



PERM Labor Certification

Justifying the Proposed Regulations

III. CONSISTENCY OF THE PROPOSED RULE

This section outlines several of the changes in the proposed rule that have been the subject of attack by the American Immigration Lawyers Association (AILA) and others. Acknowledging the persuasive arguments mounted against the proposed regulations as substantial changes to the labor certification process, the issue of law is whether such changes are still within reasonable interpretive bounds of the governing legislation. “Where ... it is possible to read the regulation as the Department reads it, and that reading is consistent with the language and purpose of the statute, the Department’s interpretation is entitled to deference.”¹

The difficulty with this proposed rule is that it represents a deviance from precedent in a direction which is both criticized and applauded from both sides of the debate. Because the proposed rule represents a change in course, DOL “must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored,” and failure to provide adequately detailed discussion of the changes “may cross the line from the tolerably terse to the intolerably mute.”²

A. *Rejecting U.S. Workers*

The governing statute provides the four criteria for determining whether an alien is trumped in the hiring process by a U.S. worker. The alien cannot be hired if the Department of Labor determines there is even one U.S. worker who is “able, willing, qualified ... and available.”³ The exact definition of these terms has been left up to the Secretary of Labor, with little guidance from the other provisions of the statute.

The proposed regulations retain the same definition of the term “United States Worker” as under the current regulatory scheme,⁴ but then go on to provide new standards for rejecting U.S. workers which ignore well-established precedent. Section 656.17(f)(2) would impose a far more intrusive standard than any ever proposed by DOL:

“Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers. For the purpose of paragraph (f)(2) of this section, a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.”⁵

¹ *Warmtex Enterprises v. Martin*, 953 F.2d 1133, 1137 (9th Cir. 1992). *See also* *United States v. Larionoff*, 431 U.S. 864, 872 (1977).

² *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

³ 8 U.S.C. § 1182(a)(5)(A)(i)(I).

⁴ 20 C.F.R. § 656.3; 67 Fed. Reg. at 30493. “United States Worker means any worker who: (1) Is a U.S. citizen; (2) Is a U.S. national; (3) Is lawfully admitted for permanent residence; (4) Is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); (5) Is admitted as a refugee under 8 U.S.C. 1157; or (6) Is granted asylum under 8 U.S.C. 1158.”

⁵ 67 Fed. Reg. at 30500.

The decision to reject a U.S. worker cannot be made by the alien's attorney. The alien and his attorney are in fact forbidden from participating in interviewing or even considering U.S. workers. "The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity."⁶ The current regulations and proposed rule go on to require that interviews and considerations of applicants for the position the alien wishes to fill be the same person who normally interviews and considers applicants.⁷ Restricting the attorney from participating in the interview is perfectly reasonable, but to disallow any participation in reviewing and considering the qualifications of job applicants is an unnecessary hurdle.

The proposed rule would continue to require all hiring personnel to be thoroughly familiar with the intricacies of the labor certification regulations. The employer's agent responsible for hiring is restricted from making normal hiring decisions which consider factors other than the job's minimum requirements. Under normal hiring conditions, if an applicant is found to have a lazy or uncooperative attitude, the reasonably prudent employer would not offer him a position. Should such a determination be made when a U.S. worker has applied for the position for which labor certification is sought, the proposed rule seems to suggest that the alien's attorney, who is preparing the application, may not advise the employer on what constitutes an unacceptable reason for rejecting the particular U.S. worker.⁸ Exact compliance with this restriction would lead to the denial of almost every labor certificate petition.

1. Able

Current regulations provide that a U.S. worker is to be found *able* if he possesses the abilities to satisfactorily perform the job duties. The reasonableness of the duties is often questioned by DOL if they exceed industry standards listed in either the Dictionary of Occupational Titles or ONET.⁹ Refusal to "take into account the job duties listed on [the employer's] applica-

⁶ 67 Fed. Reg. at 30494.

⁷ *Id.*

⁸ 67 Fed. Reg. at 30494. While an alien's attorney may provide generalized advice, he or she cannot consider particular applicants under the proposed rule: "The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview *or consider* U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative," but the provision immediately following requires the employer's representative to be "the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications." *Id.* (emphasis added). Other unacceptable reasons for rejecting a U.S. worker include: assuming that the applicant does not intend to remain on the job (Matter of General Roofing Co., 2001-INA-85 (BALCA Sept. 28, 2001)), rejecting based on unstated job requirements (Matter of Harley Baldwin, Ltd., 2001-INA-41 (BALCA July 23, 2001)), etc.

