UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' CONSOLIDATED RESPONSE TO THE AGENCY'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PLAINTIFFS' CONSOLIDATED RESPONSE TO THE AGENCY'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The current leadership at the Agency is trying to destroy the IT consulting business model through new legislative rules announced in policy guidance and informal adjudications. During the pendency of this briefing, in fact, the Agency released data to demonstrate the efficacy of its efforts. On April 1, 2019, the Agency announced the release of the "H-1B Employer Data Hub."[1] This online resource provides the public, *inter alia*, the raw number of successful and denied H1B initial applications and extensions by employer. *See* ERPA Search Result (attached as Ex. A). The numbers do not lie.

According to this database, ERP Analysts, Inc. ("ERPA") filed 328 initial H1B applications from FY 2013 through FY 2019. Ex. A. From FY 2013 - FY 2017, ERPA filed 257 initial H1B applications and 16 were denied; that is a 94% approval rate. *Id.* However, for the period of FY 2018 - FY 2019, ERPA filed 71 initial applications and 58 were denied; that is a 19% approval rate. *Id.* ERPA's business model did not change; the Agency's rules did. And nothing in the Agency's response and cross-motion identifies statutory or regulatory authority for such rules.

For the reasons below, this Court should grant Plaintiffs judgment as a matter of law, deny the Agency's cross-motion, set aside all denials in the consolidated cases, and order the Agency adjudicate them in compliance with the court's order in 30 days.

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[1] (Available at https://www.uscis.gov/news/alerts/uscis-launches-h-1b-employer-data-hub (last visited Apr. 26, 2019).

ARGUMENT

This Court should grant judgment as a matter of law to Plaintiffs on all consolidated issues. While the Agency claims Plaintiffs' motion for summary judgment goes beyond the scope of the consolidation order, Plaintiffs raised as-applied challenges to the actual denials covering only the three substantive bases mentioned in the consolidation order. The Plaintiffs moved for judgment on USCIS's ability to grant visas for less than the amount of time requested, Pls' Mot. at 37-43; they moved for judgment on the Agency's authority to review employer employee relationship, *id.* at 24-33; and they moved for judgment on whether the Agency could seek non-speculative, specific job duties for every single day of the proposed employment. *Id.* at 33-43. The additional arguments arguing that these rules are unlawful legislative rules that failed to go through rulemaking and that the partial denials are unlawful for lack of any reasoned decisionmaking are merely as-applied challenges of these three consolidated issues that apply to every consolidated case. Contrary to the Agency's argument and its response brief, for the reasons below, the Employer Employee Rule, the Non-Speculative Work Rule, and the Itinerary/Partial Denial Rules are all *ultra vires* and unlawful.

I. None of Plaintiffs' challenges are barred by the statute of limitations.

The Agency argues that Plaintiffs' challenges are time barred because Plaintiffs did not make these challenges within 6 years of the promulgation of the itinerary regulation or the regulation containing the definition of "employer." Gov't Resp. at 36-41. This argument fails for various reasons.

The six-year statute of limitations bar that runs from the date of promulgation may apply to facial challenges, but it does not apply to as-applied challenges. Attacks to agency legislative

rules are generally separated into "facial attacks" and "as applied challenges." Ordinarily, plaintiffs must file a facial attack to a regulation within six years of its promulgation.

However, the question of whether a regulation can be challenged when "applied" beyond the six-year statute of limitation has been long settled. As early as 1958, the D.C. Circuit rejected the Agency's argument, and has allowed as-applied challenges to the legality of a legislative rule or regulation up to six years after the Agency *applied* the regulation. *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 8 (D.C. Cir. 2009) (citing *Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997)); *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195-97 (D.C. Cir. 1987); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958).

Here, the consolidated case presents this Court with "as applied challenges" to 65 complete denials and 30 partial denials. Each challenge contests a complete or partial denial that was rendered within the last year, well within the six-year statute of limitation. The Agency's argument that this Court should dismiss Plaintiffs' as-applied challenges based on the statute of limitations has no merit because it simply misses the distinction between facial as applied challenges.

To the extent this Court agrees with the Agency that the statute of limitations for Plaintiffs' challenges ran in 1997—twenty years prior to any of the decisions in this case—Plaintiffs' challenges remain timely. The statute of limitations on facial attacks restarts each time the agency reopens and reconsiders its authority for the regulation. *Public Citizen v. Nuclear Regulatory Commission*, 901 F.2 147, 150-151 (D.C. Cir. 1990). The D.C. Circuit has found that the statute of limitations for a facial attack begins anew each time an agency "has — either explicitly or implicitly —undertaken to reexamine its former choice." *Id.* (discussing history of reopening doctrine and finding policy statements and public discussion of the validity of existing regulation is sufficient to trigger the reopening of the statute of limitations).

