Oral Argument Scheduled on March 31, 2017

No. 16-5287

United States Court of Appeals

for the

District of Columbia Circuit

Save Jobs USA,

Appellants,

v.

United States Department of Homeland Security

Appellee.

On appeal from an order entered in the
United States District Court for the District of Columbia
1:15-cv-615
The Hon. Tanya S. Chutkan

Opening Brief

On the Brief:
John M. Miano
Dale Wilcox
Michael Hethmon

January 11, 2017

Immigration Reform Law Institute
Attorneys for Appellants
25 Massachusetts Ave. N.W.
Suite 335
Washington D.C. 20001
(202) 232-5590

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Save Jobs USA is not a corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici Curiae

The following are all the parties and *amici curiae* that appeared before the District Court:

1. Plaintiff-Appellant is Save Jobs USA.
2. Defendant-Appellee is the U.S. Department of Homeland Security ("DHS").

Rulings Under Review

Save Jobs USA seeks review of an order by the United States District Court for the District of Columbia of September. 27, 2016 in Case No. 1:15-cv-615, (the Hon. Tanya S. Chutkan) that was accompanied by a Memorandum Opinion issued the same day. The citation to that opinion is *Save Jobs USA v. U.S. Dep't of Homeland Security*, 105 F. Supp. 3d 108 (D.D.C. 2016). The opinion is reproduced at Appendix [95] and the order is reproduced at Appendix [111].

Related Cases

Save Jobs USA is aware of two other pending cases that address the same issue of whether DHS has unlimited authority to allow aliens to work in the United States. *Wash. Alliance of Technology Workers v. U.S. Dep't of Homeland Security, et al.* in the United States District Court for the District of Columbia, No. 1:16-cv-1170, addresses this issue in the

context of a regulatory-created guestworker program operating under student visas. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) addressed this issue in the context of work authorizations for illegal aliens. That case is ongoing in the Southern District of Texas as No. B-14-254.

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Authorities upon which we chiefly rely are marked with asterisks.
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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2); because it is a federal question under 28 U.S.C. § 1331; and because the defendant is the United States, 28 U.S.C. § 1346. This court has jurisdiction over appeals from final decisions of a district court under 28 U.S.C. § 1291. The final order appealed was filed on September 27, 2016. The notice of appeal was filed on September 28, 2016.

STATEMENT OF THE ISSUES

1. Whether the U.S. Department of Homeland Security has unlimited authority to admit aliens into the American job market through regulation.
2. Whether an agency action that allows increased economic competition against a plaintiff creates an injury in fact.
3. Whether an agency action that deprives a plaintiff of statutory protections creates an injury in fact.
4. Whether an action that provides an incentive to a plaintiff's economic competitors to remain in the market creates an injury in fact.
5. Whether the filing of the complaint creates an evidentiary cut-off date for standing.

STATUTES AND REGULATIONS

Statutes at issue are reproduced in an addendum at the end of the document. The regulation at issue is reproduced at Appendix [1].

GLOSSARY

Aff.	Affidavit
APA	Administrative Procedure Act
B visa	B visitor visa: 8 U.S.C. § 1101(a)(15)(B)
Compl.	Complaint, Docket 1, April 23, 2015
CPT	Curricular Practical Training. A work authorization created by regulation for student visas.
DACA	Deferred Action for Childhood Arrivals
DAPA	Deferred Action for Parents of Americans and Lawful Permanent Residents
DHS	U.S. Department of Homeland Security
E visa/E nonimmigrant	Treaty visa: 8 U.S.C. § 1101(a)(15)(E)
EAD	Employment Authorization Document
EB-2	Employment Based permanent residency visa, second priority (Green Card)
EB-3	Employment Based permanent residency visa, third priority (Green Card)
F-1	F-1 student visa: 8 U.S.C. § 1101(a)(15)(F)
FAIR	Federation for American Immigration Reform
H-1B	H-1B visa for guestworker in speciality ocupations (*i.e.*, those requiring a college degree). 8 U.S.C. § 1101(a)(15)(H)(i)(b). Dependents of H-1B visa holders are eligible for H-4 visas.

H-2	Former H-2 guestworker visa created in the Immigration and Nationality Act of 1952 and replaced in the Immigration Act of 1990. The former H-1 and H-2 visas were precursors to the current H-1B visa.
H4	Same as H-4
H-4	H-4 Visa for dependents of H guestworkers: 8 U.S.C. § 1101(a)(15)(H). Allows dependents to accompany or join the principal alien.
H-4 Rule	Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a)
INA	Immigration and Nationality Act of 1952
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1986
IT	Information Technology
L visa/L nonimmigrant	Intra-company transfer visa: 8 U.S.C. § 1101(a)(15)(L)
LPR	Lawful Permanent Resident (Green Card Holder)
Mem. Op.	District Court's Memorandum Opinion of Sept. 27, 2016, Docket 36
OPT	Optional Practical Training. A work authorization created by regulation for student visas.

OPT Rule	Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214 and 274a)

STATEMENT OF THE CASE

This case presents yet another administrative action in the Department of Homeland Security's ("DHS") initiative to establish that the agency has unlimited authority to admit aliens into the United States labor market through regulation. Here that claim of such unlimited authority appears in the context of DHS regulations permitting spouses of H-1B guestworkers (H-4 visa status) to work in the United States in addition to the principle alien. Most of the public focus on this employment initiative has been on the Deferred Action for Childhood Arrivals program (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs granting work authorizations to illegal aliens. *Texas v. United States*, 809 F.3d 134, 146–48 (5th Cir. 2015), *aff'd by an equally divided court,* 136 S. Ct. 2271 (2015). As this and related cases illustrate, this new claim of agency authority has widespread ramifications outside the debate over illegal aliens. *E.g.*, *Wash. All. of Tech. Workers v. U.S. Dept. of Homeland Sec.*, No. 1:16-cv-1170 (D.D.C) (addressing a guestworker program created by regulation using student visas).

Plaintiff-Appellant, Save Jobs USA's members represent the roadkill of our broken immigration system. They are all American computer programmers who were longtime employees of Southern California Edison. Aff. of D. Stephen Bradley ("Bradly Aff.") ¶¶ 5–12[85–86], Aff. of Brian Buchanan ("Buchanan Aff.") ¶¶ 6–13[89–90] and Aff. of July

Gutierrez ("Gutierrez Aff.") ¶¶ 5–11[91–92]. In a well-publicized case, Southern California Edison replaced 540 American computer programmers (including the Appellants) with low paid programmers from India imported on H-1B guestworker visas. *E.g.*, Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, N.Y. Times, June 3, 2015.[1] Some of these workers founded Save Jobs USA to address the damage competition with foreign labor is causing American workers. *E.g.*, Bradley Aff. ¶ 14, Buchanan Aff. ¶ 15, Gutierrez Aff. ¶ 14

The regulations at issue were specifically designed to increase the supply of foreign labor in the United States. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a) ("H-4 Rule")[1–30]. The goal of the H-4 Rule is to induce certain H-1B guestworkers (who would otherwise leave the country) to remain in the United States job market by allowing their spouses to work as well. *Id.* Thus, the H-4 Rule adds more foreign labor directly, by authorizing an estimated 179,600 aliens in H-4 status to work, and indirectly, by providing aliens in H-1B status an inducement to remain in the labor market. H-4 Rule, 80 Fed. Reg. at 10,309[27].

Because there is no statutory authorization for aliens to work in H-4 status, the central issue in the case is whether DHS has the authority to permit such work through regulation.

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1 Available at http://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html (last visited Oct. 5, 2016)

Statutory History

Protections for American workers have been an integral part of immigration statutes. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 ("INA"), repealed all previous immigration statutes and created an entirely new immigration code. S. Rep. No. 82-1137, at 1 (1952). The INA provided for the:

> [E]xclusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor if the Secretary of Labor has determined that there are sufficient available workers in the locality of the aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Id. at 11; *see also* H.R. Rep. No. 82-1365, at 50–51 (1952) (identical text). That provision applied to all aliens except for those where there were certain exceptions in the INA. *Id.* The Immigration and Nationality Act of 1965 strengthened the labor protections of the INA by requiring that the Secretary of Labor certify such foreign labor would not adversely affect American workers prior to admission. Pub. L. No. 89-236, § 9, 79 Stat. 911, 817; *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 799–800 (D.C. Cir. 1985) ("*Bricklayers I*").

