UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK VISCINAGE

SMALL AND MEDIUM ENTERPRISE CONSORTIUM, INC., NAM INFO, INC., AND DEREX TECHNOLOGIES, INC.; Plaintiff, v. Kirstjen NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; L. Francis CISSNA, Director, U.S. Citizenship and Immigration Services, in his official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.	Case No.: MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs petition this Court for a temporary restraining order for "preservation of the status quo while the merits of the cause are explored through litigation." J.O. ex rel. C.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 273 (3d Cir. 2002) (internal quotation omitted). The standards for issuing a TRO are the same as for a preliminary injunction: "(1) a likelihood of success on the merits; (2) [the plaintiffs] will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief." Miller v. Mitchell, 598 F.3d 139, 147 (3d Cir. 2010).

I. INTRODUCTION

Prior to 1990 the Immigration and Naturalization Service ("INS," "Defendant"), Defendant United States Citizenship and Immigration Service's ("USCIS," "Defendant") predecessor in interest, was the sole agency authorized by Congress to regulate the admission of the "H-1" visa category for non-immigrant professional workers of distinguished merit and ability. Immigration and Nationality Act ("INA"), Pub. L. 414-168, June 27, 1952. Section 101(a)(15)(H).

In 1990 Congress overhauled the Immigration and Nationality Act ("INA"), altering the professional H-1 visa category. Pub. L. 101–649, 104 Stat 4978, November 29, 1990. Codified at 8 U.S.C. § 1101(a)(15)(H)(i)(b). Congress

permitted foreign professional employees in "specialty occupations" to work in the US for three-year increments ("H1B"). Id.

Congress stripped Defendant of its previous unfettered authority over non-immigrant professional visas, and split jurisdiction between the Department of Labor ("DOL") and Defendant. 8 U.S.C. §§ 1182(n), (p) and 1184(i) respectively. The new H-1B process begins with "employers" filing a labor condition application ("LCA") with DOL. Id. DOL has broad enforcement powers to protect US workers' wages and working conditions and to enforce the terms of the LCA. 8 U.S.C. §§ 1182(n) and (p). On the LCA "employers" list the occupation, duration of the LCA validity period, prevailing wage, and "area of intended employment." Employers agree to be bound by DOL's enforcing regulations and submit to DOL's enforcement jurisdiction. 20 C.F.R. § 655.700 et seq.

DOL crafted its enforcement regulations through multiple rounds of notice and comment rulemaking. DOL determined who was an "employer" under the H-1B program and thus eligible to file LCAs. DOL explicitly stated it would not exclude or otherwise create special eligibility requirements for "job contractors" in the H-1B process. The term "job contractor" refers to an employer whose employees perform work at job sites of other employers but who are paid by the job contractor and are its employees. 56 Fed. Reg. 37175, 37178, August 5, 1991. DOL understood that "job contractors" who signed the LCA would place employees at

third party worksites and both entities would share common law attributes of an employer employee relationship. Id. This understanding is evident in DOL's definition and comments on the definition.

DOL also regulated the "area of intended employment," which is pivotal in establishing the prevailing wage requirement. 8 U.S.C. 1182(p), 20 C.F.R. §§ 655.715; 655.730(c)(5) (regarding wages when employees will work in multiple locations); 20 C.F.R. § 655.735 (defining responsibilities for short term placement of employees at alternate worksites and change of area of intended employment).

The INA also allows employers to place their H-1B employees in a "non-productive status" provided the employer continues to pay required wages. 8 U.S.C. § 1182(n)(3)(c)(vii). DOL regulated when and how employers are obligated to pay wages when the employer is in non- productive status. 20 C.F.R. § 655.731(c)(7)(i) and (ii).

Under the 1990 INA, Defendants' adjudicatory role in the H-1B program is confined to: determining if the position qualifies as a "specialty occupation;" and, if the foreign employee meets the minimum requirements for that position. 8 U.S.C. 1184(i). Nothing in this subsection of the INA mentions "employers," "area of intended employment," or "itineraries."

On February 22, 2018, Defendants published PM-602-0157, Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites. PM-

602-0157 only applies to employers considered to be "job contractors." PM-602-0157 creates special eligibility requirements for job contractors and requires evidence that the employer maintains exclusive right to control "when, where, and how the beneficiary performs the job." It also requires the employee's "end-product" be "related to the petitioner's line of business." PM-602-0157 requires employers provide an "exact" itinerary showing dates and places an H-1B employee will work for up to three years. It also requires evidence that the H-1B employee will has "specific and non-speculative" assignments that cover the entire requested validity period (up to three years).

PM-602-0157 contradicts DOL's definition of "employer" and regulations governing "area of intended employment." PM-602-0157 also explicitly contradicts the statute's explicit allowance of "non-productive status." Defendants lack statutory authority to make these legislative rules.

At present, job contractors can comply with the statute and DOL's regulations governing the LCA: the first step in the H-1B process. However, job contractors are now excluded from the H-1B process by Defendants requirements.

In resolving this motion for preliminary injunctive relief, this Court must first determine if Plaintiff is likely to succeed on the merits, and determine:

1. Which agency did Congress give authority to define the term "employer" and create rules implementing "area of intended employment?"
2. What statutory authority allows Defendant to enforce its definition of "employer" and rules for "area of intended employment?"

3. What statutory authority allows Defendant to demand employers prove they have "specific and non-speculative" assignments for H-1B employees to perform for the duration of their visa stay?

Plaintiffs will succeed on the merits. The above requirements published in PM-602-0157 are unlawful and violate every conceivable tenet of the Administrative Procedures Act.

II. LEGAL BACKGROUND

A. ADMINISTRATIVE PROCEDURES ACT

1. Legislative and Interpretative Rules

Federal Agency rules are either "legislative" or "interpretative." 5 U.S.C. § 553. Legislative rules have the force and effect of law and require notice and comment rulemaking under 5 U.S.C. § 553. United States v. Reynolds, 710 F.3d 498, 519-520 (3rd Cir. 2013) (invalidating DOJ's sex offender registration rule for failure to conduct notice and comment rulemaking) citing Morton v. Ruiz, 415 U.S. 199, 232, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). A rule has the force and effect of law "if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule."

