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ADMINISTRATIVE LAW

I. AGENCY DECISION-MAKING PROCEDURES: PRESERVING A RECORD FOR JUDICIAL REVIEW

The Secretary of Labor is required by statute[1] to operate a program to protect the United States labor market from an excessive influx of skilled or unskilled foreign labor. The present program had its inception in the Immigration and Nationality Act of 1952 (McCarran-Walter Act);[2] as originally passed, the Act permitted foreign laborers to enter the country unless the Secretary certified that: (1) sufficient available domestic workers were "able, willing, and qualified" to fill the positions in question; or (2) the employment of aliens would adversely affect the wages and working conditions of domestic workers "similarly employed."[3] Certifications to exclude immigrant workers were rarely issued.[4] The Act was amended in 1965,[5] in effect reversing the certification procedure.[6] Under the amended Act an alien worker would be excluded from entry to perform skilled or unskilled labor unless the Secretary certified that there were no domestic workers "able, willing, qualified, and available" at the relevant time and locality and that employment of the alien worker would not adversely affect the wages and working conditions of domestic workers similarly employed.[7]

To facilitate the processing of requests for alien employment certifications, the Secretary has designated certain classes of occupations for special treatment.[8] Applicants in "shortage" (Schedule A) occupations,[9] and professionals or those having ex-

1. 8 U.S.C. § 1182(a)(14) (1970).
2. Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, § 212(a)(14), 66 Stat. 182-83.
3. *Id.* at 183.
4. Note: *Alien Labor Certification Proceedings: The Personal Preference Doctrine and the Burden of Persuasion*, 43 GEO. WASH. L. REV. 914, 915 n.8 (1975) [hereinafter cited as *Proceedings* Note].
5. For a brief explanation of the reasons for amendment see *id.* at 915 n.9.
6. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 10(a), 79 Stat. 917-18, *amending* 8 U.S.C. § 1182 (1964). The Act is popularly called the Immigration and Nationality Act of 1965.
7. 8 U.S.C. § 1182(a)(14) (1970).
8. 29 C.F.R. §§ 60.1 *et seq.* (1974).
9. *Id* § 60.7.

ceptional abilities in the sciences or the arts (PSAs) who qualify for exemption under section 204 of the Act,[10] may be certified without evidence of a job offer and without further inquiry into job market conditions.[11] Applicants in "oversupply" (Schedule B) occupations[12] cannot be certified for jobs in areas in which their skill is in surplus and must have job offers to be considered for certification in other areas.[13] All other applicants, including professionals or PSAs who do not qualify for exemption under section 204 of the Act, must have job offers to be considered for certification.[14]

The Secretary has delegated responsibility for certification and review to the several Regional Manpower Administrators (RMAs),[15] who in turn appoint certifying and reviewing officers to rule on the issuance of certifications within the region.[16] The RMAs or their designated representatives may also be required to rule on appeals from related decisions,[17] such as whether an alien is qualified for a Schedule A, professional, or PSA designation. Labor certification decisions are made on the basis of job market information received from the State Employment Service (SES) of the state in which the alien is to be employed and "any other applicable data available to the Manpower Administration area office."[18] While the Secretary has published rules for making the required determination whether employment of the alien at the rate offered by the prospective employer would adversely affect wages and working conditions of domestic workers similarly employed,[19] no rules for making the "able, willing, qualified, and available" determination have been published.[20] Department of Labor policy, however, is to consider any domestic worker who is registered with the local SES office and who claims to be qualified for specific work to be "able, willing, qualified, and available" to

10. *Id.* § 60.3(b).
11. *Id.* §§ 60.2(a)(1), 60.3(b).
12. *Id.* § 60.7.
13. Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245, 257-58 (1974), *citing* 29 C.F.R. § 60.3(c) (1972).
14. *Id.*
15. *Id.* §.60.3.
16. *Id.* § 60.4.
17. *Id.* § 60.4(b). For a tabulation of the various types of appeals see *Proceedings* Note, *supra* note 4, at 919 n.28.
18. 29 C.F.R. § 60.3(c) (1974).
19. *Id.* § 60.6
20. *Proceedings* Note, *supra* note 4, at 917. An exception to the certification procedure is made for alien workers seeking to perform live-in domestic service. *Id.* at 918 n.20.

perform that work.[21]

The Secretary has provided rules for administrative review of initial denials of alien employment certifications.[22] The rules specify the filing period for requests for review, the form of the request, officers to perform the review, and the venue of the hearing, but they do not specify the form of the review proceeding.[23] Nor is the hearing "required by statute to be determined on the record after opportunity for an agency hearing,"[24] hence it is not governed by the procedures specified in the Administrative Procedure Act (APA).[25]

While neither the administrative review nor its form is prescribed by statute, the federal courts have, except in three cases,[26] held the final denial of an alien labor certification reviewable.[27] All three of the exceptions were based on the plaintiff's lack of standing to maintain the action,[28] although there was some initial con-

21. *Id.* at 917.

