DEPARTMENT OF LABOR

Office of the Secretary of Labor

AGENCY: Office of the Secretary of Labor, Department of Labor.

ACTION: Notice of Intent to Issue Declaratory Order; Request for Comment.

SUMMARY: The Secretary of Labor (Secretary) is considering issuing on his own motion a declaratory order confirming that he has exclusive authority to make legal and policy determinations based on his statutory and regulatory authority to administer and enforce the H-2B temporary labor certification program. Such a declaratory order would remove uncertainty about that authority created by a decision of the Board of Alien Labor Certification Appeals in Island Holdings LLC, 2013-PWD-00002 (BALCA Dec. 3, 2013) (en banc). The Secretary issues this Notice pursuant to the authority granted in the Administrative Procedure Act (APA), 5 U.S.C. 554(e), to issue declaratory orders "to terminate a controversy or remove uncertainty." The Secretary will accept comments from the public on this Notice for 30 days, and may issue a declaratory order after consideration of all comments received in that timeframe.

DATES: This Notice is effective [INSERT PUBLICATION DATE]. Interested persons are invited to submit written comments on this Declaratory Order on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number ETA-2014-0003, by any one of the following methods:

- Federal e-Rulemaking Portal www.regulations.gov. Follow the Web site instructions for submitting comments.
- Mail or Hand Delivery/Courier: Please submit all written comments (including disk and CD–ROM submissions) to Adele Gagliardi, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. Comments received by means other than those listed above or received after the comment period has closed will not be reviewed. The Departments will post all comments received on http://www.regulations.gov without making any change to the comments, including any personal information provided. The http://www.regulations.gov Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Departments caution commenters not to include personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such information will become viewable by the public on the http://www.regulations.gov Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through http://www.regulations.gov will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Departments encourage the public to submit comments through the http://www.regulations.gov Web site.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking portal at http://www.regulations.gov. The Departments will also make

all the comments either Department receives available for public inspection during normal business hours at the Employment and Training Administration (ETA) Office of Policy Development and Research at the above address. If you need assistance to review the comments, DOL will provide you with appropriate aids such as readers or print magnifiers. DOL will make copies of the rule available, upon request, in large print and as an electronic file on computer disk. DOL will consider providing the interim final rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the ETA Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

FOR FURTHER INFORMATION CONTACT: For further information, contact William W. Thompson, Acting Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. *Statutory and Regulatory Background*

The Immigration and Nationality Act (INA) establishes the H-2B visa classification for a non-agricultural temporary worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country[.]" 8 U.S.C. 1101(a)(15)(H)(ii)(b). The INA

further requires an importing employer (H-2B employer) to petition the Department of Homeland Security (DHS) for classification of the prospective temporary worker as an H-2B nonimmigrant, and the petition must be made and approved before the beneficiary (H-2B worker) can be considered eligible for an H-2B visa or H-2B status. 8 U.S.C. 1184(c)(1). In adjudicating an H-2B petition, the INA requires DHS to consult with "appropriate agencies of the Government[.]" Id.

DHS has determined that in order to administer the INA's H-2B visa program it must consult with the Department of Labor (DOL) to determine whether U.S. workers capable of performing the temporary services or labor are available and that the foreign worker's employment will not adversely affect the wages or working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6)(iii)(A). DHS's regulation requires employers to obtain certification from DOL that these conditions are met prior to submitting a petition to DHS. Id. DHS requires DOL to "separately establish for the temporary labor program under his or her jurisdiction, by regulation at 20 CFR 655, procedures for administering that temporary labor program under his or her jurisdiction, and shall determine the prevailing wage applicable to an application for temporary labor certification." 8 CFR 214.2(h)(6)(iii)(D). DOL has rulemaking authority to carry out DHS's charge to establish rules governing the temporary labor certification process. Louisiana Forestry Ass'n v. Secretary, U.S. Department of Labor, 745 F.3d 653, 669, 672-675 (3rd Cir. 2014). DOL's H-2B regulations require a determination whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 20 CFR part 655, subpart A. As part of

DOL's labor certification process, DOL sets the wage that employers must offer and pay foreign workers entering the country on an H-2B visa. See 20 CFR 655.10.

