UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Comité de Apoyo a los Trabajadores Agrícolas,
Pineros y Campesinos Unidos del Noroeste,
Northwest Forest Worker Center,
Saul Arreguin Ruiz, Jesus Martin Sauceda Pineda,
and Héctor Hernández Gomez

Plaintiffs

v.

Thomas E. Perez, in his official capacity as United States Secretary of Labor;
United States Department of Labor;
Eric M. Seleznow, in his official capacity as Acting Assistant Secretary for Employment and Training,

Defendants.

Civil No.

Complaint – Class Action

COMPLAINT – CLASS ACTION

PRELIMINARY STATEMENT

1. This is an Administrative Procedure Act (APA) challenge to certain actions of the United States Department of Labor (DOL) and the Department of Labor's Board of Alien Labor Certification Appeals (BALCA) acting on behalf of the Secretary of Labor. Specifically, Plaintiffs allege that the BALCA exceeded its authority and acted contrary to law in declaring certain actions, policies, and rules of the Secretary of Labor governing the H-2B program to be unlawful, including, inter alia, the Secretary of Labor's interpretation of the March 21, 2013 Order of the Court in Comité de Apoyo a los Trabajadores Agrícolas v. Solis, 933 F. Supp. 2d 700, 711-12 (E.D. Pa. 2013).

2. Plaintiffs Saul Arreguin Ruiz, Jesus Martin Sauceda Pineda and Héctor Hernández Gomez bring this action as a Fed. R. Civ. P. 23(b)(2) class action for declaratory and injunctive relief on behalf of the in excess of 50,000 U.S. and H-2B non-agricultural workers whose wages have been adversely affected by the unlawful actions of BALCA and the Department of Labor.

3. Plaintiffs seek:

a. A declaration that the actions of BALCA in its December 3, 2013 Matter of Island Holdings LLC appeal decision (BALCA Case No.: 2013-PWD-00002) are unlawful and an order vacating that decision;

b. An order enjoining the Secretary of Labor from applying that BALCA decision to any of the 3,095 other H-2B cases in which the National Prevailing Wage Center (NPWC), Office of Foreign Labor Certification (OFLC), Employment and Training Administration (ETA), United States Department of Labor issued supplemental prevailing wage determinations pursuant to the Department of Labor's April 24, 2013 Interim Final Rule (IFR) at 78 Fed. Reg. 24,047 (Apr. 24, 2013) and this Court's March 21, 2013 Order; and

c. A declaration that H-2B workers and similarly employed U.S. workers are lawfully entitled to be paid at the supplemental prevailing wage rates issued by the Secretary of Labor pursuant to the U.S. Department of Labor's April 24, 2013 Interim Final Rule and this Court's March 21, 2013 Order.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346 over this suit for review of final agency action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1946), and 28 U.S.C. § 2201 (declaratory relief).

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

PARTIES

Plaintiffs

6. Plaintiff Comité de Apoyo a los Trabajadores Agrícolas (CATA), known in

8. The Northwest Forest Worker Center (Center), which was formerly known as the

14. Defendant Eric M. Seleznow is the Acting Assistant Director of the United States Employment and Training and in that capacity directs DOL's Employment and Training Administration (ETA). He is sued in his official capacity pursuant to 5 U.S.C. § 703.

CLASS ACTION ALLEGATIONS

15. Plaintiffs Arreguin, Sauceda and Hernández bring this action as a Fed. R. Civ. P. 23(b)(2) class action on behalf of a class defined as:

> All H-2B and similarly employed U.S. workers whose employers received supplemental prevailing wage determinations (SPWDs) from DOL pursuant to the April 24, 2013 Interim Final Rule.

16. This class is so numerous that it is impractical to bring all its members before this Court. On information and belief, the class is believed to include in excess of 50,000 individuals employed pursuant to 3,098 ETA H-2B cases. DOL public disclosure data suggests that as many as 3,360 affected H-2B workers were employed in Pennsylvania in a total of 209 ETA H-2B cases.

17. There are questions of law and fact common to the class including the central question posed by this suit – whether the BALCA exceeded its lawful authority in declaring the Department of Labor's supplemental prevailing wage determinations to be unlawful and the other challenged actions of the Department of Labor.

