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OALJ CASE No.: 2014-TLC-00085
ETA CASE No.: H-300-14079-526702

In The Matter Of:

CAL FARMS INC.,
Employer.

Appearances: Jeanne M. Malitz, Esq.
For the Cal Farms, Inc.

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For Administrator, Office of Foreign Labor
Certification

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For Amici Curiae

Decision and Order

This matter arises on a request by Cal Farms, Inc. for administrative review of the denial of its Application for Temporary Employment Certification by a Certifying Officer in the U.S. Department of Labor Office of Foreign Labor Certification.¹ This order affirms the denial.

Summary

Cal Farms proposes in its Application to house only its agricultural employees, never their family members. This precludes lawful permanent residents and U. S. citizens who have families from competing for the agricultural work at Cal Farms. But under Oregon's Fair Housing law, Cal Farms cannot refuse to hire a domestic worker with a family, when housing is part of the terms and conditions of employment. If it offers housing to single workers, Cal Farms also

¹ Record at pgs. 87—135.

must offer that same term or condition of employment (*viz.*, housing) to Cal Farms employees with families. Oregon's State Workforce Agency made that point when it found the Cal Farms application deficient and again when it denied the Application.

By submitting an Application that seeks to deny familial housing to nonimmigrant agricultural workers, Cal Farms gains an economic advantage. It becomes cheaper for an agricultural employer such as Cal Farms to hire temporary foreigners under the H-2A visa program who have no children to house than to hire domestic farm workers with children. This detriment to American farm workers violates a fundamental tenant of the H-2A program. That is why Cal Farms must provide housing to nonimmigrants under the H-2A visa program for agricultural work.

The federal Fair Housing Act² plays a role too, as it prohibits discrimination on the basis of familial status, at least for employers those who own no fewer than four housing units.³ No such agricultural employer may deny housing as a term or condition of employment on the basis of familial status to American agricultural workers throughout the United States. No job order or Application for Temporary Employment Certification can make it more economically advantageous to import foreign workers than to hire American workers. So the result ought be the same throughout the United States. If time permitted, I would call for the views of the Secretary of Housing and Urban Development, who enforces the federal Act.

I am aware that another Judge recently issued a decision on this issue that reached a different conclusion.

This decision first sets out how the Application was submitted and processed at the state and federal levels; rejects the request for remand; discusses the requirements of the H-2A nonimmigrant visa program; and affirms the decision that found the Application deficient.

A. The Application and the Oregon State Workforce Agency Notices of Deficiency

The Application filed on Cal Farms' behalf by the non-profit growers cooperative Washington Farm Labor Association, was based on a job order for 15 workers for the machine harvest of beets and radishes and other miscellaneous duties at seven Cal Farms locations in Madras, Oregon and Oregon City, Oregon from May 20, 2014 to December 1, 2014.⁴ Five wood frame houses of three to four bedrooms in Damascus, Oregon and Madras, Oregon were designated as sites the

² 42 U.S.C. §§ 3601—3619.

³ 42 U.S.C. § 3603(b).

⁴ Record at pg.90, box (F)(b)(5), & pg. 113.

employer would use to assign housing to individual workers.⁵ The portion of the Application on housing availability says:

“Housing will be provided at no cost to employees of Cal Farms Inc. who live beyond the area of intended employment and are unable to reasonably return to their place or residence the same day. In accordance with 20 C.F.R. § 655.122(d) and Oregon prevailing practice, housing is not provided for family members who are not employees. Separate sleeping rooms will be designated for male and female employees.”⁶

The Oregon Employment Department (Oregon Department), what the H-2A regulations calls the State Workforce Agency, is the first governmental agency to review a job order that seeks to use agricultural workers temporarily admitted to the United States as nonimmigrants, for work to be done in Oregon. The approval process the Secretary’s regulations describe permit the Oregon Department to issue a Notice of Deficiency that allows an employer to remedy any shortcomings in the Application.⁷ In the Notice of Deficiency⁸ of Job Order dated March 20, 2014, the Oregon Department stated its belief that the Oregon State Housing Act, Oregon Revised Statutes 659A.421(2)(as well as the federal Fair Housing Act, 42 U.S.C. § 3601 et seq.) prohibit discrimination in housing based on familial status. To the Oregon Department, the Cal Farms Application and the job order it contained failed to meet the requirements of 20 C.F.R. § 655.122(d)(5), by limiting the housing to Cal Farm employees, and excluding family members.

