UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ITServe Alliance, Plaintiff, v. L. Francis Cissna, Director, United States Citizenship and Immigration Services, Defendant.	)	C/A No.: 1:18-cv-2350-RMC (Lead case in consolidated cases)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' CONSOLIDATED MOTION FOR SUMMARY JUDGMENT

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Defendant ("the Agency") is trying to end the information technology consulting ("IT Consulting") business model. When Congress created the nonimmigrant H-1B visa, it laid out the eligibility criteria. Based on these criteria, Congress expected that the Agency should conclude the adjudication of an H-1B visa with 30 days. 8 U.S.C. § 1571(b). By regulation, the Agency prohibits filing an H-1B petition earlier than six months prior to the requested start date. The requested start date for initial H-1B visas filed in the lottery is October 1 of each year. By any metric or reasonable expectation, the Agency should conclude the adjudication of an initial H-1B visa before October 1.

A review of the Agency's data shows that up until recently the Agency adjudicated initial H-1B petitions in a relatively timely manner, allowing for approvals on the requested start date of October 1. But in 2018 and 2019, the time the Agency took to adjudicate an initial H-1B petition

grew to 9.5 to 12.5 months. Appendix[1] at 074. The Agency's explosion of processing times raises the question: "is USCIS relying 'on factors which Congress has not intended it to consider' when adjudicating H-1B visas filed by the IT consulting industry?" *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

These consolidated cases reveal that the dramatic increase in processing times is the direct result of the Agency's nonregulatory attack on the IT Consulting community. Starting on February 22, 2018, the Agency issued PM-602-0157 and articulated the following new standards:

1. There are two tiers of employers in the H-1B program: IT consulting companies (defined as a company whose employees work on projects located at a third party's or client location); and, all other companies;
2. IT consulting companies, but not other employers, must provide evidence showing they have an exclusive right to control all aspects of the employees' work, and that the employee's work be directly related to the employer's line of business.
3. IT consulting companies, but not other employers, must produce evidence of "specific and non-speculative" work assignments for the *entire* three years of an H-1B visa;
4. If this evidence is not produced, the Agency asserts it has discretion to deny in whole or in part an H-1B visa petition filed by an IT consulting company.
5. These rules apply to all petitions filed by a company whose business places at least one employee at a client worksite, regardless of if the employee will be working at the employer's place of business.

See PM 602-0157, Contracts and Itinerary Requirements for H-1B Petitions Involving Third-Party Worksites (February 22, 2018). Apps. 31-37.

Recently the Agency released data on its requests for evidence (RFE) sent to petitioners, and its adjudications. The Agency increased the percentage of RFEs sent on initial petitions from an average of 35% in FY 2015-2017 to 45.6% in FY 2018, and 51% so far in 2019. Appx at 58. Defendant disclosed that approval rates for initial H-1B visas has dropped from an average of 94% in FY 2015-2017, to 84.5% in FY 2018 and 75.4% so far in FY 2019. Appx. 58-63.

[1] In an effort to aid the Court, Plaintiffs have put all exhibits into one attachment and bates numbered it. It is attached as Exhibit B and Plaintiffs will cite to it as "Appx. at __."

The increase in H-1B denials has not been felt equally across the board. The Agency disclosed data on the top 30 H-1B filers for fiscal year 2018. Appx. at 57. These statistics display the disparity in adjudications between direct employers and IT consulting firms. The large IT consulting companies on that list received denial rates of 32% (Cognizant Tech Solutions), 18% (Tata Consultancy), 26% (Infosys Limited), 25% (Deloitte Consulting LLP), 40% (Capgemini), 18% (Wipro), 17% (Accenture). Meanwhile companies in the Agency's preferred tier of employer received denials ranging in the 2% range. *Id*.

The increase in processing times is likewise concentrated in the IT consulting industry, as seen in a statement released by the Agency, identifying the top reasons for increased RFEs. The Agency issues RFEs on issues exclusively targeted to the IT consulting industry tier of employers: Employer-Employee Relationship; Availability of Work (off-site); Availability of Work (on-site); and Maintenance of Status. Appx. 64-65.

Simply said, the Agency is creating new legislative rules through informal adjudications and policy memos. It is applying them only to a subset of H-1B applicants—IT consulting firms. And it is taking much longer to decide these applications because it is now considering factors that Congress did not intend it to consider. For the reasons below, this Court should declare unlawful three of these legislative rules.

LEGAL BACKGROUND

The Immigration and Nationality Act ("INA" or "the Act") splits employment-based visas into permanent ("immigrant") and temporary ("nonimmigrant") visa categories. Generally speaking, each employment based nonimmigrant visa has a corresponding immigrant visa category. In November 1990, Congress made sweeping changes to the INA's employment-based

visa categories. Congress designed the system to require a significantly higher evidentiary requirement on immigrant visas than that imposed on nonimmigrant visas.

The Act creates permanent immigrant visa categories for professional workers referred to as Employment Based Preference 2 ("EB-2") (professionals with advanced degrees) and Employment Based Preference 3 ("EB-3") (professionals with a bachelor's degree). 8 U.S.C. § 1153(b)(2) and (3). The 1990 Act continued a requirement from the prior statute and requires employers seeking an immigrant visa to file for a Labor Certificate with the Department of Labor. 8 U.S.C. § 1182(a)(5). Employers must provide documentation to DOL that they tested the labor market and could not find sufficient qualified, willing, and able United States workers in the location for the proffered position at the prevailing wage. 8 U.S.C. § 1182(a)(5). If DOL grants the certificate, the employer can apply for a visa with USCIS.

The 1990 Act created the nonimmigrant H-1B visa, for professionals in "specialty occupations." Each Fiscal year, the INA authorizes a total of 85,000 initial (numerically capped) H-1B visas. Once an initial H-1B has been approved for an employee, future extension applications are not subject to the numerical fiscal year "cap."

The INA requires US employers apply to DOL and receive an approved Labor Condition Application ("LCA") before filing an H-1B petition. 8 U.S.C. § 1182(n) and (p).

The nonimmigrant LCA and immigrant Labor Certification are different mechanisms. As noted in the Conference Report, Congress adopted the "labor certification process for [EB-2 and EB-3] workers with certain additions concerning job offer notices and the right of interested parties to submit evidence relating to the application for labor certification. It creates a modified ***attestation*** process for H–1B 'specialty occupation' nonimmigrants." HR CONF. REPT. 101-955, October 26, 1990 (emphasis added).

Congress emphasized the distinction between immigrant and nonimmigrant visa processing in the structure of the Act as well as the timelines it created for adjudication of these petitions. *See* 8 U.S.C. § 1571(b). Unlike the immigrant visas, which require substantial evidence before awarding the permanent benefit, Congress made the nonimmigrant H-1B application a streamlined "attestation" process, allowing US employers to fill needs quickly. Congress determined that USCIS should complete the analysis of the statutory standards and adjudication of a nonimmigrant H-1B visa within thirty (30) days, while its corresponding immigrant visa categories would take six months to adjudicate. 8 U.S.C. § 1571(b).

The Labor Certificate and LCA are fundamentally different in part because the availability of US workers is irrelevant to the H-1B visa category. Approval of the LCA does not require a labor market test and does not require employers hire qualified willing and able US workers before seeking an H-1B visa. Nor does the Act require the employer to provide documentary evidence when applying for the LCA. Rather, Congress required employers seeking an LCA to "attest" to five labor conditions:

> (1) It will pay the alien(s) and other individuals employed in the occupational classification at the place of employment prevailing wages or actual wages whichever are greater; (8 U.S.C. § 1182(n)(1)(A)(i)(I), 20 C.F.R. § 655.731)
>
> (2) it will provide working conditions that will not adversely affect the working conditions of U.S. workers similarly employed; (8 U.S.C. § 1182(n)(1)(A)(i)(II), 20 C.F.R. § 655.732)
>
> (3) there is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment; (8 U.S.C. § 1182(n)(1)(B), 20 C.F.R. § 655.733)
>
> (4) it has publicly notified the bargaining representative of its employees in the occupational classification at the place of employment of its intent to employ an H-1B alien worker(s), or, if there is no bargaining representative, that it has posted such notice at the place of employment; (8 U.S.C. § 1182(n)(1)(C), 20 C.F.R. § 655.734) and

> (5) the employer must provide the information required in the application about the number of aliens sought, occupational classification, job duties, wage rate and conditions under which the aliens will be employed, date of need, and period of employment., and agree to DOL's complaint driven enforcement powers. (8 U.S.C. § 1182(n)(1)(D), 20 C.F.R. § 655.735).

