THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW ORLEANS WORKERS' CENTER FOR RACIAL JUSTICE,

Plaintiff,

v.

U.S. DEPARTMENT OF LABOR, *et al.*,

Defendants.

Case No. 20-cv-1825 (RBW)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

LEA …….……Law Enforcement Agency

QCA…….....Qualifying Criminal Activity

VTVPA……. ……Victims of Trafficking and Violence Prevention Act

WHD…….Wage and Hour Division

INTRODUCTION

The U and T nonimmigrant visa programs grant temporary immigration status to an individual who has been subject to certain serious crimes or human trafficking, so long as that individual assists in the investigation or prosecution of the crimes and that assistance is certified by a law enforcement agency. 8 U.S.C. § 1101(a)(15)(T), (U). These programs protect the vulnerable and enhance the ability of law enforcement to respond to these crimes by making it safe for the immigrant victims to provide information.

The Wage and Hour Division ("WHD") of the Department of Labor ("DOL") routinely encounters the type of labor crimes against immigrant workers that could give rise to a U or T visa during its enforcement of the nation's labor laws. Recognizing its expertise in labor crimes and its authority under the U and T visa programs, in 2011 WHD established a program by which it would support vulnerable immigrant workers in obtaining this temporary immigration relief by providing certifications for U and T visa applications.

Plaintiff New Orleans Center for Racial Justice ("NOWCRJ"), and the workers on whose behalf it organizes, relied on WHD's program to improve working conditions. WHD had operated it in a transparent, immigrant-friendly way, making it a safe and appealing option for workers, many of whom have had negative experiences with other law enforcement agencies. NOWCRJ's members' willingness to report labor violations to WHD resulted in successful enforcement of workplace safety and wage and hour rules.

WHD's program was effective. It provided hundreds of exploited workers with the certifications they needed to obtain crucial immigration status, and in turn induced those workers to report the labor violations they experienced to WHD, making all American workers safer. The

U.S. Citizenship and Immigration Services ("USCIS") called WHD's work "invaluable," "well-organized and thorough." Administrative Record ("AR") 0475.

Rather than permit this useful program to continue, in 2019, the newly appointed Administrator of WHD, Cheryl Stanton, crippled it. Soon after taking her position, Administrator Stanton issued Field Assistance Bulletin 2011-1 Addendum 2 (the "New Certification Policy"). The New Certification Policy made several destructive changes to the program, making it less effective and less safe for participants. Following these changes, NOWCRJ's members are scared to engage with WHD, which in turn hampers the ability of the agency to enforce the nation's labor laws.

The New Certification Policy's explanation for its program changes was conclusory, unreasoned, and inconsistent with how WHD had operated the program to date. The required changes did not acknowledge or explain their departure from key factual findings WHD had previously made and were based on a legal misunderstanding of WHD's established authority under the U and T visa programs. The New Certification Policy is thus arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and should be set aside.

STATEMENT OF FACTS

I. Exploitation of Immigrant Labor in the United States

Tens of thousands of people are trafficked into the United States each year. Victims of Trafficking and Violence Prevention Act of 2000 ("VTVPA"), Pub. L. 106-386, § 102, 114 Stat. 1464 (also at AR 0004). While sex trafficking is the most notorious form, "[t]rafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards

worldwide." AR 0004 (VTVPA). Labor traffickers use force, fraud, or coercion to make a person perform labor or provide services against their will.[1] Forced labor occurs in numerous U.S. industries, including illicit massage businesses, domestic work, agriculture, factory work, door-to-door sales crews, bars and restaurants, peddling and begging, health and beauty services, construction, hospitality, and commercial cleaning services, among others.[2]

Workers are also exploited in other serious ways that often overlap with criminal forced labor. Certain violations of U.S. labor laws, such as illegally low wages, illegal deductions from workers' pay, an absence of wage records, unsafe or unsanitary employer-provided housing or transportation, and threats or retaliation against workers who complain of violations, are also indicators of potential labor trafficking. AR 0339 (WHD Memo No. 2015-5).[3]

Immigrants are uniquely vulnerable to forced labor and labor exploitation. AR 0281 (DHS U and T Visa Law Enforcement Resource Guide, hereafter "DHS Resource Guide"). This vulnerability results from a variety of factors, including language barriers, separation from family and friends, lack of understanding of U.S. laws, fear of deportation, and cultural differences. *Id*. For undocumented immigrants, "[p]erpetrators and human traffickers also use

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[1] U.S. code defines "severe forms of tracking in persons" to include, in addition to sex trafficking, "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 22 U.S.C. § 7102(11) (also at AR 0007).

[2] *What is Forced Labor?*, Department of Homeland Security ("DHS"), https://www.dhs.gov/blue-campaign/forced-labor (last visited Dec. 3, 2020).

[3] Labor violations enforced by the WHD are described in detail on its webpage. *See*, *e.g.*, *Resources for Workers*, WHD, https://www.dol.gov/agencies/whd/workers#workersrights (last visited Dec. 3, 2020).

victims' lack of legal status as leverage to exploit and control them." AR 0280 (DHS Resource Guide). Immigrant guestworkers with employer-sponsored visas, such as H-2A (Temporary Agricultural Worker) and H-2B (Temporary Non-agricultural Worker) visas, are vulnerable to mistreatment by their employer because they rely on their continued employment to maintain lawful immigration status. Declaration of Ursula Price ("Price Decl.") ¶¶ 6, 10-11, 14; *see also* AR 0280 (DHS Resource Guide) (workers without stable immigration status are vulnerable to labor exploitation).

And yet immigrants perform essential work, including by maintaining the U.S. food supply chain. For example, Louisiana's $2.4 billion seafood industry relies on H-2B immigrant workers to function.[4] These workers are often subject to labor violations. For instance, one Louisiana crawfish processer required its immigrant workers to work for 16 to 24 hours straight without overtime pay, locked them in the plant while they were working, threatened to fire them (which would result in the loss of their temporary immigration status) if they complained about these labor violations, and threatened violence against them and their families in Mexico. Price Decl. ¶¶ 13-14.[5]

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[4] Geoffrey T. Stewart et al., *Community Economic Development in Rural Coastal Acadiana Parishes* (USDA funded study), University of Louisiana at Lafayette, 8, 10 (2019), https://moody.louisiana.edu/sites/business/files/Community%20Economic%20Development%20in%20Rural%20Coastal%20Acadiana%20Parishes%20-%20An%20In-Depth%20Review%20of%20the%20Vermilion%20St%20Mary%20and%20Iberia%20Parish%20Seafood%20Supply%20Chains.pdf.

[5] DOL obtained back wages and penalties from this employer following an enforcement action. *C.J.'s Seafood of Breaux Bridge, LA., Instructed to Pay Fines and Back Wages After US Department of Labor Investigations*, WHD (July 24, 2012), https://www.dol.gov/newsroom/releases/whd/whd20120724.

