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Alien Labor Certification

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Note: Alien Labor Certification

American employers confront a myriad of legal barriers in attempting to recruit foreign personnel. Chief among these is the Immigration and Nationality Act,¹ which requires an employer to "hire American" unless domestic workers are not "able, willing, qualified and available" to fill an open position.² Concomitant to the legislative goal of first employing qualified American workers,³ however, is the objective of assimilating needed alien labor.⁴ These dual goals present the obvious problem of balancing the national interest in full employment with industry's need to fill job positions with qualified workers.⁵ The Department of Labor, primarily charged with administering this aspect of the statute,⁶ has not been entirely successful in accommodating these dual goals. Judicial decisions reviewing agency denials of certification to alien workers desiring to immigrate reveal that such decisions are often made on the basis of inadequate or irrelevant data;⁷ that the Department often disregards employer-specified job qualifications in order to find "available" American workers;⁸ and that the Department has not developed a systematic set of criteria by which to analyze employment needs.

Given that the Department of Labor has not been fully successful in achieving the goals of the Act, secondary responsibility for ensuring that the congressional objectives are achieved falls on the judiciary. The federal courts, however, have likewise

1. 8 U.S.C. § 1101 *et seq.* (1970).

2. 8 U.S.C. § 1182(a) (14) (A) (1970).

3. Senator Fong stated during debate that the bill was designed for the "protection of the American economy and the wages and working conditions of American Labor." 111 Cong. Rec. 24463 (1965).

4. Senator Joseph S. Clark stated during debate on the bill: "Our present laws actually deprive us of the contributions of brilliant, accomplished, and skilled residents of foreign countries who want to bring their talents here—and who would not displace American citizens because of the great need we have here for their unique skills." 111 Cong. Rec. 24500 (1965).

5. *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323, 326 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974).

6. 29 C.F.R. § 60 (1975).

7. See notes 37-47 *infra* and accompanying text.

8. See notes 53-61 *infra* and accompanying text.

not totally fulfilled their obligation.⁹ Although judicial power to review agency decisions is limited to determining whether the Secretary's actions have been arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with the law,¹⁰ the courts may, under this standard, require a record based on adequate data¹¹ and, by construing the statute, enunciate guidelines which the Department must use in ruling on future immigration applications.¹² The courts have not done so, however, but rather have rendered ad hoc decisions based on the apparent equities of the cases. Uniformity and systemization in applying the statute are needed to ensure that similarly situated aliens are treated equally, to allow planning by domestic employers in need of labor, and to facilitate departmental decision-making in a manner that achieves the intended balance between the dual objectives of the Act.

In Part I this Note briefly examines the history and provisions of the Act. In Part II it surveys cases involving challenges

9. See notes 78-81 *infra* and accompanying text.

10. Neither the Immigration and Nationality Act of 1952 nor the 1968 amendments thereto specifically provide for appeal to the courts from decisions of the certifying officer. *Ratnayake v. Mack*, 499 F.2d 1207, 1209 (8th Cir. 1974). Courts agree, however, that there is no clear and convincing evidence that Congress intended to deny employees judicial review. *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973); *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974). Certification decisions uniformly have been held not to fall within section 701(a)(2) of the Administrative Procedure Act, which exempts from judicial review action "committed to agency discretion." 5 U.S.C. § 701(a)(2) (1970); *Farino, supra* at 888. The "able, willing, qualified, and available" criterion constitutes the "law to apply," providing the courts with a reviewable standard consistent with judicial construction of the Administrative Procedure Act in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). *Farino, supra* at 888-89. Thus courts, regardless of statutory authorization, are permitted under section 706 of the Administrative Procedure Act to set aside decisions found to be arbitrary, capricious, an abuse of discretion or otherwise inconsistent with the law. 5 U.S.C. § 706 (1970). *Ratnayake, supra* at 1210; *Farino, supra* at 889-90. See also *Naporano Metal & Iron Co. v. Secretary of Labor*, 529 F.2d 537 (3d Cir. 1976). Under this standard the labor department's decision is entitled to a presumption of regularity, but the court must engage in a "substantial inquiry" to determine whether the certification decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, supra* at 416. *Accord, Farino, supra* at 889-90. While the court has power either to conduct a trial *de novo* or remand for further agency proceedings, remand to the agency has been considered the better practice. *Id.* at 891-92.

11. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 16.00-6 (1976).

12. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

to agency decisions based on inadequate or irrelevant data. That section concludes by suggesting means by which the judiciary can minimize such decisions. Part III reviews cases dealing with agency decisions denying immigration to aliens in disregard of job qualifications specified by their prospective employers and not possessed by the available American work force. It concludes by suggesting that the courts have failed to establish standards consistent with the objectives of the Act to guide the agency in determining when to prefer American over alien workers although the latter are to some extent better qualified for the position in question. Then, in Part IV, it outlines the specific components of an appropriate set of standards for so guiding the agency. Part V briefly points up the importance of a complete agency record to the courts' performance of their review function.

I. THE IMMIGRATION AND NATIONALITY ACT

The abandonment by the United States of its isolationist foreign posture after World War II prompted Congress to revise its restrictive immigration laws by enacting the Immigration and Nationality Act of 1952.¹³ Statutes in effect since the early 1920's had discriminated against certain nationalities by means of immigration quotas¹⁴ and had barred all foreign laborers

13. Act of June 27, 1952, Pub. L. No. 477, ch. 477, 66 Stat. 163.

14. The trend toward limiting immigration culminated between 1917 and 1924. In 1917, Congress, in comprehensively revising the immigration law, created an Asiatic Barred Zone that excluded all Orientals except Japanese, who were governed by an intergovernmental gentlemen's agreement. The immense backlog of prospective immigrants that accumulated during World War I and depressed economic conditions in post-war Europe caused immigration to rise from 110,000 in 1919 to 805,000 in 1921. To stem this influx, Congress passed the Quota Law of 1921, Act of May 19, 1921, Pub. L. No. 5, ch. 8, § 2(a), 42 Stat. 5, restricting annual immigration to three percent of the United States population of foreign-born residents. Although approximately 350,000 aliens could enter annually under this law, each country's quota was based on the number of its nationals in the United States in 1910. Thus, quotas overwhelmingly favored northern and western European immigrants. Legislation in 1924 eventually established a system that restricted immigration to only 150,000 immigrants per year. Act of May 6, 1924, Pub. L. No. 139, ch. 190, § 11(a), 43 Stat. 153. This Act based national quotas on the origins of the entire white population of the United States in 1920, rather than on the foreign born, thereby further enhancing the position of northern and western Europeans. Moreover, it in effect reduced immigration below 150,000, for northern Europe failed to fill its quotas. 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 1.2(c), at 1-10 to 1-11 (1976) [hereinafter cited as GORDON & ROSENFELD].

seeking entry to perform employment contracts with American employers.¹⁵ While concern for internal security during the McCarthy era obscured the discrimination issue,¹⁶ the Immigration and Nationality Act replaced the contract labor laws with a procedure whereby the Secretary of Labor excluded only those immigrants bound for areas where no demand existed for their occupational skills.¹⁷ The Act empowered the Secretary to

15. Until the late 19th century the United States actively encouraged immigration to meet the manpower needs produced by westward agricultural expansion and general industrial growth. In 1882 the Chinese Exclusion Act, Act of May 6, 1882, ch. 126, 22 Stat. 58, was passed in response to fears that the uncontrolled importation of Chinese workers would deprive Americans of jobs. GORDON & ROSENFELD, *supra* note 14, § 1.2(b) at 1-7 to 1-8. A more dramatic attempt to limit the accessibility of foreign labor came with the Contract Labor Act of 1885, Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, which prohibited employers from bringing in workers under contract by advancing money for their passage and collecting it in installments from their wages. Similar acts were in effect at various times until 1952. Typical was the Act of 1917, Act of Feb. 5, 1917, Pub. L. No. 301, ch. 29, 39 Stat. 874, which defined contract laborers as persons "induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment. . . ." *Id.* § 3. The statute made violation a criminal offense punishable by a \$1000 fine. *Id.* § 5.

