

# An Overview of the Labor Certification Requirement for Intending Immigrants

EDWIN R. RUBIN\*

MARK A. MANCINI\*\*

SCENE: Somewhere in the world two aliens are discussing their desire to obtain green cards<sup>1</sup> and come to the United States to work.

FIRST ALIEN: "I was told I couldn't work in the United States until I got a labor certification."

SECOND ALIEN: "I was told I couldn't get a labor certification until I got a job in the United States."

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\* B.A., Pennsylvania State University; J.D., Villanova Law School; member of the Bar and practicing attorney in New Jersey and Pennsylvania; partner in the firm of Wasserman, Orlow, Ginsberg & Rubin with practice substantially limited to immigration and nationality law.

\*\* A.B., University of Pennsylvania; J.D., Temple University; member of the Washington, D.C., and Pennsylvania Bars; instructor, Immigration Law Project, George Washington University Law School; associated with the firm of Wasserman, Orlow, Ginsberg & Rubin in Washington, D.C., with practice substantially limited to immigration and nationality law.

1. *Permanent residence, green card, and resident alien* are some of the terms used to designate the status of an individual lawfully admitted for permanent residence. Section 101(a)(20) of the Immigration and National-

## INTRODUCTION

Unfortunately, the provisions of section 212(a) (14) of the Immigration and Nationality Act<sup>2</sup> appear to present the contradiction described in the above colloquy. In reality, the contradiction is created more in actual practice by employers<sup>3</sup> than in the theory of labor certification.<sup>4</sup> Nevertheless, major problems concerning labor certification procedures do exist. This article will discuss the current problems of labor certification procedure by tracing the administrative process from application to review of denials and judicial review from jurisdiction to remedy.

In its eleven-year existence the wording of section 212(a) (14) has engendered criticism from the Department of Labor,<sup>5</sup> the Administrative Conference of the United States,<sup>6</sup> leading authorities in im-

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ity Act, 8 U.S.C. § 1101(a) (20) (1970) [The Immigration and Nationality Act is hereinafter cited as I. & N. Act.]. The references to the statute will be to the Act and to the *United States Code*, for the Immigration and Naturalization Service generally uses citations to the Act in its correspondence and other documents. For a full discussion of the procedure for immigrating to the United States, see Comment, *How to Immigrate to the United States: A Practical Guide for the Attorney*, 14 SAN DIEGO L. REV. 193 (1976).

2. The Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571 (Oct. 20, 1976) [hereinafter cited as 1976 Amendment], which become effective January 1, 1977, amending Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, amending 8 U.S.C. § 1182(a) (14) (1952). See generally *Afterword: Immigration and Nationality Act Amendments of 1976* [hereinafter cited as *Afterword*], 14 SAN DIEGO L. REV. 326, 29-30, 33-34 (1976).

3. The law requires merely a job offer before certification may be issued and, in some cases, a job offer is, in theory, not even required. See text accompanying notes 27-28 *infra* for a discussion of labor certification regulations and procedure. However, many employers will not apply for labor certification for an employee who has not demonstrated on-the-job capability, and other employers will not offer employment to aliens who do not have permanent residence.

4. The requirement of the I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970) is commonly referred to as "labor certification." 29 C.F.R. § 60.1 (1976).

5. E.g., *Hearings on S. 3074 Before the Subcomm. on Immigration and Naturalization, Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 59-61 (Mar.-Apr. 1976).

6. 38 Fed. Reg. 16840 (1973). See 51 INTERPRETER RELEASES 1 (1974). The Administrative Conference of the United States was established by Congress to study the efficiency, adequacy, and fairness of the administrative procedures of federal agencies. 5 U.S.C. § 571 (1970).

migration practice,<sup>7</sup> the Comptroller General of the United States,<sup>8</sup> and Congress. The criticism has not all been directed at the same problem, and proposed solutions vary. This article addresses only the criticism and guidance provided in judicial decisions which concern administrative procedures. As the House Committee on the Judiciary noted:

[T]he current *administration* of this provision by the Department of Labor has not been satisfactory. The labor certification program is a complex one—partly because of the complexity of the immigration law itself and partly because of the failure of the Department of Labor to explain adequately the program to the public or even to the Congress, with whom it has been generally uncooperative. As a result, the program is operating with little in the way of public understanding, and the Department of Labor's efforts to implement this program have been attacked by courts and commentators alike as being arbitrary, unfair and violative of the Freedom of Information Act.<sup>9</sup>

Approximately 60,000 to 70,000 applications for alien labor certification are filed each year.<sup>10</sup> Of those, about 40,000, or about 65 percent, are approved.<sup>11</sup> This represents about 10 percent of the quota immigrants<sup>12</sup> entering the United States each fiscal year. Although the impact of the labor certification procedure has been minimized by those responsible for its administration,<sup>13</sup> the impact is extreme-

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7. E.g., *Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 8, at 187 (1973) (testimony of Jack Wasserman, Esq.). See Gordon, *The Need to Modernize Our Immigration Laws*, 13 *SAN DIEGO L. REV.* 1, 11 (1975); Manulkin & Maghame, *A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker*, *id.* at 42, 51-52.

8. COMPTROLLER GENERAL, *House Comm. on the Judiciary, ADMINISTRATION OF THE ALIEN LABOR CERTIFICATION PROGRAM SHOULD BE STRENGTHENED* (May 16, 1975).

9. *Id.* at 23, discussing and quoting from H.R. REP. NO. 93-461, 93d Cong., 2d Sess. (1973) (emphasis added).

10. *Hearings on S. 3074 Before the Subcomm. on Immigration and Naturalization, Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 61 (Mar.-Apr. 1976).

11. *Id.* at 84-85.

12. Quota immigrants are not entitled to immediate relative status under I. & N. Act § 201(b), 8 U.S.C. § 1151(b) (1970). The number of quota immigrants is essentially limited to 390,000 per fiscal year. Since January 1, 1968, the number of "special" or Western Hemisphere immigrants has been limited to 120,000 per year by *id.* § 101(a)(27), 8 U.S.C. § 1101(a)(27). Pursuant to the 1976 Amendments, the Western Hemisphere numerical limitation will be set forth in the 1976 Amendment § 201(a)(2).

The number of Eastern Hemisphere immigrants is limited to 170,000 per year by I. & N. Act § 201(a), 2 U.S.C. § 1151(a).

13. (Statement of Deputy Assistant Secretary for Employment and Training, Dep't of Labor):

It is clear that the present labor certification procedures are a costly, aggravating process which affect a very small percentage of the immigrants who enter the labor force. In terms of either population or work force, the numbers entering for employment

ly significant to each alien applicant for certification. Apparently, the labor certification requirement affects a far greater percentage of aliens aspiring to enter the United States as permanent residents than of those aliens who actually enter. Because about 90 percent of those actually entering the United States as permanent residents do so on the basis of family relationships, a fair assumption is that the overwhelming majority of those desiring entry but found ineligible are precluded under the labor certification requirement.<sup>14</sup> Thus the impact from the aspiring alien's viewpoint is significant. The concern expressed over the manner in which the Department of Labor administers the labor certification program is not merely an academic exercise; rather it is a legitimate pursuit of those interested in having a system of immigration law and procedure which is consistent with America's long history of encouraging immigration and our tradition of due process.

Not all the problems which have arisen from the labor certification requirement are related to its administration. Some of the problems generated by the provisions of section 212(a) (14) are related to its apparent dual purpose

to admit and absorb into our citizenry skilled workers from other lands who would make a contribution to our society, and to protect our own workers by excluding aliens whose entry might deprive our citizens of comparable jobs.<sup>15</sup>

In part, this dichotomous statutory objective has created the difficulties encountered to date. However, the Department of Labor may not rely on the statutory objective of protecting workers in the United States as a complete justification for its policies and decisions. As the courts and commentators have frequently noted, it is

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purposes are not significant. The only way that such numbers could adversely affect U.S. workers would be if they were entering in concentrations in a particular occupation or in a single employing establishment in a given area over a relatively short period of time.

*But see* Keeley, *Effects of U.S. Immigration Law on Manpower Characteristics of Immigrants*, 12 *DEMOGRAPHY* 179 (1975).

14. I. & N. Act §§ 201(b), 203(a) (1), (2), (4), (5), 8 U.S.C. §§ 1151(b), 1153(a) (1), (2), (4), (5) (1970), and the exception specified in *id.* § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970). This statement is based on the assumption that in addition to approximately 30,000 aliens whose labor certification is denied, countless thousands more never initiate the immigration process because they know they cannot obtain the required certification.

15. *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323, 326 (1st Cir. 1974).

the fundamental inadequacies in the Department of Labor's administration of the statutory responsibility assigned by section 212(a) (14) which is the cause of most of the current problems.<sup>16</sup>

#### STATUTORY BASES FOR ALIEN LABOR CERTIFICATIONS AND THEIR EFFECTS

The statutory foundation for alien labor certification is section 212(a) (14) of the Immigration and Nationality Act as amended in October 1976.<sup>17</sup> This provision requires that aliens who intend to enter the United States as immigrants must possess an alien labor certification unless they are exempted from the requirement

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16. See notes 5-9 *supra*.

17. I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970), provides: Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

“(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in Section 101(a) (27) (A) (other than the parents, spouses or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in Section 203(a) (3) and (6), and to non-preference immigrant aliens described in Section 203(a) (8).

The 1976 Amendment changes the wording of § 212(a) (14) to conform to the new world-wide preference system. The amendments also include substantive changes in the wording of the labor certification provision. These changes will be discussed briefly in appropriate footnotes *infra*. See generally *Afterword* 326.

Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), 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 (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a) (3) and (6), and to non-preference immigrant aliens described in section 203(a) (8) . . . .

because of a familial relationship,<sup>18</sup> they are not coming to the United States for the purpose of performing skilled or unskilled labor,<sup>19</sup> or they are otherwise statutorily exempted.<sup>20</sup>

The statutory scheme places the alien who is without a required labor certification in the same position as aliens who are mentally retarded,<sup>21</sup> prostitutes,<sup>22</sup> or narcotics smugglers.<sup>23</sup> Aliens not in possession of a valid labor certification may be subject to exclusionary proceedings when they reach the United States. In addition, an alien who is a nonimmigrant and who applies for adjustment of status to that of a lawful permanent resident is subject to exclusion.<sup>24</sup> Therefore, he too is required to possess valid labor certification. If an alien has entered as an immigrant or has adjusted status on the basis of a defective<sup>25</sup> labor certification, he is subject to deportation.<sup>26</sup> Similarly, an alien who has erroneously claimed exemption from the labor certification requirement is deportable.

