

**CERTIFIABLE: THE DEPARTMENT OF LABOR'S  
APPROACH TO LABOR CERTIFICATION**

**EXECUTIVE SUMMARY**

The U.S. Department of Labor (DOL) is harming the competitiveness of U.S. companies and the growth of U.S. jobs and innovation by enforcing a labor certification policy not intended by Congress and divorced from economic reality. While the law requires labor certification for most skilled immigrants seeking a green card, the Department of Labor has created the current system “out of whole cloth.”

This analysis comes at a time when DOL has announced a mass labor certification audit of a major immigration law firm and Congress is considering legislation to make it feasible for skilled foreign nationals to be hired directly on green cards. The bill, H.R. 6039, authored by Rep. Zoe Lofgren (D-CA), would exempt from green card quotas international students who earn a master’s degree or higher in a science or technology field from a U.S. university. The bill’s goal is to keep this talent in the United States. But with a large portion of labor certification cases subjected to time-consuming audits by the Department of Labor even if the legislation passes it will still not be feasible for individuals to be hired directly on green cards (rather than first on H-1B visas).

For years, the Department of Labor has required that employers sponsoring skilled immigrants fulfill the provisions of the Immigration and Nationality Act by placing advertisements to show no eligible U.S. worker could fill the job, documenting the results of the recruitment, and other methods that require volumes of paperwork and time for the government agency to review. However, none of these requirements are in current U.S. law.

U.S. employers will always opt for the option of hiring an equally qualified U.S. worker – it’s far easier than recruiting a foreign professional, navigating the federal bureaucracy, and administering a very cumbersome visa process. However, even when a foreign-born professional is the most qualified, the Department of Labor creates new employment hurdles that aren’t required by current law.

The labor certification process made news recently when the Department of Labor announced in a press release it would audit all applications for green cards from employers that used the nation’s largest immigration law firm, pushing potentially thousands of cases back a year.

The Department stated it is auditing Fragomen, Del Rey, Bernsen & Loewy to examine whether the firm’s attorneys were advising clients on the qualifications of U.S. workers responding to advertisements mandated by DOL. This has never been an issue in the past and the law firm says it is simply advising clients on technical and legally complex aspects of labor certification.

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Missing from recent news coverage are several facts addressed in this policy brief:

- Although immigration law requires “labor certification” for most employer-sponsored immigrants, the Department of Labor has created the current system out of whole cloth. As attorney Gary Endelman writes, “There was no mention of individualized recruitment in the proposed labor certification regulations on November 19, 1965, or the final version of these same implementing rules that came out on December 3, 1965. There was no sense that employers had to advertise.”
- At the time of the 1965 Immigration Act, Senator Edward Kennedy (D-MA) stated: “It was not our intention, or that of the AFL-CIO, that all intending immigrants must undergo an employment analysis of great detail that could be time consuming and disruptive to the normal flow of immigration.” He said DOL could simply use available statistical data on employment.
- The process bears no resemblance to the reality of how companies actually recruit, with few employers using print ads for highly skilled positions, as DOL requires for labor certification, and most engaging in ongoing use of the Internet, networking and employee referrals.
- Today, the Department of Labor considers no economic facts in adjudicating labor certification applications, such as that most unemployment rates for professionals have hovered between 1 to 2 percent, essentially full employment, or that major U.S. technology companies today average more than 470 U.S.-based job openings for skilled positions, according to the National Foundation of American Policy. And when companies recruit they find most graduate students in key tech fields on U.S. campuses are foreign nationals.
- Because the low quotas on employment-based green cards create waits of 5 years or more, companies typically must first use H-1B temporary visas to hire skilled foreign nationals found in the course of normal recruiting. Labor certification is generally required when employers decide to sponsor such foreign nationals for permanent residence. The Department of Labor then requires an employer to advertise, in effect, to replace someone a company is so happy with it would pay approximately \$10,000 in legal fees to retain.
- The numerous DOL-mandated steps make labor certification an enormous misuse of time and resources. (The Department of Labor acts as if it is performing a great service by using American professionals as pawns to apply for jobs that are generally already filled.) Moreover, DOL’s “test” of the labor market is

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unrelated to normal hiring criteria: DOL rejects an employer's application if anyone who is "minimally" qualified applies for the job, likely sending the foreign national to work for a competitor overseas.