On April 24, 2013, DHS and DOL (the Departments) issued an interim final rule (IFR) that revised DOL's method of determining the prevailing wage in the H-2B program.[1] Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 FR 24,047 (Apr. 24, 2013). The IFR was a direct response to a court order vacating a portion of the DOL's prevailing wage methodology and requiring the agency to come into compliance within 30 days. Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Solis, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (CATA II). The CATA II Court found that the 2008 regulation then being implemented to set the H-2B prevailing wage, which required the issuance of prevailing wages based on four artificial skill levels that were wholly irrelevant to unskilled H-2B work, violated the INA by allowing employers to pay substandard wages that harm the domestic labor market.[2]

[1] The Departments issued the 2013 IFR jointly to dispel questions that arose contemporaneously with its promulgation regarding the respective roles of the two agencies and the validity of DOL's regulations as an appropriate way to implement the interagency consultation specified in section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1). See Bayou Lawn & Landscape Servs. v. Sec'y of Labor, 713 F.3d 1080 (11th Cir. 2013) (concluding that plaintiffs are likely to prevail on their allegation that the Department of Labor lacks independent rulemaking authority under the INA to issue legislative regulations implementing its role in the H-2B program). However, the Eleventh Circuit in Bayou only reviewed the district court's entry of a preliminary injunction against implementation of DOL's H-2B rule issued before the joint IFR. Therefore, the Bayou decision only addressed the plaintiffs' likelihood of success on the merits, and was not a final judgment on the plaintiffs' claim that DOL is without authority to promulgate legislative rules in the H-2B program before the issuance of the joint IFR. The latter issue is currently before the district court awaiting decision on pending motions for summary judgment. As noted above and in sharp contrast to the Bayou case, in an APA challenge to the 2011 Wage Rule, which also tested DOL's authority to issue legislative rules in the H-2B program, the U.S. Court of Appeals for the Third Circuit held recently that "DOL has authority to promulgate rules concerning the temporary labor certification process in the context of the H-2B program, and that the 2011 Wage Rule was validly promulgated pursuant to that authority." La. Forestry Ass'n v. Perez, 745 F.3d 653, 669 (3d Cir. Feb. 5, 2014); see also G.H. Daniels & Assocs., Inc. v. Solis, 2013 WL 5216453, *4-5 (D. Colo. Sept. 17, 2013) (DOL has authority to issue H-2B legislative rules), appeal pending, No. 13-1479 (10th Cir.).

[2] The CATA II order was the culmination of a years-long period of DOL rulemaking, challenges to that rulemaking, and Congressional riders that prevented the implementation of the agency's rules. In the preceding CATA I decision, Civ. No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. 2010), the district court concluded that the four-tiered skill levels in the 2008 prevailing wage rule were implemented without following the Administrative Procedure Act's notice-and-comment requirements. However, rather than vacate that methodology, the CATA I court left it in place and ordered DOL to issue a replacement rule that complied with the APA within 120 days.

CATA II, 933 F. Supp. 2d at 713.[3] As a result, the IFR set a new, legally valid prevailing wage standard to allow for an immediate adjustment of the wage rates for workers currently employed under the vacated 2008 wage rule. 78 FR at 24,056. In order to comply with the CATA II order, the preamble to the IFR notified the regulated community that the new prevailing wage rate under the IFR would apply to all employers currently employing H-2B workers in the U.S. upon individual notification to the employer of a new prevailing wage determination. Id. at 24,055.

