# APPENDIX

**Appendix A – Court of Appeals Opinion**

**983 F.3d 671**

**OUTDOOR AMUSEMENT BUSINESS ASSOCIATION, INC. ; Maryland State Showmen's Association, Inc.; The Small and Seasonal Business Legal Center; Lasting Impressions Landscape Contractors, Inc.; Three Seasons Landscape Contracting Services, Inc; New Castle Lawn & Landscape, Inc., Plaintiffs – Appellants,**

**v.**

**DEPARTMENT OF HOMELAND SECURITY; United States Citizenship and Immigration Services; Department of Labor; Employment & Training Administration; Wage & Hour Division, Defendants – Appellees,**

**Margharita Kuri; Timothy King; Henry Wojdylo; Ronald Nyenhuis; Shirley Harmon; Antonio Rivera Martinez; Andrew Mitschell; Comité de Apoyo a Los Trabajadores Agricolas (CATA); Pineros y Campesinos Unidos del Noroeste ; Northwest Forest Workers Center, Amici Supporting Appellees.**

**No. 18-2370**

**United States Court of Appeals, Fourth Circuit.**

**Argued: September 10, 2020**
**Decided: December 18, 2020**

ARGUED: Robert Wayne Pierce, PIERCE LAW FIRM, Annapolis, Maryland; Leon R. Sequeira, Arlington, Virginia, for Appellants. Kathryne M. Gray, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Clermont Fraser Ripley, NORTH CAROLINA JUSTICE CENTER, Raleigh, North Carolina, for Amici Curiae. ON BRIEF: Joseph H. Hunt, Assistant Attorney General, William C. Peachey, Director, Erez Reuveni, Assistant Director, Glenn M. Girdharry, Assistant Director, Joshua S. Press, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Edward Tuddenham, Paris, France; Art Read, JUSTICE AT WORK, Philadelphia, Pennsylvania; Vanessa Coe, LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC., West Palm Beach, Florida; D. Michael Dale, NORTHWEST WORKERS' JUSTICE PROJECT, Portland, Oregon, for Amici Comité de Apoyo de Los Trabajadores Agricolas (CATA), et al.

Before KEENAN, WYNN, and RICHARDSON, Circuit Judges.

Affirmed in part and vacated in part by published opinion. Judge Richardson wrote the opinion, in which Judge Keenan and Judge Wynn joined.

RICHARDSON, Circuit Judge:

H-2B visas provide vital employees for employers who need temporary nonagricultural workers but cannot find help domestically. Each year, H-2B visas allow 66,000 temporary workers to enter the country to meet those demands. A core part of the H-2B visa program is labor certifications—the process of determining whether American workers are available and whether employment of H-2B workers would adversely affect similarly employed American workers.

For at least 50 years, the agency in charge of H-2B visas relied on the Department of Labor to provide labor certifications. In 2008, the Department of Homeland Security (the agency now charged with administering the H-2B program) passed rules requiring that employers receive a favorable labor certification from Labor (as Homeland Security's chosen

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"consulting agency") before obtaining a visa. To implement and structure this labor-certification process, Labor promulgated several program and wage regulations. This set off an avalanche of litigation that led to Homeland Security and Labor jointly issuing a new series of rules in 2015.

Plaintiffs, a group of employers and associations whose members rely on H-2B visas, challenge Homeland Security's 2008 Rules and the joint 2015 Rules as exceeding the agencies' statutory authority. We agree with the district court that the challenge to the 2008 Rules is time-barred. We conclude that Plaintiffs lack standing to challenge the 2015 Enforcement Rules and therefore vacate the district court's decision on the merits as to those rules. But we agree with the district court that the remaining Rules—the 2015 Program and Wage Rules—were properly promulgated.

## I. Background

Plaintiffs are a group of employers and associations whose members rely on H-2B visas to find workers for their temporary nonagricultural jobs ("Employers"). Employers sued to challenge a series of regulations promulgated by Homeland Security and Labor governing the H-2B program. Employers claim that these rules exceeded the Government's statutory authority. *See* 5 U.S.C. §§ 558 and 706(2)(C). Employers argue that several of its named members have been harmed by these "unworkable" Rules, as the Rules have increased compliance costs, caused delays, and led to bankruptcies, layoffs, and breaches of contract. Supplemental Br. of Employers 1. And Outdoor Amusement, an organization representing some of the Employers, alleges that it

has lost members and diverted resources to educate and ensure their remaining members comply. *Id* . at 10.

The first set of challenged rules are Homeland Security's 2008 Rules. Those Rules require an employer to receive a favorable labor certification from Labor before submitting an H-2B petition to Homeland Security. 8 C.F.R. § 214.2(h)(6) ; 73 Fed. Reg. 78,104, 78,129.[1] Before these Rules, employers still had to seek a labor certification, but they could request a review by Homeland Security if they were denied. 31 Fed. Reg. 4446 (Mar. 16, 1966) ; 8 C.F.R. § 214.2(h)(6)(iv)(D), (E) (2008) ; *see also G.H. Daniels III & Assocs., Inc. v. Perez* , 626 F. App'x 205, 207 (10th Cir. 2015). Under the 2008 Rules, however, Homeland Security would not consider granting an H-2B petition if Labor denied the employer a labor certification. 8 C.F.R. § 214.2(h)(6)(iii)(C). If Labor refused to issue a certification, an employer's only recourse after the 2008 Rules was to appeal within Labor to obtain a certification. 8 C.F.R. § 214.2(h)(6) ; 73 Fed. Reg. 78,063, 78,104, 78,129. Employers argue that the 2008 Rules abrogate Homeland Security's statutory duty to be the agency determining every petition by making petitions contingent on a favorable labor certification from Labor.

The Employers also challenge two sets of rules from 2015: the 2015 Program Rules establishing the

standards governing the labor-certification-application process, 80 Fed. Reg. 24,042, and the 2015 Wage Rules setting the standards for determining prevailing wages to be paid to H-2B workers, 80 Fed. Reg. 24,146. Employers contend that these 2015 Program and Wage Rules exceed Homeland Security and Labor's statutory authority because Homeland Security cannot pass rules

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about labor certifications controlling Labor and Labor lacks authority to issue any rules governing its own conduct in granting the labor certifications.

The district court rejected these challenges and granted summary judgment upholding the regulations.

**A. Statutory framework and history**

Congress passed the Immigration and Nationality Act ("INA") in 1952 to collect and reorganize existing immigration law. 66 Stat. 163, 168 (1952), now 8 U.S.C. § 1101 *et seq* . As part of this law, Congress gave the Attorney General authority to administer and enforce laws and regulations about the admission of aliens. 8 U.S.C. § 1103(a)(1). Congress later transferred this authority to the Secretary of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178

(2002). The Secretary is given broad authority over immigration: "The Secretary of Homeland Security [is] charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). And Congress has directed the Secretary to "establish such regulations ... and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." § 1103(a)(3).

One of the Homeland Security Secretary's duties is administering the nonimmigrant H-2 Visa Program for temporary unskilled workers. 8 U.S.C. § 1184(c)(1). In administering this program, "any specific case or specific cases shall be *determined* by the [Secretary], after *consultation with appropriate agencies* of the Government, upon petition of the importing employer." *Id* . (emphasis added). The employer's petition must be approved for an H-2 visa to be granted. And that "petition *shall be in such form and contain such information as the [Secretary] shall prescribe* ." *Id.* (emphasis added).

Congress has bifurcated the H-2 visa program for temporary foreign workers. *See* 8 U.S.C. § 1101(a)(15)(H)(ii) (a) – (b). The first piece, H-2A, provides visas for temporary *agricultural* workers. The second, H-2B, permits employers to hire

temporary *nonagricultural* workers. This case concerns this second visa program, H-2B.

H-2B visas are statutorily available for those aliens (1) "having a residence in a foreign country which [they] ha[ve] no intention of abandoning" and (2) "who [are] coming temporarily to the United States to perform other [nonagricultural] temporary service or labor," but only (3) "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). And whether these three criteria are satisfied must be "determined" by the Secretary of Homeland Security "after consultation with appropriate agencies." 8 U.S.C. § 1184(c)(1).

**B. Regulatory framework and history**

Historically, the Attorney General had chosen to consult with Labor to determine "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b) ; 31 Fed. Reg. 4446, 6611 (1966) ; 18 Fed. Reg. 4925 (1953) ; 38 Fed. Reg. 35,427 (1973).[2] And, as the consulting

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agency, Labor issued various letters determining the standards for labor certifications. *See LFA* , 889 F. Supp. 2d at 715–17 (collecting various letters).

In 2008, Homeland Security promulgated rules, after notice and comment, that formalized the process by requiring a certification from Labor that the employer's temporary jobs could not be filled with American workers and that H-2B workers would not adversely affect similarly employed American workers. 8 C.F.R. § 214.2(h)(6)(iii)(A). Without that certification, the new rules barred Homeland Security from considering a petition for H-2B visas. § 214.2(h)(6)(iii)(C).[3] The standards Labor was to use in issuing a certification remained largely the same: whether there are enough American workers who can fill the positions and whether the employment of nonimmigrants will adversely affect wages of similarly employed Americans. § 214.2(h)(6)(iii)(A).

Along with Homeland Security's labor-certification requirement, Labor promulgated Wage Rules setting the methodology for how to calculate the prevailing wages to be paid to the H-2B workers. These rules were met with a flurry of litigation and several orders about their legality. A district court held that those Wage Rules violated the APA and gave Labor 120 days to issue new rules. *Comite de Apoyo a los Trabajadores Agricolas v. Solis* , No. 09-240, 2010 WL 3431761, at *27 (E.D. Pa. Aug. 30, 2010). But Labor continued using these rules until a district court enjoined it in 2013. *Comite de Apoyo a los Trabajadores Agricolas v. Solis* , 933 F. Supp. 2d 700, 716 (E.D. Pa. 2013).

Around the same time the courts enjoined the 2008 Wage Rules, Labor issued rules establishing the procedures for issuing labor certifications. These rules were also challenged with mixed results. The Eleventh Circuit enjoined them, finding that Labor lacked authority to issue rules with respect to the H-2B program. *Bayou Lawn & Landscape Servs. v. Sec'y of Labor* , 713 F.3d 1080, 1085 (11th Cir. 2013) ; *see also Bayou Lawn & Landscape Servs. v. Perez* , 81 F. Supp. 3d 1291, 1300 (N.D. Fla. 2014) (vacating the rules on the same grounds) (mooted by the 2015 Rules). But the Third Circuit rejected a similar challenge, finding Labor did have rulemaking authority based on congressional acquiescence.

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*La. Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor (LFA)* , 745 F.3d 653, 669 (3d Cir. 2014). To resolve the regulatory gap created by the various injunctions, Labor proposed more rulemaking to determine prevailing wages and continued using the 2008 procedural rules. But the 2008 Rules were again enjoined by another district court. *Perez v. Perez* , No. 14-cv-682, 2015 U.S. Dist. LEXIS 27606 (N.D. Fla. Mar. 4, 2015). Because of the various court orders, "Labor ceased operating the H-2B program." 80 Fed. Reg. 24,151.

To restart the H-2B program, Homeland Security and Labor jointly promulgated the 2015 Program

and Wage Rules. *See* 80 Fed. Reg. 24,045 (noting the agencies acted jointly "[t]o ensure that there can be no question about the authority for and validity of the regulations in this area"). First, Homeland Security and Labor issued the 2015 Program Rules establishing "the process by which employers obtain a temporary labor certification" from Labor for use in petitioning Homeland Security. 80 Fed. Reg. 24,042. Second, they issued the 2015 Wage Rules establishing the methodology by which Labor "calculates the prevailing wages to be paid to H-2B workers." 80 Fed. Reg. 24,152. These 2015 Rules were both promulgated under the "good cause" exception to full notice-and-comment rulemaking. 80 Fed. Reg. 24,047, 24,152. Although not required, the agency still took and reviewed public input. 80 Fed. Reg. 24,050, 24,153. The Rules rested on the same statutes that the regulations promulgated in 1968 had, along with various regulations. 8 U.S.C. §§ 1101, 1103, 1184 ; 8 C.F.R. § 214.2 ; *see* 80 Fed. Reg. 24,108 ; 20 C.F.R. § 655 (2015 Program Rules); 80 Fed. Reg. 24,184 ; 20 C.F.R. § 655 (2015 Wage Rules).

The 2015 Rules have also been challenged. The Government has already prevailed in two cases challenging the new rules. *See Comite de Apoyo a los Trabajadores Agricolas v. Perez,* 148 F. Supp. 3d 361, 364 (D.N.J. 2015) (finding plaintiffs lacked standing); *Bayou Lawn & Landscape Servs. v. Johnson* , 173 F.

Supp. 3d 1271, 1276 (N.D. Fla. 2016) (rejecting APA procedural challenges). Even so, Employers here challenge the 2008 and 2015 Rules as exceeding the agencies' authority.

**C. Procedural history**

Employers sought declaratory and injunctive relief, and both parties cross moved for summary judgment. The district court noted in passing that Employers had standing and then found that their challenges to the 2008 Rules were time-barred. *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.* , 334 F. Supp. 3d 697, 713 (D. Md. 2018). In any event, the court found that Homeland Security could adopt the 2008 Rules under *Chevron* because Homeland Security could reasonably interpret its "consultation with appropriate agencies" to allow it to require Labor's certifications as a condition precedent. *Id* . at 716. The court found that locating the authority for the 2015 Rules was trickier but ultimately upheld them based on congressional acquiescence to Labor's continued role in the program. *Id* . at 719. The court granted the government's motion for summary judgment, thereby upholding the regulations. Employers timely appealed the district court's final order. The district court had federal-question jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291.

## II. Discussion

We review de novo the district court's grant of summary judgment. *J.D. ex rel. Doherty v. Colonial Williamsburg Found.* , 925 F.3d 663, 669 (4th Cir. 2019). And the issues raised on appeal are all legal questions that we review de novo: standing,

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*S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC* , 713 F.3d 175, 181 (4th Cir. 2013) ; statute of limitations, *Cruz v. Maypa* , 773 F.3d 138, 143 (4th Cir. 2014) ; and APA challenges to statutory authority, *Perez v. Cuccinelli* , 949 F.3d 865, 872 (4th Cir. 2020). Because standing implicates our Article III power to hear the case, we must resolve it first. *Hein v. Freedom From Religion Found., Inc.* , 551 U.S. 587, 597, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007).

### A. Justiciability

To establish standing, the Employers must show: (1) a concrete and particularized injury that is actual or imminent, (2) a causal connection between the injury and the defendant's conduct, and (3) a likelihood that a court could redress the injury. *Lujan v. Defs. of Wildlife* , 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). A plaintiff has the burden to "demonstrate standing for each claim he seeks to

press" and "for each form of relief" sought. *Davis v. Fed. Election Comm'n* , 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008).

Employers seek to enjoin the 2008 and 2015 Rules. To have standing to seek an injunction, Employers must show they are in immediate danger of sustaining some direct injury. *City of Los Angeles v. Lyons* , 461 U.S. 95, 101–02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Mere "[p]ast exposure to illegal conduct does not in itself show a present case." *Id* . at 103, 103 S.Ct. 1660. That said, "continuing, present adverse effects" from past illegal conduct can suffice, and past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. *O'Shea v. Littleton* , 414 U.S. 488, 495–496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). "The prospect of future injury becomes significantly less speculative where, as here, plaintiffs have identified concrete and consistently-implemented policies claimed to produce such injury." *In re Navy Chaplaincy* , 697 F.3d 1171, 1176–77 (D.C. Cir. 2012). Similarly, the more "concrete" the plan and the "specification of when" plaintiffs will act and face these policies makes a future injury more imminent. *Lujan* , 504 U.S. at 564, 112 S.Ct. 2130.

Employers received every labor certification and visa they requested. But their injury stems from the alleged costs and delays that come from the new

rules. Employers offer specific facts that several of their members faced increased compliance costs because of the new regulations and delays in getting workers, which caused layoffs, lost revenue, contractual defaults, and even bankruptcy. Supplemental Br. of Employers 2, 10; Chiecko Aff. 2–5. Outdoor Amusement itself says the regulations have hurt membership, reduced dues, diverted resources, and increased litigation costs. *Id* .

**1. There is standing to challenge the 2008 Rules but the challenge is time-barred**

The Government argues that no plaintiff has standing to challenge the 2008 Rules because none of them were ultimately denied labor certifications or visas. Thus, their only injuries stem from compliance costs and delays, so enjoining the 2008 Rules would not remedy their injuries because they would still have to get a labor certification under the preexisting rules. 8 C.F.R. § 214.2(h) (1968) ; 20 C.F.R. § 621.3 (1968) ; 33 Fed. Reg. 7570–71 (1968) ; 38 Fed. Reg. 35,427 (1973). The only difference would be that Homeland Security could review denials of certifications. But the Government argues that Employers did not have any certifications denied, so an injunction would not redress their injuries. *G.H. Daniels* , 626 F. App'x at 207 ;

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31 Fed. Reg. 4446, 6611 (1966) (countervailing evidence allowed).

