UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVERGLADES HARVESTING AND HAULING, INC.
1331 Commerce Dr., LaBelle, FL 33935

STATEWIDE HARVESTING AND HAULING, LLC
201 Center St., Dundee, FL 33838

FLORIDA FRUIT AND VEGETABLE ASSOCIATION
800 Trafalgar Ct., Suite 200, Maitland, FL 32751

FLORIDA CITRUS MUTUAL
600 N Broadway Ave, Ste 101, Bartow, FL 33830

NATIONAL COUNCIL OF
AGRICULTURAL EMPLOYERS
525 Ninth St., NW, Suite 800, Washington, DC 20004

Plaintiffs

v. **Civil Action No. _____**

EUGENE SCALIA,
in his official capacity as
United States Secretary of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

JOHN P. PALLASCH
in his official capacity as Assistant Secretary of Labor,
Employment and Training Administration,
200 Constitution Avenue, N.W., Washington DC 20210

Defendants.

COMPLAINT AND PRAYER FOR INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this action seeking injunctive relief from the Department of Labor's unannounced and unlawful reversal of policy regarding whether the initial transportation of agricultural products to storage or processing constitutes "agricultural labor" for purposes of eligibility for the H-2A temporary agricultural nonimmigrant visa program.

2. Applications for H-2A temporary employment certifications for this same work were consistently and routinely approved for years prior to the 2019 harvest season.

3. Without any public announcement of a change in interpretation, much less any notice-and-comment rulemaking, the Department of Labor began to deny identical applications this year.

4. Without access to workers who can harvest fruit, vegetables, sugar cane, and other crops and, just as importantly, bring those crops from the places where they are grown to the places where they are stored or processed, the farms who produced those crops will suffer devastating and irreparable losses because of the Department's change in interpretation.

5. The Department's failure to comply with Congress' directions in the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act, and the Administrative Procedure Act jeopardizes the ongoing viability of growers and the farm labor contractors who work with them to harvest and move their crops.

6. The Department of Labor is currently considering public comments on a proposed overhaul of the H-2A visa program, with a comment period that closed in late

September 2019, and a final rule expected in early 2020. One of the issues discussed in the notice of proposed rulemaking, on which the Department specifically invited public comment, was the scope of "agricultural labor" under the Department's H-2A regulations.

7. If the Department wished to fundamentally revise its interpretation of the scope of agricultural labor to change H-2A eligibility for this essential link in the chain from growing to harvesting to delivery to storage or market, the ongoing rulemaking process was the lawful way to do that. The Department is not legally permitted to pull the rug out from growers and agricultural employers who have come to rely on access to the H-2A program.

8. Months after the Department began denying these previously-certified applications, and long after Plaintiffs Everglades Harvesting & Hauling and Statewide Harvesting and Hauling had submitted their applications for this season and been denied by the Department, the Department finally issued a series of "frequently asked questions" on the "H-2A Definition of Agricultural Labor or Services," on October 23, 2019. A copy of which is attached to this Complaint as Exhibit A.

9. By the time the Department announced this new interpretation, Everglades, Statewide, and other H-2A labor contractors represented by Plaintiffs Florida Fruit and Vegetable Association, Florida Citrus Mutual, and the National Council of Agricultural Employers had already entered into contracts for the 2019-2020 harvest and hauling season, based on their reliance on prior-year certifications and a reasonable expectation of continued participation in the H-2A program for this year.

10. These employers seek narrowly-tailored emergency relief from this Court, limited to employers who have previously been certified for H-2A work for substantially the same job duties for which they were denied this year, who were denied prior to the October 23, 2019 announcement, and only until such time as the Department issues an interpretation of "agricultural employment" after notice-and-comment.

II. JURISDICTION AND VENUE

11. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act ("APA")).

