UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REYMUNDO ZACARIAS MENDOZA, *et al.*, Plaintiffs, v. HILDA SOLIS, in her official capacity, *et al.*, Federal Defendants, v. MOUNTAIN PLAINS AGRICULTURAL SERVICES, *et al.*, Defendant-Intervenors.	Civil Action No. 11-1790-BAH

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANT-INTERVENORS' MOTION TO DISMISS

Plaintiffs brought this action under the under the Administrative Procedure Act (APA) to challenge the issuance of two Training and Employment Guidance Letters (TEGLs) without notice and an opportunity for public comment. The TEGLs provide special procedures for employers seeking to use the H-2A visa program to hire temporary foreign workers for jobs in sheepherding and the open range production of livestock. The H-2A program takes its name from the statutory provision, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), that describes the visa category for nonimmigrant foreign workers who come to the United States to perform agricultural work on a temporary basis. Pursuant to Section 218 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1188(a)(1), the Secretary of Labor must certify that an employer seeking to use the H-2A program has given preference to U.S. workers over foreign workers for the available

positions, and that, to the extent foreign workers are employed, their employment will not adversely affect the wages and working conditions of U.S. workers. These requirements are intended to protect the jobs, wages, and working conditions of U.S. workers and to prevent the exploitation of vulnerable guestworkers.

Defendant U.S. Department of Labor and its Secretary, Hilda Solis, (collectively, DOL) engaged in a rulemaking process that culminated in the publication in 2010 of regulations governing the H-2A program generally. For the labor certification and housing of sheepherders and open range livestock workers (collectively, herders), however, DOL issued TEGL 15-06, Change 1, Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock Under the H-2A Program, 76 Fed. Reg. 47,243 (Aug. 4, 2011); and TEGL 32-10, Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program, 76 Fed. Reg. 47,256 (Aug. 4, 2011). The primary issue in this case is whether DOL violated the APA by issuing the TEGLs without notice and comment.

Defendant-Intervenors Mountain Plains Agricultural Services and Western Range Association (collectively, MPAS) have moved to dismiss plaintiffs' complaint for lack of standing. Doc. 18. MPAS's motion should be denied. Plaintiffs have standing because they have suffered a procedural injury—the denial of their right to notice and an opportunity to comment before DOL issued the TEGLs that control herders' wages and working conditions—tied to their concrete interest in working as herders with wages and working conditions that have not been adversely affected by the employment of H-2A workers pursuant to the standards set forth in the TEGLs.

BACKGROUND

As explained more fully in plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 6-11, the TEGLs set wages and working conditions for H-2A herders that are far inferior to those required for other H-2A workers. For example, H-2A herders may be required to be on call 24 hours per day, 7 days per week, with no days off, but other H-2A workers cannot be required to work more than the number of hours specified in their contract for a workday, or on their Sabbath or Federal holidays. Employers of H-2A herders are not required to keep track of employee hours as are other H-2A employers, and they are permitted to pay workers on a monthly basis rather than the minimum bimonthly basis required by the general H-2A regulations. The TEGLs permit employers of H-2A herders to pay wages that are far lower than the wage rates set by the general H-2A regulations, because the TEGLs authorize the use of a prevailing wage methodology, and the general H-2A regulations require employers to pay the highest wage resulting from several different methodologies, including the adverse effect wage rate (AEWR) that almost always exceeds the prevailing wage. Thus, for example, an H-2A sheepherder in Colorado is paid $750 per month. In contrast, the hourly AEWR for an H-2A farm worker picking fruit in Colorado is $10.48 per hour. Finally, the TEGLs exempt H-2A herders from the housing standards that normally apply to the H-2A program. As a result, range housing need not have running water, electricity, toilet facilities, or a minimum amount of square footage of living space for each worker, as is required for general H-2A housing.