Substantive federal regulations set minimum requirements for a job order.⁹ In general, under 20 C.F.R. § 655.122(d), an employer must provide housing at no cost to H-2A workers—and to those working in corresponding employment—who are not reasonably able to return to their residences within the same day. “Corresponding employment” covers both the work included in the job order that non-H-2A workers are to do, and, even if not described in the job order, any and all agricultural work H-2A workers actually do.¹⁰ The specific provision in subsection on family housing says:

⁵ Record at pg. 114—115.

⁶ Record at pgs. 48 (April 3, 2014 response of the Washington Farm Labor Association to the Certifying Officer’s first Notice of Deficiency) & 114 (original application the Oregon Department reviewed.).

⁷ 20 C.F.R. § 655.121(b)(1) & (2).

⁸ Record at pg. 74—76.

⁹ 20 C.F.R. § 655.122.

¹⁰ 20 C.F.R. § 655.103(b), unnumbered heading “Corresponding Employment.”

Family housing. When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.¹¹

The language excluding the employment of workers with family members also implicates 20 C.F.R. § 653.501(d)(2)(xv) on housing, which the regulations governing applications for temporary employment certification incorporate at 20 C.F.R. § 655.121(a)(3). That second housing regulation says that the employer's job order must include as a material term and condition of employment:

(xv) An assurance of the availability of no cost or public housing which meets the Federal standards and which is sufficient to house the specified number of workers requested through the clearance system. This assurance shall cover the availability of housing for only those workers, and, when applicable, family members who are unable to return to their residence in the same day.¹²

The Oregon Department took the position that potential workers (domestic or foreign) who had families were excluded from the 15 employment opportunities by refusing to house them with their families. It took issue with the statement in the job order that the prevailing practice in Oregon is not to provide family housing. To the Oregon Department, Oregon law forbids discrimination on the basis of familial status, so if a majority of farmers or growers violate state law, the Oregon Department was not obligated to approve that sort of lawlessness. Neither was any part of Oregon government permitted, as a matter of state law, to advertise a housing limitation that the Oregon law forbids, because it would aid and abet invidious discrimination.¹³ It required Cal Farms to delete from its Application a statement I cannot find. The Oregon Department thought the Cal Farms application said "Housing is not suitable for families."¹⁴ What I find in the Application is language with a similar effect: the text quoted in the preceding section of this order from Record, at pg. 114. To approve the Application, the Oregon Department wanted Cal Farms to replace the objectionable language with the statement:

"Worker housing is provided to those who live outside the local commuting area. Fair Housing law generally applies to farm labor housing."¹⁵

¹¹ 20 C.F.R. § 655.122(d)(5).

¹² 20 C.F.R. § 653.501(d)(2)(xv).

¹³ Oregon Revised Statutes 659A.421(2)(f).

¹⁴ Record at pg. 76.

¹⁵ Record at pg. 76.

Cal Farms would not make that change. The Oregon Department issued a final denial on March 25, 2014.¹⁶ The inability to come to terms with the Oregon Department gave Cal Farms the opportunity to file its Application with the U.S. Department of Labor's Employment and Training Administration, Division of Foreign Labor Certification, National Processing Center in Chicago Illinois, using the emergency filing procedures found at 20 C.F.R. § 655.134. It did so on March 26, 2014.¹⁷

B. The Certifying Officer's Notices of Deficiency

The Certifying Officer in the National Processing Center twice served Cal Farms with Notices of Deficiency, first on April 1, 2014 and again on April 15, 2014.

Before it served the first one, on March 31, 2014, the Oregon Department determined not to require the replacement statement it had advocated (Record at pg. 72), in view of the decision Judge Kirby of the U. S. Department of Labor entered in the case of *Adelsheim Vineyards, LLC*, OALJ Case 2014-TLC-00049 on March 7, 2014.¹⁸ Nonetheless it emphasized that the Oregon Bureau of Labor and Industries continues to believe the language in Cal Farms' Application violates Oregon Revised Statutes 659A.421(2).¹⁹

The first (April 1) Notice of Deficiency from the U.S Department of Labor Certifying Officer told Cal Farms that its Application had to be limited to a single area of intended employment. The employer agreed on April 3, 2014²⁰ to remove the work site in Oregon City and the housing site in Damascus, Oregon and also removed the job duties that had been described as "tear down sanitation and maintenance of the packing shed."

