

# THE CERTIFICATION PROCESS FOR TRADE ADJUSTMENT ASSISTANCE: CERTIFIABLY BROKEN

Brad Brooks-Rubin†\*

This case stands as a monument to the flaws and dysfunctions in the Labor Department's administration of the nation's trade adjustment assistance laws—for, while it may be an extreme case, it is regrettably not an isolated one. . . . Only time will tell whether the Labor Department, and Congress, are listening [to the Court of International Trade's message regarding the Labor Department's failures].<sup>1</sup>

## I. INTRODUCTION

So wrote Judge Delissa Ridgway, venting her frustration after four long years of trying to resolve *Former Employees of Chevron Products Co. v. U.S. Secretary of Labor*. Unfortunately, her words have yet to resonate. Indeed, other Court of International Trade (CIT) judges have shed their former hesitance to do the Department of Labor's (DOL)<sup>2</sup> job for it, joining Judge Ridgway in affirmatively certifying workers as eligible for trade adjustment assistance (TAA).<sup>3</sup> This being the case, Judge Ridgway's

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†Associate, LeBoeuf, Lamb, Greene & MacRae, LLP; Founding Member, Customs & International Trade Bar Association's *ad hoc* Committee on TAA. The views expressed in this Article are those of the author alone, and do not represent those of LeBoeuf, Lamb or the Bar Association's *ad hoc* Committee. Special thanks to Michael J. Pitts, Professor Claire Kelly, Howard Rosen, Shawn Pompian, and Carla Small for their comments and assistance.

\* This Article expands on remarks given on a panel entitled "Outsourcing and Its Impact on Trade and Trade Law" at the International Law Association's International Law Weekend, in October 2004. Those remarks will appear as Brad Brooks-Rubin, *Monumental Flaws and Dysfunctions: Some Suggestions for Mending the Broken Trade Adjustment Assistance Certification Process*, 11 ILSA J. INT'L & COMP. L. (forthcoming 2005).

1. *Former Employees of Chevron Products Co., v. U.S. Sec'y of Labor*, 298 F. Supp. 2d 1338, 1348 (Ct. Int'l Trade 2003).

2. The division of DOL formally responsible for the Trade Adjustment Assistance program is the Bureau of Education, Training and Administration.

3. See, e.g., *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec'y of*

clarion call needs to be addressed fully, and soon.<sup>4</sup>

That flaws exist in the Labor Department's process for certification of workers for the TAA program is not news. More than a decade ago, the General Accounting Office (GAO)<sup>5</sup> issued a report estimating that the Labor Department committed errors in at least 63% of its investigations of TAA petitions.<sup>6</sup> But what is news is the dramatically increased attention being paid to the issue of jobs lost to foreign workers, whether through full-scale plant transfers or departmental/functional outsourcing.<sup>7</sup> A particularly bright spotlight shined on the issue of outsourced jobs and assistance programs throughout the 2004 campaign;<sup>8</sup> in the aftermath of the elections, *The New York Times* called on both the President and Congress to "aggressively finance and, more important, manage, America's neglected Trade Adjustment Assistance program."<sup>9</sup>

So what is this "neglected" program that should be "aggressively financed"? TAA is, in essence, a benefits and retraining program for workers whose jobs are lost to foreign trade.<sup>10</sup> As such, its benefits come

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Labor, No. 2003-111, 2003 Ct. Intl. Trade LEXIS 111 (Ct. Int'l Trade Aug. 28, 2003) (holding that workers' separation was caused by increases in imports of steel and entitled them to TAA benefits).

4. See, e.g., U.S. Gov't Accountability Office, *Trade Adjustment Assistance: Reforms Have Accelerated Training Enrollment, but Implementation Challenges Remain*, GAO-04-1012, at 8 (Sept. 2004) (showing statistics on consistent, dramatic decline in number of American workers engaged in manufacturing), available at <http://www.gao.gov/new.items/d041012.pdf> [hereinafter GAO 2004].

5. The GAO changed its name from the General Accounting Office to the Government Accountability Office in July 2004. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *GAO's Name Change and Other Provisions of the GAO Human Capital Reform Act of 2004*, at <http://www.gao.gov/about/namechange.html> (last visited June 26, 2005). Reports issued under the name of General Accounting Office will be referred to and cited as such in this article.

6. U.S. Gen. Accounting Office, *Dislocated Workers: Improvements Needed in Trade Adjustment Assistance Certification Process*, GAO-HRD-93-36, at 5 (Oct. 1992), available at <http://archive.gao.gov/d35t11/147879.pdf> [hereinafter GAO 1992].

7. Paul Blustein, *White House Warms up to Worker Aid; Outsourcing Controversy Prompts a Policy Shift*, WASH. POST, Mar. 13, 2004, at E01 (referencing the "furor" over outsourcing and the Bush Administration's responses).

8. See, e.g., Megan Barnett, *Starting Over*, U.S. NEWS & WORLD REP., May 31, 2004, at 48 (referencing efforts by both President Bush and Senator Kerry to address outsourcing); Blustein, *supra* note 7. President Bush even made reference to TAA in the third debate between himself and Senator Kerry. *From the Debate*, WASH. POST, Oct. 14, 2004, at A06 (quoting President Bush: "I've got policies to continue to grow our economy and create the jobs of the 21st century . . . We've expanded trade adjustment assistance").

9. *A New World Order*, N.Y. TIMES, Dec. 17, 2004, at A34.

10. Sheila M. Raftery, *Safety Net and Measuring Rod: The North American Free Trade Agreement Transitional Adjustment Assistance Program*, 12 TEMP. INT'L & COMP. L.J. 159, 177 (1998). The basic economic policy premise for TAA is to ease the costs borne by certain workers as a result of trade liberalization. While trade liberalization provides significant opportunities for many sectors of the American economy, inevitably certain

replete with a variety of inherent philosophical and practical questions. These questions range from federal and state funding levels<sup>11</sup> to training program<sup>12</sup> and post-training job<sup>13</sup> availability to the duration of certain benefits<sup>14</sup> to the lack of awareness of at least some workers that the benefits even exist<sup>15</sup> to the propriety of curing labor issues through trade legislation<sup>16</sup> to whether such an “entitlement” program should even exist at all.<sup>17</sup> So it is important to recognize at the outset that, should the problems with certification for TAA benefits discussed in this article be remedied in full, many of these broader policy questions would remain. Indeed, these issues may become even more acute than they are today, because of the likelihood that more workers will end up banging down the federal and state doors for benefits.

Obviously, TAA cannot address all of the job losses or other economic problems created by foreign competition and outsourcing.<sup>18</sup> Nor

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sectors suffer. TAA and other adjustment initiatives were created as a means to assist those bearing the burden of freer trade. See, e.g., Whitney John Smith, *Trade Adjustment Assistance: An Underdeveloped Alternative and Import Restrictions*, 56 ALB. L. REV. 943, 943-47 (1993).

11. GAO 2004, *supra* note 4, at 3-5, 28-32; see also Michael R. Triplett, *Baucus Says GAO Reports Illustrate Problems with DOL, Congressional Commitment to TAA*, 21 INT'L TRADE REP. (BNA) 1666, 1667 (2004) (referencing remarks from Rep. Phil English that Congress has failed to fund TAA adequately, forcing some states to suspend benefits to certified workers); *Schumer Urges Pataki to Request Reserve Funds for Workers Laid off from MT Picture Display*, available at [http://schumer.senate.gov/SchumerWebsite/pressroom/press\\_releases/2005/PR40066.MTWorkers11205.html](http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2005/PR40066.MTWorkers11205.html) (June 26, 2005) (noting that state had to place eligible workers on a waiting list for benefits due to lack of funds).

12. U.S. Gen. Accounting Office, *Trade Adjustment Assistance: Experiences of Six Trade-Impacted Communities*, GAO-01-838, at 3-5 (Aug. 2001) [hereinafter GAO August 2001].

13. Barnett, *supra* note 8, at 48 (reporting that sixty-one percent of TAA recipients completing training found jobs).

14. GAO August 2001, *supra* note 12, at 3-5.

15. See GAO 2004, *supra* note 4, at 22-25 (noting difficulty in identifying secondary workers who are now eligible for TAA, and low numbers of secondary workers being certified).

16. See Lori G. Kletzer & Howard Rosen, *Easing the Adjustment Burden on US Workers*, in *THE UNITED STATES AND THE WORLD ECONOMY: FOREIGN ECONOMIC POLICY FOR THE NEXT DECADE*, 316-19 (C. Fred Bergsten et al. eds., 2005) (discussing the various problems, primarily political, that are associated with linking TAA and worker adjustment programs to trade legislation and overall trade policy).

17. The political debate over TAA's effectiveness and existence has raged for decades. See, e.g., *id.* at 317-18 (“TAA has never received strong or enthusiastic support.”); Martin Tolchin, *House and Senate Give Final Votes of Approval to Reagan Budget Cuts*, N.Y. TIMES, Aug. 1, 1981, at 17 (noting TAA funds slashed in Reagan/Stockman assault on “entitlement” programs).

18. Ross Koppel and Alice Hoffman, *Worker Dislocation Policies in the US: What Should We Be Doing?*, 544 ANNALS AM. ACAD. POL. & SOC. SCI. 111 (1996) (noting that a program focused on “post-layoff training or education,” such as TAA, does not help, for an array of reasons, dislocated workers find jobs); Bill Day, *It's Time to Start Making Sense*,

should we expect it to.<sup>19</sup> However, as long as the TAA program remains on the books,<sup>20</sup> and funded at any level,<sup>21</sup> it should nevertheless be administered in a fair and effective manner.<sup>22</sup> My purpose, then, is to identify and suggest solutions for a number of the most critical shortcomings in achieving fairness and efficacy in the existing TAA certification process.<sup>23</sup>

In my opinion, the overarching problem in TAA certification is the lack of clear guidelines for DOL, both in undertaking its investigation and identifying/evaluating the information it receives, especially with respect to the definition of “production” in a given case. As will be seen, this

SAN ANTONIO EXPRESS NEWS, Nov. 20, 2004, at 2H (calling TAA “spotty at best” but quoting a Dartmouth economist as stating “there is no ideal system [for dealing with job losses]”).

