DERIVING THE MEANING OF A LABOR CERTIFICATION: WHY "EQUIVALENT" EDUCATION CAN DIFFER FROM A "FOREIGN EDUCATIONAL EQUIVALENT"

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"Education never ends, Watson. It is a series of lessons with the greatest for the last."[1]

When you hear hoofbeats, think of horses, not zebras.[2]

One of the first dilemmas a foreign worker will have to confront with his employer and attorney when considering sponsorship for lawful permanent resident (LPR) status based on a job offer is whether the alien's foreign education is equivalent to the required U.S. bachelor's or higher degree. The green card process is a long one starting with the filing of the ETA Form 9089 (ETA-9089), Application for Permanent Alien Certification, also known as the Labor Certification (LC),[3] with the U.S. Department of Labor (DOL). However, many cases fall apart once the second stage, the Form I-140 Immigrant Petition for an Alien Worker is filed with U.S. Citizenship and Immigration Services (USCIS or the Service) due to the beneficiary allegedly lacking the required equivalent education. Whether particular foreign education is or is not equivalent to a U.S. degree is one of the most common issues for which USCIS will scrutinize the I-140 before approving it in the requested preference classification. While there are a number of federal court decisions that govern USCIS adjudication of the I-140 and impact how the Service addresses questions of foreign educational equivalency, including *Madany v. Smith*,[4] a review of the key question regarding the authority of the Service to define terms on a labor certification is critical to ensuring that the rights of both I-140 petitioners and beneficiaries are protected.

Before the Immigration Act of 1990 (IMMACT90), a sponsored worker might satisfy the requirement of a bachelor's degree (or higher) on a labor certification with a professional evaluation of his academic credentials as being the equivalent of the required degree. However, among IMMACT90's effects were regulations implementing the new INA §203(b)(2) and (b)(3)(A)(i) and (ii). By statute, an employer seeking to offer permanent full-time employment in the United States to an alien must petition the Secretary of Homeland Security on the Form I-140 for classification of the worker[5] after obtaining a labor certification. INA §204(b) directs the Secretary to approve the I-140 after reviewing the grounds and evidence of eligibility, including possibly consulting with the Secretary of

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[1] Sherlock Holmes, in *The Adventure of the Red Circle*, by Arthur Conan Doyle.

[2] Medical proverb, unknown source and date.

[3] "Labor Certification" is a term of art used as a shorthand reference to describe the application filed with the Secretary of the U.S. Department of Labor pursuant to INA §212(a)(5), 8 U.S.C. §1182(a)(5), seeking certification that there are not sufficient qualified, willing, and available U.S. workers to fill an employer's position. Romulo E. Guevara, *Labor Certifications and the Law of Recruitment, in* Immigration & Nationality Law Handbook, 2006-07 Ed., at 424-31 (Stephanie L. Browning, ed.-in-chief, AILA 2006). The Secretary's approval, exercised by delegation to the certifying officers of the Office of Foreign Labor Certification in the DOL Employment and Training Administration, is also referred to as the labor certification. 20 C.F.R. §656.2. Prior to March 28, 2005, the ETA Form 750, comprising Part A and Part B, was required. Guevara, *supra,* at 424-31. However, effective March 28, 2005, DOL required the ETA Form 9089, Application for Alien Employment Certification, hereinafter ETA-9089. 20 C.F.R. §656.3. Unfortunately, completing this form is sometimes a complex venture for even a very skillful attorney. There are two easily digestible essays on the subject of drafting an ETA-9089, one for EB-2 classification and one for EB-3, identifying common obstacles to avoid: specifically, Ronald Y. Wada, *The Nth Degree – Issues and Case Studies in Degree Equivalency: Drafting Form 9089 Job Requirements for EB-2*, 14 Bender's Immigr. Bull. 1277 (Oct. 15, 2009), and Ronald Y. Wada, *The Nth Degree – Issues and Case Studies in Degree Equivalency: Drafting Form 9089 Job Requirements for a Typical EB-3 "Safe Harbor" Case*, 15 Bender's Immigr. Bull. 423 (Mar. 15, 2010).