⁹ DOL has supposedly dropped the Dictionary of Occupational Titles (DOT) in favor of the newer OES data found in ONET, but the agency has struggled to break the habit of relying on DOT classifications, which once again resurfaces in the forms attached to the proposed rule.

tion for alien labor certification is an abuse of discretion which requires reversal of the DOL's decision."¹⁰

The proposed rule does not provide any definition for the term "able." It does, however, seek to establish that "a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training."¹¹ In other words, an applicant who does not possess all of the listed qualifications may not be rejected if he is able to perform the job duties. Board of Alien Labor Certification Appeals (BALCA) rulings have come down on both sides of this issue, leaving the employer in doubt as to the duty to train unqualified but arguably able applicants.¹²

2. *Willing*

In cases of bona fide job offers and an available workforce, U.S. candidates are generally willing to accept the job if a good faith recruitment effort is made by the employer. However, in times of sudden changes in the labor market and wages offered, the prevailing wage program has been unable to keep up, and the wage offered at the level determined by DOL may be significantly lower than the current going rate. In a changing market, wages rarely stay static for over a year, and prevailing wage determinations may often be very outdated. It is just as likely that a rapid market change has sent wage levels down below the prevailing wage determination, and employers seeking to employ an alien would be forced to offer a wage higher than the going rate.

A good faith effort is required before candidates can be found to be unwilling. U.S. workers that are qualified could not be rejected because they were "unwilling to appear for a personal interview at their own expense."¹³ Likewise, it is difficult for employers to prove that applicants who submitted a resume but failed to respond to a single attempt to contact them are unwilling to work. The proposed rule does not change the practice of Certifying Officers determining "if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers."¹⁴

3. *Qualified*

Determining whether a candidate is qualified is again based on the requirements listed by the employer, and the same restrictions apply as were found in determining ability. Setting aside the statutory exceptions, U.S. workers do not need to be equally qualified as the alien in order to avoid a denial of the certification. The difficulty faced by employers is that only the most minimum requirements may be listed on the application, while DOL insists that a U.S. worker that

¹⁰ *Ashbrook-Simon-Hartley*, 863 F.2d at 414, 415. *But see Pesikoff*, 501 F.2d at 762 ("It is well within the Secretary's discretion to ignore employer specifications which he deems, in accordance with his labor market expertise, to be irrelevant to the basic job which the employer desires performed.")

¹¹ 67 Fed. Reg. at 30494.

¹² *See Bronx Medical and Dental Clinic*, 1990-INA-479 (BALCA 1992) (*en banc*); *Technology Dynamics*, 1990-INA-10 (BALCA 1990); *Team Shabbos*, 1990-INA-87 (BALCA 1991).

¹³ *Warmtex*, 953 F.2d at 1135, 1136. *See, e.g., Misak's Gen. Bldg. Contractors*, 1989-INA-39 (BALCA Oct. 25, 1989); *Hipoint Dev., Inc.*, 1988-INA-340, 1989 WL 90729 (BALCA May 31, 1989).

¹⁴ 20 C.F.R. § 656.24(b)(2)(i).

may need on-the-job training to meet such minimum requirements is qualified.¹⁵ This new requirement appears to be rooted in a presumption “that all employers inflate job requirements when filing labor certifications.”¹⁶

Critics argue that basing determinations on sub-minimum requirements “will only create a forced mediocrity in the workforce.”¹⁷ This criticism ignores the purpose of the labor certification process. Congress, in passing § 212(a)(5)(A), made the decision that, “given the choice between the employment of an adequately ‘qualified’ United States worker and the employment of an even-better-qualified alien worker, it prefers the former;” protection of U.S. workers was found to be worth giving up “some degree of increased productivity and economic efficiency.”¹⁸

Recognizing why the regulations are so protective of U.S. workers, the issue of *how* to make this determination is still left unaddressed in the proposed rule. CO determinations of stated qualifications are complex and require substantial knowledge of various fields, yet it is unclear “how the certifying officers will gain the expertise to make this [training] determination involving hundreds of industries in a dynamic economic climate.”¹⁹ Critics fear that the lack of clear standards in this area will result in “arbitrary and capricious decision making.”²⁰

In support of the employers’ interests, courts have reminded DOL that possession of certain minimum qualifications is not the only determination to be made. “DOL cannot properly narrow its inquiry to the single question of whether the U.S. worker applicant has a certain number of years of education, training, or experience.”²¹ The statute is clear that U.S. workers must be found able, willing and available, in addition to being found qualified.