16. Among the purposes of the Immigration and Nationality Act of 1952 stated in the Senate report were:

- (1) A system of selective immigration within the national origins quota system is established geared to the needs of the United States.
- (3) More thorough screening, especially of security risks, is provided.
- (5) The exclusion and deportation procedures are strengthened.
- (6) Naturalization and denaturalization procedures are strengthened to weed out subversives and other undesirable from citizenship.

S. REP. NO. 1137, 82d Cong., 2d Sess. 3 (1952). The Act was "assailed as an 'affront to the conscience of the American people', 'worthy of Stalin and not of America', a 'nefarious discriminatory measure', a betrayal of 'our American traditions', and a 'bacchanalia of meanness'." Wasserman, *The Immigration and Nationality Act of 1952—Our New Alien and Sedition Law*, 27 TEMP. L.Q. 62, (1953) (footnotes omitted). In defense of the Act, supporters asserted that its provisions were necessary to prevent infiltration of subversives into the United States. In addition, they attacked opposition to the bill as communist propaganda. *Id.* at 79. Congress narrowly passed the Act over a presidential veto. *Id.*

17. By 1952 the contract labor legislation had become obsolete. The American worker's protections had been enhanced by the growth of the labor union movement and the advance of social legislation. Moreover, there was a manpower shortage in this country, and a need for workers in many areas. In addition, from the point of view of the immigrant's favorable integration into the American economy, it was deemed desirable for new

deny admission by certifying to the Secretary of State that there was no shortage of "available" domestic workers "able, willing and qualified" for the immigrant's intended employment; or that admission of aliens would detrimentally affect the wages and working conditions of similarly employed Americans.¹⁸ Failure by the Labor Department to monitor the numbers and occupations of incoming aliens, however, resulted in the issuance of few such certifications.¹⁹ In 1963, because of the resulting contrast between the virtually unregulated influx of aliens from countries with high or no quotas, and the highly restricted immigration from countries with low quotas, President Kennedy proposed the elimination of the discriminatory national origins quota system.²⁰ Organized labor refused to endorse this proposal, fearing

immigrants to come for employment, even if that employment was prearranged.

GORDON & ROSENFELD, *supra* note 14, § 2.40 at 2-193.

18. The Act of June 27, 1952, Pub. L. No. 477, ch. 477, § 212(a) (14), 66 Stat. 182-83 provides:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

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

19. Under the 1952 certification procedure as implemented by the Department of Labor, the Secretary received reports of concentrated immigration from a foreign locale to a particular region of the United States only when twenty-five or more applications for certification were received from a single American employer at one consular office, or when Americans who believed they were being replaced by aliens contacted the labor department. This procedure was easily circumvented, since an employer could submit a large number of applications for alien workers by distributing them in groups of less than twenty-five to various consulates, and aliens could immigrate to a nearby area and seek employment in the locality from which they were technically excluded. Weber, *The Role of the U.S. Department of Labor in Immigration*, 4 INT'L MIGRATION REV. 32 (1970), cited in Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245, 253 (1974). The first exclusion under the 1952 provision occurred in 1957; between that year and 1961 only six certifications to exclude were issued. A total of 56 certifications were issued in the eight-year period between 1957 and 1965. Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245, 252-53 (1974) [hereinafter cited as Rodino]. See generally *Developments in the Law—Immigration and Nationality* 66 HARV. L. REV. 643 (1953).

20. On July 23, 1963, President Kennedy submitted to Congress a

that the abolition of existing quotas without reform of the ineffectual certification procedure would result in flooding the American job market with foreign workers.²¹ In amending the 1952 Act to abolish the quota system,²² therefore, Congress also revised the certification procedure. Instead of admitting all aliens except those certified as unnecessary or detrimental, section 212(a) (14), as amended, provides for the exclusion of immigrants²³ unless the Secretary of Labor certifies to the Depart-

comprehensive program for revising the immigration laws. His major proposals included the abolition of the national origins quota system and of discrimination against Asians. He recommended the allocation of immigrant visas on a first come, first served basis subject to preferences for relatives of United States citizens and for aliens with special skills. President Johnson pressed for the adoption of these reforms, and as a result the national origins quota system was abolished in 1965. GORDON & ROSENFELD, *supra* note 14, § 1.4(c) at 1-24.

21. The bill originally introduced by the Johnson Administration differed from the amendment to section 212(a) (14) ultimately adopted, in that the former included a provision placing administration of the labor certification procedure in the hands of the Immigration Board. Willard Wirtz, then Secretary of Labor, testified before both the House and Senate Judiciary Committees that there were "complete protections . . . to safeguard against any abuse or weakening of the work force. . . . The people coming in under this bill will find opportunity in the work force, and they will do it not at the price of any disadvantage to people presently in this country." *Hearings on S. 500 Before a Subcomm. of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. I, at 92 (1965), cited in Rodino, *supra* note 19, at 254. Organized labor, however, did not agree. They feared an influx of aliens and displacement of American workers due to the liberal provisions replacing the national origins quota system and the preferred status accorded to relatives of American citizens. Congress's willingness to respond to this apprehension stemmed from the failure of the bill to provide a ceiling on immigration from the western hemisphere, Rodino, *supra* note 19, at 254-55, although a ceiling of 170,000 visas had been established for the eastern hemisphere. The final version of the bill mollified labor by vesting responsibility for administration in the Secretary of Labor and in setting a ceiling of 120,000 visas on immigration from the western hemisphere. Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. During the Senate debate Senator Kennedy, a sponsor of the bill, stated that "this measure has the complete support of the AFL-CIO. . . ." 111 Cong. Rec. 24228 (1965).

22. The 1965 Act ended the national origins quota system as of June 30, 1968, abolished immigration restrictions governing Orientals, and prohibited discrimination in immigration procedures because of race, sex, nationality, place of birth or place of residence. Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. The Act establishes worldwide immigration quotas for areas outside the western hemisphere at 170,000 visas annually, but places a limit of only 20,000 visas on aliens from any single foreign nation. GORDON & ROSENFELD, *supra* note 14, § 14(c) at 1-24 to 1-27.

23. Labor certification is not a prerequisite for the admission of most aliens into the United States. See Rodino, *supra* note 19, at 265-

ment of State and the Immigration and Naturalization Service that there are not sufficient workers in the United States who are "able, willing, qualified and available" at the time and place of intended employment, and that admission of an alien will not adversely affect wages and working conditions of similarly employed workers in the United States.²⁴ By inverting the cer-

68. The high priority placed on family reunification by the 1965 amendments resulted in a variety of exemptions for parents, spouses and children of United States citizens and permanent resident aliens. *Id.* at 249 & n.17. The labor certification provision applies to four classes of aliens immigrating for the purpose of performing labor:

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

(2) Third preference immigrants, described as "qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." 8 U.S.C. § 1153(a) (3) (1970).

(3) Sixth preference immigrants, described as "qualified immigrants who are capable of performing specified skilled or unskilled labor not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." 8 U.S.C. § 1153(a) (6) (1970).

(4) Nonpreference immigrants, described as "other qualified immigrants strictly in the chronological order in which they qualify."

