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Anastasius Efstratiades

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## *Judicial Review of the Administrative Denial of Employment Certification to Aliens*

### INTRODUCTION

**S**LOBODAN PERERA, a citizen of Yugoslavia, was denied employment certification by the U.S. Labor Department. The certification was necessary in order to receive an immigrant visa.<sup>1</sup> The employment certification is a determination and a certification by the Secretary of Labor to the Secretary of State and the Attorney General that there is not a sufficient number of American workers who are able, willing, qualified and available at the time of the application and at the place where the alien intends to work, and that employment of such aliens would not adversely affect the wages and working conditions of similarly employed American workers.<sup>2</sup>

Slobodan Perera entered the United States under a student visa to study at the University of Colorado as a graduate student in electrical engineering. In 1972, he started working for Xytex Corporation as a part time computer programmer.<sup>3</sup> On September 19, 1973, Perera and Xytex Corporation applied for his employment certification. The application specified that the requirements for the job were a Master of Science degree, study concentration in electrical engineering and computer science, and three years of practical experience in the field. Perera was the only one available who met those requirements.<sup>4</sup>

The application was filed with the office of the Regional Manpower Administration, the local representative of the Secretary of Labor. That office, after communicating with engineering teachers and a placement service, took it upon itself to decide that a Bachelor's degree in electrical engineering would constitute sufficient qualification for the position with Xytex Corporation, and that there were Americans available meeting that qualification. On this basis Perera was denied employment certification.<sup>5</sup>

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<sup>1</sup> Xytex Corp. v. Schliemann, 382 F. Supp. 50, 51 (D. Col. 1974).

<sup>2</sup> 8 U.S.C. § 1182(a)(14) (1970).

<sup>3</sup> 382 F. Supp. at 51.

<sup>4</sup> *Id.* at 51-52.

<sup>5</sup> *Id.* at 52.

After a requested review the application was again denied, and a complaint was filed with the District Court by Xytex Corporation and Perera.<sup>6</sup> The District Court in *Xytex Corporation v. Schliemann* decided that judicial review was allowed in this case under the Administrative Procedure Act (hereinafter referred to as A.P.A.) because the administrative agency (Regional Manpower Administration) had abused its discretion.<sup>7</sup> In deciding the case upon the merits, the court found that in denying the certification the Manpower Administration acted without collecting the necessary facts. The case was remanded to the agency for more detailed consideration.<sup>8</sup>

In a similar case, *Reddy Inc. v. United States Department of Labor*, the Court of Appeals for the Fifth Circuit reviewed the case of Dhekney, an alien from India, whose application for employment certification was denied.<sup>9</sup> Dhekney's job was described in his application as an "engineering design specialist in light gauge metals."<sup>10</sup> The court held that the decisions of the Secretary of Labor denying aliens labor certification were subject to limited judicial review.<sup>11</sup> In deciding the case upon the merits, the court remanded it, holding the findings of the Secretary of Labor against Dhekney arbitrary as regarded both the availability of workers and the effect of Dhekney's employment on American wages.<sup>12</sup>

The first important issue discussed in this note is the right to judicial review of decisions of the Secretary of Labor denying labor certification to an alien. The courts, until *Reddy*, followed the view that judicial review was allowed when there was abuse of discretion on the part of the Secretary of Labor in denying labor certification. *Reddy* takes a more liberal view, holding that because of lack of contrary legislative intent (in the Immigration and Nationality Act) the courts have the right to review without first having to determine whether there was abuse of Administrative discretion.<sup>13</sup>

Under the issue of judicial review the question of the standing

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 53.

<sup>8</sup> *Id.*

<sup>9</sup> *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974).

<sup>10</sup> *Id.* at 540.

<sup>11</sup> *Id.* at 542-544.

<sup>12</sup> *Id.* at 545.

<sup>13</sup> See notes 46-47 *infra* and text following.

of an alien also frequently arises. The courts have held that an alien outside the United States, and not on the border or on a ship coming into the country, has no standing to challenge the decision of the Secretary of Labor.<sup>14</sup> However, an alien at the border has standing for a writ of habeas corpus, while an alien in the United States has standing for full review of the decision of the Secretary of Labor.<sup>15</sup>

The second issue in this article focuses upon the court's power to remand the decision of the Secretary of Labor denying an alien employment certification. In such cases the courts have strictly construed the Immigration and Nationality Act, and they have reversed and remanded decisions which did not follow the exact terms of the statute in the determination of whether the alien's job would adversely affect American wages.<sup>16</sup>

It is the purpose of this note to analyze the procedural and substantive administrative problems arising from the decisions of the Secretary of Labor denying aliens employment certification, and the courts' attempts to review such decisions.