Here, the Agency undertook a substantial review of their past regulatory and policy choices prior to creating and releasing PM-602-0157. The document gives an expansive history of how it has enforced its claimed authorities. *Id.* The level of discussion and review of authority indicates that it fully reexamined its positions and its former choices. The Agency could not create new rules without reconsidering what authority they believed they possessed under past law. The Agency explicitly undertook a substantial review and reconsideration of their authority in full view of the public. As such, they have reopened the period of time the public can challenge the employer definition and itinerary regulation.

To the extent this Court finds Plaintiffs are challenging a historic practice of requiring non-speculative work, such challenges are timely contrary to the Agency's intimations in foot note 21. Gov't Mot. at 37 n.21. The Agency's prohibition against "speculative employment" is not found in any statute or regulation. Consequently, there is no definition of what qualifies as speculative or non-speculative employment. Notwithstanding the absence of any legal basis or explanation, the Agency argues that this Court should apply the statute of limitations to non-codified "historical practices." Not surprisingly, The Agency cites no authority for this considerable aggrandizement of executive power.

Similarly, if this Court finds the Plaintiffs are making a facial attack on the itinerary regulation, such attack is timely. The Agency asserts the itinerary regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) is a legislative rule with the force and effect of law, which supports a string of interpretative rules. Even if plaintiffs had lodged a facial attack it would be timely, because this Court can determine if the rule is indeed legislative. *See Encino Motorcars, LLC*, 136 S. Ct. at 2125 (2016) (evaluating the import of a rule being designated as legislative or interpretive). As was discussed in Plaintiffs' opening brief, the agency completely failed to explain its rationale for

the rule, it failed to comply with the APA, both of which render the regulation non-legislative. Consequently, the agency cannot issue interpretative rules "crisping" 8 C.F.R. 214.2(h)(2)(i)(B)'s language.

The Agency also argues that the Plaintiffs waived any argument about the statute of limitations because they did not address it in their motion for summary judgment. Gov't Mot. at 37. But statutes of limitations "are affirmative defenses" and they are nonjurisdictional. *Maalouf v. Islamic Republic of Iran*, 306 F. Supp. 3d 203, 208 (D.D.C. 2018). Because it is an affirmative defense, the Agency bears the burden of proof on a statute of limitations defense on summary judgment. *Beach TV Properties, Inc. v. Solomon*, 306 F. Supp. 3d 70, 82 (D.D.C. 2018). Plaintiffs have no obligation to move for summary judgment affirmatively on the Agency's affirmative defense unless or until the Agency asserts it and bears its burden of proof. *Cristwell v. Veneman*, 224 F. Supp. 2d 54, 58 (D.D.C. 2002). Then, if "the Agency meets its burden, the plaintiff then bears the burden of pleading and proving facts supporting equitable avoidance of the defense." *Id.* The Agency's argument misunderstands the nature of affirmative defenses, and therefore, this Court should reject it because Plaintiffs now, properly, respond to the Agency's affirmative defense.

II. The Employer Employee Rule is *ultra vires*.

The Agency asserts its new rule, demanding employers whose employees work at client locations prove actual control over every aspect of the employee's work, is not a legislative rule but rather an interpretation of the existing legislative rule found in the regulation. Gov't Mot. at 21-25. The Agency asserts that the 2010 Neufeld Memo and 2018 PM 602-0157 merely serve to make the existing legislative rule at 8 C.F.R. § 214.2(h)(4)(i) more "crisp." Doc't 15, Pg. 38.

The Agency's brief states that the definition of United States Employer is a legislative rule and is the product of notice and comment rulemaking:

> 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 authority.

Gov't Mot. at 21-22.

However, this is not correct. While it is undisputed that the definition was published in the Federal Register, the definition of "United States Employer" found at 8 C.F.R. § 214.2(h)(4)(ii) was not provided to the public for notice and comment. Rather, the definition was inserted in the final regulation without opportunity for comment. *Compare Notice of Proposed Rulemaking*, 56 Fed. Reg. 31559-31563 (July 11, 1991) and *Notice of Final Rule*, 56 Fed. Reg. 61111, 61121 (December 2, 1991).

Presently, The Agency asserts that its definition of United States Employer at 8 C.F.R. § 214.2(h)(4)(ii) is a legislative rule. This elevated status potentially gives the agency access to *Chevron* and *Auer* deference and allows the agency to create interpretive rules. Conversely, if the rule is interpretive, the agency could not support successive policy memos interpreting the interpretative rule.

Legislative rules carry the force and effect of law. These rules are to be distinguished from non-legislative rules, such as interpretive rules and policy statements, which lack the force and effect of law. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, (D.C. Cir. 2000); *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) ("Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment.").

