

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BROADGATE, *et al.*,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES, *et al.*,

Defendants.

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) No. 10-cv-941-GK
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**PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. Plaintiffs’ Challenge of the Neufeld Memorandum is Ripe for Judicial Review 4

II. The Neufeld Memorandum Is a Legislative Rule 5

 A. The Neufeld Memorandum Substantively Changes an Existing Legislative Rule and Is Therefore a Legislative Rule 6

 B. The Neufeld Memorandum Is Binding on the Agency and Is Therefore a Legislative Rule 10

 C. The Memorandum Adds Substantive Requirements and Therefore Cannot Be an Interpretative Rule 12

 1. The Neufeld Memorandum Does Not Interpret the Existing Rule 13

 2. The Neufeld Memorandum Does Not Conform to the Wording or Purpose of the Existing Rule 13

 3. The Neufeld Memorandum Alters the Outcomes of Adjudications 14

III. The Memorandum is Inconsistent with the INA and Therefore Void 14

IV. Plaintiffs Have Been and Will Continue to Be Irreparably Harmed 17

V. The Government Will Suffer No Harm Should an Injunction Issue 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Page
<i>Air Transport Ass’n of Am. v. F.A.A.</i> , 291 F.3d 49 (D.C. Cir. 2002)	12
<i>American BioScience, Inc. v. Thompson</i> , 269 F.3d 1077 (D.C. Cir. 2001).....	18
<i>American Mining Cong. v. Mine Safety & Health Admin.</i> , 995 F.2d 1106 (D.C. Cir. 1993).....	7,8,9,12
<i>Arden Wood, Inc. v. USCIS</i> , 480 F.Supp.2d 141 (D.D.C. 2007).....	5
<i>Central Texas Tele. Coop., Inc. v. F.C.C.</i> , 402 F.3d 205 (D.C. Cir. 2005).....	12
<i>Cohen v. United States</i> , 578 F.3d 1 (D.C. Cir. 2009).....	4
<i>Darby v. Cisneros</i> , 509 U.S. 137 (1993)	5
<i>Dismiss Charities, Inc. v. Dep’t of Justice</i> , 401 F.3d 666 (6th Cir. 2005)	12
<i>Florida Power & Light Co. v. EPA</i> , 145 F.3d 1414 (D. C. Cir 1998).....	10
<i>General Elec. Co. v. EPA</i> , 290 F.3d 377 (D.C. Cir. 2002).....	9
<i>Heartland Regional Med. Ctr. v. Sebelius</i> , 566 F.3d 193 (D.C. Cir. 2009).....	18
<i>Lujan v. Nat’l Wildlife Fed’n</i> , 497 U.S. 871 (1990)	5
<i>Molycorp, Inc. v. EPA</i> , 197 F.3d 543 (D.C. Cir. 1999).....	10
<i>National Ass’n of Home Builders v. Norton</i> , 415 F.3d 8 (D.C. Cir. 2005).....	11

Nationwide Mutual Ins. Co. v. Darden,
 503 U.S. 318 (1992)2,3,7,9

Northcross v. Board of Ed. of Memphis City Sch.,
 412 U. S. 427 (1973) 16

Pension Benefit Guaranty Corp. v. The LTV Corp.,
 496 U.S. 633 (1990) 16

RCM Tech. v. DHS,
 614 F. Supp. 2d 39 (D.D.C. 2009)..... 5

Sprint Corp. v. F.C.C.,
 315 F.3d 369 (D.C. Cir. 2003)..... 9

Syncor Int’l Corp. v. Shalala,
 127 F.3d 90 (D.C. Cir. 1997)..... 12

Trudeau v. FTC,
 456 F.3d 178 (D.C. Cir. 2006)..... 4

United States v. Cleveland Indians Baseball Co.,
 532 U. S. 200 (2001) 16

United States Telecom Ass’n v. F.C.C.,
 400 F.3d 29 (D.C. Cir. 2005)..... 9

Statutes and Regulations

Administrative Procedure Act, 5 U.S.C. §§ 551-559, §§ 701-706..... 2,4,18
 5 U.S.C. § 551(4) 5
 5 U.S.C. § 702 4
 5 U.S.C. § 704 4

Regulatory Flexibility Act, 5 U.S.C. §§ 601 - 612 1

Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101-1537..... 3
 8 U.S.C. § 1182(n)(1)(F) 3,14,15,16
 8 U.S.C. § 1182(n)(3)(a)(1) 15