Notice and comment rule making creates predictability for the regulated environment by preventing the "inherently arbitrary nature of unpublished ad hoc determinations." Dia Navigation Co. v. Pomeroy, 34 F.3d 1255, 1264-1266 (3rd. Cir. 1994). Although, mere "publication in the Federal Register" does not mean the

matter is a [legislative rule].” Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986).

Interpretive rules do not require notice and comment. Interpretive rules do not “fill gaps” in the statute, but closely track the language of existing law, and their “validity stands or falls on the correctness of the agency's interpretation of those provisions.” Dia Navigation, at 1264 (citing United Technologies Corp. v. EPA, 821 F.2d 714, 719-20 (D.C. Cir.1987) (resolving ambiguity is precisely what agencies do when making [legislative rules]). Typically, agencies are not required to place interpretive rules or “policy statements” in the Federal Register for notice and comment. However, if a “policy statement” or interpretive rule “repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.” American Mining Congress, 995 F.2d at 1109.

The Third Circuit considers if a policy statement is a legislative rule, requiring notice and comment rulemaking, by whether:

- is based on an agency's power to exercise its judgment resolving statutory ambiguity. Id. at 1264 (citing United Technologies Corp., 821 F.2d at 719-20, see also American Mining Congress, 995 F.2d at 1110;
- it contradicts or conflicts with the earlier regulation. Dia Navigation Co., 34 F.3d at 1264-1266; or,
- it alters or creates rights and duties Dia Navigation Co., 34 F.3d at 1264-1266. (invalidating INS policy memorandum that required airlines to detain individuals because it altered rights and burdens).

According to Dia Navigation Co., 34 F.3d at 1264, "interpretative rules typically involve construction or clarification of a statute or regulation. Internal citations omitted (emphasis added). Interpretive rules are not binding, but courts may give them "respect" under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), "to the extent it has the power to persuade." Respect depends on the "thoroughness evident in [an agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements consistency of agency policy…" State Dep't of Natural Res. & Envtl. Control v. US Army Corps of Eng'Rs, (3rd. Cir. 2012).

2. Authority to Create Legislative Rules

Determining rulemaking authority is simple when a statute is administered by one agency ("unitary model"). However, when a statute requires multiple agencies to execute the law, the Courts must decide which agency has rulemaking authority over a given term. Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (finding the agency with technical expertise and enforcement authority was delegated rule making authority over key terms in the statute), Gonzales v. Oregon, 546 U.S. 243, 260 (2006) (the Attorney General lacked authority to make regulations under the Controlled Substances Act (CSA) that "define standards of medical practice."), Gerbier v. Holmes, 280 F.3d 297, 302 (3rd. Cir. 2002), quoting Drakes v. Zimski, 240 F.3d 246,

250 (3d Cir. 2001) ("Chevron deference is not required where the interpretation of a particular statute does not 'implicate[] agency expertise in a meaningful way…'").

Agencies must have statutory authority for the legislative and interpretive rules they create. Gonzales v. Oregon, 546 U.S. 243, 256 (2006), citing United States v. Mead Corp., 533 U.S. 218, 226-227 (2001) (Courts determine if an agency has authority by examining the language and structure of the statute).

When Congress delegates enforcement authority and the agency proceeds with "notice-and-comment rulemaking, that [] is a 'very good indicator' that Congress intended the regulation to carry the force of law, so Chevron should apply." Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125, 195 L. Ed. 2d 382, 392 (2016). However, failure to explain rules or follow rulemaking requirements may render them unenforceable. Id.

The common theme in shared jurisdiction cases is that courts will only allow enforcement of a rule created by the agency with: 1. technical experience; 2. the ability to give meaningful guidance to the regulated community; 3. and, the need for consistent definitions for enforcement authority.

3. Chevron Deference to Legislative Rules

Under Chevron Step One, legislative rules are enforceable if they implement an explicit statutory requirement. However, an agency rule is not enforceable if it contradicts the statute or otherwise renders a term in the statute "largely

meaningless." See Shalom Pentecostal Church v. DHS, 783 F.3d 156, 165 (3rd. Cir. 2015) (regulatory requirement that immigrant worked in a continuous lawful status failed Chevron Step One because it rendered a term in the statute meaningless).

Chevron Step Two requires courts to defer to an agency's statutory interpretation if it reasonably exercised its statutory authority to fill in the gaps or resolve statutory ambiguities. Chevron, 467 U.S. at 837.

Deference is not automatically given to an agency's legislative rule merely because it has the primary, yet shared role, in a statute's implementation. Gonzales, 546 U.S. at 265 (invalidating the Attorney General's interpretive rule under the Controlled Substances Act because he lacked expertise over medical issues).

Failure to explain the rationale for a regulation strips away deference. Gonzales, 546 U.S. at 257. Likewise, a rule that "parrots" the language of the statute receives no deference., see also Fogo de Chao, Inc. v. DHS, 769 F.3d 1127, 1136 (D.C. Cir. 2014) (no deference because the agency displayed no expertise).

Legislative rules are only enforceable when they are based upon the agency's expertise and the agency explained the rationale in the rulemaking process. See Encino Motorcars, 136 S. Ct. at 2125.

4. Auer Deference to Legislative Rules

Courts will defer to an agency's interpretation of its own ambiguous, properly created, legislative rule. Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137

L. Ed. 2d 79 (1997). A regulation is ambiguous when "it is not free from doubt, and where no particular interpretation of the regulation is 'compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of promulgation of the regulation.'" Sec'y of Labor v. Beverly Healthcare-Hillview, 541 F.3d 193, 198 (3rd. Cir 2008) (analyzing the regulation for indicia of a particular meaning of the word "cost.") quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994).

