UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ITSERVE ALLIANCE, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 1:18-cv-02350-RMC**
	)	**(Lead case for consolidated briefing)**
UNITED STATES CITIZENSHIP	)	
AND IMMIGRATION SERVICES,	)	
	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO PLAINTIFFS' CONSOLIDATED MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

ADMINISTRATIVE DECISIONS

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL REGISTER

PUBLIC LAW

INTRODUCTION

This memorandum of law address the three legal questions involving United States Citizenship and Immigration Services' ("USCIS") adjudication of H-1B visa petitions, for which, Judge Huvelle has ordered consolidated briefing on:

(1) the authority of USCIS to grant [petitions for H-1B] visas for less than the requested three-year period;

(2) the authority of USCIS to deny [petitions for H-1B] visas to companies that place employees at third-party locations either because the third-party is determined to be the employer or because specific and detailed job duties are not provided with the visa application; and

(3) the related statute of limitations issues raised by the government.

See Minute Order signed by Judge Huvelle dated March 6, 2019 (attached as Exhibit 1). These threshold legal issues all relate to USCIS's congressionally-mandated authority to admit temporary foreign workers into the United States and its administration and enforcement of the H-1B specialty occupation worker program.

With respect to the first question, the Government contends that USCIS' authority to grant H-1B visa petitions s for validity periods of less than three years is found at 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). This regulation was promulgated through notice-and-comment rulemaking pursuant to statutory authority found in 8 U.S.C. § 1184(a)(2)(A).

With respect to the second question, the agency in 1991 promulgated a regulation through notice-and-comment rulemaking containing both the employer-employee requirement and the itinerary requirement. The Government contends that Plaintiffs' challenge to this regulation on the grounds that it is purportedly *ultra vires*, is barred by the statute of limitations and refuted by

the express language of 8 U.S.C. § 1184(a)(2)(A), which granted the agency the authority to promulgate the 1991 regulation. Alternatively, Plaintiffs contend that the 1991 regulation is valid, but that USCIS is improperly trying to use a guidance memorandum issued in 2018 to amend or repudiate its regulatory requirements. This claim fails as a matter of law because the guidance memorandum, on its face, indicates that it is not imposing any new requirements but is instead merely interpreting existing requirements (including specifically the need to provide non-speculative evidence that the beneficiary is eligible under the H-1B program statutory requirements).

With respect to the third question (the statute of limitations), Plaintiffs' facial challenge to the authority of the agency to promulgate the 1991 regulation (containing the employer-employee requirement and the itinerary requirement) is barred by the six-year statute of limitations found in 28 U.S.C. § 2401. In their Motion for Summary Judgment, Plaintiffs fail to point to any exception to the statute of limitations that might apply and, in fact, fail to address the statute of limitations at all. As a result, Plaintiffs waive any argument in opposition to the applicability of the statute of limitations.

In Plaintiffs' Motion for Summary Judgment, Plaintiffs raise a number of issues that were not consolidated for briefing. This Court should decline to address these issues at this time because Judge Huvelle consolidated these cases for the explicit purposes of resolving "three threshold legal issues" and indicated that the cases were not being transferred "for all purposes" because the cases are "not related within the meaning of Local Civil Rule 40.5(a)." *See* Exhibit 1. Moreover, the rationale for consolidation was that a court needed to address the threshold legal issues regarding USCIS' *authority* to enforce and administer the H-1B program before making the individualized determination of whether the agency properly exercised its authority

in a particular adjudication (an inquiry that is necessarily fact-specific and will be based on the review of the administrative record for each individual adjudication). It does not make sense to determine whether the agency properly issued the rule and whether the rule remains valid.

One of the challenges in reviewing Plaintiffs' Motion for Summary Judgment, is that Plaintiffs chose not to organize their arguments around the three threshold legal questions specifically identified by Judge Huvelle, or even the three facial claims raised in the underlying Complaint and Amended Complaint (Counts I, II, and III). Rather, Plaintiffs have coined the term "Employer-Employee Rule" which is not a rule, but instead a combination of distinct legal requirements for H-1B classification from different legal authorities and discussed together. This phraseology obscures whether they are referring to the employer employee requirement found in 8 C.F.R. § 214.2(h)(4)(ii) (which was promulgated through notice-and-commenting rulemaking), the 2010 Employer Employee Memorandum which interprets this regulatory requirement, or how USCIS applies the regulatory requirement in individualized adjudications (which is not currently before the Court under Judge Huvelle's order).

In organizing its Opposition and Cross-Motion, the Government relies on Judge Huvelle's Order. *See* Minute Order, Exhibit 1. With respect to all three threshold legal questions presented, for the reasons set forth below, this Court should rule in favor of the Government.

PROCEDURAL BACKGROUND

Plaintiffs commenced litigation on October 11, 2018 asserting three facial challenges regarding USCIS' adjudication of H-1B petitions. Dkt. 1. In Count I, Plaintiffs challenged the agency's authority to promulgate the 1991 regulation containing the itinerary requirement, in Count II, Plaintiffs challenged a 2018 Guidance Memorandum, and in Count III, Plaintiffs

challenged USCIS' authority to grant H-1B petitions for periods of less than three years. *See id*. at ¶¶ 146, 157, 159-166. On January 18, 2019, Plaintiffs amended their complaint adding six additional plaintiffs who were employers challenging over 25 separate individual adjudications. *See* Dkt. 6.

The Government filed a partial motion to dismiss with respect to the three threshold legal issues (Dkt. 7) and an unopposed motion for relief from Local Rule 7(n), requesting that it be excused from providing the administrative records for the individual claims under after the Court ruled on its partial motion to dismiss for the three threshold legal issues. Dkt. 8. On February 11, 2019, this Court granted the unopposed motion and order briefing on the partial motion to dismiss stayed until the parties could confer on possible consolidation of this case with other cases filed by Plaintiffs and Plaintiffs' counsel.

The parties submitted status reports setting forth the parties' competing positions on how to proceed. The Government contended that the cases should not be consolidated, but instead Plaintiffs should respond to the Government's partial motion to dismiss on the three threshold legal issues and the other individual cases should be stayed. Dkt. 10. Plaintiffs disagreed requesting consolidation and that the case be decided on a motion for preliminary injunction prior to April 1, 2019. *See* Dkt. 9-1.

On March 6, 2019, Judge Huvelle entered a minute order consolidating the cases for a limited purpose. *See* Exhibit 1 at 1. This order stating that the cases are "not related . . . thus they are not being transferred for all purposes [,]" but instead only being transferred for the resolution of three threshold legal issues:

> Pursuant to Local Civil Rule 40.5(e), the Calendar and Case Management Committee finds that there are fifteen cases assigned to different judges that should be referred to a single judge to avoid duplication of judicial effort because all the cases concern USCISs treatment of H1-B visa petitions and raise one or more of the same three threshold legal

> issues: (1) the authority of USCIS to grant visas for less than the requested three-year period; (2) the authority of USCIS to deny visas to companies that place employees at third-party locations either because the third-party is determined to be the employer or because specific and detailed job duties are not provided with the visa application; and (3) the related statute of limitations issues raised by the government. (The parties are in agreement that these cases are not related within the meaning of Local Civil Rule 40.5(a) and thus they are not being transferred for all purposes.) . . . therefore all other cases enumerated herein will be referred to . . . [Judge Collyer] for resolution of these three issues.

Exhibit 1 at 1.

On April 1, 2019, the parties' filed a Joint Status Report establishing a briefing schedule for "the three preliminary, threshold legal questions." Dkt. 11 at 1. This document specifically stated that the "parties are in agreement that briefing will be limited to the three threshold legal questions." *Id*. In apparent reliance on this agreement, the Court cancelled the status conference scheduled for three days later (on April 4, 2019) and set the briefing schedule requested by the parties. Min. Order dated April 3, 2019.

Plaintiffs' filed their Motion for Summary Judgment on April 4 2019. *See* Dkt. 14. In their Motion, Plaintiffs only address two of the three threshold legal issues identified by Judge Huvelle, raise additional legal claims, and reference four individual adjudications that they believe are exemplars which illustrate why USCIS' actions are purportedly arbitrary and capricious.[1] For the reasons set forth in Section 4, the Government does not believe it is appropriate to address legal questions that have not been referred to this Court and will instead

[1] In light of Judge Huvelle's Order and the parties' agreement, the Government does not believe it is appropriate to address the allegations regarding these four matters at this time. *See* Dkt. 14-1 at 8-15. The Government will note that for one of the matters, *VISION v. Cissna*, 19-cv871, USCIS reopened the challenged decision and on February 27, 2019, requested additional evidence (providing that petitioner would have until May 25, 2019 to respond). Thus, for one of the matters, at this time, there is not even a final agency action that is subject to judicial review under the APA. Another matter, *Mythri Conulting v. Cissna*, 19-cv-871, was filed on March 27, 2019, well after Judge Huvelle's order, and it is unclear if this matter was ever properly served. The Government is not waiving service of process with respect to this matter.

limit their Opposition and Cross-Motion to the "three preliminary, threshold legal questions" that the parties agreed to brief. *See* Dkt. 11 at 1.

