IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SERENITY INFO TECH, INC., WHIZ GLOBAL, LLC, KESHAV CONSULTING SOLUTIONS, INC., SMARTWORKS, LLC,	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:20-cv-0647-AT
v.	:	
KENNETH T. CUCCINELLI, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services,	:	
Defendant.	:	

ORDER

This Administrative Procedure Act ("APA") action for judicial review is before the Court on Plaintiffs' Motion for Partial Summary Judgment [Doc. 19.] Defendant U.S. Citizenship and Immigration Services ("USCIS," or the "Agency") filed a Response on March 27, 2020. (Doc. 25.) Plaintiffs filed a Reply on April 3, 2020. (Doc. 27.) Pursuant to the Court's Scheduling Order which adopted the Parties' Joint Preliminary Report and Discovery Plan (Doc. 16), the Parties agreed to first brief the issues that do not require review of a certified administrative record prior to the submission of such record. For the reasons that follow, Plaintiffs' Motion for Partial Summary Judgment is **GRANTED**.

I. Background

A. Plaintiffs' Applications

Plaintiffs are all companies which petition for H-1B visas. H-1B visas are non-immigrant visas for temporary workers who come to the United States "to perform services in a specialty occupation[.]" 8 C.F.R. § 214.2 (h)(1)(ii)(B)(1).

Plaintiffs characterize themselves as "information technology consulting services" companies. (*E.g.*, *In re Form I-129 Petition of Serenity Infotech Inc*, Decision at 1, No. WAC1914350517 (U.S. Citizenship and Immig. Serv. Dec. 12, 2019) ("Serenity Denial"), Doc. 19-2 at 1.) Plaintiffs apparently "do[] not produce any software products . . . but rather contract[] with numerous outside companies in order to supply these companies with employees to fulfill specific staffing needs or complete service contracts." (*Id.* at 2.)

Plaintiffs' applications were each denied in 2019. (*See generally* Doc. 19-2.) Plaintiff Serenity Info Tech, Inc.'s ("Serenity") application was denied for two reasons. First, the Agency determined that Serenity failed to meet the definition of "United States employer" under the governing regulation. (Serenity Denial at 3, Doc. 19-2 at 3.) Second, the Agency determined that Serenity failed to meet its burden of showing services in a specialty occupation because it failed to "demonstrate that [it has] specific and non-speculative qualifying assignments in a specialty occupation for the entire time requested on the petition." (*Id.* at 6.) Plaintiffs contend that these denial reasons are generally common among the Agency's reasons for denying their Form I-129 applications.

B. Regulatory History

Under the Immigration and Nationality Act ("INA"), highly skilled, nonimmigrant workers can come to the United States on a temporary basis (up to three years) to perform services for a sponsoring "employer" in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b), INA § 101. The petitioner for an H-1B visa – the employer – has the burden of proving that the job is a "specialty occupation" as defined by the statute. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2000). The INA lists the requirements for a "specialty occupation" as follows:

> (1) Except as provided in paragraph (3), for purposes of section 1101(a)(15)(H)(i)(b) of this title, section 1101(a)(15)(E)(iii) of this title, and paragraph (2), the term "specialty occupation" means an occupation that requires—
>
> > (A) theoretical and practical application of a body of highly specialized knowledge, and
> >
> > (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 U.S.C. § 1184(i)(1). The Agency's regulations further define a specialty occupation as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the

> attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

8 C.F.R. §214.2(h)(4)(ii). Additionally, under the governing regulation, "[t]o qualify as a specialty occupation, the position must meet one of" four additional regulatory requirements, referenced later in this Order. 8 C.F.R. § 214.2 (h)(4)(iii)(A).

When filing an H-1B petition, sponsoring employers must first submit a Labor Condition Application ("LCA") to the Department of Labor. *See* 8 U.S.C. § 1182(n); *see also Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 192 (3d Cir. 2010) (citing Pub. L. No. 101–649 § 205, 104 Stat. 4978, 5021–22 (1990); Pub. L. No. 105–277 § § 412–13, 112 Stat. 2681, 2981–642 to –650 (1998)). The LCA is a document prepared by the petitioner in which the petitioner makes several attestations, including that the employer will offer wages at the level for similarly situated domestic employees, will provide working conditions that will not adversely affect these domestic employees, that there is not a labor dispute for this classification of employees and that any bargaining representative has received notice of the LCA. 8 U.S.C. § 1182(n)(1), INA § 212. The LCA also requires specifications about the number of workers sought, their employment classification, and their wage rate and conditions. *Id.*

"In 1991, DOL engaged in formal rulemaking to define who is an "employer" that can apply for a Labor Condition Application. *ITServe All., Inc. v. Cissna*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *8 (D.D.C. Mar. 10, 2020),

appeal docketed, No. 20-5132 (D.C. Cir. May 12, 2020) (citing DOL Advanced Notice of Proposed Rulemaking, Alien Temporary Employment Labor Certification Process, 56 Fed. Reg. 11705-01 (March 20, 1991)). USCIS's predecessor agency, Immigration and Naturalization Service, or INS, "adopted the definition of 'employer' used by DOL . . . and CIS has made no change to the definition." *Id.* at 9 (citing INS Final Rule, Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991); 8 C.F.R. § 214.2(h)(4)(ii)). "Neither the underlying statute nor the regulation has been amended in relevant part since 1991." *Id.*

Under the INS Final Rule, "United States employer" is defined 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).

