UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GABRIEL PEREZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL NO. 14-682-MCR**
	)	
THOMAS E. PEREZ, *et al*.,	)	
	)	
Defendants.	)	

DEFENDANTS' UNOPPOSED MOTION FOR LIMITED RELIEF
FROM THE VACATUR ORDER AND JUDGMENT

Defendants move unopposed under Rule 60(b)(6) for limited relief from the Court's March 4, 2015, order vacating the Department of Labor's (DOL's) 2008 H-2B regulation. *See* Order, ECF No. 14. The Court's *vacatur* order has resulted in a complete shutdown of the H-2B program because DOL is unable to issue H-2B labor certifications to support I-129 petitions filed with the Department of Homeland Security (DHS) for the importation of H-2B temporary workers. Without the 2008 rule, DOL has no mechanism by which to provide advice to DHS regarding the importation of H-2B workers, and without DOL's advice, DHS is unable to adjudicate any I-129 petition requesting the importation of H-2B workers. As a result, DHS cannot run the H-2B program, which means that no employer can request importation of H-2B workers until the agencies craft a solution to this immediate problem.

As an emergency measure, DHS and DOL plan to draft and issue a joint interim final rule as soon as possible to set the operational mechanism and substantive standards for DOL to provide advice and corresponding labor certifications to DHS so that the agencies can operate the program in accordance with statutory standards. But until DHS and DOL can issue an interim

final rule, the H-2B program will remain inoperative. To avoid this disruptive effect, Defendants move unopposed for limited relief in the form of a temporary stay of the Court's *vacatur* order until and including April 15, 2015. If the Court grants this limited and temporary relief from the *vacatur* order, the agencies will be able to run the H-2B program to ensure that employers can import H-2B workers in areas where United States workers are not available.

Defendants' counsel conferred with Plaintiff's counsel regarding this motion for limited relief. Plaintiff will not oppose Defendants' motion. Plaintiff's agreement not to oppose this motion is contingent on Defendants agreeing not to seek any further stay of the Court's *vacatur* order. The parties are in agreement on these terms. Therefore, assuming the Court grants this unopposed motion for a stay until and including April 15, 2015, the Department of Labor will not adjudicate or approve any H-2B labor certification under the vacated 2008 rule after April 15, 2015, and will not seek any further stay from the Court.

BACKGROUND

The Court is already familiar with the statutory and regulatory background of the H-2B program, having issued two recent decisions relating to DOL's 2008 and 2012 H-2B regulations. *See* ECF No. 14; *see also Bayou Lawn & Landscape v. Perez*, 2014 WL 7496045 (N.D. Fla. Dec. 18, 2014). Because the Court is familiar with the relevant background, Defendants will limit their discussion to the issues surrounding the current operational hiatus of the H-2B program as a result of the Court's recent *vacatur* order.

On March 4, 2015, the Court granted Plaintiff's motion for summary judgment and vacated DOL's 2008 H-2B regulation (73 Fed. Reg. 78,020) on the theory that the agency lacks authority under the Immigration and Nationality Act, as amended, (INA) to issue legislative rules governing the H-2B program. *See* Order, ECF No. 14 at 7-8. The Court also permanently

enjoined DOL from enforcing the 2008 H-2B rule. *Id*. at 8. Based on the Court's *vacatur* order and the permanent injunction, DOL immediately ceased operating the H-2B program to ensure compliance with the Court's order. Shortly after the Court issued its decision, DOL posted a notice on its website informing the public that "effective immediately, DOL can no longer accept or process requests for prevailing wage determinations or applications for labor certification in the H-2B program." Employment and Training Administration, *Announcements*, http://www.foreignlaborcert.doleta.gov (March 4, 2015). As a result of the Court's *vacatur* order, DOL is unable to process any H-2B temporary labor certification application or issue any H-2B certification as advice to DHS, which effectively shuts down the H-2B program.[1]

