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DEPARTMENT OF LABOR

Withdrawal of Notice of Intent to Issue a Declaratory Order

AGENCY: Office of the Secretary.

ACTION: Notice of Withdrawal.

SUMMARY: For legal, programmatic, and prudential reasons, the Department of Labor, through the Office of the Secretary of Labor, is withdrawing its December 17, 2014 Notice of Intent to Issue a Declaratory Order.

DATES: This Withdrawal Notice is effective March 9, 2020.

SUPPLEMENTAL INFORMATION:

I. Introduction

The Department of Labor (the Department or DOL), through the Office of the Secretary of Labor and pursuant to 5 U.S.C. § 554(e), is withdrawing its December 17, 2014 Notice of Intent to Issue a Declaratory Order, 79 Fed. Reg. 75,179 (Dec. 17, 2014) (Notice of Intent). The Notice of Intent proposed to overrule the Board of Alien Labor Certification Appeals' (BALCA) decision in *Island Holdings*, 2013-PWD-00002 (BALCA Dec. 3, 2013) (*en banc*), through an adjudicatory proceeding that would result in a declaratory order issued under 5 U.S.C. § 554(e). *Island Holdings* is among the roughly 1,050 administrative appeals that have been pending before DOL's National Prevailing Wage Center (NPWC) since 2013, and that challenge DOL's issuance of supplemental prevailing wage determinations (SPWDs) to certain H-2B employers (the 2013 SPWDs).

Although the Notice of Intent was published over five years ago, and concerned the wages of temporary workers from more than a year before that, the Department never issued the proposed declaratory order. The Notice of Intent has left interested parties under a cloud of uncertainty, and the passage of time has reduced the feasibility of compliance with and enforcement of the 2013 SPWDs. The Department is now withdrawing the Notice of Intent to provide certainty and finality, and to implement the resolution that best accords with the regulatory framework and relevant policy and programmatic considerations.

The Department's decision follows careful consideration of the applicable law and the impact of the various options on both U.S. and H-2B workers, employers, and administration of the H-2B labor certification program itself. The Department concludes that (1) issuance of the proposed Section 554(e) declaratory order would not be appropriate under the circumstances and the relevant regulations; (2) on the merits, *Island Holdings* is well-reasoned and reflects the better view of the law; and (3) prudential and programmatic considerations weigh in favor of withdrawing the Notice of Intent and accepting the *en banc Island Holdings* ruling.

II. Regulatory And Procedural Background¹

A. Regulatory Background²

A prospective H-2B employer must obtain a temporary labor certification (TLC) from the Employment and Training Administration's (ETA) Office of Foreign Labor Certification (OFLC). 8 C.F.R. § 214.2(h)(6)(iii)(A). Through the TLC, DOL advises the Department of Homeland Security (DHS) that U.S. workers capable of performing the temporary services or

¹ The relevant background has been summarized on multiple occasions. *See, e.g.*, Notice of Intent, 79 Fed. Reg. at 75,180–83; *Island Holdings* at 2–7; *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Perez*, 46 F. Supp. 3d 550, 556–59 (E.D. Pa. 2014) (*CATA III*); *CATA v. Solis*, 933 F. Supp. 2d 700, 703–09 (E.D. Pa. 2013) (*CATA II*); *La. Forestry Ass'n, Inc. v. Sec'y of Labor*, 889 F. Supp. 2d 711, 715–19 (E.D. Pa. 2012).

² This section summarizes and cites the statutory and regulatory provisions as they existed at the time relevant to the SPWD administrative appeals. This is not intended to serve as a summary of the current law or its interpretation.

labor sought by the employer are not available and that H-2B workers' employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. *Id.*; *see also* 8 U.S.C. § 1182(a)(5)(A)(i)(I)–(II). To that end, a TLC may issue only if U.S. workers are not available to fill the given position at what OFLC determines to be the “prevailing wage.” *See* 20 C.F.R. § 655.10 (2012).³

Prevailing wages are designed to ensure that jobs are advertised and offered to U.S. workers at a wage reflective of the local economy and to prevent employers from undercutting U.S. workers' wages. A would-be H-2B employer initiates the process by requesting and obtaining a prevailing wage determination (PWD) from OFLC. *Id.* § 655.10(a).⁴ The employer must then recruit U.S. workers for the job opportunity by advertising and offering the position at that prevailing wage or higher. *Id.* §§ 655.10(a)(3), 655.15. The wage used in this recruitment is known as the “offered wage.”

