No. 07-30942

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANIEL CASTELLANOS-CONTRERAS; OSCAR RICARDO DEHEZA-ORTEGA; and RODOLFO ANTONIO VALDEZ-BAEZ,

Plaintiffs-Appellees,

v.

DECATUR HOTELS, LLC and F. PATRICK QUINN III,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Louisiana

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellees' petition for panel rehearing and rehearing *en banc* on the issue 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-2B visas[1] to perform temporary nonagricultural work

[1] The H-2B visa program, *see* 8 U.S.C. 1101(a)(15)(H)(ii)(b), allows employers to bring foreign guest workers into the U.S. in very limited circumstances, and only after the U.S. Department of Labor ("Department") has certified that there are not enough

for the cost of transportation expenses and visa fees, if the failure to reimburse such costs would effectively reduce the employees' wages below the minimum wage during their first workweek. The panel erred by concluding that employees received the minimum wage "free and clear" when they were required to bear such expenses, which were primarily for the benefit or convenience of employers. Therefore, the Department believes that panel rehearing is appropriate. See Fed. R. App. P. 40(a)(2).

Should panel rehearing be denied, rehearing *en banc* is appropriate in this case because the panel opinion "presents a question of exceptional importance." Fed. R. App. P. 35(b)(1)(B). If the panel's erroneous interpretation of the FLSA's minimum wage requirements is allowed to stand, it will have a serious impact on vulnerable, low-wage employees who enter the country on H-2B visas. The decision also could adversely affect U.S. workers by making it less costly to bring in foreign workers, thereby reducing an employer's incentive to recruit and hire U.S. workers before the employer decides to utilize the H-2B program. Moreover, the panel's decision conflicts with decisions of the Eleventh Circuit concluding that

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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 similarly employed U.S. workers. *See* 8 C.F.R. 214.2(h)(6); 20 C.F.R. 655.1(b).

inbound transportation and visa fees of H-2A (a substantially similar visa program) and H-2B workers are for the primary benefit or convenience of the employer. *See Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002); *Morante-Navarro v. T&Y Pine Straw*, Inc., 350 F.3d 1163, 1166 n.2 (11th Cir. 2003) (citing *Arriaga* and stating that such expenses cannot be credited toward the minimum wage of H-2B employees). *Accord De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1309-12 (N.D. Ga. 2008)(H-2B); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479, at *1 (W.D. Mich. 2008)(H-2B); and *Rivera v. Brickman Group*, 2008 WL 81570, at *12 (E.D. Pa. 2008)(H-2B).

STATEMENT OF INTEREST

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-2B workers and for the enforcement of the program's worker protection provisions. *See* 8 U.S.C. 1184(c)(1) and 1184(c)(14)(B); 8 C.F.R. 214.2(h)(6); 20 C.F.R. Part 655. The Department has compelling reasons to participate as *amicus curiae* in this case, because it 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, *see* 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 employees must receive at least the minimum wage free and clear. *See* 29 C.F.R. 531.3, 531.32-.36.

ARGUMENT

THE PANEL ERRED IN CONCLUDING THAT TRANSPORTATION AND VISA EXPENSES OF H-2B EMPLOYEES ARE NOT PRIMARILY FOR THE BENEFIT OF THE EMPLOYER AND THUS MUST BE BORNE BY THE EMPLOYEES

1. Section 3(m) of the FLSA provides that employers must pay employees their wages due in cash but may count as wages the reasonable cost of furnishing an employee with "board, lodging, or other facilities." 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), and 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). The regulations recognize two corollaries to 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* 531.36(b). 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, if an employer requires an employee to provide tools of the trade, "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." *Id*.