19. See, e.g., Jim Puzanghera, *Safety Net: Proposed Program Would Retrain Jobless Tech Workers*, SAN JOSE MERCURY NEWS, June 8, 2004, at 1E (quoting Rep. Adam Smith, D-WA: “There are things we can do [to deal with international competition] and [TAA] is one of them.”); *Lieberman Calls Offshore Outsourcing of U.S. Jobs Tip of Economic Iceberg*, available at <http://lieberman.senate.gov/newsroom/release.cfm?id=221356> (May 11, 2004) (identifying improved TAA as one point of five-part strategy to “address offshoring and restore motivation”); U.S. Gen. Accounting Office, *Trade Adjustment Assistance: Improvements Necessary, but Programs Cannot Solve Communities’ Long-Term Problems*, GAO-01-998T, at 2 (July 2001) (“[P]roviding trade adjustment assistance cannot resolve all the workers’ or communities’ long-term challenges.”), available at <http://www.gao.gov/new.items/d01988t.pdf> [hereinafter GAO July 2001].

20. See Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 611 (1987) (arguing for a replacement of TAA and other trade remedy laws with a more comprehensive adjustment program that would “serve both compensatory and adjustment aims better than has TAA”).

21. As it is, a recent report showed that the U.S. spent the least measured either as a percentage of GDP or as a percent of all labor-market programs among France, Germany, Japan, the United Kingdom and U.S. on assisting unemployed workers through market adjustment programs. Kletzer & Rosen, *supra* note 16, at 316 fig. 10.2.

22. Vanessa Hua, *Lifting of Import Quotas a Blow to Garment Factories: Bay Area Apparel Industry Tattered by Overseas Competition*, S.F. CHRON., Jan. 18, 2005, at A1 (referencing California state official’s claim that only twenty percent of those potentially eligible for TAA apply).

23. Brent Hunsberger, *Caught in the Retraining Trap*, THE SUNDAY OREGONIAN, May 2, 2004, at E01 (telling the story of one worker who still faced a wide array of problems even after receiving TAA). The issues raised in Hunsberger’s article get at the other side of the TAA picture, which will not be discussed at length in this article, i.e., the political decisions about whether TAA is a proper or effective manner for dealing with the issues of foreign trade and displaced workers. As Kletzer and Rosen put it following a review of the various policy and structural issues affecting TAA:

Our discussion is based on the premise that every effort should be made to design and implement effective programs that deliver meaningful assistance. From a political perspective, the question is: What would be the alternative to TAA? . . . [T]he challenge is designing the most effective interventions, not whether to intervene or not.

Kletzer & Rosen, *supra* note 16, at 325.

definition lies at the heart of many TAA certification analyses. At present, TAA does not allow a worker to be certified for benefits until that worker shows she was engaged in “production” of an import-impacted good. But defining “production” is not simple, particularly in the ever-changing world of manufacturing. For this reason, DOL’s process for investigating the activities of both the petitioning workers and their former company must be sufficiently competent to answer this critical, starting question. At present, it is not.

With a petition form that requires little more than basic information and summary conclusions, investigations that are seemingly incapable of eliciting or collecting useful information, and a lack of established standards through which DOL can analyze the information that is collected, DOL’s certification process for TAA is, quite simply, certifiably broken. And although the courts reviewing DOL’s work have identified problems with DOL’s process, the judiciary has failed to agree on the fixes. As a result, not only are workers who are petitioning for TAA being denied, in effect, a form of procedural due process, the result is something akin to a lack of substantive due process in the disposition of their claims. Possibly worse, these failings may lead to an effective absence of due process altogether, as thousands of eligible workers may not even bother applying.<sup>24</sup>

By reviewing the structure of the TAA program and certification process (Part II) and examining the failings encountered by DOL and the courts in defining “production” in one representative case study (Part III), this article will identify (in Part IV) a number of essential—and doable—steps needed to fix the certification process. These measures include: (i) expanding the petition form and providing guidance for its completion, as well as permitting petitioners to consult with attorneys or other non-governmental experts during the petition process; (ii) directing DOL investigations away from Human Resources personnel, instead relying on company in-house or outside counsel; (iii) requiring DOL to develop a record consisting of more than statements from workers and company officials; (iv) capping the number of remands permitted to DOL and requiring judicial intervention after the limit is reached; and (v) “segmenting” TAA by developing guidelines on production and other critical TAA issues through the creation of “working groups” from key TAA industries.

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24. Michael R. Triplett, *Trade Court’s Critique of Labor Department Places Spotlight on Handling of TAA Claims*, 21 INT’L TRADE REP. (BNA) 795, 798 (2004) (finding that less than forty percent of potentially eligible workers applied for TAA in 2003, and only thirteen percent of the potentially eligible workers received benefits); Hua, *supra* note 22 (demonstrating that, despite the raft of problems with TAA, the program is still valuable to those who benefit from retraining).

## II. BACKGROUND ON TAA

First established in the early 1960s,<sup>25</sup> the TAA program underwent significant overhauls in 1974 and 1988.<sup>26</sup> Although there have been other minor amendments, the basic requirements and structure have remained the same for more than four decades.<sup>27</sup> In general, when a group of at least three workers lose, or expect to lose,<sup>28</sup> a job because of competition from imports, they petition for TAA benefits. Since 2002, workers whose jobs are lost to a shift in production to an overseas plant, or whose facility is an upstream or downstream supplier to a qualifying firm, may also apply.<sup>29</sup> To be certified for benefits, the following statutory standard must be met:

A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) [shall be certified by the Secretary] as eligible to apply for adjustment assistance under this [part pursuant to a petition filed under section 2271 of this title if the Secretary] determines that -

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely;

(ii) imports of articles like or directly competitive with, articles produced by such firm or subdivision have increased; and

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25. Pub. L. No. 87-794, 76 Stat. 872 (1962). See Whitney John Smith, *Trade Adjustment Assistance: An Underdeveloped Alternative to Import Restrictions*, 56 ALB. L. REV. 943, 949-50 (describing history of TAA generally and 1962 Act's purpose in following 1951 creation of "escape clause").

26. GAO 2004, *supra* note 4, at 6.

27. Between 1993 and 2002, a separate program, known as "Transitional Adjustment Assistance" or "NAFTA-TAA" was made available specifically for workers whose facilities transferred to Canada or Mexico. See generally Raftery, *supra* note 10.

28. *Former Employees of Rohm & Haas Co. v. Chao*, 246 F. Supp. 2d 1339 (Ct. Int'l Trade 2003) (finding that job loss need not have occurred in order for workers to be eligible for TAA).

29. Trade Act of 2002, Pub. L. No. 107-210, § 113 [hereinafter 2002 Act].

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

(B)(i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act (19 U.S.C. 3201 et seq.), African Growth and Opportunity Act (19 U.S.C. 3701 et seq.), or the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701 et seq.); or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.<sup>30</sup>

Obviously, in order to demonstrate that all aspects of this standard have been met, a significant amount of complex information is required: information about the industry involved, the specific plant or location in question, and all of the workers joining the petition. Yet, despite the clear need for such substantial information from petitioners in order for DOL to make its determination, petitioners get little guidance from DOL on how to present their claims. The regulation on petitions only directs petitioners to provide the following:

(6) A statement of reasons for believing that increases of like or directly competitive imports contributed importantly to total or partial separations and to the decline in the sales or production (or both) of the firm or subdivision (e.g., company statements, articles in trade association publications, etc.); and

(7) A description of the articles produced by the workers'

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30. 19 U.S.C.S. § 2272 (2004).

firm or appropriate subdivision, the production or sales of which are adversely affected by increased imports, and a description of the imported articles concerned. If available, the petition also should include information concerning the method of manufacture, end uses, and wholesale or retail value of the domestic articles produced and the United States tariff provision under which the imported articles are classified.<sup>31</sup>

Upon receipt of a petition, DOL has 40 days to investigate and to decide whether a worker meets the statutory standard for certification.<sup>32</sup> In fact, the regulation on investigations states simply:

The Director shall initiate, or order to be initiated, such investigation as he determines to be necessary and appropriate. The investigation may include one or more field visits to confirm information furnished by the petitioner(s) and to elicit other relevant information. In the course of any investigation, representatives of the Department shall be authorized to contact and meet with responsible officials of firms, union officials, employees, and any other persons, or organizations, both private and public, as may be necessary to marshal all relevant facts to make a determination on the petition.<sup>33</sup>

The DOL investigator conducting the investigation generally begins by issuing a questionnaire to the workers' former employer, often to an individual in the firm's human resources department. The questionnaire requests data on the company, its activities, and the duties of the workers involved in the petition. The investigator will sometimes issue follow-up questions to clarify the company's statements and, in those cases where one of the relevant issues is the impact of imported products, conduct surveys

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31. 29 C.F.R. §§ 90.11(c)(6)–(7). Of course, petitioners also provide basic information, such as name of the firm, location, etc.

32. 29 C.F.R. § 90.16(a). This was reduced from sixty to forty days as part of the 2002 revisions to TAA. See 2002 Act, *supra* note 29, at § 112(b) (reducing the filing time to forty days). The GAO 2004 Report found that actual petition processing time averaged thirty-eight days. GAO 2004, *supra* note 4, at 14. In one news report, DOL claimed processing time was down to twenty-seven days. See Puzanghera, *supra* note 19, at 1 (quoting Deputy Assistant Secretary of Labor for Employment and Training). As explained in Part IV.A.4 *infra*, this time frame may not be sufficient to conduct a reasonable investigation.

