REPORT IN SUPPORT OF RECOMMENDATION 73-2

PROCEDURAL DEFICIENCIES IN LABOR CERTIFICATION OF IMMIGRANT ALIENS

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I. Introduction

In 1965 the Immigration and Nationality Act [Act], 8 U.S.C. §1101 *et seq.* (1970), was amended to achieve the dual purpose of reunifying families whose members had been separated because of previously enforced national quota limitations, and establishing new controls to protect the American labor market from an influx of both skilled and unskilled foreign labor. The Act provides geographic quotas which establish the maximum number of aliens who may emigrate each year from Western or Eastern Hemisphere countries [1] and sets forth an elaborate system of preference priorities among which are allocated the total number of immigrant visas permitted to be issued annually to aliens from the Eastern Hemisphere countries. No similar system for visa quota allocation exists for Western Hemisphere aliens.

The Act also sets out classes of aliens who are automatically excluded from entry into the United States. 8 U.S.C. §1182(a) (1970). The fourteenth exclusionary category, 8 U.S.C. §1182(a) (14) (1970) [subsection 14 exclusion], excludes aliens seeking to enter the United States to find work unless they obtain a labor certification from the Department of Labor [Department].

> Except as otherwise provided in this chapter, the following classes of aliens shall be *ineligible* to receive visas and shall be excluded from admission into the United States:
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> 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

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[1] The Immigration and Naturalization Service [Service] has designated the countries of North and South America as the independent foreign countries of the Western Hemisphere. All countries other than those of North and South America have been designated the independent foreign countries of the Eastern Hemisphere.

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 1101(a) (27) (A) of this title (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 sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in section 1153(a)(8) of this title. [Emphasis added].

Prior to the 1965 amendments, alien workers were free to enter the United States unless the Secretary of Labor [Secretary] acted to prevent their entry.[2] The 1965 amendments attempted to implement the aforementioned policy of protecting the American labor market from an influx of skilled and unskilled foreign workers by requiring affirmative action on the part of the Secretary to determine the non-availability of American workers and the absence of an imposition of adverse affect on wages and working conditions prior to certifying aliens seeking employment. This study is concerned only with those aliens who seek both employment in the United States and permanent residence here (*i.e.* immigrants) rather than temporary admittance, for the predominant reason that it is the uniformity of the labor certification process undergone by these applicants that permits critical analysis of that process. However, it is useful to discuss briefly the other categories of aliens entering the United States in order to illustrate their omission from this study, either because they do not require such certification or because the certification they do require results from procedures which are numerous in their variety and substantially different in kind.

A. *The Scope of the Study*

During the fiscal year [FY] 1972, approximately 5.6 million aliens were admitted into the United States; of this total, ap-

[2] Prior to December 1, 1965, the specific authority and responsibility of the Department of Labor were set forth in Section 212(a)(14) of the Immigration Act of 1952, which then read:

> 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:
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> Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, *if* the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed . . . [Emphasis added].

proximately 400,000 came as immigrants.[3] The remainder entered this country for a temporary period only (*i.e.*, as non-immigrants). Generally speaking, an alien seeking permanent residence may be admitted to the United States not only on the basis of (1) a labor certification, by which process approximately 30,000 of the 400,000 immigrants entering the United States in FY 1972 gained entrance,[4] but also by means other than such certification, as through such qualification as (2) a familial relationship with someone already permanently residing here, or (3) refugee status, 8 U.S.C. §1153(a) (1970). And, generally, an alien seeking admittance to the United States for a temporary stay may enter as (1) a temporary worker, (2) a tourist, (3) a student, (4) a transient en route to another country, (5) a representative of: a foreign government, a foreign company, or the foreign media, or by other means detailed in the Act. 8 U.S.C. §1101(a)(15) (1970). The Immigration and Naturalization Service within the Department of Justice [Service], and the Department of State, have primary responsibility for the admission of both immigrants and non-immigrants and control over the duration of their stay. In addition, the Department of Labor plays a primary role in deciding which of those aliens seeking entry to work will ultimately be admitted. However, not all aliens who enter the United States to work obtain labor certifications; and, as earlier stated, not all aliens who obtain labor certifications fall within the scope of this study. At the outset, immigrants entering on grounds other than labor certification (*e.g.*, in FY 1972, 370,000 out of 400,000) are by definition excluded from the study. All non-immigrants, including those who have obtained labor certification, are also excluded, and they fall into diverse categories.

Of the approximately 5.2 million aliens who entered the United States during FY 1972 as non-immigrants, approximately 3.5 million aliens entered as visitors for pleasure, *i.e.*, tourists.[5] Service authorities have noted that it is not uncommon for such tourists to take a job, each thereby becoming "a lawbreaker by violating the terms of his admission to the United States as a tourist."[6] These aliens are obviously not subject to the scrutiny of the Department since they have not sought a labor certification.

[3] 1972 Immigration and Naturalization Service Annual Report 26. [Hereinafter Report].

[4] Unpublished data supplied by Mr. John Sheeran, Chief, Division of Immigration and Rehabilitation Certification, U.S. Department of Labor. [Hereinafter Unpublished Department Data].

[5] *Report*, supra note 3.

[6] *Illegal Latin 'Turistas' Live in Fear of Detection*, Washington Post, Jan. 21, 1973, §E, at 1, col. 1 [Hereinafter *Illegal Latin Turistas*].

There are also a number of non-immigrants who work legally in the United States who do not seek labor certifications, or if they do, not for permanent residence. According to Service data, approximately 40,000 aliens entered the United States as temporary workers in FY 1972.[7] Of these, approximately 10,000 were issued labor certifications for temporary non-agricultural employment [8] and approximately 15,000 were issued labor certifications for temporary agricultural employment.[9] Service regulation 8 C.F.R. §214.2(h)(3) (1972) stipulates that only those aliens who fall within the definition of 8 U.S.C. §1101(a)(15)(H)(ii) (1970)[10] need a labor certification to work temporarily in the United States. The remaining approximately 15,000 aliens who entered the United States to work temporarily did so without a labor certification, under the authority of the numerous exceptions within the Act and Service regulations.

The labor certifications, obtained by non-immigrants, issued for a temporary period of up to one year, are not included within the scope of this study for several reasons. First, the Department employs different procedures for processing certification applications for temporary agricultural and non-agricultural employment; additionally, "mini-programs" have been established for specific occupations in both employment fields, such as sheepherders, logrollers, and entertainers and little enlightenment is to be gained concerning procedural deficiencies in the alien certification program as a whole by digression into these individualistic procedures. Second, temporary certifications are issued only when a specific job exists for the alien to fill. Only the prospective employer of the alien, not the alien himself, can thus apply for a temporary certification; approximately ninety percent of all such applications are approved,[11] and few complaints have ever been lodged against the procedures employed. Finally, while the Service is bound by the Department's issuance or denial of a valid permanent certification, by inter-departmental agreement the

[7] Report, *supra* note 3.

[8] Unpublished Department Data, *supra* note 4.

[9] Interview with Mr. Jack Donnachie, Deputy Director, Rural Manpower Service, U.S. Department of Labor, in Washington, D.C. March 29, 1972. It should be noted that these certifications do not appear in the statistics on temporary certification compiled by the Department, *see* note 4 *supra*.