#### STATUTORY REQUIREMENTS

An alien may apply for an immigrant visa and permanent residence in the United States under the Immigration and Nationality Act of 1952.<sup>17</sup> The Act creates six preferences for granting an immigrant visa: first, unmarried sons or daughters of citizens; second, spouses, unmarried sons or daughters of aliens lawfully admitted for permanent residence; third, professional preference; fourth, married sons and daughters of citizens; fifth, brothers or sisters of citizens; sixth, skilled and unskilled labor.<sup>18</sup> Skilled workers and professionals come under both the third and sixth preferences.<sup>19</sup> In order to receive a visa under the third or sixth preference, an alien must ask the Secretary of Labor to make certification to the Attorney General and the Secretary of State as to the availability of American workers and the effect of the alien's wage on the wages and working conditions of similarly employed

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<sup>14</sup> See *Braude v. Wirtz*, 350 F.2d 702 (9th Cir. 1965).

<sup>15</sup> *Reddy, Inc.*, 492 F.2d at 543.

<sup>16</sup> 8 U.S.C. § 1182(a)(14) (1970).

<sup>17</sup> 8 U.S.C. §§ 1101-1503 (1970).

<sup>18</sup> 8 U.S.C. §§ 1153(a)(1)-(6) (1970).

<sup>19</sup> Scully, *Is the Door Open Again? — A Survey of Our New Immigration Law*, 13 U.C.L.A. L. REV. 227 (1966).

workers.<sup>20</sup> The purpose of this provision of the Immigration and Nationality Act was to protect the United States from the influx of foreign labor in localities where there are not enough jobs for such labor.<sup>21</sup> The statute, although encompassing aliens seeking to enter the United States, extends to nonresident aliens already in the country who are applying for adjustment of their status to that of resident. In cases of employment certification the nonresident alien is considered to be an alien seeking admission to the United States and therefore he must comply with the procedure required for admission.<sup>22</sup>

The decision of the Secretary of Labor regarding an alien's employment certification is an administrative one subject to the judicial review rules of the A.P.A. Judicial review is available if a person has suffered a legal wrong or has been adversely affected by the administrative decision, with the exception of cases where judicial review is precluded by statute or where agency action is committed to agency discretion.<sup>23</sup> With respect to employment certification the courts will allow review where there is an abuse of agency discretion.<sup>24</sup>

#### THE RIGHT TO JUDICIAL REVIEW OF THE DECISION OF THE SECRETARY OF LABOR

##### *Denial of Employment Certification to the Alien Before His Entry into the United States*

One recurring fact pattern in cases of employment certification for an immigrant visa is that of an alien seeking entry as a professional or as a skilled laborer, who has not yet entered the United States, nor is on his way to the country. Such an alien must receive the employment certification before he may apply for a visa at the American Consulate.<sup>25</sup> If such an alien is denied employment certification and asks for judicial review of the decision of the Secretary of Labor, the courts will first question whether the alien has standing to bring such an action, before the question

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<sup>20</sup> 8 U.S.C. § 1182(a)(14) (1970).

<sup>21</sup> *Cobb v. Murrell*, 386 F.2d 947 (5th Cir. 1967); Scully, *supra* note 19.

<sup>22</sup> *Talanoa v. Immigration and Naturalization Serv.*, 397 F.2d 196, 200 (9th Cir. 1968).

<sup>23</sup> 5 U.S.C. §§ 701-02 (1970).

<sup>24</sup> *Ozbirman v. Regional Manpower Adm'r*, 335 F. Supp. 467, 470 (S.D. N.Y. 1971).