In creating regulations, DOL recognized that Congress created the attestation process with the intent of quick action on petitions for temporary workers. *See* Interim Final Rule 56 Fed. Reg. 54720 (October 27, 1991). Temporary visas have finite durations, and DOL recognized that lengthy preapproval inquiries would consume time requested by the petitions. *Id.* Consequently, the statute and DOL's regulations enforce the terms of the LCA in a complaint driven system. 8 U.S.C. § 1182(n)(2)(A). This allows for expeditious initial processing of applications. DOL has authority to hear both H-1B and US workers complaints alleging violations of the terms of the LCA. *Id.* DOL's enforcement powers include administrative hearings before an administrative law judge to adjudicate allegations. 8 U.S.C. § 1182(n)(2)(C), and 20 C.F.R. § 655.800.

The way the Agency processes EB-2 and EB-3 visa petitions is also different from H-1Bs. When adjudicating the immigrant visas, USCIS determines if the evidence provided with the petition matches the terms of Labor Certificate.

In an H-1B visa, USCIS is not conducting the same analysis. USCIS's H-1B inquiry is limited to determining if the position qualifies as a "specialty occupation" (i.e. requires a degree) and if the employee has a bachelor or higher degree. 8 U.S.C. § 1184(i). Defendant determined that the statutory definition of specialty occupation and its degree requirement were ambiguous and created regulations for determining qualifications of a specialty occupation. The gap filling regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) state that:

> To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) *A baccalaureate or higher degree* or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in *parallel positions among similar organizations* or, in the alternative, an employer may show that its *particular position is so complex or unique* that it can be performed only by an individual *with a degree*;

(3) The employer normally requires *a degree or its equivalent* for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the *attainment of a baccalaureate or higher degree*.

(Emphasis added).

Nothing in the regulation requires employers provided proof of guaranteed work projects to qualify as a specialty occupation.

Petitions for H-1B visas require the employer to submit the following forms to USCIS: Form I-129, Petition for Nonimmigrant Worker; H Classification Supplement; H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement. Defendant created these forms based upon its need to gather information pertaining to statutory eligibility. According to Defendant's Paperwork Reduction Act notice published with the Instructions to Petition Nonimmigrant Worker, petitioning employers should be able to complete the forms with all required documents in 5.26 hours (Form I-129, 2.26 hours; H Classification Supplement, 2 hours; and Data Collection and Filing Fee Exemption Supplement, 1 hour).

Both the statutory scheme and Defendant's Instructions anticipate a rather simple "streamlined" attestation centered application process. However, processing times for H-1B petitions have ballooned, and are now ranging between 9.5 and 12.5 months for Defendant's California Service Center, and 7 to 9 months for the Vermont Service Center. Appx. 74. In contrast, the corresponding immigrant visa categories are being processed in 3 to 6 months for EB-

2 and EB-3 petitions processed by the Texas Service Center, and 5 to 7 months for EB-2 petitions and 4.5 to 6.5 months for EB-3 petitions processed by the Nebraska Service Center. *Id.* USCIS has turned the system upside down, taking longer to adjudicate temporary immigrant petitions than immigrant petitions.

FACTUAL BACKGROUND

The consolidated cases challenge three legislative rules that have been used as at least one basis to deny an IT consulting firm an H1B visa. To give the court context for these denials, the Plaintiffs have chosen two exemplar cases, which demonstrate the real-world impact of these arbitrary rules.

***Employer Employee Rule*: *ERPA v. Cissna*, 19-cv-292 (Chituluri)**

On April 12, 2018, Defendant selected ERPA's petition on behalf of Sai Chituluri for adjudication in the Fiscal Year 2019 H-1B lottery. Appx. at 001. The FY 2019 cap cases were the first cases adjudicated following the February 22, 2018 PM 602-0157.

ERPA sought to hire Chituluri as an IT professional for a period of three years. Appx. at 001. ERPA sought an H-1B for the position of Java Developer, and ERPA made clear it would be placing the beneficiary off-site at a third-party client location. Appx. at 003. ERPA provided letters from the third-party client, a services contract, payroll records, and weekly status reports showing ERPA had the right to hire, fire, pay, or otherwise control the beneficiary. *Id.*; Cf. 8 C.F.R. § 214.2(h)(2) (identifying documents required for H1B applications).

Because ERPA's business model includes some of its employees working at client locations, it was subjected to enhanced evidentiary requirements including proof that ERPA had exclusive right to control all aspects of Chituluri's work, and an exact itinerary and specific and non-speculative work assignments. Appx. at 003.

Defendant reviewed the petition from April 12, 2018, to December 19, 2018: roughly eight months. The petition was supported by a Labor Condition Application certified by the Department of Labor and signed by ERPA as the employer. By signing the LCA ERPA accepted the legal liability of an employer under the INA and DOL's regulations.

Defendant issued a notice of denial to the Plaintiff, and began by stating its regulatory definition of "employer" at 8 U.S.C. § 214.2(h)(4)(ii) and determined that ERPA was not an "employer:"

> United States *employer means a person, firm, corporation; contractor, or other association, or organization in the United States which*:
>
> (]) 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.
>
> * * *
>
> Neither the legacy Immigration and Naturalization Service (INS) nor USCIS has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1 B visa classification, even though the regulation describes H-1 B beneficiaries as "employees" who must have an "employer-employee relationship" with a U.S. employer. Therefore, for purposes of the H-1B visa classification, these terms are undefined.
>
> * * *
>
> In this matter, the INA does not exhibit a legislative intent to extend the definition of "employer" at INA § 101(a)(15)(H)(i)(b), "employment" in INA§ 212(n)(l)(A)(i), or "employee" in INA§ 212(n)(2)(C)(vii) beyond the traditional common law definitions. *See* generally 136 Cong. Rec. Sl7106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1 B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.
>
> * * *

> The evidence, therefore, is insufficient to establish that you qualify as a United States employer, as defined by 8 CFR § 214.2(h)(4)(ii). It appears from the record that you will pay the beneficiary a salary, employee benefits, and employment related taxes. However, these factors, even if true, are not determinative in assessing who will control the beneficiary…

Appx. at 002-003.

Defendant's decision embraces legislative rules that only apply to business models where employees work at client work sites. These rules were published in PM 602-0157 and its Employer-Employee memo. These rules contradict: DOL's regulatory definition of "employer;" the plain language of its own regulation; and, the stated intent of its own regulation at the time it was promulgated. *Id.*

Notwithstanding the definition of Employer at 8 C.F.R. 214.2(h)(4)(ii), the Agency stated that it had never defined the terms "employee, employed, employment, or employer-employee relationship." *Id.* at 2. The denial goes on to say that, where federal law fails to define the term "employee," courts use the common law test or an *actual* control test. *Id.* The Agency then cites to the regulatory definition of employer at 214.2(h)(4)(ii) and claims that it is a more narrow definition of employer than the common law definition, concluding:

> The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in [214.2(h)(4)(ii)] indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to illogical results.

Id. at 002.

The Agency rejected the broad disjunctive language of its regulation, which establishes an employer is one who has the ability to hire, fire, pay, ***or*** otherwise control the beneficiary. After going through a list of factors that would reveal actual control, the agency determined that ERPA did not provide any evidence of "work discussions between your organization and the beneficiary

that describe errors, problems, questions, solutions, or any normal issues that arise when a worker is assigned work." *Id.* at 004. Though the Agency recognized that ERPA paid the beneficiary, provided him benefits, and withheld employment taxes, it dismissed such evidence as nondispositive and held that ERPA had failed to satisfy its Employer Employee Rule. It took the Agency 9 months to render this decision.

Non-Speculative Work Rule: ERPA v. Cissna, 19-cv- 193(Kuchiculla)

On February 21, 2018, Plaintiff ERPA filed a petition to extend its employee's (Kuchikulla) H-1B visa. Appx. at 010. Kuchikulla was already employed by ERPA on an H-1B visa and worked on in-house projects at ERPA's location. The extension petition sought to continue this arrangement. Kuchikulla, is also the beneficiary of an approved immigrant visa petition, which allows him to obtain unlimited H-1B extension while waiting for a permanent resident visa.

On November 9, 2018, the Agency denied the petition and introduced the Non-Speculative Work Rule, stating that ERPA must show proof of exact projects Kuchikulla would be working on for the next three years. The Agency first reiterated how it defines a "specialty occupation."[2] The denial then targeted the consulting industry:

> You are in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained personnel to complete their projects. You negotiate contracts with various firms that pay a fee to you for each worker hired to complete their projects. You then pay the worker, in this case the beneficiary, directly from an account under your own name. However, the firm needing the computer related positions will determine the job duties to be performed.
>
> * * *

[2] This explanation in and of itself is nearly indecipherable, though it is the standard language the Agency uses. Appx. at 011-012 (interpreting its regulations to contradict the statute in an effort to avoid an illogical result).