There is, however, one plaintiff who claims injuries that could be redressed by enjoining the 2008 Rules. And only one plaintiff needs to have standing for a court to hear the case. *Bowsher v. Synar* , 478 U.S. 714, 721, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). Plaintiff Three Seasons, a landscaping company, was at first denied a labor certification for failure to comply with the 2015 Rules. After that denial, it was required by Labor to re-apply as a job contractor. J.A. 101–02. By the time Three Seasons re-applied and jumped through all of Labor's hoops to receive a certification, half the season was over, and the workers did not arrive in time. *Id.* Without the 2008 Rules, Three Seasons could have gone to Homeland Security directly and offered countervailing labor-market evidence after Labor denied certification, potentially avoiding the re-application process and the costly procedures and delay that accompany it. *G.H. Daniels* , 626 F. App'x at 207 ; 31 Fed. Reg. 4446, 6611 (1966) (countervailing evidence allowed); 38 Fed. Reg. 35,427 (1973) (same). But under the 2008 Rules, Three Seasons had to re-apply and meet Labor's other demands to get a labor certification before they could even petition Homeland Security. 8 C.F.R. § 214.2(h)(6).

While it is true that mere "past exposure to illegal conduct does not in itself show a present case," *Lyons* , 461 U.S. at 103, 103 S.Ct. 1660, this past exposure evidences a non-speculative threat of future injury. Three Seasons will continue to seek H-2B visas in the upcoming season and will again be subject to the 2008 Rules when they do. And where a policy that produced a plaintiff's prior injuries remains in effect, "[t]he prospect of future injury becomes significantly less speculative." *Navy Chaplaincy* , 697 F.3d at 1176–77 ; *Lyons* , 461 U.S. at 105–06, 103 S.Ct. 1660 (the existence of a policy authorizing the injurious conduct and a high likelihood of again being subject to that policy suffices to establish standing). The 2008 Rules facilitated Three Seasons' injury and will continue to facilitate potential future injuries. *Id* . Indeed, the nature of Labor's inquiry confirms that Three Seasons could be denied again. If there are "United States workers capable of performing the temporary services" for Three Seasons one year, there will likely be workers available the next. 8 C.F.R. § 214.2(h)(6)(iii)(A). Similarly, if Three Seasons employing aliens "will adversely affect the wages and working conditions of similarly employed United States workers" one year, it is highly likely that its doing so the next year will lead to similar adverse effects. 8 C.F.R. § 214.2(h)(6)(iii)(A). Moreover, if the evidence Three Seasons needs to provide to get a labor certification is difficult to produce or if Labor in its discretion discounts some of

Three Seasons' countervailing evidence that Homeland Security could consider, then it is not speculative to surmise that it may be forced to reapply in the future. Thus, because Three Seasons faced increased delays and costs one year, those injuries were caused by the 2008 Rules, and Three Seasons continues to seek H-2B visas and be subject to the 2008 Rules, there is enough evidence to show an immediate future injury to establish standing for an injunction.

But even with standing, Employers still must bring their case within the applicable statute of limitations. Employers brought a facial challenge against the 2008 Rules in 2016, eight years after they were promulgated. 73 Fed. Reg. 78,104. The law is clear, however, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of

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action first accrues." 28 U.S.C. § 2401(a). The Fourth Circuit has held that when "plaintiffs bring a facial challenge to an agency [action] ... the limitations period begins to run when the agency publishes the regulation." *Hire Order Ltd. v. Marianos* , 698 F.3d 168, 170 (4th Cir. 2012).[4] The claim is facial, as Employers are seeking to enjoin the Rules as improperly issued. As a result, the statute of limitations began to run eight years before this suit

was filed. As the challenge needed to be brought within six years, 28 U.S.C. § 2401(a), the challenge to the 2008 Rules is barred.[5]

**2. There is standing to challenge the 2015 Program and Wage Rules**

The challenges to the 2015 Program and Wage Rules, however, may go forward. Employers have provided enough specific facts to show that the 2015 Program and Wage Rules have harmed them and that they will continue to harm them in the future. Employers have proffered evidence that the Rules will cost over a billion dollars in ten years. And they have shown that the delays and compliance costs of dealing with the wage calculations, increased wages, and procedures for the labor certifications have cost them and their members greatly. *Id* . The harms include contractual defaults and damages, layoffs, understaffing of up to 30%, lost customers, and even bankruptcy. J.A. 30–34, 64–66. Three Seasons lost most of its customers and supervisors because of delays. J.A. 102. Plaintiff Lasting Impressions had to file for bankruptcy and lost 30% of its customers. J.A. 99. Such compliance costs and economic harms related to regulations are cognizable injuries. *Hunt v. Wash. State Apple Advert. Comm'n* , 432 U.S. 333, 347, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Outdoor Amusement also claims that over 100 members have used the H-2B visa program and plan to do so again.

Chiecko Aff. 2–5. Many of their members have received visas several years in a row and will continue to seek visas, facing similar costs in the future. *Id* . Lasting Impressions, for example, has received 12 visas in both of the last 2 years. Appellee's Supplemental Br. at Exhibit B. Many cases reviewing challenges to these or similar regulations have found similar facts enough to confer standing. *See, e.g.* , *Bayou* , 173 F. Supp. 3d at 1282 ; *LFA* , 889 F. Supp. 2d at 720 ; *Comite de Apoyo a los Trabajadores Agricolas* , 2010 WL 3431761, at *5.

This evidence suffices to show injury in fact for the 2015 Program and Wage Rules and to show a likelihood of future harm. Employers have provided evidence of past injuries from these regulations in the form of compliance costs and delays and have made credible allegations that many Employers will continue to apply for H-2B

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visas. *See Steffel v. Thompson* , 415 U.S. 452, 459–60, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ; *see also Babbitt v. United Farm Workers Nat'l Union* , 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). It is also clear when this future harm will occur: when they apply for visas in the upcoming season. Employers must either forgo seeking the benefits of H-2B visas or face costly delays and compliance costs. *See Virginia v. Am. Booksellers Ass'n, Inc.* ,

484 U.S. 383, 386, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). All told, it is likely that Employers face a concrete prospect of future harm, and they therefore have standing to seek an injunction.

Further, Outdoor Amusement has standing to sue on behalf of its injured members. An association has associational standing when at least one of its "identified" members "would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.* , 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The Supreme Court has regularly found associational standing for trade associations when an injunction would benefit many of their members. *Hunt* , 432 U.S. at 342, 97 S.Ct. 2434. As shown above, at least some of Outdoor Amusement's members have individual standing. And Outdoor Amusement represents and educates trade members, many of whom use H-2B visas. An injunction reducing delays and costs in the issuance of H-2B visas would therefore benefit many of its members without requiring any member's individual participation in the suit. Because Outdoor Amusement has associational standing, we need not address whether they have organizational standing.

* * *

Employers' challenges to the 2015 Program and Wage Rules are their only justiciable claims.[6] We therefore turn to the merits of those issues.

**B. The 2015 Program and Wage Rules are valid**

Executive agencies have broad, but not unlimited, authority to administer their programs. Employers argue that Homeland Security and Labor have exceeded their statutory authority to administer the H-2B program by promulgating the 2008 Rules and the 2015 Program and Wage Rules. 5 U.S.C. §§ 558, 706(2)(C).

Because the challenge to Homeland Security's 2008 Rules is time-barred, we need not decide whether Homeland Security may interpret "consultation" to require a

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favorable labor certification from Labor before considering an H-2B petition.[7] But for that labor-certification process, we must decide whether Homeland Security or Labor had statutory authority to promulgate the 2015 Program and Wage Rules. We find they did. The statutory circumstances reveal that Congress implicitly delegated Labor rulemaking authority to administer its labor certifications as part of its duty as the consulting agency.

As Employers point out, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.* , 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).[8] But that delegation need not be express, "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *United States v. Mead Corp.* , 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). The "power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz* , 415 U.S. 199, 231, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). When a gap exists, "a court may assume that Congress implicitly delegated the interpretive function to the agency." *Public Citizen v. F.T.C.* , 869 F.2d 1541, 1553 (D.C. Cir. 1989) ; *see also Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.* , 940 F.2d 685, 691 (D.C. Cir. 1991) (finding that the Legal Services Corporation has an implied delegation to rulemake). And in filling these gaps, agencies can choose between rulemaking and adjudications. *Morton* , 415 U.S. at 232, 94 S.Ct. 1055 ; *Sec. & Exch. Comm'n v.*

*Chenery Corp.* , 332 U.S. 194, 202–03, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) ( *Chenery II* ).

The broad statute here leaves gaps to be filled. The relevant section says that "any specific case or specific cases shall be determined by the [Secretary], *after consultation with appropriate agencies* of the Government, upon petition of the importing employer. ... The petition shall be in such form and contain such information as the [Secretary] shall prescribe." 8 U.S.C. § 1184(c)(1) (emphasis added). Congress made its intent clear that a consulting agency or agencies chosen by Homeland Security would help Homeland Security in considering petitions for H-2B visas. In doing so, Congress left gaps in the form of consultation, the identity of the consulting agency or agencies, and the content of the petitions. *Id* . Homeland Security has used the resulting discretion to fill these three

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gaps: Homeland Security chose Labor as the appropriate agency; determined that it would consult with Labor through labor certifications; and decided that the petitions must include an *approved* labor certification, along with other evidence such as a statement of the employer's need and the alien's qualifications. 8 C.F.R. § 214.2(h)(6)(iii) ; 8 C.F.R. § 214.2(h)(6)(vi). Homeland Security's choice to fill the statutory gaps by consulting with Labor through

labor certifications reflects a consistent practice for H-2 visas that various agencies have engaged in since at least 1968. *See* 8 C.F.R. § 214.2 (1968) ; *see also* 18 Fed. Reg. 4925 (1953) ; 38 Fed. Reg. 35,427 (1973) ; 8 C.F.R. § 214.2(h)(6).

Once Homeland Security used its discretion to consult with Labor through labor certifications, this imposed a duty on Labor as the consulting agency to administer the grant of those certifications. Once designated as the consulting agency, Labor still faced statutory gaps in how to administer the consultation. This "necessarily requires the formulation of policy and the making of rules to fill" that statutory gap. *Morton* , 415 U.S. at 231, 94 S.Ct. 1055. And Labor may choose rulemaking to structure the certification process. *See Chenery II* , 332 U.S. at 202–03, 67 S.Ct. 1760. Indeed, courts—and the regulated community—often prefer rulemaking to adjudication for the former's transparency, public input, notice, process, review, and stability. *See id* . (advocating rulemaking over adjudications); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy* , 78 HARV. L. REV. 921, 929–42 (1965) (same). The alternative is for Labor to use an unstructured ad hoc process or return to informal guidance letters, both of which could lead to further delays, costs, and reduced accountability through shifting determinations. *See LFA* , 889 F. Supp. 2d at 716–17 (collecting various

letters). But Congress adopted the APA to provide agencies with procedures that avoid "the inherently arbitrary nature of unpublished ad hoc determinations." *Morton* , 415 U.S. at 232, 94 S.Ct. 1055.

The statutory provisions surrounding § 1184(c)(1) show that Labor possesses implicit rulemaking authority. For example, the definition of H-2B explains that an H-2B visa may be obtained only if American workers cannot be found to fill the relevant jobs. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). This section leaves a gap as to how to determine when U.S. workers are available. Homeland Security has sensibly chosen to rely on Labor's expertise in the labor market to make a two-part determination for issuing a labor certification: "whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." 8 C.F.R. § 214.2(h)(6)(iii)(A). Neither judgment is self-evident. To fulfill its consultative duty, Labor could make rules to define how it would judge whether American workers were available and whether foreign workers would impact American workers' wages. So the 2015 Program and Wage Rules provide guidance, setting the standards for calculating wages, identifying the information required, identifying the minimum hours and wages

required, and detailing the obligation to seek American workers first. 20 C.F.R. §§ 655.10, 655.16, 655.18, 655.20.

Congress has also given Labor varying degrees of control and responsibility over labor certifications in other parts of the INA, including H-2A visas. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (H-2A nonimmigrant agricultural worker); § 1184(c)(1) ;

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§ 1188(a)(1) (H-2A); § 1182(a)(5) (permanent labor certifications); § 1182(n) (H-1B nonimmigrant workers). For these visas, Labor can promulgate rules. *See* 20 C.F.R. § 655.700 –60 (H-1B regulations); 20 C.F.R. § 656.10 – 32 (permanent labor certifications); *Mendoza* , 754 F.3d at 1021 (noting that Labor has legislative rulemaking authority for H-2A but this means they must go through notice and comment); *Kutty v. U.S. Dep't of Labor* , 764 F.3d 540, 547–48 (6th Cir. 2014) (acknowledging Labor rulemaking authority for H-1B). In a similar case, the Seventh Circuit found that Labor has "inherent" authority to promulgate rules for permanent labor certifications because part of the INA required such certifications. *Prod. Tool Corp. v. Emp. & Training Admin., U.S. Dep't of Labor* , 688 F.2d 1161, 1166–67 (7th Cir. 1982). There, the court upheld regulations requiring employers to have unsuccessfully advertised a job opportunity to

American workers to get a certification despite Labor lacking express rulemaking authority. *Id* . Labor promulgated similar rules here. 20 C.F.R. §§ 655.10 – 20. So a statutory basis for Labor to issue labor certifications grants Labor the inherent authority to pass regulations governing them. And that implicit delegation to promulgate rules similarly applies based on the statutory consulting duty under H-2B. Rules are just as necessary for the administration of Labor's role under each type of visa. *LFA* , 745 F.3d at 674.

Employers counter with the *expressio unius* canon: because Congress chose Labor as the consulting agency and defined its role elsewhere in the INA, the fact that Congress did not do so here means Congress meant to preclude Labor from occupying a similar role for H-2B visas. *See Bayou Lawn & Landscape* , 713 F.3d at 1084–85 (relying on similar reasoning to determine that Labor does not have rulemaking authority). The Supreme Court has said that Congress must "clearly delineate[ ] the general policy, *the public agency* which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States* , 488 U.S. 361, 372–73, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (emphasis added). And Employers argue that this is a clear statement rule that requires a statute to identify the agency by name. Employers also argue that there is a presumption that only one agency will have

authority to promulgate rules under a statute, a presumption that they contend serves to avoid the promulgation of conflicting rules. *See Union Pac. R.R. Co. v. Surface Transp. Bd.* , 863 F.3d 816, 826 (8th Cir. 2017). So Employers claim that Homeland Security has sole rulemaking authority because Labor is neither named nor given functions specifically for the H-2B program (in contrast with other provisions of the INA that specify Labor as the agency to perform certain functions).

These contentions fail for two reasons. First, the existence of unconstrained discretion under H-2B does nothing to imply that Labor could not be chosen for the same role it has elsewhere. The D.C. Circuit rejected a similar *expressio unius* argument where one part of a statute provided procedures for handling competing bids but another section was silent. *Cheney R. Co. v. ICC* , 902 F.2d 66, 68–69 (D.C. Cir. 1990). The court explained that "the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion." *Id* . (emphasis omitted). Here, the same section requires Homeland Security to engage in "consultation with appropriate agencies" for H-2B and H-2A visas. 8 U.S.C. § 1184(c)(1). That section then goes on to explicitly define the appropriate agencies for H-2A as Labor or Agriculture

and other sections outline the form of that consultation. 8 U.S.C. § 1184(c)(1) ; § 1188(a). But the same sections are silent on the agency and type of consultation for H-2B visas. This implies discretion, not limitation. *See Cheney* , 902 F.2d at 68–69. Surely Congress did not intend to give the consulting agency Homeland Security chooses for H-2B less power than Labor in its consulting role for H-2A when Congress used the same word in the same section but did not direct how that consultation can be done.

History also supports our reading. Labor has been consulting through labor certifications and has promulgated rules governing the certifications since at least 1968, before H-2A and H-2B were divided. 33 Fed. Reg. 7570 (1968 Labor regulation governing the certification process); 43 Fed. Reg. 19,306 (1978) ; 55 Fed. Reg. 50,510 (1990). Only in 1986 did Congress separate H-2B from H-2A and specify that the consulting agencies for H-2A were Labor or Agriculture. Immigration Reform and Control Act, Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) – (b) ; 1184(c)). But Congress left the H-2B language alone, and Labor continued to consult just as it had before. *Id* .; *LFA* , 745 F.3d at 661. By specifying the consulting agency for H-2A but not H-2B despite

both historically relying on Labor, Congress has evidenced its intent to give Homeland Security more discretion in H-2B, including the discretion to continue the historical practice of relying on Labor and its rulemaking if it so chooses. *LFA* , 745 F.3d at 674. That Labor has been providing labor certifications and has promulgated rules governing them for decades before the 2008 Rules without serious challenge from the political branches or courts is at least some evidence that Congress intended that the consulting agency could rulemake and that the chosen consulting agency could be Labor. Thus, not naming the consulting agency provides Homeland Security with more discretion and does nothing to show that rulemaking authority was withheld from the consulting agency.