[4] 696 F.2d 1008 (D.C. Cir. 1983).

[5] USCIS issued a new version of the Form I-140 on January 16, 2010. It is available at http://www.uscis.gov > FORMS. One of the major changes between the October 12, 2007, and January 16, 2010, versions is that the old form directed the petitioner to select one of several possible immigrant visa classifications, with one box requesting *either* professional *or* skilled-worker classification, both of which would use a visa number assigned pursuant to INA §203(b)(3)(A)(i) or (ii), 8 U.S.C. §1153(b)(3)(A)(i) or (ii). See an archived version of the Form I-140 at http://web.archive.org/web/20080228045940/www.uscis.gov/files/form/i-140.pdf (last visited July 14, 2010).

Labor. The authority to determine whether the I-140 petition beneficiary has the education required by the LC lies with USCIS.[6] Although DOL may certify the LC filed for a particular alien,[7] the petition filed with USCIS to request a particular immigrant visa classification based on the certified job may be denied due to a finding that the beneficiary does not satisfy the job's requirements.[8] The reason for this split lies in the statutory placement of the Secretary of Labor's role in the green-card process in INA §212,[9] the provision governing admissibility.

The DOL certification is a finding that the alien's permanent employment by the sponsoring company will not adversely impact the wages and working conditions of U.S. workers employed in the "area of intended employment" within the particular occupation.[10] The Board of Alien Labor Certification Appeals (BALCA or the Board) has explained that a certifying officer (CO) can question an employer regarding the credentials held by the worker being sponsored — e.g., does he have the required degree? — because it relates to whether or not the job offered is bona fide employment and whether the foreign worker is being offered more favorable terms and conditions of employment than U.S. workers.[11] However, such an examination by DOL does not replace or compel any reliance in the adjudication by USCIS.[12] To accord deference to such an inquiry by DOL would be an interference with USCIS's statutory duty, prohibited by the INA and the federal courts in various cases, most notably in *Madany v. Smith*, which "recognize[d] ... the statutory division of authority" between USCIS and DOL.[13]

DOL Certification and the Exclusion of USCIS Re-Interpretation

The problems faced by the parties to the I-140 filed based on an LC having an education requirement stem from the duopolistic[14] nature of the LPR process.

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[6] *See Madany*, 696 F.2d 1008; Rosedale Linden Park Co. v. Smith, 595 F. Supp. 829 (D.D.C. 1984) (requiring INS to adjudicate the I-140 based on the job requirements on the LC).

[7] Under the 20 C.F.R. §656.30(c)(2) effective March 28, 2005, to July 15, 2007, an employer could "substitute" an alien as the beneficiary of the LC. DOL prohibited this practice with 20 C.F.R. §656.11, which was promulgated at the same time as regulations prohibiting an attorney from taking fees from any party other than the sponsoring employer.

> (a) Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 C.F.R. part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.
>
> (b) Requests for modifications to an application will not be accepted for applications submitted after July 16, 2007.

20 C.F.R. §656.11, adopted by 72 Fed. Reg. 27904, 27944 (May 17, 2007). DOL had significant concerns that employers were substituting aliens into "sold" LCs. DOL previously had attempted to eliminate this practice, but was stopped by order of the U.S. Court of Appeals in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994). While DOL initially processed all such requests itself, the agency eventually executed a memorandum of understanding with the Immigration and Naturalization Service (INS) to delegate responsibility to the INS. Barbara Ann Farmer, Administrator for Regional Management, DOL, ETA, Field Memorandum No. 28-96, *Final Procedures for Substituting Alien Beneficiaries on Approved Labor Certifications* (Mar. 22, 1996); Memorandum from Associate Commissioner Louis Crocetti, INS, HQ 204.25-P, *Substitution of Labor Certification Beneficiaries* (Mar. 7, 1996). Consequently, an alien would be substituted when the employer filed the I-140 petition, the LC, and a set of forms with the new worker's professional and biographical data to USCIS. *But see* IQ Systems, Inc. v. Mayorkas, 667 F. Supp. 2d 105 (D.D.C. 2009) (original beneficiary could not be subject of I-140 petition subsequent to petition requesting substitution that was not approved by Service).