#### LABOR DEPARTMENT REGULATIONS AND PROCEDURES

The framework for processing labor certification applications by the Department of Labor is set forth in the *Code of Federal Regula-*

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18. See note 14 *supra*. See generally J. WASSERMAN, IMMIGRATION LAW AND PRACTICE (ALI-ABA, 1973), for the relationships exempted from labor certification under the current (pre-1977) law.

19. Examples of such immigrants are children, retired people, substantial investors, and the independently wealthy who are without regular employment. 8 C.F.R. § 212.8(b) (1976).

20. *E.g.*, registry cases pursuant to I. & N. Act § 249, 8 U.S.C. § 1259 (1970), for those who entered the United States prior to June 30, 1948. Such statutory exemptions are very rare and are of limited importance.

21. *Id.* § 212(a) (1), 8 U.S.C. § 1182(a) (1).

22. *Id.* § 212(a) (12), 8 U.S.C. § 1182(a) (12).

23. *Id.* § 212(a) (23), 8 U.S.C. § 1182(a) (23).

24. *Id.* § 245, 8 U.S.C. § 1255.

25. See, *e.g.*, *In re Ortega*, 13 I. & N. Dec. 606 (BIA, 1970); *In re Wel-*  
*come*, 13 I. & N. Dec. 352 (BIA, 1969); *In re Klein*, 12 I. & N. Dec. 819 (BIA, 1968).

26. I. & N. Act § 241(a), 8 U.S.C. § 1251(a) (1970). The specific exclusion charge need not be made under section 212(a) (14); a proper charge may also be made under section 212(a) (19). However, the recent decision of the Supreme Court in *Reid v. INS*, 429 U.S. 619 (1975), suggests that the INS should charge the alien under section 212(a) (20). By charging under this section, the alien is denied the relief afforded by section 241(f). But see *Hyung Dae Kim v. INS*, Civil No. 75-2154 (3d Cir., July 21, 1976), involving a labor certification, and *Persaud v. INS*, 537 F.2d 776 (3d Cir. (1976), for apparently contradictory results.

tions.<sup>27</sup> After briefly summarizing the purpose and scope of immigrant labor certification processing,<sup>28</sup> the regulations describe their geographic applicability,<sup>29</sup> the Manpower Administration regions,<sup>30</sup> and their areas of responsibility.<sup>31</sup> The Secretary of Labor has delegated his responsibility for determinations to a "Certifying Officer appointed by the Assistant Regional Director for Manpower [RMA]<sup>32</sup> of the Department of Labor for the area wherein the employment is to occur."<sup>33</sup> Requests for review of the certifying officer's decision are directed to the Assistant RMA for the area in which the denial occurred.<sup>34</sup>

In order to facilitate the processing of requests, certain advance determinations of labor certification are set forth in the regulations.<sup>35</sup> Currently, two schedules are provided, one for categories of employment considered pre-certified<sup>36</sup> and another for categories of

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27. 29 C.F.R. § 60 (1976). Newly proposed regulations appeared in the *Federal Register* on November 5, 1976. 41 Fed. Reg. 48938 (1976). These regulations, if finally adopted, will make major changes in labor certification procedures. In addition the Secretary of Labor has proposed that the new regulations be published in title 20, part 656 of the *Code of Federal Regulations*. *Id.* The reader should consult the *Federal Register* for an indication of the final content and effective date of the new regulations.

Although I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970), places the responsibility for making the labor certification decision on the Secretary of Labor, the Immigration and Naturalization Service and Department of State do have procedural, and in some circumstances, substantive roles. See text accompanying notes 132-74 *infra*.

28. 29 C.F.R. §§ 60.1(a) & (b) (1976).

29. *Id.* § 60.1(c). The regulations are applicable to the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

30. In 1976 the designation of this division of the Department of Labor was changed from Manpower Administration to Employment and Training Administration. (The change reflects the trend to avoid sexist designations in government agencies.) In addition to their responsibility for issuing labor certifications, the Employment and Training Administration is responsible for many other programs.

31. 29 C.F.R. § 60.1(d) (1976).

32. The position is now entitled Assistant Regional Director for Employment and Training. For brevity's sake and because the *Code of Federal Regulations* is, at the time of writing, using the prior terminology, the appellation, "Assistant RMA," will be used throughout the article.

33. 29 C.F.R. § 60.4(a) (1976).

34. *Id.* § 60.4(b). However, the proposed regulations (§ 656.26) provide for review through the Office of the Chief Administrative Law Judge of the Department of Labor. 41 Fed. Reg. 48938 & 48944 (1976). See text accompanying notes 132-74 *infra* for a full discussion of administrative review of labor certification denial.

35. 29 C.F.R. § 60.2 (1976).

36. *Id.* § 60.2(a) (1) designates Schedule A as a list of employment categories for which determination has been made that "there are not sufficient workers who are able, willing, qualified and available for employment" and whose employment will have no adverse effect on United States citizens.

employment for which certification may not be issued.<sup>37</sup> All the pre-certified occupations, listed on Schedule A, are in health and religious fields.<sup>38</sup> All the occupations which may not now be certified, listed on Scheduled B, require only minimal training.<sup>39</sup>

A third schedule, Schedule C, was promulgated in 1967 but is not presently in use. Schedule C pre-certified highly skilled occupations found to be in short supply in certain regions so long as the alien worked only in the designated geographic area. On February 9, 1970, the Secretary of Labor, without first publishing in the *Federal Register*, suspended Schedule C. This action was challenged as violative of the Administrative Procedure Act.<sup>40</sup> The Second Circuit held in *Lewis-Mota v. Secretary of Labor*, that publication of proposed rulemaking in the *Federal Register* was required since the cancellation "changed existing rights and obligations" of aliens of the class.<sup>41</sup> The *Lewis-Mota* decision casts doubt upon those regulations<sup>42</sup> which empower the Secretary to make revisions of the Schedules without notice.

Three forms are used in a labor certification application. Form MA 7-50A, Statement of Qualifications of Alien,<sup>43</sup> requires a description of the alien's educational and work experience. It also

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37. *Id.* § 60.2(a)(2) designates Schedule B as categories of employment for which certification may not be made.

38. *Id.* § 60.7, Schedule A, as of October 25, 1976, pre-certified individuals meeting minimum qualifications in dietetics, medicine and surgery, nursing, pharmacy, physical therapy, and certain religious pursuits. The proposed regulations of November 5, 1976, have made substantial changes in the occupations which are considered precertified on schedule A.41 Fed. Reg. 48938 (1976). By notice on March 26, 1976, the Department of Labor removed nurses from the pre-certification category for the New York Standard Metropolitan Statistical Area. *Id.* at 12654. All other categories of employment are precertified nationwide. The Health Professions Educational Assistance Act of October 12, 1976, Pub. L. No. 94-484, 90 Stat. 2243, in its Findings and Declarations of policy, states that there is no shortage of physicians and surgeons and there is no further need to admit alien physicians. This statement is clearly aimed at removing medical doctors from Schedule A.

39. 29 C.F.R. § 60.7, Schedule B (1976).

40. 5 U.S.C. § 553 (1970).

41. 469 F.2d 478, 481-82 (2d Cir. 1972). Subsequent publication effectuated the cancellation. *Query*: Would a challenge to the cancellation of pre-certification for nurses in the New York area (*see* note 38 *supra*) be successful? The change was published but without a thirty-day delay period.

42. 29 C.F.R. § 60.2(b) (1976).

43. *Id.* § 60.3(e) (1).



asks for information about the prospective employer and area of employment.<sup>44</sup> This form is signed by the alien-applicant.

Form MA 7-50B, Job Offer for Alien Employment,<sup>45</sup> requires a description of the alien's prospective employment in the United States and is signed by the prospective employer. He must describe the job, proposed wages, and efforts made to fill the job. The form warns the prospective employer not to employ a nonimmigrant alien who cannot show work authorization. It also states that the employer of an alien without work authorization is subject to having labor certification for that alien denied. However, no law or authorized regulation supports this sanction. The current regulations state that the "form [MA 7-50B] is modified to the extent that an employer is not subject to a denial of certification on the ground of employing an alien who works without authorization."<sup>46</sup> The regulation authorizing the "penalty" language was removed in February 1971, for being beyond the scope of the authorizing legislation.<sup>47</sup> The forms containing the provision, first printed in April 1970, have not been changed.<sup>48</sup>

The third form specified for use in applying for labor certification is Form MA 7-50C, Supplemental Statement for Live-at-Work Job Offers.<sup>49</sup> It is used to provide a description of the alien's prospective living and working conditions for jobs in which the alien is required to live in the employer's home.

The regulations set forth procedures for applying for labor certification.<sup>50</sup> However, these procedures are not complete because of the roles the Act assigns to the Immigration and Naturalization

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44. The Form MA 7-50A also contains, in block 19, a question concerning placement services and fees. Although *id.* § 60.3(e)(1) states that this information need not be answered, the form itself has not been changed.

45. *Id.* § 60.3(e)(2).

46. *Id.*

47. 36 Fed. Reg. 2462 (1971).

48. At a presentation before the Association of Immigration and Nationality Lawyers in May 1972, Charles E. Odell for Robert J. Brown, Acting Associate Manpower Administrator for the United States Employment Service, Department of Labor, indicated that the language remained on the forms because they had already been printed and distributed before the change in the regulation and "... [w]hen redesigning the forms, the Department of Labor will exclude the reference to 'sanction.'" This statement was made more than fifty months ago. No change has yet occurred.

49. 29 C.F.R. § 60.3(e)(3) (1976). The back of this form contains requirements for additional documentation which must accompany the application for certification of a live-in job.

50. *Id.* §§ 60.3(a)-(d).