After Cal Farms acquiesced to this change the Certifying Officer ultimately disapproved the application in a second Notice of Deficiency dated April 15, 2014. Like the Oregon Department, the Certifying Officer was under the misimpression that the job order stated that the housing Cal Farms proposed to provide to workers "is not suitable for families."²¹

¹⁶ Record at pg. 77. Cal Farms says it never got that denial, but it makes no difference, because the governing regulation treats silence by the State Workforce Agency as a denial that allows the employer to seek approval from a Certifying Officer at the U.S. Department of Labor, and it did so. 20 C.F.R. § 655.121(b)(2).

¹⁷ Record at pgs. 12 & 65, each acknowledging the Department of Labor received the Cal Farms Application on March 26, 2014.

¹⁸ Record at pgs. 19—28.

¹⁹ Record at pg. 72.

²⁰ Record at pg. 37.

²¹ Record at pg. 14.

Cal Farms requested expedited administrative review of the Notice of Deficiency from the Chief Administrative Law Judge of the Department the next day.²² Cal farms alleged that “given the cost of [family] housing, [such a requirement] would practically prevent any employer in Oregon from using H-2A.”²³

The judge’s role on administrative review is to “affirm, reverse or modify”²⁴ the Certifying Officer’s decision.

C. No Remand is Required

I reject the idea that the failure of the Certifying Officer to include all bases for denial in the first notice of deficiency requires the approval of the Cal Farms Application. The second notice of deficiency came later than the period of seven calendar days the regulation prescribes.²⁵ But the underlying statute²⁶ doesn’t say an application is granted if a Certifying Officer’s deficiency notice is late.²⁷ Neither does implementing regulation, 20 C.F.R. § 655.141(a). I also reject the idea that there is some additional disapproval the Certifying Officer must issue if the Applicant declines to make the changes a notice of deficiency requires. No further action is warranted under the review process Cal Farms invoked, which is described at 20 C.F.R. § 655.141(c).

D. The H-2A Visa Program

1. The Congressional Goal to Protect Domestic Workers

Agricultural employers who anticipate a shortage of domestic farm workers may apply to bring foreign workers to the United States. They must seek authority from the Department of Homeland Security to sponsor one or more aliens to enter the United States to do temporary or seasonal agricultural work. Work is seasonal if it is tied to a certain time of year by an event or pattern such as a growing cycle.²⁸ It is temporary when the employer’s need for work lasts no more than one year.²⁹

Each alien worker under an Application for Temporary Employment Certification the Secretary of Labor has approved

²² Record at pg. 9.

²³ Letter of Rebekah Finn of the Washington Farm Labor Association received by the Office of Administrative Law judges on April 16, 2104.

²⁴ 20 C.F.R. § 655.171(a).

²⁵ 20 C.F.R. § 655.141(a).

²⁶ 8 U.S.C. § 1188 (c)(2)(A).

²⁷ *Brock v. Pierce County*, 476 U.S. 253 (1986).

²⁸ 20 C.F.R. § 655.103(d).

²⁹ 20 C.F.R. § 655.103(d).

receives a nonimmigrant visa to enter the United States under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The visas have become known as H-2A visas, after the final three parentheses of the statute. The agricultural worker may remain in the United States only for a limited time, which is why the visa is designated as one for nonimmigrants.³⁰ The employer is obligated to tell the nonimmigrant of the limited time the visa allows the worker to be present in the United States.