[8] *See* INA §204, 8 U.S.C. §1154; Tongatapu Woodcraft Hawaii Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984) (INS had original jurisdiction over the question of whether the beneficiary met LC's requirements for employment); Madany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983); 8 C.F.R. §204.5(n).

[9] In *Durable Mfg. Co. v. U.S. Dep't of Labor*, 584 F. Supp. 2d 1092 (N.D. Ill. 2008), *aff'd* 578 F.3d 497 (7th Cir. 2009), the U.S. District Court explains that the Secretary of Labor has been delegated authority by Congress to implement INA §212(a)(5) and establish the rules under which certification may be granted.

[10] 20 C.F.R. §656.2.

[11] *See* Judges' Benchbook [a/k/a BALCA Deskbook, available on lexis.com and in vol. 13 of Immigration Law and Procedure] Chapter 4, *Alien's Qualifications for the Job* (2d ed. 1992) (discussing the consideration of the alien's education as an element of the CO's adjudication of the LC.

[12] *Madany*, 696 F.2d 1008; *Tongatapu Woodcraft Hawaii Ltd.*, 736 F.2d 1305.

[13] *Madany*, 696 F.2d at 1015.

[14] Although the path to LPR status may put the alien in contact with either DOL and USCIS or DOL, USCIS, and the Department of State (when the alien is consular processing for the immigrant visa abroad), the issue of foreign education equivalency involves just DOL and USCIS. The CO is limited to verifying the existence of the LC, that the I-140 approval and evidence are "consistent," that there was no misrepresentations made, and that the sponsored worker meets the job requirements. 9 U.S. Department of State

Generally, one would expect that the minimum education requirement would specify credentials required by an employer for the job offered and that once the LC is approved by DOL, an I-140 approval by USCIS would follow shortly on presentation of the sponsored worker's credentials, without incurring either wrath or controversy. This is likely to be the case unless the sponsored worker has not earned a four-year baccalaureate degree from a single institution and the LC requires a degree.

Once DOL completes its certification under INA §212(a)(5)(A)(iv), if there remains some ambiguity regarding whether the sponsored worker meets the minimum education requirement on an LC, USCIS generally defines the LC's term as a foreign equivalent degree: a four-year degree to a bachelor's degree or, if a master's degree, an advanced degree preceded by a four-year bachelor's degree. The Service will generally impose its own meaning on the terms used by DOL and the sponsor despite having been told not to do so by such cases as *Hoosier Care, Inc. v. Chertoff*,[15] *Madany v. Smith*, *Grace Korean United Methodist Church v. Chertoff*,[16] and *SnapNames.com, Inc. v. Chertoff*.[17]

Two and One – *Maramjaya*'s Diversion from the U.S. District of Oregon

In three federal court decisions that turned on the meaning of the term "equivalent" on an LC, the only case in which the court deferred to USCIS and against the plaintiff was in *Maramjaya v. USCIS*.[18] Notably, in *Maramjaya*, unlike the other two cases, *Grace Korean* and *SnapNames.com*, the petitioner of the I-140 was not a party.

In *Maramjaya*, U.S. District Judge Lamberth ruled against USCIS that the beneficiary of the I-140 petition has standing to challenge a denial by the AAO. While the district court deferred to the Service's definition of the word "equivalent," the party that actually used the word "equivalent" on that LC never challenged this presumption by USCIS because the petitioner never participated in the lawsuit. *Maramjaya* is inapplicable to most proceedings before a USCIS service center or the AAO because the agency's regulations limit standing to the filing petitioner as the only party in interest.

