PERM Labor Certification

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D.Ray Mantle[1]

I. INTRODUCTION

Earlier this year, the Department of Labor unveiled its proposals for a new alien labor certification system known as PERM (Program Electronic Review Management).[2] Long-anticipated by employers and aliens as a means of modernizing the labor certification process, the proposed rule received mixed reactions due to its obvious prejudice against employers and amendments which radically reduce the chances of most aliens to be certified for employment. While the arguments launched against many of the regulatory changes may contain persuasive policy arguments, the proper framework for analyzing the proposed rule is whether it conforms to the governing statutes and can be administered in compliance with the Administrative Procedures Act.

The statutory provision providing for the labor certification process are confined to section 212(a)(5)(A) of the Immigration and Naturalization Act.[3] While most of the criticism launched against the proposed rule has been based on comparisons with current and previous regulations, the proper starting point for reviewing proposed regulation is the enabling statute as passed by Congress. A review of the statutory language separate from the regulations will provide several of the basic principles which must be embodied in a valid regulation. To be valid, however, the regulations promulgated by the Secretary of Labor do not need to be the best interpretation of the statute; they need only be a reasonable interpretation to be held up by the courts. A focus on the statutory language, context and intent provides standards with which to judge the reasonableness of the Secretary's interpretation.

This paper explores (1) the statutory basis of the labor certification requirement for employment-based immigrant applicants in the third category (EB-2 and EB-3), (2) justification for provisions of the proposed rule dealing with recruitment and certification standards for mainstream applications, and (3) limits on the rights of alien employees in appealing adverse DOL determinations.

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[2] *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 67 Fed. Reg. 30466 (May 6, 2002). The final rule is slated for January 2003 according to the Labor Department's most recent Unified Agenda. 67 Fed. Reg. 74174-5 (Dec. 9, 2002) (note that certain internal citations in the Unified Agenda are incorrect as of December 20, 2002).

[3] 8 U.S.C. § 1182(a)(5)(A) (2002).

A. The Labor Certification Process

Before moving on to the issues raised by the proposed rule, it is important to clarify the labor certification process as it now operates. This paper focuses on the proposed rule as it applies to those seeking admission in the third employment-based category (EB-2 and EB-3) of the Immigration and Nationality Act, pertaining to skilled workers, professionals and other workers.[4] Those seeking to enter the United States to perform skilled or unskilled labor must first obtain certification from the Secretary of Labor that there are no U.S. workers that are able, willing, qualified and available for the offered position, and that employment of the alien will not adversely affect the wages and working conditions of similarly employed workers.[5]

The process begins when the employer makes an offer of permanent, full-time employment to the alien.[6] The job offer is to detail minimum requirements for performing the job which are to be listed "without unduly restrictive job requirements."[7] The employer then requests a prevailing wage determination from the local State Employment Security Agency (SESA), which could be affected by the Davis Bacon Act[8] or the McNamara-O'Hara Service Contract Act[9] based on the job duties and requirements.[10] If the job offer falls into one of the categories identified as Schedule A, then the employer may apply for the immigrant visa directly without having to conduct further recruitment.[11]

The next step in the process requires recruitment of U.S. workers. Most employers will attempt their own recruitment rather than relying on the SESA, and if their own recruitment is sufficient, there will be no need to conduct supervised recruitment after the application is submitted. The recruitment report should contain a listing of (1) all sources by name, (2) the number of responses from and interviews with U.S. workers, (3) the "lawful job-related reasons for not hiring each U.S. worker interviewed, and (4) the specific wages and working conditions offered.[12] Recruitment sources should include those normal to the area or industry, including seeking referrals from labor unions.[13]

The application for labor certification is then submitted to the SESA. Attestations are made by the employer that the recruitment was conducted in good faith and that the job require-

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[4] 8 U.S.C. § 1153(b)(3) (2002).
[5] 8 U.S.C. § 1182(a)(5)(A) (2002).
[6] 20 C.F.R. § 656.21(a)(2) (2002).
[7] § 656.21(b)(2). A "business necessity" exception has been recognized by the reviewing courts. Information Industries, 1988-INA-82 (BALCA Feb. 9, 1989) (*en banc*).
[8] 40 U.S.C. § 276a et seq. (2000).
[9] 41 U.S.C. § 351 et seq. (2000).
[10] 20 C.F.R. § 656.40.
[11] § 656.22. For occupations listed on Schedule A, the Secretary of Labor has already determined that a shortage of qualified U.S. workers exists and has pre-certified such applications. On the flip side, occupations listed on Schedule B are those identified to have no shortage of qualified U.S. workers and that employment of an alien in such a position would adversely affect the wages and working conditions of U.S. workers. Nevertheless, employers may file a waiver request for positions listed on Schedule B. § 656.22a.
[12] § 656.21(b)(1)(i).
[13] § 656.21(b)(4).