If, after these domestic recruitment efforts, an employer still has unmet labor needs, it applies for a TLC. *Id.* §§ 655.15(a), 655.20(a). The employer agrees to abide by certain conditions, including to pay workers the offered wage, which cannot be lower than the PWD rate, “during the entire period of the approved H-2B labor certification.” *Id.* § 655.22(e); *see also id.* § 655.10(d) (the PWD applies “for the duration of” a given certified H-2B employment). The employer also attests that it will not offer H-2B workers more favorable wages than those it offered to U.S. workers. *Id.* § 655.22(a). After obtaining a TLC, an employer petitions DHS to

³ Citations to Title 20 of the 2012 edition of the *Code of Federal Regulations* are to those provisions in effect when that edition was published, and such citations reference provisions promulgated in 2008, *see* 73 Fed. Reg. 78,020 (Dec. 19, 2008). The 2012 edition separately included, for convenience, provisions associated with a rulemaking that had not yet gone into effect and, as discussed *infra*, never did.

⁴ OFLC sets a validity period for each PWD, which is at minimum three months and at maximum twelve months. *Id.* § 655.10(d). The validity period dictates when an employer may begin the recruitment process or file its TLC application, *id.* § 655.10(a)(2), but does not govern the time period in which the employer is required to offer and pay the prevailing wage.

employ H-2B workers for the duration and conditions specified in the TLC. 8 C.F.R. § 214.2(h)(6)(iii)(A). DOL’s Wage and Hour Division (WHD), as necessary, investigates and brings enforcement actions for violations of the employer’s obligations.

An employer who disputes a PWD may seek review by NPWC. 20 C.F.R. § 655.10(g) (2012). If still dissatisfied, the employer may seek review by the NPWC Center Director. *Id.*; *see also id.* § 655.11(a)–(d). As a final avenue of administrative review, the employer may appeal the Center Director’s decision to BALCA, and the resulting decision represents “the final administrative decision of the Secretary.”⁵ *Id.* § 655.11(e); 29 C.F.R. § 18.58 (2012).⁶ If an employer declines to pursue review at any of these stages, it is deemed to have acquiesced to the PWD or to the most recent administrative decision.

B. Procedural Background

1. CATA I And The 2011 Rule

In 2008, DOL set forth a methodology via rulemaking for calculating prevailing wages in the H-2B program (the 2008 Methodology) that became the subject of a multi-year litigation. In a 2010 court decision in that case, the 2008 Methodology was invalidated on procedural grounds. *CATA v. Solis*, Civ. No. 09-240, 2010 WL 3431761, at *19 (E.D. Pa. Aug. 30, 2010) (*CATA I*). Citing the disruption that would result if DOL could not use the methodology, the court allowed it 120 days to “promulgate new, valid regulations for determining the prevailing wage rate.” *Id.* DOL lawfully continued to use the invalidated 2008 Methodology as it worked to issue a new rule.

⁵ The BALCA consists of administrative law judges (ALJs) within DOL assigned to review certain decisions pertaining to DOL’s foreign labor certification programs. *See, e.g.*, 52 Fed. Reg. 11,217, 11,218 (Apr. 8, 1987).

⁶ This provision has since been slightly modified to provide that BALCA’s decision in this context constitutes the “Secretary’s final administrative decision.” 29 C.F.R. § 18.95 (2019).

Plaintiffs next sought to prohibit DOL from issuing any TLC unless the employer agreed to comply with an SPWD resulting from any changes in the methodology in the forthcoming rule. *CATA v. Solis*, Civ. No. 09-240, 2010 WL 4823236, at *1 (E.D. Pa. Nov. 24, 2010). The Department responded that such relief would force it to violate its own regulations, under which the PWD was in effect “for the duration of employment.” *Id.* at *1–2 (quoting 20 C.F.R. § 655.10(d)). The court held that it lacked the authority to grant plaintiffs’ request. It explained that “[u]nder plaintiffs’ proposed relief, every H-2B employer who received a conditional labor certification would have to obtain [an SPWD] after DOL issued revised wage regulations” and that the court’s equitable authority did not extend to requiring DOL to undergo such “extensive administration and management.” *Id.* at *3. Nevertheless, the court stated in dicta that DOL’s interpretation of the regulations was erroneous and that nothing precluded DOL from issuing such conditional labor certifications as an “interim measure[].” *Id.* at *1–2.