8 U.S.C. § 1153(a) (8) (1970).

The provision does not apply to migrant workers, classified as "nonimmigrant" persons entering to perform labor of a temporary or seasonal nature, or to commuter aliens, foreign citizens maintaining a home in Canada or Mexico and crossing the border to work. The former are covered by a separate provision of the Immigration and Nationality Act. 8 U.S.C. § 1101(a) (15) (H) (ii) (1970). See *Elton Orchards v. Brennan*, 508 F.2d 493 (1st Cir. 1974). The legal status of the latter group was the subject of controversy until the recent Supreme Court decision in *Saxbe v. Bustos*, 419 U.S. 65 (1974) (commuter's status held to be that of a permanent resident alien, thus exempt from the usual requirements of documentation and labor certification).

24. Section 212(a) (14) currently provides:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States.

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States simi-

tification procedure to require an affirmative determination for each applicant of the labor market in a given geographical area,²⁵ the section was intended to ensure that the numbers and occupations of incoming aliens would be continually monitored.²⁶ The congressional objective was to permit controlled assimilation of aliens into the work force to satisfy employment needs,²⁷ while simultaneously protecting American labor from an unregulated influx of foreign workers.

The regulations promulgated under section 212(a)(14)²⁸ in essence provide for three classes of potential immigrants. Immigrants in two of these classes are allowed admittance or excluded according to Department of Labor schedules which reflect nationwide or regional shortages or surpluses of workers in particular occupations.²⁹ The third class, with which this Note is

larly employed.

8 U.S.C. § 1182(a)(14) (1970).

25. S. REP. NO. 748, 89th Cong., 1st Sess. 15 (1965).

26. Arnold Weber, former Assistant Secretary of Manpower, acknowledging lack of notification of the numbers and occupations of incoming aliens as a primary problem with the 1952 provision, emphasized that the 1965 legislative amendments should "by placing responsibility on the intending immigrant or his prospective employer, permit scrutiny of each application for alien employment individually and in advance of entry." Weber, *The Role of the U.S. Department of Labor in Immigration*, 4 INT'L MIGRATION REV. 32, 32-33 (1970).

27. During the Senate debate Senator Joseph S. Clark stated: "[T]he bill before us offers even more protection to American workers, while at the same time encouraging skilled and talented people to move to the United States." 111 CONG. REC. 24500 (1965).

28. See 29 C.F.R. § 60 (1975).

29. To facilitate processing of requests for labor certification, the Secretary of Labor has promulgated two schedules: Schedule A, a list of occupations for which workers are in short supply on a nationwide or regional basis, and Schedule B, a list of occupations for which there is a surplus of workers on a nationwide or regional basis. 29 C.F.R. § 60.7 (1975) *as amended*, 41 Fed. Reg. 8954, 12654 (1976). At present Schedule A is limited to health science professions and clergy, while Schedule B includes such unskilled jobs as parking lot attendants, cashiers, clerks, porters and receptionists. *Id.* Aliens under Schedule A are eligible for certification without a job offer or review of their application by the Labor Department. Applications of aliens under Schedule B are summarily rejected by immigration personnel without involvement of the Labor Department. 29 C.F.R. § 60.3(a) (1975). See Rodino, *supra* note 19, at 257. Although their occupations do not appear in Schedule A, aliens who qualify as professionals or who possess exceptional ability in the sciences or arts may be certified without a specific job offer. 29 C.F.R. § 60.3(b) (1975). Where such preference status is requested the alien must submit a documented qualifications of alien form. A consular officer reviews and forwards the form to the Immigration and Naturalization Service, which, upon determining that the alien qualifies as a professional or as possessing exceptional ability in the arts

concerned, includes aliens who have job offers but whose occupations are not included in either of the two schedules.³⁰ In their case an individual certification proceeding is required. The prospective employer must apply³¹ to the regional certifying officer for the area of intended employment.³² That officer decides whether to certify a labor shortage on the basis of information submitted by the state employment service bureau³³ and

or sciences, forwards it to the Manpower Administration for the area of the alien's intended residence so that a certification determination may be made. *Id.*

30. Aliens whose occupations are not included in Schedule A or B and who do not qualify as professionals or persons with exceptional ability in the arts or sciences must have a specific job offer to receive certification. The apparent rationale for this distinction is that professionals and others with exceptional skills will not seek to compete with unskilled Americans for jobs. See *Butterfield v. Attorney General of the United States*, 442 F.2d 874 (D.C. Cir. 1971). Since members of some professions, notably law, must receive extensive re-education before being allowed to market their skills, and might seek unskilled employment in the interim, this assumption is dubious.

31. The prospective employer must file a Statement of Qualifications of Alien, a Job Offer for Alien Employment and, if the alien is to live at the place of employment, a documented Supplemental Statement for Live-At-Work Job Offers. The qualifications of alien statement, completed by the prospective immigrant, provides for a description of the alien, his job qualifications, and his intended area of residence. The Job Offer for Alien Employment, completed by the prospective employer, provides for a description of the alien's prospective living and working conditions. 29 C.F.R. § 60.3 (1975). These are filed at the office of the state employment agency in the area where the alien will be employed.

32. 29 C.F.R. § 60.4(a) (1975). The Manpower Administration, a subdivision of the Department of Labor, has 12 regional offices, each headed by a Regional Manpower Administrator. The Assistant Regional Director for Manpower appoints the certifying officer, who works with the local offices of the state employment service. This high degree of decentralization is intended to promote responsiveness to the peculiar needs of local labor markets. Rodino, *supra* note 19, at 256.

33. The majority of Manpower Administration programs are run through the Employment Security Agency, which is composed primarily of state agencies receiving grants from the labor department. Contact between the labor department and the state agencies occurs at the regional level of the Manpower Administration. Regional officers visit the state agencies to provide technical assistance and aid in understanding guidelines promulgated by the labor department. *Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 8, at 197-98 (1973). The types of information forwarded by state agencies to the Manpower Administration varies with the state agency collecting the information and the regional manpower office requesting it. Generally, state employment service procedures include checks of registered applicants for employment, monitoring of advertising and of completion dates of state and federal training programs, contacts with unions and professional organizations, review of employer

any other pertinent data available to the regional Manpower Administration office.³⁴ Although the certifying officer receives some guidance from Department of Labor regulations as to what is deemed not to adversely affect domestic "wages" or "working conditions,"³⁵ the regulations provide no guidance for determining when American workers satisfy the statutory "able, willing, qualified and available" standard so as to preclude certification of a labor shortage and entry by prospective immigrants.³⁶

II. CERTIFICATION DECISIONS BASED ON INADEQUATE DATA

Any certification decision necessarily rests on empirical data reflecting the availability and qualifications of American workers. If both optimal employment of American workers and admission of needed alien workers are to be attained, certification decisions must be based on pertinent, accurate data. Judicial response to claims that the Secretary has denied certification on the basis of inadequate data has been overwhelmingly adverse

layoff plans, and contacts with other established recruiting services. GORDON & ROSENFELD, *supra* note 14, § 3.6(b) (4) at 3-44.2.

34. 29 C.F.R. § 60.3(c) (1975). Other applicable data include occupational information and general local employment information available to the Labor Department from professional societies, trade associations, labor unions, and employer recruitment efforts. GORDON & ROSENFELD, *supra* note 14, § 3.6(b) (4) at 3-44.1.

35. The regulations promulgated by the Secretary under section 212 (a) (14) (B) list factors defining "adverse effect." These regulations provide an explanation of several means of computing prevailing wages, 29 C.F.R. § 60.6(a) (1975), the requirement that the employment include "the furnishing of fringe benefits that prevail for United States workers similarly employed in the area of employment," *id.* at § 60.6(b); the requirement that the employment be in "adherence to prevailing working conditions including customs in the area of employment regarding the furnishing of board, lodging and other facilities," *id.* at § 60.6(c), a stipulation that the employment does not involve strike or lockout vacancies resulting from a labor dispute, *id.* at § 60.6(d), a provision that there be no discrimination relating to "race, creed, color, national origin, age or sex," *id.* at § 60.6(e), and a provision that neither the terms or conditions of employment violate federal, state or local law, *id.* at § 60.6(f).