2. The panel decision notes that the guest workers relied upon section 3(m) to argue that they were entitled to reimbursement of their expenses because such expenses were de facto deductions from their cash wages during the first workweek. The panel incorrectly concluded, however, that section 3(m) is irrelevant because it only permits employers to take credit for board, lodging, and other facilities; the panel stated that it "provides no ground for Decatur to have violated

the FLSA by refusing to reimburse the guest workers for recruitment, transportation, and visa expenses that they incurred." 2009 WL 2152622, at *4 (emphasis added). This view of section 3(m) is far too constrained. As the regulations interpreting section 3(m) recognize, the fact that an employer may take credit toward the minimum wage for facilities, if the employee is the primary beneficiary, is only one aspect of section 3(m). Equally necessary to prevent employers from evading the requirement to pay the minimum wage are the regulatory concepts that an employer may not: (1) appear to pay an employee the full minimum wage in cash, but then deduct from that cash wage for the cost of an item (*e.g.*, a required uniform) that primarily benefits the employer; or (2) appear to pay the full minimum wage in cash, but then require the employee to purchase an item that primarily benefits the employer. *See* Wage and Hour opinion letter FLSA2001-7, 2001 WL 1558768 (Feb. 16, 2001). Thus, there is no legal or logical difference between an employer taking credit for its business expense by deducting such a cost from a worker's wages, and shifting the cost to an employee to bear directly. *See Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d at 1236.

The panel instead viewed the proper analysis as whether Decatur violated the prohibition against kick-backs -- the requirement to pay wages "finally and unconditionally or 'free

and clear.'" 29 C.F.R. 531.35. An "employer-imposed condition of employment is a kick-back if it 'tend[s] to shift part of the employer's business expense to the employees.'" 2009 WL 2152622, at *5 (quoting *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 474 F.2d 1196, 1199 (5th Cir. 1972)). Although the "free and clear" principle is an important part of the analysis, the panel erred when it ignored the other regulations interpreting section 3(m), such as the regulation providing that where "transportation is an incident of and necessary to the employment," it is an employer expense that may not be transferred to the employee. 29 C.F.R. 531.32(c).

This overly narrow view of section 3(m) is the basis on which the panel distinguished the *Arriaga* decision. In particular, the panel rejected *Arriaga* because the decision relies upon section 531.32, which implements section 3(m) -- a provision the panel believed is inapplicable. 2009 WL 2152622, at *7.[2] The panel, however, failed to recognize that section

[2] The panel also declined to follow *Arriaga* because it arose under the H-2A visa program, which provides for the admission of nonimmigrants to perform temporary or seasonal agricultural labor or services, if the employer demonstrates that sufficient numbers of U.S. workers are not available to perform the work and the employment of foreign workers will not adversely affect the wage and workers conditions of similarly employed U.S. workers. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188(a)(1). The Department believes this provides no basis for distinguishing the *Arriaga* decision. Both cases involve whether particular compensation practices are lawful under the FLSA, applying FLSA principles. Moreover, because the visa programs

531.35 -- the kick-back prohibition -- also implements section 3(m). Indeed, section 531.35 contains a cross-reference to section 531.32(c). The panel also stated that the decision in *Donovan v. Miller Props., Inc.*, 711 F.2d 49, 50 (5th Cir. 1983) (per curiam), "informs us that . . . § 203(m) imposes no obligation on employers to bear employee-incurred expenses" and "forecloses us from following [a] § 203(m)-based analysis." 2009 WL 2152622, at *7. However, that decision held only that an employer could take credit for meals it provided to employees under section 3(m), even if the employees had not voluntarily accepted the meals. Thus, that decision is inapposite. Therefore, the panel erred in its interpretation of the requirements of section 3(m) and in its refusal to consider all the Department's implementing regulations, including section 531.32(c).

