No. 11-17365

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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VICTOR RIVERA RIVERA, ET AL.,

Plaintiffs-Appellants,

v.

PERI & SONS FARMS, INC.,

Defendant-Appellee.

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On Appeal from the United States District Court
for the District of Nevada

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# BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Cases -- continued

Cases -- continued



**Statutes:**

Statutes -- continued

**Miscellaneous:**



**Federal Register:**

Miscellaneous -- continued

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants with respect to whether the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 201 *et seq*., requires employers to reimburse their employees who enter the country on H-2A visas to perform temporary agricultural work for the cost of their inbound transportation expenses and visa fees, if the failure to

reimburse such costs would effectively reduce the employees' wages below the FLSA minimum wage during their first workweek.[1]

The Secretary is responsible for the administration and enforcement of the FLSA. *See* 29 U.S.C. 204(a) and (b), 216(c), and 217. The Secretary also is responsible for the procedures employers must follow to obtain labor certifications for the admission of H-2A workers and for the enforcement of the program's worker protection provisions. *See* 8 U.S.C. 1184(c)(1) and 1188; 20 C.F.R. Part 655, subpart B;[2] 29 C.F.R. Part 501. The Secretary has compelling reasons to participate as *amicus curiae* in this case, because she has a substantial interest in the correct interpretation of the FLSA to ensure that all employees receive the wages to which they are entitled. In particular, the Department is interested in the correct interpretation of section 3(m) of the Act, 29 U.S.C. 203(m), and the regulations interpreting it, including the requirements that employers may not shift their business expenses to employees and

[1] The H-2A visa program, *see* 8 U.S.C. 1101(a)(15)(H)(ii)(a), allows employers to bring foreign workers into the United States in very limited circumstances to perform temporary agricultural labor or services, but only after the U.S. Department of Labor ("Department") has certified that there are not enough able and qualified U.S. workers available for the position and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. *See* 8 U.S.C. 1184(c)(1) and 1188(a)(1).

[2] Citations to the H-2A regulations are to the current regulations promulgated in 2010. *See* 75 Fed. Reg. 6884 (Feb. 12, 2010).

that employees must receive at least the minimum wage each week free and clear. *See* 29 C.F.R. 531.3, 531.32-.36.

## ARGUMENT

### THE DISTRICT COURT ERRED WHEN IT HELD THAT TRANSPORTATION AND VISA EXPENSES OF H-2A EMPLOYEES ARE NOT PRIMARILY FOR THE BENEFIT OF THE EMPLOYER AND THUS THAT THE EMPLOYER DOES NOT HAVE TO PAY THEM EVEN IF THEY EFFECTIVELY BRING THE EMPLOYEES' WAGES BELOW THE FLSA MINIMUM WAGE

1. The FLSA is a statute of broad remedial purpose. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). Congress enacted the minimum wage provision of the FLSA to protect workers from substandard wages and to prevent labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); 29 U.S.C. 202(a), (b). Therefore, the Supreme Court "has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction" in order to effectuate the broad remedial and humanitarian purposes of the Act. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985) (internal citation omitted); *see Solis v. State of Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011); *Klem v. Country of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000).

2. Section 6 of the FLSA requires covered employers to pay their nonexempt employees at least the minimum wage (currently

$7.25 per hour) for each hour worked. *See* 29 U.S.C. 206(a). Generally, employers must pay the wages due in cash. However, section 3(m) of the FLSA provides that an employer also may count as wages "the reasonable cost, as determined by the Administrator [of the Wage and Hour Division], to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. 203(m). The regulations implementing this provision state that "other facilities" must be "something like board or lodging." 29 C.F.R. 531.32(a); *see Ramos-Barrientos v. Bland*, 661 F.3d 587, 597 (11th Cir. 2011) ("other facilities" should be "considered as being in pari materia with the preceding words 'board and lodging'") (internal quotation marks omitted); *Soler v. G. & U., Inc.*, 833 F.2d 1104, 1109 (2d Cir. 1987) (the regulations "provide guidance for the identification of items that may be considered to be in pari materia with 'board and lodging'"). For example, the regulations provide that employers may take a credit toward wages due if they provide such "other facilities" as merchandise furnished at company stores or "electricity, water, and gas furnished for the noncommercial personal use of the employee." 29 C.F.R. 531.32(a). However, the "cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer

will not be recognized as reasonable and may not therefore be included in computing wages." 29 C.F.R. 531.3(d)(1). The regulations further state that expenses such as tools of the trade, uniforms required by the nature of the business, and "transportation charges where such transportation is an incident of and necessary to the employment," are primarily for the convenience of the employer and, therefore, may not be included as wages. 29 C.F.R. 531.32(c); *see Soler*, 833 F.2d at 1109 (the balancing of benefits test established by the regulations provides a common-sense and logical approach to resolve whether costs for facilities other than board and lodging may be counted toward the payment of an employee's wage).