The question of how petitioners who contract to staff visa beneficiaries at third party worksites may satisfy the burden of showing that they are "employers" has a somewhat protracted regulatory history.

1. Guidance by USCIS's Predecessor Agency

In the 1990's, USCIS's predecessor agency, the Immigration and Naturalization Service (INS), "in accord with the law, simplified and streamlined the application and approval process" for H-1B Visas. *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *1. The logic behind this move was that unlike "an employer seeking an employment-based *immigrant* visa in order to hire a foreign worker who plans to stay in this country," applicants for non-immigrant visas such as the H-1B, are seeking employees who "are planning to work here on a temporary basis." *Id.* at *2 (emphasis in original).

INS issued three relevant guidance memos which streamlined the H-1B process: (1) *Contracts Involving H-1B Petitioners*, (June 6, 1995); (2) *Supporting Documentation for H-1B Petitions* (Nov. 13, 1995); and (3) *Interpretation Of The Term 'Itinerary' Found in 8 CFR 214.2(h)(2)(i)(B) As It Relates To The H-1B Nonimmigrant Classification* (Dec. 29, 1995). The Court refers to these collectively as the "1995 INS Memoranda."

The first of these memos "permitted H-1B visa adjudicators to 'request and consider any additional information deemed appropriate to adjudicate a petition,' including specifically third-party contracts, on a case-by-case basis." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *5 (citing INS June 6, 1995, *supra*). The second "clarified that it 'should not be a normal requirement' for applicants to submit third-party contracts," but rather "only in those cases where the officer can articulate a specific need for such documentation." *Id.* 5 (citing INS Nov. 13,

1995, *supra*). Crucially, "[t]he mere fact that a petitioner is an employment contractor [was] not a reason to request such contracts." *Id.*

The third memo, more on point to the instant motion, pertained to the regulatory requirement of an 'itinerary' for H-1B applications where service or training will take place in more than one location. The INS Final Rule provides, in relevant part, that "[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." 8 C.F.R. 214.2(h)(2)(i)(B). "The INS December 1995 Memo . . . explained that the purpose of the itinerary requirement 'is to insure [sic] that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment.'" *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *5 (citing INS Dec. 29, 1995, *supra*).

For contractors such as Plaintiffs, the INS provided that "a general statement of the alien's proposed or possible employment is applicable since the regulation does not require that the employer provide . . . the exact dates and places of employment." *Id.*

2. USCIS seeks to clarify the definition of "employer"; the 2010 Neufeld Memo

In 2010, Donald Neufeld, Associate Director of USCIS's Service Center Operations penned a Memorandum entitled "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site

Placements." (Def.'s Resp. Ex. B, Doc. 25-2.) This Memo has been referred to variously as the "Employer-Employee Memo" or "2010 Guidance Memo" or simply the "Neufeld Memo," the last of which the Court will use. The Neufeld Memo lists eleven factors for determining whether an employer-employee relationship exists between the petitioner and the beneficiary of the visa where the beneficiary will be working at a third-party work site placement.[1] (Neufeld Memo at 3–4.) "CIS adjudicators were instructed to evaluate these factors using a totality-of-the-circumstances test and to determine if the petitioning employer had established its 'right to control' the foreign worker's employment." *ITServe All., Inc. v. Cissna*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *6 (D.D.C. Mar. 10, 2020) (citing Neufeld Memo at 4). The Neufeld Memo distinguished between the "right to control" the beneficiary from "actual control," noting that the

[1] The factors are:

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, i.e. weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

(Neufeld Memo at 3–4.)

employer-employee relationship "hinges" on the former. (Neufeld Memo at 3 n.6.) Plaintiff staffing companies here maintain they have the "right to control" the visa beneficiaries in their contractual relationships. "The CIS 2010 Guidance Memo also indicated that documents used to demonstrate an employer-employee relationship could include itineraries, one or more employment agreements, an offer letter, contracts between a U.S. client and U.S. petitioning[/contracting] employer that explain the role of the foreign worker with the client, statements of work, position descriptions, etc." *Id.* (citing Neufeld Memo at 8–9). However, the Neufeld Memo clarified that requests for evidence "should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition." (Neufeld Memo at 10)

3. USCIS departs from prior guidance: the 2018 Policy Memo

On February 22, 2018, USCIS issued a Policy Memorandum entitled "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites." (Def.'s Resp. Ex. 1, "2018 Policy Memo," Doc. 25-1.) The 2018 Policy Memo superseded the 1995 INS Memoranda in several key ways. First, while the 1995 Memoranda "had not required petitioning employers to submit . . . itineraries with exact dates and locations of employment," the new 2018 Memoranda now required "[a]n itinerary with the dates and locations of the services to be provided must be included in all petitions that require services to

be performed in more than one location" and noted "[a]djudicators may deny the petition if the petitioner fails to provide an itinerary." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *7 (citing 2018 Policy Memo at 2, 6). Second, while the 1995 Memoranda provided that for third party staffing companies, copies of contracts with the worksite should be requested "only in those cases where the officer can articulate a specific need for such documentation," *Id.* at *5, now "[f]or such third-party, off-site arrangements, additional corroborating evidence, such as contracts and work orders, may substantiate a petitioner's claim of actual work in a specialty occupation . . . [and if] the petitioner does not submit corroborating evidence or otherwise demonstrate that there is a specific work assignment for the H-1B beneficiary, USCIS may deny the petition." (2018 Policy Memo at 4.)