Moreover, even if the FLSA kick-back regulation were the only relevant regulation, as the panel believed, it construed that regulation too narrowly as well. The panel emphasized that the kick-back regulation does not specifically address the particular H-2B expenses in question. *See* 2009 WL 2152622, at **5-6. However, the FLSA regulations set forth general

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are very similar in design and purpose, the analysis whether the employer or the employee is the primary beneficiary is the same under both visa programs. Indeed, in *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d at 1166 n.2, the Eleventh Circuit adopted *Arriaga* in a case involving H-2B workers.

principles and, of course, cannot contain an example addressing every distinct fact situation. The panel also stated that the expenses at issue here are unlike the expenses (*e.g.*, wage deductions for cash register shortages) that the Fifth Circuit previously had found to be kick-backs. *See* 2009 WL 2152622, at *8. As noted above, whether an employer deducts cash from an employee's paycheck, or requires an employee to pay out-of-pocket for an employer business expense (whether pre-employment for something like the purchase of tools of the trade or during the course of employment), does not affect the analysis whether the employee has received the minimum wage free and clear. *See* 29 C.F.R. 531.35.

3. As explained in greater detail in Wage and Hour's Field Assistance Bulletin No. 2009-2 (copy attached, Addendum A), analyzing this issue consistent with section 3(m) and all applicable regulations demonstrates that, in the context of the H-2B visa program, transportation expenses and visa fees primarily benefit the employer. The employer has chosen to participate in the H-2B program, and has demonstrated to the Department that, absent foreign guest workers, it would not have sufficient numbers of employees to perform its work. Specifically, employers must follow various prescribed recruiting steps in order to determine whether adequate numbers of U.S. workers are available. They must submit a job order to

the State Workforce Agency and allow the job posting to remain open for at least 10 days; place two newspaper advertisements for the job; offer and pay at least the prevailing wage specified by the Department; offer full-time employment; contact any U.S. workers who were laid off within 120 days and offer them employment; contact the local union, if the employer is a party to a collective bargaining agreement, and advise it of the vacancies; 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* 20 C.F.R. 655.15, 655.20-.22. An employer may apply for a labor certification from the Department only after it has completed its U.S. recruitment efforts, and the Department issues a certification only if all these steps demonstrate that there are not sufficient U.S. workers available to perform the work and hiring guest workers will not adversely affect U.S. workers.

As Field Assistance Bulletin 2009-2 explains, 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. As the court stated in *Arriaga* under the H-2A program, which imposes similar requirements, inbound travel and visa costs "are an inevitable and inescapable consequence of having H-2A foreign workers employed in the

United States; these are costs which arise out of the employment of H-2A workers." 305 F.3d at 1242. Therefore, under 29 C.F.R. 531.32(c), such travel and visa costs are an "incident of and necessary to the employment." They are not ordinary living expenses (they do not have substantial value to an employee that can be used independent of the job performed), and they do not ordinarily arise in an employment relationship (unlike daily home-to-work commuting costs). *See* 305 F.3d at 1242-43.

In contrast to the employers' greater-than-normal benefit from these expenses, the H-2B guest workers who enter the country under this visa program benefit less than employees typically benefit from new jobs. The positions are, by definition, temporary (less than one year) with no possibility of the jobs becoming permanent. The employees' visas are tied to a particular employer; they are not permitted to seek work from other U.S. employers. And when the work period is completed, the employees must leave the country unless they have secured subsequent temporary employment under the visa program. *See* 20 C.F.R. 655.22.

Given these circumstances, the Department believes that the employers are the primary beneficiaries of the inbound travel and visa expenses that are necessary for the employees to be able to work temporarily in the U.S., because the expenses are "an incident of and necessary to the employment." 29 C.F.R.

531.32(c); *see Arriaga*, 305 F.3d at 1241-42 ("incident" means "anything which inseparably belongs to, or is connected with, or inherent in, another thing" and "necessary" means "of an inevitable nature: inescapable"); *see also Brennan v. Modern Chevrolet Co.*, 363 F. Supp. 327, 333 (N.D. Tex. 1973), *aff'd*, 491 F.2d 1271 (5th Cir. 1974) (Table) (car dealership is the primary beneficiary of demonstrator cars provided to salesmen, even though 90% of the mileage was for their own personal use).[3] Therefore, the employer may not shift such costs to the employees if doing so effectively brings their wages below the minimum wage in their first workweek of employment.[4]