[10] 8 U.S.C. §1101(a)(15)(H)(ii) (1970) states:

> (15) the term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
> (H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

[11] Unpublished Department Data, *supra* note 4.

Service considers the Department's ruling on a temporary certification as an advisory opinion which it can overrule.

There is one other substantial group of non-immigrants working in this country who enter the country periodically to work. These aliens have in prior years already obtained labor certifications as permanent residents, and thus are embraced by the terms of the study. The returning resident alien (also referred to as a "commuter" or a "green card" alien) is an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad," 8 U.S.C. §1101(a)(27)(B) (1970), although for statistical purposes the Service treats him as a non-immigrant. The regulations amplify this definition by describing commuters as persons "returning to an unrelinquished lawful permanent residence in the United States after a temporary visit abroad." 8 C.F.R. 211.1(b)(1) (1972). In FY 1972, approximately 700,000 commuters entered the United States.[12] The *daily* commuter does not have to resubmit to Department certification procedures each time he enters the country. The U.S. Court of Appeals for the District of Columbia Circuit recently decided, however, that the *seasonal* commuter is not entitled to the benefits of the classification of a returning resident alien; he must therefore seek a labor certification under 8 U.S.C. §1101(a)(15)(H)(ii) (1970) each time he enters the country to work.[13] Since this decision was handed down so recently, the Service has not yet had the opportunity to challenge or comply with it. The required additional labor certifications obtained by seasonal commuters are not, therefore, reflected in the statistics on the number of certifications issued annually and are not included in this report. The three major groups of non-immigrants discussed above—tourists, temporary workers, and commuters—account for 4.6 of the 5.2 million non-immigrants entering this country in FY 1972. The remaining non-immigrants, such as transit aliens and dependents of aliens within these major groups, do not enter the United States to work; should they obtain employment, they, like the tourists mentioned earlier, do so illegally, without seeking labor certification, or fall within an exemption to the subsection 14 exclusion.

Although small by comparison to the total number of aliens annually entering the United States, there is, nevertheless, a sizable group of aliens for whom the acquisition of a labor cer-

[12] Report, *supra* note 3.

[13] Bustos v. Mitchell, No. 72-1179 (D.C. Cir., April 16, 1973). Slip, op. at 8. For more information on the returning resident alien, *see* Greene, *Non-Resident Alien Labor*) 40 Geo. Wash. L.Rev. 440 (1972).

tification is a necessity prior to gaining admission for permanent residence in the United States. In FY 1972, approximately 70,000 aliens applied for labor certifications, and the number of applications were much higher in previous years.[14] Of the 70,000, approximately 60,000 applications were for permanent certifications,[15] and as noted earlier, 30,000 of those were granted. *See* note 4 *supra*. It is the procedures governing the approval or denial of the latter applications with which we are concerned.

B. *The Reason for the Study*

After the Act was amended in 1965, the Department established procedures to screen all those aliens whose permanent visa applications must contain a labor certification. These procedures were created to make it possible to decide which aliens would pose a threat to the American labor market according to the criteria of availability and adverse affect set forth in the subsection 14 exclusion, and thus which aliens should be denied labor certification. The Department regulations which established these procedures,[16] amended as recently as February, 1971,[17] and the manner in which they are implemented, have been the subject of numerous complaints by the bar representing aliens seeking to enter the United States in order to work. Members of the Association of Immigration and Nationality Lawyers [Association] claim that when an alien applies for a labor certification, his right to administrative fairness [18] is repeatedly violated both while his application is being considered initially and while his application is being administratively reviewed if an appeal is taken from a denial of certification: [19]

> Initial decisions are made in secret upon undisclosed evidence, upon unrevealed statistics, upon prevailing wages computed *in camera* and required experience adjudicated *ex parte*. Administrative appeals are

[14] According to Unpublished Department Data, *supra* note 4, 113,915 aliens applied for labor certifications in Fiscal Year 1971; 152,768 in 1970; 157,096 in 1969; and 191,927 in 1968.

[15] Unpublished Department Data, *supra* note 4. The 10,000 remaining applications were for temporary non-agricultural employment. As noted earlier, *see* note 9 *supra*, the temporary agricultural certification statistics are not included in data compiled by the Department.

[16] 29 C.F.R. §60.1 *et seq.* (1972).

[17] 36 Fed. Reg. 2462 (Feb. 4, 1971).

[18] It is within the powers and duties of the Administrative Conference of the United States to study and make recommendations concerning the "efficiency, adequacy, and fairness of administrative procedures used by administrative agencies in carrying out administrative programs." 5 U.S.C. §574 (1970).

[19] Speech by Mr. Jack Wasserman, past President of the Association of Immigration and Nationality Lawyers at the 1972 Conference of the Association, in New Orleans, Louisiana, May 26, 1972. [Hereinafter Wasserman Speech.]

generally decided in similar fashion and without courtesy or fairness or oral argument or any advance notice of the real issues to be decided upon such appeal.

The importance of a labor certification should not be underestimated. For those who cannot claim a specific relationship to a permanent United States resident or who do not qualify for permanent residence under other sections of the Act, the certification is a condition precedent to ultimate approval of a visa petition for permanent residence or an application for adjustment to permanent resident status by the Service.[20] For those who are in this country as tourists but violate the conditions of their entry and take employment, a labor certification is the difference between working openly and working furtively, often at menial jobs for inadequate pay, in constant fear of deportation.[21] Possession of a valid labor certification gives the immigrant alien freedom eventually to change his residence, his occupation, or his employment at will. 29 C.F.R. §60.5(f). *See* Part II(D) *infra.*

The Department's regulatory procedures for labor certification, when joined with those aspects of the Service's statutory procedures governing visa petitions which require labor certification, establish a complex route that must be followed by the alien seeking to emigrate to the United States for the purpose of obtaining permanent employment. In order to determine whether labor certification procedures fail to meet ordinary standards of administrative fairness and uniform application, whether the Department's policies on disclosure satisfy the requirements of the Freedom of Information Act,[22] and whether these determinations will result in the deficiencies charged thus calling for corrective recommendations, we must first examine the operation of the relevant provisions of the Act and the Department regulations underlying the labor certification program.

II. Certification

A. *Statutory Provisions which Require Labor Certification for Visa Approval*

Within the Act, seven categories of preference priorities plus

[20] Many assume that the alien applying for a visa number resides outside the United States. There are, however, a number of such aliens legally within the United States and these aliens are *prima facie* eligible for an immigrant visa. Once it is established that a visa number is available under one of the preferences, the alien can apply for adjustment of status. 8 U.S.C. §1255 (1970). For an in depth discussion of adjustment of status procedures, *see* Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process,* 1 J.Leg. Studies 349 (1972).

[21] *See, e.g., Illegal Latin Touristas, supra* note 6, at 7.

[22] 5 U.S.C. §551 *et seq.* (1970).

a non-preference category have been established to determine the allocation of immigrant visas within the annual statutory ceiling;[23] each of the seven preferences as well as the non-preference has a quota of immigrant visas expressed in a fixed percentage of that ceiling. Four of the preferences set forth prescribed relationships to citizens or permanent residents of the United States and one concerns refugees; aliens seeking to enter the United States under the terms set forth in any of these five preferences need not obtain a labor certification.[24] Pursuant to the requirements of 8 U.S.C. §§1153 and 1101(a) (27) (1970), a labor certification *must* be obtained by the following four classes of aliens:

1) Third preference immigrants, who are described as "qualified members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." 8 U.S.C. §1153(a)(3) (1970). The third preference immigrant is customarily referred to as a "PSA" (profession, science, or art).