STATUTORY AND REGULATORY BACKGROUND

I. Overview of H-1B Program

The Immigration and Nationality Act ("INA") provides for the classification of qualified temporary worker ("nonimmigrant") aliens who are coming to the United States to perform services for a sponsoring "employer" in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). These aliens are classified as "H-1B" nonimmigrants.[2]

The Immigration Act of 1990 introduced the "specialty occupation" requirement into the INA. *See* Pub. Law No. 101-649, § 205(c) (Nov. 29, 1990).[3] Consistent with the Immigration Act of 1990, "specialty occupation" means an occupation that requires a "theoretical and practical application of a body of highly specialized knowledge, and [the] attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1)(A)-(B); *see, e.g., Royal Siam*

[2] The "H-1B" designation derives from the section of the INA providing for this category of temporary workers, namely, section 101(a)(15)(H)(i)(b) of the Act. Nonimmigrants are aliens who are admitted to the United States for a temporary period of time for a specific purpose, e.g., to visit, study or work. *See* 8 U.S.C. § 1101(1)(a)(15).

[3] Prior to those 1990 statutory changes, the H-1 classification applied to "aliens of distinguished merit and ability" which included aliens who are members of the professions (except for certain physicians) and aliens who are prominent in their field. *See* 56 Fed. Reg. 31,553 (INS) (proposed rule) (July 11, 1991). The statutory amendments created the H-1B specialty occupation classification for workers who previously qualified for H-1 as a member of the professions, and created new O and P nonimmigrant classifications for aliens who may have previously qualified under the H-1 prominence category. *Id*. at 31554. In the proposed rule, the INS explained that the "definition and standards for an alien in a specialty occupation mirror the Service's current requirements for aliens who are members of the professions" and the proposed rule amended regulations at 8 C.F.R. § 214.2(h)(4) that existed at the time for the H-1 distinguished merit and ability classification to update the regulations and implement the 1990 statutory changes. *Id*.

Corp. v. Chertoff, 484 F.3d 139, 144 (1st Cir. 2007) ("Congress has laid out eligibility standards for the granting of H–1B specialty occupation visas"). Petitioners seeking to employ foreign nationals under the H-1B program must demonstrate, among other things, that the proffered position is a specialty occupation, and that the alien beneficiary qualifies for the specialty occupation position. *See* 8 C.F.R. § 214.2(h)(4)(iii) and (h)(4)(iv)(A).

"[P]etitioner[s] must establish that [they are] eligible for the requested benefit *at the time of filing the benefit request* [.]" 8 C.F.R. § 103.2(b)(1) (emphasis added); *see Olamide Olorunniyo Ore v. Clinton*, 675 F. Supp. 2d 217, 217 (D. Mass. 2009) (holding that "the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and not at some future date"); *see also Matter of S-P-, LLC*, 2019 WL 553316 at *3 (AAO Jan. 23, 2019 ("The agency made clear long ago that speculative employment is not permitted in the H-1B program"); *Matter of J-S-T- Inc.*, 2016 WL 3194527, at *4 n.3 (AAO May 24, 2016) (explaining that historically the agency has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment) (citations and quotations omitted). In the context of work performed at third-party locations, INS, and now USCIS, requires that the petitioner produce evidence that the position qualifies as a specialty occupation and that such evidence must be sufficiently detailed to demonstrate the type and level of specialized knowledge that is necessary to perform that particular work. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

By statute, the number of aliens who may be accorded initial H-1B nonimmigrant status is limited to 65,000 for each fiscal year, with certain exemptions. *See* 8 U.S.C. § 1184(g)(1)(A)

(vii).[4] Because the H-1B program has been oversubscribed in recent years, USCIS instituted a lottery system for processing H-1B petitions in a fair and orderly manner beginning in 2005. *See* 73 Fed. Reg. 15,389, 15,390-91 (USCIS) (Mar. 24, 2008); 70 Fed. Reg. 23,775, 23,783 (USCIS) (May 5, 2005) and 73 Fed. Reg. 15,389, 15,390-91 (USCIS) (Mar. 24. 2008).[5]

Before filing a petition with USCIS to classify an alien beneficiary as an H-1B nonimmigrant, the petitioner must file a Labor Condition Application (LCA) with the Department of Labor ("DOL") making certain attestations regarding the wages and working conditions of prospective H-1B nonimmigrants. *See* 8 U.S.C. § 1182(n).

When filing an LCA, the petitioner must agree, among other things, to pay a required wage that is at least the actual wage paid to similarly employed U.S. workers or the prevailing wage for the occupational classification in the area of intended employment, whichever is higher, for the entire period of authorized employment. *See* 20 C.F.R. § 655.731(a). For purposes of an LCA filing, DOL defines "employment relationship" "as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed." 20 C.F.R. § 655.715.

[4] A nonimmigrant "employed (or has an offer of employment) at" institutions of higher education, governmental research organizations, and non-profit research organizations is exempt from the statutory limit. *See* 8 U.S.C. § 1184(g)(5)(A)-(B). The statute also provides an exemption for 20,000 new H-1B visas each fiscal year for foreign nationals who have earned a master's or higher degrees from U.S. institutions of higher education. *See* 8 U.S.C. § 1184(g)(5)(C).

[5] The first day on which petitioning employers may file H-1B petitions is six months ahead of the employment start date. *See* 8 C.F.R. § 214.2(h)(9)(i)(B). Therefore, a petitioner requesting an employment start date of October 1, the first day of the Government's fiscal year, may file the H-1B petition as early as April 1 of the current fiscal year.

Once the petitioner receives a certified LCA from DOL,[6] the petitioner may file an H-1B petition (Form I-129) with USCIS along with supporting documentation to establish eligibility including, but not limited to, evidence showing that the beneficiary will be employed in a specialty occupation position and evidence regarding the beneficiary's qualifications.

A certified LCA issued by DOL is not a determination that the petitioner's job otherwise qualifies under the statute for purposes of classifying a proposed alien beneficiary as an H-1B nonimmigrant. *See* C.F.R. § 214.2(h)(4)(i)(B)(2) and 20 C.F.R. § 655.715 (as discussed under the definition of "specialty occupation"). The certified LCA simply establishes the petitioner's responsibility for complying with certain prevailing wage and working condition requirements. *See* 8 U.S.C. § 1182(n); *see also, Matter of Vojtisek-Lom*, ARB No. 07-097, 2009 WL 2371236 (DOL Adm. Rev. Bd, July 30, 2009).

After the petitioner's H-1B petition, certified LCA, and other supporting documents have been received and accepted for processing, USCIS adjudicators make a case-by-case, fact-sensitive determination of whether the petitioner, the proffered position, and the beneficiary qualify under the H-1B program. *See* 8 C.F.R. § 214.2(h)(9)(i); *see, e.g., EG Enterprises, Inc. v. Dep't of Homeland Sec.*, 467 F. Supp. 2d 728, 737 (E.D. Mich. 2006) ("The statutory and regulatory framework of the H–1B visa obliges. . . [USCIS] to examine the interplay among the petitioner, the job, and the industry") (citations and quotations omitted); *All Aboard Worldwide Couriers, Inc. v. Attorney General*, 8 F.Supp.2d 379, 381-2 (S.D. N.Y. 1998) ("The fact that Ms.

[6] DOL does not make a determination regarding whether the entity that filed the LCA is an employer, which is consistent with the limitations Congress placed on DOL's authority as reflected in 8 U.S.C. § 1182(n)(1)(G) ("The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the [certified LCA] within 7 days of the date of the filing of the application.").

Virk received an H–1B visa for a public relations position in a different industry does not, in light of the statutory and regulatory requirements of case-by-case determinations using job, applicant, and industry-specific information, without more create the possibility of an abuse of discretion")

After evaluating an H-1B petition for a specialty occupation worker, if the USCIS adjudicator makes a favorable determination, the petitioner's H-1B petition is approved with a validity period "up to three years." *See* 8 C.F.R. § 214.2(h)(8)(ii)(A)(1).[7] A petitioner may request an extension of the petition approval and an associated request for an extension of stay for the H-1B nonimmigrant for up to an additional three years. *See* 8 C.F.R. § 214.2(h)(15)(ii)(B)(1). However, foreign workers are generally limited to a six-year period in H-1B status, *see* 8 C.F.R. § 214.2(h)(13)(iii), except under specific statutorily defined exceptions, *see* American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. No. 106-313, § 106(a) (2000), *as amended by* Pub. L. No. 107-273, § 11030A (2002) (providing for an extension of stay beyond the six year limit for H-1B nonimmigrants who are the beneficiaries of certain employment-based immigrant petitions).

II. The Employer-Employee Statutory Requirement

By statute, with limited exceptions, only United States "employers" may seek classification of aliens as H-1B nonimmigrants. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see also* 8 C.F.R. §§ 214.2(h)(1)(i) and 214.2(h)(2)(i)(A). The determination of whether a petitioner qualifies as an "employer" has been delegated to the Secretary of Homeland Security, *compare* 8

[7] To be precise, the "up to three years" language predates the H-1B category was contained in the earlier H-1 category to reflect requirements under that program to ensure temporariness. INS retained this language when it promulgated regulations in 1991 governing the H-1B program.

U.S.C. § 1103(a)(1) *with* § 1184(c)(1), which has been sub-delegated to USCIS, *see* 8 C.F.R. § 2.1; Secretary of Homeland Security's Delegation Order No. 0150, § 2(W) (June 5, 2003).[8]

In 1991, the agency promulgated a regulation, 8 U.S.C. § 1184(c)(1) interpreting its statutory authority and defining "United States employer" as follows:

> United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) Has an *employer-employee relationship* with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (3) Has an Internal Revenue Service Tax identification number.