18. The representative Plaintiffs' claims are typical of the claims of the other class members.

19. The representative Plaintiffs will fairly and adequately protect the interest of the class.

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relief, including invalidating and vacating BALCA's decision in Matter of Island Holdings LLC, is appropriate for the class as a whole.

FACTS

Statutory and Regulatory Framework

21. The H-2 temporary labor program was initially created by the Immigration and Nationality Act of 1952. Immigration Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), c. 477, 66 Stat. 166, § 101 (June 27, 1952) (INA). Visas for temporary workers in non-agricultural jobs were re-designated H-2B visas after enactment of the Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, 100 Stat. 3359, § 301(a) (Nov. 6, 1986) (IRCA).

22. Congress permits employers to import foreign workers to perform temporary non-agricultural services or labor only if "…unemployed persons capable of performing … services or labor cannot be found in this country." 8 U.S.C. § 1101 (a)(15)(H)(ii)(b).

23. The statute broadly charges the Attorney General – now the Department of Homeland Security (DHS)[1] – with determining, "upon petition of the importing employer," whether to grant an H-2B visa, but only "after consultation with appropriate agencies of the Government." 8 U.S.C. § 1184(c)(1). The Attorney General, in turn, has designated the United State Department of Labor (

24. Pursuant to this statutory and regulatory mandate, the Secretary of Labor has established rules and procedures governing the issuance of temporary labor certifications. 20 C.F.R. § 655.0(a); 73 Fed. Reg. 29,942 (May 22, 2008).

The H-2B Prevailing Wage Rule

25. Among other requirements for the issuance of a temporary labor certification, DOL has, for over half a century, required employers to offer wages no less than the prevailing wage in the occupation and location where the work is to be performed. This prevailing wage requirement is designed both to ensure accurate gauges of the availability of U.S. workers and to ensure that if permission is granted to employ foreign H-2B workers, their employment will not adversely affect the wages of similarly employed U.S. workers. See 16 Fed. Reg. 9142 (Sept. 7, 1951).

26. From the 1960s until 2005, DOL required the prevailing wage rate for the H-2 program generally to be at least the average wage paid to similarly employed U.S. workers in the area of intended employment. See Comité de Apoyo a los Trabajadores Agrícolas, et al., v. Solis, et al., No. 09-240, 2010 WL 3431761, labi

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Level I wages—wages based on the mean of the bottom one-third of all reported wages in a given occupation).

28. In 2008, DOL promulgated H-2B regulations that codified the "skill level" policy provided in its 2005 Wage Guidance. 73 Fed. Reg. 78,020, 78,056 (Dec. 19, 2008) ("2008 wage rule"); 20 C.F.R. § 655.10(b)(2) (2008).

29. H-2B workers and organizations representing H-2B and U.S. workers (including Plaintiffs CATA, PCUN, and the Center), challenged the 2008 skill level wage rule under the APA in CATA I v. Solis. See 2010 WL 3431761, at *1. On August 30, 2010, Judge Pollak of the Eastern District of Pennsylvania granted summary judgment to the plaintiffs in CATA I, finding that the "at the skill level" language used in the prevailing wage regulation at 20 C.F.R. § 655.10(b) (2008) was arbitrary and that the 2005 wage methodology used to implement it was unlawful because it was a legislative rule that had never been subject to notice and comment rulemaking. Id. at *25.

30. In response to Judge Pollak's Order, DOL published a new wage rule on January 19, 2011 with an effective date of January 1, 2012. 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 wage rule"). In the rulemaking, DOL made a factual finding that the use of skill level wages was adversely affecting U.S. workers because it "artificially lowers [wages] to a point that [they] no longer represent[] a market-based wage for the occupation." 76 Fed. Reg. at 3463.

31. Upon motion by the CATA I plaintiffs, the court invalidated the January 2012 effective date for the wage rule and ordered DOL to announce a new effective date within 45 days of the order "because of the critical importance of avoiding the depression of wages paid to U.S. and to H-2B workers." Id. at *5. After notice and comment rulemaking, DOL set a new effective date of September 30, 2011. 76 Fed. Reg. 37,686 (June 28, 2011) (NPRM); 76 Fed. Reg. 45,667 (Aug. 1, 2011) (final rule).