2) Sixth preference immigrants, who are described as "qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." 8 U.S.C. §1153(a)(6) (1970). The sixth preference immigrant is customarily referred to as a job-offer applicant since he must have a specific job offer; and it is the prospective employer who seeks the certification for the applicant alien.

3) Non-preference immigrants, who are described as "other qualified immigrants strictly in the chronological order in which they qualify." 8 U.S.C. §1153(a)(8) (1970).

4) Special immigrants, who are described as immigrants who were "born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him." 8 U.S.C. §1101(a)(27)(A) (1970). [Hereinafter Western Hemisphere.]

The exemptions from these requirements to obtain a labor certification are detailed in 8 C.F.R. §212(8)(b) (1972) and 22 C.F.R. §42.91(a)(14)(ii) (1972). The most widely used exemption is that which provides that the spouse or child accompanying

[23] The ceiling applies only to the seven categories of preference immigrants, and non-preference immigrants, and only to natives of Eastern Hemisphere countries and dependent areas of those countries. 8 U.S.C. §1151(a) (1970).

[24] 8 U.S.C. §§1153(a) (1), (2), (4), (5), (7) (1970).

the alien who has gained a certification need not obtain a certification. The other exemptions apply to specified groups of people and generally require assurances that the entering alien will not seek employment while in the United States.

B. *The Agency Structure*

When the Act was amended in 1965, the Secretary delegated his responsibility for the certification program to the Assistant Secretary of Labor for Manpower.[25] In an attempt to provide more discriminating attention to the domestic labor situation in different geographical areas across the United States, the Department began to decentralize its operation of the labor certification program in 1967. Decentralization was accomplished by the further delegation of authority to the Regional Manpower Administrator in each of the Department's ten existing regional offices (plus the Administrator for the District of Columbia), and the establishment within the Manpower Administration of a National Office located in Washington.

While the National Office retains the responsibility to provide general guidance to the regional offices, each regional office remains relatively autonomous, having primary responsibility for the conduct of the labor program in its geographical area. The National Office dictates the broad outlines for the conduct of the certification program within each of the regions and remains available to handle unusual cases that regional officers are unable to resolve.

In addition to a Regional Manpower Administrator at its head, each regional office is composed in part of a certifying officer who approves or denies applications for certification, 29 C.F.R. §60.4(a) (1972), and a reviewing officer who is responsible for requests for a review of a denial of certification (*i.e.*, hears appeals). 29 C.F.R. §60.4(b) (1972). A representative survey of three regional offices revealed that, to some extent, each such office follows different procedures in its handling of certification applications. The following information, unless otherwise specified, is derived from that survey.[26]

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[25] For references to this delegation of authority, *see* 29 C.F.R. §§60.4(a) and (e) (1972).

[26] During the week of April 9, the author interviewed certifying and reviewing officers in the New York and Atlanta regional offices and in the Manpower Administration Office for the District of Columbia. Complete access to all staff members and all files within these offices was provided and full advantage of the opportunity to become acquainted with the operation of the certification program in different parts of the country was taken. All references to a survey of regional offices refers to this field experience.

In all regional offices, the certifying officer has numerous duties relating to aspects of the Manpower Administration program other than immigration, and therefore devotes only a portion of his time, generally about twenty-five percent, to the certification program. Each certifying officer has a staff of several professionals who have a civil service rating ranging from GS–9 to GS–12. It is these professionals who conduct the research and analysis necessary to determine whether a certification application should be approved or denied. Some certifying officers take an active part in the determination to approve or deny a certification, while others simply approve the determinations arrived at by staff members without themselves reviewing the file. Some reviewing officers have a supporting staff of professionals while others do not. Some reviewing officers rely on the information in the file as it arrives from the certifying officer while others conduct their own independent research. It is clear that while the broad outlines of the structure of the certification program are similar across the country, numerous dissimilarities exist in the implementation of the program within the regions, resulting in different treatment of aliens seeking certification depending upon the geographic location of their intended employment and intended residence.

C. *Regulations Governing Labor Certification*

Certification application procedures will vary according to five factors: (1) The applicant alien's native country (Eastern or Western Hemisphere); (2) the applicant's present location (abroad or in the United States); (3) the nature of the job sought by the applicant (professional, skilled or unskilled); (4) the preference under which the Eastern Hemisphere applicant petitions for a visa (third, sixth, or non-preference); and (5) the nature of the application (visa application or adjustment of status application, both of which will be accompanied by a certification application).

Department regulations contain two categories of employment wherein certification is granted or denied on a predetermined basis. Groups I and II of Schedule A list a few professions and occupations in the medical and health services area, and group III of Schedule A includes certain professions and occupations in the field of religion. There is presently a manpower shortage within all of these professions in the United States. An alien whose application for labor certification provides proof of quali-

fication for a job listed in Schedule A is considered by the Service or the consular officer who receives the application to have been issued a labor certification, without Department intervention, (*i.e.*, precertified). 29 C.F.R. §60.2(a)(1) (1972). Schedule B presently lists 48 unskilled and low skilled jobs for which there is a surplus of American candidates; an alien seeking to enter the United States to perform one of these jobs will have his certification automatically denied by a regional office. 29 C.F.R. §60.2(a)(2) (1972).

1. *Schedule A*

Since Schedule A applications do not involve Department action, their processing is the most straight forward for purposes of this paper. A brief explanation of that type of application provides a good beginning point for discussing the various procedural routes taken by the applications. Schedule A applications are filed with either a consular officer of the State Department abroad or with a Service officer in the United States. 29 C.F.R. §60.3(a) (1972). All adjustment of status applications by definition come from within the United States, *see* note 20 *supra;* their supporting certification applications thus are filed with a Service officer. All Eastern Hemisphere aliens located in the United States seeking issuance of statutory third, sixth, or non-preference immigrant visas who claim to be qualified in a Schedule A occupation or profession must also file their certification applications with a Service officer. Such applicants located abroad must file with a consular officer, as must all Western Hemisphere aliens, regardless of their location, who claim to be qualified in a Schedule A occupation or profession. Normally certification applications for Schedule A occupations will not be referred to the Department, but the Service or Consulate may occasionally request an opinion or determination as to whether such an applicant qualifies for Schedule A processing in the occupation listed by the applicant. Once the Service or Consular officer concludes that the alien's qualifications meet the appropriate standards, he will indicate the Schedule A occupation for which the alien qualifies on the application for the certification, thereby completing the precertification process. 29 C.F.R. §60.3(a) (1972).