"Legislative rules generally receive *Chevron* deference," *Guedes v. BATFE*, 2019 U.S. App. LEXIS 9455, *30, __ F.3d __, 2019 WL 1430505, (D.C. Cir. April 1, 2019) citing *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014), whereas "interpretive rules * * * enjoy no *Chevron* status as a class," *United States v. Mead Corp*., 533 U.S. 218, 232, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); *see also Nat'l Mining Ass'n*, 758 F.3d at 251 (observing that interpretive rules "often do not" receive *Chevron* deference). "Legislative rules result from an agency's exercise of 'delegated legislative power' from Congress." *Guedes v. BATFE*, 2019 U.S. App. LEXIS 9455, *30, __ F.3d __, 2019 WL 1430505, (D.C. Cir. April 1, 2019). Accordingly, legislative rules have the "force and effect of law." *Id.*

Interpretive rules, on the other hand, are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp*., 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995). Because they are not an exercise of delegated legislative authority, interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id*. While legislative rules generally require notice *and* comment, interpretive rules need not issue pursuant to any formalized procedures. *See* 5 U.S.C. § 553(b).

Here, the definition of United States Employer at 8 C.F.R. § 214.2(h)(4)(ii) is not a legislative rule. First, the Agency did not exercise any expertise or delegated legislative power to create the rule. Rather, The Agency merely used a definition created by the Department of Labor. *Compare id*. and *Department of Labor Interim Rule*, 56 Fed. Reg. 37175-37194 (August 5, 1991). *See also Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991) (agencies only receive deference when making rules pursuant to their innate competence); and

Fogo de Chao, Inc. v. DHS, 769 F.3d 1127, 1136 (D.C. Cir. 2014) (agencies do not receive deference when they parrot existing law).

Second, the agency's explanation for the definition clearly indicates that it is interpretive and "clarifies" the notice requirement found in 8 U.S.C. § 1182(n)(1)(C). As noted in the Federal Register, the definition was inserted for the following purpose:

> 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).

Here, the statutory provision 8 C.F.R. § 214.2(h)(4)(i) seeks to interpret is part of the section delegating authority to the Department of Labor and setting rules for the Labor Condition Application.

Because the definition is interpreting the statutory language relating to a different agency's authority (requiring posting notices in a US work place) and not creating a binding norm it is interpretative and ineligible for *Chevron* deference. *Gonzales v. Oregon*, 546 U.S. 243, 255-256 (2006) ("*Chevron*, however, is warranted only when it appears that Congress *delegated authority to the agency* generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.") (emphasis added).

Thus, the statutory provision at 8 U.S.C. § 1182(n)(1)(C) was not delegated to the Agency to administer, nor did Congress intend for the Agency to create binding legislative rules over this section. *See Gonzales*, 546 U.S. 268 ("Since the Interpretive Rule was not promulgated pursuant to the Attorney General's authority, its interpretation of 'legitimate medical purpose' does not receive *Chevron* deference."). Moreover, the definition was copied from DOL and was not created

using the any statutory expertise or experience. *See id.* Here, the Department of Labor has the statutory delegation and core competence and expertise need to define who an employer is.

It is also worth noting that Section 1184(i), the provisions of the H-1B visa delegated to the Agency, does not include the word "employer."

At best, the interpretation of 8 U.S.C. § 1182(n)(1)(C) located at 8 C.F.R. § 214.2(h)(4)(i) is "entitled to respect" under *Skidmore v. Swift & Co*., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), only to the extent it has the "power to persuade." *See Gonzales*, 546 U.S. 268.

Here, the agency's definition is persuasive for its stated intent: requiring H-1B employers to have a physical presence in the United States. This proposition is also redundant with the Department of Labor's regulations stating the same thing. However, the current application of the definition and spawning of new legislative rules is unpersuasive. In another shared enforcement statutory system, the Supreme Court rejected an agency's attempt to create interpretative rules that exceeded the scope of its statutory authority and intruded on the expertise of another agency. The Court noted:

> The authority desired by the Government is inconsistent with the design of the statute in other fundamental respects. The Attorney General does not have the sole delegated authority under the CSA. He must instead share it with, and in some respects defer to, the Secretary, whose functions are likewise delineated and confined by the statute. The CSA allocates decision making powers among statutory actors so that medical judgments, if they are to be decided at the federal level and for the limited objects of the statute, are placed in the hands of the Secretary. In the scheduling context, for example, the Secretary's recommendations on scientific and medical matters bind the Attorney General. The Attorney General cannot control a substance if the Secretary disagrees.

Gonzales, 546 U.S. at 264.

Here the structure of the statute requires DOL to define who is an H-1B "employer," what the prevailing wage is, how notice of LCA filings will be performed, and gives DOL substantial enforcement powers. 8 U.S.C. § 1182(n)(1) and (2). DOL protects US worker's wages and

working conditions by ensuring *employers* honor the terms of the LCA. 8 U.S.C. § 1182(n)(2). DOL created a simple rule governing who is an employer under the Act, and who is liable for violations of the terms of the LCA. The Agency's brief is silent on DOL's role in the process. The undisputed statutory structure undermines the Agency's argument that there is no "statutory language supporting this proposition." *See* Doc't 15, Pg. 32.

