

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

LEGAL AID JUSTICE CENTER,)	
Plaintiff,)	
)	
v.)	Case No. 3:22-cv-13
)	
U.S. DEPARTMENT OF LABOR,)	
Defendant.)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the U.S. Department of Labor to produce records responsive to a FOIA request submitted by Legal Aid Justice Center.
2. Legal Aid Justice Center requested that the U.S. Department of Labor provide records regarding how they make determinations of contract impossibility, which is a process which allows for employers under the H-2A temporary visa program to avoid fully paying the foreign workers they promised to employ. The U.S. Department of Labor, however, has only produced insufficient records.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
4. Venue in this district is proper pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff Legal Aid Justice Center (“LAJC”) is a nonprofit, public interest legal services organization. LAJC submitted the request for records under the FOIA that is at issue in this

action alongside a second organization, Legal Aid of North Carolina (“LANC”), also a nonprofit, public interest legal services organization. Legal Aid Justice Center is headquartered in Charlottesville, Virginia.

6. Defendant U.S. Department of Labor (“DOL” or “Defendant”) is an agency of the United States for the purposes of FOIA and has possession of and control over the records that LAJC seeks.

STATEMENT OF FACTS

7. The H-2A visa program is a nonimmigrant visa program that allows companies to bring workers to the United States to perform agricultural jobs on a temporary basis. *See* 8 U.S.C. § 1188. To be able to participate in the program, employers must get certification from the DOL. 20 C.F.R. § 655.130.
8. Upon receiving that certification, employers must provide certain benefits to guest workers, including a guarantee to offer the guest worker employment for a total number of work hours equal to at least three quarters of the workdays of the contract, also known as the “three quarters guarantee.” 20 C.F.R. §§ 655.122, 655.135. One of the only ways which employers may avoid the three quarters guarantee is if the DOL makes a finding of contract impossibility upon an application from the employer. 20 C.F.R. § 655.122(o).
9. On November 16, 2020, LAJC and LANC submitted a joint request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for records seeking information about how the Defendant makes determinations of contract impossibility under the H-2A guest worker program (“the FOIA Request”), included herein as Exhibit A.
10. Specifically, LAJC and LANC requested:

- NPC, OFLC, or ETA¹ policy manuals describing how determinations of contract impossibility should be made by Certifying Officers (“COs”)
- Any evidence requirements the NPC imposes on H-2A employers before deciding whether to grant or deny a request for contract impossibility
- Any requirement NPC has for COs to consult with the State Workforce Agency (SWA) of the state(s) where the employer seeking contract impossibility employs H-2A workers regarding the request for a declaration of contract impossibility
- Any checklists, forms, evaluations, etc. COs must complete before determining whether a contract should be declared impossible
- Any factors, elements, considerations, COs are required or encouraged to contemplate before declaring a contract impossible
- Training materials that COs receive about contract impossibility determinations
- Policy guidance regarding declarations of contract impossibility issued to COs via memoranda, email, or other means
- Examples of cases where a CO should or should not issue a determination
- What means, if any, H-2A workers have to challenge a determination of contract impossibility
- What data, if any, NPC, OFLC, or ETA keeps about which employers request declarations of contract impossibility, how often such requests are made, and whether they are approved or denied

11. These records are important because the process by which DOL grants or rejects employer requests for contract impossibility is opaque, leaving advocates and H-2A workers unclear as to how these decisions are being made. A grant of contract impossibility can have a massive impact on an H-2A worker, as but for the grant of contract impossibility, so long as the worker does not voluntarily leave early or is not fired justly for cause, they are entitled

¹ The request itself listed just the acronyms. For clarity, “NPC” is the National Processing Center, “OFLC” is the Office of Foreign Labor Certification, and “ETA” is the Employment & Training Administration.

to payment of three-quarters of the promised wages for the season, which can easily be thousands of dollars per worker. 20 C.F.R. §§ 655.122(i).

12. LAJC and LANC also requested that any fees associated with the request for documents be waived since they are nonprofit organizations.
13. On November 18, 2020, DOL acknowledged the FOIA Request and stated that it had been assigned to the OFLC with tracking number 2021-F-01766.²
14. On December 1, 2020, DOL notified LANC that “the volume of records and effort [the] request entailed” required DOL to stop processing the request until a check for one half of the processing fee, which amounted to \$160.00, was sent. LAJC and LANC responded through LANC on December 3, 2020, explaining why fees should be waived in this instance.
15. On December 9, 2020, DOL replied stating that the request did not meet the criteria for a full fee waiver and thereby only reduced fees. The fees were sent to Defendant on or about January 13, 2021.
16. On April 9, 2021, DOL made a determination on the FOIA Request, providing some of the records allegedly found in the search. Defendant noted that 142 pages had been found, but that only twenty-two (22) were “responsive and available for public disclosure,” citing 5 U.S.C. § 552(b)(5) and claiming the deliberative process exemption.
17. The final determination letter, included herein as Exhibit B (excluding enclosed documents), stated that while some of the 120 undisclosed pages contained responsive information, DOL determined the information would not be useful because much of it would have to be redacted.

² DOL later reassigned the number to 2021-F-06458, and so informed LAJC and LANC on March 30, 2021.

18. Of the twenty-two (22) disclosed pages, some are duplicates or contain substantially the same information.
19. On July 8, 2021, LAJC and LANC submitted an administrative appeal of DOL's determination ("the FOIA Appeal"), included herein as Exhibit C (excluding exhibits). DOL did not respond to the FOIA Appeal.
20. On August 31, 2021, LANC and LAJC through LANC sent an email to DOL's FOIA appeals email address asking for a status update. DOL did not respond to the August 31 email.
21. Under 5 U.S.C. § 552(a)(6)(A)(ii), DOL had twenty (20) working days to respond to the FOIA Appeal. More than twenty (20) working days have passed since DOL has received the FOIA Appeal, and DOL has neither made a final determination on the appeal nor produced the information it wrongfully withheld that was responsive to the FOIA Request.
22. LAJC has exhausted all administrative remedies.

CAUSE OF ACTION

23. Plaintiff realleges and incorporates by reference each and every allegation contained in this Complaint as if fully set forth herein.
24. Plaintiff has a statutory right under FOIA, 5 U.S.C. § 552(a)(3)(A), to the records it requested.
25. DOL has no legal basis for refusing to produce the records responsive to Plaintiff's request.
26. Under 5 U.S.C. § 552(a)(4)(A)(iii), LAJC is entitled to a full waiver of fees that otherwise would be assessed in connection with its FOIA request, and DOL's denial of LAJC's request for a public-interest fee waiver violates FOIA.

27. In addition, under 5 U.S.C. § 552(a)(4)(A)(viii)(I), LAJC is, in any event, entitled to a waiver of search fees because DOL failed to make a determination with respect to LAJC's administrative appeal within 20 working days as required by 5 U.S.C. § 552(a)(6)(A)(ii).

PRAYER FOR RELIEF

WHEREFORE, LAJC requests that this Court:

- (1) Declare that DOL's withholding of the requested records is unlawful;
- (2) Order DOL to make the requested records available to LAJC at no cost and without delay;
- (3) Award LAJC its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (4) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted this 30th day of March 2022,

LEGAL AID JUSTICE CENTER

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