ments are "the employer's actual minimum requirements for the job opportunity."[14] The alien attests to his or her qualifications for the position and provides appropriate evidence.[15] If the employer has shown that its recruitment efforts are an adequate test of the labor market and no U.S. workers were found for the prevailing wage, then the application may be forwarded to the Certifying Officer for a determination without supervised SESA recruitment.[16] Otherwise, SESA will process a job order and require an additional 30 days of supervised recruitment.[17]

The regional or national Certifying Officer (CO) of the Department of Labor Employment and Training Administration (ETA) determines whether to grant the labor certification or to return the application with a Notice of Findings.[18] Before granting the labor certification, the CO must determine (1) if all appropriate recruitment sources were used,[19] (2) whether a U.S. worker was able and qualified for the job,[20] (3) if the nationwide system of public employment offices indicates U.S. workers are available in the place of the job opportunity,[21] and (4) whether labor market information or special circumstances show that employing the alien "will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed."[22] Rebuttals to a Notice of Findings may be submitted before a Final Determination is made by the CO, and Final Determinations may be reviewed by the Board of Alien Labor Certification Appeals (BALCA).[23]

II. STATUTORY BASIS

This section explores the statutory basis of the labor certification process. The specific provision for labor certification is limited to section 212(a)(5)(A) of the Immigration and Nationality Act. Amendments to the Act from 1990 and later have offered insight into the purpose of the provision. And finally, the Department of Labor has sought to find statutory basis in its exacting burden of proof by claiming that section 291 of the Act applies.

A. Section 212(a)(5)(A) Labor Certification

The statutory basis of the labor certification process is separated into two prongs, the precise boundaries of which are defined only in the regulations. Immigrant aliens seeking permanent residence based on an employment offer in the U.S. are inadmissible unless such employ-

[14] § 656.21(b)(5). The employer must state that it "has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer."
[15] § 656.21(a)(1).
[16] § 656.21(i).
[17] § 656.21(f), (g).
[18] § 656.24(b).
[19] § 656.24(b)(2)(i).
[20] § 656.24(b)(2)(ii). A U.S. worker is qualified if he or she, "by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."
[21] § 656.24(b)(2)(iii), (iv).
[22] § 656.24(b)(3).
[23] § 656.25. The alien may submit a rebuttal to the CO or appeal to BALCA only if the employer does so as well.

ment is certified by the Secretary of Labor. The two prongs of the certification are (1) an insufficiency of able, willing, qualified and available U.S. workers for the position, and (2) employing the alien will not have an adverse affect on wages and conditions of U.S. workers. The statutory language is extremely brief in comparison with the voluminous regulations which are based on it:

> (a) Classes of aliens ineligible for visas or admission
> Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
> (5) Labor certification and qualifications for certain immigrants
> (A) Labor certification
> (i) In general
> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.[24]

Beginning with the statutory language, we can make several assumptions without even venturing into the voluminous legislative history in an attempt to divine out the reasonably prudent legislator's intent. *Availability* is to be determined "at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor."[25] Regulations regarding availability standards should provide for a determination that would be valid for a long enough period to enable the alien to apply for an immigrant visa *and* to enter the U.S., or in the alternative to provide a re-determination when there is a significant delay in the approval of the visa and the alien's entry under such visa. The pool of candidates is also limited to a geographic region containing the place of intended employment but otherwise undefined in the statute.

While the second prong of the statutory provision dealing with prevailing wages is not addressed in this paper, a review of its language may assist in defining the meanings of the remaining three factors—able, willing, and qualified. The meaning of two of the terms, *able* and *qualified*, may be influenced by the prevailing wage provision, which could reasonably be read to apply to the conditions of the job offer which form the basis for determining ability and qualifications. The remaining term, *willing*, may also be related to the wage level offered. But again,

[24] 8 U.S.C. § 1182(a)(5)(A) (2002).
[25] *Id.*

the statute does little to provide guidance on the terms used, such as "adversely affect," "working conditions," and "similarly employed."[26]

B. Immigration Act of 1990 and Subsequent Amendments

The Immigration Act of 1990 provided various changes to non-mainstream labor certification which are beyond the scope of this paper.[27] These changes included a labor market based pilot program and notice requirements.[28] However, reviewing the congressional reports and testimonies shows that the Department of Labor was pursuing several statutory changes that did not make it into the final versions of the public law, and that several of these changes are now embodied in the proposed rule.