The *Grace Korean* court ruled that "CIS has no authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification."[19] The AAO has challenged the reliability of this ruling because the federal judge cited "as legal support for its determination ... a case holding that the United States Postal Service has no expertise or special competence in immigration matters."[20] However, the *Grace Korean* court actually cited to *Tovar v. U.S. Postal Service*[21] ***and*** *Omar v. INS*.[22] The *Tovar* court's decision is important because it told the Postal Service that the agency was entitled to no deference in its own interpretation of the INA. While the AAO seeks to distinguish *Tovar* in cases like *Matter of X*[23] and Case Number LIN 06 227 52100,[24] it proves the *Grace Korean* court's purpose in citing that Ninth Circuit decision.

> On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States

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Foreign Affairs Manual (FAM) §42.32(c) notes; *see also* 20 C.F.R. §656.31 (delegation of authority to Department of State and Department of Homeland Security to invalidate LC on finding of "fraud or willful misrepresentation"). The FAM is available in volumes 17-19 of Immigration Law and Procedure, on lexis.com, and on the State Department's website.

[15] 482 F.3d 987 (7th Cir. 2007).

[16] 437 F. Supp. 2d 1174 (D. Ore. 2005).

[17] 2006 U.S. Dist. LEXIS 87199 (D. Ore. 2006). *Grace Korean* and *SnapNames* are both discussed in Ronald Y. Wada, SnapNames.com v. Chertoff – *A Federal Court Perspective on Degree Equivalency Requirements for EB2 and EB3 I-140 Petitions*, 12 Bender's Immigr. Bull. 1 (Feb. 1, 2007).

[18] 1:06-cv-02158-RCL (D.D.C. Mar. 26, 2008), *reprinted at* **Appendix A**. Notwithstanding the AAO's reference to *Maramjaya* as a decision of the U.S. Court of Appeals for the D.C. Circuit in some cases, the Honorable Royce C. Lamberth is a judge on the U.S. District Court for the District of Columbia, and his decision in *Maramjaya* is nonprecedential.

[19] 437 F. Supp. 2d at 1178.

[20] Matter of X, LIN 06 227 52100, at 6 (AAO Jun. 26, 2009), *available at* http://www.uscis.gov > LAWS > Administrative Decisions > B6 – Skilled Workers, Professionals, and Other Workers > Decisions_Issued_in_2009 > Jun262009_02B6203.pdf (last visited Dec. 9, 2010).

[21] 3 F.3d 1271 (9th Cir. 1993).

[22] 298 F.3d 710 (8th Cir. 2002), *overruled in part on other grounds*, Leocal v. Ashcroft, 543 U.S. 1 (2004).

[23] LIN 05 184 50710, at 6 (AAO Jan. 2, 2008), *available at* http://www.uscis.gov > LAWS > Administrative Decisions > B6 – Skilled Workers, Professionals, and Other Workers > Decisions_Issued_in_2008 > Jan022008_07B6203.pdf (last visited Dec. 9, 2010).

[24] Matter of X, *supra* note 20.

> immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. §1103(a).[25]

USCIS is charged with enforcement and interpretation of the INA, but this authority does not include interpretation of INA §212(a)(5)(A) and the LC form.

The *Grace Korean* court's citation of *Omar* is not properly addressed by the AAO in such cases as these. The U.S. Court of Appeals for the Eighth Circuit stated in *Omar*:

> The interpretation by a government agency of a statute it administers is entitled to deference unless its construction is unreasonable, *Chevron USA v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), and the Board is entitled to deference regarding its interpretation of the INA. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S. Ct. 1439, 143 L.Ed.2d 590 (1999). The question here, however, is whether deference is owed to the INA's interpretation of criminal statutes which it does not administer.[26]

Although *Omar* was overruled by the U.S. Supreme Court, it was on grounds other than this one. This principle, that USCIS is not entitled to deference when interpreting INA §212(a)(5)(A) because it lacks the authority to enforce this section, remains established law. "Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction."[27]