33. 29 C.F.R. § 90.12. This regulation also provides that DOL must report receipt of a petition in the Federal Register. The regulations do provide, at 29 C.F.R. §§ 90.13–90.14, for the conduct of public hearings (upon request made to DOL) and subpoena power; however, neither regulation supplements the initial regulation with guidance on the standard for an investigation.



of up to six of the company's customers to assess whether they are purchasing imported products instead of the company's domestic goods.<sup>34</sup>

After the investigation concludes, DOL chooses to certify or deny the petition. If DOL certifies, then the petitioners hopefully begin to receive benefits through the appropriate state agency.<sup>35</sup> In fiscal year 2003, an estimated<sup>36</sup> 204,000 workers received TAA certification;<sup>37</sup> funding for the program was approximately \$1.3 billion, most of which was spent on extended unemployment insurance.<sup>38</sup>

If DOL denies the petition, the regulations provide the opportunity for reconsideration by DOL and/or judicial review at the CIT.<sup>39</sup> The court conducts "on the record" reviews of DOL's determinations and may set aside DOL's determination if the investigation is seen as "so marred that [its] finding was arbitrary, or that it was not based on substantial

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34. This description of the process is distilled from four GAO publications: GAO 1992, *supra* note 6, at 4–7; GAO 2004, *supra* note 4, at 11; U.S. Gen. Accounting Office, *Trade Adjustment Assistance: Trends, Outcomes and Management Issues in Dislocated Worker Programs*, GAO-01-59, at 8 (Oct. 2000), available at <http://www.gao.gov/new.items/d0159.pdf> [hereinafter GAO 2000]; U.S. Gen. Accounting Office, *NAFTA TAA Program: Certification Criteria, Procedures and Activity*, GAO/NSIAD-98-51R, at 6–7 (Nov. 4, 1997) (describing a process for NAFTA-TAA essentially identical to that for TAA), available at <http://archive.gao.gov/paprrpdf1/159528.pdf>.

35. GAO 2004, *supra* note 4, at 18, fig. 2 (detailing the labyrinthine process a certified worker must go through in order to receive benefits).

36. *Id.* at 54. The data is estimated because DOL does not collect data on how many workers are actually certified for TAA. The estimate is based on the number of employees affected by the layoffs at the time each petition is filed. Since 1975, approximately 3 million workers have been certified for TAA benefits. See also Rep. Phil English, Address at TAA Coalition Luncheon (Oct. 5, 2004) (copy of remarks on file with journal).

37. It is important to note that the number of workers certified for TAA is not the number of workers actually receiving benefits. In fact, the "take-up" rate for benefits, i.e. the percentage of workers who end up taking the benefits for which they are eligible, was only twenty-four percent in FY2003. In 2002, it was even lower at eighteen percent. Two of the presumed reasons that so few eligible workers take advantage of the benefits are that the workers may already have found new jobs, and workers may not want to go through the administrative hoops necessary to claim benefits. Kletzer & Rosen, *supra* note 16, at 322–323.

38. Of the total of \$1.3 billion, \$220 million went to retraining. GAO 2004, *supra* note 4, at 1, 31. This training figure was up from \$104 million in 2000. GAO July 2001, *supra* note 19, at 2. Interestingly, the overall TAA program was funded at nearly double this level in 1980. Tarullo, *supra* note 20, at 33.

39. 29 C.F.R. §§ 90.18–90.19. Most workers whose claims are denied never seek such review. GAO 1992, *supra* note 6, at 7. As Judge Ridgway has pointed out, "the vast majority of workers whose petitions are denied never challenge the agency's determinations in court. Thus, the claims of many workers may never have been the subject of thorough investigation; and, obviously, some percentage of those claims were meritorious." Former Employees of Ameriphone, Inc. v. United States, 288 F. Supp. 2d 1353, 1359 n.9 (Ct. Int'l Trade 2003) (emphasis in original). It is likely also true that some workers who are certified for benefits should not have been. GAO 1992, *supra* note 6, at 3.

evidence.”<sup>40</sup> Investigations are supposed to be conducted with the “utmost regard for the interests of the petitioning workers” because of the remedial purpose of the TAA program and because petitioners are not represented by counsel during the petition stage.<sup>41</sup>

Increasingly, the CIT is finding that petitions are not, in fact, being considered with this “utmost regard” for workers, and has begun to conduct its own investigations and build its own record. As Judge Ridgway noted in *Former Employees of Ameriphone, Inc.*, “there is something fundamentally wrong with the administration of the nation’s trade adjustment assistance programs if, as a practical matter, workers often must appeal their cases to the courts to secure the thorough investigation that the Labor Department is obligated to conduct by law.”<sup>42</sup>

When reviewed in court of late, DOL’s investigations have, more often than not, failed to withstand review. According to a special report issued by the Bureau of National Affairs in May 2004, a study of three years of decisions found that the CIT upheld only 12.5% of DOL’s denials of certifications of eligibility.<sup>43</sup> And, as demonstrated by the quote introducing this article, the CIT judges have not been bashful in their criticism of DOL, using such descriptions of DOL’s efforts as “sloppy and inadequate,” “misguided and inadequate,” “cursory at best,” and “arbitrary and capricious.”<sup>44</sup> Often, CIT remands are themselves not sufficient to compel DOL to improve the investigations, with some groups of petitioners having their cases remanded multiple times.<sup>45</sup>

In sum, DOL’s process for investigating TAA petitions and reaching benefits qualification decisions has yet to provide any reasonably clear and detailed explanations of who is, and who is not, the type of worker covered by TAA. Without such guidelines, individual workers have no effective means to judge whether or not they would, or should, be covered. With an agency failing to develop, or request from Congress, consistent standards for evaluation of individual TAA cases, the judiciary has not only found

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40. *Former Employees of Oxford Automotive U.A.W. Local 2088 v. U.S. Dep’t of Labor*, No. 03-129, slip op. at 2–3 (Ct. Int’l Trade Oct. 2, 2003) (internal citations omitted).

41. *Former Employees of Ameriphone, Inc. v. United States*, 288 F. Supp. 2d 1353, 1355 (Ct. Int’l Trade 2003) (internal citations omitted).

42. *Id.* at 1359.

43. Triplett, *supra* note 24, at 795.

44. *See Former Employees of Ameriphone, Inc.*, 284 F. Supp. 2d at 1355 n.3 (citing and quoting nine representative cases where the CIT set aside DOL determinations).

45. *See, e.g., Former Employees of Chevron Prod. Co. v. U.S. Sec’y of Labor*, 298 F. Supp. 2d 1338, 1347–48 (Ct. Int’l Trade 2003) (involving eight remands over four years); *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec’y of Labor*, No. 2003-111, 2003 Ct. Intl. Trade LEXIS 111, at \*45 (Ct. Int’l Trade Aug. 28, 2003) (noting that Court-ordered certification was justified because DOL had had “five bites at the apple”); Part III *infra* (describing case of workers separated from Marathon Ashland and DOL’s three attempts to investigate petitioners’ claims).

itself in the middle of the fray, but also unable to settle on a proper role in reviewing or guiding the agency's efforts. Few cases demonstrate the complexity and urgency of all of these issues as clearly as *Former Employees of Marathon Ashland Pipeline, Inc.*, the subject of the next section.

### III. LIKE OIL AND WATER: THE CIT AND FEDERAL COURT REVIEW THE CASE OF *FORMER EMPLOYEES OF MARATHON ASHLAND PIPELINE*

The presumed starting point for any TAA investigation is for DOL to look at what a worker was doing with her firm, and to evaluate whether the work was sufficient to be certified for TAA. In general, workers receive TAA when DOL finds that they were engaged in "production," or services directly related to production.<sup>46</sup> How DOL goes about addressing this single question—what is production?—provides considerable insight into DOL's lackluster performance of its overall investigatory and analytical duties.

Yet before proceeding with a discussion of what constitutes "production," it is important to acknowledge that attempts to define "production" have become increasingly muddled by the debate over whether workers in the truly non-production "service industry," such as call centers,<sup>47</sup> should be eligible for TAA.<sup>48</sup> In addition to the question of call

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46. 19 U.S.C. § 2272(a)(2)(A)(iii). See also *Former Employees of Marathon Ashland Pipeline v. Chao*, 370 F.3d 1375, 1381 (Fed. Cir. 2004).

47. TAA makes an important distinction between service industry workers, such as call center operators, and workers who perform manufacturing-related services, such as merchandise logistics. The former are currently clearly excluded from TAA, while the latter are potentially eligible for TAA if they satisfy a 3-part test: (1) the workers' separations were caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control; (2) the reduction in the demand for their services originated at a production facility whose workers independently met the statutory criteria for certification; and (3) the reduction directly related to the product impacted by the imports. *Former Employees of Pittsburgh Logistics, Inc.*, 2003 Ct. Intl. Trade LEXIS 111, at \*32 (citing *Abbott v. Donovan*, 570 F. Supp. 41, 49 (1983)). See also Blustein, *supra* note 7 (referencing Bush Administration opposition to class action lawsuit filed at CIT on behalf of former IBM computer programmers seeking TAA); *DOL Planning More In-Depth Probes of Service Workers' Eligibility for TAA*, 21 INT'L TRADE REP. (BNA) 1019 (2004) (describing new DOL policy related to workers performing manufacturing-related services, including the development of a new petition form devoted to non-production issues).