Service<sup>51</sup> (INS) and to the State Department.<sup>52</sup> Additionally, the Labor Department regulations do not address such factors as the differences between Eastern- and Western-Hemisphere chargeable aliens<sup>53</sup> and the job opportunities for members of the professions or for people possessing exceptional ability in the sciences or arts.<sup>54</sup> Visa availability<sup>55</sup> also must be consulted in order to determine whether a Schedule A or a PSA-NSA<sup>56</sup> alien may apply directly for adjustment of status.<sup>57</sup>

The basic procedure used in applying for labor certification for an alien who is not listed on Schedule A or B and is not a professional or an individual with exceptional ability in the sciences or arts is to have the prospective employer file the MA 7-50A and MA 7-50B forms in duplicate with the appropriate local office of the State Employment Service.<sup>58</sup> If the job requires the alien to live-in, Form MA 7-50C must also be filed in duplicate. Each State determines how it will handle the applications before forwarding them to the certifying officer for decision.

51. *E.g.*, adjudication of preference petitions, I. & N. Act §§ 204(a) & (b), 8 U.S.C. §§ 1154(a) & (b) (1970).

52. *E.g.*, *id.* § 221(a) (1), 8 U.S.C. § 1201(a) (1).

53. The preference system established by *id.* § 203(a), 8 U.S.C. § 1153(a), has no application to the intending immigrant chargeable to the Western Hemisphere quota. *See id.* §§ 201(a) & 202, 8 U.S.C. §§ 1151(a) & 1152. However, as of January 1, 1977, the Eastern and Western Hemisphere will have identical preference systems. *See Afterword* 327-29.

54. 8 C.F.R. § 204.1(c) (4) (1976). These individuals are usually thought of as belonging to the third preference category, which requires no job offer. I. & N. Act § 203(a) (3), 8 U.S.C. § 1183(a) (3) (1970).

55. The State Department publishes a monthly "Visa Bulletin" entitled *Availability of Immigrant Visa Numbers for (month-year)*. It may be ordered free from the Visa Office, Bureau of Security and Consular Affairs, United States Department of State, Washington, D.C.

56. Those professional, scientific, and artistic occupations not on Schedule A are frequently referred to as PSA-NSA.

57. Adjustment of status from nonimmigrant to immigrant is available for certain classes of Eastern Hemisphere aliens pursuant to I. & N. Act § 245, 8 U.S.C. § 255 (1970). 8 C.F.R. § 245.2(b) (1) (1976) permits direct application in the nonpreference category (I. & N. Act § 203(a) (8), 8 U.S.C. § 1153(a) (8) (1970)) for Schedule A aliens and for PSA-NSA aliens if visa numbers are current for the country in the nonpreference category. *See* 8 C.F.R. § 245.1(g) (1) (1976). For PSA-NSA applicants the MA 7-50A form is sent to the Department of Labor for determination of certification. As of January 1, 1977, adjustment of status will also be available to Western Hemisphere natives. *See Afterword* 330.

58. 29 C.F.R. § 60.3(c) (1976).

An alien who is engaged in an occupation listed on Schedule A but who is proceeding without a job offer may file Form MA 7-50A in duplicate and fully documented with the United States Consul or the Immigration and Naturalization Office. If after review the Consular or Immigration Officer agrees the alien qualifies for Schedule A, this decision is indicated on the forms.<sup>59</sup>

Finally, the regulations outline the procedure for application by a member of the professions or by an individual who has exceptional ability in the sciences or arts but who is not pre-certified on Schedule A.<sup>60</sup> The individual may file Form MA 7-50A in duplicate and fully documented<sup>61</sup> with either the United States Consul<sup>62</sup> or with the Immigration and Naturalization Service. If the alien qualifies for professional status, the Consul or Immigration and Naturalization Service will forward the application to the certifying officer for the place of intended employment. The certifying officer will then determine whether to issue certification. Because the regulations are not complete, State Department<sup>63</sup> and INS<sup>64</sup> regulations also should be consulted to determine all possible ways to file an application for labor certification under a given set of circumstances. After having determined what may be done, counsel must decide what should be done to obtain permanent residence as expeditiously as possible.<sup>65</sup>

Once the application is received by the State Employment Service, the actual processing and decisionmaking commence. This process entails determining whether able, qualified, and willing United States workers are available and whether the alien-appli-

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59. *Id.* § 60.3(a). The decision of the Immigration and Naturalization Service is final after INS review procedures are complete, *id.* § 60.3(d). However, the Assistant RMA may be requested to review a consular decision concerning the alien's qualifications, *id.* § 60.4(b).

60. *Id.* § 60.3(b).

61. *Id.* § 60.3(f).

62. The initial filing is with the appropriate United States Consul (*id.* § 42.110) in all Western Hemisphere cases. If an Eastern Hemisphere alien is abroad, he or she may file either with the Consul or directly with Immigration.

63. See *id.* § 42.91(a)(14); 9 U.S. DEPT OF STATE, ANNOTATED IMMIGRANT VISA REGULATIONS, NOTES AND PROCEDURAL NOTES TO 42.91(a)(14), in FOREIGN AFFAIRS MANUAL, pt. III. See also note 55 *supra*.

64. See 8 C.F.R. §§ 204.1(c), 204.2(e), 245.2(b), 245.1(g) (1976); INS, OPERATIONS INSTRUCTIONS §§ 204.4 and 245.2(c) (1974); Instructions of INS Form I-140, Petition to Classify Preference Status of Alien on Basis of Profession or Occupation.

65. The scope of this article allows neither a detailing of all possible methods of application nor a discussion of the factors in the decision-making process of how best to obtain labor certification and permanent residence.

cant's employment will adversely affect wages and working conditions of those similarly employed. On December 4, 1973, in response to strong criticism by the Administrative Conference of the United States,<sup>66</sup> the Department of Labor Manpower Administration issued a field memorandum implementing changes in its procedures.<sup>67</sup> These instructions established the use of Form MA 7-147 as a transmittal sheet from the State Employment Service to the Assistant RMA. The MA 7-147, when completed, contains information concerning availability, wages, the source of information, and the employer's recruiting efforts. The certifying officer or an assistant (called an analyst) prepares a Form MA 7-146, which is used as the worksheet for issuance of the final decision.<sup>68</sup> A decision is rendered on Form MA 7-145, which in the case of denial is completed with the information stating the basis for denial.

The revision in procedure is a vast improvement over procedures existing before December 1973. However, intense criticism of Department of Labor Alien Labor Certification procedures still exists. The American Bar Association Section of Administrative Law, Committee on Immigration and Nationality recently issued a *Report and Recommendations*,<sup>69</sup> which recommended "issuance of long delayed regulations implementing the 1973 recommendations of the Administrative Conference,"<sup>70</sup> upgrading of procedure and the following of court decisions."<sup>71</sup>

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66. See note 6 *supra*; 51 INTERPRETER RELEASES 1 (1974).

67. MANPOWER ADMINISTRATION, DEP'T OF LABOR, FIELD MEMORANDUM NO. 378-73 (Dec. 4, 1973) was issued to all Assistant RMA's. They in turn presumably disseminated the information to State Employment Service Offices within their region—e.g., Regional Field Instruction, ADV No. 52-73, issued by the Assistant RMA for Region III (at Philadelphia), Dec. 27, 1973.

68. Forms MA 7-146 and MA 7-147 are made available to the applicant upon request, if the certification is denied and appeal is taken. See text accompanying notes 132-74 *infra*.

69. May 1976.

70. See note 6 *supra*. In both May and December 1975, at liaison meetings between the Association of Immigration and Nationality Lawyers and the Department of Labor, officials of the Labor Department indicated a current lengthy draft of the proposed regulations was in the process of or had been reviewed by the Office of Solicitor. The proposed regulations of November 5, 1976, represent a step toward improving labor certification procedures. However, still greater efforts are needed. 41 Fed. Reg. 48938 (1976).

71. *E.g.*, at a liaison meeting between the N.Y. Chapter, Association of Immigration and Nationality Lawyers and officials of the N.Y. Regional Of-

## The report concluded:

The foregoing report and recommendations are based on our conviction that extensive revisions are needed in the administration of the labor certification program in order to assure its compliance with the requirements of law and of fair play.

We urge the Department of Labor to take prompt action to adopt and implement our recommendations.<sup>72</sup>

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face, United States Department of Labor on March 10, 1976, the Labor Department stated that it has always held that a district court decision is applicable only to the facts of that case.

72. An extract from the recommendations, quoted below, is instructive of the problems faced by the practitioner attempting to obtain labor certification for his client:

3. The Department of Labor should improve its facilities for public information and communication in the following respects:

a. The long-delayed issuance of regulations implementing the 1973 recommendations of the Administrative Conference should be published forthwith.

b. The Department of Labor should immediately inaugurate a program, in compliance with the public information requirements of 5 U.S.C. 552, to publish as regulations or otherwise make available to the public all interpretations, policy determinations, and decisions adopted in its administration of the labor certification requirement. The Department of Labor should designate and publish specified decisions as precedents.

c. The Department of Labor should publish or otherwise make available on a current basis its internal criteria for adjudicating labor certification requests.

d. The Department of Labor should publish or otherwise make available to the public current information regarding types of labor certification requests granted and types denied.

4. The Department of Labor should make the following procedural improvements in the labor certification process, in order to assure compliance with the law and with the requirements of due process:

a. Any denial of labor certification request should be based on an adequate record, in which the evidentiary basis for the proposed action is fully developed.

b. Any denial of labor certification request should be based on substantial evidence or information incorporated in the record of the proceeding.

c. No determination to deny a labor certification request should be made before the applicant is given an opportunity to rebut any evidence or information on which the proposed denial is predicated.

d. In order to promote uniformity and facilitate the correction of errors, the Department of Labor should make provision for centralized review of labor certification denials in appropriate cases.

5. The Department of Labor should take steps to avoid reliance on inadequate and erroneous criteria in adjudicating labor certification cases, and particularly to follow court decisions in which such errors are indicated. Among such improper criteria are the following:

a. Use of inadequate and unreliable information, such as telephone surveys and computer tabulations of supposedly available workers.

b. Use of unrealistic criteria, ignoring the employer's needs and alien's specialized skills, resulting in an unsupportable finding that qualified workers are available to fill the open position.

c. Use of excessive geographic criteria of availability, disregard-

After labor certification is obtained, the only remaining question is its validity. Generally, labor certifications are valid for an indefinite period of time.<sup>73</sup> However, certifications for domestic workers and teachers are excepted from this rule.<sup>74</sup> Certifications issued pursuant to Schedule A are limited to specified occupation and geographic area set forth in Schedule A.<sup>75</sup> Certifications for members of the professions without job offers are limited to the intended occupation and geographic area set forth in the MA 7-50A.<sup>76</sup> Labor certification issued pursuant to a job offer are limited to the job offer specified in the particular geographic location.<sup>77</sup> Once the alien fulfills the conditions of the labor certification and assumes his job, he is not precluded from "subsequently changing his occupation, job, or area of residence."<sup>78</sup>

#### ABLE, WILLING, QUALIFIED, AND AVAILABLE

##### *Job Description and the Dictionary of Occupational Titles*

Prior to the issuance of certification, the Secretary of Labor must determine that sufficient workers are not available who are able, willing, and qualified. He must also determine that the alien's employment will not adversely affect the wages and working conditions of aliens similarly employed.<sup>79</sup> Thus, the proper occupational category of the alien must be determined.