Second, multiple agencies commonly cooperate with overlapping statutory duties. *See generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space* , 125 HARV. L. REV. 1131 (2012). Employers do not contend that Labor's role in H-2A raises any concerns, so it is not clear why having an unnamed agency with a consulting role in H-2B would create problems. An analogous example comes from section 7 of the Endangered Species Act: "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action ... is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. §

1536(a)(2). Under this law, if an agency action might harm an endangered species, that agency must start a consultation with the Fish and Wildlife Service, which then prepares a "biological opinion" on the potential harm. Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies* , 33 HARV. ENVTL. L. REV. 1, 53–54 (2009).[9] In administering this

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statutory requirement, the Fish and Wildlife Service has promulgated regulations governing the consultation and its relationship with other agencies. 50 C.F.R. §§ 402.10 – 17. If a consulting agency may issue regulations that impact many unnamed agencies, it is not clear why Labor, with Homeland Security's blessing, cannot promulgate regulations to structure its consulting role. Based on statutory circumstances, history, and similar laws, we find that the unnamed consulting agency—which Homeland Security may choose—has implicit rulemaking authority that may overlap with Homeland Security's authority in a symbiotic relationship set out by the statute.

The Eleventh Circuit rejected this implicit delegation for Labor to rulemake based on its role as a consulting agency because this would mean that "any federal employee with whom the Secretary of [Homeland Security] deigns to consult would then

have the authority to issue legislative rules to structure [his] consultation with Homeland Security." *Bayou Lawn* , 713 F.3d at 1084. We find this concern unwarranted.[10] Homeland Security lacks unlimited discretion to consult with any agency, much less any federal employee. The statute requires "consultation with *appropriate agencies* of the Government." 8 U.S.C. § 1184(c)(1) (emphasis added). Not only must the consulting party be an agency rather than any employee, but it must be an "appropriate" agency. *Id* . Even under *Chevron* deference, some choices of "appropriate agencies" would not be reasonable. *Id* .; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* , 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). What is appropriate depends on the statutory circumstances, including the definition of H-2B. § 1101(a)(15)(H)(ii)(b). And if the agency does not adequately explain its choices, it may be subject to an arbitrary and capricious challenge. 5 U.S.C. § 706(2)(A). For example, Homeland Security might consult with the Department of Commerce or the Treasury Department if they could rationally tie that choice to their statutory duty, such as a reliance on whatever expertise those Departments might have on wages and the labor market. Choosing the Fish and Wildlife Service, on the other hand, is likely impermissible as they would probably not be an appropriate agency (barring some unusual justification). This does not give Homeland Security

carte blanche to bestow legislative rulemaking authority on anyone in the executive branch. And here Labor is an appropriate agency given their expertise and historical role in providing information on the availability of American workers. § 1101(a)(15)(H)(ii)(b) ; 20 C.F.R. § 621.3(a) (1968) (original regulation requiring Labor to find that American workers were unavailable); 8 C.F.R. § 214.2(h)(6)(iii)(A) (similar regulation today based on H-2B definition); 73 Fed. Reg. 78,104, 78,110 (Homeland Security's review adds nothing to Labor's expertise).

And even when Homeland Security chooses an appropriate consulting agency, that agency does not acquire unlimited rulemaking authority or even authority commensurate with Homeland Security. The Supreme Court has said that a regulation

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must be "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publ'ns Serv., Inc.* , 411 U.S. 356, 369, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). The promulgating agency must "establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler Corp. v. Brown* , 441 U.S. 281, 304, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). So any rules that Labor promulgates relating to H-2B visas must relate to its consulting role, and that role is in

part defined by Homeland Security's regulations choosing them as the consulting agency and defining their consultation. Homeland Security chose Labor as the consulting agency, chose the form of consultation as labor certifications, and required Labor to determine the availability of American workers and the effect on their wages. 8 C.F.R. § 214.2(h)(6)(iii)(A). Labor's consulting role and the resulting gap in how to administer it is defined by Homeland Security's regulations. As a result, Labor's regulations must be reasonably related to administering their labor certifications and making the determinations about the labor market and required wages. The regulations here relate to filling the statutory gap of how to administer the required consultation that Homeland Security has chosen. The 2015 Rules do just that by establishing "the process by which employers obtain a temporary labor certification from [Labor] for use in petitioning [Homeland Security]" and "the methodology for determining the wage that a prospective H-2B employer must pay." 80 Fed. Reg. 24,042, 24,046. Homeland Security is limited in its ability to choose an "appropriate" agency to consult with and, once chosen, Labor is limited in its rulemaking authority. But here, the 2015 Program and Wage Rules are well within the scope of that limited authority as designated by Congress.

The 2015 Program and Wage Rules are valid exercises of Labor's implied delegation to rulemake as part of its duty as Homeland Security's chosen consulting agency. This implied delegation is evident from the statutory circumstances in the INA, including the requirement that Homeland Security engage in "consultation with appropriate agencies," the definition of H-2B, and Labor's rulemaking powers for similar visas. While there are limits on which agencies Homeland Security can choose and on those agencies' ability to rulemake, Labor's 2015 Program and Wage Rules fall within both boundaries.

* * *

Agencies have wide latitude in administering the programs Congress has tasked them with. But agencies do not have unlimited power in the areas they govern. As a result, those burdened by regulations may challenge agency actions as exceeding their statutory authority. Our job is to police the boundary between permissible agency actions that help fulfill the goals of the political branches and agency overreach that threatens to unjustly burden those they regulate and blur the lines upholding the separation of powers.

As one of the three branches, however, we also have our own limits. One of those limits comes from Article III itself: standing. Here, Employers have

shown standing to challenge the 2008 Rules and the 2015 Program and Wage Rules.[11] Another type

[983 F.3d 690]

of limit can be set by Congress: statutes of limitations. And Employers' facial challenge to the 2008 Rules is time-barred.

Once we have shown that we are operating within our lawful sphere, we can begin to examine the validity of agency actions. In doing so, we find that the 2015 Program and Wage Rules were properly promulgated based on Congress' implied delegation to Labor as the consulting agency. The Government's regulations stand, and the judgment of the district court is therefore

*AFFIRMED IN PART AND VACATED IN PART.*

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Notes:

[1] A labor certification may be granted if United States workers able to perform the temporary labor are unavailable and the H-2B's employment will not adversely affect similarly employed United States workers. 8 C.F.R. § 21432(h)(6)(iii)(A).

[2] Labor has had a hand in immigration since its inception in 1913 and has expertise in wages and the

labor market. *See La. Forestry Ass'n, Inc. v. Solis (LFA)* , 889 F. Supp. 2d 711, 715–17 (E.D. Pa. 2012), *aff'd sub nom. La. Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor* , 745 F.3d 653 (3d Cir. 2014). In 1968, the Attorney General promulgated regulations requiring employers to apply for labor certifications from Labor as part of the Attorney General's duty to consult. 8 C.F.R. § 214.2 (1968). The regulations directed an administrator to issue a labor certification "if he finds that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed." 20 C.F.R. § 621.3(a) (1968) ; *see also* 8 C.F.R. § 214.2(h)(6)(iv)(A). In turn, Labor issued regulations to govern the labor-certification process. 20 C.F.R. § 621.3 (1968) ; 33 Fed. Reg. 7570–71 (1968). These regulations were justified under 8 U.S.C. §§ 1101 and 1184, which have not changed since these rules. *Id* . Similar rules remained intact for 50 years. *See* 43 Fed. Reg. 19,306 –18 (1978); 55 Fed. Reg. 50,510 (1990).

[3] Before the 2008 Rules, Homeland Security could review a petition de novo without a certification and make a final determination regardless of Labor's input. *See* 8 C.F.R. § 214.2(h)(6)(iv)(D), (E) (2008) ; *see also* 31 Fed. Reg. 4446, 6611 (1966) (countervailing evidence allowed). Under the 2008 Rules, an employer denied a certification was limited

to review within Labor by its Board of Alien Labor Certification Appeals. 73 Fed. Reg. 78,063 (to be codified 20 C.F.R. § 655.33(a) ). Receiving a favorable Labor determination is thus a condition precedent to a petition to Homeland Security. 73 Fed. Reg. 78,127, 78,129. Homeland Security made this change because it believed that Labor had the required expertise and that Homeland Security's review added nothing. 73 Fed. Reg. 78,104, 78,110.

[4] Our sister circuits are divided on whether to recognize an equitable exception to the statute of limitations in 28 U.S.C. § 2401(a) when a plaintiff raises an ultra vires challenge to agency action. Here, however, Plaintiffs have not relied on such an exception. Although this is an important issue deserving of the Court's attention, we will forgo weighing in until the matter is properly presented.

[5] Employers argue that the D.C. Circuit's "reopening doctrine" renders their claim timely. In the D.C. Circuit, the reopening doctrine applies to restart the statute-of-limitations clock where an agency "serious[ly], substantive[ly] reconsider[s]" an earlier regulation. *Nat'l Min. Ass'n v. U.S. Dep't of Interior* , 70 F.3d 1345, 1352 (D.C. Cir. 1995). Even assuming this Court would adopt the doctrine—an issue we need not reach today—we agree with the district court that it would not apply here because "[n]one of the 2015 Rules reopened [Homeland Security]'s 2008 decision to require an employer to first obtain 'a

favorable labor certification determination' from [Labor] before applying for an H-2B visa." *Outdoor Amusement Bus. Ass'n* , 334 F. Supp. 3d at 713.

[6] Although Employers also sought to challenge certain enforcement rules passed in 2015, they lack standing to do so. *See* 80 Fed. Reg. 24,084. As part of the 2015 Rules, Labor and Homeland Security promulgated 2015 Enforcement Rules that "set[ ] forth enforcement procedures and remedies" under Homeland Security's delegation of enforcement authority to Labor. *See* 80 Fed. Reg. 24,046 (Enforcement Rule) ; 80 Fed. Reg. 24,131 ; 73 Fed. Reg. 78,115, 78130 ; 8 C.F.R. § 214.2(h)(6)(ix) ; *see also* 8 U.S.C. § 1184(c)(14)(B) (statutory authority to delegate enforcement powers).

No Employer has shown that it was or will be injured by the 2015 Enforcement Rules. In fact, Employers have made no specific claims against the 2015 Enforcement Rules. J.A. 91–110; Supplemental Br. of Employers 4. Instead, they claim generally that the Enforcement Rules are included in the 2015 Rules. But plaintiffs must show standing for each claim and form of relief. Without having alleged a past injury or made specific claims against the 2015 Enforcement Rules, Employers lack standing to enjoin those rules.

[7] *See* 8 U.S.C. § 1184(c)(1) ; *Consult* , 3 Oxford English Dictionary 799–800 (2d ed. 1989) ("To confer

about, deliberate upon, debate, discuss, consider (a matter)"), ("To ask advice of, seek counsel from; to have recourse to for instruction, guidance, or professional advice"), *but see id* . ( [T]o seek permission or approval from (a person) for a proposed action"). *See also Bennett v. Spear* , 520 U.S. 154, 169, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (noting that while the duty to "consult" in section 7 of the Endangered Species Act is technically "advisory," in effect it has a "powerful coercive effect" that renders the "consultation" essentially nondiscretionary); *Lopez v. Davis* , 531 U.S. 230, 243–44, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) ("[E]ven if a statutory scheme requires individualized determinations ... the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." (internal quotations omitted)).

[8] We assume that at least some of these rules are legislative rather than procedural. *Compare Mendoza v. Perez* , 754 F.3d 1002, 1023–25 (D.C. Cir. 2014), *with* 20 C.F.R. § 655.20.

[9] If the "biological opinion" finds a potential harm, it "must outline any 'reasonable and prudent alternatives' that the Service believes will avoid that consequence," which the acting agency must consider. *Bennett v. Spear* , 520 U.S. 154, 158, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). While these

suggestions are "advisory" and an agency could theoretically reject them, the Supreme Court has found that the potential liability from not following the advice has a "powerful coercive effect" that renders them essentially nondiscretionary. *Id* . at 169, 117 S.Ct. 1154. In fact, unless the agency follows the "advice" given in the consultation, an incidental taking can lead to "substantial civil and criminal penalties, including imprisonment." *Id* . at 170, 117 S.Ct. 1154.

[10] Because we find that Labor has an implied delegation, there is no subdelegation issue. Homeland Security did not subdelegate any of its power; it carried out its statutory duty to consult by choosing to require labor certifications from Labor, as various agencies have historically done. Labor, as the consulting agency, then got its own implied delegation from Congress to administer its consulting duty, not a subdelegation from Homeland Security.

[11] As mentioned above, the Employers lack standing to challenge the 2015 Enforcement Rules. Thus, we must vacate the portion of the district court's opinion that found the 2015 Enforcement Rules valid on the merits. Employers' challenge to the 2015 Enforcement Rules must be dismissed without prejudice. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC* , 713 F.3d 175, 185 (4th Cir. 2013) ("A dismissal for lack of

standing—or any other defect in subject matter jurisdiction—must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits.").

**Appendix B – Court of Appeals Order Denying Rehearing *En Banc***

FILED: February 16, 2021
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 18-2370
(1:16-cv-01015-ELH)

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OUTDOOR AMUSEMENT BUSINESS ASSOCIATION, INC.; MARYLAND STATE SHOWMEN'S ASSOCIATION, INC.; THE SMALL AND SEASONAL BUSINESS LEGAL CENTER; LASTING IMPRESSIONS LANDSCAPE CONTRACTORS, INC.; THREE SEASONS LANDSCAPE CONTRACTING SERVICES, INC; NEW CASTLE LAWN & LANDSCAPE, INC.
Plaintiffs - Appellants

v.

DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; DEPARTMENT OF LABOR; EMPLOYMENT & TRAINING ADMINISTRATION; WAGE & HOUR DIVISION
Defendants - Appellees

and

MARGHARITA KURI; TIMOTHY KING; HENRY WOJDYLO; RONALD NYENHUIS; SHIRLEY

HARMON; ANTONIO RIVERA MARTINEZ; ANDREW MITSCHELL; COMITE DE APOYO A LOS TRABAJADORES AGRICOLAS (CATA); PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE; NORTHWEST FOREST WORKERS CENTER

Amici Supporting Appellees

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O R D E R

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The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Keenan, Judge Wynn, and Judge Richardson.

For the Court
/s/ Patricia S. Connor, Clerk

## Appendix C – District Court Opinion

334 F.Supp.3d 697
United States District Court, D. Maryland.

OUTDOOR AMUSEMENT BUSINESS ASSOCIATION, INC., et al., Plaintiffs,
v.
DEPARTMENT OF HOMELAND SECURITY et al., Defendants.

Civil Action No. ELH-16-1015

Signed 09/12/2018

As Amended 10/11/2018

### Attorneys and Law Firms

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### MEMORANDUM OPINION

Ellen Lipton Hollander, United States District Judge

This case concerns a challenge to the validity of certain rules and regulations issued by the

Department of Homeland Security and the Department of Labor, pertaining to the H-2B visa program (the "Program"). The Program governs the temporary employment of non-immigrant foreign workers in non-agricultural businesses.

Plaintiffs are business entities who rely on the Program to obtain workers, as well as trade associations whose members rely on the Program to maintain their workforces. ECF 44 (Second Amended Complaint), ¶¶ 12-17. In particular, they are Outdoor Amusement Business Association, Inc.; Maryland State Showmen's Association, Inc.; The Small and Seasonal Business Legal Center; Lasting Impressions Landscape Contractors, Inc.; Three Seasons Landscape Contracting Services, Inc.; and New Castle Lawn & Landscape, Inc. They have sued the following defendants, *id.* ¶¶ 18-22: the Department of Homeland Security ("DHS"); the United States Citizenship & Immigration Services ("USCIS"), a component agency of DHS that operates service centers for adjudicating H-2B visas; the Department of Labor ("DOL"); the Employment & Training Administration ("ETA"), a component agency of DOL that participates in promulgating legislative regulations to administer the H-2B program; and the Wage & Hour Division ("WHD"), another component of DOL, which promulgates legislative regulations "to enforce substantive requirements ... imposed by DOL on employers in the H-2B program." *Id.* ¶ 22. At times, I shall refer to the defendants collectively as the "Government."