36. 29 C.F.R. § 60.1 (1975), a regulation generally establishing the purpose and scope of the labor certification procedure as viewed by the labor department, characterizes the Secretary's role as determining "that qualified U.S. workers are not available and that [the alien's] employment will not adversely affect wages and working conditions of the workers in the United States similarly employed." The regulations fail to elaborate further the labor department's understanding of "qualified" and "available". No guidance is provided for determining the willingness of domestic workers to accept the proffered job.

to the agency. In *Bitang v. Regional Manpower Administrator*,³⁷ for instance, the federal district court criticized a certifying officer's reliance on communications from the Illinois State Employment Service that Americans seeking employment in the aliens' professions had registered with its office.³⁸ Reviewing a decision refusing entry to several foreign accountants and auditors, the court held that the determination required more than "blind and unquestioning acquiescence in a state agency's ultimate conclusions."³⁹ The court's primary objection was that there was nothing beyond a bare record of statistics to indicate that the state employment service, in reaching its conclusion, had utilized the federal standard of "able, willing, qualified and available."⁴⁰

In *Yusuf v. Regional Manpower Administrator*,⁴¹ a district court reviewed a denial of certification to a doctoral candidate who was residing in this country under a student visa and wished to teach here after obtaining his degree.⁴² The court acknowledged that the regional labor market statistics indicated an oversupply of employable persons in the category of "faculty member," which included all teaching positions in higher education, but held that such data failed to demonstrate the availability

37. 351 F. Supp. 1342 (N.D. Ill. 1972).

38. *Id.* at 1344. It is the policy of the labor department in making certification determinations to consider a domestic worker who has registered with the state employment service as "able, willing, qualified and available" to perform the type of work he has specified. A certification will not be issued if the data forwarded to the certifying officer by the state agency contains a statement that Americans have listed with its office for employment in the occupational category corresponding to that of the alien applicant. *Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 8, at 174 (1973).

39. 351 F. Supp. 1342, 1345 (N.D. Ill. 1972).

40. The court indicated that a different result would follow if the number of persons listed with the state employment service was so large as to permit a reasonable finding of availability even assuming that some persons listed falsified their qualification, left the area, or were no longer unemployed. *Id.*

In *First Girl, Inc. v. Regional Manpower Adm'r.*, 361 F. Supp. 1339 (N.D. Ill. 1973), *aff'd*, 499 F.2d 122 (7th Cir. 1974), stenographers referred to plaintiff employer by the state employment service flunked office skills tests. In addition, one indicated that she only interviewed for the job to avoid forfeiture of her unemployment benefits. The court held that absent a showing that American stenographers listed by the state employment service were in fact qualified and were still "available" and willing to work for an employer engaged in placing secretaries in various offices on a temporary basis, certification of alien secretaries could not be denied. *Id.* at 1341.

41. 390 F. Supp. 292 (W.D. Va. 1975).

42. *Id.* at 293.

of instructors in the alien's area of specialization, foreign affairs.⁴³

In *Golabeck v. Regional Manpower Administration*,⁴⁴ the court reversed the decision to exclude a prospective immigrant seeking a position teaching parochial school. Since no applicant had actually submitted the proper credentials, none of the unemployed teachers residing in the area was considered "willing" to accept the job for which the alien applied; the certifying officer had found qualified and available applicants, but no evidence indicated the ability and willingness to instruct in a religious setting.⁴⁵ In *Reddy, Inc. v. United States Department of Labor*,⁴⁶ the court held that denial of certification to an engineering design specialist in light gauge metal applying for a job in Texas was "patently insufficient" because the decision was made on the basis of a California listing of engineers.⁴⁷

Although the preceding cases demonstrate a willingness on the part of the judiciary to overturn denials of certification on

43. *Id.* at 296. In *Digilab, Inc., v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974), the employer, engaged in design, production, and sale of analytical biomedical instrumentation, requested certification of an alien possessing specialized engineering training. Certification was denied on the basis of information that 200 American "electrical engineers" were available. The court reversed, stating that "[e]lectrical engineers" in this age of intense specialization is far too generic a term in determining whether any of them are qualified in the particular field required by Digilab." *Id.* at 326. In *Ozbirman v. Regional Manpower Adm'n.*, 335 F. Supp. 467 (S.D.N.Y. 1971), however, the court refused to require that the category "tailor" be subdivided to allow for specialties. It concluded that the Secretary need only make a generalized inquiry into the labor market to determine whether persons with the threshold qualifications were available for the job. *Id.* at 473.

44. 329 F. Supp. 892 (E.D. Pa. 1971).

45. *Id.* at 895. Some insight into the labor department's lack of concern that workers be "willing" is found in the answer of former Assistant Secretary of Labor for Manpower, Stanley Ruttenberg, to the question whether concern was being given to congressional intent to make relevant the will to engage in the particular employment:

You can interpret the word 'will' in two different ways. One would argue if they are not willing voluntarily to do it. Therefore there is a shortage of that occupation and therefore you ought to permit immigration to occur or you could say the word "will" really means that they don't have a choice, they will work at it, not voluntarily, but they must work at it. So it depends on how it is interpreted.

Hearings on Immigration Before a Subcomm. of the House Comm. on the Judiciary, 90th Cong., 2d Sess. at 133 (1968), quoted in Rodino, *supra* note 19, at 260.

46. 492 F.2d 538 (5th Cir. 1974).

47. *Id.* at 544.

the ground that the data supporting the denials fails to demonstrate the presence of "able, willing, qualified and available" American workers, the decisions do not provide any general guidance as to what showing the agency must make. While the accuracy of the data does not in and of itself dictate that certification should be granted or denied, accuracy is a necessary prerequisite to a reasoned decision. It is unrealistic to assume that the labor department must undertake the function of an employment agency,⁴⁸ but it must also be recognized that the quality of the decisions can be no better than the data underlying them. Federal courts should thus require that each certification decision specify the following: 1) the precise job opening available, including a description of the type of work to be done; 2) any information relating to working conditions or the nature of the employer which might dissuade a substantial number of American workers from accepting employment; 3) a precise description of the state agency information or other employment data relied upon, including a statement of the scope and nature of jobs encompassed by any given employment statistic; 4) the precise meaning of the data relied on,—whether, for instance, statistics reflect mere indications of interest in such employment or workers actually and presently available; and 5) geographical labor market considerations and the probabilities that prospective employees will be willing to relocate. A requirement that the record of the certification proceeding contain the above infor-

48. The Senate and House Reports of the amendment to section 212 (a) (14) state: "The Department of Labor should have no difficulty in adapting to this new procedure in as much as the Department, through its Bureau of Employment Security and affiliated State Employment Service agencies, presently determines availability of domestic workers and the standards of working conditions. There is no apparent need to increase facilities." H.R. REP. NO. 745, 89th Cong., 1st Sess. 14 (1964); S. REP. NO. 748, 89th Cong., 1st Sess. 15 (1965). Senator Kennedy's comments during debate indicate, however, that the rationale for not expanding facilities was not an intent that routinely collected general data would suffice, but an assumption that there would be enough clear-cut cases to permit in-depth investigation of other applications. He stated:

We know that the Department of Labor maintains statistics on occupations, skills, and labor in short supply in this country. Naturally, then, any applicant for admission who falls within the categories should not have to wait for a detailed study by the Labor Department before his certificate is issued. On the other hand, there will be cases where the Secretary will be expected to ascertain in some detail the need for the immigrant in this country under the provisions of the law. . . . The 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).

mation has much to commend it.⁴⁹ It will greatly facilitate appeal from denials of certification by clearly revealing to both the petitioner and the court the data underlying the decision.⁵⁰ Moreover, it will to some extent force the certifying officer to articulate how the data was utilized in reaching a given determination, a process which should contribute to both the fairness and consistency of such decisions.⁵¹

III. JUDICIAL REVIEW OF DENIALS OF CERTIFICATION BASED ON DISREGARD OF EMPLOYEE JOB QUALIFICATIONS

Several recent cases reveal that decisions denying certification are often reached by disregarding job qualifications specified by the employer.⁵² By disregarding specific job requirements, the certifying officer is able to find that American workers are "able, willing, qualified and available," even though such workers only approximate the type of worker desired by the employer. Judicial response to this practice has been varied.