The Department of Labor relies upon its *Dictionary of Occupational Titles* (D.O.T.) to identify the occupation in which the applicant for labor certification is seeking work.<sup>80</sup> This publication as-

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ing the statutory directive that qualified workers must be available at the place of intended employment.

COMM. ON IMMIGRATION & NATIONALITY, SECTION OF ADMIN. LAW, ABA, REPORT AND RECOMMENDATIONS (May 1976).

73. 29 C.F.R. § 60.5(a) (1976). Period of time of validity is the time by which permanent residence (visa) must be issued.

74. *Id.* § 60.5(b) (1975). The concept of a limited period of validity was approved in *Maceren v. District Director*, 509 F.2d 934, 939 (9th Cir. 1974).

75. 29 C.F.R. § 60.5(e) (1) (1976).

76. *Id.* § 60.5(e) (2).

77. *Id.* § 60.5(e) (3).

78. *Id.* § 60.5(f).

79. I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970).

80. BUREAU OF EMPLOYMENT SECURITY, U.S. DEP'T OF LABOR, *DICTIONARY OF OCCUPATIONAL TITLES* vii (Supp. 1966) (3d ed. 1965). The third edition of the D.O.T. is available for \$5.00 from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

signs a six-digit numerical code to approximately 10,000 occupations in the United States and defines customary duties. The numerical code, which is placed on the bottom of the labor certification application forms, is utilized by the appropriate state agencies and the certifying officer to determine availability in the occupation. This determination is made by consulting summaries of individuals registered with the state employment service under the designated code.<sup>81</sup>

The *Dictionary of Occupational Titles* is by its nature very general. Its authors noted the problem in a "Special Notice," which states:

The user should exercise caution in interpreting and applying the information in this publication. . . . [T]he job definitions are composite descriptions of jobs as they may typically occur, rather than as they actually are performed in a particular establishment or in a given locality.<sup>82</sup>

One example of the problems inherent in the D.O.T. is illustrated by the fact that an application for a labor certification for an instructor in ceramics at an art institute and for a professor of invertebrate zoology at a medical school will both be given D.O.T. code 090.228, Faculty Member. Consequently, availability statistics may reflect an excess of zoology professors in the ceramics instructor's application and vice versa.

D.O.T. codification was the basis for reversing the denial of a labor certification in *Yusuf v. RMA*.<sup>83</sup> The applicant in *Yusuf* had a B.A. and an M.A. in Islamic Studies and a Ph.D. in Foreign Affairs. Utilizing its Employment Security Automated Reporting System,<sup>84</sup> the Department of Labor found an excess of 304 "faculty members" in the region. The court remanded the case to the Department of Labor, stating:

[T]he data relied upon by the Certifying Officer in denying plaintiff's application has virtually no probative value in determining the availability of domestic workers with whom plaintiff would com-

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81. Much of the criticism of the labor certification process relates to the nature of these employment summaries. See text accompanying notes 83-107 *infra*.

82. BUREAU OF EMPLOYMENT SECURITY, U.S. DEP'T OF LABOR, *DICTIONARY OF OCCUPATIONAL TITLES* vii (Supp. 1966) (3d ed. 1965).

83. 390 F. Supp. 292 (W.D. Va. 1975).

84. The Employment Security Automated Reporting System (ESARS) has been heavily relied upon by certifying officers and the Assistant RMA to determine availability of workers. ESARS has essentially been discredited as a basis for determining whether there are sufficient workers in the United States "who are able, willing, qualified, and available" at the alien's intended place of employment. See text accompanying notes 113-15 *infra*.

pete for work. Such a lack of evidentiary basis for the administrative decision is an abuse of discretion justifying judicial relief.<sup>85</sup>

*Digilab, Inc. v. Secretary of Labor*,<sup>86</sup> was a similar case involving the overgeneralization of an occupation based on the *Dictionary of Occupational Titles*. In *Digilab*, the employer required an engineer with a very specific combination of skills.<sup>87</sup> The *Dictionary of Occupational Titles* code assigned was Electrical Engineer, 003.081. Availability statistics allegedly reflected 200 unemployed "electrical engineers." The court commented:

"Electrical Engineers" in this age of intense specialization is far too generic a term in determining whether any of them are qualified in the particular field required by *Digilab*.<sup>88</sup>

The case was remanded to the Department of Labor to obtain a specific basis for the denial, one which did not involve vagaries such as "electrical engineers." Unfortunately the *Dictionary of Occupational Titles* provides no greater specificity, and it is used in adjudicating every labor certification application.<sup>89</sup>

Independent of the inadequacies of the D.O.T., courts have disagreed with the Department of Labor's classification of alien applicants for labor certification in relation to a particular peer group for the purpose of determining "availability."<sup>90</sup> *Golabek v. RMA*<sup>91</sup> was one of the earliest cases which considered this issue. The case in-

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85. 390 F. Supp. at 296. The 1976 Amendment addresses this problem. The parenthetical phrase inserted in the new § 212(a)(14) is designed to facilitate certification of "research scholars and exceptional members of the teaching profession." See H.R. REP. NO. 94-1553, 94th Cong. 2d Sess. 10-11 (1976).

86. 495 F.2d 323 (1st Cir.), *aff'g* 357 F. Supp. 941 (D. Mass. 1973), *cert. denied*, 419 U.S. 840 (1974).

87. *Id.* at 325 n.2.

88. *Id.* at 326.

89. As demonstrated, the six-digit code is inadequate but some certifying officers have, on occasion, attempted to rely on the first three digits. This results, for example, in a tax accountant being compared not only to all other types of accountants (using six-digit code of 160.188) but also to a lister in woodworking and to a chief (bank) examiner (using the three-digit code 160). The result is even more absurd if the applicant is an applied statistician. Using the three-digit code, 020, ESARS would show "availability" for occupations as diverse as aircraft weight analyst, applications engineer, and demographer.

90. *Availability* used in this context throughout the remainder of the article is a shortened designation for lack of able, qualified, willing, and available workers and for lack of adverse effect.

91. 329 F. Supp. 892 (E.D. Pa. 1971).



volved an alien-applicant for a lay teacher position in the Philadelphia parochial school system. Although teachers were available for public schools, no one other than the alien had applied for the parochial school job. At issue was whether public and parochial school teachers were properly categorized as peers. The court noted that "although the Administrator found that there might be qualified and available applicants, there is nothing to indicate that those applicants would be 'able' and 'willing' to work for the Archdiocese."<sup>92</sup> Thus, the proper job classification should have been "Catholic School Teacher" rather than "School Teacher," for the willingness to assume the position is part of the job classification process. Similarly, in *First Girl, Inc. v. RMA*,<sup>93</sup> the court held that secretaries seeking full-time permanent jobs could not be included in the same category as secretaries willing to work for an agency supplying temporary help.<sup>94</sup>

The job title<sup>95</sup> utilized by the employer and alien is not as significant as the job description<sup>96</sup> in determining availability.<sup>97</sup> In *Ratnayake v. Mack*,<sup>98</sup> the employer, a Montessori School, indicated that the job required a teacher certified by the Association Montessori Internationale (A.M.I.). The labor department denied the alien applicant certification on the basis that unemployed American teachers were available who could, with a minimum of training, perform the employment described. The court held that the requirement for an A.M.I. certified teacher was too restrictive, for other training and certifying bodies for Montessori teachers existed. However, the court also held that the labor department was incorrect in deciding availability by determining whether "teachers" were available. The court found that the employer was entitled to have a Montessori teacher.<sup>99</sup>

The labor department has asserted that it has the power to judge the good faith of the employer and any necessary job qualifications.

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92. *Id.* at 895.

93. 499 F.2d 122 (7th Cir. 1974).

94. *Id.* For a full discussion of the issue of job classification, see the lower court opinion, *First Girl, Inc. v. RMA*, 361 F. Supp. 1339 (N.D. Ill. 1971).

95. Block 25 on the MA 7-50B Form and Block 13 on the MA 7-50 A Form.

96. Block 30 on the MA 7-50B Form.

97. *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974).

98. 400 F.2d 1207 (8th Cir. 1974).

99. *Id.* at 1212.

The court in *Digilab*<sup>100</sup> answered this contention by stating that the labor department "should not have the privilege of determining the qualifications of any particular applicant for the job to be filled. Nor without proof, should it have the right to attack the good faith of an employer's personnel procedures."<sup>101</sup> However, two D.C. Circuit Court opinions<sup>102</sup> have to some extent challenged employer job requirements. In *Acupuncture Center of Washington v. Dunlop*,<sup>103</sup> the court determined that an employer's requirement for (among other qualifications) an individual who spoke three specified Chinese dialects was overly restrictive. The Court quoted favorably from *Pesikoff v. Secretary of Labor*.<sup>104</sup>

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.<sup>105</sup>

The statement is, in principle, a good one, but the court in *Pesikoff* stretched the concept to hold that a request for certification of a live-in domestic was "merely a personal preference" which the labor department could properly ignore in denying certification because live-out domestics were available. The majority opinion in *Pesikoff* was severely criticized in a well-reasoned dissent and by the First Circuit in *Silva v. Secretary of Labor*.<sup>106</sup> The *Silva* court characterized labor's position as "absurd" and *Pesikoff's* result as "Orwellian."<sup>107</sup>

### *Able, Willing, Qualified, and Available*

Most labor certification cases involve a review of a denial of certification based upon the certifying officer's determination that

100. *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *aff'd* 357 F. Supp. 941 (D. Mass. 1973), *cert. denied*, 419 U.S. 840 (1974).

101. *Id.* at 326.

102. *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974); *Acupuncture Center of Washington v. Dunlop*, Civil No. 74-1050 (D.C. Cir., Jan. 16, 1976), *rev'd* 364 F. Supp. 1038 (D.D.C. 1973).