On January 19, 2011, DOL promulgated a rule containing a new prevailing wage methodology (the 2011 Rule). 76 Fed. Reg. 3,452 (Jan. 19, 2011). In conjunction with this new rule and in anticipation of it going into effect, DOL conditioned TLCs on an employer’s agreement to later receive and comply with an SPWD calculated under the 2011 Rule’s methodology. 76 Fed. Reg. 21,036 (Apr. 14, 2011). To implement this change, DOL amended ETA’s Form 9142 to contain an attestation in which the employer agreed to pay at least the prevailing wage rate that “is or will be issued by” DOL. *Id.*; Form 9142, Appendix B.1 § B(5).

The 2011 Rule never went into effect due to litigation and to congressional appropriations riders blocking the use of funds for its implementation, administration, or enforcement. *See* 78 Fed. Reg. 24,047, 24,052 (Apr. 24, 2013). Despite its connection to the blocked 2011 Rule, the 2011 attestation remained on the Form 9142.

2. *CATA II*, The Interim Final Rule, And The 2013 SPWDs

Since the 2011 Rule never went into effect, DOL continued to use the 2008 Methodology. The *CATA* plaintiffs again sought invalidation of the methodology and a permanent injunction barring its use. *CATA II*, 933 F. Supp. 2d at 709. On March 21, 2013, the court held that not only did the *procedures* by which the 2008 Methodology was adopted violate the APA, as ruled in *CATA I*, but also that the *substance* of the Methodology conflicted with the APA's requirement of reasoned decision-making. *Id.* at 710–13. Specifically, the court said that the 2008 Methodology resulted in TLCs that did not comply with the statutory and regulatory mandate that DOL ensure H-2B workers' employment will not adversely affect similarly employed U.S. workers' wages. *Id.* at 711–13. In reaching this conclusion, the court relied on DOL's statement in the preamble to the 2011 Rule (a rule that never took effect) that the 2008 Methodology set artificially low wage rates that harmed U.S. workers. *Id.* The court vacated the 2008 Methodology and allowed the Department thirty days to "come into compliance." *Id.* at 716.

After *CATA II*, OFLC immediately ceased issuing PWDs in the H-2B program based on the 2008 Methodology. 78 Fed. Reg. 19,098, 19,099 (Mar. 29, 2013). On April 24, 2013, DHS and DOL issued an interim final rule (IFR) revising the methodology. 78 Fed. Reg. 24,047 (Apr. 24, 2013). The IFR's methodology generally resulted in higher prevailing wages than under the 2008 Methodology, *id.* at 24,058 (estimating as much as a \$2.12 increase in the weighted average hourly rate), and was effective immediately, *id.* at 24,055. OFLC resumed processing pending H-2B requests for PWDs using the new methodology.

The IFR's preamble also suggested something more: it stated that H-2B employers who had already received PWDs would be issued SPWDs, calculated under the new methodology—

including employers who had already received TLCs and were currently employing H-2B workers. *Id.* at 24,055–56. The preamble explained that the employers’ obligation to pay wages consistent with these SPWDs derived from *CATA II* and the Form 9142 attestation to offer and pay the most recent prevailing wage issued by DOL. *Id.* at 24,055. The IFR itself, however, modified only the regulatory text setting forth the prevailing wage methodology. It did not alter the text under which PWDs and offered wages apply throughout the certified employment.

On April 25, 2013, DOL clarified in a “frequently asked questions” document that employers would be “required to offer and pay” at a minimum the SPWD wage rate “for any work performed on and after the date the employer receives the supplemental determination” (SPWD Notice).⁷ Thus, the SPWD rates would apply to the remaining work performed in conjunction with the employers’ TLCs for the 2013 season. Notably, the SPWD Notices did not require employers to reopen or conduct additional recruitment of U.S. workers at the SPWD rate.

DOL completed issuance of SPWD Notices on August 12, 2013.⁸ *See* 79 Fed. Reg. at 75,181. In each Notice, DOL informed the employer that it could seek redetermination of the SPWD.

Employers filed more than 1,400 requests for NPWC redetermination. *See* Protective Order Mot. at 5. Because an SPWD is not a final agency action until the employer has exhausted all administrative review and appeal processes, an appealing employer does not have an

⁷ Frequently Asked Questions, Interim Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, at 2 (ETA, OFLC Apr. 25, 2013), https://www.foreignlaborcert.doleta.gov/pdf/faq_final_rule_april_2013.pdf.

