

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

Civil Case No. 15-cv-01785

HISPANIC AFFAIRS PROJECT  
RODOLFO LLACUA; and  
JOHN DOE,

Plaintiffs,

v.

THOMAS E. PEREZ, in his official capacity as United States Secretary of Labor;  
UNITED STATES DEPARTMENT OF LABOR; and  
PORTIA WU, in her official capacity as Assistant Secretary, Employment and Training  
Administration, United States Department of Labor;

Defendants.

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**COMPLAINT**

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**INTRODUCTORY STATEMENT**

This lawsuit aims to address the United States Department of Labor's ("DOL's") repeated and ongoing violation of its own regulations, which have caused the exclusion of nearly all U.S. workers from the shepherd labor force and replaced them with impoverished foreign workers on H-2A visas. In most states, those workers earn \$750, or about \$2-3 per hour.

The DOL has failed to comply with three regulatory requirements in violation of the Administrative Procedure Act (APA). These requirements govern the DOL's techniques for calculating a wage floor for shepherders in the H-2A program in a way that will not adversely affect domestic workers. To do that, the DOL must: (1) update its

determination of the shepherd wage floor annually, (2) rely on statistically valid data to determine the wage floor, and (3) rely on current data.

DOL has violated all three of these requirements, thereby preventing the Plaintiffs from earning living wages as shepherders. Plaintiffs therefore ask this Court to force the DOL to act in accord with its statutory and regulatory mandates and to calculate a wage floor for the shepherding industry in a just and reasoned way.

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction over this suit pursuant to 28 U.S.C. §§ 1331 and 1346 for review of final agency action under the APA, 5 U.S.C. §§ 701-706. In addition, this Court has jurisdiction under 28 U.S.C. § 2201 for declaratory relief.

2. Venue is proper pursuant to 28 U.S.C. § 1391(e)(1) because all of the defendants are officers of the federal government sued in their official capacities.

### **PARTIES**

3. Plaintiff Hispanic Affairs Committee (HAP) is a Colorado nonprofit corporation and organization open to H-2A shepherders, other members of the immigrant worker community, members of the Hispanic community in Western Colorado, former shepherders, and their supporters. Members live and work primarily in Western Colorado. Members include current H-2A shepherders and former herders who would legally work as shepherders but for the low wages earned by workers in this industry. Through its work, HAP strives to improve the working and living conditions of its members and member communities. HAP seeks to protect its members' interest in ensuring the DOL is enforcing the H-2A regulations, setting a rationally

calculated wage floor, and operating in accordance with the Administrative Procedure Act. HAP has members, its central office, and staff in Montrose, Colorado.

4. Plaintiff John Doe is a current Colorado-based H-2A shepherd who earns \$750 per month. He is willing, qualified, and available for continued employment as a shepherd and hopes to renew his employment contract later this year. He fears serious retaliation in the form of possible physical violence, adverse employment action, removal from the United States, and blacklisting because of his decision to participate in this lawsuit. He is therefore participating using a pseudonym.<sup>1</sup>

5. Plaintiff Rodolfo Llacua is a former shepherd and U.S. Citizen residing in Grand Junction, Colorado. He has enjoyed working with sheep and other livestock for most of his life and worked for over ten years as a shepherd in the United States. He is able, willing, qualified, and available for employment as a shepherd, and his preference is to work as a shepherd. At the same time, he does not work as a shepherd anymore because of the low wages that shepherders make. He is in direct competition with current H-2A shepherders for work in this labor market but is effectively excluded from it because the DOL's illegal wage rules allow for the importation of very cheap foreign labor.

6. Defendant Thomas E. Perez is the United States Secretary of Labor. The Secretary is responsible for all the functions of the DOL, including administration of the H-2A program for herders. Secretary Perez is sued in his official capacity, pursuant to 5 U.S.C. § 703.

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<sup>1</sup> Because this case is filed against the government instead of an individual and because of the threats of physical violence and other serious forms of retaliation he faces, Plaintiff John Doe is entitled to proceed anonymously.