4. Available

Availability standards for Certifying Officer (CO) determinations remain the same under the proposed rule. The regulations provide for a two-tier determination, one at the national level based on “the nationwide system of public employment offices,” and a second determination limited to the locality.²² U.S. workers considered available are those “living or working in the area of intended employment,” as well as those willing to relocate on terms normal to the occupation.²³

¹⁵ 67 Fed. Reg. at 30500.

¹⁶ Letter from Crystal L. Williams, Director of Liaison & Information, American Immigration Lawyers Association, to Dale Ziegler, Chief, Division of Foreign Labor Certification, Department of Labor 38 (July 5, 2002) (available at <http://www.aila.org/contentViewer.aspx?bc=10,911,576,1329>) (hereinafter *Comments by AILA*).

¹⁷ *Id.*

¹⁸ *Hall v. McLaughlin*, 864 F.2d 868, 876 (D.C. Cir. 1989).

¹⁹ *Comments by AILA* at 38.

²⁰ *Id.* at 39.

²¹ *Ashbrook-Simon-Hartley*, 863 F.2d at 415, 416.

²² 20 C.F.R. § 656.24(b)(2)(iii), (iv).

²³ § 656.24(b)(2)(iv). “[T]he Certifying Officer ... may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expenses, or, if the prevailing practice among employers employing workers in the occupation in the area of intended employment is to pay such relocation expenses, at the employer’s expense.”

Under the current regulatory structure, determinations of availability are often made more than a year after the employer decides to offer the permanent position to the alien. Even under the Reduction in Recruitment (RIR) procedures, the time span between the commencement of the recruitment campaign, followed by the CO determination and issuance of the labor certificate, and finally the approval of the immigrant visa by the Bureau of Citizenship and Immigration Services, makes preliminary determinations of U.S. worker availability by the employer obsolete, especially in the high-tech fields.

The proposed rule will provide determinations of U.S. worker availability that more closely satisfy the statutory mandate than the existing provisions. The availability determination must apply to “the time of application for a visa and admission to the United States.”²⁴ An automated adjudication system, such as PERM, will significantly reduce the processing time for labor certification applications, but it remains to be seen if the restructuring of INS under the Directorate of Border and Transportation Security as the Bureau of Citizenship and Immigration Services will reduce processing times and eliminate the backlog as directed by the Homeland Security Act.²⁵

B. Job Requirements

As one of the most heated topics of debate over the proposed rule, the limitations placed on the employer in determining job requirements are based on the DOL premise that most employers purposefully inflate job requirements in order to obtain labor certification. The new procedure would eliminate the employer’s ability to show “business necessity” for any requirement beyond those listed in the OES classifications. Requirements are limited to “those relating to the number of months or years of experience in the occupation or the number of months or years of education or training in the occupation,” with very limited exceptions.²⁶ This section explores the justifications provided by DOL for removing the business necessity exception in all areas other than foreign language requirements.

1. Business Necessity

Established precedent allows employers to include additional requirements in the job description provided “that the job requirements bear reasonable relationship to the occupation in the context of the employer’s business and are essential to perform in a reasonable manner the job duties as described by the employer.”²⁷ The DOL proposes to disallow any such argument, and then seeks to justify such a decision by arguing that this standard “often works to the disadvantage of U.S. workers.”²⁸

Employers are limited to requiring no more than “the Specific Vocational Preparation level assigned to the occupation as shown in the O*Net Job Zones, except in certain limited cir-

²⁴ 8 U.S.C. § 1182(a)(5)(A)(i)(I).

²⁵ *Homeland Security Act of 2002*, Pub. L. No. 107-296, §§ 451, 458, 459, 116 Stat. 2135 (2002).

²⁶ 67 Fed. Reg. at 30472.

