IN THE BOARD OF ALIEN LABOR CERTIFICATION APPEALS

In the Matters of:

MICROSOFT CORPORATION,
Employer,

on behalf of

DILAN SUDHARAKA HEWAGE,	**BALCA Case No.:**	**2013-PER-01478**
	ETA Case No.:	A-11228-00132
ADIT ABHAY DALVI,	**BALCA Case No.:**	**2013-PER-02904**
	ETA Case No.:	A-11222-98848
BHARADWAJ JANARDHAN,	**BALCA Case No.:**	**2013-PER-02962**
	ETA Case No.:	A-11231-01013

On En Banc Review

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE EMPLOYER

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November 7, 2013

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in litigation before administrative agencies and in the courts raising issues of vital concern to the nation's business community. This case implicates one of the most significant labor certification issues facing employers in the United States, which is why the Chamber files this brief, at the invitation of the Board, as *amicus curiae*. *See* 29 C.F.R. § 18.12.

SUMMARY OF ARGUMENT

The Department of Labor's foreign labor certification regulation, 20 C.F.R. § 656.17(k), requires that an employer, before hiring an available foreign worker for an open position, "notify and consider" all potentially qualified U.S. workers who have been laid off by the employer within the last six months. Neither that regulation nor any other agency directive, however, explains how an employer may or must satisfy this requirement. The result is that an employer (such as Microsoft), which may have spent years developing and implementing a system to "notify and consider" potentially qualified and recently laid-off workers, and which may have relied on that system in recruiting qualified foreign workers to staff otherwise unfillable mission-critical posts, may later find those efforts wasted if the system does not satisfy the *ad hoc* expectations—previously unpublished and unknowable to the employer, announced only in retrospect upon denial of a labor-certification petition—of the Department of Labor analyst

assigned to the matter. The uncertainties inherent in this standardless process impose substantial and largely unrecoverable costs on employers throughout the country.

The purpose of this brief is twofold. The first is to highlight the problems with the current regulatory structure, which provides no governing standards by which employers can with confidence develop or implement a foreign labor certification system. The second is to explain why the Department should use notice and comment rulemaking to adopt regulatory provisions defining and clarifying the "notify and consider" requirement. In all events, and however the Board rules in this particular case, it should recommend that the Department proceed as soon as possible to address these issues.

ARGUMENT

I. The Department Should Clarify The "Notify And Consider" Requirement Of The Foreign Labor Certification Regulation.

The existing regulatory structure provides insufficient—indeed, no—guidance to employers seeking to comply with the laid-off worker notification requirement of the foreign labor certification regulation, 20 C.F.R. § 656.17(k). *See, e.g.*, Am. Immigration Lawyers Ass'n (AILA), *AILA's Guide To PERM Labor Certification* 253 (2011). To bring needed certainty to this field, and to alleviate the immense burden on employers, the Department should take immediate action to clarify the steps an employer may or must take to satisfy this requirement.

A. The notification provision in 20 C.F.R. § 656.17(k) leaves critical questions unanswered. That provision states simply, without further explanation, that an employer must "notify and consider" recently laid-off, potentially qualified U.S. workers. *Id.* The regulation does not, however, specify *how*—among the wide range of possibilities—employers should go about "notifying" their former employees. And there are in fact many reasonable ways that employers may provide notice.

Legal practice is replete with disparate requirements for providing notice.[1] Notice might be accomplished, for example, by delivery of a letter or other physical document, *e.g.*, Fed. R. Civ. P. 5(b)(2)(A), or by transmission of information through verbal communication or electronic means, *e.g.*, Fed. R. Civ. P. 5(b)(2)(E). In some other circumstances, notice must be specific and detailed, explaining all pertinent information and its relevance to the individual, *e.g.*, 29 C.F.R. § 639.7, whereas in others it need only alert an individual that an obligation or opportunity may exist and should be further investigated, *e.g.*, Fed. R. Civ. P. 23(c)(2). Notice must sometimes be delivered personally to the individual, up to and including through hand delivery by a registered agent, *e.g.*, Fed. R. Civ. P. 4.1, but quite often (including in the rulemaking context) it can be provided through publication in an official reporter, *e.g.*, 5 U.S.C. § 553(b), Internet site, *e.g.*, 28 C.F.R. § 8.9, or even a local "newspaper with general circulation," *e.g.*, Fed. R. Civ. P. 71.1(d)(3)(B). Notice might be deemed effective only upon receipt, or only upon express certification by the recipient, *e.g.*, *Weigner v. City of New York*, 852 F.2d 646, 651 & n.6 (2d Cir. 1988), or it might be considered complete upon mailing or other attempt at service, regardless of whether the information is in fact ever received, *e.g.*, Fed. R. Civ. P. 5(b)(2)(C).