To implement the IFR, on April 25, 2013, DOL issued an "FAQ" on its website informing the public that "[e]mployers who have H-2B workers performing work that is based on the [vacated 2008 regulation] on or after April 24, 2013, will receive a new prevailing wage determination in accordance with the Wage Methodology IFR." Employment and Training Administration, Frequently Asked Questions, Interim Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, at 1 (Apr. 25, 2013). DOL also advised the public, consistent with the statement in the preamble to the IFR, that "employers are required to offer and pay [the new IFR] wage for any work performed on or after the date the employer receives the supplemental determination." Id. In addition, DOL indicated that employers were permitted under the regulation to file an appeal of any supplemental prevailing wage determination, but not based on a challenge to the occupational classification, because employers should have already raised that issue when they received their original prevailing wage determinations. Id. at 2. Immediately following the publication of the IFR, DOL issued

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CATA I, slip op. at 27. DOL complied with the CATA I order by revising the H-2B wage regulation through notice and comment procedures (76 FR 3452, Jan. 19, 2011), but Congress, through appropriations riders, blocked its implementation. For a complete history of events leading up to the CATA II order and the IFR, see "Notification of Status of the 2011 H–2B Wage Rule," 79 FR 14450 (March 14, 2014).

[3] As discussed further below in Sec. III, supra, the CATA orders anticipated that once DOL issued a valid regulatory method for determining the prevailing wage, the agency would also issue supplemental prevailing wage determinations to employers with current labor certifications to correct the unlawful wage issued with those extant certifications.

supplemental prevailing wage determinations to all H-2B employers subject to the IFR, including employers currently employing H-2B workers under the vacated 2008 wage regime. In each supplemental prevailing wage determination, DOL informed the employer of its ability to seek a redetermination of the supplemental prevailing wage determination, pursuant to 20 CFR 655.10(g). On August 12, 2013, DOL completed the processing of new and supplemental prevailing wage determinations for all cases falling within the scope of the IFR.

II. *The Island Holdings Challenge*

Island Holdings, LLC, filed applications for labor certification with DOL in early 2013 for multiple H-2B nonimmigrant workers with proposed dates of employment into November 2013. When filing its applications for H-2B certification, Island Holdings agreed to pay the wage rate that equals or exceeds the highest of the most recent prevailing wage rate that is or will be issued by DOL for the time period the H 2B workers perform work in the United States. See ETA Form 9142 – Appendix B.1. Before the publication of the IFR, DOL certified three Island Holdings' applications with prevailing wages based on the 2008 wage methodology, and these prevailing wages were valid generally through the end of 2013. Shortly after DOL published the IFR, the agency issued to Island Holdings three supplemental prevailing wage determinations (SPWDs) informing the company that it was required to pay new prevailing wage rates, as applicable under the IFR.

On May 23, 2013, Island Holdings filed an administrative appeal of DOL's supplemental prevailing wage determinations with the Board of Alien Labor Certification Appeals (BALCA), a group of Administrative Law Judges (ALJs) empowered to hear and decide appeals involving alien labor certification. 20 CFR 655.11(e); 655.33(e). The BALCA remanded the matter back

to DOL to address Island Holdings' request for a redetermination under 20 CFR 655.10(g). Island Holdings subsequently sought a redetermination of DOL's supplemental prevailing wage determinations, but DOL determined that the agency's initial wage adjustments under the IFR were correct. Consistent with its statement in the IFR, DOL informed Island Holdings that the CATA II Court's vacatur order required the agency to replace the vacated 2008 prevailing wage rates with the valid prevailing wage rates under the IFR. DOL also informed Island Holdings that by signing ETA Form 9142, Appendix B.1, the company agreed, as a condition for importing foreign workers, that it would pay the prevailing wage rate in effect at the time the company employed H-2B workers in the United States. Because the 2008 wage rates had been vacated and were no longer in effect, DOL informed Island Holdings that the new IFR wage rates controlled.

