addressing the concerns raised by commenters who opposed implementation of the revocation remedy, and failed to explain adequately its reasoning for maintaining revocation of petitions as the penalty for improper fees.

243. The revocation remedy adopted by DHS contravenes DHS' stated purpose of protecting H-2B workers from unscrupulous recruitment practices by failing to require that

disincentive for workers to come forward and report unlawful fees, as reporting these violations

249. Both the May 2008 DOL NPRM and the August 2008 DHS NPRM proposed to significantly change this definition so as to permit a "one-time" occurrence to include "temporary" employment of up to three years.

250. In the December 19, 2008 preamble to the DOL regulations, DOL states that:

> … the Department will consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need--as demonstrated by the employer's attestations, temporary need narrative, and other relevant information--is less than 3 consecutive years.

73 Fed. Reg. at 78025-78026.

251. DOL accomplishes this by reference to the December 19, 2008 change to 8 CFR

2er oerrc.f 2oaOt rmnoa uerioion r s.

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor,

such persons. Doing so despite a demonstrated history of abuse by many such agents is arbitrary and capricious and contrary to law. See, ETA-2008-0002-0088, Exhibit A. See also, ETA-2008-0002-0074 at pp. 5-8 reflecting comments of American Immigration Lawyers Association (AILA).

263. The actions of DOL and DHS as described above are arbitrary and capricious and contrary to law.

A A

LA 6

264. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

265. The actions by the DOL Defendants as set forth above are in violation of the Administrative Procedure Act in violation of 5 U.S.C. §706(2).

266. The actions of the DOL Defendants as set forth above are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in accordance with 5 U.S.C. §706(2)(a).

LA
M LA A A 6

267. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

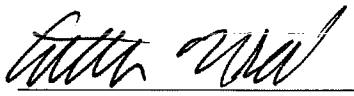
268. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are in violation of the Administrative Procedure Act in violation of 5 U.S.C. §706(2).

269. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are arbitrary, capricious, an abuse of

(a) Grant such further and additional relief as this Court may deem just and proper.

Dated: August 17, 2009

Respectfully submitted,



Signature Code: ANR5140

Arthur N. Read
Attorney Registration No. 29360
Liz M. Chacko
Attorney Registration No. 95115
Friends of Farmworkers, Inc.
924 Cherry Street, 4th floor
Philadelphia, PA 19107-2411
Telephone: (215) 733-0878
Fax: (215) 733-0876

Edward Tuddenham
272 W. 107th St. #20A
New York, New York 10025
Telephone: (212) 281-6660
Fax: (212) 866-6026

Mary Bauer
Southern Poverty Law Center, Inc
400 Washington Avenue
Montgomery, Alabama 36104
Telephone: (334) 956-8200
Fax: (334) 956-8481

D. Michael Dale
Northwest Workers' Justice Project
917 SW Oak, Suite 412
Portland, OR 97205
Telephone: (503) 535-8545
Fax: (503) 946-3089

Rachel Micah-Jones
Migrant Rights Center
P.O. Box 025250 #11540
Miami, Fl 33102-5250
Telephone: (800) 401-5901
Fax: 011 (52) 492 925 2511

Clermont L. Fraser
North Carolina Justice Center
P.O. Box 28068
Raleigh, NC 27611
Telephone: (919) 861-0606
Fax: (919) 856-2175 (fax)

Attorneys for Plaintiffs