2. *PSA—Not Schedule A*

Applications for certifications of aliens in the professions, sciences, or arts, whose occupations are not included on Schedule A,

[PSA—Not Schedule A] are submitted to the Service or consular officer as attachments to the visa petition for statutory third preference classification. These applications will not be made by Western Hemisphere aliens, whose applications are handled outside the preference system. Accordingly only Eastern Hemisphere applicants are involved, the location of the applicant determining the office of filing. Upon receipt, the Service or consular officer determines the specific occupation for which certification is sought and whether the alien is qualified for that occupation. Upon determining proper qualification, the officer then forwards the application for the certification to the appropriate Manpower Administration regional officer for certification analysis. The certifying officer is bound by the determination of a Service officer as to whether the alien qualifies for the occupation cited on the application and whether that occupation falls within the definition of "PSA"; such determinations by a consular officer are, however, reviewable by the certifying officer. 29 C.F.R. §60.3(b) (1972). The application of an alien who claims to be qualified as a "PSA" but nevertheless seeks classification under the statutory sixth preference (skilled or unskilled), or as a statutory non-preference applicant for adjustment of status, is similarly processed.

3. *Job Offer*

Applications of aliens whose occupations are not included in Schedule A or who are not "PSA's" must follow slightly different procedural routes. These aliens must have a job offer from an American employer as part of their application for certification. Job-offer applications for certification are filed by the prospective employer, rather than the applicant alien, with the local office or the central state office of the State Employment Service serving the area of prospective employment. 29 C.F.R. §60.3(c) (1972). That office gathers information with respect to the subsection 14 exclusion criteria of availability and adverse affect. The files of the local office as well as other available source material are searched for possible American job applicants who meet the requirements for the job offer. Additionally, the employer's wage offer is reviewed in light of the duties of the job for which the offer has been made. If American applicants are found to be available through the local office files, the certification application will be denied by the regional office. If the wage offer appears to be below the standard area wage for that occupation, the State Employment Office contacts the employer, and he is

offered an opportunity to amend his wage offer to meet the prevailing wage rate. If he fails to meet the prevailing wage rate, such failure constitutes an adverse affect such as to require denial of a certification application by the regional office.

Once these preliminary steps have been accomplished, the local office forwards the application, together with the information developed—whether favorable to the alien's application or not—to the State office of the State Employment Service, for transmittal to the appropriate regional office of the Department's Manpower Administration. The information transmitted should be precise in setting forth details on availability, adverse affect, and the source of this information. 29 C.F.R. §60.3(c) (1972). The certifying officer (or his staff) reviews the application and makes a determination using the information furnished by the State Employment Service together with any other information independently developed by the staff.

All applications for certification where a job offer is required are returned to the employer upon *denial*, accompanied by a transmittal form stating the reasons for denial. If the alien whose job-offer application is *approved* is a Western Hemisphere alien or will be applying abroad for the issuance of a non-preference immigrant visa, the approval is sent to the appropriate *Consulate* and notification of that transmittal is furnished to the employer. If the alien whose job-offer application is approved is an Eastern Hemisphere alien who will have a sixth-preference visa petition filed on his behalf or will be applying for adjustment of status from within the United States, the certification approval is returned to the *prospective employer* who will forward it to the Service for use with a sixth-preference petition or will deliver it to the alien to be filed in support of his application for adjustment of status.

D. *The Certification Decision*

The Department's certification decision plays a decisive role in determining whether the alien is accorded a priority date for allocation of a visa number, and what that date will be. Third preference aliens (who do not require a job offer), and applicants for adjustment of status who are found eligible for a labor certification where no job offer is required, receive a priority date as of the date the visa petition on their behalf, or their application for adjustment of status, is filed with the Service or Consulate. Both sixth and non-preference aliens who require a job offer get

a priority date according to the date their prospective employer files an application with the State Employment Service, if the certification is issued. The Western Hemisphere alien's priority date is determined by the date that either the Consul or the State Employment Service receives his application, depending on whether that type of alien seeks a visa as a "PSA" or job-offer applicant.

If the alien's application for labor certification is denied by the certifying officer, the alien has the right to one administrative appeal at the reviewing officer level; any further appeal must be taken to the courts. *See* Part III(A) *infra*. If, after exhausting all his remedies, the alien's denial is upheld, he must file a new application if he continues to desire to come to the United States to work. If the new application results in the issuance of a certification, the alien will be assigned a priority date for visa issuance on the basis of the new application, thereby extending the period of time the alien must wait before he can finally be admitted to the United States.

The length of time, intended occupation and geographic area for which a labor certification is valid also reflect a certification's importance, as well as its limitations. Once issued, the certification is valid indefinitely except that aliens working as household domestics or as teachers are certified for only one year at a time and require annual revalidation. 29 C.F.R. §60.5(a) (1972). The automatic labor certifications issued pursuant to Schedule A are limited to the intended occupation set forth on the alien's occupation form. While the Department may impose geographic restrictions for Schedule A occupations, it has not done so to date. 29 C.F.R. §60.5(e)(i) (1972). A labor certification issued to a "PSA—not Schedule A" applicant is limited to the intended occupation and geographic area of intended residence designated in the alien's application. 29 C.F.R. §60.5(e)(2) (1972). A labor certification issued to a job-offer applicant is also limited to the job and geographic location upon which the alien based his certification application. 29 C.F.R. §60.5(e)(3) (1972). As noted above, however, possession of a valid permanent labor certification in fact gives the alien freedom to change his residence, his employment, or his occupation at will even before fulfilling the conditions of his certification. Neither the Service nor the Department is equipped to monitor what the alien does once he arrives in this country with a valid certification. Thus, though the terms of the certification may be restricted on its face,

in reality, the alien has complete mobility within the American labor market.

Review of an adverse decision on a certification application is the final step in the Department's certification decision-making. The request for review must be made in writing and addressed to the Regional Manpower Administrator who oversees the certifying officer who denied certification, and must be made (perfected) within 90 days of the denial or the denial is not reviewable. It must clearly identify the alien, and prospective employer, if applicable, for whom certification has been denied; must state specific reasons for requesting a review; and must include all documents which accompanied the denial of certification. 29 C.F.R. §60.4(b) (1972).

The regulatory language states that "[r]equests for review of a denial of certification . . . may be made . . .," 29 C.F.R. §60.4(b) (1972), but nowhere particularizes who shall request review. In actual practice, the "PSA—not Schedule A" alien naturally presses his own appeal; the alien for whom application for certification was based on a job offer can press his own appeal or have his prospective employer appeal the certification denial.[27] The review is made by the Administrator or his designated representative (the reviewing officer), 29 C.F.R. §60.4(c) (1972), and is often based not only on information in the record but also on information developed independently by the reviewing officer.[28] Neither the certifying officer who denied certification nor any member of his staff may participate in any phase of the review.

III. Deficiencies in Certification Procedures

If it were relatively easy to obtain a labor certification today, and if the vast majority of those applying for certification were successful, perhaps the complaints of those who cite violations of both the requirement of fairness and statutory mandates within the Department's certification procedures would not sound so harshly. Under the pre-1965 policy only twelve to fifteen percent of all those who sought to enter the United States to work

[27] Interview with Department of Labor officials (Kenneth Bell, Special Assistant to the Associate Manpower Administrator; Robert Pfeffer, Counsel for Manpower; Elizabeth McAghan, Assistant Division Chief, Division of Immigration and Rehabilitation Certification), in Washington, D.C., Sept. 7, 1972. [Hereinafter Department Interview]. It has been established that the alien's prospective employer has standing to seek judicial review of the denial of the alien's request for labor certification. *See, e.g.*, Farino v. Secretary of Labor, No. 71-C-2495 (N.D. Ill., Sept. 26, 1972).