Island Holdings again sought an administrative appeal of DOL's supplemental prevailing wage determinations under the IFR, which the BALCA docketed for en banc review. On December 3, 2013, the BALCA purportedly vacated DOL's supplemental prevailing wage determinations under the IFR. See Island Holdings LLC, 2013-PWD-00002 (BALCA Dec. 3, 2013) (en banc). Contrary to the Secretary of Labor's interpretation of the IFR stated in the preamble, the BALCA determined that DOL lacks the authority to issue supplemental prevailing wage determinations in cases where DOL has already approved labor certification applications based on the vacated 2008 prevailing wage rule. The BALCA rejected DOL's position, as stated in the preamble to the IFR, that the CATA II Court's vacatur order requires DOL to issue supplemental prevailing wage determinations to replace the vacated 2008 prevailing wage rates for all work performed by H-2B nonimmigrant workers after the issuance of the IFR. In addition, the BALCA determined that DOL lacks authority to require employers to pay the

highest of the most recent prevailing wage that is or will be issued by DOL to the employer for the time period H-2B workers perform labor or services in the United States, despite the employer's signed agreement on ETA Form 9142, Appendix B.1, to pay the adjusted prevailing wage rate.

On December 11, 2013, CATA filed a civil action challenging the BALCA's Island Holdings decision as arbitrary, capricious, and in excess of law under the Administrative Procedure Act. CATA v. Perez, --- F.R.D. ---, 2014 WL 3629528 (E.D. Pa. 2014) (CATA III). On January 10, 2014, CATA moved for summary judgment, seeking an order vacating the BALCA's decision. CATA argued that the BALCA, as subordinate Administrative Law Judges, lacks the authority to overrule the Secretary of Labor on issues of law and policy. Even if the BALCA had such authority, CATA contended that the BALCA's decision is an unreasonable and substantive alteration of the agency's legislative rule under the IFR, which violates the requirements of notice and comment rulemaking. In its pleadings, the Department of Labor agreed that Island Holdings does not represent the legal or policy decision of the Secretary of Labor as reflected in the IFR. The Department stated that the "BALCA's Island Holdings decision represents a resolution of that individual case which is not subject to further administrative review . . . , but the BALCA's decision does not represent the legal position of the Secretary of Labor." On December 20, 2013, while the CATA III case was pending, DOL stayed further action on all pending supplemental prevailing wage determinations (approximately 1050 SPWDs), and has not yet taken any further action on them.

On July 23, 2014, the district court dismissed CATA's complaint, concluding that the plaintiffs were without standing because there was no showing of agency action applying Island Holdings to CATA or its members. CATA III, --- F.R.D. ---, 2014 WL 3629528, *7-8, The

district court also held that the case did not involve final agency action because "it is…the Secretary of Labor, and not the BALCA, that ultimately makes the policies and rules governing H-2B prevailing wages." Id. at 8. Finally, the court concluded that because the DOL was presently engaged in rulemaking to revise the H-2B wage methodology, adjudication would be premature because the agency may address the issue in that context. Id. at 8-10.

III. *Basis for Declaratory Order*

The BALCA's Island Holdings decision has created uncertainty about the Secretary of Labor's authority to set law and policy in the H-2B program generally, and about the immediate application of the revised wage regulation in the IFR to employers with H-2B workers employed at the time of the IFR but with prevailing wages set under the vacated 2008 wage rule. The decision has further cast uncertainty on the legal status of the pending supplemental prevailing wage determinations that DOL stayed shortly after the BALCA's decision. DOL's expectation was that the CATA III litigation, which squarely framed the issue whether the BALCA's Island Holdings decision exceeded the scope of its authority, would dispose of the matter in the Secretary's favor and resolve the uncertainty created by the BALCA. However, the district court chose to stay its hand, and returned resolution of the issue to DOL. Although the agency is currently preparing rulemaking to address issues involving the methodology to set the H-2B prevailing wage, that rulemaking cannot address the determination of rights and obligations under a prior rule, Bowen v. Georgetown University Hosp., 488 U.S. 204, 208-211 (1988), and in any event will not be finalized until 2015 at the earliest.