Code of Federal Regulations
 8 C.F.R. § 214.2(h)(4) 6,7
 8 C.F.R. § 214.2(h)(4)(ii) 13
 8 C.F.R. § 274a.1(g) 15

56 Fed. Reg. 61,111 (Dec. 2, 1991)..... 8

Miscellaneous

USCIS Memorandum regarding 8 C.F.R. § 214.2(4)(ii) (January 8, 2010),
available at <[http://www.uscis.gov/USCIS/Laws/Memoranda/
2010/H1B%20Employer-Employee%20Memo010810.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf)>.*passim*

Adjudicator’s Field Manual, available at
<<http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm>> 10,11

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INTRODUCTION

At issue in this case is whether a memorandum that amends a regulation by adding new or different criteria for determining whether an employer-employee relationship exists is a legislative rule requiring notice-and-comment rulemaking. Plaintiffs maintain that such a memorandum satisfies each of the disjunctive requisites of a legislative rule: it amends a legislative rule thereby changing the substantive law; it binds agency personnel to use new criteria and directs agency personnel to find that third-party information technology (“IT”) placement services firms, such as the Plaintiff companies, are not United States employers; and it affects the public by effectively banning a form of business that had been lawful prior to the issuance of the memorandum. Plaintiffs also maintain that the memorandum is inconsistent with the organic legislation and that the Government has failed to comply with the Regulatory Flexibility Act (“RFA”).¹

¹ The Government and Plaintiffs both recognize that Plaintiffs’ RFA claim turns on whether the Neufeld Memorandum is a legislative rule. If it is, an RFA analysis was necessary.

The Government disagrees. The Government argues that (1) the memorandum is not final agency action, (2) the memorandum is not a legislative rule, (3) the memorandum's definition of employer-employee relationship is consistent with the organic legislation, and (4) plaintiffs have failed to demonstrate irreparable injury sufficient to justify preliminary relief. Each of these arguments lacks merit.

First, whether the memorandum is final agency action begs the question. If this Court determines that the memorandum is a legislative rule, then the memorandum is, by definition and under the law of this Circuit, final agency action.

Second, the Government's argument that the memorandum is not a legislative rule fails for several reasons. According to the Government, the memorandum does not amend a legislative rule but merely imports a variant of the common law definition of employer-employee relationship. The Government believes that agencies are free, under *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), to use common law definitions. The Government, though, does not dispute that the current regulation does not use the common law definition. Nor does it dispute that the memorandum replaces the current five-factor definition of employer-employee relationship, issued through notice-and-comment rulemaking and published in the Code of Federal Regulations, with a different eleven-factor test. Nor does the Government dispute that the new definition effectively forecloses a sector of businesses, a fact illustrated in the memorandum itself. When the definition was originally codified in 1991, the agency could have imported the common law definition, but opted instead for a different definition, one more suited to the immigration law setting. The memorandum amends this nearly twenty-year old definition. Finally, *Darden* only permits the use of the common law definition if there is no law on the subject; where the term is defined in a published rule, as is the case here, an agency is not free to

abandon that definition without notice-and-comment rulemaking: *Darden* does not relieve an agency of its obligations under the Administrative Procedure Act.

The Government asserts that the memorandum is either an interpretative rule or statement of general policy. According to the Government, the memorandum does not truly bind agency personnel even though the Government acknowledges that the Manual which it amends is binding. Instead, the Government suggests that there are different degrees of “binding” and in only one instance is a Manual provision that is binding really binding. While this set of subtle distinctions may reflect the agency’s post-litigation beliefs, those beliefs are not reflected in the Manual or the case law, both of which provide otherwise. The Government also argues that the memorandum is interpretative because it does no more than flesh out the regulatory term “otherwise control.” However, many of the new factors in the memorandum have nothing to do with control--they relate to tools, intellectual property, and end products. Finally, the Government’s assertion that the memorandum is a statement of general, as opposed to specific, policy is belied by the structure, length, scope and detail of the memorandum. The nineteen-page memorandum sets out a new eleven-factor definition of “employer-employee” relationship and directs how that new definition must be applied in specific cases. This is hardly general policy or procedure.

Third, although the Government argues that its policy is consistent with the Immigration and Naturalization Act (“INA”) in some respects, the Government does not dispute that the new definition is inconsistent with the INA’s express recognition that third-party “contractors” can be employers for H-1B visa purposes, that an individual can be a joint employee, and that the Neufeld Memorandum precludes this form of relationship. *See* 8 U.S.C. § 1182(n)(1)(F).