The 2018 Policy Memo did not supersede the Neufeld Memo but was "intended to be read together with . . . and as a complement to that policy." (2018 Policy Memo at 2.) However, Plaintiffs contend that the 2018 Policy Memo departs from the Neufeld Memo because under the earlier memo, "the Agency affirmed that 'the employer-employee relationship hinges on the right to control the beneficiary,' not actual control." (Pls.' Br. at 2–3.) But, Plaintiffs contend, "the February 2018 [Policy] memo requires 'actual' and exclusive control over day to day activities." (*Id.*)

The 2018 Policy Memo provides that "[u]nless specifically exempted in this memo, this PM [policy memo] applies to and shall be used to guide

determinations by all USCIS officers adjudicating Form I-129 H-1B petitions." (2018 Policy Memo at 1.) The memo states that it is issued pursuant to the Agency's authority under "Section 214 of the INA and Title 8, Code of Federal Regulations (CFR), section 214.2(h)." Section 214 of the INA is codified at 8 U.S.C. § 1184, and provides, among other things, that "[t]he 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 regulation prescribe." 8 U.S.C. § 1184(a)(1).

II. Legal Standard

The applicable standard under the APA is whether the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Defenders of Wildlife v. U.S. Dept. of Navy*, 733 F.3d 1106, 1114-1115 (11th Cir. 2013). An agency action may be found arbitrary and capricious:

> where the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Miccosukee Tribe of Indians of Florida v. United States, 566 F.3d 1257, 1264 (11th Cir. 2009) (quoting *Alabama–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1254 (11th Cir. 2007)).

Where judicial review is based on a policy determination, the Court must ask whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1288 (11th Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "The arbitrary and capricious standard is 'exceedingly deferential.'" *Defenders of Wildlife*, 733 F.3d at 1115 (citing *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996)). The Court is not authorized to substitute its judgment for the agency's as long as the agency's conclusions are rational. *Defenders of Wildlife*, 733 F.3d at 1115 (citing *Miccosukee Tribe of Indians*, 566 F.3d at 1264); *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008); *Pres. Endangered Areas of Cobb's History, Inc. ("PEACH") v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996) ("The role of the court is not to conduct its own investigation and substitute its own judgment for the administrative agency's decision.")). While the Court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned . . . [it] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Black Warrior Riverkeeper,* 781 F.3d at 1288 (internal citations omitted).

However, where "[agency] action is based upon a determination of law . . . an order may not stand if the agency has misconceived the law." *Sec. & Exch. Comm'n v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94 (1943). This is so even if

the agency action could be supported on policy grounds. The basis of this rule is that

> a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

Chenery I, 318 U.S. at 88.

III. Discussion

As noted above, at this stage of the proceeding, Plaintiffs challenge two aspects of the 2018 Policy Memo: the requirement of detailed itineraries and supporting evidence "of what a particular employee will do every day for the next 3 years or the next 1095 days," referred to by Plaintiffs as the "Specific Work Assignment Rule," and the requirement for "United States employers to demonstrate actual control over its employees before the Agency will consider them to be employees," referred to by Plaintiffs as the "Employer Employ Rule" or "Actual Control Rule" (Pls.' Br. at 3.) The Court refers to both aspects of the 2018 Policy Memo as the "Challenged Polices." Plaintiffs assert that the Challenged Policies are *ultra vires* regulations, issued without notice and comment and purporting to exercise regulatory authority not granted to the Agency by Congress. The Agency disputes Plaintiffs' characterization of the Challenged Policies, contending that the 2018 Policy Memo does not contain rules or regulations but is merely an "interpretive policy document." (Def.'s Resp. at 2.)

This Court is not the first to address the issues posed in this case. Plaintiffs' counsel has filed actions across the country challenging aspects of the 2018 Policy Memo. Courts have come out different ways. *Compare ITServe All., Inc. v. Cissna*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *15 (D.D.C. Mar. 10, 2020), *with Kollasoft Inc. v. Cuccinelli*, No. CV-19-05642-PHX-JZB, 2020 WL 263618, at *8 (D. Ariz. Jan. 17, 2020).[2]

For the reasons that follow, the Court finds that Plaintiffs have met their burden of showing that they are entitled to summary judgment on their threshold claims that the Challenged Policies did not justify the visa denials at issue in this case.