7. Defendant United States Department of Labor is responsible for issuing prevailing wage determinations as a part of the process of granting labor certifications for the H-2A program and is charged with enforcing the 2011 Special Procedures.

8. Defendant Portia Wu is Assistant Secretary, Employment and Training Administration (ETA). ETA is responsible for making annual wage determinations for sheepherders and otherwise complying with the laws governing this class of workers. She is sued in her official capacity, pursuant to 5 U.S.C. § 703.

### **STATEMENT OF FACTS**

#### **The H-2A Visa Program**

9. The H-2A program takes its name from the statutory provision, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), which describes the visa category for nonimmigrant foreign workers who come to the United States to perform agricultural work on a temporary basis. 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. *See* 8 U.S.C. § 1188(a)(1)(A), (B); *id.* § 1188(b).

10. To obtain authorization to hire an H-2A worker, an H-2A employer prepares an Application for Temporary Employment Certification (hereinafter “H-2A Application”).

11. An H-2A Application is an agreement between the employer and employee that in part governs herder working and living conditions, including herder salaries. The H-2A Application must ultimately be certified by the DOL.

12. The DOL can only certify an H-2A Application that complies with H-2A program requirements.

13. Obtaining DOL certification for an H-2A Application is a necessary precondition for an H-2A employer to bring an H-2A worker to the United States.

14. By regulation, H-2A employers must agree to pay H-2A workers at least the Adverse Effect Wage Rate (AEWR), the prevailing wage, the federal or state minimum or the agreed-upon collective bargaining rate (whichever is highest). *See* 20 C.F.R. § 655.120.

15. The AEWR is often the highest wage available for H-2A workers and generally accords them a minimum hourly wage of between approximately \$10-13, depending on the state in which the worker is employed.

16. H-2A shepherders, however, do not receive the hourly AEWR mandated by DOL regulations. Instead, the DOL has created what it calls “Special Procedures” that govern herder living and working conditions.

17. According to the DOL, the Special Procedures are exceptions from normal rules governing other classes of H-2A workers. Over the last thirty years, the DOL has published various iterations of Special Procedures that apply to H-2A herders. The most recent version in effect was issued in August 2011 and will be referred to as “the 2011 Special Procedures.”<sup>2</sup>

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<sup>2</sup> *See* 76 Fed. Reg. 47,256 (issued Aug. 4, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-08-04/pdf/2011-19755.pdf>

18. The 2011 Special Procedures will be superseded later this year by new special procedures. Until the new procedures are issued in final form, however, the 2011 Special Procedures govern sheepherder living and working conditions.

**2011 Special Procedures Wage Determination Methodology**

19. The 2011 Special Procedures dictate that herder wages are determined based on annual prevailing wage surveys conducted by State Workforce Agencies (SWAs).

20. In conducting these prevailing wage surveys, SWAs are only allowed to rely on wages reported by domestic (i.e., non-H-2A) workers.

21. According to the 2011 Special Procedures, SWAs are required to conduct these annual surveys between May 1 and June 1 of each calendar year.

22. The 2011 Special Procedures then dictate that the DOL review the SWA findings and publish annually in the Federal Register the sheepherder wage floor applicable in each state.

23. As part of the DOL's annual review of the SWA surveys, the DOL must determine if the survey is statistically valid.

24. The DOL has stated that surveys with sample sizes of less than thirty workers are insufficient to support statistically reliable wage results.

25. If a state does not provide usable survey data in its prevailing wage survey, the 2011 Special Procedures allow the DOL to use several alternative methodologies to determine sheepherder wages.

26. First, the DOL can issue a prevailing wage rate for that State based on the wage floor findings submitted by an adjoining or proximate SWA for the same or similar agricultural activities to ensure that the wages of similarly employed workers are not adversely affected.

27. The DOL can also consider aggregating survey data for sheepherding activities across states to create regional prevailing wage rates and/or can rely on data from the U.S. Department of Agriculture's production or farm resource regions or other groupings of States the USDA used to conduct its Farm Labor Survey.