Finally, the Government argues that even if the memorandum were a legislative rule, Plaintiffs have not been or will not be irreparably harmed. The Government argues that two of the Plaintiffs have had visa applications approved since the issuance of the memorandum and that Plaintiffs' claims about future denials are speculative. The Government misses the point. The four visa petitions highlighted by the Government were filed before the Neufeld Memorandum was issued. *See* Defendants' Exhibit 2, "Receipt Date," upper left-hand corner of each approval. Moreover, the Government does not deny that the Neufeld Memorandum is being broadly applied to the detriment of IT placement services firms, such as the Plaintiff companies and the members of the Plaintiff associations.

ARGUMENT

I. Plaintiffs' Challenge of the Neufeld Memorandum is Ripe for Judicial Review

The thrust of the Government's response is that the Neufeld Memorandum is not a legislative rule, but rather a statement of general policy or an interpretative rule. For example, the Government initially argues that the probability of success is low because there has been no final agency action, a prerequisite for maintaining a challenge under the Administrative Procedure Act ("APA"). The APA permits parties adversely affected by agency action to seek judicial review. *See* 5 U.S.C. §§ 702, 704; *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006). Judicial review, as the Government notes, is limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. However, in this Circuit, "[a] substantive rule constitutes a binding final agency action and is reviewable. *Id.* § 704." *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009). Therefore, if the Neufeld Memorandum is a legislative rule, as Plaintiffs maintain, then its issuance constitutes final agency action and this Court has jurisdiction to entertain this case. No

separate inquiry is necessary. If the Government were correct, there could never be a challenge to a legislative rule masquerading as an interpretive one. The Government's reliance on *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), is misplaced.² There, the issue was whether an agency determination constituted "agency action." Here, the Government has argued that the Neufeld Memorandum is an interpretative rule. All rules--interpretative or legislative--are agency actions, by definition. *See* 5 U.S.C. § 551(4).³

II. The Neufeld Memorandum Is a Legislative Rule

The Neufeld Memorandum is a legislative rule for two reasons. First, it modifies an existing legislative rule, one published in the Code of Federal Regulations. Any issuance that substantively modifies a legislative rule is, by definition, a legislative rule. And second, it binds agency personnel while affecting those outside of government, two primary indicia of a legislative rule.

The Government acknowledges that an issuance that modifies an existing legislative rule is itself a legislative rule. The Government argues, though, that the Neufeld Memorandum does

² The Government also relies on *Arden Wood, Inc. v. USCIS*, 480 F.Supp. 2d 141 (D.D.C. 2007) and *RCM Technologies, Inc. v. DHS*, 614 F.Supp. 2d 39 (D.D.C. 2009). Here too, the reliance is misplaced. In *Arden Wood*, there was no written issuance at issue. Moreover, no one had been denied a visa based on plaintiffs' belief as to how the agency might interpret its statute or regulations. Here, no speculation is involved. Visas have been denied based on the published Neufeld Memorandum. In *RCM Technologies*, the parties disputed whether a policy even existed. Here, there is no such dispute and the issue is different. Here, at issue is whether the agency's lengthy document is a legislative rule or a statement of general policy. *RCM Technologies* did not address this type of question because it was not presented.

³ Nor is the Government's suggestion that exhaustion is required well taken. *See RCM Tech.* 614 F. Supp. 2d at 45 ("[A]n appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993). Hence, plaintiffs need not pursue an AAO appeal before seeking judicial review of denied visa applications in federal court.") (internal quotation mark omitted).

not alter an existing regulation or regulatory framework, but rather interprets that regulation by adding some necessary fabric to that framework. The Government also argues that the Neufeld Memorandum is immune from notice-and-comment rulemaking because it is a statement of general policy.

