In the
United StatesDistrict 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

Motion for Preliminary Injunction

Plaintiff moves the court for a preliminary injunction staying the implementation of the regulation Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284, Feb. 25, 2015 (codified at 8 C.F.R. §§ 214, 274a) pending further order of the court. The reasons supporting the motion are set forth in the attached memorandum.

Respectfully submitted,
Dated: Apr. 23, 2015

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Memorandum of Points and Authorities
in Support of Plaintiff's Motion for Preliminary Injunction

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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?
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INTRODUCTION

Plaintiff, Save Jobs USA, is a group composed of former technology workers at Southern California Edison ("SCE"). All of these Americans lost their jobs when they were replaced by foreign workers imported under the H-1B guest worker program in 2014–2015. They bring this action under the Administrative Procedure Act, Pub. L. No, 79–404, 60 Stat. 237 ("APA"). The basis of the complaint is that the U.S. Department of Homeland Security ("DHS") has promulgated regulations authorizing aliens to work on H-4 visas when there is no authority whatsoever for it to do so. DHS will start taking applications for this new work authorization program on May 26, 2015. Save Jobs USA seeks a preliminary injunction to delay the implementation of these regulations to preserve the *status quo* that has existed for nearly a half century until the merits of the case are decided.

STATUTORY FRAMEWORK

Aliens are admitted into the United States as *immigrants*, *non-immigrants* or *refugees*. 8 U.S.C. §§ 1101(a)(15), 1157. Section 1101(a)(15) authorizes DHS to admit non-immigrants for various purposes (*e.g.*, diplomats, crewmen, visitors, 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).

Congress has put in place a general prerequisite before aliens can work in the United States. Any alien seeking to perform "skilled or unskilled labor" is inadmissible, "unless the Secretary of Labor has determined and certified" that there are no workers available in the United States and that the employment of the alien "will

not adversely affect the wages and working conditions of workers in the United States similarly employed." § 1182(a)(5)(A).

8 U.S.C. § 1101(a)(15)(H) authorizes several well-known 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" or as a "fashion model [] of 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 condition (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 condition (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).

This case concerns the H-4 visa. This visa category was created by Pub. L. No. 91-225, 84 Stat. 116 in 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 thus available to the dependents of H-1B, H-1B1, H-2A, H-2B, and H-3 visa holders defined in the same paragraph. There is

no authorization whatsoever for work under H-4 status and no provision for a labor certification by the Department of Labor. From its creation until now, aliens who possess an H-4 visa have not been authorized to work.

THE REGULATION AT ISSUE

On February 25, 2015, DHS promulgated the regulations at issue here, called the 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"). DHS promulgated the regulations on its own initiative and with no statutory authority. *Id*. These regulations go into effect on May 26, 2015. 80 Fed. Reg. 10,297. Those eligible to work 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. However, DHS states 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. Through the H-4 Rule, DHS has circumvented all statutory protections and restrictions on the importation of foreign labor.

Such regulations are unnecessary because an alien on H-4 visa is not prohibited from getting a guest worker visa (*e.g.*, H-1B) in his own right.

STANDARD OF REVIEW

The standard of review in this action is set forth in *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). *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002).

> 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."

Id. (internal citations omitted).

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (internal citations omitted).

I. Save Jobs USA is likely to succeed on the merits because DHS has no authority to authorize aliens to work on an H-4 visa.

The merits of this case present purely questions of law. *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207 (D.C. Cir. 2007) (stating "claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues") (internal citations omitted).

Congress has defined various classes of non-immigrants. 8 U.S.C. § 1101(a)(15). Some visas allow aliens to work. See, *e.g.*, 8 U.S.C. §§ 1101(a)(15)(E)(iii), (H)(i)(b), (H)(ii)(a), (H)(ii)(b), (O). For a few visa categories, Congress has authorized spouses of guest workers to accept employment as well. *See, e.g.*, 8 U.S.C. §§ 1184(c)(2)(E) (spouses of intra-company transfers), and (e)(6) (spouses of aliens admitted under

treaty). Although Congress has clearly delineated which aliens are authorized to work on any particular visa, the INS (and now DHS) has a long history of ignoring Congress' express desire and authorizing aliens to work on inappropriate visas.

