**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 |

*Aliens.*

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# BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYER

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Russell Abrutyn
Anthony Weigel
Christina Murdoch
American Immigration Lawyers Association
1331 G Street NW, Suite 300
Washington, DC 20005
(202) 507-7600

Melissa Crow
Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7523

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## INTRODUCTION

Consistency in agency decision making is a hallmark of due process and fundamental fairness. Regulated parties rely on established policies and practices and conform their behavior accordingly. They assume that similarly situated applicants will be subject to the same rules unless they receive notice to the contrary. As this case demonstrates, an agency's decision to change course without prior notice can have serious economic and practical consequences.

The labor certification process is a serious undertaking for an employer. It is time-consuming, costly, and labor-intensive. Having to go through the process multiple times substantially increases the cost and can jeopardize an employer's ability to retain qualified foreign employees for jobs in which there are no able, willing, qualified, and available U.S. workers. As such, an employer who files an application for a labor certification wants to do it right.

The layoff regulation currently before the Board, 20 C.F.R. § 656.17(k)(1), does not require an employer to use a specific procedure to notify laid off employees of a new job opportunity, and the Department of Labor ("Department") has never articulated a preferred or required method of notification. That means that employers have been left to develop their own procedures—procedures that make sense in their real-world recruiting efforts to attract qualified candidates for a job—and await approval (or rejection) of their selected method of notification through individual adjudications of their applications. Time and time again, Certifying Officers have approved the very notification procedure that was employed in this case. The Certifying Officer's (CO) decisions here represent a clear departure from its established pattern of decision making.

Although *amici curiae* take no position on the reasonableness of the employer's interpretation of 20 C.F.R. § 656.17(k)(1) in this case, *amici* contend that the Board should not accord deference to the CO's decisions and instead should set them aside because they ignore established practices and thus are arbitrary and capricious under the Administrative Procedure Act. The CO's decisions also fail to comport with due process because the Department did not notify employers before abandoning its established interpretation of 20 C.F.R. § 656.17(k)(1). Even if the Board were to affirm the CO's interpretation, *amici* would urge the Board to apply this new interpretation prospectively only so as not to impose an unfair burden on employers who reasonably relied on the prior interpretation.

## INTEREST OF *AMICI CURIAE*

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels, including their roles as innovators and entrepreneurs. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a 21st century American economy. The Immigration Council also engages in impact litigation, appears as *amicus curiae* before administrative tribunals and federal courts, and provides technical assistance to attorneys on business immigration and other issues.

The American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States, including lawyers and law school

professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Through its government agency liaison activities, AILA regularly engages with the Department of Labor and the Office of Foreign Labor Certification (OFLC) directly and through quarterly "stakeholder" meetings conducted by the OFLC as part of its outreach to the regulated community on matters of policy and operation.

Both the Immigration Council and AILA have a substantial interest in the issues presented in this case, which implicate due process and fundamental fairness in PERM adjudications.

## ARGUMENT

### I. THE CERTIFYING OFFICER'S NARROW READING OF 20 C.F.R. § 656.17(k)(1) REPRESENTS A CLEAR DEPARTURE FROM ITS ESTABLISHED INTERPRETATION OF THE LAYOFF REGULATION.

On its face, the layoff regulation, 20 C.F.R. § 656.17(k)(1), does not require an employer to use specific procedures to notify laid off employees of a new job opportunity. Rather, the regulation provides only that the "employer must document it has notified and considered all potentially qualified laid off (employer applicant) U.S. workers of the job opportunity involved in the application and the results of the notification and consideration." *Id*. The history of the layoff provision confirms that the Department of Labor has never articulated a preferred or required method of notification and thus has permitted employers to decide for themselves how to notify their former workers. Moreover, through a pattern of decision making, the Department has repeatedly approved the notification procedures at issue in this case. Thus, the CO's narrow

reading of 20 C.F.R. § 656.17(k)(1) represents a clear departure from its established interpretation of this regulation.