Temporary Alien Workers, 56 Fed. Reg. 61111, 61121 (INS) (final rule) (Dec. 2, 1991) (codified at 8 C.F.R. § 214.2(h)(4)(ii)) (emphasis added) (hereafter the 1991 Rule). Thus, the regulation establishes five factors, sometimes referred to as the "control test," to assess whether there is an "employer-employee relationship" sufficient to grant an H–1B visa: whether the employer hires, pays, fires, supervises, or otherwise controls the work of an employee. *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 242 (D.D.C. 2010). This assessment is also relevant in evaluating whether the beneficiary will be employed in a "specialty occupation," *see* 8 C.F.R. § 214.2(h)(4)(iv)(B), which the petitioner must establish at the time of filing, *see* 8 C.F.R. § 103.2(b)(1).

---

[8] Under the Homeland Security Act of 2002, the Immigration and Naturalization Service (INS) was abolished. *See* Pub. Law No. 107-269, § 471 (Nov. 25, 2002). The adjudication of nonimmigrant petitions, including H-1B petitions, was transferred from the Commissioner of INS (and the Attorney General) to the Director of the U.S. Citizenship and Immigration Services, an agency within the Department of Homeland Security. *Id.* at § 451(b).

In 2010, USCIS issued a guidance memorandum interpreting the 1991 rule and clarifying the "control test," articulating 11 factors that adjudicators are to consider in determining whether a valid employer-employee relationship exits. *See Broadgate*, 730 F. Supp. 2d at 246 citing Memorandum from Donald Neufeld, Associate Director, Serv. Ctr. Operations, USCIS to Serv. Ctr. Dirs., (Jan. 8, 2010)) (the "Employer-Employee Memorandum," also referred to by courts as the Neufeld Memorandum, attached as Exhibit 2). The factors are used to establish whether, based on the totality of the circumstances, the employer has submitted evidence sufficient to establish that it has the right to control the beneficiary's work. The factors are:

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?

(2) If the supervision is off-site, how does the petitioner maintain such supervision, i.e. weekly calls, reporting back to main office routinely, or site visits by the petitioner?

(3) Does the petitioner have the right to control the work of the beneficiary on a day-today basis if such control is required?

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?

(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?

(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?

(7) Does the petitioner claim the beneficiary for tax purposes?

(8) Does the petitioner provide the beneficiary any type of employee benefits?

(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?

(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

(11) Does the petitioner have the ability to control the manner and means in which the work of the beneficiary is accomplished?

Employer-Employee Memorandum at 3-4; *Next Generation Tech., Inc. v. Johnson*, 328 F. Supp. 3d 252, 268–69 (S.D.N.Y. 2017) (applying these factors).

In a lawsuit filed in 2010, the Employer-Employee Memorandum was challenged on the grounds that it was an impermissible substantive/legislative rule, but the district court rejected this claim because the memorandum simply provided guidance to adjudicators on how to interpret the regulation and did not impose any new requirements. *Broadgate*, 730 F. Supp. 2d at 246 (dismissing with prejudice an action to invalidate the Employer-Employee Memorandum and concluding that "the Memorandum establishes interpretive guidelines for the implementation of Regulation [8 C.F.R. § 214.2(h)(4)(ii)], and . . . does not amend the Regulation by repudiating or being irreconcilable with it"). In the current litigation, Plaintiffs are not challenging the 2010 Employer-Employee Memorandum.

III. The Itinerary Regulatory Requirement

The 1991 Rule retained, after notice and an opportunity for comment, the earlier H-1 itinerary requirement for petitioners when the services to be performed or the training to be received is in "more than one location." In relevant part, the 1991 Rule states:

> Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I–129 shall be where the petitioner is located for purposes of this paragraph.

8 C.F.R. § 214.2(h)(2)(i)(B).

The 1991 Rule's itinerary requirement does not include any exceptions under which a petitioner is not required to provide an itinerary.

IV. Guidance Memorandum dated February 22, 2018 (PM-602-0157)

Subsequently, USCIS issued a guidance memorandum, PM-602-0157

("2018 Guidance Memorandum"), to agency adjudicators providing guidance regarding adjudicating H-1B petitions involving third-party worksites. *See* U.S. Citizenship and Immigration Services, Policy Memorandum, *Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites*, 2018 WL 1082015 (Feb. 22, 2018) (Exhibit 3). The 2018 Guidance Memorandum states that it is intended to "solely for the training and guidance" of USCIS personnel performing adjudicating application and petitions and is:

> [N]ot intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

2018 Guidance Memorandum at 7 (emphasis added).

By way of an overview, the 2018 Guidance Memorandum does not address what constitutes a valid employer-employee relationship, but instead addresses the itinerary requirement found at 8 C.F.R. § 214.2(h)(2)(i) and the types of evidence an employer typically submits to meet its statutory burden of demonstrating a specialty occupation in the context of placing workers at a third-party worksite. USCIS specifically noted in the 2018 Guidance Memorandum that while "third-party arrangements may be a legitimate and frequently used business model," scenarios involving a third-party worksites "generally make it more difficult to assess whether the petitioner has established that the beneficiary will actually be employed in a specialty occupation or that the requisite employer-employee relationship will exist." 2018 Guidance Memorandum at 3. The Memorandum explains:

> USCIS recognizes that significant employer violations--such as paying less than the required wage, benching employees (not paying workers the required wage while they wait for projects or work) and having employees perform non-specialty occupation jobs--may be more likely to occur when petitioners place employees at third-party worksites. Therefore, in order to protect the wages and working conditions of both U.S. and H-1B nonimmigrant workers and prevent fraud or abuse, USCIS policy should ensure that

> officers properly interpret and apply the statutory and regulatory requirements that apply to H-1B petitions involving third-party worksites.

Id. at 4.

The 2018 Guidance Memorandum did not address what constitutes an employer-employee relationship, instead directing adjudicators to the earlier 2010 Employer-Employer Memorandum (which is not at issue in this case). Rather, the 2018 Guidance Memorandum addresses the types of evidence petitioners typically submit, when a beneficiary will be placed at one or more third-party worksites, to establish that the H-1B beneficiary will be employed in a specialty occupation, and to demonstrate the petitioning employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period. *Id.* at 4-5.

The 2018 Guidance Memorandum also reiterates that "8 C.F.R. § 214.2(h)(2)(i)(B) requires petitioners to file an itinerary with a petition that requires services to be performed in more than one location," and that there is no exemption from this regulatory requirement. *Id.* at *6. The itinerary should detail when and where the beneficiary will be performing services, and a more detailed itinerary can help to demonstrate that the petitioner has non-speculative employment for the beneficiary in a specialty occupation. *See id.*

Lastly, the 2018 Guidance Memorandum notes that if an H-1B petitioner is applying to extend H-1B employment for a beneficiary who was placed at one or more third-party worksites during the course of past employment with the same petitioner, that petitioner should also establish that the H-1B requirements have been met for the entire prior approval period. *Id.* at 7.

STANDARD OF REVIEW

The APA authorizes judicial review of "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704

(emphasis added). An agency action must be final in order to be judicially reviewable. *See Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 882 (1990). Absent a discrete and final agency action, federal courts cannot review an ongoing program or policy. *See Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004) ("The limitation to discrete agency action precludes the kind of broad, programmatic attack we rejected in *Lujan*[.]").

Agency statements of policy without the force of law do not constitute a final agency action and are not reviewable under the APA. *See Center for Auto Safety v. NHTSA*, 452 F.3d 798, 809 (D.C. Cir. 2006). Agencies are only required to use notice and comment procedures when promulgating substantive/legislative rules with the force and effect of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301-20 (1979). The APA exempts from its notice and comment requirements "interpretive rules, general statements of policy, or rules of agency organization procedure, or practice." 5 U.S.C. § 553(b)(A); *see also Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1204 (2015) (discussing the differences between these types of rules).[9] "If . . . a rule cannot fairly be viewed as interpreting—even incorrectly—a statute or a regulation, the rule is not an interpretive rule . . ." *Cent. Texas Tel. Co-op., Inc. v. F.C.C.,* 402 F.3d 205, 212 (D.C.

---

[9] The D.C. Circuit Court of Appeals has cited, with approval, the Attorney General's Manual of 1947, which defines interpretative rules and general statements of policy as follows:

> *Interpretative rules*—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers....
>
> *General statements of policy*—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

Am. Min. Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) citing Attorney General's Manual (1947) at 30 n. 3

Cir. 2005). But statements of policy clarifying an agency position and interpretive statements supplying crisper and more detailed guidelines than the rule being interpreted are exempt from the APA's notice and comment rulemaking requirements. *See Funeral Consumer Alliance, Inc. v. FTC*, 481 F.3d 860, 863-64 (D.C. Cir. 2007).

ARGUMENT

1. USCIS has the authority to grant H-1B petitions for a validity period that is less than three years.

The first question raised in Judge Huvelle's order consolidating briefing of the threshold legal issues, is whether USCIS is permitted to grant an H-1B petition for a validity period of less than three years. Exhibit 1 at 1 (providing for consolidated briefing on "the authority of USCIS to grant [H-1B petitions for] visas for less than the requested three-year period"). The Government's position is that 8 C.F.R. § 214.2(h)(9)(iii), which was promulgated through notice-and-comment rulemaking, provides that USCIS has the authority to grant H-1B petitions for a period of less than three years.

Significantly, Congress did not specify the validity period for an approved H-1B visas petition. Instead, Congress authorized the INS, now USCIS, to promulgate regulations setting the validity period. 8 U.S.C. § 1184(a)(2)(A). In relevant part, the statute states:

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

8 U.S.C. § 1184(a)(2)(A) (emphasis added). The only limitation that Congress placed on INS' authority to promulgate regulations governing the validity period for H-1B petitions is that "the period of authorized admission as such a nonimmigrant may not exceed 6 years." 8 U.S.C. § 1184(g)(4). Pursuant to this general grant of authority, INS promulgated a regulations stating in relevant part:

> An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of **up to three years** but may not exceed the validity period of the labor condition application.