The "intent [of the rule] at the time of promulgation" is the basis of Auer deference. Regulations that predate a statute cannot be grounds for enforcement because the intent of the regulation is unrelated to the new law. Gonzales, 546 U.S. at 258 ("The regulation was enacted before those amendments, so the Interpretive Rule cannot be justified as indicative of some intent the Attorney General had in 1971").

Auer deference is not warranted when an agency regulation is not based on its own expertise, but merely parroted the statute. Hagans, 694 F.3d at 295 citing Gonzales, 546 U.S. at 257.

An agency who copies, or parrots, another agency's regulation is not entitled to Auer deference because it has not exercised its competence and experience City Club of N.Y. v. United States Army Corps of Eng'rs, 246 F. Supp. 3d 860, 869,

(S.D.N.Y. 2017) (Army Corps of Engineers was not entitled to Auer deference on its regulation that it copied from EPA).

B. IMMIGRATION AND NATIONALITY ACT

Congress overhauled the Immigration and Nationality Act in 1990, creating a new visa category that allowed professional employees in "specialty occupations" to work in the US for three-year increments ("H1B"). Pub. L. 101–649, 104 Stat 4978, November 29, 1990. Codified at 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

The visa category is eligible for:

> an alien …who is coming temporarily to the United States to perform services … in a specialty occupation described in section 1184(i)(1) of this title… who meets the requirements for the occupation specified in section 1184(i)(2) of this title… and with respect to whom the Secretary of Labor determines and certifies to [Defendant USCIS] that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title…

8 U.S.C. § 1101(a)(15)(H)(i)(b).

As seen above, Congress split enforcement of this new visa category between DOL and Defendants' predecessor, the Immigration and Nationality Service (INS). Id., delegating authority to DOL at §§1182(n), (p) and to Defendant at 1184(i).

By statute, the H-1B process begins with the Secretary of Labor "determin[ing] and certif[ing] that the intending **employer** has filed [] a Labor Conditions Application under section 1182(n)." 8 U.S.C. § 1101(a)(15)(H)(i)(B) (emphasis added). The "employer" completes and signs the Labor Conditions Application (LCA) and agrees that it will:

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

Id. at § 1182(n)(1)(A)-(E).

DOL has vast and exclusive powers to enforce the terms of the LCA and penalize "employers" who violate them. Id. at § 1182(n)(2). Defendants regulations confirm DOL's exclusivity in this role. 8 C.F.R. § 214.2(h)(4)(i)(B)(5).

1. Definition of Employer

By completing and signing the LCA the "employer" is subject to DOL's jurisdiction and enforcement authorities for the duration of the H-1B visa and one year after. 8 U.S.C. § 1182(n)(2).

Nothing in the INA further defines an H-1B "employer." Nothing in the INA references: "employers who place employees at third party worksites," "job contractors," "consulting companies," or "staffing companies."

a. DOL's Definition of Employer under 1990 INA

After the 1990 INA was passed, DOL issued an Advanced Notice of Proposed Rulemaking (ANPRM) to implement the H-1B program. 56 Fed. Reg. 11705-11712, March 20, 1991.

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

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

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

Id. at 37178.

DOL then published its proposed rule, and again solicited comments. In the rule DOL provided a definition of "employer:"

> [a] person, firm, corporation, **contractor**, or other association or organization in the United States:
>
> (1) Which suffers or permits a person to work within the United States;
> (2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it **may** hire,

> pay, fire, supervise **or** otherwise control the work of any such employee; and
>
> (3) Which has an Internal Revenue Service tax identification number.

Id. at 37182, (emphasis added).

It is noteworthy that in subclause (2), DOL provided a list of factors that any one or more of which were sufficient to establish an employer employee relationship. See id. (list beginning with the permissive "may" and including the disjunctive "or"). This captures DOL's understanding that job contractors would share aspects of the employer-employee relationship with the third-party worksite.

Several times throughout the rule making process DOL determined that "job contractors" would not be excluded from the definition of "employer" and that they would not be subject to special eligibility or filing for H-1B visas. 56 Fed. Reg. 54720-54739, October 22, 1991. 57 Fed. Reg. 1316-1338, January 13, 1992. 59 FR 65646, December 20, 1994.

DOL stated that it "considered carefully the comments concerning the job contractor concept as proposed and has decided-at this time-not to establish special procedures applicable only to those businesses operating as job contractors." 59 FR 65646, 65651 (emphasis added).

DOL's final definition of an H-1B "employer" was substantially the same as a prior definition DOL had utilized for nonimmigrant agricultural and logger laborer regulations under the prior statute, which read:

> "Employer" means a person, firm, corporation or other association or organization which suffers or permits a person to work …

20 C.F.R. §§ 655.100(b) and 655.200(c) (1990).

The final definition in 20 C.F.R. § 655.715 added the word "contractor" to the list of entities that are "employers," reflecting the consummation of DOL's decision making process that "job contractors" were proper "employers."

b. Defendant's Definition of Employer under the 1990 INA

On July 11, 1991, Defendants published a Notice of Proposed Rulemaking, and solicited comments on its draft rule to implement the 1990 INA. 56 Fed. Reg. 31559-31563, July 11, 1991. This proposed rule did not include a definition of "employer." See id.

However, when Defendant published its final rules implementing the H-1B statute, it included a verbatim copy of DOL's definition of "employer." 56 Fed. Reg. 61111, 61121, December 2, 1991, promulgated at 8 C.F.R. § 214.2(h)(4)(ii). Defendant stated that the reason for the inclusion was to explain that only "employers" with a physical presence in the United States could file visa petitions. In particular, they stated:

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

56 Fed. Reg. 61111-61121 (emphasis added).

The intent of the definition had no application to job contractors or their need to maintain exclusive right to control H-1B employees. Id. Defendants' discussion in the Federal Register coupled with the lack of notice for the definition show a lack of intent to create a legislative rule with the force and effect of law. See American Mining Congress, 995 F.2d at 1109. Defendants are not legally able to use this rule to create of new legal burdens and binding definitions of terms in that provision.