### A. The Department Has Not Issued Guidance Regarding a Preferred or Required Method of Notification.

Prior to the issuance of the PERM regulations, the Department did not specifically require employers to notify and consider laid off workers of new job opportunities, though the Department did take the position that COs "have the authority to consider the availability of these workers under § 656.24(b)(2)(i) and (iii) [(2002)]" of the former regulations. *See* Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 67 Fed. Reg. 30466, 30474 (May 6, 2002) (citing pre-PERM regulations that permitted the CO to determine whether there are other appropriate sources of workers from which the employer should or might be able to recruit U.S. workers and to consider as many sources as are appropriate in determining whether U.S. workers are available). In 2002, the Department announced a proposed rule that would "require employers, if there has been a layoff in the area of intended employment within 6 months of the filing of the application, to attest to and document notification and consideration of potentially qualified U.S. workers involved in the layoff and the results of such notification." *Id.*[1]

The Department received several comments and suggestions regarding the proposed layoff regulation. *See* Labor Certification for the Permanent Employment of Aliens in the

[1] The Department proposed the following language:

> If there has been a layoff by the employer applicant in the area of intended employment within 6 months of filing the occupation [sic] involving the occupation for which certification is sought or in a related occupation, the employer must document that it has notified and considered all potentially qualified laid off U.S. workers of the job opportunity involved in the application and the results of the notification.

*Id.* at 30499.

United States; Implementation of New System, 69 Fed. Reg. 77326, 77354-55 (Dec. 27, 2004). In the preamble to the final rule, the Department addressed comments concerning whether an employer was required to notify workers laid off by other employers, how the CO would know that there were laid off workers, and the definitions of "related occupation" and "layoff." *Id.* In addition, the Department rejected a commenter's suggestion that the employer be required to document that all its laid off workers are employed. *Id.* at 77355. In rejecting this more rigorous requirement, the Department noted that "laid-off staff may be unreachable, and may be unwilling to cooperate with former employers. . . ." *Id.*[2]

Significantly, nothing in the Federal Register notice—including both the preamble and the final rule itself—addressed the method of notification. This is particularly noteworthy given that other PERM provisions do mandate specific procedures. For example, for professional occupations, the Department specifies where, when, and how advertisements must be placed. *See* 20 C.F.R. § 656.17(e)(1). Similarly, when employers are in supervised recruitment, the regulations specify where, when, and how an employer must advertise a position. *See* 20 C.F.R. § 656.21(b). The regulations also mandate specific procedures for posting the notice of filing an application under § 656.17. *See* 20 C.F.R. § 656.10(d). Given that the Department has provided specific notice methods and procedures in other contexts, the absence of specific notice requirements in the layoff context must be construed to give employers more leeway in notifying laid off U.S. workers. *See Seven Oaks Landscapes*, 2011-PER-02628, 2011-PER-02471 at 5 (Jul. 26, 2013) ("To expand the regulations to cure a presumed inadvertent omission amounts to judicial overreaching, especially when confronting a regulation crafted with such painstaking attention to detail as the PERM regulations."). *Accord Hamdan v. Rumsfeld*, 548 U.S. 557, 578

[2] The Department also rejected a commenter's suggestion that consulting firms document that they are not referring workers to a place of employment where workers were laid off. *Id.*

(2006) ("a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions"), *superseded by statute,* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in Hamad v. Gates,* 732 F.3d 990 (9th Cir. 2013) ("a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions").

The Department's failure to issue an FAQ on the layoff regulation bolsters this interpretation. *See OFLC Frequently Asked Questions and Answers*, http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited November 6, 2013). Although an FAQ may not be legally binding, the Department often uses this mechanism to provide guidance to employers who wish to conform their conduct to its designated best practices. *See HealthAmerica*, 2006-PER-1, at 12 (July 18, 2006) (en banc) *superseded in part by regulation*, Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 72 Fed. Reg. 27904, 27912, 27916-17 (May 17, 2007) (noting that FAQs "undoubtedly provide helpful guidance to applicants and their representatives, [but] are not a method by which an agency can impose substantive rules that have the force of law"). AILA has requested that the Department provide further guidance regarding layoff notice and consideration procedures. At a stakeholders meeting on July 15, 2008, AILA asked the Department for an update on an anticipated layoff FAQ:

> **Layoffs**
>
> 19. Please provide an update on when we can expect a new layoff FAQ re "notify and consider" issues.
>
> No date set. This is in line to be drafted but DOL has other priorities. DOL would welcome a list of pressing layoff issues it would like discussed.