Nor does the Agency countenance the fact that only DOL was given enforcement authority over H-1B violations. *See* Doc't 15, Pg. 34 ("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*.")[2] The Agency is asserting authority to preemptively attack scenarios that may lead to abuse, all the while ignoring the fact that Congress created a comprehensive approach for addressing violations and delegated the enforcement role to DOL.

The result in this case is determined by *Gonzales*. The structure of the statute dictates that DOL, and not the Agency, was delegated authority to define who is an H-1B employer. DOL has accepted the mantle and created regulations defining the term. The Agency now seeks to create a separate and contradictory definition of the term using statutory language entrusted to DOL. Simply put, by demanding some employers prove actual control over every aspect of an employee's work, the Agency has unlawfully exceeded its authority.

Even if the definition was intended to be legislative, it would not be eligible for deference because the agency failed to provide notice and an opportunity to comment to the regulated public.

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[2] The Agency's failure to understand DOL's statutory enforcement powers explains its assertion that "[u]nder 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." Doc't 15, Pg. 33.

The Supreme Court has explained that courts "cannot defer" to a rule created from procedurally defective rulemaking. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1139 (2018), citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Chevron deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.).

The agency must comply with the demands of 5 U.S.C. § 553 notice and comment rulemaking. Before creating a legislative rule, the agency is required to provide the substance of the proposed rule and the statutory authority the rule is based on. The agency is required to accept comments from the regulated public. Following that, the agency must provide a reasoned explanation for the chosen rule.

Here, the agency failed to provide notice of the rule prior to publication. Because it violated the procedural requirements of rulemaking the regulatory provision is treated as an interpretative rule and this Court cannot grant the rule deference under *Chevron*. *Encino Motorcars, LLC,* 136 S. Ct. at 2125.

As described above, the regulatory provision is unpersuasive and unworthy of *Skidmore* respect.

Assuming arguendo that the Agency's definition of United States Employer is a valid legislative rule, this provision creates a disjunctive test for determining who is a valid employer: hire, pay, fire, or otherwise control. According to the plain language of the regulation, anyone of the listed attributes is sufficient to qualify as an employer.

The Agency states that neither PM-602-0157 nor the 2010 Neufeld Memo contradict the regulatory provision because neither document uses the term "actual control." Doc't 15, Pg. 43.

The Agency continues on to say this negates Plaintiff's assertion that the documents create unlawful legislative rules.

The Supreme Court has stated that an agency is allowed to change an interpretation of a regulation without going through notice and comment rulemaking. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1208 (2016). However, the Court distinguished between a policy that "amended" the regulation and one that is a new interpretation. *Id. citing.* , *Christensen v. Harris Count*y, 529 U. S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) ("Instead, we there refused to give deference to an agency's interpretation of an unambiguous regulation, observing that to defer in such a case would allow the agency "to create de facto a new regulation.")

The Agency's policy memos and decisions provide conclusive proof that the Agency has abandoned the regulation's disjunctive test in favor of a test requiring evidence of actual control. In so doing, The Agency has ignored the "unambiguous regulation" and created a new de facto regulation. *Id.*

The Agency's protestations that the policy memoranda do not require actual control is contradicted by their language and the Agency's decisions denying H-1B visa petitions. First, PM 602-0157 unequivocally states that the employer must exercise control, and not just hire, pay, fire, or otherwise control:

> USCIS looks at a number of factors to determine whether a valid relationship exists, *including whether the petitioner controls when, where, and how the beneficiary performs the job*.

Doc't 14-2, Pg. 32.

The 2010 Neufeld Memorandum also rejects the regulation's disjunctive language and in its place requires some employers to provide evidence that they actually control all aspects of the employee's work:

> Petitioner *control over the beneficiary must be established* when the beneficiary is placed into another employer's business, and expected to become a part of that business's [sic] regular operations. The *requisite control* may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs.
>
> ***
>
> In considering whether or not there is a valid "employer-employee relationship" for purposes of H-lB petition adjudication, users *must* determine if the employer *has a sufficient level of control over the employee.*

Doc't 14-2, Pgs. 39, 40.

The application of these rules is seen in the Agency's decisions, which deny the petition because the petitioning employer did not provide proof of actual control, despite acknowledging that the petitioning employer met the regulatory requirement of hiring, and paying:

> 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. Other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, where will the work be located, and who has the right or ability to affect the projects to which the beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

Doc't 14-2, Pg.. 4.

The Agency's assertion that it has not amended its regulatory definition of United States Employer, with its disjunctive test, is contradicted by the plain language of the policy memos and decisions. The Agency has repudiated the regulation and replaced the test with a requirement for employers to show actual control. *See Funeral Consumer Alliance, Inc. v. FTC*, 481 F.3d 860 (D.C. Cir. 2007) (agencies amend a regulation when new interpretations effectively repudiate regulatory requirements).