8 C.F.R. § 214.2(h)(9)(iii)(A)(1) (emphasis added).

Under the plain language of 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), the phrase "up to three years" does not mean that USCIS is required to approve a petition an entire period of "three years." Rather, the phrase "up to three years" connotes a degree of discretion. USCIS may grant a petition for a period of three years, but it is not required to do so. *See, e.g., Valorem Consulting Group v. U.S. Citizenship and Immigration Services*, No. 13-1209-CV-005, 2015 WL 196304, *1 (W.D. Mo. Jan. 15, 2015) (entering summary judgment in favor of USCIS on this basis). Any other reading of 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) would put the provision at odds with the overall statutory and regulatory scheme governing the H-1B program by requiring USCIS to approve H-1B petitions for specialty occupation workers even if eligibility has not been established for that entire period of time or any period of time for that matter. *See id*. at *1 & 3 ("USCIS' primary concern is the extent to which" the employer establishes that the beneficiary "would be working in a specialty occupation *and* how long he would be doing so. The statutes and regulations establish that this is of paramount concern") (emphasis original); *see also, Defensor*, 201 F.3d at 387-88 (discussing the purpose of the statutory and regulatory scheme).

Plaintiffs disagree by contending that USCIS is required by law to grant a validity period of three years "unless: the employer requests a lesser period of time; or the maximum amount of time available under the six-year statutory cap is less than three years." Dkt. 14-1 at 42; *see also id.* at 43 (asserting "the Agency's claimed authority to *sua sponte* limit visa validity periods is unlawful and has no legal support"); *ITServe* Amended Complaint, Dkt. 6. at ¶¶ 215, 216, 219,

"Prayer for Relief" at ¶ F (requesting an order enjoining "Defendant from *sua sponte* approving H-1B visas for period less than that requested by employers or less than the remaining time on an employee's statutory maximum"). According to Plaintiffs, USCIS is required to grant an H-1B petition for a worker in a specialty occupation for a period of up to three years even if the petitioner has not shown that the beneficiary will be working a specialty occupation, or otherwise complying with the statutory requirements for the H-1B program, for the full three years. Thus, under Plaintiffs' reading of the regulation, even if the beneficiary will only work in a specialty occupation for the petitioning employer for a single day, USCIS is required to grant the H-1B petition for three years if requested to do so.

This reading of the phrase "up to three years" within the regulation, however, does not make sense. Significantly, Plaintiffs do not advance any textual argument as to why the phrase "up to three years" should be read as "three years." Nor do Plaintiffs present an argument that the term "up to three years" is a term of art in this context. Thus, it is essentially undisputed that the text of 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), by its plain meaning, authorizes USCIS to approve H-1B visas for a period of time than can be less than three years.

Given that there is no dispute as to the meaning of the phrase "up to three years [,]" and that agency used notice-and-comment rulemaking to promulgate 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), the Court should reject Plaintiffs' reading of the regulation. To the extent that Plaintiffs argue that INS lacked the statutory authority to promulgate 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) in 1991, this is incorrect. As an initial matter, such a claim is time-barred for the reasons set forth in Section 3 of this Opposition.

Secondly, Congress expressly authorized INS to promulgate regulations governing the length of the validity period. *See* 8 U.S.C. § 1184(a)(2)(A) ("The admission to the United States

of any alien as a nonimmigrant **shall be for such time** and under such conditions at the Attorney General may be regulation prescribe . . .") (emphasis added). Even Plaintiffs seem to concede this point, acknowledging that Congress "directed the Agency to create regulations setting standards for the time and conditions of the H-1B visa . . ." Dkt. 14-1 at 43.[10] Thus, Plaintiffs' assertion that there is "no legal support" for the proposition that USCIS has the authority to grant H-1B petitions for less than three years lacks merit. *Id.* at 43.

In sum, based on the plain language of 8 C.F.R. 214.2(h)(9)(iii)(A)(1), there is no basis to conclude that USCIS is required, in all instances, to grant an H-1B petition for the period of three years (unless the petitioner requests a shorter period of time or a grant of three years would exceed the six-year statutory cap). The agency used notice-and-comment rulemaking to specify that the period of time shall be "up to three years." Accordingly, USCIS is permitted to grant an H-1B petition for a period of three years, but it is not required to do so.

2. USCIS has the authority to deny H-1B petitions if the petitioner fails to meet the employer-employee requirement or the itinerary requirement found in the 1991 Rule.

The 1991 Rule contains certain requirements on H-1B petitioners including the requirement that: (i) there is a valid employer-employee requirement, and (ii) that a petitioner provide an itinerary for workers placed at third-party worksites. Plaintiffs argue that the 1991 Rule addressing these requirements is *ultra vires*. Alternatively, if the Court finds that these requirements are valid, Plaintiffs request that this Court invalidate the 2018 Guidance

[10] The Government recognizes that Plaintiffs are also challenging the itinerary requirement found in the 1991 Rule, dkt. 14-1 at 37, but this is a separate claim from their contention that USCIS is required to approve an H-1B petition for three years. Additionally, Plaintiffs contend that USCIS cannot limit the validity period "based on evidence of work assignments." Dkt. 14-1 at 43. But again, this is separate issue governed by a separate regulation, 8 C.F.R. § 103.2(b)(1), which requires that a petitioner establish eligibility "at the time of filing the benefit request[.]"

Memorandum on the grounds that it is inconsistent with these regulatory requirements. *See* Dkt. 14-1 at 18. These questions regarding USCIS's authority have been consolidated. *See* Exhibit 1 at 1 (consolidating briefing on "the authority of USCIS to deny visas to companies that place employees at third-party locations either because the third-party is determined to be the employer or because specific and detailed job duties are not provided with the visa application").

In responding to these arguments, the Government will address the question of whether Plaintiffs' challenge to the 1991 Rule is barred by the six-year statute limitations separately in Section 3, per the organization of Judge Huvelle's order. In this section, the Government will address: (A) the agency's statutory authority to promulgate the employer-employee requirement through notice-and-comment rulemaking, (B) the agency's statutory authority to promulgate through notice-and-and comment rulemaking the itinerary requirement, and (C) why the 2018 Guidance Memorandum does not constitute an impermissible legislative rule.

A. The Employer-Employee requirement is not *ultra vires* and USCIS has the authority to review an H-1B petition to determine whether the petitioner is, in fact, the employer.

The parties are in agreement that in 1991, INS, now USCIS, promulgated a regulation through notice-and-comment rulemaking requiring that the petitioner demonstrate an "employer-employee relationship." 8 C.F.R. § 214.2(h)(4)(ii).[11] It is also undisputed that USCIS will deny an H-1B petition when a petitioner fails to meet this requirement. The question before the Court is whether, as Plaintiffs contend, this regulatory requirement exceeded the agency's statutory

[11] To be clear, the employer-employee requirement for temporary workers is longstanding and predates the current H-1B program. *See Matter of Michelin Tire Corp.*, 17 I. & N. Dec. 248, 249 (Reg. Comm. 1978).

authority. *See* Dkt. 14-1 at 24 (arguing that "the Agency lacks authority to define 'employer' and, therefore, its Employer Employee Rule is *ultra vires*"). [12]

As a threshold matter, the Government contends that this claim is barred by the statute of limitations for the reasons set forth in Section 3. In addition, the regulation is valid because of Congress' broad delegation of authority to the Department of Homeland Security. Specifically, 8 U.S.C. § 1103(a) gives the Secretary of Homeland Security the express authority to administer and enforce the provisions of the INA, and 8 U.S.C. § 1184 delegates broad discretion to the Secretary, to determine the terms and conditions for admitting nonimmigrants. Section 1184(a)(1) states, "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 [now Secretary of DHS] may by regulations prescribe . . ." In light of this clear delegation of authority by Congress, courts should be very reluctant in finding implicit limitations on USCIS's authority in this area. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking, Assoc.*, 531 U.S. 457, 468 (2001). Had Congress' intent been to limit USCIS's role to determining whether a position qualifies as a specialty occupation (as Plaintiffs suggest, Dkt. 14-1 at 6), Congress would have clearly stated this intent in the statutory provisions

[12] Plaintiffs confuse the issue when they state that the Employer Employee rule is an unlawful legislative rule that was promulgated without notice-and-comment rulemaking. Dkt. 14-1 at 16-17. The employer-employee requirement is located in a regulation that was promulgated through notice-and-comment rulemaking. 8 C.F.R. § 214.2(h)(4)(ii). USCIS subsequently issued a guidance memorandum, the Employer Employee Memorandum, in 2010. This interpretative memorandum is also not at issue in this litigation. Rather the claim in the consolidated briefing is whether USICS, then INS, had the statutory authority to promulgate 8 C.F.R. § 214.2(h)(4)(ii). *See* Dkt. 14-1 at 24.

regarding the H-1B petition process. *See* 8 U.S.C. § 1184. The fact that Congress did not do so, counsels strongly against a finding that the employer-employee requirement is *ultra vires*.