IDENTITY AND INTEREST OF PLAINTIFFS

Plaintiffs are four workers with experience in sheepherding or in the open range production of livestock. Plaintiffs originally came to the United States as H-2A workers but left the program because of abusive conditions. *See* Declarations of Reymundo Zacarias Mendoza,

Francisco Javier Castro, Alfredo Conovilca Matamoros, and Sergio Velasquez Catalan, attached as Exhibits 1-4, respectively. Each plaintiff has a lawful immigration status and is authorized to work in the United States. Ex. 1 ¶ 8; Ex. 2 ¶ 6; Ex. 3 ¶ 6; Ex. 4 ¶ 7. Thus, plaintiffs are now "U.S. workers" as that term is used in the regulations governing labor certification of H-2A workers. *See* 20 C.F.R. § 655.103(b).[1]

Plaintiffs are able, willing, qualified, and available to work as herders. Although each plaintiff has a specific and concrete desire to work as a herder, none of the plaintiffs will accept work as a herder under the wages and working conditions set by the TEGLs for H-2A herders. Ex. 1 ¶¶ 10-11; Ex. 2 ¶¶ 7-9; Ex. 3 ¶¶ 7-12; Ex. 4 ¶¶ 8-10. Plaintiffs assert that the special procedures set forth in the TEGLs have had an adverse effect on their employment opportunities and that, but for this adverse effect, they would be working as sheepherders or in the open range production of livestock. Ex. 1 ¶ 12; Ex. 2 ¶ 10; Ex. 3 ¶¶ 10-12; Ex. 4 ¶ 11.

Plaintiff Reymundo Zacarias Mendoza came to the United States as an H-2A worker from Peru, where he was a farmer. From July 9, 2009 to September 13, 2010, he worked as an H-2A sheepherder near Evanston, Wyoming. His employers failed to provide him with sufficient food, and after he complained to DOL, he was fired. Ex. 1, ¶¶ 2, 5. After leaving his H-2A job, Mr. Zacarias Mendoza worked as a ranch hand tending cattle in Utah for an employer who also employed H-2A workers, and he has had a series of temporary jobs. *Id.* ¶¶ 6-7. Mr. Zacarias Mendoza is a lawful permanent resident of the United States, and he is authorized to work in the United States. *Id.* ¶ 8.

[1]A "U.S. worker" is "[a] worker who is: (1) A citizen or national of the U.S.; or (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by the Department of Homeland Security) to be employed in the U.S.; or (3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging." 20 C.F.R. § 655.103(b).

Plaintiff Francisco Javier Castro worked with livestock in his native Chile, and with sheep in Argentina, before coming to the United States as an H-2A sheepherder. He left his H-2A sheepherding job in March 2010 because of mistreatment by his employer. His employer failed to provide Mr. Castro with sufficient food, and withheld his documents and wages. Ex. 2 ¶¶ 2-4. Since leaving his job as an H-2A sheepherder, Mr. Castro has worked on a farm and at a meatpacking plant. *Id.* ¶ 5. Mr. Castro is a lawful permanent resident of the United States, and he is authorized to work in the United States. *Id.* ¶¶ 6, 10.

Plaintiff Alfredo Conovilca Matamoros was a sheepherder in Peru before coming to the United States in March 2009 to work as an H-2A sheepherder in Colorado. Ex. 3 ¶¶ 2-3. Mr. Conovilca Matamoros was mistreated by his employer who took his travel documents and refused to return them, denied Mr. Conovilca Matamoros personal access to his bank account, refused to let him talk to strangers, and failed to timely provide food, medical attention, and wages. *Id.* ¶ 4. Since leaving his job as an H-2A sheepherder, Mr. Conovilca Matamoros has had a variety of jobs, including picking fruit alongside H-2A workers. *Id.* ¶¶ 5, 11. Mr. Conovilca Matamoros is in the United States legally and is authorized to work in the United States. *Id.* ¶ 6.

Plaintiff Sergio Velasquez Catalan worked for many years tending sheep and cattle in Chile before coming to the United States in April 2004 to work with cattle on the open range as an H-2A worker. Ex. 4 ¶¶ 2-3. After he arrived in the United States, he found the conditions to be far inferior to what he expected. He left his employment as an H-2A herder because his employer was abusive, held his documents, and prevented him from leaving his housing and surrounding work area. *Id.* ¶ 4. Since leaving his H-2A job, Mr. Velasquez Catalan has worked various jobs, including as a ranch hand tending cattle. *Id.* ¶¶ 5-6. Mr. Velasquez Catalan is a

lawful permanent resident of the United States, and he is authorized to work in the United States. *Id.* ¶ 7.