The nearly boundless range of possible methods of providing "notice" poses a serious problem for employers attempting to comply with 20 C.F.R. § 656.17(k). The regulation requires them to develop and document a process to "notify" all "potentially qualified" recently laid-off workers of a job opening, *id.*, but it does not define or restrict the method or guidelines that must be followed in doing so, *id.*; *see also Labor Certification for the Permanent*

[1] *See* Black's Law Dictionary 1087 (7th ed. 1999) (listing various methods of providing and receiving "notice," *inter alia*, "actual notice," "constructive notice," "direct notice," "express notice," "immediate notice," "implied notice," "imputed notice," "indirect notice," "inquiry notice," "legal notice," "personal notice," "public notice," "record notice").

Employment of Aliens in the United States, 69 Fed. Reg. 77,326, 77,354-55 (Dec. 27, 2004). Thus, employers must rely on their own judgment, in light of their knowledge of industry practice and experience in recruitment, to determine the most effective means to notify workers of a new opportunity. *See AILA's Guide to PERM Labor Certification*, *supra*, at 253; *see also* Austin T. Fragomen, Jr., et al., *Labor Certification Handbook* § 2:74 (2013 supp.). That is, indeed, what appears to have occurred in this case, with the employer developing an Internet-based notification system that, in the employer's reasonable view, provided the best means to maintain communication with former employees.

Nothing in the regulation precludes employers from relying on their own judgment and experience in crafting their notification process. Indeed, in the absence of any specific limitation regarding the form of notice that must be provided, the regulation should be interpreted as granting employers discretion to choose from the available methods of providing reasonable notice to former employees, to craft and implement their notice procedures accordingly, and then to certify that fact to the Department. *See* U.S. Dep't of Labor, ETA Form 9089, *Application for Permanent Employment Certification*, Part I.e.26-A (directing employer to certify whether "[any] laid off U.S. workers [were] notified and considered for the job opportunity for which certification is sought").

Nevertheless, employer-crafted notification procedures are, with increasing frequency, being rejected *post hoc* by Department analysts. The reasons provided vary widely—including, as here, failure to "directly" or "actively" notify the qualified workers—but they all share a common attribute: they are premised on the employer's alleged failure to satisfy a notice requirement that appears nowhere on the face of the regulation or in any other document issued

by the Department. They are instead based on the *ad hoc* judgments of the analysts regarding what, in their view, *should* be mandated as a matter of policy and best practice.

Here, for example, the Department analyst determined that an employer cannot satisfy its obligation under the regulation by providing notice to laid-off employees of a website where jobs are posted and available for review—even though such posting would satisfy the general definition of "notify." *See supra* p.3. Instead, according to the Department's decision, employers must "actively" and "directly" contact these employees and provide them with "specific" notice of the relevant job opportunity. Even assuming for the sake of argument that this would be a permissible standard for the Department to adopt—and the Chamber does not concede that it would be—it does not currently appear in the regulation and could not have been reasonably anticipated by the employer when it was developing its notice procedures.[2]

The problem is exacerbated because the Department does not publish determinations made under the foreign labor certification program and is not bound by those prior decisions. *See* 20 C.F.R. § 656.24. This means that employers have little if any information concerning the standards that have previously been applied to assess the sufficiency of notification procedures—and even when they do, they cannot rely on that information in crafting their own processes. Indeed, an employer cannot even be sure that a notification procedure that previously passed muster will be recognized as valid in the future. In any particular case, a Department analyst may conclude that the regulation imposes a more rigorous "notice" requirement—demanding more specificity, more direct delivery, or more clear evidence of receipt—than the one used by