*Amici curiae* are individual U.S. workers employed in occupations in which H-2B workers are also

employed. *See* ECF 83 (Order granting *amicus* status). Collectively, *amici* support the Government.

The Second Amended Complaint (ECF 44), filed on July 5, 2016, is the operative ***702** complaint. Plaintiffs seek declaratory and injunctive relief, claiming that the regulations promulgated by defendants to administer the Program are unlawful because DHS, to which Congress has delegated responsibility for the Program, impermissibly redelegated substantial parts of the Program's standards and administration to DOL. *See* ECF 44.

The suit focuses on four sets of legislative rules related to the Program. ECF 92-1 at 13-14. First, it concerns the 2015 Interim Final Rule, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, promulgated on April 29, 2015, at 80 Fed. Reg. 24042. That rule consists of two components: the "2015 Program Rules," published at 20 C.F.R. § 655, and the "2015 Enforcement Rules" (a subset of the 2015 Program Rules, often referred to separately), published at 29 C.F.R. § 503. *See* ECF 44, ¶ 2. Next, plaintiffs challenge the 2015 Final Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, also promulgated on April 29, 2015, at 80 Fed. Reg. 24146. *Id*. This rule includes the "2015 Wage Rule," also published at 20 C.F.R. § 655. I shall refer to the 2015 Program Rules, the 2015 Wage Rule, and the 2015 Enforcement Rules collectively as the "2015 Rules."[1] Last, plaintiffs challenge a number of subsections of what they term "DHS's Labor-Certification Regulations," published in 2008 at 8 C.F.R. §§ 214.1 and 214.2. I shall refer to these rules

as the 2008 Labor-Certification Regulations.

In the lengthy Second Amended Complaint, plaintiffs outline the purpose of the Program, as follows, *id.* ¶ 26:

> Since 1952, the purpose of the temporary employment H visas, including the H-2B program, has been to alleviate U.S. labor shortages for temporary work and provide nonimmigrant alien labor to fill those temporary or seasonal positions. The H-2B program protects the interests of both U.S. non-agricultural workers and employers, as well as the U.S. economy as a whole, through the preservation of jobs, work opportunities, and employers in the United States. The H-2B program is a legally-authorized source of employees for difficult-to-fill temporary positions, and supports the employment of countless other U.S. workers whose jobs rely on the temporary work performed by foreign workers.

The Second Amended Complaint contains six counts. In Count I, plaintiffs assert that the 2015 Program Rules, the 2015 Wage Rule, and the 2008 Labor-Certification Regulations exceed defendants' statutory authority, citing 5 U.S.C. §§ 558 and 706(2)(C). Count II challenges the disputed regulations as arbitrary and capricious, citing 5 U.S.C. § 706(2)(A). In Count III, plaintiffs assert that the regulations are unconstitutional and violate 5 U.S.C. § 706(2)(B). Count IV is titled "Compulsion of Agency Action Unlawfully Withheld." It is predicated on 5 U.S.C. § 706(1). Count V is titled "Mandamus,"

pursuant to the Mandamus Act, 28 U.S.C. § 1361, and the All Writs Act, 28 U.S.C. § 1651. Finally, Count VI seeks a declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.[2]

Following the submission of the voluminous Administrative Record (*see* ECF 46, ***703** ECF 87, ECF 129),[3] the parties submitted cross-motions for summary judgment. Plaintiffs' motion (ECF 91) is supported by a memorandum of law (ECF 92-1) (collectively, "Plaintiffs' Motion"), and exhibits.[4] Defendants filed a combined opposition to Plaintiffs' Motion, along with their own motion for summary judgment (ECF 102), supported by a Memorandum of Law. ECF 102-1 (collectively, "Defendants' Motion"). Thereafter, plaintiffs filed a combined opposition to Defendants' Motion and reply. *See* ECF 111-1 ("Plaintiffs' Reply").[5] Defendants also replied. ECF 113 ("Defendants' Reply"). And, *amici* submitted a memorandum of law in opposition to Plaintiffs' Motion. ECF 105 ("*Amici* Opposition").

The Court held oral argument on August 14, 2018. ECF 122.[6] Following the hearing, the Court invited limited supplemental briefing. ECF 121. Supplemental briefing was submitted by *amici* (ECF 123), plaintiffs (ECF 124), and the Government (ECF 125). The transcript for the motions hearing is docketed at ECF 126.

For the reasons that follow, I shall grant Defendants' Motion and deny Plaintiffs' Motion.

## I. Factual and Procedural Summary

## A. H-2B Visa Program

### 1. Program History

In 1952, as part of the Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq*., "Congress created the nonimmigrant H-2 visa category for temporary agricultural and non-agricultural employment that did not require advanced education, skills, or training." ECF 44, ¶ 25. Until 1986, one program existed for all temporary foreign workers. "Congress decided, however, that the earlier program did not 'fully meet the need for an efficient, workable and coherent program that protect[ed] the interests of agricultural employers and workers alike' and therefore amended the INA as part of the Immigration Reform and Control Act of 1986 to provide for two separate programs: the H-2A program for agricultural workers and the H-2B program for non-agricultural workers." *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1276 (N.D. Fla. 2016) (quoting H.R. Rep. No. 99-682, pt. 1, at 80); *see also* Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a)-(b) ).

The H-2B visa program permits U.S. employers to recruit and hire foreign workers to fill temporary unskilled, non-agricultural positions for which domestic workers cannot be located. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Louisiana Forestry Ass'n, Inc. v. Sec'y of Labor*, 745 F.3d 653, 658 (3d Cir. 2014). An H-2B employee is defined as a nonimmigrant alien "having a ***704** residence in a foreign country which

he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country...." 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

The statute identifies the Attorney General as the person responsible for determining whether to issue an H-2B visa. *See id.* § 1184(c)(1). However, Congress transferred enforcement of immigration laws to the Secretary of DHS under the Homeland Security Act of 2002. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002). Therefore, DHS is now charged with determining, "upon petition of the importing employer," whether to grant an H-2B visa "after consultation with appropriate agencies of the Government." 8 U.S.C. § 1184(c)(1).

**2. DOL's Involvement**

Pursuant to the statutory direction to consult with appropriate agencies, DHS and its predecessors have for some 50 years looked to DOL for advice on whether United States workers capable of performing the desired temporary services or labor are available, and whether the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers. *See, e.g.*, 8 C.F.R. § 214.2(h)(6)(iii)(A). In 1968, DOL first issued formal regulations establishing standards and procedures for certifying employers' requests to import H-2 workers. *See* 33 Fed. Reg. 7570 (May 22, 1968). DOL later supplemented the regulations with informal, non-

binding guidance letters, which were promulgated without notice and comment. *See Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 09-240, 2010 WL 3431761, at *2 (E.D. Pa. Aug. 30, 2010) ("*CATA I* ") (discussing issuance of guidance letters). Then, in 2008, DOL published another formal regulation governing the labor certification process. *See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture (H-2B Workers)*, 73 Fed. Reg. 78020 (Dec. 19, 2008) ("2008 DOL Rule"). These regulations concerned, *inter alia*, the wages that employers were required to pay H-2B workers. *See* 73 Fed. Reg. at 78056-57. These 2008 rules issued by DOL were the precursors to the 2015 Wage Rule and the 2015 Program Rules, and gave rise to a number of challenges to the administration of the H-2B program, of which this case is one.

Of importance here, beginning in 2008, DHS also began to require that employers petitioning DHS for H-2B visas must "apply for a temporary labor certification with the Secretary of Labor." 8 C.F.R. § 214.2(h)(6)(iii)(A). Pursuant to certain DHS labor certification regulations, issued in 2008, DOL is directed to determine whether (1) qualified workers in the United States are available to fill the petitioning employer's job and whether (2) an alien's employment will adversely affect wages and working conditions of similarly employed U.S. workers. *Id.* If, after reviewing an employer's job offer and recruitment efforts, the Secretary of Labor determines that U.S. workers are not available to fill the jobs described in the employer's application and that the offered terms of work will not adversely

affect similarly employed U.S. workers, DOL issues a "temporary labor certification" that the employer must attach to the H-2B visa petition it submits to DHS. *id.* §§ 214.2(h)(6)(iii)(C) and 214.2(h)(6)(iv)(A).

Notably, a "petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor ... within the ***705** time limits prescribed or accepted by each, and has obtained a favorable labor certification determination...." *Id.* § 214.2(h)(6)(iii)(C). Thus, without a temporary labor certification from DOL, a petitioner cannot obtain H-2B visas. DHS provides no mechanism for an employer to challenge DOL's determination on this question.

On April 29, 2015, DHS and DOL jointly issued revised H-2B regulations: the *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24042 (Apr. 29, 2015) ("2015 Interim Final Rule"), and the *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 80 Fed. Reg. 24146 (Apr. 29, 2015) ("2015 Final Rule"). ECF 44, ¶ 2. Both the 2015 Interim Final Rule and the 2015 Final Rule are in effect.[7]

The 2015 Interim Final Rule and 2015 Final Rule replace the prior H-2B regulations published on December 19, 2008, at 73 Fed. Reg. 78020 ("2008 Program Rules"). The 2008 Program Rules were regarded as "vulnerable to challenges by employers in current and future enforcement proceedings based on the ground that the regulations ... are void because DOL exceeded its statutory authority in

unilaterally issuing the 2008 rule." *See* 80 Fed. Reg. at 24048-49.

### B. The Statutes

Several sections of the INA are relevant here. As a general matter, the "Secretary of Homeland Security [is] charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). As such, Congress has directed the Secretary to "establish such regulations ... and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." *Id.* § 1103(a)(3). Notably, Congress has provided that the Secretary "is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service." *Id.* § 1103(a)(6). "Service means U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears." 8 C.F.R. § 1.2.

One of the Secretary's statutory responsibilities is the administration of the H-2B visa program. In particular, "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe." 8 U.S.C. § 1184(a)(1).[8] Section 1101(a)(15)(H)(ii)(b) of Title 8 is the source of the

term "H-2B." As noted, it defines an H-2B worker as a nonimmigrant alien "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed ***706** persons capable of performing such service or labor cannot be found in this country...."

Section 1184(c)(1) of Title 8 of the U.S. Code provides: "The question of importing any alien as a nonimmigrant ... in any specific case or specific cases shall be determined by the [Secretary of DHS], *after consultation* with appropriate agencies of the Government, upon petition of the importing employer." (Emphasis added.) This case concerns, among other issues, the breadth of the term "consultation," which is not defined in the statute, as well as the scope of the Secretary's ability to "confer or impose upon any employee of the United States ... any of the powers, privileges, or duties conferred or imposed ... upon officers or employees of the Service."

### C. Litigation History

Consistent with the regulations described above, DOL has established various procedures to determine whether a qualified U.S. worker is available to fill the job described in the employer's petition. Although, as noted, DOL had issued regulations concerning labor certifications as far back as 1968, for many years DOL set forth specific requirements on employers "via a series of General Administration Letters ('GALs') and Training and Employment Guidance Letters ('TEGLs')." *CATA I*, 2010 WL 3431761, at *2. These letters were promulgated without notice and comment. *See id.* In

2008, however, DOL promulgated a regulation designed "to modernize the procedures for the issuance of labor certifications to employers sponsoring H-2B nonimmigrants." 73 Fed. Reg. 78020, at 78020 (Dec. 19, 2008) (codified at 20 C.F.R. §§ 655-56) ("2008 DOL Rule"). The 2008 DOL Rule contained two major components: the 2008 Program Rules, which set forth the criteria for obtaining a temporary labor certification (73 Fed. Reg. at 78058), and the 2008 Wage Rule, which established the method for determining the prevailing wage for labor certification purposes. *See id.* at 78056.

"In order to issue a labor certification, the DOL must determine as a threshold matter, that qualified United States workers are not available to fill the position for which an employer seeks foreign workers." *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F.Supp.2d 700, 704 (E.D. Pa. 2013) ("*CATA II* "); *see* 8 C.F.R. § 214.2(h)(6)(iii). Because the availability of workers is inextricably linked to an employer's wages, "the DOL may only issue labor certifications where United States workers are unavailable to fill a given position at the occupation's 'prevailing wage.' " *Id.* (citing 2008 DOL Rule). As a result, before applying for a labor certification, "an employer must first obtain from the DOL a prevailing wage determination for the area of intended employment, submit a work order with a state workforce agency," and then "advertise the position at a wage equal to or higher than the prevailing wage, as established by the DOL." *Id.* at 705 (citing 2008 DOL Rule).

The 2008 Wage Rule contained "numerous

significant changes from the prior regime." *CATA I*, 2010 WL 3431761, at *3. As a result, in 2009, shortly after the new regulations took effect, a group of plaintiffs filed suit in the Eastern District of Pennsylvania, challenging several substantive aspects of the 2008 DOL rule. *Id.* at *1. The *CATA I* Court upheld various aspects of the challenged rule. *See id.* at *12-14. But, it vacated other aspects of the 2008 DOL Rule and remanded the rule to DOL, "so that the agency may correct its errors." *See id.* at *24. In particular, *CATA I* held invalid elements of the 2008 DOL Rule that pertained to the calculation of a prevailing wage. *See id.*; 73 Fed. Reg. at 78056.

***707** Following *CATA I*, DOL promulgated a notice of proposed rulemaking ("NPRM") with respect to wage rate calculations. *Wage Methodology for the Temporary Non–Agricultural Employment H-2B Program*, 75 Fed. Reg. 61578-01, 61579 (October 5, 2010) ("2010 Wage NPRM"). After allowing for notice and comment, DOL announced a revised prevailing wage regulation in 2011. *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 Wage Rule"). Although DOL initially set January 1, 2012, as the effective enforcement date for the 2011 Wage Rule, as of March 2013, DOL was still using the 2008 Wage Rule declared invalid in *CATA I*. *See CATA II*, 933 F.Supp.2d at 708-09. The *CATA* plaintiffs successfully challenged DOL's continued use of the partially invalid 2008 DOL Rule, and in *CATA II* the Eastern District of Pennsylvania vacated the 2008 Wage Rule and barred its continued use. *See id.* at 709, 716.

At the same time that litigation was ongoing about DOL's 2008 Wage Rule, DOL began to promulgate a series of separate rules that addressed a broader range of revisions to the H-2B labor certification process, many of which were prompted by *CATA I*. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 76 Fed. Reg. 15130-01 (Mar. 18, 2011) (2011 Program Rules). DOL issued a final version of this rule in 2012. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10038, 10038-10146 (Feb. 21, 2012) (2012 Program Rules).

In 2012, other plaintiffs in Florida obtained a "preliminary injunction prohibiting DOL from enforcing" the 2012 Program Rules while litigation on the merits was ongoing. *Bayou Lawn & Landscape Servs. v. Solis*, 3:12-183-MCR-CJK, 2012 WL 12887385, at *1 (N.D. Fla. Apr. 26, 2012) ("*Bayou I*"). The Eleventh Circuit affirmed the preliminary injunction, on the ground that DOL lacked the authority to issue rules pertaining to the H-2B program, and remanded the case to the district court. *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013). Thereafter, on the merits, the district court held that DOL lacked the "authority to engage in legislative rulemaking under the H-2B program," and so it vacated the 2012 Program Rules. *Bayou Lawn & Landscape Servs. v. Perez*, 81 F.Supp.3d 1291, 1300 (N.D. Fla. 2014) ("*Bayou II*").

By the time the Eleventh Circuit considered the Government's appeal, DOL and DHS had issued the 2015 Rules. As a result, the challenge to the 2012

Program Rules was rendered moot, and the Eleventh Circuit vacated the district court's order and remanded the case. *Bayou Lawn & Landscape Servs. v. Sec'y, U.S. Dep't of Labor*, 621 F. App'x 620, 621 (11th Cir. 2015)(per curiam).

In 2012, around the same time as the *Bayou I* challenge, other plaintiffs in the Eastern District of Pennsylvania (not those in the *CATA* cases), challenged DOL's rules on a theory similar to the one used in *Bayou I*. *See Louisiana Forestry Ass'n, Inc. v. Solis*, 889 F.Supp.2d 711, 720 (E.D. Pa. 2012). In that case, however, the Eastern District of Pennsylvania ruled that DOL *did* have the authority to promulgate the 2011 Wage Rule. *Id.* at 731.The Third Circuit subsequently affirmed, in an apparent rejection of the Eleventh Circuit's holding in *Bayou*. *Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 669 (3d Cir. 2014) (affirming *Louisiana Forestry*, 889 F.Supp.2d 711).[9]

***708** In response to *CATA II*'s vacatur of the 2008 Wage Rule and *Bayou*'s holding that DOL lacked rulemaking authority for the H-2B program, DHS and DOL jointly promulgated an interim final rule ("IFR") in 2013, to address wage determinations. *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2*, 78 Fed. Reg. 24047 (Apr. 24, 2013) ("2013 DHS/DOL Wage IFR"). But, DOL had not entirely abandoned the system used under the 2008 Wage Rule. *See CATA v. Perez*, 774 F.3d 173, 182 (3d Cir. 2014) ("*CATA III* "). Although the 2013 DHS/DOL Wage IFR formally eliminated the use of skill levels, it did not alter the practice of "allowing a prevailing wage

to be set by use of either" a Bureau of Labor Statistics Occupational Employment Statistics Survey (OES) or a "private wage survey." *CATA III*, 774 F.3d at 181; *see* 2013 DHS/DOL Wage IFR, 78 Fed. Reg. at 24061.

