Leon Wildes

Invalidating Labor Certifications — By Whom, For What, and When

With three government agencies getting into the act, its no surprise that rules for the invalidation of labor certifications remain in a state of confusion. Conflicting decisions by federal courts have been no great help, either.

Frequently an alien's initial step in the long process of obtaining an immigrant visa, acquisition of a valid labor certification, is of crucial importance for a number of reasons. On the most pragmatic level, it is, simply, the base of the pyramid upon which so much else is founded. Should the labor certification prove, after acquisition, to be invalid or improper, a great deal of effort — on the part of both the petitioning alien as well as the attorney involved — will have been wasted.

Yet the labor certification is also significant on another, more ephemeral, level. It often constitutes the first contact between a prospective immigrant and the United States bureaucracy which will handle the ensuing series of steps comprising the immigrant visa process. If the petitioner is to have any faith at all in this course, it is of paramount importance that the labor certification procedures be uniform and efficient. Any conflicting signals from the various departments of government, or any procedural inefficiencies — real or perceived — can serve to alienate the very person whom the process is intended to assist, and may result in a sadly jaundiced view of United States government and society.

It is quite unfortunate, therefore, that conflicting policies in this field have indeed existed in the different branches of the federal bureaucracy. The concurrent involvement of the Department of Labor, the Department of State, and the Immigration and Naturalization Service, has virtually ensured that confusion would reign. Tragic instances of the invalidation of labor certifications have occurred, occasionally taking place quite some time after the certifications were originally issued by the personnel of the Department of Labor. Often the invalidations occur simply because the separate departments of the government simultaneously employ distinctive sets of criteria for determining the validity of the labor certification.

A necessary first measure in the elimination of inefficiency in this critical area is a full understanding of the origins of the current confusion — that is, a working knowledge of the recent history of the field, as well as the present state of affairs. Given the lack of any clear-cut division of authority here, this task is itself far from simple, yet a determined effort can be rewarding.

Development of a Uniform Policy

The early versions of the regulations governing this area of the immigration law contained a number of differing guidelines for determinations regarding the validity or invalidity of a labor certification which had been in some manner improperly obtained. Furthermore, the regulations did not outline precisely how such a determination was to be made.[1]

Largely in order to fill this vacuum, the responsibility for examining the validity of certifications was spontaneously undertaken by consular officers and immigration officials. Although these authorities resisted the adoption of any definitive series of factors relevant to ascertaining invalidity, it was widely recognized that a good rough gauge was whether the certification in question had been acquired on the basis of materially incorrect information. A finding by the consular officer or immigration official that such had indeed been the case would frequently lead to the invalidation of the labor certification.[2]

This situation persisted until relatively recently. The pertinent regulation, 29 CFR 60.5(g), had been interpreted by the Board of Immigration Appeals as mandating invalidation wherever material misrepresentation had occurred in the certification procedure.[3] Predictably, this system, or lack of system, resulted in the various branches of the government second-guessing one another, as each made independent evaluations as to whether the labor certification then before it had been granted based upon incorrect information.

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In a May, 1977 landmark decision, the Court of Appeals for the District of Columbia Circuit strongly disapproved the status quo.[4] According to the court, the validity of a labor certification issued by the Department of Labor could not be re-examined by the State Department or by the Immigration and Naturalization Service except under strictly prescribed conditions. These conditions were that no longer would the fact that incorrect information had been utilized as the basis for a certification be permitted to lead to subsequent invalidation by State or the Service. Rather, the willfulness of the misrepresentations would now be the deciding factor.

In the words of the court, in judging whether an alien is deportable because he or she was inadmissable at entry due to the lack of a valid labor certification under Section 212(a)(14) of the Immigration and Nationality Act, "the Attorney General's inquiry is limited to whether the Secretary of Labor has determined that the substantive requirements of that subsection are satisfied."[5] No other department could any longer make an independent decision as to whether incorrect data were utilized in the original issuance of the certification by the Department of Labor, as the decision by Labor in this respect was to be final. Once the alien had proven, by production of the labor certification, that the Department of Labor had, in fact, determined the subsection's requirements to have been satisfied, "the statutorily delegated enforcement power of the Attorney General is exhausted."[6] The only remedy of the Attorney General at that point, and by derivation the only remedy of the Immigration and Naturalization Service, would be to exclude the alien by resorting to I.N.A. Section 212(a)(19), which, however, requires a showing not only of a material misrepresentation, but also of the fact that the misrepresentation had been willful.