Not only did Defendant copy, or "parrot," DOL's definition of employer, but it appears to have agreed with DOL that job contractors or "staffing companies" fell under the statutory definition of "employer." See 63 Fed. Reg. 30419-30423, June 4, 1998 (discussing staffing companies and the use of H-1B visas).

c. DOL's Definition of Employer under 1998 ACWIA

Congress amended the H-1B category in 1998, substantially adding to DOL's LCA enforcement and oversight powers in 8 U.S.C. § 1182(n). American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV, Pub.L. 105-277 (October 21, 1998). ACWIA empowered DOL to ensure US employers were not displacing US workers with H-1B employees. 8 U.S.C. § 1182(n)(2)(E)-(G).

ACWIA also gave DOL enhanced enforcement powers to ensure employers were complying with the LCA and paying the wage required. 8 U.S.C. §

1182(n)(2)(C)(vii). Congress did not require employers have "specific and non-speculative" assignments at the time of filing, nor did Congress forbid employees from using H-1B visas for speculative work projects. Congress allowed speculative hiring but required employers to pay H-1B employees the required wage if there was insufficient work to perform (referred to as "non-productive status"). 8 U.S.C. § 1182(n)(3)(c)(vii). The requirement to pay in non-productive status is referred to as the "anti-benching" provision. Congress also gave DOL authority to force employers to given "benched" employees back pay. Id.

Under 8 U.S.C. § 1182(n)(2)(C)(vii) H-1B employers who signed the LCA have two options when they do not have work for an H-1B employee to perform: 1. Terminate the employee, end the employee's work authorization, and pay to return the employee to their home; or, 2. Continue to pay the wage required on the LCA until there is work to perform. Id.

ACWIA also prohibited "H-1B dependent employers" from placing employees with employers who had laid off US employees in the past ninety (90) days. 8 U.S.C. 1182(n)(2)(F), 8 U.S.C. § 1182(n)(3)(A). 8 U.S.C. § 1182(n)(2)(E). Congress did not prohibit granting visas to employers for H-1B employees, it only prohibited employees being "placed" where US workers had been laid off.

DOL recognized there could be direct (the US employer signs the LCA and places the employee on their payroll) and secondary displacement (a US employer

utilizes a job contractor to fill a position). DOL's rule prohibiting secondary displacement further shows its view that petitioning H-1B employers and third-party worksites share aspects of control over employees. See 65 Fed. Reg. 80110, 80141-45. DOL did not object to shared aspects of the employment relationship unless it violated the statute prohibiting displacement. Id. and 20 C.F.R. § 655.736(a)(2)(i).

DOL updated its definition of employer to define who qualifies as an employer, and who is liable for violating the protections in the H-1B program. The new definition reads:

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

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

In making regulations under ACWIA, DOL endorsed the standards the Internal Revenue Service and the Equal Employment Opportunity Commission (EEOC) applied to determine employment relationships in the job contractor ("staffing company") context. Id. citing EEOC Policy Guidance on Contingent Workers, Notice No. 915.002 (Dec. 3, 1997).

The EEOC memo states that both the staffing company and the client have indicia of an employer-employee relationship, and provides this example of an "employer:"

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

Id.

Nothing in that discussion or the final regulations implies that an H-1B employer must control all aspects of the employee's day to day operations and production. Id. Nothing in DOL's regulatory history indicates that a job contractor's employee's "end-product" will be "related to the petitioner's line of business." The intent of the regulations as discussed in the Federal Register are clear: DOL does not prohibit job contractors and third-party worksites from sharing aspect of control over the H-1B employee.

d. Defendant's Definition of Employer under 1998 ACWIA

ACWIA did not add to or change Defendants' authority under 8 U.S.C. § 1184(i). Defendants did not change their view that job contractors were "employers"

until January 8, 2010, when releasing a memo titled: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" ("Employer-Employee Memo," "EEM"). PM-602-0157 incorporates and adopts this memo and its requirement that job contractors prove they have exclusive right to control "when, where, and how the beneficiary performs the job." It also requires the employee's "end-product" be "related to the petitioner's line of business." These requirements are not found in Defendants' regulations nor in its regulatory history.

Defendants claim the EEM relies on DOL's definitions of "employed by the employer" at 20 C.F.R. § 655.715 (2010). EEM, Pg. 2, Note 1. However, a reading of the regulations and rulemaking proceedings is completely at odds with this conclusion. See 65 Fed Reg 80110, 810141-42. The EEM does not discuss DOL's new expanded definition of employer or how that impacts Defendants' new interpretation of its authority under the INA.

2. Prevailing Wage, Area of Employment

a. DOL's Authority

The INA delegates authority to DOL to ensure H-1B employees are not paid less that the "prevailing wage" for the "area of intended employment." 8 U.S.C. § 1182 (n)(1)(A)(i)(II). The term "area of employment" is only used in the context of

setting wages and prohibiting displacement: both areas Congress has delegated DOL enforcement authority.

DOL's final prevailing wage rule requires employers to identify the occupational code, offered wage, dates of intended employment, the area of intended employment, and the prevailing wage based on those factors. 20 C.F.R. § 655.730 (c)(4). The regulation also has extensive provisions covering short-term work outside the area of intended employment listed on the LCA. 20 C.F.R. § 655.735. This allows employers "flexibility." Id. at § 655.735(e). Employers may reassign an H-1B employee to a new area of employment provided they complete an updated LCA showing the appropriate wage for the new location. Id. at 655.735(g).