<sup>25</sup> 8 U.S.C. § 1182(a)(14) (1970).

of jurisdiction of the court is addressed.<sup>26</sup> As a general rule the courts will grant no review in such cases.<sup>27</sup>

The reason the courts will not grant review stems from the concepts of the rights of aliens who are not in the country. An unadmitted alien, according to the United States Supreme Court,<sup>28</sup> does not have the right to enter or remain in the United States. Therefore, the alien cannot ask for review on the theory that his right to enter was violated. Furthermore, due process is guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution only to persons within the jurisdiction of the United States.<sup>29</sup> As such, the alien may not argue that his due process right was violated by an unfair proceeding, and he has no standing. Consequently, the courts are unable to grant review in cases where aliens outside of and not on their way to the United States are denied employment certification by the Secretary of Labor. This was first stated as dictum in *Brownell v. Tom We Shung*,<sup>30</sup> and this dictum became the holding of *Braude v. Wirtz*,<sup>31</sup> where the Ninth Circuit Court of Appeals refused to review the denial by the Secretary of Labor of employment certification to 181 Mexican workers who were still in Mexico. The court was unable to find, and appellant workers were unable to cite, any cases where aliens outside the United States were granted judicial review for a denial of employment certification.

Because no constitutional rights of the aliens are involved in such a case, the matter is purely administrative. As the court stated in *Cobb v. Murrell*, a case of denial of employment certification to a Mexican maid still in Mexico:

Thus we are in agreement with the Ninth Circuit specific holding in *Braude* that aliens outside the country have no standing to challenge a determination of the Secretary of Labor that their entry would adversely affect wages and working conditions of workers in the United States. Courts are not universal monitors and ombudsmen of the administrative apparatus of government. When constitutional rights will not be violated, Congress can make an administrative officer the *apogee*

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<sup>26</sup> See *Reddy, Inc.*, 492 F.2d at 538; *Cobb*, 386 F.2d at 947; *Braude*, 350 F.2d at 702.

<sup>27</sup> E.g., *Cobb*, 386 F.2d at 947.

<sup>28</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>29</sup> U.S. CONST. amend. XIV.

<sup>30</sup> *Brownell v. Tom We Shung*, 352 U.S. 184 (1956).

<sup>31</sup> *Braude*, 350 F.2d 702.

of *finality*, and no constitutional safeguard requires judicial review in denying entry to aliens. (Emphasis supplied)<sup>32</sup>

The courts have taken a different attitude regarding the exclusion of an alien who has a visa and has presented himself at the border to enter in the United States. In 1956 the United States Supreme Court extended the courts' jurisdiction regarding this type of case by holding that the order of exclusion may be challenged by a declaratory judgment, and not only by a habeas corpus proceeding.<sup>33</sup> Because of this expansion, Congress by legislation limited the Court's holding in 1961, leaving a habeas corpus proceeding as the sole recourse of an alien who has been excluded.<sup>34</sup> This statute, however, has been interpreted by the courts as limiting the habeas corpus proceedings not only to final exclusion orders of any alien but also to aliens seeking admission at the borders of the country.<sup>35</sup> This attitude of the courts in favor of granting review to aliens who have presented themselves at the borders of the country is not, however, a novel one. Since 1956, when the Supreme Court expanded its jurisdiction to grant declaratory judgments in exclusion cases, the Court has held that the alien had to present himself at the borders of the United States to receive the benefit of declaratory judgment.<sup>36</sup> Today, the alien who presents himself at the border and is excluded, or who is on a ship on his way to the United States and is excluded, has a right only to a habeas corpus proceeding. He is, however, the only alien outside the United States who may be granted some type of judicial proceeding.

*Denial of Employment Certification to the Nonresident Alien  
Who Is in the United States*

If an alien is within the United States, the courts will view differently the denial of employment certification by the Secretary of Labor. As Justice Murphy said in *Bridges v. Wixon*: "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien enters and resides in this country he becomes invested by the rights guaran-

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<sup>32</sup> Cobb, 386 F.2d at 951.

<sup>33</sup> Brownell, 352 U.S. at 180.

<sup>34</sup> 8 U.S.C. §§ 1105(a)-(b) (1970).

<sup>35</sup> See Brownell, 352 U.S. 180; Braude, 350 F.2d 702.