> USCIS notes that H-1B petitions do not establish a worker's eligibility for H-IB classification if they are based on speculative employment or do not establish the actual work the H-1 B beneficiary will perform at the third-party worksite…
>
> You indicated that *the beneficiary will be working in-house on projects* for your clients. You submitted the above listed documents to establish that the beneficiary would work on a project during the beneficiary's tenure with your organization.
>
> While the beneficiary may in fact be tasked to work on projects according to the provided evidence, *the very nature of your business indicates that eventually, the beneficiary would be outsourced to client sites to implement the specific project and/or assist clients with other technical issues.* Furthermore, the submitted end-clients' documents indicate that the services to be performed for DSC and FSCJ will be ended on June 30, 2020. *As such, absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one or two projects, cannot be deemed representative of the beneficiary's entire schedule while in the United States*…

Appx. at 012-013.

Defendant required ERPA to provide this evidence because some of its employees work at client locations. This triggered the enhanced evidentiary requirement of proving specific non-speculative work assignments. *Id.* at 012. The Agency noted that in such situations the petitioner must provide evidence of specific and non-speculative work assignments in the form of contracts statements of work, work orders service agreements and client letters to identify the work duties. *Id.* The Agency then averred that: "you must demonstrate that you have specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested on the petition." *Id.* It then described the petitioner's burden of proof as such:

> • You have a specific work assignment in place for the beneficiary;
> • The petition is properly supported by a Labor Condition Application (LCA) that corresponds to such work; and
> • The actual work to be performed by the beneficiary will be in a specialty occupation based on the work requirements imposed by the end-client who uses the beneficiary's services. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

Id. at 0013.

The Agency then noted that uncorroborated statements (or attestations) would be insufficient satisfy this burden of proof. *Id.* Despite having worked in the same capacity for several years, Defendant stated the rule against speculative employment demanded this evidence of specific and non-speculative work assignments.

The Agency assumed, without evidence, that ERPA would convert Kuchikulla from working in-house projects to working at third party locations. The Agency acknowledged the record contained proof of two years of projects, but noted that they will end in June 2020, and "absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one or two projects, cannot be deemed representative of the beneficiary's entire schedule while in the United States." *Id.* The Agency denied on this basis alone. It took the Agency 10 months to make this decision.

Nothing in the statute or regulation creates two tiers of employers or authorizes disparate evidentiary burdens. Nothing in the statute or regulation defines or prohibits "speculative employment." Nothing in the statute or regulations justifies denying a petition as speculative, where the employee is continuing to perform the same job at the same location.

Itinerary/Partial Denial Rule: VSION v. Cissna, 19-cv-423 (Partial Denial), Mythri Consulting v. Cissna, 19-cv-871 (Itinerary Denial)

The Itinerary/Partial Denial Rule are two sides of the same coin. To figure out the apparent rationale for the Partial Denials (with no explanations), Plaintiffs use two cases to demonstrate the effects of these rules.

VSION Technologies, Inc. ("VSion") sought an initial "cap" H-1B for beneficiary Satyanarayana Kommagalla on April 12, 2018. Appx. at 017. The underlying petition sought three years of status and it indicated the beneficiary would seek the visa at the consulate in India. *Id.* After ten months, the Agency issued an approval notice with a validity period from February 1,

2019 through February 2, 2019. *Id.* Though the Agency approved the status for 1 day, the delay and the partial approval effectively acted as a partial denial for 1094 days out of the 1095 days VSion sought. *Id.* The partial denial provides no explanation or rationale. *Id.*

Before starting employment, Kommagalla would be required to schedule and appear in person for an interview at the United States Consulate in Hyderabad, India. The wait time for a non-immigrant H-1B appointment with the HydrAbad Consulate is 57 days. Appx. at 020. The Consulate states that "[a]t the end of your immigrant visa interview, the consular officer will inform you whether your visa application is approved or denied." Appx. at 019. However, "some visa applications require further administrative processing, which takes additional time after the visa applicant's interview by a consular officer. Applicants are advised of this requirement when they apply. Most administrative processing is resolved within 60 days of the visa interview." *Id.* When the visa for travel is approved VSion would be required to schedule and purchase international airfare for Kommagalla. Upon his arrival, and before beginning work, Kommagalla need to secure housing and a mode of transportation to and from work. Then, VSion would need to in-process Kommagalla (signing up for insurance, pension plans, etc.). All in one day.

The apparent rationale or explanation for this Partial Denial is the Itinerary Rule and Defendant's PM 602-0157, which states it will curtail the requested validity period to match evidence of an exact itinerary and specific non-speculative work assignments.

On April 12, 2018, Mythri Consulting LLC ("Mythri") sought an initial "cap" H-1B on behalf of beneficiary Sunil Reddy Vatti. Appx. at 023. The Agency identified Mythri as an IT Consulting business, and applied enhanced evidentiary burdens to the petition, stating:

> If the beneficiary will be placed at one or more third-party worksites, you must demonstrate that you have specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested on the petition. You will need to show that:

> • You have a specific work assignment in place for the beneficiary;
> • The petition is properly supported by a _Labor Condition Application (LCA) that corresponds to such work; and
> • The actual work to be performed by the beneficiary-will be in a specialty occupation based on the work requirements imposed by the end-client who uses the beneficiary's services.
>
> USCIS notes that H-IB petitions do not establish a worker's eligibility for H-IB classification if they are based on speculative employment or do not establish the actual work the H-IB beneficiary will perform at the third-party ·worksite. Uncorroborated statements by your organization, without additional corroborating evidence, are often insufficient to establish by a preponderance of the evidence that the beneficiary will actually perform specialty occupation work.
>
> For such third-party, off-site arrangements, additional corroborating evidence, such as contracts and work orders, may substantiate your claim of actual work in a specialty occupation…

Appx. at 029. The Agency justified this requirement by citing the itinerary regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) that states in full:

> (B) 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.

Id. The Agency noted that Mythri's labor condition application stated that the beneficiary would work in multiple sites. This is explicitly allowed by DOL regulations. 20 C.F.R. §§ 655.715, 730, 731, and 735. The Agency declared that Mythri would need to submit an itinerary with the exact dates and locations of the services to be provided. *Id.* at 028. The Agency then noted that, though Mythri submitted an itinerary, it did not specify the "exact dates when the beneficiary will be working at each location of services." And for that reason, the Agency determined that Mythri did not satisfy the Itinerary Rule and denied the entirety of the H1B application. It took the Agency 9 months to make this decision.

ARGUMENT

Plaintiffs are entitled to judgment as a matter of law on the three consolidated issues. Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The standards announced in Rule 56, however, do not apply in actions under the Administrative Procedure Act ("APA"). *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006) (internal citation omitted). Rather, under the APA, "'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Id.* at 90 (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir.1985)). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* (citing *Richards v. INS*, 554 F.2d 1173, 1177 & n. 28 (D.C. Cir. 1977)).

The three consolidated issues in this case present "familiar administrative-law inquiries." *Detroit Int'l Bridge Co. v. Gov't of Canada*, 192 F. Supp. 3d 54, 65 (D.D.C. 2016). First, the Employer Employee Rule, the Non-Speculative Work Rule, and the Itinerary Rule are new legislative rules that did not go through notice and comment rulemaking. Second, the Agency provided no explanation for any Itinerary/Partial Denial and, thus, each partial denial lacks any reasoned decisionmaking. Finally, the Employer Employee Rule, the Non-Speculative Work Rule, and the Itinerary/Partial Denials are all *ultra vires* and not in accordance with law.

I. The Employer Employee Rule, the Non-Speculative Work Rule, and the Itinerary/Partial Denial Rule are unlawful legislative rules.

The Agency's Employer Employee Rule and Non-Speculative Work Rule are unlawful legislative rules. The APA requires an agency to publish notice of proposed rulemaking in the

Federal Register and to accept and consider public comments on legislative or substantive rules. 5 U.S.C. § 553; *Cent. Tex. Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005). In contrast, the APA exempts from notice and comment rulemaking interpretative rules; general statements of policy; and rules of agency organization, procedure, or practice. *Id.* When an agency issues a substantive rule without notice and comment rulemaking under the guise of an interpretive rule, the court must determine whether the rule is in fact substantive and, if it is, the rule must be set aside as a violation of the APA. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

This Court distinguishes legislative (or substantive) rules from interpretative rules by determining "whether the new rule effects a substantive regulatory change to the statutory or regulatory regime." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec. (EPIC)*, 653 F.3d 1, 6–7 (D.C. Cir. 2011). Interpretative rules must clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or track preexisting requirements and explain something the statute or regulation already required. *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236–37 (D.C. Cir. 1992). A legislative rule, on the other hand, goes further. *Id.* at 237. A legislative rule supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy. *Id.*; *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule").