In *Int'l Union of Bricklayers v. Meese*, the INS had unlawfully authorized foreign bricklayers to work on B (visitor) visas. 761 F. 2d 798, 802–05 (D.C. Cir. 1985); *Int'l Union of Bricklayers and Allied Craftsmen v. Meese,* 616 F. Supp. 1387 (N.D. Calif. 1985). In *Int'l Longshoremen's & Warehousemen's Union v. Meese*, the INS unlawfully admitted foreign crane operators to work on D (crewmen) visas. 891 F.2d 1374, 1379 (9th Cir. 1989). The H-1B visa itself was created in response to similar, abusive agency interpretation of the previous H-1 visa. H.R. Rept. No. 101-723, p. 67. DHS continues this sordid tradition of abuse by authorizing aliens to work on H-4 visas when there is no authority to do so.

A. 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, 499–00 (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 of Am.*, 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 Rules 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 Immigration and Nationality Act ("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 of Am.*, 309 F.3d at 798–99, 802–03 (D.C. Cir. 2002) (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. § 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:

> (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)).

While this provision is expressly limited in scope to, "as used in this section," DHS has serially recast this prohibition on hiring unauthorized aliens ever more broadly as a general grant of authority for it to authorize aliens to work in the United States whenever it chooses. When introducing the H-4 Rule at issue here last year, DHS described § 274a(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 § 274a(h)(3) as establishing in and of itself "the Secretary's authority to extend employment to noncitizens in the United States." 80 Fed. Reg. 10285. This later interpretation conflicts with the structure and legislative intent of IRCA and the context of §1324a(h)(3) in the statutory scheme of the INA.

Section 1324a does not confer on DHS any authority to allow aliens to work. It merely prohibits employers from hiring unauthorized aliens. The exclusion of those "authorized to be employed by … the Attorney General" from the definition of "unauthorized aliens" makes the section work rationally with the rest of IRCA. § 1324a(h)(3)(B). Other 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. In the absence of the clause "or by the Attorney General" in § 1324a(h)(3)(B), such aliens would be authorized to work but it would be illegal for employers to hire them. *See*, S. Rep. 99-132, p. 43 ("An alien employed as a transitional worker and in possession of a properly endorsed such work permit or other documentation shall, for purpose of INA section 274A, be considered to be authorized by the Attorney General to be so employed during the period of time indicated on such documentation.").

There is no precedent in this circuit holding that § 1324a gives DHS the authority to authorize aliens to work in the United States. In the H-4 Rule, 80 Fed. Reg. 10,294, DHS cites a Ninth Circuit opinion, *Arizona Dream Act Coalition v. Brewer*, in support of that proposition. 757 F.3d 1053, 1062 (9th Cir. 2014). However, *Arizona Dream Act* is directly contradicted on that point by another opinion from the Ninth Circuit, *i.e.*, *Guevara v. Holder,* 649 F.3d 1086 (9th Cir. 2011). In *Guevara*, the Ninth Circuit held that there was "nothing in the statute [8 U.S.C. § 1324a] or administrative regulation to provide for more" than "merely allow[ing] an employer to legally hire an alien (whether admitted or not) while his [adjustment of status] application is pending." *Id.* at 1095. As authority for DHS's new interpretation of § 1324a, *Arizona Dream Act* stands alone. The otherwise unanimous view of the courts is that the purpose of § 1324a is to restrict alien employment (not to grant DHS unfettered power to authorize aliens to work). *E.g.*, *see*, *Rivera v. United Masonry*, 948 F.2d 774, 776 (D.C. Cir. 1991); *Richmond v. Holder*, 714 F.3d 725, 728 n.1 (2d Cir. 2013); *Castro v. AG of the United States*, 671 F.3d 356, 369 n.9 (3d Cir. 2012); *Ferrans v. Holder*, 612 F.3d 528, 532 (6th Cir. 2010); *Guevara,* 649 F.3d at 1095*; United States v. Ala.*, 691 F.3d 1269, 1289 (11th Cir. 2012).

The court should scrutinize the DHS 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, the DHS claim of unfettered executive discretion over alien employment authorization must be rejected because it would nullify the 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). One 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 employment, 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. 8 U.S.C. § 1227(a)(1)(A)–(B).