48. In 2004, a bill entitled the "Trade Adjustment Assistance Equity for Service Workers Act of 2004," which would have included service industry workers within the category of TAA-eligible workers, was introduced in both houses of Congress. S. 2157, 108th Cong. (2004); H.R. 3881, 108th Cong. (2004). See John Sullivan, *Senate Bill Would Expand TAA to Services as House Democrats Ready Similar Measure*, 21 INT'L TRADE REP. (BNA) 409 (2004) (describing legislation). The provision failed to generate enough support to be brought to the Senate floor, though it is likely to see new life in the 109th Congress.

centers, recent cases have addressed more novel, “twenty-first century” issues, such as whether software engineers developing code for cellular phones are engaged in “production” of an article.<sup>49</sup> My focus, however, lies at a far less novel level, with the difficulties DOL has had in conducting investigations and clarifying what falls within its definition of “production” in more basic, “old world”<sup>50</sup> cases. The 2003 CIT decision in *Former Employees of Marathon Ashland Pipeline, Inc.*,<sup>51</sup> and the 2004 reversal of the CIT decision by the Court of Appeals for the Federal Circuit, serve to showcase DOL’s deficiencies in the most basic of cases.<sup>52</sup>

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*See Health Insurance Aid for Displaced Workers Dies in U.S. Senate*, BEST’S INS. NEWS, May 12, 2004 (noting that measure generated fifty-four votes, but not the sixty required to bring the measure to the floor). *See also* Kletzer & Rosen, *supra* note 16, at 328, 331, 336–38 (highlighting the issue of the exclusion of service industry workers from TAA). *Compare Lieberman Calls Offshore Outsourcing of U.S. Jobs Tip of Economic Iceberg*, available at <http://lieberman.senate.gov/newsroom/release.cfm?id=221356> (May 11, 2004), with Sen. Max Baucus, *Address at TAA Coalition Luncheon*, (Oct. 5, 2004) (both noting that extending TAA to service industry workers remains as a legislative goal) (copy of Baucus remarks on file with journal). The House measure was referred to the Ways and Means Subcommittee on Trade, but has seen no further action; to date, it has 111 sponsors. Bill Summary & Status for H.R. 3881, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR03881:@@L&summ2=m&> (last visited June 26, 2005).

49. *Former Employees of Ericsson, Inc. v. U.S. Sec’y of Labor*, No. 2004-130, 2004 Ct. Intl. Trade LEXIS 136, at \*2 (Ct. Intl Trade Oct. 13, 2004) (considering the issue of whether software engineers may be considered production workers). Although this case technically involved NAFTA-TAA, the analysis of production was the same under that program. *See generally* Raftery, *supra* note 10. A subject crying out for further, in-depth academic review is the issue of how an “article” should be defined for TAA purposes. At present, the standard relates to whether the work done produces an item classified somewhere within the Harmonized Tariff Schedules of the United States. This standard was recently brought into question in *Former Employees of Electronic Data Systems Corp. v. U.S. Sec’y of Labor*, 350 F. Supp. 2d 1282 (Ct. Intl Trade 2004). In Part IV.B *infra*, I suggest that the best approach to the question may be to “segment” TAA and avoid adoption of a single approach to what constitutes “production” of an “article.”

50. In addition to the legislation described *supra* note 48, a group of computer programmers at IBM whose jobs were outsourced have initiated a class action at the CIT related to coverage of service industry workers. Ben Worthen, *Offshored IT Workers May Get Training Benefits*, 2004 WL 67900325 (May 15, 2004) (quoting one petitioner as stating “we think the Labor Department is stuck in the old world” [of believing that production must result in a tangible article]).

51. *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 277 F. Supp. 2d 1298 (Ct. Intl Trade 2003) [hereinafter *Marathon Ashland/CIT*].

52. *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 370 F.3d 1375 (Fed. Cir. 2004) [hereinafter *Marathon Ashland/CAFC*].

A. *Former Employees of Marathon Ashland at the CIT: Manufacturing a Judicial Definition of Production*

Traditionally, DOL has defined the term “production” as creating or manufacturing a tangible commodity, or transforming commodities into new and different articles.<sup>53</sup> In *Former Employees of Marathon Ashland Pipeline, Inc.*, DOL was faced, for the third time, with the issue of whether “gaugers” at an oil production facility were involved in production.<sup>54</sup>

Simply put, gaugers perform quality control to determine whether oil can be introduced into the stream of commerce and, when oil is being prepared for shipment, gaugers measure out the quantities to be shipped.<sup>55</sup>

1. Starting and Staying on the Wrong Track: DOL’s Investigation(s)

A detailed description of the procedural history of the case is critical to an understanding of the two judicial opinions, as well as the recommendations I present in Part IV. The gaugers first petitioned for TAA in 1999, when they were informed that the division of the company for which they worked would be sold and that, as a result, eight gaugers would lose their jobs.<sup>56</sup> DOL’s investigation of the gaugers’ initial petition “consisted mainly of sending an inquiry to Marathon Ashland Pipeline’s human resources representative asking for information regarding the firm’s organizational structure, sales, production, employment and imports.”<sup>57</sup> Based on the information provided by this representative,<sup>58</sup> DOL denied the

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53. *Marathon Ashland/CIT*, 277 F. Supp. 2d at 1305 (citing *Nagy v. Donovan*, 571 F. Supp. 1261, 1264 (Ct. Int’l Trade 1983)).

54. *Marathon Ashland/CIT*, 277 F. Supp. 2d at 1303. The Court also reviewed other issues in contention, such as whether the workers had been separated as a result of a transition of jobs overseas. *Id.* at 1311. As explained below, the CIT first ruled on the employees’ claims in *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 215 F. Supp. 2d 1345 (Ct. Int’l Trade 2002).

55. *Marathon Ashland/CIT*, 277 F. Supp. 2d at 1302–03.

56. *Marathon Ashland/CAFAC*, 370 F.3d at 1376. As the Federal Circuit ultimately upheld the DOL investigation as reasonable, I will primarily cite to that opinion for a procedural description of the investigation.

57. *Marathon Ashland/CAFAC*, 370 F.3d at 1376.

58. In one recent exemplary case reminiscent of, but perhaps even more egregious than *Former Employees of Marathon Ashland*, DOL relied on evidence provided by a firm’s Human Resources Manager to make its decisions, but failed to consider at all the information provided by the workers (or any other potential source of information). In *Former Employees of Sun Apparel v. U.S. Sec’y of Labor*, No. 2004-106, 2004 Ct. Intl. Trade LEXIS 105 (Ct. Int’l Trade Aug. 20, 2004), several hundred garment workers from three Sun Apparel facilities in Texas applied for TAA. Because the workers lost their jobs in waves, the petitions came in several different stages, covering three company facilities. The workers came from a number of departments, including printing, cutting, sewing, trim and laundry. Throughout the process leading to the CIT’s review, DOL’s investigation

petition because, among other things, the gaugers did not produce an article, but rather worked for a company that simply provided a transportation service.<sup>59</sup>

The employees requested administrative reconsideration, citing several failings of the determination, but were denied.<sup>60</sup> The employees then initiated a case at the CIT, and when the employees moved for the court to make a decision on the record, DOL requested a voluntary remand to enable further investigation.<sup>61</sup> But the investigation conducted pursuant to the voluntary remand, which again consisted of information requested from and provided by the Marathon Ashland human resources representative, did not change the outcome. DOL denied the employees a second time.<sup>62</sup>

After this second denial, the employees returned to the CIT, where they met with better success. The court set aside DOL's voluntary remand determination on a number of grounds.<sup>63</sup> The court found the overall record "limited," with DOL failing to explain how it determined the gaugers were not engaged in production. Moreover, with the record that did exist, the court chided DOL for its exclusive reliance on statements from company officials, ignoring contradictory claims made by the workers.<sup>64</sup> Because of these deficiencies, the court ruled the investigation conducted by DOL insufficient and remanded to the agency for a third try.

But rather than use the court's analysis to create a new and improved record, DOL simply went back to the same officials at the company and requested additional information.<sup>65</sup> DOL did produce an expanded determination, providing more detail than in the first two determinations, but yet again DOL based its analysis solely on data provided by the

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consisted solely of a series of e-mails and conversations with questions to, and information provided by, the firm's Human Resources Manager. Even when her answers appeared inconsistent, or at least incomplete, DOL failed to follow up. Indeed, that she was an unreliable source should have been evident from the outset. It was the Human Resources Manager herself who filed the first TAA petition for the workers, yet in this initial petition, she provided evidence that the workers would be ineligible—that is, she helped them apply for benefits *to which she was also declaring they were not entitled*. Despite this clear evidence that she could not be a reliable source of information, DOL relied almost exclusively on her for the investigation. Not surprisingly, the CIT found DOL's investigation to have reached an "inexplicable" conclusion. *Id.* at 7. Sadly, the workers ended up not receiving benefits, as they failed to file comments opposing a second negative determination. *Former Employees of Sun Apparel v. U.S. Sec'y of Labor*, No. 05-36, 2005 Ct. Intl. Trade LEXIS 37 (Ct. Int'l Trade Mar. 17, 2005).

59. *Marathon Ashland/CAFC*, 370 F.3d at 1376–77.

60. *Id.* at 1377.

61. *Id.*

62. *Id.* at 1377.

63. *Id.* at 1378.

64. *Id.* at 1378.

65. *Id.*

company. DOL continued to ignore the workers' claims altogether, determining in cursory fashion that gaugers were "merely responsible for certifying the quality and quantity of crude oil being shipped to customers" and the oil they worked with was "already in tanks."<sup>66</sup> As a result, DOL asserted that the production stage had already occurred by the time the gaugers performed their tasks; thus, they were not involved in TAA-eligible production-related activities.<sup>67</sup>

## 2. The CIT Takes Over

Thrice spurned, the employees went back to the CIT, and for the second time the CIT rejected DOL's conclusion. In overturning DOL's findings, the CIT called out DOL for failing to conduct a sufficient investigation into what "production" meant in the context of the crude oil and gas industry,<sup>68</sup> despite the court's earlier instructions to DOL that it specifically investigate the issue and develop an industry-specific definition of production.<sup>69</sup> As Judge Barzilay wrote:

[DOL's] Remand Determination does not define the term production, nor does it provide any support for its conclusion that the gaugers do not engage in production. It does not attempt to define or describe the production process. It does not explain why gauging raw crude to determine if it can be sold for refining does not qualify as part of the production process. It does not say at what point the production process ends. It does not explain why oil already "in tanks" falls outside the production process. It does not explain why gaugers who monitor the quantity and quality of oil going directly into the pipeline (and not into tanks), are not part of the production process. It does not explain why quality control may be different for oil than for other products. It does not explain how a raw product like crude oil can be "produced" at all. It does not explain how workers employed by the pipeline company were able to work on oil tanks owned by the crude oil producers, but not be part of the production process.<sup>70</sup>

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66. *Marathon Ashland/CIT*, 277 F. Supp. 2d 1298, 1301 (Ct. Int'l Trade 2003).