3. The regulations recognize two corollaries that flow naturally from the general rule that an employer may not take credit for facilities that are for its primary benefit, both of which are necessary to ensure that the purpose of section 3(m) is not circumvented. First, section 3(m) applies "regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages." 29 C.F.R. 531.29; *see* 29 C.F.R. 531.36(b). Thus, section 3(m) is applicable whether an employer pays a stipulated wage that is less than $7.25 per hour and makes an addition to that wage for facilities it provides in order to reach the required minimum wage rate, or

the employer stipulates a wage rate of $7.25 per hour and makes deductions for facilities provided from that stipulated rate.

Second, "the wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee." 29 C.F.R. 531.35. For example, an indirect kick-back occurs if an employer requires an employee to provide tools of the trade or a uniform required by the nature of the business. Although the employer may in such a case appear to pay the full minimum wage in cash, it then requires the employee to purchase an item that primarily benefits the employer. In that situation, "there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act." 29 C.F.R. 531.35. This is true because there is no legal or logical difference between an employer deducting the cost of such a business expense directly from a worker's wages, and an employer shifting such a cost to an employee to bear directly. *See Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir. 2002).

Therefore, for an employer to actually pay the FLSA minimum wage it must pay the full amount due without any kick-back; employer business expenses may not be shifted to employees

because, as the regulations provide, the wages must be paid "finally and unconditionally or 'free and clear.'" 29 C.F.R. 531.35. "This rule prohibits any arrangement that 'tend[s] to shift part of the employer's business expense to the employees ... to the extent that it reduce[s] an employee's wage below the statutory minimum.'" *Ramos-Barrientos*, 661 F.3d at 594 (quoting *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972)); *see Gordon v. City of Oakland*, 627 F.3d 1092, 1095 (9th Cir. 2010); *Donovan v. Crisostomo*, 689 F.2d 869, 876 (9th Cir. 1982); Wage and Hour Opinion Letter FLSA2001-7, 2001 WL 1558768 (Feb. 16, 2001).

4. The critical question under section 3(m) is whether the item in question qualifies as a "facility" because it is in pari materia with board and lodging, or is a business expense that is primarily for the benefit of the employer. In this case, the district court evaluated the nature of travel and immigration expenses paid by employees recruited in Mexico to perform temporary agricultural work pursuant to the H-2A program for Peri & Sons. *Rivera v. Peri & Sons Farms, Inc.*, No. 3:11-CV-00118, 2011 WL 3177538, at *1 (D. Nev. July 27, 2011).[3] Relying

[3] The employees also raised other claims, such as that they were not paid for all hours worked. The Secretary's participation as amicus is limited to whether an H-2A employee's travel and immigration expenses are primarily for the benefit of the employer.

upon the *Arriaga* decision,[4] the employees argued that the employer's failure to reimburse them for these expenses violated the FLSA when the costs effectively brought their pay in the first workweek below the minimum wage, in violation of the "free and clear" principle. The district court rejected the employees' argument. *Id*. at *4.

The court relied upon the fact that the H-2A regulations (20 C.F.R. 655.122(h)(1)) specifically address inbound transportation, and they only require reimbursement if the employee completes 50% of the contract period, whereas the FLSA section 531.35 kick-back regulation does not expressly describe such expenses as tools of the trade. *Rivera*, 2011 WL 3177538, at *4. The district court concluded that "the specific controls the general" and, thus, that the H-2A rules prevail over the general FLSA kick-back prohibition. *Id*.

The court stated that it accepted the principle in *Powell v. U.S. Cartridge*, 339 U.S. 497 (1950), that employers must comply with cumulative employment regulations that do not expressly conflict; however, "this does not mean that the requirements of 655.122(h)(1) are incorporated into section

[4] In *Arriaga*, 305 F.3d 1228, the Eleventh Circuit held that transportation and visa fees of H-2A workers are primarily for the benefit or convenience of the employer and, therefore, that the FLSA requires employers to reimburse such fees in the first workweek to the extent necessary to raise the employees' wages up to the minimum wage.

