



12-1-2015

If at First You Don't Succeed, Try, Try, Try Again: The Third Circuit Strikes Down Prevailing Wage Rule Once More in *Comite de Apoyo a los Trabajadores Agricolas v. Perez*

Sara Moyer

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Sara Moyer, *If at First You Don't Succeed, Try, Try, Try Again: The Third Circuit Strikes Down Prevailing Wage Rule Once More in *Comite de Apoyo a los Trabajadores Agricolas v. Perez**, 60 Vill. L. Rev. 815 (2015).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol60/iss4/6>

This Issue in the Third Circuit is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

IF AT FIRST YOU DON'T SUCCEED, TRY, TRY, TRY AGAIN:
THE THIRD CIRCUIT STRIKES DOWN PREVAILING WAGE RULE
ONCE MORE IN *COMITÉ DE APOYO A LOS TRABAJADORES*
AGRÍCOLAS v. PEREZ

SARA MOYER*

“[W]e see no reason to allow [the Department of Labor] to continue to use a wage guidance that contradicts its own rules.”¹

I. INTRODUCTION

When landscaping companies, hotels, restaurants, ski resorts, and amusement parks cannot find American workers to satisfy their labor needs, they turn to the H-2B visa program.² This program admits foreign guestworkers to fill temporary, unskilled positions in the workforce.³ Participating employers contend that Americans will not deign to fill these positions for feasible wages.⁴ The H-2B visa program, in contrast, attracts thousands of eager applicants, many of whom are from impoverished countries and are willing to accept wages that meet employers' fiscal demands.⁵

Unfortunately, the original intent of the guestworker program has been frustrated, and actual use of the program has been riddled with em-

* J.D. Candidate, 2016, Villanova University School of Law; M.S. 2012, University of Wisconsin—Madison; B.S. 2010, Gettysburg College. I would like to thank Craig Ewer for his support, encouragement, and patience throughout my law school career, without which this Casebrief would not exist. I would also like to thank my parents, Jo Ann and Terry Moyer, whose love and support has always encouraged me to reach for the stars.

1. *Comité de Apoyo a Los Trabajadores Agrícolas v. Perez (CATA IV)*, 774 F.3d 173, 190 (3d Cir. 2014).

2. *See id.* at 179 (listing low-skilled occupations typically filled by H-2B visa holders).

3. *See* 8 U.S.C. § 1101(a)(15)(H)(ii) (2012) (differentiating between skilled and unskilled labor in various guestworker programs).

4. *See* DAVID SEMINARA, *DIRTY WORK: IN-SOURCING AMERICAN JOBS WITH H-2B GUESTWORKERS*, CTR. FOR IMMIGRANT STUD. 1 (2010), *available at* <http://www.cis.org/sites/cis.org/files/articles/2010/h-2b.pdf> [<http://perma.cc/K4VG-V66G>] (noting justifications offered by employers advocating for guestworker programs).

5. *See* STACIE A. HUNHOFF & ALLIE K. SIEVERS, REPORT, NAT'L GUESTWORKER ALLIANCE, *LEVELING THE PLAYING FIELD: REFORMING THE H-2B PROGRAM TO PROTECT GUESTWORKERS AND U.S. WORKERS* 9 (2012), *available at* <http://www.guestworkeralliance.org/wp-content/uploads/2012/06/Leveling-the-Playing-Field-final.pdf> [<http://perma.cc/XD5T-SRFK>] (describing plight of guestworker to illustrate difficult economic conditions guestworkers often face in their native countries).

ployer fraud and abuse.⁶ Foundationally, the premise of the guestworker program is unsound; in reality, many American employees are willing to work in the sectors targeted by the H-2B visa program.⁷ Moreover, employers who hire H-2B visa holders often pay these workers far less than similarly situated American employees.⁸ Additionally, guestworkers are discouraged from reporting poor working conditions and other abuses due to fear of deportation.⁹

Despite these apparent problems, guestworkers are an integral and necessary part of our economy.¹⁰ Regulations developed by the Department of Labor (DOL) govern employer requirements for the H-2B visa program.¹¹ Under the H-2B provisions of the Immigration and Nationality Act, the DOL's primary mandate is to balance the need for guestworkers against any potential and resulting harm to the American workforce.¹² Accordingly, the DOL requires employers to apply for temporary labor certifications and, in doing so, identify the "prevailing wage rate" for a given position in that geographic area.¹³ In order to protect the American workforce from being replaced by foreign workers willing to accept below-market wages, the DOL further requires employers to pay guestworkers at a rate equal to or greater than the median wage for similarly situated positions in their particular industry and region.¹⁴

6. *See id.* at 8 (recounting numerous cases of abuse related to H-2B visa program, including "high recruitment fees abroad" and "threats of deportation"); *see also, e.g.*, Steven Greenhouse, *Wal-Mart Suspends Supplier of Seafood*, N.Y. TIMES, June 29, 2012, http://www.nytimes.com/2012/06/30/business/wal-mart-suspends-seafood-supplier-over-work-conditions.html?_r=0 [<http://perma.cc/7PP8-V2KM>] (discussing abuses of H-2B workers in seafood industry).

7. *See SEMINARA, supra* note 4, at 10-12 (dispelling misconception that American workers are unwilling to fill positions often occupied by H-2B visa holders).

8. *See CATA IV*, 774 F.3d 173, 190 (3d Cir. 2014) (noting that disparity in wages can reach \$5/hour). Notably, employers are permitted to deduct a housing allowance from H-2B visa workers. *See HUNHOFF & SIEVERS, supra* note 5, at 33. As a result, net wages for H-2B visa workers are often far below even minimum wage. *Id.*

9. *See HUNHOFF & SIEVERS, supra* note 5, at 14 (noting guestworkers are often threatened with deportation if they report employer violations).

10. *See SEMINARA, supra* note 4, at 7 (quoting Congressman Tim Bishop who believed that many businesses would be forced to shut down if H-2B visa program was unavailable).

11. *See* 20 C.F.R. § 655 (2015) (dictating requirements for admission of guestworkers under H-2B visa program).

12. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2012) (providing statutory mandate for H-2B visa program). Congress authorized the admission of temporary, unskilled laborers "if unemployed persons capable of performing such service or labor cannot be found in this country." *See id.*

13. *See* 20 C.F.R. § 655.10 (detailing DOL's prevailing wage methodology); *see also Prevailing Wage, USA VISA NOW*, <http://www.usavisanow.com/h-1b-visa/h1b-visa-resources/prevailing-wage/> (last visited Oct. 13, 2015) ("The prevailing wage rate is defined as the average wage paid to similarly situated employed workers in the requested occupation in the area of intended employment.").

14. *See CATA IV*, 774 F.3d 173, 177 (3d Cir. 2014) (describing wage requirements for employers of H-2B visa holders).

In *Comité de Apoyo a Los Trabajadores Agrícolas v. Perez (CATA IV)*,¹⁵ the plaintiffs challenged the DOL's prevailing wage methodology.¹⁶ While the DOL permitted employers to submit private wage surveys to calculate prevailing wage rates, these surveys featured wage rates that were significantly lower than those reported by government surveys.¹⁷ In light of these disparities, the Third Circuit held that the DOL's methodology violated the agency's statutory mandate to protect the American workforce.¹⁸

The Third Circuit's decision in *CATA IV* follows a line of cases that have systematically rebuked the DOL's rulemaking processes.¹⁹ Following *CATA IV*, the DOL must implement policies that reflect the congressional mandate prescribed by the H2-B visa program.²⁰ While this politically-fraught issue is far from resolved, the Third Circuit has repeatedly expressed its distaste for H-2B employers that abuse regulatory loopholes, the most recent example of this dissatisfaction manifesting in the court's *CATA IV* opinion.²¹

This Casebrief discusses the Third Circuit's ruling in *CATA IV* and examines the practical implications of that decision.²² Section II in-

15. 774 F.3d 173 (3d Cir. 2014).

16. *See id.* at 176 (introducing challenged provision in *CATA IV*).

17. *See id.* at 189–90 (noting disparity in prevailing wage calculations).

18. *See id.* at 180 (describing statutory mandate to protect American workforce).