28. Under the 2011 Special Procedures, however, one additional method is no longer available for the DOL to determine herder wages. In particular, while the DOL used to rely on prior surveys of herders to establish their current wages, in the 2011 Special Procedures, the DOL opted not to continue using this methodology.

29. The DOL precluded use of prior state surveys to establish the current wages because reliance on this methodology caused herder wage stagnation.

#### **Current Wage Floors Set By the DOL**

30. Despite the requirement mandated in the 2011 Special Procedures that the DOL make annual determinations of sheepherder wages, the last time the DOL published a wage determination was in January 2013.

31. The January 2013 Wage Determination does not even apply to every state: some determinations date from July 2011.

32. The DOL neither issued nor published in the Federal Register an annual wage determination in 2014 or 2015.

33. The DOL certified H-2A Applications for sheepherders in 2014 and 2015 at the wage floors set pursuant to DOL wage determinations for 2013 or 2011 and will continue to do so absent injunctive relief from this Court.

34. In 2013-2015, the DOL received data from SWAs and other sources that could have been used for the purposes of making annual herder wage determinations for those years.

Nevertheless, the DOL has chosen to continue to rely on antiquated data and wage determinations as the basis for herder wages today.

35. The DOL has also chosen to rely on statistically invalid data to make wage determinations for every state in which it currently uses a SWA prevailing wage survey (PWS) as the basis for determining herder wages.

36. The current basis for the sheepherder wage floor in most states is as follows:

<b>State(s)</b>	<b>Monthly Wage Floor</b>	<b>Basis for Wage</b>	<b>Date SWA Finding Made</b>	<b>Date of DOL Determination</b>	<b># of Workers Surveyed</b>
Nine States <sup>3</sup>	\$750	Colorado PWS	May 16, 2012	January 8, 2013	Nine
Arizona Washington	\$750	Wyoming PWS	April 15, 2011	July 26, 2011	Six
Nevada	\$800	Nevada PWS	June 9, 2009	July 26, 2011	Seven
California	\$1,422.55	California PWS	January 18, 2012	January 8, 2013	Ten
Oregon	\$1,277	Settlement Agreement	January 24, 2011	July 26, 2011	N/A

37. As the above establishes, DOL is not complying with three regulatory mandates from the 2011 Special Procedures to: (1) update its determination of sheepherder wages annually, (2) rely on statistically valid data (of 30 herders or more) to determine wages, and (3) rely on current data.

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<sup>3</sup> The nine states are Colorado, Idaho, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming.



**CLASS ACTION ALLEGATIONS**

38. Plaintiffs assert all claims as a Fed. R. Civ. P. 23 class action on their own behalf and on behalf of a class for which Plaintiffs seek certification.

39. Pending any modifications necessitated by discovery, the Plaintiffs preliminarily define this “Rule 23 Class” as follows:

ALL CURRENT H-2A SHEEPHERDERS AND ALL PERSONS WHO  
WOULD BE WORKING AS SHEEPHERDERS IN THE UNITED  
STATES BUT FOR THE UNITED STATES DEPARTMENT OF  
LABOR’S ILLEGAL IMPLEMENTATION OF ITS 2011 SPECIAL  
PROCEDURES

40. The class is so numerous that joinder of all potential class members is impracticable. Plaintiffs do not know the exact size of the Class, but roughly 2,000-2,500 foreign sheepherders come to the United States under H-2A visas each year.

41. The named Plaintiffs therefore estimate that the class is composed of well more than 2,500 persons.

42. In failing to legally implement its 2011 Special Procedures, the DOL has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

43. There are questions of law or fact common to the class that predominate over any individual issues that might exist. Common questions of law and fact include whether or not the DOL’s implementation of the 2011 Special Procedures violated the Administrative Procedure Act.

44. The class claims asserted by the Plaintiffs are typical of the claims of all of the potential class members. All of the class members are pursuing the same claim for an injunction to prevent

the DOL from continuing to implement the 2011 Special Procedures in a manner violative of the Administrative Procedure Act.