²⁷ *Information Industries*, 1988-INA-82 (BALCA Feb. 9, 1989) (*en banc*).

²⁸ 67 Fed. Reg. at 30472.

cumstances.”²⁹ The regulations fail to address whether the Labor Department’s own Occupational Outlook Handbook would be persuasive, since many of the occupations indicate some or many employers in the particular field require higher levels of education or training. The proposed rule does allow employers to document other requirements that are normal to the occupation “by providing copies of state and/or local laws, regulations, ordinances; articles; help-wanted advertisements; or employer surveys.”³⁰

The elimination of business necessity arguments elevates the DOL occupational data to an unprecedented level of accuracy and timeliness. Requirements once held to be impermissibly restrictive compared to those found in the *Dictionary of Occupational Titles* (DOT) are now widely accepted as normal as required job skills continue to rise with improvements in technology. Had the business necessity argument been restricted in the 1980s, no employer could have justified computer-related job requirements for accountants and the like.³¹

It has been argued that the business necessity exception is a controversial “bureaucratic invention.”³² The Federation for American Immigration Reform (FAIR) commends ETA for recognizing “that an irremediable conflict exists where the employer asserts business necessity and the LCA beneficiary, as is typically the case, is currently an employee.”³³ FAIR also points out that BALCA recommended a rewrite of the regulation as early as 1989.³⁴

A rewrite of the regulations does not necessarily mean eliminating the exception entirely. The justifications provided in the proposed rule do not stand muster under even the most deferential standard of review. The reasons provided by DOL include: (1) it “often works to the disadvantage of U.S. workers;” (2) the “regulation has been difficult to administer;” (3) it “has generated a greater amount of litigation than any other regulatory provision in the current regulations;” (4) “requirements tend to be manipulated to favor the selection of the alien;” (5) it has proven to be “an extremely difficult undertaking;” and (6) in high tech occupations, DOL is “in no position to second guess the employer.”³⁵ Rather than refining the standards, DOL concludes “that any business necessity standard that may be adopted would present similar problems.”³⁶

Accepting these complaints at face value, it is still a difficult jump to make the conclusion that no business necessity standard could be adopted. Such reasoning could be used again and again to carve away at any justification employers provide for wishing to hire an alien employee. It could be argued that the mere existence of the labor certification works to the disadvantage of certain U.S. workers; the fact that employers have the option to hire alien workers means that employer expectations and standards would not be lowered to hire less than minimally qualified U.S. workers.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Comments by AILA* at 45.

³² Letter from Michael M. Hethmon, Staff Counsel, Federation for American Immigration Reform (FAIR), to Dale Ziegler, Chief, Division of Foreign Labor Certification, Department of Labor (July 5, 2002) (available at <http://www.ilw.com/lawyers/immigdaily/letters/2002,0709-fair.shtm>) (hereinafter *Comments by FAIR*).

³³ *Id.*

³⁴ *Information Industries, Inc.*, 1988-INA-82 (BALCA Feb. 9, 1989) (*en banc*).

³⁵ 67 Fed. Reg. at 30472.

³⁶ *Id.*

The second reason provided, that the regulation has been difficult to administer, provides justification for a change but not one which places a substantially greater burden on the employer. Adopting BALCA case law would be a more reasonable alternative, and with the benefit of more decisions handed down on this issue than any other under the regulation, DOL should feel somewhat compelled to include the standards established through repeated and closely scrutinized deliberations.

DOL claims that business necessity requirements tend to be manipulated by the employer. The fear of fraud is fully justified by the continued reduction in resources available for adjudicating the applications and the instances of fraudulent filings that reveal “shoddy practices in reviewing and processing applications.”³⁷ One recent example occurred in Virginia, where almost 2,700 labor certification applications were fraudulently filed for short-order cooks; neither the Virginia Employment Commission nor DOL were alerted to the fact that “one diner in Arlington, Virginia was the ‘sponsor’ of 184 applications for short-order cooks in [an] 18-month period.”³⁸ Such examples show that fraud is not tied to the business necessity exception, and that eliminating the exception will do little to address the underlying problem of inefficient processing. An interconnected database system, hopefully to be included in the PERM system, would provide greater protection against fraud than eliminating employer-specific job requirements.