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[3] With regard to recruiter fees, the Department notes that the December 2008 H-2B final rule requires an employer to attest that it "has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees." 20 C.F.R. 655.22(g)(2). The preamble stated that requiring employers to incur such costs is reasonable because a recruiter is essential to the securing of such workers. *See* 73 Fed. Reg. at 78037. Similarly, under the FLSA, the employer is the primary beneficiary of the recruiter fees when the employer has retained the recruiter to locate foreign workers or has offered the job opportunity only to those workers using the recruiter. *See Rivera v. Brickman Group, Ltd.*, 2008 WL 81570, at **13-14 (E.D. Pa. 2008); *Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 WL 2106188, at *14 (S.D. Ga. 2007). The Department does not have sufficient facts to express a view regarding whether Decatur Hotels is responsible for bearing these costs under the FLSA.

[4] The panel relied on various immigration provisions that impose certain fees and costs on employers to conclude that their silence as to other costs implies that those costs should be borne by employees. However, the visa programs' silence as to who is responsible for the other expenses does not negate the

4. This interpretation is consistent with the position the Wage and Hour Division has articulated over many years regarding the cost of transporting remotely hired workers to the worksite for temporary employment. 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.*, opinion letters dated May 11, 1960; February 4, 1969; November 10, 1970; September 26, 1977; November 28, 1986; and June 27, 1990; and Field Operations Handbook, ¶30c13(e) (copies attached, Addendum

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applicability of the FLSA. The panel's reasoning ignores the cardinal rule of statutory construction that "repeals by implication are not favored," *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007), and that "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978) (internal quotation omitted); *see Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326, 330 (5th Cir. 2007) (statutes "are in irreconcilable conflict only if there is 'a positive repugnancy' between the statutes, such that one is eviscerated by the other") (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. at 189-90). There is no irreconcilable conflict between the requirements of the FLSA, which set a floor requiring covered employers to pay employees at least the minimum wage free and clear, and the requirements of the H-2B visa program. Employers covered by both laws are capable of complying with both Acts simultaneously. *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 518-19 (1950) (the FLSA expressly contemplates that its coverage overlaps that of other federal labor laws, and employers must comply with the FLSA and such other laws by determining the respective wage requirements under each Act and applying the higher requirement in order to satisfy both).

B); *see also* *Marshall v. Glassboro Service Ass'n, Inc.*, 1979 WL 1989 (D.N.J. 1979) (subsequent history omitted).[5]

The Department briefly reversed this conclusion, in the preamble to the H-2B final rule published in December 2008. *See* 73 Fed. Reg. 78020, 78039-41 (Dec. 19, 2008); *see also* 73 Fed. Reg. 77110, 77148-52 (H-2A) (Dec. 18, 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, courts had uniformly held that such travel expenses were primarily for the benefit of employers, and it stated that the Department would provide further guidance after reconsideration of the issue. The Department has completed its review and, as set forth in Field Assistance Bulletin 2009-2, has concluded 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.

The Department's extensively-supported interpretation, setting forth the application of its regulations in the H-2B context, is entitled to deference. *See Skidmore v. Swift & Co.*,

[5] The Department reaffirmed that interpretation in 1996 and 2001 letters, but stated that as a matter of enforcement practice it would only assert a violation of the FLSA in certain factual scenarios, pending further review (copies attached, Addendum C).

323 U.S. 134, 139-40 (1944); *cf. Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865, 872 n.7 (2009) (change in interpretation by agency does not provide an independent ground for disregarding such interpretation) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007)).

CONCLUSION

For the foregoing reasons, the Department supports panel rehearing and, should the panel deny rehearing, believes that rehearing *en banc* is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2009, a copy of the Brief for the Secretary Of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees' Petition for Panel Rehearing and Rehearing En Banc was served, via Federal Express, on the following:

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This Brief complies with the length limitation set forth in Federal Rules of Appellate Procedure 35(b)(2) and 40(b) because it does not exceed 15 pages long (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.

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