Similar exploitation of immigrant workers occurs all over the country. An orchard in New Jersey failed to provide workers with sanitary housing (in violation of H-2A visa program requirements), terminated workers without cause short of the time commitment required by H-2A regulations, and made illegal deductions from their wages.[6] A Florida-based farm labor contractor violated H-2A visa program requirements by failing to provide workers with three meals per day and illegally underpaying them.[7] And a California onion grower underpaid its H-2A workers by more than $2.3 million.[8]

As Congress found prior to enactment of the visa programs at issue in this litigation, the United States' law enforcement response to trafficking was "inadequate" and existing laws often failed to protect victims of trafficking. VTVPA, § 102 (also at AR 0005). Immigrant workers are often reluctant to report such labor abuses and trafficking, and for good reason. AR 0280 (DHS Resource Guide), 67 Fed. Reg. 4784, 4784 (also at AR 0082), 72 Fed. Reg. 53,014, 53,014-15 (also at AR 0136). As the drafters of the statute explained:

> Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often

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[6] *U.S. Department of Labor Investigation Results in Judge Ordering New Jersey Farm to Pay $556,745 in Back Wages and Penalties*, WHD (Nov. 21, 2019), https://www.dol.gov/newsroom/releases/whd/whd20191121.

[7] *U.S. Department of Labor Finds Florida-Based Farm Labor Contractor Violated Guest Worker Visa Requirements at 5 North Carolina Farms*, WHD (Mar. 5, 2020), https://www.dol.gov/newsroom/releases/whd/whd20200305.

[8] *US Department of Labor Reaches Agreement Resulting in More than $2.3 Million in Back Wages to Temporary Foreign Agricultural Workers*, WHD (July 10, 2012), https://www.dol.gov/newsroom/releases/whd/whd20120710.

> find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

VTVPA, § 102 (also at AR 0005-6). Immigrants reasonably fear retaliation by their employers, on whose continued goodwill their economic wellbeing and immigration status depends. AR 0280 (DHS Resource Guide); *see also* Price Decl. ¶ 10. And they may fear interacting with law enforcement agencies, especially if they or their family members do not have lawful status. AR 0280 (DHS Resource Guide), 67 Fed. Reg. at 4784 (also at AR 0082), 72 Fed. Reg. at 53,014-15 (also at AR 0136).

II. The U and T Visa Program

Recognizing the prevalence of trafficking and the exploitation of immigrants as well as the inadequate law enforcement response, in 2000, Congress enacted the Victims of Trafficking and Violence Prevention Act. Through this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of trafficking, domestic violence, sexual assault, and other crimes, while offering protections to victims of such crimes. VTVPA, § 102 (also at AR 0004-6); *see also* 67 Fed. Reg. at 4784 (also at AR 0082); 72 Fed. Reg. at 53,014-15 (also at AR 0136). Congress also sought to encourage law enforcement to better serve immigrant crime victims. *Id*. (all citations).

As relevant here, VTVPA created two new nonimmigrant visa classifications, known as the T and U visas (so named for their location in the immigration code, sections 1101(a)(15)(T) and (U) of the Immigration and Nationality Act). T visas are available to survivors of human trafficking, and U visas are available to survivors of certain other serious crimes in the United States. 8 U.S.C. § 1101(a)(15)(T), (U). With limited exceptions, both visas require that the visa applicant has been helpful or is likely to be helpful in the investigation or prosecution of the

underlying criminal activity. *Id.* § 1101(a)(15)(T)(i)(III), (U)(i)(III). Congress explained that such immigration relief:

> [W]ill facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.

VTVPA, § 1512 (also at AR 0057). Providing temporary immigration relief is essential to encourage victims to report criminal activity without fear of reprisal. 67 Fed. Reg. at 4784 (also at AR 0082); 72 Fed. Reg. at 53,014 (also at AR 0136) ("Alien victims may not have legal status and, therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States."); AR 0280 (DHS Resource Guide).

An individual may qualify for a U visa if he or she has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activities ("QCAs"), possesses information about the QCA, and has been or is likely to be helpful in the investigation or prosecution of the QCA. 8 U.S.C. § 1101(a)(15)(U). QCAs include, among other crimes, trafficking, involuntary servitude, and forced labor, as well as non-workplace-based crimes. *Id.* § 1101(a)(15)(U)(iii). A U visa application requires certification regarding the QCA from a law enforcement agency ("LEA") – on Form I-918, Supplement B. 8 C.F.R. § 214.14(c)(2). The certification confirms that the applicant has been helpful or is likely to be helpful in investigation or prosecution of the QCA. *Id*.

An individual may qualify for a T visa if he or she has been the victim of a "severe" form of human trafficking, is present in the United States as a result of the trafficking, complies with any reasonable request for assistance in any investigation or prosecution of acts of trafficking,

and demonstrates that he or she would suffer extreme hardship involving unusual or severe harm upon removal. 8 U.S.C. § 1101(a)(15)(T). "Severe" forms of human trafficking include (but are not limited to) defined types of labor trafficking. 22 U.S.C. § 7102(11). Although law enforcement support is not required for a T visa application, a law enforcement endorsement (sometimes also referred to as a certification) may strengthen an application. 8 C.F.R. § 214.11(d)(3). Such an endorsement may be used, *inter alia*, to establish victimization or compliance with reasonable law enforcement assistance requests. *Id.* § 214.11(d)(3)(i).

USCIS adjudicates U and T visa applications. *Id.* §§ 214.11(d), 214.14(c)(1). U visas are capped at 10,000 per year. 8 C.F.R. § 214.14(d)(1). The need for these visas far exceeds this cap. In recent years, tens of thousands of applicants have applied annually.[9] All eligible U visa applicants who, due solely to the cap, do not receive the requested visas are placed on a waiting list. 8 C.F.R. § 214.14(d)(2). For waitlisted applicants, USCIS "will grant deferred action or parole" to the applicant and qualifying family members and may also authorize employment. *Id.* Accordingly, those applicants receive some protections while waiting for receipt of the visa. T visas are subject to an annual cap of 5,000 visas, but that cap is not typically reached. *Id.* § 214.11(j).

Both U and T visas permit recipients and their immediate family members to live and work in the United States for four years. *Id.* §§ 214.11(c)(1), 214.14(g). U and T visa holders may apply for lawful permanent residence after three years. 8 U.S.C. § 1255(l), (m).

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[9] USCIS, U Visa Report 4 (April 2020) https://www.uscis.gov/sites/default/files/document/reports/Mini_U_Report-Filing_Trends_508.pdf.

III. WHD's Prior U and T Visa Certification Policy

WHD enforces critical workplace protections. *See* AR 0323 (Secretary of Labor's Order 01-2014 delegating authority to WHD). Particularly relevant here, it enforces the Fair Labor Standards Act ("FLSA"), which provides minimum wage, overtime pay, and child labor requirements. *Id*., *see also* 29 U.S.C. § 201 *et seq*. WHD also enforces the Migrant and Season Agricultural Worker Protection Act and portions of the Immigration and Nationality Act that provide protections for certain temporary nonimmigrant workers, including H-2A Agricultural Workers and H-2B Non-Agricultural Workers. AR 0324 (Secretary's Order 01-2014); *see also* 29 C.F.R. Part 500 (MSAP); 29 C.F.R. Part 501 (H-2A); 29 C.F.R. Part 503 (H-2B).