[2] The "notify" requirement is of quite recent vintage, having been adopted only in 2004 (effective in 2005). It represented a "clear break from [the Department's] historical treatment of layoffs," which was "never before set forth in regulations, BALCA decisions, or policy memoranda." *AILA's Guide to PERM Labor Certification*, *supra*, at 253. There is, for that reason, no prior tradition or history of practice from which employers might draw guidance in assessing the adequacy of their notification procedures.

the employer. These decisions are of course subject to review by the Board, *id.* § 656.26, which can and does with some regularity reverse, *see, e.g.*, *In re Cisco Systems, Inc.*, 2011-PER-02811, 2013 WL 1854064 (Bd. Alien Lab. Cert. App. 2013). But only a small percentage of cases reach the Board level and an even smaller percentage result in a published opinion.

In short, there is no publicly available, reliable source employers can consult to determine whether their notification process will be deemed to satisfy the regulation. "Employers must pick, at their peril, among the wide range of [notification] options"—anything from "posting on the state workforce agency ... job board to sending a letter to each laid-off worker via overnight delivery," *AILA's Guide to PERM Labor Certification*, *supra*, at 253—and then hope the selected option is favorably received by the Department analyst. This is precisely the type of regulatory system that the Supreme Court has said implicates fundamental concerns of due process: one that "fails to provide a person of ordinary intelligence fair notice of what is [required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

B. The vagaries and uncertainties inherent in this system impose enormous costs upon all participants in the labor certification system. Employers devote substantial time and resources to the development and implementation of their labor-certification processes, including the layoff-notification procedures. *See, e.g.*, Fragomen et al., *supra*, §§ 2:62, 2:74-2:75. Managers and human resources personnel must decide how best to determine whether a laid-off worker is in the "occupation for which certification is sought or in a related occupation"; whether the laid-off worker is "potentially qualified"; how to inform the worker of the opening; and whether the employer's process of consideration meets the regulatory standard. *Id.* They must

then actually put that system into practice—possibly incurring, among other costs, the expense of hiring a computer consultant to set up a job-posting website or contracting with delivery companies to distribute job-notification letters. *Id.* Companies will in addition often retain experienced attorneys to advise and assist them with developing these procedures and documenting their implementation, and when necessary preparing and submitting the documentation for an audit by the Department. *Id.*; *see also AILA's Guide to PERM Labor Certification*, *supra*, at 253.

These expenses are all for nothing if a Department analyst subsequently declares the notification procedures invalid. Any notice provided to laid-off employees under those procedures will be deemed ineffective, meaning the employer will have to start the full labor-certification process once again, essentially from scratch. The employer will, once again, need to obtain a prevailing-wage determination, place recruitment advertisements, review the résumés of any applicants, and then develop and execute, in the event of layoffs in the preceding six months, revised notification and consideration procedures for laid-off U.S. workers—all the time under the cloud that the revised procedures may suffer the same rejection as the previous process, if they do not satisfy the demands of the next Department analyst.

Beyond the direct monetary costs, this system also produces hidden, but often more significant, costs in the form of lost productivity. The reason employers go through the labor-certification process—and indeed the fundamental purpose of the regulation—is, of course, to allow them to hire workers for positions that would otherwise go unfilled. *See, e.g.*, 69 Fed. Reg. at 77,326-28; *see also AILA's Guide to PERM Labor Certification*, *supra*, at 253. An employer whose notice provisions are deemed insufficient will be unable to hire the qualified foreign

worker, and the position will continue to go unfilled. Particularly for mission-critical functions, the ultimate financial loss to an employer can be severe, and potentially debilitating.

All of this can and should be avoided. The Department has in other regulatory schemes with similar notification requirements adopted clear guidelines describing when and how notice must be provided, and there is no reason it cannot do so here. *See, e.g.*, 29 C.F.R. §§ 639.1-639.10 (stating requirements for notice under Worker Adjustment and Retraining Notification Act). Indeed, another subsection of the labor-certification regulation sets forth, in some detail, the procedures that employers must follow in publishing "notice" of job opportunities for purposes of pre-filing recruitment. *See* 20 C.F.R. § 656.17(e). Given the high costs associated with the current standardless system, and the regulatory and constitutional concerns it implicates, the Department should immediately take action to clarify the notification requirement in 20 C.F.R. § 656.17(k).