DHS is charged with adjudicating I-129 petitions filed by employers seeking to employ H-2B workers, but Congress directed the agency to issue its decisions relating to H-2B petitions "after consultation with appropriate agencies of the Government." 8 U.S.C. § 1184(c)(1). Legacy INS and now DHS have historically consulted with DOL on labor market conditions to determine whether to approve an employer's petition to import H-2B workers. *See* 73 Fed. Reg. 78,104; 78,110 (DHS) (Dec. 19, 2008); 55 Fed. Reg. 2606, 2617 (INS) (Jan. 26, 1990). DOL plays a significant role in the H-2B program because DHS "does not have the expertise needed to make any labor market determinations, independent of those already made by DOL." 73 Fed. Reg. at 78,110; *see also* 55 Fed. Reg. at 2626. Without a consultation from DOL, DHS is unable to make the statutorily mandated determination about the availability of United States workers to fill the proposed job opportunities in the employers' I-129 petitions. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 78 Fed. Reg. 24,047; 24,050 (DHS-DOL) (April 24, 2013). Thus,

[1] Although DHS is not named as a defendant in this litigation, the parties agree that DHS will resume adjudicating H-2B I-129 petitions based on temporary labor certifications granted before the Court's *vacatur* order, and based on temporary labor certifications granted during the stay of the Court's *vacatur* order.

DHS's regulations require employers to obtain a labor certification determination from DOL before filing a petition with DHS to import H-2B workers. *See* 8 C.F.R. §§ 214.2(h)(6)(ii)(A), (C), (iv)(A).

DOL has traditionally fulfilled its consultative role in the H-2B program through the use of legislative rules to structure its advice to legacy INS and now DHS. *See* 33 Fed. Reg. 7570-71 (DOL) (May 22, 1968); 73 Fed. Reg. 78,020 (DOL) (Dec. 19, 2008). Before DOL issued the 2008 H-2B rule, it supplemented its regulations with guidance documents that set substantive standards for wages and recruitment and structured the manner in which the agency processed applications for H-2B labor certification. *See* 73 Fed. Reg. at 78,021-22. At least one district court has held that DOL's pre-2008 H-2B guidance document was a substantive rule that determined the rights and obligations of employers and employees, and DOL's failure to issue the guidance through the notice and comment process was a procedural error resulting in the Court invalidating the guidance. *See Comite de Apoyo a Los Trabajadores Agricolas v. Solis*, 2010 WL 3431761, *19, 25 (E.D. Pa. Aug. 30, 2010) (*CATA*). In 2011, DOL sought to correct the error of using a guidance document to set the substantive terms of the H-2B program by publishing a new legislative rule through notice and comment rulemaking, which the Third Circuit upheld. *See Louisiana Forestry Ass'n v. Sec'y of Labor*, 745 F.3d 653 (3d Cir. 2014). DHS and DOL also issued a companion interim final rule setting new prevailing wage rates for the H-2B program to address, in part, appropriations issues preventing DOL's 2011 legislative rule from going into effect. *See id*. at 665-67; *see also* 78 Fed. Reg. at 24,061. In the preamble to the interim final rule, DHS and DOL determined that the only effective way of structuring the consultation process is to have DOL administer its labor market determinations through the use of legislative rules to ensure the use of uniform standards. *See* 78 Fed. Reg. at 24,050.

Currently, DOL's 2008 rule is the only mechanism for DOL to provide advice to DHS because the rule sets the edifice for receiving, reviewing, and issuing H-2B labor certifications. *See* 73 Fed. Reg. at 78,056-60. The 2008 rule set the recruitment standards for testing the domestic labor market and provided the mechanics for processing prevailing wage requests. *Id*. Without the structural edifice of the 2008 rule, there is no way for DOL to provide advice to DHS regarding any particular request by an employer to import H-2B workers. Without advice from DOL, DHS in turn has no means by which to test the domestic labor market or determine whether there are available United States workers to fill the employer's job opportunity. Moreover, DHS is precluded by regulation from processing any H-2B petition without a labor certification from DOL. *See* 8 C.F.R. § 214.2(h)(6)(iii)(C). As a result, the Court's *vacatur* of DOL's 2008 rule has closed the H-2B program until the agencies can put in place a new mechanism for fulfilling the statutory directive to ensure that the importation of foreign workers will not harm the domestic labor market. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

STANDARD OF REVIEW

Rule 60(b)(6) grants the Court discretion to "relieve a party . . . from a final . . . order" for "any other reason that justifies relief." This catchall provision has been interpreted to apply when a party demonstrates "extraordinary circumstances." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P*., 507 U.S. 380, 393 (1993); *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996) ("judgment under Rule 60(b)(6) is an extraordinary remedy"). But Rule 60(b)(6) "must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the incessant command of the court's conscience that justice be done in light of *all* the facts." *Griffin v. Swim–Tech Corp*., 722 F.2d 677, 680 (11th Cir. 1984). Whether to grant the requested

relief is a matter for the district court's sound discretion. *See Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000).