The Agency is also incorrect in saying PM 602-0157 and the 2010 Neufeld Memo "only guide[] adjudicators in exercising their discretion and do 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." Doc't 15, Pg 33.

When the Agency issues policy memoranda, it unequivocally and unabashedly restricts its adjudicators' discretion. As seen in the Agency's Adjudicator's Field Manual (AFM):

> Policy material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material. On the other hand, correspondence is advisory in nature, intended only to convey the author's point of view. Such opinions should be given appropriate weight by the recipient as well as other USCIS employees who may encounter similar situations. However, such correspondence does not dictate any binding course of action which must be followed by subordinates within the chain of command.
>
> Examples of policy materials are:
>
> > Field and Administrative Manuals;
> >
> > Memoranda and cables from Headquarters specifically designated as policy (bearing the "P" suffix in the reference file number)
>
> Examples of correspondence include:
>
> > Memoranda not bearing the "P" designation (Routine memoranda to subordinates within the chain of command may nevertheless direct specific actions even though they do not constitute policy.)

Adjudicator Field Manual, Chapter 3.4(a).

Both PM 602-0157 and the Neufeld Memo[3] are "policy materials" that are binding on The Agency's adjudicators. The first page of the Neufeld Memo states that it will be used to update

[3] The Agency cites to *Broadgate Inc. v. USCIS*, 730 F. Supp. 2d 240 (D.D.C. 2010) for the proposition that the Neufeld Memo is not a legislative rule. *Broadgate* was litigated immediately after the Neufeld Memo was released, and the binding nature of the rule was not apparent. Nor is it clear that the AFM at that time demanded compliance of all adjudicators. The actual ruling in *Broadgate* was limited to stating the memo did not constitute a "final agency action." The Court did note that the proper avenue for challenging the Neufeld memo was through as applied challenges. In any event, the above arguments were not raised or ruled on in *Broadgate*.

the Adjudicator Field Manual, which the Agency states limits the discretion of its employees. PM 602-0157 is similarly binding because it includes the "P" designation.

The Agency cannot have it both ways. It cannot tell its adjudicators they are bound by the terms of the policy memos, and then profess to this Court that adjudicators are free to exercise discretion.

Beyond the binding requirements in the AFM, the plain text of the policy memos use imperative language and demand compliance.

III. The Non-Speculative Work Rule contradicts 8 U.S.C. § 1184(n)(2)(C)(vii) and congressional intent.

The Agency next argues that its Non-Speculative Work Rule is authorized by the itinerary regulation and § 1184(n)(2)(C)(vii). Gov't Mot. at 27-28, 35-36. Although the Agency's brief repeatedly asserts the Non-Speculative Work Rule is a "historical" practice, neither the brief, nor the decisions provide legal authority for the rule. The best explanation of the current rule against speculative employment is found in a 1998 Notice of Propose Rulemaking.

> The regulation [8 C.F.R. § 214.2(h)(2)(i)(B)] was designed 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…. *Specifically, this regulation 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*.
>
> ***
>
> To ensure that petitioners will not use the H-1B classification for speculative employment, this *proposed regulation would require petitioners to establish that they, in fact, have employment in a specialty occupation available for the alien at the time that the petition is initially filed*. Under this proposed rule, the petitioner would be required to establish, both through the submission of *evidence relating to its past employment practices and through the submission of evidence relating to its employment plans for the beneficiary*, that the alien will, in fact, commence work in a specialty occupation immediately upon admission in H classification. *The*

> *petitioner must be able to demonstrate its need for the alien's services within the specialty occupation described in the petition when the petition is filed.*

Notice of Proposed Rulemaking, 63 FR 30419 (June 4, 1998) (emphasis added).

The "historical practice" they agency cites applies to a small subset of nonimmigrants who were eligible for the H visa under the pre 1990 INA. As the Agency conceded the itinerary regulation "was promulgated primarily to address certain practices in the entertainment industry, which, prior to the passage of the Immigration Act of 1990, was one of the largest users of the H-1B classification. (Entertainers now typically enter the United States in the O and P nonimmigrant classifications.)" *Id.*

Congress codified the historical practice described above at 8 U.S.C. § 1184(a)(2), and allowed the Agency to demand evidence in O and P visas that justified the requested duration. This delegation of authority in O and P visas is in stark contrast to the limits Congress placed on the Agency in H-1B visas. *See* 8 U.S.C. § 1184(a)(1) (requiring the Agency to conduct notice and comment rulemaking for nonimmigrant visas to identify the duration ("such time") and conditions for approval).

