

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Case No. 15-cv-01562-BAH

HISPANIC AFFAIRS PROJECT, ET AL.,
Plaintiffs,

v.

EUGENE SCALIA, ET AL.,¹
Defendants.

JOINT STATUS REPORT

On April 23, 2019, the Court granted the parties' joint motion to refer this case to mediation and to stay the discovery deadlines. *See* Minute Order (Apr. 23, 2019). Pursuant to this Court's April 23, 2019 and July 23, 2019 minute orders, the parties inform the Court that Plaintiffs and the Federal Defendants have entered into a Settlement Agreement, outlined below, which resolves the remaining issues in this case. *See* Settlement Agreement, Attached.

Intervenor Defendants do not object to the Settlement Agreement.

In particular, the Department of Labor ("DOL") and the Department of Homeland Security ("DHS") United States Citizenship and Immigration Services ("USCIS") agree to take the following actions:

1. USCIS will endeavor to issue a policy memorandum addressing what constitutes a temporary or seasonal need for H-2A sheep and goat herder visa petitions by November 15, 2019. This memorandum will have a thirty-day comment period to provide the parties and the public with notice and opportunity to comment. USCIS will endeavor to review all comments and, if necessary, make edits and

¹ Pursuant to Federal Rule of Civil Procedure 25(d), the Court should substitute the following individuals for their predecessors: Eugene Scalia as the Secretary of Labor; John Pallasch as the Assistant Secretary for Department of Labor's Employment and Training Administration; and Kevin McAleenan as the Acting Secretary for the Department of Homeland Security.

publish a revised policy memorandum by March 1, 2020. USCIS anticipates that the policy memorandum will have a June 1, 2020 effective date.

2. DOL will engage in rulemaking to propose rescinding 20 C.F.R. § 655.215(b)(2), which provides:

The period of need identified on the *H-2A Application for Temporary Employment Certification* and job order for range sheep or goat herding or production occupations must be no more than 364 calendar days. The period of need identified on the *H-2A Application for Temporary Employment Certification* and job order for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months.

DOL will request that this proposed rule be placed on the Office of Management and Budget's Spring 2020 regulatory agenda.

3. DOL will provide agency contact information for reporting enforcement concerns and USCIS will provide a direct submission option for submitting an electronic "tip" regarding potential H-2A visa fraud.
4. USCIS will provide eight quarterly reports of certain aggregate data so that Plaintiffs can independently monitor the effect of this settlement.

Upon satisfaction of terms (1) and (2), Plaintiffs will move to dismiss the remaining counts in this case, with prejudice. Such motion will state that all remaining claims, including attorneys' fees, are resolved.

Functionally, this Settlement Agreement will address the D.C. Circuit's concerns with the approval of seriatim 364-day H-2A petitions for sheep and goat herders or petitions for similarly lengthy consecutive periods for the same type of sheep/goat herder position. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 386 (D.C. Cir. 2018) ("the Project has plausibly shown that the agency's *de facto* policy of authorizing long-term visas is arbitrary, capricious, and contrary to law in violation of the APA and the Immigration and Nationality Act, . . . because it authorizes the creation of permanent herder jobs that are not temporary or seasonal.") (internal marks and citation to Second Am. Compl. omitted). In particular, USCIS's policy memorandum

will make clear that, going forward, employers seeking to petition for H-2A sheep and goat herders will be required, as with other H-2A petitioners, to establish that the employer's need, and therefore, the employment proposed in the temporary labor certification and in the petition, is of a temporary or seasonal nature. Moreover, the policy memorandum will address the D.C. Circuit's strong suggestion that "a policy of authorizing long-term visas," resulting in the "creation of permanent herder jobs that are not temporary or seasonal" violates both the Administrative Procedure Act and the Immigration and Nationality Act. *See Hispanic Affairs Project*, 901 F.3d at 386 (internal marks omitted). DOL's proposed rescission of 20 C.F.R. § 655.215(b)(2) will, in turn, eliminate any presumptive period of need for employment involving range herding, and thus all applicants for labor certifications must individually demonstrate that the employer's need is temporary or seasonal. Ultimately, DOL and USCIS will adjudicate all H-2A labor certification applications and visa petitions on a case-by-case basis.

The parties request that the Court approve the Settlement Agreement, vacate any prior deadlines, including the discovery deadline, and administratively stay the case as outlined in the attached Proposed Order.

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November 8, 2019

Respectfully Submitted,

/s/ David Seligman

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, I served a true and correct copy of the forgoing on all parties pursuant to F.R.C.P. 5.

/s/ Jessica A. Dawgert
Jessica A. Dawgert
Attorney for Federal Defendants