The catch-all provision under Rule 60(b)(6) is mutually exclusive with the grounds for relief in the other provisions under Rule 60(b), namely, excusable neglect, newly discovered evidence, and fraud. *See Pioneer Inv. Servs.*, 507 U.S. at 393. A party seeking relief must also meet a threshold timeliness requirement under Rule 60(c)(1), and show that it has "a meritorious claim or defense" to the ground on which the district court entered its order. *See Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995).

ARGUMENT

The regulatory hiatus caused by the Court's *vacatur* order warrants granting Defendants' request for limited and temporary relief from the order. The Court's *vacatur* of the 2008 rule has caused an emergency situation that can only be addressed by DHS and DOL issuing an interim final rule to ensure the continued operation of the H-2B program, but the agencies need additional time to issue a new rule. During this time leading up to the issuance of a new interim final rule, the entire H-2B program will remain shut down in the absence of an order staying the effect of the *vacatur*. Defendants are not asking for the *vacatur* order to be set aside or altered. Rather, Defendants simply ask that the Court hold the *vacatur* in abeyance until and including April 15, 2015, to allow employers during this limited stop-gap timeframe to request the importation of H-2B nonimmigrants in the absence of available United States workers.

The Court's March 4, 2015, *vacatur* order has the effect of setting aside DOL's 2008 rule and taking it "off the books." *See Heartland Regional Center v. Sebelius*, 566 F.3d 193, 198-99 (D.C. Cir. 2009) (discussing the distinction between invalidating and vacating a rule); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 92 (D.D.C. 2007) ("vacatur takes the rule off the books"). Without

the 2008 rule, DOL cannot process labor certification applications and is correspondingly unable to provide advice to DHS regarding an assessment of the current domestic labor market conditions. *See* ECF No. 14 at 7. This Court also vacated DOL's 2012 comprehensive H-2B rule, so the agency lacks the necessary procedural and substantive edifice for receiving, processing, evaluating, and approving H-2B labor certification applications. *See Bayou*, 2014 WL 7496045, *4-7. Although the effect of vacating a rule is normally to reinstate the rule previously in force, *see Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005), an agency cannot reinstate a rule or guidance that is also invalid or subject to the very objection that set aside its replacement, *see Nat'l Roofing Contractors Ass'n v. Dep't of Labor*, 639 F.3d 339, 343 (7th Cir. 2011). Before 2008, DOL had used, in part, guidance documents to set substantive standards for receiving, processing, and adjudicating H-2B labor certifications, but the agency's use of guidance in this area was held invalid. *See CATA*, 2010 WL 3431761, *19, 25. Therefore, DOL cannot fall back on the pre-2008 guidance documents as a mechanism for administering the H-2B program without running afoul of an order of another district court. Defendants do not concede the point, but if, as this Court has held, DOL does not have authority under the INA to use substantive rules to administer the H-2B program, *see Bayou*, 2014 WL 7496045, *4-5, any DOL guidance document that sets substantive standards in the H-2B program would potentially suffer from the same defect, *see Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021-22 (D.C. Cir. 2000) (guidance document setting substantive standards is a defective legislative rule). Thus, without the 2008 rule, there is no valid predecessor rule or guidance to structure DOL's administration of the H-2B program, and DOL therefore cannot, consistent with court orders, consult with DHS, which is required by the statute and DHS regulations. *See* 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iii)(C).