ARGUMENT

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a court must accept all of the factual allegations in the complaint as true, and also "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction[.]" *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). To demonstrate standing under Article III, a party must show injury in fact that was caused by the conduct of the defendants and that can be redressed by judicial relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The "party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

"A special standing doctrine applies when litigants attempt to vindicate procedural rights, such as the right to have notice of proposed regulatory action and to offer comments relating to such action." *Ctr. for Auto Safety, Inc. v. Nat'l Highway Traffic Safety Admin.*, 342 F. Supp. 2d 1, 11-12 (D.D.C. 2004) (citing *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)); *see Iyengar v. Barnhart*, 233 F. Supp. 2d 5, 12 (D.D.C. 2002) (same). In such a case, "'where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs,' they can establish standing 'without meeting all the normal standards for redressability and immediacy.'" *Id.* at 12 (quoting *Lujan*, 504 U.S. at 572 n.7). Rather, "'a party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority'—such as the APA's notice and comment requirements—'at least if the procedure is intended to enhance the quality of the substantive decision.'" *Id.* (quoting *Int'l Bhd.*

of Teamsters v. Pena, 17 F.3d 1478, 1484 (D.C. Cir. 1994)). Although a plaintiff asserting a procedural violation must show that "the procedural step was connected to the substantive result," a plaintiff "never has to prove that if he had received the procedure the substantive result would have been altered." *Sugar Cane Growers*, 289 F.3d at 94-95; *accord Nat'l Parks Conservation Ass'n v. Mason*, 414 F.3d 1, 5 (D.C. Cir. 2005); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). Indeed, "[i]f a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers*, 289 F.3d at 95.

I. Plaintiffs Have Standing to Challenge DOL's Failure to Conduct Notice-and-Comment Rulemaking in Accordance with the APA.

In establishing the conditions for approval of H-2A petitions, Congress intended to protect the employment opportunities, wages, and working conditions of similarly employed workers in the United States from any downward pressure that might result from the employment of H-2A guest workers. Thus, a "petition to import an alien as an H-2A worker . . . may not be approved" unless the Secretary of Labor certifies that:

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
>
> (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1).

Plaintiffs have standing to challenge the deprivation of their procedural right to comment on the TEGLs because that procedural step is connected to their concrete interest—protected by § 1188—in working as herders with wages and working conditions that have not been adversely

affected by the employment of H-2A workers. "It requires no imaginative leap to conclude that by cutting plaintiffs out of the loop" when DOL issued the TEGLs without notice and comment, "the agency appreciably increased the risk that plaintiffs' interest would be compromised." *Iyengar*, 233 F. Supp. 2d at 13.

A. The procedural violation is connected to plaintiffs' substantive rights.

MPAS erroneously argues that plaintiffs lack standing because the alleged procedural violation is not connected to a substantive right. Doc. 18 at 9. The source of MPAS's error is its mischaracterization of the right that plaintiffs seek to protect. Contrary to MPAS's assertion, plaintiffs do not claim that the INA "create[s] a right to attractive wages and working conditions." *Id.* Rather, plaintiffs claim a legally protected interest in not having their employment opportunities, wages, and working conditions adversely affected by the employment of H-2A workers—an interest clearly protected by 8 U.S.C. § 1188(a)(1). Because MPAS fails to properly identify the substantive right at issue, MPAS's reliance on *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976), and *Hernandez Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977), is misplaced.

In *Williams*, the Fifth Circuit held that the Secretary of Labor is authorized to set wages for H-2 workers that will avoid wage depression, but not wages "high enough to attract those domestic workers not otherwise willing to work" in the industry. 531 F.2d at 306-07. In this case, plaintiffs allege that the violation of their procedural rights resulted in TEGLs that, among other things, allow employers to pay wages adversely affected by the importation of H-2A workers. Contrary to MPAS's assertion, plaintiffs do not allege that wages must be high enough to attract workers who, unlike plaintiffs, have no interest in herder jobs. Rather, plaintiffs assert that they have a right to compete for herder jobs at non-depressed wages. Although wages at that

level may be too low to attract workers from other industries, plaintiffs would be interested in such jobs at non-depressed wages, *see* Ex. 1 ¶¶ 11-13; Ex. 2 ¶ 9; Ex. 3 ¶ 9, 12; Ex. 4 ¶ 9, and Congress has given them the right to compete for such jobs at non-depressed wages, 8 U.S.C. § 1188(a)(1).