A. Framework for Reviewing Interpretive Rules

The Administrative Procedure Act requires that "notice of proposed rule making . . . be published in the Federal Register" and that after such notice, the Agency "give interested persons an opportunity to participate in the rule making." 5 U.S.C. § 553(b), (c). This paradigm is commonly referred to as "notice and comment" rulemaking. Notice and comment rulemaking is required for so

[2] *Kollasoft*, though relevant authority, is of somewhat limited precedential value, as the posture of the case was on a motion for preliminary injunction, and while the Court found that the plaintiffs had not met their burden to show that the facts and law "clearly favor" their claim such that there was a likelihood of success on the merits, the Court did not foreclose an eventual ruling on the merits for the plaintiffs. No. CV-19-05642-PHX-JZB, 2020 WL 263618, at *8 (D. Ariz. Jan. 17, 2020) ("Ultimately, the Court finds it an open question whether the directives contained in the 2018 Memo constitute substantive rules necessitating a notice-and-comment period."). An appeal was docketed on January 22, 2020. No. 20-15092 (9th Cir.).

called "legislative" rules, but not for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* § 553(b)(A).

"A legislative rule creates new law, rights, or duties. An interpretive rule, on the other hand, 'typically reflects an agency's construction of a statute that has been entrusted to the agency to administer' and does not 'modif[y] or add[ ] to a legal norm based on the agency's own authority.'" *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009) (quoting *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94–95 (D.C. Cir. 1997)) (alterations in original). "[T]he distinction between an interpretative rule and a substantive rule . . . likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute." *Id.* (internal quotations omitted, alterations in original).

Plaintiffs, in challenging the denials at issue in this case, have contended that the Challenged Policies are procedurally invalid because they "are in fact substantive rules and require notice and comment rulemaking." (Pls.' Br. at 8.). Plaintiffs cite the test in *Texas v. United States*, which examined "whether the rule (1) 'impose[s] any rights and obligations' and (2) 'genuinely leaves the agency and its decision-makers free to exercise discretion.'" 809 F.3d 134, 171 (5th Cir. 2015), as revised (Nov. 25, 2015), (quoting *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995)) (alterations in original).

But this is not quite the problem here. The Agency framed the 2018 Policy Memo as an interpretive rule which rescinded the 1995 INS Memoranda, which

were themselves interpretive rules. "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule," even if the initial interpretive rule represents a longstanding or authoritative interpretation of an agency's own regulation. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). Instead, the question is whether this Court, in reviewing the denials at issue, owes the Agency's interpretation of the terms "employer" and "itinerary" found in the underlying H-1B regulation and as applied in the instant cases any deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).[3]

The Supreme Court has recently provided guidance on how to determine whether *Auer* deference is owed to an interpretation. "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (citing *Chevron*

[3] In some contexts, whichever test is applied, the same result may ultimately be reached. If the purported interpretive rule imposes burdens that cannot be linked to existing statutory or regulatory requirements, it is a procedurally invalid legislative rule, but it is also not binding on a reviewing court because it is owed no deference. The majority in *Perez* recognized both approaches, noting that "[t]here may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in such situations. Quite the opposite." 575 U.S. at 105–06. The Court finds that the question of *Auer* deference as to the specific terms at issue is the narrower ground and thus the better means of resolving this case.

U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, n.9 (1984)).

Even if the interpretation is ambiguous, that does not end the inquiry, "for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference." *Id.* at 2416. Rather, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

B. The Agency's interpretation of "Employer-Employee Relationship"

The Court first addresses what Plaintiff has called the "Employer Employ Rule" or the "Actual Control Rule." Plaintiffs cite the 2018 Policy Memo as the impetus behind the visa denials at issue in this case. (*See* Pls.' Br. at 3.) The 2018 Policy Memo, however, is somewhat sparse on details about how to define "employer." In the background section, it incorporates the Neufeld Memo and states that "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." (2018 Policy Memo at 2.) The memo stresses that adjudicators should apply this test to third-party staffing companies with "proper" scrutiny "in order to protect the wages and working conditions of both U.S. and H-1B nonimmigrant workers and prevent fraud or abuse." (*Id.* at 4. ("USCIS policy should ensure that officers **properly interpret** and apply the

statutory and regulatory requirements that apply to H-1B petitions involving third-party worksites.") (emphasis added).

However, in practice, "properly interpret" appears to mean "adopt one very specific, and narrow interpretation." Most of the challenged visa denials contain the following similar language:

> 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-1 B visa classification, these terms are undefined.
>
> Thus, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1 B nonimmigrant petitions, USCIS focuses on the common-law touchstone of "control." *See* 8 CFR § 214.2(h)(4)(ii)(2) defining a "United States employer" as one who "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 . . . ."

(Serenity Denial at 2.) And this is not a local phenomenon. This similar interpretation was adopted in the 33 H-1B visa denials at issue before the district court for the District of Colombia. *See ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *16 (D.D.C. Mar. 10, 2020) ("CIS states in its December 19, 2019 decision on ERP Analyst's visa petition that the 'employer-employee relationship'

is not a defined term by statute or regulation and, therefore, it is free to apply its own interpretation of the 'common-law agency doctrine.'").[4]

1. "Employer-employee relationship" is not ambiguous in context

The Court starts with the text of the regulation:

> 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). The Agency states that the terms "employee," "employed," "employment," or "employer-employee relationship" are not defined in the statute or regulation. But the absence of a definition alone does not indicate ambiguity. The plain language of the regulation provides ample guidance on how to determine whether an employer-employee relationship exists, including whether the applicant "may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.* The authority of applicant to hire, pay, fire, or supervise the employee are all given as examples of criteria which would indicate an employer-employee relationship for the purpose of the statute.