22. 29 C.F.R. § 60.4 (1974).

23. *Id.*

24. Administrative Procedure Act of 1946 § 5, 5 U.S.C. § 554(a) (1970).

25. Yong v. Regional Manpower Adm'r, 509 F.2d 243, 245 (9th Cir. Jan., 1975).

26. *See* Intercontinental Placement Serv. v. Shultz, 461 F.2d 222 (3d Cir. 1972); Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965). These cases are discussed in detail at note 28 *infra*.

27. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. section 702, provides:

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

28. In Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965), relief was denied to 181 Mexican nationals on the ground that no right of review existed of determinations made by the executive branch acting pursuant to congressional direction. The potential employers of the Mexican nationals involved in *Braude* were also denied relief on the basis of their lack of standing. In Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967), a potential employer was held not to have standing to contest the determination of a Regional Director that a Mexican alien could not be allowed into the United States to work as a nurse and housekeeper. For the employer to gain judicial review of such a determination, the *Cobb* court stated, "[h]e must show that the Secretary of Labor has violated his rights under either the Immigration and Nationality Act 'or any relevant statute.' " *Id.* at 951. The Fifth Circuit panel found no such showing in the *Cobb* case. Both of the foregoing cases were decided before the Supreme Court liberalized the law of standing in Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970)—and *Braude* and *Cobb* have consistently been interpreted since as pertaining only to standing and not to reviewability. *See* Reddy, Inc. v. United States Dep't of Labor, 492 F.2d 538 (5th Cir. 1974), where, when the Fifth Circuit raised the question of the viability of its *Cobb* precedent, the Department of Labor conceded the reviewability of certification denials and stated that *Cobb* was distinguishable. The Fifth Circuit found, as have other circuits, that the distinction was to be made on the basis of standing.

fusion about this.[29] In holding final denials reviewable, the courts have necessarily rejected the contention that has occasionally been made by the Department of Labor that the decision to issue or deny an alien labor certification is "committed by law to agency discretion"[30] within the meaning of section 10 of the APA, 5 U.S.C. section 701(a)(2). While rejecting the contention that certification decisions per se are committed to agency discretion, the courts have conceded that the Secretary must be allowed some discretion in the administration of the statutory standards.[31] Since the agency review proceedings have tended to be procedurally casual to the point of being haphazard,[32] and since the courts have tended to take agency procedures as they have found them,[33] the resultant body of case law reflects the inadequacies

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Also involving the issue of standing was Intercontinental Placement Serv. v. Shultz, 461 F.2d 222 (3d Cir. 1972), where review was denied to a plaintiff employment agency whose business included securing alien employees for domestic businesses. Thus, none of the cases in which review has been denied turned exclusively on considerations of unreviewability, and when unreviewability has been advocated by the Department of Labor, on the basis that certification decisions are "committed to agency discretion by law" within the meaning of section 10 of the APA, 5 U.S.C. section 701(a)(2), the contention has been rejected. *See* Secretary of Labor v. Farino, 490 F.2d 885, 888-89 (7th Cir. 1973). While it seems clear that review is available, the standing of some classes of potential plaintiffs is unclear. In the *Farino* case, the court said of *Braude* and *Cobb*: "[b]oth cases were decided before . . . *Data Processing* . . . and *Barlow*. We consider that their holdings are no longer tenable and will not be followed in the 5th and 9th Circuits in the future." *Id.* at 889. Nor is the standing of potential third-party plaintiffs clear. *Intercontinental* is the only case yet to consider it; no case has yet arisen where a third party, *e.g.*, a union, has attempted to prevent the issuance of a labor certification.

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

30. *Id.* at 543-44; *see* Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973) and cases cited therein.