As part of its enforcement work, WHD conducts investigations of employers.[10] Investigations include gathering employer data, entering and inspecting an employer's premises and records, and questioning employees. *See*, *e.g.*, 29 U.S.C. § 211(a). These investigations may be prompted by employee complaints or strategic targeting of particular industries in which violations are prevalent.[11] WHD explains that it "targets low-wage industries [for investigation]. . . because of high rates of violations or egregious violations, the employment of

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[10] WHD provides comprehensive information about its investigations in *Fact Sheet #44: Visits to Employers*, WHD, https://www.dol.gov/agencies/whd/fact-sheets/44-flsa-visits-to-employers (last revised Jan. 2015). The FLSA, among other authorities, authorizes DOL representatives to conduct such investigations, including by gathering data concerning wages, hours, and other employment practices; entering and inspecting an employer's premises and records; and questioning employees. 29 U.S.C. § 211(a); *see also* 29 C.F.R. § 501.15 (WHD's enforcement authority as to H-2A workers); 29 C.F.R. § 503.1(c) (WHD's enforcement authority as to H-2B workers).

[11] *Fact Sheet #44: Visits to Employers*, WHD, https://www.dol.gov/agencies/whd/fact-sheets/44-flsa-visits-to-employers (last revised Jan. 2015).

vulnerable workers. . . .” WHD, *supra* note 11. During these investigations, in addition to any civil violations observed, WHD may detect workplace crimes that could support the worker-victim’s eligibility for a U and/or T visa. AR 0313 (WHD FAB 2011-1). As WHD has explained: “[b]ecause many wage and hour investigations take place in industries that employ vulnerable workers, WHD is often the first federal agency to make contact with these workers and detect exploitation in the workplace.” AR 0336 (Fact Sheet).

Recognizing that “DOL investigators may detect evidence of qualifying criminal activities during the course of investigating violations of workplace laws,” AR 0321 (WHD Memo No. 2011-4), USCIS has identified DOL as a law enforcement agency that may provide certifications for U and T visas, 8 C.F.R. §§ 214.14(a)(2), 214.11(a). DHS’s U visa regulation defines such a certifying agency as:

> a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.

Id. § 214.14(a)(2). Similarly, DOL may endorse a T visa application because of its “responsibility and authority for the detection, investigation, and/or prosecution of severe forms of trafficking in persons.” *Id.* § 214.11(a). USCIS regulations also explain that “detection” of the underlying crime (WHD’s typical role) is included in the meaning of “investigation or prosecution” under the VTVPA. *Id.*; *Id.* § 214.14(a)(5).[12]

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[12] USCIS explained this interpretation: “The rule provides that the term ‘investigation or prosecution,’ used in the statute and throughout the rule, includes the detection or investigation of a qualifying crime or criminal activity, as well as the prosecution, conviction, or sentencing of the perpetrator of such crime or criminal activity. . .. Referring to the AG Guidelines, USCIS is

The Secretary of Labor delegated DOL's certification authority to WHD. *See*, *e.g.*, AR 0320 (WHD Memo No. 2011-3), 0323-25 (Secretary's Order 01-2014), 0334 (WHD Memo No. 2015-04). In April 2011, WHD issued Field Assistance Bulletin No. 2011-1 ("FAB 2011-1") establishing its program to review and certify U visa applications. Per FAB 2011-1, when in the course of a labor violation investigation or following a complaint, WHD detects qualifying criminal activity:

> WHD will consider . . . certify[ing] Supplement B forms in cases in which it has detected a QCA and each of the following conditions are met: (1) the detected QCA is involuntary servitude, peonage, trafficking, obstruction of justice or witness tampering; (2) the alleged QCA arises in the context of a work environment or an employment relationship; and (3) there is a related, credible allegation of a violation of a law that WHD enforces.

AR 0312 (FAB 2011-1). WHD further explained that the QCAs it identified:

> [A]re most likely to be found in connection with its workplace investigations and that it can effectively train its staff in the detection of these QCAs. WHD will document basic information and evidence concerning these QCAs when they are detected during a WHD investigation, but it does not have jurisdiction to investigate or prosecute these crimes. Thus, DOL's authority to complete and certify Supplement B forms will be based on its role as a law enforcement agency that has 'detected' the crimes.

AR 0313-14 (FAB 2011-1 at 3-4).

FAB 2011-1 also explained the procedures by which WHD would exercise its certification authority, including: creating regional U visa coordinator roles; designating Solicitor of Labor regional attorneys as responsible for preparing certification and providing advice as to the interaction between a certification request and WHD workplace investigations and criteria for

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defining the term to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer's investigative duties." 72 Fed. Reg. at 53,020 (also at AR 0144).

determining whether to certify; delegating final authority to certify in most instances to the Regional Administrator, and establishing procedures for timeliness, transparency, and confidentiality. AR 0313-19 (FAB 2011-1 at 3-9). FAB 2011-1 made clear that WHD's certification program was derivative of its responsibilities for enforcing labor laws—it would only consider requests for certification related to a WHD investigation or to a complaint alleging a violation of law that WHD enforces. AR 0314 (FAB 2011-1 at 4).

As provided by regulation, certification was permissible based only on the detection of a QCA, 8 C.F.R. § 214.11(a), (d), § 214.14(a)(5), (c)(2)(i), and WHD did not require final adjudication of an alleged QCA. This was consistent with USCIS's view that "Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation," 72 Fed. Reg. at 53,019 (also at AR 0143), and acknowledged that no LEA pursues enforcement of all violations it identifies. AR 0358 (RSOL Attorney Training); *see also* AR 0362 (same) (WHD advised its staff "[p]lease note that there does not have to be an investigation or prosecution in order for the petitioner to be eligible."). In making certification decisions, WHD would consider whether another LEA was already involved or would be in a better position to provide the certification, AR 0315 (FAB 2011-1 at 5), but nothing in FAB 2011-1 required WHD to condition its decision on certification on the views of another LEA.

FAB 2011-1 also made factual conclusions about petitioner safety and the importance of timely review, including that the certification of a U visa petition may help protect crime victims from future harm and that the timeliness of the certification review promotes the safety of the petitioner:

> It is very important that all requests for U visa certification be processed expeditiously and that WHD notify the petitioner and/or his or her representative of its decision in writing as soon as possible. *The timely review of the petitioner's*

> *allegations and, where appropriate, the certification of a U visa petition could help to protect the individual victims of QCAs who may be at risk of future harm*, and whose cooperation with law enforcement officials will be helpful to investigating or prosecuting the alleged perpetrator(s) of the QCAs. In those cases where WHD determines it will be unable to certify a Supplement B form, the petitioner should be provided with information as to which other law enforcement agencies may be able to certify the petition.

AR 0318-19 (Fab 2011-1 at 8-9) (emphasis added). FAB 2011-1 estimated that it would take approximately three months for WHD to review and process a U visa certification request. AR 0319 (FAB 2011-1 at 9). Relatedly, while FAB 2011-1 required that the underlying QCAs be referred to appropriate law enforcement agencies for criminal investigation and prosecution, it provided flexibility as to the timing of referrals, depending on safety considerations:

> Whether such a referral is made before or after a decision to complete and certify a Supplement B form will depend on the circumstances of a case. *In all cases, the safety of the petitioner and his or her family should be a primary consideration, as well as the safety of other individuals who have been harmed or may be at risk of harm from the detected criminal activity*. The regional U Visa coordinator will provide guidance as necessary to the local District Office (DO) as to how to manage the referral and will, as appropriate, work with social service organizations or representatives for the petitioner.

