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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF MANUFACTURERS; BAY AREA COUNCIL; NATIONAL RETAIL FEDERATION; AMERICAN ASSOCIATION OF INTERNATIONAL HEALTHCARE RECRUITMENT; PRESIDENTS' ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION; CALIFORNIA INSTITUTE OF TECHNOLOGY; CORNELL UNIVERSITY; THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY; UNIVERSITY OF SOUTHERN CALIFORNIA; UNIVERSITY OF ROCHESTER; UNIVERSITY OF UTAH; and ARUP LABORATORIES,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF LABOR; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security; and EUGENE SCALIA, in his official capacity as Secretary of Labor
Defendants.

Civil Action No. 4:20-cv-7331-JSW

U.S. TECH WORKERS' *AMICUS CURIAE* BRIEF IN SUPPORT OF FEDERAL DEFENDANTS IN OPPOSITION TO INTERIM RELIEF AND IN SUPPORT OF SUMMARY JUDGMENT

Date: November 23, 2020

Time: 10:00 a.m.

Judge: Hon. Jeffrey S. White

Ctrm.: 5

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MEMORANDUM OF PONTS AND AUTHORITES

Amicus curiae U.S. Tech Workers submits this memorandum of points and authorities in support of the federal defendants' opposition to the plaintiffs' motion for interim relief and their cross-motion for summary judgment pursuant to U.S. Tech Workers' accompanying motion for leave to file.

IDENTIFY AND INTERESTS OF *AMICUS CURIAE*

U.S. Tech Workers is a 501(c)(3) nonprofit representing the interests of American workers in technology fields. The use of non-immigrant guestworker visas to displace American workers and lower wages in the industry is a key concern of U.S. Tech Workers. For example, the President of the United States acknowledged that U.S. Tech Workers played a key role in bringing a halt to the Tennessee Valley Authority's use of H-1B non-immigrants to replace American workers. Remarks by President Trump in a Meeting with U.S. Tech Workers and Signing of an Executive Order on Hiring American, The White House, Aug. 3, 2020.

INTRODUCTION

The H-1B guestworker program admits nonimmigrants in occupations that normally require a college degree. 8 U.S.C. § 1101(a)(15)(H)(i). Employers are required to pay H-1B workers the higher of the prevailing wage for the occupation and location or the actual wage paid to similar employees. 8 U.S.C. § 1182(n)(1).

H-1B is largely used to import computer workers from India. In FY 2018 66% of H-1B visas were for computer workers and 73% of H-1B visas went to aliens from India. USCIS,

Characteristics of Specialty Occupation Workers FY 2019, Apr. 4, 2019, pp. 7, 13.[1] No other occupation accounts for over 8% of H-1B visas. *Id*. There were 48,017 new H-1B visas approved for computer workers in FY 2018. *Characteristics of Specialty Occupation Workers,* pp. 12. For comparison, between May 2018 and May 2019 computer employment in the United States grew by 168,580. Bureau of Labor Statistics, OES data.[2] So H-1B workers have a significant impact on employment in the computer job market.

The first step in the H-1B application process is for the employer to file a Labor Condition Application (LCA) with the U.S. Department of Labor (DoL). 8 U.S.C. 1182(n)(1). In the LCA, the employer certifies the prevailing wage, the wage to be paid, and to other labor-related conditions *Id*. The DoL has no adjudicative power over LCAs. *Id*. It must approve all LCAs within 14 days unless there are obvious errors or inaccuracies. *Id*. Furthermore, the DoL is prohibited from post-approval review of LCAs. 8 U.S.C. § 1182(n)(2)(G)(v). If the form is filled out correctly, whatever the employer says is approved. The Department of Labor Inspector General found "visa programs, in particular the H-1B program for workers in specialty occupations, to be susceptible to significant fraud and abuse." *Semiannual Report to Congress*, Oct. 1, 2019–Mar. 31, 2020, p. 15.

While employers are required to pay H-1B workers at least the prevailing wage for the occupation and location, from the mid-1996's through 2004, the DoL provided a two-tiered scale based upon the Bureau of Labor Statistics' Occupational Employment Statistics (OES). The upper

[1] Available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2018.pdf

[2] Available at www.bls.gov/oes

tier was the average of the top 25% of wages while the lower tier was average of the bottom 25%. *Intra-Agency Memorandum of Understanding, Employment and Training Administration and Bureau of Labor Statistics*, September 1996, p. 3. DoL estimated that the lower tier represented the 17th percentile (bottom 1/6th) of wages and the upper tier the 67th percentile. Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 79 Fed. Reg. 14,500, 14,501 n.3 (Mar. 14, 2014).