It is useful to note further that while the appeal of the lower court decision in this revolutionary case was yet pending, the earlier regulation, 29 CFR 60.5(g), was superseded by 20 CFR 656.30(d).[7] The new regulation states that:

> After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of

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Immigrant Visa Processing In Mexico City

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Issues and procedures at one of the country's busiest visa issuing post. How you can help your client through the process.

Recently I had an opportunity to address the Texas Chapter of the American Immigration Lawyers Association at their conference in Cancun, Mexico. It was an interesting experience for me as well as a pleasure to meet some of the folks I've been writing to and conversing with over the telephone since my arrival in Mexico.

In my talk to the Texas Chapter I gave a brief run down on how we process immigrant visas in Mexico City. It is the same system the world over. If someone walks into the office and says I want to go to the United States to live we hand him a Packet One. This Packet consists of an information sheet and a questionnaire to determine immigrant status. i.e. immediate relative, preference, etc. Once we have received the completed questionnaire and status is determined we generally send the applicant a Packet Three which contains a biographic data form and a list of the documents the applicant will require to obtain an immigrant visa. In cases where long waits are inevitable due to backed-up cut-off dates we notify the applicant that he has acquired status by means of a Packet Two. When the applicant furnishes the necessary information, we request the FBI and any other clearances which may be required.

Once the clearances are received we report the preference applicants documentarily qualified to the Department on or about the 22nd of each month. We receive the numbers for these applicants the next month for issuing in the following month. In other words, from the time an applicant is reported qualified it takes approximately sixty days before they are scheduled for an interview.

Interviews are scheduled based on the quantity of statutory numbers we receive and available personnel. We must issue the preference or statutory numbers during the month for which they are allotted as any unused numbers must be returned to the Department of State at the end of the month. We complete our scheduling with immediate relatives. As immediate relatives do not require visa numbers we schedule them as soon as they are documentarily qualified, most generally in the following month.

Available staff is a very important factor in our scheduling process as we must take into consideration leave, gaps caused by transfers and from time to time, the requirements of the non-immigrant visa section. As we decide how many immigrants we can schedule it is possible to maintain control of their numbers. Obviously this is not possible with non-immigrant as we daily take everyone that comes before twelve o'clock noon.

When applicants come to Mexico City for their interviews two days are required. One for the medical examination and the following day for the interview. We take all the immigrants into the waiting room at eight o'clock in the morning on the day of the interview. If they are here by that time it is soon enough. It is necessary for them to form a line at five o'clock in the morning. Once the applicants are in the office they give the receptionist their appointment letter and she distributes their cases equally among the document checkers. There is no special order to precedence involved.

Children under fourteen of all applicants are not required to attend the interview. We discourage their presence due to space problems as we do not have room for everyone in our waiting room on busy days.

After the documents are checked by our local document checkers the applicants are interviewed by a consular officer. If the applicant is found eligible the visa is issued the same day as the interview.

The greatest number of refusals at this Post are attributable to applicants not bringing all the required documents. Nevertheless, the documents checker refers the case to a consular officer to be sure there is no other recourse. As an example, the consular officer may accept a baptismal certificate instead of a birth certificate but the document checker does not have the authority to make these decisions. This decision is also discretionary on the part of the consular officer as applicants are required to have primary documentation if it is available.

Section 212(a)(15) of the Act constitutes the second largest category of refusals. We have guidelines to determine the poverty levels in the continental United States, Alaska and Hawaii. These guidelines are followed, but the consular officer uses his discretion in determining ineligibility under this Section of the Act.

There are, of course, refusals under other Sections of 212(a), but fortunately they are not too numerous.