[4] "These "approximately 33" cases were consolidated before Hon. Rosemary M. Collyer for the purpose of briefing and resolution of the similar legal issues at stake raised in these cases (as in the instant case here) as well as a statute of limitations issue. 2020 WL 1150186, at *2.

The Agency fixates on the last of the listed items: "Thus, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1 B nonimmigrant petitions, USCIS focuses on the common-law touchstone of 'control.'" (Serenity Denial at 2.) The Serenity Denial cites 8 C.F.R. § 214.2(h)(4)(ii)(2), but the regulation does not expressly reference the common law definition of employer. Nor does the underlying statute. 8 U.S.C. § 1101(a)(15)(H)(i)(b), INA § 101. In denying the Serenity application, for example, the Agency required a showing that Serenity had "the right to control when, where, and how the beneficiary performs the job." (*Id.* at 3.) Essentially, under the Agency's interpretation, even where an applicant may hire, pay, fire, and supervise a visa beneficiary, the Agency may still find that an employer-employee relationship does not exist if a third-party controls the manner and means of the beneficiary's day-to-day work. The critical flaw of this interpretation is that it effectively deletes the majority of the criteria provided by the regulation.

"[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (citing 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991)). "Under this rule of construction" known as "*ejusdem generis*," "the residual clause should be read to

give effect to the terms" hire, pay, fire, and supervise "and should itself be controlled and defined by reference to the enumerated categories." *Id.*

The 2018 Policy Memo, at least as applied to the visa denials at this case, elevates the factor of "control," such that it is no longer "defined by reference" to the other factors. The interpretation of "employer-employee relationship" advanced by the Agency below contradicts the plain language of the regulation because it "emphasizes one regulatory criterion to the derogation of others, without any relevant change in the underlying statute." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *17.

The *ITServe* court noted that INS adopted the DOL's definition of "employer" and that the Agency "has made no change to the definition." *Id.* at *9. It appears that DOL, which wrote the definition in question, has not determined that any of the applicants at issue do not constitute "employers" such that a denial of an LCA or subsequent post-approval enforcement action was necessary, though the Court recognizes that the DOL's approval process appears more cursory than USCIS's. The Agency, however, pays no heed to the regulatory origin of the DOL's definition of employer, and instead "it cherry picks from the formal 1991 Regulation to create a new definition of employer." *Id.* at *14. But "[a] new interpretation by CIS decades later that emphasizes one regulatory criterion to the derogation of others, without any relevant change in the underlying statute, is not worthy of deference." *Id.* at 17.

In response, the Agency argues that "the *ITServe* decision, frankly, leads to an inaccurate conclusion that simply 'paying' an H-1B visa beneficiary is sufficient to establish an employer-employee relationship. . . . That is absurd as all petitioners must include an LCA ***certifying*** that they will pay the required wage and would render the rest of the test superfluous." (Def.'s Resp. at 26 n.16 (emphasis in original)). The Agency again misses the point. The regulation requires a balancing of factors. The Court holds that actual day-to-day "control" is not so important that it blots out all other factors, i.e. capacity to hire and fire.

While another regulatory factor, "supervise," no doubt carries the connotation of some aspect of control, the Agency has historically recognized that "supervision" can take many forms, including "weekly calls, reporting back to main office routinely, or site visits by the petitioner." (Neufeld Memo, Doc. 25-2 at 3.) Supervision may also take place after the work is done, including by "evaluat[ing] the work-product of the beneficiary, *i.e.* progress/performance reviews." (*Id.* at 4). Furthermore, the Agency recognized in the Neufeld Memo that the employer-employee relationship has a contractual dimension, considering whether the petitioner has the right to "hire, pay, and have the ability to fire the beneficiary," whether the petitioner claims "the beneficiary for tax purposes," and whether the petitioner provides "the beneficiary any type of employee benefits." Although the "ability to control the manner and means in which the work product of the beneficiary is accomplished" is a factor considered by the Neufeld Memo, it is just one such factor. (*Id.* at 3–4.). While the Neufeld

Memo also invokes the common law in support of its multi-factor test, Associate Director Neufeld's reading of the common law is far less wooden than the interpretation set forth in the denials at issue. The Neufeld Memo notes that "[u]nder the common law, 'no shorthand formula or magic phrase . . . can be applied to find the answer . . . . [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" (*Id.* at 2 n.1 (citing *NLRB v. United Ins. Co. of America*, 390 U.S. 254,258 (1968)). The Agency's lip service to the Neufeld Memo is thus laid bare; "no one factor being decisive" cannot possibly be reconciled with the Agency's newly-found "focus[] on the common-law touchstone of 'control.'" (*Id.*; Serenity Denial at 2.)

In purporting to strictly interpret the term "employer-employee" relationship set forth in the regulation, the Agency has obliterated the regulation's clear flexibility. Because the regulation's definition of "employer-employee" relationship is not ambiguous, the interpretation advanced by the Agency cannot stand.