AR 0314 (FAB 2011-1 at 4) (emphasis added). WHD reemphasized these safety considerations in its internal guidance on the timing of referral. When making referrals, "the safety of the petitioner, the petitioner's family, and other possible victims need to be taken into account. This includes the timing of a referral." AR 0368 (RSOL Attorney Training); AR 0340 (WHD Memo No. 2015-5) (cautioning WHD staff not to take certain action that could place a worker who may be being trafficked in fear of reprisal).

In April 2015, WHD expanded the certification program to reach more workers. AR 0330 (FAB 2011-1 Addendum 1). WHD added three more QCAs related to labor violations it routinely investigated (fraud in foreign labor contracting, extortion, and forced labor) for which

it would consider certifications. And it extended the program to consider endorsements (which it referred to as a certification, a term this brief will also use at times, for clarity) for T visa applicants:

> [I]n cases where the following conditions are met: (1) WHD has detected a severe form of trafficking in persons; (2) the trafficking activity arises in the context of a work environment or an employment relationship; and (3) there is a credible allegation of a violation of a law that WHD enforces related to the work environment or employment relationship.

AR 0330 (FAB 2011-1 Addendum 1 at 3). It explained that through this expansion "the Department is providing additional support to workers it believes are victims of the relevant crimes and are willing to cooperate with law enforcement. These actions will protect workers and help law enforcement protect our communities and public safety." AR 0336 (Fact Sheet). WHD retained the same process for processing these additional requests for certification. AR 0328 (FAB 2011-1 Addendum 1 at 1).

For ease of reference, this brief refers collectively to the program created by these WHD documents as the "Prior Certification Policy." The Prior Certification Policy was a lifeline for vulnerable immigrants, especially those with employer-sponsored visas and those without lawful status, because, as discussed above, the potential to stabilize their immigration status encouraged reporting. AR 0336 (Fact Sheet); AR 0349-50, 52-53, 67 (RSOL Attorney Training). Prior to the overhaul challenged in this litigation, WHD processed at least 1,794 requests for U or T visas, certifying in total 891 U visa applications and 301 T visa applications. AR 0468-69 (WHD staff emails). In the years after the 2015 expansion, WHD processed an average of over 300 requests per year. *Id*. WHD hardly operated as a rubber stamp for such requests, however, declining to certify at least 448, or about one-quarter of the requests it received. *Id*.

WHD's administration of the Prior Certification Policy was highly effective. As USCIS reported to Administrator Stanton, on June 26, 2019, less than a week before the decision to scale back the Prior Policy:

> The information provided by WHD is critical to the assessment of T visa applications and U visa petitions, as it provides officers with a detailed description of the victimization an applicant has suffered, along with other critical evidence. WHD's role in detecting criminality during the process of workplace investigations is invaluable. Moreover, USCIS highly values our ongoing collaborative relationships with WHD HQ and regional officers. The information that WHD provides USCIS after speaking with stakeholders is especially beneficial to USCIS, as this information enables increased understanding and proactive consideration of stakeholder concerns and general trends within the U and T visa programs. In addition, USCIS appreciates the well-organized and thorough responses that WHD provides when completing the Supplement B and attaching relevant evidence.

AR 0475 (Email from USCIS staff member).

IV. WHD's New Certification Policy

Ms. Stanton became the WHD Administrator on April 29, 2019. On July 1, 2019, she issued Addendum 2 to FAB 2011-1, which this brief refers to as the "New Certification Policy." AR 0480. The New Certification Policy instructs WHD staff on the process WHD "will follow to determine when and whether" to complete and certify U and T visa applications. AR 0480 (FAB 2011-1 Addendum 2 at 1).

The New Certification Policy changes WHD's process in the following ways:

First, it requires that WHD notify a criminal LEA of the underlying QCA or trafficking violation *before* WHD decides whether to certify or endorse U and T visa applications. AR 0481 (FAB 2011-1 Addendum 2 at 2) ("If a criminal law enforcement agency is not already engaged in the investigation or prosecution of the QCA or trafficking activity, WHD will refer the detected QCA or trafficking crimes to the appropriate enforcement agency in accordance with its

referral protocols."). Administrator Stanton informed WHD staff that "[t]he revised protocols emphasize that appropriate criminal law enforcement agencies be made aware of any potential qualifying criminal activities or trafficking violations as soon as possible." AR 0479 (Email from Administrator Stanton). Previously, as discussed above, WHD required referral of the underlying crime, but provided discretion to determine when to do so, and required consideration of the petitioners' safety in the decision on timing. FAB 2011-1 at 4 (AR 0314).

Second, the New Certification Policy requires WHD to wait to determine the status of the criminal investigation before WHD may decide whether to certify a U visa application. AR 0481 (FAB 2011-1 Addendum 2 at 2) ("Where WHD has referred the detected QCA to a criminal law enforcement agency, WHD will determine (when possible) the status of the investigation before issuing a certification for a U visa."). Previously, WHD would consider whether another agency was already engaged in the investigation or prosecution or was in a better position to decide whether to issue such a certification, AR 0315 (FAB 2011-1 at 5), but did not make referral or determination of another agency's view a pre-condition for certification.

Third, the New Certification Policy imposes a requirement that WHD consider the criminal LEA's view of the referred crime in the decision whether to certify. The other agency's view can now serve as a veto preventing WHD from exercising its certification authority:

> If the criminal law enforcement agency is already engaged in an investigation or prosecution, but does not complete the Supplement B form, WHD will request concurrence of WHD's identification of the QCA or trafficking crime before proceeding to file a certification. *If the criminal law enforcement agency does not concur, a certification will be declined*. If the criminal law enforcement agency does not respond or fails to take a position, a certification is not precluded and WHD will consider whether to complete the Supplement B form based on the facts presented. WHD will note in the file the criminal law enforcement agency's response. . . .

> [For U visas] If a criminal law enforcement agency declines to investigate because it determines that no QCA has occurred, WHD must decline to issue a certification because a QCA is a legal requirement for issuing the certification.

AR 0481 (FAB 2011-1 Addendum 2 at 2) (emphasis added). This change limits the circumstances in which WHD may provide certifications or endorsements based on the underlying crimes that it detects.

V. The New Certification Policy's Impact on Exploited Immigrant Workers

Neither the New Certification Policy nor the Administrative Record reveals any assessment of the Policy's expected impact on vulnerable immigrant workers or on the ability of WHD to enforce labor law. In Plaintiff's experience, however, the change has made the program less effective, has left immigrant workers vulnerable to abuses, and has discouraged them from reporting labor violations for enforcement.

The New Certification Policy discourages immigrant workers from reporting abusive working conditions to WHD. Price Decl. ¶¶ 19, 22. Whereas previously the protection that a completed U or T visa application could provide encouraged reporting of labor crimes—just as Congress had intended the program to function—workers who had planned to make such reports abandoned their plans out of fear of the required referral to criminal law enforcement and retaliation by their employer. *Id*. By conditioning WHD's certification decision on the views of other law enforcement agencies, the New Certification Policy delays such certifications and makes them less likely. *Id*. ¶ 31.