The *Grace Korean* court accepted the proffer by the I-140 petitioner regarding the term "equivalent" on the LC because the employer put the term on the form and it was accepted as sufficient by DOL; USCIS deserves no deference in the interpretation of terms on the ETA Form 750, the LC form pre-dating the ETA-9089. The *SnapNames* court similarly pointed out that USCIS deserves no deference in consideration of the I-140 for skilled-worker classification.[28] *Tovar* pointed out the same principle, but to the U.S. Postal Service, and said that it – unlike USCIS – cannot interpret the INA. The *Grace Korean* court cited *Tovar* for the *Adams Fruit* principle that only the agency delegated legislative authority regarding a statute may interpret it; USCIS has the authority to interpret the provisions of the INA **except** for INA §212(a)(5)(A).

The responsibility to enforce the ground of inadmissibility requiring a certification that there are no available U.S. workers, and the authority to interpret that statutory provision, lies with DOL. "[T]he Secretary of Labor[] [has an] inherent authority to adopt interpretive rules"[29] implementing INA §212(a)(5)(A). While INA §103(a) directs that the Attorney General's opinion is controlling on all questions of law implicated by the statute, *Castaneda-Gonzalez v. INS*[30] makes clear that, given Congress's decision to provide a specific delegation of authority to the Secretary of Labor, the Secretary's position is insulated from Department of Justice and USCIS authority and interference. The issue typically develops as a question regarding the actual meaning of a term used by the petitioner on a DOL form, the ETA-750 or the ETA-9089, completed to obtain a certification pursuant to INA §212(a)(5)(A). Transforming the definition of a term like "equivalent" used on an LC into that of "foreign equivalent degree" can be precluded by judicial precedent, as well as by evidence proffered by the sponsoring employer.

The ETA-750 is not prepared by the sponsor for DOL so that the form complies with USCIS regulations; to impose such a requirement would throw *Metropolitan Stevedore Co. v Rambo*[31] to the garbage heap. As such, a decision by the Service regarding what it believes the words on an LC form mean is not entitled to and should not be given authoritative weight by a court.[32]

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[25] *Id.* at 11.

[26] 298 F.3d 710, 714.

[27] Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990).

[28] 2006 U.S. Dist. LEXIS 87199, at *27.

[29] Production Tool v. Employment & Training Admin., 688 F. 2d 1161, at 1165 (7th Cir. 1982); *see* Metro. Sch. Dist. of Wayne Twp. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992) (an agency with delegated authority has the power to issue interpretive and legislative rules implementing the statute); *see also In re* Cardiac Devices Qui Tam Litigation, 221 F.R.D. 318 (D. Conn. 2004) (1986 Medicare Manual an interpretive rule of the agency).

[30] 564 F.2d 417 (D.C. Cir. 1977).

[31] 521 U.S. 121 (1997) (agency is entitled to deference only when interpreting law it has expertise in and responsibility for).

[32] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (includes four-factor test to determine level of deference).

> Pursuant to *Skidmore*, an agency's "interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon*, 546 U.S. 243, 256, 126 S. Ct. 904, 163 L.Ed.2d 748 (2006) (citing *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161). Under *Skidmore*, the weight afforded to "a judgment in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with