31. *See* Pesikoff v. Secretary of Labor, 501 F.2d 757, 762 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974); *Proceedings* Note, *supra* note 4, at 925-34. Among the necessary functions accorded to the Secretary is prevention of circumvention of the law by employers through the inclusion in their job offers of purely personal preferences which are unnecessary to the performance of the job (*e.g.*, the household employee must live in the employer's home when a day worker could do the job adequately) or inflated qualifications tailored to the particular alien (*e.g.* an advanced degree for the performance of a job for which some lesser qualification is sufficient).

The legislative history of the Immigration and Nationality Act of 1965 indicates that it was designed not only to protect the American labor market, but also to improve the quality of immigration. Senator Edward Kennedy (D. Mass.), the principal Senate sponsor of the 1965 Immigration and Nationality Act, said "[t]he function of the Secretary is to increase the quality of immigration, not to diminish it below levels authorized by law." 111 CONG. REC. 24227 (1965).

32. A most glaring example occurs in Yong v. Regional Manpower Adm'r, 509 F.2d 243 (9th Cir. Jan, 1975), discussed more fully at text accompanying notes 40-48 *infra*.

33. A notable exception was Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973), where the Seventh Circuit suggested that if the trial court were unable to deter-

often found in agency hearing and recording procedures.[34]

Among the uncertainties reflected in the case law are: (1) the degree of the agency's discretion in determining which of the potential employer's job specifications are necessary to the performance of the job offered and which are mere personal preferences;[35] (2) the nature of the requisite proof of whether domestic workers are available and who should have to produce that proof;[36] and (3), when a court is confronted with an insufficient

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mine that the plaintiffs had received an adequate opportunity to be heard in the administrative review, it should remand the case to the agency and suggested procedures for the agency to follow on the remand to insure that plaintiffs received an adequate hearing. However, even though the court had found the hearing record inadequate, it made no suggestion that the agency improve its recording methods.

34. However adequate the hearing procedures, the courts would be hampered in their adjudication of appeals if the records of the hearing were inadequate. Contrarily, if the records were adequate and the procedures wanting, the courts would find their task of imposing and monitoring procedural improvements vastly simplified. The inconsistencies in the case law derive at least in part from the facts that both the procedure and the records have often been inadequate and that the courts have tended to respond on an ad hoc basis, *i.e.*, without an analysis of the fundamental inadequacy of the agency's processing of reviews and a direct attack on that problem through the requirement that the agency adopt and adhere to adequate hearing and recording procedures. The *Farino* court, discussed at note 33 *supra*, made a valuable initial step in the right direction; Yong v. Regional Manpower Adm'r, 509 F.2d 243 (9th Cir. Jan., 1975), completed the equation. It remains for the agency to implement the two courts' suggestions.

35. The case of Ozbirman v. Regional Manpower Adm'r, 335 F. Supp. 467 (S.D.N.Y. 1971), where the court asserted that "[t]he labor certification procedure was not designed to cater to the personal quirks of the employer . . . ," *id.* at 474, is the basis for the personal preference doctrine, whose premise is that the Secretary may set aside personnel requirements deemed unnecessary to the basic job which the prospective employer has offered. *See Proceedings* Note, *supra* note 4, at 925.

The courts have divided over the extent of the Secretary's discretion in applying the personal preference doctrine. The majority view, exemplified by Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974), and including Digilab, Inc. v. Secretery of Labor, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974), is that the Secretary may set aside only those requirements which are demonstrably unreasonable. The contrasting view, as expressed by the D.C. Circuit in Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), would concede discretion whenever the Secretary's labor market expertise indicates that the employer's requirement is irrelevant to the basic job to be performed. *Accord*, Seo v. United States Dep't of Labor, 523 F.2d 10 (9th Cir. Sept., 1975).

36. The question is whether the Secretary should have to prove the existence of currently available domestic workers to fill the job; the Secretary usually relies on local State Employment Service (SES) data, but such data does not necessarily accurately reflect either the skill or availability of the workers registered. *See* Secretary of Labor v. Farino, 490 F.2d 885, 890-91 (7th Cir. 1973). The Secretary has frequently been unmoved by claims that the employer has been unable to find a domestic worker to fill the job. In the view of the majority in Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), this recalcitrance is justified because section 212(a)(14) "set[s] up a presumption that aliens should not be permitted to enter the

agency record, the choice between conducting a trial de novo[37] or remanding the cause to the agency.[38] Clear and unequivocal resolution of any of these uncertainties depends inevitably on the maintenance of adequate records of the agency review proceedings so that the courts may concentrate on the substance of the review proceedings and not their form.[39]

In *Yong v. Regional Manpower Administrator*,[40] these record

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United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers." 501 F.2d at 761. *Accord*, Seo v. United States Dep't of Labor, 523 F.2d 10, 13 (9th Cir. Sept., 1975).