19. *See* La. Forestry Ass'n v. U.S. Dep't of Labor (*Louisiana Forestry II*), 745 F.3d 653, 680 (3d Cir. 2014) (affirming grant of summary judgment in favor of government); *see also* Comité de Apoyo a Los Trabajadores Agrícolas v. Solis (*CATA II*), 933 F. Supp. 2d 700, 715–16 (E.D. Pa. 2013) (ordering vacatur of skill-level definition used in prevailing wage rule); La. Forestry Ass'n v. Solis (*Louisiana Forestry I*), 889 F. Supp. 2d 711, 715 (E.D. Pa. 2012) (upholding 2011 wage rule adopting prevailing wage methodology that excluded skill-level definition), *aff'd*, 745 F.3d 653 (3d Cir. 2014); Comité de Apoyo a Los Trabajadores Agrícolas v. Solis (*CATA I*), No. 09-240, 2010 WL 3431761, at *24–25 (E.D. Pa. Aug. 30, 2010) (finding skill-level definition in prevailing wage rule invalid under Administrative Procedures Act (APA)).

20. *See* 8 U.S.C. § 1101(a)(15)(H)(ii) (2012) (describing statutory mandate for H-2B visa program). *See generally* Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 75 Fed. Reg. 61,578, 61,579 (Oct. 5, 2010) (noting that prevailing wage methodology used in 2008 Wage Rule did “not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H-2B workers”).

21. *See CATA IV*, 774 F.3d at 191 (vacating prevailing wage rule permitting private survey data); *see also Louisiana Forestry II*, 745 F.3d at 680 (affirming grant of summary judgment in favor of government); *CATA II*, 933 F. Supp. 2d at 715–16 (ordering vacatur of skill-level definition used in prevailing wage rule); *Louisiana Forestry I*, 889 F. Supp. 2d at 715 (upholding 2011 wage rule adopting prevailing wage methodology that excluded skill-level definition); *CATA I*, 2010 WL 3431761, at *24–25 (finding skill-level definition in prevailing wage rule invalid under APA). *But see* Bayou Lawn & Landscape Servs. v. Perez, 81 F. Supp. 3d 1291, 1292–93 (N.D. Fla. 2014) (finding DOL lacked authority to regulate with respect to H-2B visa program).

22. *See CATA IV*, 774 F.3d at 191 (vacating prevailing wage rule that permitted private survey data to determine prevailing wages).

roduces key considerations in regulatory decision-making and provides a historic overview of the rulemaking associated with H-2B visa prevailing wage determinations.²³ Section III discusses plaintiffs' challenge to the use of private surveys for prevailing wage determinations in *CATA IV*.²⁴ Section IV analyzes the immediate impact of the court's decision on H-2B visa holders and applicants.²⁵ Finally, Section V provides advice for practitioners serving clients in the employment and immigration sectors and discusses how to best advocate for those clients during this transition period.²⁶

II. STUCK ON REPEAT: RULEMAKING REDUX

The Department of Labor is charged with administering the H-2B visa program in conjunction with other administrative agencies.²⁷ The DOL must promulgate rules for this program in accordance with the Administrative Procedure Act (APA), a federal statute that governs the scope of authority for administrative agencies.²⁸ Additionally, when overseeing the H-2B visa program, the DOL must follow the congressional mandates governing the admission of temporary guestworkers.²⁹ As a result of the far-reaching impacts of the guestworker program, the agency's rulemaking processes have attracted considerable lobbying efforts and led to numerous legal challenges.³⁰

A. Administrative Decision-Making

Congress charges administrative agencies with implementing statutory initiatives.³¹ "It is axiomatic that an administrative agency's power to

23. For a discussion of regulatory processes and prevailing wage regulations, see *infra* notes 27–87 and accompanying text.

24. For a discussion of the *CATA IV* decision, see *infra* notes 88–112 and accompanying text.

25. For a discussion of *CATA IV*'s impact on H-2B visa program, see *infra* notes 113–46 and accompanying text.

26. For a discussion of practitioner advice, see *infra* notes 147–63 and accompanying text.

27. See 8 U.S.C. § 1184(c)(1) (2012) (directing Attorney General to regulate admission of nonimmigrant aliens, after consulting appropriate agencies, including DOL).

28. See 5 U.S.C. § 500 (2012). For a discussion of administrative decision-making, see *infra* notes 31–40 and accompanying text.

29. For a discussion of H-2B visa program, see *infra* notes 41–44 and accompanying text.

30. For a discussion of historical regulatory development related to H-2B visa program, see *infra* notes 45–87 and accompanying text.

31. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 492 (4th ed. 2006) (discussing delegation of power by Congress to administrative agencies). Congressional delegation of power may be explicit or implicit. *Id.* Where the intent of Congress is clear, the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 491 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (setting precedent for what is now known as *Chevron* deference)).

promulgate legislative regulations is limited to the authority delegated by Congress.”³² Limitations on agency authority are codified in (1) statutes directed at particular programs and (2) overarching provisions, the most important of which is the APA.³³

The APA requires agencies “[t]o provide for public participation in the rule making process.”³⁴ Accordingly, when agencies propose new regulations or amend existing regulations, they must explain their goals and note their source of statutory authority.³⁵ Agencies must then consider any public comments made during a notice and comment period when adopting a final rule.³⁶

The APA also provides for judicial review of agency actions.³⁷ Only “final agency action[s]” are reviewable.³⁸ A reviewing court must set aside agency actions when it finds that a particular action was arbitrary or lacked statutory authority, or when the agency failed to observe proper procedu-

32. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (discussing agency authority).

33. See 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., *FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* § 8134 (2006) (detailing evolution of APA). Congress enacted the APA in 1946. *Id.*

34. See TOM C. CLARK, U.S. DEP’T OF JUSTICE, *ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 9 (Wm. W. Gaunt & Sons, Inc. reprinted ed. 1973) (1947) (citation omitted), available at <https://ia801902.us.archive.org/19/items/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947.pdf> [<https://perma.cc/28GM-T5FQ>] (explaining purpose of APA).

35. See *Administrative Procedure Act*, 5 U.S.C. § 553(b) (2012) (describing rulemaking process and requirements).

(b) General notice of proposed rule making shall be published in the Federal Register The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Id. § 553(b).

36. See *id.* § 553(c) (mandating notice and comment period). The Office of Management and Budget recommends that an agency “[p]repare and post on the agency’s Web site a response-to-comments document.” Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,440 (Jan. 25, 2007). Agencies may avoid the notice and comment period in specific instances, a process known as “direct final rulemaking.” See 32 WRIGHT & KOCH, *supra* note 33, § 8174.

37. See 5 U.S.C. §§ 701–706 (enumerating judicial review of administrative agency action).

38. See *id.* § 704 (detailing which agency actions are reviewable).

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Id.

ral requirements.³⁹ In practice, when a court finds an agency action invalid, it may remand the issue to the agency for further review without vacatur.⁴⁰

B. *H-2B Visa Program*

Established by the Immigration and Nationality Act of 1952 (Act), the H-2B visa program authorizes the admission of foreign workers into the United States to perform temporary, non-agricultural work when “persons capable of performing such service or labor cannot be found in this country.”⁴¹ The Act directs the Attorney General, in “consultation with appropriate agencies of the Government,” to regulate the admission of non-immigrant aliens.⁴² The Department of Homeland Security (DHS) and

39. *See id.* § 706(2)(A)–(D) (noting grounds for “sett[ing] aside agency action”).

The reviewing court shall . . .

(2) 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;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law

Id. Note, however, agencies generally enjoy deference in statutory interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). *Chevron* deference requires reviewing courts to defer to an agency’s statutory interpretation, so long as it is reasonable. *See id.*

40. The D.C. Circuit was the first to propose the alternative of remand without vacatur, despite the clear language of the statute requiring a reviewing court to set aside invalid actions. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). The Supreme Court has not yet commented on the validity of this approach. In the Eastern District of Pennsylvania, the court has come out two different ways. *Compare CATA I*, No. 09-240, 2010 WL 3431761, at *24–25 (E.D. Pa. Aug. 30, 2010) (recommending remand without vacatur), *with CATA II*, 933 F. Supp. 2d 700, 715–16 (E.D. Pa. 2013) (ordering vacatur of skill-level definition used in prevailing wage rule).

41. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2012) (defining parameters for temporary admission of foreign workers to United States). The H-2B visa program is “named for the statutory section [that] authorized [the] creation” of the program. *CATA IV*, 774 F.3d 173, 177 (3d Cir. 2014). The H-2A and H-2B visa programs were bifurcated in 1986, after Congress enacted the Immigration Reform and Control Act, Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411 (1986) (the Act). The H-2B visa program governs the admission of non-agricultural workers, while the H-2A visa program governs the admission of agricultural workers. *See id.*

42. *See* 8 U.S.C. § 1184(c)(1) (directing Attorney General to regulate admission of nonimmigrant aliens, after consulting appropriate agencies). The Homeland Security Act of 2002 transferred authority over the admission of nonimmigrant aliens from the Attorney General to the Secretary of Homeland Security. *See* 6 U.S.C. § 236(b) (2012).

the DOL currently administer the H-2B visa program.⁴³ DHS regulations instruct employers petitioning for H-2B visas to “apply for a temporary labor certification with the Secretary of Labor”⁴⁴

C. *The Prevailing Wage Saga*

At the direction of the DHS, the DOL has established its own set of regulations governing labor certifications for the H-2B visa program.⁴⁵ The labor certification process ensures first, that there is truly a lack of “able, willing, [and] qualified” workers in the United States before employers can utilize foreign workers, and second, that the employment of foreign workers “will not adversely affect the wages and working conditions of” the domestic workforce.⁴⁶ The availability of American workers is correlated to the wage offered for a given position.⁴⁷ As such, DOL labor certifications ensure “that the employment is not being filled by United States workers at the occupation’s ‘prevailing wage.’”⁴⁸

The DOL’s methodology for calculating prevailing wages has been the subject of debate since the agency issued its 1995 Interim Prevailing Wage Policy, which altered the established rule by bifurcating its *unskilled* labor classifications into different skill levels.⁴⁹ The agency further expanded changes to its prevailing wage methodology in its 2005 Wage Guidance, which divided H-2B occupations into four skill levels, borrowing from then-recent changes to the H-1B visa program for *skilled* workers.⁵⁰

43. See 6 U.S.C. § 236(b) (transferring authority over admission of nonimmigrant aliens to Secretary of Homeland Security); 8 C.F.R. § 214.2(h)(6)(iii)(A) (2015) (directing employers seeking admission of foreign workers to apply for temporary labor certification).

44. See 8 C.F.R. § 214.2(h)(6)(iii)(A) (“Prior to filing a petition with the director to classify an alien as an H-2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor for all areas of the United States”).

45. See *id.* § 214.2(h)(6)(iii)(D) (directing DOL to “establish procedures” for labor certifications for H-2B visa program).

46. See 8 U.S.C. § 1182(a)(5)(A)(i)(I)-(II) (prescribing conditions for admission of nonimmigrant aliens).

47. See *CATA IV*, 774 F.3d 173, 177-78 (3d Cir. 2014) (“[T]he higher the wage the greater the likelihood that domestic workers can be found for the employment”).

48. See *id.* at 178 (citing Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78,056 (Dec. 19, 2008) [hereinafter 2008 Wage Rule] (codified at 20 C.F.R. § 655.10(b)(2)).

49. See U.S. DEP’T OF LABOR, GAL NO. 4-95, INTERIM PREVAILING WAGE POLICY FOR NONAGRICULTURAL IMMIGRATION PROGRAMS 5-6 (May 18, 1995), available at http://wdr.doleta.gov/directives/attach/GAL4-95_attach.pdf [<http://perma.cc/55KA-BR7Q>] (announcing new skill-level definition for prevailing wage calculations).

50. See Memorandum from Emily Stover DeRocco, U.S. Dep’t of Labor to State Workforce Agency Adm’rs, Revised Prevailing Wage Determination Guidance 6-16 (May 9, 2005), available at <http://www.usimmigration.net/images/>

Additionally, the 2005 Wage Guidance authorized prevailing wage rates based on private employer surveys.⁵¹ Previously, rates had been based on government surveys, such as the Bureau of Labor Statistics Occupational Employment Statistics (OES) survey.⁵² However, the 2005 changes to the prevailing wage methodology were made without adhering to the requisite APA notice and comment period.⁵³

Three years later, the DOL promulgated the 2008 Wage Rule, which formally adopted the methodology changes first proposed in the 2005 Wage Guidance.⁵⁴ The agency once again did not seek public comment on the skill-level methodology.⁵⁵ Despite its failure to request comments, the DOL's policy shift was not insulated from criticism.⁵⁶ Some opponents suggested that, contrary to the purpose underlying the congressional mandate, the skill-level methodology and permissibility of private wage surveys would create loopholes for employers and depress wages for American workers.⁵⁷ Nevertheless, the DOL continued to promote skill-level methodology for prevailing wage calculations in its adoption of the 2009 Wage Guidance.⁵⁸ The 2009 Wage Guidance described how "OES

PW_guidance_memo_5-17-05.pdf [<http://perma.cc/838F-K6Z5>] (announcing new prevailing wage methodology based on four skill levels for H-2B visa program).

51. *See id.* at 14–16 (allowing for private employer surveys).

52. *See id.* at 3, 6–14 (altering prior methodology, which only permitted applicable government surveys); *see also* *CATA IV*, 774 F.3d at 178 (discussing alterations made in 2005 Wage Guidance).

53. *See CATA IV*, 774 F.3d at 178 (highlighting procedural irregularities in adoption of 2005 Wage Guidance).

54. *See* 2008 Wage Rule, 73 Fed. Reg. 78,020, 78,056 (Dec. 19, 2008) (codified at 20 C.F.R. §§ 655–56) (adopting four skill-levels definition and permitting use of private employer surveys).

[T]he prevailing wage for labor certification purposes shall be the arithmetic mean . . . of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides [an acceptable] survey

Id.

55. *See CATA IV*, 774 F.3d at 179 (noting failure of DOL to seek notice and comment period).

56. *See* 2008 Wage Rule, 73 Fed. Reg. at 78,031 (discounting comments critical of new methodology).

Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

Id.

57. *See id.* (noting comments received in response to change in prevailing wage methodology).

58. *See* U.S. DEP'T OF LABOR, PREVAILING WAGE DETERMINATION POLICY GUIDANCE: NONAGRICULTURAL IMMIGRATION PROGRAMS 7–13, 17 apps. A–B (revised

survey data for an occupation would be manipulated mathematically to produce four different prevailing wages”⁵⁹

Organizations representing H-2B guestworkers and American workers challenged the 2008 Wage Rule and the 2009 Wage Guidance in *Comité de Apoyo a Los Trabajadores Agrícolas v. Solis (CATA I)*.⁶⁰ The District Court for the Eastern District of Pennsylvania struck down the DOL’s skill-level definitions.⁶¹ The court found that the agency action was arbitrary due to its failure to explain why a skill-level definition was appropriate for a visa program dedicated to *unskilled* workers.⁶² Rather than vacate the rule entirely, which would have left the DOL without an alternative method for calculating prevailing wage rates, the district court remanded the matter to the agency with orders to promulgate a new rule within 120 days.⁶³

In response to this decision, the DOL engaged in a new rulemaking process and announced the 2011 Wage Rule, this time providing a notice and comment period.⁶⁴ The agency determined that its earlier skill-level definition “d[id] not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H-2B workers.”⁶⁵ In light of this determination, the DOL’s final 2011 Wage Rule abandoned the enumeration of varying skill levels present in the agency’s earlier rule, but still allowed employers to submit private wage

Nov. 2009), available at http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf [<http://perma.cc/6XP5-VFP2>] (providing mathematical formula for calculating prevailing wage based on four skill-level definitions). The DOL simply “republished the 2005 Wage [Rule] in November 2009,” retitling it the 2009 Wage Guidance. See *id.*; see also *CATA IV*, 774 F.3d at 179 n.5.

59. See *CATA IV*, 774 F.3d at 179 (describing methodology established by 2009 Wage Guidance).

60. No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (challenging 2008 Wage Rule and 2009 Wage Guidance under APA).

61. See *id.* at *19 (examining skill-level definition in calculating prevailing wage).

62. See *id.* (criticizing DOL for its lack of reasoned explanation).

In the absence of any valid regulatory language authorizing the use of skill levels in determining the prevailing wage rate, however, the four-tier structure of skill levels set out in the guidance letters—which is entirely untethered from any other statutory or regulatory provisions, and which affirmatively creates the wages paid to H-2B workers—constitutes a legislative rule which must be subjected to notice and comment. It has not been so subjected and it, too, is therefore invalid.

Id.

63. See *id.* at *25 (ordering remand instead of vacatur); *id.* (“Because the issue of wage rates is of [] central importance, this court will not vacate the regulations but rather . . . accord the agency 120 days in which to promulgate new, valid regulations for determining the prevailing wage rate in the H-2B program.”).