In *Pesikoff v. Secretary of Labor*,⁵³ the plaintiff, a child psychologist, and his wife, a law student, sought a live-in domestic to care for their household and preschool children. The labor department refused certification on the basis of state employment data indicating over 100 maids available for work, although none was willing to live in. Reading section 212(a)(14) as designed primarily to protect American labor, the Court of Appeals for the District of Columbia upheld the Secretary's finding that the live-in requirement was a "personal preference" irrelevant to whether domestic workers were "able, willing, qualified and available" to perform the job.⁵⁴ The court fortified

49. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 16.05 & 16.12 (1958).

50. *Id.*

51. *Id.*

52. See *Acupuncture Center of Washington v. Brennan*, — F.2d — (D.C. Cir. 1976); *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974); *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974).

53. 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974).

54. *Id.* at 762. In *Ozbirman v. Regional Manpower Adm'n*, 335 F. Supp. 467 (S.D.N.Y. 1971) the court, in upholding a denial of certification to a tailor, held that the Secretary need make only a generalized inquiry into market conditions to determine whether Americans with "threshold" qualifications could be located. The court stated in dictum that the "labor certification procedure was not designed to cater to the personal quirks of an employer." *Id.* at 474.

this position by holding that the statute created a presumption against entry,⁵⁵ placing the burden of proving lack of suitable American workers on the alien and his employer.⁵⁶

In *Ratnayake v. Mack*,⁵⁷ the Court of Appeals for the Eighth Circuit viewed the statute as conferring on the Secretary a limited power to modify job descriptions.⁵⁸ The Secretary of Labor had denied the applications for alien labor certification of two teachers trained at Montessori schools, on the grounds that there was a surplus of unemployed and underemployed college educated American teachers who could easily be trained

55. The court emphasized that prior to the 1965 amendments section 212(a) (14) was structured to permit entry unless the Secretary of Labor certified that there were sufficient American workers available or that the employment of the aliens would adversely affect wages and working conditions of American workers. The court concluded that by restructuring the provision to exclude such aliens unless the Secretary certified that there were not sufficient American workers, Congress "intended to reverse the prior presumption favoring admission to strengthen the protection of the American labor market. . . ." 501 F.2d at 761-62.

56. The court concluded that the structure of the statute, see note 55 *supra*, and the presumption it creates, indicate that "if the Secretary's consultation of the general labor market data readily available to him suggests that there is a pool of potential workers available to perform the job which the alien seeks, the burden should be placed on the alien or his putative employer to prove that it is not possible for the employer to find a qualified American worker." 501 F.2d at 761. The court also emphasized Senator Kennedy's statement that the new bill "places the burden of proving no adverse affect on the applying alien." 111 Cong. Rec. 24227 (1965). Accord *Yusuf v. Regional Manpower Administrator*, 390 F. Supp. 292 (W.D. Va. 1975). The majority of courts, however, have concluded that the burden of proof is on the Secretary. Courts adopting this view find that the Secretary abused his discretion unless he adequately demonstrates on the administrative record that the alien will displace "adequate, willing, qualified and able" Americans or that his employment will adversely affect wages and working conditions of similarly employed domestic workers. See *Digilab, Inc., v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974); *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974); *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973); *First Girl, Inc. v. Regional Manpower Adm'r*, 361 F. Supp. 1339 (N.D. Ill. 1973), *aff'd*, 499 F.2d 122 (7th Cir. 1974); *Bitang v. Regional Manpower Adm'n.*, 351 F. Supp. 1342 (N.D. Ill. 1972); *Golabeck v. Regional Manpower Adm'n*, 329 F. Supp. 892 (E.D. Pa. 1971). See note 82 *infra* and accompanying text.

57. 499 F.2d 1207 (8th Cir. 1974).

58. *Id.* at 1212. Cf. *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974). The court in *Pesikoff* deferred to the Secretary's labor market expertise in construing the statute to confer absolute discretion to disregard job specifications on the labor department: "Our analysis . . . of the section and its legislative history indicates that the Secretary has discretion to protect the American labor market . . . with prophylactic procedures such as the employer personal preference disposition he made here." *Id.* at 763.

for the job, and that the specialized Montessori training the employer desired was unnecessary. Reversing, the court held that lengthy and extensive training in Montessori as opposed to traditional teaching methods was a legitimate prerequisite for the job because it contributed to the "efficiency and quality of the business"⁵⁹ by ensuring a certain level of competency in specialized educational techniques.⁶⁰ The court, however, concurred in the Secretary's finding that the employer's desire to require training from a specific Montessori organization was unreasonable, as it permitted the employer to reject applicants with comparable or superior training.⁶¹

The Court of Appeals for the First Circuit espoused yet another approach in *Silva v. Secretary of Labor*.⁶² Reluctant to substitute either its own or the Secretary's business judgment for that of the petitioner, the court reversed the denial of certification.⁶³ Petitioner, an obstetrician with irregular working hours, sought a live-in domestic to double as a companion for his wife. Certification was denied on the ground that Americans were "available" for the job, despite advice by the Massachusetts Division of Employment Security that none of the 21 persons registered for such employment was willing to live in. The court rejected the Secretary's arguments that the statute empowered him to treat the employer's specifications as irrelevant and that a day worker could perform the job satisfactorily.⁶⁴ Agreeing that live-in help offered benefits that day workers did not, the

59. 499 F.2d at 1212. This test was devised by the United States District Court for the District of Columbia in *Acupuncture Center of Washington v. Brennan*, 364 F. Supp. 1038 (D.D.C. 1973), *rev'd*, — F.2d — (D.C. Cir. 1976). The district court held that the Secretary was required to give full consideration to reasonable job requirements. *Id.* at 1042. Reversing the Labor Department's refusal to certify a shortage of acupuncture assistants, the court reasoned that the employer's requirement of fluency in three Chinese dialects and a familiarity with acupuncture terminology was reasonable and would contribute to the efficiency and quality of the business in light of the special medical setting. The appellate court applied its holding in *Pesikoff* to reverse. *Acupuncture Center of Washington v. Brennan*, — F.2d — (D.C. Cir. 1976).

60. The court stated that the mere fact that the employer's job requirements specify lengthy and extensive training does not automatically permit the Secretary to regard them as unreasonable. 499 F.2d at 1212.

61. *Id.*

62. 518 F.2d 301 (1st Cir. 1975).

63. *Id.* at 310.