Similarly, a rule that "amends" substantive rules is not an interpretive rule; such rules are substantive and must go through notice and comment rulemaking. *See desen v. Harris County*, 529 U.S. 576 (2000). This Court later noted courts "should not defer to an agency's interpretation imputing a limiting provision to a rule that is silent on the subject . . . [in] cases in which the

agency's interpretation postdated its adoption of the rule and was not itself subject to the rigors of notice and comment." *see also Appalachian Power Co. v. Envtl. Protection Agency*, 249 F.3d 1032, 1048 (D.C. Cir. 2001). And this court has recently applied this case law to undermine a rule announced in a policy memo from the Agency that attempted to amend a regulation without going through notice and comment rulemaking. *Huashan Zhang v. United States Citizenship & Immigration Servs.*, 344 F. Supp. 3d 32, 49 (D.D.C. 2018).

Here, the Employer Employee Rule and the Non-Speculative Work rule are unlawful legislative rules or amendments because they effect a substantive change and they did not go through notice and comment rulemaking. The clearest way to see that the Employer Employee Rule and the Non-Speculative Work Rule—rules that are involved in each denial in each consolidated case—are unlawful legislative rules, substantive rules, or amendments is to review justifications the Agency articulated for both rules in the Agency's February 2018 Memo that announced these "changes." Appx. at 031.

On February 22, 2018, the Agency issued a new memo entitled: "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites." Appx. at 031. The Background section of the memo clearly explains the changes the Memo would make to the Agency's existent rules governing Employer Employee Rule and Non-Speculative Work Rule. *Id.*at 031-032 The February 2018 Memo made at least the following changes:

> • Under a June 6, 1995 policy memo and a November 13, 1995 memo, the Agency did not require third party contracts; adjudicators could request them on a case-by-case basis or when they could "articulate a specific need" for those contracts. Appx. at 031-032. However, under the February 2018 Memo, "the petitioner must" provide third-party contracts. *Id.* at 034. This demonstrates a change in the Itinerary Rule which underlies the Partial Denials.
>
> • Under a December 29, 1995 Memo, the Agency would accept statements about a beneficiary's dates and places of employment. *Id.* at 032. The February 2018 Memo rescinded this memo. And now requires "petitioner must demonstrate that it has a specific

> and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested on the petition." *Id.* at 036. It also requires "corroborating evidence," far more than general statements. This rule contradicts the INA's provisions at 8 U.S.C. § 1182(n)(2)(C)(vii) which allows placing employees in "non productive status (when there is no work to perform)." This demonstrates a new mandatory evidentiary standard.
>
> • Under a January 8, 2010 memo, the Agency affirmed that "the employer-employee relationship hinges on the *right* to control the beneficiary," not actual control. Appx. at 040. But the February 2018 memo requires "actual" and exclusive control over day to day activities. Appx. at 033, 035-036. This standard is at odds with the plain language of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) and demonstrates a change in the Employer Employee Rule.
>
> • Finally, PM 602-0157 proclaims the Agency has the authority to deny outright or curtail approval periods of H-1B visas filed by IT consulting companies if they do not provide proof or guaranteed specific and non-speculative work assignments. *Id.*

Thus, the February 2018 Memo explains the Agency's positions on the three consolidated issues and the changes the Agency intended to make through the February 2018 Memo.

In addition to these conceded changes to existing rules, the Employer Employee Rule, the Non-Speculative Work Rule, and the Itinerary Rule (leading to Partial Denials) also change or amend longstanding regulations or are at odds with the statute. First, the Agency defines who is an employer in its regulations 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.

8 C.F.R. § 214.2(h)(4)(ii).

However, the February 2018 Policy Memo amends this definition in two ways. It first ignores its own statement that a "contractor" can be a proper employer. And second, it reads the

second subsection as conjunctive rather than disjunctive. In other words, the regulation requires only the *right* to control, as evidenced by the ability to "hire, pay, fire, supervise, or otherwise control." But the 2018 Policy Memo and the rationale for the denials in these consolidated cases requires *actual* control. This is a substantive change to the regulatory burden. And as noted below, the Agency lacks any statutory authority to define who is an employer for purposes of the H1B program, and therefore, the Employer Employee Rule also attempts to change, amend, or alter a statute.

Similarly, the Agency's Non-Speculative Work Rule and the Itinerary Rule conflicts with 8 U.S.C. § 1182(n)(2)(C)(vii) which explicitly rejects a requirement of guaranteed work assignments for the entire duration of the H-1B visa. The rule also alters the Agency's regulation at 8 C.F.R. § 214.2(h)(2)(i)(B). This regulation states:

> **(B) 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.

Id. The Non-Speculative Work Rule clearly amends this definition because the regulation requires only the dates and locations of the services, not a detailed explanation of the beneficiary's work for the entirety of the requested status. And the Itinerary Rule also amends this regulation by requiring the details of all services and specific dates and locations for the entirety of the period of requested status. Nothing in this regulation requires the petitioner to demonstrate uninterrupted contracts for the entirety of the period requested. Further, as explained below, both the Non-Speculative Work Rule and the Itinerary Rule conflict with statutes; therefore, these rules are also attempt to substantively change or amend statutes

The impact of these rules is readily apparent when reviewing numbers recently released by the Agency. As noted in the introduction, two Agency reports make clear that, since

implementation of these new standards, USCIS's denial rate for petitions petitioners in the IT Consulting industry have skyrocketed and two of the biggest sources of requests for evidence are directly related to the three, new challenged policies here. Appx. at 057-073. USCIS reported the following approval rates for the top ten H1B filers in FY 2018. Out of the top ten H-1B filers, seven of these companies are IT consulting companies while three petitioners use onsite workers only. Appx. at 057. The three companies that petition for onsite workers only have a 99% approval rate; the remaining seven have cumulative approval rates from 68% to 83%. The cumulative rate combines initial (first fiscal year cap petition) and continuing (extension, amendment, and transfer petitions). *Id.* The seven IT consulting companies' initial "cap" petition denial *rates* were: 61.2%, 22.4%, 53.7%, 33.2%, 80.1%, 18%, and 30.1%. In contrast the other companies' initial petition denial rates were: 1%, 0.9%, and 2%. *Id.*

The denial rates for continuing petitions paints an equally dark picture of the impact these new rules have had on the IT consulting business model. *Id.* These petitions are filed on behalf of employees who have been previously approved by the agency but are now denied following the change of rules in PM 602-0157. The denials rates for IT consulting companies' extensions petitions for previously approved work are, respectively: 29%, 17.4%, 26%, 23.4%, 25.5%, 17.2%, and 14.5%. When the Agency started applying its new substantive rules, applications that had been previously approved got denied at inordinate percentages. This indicates a substantive change in the criteria for approval. *Id.*

This is further borne out by the top reasons the Agency sent out requests for evidence. In Fiscal Year 2018, the number of requests for evidence the Agency sent out went up to 38% of cases; in real numbers, the Agency sent out nearly twice as many requests for evidence than it did in the prior year. Appx. at 058. The Agency also put out a report indicating the top subjects for

this onslaught of requests for evidence: the Employer Employee Rule and the Non-Speculative Work Rule were two out of the top three, while the Itinerary Rule came it at number 9. Appx. at 064-065. The numbers themselves bear out that these are substantive changes in the eligibility criteria that must go through notice and comment rulemaking.

The Employer Employee, Non-Speculative Work, and Itinerary/Partial Denial Rules are in fact "legislative" and require notice and comment rulemaking, but it is undisputed the Agency did not engage in notice and comment rulemaking for these rules. For this reason alone, this Court should declare them unlawful and set aside all denials in the consolidated cases that rely on these grounds.

II. The Agency's Partial Denials lack any explanation or reasoned decisionmaking.

In addition to the full denials based on these unlawful legislative rules, the Agency issued partial approvals to some H-1B petitioners, only granting H-1B status for months, weeks, or even a single day even though the petitioners sought years of status. These partial approvals are also partial denials. But the Agency failed to provide any explanation or rationale for its partial denials and, as such, those partial denials are arbitrary and capricious.

An agency must give a written explanation for a complete *or* partial denial:

> notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. . . . The notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C.A. § 555(e). And partial denials are subject to judicial review under § 706. *See, e.g., Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014); *Envtl. Def. Fund v. Thomas*, 657 F. Supp. 302, 307 (D.D.C. 1987) (recognizing a partial grant is also a partial denial); *Willis Shaw Frozen Exp., Inc. v. I. C. C.*, 587 F.2d 1333, 1336 (D.C. Cir. 1978).