2. Foreign Language

The “business necessity” exception is permitted under the proposed rule only in justifying foreign language requirements. The exception has traditionally allowed employers to overcome the regulatory definition of “unduly restrictive” job requirements, including “requirements for a language other than English.”³⁹ The proposed rule bases its restrictions in this area on relevant BALCA case law. Justification for a foreign language requirement must be based on the inability of the majority of customers or clients to communicate in English; the requirement cannot be based on convenience of the employer arguments.⁴⁰

³⁷ Steven C. Bell, *Labor Department joins INS and State Department in the post 9-11 “Hall of Shame” as shoddy practices in reviewing and processing applications exposed by federal fraud indictment: A news report with commentary*, 2002 IMMIGR. BUS. NEWS & COMMENT DAILY 71 (July 31, 2002).

³⁸ *Id.* Had DOL not made the mistake of sending notice to one of the restaurants instead of the attorney of record, the two men responsible for the 2,700 applications would have gone unnoticed. The author of the article concludes: “As always in the immigration field, never underestimate the ability of the government agencies involved to shoot themselves in the foot.”

³⁹ 20 C.F.R. § 656.21(b)(2)(i)(A)-(C) (2002) provides:

- (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
 - (i) The job opportunity’s requirements, unless adequately documented as arising from business necessity:
 - (A) Shall be those normally required for the job in the United States;
 - (B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of jobs;
 - (C) Shall not include requirements for a language other than English.

⁴⁰ 67 Fed. Reg. at 30498. The proposed rule would eliminate any reference to “business necessity,” remove § 656.21(b)(2)(i), and amend § 656.17(g)(iii) to read:

BALCA has provided a thorough analysis of foreign language requirements based on business necessity in the more than 200 decisions that have addressed the issue. After reviewing the leading cases on the issue, BALCA summarized the two-part test:

First, it must be determined whether a foreign language requirement is shown to bear a reasonable relationship to the *occupation itself*, in the context of employer's business. Second, it must be determined whether the foreign language is essential to perform, in a reasonable manner, the *job duties* as described by the employer.⁴¹

The test is an adaptation of the *Information Industries* business necessity test,⁴² and BALCA has required that both prongs be met.⁴³ The majority draws a clear distinction "between an employee's need to communicate with 'clients, contractors and customers' and his need to communicate with 'coworkers.'"⁴⁴ Critics have attacked the exclusion of coworkers from this test, arguing that this encourages "employers to substitute contractors for their existing employees, thereby exempting these employers from liability for unauthorized employment or taxation."⁴⁵

The Chief Administrative Law Judge, concurring in part and dissenting in part, urged DOL to "not ignore the potential for abuse of foreign language requirements in alien labor certification cases," but that "it should also recognize that there are many times when a workforce with poor English language skills is an economic or sociological reality rather than an improper creation of an enclave of foreign-born workers to the exclusion of U.S. workers."⁴⁶ The dissent argues that prong one of the test may be met by a showing a "poor English language proficiency of the workforce."⁴⁷

The proposed regulations codify the majority's interpretation of the test. Despite the majority's disclaimer that the rule does not require "employers to hire only English speaking em-

A foreign language requirement cannot be included merely for the convenience of the employer or due to the mere preference of the employer, or customers. A foreign language requirement can be based on the nature of the occupation; e.g., translator, or, for example, the need to communicate with a large majority of the employer's customers or contractors who cannot communicate effectively in English. Acceptable documentation includes:

- (A) The employer furnishing the number and proportion of its clients, or contractors who cannot communicate in English, and/or a detailed plan to market products or services in a foreign country; and
- (B) A detailed explanation of why the duties of the position for which certification is sought require frequent contact and communication with customers, or contractors who cannot communicate in English and why it is reasonable to believe that the allegedly foreign language customers, employees and contractors cannot communicate in English.

⁴¹ Lucky Horse Fashion, Inc., 1997-INA-182 (BALCA Aug. 22, 2000).

⁴² Information Industries, Inc., 1988-INA-82 (BALCA Feb. 9, 1989) (*en banc*). See also Coker's Pedigreed Seed Co., 1988-INA-48 (BALCA Apr. 19, 1989) (*en banc*) (adapted business necessity test to foreign language requirements).

⁴³ Lucky Horse Fashion, Inc., 1997-INA-182 (BALCA Aug. 22, 2000).