The *SnapNames* court pointed out that the reason USCIS deserves no deference is "the difference between [the agency] interpreting the labor certification and [interpreting] statutory or regulatory provisions."[33] The U.S. Supreme Court specifically addressed this effort by USCIS in litigation over the Migrant and Seasonal Agricultural Worker Protection Act. The Supreme Court warned that, "Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction."[34] The LC form is prepared by an employer to provide information to the Office of Foreign Labor Certification to facilitate its determination on whether or not to certify the job offer, so under INA §212(a)(5)(A), DOL retains authority as the agency responsible for it and its adjudicatory process. In the *Syscorp International*[35] decision, BALCA approved the certification of an ETA-750 relying on a combination of education and experience that met the H-1B regulatory definition of a bachelor's-degree equivalent. In *SnapNames*, the court ruled that a rejection of a combination of education with experience by *Hong Video Technology*[36] does not preclude qualification by combinations of education alone.[37] However, in *Hong Video Technology*, BALCA upheld the CO's denial because the sponsored worker qualified only based on the alternative requirement of an "equivalent." The Board pointed out that BALCA established in *Francis Kellogg*[38] that "the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of §656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable."[39] The advertisements in *Hong Video Technology* did not include this additional language. Subsequently, with the introduction of the "reduction in recruitment" method to the LC process, a determination (although nonbinding) would be made by the DOL officer regarding whether the job requirements were unlawfully tailored. The worksheet used by DOL officers specifically directed them to consider such factors as the credentials of the alien, including whether the *Kellogg* decision was complied with, notwithstanding the nonbinding effect of its own determinations on USCIS. In the ETA-9089 world, however, the absence of what is commonly referred to as the "*Kellogg* language" is meaningless, given BALCA's conclusion that its absence from the DOL form does not preclude certification, because the new regulations do not require it in the advertisements.[40]

The greatest challenge that an employer and its attorney face is to prepare an LC that will satisfy the requirements of DOL and USCIS while enabling the alien to meet a degree requirement based on a combination of education plus experience. The *Syscorp International* decision, at least until *Globalnet Management L.C.*,[41] indicated that a degree equivalency based on the H-1B formulation of 8 C.F.R. §214.2(h)(4)(iii)(D)(5) was satisfactory. Even in *Globalnet*, BALCA did not reject an equivalency to a bachelor's degree based on education;[42] the Board

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> earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161. Other factors may be considered when evaluating the persuasiveness of an agency's interpretation. [Doe v. Leavitt, 552 F.3d 75,] 81 (noting that the list of factors stated in *Skidmore* is non exhaustive). Said factors include the formality of the adjudication and the agency's expertise.

River Street Donuts, LLC v. Napolitano, 558 F.3d 111, 116-17 (1st Cir. 2009). In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court explained that the amount of deference that is warranted by an agency's policy manual is determined by the factors in *Skidmore*.

[33] 2006 U.S. Dist. LEXIS 87199, at *27.

[34] Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990).

[35] 1991 BALCA LEXIS 345 (BALCA Apr. 1, 1991).

[36] 2001 BALCA LEXIS 182 (BALCA Aug. 17, 2001).

[37] 2006 Dist. LEXIS 87199, at *26-27.

[38] 1998 BALCA LEXIS 161 (BALCA Feb. 2, 1998) (en banc).

[39] *See also* Ronald Y. Wada, *BALCA Interprets the* Kellogg *Rule on PERM Applications Filed with the Current Form ETA 9089*, 14 Bender's Immigr. Bull. 457 (Apr. 15, 2009) (discussing litigation over the *Kellogg*-language requirement under PERM).

[40] In *Matter of Francis Kellogg*, 1988 BALCA LEXIS 161, BALCA ruled that when an alien is qualifying based on the alternative job requirements, the advertisements must state that the employer will "accept any suitable combination of education, training, or experience." The PERM regulations incorporated *Kellogg*'s directive into the regulatory scheme at 20 C.F.R. §656.17(h)(4)(ii), requiring that this language appear on the labor certification application instead of the advertisements. BALCA recognized this shift in *Matter of Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), noting the oddity of this change given that the original purpose was to inform potential applicants of their possible eligibility for the job offered.

[41] 2009 BALCA LEXIS 221 (BALCA Aug. 6, 2009).