531.35's definition of kick-backs." *Rivera*, 2011 WL 3177538, at *4. It stated that the employees' argument went beyond reading the FLSA kick-back regulation and the H-2A travel reimbursement regulation as cumulative requirements, and that the employees actually attempted to incorporate the H-2A requirement into the FLSA's definition of a kick-back. *Id*. at *5. The district court concluded that section 531.35 does not incorporate the H-2A requirement, and it noted that a regulation cross-referenced in the section 3(m) regulations (29 C.F.R. 778.217) only mentions travel expenses incurred while working for an employer but not those incurred to begin work in the first instance. Therefore, the court concluded that these expenses incurred by H-2A employees "are simply not 'kickbacks' under section 531.35 itself," noting that an employer is not expected to pay travel costs for a worker to move from Ohio to Nevada to obtain employment. *Id*.

5. The district court misinterpreted the guidance that the regulations implementing section 3(m) provide regarding this key issue and erred in failing to give deference to the Department's interpretations of its regulations. Section 3(m) of the FLSA allows an employer to take credit only for "the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities." 29 U.S.C. 203(m). The Department's regulations

implementing section 3(m) clarify that facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable. *See* 29 C.F.R. 531.3(d)(1). In particular, the regulations provide that transportation that "is an incident of and necessary to the employment" will not be recognized as a facility. 29 C.F.R. 531.32(c). By contrast, the provision of transportation for ordinary home-to-work commuting can constitute a facility for which the employer may take credit. *See* 29 C.F.R. 531.32(a).

6. As the Eleventh Circuit concluded in *Arriaga,* 305 F.3d at 1242 (an H-2A case), and as explained in Wage and Hour's Field Assistance Bulletin No. 2009-2 (Aug. 21, 2009), www.dol.gov/whd/FieldBulletins/index.htm (copy attached as Addendum A), addressing the H-2B visa program,[5] the nature and requirements of these visa programs dictate that the employer is the primary beneficiary of the transportation expenses and visa fees because they are an "incident of and necessary to the employment" of such workers.

a. The *Arriaga* court noted that the dictionary definition of the term "incident" is "anything which inseparably belongs to, or is connected with, or inherent in, another thing," and the definition of "necessary" is "of an inevitable nature:

[5] The H-2B visa program, *see* 8 U.S.C. 1101(a)(15)(H)(ii)(b), is a substantially similar visa program for the admission of workers to perform temporary nonagricultural labor or services.

inescapable." 305 F.3d at 1242. The court emphasized that the employers who elect to participate in the visa program understand that the nonimmigrant workers they employ are not coming from commutable distances. In that situation, under 29 C.F.R. 531.32(c), one-time transportation costs "are an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of the employment of H-2A workers [and thus] transportation will be needed, and not of the daily commuting type, whenever employing H-2A workers." *Id*.

The *Arriaga* court also stated that the regulations draw a consistent line "between those costs arising from the employment itself and those that would arise in the course of ordinary life." 305 F.3d at 1242. "Other facilities" must be something like board or lodging, and the regulations give as examples clothing, household effects, and electricity, water and gas furnished for the employee's personal use. *See* 29 C.F.R. 531.32(a). Thus, "the line is drawn based on whether the employment-related cost is a personal expense that would arise as a normal living expense." 305 F.3d at 1243. The court concluded that one-time transportation expenses from a foreign country are not in pari materia with board and lodging; such expenses are not ordinary living expenses, because they do not have substantial value to an employee that can be used

independently of the job performed, and they do not ordinarily arise in an employment relationship, unlike daily home-to-work commuting costs. 305 F.3d at 1242-43.

Similarly, with regard to visa costs, the *Arriaga* court concluded that such costs were "necessitated by the Grower's employment of the Farmworkers under H-2A program," which involves applying for certification to bring foreign workers into the country. 305 F.3d at 1244. These costs do not arise in ordinary life but are certain to arise under the H-2A program; further, the visas restrict the workers to the particular work described in the application and limit them to working for the employer who obtained the temporary labor certification. Thus, such costs are not ordinary living expenses, unlike food, board, and commuting costs, and therefore they "are not the type of expense they are permitted to pass on to the Farmworkers as 'other facilities.'" *Id*. Accordingly, the employer may not shift such costs to the employees if doing so effectively brings their wages below the FLSA minimum wage in their first workweek of employment. *Id*.[6]

[6] The fact that H-2A employees derive some benefit from the employment relationship that flows from the transportation and visa costs does not mean that they are the primary beneficiaries of these expenses. The case law recognizes that an employer may still be the primary beneficiary of an expense, and therefore must pay for it if the failure to do so would bring the employee's wages below the minimum wage, even though the item in question also provides some benefit to the employee. *See Reich*