In *Hernandez Flecha*, the First Circuit held that "a worker who is not able and willing to enter into a contract of employment" under the standards set by the Secretary of Labor is not "available" for such work. 567 F.2d at 1157. But unlike plaintiffs in this case, the plaintiffs in *Hernandez Flecha* were not challenging the procedure by which the work standards were set. Plaintiffs here are making such a challenge because they believe that, as a result of DOL's failure to use notice-and-comment rulemaking, the working conditions set by the TEGLs are depressed. Because plaintiffs bring a procedural challenge, they need not prove that the notice-and-comment rulemaking process would have altered the standards in the TEGLs, or resulted in standards under which plaintiffs would be willing to work as herders. Rather, it is enough for plaintiffs to show "that the procedural step was connected to the substantive result," *Sugar Cane Growers*, 289 F.3d at 94-95, and that compliance with the notice-and-comment requirements of the APA might have resulted in standards under which plaintiffs would return to work as herders.

MPAS's reliance on *Comite de Apoyo Para los Trabajadores Agricolas (CATA) v. Dole*, 731 F. Supp. 541 (D.D.C. 1990), is similarly misplaced. The court in *CATA* found that a labor organization had standing to challenge a handbook definition adopted without notice and comment, based on a single incident in which the disputed definition allegedly prevented a particular practice from becoming a required element of H-2A work contracts in a particular region. *Id.* at 543-44. The court determined that the organization had standing despite "the failure of plaintiffs to allege with specificity any ongoing harm from the disputed definition." *Id.*

at 546. On the merits, the court granted summary judgment to the plaintiffs based solely on the violation of the APA's notice-and-comment requirement and found that plaintiffs' challenge to the substance of the disputed definition was premature. *Id.* The court's only mention of standing in the context of the procedural violation came in a footnote, in which the court observed that the D.C. Circuit had found standing to bring a procedural challenge where a substantive statute guarantees procedural rights. *Id.* at 544 n.1. The court observed that the substantive statutes at issue in *CATA* did not themselves "create any rights in plaintiffs to complain of lack of notice-and-comment procedures," *id.*, but went on to find for plaintiffs based on a violation of the APA. To the extent the decision in *CATA* can be read as requiring a guarantee of procedural rights in the substantive statute in order for plaintiffs to have standing to challenge a violation of the notice-and-comment requirements of the APA, the decision is wrong. In any event, *CATA* was decided before *Lujan* clarified the special standing doctrine for plaintiffs seeking to enforce a procedural right.

B. Plaintiffs have alleged a concrete, particularized injury.

MPAS argues that plaintiffs have not established that the violation of their procedural rights under the APA has caused them injury because, according to MPAS, plaintiffs have failed to allege facts that sufficiently distinguish plaintiffs from the general public. Doc. 18 at 12. Contrary to MPAS's assertion, plaintiffs have described in detail their experience working as herders and their desire to return to herding on the open range. *See* Ex. 1 ¶¶ 11-13; Ex. 2 ¶¶ 7-12; Ex. 3 ¶¶ 7-12; Ex. 4 ¶¶ 8-11. Although plaintiffs have sought such work, plaintiffs have not encountered any employer willing to offer employment on terms superior to those required by the challenged TEGLs. Plaintiffs allege that the standards in the TEGLs have had an adverse effect on their employment opportunities and caused them economic injury by allowing the

importation of foreign workers under depressed wages and working conditions. *Id.* Because plaintiffs are experienced herders who have demonstrated their willingness to accept herder work if the terms were not depressed as plaintiffs believe they are under the challenged TEGLs, plaintiffs have suffered and continue to suffer an injury not shared by members of the public who are not experienced herders and have not actively sought such work.