A. The Neufeld Memorandum Substantively Changes an Existing Legislative Rule and Is Therefore a Legislative Rule

While the government argues that it is merely supplying crisper and more detailed guidelines, *see* Government Brief at 13, 26, the Neufeld Memorandum in fact substantively changes a legislative rule by compressing the factors set forth in the regulation and inserting wholly new factors. Prior to the Neufeld Memorandum, the employee-employer relationship was determined based on five factors (“[1] hire, [2] pay, [3] fire, [4] supervise, or [5] otherwise control the work of any such employee”) articulated in a legislative rule published by the agency’s predecessor following notice-and-comment rulemaking. 8 C.F.R. § 214.2(h)(4). The Neufeld Memorandum replaces the five factors with eleven factors. These new factors do not merely add crispness to guidelines. *See* Government Brief at 28-29, 32-33. Of the eleven factors, three are unrelated to control or to any of the five factors in the regulation, *i.e.*, (i) does the beneficiary use proprietary information of the petitioner to perform the duties of employment; (ii) does the beneficiary produce an end product that is directly linked to the petitioner’s line of business; and (iii) does the petitioner provide the tools or instrumentalities needed by the beneficiary to perform the duties of employment.

The Government argues that these eleven factors do not represent a change because the factors mirror the common law. *See* Government Brief at 28-29, 32-33. This argument is difficult to accept. First, several of the new eleven factors are unrelated to any common law test or to any of the five regulatory factors--they are new. Second, the Government’s reliance on the

common law is misplaced for two reasons. In a regulatory setting, the common law fills a breach; where, as here, there is no breach, resort to the common law is not appropriate. Further, the test presented in the Neufeld Memorandum is not even the common law test.⁴

The Government also argues that the Neufeld Memorandum does not change existing law because it “does not compel the regulated public to submit any type of specific evidence or documentation, aside from the requirements already set forth in the governing regulations.” Government Brief at 21. That, however, is only one factor for consideration and not a dispositive one. The Court in *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), a case heavily relied upon by the Government, articulated four characteristics of a legislative rule, the presence of any one of which is sufficient to label the rule as “a legislative, not an interpretative rule.” The characteristic of significance here is “whether the rule effectively amends a prior legislative rule.” *Id.* In *American Mining*, the Department of Labor had issued a rule requiring certain mine operators to report “diagnoses of the specified diseases.” The regulation did not define the term “diagnosis,” leaving a complete regulatory void. To fill that void, the Mine Safety & Health Administration issued a manual provision defining what constituted a “diagnosis” for reporting purposes. A sector of the mining industry challenged the issuance arguing that it was substantive rule. In turning back the challenge, the

⁴ The common law test recounted in *Darden* involves twelve factors, many of which do not correspond to the eleven factors set out in the Neufeld Memorandum. *See Darden*, 503 U.S. at 324-25. For example, the Neufeld Memorandum asks how the petitioner supervises the employee; *Darden* contains no such factor. The Neufeld Memorandum asks whether the employee uses the petitioner’s proprietary information; *Darden* contains no such element. The Neufeld Memorandum asks whether the employee produces an end-product that is directly linked to the petitioner’s line of business; *Darden*, in contrast, asks whether the “hiring party is in business.” *Id.* *Darden* asks the extent of the hired party’s discretion over when and how long the hired party must work; the Neufeld Memorandum is silent on this point. *Darden* asks for the level of skill required; the Neufeld Memorandum is silent on this point, although skill is prerequisite for obtaining the visa.

Court concluded that the issuance did not amend an existing rule; there was no rule that defined the term “diagnosis” and therefore, there was nothing to amend. That is not the case here.

The Government acknowledges that its published regulation defines a “United States employer” in terms of an employer-employee relationship which is “indicated by the fact that [an employer] may [1] hire, [2] pay, [3] fire, [4] supervise, or [5] otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4). If there is no employer-employee relationship, then the entity is, by definition, not a United States employer. When this rule was originally promulgated, “the Service . . . included a definition of the term ‘United States employer’” “[i]n order to provide clarification.” 56 Fed. Reg. 61,111 (Dec. 2, 1991). The rule proposed in 1991, like the final rule in *American Mining*, contained no definition of the operative term. The INS rectified that shortcoming in its final regulation. It is this final regulation that the Neufeld Memorandum amends by adding new factors, many of which have nothing to do with the existing five factors and therefore, cannot be characterized as elaborations or clarifications of existing criteria, or filling a void.