- DOL has made the process so complex that employers need the advice of attorneys to navigate the system. A recent book by ILW.COM published to explain labor certification to businesses totals nearly 900 pages and weighs almost 7 pounds.
- Historically, DOL has badly mismanaged labor certification. By requiring so much government oversight it created backlogs that lasted years. The new PERM (Program Electronic Review Management) system is supposed to be streamlined. Yet since DOL audits a large proportion of cases it still takes a year or more.

The Department of Labor's labor certification system adds a significant dead weight cost to the operations of many of America's most innovative companies, diverting energy and resources that employers could better utilize on innovations that could create more jobs and wealth in the United States. DOL's mandated advertising and recruitment scheme, which it wields like a club against employers, their attorneys and skilled immigrants, goes well beyond what the law prescribes for labor certification.

Congress should largely remove the Department of Labor from the process by exempting many foreign nationals from labor certification, as proposed in a Senate-passed bill in 2006. Absent that, labor certification requirements could be satisfied by employers showing a) they pay the immigrant the same or more than a comparable American and b) they engage in recruitment typical to their industry.

Given its actions, the Department of Labor has shown it has no interest in proposing or operating a simple system, since that would reduce the role and influence of Labor Department employees. It increasingly appears that the process contrived by the Department of Labor and the Department's battles against employers and their attorneys is not about protecting jobs for U.S. workers but jobs for employees at the U.S. Department of Labor.

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## **THE LAW DOES NOT REQUIRE DOL'S MANDATED PROCESS**

Taking its authority to require "labor certification" for employer-sponsored immigrants from a single sentence in the Immigration and Nationality Act, the Department of Labor has made life as difficult as possible for employers, their attorneys and highly skilled immigrants.

While the law requires "labor certification" for most employer-sponsored immigrants to obtain a green card, the Department of Labor has created out of whole cloth the current system it enforces against U.S. employers. As attorney Gary Endelman writes in his history of labor certification, "There was no mention of individualized recruitment in the proposed labor certification regulations on November 19, 1965, or the final version of these same implementing rules that came out on December 3, 1965. There was no sense that employers had to advertise; the availability of U.S. workers, or their nonavailability, was based solely on statistics as embodied in Schedules A and B, respectively."<sup>1</sup>

For years, the Department of Labor has required that employers fulfill the provisions of the Immigration and Nationality Act by placing advertisements to show no eligible U.S. worker could fill the job, documenting the results of the recruitment, and other methods that require volumes of paperwork and time for the government agency to review.

The law actually says nothing about placing advertisements or providing individual affirmative proof of various actions by an employer in the labor market. Nor does it say that employers forced to follow the DOL's recruitment rules in "testing" the labor market must hire anyone who is "minimally qualified" for the position, as DOL regulations require.

The relevant portion of the Immigration and Nationality Act as it relates to the requirements of labor certification states:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.<sup>2</sup>

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The statute has always provided great flexibility to the Department of Labor in meeting the requirements of the law, which is conceded by DOL through its own various deviations from the agency's previously accepted practices.

In discussing the labor certification requirement in the 1965 Act, Senator Edward Kennedy (D-MA) stated:

"It was not our intention, or that of the AFL-CIO, that all intending immigrants must undergo an employment analysis of great detail that could be time consuming and disruptive to the normal flow of immigration. 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 ...[W]e would expect the Secretary of Labor to devise workable rules by which he could carry out his responsibilities under the law without unduly interrupting or delaying immigration to this country. The function of the Secretary is to increase the quality of immigration, not to diminish it below levels authorized by the law."<sup>3</sup>

The Department of Labor has conceded the process it has imposed on U.S. employers is time-consuming and resource-intensive for both employers and DOL itself. In proposing a revised system in 2002, it stated in its rule: "The process for obtaining a permanent labor certification has been criticized as being complicated, time consuming and requiring the expenditure of considerable resources by employers, SWAs [state workforce agencies] and the Federal Government. It can take up to two years or more to complete the process for applications that are filed under the basic process and do not utilize the more streamlined reduction in recruitment process."<sup>4</sup>