The statute does not require employers to provide an exact itinerary showing where employees will be and what projects they will work for the duration of the LCA validity period. Nor does the statute require the employer show "specific and non-speculative" employment. The statute allows employers to keep employees in a "non-productive status" with no work to perform, provided they continue to pay the required wage.

b. Defendant's Claimed Authority

Defendants have not attempted to create a separate definition of "area of intended employment." However, Defendants require H-1B employers to comply with the regulation at 8 C.F.R. 214.2(h)(2)(i)(B), which states:

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

This rule was not created to implement Defendants' authority under the 1990 INA, rather it was created under the 1952 INA, and:

> consolidates into regulations for the H-1, H-2B, and H-3 classifications the Service's interpretation of the statutory, requirements, definitions of terms, standards for eligibility, and documentary requirements for establishing eligibility.

55 Fed. Reg. 2606, 2620, January 26, 1990 (Under the 1952 INA nonimmigrant visas included distinguished merit and ability (H-1), laborers (H-2), and trainees (H-3)).

When Defendant issued proposed regulations and final regulations under the 1990 INA it did not include the text of this section for notice and comment. 56 Fed. Reg. 31553. Defendants included it, unchanged, in the final regulation without the text, comment, or discussion of how a regulation from a prior statute was relevant to the H-1B category. 56 Fed. Reg. 61111. Nor did Defendants explain how it had authority for the rule, given the new statute delegated authority to DOL over the area of intended employment.

In 1998 Defendant issued a notice to rescind the itinerary rule, acknowledging the above legal infirmities. According to Defendants, the itinerary rule was

primarily applicable to traveling entertainers of distinguished merit and ability who received H-1 visas. INS went on to say:

> …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…
>
> Moreover, some employers who use the H-1B classification may have a legitimate, but unforeseeable, need to transfer their employees on short notice from one work site to another within the organization, such as from the employer's Los Angeles office to its New York office. Under the current regulation, however, such an employer is required to submit with its petition a complete itinerary listing all of the locations where the contract workers will be employed. The regulation as now written, therefore, does not fully reflect current legitimate business practices.

63 Fed. Reg.30419, emphasis added.

Defendants never countermanded this notice of rescission. They just failed to complete the process. However, Defendants are on record, and have definitively provided the intent of the regulation, and conceded it lacks authority in the statute.

COUNT I

A. DOL was Given Authority to Define and Control who is an "Employer" in the H-1B program: Defendants' Lack Statutory Authority to Define

the Term, PM-602-0157 are 8 C.F.R. § 214.2(h)(4)(ii) are Ultra Vires and Otherwise Unenforceable

1. Statutory Authority to Define Employer

This Court will invalidate Defendants' special eligibility requirements for job contractors in PM-602-0157 because Congress gave DOL sole authority to regulate the terms and conditions of the LCA, including "employer" and "area of intended employment."

Congress delegated authority to the Labor Department to define "employer." Compare Sections 101(a) (15), 214(c) Pub. L. 414-168 (June 24, 1952), and 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), (p), 1184(i). Section 1182(n) describes an "employer's" responsibilities and DOL's enforcement power. "Employers" sign an LCA seeking to hire an H-1B employee, and attest to future compliance with the rules. DOL protects US workers' wages and working conditions by investigating and penalizing "employer" violations of the LCA. The majority of DOL's enforcement power is applied against "employers," a term that requires uniformity for consistent enforcement. See Martin, 499 U.S. at 152-153 (DOL's need to enforce the statutory provisions required it to have a consistent definition).

In contrast, Defendant's' adjudications authority is listed in § 1184(i), and is limited to determining if a position qualifies as a "specialty occupation." Section 1184(i) does not mention "employer," nor is that term needed for Defendants' determination on specialty occupation.

Based on the analysis in Martin, DOL is the only agency with the authority to define who is an "employer" and Defendants must acquiesce to that understanding. Gonzales, 546 U.S. at 265, and Gerbier, 280 F.3d at 302 (3rd. Cir. 2002) (only the agency with technical expertise over the statute's subject matter has authority to make rules).

Aside from the fact that defining and regulating the US labor market is DOL's mission, its competence was displayed in the rulemaking process. Encino Motorcars, LLC, 136 S. Ct. at 2125 (agencies who conduct notice and comment rulemaking are presumed to have authority to create regulations with force and effect of law). After multiple rounds of notice and comment addressing this very definition, DOL determined that job contractors were H-1B "employers." Defendants by contrast copied DOL's rule, inserting it in their final rule without ever providing notice or comment. Defendants have nothing in the rule making process that shows their definition at 8 C.F.R. § 214.2(h)(4)(ii) was the "consummation" of the agency's deliberative process and exercise of special expertise. Under Encino Motorcars this procedural violation alone is sufficient to invalidate Defendants' definition of employer.

Authority to define "employer" is centered on: DOL's expertise in the labor market; the importance of the term to enforcing DOL's mandate under the statute;

and the careful consideration DOL has given this issue through regulation. Hagans, 694 F.3d at 300. Defendant meets none of these criteria.

This is a conclusion Defendants appeared to accept when publishing the final rule at 8 C.F.R. § 214.2(h)(4)(ii), proclaiming their definition was a "clarification" and thus not a binding legislative rule. Defendants now assert their definition of "employer" is a legislative rule, and their new requirements are merely interpretations. Beyond the procedural and factual flaws with this approach, Defendants' definition of "employer" is invalid because like the agencies in Gonzales, 546 U.S. at 265, and Gerbier, 280 F.3d at 302 (3rd. Cir. 2002), Defendants lack the subject matter expertise needed to give meaningful guidance to the regulated community.

The only definition of "employer" that Congress intended to have the force and effect of law was created by DOL. DOL's understanding of that term is binding on Defendants. Defendants refusal to allow shared control of employees between the "employer" and the third-party worksite is unlawful. Defendants demand that employers provide contracts and documentation showing exclusive right to control is unlawful.