2. The interpretation advanced is not entitled to any deference

While under *Kisor*, the lack of any ambiguity as to the meaning of a term ends the analysis, the Court writes briefly to state why the interpretation, even if permissible, is owed no deference. As noted by the *ITServe* court, "INS borrowed the DOL definition [of employer] and used it in the INS 1991 Regulation, which it then interpreted in the INS 1995 Guidance Memos that governed for over twenty

years without congressional action." No. CV 18-2350 (RMC), 2020 WL 1150186, at *17. Likewise, it does not appear that the DOL, the originator of the regulatory text in question, has followed USCIS's lead. The parties have disputed whether the new rule has increased denials, and the Court cannot say one way or another at this stage, though the initial volley of litigation clearly suggests such. However, the Court notes that it does appear that this interpretation has "create[d] unfair surprise or upsets reliance interests" to the extent that denials of extensions, that is, applications which were previously approved, has increased, based on the Agency's own data. (Pls.' Br. at 6.); *Kisor*, 139 S. Ct. at 2421. Ultimately, the Court need not resolve the potential fact dispute, as the interpretation cannot stand for the above reasons.

C. The Agency's interpretation of "itinerary"

The Court next turns to the second aspect of Plaintiffs' challenge. Plaintiffs argue that the 2018 Policy Memo improperly requires applicants "to provide evidence of what a particular employee will do every day for the next 3 years or the next 1095 days." (Pls.' Br. at 3.) Plaintiffs refer to this alleged requirement as the "Specific Work Assignment Rule." There is no dispute that where, as here, employees may perform service or training in more than one location, the 1991 regulation requires a limited form of itinerary:

> 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.

8 C.F.R. § 214.2(h)(2)(i)(B). "[T]he itinerary requirement is not in the statute." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *20. Instead, it was added pursuant to the Attorney General's residual authority to regulate the "admission to the United States of any alien as a nonimmigrant." 8 U.S.C. § 1184(a)(1), INA § 214. "[I]n the December 1995 Memo[, INS clarified] that it 'could accept a general statement of the alien's proposed or possible employment, since the regulation does not require that the employer provide the exact dates and places of employment.'" *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *10. The 2018 Policy Memo rescinded that INS memo. The Plaintiffs contend that USCIS's new 2018 interpretation and application of the itinerary requirement now turn the entire intent of the H-1B nonimmigrant statutory scheme on its head.

1. **The Agency's interpretation is impermissible.**

As noted above, the itinerary requirement has no statutory basis. The 2018 Policy Memo further admits that "the regulations only require that an itinerary contain the dates and locations of the services to be provided when the petition requires the beneficiary to work at multiple worksites." (2018 Policy Memo at 6.) Nonetheless, the memo specifies that "a more detailed itinerary can help to demonstrate that the petitioner has nonspeculative employment, even when the beneficiary will only be working at one third-party worksite." For example, the Agency impels petitioners to provide:

- The dates of each service or engagement;
- The names and addresses of the ultimate employer(s);

- The names, addresses (including floor, suite, and office) and telephone numbers of the locations where the services will be performed for the period of time requested; and
- Corroborating evidence for all of the above.

(*Id.*). Plaintiffs contend that this is, in practice, is a hard-and-fast requirement which has led to routine denials. Plaintiffs contend that these added requirements "clearly amend[]" the definition of an itinerary "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." (Pls.' Br. at 8.)

The Agency responds that by rescinding INS's guidance that it "could accept a general statement of the alien's proposed or possible employment" in lieu of exact dates and locations (2018 Policy Memo at 2), it has reverted "to the plain language of the regulation, which requires H-1B visa petitioners to include an itinerary." (Def.'s Resp. at 22–23) (citing 8 C.F.R. § 214.2(h)(2)(i)(B), *Funeral Consumer Alliance v. FTC*, 481 F.3d 860, 863-64 (D.C. Cir. 2007)).

Again, the Agency's interpretation fails at *Kisor* step one. The regulation is clear what the itinerary must include: the "dates" and "locations" of the services and trainings. There is nothing here to interpret. Instead, this "new interpretation" was part and parcel of the Agency's "erroneous effort to substitute [its] understanding of common law for the unambiguous text of the INS 1991 Regulation," which led to its misguided expounding of the term "employer-employee relationship." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at

*17. If the Agency wishes to add a host of detailed provisions which must be included in an itinerary (i.e., office floor movement and work assignment from day to day) to meet approval, it remains free to amend the regulation by the established notice and comment regulatory process.

2. The detailed itinerary requirement has no alternative regulatory basis.

As noted above, in the 2018 Policy Memo, the agency effectively concedes that the regulatory requirement of an "itinerary" does not encompass the level of detail that the memo specifies should be included with H-1B applications. In the 2018 Policy Memo and in the Agency's Response brief, the Agency offers two alternative possible regulatory bases for the detailed itinerary requirement. First, the Agency contends that the requested information is necessary to meet the applicant's burden of showing non-speculative employment. Second, the Agency asserts that the information is necessary to meet the applicant's burden of showing that the visa beneficiary will be serving in a "specialty occupation." For the reasons that follow, the Court finds that neither of these regulatory requirements can be permissibly interpreted to include an itinerary with the requested level of detail set forth in the 2018 Policy Memo.