64. The court expressly rejected *Pesikoff*, referring to the court's disregard of the employer's "personal preferences" as "Orwellian". 518 F.2d at 309.

court held that the Secretary could not deny certification under the "able, willing, qualified and available" standard on his own determination that market data revealed a surplus of workers who, in his estimation, had skills functionally equivalent to those of the person sought.⁶⁵

These cases suggest that both the Department of Labor and the courts have refused to recognize the crucial question posed under section 212(a)(14) of the Act—whether an employer, in light of current unemployment conditions in a given job market, should be required to accept American laborers whose qualifications approximate those of the worker desired.⁶⁶ The various approaches taken by the courts fail to force a resolution of this question. The approach used by the court in *Pesikoff* appears to give the certifying officer nearly unlimited discretion to ignore specified job requirements on the ground that the skills of the alien and the American are functionally equivalent.⁶⁷ This approach presents several difficulties. First, as the court in *Silva* noted, it is not at all clear that the statute grants the Department of Labor such power.⁶⁸ Second, the employer rather than the agency or the courts is in the best position to determine what business realities necessitate in terms of employee job qualifications. It must be noted that there is little economic incentive other than increased efficiency for an employer to hire alien labor, since the employer is required by law to pay an alien worker the same wages as a similarly situated American worker.⁶⁹ The job qualification decision should be the

65. *Id.* at 310.

66. In *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975), the court acknowledged the issue and then avoided it. The court expressly avoided determining the extent to which the Secretary may subordinate the employer's reasonable needs to the welfare of American laborers. It indicated in dictum, however, that the issue should be resolved under part (B) of the statute, which requires a determination that the alien's admission will adversely affect neither wages nor working conditions of similarly situated Americans, rather than under the "able, willing, qualified and available" standard. *Id.* at 310.

67. The court stated:

It is well within the Secretary's discretion to ignore employer specifications which he deems, in accordance with his labor market expertise, to be irrelevant to the basic job which the employer desires performed. The Secretary may, therefore, survey the available labor market for a class of workers who, while possibly not meeting the prospective employer's personalized job description, do provide the employer with the potential for getting his job accomplished.

501 F.2d at 762-63.

68. 518 F.2d at 309-10.

69. A major concern of the courts in *Pesikoff v. Secretary of Labor*,

employer's; the agency's responsibility should be to determine whether the congressional objective of securing employment for Americans ought, in particular cases, to prohibit employers from hiring aliens more precisely qualified than any American. Finally, by overlooking the statutory question posed, the *Pesikoff* approach perpetuates ad hoc and potentially inconsistent resolution of these immigration cases by allowing both the Department and the courts to avoid declaring rules by which future cases are to be decided.⁷⁰

501 F.2d 757, 762-63 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), and *Ozbirman v. Regional Manpower Adm'n.*, 335 F. Supp. 467, 474 (S.D.N.Y. 1971), was that employers would circumvent the statutory objective of protecting domestic labor by insisting on employment qualifications irrelevant to the performance of the job or by drawing up the specifications to conform with the attributes of the alien. This problem was also addressed in *Xytex Corp. v. Schliemann*, 382 F. Supp. 50 (D. Col. 1974). In that case the alien applicant had been employed on a part time basis as a computer programmer while doing graduate work in electrical engineering. The job offer submitted with the application for labor certification required an M.S. with specialty in electrical engineering and computer science and three years experience in programming. Conversations between the Manpower Administration and engineering teachers indicated that the job could be performed with a B.S. in electrical engineering. Since the Colorado Engineers Placement Service indicated that such persons were available, certification was denied. The court held that the certifying officer had abused his discretion by concluding that the employer had acted in bad faith to benefit the alien without sufficiently supporting that conclusion on the record. *Id.* at 53. *Accord*, *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974).

The danger of an employer tailoring his job description to fit a potential immigrant is largely illusory and, to the extent it exists, may be dealt with by regulations promulgated under part (B) of section 212(a) (14) of the Immigration and Nationality Act. See note 35 *supra* and accompanying text and *Silva v. Secretary of Labor*, 518 F.2d 301, 311 (1st Cir. 1975) (dictum). The time and expense necessary to locate a suitable alien, as compared with the convenience of hiring someone locally, deters the falsification of job descriptions to match an alien's qualifications. Section 212(a) (14) (B) of the Act, requiring employers to pay immigrants identical wages, removes any profit incentive that might offset the inconvenience of looking abroad for employees. See *Naporano Metal and Iron Co. v. Secretary of Labor*, 529 F.2d 537 (3d Cir. 1975); *Ozbirman v. Regional Manpower Adm'n.*, 335 F. Supp. 467 (S.D.N.Y. 1971); *Golabeck v. Regional Manpower Adm'n.*, 329 F. Supp. 892 (E.D. Pa. 1971).

70. The labor department has been severely criticized for its uncommunicativeness regarding the labor certification program. See *Rodino, supra* note 19, at 262-65; *Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 8, at 187 (1973). An extensive review of the labor certification procedures by the Administrative Conference of the United States in 1973 led to a recommendation that standards be formulated and made public, but this recommendation remains unacted upon. Recommendation 73-2,

The approach adopted in *Ratnayake* suffers from these same defects,⁷¹ for that case differs from *Pesikoff* only in that it confronts a different set of facts and consequently requires a different determination of what job requirements it is reasonable to disregard.⁷²

The *Silva* approach, while it at least denies the certifying officer the discretion to determine whether the skills of surplus American workers are the functional equivalent of those of applicant aliens, also fails to address the question posed by section 212(a) (14). Thus, in deferring to the employer's determination of the necessary qualifications for the job, rather than to the agency's determination of functional equivalence, it fails, like *Ratnayake* and *Pesikoff*, to balance the dual goals of the act. Where those cases err in over-emphasizing the goal of protecting American labor, the tendency of the *Silva* approach is to exclusively foster the goal of admitting alien workers. The *Silva* opinion does suggest that the Secretary of Labor may be empowered to subordinate an employer's needs to the welfare of American labor,⁷³ but by failing to offer a construction of the statute indicating what circumstances would require such a subordination, the court emphasized its deference to the employer's specifications.

What is needed is an approach which, like *Silva*, refuses to accept, without more, the agency's determination of functional

Labor Certification of Immigrant Aliens, 1972-73 REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 45 (1973). The court in *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975), stated that until the labor department adopts and publishes a governing policy, employers "will expend time and effort seeking to hire an alien, only to be turned down for reasons they could not have anticipated." *Id.* at 311.

71. The ruling in *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), committed the decision to agency discretion and sanctioned the secretiveness of the agency. The "reasonableness" approach of *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974), which allows the court to determine whether a job qualification enhances the efficiency and quality of the business, involves a subjective judicial decision of little precedential value. By definition a reasonableness determination is bound to circumstance.

72. For a contrary view, which contrasts the *Pesikoff* and *Ratnayake* positions, see Note, *Alien Labor Certification Proceedings: The Personal Preference Doctrine and the Burden of Persuasion*, 43 GEO. WASH. L. REV. 914 (1975). The author argues that *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975), *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974), and *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974), constitute a majority viewpoint allowing the Secretary to disregard unreasonable aspects of the employer's job description, *id.* at 926 n.63, and concludes that this approach is desirable. *Id.* at 929.

73. *Silva v. Secretary of Labor*, 518 F.2d 301, 310 (1st Cir. 1975).

equivalence where the qualifications offered by the American and the alien respectively are not identical, but which, unlike *Silva*, goes further and modifies deference to the employer's desires with consideration of factors relevant to promotion of the statutory objectives, allowing denial of certification in particular cases not solely by reference to degrees of equivalence in qualifications, but also by reference to the welfare of American labor and the American economy. Those factors are explored in the following section.

It must be recognized, of course, that the type of approach suggested here is potentially subject to the same degree of agency influence as is reflected in *Pesikoff*, for agency definition under part (A) of section 212(a)(14), of the pertinent job market in which to examine unemployment conditions could be employed to the same end as a determination of functional equivalence designed to bring a particular job within an employment service bureau job category. The change in focus from the facts involved in a particular case to standards of law designed to implement congressional objectives, however, will compel the agency and the courts to consider the objective which they are trying to attain, and should add consistency to future decisions.