Like any final agency action, the "agency must articulate an explanation" for a partial denial. *Amerijet Int'l*, 753 F.3d at 1350. It is a "fundamental requirement of administrative law [] that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action." *Tourus Records, Inc. v. Drug Enf't Admin*., 259 F.3d 731, 737 (D.C. Cir. 2001) (internal quotation marks omitted). The agency must explain "why it chose to do what it did." *Id.* (quoting Henry J. Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 DUKE L.J. 199, 222). Conclusory statements are insufficient; rather, an "agency's statement must be one of reasoning." *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

Here, the Agency's approval is a partial denial with no explanation. In each petition, the Plaintiff sought H1B status for three years or the period of H1B status remaining for a particular beneficiary. In each approval, the Agency partially granted and partially denied the Plaintiffs' requests. It partially granted for the period of time reported on the Form I-797C Notice of Action. At the same time—in the same decision—the Agency partially denied Plaintiffs' H1B status request by refusing the Plaintiffs' request for H1B status for three years or the period of H1B status remaining for a particular beneficiary. Simply said, when the Plaintiffs request three years and the Agency grants the application for one month, the same decision denies the request for the additional 35 months. The Agency has not articulated any reason, rationale, explanation, or reasoned decision making for any of these partial denials. This is an unarguable violation of the APA's written decision requirement.

Because the Partial Denials lack any reasoned decision making or any explanation, this Court should set aside all such denials in the consolidated cases.

III. The Agency's Employer-Employee Rule is *ultra vires* and not in accordance with law.

The Agency's Employer Employee Rule is *ultra vires* and not in accordance with law. As a threshold issue, the Agency lacks authority to define "employer" and, therefore, its Employer Employee Rule is *ultra vires*. Agencies only have those powers granted to them by Congress. When reviewing an agency rule or regulation, courts first determine if Congress delegated authority to make rules interpreting the statute with the force and effect of law. *United States v. Mead Corp*., 533 U.S. 218, 226-227 (2001). Where Congress creates a system that splits authority between two different agencies the courts must determine which agency has rulemaking authority over a statutory provision. *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991) (finding the agency with technical expertise and enforcement authority was delegated rule making authority over key terms in the statute), *Gonzales v. Oregon*, 546 U.S. 243, 260 (2006) (the Attorney General lacked authority to make regulations under the Controlled Substances Act (CSA) that "define standards of medical practice."). In shared jurisdiction statutes, the courts first look to see if Congress delineated which agency has rulemaking authority. *See Chevron U. S. A. Inc. v. Natural Resources Defense Council*, *Inc*. 467 U.S. 837 (1984).

Here, Congress gave the Department of Labor ("DOL") the authority to define and regulate who constitutes an H1B employer. In 1990, congress amended the Immigration and Nationality Act ("INA") and created a new nonimmigrant visa category for professionals in "specialty occupations" ("H1B"). Pub. L. 101–649, 104 Stat 4978, November 29, 1990. Codified at 8 U.S.C. § 1101(a)(15)(H)(i)(b).[3] Congress split jurisdiction over this new visa category between the Department of Labor ("DOL") and the legacy Immigration and Nationality Service (INS)—the

[3] This category was part of a broader reform to increase the number of high skilled and professional employees needed to stay competitive in the global market place. *See* 136 Cong Rec S 17103, 17103 (1990) (discussing the need for more high-tech employees in the US economy).

undisputed predecessor of the Agency. Congress gave the Agency the authority to determine whether a particular position constitutes a "specialty occupation," and Congress gave DOL the authority to define and regulate who constitutes an H1B "employer."

As part of this split of authority, Congress gave DOL enforcement power over H1B employers. Under the 1990 law, the H-1B process begins with the DOL "determining and certifying that the intending *employer has filed* [] a Labor Conditions Application (LCA) under section 1182(n)." 8 U.S.C. § 1101(a)(15)(H)(i)(B) (emphasis added). The "employer" completes and signs the certified Labor Conditions Application and agrees that it will:

1. at a minimum they will pay the employee the prevailing wage based on the "area of intended employment" and defined at § 1182(p);
2. The employee will not replace striking US workers;
3. They have provided notice to US workers of the details in the LCA; and,
4. The employee will not displace US workers.

§ 1182(n)(1)(A)-(E). Section 1182(n)(2) accords DOL vast and exclusive powers to enforce the terms of the LCA and penalize "employers" who violate them. § 1182(n)(2). Congress therefore gave DOL statutory enforcement authority over H1B employers.[4]

DOL embraced its statutory duties over H1B employers through rulemaking. In 1991, with its enforcement authorities over employers firmly established by congress through the LCA process, DOL issued an Advanced Notice of Proposed Rulemaking (ANPRM) to implement the H-1B program. 56 Fed. Reg. 11705-11712, March 20, 1991. DOL asked for comments on "who

[4] In contrast, Section 1184(i) Discusses the Agency's role in the H-1B visa, which is limited to determining if the occupation requires theoretical and practical application of a highly specialize body of knowledge that is indicative of a bachelor's or higher degree. Section 1184(i) does not mention employers, or who qualifies to file an H-1B visa. The Agency's own regulations confirm DOL's exclusivity in this role, and that the Agency has no role in enforcing the terms of the LCA. 8 C.F.R. § 214.2(h)(4)(i)(B)(5) and (6).

should be eligible to file an H-1B labor application." *Id*. at 11711. DOL also stated it was "seeking comments as to whether job contractors should be treated the same as employers." *Id.*

DOL accepted, reviewed, and analyzed comments prior to releasing its Notice of Proposed Rule. 56 Fed. Reg. 37175-37194, August 5, 1991. DOL address its questions about "job contractors" and stated:

> Consideration was also given to whether a *job contractor* should be treated as an employer for H-1B purposes. The term job contractor refers to an employer whose employees perform work at job sites of other employers but who are paid by the job contractor and are its employees. In the proposed regulations, job contractors are treated like any other employer and are bound by the regulations applicable to all H-1B employers.

Id. at 37178. DOL then published its proposed rule, and again solicited comments.

In the final rule DOL provided a definition of "employer:"

> [a] person, firm, corporation, *contractor*, or other association or organization in the United States:
>
> (1) Which suffers or permits a person to work within the United States;
> (2) Which 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) Which has an Internal Revenue Service tax identification number.

Id. at 37182 (emphasis added). DOL's final definition of an H-1B "employer" was substantially the same as a prior definition DOL had utilized for nonimmigrant agricultural and logger laborer regulations under the prior statute, which read: "Employer" means a person, firm, corporation or other association or organization which suffers or permits a person to work …" 20 C.F.R. §§ 655.100(b) and 655.200(c) (1990). Tellingly, the final definition in 20 C.F.R. § 655.715 added the word "contractor" to the list of entities that are "employers," reflecting the consummation of DOL's decision making process that "job contractors" were proper H-1B "employers."

Over the next few years, DOL would again consider and refuse to exclude "job contractors" from the definition of "employer" or impose special eligibility or filing requirements for LCAs. 56 Fed. Reg. 54720-54739, October 22, 1991. 57 Fed. Reg. 1316-1338, January 13, 1992. 59 FR 65646, December 20, 1994. DOL stated that it "considered carefully the comments concerning the job contractor concept as proposed and has decided-at this time-*not to establish special procedures applicable only to those businesses operating as job contractors*." 59 FR 65646, 65651 (emphasis added).

In 1998, Congress passed the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), adopting various DOL definitions and tacitly approving of DOL's exclusive authority over employers. *American Competitiveness and Workforce Improvement Act of 1998* ("ACWIA"), Title IV, Pub. L. 105-277 (October 21, 1998). ACWIA substantially added to DOL's LCA enforcement and oversight powers in 8 U.S.C. § 1182(n) and empowered DOL to ensure US employers were not displacing US workers with H-1B employees. 8 U.S.C. § 1182(n)(2)(E)-(G). Congress read, considered, and adopted significant pieces of DOL's regulatory language into the text of ACWIA. *Compare* 8 U.S.C. § 1184(n)(2)(C)(vii) and 20 C.F.R. § 655.731(c)(5)(i) (1997) (requiring employers to pay H-1B wages for employees in a nonproductive status). Congress was aware of DOL's inclusion of job contractors/consulting companies in the definition of "employer." The text of ACWIA shows Congress was also aware that IT consulting companies were using H-1B visas. *See* 8 U.S.C. § 1182(n)(2)(E) and (F) (prohibiting an employer from "placing" an H-1B employee with another employer who had recently laid off US workers). 8 U.S.C. § 1182(n)(2), 8 U.S.C. § 1182(n)(3)(A).