<sup>36</sup> Brownell, 352 F.2d at 183-185.

ted by the Constitution to all people within our borders.”<sup>37</sup> Therefore, the alien who is within the country has standing, being entitled to due process under the Fifth and Fourteenth Amendments<sup>38</sup> and also because his right to work has been violated with the denial of employment certification.<sup>39</sup>

Another problem is presented by the question of standing under the A.P.A. The Act states that for a person to have standing to challenge an administrative decision in court, such as denial of the employment certification, he must have suffered a legal wrong or be adversely affected by such a decision.<sup>40</sup> Legal wrong is the violation of a common law right, or “an interest created by the Constitution or by statute.”<sup>41</sup>

An alien in the United States who is denied employment certification may allege that he suffered legal wrong and that he is adversely affected.<sup>42</sup>

For an alien like the plaintiff, uprooted from his homeland, and thousands of miles away, with the requisite employment relationship established, the adverse administrative ruling is the direct cause of his grievance under the statute.<sup>43</sup>

The alien, therefore, who is in the country and asks for an employment certification and is denied it, has standing to seek judicial review of his case. On this basis the Fifth Circuit Court of Appeals distinguished its previous decision in *Cobb*, where judicial review of a denial of an employment certification was refused, from its recent decision in *Reddy*, where review was granted. In *Cobb* the alien was not in the country while in *Reddy* the alien was in the United States. The significance of the distinction is that an alien outside the United States does not have standing for judicial review of an adverse decision by the Secretary of Labor.

After deciding the question of standing, the issue of jurisdiction of the courts arises. The employment certification involves administrative discretion.<sup>44</sup> According to the A.P.A. courts have no jurisdiction to review administrative decisions which require

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<sup>37</sup> *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

<sup>38</sup> U.S. CONST. amends. V & XIV.

<sup>39</sup> *Reddy, Inc.*, 492 F.2d at 543.

<sup>40</sup> 5 U.S.C. § 702 (1970).

<sup>41</sup> *Hom Sin v. Esperdy*, 239 F. Supp. 903, 905 (S.D. N.Y. 1965), citing *Ala. Power Co. v. Ickes*, 302 U.S. 464 (1938).

<sup>42</sup> *Reddy, Inc.*, 492 F.2d at 543.

<sup>43</sup> *Hom Sin*, 239 F. Supp. at 906.

<sup>44</sup> *Ozbirman*, 335 F. Supp. at 470.



administrative discretion.<sup>45</sup> However, the courts have allowed judicial review of such cases when, for example, there is abuse of discretion, arbitrary classification, or erroneous implementation of the statute.<sup>46</sup> The courts review adverse decisions of the Secretary of Labor regarding aliens on the abuse of discretion theory.<sup>47</sup> According to the test set forth in *Digilab, Inc. v. Secretary of Labor*,<sup>48</sup> the Secretary of Labor abuses his discretion "if there is no evidence to support the decision or if the decision is based on an improper understanding of the law."<sup>49</sup> Whenever the Secretary's decision does not have a rational basis there is abuse of discretion and the case is remanded. Under the abuse of discretion theory the courts determine their jurisdiction by deciding the case on its merits.<sup>50</sup>

In determining the jurisdiction of the court, *Reddy* followed a different theory. The court applied a broad interpretation to the A.P.A. section which states that judicial review of administrative decisions is allowed except where "statutes preclude judicial review," or "agency action is committed to agency discretion,"<sup>51</sup> and that according to this section judicial review of administrative decisions is prohibited only if there is clear and convincing evidence of legislative intent against judicial review.<sup>52</sup>

In the Immigration and Nationality Act<sup>53</sup> the *Reddy* court found no provision against judicial review, nor any special procedure for review of decisions of the Secretary of Labor denying employment certification. The only immigration orders for which the Act establishes a strict review procedure are the final orders

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<sup>45</sup> 5 U.S.C. § 701(a)(2) (1970).

<sup>46</sup> *Ozbirman*, 335 F. Supp. at 470-71.

<sup>47</sup> See *First Girl, Inc. v. Regional Manpower Adm'r*, 361 F. Supp. 1339 (N.D. Ill. 1973); *Digilab, Inc. v. Secretary of Labor*, 357 F. Supp. 941 (D. Mass. 1973); *Ozbirman*, 335 F. Supp. at 467; *Golabek v. Regional Manpower Adm'r*, 329 F. Supp. 892 (E.D. Pa. 1971). The abuse of discretion theory is also used to review cases involving the denial of a visa to an alien by the immigration authorities. See *Song Jook Suh v. Rosenberg*, 487 F.2d 1098 (9th Cir. 1971); *Roumeliotis v. Immigration and Naturalization Serv.*, 304 F.2d 453 (7th Cir. 1962).