Later in the H-4 Rule findings, DHS addresses concerns raised by commenters that authorizing aliens to work on H-4 visas is in excess of its authority with a stream of generalities about its authority to administer the immigration system. 80 Fed. Reg. 10,294–95. It concludes with the shocking declaration that DHS can ignore statutory framework established by Congress and allow aliens to work in the United States at will.

> 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. 10,295. DHS's assertion runs counter to a basic principle of statutory construction, *expressio unius est exclusio alterius* (the express mention of one thing excludes all others). *See, e.g.*, *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 677–678 (2007).

Without authorization from Congress, the H-4 regulation does not even survive the *Chevron* Step One analysis. *See*, *Motion Picture Ass'n of Am.*, 309 F.3d at 801–05 (D.C. Cir. 2002). "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 v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994); *accord*, *NRDC v. EPA*, 749 F.3d 1055, 1063–64 (D.C. Cir. 2014).

B. Congress recognizes aliens do not have authority to work on H-4 visas.

It is a basic principle of statutory interpretation that, where Congress specifically includes certain things, all others are excluded. *See, POM Wonderful*, 134 S. Ct. at 2238 (applying the principle of *expressio unius est exclusio alterius*). Congress has authorized spouses on certain other visas to work. For example, the E visa authorizes aliens to work in "pursuance of the provisions of a treaty of commerce and navigation". § 1101(a)(15)(E). Congress has explicitly authorized the spouses of such aliens to work. § 1184(e)(5). By identifying specific guest worker visas where the spouse may work and by omitting H-1B spouses from that group, Congress has clearly expressed its intent that spouses of H-1B aliens may not work. *See, POM Wonderful,* 134 S. Ct. at 2238. Furthermore, Congress has recognized that it has not authorized H-4 aliens to work. This is clear from the number of recent bills that contain provisions that would authorize aliens to work on H-4 visas. *E.g.*, I-Squared Act, S.153, 114th Congress, § 103; Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 114th Congress, § 4102; I-Squared Act, S.169, 113th Congress, § 102; Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Congress § 4102. If DHS already possessed the authority to authorize H-4 visa holders to work, no such legislation would be necessary.

C. The H-4 Rule conflicts with 8 U.S.C. § 1182(a)(5)(A).

Section 1182(a)(5)(A) provides that, "In general Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified" that "there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii) [teachers, those with "exceptional ability in the sci-

ences or the arts," and professional athletes]) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor" and "the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed." DHS's H-4 Rule authorizes H-4 visa holders to work but does not require labor certification. It therefore conflicts with § 1182(a)(5)(A).

D. The H-4 Rule is arbitrary and capricious because it changes a policy that has been adopted by Congress.

The H-4 visa was created 45 years ago. Pub. L. No. 91-225, 84 Stat. 116. For that entire period the authorizing statute has been interpreted as prohibiting work by aliens possessing an H-4 visa. Congress has recognized and adopted that interpretation under the INA. In recent years, several bills have been introduced and debated that would allow aliens who possess an H-4 visa to work. 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. Once Congress adopts an agency interpretation, the agency is not free to change it. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155–56 (2000); *see also*, *Loving v. IRS*, 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.").

E. DHS acted arbitrarily and capriciously by dismissing the effect of more foreign workers on domestic workers.

In conclusory fashion, DHS stated in its H-4 Rule findings that, "any labor market impacts will be minimal." 80 Fed. Reg. 10,295. DHS came to this conclusion despite finding that the H-4 Rule will add as many as 179,600 new competitors to the labor market in the first year and 55,000 new competitors annually in subsequent

years. *See also*, 80 Fed. Reg. 10,295 ("This increased estimate does not change the Department's conclusion that this rule will have minimal labor market impacts."). DHS also came to this conclusion despite the fact that Americans such as Save Jobs USA's members are being displaced by foreign guest workers. DHS's findings are arbitrary and capricious and there exists no justification for it in the record. Furthermore, if indeed the H-4 Rule will have a minimal impact on the labor market, then it serves no purpose, also making it arbitrary and capricious.

II. Save Jobs USA will suffer irreparable harm if an injunction is not granted because there is no remedy under the APA other than to set aside the regulation.

The APA does not authorize damage awards. 5 U.S.C. § 500 *et seq*. Therefore, the harm to Save Jobs USA is irreparable in the absence of temporarily relief. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 107–08 (D.C. Cir. 1986).