⁴⁴ *Id.*

⁴⁵ Comments by AILA at 47.

⁴⁶ Lucky Horse Fashion, Inc., 1997-INA-182 (BALCA Aug. 22, 2000).

⁴⁷ *Id.*

ployees, or to conduct business in the English language,”⁴⁸ the “special scrutiny” that attaches to the first prong in practice almost mandates an English-only workplace. The rule goes well beyond protecting U.S. workers by establishing a prejudice against non-English-speaking employers, and the impact is felt greatest in the small business realm.⁴⁹

Critics on the other side argue that the proposed standard is too lenient and invites abuse. Pointing to the business practice found in most other countries of hiring foreign language specialists “on a temporary basis until indigenous staff can be trained,” the Federation for American Immigration Reform (FAIR) argues that the labor certification process require the same from U.S. employers, rather than allowing them to justify a business necessity for a permanent foreign language position.⁵⁰ They also point out the potential for abuse that exists under the proposed rule in allowing employers to submit “a detailed plan to market products or services in a foreign country,”⁵¹ and would instead suggest requiring “an *existing* marketing program.... The speculative nature of a ‘plan’ makes verification and enforcement impossible, under both existing and proposed regulations.”⁵²

As opposed to the removal of the business necessity exception, the inclusion of the foreign language exception provision of the proposed rule is adequately justified. By incorporating the position of the BALCA majority, the proposed rule is not a deviation from existing practices. We are left to speculate, however, as to why the DOL complaints about the business necessity exception were not applied to the foreign language exception. The ability to codify a rule developed through BALCA case law regarding foreign language requirements again shows that DOL’s conclusion regarding the business necessity exception was in error. The *Information Industries* test should continue to be allowed in justifying a business necessity exception.

IV. RIGHTS OF THE ALIEN

The final topic for review in this paper is the impact the proposed rule has on the rights of the alien beneficiary of a labor certification application. Specifically, the proposed rule severely limits the alien’s standing in judicial review proceedings, thereby violating the Supreme Court’s interpretation of certain provisions of the Administrative Procedure Act. As an additional note, the existence of an alien’s right to work is reviewed.

A. *Administrative Procedure Act*

The proposed rule adds three new limits to BALCA reviews of CO determinations. First, the proposed rule limits the right of appeal of labor certification denials to employers only, since

⁴⁸ *Id.*

⁴⁹ Letter from Larry Agpan, Mayor, City of Irvine, CA, to Dale Ziegler, Chief, Division of Foreign Labor Certification, Department of Labor, (July 3, 2002) (available at <http://www.ilw.com/lawyers/immigdaily/letters/2002,0711-Ltr-City-of-Irvine.PDF>).

⁵⁰ *Comments by FAIR.*

⁵¹ Fed. Reg. at 30498.

⁵² *Comments by FAIR.*

only an employer can file the initial application.⁵³ Second, the proposed rule seeks to deny the alien beneficiary of a labor certification application any standing to challenge the decision, claiming that “it makes little sense to allow an alien to also file an appeal.”⁵⁴ And third, BALCA may no longer remand cases to the CO, under the assumption that “cases processed under the new system would be sufficiently developed by the time they get to the Board that there should be no need to remand a case to a Certifying Officer.”⁵⁵

The Administrative Procedures Act (APA) has been interpreted by the Supreme Court to provide standing to parties who have suffered an “injury in fact” from the administrative action which is within the “zone of interests” embodied in the statute.⁵⁶ This standard allows the alien beneficiary of a labor certification application to appeal the final BALCA decision. By removing the alien from participating in the administrative review by BALCA in any way, the proposed regulation makes the alien’s ability to seek federal judicial review dependent on whether the employer has chosen to exhaust all administrative remedies.

A decision to deny labor certification may be reversed by a federal court only “where the Secretary or his delegate abused his discretion by basing the decision on evidence neither reliable nor sufficient for the finding required by the statute.”⁵⁷ In determining whether there was an abuse of discretion, § 706(2)(A) of the Administrative Procedure Act provides that “the scope of review of a denial of an alien labor certification is limited ... as to whether the decision was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”⁵⁸ Furthermore, the “scope of review under the arbitrary and capricious standard is limited, and a court may not substitute its judgment for that of the agency.”⁵⁹ Because federal judicial remedies are so limited, the administrative remedies should provide adequate protection of the individual’s rights.