103. Civil No. 74-1050 (D.C. Cir., Jan. 16, 1976), *rev'd* 364 F. Supp. 1038 (D.D.C. 1973).

104. 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974).

105. *Id.* at 762.

106. 518 F.2d 301 (1st Cir. 1975).

107. *Id.* at 308 & 309. A recent district court decision cited *Silva* with approval and criticized the Department of Labor's position that availability of live-out workers is a proper basis for denying a request for a live-in

United States workers were available. Courts have generally addressed certification denials by holding the labor department to the statutory standards of able, willing, qualified, and available.

The Department of Labor has attempted to argue that the requirement for "qualified" domestic workers was the equivalent of readily trainable workers. However, as one court noted, the authority assumed by Labor was "well beyond any power that may fairly be implied from the express terms of the statute."<sup>108</sup> The same court held that "trainable" workers did not meet the statutory standards of "qualified" workers.<sup>109</sup>

Location is one factor used to determine whether United States workers are willing and available and, perhaps, to some extent ready.

If none of the available workers in the pertinent geographic region are willing to work at a specific place of employment, the statutory purpose is not well implemented by denying . . . [the] application.<sup>110</sup>

In *Reddy v. United States Department of Labor*,<sup>111</sup> the Fifth Circuit properly pointed to the fact that both the statute and regulations required findings to be made at the place of employment. The court reversed the denial because the certifying officer had merely attempted to determine whether workers were available "within the United States."<sup>112</sup>

A number of cases have discussed the sufficiency of state employment services data and ESARS data. The cases have held that merely stating that specified numbers of individuals are registered is not a basis for finding that United States workers were able, will-

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domestic. The court in *Jadeszko v. Secretary of Labor*, CA No. 75-2054 (E.D. Pa., July 13, 1976), stated that such reasoning was "Washingtonian whimsy." *Id.* at 5.

108. *Jersey Plastic Molders, Inc. v. Secretary of Labor*, Civil No. 74-485, at 10 (D.N.J., July 2, 1975) (designated "Not for Publication").

109. *Id.*

110. *Ozbirman v. RMA*, 335 F. Supp. 467, 474 (S.D.N.Y. 1971). Although the Regional Manpower Administrator is named as party defendant in many of these cases, the authors have been unable to determine why. The statutory duty for certification is upon the Secretary of Labor, who has delegated his authority to the Assistant Regional Director for Manpower and others designated by the Assistant RMA.

111. 492 F.2d 538 (5th Cir. 1974).

112. *Id.* at 544. The 1976 Amendment changes the wording of § 212 (a) (14) to emphasize the "intent that the Secretary of Labor certify on the basis of whether there are sufficient workers 'at the place' where the alien is going, rather than in the United States as a whole." H.R. REP. No. 94-1553, 94th Cong. 2d Sess. 14 (1976).

ing, qualified, and available to perform the alien's proposed job.<sup>113</sup> Although this is a strong majority position,<sup>114</sup> large numbers of denials have been and continue to be based on these types of data. The applicant must be prepared to challenge a denial.

#### ADVERSE EFFECT ON WAGES AND WORKING CONDITIONS

The test for issuance of labor certification is essentially two-pronged. The question of the availability of able, willing, and qualified workers has previously been discussed. However, an alien seeking labor certification is also required to demonstrate that his employment will have no "adverse effect."<sup>115</sup> The basic definition of this term indicates employment will be deemed to affect adversely wages and working conditions unless it appears that:

(a) the employment will be for wages no less than those prevailing for U.S. workers similarly employed in the area of employment: . . .

(b) That such employment will include the furnishing of fringe benefits that prevail for U.S. workers similarly employed in the area of employment;

(c) That such employment will involve adherence to prevailing working conditions including customs in the area of employment regarding the furnishing of board, lodging, and other facilities;

(d) That such employment will not involve positions (1) that are vacant because the former occupants are on strike or are being locked out in the course of a labor dispute or (2) the filling of which is at issue in a labor dispute;

(e) That such employment will not involve any discrimination with regard to race, creed, color, national origin, age, or sex; and,

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113. *Seo v. United States Dep't of Labor*, 523 F.2d 10 (9th Cir. 1975); *Shuk Yee Chan v. RMA*, 521 F.2d 592 (7th Cir. 1975); *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *aff'g* 357 F. Supp. 941 (D. Mass. 1973), *cert. denied*, 419 U.S. 840 (1974); *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973); *Jadeszko v. Secretary of Labor*, Civil No. 75-2054 (E.D. Pa., July 13, 1976) (In discussing state statistics for live-out workers, the *Jadeszko* court stated that such statistics were "fantasy not fact" and that the Department of Labor's "number, 366 available workers is pure bureaucratic prestidigitation." *Id.* at 7.); *Gajjar v. RMA*, Civil No. 75-4299 (N.D. Ill., May 7, 1976); *Sherwin-Williams Company v. RMA*, Civil No. 76-220 (N.D. Ill., May 4, 1976); *Yusuf v. RMA*, 390 F. Supp. 292 (W.D. Va. 1975); *Bitang v. RMA*, 351 F. Supp. 1342 (N.D. Ill. 1972).

114. *But see Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974) (which relied on state data to prove live-out workers were available).

115. I. & N. Act § 212(a) (14) (B), 8 U.S.C. § 1182(a) (14) (B) (1970).

(f) That such employment or any term or condition thereof is not contrary to any provisions of Federal, State, or local law.<sup>116</sup>

It is not surprising that because of these regulations a male hairdresser was denied labor certification despite his employer's insistence that only a male would be satisfactory to the customers.<sup>117</sup>

Wages have proved to be a matter of great concern to certifying and reviewing officers, but the decisions to date have almost uniformly found the Department of Labor's determination of the appropriate wage to be based on improper standards. Two issues are involved: (1) whether the certifying officer is measuring the wage rate against the proper peer group,<sup>118</sup> and (2) whether the wage determined by the certifying officer to be necessary is itself properly computed.<sup>119</sup> In addition, serious doubt exists about the propriety of the regulation requiring the prevailing wage and of the definition specified for prevailing wage.<sup>120</sup>

In order to determine the proper peer group with which to compare the applicant's wage the certifying officer must first classify the applicant's job. Once the job is classified, the wage rate must be measured against that of the appropriate peer groups. Problems have arisen from the comparison of dissimilar groups. For example, in *Golabek v. RMA*,<sup>121</sup> the certifying officer compared the wage scale of public school teachers with that of parochial schools. The court held that the comparison was inappropriate because of the dissimilarity in jobs.

In *Reddy, Inc. v. Department of Labor*,<sup>122</sup> the applicant was a mechanical engineer, but the wage rate applied was for a civil engineer. Comparison was held improper because "[t]he phrase 'simi-

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116. 29 C.F.R. § 60.6 (1976).

117. *Witt v. Secretary of Labor*, 397 F. Supp. 673 (D. Me. 1975).

118. See *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974); *Golabek v. RMA*, 329 F. Supp. 892 (E.D. Pa. 1971).

119. See *Naporano v. Secretary of Labor*, 529 F.2d 537 (3d Cir. 1976); *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974); *Ozbirman v. RMA*, 335 F. Supp. 467 (S.D.N.Y. 1971).

120. *Naporano v. Secretary of Labor*, 529 F.2d 537 (3d Cir. 1976); *Ozbirman v. RMA*, 335 F. Supp. 467 (S.D.N.Y. 1971).

121. 329 F. Supp. 892, 896-97 (E.D. Pa. 1971).

122. 492 F.2d at 545. The court was, of course, referring to I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970), the labor certification requirement. The decision continued at 545:

If appellant were trained in the ministry but performing light gauge steel work, the relevant wages and working conditions of "the workers in the United States similarly employed" would be those of persons performing light gauge steel work, which by the Department's definition is mechanical engineer's work, and not the wages and working conditions of ministers.

larly employed' in (B) describes those persons performing the labor referred to in the introductory clause of subsection (14) and in (A) of that subsection."<sup>123</sup>

We do not suggest that certifying officers routinely make errors in wage determinations by comparing totally different job titles. However, certifying officers do ignore such factors as length of time in the position, experience, and fringe benefits.<sup>124</sup> For example, it is fundamental that longevity affects wage rate. Nevertheless, the Department of Labor routinely requires wages for qualified but entry level applicants to meet the occupation's average wage. Thus, an entry wage will be compared with an average wage which necessarily includes the higher salaries of individuals with long terms of employment. There is no adverse effect if the alien applicant is receiving the same wage as an American worker with the *same* qualifications and experience. The courts have advocated this position within the context of union wages. In *Ozbirman v. RMA*,<sup>125</sup> the court indicated that "[b]y failing to consider whether a collectively bargained wage offer would have an adverse effect on wages, the Secretary of Labor has abused his discretion."<sup>126</sup> Similarly, in *Naporano v. Secretary of Labor*,<sup>127</sup> the Third Circuit flatly held that a union wage, absent some evidence impugning the agreement, "cannot be said to 'adversely affect' the wages and working conditions of American laborers in the area."<sup>128</sup> Of particular interest is the court's analysis of the regulation which required that prevailing wages be paid.<sup>129</sup> The court questioned whether the regulation was consistent with the governing statute.<sup>130</sup> In *Naporano, Ozbirman*,

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123. 429 F.2d at 545.

124. *E.g.*, *Ozbirman v. RMA*, 335 F. Supp. 467 (S.D.N.Y. 1971).

125. *Id.*

126. *Id.* at 472-73. *Accord*, *Golabek v. RMA*, 329 F. Supp. 892, 896 (E.D. Pa. 1971).

127. 529 F.2d 537 (3d Cir. 1976).

128. *Id.* at 537-38.

129. 8 C.F.R. § 60.6(a) (1976).

130. 529 F.2d at 540 n. 9.