The only substantial change to mainstream labor certification processing provided for in the 1990 amendments was a notice requirement. A labor certificate may not be issued unless the employer has "provided notice of the filing … to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or" posted notice "in conspicuous locations" for such employees if there is no bargaining representative.[29] The notice provision allows "any person" to provide evidence or "information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers."[30] These provisions were the obvious results of a strong union lobby and underscore Congress's continued protection of the U.S. worker from foreign labor.

The House Judiciary Committee proposed an attestation process for EB-2 and EB-3 immigrants and H-1B and H-2B nonimmigrants with much greater detail than the current statute.[31] Under this proposal, the employer seeking to employ the alien in an occupational classification must file an attestation with the Secretary of Labor that the employer:

> (i)(I) has made and is making positive recruitment efforts, in the recruitment area [identified by DOL as "areas of traditional or expected labor supply"], reasonably designed to locate and employ able, willing, and qualified … workers, and (II) recites the specific actions the employer has taken with respect to such recruitment; and
>
> (ii) has been unable to find such workers who are available at the time and place of need.[32]

The employer would also be required to attest that the wage offered the immigrant employee for the first year of employment would be at least the base prevailing wage level and that

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[26] 8 U.S.C. § 1182(a)(5)(A)(i)(II).
[27] Pub. L. No. 101-649, § 122, 104 Stat. 4978 (1990).
[28] *Id.*
[29] Immigration Act of 1990 § 122.
[30] *Id.*
[31] *Family Unity and Employment Opportunity: Immigration Act of 1990*, H.R. REP. NO. 101-723(I), 1990 U.S.C.C.A.N. 6710 (Sep. 19, 1990).
[32] *Id.*

the working conditions would also meet prevailing working conditions.[33] The recommended statutory wording also defined how and when the prevailing wage is to be determined.

It is important to note that the specific requirements provided in the Judiciary report were not included by Congress in the final version of the bill. The statutory language as it stands today still leaves broad discretionary authority to the Secretary of Labor to make determinations based only on the few sentences enacted. Based on the statute, certification can only be given if DOL determines there are no able, willing, qualified and available U.S. workers and the wage and working conditions meet the prevailing standard. Recruitment attestation requirements embodied in the regulations do not have any basis in the current statutory language other than the general instruction to require certification.

C. Burden of Proof

1. Section 291

In interpreting the statutory basis for the labor certification procedures, the proposed rule cites section 291 of the Immigration and Nationality Act as requiring the employer to meet the burden of proof by "submit[ing] sufficient evidence of its attempts to obtain available U.S. workers," as well as "evidence that the wages and working conditions which the employer is offering will not adversely affect the wages and working conditions of similarly employed U.S. workers."[34] However, the plain language of section 291 seems to indicate that it does not directly apply to the labor certification process.[35]

True, the alien applying for entrance to the United States must establish "that he is not inadmissible under any provision" of the Act, but such burden is applicable to petitions and applications to the Attorney General or consular officer, not to the Secretary of Labor or his delegates.[36] The language is clearly limited to "application for a visa or any other document required

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[33] *Id.*

[34] 67 Fed. Reg. at 30468.

[35] The language of § 291 of the Immigration and Naturalization Act is codified at 8 U.S.C. § 1361 (2000):

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this Act. In any removal proceeding under chapter 4 [8 USC §§ 1251 et seq.] against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

[36] 8 U.S.C. § 1361 (2002).

for entry," or proof of entitlement to immigrant status.[37] For EB-2 and EB-3 petitions, the burden of proof spoken of in section 291 may be met by submitting the labor certification and other required documentation to INS. Nowhere in this section does the statute explicitly impugn the employer with the burden of proof for applications to the Department of Labor.

A viable standard for determining which party has the burden of proof in labor certification procedures may be drawn from the context of section 212(a)(5)(A). As the D.C. Circuit has noted,

> "[Section 212] is written so as to set up a presumption that aliens should not be permitted to enter the United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers. This presumption, the statutory language makes clear, can be overcome only if the Secretary of Labor has determined that the two conditions … of the subsection are met. This structuring of the statute strongly indicates that the Secretary is not obligated to prove in the case of every alien seeking entry to perform labor that the conditions are not met. Given the presumption of the statute against admission, if the Secretary's consultation of the general labor market data readily available to him suggests that there is a pool of potential workers available to perform the job which the alien seeks, the burden should be placed on the alien or his putative employer to prove that it is not possible for the employer to find a qualified American worker."[38]

This would seem to suggest that the initial inquiry made by DOL may provide sufficient evidence for granting a certification in cases where the DOL market data indicates a shortage in the employment field for the particular area. The employer would carry the burden of proof only if the market data suggests an availability of able, willing and qualified U.S. workers.