⁸ This included issuance of SPWDs to employers, who (i) had already received a TLC and were currently employing H-2B workers; (ii) had received a TLC and had an H-2B petition pending at DHS; and (iii) had completed recruitment of U.S. workers and had a TLC application pending at OFLC. *See* Defs.’ Mem. ISO Mot. for a Protective Order at 5, *CATA v. Perez*, Civ. No. 09-240 (E.D. Pa.), ECF No. 189-1 (Protective Order Mot.) (detailing the categories). Because of the manner in which H-2B case files are maintained by DOL, it would be exceptionally difficult and time-consuming—and potentially impossible—to determine, seven years after the fact, which employers fell into each of these three groups and the scope of worker positions impacted.

obligation to comply with the SPWD unless or until the SPWD is affirmed at the conclusion of this review and appeal.

3. The *Island Holdings* Administrative Appeal And *CATA III*

Before *CATA II* and publication of the IFR, OFLC had granted Island Holdings, LLC (Island Holdings) three TLCs for the 2013 season. *Island Holdings* at 6. The TLCs were premised on PWDs calculated under the 2008 Methodology and certified employment dates going into November 2013. *Id.*; 79 Fed. Reg. at 75,181. On May 6, 2013, Island Holdings received SPWD Notices for each of its TLCs setting forth prevailing wages higher than those in its PWDs. *Island Holdings* at 6–7. On May 23, 2013, Island Holdings filed an administrative appeal to BALCA arguing, *inter alia*, that DOL lacked authority to issue SPWDs in the manner contemplated in the IFR’s preamble. *See* 79 Fed. Reg. at 75,181.

At this time, the number of requests for NPWC and Center Director review of the 2013 SPWDs was rapidly rising and had resulted in an extraordinarily high case volume. It was apparent that a global resolution of the legal issues presented by these administrative appeals would be instrumental to the appeals’ fair and expeditious resolution. Thus, on June 6, 2013, DOL requested that BALCA hear Island Holdings’ three combined appeals *en banc*, explaining that the argument that DOL lacked authority to issue the 2013 SPWDs presented “a matter of exceptional importance which could impact a significant number of additional cases” Certifying Officer’s Request for *En Banc* Consideration, at 1–2, *Island Holdings*, 2013-PED-00002. BALCA’s *en banc* review was expected and intended to (i) address the question of DOL’s authority to issue the SPWDs and (ii) serve as a bellwether decision that would impact DOL’s adjudication of the other SPWD administrative appeals presenting this question. After a

brief remand to the NPWC, which relied on the IFR's preamble to affirm the SPWDs, the case became ripe for BALCA's consideration. 79 Fed. Reg. at 75,181.

On December 3, 2013, the *en banc* BALCA unanimously ruled to vacate Island Holdings' SPWDs. *Island Holdings* at 15. BALCA held that DOL lacked the authority to issue SPWDs where it had already approved and issued a TLC based on the 2008 Methodology. BALCA concluded that nothing in DOL's regulations contemplated the issuance of the 2013 SPWDs, *id.* at 11–12, and it rejected DOL's argument that *CATA II* required DOL to issue them, *id.* at 14. Moreover, BALCA held that the relevant attestation on the Form 9142 could not serve as the authority to issue the 2013 SPWDs, since it lacked a foundation in the regulatory text. *Id.* at 12–14. Pursuant to DOL's regulations, this decision constituted “the final administrative decision of the Secretary.” 29 C.F.R. § 18.58 (2012).⁹

On December 20, 2013, after the *CATA* plaintiffs filed a new lawsuit, OFLC stayed further action on all pending SPWD administrative appeals. *See CATA III*, 46 F. Supp. 3d at 557. Plaintiffs asked the district court to set *Island Holdings* aside, arguing that BALCA, which is composed of ALJs, exceeded its authority by overruling the Secretary on issues of law and policy. *Id.* at 555. In tension with its prior representation when requesting *en banc* BALCA review, DOL stated that *Island Holdings* merely “represents a resolution of that individual case”; “BALCA's decision does not represent the legal position of the Secretary of Labor,” DOL said. *Id.* (citation omitted). On July 23, 2014, the court dismissed plaintiffs' complaint on standing and ripeness grounds. *Id.* at 560–64. Despite this holding, OFLC continued to stay the SPWD administrative appeals.

⁹ Despite BALCA's remand to the NPWC with instructions to vacate the SPWDs issued to Island Holdings, NPWC has yet to do so. *See CATA III*, 46 F. Supp. 3d at 562.