32. On April 14, 2011, in anticipation of the implementation of the 2011 wage rule, DOL published a Notice Modifying the ETA Form 9142 Appendix B.1 in the Federal Register, which all employers seeking certification for H-2B workers must sign. See 76 Fed. Reg. 21,036 (Apr. 14, 2011) ("Notice"). The Notice clarified that the prevailing wage employers must attest to pay is the wage that "is or will be" issued by DOL during the period of the certification. See 76 Fed. Reg. at 21,036.

33. Throughout the 2011 rulemaking process, DOL provided notice and an opportunity to comment on the fact that when the 2008 wage rule was replaced by a new wage rate employers currently certified for H-2B workers would be issued supplemental prevailing wage determinations and would be required to pay the new wage rate immediately. See 76 Fed. Reg. at 3462 (stating the new wage rule applies to work performed on or after the effective date); 76 Fed. Reg. at 37,688 (discussing the SPWD process in light of the proposed change in the rule's effective date); 76 Fed. Reg. at 45,669 (noting the NPWC will have to issue 4,000 SPWDs pursuant to the new wage rule). Employers submitted comments on the SPWD process and the requirement to pay the new wage rate upon the new rule's implementation and DOL considered those comments in its rulemaking. See 76 Fed. Reg. at 3452 (soliciting comments); 76 Fed. Reg. at 37,687 (same); 76 Fed. Reg. at 45,670-71 (discussing several employer comments on the SPWD process).

34. DOL delayed implementation of the 2011 wage rule numerous times in response to parallel lawsuits filed by employers and employer associations challenging the validity of the rule and repeated congressional appropriations measures barring DOL from using funding to implement the rule. See 76 Fed. Reg. 59,896 (Sept. 28, 2011); 76 Fed. Reg. 73,508 (Nov. 29, 2011); 76 Fed. Reg. 82,115 (Dec. 30, 2011), 77 Fed. Reg. 60,040 (Oct. 2, 2012), 78 Fed. Reg.

wage for a given occupation without skill le ls in compliance with this Court's vacatur and remand.

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Department to the employer for the entire period the work is performed." See ETA Form 9142, Appendix B.1.

41. In early May 2013, the DOL Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC), National Prevailing Wage Center (NPWC) began the process of issuing SPWD notices of the new IFR wage rates to H-2B employers who had received DOL H-2B labor certifications prior to April 2013. According to DOL, the NPWC completed this process in early August 2013.

42. DOL has indicated that the NPWC issued SPWD notices in 3,098 ETA cases. Information available from DOL's public disclosure database indicates that as many as 58,000 H-2B workers may have been employed in jobs subject to the SPWDs.

43. The SPWD notices stated that the IFR prevailing wage rate specified in the SPWD would be effective as of the date indicated on the SPWD. The notices stated that an employer could request a "redetermination" of the IFR wage rate listed in its SPWD within thirty (30) days from the date of the redetermination's issuance. The notices stated that such requests for redeterminations would be considered in accordance with procedures in 20 C.F.R. § 655.10(g)(1), which allows employers to submit "supplemental information" to the NPWC, but the SPWD notice limited the categories of supplemental information which would be appropriate to such requests for redetermination of the IFR prevailing wage rate. See 20 C.F.R. §655.10(g)(1); Ex. A.

44. The calculation of the IFR prevailing wage rate by the NPWC for each SPWD issued involved a purely ministerial act of identifying the published ETA OES mean wage rate under the ETA OES "All Industries database 7/2012 - 6/2013" for each geographic area of work identified by the employer in its initial application for prevailing wage determination for

the standard occupational classification (SOC Code) previously assigned to that position. The mean H-2B OES wage rate for each geographic area for each SOC code has been available to the public at http://www.flcdatacenter.com since July 1, 2012. See http://www.flcdatacenter.com/ChangeHistory.aspx.