The BALCA's Island Holdings decision does not reflect the legal position of the Secretary of Labor because the BALCA erroneously rejected the Secretary of Labor's own plain

interpretation of the relevant regulatory provisions, as reflected in the preamble to the IFR and a separate notice amending ETA Form 9142, requiring H-2B employers to attest that they will pay at least the prevailing wage that "is or will be issued by the Department" during the course of the certified employment. See 78 FR at 24,055; 76 FR 21,036 (Apr. 14, 2011).[4] In dismissing the Secretary's preamble discussions, the BALCA ignored the established principle that a preamble statement to a rule constitutes the best evidence of the agency's contemporaneous interpretation of a regulation, to which the courts owe substantial deference. See Public Citizen v. Carlin, 184 F.3d 900, 911 (D.C. Cir. 1999); cf. Dearborn Public Schools, 1991-INA-222 (BALCA Dec. 7, 1993) (en banc), (BALCA, as a non-Article III court, lacks inherent authority to rule on the validity of a regulation).

Moreover, the BALCA's decision in Island Holdings that the Department is without authority to issue supplemental prevailing wage determinations is in direct opposition to the district court's orders in the CATA case, and potentially leaves the Department susceptible to conflicting legal obligations. CATA I ordered DOL to issue a new wage regulation that followed APA procedures. While DOL was drafting its new wage regulation to comply with CATA I, the district court concluded that it need not order DOL to issue conditional labor certifications to employers seeking to hire H-2B workers that would require employers to agree to pay a prevailing wage set by the new methodology as soon as that methodology became effective. Rather, the court specifically held that nothing in the existing H-2B regulations precluded DOL from issuing certifications conditioned on a promise to pay a new prevailing wage as soon as one

[4] When it published the new ETA Form 9142 requiring employers seeking a labor certification to swear under penalty of perjury that they would pay at least the prevailing wage that "is or will be issued by the Department" during the course of the certified employment, the Department explained that when a new wage rate became effective as a result of a revision to the methodology to determine the prevailing wage, employers would be required to pay the prevailing wage rate in effect for the period of work encompassed by their application, which could result in two wage rates being applicable to a single application. 76 FR 21,036. Employers have been voluntarily signing this attestation for over three years.

became effective. CATA I, 2010 WL 4823236, at *2-3 (Nov. 24, 2010). The agency complied with the CATA I order in 2011 by issuing a new wage rule. 76 FR 3452. Congress then barred that 2011 wage rule from being implemented through a series of appropriations riders, causing the agency to continue applying the invalid 2008 wage rule. The court in CATA II then vacated the 2008 wage rule, concluding that prevailing wage determinations issued based upon the four-tiered wage rates in that rule resulted in adverse effect on U.S. workers' wages, and that the labor certifications based on such prevailing wages "exceed the bounds of DOL's delegated authority." 933 F. Supp. 2d at 711-712. The court also found that the four-tiered wages required by the 2008 rule violated section 706(2)(A) of the APA, because it had consequences that "plainly contradict congressional policy and render the 2008 Wage Rule invalid[.]" Id. at 713. Once the court vacated the 2008 wage rule, it ceased to exist and DOL was obligated to move quickly to issue a valid replacement rule to fill the void. Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993); Nat'l Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir. 1995).

Taken together, these rulings make it clear that the CATA court expected that once DOL issued a valid regulatory method for determining the prevailing wage, the agency would also issue supplemental prevailing wage determinations to employers with current labor certifications to correct the unlawful wage issued with those extant certifications. The Secretary determined that the court's orders obliged the Department to issue the SPWDs, and that judgment is reflected in the IFR and its implementing guidance. The BALCA's Island Holdings decision directly controverts the CATA orders and, if abided, leaves the Department vulnerable to continuing legal challenges based on prevailing wage determinations invalidated by the IFR on April 24, 2013.