The impacts of the New Certification Policy are especially significant in areas of the country, such as rural Louisiana where Plaintiff provides its services, where state and local law enforcement agencies are not effective alternatives to the WHD certification program. *Id*. ¶ 24. In many cases, these agencies are unfamiliar with the U and T visa certification process and lack

the resources or interest to determine their certification authority, are unfamiliar with identifying workplace-based crimes, or are simply hostile to immigrants. *Id*. NOWCRJ has observed that it is significantly more difficult, if not impossible, to obtain certifications for qualified applicants from state and local law enforcement agencies than it was from WHD. *Id*.

STANDARD OF REVIEW

Under the APA, a court must set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court's role at the summary judgment stage in an APA action is to decide "as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Save Jobs USA v. U.S. Dep't of Homeland Sec*., 210 F. Supp. 3d 1, 5-6 (D.D.C. 2016) (quoting *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)). A court's review of an agency action "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). However, its review "must . . . include the substantive reasonableness of [the agency's] decision," and in so doing the court must make a "'thorough, probing, in-depth review' to determine if the agency has considered the relevant factors or committed a clear error of judgment." *James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1098 (D.C. Cir. 1996) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)).

LEGAL ARGUMENT

As a threshold matter, the New Certification Policy is subject to judicial review on its merits. Plaintiff has standing to challenge the Policy, which has made it more difficult for Plaintiff to provide its mission-driven services to support immigrant workers and has accordingly required Plaintiff to expend additional resources. The Policy is final agency action subject to

judicial review under the APA because it constrains agency decision-making, eliminating prior areas of staff discretion.

On the merits, the New Certification Policy is irredeemably flawed. WHD does not have a "good reason[]" for this policy change, *Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S. Ct. 2117, 2125–26 (2016), having identified no concerns about the prior policy or any logical and nonconclusory justification for the New Policy. The New Certification Policy fails to acknowledge or explain its departure from earlier factual findings related to the likely effectiveness of the program and the safety of exploited workers. And it fails to consider the reliance interests of those workers and their advocates who had planned to seek certifications from WHD. Finally, the key policy change, that WHD refer all detected QCAs and trafficking violations to another LEA and that it defer to that agency's view, is conclusory and unreasoned and relies on a mistake of law. The New Certification Policy is arbitrary and capricious and, accordingly, must be set aside. 5 U.S.C. § 706(2)(A).[13]

I. The New Certification Policy Is Subject To Judicial Review On Its Merits.

Defendants have not raised threshold objections to reviewability pursuant to Rule 12 of the Federal Rules of Civil Procedure, opting instead to file an answer, Dkt. No. 9. Appropriately so, as the allegations of the Complaint make Plaintiff's standing and the reviewability of the New Certification Policy on its merits clear. Nevertheless, cognizant of its burden at the summary

[13] Plaintiff's complaint included a count alleging that the New Certification Policy is a legislative rule that required notice and comment rulemaking. Dkt. No. 1 at 25-26. Plaintiff is no longer pursuing relief on this count.

judgment stage, Plaintiff sets forth below the basis for the determination that there are no threshold barriers to reviewability of the New Certification Policy.

A. Plaintiff has standing to challenge the New Certification Policy.

An organization may pursue claims on its own behalf if, "like an individual plaintiff, [it can] show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quoting *Equal Rts. Ctr. v. Post Props*., 633 F.3d 1136, 1138 (D.C. Cir. 2011)). Cognizable organizational injuries include a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—[that] constitutes far more than simply a setback to the organization's abstract social interests." *PETA v. U.S. Dep't of Agric*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). To make this determination, "[a court asks], first, whether the agency's action or omission to act injured the organization's interest and, second, whether the organization used its resources to counteract that harm." *PETA*, 797 F.3d at 1094 (quotations omitted). As alleged in the Complaint, Dkt. No. 1 ¶¶ 13-15, 72-102, and now set forth in the attached Declaration of Ursula Price, Plaintiff has been injured in its own right by the New Certification Policy.

NOWCRJ furthers its mission of advancing immigrant rights, racial justice, and economic equity by working on behalf of immigrant workers, including through direct worker organizing and strategic campaigns. Price Decl. ¶ 4. This work includes applying for U and T visas on behalf of its clients and seeking supporting certifications from WHD in appropriate cases. *Id*. ¶¶ 5, 6. The Prior Certification Policy made seeking WHD certification an appealing option for immigrant workers with whom NOWCRJ was working. *Id*. ¶ 6.

As explained in detail in Ms. Price's declaration, the New Certification Policy impedes this work because the required immediate referral to criminal law enforcement, among other aspects of the New Certification Policy, discourages workers from seeking certifications from WHD. *Id*. ¶¶ 18-19, 22. The resulting difficulty is precisely the kind of perceptible impairment to NOWCRJ's ability to provide services that meets the D.C. Circuit's requirement that an organization's interest be injured to establish standing. *See*, *e.g*., *Food & Water Watch, Inc.,* 808 F.3d at 919; *PETA v. Perdue*, 464 F. Supp. 3d 300, 309 (D.D.C. 2020) (agency's auto-renewal of licenses made animal-protection organization's complaints about licensees less effective, establishing an impairment to its ability to provide its regular services); *Texas Def. Serv. v. DOJ*, No. CV 18-426 (RBW), 2019 WL 1538250, at *6 (D.D.C. Apr. 9, 2019) (organization dedicated to fair and just criminal justice system established that its daily operations were impeded by regulation imposing restrictions on the ability to file federal habeas petitions).

NOWCRJ has been forced to use its limited resources to respond to the harms caused by the New Certification Policy. Its staff have spent additional time researching the remaining options for responding to workplace violations and counseling immigrant workers on those options now that an effective avenue for redress has been lost. Price Decl. ¶ 25; *see also* ¶¶ 21, 26. This increased time commitment reduces NOWCRJ's ability to organize other workers. *Id*. ¶¶ 26-27. The increased need to meet with workers who halted planned reporting to WHD because of the New Certification Policy has increased NOWCRJ's travel time and expenses and has required the purchase of a vehicle and a search for temporary housing closer to the workers. *Id*. ¶¶ 28-29.

NOWCRJ has therefore shown that it expended operating costs beyond those normally required to carry out its mission. *See, e.g., PETA v. Perdue*, 464 F. Supp. 3d at 310 (organization

had standing based on its showing that it had to spend more time and effort on its submission of complaints regarding animal mistreatment because of challenged action) (citing *PETA*, 797 F.3d at 1095). NOWCRJ undertook these expenditures in response to the challenged policy, not as mere issue advocacy, and they impeded its ability to provide its services to others, thus meeting the second factor for establishing an organizational injury. *Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 27 (D.D.C. 2017).

The remaining elements of standing are also easily satisfied. Ms. Price's declaration explains that the New Certification Policy caused the increased risk of pursuing U and T visa certifications from WHD and immigrant workers' associated increased reluctance to do so. Price Decl. ¶¶ 18-19, 22, 30. Reversal of this Policy and a return to the Prior Certification Policy, and the associated separation of the certification process from traditional criminal law enforcement would make the process more accessible and viable again, redressing NOWCRJ's injuries. *Id*. ¶¶ 23-34.