In addition, 8 U.S.C. § 1184(c)(1) specifically requires USCIS to approve an employer's nonimmigrant visa petition before the visa stamp is granted (enabling the foreign worker to travel to the United States and seek admission) and states that the "question of importing any alien as a nonimmigrant . . . in any specific case or specific cases shall be determined by the Attorney General [now USCIS] . . ." It is impossible to square this sweeping statutory language with Plaintiffs' position that Congress limited USCIS's role in the H-1B process to determining if a position qualifies as a specialty occupation. *See* Dkt. 14-1 at 24.

It is true that 8 U.S.C. § 1184(c)(1) directs USCIS to consult with "appropriate agencies" before allowing employers to import foreign workers temporarily. But this directive does not divest USCIS of its authority to determine and define who is an "employer" in the H-1B program or to promulgate regulations to ensure that the imported worker will actually work in a specialty occupation while in the United States. *Cf. Defensor*, 201 F.3d at 387-88 (discussing USCIS's role in the H-1B process and the need to avoid an outcome in which workers could obtain an H-1B visa "through the subterfuge of an employment agency . . . [a] result . . . completely opposite the plain purpose of the statue and regulations, which is to limit H1-B visas to position which require specialized experience and education to perform").

Plaintiffs disagree. Plaintiffs' argument focuses almost exclusively on 8 U.S.C. § 1182(n), which governs the Labor Condition Application process administered by the DOL. *See* Dkt. 14-1 at 25-29.[13] But Congress has made clear that DOL has no role in the adjudication

[13] Plaintiffs also argue that INS' purported lack of statutory authority is evidenced by the fact that earlier in 1991, INS proposed a rule that did not define who was an "employer." *See* Dkt. 14-1 at 29 citing 56 Fed. Reg. 31,559-31,563, July 11, 1991. But although the proposed rule did

of H-1B visa petitions or the admission of foreign nationals into the United States. *See* 8 U.S.C. § 1182(n)(1)(G) ("The Secretary of Labor shall review [a Labor Condition Application ("LCA")] only for completeness and obvious inaccuracies").[14] There simply is no statutory language in 8 U.S.C. § 1182(n) suggesting that USCIS is no longer permitted to inquire whether a valid employer-employee relationship exists. *See Defensor*, 201 F.3d at 387-88; 8 U.S.C. § 1184(c)(1) (Congress has explicitly bestowed upon USCIS the authority to determine "the question of importing any alien as [an H-1B temporary worker] . . . after consultation with appropriate agencies of the Government," which includes the DOL). Although Plaintiffs contend that "Congress intended for DOL [and only DOL] to regulate and define 'employer' in the H1B context[,]" Dkt. 14-1 at 30, they cannot point to any statutory language supporting this proposition.

The purpose of the LCA is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers." *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110-11 (DOL) (Dec. 20, 2000). It also serves to protect H-1B workers from wage abuses. While the DOL certifies the LCA, USCIS determines whether the

---

not include a definition of who is an "employer," the rule that INS actually adopted did define who is an employer. 8 C.F.R. § 214.2(h)(4)(ii). The fact that INS considered promulgating a rule without a definition of who is an employer, before promulgating a rule that does not contain such a definition simply has no bearing on any issue in this case and certainly does not suggest that Congress, in 1990, believed that the INS lacked the authority to define who is an employer.

[14] Moreover, by regulation, DOL automatically deems whoever files the H-1B petition "to be the employer." 20 C.F.R. § 655.715. Thus, DOL is not independently making an inquiry into whether the petitioner is in reality the employer but rather is reviewing the LCA only for completeness and obvious inaccuracies.

LCA's content corresponds with the H-1B petition. *See* 20 C.F.R. § 655.705(b) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition. . . .").

It simply makes no sense to conclude, as Plaintiffs contend, that even though the H-1B program is an employment-based temporary visa program and even though DOL's role is limited to reviewing LCA for "completeness and obvious inaccuracies . . . within 7 days of the date of the filing of the application [,]" 8 U.S.C. § 1182(n)(1)(G), that USCIS has no role in determining whether an employer-employee relationship exists. Under such a view, there would be no meaningful inquiry by any agency into whether an H-1B petitioner is the actual employer that seeks to import foreign skilled labor into the United States. Such an outcome would be "completely opposite" of Congress' intent and would invite abuse of the H-1B program. *See Defensor*, 201 F.3d at 387-88.

Accordingly, USCIS is the agency tasked with ensuring that all H-1B program requirements are met, including whether or not the petitioner meets the definition of "employer" for the H-1B program. *See* 8 U.S.C. § 1184(c)(1).[15]

B. The itinerary requirement found in the 1991 Rule is not *ultra vires*.

As previously discussed, Congress provided that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions that the Attorney

[15] For the sake of completeness, USCIS notes that, to the extent, Plaintiffs contends that INS never provided a rationale for the itinerary rule when it promulgated the rule in 1991 this type of procedural challenge is barred by the statute of limitation. *See Indep. Cmty. Bankers of Am.*, 195 F.3d at 34. Moreover, USCIS notes that the explanation appears at 56 Fed. Reg. 31,553. By retaining the itinerary requirement, along with various other H-1 regulations that existed at the time, and amending them to conform the rules to the statutory amendments, INS determined based on its operating experience that the itinerary requirement was still needed and relevant in the H-1B context.

General may by regulation prescribe . . . " 8 U.S.C. § 1184(a)(2)(A). Pursuant to this statutory authority, INS, now USCIS, promulgated a regulation requiring that an H-1B petition that requires services to be performed in more than one location include an itinerary with the dates and locations of the services. 8 C.F.R. § 214.2(h)(i)(B).

The reason for this rule is simple. The LCA does not provide adequate information for USCIS to make a determination that the position offered is a specialty occupation, nor does the LCA contain sufficient information for USCIS to determine exactly where the beneficiary will be performing services at any given time when the petition indicates that services will be performed in more than one location. The itinerary, along with other evidence pertaining to the actual work the beneficiary will perform, helps USCIS determine whether the petitioner has met its burden of proof and shown that the beneficiary will actually be employed in a specialty occupation, and that they are not coming to the U.S. based on speculative employment or work that does not qualify as a specialty occupation. *See Olamide Olorunniyo Ore*, 675 F. Supp. 2d at 227; *Matter of J-S-T*, 2016 WL 3194527 at *6. The itinerary also helps USCIS identify when the beneficiary will be working at a particular location, which is needed so that USCIS can perform site visits consistent with its authority to prevent fraud and abuse in the H-1B program. As such, submission of the itinerary is necessary for the petitioning employer to demonstrate eligibility for the requested benefit and for the duration of the requested benefit, as required by 8 C.F.R. § 103.2(b)(1).

Plaintiffs disagree and assert that this regulation is *ultra vires*. First, Plaintiffs argue that this regulation "is explicitly contradicted by 8 U.S.C. § 1182(n)(2)(C)(vii)." *See* Dkt. 14-1 at 35. But 8 U.S.C. § 1182(n)(2)(C)(viii) establishes certain notice requirements that DOL must comply with before commencing an investigation into potential violations of wages and working

conditions. 8 U.S.C. § 1182(n)(2)(C)(vii) ("The Secretary of Labor shall provide notice to an employer with respect to whom there is reasonable cause to initiate an investigation . . . The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced"). Section 1182(n)(2)(C)(vii) does not limit USCIS' authority under 8 U.S.C. § 1184(a)(2)(A) or have any bearing on any issue in this case.

Second, Plaintiffs contend that the itinerary requirement is "nonsensical" because it is impossible for a petitioner to know where one of its employees will be working at the time it files an H-1B petition. Dkt. 14-1 at 37. As a result, according to Plaintiffs, there is no way for a petitioner to comply with this requirement. *Id*. It is difficult to know how to respond to this argument. As a threshold matter, this argument is not responsive to the question of whether INS had the authority to promulgate a regulation containing the itinerary requirement. Additionally, Congress created the H-1B program to allow employers to petition to import foreign workers in a "specialty occupation." *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b). If an employer cannot determine in advance whether the employee will actually be working a "specialty occupation," then necessarily the employer failed to meet its burden under the statute and USCIS should deny the petition. *See, e.g., Olamide Olorunniyo Ore*, 675 F. Supp. 2d at 227 (holding that petitioner must meet the statutory requirements at the time of filing); *Matter of J-S-T,* 2016 WL 3194527 at *6 (holding "the appeal must be dismissed, as the evidence of record does not establish that the petition was filed for definite, non-speculative work requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as required to establish a position as an H-1B specialty occupation in accordance with the governing statutory and regulatory framework").

Third, Plaintiffs reference a 1998 proposed rule that was never adopted by INS. *See* Dkt. 14-1 at 33-35, 40 n.9, *ITServe* Amended Complaint, Dkt. 6 at ¶¶ 141, 204 citing *Petitioning Requirements for the H Nonimmigrant Classification*, 63 Fed. Reg. 30,419 Proposed Rule (June 4, 1998). This proposed rule does not support Plaintiffs' claims in this case because the INS, pursuant to a valid grant of statutory authority from Congress, established the itinerary requirement in its current form in 1991, and it is irrelevant whether the INS in 1998 considered changing this requirement before deciding not to do so. *Cf. 1756, Inc. v. Attorney Gen. of U.S.*, 745 F. Supp. 9, 13 (D.D.C. 1990) (holding that "plaintiffs cannot fairly contend that the agency's regulation is infirm merely because it rejects an earlier interpretation").[16]

The 1998 proposed rule, however, does explain that the itinerary requirement found in the 1991 Rule was primarily intended to address scenarios in the entertainment industry, but that it was not exclusively intended to address such cases, or only apply to such cases. *See* 63 Fed. Reg. 30,419. Specifically, the 1998 proposed rule acknowledged the broader purpose of the itinerary requirement: "to ensure that aliens seeking H nonimmigrant status have an actual job offer and are not coming to the United States for the purpose of seeking employment following arrival in this country." *See id*. Tellingly, the preamble to the proposed rule reiterated, once again, that a petitioner was *not* permitted to satisfy the statutory requirements for an H-1B petition by pointing to speculative work assignments:

> *Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment*. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under

[16] Elsewhere in the Motion for Summary Judgment, Plaintiffs appear to recognize this. *See* Dkt. 14-1 at 46 (noting that the "Proposed Rule was never finalized or promulgated" and that the itinerary regulation was left "in place."