The H-2A program is authorized by the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1188. The Secretary of Labor enforces the program's requirements.³¹

Before H-2A employers may bring foreign workers into the country, the Immigration and Nationality Act, as amended, requires them to obtain a certification from the Secretary of Labor that:

“(1) there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor . . . ; and
(2) the employment of the alien[s] in such labor and services will not adversely affect the wages and working conditions of workers in the United States similarly employed.”³²

This concern with not admitting alien workers in ways that adversely affect the wages and working conditions of domestic workers is a recurring theme in Congressional immigration policy. It finds expression in other visa programs the Secretary of Labor administers, like the H-1B discussed in the next section.

a. Other Nonimmigrant Visa Programs Incorporate Similar Concerns

The Immigration and Nationality Act, as amended, permits employers to hire nonimmigrant professionals temporarily in specialty occupations under the H-1B visa program. The design of the H-1B visa program deprives employers of economic incentives to prefer non-immigrant professional employees, because their wages and benefits must equal those that would be paid to American workers. Amendments to the Immigration and Nationality Act made in the American Competitiveness and Workforce Improvement Act of 1998³³

³⁰ 8 C.F.R. § 214(2)(h) (5)(vii) and (viii)(B).

³¹ 20 C.F.R. § 655.100 et seq.; 20 C.F.R. § 653.500—.503; and 29 C.F.R. § 501 et. seq.

³² 8 U.S.C. § 1188(a)(1)(A) and (B).

³³ Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. 105-277, 112 Stat. 2681.

created some of these disincentives. The employer attests in a Labor Condition Application that it will pay the H-1B nonimmigrant professional the greater of the job's actual wage rate or the prevailing wage rate throughout the entire period of authorized employment, and will pay for the nonimmigrant's non-productive time.³⁴ The prevailing wage rate is the average wage paid to professionals who are similarly employed in the occupation listed on the Labor Condition Application, at the location where the H-1B employee will work; ordinarily the employer obtains it by contacting the State Employment Security Agency that has jurisdiction over the geographic area where the H-1B worker will be stationed.³⁵

If the employer has other workers with "substantially the same duties and responsibilities" as the H-1B worker who earn more than the area's "prevailing wage," their compensation becomes the "actual wage" the H-1B worker must be paid.³⁶ Should the employer have no other employees with comparable duties and responsibilities, it is free to pay the H-1B worker more than the area's prevailing wage, which becomes the H-1B worker's "actual wage."

The nondisplacement concern evident in the H-2A temporary agricultural worker visa program is therefore neither unusual or unique.

b. H-2A Program Efforts to Protect Domestic Workers

The Scope and Purpose section of 20 C.F.R. Part 655 that guides the construction of the H-2A program regulations recognizes the Congressional goal that H-2A visas not lead to the displacement of American workers:

Construction. This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros*, 567 F. 2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v. Usery*, 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.³⁷

³⁴ 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(c)(7)(i).

³⁵ 20 C.F.R. § 655.731(a)(2)(iii)(A).

³⁶ 20 C.F.R. § 655.731(a)(1).

³⁷ 20 C.F.R. § 655.0(a)(3).

The H-2A program includes its own process to ensure that foreign workers do not become less expensive labor that displaces American workers. In the certification process, H-2A employers submit a job order through the Employment Service System, a nationwide federal job referral system, to first attempt to attract American workers to their jobs. The Secretary's regulations require that the job orders offer certain minimum wages and working conditions, including free housing to workers.³⁸

2. The Text of the Statutes and Regulations that Bear on Housing in the H2-A Visa Program

As a starting point, Secretary of Labor must receive enforceable assurances from an employer who seeks to hire alien workers admitted to the United States on H-2A visas that the employer will "comply with all applicable Federal, State and local laws and regulations."³⁹

A duty to offer housing to farm laborers, both nonimmigrant and domestic, is part of the federal H-2A program. Section 218 of the Immigration and Nationality Act, as amended, addresses farm worker housing by saying:

(4) Housing. Employers shall furnish housing in accordance with regulations. The employer shall be permitted at the employer's option to provide housing meeting applicable Federal standards for temporary labor camps or to secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation: Provided, That in the absence of applicable local standards, State standards for rental and/or public accommodations or other substantially similar class of habitation shall be met: Provided further, That in the absence of applicable local or State standards, Federal temporary labor camp standards shall apply: Provided further, That the Secretary of Labor shall issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock: Provided further, That *when it is the prevailing practice in the area and occupation of intended employment to provide family housing, family housing shall be provided to workers with families who request it*: And provided further, That nothing in this paragraph shall require an employer to provide or secure housing for workers who are not entitled to it under the temporary labor certification regulations in effect on June 1, 1986. (emphasis added)⁴⁰

³⁸ 20 C.F.R. § 655.122(c) and (d).

³⁹ 20 C.F.R. § 655.135(e).