67. *Id.* DOL also denied the workers because of its finding that the specific subsidiary of the Marathon Ashland company for which the gaugers worked was sold, resulting in the gaugers losing their jobs, because of a strategic, rather than import-related, reason. *Id.* at 1302.

68. *Id.* at 1299, 1303–05.

69. *Id.* at 1299.

70. *Id.* at 1304–05.

Frustrated with DOL's recalcitrance, the CIT was reluctant to remand to DOL yet again.<sup>71</sup> So the court chose to address all of these failures itself: creating its own record of what production means in the crude oil industry, conducting its own analysis, and determining whether the workers should be certified or not.<sup>72</sup> Although the CIT's charge is to conduct reviews of DOL's findings based on the record compiled by the agency, the court here decided that the record established by DOL did not merit any level of deference, and that DOL would be unable to produce such a record if given another chance. In essence, the court saw DOL's procedural failures resulting in such a level of substantive error that it had no choice but to do the work of the agency. That is, because DOL's determination had been based solely on information provided by the company, the agency had, according to the court, allowed itself to be replaced by the company. Now the court would return the favor and replace the agency.<sup>73</sup>

In setting out to create its own record and make its own determination, the court established that a TAA analysis consists of two questions: a legal question of "what is production?" and a factual question of "were these specific workers engaged in such production?" Believing that DOL had addressed neither question sufficiently, the CIT set out to answer both.

In addressing the legal question first, the court explained, largely without citation to any source, the various segments of the petroleum industry, and how each segment works with others to take oil from a deposit in the ground all the way to the refinery.<sup>74</sup> Next, the court narrowed

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71. *Id.* at 1305, 1313 (lamenting that, based on past experience, further remand would result in only marginally improved investigation and, as a result, court must do its own investigation and make its own certification decision).

72. In this case, the definition of production was being construed according to a specific provision within the TAA statute indicating that "any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas." 19 U.S.C.S. § 2272(c)(2)(A). In essence, the existence of this provision should have been even more helpful to DOL, by providing a guide to general categories of industry segments that must be deemed related to production. Nevertheless, the statute did not identify which workers within these segments should be considered production workers. This analysis is essentially the same analysis required in any TAA case, even where such provisions do not exist. For example, the court compared DOL's analysis related to the work of gaugers to cases analyzing whether marine vessel repair or auto dealership repair and inspection would be considered production. *Marathon Ashland/CIT*, 277 F. Supp. 2d at 1307-09 (analyzing DOL investigations in *Pemberton v. Marshall and Woodrum v. Donovan*, 639 F.2d 798 (1981)).

73. *Marathon Ashland/CIT*, 277 F. Supp. 2d at 1301 ("If allowed to stand, the Secretary [of Labor]'s negative determination would provide a definition of 'production' that excludes those duties performed by gaugers. This definition, however, essentially would be an interpretation of the statute by Marathon Ashland's company officials, and not, as the law requires, by the Secretary.").

74. *Id.* at 1302-03. The only citations in the court's recitation of the oil production process are to an antidumping/countervailing duties case and a single page of a House Conference Report concerning the 1988 changes to the TAA. *Id.* at 1303 n.5. These



this analysis down to the two key segments, extracting and refining, which could be considered the points at which oil actually gets produced.<sup>75</sup> As a result, activity within these two segments became the answer to the court's legal question of what is production.

As it did with the legal question of production, the court dove into the factual analysis by examining various secondary sources not otherwise in the record, such as the *Career Guide to Industries* and *Dictionary of Occupational Titles*, which are both issued by other offices within the Department of DOL, and found that those sources placed gaugers squarely within TAA-qualifying production.<sup>76</sup> Here, the court again attempted to provide a definition for which workers would be eligible for TAA within the context of its legal definition of production. In the end, the court declared that all workers engaged in activity leading up to the introduction of oil into the stream of commerce, including gauging, would be considered to be within the definition of production and thereby eligible for TAA.<sup>77</sup>

In finding the gaugers eligible for TAA,<sup>78</sup> the court demonstrated what a proper investigation could look like. The court began by considering the overall industry involved in the petition. After developing its understanding of the broader context, the court looked to the specific place of the workers within the industry, setting out clearly in its findings how and why the workers met the definition of production for that industry. In so doing, the court provided one example of how DOL could perform its work in a manner that would pass judicial muster and imbue the investigatory process with a level of clarity and consistency.

### *B. Former Employees of Marathon Ashland at the Federal Circuit: Back to the Drawing Board*

After all of the CIT's heavy lifting to provide a legal definition of production and factual analysis related to the gaugers, the Federal Circuit reversed.<sup>79</sup> Following its lengthy review of the procedural history of the

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citations are made solely for the issue of how many segments oil production can be divided into, rather than a statement of what that production entails, and what the workers are called who do it.

75. *Id.* at 1303.

76. *Id.* at 1305–08.

77. The Court also considered whether the gaugers would be considered “service workers,” pursuant to the three-part test outlined *supra* note 47 above, but ruled gaugers were more properly considered production workers. *Id.* at 1307–10.

78. On the issue of whether the job losses were truly as a result of imports, rather than a strategic business decision to sell assets, the court found that DOL had failed to answer the question at all, using the same flawed information in its Remand Determination that it had in its initial determination. Not entirely clear itself, the court used the “remedial nature” of TAA to break the tie in favor of the workers. *Id.* at 1310–13.

79. *Marathon Ashland/CAFC*, 370 F. 3d 1375, 1375 (Fed. Cir. 2004).

case, the Federal Circuit found that the CIT had “erred in its approach to the production issue.”<sup>80</sup> That is, the Federal Circuit first agreed with the CIT that establishment of the definition of production in a given industry is a question of law.<sup>81</sup> However, the Federal Circuit saw the limit of the judicial role in TAA cases to be ruling on whether the legal question has been reasonably analyzed by DOL. Put another way, the Federal Circuit ruled that courts have no place in investigating and creating their own record, let alone engaging independently with the factual question of whether individual workers fell within the definition of production. Provided DOL’s evaluation of the legal question had been reasonable, the Federal Circuit believed the judiciary had no role in the next step of the analysis because too much would depend on the particular facts of an individual case.<sup>82</sup> The Federal Circuit thus rejected the lower court’s approach of creating its own record and answering for itself whether the gaugers should be certified.

With this limited role in mind, the Federal Circuit nevertheless stepped into the legal analysis and developed still another definition of production in the crude oil context. Yet the substance of that definition also demonstrates a dramatically different view of the question of what a reasonable investigation and analysis of a definition of production should look like. That is, the Federal Circuit did not raise and answer, as the CIT had done, the many detailed sub-questions behind the overall question of what production of crude oil actually means; rather, the Federal Circuit simply stated that, following a stipulation between the parties, it would declare production to “include all the steps incident to extracting the oil from the ground.”<sup>83</sup> The Federal Circuit expanded on this by stating that anything considered “incident to the moving of oil to the refinery” for finishing would be considered “transportation.”<sup>84</sup>

In the Federal Circuit’s view, then, the results of the factual question would hinge on its newly-pronounced legal distinction between whether work qualified as production or transportation. Notwithstanding its view that performing factual analysis was outside the judicial purview, the Federal Circuit nevertheless chose to provide guidance on how to approach the factual questions of where individual workers fell within these legal definitions. Specifically, the Federal Circuit opined that the question was not just whether the work itself would be categorized as production or transportation, but whom the workers worked for when doing it. The

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80. *Id.* at 1381 (internal quotes omitted).

81. *Id.*

82. *Id.*

83. No citation is provided in the opinion for this “agreement of the parties.” *Marathon Ashland/CAFC*, 370 F.3d at 1381.

84. *Id.*

Federal Circuit stated:

Contrary to the view of the trial court, the fact that part of the gauger's responsibility involved quality control does not necessarily render them production workers. *Nor should the employees in this case necessarily be considered production workers simply because other gaugers performing similar tasks in other settings would be regarded as part of the production process.* If, for example, the independent producers and the pipeline company had both employed gaugers to test the crude oil – the producers using the gaugers to test the oil before the producers placed it on the market and the pipeline company using the gaugers to ensure that the oil that was offered for purchase was of the requisite quality and quantity – it would be reasonable to characterize the first set of gaugers as part of the production process and the second set of gaugers as part of the purchase and transportation process, *even though the work they did would be identical.*<sup>85</sup>

Here, the Federal Circuit's opinion demonstrates what can and does occur in a regulatory environment with no clear standards on who should, and who should not, be eligible for the subject program. In the above quote, the Federal Circuit stresses corporate formalities of ownership and control as critical factors in identifying which workers come within TAA's purview. In other words, the Federal Circuit's opinion defines whether workers should be eligible for TAA as much on the basis of who employed them, as on whether the work they did for their former employer may have qualified as production, in and of itself.<sup>86</sup> The CIT, on the other hand, hardly considered the workers' formal structure of employment at all.<sup>87</sup>

The Federal Circuit concluded its review by finding DOL's remand determination analysis sufficient "based on the evidence in the

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85. *Id.* at 1382 (emphasis added).

86. The Federal Circuit makes this distinction despite the fact that TAA is meant as a "remedial" program focused on workers, and one specifically meant to identify those workers whose skills and experience require the benefits of retraining. It is worth noting that the view taken here by the Federal Circuit was discussed in, and rejected, by the CIT in *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec'y of Labor*, No. 2003-111, 2003 Ct. Intl. Trade LEXIS 111 (Ct. Intl Trade Aug. 28, 2003) (rejecting the finding by DOL that employees of different entities within one facility, performing largely identical work, should be treated differently with respect to TAA).