In 2004 Congress directed that, when the DoL provides a prevailing wage survey, it make a least 4 levels of wages commensurate with experience, education, and the level of supervision available. 8 U.S.C. § 1182(p). It also permitted the DoL to take an existing two-tier scale and subdivide the levels. *Id*. But no two-tier wage survey existed that considered education, experience, or level of supervision. Nonetheless, the DoL created its four-tier scale by simply subdividing the existing two-tier scale, even though it did not consider the factors Congress mandated. 79 Fed. Reg. at 14,501 n.3. DHS estimated that the wage levels approximated the 17th, 34th, 50th, and 67th percentiles. The DoL provided a description of the wage levels. *Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs*, Employment and Training Administration, Nov. 2009, Nov. 2009.[3] But the DoL did not have a shred of analysis that showed how those descriptions had any relationship to actual wage levels in industry. Thus, this wage scale was completely arbitrary, relied on a survey that had no data on skills or responsibilities, and was made without regulation. *Id*.

Critically for American workers, the four tiers were skewed to the low end of the wage scale. This allowed employers to pay extremely low wages to H-1B workers, especially in high

[3] Available at https://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf

wage locations of the country. *E.g.*, Daniel Costa and Ron Hira, *A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages*, Economic Policy Institute, May 4, 2020.[4] The H-1B–U.S. wage difference is so great that American workers face not only competition from H-1B workers but also direct displacement. *E.g.*, Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, NY Times, June 3, 2015. Replacing Americans with H-1B workers has continued even during the pandemic. Dave Flessner, *TVA lays off remaining 62 IT workers whose jobs are being outsourced*, Chattanooga Times Free Press, June 2, 2020. Joseph N. DiStefano, *Decision day for 1,300 Vanguard workers as their jobs head to India-based Infosys*, Philadelphia Inquirer, July 29, 2020.

The national emergency created by the pandemic and displacement of Americans created an urgency for the DoL to revise its tiered wage scales so that they had some relationship between skill and the job market, rather than being just arbitrary divisions of the values from the OES wage survey. Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (IFR). Even though the new wage levels still allow employers to pay below the actual prevailing wage, having he lowest level at the 45th percentile is a great improvement over the bottom 1/6th of wages.

[4] The only studies showing H-1B workers earn comparable wages to Americans have done so using comparisons by age while excluding geography. To get that result one also has to cherry pick the right age cohorts and not consider that H-1B workers are overwhelmingly concentrated in high wage locations. *See*, *e.g.* Neil G. Ruiz and Jens Manuel Krogstad, *East Coast and Texas metros had the most H-1B visas for skilled workers from 2010 to 2016*, Pew, Mar. 28, 2018 (showing H-1B workers are concentrated in high wage locations); Government Accountability Office, *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Jan. 2011, p. 42 (comparing H-1B–U.S. wages based upon age showing that even when omitting geography as a factor one has to pick the right age ranges for H-1B wages to be comparable to U.S. wages).

I. THE PREVIOUS WAGE LEVELS WERE COMPLETELY ARBITRARY CALCULATIONS THAT HAD NO BASIS IN THE JOB MARKET.

The H-1B visa requires the employer to certify that it will pay the non-immigrant the higher of the actual wage paid to the employer's employees with similar experience and qualifications and the prevailing wage for the occupation and physical location of employment. 8 U.S.C. §§ 1182(n)(1)(A)(ii) & (n)(4)(A). Thus, Congress has mandated the minimum statutory H-1B wage rate to be that for the occupation and location, without considering other factors, such as the experience of the non-immigrant.

Prior to 2004, the Department of Labor had been providing employers a two-tier wage scale for foreign labor purposes and did so without a published regulation. *See* 85 Fed. Reg.at 63,874. Such a two-tier scheme should have been invalid for the purposes of H-1B, which required paying at least the prevailing wage for the occupation and location. 8 U.S.C. § 1182(n)(1). Nonetheless, employers in FY 2004 frequently made extremely low prevailing wage claims on LCAs using sources that did not meet the statutory requirement that the prevailing wage be based upon occupation and location. John Miano, *The Bottom of the Pay Scale: Wages for H-1B Computer Programmers*, Center for Immigration Studies, Dec. 2005, pp. 8–9. This is because the DoL is required to approve all H-1B Labor Condition Applications within 14 days as long as the form is filled out correctly. 8 U.S.C. § 1182(n)(1). So, even if a claim did not meet the statutory minimum as being the prevailing wage for the occupation and location, the Department of Labor lacked—and still lacks—the power to reject it.