In 1998, the agency determined it must conduct notice and comment rulemaking prior to creating a rule that required some H-1B employers to provide evidence that they had specific work assignments in specialty occupations. *Id.* The Agency proposed that employers could establish the non-speculative nature of the visa through past employment practices, and employment plans for the employee. The key factor was that the employer realistically had work for the employee at the time the petition was filed. *Id.* The Proposed Rule did not require evidence of guaranteed work assignments for the entire duration of the visa nor did it proclaim authority to limit the duration of visas to evidence of employment plans. *Id.*

The Agency abandoned this rulemaking after Congress passed ACWIA. However, The Agency cites authoritatively to the proposed rule in its decisions. *See* Doc't 14-2, Pg. 70. In its brief, The Agency states:

> 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." 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.

Doc't 15, Pg. 37 Footnote 17

However, the clear text of the proposed rule contradicts the Agency's explanation. The agency historically only required an itinerary for entertainers.

Under the prior law, the statute did not require an offer of employment in H visas. The itinerary rule was meant to address this. After November 1990, the new H-1B statutory provisions required an offer of employment, rendering the purpose of the itinerary rule obsolete. Regardless of the Agency's "historical practices" Congress changed the law, and with it the Agency's authority.

There is no evidence that the agency historically demanded evidence of guaranteed specific and non-speculative work assignments for the entire duration of the visa. Indeed, the agency determined a far less demanding rule would require notice and comment rulemaking.

The Agency's 1998 proposed rule anticipated analyzing past employment practices, and employment plans to ascertain if there was a "need" for the employee at the time the visa petition was submitted. The Agency did not propose to require evidence of work projects covering the entire duration of the H-1B visa. Nor did The Agency claim authority to deny portions of the visa for failing to prove three years of work assignments.

The only authority The Agency cites to in support of its non-speculative work rule is a historical prohibition. The Agency provides no law for this rule.

By itself, the rule would be an unlawful legislative rule.[4] However, the demand for employers to provide evidence of specific and non-speculative work assignments for the duration of the H-1B visa contradicts also clearly contradicts 8 U.S.C. § 1182(n)(2)(C)(vii).

As noted above, DOL has been granted authority to protect the wages and working conditions of US workers and to enforce the requirements of the H-1B program. At 8 U.S.C. § 1182(n)(2)(C), Congress gave DOL authority to take complaints alleging violations of the LCA, and hold hearings on the record to establish if a violation occurred, and the extent of liability the employer incurred. Congress gave DOL authority to force employers to pay the LCA wage for the duration of the H-1B visa even if the employee was in a "nonproductive status due to a decision by the employer (based on factors such as lack of work) . . ." 8 U.S.C. § 1182(n)(2)(C)(vii). This provision shows Congress considered the question of whether employers must show guaranteed work assignments at the time of filing, and rejected that approach. Congress instead opted for a system where the employer is required to continue paying wages or terminate the employment relationship and pay to return the employee home.

The Agency's rule requiring guaranteed specific and non-speculative work assignments is in direct conflict with 8 U.S.C. § 1182(n)(2)(C)(vii). The Agency's brief offers no discussion of the provisions allowing nonproductive status for lack of work.

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[4] Given that the H-1B visa is over-prescribed, and petitions are selected in a lottery system, it would be impossible for any employer to provide guaranteed specific and non-speculative work assignments at the time of filing. The Agency fails to explain how such a requirement can be met when every new H-1B petition is by definition speculative (due to the uncertainty of selection in the lottery).

While the Agency cites this statutory section at Doc't 15, Pg. 34-35, it quoted and analyzed the wrong statutory provision, apparently focusing instead on 8 U.S.C. § 1182(n)(2)(**G**)(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"). Plaintiffs agree, Section 1182(n)(2)(G)(vii) does not speak to the question at issue. However, The Agency has yet to explain how Congress' explicit allowance of "nonproductive status for lack of work" is consistent with the Agency's demand for evidence of specific work assignments for the entire duration of the H-1B visa.

In a similar case, the Third Circuit determined that an agency rule is unlawful if it renders a statutory term meaningless. *See Shalom Pentacostal v. USCIS*, 783. F.3d 156 (3rd Cir 2015). For the same reason, this Court should also hold the rule requiring evidence of specific and non-speculative work assignments unlawful.

IV. The Itinerary/Partial Denial Rule is *ultra vires*.

As noted in Plaintiffs' motion for summary judgment, there is no indication of whether the partial denials are a result of the itinerary rule. Pls' Mot. at 37. And in their response and cross motion, the Agency argues the issues separately. Regardless of how the rule(s) apply, both are unlawful.

A. The Agency cannot grant H1Bs for less than the full amount of time requested or available.[5]

The Agency initially argues that it has discretion to grant H1B visas for any period of time it chooses under 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) because it says the Agency may grant H1B visas "for a period *up to three years*." Gov't Mot. at 17-20. The Agency asserts that some H-1B employers, but not all, must provide evidence of specific and non-speculative work assignments for the entire duration of the H-1B visa. The Agency states that failure to comply with this rule will result in partial or full denial of the H-1B visa.