87. Although the statutory language does limit benefits to those workers separated from a "firm, or appropriate subdivision of a firm," which limitation the Federal Circuit relied on in reaching its decision, the CIT read this provision expansively, given the "spirit of the legislative history" and remedial purposes of the statute. *Marathon Ashland/CAFC*, 370 F.3d at 1383.

administrative record.”<sup>88</sup> Essentially, the CIT had rejected DOL’s record altogether based on its exclusive reliance on the opinions of company officials as to what the gaugers did, and how their work fell within the CIT’s analysis of the legal definition of production. The Federal Circuit suggested a framework for analysis of the production question different than the one used by either DOL or the CIT, but nevertheless held DOL’s reliance on company officials to have constituted a reasonable investigation that led to a “fact-intensive determination.”<sup>89</sup> Specifically, despite the CIT’s demonstration of what a more developed record *could* look like, the Federal Circuit saw “no conflict over the underlying facts in the evidence” that required DOL to look beyond the record it developed.<sup>90</sup> In so doing, the Federal Circuit upheld DOL’s conclusions as reasonable and denied TAA to the gaugers.

Through these two opinions, we see one court determined to identify, and provide a “fix-by-example” for, the range of problems plaguing DOL’s investigations, analyses and determinations, and a second court equally determined to prevent the judiciary from engaging in such proactive steps. As a result of the higher court’s decision, the lack of clear standards for the TAA certification process persists, and workers continue to lose.

#### IV. PRODUCING THE DRAWING BOARD: SUGGESTIONS FOR IMPROVING DOL’S TAA INVESTIGATIONS

Following three years of administrative processes and appellate litigation, the CIT’s decision to intervene, investigate and certify the former Marathon Ashland workers must have been a welcome result for them; the Federal Circuit’s decision to reverse likely equally frustrating and disappointing. And each decision, like each of DOL’s administrative decisions, must have been, in its own way, rather confusing.

To review, DOL began the confusion by declaring the dividing line between production and non-production activities in the crude oil industry to be the point at which oil is extracted from the ground. Because the gaugers’ activities were post-extraction, they were held not to be engaged

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88. *Id.* at 1384.

89. *Id.* at 1382, 1384. The judicial standard established for reliance on statements from company officials in TAA cases hinges on whether those statements are reliable and not contradicted by other evidence in the record. *See e.g.*, *Former Employees of Swiss Indus. Abrasives v. United States*, 830 F. Supp. 637 (Ct. Int’l Trade 1993). Here, because the record consisted only of what the company had provided, the CIT found the record itself insufficient, then held the statements unreasonable because they were contradicted by the record the court developed on its own. The Federal Circuit rejected the CIT creation of its own record altogether, and so found DOL’s reliance on the company’s statements reasonable under the existing record.

90. *Id.* at 1385.

in production. DOL's investigation, and hence its conclusions, consisted almost entirely of evidence provided by the gaugers' former employer.

In its opinion, the CIT discarded DOL's efforts and conducted its own, two-tiered analysis of both the legal (what does production mean) and factual (were the jobs these people performed within that definition) questions. The court's investigation relied on evidence provided by the gaugers, evidence from their former employer, and new material from a variety of third party sources. The CIT concluded its investigation by defining TAA-qualifying production to be all work done by any worker regardless of corporate relationship, up to the point of entry of the good into the stream of commerce, which included both extracting and refining. Because the gaugers' work preceded the entry of the oil into the stream of commerce, the court found they qualified as production workers.

In reversing the CIT, the Federal Circuit first demanded that the courts respect the distinctions between the general/legal and specific/factual questions, thereby invalidating the decision of the CIT to investigate both. The Federal Circuit next echoed DOL's definition of "production" of crude oil as activities incident to removing oil from the ground, labeling activities after that point "transportation." From that analysis, even though the Federal Circuit refused to conduct its own investigation into the factual issue of where the Marathon Ashland gaugers fell, it appeared there would be no way for any gaugers to qualify for TAA, as gauging necessarily involves post-extraction activity. The Federal Circuit then introduced another angle to the analysis. According to the Federal Circuit, some gaugers may qualify for TAA, depending on who employed them, but two gaugers doing the exact same actual work may not both be eligible for TAA. Yet, rather than elaborate and provide clearer guidance, or decide what a proper investigation must consist of in order to answer any of the questions it posed, the Federal Circuit extricated itself from the entire discussion and upheld DOL's original investigation, notwithstanding DOL's reliance on a different legal analysis.

Three levels of review yielded three different answers. Regardless of which of the three may have been "right" in this individual case, it is unrealistic to imagine the trial or appellate courts replacing DOL in each investigation nor would it be appropriate for them to do so. DOL has not only the authority<sup>91</sup> and administrative capacity to investigate the myriad

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91. I am not aware of any formal suggestions to move administration of TAA to another agency, nor would such a move likely serve any purpose other than to shift the problem from one hand to the other. *But see* Tarullo, *supra* note 20, at 621 (recommending "abandon[ing] . . . the Labor Department bureaucracy that certifies groups of workers" in favor of local economic councils that would redirect allotments of funds to needy workers and firms).

petitions filed each year,<sup>92</sup> but also, at least theoretically, an entire executive agency's worth of expertise available to guide the investigatory process.

Yet DOL has not met its task, at least not to the satisfaction of its immediate reviewing court. But by the time a case reaches the CIT, if it gets there at all,<sup>93</sup> it is likely already too late for DOL and the workers.<sup>94</sup> Even worse, the lack of standards for what a TAA investigation should be, and what should qualify as eligible production work, has resulted in the CIT and Federal Circuit taking dramatically different stands on what the agency should be doing and how.

So what can be done? I propose several changes, both to the investigation process<sup>95</sup> and the overall TAA program: (i) improving the TAA petition, providing petition guidance and permitting representation at the TAA stage; (ii) requiring DOL questionnaires to be directed to company counsel and inclusive of opinions from throughout the company; (iii) including third party sources in investigations; (iv) capping the number of chances DOL gets to conduct an investigation; and (v) "segmenting" certain industries off from the normal TAA processes.

#### *A. The Petition and Questionnaire Process*

Clearly, the task of defining production, let alone the other issues that must be addressed in a TAA investigation, is not simple. And as described above, the petition process has proved an insufficient method for asking separated workers to convey the necessary information to DOL.<sup>96</sup> But frustration with DOL's ability to make proper determinations goes beyond the substance of the initial worker petition stage. The questionnaire process, by which DOL asks the workers' former employer questions about the business of the company and work performed by the petitioners, has also proved an insufficient means for collecting information from a given company, primarily because those questions often comprise the whole of

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92. See, e.g., U.S. DEP'T OF LABOR, Number of TAA Petitions Received, Certifications Issued, and Denials Issued by State, at <http://www.doleta.gov/tradeact/states2004.cfm> (Apr. 6, 2004).

93. See *supra* note 39 and accompanying text.

94. See *Former Employees of Chevron Prod. Co., v. U.S. Sec'y of Labor*, 298 F. Supp. 2d 1338 (Ct. Int'l Trade 2003) (noting that the effectiveness of the TAA program is a function of the timeliness with which it is administered).

95. The changes proposed herein reflect primarily my concerns with how the agency addresses the issue of production. Clearly, there are a variety of other areas of concern with respect to DOL's investigations of TAA, such as how it determines whether imports "contributed importantly" to the workers' separation. However, those issues go beyond the scope of this article, as they generally involve larger questions about the structure of the program itself.

96. See *supra* notes 31-39 and accompanying text.

the investigation. So, four changes should be made to the petition and questionnaire process.

### 1. Improved Petition and Related Guidance

The problems with TAA certification begin at step one, the petition.<sup>97</sup> The “guidance” provided in the DOL regulations<sup>98</sup> and on the DOL website about what should appear in a petition amounts to little more than a restatement of the statutory standards for certification.<sup>99</sup>

For the workers completing the petitions, many of whom lack the time, resources, or educational background necessary to complete the petitions in a completely responsive manner, these guidelines provide little assistance.<sup>100</sup> Indeed, the paucity of detail or standards in the regulations led to DOL’s creation of a petition form that requests little relevant detail or analysis.<sup>101</sup> With no room to present supporting data on the petition—whether the workers claim their firm produces an impacted article is reduced to checking a “Yes,” “No,” or “Don’t Know” box—the investigation process is filled with potential hidden “traps” and is off to a difficult start.<sup>102</sup>

Development of an expanded petition form/process would likely improve dramatically DOL’s ability to conduct a proper investigation. DOL should first issue more detailed guidance (in both English and Spanish) on the petition process, particularly by providing examples and other assistance for workers to understand the type of information necessary for the agency to review their claim. Workers completing the initial petition may not understand the full implications of the questions, or have access to the accurate information, yet may still feel obliged to

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97. See Raftery, *supra* note 10, at 187 (suggesting the need to provide workers with legal assistance to complete the petition).

98. See *supra* note 35 and accompanying text.

99. The only help provided by DOL on its site is a “detailed review” of five sections of the petition, yet this review, too, is little more than a restatement of the basic TAA standards. U.S. DEP’T OF LABOR, Trade Adjustment Assistance (TAA) and Alternative Adjustment Assistance (ATAA) Application Process, at <http://www.doleta.gov/tradeact/petitions.cfm> (last visited June 26, 2005). The only outside assistance petitioners are offered is to visit state unemployment agencies or their state “One-Stop Career Centers,” which are offices established by each state to provide unemployed workers with assistance on all of the varied programs available to them. *Id.*

100. GAO data shows that approximately eighty percent of workers completing TAA petitions have not gone past high school in their education, and twenty percent are not proficient in English. GAO 2000, *supra* note 34, at 30; Hua, *supra* note 22, at A1 (noting that TAA process is “difficult for non-English speakers to navigate”).