2. Analogous Provisions

Various analogous provisions of INA may also provide guidance in determining which party has the burden of proof at each stage. For example, in removal proceedings for aliens who gained conditional permanent residence based on either marriage to a U.S. citizen or the entrepreneur classification, the burden of proof of fraud is on the Attorney General and requires "a preponderance of the evidence while the alien still retains the burden of showing that the proper applications had been filed.[39]

In removal proceedings, the statute again allocates the burden of proof between the parties, requiring the alien to prove his lawful entry "by clear and convincing evidence," and then shifts the burden to the service to establish "by clear and convincing evidence," that the alien is deportable based on "reasonable, substantial, and probative evidence."[40] Only if the alien is applying for admission does the statute require him to prove eligibility "clearly and beyond

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[37] *Id.*
[38] Pesikoff v. Sec'y of Labor, 501 F.2d 757, 761 (D.C. Cir. 1974)
[39] 8 U.S.C. §§ 1186A(b)(2), (c)(2)(B), 1186B(b)(2), (c)(2)(B) (2002).
[40] 8 U.S.C. § 1299A(c)(2)-(3) (2002).

doubt."[41] The Alien Terrorist Removal Procedures provide that "it is the Government's burden to prove, by the preponderance of the evidence, that the alien is subject to removal because the alien is an alien terrorist."[42]

The most analogous provision which specifically mentions burden of proof deals with DOL certification of temporary agricultural workers for H-2A status. When an expedited administrative appeal of a determination is requested by the employer, the employer bears the burden of proof "to establish that the individual referred is not able, willing, or qualified because of employment-related reasons."[43] Congress did not include a similar provision for permanent labor certification; however, the Secretary of Labor could find justification in adopting similar standards.

D. Possible Certification Procedures Meeting Statutory Requirements

The burden of overcoming the statutory presumption of non-admissibility is based solely on DOL's determination, and the burden of convincing DOL can be categorically administered. Before delving into the regulation, both as it exists now and under the proposed rule, several possible solutions may be proposed based on the statutory mandates and Congress's desire to protect U.S. workers.

1. Case 1: DOL Recognizes a Regional Shortage of U.S. Workers in the Job Category

The process could begin with an inquiry similar to a prevailing wage determination request, which includes a detailed job description and minimum requirements, discussed *infra*. If DOL prevailing wage data are as accurate and complete as the department claims[44], then it is not a far stretch to assume that similar data regarding the availability of workers in the specified area could also be quite accurate. Certification could be issued by DOL without requiring employer attestations or evidence of recruitment if, at the inquiry stage, labor market data indicates a shortage in the requested employment field. In essence, this would be a regionalized Schedule A determination, rather than the national Schedule A currently in use.[45]

2. Case 2: Data Collected by DOL May be Trumped by Good Faith Recruitment

If, after reviewing labor market data, DOL determines that there are available U.S. workers in the employment region, the burden of proof would shift to the employer to show that good

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[41] *Id.*

[42] 8 U.S.C. § 1534(g) (2002).

[43] 8 U.S.C. § 1188(e)(2) (2002).

[44] 67 Fed. Reg. at 30479. "The wage component of the OES survey is conducted by the Bureau of Labor Statistics (BLS) and, with the exception of the decennial Census, is the most comprehensive survey conducted by an agency of the Federal government…. Due to the comprehensive nature of the survey and the resulting degree of statistical precision with regard to the results thereof, we believe that it is no longer necessary to provide the 5% variance…."

[45] 67 Fed. Reg. at 30493. "Schedule A means the list of occupations set forth in § 656.5 for which we have determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed."

faith recruitment efforts among the available workers found that none were able, willing and qualified for the position.[46] This second situation is the most widely-encountered labor certification, and review of the employer's recruitment efforts has been a substantial portion of the intolerable delays under the current system. Should DOL decide to adopt a regional Schedule A system, the number of employers required to submit to the grueling recruitment procedures will most likely be significantly reduced.

3. Case 3: Job Categories Requiring Regional Protection

The third situation would be if labor market data readily available to DOL clearly shows that the particular position could not be filled with an alien worker without an adverse impact on the wages or working conditions of similarly employed U.S. workers, then DOL could issue a denial of the request for certification and the employer would be left with administrative remedies to seek an appeal. Current regulations provide for a nationwide determination of Schedule B occupations, but do not attempt to make such determinations on a regional level.

[46] *See* Hsing v. Usery, 419 F.Supp. 1066 (W.D. Pa. 1976).