Worker Advocates Prevail in Critical Litigation on behalf of H-2B Workers

One of the current principal temporary foreign worker "guest worker" programs is the H-2B non-agricultural temporary worker program which brings foreign workers into the United States on short term "non-immigrant" visas. The program dates back to the mid-1960's and employers are not permitted to hire such H-2B workers without a determination that there are no "domestic" workers available for the jobs and that the wages and working conditions offered will not have an adverse impact on the wages of "domestic" workers in the country. Under the Bush administration the H-2B program grew from a relatively small program which brought fewer than 15,000 foreign workers into the country as of the mid-1990's to a much larger program in which employers sought certification from the Department of Labor (DOL) for as many as 250,000 jobs in federal FY2008. Nationally and locally landscaping workers were the most commonly certified job classification under the program.

Two days before President Obama was inaugurated in January 2009, Friends of Farmworkers and our co-counsel (including the Southern Poverty Law Center, Centro de los Derechos Migrante, and Northwest Worker Justice Project) commenced litigation on behalf of client organizations and individual clients to challenge regulations promulgated by the Bush administration in December 2008 which took effect in January 2009 for the H-2B temporary non-agricultural worker program. ***Comité de Apoyo a Los Trabajadores Agrícolas [("CATA")], et al., v. Elaine L. Chao, et al.***, E.D. Pa. No. 09-CV-240. A number of aspects of those regulations were challenged in the Administrative Procedure Act (APA) lawsuit about those regulations. The CATA lawsuit was assigned to Judge Louis Pollak as related to earlier litigation brought by Friends of Farmworkers on behalf of H-2B landscaping workers.

One of the central aspects of the Bush administration regulations and procedures which was challenged by plaintiffs was the wage rate methodology established by the December 2008 DOL regulations and prior DOL practices which resulted in allowing employers to bring in unskilled foreign temporary H-2B workers at wage rates which were far below the prevailing wage rates for those jobs.

In August 2010 Judge Pollak ruled that the challenged DOL prevailing wage rate regulation had been adopted in violation of the APA, but instead of immediately vacating the invalidated regulations, he directed DOL to promulgate new regulations with 90 days. See, ***Comite de Apoyo a Los Trabajadores Agricolas v. Solis***, No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010). In the subsequent DOL rulemaking proceeding, DOL specifically concluded that the methodology adopted in the 2008 rulemaking had an adverse impact on the wages and working conditions of U.S. workers, but was ordered by the Office of Management and Budget (OMB) to delay the implementation of new regulations promulgated in accordance with Judge Pollak's order until January 2012. Thereafter, Judge Pollak issued a further order invalidating the delay until January 2012 of the effective date of the new regulations and directing that DOL within 45 days promulgate regulations setting a valid effective date for the regulations. Under the subsequent DOL rulemaking, the new prevailing wage rate regulations were to take effect before the end of September 2011.

Thereafter, in September 2011 employer organizations filed challenges to the new DOL regulations in federal courts in the Western District of Louisiana and the Northern District of Florida. In late September 2011, DOL delayed the effective date of the challenged regulations until December 2011. Prior to the new effective date of the H-2B prevailing wage rule, employer organizations persuaded Congress to adopt a Senate Appropriations Committee

initiated rider to the continuing appropriation resolution for the Department of Labor operations barring use of appropriated funds to implement the 2011 H-2B prevailing wage rate regulations. That appropriation rider has been continued in subsequent appropriations for the Department of Labor including the most recent continuing appropriation for operations from March 27, 2013 through September 2013.

On March 21, 2013 Judge Legrome Davis who was assigned the CATA litigation and a companion employer challenge transferred from the Western District of Louisiana after the death of Judge Pollak, vacated the December 2008 Bush administration prevailing wage rate regulation effective 30 days later. ***Comite de Apoyo a Los Trabajadores Agricolas v. Solis***, No. 09-240, 2013 WL 1163426 (E.D. Pa. March 21, 2013)

On March 29, 2013 the Department of Labor is promulgating an interim rule effective March 27, 2013 immediately withholding prevailing wage determinations based upon the invalidated 2008 rule pending promulgation of new interim regulations within 30 days after the Court's order. See: http://content.govdelivery.com/bulletins/gd/USDOL-735d64? and https://www.federalregister.gov/articles/2013/03/29/2013-07431/delay-of-effective-date-wage-methodology-for-the-temporary-non-agricultural-employment-h-2b-program.

The net effect of the court's decision and the DOL regulatory response is that employers participating in the H-2B program will have to pay workers recruited for employment with them at actual prevailing wage rates for those jobs rather than at substandard wage rates permitted under the invalidated wage regulations.

An employer organization appeal from an earlier related decision by Eastern District of Pennsylvania Judge Legrome Davis upholding the rulemaking authority of the Department of Labor in relationship to the H-2B program in ***Louisiana Forestry Association, Inc. v. Solis***, Civil No. 11-7687 (E.D. Pa. Aug. 20, 2012) is pending for oral argument before the Third Circuit Court of Appeals on May 31, 2013. Louisiana Forestry Association, Inc. v. Secretary United States Department of Labor (3d Cir. No. 12-4030).

Other regulations for the H-2B program promulgated by DOL in the Spring of 2012 remain blocked by a preliminary injunction from the Northern District of Florida which is on appeal to the Eleventh Circuit Court of Appeals. ***Bayou Lawn & Landscape Service v. Secretary of Labor*** (11th Cir. No. 12-12569). Implementation of these regulations is critical to assuring that domestic workers are given adequate notice of employment opportunities with employers seeking to utilize H-2B workers.

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