64. See *CATA II*, 933 F. Supp. 2d 700, 707 (3d Cir. 2013) (reviewing DOL’s rulemaking process following *CATA I*).

65. See Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 75 Fed. Reg. 61,578, 61,579 (proposed Oct. 5, 2010) [hereinafter Proposed 2011 Wage Rule] (announcing DOL findings with regard to prior prevailing wage methodology).

surveys under limited circumstances.⁶⁶ The DOL estimated the 2011 Wage Rule would increase wages by \$4.83 per hour for both H-2B workers and domestic workers recruited in conjunction with H-2B visa applicants, which would in turn create an additional yearly “transfer cost” of \$847.4 million in wages for employers participating in the program.⁶⁷ Despite the agency’s findings and subsequent changes to its prevailing wage methodology, the DOL was unable to implement the 2011 Wage Rule, largely due to congressional appropriations delays.⁶⁸

Meanwhile, in *Louisiana Forestry Association v. Solis* (*Louisiana Forestry I*),⁶⁹ employer associations brought a suit challenging the DOL’s authority to promulgate the 2011 Wage Rule and the rule’s procedural validity under the APA.⁷⁰ The plaintiffs from *CATA I* intervened on behalf of the government.⁷¹ On appeal to the Third Circuit, they ultimately defeated the challenge to the 2011 Wage Rule in *Louisiana Forestry Association v. U.S. Department of Labor* (*Louisiana Forestry II*).⁷²

Despite the judicial victory upholding the validity of the 2011 Wage Rule, economic barriers linked to Congress’s denial of funding prevented the new wage rule methodology from being implemented, and the DOL

66. Compare 2008 Wage Rule, 73 Fed. Reg. at 78,029, 78,056 (including four-tier methodology featuring differing skill levels), with Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 76 Fed. Reg. 3,452, 3,453, 3,484 (Jan. 19, 2011) [hereinafter Final 2011 Wage Rule] (codified at 20 C.F.R. § 655.10) (eliminating skill level differentiation). The 2011 Wage Rule also curtailed the use of private employer surveys comparatively more than the 2008 Wage Rule by only allowing employers to use private surveys when applicable government surveys were unavailable. See Proposed 2011 Wage Rule, 75 Fed. Reg. at 61,581.

67. See Final 2011 Wage Rule, 76 Fed. Reg. at 3,470–71.

The change in the method of determining wages results in transfers from H-2B workers to U.S. workers and from U.S. employers to both U.S. workers and H-2B workers. A transfer from H-2B workers to U.S. workers arises because, as wages increase, jobs that would otherwise be occupied by H-2B workers will be more acceptable to a larger number of U.S. workers. Additionally, faced with higher H-2B wages, some employers may find domestic workers relatively less expensive and may choose to not participate in the H-2B program and, instead, employ U.S. workers. Although some of these U.S. workers may be drawn from other employment, some of them may otherwise be or remain unemployed or out of the labor force entirely, earning no compensation. *Id.* at 3,470; see also *Louisiana Forestry I*, 889 F. Supp. 2d 711, 719 (E.D. Pa. 2012) (describing as transfer payments as “transfer cost”), *aff’d*, 745 F.3d 653 (3d Cir. 2014).

68. See *CATA II*, 933 F. Supp. 2d at 708 (discussing delays in promulgating 2011 Wage Rule following its initial publication due to congressional appropriations issues).

69. 889 F. Supp. 2d 711, 715 (E.D. Pa. 2012), *aff’d*, 745 F.3d 653 (3d Cir. 2014).

70. See *id.* at 715 (challenging 2011 Wage Rule).

71. See *id.* at 719 (describing procedural history of *CATA* plaintiffs intervening on behalf of government).

72. 745 F.3d 653, 680 (3d Cir. 2014).

continued to adhere to the 2008 Wage Rule as a result.⁷³ Frustrated by the DOL's inability to promulgate a successful alternative prevailing wage methodology and its continued use of the invalidated 2008 Wage Rule, the CATA plaintiffs again sued the agency.⁷⁴ In *Comité de Apoyo a Los Trabajadores Agrícolas v. Solis (CATA II)*,⁷⁵ the plaintiffs sought vacatur of the skill-level definition entirely.⁷⁶ The district court granted the requested remedy and barred the DOL from using skill-level definitions in granting any further H-2B visa labor certifications.⁷⁷

In 2013, the DOL responded to the district court's vacatur order by promulgating an Interim Final Wage Rule.⁷⁸ This rule eliminated any reference to skill levels in calculating prevailing wages for H-2B visa applicants.⁷⁹ The agency, however, continued to allow private employer surveys.⁸⁰

73. See *CATA II*, 933 F. Supp. 2d at 708–09 (tracing DOL's postponement of 2011 Wage Rule effective date in light of appropriations concerns). The DOL has continued to use the 2008 Wage Rule since Congress passed the Consolidated and Further Continuing Appropriations Act in November 2011. See *id.* at 709. However, while the conference report to the Act detailed the need to postpone implementation of the 2011 Wage Rule to "allow congress to address" the Wage Rule, the two additional appropriations riders released since November 18, 2011, again denied funding for the 2011 Wage Rule but did not instruct the DOL to continue to adhere to the previously invalidated 2008 Wage Rule. See *id.* at 708 (internal quotation marks omitted).

74. See *id.* at 709 (explaining return of CATA plaintiffs to federal court).

75. 933 F. Supp. 2d 700 (3d Cir. 2013).

76. See *id.* at 709 (challenging continued use of skill-level definition).

The DOL now continues to use the 2008 Wage Rule, nearly thirty (30) months after Judge Pollak invalidated the Rule, and two years after the DOL found that the Rule violates the DOL's statutory and regulatory mandates. While the DOL anticipates continued barriers to funding the 2011 Rule, the DOL has not engaged in any efforts to promulgate a new regulation or to otherwise validly grant H-2B labor certifications.

Id.

77. See *id.* at 715 (granting vacatur of skill-level definition for calculating prevailing wage rates); *id.* ("In light of the extent and seriousness of the DOL's errors, as well as the DOL's representation that the DOL is not engaging in efforts to validly grant H-2B labor certifications, this consequence hardly compels leaving the 2008 Wage Rule in place . . .").

78. See Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 Fed. Reg. 24,047, 24,053 (Apr. 24, 2013) [hereinafter Interim Final Wage Rule] (codified at 8 C.F.R. §§ 214.2, 655.10) (noting motivation for promulgating rule). The Interim Final Wage Rule was promulgated pursuant to the good cause exception in the APA. See *id.* at 24,055; see also Administrative Procedure Act, 5 U.S.C. § 553(b)(B) (2012) (discussing good cause exception to notice and comment period under APA). After the vacatur, the DOL's prevailing wage determinations were left unregulated, necessitating the quick action taken by agency in promulgating this interim rule. See Interim Final Wage Rule, 78 Fed. Reg. at 24,055–56.

79. See *id.* at 24,053–54 (explaining new methodology implemented by Interim Final Wage Rule).

80. See *id.* at 24,054–55 (permitting employers to submit private surveys for calculation of prevailing wages).

While the agency evaluated public comments on its Interim Final Wage Rule, Congress passed an appropriations act that, “[f]or the first time in over two years . . . did not prohibit the implementation or enforcement of the 2011 Wage Rule.”⁸¹ Optimistic that it could now promulgate a valid wage methodology, the DOL announced its intention to propose a new prevailing wage rule using “the 2011 Wage Rule as a starting point.”⁸²

The *CATA* plaintiffs were not confident in the DOL’s ability to reform its earlier methodology.⁸³ Therefore, on May 8, 2014, they filed suit in the Eastern District of Pennsylvania challenging the agency’s use of private employer surveys as authorized by the DOL’s 2009 Wage Guidance and 2008 Wage Rule.⁸⁴ In *Comité de Apoyo a Los Trabajadores Agrícolas v. Perez (CATA III)*,⁸⁵ the district court rejected the plaintiffs’ argument, finding the issues were not ripe for adjudication.⁸⁶ The court cited the agency’s notice of proposed rulemaking in concluding that the agency’s decision lacked the finality necessary for judicial intervention.⁸⁷

III. FOURTH TIME’S A CHARM?: THE *CATA* PLAINTIFFS RETURN TO COURT

The *CATA* plaintiffs appealed the district court’s dismissal of their challenge to the DOL’s 2008 Wage Rule and the 2009 Wage Guidance in *Comité de Apoyo a Los Trabajadores Agrícolas v. Perez (CATA IV)*.⁸⁸ Unlike the Eastern District, the Third Circuit determined that this issue was ripe for adjudication.⁸⁹ In reaching the merits of the case, the court concluded that the rulemaking was “arbitrary and capricious and in violation of the APA.”⁹⁰ It ordered vacatur of both the 2008 Wage Rule and the 2009 Wage Guidance, which effectively invalidated the prevailing wage regulations that permitted private employer surveys.⁹¹

81. See Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 79 Fed. Reg. 14,450, 14,453 (Mar. 14, 2014) (to be codified at 20 C.F.R. pt. 655) (discussing political dynamic related to 2011 Wage Rule).