If an applicant is found to be ineligible and qualifies for waiver consideration, in most cases the waiver is processed at the Immigration and Naturalization Service (INS) office in the Embassy. The INS office here in Mexico City is very cooperative and always processes applications for waivers as fast as possible. If all the documents are in order they will act on them within 72 hours in practically every case. Of course, if they have to request a file or information from the United States or other sources it takes more time. There is one thing which should be noted about waivers of ineligibility. They cannot be processed until the applicant has been found ineligible. That sounds like the most logical statement in the world but we receive many calls about this and practically always there is nothing that can be done about a waiver of ineligibility prior to the interview and the finding of ineligibility by a consular officer.

If an applicant has a police record in the United States, it will normally come to Consulate's attention through an FBI "rap sheet" with the charges listed. Many times the disposition of these charges is not listed. In cases of applicants with a police record, processing time can be saved if official court and police records are presented with other documents at the time of formal interview.

Passports should also be checked for errors as this also causes many delays. To correct a Mexican passport issued in the United States the Embassy has to give the applicant letter and then send him to the Secretariat of Foreign Relations in

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> State upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification application.

This new regulation, clearly delineating the powers of the I.N.S. and State Department in this field, was obviously a forceful endorsement of the Castaneda-Gonzalez doctrine. Yet despite the ostensible elimination of all confusion by the concommitant adoption of a new regulation and a parallel court decision, there was no abatement of the difficulties theretofore experienced. Paradoxically, there was still no consensus as to the proper role for each of the governmental entities involved in the labor certification process, and confusion did remain the hallmark of the certification procedure.

Attempts to Interpret the New Guidelines

Despite the fact, then, that the *Castaneda-Gonzalez* opinion, together with the new regulation — as implemented and approved by the Board of Immigration Appeals in 1978[8] — would have appeared to restrict considerably any interference with Labor's handling of the certification procedure, subsequent events were to prove that simplicity and efficiency had not yet been achieved. As evidenced by a number of court decisions, the Immigration and Naturalization Service and the State Department both continued to endeavor to oversee the certification process, and both persisted in making independent evaluations regarding the validity of already-issued certifications.

In December of 1980 a federal district court was forced to confront directly and reject explicitly an I.N.S. denial of a sixth-preference visa petition.[9] The Immigration and Naturalization Service had denied the petition based on its determination, through the investigations of the American Embassy in New Delhi, that the applicant did not actually have the job experience she had claimed to have when she applied for a labor certification. Rejecting this denial of the petition, the court offered two alternate holdings: a) that the Department of Labor alone has the statutory authorization to make such determinations, and b) that even if the Service possessed the requisite power, it had improperly delegated that power to the Embassy. Broadly speaking, the court declared, "the Attorney General has no general authority independently to override the Secretary of Labor's issuance of a labor certificate."[10]

Aside from the patent discomfort the district court felt in censuring the Service or State for their intrusions in what the Castaneda-Gonzalez court and the new regulation had (rightly or wrongly) determined to be the affairs of Labor, thus leading the court to proffer alternate holdings, it is significant that the opinion

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minister to be seeking admission "solely" to carry on his or her ministry, it is apparent that part time ministers will not do, and that the inability of the church to pay a reasonable salary will compel the immigrant to seek other work, thus rendering the applicant ineligible for special immigrant status. See *Matter of Biscula,* 10 I & N Dec. 712.

The use of the word "needed" presumably means more than a mere desire for the minister's services. But who is to define need? Must the organization show that two ministers are "needed" when it already has one, or that three are "needed" when it already has two? See *Matter of Biscula,* supra, and *Matter of Balbin,* 14 I & N Dec. 165.

Other elements to establish are of course the applicant's ministry for at least two years prior to the application for admission or adjustment of status. See Matter of M--, 1 I & N Dec. 147; Matter of B--, 3 I & N Dec. 162.

Religious Occupations — Schedule A

If an immigrant cannot qualify as a "minister of religion," the Labor Department's schedule A of pre-certified occupations is the next best thing.