> the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. *In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification*. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30,420 (emphasis added).

The 1998 proposed rule did not acknowledge that the itinerary regulation was *ultra vires* or otherwise inapplicable to H-1B petitions. To the contrary, the proposal retained the itinerary requirement but simply proposed to modify when it applies, what is needed to satisfy the itinerary requirement, and alternative evidence that could be submitted if the employer does not know the worker's complete itinerary at the time of filing. *See* 63 Fed. Reg. 30,419. And, the regulation reiterated that a petitioner cannot simply point to "speculative employment" because such speculative assignments do not permit the agency to "adjudicate properly a request for H-1B classification." *Id*. at 30,420.[17]

In sum, the itinerary requirement contained in the 1991 Rule is not *ultra vires*. The Government recognizes that Plaintiffs do not believe that USCIS is properly applying the itinerary requirement, Dkt. 14-1 at 20, but this is separate question from whether the requirement is authorized by statute.

[17] The fact that the preamble to the 1998 proposed rule referenced this historic practice (which continues to this day) does not mean that USCIS is now demanding that "employers comply with the specific and non-speculative work assignment requirement created in the June 4, 1998 Proposed Rule . . . as if it were a binding legislative rule." Dkt. 46-47, n.9. The whole point of the citation in the preamble, is that this historic practice predates the 1998 proposed rule and is independent of it. Obviously, if one describes how an entity "[h]istorically" did something, one is not announcing a new practice. 63 Fed. Reg. 30,420.

C. The 2018 Guidance Memorandum is not a legislative rule.

Plaintiffs contend that the 2018 Guidance Memorandum should be invalidated because, according to them, USCIS is using this interpretative rule to impermissibly impose new requirements on petitioners without using notice-and-comment rulemaking. *See* Dkt. 14-1 at 18. This Court should reject this argument because the 2018 Guidance Memorandum merely interprets existing statutory and regulatory requirements; it does not impose any new requirements.

There is no one clear test for determining whether a guidance memorandum is a legislative rule, but the D.C. Circuit has pointed to several factors to guide courts in making this determination. First, the D.C. Circuit has explained that the agency's clear expression of its intention "is an important consideration" in determining whether the agency has issued a binding norm or only an unreviewable statement of policy." *See Center for Auto Safety*, 452 F.3d at 806; *see Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Fed. Deposit Ins. Corp.*, 132 F. Supp. 3d 98, 120 (D.D.C. 2015) ("While this alone does not totally insulate the documents from having legal consequences, the agency's characterization of the documents is one of the relevant factors for consideration"); *Broadgate*, 730 F. Supp. 2d at 245 (emphasizing that the language in an H-1B memorandum states on its face that it was only intended to provide guidance).

Second, an agency's intent to exercise legislative power may be shown where the agency issues a rule that effectively amends the previously adopted substantive legislative rule, either by repudiating it or because the two rules are irreconcilable. *See Funeral Consumer Alliance*, 481 F.3d at 863-64 (explaining that the task of courts is to determine "whether the agency has 'repudiated' or 'supplemented' one of its rules. . ."). In contrast, an agency action does not become an amendment merely because it supplies "crisper and more detailed lines than the

authority being interpreted." *Funeral Consumer Alliance*, 481 F.3d at 863 *citing Am. Min. Cong. v. MSHA*, 995 F.2d 1106, 1107 (D.C. Cir. 1993). If it were otherwise, "no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." *Id.*[18]

Third, where the guidance document does not cabin the agency's discretion, it is not a legislative rule. *Center for Auto Safety*, 452 F.3d at 806, 809 (explaining that if a policy is "permissive' or if officials are "free to exercise their discretion" pursuant to the policy, then "rights or obligations" have not been determined); *see, e.g.*, *RCM Tech., Inc. v. U.S. Dep't of Homeland Sec.*, 614 F. Supp. 2d. 39, 46 (D.D.C. 2009) (noting that, in the context of the H-1B program, purported policy that "gives adjudicators *permission* to require master's degrees" but which does not "*require* adjudicators to require master's degrees in all cases" is not binding) (emphasis original).

For example, in *Center for Auto Safety*, the D.C. Circuit concluded that the agency's policy memorandum did not rise to the level of a binding norm because the memorandum merely sets forth several factors to be used as guidelines for determining whether a manufacturer could limit its recall of defective automobiles to certain regions of United States. 452 F.3d at 803. Although the agency encouraged automakers to comply with the guidelines, the policy did not cabin the agency's discretion. *Id.* at 809. The guidelines may have had practical consequences

[18] To be sure, "deciding whether an interpretation is an amendment of a legislative rule is different from deciding the substantive validity of that interpretation." *Am Min. Cong.*, 995 F.2d at 1113. In other words, "[a]n interpretive rule may be sufficiently within the language of a legislative rule to be a genuine interpretation and not an amendment, while at the same time being an incorrect interpretation of the agency's statutory authority." *Id.*

on the automaker's decisions to comply with the regional recall policy, but these practical effects were insufficient to create a substantive/legislative rule. *Id*. at 811.

By further illustration, in the context of the H-1B program, a court in this district found that the 2010 Employer-Employee Memorandum was not a legislative rule even though it lists scenarios in which third-party employers do not exercise sufficient control to find an employer-employee relationship. *See Broadgate*, 730 F. Supp. 2d at 245. The court explained that because the Employer-Employee Memorandum makes clear that the scenarios are "meant to be illustrative examples" and leaves USCIS adjudicators with considerable discretion in applying the listed factors in adjudicating H-1B petitions, it does not constitute a substantive/legislative rule. *Id*. at 245-46.

Applying these principles to the present case, it is clear that the 2018 Guidance Memorandum does not constitute a legislative rule. First, the Memorandum expressly states that it "is intended solely for the training and *guidance* of USCIS personnel in performing their duties relative to the adjudication of applications and petitions," and that "*[i]t is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law*." *Id.* at 7 (emphasis added). Thus, USCIS intends that the 2018 Guidance Memorandum serve as a guidance document and does not intend to create any binding norms. *See Center for Auto Safety*, 452 F.3d at 806; *Cmty. Fin. Servs. Ass'n of Am.*, 132 F. Supp. 3d at 120.

Second, the 2018 Guidance Memorandum does not conflict with the 1991 Rule. By its terms, it does not amend or repudiate any provision or requirement in the 1991 Rule. *See Funeral Consumer Alliance*, 481 F.3d at 863-64. Thus, this factor also cuts against a finding of that the 2018 Guidance Memorandum is a legislative rule.

Third, the 2018 Guidance Memorandum does not cabin the authority of adjudicators to adjudicate H-1B petitions. *See Center for Auto Safety*, 452 F.3d at 806, 809. The 2018 Guidance Memorandum does provide guidelines for adjudicators, providing examples of the types of evidence that a petitioner typically provides to show that a beneficiary will be working in a specialty occupation. But as in earlier cases challenging guidance memoranda regarding the H-1B program, the fact that a memorandum provides illustrative examples for adjudicators is alone insufficient to transform the memoranda into a legislative rule. *See Broadgate*, 730 F. Supp. 2d at 245; *see also*, *RCM Tech.*, 614 F. Supp. 2d at 46 (explaining that purported policy that "gives adjudicators *permission* to require master's degrees" but which does not "*require* adjudicators to require master's degrees in all cases" is not binding) (emphasis original).

While the 2018 Guidance Memorandum notes that 8 C.F.R. § 214.2(h)(2)(i)(B) requires that petitioners file an itinerary with a petition that requires services to be performed in more than one location, *see* 2018 Guidance Memorandum at 6, that requirement obviously derives from the regulation, not the guidance document. *See Am. Min. Cong.*, 995 F.2d at 112 (concluding that challenged agency action was an interpretative rule because the "regulations themselves" contain the reporting requirement). Where, as here, the agency does not compel the regulated public to take certain actions, the guidance document is properly characterized as a general policy statement. *Center for Auto Safety*, 452 F.3d at 806, 809. The Memorandum only guides adjudicators in exercising their discretion, and does not compel the regulated public to submit any specific type of evidence or documentation, aside from the requirements already set forth in the governing regulations. *See generally* 2018 Guidance Memorandum. USCIS's guidance does not preclude the use of certain types of documents or other evidence for the purpose of demonstrating that the beneficiary will be employed in a specialty occupation, and

that the H-1B petitioner will maintain an employer-employee relationship for the duration of the requested validity period. Rather the Memorandum simply provides interpretative guidance to USCIS adjudicators as to the types of evidence that may be submitted by the petitioner to show that the beneficiary will actually be employed in a specialty occupation.

Plaintiffs disagree arguing that the 2018 Guidance Memorandum fundamentally changes the regulatory employer-employee definition. First, Plaintiffs contend that a "contractor" can no longer be a proper employer. *See* Dkt. 14-1 at 19. Plaintiffs do not cite any language from the 2018 Guidance Memorandum to support this contention because there is none. To the contrary, the 2018 Guidance Memorandum expressly reaffirms that "third-party arrangement may be a legitimate and frequently used business model." 2018 Guidance Memorandum at 3.