It should be noted that such an approach does not preclude agency consideration of whether a particular job qualification was in good faith considered necessary by the employer.⁷⁴ This inquiry would be aimed at determining whether the employer was establishing artificial criteria in an attempt to circumvent the statute and avoid hiring available American workers for some impermissible reason, such as doubt as to the competency of otherwise qualified and available American laborers. But beyond this inquiry the employer's job requirements should remain unaltered.

IV. APPLYING THE STATUTORY STANDARD

The preceding two sections emphasize the need for specificity in analyzing data pertinent to an alien labor certification determination, and the proper focus in ascertaining the relationship between available American workers and available positions

74. In *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323, 326 (1st Cir.), cert. denied, 419 U.S. 840 (1974), the court stated that although the statute does not permit the Secretary to determine the qualifications of applicants, it would permit an attack on the employer's good faith as long as there was proof of bad faith procedures in selecting personnel.

described by employers. These sections also illuminate the need for standards by which to implement the statutory goals. The decision to approve or deny certification may be made fairly easily when it is clear that available American workers do or do not meet the specific needs of the employer. The difficulty arises when available domestic laborers have skills only approximating or substantially similar to those desired by the employer.⁷⁵ On the one hand, the national interest demands that as many American workers as possible be employed at all times in order to avoid unnecessarily incurring the welfare costs and psychological and moral damage associated with unemployment.⁷⁶ On the other hand, assimilating skilled aliens qualified to perform specific tasks enhances productivity and the opportunity to achieve optimal efficiency, also an important objective.⁷⁷ Confrontation and reasoned analysis of the issues are prerequisites to achieving a balance between these goals. The proliferation of judicial approaches to reviewing certification decisions, however, has prevented courts from formulating a clear and uniform national immigration policy.⁷⁸ Generally, the judicial ap-

75. Compare *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974), with *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975).

76. During the congressional debate, concern was expressed that the level of national unemployment at the time of the alien's application should be taken into account. In his presentation of the bill to the Senate, Senator Kennedy stated that section 212(a)(14) "was included in this bill to further protect our labor force during periods of high unemployment." 111 CONG. REC. 24227 (1965).

77. During the Senate debate, Senator Fong stated that after considering the "hard facts about our complex technologically oriented economy," it was the belief of the bill's author "that the immigration program proposed by our bill would enhance our economic growth, help stimulate our economy and generate new employment opportunities." 111 CONG. REC. 24456 (1965).

78. Lack of uniformity between the state employment services within a single state and among the several states has resulted in uncertainty on the part of applicants as to when and why certification will be granted. *Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 8, 179 (1973). These differences are magnified at the judicial level, where no attempt has been made to formulate clear policy guidelines. To the extent that courts have taken positions on the Secretary's power to alter the employer's job description, they have varied from conferring broad discretion on the Secretary, see notes 53-56 *supra* and accompanying text, to requiring that the record contain data responsive to the precise specifications of the employer. See notes 62-65 *supra* and accompanying text. The intermediate reasonableness approach, permitting the court to substitute its judgment for that of the agency, merely adds to the confusion. See notes 57-61 *supra* and accompanying text.

proaches are outcome oriented; courts, like the Secretary, tend to recite the statutory language without revealing their reasoning.⁷⁹ This lack of a coherent, uniform approach has resulted in inconsistency among decisions based upon apparently identical facts⁸⁰ and done little to provide useful information to the Secretary, the employer, or the alien,⁸¹ or otherwise to promote the goals of the Act.

Requiring that the Secretary base his individualized assessment of local labor conditions upon specific data and that he sustain the burden of proving the existence of legally eligible American workers⁸² in order to justify the exclusion of a poten-

79. In those cases giving rise to litigation, the denial of certification by the labor department has frequently consisted of a form response stating: "Available job market information will not warrant a certification of unavailability of workers in the United States." *Silva v. Secretary of Labor*, 518 F.2d 301, 305 (1st Cir. 1975). See also *Secretary of Labor v. Farino*, 490 F.2d 885, 890 (7th Cir. 1973), and *Acupuncture Center of Washington v. Brennan*, 364 F. Supp. 1038, 1040 (D.D.C. 1973), *rev'd*, — F.2d — (D.C. Cir. 1976). The absence of coherent, announced policies on the agency level, coupled with the unwillingness of courts to construe the statute and establish guidelines thereunder, has prevented courts from making logically reasoned decisions. Courts readily reject the labor department's evidence on the ground that it does not satisfy one of the statutory criteria, but fail to amplify what the agency must do to comply with the statute. See *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974); *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974); *Yusuf v. Regional Manpower Adm'n.*, 390 F. Supp. 292 (W.D. Va. 1975); *Bitang v. Regional Manpower Adm'n.*, 351 F. Supp. 1342 (N.D. Ill. 1972). The practice of most courts is to remand to the agency when an abuse of discretion has been found. *Secretary of Labor v. Farino*, 490 F.2d 885, 892 (7th Cir. 1973). Since the labor department has not responded by promulgating regulations, the result has been to further confuse the standards.

80. On the agency level it has been reported, for example, that the Washington, D.C., regional office requires a Chinese cook to have three years experience for certification, while the Philadelphia office will not grant certification at all on the ground that a Chinese cook can be trained in a maximum of six months. Rodino, *supra* note 19, at 246. For an example of judicial inconsistency, compare *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), with *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975).

81. See *Silva v. Secretary of Labor*, 518 F.2d 301, 311 (1st Cir. 1975).

82. Judge MacKinnon, dissenting in *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), has suggested placing on the potential employer the burden to demonstrate that he has made extensive attempts to locate a domestic worker. Upon this showing the burden would shift to the Secretary to produce sufficient evidence to demonstrate that despite the employer's unsuccessful efforts, "able, willing, qualified and available" Americans can be found. *Id.* at 771. See Note, *Alien Labor Certification Proceedings: The Personal Preference Doctrine and the Burden of Persuasion*, 43 GEO. WASH. L. REV. 914

tial immigrant will enhance substantially the quality of the certification decision. Since, however, the labor department cannot, short of interviewing all potentially eligible workers, guarantee to an employer a worker with precisely the desired qualifications, the courts must promulgate guidelines to assist the labor department in determining in which instances the specific employment needs of the employer are to be tempered by the needs of approximately qualified American workers. Where employment data, properly gathered and interpreted, indicate that domestic workers may be eligible for employment, several factors should be considered in deciding whether they are "able, willing, qualified and available" under section 212(a) (14).⁸³

(1) *The unemployment level.*⁸⁴ When unemployment is high the likelihood of employment or reemployment is correspondingly low, so that a worker must be supported by transfer payments for a longer period of time. Because of these higher welfare costs, the Secretary and his delegates should have greater latitude at such times in determining that domestic workers are able and qualified to meet the employer's needs.⁸⁵ Conversely,

(1975). The *Pesikoff* position, placing the burden on the alien (in practice his prospective employer) to prove his entitlement to certification, does not satisfy the congressional objective of assimilating skilled aliens. There are several reasons why it is unlikely that aliens will receive certification when employers are required to introduce evidence sufficient to overcome the Secretary's conclusion that potential workers are available. First, employers lack the knowledge and techniques to collect labor market data. This is, however, within the routine activities of the labor department. Second, the costs of gathering such evidence would be prohibitive for most employers, thus perhaps precluding all but large, wealthy corporations from procuring the services of aliens. Third, even if the employer could pay the price and collect accurate data, the proof required would be exceedingly difficult to establish. As Judge MacKinnon emphasized in his dissent in *Pesikoff*, the majority's placement of the ultimate burden of persuasion would require the employer to "prove the existence of the nonexistent." 501 F.2d at 771.