Occupations on schedule A are those acknowledged by the Labor Department as shortage occupations. That is, the labor Department has certified in advance that a nationwide shortage exists of qualified American citizens or residents for such jobs. An immigrant who satisfies the schedule A specifications automatically satisfies the provisions of section 212 (a)(14) of the I & N Act and can thereby qualify for either third or sixth preference immigrant status.

Schedule occupations may be found in 20 CFR 656.20. Listed there within Group III are religious occupations. Thus qualified for immigration preference are:

> 1) Aliens who seek admission to the United States in order to perform a religious occupation such as the preaching or teaching of religion; and
>
> 2) Aliens with a religious commitment who seek admission into the United States in order to work for a non-profit religious organization.

To qualify for such pre-certification, however, the immigrant must have worked for the two "previous" years in a similar religious capacity. 20 CFR 656 (e).

The first class of religious workers named in Group III would seem to pose no problem of interpretation. The lay brother, the nun, the religious teacher are clearly qualified. But the second paragraph could raise some interesting questions.

Literally, anyone who is to work for a non-profit religious organization, even the janitor who would clean the church basement, is qualified provided he or she has a "religious commitment." (Presumably, the commitment must be to the same faith as that of the employing organization, but literally the regulation does not say that.)

Yet it seems unrealistic to suppose that the Labor Department meant to certify anyone who would work for a church in any capacity. Probably what was meant by the paragraph were occupations, other than as nuns or monks and the like, which tend to further the religious objectives of the church, such as a religious teacher or principal. See *Matter of Kjeldaas,* 16 I&N Dec. 300.

Religion and Nonimmigrants

Religion may also open the door to admission of non-immigrants. For example, the following persons would be admissible as business visitors:

(a) A missionary who will not sell articles or solicit or accept donations and only receives an expense allowance in the United States. INS, Operations Instructions, Vol. 9. Foreign Affairs Manual, 41.25(h)

(b) One who will participate in voluntary service programs by a recognized religious body who will not receive salary or reimbursement in the United States. INS 0.I.214.2(b)(7)

(c) A minister on an evangelical tour who will not be assigned to one Church and who will be supported by offerings. 9 FAM 41.25(g)

(d) A minister who will exchange pulpits with his or her American counterparts. 9 FAM 41.25(p)

Likewise, a minister might well qualify for admission as a person of distinguished merit and ability for H-1 purposes, as an intracompany transferee.

was affirmed on appeal to the District of Columbia Circuit Court solely on the basis of the second of the two alternate conclusions offered. Claiming that it was unnecessary to deal with the question of I.N.S. power, since even if such power did exist it had been improperly delegated, the appellate court was quite careful to avoid any substantive discussion of the possible powers of the Service and the State Department in this matter.[11] Evidently, the appellate court was in no mood to render a definitive opinion on the issue.

Less than one month prior to the Court of Appeals' unsatisfying decision in that case, the First Circuit was faced with a strikingly similar matter.[12] In this instance the First Circuit held that, when dealing with a sixth-preference visa petition, the Immigration and Naturalization Service has the right and the duty to question a claimed job qualification, notwithstanding the Labor Department's having issued a labor certification based upon its acceptance of that very same qualification. According to the court, the division of power among the various elements of governmental authority was in no way troublesome — the Attorney General (through his delegate, the I.N.S.) has the power to pass upon visa applications, as per I.N.A. Sections 203(a)(6) and 204(b), while under I.N.A. Section 212(a)(14) the Department of Labor has the authority to ascertain the alien's potential impact upon the United States labor force and to protect that force.

Having accepted this fundamental division of responsibilities, the court proceeded to explain, it becomes less difficult to comprehend the precise holding of Castaneda-Gonzalez. For whereas the Service may not, under *Castaneda-Gonzalez,* deport an alien based upon a Labor-issued certification which the Service claims to be invalid due to its having been granted on the basis of incorrect information, the I.N.S. surely retains the power, the First Circuit proclaimed, to refuse an alien sixth-preference visa status due to the Service's questioning of information which Labor had accepted as true. This, the court claimed, would not be a statutorily-prohibited faithlessness in the certification of the Department of Labor, but merely a fulfillment of the Service's own statutory directive to grant or withhold visa preference status. In effect, each branch of the government has its own job to do, and what one had accepted as true for the purposes of its duty, need not bind another branch in the execution of its duty.