101. The petition form is available at [http://www.doleta.gov/tradeact/docs/TAA2002\\_petition\\_Revised.pdf](http://www.doleta.gov/tradeact/docs/TAA2002_petition_Revised.pdf) (last visited June 26, 2005).

102. Sen. Max Baucus, *supra* note 48.

complete the document, or ask their former employer to complete it, even if it means providing bad information. With a petition process that either provides detailed instructions and examples for workers, or even access to legal assistance in the preparation of their petition,<sup>103</sup> so that the information and assertions workers provide are worthy of detailed review, the investigation would likely be based on more usable data and lead to more credible results.<sup>104</sup>

Finally with respect to petitions, although it is not necessary to eliminate the practice of employer completion of the petitions, as these are sometimes successful efforts,<sup>105</sup> DOL should be required to subject petitions completed by the petitioners' former employer to an even higher level of scrutiny and investigation than that suggested below, such as by providing for an immediate and automatic remand of a negative DOL finding to a second investigator. That an employer, as in *Former Employees of Sun Apparel*, has the ability both to let workers go, then to impede, intentionally or not, their chances for TAA, is a potential conflict of interest that should be permitted to stand only in the rarest of cases.

## 2. Directing Questionnaires to Company Counsel and Requiring a Company to Perform Complete Reviews

The second fix is to standardize who within a company completes the DOL questionnaire. My suggestion would be to direct all questionnaires to in-house counsel, or if there are none, to the company's outside legal counsel. Neither *Former Employees of Marathon Ashland Pipeline, Inc.* nor *Former Employees of Sun Apparel* squarely addressed the issue of who the individual completing the questionnaire should be; the cases focused more on whether statements made by company officials were "reliable." However, reliability depends not only on an individual's credibility, but on her knowledge.<sup>106</sup> Although a Human Resources Manager may have a

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103. For example, DOL could make available a database of attorneys who have handled TAA cases in the past. These attorneys would be contacted by DOL and asked to permit their names and contact information to be listed for workers interested in seeking advice. In conjunction with the CIT, the Customs and International Trade Bar Association is currently collecting such a list. See Customs & Int'l Trade Bar Ass'n, *Announcements*, at <http://www.citba.org/announce.htm> (last visited June 26, 2005).

104. See *supra* note 39 and accompanying text.

105. See, e.g., Sharon Smith, *30 Will Get Aid After Layoff; Turbon International Will Move Manufacturing Jobs to Germany*, YORK DAILY REC., Dec. 3, 2004, at 10 (noting that company successfully applied for TAA for its workers).

106. In general, the Human Resources department appears to be DOL's primary source in investigations. In most cases, the data they provide is lacking in some respect. Other cases where the entire DOL investigation consists of information provided by human resources personnel include *Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, No. 2004-103, 2004 Ct. Intl. Trade LEXIS 136 (Ct. Int'l Trade Oct. 13, 2004); *Former*



general, even moderately detailed, understanding of the firm's business, her main functions are to handle the administrative details of the worker's life at the firm, not to decide whether the hiring or firing should occur.<sup>107</sup> Moreover, as Judge Barzilay pointed out in *Former Employees of Marathon Ashland Pipeline, Inc.*, the human resources manager should not be entrusted with making legal conclusions as to the meaning of such firings.<sup>108</sup>

By directing the questionnaires to the company's counsel, with instructions to the attorney to consult with all relevant company departments, DOL can rely on the standards of legal professional ethics in demanding that information be provided in a complete and accurate manner. It is also reasonable to assume that, in most cases, attorneys will research the relevant standards and issues in order to provide DOL with usable answers, rather than guess or provide perfunctory answers.<sup>109</sup> DOL should develop a model cover letter to accompany the questionnaire to the lawyer, directing her to the relevant statutory and regulatory provisions, as well as reference to a compendium of recent CIT and Federal Circuit cases.

In responding, the company's counsel should be asked to identify whom within the firm she consulted with in generating the response. At a minimum, this should include job titles such as a Plant Manager, Operations Manager, or a comparable individual who has specific responsibility for oversight of what the firm produces. In addition, the lawyer should consult with the Traffic, Logistics, or Import/Export Department to review specific data, generated from the firm's customs brokers and/or freight forwarders, on the firm's levels of importing. DOL should also be provided with a detailed organizational chart, setting forth names, titles, primary responsibilities and direct contact information. This chart would then be used by DOL to review and identify additional individuals capable of discussing the pertinent issues throughout its investigation.

Requiring this level of detail in the questionnaire response is necessary for DOL to be assured that the answers being provided are not tinged with concern for the company's public image. Despite the fact that

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*Employees of Electronic Data Sys. Corp. v. U.S. Sec'y of Labor*, 350 F. Supp. 2d 1282 (Ct. Int'l. Trade 2004).

107. For example, at one website devoted to helping people find jobs in Human Resources, examples of duties are listed as "Recruitment and Hiring," "Training and Development," "Human Resources Administration," "Salary and Benefits" and "Employee Relations." *Become a Human Resources Specialist*, at <http://www.fabjob.com/humanresources.asp> (last visited June 26, 2005).

108. See *supra* notes 58 and accompanying text; see also *Former Employees of Ericsson*, 2004 Ct. Intl. Trade LEXIS 136, at \*21-23.

109. Raftery, *supra* note 10, at 187 (suggesting as an improvement to TAA that DOL demand "accurate information" from corporate management).

the payouts for TAA, unlike other worker relief programs, do not cost the company, some companies have been wary to be seen as contributing to the “outsourcing” trend.<sup>110</sup> Placing the questionnaire with in-house or outside counsel, and requiring transparency as to how the company reached its conclusions, will provide DOL with more usable data and analysis,<sup>111</sup> and might enable the company to appreciate the positive public relations that may ensue when workers are certified for TAA.<sup>112</sup> Structuring the process in this manner will also provide the reviewing courts with a clearer sense of what actually happened in the investigation, and whether the investigation was reasonable.

### 3. Requiring Third Party Sources in Investigations

Even with an improved questionnaire process, DOL should be required to generate a record that goes beyond exclusive reliance on statements from the workers and company officials. No record should be deemed complete unless objective, third party evidence is gathered on the issues relevant to the case, particularly, as explained above, when the company itself has completed the petition on behalf of the workers. Such third party evidence could include, depending on the issues at hand, the sources consulted by the CIT in *Former Employees of Marathon Ashland Pipeline, Inc.*, trade-specific publications, trade data for an industry, consultations with industry experts, etc.<sup>113</sup> The failure to develop a record inclusive of such sources should be deemed *prima facie* evidence that DOL did not conduct a reasonable investigation. Although this, as well as the recommendation above regarding company counsel, may require a return to

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110. For example, CNN’s Lou Dobbs has made “outsourcing” his cause celebre over the past few years. His program, and its website, include such features as “Exporting America,” which, according to the site, is “a list of companies we’ve confirmed are ‘Exporting America.’ These are U.S. companies either sending American jobs overseas, or choosing to employ cheap overseas labor, instead of American workers.” The site does not include any ability for companies to respond to these claims. *Lou Dobbs Tonight*, at <http://www.cnn.com/CNN/Programs/lou.dobbs.tonight/> (last visited June 26, 2005). For an example of the bad public relations associated with outsourcing on a local level, see Nan Lundeen and Woody White, *540 Textile Workers to Lose Jobs*, GREENVILLE NEWS, Dec. 2, 2004, at 5.

111. Requiring completion of questionnaires by company counsel would also admittedly increase the costs of the investigation to the company. However, such cost-shifting is appropriate because the company has closer access to the necessary information than does DOL or the workers.

112. Examples of articles in local papers describing TAA benefits and how they will help workers include: Jeff Bollier, *Aid Available to Leach Workers, Funding, Benefits will Help Laid-off Employees*, OSHKOSH NW., Jan. 12, 2005; Hua, *supra* note 22; Smith, *supra* note 105; Snowe, *Collins Announce Trade Adjustment Assistance Granted to Osram Sylvania Workers*, 2004 WL 101588340, Dec. 14, 2004, at 1.

113. See *supra* note 72 and accompanying text.

the 60-day, or even a 90-day, investigation period, even these somewhat longer time frames are preferable to the time it takes to conduct litigation, or to a complete denial resulting from a poor investigation that is never appealed.

#### 4. Stopping the Madness

Finally, it is likely that no matter which changes are implemented, at least some DOL investigations will be insufficient. Although, as seen, some judges of the CIT have decided to step in and to conduct their own investigations, this has not happened in all cases. The case of *Former Employees of Chevron Products Co.*, cited at the outset of the Article, came before DOL eight times over a four-year period prior to certification.<sup>114</sup> This process of repeated remanding fails to meet the standard of review with “utmost regard”<sup>115</sup> for workers and the continued failure of the process, time and time again, serves to deny them their statutory rights.

In order to preserve adequate safeguards for workers, the number of remands, whether voluntary or court-ordered, should be limited to three, and extend no more than eighteen months from the date of initial petition. Should DOL be unable to complete an investigation deemed reasonable within these limitations, the CIT should be empowered to conduct its own investigation and issue a decision.<sup>116</sup>

#### *B. Removing the Courts from the Business of Defining Production: Introducing Working Group Review*

But even if petitioners were given better groundwork for petitioning, and DOL did a better job of investigating, would the type of real change needed for the program even be possible? After all, with the number of claims being filed, and the requirement to make decisions in restricted timeframes, whether forty or sixty or ninety days, is it realistic to imagine that low-level DOL investigators can come up with the kind of

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114. *Former Employees of Chevron Products Co. v. U.S. Sec’y of Labor*, 298 F. Supp. 2d 1338 (Ct. Int’l Trade 2003).

115. *Former Employees of Ameriphone, Inc. v. United States*, 288 F. Supp. 2d 1353, 1355 (Ct. Int’l Trade 2003) (internal citations omitted).