The Agency applies the rule, resulting in H-1B approvals lasting as short as one day. As a practical matter, such a practice frustrates the purpose of a work visa. An employee cannot schedule an interview with the consulate to get a visa stamp in that time, let alone travel to the United States and work on a one-day visa.

The Agency fails to address the structure of the statute and the import of changes made by Congress over time and how this impacts their professed authority to deny H-1B visas based on lack of guaranteed work assignments.

Prior to November 1990, nonimmigrant employment visas were lumped into the same "H" category, granting visas to aliens of exceptional merit and ability. The statute did not delegate any authority to DOL over this visa category. The 1990 changes split the prior H category into a number of new visa categories: notably H-1B, O (for aliens who possesses extraordinary ability in the sciences, arts, education, business, or athletics…), and P (entertainers). Congress created

[5] The Agency provides no rebuttal to Plaintiffs argument that all of the partial denials lack reasoned decisionmaking. Pls' Mot. at 22-24. Thus, the Court should enter judgment as a matter of law on this point.

special provisions for O and P visas, which allowed the agency to limit the duration of those visa based on evidence of engagements, work, or competition.

> (2)(A) The period of authorized status as a nonimmigrant described in section 1101(a)(15)(O) of this title shall be for such period as the Attorney General may specify in order to provide for the event (or events) for which the nonimmigrant is admitted.
>
> (B) The period of authorized status as a nonimmigrant described in section 1101(a)(15)(P) of this title shall be for such period as the Attorney General may specify in order to provide for the competition, event, or performance for which the nonimmigrant is admitted. In the case of nonimmigrants admitted as individual athletes under section 1101(a)(15)(P) of this title, the period of authorized status may be for an initial period (not to exceed 5 years) during which the nonimmigrant will perform as an athlete and such period may be extended by the Attorney General for an additional period of up to 5 years.

8 U.S.C. § 1184(a)(2).[6]

In contrast to this express grant of authority to limit the duration of O and P visas (based on evidence of scheduled events or competitions), Congress required The Agency to create regulations through notice and comment rulemaking defining the duration of all other nonimmigrant visas. 8 U.S.C. § 1184(a)(1)("The admission to the United States of any alien as a nonimmigrant shall be for *such time* and under *such conditions* as the Attorney General may by regulations prescribe…).

The Agency has not created a regulation allowing it to limit the duration ("such time) of an H-1B visa based on evidence of guaranteed work assignments ("such condition"). In short, it has not complied with the statutory charge to create regulations limiting H-1B visas based on these criteria.

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[6] The Agency's brief repeatedly cites this section of the INA. However, from the context of the brief The Agency appears to be actually discussing section 1184(a)(1), and not the provisions governing O and P visas. *See* Doc't 15, Pgs. 9, 10, 25, 27, 34, and 35.

The Agency urges this Court to take a "soda straw" view of 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) and ignore the surrounding context. The regulation at 8 C.F.R. § 214.2(h)(9), *Approval and validity of petition*, is the regulation containing the H-1B visa's "time" and "conditions" of approval. At subsection (iii)(A)(1), the regulation states:

> *H-1B petition in a specialty occupation*. 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*.

The Agency's regulation at 8 C.F.R. § 214.2(h)(9) (iii) does state H-1B visas "shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application." The regulation prohibits granting more time than requested by the employer on the LCA but does not envision granting less.

The Agency claims that the language "up to three years" grants it unchecked discretion to limit the duration of an H-1B visa.[7] Doc't 15, Pg. 26. However, The Agency failed to create a regulation explaining that it could limit the visas for such time and such conditions as it now does.

The Agency ignores the fact that the language allowing "up to three years" is referring to the duration requested by the employer on the LCA, which may be less than three years. *Id.* The regulations at section 214.2(h)(13)(i)(C) also provide significant detail on calculating the amount of time left on the six-year statutory cap. The regulation provides rules for "recapturing" time spent out of the country. An employee may have been approved for two three-year H-1B visas

[7] The Agency's sole citation in support of its argument is an unpublished decision from the Western District of Missouri, *Valorem Consulting Group v. United States Citizenship & Immigration Servs.,* 2015 U.S. Dist. LEXIS 4664, *2 (2015). *Valorem Consulting* does not address any of the issues raised in this brief, such as differences between 8 U.S.C. §§ 1184(a)(1) and (2), nor does it address the relevance of 8 U.S.C. § 1184(n)(2)(C)(vii).

but may be eligible to recapture days spent out of the country and receive a new H-1B visa for the time remaining on the six year H-1B limit.

Thus, using the "conditions" created by regulation, The Agency may approve an H-1B visa up to the time requested by the employer or the statutory maximum duration (which may be less than the time requested by the employer).