<sup>48</sup> *Digilab, Inc.*, 357 F. Supp. 941.

<sup>49</sup> *Song Jook Suh*, 437 F.2d at 1102.

<sup>50</sup> See *Ozbirman*, 335 F. Supp. at 470-71.

<sup>51</sup> 5 U.S.C. § 701 (1970).

<sup>52</sup> *Reddy, Inc.*, 492 F.2d at 543. There is a trend in recent cases to follow this theory. The courts have interpreted the exemption from judicial review because of administrative discretion to be a narrow one. See *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974). See also, *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973).

<sup>53</sup> 8 U.S.C. §§ 1101-1153 (1970).

of deportation and exclusion. The labor certification does not come under these orders. Therefore, once it determined there was no contrary legislative intent in the statute or the legislative history, the court decided that it had jurisdiction to review the case.<sup>54</sup>

The theory of jurisdiction presented in *Reddy* is more liberal than the abuse of discretion theory. The significance of *Reddy* is that courts may have jurisdiction to review any final decision of the Secretary of Labor denying employment certification to an alien.

#### *A Prospective Employer's Challenging of the Decision of the Secretary of Labor*

The prospective employer of an alien has sometimes joined in court action or brought his own action against the decision of the Secretary of Labor.<sup>55</sup> There is, however, a question of whether prospective employers can bring an action against the Secretary of Labor.

In *Cobb* the court held that the employer cannot bring an action by himself.<sup>56</sup> However, *Cobb* involved a Mexican maid still in Mexico who did not join in the action challenging the denial of employment certification; because the employer could not show that he had suffered legal wrong himself, no review was granted. A similar result was reached in *Braude*, where the court held that the agricultural corporations challenging the denial of employment certification to their prospective Mexican employees had not suffered a legal wrong, and therefore had no standing.<sup>57</sup>

*Cobb* presents a solution to avoid the problem of the prospective employer's standing in cases where the alien is applying for a quota visa<sup>58</sup> by applying a special provision of the Immigration Act.<sup>59</sup> According to this provision, the employer can apply to the Attorney General for a preference of the employee within

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<sup>54</sup> *Reddy, Inc.*, 492 F.2d at 543. The dissent in this case used the abuse of discretion theory in discussing the case on its merits. *Id.* at 545-46.

<sup>55</sup> Employers joined in the action brought by the aliens in *Reddy*, *Braude*, *Pesikoff*, and *Xytex*. Employers brought their own action in *First Girl*, *Cobb*, and *Farino*.

<sup>56</sup> *Cobb*, 386 F.2d at 951-52.

<sup>57</sup> *Braude*, 350 F.2d at 706-08.

<sup>58</sup> 8 U.S.C. § 1154(a) (1970). Although the quota system does not exist today, the employer's petition for preference status still exists for aliens subject to numerical limitations. *Cobb*, 386 F.2d at 951 n.6.

<sup>59</sup> *Cobb*, 386 F.2d at 951-52.

the quota of the employee's country. If the Attorney General is convinced the alien is urgently needed he will adjust his status.<sup>60</sup>

In recent decisions the courts have upheld the employer's standing to ask for review of a denial of employment certification. In *Pesikoff v. Secretary of Labor*, where the employer's application for labor certification for a live-in maid still in Mexico was denied by the Labor Department,<sup>61</sup> the court held that the employer had standing to bring the action, on the basis of a two-step test: first, the employer must allege that the denial of certification has caused him an injury in fact, and secondly, the injury must be to an interest protected or regulated by the statute providing for the certification.<sup>62</sup> In *Pesikoff* the court held that the employer's allegation of not being able to find a live-in maid was an injury in fact, and that the injury was to the interest of American employers to find qualified employees, which interest is protected by the Immigration and Naturalization Act.<sup>63</sup>

Finally, some recent decisions have not been concerned with such procedural problems as the employer's standing. In *First Girl, Inc. v. Regional Manpower Administration of U.S. Department of Labor*,<sup>64</sup> where the company was denied employment certification by the Labor Department for three English stenographers, the company's standing was not discussed at all, and review was allowed.