116. Although it is beyond the scope of this Article, it is worth noting that one of the other issues with TAA in need of a legislative fix is the need to “stop the clock” during the appeals process. In *Former Employees of Tyco Electronics, Fiber Optics Division v. U.S. Dep’t of Labor*, 350 F. Supp. 2d 1075 (Ct. Int’l Trade 2004), workers eventually certified for NAFTA-TAA benefits, following two years of remands and appeals, were told that too much time had passed between the time of their separation and their claim of benefits. Although resolved in this case through the issuance of a special letter, it is essential that workers exercising their appellate rights not lose their rights to benefits during the course of the process.

comprehensive fact-finding, engaging with the complex nuance and detail involved in international business decisions, that at least the CIT had in mind in *Former Employees of Marathon Ashland Pipeline, Inc.*? There is no doubt the CIT's vision of what a reasonable investigation looks like is far more comprehensive than that of DOL, or the Federal Circuit, and other judges have followed the course set by Judge Barzilay and listed for DOL: not only the issues it expected addressed, but the types of questions they should pose in reaching the result.<sup>117</sup> But the CIT's format is not the legislative or regulatory standard. And even if it was, it is not clear if DOL could keep up with the work.

The most direct fix would be to "segment" TAA and begin the establishment of clear standards for what "production" means in as many industries as possible.<sup>118</sup> Statistics show that approximately 35% of workers applying for TAA in the past several years have been from the textile industry.<sup>119</sup> It would therefore be desirable, at least in the textile sector, to have working definitions of what the production process means in the textile context: does it include every worker involved from thread to yarn to cutting and sewing and finishing? Does it also include workers, akin to oil gaugers, involved in inspection, shipping, and the like?

After all, if one definition of production is, as the CIT defined it in *Former Employees of Marathon Ashland Pipeline, Inc.*, creation of a good for sale and introduction of it into the stream of commerce, it is certainly reasonable to argue that anyone involved, in any way, in the process of bringing a good to market should be eligible for TAA. As one commentator has argued, why not certify all workers who lose their jobs for TAA?<sup>120</sup> Even the Accounting and Customer Service departments of a given company make possible the sale of a good, so why should they be denied TAA because they are not "production" workers? And if the answer to these questions is no, and the policy is to prefer a more limited TAA coverage scope, shouldn't workers, let alone the courts, at least know what the scope is from the outset?

How to do this? A program that sets out definitions and general

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117. See, e.g., *Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, No. 2004-130, 2004 Ct. Intl. Trade LEXIS 136, at \*24-25 (Ct. Int'l Trade Oct. 13, 2004) (posing thirteen questions for DOL to answer in its investigation); *Former Employees of Sun Apparel v. U.S. Sec'y of Labor*, No. 2004-106, 2004 Ct. Intl. Trade LEXIS 105, at \*33 nn.20-21 (Ct. Int'l Trade Aug. 20, 2004) (posing ten questions for DOL).

118. Mary Anne Joseph, *Trade Adjustment Assistance: An Analysis*, 6 CONN. J. INT'L L. 251, 275 (1990) (recommending "policy decisions" as to which workers in a firm should be eligible for TAA, based on worker function as well as other individualized factors, such as worker age).

119. GAO July 2001, *supra* note 19, at 2.

120. Howard Rosen, *Trade Adjustment Assistance and Offshore Outsourcing*, available at <http://www.newamerica.net/index.cfm?pg=article&DocID=1486> (Feb. 19, 2004).

standards for complex economic issues in all facets of the American economy simply cannot work. Yet while it may not be possible or desirable to establish a single standard for the entire domestic economy, it may well be possible to do so for the dominant industries impacted by trade.<sup>121</sup> As stated above, the textiles industry is the overwhelming leader, and when workers from the electronics and metals industries are added in, the jobs of approximately half of all workers applying for TAA can be accounted for through these three general sectors.<sup>122</sup>

While it would be costly in terms of time and money initially, the needed fix is for DOL to convene, or be legislatively ordered to create, working groups from the industries and sectors from which the highest numbers of workers applying for TAA come from.<sup>123</sup> Working groups should consist of Congressional staff, DOL officials, facility owners/management, workers and/or associated unions, attorneys experienced in TAA, and industry experts. Such broad-based working groups would account for all TAA-related interests and likely result in the most comprehensive definitions of production. The job of the working groups would be to provide clear guidance on what production means in given industries to both DOL and Congress, to enable subsequent informed legislative and regulatory decision-making in codifying definitions of production. The funding spent on generating standards of whom within these industries is eligible for TAA would likely pay for itself in terms of more efficient administration of petitions, reduced appeals, etc.<sup>124</sup>

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121. Kletzer and Rosen go a step further and propose that, rather than develop standards for “production” in certain industries, all workers in “pre-identified trade-supported industries” should be automatically eligible for TAA. Listing such industries they argue that the certification process should be eliminated, with workers needing only to show that they were employees of these industries. Kletzer & Rosen, *supra* note 16, at 333, 341.

122. DOL provides statistics on total number of workers certified, as well as the number of petitions (but not the corresponding number of workers) certified by industry. In 2004, 49.3% of total petitions (855 of 1,734) came from the five categories applicable to textiles, apparel, primary metals, fabricated metal products and electronics. U.S. DEP’T OF LABOR, Trade Adjustment Assistance (TAA) Distribution of Certifications by Industry Fiscal Year 2004, at [www.doleta.gov/tradeact/certs\\_2004.cfm](http://www.doleta.gov/tradeact/certs_2004.cfm) (last visited Jan. 26, 2005). In 2003, these categories accounted for 49.8% of the total (940 of 1,885). U.S. DEP’T OF LABOR, Trade Adjustment Assistance (TAA) Distribution of Certifications by Industry Fiscal Year 2004, at [www.doleta.gov/tradeact/certs\\_2003.cfm](http://www.doleta.gov/tradeact/certs_2003.cfm) (last visited Jan. 26, 2005). See also GAO July 2001, *supra* note 19, at 6–7.

123. In addressing how to reach “policy decisions” on which workers should be certified, Mary Anne Joseph recommended that industry-specific “task forces” be established. However, Joseph envisioned task forces that would make strategic decisions about which industries to target for TAA, and what types of benefits they needed, rather than perform detailed inquiries to specific job titles within those industries. Joseph, *supra* note 118, at 270.

124. Both *Former Employees of Marathon Ashland* and *Former Employees of Chevron* involved gaugers. In just these two cases, clearer industry standards would have saved at least two groups of workers from eight total years of proceedings and litigation.

Although individual review by DOL of petitions would still be required, with ongoing judicial review of DOL's analysis, such standards could help take care of a large percentage of cases, leaving more time to deal with the complex ones.<sup>125</sup>

The working groups would also provide an informal source of guidance on the current legislative and regulatory framework, as applied to a given industry.<sup>126</sup> For example, according to the Federal Circuit in *Former Employees of Marathon Ashland Pipeline, Inc.*, it may be that two workers doing the same work, but for different companies, may not both be eligible for TAA. However, the CIT has rejected this line of reasoning in at least one case.<sup>127</sup> Nevertheless, it is reasonable to presume that these distinctions of corporate formalities will be critical in some industries. Similarly, issues like whether production of an article should require that an item be identified on the HTSUS result, or the realistic impact of imports,<sup>128</sup> or the need to investigate not only the products produced by the workers themselves, but those of related industries, may also be best left to knowledgeable working groups, rather than addressed on a universal level. By segmenting the generalized aspects of an investigation, and leaving DOL to review specific facts, rather than re-define the overall standards for a given industry, DOL is more likely to produce investigations that provide displaced workers with fair procedures and fair results.

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125. This process of establishing definitions of which workers are, or are not, to be considered production workers, differs from standardization plans apparently underway already at DOL. According to the GAO 2004 Report, DOL plans to standardize and computerize certain aspects of the investigation process, resulting in a computer-based calculation, based on a variety of factors, whether workers should be certified or not. These plans will likely result in the generating of even less satisfactory investigations by DOL than at present. GAO 2004, *supra* note 4, at 14 n.10.

126. See Tarullo, *supra* note 20, at 621–22. Although Tarullo suggested the creation of “local adjustment councils” to replace a DOL-run TAA program, but rather to guide the reorienting of local economies, the underlying rationale is the same: it is necessary to have a cross-section of experts and constituents to generate standards that apply to individual workers from a given industry in a specific community.

127. See *supra* note 86 and accompanying text.

128. See, e.g., *Former Employees of Murray Engineering v. Chao*, 358 F. Supp. 2d 1269, at 1275 (Ct. Int'l Trade 2004) (remanding to DOL the petition of workers from a machine manufacturing company, requiring them to investigate both the machine industry, and the industry of the goods produced from those machines); GAO 2000, *supra* note 34, at 8 (suggesting that macroeconomic indicators may be more important than the “contributed importantly” standard currently in the law); Raftery, *supra* note 10, at 183 (describing the fact that a worker's job loss may not have been the result of a single business decision, but rather a process occurring over time).

## V. CONCLUSION

In *Former Employees of Ericsson, Inc.*, Judge Eaton issued a remand with thirteen questions for DOL to answer regarding production in the novel area of software programming for electronic devices.<sup>129</sup> Given DOL's history, it would seem likely that few, if any, of these questions will be answered to the court's satisfaction, thus requiring the court to continue remanding, or step in and perform its own analysis. And perhaps if it chooses to do so, the Federal Circuit will again reverse. Without the changes outlined in Part IV, it is likely that the courts will continue to try to either answer these questions on their own, and thus judicially manage and potentially alter TAA, or end up directing DOL's investigations through never-ending remands. Unless DOL's broken certification process is remedied, some American workers will continue to bear its burden.

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129. *Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, No. 2004-130, 2004 Ct. Intl. Trade LEXIS 136, at \*24-25 (Ct. Int'l Trade Oct. 13, 2004).