III. The balance of equities weighs in Save Jobs USA's favor because it seeks to preserve the *status quo*.

The primary purpose of a preliminary injunction is to preserve the *status quo*, keeping in place the relative positions of the party until the merits can be decided. *Aamer*, 742 F.3d at 1043–44; *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In their motion, Save Jobs USA seeks to preserve the *status quo* that has been in place since the creation of the H-4 visa 45 years ago. Pub. L. No. 91-225, 84 Stat. 116. There is no sudden urgency that has created an immediate need for aliens to work on H-4 visas.

IV. An injunction is in the public interest because, if denied, a favorable decision later would cause widespread injury.

If Save Jobs USA's motion is denied, aliens will be able to work starting on May 26, 2015. DHS estimates 179,600 aliens will apply for work under the regulations. 80 Fed. Reg. 10,296. A subsequent decision in Save Jobs USA's favor would mean all of those aliens would have to cease work, causing disruption to themselves and

their employers. Keeping the *status quo* in place until the merits are decided would avoid such potential disruption.

V. Save Jobs USA has standing to bring this action.

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).

Save Jobs USA's complaint pleads three injuries-in-fact from DHS's regulatory actions: (1) they deprive Save Jobs USA of its statutory protections from foreign labor; (2) they increase the number of its economic competitors; and (3) they provide a benefit to competitors.

An association has standing to bring suit on behalf of its members if at least one member would have standing to sue in its own right, the interests the association seeks to protect are germane to its purpose, and 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. *See*, § V.B–C, *infra*. Save Jobs USA was created to protect the economic security and working conditions of its members. Affidavit of Brian Buchanan ("Buchanan Aff.") ¶ 16; Affidavit of Julie Gutierrez ("Gutierrez Aff.") ¶ 14; Affidavit of D. Steven Bradley ("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.

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

"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*"). Indeed, this is just a labor-specific variant of the bedrock rule that "Congress may create a statutory right … the alleged deprivation of [those rights] can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). As explained in this section, DHS's actions denied Save Jobs USA members—and American workers generally—of numerous statutory protections.

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). 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 concrete 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 purported cancellation of statutory protections confers standing on those whom Congress intended to protect.

The H-4 rule undermines the basic protections for Save Jobs USA members incorporated in immigration law. 8 U.S.C. § 1182(a)(5)(A) puts in place the general rule that, as a prerequisite for aliens (except teachers, those with extraordinary ability in arts and science, and professional athletes) that the Secretary of Labor must certify that there are no Americans available for the position and that the admission of the aliens will not adversely affect the wages and working conditions of Americans. USCIS Director Leon Rodriguez admitted during a teleconference with reporters that the H-4 aliens in question, "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. The H-1B program has some protections for domestic labor. The number of H-1B workers is limited by statutory caps. 8 U.S.C. § 1184(g). The filing of a Labor Condition Application ("LCA") is a prerequisite for an H-1B visa. 8 U.S.C. §§ 1101(a)(15)(H)(i)(B), 1182(n). By authorizing aliens to work on an H-4 visas, DHS has thus deprived Save Jobs USA members of these statutory protections.

B. The H-4 Rule increases the number of economic competitors for Save Jobs USA members.

It is settled law in this circuit that a "part[y] suffer[s] constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition." *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014) (quoting *La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998). The H-4 Rule increases competitors for Save Jobs USA in two ways. First, it is designed to attract more foreign workers and to encourage H-1B workers who might

otherwise return home to remain in the United States job market. This is repeatedly stated in the H-4 Rule findings:

> The final rule will also support the goals of attracting and retaining highly skilled foreign workers.

80 Fed. Reg. 10,284.

> 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. 10,286.

> Supporters of the proposed rule agreed that it would help the United States to attract and retain highly skilled foreign workers.