Since the majority in *Pesikoff* accepted the named plaintiff's contention that he had been unable to find a domestic worker to perform the job he wanted filled as evidence of "injury in fact" to establish his standing to bring suit, and since the majority upheld the Secretary's refusal to certify the alien worker, it follows that proof of inability to fill the job was insufficient to overcome the "presumption that aliens should not be admitted." As Judge MacKinnon observed, "the majority would have the employer carry the ultimate burden of persuasion . . . that it is impossible . . . to find an 'able, willing, and qualified' American worker— . . . [to] prove the existence of the non-existent, a sometimes difficult proposition." 501 F.2d at 771 (MacKinnon, J., dissenting).

The position of the majority of the courts, as exemplified by Ratyanake v. Mack, 499 F.2d 1207 (8th Cir. 1974), is that it constitutes an abuse of discretion (or alternatively, is not in accordance with law) for the Secretary to deny a labor certification without demonstrating on the record that the alien will displace an able, willing, qualified, and available domestic worker. *See Proceedings* Note, *supra* note 4, at 930 and materials cited therein.

37. In Citizens to Protect Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Supreme Court indicated that one of the two circumstances when a trial de novo is appropriate under section 10(e)(2)(F) of the APA, 5 U.S.C. section 706(2)(F), is "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate." *Id.* at 415.

38. The considerations affecting the choice between a trial de novo and a remand to the agency were articulated by the court in Secretary of Labor v. Farino, 490 F.2d 885, 891-93 (7th Cir. 1973), and the court concluded that even where the circumstances would justify a trial de novo, remand was to be preferred. Of five cases it listed, three had been remanded and two tried de novo. The reasoning of the *Farino* court has been accepted explicitly by the First Circuit in the *Digilab* case, discussed at note 35 *supra*, and implicitly by the Ninth Circuit in Yong v. Regional Manpower Adm'r, 509 F.2d 243 (9th Cir. Jan., 1975). The Ninth Circuit's decision in Seo v. United States Dep't of Labor, 523 F.2d 10 (9th Cir. Sept., 1975), is not to the contrary, for it was not resolved by a trial de novo but on the basis of a review of the record.

In *Digilab*, the trial court had found the agency's failure to establish that there were sufficient domestic workers available to Digilab not in accordance with law and had granted summary judgment to the plaintiffs only after the agency had asked for more time to file a responsive reply and then had failed to do so. Even so, the First Circuit instructed the trial court to remand the cause to the defendants "for a more specific factual basis for their decision." 495 F.2d at 327.

39. To date the Secretary has not amended the procedural rules to reflect the criticisms of the *Farino* court, discussed at note 33 *supra*, or the *Yong* court, discussed at text accompanying notes 40-48 *infra*.

40. 509 F.2d 243 (9th Cir. Jan., 1975) (per Hufstedler, J.).

keeping and review issues were directly confronted. The plaintiffs in *Yong* had been denied an alien employment certificate. At a subsequent review before an agency hearing officer they submitted documentary material and gave testimony to refute the Secretary's contention that available job market information, supplied by the California Department of Human Resources Development (HRD), indicated that certification was not warranted. Neither the details nor substance of the plaintiffs' presentation were recorded. Subsequently, denial of the certificate was upheld by a reviewing officer who had not been present at the original hearing. The decision of the reviewing officer indicated that he had relied upon information furnished by HRD, but gave no indication that he had considered the material presented by the plaintiffs.[41] The plaintiffs appealed and the district court granted summary judgment for the defendants.[42] The Ninth Circuit reversed,[43] finding that the record did not show that the agency had accorded the plaintiffs an opportunity to be heard in accordance with the hearing "procedure required by law."[44] On the basis of the inadequate record, said the court, "neither the district court nor we can determine whether the denial of certification was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' (5 U.S.C. section 706(2)(A)), or whether the agency decision 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' "[45] The Ninth Circuit ordered the cause remanded to the agency[46] with instructions to vacate the denial of the certificate and to conduct and record a new hearing consistent with requirements it outlined.

41. *Id.* at 245.

42. *Id.* at 244.

43. *Id.* at 246.