[28] Department of Labor Guidelines, established pursuant to revised procedures found at 29 C.F.R. §60.1 *et seq.* (1972). [Hereinafter Guidelines].

were barred; today the disapproval rate is 46.3 percent of all those seeking labor certifications.[29] The determination to approve or deny certification applications reflects the state of the American economy, the nature of the American labor market, and the level of American unemployment. Within recent years the percentage rate of certifications granted has dropped rapidly:

> The impact of the transition from a tight labor market to widespread labor surpluses on the numbers and occupations of alien workers approved for permanent immigrant certification was very sharp. The number of such certificates issued dropped by over 40 percent between FY 1970 and FY 1971—from 97,093 to 57,517.[30]

Although it is clear that American economic factors dictate in part both the number of certification applications received and the number of certifications ultimately approved, the fact that a large number of people seek certification each year, and that increasingly more people are unsuccessful in their quest for one of the ingredients vital to their legal entry into this country to work, further support the need for a close look at the legality of these procedures.

A. *Review of Certification Denial*

1. *Notice of Denial*

When the certifying officer decides to deny certification, he indicates the date of denial on the appropriate form and returns the form, as discussed in Part II(C) above, either to the Service or Consulate (if the alien is a "PSA—not Schedule A" applicant) or to the employer (if the alien is a job-offer applicant).[31] In no case does the alien receive notice directly from the Department that certification has been denied.[32] The failure of the Department to notify the alien of its action in his case does not appear to be supportable on grounds of either policy or administrative burden, and the ramifications of that failure render this a problem that should be rectified.

As indicated earlier, the alien or his prospective employer, *see* note 27 *supra* and accompanying text, has 90 days from the date

[29] Interview with Mr. John Sheeran, Chief, Division of Immigration and Rehabilitation Certification, U.S. Department of Labor, in Washington, D.C., Oct. 6, 1972.

[30] Address by Robert J. Brown, Acting Associate Manpower Administrator for U.S. Employment Service, Department of Labor, 1972 Conference of the Association of Immigration and Nationality Lawyers, in New Orleans, May 26, 1972. [Hereinafter Brown Address.]

[31] Department Interview, *supra* note 27.

[32] *Id.*

of certification denial in which to appeal the certifying officer's determination. If the alien does not appeal for a review of that determination within 90 days, he must file a new application for certification, resulting in the assignment of a new priority date no earlier than the filing date of the new application, if the certification is issued. With respect to the "PSA—not Schedule A" alien, as much as 30 of those 90 days are often lost between the Department's notice of denial to the Service and the Service's ultimate notification to the alien or his employer that a visa petition or application for adjustment of status has been denied because of lack of a required certification. A similar type of time loss is visited upon the job-offer alien who wishes to press his own appeal rather than depend on his prospective employer. Although the Department has noted that the employer is essential in the pursuit of a certification for a job-offer alien,[33] it would not appear to impose an untoward burden on the Department to dispatch notice of denial of certification to the alien at the same time such notice is sent to the employer. The alien should be given every opportunity to assist himself in his efforts to achieve certification.[34]

Although officials at the Department contend, despite an absence of such language in the regulations, 29 C.F.R. §60.4(b) (1972), that the 90-day limit for appeals was intended to include possible delays in notice to the alien,[35] when balanced against the minimal increase in the administrative burden for the agencies involved, it becomes apparent that the Department in coordination with the Service should adopt an appropriate combination of the following alternatives.

If the regulation guaranteeing the alien 90 days in which to request review is to be taken at face value, it should be applied in the following manner. With respect to notice of denial to "PSA—not Schedule A" applicants, the Department should send its notice directly to the alien as well as to the Service or consular officer. If the Department prefers to continue its practice of sending notice to the Service or consular officer alone, it may do so. In either event, the 90-day period should begin to run the day notice is sent to the alien, whether by the Department or by the Service. With respect to the job-offer applicants, the Depart-

[33] *Id.*

[34] It should be noted that if the prospective employer withdraws his job offer, the alien can no longer press his application for certification as a job-offer applicant. Administrative fairness dictates, however, that the alien should be kept apprised of the status of his application and should be provided the opportunity to further his own case in any way he can.

[35] Department Interview, *supra* note 27.

ment should send its notice directly to the alien as well as to the prospective employer, with the 90-day period commencing the day notice is sent. *See* note 34 *supra* and accompanying text.

If, however, the administrative delays presently encountered were meant to be absorbed in the 90-day period as the Department suggests, then the amendment to the regulation dealing with the amount of time the alien has to seek review should reflect an appropriately shortened time period, to incorporate only mailing delays, commencing upon the date of mailing. These alternatives are devised to insure both that the clock will not be running against the alien who may not otherwise know that further action is necessary on his application for entry into the United States and also that he will have only a specified amount of time in which to act in order to maintain his position of priority on the visa quota list.

2. *Notice of Right to Appeal*

When the Department sends out the aforementioned notice to the prospective employer that the alien's application for certification in a job-offer case has been denied, that notice contains no information about the alien's right to appeal the denial, nor is there any statutory or regulatory requirement for such notice.[36] Until recently the Service also omitted any information about the 90-day right to appeal on its notice of denial to the "PSA—not Schedule A" alien. However, after one alien filed an appeal after the 90 days had elapsed and proved that his tardiness was directly related to lack of notice about the time limit on his right to appeal, the Service added [37] the following statement to its denial of an alien's visa petition: [38]

> [R]eview of the Department of Labor's denial of the certification may be requested within 90 days of the date of the attached copy of that Department's notice of denial. Such review may be obtained by submitting a written request setting forth the grounds on which the request is based, to the Department of Labor office which denied the certification, along with Forms MA7–50A and the documents attached thereto.

As recommended above in Part III (A)(1), the Department should send notice of denial directly to the alien as well as to the prospective employer; such notice should incorporate the statement used by the Service to provide the alien with notice of his

[36] Some of the regions now include notice of appeal in a denial of certification but the practice is neither widespread nor uniform. *See* note 26 *supra*.

[37] Interview with Robert Lindsey, Deputy Assistant Commissioner, Adjudications, Immigration and Naturalization Service, in Washington, D.C., Sept. 1, 1972.

[38] Immigration and Naturalization Form I–521 (Feb. 1, 1972).

right to appeal, and reflect the correct date on which the time to file the appeal begins to run. As with the earlier recommendations, the inclusion of this statement will facilitate the alien's pursuit of appeal and insure treatment of the alien comporting with the requirements of administrative fairness.

3. *Protective Appeals*

Aliens or prospective employers who appeal from a certification denial may encounter difficulty in meeting all the requirements necessary to perfect their appeal, *see* Part II(D) *supra,* within the required 90 days. As discussed above, the alien rarely has the benefit of a full 90 days because some of his appeal time has elapsed before he even receives notice of denial. Adoption of the recommendations made above should eliminate this aspect of the alien's difficulties in pursuing a review of the certifying officer's denial. But even with the full period considered appropriate available to him, the appellant may be unable to marshal all the necessary information.