⁴⁰ Section 218 of the INA has been codified as 8 U.S.C. §1188(c)(4).

Two regulations of the Secretary of Labor deal with housing and the duty to house agricultural workers, although some are more Delphic than helpful. First, the Secretary of Labor promulgated in 2010 a regulation that addressed the concept of “prevailing practice” that the Immigration and Nationality Act mentioned. According to the regulation, H-2A employers are obliged to provide family housing when it is the prevailing practice to do so in the area where it intends to employ agricultural workers, and in that occupation.⁴¹ But this not the only source of positive law on the topic of housing.

The second requires a trip through several regulations. According to 20 C.F.R. § 655.121(a)(3), an employer’s job order also must satisfy the requirement of another Part and subpart in the Secretary’s regulations—20 C.F.R. Part 653, subpart F, that was initially promulgated in 1980 to deal with Migrant and Seasonal Farm Workers. Part 653 addresses housing requirements in 20 C.F.R. § 653.501(d)(2)(xv). That Part 653 regulation obligates the employer to make “no cost or public housing” available that is “sufficient to house the specified number of workers requested through the clearance system.”⁴² That duty encompasses all workers the employer requested through the nationwide federal job referral system. The 1980 regulation recognizes an obligation to provide housing for “family members.”⁴³ The syntax of that sentence in Part 653 is challenging, for it reads:

“This [housing] assurance shall cover the availability of housing for only those workers, and, when applicable, family members who are unable to return to their residence in the same day.”⁴⁴

By the nature of the arrangement, no foreign agricultural worker can return to his or her foreign residence each day—nor could their family members. The duty to house textually extends beyond the agricultural workers to family members “when applicable.” The trigger for the duty, however, is unclear. The discussion of public comments received when the Secretary adopted 20 C.F.R. § 653.501(d)(2)(xv) as a final rule on June 10, 1980⁴⁵ focused on the Secretary’s authority to require free housing or public housing. It offers little more than recognition that family housing is sometimes required.

⁴¹ 20 C.F.R. § 655.122(d)(5).

⁴² 20 C.F.R. § 653.501(d)(2)(xv).

⁴³ 20 C.F.R. § 653.501(d)(2)(xv).

⁴⁴ 20 C.F.R. § 653.501(d)(2)(xv).

⁴⁵ 45 Fed. Reg. 39454, 3955—3956, 39467 (June 10, 1980).

Returning to the regulation for the H-2A visa program, the Secretary's regulation at 20 C.F.R. § 655.103(b) defines "prevailing practice" this way:

A practice engaged in by employers, that:

- (1) Fifty percent or more of employers in an area and for an occupation engage in the practice or engage in the benefit;
and
- (2) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H-2A and non-H-2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of farm labor contractors.

I don't know from the record available to me on this request for administrative review what practice actually prevails in Oregon, but I know what it should be. Cal Farms thinks the prevailing practice is not to provide family housing, relying on a statement in a web site that is reproduced in the Record at pg. 3 that says providing family housing to workers is not the prevailing practice. No survey date is given, instead the web site lists "not applicable" in that box. The Oregon Department has tried to survey employers, to learn what practice prevails with respect to providing family housing. Because "responses were minimal and DOL indicated that the responses were not enough to establish prevailing practices,"⁴⁶ there is no valid survey evidence either way.

What the Oregon Department did know is discussed in the following section: Oregon law requires all non-H-2A employers to provide family housing.

In the Preface to the implementing regulations for the H-2A program published in 2010, the Department "agree[d] with commenters that where agricultural employers are required by a State statute or applicable court decision to provide family housing to workers with families, the prevailing practice is to provide family housing."⁴⁷ That view was stated in the course of discussing comments made to the notice of proposed rule making that had been published before the final rules were adopted. It isn't text of the regulation itself.⁴⁸ Nonetheless it bears on the proper interpretation of the part of the H-2A program that expects employers to abide by applicable laws.

⁴⁶ Record at pg. 4.

⁴⁷ 75 Fed. Reg. 6884, 6910 (Feb. 12, 2010).

⁴⁸ Notice of Proposed Rulemaking was published in September 2009, at 74 Fed. Reg. 45906, Sept. 4, 2009.