II. Plaintiffs Have Prudential Standing.

MPAS contends that plaintiffs lack prudential standing because the interests they assert supposedly fall outside the zone of interests protected by the INA. Doc. 18 at 15. MPAS's argument is based on the same mistake discussed above—MPAS's misunderstanding of the interest that plaintiffs seek to protect. Plaintiffs do not claim that the INA protects an interest in "attractive wages and working conditions." *Id.* Rather, plaintiffs claim a legally protected interest in not having their employment opportunities, wages, and working conditions adversely affected by the employment of H-2A workers. *See* 8 U.S.C. § 1188(a)(1).

The zone-of-interests test "is not demanding." *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 791 (D.C. Cir. 2004). It is enough that "the interest sought to be protected by the complainant is *arguably* within the zone of interest to be protected . . . by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). Here, the language of the statute makes clear that one of the purposes of INA is to protect U.S. workers from the wage depression caused by foreign workers. *See Bennett v. Spear*, 520 U.S. 154, 175-76 (1997) (whether a plaintiff's interests satisfy zone-of-interests test is determined by reference "to the particular provision of law upon which the plaintiff relies"). Plaintiffs are U.S. workers, and they allege that the TEGLs allow the wages and working conditions in their preferred profession to be adversely affected by the importation of foreign

workers. Thus, plaintiffs' interests fall within the zone of interests protected by the INA. *See Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359 (D.C. Cir. 1996) (a plaintiff may show that it is within a statute's zone of interests "if it is among those [who] Congress expressly or directly indicated were the intended beneficiaries of a statute," or "if it is a 'suitable challenger' to enforce the statute," by virtue of having "interests . . . sufficiently congruent with those of the intended beneficiaries" (citations omitted)); *e.g.*, *Teamsters*, 17 F.3d at 1483 ("The union's interest in highway safety is indisputably one that the Safety Act . . . seek[s] to advance, and so the union plainly has [prudential] standing.") Plaintiffs' interests are the *very kinds of interests* that Congress intended to protect. Plaintiffs therefore have prudential standing.

MPAS reluctantly concedes that "similarly employed U.S. workers fall within the zone of interests of the statute if their wages and working conditions have been adversely affected by the employment of aliens," Doc. 18 at 16, but contends that plaintiffs are not U.S. workers willing to work as herders. *Id.* at 18. MPAS is wrong. First, plaintiffs' declarations establish that they are legally authorized to work in the United States, which qualifies them as "U.S. workers." 20 C.F.R. § 655.103(b). Second, contrary to MPAS's assertion, plaintiffs are willing to work as herders and have sought such jobs, but the conditions set forth in the challenged TEGLs are the only conditions under which plaintiffs can obtain such employment. If plaintiffs ask for better wages and working conditions, employers can treat plaintiffs as "unavailable" and import H-2A workers who will work under the depressed TEGL conditions. *See Hernandez-Flecha*, 567 F.2d at 1157. MPAS claims that by refusing to accept employment under the conditions set by the TEGLs, plaintiffs have excluded themselves from the class of workers protected by the INA. In fact, just the opposite is true. The INA explicitly protects U.S. workers, like plaintiffs, who

would be working as herders if the TEGLs had not depressed the wages and working conditions available to them.

III. Plaintiffs' Claims Are Ripe.

Finally, MPAS contends that plaintiffs' claims are not ripe because plaintiffs have not identified any specific impact that the TEGLs have had or will have on them. Doc. 18 at 19. To the contrary, plaintiffs have shown that they have suffered and will continue to suffer injury because they cannot find herder jobs with wages and working conditions that have not been adversely effected by the TEGLs.

Moreover, because plaintiffs bring a procedural challenge to TEGLs that have already been issued, plaintiffs' claim "can never get riper." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) ("[A] person with standing who is injured by a failure to comply with [a procedural requirement] may complain of that failure at the time the failure takes place, for the claim can never get riper."). The Court can resolve the merits of this case by focusing on the TEGLs to determine whether they should have been subject to notice and comment. No further agency action is needed to analyze whether DOL violated the APA. *See Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C. Cir. 1999).

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

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