*See DOL Stakeholders Meeting July 15, 2008, New Orleans, Louisiana, Report by AILA*, AILA InfoNet Doc. No. 08073066 (July 15, 2008), *available at* http://www.aila.org/content/default.aspx?docid=26089 (last visited November 6, 2013). Despite receiving this request over five years ago, the Department still has not issued a layoff FAQ.

### B. The Absence of Specific Requirements Means that Various Methods of Notice Are Acceptable.

Given the Department's decision *not* to mandate specific notice procedures or to provide informal guidance regarding best practices, the Department has left employers to choose among a multitude of reasonable methods of complying with § 656.17(k). *See, e.g.*, *Sanmina-Sci Corporation*, 2010-PER-00697 (Jan. 19, 2011) (where no procedure is specified for recruitment through an employer referral program with incentives under 20 C.F.R. § 656.17(e)(1)(ii)(G), employers could adopt reasonable procedure); *cf. Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) (an agency "cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette'").

AILA's practice assistance to its members reflects this understanding. In 2009, AILA provided the following "practice tip" regarding the layoff regulation:

> Acceptable means of notifying laid off workers have not been specified by the DOL. Examples of steps employers have taken to fulfill the notification requirement include: 1) sending an e-mail, letter, or certified mail letter to laid off workers; or 2) posting the position on the employer's website in conjunction with including language in termination letters to check the website for currently available job openings. DOL has not opined as to whether the above steps are acceptable.
>
> . . .
>
> The regulation does not specify whether an employer must first notify then consider potentially qualified workers, or first consider then notify potentially qualified workers. In some cases, an employer may be familiar with the pool of

> laid off workers and can consider whether the laid off workers are potentially qualified to determine whether notification is required. In other cases, an employer may choose to notify all potentially qualified workers who were laid off, and then consider any workers who apply for the position.

*DOL Liaison Practice Tip: Layoffs in the PERM Context*, AILA InfoNet Doc. No. 09021762 (Feb. 17, 2009), *available at* http://www.aila.org/content/default.aspx?docid=42945 (last visited November 6, 2013).

AILA reiterated this guidance in early 2013:

> - Document how the employer provided notice of the sponsored job opportunity to all potentially qualified employees who were laid off in the prior six months. This could be done with letters sent to employees, a notification included as part of their termination/separation package on how to apply to labor certification roles, or through some other means of notification.

*Common Trends in DOL Audits: Practice Pointers*, AILA InfoNet Doc. No. 13012344 (Jan. 23, 2013) *available at* http://www.aila.org/content/default.aspx?docid=42945 (last visited November 6, 2013).

### C. Through a Pattern of Decision Making, the Department Approved the Notification Procedures Employed in This Case.

For years, the Department has approved the notification procedures employed in this case. *See* Brief for Microsoft, *Microsoft Corporation*, 2013-PER-01478, 2013-PER-02904, 2013-PER-02962, at 1 and Addendum (Nov. 7, 2013) ("Brief for Microsoft"). In nearly 200 cases involving virtually identical notification procedures, the Department audited and then approved labor certifications. *Id.* Through this pattern of decision making, the Department has established a practice of approving applications using the notification procedures employed in this case. *See Hillel Hebrew Acad.*, 90-INA-572 (Mar. 4, 1992) (finding that the Department created an established practice through individual CO approvals).