3. The Oregon Fair Housing Act

Oregon's Fair Housing Act⁴⁹ textually prohibits discrimination in housing on the basis of familial status when it says:

“A person may not, because of the race, color, religion, sex, sexual orientation, national origin, marital status, *familial status* or source of income of any person...(j) ... otherwise make unavailable or deny a dwelling to a person.” (emphasis added).

The statute goes on to prohibit discriminatory advertising,⁵⁰ and to prohibit aiding and abetting others in the violation of the Fair Housing Act.⁵¹

The U.S. District Court for the District of Oregon has already determined that refusing to house families with children, when housing is otherwise provided to seasonal agricultural workers as a term or condition of employment, violates the Oregon Fair Housing Act and the Federal Fair Housing Act.⁵²

But these decisions of federal courts in Oregon are not binding precedent. District courts decision never are.⁵³ The judgments of trial courts generally are not precedential as that term is conventionally understood. Those decisions bind only the parties to that litigation under orthodox principles of *res judicata*. Even the judge who issued them is not otherwise obligated, except in service of a seemly consistency, to follow them in later cases. As Judges Posner and Easterbrook have repeatedly and accurately observed with characteristic bluntness, district court decisions are neither authoritative nor precedential.⁵⁴ District court decisions, “by

⁴⁹ Oregon Revised Statutes (ORS) 659A.421(2); earlier it had been codified as ORS 659.033.

⁵⁰ ORS 659A.421(2)(e).

⁵¹ ORS 659A.421(2)(f).

⁵² *Villegas v. Sandy Farms*, 929 F.Supp. 1324 (D. Or. 1996) (granting summary judgment finding a policy of refusing to house agricultural workers with families violates 42 U.S.C. § 3604(a) & (c), as well as Oregon's Fair Housing Act), and *Hernandez v. Ever Fresh Co.*, 923 F.Supp. 1305, 1309 (granting plaintiffs partial summary judgment on the legal issue that the federal Fair Housing Act prohibiting discrimination on family status applies to temporary farm worker housing at labor camps, and distinguishing the Fourth Circuit opinion in *Farmer v. Employment Sec. Comm'n*, 4 F.3d 1274 (4th Cir. 1993); no claim was made under the Oregon Fair Housing Act).

⁵³ *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001) (“[M]ost decisions of the federal courts are not viewed as binding precedent. No trial court decisions are . . .”).

⁵⁴ See, e.g., *RLJCS Enters., Inc. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan*, 487 F.3d 494, 499 (7th Cir. 2007) (“Decisions by district judges have no authoritative effect.”) (Easterbrook, C.J.); *Old Republic Ins. Co. v. Chuhak & Tecson, P.C.*, 84 F.3d 998, 1003 (7th Cir.1996) (“Decisions by district judges do not have the force of precedent....”) (Posner, C.J.); *Mueller v. Reich*, 54 F.3d 438, 441 (7th Cir.1995)

themselves ... cannot clearly establish the law because, while they bind the parties by virtue of *res judicata*, they are not authoritative as precedent and therefore do not establish the duties of nonparties.”⁵⁵ Authoritative precedent that binds trial courts—federal and state—comes from their appellate courts.

Nonetheless the Oregon district court decisions carry force by virtue of their reasoning. I am convinced that agricultural employers are generally required to refrain from familial status discrimination when housing workers as part of the terms and conditions of employment. Those who offer housing to a non-H-2A agricultural worker as a term or condition of that employment must offer it without regard to whether the worker needs housing for family members too.

The remark in Cal Farms’ request to the Office of Administrative Law Judges for administrative review is telling. Cal Farms took the position that being required to provide family housing would be so costly it would scuttle the utility of the H-2A program in Oregon. But nothing in the record suggests it has sunk non-H-2A employers, who must provide familial housing. If the margin is so slim that it is economically feasible to hire H-2A workers only if the agricultural employer is relieved from the duty to provide family housing, the Congressional non-displacement principle is violated. The employer then gains an economic advantage from preferring H-2A workers to domestic agricultural workers.

Cal Farms has objected that no application from an H-2A worker to house family members has been made, so the issue is not ripe for decision. That is true as to an individual H-2A worker. But the Certifying Officer must decide whether the Application meets the requirements of 20 C.F.R. § 655.135(e) before any foreign workers are admitted to the United States on H-2A visas. The question whether to approve this Application is ripe for decision.