In the decade since the *Arriaga* decision, numerous courts have come to the same conclusion in both H-2A and H-2B cases. *See, e.g.*, *Morante-Navarro v. T&Y Pine Straw*, Inc., 350 F.3d 1163, 1166 n.2 (11th Cir. 2003) (H-2B); *Salazar-Martinez v. Fowler Brothers, Inc.*, 781 F. Supp. 2d 183 (W.D.N.Y. 2011) (H-2A); *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F. Supp. 2d 117 (E.D.N.C. 2011) (H-2B); *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175 (W.D.N.Y. 2011) (H-2B); *Perez-Benites v. Candy Brand, LLC*, No. 1:07-CV-1048, 2011 WL 1978414 (W.D. Ark. May 20, 2011) (H-2A); *Rosales v. Hispanic Employee Leasing Program*, No. 1:06-CV-877, 2008 WL 363479 (W.D. Mich. Feb. 11, 2008) (H-2B); *Rivera v. Brickman Group*, No. 05-1518, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008) (H-2B); *Martinez-Bautista v. D&S*

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*v. Japan Enterprises Corp.*, 91 F.3d 154 (9th Cir. 1996) (Table), 1996 WL 387667, at *6 (cocktail dresses that the employer required nightclub employees to wear were uniforms that employer was required to provide, despite the fact that one employee wore the top of an outfit to church once, because "it is possible that a portion of the outfit could be worn outside work but still be the financial responsibility of the employer"); *Brennan v. Modern Chevrolet Co.*, 363 F. Supp. 327, 330, 333 (N.D. Tex. 1973), *aff'd*, 491 F.2d 1271 (5th Cir. 1974) (Table) (car dealership was the primary beneficiary of demonstrator cars it provided to its car salesmen, even though 90% of the mileage was for the employees' own personal use). Indeed, even lodging, from which the employee clearly derives some benefit, does not always qualify as a facility. *See,* e.g., *Ramos-Barrientos*, 661 F.3d at 595-98 (housing employer is required by law to provide to H-2A employees is a business expense primarily for the benefit of the employer); *Marshall v. DeBord d/b/a/ Bernie's Rest Haven*, No. 77-106-C, 1978 WL 1705 (E.D. Okla. July 27, 1978) (lodging not a section 3(m) facility where employees were required to live on-site at a nursing home in order to be available at all times to care for the residents).

*Produce*, 447 F. Supp. 2d 954 (E.D. Ark. 2006) (H-2A); *DeLuna-Guerrero v. North Carolina Grower's Ass'n, Inc.*, 338 F. Supp. 2d 649 (E.D.N.C. 2004) (H-2A). The Fifth Circuit, however, came to the opposite conclusion in an H-2B case. *See Castellanos-Contreras v. Decatur Hotels*, 622 F.3d 393 (5th Cir. 2010) (en banc, 8-6).

b. Moreover, Bulletin 2009-2 emphasized that the visa programs impose significant obligations on an employer that chooses to participate, and an employer is authorized to obtain workers only if it has demonstrated to the Department that, absent foreign guest workers, it would not have sufficient numbers of employees to perform its work. Specifically, under the H-2A program, employers must follow various prescribed recruiting steps when filing an Application for Temporary Employment Certification in order to test the labor market, to determine whether adequate numbers of U.S. workers are available for the job in question, and must offer terms and conditions that will not adversely affect U.S. workers. Employers must: submit a job order to the relevant State Workforce Agency, which must refer to the employer each U.S. worker who applies for the job opportunity; place two newspaper advertisements for the job, including one in the Sunday paper; offer and pay at least the required wage rate specified by the Department (H-2A rates exceed the FLSA minimum wage rate, by significant amounts in

some states, *see* 76 Fed. Reg. 79711 (Dec. 22, 2011)); offer full-time employment of at least 35 hours per week; guarantee to provide employment for at least three-fourths of the workdays during the total period of employment; offer housing at no cost to U.S. workers who are not reasonably able to return to their residence within the same day; provide daily transportation between the housing and the job site at no cost; reimburse inbound transportation costs if the employee completes 50 percent of the period of the work contract; provide the equivalent of worker's compensation insurance; contact its former U.S. workers in that job during the previous year and offer them employment; conduct any additional recruitment ordered by the Department; attest that the job opportunity is not vacant because the former occupants are on strike or locked out; and submit a report to the Department regarding its recruitment efforts. *See* 8 U.S.C. 1188(c)(4); 20 C.F.R. 655.121-.122, 655.135, 655.151-.156. The Department will issue a labor certification only after an employer has completed its U.S. recruitment efforts, and only if all these steps demonstrate that there are not sufficient U.S. workers available to perform the work and that hiring guest workers will not adversely affect similarly employed U.S. workers. *See* 8 U.S.C. 1188(a)(1); 20 C.F.R. 655.103(a). Similar, although not as

extensive, requirements apply to the H-2B program. *See* 20 C.F.R. 655.15, 655.20-.22.