The proposed regulations, while directly limiting the alien’s rights, provide additional opportunities for federal judicial review. Eliminating BALCA remands exposes DOL to federal suits under the APA whenever there is a question of “whether the agency action was based upon a consideration of relevant factors.”⁶⁰ Allowing BALCA to remand the case for further fact-finding or determination would protect the administration from judicial reversal. This does not

⁵³ Fed. Reg. at 30476.

⁵⁴ *Id.*

⁵⁵ Fed. Reg. at 30477.

⁵⁶ *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). See *Ass’n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-690 (1973); *Sec’y of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973).

⁵⁷ *Sherwin-Williams Co. v. Reg’l Manpower Admin’r of the United States Dept. of Labor*, 439 F. Supp. 272, 274 (N.D. Ill. 1976). See also *Shuk Yee Chan v. RMA*, 521 F.2d 592 (7th Cir. 1975); *First Girl, Inc. v. RMA*, 499 F.2d 122, 124 (7th Cir. 1974); *Digilab, Inc. v. Sec’y of Labor*, 495 F.2d 323, 327 (1st Cir. 1974); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098, 1102 (9th Cir. 1971).

⁵⁸ *Pancho Villa Restaurant, Inc. v. Dept. of Labor*, 796 F.2d 596 (2d Cir. 1986) (quoting 5 U.S.C. §706(2)(A) (1982)); *Pesikoff v. United States Sec. of Labor*, 501 F.2d 757, 761 n. 5 (D.C. Cir. 1974); *Seo v. United States Dept. of Labor*, 523 F.2d 10, 12 (9th Cir. 1975).

⁵⁹ *Kwan*, 777 F.2d at 480; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁶⁰ *Kwan v. Donovan*, 777 F.2d 479, 480 (9th Cir. 1985). See also *Nance v. EPA*, 645 F.2d 701, 705 (9th Cir. 1981).

impose any great burden on the administration, especially considering the relatively low bar established by the federal courts: “While we require the DOL to consider the entire application for alien employment certification, the department need not make any inquiry beyond the four corners of that document.”⁶¹

B. Right to Work

DOL arguments for allowing only the employer a right to pursue a reversal, regardless of the Supreme Court’s zone of interest tests, has basis in the fact that alien employees do not have a constitutionally protected right to work absent authorization from the federal agencies. “Aliens acquire only the ‘limited status’ established by the regulations and statutes and they have no constitutional right to work without authorization.”⁶²

As unfair as it may sound, our nation has consistently made determinations that place aliens in an inferior position. “A host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other.”⁶³ This distinction is at the very core of the labor certification process, which values U.S. worker protections more than efficiency, and now under the proposed rule, more than business necessity.

V. CONCLUSION

Comparing the proposed rule to its statutory basis, we find that, even with the great deference given to the Department of Labor, certain proposed changes have not been adequately justified. Consistent with the legislative purpose, the new regulations would afford greater protection to U.S. workers, but at a substantial cost to employers in the form of administrative hurdles and presumptions of manipulating the system. Both the increased evidentiary burden and lack of adequate justification for change are seen clearly in the provisions removing the business necessity exception.

Efforts to streamline the process and eliminate backlogs come as a welcome relief, and the accompanying technological upgrades will hopefully prove effective against fraudulent applications. However, the proposed rule goes too far in limiting the rights of alien beneficiaries of labor certification applications to appeal adverse determinations. At a minimum, the rule should allow BALCA remands to Certifying Officers for further fact-finding and determinations.

The introduction of automated processing provides additional opportunity for improving the labor certification process. Consistent with the legislative purpose and statutory language, the Department of Labor should adopt a localized Schedule A procedure, drawing on their extensive labor market data as well as extrapolations from the PERM database. Expanding the list of pre-qualified occupations on Schedule A for the area of intended employment will further reduce

⁶¹ *Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410, 417 (5th Cir. 1989).

⁶² *WJA Realty Ltd. v. Nelson*, 708 F.Supp. 1268, 1273 (S.D. Fla. 1989). *See Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir. 1970).

⁶³ *Matthew v. Diaz*, 426 U.S. 67, 78 (1976).

the load placed on DOL by shifting the individual adjudications to the Bureau of Citizenship and Immigration Services.