Although *amici* do not know how many employers have successfully used this notification process, the sheer volume of applications that will be impacted by this case strongly suggests that this policy was entrenched and widely known. *See* Order Granting En Banc Review, *Microsoft Corporation*, 2013-PER-01478, 2013-PER-02904, 2013-PER-02962 (Sept. 10, 2013) (seeking en banc review because the outcome of this case "will impact thousands of PERM labor certification applications currently pending before the Office of Foreign Labor Certification, including more than 1,400 applications filed by Microsoft Corporation"). The CO's decisions in this case thus represents a clear departure from an established interpretation of the regulation.

## II. THE BOARD SHOULD NOT ACCORD DEFERENCE TO THE CO'S NEW INTERPRETATION OF 20 C.F.R. § 656.17(k)(1) BECAUSE DOING SO WOULD SUBJECT EMPLOYERS TO UNFAIR SURPRISE.

The Board has looked to federal court decisions for guidance in determining the level of deference it owes to the Department's reading of its own regulation. In *HealthAmerica*, for example, the Board drew upon *Christensen v. Harris County*, 529 U.S. 576 (2000), in declining to accord "*Chevron*-style" deference to an agency interpretation not issued through a formal adjudication or notice-and-comment rulemaking. *See HealthAmerica*, 2006-PER-1, at 12-13.[3]

The Supreme Court has clarified that deference to an agency interpretation is not appropriate unless the regulated parties have received fair notice of the conduct a regulation requires or prohibits. *See, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (deferring to new interpretation that "create[d] no unfair surprise" because agency had used full notice-and-comment rulemaking); *Martin v. OSHRC*, 499 U.S. 144, 158 (1991)

[3] *Amici* note that "*Chevron*-style" deference—or, more accurately, *Auer* deference—normally refers to judicial review of agencies' interpretations of regulations. However, because the Board frequently considers federal court decisions on deference in reviewing decisions by COs, *amici* discuss them here.

(identifying "adequacy of notice to regulated parties" as one factor relevant to the reasonableness of the agency's interpretation); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding where doing so would impose "new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements" or in a case involving "fines or damages").

The Supreme Court elaborated on its reasoning in *Christopher v. SmithKline Beecham Corp.*, which—like the present case—addressed whether to accord deference to the Department of Labor's newly restrictive reading of a broad regulation. *See* 132 S. Ct. 2156, 2165-2169 (2012) (considering and declining to apply deference pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997)). The petitioners in *Christopher*, sales representatives (known as "detailers") for SmithKline Beecham, alleged that they were entitled to overtime compensation under the Fair Labor Standards Act (FLSA). *Id*. at 2163-64. The issue in the case was whether pharmaceutical "detailers" are "outside salesmen," as defined in applicable DOL regulations, and thus exempt from the FLSA's overtime requirements. *Id.* at 2165. Writing for the majority, Justice Alito found that deference to an agency's interpretation of its own regulation was not warranted where it would "impose potentially massive liability on a [regulated entity] for conduct that occurred well before that interpretation was announced." *Id.* at 2167. Noting that pharmaceutical companies had an established practice of treating their detailers as outside salesmen under the FLSA, and that neither the statute nor the DOL regulations provided "clear notice" to the contrary, the Court declined to accord controlling deference to an interpretation that would have subjected employers to "unfair surprise" and violated the principle of "fair warning." *Id.* (internal citation and quotation omitted).

The present case similarly involves a clear departure from the Department's established practice. *See* Brief for Microsoft at 1 (nearly 200 audited and approved cases employing virtually identical notification procedures). As in *Christopher*, deference to the CO's interpretation in this case would impose "potentially massive liability" on Microsoft and other employers. If the Board upheld the CO's decisions, thousands of pending PERM applications would be in jeopardy, and both the employers and the employees would be severely impacted. Sponsored individuals would lose the priority dates established by the filing of the PERM applications. As a result, their employers would have to expend significant funds and resources to undertake an additional round of recruitment that would add approximately nine months to the certification process. *See* Brief for Microsoft, at 28 (explaining costs to petitioner and employees in this case). Under these circumstances, deference to the CO's new interpretation is not warranted.