As Field Assistance Bulletin 2009-2 explains, employers benefit far more than usual from the preliminary expenses necessary for the workers' employment. The employers' choice to utilize this process, and their proof that they are unable to find qualified and available U.S. workers, is evidence of their specific need for, and the benefit derived from, these foreign workers. Indeed, the entire application process is designed to demonstrate that the employer would not otherwise be able to fulfill its employment needs.

In contrast to the employers' greater-than-normal benefit from these expenses, the H-2A guest workers who enter the country under this visa program benefit less than employees typically do from travel to take a new job because of the limitations on their rights. The positions are, by definition, temporary ("tied to a certain time of year by an event or pattern, such as a short annual growing cycle" and generally required to be less than twelve months, *see* 20 C.F.R. 655.103(d))); thus, there is no possibility of permanent employment, no matter how well the workers perform or what qualifications they possess or acquire. The employees' visas require them to work for a particular agricultural employer, for a particular term, performing specified duties. *See* 8 C.F.R.

214.2(h)(5)(iii). The employees are not permitted to quit that job and use their visa to seek work from other nonagricultural employers in the area or to quit and remain in the U.S. *See* 8 C.F.R. 214.2(h)(5)(vii)-(viii). Indeed, the H-2A employer must notify the Department of Homeland Security ("DHS") if a worker quits or is fired before the end date of employment specified in the application or if the work ends more than 30 days before the end of the certified period. *See* 8 C.F.R. 214.2(h)(5)(vi); 20 C.F.R. 655.122(n). When the work period approved for that employer is completed or the workers' employment is terminated, whichever occurs first, the employees must leave the country (absent any extension to work for another certified H-2A employer or change of status pursuant to DHS regulations). *See* 20 C.F.R. 655.135(i). Thus, H-2A workers are not able to use their transportation to the U.S. and their visa to find work generally or to remain in the U.S. after their approved work ends. Accordingly, Bulletin 2009-2 finds that the travel and visa expenses of temporary foreign workers are "an incident of and necessary to the employment" with their certified employers and, therefore, the employers are the primary beneficiaries of these expenses. *See* 29 C.F.R. 531.32(c).

It is evident that there are many significant differences between the relocation of a U.S. employee within the country for a permanent job and the move of an H-2A employee. For example,

a U.S. employee moving to a new location to start work might remain with that employer for many years, and good performance could lead to a promotion. Alternatively, the employee might quit or be fired; nevertheless, that employee would still be entitled to remain in the new community, and that employee would have the option to look for work with any other employer in that community or simply to remain in the community with friends or family while unemployed. In contrast, the transportation expenses of H-2A employees are not typical relocation costs; they are incurred as a result of travel away from the employee's foreign home for specific, temporary employment, not a change in the employee's domicile for permanent employment. Thus, the primary beneficiary analysis is very different in the U.S. employee situation than in the H-2A context, and the district court's reliance upon the analogy of a worker moving from Ohio to Nevada is consequently flawed. *See Rivera*, 2011 WL 3177538, at *5.

7. Contrary to the district court's conclusion here, *id.*, the fact that the kick-back regulation does not expressly mention travel and immigration costs does not indicate that such expenses are not employer business expenses. The district court relied upon the Fifth Circuit's decision in *Decatur Hotels* for its conclusion that the inbound transportation costs of H-2A workers are not similar to "tools of the trade" for purposes of

applying the kick-back regulation. In *Decatur Hotels,* the Fifth Circuit emphasized that no statute or regulation specifically provides that inbound travel and visa expenses must be reimbursed when it concluded that applying the kick-back regulation to such expenses "stretches the concept of 'tools of the trade' too far." *Decatur Hotels*, 622 F.3d at 400. The section 3(m) regulations, however, set forth general principles and, of course, cannot contain an example addressing every specific fact situation. Indeed, the kick-back regulation essentially recognizes this fact by prefacing its discussion of an employer that requires a worker to provide "tools of the trade" with the words "[f]or example." 29 C.F.R. 531.35. Even more significantly, the following sentence of the kick-back regulation cross-references section 531.32(c), which sets forth a lengthy list of examples of expenses that are for the primary benefit of the employer. The examples include such diverse expenses as electric power used for business production, company police and guard protection, taxes and insurance on the employer's buildings, dues paid to the chamber of commerce or other organizations, medical services required under worker's compensation or similar laws, and "transportation charges where such transportation is an incident of and necessary to the employment." 29 C.F.R. 531.32(c). This regulation then cross-references another regulation, 29 C.F.R. 778.217, to make clear

that, although “normal everyday” home-to-work commuting costs are primarily for the benefit of the employee, 29 C.F.R. 778.217(d), “temporary excess” travel expenses incurred “on a particular occasion” such as where an employee must “report for work at a place other than his regular workplace” may be excluded from the regular rate of pay for overtime purposes because such expenses are incurred for the benefit or convenience of the employer. 29 C.F.R. 778.217(b)(5). Thus, because the kick-back regulation necessarily encompasses various transportation costs, treating such costs as kick-backs does not stretch the concept of “tools of the trade” too far.