In 2014, DOL promulgated a proposed rule related to the Wage Methodology calculations for the H-2B program. *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 79 Fed. Reg. 14450 (Mar. 14, 2014). That rule indicated DOL's intent to conduct future rulemaking on the issue of the prevailing wage calculations but painted "an uncertain picture" of DOL's future plans in this respect. *See CATA III*, 774 F.3d at 182. The district court ruled in DOL's favor "on the ground that the proposed 2014 or 2015 rule-making process could result in a prospective change of the rules at issue such that plaintiffs' challenge was not ripe for adjudication." *Id.* at 182; *see Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 14-2657, 2014 WL 4100708 (E.D. Pa. July 23, 2014), *rev'd and remanded*, *CATA III*, 774 F.3d 173.

The CATA plaintiffs sued again, in the Eastern District of Pennsylvania, challenging on various grounds DOL's continued use of private wage surveys. *See CATA III*, 774 F.3d at 181-82. In July 2014, the district court dismissed the case, without prejudice, on procedural grounds. *Id.* at 182. The Third Circuit reversed and remanded. *Id.* at 191-92.

Three months after *CATA III*, the Northern District of Florida vacated the 2008 DOL Rule and found, following *Bayou*, that DOL had no independent

authority to issue legislative rules for the H-2B program. *Perez v. Perez*, No. 14-cv-682, 2015 U.S. Dist. LEXIS 27606 (N.D. Fla. Mar. 4, 2015). "Based on the *Perez* vacatur order and the permanent injunction, DOL ceased operating the H-2B program to comply immediately with the court's order." 80 Fed. Reg. 24151. The combination of *CATA III* and *Perez* "left DOL without a complete methodology or any procedures to set prevailing wages in the H-2B program." *Id.* at 24152.[10]

Because of the problems the *Perez* order caused, the *Perez* Court temporarily ***709** stayed its order until May 2015. In April 2015, to prevent "another program hiatus if and when the temporary stay expire[d]," DOL and DHS jointly issued the 2015 Wage Rule. *See id.* at 24152. According to the agencies, the 2015 Wage Rule "implements a key component of DHS's determination that it must consult with DOL on the labor market questions relevant to its adjudication of H-2B petitions." *Id.* at 24148. The 2015 Wage Rule finalized the 2013 DHS/DOL Wage IFR. *See id*. at 24151.

As a result of the *Perez* order and the temporary stay, DHS and DOL invoked the "good cause" exception in the Administrative Procedure Act ("APA") to make the 2015 Wage Rule effective immediately. *Id.* at 24152-53; *see also* 5 U.S.C. § 553(d)(3). Although the agencies did not solicit additional comments before promulgating the 2015 Wage Rule, because that rule is similar to the 2013 DHS/DOL Wage IFR, the agencies concluded that the public had already had an adequate "opportunity to comment on all aspects of this final rule in

response to the 2013 IFR." *Id.* at 24151.

Simultaneous with the 2015 Wage Rule, DHS and DOL jointly issued the 2015 Interim Final Rule containing the 2015 Program Rules and the 2015 Enforcement Rules. The 2015 Program Rules are "virtually identical" to the 2012 Program Rules. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24042-01, 24043 (Apr. 29, 2015) (2015 Program Rules). However, the departments elected to reissue the rule jointly, in light of the various challenges to "DOL's authority to issue its own legislative rules to carry out its duties under the INA." *Id.* at 24045 (citing *Bayou*, 713 F.3d 1080).

As with the 2015 Wage Rule, the departments invoked the APA's "good cause" exception to proceed without notice and comment. *Id.* at 24047. Nevertheless, the departments sought "public input on every aspect of this interim final rule (even though virtually every provision herein has already gone through one round of notice and comment), and [planned to] assess that input and determine whether changes are appropriate." *Id.* at 24050.

The *CATA* plaintiffs once again challenged these rules. In *CATA IV*, the plaintiffs challenged only the 2015 Wage Rule. *CATA v. Perez*, 148 F.Supp.3d 361, 364 (D.N.J. 2015) ("*CATA IV* "). The district court ruled for the Government, finding that the plaintiffs lacked standing. *Id.* at 374. And, in *Bayou III*, plaintiffs challenged the validity of each of the 2015 Rules. *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F.Supp.3d 1271, 1276 (N.D. Fla. 2016) ("*Bayou*

*III*'). In *Bayou III*, the district court found that the plaintiffs in that case had standing, but their claims failed on the merits. *Id.* at 1292.

**D. Plaintiffs' Suit**

As discussed, challenges to recent H-2B regulations have taken one or both of two approaches: Some contest the *substance* of the DHS or DOL Program regulations, such as the methodology by which H-2B wages are determined, and some contest the *structure* of the Program.

In this case, plaintiffs challenge the structure of the Program. They contend that DHS and DOL violated the INA and the APA, codified in various sections of Title 5 of the U.S. Code, as well as the United States Constitution, by jointly issuing certain regulations with respect to the Program. ECF 44, ¶ 4; *see also id.* ¶¶ 94, 96. In particular, plaintiffs argue that DOL has no lawful authority to engage in legislative rulemaking with regard to the Program. *See* ECF 92-1 at 13.

According to plaintiffs, "Congress has granted DHS sole rulemaking and adjudicative ***710** authority for the H-2B program, has not granted such authority to DOL, has not granted shared or joint authority among multiple Departments, and has not permitted DHS to redelegate such authority to DOL." *Id.* As a result, plaintiffs maintain that DHS has unlawfully redelegated its authority to DOL, and the "jointly-issued" 2015 Rules promulgated by DHS and DOL are invalid. *Id.* at 13-15.

In particular, plaintiffs contest the 2015 Program

Rules, the 2015 Wage Rule, and the 2015 Enforcement Rules, as well as the 2008 Labor-Certification Regulations. The 2015 Rules establish "the process by which employers obtain a temporary labor certification from DOL for use in petitioning DHS to employ a[n H-2B] nonimmigrant worker," 80 Fed. Reg. at 24042; "the methodology by which DOL calculates the prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with application for temporary labor certification," *id.* at 24146; and "enforcement procedures and remedies pursuant to DHS's delegation of enforcement authority to DOL." *See id.* at 24046.

Specifically, the 2015 Program Rules "expand[ ] the ability of U.S. workers to become aware of the job opportunities in question and to apply for opportunities in which they are interested" and "requir[e] that U.S. workers in corresponding employment receive the same wages and benefits as the H-2B workers." *See id.* at 24043. The regulations also provide additional protections to H-2B workers (such as guaranteed minimum hours and reimbursements for visa and transportation expenses) and to whistleblowers. *See id.* The 2015 Wage Rule "set[s] the methodology by which DOL calculates the prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with applications for temporary labor certification." *See id.* at 24146. In addition, plaintiffs challenge certain DHS regulations, "collectively referred to and identified ... as DHS's Labor-Certification Regulations." ECF 44, ¶ 2; *see also id.*¶ 34; 8 C.F.R. § 214.2(h)(6). The Labor-Certification Regulations, issued in 2008, "govern DHS's administration of the

H-2B program generally, including DOL's role in the program." ECF 69 at 11.

According to plaintiffs, the regulatory scheme is "unworkable" and causes unnecessary delay in visa processing. ECF 44, ¶ 8. They assert that "H-2B workers are now arriving weeks, and often months, after employers' dates of need," which has harmed the businesses of plaintiffs and/or their members. *Id.* . Defendants observe that plaintiffs' labor certifications and H-2B petitions have all been granted. ECF 102-1 at 25; *see also* ECF 44, ¶¶ 15, 17.[11] However, according to plaintiffs, this "regulatory scheme imposes more than $1,000,000,000 in compliance costs." ECF 92-1 at 15. Therefore, plaintiffs ask the Court to enter an Order "enjoining the Defendants nationwide from implementing the unlawful" 2015 Program Rules, the 2015 Wage Rule, and the 2008 Labor-Certification Regulations. ECF 44, ¶ 115.

## II. Standard of Review

The APA provides for judicial review of a final agency action. *See* ***711** *Ergon-W. Virginia, Inc. v. United States Envtl. Prot. Agency*, 896 F.3d 600, 609 (4th Cir. 2018); *Roland v. United States Citizenship & Immigration Servs.*, 850 F.3d 625, 629 n.3 (4th Cir. 2017); *Friends of Back Bay v. U.S. Army Corps of Eng'rs,* 681 F.3d 581, 586 (4th Cir. 2012); *Lee v. U.S. Citizenship & Immigration Servs.,* 592 F.3d 612, 619 (4th Cir. 2010); *Ohio Valley Envtl. Coal v. Aracoma Coal Co.,* 556 F.3d 177, 192 (4th Cir. 2009). An agency's regulations must be set aside and held unlawful when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law," 5 U.S.C. § 706(2)(A); when they are "contrary to constitutional right, power, privilege, or immunity," *id.* § 706(2)(B); or when they are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C).

As noted, the Government submitted the Administrative Record. ECF 46; ECF 87; ECF 129. Generally, "claims brought under the APA are adjudicated without a trial or discovery, on the basis of an existing administrative record...." *Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.,* 524 F.Supp.2d 642, 660 (D. Md. 2007) (citing *Citizens for the Scenic Severn River Bridge, Inc. v. Skinner,* 802 F.Supp. 1325, 1332 (D. Md. 1991), *aff'd,* 972 F.2d 338 (Table) (4th Cir. July 29, 1992) ). In this context, "review of the administrative record is primarily a legal question...." *Skinner*, 802 F.Supp. at 1332.

"The APA provides that a reviewing court is bound to 'hold unlawful and set aside agency action' for certain specified reasons, including whenever the challenged act is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Friends of Back Bay,* 681 F.3d at 586-87 (quoting 5 U.S.C. § 706(2)(A) ); *see United States v. Bean,* 537 U.S. 71, 77, 123 S.Ct. 584, 154 L.Ed.2d 483 (2002); *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (per curiam); *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers,* 702 F.3d 755, 763 (4th Cir. 2012) (quoting 5 U.S.C. § 706(2) ). Review under the APA is highly deferential, however, and the agency action enjoys a presumption

of validity and regularity. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.,* 556 F.3d 177, 192 (4th Cir. 2009) (citing *Natural Res. Def. Council, Inc. v. EPA,* 16 F.3d 1395, 1400 (4th Cir. 1993) ). The party challenging an agency decision has the burden to demonstrate that the agency action was arbitrary or capricious. *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995).

Notably, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency...." *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). In assessing an agency decision, "the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (quoting *Overton Park,* 401 U.S. at 416, 91 S.Ct. 814).

" 'Deference is due where the agency has examined the relevant data and provided an explanation of its decision that includes 'a rational connection between the facts found and the choice made.' ' " ***712** *Ohio Valley Envtl. Coal., Inc. v. United States Army Corps of Engineers*, 828 F.3d 316, 321 (4th Cir. 2016) (citation omitted); *see Trinity Am. Corp. v. U.S. EPA,* 150 F.3d 389, 395 (4th Cir. 1998); *Clevepak Corp. v.*

*U.S. EPA,* 708 F.2d 137, 141 (4th Cir. 1983). However, and of import here, "[t]he 'arbitrary and capricious' standard is not meant to reduce judicial review to a 'rubber-stamp' of agency action." *Ohio Valley Envtl. Coal,* 556 F.3d at 192 (quoting *Ethyl Corp. v. Envtl. Prot. Agency,* 541 F.2d 1, 34 (D.C. Cir. 1976)); *see also Ergon-W. Virginia, Inc.*, 896 F.3d at 609.

## III. Discussion

### A. 2008 Labor-Certification Regulations

As noted, plaintiffs challenge the 2015 Wage Rules, the 2015 Program Rules, the 2015 Enforcement Rules, and the 2008 Labor-Certification Regulations. I shall discuss the challenges to each of these rules in turn, along with defendants' defenses to them.

In 2008, DHS promulgated a regulation governing the H-2B program. *See* 73 Fed. Reg. 78104 (Dec. 19, 2008) (codified at 8 C.F.R. §§ 204, 214, 215). Although other regulations concerning labor certifications had been in place for many years, the 2008 regulation included a provision stating that an employer "may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor ... and has obtained a favorable labor certification determination." 8 C.F.R. § 214.2(h)(6)(iii)(C). Section 214.2(h)(6)(iv)(A) states: "An H-2B petition for temporary employment in the United States ... shall be accompanied by an approved temporary labor certification from the Secretary of Labor 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."

Plaintiffs contest, *inter alia*, the requirement for an employer to first obtain "a favorable labor certification determination" from DOL before the employer may file an H-2B petition. *See, e.g.*, ECF 44, ¶¶ 34-39.

**1. Statute of Limitations**

About ten years ago, DHS promulgated the regulation found in 73 Fed. Reg. 78104, published at 8 C.F.R. § 214.2. Therefore, I shall first address whether this portion of plaintiffs' claim is time-barred.

"[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). In general, when "plaintiffs bring a facial challenge to an agency ruling ... 'the limitations period begins to run when the agency publishes the regulation.' " *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (quoting *Dunn–McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) ). But, this general statute of limitations " 'does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action applying it.' " *N.L.R.B. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195-96 (D.C. Cir. 1987) (quoting *Functional Music, Inc. v. F.C.C.*, 274 F.2d 543, 546 (D.C. Cir. 1958) ).

Despite plaintiffs' vague protests to the contrary, this

suit clearly represents a facial, rather than an as-applied, challenge. *See* ECF 44, ¶¶ 94, 95, 96 (challenging "Defendants' *issuance* of the 2015 Program Rules, the 2015 Wage Rule, and DHS's Labor-Certification Regulations" (emphasis added) ); *see also Hire Order*, 698 F.3d at 170. Because this is a facial challenge, the statute of limitations presumptively began to run in 2008. ***713** *Hire Order*, 698 F.3d at 170; ECF 102-1 at 24. If that is the case, plaintiffs' 2016 lawsuit—filed eight years after DHS promulgated the 2008 regulation—is untimely.

In an attempt to forestall this conclusion, plaintiffs invoke the "reopening doctrine," ECF 111-1 at 50, a theory derived from D.C. Circuit case law. According to this doctrine, "where an agency conducts a rulemaking or adopts a policy on an issue at one time, and then in a later rulemaking restates the policy or otherwise addresses the issue again without altering the original decision," the six-year statute of limitations begins anew when the agency "reopens" the original decision. *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd. ("NARPO")*, 158 F.3d 135, 141 (D.C. Cir. 1998) (quoting *United Transp. Union Illinois Legislative Bd. v. STB*, 132 F.3d 71, 75-76 (D.C. Cir. 1998) ). Under this doctrine, " 'when the agency ... by some new promulgation creates the opportunity for renewed comment and objection, affected parties may seek judicial review, even when the agency decides not to amend the long-standing rule at issue.' " *P & V Enters v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023-24 (D.C. Cir. 2008) (quoting *Gen. Motors Corp. v. EPA,* 363 F.3d 442, 449-50 (D.C. Cir. 2004) ).

To determine whether an agency has "reopened" its earlier rulemaking and thus restarted the statute of limitations, a court "must look to the entire context of the rulemaking including all relevant proposals and reactions of the agency." *NARPO*, 158 F.3d at 141 (quoting *Public Citizen v. NRC,* 901 F.2d 147, 150 (D.C. Cir. 1990) ). This includes, *inter alia*, both explicit and implicit evidence, as well as the language of the agency's notice of proposed rulemaking and the "agency's response to comments filed by parties during a rulemaking." *Id.* at 142-46. Although either the actual or implicit reconsideration of an existing regulation can suffice, the reopening doctrine only applies where this evidence "demonstrates that the agency 'ha[s] undertaken a *serious, substantive reconsideration* of the [existing] rule.' " *P & V Enters.*, 516 F.3d at 1024 (emphasis added) (quoting *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995) ). An agency may also constructively reopen an existing regulation "if the revision of accompanying regulations 'significantly alters the stakes of judicial review,' as the result of a change that 'could have not been reasonably anticipated.' " *Sierra Club v. E.P.A.*, 551 F.3d 1019, 1025 (D.C. Cir. 2008) (quoting *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1227 (D.C. Cir. 1996) and *Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C. Cir. 2006) ).