2. Defendants Definition of "Employer" at 8 C.F.R. 214.2(h)(4)(ii) is at Best an "Interpretive Rule," and Defendants' New Definitions of Employer Contradict the Intent of the Regulation

Defendants definition of "employer" at 8 C.F.R. § 214.2(h)(4)(ii) is, at best, an interpretive rule. Defendants' statements in the Federal Register that accompany the final regulation at 8 C.F.R. 214.2(h)(4)(ii) state its purpose was merely to "clarify" that only employers with a presence in the United States could file for H-1B visas. Even if Defendants had statutory authority to create an interpretative rule governing who is eligible to participate in the H-1B program, that regulation is not a binding legislative rule because it was not posted for notice and comment, and it only "clarifies" a term in the statute. Dia Navigation Co., 34 F.3d at 1264. Defendants cannot use a non-binding interpretative rule to bootstrap onerous legislative requirements without notice and comment rulemaking.

Defendants added their "clarification" at 8 C.F.R. 214.2(h)(4)(ii) to explain petitioning employers must have a physical presence in the US. Defendants now add to that definition through PM-602-0157 and require that: the petitioning H-1B employer have an exclusive right to control "where, when, and how the H-1B employee performs their work;" and, the H-1B employee's work is related to the petitioning employer's line of business."

Defendants did not create the language in their regulation at § 214.2(h)(4)(ii). The intent of the language when DOL created it was to allow job contractors to participate in the H-1B program. Defendants requirements in PM-602-0157 clearly contradict the intent of the regulation when DOL created it.

Even if Defendants claimed their "clarification" had the force and effect of law and stands apart from DOL's stated intent, the intent of the regulation at the time Defendants published it was to require a physical United States worksite. There was nothing in the Federal Register discussing a prohibition on job contractors or requirement for exclusive right to control the H-1B employee's work.

COUNT II

A. PM-602-0157 is a Legislative Rule Requiring Notice and Comment

1. Notice and Comment Requirement

The Third Circuit has observed three significant factors for identifying "legislative" rules that require notice and comment: 1. Whether the rule conflicts with a prior legislative rule; 2. Whether the rule requires "gap filling;" and, 3. Whether the rule alters rights or legal burdens. Dia Navigation, 34 F.3d at 1264.

a. PM-602-0157 Contradicts 8 C.F.R. § 214.2(h)(4)(ii)

First, policy memoranda that conflict with regulations are legislative rules. Dia Navigation, 34 F.3d at 1264-1266. The requirements in PM-602-0157 that employs must have exclusive right to control H-1B employees, and the employee's work must be related to the employer's line of business contradict the existing regulations.

The regulation DOL created, and Defendant adopted, was modified from a regulation DOL used for nonimmigrant laborers under the prior INA. 20 C.F.R. §§

655.100(b) and 655.200(c) (1990). That regulation listed the following types of employers: "person, firm, corporation or other association or organization." Id. Following DOL's rulemaking and discussion about "job contractors," DOL published its rule, adopting the above list and including "contractor." 20 C.F.R. § 655.715 (1994). The term "contractor" is an explicit reference to job contractors or staffing companies. See 56 Fed. Reg. 54720-54739, October 22, 1991.

The language of subclause (2) of the definition now found at 8 C.F.R. § 214.2(h)(4)(ii) reads: "Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it **may** hire, pay, fire, supervise **or** otherwise control the work of any such employee."

The use of the permissive "may" and disjunctive "or" mean that the employer can satisfy the requirements by one or more of those factors. This is in keeping with DOL's understanding that job contractors would be placing employees at third party worksites. See 57 Fed. Reg. 1316-1338, 56 Fed. Reg. 54720-54739, 56 Fed. Reg. 37175-37194. This is an understanding Defendants apparently shared. See 56 Fed. Reg. 61111, 61121 (staffing companies often times only have a day's advance notice before placing an employee at a third-party worksite).

DOL was completely aware of the structure and business model of job contractors and staffing companies. When DOL discussed these employers, it referenced their ability to hire, fire and pay employees. See 57 Fed. Reg. 1316-1338,

56 Fed. Reg. 54720-54739, 56 Fed. Reg. 37175-37194. DOL did not discuss a need to supervise or otherwise control H-1B employees placed at third party worksites.

At the time Defendants adopted 8 C.F.R. §214.2(h)(4)(ii) both the job contractor "employer" and third-party worksite employer were understood to share aspects of the employer-employee relationship. PM-602-0157, and the Employer-Employee Memo, contradict the intent of that regulation and demand evidence that the H-1B employer maintains all aspects of control.

However, the text of the regulation at § 214.2(h)(4)(ii) and its previously stated intent are contradicted by Defendants' PM-602-0157 and its adoption of the Employer-Employee Memo. PM-602-0157 now requires employers to provide evidence in the form of contracts or statements of work to establish that they will maintain exclusive control over the employee for the duration of the validity period. Id. at 5-6. Defendants demand that employers control the day to day operations and work of the employee. Id. This is a standard that contradicts the language and intent of the rule when it was promulgate. Gonzales, 546 U.S. at 258.

PM-602-0157 requires evidence that the employee will become "part of the petitioner's regular business operations." This memo eliminates the ability for the H-1B employer and the worksite to share common law aspects of control. Id. at 3-6. This is the type of contradiction that invalidated INS regulations in Dia Navigation, LLC. 34 F.3d at 1264-1266. Even if Defendants had authority to create

an interpretive rule over its definition of "employer," it would still be unlawful because it is not "consistent and contemporaneous with other pronouncements of the agency." State Dep't of Natural Res. & Envtl. Control, 685 F.3d 259, 283 (3rd. Cir. 2012).

b. PM-602-0157 Requires Gap Filling

Statements of policy that closely track the statutory language are "interpretive" not "legislative" rules. Id. at 1264 (citing United Technologies Corp. v. EPA, 261 U.S. App. D.C. 226, 821 F.2d 714, 719-20 (D.C. Cir.1987) (resolving ambiguity is precisely what agencies do when making regulations). Conceptually, interpretive rules are given as much deference as regulations that parrot the statute. See Fogo de Chao (Holdings) Inc. v. United States Dep't of Homeland Sec., 769 F.3d 1127, 1136 (D.C. Cir. 2014) (no deference is due to regulations that parrot the language of the statute).