While the Department's lack of adequate notice to regulated parties was an important consideration in *Christopher*, the Court emphasized the "[e]ven more important" fact that the Department "conspicuous[ly]" failed to take any enforcement action during the industry's "decades-long practice" of treating detailers as exempt outside salesmen. *Id.* at 2168. In the present case, the CO not only acquiesced in the employer's use of the "notify and consider" procedures under discussion, but also approved these practices in nearly 200 audited cases filed by Microsoft alone. As in *Christopher*, deference to the underlying decisions is unwarranted because it would inflict "unfair surprise" on employers who have shaped their behavior in accordance with the Department's past practice and would deprive them of "fair warning."

## III. BECAUSE THE CO'S DENIALS IGNORE ESTABLISHED AGENCY PRACTICE AND TREAT SIMILARLY SITUATED APPLICANTS DIFFERENTLY, THEY CONSTITUTE ARBITRARY AND CAPRICIOUS AGENCY ACTION.

As a "fundamental principle of justice," federal agencies are required to treat similarly situated applicants similarly, *see Zhang v. Gonzales*, 452 F.3d 167, 173 (2d Cir. 2006), and they must follow their established patterns of decision making. *See, e.g.*, *Cruz v. Attorney Gen. of U.S.*, 452 F.3d 240, 250 (3d Cir. 2006); *Haoud v. Ashcroft*, 350 F.3d 201, 207-8 (1st Cir. 2003). Ignoring established practices and applying different standards is arbitrary and capricious and thus, pursuant to the Administrative Procedure Act, such decisions must be set aside. 5 U.S.C. § 706(2)(A). *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio*. . . .").

In the immigration context, circuit courts have held that once an agency has established a general policy or a pattern of decision making, its failure to follow this policy or practice constitutes arbitrary and capricious decision making. *See Cruz*, 452 F.3d at 250; *Haoud*, 350 F.3d at 207. As the First Circuit explained, "[t]he law demands a certain orderliness." *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994). "An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996).

For example, in *Cruz*, an individual ordered removed attempted to reopen his removal proceedings after his criminal conviction was vacated. 452 F.3d at 242. The Board of Immigration Appeals (BIA) denied his request as untimely even though it had granted similar requests in the past. *Id.* On appeal, the Third Circuit found that the BIA should not have ignored its established pattern of reopening cases with vacated convictions regardless of when the noncitizen filed the motion to reopen. *Id.* Specifically, the court noted that "[w]here there is a

consistent pattern of administrative decisions on a given issue, we would expect the [agency] to conform to that pattern or explain its departure from it." *Id.* at 250.

Likewise, in *Haoud*, the First Circuit rejected an agency decision that was inconsistent with a prior decision based on similar facts. There, the BIA had affirmed the denial of an applicant's asylum application based on his claim that negative media coverage within the United States could subject him to persecution in his home country. 350 F.3d at 203. However, the BIA had previously affirmed a grant of asylum based on a similar claim about media coverage. *Id.* at 207. Noting the inconsistent treatment, the First Circuit held that the BIA was required to follow its precedent or fully explain its failure to do so. *Id.* at 207-08.

Significantly, these courts have demanded consistency even when an established pattern of decision making has never been articulated in a published, or designated "precedent," decision. For example, in *Cruz*, many of the BIA's earlier decisions took the form of unpublished opinions. But the court still found that the agency was bound by those decisions:

> While the unpublished BIA decisions we have consulted are not necessarily in the category of "selected decisions . . . designated to serve as precedents in all proceedings involving the same issue or issues," 8 C.F.R 1003.1(g), agencies should not move away from their previous rulings without cogent explanation.

452 F.3d at 250. Similarly, in *Haoud*, despite the fact that the earlier case was an unpublished, non-binding decision, the First Circuit held that the BIA still was required to follow that precedent. *See Haoud*, 350 F.3d at 203-04, 207.