The existing regulation does not exclude joint or shared employment relationships. The Neufeld Memorandum does. The Government does not dispute this. This too is a change. Prior to the Neufeld Memorandum, Plaintiffs’ business model satisfied the factors set forth in the regulation (*e.g.*, IT consulting/staffing firms “recruit, hire, pay, fire and exercise supervisory responsibility over individuals on H-1B visas.”). Roberts Declaration ¶ 4; *see also* Lenz Declaration ¶ 6. The new factors articulated in the Neufeld Memorandum are inconsistent with Plaintiffs’ business model. For example, IT placement services firms do not and cannot, by their very nature, produce their own end products. Nor do they use their own software or their own proprietary information. By focusing on these factors rather than those in the issued regulation,

the Neufeld Memorandum ordains that an IT placement services firm does not present a valid employer-employee relationship. This is confirmed by the so-called “Third-Party Placement/Job Shop” scenario presented in the Neufeld Memorandum which directs adjudicators to so find. “In short, this is not a case in which an interpretative rule merely ‘supplies crisper and more detailed lines than the authority being interpreted,’ *American Mining Cong.*, 995 F.2d at 1112, or simply provides ‘a clarification of an existing rule,’ [*Sprint Corp. v. F.C.C.*, 315 F.3d 369, 374 (D.C. Cir. 2003)]. Rather, it is one in which the rule at issue substantively changes a preexisting legislative rule. Such a rule is a legislative rule, and it can be valid only if it satisfies the notice-and-comment requirements of the APA.” *United States Telecom Ass’n v. F.C.C.*, 400 F.3d 29, 38 (D.C. Cir. 2005).

The Government seeks to defend these modifications by arguing that the Neufeld Memorandum does nothing more than codify the Court’s decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318. In *Darden*, the Court held, in an ERISA case, that if an underlying statute or regulation failed to define a term, an agency or court could properly use the common law definition of that term. The *Darden* Court then held that since neither ERISA nor its implementing regulations defined the term “employee,” a court could properly import the common law definition to fill the regulatory void. *Darden* applies here, but not in the way the Government might have hoped. Under *Darden*, the common law definition is only appropriate where there is a statutory or regulatory void. Here, there is no void. The agency went out of its way when it issued its original H-1B visa rule to define the terms “United States employer” and “employer-employee relationship.” The regulatory definition is not the same as the common law test or the eleven-factor Neufeld Memorandum definition.

B. The Neufeld Memorandum Is Binding on the Agency and Is Therefore a Legislative Rule

The Government acknowledges, as it must, that in this Circuit one of the key indicia of a legislative rule is whether it imposes binding obligations on agency personnel or limits their discretion. Government Brief at 22. "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). The Neufeld Memorandum, which amends the Adjudicators Field Manual, is both binding on its face and as applied.

The Government acknowledges that the Neufeld Memorandum "does use some mandatory language" but argues that since "it does not compel the regulated public to take certain actions[,] it is not truly binding. Government Brief at 22. In determining whether a regulation is binding, this Circuit looks to the rule's effect on both the public and the agency: if it binds either, it is a legislative rule. *See Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999); *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D. C. Cir 1998). The Neufeld Memorandum not only binds both the agency and the public, it ordains the result in any petition filed by a third-party contractor, such as Plaintiff companies and the members of Plaintiff associations. The Neufeld Memorandum sets out a scenario that mirrors Plaintiffs' business model, a fact never disputed by the Government *See* Neufeld Memorandum 6-7, 14-15. The memorandum then instructs adjudicators that "**Petitioner Has No Right to Control; No Exercise of Control.**" *Id.* at 7, 15 (emphasis in original). The Government never disputes this. It concludes that this is a scenario that "would not present a valid employer-employee

relationship.” *Id.* at 5, 13. The Government’s response never addresses this example or its effect on the adjudicator.

Nothing in the Neufeld Memorandum suggests that this result is “recommended,” as in *National Ass’n of Home Builders v. Norton*, 415 F.3d 8 (D.C. Cir. 2005), or optional. Whatever discretion an adjudicator may have had, the Neufeld Memorandum eliminates that discretion. The Government attempts to avoid the language of the Neufeld Memorandum and the Manual that it amends through a somewhat circular discussion of the meaning of the word “binding.” The Government claims that the Manual really has three levels of obligation, none of which can be deemed to create a “legislative norm,” even though they are binding on the agency: (i) procedural or managerial directives; (ii) guidelines; and (iii) legal interpretations. Government Brief at 24-25. This case does not involve any of these three types, but rather a new substantive definition of a key statutory term already defined in a regulation published in the Code of Federal Regulations pursuant to notice-and-comment rulemaking. Moreover, the detailed descriptions of the various degrees of “binding” presented by the agency in its brief are inconsistent with the Manual. The Manual leaves little room for doubt. It states: “Policy material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material[,]” and then states that the Manual itself is a policy document. Manual at § 3.4(a). The Government attempts to avoid this language by relying on section 10.15, arguing that the Memorandum did not have the magic letter “P” affixed to it, and that only memoranda with a “P” qualify as policy. There are problems with both arguments. Section 10.15 merely addresses the discretion of an adjudicator; nothing in that section frees the adjudicator of his or her obligation to apply the definitions or tests set forth in the Manual. The Government ultimately