The district court emphasized that the cross-referenced regulation (29 C.F.R. 778.217) does not specifically address pre-employment transportation expenses. *See Rivera*, 2011 WL 3177538, at *5. Again, this regulation simply sets forth a general rule in subsection (a), and then in subsection (b) provides “illustrations” or examples of expenses that must be included or may be excluded from the regular rate. It does not create an exhaustive list of all transportation-related expenses that would qualify as “excess” or “particular occasion” occurrences that are primarily for the benefit of the employer. Therefore, the absence of an example describing the appropriate treatment of various pre-employment travel costs is meaningless.

8. Similarly, contrary to the district court's conclusion here, the fact that the H-2A regulatory provisions specifically impose transportation costs on employers at the 50 percent point of the work contract does not justify negating the applicability of the FLSA based upon the maxim that "the specific controls the general." 2011 WL 3177538, at *4. This principle of statutory construction does not apply to this situation; it applies when there is a conflict between two provisions of law. *See* 2A Sutherland Statutory Construction (2007 Edition) § 46:5, 224 ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail."); *Xilinx, Inc. v. Commissioner of Internal Revenue*, 567 F.3d 482, 489 (9th Cir. 2009).

The district court ignored the fact that there is no conflict between the H-2A rule requiring reimbursement at the 50 percent point of the contract period and the FLSA requirement for reimbursement up to the minimum wage level in the first workweek. *See Arriaga*, 305 F.3d at 1235 ("There has been no demonstration here that it is impossible to simultaneously comply with both sets of regulations."); *DeLuna-Guerrero*, 338 F. Supp. 2d at 663 ("[T]here is no indication that it is impossible to comply with both laws."); *Rivera*, 2008 WL 81570, at *3 ("[T]here is no question that an employer can simultaneously comply with both the INA [H-2B] and the FLSA."). Thus, under

the FLSA, in the first workweek the employer must pay the minimum wage (currently $7.25 per hour) plus the transportation and visa costs. However, to comply under H-2A, the employer must pay only the higher H-2A prevailing wage rate; the employer must reimburse the travel expenses only if the employee completes 50 percent of the contract period.[7] As the Supreme Court stated in *Powell*, Congress specifically recognized that the coverage of the FLSA "overlaps that of other federal legislation affecting labor standards," and an employer must comply with both the FLSA and other applicable laws simultaneously when they are not in irreconcilable conflict by determining "the respective wage requirements under each Act and applying the higher requirement as satisfying both." 339 U.S. at 518-19. Therefore, contrary to the district court's assertion in declining to apply *Powell*, the employees did not seek to graft the H-2A transportation reimbursement requirement

[7] For example, assume that the H-2A required wage rate is $10 per hour, and that an employee worked 40 hours in the first workweek and incurred $300 in travel and immigration expenses. To comply with the FLSA, the employer must pay $7.25 x 40 = $290, plus $300 = $590. To comply under H-2A, the employer must pay $10.00 x 40 = $400 in the first workweek. Because an employer must comply with the higher requirement, it must pay $590 in the first workweek. Therefore, it has effectively paid $190 in transportation costs for purposes of H-2A compliance (even though that law did not require it to do so at that point). If the employee completes 50 percent of the contract period, the employer would have to pay the balance of the transportation costs ($300 - $190 = $110). This equals the difference between the H-2A wage rate and the FLSA minimum wage ($10.00 - $7.25 = $2.75 x 40 hours = $110).

onto the FLSA; rather, employers that choose to participate in the H-2A program must determine their wage requirements under the FLSA and the H-2A in each workweek and comply with the higher requirement.

Furthermore, in giving controlling weight to the H-2A regulation at the expense of the FLSA regulation, the district court ignored the last sentence of the relevant H-2A rule; the regulation itself confirms that "the FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages." 20 C.F.R. 655.122(h)(1); *see* 20 C.F.R. 655.122(p) (an employer "may not make deductions that would violate the FLSA"); 20 C.F.R. 655.135(e) (the "FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages"). The Department added this sentence when it promulgated the 2010 H-2A regulations and rejected employer commenters' requests that the Department repudiate the *Arriaga* decision. *See* 75 Fed. Reg. at 6911-12, 6914-16. Rather, the preamble emphasized that, to avoid the confusion that could be caused by the H-2A 50 percent rule, it was important to remind employers that "an H-2A employer covered by the FLSA is responsible for paying inbound transportation costs in the first workweek of employment to the extent that shifting such costs to employees (either directly or indirectly) would effectively

bring their wages below the FLSA minimum wage." 75 Fed. Reg. at 6915.