In the past few years, the Department of Labor shifted to a slightly different system called PERM (Program Electronic Review Management), which employers and their attorneys agree is not much better. While it is in theory quicker on the front end (more attestation-based), the Department of Labor is auditing a large proportion of the cases anyway, and such audits (and the more intensive "supervised recruitment" procedures) can take a year or longer. As the authors of a chapter in the AILA (American Immigration Lawyers Association) 2007-08 handbook explained to other attorneys: "Understanding PERM has been one of the greatest challenges in recent times in the practice of immigration law."<sup>5</sup> This is what DOL describes as its "streamlined" process.<sup>6</sup>

Although the Department of Labor is challenging the role that attorneys should play in advising clients on labor certification, it is DOL that has created the current complicated system. How complex is DOL's process that

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employers all need the advice of attorneys? A recent book by ILW.COM published to explain labor certification to businesses totals nearly 900 pages and weighs almost 7 pounds.<sup>7</sup>

In addition to ignoring a plain reading of the statute on labor certification, as well as the skills and contributions of foreign nationals, the U.S. Department of Labor also ignores how the labor market functions. Today, there is not necessarily a specific fixed U.S. job that forever must be guarded by a team of investigators at the Department of Labor. Rather, there is work that needs to be done and if an employer cannot find the right person to perform that work in the United States, the company will arrange for the work to be performed in another country or will change plans and grow less domestically because a key individual could not be found.

We know from statistics on H-1B visas that nearly all the companies seeking green cards for skilled immigrants employ 85 to 99 percent U.S. workers or legal residents.<sup>8</sup> There is no evidence that without the elaborate procedures of the Department of Labor companies would suddenly shift these proportions.

Contrary to current U.S. policies of making life more difficult for talented individuals and their employers, the Government of Alberta, Canada, for example, is taking the opposite approach, launching an Internet campaign to attract current H-1B visa holders to Alberta. The campaign also includes buying booths to appear at a half dozen or more U.S. job fairs. Here is an excerpt from the Internet campaign:

**Alberta Welcomes H-1B Visa Holders and Their Families**

Work Here. Live Here.

Work in Alberta and enjoy safe communities, excellent public education and world-class health care. Alberta is full of opportunities and there are hundreds of jobs available in the province's many industries and professional sectors. Find out how you can build your dreams in North America's most vibrant region for you and your family.

**Are you currently working in the United States in a temporary skilled worker visa category?**

You may be eligible to qualify for Canadian Permanent Residency through the Strategic Recruitment Stream pilot program recently introduced by the Alberta Provincial Nominee Program (PNP).<sup>9</sup>

Legislation proposed by Rep. Zoe Lofgren (D-CA) would exempt from employment-based green card quotas foreign nationals who graduated with an M.A. or higher from a U.S. university in a science, technology, engineering or mathematics field.<sup>10</sup> One goal of the legislation is to allow employers to hire such individuals directly on a green card (without first having to use an H-1B temporary visa, as is now typically the case). The ability to hire individuals directly on green cards would be a major competitive advantage for U.S. employers, but

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one that will never be achieved, regardless of the employment-based immigration quotas, unless the U.S. Department of Labor formulates policies that correspond with the way the world and the labor market functions. Businesses thrive on certainty and current DOL policies create great uncertainty for employers and immigrants.

**DOL'S LABOR CERTIFICATION POLICIES DIVORCED FROM ECONOMIC REALITY**

Today, the Department of Labor considers no economic facts in adjudicating individual labor certification applications, ignoring economic conditions in the country, as well as who is studying in the fields sought after by many employers.

Because the low quotas on employment-based green cards translate into waits of 5 years or more, companies typically must first use H-1B temporary visas to hire skilled foreign nationals found in the course of normal recruiting. Labor certification is generally required when employers decide to sponsor such foreign nationals for permanent residence. The Department of Labor then requires an employer to advertise, in effect, to replace someone a company is so happy with it would pay approximately \$10,000 in legal fees to retain.