In 1970, Pub. L. No. 91-225, 84 Stat. 116 created the H-4 visa at issue here. That Act authorized spouses of H category visa holders (H-1, H-2, H-3) to accompany or join the principal alien into the United States. 8 U.S.C. § 1101(a)(15)(H). There has never been a statutory authorization

for aliens to work while in H-4 status nor any provision that prevents an H-4 visaholder from applying for guestworker status through the statutory alien employment process in his own right.

By enacting the Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 101, 100 Stat. 3445 ("IRCA") (creating the new section 274a of the INA codified at 8 U.S.C. § 1324a), Congress for the first time, criminalized and imposed civil sanctions for the act of hiring an alien who is not authorized to work in the United States. This section also created the definition of the term *unauthorized alien* (limited in scope to its own section), that DHS now claims as a source of unlimited authority to allow aliens to work in the United States. 8 U.S.C. § 1324a(h)(3).

The Immigration Act of 1990 made major changes to the immigration system. Pub. L. No. 101-649, 104 Stat. 4978. Section 104 of the Act (104 Stat. 5010) reorganized the H visa category and created the H-1B visa for college-educated labor. 8 U.S.C. § 1101(a)(H)(i)(b). However, the 1990 Act left the H-4 visa unmodified. The Immigration Act of 1990 also moved (and modified for context) the general labor protections of the 1965 Act from 8 U.S.C. § 1182(a)(14) to § 1182(a)(5). § 601, 104 Stat. at 5072. Another provision of the 1990 Act narrowed the scope of this worker protection to apply only to EB-2 and EB-3 permanent residency petitions. § 162(e)(1)(A), 104 Stat. at 5011. However, the very next year, Congress enacted the Miscellaneous and Technical Immigration and Nationalization Amendments of 1991 that repealed the 1990 Act's

restriction of 8 U.S.C. § 1182(a)(5) only to EB-2 and EB-3 categories, restoring its applicability to the current, "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor. . . ." Pub. L. No. 102-232, § 302(e)(6), 105 Stat. 1733, 1746; 8 U.S.C. § 1182(a)(5).

In 2002, Congress enacted Pub. L. No. 107-124, 115 Stat. 2402, authorizing spouses of guestworkers in the E category (treaty visas) to be employed and Pub. L. No. 107-125, 115 Stat. 2403, authorizing spouses of guestworkers in the L category (intra-company transfers) to work. At that time, it was recognized that Congress had not extended work authorizations to all guestworker spouses. *See* 147 Cong. Rec. H5357 (daily ed. Sept. 5, 2001) (Congressman Wexler expressed the view, "I hope that this bill is the beginning of an understanding that we should allow spouses in other nonimmigrant classifications who accompany their husband or wife to the United States to be able to obtain work authorization."). Since then, several bills have been introduced that included provisions to authorize aliens on H-4 visas to work but none has been enacted. *E.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Congress, § 4102 (2013).

Regulatory History

The first germ of DHS's claim of unlimited authority to permit aliens to work appeared in the mid-1980s. The Federation for American Immigration Reform ("FAIR") filed a petition for rulemaking seeking re-

scission of part of 8 C.F.R. § 109.1(b) (1986) governing alien employment. Employment Authorization, 51 Fed. Reg. 39,385 (Oct. 28, 1986). FAIR asserted in its petition that new regulatory provisions authorizing the Attorney General to permit work outside that authorized by statute were so in excess of agency authority that they undermined the statutory labor certification process designed to protect American workers. *Id.* FAIR pointed to case law holding that protecting American workers was a primary purpose of the immigration system. *Id.* In particular, FAIR pointed out that the court in *Int'l Union of Bricklayers and Allied Craftsmen v. Meese*, ("*Bricklayers II*") had rejected a specific example of such employment authorized through agency action. 616 F. Supp. 1387 (N.D. Cal. 1985). *Id.* Significantly, *Bricklayers II* held that such authorizations allowing work on B visitor visas violated both the terms of the B visa itself and the terms of the H-2 guestworker visa, whose provisions were being circumvented by using B visas instead. *Id.* at 1403. In rejecting the FAIR petition, the Department of Justice asserted that the authority to create such a regulation "is apparent in the new [IRCA] section 274A(h)(3)." Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092 (Dec. 4, 1987). The agency did not address the *Bricklayers II* opinion that directly contradicted this political assertion. *Id.* Unfortunately, FAIR never followed up the rejection with a court challenge, so the agency's interpretation of IRCA § 274A(h)(3) (codified at 8 U.S.C. § 1324a(h)(3)) was never subjected to judicial review.

After the FAIR petition, the claim that § 1324a(h)(3) conferred on the administering agency unlimited authority to allow aliens to work then lay dormant for decades. The H-4 Rule at issue here is the very first in a series of recent proposed and final regulations in which the agency cited § 1324a(h)(3) as the source of such authority. 80 Fed. Reg. at 10,285[3] and 10,294–95[12–13]. The H-4 Rule grants employment to certain spouses of H-1B workers who are seeking permanent residency. *Id.* However, "DHS may consider expanding H-4 employment eligibility in the future." 80 Fed. Reg. at 10,289[7]. Unlike their H-1B spouses, under the H-4 Rule, aliens can work anywhere, in any field, and without any protections for American workers. *Compare* 80 Fed. Reg. at 10,294[12] *with* 8 U.S.C. § 1011(a)(15)(H)(i)(b), 1182(n), and 1184(g) (applying restrictions and labor protections to H-1B workers).

Litigation History

The Complaint in this action was filed on April 23, 2015 with a motion for preliminary injunction. Compl., Docket 1[31] and Mot. for Prelim. Inj., Docket 2. The district court denied the motion for preliminary injunction on May 24, 2015. Mem. Op., Docket 13[95] and Order, Docket 14[111]. On September 11, 2015, Save Jobs USA moved for summary judgment and on October 2, 2015, DHS cross-moved for summary judgment.

On September 27, 2016, the district court issued its opinion and order. Docket 36 & 37. The district court found that the H-4 Rule allows aliens to work in any job in the United States labor market. Mem.

Op. at 8[102] & 11–12[105–06]. Because these aliens (unlike their H-1B spouses) are allowed to work anywhere, they are allowed to compete with anyone in the American job market, including Save Jobs USA members. However, incorporating the standard for injunctive relief, the district court then held that a plaintiff must show something more than the mere allowance of competition to establish standing. Mem. Op. at 8[102] (citing as authority for standing the standard for injunctive relief in *Wis. Gas. Co. v. Fed. Renergy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *contra La. Energy & Power Auth. v. Fed. Energy Regulatory Comm'n*, 141 F.3d 364, 367 (D.C. Cir. 1998) (stating that the D.C. Circuit has "repeatedly [] held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."). Although it recognized that the goal of the H-4 Rule was to keep H-1B guestworkers in the country who would otherwise leave, Mem. Op. at 9[103], the district court held that retaining workers who would leave the United States absent the H-4 Rule was not an increase in competition caused by the Rule. *Id.* The district court also held that providing an incentive under the H-4 Rule for aliens in H-1B status to remain in the job market (where they are in competition with Save Jobs USA members) is not an injury in fact. Mem. Op. at 10–11[104–05]; *contra Sea-Land Serv. v. Dole*, 723 F.2d 975, 977–78 (D.C. Cir. 1983) (injury requirement satisfied where challenged action benefits competitor who is in direct competition with

plaintiff). The district court then held that the H-4 Rule's deprivation of Save Jobs USA's members' statutory protections governing the admission of foreign labor into their market by allowing aliens to work through regulation was not an injury in fact. Mem. Op. at 11–12[105–06]. The district court concluded that Save Jobs USA lacked standing to bring the case. *Id.* at 12.

The district court's opinion then went on to analyze the merits of the case. The district court concluded that Save Jobs USA's claims fell within the zone of interests of the statutes in question. *Id.* at 13–14. The district court also addressed the ultimate question of whether DHS had the authority to promulgate the H-4 Rule. *Id.* at 14–16. The district court held that the agency's general authority under 8 U.S.C. § 1103(a) and the definition of the term *unauthorized alien* in § 1324a(h)(3) authorized DHS to permit aliens to work in the United States through regulation. *Id.* at 14; *contra Texas*, 809 F.3d at 183–82 (holding §§ 1103(a) and 1324a(h)(3) did not confer on DHS authority to permit aliens to work in the United States). The district court concluded that extending employment to aliens in H-4 status was thus within DHS authority. *Id.* at 16.

Challenges to other recent administrative actions promulgated under DHS's newfound, unlimited authority to admit aliens into the labor market under §§ 1103(a) and 1324a(h)(3) are also proceeding through the courts in parallel litigation. *See* Statement of Related Cases.

SUMMARY OF THE ARGUMENT

The H-4 Rule clearly allows aliens to compete with Save Jobs USA members in their job market because it allows 179,600 aliens to work anywhere in the United States—an injury in fact to participants in the entire labor market. 80 Fed. Reg. at 10,285[3]. The district court arbitrarily abandoned this Circuit's competitive injury in fact standard, that a plaintiff suffers an injury in fact when an agency action *allows* increased competition with them. *La. Energy*, 141 F.3d at 367. In its place, the district court fashioned a novel, heightened standard, incorporating elements from the standard for injunctive relief, that requires a plaintiff show the agency *intended* to create competition to establish an injury in fact. Mem. Op. at 8[102].

The H-4 Rule also creates economic injury to Save Jobs USA members by inducing their H-1B competitors to remain in the job market who, in the absence of the rule, would otherwise leave the country. *E.g.*, 80 Fed. Reg. at 10,285[3] The district court erred by holding that the greater number of foreign H-1B competitors in the job market caused by the H-4 Rule was not an increase because those aliens were already in the job market. Mem. Op at 9[103].

In defending various unilateral administrative actions granting employment to aliens since 2012, DHS has begun to claim that its general authority to administer the immigration system in § 1103(a) and the definition of the term *unauthorized alien* in § 1324a(h)(3) confer unlimited

authority on the agency to admit aliens into the American labor market through regulation, even in the absence of a specific statutory authorization for such employment. H-4 Rule, 80 Fed. Reg. at 10,285[3]. DHS has applied this claim to aliens lawfully present but whose visa status does not confer authority to work, illegal aliens, and aliens invited to enter the country through parole. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214 and 274a) ("OPT Rule"); *Texas*, 809 F.3d at 164–65; International Entrepreneur Rule, 81 Fed. Reg. 60,130 (proposed Aug. 31, 2016). The district court's holding that the elephant of such expansive authority hides in the mousehole of §§ 1103(a) and 1324a(h)(3) is inconsistent with the terms of those provisions; with past judicial interpretation of the scope of DHS authority to authorize alien employment; with the Fifth Circuit's rejection of this very same claim of authority; and with the structure of the INA. If confirmed by this Court, that holding would permit the executive to supplant the statutory scheme for admitting alien labor with a regulatory scheme and eviscerate the statutory protections for American workers.

STANDARD OF REVIEW

The review of an agency record presents entirely questions of law. *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001). The Court reviews questions of law *de novo*. *Acree v. Republic of Iraq*, 370 F.3d 41, 49

(D.C. Cir. 2004). "[O]n appeal [the Court] review[s] not the judgment of the district court but the agency's action directly, giving 'no particular deference' to the district court's view of the law." *Oceana v. Locke*, 670 F.3d 1238, 1240 (D.C. Cir. 2011) (quoting *Nat. Res. Def. Council v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000)). A district court's standing determinations are also reviewed *de novo*. *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016)

ARGUMENT

I. The H-4 Rule causes multiple injuries in fact to Save Jobs USA members.

A party invoking a court's jurisdiction has the burden of demonstrating that it satisfies the irreducible constitutional minimum of standing: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014). The injury in fact "need not be large or intense." *Action All. of Senior Citizens v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986). It is settled law that government action that causes widespread economic injury is still an injury in fact that gives rise to standing. *See Sierra Club v. Morton*, 405 U.S. 727, 733–34 (1972) (clarifying that widely shared economic and noneconomic injures are both still injuries in fact). "[T]he causation requirement for constitutional stand-

ing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise" even if "actual injury depends on action by non-governmental thirdparties." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 92–93 (D.C. Cir. 2005) (collecting cases).

A. The H-4 Rule injures Save Jobs USA members because it allows competition with foreign workers in H-4 status.

The D.C. Circuit has "repeatedly" held that an agency action that allows competitors to enter a plaintiff's market causes an injury in fact. *E.g.*, *Fin. Planning Ass'n v. Sec. and Exch. Comm'n*, 482 F.3d 481, 486–87 (D.C. Cir. 2007) (stating the D.C. Circuit has "repeatedly recognized" that parties suffer constitutional injury in fact when agencies allow increased competition against them); *New Eng. Pub. Commc'ns Council v. Fed. Commc'ns Comm'n*, 334 F.3d 69, 74 (D.C. Cir. 2003) (stating the D.C. Circuit has "repeatedly held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."); *La. Energy*, 141 F.3d at 367 (stating the D.C. Circuit has "repeatedly [] held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."). DHS estimated that 179,600 aliens could be added to the job market under the H-4 Rule in the first year alone and 55,000 every year thereafter. 80 Fed. Reg. at 10,285[3]. DHS refused to put any limitation on where and in which occupations H-4 aliens can work in the H-4 Rule. 80 Fed. Reg. at 10,294[12].

1. The district court's opinion describes an injury in fact to Save Jobs USA members.

Despite finding Save Jobs USA members lacked standing, the district court's opinion describes an injury in fact to them, stating the H-4 Rule "will *allow* [aliens] to seek employment in any job in the *entire* U.S. labor market," Mem. Op. at 8[102] (emphasis added), and that, "In sum, the H-4 Rule enables a subset of H-4 visa holders to apply for EADs [Employment Authorization Documents], which *permit* them to apply for and secure paid employment in *any job* in the U.S. labor market." *Id.* at 11–12[105–06] (emphasis added). If the H-4 Rule allows aliens to compete in the "entire U.S. labor market" it allows these aliens to compete in Save Jobs USA members' job market—an injury in fact. *E.g.*, *La. Energy*, 141 F.3d at 367; *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1331 (D.C. Cir. 1986) (stating "an injury shared by a large number of people is nonetheless an injury."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23–24 (1998) (explaining why a concrete injury shared by all voters is not a generalized grievance). Under this Court's precedent, Save Jobs USA has "sufficiently establish[ed] [its] constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that *have the clear and immediate potential to compete* with the petitioners.... They need not wait for specific, allegedly illegal transactions to hurt them competitively." *Associated Gas Distribs. v. Fed. Energy Regulatory Comm'n*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (emphasis added). Not only are these aliens *allowed* to compete with Save Jobs USA

members, many of them are *likely* to compete in their market. *See* Mem. Op. at 9[103], n.1. As the district court recognized, there is no question that the H-4 Rule authorizes 179,600 aliens to enter any segment of the American job market in the first year and 55,000 every year thereafter. Mem. Op. 8[102], 11–12[105–06], 80 Fed. Reg. at 10,285[3] and 10,303[21]. Therefore, the district court describes an injury in fact to Save Jobs USA members in spite of holding otherwise. *See La. Energy* 141 F.3d at 367.

2. The district court invented a new standard for competitive injury that incorporated requirements for injunctive relief to deny standing to Save Jobs USA members.

While the district court's factual findings state an injury in fact under this Court's *allows competition* standard that has been in place for over four decades, the district court inexplicably chose to fashion a new, vague standard incorporating requirements for injunctive relief (citing *Wis. Gas.*, 758 F.2.d at 674) that would leave Save Jobs USA members without standing to challenge their job market competitors. Mem. Op. at 8–10[102–04]. The district court recognized that Save Jobs USA had shown that DHS expected that aliens working under the H-4 Rule would enter the technology job market. Mem. Op. at 9[103] n.1. However, the court brushed off this showing, stating that it, "fails to establish that DHS *intended* H-4 visa holders to apply for tech jobs…." *Id.* (emphasis added); *contra Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 n4 (1998) (stating "it is not disputed that

respondents have suffered an injury-in-fact" when the agency *allowed* a single competitor into their market); *La. Energy*, 141 F.3d at 367 (stating plaintiffs establish standing by showing "allegedly illegal transactions that have the clear and immediate *potential* to compete with [their] own sales.") (emphasis added).[2] The district court's opinion suggests that a plaintiff now has to show the agency *intended* to cause competition to establish injury. *Id.* (stating "there is simply no evidence that the H-4 Rule was targeted at the tech field" and that a quote from the agency stating H-4 workers were likely to apply for tech jobs "fails to establish that DHS intended H-4 visa holders to apply for tech jobs."). Yet, how many times does this Court have to instruct that an agency action *allowing* competition with a plaintiff causes an injury in fact before this becomes a non-issue in the district courts? *E.g.*, *Fin. Planning Ass'n*, 482 F.3d at 486–87; *see also Arpaio v. Obama*, 797 F.3d 11, 25–32 (D.C. Cir. 2015) (Brown, J. concurring) (describing shortcomings of the current approach to standing); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U.L. Rev. 301, 338 (2002) (concluding the current approaches to Article III standing "have not worked well.").

Worse yet, the district court's opinion sets up an impossibility standard for standing. Under the H-4 Rule, alien guestworkers are provided with

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2 Save Jobs USA presented additional evidence that employers were actively seeking aliens in H-4 status for computer jobs that the district court struck from the record. Mem. Op. at 5[99]. This is another issue on appeal. *See infra* at II.

an Employment Authorization Document ("EAD"), making them eligible to work anywhere in the United States. 80 Fed. Reg. at 10,287[5]. The H-4 Rule does not require the alien to report where he is working. Under the district court's new standard, no one would ever have standing to challenge the regulation because no data exists on where the aliens are employed. In particular, it would be impossible for a plaintiff to seek a preliminary injunction prior to a regulation going into effect, if the plaintiff must show that a competitor "has sought or will seek a tech job in competition with Plaintiff's members" before a rule has gone into effect. Mem. Op at 9[103].

Here we have *déjà vu* all over again. This Court has already and repeatedly addressed this kind of market uncertainty under its *allows competition* standard for injury. In *Bristol-Myers Squibb v. Shalala*, the plaintiff challenged the allowance of a competitor's generic drug on the market. 91 F.3d 1493, 1499 (D.C. Cir. 1996). The agency asserted the same kind of impossible-to-prove requirement for standing, where the competition is turned loose in the market and there is no way to track injury on an item-by-item basis. *Id.* (arguing "the plaintiff's quarrel, if it exists, is with the pharmacists who dispense generics…."). This Court rejected that argument, stating, "This reasoning is inconsistent with the competitor standing doctrine. Consumers always decide whether to purchase the product of one competitor or another. The injury claimed here is not lost sales, *per se*.… Rather the injury claimed is exposure to competition as a result of the [agency action allowing the competitor's

product into the market]." *Bristol-Myers*, 91 F.3d at 1499; *see also Shays*, 414 F.3d at 92–93. (describing how agency actions that allow conduct harming a plaintiff is an injury in fact). Save Jobs USA simply asks that the same standard that this Court has used for decades be available to its members, rather than a novel standard incorporating the requirements for injunctive relief. Mem. Op. at 8[102].

B. The H-4 Rule injures Save Jobs USA members because it increases the number of their H-1B competitors.

Having each been replaced by H-1B workers, Save Jobs USA members are indisputably competitors with H-1B workers. Bradley Aff. ¶¶ 5–12[85]; Buchanan Aff. ¶¶ 6–13[89–90]; Gutierrez Aff. ¶¶ 5–11[91–92]. Save Jobs USA alleged injury because the H-4 Rule would also increase the number of their H-1B competitors. Compl. ¶ 23[35]; *see also* H-4 Rule, 80 Fed. Reg. at 10,295[13] (describing "the potential that this rule and the policy goals of retaining certain highly skilled H-1B nonimmigrants may cause native worker displacement and wage reduction"). The rules for establishing competitive injury are well-defined in the D.C. Circuit. "[T]he basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact." *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010).

Save Jobs USA's injury here would then be obvious. The entire purpose of the H-4 Rule was to increase the number of H-1B workers by

providing an incentive to such workers (who would otherwise leave) to remain in the United States job market. *E.g.*, 80 Fed. Reg. at 10,285[3] (stating "the change will ameliorate certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States").[3] However, the district court found Save Jobs USA members did not have an injury in fact, stating plaintiffs, "fail to demonstrate an *increase* in competition from H-1B visa holders; instead, it appears the H-4 Rule might simply contribute to keeping H-1B visa holders applying for LPT [*sic* LPR?] status in the U.S." Mem. Op. at 9[103] (emphasis added).

This is a distinction without a difference. But for the H-4 Rule, large numbers of aliens in H-1B status would complete their authorized period of admission, and then leave the country and the job market. 80 Fed. Reg. at 10,285[3]. By providing an incentive for aliens to remain in the job market, the H-4 Rule increases the number of alien competitor above the number there would be without the rule. *Id.* That is an injury in fact. *See Sherley*, 610 F.3d at 73.

C. The H-4 Rule injures Save Jobs USA members because it confers benefits on their H-1B competitors that are designed to induce them from leaving the American labor market.

The primary purpose of the H-4 Rule is to induce aliens in H-1B status (who would otherwise leave the job market) to remain in the United

3 The appendix, Docket 26-1 at A-7–A-8[50–51] identifies 25 similar statements from the H-4 Rule.

States by providing the "incentives" of spousal employment. *E.g.*, 80 Fed. Reg. at 10,285[3] The Complaint alleges that conferring this benefit on Save Jobs USA competitors is an injury in fact. Compl. ¶ 23[35]; *see Sea-Land Service*, 723 F.2d at 977–78 (stating injury requirement satisfied where the challenged action benefits a competitor).

The district court dismissed this injury, stating, "Plaintiff offers no support for its position that the goal of relieving economic uncertainty and personal anxiety in H-1B workers' families amounts to an injury to Plaintiff's members." Mem. Op. at 11[105]. That statement misses the injury entirely. The injury is not that Save Jobs USA's competitors have greater happiness, but rather that DHS is conferring an incentive (spousal employment that in turn is intended to relieve the alien's economic uncertainty) on those competitors so that more of them will remain in competition with Save Jobs USA members. H-4 Rule, 80 Fed. Reg. at 10,285[3]. Conferring that benefit to induce competition with Save Jobs USA members is an injury in fact. *See Sea-Land Service*, 723 F.2d at 977–78.

D. The H-4 Rule injures Save Jobs USA members because it deprives them of statutory protections that rightfully should be applied before allowing aliens to compete with them.

The last injury pled by Save Jobs USA is deprivation of statutory protections. "Even where the prospect of job loss is uncertain, [the D.C. Circuit has] repeatedly held that the loss of labor-protective arrange-

ments may by itself afford a basis for standing." *Bhd. of Locomotive Eng'rs v. United States*, 101 F.3d 718, 724 (D.C. Cir. 1996); *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 852–55 (D.C. Cir. 2006); *see also Bristol-Myers*, 91 F.3d at 1497 ("where [] a statutory provision reflects a legislative purpose to protect a competitive interest, the protected competitor has standing to require compliance with that provision"). Indeed, this is just a labor-specific variant of the bedrock rule that "Congress may create a statutory right … the alleged deprivation of which can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975).

Congress created the H-1B program to govern the admission of college-educated labor. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1182(i). Under the statutory scheme for admitting foreign labor, the H-1B visa is the normal path[4] for aliens to work in the same computer-related fields as Save Jobs USA members. Spouses of H-1B holders can apply personally for an H-1B visa to work in IT-related occupations in their own right, provided that they comply with the provisions designed to protect domestic labor. *E.g.*, 8 U.S.C. §§ 1182(n) and 1184(g); *see also* 8 U.S.C. § 1182(a)(5) (making alien labor inadmissible unless the Secretary of Labor has certified that such labor will not adversely affect American workers). In contrast, the H-4 Rule allows aliens to work in any occu-

4 In some situations aliens can work in computer occupations under other visas, such as L (intra-company transfer). 8 U.S.C. § 1101(a)(15)(L). However, H-1B is the most common and the only one likely to apply here to aliens who wish to work in computer occupations.

pation (including computer related fields) without complying with any labor protections at all. When nonimmigrants are allowed to work in computer fields without complying with the statutory labor protections that should rightly be applied to such labor (*e.g.*, 8 U.S.C. §§ 1182(n) and 1184(g)), Save Jobs USA members are injured by the deprivation of those protections. *See e.g.*, *Bristol-Myers*, 91 F.3d at 1497.

In rejecting this injury, the district court never mentioned the labor protections Save Jobs USA members are deprived of under the H-4 Rule. Mem. Op. at 11–12[105–06]. Instead, the district court dismissed this as a future injury stating, "While Plaintiffs may be correct in speculating that H-4 visa holders will seek tech jobs in competition with its members, there is simply no evidence before the court to show that that will happen."[5] Mem. Op. at 12[106]. That reasoning conflicts with a previous statement by the court indicating that DHS expected aliens to be working in technology fields: "Plaintiff's only evidence on this point is a quote from Leon Rodriguez, director of the U.S. Citizenship and Immigration Service, that H-4 visa holders 'are in many cases, in their own right, high-skilled workers of the type that frequently seek H-1Bs.'" Mem. Op. at 9[103] n.1.

More significantly, the district court ignored that a plaintiff suffers a cognizable injury in fact when the injury is "imminent." *Lujan v. Defs.*

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5 Save Jobs USA had in fact submitted evidence to the court that made this very showing, but the court struck that evidence. *See* section II, *infra*.

of Wildlife, 504 U.S. 555, 560 (1992). On the date the Complaint was filed (April 23, 2015. Compl., Docket 1[31]), it was certain that starting on May 26, 2015, DHS was going to allow aliens in H-4 status to work in computer programming occupations without complying with the labor protections that should rightly be applied under the statutory scheme for admitting foreign labor. See H-4 Rule, 80 Fed. Reg. at 10,284[2]. There was no speculation: it was an absolute certitude that this injury would occur within a matter of weeks after the Complaint was filed. *Id.*

II. The district court erred by setting an evidentiary cut-off at the date of the Complaint and striking evidence showing H-4 workers were already entering Save Jobs USA's specific job market.

Save Jobs USA submitted evidence that aliens would be working in their specific job market under the H-4 Rule. Specifically, Docket 26-1 at A-13[56] (downloaded June 4, 2015) and A-14 (June 3, 2015) are job advertisements for computer programmers from Tata. Both advertisements state that they will take foreign workers with EADs as granted under the H-4 Rule. Tata is the company that supplied Save Jobs USA members' foreign replacements to Southern California Edison. Bradley Aff. ¶ 7[86]; Buchanan Aff. ¶ 8[89]; Gutierrez Aff. ¶·8[92]. Docket 26-1 A-15[58] (May 27, 2015), A-17 (June 3, 2015), A-20[63] (May 27, 2015) and A-25[69] (Aug. 21, 2015) are computer job advertisements in which the employer was specifically seeking aliens granted EADs under the H-4 Rule. *E.g.*, A-25[69] (stating "We are particularly interested in pro-

fessionals who have extensive IT experience and may be on a dependent visa like H4 or on OPT/CPT."). Docket 26-1 at A-18[61] (June 3, 2015) and A-24[68] (June 3, 2015) are advertisements for computer jobs located in Southern California that state it will take foreign workers with EADs. These advertisements show that within days of the H-4 Rule going into effect, employers were specifically seeking computer workers authorized under the H-4 Rule or accepting such workers. While it should have only been necessary to show that the H-4 Rule would *allow* competition with Save Jobs USA members, these advertisements clearly establish that these aliens would in fact be (and are now) in competition with Save Jobs USA members.

Even further, Docket 26-1 at A-29–A-39[72–82] is a web page advocating H-1B employment.[6] This web page describes aliens in H-4 status and shows that many of them are computer workers. *Id.* The text in the appendix reflects its state as of August 20, 2015. *Id.* However, the Wayback Machine Internet archive shows that this web page has existed since at least 2014.[7] The Waybach Machine's October 9, 2014 snapshot made months before the Complaint was filed, *id.*, is substantially the same as the version downloaded on August 20, 2015, Docket 26-1 at A-29–A-39[72–82], and shows that

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6 Available at http://h4-visa-a-curse.blogspot.com/p/view-stories.html (last visited Oct. 7, 2016)

7 Available at http://web.archive.org/web/20141009120318/http://h4-visa-a-curse.blogspot.com/p/view-stories.html (last visited Nov. 7, 2016)

many of these H-4 workers are computer professionals who would likely work in competition with Save Jobs USA members and did so long before the Complaint was filed.

However, the district court struck this evidence of imminent injury because it was dated after the Complaint. Mem. Op. at 4[98]. Save Jobs USA is unaware of any precedent supporting the district court's holding that the date of the Complaint creates an evidentiary cutoff date for standing. In support of that proposition, the district court relied solely on an Eighth Circuit opinion, *Tracie Park v. Forest Serv. of the U.S.*, 205 F.3d 1034, 1037–38 (8th Cir. 2000). Mem. Op. at 4[98]. There are several reasons why the court should not adopt the Eighth Circuit's position.

First, it does not address imminent injury. Save Jobs USA filed its Complaint on April 23, 2015 in order to seek a preliminary injunction. Compl., Docket 1[31]. The H-4 Rule went into effect May 26, 2015. 80 Fed. Reg. at 10,284[2]. At the time, the competitive injuries were imminent with a date certain. Job advertisements showing that employers were, in fact, explicitly seeking H-4 aliens for computer jobs days and weeks after the H-4 Rule went into effect clearly demonstrate that the competitive injuries pled were not just imminent at the date of the Complaint: they had actually occurred.

Second, such a cutoff is inconsistent with the requirement that standing must "persist[] throughout the life of the lawsuit." *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). The district court's cutoff re-

quirement would preclude a showing of standing at any point after the date of the Complaint.

Third, an evidentiary cutoff at the date of the Complaint is inconsistent with the Supreme Court's directive that the standing requirements vary with the stage of litigation. *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* At the summary judgment stage, such allegations must be supported by "affidavit or other evidence." *Id.* The district court's cutoff rule means that all such evidence must be gathered before the complaint is filed. Such a cutoff requirement would require plaintiffs to make such affidavits prior to the date of the complaint.

Fourth, such a cutoff rule would encourage the waste of limited judicial resources. If the Court demands an evidentiary cutoff at the date of the complaint, the obvious tactic for any plaintiff is to simply file a *pro forma*, unchanged amended complaint. The Court would be saying that Save Jobs USA should have re-filed its Complaint (unchanged) under Fed. R. Civ. P. 15(a)(1)(B) and DHS should file another answer—both of which would be needless additional paper shuffling.

Finally, none of the evidence the district court had stricken was necessary to show standing under the established *allows competition* standard for injury. *La. Energy*, 141 F.3d at 367. The record shows H-4 aliens would be allowed in Save Jobs USA's market, H-4 Rule, 80 Fed. Reg. at 10,294[2] (stating H-4 aliens would be able to work anywhere),

and the district court acknowledged that H-4 aliens would be allowed in that job market. Mem. Op. at 8[102] and 11–12[105–06]. Plaintiffs, such as Save Jobs USA, only submit such additional evidence because the *allows competition* standard for competitive injury is so frequently ignored by district courts.

III. The H-4 Rule is in excess of DHS authority because Congress has not provided for DHS to admit alien labor outside the statutory scheme of the INA.

"For a court to pronounce upon the merits when it has no jurisdiction to do so … is for a court to act *ultra vires*." *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). While the district court did not accept jurisdiction, it pronounced on the merits, holding for the first time by any court: "[T]he court determines that Congress has already spoken to the issue of whether DHS can issue employment authorization regulations, *see* 8 U.S.C. §§ 1103(a)(1), 1324a(h)(3)…." Mem. Op. at 14[108]; *contra Texas*, 809 F.3d at 183–82 (holding that 8 U.S.C. § 1324a(h)(3) and the general grants of authority to administer the immigration system under 6 U.S.C. § 112 and 8 U.S.C. § 1103 did not confer on DHS the authority to grant such work authorizations). Despite the district court's error, Save Jobs USA raises this issue on appeal and prays the court will now address the merits, rather than impose the delay of remand and a subsequent appeal as the district court has already weighed in on this issue and this is a question of law that will not benefit from additional argument in the district court.

Under the Administrative Procedure Act ("APA") a court should "hold unlawful and set aside agency action" that is "in excess of statutory [] authority." 5 U.S.C. § 706(2). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

DHS's claim of authority is novel, and this case thus presents the District of Columbia Circuit with a question of first impression:

> Does DHS general authority to promulgate regulations in 8 U.S.C. § 1103(a) and the definition of the term *unauthorized alien* in § 1324a(h)(3) confer on DHS unlimited authority to admit aliens into the United States labor market?

This question is of major importance because of the zealousness DHS has exhibited since divining this authority. *E.g.*, H-4 Rule[2]; International Entrepreneur Rule, 81 Fed. Reg. at 60,131; OPT Rule, 81 Fed. Reg. at 13044–45; Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants, 81 Fed. Reg. 2,068, 2068–69 (Jan. 15, 2016) (codified at 8 C.F.R. §§ 204, 214, 248, and 274a).

To date, the Fifth Circuit is the only court of appeals to address this question, holding that 8 U.S.C. §§ 1103(a) and 1324a(h)(3) *do not* confer such authority on DHS. *Texas*, 809 F.3d at 182–83. The Fifth Circuit observed that § 1324a(h)(3) is a definitional provision, limited in scope to its own section and that "Congress … does not alter the fundamental

details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); *accord Loving v. Internal Revenue Serv.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (stating "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies"). The Fifth Circuit also observed that the general authority to promulgate regulations in 8 U.S.C. § 1103(a) "cannot reasonably be construed as assigning 'decisions of vast economic and political significance.'" *Id.* (quoting *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 134 S. Ct. 2427, 2444 (2014)). Nonetheless, the district court came to the opposite conclusion, holding that these provisions do authorize DHS to extend alien employment yet never mentioning *Texas*, let alone explaining why it came to a different conclusion. Mem. Op. at 14[108].

The H-4 visa authorizes dependents of H guestworkers to "accompany" or to "join" them in the United States. 8 U.S.C. § 1101(a)(15)(H); Pub. L. No. 91-225, 84 Stat. 116 (1970). There is no statutory provision authorizing such aliens to work in the United States. In the H-4 Rule, DHS unilaterally took the action of authorizing certain spouses of H-1B guestworkers to work in the United States. 80 Fed. Reg. at 10,284[2]. DHS also indicated that it would consider expanding this work authorization in the future. *Id.* at 10,289[7]. DHS estimated that 179,600 aliens are eligible for employment under the H-4 Rule in the first year,

and 55,000 aliens per year every year thereafter. *Id.* at 10,296[14]. Lacking a provision authorizing employment in H-4 status, DHS instead claimed the authority for the H-4 Rule came from its general authority to promulgate regulations (6 U.S.C. § 112 and 8 U.S.C. § 1103(a)) and the definition of the term unauthorized alien (8 U.S.C. § 1324a(h)(3)). *Id.* at 10,285[3], 10,294–95[12–13]. DHS stated in the H-4 Rule:

> The fact that Congress has directed the Secretary to authorize employment to specific classes of aliens (such as the spouses of E and L nonimmigrants) does not mean that the Secretary is precluded from extending employment authorization to other classes of aliens by regulation as contemplated by section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B).

80 Fed. Reg. at 10,295[3]; *contra Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (stating that courts cannot presume a delegation of power to an agency from an absence of an express withholding of that power). The question is whether 8 U.S.C. § 1324a(h)(3)(B), in fact, contemplates DHS extending employment to classes of aliens not authorized by Congress.

A. The exclusion of aliens in H-4 status from the labor market was a conscious decision by Congress.

Congress has granted spouses of principal aliens in certain nonimmigrant visa classifications authorization to work. In 2002, Congress authorized DHS to grant employment authorization to spouses of E visa treaty aliens, Pub. L. No. 107-124, 115 Stat. 2402, and to spouses of L visa intra-company transfer workers, Pub. L. No. 107-125, 115 Stat. 2403. In

the debate on these bills, Congressman Wexler expressed the view, "I hope that this bill is the beginning of an understanding that we should allow spouses in other nonimmigrant classifications who accompany their husband or wife to the United States to be able to obtain work authorization." 147 Cong. Rec. H5357 (daily ed. Sept. 5, 2001). Since then, several bills have been introduced that included provisions to authorize aliens on H-4 visas to work but Congress has rejected them all. *E.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, § 4102, S.744, 113th Congress. The lack of a statutory authorization for aliens to work in H-4 status is, therefore, not an oversight but rather the result of deliberate action by Congress.

B. DHS's claim of unlimited authority to admit aliens into the American labor market through regulation is a recent invention that has produced a frenzy of administrative actions.

Under the various provisions of the INA, Congress authorizes alien employment in three ways. First, there are provisions that authorize alien employment in conjunction with the alien's visa status. *E.g.*, 8 U.S.C. § 1101(a)(15)(H)(i)(B) (H-1B visa category guestworkers). Second, there are provisions that give DHS the discretion to extend employment to specified categories of aliens. *E.g.*, 8 U.S.C. § 1105a (giving DHS the discretion to authorize employment for battered spouses of nonimmigrants). Finally, there are provisions that direct DHS to extend employment to certain aliens whose visa status does not otherwise confer the

ability to work. *E.g.*, 8 U.S.C. § 1255a(b)(3)(B) (directing the agency to authorize employment to illegal aliens whose status is being adjusted to lawful permanent resident).

Recently DHS has begun to assert that the definitional provision 8 U.S.C. § 1324a(h)(3) confers on the agency unlimited authority to admit any alien into the American job market through regulation (including admitting aliens into the country) without having a specific authorization from Congress. In the past two years there has been a frenzy of proposed and final regulations promulgated under this newfound authority. *E.g.*, H-4 Rule; International Entrepreneur Rule (extending parole to aliens the agency classifies as entrepreneurs and allowing them to work in the United States); and OPT Rule (authorizing aliens in student visa status to remain in the U.S. for up to 42 months and work). The most controversial new work authorization initiatives relying on 8 U.S.C. § 1324a(h)(3) are the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs that the agency created without regulation and classified as a "policy statement." *Texas*, 809 F.3d at 171. However, the H-4 Rule was the very first regulation published in the Federal Register that claimed 8 U.S.C. § 1324a(h)(3) as a source of authority for granting alien employment.

In fact, this claim of unlimited authority to grant alien employment is so new that DHS has not yet developed a consistent story where it is

found in the statutes. In *Texas*, the government argued to the Fifth Circuit that 8 U.S.C. § 1324a(h)(3) was the source of its authority to grant employment to any class of aliens it chooses. No. 15-40238 and Br. for Appellants, ECF No. 00512986669 at 8–9 (5th Cir. Mar. 3, 2015), Reply Br. for Appellants, ECF No. 00513047024 at 13 & 22–23 (5th Cir. May 18, 2015). When the state respondents argued to the Supreme Court that § 1324a(h)(3) could not grant DHS the authority to define classes of aliens to work, the government had a brand new story: "[R]espondents focus on the wrong provision. Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in Section 1103(a)…." *United States v. Texas*, No. 15-674, Br. for the Pet'rs at 63 (U.S. Mar. 1, 2016).[8]

DHS's interpretation of § 1324a(h)(3) is an evolving work in progress as well. When DHS proposed the H-4 Rule at issue, it described § 1324a(h)(3) as a provision, "which refers to the Secretary's authority to authorize employment of noncitizens in the United States," without identifying the source of the authority to which it was referring. Employment Authorization for Certain H-4 Dependent Spouses, 79 Fed. Reg. 26,886, 26,887 (proposed May 12, 2014). In the final version of the

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8 The government's Pet. for Writ of Cert. at 13, 22–23, & 27 (U.S. Nov. 20, 2015) had also asserted § 1324a(h)(3) is the source of its authority to allow any alien to work and made no mention of § 1103(a) for that proposition. In reply on the petition, the government raised for the first time the claim that § 1103(a) conferred the authority to allow any alien to work. Reply Br. for Pet'rs at 10 (U.S. Jan. 15, 2016).

H-4 Rule, DHS reinterpreted § 1324a(h)(3) as the actual source of power for the DHS Secretary "to extend employment to noncitizens in the United States" to whomever he chooses. 80 Fed. Reg. at 10,295[3].

Over the years there have been a number of court opinions addressing whether the executive has authority under the INA to grant classes of aliens employment. *E.g.*, *Bricklayers I*; *Bricklayers II*; *Bustos v. Mitchell*, 481 F.2d 479 (D.C. Cir. 1973) *aff'd in part rev. in part*, 419 U.S. 65, 79 (1974); *Amalgamated Meat Cutters & Butcher Workmen v. Rogers*, 186 F. Supp. 114 (D.D.C. 1960); *Gooch v. Clark*, 433 F.2d 74, 76 (9th Cir. 1970); *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981). However, in reaching the merits, such opinions have always addressed whether the grant of employment in question fell within the terms of specific statutory provisions granting the agency authority to extend employment. *E.g.*, *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1384 (9th Cir. Wash. 1989) (holding crane operators were not crewmembers authorized to work under 8 U.S.C. § 1101(a)(15)(D)); *Saxbe v. Bustos*, 419 U.S. 65, 79 (1974) (holding commuters from Mexico and Canada were authorized to work as permanent residents under 8 U.S.C. § 1101 (a)(27)(B)). Save Jobs USA is unable to find any opinion prior to 2014 in which it was even suggested that §§ 1103(a) and 1324a(h)(3) conferred on DHS authority to extend employment to aliens independent of specific provisions authorizing DHS to do so. Given the number of opinions addressing the scope of agency authority to admit foreign labor

into the job market and the fact that that §§ 1103(a) and 1324a(h)(3) were never even mentioned until 2014, it is implausible that these provisions confer on DHS the authority it now claims.

C. Congress never conferred unlimited agency authority to admit aliens into the American labor market through regulation.

Under the Constitution, Congress has control over immigration. U.S. Const. Art. I § 8; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (stating, "'Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 940–41 (1983) ("The plenary authority of Congress over aliens under U.S. Const. art. I, § 8, cl. 4, is not open to question."). Yet in the H-4 Rule and other recent administrative actions, DHS claims that Congress ceded to it complete authority to admit aliens into the American job market, whether or not such aliens are in a lawful status or authorized to work. *E.g.*, H-4 Rule, 80 Fed. Reg. at 10,284[2]; *Texas*, 787 F.3d at 743–46 (DHS enjoined from granting unauthorized aliens legal presence and work permits). DHS even claims this authority is so comprehensive that it includes admission into the United States to perform work that is solely authorized by agency policy. *See e.g.*, International Entrepreneur Rule (admitting aliens into the country under parole and allowing them to enter the job market through regulation).

This Circuit has made clear that a grant of total control over the admission of foreign labor to the executive should derive from an explicit provision in statute: "Congress does not, one might say, hide elephants in mouseholes." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 54 (D.C. Cir. 2016) (quoting *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016)). Furthermore, "It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *Am. Library Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691 (D.C. Cir. 2005). "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Execs.*, 29 F.3d at 671; *contra* H-4 Rule, 80 Fed. Reg. at 10,295[13] (stating "The fact that Congress has directed the Secretary to authorize employment to specific classes of aliens . . . does not mean that the Secretary is precluded from extending employment authorization to other classes of aliens by regulation"). Nonetheless, DHS infers this complete authority over alien employment from a term definition (limited in scope to its own section) in 8 U.S.C. § 1324a(h)(3) and the agency's general authority to promulgate regulations in § 1103(a).

1. Section 1324a(h)(3) cannot confer unlimited agency authority to admit aliens into the American labor market because it is a definitional provision limited in scope to its own section.

Section 1324a(h)(3) was enacted as part of IRCA § 101, 100 Stat. 3368. That section for the first time criminalized and imposed civil sanctions on employers for hiring an alien who is not authorized to work in the United States (*i.e.*, an *unauthorized alien*). *Id.* at 100 Stat. 3360–74. Section 101(h)(3) of the Act (8 U.S.C. § 1324a(h)(3)) provides:

> (3) Definition of unauthorized alien
>
> As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

8 U.S.C. § 1324a(h)(3). This provision is merely a definition and does not authorize DHS to do anything. *Texas*, 787 F.3d at 760, n.84, n.85 & n.86 (5th Cir. 2015); *see also W. Union Tel. Co. v. Fed. Commc'n Comm'n*, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (holding a section was "only definition" where it began with "as used in this section" and contained only definition subsections).

DHS grasps the slender reed of "or by the Attorney General" to avoid falling off a cliff.[9] This phrase clearly refers to the many situations where Congress has granted DHS discretionary authority to permit alien em-

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9 The same "or by the" Attorney General or Secretary of Homeland Security language occurs in other definitions also limited in scope. *E.g.*, 8 U.S.C. §§ 1182(n)(4)(E) and (t)(4)(D).

ployment, or directed DHS to grant certain aliens employment that is not conferred by an alien's visa classification. In fact, IRCA contains seven such provisions. Pub. L. No. 99–603, § 101, 100 Stat. 3359, 3368, § 201 ("Legalization") 100 Stat. 3397, 3399 (two), § 301 ("Lawful Residence for Certain Special Agriculture Workers") 100 Stat. 3418, 3421 (two), 3428. Had Congress omitted the phrase "or by the Attorney General" in § 1324a(h)(3)(B), it would have created the absurd situation where aliens would be authorized to work under IRCA but where § 101 of the same Act would have made hiring these aliens unlawful.

Subsequently, Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005 that provided DHS with the authority that it "may" grant Violence Against Women Act petitioners work authorization. Pub. L. No. 109-162, § 814, 119 Stat. 2960, 3059 (2006). The same section also provided that DHS "may authorize" battered spouses, including those who happen to be H-4 visa holders, "to engage in employment." *Id*. Similarly, the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, § 908, 112 Stat. 2681, 2681-539, provided that the Attorney General (now DHS Secretary), "may" extend employment to certain Haitian nationals. Under the agency's new interpretation of § 1324a(h)(3), DHS already had the power to grant these discretionary work authorizations. That claim of authority compels the impermissible conclusion that all Congress did by enacting these provisions was to create useless surplusage. *See Platt*

v. Union P. R. Co., 99 U.S. 48, 59 (1879) (In statutory construction, "no words are to be treated as surplusage or as repetition.")

2. Section 1103(a) cannot confer on DHS unlimited authority to permit aliens to work in the United States because it provides the general authority of the agency to promulgate regulations necessary to carry out its authority under other provisions.

Section 112 of Title 6 defines the functions of the Secretary of Homeland Security and section 1103 of Title 8 charges the Secretary with administering the provisions of the INA. Such general authorizations do not grant the DHS Secretary unlimited authority to act as he sees fit with respect to all aspects of immigration policy. *See Motion Picture Ass'n of Am. v. Fed. Commc'ns Comm'm*, 309 F.3d 796, 798–99, 802–03 (D.C. Cir. 2002) (finding the general authority of the Federal Communications Commission to regulate television did not grant it unlimited authority to act as it sees fit with respect to all aspects of television transmissions). "Statutory interpretations by agencies are 'not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue.'" *Port Auth. of N.Y. & N.J. v. U.S. Dep't of Transp.*, 479 F.3d 21, 27 (D.C. Cir. 2007) (quoting *Motion Picture Ass'n*, 309 F.3d at 801). Indeed, Congress has recognized this limited authority by making regulatory actions taken by the Secretary explicitly reviewable under the APA. 6 U.S.C. § 112(e).

Under § 1103(a)(3), DHS is authorized to promulgate regulations "necessary for carrying out his authority under the provisions of this

chapter." While DHS refers to § 1103(a)(3) as allowing it to make regulations, the H-4 Rule did not identify any specific provision of law that necessitated promulgation of the H-4 Rule. *Cf. Helicopter Ass'n Int'l v. Fed. Aviation Admin.*, 722 F.3d 430, 433–34 (D.C. Cir. 2013) (a rule for noise abatement fell within the FAA's general rulemaking authority when the purpose of a rule was to implement its specific authority "to protect individuals and property on the ground"). In fact, DHS could not have shown the H-4 Rule was necessary to carry out its authority because aliens in H-4 status had not been permitted to work for 45 years without inhibiting the agency from carrying out its authority.

3. The district court's determination that §§ 1103(a) and 1324a(h)(3) confer on DHS independent authority to admit classes of aliens into the labor market is inconsistent with prior judicial interpretation of the INA.

The district court was the very first to hold that DHS's general authority under 8 U.S.C § 1103(a) and the definition of the term *unauthorized alien* in § 1324a(h)(3) confer authority to permit aliens to work in the United States outside the specific grants of authority to do so. Mem. Op. at 14[108]; *contra Texas*, 809 F.3d at 182–83.

Before *Texas*, no earlier opinion that considered the scope of agency authority to permit aliens to work had ever addressed the question of whether §§ 1103(a) and 1324a(h)(3) conferred such authority. In *Int'l Longshoremen*, the Ninth Circuit held the INS exceeded its authority by permitting crane operators to work under D crewmember visas.

891 F.2d at 1384. In *Bricklayers II*, the Northern District of California held the INS exceeded its authority by authorizing alien bricklayers to work while in B visitor visa status. 616 F. Supp. 1387, 1398–401 (N.D. Cal. 1985). Both of these opinions, setting aside agency regulations permitting aliens to work, conflict with the DHS claim (and the district court's holding) of agency authority to permit work by any alien under 8 U.S.C. §§ 1103(a) and 1324a(h)(3). Mem. Op. at 14[108].

Even in cases where the courts have found the agency had authority to admit foreign labor, they have done so by examining specific provisions authorizing such labor and never the general authority under § 1103. In *Bustos v. Mitchell*, this court addressed whether the INS had the authority to promulgate regulations allowing aliens to commute from Mexico and Canada to engage in employment in the United States. 481 F.2d at 481. This Court held the regulations were lawful in regard to daily commuters who could be treated as returning resident aliens under 8 U.S.C. § 1181(b) (1970), *id.* at 486, but were in excess of INS authority in regard to seasonal commuters, *id.* at 487. The Supreme Court affirmed in regard to the daily commuters but reversed in regard to the seasonal commuters, holding both could be treated as returning resident aliens. *Saxbe v. Bustos*, 419 U.S. at 79. Neither this Court nor the Supreme Court made any mention of the agency possessing the unlimited authority to permit aliens to work that DHS now claims under 8 U.S.C. § 1103, and which—had it really existed—should, under the

challenged DHS theory, have been controlling even prior to the passage of IRCA in 1986.

D. The system Congress established for admitting foreign labor does not contemplate the executive having independent authority to permit any alien to work in the United States.

The 1952 INA was a "complete revision" of our immigration laws, providing a clear starting point for the legislative history of the immigration system. S. Rep. No. 82-1072, at 2 (1952). Section 103 of the INA (codified at 8 U.S.C. § 1103) provided for the general authority of the Attorney General to administer the immigration system and to promulgate regulations "necessary for carrying out his authority." This provision has been amended several times. 8 U.S.C. § 1103 (Amendments Section). Notably the Homeland Security Act of 2002 transferred this authority to the Secretary of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2273–74. However, 8 U.S.C. § 1103 throughout its entire history has never mentioned the authority to admit aliens into the American labor market. *Id.* It is implausible that Congress would have created a comprehensive scheme governing the employment of aliens in the INA and, at the same time, conferred on the executive the authority to supplant that scheme through regulation in a general provision. *See Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623, 639 (D.C. Cir. 2014) (stating "Congress does not … 'hide elephants in mouseholes.'") (quoting *Whitman*, 531 U.S. at 468); *Motion Picture Ass'n*, 309 F.3d at 798–99,

802–03 (finding the general authority of the Federal Communications Commission to regulate television did not grant it unlimited authority to act as it sees fit with respect to all aspects of television transmissions).

The lack of such authority to permit any alien to work in the United States is clear from the legislative history. Both the House and Senate reports on the INA state that it "provides strong safeguards for American labor" and that all aliens (with three exceptions not applicable here) seeking to perform labor are excluded if the Secretary of Labor determines that American workers are available or that the foreign labor would adversely affect American workers. S. Rep. No. 82-1137, at 11 and H.R. Rep. No. 82-1365, at 50–51 (identical text). Neither the House nor the Senate reports on the INA makes any mention of granting the executive authority to permit foreign labor through regulation or that such regulation would be exempt from these requirements. S. Rep. No. 82-1137 or H.R. Rep. No. 82-1365. If such authority had been intended, surely Congress would have listed this class of labor among the exceptions to labor protection requirements—which it did not. *Id.*

The Immigration and Nationality Act of 1965 strengthened the protections for American workers by requiring an affirmative certification by the Secretary of Labor that American workers were not available and that the alien labor would not adversely affect American workers prior to the admission of foreign labor. § 9, 79 Stat. 917–18 (then codified at 8 U.S.C. § 1182(a)(14)). Like the 1952 INA, the 1965 Act did

not create an exemption from labor certification for aliens granted permission to work through regulation. *Id.* Congress reaffirmed that labor protection in the Miscellaneous and Technical Immigration and Nationalization Amendments of 1991, § 302(e)(6), 105 Stat. at 1746. Over the decades, Congress has repeatedly required most foreign labor to comply with statutory labor protections and it has never included labor independently authorized through regulation as one of the exceptions. *Id.*; INA, § 9, 66 Stat. at 282; Immigration and Nationality Act of 1965, § 9, 79 Stat. at 817.

E. If the courts adopt the district court's interpretation of §§ 1103(a) and 1324a(h)(3), alien employment in the immigration system will be defined by regulation rather than by statute.

The scope of DHS's newfound authority to permit aliens to work in the United States is unprecedented as is the volume of agency actions acting on this newly discovered, unlimited authority. Should other courts follow the district court in upholding the existence of such authority (rather than the Fifth Circuit's rejection of it) the United States would no longer have a statutory scheme for admitting foreign labor. Under the claim of agency authority challenged by Save Jobs USA, there is no bar preventing the agency from promulgating a regulation that allows any alien to pay a $465 fee and authorizes him to work in the United States regardless of immigration status. *C.f. Texas*, 809 F.3d at 192.

This is not hyperbole. The regulatory path is already headed in that direction. The district court's opinion demonstrates the newfound authority is not a bar to authorizing employment to lawful aliens lacking a statutory authorization to work where the statutory definition of their visa status does not explicitly authorize the aliens to work. Mem. Op. at 16[110]. Even where the statutory definition of the visa status explicitly precludes work, this new authority allows such work through administrative action. For example, the statutory definition of B visitor visas status excludes aliens coming to the United State for "performing skilled or unskilled labor." 8 U.S.C. § 1101(a)(15)(B). However, through administrative action, under a program known as *B in Lieu of H* ("BILOH"), aliens otherwise eligible for H-1B guestworkers are permitted to work on B visas instead. 9 FAM 402.2-5(F) (2016). Another example is F-1 student visa status that restricts the alien to solely pursuing a course of study at an approved academic institution that will report termination of attendance. 8 U.S.C. § 1101(a)(15)(F)(i). Yet DHS regulations allow aliens to remain in the United State and work for years after graduation in student visa status. OPT Rule, 81 Fed. Reg. at 13,040.

What is more, possessing lawful presence in the United States is not even a bar to the executive permitting aliens to work under DHS's newly discovered authority. The purpose of IRCA was to "control illegal immigration" and establish penalties for employers

that hire illegal aliens. H.R. No. Rep. 99-682, at 1 (1986). Yet DHS now claims that IRCA (8 U.S.C. § 1324a(h)(3)) confers on it authority to allow illegal aliens to remain and work in the U.S. *Texas*, 809 F.3d at 182–83.

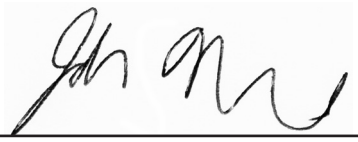
DHS's claim of authority here is not even limited to aliens already in the United States. Under the proposed International Entrepreneur Rule, DHS would invite aliens to apply to *enter* the United States and work with no statutory authorization under the parole power. 81 Fed. Reg. at 60,133–36.

If the courts adopt DHS's claim of unlimited authority to admit foreign labor into the American job market, every statutory protection for American workers in the entire immigration system is at risk of nullification through regulation. *E.g.*, Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students, 73 Fed. Reg. 18,944, 18,946 (Apr. 8, 2008) (codified at 8 C.F.R. § 214 and 274a) (agency regulations promulgated without notice and comment whose very purpose was to circumvent protections for American workers in the H-1B program). Should the courts ultimately reject the Fifth Circuit's interpretation and adopt the district court's interpretation, it would set the stage for an administrative dismantling of the entire statutory scheme for alien employment in favor of one promulgated through regulation or other executive action.

CONCLUSION

For the reasons given above, Save Jobs USA prays that the Court finds the district court erred when it ruled Save Jobs USA's members lacked standing to challenge the H-4 Rule that allows competitors into their job market while in H-4 visa status and provides an incentive to their competitors in H-1B status to remain in the American job market. Save Jobs USA also prays that the Court will hold the H-4 Rule is in excess of DHS authority and set it aside under 5 U.S.C. § 706(2)(C).

Respectfully submitted,
Dated: January 11, 2017



John M. Miano
D.C. Bar No. 1003068
Attorney of Record for
Save Jobs USA
(908) 273-9207
miano@colosseumbuilders.com

Dale Wilcox
D.C. Bar No. 1029412
Michael Hethmon
D.C. Bar No. 1019386
Immigration Reform Law Institute
25 Massachusetts Ave., N.W.
Suite 335
Washington, D.C. 20001
(202) 232-5590

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,570 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 using 14 pt. Caslon.

John M. Miano
D.C. Bar No. 1003068
Attorney of Record for
Save Jobs USA
(908) 273-9207
miano@colosseumbuilders.com

STATUTES AND REGULATIONS

8 U.S.C. § 1101(a)(15)(H)

(H) an alien (i) [(a) Repealed. Pub. L. 106–95, §2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26, agriculture as defined in section 203(f) of title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

H-4 Status Definition

§ 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

(4) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service.

(5) He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.

(6) He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

(7) He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

(8) After consultation with the Secretary of State, the Attorney General may authorize officers of a foreign country to be stationed at preclearance facilities in the United States for the purpose of ensuring that persons traveling from or through the United States to that foreign country comply with that country's immigration and related laws.

(9) Those officers may exercise such authority and perform such duties as United States immigration officers are authorized to exercise and perform in that foreign country under reciprocal agreement, and they shall enjoy such reasonable privileges and immunities necessary for the performance of their duties as the government of their country extends to United States immigration officers.

(10) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

(11) The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized—

(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State; and

(B) to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.

8 U.S.C. § 1324a(h)(3)

(3) Definition of unauthorized alien

As used in this section, the term ''unauthorized alien'' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.