4. Notice Of Intent To Issue A Declaratory Order

Nearly a year after OFLC stayed the SPWD administrative appeals, on December 17, 2014, the Office of the Secretary published the Notice of Intent proposing to overrule *Island Holdings* through a declaratory order issued under 5 U.S.C. § 554(e), which would “reaffirm the Secretary’s interpretation of the regulations, as stated in the preamble to the IFR.” 79 Fed. Reg. at 75,183. Section 554(e) of the APA provides that an “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e). While Section 554(e) declaratory orders have issued infrequently in the APA’s history, agencies have used them in the past to, for example, interpret the agency’s governing statute or its own regulations, define terms of art, clarify whether a matter falls within federal regulatory authority, or address questions of preemption.¹⁰ The Department of Labor does not appear to have ever issued a Section 554(e) order, nor to have used such an order to reverse an agency action that—under Departmental regulations—constituted “the final . . . decision of the Secretary,” 29 C.F.R. § 18.58 (2012).

During his more than two remaining years in office, Secretary Thomas E. Perez never issued the declaratory order he had proposed. The roughly 1,050 remaining requests for NPWC review or Center Director review (collectively the SPWD administrative appeals) have remained stayed.¹¹ On June 24, 2019, five former H-2B workers filed a complaint alleging that DOL’s failure to give effect to the 2013 SPWDs or resolve their former employers’ SPWD administrative appeals constitutes an unreasonable delay and is arbitrary and capricious under the APA. *Calixto v. Scalia*, Civ. No. 19-1853 (D.D.C.).

¹⁰ Emily S. Bremer, *The Agency Declaratory Judgment*, 78 Ohio St. L.J. 1169, 1203–04 (2017).

¹¹ Employers filed over 1,400 SPWD administrative appeals. Of these, roughly 1,050 were still pending when *Island Holdings* issued and were stayed by OFLC. The other approximately 350 appeals were either rejected for late submission or had already been resolved at the NPWC review level and the employers had acquiesced by declining to seek Center Director review.

Roughly five years after the issuance of the Notice of Intent, six years after the appeals were stayed, and almost seven years since the year of temporary employment at issue, it is time for the Department to bring a resolution to this matter.

III. The Department Will Not Issue A Declaratory Order

The Department has determined not to engage in an APA Section 554(e) adjudication or to issue the proposed declaratory order. Existing DOL regulations, unlike the regulations of some agencies, do not contemplate such orders or provide procedures for their issuance. Indeed, DOL's regulations provide no mechanism at all for a Department official to review BALCA decisions regarding H-2B prevailing wage determinations, stating instead that the "decision of [BALCA] shall become the final administrative decision of the Secretary." 29 C.F.R. § 18.58 (2012); *see also* 29 C.F.R. § 18.95 (2019). There appears to be no precedent, at any federal agency, for using a Section 554(e) order in circumstances like these.

This is not to say that it is appropriate for BALCA to have the unreviewable final say on questions of law and policy presented to the Department. Indeed, in order to establish a defined procedural mechanism for review of decisions of ALJs, the Department recently proposed changes to its regulations to provide for discretionary Secretarial review of BALCA decisions in the H-2A, CW-1, and PERM programs. *See* 85 Fed. Reg. 13,024 (Mar. 6, 2020). DOL and DHS also intend to jointly issue a separate proposed rule regarding the Secretary's review authority over BALCA decisions in the H-2B program.¹² *See id.* at 13,026.

¹² The Department would not attempt to exercise this new discretionary review authority to reverse BALCA decisions applying *Island Holdings* to the 2013 SPWDs, in light of the passage of time and the factors addressed below, among other considerations.

**IV. For Legal, Prudential, And Programmatic Reasons, The Department Will Accept
The Decision In *Island Holdings***

Even if there were an appropriate procedural mechanism to do so, the Department will not overrule *Island Holdings*. BALCA’s decision—and not the Notice of Intent—sets forth the better view of law as to the 2013 SPWDs. Permitting *Island Holdings* to remain “the final administrative decision of the Secretary,” 29 C.F.R. § 18.58 (2012), is also more consistent with programmatic, policy, and prudential considerations.