80 Fed. Reg. 10,288; *see also, e.g.*, 80 Fed Reg. 10,284–85, 10,289, 10,292, 10, 295, 10,305. United States Citizenship and Immigration Services ("USCIS") Director Leon Rodriguez admitted of the H-4 Rule that, "It helps U.S. businesses keep their highly skilled workers by increasing the chances these workers will choose to stay in this country during the transition from temporary workers to permanent residents." Press Release, "Authorization to Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking Employment-Based Lawful Permanent Residence", USCIS, Feb. 24, 2014. USCIS's admission shows that the very purpose of the rule is to increase the number of H-1B workers, that is, Save Jobs USA's competitors. DHS's findings also observed that, "Approximately, two dozen commenters stated that they left the United States because the current regulations preclude H-4 dependent spouses from engaging in employment," 80 Fed. Reg. 10,293, demonstrating that the H-4 Rule will cause more H-1B workers to remain in the United States. Exposing Save Jobs USA members to this increased competition is an injury-in-fact. *Tozzi v. HHS*, 271 F.3d 301, 308–09 (D.C. Cir. 2001).

The H-1B program must be viewed largely as a mechanism for importing foreign computer workers. In FY 2013, 127,536 new H-1B petitions were approved where the alien's occupation was known. "Characteristics of H-1B Specialty Occupation

Workers [2013]," U.S. Dep't of Homeland Security, Mar. 24, 2014, p. 12. Of those, 79,870 (62%) worked in computer occupations. *Id*.

All of the members of Save Jobs USA are computer professionals formerly employed by SCE. Bradley Aff. passim; Buchanan Aff. passim; Gutierrez Aff. passim. They were fired, replaced by H-1B workers, and required to train their replacements in order to collect severance and be eligible for unemployment. Bradley Aff. ¶ 7–12; Buchanan Aff. ¶ 9–13; Gutierrez Aff. ¶ 8–11. All of them remain in the computer job market where they remain in competition with H-1B workers for jobs for the rest of their careers. Bradley Aff. ¶ 13–15; Buchanan Aff. ¶ 14–15; Gutierrez Aff. ¶ 12–14. Therefore, the members of Save Jobs USA are direct economic competitors with H-1B workers.

Second, it adds new economic competitors to Save Jobs USA members by authorizing aliens possessing an H-4 visa to work. *Id*. DHS estimates that the H-4 Rule will add 179,600 foreign workers in the first year and 55,000 each additional year. 80 Fed. Reg. 10,285. USCIS director Rodriguez admitted that many of these aliens would be, "of the type that frequently seek H-1Bs." ComputerWorld, Feb. 24, 2015. Employers are already placing advertisements for computer jobs seeking H-4 workers in anticipation of the H-4 Rule. See, Appendix A. This increase in competitors is an injury-in-fact. *Mendoza*, 754 F.3d at 1011.

C. The H-4 rule injures Save Jobs USA members by providing a benefit to its economic 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. Ass'ns Clean Air Project*, 752 F.3d at 1003; *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).

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. Conferring such benefits on Save Jobs USA's current economic competitors is an injury-in-fact. *New World Radio*, 394 F.3d at 172.

CONCLUSION

Because there is not an iota of statutory authority for DHS to allow aliens to work on H-4 visas and its actions are otherwise arbitrary and capricious and because a preliminary injunction would preserve the *status quo* that has existed for nearly a half century, a preliminary injunction should be granted until this court can address the merits of Plaintiff's claims.

Respectfully submitted,
Dated: Apr. 23, 2015

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In the
United StatesDistrict 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

Propsed Order Granting Plaintiff's Motion for Preliminary Injunction

THIS MATTER comes before the court on Plaintiff Save Jobs USA's motion for a preliminary injunction. Having reviewed the papers filed in support and in opposition to this motion (if any), and being fully advised, the court finds that Save Jobs USA has demonstrated both a strong likelihood of success on the merits and the possibility that it faces immediate, irreparable harm from Defendant's conduct. Accordingly, Save Jobs USA is entitled to provisional injuctive relief and the court GRANTS Save Jobs USA's motion at follows:

1. Upon finding that plaintiff Save Jobs USA has carried its burden of showing (a) the possibility of irreparable injury, and (b) a likelihood of success on the merits, this Preliminary Injunction is is granted pursuant to Fed. R. Civ. P. 65, 15 U.S.C. § 1116(a), and the inherent equitable powers of the court.
2. The court hereby preliminarily RESTRAINS and ENJOINS Defendant, all of its subordinate agencies, employees, agents, and all others in active

concert or participation with Defendent, from authorizing aliens holding H-4 visas to engage in work within the United States.

3. This Preliminary Injunction shall take effect immediately and shall remain in effect pending trial in this action or further order of this court.

Dated this _____ day of _____, 2015.

_____