This definition of "prevailing wage" was formulated by the Secretary for use in connection with the Davis-Bacon Act, 40 U.S.C. § 276a. That Act requires the Secretary to establish a "prevailing wage" rate for laborers and mechanics on contracts to which the United States or the District of Columbia is a party. The Secretary has obviously borrowed this "prevailing wage" formula from Davis-Bacon and has applied it in this labor certification context. However, the labor certification statute, 8 U.S.C. & 1182(a)(14)

and *Golabek*, the labor department would have required that the alien applicant be paid *more* than his American co-worker for identical work at the same place of employment. A challenge to this regulation is long overdue, especially when one considers the manner in which "prevailing wage" is determined under the regulation.<sup>131</sup>

#### ADMINISTRATIVE REVIEW OF LABOR CERTIFICATION DENIAL

##### *Procedure*

In the event labor certification is denied, the regulations provide for administrative appeal to the Assistant RMA of the same area in which the denial occurred.<sup>132</sup> The appeal is termed a request for review, and it must be made within ninety days of the date of denial. The regulations do not specify the nature of the appeal. The request for review is required only to:

- (1) Clearly identify the particular certification determination for which review is sought;
- (2) set forth the particular grounds on which request is based; and
- (3) include all documents which accompanied the denial of certification.<sup>133</sup>

The regulations do require that the review be carried out by the Assistant RMA or his designated representative "who shall not have participated in the appeal."<sup>134</sup> The review may result in an order to issue a certification for an affirmance of the denial. This decision is the final step in the exhaustion of administrative remedies.<sup>135</sup>

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with which we are concerned here, establishes a substantially different standard. It does not require that aliens be paid a "prevailing wage", but rather that their wage not "adversely affect" the wages of American workers. Because no attack is made on the regulations as such, we pass this issue without deciding whether the Secretary's regulations are consistent with the governing statute and confine our discussion to the Secretary's action regardless of the legality of the regulations.

131. 8 C.F.R. § 60.6(a) (1976).

132. 29 C.F.R. § 60.4(b) (1976). The proposed regulations (§ 656.26) provide for review of a Labor certification denial before a hearing office designated by the Chief Administrative Law Judge of the Department of Labor in addition to other changes in review procedure. 41 Fed. Reg. 48938 & 48944 (1976).

133. 29 C.F.R. § 60.4(b) (1976).

134. *Id.*

135. *Id.* There is one case which permitted judicial review without any request for review having been filed. *Sugay v. RMA*, Civil No. 73-1539 (N.D. Ill., Oct. 19, 1973). The case is clearly distinguishable. The application for labor certification was filed with the Immigration and Naturalization Service with a third preference petition. The alien was notified by the Immigration and Naturalization Service that his petition had been denied because his labor certification had not been approved and that "there was no appeal from the denial." *Id.* at 9. It is strongly suggested that administrative remedies be exhausted prior to requesting judicial review. Labor certification denials on Form MA 7-145 contain instructions for re-

However, nothing in the regulation prevents filing another request for labor certification after the first one is denied either by the certifying officer or on review. Indeed, if the first application was defective or new evidence becomes available, a new application will frequently be preferable to administrative or judicial review.<sup>136</sup>

The procedure on review now involves a request by the applicant for the information upon which the denial was based and at least partial compliance with that request by the certifying officer. This was not always the situation. Until recently the form denial only stated that certification could not be issued because workers were unavailable or because there would be an adverse effect.<sup>137</sup> No further explanation was provided. The information upon which the decision was based was difficult to obtain. Currently, certifying officers are making the data available upon request.<sup>138</sup>

Once the unsuccessful applicant has the information upon which the denial is based, he may submit his request for review with supporting documents. The ninety-day appeal period is generally not extended by requests for information or documents. The request for review need take no particular form. Letter "briefs" are routinely used. In *Secretary of Labor v. Farino*,<sup>139</sup> the court outlined an appropriate procedure for review. It indicated that the applicant must have "an opportunity to litigate."<sup>140</sup> *Farino* seems to in-

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questing review. This information was added to the form in November 1973, after recommendations by the Administrative Conference of the United States. See 51 INTERPRETER RELEASES 1 (1974).

136. See *Baig v. RMA*, Civil No. 74-550, at 5 (N.D. Ill., Dec. 20, 1974).

137. E.g., *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323, 324 (1st Cir. 1974); *Golabek v. RMA*, 329 F. Supp. 892, 894 (E.D. Pa. 1971).

138. See text accompanying notes 27-78 *supra*. Forms MA 7-147 and MA 7-146 are now generally supplied to the applicant during request for review when demand is made for their production. The applicant should request, in addition, all other data upon which the decision was based. The proposed regulations (§ 656.25) would require the certifying officer to issue a notice of findings setting forth the bases of his decision. 41 Fed. Reg. 48938 & 48944 (1976).

139. 490 F.2d 885 (7th Cir. 1973).

140. *Id.* at 892. The court stated:

An acceptable procedure on remand to the agency need not include a trial-type hearing. In general, it should be sufficient if the Regional Manpower Administrator makes available to plaintiffs all the information before him, and gives plaintiffs a reasonable opportunity to respond with affidavits and written argument. However, it appears that an important issue in this case is the reliability of the information-gathering procedures used by the Illinois State Employment Service. Any procedure on remand must include an opportunity to litigate this issue. One possibility is for the Manpower Administrator to ask the state agency to give plaintiffs a



dicade that the applicant is entitled to personally appear before the reviewing officer and is to present argument and examine witnesses. At least one Assistant RMA has attempted to afford a *Farino*-type hearing. However, judicial review of the subsequent denial found the procedure defective because the staff member conducting the hearing failed to communicate the information presented to the individual deciding the request for review.<sup>141</sup> Difficulties are still encountered in seeking meaningful review because of the Department of Labor's continued reliance on certain types of data and because of its refusal to give credence to rebuttal evidence.

### *Impeachment of Evidence Used to Deny Certification*

A United States district court may reverse a denial of a labor certification

where the Secretary or his delegate abuses his discretion by basing the decision on evidence neither reliable nor sufficient for the finding required by the statute.<sup>142</sup>

Plaintiffs in labor certification suits may demonstrate unreliability and insufficiency in a variety of ways. Counsel should attempt to utilize as many methods as possible in order to protect the administrative record. In *Sherwin-Williams v. RMA*,<sup>143</sup> the Department of Labor's evidence consisted of State Employment Service statistics, evidence "shrouded in doubt."<sup>144</sup> It is incumbent upon plaintiffs to belie the statistics; otherwise, they stand as the only evidence in the case. As the court noted in *Secretary of Labor v. Farino*:

If the report of the State Employment Service stood unimpeached, we could not conclude that the Secretary's refusal to certify the alien workers was "arbitrary, capricious or otherwise not in accordance with law."<sup>145</sup>

The application in *Sherwin-Williams* was for an organic chemist. The certifying officer received information from the Illinois State

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full explanation of its procedures, so that plaintiffs may respond in writing. Alternatively, plaintiffs might be given an opportunity to cross-examine the state officials about the information furnished the defendants. The defendants themselves should be given the first opportunity to work out an acceptable procedure.

*Accord*, *Gajjar v. RMA*, Civil No. 75-4299 (N.D. Ill., May 7, 1976).

141. *Yong v. RMA*, 509 F.2d 243, 246 (9th Cir. 1975).

142. *Sherwin-Williams Company v. RMA*, Civil No. 76-220 (N.D. Ill., May 4, 1976). The court cites *Shuk Yee Chan v. RMA*, 521 F.2d 592 (7th Cir. 1975); *First Girl, Inc. v. RMA*, 499 F.2d 122 (7th Cir. 1974); *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Bitang v. RMA*, 351 F. Supp. 1342 (N.D. Ill., 1972).

143. Civil No. 76-220 (N.D. Ill., May 4, 1976).

144. *Shuk Yee Chan v. RMA*, 521 F.2d 592, 594 (7th Cir. 1975).

145. 490 F.2d 885, 895 (7th Cir. 1973).

Employment Service (ISES) that twenty individuals were listed as available for work while only four openings were listed with them. The employer apparently did not request referrals from ISES. However, the RMA had approved other applications for chemists during the same period. The court allowed the evidence to be offered for impeachment purposes.<sup>146</sup> Other impeaching evidence consisted of the employer's affidavits about the difficulty in finding qualified United States chemists and of copies of "extensive want ad listings" for such positions at the time the application was filed. Impeaching evidence of this nature, as Judge MacKinnon pointed out in his dissent in *Pesikoff v. Secretary of Labor*,<sup>147</sup> tends to demonstrate "the tension between the theoretical [employment service data] and the actual availability of qualified workers."<sup>148</sup>

Occasionally impeachment of Department of Labor evidence is accomplished by the evidence itself. In *Hanif v. RMA*,<sup>149</sup> the record revealed a January 19, 1973, letter to the certifying officer from the Illinois State Employment Service stating that six floor inspectors were registered with them and that none were available from the union. The record also showed a January 25, 1973, letter from the Illinois State Employment Service (ISES) to plaintiff's attorney stating that ten floor inspectors were available on ISES listings and that there was also union availability. The denial was reversed and the case remanded to the Assistant RMA for an agency hearing.

The lack of impeaching evidence may prove to be fatal. However, counsel can impeach the statistics of the state agencies by placing a job order<sup>150</sup> with the State Employment Service and requesting referrals to the employer of any person registered with them—i.e., any individual who is available, willing, qualified, and who has ability in the specific occupation required by the employer. In *Golabek v. RMA*,<sup>151</sup> impeachment of the state agency statistics on elemen-

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146. Civil No. 76-220, at 9. Compare *Baig v. RMA*, Civil No. 74-550 (N.D. Ill., Dec. 20, 1974).

147. 501 F.2d 757, 764 (D.C. Cir. 1974) (concurring & dissenting).

148. *Id.* at 771.

149. Civil No. 73-2553 (N.D. Ill., Feb. 1, 1974).

150. *Pesikoff v. United States Dep't of Labor*, 501 F.2d 757, 765 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974). Judge MacKinnon, however, regards a statement in the Secretary's brief that the reports of the Texas Employment Commission are neither conclusive nor efficient as self-impeaching and would have remanded for sounder evidence.

151. 329 F. Supp. 892 (E.D. Pa. 1971).

tary school teachers occurred by utilizing a job order pursuant to which only three people showed up for interviews, none of whom later submitted transcripts. This situation was held to be good evidence that no United States workers were able and willing to accept the employment.<sup>152</sup>

In *Ratnayake v. Mack*,<sup>153</sup> impeaching evidence came from an unusual source, the United States Commissioner of Education. In response to the RMA's position that it was unreasonable to require two years' training by a Montessori school certified by the Association Montessori Internationale as a job prerequisite, plaintiffs produced a letter from the Commissioner advising that it was certainly not unreasonable to require extensive training. The letter also indicated that there was a shortage of trained Montessori teachers.