Even assuming, *arguendo*, that the Fourth Circuit would recognize the reopening doctrine, it does not apply here. *See Indep. Cmty. Bankers of Am. v. Nat'l Credit Union Admin.*, 1:16-1141-JCC-TCB, 2017 WL 346136, at *4 (E.D. Va. Jan. 24, 2017) ("The Court

can find no Supreme Court or Fourth Circuit precedent recognizing the reopening doctrine. As such, the doctrine's status in this Circuit is unsettled."). None of the 2015 Rules reopened DHS's 2008 decision to require an employer to first obtain "a favorable labor certification determination" from DOL before applying for an H-2B visa. *See* 8 C.F.R. §§ 214.2(h)(6)(iii)(C), (iv)(A).

First, although the 2015 Interim Final Rule "establishes the process by which employers obtain a temporary labor certification from DOL for use in petitioning DHS to employ a nonimmigrant worker in H-2B status," 80 Fed. Reg. at 24042, the 2015 Interim Final Rule does not reconsider DHS's initial decision to require such certifications. The Executive Summary of ***714** the 2015 Interim Final Rule itself makes this clear, 80 Fed. Reg. at 24042-43 (emphasis added):

> Under DHS regulations, an H-2B petition for temporary employment must be accompanied by an approved temporary labor certification from DOL, which serves as DOL's advice to DHS regarding whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 8 CFR 214.2(h)(6)(iii)(A) and (D).
>
> This interim final rule, which is virtually identical to the 2012 final rule that DOL developed following public notice and comment, *improves DOL's ability to determine whether it is appropriate to grant a*

*temporary employment certification.*

* * *

The Departments believe that these procedures and additional worker protections will lead to an improved temporary employment certification process.

In other words, although the 2015 Interim Final Rule reiterates the temporary labor certification requirement, as set forth in the 2008 Labor-Certification Regulations, the 2015 Interim Final Rule's clear objective is to establish "the process by which employers obtain a temporary labor certification from DOL for use in petitioning DHS to employ a nonimmigrant worker in H-2B status." *Id.* at 24042; *see also id.* at 24045 ("DHS has therefore made DOL's approval of a temporary labor certification a condition precedent to the acceptance of the H-2B petition.... This interim final rule establishes the process by which employers obtain a temporary labor certification and the protections that apply to H-2B workers and corresponding workers.").

In arguing to the contrary, plaintiffs point to "the second line of the 2015 IFR," which says that the rules relate to " '8 C.F.R. Part 214.' " *See* 80 Fed. Reg. at 24042; ECF 111-1 at 51. According to plaintiffs, "This line means that the 2008 DHS Rule was 'directly affected' by the 2015 IFR." ECF 111-1 at 51. This misconstrues the requirement and purpose of the reopening doctrine, which only applies when an agency engages in *"serious, substantive*

*reconsideration"* of an existing rule. *P & V Enters.*, 516 F.3d at 1024 (emphasis added) (quoting *Nat'l Mining Ass'n,* 70 F.3d at 1352). The mere citation to "8 C.F.R. Part 214" cannot suffice to restart the clock for every subpart of a 186-page long regulatory provision that includes 16 separate subsections. *See also Am. Iron & Steel Inst. v. U.S. E.P.A.*, 886 F.2d 390, 398 (D.C. Cir. 1989).

Second, plaintiffs argue that in the 2015 Interim Final Rule, DHS "affirmatively requested public comment on all issues." ECF 111-1 at 51. To be sure, the 2015 IFR states that it "seek[s] public input on every aspect of this interim final rule." 80 Fed. Reg. at 24050. However, just as the mere invocation of a subsection of the C.F.R. does not trigger the reopening doctrine, neither does the agency's decision to welcome general comments on "every aspect" of an interim final rule. *See Indep. Cmty. Bankers of Am.*, 2017 WL 346136, at *4 ("Merely welcoming general comments beyond the scope of a proposed rulemaking does not affect a 'regulatory reset.' "); *see also NARPO*, 158 F.3d at 142 ("When an agency invites debate on some aspects of a broad subject ... it does not automatically reopen all related aspects including those already decided.").

Finally, plaintiffs contend that DHS "constructively reopened" the 2008 regulation ***715** by changing " 'the regulatory context in such a way that could not have been reasonably anticipated by the regulated entity and is onerous to its interests.' " ECF 111-1 at 52 (quoting *Envtl. Def. v. E.P.A*467 F.3d at 1334). Plaintiffs suggest that this is so because "regulated employers could not have reasonably anticipated

that a court would vacate the 2008 DOL Rule and DHS would respond by promulgating its own, far-more onerous replacement regulations." *Id.* This falls short of the type of "sea change" required to trigger a "constructive reopening." *See Nat. Res. Def. Council v. E.P.A.*, 571 F.3d 1245, 1266 (D.C. Cir. 2009). Instead, as in *Natural Resources Defense Council*, "The basic regulatory scheme remains unchanged." *Id.*

As a result, plaintiffs' challenge to the 2008 Labor-Certification Regulations is barred by the six-year statute of limitations.

**2. Scope of 8 U.S.C. § 1184**

Because plaintiffs' challenge to the 2008 Labor-Certification Regulations is time-barred, I need not consider whether the regulations are within the scope of the relevant statutes. However, even if plaintiffs' claims are not time-barred, the 2008 Labor-Certification Regulations would survive.

Defendants maintain that 8 U.S.C. § 1184(c)(1), which authorizes DHS to determine whether to import an H-2B worker "after consultation with appropriate agencies of the Government," supports DHS's policy of conditioning approval of H-2B visa petitions on a favorable labor certification from DOL. ECF 102-1 at 29. But, plaintiffs charge that by establishing this requirement, without an opportunity for an employer to appeal an adverse decision to DHS, DHS has abdicated its statutory responsibility to adjudicate all H-2 visa petitions, and has impermissibly redelegated its authority to another agency. *See* ECF 92-1 at 48-49.

Plaintiffs rely, *inter alia*, on *G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205 (10th Cir. 2015), *as amended* (Nov. 5, 2015), an unpublished Tenth Circuit decision that found an impermissible delegation of DHS's authority in the H-2B visa context. The *Daniels* Court looked to the definition of "consultation" and noted that it meant, *inter alia*, "to seek advice." *Id.* at 210-11. Based on this definition, the court stated that "advice is only that; it can, and sometimes should, be prudently ignored." *Id.* at 211. But, the court reasoned that DHS had "no ability to ignore DOL's advice if a certification has been denied[, and thus] DOL ha[d] effectively supplanted DHS as final decision-maker as to whether to allow for the admission of some H-2B workers." *Id.* (alterations added). The Tenth Circuit concluded, "That is a subdelegation." *Id.* And, because the Government had not presented any statute allowing such a delegation, the court found that it was improper. *Id.* at 212.[12] As a result, the *Daniels* Court reversed the district court's dismissal of the plaintiff's challenge to the 2008 Labor-Certification Regulations. *Id.* at 215. Of import here, however, the regulations were never vacated or enjoined by the district court.

The Tenth Circuit's decision is contrary to the Third Circuit's ruling in *Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653 (3d Cir. 2014). The Third Circuit, in reviewing DOL's 2011 Wage Rule, discussed and approved of the Government's entire regulatory scheme. ***716** *See id.* at 673-76. Applying *Chevron* deference, *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.

837, 845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Third Circuit determined that DHS had reasonably interpreted the consultation provision of 8 U.S.C. § 1184(c)(1) to allow it to "*condition*[ ] its own granting of an H-2B visa petition on the DOL's grant of a temporary labor certification." 745 F.3d at 670, 673 (emphasis in original) (alteration added).

In the view of the Third Circuit, DHS "did not impermissibly subdelegate all of its authority in this area." *Id.* The court reasoned that a rule requiring H-2B employers "to first obtain a temporary labor certification from the DOL on the questions of whether there are United States workers capable of performing the job in question and the impact of the aliens' employment on United States workers, and giving the DOL discretion to issue a limited set of rules governing the certification process," was a permissible exercise of DHS's "broad authority" to determine its obligations under the statute. *Id.* at 672-73.

In support, the Third Circuit cited *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 567 (D.C. Cir. 2004), for the proposition that "a federal agency entrusted with broad discretion to permit or forbid certain activities may condition its grant of permission on the decision of another entity ... so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination."

On this question, I am persuaded by the Third Circuit's analysis. As that court noted, 745 F.3d at 673: "The DOL has been involved in the administration of the nation's immigration laws

since its inception in 1913, and for the past six decades, has provided temporary labor certifications in some form to the government agency charged with administering the nation's immigration laws concerning admission of temporary non-agricultural workers." Given DOL's "institutional expertise in labor and employment matters, as well as [DOL's] history of rulemaking authority in the context of the H-2B program," the Third Circuit found a "reasonable connection" between DOL's labor certification decisions and DHS's H-2B petition decisions. *Louisiana Forestry*, 745 F.3d at 673. Furthermore, the court said, *id.* at 672: "Although the DHS's decision to grant an H-2B petition depends, in part, on whether or not the DOL issues a temporary labor certification to the petitioner-employer, it is the DHS—not the DOL—that must determine whether the other criteria for an H-2B visa have been satisfied." Therefore, the court concluded that 8 C.F.R. § 214.2 "does not effect a delegation of authority, but instead provides for a type of 'legitimate outside party input into agency decision-making processes.' " *Id.* (quoting *U.S. Telecom Ass'n*, 359 F.3d at 566).

This conclusion is further bolstered by 8 U.S.C. § 1101(a)(15)(H)(ii)(b), which provides, as part of the definition of an H-2B worker, that "unemployed persons capable of performing [the H-2B worker's] service or labor cannot be found in this country...." A plain reading of this language lends credence to defendants' use of the DOL's labor certification as a condition precedent. If unemployed Americans are available for the job, then by the terms of the statute no H-2B workers can be imported.

Thus, in my view, the 2008 Labor-Certification Regulations follow from a reasonable interpretation of DHS's statutory authority.

### B. 2015 Rules

Plaintiffs challenge the 2015 Program Rules, the 2015 Wage Rule, and the 2015 Enforcement Rules on several grounds. As ***717** an initial matter, plaintiffs assert that defendants failed to identify the legal authority for their joint rulemaking. *See* ECF 92-1 at 28-29. Their primary argument, however, is that DHS has no power to confer rulemaking authority on DOL. Moreover, plaintiffs assert that DHS and DOL cannot "jointly issue" rules, because rulemaking authority was delegated by Congress to DHS alone, and Congress did not authorize the redelegation of authority to DOL. *See id.* at 31-44.

#### 1. Identification of Authority

A notice of proposed rulemaking must contain a "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2). And, when ready to finally publish, the relevant agency "shall incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* § 553(c). However, as defendants correctly note, "this requirement is not onerous, and requires only sufficient notice of the legal authority exercised to apprise the public of the source of the authority and permit the public to comment on it." ECF 102-1 at 46 (citing *Louisiana Forestry*, 745 F.3d at 676-77; *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978) ).

In my view, DHS and DOL adequately cited the legal basis for their authority to issue the 2015 Rules. The 2015 Rules cite, *inter alia*, 8 U.S.C. §§ 1101, 1103, and 1184 as the basis for DHS and DOL's rulemaking authority, as well as 8 C.F.R. § 214.2. *See* 80 Fed. Reg. at 24108 (2015 Program Rules); *id.* at 24131 (2015 Enforcement Rules); *id.* at 24184 (2015 Wage Rule). This is enough to stave off a challenge on the basis of inadequate citation of legal authority.

**2. DOL's Rulemaking Authority**

Whether DOL may lawfully issue legislative rules concerning the Program is a close question. Plaintiffs correctly observe that "only Congress may grant rulemaking, adjudicative, or enforcement authority to an agency." ECF 92-1 at 30; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). The Government has not identified any statute that explicitly gives DOL such authority. Instead, it offers several arguments for why explicit congressional authorization is unnecessary. Most of these arguments are unpersuasive, and the Government's circular retreat from one to the next in both briefing and argument reveals the fragility of its position.

However, for several reasons, I am ultimately convinced that the Program's current regulatory scheme is consistent with Congress's intent.

**a.**

The Government relies heavily on the Third Circuit's decision in *Louisiana Forestry*, 745 F.3d 653, discussed earlier. *See, e.g.*, ECF 102-1 at 34. The district court's opinion in that case, which the Third Circuit affirmed, is also informative. *See Louisiana Forestry Ass'n, Inc. v. Solis*, 889 F.Supp.2d 711 (E.D. Pa. 2012). Judge Legrome Davis's artful decision concerning the 2011 Wage Rule frames DOL's long history with the Program.

The district judge recounted, as discussed earlier, that "the modern H-2B visa program was created in 1986 through the enactment" of the IRCA, "which bifurcated the existing H–2 visa program into agricultural [H-2A] and non-agricultural [H-2B] components. At the time of IRCA's enactment, the DOL regulations governing the labor certification process for non-agricultural, unskilled guest workers already ***718** had been in place for many years." *Id.* at 728. In fact, DOL had been issuing legislative rules, strikingly similar to the 2015 Rules at issue here, as far back as 1968. *See* 33 Fed. Reg. 7570-71.

The 1968 rules, then published at 20 C.F.R. § 621, concerned labor certifications for employers seeking temporary non-agricultural workers. Notably, the 1968 rules cite the very same authority that DOL cited in 2015: 8 U.S.C. § 1101, 8 U.S.C. § 1184, and 8 C.F.R. § 214.2. *See Certification of Temporary Foreign Labor for Industries Other Than Agriculture or Logging*, 33 Fed. Reg. 7570, 7571 (May 22, 1968) (establishing DOL labor certifications). Moreover, the statutory language of 8 U.S.C. §§ 1101 and 1184

remains "materially identical" to the versions from the 1960s. *See Louisiana Forestry*, 889 F.Supp.2d at 728. Those DOL rules stood intact for decades, having no more statutory basis than the 2015 Rules have.

The district court in *Louisiana Forestry* also emphasized that Congress revisited this part of the U.S. Code when it passed the IRCA, splitting the H-2 program into agricultural (H-2A) and non-agricultural (H-2B) components. The IRCA altered 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (the agricultural component) to specifically refer to the Secretary of Labor. But, the law left § 1101(a)(15)(H)(ii)(b) (the Program) unchanged.

Plaintiffs argue that the doctrine of *expressio unius* weighs against DOL's authority, because Congress "imposed a labor-certification requirement" for the H-2A program, but did not mention DOL or labor certifications under the authorizing statute for the H-2B program. *See* ECF 111-1 at 20. This is a plausible interpretation, but it is not the only interpretation. It may be, as counsel for *amici* suggested during oral argument, that Congress sought to direct the administration of the H-2A program by specifically designating DOL and the Department of Agriculture as the *only* "appropriate agencies of Government" with which to consult. *See* ECF 126 at 48; 8 U.S.C. § 1184(c)(1). By contrast, DHS may consult with any appropriate agencies for purposes of the H-2B program. *See* 8 U.S.C. § 1184(c)(1).

Of course, for more than 50 years, DHS (or its

predecessor) has consulted with DOL. And, throughout that period, Congress has never gainsaid that decision or DOL's rulemaking in the context of the Program. As Judge Davis observed in *Louisiana Forestry*, 889 F.Supp.2d at 729: "In enacting IRCA, Congress chose to leave intact the statutory text governing nonagricultural workers, and, by implication, the preexisting regulatory scheme."

Certainly, Congress was aware that DOL was involved in rulemaking. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). And, only four years before IRCA's passage—before the agricultural and nonagricultural components were divided—the Supreme Court drew attention to DOL's H-2 program rulemaking in the case of *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 595-96, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). In that case, the Supreme Court noted that "the Secretary of Labor [makes] initial determinations" of labor market availability, and that employers who wish to import foreign workers must follow DOL's rules to obtain a labor certification. *Id.*

Accordingly, Judge Davis concluded that, "at the time of IRCA's enactment, Congress was presumptively aware of the Court's interpretation of ***719** 8 U.S.C. § 1184(c) as authorizing DOL regulations governing labor certifications." *Louisiana Forestry*, 889 F.Supp.2d at 729 (citing *Lorillard*, 434 U.S. at 580-81, 98 S.Ct. 866). Further, Judge Davis

noted that parts of IRCA's legislative history made explicit reference to DOL's rules. *Louisiana Forestry*, 889 F.Supp.2d at 729 (citing H.R. Rep. No. 99-682, pt. 1, at 80 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5684).