A. *Island Holdings* Represents The Better View Of The Law

1. The 2013 SPWDs Were Inconsistent With DOL’s Regulations

DOL’s regulations did not contain any express provisions regarding calculating, issuing, or complying with SPWDs. To the contrary, the regulations provided that the original PWD “shall apply and shall be paid . . . at a minimum, for the duration of employment,” 20 C.F.R. § 655.10(d) (2012), *id.* § 655.20(f), and that employers agree to pay the wage offered to U.S. workers in recruitment (which could not be lower than the prevailing wage) “during the entire period of the approved H-2B labor certification,” *id.* § 655.22(e); *Island Holdings* at 8–10. As BALCA noted, the requirement to continue paying the offered wage throughout the employment is part of an employer’s obligation to offer to U.S. workers wages “not less favorable than those offered to the H-2B workers.” *Island Holdings* at 11 (citing 20 C.F.R. § 655.22(a)). An employer could not agree to, or comply with, this obligation if DOL could raise PWDs during the certified employment.¹³

¹³ This does not mean that DOL could have never issued an SPWD under the regulations as they existed at the time. There may have been instances where doing so would have been appropriate, such as to correct an inadvertent error in a PWD, rather than for purposes of programmatic administration of the H-2B program.

This is consistent with DOL’s longstanding interpretation of the regulations and with its historical practice.¹⁴ Before 2013, DOL had never imposed new prevailing wage rates on employers during the course of the employment. DOL only departed from this interpretation to issue and justify the 2013 SPWDs, relying on dicta from the *CATA* court.¹⁵ *See, e.g.*, Notice of Intent, 79 Fed. Reg. at 75,182. DOL now returns to the best reading of its own regulations.

Under these circumstances, neither the IFR’s preamble nor the Form 9142 attestation could have served as authority to issue the 2013 SPWDs. *Island Holdings* at 11–14. The IFR’s preamble described DOL’s intent to issue the SPWDs, but a preamble cannot impose legal obligations that contradict the regulatory text. *Id.* at 12 (citing *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 569–70 (D.C. Cir. 2002)). Likewise, the regulations do not support adjusting the prevailing wage rate on the basis of an employer’s attestation that it will pay the prevailing wage rate that “is or will” be issued.¹⁶ Doing so is also inconsistent with principles requiring proper notice to regulated parties of their legal obligations. Finally, the weight to be given to the attestation’s language in this context is diminished further by the fact that the language was adopted in conjunction with the 2011 Rule, which was barred from taking effect.

2. The 2013 SPWDs Were Inconsistent With The H-2B Labor Certification Program’s Structure And Primary Purposes

The H-2B program balances the need for temporary, seasonal foreign workers in certain industries against the need to protect U.S. workers’ jobs, wages, and working conditions.

¹⁴ *See, e.g.*, Defs.’ Response in Opp. to Mot. for Additional Relief, *CATA v. Solis*, Civ. No. 09-240, 2010 WL 4823236 (Nov. 24, 2010) (E.D. Pa.), ECF No. 89.

¹⁵ *See CATA v. Solis*, Civ. No. 09-240, 2010 WL 4823236, at *2–3 (E.D. Pa. Nov. 24, 2010). The *CATA* plaintiffs had not challenged these portions of the regulations. They were only at issue because, as DOL interpreted them, they precluded the additional relief the plaintiffs requested—relief the court held it was powerless to grant. *Id.* at *3.

¹⁶ This analysis is distinguished from instances in which (i) a preamble merely explains or clarifies language in the existing regulations in a manner consistent with—as opposed to in contradiction with—the regulatory text or (ii) an employer’s attestation forms the basis of an enforcement action where the underlying attestation is supported—not contradicted—by the regulatory text.

As evidenced by their role in the labor certification process, H-2B prevailing wages are primarily intended to bolster the protection side of the equation. The 2013 SPWDs must be assessed in light of this structure and purpose.

Ordinarily, PWDs safeguard U.S. workers in at least two important ways. First, they serve to require employers to recruit U.S. workers at a wage rate that is not artificially depressed by the importation of temporary foreign labor. The 2013 SPWDs never fulfilled this purpose because H-2B employers were not required to conduct additional recruitment of U.S. workers at the SPWD rate. Ordering employers to pay foreign H-2B workers a higher wage than they offered to U.S. workers in recruitment is inconsistent with the central purpose of the mandatory recruitment process. *See Island Holdings* at 14.

Second, the employer's obligation to pay, at minimum, the PWD wage rate for the duration of the H-2B employment protects all similarly employed U.S. workers from wage depression. The delay resulting from the stay of more than 1,050 administrative appeals means that the SPWDs at issue in those actions will never have this impact on the wages of similarly employed workers. Had those SPWD wages been paid at the time the work was performed, these H-2B employers' competitors might have been pressured to raise wages in order to attract and retain workers. But now, seven years after their issuance, these SPWDs cannot serve this purpose.¹⁷

By and large, then, U.S workers whose wages may have been depressed in 2013 would not benefit from now affirming the 2013 SPWDs. By definition, H-2B employers' efforts to recruit U.S. workers were at best only partially successful, meaning that executing the Notice of

¹⁷ Ordinarily, the protective purpose of PWDs is also furthered by WHD's investigations and enforcement actions, including for back wages for both U.S. and H-2B workers. Such investigations and actions ensure H-2B employers comply with their obligations, including those obligations designed to protect U.S. workers. However, for the reasons set forth *infra*, enforcement of the 2013 SPWDs would be neither feasible nor prudent.