Even if DOL were not required under the CATA Court's decisions to adjust the prevailing wage obligations of H-2B employers under the IFR, the BALCA still erred in determining that DOL was not authorized to issue supplemental prevailing wage determinations. In 2011, DOL amended its ETA Form 9142, Appendix B.1, to require an agreement from all H-2B employers, as a condition for importing H-2B nonimmigrant workers, to pay the prevailing wage rate in effect for the pay period of work encompassed by the employer's labor certification application for H-2B nonimmigrant workers. 76 FR at 21,036-39. In the preamble to the Federal Register notice announcing the amendment to ETA Form 9142, Appendix B.1, the Assistant Secretary of Labor stated that DOL requires all employers who apply for an H-2B labor certification to agree, as a condition of receiving the H-2B labor certification, to pay the prevailing wage rate in effect for the period of work encompassed by the employers' labor certification applications. Id. at 21,036. When publishing the IFR, the Secretary of Labor again stated that all employers are required to comply with this condition after receiving a supplemental prevailing wage determination under the IFR. 78 FR at 24,055. Thus, DOL's issuance of supplemental prevailing wage determinations under the IFR is authorized by the contractual conditions to which the employers agreed when signing ETA Form 9142, Appendix B.1, and the Secretary's interpretation of the scope of the IFR wage obligations for employers currently employing H-2B workers under wage rates that have been vacated or rendered legally erroneous.

In the case under review, Island Holdings willingly agreed to the wage adjustment conditions when the company signed ETA Form 9142, Appendix B.1. Island Holdings agreed to pay the wage rate that equals or exceeds the highest of the most recent prevailing wage rate that is or will be issued by DOL for the time period the H-2B workers perform work in the United

States. Because Island Holdings specifically agreed to contractual terms set by DOL as a condition for importing foreign workers, the company remains bound to those contractual terms. Woodside Village v. Secretary of Labor, 611 F.2d 312, 315 (9th Cir. 1980); Vulcan Arbor Hill Corp. v. Reich, 81 F.3d 1110, 1115-16 (D.C. Cir. 1996). Island Holdings, and all similarly situated H-2B employers, remain bound by the voluntary and unconditional promise to pay the wage rate that equals or exceeds the highest of the most recent prevailing wage rate that is or will be issued by DOL for the time period the H-2B workers perform work in the United States, including the new IFR wage rates. Frederick County Fruit Growers v. Martin, 968 F.2d 1265, 1269 (D.C. Cir. 1992). The Secretary's position on this issue was clearly stated in the preamble to the IFR, which indicated that employers are required to pay the higher IFR wage rates based on the employers' signed agreements under Appendix B.1 to ETA Form 9142. 78 FR at 24055. Therefore, the BALCA's determination that employers are not required to pay the adjusted wage rates under the supplemental prevailing wage determinations was a legal error issued contrary to the Secretary's clear direction on this precise issue under the IFR.

Accordingly, pursuant to the authority granted to DOL under 5 U.S.C. 554(e), the Secretary is now considering issuing on his own motion a declaratory order to clarify his authority to set law and policy in the H-2B labor certification program, and to resolve the controversy arising from the BALCA's legally erroneous decision. The BALCA's Island Holdings decision does not represent the legal or policy position of the Secretary of Labor. The Administrative Law Judges composing the BALCA are subordinate employees of the agency. See 5 U.S.C. 3105; 52 FR at 11,217; Dep't of Justice, Legal Counsel Opinion, 14 Op. O.L.C. 1, 2-3 (1990). It is a basic principle of administrative law that the agency makes law and policy, not subordinate ALJs. See Ho v. Donovan, 569 F.3d 677, 682 (7th Cir. 2009); Croplife v. EPA,

329 F.3d 876, 882 (D.C. Cir. 2003); Iran Air v. Kugelman, 996 F.2d 1253, 1260 (D.C. Cir. 1993); Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989); Admin. Conf. of the United States, Recommendation 92-7, 57 FR 61,759, 61,763 (Dec. 29, 1992). The BALCA ALJs' authority is limited to non-lawmaking functions, including determining issues of fact and applying undisputed law to the facts of an employer's particular case.