This Board also has specifically required consistent CO decision making even though prior certifications are not "binding" precedent. *See Hillel Hebrew Acad.*, 90-INA-572 (Mar. 4, 1992). *Hillel Hebrew Academy* involved the denial of a certification request based on the employer's placement of job postings in small, ethnic newspapers rather than large, mainstream ones. *Id.* However, prior to this denial, COs had consistently granted certification based on

placements in the smaller papers. *Id.* On review, the Board stressed that the CO's decisions must be consistent. *Id.* Noting that the employer "followed an established practice of the C.O. which was demonstrated by three recent cases with similar fact patterns," it reversed the denial and held that the "agency must follow its established precedent." *Id.* (relying on *Trunkline LNG Co. v. F.E.R.C.*, 921 F.2d 313, 320 (D.C. Cir. 1990) (noting that an agency cannot abandon an earlier position without providing a "reasoned analysis" for its change)). *See also Dr. Mohsen Hamza*, 90-INA-574 (Apr. 1, 1992) ("We are in complete agreement with Employer as to the need for uniformity of decisions.").[4]

In the instant case, the CO's denials represent a clear departure from past agency decision making. Like the BIA in *Cruz*, the Department has an established, informal practice: in nearly 200 audited cases where the employer had used an identical notification process, it approved labor certifications. The Department must either continue this established practice in similarly situated cases or provide a cogent explanation of its rationale for abruptly rejecting it. The CO's failure to do either in this case is arbitrary and capricious.

[4] The Board's cases indicating that the CO is not bound by earlier decisions are inapposite and distinguishable from *Hillel Hebrew Academy* in that the Board was not deciding whether an established practice or pattern of decision making is binding. *Albert Einstein Med. Ctr.*, 2009-PER-00379, et al., at 17 (Nov. 21, 2011) (en banc) (noting that the Board has held that a CO's grant is not binding in future cases); *Tedmar's Oak Factory*, 89-INA-62 (Feb. 26, 1990) (noting that "the findings of a C.O. in one case are not necessarily binding on all future cases"); *Pine Ridge Landscaping & Irrigation, Inc.*, 99-INA-103 (Mar. 23, 1999) (the "previous granting of a labor certification in a similar case" is not a "basis for granting labor certification" in the future).

## IV. THE AGENCY'S FAILURE TO PROVIDE ADEQUATE NOTICE TO EMPLOYERS BEFORE ABANDONING ITS ESTABLISHED INTERPRETATION OF 20 C.F.R. § 656.17(k)(1) VIOLATES DUE PROCESS.

The Board has recognized that it is "compelled to interpret the [PERM] rules in a manner consistent with procedural due process." *Denzel Gunnels, d/b/a Gunnels Arabians*, 2010-PER-00628 at 11 (Nov. 16, 2010). Where an agency fails to provide fair notice of what is required, it violates due process. *See HealthAmerica*, 2006-PER-1, at 17 (Although an agency may adopt strict procedural rules, "[t]he quid pro quo for such stringent criteria is explicit notice.").

Regulations will normally satisfy due process if "a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require." *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997); *see Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083-84 (10th Cir. 1998); *Vanco Constr., Inc. v. Donovan*, 723 F.2d 410, 412-14 (5th Cir. 1984); *Ray Evers Welding v. OSHRC*, 625 F.2d 726, 732 (6th Cir. 1980). Where different divisions of an enforcing agency—or, as in this case, different Certifying Officers— disagree about the meaning of regulations, it is unlikely that such regulations provide adequate notice. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995).

The Supreme Court's recent decision in *FCC v. Fox* is particularly instructive. *See FCC v. Fox*, 132 S. Ct. 2307 (2012). Finding that the applicable standards were vague, the Court ordered the FCC to set aside its findings that Fox and ABC had violated a new "fleeting expletives" policy. *Id.* at 2320. The Court declined to defer to the FCC's findings because the agency had failed to give broadcasters fair notice that fleeting expletives and momentary nudity were actionably indecent and previously had issued decisions to the contrary. *Id.* at 2317-20.

As in *Fox*, the employer in this case did not have sufficient—or indeed any—notice that the "notify and consider" procedure required under 20 C.F.R. § 656.20(k)(1) had changed. Having had nearly 200 applications for labor certification audited and approved following submission of virtually identical information regarding its "notify and consider" procedure, Microsoft reasonably assumed that the procedure complied with the regulatory requirements. Further, the harm to the employer is substantial: Microsoft and other similarly situated employers would suffer substantial losses of time and resources, and thousands of employees would lose their priority dates and possibly their ability to continue working. As a result, the Board should reject the CO's denial on due process grounds.