12. Venue in this judicial district is proper under 28 U.S.C. § 1391(e).

III. PARTIES

13. Plaintiff, EVERGLADES HARVESTING & HAULING ("Everglades") is incorporated under the laws of the State of Florida. They contract with growers to provide agricultural labor to harvest a variety of crops and to transport those harvested crops to off-site storage or processing locations. Their recent history of participation in the H-2A program with respect to these hauling activities is as follows:

- H-300-17276-315601 – 9 Drivers ***approved*** October 26, 2017 for the period of November 18, 2017 to May 31, 2018
- H-300-17192-342141 – 4 Mechanics ***approved*** August 2, 2017 for the period of September 1, 2017 to May 31, 2018
- H-300-18222-134087 – 30 Drivers ***approved*** September 4, 2018 for the period of October 5, 2018 to May 31, 2019

- H-300-18262-059828 – 30 Drivers ***approved*** October 16, 2018 for the period of November 15, 2018 to May 31, 2019

- H-300-18199-956082 – 4 Mechanics ***approved*** August 4, 2018 for the period of September 7, 2018 to May 31, 2019

- H-300-19228-106282 – 44 Drivers ***denied*** October 1, 2019 for the period of October 15, 2019 to March 29, 2020

Without these H-2A workers, Everglades will not be able to perform contracts in which it has entered with its grower clients. Everglades had no notice or other reason to believe that the consistent pattern of certifications in previous years would be upended in 2019. Everglades' business is structured around bringing its grower-clients' crops from the fields and groves where they are grown to storage or processing facilities. Without access to the H-2A program, it will be impossible for Everglades to perform this work.

14. Plaintiff STATEWIDE HARVESTING AND HAULING, LLC ("Statewide") is incorporated under the laws of the State of Florida. They contract with growers to provide agricultural labor to harvest a variety of crops and to transport those harvested crops to off-site storage or processing locations. Their recent history of participation in the H-2A program with respect to these hauling activities is as follows:

- H-300-18270-265546 – 5 Truck Drivers ***approved*** October 31, 2018 for the period of November 18, 2018 to May 31, 2019

- H-300-18354-825382 – 6 Truck Drivers ***approved*** January 15, 2019 for the period of February 18, 2019 to June 21, 2019

- H-300-19192-814770 - 3 Truck Drivers ***denied*** August 7, 2019 for the period of September 16, 2019 to June 30, 2020

Based on the 2018 and 2019 certifications, Statewide reasonably believed that the Department would continue to certify the same position for the winter 2019 period for

Truck Drivers and had no notice prior to submitting the most recent application that the Department had reversed itself and would not certify such positions as H-2A workers. Without these H-2A workers, Statewide will not be able to fulfill its contracts with growers to harvest and haul produce from the farms to storage or processing locations, irreparably harming Statewide and its grower-customers.

15. Plaintiff FLORIDA FRUIT AND VEGETABLE ASSOCIATION ("FFVA") is an agricultural organization whose mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. For more than 70 years, FFVA has represented Florida's grower-shipper community, with members covering a broad range of crops: vegetables, citrus, tropical fruit, berries, sod, sugar cane, tree crops, and more. FFVA was organized under the laws of the State of Florida in 1943 and currently represents the vast majority of fresh fruit and vegetable production in Florida, with 134 producer members and another 235 trade associate members. FFVA's members include both growers who rely on H-2A labor contractors to harvest and haul their crops and the H-2A labor contractors who perform this essential work. FFVA files applications for H-2A workers on behalf of its members (more than 200 last year), is an active participant in national H-2A employer groups, and tracks Department of Labor actions and announcements regarding the H-2A program.

16. Plaintiff FLORIDA CITRUS MUTUAL ("FCM"), founded in 1948, is Florida's largest citrus grower organization. The Florida citrus industry creates an $8.6 billion annual economic impact, employing nearly 46,000 people and covering more than 400,000 acres. FCM's membership accounts for more than 90% of Florida citrus

production acres, and more than 90% of those acres are harvested by H-2A workers, many of whom are employed by H-2A labor contractors. As a result, FCM advocates on behalf of its members on H-2A issues like those presented in this action.