Apart from the general principle of administrative law that the BALCA ALJs do not have authority to speak for the agency on questions of law and policy, under DOL's regulation the BALCA does not have delegated authority to speak for the agency. Unlike the Secretary's express delegation of his authority to the Administrative Review Board (ARB), see 77 FR 69378 (Secretary's Order 1-2012), the agency has never endowed the BALCA with authority to speak for the Secretary on legal issues, see 52 FR at 11,217-18. Courts have recognized that the ARB speaks for the agency because it has delegated authority, see Sasse v. DOL, 409 F.3d 773, 778-79 (6th Cir. 2005), but the BALCA lacks such delegation. Although the agency's administrative appellate regime may terminate with the BALCA's review because there is no procedure for appealing to a higher agency official, that termination does not create delegated authority in the BALCA to make law or policy for the agency. The lack of further administrative review simply means that the BALCA's decision is the final agency action for purposes of judicial review. See 5 U.S.C. 704; cf. Tom C. Clark, Attorney General's Manual on the Administrative Procedure Act 83 (1947). However, as a neutral fact finder and arbiter of an employer's complaint, the BALCA's decisions do not necessarily represent the agency's authoritative interpretation of the regulation. Cf. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 154-

55 (1991).[5] The Secretary establishes H-2B wage policy and any related, governing legal standards. If the Secretary determines that the BALCA's decision rests on a legal error or departs from the Secretary's announced legal interpretation or policy, the Secretary may issue in his discretion a declaratory order overruling the BALCA. 5 U.S.C. 554(e).

The Secretary proposes issuing a declaratory order to overrule the BALCA's decision and legal conclusions in Island Holdings, and to reaffirm the Secretary's interpretation of the regulations, as stated in the preamble to the IFR. The Secretary does not intend through the proposed declaratory order to create a new rule, but seeks to resolve and clarify the agency's prior interpretation of the H-2B regulation and apply this interpretation, as originally intended, to the undisputed facts in Island Holdings. Thus, the proposed declaratory order is limited to the concrete and narrow question of law about the scope of the IFR as applied to the factual scenario in Island Holdings, which order will eliminate confusion and uncertainty created by the Island Holdings decision related to the Secretary's authority to set law and policy in the H-2B program, and the related status of the supplemental prevailing determinations issued to the employer in Island Holdings under the IFR. In addition, a final declaratory order on this issue will also establish binding precedent for resolution of all supplemental prevailing wage determinations under the IFR involving similarly situated parties. Following the issuance of such an order, the supplemental prevailing wage determinations at issue in Island Holdings and any similar pending cases will be handled and finally resolved in accordance with the final declaratory order.

[5] Even under a split enforcement regime where Congress delegates to a neutral adjudicatory board the authority to hear claims or sanctions brought by the agency with enforcement authority, the Supreme Court has held that the enforcement agency with authority to administer the statute has jurisdiction to issue binding interpretations of the agency's regulation. See Martin v. OSHRC, 499 U.S. 144, 154-55 (1991). A neutral adjudicatory board outside the agency does not have authority to issue binding interpretations of law because the purpose of the adjudicatory board is to determine whether the agency's action is consistent with the regulation, which the agency defines in the first instance. Id. Martin's principle that the enforcement agency has policy making authority has even more force in this case, where DOL does not operate under a split enforcement regime in H-2B context and a single agency has retained to itself all enforcement functions.

Since the proposed declaratory order involves solely questions of law and the application of law to undisputed facts relating to the issuance of the supplemental prevailing wage determinations in Island Holdings, the Secretary seeks comment from the public in the nature of legal briefing related to the proposed legal determinations stated in this notice. In order to establish the record for this adjudicatory proceeding, the Department will provide access to the following documents on the http://www.regulations.gov Web site under the docket number ETA-2014-0003: (1) the Department's April 24, 2013 Interim Final Rule; (2) the CATA I and CATA II decisions; and (3) the Island Holdings decision.

Signed: at Washington, D.C. this _2nd_ of December, 2014.

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Thomas E. Perez,

Secretary of Labor.

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