Intent's plan would result in ordering back wages predominantly to H-2B workers.¹⁸ Creating an obligation to pay such back wages arguably protects those H-2B workers from substandard wages, but that is not the primary purpose of prevailing wages. The large disparity between the back wages that would be owed to H-2B and U.S. workers places the 2013 SPWDs in tension with the temporary labor certification program's predominant concerns of protecting the domestic workforce from wage depression and from preferential treatment of H-2B workers.

3. *CATA II* Did Not Compel DOL To Issue The 2013 SPWDs

Despite earlier suggestions by the Department to the contrary, *CATA II* did not require issuance of the 2013 SPWDs. *Island Holdings* at 14; *see, e.g.*, 79 Fed. Reg. at 75,182 (speculating that “the *CATA* court expected” DOL to issue the SPWDs while acknowledging that *CATA II* might not have “required” it to do so). Far from ordering adjustment of PWDs already issued under the 2008 Methodology, the court spoke only to the likelihood of its order disrupting determinations to be made in the future. *CATA II*, 933 F. Supp. 2d at 715. Nor may such a directive in *CATA II* properly be inferred.¹⁹ *CATA II* did not revisit the court's previous rulings that (i) the court lacked power to order DOL to issue SPWDs and (ii) use of the 2008 Methodology had been permissible following *CATA I*.

¹⁸ If employers did recruit any U.S. workers in conjunction with their H-2B applications, the SPWD Notices required them to pay those U.S. workers as well as the H-2B workers at least the SPWD wage rate for the remainder of the certified employment.

¹⁹ DOL was not required to give *CATA II* retroactive effect by issuing the 2013 SPWDs. The applicable case law does not set a default requirement that agencies nullify actions undertaken pursuant to a rule before that rule is vacated. *Council Tree Communc'ns, Inc. v. FCC*, 619 F.3d 235, 257 (3d Cir. 2010) (declining to nullify certain auction results). Further, *CATA II* did not reinstate the *status quo ante* and instead necessitated promulgation of a new rule. Using a new rule to adjust actions taken before the rule issued is arguably in tension with the prohibition against retroactive rulemaking absent congressional authorization. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

B. Prudential And Programmatic Considerations Favor Accepting *Island Holdings*

DOL has considered the effect that withdrawing the Notice of Intent, and allowing *Island Holdings* to remain the “the final administrative decision of the Secretary,” 29 C.F.R. § 18.58 (2012), will have on workers, both H-2B and U.S. DOL has also considered reliance interests and the impact that individually adjudicating the stayed SPWD administrative appeals would have on time-sensitive programs, likely for little practical benefit. These prudential and programmatic concerns weigh in favor of withdrawing the Notice of Intent.

1. Individually Adjudicating The Employer Appeals Would Disrupt Administration Of Labor Certification Programs For Little Practical Benefit

Overruling *Island Holdings* and leaving OFLC to individually adjudicate each of the roughly 1,050 pending SPWD administrative appeals relating to the 2013 employment season would drain significant DOL resources.²⁰ This would substantially detract from the pursuit of other priorities and, in the end, would likely prove futile given that the passage of time has diminished employers’ ability to comply with the 2013 SPWDs and WHD’s preparedness to enforce them.

ETA estimates that notifying the employers, reviewing the case files, issuing Center Director opinions, processing BALCA requests, and taking BALCA-directed action could collectively take over two-and-a-half years to complete.²¹ This work would impact OFLC’s

²⁰ Even if the Secretary issued a declaratory order overruling *Island Holdings* and setting the policy for OFLC to apply to various arguments raised by employers challenging the 2013 SPWDs, OFLC would have to review each case file to determine which arguments a given employer raised and then draft an individualized opinion accordingly. Moreover, OFLC would have to address any arguments that, even if the 2013 SPWDs were valid, particular SPWDs were improperly calculated under the IFR’s methodology. Application of *Island Holdings* avoids such individualized review and adjudication because its conclusion that the 2013 SPWDs were invalid may be uniformly applied to all the remaining requests for review of 2013 SPWDs.