The numerous DOL-mandated steps make labor certification an enormous misuse of time and resources. (The Department of Labor acts as if it is performing a great service by using American professionals as pawns to apply for jobs that are generally already filled.) Moreover, DOL's "test" of the labor market is unrelated to normal hiring criteria: DOL rejects an employer's application if anyone who is "minimally" qualified applies for the job, likely sending the foreign national to work for a competitor overseas.

The current DOL process harms the competitiveness of U.S. companies in global markets. "I have personally seen foreign nationals with U.S. Master's degrees go to more welcoming countries abroad to settle because the U.S. system is so time consuming and complex," said Ann Pinchak, a Houston-based attorney with 23 years of experience in immigration law. "Other nations understand the need to hire the best and brightest and encourage immigration for those with advanced degrees in technological fields. In the areas of science, engineering and math. U.S. employers have enough problems keeping up with competition overseas, rising costs and an inadequate supply of qualified U.S. workers without having to navigate artificial barriers to their needs constructed by the Labor Department."<sup>11</sup>

According to Pinchak, employers are amazed at how complex and artificial is the Department of Labor's system. "Employers cannot believe it when I say they must spend thousands of dollars on print ads in the most expensive media in town when their usual method of recruitment is the Internet or word-of-mouth," said Pinchak. "They also are amazed that they have to take the time to review and interview minimally qualified applicants and that the process will stretch over several months."<sup>12</sup>

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Technology companies interviewed by NFAP confirmed this. “Contrary to the way DOL views it, hiring isn’t an event,” said one vice president of human resources at a large U.S. technology company. “Our task in recruiting is to attract talented people on an ongoing basis. We do this primarily by using the Internet, networking and employee referrals. We spend little on advertisements.” He points out the company actually never uses print ads – except for those required for labor certification by the Department of Labor.<sup>13</sup>

Angelo A. Paparelli, managing partner, Paparelli & Partners LLP, and Ted J. Chiappari, partner, Satterlee Stephens Burke and Burke LLP, recently provided a good summary of the current DOL labor certification process:

“Applying for labor certification is the first step in a years-long, multi-agency administrative process required of employers who seek to sponsor foreign-born employees for the coveted right of lawful permanent residency in the United States, colloquially-titled the “green card.”

“Under the DOL’s automated, online process known as PERM (Program Electronic Review Management), before an employer may file a labor certification application seeking to employ a foreign citizen on a permanent basis, the business is required to engage in a good-faith recruiting effort. This DOL-mandated ‘test’ of the labor market is intended to determine if any ready, willing and able U.S. workers (citizens, green-card holders, refugees and asylees) can be found.

“This DOL-devised recruitment effort is unlike any in the real world of business. The employer must use print ads despite the overwhelming predominance today of internet-based recruiting. The required ‘prevailing wage’ is often inflated because it must be divined in a square-peg/round-hole process from an online DOL database listing fewer than 2,000 occupations, dumbed-down for bureaucratic convenience from the previous *Dictionary of Occupational Titles*, a compendium of over 40,000 job descriptions. The employer must consider as qualified for the advertised position any job applicants (though lacking the minimum requirements) whom the employer could train in a ‘reasonable’ time. Also up for mandatory consideration are applicants who are clearly over-qualified for the job even though experience has taught that many over-qualified new hires grow bored quickly and soon resign. These are but a few of the deviations from real-world recruiting concocted by the DOL.<sup>14</sup>

“Counterintuitively, the DOL will issue an approved labor certification for a foreign worker only if the employer’s recruiting efforts ‘fail.’ In order to ‘fail’ the labor market test, the employer must establish to the DOL’s satisfaction that the recruitment test produced no minimally qualified U.S. job applicants who met



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the employer's objective requirements for the offer of a prospective job (a job which the employer hopes will be filled or, more often, remain filled, by the foreign worker if a green card is ultimately issued)."<sup>15</sup>

It would surprise many people to learn that economic data, such as unemployment rates in professional fields, or facts unrelated to the DOL mandated recruitment procedures are not a part of the labor certification process as regulated by the Department of Labor. Below are some examples of the type of information that would not be considered in adjudicating labor certification application:

- Major U.S. technology companies today average more than 470 U.S.-based job openings for skilled positions, while defense companies have more than 1,265 each, indicating U.S. businesses continue to experience difficulty in filling positions in the United States for skilled labor of all types, according to a recent National Foundation for American Policy analysis.<sup>16</sup> A number of companies have thousands of skilled positions open, with this level of openings persisting for a year or more. The numbers are conservative in that, for example, most large companies have openings as part of ongoing recruitment programs for recent or upcoming college graduates that are not listed publicly as posted jobs.
- The market for advanced science and engineering education, like the science and engineering labor market as a whole, is global. When companies recruit on college campuses they find most of the students in key graduate programs are foreign nationals. In 2006, 73% of new electrical engineering Ph.D.s were granted to international students, as were 64% of all engineering Ph.D.s awarded, according to the National Science Foundation. In the physical sciences, 48% of Ph.D.s were granted to foreign students. In 2005, foreign nationals (international students) received 55 percent of electrical engineering master's degrees and 42 percent of computer science master's` degrees.<sup>17</sup>
- The National Science Foundation reports foreign nationals with advanced degrees from U.S. universities earn more than natives after controlling for age and years since degree.<sup>18</sup>
- The long-term trend for U.S. skill levels is not positive. "America in the 21<sup>st</sup> Century is no longer a skill-abundant country relative to an increasing share of the rest of the world . . . America faces an imminent disproportionately larger skills drain into retirement than other industrialized countries," concludes Jacob Funk Kirkegaard, a research associate at the Peterson Institute for International Economics in Washington, D.C. in a recent book.<sup>19</sup>
- "The rate of growth of the S&E [science and engineering] labor force may decline rapidly over the next decade because of the aging of individuals with S&E educations, as the number of individuals with S&E

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degrees reaching traditional retirement ages is expected to triple,” according to the National Science Foundation. “If this slowdown occurs, the rapid growth in R&D employment and spending that the United States has experienced since World War II may not be sustainable. . .The growth rate of the S&E labor force would also be significantly reduced if the United States becomes less successful in the increasing international competition for immigrant and temporary nonimmigrant scientists and engineers.”<sup>20</sup>

- Research from the National Foundation for American Policy found that hiring skilled foreign nationals is associated with job creation at U.S. technology companies. Examining H-1B filings and year-by-year job totals for the technology companies in the S&P 500, the National Foundation for American Policy (NFAP) used a regression model that controls for both general market conditions and firm size and found that there is a positive and statistically significant association between the number of positions requested in H-1B labor condition applications and the percentage change in total employment. The data show that for every H-1B position requested, U.S. technology companies increase their employment by 5 workers. For technology firms with fewer than 5,000 employees, each H-1B position requested in labor condition applications was associated with an increase of employment of 7.5 workers.<sup>21</sup>

## **GOING AFTER EMPLOYERS AND THEIR ATTORNEYS**

Many believe the Department of Labor was engaging in intimidation tactics by announcing in a much-criticized press release that it would audit all PERM (labor certification) cases from the nation’s largest law firm, Fragomen, Del Rey, Bernsen & Loewy. An audit generally pushes a case back a year, meaning longer waits for employees at the companies that are clients of the Fragomen firm.

The Department claims it is auditing Fragomen, Del Rey, Bernsen & Loewy to examine whether the firm’s attorneys were advising clients on the qualifications of U.S. workers responding to advertisements mandated by DOL. This has never been an issue in the past and the law firm says it is simply advising clients on technical and legally complex aspects of labor certification.

In the Department of Labor’s press release announcing the audit, DOL stated that its “regulations specifically prohibit an employer’s immigration attorney or agent from participating in considering the qualifications of U.S. workers who apply for positions for which certification is sought, unless the attorney is normally involved in the employer’s routine hiring process. Where an employer does not normally involve immigration attorneys in its hiring process, there is no legitimate reason to consult with immigration attorneys before hiring apparently qualified U.S. workers who have responded to recruitment required by the permanent labor certification program.”<sup>22</sup>

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As noted earlier, the DOL-mandated process is enormously complex, so there are legitimate reasons for employers to wish to consult immigration attorneys at all stages of the process. Moreover, it is a leap to say that consulting an attorney at any stage of labor certification is the same as “consulting with immigration attorneys before hiring apparently qualified U.S. workers” who responded to DOL-required advertisements. Evaluating a response to a DOL-mandated advertisement that arrives as part of a “test” of the labor market is not the same as deciding whether to offer someone a job. Moreover, turning labor certification into some type of awkwardly designed government jobs program would not be permissible under even the most expansive reading of the statute.