First, the Agency contends that a detailed itinerary is necessary to provide evidence of non-speculative employment. While there is no statutory or regulatory requirement that an H-1B applicant affirmatively demonstrate that the employment for the beneficiary is not "speculative" via proof of specific work

assignments, the Agency has inferred the need for such a showing. The Agency argues this showing is based on the regulatory requirement that [a]n applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication." 8 C.F.R. § 103.2(b)(1); see also *Matter of (Redacted)*, 2012 WL 4108332 (AAO January 6, 2012) ("A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts.").

However, it is worth noting that the INS originally proposed a 1998 rule which would have explicitly expanded the itinerary requirement for the purpose of policing against speculative employment. INS, Proposed Rule, *Petitioning Requirements for the H Nonimmigrant Classification*, 63 FR 30419-01 (1998) ("Petitions filed without any itinerary may not be approved since this type of petition involves purely speculative employment."). The 1998 INS proposed rule was never finalized. However, as Plaintiffs note, "in 1998 USCIS determined that its prohibition on speculative/non-productive status required notice and comment rulemaking. . . . Yet, USCIS 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." (Pls.' Br. MSJ at 11 n.5.)

Putting aside the fact that the Agency's current position that it can accomplish with an interpretive rule what its predecessor agency tried

unsuccessfully to accomplish with a notice and comment rule, the decisional authority cited by the Agency does not support the 2018 Policy Memo's broadly expanded requirement of a detailed itinerary. For example, in *Matter of J-S-T-*, 2016 WL 3194527 at *3 (AAO May 24, 2016) (non-binding decision), the petitioner sought to employ a prospective visa beneficiary for assistance in developing a "marriage web portal." However, the petitioner failed to provide any evidence regarding the actual stage of the development process for the software portal, including whether the project had even reached a point where a software developer's services were required. *Id.* The petitioner had also made plans to develop an "automobile-training application" but had only engaged in "preliminary discussion with one potential client possibly interested in such a product." *Id.* at *4. The Administrative Appeals Office dismissed the appeal, noting that "[t]he agency made clear long ago that speculative employment is not permitted in the H-1B program." *Id.* at *4 n.3. The issue in *J-S-T-* was not the failure to explain in detail every day to day aspect of the beneficiary's role, but the petitioner's failure to have in effect a concrete employment role for the beneficiary to begin with.

Plaintiffs contend the Agency's requirement of up to three years of granular detail about a beneficiary's day-to-day activities conflates non-speculative *employment* with non-speculative *work assignments*. The Court agrees. Demonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement, but nothing in the statute or

regulation "requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *19.

On a closely related note, the Agency contends that a detailed itinerary is necessary to provide evidence that the employees are serving in a "specialty occupation." The Agency notes that "[t]he regulation requires evidence 'that the services the beneficiary is to perform are in a specialty occupation,' which ***requires knowing what services the beneficiary will actually be performing during the requested validity period***. (Def.'s Resp. at 6 (citing 8 C.F.R. § 214.2(h)(4)(iv)(A), (B)) (emphasis in original).)

The Court quoted the statutory and regulatory definitions of "specialty occupation" in the background section, above. In addition to meeting those definitions, the regulation provides that a position must meet any one of the following four 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.

8 C.F.R. §214.2(h)(4)(iii)(A); *see also Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007) ("To satisfy [8 C.F.R. §214.2(h)(4)(ii)], a position must touch at least one of four overlapping bases.").

In *ITServe*, the Agency attempted to justify the requirement of a detailed itinerary containing specific work assignments by looking to the fourth criterion. Judge Collyer rejected this argument, noting that the fourth criterion is only one of four possible ways to demonstrate service in a specialty occupation. *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *19 ("Criteria one, two, and three address various ways a baccalaureate or other degree may suffice. The fourth criterion does not erase the prior three; to the contrary, it offers an alternative by which a petitioning employer may submit evidence of 'specialized and complex' duties that usually require a degree but which the foreign worker has the experience to perform without such studies."). *See also RELX, Inc. v. Baran*, 397 F. Supp. 3d 41, 45 (D.D.C. 2019) (The petitioner bears the burden of proving that his or her occupation falls within one of the four categories.) (citing 8 U.S.C. § 1361); *3Q Digital, Inc. v. United* States Citizenship & Immigration Servs., No. 1:19-CV-579-RCL, 2020 WL 1079068, at *2 (D.D.C. Mar. 6, 2020) ("If a petitioner proves by a preponderance of the evidence that any one of these four subclauses is satisfied, then the agency must grant the petition").

To the extent that the Agency contends more generally that close scrutiny of daily tasks is necessary in a general sense to determine whether an occupation requires "theoretical and practical application of a body of highly specialized knowledge," this interpretation of the statute fails as well. 8 U.S.C. § 1184(i)(1)(A), INA § 214. Judge Collyer noted that "Congress devised a definition for an 'occupation,' not a 'job.'" *Id.* In rejecting a requirement that a petitioner provide a detailed, day-by-day account of assignments for the entire three year visa period, she noted the importance of this distinction:

> Thus, a specialty occupation would likely encompass a host of jobs, from trainee to expert along with concomitant but differing personal job duties. The statute requires that the petitioning employer only employ those who are qualified in specialty occupations. Nothing in its definition requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition.