At the end of 2004, Congress directed, that where the Department of Labor makes available a prevailing wage scale to employers (while not singling out H-1B), that such a scale should include four skill-based tiers. Consolidated Appropriations Act, 2005, 108 P.L. 447, § 432, 118 Stat. 2809, 3352 (codified at 8 U.S.C. § 1182(p). The Consolidated Appropriations Act also

provided that the Labor Department could create four wage levels from a two-level wage survey interpolating two intermediate levels. 8 U.S.C. § 1182(p)(4). Yet, the two levels in use at the time were not from a reported government survey. *Intra-Agency Memorandum of Understanding, Employment and Training Administration and Bureau of Labor Statistics*, September 1996, p. 3. Instead the DoL's two levels were the mean of the upper and lower quarters of reported wages, with experience, education, and the level of supervision not even being part of the calculation or even of the original survey.[5]

Even though the two-level wage scheme did not meet the requirements of Congress, DoL used it with interpolation to create the four-level scheme it used until this year. The process for determining the previous four wage levels was:

1. Divide the OES wage data into quarters
2. Discard the middle two quarters
3. Take the average of the lower quarter to get the Level 1 wage.
4. Take the average of the upper quarter to get the Level 4 wage
5. Take the difference of the Level 1 wage from the Level 4 wage and divide by 3.
6. Add that amount to the Level 1 wage to get the Level 2 wage.
7. Subtract that amount from the Level 4 wage to get the Level 3 wage.

85 Fed. Reg. at 63,875. There are several key points to note. First, experience, education, and the level of supervision were never even considered when generating the four skill levels. Second, there had never been any justification why the top quarter and bottom quarter of wages should translate into skill levels to begin with. Third, the wage calculation discards half the data in the

[5] The only place Amicus is aware that the Department of Labor has described

original survey. Fourth, the wage levels only *approximate* the 17th, 34th, 50th, and 67th percentiles. 85 Fed. Reg. at 63,875. The wage levels are interpolated averages of percentile wages with no statistical meaning. Fifth, and most importantly for American workers, the web levels are skewed to the low end of the scale. Even under the IFR, employers can still use other wage sources to make absurdly low prevailing wage claims because DoL has no ability to challenge them. 8 U.S.C. § 1182(n)(1). The real change in the IFR is that DoL will no longer be the source of bottom-of-the-barrel prevailing wages claims.

II. THERE IS NO EFFECTIVE DIFFERENCE AMONG THE SKILL LEVELS FOR H-1B PREVAILING WAGES.

The employer makes H-1B prevailing wage claims in a Labor Condition Application filed with the DoL. 8 U.S.C. § 1182(n)(1). The DoL, however, has no adjudicative power over Labor Condition Applications. 8 U.S.C. § 1182(n)(1). The DoL must approve all Labor Condition Applications within days as long as the form is filled out correctly. *Id*. Furthermore, the DoL is prohibited from reviewing Labor Condition Applications after they have been approved. 8 U.S.C. § 1182(n)(2)(G)(v). The DoL has no power whatsoever to contest an employer's skill level claim for an H-1B non-immigrant. The non-immigrant's skill level is whatever the employer says it is. Consequently, the Level 1 wage, setting the prevailing wage floor for the DoL's system, is the only one of significance.

The actual breakdown of H-1B workers by skill level is:

- Level 1: 52%
- Level 2: 30%
- Level 3: 12%
- Level 4: 6%

Government Accountability Office, *H-1B Visa Program: Reforms Are Needed to Minimize the*

Risks and Costs of Current Program, Jan. 2011, p. 97. These figures further emphasize the injury the H-1B program causes to American workers. Not only were the previous H-1B wage levels heavily skewed to the low end, but employer claims of H-1B worker skill were skewed to the low end, as well. The percentage of H-1B workers who are sufficiently skilled—as claimed by employers—to warrant the median as the prevailing wage is insignificant.

In India, which lacks a flood of lobbyist-funded studies with results contrary to the basic law of supply and demand, the body of research on H-1B is unambiguous that it has become a mechanism to bring cheap, foreign labor into the United States. For example, the Indian investment research company Crisil published a report on H-1B earlier last year to provide insight for investors in Indian companies that supply H-1B workers to the United States. Crisil, *Bulging staff cost, shrinking margins*, May 27, 2019.[6] The report states that "[t]raditionally, the sector has relied on labour arbitrage for maintaining margins." *Id*. at 1. The report further points out that "[e]mployees with H-1B visas have been at the core of their strategy, given that they cost ~20% cheaper than US-based employees." *Id*. "[I]n general, local talent needs to be paid 25–30% higher wages [than H-1B workers]." *Id*. at 6.