### *Discovery of Available Data*

Courts have been fairly uniform in allowing the applicant or his employer to discover any data utilized by the Department of Labor in deciding the labor certification application.<sup>154</sup> In *Secretary of Labor v. Farino*,<sup>155</sup> the Regional Manpower Administrator was petitioned under the Freedom of Information Act<sup>156</sup> for the names of available unemployed people with the qualifications demanded by the job offers made by the plaintiffs. The information had been given to the certifying officer by the Illinois State Employment Service. The petition was denied by the district court. The court of appeals reversed and noted that the regulations<sup>157</sup> were designed to reduce rather than expand the scope of exceptions to the Freedom of Information Act.<sup>158</sup> A similar claim of privilege which the district court sustained was made in *Doraiswamy v. Secretary of Labor*.<sup>159</sup> The matter is now pending on appeal in the District of Columbia Circuit, and it remains to be seen if the court will follow *Farino* and its progeny. However, the labor department continues

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152. See *Seo v. United States Dep't of Labor*, 523 F.2d 10 (9th Cir. 1975); *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975).

153. 499 F.2d 1207 (8th Cir. 1974).

154. See, e.g., *Khandwala v. RMA*, Civil No. 75-4300 (N.D. Ill., May 4, 1976).

155. 490 F.2d 885 (7th Cir. 1973).

156. 5 U.S.C. § 552 *et seq.* (1976).

157. 29 C.F.R. § 70.22(b) (1976) (the Department of Labor's policy statement regarding the Freedom of Information Act).

158. *Secretary of Labor v. Farino*, 490 F.2d 885, 893 (7th Cir. 1973).

159. Civil No. 74-37 (D.D.C., June 7, 1974), *appeal docketed* Civil No. 74-1847, D.C. Cir., July 26, 1974.

to refuse to disclose the names of individuals registered with state employment services.<sup>160</sup>

### *Burden of Proof*

The labor certification requirement states that an alien seeking to enter the United States to work is excludable

unless the Secretary of Labor has determined and certified to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available .  
 . . .<sup>161</sup>

Questions have arisen concerning which party has the burden of proving that "there are not sufficient workers."<sup>162</sup> Prior to the 1965 Amendments to the Immigration and Nationality Act, the law was structured to permit workers to enter *unless* the Secretary of Labor certified that sufficient American workers were available to perform such labor or that the employment of aliens would adversely affect the wages and working conditions of American workers.<sup>163</sup> There is no dispute that under that provision an affirmative duty was placed upon the Secretary of Labor to initiate the procedure and to prove the availability of American workers before an alien was excludable under the 1952 provision.<sup>164</sup>

By its shift in wording the 1965 Amendment placed the burden of initiating the procedure for labor certification upon the alien applicant. In *Pesikoff v. Secretary of Labor*, the majority of the court concluded that the 1965 Amendment also placed the burden of proving that "there are not sufficient workers" upon the alien applicant for labor certification.<sup>165</sup> *Pesikoff* has been cited for this proposi-

160. The Department of Labor continues to rely on the same bases for nondisclosure as was found inapplicable in *Farino* (29 C.F.R. § 70.22(b) (1976)) as well as on *id.* § 70.26(b) (4). For discussion of arguments which may be used to compel disclosure, see 52 INTERPRETER RELEASES 229-32 (1975).

161. I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970).

162. Compare *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 491 U.S. 1038 (1974), with *Sherwin-Williams Company v. RMA*, Civil No. 76-220, at 5 (N.D. Ill., May 1976).

163. Act of June 27, 1952, ch. 477, § 212(a) (14), 66 Stat. 183, as amended I. & N. Act § 212(a) (14), 8 U.S.C. § 1182 (a) (14) (1970).

164. *E.g.*, *Jersey Plastic Molders, Inc. v. Secretary of Labor*, Civil No. 74-485, at 8 (D.N.J., July 2, 1975) (designated "Not for Publication").

165. 501 F.2d at 761 (D.C. Cir.), *cert. denied*, 491 U.S. 1038 (1974).

tion with approval by several decisions.<sup>166</sup> But the overwhelming majority of cases<sup>167</sup> recognize that:

Since it is not feasible for an employer to affirmatively and conclusively show that acceptable alternative American workers do not exist, the denial of certification must rest on some meaningful evidence.<sup>168</sup>

The reference to "some meaningful evidence" indicates the crux of the problem. The *Pesikoff* majority would have the applicant carry the ultimate burden of persuasion that no American workers meet the statutory standards of able, available, willing, and qualified. That is, the applicant would have to prove the "existence of the non-existent."<sup>169</sup>

Other courts have adopted a different standard. When Labor does produce some evidence, the burden of proof shifts to the alien to rebut that evidence. If the evidence produced by Labor in support of denial is demonstrated not to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law after a thorough, probing, in-depth review, their denial of certification will be upheld.<sup>170</sup> Otherwise reversal is required.<sup>171</sup> If there is any indication that the evidence does not establish that there are American workers who are "able, willing, qualified, and available," the burden is on the Department of Labor to prove there are American workers.<sup>172</sup> It is submitted that part of the difference in the language of the cases has to do with the way the court views the

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166. *Acupuncture Center of Washington v. Dunlop*, Civil No. 74-1050 (D.C. Cir., Jan. 16, 1976), *rev'g*, 364 F. Supp. 1038 (D.D.C. 1973); *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975); *Witt v. Secretary of Labor*, 397 F. Supp. 673 (D. Me. 1975); *Yusuf v. RMA*, 390 F. Supp. 292 (W.D. Va. 1975). *Witt* curiously cites *Pesikoff* for the proposition that the burden placed on the alien "is well established." 397 F. Supp. at 679.

167. For a partial listing of cases placing the burden of establishing the existence of United States workers meeting the standards of I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970), upon the Secretary of Labor, see *Yusuf v. RMA*, 490 F. Supp. 292, 295 (W.D. Va. 1975).

168. *Sherwin-Williams Company v. RMA*, Civil No. 220, at 7 (N.D. Ill., May 1976).

169. *Id.* at 6.

170. *E.g.*, *Khandwala v. RMA*, Civil No. 75-4300 (N.D. Ill., May 4, 1976). The standard here enunciated is the one set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

171. *E.g.*, *Shuk Yee Chan v. RMA*, 521 F.2d 592 (7th Cir. 1975).

172. *E.g.*, *Seo v. United States Dep't of Labor*, 523 F.2d 10 (9th Cir. 1975); *Shuk Yee Chan v. RMA*, 521 F.2d 592 (7th Cir. 1975); *First Girl, Inc. v. RMA*, 499 F.2d 122 (7th Cir. 1974); *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974); *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974); *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974); *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973).

evidence. For example, the Seventh Circuit has essentially established a presumption (perhaps irrebutable) that State Employment Service data is not reliable to prove actual availability.<sup>173</sup> However the majority position is that if burden of proof is defined in terms of who prevails if the evidence is equally weighted for each side, the certifying officer must carry the ultimate burden of proving unavailability of qualified, able, and willing American workers.<sup>174</sup>

## JUDICIAL REVIEW

### *Jurisdiction*

United States district courts commonly find jurisdiction in labor certification cases pursuant to Section 10A of the Administrative Procedure Act (APA), which provides:

Any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.<sup>175</sup>

However, in many cases this jurisdictional base is joined with the Declaratory Judgment Act,<sup>176</sup> and occasionally with the Mandamus and Venue Act of 1962.<sup>177</sup> In *Naporano v. Secretary of Labor*,<sup>178</sup> jurisdiction was *not* found under either the APA or the Declaratory Judgment Act, but *was* found under the Mandamus and Venue Act. Apparently, the Third Circuit is the only circuit which utilizes this jurisdictional basis. Jurisdiction may also be founded on section 279 of the Act,<sup>179</sup> which gives district courts jurisdiction over

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173. See note 113 *supra* for a partial discussion of the progression of this presumption.

174. *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 771 (D.C. Cir.), *cert. denied*, 491 U.S. 1038 (1974). Curiously the clearest, most concise statement about the ultimate burden of proof being on the labor department is contained in the dissenting opinion of the one case which clearly placed the ultimate burden of proof of "unavailability" on the applicant.

175. 5 U.S.C. § 702 (1970).

176. 28 U.S.C. § 2201 (1970).

177. *Id.* § 1361.

178. 529 F.2d 537 (3d Cir. 1976). For its jurisdictional proposition, the court cites *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970). The Third Circuit does not recognize section 10 of the APA as providing an independent source of jurisdiction. See *Zimmerman v. United States*, 422 F.2d 326 (3d Cir. 1970), concerning Third Circuit jurisdiction and *Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967), concerning Eighth Circuit jurisdiction.

179. 8 U.S.C. § 1329 (1970).

any case arising under Title II of the Act, in which the labor certification requirement appears. The argument (still occasionally made by the Department of Labor) that a denial of a labor certification is unreviewable because it is a matter committed by law to agency discretion and thus exempt from the APA, is no longer tenable.<sup>180</sup>

### *Standing to Sue*

Two early cases, *Braude v. Wirtz*<sup>181</sup> and *Cobb v. Murrell*,<sup>182</sup> held that neither the alien nor his employer had standing to challenge the denial of a labor certification. However, both cases are now inapplicable because of the Supreme Court's intervening decisions in *Citizens to Preserve Overton Park v. Volpe*<sup>183</sup> and *Association of Data Processing Services v. Camp*.<sup>184</sup> Currently, both the employer and the alien have standing to sue.<sup>185</sup>

Standing may continue to be a problem in certain fact situations. In *Rumahorbo v. Secretary of Labor*,<sup>186</sup> the alien was physically outside the United States and did not have a definite job offer. He alleged that he desired to work as a teacher in Coredale, Crisp County, Georgia but that he had not been hired by the school district. He was found to lack standing because of a failure to show a "case controversy"; his injury was deemed hypothetical and speculative. If the alien had had a definite job offer, his employer could have sued without any question of standing.

In *Intercontinental Placement Service v. Shultz*,<sup>187</sup> plaintiff was an employment agency which for a fee located specific jobs in the United States for aliens. The court found that Congress did not intend to protect such an interest, and, therefore, the agency failed the test enunciated in *Data Processing Services*. Actual employers, however, could have challenged the denials. Absent the specific ob-

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180. See, e.g., *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), cert. denied, 491 U.S. 1038 (1974); *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973).