Second, Plaintiffs contend that USCIS repudiates the standard that has guided the agency since the 1991 Rule was promulgated in determining whether there is a valid employer-employee relationship. Dkt. 14-1 at 19-20 ("This is a substantive change to the regulatory burden"). Instead of requiring that an employer exercise the "right to control," Plaintiffs contend that under the 2018 Guidance Memorandum, an employer must now exercise "actual control." *Id*. But Plaintiffs fail to point to any language in the 2018 Guidance Memorandum that says this. And the 2018 Guidance Memorandum disavows any such reading. *See* 2018 Guidance Memorandum at 3, n.1. To the contrary, it states that USCIS is not changing the employer-employee requirement and that adjudicators should continue to refer to the 2010 Employer-Employee Memorandum in determining whether there is an employer-employee relationship. *See id.* ("To determine whether an employer-employee relationship exists, adjudicators should see the

Employer-Employee Memo, published on January 8, 2010").[19] In fact, the 2018 Guidance Memorandum does not ever use the phrase "actual control," instead continuing to use the phrase "right to control." *See* 2018 Guidance Memorandum at 7. Thus, there is no basis for concluding that the 2018 Guidance Memorandum changes or repudiates in any way, any regulatory requirement.

Third, Plaintiffs imply that the 2018 Guidance Memorandum should be invalidated because it purportedly creates the requirement that a petitioner provide evidence of non-speculative work in order to qualify as a specialty occupation. *See* Dkt. 14-7 at 7 ("Nothing in the regulation requires employers . . . [to provide] proof of guaranteed work projects to qualify as a specialty occupation"). As a threshold matter, Plaintiffs are simply incorrect. "Historically" USCIS, and before it INS, refused to grant "H-1B classification on the basis of speculative, or undetermined, prospective employment . . ." 63 Fed. Reg. 30,420 (recognizing that in "the case of speculative employment . . . the Services is unable to adjudicate properly a request for H-1B classification); *see also Matter of J-S-T*, 2016 WL 3194527 at *4, n.3 (referencing this historic practice). Additionally, by regulation, a petitioner is required to establish that they are "eligible for the requested benefit at the time of filing the benefit request." 8 C.F.R. § 103.2(b)(1); *see also Olamide Olorunniyo Ore*, 675 F. Supp. 2d at 217 (addressing this requirement in a somewhat different context); *Matter of Simeio Sols., LLC*, 26 I. & N. Dec. 542, 549 (AAO April

[19] The earlier Employer-Employee Memorandum drew a distinction between the right to control and actual control, explaining that a petitioner need only show a right to control. Employer-Employee Memorandum at 3 n.6. The fact that the 2018 Guidance Memorandum, in referring adjudicators to this earlier memorandum, does not repeat this analysis (which appeared in a footnote) is not an indication that USCIS intended to repudiate it. Rather, the clear import of this admonition is that adjudicators should read the earlier memorandum and continue to follow it, including specifically the portion of the memorandum making clear that a petitioner need only show a right to control. *Id.* at 3.

9, 2015) ("It is the petitioner's burden to establish eligibility for the immigration benefit sought"); *Matter of S-P-*, 2019 WL 553316 at *3 ("The agency made clear long ago that speculative employment is not permitted in the H-1B program'); *cf. Defensor*, 201 F.3d at 387 (addressing why a petitioner must provide sufficient evidence for the agency to make a proper determination regarding the H-1B petition).[20]

Thus, this practice is nothing new. The petitioner bears the burden of proof of demonstrating compliance with all statutory and regulatory requirements through providing non-speculative evidence. *See* 8 C.F.R. § 103.2(b)(1). To the extent that a petitioner cannot meet this burden, USCIS should deny the petition or grant for the portion of time that the petitioner can prove it satisfies the requirements of the H-1B program. *See Valorem Consulting Group*, 2015 WL 196304 at *1 & 3.

In sum, while individuals can reasonably disagree as to how USCIS should adjudicate a particular H-1B petition, it is clear that the agency properly promulgated, through notice-and-comment rulemaking a regulation containing the employer-employee requirement and the itinerary requirement, and that the 2018 Guidance Memorandum does not repudiate or amend these or any other regulatory requirement. Rather, the 2018 Guidance Memorandum interprets existing statutory and regulatory requirements; it does not impose any new requirements.

3. The statute of limitations bars Plaintiffs from challenging the 1991 Rule.

The third issue consolidated for briefing is whether Plaintiffs' challenge to the 1991 Rule, containing both the employer-employee requirement and the itinerary requirement, is barred by the statute of limitations. *See* Exhibit 1 at 1 (consolidating "the related statute of limitations

[20] Plaintiffs sometimes refer to this long-standing practice as the "Non-Speculative Work rule." Dkt. 14-1 at 18.

issues raised by the government").[21] A claim under the APA is subject to the six-year statute of limitations found in 28 U.S.C. § 2401. *See Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014). The limitation period under 28 U.S.C. § 2401 begins to run "on the date of the final agency action." *Harris v. F.A.A.*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). As a result, Plaintiffs' challenge to the 1991 itinerary rule is time barred.

Even though this issue is one of the three questions upon which consolidated briefing was ordered, Exhibit 1 at 1, Plaintiffs' Motion for Summary Judgment fails to make any mention of this question or provide any argument as to why their challenge to the 1991 Rule is timely. Given that the parties' agreed briefing schedule was adopted by this Court, Dkt. 11 at 1, this failure to present argument constitutes a waiver of any argument they may have had.

Although not raised by Plaintiffs there are two potential exceptions to the statute of limitations that might be relevant in the context of APA challenge. Neither is applicable here. First, the D.C. Circuit recognizes the reopener doctrine. Under this doctrine, an otherwise stale challenge can proceed but only "when the agency . . . by some new promulgation creates the opportunity for renewed comment and objection . . ." *P. & V. Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008). The D.C. Circuit cautioned that "when an agency invites debate on some aspects of a broad subject . . . it does not automatically reopen all related aspects including those already decided [,]" *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 142 (D.C. Cir. 1998), and the reopener doctrine is not a license for a

[21] It is unclear whether Plaintiffs are also challenging the agency's historic practice of requiring non-speculative evidence to satisfy the statutory requirement of demonstrating the beneficiary will actually be performing work in the specialty occupation position. To the extent they are, this claim would also be barred by the statute of limitation because this practice dates back at least to 1998. *See* Fed. Reg. 30,420 (discussing in the Federal Register in 1998 the agency's historic practice of not granting H-1B classification on the basis of speculative, or undetermined, prospective employment); *see also Defensor*, 201 F.3d at 387 (discussing this requirement).

petitioner to comment on matters other than those actually at issue and then sue on the grounds that the agency has re-opened the issue. *Am. Iron & Steel Inst. v. U.S. E.P.A.*, 886 F.2d 390, 398 (D.C. Cir. 1989). Thus, the fact that an agency comments on or invokes a prior regulation is not enough to restart the six-year limitation period. *See, e.g.*, *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997) (explaining that the fact that an agency "discusses the merits at length when it denies a request for reconsideration does not necessarily mean the agency has reopened the proceeding"); *Alaska Cmty. Action on Toxics v. EPA*, 943 F. Supp. 96, 103 (D.D.C. 2013) (finding that the limitations period for challenging an EPA policy published in 1984 was not restarted by the publication of periodic product schedules based on that 1984 policy).

Here, it is true that USCIS's Administrative Appeals Office ("AAO") issued a non-precedential decision within the last six years regarding the 1991 Rule and USCIS has recently provided additional informal guidance as to how adjudicators should apply this regulation. But these actions fall well short of what a plaintiff is required to show for the reopener doctrine to apply because they do not contain any indication that USCIS intended to provide an opportunity for renewed comment on the 1991 Rule. *See P. & V. Enters.*, 516 F.3d at 1024. If the law were otherwise, an agency would not be able to publicly discuss its regulations without subjecting itself to renewed litigation on its regulations. Accordingly, the fact that the AAO referenced an earlier regulation in one of its non-precedent decisions, or the fact that USCIS provided guidance on how the regulation should be read, is not enough to trigger the reopener doctrine. *See Sendra Corp.*, 111 F.3d at 167; *Am. Iron & Steel Inst.*, 886 F.2d at 398.

Second, there is a narrow exception for APA challenges to a regulation on the grounds that an agency exceeded its statutory authority in promulgating the regulation, but this exception excludes facial challenges to the regulation and is instead limited to those situations in which an

agency seeks to "apply" the rule. *See Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys*., 195 F.3d 28, 34 (D.C. Cir. 1999) (holding "that a party *against whom a rule is applied* may, at the time of *application*, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule . . .") (emphasis added); *see, e.g., Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 664 (D.C. Cir. 2014) (applying this holding and explaining that a statue "does not preclude a challenge *when the government actually applies its regulation against a party*") (emphasis added).[22]

Although the D.C. Circuit has described this exception as a "narrow" one, *see Genuine Parts Co.*, 890 F.3d 304, 315 (D.C. Cir. 2018), it has not precisely defined what constitutes an "application" of a regulation for purposes of this exception. *See Peri & Sons Farms, Inc. v. Acosta*, No. CV 19-34 (TJK), 2019 WL 1258474, at *8 (D.D.C. Mar. 18, 2019). Nonetheless, the D.C. Circuit provided some guidance. *See id citing Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003) (describing the exception as permitting it to "entertain challenges beyond a statutory time limit to the authority of an agency to promulgate a regulation . . . following *enforcement* of the disputed regulation (emphasis added); *see also NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987) (noting that "[a] challenge of this sort might be raised, for example, by way of defense in an enforcement proceeding"). This language is telling because it indicates that this limited exception does not extend to every situation in which a regulation affects a party, or even every situation in which, at least arguably, the regulation has been "applied in some sense." *See Peri & Sons*, 2019 WL

[22] To be clear, this exception is narrow and the six-year statute of limitations would still bar an "as-applied" procedural challenge regarding the method used in promulgating the regulation (such as the agency failed to provide adequate notice or failed to adequately respond to comments). *See Indep. Cmty. Bankers of Am.*, 195 F.3d at 34.