III. III. THE STATUTORY REQUIREMENTS FOR H-1B WAGES HAVE BEEN IGNORED BY THE DEPARTMENT OF LABOR AND EMPLOYERS.

Congress directed the Department of Labor to provide four skill-based prevailing wage levels in 2004. 8 U.S.C. § 1182(p). However, Congress never changed the requirement that the H-1B wage must be at least the prevailing wage for the occupation and location (without considering other factors). 8 U.S.C. § 1182(n)(1). As the statutes are written, a skill-based wage determination

[6] Available at https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html

could raise the H-1B wage above the prevailing wage for the occupation and location, but it should not lower the wage below that threshold. *Id*. Yet under previous system, two of the wage levels (the 17th and 34th percentiles) were below the overall prevailing wage, 79 Fed. Reg. at 14,501 n.3, and they should have been invalid for H-1B purposes, 8 U.S.C. § 1182(n)(1). Even more shocking, nearly all H-1B wages were certified at these unlawful levels. *H-1B Visa Program*, p. 97. Even under the IFR, the new Level 1 wage (45th percentile) should be invalid for H-1B purposes because it is below the prevailing wage for the occupation and location. 85 Fed. Reg. at 63,888.

IV. THE PREVIOUS WAGE SCALES WERE SO LOW THAT THEY ENCOURAGED THE DISPLACEMENT OF AMERICANS, EVEN DURING THE PANDEMIC.

The injury to American workers from the H-1B program is apparent in the job market. Even if H-1B workers were paid comparably to Americans, their volume and concentration in a few industries (computers and engineering) would have a devastating impact due to the law of supply and demand. Yet, when the system allows employers to pay H-1B workers significantly less than Americans, the result is entirely predictable: Americans are replaced by H-1B workers. *See Bulging staff cost, shrinking margins*, p. 1 (describing H-1B as a system of "labor arbitrage").

In the midst of the pandemic, the Tennessee Valley Authority began using H-1B workers supplied by third parties to replace American computer workers. Dave Flessner, *TVA lays off remaining 62 IT workers whose jobs are being outsourced*, Chattanooga Times Free Press, June 2, 2020. President Trump's intervention put a halt to those replacements, but many Americans had already lost their jobs. Dave Flessner, *Under fire from Trump, TVA agrees to keep IT workers, drop outsourcing plan*, Chattanooga Times Free Press, Aug. 6, 2020. Also, in the midst of the pandemic, 1,500 Americans at Vanguard learned their jobs were moving to the Indian outsourcing firm Infosys, whose technical positions are nearly entirely filled with H-1B workers. Joseph N.

DiStefano, *Decision day for 1,300 Vanguard workers as their jobs head to India-based Infosys*, Philadelphia Inquirer, July 29, 2020.

V. IF THE COURT FINDS A LACK OF GOOD CAUSE FOR WAIVING NOTICE AND COMMENT, IT SHOULD REMAND TO PERMIT THE DEPARTMENT OF LABOR TO DO NEW RULEMAKING.

Should the Court find that a global pandemic, declared national emergency, soaring unemployment, and the direct displacement of Americans by H-1B workers do not provide sufficient justification for the DoL to invoke the good cause exemption for public notice and comment, the proper remedy would be to remand to the agency while staying vacatur of the regulation. *Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 147–49 (D.D.C. 2015) (staying vacatur and remanding). It would be both paradoxical and unlawful to restore the previous wage levels made without public notice and comment on the ground that their replacements were made without notice and comment. *See, e.g., Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (finding a rule invalid but refusing to reinstate a previous rule because it too was invalid). Such a restoration would be particularly absurd because the original wage levels were simply arbitrary averages pulled out thin air and skewed to the low end with no relation to the labor market. At least with the current wage levels, DoL made some attempt to correlate the wage levels to skill and experience in the market. 85 Fed. Reg. at 63,888. Therefore, if this Court does not find good cause, a stay of vacatur and remand would better support the public interest, and more fully conform to the purposes of administrative law, than the restoration of an unlawful *status quo* that harmed American workers.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for a preliminary injunction should be denied and the defendants' cross-motion for summary judgment should be granted.

Dated: November 13, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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