²¹ Specifically, ETA estimates that this work could occupy 706 workdays and would require the use of four senior analysts, roughly half-time each. Such analysts have experience in, and are typically tasked with, making prevailing wage determinations for the H-2B, CW-1, PERM, and H-1B programs.

usual case-processing tasks, including in time-sensitive programs. ETA's normal business lines would see an increase in processing times and backlogs, including during high-filing periods. For example, it currently takes on average 110 days to process prevailing wage determinations in the CW-1 and PERM programs, but that could increase to approximately 150 days if, without acquiring new resources, ETA were tasked with individually adjudicating the SPWD administrative appeals.²²

Even if the Department were to expend these considerable resources on the 2013 case files, there would likely be little practical benefit to doing so, given the significant obstacles that now exist to compliance and enforcement. There would be several hurdles to an employer's ability to now comply with the 2013 SPWDs by issuing back wages: the passage of time since the work at issue was performed; the fact that the regulations in place in 2013 had no requirement that employers retain the relevant employment records and therefore records are likely to have been lost or destroyed; and the difficulty of locating the relevant workers—most of whom, by definition, reside outside the United States and came here to work here temporarily. Were DOL, at this late date, to finalize the SPWDs at issue in the stayed administrative appeals, these and other factors would also present substantial barriers to enforcement. To be actionable, H-2B violations must be willful. 8 U.S.C. § 1184(c)(14)(D) (prohibiting a “willful failure to comply with the requirements of [the H-2B provisions] that constitutes a significant deviation from the terms and conditions of a petition”). It is questionable whether an employer's decision to adhere to an initial PWD, rather than to an SPWD judged unlawful in a “final” decision of the Department, could properly be deemed “willful.” Regardless, the practical obstacles to compliance described above would also pose serious challenges to proving the willfulness of any

²² Processing times for H-2B prevailing wage requests, which are currently 30 days on average, would not be impacted due to regulatory requirements.

subsequent non-compliance. Indeed, the challenges presented by lost records, faded memories, and hard-to-locate workers are precisely the type of staleness concerns that underlie WHD's general policy of limiting its investigations to violations alleged to have taken place within the last two years. WHD Field Operations Handbook 76c03(a).

In short, the Department has strong programmatic reasons to accept the "final" decision in *Island Holdings*, rather than expending thousands of work hours, in derogation of other responsibilities, to issue decisions that would be difficult ever to obey or enforce.

2. Prudential Considerations Do Not Warrant Issuing The Proposed Declaratory Order Or Continuing To Contest *Island Holdings*

The H-2B workers and U.S. workers recruited in connection with the appealing employers' H-2B applications understood their work would be temporary, and they accepted and performed the work at the offered wage. Although the 2013 SPWDs may have given them an initial expectancy of increased wages or back pay, those SPWDs subject to administrative appeals were properly challenged and never became final because the stay of the appeals prevented completion of administrative review. *Island Holdings*—a "final decision" of the Secretary—held the SPWDs were *ultra vires*, and no court has ever invalidated that holding. The Notice of Intent proposed overruling *Island Holdings*, but the Notice never progressed beyond a mere proposal. Five years have passed, and DOL never issued a final declaratory order overturning *Island Holdings*. In these circumstances, reliance on those SPWDs would not have been reasonable.

On the other hand, many parties relied on the original PWDs before recruitment and hiring. Prior to 2013, DOL had never issued SPWDs, at least not on a large scale to all H-2B employers with then-extant TLCs. Nor did the text of DOL's regulations provide notice of the

potential for SPWDs, much less specify the potential increase to wages. Further, the 2013 SPWDs were issued not only to employers who had yet to hire H-2B workers, but also to employers already employing H-2B workers. Such employers had already paid the costs of recruiting workers, and would have had limited options for responding to the SPWDs' increased costs: H-2B workers, once employed, must be employed full-time; the employer must pay return transportation for H-2B workers dismissed earlier than scheduled; and the employer cannot lay off similarly employed U.S. workers. 20 C.F.R. § 655.22(h), (i), (m) (2012). And, while employers might have inferred from their Form 9142s that it was *possible* DOL would issue SPWDs, there was no notice that this would in fact occur, let alone notice of the amount or timing of the SPWD, or the methodology that DOL would use.

V. Conclusion

For all the foregoing reasons, the Notice of Intent is withdrawn.

Signed: at Washington, D.C. this 9th of March 2020.

Eugene Scalia,

Secretary of Labor

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