9. The district court's reliance on *Decatur Hotels* is misplaced because the Fifth Circuit did not provide any sound basis for its conclusion that transportation and visa costs are primarily for the temporary visa employee's benefit. As discussed *supra*, the kick-back regulation, with its cross-references to other regulations, recognizes that transportation expenses can qualify as "tools of the trade."

Furthermore, the Fifth Circuit erred in declining to give any deference to Bulletin 2009-2 because it "was issued long after the events in question. The general rule, applicable here, is that changes in the law will not be applied retroactively . . . . Whatever deference may be due to the Department's informally promulgated Bulletin in the future, it does not itself in any way purport to apply retroactively. Accordingly, we decline to apply it to the situation here." *Id*. at 401-02. To the extent that this case involves any H-2A workers who incurred travel or immigration expenses after the Department published the Bulletin on August 21, 2009, there is no retroactivity issue.[8] Moreover, the Department's

[8] Paragraph 7 of the Second Amended Complaint, filed May 16, 2011, sets forth allegations of FLSA violations involving plaintiffs who were admitted to the United States on a temporary

interpretation in the Bulletin did not change the law; rather, Bulletin 2009-2 is the Department's interpretation of the section 3(m) regulations and how they apply in this specific situation. Thus, it simply clarifies what the law has always meant, and such clarifications do not create retroactivity concerns. *See Yu v. U.S. Attorney General*, 568 F.3d 1328, 1333-34 (11th Cir. 2009) (Attorney General's clarification of the INA does not change the law, and the interpretation is "entitled to full retroactive effect in all cases still open").

Finally, the Fifth Circuit stated in *Decatur Hotels* that the *Arriaga* court's reasoning was not persuasive because *Arriaga* "dealt with H-2A workers, not H-2B workers." *Id*. at 403. Of course, this case involves H-2A workers, just as *Arriaga* did. In any event, many courts have recognized that the result of the FLSA primary beneficiary analysis is the same under both programs because of the similarities between the two visa programs. *See*, *e.g.*, *Morante-Navarro*, 350 F.3d at 1166 n.2 (applying *Arriaga* in an H-2B case); *Gaxiola*, 776 F. Supp. 2d at 126 (the rationale for concluding the expenses of H-2A workers are an incident of and necessary to their employment "appl[ies] equally to H-2B visas"); *Teoba*, 769 F. Supp. 2d at 186 (disagreeing in an H-2B case with the *Decatur Hotels* holding

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basis at "various times between February 16, 2005 and the present."

that *Arriaga* was inapplicable because it dealt with H-2A workers).

10. The interpretation that transportation and visa fees are an incident of and necessary to the employment of H-2A employees is consistent with the position Wage and Hour has articulated over many years regarding the cost of transporting remotely hired workers to the worksite for temporary employment. As explained in the attached Field Assistance Bulletin, in a number of opinion letters issued between 1960 and 1990, the Department consistently concluded that the cost of transporting such workers is a cost that must be borne by the employer, because the transportation is primarily for the employer's benefit. *See*, *e.g.*, Wage and Hour opinion letters dated May 11, 1960; February 4, 1969; November 10, 1970; September 26, 1977; November 28, 1986; and June 27, 1990; *see also* Field Operations Handbook, ¶30c13(e), www.dol.gov/whd/FOH (copies of the opinion letters and the relevant provision of the Field Operations Handbook are attached as Addendum B). The Department also successfully took this position in its own litigation in *Marshall v. Glassboro Service Ass'n, Inc.*, 1979 WL 1989 (D.N.J. 1979) (subsequent history omitted). The court in *Glassboro* relied upon the earlier opinion letters and held that the cost of transporting migrant farmworkers from Puerto Rico to New Jersey did not qualify as a facility under section 3(m) and

"cannot properly be included in the computation of the employees' minimum wages." 1979 WL 1989, at *3.

In two letters issued in 1994 (May 11, 1994 and June 30, 1994), the Department noted its longstanding position but stated, in response to concerns raised by agricultural growers about the costs involved, that it would review the issue and provide further guidance; in the meantime it would not assert violations in this area under the FLSA (copies attached, Addendum B). In a May 10, 1996 letter and a May 30, 2001 letter, the Department reaffirmed its view that such transportation costs are primarily for the benefit of the employer and may not infringe upon the FLSA minimum wage; however, the letters stated that as a matter of enforcement practice the agency would assert a violation of the FLSA only in certain factual scenarios, pending further review (copies attached, Addendum B).