181. 350 F.2d 702 (9th Cir. 1965).

182. 386 F.2d 947 (5th Cir. 1967).

183. 401 U.S. 402 (1971).

184. 397 U.S. 150 (1970).

185. Because of *Braude* and *Cobb*, almost every labor certification case discusses the issue of standing. Good discussions are found in *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), cert. denied, 491 U.S. 1038 (1974), and *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973). The Fifth Circuit specifically overruled *Cobb* in *Reddy v. Secretary of Labor*, 492 F.2d 538 (5th Cir. 1974).

186. 390 F. Supp. 208 (D.D.C. 1975).

187. 461 F.2d 222 (3d Cir. 1972).

jections of *Rumahorbo* and *Intercontinental*, it is fair to assume that both the alien and his employer will have standing to sue.

### Scope of Judicial Review

With limited exception,<sup>188</sup> most courts which have considered the scope of their power to review denials of labor certification applications have concluded that they are governed by section 10(e) (2) (A) of the Administrative Procedure Act.<sup>189</sup> Courts have reached this conclusion by relying on the reasoning set forth in *Citizens to Preserve Overton Park v. Volpe*,<sup>190</sup> *Secretary of Labor v. Farino*,<sup>191</sup> or by independent judicial determination.<sup>192</sup> Thus, a reviewing court must determine whether the labor department's decision is

"arbitrary, capricious, or otherwise not in accordance with law." To make such a finding the district court must consider whether the Secretary's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Nevertheless, "the ultimate standard of review is a narrow one," and the district court may not "substitute its judgment for that of the agency."<sup>193</sup>

However,

Even though the Secretary's decision is entitled to a presumption of regularity, his action is not to be shielded "from a thorough, probing, in-depth review."<sup>194</sup>

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188. *E.g.*, *Golabek v. RMA*, 329 F. Supp. 892 (D. Pa. 1971).

189. 5 U.S.C. § 706(2) (A) (1970).

190. 401 U.S. 402 (1971).

191. 490 F.2d 885 (7th Cir. 1973). The cases citing *Farino* with approval of scope of judicial review are: *Seo v. United States Dep't of Labor*, 523 F.2d 10 (9th Cir. 1975); *Shuk Yee Chan v. RMA*, 521 F.2d 592 (7th Cir. 1975); *First Girl, Inc. v. RMA*, 499 F.2d 122 (7th Cir. 1974); *Reddy v. Secretary of Labor*, 492 F.2d 538 (5th Cir. 1974); *Gajjar v. RMA*, Civil No. 75-4299 (N.D. Ill., May 7, 1976); *Sherwin-Williams Company v. RMA*, Civil No. 76-220 (N.D. Ill., May 4, 1976); *Khandwala v. RMA*, Civil No. 75-4300 (N.D. Ill., May 4, 1976); *Hanif v. RMA*, Civil No. 73-2553 (N.D. Ill., Feb. 1, 1974); *Witt v. Secretary of Labor*, 397 F. Supp. 673 (D. Me. 1975). See also *Bitang v. RMA*, 351 F. Supp. 1342 (N.D. Ill. 1972).

192. *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975); *Yong v. RMA*, 509 F.2d 243 (9th Cir. 1975); *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974); *Yusuf v. RMA*, 390 F. Supp. 292 (W.D. Va. 1975); *Ozbirman v. RMA*, 335 F. Supp. 467 (S.D.N.Y. 1971).

193. *Secretary of Labor v. Farino*, 885, 889 (7th Cir. 1973), citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

194. 490 F.2d at 889.



The evidence presented at the district court proceeding should include the administrative record and whatever impeaching evidence *dehors* the record that the petitioner could have presented "at the time of the administrative proceeding but for which no opportunity was afforded."<sup>195</sup> Counsel should also present any evidentiary material arising after the administrative hearing if it tends to prove job market conditions during the time of agency proceedings.<sup>196</sup> Abuse of discretion is a factual determination in each case and depends, in large part, upon the particular reviewing court's concept of the certification process, particularly the nature of the burdens to be carried by each party.<sup>197</sup>

Two cases in the Third Circuit relied on the federal mandamus statute for jurisdiction,<sup>198</sup> but utilized the same standard of review as the cases relying on the APA. One case held that when a claim of non-permissible exercise of discretion was at issue, the courts were to inquire into the scope of authority and ensure that the official "did not abuse his discretion by transgressing the authority actually delegated to him."<sup>199</sup> In *Naporano v. Secretary of Labor*,<sup>200</sup> the court indicated that Labor had "no discretion to review" in determining the proper wage necessary to avoid adversely affecting working conditions when the alien was being paid the union wage.

### *Judicial Remedy*

If the reviewing court has determined that certification has been improperly denied, it can either order the issuance of labor certification or remand the matter to the Assistant RMA for final adjudication. *Secretary of Labor v. Farino* is the leading case in this area. In *Farino* the court extensively discussed the authority for the two available remedies<sup>201</sup> and concluded that remand was the better

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195. *Baig v. RMA*, Civil No. 74-550, at 2 (N.D. Ill., Dec. 20, 1974).

196. At least in those jurisdictions where the courts require the certification decision to be made based on job market conditions at time of remand, current job market data should also be admissible. See text accompanying notes 201-08 *infra*.

197. Compare *Xytex Corp. v. Schliemann*, 382 F. Supp. 50 (D. Colo. 1974), with *Acupuncture Center of Washington v. Dunlop*, Civil No. 73-635 (D.C. Cir. 1976).

198. *Naporano Metal & Iron Co. v. Secretary of Labor*, 529 F.2d 537 (1976) and *Jersey Plastic Molders, Inc. v. Secretary of Labor*, Civil No. 74-845 (D.N.J., July 2, 1975) (designated "Not for Publication").

199. *Jersey Plastic Molders, Inc. v. Secretary of Labor*, Civil No. 74-485, at 4-5 (D.N.J., July 2, 1975) (designated "Not for Publication").

200. 529 F.2d 537 (3d Cir. 1976).

201. 490 F.2d at 891-92. The essential basis for issuance would be

procedure in labor certification cases.<sup>202</sup>

The majority of courts which have considered the issue have followed the *Farino* reasoning and have ordered a remand.<sup>203</sup> In most of these cases the remand is "for further consideration not inconsistent with the opinion."<sup>204</sup> This language indicates that the Assistant RMA must make his decision based on the record as it existed at the time of the district court proceedings. However, some cases have required the decision to be based on the employment situation at the time of reconsideration.<sup>205</sup> The Ninth Circuit in *Seo v. United States Department of Labor*<sup>206</sup> found this objectionable because of possible inequities which could have resulted from changes in the job market during litigation.

The reasoning of the *Seo* court is applicable in cases in which the court determines that certification should have been issued. Few courts have taken the opportunity to order issuance of labor certification after deciding that the administrative decision was an abuse of discretion.<sup>207</sup> However, other courts may be persuaded to order issuance because of the resolute position adopted by counsel for the Department of Labor. In *Naparano* counsel for the Secretary stated at oral argument (apparently after being asked what would happen on remand if the decision held the wage rate being paid plaintiff was not adverse) that remand merely would result in another denial of certification.<sup>208</sup>

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trial de novo based on plaintiff's evidence of abuse of discretion, the administrative record, and the provisions of sections 10(e) (1) and 10(e) (2) (F) of the APA, 5 U.S.C. § 702 (1967). Remand is, according to *Farino*, authorized by APA section 706, if the reviewing court may set aside agency action, and section 703, providing the "proceedings for judicial review is . . . any applicable form of legal action." 490 F.2d at 889.

202. *Id.* at 892.

203. See case cited note 184 *supra*. In addition, all cases cited in this article but not discussed in the remainder of the section on judicial remedy have usually ordered remand.

204. *Khandwala v. RMA*, Civil No. 75-4300 (N.D. Ill., May 4, 1976).

205. *E.g.*, *Reddy v. Secretary of Labor*, 492 F.2d 538 (5th Cir. 1974); *Xytex Corp. v. Schliemann*, 382 F. Supp. 50 (D. Colo. 1974).

206. 523 F.2d 10 (9th Cir. 1975).

207. *Naporano v. Secretary of Labor*, 529 F.2d 537 (3d Cir. 1976); *Jersey Plastic Molders, Inc. v. Secretary of Labor*, Civil No. 74-485 (D.N.J., July 2, 1975) (designated "Not for Publication"); and *Golabek v. RMA*, 329 F. Supp. 892 (D. Pa. 1971) ordered certification to issue.

208. 529 F.2d at 542.

## CONCLUSION

Because of the widespread criticism which has arisen over the manner in which the Department of Labor has administered the labor certification requirement, the Secretary of Labor should immediately take two steps: (1) The Secretary should upgrade the quality of evidence used by the Department of Labor in adjudicating labor certification applications; and (2) the Secretary should promulgate detailed regulations and operations instructions which would be made available to the public.<sup>209</sup>

Even the Secretary of Labor understands the inadequacy of using State Employment Service Statistics. As counsel for the Secretary stated in their brief in *Pesikoff*:

[A]ppellants would like the Court to rely on the statement of the [Texas] Employment Commission. As anyone who has dealt with the state employment commissions knows, they are not a final and conclusive, nor even an efficient, repository for information with regard to positions and employees available. They exist primarily to administer unemployment compensation programs.<sup>210</sup>

The need for promulgating more detailed regulations and other public guidance could not be stated more succinctly than did the *Silva* court.

We can appreciate that there are problems of delicacy in adjusting the needs of United States employers to those of resident workers. But in an area where the Secretary has considerable power under general statutory standards and must decide numerous cases in a routine-fashion, the clarification of policy through rules or published pronouncements would protect against arbitrary action.<sup>211</sup>

Absent the implementation of these recommendations, the courts will undoubtedly continue to overturn many of the labor certification denials brought before them because those denials are adverse to the requirements and purposes of the statute and the public interest embodied in section 212(a) (14) of the Immigration and Nationality Act.

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209. On November 5, 1976, proposed regulations appeared in the *Federal Register*, 41 Fed. Reg. 48938 (1976). These regulations if finally adopted may alleviate some of the problems which have occurred in the past.

210. Brief for Appellee at 17, *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 771-72 (D.C. Cir. 1974).

211. 518 F.2d at 311. See also note 72 *supra*.