Well aware that "employers" included job contractors, Congress crafted language in ACWIA to protect US workers but did not differentiate between consulting companies or other

employers. Congress again accorded new powers over employers to DOL in 8 U.S.C. § 1182(n) (DOL's portion of the statute dealing with the H-1B visa). Congress did not prohibit consulting companies from using H-1B visas, nor did it place special rules on these companies. Instead, Congress endorsed and adopted DOL's definition of who qualifies as an H-1B employer. *Id.*

ACWIA's new authorities allowed DOL to enforce the wage requirements on the LCA and order the employer to pay back wages after a hearing on the record. DOL recognized that consulting companies and their clients my share aspects of control, so to streamline enforcement actions, DOL created a per se rule that defined the liable US "employer" as the entity that accepted legal responsibility on the LCA. The new definition reads:

> Employer means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H–1B nonimmigrants and/or U.S. worker(s). *The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H–1B nonimmigrant is deemed to be the employer of that H–1B nonimmigrant.*

65 Fed. Reg. 80110, 80211, codified at 20 C.F.R. § 655.715 (emphasis added).[5]

DOL then engaged in rulemaking under ACWIA. DOL endorsed the standards the Internal Revenue Service and the Equal Employment Opportunity Commission (EEOC) applied to determine employment relationships in the job contractor ("staffing company") context. *Id*. (citing EEOC Policy Guidance on Contingent Workers, Notice No. 915.002 (Dec. 3, 1997)). The EEOC memo states that both the staffing company and the client have indicia of an employer-employee relationship, and provides this example of an "employer:"

[5] the Agency claims the EEM relies on DOL's definitions of "employed by the employer" at 20 C.F.R. § 655.715 (2010). EEM, Pg. 2, Note 1. However, a reading of the regulations and rulemaking proceedings is completely at odds with this conclusion. *See* 65 Fed Reg 80110, 810141-42. The EEM does not discuss DOL's new expanded definition of employer or how that impacts the Agency's new interpretation of its authority under the INA. Nor does it explain how it has authority to encroach on DOL's exclusive powers to enforce the LCA.

> Example 1: A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency's clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty. In these circumstances, the worker is an "employee."

Id. DOL again considered and cited approvingly to job contractors as employers. The intent of the regulations as discussed in the Federal Register are clear: DOL does not prohibit job contractors and third-party worksites from sharing aspect of control over the H-1B employee when working on client's projects. It is very clear that DOL occupied the regulatory space related to the term "employer" for H1B purposes, gave considerable, repeated attention to defining who is a qualified "employer" for the H-1B visa., and Congress tacitly approved of DOL's definition of employer and increased DOL's enforcement authority over those employers. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125, 195 L. Ed. 2d 382, 392 (2016) (When Congress delegates enforcement authority and the agency proceeds with "notice-and-comment rulemaking, that [] is a 'very good indicator' that Congress intended the regulation to carry the force of law, so *Chevron* should apply").

In stark contrast, in 1991, the Agency did not use its rulemaking authority to define employer; rather, it merely parroted DOL's regulatory definition of "employer." On July 11, 1991, the Agency published a Notice of Proposed Rulemaking, and solicited comments on its draft rule to implement the 1990 INA H-1B visa. 56 Fed. Reg. 31559-31563, July 11, 1991. This proposed rule *did not* include a definition of "employer." *See id*. However, when the Agency published its final rules implementing the H-1B statute, it included a verbatim copy of DOL's proposed definition of "employer." 56 Fed. Reg. 61111, 61121, December 2, 1991, promulgated at 8 C.F.R.

§ 214.2(h)(4)(ii). the Agency stated that the reason for the including the definition was to clarify this point:

> The labor condition application requires that a petitioner post a notice of the filing of a labor condition application at its place of employment. *This obviously requires the petitioner to have a legal presence in the United States.* As a result, this requirement will be retained in the final rule. *In order to provide clarification*, the Service has included a *definition of the term "United States employer" in the final rule.*

56 Fed. Reg. 61111-61121 (emphasis added). The Agency's only concern was that the petitioner employer must have a legal presence in the United States. That's it. The Agency's regulatory definition of employer remains the same today. *See* 8 C.F.R. § 204.2(h)(4)(ii). Congress did not accord the Agency any authority over employers in ACWIA in 1998. The Agency's regulatory definition of employer has not changed since 1991, when it adopted the DOL's definition of employer whole cloth.

The statutory and regulatory history reveal that Congress intended for DOL to regulate and define "employer" in the H1B context. DOL has consistently considered whether consulting companies (like Plaintiffs) qualify as an employer and repeatedly determined that they do. DOL's actions comport with Congress's intent and DOL's understanding of its exclusive authority over this question. In contrast, the Agency conceded DOL's authority over the definition of "employer" by failing to include such definition in its notice of proposed rulemaking and instead merely including DOL's regulatory definition wholesale with one small change, irrelevant to this case. Both agencies knew that Congress intended DOL to regulate employers in the H1B program. DOL acted vigorously to do so and the Agency deferred, relying on DOL's definition rather than attempting to implement its own. *See Gonzales v. Oregon*, 546 U.S. 243, 260 (2006) (agencies cannot make rules implementing another agency's statutory authority). For these reasons, the Agency's definition of Employer and its Employer Employee rule is unlawful as *ultra vires*.

To the extent the Agency has statutory authority to define "employer" under § 214.2(h)(4)(ii), the Employer Employee Rule is unlawful under that regulation. § 706(2)(A) (allowing court to set aside action "otherwise not in accordance with law"). The Agency's definition of Employer states in full:

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.

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added).

Here, the Employer Employee Rule cannot be sustained in light of the plain language of this regulation. The first line of 8 C.F.R. §214.2(h)(4)(ii) includes "contractors" in the type of entities who are H-1B employers. This explicitly embraces consulting and staffing company business models. *See* 56 Fed. Reg. 37178. Next, the Agency's Employer Employee Rule demands that H-1B employers maintain exclusive right to control and not share control. This interpretation is at odds with the language 8 C.F.R. §214.2(h)(4)(ii) which says: "*may* hire, pay, fire, supervise, ***or*** otherwise control the work…" the Agency's rule against consulting and staffing companies turns the permissive "may" into a mandatory "must." The Agency then turns the list's disjunctive "or" (allowing any one of the items to be sufficient) into a conjunctive "and" (demanding all of the items in the list be satisfied). Thus, under the APA the Agency cannot interpret 8 C.F.R. §214.2(h)(4)(ii) to create two tiers of employers and allocate disparate legal burdens to each tier.

To the extent the Agency argues its regulation or its interpretation of that regulation embodied in the Employer Employee Rule is entitled to deference, all such arguments fail. First, the Agency was not interpreting its own statutory authority, but rather a section of the INA that delegated authority to DOL. *See Gonzales v. Oregon*, 546 U.S. 243, 260 (2006) (agencies cannot make rules implementing another agency's statutory authority). Second, the Agency parroted another agency's regulatory language, and displayed no expertise in crafting the language. *See Fogo de Chao, Inc. v. DHS*, 769 F.3d 1127, 1136 (D.C. Cir. 2014) (no deference is afforded to an agency regulation that parrots other law or fails to display its unique expertise). Third, the Agency's rules cannot be construed as resolving ambiguity in its own regulations as the plain language of 8 C.F.R. §214.2(h)(4)(ii) is at odds with the Agency's current rules prohibiting consulting and staffing companies. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (agencies may resolve ambiguity in their own regulations but may not create interpretations that contradict the regulation). Fourth, the express intent of the regulatory definition of employer bares no relationship to the current rule the Employer Employee Rule. The Agency's discussion in the Federal Register indicates the express intent of this regulation had no application to job contractors or their need to maintain exclusive right to control H-1B employees, but merely stated a general rule that an H-1B petitioner must have a physical presence in the United States. *See Gonzales*, 546 U.S. at 258 (the stated intent of a regulation forms the basis of interpretation of its application). Fifth, the Agency's failure to provide notice and an opportunity to comment on the final rule's definition of "employer" strips it of *Chevron* deference and enforceability. *See Encino Motorcars,* 136 S. Ct. at 2125 (Failure to explain rules or follow rulemaking requirements prevent deference under *Chevron* and may render them unenforceable), see also *American Mining Congress*, 995 F.2d at 1109. Sixth, not only did the Agency copy, or "parrot," DOL's definition

of employer, but it appears to have previously agreed with DOL that job contractors, "staffing companies," or "consulting companies" fell under the statutory definition of "employer." *See* 63 Fed. Reg. 30419-30423, June 4, 1998 (discussing staffing companies and the use of H-1B visas). Even if the Agency had authority to "interpret" this statutory term it has not earned this Court's respect under *Skidmore v. Swift,* 323 US 134 (1944), because the current interpretation of the statute is at odds with prior interpretations, and it is not consistent with the statutory scheme.

The Agency's Employer Employee Rule is *ultra vires* because Congress accorded exclusive authority to DOL to regulate H1B employers. And even if the Agency's was permitted to promulgate its definition of "employer," its Employer Employee Rule is unlawful under the Agency's own regulatory definition. In today's H-1B program an employer can satisfy DOL's definition and be subject to DOL enforcement, but go unrecognized as an employer by the Agency. At a minimum, both DOL and the Agency's definition of employer is based on the same statutory text, but with opposite interpretations. This Court must invalidate the Agency's unlawful requirements. Thus, Plaintiffs are entitled to judgment as a matter of law on this consolidated issue.