"It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (internal quotation marks and citations omitted). "Since IRCA's enactment, Congress has chosen, on multiple occasions, to leave the DOL's rulemaking in the H-2B context intact," Judge Davis wrote. *Louisiana Forestry*, 889 F.Supp.2d at 729. "In 2005, Congress amended the H-2B program to confer enforcement powers on the DOL, without abrogating the DOL's legislative rulemaking authority." *Id.*

Furthermore, as defendants assert, "Congress has chosen (on multiple occasions) to endorse the agencies' joint action and/or DOL's participation in the H-2B program by funding the very program Plaintiffs now challenge." ECF 102-1 at 38 n.12 (citing Department of Labor Appropriations Act, 2016, Pub. L. No. 114-113, §§ 111-13, 129 Stat 2242, 2599 (2015)). Congress has referred to rules promulgated by DOL pertaining to the Program in both appropriations bills (*see id.*) and conference reports for appropriations bills. *See* 157 Cong. Rec. H7528 (Nov. 14, 2011) (directing the Secretary of

Labor to "continue to apply the rule entitled 'Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes' published by the Department of Labor on December 19, 2008 (73 Fed. Reg. 78020 *et seq*.).").

Plaintiffs take issue with this argument, calling it a "*post hoc* rationalization," and noting again that Congress has never extended explicit rulemaking authority to DOL in this context. *See* ECF 111-1 at 43-44. They posit, *id.* at 44: "Acquiescence (i.e., congressional silence) cannot possibly qualify as a 'clear' or 'affirmative' or 'express' statement of rulemaking authority...." *See also Bayou*, 713 F.3d at 1085 ("Furthermore, if congressional silence is a sufficient basis upon which an agency may build a rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change and 'agencies would enjoy virtually limitless hegemony....' " (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ) ).

But, in my view, and in light of the principles articulated by the Supreme Court, Congress has not been silent. In *Louisiana Forestry*, 889 F.Supp.2d at 728, Judge Davis concluded that "the history of the H-2B program demonstrates Congress's expectation that the DOL would engage in legislative rulemaking." I concur. DOL is not engaged in some sudden power-grab. DOL has not simply been *involved* in the H-2B program; it has actually been issuing legislative rules since the 1960s. Moreover, "DOL's rulemaking in the H-2B program is also

consistent with the objective of the statute creating the H-2B visa program, which is to permit U.S. employers to bring foreign workers to the United States to perform temporary non-agricultural work, provided that 'unemployed ***720** persons capable of performing ... service or labor cannot be found in this country.' " *Id.* at 730 (quoting 8 U.S.C. § 1101(a)(15)(H)(ii)(b) ).

**b.**

I shall briefly explain why I agree with the Third Circuit, rather than the Eleventh Circuit, on the question of DOL's rulemaking authority.

In *Bayou*, 713 F.3d at 1084, the Eleventh Circuit, upholding the district court's preliminary injunction of DOL's 2012 Program Rules, rejected the Government's argument that DHS's authority to consult with DOL under 8 U.S.C. § 1184(c)(1) enabled DOL to issue legislative rules. The *Bayou* Court stated, *id.*:

> We reject this interpretation of "consultation." Under this theory of consultation, any federal employee with whom the Secretary of DHS deigns to consult would then have the "authority to issue legislative rules to structure [his] consultation with DHS." This is an absurd reading of the statute and we decline to adopt it.
>
> DHS was given overall responsibility, including rulemaking authority, for the H-2B program. DOL was designated a consultant. It cannot bootstrap that supporting role into a co-equal one.

Indeed, if DHS decided tomorrow that, rather than

collaborating with DOL in the same way it and its predecessor have done for half a century, it preferred to consult only with the Department of Transportation—or, as the *Bayou* Court suggests, with a particular employee at the Department of Transportation—that new consultant's ability to issue rules would be gravely in doubt. For one, plaintiffs could make a strong argument that the choice to consult with the Department of Transportation, which has no experience or expertise in assessing labor markets, is an arbitrary and capricious one. More important, that new consulting relationship would bear none of the hallmarks of Congressional acknowledgement and approval that are present here.

I acknowledge the apparent rarity of finding rulemaking authority without explicit statutory authority. Plaintiffs assert in their supplemental briefing, ECF 124 at 3-4: "The only individual that has ever determined that DOL should be a consultant is the Secretary of Homeland Security or her predecessors." But, that is not the whole story. As discussed, Congress has repeatedly and over a long period recognized DOL's role, and the validity of its rules, albeit not via statute. *See Louisiana Forestry*, 745 F.3d at 674. Given this history, I am not persuaded to take from DOL a power that it has openly exercised for decades.

**3. Defendants' Other Arguments**

**a. The Delegation Provision of the INA**

The Government maintains that 8 U.S.C. § 1103(a)(6) gives DHS the power to delegate any of its

responsibilities, including rulemaking, to anyone in the federal government, including the Secretary of Labor. *See* ECF 102-1 at 25, 46 n.22; ECF 113 at 37. The Government employs this argument largely to defend DHS's decision to seek temporary labor certifications from DOL, but reprises it to justify DOL's role in the 2015 Rules. *See id.*

Although the scope of DHS's authority to delegate under § 1103(a)(6) is something of a gray area, I am not entirely convinced by defendants' argument. For one, the statutory language does not seem to support a delegation of this breadth. Section 1103(a)(6) provides: "[The Secretary of Homeland Security] is authorized to confer or impose upon any *employee* of the United States ... any of the *powers,* ***721** *privileges, or duties* conferred or imposed by this chapter or regulations issued thereunder upon *officers or employees of the Service.*" (Emphasis added.)

The language presents two potential obstacles to defendants' interpretation. First, is rulemaking authority one of the "powers, privileges, or duties" conferred on "officers or employees of the Service?" It would seem not. In the same statutory section, Congress has instructed that the Secretary of Homeland Security "shall establish such regulations ... as he deems necessary for carrying out his authority...." 8 U.S.C. § 1103(a)(3). Although the Secretary may subdelegate his responsibilities to subordinate agencies and officers, the power to issue regulations is conferred on him by Congress.

Second, given the general rule that only Congress

can confer rulemaking authority, discussed *supra*, there would appear to be a presumption against the theory that the head of one agency can in fact assign the power to issue binding rules to "any employee" of another agency. Under the Government's reading, could the Secretary of Homeland Security confer rulemaking authority on a health inspector for the Department of Agriculture, or on a private in the U.S. Army? Defendants have offered no limiting principle for their interpretation. On this basis, it is not clear that DHS validly delegated rulemaking authority to DOL, such that DOL could issue the 2015 Rules.

My conclusion is qualified, however, in the context of the 2015 Enforcement Rules. Section 1184(c)(14)(B) provides: "The Secretary of Homeland Security may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security under subparagraph (A)(i)." Subparagraph (A)(i) authorizes the Secretary of Homeland Security to impose administrative remedies on employers who fail to meet any of the conditions of their H-2B petitions. *Id.* § 1184(c)(14)(A).

Pursuant to this section, DHS formally redelegated a portion of its enforcement authority to DOL in January of 2009. *See* AR003764-65 ("Delegation of Authority to the Department of Labor under Section 214(c)(14)(A) of the Immigration and Nationality Act"). The Inter-Agency Agreement accompanying the delegation letter provided that "DOL will issue regulations as needed for the implementation and operation of the enforcement authority...."

AR003768. Plaintiffs concede that DHS may delegate some of its enforcement power under the statute. *See* ECF 92-1 at 50. However, they assert that the delegable authority does not include the power to make rules or regulations. *Id.* at 50-51.

Given that Congress clearly anticipated that DOL would be delegated some enforcement authority, it seems likely that Congress also anticipated that DOL might need to engage in limited rulemaking to support its enforcement efforts.

Plaintiffs do not discuss the 2015 Enforcement Rules with any degree of particularity. *See id.* at 50-52. DOL has been delegated the power to "impose administrative remedies" on an employer, "in addition to any other remedy authorized by law," once DOL "finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to" an H-2B worker. *See* 8 U.S.C. § 1184(c)(14). To the extent that the 2015 Enforcement Rules support that lawfully delegated power, those rules are permissible.

**b. Joint Rulemaking**

Defendants also maintain that, were the Court to conclude that DOL has no authority to issue rules, this defect could be somehow remedied by the "joint issuance" ***722** of these rules with DHS. The Government asserts that "there is nothing inherently impermissible about joint rulemaking." ECF 102-1 at 43. Indeed, there are many examples of joint rulemaking. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv.

L. Rev. 1131, 1165-68 (2012) (collecting examples). However, as plaintiffs point out, agencies tend to use joint rulemaking "where Congress has allocated each of them a role implementing one or a set of related statutes." *Id.* at 1167.

Defendants do not point to any examples of joint rulemaking where only one agency has rulemaking authority, and the other agency simply consents to be subject to those rules. Rather, they contend that "neither the INA nor the APA prohibit the agencies' jointly issued rules, and plaintiffs cite no authority that mandates that joint rules may only be issued through express congressional authorization." ECF 102-1.

To be sure, joint rulemaking is not prohibited, and it may even be advisable where agencies have overlapping jurisdiction. But, the Government has presented no authority to suggest that joint rulemaking carries any independent legal significance.

Defendants assert that "the agencies' joint participation in 2015 eliminates any doubt that any part of the rules was issued without ample authority." ECF 102-1 at 44. As support for this proposition, defendants quote from their own rule: "To ensure that there can be no question about the authority for and validity of the regulations in this area, DHS and DOL ... together are issuing this interim final rule." *Id.* (quoting 80 Fed. Reg. at 24045). But wishing does not make it so. The concern with defendants' prior rules issued by DOL has never been skepticism that DOL and DHS shared the same

goals; it was that DHS and DOL cannot lawfully achieve those goals in this manner.

The Government also relies on the decisions of the Northern District of Florida and the Eleventh Circuit to support their theory that joint rulemaking solves prior problems of authority. They note that "the same district court that twice issued an injunction against DOL's unilaterally issued H-2B rules ... has since concluded that the joint rules at issue in this case are a valid exercise of DHS's authority." ECF 102-1 at 44 (citing *Bayou III*, 173 F. Supp. 3d at 1277, 1289-91). The district court in *Bayou III*, considering the 2015 Rules, did not expressly endorse defendants' joint rulemaking, but it did observe in a footnote that although "DOL did not have unilateral authority to promulgate H-2B regulations.... [t]he 2015 Program Rule and Wage Rule were promulgated jointly by DHS and DOL in response." *Bayou III,* 173 F.Supp. 3d at 1277 n.2. The court upheld the 2015 Rules. *Id.* at 1292. To the extent that this ruling carries any weight, it supports the Government. However, given that the *Bayou III* Court declined to discuss the joint rulemaking in any detail, the case's persuasive value as to this point is minimal.

On this question, the significance of the Eleventh Circuit's opinion in *Bayou*, 713 F.3d 1080, is thinner still. Defendants observe that the court rejected the proposition that DOL "is empowered to engage in rulemaking, even without the DHS." *Id.* at 1084. They reason that the inverse must also be true: "where DOL issues rules jointly with, rather than 'without' DHS, such jointly promulgated rules are

unquestionably fully consistent with the INA and APA." ECF 102-1 at 45. I am unable to discern anything in the Eleventh Circuit's decision that supports this inference.

In the alternative, defendants assert, in a footnote, that "it is unnecessary for the Court to reach the question of DOL's rulemaking authority because the joint rules are a proper exercise of DHS's rulemaking ***723** authority. See 8 U.S.C. § 1103(a)(3). In such a case, DOL's signature would be surplusage; it would not invalidate the rule." ECF 102-1 at 44 n.20. However, defendants do not adequately explain how DHS alone could issue a rule that purports to govern the Secretary of Labor and his subordinates, and is published under DOL's title of the Code of Federal Regulations.

## IV. Conclusion

Plaintiffs' suit attacks the 2008 Labor-Certification Regulations and the 2015 Rules. Their challenge to the former is time-barred, and, even if it were not, the regulations are consistent with the statute. Furthermore, I am persuaded that the 2015 Rules are consistent with Congress's intent, given DOL's long history of rulemaking in the context of the Program.

For the reasons stated above, I shall DENY Plaintiffs' Motion and I shall GRANT Defendants' Motion. Judgment shall be entered in favor of the Government.

A separate Order follows, consistent with this

Memorandum Opinion.

Footnotes
1. According to plaintiffs, the 2015 Program Rules consist of ETA's administrative regulations and WHD's enforcement regulations. ECF 44, ¶ 40. The 2015 Enforcement Rules represent "WHD's enforcement portion of the 2015 Program Rules." *Id.* And, the 2015 Wage Rule "represent[s] more of ETA's administrative regulations." *Id.*

2. As noted, the 2015 Enforcement Rules are alleged to be part of the 2015 Program Rules, "except when separately identified." ECF 44, ¶ 40.

3. Government counsel provided Chambers with both a compact disc and a paper copy of the record. *See* ECF 46; ECF 87. However, counsel failed to file a copy with the Clerk. Therefore, by Order of September 7, 2018, the Court directed counsel to do so. ECF 127. A copy of the administrative record was docketed on September 12, 2018, in paper format. *See* ECF 129.

4. Plaintiffs' Motion was filed as ECF 91. However, plaintiffs submitted a revised version of their memorandum of law in support of their Motion. *See* ECF 92-1.

5. Plaintiffs' Reply was initially docketed at ECF 110. They provided a corrected submission, docketed at ECF 111-1.

6. *Amici* were permitted to argue at the hearing.

7. Plaintiffs refer to the Interim Final Rule as the "2015 Program Rules" and the "2015 Enforcement Rules." They refer to the Final Rule as the "2015 Wage Rule." ECF 44, ¶ 2. The Government refers to the Interim Final Rule as the "2015 Interim Final Rule" or "2015 IFR." And, they refer to the Final Rule as the "2015 Wage Final Rule." ECF 69 at 11.

8. The statute, as initially written, assigned this duty to the Attorney General. However, as noted, the Homeland Security Act of 2002 transferred enforcement of the immigration laws from the Attorney General to the Secretary of DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002).

9. As the Third Circuit observed, there is technically no circuit split, as the "three-member panel in *Bayou* opined only on whether the District Court abused its discretion in finding that the employer-plaintiffs were likely to succeed on the merits of their challenge to the DOL's rulemaking authority, not on whether the DOL actually has that authority or not." *Louisiana Forestry*, 745 F.3d at 675 n.17. As such, "[a] circuit split is thus not yet a foregone conclusion." *Id.*

10. As the agencies explain, the 2013 DHS/DOL Wage IFR left almost all "of the wage methodology and procedures from the 2008 [DOL] rule untouched." 2015 DHS/DOL Wage Rule, 80 Fed. Reg. at 24151. *CATA III* vacated a portion of the 2013 IFR—20 C.F.R. 655.10(f)—and *Perez* "then vacated the remainder of 20 C.F.R. 655.10." *Id.*

11. The Government has not seriously contested plaintiffs' standing to bring this suit at any point in the litigation. Moreover, plaintiffs have adequately alleged economic harm as a result of the regulations. See *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (APA standing); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 342, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (associational standing).

12. Notably, in that case, the court did not consider the Government's alternative argument, i.e., that Congress had authorized delegation under 8 U.S.C. § 1103(a)(6). *See* ECF 102-1 at 38-43; *Daniels*, 626 F. App'x at 212 n.10.

## Appendix D – Relevant Constitutional and Statutory Provisions

U.S. Const. art. I, §1

Section 1.

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**§1101. Definitions**

(a) As used in this chapter—

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the

biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term "clerk of court" means a clerk of a naturalization court.

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term "consular officer" means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III, for the purpose of adjudicating nationality.

(10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.

(11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded

as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by

the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land

temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam or the Commonwealth of the Northern Mariana Islands and solely in pursuit of his calling as a crewman and to depart from Guam or the Commonwealth of the Northern Mariana Islands with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer

has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title;

(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) [1] of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign

government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) [22 U.S.C. 288 et seq.], accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien (i) [(a) Repealed. Pub. L. 106–95, §2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph

(O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor

defined in section 3121(g) of title 26, agriculture as defined in section 203(f) of title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is

coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p) [1] of section 1184 of this title, an alien who—

(i) is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M)(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is

described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who—

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III)(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals,

or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who—

(i)(a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or (b) is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more

foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who—

(i) for the 2 years immediately preceding the time of application for admission, has been a

member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184(k) of this title, an alien—

(i) who the Attorney General determines—

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine—

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines—

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22;

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

(cc) has not attained 18 years of age; and

(IV) the alien [2] would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if accompanying, or following to join, the alien described in clause (i)—

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

(III) any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, as of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this

subparagraph, if the Secretary of Homeland Security determines that—

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i)—

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for

status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if—

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and—

(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or

(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

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## §1184. Admission of nonimmigrants

### (a) Regulations

(1) 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, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States. No alien admitted to Guam or the Commonwealth of the Northern Mariana Islands without a visa pursuant to section 1182(l) of this title may be authorized to enter or stay in the United States other than in Guam or the Commonwealth of the Northern Mariana Islands or to remain in Guam or the Commonwealth of the Northern Mariana Islands for a period exceeding 45 days from date of admission to Guam or the Commonwealth of the Northern Mariana Islands. No alien admitted to the United States without a visa pursuant to section 1187 of this title may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

(2)(A) The period of authorized status as a nonimmigrant described in section 1101(a)(15)(O) of this title shall be for such period as the Attorney General may specify in order to provide for the event (or events) for which the nonimmigrant is admitted.