acknowledges this when it noted that “the agency’s legal interpretations . . . are ‘binding’ on agency personnel in a legal sense” Government’s Brief at 25. The Government, however, argues that if the binding character of the regulation derives from the statute rather than the regulation, then the regulation is interpretative. *Id.*, citing *Dismiss Charities, Inc. v. Dep’t of Justice*, 401 F.3d 666, 681 (6th Cir. 2005). We do not disagree. The problem is that the definition of employer-employee relationship does not appear in the statute; it is a creature solely of rulemaking and the Neufeld Memorandum does not merely interpret the regulation, it amends it. The Government’s reliance on the letter “P” is similarly at odds with the Manual’s language. No “P” was necessary. The Neufeld Memorandum amended the Manual, which is classified as “P” by the agency. *See* Manual § 3.4(a).

C. The Memorandum Adds Substantive Requirements and Therefore Cannot Be an Interpretative Rule

The Government accurately describes this Circuit’s guidelines for distinguishing between interpretative and substantive rules. Government Brief at 27-28. First, an interpretative rule must interpret something rather than create a new rule. *See Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). Second, an interpretative rule “sensibly conforms to the wording and purpose of a prior legislative rule.” Government Brief at 28, citing *Central Texas Tele. Coop., Inc. v. F.C.C.*, 402 F.3d 205, 213 (D.C. Cir. 2005). And third, an interpretative rule does not alter the way in which an agency implements its organic legislation. Government Brief at 28, citing *American Mining Cong.*, 995 F.2d at 1112; *Air Transport Ass’n of Am. v. F.A.A.*, 291 F.3d 49, 56-57 (D.C. Cir. 2002) (whether the interpretation “spells out a duty fairly encompassed within the regulation that the interpretation purports to construe.”). The Neufeld Memorandum fails each of these tests.

1. The Neufeld Memorandum Does Not Interpret the Existing Rule

The Government asserts that the Neufeld Memorandum interprets the regulatory text at 8 C.F.R. § 214.2(h)(4)(ii) and, in particular, the phrase “and otherwise control.” Government Brief at 29. It does far more than that. Several of the Memorandum’s requisites have little or nothing to do with “control.”⁵ The Memorandum, among other things, asks: (i) does the petitioner provide the tools or instrumentalities needed by the beneficiary to perform the duties of employment; (ii) does the beneficiary use proprietary information of the petitioner to perform the duties of employment; and (iii) does the beneficiary produce an end product that is directly linked to the petitioner’s line of business. None of these are related to “control,” and the Government never explains how tools, intellectual property or the nature of the end product are indicia of “control.”

2. The Neufeld Memorandum Does Not Conform to the Wording or Purpose of the Existing Rule

The Government does not argue that the wording of the Neufeld Memorandum tracks the wording of the regulation. Nor can it. The regulation contains five factors while the Memorandum contains eleven; one of the new factors collapses three of the original factors into a single factor. *See* Neufeld Factor 5 (hire, fire, pay). Critically, though, the Neufeld Memorandum sets out scenarios that either satisfy the new criteria or do not. Plaintiffs’ business model falls in the latter category, a fact not challenged by the Government. The Memorandum therefore effectively precludes a form of business arrangement that has been permitted for

⁵ The Government asserts that Plaintiffs concede in their Complaint that the eleven factors focus mostly on the issue of supervision. Government Brief at 29. Whether most of the eleven focus on supervision is beside the point since Plaintiffs never conceded that all focus on supervision. At least three do not and that makes all the difference.

decades under the existing the rule. It is therefore difficult to understand how the wording or purpose of the Neufeld Memorandum corresponds with those of the regulation.

In addition, as noted above, the Government does not deny that the Neufeld Memorandum precludes “joint employment” or “shared employment” relationships which are a fundamental feature of Plaintiff companies’ operations. The statute and the current regulation permit these arrangements. Since the Neufeld Memorandum does not permit these arrangements, it cannot conform with either the regulation or the organic legislation.