The Agency fails to address the intricacies of this regulation because to do so highlights the inadequacy of its position. On one hand, the regulations goes out of its way to prevent approval of a visa for a duration greater than that requested by the employer, and then spills a great deal of ink on determining the amount of time an employee can "recapture" on their six-year cap. Yet, the regulations are absolutely silent on the ability to limit the duration of H-1B visas based on the duration of guaranteed work assignments. The regulations are similarly silent on the Agency's ability to separate employers based up on their business model.

B. The Agency's Itinerary Rule is Ultra Vires.

The Agency then argues that 8 C.F.R. § 214.2(h)(i)(B) is a duly promulgated regulation with statutory authority. Gov't Mot. at 25-29. But the question for this Court is: given the language and context of the statute, did Congress intended for the Agency to require some employers to provide an *exact* itinerary covering the three years of an H-1B visa?

The itinerary regulation at 8 C.F.R. § 214.2(h)(4)(i)(B) lacks statutory authority and must be invalidated for being ultra vires. Because an agency's "power to act and how [it is] to act is authoritatively prescribed by Congress . . . when [it] act[s] improperly, no less than when [it] act[s] beyond [its] jurisdiction, what [it] do[es] is ultra vires." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013). "[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Id*. at 1871.

The structure of the statue clearly shows that the Agency has not been granted authority to define the area of intended employment, or to otherwise demand an exact itinerary for the duration of the H-1B visa.

As noted above, the 1990 amendments to the INA limited the Agency's role in the H-1B visa. Congress delegated authority to DOL to determine the prevailing wage based upon the "area of intended employment." 8 U.S.C. §§ 1184(n) and (p). It is worth noting that 8 U.S.C. § 1184(i) does not make any reference to the area of employment, nor does it require an itinerary.

At every step of the process, the area of intended employment is used to determine the prevailing wage.

DOL exercised its statutory authority and created regulations discussing work in multiple locations. 20 C.F.R. § 655.730(c)(5). Employers are allowed to file an LCA and list a variety of potential locations of employment. *Id.* This allows the employer to change work locations and have an established prevailing wage determination for each location. DOL also created regulations governing when employers move an employee to a work location not covered by an existing LCA.

The Agency now requires an "exact itinerary" for the duration of the H-1B visa. This requirement is not tethered to any statutory language. As the agency conceded, the itinerary regulation was promulgated under the 1952 INA's H visa language, and:

> … was promulgated primarily to *address certain practices in the entertainment industry,* which, prior to the passage of the Immigration Act of 1990, was one of the largest users of the H-1B classification. (Entertainers now typically enter the United States in the O and P nonimmigrant classifications.) *Specifically, this regulation 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.*
>
> ***
>
> Since promulgation of this regulation, however, many industries in the United States, such as the health care and computer consulting industries, have begun to

> rely more frequently on the use of contract workers. It has been the experience of the Service that many bona fide businesses which provide contract workers to certain industries under the H-1B classification have experienced difficulty in providing complete and detailed itineraries due to the unique employment practices of such industries. *For example, companies which are in the business of contracting out physical therapists or computer professionals often get requests from customers to fill a position with as little as 1 day advance notice. Clearly an H-1B petitioner in this situation could not know of all particular contract jobs at the time that it first files the H-1B petition with the Service.*

63 Fed. Reg 30419.

As noted in Plaintiffs' opening brief, the current itinerary requirement is impossible to comply with and is nonsensical. First, it ignores the fact that H-1B visas are awarded in a lottery, precluding any certainty in personnel on the employers' side. The Agency requires exact itineraries at the time of filing a petition, yet the employer does not know which petitions will be selected.

The Agency claims "it is difficult to know how to respond to this argument." Doc't 15, Pg. 35. Plaintiffs did not create this "argument." Rather, The Agency published this factual statement in the Federal Register, and Plaintiffs cited it. *See* 63 Fed. Reg 30419.

The Agency fails to cite any particular statutory language entrusted to it by Congress that authorizes this requirement. The Agency does not address the fact that Congress gave it authority to demand itineraries and thus limit the duration of O and P visas (the types of nonimmigrants the itinerary rule was created to regulate), and withheld this authority over the H-1B visa. *Compare* 8 U.S.C. §§ 1184(a)(1) and (a)(2).

Congress did not intended for the Agency to demand some employers provide an exact itinerary for the duration of the H-1B visa. This is evident in: The Agency's failure to provide any statutory authority for its H-1B itinerary requirement; Congress' delegation of "area of intended employment" to DOL; the distinctions between H-1B, O, and P statutory language; and the

dynamic nature of the private sector's need for changes in manning allocation. The agency cannot hide or disregard its prior admission that the H-1B exact itinerary requirement is not based on the current statute. Consequently, this Court should invalidate it, and hold 8 C.F.R. § 214.2(h)(2)(i)(B) is ultra vires.

CONCLUSION

For these reasons, this Court should find the Agency conceded that the partial denials lack any reasoned decisionmaking and set those aside and then enter judgment as a matter of law on the remaining consolidated issues in favor of Plaintiffs.

April 26, 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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