(B) The period of authorized status as a nonimmigrant described in section 1101(a)(15)(P) of this title shall be for such period as the Attorney General may specify in order to provide for the competition, event, or performance for which the nonimmigrant is admitted. In the case of nonimmigrants admitted as individual athletes under section 1101(a)(15)(P) of this title, the period of authorized status may be for an initial period (not to exceed 5 years) during which the nonimmigrant will perform as an athlete and such period may be extended by the Attorney General for an additional period of up to 5 years.

**(b) Presumption of status; written waiver**

Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 1101(a)(15) of this title, and other than a nonimmigrant described in any provision of section 1101(a)(15)(H)(i) of this title except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title. An alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act [22 U.S.C. 288 et seq.], or an alien who is the attendant, servant, employee, or member of the immediate family of any such alien shall not be entitled to apply for or receive an immigrant visa, or to enter the United States as an immigrant unless he executes a

written waiver in the same form and substance as is prescribed by section 1257(b) of this title.

**(c) Petition of importing employer**

(1) The question of importing any alien as a nonimmigrant under subparagraph (H), (L), (O), or (P)(i) of section 1101(a)(15) of this title (excluding 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. 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. For purposes of this subsection with respect to nonimmigrants described in section 1101(a)(15)(H)(ii)(a) of this title, the term "appropriate agencies of Government" means the Department of Labor and includes the Department of Agriculture. The provisions of section 1188 of this title shall apply to the question of importing any alien as a nonimmigrant under section 1101(a)(15)(H)(ii)(a) of this title.

(2)(A) The Attorney General shall provide for a procedure under which an importing employer which meets requirements established by the Attorney General may file a blanket petition to import aliens as nonimmigrants described in section 1101(a)(15)(L) of this title instead of filing individual petitions under paragraph (1) to import such aliens. Such procedure shall permit the expedited processing of

visas for admission of aliens covered under such a petition.

(B) For purposes of section 1101(a)(15)(L) of this title, an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

(C) The Attorney General shall provide a process for reviewing and acting upon petitions under this subsection with respect to nonimmigrants described in section 1101(a)(15)(L) of this title within 30 days after the date a completed petition has been filed.

(D) The period of authorized admission for—

(i) a nonimmigrant admitted to render services in a managerial or executive capacity under section 1101(a)(15)(L) of this title shall not exceed 7 years, or

(ii) a nonimmigrant admitted to render services in a capacity that involves specialized knowledge under section 1101(a)(15)(L) of this title shall not exceed 5 years.

(E) In the case of an alien spouse admitted under section 1101(a)(15)(L) of this title, who is accompanying or following to join a principal alien admitted under such section, the Attorney General shall authorize the alien spouse to engage in employment in the United States and provide the spouse with an "employment authorized" endorsement or other appropriate work permit.

(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101(a)(15)(L) of this title and

will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101(a)(15)(L) of this title if—

(i) the alien will be controlled and supervised principally by such unaffiliated employer; or

(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

(3) The Attorney General shall approve a petition—

(A) with respect to a nonimmigrant described in section 1101(a)(15)(O)(i) of this title only after consultation in accordance with paragraph (6) or, with respect to aliens seeking entry for a motion picture or television production, after consultation with the appropriate union representing the alien's occupational peers and a management organization in the area of the alien's ability, or

(B) with respect to a nonimmigrant described in section 1101(a)(15)(O)(ii) of this title after consultation in accordance with paragraph (6) or, in the case of such an alien seeking entry for a motion picture or television production, after consultation with such a labor organization and a management organization in the area of the alien's ability.

In the case of an alien seeking entry for a motion picture or television production, (i) any opinion under the previous sentence shall only be advisory, (ii) any such opinion that recommends denial must be in writing, (iii) in making the decision the Attorney General shall consider the exigencies and scheduling of the production, and (iv) the Attorney General shall append to the decision any such opinion. The Attorney General shall provide by regulation for the waiver of the consultation requirement under subparagraph (A) in the case of aliens who have been admitted as nonimmigrants under section 1101(a)(15)(O)(i) of this title because of extraordinary ability in the arts and who seek readmission to perform similar services within 2 years after the date of a consultation under such subparagraph. Not later than 5 days after the date such a waiver is provided, the Attorney General shall forward a copy of the petition and all supporting documentation to the national office of an appropriate labor organization.

(4)(A) For purposes of section 1101(a)(15)(P)(i)(a) of this title, an alien is described in this subparagraph if the alien—

(i)(I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance;

(II) is a professional athlete, as defined in section 1154(i)(2) of this title;

(III) performs as an athlete, or as a coach, as part of a team or franchise that is located in the United States and a member of a foreign league or association of 15 or more amateur sports teams, if—

(aa) the foreign league or association is the highest level of amateur performance of that sport in the relevant foreign country;

(bb) participation in such league or association renders players ineligible, whether on a temporary or permanent basis, to earn a scholarship in, or participate in, that sport at a college or university in the United States under the rules of the National Collegiate Athletic Association; and

(cc) a significant number of the individuals who play in such league or association are drafted by a major sports league or a minor league affiliate of such a sports league; or

(IV) is a professional athlete or amateur athlete who performs individually or as part of a group in a theatrical ice skating production; and

(ii) seeks to enter the United States temporarily and solely for the purpose of performing—

(I) as such an athlete with respect to a specific athletic competition; or

(II) in the case of an individual described in clause (i)(IV), in a specific theatrical ice skating production or tour.

(B)(i) For purposes of section 1101(a)(15)(P)(i)(b) of this title, an alien is described in this subparagraph if the alien—

(I) performs with or is an integral and essential part of the performance of an entertainment group that has (except as provided in clause (ii)) been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time,

(II) in the case of a performer or entertainer, except as provided in clause (iii), has had a

sustained and substantial relationship with that group (ordinarily for at least one year) and provides functions integral to the performance of the group, and

(III) seeks to enter the United States temporarily and solely for the purpose of performing as such a performer or entertainer or as an integral and essential part of a performance.

(ii) In the case of an entertainment group that is recognized nationally as being outstanding in its discipline for a sustained and substantial period of time, the Attorney General may, in consideration of special circumstances, waive the international recognition requirement of clause (i)(I).

(iii)(I) The one-year relationship requirement of clause (i)(II) shall not apply to 25 percent of the performers and entertainers in a group.

(II) The Attorney General may waive such one-year relationship requirement for an alien who because of illness or unanticipated and exigent circumstances replaces an essential member of the group and for an alien who augments the group by performing a critical role.

(iv) The requirements of subclauses (I) and (II) of clause (i) shall not apply to alien circus personnel who perform as part of a circus or circus group or who constitute an integral and essential part of the performance of such circus or circus group, but only if such personnel are entering the United States to join a circus that has been recognized nationally as outstanding for a sustained and substantial period of time or as part of such a circus.

(C) A person may petition the Attorney General for classification of an alien as a nonimmigrant under section 1101(a)(15)(P) of this title.

(D) The Attorney General shall approve petitions under this subsection with respect to nonimmigrants described in clause (i) or (iii) of section 1101(a)(15)(P) of this title only after consultation in accordance with paragraph (6).

(E) The Attorney General shall approve petitions under this subsection for nonimmigrants described in section 1101(a)(15)(P)(ii) of this title only after consultation with labor organizations representing artists and entertainers in the United States.

(F)(i) No nonimmigrant visa under section 1101(a)(15)(P)(i)(a) of this title shall be issued to any alien who is a national of a country that is a state sponsor of international terrorism unless the Secretary of State determines, in consultation with the Secretary of Homeland Security and the heads of other appropriate United States agencies, that such alien does not pose a threat to the safety, national security, or national interest of the United States. In making a determination under this subparagraph, the Secretary of State shall apply standards developed by the Secretary of State, in consultation with the Secretary of Homeland Security and the heads of other appropriate United States agencies, that are applicable to the nationals of such states.

(ii) In this subparagraph, the term "state sponsor of international terrorism" means any country the government of which has been determined by the Secretary of State under any of the laws specified in clause (iii) to have repeatedly provided support for acts of international terrorism.

(iii) The laws specified in this clause are the following:

(I) Section 4605(j)(1)(A) of title 50 (or successor statute).[1]

(II) Section 2780(d) of title 22.

(III) Section 2371(a) of title 22.

(G) The Secretary of Homeland Security shall permit a petition under this subsection to seek classification of more than 1 alien as a nonimmigrant under section 1101(a)(15)(P)(i)(a) of this title.

(H) The Secretary of Homeland Security shall permit an athlete, or the employer of an athlete, to seek admission to the United States for such athlete under a provision of this chapter other than section 1101(a)(15)(P)(i) of this title if the athlete is eligible under such other provision.

(5)(A) In the case of an alien who is provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) or 1101(a)(15)(H)(ii)(b) of this title and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.

(B) In the case of an alien who is admitted to the United States in nonimmigrant status under section 1101(a)(15)(O) or 1101(a)(15)(P) of this title and whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of such nonimmigrant status and the petitioner are jointly and severally liable for the reasonable cost of return transportation of the alien abroad. The petitioner shall provide assurance satisfactory to the Attorney General that the reasonable cost of that transportation will be provided.

(6)(A)(i) To meet the consultation requirement of paragraph (3)(A) in the case of a petition for a nonimmigrant described in section 1101(a)(15)(O)(i)

of this title (other than with respect to aliens seeking entry for a motion picture or television production), the petitioner shall submit with the petition an advisory opinion from a peer group (or other person or persons of its choosing, which may include a labor organization) with expertise in the specific field involved.

(ii) To meet the consultation requirement of paragraph (3)(B) in the case of a petition for a nonimmigrant described in section 1101(a)(15)(O)(ii) of this title (other than with respect to aliens seeking entry for a motion picture or television production), the petitioner shall submit with the petition an advisory opinion from a labor organization with expertise in the skill area involved.

(iii) To meet the consultation requirement of paragraph (4)(D) in the case of a petition for a nonimmigrant described in section 1101(a)(15)(P)(i) or 1101(a)(15)(P)(iii) of this title, the petitioner shall submit with the petition an advisory opinion from a labor organization with expertise in the specific field of athletics or entertainment involved.

(B) To meet the consultation requirements of subparagraph (A), unless the petitioner submits with the petition an advisory opinion from an appropriate labor organization, the Attorney General shall forward a copy of the petition and all supporting documentation to the national office of an appropriate labor organization within 5 days of the date of receipt of the petition. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, that representative shall be the appropriate labor organization.

(C) In those cases in which a petitioner described in subparagraph (A) establishes that an appropriate peer group (including a labor organization) does not exist, the Attorney General shall adjudicate the petition without requiring an advisory opinion.

(D) Any person or organization receiving a copy of a petition described in subparagraph (A) and supporting documents shall have no more than 15 days following the date of receipt of such documents within which to submit a written advisory opinion or comment or to provide a letter of no objection. Once the 15-day period has expired and the petitioner has had an opportunity, where appropriate, to supply rebuttal evidence, the Attorney General shall adjudicate such petition in no more than 14 days. The Attorney General may shorten any specified time period for emergency reasons if no unreasonable burden would be thus imposed on any participant in the process.

(E)(i) The Attorney General shall establish by regulation expedited consultation procedures in the case of nonimmigrant artists or entertainers described in section 1101(a)(15)(O) or 1101(a)(15)(P) of this title to accommodate the exigencies and scheduling of a given production or event.

(ii) The Attorney General shall establish by regulation expedited consultation procedures in the case of nonimmigrant athletes described in section 1101(a)(15)(O)(i) or 1101(a)(15)(P)(i) of this title in the case of emergency circumstances (including trades during a season).

(F) No consultation required under this subsection by the Attorney General with a nongovernmental entity shall be construed as permitting the Attorney General to delegate any authority under this

subsection to such an entity. The Attorney General shall give such weight to advisory opinions provided under this section as the Attorney General determines, in his sole discretion, to be appropriate.

(7) If a petition is filed and denied under this subsection, the Attorney General shall notify the petitioner of the determination and the reasons for the denial and of the process by which the petitioner may appeal the determination.

(8) The Attorney General shall submit annually to the Committees on the Judiciary of the House of Representatives and of the Senate a report describing, with respect to petitions under each subcategory of subparagraphs (H), (O), (P), and (Q) of section 1101(a)(15) of this title the following:

(A) The number of such petitions which have been filed.

(B) The number of such petitions which have been approved and the number of workers (by occupation) included in such approved petitions.

(C) The number of such petitions which have been denied and the number of workers (by occupation) requested in such denied petitions.

(D) The number of such petitions which have been withdrawn.

(E) The number of such petitions which are awaiting final action.

(9)(A) The Attorney General shall impose a fee on an employer (excluding any employer that is a primary or secondary education institution, an institution of higher education, as defined in section 1001(a) of title 20, a nonprofit entity related to or affiliated with any such institution, a nonprofit entity which engages in established curriculum-related clinical training of students registered at any

such institution, a nonprofit research organization, or a governmental research organization) filing before [2] a petition under paragraph (1)—

(i) initially to grant an alien nonimmigrant status described in section 1101(a)(15)(H)(i)(b) of this title;

(ii) to extend the stay of an alien having such status (unless the employer previously has obtained an extension for such alien); or

(iii) to obtain authorization for an alien having such status to change employers.

(B) The amount of the fee shall be $1,500 for each such petition except that the fee shall be half the amount for each such petition by any employer with not more than 25 full-time equivalent employees who are employed in the United States (determined by including any affiliate or subsidiary of such employer).

(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 1356(s) of this title.

(10) An amended H–1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.

(11)(A) Subject to subparagraph (B), the Secretary of Homeland Security or the Secretary of State, as appropriate, shall impose a fee on an employer who has filed an attestation described in section 1182(t) of this title—

(i) in order that an alien may be initially granted nonimmigrant status described in section 1101(a)(15)(H)(i)(b1) of this title; or

(ii) in order to satisfy the requirement of the second sentence of subsection (g)(8)(C) for an alien having such status to obtain certain extensions of stay.

(B) The amount of the fee shall be the same as the amount imposed by the Secretary of Homeland Security under paragraph (9), except that if such paragraph does not authorize such Secretary to impose any fee, no fee shall be imposed under this paragraph.

(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 1356(s) of this title.

(12)(A) In addition to any other fees authorized by law, the Secretary of Homeland Security shall impose a fraud prevention and detection fee on an employer filing a petition under paragraph (1)—

(i) initially to grant an alien nonimmigrant status described in subparagraph (H)(i)(b) or (L) of section 1101(a)(15) of this title; or

(ii) to obtain authorization for an alien having such status to change employers.

(B) In addition to any other fees authorized by law, the Secretary of State shall impose a fraud prevention and detection fee on an alien filing an application abroad for a visa authorizing admission to the United States as a nonimmigrant described in section 1101(a)(15)(L) of this title, if the alien is covered under a blanket petition described in paragraph (2)(A).

(C) The amount of the fee imposed under subparagraph (A) or (B) shall be $500.

(D) The fee imposed under subparagraph (A) or (B) shall only apply to principal aliens and not to the spouses or children who are accompanying or following to join such principal aliens.

(E) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 1356(v) of this title.

(13)(A) In addition to any other fees authorized by law, the Secretary of Homeland Security shall impose a fraud prevention and detection fee on an employer filing a petition under paragraph (1) for nonimmigrant workers described in section 1101(a)(15)(H)(ii)(b) of this title.

(B) The amount of the fee imposed under subparagraph (A) shall be $150.

(14)(A) If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 1101(a)(15)(H)(ii)(b) of this title or a willful misrepresentation of a material fact in such petition—

(i) the Secretary of Homeland Security may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation) as the Secretary of Homeland Security determines to be appropriate; and

(ii) the Secretary of Homeland Security may deny petitions filed with respect to that employer under section 1154 of this title or paragraph (1) of this subsection during a period of at least 1 year

but not more than 5 years for aliens to be employed by the employer.

(B) The Secretary of Homeland Security may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security under subparagraph (A)(i).

(C) In determining the level of penalties to be assessed under subparagraph (A), the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.

(D) In this paragraph, the term "substantial failure" means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition.

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