The Real World

It is apparent, then, that according to recent court decisions purporting to interpret and apply Castaneda-Gonzalez, the Immigration and Naturalization Service and the Department of State have certainly not been utterly excluded from any participation in the labor certification procedure. Whether the proposition is stated in terms of the rights of agencies to question Labor's findings when making decisions relating to their own fields of practice, as the First Circuit did, or refusing to bar those departments from a direct involvement in the entire process, the result is basically the same: the Department of Labor has been refused plenary power over the labor certification process and its attendant ramifications. Whatever one believes as to what the ideal situation would be, there can be no denying that this is the present reality.

The bewilderment which continues to exist as to the proper delineation of power is further illustrated by the State Department's Foreign Affairs Manual.[13] The Manual contains several notes which are intended to elucidate 22 CFR 42.91(a)(14), the regulation dealing with that provision of the I.N.A. which authorizes exclusion of an alien for lack of a valid labor certification.[14] These Manual notes declare that while, in order to carry out its function of protecting the United States labor force, the Department of Labor is charged with the task of issuing labor certifications, a certification can be invalidated by a consular officer for any of three reasons, of which one is a determination that the certification had been obtained through the utilization of fraud or willful misrepresentation.[15] Concluding that fraud had been employed results not only in the invalidation of the certification, but in the denial of visa preference status, as well.[16] Moreover, the notes offer the following nebulous warning:

> Consular officers must bear in mind that any certification . . . was made on the basis of documents submitted by the alien, and that the certifying officer had no means of verifying that the alien did in fact possess the skills, training, experience, or other qualifications which were claimed in the documents. In all such cases, therefore, it is the responsibility of the consular officer to satisfy himself that the alien does possess such skills . . .[17]

That the consulates experience many difficulties with the meaning and import of the Manual notes is little consolation to the equally-troubled practitioner, but an instructive telegram sent by the State Department to its posts indicates just how muddled the issue remains (portions of the telegram are set out in note 18 of this essay). It dramatically reinforces the popular impression that the conflicting views of the Service, Labor, and State as to their respective powers is compounded by similar disagreements even within the very agencies themselves.

A brief example may serve to exemplify the real problems which can daily result from the uncertainty which pervades this particular point in the immigration law.

Under 20 CFR 656.20(c)(2),[19] a labor certification application is to be approved only if the "wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."[20] The Department of Labor's Operating Instructions Handbook[21] once interpreted this to mean that payment of the prevailing wage must begin with the granting of the labor certification. If the alien had previously received less than the prevailing wage, then once the certification was granted the employer must immediately begin paying the prevailing wage.[22]

The 1981 replacement for the Handbook, Technical Assistance Guide Number 656 of the Department of Labor, has revised this interpretation of the regulation. In the new Guide the Department states its position as being that the prevailing wage must be paid starting "from the time a petition filed under Section 245 of the Act is approved, or from the time the alien enters the United States to take up the certified employment pursuant to the issuance of a visa."[23]

Despite this explicit alteration in position by the Department of Labor, however, which would mean that a labor certification's validity would be unaffected by the alien's receiving less than the prevailing wage even after the granting of the certification, as long as the correct wage were paid as of the dates stipulated in the Guide, the new rule did not gain immediate acceptance. In point of fact, when the exact situation where the new interpretation would have an impact did transpire (that is, in cases where the prevailing wage was paid as of the Guide dates, but not as of the grant of the certification), the Department of State shifted into low gear. Unilaterally holding up the issuance of visas in many such cases, the Department asserted that it was awaiting a policy determination as to whether labor certifications should, in such instances, be treated as invalid.

Finally, in May of this year the State Department instructed its posts via cable that the Department of Labor rule stated in the Technical Assistance Guide was the correct one, and to be followed.[24] Yet even at this point the waters are not clear, for while the Guide refers to the date of approval of the Section 245 application as the critical date, the State