1258474 at *9 *citing, inter alia, Edison Electric Institute v. Interstate Commerce Commission*, 969 F.2d 1221, 1229 (D.C. Cir. 1992).

In *Peri & Sons*, a district court addressed whether this exception to the statute of limitations was applicable in a context very similar to the present case. 2019 WL 1258474 at *7-10. In that case, the plaintiffs were employers who submitted petitions for temporary workers under a different foreign worker program (the H-2A program for temporary agricultural workers). *Id*. at *1. The employers argued that their APA challenge to an agency regulation promulgated in 2010 was not time barred, because they were challenging whether the agency had the statutory authority to promulgate a regulation in the first place. *Id*. at *8. Plaintiffs argued that their challenge to the regulation on the grounds that it was *ultra vires* re-started any time they filed an H-2A application and the agency denied the petition based on this regulation. *See id*. The district court rejected this argument stating that even if the agency's action constitutes an application of the 2010 regulation, it was not "the sort of application that allows them to invoke this narrow exception to the statute of limitations." *Id*. at *9 (quotations omitted). The district court reasoned that if it adopted the plaintiff's argument, it would "effectively nullify the six-year statute of limitations" because "any H-2A employer could challenge the 2010 Rule at any time." *Id*. at *10 (explaining that if the exception were applicable in this context, the court "would be hard-pressed to describe its limitations"). The district court further explained that "regulations establishing other similar regimes would also be exposed to never-ending facial challenges from those subject to them" and this would "frustrate Congress' objection that facial challenges to a regulation be confined to a limited period." *Id*.

Here, this narrow exception to the statute of limitations is not applicable because Plaintiffs are raising a facial challenge to the 1991 Rule. *See Indep. Cmty.*, 195 F.3d at 34.

Plaintiffs contend that, on its face, it is invalid under all circumstances, as evidenced by the fact that they have sought consolidation on this threshold legal issue. They are not merely alleging that it is *ultra vires* as applied under certain circumstances.

Moreover, the reasoning from *Peri & Sons* should apply here. There is no principled basis for distinguishing between H-1B petitioners and H-2A petitioners with respect to the statute of limitations. Under either program, an employer should not be permitted to wait until years after a regulation is promulgated and then challenge the statutory authority of that regulation simply because they have filed a new petition. To rule otherwise would essentially render the statute of limitations a nullity. *See Peri & Sons*, 2019 WL 1258474 at *10.

In sum, Plaintiffs challenge to the 1991 Rule, including specifically the employer-employee requirement and the itinerary requirement, are barred by the statute of limitations.

4. This Court should not consider issues outside the scope of Judge Huvelle's order.

Judge Huvelle enter an order consolidating the cases for the limited purpose of the resolution of "three threshold legal issues." Exhibit 1 at 1 (stating that the cases are "not related"). The parties Joint Status Report setting forth the briefing schedule specifically stated that the "parties are in agreement that briefing will be limited to the three threshold legal questions." Dkt. 11 at 1. Had there been any question as to the substance of these questions, these could have been addressed at the status conference that had been set on April 4, 2019 (just three days later).

Nonetheless, Plaintiffs seeks to raise additional questions in their Motion for Summary Judgment. Specifically, they repeatedly refer to the pace at which USCIS is adjudicating H-1B petitions. *See* Dkt. 14-1 at 1-3. This was not one of the issues that was consolidated. Moreover, although a litigant can under certain circumstances seek to compel agency action unlawfully

withheld, such a claim is necessarily moot when, as is here, the agency had acted by adjudicating the H-1B petitions. *See S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 729-30 (10th Cir. 1997).

Plaintiffs also seek to raise claims regarding USCIS's explanations. *See* Dkt. 14-1 at 11 n.2 (calling one explanation issued by USCIS "in and of itself nearly indecipherable"). Plaintiffs further argue that USCIS is required to provide an explanation for a decision *granting* an H-1B petition, when it is granted for a period of less than three years. *Id*. at 22-23. Not only were these claims outside the scope of consolidation, they are necessarily inconsistent with Plaintiffs' request to consolidate the threshold legal questions. It is true that a party can request that a denial be vacated on the grounds that the decision and administrative record are so inadequate that a district court cannot engage in a meaningful review of the denial. *See Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014) (explaining that if "an agency's explanation does not permit a court to evaluate the agency's action, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation") (quotations and citations omitted); *see also Torus Records, Inc. v. Drug Enforcement Admin*., 259 F.3d 731, 737 (D.C. Cir. 2001) (discussing remand) (cases cited by Plaintiffs).

But this principle has no application here, where Plaintiffs have already requested consolidation of the briefing on the threshold legal issues based on Plaintiffs' representation that there were common legal issues. *See* Dkt. 9; *see also* Dkt. 14-1 at 18 (referencing the "rules that are involved in each denial in each consolidated case"). Based on these representations, Judge Huevelle ordered consolidation for the limited purpose of resolving these questions. There is no basis for them to now backtrack and argue that the agency failed to explain its actions and, as a

result, the matter should be remanded back to USCIS for a better explanation before litigation can proceed further. *See Amerijet Int'l*, 753 F.3d at 1353.[23] A remand now would serve no legitimate purpose and would simply delay resolution of the threshold legal questions regarding USCIS' authority in this case.

Moreover, as a general matter, the question of whether a case should be remanded to an agency for a better explanation is a fact specific inquiry. The D.C. Circuit, discussing the requirements of 5 U.S.C. § 555(e), explained that "whenever an agency denies 'a written application, petition, or other request of an interested person made in connection with any agency proceeding,' the agency must provide 'a brief statement of the grounds for denial,' unless the denial is 'self-explanatory.'" *Torus Records, Inc. v. Drug Enf'l. Admin*., 259 F.3d 731, 737 (D.C. Cir. 2001) citing 5 U.S.C. § 555(e). Applying this principle, the D.C. Circuit found that although the agency's letter decision was inadequate to explain the decision, it was not the sole explanation of the agency's rationale. *Id*. at 737-38. On appeal, the agency was able to point to various memoranda that specified the grounds upon which the petitioner was denied and the D.C. Circuit found that these memoranda were sufficient. *Id.* at 738. Under *Torus Records* a reviewing court must consider the context of the decision, including other contemporaneous documents that might reflect the agency's rationale. Thus, applying this principle in the context of H-1B petitions, it is difficult to determine without the administrative record whether the agency has adequately explained its decision because the record may contain communications

[23] Remand is also inconsistent with this Court's February 11, 2019 minute order granting the Government's unopposed motion regarding scheduling. *See* Dkt. 8. As this Court recognized the threshold legal questions regarding USCIS' authority should be determined before reviewing individual adjudications.

with the H-1B petitioner outlining deficiencies with its petition, even if these deficiencies are not outlined in the denial itself.

There are two additional problems with Plaintiffs' claim in the context of a decision by USCIS granting an H-1B petition for a portion of the validity period requested. First, the only district court to consider this question found that USCIS was not required to provide *any* explanation in this context. *See Valoreum Consulting Group*, 2015WL 196304 at * 1, n.2 (holding that the agency "is not required to issue a written explanation of its decision") *citing, inter alia, Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417 (1971). Second, even if this Court were to conclude that *Valoreum Consulting* was wrongly decided, there is no nexus between this claim and the underlying relief sought by Plaintiffs. Plaintiffs are not seeking more information as to why their H-1B petitions were granted for less than the three years or seeking these decision reopened and re-adjudicated; rather they are seeking an order requiring USCIS to *approve* the H-1B petition for the full three years and enjoin USCIS from granting H-1B petitions for less than three years (unless the petitioner requests a shorter period of time). Thus, their claim is not a proper basis for these remedies even if, *assuming arguendo*, USCIS was required to provide an explanation.

CONCLUSION

WHEREFORE, the Government respectfully requests that this Court dismiss, under the statute of limitations, Plaintiffs' challenges to USCIS' authority to promulgate the regulations governing (i) the approval of H-1B petitions for less than three years, (ii) the employer-employee requirement, and (iii) the itinerary requirement, and enter summary judgment with respect to Plaintiffs' challenge to the 2018 Guidance Memorandum. In the alternative, the Government requests that the Court enter summary judgment with respect to Plaintiffs' challenge to USCIS'

authority as set forth in items (i), (ii), and (iii) above, and enter summary judgment in favor of USCIS with respect to any and all other threshold legal questions before it.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director

GLENN M. GIRDHARRY
Assistant Director

By: *s/ Aaron S. Goldsmith*
Aaron S. Goldsmith
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 532-4107
Email: aaron.goldsmith@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the CM/ECF system will be sent electronically to the registered participants. There are no unregistered participants.

s/ Aaron S. Goldsmith
AARON S. GOLDSMITH
Senior Litigation Counsel