#### REVIEWING THE DECISION OF THE SECRETARY OF LABOR ON ITS MERITS

##### *The Requirement of Availability of American Workers*

As previously mentioned, the first determination the Secretary of Labor must make in order to grant employment certification to an alien is whether:

[t]here are not sufficient workers in the United States who are able, willing, qualified and available at the time of the application for a visa and admission to the United States and at the

<sup>60</sup> This trend is the result of a new interpretation of the A.P.A. by the Supreme Court regarding standing in *Ass'n of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970).

<sup>61</sup> *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir. 1974).

<sup>62</sup> This test replaces the former legal right test under which *Cobb* and *Braude* were decided.

<sup>63</sup> *Ass'n of Data Serv. Processing Organizations*, 397 U.S. at 150.

<sup>64</sup> *First Girl, Inc.*, 361 F. Supp. at 1339.

place to which the alien is destined to perform such skilled or unskilled labor.<sup>65</sup>

The courts have strictly construed this provision. In the first place they require that the workers are not only "available," but also that those workers are "able," "willing," and "qualified" to work. In *Golabek v. Regional Manpower Administration, U.S. Department of Labor*, the alien was the only one of three applicants for a Philadelphia parochial school job who was interested in the position.<sup>66</sup> The court reversed the decision of the Secretary of Labor who had denied employment certification on the basis of availability of workers. That the other applicants were not interested in the job was a pivotal consideration in the court's decision:

There are not facts on the record which indicate to us that petitioner is likely to displace any American workers. In addition, although the Administrator found that there might be qualified and available applicants, there is nothing to indicate that those applicants would be "able and willing" to work for the Archdiocese.<sup>67</sup>

A second important consideration concerning the availability of workers focuses upon the time at which the availability of workers is to be determined. The statute requires that the determination be made at the time of application.<sup>68</sup> However, if there is a reconsideration, and even more, if there is a review by the court and a remand of the case, the question becomes whether the availability at the time of the initial application or at the time of the review should be considered the proper point for the determination. The court in *Reddy* held that:

[t]he inquiry under Section 1182 (a) (14) into the sufficiency of workers is "at the time of application," an inquiry hardly susceptible of retrospective determination. Necessarily the Department's reconsideration must be in the light of the facts existent at the time of reconsideration, with respect to both

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<sup>65</sup> 8 U.S.C. § 1182(a)(14) (1970).

<sup>66</sup> *Golabek*, 329 F. Supp. at 895.

<sup>67</sup> *Id.* In *Digilab*, where the administrative record listed 200 electrical engineers without indication whether they were able, willing, qualified, and available, the court reversed the denial of certification by the Labor Department because of non-compliance with the requirements of the statute. 357 F. Supp. at 944. In *First Girl*, where the employer had made unsuccessful efforts to obtain personnel through advertisement, the court reversed the negative determination of the Secretary of Labor regarding the availability of workers, because, the court stated, there were no workers available. 361 F. Supp. at 1349-41.

<sup>68</sup> *Reddy, Inc.*, 492 F.2d at 545.

sufficiency of workers and adverse effect on wages and working conditions of workers similarly employed.<sup>69</sup>

A final consideration regarding the availability of workers is the place of employment. The administrative rules state that the availability of workers at the place of employment should be the concern of the Secretary of Labor.<sup>70</sup> For this reason, the determination is delegated to the Regional Manpower Administrators.<sup>71</sup> The courts, however, may intervene if the Secretary of Labor applies an erroneous standard regarding the place of determination. In *Reddy*,<sup>72</sup> the court reversed the determination because the reviewing officer erred with regard to the place of determination by considering the workers available in the United States and not in Dallas, Texas, where the alien was seeking employment.

In considering all elements of the availability of workers for provision of the employment certification, the courts will continue to review the Secretary's application of the statute and whether he strictly followed the requirements of the provision.

#### *Adverse Effect of the Employment of the Alien on American Workers*

Another determination that the Secretary of Labor will have to make in order to grant employment certification to an alien is whether the employment of the alien will "adversely affect the wages and working conditions of the workers in the United States similarly employed."<sup>73</sup>

The first problem related to this consideration is how an alien's work adversely affects American workers. The court dealt with the question extensively in *Ozbirman v. Regional Manpower*

<sup>69</sup> *Id.*

<sup>70</sup> 29 C.F.R. § 60.1 (1974).