II. The Department Should Develop Standards Through Notice And Comment Rulemaking.

The appropriate way to establish greater clarity is through "notice and comment" rulemaking, as prescribed by the Administrative Procedure Act (APA), 5 U.S.C. § 553. Although agencies have sometimes employed less deliberative methods of setting policy, such as issuing guidance documents or case-by-case adjudication, notice and comment rulemaking is a superior choice for many reasons and should be used in these circumstances. *See generally* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin L. Rev. 565, 567 (2012); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 Duke L.J. 1311 (1992).

A. The APA specifies notice and comment rulemaking as the method of promulgating generally applicable rules. *See, e.g., Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382

(D.C. Cir. 2002). Although the statute permits agencies in some circumstances to issue "interpretative rules" or publish "general statements of policy," 5 U.S.C. § 553(b), it affirmatively mandates notice and comment for those rules intended to bind the public and the agency with the force of law, *Gen. Elec. Co.*, 290 F.3d at 382-83. Standards defining the manner by which employers are required to "notify" laid-off workers under the labor-certification process are precisely of this type. The current regulation, in fact, was promulgated through notice and comment rulemaking. *See* 69 Fed. Reg. 77,326. Furthermore, as noted above the Department has in other regulatory schemes employed the notice and comment process as the appropriate legal means by which to establish and enforce similar notification requirements. *See, e.g.*, 29 C.F.R. §§ 639.1-639.10.

Congress, administrative officials, and courts have repeatedly admonished that notice and comment rulemaking should be preferred over other forms of agency policymaking. *See, e.g.*, *Non-binding Legal Effect of Agency Guidance Documents*, H.R. Rep. No. 106-1009, at 1 (2000) (disapproving of "backdoor" regulation through guidance documents); *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3,432, 3,433 (Jan. 25, 2007) (Office of Management and Budge directive, which advises that notice and comment rulemaking affords the "benefit of careful consideration" that may be lacking in other forms of agency action); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (criticizing agency's practice of creating new law through guidance documents). Compared to case-by-case adjudication or informal agency guidance, notice and comment rulemaking produces rules of higher quality, greater legitimacy, and less susceptible to legal challenge. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 8 (D.C. Cir. 2011); *Gen. Elec. Co.*, 290 F.3d at 385; *Appalachian Power*, 208 F.3d at 1019; *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206, 213 (D.C. Cir. 1999). Notably,

courts frequently strike down administrative policies issued through guidance documents and other informal publications as violating the APA's notice and comment requirements. *E.g.*, *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966, 972 (D.C. Cir. 2013); *Elec. Privacy Info. Ctr.*, 653 F.3d at 8; *Gen. Elec. Co.*, 290 F.3d at 385; *Appalachian Power*, 208 F.3d at 1019; *Chamber of Commerce*, 174 F.3d at 213; *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). The Supreme Court has long since established that "[t]he function of filling in the interstices of [a statute] should be performed, as much as possible, through [the] *quasi*-legislative promulgation of rules to be applied in the future." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("Since [an agency], unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct.").

B. The presumption favoring notice and comment rulemaking exists for good reason. Compared to other forms of agency action, notice and comment rulemaking produces rules of higher quality and greater legitimacy. The centerpiece of the APA's rulemaking process—the requirement of a period for receiving public comments—gives the agency an opportunity to receive a wide variety of information from all interested groups, enabling them "to obtain information that may help them better understand how current policies could be improved and also how the public or regulated parties would respond to a change in policy." Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process*, 77 Geo. Wash. L. Rev. 924, 927 (2009). With more information from a broader range of interested persons at its fingertips, the agency is in a better position to take reasonable and effective agency action.[3]

[3] Other requirements of notice and comment rulemaking, including the obligation of responding to "significant points raised by the public," *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012), and adequately explaining the basis and purposes of the rule, *Northeast*

That is certainly true here. The employers and employees who participate in the labor-certification process will have, by virtue of their direct experience, the best knowledge as to how notice of a recruitment opportunity can be most effectively and efficiently conveyed. This input is especially important given the wide range of commercial enterprises and industries that resort to the labor-certification process: a notification procedure that is appropriate for a high-tech company, for example, may not be appropriate for a manufacturer of heavy equipment. By inviting and obtaining the viewpoints of those across the industrial and commercial spectrum, the Department will be in the best position to decide how to craft the notification procedures so as to provide sufficient clarity for all employers (and regulators) while ensuring adequate flexibility across different sectors of the economy.