At the October 7, 1972 liaison meeting,[39] Association members requested that regional offices accept, where circumstances warrant, protective appeals, *i.e.,* incomplete appeals filed within the 90-day limit, with additional time beyond that limit to submit material necessary for the perfection of the appeal.[40] Officials at the National Office have expressed a willingness to instruct the regional offices to be "reasonable" in allowing the perfection of an appeal through the submission of additional evidence after the expiration of 90 days, but the instruction remains only in advisory terms.[41] Formalization of the protective appeal procedure by regulation amendment should take place, thereby allowing the alien, for whom verified circumstances have rendered it impossible to gather all evidence prior to the ninetieth day, to submit additional evidence up until some reasonable time before the reviewing officer's final determination. Such an amendment would insure a full review for the alien and provide the reviewing officer with a complete record for making his decision. The

[39] Liaison meetings between officials of the Departments of State, Justice, and Labor and members of the Association of Immigration and Nationality Lawyers are held at the national level and in some regions at irregular intervals during the year. The purpose of these meetings is to permit an exchange of comments about the operation of immigration programs as it relates to each of the three Government agencies attending.

[40] Association of Immigration and Nationality Lawyers Liaison Meeting with the Department of Labor, in Washington, D.C., Oct. 7, 1972, *see* note 39 *supra.* [Hereinafter Oct. 7 Meeting.]

[41] *Id.*

amendment would, of course, be limited in use to those who can prove their inability, due to circumstances beyond their control, to perfect their appeal within 90 days.

4. *The Record Below*

Under the provisions of the subsection 14 exclusion, the Secretary (*i.e.*, the certifying officer) must determine that no American workers are "able, willing, qualified, and available" for the job sought by the applicant alien, and that the wages and working conditions of American workers will not be adversely affected by the employment of that alien, before granting a labor certification. Availability and adverse affect are the only two criteria which the Secretary may use. In connection with the use of these criteria, it has resulted that often the certifying officer's determination is based on vague and incomplete information; the same problem often exists when the reviewing officer makes independent findings to support his determination. It is in this setting that several of the significant judicial decisions relating to labor certification have arisen.

In *Farino* v. *Secretary of Labor*,[42] plaintiffs were two employers who each alleged a need for a specialized employee who could not be found in the Chicago area. They sought review of the defendant Secretary's affirmance of the regional office's refusal to certify employment of non-resident aliens pursuant to the subsection 14 exclusion. In both cases, the reviewing officer affirmed denial of certification on the certifying officer's ground of availability of American workers and, in one case, on the additional ground independently developed by the reviewing officer that the wage offered by the prospective employer would adversely affect American workers since it was below the wage prevailing in the area. The court found that the latter "finding was not made by the certifying officer but was superimposed by the reviewing officer, from what data no one can tell." [43] With regard to the record upon which the reviewing officer based his final decision, the court held: [44]

> The certified records which we are called upon to review are almost totally devoid of any factual basis for the defendant's determination—no doubt they reflect standard procedure in the Manpower Administration which probably did not anticipate that a review of its determination was provided by law. . . . If our conclusion is correct that the Manpower

[42] No. 71–C–2495, N.D. Ill., Sept. 26, 1972.
[43] *Id.*
[44] *Id.*

> Administration's actions were discretionary, and subject to judicial review, however, then it is clear that they must be set aside on the basis of 5 U.S.C. §706(2)(A) [The Administrative Procedure Act]. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963). They are not supported by the facts.

Under the Administrative Procedure Act, 5 U.S.C. §706(1) (1970), the court held that it had the power to compel agency action unlawfully withheld, but no specific authority to remand the matter to the agency for development of a more adequate record; consequently, the court ordered the defendants to issue the requested alien certifications pursuant to the subsection 14 exclusion.

In a similar case arising in the same court, *Bitang* v. *Regional Manpower Administration of the U.S. Department of Labor*,[45] plaintiffs were aliens whose certification applications had been denied on the ground of availability of American workers. They alleged that the defendant regional office abused its discretion and that its actions were without rational explanation. The sole basis in the administrative record for defendant's determination in each case that there were a sufficient number of American workers in the Chicago area available to work in plaintiffs' professional fields was apparent oral communications from the Illinois State Employment Service (ISES) to defendant that there were a number of people listed with that service who were seeking employment in plaintiffs' occupational fields. The only evidence of these communications was unsigned sheets of paper containing handwritten notes which apparently were made a part of plaintiffs' files. Defendant urged the inference that these notes were made by the certifying officer during telephone conversations with ISES employees. The court found that the record at most established that on the dates for which defendant asserted availability of American workers, there were a number of people on the list who had in the past listed their names with ISES as seeking work and whose names had never been removed. Furthermore, there was no indication that persons listed fell within federal standards of "able, willing, qualified, and available." Finally, the number of persons listed with ISES as seeking positions in plaintiffs' occupations was very small. The court found that this latter number was not enough to "discount those who had falsely listed their qualifications or their lack of current employment or who had not yet had their names removed after they

[45] No. 72-C-1099, N.D. Ill., Oct. 4, 1972.

had in fact found employment." [46] The court admonished the regional office for its reliance on such an incomplete record, stating: [47]

> I recognize that a certain amount of reliance upon state agency findings is necessary. Nevertheless, the statute conferring upon the Secretary of Labor the responsibility for making these determinations certainly requires that the duty not be completely abrogated through unexamined acquiescence in a state agency's ultimate conclusions.

The court then remanded the plaintiffs' cases for action consistent with its opinion.

In both of these cases, the court strongly admonished Department officials for rendering decisions on incomplete records and for relying on ambiguous and questionably valid evidence.

In an analogous case, *Camp* v. *Pitts*,[48] the Supreme Court set forth in a *per curiam* opinion the proper procedure to be followed when a reviewing court determines that an administrative agency's stated justification for informal action does not provide an adequate basis for review. The Court found that the appropriate standard for review is whether the Administrator's actions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), and that "[i]n applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." [49] The Court went on to note that where "there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." [50] Such additional information would allow the reviewing court to arrive at a proper assessment of the agency's decision.

The implication of *Camp* is that when an agency engages in informal action, such as the consideration of a certification application, it must be prepared to provide reasons for that decision sufficient to allow judicial review of the agency action; it appears that the Department often fails to meet these requirements. It is common practice among regional offices to give no explanation beyond the fact that American workers are available or that

[46] *Id.*
[47] *Id.*
[48] 41 U.S.L.W. 3515, Mar. 27, 1973.
[49] *Id.*
[50] *Id.*, at 3516.

wages offered are substandard for the area [51] in the initial notice to the alien or his prospective employer that the certification application has been denied. Information as to the sources of the information upon which denial was based and specific details concerning availability and adverse affect are provided only upon request by the alien or the prospective employer. It should be again noted that notice of right to appeal is *not* included in the initial notice of denial, and ignorance of that right may dampen desire to delve behind the meaning of the terms "availability" or "adverse affect." *See* Part III(A)(2) *supra.*

A review of files in some regional offices, *see* note 26 *supra,* reveals striking dissimilarities in both the amount and quality of the information included in a file to support a certification determination. Some regional offices depend almost solely on the information provided by the local and State offices of the State Employment Services, the practice condemned in *Bitang,* while others maintain their own files and own sources of information to supplement such information, skeletal as it often is. Some regional offices maintain the complete documentation for a certification determination in an alien's file from the beginning of the certification process, while others maintain only shorthand references to where information can be found and little or no documentation to support the validity of their determination. While all regional offices indicate that the information upon which a denial of certification was based will be provided upon the request of the alien or his prospective employer, it is clear that the quality and quantity of that information vary, depending upon the regional office processing the application.