Id. The statutory and regulatory definitions of "specialty occupation" are categorical — they focus on specialized knowledge and the ability to apply that knowledge. It is certainly the Agency's prerogative to ascertain generally whether the beneficiary will actually be **serving** in the purported specialty occupation, but that does not extend to micro-managing every aspect of the occupation's duties. The Court explains further by analogy. Many law graduates have passed the bar but, unable to find legal work, have settled for employment which does not involve the practice of law. They are not "serving" in a legal occupation. But plenty of lawyers, working at law firms, have found themselves performing day-to-day tasks which do not involve the practice of law, such as making copies,

sealing and posting envelopes, or organizing files. They are still "serving" as lawyers, because their qualification for the occupation is based on the knowledge they possess and the realistic expectation that they will be able to apply that knowledge. Likewise, Congress did not expect USCIS to analyze the day-to-day activities of H-1B applicants to determine whether the occupation is a specialty occupation, but instead provided guidance for defining specialty occupation categorically based in large part on the qualifications required for the occupations.

Indeed, the requirement of a day-by-day specification of work assignments seems irreconcilable with the very concept of service in a specialty occupation. How can the employer of someone who has "theoretical and practical application of a body of highly specialized knowledge" be expected to know better than the employee what exactly is necessary, on a day-to-day basis, for executing the responsibilities of their position and whether that employee will be working with a team of colleagues or not on floor 1, 2, 3 or 10 on any given day? *See* 8 U.S.C. § 1184(i)(1), INA § 214. Undeniably, "very few, if any, U.S. employer[s] would be able to identify and prove daily assignments for the future three years for professionals in specialty occupations." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *19.

Plaintiffs' final argument against the "Specific Work Assignment Rule" is that, to the extent it seeks to police "benching," or the practice of not paying an employee on an H-1B visa when there is no qualifying work to be done, such

requirement is abrogated by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L. 105-277, 112 Stat. 2681 (October 21, 1998), codified at 8 U.S.C. § 1182(n)(2)(C)(vii).

As the Court noted above, the INS originally proposed a 1998 rule which would have explicitly expanded the itinerary requirement for the purpose of policing against practices such as benching. INS, Proposed Rule, *Petitioning Requirements for the H Nonimmigrant Classification*, 63 FR 30419-01 (1998). However, in 1998, "Congress enacted the ACWIA, to permit employers to place holders of H-1B visas in "non-productive status" as long as the employer continued to pay the approved fulltime wage." *ITServe*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *21. The INS's proposed solution of policing against benching by frontloading scrutiny on H-1B visa petitioners never went into effect.

Thus, Plaintiffs contend that the ability of an employer to place an H-1B beneficiary on paid, non-productive status consistent with the terms of the ACWIA conflicts with the Agency's 2018 requirement that petitioners demonstrate up front that there will be "qualifying work" for every day of the entire visa period. Judge Collyer reasonably accepted Plaintiffs' argument in *ITServe*. *Id*. Judge Collyer's analysis is persuasive. But ultimately, the Court need not reach this issue, as it has already found that statute and regulation do not require a petitioner to submit a detailed itinerary in the way required by the Agency's new interpretive memorandum.

In conclusion, the Court finds that there is no basis in the INA or the Agency's regulations for requiring a petitioner to submit evidence of specific, qualifying work requirements and micro-location information for every single day of the visa period. Accordingly, the Agency's 2018 interpretation of the statute and regulations, as applied in the instant case, is owed no deference. A petitioner may meet its burden of showing non-speculative employment, service in a specialty occupation, and the regulatory requirement of an itinerary, if applicable, without providing evidence with that level of micro-granularity. Once again, if the Agency finds that there is a policy justification for requesting all of this information, it possesses the authority to promulgate new regulations by notice and comment.[5] The Agency instead chose to make use of interpretive rulemaking. "The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez*, 575 U.S. 92, 97 (2015) (citing *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995)). Because the Court finds nothing in the statute or regulations requires a "detailed itinerary" setting forth everything

[5] Absent a fully-developed administrative record, the Court is not in a position to determine whether or not the 2018 Policy Memo is substantively arbitrary and capricious. But the Court harbors serious concerns that requiring the "[t]he names, addresses (including floor, suite, and office) and telephone numbers of the locations where the services will be performed for" a three year period is seemingly "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)).

the prospective visa beneficiary will be doing day by day for three years, there was no interpretive basis for the Agency to suggest that such information is necessary or advisable in most cases to include in connection with an H-1B petition.

IV. Conclusion

Because the challenged denials are "based upon a determination of law" and the Court has determined that the "agency has misconceived the law," the proper remedy is remand to the agency. *Chenery I*, 318 U.S. 80, 94 (1943). Ordinarily, the Court would provide 60 days for the Agency to reconsider its earlier decision on Plaintiffs' Form I-129. However, in light of the fact that the Agency has already had the benefit of the *ITServe* opinion since March 10, 2020, and the potential imminence of the H-1B cap, the Court finds that 30 days is justified under the circumstances.

It is **ORDERED** that Plaintiffs' Motion for Partial Summary Judgment [Doc. 19] is **GRANTED**. It is **FURTHER ORDERED** that these matters are **REMANDED** to the agency for reconsideration consistent with this Order to be completed **NO LATER THAN** Friday, June 19, 2020. The Clerk is directed to close the case.

IT IS SO ORDERED this 20th day of May, 2020.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE