In the
United States District Court
for the
District of Columbia

Save Jobs, USA 31300 Arabasca Circle Temecula CA 92592 *Plaintiff,* *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:15-cv-00615 (TSC)

Plaintiff's Cross Motion for Summary Judgment

Plaintiff Save Jobs USA respectfully moves the court to grant it summary judgment on all counts of its complaint. On May 11, 2015, Defendant U.S. Department of Homeland Security ("DHS") filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ECF #10. On May 26, 2015, Save Jobs USA filed its response to that motion. ECF #16. On June 2, 2015, DHS filed its reply, ECF #19, and supplemented that motion with evidence outside the pleadings, Declaration of Alexandra P. Haskell, ECF #19-1.

Under Fed. R. Civ. P. 12(d), if matters outside the pleadings are presented by a party and not excluded by the court under a R. 12(b)(6) motion, the motion must be treated as one for summary judgment. DHS's factual challenge to standing combined with its challenge to the merits as questions of law are, in effect, a motion for summary judgment. Because DHS supplemented the pleadings in its reply, Save Jobs USA must make its own motion to respond to this new testimony. Because this case presents only questions of law that can be resolved now and the parties are repeating themselves at this point, summary judgment is appropriate at this time.

Respectfully submitted,
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Memorandum of Law in Support of
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QUESTIONS PRESENTED

1. Does the general authority of DHS to administer the immigration system grant it unlimited authority to allow aliens to work in the United States?
2. Does the definition of *unauthorized alien* in 8 U.S.C. § 1324a grant DHS unlimited authority to allow aliens to work in the United States?
3. May an agency deny the findings of the adminstrative record in order to prevail on standing?

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INTRODUCTION

Plaintiff, Save Jobs USA is an unincorporated group of computer professionals who were employed at Southern California Edison until they were replaced by foreign workers on H-1B visas in 2015. These American workers bring this action under the Administrative Procedure Act, challenging a U.S. Department of Homeland Security ("DHS") regulation that is designed to increase the amount of foreign labor in the United States and circumvent the American worker protections embodied in statute by allowing certain aliens possessing H-4 dependent visas to work when there is no statutory authorization for such aliens to work. Employment Authorization for Certain H–4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a) (the "H-4 Rule").

STATEMENT OF THE FACTS

Aliens are admitted into the United States as *immigrants*, *non-immigrants* or *refugees*. 8 U.S.C. §§ 1101(a)(15) and 1157. Section 1101(a)(15) authorizes DHS to admit non-immigrants for various purposes (*e.g.*, diplomats, crewmen, visitors, and journalists). The common name associated with a non-immigrant visa category is derived from its subsection within § 1101(a)(15). 8 C.F.R. § 214.1(a)(2). For example, the A-1 visa for diplomats is authorized by 8 U.S.C. § 1101(a)(15)(A)(i). There are a number of visa categories for admitting non-immigrants to perform labor. For example, the L-1 visa allows companies to transfer foreign managers to the United States, § 1101(a)(15)(L), and the O visa is for highly skilled workers of extraordinary ability, § 1101(a)(15)(O).

8 U.S.C. § 1101(a)(15)(H) authorizes the most important guestworker programs (*i.e.*, H-1B, H-1B1, H-1C, H-2A, and H-2B) and defines the terms under which they may be used to perform labor in the United States. The H-1B category authorizes an alien to "perform services" in a "specialty occupation"[1] or as a "fashion model [] of

1 A *specialty occupation* is defined as one that generally requires a college degree or equivalent knowledge. *See*, § 1184(i).

distinguished merit and ability" but requires a labor condition application (requirements defined at § 1182(n)). § 1101(a)(15)(H)(i)(b). H-1B1 (treaty visas) authorizes admission to an alien in a "specialty occupation" but requires the employer to file an attestation related to wage and working conditions (requirements at § 1182(t)). § 1101(a)(15)(H)(i)(b1). H-1C authorizes admission for aliens to "perform services as a registered nurse" and requires the employer to file an attestation to the wages and working conditions (requirements at § 1182(m)). § 1101(a)(15)(H)(i)(c). H-2A authorizes admission for aliens to perform "agricultural labor or services" (with labor certification requirements at § 1188). § 1101(a)(15)(H)(2)(a). H-2B authorizes admission to "perform other temporary service or labor … if unemployed persons capable of performing such service or labor cannot be found in this country" (with a labor certification required under § 1184(g)(9)). § 1101(a)(15)(H)(2)(b). The same section also authorizes DHS to approve H-3 visas to aliens for a "training program that is not designed primarily to provide productive employment" (with no labor certification requirement). § 1101(a)(15)(H)(3).

The H-4 visa category was created by Pub. L. No. 91-225, 84 Stat. 116 (1970) and is defined in an unnumbered clause at the end of § 1101(a)(15)(H). That provision reads in its entirety: "and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him." This visa is available to the dependents of H-1B, H-1B1, H-2A, H-2B, and H-3 visa holders defined in the same paragraph.[2] *Id.*

The Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 101, 100 Stat. 3445 ("IRCA") (creating a new section § 274a of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1324a) 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. Section 1324a(h)(3) defines the term *unauthorized alien* to mean the following:

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2 The Immigration Act of 1990, reorganized the H visa category. At the time the H-4 visa was created in 1970, the other visas were H-1, H-2, and H-3. Only the H-3 visa persists to this day.

> (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 Act or by the Attorney General.

INA § 274a(h)(3) (codified at 8 U.S.C. § 1324a(h)(3)).

Section 1101(a)(15)(H) was radically revised in the Immigration Act of 1990 ("IMMACT90"), Pub. L. No. 101-649, 104 Stat. 4978, in response to abusive administrative interpretation that had undermined its domestic labor protections. H.R. Rept. 101-723, pp. 44. IMMACT90 replaced the H-1 and H-2 guest worker visas with the current, more specific visas largely in place now. 8 U.S.C. § 1101(a)(15)(H).

On February 25, 2015, DHS promulgated the regulations at issue here, the H-4 Rule. The H-4 Rule went into effect on May 26, 2015. 80 Fed. Reg. 10,297. The Rule grants certain H-4 visa holders work authorization through regulation. Specifically, it authorizes aliens to work who are the spouses of principal beneficiaries of an approved Form I-140, Immigrant Petition for Alien Worker or of aliens who been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000. 80 Fed. Reg. 10,307.[3] DHS's claimed legal authority for the H-4 Rule is 6 U.S.C. § 112 (defining the functions of the Secretary of Homeland Security), 8 U.S.C. § 1103(a) ("which authorize[s] the Secretary to administer and enforce the immigration and nationality laws"), and 8 U.S.C. § 1324a(h) (defining the term *unauthorized alien*). 80 Fed. Reg. 10,285. The purpose of the H-4 Rule is to retain H-1B aliens who would otherwise leave the country and to attract additional H-1B workers. 80 Fed. Reg. 10,284, 10,285, 10,286, 10,288, 10,289, 10,295, 10,305.

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3 DHS stated in its findings that it, "may consider expanding H-4 employment eligibility in the future," 80 Fed. Reg. 10,289, and "may consider expanding employment authorization to other dependent nonimmigrant categories in the future." 80 Fed. Reg. 10,292.

The Plaintiff, Save Jobs USA, is an unincorporated group of American workers who were employed in computer related occupations at Southern California Edison until 2015 when they were replaced by foreign workers on H-1B visas employed by the Indian multinational conglomerate company Tata. Affidavit of Brian Buchanan ("Buchanan Aff.") ¶¶ 3–13; Affidavit of Julie Gutierrez ("Gutierrez Aff.") ¶¶ 3–11; Affidavit of D. Steven Bradley ("Bradley Aff.") ¶¶ 3–12.

STANDARD OF REVIEW

The courts of this circuit have repeatedly held that cases arising under the Administrative Procedure Act ("APA") are typically resolved by summary judgment on the basis of the administrative record compiled by the agency. *E.g.*, *Bloch v. Powell*, 227 F. Supp. 2d 25, 30–31 (D.D.C. 2002); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 81–82 (D.D.C. 2007). "The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency factfinding …. [C]ourts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

The APA directs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; … [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §´706(2). In APA challenges to agency action, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 32 (D.D.C. 2010) (internal quotation marks omitted), *aff'd*, 663 F.3d 476 (D.C. Cir. 2011). This Court must "thoroughly review[] the agency's actions," and "consider[] whether the agency acted within the scope of its legal authority, whether the agency has ex-

plained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995).

ARGUMENT

I. Save Jobs USA's injuries from the H-4 rule routinely have provided standing in the D.C. Circuit.

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). Standing only requires an "identifiable trifle" of injury. *Center for Auto Safety v. Gen. Motors*, 793 F.2d 1322, 1131 (D.C. Cir. 1986). Save Jobs USA identifies three injury theories and four specific injuries in fact resulting from the H-4 Rule and describes each in detail, *infra*.

An association has standing to bring suit on behalf of its members if (1) at least one member would have standing to sue in his or her own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit. *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1005 (D.C. Cir. 2014).

Save Jobs USA's complaint identifies three of its members who would have standing to bring this action on their own: Brian Buchanan, D. Steven Bradley, and Julie Gutierez. Save Jobs USA was created to protect the economic security and working conditions of its members. Buchanan Aff. ¶ 16; Gutierrez Aff. ¶ 14; Bradley Aff. ¶ 14. Relief under the APA does not require that an individual member participate in the suit. 5 U.S.C. § 702. Therefore, Save Jobs USA can represent the interests of its members here.

Save Jobs USA members are direct competitors with H-1B workers. Specifically, Save Jobs USA members work in computer-related occupations and they were replaced by H-1B workers employed by Tata. Bradley Aff. ¶¶ 3–13; Gutierrez Aff. ¶¶ 3–14; Buchanan Aff. 3–14. They continue to see new work in computer-related occupations. Bradley Aff. ¶¶ 3–13; Gutierrez Aff. ¶¶ 3–14; Buchanan Aff. ¶¶ 3–14. That makes Save Jobs USA members active participants in the specialty occupation (more specifically, computer) job market. *See*, *Mendoza v. Perez*, 754 F.3d 1002, 1014 (D.C. Cir. 2014) (stating a person can involve himself in a job market by means other than submitting formal applications, including by monitoring the job market).

In *Washington Alliance of Technology Workers v. DHS*, a case strikingly similar to the case at bar, a union representing American technology workers brought suit under the APA to challenge DHS's Optional Practical Training program that allows F-1 student visa holders to stay and work in the United States even after they have graduated from college and are no longer students. Civil Action No. 14-529, 2014 U.S. Dist. LEXIS 163285 (D.D.C. Nov. 21, 2014). The plaintiff alleged that DHS's rules creating its OPT program and subsequent amendments were in excess of DHS's statutory authority and otherwise arbitrary and capricious. The plaintiff claimed it was harmed by DHS allowing increased competition into the labor market. In a motion to dismiss, DHS argued that the plaintiff lacked standing because it merely alleged it was harmed by increased competition and "failed to provide sufficient detail of the three named members' training and employment circumstances to establish an injury-in-fact arising from competition. (Mot at 13.) In particular, plaintiff did not enumerate the specific positions to which its named members applied or planned to apply in the future, their qualifications for the job, or whether the position applied for was filled by an OPT student on a seventeen-month STEM extension. *Id.*" Nov. 21, 2014 Memorandum Opinion at 8 ("Mem. Op.").

This Court rejected DHS's argument, finding that the omissions were "not fatal to plaintiff's standing, for such a close nexus is not required." *Id.* (citing *Honeywell v. EPA*, 374 F.3d 1363, 1368 (D.C. Cir. 2004) (finding chemical manufacturer had standing because the challenged regulation could lead customers to seek out the manufacturer's competitors in the future);[4] *Int'l Union of Bricklayers and Allied Craftsmen v. Meese*, 761 F.2d 798, 802 (D.C. Cir. 1985) (finding standing despite lack of details regarding specific future jobs as to which U.S. bricklayers would compete with foreign laborers); *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir. 1989) (finding union had standing to challenge Immigration and Naturalization Service ("INS") regulation without pleading specific job opportunities lost to Canadian longshoremen). *C.f.*, *Sierra Club v. Jewell*, 764 F.3d 1, 6 (D.C. Cir. 2014) (stating plaintiff's members need not set foot on disputed property to have interest in enjoying it for the purpose of establishing injury)). The Court also noted that the D.C. Circuit found in *Mendoza* that the plaintiffs had standing despite not showing that they applied for and were denied a specific position that was filled by a competitor:

> There, the Department of Labor changed special procedures that established the minimum wage and working conditions requirements for U.S. sheepherders and goatherders. The plaintiffs did not work as herders nor had they applied for herder positions at the time the action was filed, but the Court held that "[t]he plaintiffs are not removed from the herder labor market simply because they do not currently work as herders and have not filled out formal job applications." *Mendoza*, 754 F.3d at 1014.

Mem. Op. at 9.

A. Injury 1: The H-4 Rule deprives Save Jobs USA of statutory protections from foreign labor.

A central feature of the immigration system is its protections for domestic labor. For example, 8 U.S.C. § 1182(a)(5)(A) provides, "In general Any alien who seeks to enter

4 Subpart III of Part II of this opinion was withdrawn in *Honeywell v. EPA*, 393 F.3d 1315, 1316 (D.C. Cir. 2005) (corresponding to *Honeywell*, 374 F.3d at 1371–74). Save Jobs USA relies herein on the portions of the opinion not withdrawn.

the United States for the purpose of performing skilled or unskilled labor is inadmissible" unless there has been a certification by the Department of Labor. Directly related to the Save Jobs USA's interests, Congress has established the H-1B visa for the admission of nonimmigrant labor in specialty occupations (such as computers). 8 U.S.C. § 1101(a)(15)(H)(i)(b). Computer-related occupations represented 65% of H-1B visas approved in FY 2014. *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year* 2014 *Annual Report to Congress*, DHS, Feb. 26, 2015, p. 12. Specialty occupation workers under the H-1B program must comply with the labor protection requirements, including a Labor Condition Application, § 1182(n), and statutory limits, § 1184(g). There is no prohibition whatsoever against an H-1B spouse who is qualified to work in a specialty occupation to get an H-1B visa on his or her own. 8 U.S.C. *passim*.

Save Jobs USA's members are all computer workers. Bradly Aff. ¶¶ 3–6, 13; Buchanan Aff. ¶¶ 2–7, 15; Gutierrez Aff. ¶¶ 4–7, 12. The H-4 Rule allows nonimmigrants possessing H-4 visas to work in computer-related occupations in competition with Save Jobs USA members because it imposes no restrictions on where these aliens may work. H-4 Rule. Furthermore, USCIS Director Rodriguez admitted of the pool of aliens that will be authorized to work under the H-4 rule that, "They are in many cases, in their own right, high-skilled workers of the type that frequently seek H-1Bs." Patrick Thibodeau, *U.S. to allow some H-1B worker spouses to work*, ComputerWorld, Feb. 24, 2015.

However, the H-4 Rule does not require nonimmigrants working in computer related fields to comply with the labor protections of H-1B. H-4 Rule. By allowing aliens to work in computer occupations on H-4 visas through regulation instead of the appropriate H-1B visas, DHS deprives Save Jobs USA members the benefits of protections that rightly should be applied to such labor under the statutory immigration scheme. §§ 1182(n) and 1184(g).

That is an injury-in-fact to Save Jobs USA members. "Even where the prospect of job loss is uncertain, [the D.C. Circuit has] repeatedly held that the loss of labor-protective arrangements 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) ("BLE"); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 852–55 (D.C. Cir. 2006); *see also*, *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1497 (D.C. Cir. 1996) ("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). As the *BLE* Court explained, "as long as there is a reasonable possibility that union members will receive and benefit from labor-protective arrangements, the loss of those arrangements stemming from [an agency's action] provides a sufficient basis for union standing." *Id*. at 724; *see also*, *Simmons v. ICC*, 934 F.2d 363, 367 (D.C. Cir. 1991) (stating one only need demonstrate "[t]he possibility" of greater labor protections to create a justiciable injury). "[E]ven if the actual usefulness of labor-protective arrangements depends on a future event, the injury is not too speculative to support standing. The future event need not even be likely; it need only be possible." *Id*. In situations like this, it is the denial of the statutory protection itself that is the injury-in-fact, not the secondary question of whether that denial causes a more specific harm, such as getting a job or winning a contract:

> We have held, however, that a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result. In [*Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*] an association of contractors challenged a city ordinance that accorded preferential treatment to certain minority-owned businesses in the award of city contracts …. Even though the preference applied to only a small percentage of the city's business, and even though there was no showing that any party would have

> received a contract absent the ordinance, we held that the prospective bidders had standing; the "injury in fact" was the harm to the contractors in the negotiation process, "not the ultimate inability to obtain the benefit."

Clinton v. New York, 524 U.S. 417, 433 & n.22 (1998) (citations omitted). Under the circumstances, "each injury is traceable to the [agency's] cancellation of [the statutory protections] and would be redressed by a declaratory judgment that the cancellations are invalid." *Id.*

Just as in *Clinton*, DHS's cancellation of statutory protections confers standing on those whom Congress intended to protect. Specifically, the H-4 Rule undermines the basic protections contained in the INA formulated by Congress to protect Save Jobs USA members. For instance, 8 U.S.C. § 1182(a)(5)(A) requires that, as a prerequisite for an alien to work in the United States (except teachers, those with extraordinary ability in arts and science, and professional athletes), the Secretary of Labor must certify that there are no Americans available for the position and that the admission of the alien will not adversely affect the wages and working conditions of Americans. As stated above, the specific provisions §§ 1182(n) and 1184(g) apply to foreign nonimmigrant labor in specialty (including computer-related) occupations.

Agency use of visa substitution to circumvent labor protections is not new to this case. The H-1B program was created in response to abusive agency interpretation where the INS approved H-1 visas for aliens that should have been required to obtain H-2 visas. H.R. Rept. 101-723, p. 46. In *Bricklayers*, the INS had unlawfully authorized foreign bricklayers to work on B (visitor) visas rather than H (guestworker) visas that should have been required. 761 F. 2d at 802–05; *Int'l Union of Bricklayers and Allied Craftsmen v. Meese,* 616 F. Supp. 1387 (N.D. Calif. 1985). In *Longshoremen*, the INS unlawfully admitted foreign crane operators to work on D (crewmen) visas rather than the proper H visa. 891 F.2d at 1379. In both cases, the visa substitution created injury affording standing to the American worker plaintiffs. Likewise here, DHS has deprived Save Jobs USA members of labor protections under the INA by

allowing aliens to work in Save Jobs USA members' occupational fields without incorporating into the H-4 Rule labor protections for American workers as are required in the H guestworker categories.

B. Injury 2: The H-4 Rule creates increased competition from H-1B workers.

A party suffers an injury-in-fact when the government increases competition against it. *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010). "Because increased competition almost surely injures a seller in one form or another, he need not wait until 'allegedly illegal transactions … hurt [him] competitively' before challenging the regulatory (or, for that matter, the deregulatory) governmental decision that increases competition." *Id.* (quoting *La. Energy & Power Authority v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). As the D.C. Circuit explained in, *Bristol-Meyers*, "Consumers always decide whether to purchase the product of one competitor or another." 91 F.3d at 1499. The injury-in-fact is "exposure to competition" from other market entrants. *Id.*; *accord, Honeywell*, 374 F.3d at 1369–70.

Just one new competitor allowed into a market is an injury-in-fact. In *First Nat'l Bank & Trust Co. v. NCUA*, four banks challenged a charter change allowing the AT&T Family Credit Union to enroll unaffiliated members. 988 F.2d 1272, 1273 (D.C. Cir. 1993). At that time there were 8,774 FDIC insured banks in the country. FDIC, "Statistics at a Glance", available at https://www.fdic.gov/bank/statistical/stats/2014dec/FDIC.html (last visited May 5, 2015). Affirming that the banks had standing, the Supreme Court observed that, because of the addition of a single competitor to the market, "it [was] not disputed that respondents have suffered an injury-in-fact." *NCUA v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 488 n.4 (1998).

Courts have found competitive injury even when the increased competition occurs throughout the national market. *E.g.*, *Int'l Ladies' Garment Workers' Union v. Donovan,* 722 F.2d 795 (D.C. Cir. 1983) (finding plaintiffs had established an injury-

in-fact despite injury occurring in a national market where competitors could appear anywhere in the country). Courts have even found standing from increased competition where there was no specific, identifiable loss of sales in the national market. *E.g.*, *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1483 (D.C. Cir. 1994); *Bristol-Myers*, 91 F.3d at 1499; *Int'l Bhd. of Teamsters v. United States DOT*, 724 F.3d 206, 212 (D.C. Cir. 2013).

In this case, the administrative record provides the necessary proof of Save Jobs USA's injury-in-fact. DHS repeatedly stated in its findings that the purpose of the H-4 Rule is to increase the number of H-1B workers (*i.e.*, Save Jobs USA competitors) by attracting new H-1B workers or enticing existing H-1B workers to remain in the labor market. *E.g.*, 80 Fed. Reg. 10,284 ("The final rule will also support the goals of attracting and retaining highly skilled foreign workers."); 80 Fed. Reg. 10,286 ("DHS believes that this effective date balances the desire of U.S. employers to attract new H-1B workers, while retaining current H-1B workers."); 80 Fed. Reg. 10,288 ("Supporters of the proposed rule agreed that it would help the United States to attract and retain highly skilled foreign workers."); 80 Fed. Reg. 10,293 ("Approximately, two dozen commenters stated that they left the United States because the current regulations preclude H-4 dependent spouses from engaging in employment"); *see also, e.g.*, 80 Fed Reg. 10,284–85, 10,289, 10,292, 10,295, 10,305 (describing how the H-4 rule will attract and benefit H-1B workers).[5] By promulgating an unlawful rule that is deliberately designed to increase the number of its H-1B competitors, DHS has caused Save Jobs USA members an injury-in-fact.

DHS makes a factual challenge to this injury that appears to suggest Save Jobs USA suffers no injury because number of H-1B workers is constant due

5 To the extent DHS argues in its efforts to defeat Save Jobs USA's standing that the H-4 Rule will not increase the number of H-1B workers, it is undermining its defense of Save Jobs USA's claim that the H-4 Rule is arbitrary and capricious as DHS claimed throughout the Rule that the Rule's purpose is to attract and maintain H-1B workers.

to the quotas on admissions. ECF #19, pp. 6–8. (claiming, "The statutory limits capping the number of H-1B workers admissible to the United States, see 8 U.S.C. § 1184(g)(1)(A), have been reached every year since 2004"). In support of this claim, DHS has submitted Decl. of Alexandra P. Haskell, ECF #19-1 ("Haskell Decl.").

This portrayal of H-1B numbers has at least two serious flaws. First, the number of H-1B visas awarded each year is highly variable. This is clearly visible in Appendix A-1–A-2, showing the number of H-1B visa petitions approved each year. Over the 10-year range FY 2004 to FY 2014 the mean number of new H-1B visas was 111,479 with the peak variation ranging from -31% (FY 2010) to +23% (FY 2012). A-3—A-5. DHS has not taken into account that certain visas are not applied to the quota. § 1184(g)(5).

Second, DHS's own statements contradict its claim that the quota is has been reached every year since 2004. The 20,000 cap for U.S. graduates was not reached in 2005. Haskell Decl. ¶ 10. For other years there are discrepancies between DHS's press releases and its reports to Congress. For example, Haskell states that DHS announced in a press release that DHS reached the statutory caps for FY 2010. Haskell Decl., ¶ 18. Contradicting that statement, DHS's annual report to Congress on the H-1B program states 76,627 new H-1B visas were approved in FY 2010. *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2010 Annual Report*, U.S. Dep't of Homeland Security, Aug. 4, 2011, p. 5.[6] That is well below the 85,000 annual limit under the H-1B quotas. 8 U.S.C. § 1184(g). Either the press release to which Haskell refers be in error, the press release did not take all factors into account, or DHS's report to Congress is misleading.

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6 DHS reports the same 76,627 figure for FY 2010 H-1B visas in its FY 2011, FY 2012, and FY 2013 annual reports to Congress. These reports are available on USCIS's web site at http://www.uscis.gov/tools/reports-studies/reports-and-studies.

Similarly, the Haskell Decl., ¶ 17 states that DHS announced in a press release that the H-1B cap had been reached in FY 2009. In contrast, DHS reported to Congress that it had approved 86,300 new visas that year—just 1,300 greater than the quota.[7] *Characteristics*, FY 2010, *supra*. However, that is not the end of the quota calculation.

When the employer is a university, the H-1B visa is not counted towards the quota. § 1184(g)(5)(A). Digging deeper, DHS also provides a list giving the "Number of H-1B Petitions Approved by USCIS in FY 2009 for Initial Beneficiaries" on its web site.[8] Well over 7,000 visas on DHS's list have a university as the employer. *Id*.; *see also*, Appendix A-20 (showing selected rows listing the number of H-1B visas approved for university employers in FY 2009). Subtracting quota exempt university visas DHS claims were approved from the total number of new visa DHS reported to Congress produces a figure for the number of H-1B visas in FY 2009 well below the 85,000 quota. So again, either the press release to which Haskell refers be in error, the press release did not take all factors into account, or DHS's report to Congress is misleading.[9]

Third, DHS's constant H-1B numbers argument contradicts the findings of the H-4 Rule. E.g., 80 Fed. Reg. 10, 284 ("The final rule will also support the goals of

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7 DHS reports the same 86,300 figure for FY 2009 H-1B visas in its FY 2010, FY 2011, and FY 2012 annual reports to Congress.

8 http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1b-fy09%20counts-employers.csv (last visited June 4, 2015). DHS states that this list omits about 3,000 of the approved petitions from this list because they omitted the employer's tax ID number.

9 DHS has not made the same data available for any other fiscal years. Therefore, it is impossible to confirm if the number of quota exempt visas dropped the reported total number of visas below the H-1B quotas for any other years—but there is reason to believe it did. The Haskell Decl., ¶ 10 states that the 20,000 quota for U.S. graduates was not reached in FY 2005. That year DHS approved 116,927 new H-1B visa petitions. *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2006*, U.S. Dep't of Homeland Security, Mar. 2008, p. 4. The next year (FY 2006), DHS approved fewer visa petitions (109,614) visas, *id*., but announced it had reached both caps, Haskell Decl., ¶ 14. In FY 2011, even fewer visa petitions were approved (106,445). *Characteristics* FY 2014, *supra*, p. 5. Yet, DHS announced it had reached the quota. Haskell Decl., ¶ 19. These figures and the ones described in the text above suggest there is a difference between "receiv[ing] a sufficient number of H-1B petitions to reach the statutory cap" and reaching the statutory cap. *Id*. In any event, this question is a side issue: the number of visa petitions each year is highly variable regardless of whether the cap is reached.

attracting and retaining highly skilled foreign workers and minimizing the disruption to U.S. businesses resulting from H-1B nonimmigrants who choose not to pursue LPR status in the United States."); 80 Fed. Reg. 10, 286 ("DHS believes that this effective date balances the desire of U.S. employers to attract new H-1B workers, while retaining current H–1B workers who are seeking employment-based LPR status."); 80 Fed. Reg. 10, 288 ("Several commenters stated that they are planning to leave the United States in the near future because H-4 dependent spouses cannot work under the current rules."); 80 Fed. Reg. 10,293 (describing aliens on H-1B visas who left the country because their spouses could not work); 80 Fed. Reg. 10,309 (stating in the absence of the H-4 Rule aliens, "may leave the United States."). By contradicting the findings of the rule, DHS sacrifices the merits of this case in order to prevail on standing. 5 U.S.C. 706(2).

Building upon the unsound foundation of the Haskell Decl., DHS makes a number of statements that distort the effect of H-1B workers on the job market. ECF #19, p. 7. First, as noted above, DHS ignores the fact that H-1B visas to universities and certain research institutions are exempt from the cap, creating variability in visa numbers. § 1184(g)(5)(A).

Second, an H-1B holder under the cap may cease employment at any time and leave the job market. 80 Fed. Reg. 10, 288 ("Several commenters stated that they are planning to leave the United States in the near future because H-4 dependent spouses cannot work under the current rules."); 80 Fed. Reg. 10,293 (describing aliens on H-1B visas who left the country because their spouses could not work). Such workers do not become a "permanent fixture" in the labor market when they get an H-1B visa, as DHS describes. ECF #19, p. 7.[10] Therefore, providing such

10 Again DHS sacrifices its defense to Save Jobs USA's arbitrary and capricious claim in an attempt to prevail on standing. *E.g.*, 80 Fed. Reg. 10, 288 ("Several commenters stated that they are planning to leave the United States in the near future because H–4 dependent spouses cannot work under the current rules."); 80 Fed. Reg. 10,293 (describing aliens on H-1B visas who left the country because their spouses could not work); 80 Fed. Reg. 10,309 (stating in the absence of the H-4 Rule aliens, "may leave the United States.").

aliens an unlawful inducement to remain in the country does increase competition with Save Jobs USA members above that which would exist absent the H-4 Rule.

Third, DHS asserts that, by being employed, H-1B workers are not economic competitors with Save Jobs USA members. ECF #19, p. 7. This argument ignores the fact that, even while employed, such aliens remain economic actors affecting the market. *C.f.*, *Wickard v. Filburn*, 317 U.S. 111, 128–19 (1942) (describing how the small actions of an economic actor affect the larger market). H-1B workers can also seek new jobs and change employers. 8 C.F.R. § 214.2(h)(2)(D). The fact that the Save Jobs USA members were replaced by H-1B workers *already employed by Tata* drives a stake into the heart of DHS's argument. Bradley Aff. ¶¶ 7–12; Buchanan Aff. ¶¶ 8–13; Gutierrez Aff. ¶¶ 8–11.

C. Injury 3: The H-4 Rule allows increased competition to Save Jobs USA members.

H-4 visa holders have the clear and immediate potential to compete with Save Jobs USA members in the computer job market. The H-4 Rule authorizes aliens to work in the United States but imposes no restrictions on the occupations or locations where the aliens may work. H-4 Rule. If H-4 aliens are permitted to work in any occupation, at this very moment they are *allowed* to work in computer occupations, an injury-in-fact to Save Jobs USA members:

> We repeatedly have held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise *allow* increased competition. The lifting of such restrictions alone is generally sufficient, and we have not required litigants to wait until increased competition actually occurs. A party may establish 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' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively.

La. Energy, 141 F.3d at 367 (internal quotations and citation omitted) (emphasis added). The injury is thus complete.

Even so, Save Jobs USA has submitted authority, even though it need not do so under D.C. precedent, that H-4 workers will enter the same segment of the jobs market (specialty occupations) where Save Jobs USA members participate. Specifically, Save Jobs USA has cited the statement of USCIS director Rodriguez wherein he admitted that many H-4 visa holders would be, "of the type that frequently seek H-1Bs" who are already in direct competition with Save Jobs USA members. Thibodeau, *supra*. It is undisputed that 65% of H-1B workers approved in FY 2014 worked in computer fields. *Characteristics* FY 2014, *supra*, p. 12.

And DHS is wasting no time injecting these new workers into Save Jobs USA's job market as it has announced a temporary suspension of premium processing of H-1B petitions to enable it to expedite the processing of H-4 visa holder's applications for work authorization:

> This temporary suspension will allow USCIS to implement the Employment Authorization for Certain H-4 Spouses final rule in a timely manner and adjudicate applications for employment authorization filed by H-4 nonimmigrants under the new regulations. We anticipate receiving an extremely high volume of Form I-765 applications once the H-4 final rule becomes effective on May 26, 2015, and need to temporarily suspend premium processing to ensure that we can provide good customer service to both H-1B petitioners and H-4 applicants.

Press Release, *USCIS Temporarily Suspends Premium Processing for Extension of Stay H-1B Petition*s, U.S. Citizenship and Immigration Services, May 26, 2015.

The effect of this rush to get H-4 aliens into the job market is already visible. Employers are already placing advertisements for computer jobs seeking workers authorized under the Rule. Tata, the company that supplied the replacements for Save Jobs USA members, has posted job solicitations in various locations where it states it will accept workers on EAD [Employment Authorization Document] as granted by the H-4 Rule. *E.g.*, A-8, A-9. Appendix A-10–A-11 shows an advertisement specifically seeking H-4 computer workers at unspecified locations in the

United States. Appendix A-12 is another job advertisement specifically seeking H-4 workers for a "client base all across the USA." Appendix A-13 is an advertisement from Hitachi for a computer job in Southern California where the company will accept aliens on EADs as granted by the H-4 Rule. Appendix A-14 is an advertisement for computer jobs at "Multiple locations across the United States" where the company specifically state it will hire aliens on H-4 visas. Appendix A-15 is an advertisement for computer jobs "nationwide" where the company states it is "particularly interested" in aliens on H-4 dependent visas. Appendix A-16–A19 are advertisements for a computer jobs in Southern California where the company will accept aliens on EADs as granted by the H-4 Rule. These advertisements demonstrate that employers consider H-4 aliens to be competitors with American workers in computer occupations, such as Save Jobs USA members.

Allowing additional aliens to compete with Save Jobs USA members is a cognizable injury-in-fact resulting from the H-4 Rule. *La. Energy*, 141 F.3d at 367.

D. Injury 4: The H-4 Rule confers benefits on Save Jobs USA's H-1B competitors.

An agency action that "provides benefits to an existing competitor" creates an injury-in-fact. *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002); *Nat'l Envtl. Dev.*, 752 F.3d at 1003, 1005–06; *Sea-Land Service Inc. v. Dole*, 723 F.2d 975, 977–78 (D.C. Cir. 1983) (stating injury requirement satisfied where challenged action benefits competitor who is in direct competition with plaintiff). Save Jobs USA members are already direct competitors with H-1B workers. Bradley Aff. ¶¶ 3–13; Gutierrez Aff. ¶¶ 3–14; Buchanan Aff. ¶¶ 3–14. DHS's findings repeatedly tout the benefits the H-4 rule will confer on Save Jobs USA's H-1B competitors: "DHS expects this change to reduce the economic burdens and personal stresses that H-1B nonimmigrants and their families may experience," 80 Fed. Reg. 10,285, and "anticipates that this regulatory change will reduce personal and economic burdens

faced by H-1B nonimmigrants." 80 Fed. Reg. 10,284; *see also*, *id.* at 10,286, 10,288 (describing benefits for H-1B workers under the H-4 Rule). Conferring such benefits on Save Jobs USA's current H-1B economic competitors is an injury-in-fact. *New World Radio*, 394 F.3d at 172.

E. Causation and redressability are trivial under increased competition injury.

Causation and redressability for these injuries are simple and straightforward. But for the H-4 rule, (1) aliens in specialty occupations would not be allowed to compete with Save Jobs USA members without complying with H-1B labor protections by working on H-4 visas instead; (2) aliens, who would not seek H-1B status or would give up H-1B status because their spouse could not work, would not be in competition with Save Jobs USA members; (3) aliens possessing H-4 visas would not be allowed to compete with Save Jobs USA members in the computer job market; and (4) H-1B aliens would not receive the various benefits resulting from their H-4 spouses being allowed to work, 80 Fed. Reg. 10,284–310. Clearly the pled injuries are caused directly by the H-4 Rule. *See*, *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) (stating "injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality"); *Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312 (D.C. Cir. 2010) (finding increased competition injury traceable to allowing more competitors into the market); *Honeywell*, 374 F.3d at 1369 (holding traceability requirement satisfied when a rule legalizes the entry of a product into a market in which the plaintiff competes).

Likewise, the pled injuries are redressable by the Court. Should Save Jobs USA prevail, (1) H-1B spouses who want to work in competition with Save Jobs USA members will have to get their own H-1B visa and comply with its labor protections; (2) aliens who would not seek H-1B status or would give up H-1B status

because their spouse could not work will not be in competition with Save Jobs USA members; (3) aliens possessing H-4 visas will no longer be allowed to compete with Save Jobs USA members; and (4) H-1B aliens would no longer receive the various benefits resulting from allowing their H-4 spouses to work, 80 Fed. Reg. 10,284–310. Clearly, the pled injuries are completely redressable by the Court. *See*, *Teva*, 595 F.3d at 1312 ("Any imminent deprivation of [plaintiff's] allegedly deserved exclusivity would be directly attributable to the FDA's statutory interpretation," and a declaratory judgment would redress its injury); *Honeywell*, 374 F.3d at 1369–70 (holding that a favorable opinion from the court removing competitor's products from the market redresses increased competition injury); *Bristol-Myers*, 91 F.3d at 1499 (stating that pharmacist cannot sell a drug that is not permitted on the market).

II. Save Jobs USA satisfies the zone of interest test.

"[A] statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The zone of interest test requires that the plaintiff be "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012); *Mendoza*, 754 F.3d at 1011–17. In the context of the APA, the test is not especially demanding. *Lexmark*, 134 S. Ct. at 1389. The benefit of any doubt goes to the plaintiff when applying the zone of interest test. *Patchak*, 132 S. Ct. at 2210.

The Supreme Court has repeatedly held that, "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *E.g.*, *Reno v. Flores*, 507 U.S. 292, 334 (1993) (citation omitted). Following that maxim, courts have held that American workers fall within the zone of interest to be protected by the INA's provisions regarding entry of nonimmigrant alien workers. *E.g.*, *Bricklayers*, 761 F.2d

at 804–05 (holding that several unions comprised of American workers had prudential standing to challenge INS practices that allowed foreign workers to come to the U.S. and perform work that U.S. workers could perform); *Longshoremen*, 891 F.2d at 1379 (holding that the union and its members were "within the 'zone of interests' protected by the INA" because a "primary purpose of the immigration laws, with their quotas and certification procedures, is to protect American laborers"). The specific provision at issues, § 1101(a)(15)(H), was radically revised in IMMACT90 in response to abusive administrative interpretations that had undermined its domestic labor protections. H.R. Rept. 101-723, p. 44. Because Save Jobs USA seeks to preserve employment opportunities for domestic labor, a primary purpose of the INA and the provision at issue, § 1101(a)(15)(H), and related provisions under the act (*e.g.*, §§ 1182(a)(5)(A), 1182(m)(2), 1182(n)(1), 1182(t)(1), 1184(g), and 1188) reflect the same purpose, it clearly is a suitable challenger for the H-4 Rule under the zone of interest test.

III. The H-4 Rule must be set aside because it is in excess of DHS authority.

A court should "hold unlawful and set aside agency action, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The D.C. Circuit elucidated this standard in *Motion Picture Ass'n of Am. v. FCC*:

> In *Chevron*, the Court held that, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." This is so-called 'Chevron Step One' review. If Congress "has not directly addressed the precise question" at issue, and the agency has acted pursuant to an express or implicit delegation of authority, the agency's interpretation of the statute is entitled to deference so long as it is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." This is so-called "Chevron Step Two" review. In either situation, the agency's interpretation of the statute is not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue.
>
> *Mead* reinforces *Chevron's* command that deference to an agency's interpretation of a statute is due only when the agency acts pursuant to "delegated

> authority." The Court in *Mead* also makes it clear that, even if an agency has acted within its delegated authority, no Chevron deference is due unless the agency's action has the "force of law."

309 F.3d 796, 801 (D.C. Cir. 2002) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

The central question here is did Congress grant DHS the authority to allow aliens to work on H-4 visas? If the answer to that question be it did not, then DHS has exceeded its statutory authority and the analysis does not proceed beyond *Chevron* Step One and the H-4 Rule should then be set aside. Again, "[s]tatutory 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. DOT*, 479 F.3d 21, 27 (D.C. Cir. 2007) (quoting *Motion Picture Ass'n*, 309 F.3d at 801).

The following sections show that the H-4 Rule is in excess of the claimed source of authority, 6 U.S.C. § 112, 8 U.S.C. § 1103, and 8 U.S.C. § 1324a(h)(3)(B), and the authorizing provision, 8 U.S.C. § 1101(a)(15)(H) and is also in violation of 8 U.S.C. §§ 1182(a)(5)(A), 1182(m)(2), 1182(n)(1), 1182(t)(1), 1184(g), and 1188. As a result, this Court need not proceed beyond its *Chevron* Step One analysis.

A. Controlling federal law and Supreme Court separation of powers doctrine impose mandates and restrictions on DHS discretion over alien employment.

The U.S. Constitution delegates all immigration-related powers to Congress:

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress.

Harisiades v. Shaughnessy, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring). The plenary authority of Congress over aliens under U.S. Const. art. I, § 8, cl. 4, is not open to question. *INS v. Chadha*, 462 U.S. 919, 940–41 (1983). The Constitution

confers no enumerated powers over immigration upon the president. In contrast, Congress has exercised its plenary authority by creating a comprehensive legislative scheme, the INA, which delegates carefully circumscribed enforcement duties to the executive branch. *See*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (describing the history and structure of the INA). DHS has no authority to overstep those bounds and ignore statutory mandates as it has done in this case.

B. An agency's power to promulgate regulation is limited to that delegated by Congress.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *accord*, *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). "Absent such authority, [a court] need not decide whether the regulations are otherwise 'reasonable.' An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress." *Motion Picture Ass'n*, 309 F.3d at 801.

The definition of H-4 visa status contains no authorization for such aliens to work, § 1101(a)(15)(H), and there is no authorization in any other provision. 8 U.S.C. *passim*. DHS's statement of authority in its findings for the H-4 Rule does not identify any provision that actually authorizes aliens to work on H-4 visas:

> The authority of the Secretary of Homeland Security (Secretary) for this regulatory amendment can be found in section 102 of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 112, and section 103(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1103(a), which authorize the Secretary to administer and enforce the immigration and nationality laws. In addition, section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), recognizes the Secretary's authority to extend employment to noncitizens in the United States.

80 Fed. Reg. 10,285. None of the three sections DHS cites give it authority to extend employment to H-4 aliens. 6 U.S.C. § 112 defines the functions of the Secretary of Homeland Security and 8 U.S.C. § 1103 charges the Secretary with administering

the provisions of the INA. Such general authorizations do not grant the Secretary unlimited authority to act as it sees fit with respect to all aspects of immigration policy. *See, Motion Picture Ass'n*, 309 F.3d at 798–99, 802–03 (finding the general authority of the FCC to regulate television did not grant it unlimited authority to act as it sees fit with respect to all aspects of television transmissions).

The remaining provision DHS claims as a source of authority, 8 U.S.C. § 1324a(h)(3), likewise contains no authorization for DHS to allow aliens to work. This section merely defines, for the purposes of that section only, the term *unauthorized alien*. Specifically, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3445 ("IRCA") (creating a new section § 274a of the INA codified at 8 U.S.C. § 1324(a)) 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. Section 1324a(h)(3) defines the term *unauthorized alien* to mean the following:

> (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 Act or by the Attorney General.

INA § 274a(h)(3) (codified at 8 U.S.C. § 1324a(h)(3)).

The central question in this case is whether the United States has an immigration system where (1) Congress defines the classes of aliens authorized to work and where DHS has the broad authority to determine which individuals may be authorized to work within those defined classes, or (2) Section 1324a(h)(3) has conferred on DHS dual authority with Congress to define which classes of aliens may work, as DHS claims. Unless an archaeological dig can unearth such dual authority within § 1324a(h)(3), the H-4 Rule does not survive the *Chevron* Step One analysis. *See*, *Motion Picture Ass'n*, 309 F.3d at 801–05 (explaining how an FCC rule outside its authority does not receive deference). "Agencies owe their capacity to act to the

delegation of authority, either express or implied, from the legislature." *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994). Otherwise, "[w]ere 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 Executives' Ass'n*, 29 F.3d at 671; *Motion Picture Ass'n*, 309 F.3d at 805–06; *NRDC v. EPA*, 749 F.3d 1055, 1063–64 (D.C. Cir. 2014).

C. There is no precedent holding § 1324a(h)(3)(B) confers on DHS the authority to define classes of aliens that may work.

The question of whether § 1324a(h)(3)(B) confers on DHS dual authority with Congress to define classes of aliens that may work in the United States is one of first impression in this circuit.[11] Save Jobs USA is unable to identify any published opinion in the D.C. Circuit or D.C. District addressing § 1324(h). The Supreme Court has cited § 1324a(h)(3) in two opinions, neither of which addresses the question at issue here. *Hoffman Plastics Compounds v. NLRB*, 535 U.S. 137, 147–48 (2002) (holding the purpose of § 1324a is to prevent the employment of unauthorized aliens as defined by § 1324(h)(3)); *Chamber of Commerce*, 131 S. Ct. at 1974, 1981, 1998 n.1 (holding Arizona's unauthorized alien employment law fits within the confines of IRCA's savings clause and does not conflict with federal immigration law because it used the definition of § 1324a(h)(3)).

The Fifth Circuit is the only circuit to directly address the question of whether § 1324a(h)(3)(B) confers any authority on DHS to authorize *classes* of aliens to work. *Texas v. United States*, 2015 U.S. App. LEXIS 8657, *54 n.84, n.85 & n.86 (5th Cir. Tex. May 26, 2015). That court rejected the proposition, holding § 132a(h)(3) is merely "definitional." This is consistent with that court's past practice. For example, in *Pe-*

11 In its reply memorandum, ECF #19, p. 15, DHS listed thirty-five instances where it has cited this provision in regulation to justify its own actions. Clearly, this is not case law, nor a ruling on the legality of its exercise of authority. Save Jobs USA's representation remains unimpaired.

rales v. Casillas, the Fifth Circuit held the Attorney General's (DHS's) authority is unfettered when it is granted discretionary authority to grant relief *by a statute* that "does not restrict the considerations which may be relied upon or the procedures by which the discretion should be exercised." 903 F.2d 1051, 1048–50 (5th Cir. 1990).

D. DHS's interpretation of § 1324a(h)(3) cannot survive the application of any canon of statutory construction.

DHS's interpretation of § 1324a(h)(3) does not survive the application of several canons of statutory construction, including the Plain Language Canon; Rule Against Surplusage canon; *in pari materia* canon ("upon the same matter"), *generalia specialibus non derogant* canon ("the general does not detract from the specific"); and *expressio unius est exclusio alterius* canon ("the express mention of one thing excludes all others"). In some situations, the selective application of canons of construction produces varying results, *see*, *United States v. United Mine Workers*, 330 U.S. 258, 349 n.11 (1947) (Rutledge, J., dissenting)—but not here. Applying any relevant canon of statutory interpretation to § 1324a produces the same result: that provision does not provide unfettered authority for DHS to authorize classes of aliens to work in the United States.

1. The plain language of § 1324a(h)(3) does not confer any authority to do anything.

The plain language of § 1324a(h)(3) confers no authority on DHS. This provision is expressly limited in scope to, "as used in this section." *See*, *W. Union Tel. Co. v. FCC*, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (hold a section was "*only* definitional" where it began with "as used in this section" and contained only definition subsections). When read in context the purpose of § 1324a(h)(3) is clear: It defines those aliens employers may not hire without running the risk of criminal and civil penalties. § 1324a. Even DHS's own interpretation of § 1324a is an evolving work in progress. When introducing the H-4 Rule at issue here last year, DHS 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 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. 10,285.

Such authority cannot be conferred in this kind of obscure manner. "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." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress intended to make DHS an equal partner in defining classes of aliens who may work, one would expect such expansive powers would be worthy of a dedicated section—not reduced to an unnumbered clause buried in a sub-subsection of a provision prohibiting employers from hiring certain aliens. One would also expect such an expansive grant of authority to include a verb, such as *may* or *can*—not a passive definition, explicitly limited in scope to its own section. Section 1324a is merely definitional. *Texas*, 2015 U.S. App. LEXIS 8657, *54 n.84, n.85 & n.86 (finding the § 1324a(h)(3) to be merely "a definitional provision").

2. DHS's interpretation of § 1324a(h)(3) violates the Rule Against Surplusage.

In statutory construction, "no words are to be treated as surplusage or as repetition." *Platt v. Union P. R. Co.*, 99 U.S. 48, 59 (1879). DHS's interpretation that § 1324a gives it dual authority with Congress to define classes of aliens that may work, creates surplusage throughout the immigration system. For example, the Violence Against Women and Department of Justice Reauthorization Act of 2005, provided DHS 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 granted DHS the authority that it "may authorize" battered spouses, including H-4 visa holders, "to engage in employment." *Id*. 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), "may" extended employment to certain Haitian nationals. Under DHS's interpretation of § 1324a, it already had the power to grant these discretionary work authorizations—all Congress did by enacting these provisions was to create surplusage. Under the Rule Against Surplusage canon, DHS's interpretation of § 1324a cannot stand.

3. The specific, limited authorizations for H-4 aliens to work made by Congress trump any claim of a general authorization for H-4 work.

Under the *generalia specialibus non derogant* canon, "the specific governs the general. That is particularly true where … Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal citations and quotations omitted). "[T]he canon has full application as well to statutes … in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids [] contradiction but the superfluity of a specific provision that is swallowed by the general one." *Id*.

DHS's interpretation of § 1324a(h)(3) violates this canon as well. As shown, *supra*, Congress has enacted specific provisions authorizing aliens possessing H-4 visas to work in cases of domestic violence. Pub. L. No. 109-162 (codified at § 1105a) If, as DHS, claims § 1324a(h)(3) permits DHS to authorize any class of alien to work through regulation, this specific provision creating a class of H-4 aliens eligible to work gets consumed by DHS's general claim of authority to allow any H-4 alien to work. That cannot stand under the *generalia specialibus non derogant* canon where the specific trumps the general. *See*, *Rodgers v. United States*, 185 U.S. 83, 88 (1902) (applying the *generalia specialibus non derogant* canon).

4. Congress has explicitly defined the dependent spouse visa categories that permit the alien to work.

Under the e*xpressio unius est exclusio alterius* canon, "the express mention of one thing excludes all others." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 92 (D.C. Cir. 2014). This canon has force only, "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

Congress has granted spouses on certain visa categories the ability to work. In 2002, Congress authorized DHS to grant employment authorizations 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 included provisions to authorize aliens on H-4 visas to work. *E.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, § 4102, S.744, 113th Congress (passed Senate). Clearly, the exclusion of H-4 aliens from work authorization was a deliberate choice made with full knowledge of Congress.

DHS was aware of this history and simply ignored it. In the H-4 Rule DHS stated, "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." 80 Fed. Reg. 10,295. Given Congress's clear, deliberate action in defining which dependent visa categories can work, e*xpressio unius est exclusio alterius* excludes H-4 holders from work authorization.

5. DHS's interpretation of § 1324a(h)(3) is nonsensical when viewed in context with the rest of the immigration system.

The Court should scrutinize DHS's claim of general executive discretion *in pari materia* with the extensive mandatory provisions regulating employment-based admissions. *Griffith v. Lanier*, 521 F.3d 398, 402 (D.C. Cir. 2008) (stating courts read a body of statutes addressing the same subject matter *in pari materia*, as if they were one law). Looking at the INA as a whole, DHS's claim of unfettered executive discretion over alien employment authorization must be rejected because it would nullify many provisions of the act governing alien employment. *See*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating courts have a "duty to give effect, if possible, to every clause and word of a statute") (citation and internal quotations omitted).

The phrase, "or by the Attorney General" serves a critical, but limited purpose in § 1324(h)(3)(B). Sections of IRCA contain seven specific, mandatory directives for the Attorney General to authorize aliens without visas who are in the legalization process to engage in employment. § 201 ("Legalization") 100 Stat. 3397, 3399 (two), § 301 ("Lawful Residence for Certain Special Agriculture Workers") 100 Stat. 3418, 3421 (two), 3428. Other provisions in the INA provide DHS the discretionary authority to issue work authorizations. *E.g.*, the Violence Against Women Act, *supra*. If Congress had omitted the clause "or by the Attorney General," those aliens without work visas who Congress has directed be given, or discretionally may be given, work authorization would be unemployable under the remaining provisions of § 1324a. Such aliens would have work permits but those permits would be useless because employers would be barred from employing them under the threat of civil and criminal penalties. § 1324a.

Looking more broadly, another example is § 1182(a)(5)(A), that bars the admission of "any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor" unless the Secretary of Labor—not DHS—has "determined and certified" that such employment will not adversely affect the em-

ployment, wages or working conditions of similarly employed U.S. workers. Aliens who have already been admitted who are "present in the United States in violation of this Act" and fail to request and receive labor certification from the Secretary of Labor, are also removable. § 1227(a)(1)(A)–(B).

Still another example that is especially pertinent here is the H-1B authorization. § 1101(a)(15)(H)(i)(B). H-1B status requires maintaining employment with the sponsor, complying with labor condition requirements, and conforming to numeric limits. §§ 1101(a)(15)(H), 1182(n) and 1184(g). From a public policy perspective, it makes no sense to apply such restrictions to the principal alien then allow her spouse to work anywhere with no restrictions at all.

E. DHS's interpretation of § 1324a(h)(3) would upend the immigration system.

Congress has set up an elaborate scheme for the admission of nonimmigrants. § 1101(a)(15). Some nonimmigrant visas do not authorize work. For example, Congress has not authorized work on visitor B visas. § 1101(a)(15)(B). On the other hand, the H-1B, H-1B1, H-1C, H-2A, and H-2B nonimmigrant visas all specifically authorize work and contain protections for domestic labor. § 1101(a)(15)(H).

Unfortunately, this system has suffered under the constant problem of administrative erosion and abuse. For example, in *Bricklayers*, the INS authorized the admission of foreign bricklayers on B visitor visas, thereby nullifying the domestic labor protections of the H-2 visa that should have been applied to such labor. 761 F.2d 798. The courts blocked this practice in *Bricklayers*, 616 F. Supp. 1387. The current H-1B visa was created because of administrative abuse where the previous H-1 visa (which did not have worker protections) was being used in place of the H-2 visa. H.R. Rept. 101-723, p. 44. DHS now continues that same type of abuse with H-4 visas.[12]

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12 *E.g*, when the H-1B quota is reached, *see*. Haskell Decl., allowing aliens to work on H-4 visas in computer occuptations circumvents the statutory limits on those workers.. 8 U.S.C. § 1184(g).

Under the H-4 Rule, DHS claims that it has "unfettered"[13] authority to allow aliens to work in the United States. 80 Fed. Reg. 10,295. Should the Court adopt DHS's interpretation of its authority, the entire system of nonimmigrant visas for different purposes would be upended and nearly all protections for domestic labor could be wiped out through administrative action. What is more, past precedent, such as *Bricklayers*, would be meaningless because DHS now could simply let aliens work on B visitor visas through regulation. If § 1324a(h)(3) gives DHS dual authority with Congress to define the classes of aliens allowed to work, it would have the political effect that industry lobbyists no longer need to go through Congress to seek foreign labor. They could bypass Congress entirely to receive such labor directly from DHS through regulations, thereby circumventing statutory labor protections. *E.g.*, H-4 Rule; Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a). Who knows, DHS might next authorize aliens to work on visitor or tourist visas. That is not *hyperbole*—it has already happened. *Bricklayers*, 761 F.2d at 800. The courts had to step in to put a stop to the practice, *Bricklayers*, 616 F. Supp. 1387, as this Court should stop DHS from overstepping the bounds of its authority here.

F. The D.C. Circuit recently rejected a similar expansion of agency power.

The facts of this case are strikingly similar to those of *Loving v. IRS*, where the Internal Revenue Service ("IRS") had interpreted the phrase "Secretary of the Treasury may … regulate the practice of representatives of persons before the Depart-

13 The scope of DHS's claimed authority under § 1324a appears to be that DHS can allow any alien to work in the United States unless Congress explicitly prohibits it. ECF #19, pp. 17–18. "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 Executives' Ass'n*, 29 F.3d at 671

ment of the Treasury" in 31 U.S.C. § 330 as authorizing it to regulate tax preparers. 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd* by 742 F.3d 1013 (D.C. Cir. 2014). This central issue was whether tax preparers were "representatives of persons before the Department of the Treasury." *Id.* at 73–80.

In *Loving,* this Court observed that Congress had put in place protections for tax preparers in 26 U.S.C. § 7407(b) and that the IRS's interpretation of its power was invalid as it would enable it to, "sidestep every protection § 7407 affords." *Id.* at 78. Similarly, DHS's claim of dual authority to define classes of aliens who can work enables the agency to sidestep every worker protection in the INA. For example, it allows aliens on H-4 visas to work in specialty occupations without complying with the labor protections under §§ 1182(n) and 1184(g) that are applied to such labor under the statutory scheme. DHS Br. 42 n.19 (DHS's claim of authority under § 1324a permits it "to make employment authorization determinations for certain aliens outside the specific framework of the H-1B 'specialty occupation' worker program."). As in *Loving*, this Court should "not lightly assume that Congress enacted [] a pointless statute" in the INA. *Loving*, 917 F. Supp. 2d at 78.

This Court also applied the Specific/General Canon, that is, "the specific statutes … trump the general", to 31 U.S.C. § 330 and the specific provisions governing tax preparers. *Id.* at 77. Observing that the canon applies even when the specific and general authorize similar action, it held that the "U.S. Code already sets forth a comprehensive scheme targeting specific problems with specific solutions" and held that the general provision at 31 U.S.C. § 330 did not authorize the IRS to sanction tax preparers. Likewise here, the specific provisions authorizing DHS to allow employment for certain classes of aliens possessing H-4 visas, *e.g.*, § 1105a(a) (battered spouses), trump DHS's claim of general authority under § 1324a(h)(3)(B) to approve any alien in H-4 status to work. *See*, *Loving*, at 917 F. Supp. 2d at 77 (describing how specific provisions governing the regulation

of tax preparers trumped the IRS's claim that there was a general provision authorizing it to regulate tax preparers).

In affirming, the D.C. Circuit came to the same result applying different canons. *Loving v. IRS*, 742 F.3d 1013, 1020 (D.C. Cir. 2014) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012)). The D.C. Circuit observed that Congress had "enacted a number of targeted provisions specific to tax-return preparers" which, under the IRS's interpretation of its authority such provisions, "would have been unnecessary." *Id.* at 1020.

The facts in the case at bar are strikingly similar. Where DHS claims IRCA granted it "dual authority" to authorize classes of aliens to work, DHS Br. 39, Congress continues to make specific grants of authority to allow defined classes to work. For example, the Violence Against Women and Department of Justice Reauthorization Act of 2005, granted DHS 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 granted DHS the authority that it "may" authorize battered spouses, including H-4 visa holders, "to engage in employment." *Id.* If the DHS Secretary already had the discretion to grant work authorization to whomever it wishes as DHS claims, Congress did not need to grant DHS this specific discretionary authority. As in *Loving*, DHS's interpretation makes these (and similar) work authorizations entirely unnecessary. Therefore, DHS's interpretation of § 1324a(h)(3) cannot stand.

In *Loving*, the D.C. Circuit repeated the reminder from the Supreme Court that, "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies." *Id.* at 1021 (citing, *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 160 (2000)). DHS has ignored

that admonition here. It has taken a passage of limited scope out of context to assert "dual authority" with Congress. DHS Br. 39. There is nothing in the legislative history of IRCA or the structure of the INA that suggests that Congress intended to grow such a large elephant in such a small mousehole as § 1324a(h)(3)(B).