82. See *id.* at 14,450 (announcing proposed rulemaking).

83. See *CATA III*, No. 14-2657, 2014 WL 4100708, at *1 (E.D. Pa. July 23) (summarizing plaintiffs’ complaint), *rev’d*, 774 F.3d 173 (3d Cir. 2014).

84. See *id.* (noting that *CATA* plaintiffs sought summary judgment vacating DOL’s regulation permitting private wage surveys).

85. No. 14-2657, 2014 WL 4100708 (E.D. Pa. July 23), *rev’d*, 774 F.3d 173 (3d Cir. 2014).

86. See *id.* at *7-10 (evaluating fitness for judicial review and hardship to parties).

87. See *id.* at *8 (citing notice of proposed rulemaking in fitness analysis). Judge Davis determined that judicial intervention “would only disrupt the agency’s work and perhaps prolong the suffering of those Plaintiffs represent.” See *id.* at *9.

88. 774 F.3d 173 (3d Cir. 2014).

89. See *id.* at 176 (announcing reversal of district court). For a discussion of ripeness in *CATA IV*, see *infra* notes 92-97 and accompanying text.

90. See *id.* (concluding on merits of case). For a discussion of the validity of rulemaking under the APA, see *infra* notes 98-108 and accompanying text.

91. See *id.* at 176, 191 (striking down prevailing wage rule permitting private wage surveys).

A. *Ripeness*

The Third Circuit concluded that the district court erred in finding that the case was not ripe.⁹² The ripeness requirement, the court explained, prevents cases from “becoming entangled in premature adjudication.”⁹³ With respect to agency actions, “considerations of ripeness reflect the need to protect . . . agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way”⁹⁴

A ripeness analysis is twofold, requiring a court to consider whether the issues are fit for judicial consideration and the degree of hardship to the parties if judicial consideration is withheld.⁹⁵ The longstanding use of the challenged prevailing wage rule rendered it “sufficiently final” to subject it to adjudication.⁹⁶ Moreover, the continued application of this rule had adversely affected the American workforce by depressing wages and creating “unjustified disparities between employers who submit private wage surveys and . . . [those] who [] pay the OES prevailing wage.”⁹⁷

B. *Validity Under the Administrative Procedure Act*

The Third Circuit “considered but rejected” the possibility of remanding the case to the district court for a decision on the merits.⁹⁸ Instead, “in the interest of judicial economy,” the court reached the merits of the

92. *See id.* at 186 (reversing district court’s conclusion that planned rulemaking rendered issue unripe).

93. *See id.* at 182 (annunciating purpose of ripeness requirement).

94. *See id.* at 182–83 (first alteration in original) (internal quotation marks omitted) (highlighting aspects of ripeness requirement specific to agency rulemaking decisions).

95. *See id.* at 183 (noting two elements associated with ripeness review).

96. *See id.* (internal quotation marks omitted) (evaluating fitness for judicial intervention). The Third Circuit found that the “DOL’s wage determinations predicated on private wage surveys [were] final agency actions,” despite the agency’s notice of proposed rulemaking. *See id.*; *see also* Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, 79 Fed. Reg. at 14,450 (announcing DOL’s intent to promulgate new wage methodology). The court reasoned that the published regulation and “the 2009 Wage Guidance have been in place for years” *CATA IV*, 774 F.3d at 183 (noting long-standing policy of DOL).

97. *See CATA IV*, 774 F.3d at 186 (adding that employers are themselves being burdened by current rule). The Third Circuit noted that employers’ use of private surveys increased dramatically since the vacatur of the skill-level definition in *CATA II*. *See id.* at 185–86 (identifying increased popularity of private surveys); *see also CATA II*, 933 F. Supp. 2d 700, 716 (E.D. Pa. 2013) (vacating skill-level definition for prevailing wage calculation in H–2B visa application). The court concluded that employers were simply “seek[ing] to exploit the lingering loophole in [the] DOL’s administration of the H–2B program.” *CATA IV*, 774 F.3d at 185. Further, the court highlighted the DOL’s own finding “that these wage levels [we]re causing wage depression among domestic workers.” *See id.* at 186.

98. *See CATA IV*, 774 F.3d at 186 (rejecting DOL’s request to remand case to district court).

case.⁹⁹ The court evaluated the 2008 Wage Rule and the 2009 Wage Guidance under the APA and ultimately found that both regulations were invalid.¹⁰⁰

The 2008 Wage Rule was “procedurally invalid” and “substantively arbitrary,” according to the court’s analysis.¹⁰¹ The DOL’s failure to explain why it allowed employers to use private wage surveys when valid OES surveys were available made the rule procedurally invalid.¹⁰² Although the DOL drastically changed its policy in 2005 to allow for private surveys, this policy shift was never explained in the 2005 Wage Guidance—where it first appeared—nor in subsequent rulemaking, despite comments it received during the rulemaking process.¹⁰³

The Third Circuit also found the 2008 Wage Rule was “arbitrary and capricious,” in violation of the APA.¹⁰⁴ The court cited the DOL’s own findings against it to conclude that the rule was invalid, noting that the DOL had endorsed OES wage surveys as “the most consistent, efficient, and accurate means of determining the prevailing wage rate for the H–2B visa program.”¹⁰⁵ The DOL’s “[f]ailure to consider [all] relevant factors” without “an adequate explanation” led the court to “judicially brand[] [the rulemaking] as arbitrary and capricious.”¹⁰⁶

Additionally, the court found that the 2009 Wage Guidance was irreparably flawed because it directly contradicted the DOL’s prevailing wage definition by evaluating wage surveys based on skill level.¹⁰⁷ Moreover, the court was troubled by the impact private wage surveys had on the DOL’s ability to carry out its statutory charge of ensuring the H–2B visa program does not “adversely affect wages and working conditions of United States workers”¹⁰⁸

99. *See id.* at 186–87 (noting that factual record was fully developed, U.S. workers were being prejudiced by existing administration of program, and Third Circuit exercises plenary review over purely legal questions raised by case).

100. *See id.* at 187–91 (holding 2008 Wage Rule “procedurally invalid” and “substantively arbitrary” and 2009 Wage Guidance contrary to DOL’s own findings).

101. *See id.* at 187–90 (finding 2008 Wage Rule violated Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (D) (2012)).

102. *See id.* at 187–89 (noting requirements dictated in 5 U.S.C. § 706(2)(D)).

103. *See id.* at 188 (criticizing DOL for failing to address comments directed at potential problems with private employer surveys).

104. *See id.* at 189–90 (concluding 2008 Wage Rule violated 5 U.S.C. § 706(2)(A)).

105. *See id.* at 189 (quoting Final 2011 Wage Rule, 76 Fed. Reg. at 3,465).

106. *See id.* at 190 (quoting *FEC v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986)) (internal quotation marks omitted).

107. *See id.* (noting that wage calculations based on skill-level considerations were disallowed by court in *CATA I* and in 20 C.F.R. § 655.10(b)(2) (2013) thereafter).

108. *See id.* (detailing DOL’s statutory mandate under H–2B visa program); *see also* 8 U.S.C. §§ 1101(a)(15)(H)(ii), 1182(a)(5)(A)(i)(I)–(II).

C. Remedy

After striking down these regulations, the Third Circuit considered the appropriate remedy under the APA.¹⁰⁹ In light of how difficult it had been for the agency to promulgate a valid rule in its past three attempts, the court was hesitant to remand the matter to the DOL for further review.¹¹⁰ Instead, it ordered vacatur, a remedy reserved for exceptional cases.¹¹¹ To hold otherwise, the court felt, would be tantamount to “‘legally sanction[ing] an agency’s disregard of its statutory or regulatory mandate.’”¹¹²

IV. DÉJÀ VU: CRITIQUING A FAMILIAR NARRATIVE

Following the Third Circuit’s vacatur, the DOL immediately stopped issuing wage determinations based on private employer surveys.¹¹³ The agency has reiterated its intent to propose a new methodology for future wage determination rulemaking, though it has also conceded any new regulation would “not be finalized until 2015 at the earliest.”¹¹⁴ If history is any indication, the DOL’s forthcoming wage rule promises continued litigation.¹¹⁵ Moreover, the DOL’s consistent failure to adhere to the APA requirements consigns any future rulemaking to greater scrutiny.¹¹⁶ While the court’s ruling in *CATA IV* follows an emerging trend in the Third Circuit, the opinion contradicts rulings in other circuits.¹¹⁷ As

109. See *CATA IV*, 774 F.3d at 191 (discussing remedies under APA).

110. See *id.* (referring to valid 2011 Wage Rule that was initially delayed by congressional appropriations and expressing frustration over lengthy implementation of valid rule).