<sup>71</sup> 29 C.F.R. § 60.3(b) (1974).

<sup>72</sup> *Reddy, Inc.*, 492 F.2d at 538. In *Ozbirman*, where the alien argued "place of employment" means the specific situs of a specific employer and not a geographic region, the court, in ruling against this argument, pointed out why the geographic region determination is preferable:

The plaintiff's determination of "place" would require the Department of Labor to compile statistics of employment availability for millions of employers. Such a requirement would indeed be a burden on the Department of Labor and would be "disruptive to the normal flow of immigration."

335 F. Supp. at 467, 473-74.

<sup>73</sup> 8 U.S.C. § 1182(a)(14) (1970).

*Administration, U.S. Department of Labor*,<sup>74</sup> where the plaintiff had been denied employment certification because the Secretary of Labor had determined that the salary offered to the alien did not meet the prevailing wage. The court, in reversing the determination, stated that the "adverse effect" is "a box of variables,"<sup>75</sup> and should be measured not only by the prevailing wage, but also by such variables as shorter work hours, unique vacations, proximity to home, better working conditions, and other fringe benefits which can overcome the problem of lower wages. The court concluded:

Any determination of adverse effect on wages should be scrutinized and balanced in light of the variables which enter into the job offer. In this way the purpose of Congress in protecting the American Labor market could be implemented in light of realistic employment factors.<sup>76</sup>

In order to avoid overburdening of the Secretary of Labor with detailed determinations of many factors, the *Ozbirman* court stated that it is the Secretary of Labor who "should determine which factors play a major role in affecting wage rates and consider them as a package."<sup>77</sup>

A factor to which the courts give a great deal of attention in balancing the adverse effect of a lower wage rate is labor union approval of the wage and benefits of the alien. In *Ozbirman*, the court stated that the wage of the alien would not have an adverse effect on similarly employed workers by emphasizing the fact that the proposed wage met the union standards, although it did not meet the prevailing wage.<sup>78</sup> In *Golabek*, an important factor for the court in reversing the Secretary of Labor's determination that the parochial school wage offered to the alien did not meet the public school prevailing wage was that parochial school wage rates were union approved. The union's purpose in this regard was to protect the labor market. Since this corresponds to the legislative intent of the adverse effect provision, when the union approves the wage the legislative intent is fulfilled.<sup>79</sup>

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<sup>74</sup> *Ozbirman*, 335 F. Supp. at 467.

<sup>75</sup> *Id.* at 471.

<sup>76</sup> *Id.* at 472.

<sup>77</sup> *Id.* at 472 n.5.

<sup>78</sup> *Ozbirman*, 335 F. Supp. at 472-73.

<sup>79</sup> *Id.* The court stated:

A primary factor in achieving adequate wages for laborers in this country has been the effect of unions. To affirm the decision of the

The second issue arising under this provision of the statute is the notion of "similarly employed" workers. The statute states that the determination must be as to the adverse effect on wages and working conditions of similarly employed workers.<sup>80</sup> To determine the effect on the similarly employed workers the Secretary of Labor must determine the prevailing wage "for certain classifications of labor in a particular area."<sup>81</sup> The courts have been very strict in requiring that the labor classification, which will be the total of "similarly employed" workers, include only workers of precisely the same job as the one offered to the alien. Applying a strict standard, the court in *Golabek* reversed the determination of adverse effect made by the Secretary of Labor, where the determination dealt with public school teachers, while the job offered to the alien was that of a parochial school teacher. The court, in ruling that the Secretary erred in his classification, stated that:

The wage scale of teachers in the Philadelphia public schools cannot be placed in the same group as that for teachers in Philadelphia's parochial schools. The classroom and school situation is different and there may be any number of reasons why a teacher would prefer to work in one school system rather than the other.<sup>82</sup>

In *First Girl* there was a reversal of the Secretary of Labor's determination that the alien's job would adversely affect similarly employed workers, where the aliens would be temporary secretaries and the determination was made on the basis of the wages of ordinary secretaries. The court held that because of the special temporary assignments, different offices and unsteady work hours, the aliens could not be classified as similarly employed with ordinary secretaries.<sup>83</sup>

In *Reddy*, the Secretary of Labor classified the alien as a mechanical engineer, which was the type of job the alien would perform, but in measuring the availability of workers and the adverse effect of his employment on these workers he classified the alien as a civil engineer, which was the job he was educated for at

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Secretary of Labor would require this court to ignore the fact that labor unions attempt to obtain the most the market will bear for their members through collective bargaining.