Seven years later, the Department briefly reversed this conclusion, in the preamble to the H-2A final rule published in December 2008. *See* 73 Fed. Reg. 77110, 77148-52 (Dec. 18, 2008); *see also* 73 Fed. Reg. 78020, 78039-41 (H-2B) (Dec. 19, 2008). However, the Department withdrew that reversal just three months later. *See* 74 Fed. Reg. 13261 (March 26, 2009). The Department noted in that withdrawal that, prior to the preamble interpretation, many courts in addition to *Arriaga* had

held that such travel and visa expenses were primarily for the benefit of the employer. Therefore, the Department stated that it would provide further guidance after reconsideration of the issue.

A few months later, the Department completed its review and on August 21, 2009 issued Field Assistance Bulletin 2009-2. That Bulletin concludes that the transportation and visa expenses necessary to bring H-2B employees into the country and to the site of work are primarily for the benefit of the employer and cannot be shifted to the employees in violation of the minimum wage. As discussed *supra*, on February 12, 2010, the Department reaffirmed this interpretation in the preamble to a Final Rule implementing changes to the H-2A program. *See* 75 Fed. Reg. at 6915-16, 6925. The preamble to an H-2B Notice of Proposed Rulemaking issued on March 18, 2011 similarly restated the interpretation (*see* 76 Fed. Reg. 15130, 15145). Thus, but for a brief three-month period, the Department has expressed a consistent interpretation of the requirements of the FLSA for some 50 years.

Section 3(m) states that a wage paid "includes the reasonable cost, as determined by the Administrator," of a "facility," 29 U.S.C. 203(m), and the Department has promulgated notice-and-comment regulations implementing that authority. *See* 32 Fed. Reg. 13575 (Sept. 8, 1967); Pub. L. No. 87-30, §14, 75

Stat. 65, 75 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. (1961), as reprinted in 1961 U.S.C.C.A.N. 1620, 1659. The Department's interpretation of its regulations in the Bulletin, multiple opinion letters (cited in the Bulletin) issued between 1960 and 1990, the preambles to the H-2A and H-2B rulemakings, and in this amicus brief are entitled to controlling deference. *See Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2261 (2011); *Chase Bank USA v. McCoy*, 131 S. Ct. 871, 880 (2011); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008); *Long Island Care at Home, LTD v. Coke*, 551 U.S. 158, 171 (2007) (change in interpretation by agency does not provide an independent ground for disregarding such interpretation); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (giving controlling deference to Wage and Hour's interpretation of its own regulations as set forth in an amicus brief); *Solis v. State of Washington*, 656 F.3d at 1085 (deferring to the agency's interpretation of its regulations set forth in opinion letters); *Klem v. Country of Santa Clara*, 208 F.3d at 1089 (deferring to the agency's interpretation of its regulations set forth in an amicus brief).[9] At a minimum, the Department's interpretations

[9] Thus, the Fifth Circuit erred in declining to give deference to the Department's views in *Decatur Hotels*. As the six dissenting judges stated, the majority opinion "does not attempt to reconcile its decision with the Supreme Court's cases; nor does it try to show that the DOL's interpretations are unreasonable and therefore not controlling. Rather, the majority adopts an

are entitled to substantial deference under the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (the Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). *See Salazar-Martinez v. Fowler Brothers, Inc.*, 781 F. Supp. 2d at 194 (giving "substantial deference" to Bulletin 2009-2); *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d at 185 (giving "considerable weight" to Bulletin 2009-2).

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unfounded, eclectical approach, applying the statutory, regulatory and interpretive provisions it chooses while disregarding those that are inconsistent with its own notions of justice." 622 F.3d at 406.

## CONCLUSION

For the foregoing reasons, the Secretary requests that this Court reverse the district court's decision and conclude that the travel and immigration fees of H-2A workers are an incident of and necessary to their employment. Therefore, such expenses are primarily for the benefit of H-2A employers and may not reduce, directly or indirectly, H-2A employees' wages below the FLSA minimum wage.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limitation set forth in Federal Rules of Appellate Procedure 35(b)(2) and 40(b) because it contains 6,992 words (excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

This Brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6). This Brief was prepared using Microsoft Office Word utilizing Courier New 12 point and a monospaced font.

Dated: January 19, 2012

/s/ Diane A. Heim_____

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## CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2012, a copy of the foregoing Brief for the Secretary Of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system except the following who will be served by overnight delivery by UPS:

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