111. See *id.* (ordering vacatur).

112. See *id.* (alteration in original) (refusing to sanction DOL’s invalid policies).

113. See *Foreign Labor Certification: News & Updates*, U.S. DEP’T OF LABOR [hereinafter *DOL Update*], <http://www.foreignlaborcert.doleta.gov/news.cfm> [<http://perma.cc/KYC2-F7NY>] (last updated Oct. 13, 2015) (announcing DOL’s response on December 9, 2014 to *CATA IV* ruling). The DOL advised employers that pending prevailing wage requests would be calculated based on the appropriate OES wage for the given occupation. See *id.*

114. See *Intent to Issue Declaratory Order*, 79 Fed. Reg. 75,179, 75,182 (Dec. 17, 2014) (noting that proposed rulemaking would not occur immediately).

115. See *CATA IV*, 774 F.3d at 191 (vacating rule that allowed employers to submit private surveys for purposes of determining prevailing wages); see also *CATA III*, No. 14–2657, 2014 WL 4100708, at *10 (E.D. Pa. July 23) (refusing to adjudicate prevailing wage challenge on ripeness grounds), *rev’d*, 774 F.3d 173 (3d Cir. 2014); *CATA II*, 933 F. Supp. 2d 700, 715–16 (E.D. Pa. 2013) (ordering vacatur of skill-level definition used in prevailing wage rule); *CATA I*, No. 09–240, 2010 WL 3431761, at *24–25 (E.D. Pa. Aug. 30, 2010) (striking down skill-level definition used in prevailing wage rule).

116. See *CATA IV*, 774 F.3d at 191 (concluding that use of private employer surveys was procedurally invalid, arbitrary, and in violation of APA); see also *CATA I*, 2010 WL 3431761, at *24–25 (finding skill-level definition arbitrary and capricious and in violation of APA).

117. For a discussion of *CATA IV*’s consistency with other precedent, see *infra* notes 119–36 and accompanying text.

such, interested parties have responded to *CATA IV* with both criticism and praise.¹¹⁸

A. *More of the Same?*

The Third Circuit's vacatur order in *CATA IV* was unsurprising given the court's obvious frustration with the DOL's continuously failed reforms to its prevailing wage methodology.¹¹⁹ Congress admitted foreign workers under the H-2B visa program on the condition that doing so would not "adversely affect the wages and working conditions of [American] workers."¹²⁰ Nevertheless, in past wage rules, the DOL capitulated to powerful employer groups by promulgating rules that divided unskilled labor into various skill levels.¹²¹ Specifically, employers used the skill-level distinction to manipulate wage data in their favor, which resulted in diminished wages and concomitant harm to the American workforce.¹²² Furthermore, during the nine-month period after the district court vacated this rule, the DOL saw a dramatic rise in the number of private employer surveys submitted.¹²³ The DOL was certainly aware of this trend and its implications, as reflected in the agency's findings following the invalidation of the 2008 Wage Rule.¹²⁴

The Third Circuit's vacatur remedy is consistent with the court's own precedent and appropriately responds to the DOL's recalcitrance to adopt a valid prevailing wage methodology.¹²⁵ After the district court ordered remand in *CATA I*, the agency was given the opportunity to rectify the 2008 Wage Rule.¹²⁶ In the face of political opposition, the DOL was una-

118. For a discussion of critics' response to *CATA IV*, see *infra* notes 137-46 and accompanying text.

119. See *CATA IV*, 774 F.3d at 190 (citing DOL's own findings in concluding rule was invalid). "[W]e see no reason to allow DOL to continue to use a wage guidance that contradicts its own rules." *Id.*

120. See *id.* at 190; see also 8 U.S.C. § 1101(a)(15)(H)(ii) (2012) (establishing H-2B visa program). Congress conditioned this program on the employer's ability to demonstrate that "unemployed persons capable of performing such service or labor cannot be found in this country." See *id.*

121. See SEMINARA, *supra* note 4 (discussing special interests and congressional lobbying for prevailing wage definition).

122. See *CATA II*, 933 F. Supp. 2d 700, 707-08 (E.D. Pa. 2013) (discussing DOL's own finding that 2008 Wage Rule did not adequately protect U.S. and H-2B workers).

123. See *CATA IV*, 774 F.3d at 185-86 (noting 3,182% increase in private wage survey use after *CATA II* ruling).

124. See *supra* notes 17 & 62.

125. See *CATA IV*, 774 F.3d at 191 (vacating prevailing wage rule that allowed use of private employer surveys); see also *CATA II*, 933 F. Supp. 2d at 715 (granting vacatur of skill-level definition for calculating prevailing wage rates). In both *CATA II* and *CATA IV*, the courts determined that different portions of the prevailing wage rule violated the APA. Compare *CATA IV*, 774 F.3d at 191, with *CATA II*, 933 F. Supp. 2d at 715.

126. See *CATA I*, No. 09-240, 2010 WL 3431761, at *26 (E.D. Pa. Aug. 30, 2010) (remanding rule to DOL after finding it invalid under APA).

ble to effectuate the necessary changes to its prevailing wage methodology.¹²⁷ The *CATA* plaintiffs thus returned to court for relief, where vacatur was finally imposed.¹²⁸ The Third Circuit viewed *CATA IV* in this historical context and opted to preserve judicial resources by ordering vacatur from the outset.¹²⁹

Though the Third Circuit has now struck down two objectionable provisions of the 2008 Wage Rule, and the DOL has promised new rulemaking, the prevailing wage saga is far from over.¹³⁰ Litigation in other circuits has raised new concerns over the legitimacy of the DOL's authority to issue temporary labor certifications for the H-2B visa program.¹³¹ Notably, employer groups have attacked this delegation of power in hopes of mitigating "losses" that will result from court-ordered changes to the prevailing wage methodology.¹³² In the separate case of *Louisiana Forestry II*, for example, the Third Circuit explicitly upheld the DOL's authority to oversee wage determination.¹³³ However, immediately following the *CATA IV* decision, the United States District Court in the Northern District of Florida in *Bayou Lawn & Landscape Services v. Perez*¹³⁴ ruled that the DOL lacked authority to promulgate rules related to the H-2B visa program.¹³⁵ An appeal has been filed, and while the Eleventh

127. See *CATA II*, 933 F. Supp. 2d at 708 (discussing delays implementing 2011 Wage Rule caused by congressional appropriations decisions).

128. See *id.* at 715 (granting vacatur of skill-level definitions).

129. See *CATA IV*, 774 F.3d at 191 (ordering vacatur that permitted private wage survey data). The judicial-economy argument in *CATA IV* differs greatly from the judicial-economy argument offered in *CATA III*. Compare *id.*, with *CATA III*, No. 14-2657, 2014 WL 4100708, at *10 (E.D. Pa. July 23) (refusing to adjudicate case on ripeness grounds), *rev'd*, 774 F.3d 173 (3d Cir. 2014). In *CATA III*, the district court opted to wait for the DOL's new prevailing wage rule, citing "judicial economy." See *id.* at *10. The Third Circuit, by contrast, cited the historical context of the case in deciding *CATA IV* on the merits. *CATA IV*, 774 F.3d at 191.

130. *CATA IV*, 774 F.3d at 191 (citing DOL's own findings to conclude rule was invalid); see also *supra* note 82 and accompanying text.

131. See *Bayou Lawn & Landscape Servs. v. Perez*, 81 F. Supp. 3d 1291, 1292-93 (N.D. Fla. 2014); see also *In re Island Holdings, LLC*, No. 2013-PWD-00002 (BALCA Dec. 3, 2013) (challenging DOL's authority to issue supplemental prevailing wage determinations that increased set wage rate employers must pay).

132. See *Bayou Lawn & Landscape*, 81 F. Supp. 3d at 1292-93 (challenging DOL's authority to issue temporary labor certifications for H-2B visa program); see also *CATA IV*, 774 F.3d at 189-90 (describing disparity between OES survey based wages and private employer survey based wages).

133. See *Louisiana Forestry II*, 745 F.3d 653, 680 (3d Cir. 2014) (upholding DOL's authority to promulgate 2011 Wage Rule). But see *Bayou Lawn & Landscape*, 2014 WL 7496045, at *1 (concluding DOL lacked authority to regulate H-2B visa program).