B. The New Certification Policy is Final Agency Action Subject to the APA.

The APA provides for judicial review of final agency action. 5 U.S.C. § 704. The New Certification Policy is both agency action under the APA, because it is an agency rule, 5 U.S.C. § 551(4), (13); and it is final, because it is the culmination of WHD decision-making and it eliminates agency discretion as to decisions on U and T visa certification requests, creating a legal consequence. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, —— U.S. ——, 136 S. Ct. 1807, 1814 (2016).

The APA defines an "agency action" to include "an agency rule." 5 U.S.C. § 551(13). A "rule," in turn, includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.*

§ 551(4). Here, the New Certification Policy implements WHD's policy as to its U and T visa certification and endorsement program, with general applicability and future effect, making it an agency action.

To meet the requirement of finality, an agency action must "[f]irst . . . mark the consummation of the agency's decisionmaking process . . . . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). On the first factor, the New Certification Policy was issued by Administrator Stanton, who has delegated authority to implement DOL's certification program for U and T visas, AR 0323 (Secretary's Order 01-2014), and it sets forth the "guidelines and procedures" WHD "will follow" in its certification decisions. AR 0480 (FAB 2011-1 Addendum 2 at 1). Accordingly, the Policy was issued by the authorized decisionmaker, *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 636 (D.C. Cir. 2019), and it provides the "agency's settled position" as to how to review and process certification requests, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). There can be no question that it is the consummation of the agency's decision-making process.

On the second *Bennett* factor, the New Certification Policy has legal consequences in that it eliminates agency discretion over certain U and T visa certification requests, requiring that WHD defer to the views of a criminal LEA. An agency policy that eliminates agency staff discretion as to individual adjudications is typically final for APA purposes. *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011) (EPA guidance document that eliminated regional director's discretion to reject implementation plans on certain grounds was final agency

action); *cf Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 718 (D.C. Cir. 2015) (agency notice was not final because it did not constrain agency discretion).

II. The New Certification Policy Is Arbitrary And Capricious.

"It is axiomatic that the APA requires an agency to explain its basis for a decision," or the challenged action will be deemed arbitrary and capricious. *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm,* 463 U.S. at 43 (quotation omitted).

These principles are particularly important "where, as here, an agency changes course." *Physicians for Soc. Resp.*, 956 F.3d at 644. "Reasoned decision-making requires that when departing from precedents or practices, an agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'" *Id.* (quoting *Southwest Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019) (internal quotation marks and citation omitted)). "Agencies are free to change their existing policies," but in doing so they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC,* 136 S. Ct. at 2125(citation omitted).

Several fundamental errors of reasoning and explanation render the New Certification Policy arbitrary and capricious in violation of the APA. First, the Policy provides no justification for its existence—the Prior Certification Policy was working effectively and nothing in the Administrative Record reveals a basis to change it. Second, the New Policy changes course without providing good reasons for doing so or explaining its departure from prior factual conclusions. The New Policy fails to consider the consequences of its change, including the reliance interests of immigrant workers who were considering reporting labor violations, and the accompanying diminishment of WHD's ability to enforce labor law. And finally, the New

Certification Policy is premised on an legally incorrect understanding of WHD's authority, namely that it lacks independent authority to certify U and T visa applications based on its detection of an underlying QCA, irrespective of the views of other law enforcement agencies.

A. WHD Does Not Have a Good Reason for its Policy Change.

WHD provides no meaningful explanation for why it changed an effective program, nor does the record reveal any internal agency concerns that would explain the policy change. While agencies are permitted, of course, to change their policies and procedures, they "must at a minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). Doing so includes "show[ing] that there are good reasons for the new policy." *Encino Motorcars,* 136 S. Ct. at 2126 (quotation omitted). And the scope of review "is limited to 'the grounds that the agency invoked when it took the action,'" namely any explanation contained in the New Certification Policy itself. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)).

The New Certification Policy provides almost no justification for the changes it makes to DOL policy. It does not include a statement of goals or purpose. It does not identify any problems with the Prior Certification Policy, nor does it explain that it is seeking to improve the effectiveness or efficiency of the Prior Policy. It likewise does not explain that it is the result of shifting policy priorities, resource constraints, or any of the other reasons for which agencies typically change their policies. The closest that the agency gets to an explanation for the New Policy is the statement:

> WHD is issuing this addendum to ensure that WHD focuses on actionable complaints within its authority and that the appropriate criminal law enforcement agency is engaged in the process. The referral to criminal law enforcement for

> investigation and prosecution is critical – not just to protect an individual – but every other individual who is a potential victim.

AR 0481 (FAB 2011-1, Addendum 2 at 2).

This conclusory, unsupported statement is insufficient on its face because the agency never actually concluded that, under the Prior Certification Policy, WHD had been prevented from focusing on complaints within its authority.

Nor could it because the Prior Certification Policy *focused* on actionable complaints within WHD's authority. It was explicitly premised on the understanding "that DOL investigators may detect evidence of qualifying criminal activities *during the course of investigating violations of workplace laws*." AR 0321 (WHD Memo No. 2011-4) (emphasis added). WHD thus limited its consideration of certifications that arose in the context of the labor laws it enforced,[14] and considered requests for certification *only* when they arose in the context of one of its investigations or a complaint it received. AR 0314 (FAB 2011-1 at 4). And the Prior Certification Policy was clear that WHD would not devote its own resources to investigating the QCA or trafficking violation it detected.[15] Reinforcing the insufficiency of the New Certification Policy's explanation, the Administrative Record reveals no consideration by WHD of its ability

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[14] WHD training materials explained that it was "a WHD (not a USCIS) requirement [that] the QCA/trafficking must arise in the context of an employment relationship or work environment, and there must be a credible allegation of a violation of law that WHD enforces." AR 0362 (RSOL Attorney Training).

[15] As the Prior Certification Policy explained, "DOL does not have the authority to investigate and prosecute QCAs." As to enforcement of those crimes, WHD's role was limited to providing "where appropriate, detected information to the appropriate law enforcement agency charged with investigating and prosecuting the crime, and to pursue in coordination with that law enforcement agency the wage and hour or other workplace claims on behalf of the workers." AR 0314 (FAB 2011-1 at 4).

to focus on actionable complaints under the Prior Policy, nor any evidence that could be construed to suggest that WHD had ever actually had to focus on a single complaint outside its authority. This is hardly the type of "good reason" required to support a policy change.

The reference to ensuring engagement by criminal law enforcement is also inadequate to justify the New Certification Policy. The Prior Policy required such engagement, differing only in that it allowed flexibility to do so when it was safe for the worker. WHD's discussion of the change removing that flexibility is conclusory, unreasoned, and unsupported by the record, making it arbitrary and capricious. As the D.C. Circuit has emphasized repeatedly, "[A]n agency must explain 'why it chose to do what it did.' And to this end, conclusory statements will not do; an 'agency's statement must be one of *reasoning*.'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (emphasis in original) (quoting *Tourus Records, Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001); *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)).