Legislative rules require the agency to use its expertise to fill in the gaps or resolve ambiguity in the statute. Dia Navigation, LLC. 34 F.3d at 1264-1266.

PM-602-0157 creates two requirements not found in the statute or regulation: a definition of "employer;" and evidence of "specific and non-speculative" assignments at the time of filing. These rules do not closely track the statute or regulatory language. In fact, the Labor Department deemed the term "employer"

was sufficiently ambiguous that it needed to conduct notice and comment rulemaking to consider if it was authorized to make special rules for job contractors.

PM-602-0157 explicitly creates special rules for job contractors. This rule is not based on the express language of the statute, nor is it based on the express language of the regulation. Defendants are attempting to create a new standard based upon an ambiguity in the statute. An ambiguity that DOL has already fully analyzed. Alternatively, Defendants hold the position that they not only have authority to define the term "employer," but that the statute is so supportive of their position that they need not undertake notice and comment rulemaking to support different rules for job contractors. Either approach is unsupportable by the law. United Technologies Corp., 821 F.2d at 719-20 (resolving ambiguity is precisely what agencies do when making [legislative rules]).

Even if Defendants had authority to define the term "employer" they must conduct notice and comment rulemaking to create special rules for job contractors. Any rules requiring employers show exclusive "right to control" are legislative and unenforceable unless created in accordance with 5 U.S.C. § 553. Any evidentiary requirement tied to establishing an employer's exclusive right to control is unlawful and unenforceable.

Likewise, although Defendants' claimed authority for the requirement under 8 U.S.C. § 1184(i), the term "specific and non-speculative" assignment has no

statutory mooring. PM-602-0157 does not provide statutory or regulatory language that they are closely following. This term has been created by Defendants from whole cloth. It can only be an attempt to fill in a gap, which requires notice and comment rulemaking. This requirement is unlawful.

c. PM-602-0157 Creates Evidentiary Burdens

Defendants have articulated a new standard of "employer" and have required H-1B petitioners to provide evidence to support this new rule. Adjudicators are required, by the terms of PM-602-0157, to ask for contracts proving the employer meets the new definition of "employer." Id. at 2 (the prior memo was erroneously interpreted to allow processing of applications without evidence of contracts). Failure to comply will result in denial.

Count III

A. Defendants' Regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) is Ultra Vires and Violates the Express Terms of the Statute

1. 8 C.F.R. § 214.2(h)(2)(i)(B) (Itinerary) is Ultra Vires

DOL is required by statute to know the "area of intended employment" for determining and enforcing the required LCA wage. § 1182(n)(1)(A). However, nothing in the statute indicates Defendant has a role in the LCA process. Compare §§ 1182(n)(1)(A) and 1184(i). Nothing in Section 1184(i) of the INA mentions the need for itineraries or even the area of intended employment.

Defendants' cannot argue that this regulation is a reasonable interpretation of an ambiguity in the statute under Chevron Step Two. The itinerary regulation was not created to implement new statutory authority under 8 U.S.C. §§ 1101(a)(15)(H)(i)(B) or 1184(i). It was promulgated under the prior INA, before the term "specialty occupation" had been entered the INA. 55 Fed. Reg. 2606, 2620, January 26, 1990. Defendants all but admitted the section was ultra vires because:

> as previously indicated, the regulatory requirement relating to the submission of a complete itinerary was geared primarily for the entertainment industry, which, in light of changes under the Immigration Act of 1990, generally no longer uses the H-1B nonimmigrant classification. While it is preferable that all H-1B petitions be accompanied by complete itineraries listing the dates and places of the alien's employment, the Service recognizes such an across-the-board requirement is no longer practical in today's business environment.

63 Fed. Reg.30419-20.

As noted in Gonzales, 546, U.S. at 258, the intent of the regulation at the time it was created is controlling. The intent of the itinerary regulation was to monitor entertainers coming to the US under the prior statute. Defendants have conceded this point. See 63 Fed. Reg.30419-20. They are unable to enforce the regulation based upon a new theory that did not apply when the H-1B statute was created. Gonzales, 546 U.S. at 258.

2. **8 C.F.R. § 214.2(h)(2)(i)(B) Violates the Statute**

The statute does not require employers to provide Defendants with an itinerary or prove three years' worth of "specific and non-speculative" assignments when applying for an H1B visa. In fact, Congress explicitly anticipated a scenario when employees would be in an "non-productive" status and requires employers to continue to pay wages. 8 U.S.C. §§ 1182(n)(1)(A) and (3)(c).

The itinerary and "specific and non-speculative" requirement conflict the express language of the INA which allows employees to be in a non-productive status and would render § 1182(n)(3)(c)(vii) meaningless. See Shalom Pentecostal Church v. DHS, 783 F.3d 156, 165 (3rd. Cir. 2015) (regulatory requirement that rendered a term in the statute "largely meaningless" was *ultra vires*).

Congress clearly understood and anticipated that employers could not see the future and would encounter slowdowns. Congress explicitly legislated H-1B employees should be treated in that situation. Defendants' requirements render the provision of the statute meaningless because it demands full and identifiable employment at the time the visa is filed.

3. **8 C.F.R. § 214.2(h)(2)(i)(B) Frustrates DOL's Regulatory Scheme**

DOL has extensively regulated how employers disclose and report employees who work at multiple worksites, or who change worksites. 20 C.F.R. 655.10(d), 655.715 (Place of Employment), 655.735 (Short-term worksite). Defendants'

itinerary requirement contradicts these rules. DOL's rules are the product of notice and comment, and show a comprehensive consideration of its statutory authority, as well as its expertise regulating the US labor market. DOL created reasonable rules that allow flexibility and accommodate the needs of employers. Defendants' itinerary rule meets none of these legal necessities and is unlawful, and unenforceable.