134. No. 3:12cv183/MCR/CJK, 2014 WL 7496045 (N.D. Fla. Dec. 18, 2014).

135. See *id.* at *1 (finding DOL lacked authority to regulate under H-2B visa program).

Circuit has not yet weighed in on this issue, if it affirms the lower court's decision, the holding would create a circuit split.¹³⁶

B. *Mixed Reviews*

Proponents of the Third Circuit's ruling in *CATA IV* argue that the decision benefits both American employees and guestworkers.¹³⁷ These proponents argue that the court's ruling will force employers to advertise jobs at accurate prevailing wages, rather than at "artificially reduced wage[s]."¹³⁸ Further, they assert that higher wages will attract more American workers and, in cases where foreign workers are still needed, the resulting impact on the prevailing wage methodology will provide H-2B visa holders with higher wages and better working conditions.¹³⁹

In contrast, opponents highlight the potential negative economic impact of the *CATA IV* ruling.¹⁴⁰ Employer associations have been particularly vocal in their opposition to the court-ordered changes to the prevailing wage methodology and have noted that these changes make it more difficult and costly to meet "seasonal labor shortage needs."¹⁴¹

136. *Compare Louisiana Forestry II*, 745 F.3d at 680 (holding DOL had authority to promulgate 2011 Wage Rule), *with Bayou Lawn & Landscape*, 2014 WL 7496045, at *1 (finding DOL lacked authority to regulate with respect to H-2B visa program).

137. *See, e.g.,* Ross Eisenbrey, *A Victory for U.S. and Migrant Workers*, ECON. POL'Y INST. (Dec. 9, 2014, 10:38 AM), <http://www.epi.org/blog/a-victory-for-u-s-and-migrant-workers/> [<http://perma.cc/M2RX-2CRV>] (praising Third Circuit's decision in *CATA IV*).

138. *See id.* (noting prevailing wage should now reflect true wages in geographic area, rather than below-market wages).

139. *See id.* (discussing benefits of changes to prevailing wage rule); *see also* Meredith Stewart, *Federal Appeals Court Ruling in SPLC Case Closes Loophole, Protects Workers' Right to Fair Wages*, S. POVERTY L. CTR. (Dec. 4, 2014), <http://www.splcenter.org/get-informed/news/federal-appeals-court-ruling-in-splc-case-closes-loophole-protects-workers-right-t> [<https://perma.cc/DEX9-VLLY>] (announcing *CATA IV* decision).

140. *See* Otieno B. Ombok, *DOL Nullifies Use of Employer-Provided Wage Surveys in H-2B Program*, NAT'L L. REV. (Dec. 11, 2014), <http://www.natlawreview.com/article/dol-nullifies-use-employer-provided-wage-surveys-h-2b-program> [<http://perma.cc/8UYS-ZHML>] (denouncing DOL's response to *CATA IV* ruling).

The DOL announcement is devastating news to employers that utilize H-2B temporary foreign workers to meet their seasonal labor shortage needs, as DOL's default OES-based wage determinations set the mandatory minimum wage prohibitively high—as much as \$4–\$5/hour higher than the market wages reflected in private wage surveys. Because the DOL's wages do not appear to reflect accurately the actual industry/market wage, H-2B employers particularly in the landscaping and seafarming industries have been relying on private surveys to establish a fair prevailing wage for their seasonal workers. This decision essentially nullifies this practice, creating a significant wage differential that ultimately will make many contract bids unprofitable.

Id.

141. *See* Roy Maurer, *Court Strikes Down DOL Wage Guidance for H-2B Workers*, SOC'Y FOR HUM. RESOURCE MGMT. (Dec. 19, 2014), <http://www.shrm.org/hrdis>

These groups continue to lobby aggressively for relief from what they consider an “onerous” administrative policy.¹⁴²

Regardless of one’s ideological position, the unsettled nature of the H-2B visa labor certification process is problematic.¹⁴³ Employers must fulfill their labor needs, and employees, both in the United States and abroad, need meaningful employment prospects. Consistency and certainty are critical to maintaining a steady workforce.¹⁴⁴ The seemingly endless series of cases litigating various aspects of the H-2B visa program detrimentally impact both employers and employees.¹⁴⁵ Moreover, the contradictory rulings prevent both groups from making educated decisions based on clear guidance from the controlling administrative agencies.¹⁴⁶

ciplines/global/articles/pages/dol-wage-guidance-h-2b.aspx [http://perma.cc/NUD5-LV9A] (discussing hardship for employers caused by changes to prevailing wage calculations). Some opponents describe the alternative OES-based wages as setting “the mandatory minimum wage prohibitively high.” *See id.* (quoting Otieno B. Ombok) (internal quotation marks omitted). They claim that these wages “can be as much as \$4–\$5 an hour higher than the market wages reflected in private wage surveys.” *See id.* They further predict the DOL’s new methodology may “make many contract bids unprofitable.” *See id.* (quoting Otieno B. Ombok) (internal quotation marks omitted).

142. *See* Craig Regelbrugge, *DOL No Longer Accepting H-2B Wage Surveys*, AMERICANHORT (Dec. 11, 2014, 4:22 PM), [http://perma.cc/F64B-2WNK](http://americanhort.theknowledgecenter.com/AmericanHortNews/index.cfm?view=detail&colid=124&cid=335&mid=8275&CFID=1258245&CFTOKEN=578107406e1fd5c2-5DC7F8E2-AF03-A8DD-DE70516AA193C00B) (describing efforts to lobby Congress for relief from current prevailing wage rules). As noted in *CATA IV*, employer associations continue to lobby for favorable congressional appropriations efforts to block the DOL’s implementation of an alternative prevailing wage methodology. *See id.* The most recently debated congressional appropriations bill “d[id] not include any wage relief for H-2B employers.” *See id.*

143. *See Louisiana Forestry II*, 745 F.3d 653, 680 (3d Cir. 2014) (upholding DOL’s power with respect to H-2B visa program). *But see* Bayou Lawn & Landscape Servs. v. Perez, 81 F. Supp. 3d 1291, 1292–93 (N.D. Fla. 2014) (holding DOL did not have authority to regulate H-2B visa program).

144. *See* MADELINE ZAVODNY WITH TAMAR JACOBY, U.S. CHAMBER OF COMMERCE & IMMIGRATIONWORKS USA, *THE ECONOMIC IMPACT OF H-2B WORKERS* 9 (Michael Dendas ed., 2010), available at http://www.immigrationworksusa.org/uploaded/IW-Chamber_H-2B_report.pdf [http://perma.cc/2U3P-AAG3] (describing short timeline for H-2B visa program). “The H-2B process requires precise and exacting timing on the part of employers. The windows during which they must advertise for workers and file the recruiting report required for a labor certification are specified and short.” *Id.*

145. *See supra* notes 19, 116, 132 and accompanying text.

146. *See supra* note 143. Recent cases have questioned the authority delegated by the DHS to the DOL. *See, e.g., Bayou Lawn-Landscape*, 81 F. Supp. 3d at 1292–93. Lack of authority would invalidate any prevailing wage rule promulgated by the DOL. *Id.*

V. PRACTITIONER ADVICE

Practitioners in the immigration and employment sectors must advise their clients regarding changes to the H-2B visa program.¹⁴⁷ Employers seeking to participate in this program must now rely on OES survey data to determine the appropriate prevailing wage rate for a given occupation.¹⁴⁸ Practitioners will need to advise employers regarding the implications of this difference, particularly if those clients previously used private surveys.¹⁴⁹ In most cases, the difference between these two sources is sig-

147. See *CATA IV*, 774 F.3d at 191 (vacating former labor certification rule that allowed private survey data to set prevailing wage); see also DOL Update, *supra* note 113 (announcing changes to H-2B labor certification process following *CATA IV* decision). The DOL labor certification process is merely the first step toward obtaining an H-2B visa. *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/h-2b-temporary-non-agricultural-workers> [<http://perma.cc/6372-82ZF>] (last updated Apr. 28, 2015) (listing requirements for H-2B visa applicants). After receiving a labor certification from the DOL, an employer must then submit Form I-129 to the U.S. Citizenship and Immigration Services office for approval. *Id.* H-2B visa workers may apply for admission once the employer receives approval from the U.S. Citizenship and Immigration Services office. *Id.*

148. See DOL Update, *supra* note 113 (requiring OES survey data in place of private employer surveys).

149. See *id.* (announcing new procedures for labor certification process following Third Circuit's ruling in *CATA IV*). The DOL advised employers of immediate changes to its prevailing wage methodology. See *id.*

Employers with pending prevailing wage request: Employers who have a prevailing wage determination request pending that is based on an employer-provided survey may modify that request to utilize a Service Contract Act (SCA) or Davis Bacon Act (DBA) wage determination or a wage based on a Collective Bargaining Agreement (CBA). That request will not be treated as a new filing and the request will be processed based on the original filing date. Employers are reminded that the request must specify precisely which SCA or DBA wage determination is being used or provide a copy of the Collective Bargaining Agreement. In the absence of such a request, the [National Prevailing Wage Center] will issue the prevailing wage determination based on the OES mean for the occupation.