This raises the obvious question: If Congress wanted to confer on DHS unfettered authority to allow any alien that it chooses to work in the United States, why would Congress bury such authority in a definition within a section banning employers from hiring certain aliens that is limited in scope to that one section? *See*, *Loving*, 742 F.3d at 1021 (citing *Brown & Williamson*, 529 U.S. at 160 (stating "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion")). Here, DHS asserts Congress has created a grant of dual authority with DHS though § 1324a(a)(H)(3). DHS Br. 35. The claim that Congress has made DHS a co-equal partner implicitly through a definition restricted in scope to a single section is precisely the type of presumption the Supreme Court has prohibited. *Loving*, 732 F.3d at 1021.

IV. DHS acted arbitrarily and capriciously in promulgating the H-4 Rule

A court should "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "An agency's decision will normally be found arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Int'l Ladies' Garment Workers' Union*, 722 F.2d at 814.

A. DHS improperly reversed a policy adopted by Congress.

The H-4 Rule reverses a policy in place for 45 years. DHS Br. 39–40. Once Congress adopts an agency interpretation, the agency is not free to change it.

Brown & Williamson, 529 U.S. at 155–56. The fact that Congress has understood that aliens cannot work on H-4 visas is well documented. For example, in the debate over authorizing spouses of aliens on treaty visas to work, Congressman Wexler expressed that he hoped such work authorizations would be extended to the spouses of other types of visas, thereby recognizing the need for congressional action to allow such work. 147 Cong. Rec. H5357 (daily ed. Sept. 5, 2001). In recent years, several bills have been introduced and debated that would allow aliens who possess an H-4 visa to work. *E.g.,* Border Security, Economic Opportunity, and Immigration Modernization Act, § 4102, S. 744, 113th Congress (passed Senate); I-Squared Act of 2013, § 103, S. 169, 113th Congress; I-Squared Act of 2015, § 104, S. 153, 114th Congress. This demonstrates that Congress understands it has not authorized H-4 aliens to work and has adopted that interpretation. Changing the policy that H-4 aliens may not work when it has been adopted by Congress is arbitrary and capricious. *Brown & Williamson*, 529 U.S. at 155–56.

B. The H-4 Rule is arbitrary and capricious because it reverses longstanding policy without acknowledging or explaining the reasons for the reversal.

A long-standing policy is not immutable. An agency can change course, as long as it acknowledges and explains why it is making the change.

> Of course, the Agency is entitled to change its mind as long as its new direction falls within the ambit of its authorizing statute and the policy shift is adequately explained. The requirement that an agency provide a reasoned explanation for its actions ordinarily means the agency must "display awareness that it is changing position."

Arkema v. EPA, 618 F.3d 1, 6 (D.C. Cir. 2010) (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)). "An agency's departure from past practice can, however, if unexplained, render regulations arbitrary and capricious." *Ass'n of Private Colleges and Universities, v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). In the

H-4 Rule, DHS provided no acknowledgement that it was reversing a policy in place for 45 years, let alone an explanation why it was reversing this policy. 80 Fed. Reg. 10,284–312. That glaring omission makes the H-4 Rule arbitrary and capricious as well. *Ass'n of Private Colls.*, 681 F.3d at 441.

C. The H-4 Rule is arbitrary and capricious because DHS's conclusion that adding 179,600 new workers in one year will have "minimal impact" on U.S. workers has no basis in fact.

An agency's action is arbitrary and capricious if it has entirely failed to consider an important aspect of the problem it faces. *SecurityPoint Holdings, Inc. v. Transp. Sec. Admin.*, 769 F.3d 1184, 1187–88 (D.C. Cir. 2014). The H-4 Rule is also arbitrary and capricious because the conclusion that the rule will only have a "minimal impact" on American workers is unfounded and DHS entirely failed to consider employment growth. 80 Fed. Reg. 10,295. DHS's reaches this unrealistic conclusion by making the apples-to-oranges comparison of the number of workers added under the H-4 rule per year to the total size of the American workforce. *Id.* That is like comparing a 60 m.p.h. average speed to the 2,789 miles it takes to drive from New York to Los Angeles. The correct comparison for such an analysis is to compare increases to increases: the increase in United States employment to the increase in available labor caused by the H-4 Rule. *See, Mississippi v. EPA*, 744 F.3d 1334, 1344 n.1 (D.C. Cir. 2013) ("logic rejects comparisons of apples and oranges").

From 2009 to 2014, the average monthly job creation in the United States was 74,677 and from 2004 to 2014 it was 58,340.[14] www.bls.gov/oes (OES national employment data for 2004–2014) (last visited May 11, 2015). Compared to job creation, the 179,600 workers DHS plans to add this year under the H-4 Rule is staggering and will have a major impact. 80 Fed. Reg. 10,285. When making an apples to apples comparison, the amount of labor being added under the H-4 Rule is stag-

14 BLS National Employment Figures: (2014) 135,128,260, (2013) 132,588,810, (2012) 130,287,700, (2011) 128,278,550, (2010) 127,097,160, (2009) 130,647,610, (2008) 135,185,230, (2007) 134,354,250, (2006) 132,604,980, (2005) 130,307,840, (2004) 128,127,360

gering.[15] By failing to consider the rate of job creation before adding foreign labor to the job market through the H-4 Rule, DHS has acted arbitrarily and capriciously.

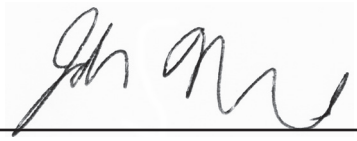
CONCLUSION

The outcome of this case has major implications. As the plight of the Save Jobs USA members demonstrates, the protections for American workers in the immigration system are inadequate. Should the Court adopt DHS's interpretation that it has dual authority with Congress to define categories of aliens allowed to work in the United States, the remaining protections for Americans workers can be swept away through regulation. No longer will industry lobbyists have to go to Congress to get increases in foreign labor. As here, they will be able to bypass Congress and go directly to unelected bureaucrats in DHS when they want more foreign workers. The lessons learned from cases like *Bricklayers* should give this Court pause as to the consequences of ruling that DHS has such broad authority. The labor protections embodied in the INA will be undermined and the American worker will suffer.

15 Furthermore, DHS states that it received 13,000 comments on the H-4 Rule. 80 Fed. Reg. 10,287. Of those, DHS stated that, "After careful consideration of public comments, DHS is adopting the proposed regulatory amendments with minor wording changes to improve clarity and readability. 80 Fed. Reg. 10,285. Apparently, DHS adopted none of the comments in the final rule—the entire notice and comment process was just a pointless exercise in futility.

I

Respectfully submitted,
Dated: June 15, 2015



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In the
United States District Court
for the
District of Columbia

Save Jobs, USA 31300 Arabasca Circle Temecula CA 92592 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:15-cv-00615 (TSC)

[Proposed] Order

Upon consideration of the Plaintiff's and Defendant's Cross-Motions for Summary Judgment/Motion to Dismiss, Memoranda of Law supporting those motions, and replies, it is hereby

ORDERED that the Plaintiff's Cross Motion for Summary Judgment is GRANTED, and further

ORDERED that the Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Summary Judgment) is DENIED, and further

ORDERED that the regulation Employment Authorization for Certain H–4 Dependent Spouses, 80 Fed. Reg. 10,284 (codified at 8 C.F.R. §§ 214, 274a) (the "H-4 Rule") is vacated and further

ORDERED that the Secretary of Homeland Security to revoke all work authorizations granted under Employment Authorization for Certain H–4 Dependent

Spouses and notify all such aliens of revocation and further

ORDERED that the court permanently enjoins the Secretary of Homeland Security and his successors from authorizing work under H-4 visas through administrative action and further

ORDERED that the Plaintiffs are awarded attorney fees and litigation costs.

Dated: _____, 2015

_____

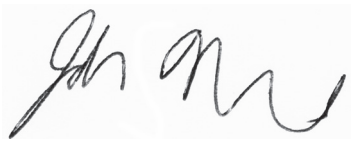
The Honorable Tanya S. Chutkan
United States District Judge

In the
United States District Court
for the
District of Columbia

Save Jobs, USA 31300 Arabasca Circle Temecula CA 92592 *Plaintiff,* *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:15-cv-00615 (TSC)

Certificate of Service

I certify that on June 15, 2015, I filed the attached Plaintiff's Cross Motion for Summary Judgment, Appendix A, and Affidavits with the Clerk of the Court using the CM/ECF system that will provide notice and copies to the Defendant's attorneys of record.



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