IV. The Non-Speculative Work Rule is *ultra vires* and not in accordance with law.

The Agency's Non-Speculative Work Rule is *ultra vires* and not in accordance with law. As mentioned above, this Court must first determine whether an agency action is authorized by Congress before looking to the propriety of the action. *See supra.* As a threshold issue, the Agency's Non-Speculative Work rule is *ultra vires.*[6]

Here, in 1998 the Agency sought to engage in rulemaking to "fix" the problem of benching in the H1B context, but before it could do so, Congress spoke clearly and spoke to DOL. Benching

[6] This requirement does not appear in any promulgated regulation, and consequently is not eligible for *Chevron* deference.

was a practice where, after being granted H1B status, an employer would "bench" an employee when it lacked work for the employee to do, and the employer would not pay the employee during this period of benching. The Agency sought to "fix" the problem of benching through rulemaking through an enhanced "itinerary regulation." *See* Proposed Rule, *Petitioning Requirements for H Nonimmigrant Classification*, 63 Fed. Reg. 30419 (June 4, 1998). [7] The Agency, therefore, proposed a pre-approval process where employers would be required to provide an "itinerary" as part of their petition to ensure to the Agency that the employee would not be benched. *Id.*

The Proposed Rule then went on to prohibit self-employed workers from seeking work in the United States. Finally, the Agency proposed prohibiting hiring "temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts." *Id.* The Agency's Proposed Rule would approve visas if there was work available *when the petition was initially filed*. *Id.* Employers could satisfy this requirement by showing past employment practices and plans for the employee. The only requirement was that there was work at the "time the petition is filed." *Id.* The proposed rule did not anticipate requiring evidence of specific and non-speculative work assignments for the *entire* duration of the visa validity period. *See id.*

But Congress flatly rejected the Agency's proposed rule to fix benching. After the Agency's notice of proposed rulemaking, Congress passed ACWIA. ACWIA sought to fix the

[7] Ironically, in the Proposed Rule, the Agency endorsed consulting and staffing companies as proper H-1B employers 63 Fed. Reg. 30419-20, "It is important to note that this proposed rule affects only those entities *which are the actual employer of the alien, such as employment contractors and direct employers*. In this regard, an employment contractor is one which employs the alien but assigns the alien to work at a different location than the contractor's place of business, based on the terms of a contract with a person or entity seeking the employer's services. A direct employer is one which hires the alien and assigns the alien to work at the employer's place of business. In both instances, the petitioner is the employer of the alien and retains the ability to hire and fire the alien."

benching problem by requiring employers to pay their H-1B employees (as part of the LCA process) even when they were in "non-productive status." It created the "non-productive status" rule, which expressly requires employers to pay the prevailing wage to workers whether or not there is work to perform. 8 U.S.C. § 1182(n)(2)(C)(vii). Congress again (consistently) gave DOL authority to enforce the non-productive status provision through enforcement actions against employers. *Id.* Congress authorized an attestation and enforcement process to be policed by DOL. This is a flat rejection of the Agency's pre-approval model.[8]

Here, the Agency lacks authority to enforce the non-productive status rule through pre-approval. The Agency attempted to do that and Congress rejected it. Instead, Congress gave DOL exclusive authority to protect against unpaid benching (by allowing paid non-productive status) through attestations on the LCA and enforcement actions by DOL for any violations. Where the Agency once conceded notice and comment rulemaking was required to create these substantive rules, the Agency now attempts to make changes through policy memo and informal adjudication. The Agency's attempt to again "regulate" in this space (through policy memo) lacks any Congressional authority. Instead, Congress chose DOL to enforce the terms of the LCA including the non-productive work status rule. The Agency's mere attempt to regulate in this area lacks any Congressional authority and it is again *ultra vires.*

[8] Curiously, in 1998 the Agency determined that its prohibition on speculative/non-productive status required notice and comment rulemaking. It abandoned this rulemaking process when Congress unequivocally rejected its proposed regulatory approach. Yet, the Agency now cites this abandoned Proposed Rule as controlling legal authority to justify its demands that consulting and staffing companies provide evidence of guaranteed specific and non-speculative work assignments for the entire three years of an H-1B visa. *See Matter of D-S-, Inc*., USCIS Administrative Appeals Office Decision, Pg. 5, Note 2 (June 28, 2018) (Appx at 070).

To the extent the Agency has statutory authority to regulate benching, its Non-Speculative Work Rule is in violation of law. The Agency's rule is explicitly contradicted by 8 U.S.C. § 1182(n)(2)(C)(vii), which allows employers to place H-1B professionals in a "non productive status" when there is no work to perform. It therefore violates law and violates the APA. It is also impossible to read the non-productive status provision consistently with the Agency's non-speculative work rule. The Agency would deny an application where a petitioner fails to show work for one month, whereas the non-productive status provision would simply require the employer to pay the worker during that month. Because Congress envisions gaps in employment for H-1B workers, the Agency's rule that disallowing any gaps for three solid years contravenes Congressional intent.

To the extent this Court may apply *Skidmore* deference to the Agency's Non-Speculative Work Rule, this respect is only afforded to an agency's interpretative rule when the agency interprets its own statutory authority. *Gonzales*, at 260. Nothing in 8 U.S.C. § 1184(i) indicates that Congress intended to delegate this authority to the Agency. Indeed, in that section Congress allowed speculative hiring but required employers to pay H-1B employees the LCA wage if there was insufficient work to perform (referred to as "non-productive status"). *Id.* The requirement to pay employees who are in non-productive status is referred to as the "anti-benching" provision. Congress also gave DOL authority to force employers to given "benched" employees back pay if the employer violated the terms of the LCA. *Id*. Second, as mentioned above, it cannot be persuasive under *Skidmore* because it contradicts the statute. *See* 8 U.S.C. § 1182(n)((2)(C)(vii). Third, it creates an impossible standard for employers to meet, and is not based upon evidence or any discernable investigation. The rule cites an *abandoned* Proposed Rule as its legal basis. However, that Proposed Rule only required proof of work at the time the petition is filed. The

Agency's current rule as currently enforced goes beyond even its now defunct Proposed Rule and demands evidence of specific non-speculative work for the entire validity period of the H-1B visa.

On a practical level, the Non-Speculative Work Rule is nonsensical. Again, it is worth noting that every initial H-1B petition that is filed is "speculative." Each year the number of initial H-1B petitions exceeds that number of available visas. The agency must conduct a lottery to determine with petitions it will adjudicate. At the time of filing, no employers can guarantee a particular assignment because they do not know if the employee's petition will be selected for processing. *See* Notice of Proposed Rulemaking, 83 Fed. Reg. 62406 (Dec. 3, 2018) (explaining the lottery process and identifying the number of applications over the last five years).

Congress fixed benching by assigning DOL to require H1B employers to pay wages during any period of non-productive status. The Agency's Non-Speculative Work Rule contravenes Congress's express intent and violates the APA. Thus, Plaintiffs are entitled to judgment as a matter of law on this issue.

V. The Itinerary/Partial Denial Rule is *ultra vires* and unlawful.

While the Agency has provided no rationale for any of the Partial Denials at issue in these consolidated cases, Plaintiffs conclude that the rationale relies on the Itinerary Rule as announced in the February 2018 Memo. As discussed above, the Agency announced it would require corroborating information for the locations and dates of all off-site work assignments for IT consulting firms. Appx. At 031-040. Assuming this is the rationale for the partial denials, the Itinerary Rule (or the application of the Itinerary Regulation) is *ultra vires* and unlawful.

The Agency's Itinerary Rule (and regulation) are *ultra vires* because Congress did not give the Agency the authority to determine and limit the duration of H-1B status based on proof of work assignments. Prior to November 1990, the nonimmigrant H visa applied to aliens of distinguished

merit and ability; temporary laborers; and industrial trainees. *See* 8 U.S.C. § 1101(a)(15)(H) (1989), 66 Stat. 168 (1952). Under that statute, the Agency had sole authority to regulate the admission of H-1 nonimmigrant visas for aliens of "distinguished merit and ability." *Id.*

On January 26, 1990, the Agency promulgated its final rule on "Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act." 55 Fed. Reg. 2606 (January 26, 1990). This regulation applied to the H visa category created by the 1952 Immigration and Nationality Act. In the preamble to that rule, the Agency discussed at length nonimmigrant artists and entertainers traveling to the US, and the impact an itinerary requirement would have on those H petitions. *Id.* the Agency sought to ensure entertainers had scheduled performances before issuing a visa. *Id.* the Agency also sought to ensure other foreign workers had a firm offer of employment and would not be coming to the United States without prospects. *Id.* Based on these concerns, the Agency promulgated the following rule after notice and comment from the film and artistic communities:

> **(B) Service or training in more than one location.** A petition which 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 the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph. If the petitioner is a foreign employer with no United States location, the petitioner shall be filed with the Service office that has jurisdiction over the area where the employment will begin.

Id. This "itinerary regulation" was codified at 8 C.F.R. § 214.2(h)(2)(i)(B) (1990).