Defendants' motion for a limited stay of the *vacatur* order is similar to the requested relief that the court granted in *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv*., 288 F. Supp. 2d 7 (D.D.C. 2003). In that case, the court vacated the agency's fishing quota regulation, but the *vacatur* caused "serious disruptions" for the regulated community because without the regulation the agency was unable to issue any fishing permits. *Id*. at 9. On motions to reconsider, the Court agreed that the *vacatur* caused an immediate disruption by suspending the fishing permit process, but the Court was not willing to remand the regulation to the agency without a *vacatur* because of serious errors in the agency's decision making process. *Id*. at 12. Nevertheless, the court agreed that the disruption to the permitting process warranted limited relief to the regulated community in the form of a temporary stay of the *vacatur*. *Id*. The court further noted that "[w]hen compared to remand without vacatur . . . issuing a stay of the mandate has the added advantage of not presupposing the validity of the [agency's] actions." *Id*.

A similar stay of the Court's *vacatur* mandate is appropriate in this case. Like the disruptive effect of the vacated regulation in *Hawaii Longline*, the *vacatur* of the 2008 rule prevents a permitting process that blocks employers from participating in a program that Congress created under the INA. The complete hiatus of the H-2B program creates an emergency situation for employers that require H-2B nonimmigrants in the absence of available United States workers. By statutory and regulatory design, many employers using the H-2B program have a seasonal or peakload demand for workers, and most employers currently awaiting labor certification will require a supplemental workforce, in the absence of United States workers, to address an imminent seasonal demand. *See* 8 C.F.R. § 214.2(h)(6)(ii)(A)(2)-(3) (recognizing seasonal and peakload need). A stay of the Court's mandate in this case until and including April 15, 2015, will allow for a temporary continuation of the H-2B program

during a substantial part of the period the agencies require to complete their work to issue a new joint interim final rule, which will help minimize disruption in the program. Granting Defendants' request for a stay will avoid harm to third parties and has the advantage of "not presupposing the validity" of the 2008 rule, which this Court has found to be *ultra vires*. *See Hawaii Longline*, 288 F. Supp. 2d at 12.

Moreover, Defendants' request for limited relief from the Court's *vacatur* order otherwise meets the stringent standards under Rule 60(b)(6). The courts have observed that Rule 60(b)(6) "should be only sparingly used" and may not "be employed simply to rescue a litigant from strategic choices that later turn out to be improvident." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). Similarly, the Supreme Court has held that "extraordinary circumstances" are not present when in hindsight it appears certain that an appeal, which was not taken, would have been successful, see *Ackermann v. U.S.*, 340 U.S. 193, 197–99 (1950), or when there has been an intervening change in case law, *see Agostini v. Felton*, 521 U.S. 203, 239 (1997).

The derogatory conditions that the courts have found to militate against granting a Rule 60(b)(6) motion are not present in this case. DOL is not a asking for an alteration of the order to rescue itself from strategic choices that turned out to be improvident, *see Good Luck Nursing Home*, 636 F.2d at 577, nor is it asking the Court to take into account an intervening change in case law, *see Agostini*, 521 U.S. at 239. Rather, Defendants are requesting a brief stay of the *vacatur* mandate to address an emergency situation resulting from a complete hiatus in the H-2B program. The requested stay will bridge the gap to allow for the employers' continued participation in the program while DHS and DOL draft an emergency interim final rule to address the issues related to the Court's *vacatur* order. Because Defendants' request is for the

purpose of coming into compliance with the Court's *vacatur* order through further rulemaking with DHS, Defendants have presented a non-futile request that warrants relief under Rule 60(b)(6). *See Murray*, 52 F.3d at 355.

CONCLUSION

For good cause shown, the Court should grant Defendants' unopposed Rule 60(b)(6) motion for limited relief from the Court's *vacatur* order (ECF No. 14) in the form of a stay of the *vacatur* mandate until and including April 15, 2015, which will allow DHS and DOL to operate the H-2B program while the agencies work to finalize an emergency rule to address the issues in the Court's decision.

Respectfully submitted this 16th day of March, 2015:

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CERTIFICATE OF SERVICE

I certify that on March 16, 2015, I electronically filed the foregoing DEFENDANTS' UNOPPOSED MOTION FOR LIMITED RELIEF FROM THE VACATUR ORDER AND JUDGMENT with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to the following attorney of record:

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