44. Administrative Procedure Act of 1946 § 10(e)(2)(D), 5 U.S.C. § 706(2)(D) (1970). Specifically, the court held that the plaintiffs had not had an opportunity to "challenge the record on which the initial denial [was] predicated," 509 F.2d at 246, which opportunity it found implied in 29 C.F.R. section 60.4(c)'s requirement that the challenging party "set forth the particular grounds on which the request [for review] is based." *Id.* Furthermore, observed the court, "the opportunity to respond is meaningless if the reviewing officer . . . has no obligation to consider [the applicant's response] in reaching his decision." *Id.*

45. 509 F.2d at 246, *citing* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

46. In ordering the cause remanded to the agency, the court implicitly rejected the possibility of a trial de novo in the district court, which, the court's analysis implies, would be appropriate under the criteria prescribed in *Overton Park*, discussed at note 37 *supra*.

While the court did not require the agency to adopt a particular form of hearing or recording, it did specify what the record must show in order to establish that the hearing had been governed by the "procedure required by law." The record must adequately reveal: "(1) the foundation for the original denial of certification, (2) the substance of the relevant documentary evidence and oral information . . . presented . . . in response, (3) the transmittal of that information to the reviewing officer who made the decision, and (4) the receipt and consideration of that record by the reviewing officer before he decides."[47] The requirement that the record reveal this sequence of proceedings implies, of course, that this sequence is necessary to the conduct of a procedurally sufficient hearing.

The significance of the Ninth Circuit's action in the *Yong* case extends beyond the alien labor certification program and beyond the compass of informal agency adjudication in general; the *Yong* holding is applicable to any mundane agency decision-making process which is potentially injurious to specific persons.[48] It is profitable to read *Yong* in light of other relevant decisions. The District of Columbia Circuit has used the requirement that an agency formulate findings, reasons and opinions in support of its informal actions as a means of monitoring the exercise of agency discretion in a variety of cases in which such findings were not required by statute.[49] In *Camp v. Pitts*,[50] the Supreme Court vacated a decision of the Fourth Circuit that a trial court, when confronted with an inadequate agency justification for a contested

47. 509 F.2d at 246.

48. The District of Columbia Circuit, in Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), said:

> Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review where judicial review is sought.

Id. at 598 (footnote omitted). Obviously, such findings will be of use only insofar as they are recorded in transmissible form. The D.C. Circuit's remark was subsequently given added relevance by the decision of the Supreme Court in the *Overton Park* case, discussed at note 37 *supra*, which significantly restricts the applicability of section 10 of the APA, 5 U.S.C. section 701(a)(2), which exempts from judicial review "agency action . . . committed to agency discretion by law," thus increasing the range of administrative action subject to judicial review. Significantly, the Supreme Court in *Overton Park* authorized the trial court to require the Secretary to make such additional submissions as would be necessary to enable the district court to review the "full administrative record" of the decision-making process. 401 U.S. at 420.

denial of permission to open a new bank, should conduct a trial de novo. The Supreme Court stated that the appropriate course was "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary."[51] Taken in the context of these cases, the solution adopted by the *Yong* court may be seen as paradigmatic for a wide range of agency actions which are not governed by the APA's rulemaking or adjudication procedures,[52] but are reviewable[53] and recur frequently enough to require routinized treatment. To require agencies to establish regular decision-making procedures and to keep records of the basis for every decision would be inefficient and unduly burdensome; to limit procedural and record-keeping requirements to those decisions which are covered by the procedural requirements of the APA would be to leave the majority of decisions to the vagaries of agency convenience. The solution adopted in *Yong* takes advantage of the most efficient means available to the courts[54] of insuring procedural due process while interfering as little as possible with legitimate exercise of agency discretion.

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49. *See* Air Line Pilots Ass'n, International v. Civil Aeronautics Bd., 475 F.2d 900 (D.C. Cir. 1973) (possible failure of CAB to consider adverse affects on airline employees of CAB proposed approval of industry agreement to cut back service), *cert denied*, 420 U.S. 972 (1975); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (agency approval of state air pollution control plans). The Court of Appeals for the First Circuit adopted a similar position in National Resources Defense Council, Inc. v. Environmental Protection Agency, 478 F.2d 875 (1st Cir. 1973).

50. 411 U.S. 138 (1972).

51. *Id.* at 143.

52. These procedures are codified at 5 U.S.C. §§ 553-54 (1970).

53. That is, are not "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1970).

54. Perhaps the most potent criticism of the alternative of trial de novo is that it does absolutely nothing to correct agency procedure.