WHD does not explain what about flexibility as to the timing of referrals was problematic, nor does it explain why its rigid early referral requirement would better protect either the worker at issue or other potential victims, how it would impact workers considering reports of violations, or why its change is consistent with the statutory purpose—to *first* stabilize a vulnerable worker's immigration status to enable that individual to cooperate with a law enforcement investigation or prosecution. AR 0280 (DHS Resource Guide). As the D.C. Circuit recently held, an agency's mere assertion that a policy change will yield safety benefits without any "justification" for its conclusion or "any comparative analysis whatsoever" is arbitrary and capricious. *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1285 (D.C. Cir. 2019). Moreover, WHD's statement about law enforcement engagement has nothing to do with, and so

cannot justify, its new blanket refusal to provide certifications for QCAs or trafficking violations it detected based on another LEA's conflicting view.

While, as discussed below, the New Certification Policy is flawed in additional ways, the agency did not even meet the threshold requirement of providing a good reason for its action, and the Court need go no further to vacate the Policy.

B. The New Certification Policy Deviates from Factual Findings Made by the Prior Certification Policy Without Acknowledgement or Explanation.

The New Certification Policy also abandons key factual findings upon which the Prior Certification Policy was based, namely: (1) that WHD could effectively train its staff in the detection of QCAs likely to be found in connection with workplace investigations; and (2) that petitioner safety is an essential factor to consider in the timing of referrals to criminal law enforcement. While agencies are free to change their policies, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (quoting *Fox Television*, 556 U.S. at 515) ("[T]he APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy.'").

First, the Prior Certification Policy was based on WHD's factual determination that the QCAs for which it would provide certifications, "are most likely to be found in connection with its workplace investigations and that it can effectively train its staff in the detection of these QCAs." AR 0313 (FAB 2011-1 at 3). The Record substantiates this conclusion. It reveals a robust training program, AR 0344 (RSOL Attorney Training), which focused on the intersection of the labor laws WHD enforced and related QCAs and trafficking crimes. USCIS later agreed

that WHD had succeeded in setting up an effective program, telling Administrator Stanton: "WHD's role in detecting criminality during the process of workplace investigations is invaluable. . . . USCIS appreciates the well-organized and thorough responses that WHD provides when completing the Supplement B [visa certification] and attaching relevant evidence." AR 0474 (Email from USCIS staff member).

The New Certification Policy does not acknowledge or grapple with WHD's earlier conclusions about the likely effectiveness of the U/T visa certification program. Nor does the Administrative Record reveal any concern about WHD's training program or the effectiveness of its staff's ability to detect QCAs or trafficking crimes. Rather, without explanation for the change, the New Certification Policy abandons the expertise of WHD staff in favor of the views of any other criminal LEA.

Second, the new requirement that WHD refer the detected QCA or trafficking crime to a criminal LEA "as soon as possible", AR 0479 (Email from Administrator Stanton), does not acknowledge or explain the departure from WHD's earlier conclusion that the timing of such referrals should depend on the "primary consideration" of the safety of the petitioner, his or her family, and other victims. AR 0314 (FAB 2011-1 at 4). Indeed, in certain circumstances, taking safety considerations into account, the referral should not occur until after the decision to certify a visa application. *Id*. Relatedly, as WHD previously concluded, it is "very important" to process certification requests expeditiously "to "help to protect the individual victims of QCAs who may be at risk of future harm." AR 0318-19 (FAB 2011-1 at 8-9). Nor does the New Policy consider other timing-related safety considerations, such as the likelihood that once a local criminal LEA receives the referral, it may make the employer aware that its workers are seeking to report labor violations, risking retaliation against the workers before they receive any immigration

protections. "[A] rule is arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem." *Am. Wild Horse Pres. Campaign*, 873 F.3d at 923 (quotation omitted).

Similarly, the New Certification Policy does not address the interests of workers who were considering reporting labor violations to WHD based on the Prior Certification Policy, but abandoned those plans given retaliation concerns resulting from the New Certification Policy. Price Decl. ¶¶ 19, 22. These are precisely the type of reliance interests that WHD should have considered before abruptly changing its policy. *Regents of the Univ. of Cal*. 140 S. Ct. at 1914. The New Policy simply ignores them, however. Likewise, WHD did not consider whether making the program less accessible to those workers would reduce WHD's ability to enforce labor laws due to the likely drop worker reports of violations.

Instead of this required careful consideration, the Administrative Record reveals that WHD may have mistakenly ignored its earlier cautions about the timing of law enforcement referrals. In transmitting the key Prior Certification Policy documents to Administrator Stanton shortly before the New Policy was announced, a senior WHD official explained "[a]s you will read in the guidance, WHD does refer to law enforcement when we detect a crime if no law enforcement entity is already engaged." AR 0447 (Email to Administrator Stanton). This cover email's description was incomplete, of course, as it omitted the prior Policy's key conclusions about the importance of the timing of the referral.

Whatever the reason, failing to acknowledge, much less explain its departure from these earlier conclusions renders the New Certification Policy arbitrary and capricious. *Encino Motorcars,* 136 S. Ct. at 2125–26. An agency's wholesale failure to address "past practice and

formal policies regarding [an issue], let alone to explain its reversal of course . . . [is] arbitrary and capricious." *Am. Wild Horse Pres. Campaign*, 873 F.3d at 927.

C. The New Certification Policy's Requirement that WHD Defer to the View of Another LEA is Unreasoned and Derives from a Mistake of Law.

The New Certification Policy requires that in certain circumstances WHD defer to the views of a criminal law enforcement agency without exception. This requirement is unreasoned and does not consider or account for the likelihood that WHD, with its expertise about vulnerable immigrant workers, may have a different assessment about whether a certification is appropriate, nor does it provide for any exception to the policy. The requirement also misunderstands WHD's legal authority to reach its own conclusion about whether to provide certifications for visa applications.

There is no question that DOL has the legal authority to provide U and T visa certifications and endorsements. *See* 8 C.F.R. §§ 214.14(a)(2) (for U visas "Certifying agency . . . includes . . . the Department of Labor"), 214.11(a) (for T visas "Law Enforcement Agency (LEA) [which may provide an endorsement] means . . . Department of Labor"). The Prior Certification Policy derived from this authority—as WHD explained in its trainings on the Policy: "Our authority to complete both U and T certifications rests in our ability to detect qualifying criminal activity or trafficking in the course of our investigations." AR 0358 (RSOL Attorney Training).

Yet WHD now subordinates its expertise to any contrary determination by a criminal LEA for both U and T visas without explanation, saying only that "[i]f the criminal law enforcement agency does not concur" in response to WHD's request "a certification will be declined." AR 0481 (FAB 2011-1 Addendum 2 at 2). In such a circumstance, WHD is now

prohibited from certifying, even though it has detected a QCA or trafficking crime, all that is legally required for a certification.[16]

This unexplained conclusion "entirely failed to consider an important aspect of the problem"—namely the possibility that WHD may have a different view as to occurrence of a QCA or trafficking crime as another LEA and/or that with further investigation, it can convince the LEA of the existence of such a crime. *State Farm*, 463 U.S. at 43. Such possibilities are entirely predictable. WHD has expertise in detecting the QCAs and trafficking crimes for which it will consider certifications because they typically overlap with the labor violations it investigates. *See* AR 0338 (WHD Memo No. 2015-5) ("WHD is uniquely positioned to detect and refer possible human trafficking indicators that may be identified during the normal course of WHD investigations"). And WHD may have more information about the alleged QCA than the other law enforcement agency. AR 0315 (FAB 2011-1 at 5) (WHD would receive information from the petitioner and interview him or her to assess the alleged QCA and the requested certification). Conversely, a local police force, sheriff's office, or other LEA with wide-ranging criminal enforcement responsibilities, necessarily will not have that expertise and may not have engaged in the robust assessment process provided for by the Prior Certification Policy.