3. The Neufeld Memorandum Alters the Outcomes of Adjudications

The Government argues that the Neufeld Memorandum does not affect the agency’s ability to conduct its business and has no substantive impact on how the agency adjudicates H-1B visa applications. *See* Government Brief at 30-31. In particular, the Government asserts that the Memorandum does nothing more than flesh out the meaning of “control” and adopt the common law definition of employer-employee relationship. As noted above, however, that is not the case. The Memorandum contains factors that have nothing to do with control. Neither the statute nor the regulation adopted the common test of employment; the regulation sets forth a different scheme. The Government now champions the common law test as a reason for treating the memorandum as interpretative. The opposite is the case. A change in substantive standards is a substantive rule; the fact that the new standard may be based on the common law does not insulate it from notice and comment.

III. The Memorandum is Inconsistent with the INA and Therefore Void

The Neufeld Memorandum precludes third-party IT placement services firms from obtaining H-1B visas on behalf of their employees, because contractors, by definition, not only do not exert moment-to-moment control over their employees, but in producing their end

product, *i.e.*, software, their employees do not use the contractor's proprietary information, the end-product is not linked to the contractor's line of business, nor does the contractor supply the tools or instrumentalities to perform the work. Therefore, contractors cannot be "employers" under the Neufeld Memorandum and the scenario set forth in the Memorandum confirms this. However, INA expressly authorizes contractors to place their employees at worksites controlled by another employer, and in so doing, recognizes the concept of joint employment, one that is now prohibited by the Neufeld Memorandum. *See* 8 U.S.C. § 1182(n)(1)(F); 8 C.F.R. § 274a.1(g). Specifically, section 1182(n)(1)(F), referenced in Plaintiffs' Memorandum at 13, provides as follows:

In the case of an application described in subparagraph (E)(ii) [H-1B visa application], the employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where—

(i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(ii) there are indicia of an employment relationship between the nonimmigrant and such other employer;

unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.

8 U.S.C. § 1182(n)(1)(F) (emphasis supplied).

In short, the INA expressly contemplates that third-party contractors are employers, even though they might not exercise complete day-to-day control over the activities of their employees, provided that the contractor has an approved Labor Condition Application in place for that site. The Neufeld Memorandum is not consistent with this provision because it does not permit third-party IT contractors to obtain H-1B visas for their employees even though no United States employees are available in that area.

In response, the Government appears to argue that section 1182(n)(1)(F) cannot mean what it says because section 1182(n)(3)(A)(i) characterizes “dependent employers” “in terms of full-time ‘employees,’ without defining that term.” Government Brief at 35. The fact that the term “employee” is not defined does not affect subparagraph (F) which expressly permits Plaintiff contractors to apply for and receive H-1B visas on behalf of their employees, something precluded by the Neufeld Memorandum. The Government never addressed this point. The Government, though, argues that merely because other statutes recognize joint employment, which is an inherent characteristic of third-party contracting, the INA does not, and according to the Government, reference to other statutes “is legally erroneous[,]” because an agency is not required to consider statutes that it does not administer when developing policy. Government Brief at 36 n.17 (citing *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633, 646-47 (1990)). The Government misses the point.

This is not a case where Plaintiffs are challenging agency action because the agency failed to consider legislation that it does not administer. To the contrary, where, as here, a statute fails to define a term, such as “employer,” courts are free to look to other legislation to ordain the meaning of that term: Congress is assumed to define terms similarly from statute to statute, unless otherwise indicated. Therefore, where two statutes use similar language courts generally take this as “a strong indication that [they] should be interpreted *pari passu*.” *Northcross v. Board of Ed. of Memphis City Sch.*, 412 U. S. 427, 428 (1973) (per curiam). Only where the language or legislative intent indicates to the contrary, do courts abandon parallel interpretation. See e.g., *United States v. Cleveland Indians Baseball Co.*, 532 U. S. 200, 213 (2001). That is not the case here where the INA itself expressly recognizes third-party contractors as legitimate

employers and other statutes recognize the concept of joint employment, a fundamental feature of a third-party contractual relationship.

In short, the Neufeld Memorandum is inconsistent with the INA to the extent that it precludes, through word and example, contractors from obtaining H-1B visas on behalf of their employees even though contractors are expressly authorized to do so under section 1182(n)(1)(F).