[42] *See* Ronald Y. Wada, *The Nth Degree – Issues and Case Studies in Degree Equivalency:* Matter of Globalnet Management, 14 Bender's Immigr. Bull. 1409 (Nov. 15, 2009); Ronald Y. Wada, *The Nth Degree – Issues and Case Studies in Degree Equivalency: Strategies for Avoiding Substantial-Equivalence Issues Under* Globalnet, 15 Bender's Immigr. Bull. 569 (Apr. 15, 2010) (discussing the

simply rejected the appropriateness of reliance on the education-plus-experience combination at §214.2(h)(4)(iii)(D)(5) as inconsistent with the duty under 20 C.F.R. §656.17(h)(4)(i) and *Francis Kellogg* to ensure that alternative job requirements on the ETA-9089 be "substantially similar" pursuant to the Specific Vocational Preparation[43] formulation used in the LC process for assessing whether the job requirements are excessive. While the AAO has dismissed such a basis for qualification for skilled-worker classification in its nonprecedent decisions,[44] the possibility of a willing plaintiff litigating the matter in federal court reserves the success or failure of this question to be resolved another day.

Ultimately, the decisions that are coming from BALCA are notable for their distinctive focus on that agency's statutory responsibility notwithstanding USCIS's obsession with the "foreign equivalent degree" formulation. Even if *Syscorp* is no longer good law after *Globalnet*, BALCA has confirmed that an employer's meaning when consistent with Part 656 of Title 20 of the Code of Federal Regulations is acceptable, reflecting that the interpretive position taken by USCIS warrants no deference.[45] In *Metropolitan Stevedore Co. v Rambo*,[46] the Supreme Court explained that the interpretation by the Director of the Office of Workers' Compensation Programs of how the Administrative Procedure Act allocates burdens in administrative proceedings is not accorded deference because he has no expertise and was not delegated authority to interpret the APA. In the scheme established by Congress with the enactment of the INA, USCIS has not been delegated authority to interpret or implement INA §212(a)(5), and therefore it has no expertise warranting deference. The responsibility to enforce the ground of inadmissibility requiring a certification, and the authority to interpret that statutory provision, lie with DOL. "[T]he Secretary of Labor[] [has an] inherent authority to adopt interpretive rules"[47] implementing INA §212(a)(5)(A). On this basis, the necessary conclusion is that USCIS must be wary of imposing its own meaning on a DOL form and certification.

On the question of whether USCIS has authority over certification decisions by the Secretary of Labor, the U.S. Court of Appeals for the D.C. Circuit answered no over thirty years ago. "Once an alien shows that the Secretary of Labor has made such a determination in his favor, the statutorily delegated enforcement power of the Attorney General is exhausted."[48] Congress limited the Attorney General's authority (now the Secretary of Homeland Security's) under INA §103(a) by dint of INA §212(a)(5), formerly INA §212(a)(14).

> This language [INA §212(a)(14), now INA §212(a)(5)] clearly delegates the determination of whether the factual circumstances underlying

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BALCA decision in *Globalnet* with potential strategies for avoiding the grounds for denial).

[43] Ronald Y. Wada, *The Nth Degree – Issues and Case Studies in Degree Equivalency*, 14 Bender's Immigr. Bull. 979 (Aug. 15, 2009) (explaining the way in which to calculate and report on SVP); *see also* Geoffrey Forney, *Paradigm and Meaning in Labor Certification Adjudication: The Regulatory World of the Occupational Information Network (O*NET)*, 12 Bender's Immigr. Bull. 839, 848 (July 1, 2007); William Stock & Geoffrey Forney, *Understanding the Department of Labor's Job Classification System*, 2 Immigration & Nationality Law Handbook, 2003-04 Ed., at 265-72 (Stephanie L. Browning, ed.-in-chief AILA 2003). Despite the requirement that alternative job requirements be substantially equivalent to the primary job requirements and that the LC form includes the statement that the employer will accept any suitable combination of education, training, and experience, pursuant to 20 C.F.R. §656.17(h)(4) and *Kellogg*, BALCA has ruled that, given the absence of any instruction on the ETA Form 9089 regarding where to write the language and that DOL requires it on the LC form and not in the advertisements, the absence of the "*Kellogg* language" does not constitute a ground for denial. *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009).