*Id.* at 472.

<sup>80</sup> 8 U.S.C. § 1182(a)(14) (1970).

<sup>81</sup> *Golabek*, 329 F. Supp. at 895.

<sup>82</sup> *Id.* at 895-96.

<sup>83</sup> *First Girl, Inc.*, 361 F. Supp. at 1341.

school.<sup>84</sup> Asking for consistency of classification in the determinations, the *Reddy* court ruled against the civil engineer classification and added:

If appellant were trained in the ministry, but performing light gauge steel work, the relevant wages and working conditions of "the workers in the United States similarly employed" would be those of persons performing light gauge steel work, which by the Department's definition is mechanical engineer's work, and not the wages and working conditions of ministers.<sup>85</sup>

However, the courts have placed limits on the classification of labor. In *Ozbirman* the court held that individual differences cannot be taken into consideration in creating a separate class of workers. The Secretary of Labor can require that workers only meet the "threshold requirements" for the job, and he may disregard the subclasses based on the appellant's background. The court, however, did not specify what these "threshold requirements" are.<sup>86</sup>

In contrast to *Ozbirman*, the court in *Reddy* based its decision on the fact that the alien was a civil engineer with a special background.<sup>87</sup> He was a design specialist in light gauge metal work. Dissenting Judge Clark, however, warned that the classification was based on individual background and not on meeting the general job qualifications, and that:

*Reddy* created the description of a unique combination of skills which were really job acquired talents rather than qualifications for employment . . . , adopted them as pre-requirements for its job, and then sought certification for *Dhekney* upon its failure to find any other individual with such a novel combination of skills.<sup>88</sup>

The courts have followed a strict, but reasonable interpretation of the requirements for an alien's labor certification. If the Secretary of Labor does not follow the statute *in haec verba* the courts will rule against the determination, holding it arbitrary.<sup>89</sup>

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<sup>84</sup> *Reddy, Inc.*, 492 F.2d at 544-45.

<sup>85</sup> *Id.* at 545.

<sup>86</sup> *Ozbirman*, 335 F. Supp. at 473.

<sup>87</sup> *Reddy, Inc.*, 492 F.2d at 540.

<sup>88</sup> *Id.* at 546 (dissenting opinion). The Court in *Xytex*, however, held that experience acquired by the alien during his part-time job at the employer's corporation should be considered in determining the alien's qualifications for the position. 382 F. Supp. at 53.

<sup>89</sup> *Reddy, Inc.*, 492 F.2d at 546.



## CONCLUSION

The immigration laws of the United States have made it difficult for an alien to stay in this country. The high rate of unemployment within the United States could be considered a good reason for the Secretary of Labor to use the immigration laws to deny employment certification to aliens. But the purpose of the statutory requirement for employment certification is not to reduce the number of immigrants. Its purpose, as Senator Kennedy advocated in introducing the Act, is to increase the quality of immigrants.<sup>90</sup> It would seem rather illogical to deny employment certification to a highly specialized engineer, teacher, or lawyer only because there are people of the same profession available, but who are not trained in his special field.

The courts have been faithful to the intent of the legislature. They have granted review where the alien is in the United States and has asked for an employment certification to adjust his status from nonresident to immigrant, and they have reversed the remanded arbitrary decisions of the Secretary of Labor denying aliens the right to work.

The courts may have been sympathetic toward an alien's desire to stay and work in the United States, but their determination of the arbitrariness of the Secretary of Labor's decisions have been within reasonable limits. Where the denial of employment certification is a reasonable result reached by the Secretary of Labor, the courts will uphold it, because:

[w]ounded or bruised feelings may be painful, but we do not have a legal right to be free of all insensitive, illogical or unreasonable hurts. Not all wounds are nursed by courts.<sup>91</sup>

ANASTASIUS EFSTRATIADES\*

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<sup>90</sup> III CONG. REC. 24227 (1965).

<sup>91</sup> Cobb, 386 F.2d at 952-53.

\* J.D. candidate, Villanova University, 1976