17. Plaintiff NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS ("NCAE") is a national association organized under the laws of the District of Columbia. Founded in 1964, NCAE is the only national association focusing exclusively on agricultural labor issues from the agricultural employer's viewpoint. NCAE represents labor-intensive agriculture before Congress, with federal agencies and, where necessary, in court. Its members are growers, associations, and others whose business interests depend on labor-intensive agriculture. NCAE's membership, including farmers represented by its association members, represents an estimated two-thirds of all U.S. agricultural employers directly engaged in the production of food and nursery crops in the United States, and 85% of H-2A employers. Many of the growers and processors represented by NCAE make use of the H-2A temporary nonimmigrant visa programs to meet their temporary or seasonal labor needs. NCAE brings this action on behalf of its employer members who participate in the H-2A program, the H-2A employer-members of its member associations, and its non-H-2A grower members who rely on H-2A labor contractors to harvest and haul their crops.

18. Defendant EUGENE R. SCALIA is the United States Secretary of Labor ("Secretary Acosta" or "the Secretary"). The Secretary is responsible for all functions of the DOL, including the Office of Foreign Labor Certification within the Employment and Training Administration, which issues H-2A labor certifications and is authorized by

Congress to determine the scope of "agricultural employment" under the H-2A program. Secretary Scalia is sued in his official capacity; he is an official resident of Washington, D.C. and notices and interpretations related to the H-2A program are issued out of Washington, D.C.

19. Defendant JOHN PALLASCH is the Assistant Secretary of Labor for the Employment and Training Administration ("ETA"). ETA oversees the Office of Foreign Labor Certification ("OFLC") which is responsible for approving or denying employers' applications for temporary employment certification under the H-2A program. Assistant Secretary Pallasch is sued in his official capacity; he is an official resident of Washington, D.C. and he issues notices and interpretations relating to the H-2A program from Washington, D.C.

IV. LEGAL BACKGROUND

19. Congress created the H-2A program when it amended the Immigration and Nationality Act ("INA") through the Immigration Reform and Control Act of 1986 ("IRCA") to divide the single H-2 nonimmigrant visa program into a temporary agricultural visa program (H-2A) and a temporary non-agricultural visa program (H-2B), with eligibility for H-2A contingent on the work to be performed to consist of "agricultural labor or services." 8 U.S.C. § 1101(a)(15)(H)(ii)(A).

20. In creating this division, Congress directed the Secretary of Labor to define "agricultural labor or services" as "including" the definition of "agricultural labor" from the Fair Labor Standards Act and "agriculture" from the Internal Revenue Code. 8 U.S.C. § 1101(a)(15)(H)(ii)(A). This use of the term "including" reflects a clear Congressional

intent that the Secretary use a more expansive definition than just those two definitions. *See, e.g., United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1115 (D.C. Cir. 2009) (Congress' use of term "includes" means same as "includes but not limited to" and is equally non-exhaustive).

21. For years, the Office of Foreign Labor Certification has exercised the Secretary's Congressionally-delegated authority in defining the scope of "agricultural labor or services" to include work harvesting and hauling crops by H-2A labor contractors ("H-2ALCs"). Everglades, Statewide, and other members of FFVA, FCM, and NCAE were among the employers certified for this sort of work, including truck-driving positions to haul harvested crops grown by the farms with which the H-2ALC contracted.

22. Where the Department of Labor operates under a given interpretation for a period of time and employers come to rely on that interpretation, the Department is not permitted to reverse that interpretation without providing an adequate rationale for its change. *See, e.g., Encino Motorcars, LLC v. Navarro*, 579 U.S. ____, 136 S.Ct. 2117 (2016) (FLSA interpretation of overtime eligibility for automotive service advisors), interpreting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

23. By failing to provide public notice, much less an opportunity for notice-and-comment rulemaking, on this reversal of interpretation, the Department of Labor has violated the requirements of the Administrative Procedure Act. 5 U.S.C. § 706(2).

24. In addition to the procedural violation, the Department's interpretation that this truck-driving work to move freshly harvested crops to storage is substantively flawed

and constitutes an arbitrary and capricious exercise of the discretion conveyed by Congress to the Secretary of Labor in IRCA. Agricultural production by a farmer is pointless unless the farm is able to harvest those crops and move them to storage or to market. The new DOL interpretation threatens to leave millions of tons of crops to rot in the fields where they were grown, for want of agricultural workers to transport them away.