Clear standards will also help resolve another problem: the Department has for years struggled with increasing caseloads and a backlog of certification requests. *See Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 109 (D.D.C. 2005) (citing Declaration of William Carlson, Director of Foreign Labor Certification); *see also* Faegre Baker Daniels et al., *PERM Applications: Longer Processing Times and Continued Scrutiny By Department of Labor*, Lexology (Aug. 21, 2013), http://www.lexology.com/library/detail.aspx?g=568ecc36-c5c6-4d27-82d9-0cae8aba1d7a. Although there are many reasons for this, one of them is confusion—among both employers and Department analysts—regarding the applicable notification standards for laid-off workers. Another reason is the high number of appeals (and refilings of labor certifications) in cases where a petition is denied based on a finding of insufficient notification and consideration of U.S. workers. Clarifying the notification standards would mitigate at least

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Maryland Waste Disposal Authority v. EPA, 358 F.3d 936, 948-49 (D.C. Cir. 2004), also lead to heightened agency deliberation and, in turn, to improved, better-planned regulations.

some of these problems and, thereby, would reduce the pending caseloads of the Department and its analysts.

C. Notice and comment rulemaking also serves several other interests. Perhaps most importantly, a formal regulation is the only type of rule that can legally bind the public and the agency and thus provide employers with the predictability needed in the labor-certification process. *Gen. Elec. Co.*, 290 F.3d at 385. By contrast, agency policy statements, which may frequently change and are not binding, *id.*, cannot remedy the chief concerns of employers: an inability to rely on specific notice standards and to predict accurately what a Department analyst will decide on any given day.

The comment period also gives employers and workers a valuable opportunity to participate in the rulemaking process by submitting input on any proposed regulation before its adoption. The right to comment places all interested groups—employers, U.S. workers, and foreign workers alike—on equal footing to express their views. Indeed, public participation is a core democratic value in its own right, one that instills a final regulation with a valuable measure of democratic legitimacy. Equally important, public rulemaking procedures foster government transparency. These values are not merely a "convenient formalism," but have been characterized by the Supreme Court as a "structural necessity," *National Archives & Records Administration v. Favish*, 541 U.S. 157, 172 (2004), and "vital to the functioning of a democratic society," *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Providing this opportunity for all stakeholders to participate is especially important in this circumstance. The purpose of the foreign labor certification regulation—allowing employers to hire foreign workers for positions for which no U.S. worker is available—is undoubtedly worthy and consistent with the interests of all relevant stakeholders. By engaging with these groups

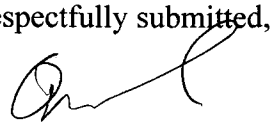
through the public notice and comment process, and offering them a voice in developing a set of governing rules, the Department can best ensure both that the final rules reflect the concerns of these parties and that they will ultimately be viewed as legitimate.

Put simply, in light of the substantial benefits of notice and comment rulemaking, and the risks of dispensing with the APA's rulemaking procedures, it is in the Department's and the public's best interests to use notice and comment rulemaking as the means of clarifying the notification standards for foreign labor certifications. And because of the serious problems with the current lack of notification standards, it is clear that greater clarity is necessary.

CONCLUSION

For all of these reasons, and the reasons stated by Microsoft, the Board should reverse the decision of the certifying officer, and the Department should clarify the "notify and consider" requirement in 20 C.F.R. § 656.17(k) through notice and comment rulemaking.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief as *Amicus Curiae* by the U.S. Chamber of Commerce is being served by first class mail, postage prepaid, on November 7, 2013, addressed to the following:

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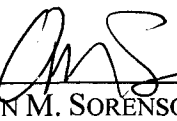
/s/ 
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