83. Since a unified judgment of statutory purposes is called for, and since the concept of purpose is nontechnical, the court is best equipped to construe the statute. Once this is done the agency's expertise becomes more important. It may then determine what means of implementing the judicially construed statutory language best carries out the purposes of the Act, and promulgate regulations accordingly. H. HART & A. SACKS, *THE LEGAL PROCESS* 1345-47 (1958).

84. Throughout the congressional debate a focal point of concern was unemployment. See 111 CONG. REC. 24227 (1965) (remarks of Senator Kennedy), and 111 CONG. REC. 24456-62 (1965) (remarks of Senator Fong).

85. Unemployment analysis must be precise, however, for high unemployment rates alone may not justify automatic exclusion of aliens.

when the employment rate in a given geographical area and occupation is high, there is greater likelihood that marginally qualified personnel will soon work elsewhere and that welfare costs will be minimal compared with the economic benefits of increased productivity obtained by hiring a precisely qualified alien. Certifying officers should gauge unemployment levels according to national, regional, or local markets, depending upon where an employer would normally look for personnel and on the propensity of workers in the designated occupations to move long distances to find jobs.

(2) *The cost of training.* When only marginally qualified workers are willing and available, consideration should be given to the cost of training them to meet the employer's job specifications. If unemployment is high, employers, with the aid of federal funds, should be prepared to sustain greater training costs. Requiring the employer to incur larger training expenses would also be justifiable when marginally qualified workers are not likely, because of technological innovations, to be retained in their present fields of specialization. The amount of training which an employer must provide should depend on the level of skill the job demands. As the skill required for the job increases, the proportion of training for which the employer is responsible should decrease. Thus marginally qualified workers who are willing and available to perform a relatively unskilled job must be trained. When a worker is already highly skilled, however, additional training, though costly, will represent a smaller proportion of the employee's total education. The increment in productivity justifies this higher training expense.⁸⁶

Senator Fong commented: "Although our knowledge of the causes underlying the rising trend of unemployment is as yet imperfect, it has been increasingly clear that labor has been displaced largely by advances in technology and the striking gains in man-hour productivity." 111 Cong. Rec. 24458 (1965). He continued: "Unemployment, then, does not always mean that there is a job shortage. It may also indicate a shortage of persons who have the kinds of skills, knowledge and abilities required by the economy." *Id.* at 24459.

86. For example, an employer wishing to hire an auto mechanic to work on foreign cars should be required to incur the cost of educating a general mechanic, even though the additional training might be proportionally great compared with the prospective employee's previous training costs. This requirement will discourage an influx of immigrants whose specialty is easily acquired, and raise the education level of American workers. On the other hand, an employer requiring an employee with a master's degree would not be forced to incur the expense of raising a bachelor's level prospective to this level, although proportionately the cost of additional training to previous training may not be greater

(3) *Immediacy of the employer's needs.* Even if unemployment is high and the costs of training are not prohibitive, the immediacy of the employer's needs should be considered before rejecting an alien on the grounds that marginally qualified workers are prepared to fill a position. Needs may be immediate whenever circumstances create an unanticipated demand for a particular skill that exceeds its supply. Governmental actions and unexpected technological developments are the most common such situations.

(4) *Labor mobility.*⁸⁷ Whether a worker is willing and available to work at the employer's location should in part be determined by reference to the tendency of workers in the designated occupation to relocate. Again, where unemployment is high and the likelihood of obtaining employment in the near future is low, the certifying officer should be more willing to assume that the employer can induce an able and qualified worker to move.

These factors, if applied consistently, will not only provide useful guidance in construing the statutory standard, but will also afford courts a basis for determining whether the labor department has abused its discretion in making a certification decision.⁸⁸

than in the case of the mechanic. If a prospective employee with some post-graduate work is available, however, the employer may be required to pay the additional expense of his obtaining a master's degree, even though this amount may actually total more than that required to educate the mechanic. It is still less *proportionately*. If proportionately less in training expenditures is required of the employer as the amount of education required to perform the job increases, highly trained foreigners will be encouraged to immigrate, thus improving the employment quality of American immigration in accordance with the goals of the statute.

87. The court in *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), *cert. denied*, 419 U.S. 840 (1974) expressly rejected the Secretary's contention that he has the power to consider the mobility of engineers as a class. It emphasized the statutory requirement that the employer's criteria be satisfied as of the place of the alien's destination. *Accord*, *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (7th Cir. 1974). When an employer normally would look to a mobile national group in hiring, it would be unfair to permit him to hire an alien because no suitable Americans can be found at the place of employment. This is especially true when employers have located in unpopulated areas in an attempt to minimize other costs.

88. The enumerated considerations comprise a group of relevant factors to which a court can look in determining whether the Secretary has abused his discretion. If the record reveals adequate evidence that he has considered each of these, the court may only reverse his decision if it determines that the conclusion is clearly erroneous. This approach perceives the proper relationship between court and agency, allowing the determination to be made as Congress intended it, with full benefit of

V. CREATING A RECORD

The inadequacy of the record upon which the certification decision is based has been a major obstacle to formulating an acceptable standard of judicial review.⁸⁹ A court attempting to determine whether the labor department has sustained its burden of proof or considered all of the relevant factors in applying the statutory standard generally remands the case to the agency for a statement of its findings and the supporting rationale.⁹⁰ Some courts have been moving toward requiring a more complete record containing both findings of fact and a statement of their relation to the statute. In *Xytex Corp. v. Schliemann*,⁹¹ the court stated that each of the statutory criteria must be addressed on the basis of "specific information."⁹² In *Yong v. Regional Manpower Administrator*,⁹³ the court went a step further, requiring that the record reveal:

- (1) the foundation of the original denial of certification,
- (2) the substance of the relevant documentary evidence and oral information, if any, presented by the applicant 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.⁹⁴

The foundation for the original denial of certification should contain the statistical information upon which the certification decision was based, the methods by which the data was gathered and analyzed, and a statement of how the certifying officer weighed the unemployment level, the costs of training, the special needs of the employer, and the mobility of eligible workers. Only by improving the quality of the record will the applicant receive adequate information enabling him to challenge a denial, and only then will the court be able to assess whether the Secretary has abused his discretion.

the agency's expertise and judicial review limited to checking arbitrary action.

89. The Administrative Conference recommended that the quality and degree of specificity in the record be improved. Recommendation 73-2, *Labor certification of Immigrant Aliens*, 1972-73 REPORTS OF ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 45, 46 (1973).

90. See *Yong v. Regional Manpower Adm'n.*, 509 F.2d 243 (9th Cir. 1974); *Ratnayake v. Mack*, 499 F.2d 1297 (8th Cir. 1974); *Digilab, Inc. v. Secretary of Labor*, 495 F.2d 323 (1st Cir.), cert. denied, 419 U.S. 840 (1974); *Yusuf v. Regional Manpower Adm'n.*, 390 F. Supp. 292 (W.D. Va. 1975); *Xytex Corp. v. Schliemann*, 382 F. Supp. 50 (D. Col. 1974).

91. 382 F. Supp. 50 (D. Col. 1974).

92. *Id.* at 53.

93. 509 F.2d 243 (9th Cir. 1975).

94. *Id.* at 246.

VI. CONCLUSION

Decisions regarding whether to certify an alien laborer for immigration are presently a plethora of ad hoc and often inconsistent resolutions based on imprecise data. The quality of these decisions will improve only if the Department of Labor carefully examines pertinent employment data and articulates, in terms of the objectives of the statute, the reasons for granting or denying certification. Although labor department officials must be permitted some discretion in applying the "able, willing, qualified and available" standard where domestic workers do not possess the precise qualifications desired by the employer, such discretion should be allowed only when it is clear that the decision will effectuate the policies of the Act. Since the agency has not yet utilized such a scheme of its own accord, the responsibility for implementing it necessarily rests on the federal judiciary.