The only reason why this rule would not apply would be if the State of Oregon’s opportunity to set fair housing policy were preempted by federal law. I do not believe it is.

E. No Federal Preemption

Preemption analysis asks three questions:

1. 1) Does the statute explicitly preempt state law?
2. 2) Does the state law actually conflict with the federal law?

(“District court decisions are not authority as precedents, even at the district court level.”) (Posner, C.J.).

⁵⁵ *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995).

3. 3) Does the federal law occupy the legislative field to an extent that it appears that Congress left no room for state regulation?⁵⁶

The answer to the first two questions is no. No language in 8 U.S.C. § 1188(c)(4) forbids a state from enacting or enforcing fair housing laws. The only express preemption is found elsewhere, where Congress said that “The provisions of subsections (a) and (c) of section 1184 of this title and the provisions of this section pre-empt any State or local law regulating admissibility of nonimmigrant workers.”⁵⁷

This is not a situation where complying with both Oregon’s Fair Housing Act and the H-2A portion of the Immigration and Nationality Act at 8 U.S.C. § 1188(c)(4) is impossible, or where the Oregon law presents an obstacle to accomplishing the objectives of the federal law. Nothing in the federal law prohibits an H-2A employer from providing familial housing, indeed in some circumstances, they must. The question is when. They certainly have to do it when the prevailing practice is to do so. But there is no reason to believe that providing it in any other circumstances frustrates the goal of the Immigration and Nationality Act. No text of the Act exempts agricultural employers from providing family housing a state law requires.

The final question is easily answered too. A Congressional intent to displace state law altogether can be inferred from a framework of federal regulation “so pervasive ... that Congress left no room for the States to supplement it” or where there is a “federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”⁵⁸

The very text of the Immigration and Nationality Act at 8 U.S.C. § 1188(a)(1)(B) shows Congress meant to ensure that agricultural employers had no reason to prefer nonimmigrant over domestic workers in their hiring. In the absence of express preemption, the States are free to enact prohibitions on invidious discrimination. Unless the discrimination laws states enact apply across the board, the Congressional policy to ensure that domestic workers are not displaced by H-2A nonimmigrant temporary workers suffers. The cost to hire nonimmigrants drops compared to the costs of hiring a domestic agricultural worker when an H-2A employer need not observe a state statues that bars familial discrimination in housing, including agricultural housing.

⁵⁶ *Arizona v. U.S.*, __ U.S. __, 132 S.Ct. 2491, 2500-01 (2012).

⁵⁷ 8 U.S.C. § 1188(h)(2).

⁵⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

F. The federal Fair Housing Act

The federal Fair Housing Act prohibits discrimination based on familial status for employers those who own no fewer than four housing units.⁵⁹ Were there time, I would call for the views of the Secretary of Housing and Urban Development on the matter. The short time frame for entry of the order on administrative review makes that impossible.

This Application from Cal Farms designates four housing sites, and appears to fall under the federal Act. Because 20 C.F.R. § 655.135(e) requires that the Application and job offer “comply with all applicable Federal . . . laws and regulations,” the federal Fair Housing Act appears to provide an additional reason for the Certifying Officer to find the Application deficient.

I realize that the decision of the Fourth Circuit in *Farmer v. Employment Security Comm’n of North Carolina*, 4 F.3d 1274, 1281 (4th Cir. 1993) held that the federal Fair Housing Act must give way to the Immigration and Nationality Act’s provision on familial housing. The court reasoned that the prevailing practice clause of 8 U.S.C. § 1184(c)(4) is a limiting clause that fixes the only time an H-2A employer must provide familial housing.

⁵⁹ 42 U.S.C. § 3603(b).

If this case arose in the Fourth Circuit, I would apply the *Farmer* holding. But the issue is open in the Ninth Circuit. The Fourth Circuit's holding seems insufficiently attentive to the non-displacement provision in 8 U.S.C. § 1188(a)(1)(B) that lies at the heart of the H-2A program, so I do not follow it. I believe the better approach is to try to harmonize all portions of the two Acts and the Secretary of Labor's H-2A regulations. The Certifying Officer's April 15, 2014 Notice of Deficiency does that.

Order

The decision of the Certifying officer is affirmed.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California