It is not difficult to postulate the alien who could not gain the remedies provided by the cases discussed above either because he was not aware that such deficiencies would warrant a remedy, or because he lacked the resources to seek judicial review. These illustrative decisions and the judicial standards set forth therein, as well as the variations among the regions regarding the compilation of a record as the basis for a certification determination, make it apparent that the procedural standards for denial and for review of denial of certification applications should be formally amended to improve and standardize the quality and degree of specificity of the information upon which those actions should be based. Such formalization should serve to alert the alien to the treatment he may rightfully expect, and minimize

[51] If substandard wages is the basis for denial, the certifying officer will include the amount of the standard wage rate in the initial denial notice.

Department reliance on an insufficient record, thereby reducing the number of aliens whose financial situation causes them to suffer from such reliance without recourse.

5. *Scope of Review and Access to the Record*

The Department's Guidelines, note 28 *supra*, and *Farino* v. *Secretary of Labor*, discussed in Part III(A)(4) above, both reveal that the reviewing officer not only is permitted to, but does, go outside the record developed by the certifying officer in order to dispose of the alien's request for review. At one of the periodic liaison meetings between Department officials and the Association Liaison Committee, *see* note 39 *supra*,

> The Committee stated that in almost each of the . . . [Department] regions, the reasons given for a denial and the information made available as the basis for such denial are invariably augmented by new material and additional reasons, which are made known for the first time in the affirmance of the denial on reconsideration, and first communicated in many instances after the ninety-day period is over.[51a]

This is so even though the regulations do not address the appropriate scope of review for certification denials. 29 C.F.R. §60.4(c) (1972). The extent of that scope is a subject of much debate among members of the Immigration and Nationality Bar. Although these attorneys object to the exercise of *de novo* review, their main concern is with access during the course of review to the information independently developed by the reviewing officer. The decision of the reviewing officer is final; no further administrative appeal is provided for. *Id.* The alien whose certification is denied on appeal has only two alternatives if he persists in his desire to emigrate to the United States: he can seek judicial review of the reviewing officer's decision,[52] or file a new application for certification and acquire a priority date for visa issuance no earlier than the date of filing the new application, if a certification is issued. The demand for maximum availability of information at the reviewing officer level is therefore clear.

The Department asserts that *de novo* review is necessary to insure a thorough evaluation of all the ramifications of granting an alien employment opportunities in this country; and this position appears to be consistent with the policy embodied in the

[51a] Association of Immigration and Nationality Lawyers Liaison Meeting with the Department of Labor, in Washington, D.C., July 8, 1972, *see* note 39, *supra*. [Hereinafter July 8 Meeting.]

[52] 5 U.S.C. §§702, 704 (1970). *See* Bitang v. Regional Manpower Administrator, *supra* note 45.

1965 amendments to the Act which requires affirmative action (certification by the Secretary) to admit immigrant aliens to the United States for employment purposes. But denial of alien access to the information independently developed by the reviewing officer cannot be so easily justified. And assuming that *de novo* review is not proper—thereby eliminating the possibility of introduction of *new* information—there is evidence that the alien often does not have access even to the information upon which the certifying officer bases his decision.

According to the Guidelines issued by the National Office to the regional offices, the alien should be given access to all the information used by the certifying officer in order to structure his appeal: [53]

> If an applicant or his authorized representative requests clarifying information concerning a denial of certification within 90 days of the denial, the clarifying information must be supplied.

And, at the May, 1972 Convention, an Association member queried: "Does an attorney have a right to see the labor market information that has been used as a basis for denial of his client's application for alien certification?" The Department's response was "Yes." [54] At the same Convention, however, another member stated: [55]

> I have yet to obtain prior to final adjudication a photostatic copy of the material employed by the certifying officer in response to [a] letter of appeal. I once did obtain a copy of the material after I complained on appeal to the Secretary of Labor.

The disparity between Department policy and actual practice continues, as evidenced by Association statements made at more recent liaison meetings: [56]

> We urged that *all* of the reasons for denial should be stated in the initial notice of denial, and all of the information on which denial is based should be made available when initially requested. We were advised that all field officers would be so instructed.

And yet three months later it was again asserted: [57]

> [I]n some of the regional offices, attorneys are not permitted access to files to see the material that is the basis for denial.

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[53] Guidelines, *supra* note 28, at 7.

[54] Conference of the Association of Immigration and Nationality Lawyers, in New Orleans, May 29, 1972.

[55] Wasserman Speech, *supra* note 19.

[56] July 8 Meeting, *supra* note 51.

[57] Oct. 7 Meeting, *supra* note 40.

It therefore appears that, although Department officials at the National Office have stated and continue to maintain that an alien is entitled to know exactly what the certifying officer's denial is based on, the regional offices often fail to provide access to all the information that resulted in a negative determination.

Whether we are dealing with access to the information used by the certifying officer or to the new information developed by the reviewing officer if *de novo* review is in order, we need not establish the alien's right to that information since the Department has already acknowledged in principle its responsibility in this regard. What remains is for the Department to make its acknowledgement effective. The Department should clarify the scope of review by regulation amendment; it should also mandate access for the alien to the information relied upon by the certifying and reviewing officers. Only with these amendments can the alien be assured a full opportunity to evaluate and attempt to refute all alleged grounds supporting the denial of his certification application at the final administrative level.

B. *Freedom of Information*

The National Office, as noted earlier, is responsible for providing direction to the regional offices concerning the conduct of the certification program. In addition to the published regulations which set forth the basic procedural framework for the certification process, the National Office has issued Guidelines in the form of a 14-page supplement to the published regulations, *see* note 28 *supra,* which provide greater specificity in certification procedures. The National Office also distributes memoranda concerning the Department's official posture regarding specific occupations or specific elements of the certification process; the contents of these memoranda reveal them to be essentially addenda to the Guidelines.

The aforementioned survey of several of the regional offices revealed a marked confusion regarding the confidentiality of the Guidelines and memoranda. While some certifying officers indicated that they considered these publications to be confidential and not to be shown to the public, at least one certifying officer kept these same publications in a large looseleaf binder labelled "Disclosure Book" and stated that it was available for public inspection at any time.

It is clear, as we have discussed previously in this Part, that the regulations underlying the certification program are, at best,

skeletal. It is the above-noted publications that therefore constitute the substance of the program's operation. The dangers of allowing an agency to operate in significant part by unpublished (or sporadically published) standards are easily illustrated; reference need only be made to Part III(A)(5) above wherein was discussed the Department's treatment of scope of review and access to the record. The absence of published procedural standards diminishes the fairness of the conduct of the certification program. First, the alien, without knowledge of applicable Department Guidelines and memoranda, will be unable to preceive whether his application receives proper processing. Second, even if the alien believes that his application has not been treated in accordance with Department Guidelines, he can neither substantiate his belief by reference to official documents nor use such documents to gain a remedy by claiming agency violation of its own standards. The solution to this opportunity for potential agency abuse of discretion is the provision of these Department publications to the alien. Association members maintain, however, that despite their requests, they are unable to obtain the publications.[58] In order to decide whether the publications provided by the National Office to the regional offices must be made publicly available, a discussion of the statutory treatment of the problem of agency disclosure—the Freedom of Information Act, 5 U.S.C. §522 *et. seq.* (1970)—and relevant litigation would appear in order.