The likelihood of disagreement is compounded by the fact that "Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation."

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[16] The New Certification Policy provides that the QCA will be referred to a criminal LEA *after* WHD has "detected" it. AR 0481 (FAB 2011-1 Addendum 2 at 2) ("WHD will ensure appropriate criminal law enforcement agencies are aware of any QCAs or trafficking violations that WHD *detects*.") (emphasis added).

72 Fed. Reg. at 53,019 (also at AR 0143). As WHD has instructed staff responsible for reviewing U visa certification requests, "there does not have to be an investigation or prosecution in order for the petitioner to be eligible." AR 0362 (RSOL Attorney Training).[17] Early certification is consistent with the purpose of the visa programs—to encourage vulnerable immigrants to assist in the investigation or prosecution of those crimes. Given the early stages of the investigation, another criminal LEA may well not be prepared to concur with WHD's assessment as to a visa certification. But under the New Policy, WHD must now deny such a certification request without exception.

The concurrence requirement is especially unreasoned in the context of T visa applications, where USCIS's regulations set forth specifically, that "USCIS, not the LEA, will determine if the applicant was or is a victim of a severe form of trafficking in persons, and otherwise meets the eligibility requirements for T nonimmigrant status." 8 C.F.R. § 214.11(d)(3)(i). Given USCIS's ultimate determination of the question, the contrary assessment by another LEA of whether a trafficking crime occurred should carry little weight with WHD. And similarly, for U visas, USCIS conducts its own investigation of all submissions in favor of the visa application, and "will determine, in its sole discretion, the evidentiary value of . . .

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[17] WHD explained: "[o]ur authority to complete both U and T certifications rests in our ability to detect qualifying criminal activity or trafficking in the course of our investigations. Note that 'in the course of an investigation' is interpreted broadly and . . . . Each [District Office] has the prosecutorial discretion about which cases it decides to investigate further. Each DO having different priorities, and there is a complaint intake protocol / case prioritization system that is unaffected by the existence of a T or U visa request. The fact that WHD does not investigate an underlying WH complaint does not foreclose a petitioner's ability to request that we complete a U or T visa certification." AR 0358.

evidence, including [the] Certification." 8 C.F.R. § 214.14(c)(4). There is no reason for WHD to second guess its own detection of a QCA, when USCIS can and will reach its own conclusion about the quality of the evidence and whether to issue the visa.

Despite these readily apparent reasons LEAs may have different views and why WHD's view may be sufficient, WHD provides no explanation why another LEA's assessment should outweigh its own. *See Amerijet Int'l*, 753 F.3d at 1350. Compounding this problem, the New Certification Policy is absolute, and thus makes no exception for any circumstances in which WHD could issue a certification despite the contrary view of any criminal LEA. *E. Texas Med. Ctr.-Athens v. Azar*, 337 F. Supp. 3d 1, 15 (D.D.C. 2018) (RBW) ("Agency action cannot be upheld 'if it fails to consider "significant and viable and obvious alternatives"'") (quoting *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015)).

Further, WHD characterizes the deferral policy as legally required in a section of the New Certification Policy specific to U visas, where it asserts "[i]f a criminal law enforcement agency declines to investigate because it determines that no QCA has occurred, WHD must decline to issue a certification because a QCA is a legal requirement for issuing the certification." AR 0481 (FAB 2011-1 Addendum 2 at 2). On the contrary, U visa regulations require *only* that a QCA have been "detected" by WHD or other law enforcement agencies. 8 C.F.R. §§ 214.11(a), (d)(3)(i), 214.14(a)(5), (c)(2)(i). And there is no legal requirement that if one LEA detects a QCA but another LEA has a different view of whether that QCA occurred, the first must subordinate its view to that of the second, nor does WHD point to one. Indeed, as discussed above, the Congressional intent that certification occur in the early stages of an investigation allows for some uncertainty as to whether a QCA would finally be established.

While in some instances there may be good reasons to defer to the assessment of a criminal LEA that has launched a full-scale investigation and reached an informed conclusion about the occurrence of the QCA, doing so is *not* a legal requirement. WHD's characterization of it as such is mistaken. And this erroneous characterization matters because as a "legal requirement" it permits no exceptions to the policy. As discussed above, however, there are good reasons that WHD and another LEA reach different conclusions; for WHD to assert that it is prohibited from exercising its independent judgment in such a scenario is erroneous. "An agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.'" *NAACP v. Trump*, 298 F. Supp. 3d 209, 238 (D.D.C. 2018) (quoting *Sea–Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998)), *aff'd and remanded sub nom. DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

In considering a strikingly similar legal misinterpretation, another court in this district recently set aside an agency decision resulting from an incorrect interpretation of the governing legal regime as *requiring* dismissal of an administrative appeal, when in fact the regulations made dismissal in such a circumstance permissive. *St. Vincent's Med. Ctr. v. Burwell*, 222 F. Supp. 3d 17, 23 (D.D.C. 2016). The court explained that even though the agency could have exercised its judgment to dismiss the untimely appeal, because it did not, instead relying on the legally erroneous interpretation, the agency decision was contrary to law. *Id*. *See also Defs. of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997) (misinterpretation of relevant statute made agency action arbitrary and capricious). So too here. WHD's legally incorrect view that the determination of a criminal LEA must override its own detection of a QCA must be set aside.

III. Vacating the New Certification Policy is the Appropriate Remedy.

Vacatur is the typical remedy for an agency action found unlawful under the APA. The APA provides that the reviewing court shall "*hold unlawful and set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added); *see Citizens to Preserve Overton Park*, 401 U.S. at 413–14 ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."); *see also Pub. Emps. for Envtl. Resp. v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016). "[U]nsupported agency action" such as the New Certification Policy "normally warrants vacatur." *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin*., 429 F.3d 1136, 1151 (D.C. Cir. 2005) (citation omitted).

Courts do have discretion to remand without vacatur in limited cases not applicable here. As the D.C. Circuit explained, "[t]he decision whether to vacate depends on the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quotation omitted). Neither factor supports remand. First, WHD's errors in analysis were egregious—the record reveals no good reason for the policy, it was legally incorrect on the key question of its authority to provide certifications and failed to account for key earlier findings about the safety of vulnerable immigrant workers. Second, vacatur is unlikely to be disruptive because the agency would be able to return to its recently operative, established, effective certification program. There are no extraordinary circumstances that warrant the "exceptional remedy" of remand without vacatur. *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020)

Thus, the Court should determine that vacatur is the appropriate remedy here.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court declare that the New Certification Policy is arbitrary and capricious and set it aside.

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Respectfully submitted,

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