As Angelo Paparelli and Ted J. Chiappari explain, “In other words, the Labor Department is conducting the largest audit in the history of the PERM program (and consigning perhaps thousands of foreign workers to even longer delays) because the law firm representing its clients ‘instructed’ them to consult with counsel if an ‘apparently qualified’ U.S. worker were to apply for the position.”<sup>23</sup>

Paparelli and Chiappari note that DOL apparently claims this right to limit the use of counsel by a “rulemaking sleight of hand,” having “materially changed the wording of another related section [of the PERM regulation] without announcing the change – an apparent violation of the notice and comment provisions of the Administrative Procedures Act. . . .With this change of wording the DOL presumably intended that the attorney for the employer be subject to the same prohibition against interviewing or considering the qualifications of U.S. workers who apply for the job opportunity as has long applied to the lawyer for the foreign national.”<sup>24</sup>

In a previous regulation, the Department of Labor prevented individuals from paying for their own attorneys in labor certification cases, which has meant that less well-heeled employers, such as poorer school districts and non-profit health clinics have stopped filing for green cards (even though the doctors and teachers would be happy to pay the legal costs themselves).<sup>25</sup> A recent DOL regulation on H-2B visa applications (for seasonal nonagricultural workers) would debar attorneys for up to three years from practicing immigration before government agencies – without the right to object or appeal such a devastating debarment – for such things as failing to cooperate with an audit or DOL-supervised recruitment.<sup>26</sup> It appears these DOL actions are part of a larger battle of attrition against employers and foreign-born workers by an agency that, ironically, is headed by an immigrant.

## **CONCLUSION**

In response to one sentence in the Immigration and Nationality Act authorizing labor certification, the Labor Department has 1) invented a Byzantine process for employers that necessitates legal counsel, 2) established sanctions for not adhering to their contrived process (placing ads and recruiting in specific ways), and 3) now seeks to punish employers and discourage them from using law firms for at least certain aspects of this complicated process by auditing all cases from a major law firm.

The long processing times at DOL and even the current audit of Fragomen, Del Rey, Bernsen & Loewy are a result of interpreting the law in a way that has guaranteed complexity, laborious processing and inherent time lags for U.S. employers and skilled immigrants.

The Department of Labor's labor certification system adds a significant dead weight cost to the operations of many of America's most innovative companies. DOL procedures divert time and resources that employers could better spend on innovations that could create more jobs and wealth in the United States. DOL's mandated advertising and recruitment scheme, which it wields like a club against employers, their attorneys and skilled immigrants, goes well beyond what the law prescribes for labor certification. Ironically, even when DOL's procedures are "successful," the result is that an employer will no longer be able to retain on a permanent basis an employee found to be a productive member of the labor force.

Congress should largely remove the Department of Labor from the process by exempting many foreign nationals from labor certification, as proposed in a Senate-passed bill in 2006. Absent that, labor certification requirements could be satisfied by employers showing a) they pay the immigrant the same or more than a comparable American and b) they engage in recruitment typical to their industry.<sup>27</sup>

Given its actions, the Department of Labor has shown it has no interest in proposing or operating a simple system, since that would reduce the role and influence of Labor Department employees. It increasingly appears that the process contrived by the Department of Labor and the department's battles against employers and their attorneys is not about protecting jobs for U.S. workers but jobs for employees at the U.S. Department of Labor.

**END NOTES**

<sup>1</sup> Gary Endelman, "Labor Certification From 1952 to PERM: Part I," *Interpreter Releases*, October 4, 2004, p. 1362.