## V. EVEN IF THE BOARD WERE TO AFFIRM THE CO'S INTERPRETATION OF THE LAYOFF REGULATION, THE NEW INTERPRETATION SHOULD NOT APPLY RETROACTIVELY.

If the Board were to affirm the CO's interpretation of 20 C.F.R. § 656.17(k), this new interpretation should not apply retroactively to those employers who initiated the PERM process prior to the announcement of the new interpretation. As the Supreme Court has explained, "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding . . . ." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). Here, forcing employers to comply with a new, more rigid interpretation of the notice requirement would undermine fundamental fairness.

In *SEC v. Chenery Corp*, 332 U.S. 194, 203 (1947), the Supreme Court established the standard for determining whether a new agency rule or standard of conduct may apply retroactively or whether it may apply prospectively only. The Court provided, "retroactivity

must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." *Id.* The Supreme Court further explained that new agency rules should not "unduly intrude upon reasonable reliance interests." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984).

Federal courts have refined the *Chenery* standard by adopting a list of factors that should be considered in determining whether an agency may apply a new rule, adopted through adjudication, retroactively. *See, e.g., Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail Union*"). The factors, first announced by the U.S. Court of Appeals for the District of Columbia in *Retail Union*, are:

> (1) whether the particular case is one of first impression,
>
> (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law,
>
> (3) the extent to which the party against whom the new rule is applied relied on the former rule,
>
> (4) the degree of the burden which a retroactive order imposes on a party, and
>
> (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

*Id.* "This equitable formula focuses attention on the degree of 'surprise,' the harm to the party burdened by the new policy, and the need, in terms of fulfilling the statutory goal, for retroactive effect." William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 Duke L.J. 106, 113 (February 1991). Other courts of appeals have adopted the *Retail Union* test. *See, e.g.*, *Lehman v. Burnley*, 866 F.2d 33, 37-38 (2d Cir. 1989); *Laborers' Int'l Union v. Foster Wheeler*

*Corp.*, 26 F.3d 375, 392 (3d Cir. 1994); *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982); *Stewart Capital Corp. v. Andrus*, 701 F.2d 846, 848-50 (10th Cir. 1983).[5]

Application of the *Retail Union* factors to the instant case counsels against retroactive application of the new interpretation. The second, third and fourth factors weigh heavily in favor of prospectivity. With respect to the second factor, the CO's interpretation of 20 C.F.R. § 656.17(k) is a complete reversal of the agency's established practice. As discussed above, on almost 200 occasions, the Department has approved the notification procedures at issue here. By interpreting 20 C.F.R. § 656.17(k) as precluding this very same process, the new interpretation represents an abrupt departure from prior practice. Microsoft also satisfies the third factor, reliance. In this case, Microsoft reasonably relied on the agency's established practice of approving applications using the same notification procedures. Finally, the fourth factor—the burden—is potentially immense. Microsoft and other employers who initiated the PERM process prior to the announcement of the new interpretation would be severely impacted by its retroactive application. Thousands of employees would lose their priority dates, and their employers would have to invest significant time and resources for a new certification process in each of these cases.

The fifth factor from *Retail Union*—the statutory interest in applying a new interpretation despite the reliance of a party on the old interpretation—is negligible. The Immigration and Nationality Act permits employers to petition for a noncitizen worker only if there are not sufficient U.S. workers who are able, willing, qualified, and available for the sponsored position. INA § 212(a)(5)(A)(i)(I). In order to ensure that there are no able, willing, qualified, and available U.S. workers, those laid off in the past six months must be notified. 20 C.F.R. §

[5] Although the Fifth Circuit has rejected this test, it nonetheless adopted a test that "balances the ills of retroactivity against the disadvantages of prospectivity." *See Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998).