V. IRREPARABLE HARM

25. Farmers and H-2A labor contractors entered into contracts for the 2019 harvest season based on a reasonable reliance on prior-year certifications for this sort of truck-driving work. If the Department denies the H-2A labor contractors' ability to hire these essential workers under this unannounced change in interpretation, the farms will lose their year's crops and/or the H-2A labor contractor will be in breach of their contract and suffer irremediable loss of reputation and/or financial losses that could put them out of business.

26. Had the Department timely announced its change of position or, ideally, effected a change of position supported by an adequate rationale and with an opportunity for public comment, then the farmers and labor contractors would have been able to avoid this irreparable harm. Given the extremely late public statement, however, here at the end of October at the worst possible time for citrus and cane sugar harvesting/hauling operations, the Department's actions will be nothing short of disastrous for Everglades, Statewide, and the members of FFVA, FCM, and NCAE.

27. If the short-term injunctive relief requested is not granted, and the Department simply refuses to certify employers for truck-driving positions to move

harvested crops, there will no remedy available for these farms and employers. If, however, the Court were to grant injunctive relief, and direct the Department to certify these H-2A employers in exactly the same way that they did in 2018, 2017, and many previous years, no one would be injured, as that is the status quo.

28. Thus, the balance of equities weighs strongly in the favor of preserving the status quo and affording these agricultural employers at least temporary or preliminary injunctive relief while this issue can be litigated fully.

VI. CLAIMS

Count I

The Department of Labor Has Failed to Give Timely Notice of a Change in Interpretation or to Provide Required Notice and Comment Procedures (5 U.S.C. § 706(2)(D))

29. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1-28, above, as though set forth fully herein.

30. The Department of Labor has reversed a long-standing practice without the requisite public notice to the H-2A stakeholder community in a timely manner, and without observance of the procedures called for in the APA. 5 U.S.C. § 706(2)(D).

31. This lack of timely notice has and will continue to cause irreparable harm to Plaintiffs and their association members.

32. Since the Department acted in violation of the APA in reversing a policy on which they relied, employers who have been certified for H-2A applications prior to 2019 who were denied such certifications on or before October 23, 2019 when the Department finally issued written notice of a change in that policy should be certified on an expedited

basis for this season. To the extent that the Department completes the current rulemaking process for the H-2A program in a way that addresses this issue and codifies an interpretation of the scope of agriculture, that will remedy the procedural violation. Until that time, this narrow set of applications, including but not limited to Everglades and Statewide, should be certified under the Department's previous interpretation.

Count II

The Department of Labor Is Acting in Violation of 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (5 U.S.C. § 706(2)(A), (C))

33. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1-32, above.

34. The Administrative Procedure Act does not permit an agency to act in a manner that is "not in accordance with law" 5 U.S.C. § 706(2)(A), nor "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

35. The Department of Labor is applying an improperly narrow definition of "agricultural labor or services" for the H-2A program, ignoring Congress' directive to apply a definition broader than just the FLSA and IRC definitions.

36. Since the Department's actions are not supported by and, indeed, are contrary to statutory authority, the Department of Labor's October 23, 2019 Frequently Asked Questions notice should be withdrawn, and a substitute notice reflecting a more expansive interpretation of "agricultural labor or services," consistent with IRCA, should be issued by the Department at once, and the Department should be enjoined from denying

additional applications based on the improperly narrow definition of "agricultural labor or services" set forth in the October 23, 2019 notice.

WHEREFORE, Plaintiffs pray that the Court:

37. Enter a temporary restraining order and preliminary injunction, pending a decision on the merits, enjoining the Defendants from: (i) denying applications for temporary employment certifications for H-2A labor contractors engaged in hauling harvested crops; or (ii) otherwise applying the October 23, 2019 Frequently Asked Questions interpreting the scope of "agricultural labor or services" under 8 U.S.C. § 1101(a)(15)(H)(ii)(A); and requiring the Defendants to withdraw the October 23, 2019 notice and to issue an interpretation of the scope of "agricultural labor or services" following notice-and-comment rulemaking under the APA;

38. Award Plaintiffs their costs and expenses, including reasonable attorney's fees whether under the Equal Access to Justice Act or otherwise; and

39. Award such further and additional relief as is just and proper.

Dated: October 31, 2019

/s/ Christopher J. Schulte
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