Only months later, in November 1990, Congress split the H category into multiple new nonimmigrant categories, including but not limited to specialty occupation workers ("H-1Bs"); aliens of extraordinary ability ("O" visa); and entertainer visas ("P" visa). Pub. L. 101–649, 104 Stat 4978, November 29, 1990. Codified at 8 U.S.C. § 1101(a)(15)(H), (J), (M), (O), (P), and (R).

Congress, presumably in light of the aforementioned concerns, authorized the Agency to require itineraries for O and P visas at 8 U.S.C. § 1184(a)(2) and (3), which explicitly grants the Agency authority to limit the duration of O and P visas based on evidence of an itinerary, scheduled events, or competitions. However, it did not grant that authority to the Agency over H-1Bs. *See* 8 U.S.C. § 1184(a)(1). Instead, Congress gave the Agency authority to create regulations prescribing "such time and under such conditions" an H-1B visas will be approved. *Id.*

Based on the new statute, the Agency again proposed new rule making. 56 Fed. Reg. 31553, 31558, Proposed Rule (July 11, 1991) (citing 8 U.S.C. § 1184). Unsurprisingly, the Agency published proposed itinerary regulations for the new O ("extraordinary ability") and P ("entertainers") visas and provided analysis for why itinerary regulations were applicable to those new categories. *See id.* at 31567, 31571. But when it came to new regulations for the new H-1B visa, the Agency simply placed five asterisks (*****) over the itinerary's code section, indicating it would bring the text forward from the existing regulation unchanged. *Id.* Nothing in the comments to the proposed regulation explains why the 1990 itinerary regulation, created to implement the 1952 INA's H visa, was relevant to the new "specialty occupation" category. *Compare* 8 C.F.R. § 214.2(h)(2)(i)(B) (1991-1993) and 56 Fed. Reg 61111, Final Rule (December 2, 1991).

The Agency's final rule mirrored its proposed rule as it related to the itinerary regulation for H-1Bs. 56 Fed. Reg. 61111, Final Rule (December 2, 1991) (containing five asterisks over the section for the itinerary regulation). The Agency's final rule was silent as to why the itinerary regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), with its anachronistic requirements (pertaining to trainees, non-U.S. employers, and workers without job offers) was carried forward for the H1B visa. *See* 56 Fed. Reg. 61111.

On June 4, 1998, the Agency published a Proposed Rule, listing possible requirements for H nonimmigrant visas. 63 Fed. Reg. 30419, Proposed Rule (June 4, 1998). This proposed rule sought to repeal the H-1B itinerary regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) and create a legislative rule with new evidentiary requirements for H-1B visas. *Id.* The Agency noted that the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) was promulgated "prior to the passage of the Immigration Act of 1990" and was "intended to preclude foreign entertainers who were admitted in H classification for the purpose of performing at a specific engagement from engaging in freelance work in this country subsequent to their admission." *Id.* The Agency explained that health care staffing and information technology consulting companies use the H-1B visa to place workers at various locations on short notice. *Id.* The Agency conceded that these industries clearly cannot comply with 8 C.F.R. § 214.2(h)(2)(i)(B) (the 1990 H visa itinerary regulation) at the time they file a petition. *Id.* at 30420 ("complete itineraries listing the dates and places of the alien's employment, the Service recognizes such an across-the-board requirement is no longer practical in today's business environment."). The Agency unequivocally stated that the intent behind the itinerary regulation was unrelated to determining if a position was a "specialty occupation." *Id.* The Agency provided the public until August 3, 1998 to provide comments on the 1998 Proposed Rule. But the Proposed Rule was never finalized or promulgated, leaving the inapposite itinerary regulation in place.[9]

[9] Despite its admission in the June 4, 1998 Proposed Rule that the itinerary regulation was *ultra vires*, the Agency continues to demand that H-1B employers must provide a complete itinerary with the petition. *See* 8 C.F.R. § 214.2(h)(2)(i)(B), and Appx at 031. The explanation of the June 4, 1998 Proposed Rule asserted that evidence of work assignments at the time of filing was necessary to determine if a position qualified as a specialty occupation. However, that Proposed Rule was never finalized, nor did it gain the force and effect of law. The Agency now demands employers comply with the specific and non-speculative work assignment requirement created in the June 4, 1998 Proposed Rule not just at the time of filing but for the entire duration of the visa. Appx at 034. Through this memorandum the Agency has articulated binding legislative rules in

Here, the Agency denied Mythri's H-1B visa because it did not provide an acceptable itinerary. Plaintiffs conclude that the Partial Denials—like VSion's—are based in part on an application of the Itinerary Rule (or application the Itinerary Regulation). Presumably, the Agency is reviewing the evidence submitted, determining that there is a sufficient itinerary for a period of the requested term, and then denying any additional time beyond that which is in an itinerary and corroborated by other evidence. Any application of the itinerary rule or regulation is ultra vires and unlawful.

To the extent the Agency argues that, regardless of any itinerary regulation or rule, it has the discretion to determine a period of authorized admission, the Agency again posits a *ultra vires* and unlawful legislative rule. Congress created a maximum "period of authorized admission" for an H-1B employee, capping the period at six years. 8 U.S.C. § 1184(g)(4). This six-year cap can be extended if the beneficiary of the H-1B visa is also the beneficiary of an immigrant visa and waiting for approval of their application to adjust status or establish permanent residence (green card). 8 U.S.C. § 1184(n).

Congress allowed the Agency to create regulations admitting H-1B employees to the United States for a defined duration less than six years. 8 U.S.C. § 1184(a)(1). However, this authority can only be exercised after notice and comment rulemaking. *Id.* As noted earlier, Congress anticipated that some nonimmigrant visa categories required proof of actual itineraries

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violation the APA's notice and comment requirements. In the Agency's adjudications and denials of H-1B petitions it now cites to and enforces the specific and non-speculative work assignment requirement of the June 4, 1998 rule as if it were a binding legislative rule. *See* AAO Decisions, Appx. 070, Note 2 (citing authoritatively to the 1998 Proposed Rule as "to be codified at 8 C.F.R. 214."). The Agency asserts that employers must provide evidence of specific and non-speculative work assignments "for the entire time requested in the petition." Appx. at 32. The Agency claims authority to "limit the approval period to the length of time demonstrated that the beneficiary will be placed in non-speculative work…" Appx. at 39.

and granted the Agency authority to limit the requested duration of those visas based on evidence. *See* 8 U.S.C. § 1184(a)(2) and (3) (granting authority to limit visa duration of O and P visas based on evidence of competitions or events) the Agency used its authority under § 1184(a)(1) to promulgate 8 C.F.R. § 214.2(h)(9), *Approval and validity of petition*.

The Agency's regulation created the following limits:

> **(iii) Validity.** The initial approval period of an H petition shall conform to the limits prescribed as follows:
>
> > (A)(1) H-1B petition in a specialty occupation. An approved petition classified under section [1101](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.

The Agency also created regulations at 8 C.F.R. §214.2 (h)(13)(iii)(C):

> (C) *Calculating the maximum H-1B admission period*. Time spent physically outside the United States exceeding 24 hours by an alien during the validity of an H-1B petition that was approved on the alien's behalf shall not be considered for purposes of calculating the alien's total period of authorized admission under section 214(g)(4) of the Act, regardless of whether such time meaningfully interrupts the alien's stay in H-1B status and the reason for the alien's absence. Accordingly, such remaining time may be recaptured in a subsequent H-1B petition on behalf of the alien, at any time before the alien uses the full period of H-1B admission described in section [1184](g)(4) of the Act.

Thus, the Agency's regulation requires it to grant a duration 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. *Id.*

To the extent the Agency argues that it is allowed to limit the duration of status beyond its own regulations, the Agency's requirements are contradicted by the plain language of the statute (allowing non-productive status, § 1184(n)). It cannot, therefore, seek or acquire *Auer* deference for its interpretation of its own regulation. Moreover, Congress created the O and P visas from a prior version of the H nonimmigrant visa. In so doing, Congress explicitly granted authority to

limit the visa duration of O and P visas based on evidence of actual work, performances, and competitions. Congress did not extend this authority to the H-1B visa. Rather, Congress directed the Agency to create regulations setting standards for the time and conditions of the H-1B visa, and the Agency has not created regulations allowing it to limit H-1B visas based on evidence of work assignments. Thus, the Agency's claimed authority to *sua sponte* limit visa validity periods is unlawful and has no legal support. In this case, the Agency randomly selected the start and end dates of the visa.

CONCLUSION

For these reasons, this Court should set aside all denials based on each of these rationales in the consolidated cases and enter judgment in favor of the Plaintiffs on the three consolidated issues.

April 3, 2019

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CERTIFICATE OF SERVICE

I declare that I filed the foregoing on the court's electronic filing system, which forwarded an electronic copy to all counsel of record.

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