656.17(k). There are many different methods of notifying laid off workers, so that even if the Board were to direct employers to use a specified method, the fact that other methods have been used previously does not mean that the statutory interest has been frustrated. To the extent that the new rule adopts a preferred standard of conduct, the statutory interest in applying it to those employers who have previously used other reasonable notification methods to comply with 20 C.F.R. § 656.17 is negligible. Furthermore, given that the immigration laws also facilitate the employment of foreign workers where there are no able, willing, qualified, and available U.S. workers, permitting employers to use their own tested, business-appropriate notification procedures to recruit U.S. workers (until told otherwise) advances statutory interests at issue here.

Finally, the first factor in the *Retail Union* test—whether the case is one of first impression—is not relevant in this case. In *Retail Union*, the court found that the fact that a case is one of first impression favors applying the new rule retroactively. *See Retail Union*, 466 F.2d at 390. As the court explained, "to deny the benefits of a change in the law to the very parties whose efforts were largely responsible for bringing it about might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines." *Id.* In that case, the new rule in question had been announced in a prior decision—albeit a prior decision issued *after* the party in that case had relied on the prior rule—and thus it was a case of second impression, which did not weigh in favor of retroactive application. *See id.* at 387-88, 390-91.

Although the interpretation of the "notify and consider" requirements of 20 C.F.R. § 656.17(k) may be an issue of first impression before the Board, as the Ninth Circuit recently explained, "*Retail Union's* concerns over issues of 'first impression' and 'second impression' arose in the litigation-intensive context of the NLRB regulating labor disputes between *private*

*parties*. These concerns may not be well suited to the context of immigration law, where one of the parties will always be the government." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 521 (9th Cir. 2012) (en banc) (emphasis added). It would make little sense to permit the government to "benefit" from the change in law in the same way that it makes sense to incentivize the advancement of a new theory presented by a private party. *See id.* (finding that a noncitizen applying for adjustment of status in removal proceedings "is not analogously situated to either the union or the company in *Retail Union* because it was the government who brought about the change in the law"). Therefore, the first factor does not weigh in favor of either side and thus is irrelevant to the inquiry.

## CONCLUSION

The CO's departure from established practice without prior notice constitutes arbitrary and capricious decision making and violates due process. For the above reasons, *amici curiae* urge the Board to reverse the CO's decision below.

November 7, 2013

Respectfully submitted,

Melissa Crow
Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7523

Russell Abrutyn
Anthony Weigel
Christina Murdoch
American Immigration Lawyers Association
1331 G Street NW, Suite 300
Washington, DC 20005
(202) 507-7600

## CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I filed the foregoing with the Board of Alien Labor Certification Appeals and served a copy through the United States Postal Service to the following:

Administrator
Office of Foreign Labor Certification
U.S. Department of Labor/ETA
Room C-4312, FPB
200 Constitution Ave., NW
Washington, DC 20210

ALC Certification Officer
U.S. Department of Labor/ETA
Harris Tower
233 Peachtree Street
Suite 410
Atlanta, GA 30303

Counsel for Litigation
Employment and Training Legal Services
Room N-2101, FPB
200 Constitution Ave., NW
Washington, D.C. 20210

Vincent C. Costantino
Senior Trial Attorney
Division of Employment and Training Legal Services
U.S. Department of Labor
200 Constitution Ave., NW, Suite N-2101
Washington, D.C. 20210

Jack Chen
Tenzin Tsorpon
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Bo Cooper
Fragomen, Del Rey, Bernsen & Loewy, LLP
1101 15th Street, NW
Suite 700
Washington, DC 20005

Kevin Miner
Fragomen, Del Rey, Bernsen &
Loewy, LLP
600 Peachtree Street, NE
Suite 4200
Atlanta, GA 30308

E. Joshua Rosenkranz
Brian P. Goldman
Orrick, Herrington & Sutcliffe LLP
51 W. 52nd Street
New York, NY 10019
(212) 506-5000

Robert M. Loeb
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Dated: November 7, 2013

Seth Garfinkel
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7523