Employers who have received a prevailing wage determination: Employers who have already received a prevailing wage determination based on an employer-provided survey but who have not yet filed their application with the Chicago National Processing Center (NPC) may request a redetermination from the National Prevailing Wage Center irrespective of the time limits set forth in 20 CFR 655.10(g). An employer who has received a prevailing wage determination based on an employer-provided survey may use the survey-based wage rate in its recruiting. Employers who *have* filed their application with the NPC, and whose applications are adjudicated favorably, will receive a supplemental prevailing wage determination (SPWD) based on the OES mean for the occupation, along with the certification. The SPWD will provide the opportunity to seek a redetermination under 20 CFR 655.10(g). If, upon redetermination, the use of an alternative wage source (SCA, DBA, or CBA) is approved, the employer should return the original certification to the NPC and a new certification will be issued.

nificant and may negatively affect an employer's financial outlook.¹⁵⁰ Therefore, practitioners representing H-2B visa workers should also make their clients aware of the new requirements.¹⁵¹ Educating guestworkers will help ensure that employers do not take advantage of this population.¹⁵²

Practitioners should discuss the uncertainty surrounding the DOL's authority to issue temporary labor certifications for the H-2B visa program.¹⁵³ This issue will become more relevant if the Eleventh Circuit creates a circuit split.¹⁵⁴ Any successful challenge to the DOL's authority would cast doubt on the entire labor certification process, crippling the H-2B visa program.¹⁵⁵ Employers and employees alike should be prepared for future changes to the temporary guestworker program pending resolution of this issue.¹⁵⁶

Groups representing employer associations and guestworkers now have the opportunity to participate in the DOL's rulemaking process.¹⁵⁷ Following the Third Circuit's ruling in *CATA IV*, the DOL reiterated its intention to propose new prevailing wage methodologies.¹⁵⁸ The DOL

Id.

150. See Ombok, *supra* note 140 (highlighting disparity in wages between private employer surveys and OES surveys).

151. See *CATA IV*, 774 F.3d at 191 (ordering vacatur of rule allowing private surveys for prevailing wage determinations); see also DOL *Update*, *supra* note 113 (announcing changes to labor certification process following Third Circuit's ruling in *CATA IV*).

152. See EL COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, <http://www.cata-farmworkers.org/english%20pages/News.htm> (last visited Oct. 15, 2015) (providing resources for farmworker community); S. POVERTY L. CTR., <http://www.splcenter.org/> (last visited Oct. 15, 2015) (aiding immigrant workers). El Comité de Apoyo a Los Trabajadores Agrícolas was a named plaintiff in *CATA IV*. See *CATA IV*, 774 F.3d at 173.

153. See *supra* note 145 and accompanying text.

154. See *supra* notes 134-36 and accompanying text.

155. See *Bayou Lawn & Landscape Servs. v. Perez*, 81 F. Supp. 3d 1291, 1292-93 (N.D. Fla. 2014) (challenging DOL authority, seeking to block enforcement of alternative prevailing wage methodology).

156. See Angelo A. Paparelli, *Oh What a Tangled Immigration Web We Weave: A Knotty Future for the H-2B Program*, NATION IMMIGRATORS (Mar. 31, 2013), <http://www.nationofimmigrants.com/employment-based-immigration/guest-column-oh-what-a-tangled-immigration-web-we-weave-a-knotty-future-for-the-h-2b-program/> [<http://perma.cc/AN9C-YU5L>] (updated Apr. 3, 2013) (discussing uncertainty associated with H-2B visa program).

157. See *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 79 Fed. Reg. 14,450, 14,453 (Mar. 14, 2014) (seeking comment from public on prevailing wage methodology).

158. See *id.* at 14,450 (announcing intent to propose new prevailing wage methodology, using 2011 Wage Rule as starting point); see also *Intent to Issue Declaratory Order*, 79 Fed. Reg. 75,179, 75,182 (Dec. 17, 2014) (reiterating intent to propose new prevailing wage methodology). In *CATA IV*, the court stressed the importance of APA compliance. See *CATA IV*, 774 F.3d 173, 187-91 (3d Cir. 2014). Accordingly, the DOL must adhere to the APA requirement of notice and comment. *Id.*

will accept comment from the public, presenting the opportunity for interested parties to suggest alternative methodologies.¹⁵⁹ Practitioners should advocate on behalf of their clients by preparing comments that most directly advance their clients' goals.¹⁶⁰

The H-2B visa program is in a state of flux.¹⁶¹ As such, practitioners must remain vigilant and adapt to the changing landscape as courts resolve the outstanding issues.¹⁶² Employers and H-2B workers are acutely affected by changes to the H-2B visa program, and practitioners must consult closely with these clients.¹⁶³

VI. CONCLUSION

Challengers have litigated numerous aspects of the H-2B visa program, jockeying for more favorable treatment under the existing regulatory framework.¹⁶⁴ In *CATA IV*, the Third Circuit resolved a dispute over the use of private survey data in prevailing wage determinations.¹⁶⁵ The court concluded that these private surveys were inconsistent with the DOL's statutory mandate to protect the American workforce.¹⁶⁶ Moreover, the DOL's rulemaking process was procedurally invalid under the APA.¹⁶⁷ The court's vacatur order in *CATA IV* is consistent with the Third Circuit's generally employee-friendly position demonstrated in the court's related H-2B visa cases.¹⁶⁸

159. See *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 79 Fed. Reg. at 14,450 (announcing public comment period).

160. See *id.* (announcing public comment period).

161. See *CATA IV*, 774 F.3d at 191 (vacating prevailing wage rule that permitted private survey data); see also *supra* notes 144, 155 and accompanying text.

162. See *CATA IV*, 774 F.3d at 191 (announcing changes to H-2B visa program administration).

163. See *SEMINARA*, *supra* note 4 (discussing H-2B visa impact on employers); see also *HUNHOFF & SIEVERS*, *supra* note 5, at 9 (noting H-2B visa impact on employees).

164. See *supra* notes 19, 116, 132, 147 and accompanying text.

165. See *CATA IV*, 774 F.3d at 176 (describing challenge in use of private survey data in prevailing wage determinations for H-2B visa program).

166. See *id.* at 191 (finding 2009 Wage Guidance was inconsistent with congressional mandate).

167. See *id.* at 187-89 (concluding rulemaking was procedurally invalid under APA).

168. See *Louisiana Forestry II*, 745 F.3d 653, 680 (3d Cir. 2014) (affirming grant of summary judgment in favor of government); see also *CATA II*, 933 F. Supp. 2d 653, 715-16 (3d Cir. 2014) (ordering vacatur of skill-level definition used in prevailing wage rule); *Louisiana Forestry I*, 889 F. Supp. 2d 711, 715 (E.D. Pa. 2012) (upholding 2011 Wage Rule adopting prevailing wage methodology that excluded skill-level definition), *aff'd*, 745 F.3d 653 (3d Cir. 2014); *CATA I*, No. 09-240, 2010 WL 3431761, at *24-25 (E.D. Pa. Aug. 30, 2010) (finding skill-level definition in prevailing wage rule invalid under APA).

The guestworker program remains an important source of labor for particular industries.¹⁶⁹ The DOL and other controlling administrative agencies must therefore work to balance the interests of both employers and employees.¹⁷⁰ Furthermore, courts continue to differ in their interpretations of the appropriate way to accomplish this lofty goal and administer the H-2B visa program accordingly.¹⁷¹ Thus, practitioners must engage all levels of government to advocate on behalf of their clients.¹⁷²

169. See SEMINARA, *supra* note 4, at 7 (noting some employers might “be forced to close” without H-2B visa holders).

170. See 8 U.S.C. § 1101(a)(15)(H)(ii) (2012) (conditioning H-2B visa program on protection of American workforce).

171. See *supra* note 144 and accompanying text.

172. See Regelbrugge, *supra* note 142 (discussing congressional lobbying for prevailing wage definition); see also 8 U.S.C. § 1101(a)(15)(H)(ii) (delegating power to administrative agencies); *CATA IV*, 774 F.3d 173, 179 (3d Cir. 2014) (initiating judicial review of administrative procedures).