The enactment of the Freedom of Information Act was an attempt to define what information administrative agencies must make public and what information the agency need not disclose, in light of the legislative purpose "to increase the citizen's access to government records." *Bristol-Meyers Co.* v. *Federal Trade Commission.*[59] The Act is divided into three major subsections. Subsection (a) describes those documents which are subject to mandatory disclosure to the public. Subsection (b), and the most controversial, specifically exempts certain materials from mandatory disclosure. Subsection (c) states that the Act "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated [in the Act]."

Subsection (a)(2)(C) provides that "administrative staff manuals and instructions to staff that affect a member of the public" are subject to compulsory disclosure, and it seems evident that the publications discussed above fall within that definition.

[58] *Id.*

[59] 424 F.2d 935, 938 (D.C. Cir. 1970) (Bazelon, C.J.), *cert. denied*, 400 U.S. 824 (1970).

The narrow exception from the disclosure requirement of (a) (2) (C) for "law enforcement" materials as opposed to "administrative" materials, *see, e.g., Hawkes* v. *Internal Revenue Service, infra* note 64, does not apply to the Department publications at issue. It remains only to be determined whether these publications fall within the only two possibly applicable exemptions in the Act. If they do not, they must be disclosed.

Subsection (b) (2) exempts from disclosure matters that are "related solely to the *internal personnel rules and practices* of an agency," (emphasis added); there is considerable controversy over the meaning of that phrase. The basic cause for the controversy surrounding the embrace of subsection (b) (2) is the discrepancy between the Senate and House legislative history concerning the meaning of that subsection. The Senate understood the exemption to be relatively narrow in scope:[60]

> Exemption number two relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like.

The House Committee version, however, would exempt a broader class of materials:[61]

> Operating rules, guidelines and manuals of procedure for government investigators or examiners . . . but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are exempt under present law.

The meaning of subsection (b) (2) has been studied extensively by Professor Davis, who states:[62]

> My opinion is that the words "internal personnel rules" mean what the Senate Committee says, not what the House Committee and the Attorney General say. "Operating rules" may be "internal personnel rules" only to the extent that they deal with relations between an agency and its employees, not to the extent that they deal with the relations between an agency and an outsider or between employees of the agency and an outsider.

The timing of the reports by the Senate and House Committees is a crucial factor in evaluating these two interpretations:[63]

> After the bill had passed the Senate on the basis of a committee report that was reasonably faithful to the words of the bill, the House Com-

[60] S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).
[61] H.R. Rep. No. 1947, 89th Cong., 2d Sess. 7–8 (1965).
[62] Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 778–79 (1968).
[63] *Id.*

> mittee was subjected to pressures to restrict the disclosure requirements. It yielded to the pressures. But it did not change the bill. Instead, it wrote the restrictions into the committee report. These restrictions differ drastically from the bill as passed by the Senate. . . . The basic principle is quite elementary: the content of the law must depend upon the intent of both Houses, not just one. In this instance, only the bill, not the House Committee's statements at variance with the bill, reflects the intent of both Houses, *Indeed, no one will ever know whether the Senate Committee or the Senate would have concurred in the restrictions written into the House Committee report.*

The meaning of subsection (b) (2) has also been considered in detail by two Federal District Courts and a Federal Court of Appeals and all concluded that the Senate's view (and that of Professor Davis) of the exemption provision should prevail.[64] This conclusion indicates that the Department's Guidelines and memoranda do not fall within the meaning of the terms of the subsection (b) (2) exemption since they do not "deal with relations between an agency and its employees."

It may also be argued that the publications distributed by the National Office to the regional offices fall within the definition of the subsection (b) (5) exemption, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The test set forth in the recent Supreme Court opinion, *Environmental Protection Agency* v. *Mink*,[65] must be applied. As Justice White pointed out in *Mink*, the language of the subsection (b) (5) exemption "contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."[66] He discussed the incorporation into the subsection (b) (5) exemption of the recognized rule that confidential intra-agency communication is privileged from disclosure. He noted that such privilege exists in order to preserve frank discussion of legal or policy matters in writing within Government agencies.[67] The preservation of candor within Government agencies is necessary to allow the free exchange of opinions; there is no such difficulty encountered in the distribution of facts within Government agencies. The *Mink* opinion analyzes subsection (b) (5) on the basis of distinctions to be drawn between opinion and fact, with the former exempt from

[64] Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972); Benson v. General Services Admin., 289 F. Supp. 590, 594, (W.D. Wash. 1968) aff'd. 415 F.2d 878 (9th Cir. 1969); Consumers Union of United States v. Veteran's Admin., 301 F. Supp. 796, 801 (S.D.N.Y. 1969).

[65] 41 U.S.L.W. 4201, Jan. 22, 1973.

[66] *Id.*, at 4205.

[67] *Id.*, at 4205.

disclosure and the latter subject to disclosure. It would appear that the Department's publications are neither opinion nor fact but rather directives representing conclusions reached after consideration of all relevant law and internal agency policy and opinion. Just as this type of subject matter suggests that the publications are "manuals" for the purpose of subsection (a)(2)(C), so too does it suggest that the reasons expressed in *Mink* for non-disclosure (preserving candor) are inapplicable. The publications do not, therefore, appear to be subject to the subsection (b)(5) exemption.

Consistent with what appears to be the weight of authority then, the Department's refusal to disclose its Guidelines does not find support within the exemptions to the Freedom of Information Act. They appear, therefore, to be subject to mandatory disclosure under subsection (a)(2)(C). In addition to the disclosure requirement of the Freedom of Information Act, ordinary standards of administrative fairness dictate disclosure of these Department publications. Once these publications are made available to the public either by publication in the Federal Register or some acceptable alternative, an alien will know more nearly what treatment he can expect to receive when he applies for a labor certification; and he will be able to use this information in an effort to insure standard treatment during the certification decision, or in seeking review of a certification denial should he not have been accorded the procedural protections required by the National Office.

IV. Conclusions

The policy behind the labor certification program was to protect American workers from an influx of skilled and unskilled foreign labor.

> The need for alien workers to meet the nation's needs in the production of goods and services reflects, of course, an imbalance between the demands for workers in specific skills, and in particular areas, and the availability and mobility of American workers able to meet those requirements. A major goal of our manpower programs is to build up a force of American workers able to meet all national needs, to the greatest possible extent. To the extent this goal is attained, the need and opportunity for alien workers to fill jobs in America will of course diminish. A better balance between the skills and educational attainment of American workers, and the demands of employers would have greatly reduced

> dependence on aliens to fill jobs in this country, even in 1969 when unemployment was at a relatively low water-mark.[68]

The following recommendations are aimed at clarifying some aspects of the existing procedures and creating additional procedures or policies where omissions have caused hardships for aliens who seek such certifications.

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[68] Brown Address, *supra* note 30.