45. Under the terms of the SPWD notices issued by the NPWC, the IFR prevailing wage rate specified in the SPWD became final agency action if no request for redetermination was filed within 30 days after the date of the issuance of the SPWD. See Ex. A. As of August 23, 2013 DOL reported that in 1,400 out of the 3,098 ETA cases in which SPWDs were issued, employers had filed requests for redeterminations. As of that date, in 1,698 ETA cases employers had not filed requests for redeterminations. In each case where no timely request for redetermination was received by the NPWC, the prevailing wage rate specified in the SPWD was required to be paid by the H-2B employer for work performed after the date specified on the SPWD.

46. The NPWC has reviewed all 1,400 ETA cases in which employers requested redetermination, considered any information offered in support of such requests, and issued decisions on those requests for redetermination

48. On the contrary, since July 26, 2013 DOL through the NPWC has included in determinations rejecting employe

during the pendency of the employer's request for redetermination. DOL has also permitted employers who requested further review by the NPWC Center Director after their request for redetermination was denied to continue paying the invalid 2008 wage rate pending review by the NPWC Center Director.

Island Holdings LLC Appeals

52. On May 6, 2013 DOL issued three SPWDs to Island Holdings LLC, an H-2B employer located in Massachusetts, for housekeepers, cooks, and servers. See Ex. A.

53. In accordance with the instructions in the May 6, 2013 notice, Island Holdings LLC filed requests for redetermination of the SPWD on May 13, 2013. Island Holdings Housekeeper AF 1356-13[3]57.

54. Thereafter, on May 23, 2013 Island Holdings LLC filed an Emergency Motion before the Department of Labor's Board of Alien Labor Certification (BALCA) requesting direct review by BALCA of the three SPWDs. Island Holdings LLC argued that regulations at 20 C.F.R. §655.10(g) and 655.11 did not apply to SPWDs issued by the NPWC pursuant to the IFR.

55. On June 6, 2013 the NPWC filed a Request for En Banc Consideration by BALCA urging the Board to review this matter en banc "because [it] involves a matter of exceptional importance which could impact a significant number of additional cases and expose the Department to sanctions from a U.S. District Court."

56. On June 20, 2013 BALCA issued an order granting en banc review and permitting participation by amici curiae. See Ex. D. On July 2, 2013, BALCA remanded the request for

[3] Plaintiffs request the Defendants file the record from the three Island Holdings LLC appeals to the BALCA with this Court and are therefore not attaching as exhibits documents in the record before BALCA.

review of the three Island Holdings LLC SPWDs to the NPWC for further review before consideration by BALCA.

57. On July 26, 2013, the NWPC denied the requests for redetermination and affirmed Island Holding LLC's SPWDs as having been correctly issued in conformity with the IFR. See Ex. B. Island Holdings LLC sought review of this decision by the NPWC Center Director. On August 20, 2013 three NPWC Center Director decisions were issued on cases involving Island Holdings, LLC upholding the initial SPWDs. See Ex. C.

58. In no other cases have such NPWC Center Director determinations been issued and all other employers who sought review of denials of their requests for redetermination remain pending before the NPWC Center Director.

59. The NPWC Center Director determinations issued on August 20, 2013 to Island Holding, LLC stated that:

> Should the employer disagree with this determination, the employer may ... request review by the Board of Alien Labor Certification Appeals (BALCA) under 20 CFR § 655.11 within 30 days of the date of this letter by sending the request to U.S. Department of Labor-ETA, Foreign Labor Certification, National Prevailing Wage Center, Attn: PWD Appeal, 1341 G Street, Suite 201, Washington D.C. 20005-3105.

60. In accordance with that notice on August 30, 2013, Island Holdings filed an appeal of the NPWC Center Director decision to BALCA.

BALCA's December 3, 2013 Decision

61. The BALCA was initially established by 20 C.F.R. Part 656. See 52 Fed. Reg. 11,217-19 (Apr. 8, 1987). BALCA consists of Administrative Law Judges ("ALJs") whose authority is limited by regulation and the delegation of authority granted by the Secretary of Labor, see 20 C.F.R. §§ 656.26-27, and the APA, 5 U.S.C. § 556(c). See also 20 C.F.R. §§ 655.11(e) and 655.33.