<sup>2</sup> 8 USC Section 1182. Immigration and Nationality Act Section 212(a)(5)(A). Clause (ii) refers to "a member of the teaching profession, or [an individual who] has exceptional ability in the sciences or the arts."

<sup>3</sup> Statement of Senator Edward Kennedy, Congressional Record, September 17, 1965, as cited in Gary Endelman, "Labor Certification From 1952 to PERM: Part I," *Interpreter Releases*, October 4, 2004, p. 1359.

<sup>4</sup> Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 67 *Federal Register* 30466-521 (May 6, 2002) as cited in Endelman, p. 1355.

<sup>5</sup> Romy Kapoor, Edward R. Litwin, Deborah J. Notkin, and Linda Rose, "A Magical Mystery Tour: Selected PERM Issues," *Immigration & Nationality Law Handbook*, 2007-08, AILA, p. 180.

<sup>6</sup> [http://www.doleta.gov/whatsnew/new\\_releases/2008-06-02.cfm](http://www.doleta.gov/whatsnew/new_releases/2008-06-02.cfm).

<sup>7</sup> [www.ilw.com](http://www.ilw.com).

<sup>8</sup> Relatively few companies qualify as "H-1B dependent" employers. Such employers have 15 percent or more of its workforce made up of H-1B visa holders. While it is possible some companies who are not H-1B dependent have more than 15 percent of their workforce made up of non-U.S. citizens, lawful permanent residents who work for a company can apply to become citizens within 5 years of obtaining their green cards.

<sup>9</sup> <http://albertacanada.com/immigration/campaigns/h1b.html>.

<sup>10</sup> H.R. 6039.

<sup>11</sup> Interview with NFAP.

<sup>12</sup> *Ibid.*

<sup>13</sup> Interview with NFAP.

<sup>14</sup> Angelo A. Paparelli and Ted J. Chiappari, "U.S. Labor Department to Immigration Lawyers: You're All Just Potted Plants," *New York Law Journal*, June 23, 2008.

<sup>15</sup> *Ibid.*

<sup>16</sup> See Talent Search (March 2008) at <http://www.nfap.com/pdf/080311talentsrc.pdf>.

<sup>17</sup> *Science and Engineering Indicators 2008*, National Science Foundation, 2008 and <http://www.nsf.gov/statistics/infbrief/nsf08301/>.

<sup>18</sup> *Science and Engineering Indicators 2008*.

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<sup>19</sup> The book can be found on the Peterson Institute's website at: <http://bookstore.petersoninstitute.org/bookstore/4136.html>, pp. 12-13.

<sup>20</sup> *Science and Engineering Indicators 2008*, The National Science Foundation, 2008, Chapter 3.

<sup>21</sup> <http://www.nfap.com/pdf/080311h1b.pdf>.

<sup>22</sup> "U.S. Department of Labor auditing all permanent labor certification applications filed by major immigration law firm," ETA release, June 2, 2008. Available at: [http://www.doleta.gov/whatsnew/new\\_releases/2008-06-02.cfm](http://www.doleta.gov/whatsnew/new_releases/2008-06-02.cfm).

<sup>23</sup> Paparelli and Chiappari.

<sup>24</sup> Ibid. The authors write, "Specifically, the Labor Department altered 20 CFR § 656.10(b)(2)(i) by adding a new restriction on the role of the employer's attorney so that it parallels a longstanding limit on the foreign worker's lawyer. The cited regulation now provides in relevant part (with altered text italicized):

It is contrary to the best interests of U.S. workers to have the alien and/or agents or *attorneys for either the employer or the alien participate in interviewing or considering U.S. workers for the job offered the alien*. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney can not represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative, as described in paragraph (b)(2)(ii) of this section. (Italics supplied.)"

<sup>25</sup> Interviews with attorneys.

<sup>26</sup> Paparelli and Chiappari. The proposed H-2B rule can be found at 73 Federal Register 29942 (May 22, 2008).

<sup>27</sup> A company could show that it engages in recruitment typical to their industry by writing a description of their recruitment policies and showing how they are similar to those generally practiced in their line of business, as detailed in reports and surveys on the industry.

## **ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY**

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at [www.nfap.com](http://www.nfap.com).