IV. Plaintiffs Have Been and Will Continue to Be Irreparably Harmed

The Government argues that Plaintiffs' harm is "merely speculative or conjectural," and any harm is purely economic and thus, cannot support a claim for preliminary relief. The harm is neither speculative nor conjectural, but is spelled out in the Neufeld Memorandum itself. The Memorandum directs adjudicators to deny applications by third-party placement firms (*e.g.*, computer consulting companies). If Plaintiffs' fears are unfounded, the Government should have advised us of this long ago; they did not and have not. There is nothing in the Government's response that even suggests that Plaintiffs' fears are unfounded or that the instructions mean something different than what they say.

There is ample evidence in the record to establish that Plaintiffs will be irreparably harmed. Uncontradicted declarations attest to the fact that "[b]ased on the rules set forth in the Neufeld Memorandum, H-1B petitions of IT staffing/consulting companies have been denied. ... [reflecting] scores of ... entities [other than the named plaintiffs] and individuals who are being devastated by this new rule" Roberts Declaration ¶ 3, 6. Roberts explained that "members will be unable to continue in business and will therefore be irreparably injured" Roberts Declaration ¶ 7, 8. Similarly, Plaintiff ASA's member companies "will be substantially and irreparably injured because they will be unable to hire or retain qualified employee and will

therefore be unable to bid on contracts resulting in substantial loss of revenues.” Lenz Declaration ¶ 9. The Plaintiff companies’ declarations confirm these statements. *See* Varma Declaration ¶ 16; Devulapalli Declaration ¶ 16.

The Government argues that economic injury alone does not constitute irreparable harm and that Plaintiffs have not alleged that the Memorandum will cause them to cease operating. The Government overlooks the Declarations of Sudhir Varma (Logic Planet) and Ramana Devulapalli (DVR Softek) both of whom state: “If our employees are unable to obtain renewals, we will cease having any employees capable of performing computer-related services for our clients. As a result, we would be compelled to cease operating as a business, not for want of customers, but for want of employees.” Declarations at ¶ 16. In short, the uncontroverted declarations meet the irreparable harm standard enunciated by the Government in its Response.

The Government’s argument runs into a second problem. Following the status conference, the parties agreed to consolidate the briefing and possible oral argument on the preliminary injunction with the trial on the merits. *See* Doc. # 10. While a four-prong test typically applies where a party is seeking preliminary relief, that test does not apply where the case is being resolved on the merits and where all that is necessary to provide plaintiffs significant (although not complete) relief is the issuance of a vacatur. *See American BioScience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). As the Court recognized: “To be sure, although appellant based its cause of action on the APA, it introduced a good deal of confusion by seeking an injunction (as well as other appropriate relief). But, whether or not appellant has suffered irreparable injury, if it makes out its case under the APA it is entitled to a remedy.” *Id.* “Failure to provide the required notice and to invite public comment . . . is a fundamental flaw that ‘normally’ requires vacatur of the rule.” *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d

193, 199 (D.C. Cir. 2009) (distinguishing failure to provide notice-and-comment rulemaking from failing to provide adequate justification for a rule). Plaintiffs would still need to establish “irreparable harm” for their Regulatory Flexibility Act claim (*see* Complaint at Count II), where the sole relief sought is injunctive. Vacatur would provide Plaintiffs with relief with respect to their APA claims (*see* Complaint at Counts I, III-V); however, an injunction with respect to these four counts would be necessary to ensure that the agency does not apply the vacated memorandum *sub silentio*.

V. The Government Will Suffer No Harm Should an Injunction Issue

Finally, the Government argues that the “public interest” will be harmed should an injunction issue because such relief “would disrupt the agency’s administration of a national program, and would cause public confusion regarding the agency’s adjudication guidelines and procedures [and] . . . would also cause unnecessary delay in the administration of the agency’s program.” Government Brief at 44. However, an injunction can only have these effects if the Neufeld Memorandum changed the status quo. The Government has spilled much ink arguing that it does not. It cannot be both ways. Also, the Neufeld Memorandum does not appear to have eliminated confusion. To the contrary, Plaintiffs believe, based on the Memorandum’s language, that it will preclude the agency from approving their three-year H-1B visa applications. The agency suggests implicitly that it will not have this effect. If the Government is correct that the Memorandum does not change anything and that Plaintiffs’ visa applications will continue to be approved after the litigation ends, then the Neufeld Memorandum generates more confusion than it resolves.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, the Court should grant the relief requested by the Plaintiffs.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2010, I electronically filed the foregoing Plaintiffs' Reply To Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to the document to the following attorney of record:

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