III. IRREPARABLE HARM

An applicant for preliminary injunctive relief must "demonstrate that irreparable injury is likely [not merely possible] in the absence of [a] [stay]." Revel AC, Inc. v. IDEA Boardwalk LLC, 802 F.3d 558, 569 (3rd Cir 2015) citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). In deciding how strong a case a stay movant must show, we have viewed favorably what is often referred to as the "sliding-scale" approach. Id. Plaintiffs can establish irreparable harm by showing a money damages are not recoverable, and their business model will be destroyed without relief. HR Staffing Consultants LLC v. Butts, 627 Fed. Appx. 168, 173-174, 2015 U.S. App. LEXIS 17202, *11, ("HR Staffing's ability to protect its role as an intermediary through the non-compete is essential to its very existence, and money will not remediate the injury if its business model is destroyed.") citing Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 802 (3d Cir. 1989). Loss of trade and ability to work, damages to

reputation and goodwill have also been deemed to constitute irreparable harm warranting relief. Pappan Enters. v. Hardee's Food Sys., 143 F.3d 800, 805 (3rd. Cir. 1998). The United States has not waived sovereign immunity over economic harms created by unlawful rules or regulations. Each economic harm suffered by Plaintiffs is a permanent loss.

Plaintiffs have provided this Court evidence that Defendants are enforcing the requirements in PM-602-0157 to the detriment of Plaintiffs, Plaintiffs' employees, Plaintiffs' clients, and the communities where these employees lived. Ganji Declaration ¶¶ 33-35, Ex. 1, Ex. 2, and Ex. 3. Defendants unlawful requirements in PM-602-0157 are impossible for Plaintiffs to comply with. Id. at ¶¶ 9-28. Defendants cite to PM-602-0157 with the force and effect of law. Id. Plaintiffs are losing highly skilled and well trained professional employees because of Defendants' policies. Id.

Defendants' unlawful requirements will eventually choke out Plaintiff's work force through extension denials and refusing initial H-1B application. Id.

As mentioned above, and at Ganji Declaration, ¶¶ 8-10, Defendants require all new initial H-1B cap filings to be submitted each April. Defendants have begun adjudicating H-1B petitions and are demanding evidence in compliance with PM-602-0157. Id. at Ex. 2. Defendants requirements cannot be met, and Plaintiffs H-1B visas will be denied based on this unlawful policy.

Without employees here in the United States, Plaintiffs will necessarily lose the ability to compete for new work. Plaintiffs' industry operates on short term contracts of approximately six (6) months. Id. at ¶ 26. Without sufficient employees to meet their clients' needs, Plaintiffs will suffer irreparable harm to reputation and ability to compete. See Pappan Enters. v. Hardee's Food Sys., 143 F.3d at 805 (finding irreparable harm when Plaintiff loses good will and ability to compete). US based consumers of Plaintiffs' services will contract with offshore providers of information technology services, sending US jobs and dollars to overseas companies. This is a reality noted by the New York Department of Labor (noting IT jobs are especially susceptible to being "offshored").[1]

These harms are not theoretical. Defendants are enforcing unlawful requirements. Plaintiffs are losing established experienced employees as a result. Plaintiffs will lose the opportunity to hire new employees this H-1B season. Plaintiffs will shrink in size and ability to compete. Given the six-month contract cycle in the industry Plaintiffs and their sister companies and associations across the United States face an existential threat to their business model. See HR Staffing Consultants LLC v. Butts, 627 Fed. Appx. at 173-174.

[1] https://www.labor.ny.gov/stats/PDFs/Offshore_Outsourcing_ITJobs_NYS.pdf , Pgs. 1-4 (accessed May 1, 2018).

There is no remedy available that can unwind Defendants unlawful actions. If left unchecked, Defendants will destroy Plaintiffs and hundreds of similar companies across the country. Defendants will force highly skilled employees out of the United States. Defendants will deprive localities of commerce and tax revenue. Defendants will send US companies off shore to contract for IT services.

IV. Public Policy

Public policy favors granting preliminary relief. The H-1B visa category was created by Congress to meet a shortage of information technology workers in the US economy. 136 Cong. Rec. H. 8672 (October 2, 1990). The Congressional record makes repeated reference to a study commissioned by the Department of Labor called "Workforce 2000" published in June 1987. Id. That study described the need for information technology professionals in the US economy and recognized a critical labor shortage in that field. DOL also summarized the Congressional Record and stated that intent of the H-1B category was to increase the numbers of IT professionals available to the US economy. 56 Fed Reg 11705, March 20, 1991.

The intent of Congress in passing ACWIA was to increase the ease and availability of IT workers in the US economy. The Congressional findings accompanying ACWIA are explicit: the law was created to increase the ease and access of hiring foreign IT professionals. See 105 S. Rep. 186, May 1, 1998. This was to address a shortage that would cripple the economy. Id.

Congress acted again to increase the number of IT professionals available to the US economy in passing AC21, which allowed H-1B employees to stay indefinitely in the US if they had a permanent job offer. Pub. L. 106-313, Sec. 106 (October 17, 2000).

Congress has consistently shown the public policy is to increase access to IT professionals, and not increase burdens on US companies to retain this resource. Defendants unlawful requirements thwart that policy.

V. Balance of Equities

The equities weigh in favor or Plaintiffs. Plaintiffs seek to preserve their businesses, to continue services to clients, and to protect the interests of employees who have lived and worked in this country for many years. Defendants seek to enforce requirements in violation of the Administrative Procedures Act, and more than their statutory authority.

VI. Conclusion

Plaintiffs have established they will win on the merits. Plaintiffs have shown they will suffer irreparable harm. Plaintiffs have shown that public policy supports their request for preliminary relief, and that the balance of equities tip in their favor.

Plaintiffs are entitled to relief.