45. The named Plaintiffs will fairly and adequately protect and represent the interests of the class.

46. The named Plaintiffs are represented by counsel experienced in class action litigation representing workers.

47. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual, potential Class Members that would establish incompatible standards of conduct for Defendants.

48. Each Class Member is seeking identical injunctive relief. Thus, the interest of potential Class Members in individually controlling the prosecution or defense of separate actions is slight. In addition, public policy supports the broad remedial purposes of class actions.

49. The Plaintiffs are unaware of any members of the putative class who are interested in presenting their claims in a separate action.

50. The Plaintiffs are unaware of any pending litigation commenced by members of the Class concerning the instant controversy.

51. It is desirable to concentrate this litigation in this forum because the majority of workers potentially affected by this suit, and thus the majority of the Class Members, are located in the Western United States, including in Colorado.

52. This class action will not be difficult to manage due to the uniformity of claims among the Class Members.

## **I. FIRST CAUSE OF ACTION**

### **5 U.S.C. § 706(2)(A)**

53. 5 U.S.C. § 706(2)(A) requires that this Court shall “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

54. For the reasons stated above, the DOL’s actions in certifying labor certification applications violate 5 U.S.C. § 706(2)(A) by:

- i. failing to publish and require employers to pay annual adjustments in the applicable sheepherder wage rates;
- ii. approving wages that are based on data that are three to six years old;
- iii. approving wages that are based on data that are statistically invalid; and
- iv. approving wages that adversely affect similarly situated American workers.

## **II. SECOND CAUSE OF ACTION**

### **5 U.S.C. § 706(2)(C)**

55. 5 U.S.C. § 706(2)(C) requires that this Court shall “hold unlawful and set aside” agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

56. For the reasons stated above, the DOL’s actions in certifying labor certification applications in 2013, 2014 and 2015 violated 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 by:

- i. failing to publish and require employers to pay annual adjustments in the applicable sheepherder wage floors;

- ii. approving wages that are based on data that are three to six years old;
- iii. approving wages that are based on data that are statistically invalid; and
- iv. approving wages that adversely affect similarly situated American workers.

### **III. THIRD CAUSE OF ACTION**

#### **5 U.S.C. § 706(2)(D)**

57. 5 U.S.C. § 706(2)(D) requires that this Court shall “hold unlawful and set aside” agency action that is “without observance of procedure required by law.”

58. For the reasons stated above, the DOL’s actions in certifying labor certification applications in 2013, 2014 and 2015 violated 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 by:

- i. failing to publish and require employers to pay annual adjustments in the applicable sheepherder wage floors;
- ii. approving wages that are based on data that are three to six years old;
- iii. approving wages that are based on data that are statistically invalid;
- iv. approving wages that adversely affect similarly situated American workers; and
- v. failing to explain the basis for any of these decisions and/or changes in policy.

### **IV. FOURTH CAUSE OF ACTION**

#### **5 U.S.C. § 706(1)**

59. 5 U.S.C. § 706(1) requires that this Court “shall compel agency action unlawfully withheld or unreasonably delayed.”

60. For the reasons stated above, the DOL has unlawfully withheld and unreasonably delayed action in violation of 5 U.S.C. § 706(1) by failing in its duty to make an annual publication of prevailing wage surveys.

**THE PLAINTIFFS DO NOT DEMAND A JURY**

**PRAYER FOR RELIEF**

61. The Plaintiffs respectfully request that this Court:

- a. Enter a preliminary injunction enjoining the DOL from certifying any further H-2A sheepherder H-2A Applications at the illegal wage rate and requiring the DOL to send immediate notice of the anticipated future change in wage floor to current employers of H-2A sheepherders.
- b. Enter a final order declaring the current wage floor rule employed by the DOL unlawful and in violation of the aforementioned sections of the APA, 5 U.S.C. § 706(1)-(2).
- c. Require the DOL to promptly issue a wage determination that accords with the regulatory framework of the 2011 Special Procedures.
- d. Award Plaintiffs their attorneys' fees and costs pursuant to the Equal Access To Justice Act;
- e. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled.

Respectfully submitted,

s/Alexander Hood  
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