[44] *See* Matter of X, LIN 04 236 50562 (AAO Mar. 11, 2009) (from the Nebraska Service Center), *available at* http://www.uscis.gov > LAWS > Administrative Decisions > B6 – Skilled Workers, Professionals, and Other Workers > Decisions_Issued_in_2009 > Mar112009_01B6203.pdf (last visited Dec. 9, 2010) (explaining that 8 C.F.R. §214.2(h)(4)(iii)(c) governs equivalency determinations in the context of H-1B petitions).

[45] Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 Sup. Ct. Rev. 201 (2007) (discussing the conflicts arising when multiple agencies are tasked with responsibility for implementing the same statute); *see also* NLRB v. Fluor Daniel, Inc., 161 F.3d 953, 967 n.16 (6th Cir. 1998) (noting that the court is not supposed to defer to the agency's interpretation of the APA's allocation of burdens, because the NLRB has no expertise in the APA warranting deference).

[46] 521 U.S. 121, 137 n.9 (1997).

[47] Production Tool v. Employment & Training Admin., 688 F. 2d 1161, 1165 (7th Cir. 1982); *see* Metro. Sch. Dist. of Wayne Twp. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992) (recognizing that an agency with delegated authority has the power to issue interpretive and legislative rules implementing the statute); *see also In re* Cardiac Devices Qui Tam Litigation, 221 F.R.D. 318 (D. Conn. 2004) (1986 Medicare Manual an interpretive rule of the agency responsible for implementing the statute).

[48] Castaneda-Gonzalez v. INS, 564 F.2d 417, 425 (D.C. Cir. 1977).

> any particular application for certification [i.e., LC] satisfy the substantive requirements of subsection 212(a)(14) to the Secretary of Labor and not to the Attorney General. Under the frequently-applied maxim of statutory construction that a specific provision prevails over a more general one, we do not think that the general language of section 103(a) should be construed as delegating an authority to the Attorney General which is delegated only to the Secretary of Labor by subsection 212(a)(14).[49]

Consequently, a refusal by USCIS at the service center or AAO to defer to the Secretary of Labor's rules on questions covered and affected by INA §212(a)(5)(A) will throw into question all of Parts 655 and 656 of Title 20 of the Code of Federal Regulations, including 20 C.F.R. §656.730 authorizing the invalidation of an LC by USCIS.

Limits on USCIS Adjudication are Not Overruled by Unpublished U.S. District Court Decision

The limitations and duties imposed by the *Madany* court and more recently confirmed by *Hoosier Care, Inc. v. Chertoff* were questioned by the U.S. District Court for the District of Columbia in *Maramjaya v. U.S. Citizenship and Immigration Services*.[50] *Maramjaya* involved the unusual situation of an I-140 beneficiary filing for a writ of mandamus in federal court as a challenge to the AAO's denial of the I-140 petition filed on his behalf.[51] Footnote 7 in *Maramjaya* is directly contrary to this instruction from *Madany*.

> [P]laintiff misinterprets the proper role of USCIS, DOL, and the employer in this process. This Circuit has recognized that "the statutory division of authority between DOL's labor certification determination and [USCIS's] preference classification decision can lead to some discontinuity insofar as DOL-imposed job requirements are subject to interpretation by [USCIS] in its review of the alien's qualifications." Madany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983).[52]

USCIS is, however, precluded from refusing to consider and give weight to the definition proffered by the I-140 petitioner. While the Service may consider that in some instances the explanation offered is an unreliable post hoc justification, the fact remains undisputed that often an employer that has filed an ETA-750 or ETA-9089 has had no need to provide DOL with any details regarding its meaning. Existing legal authority, including 8 C.F.R. §103.2(b)(2), *Matter of Treasure Craft of California*,[53] and *Soltane v. U.S. Department of Justice*,[54] provide a sufficient basis for the Service to consider even secondary evidence or a sworn statement from the I-140 petitioner's authorized representative regarding the intended meaning of terms on the LC. "Thus, USCIS should coordinate DOL and USCIS interpretations and 'must also recognize that DOL bears the authority for setting the content of the labor certification and that it cannot impose job qualifications beyond those contemplated therein.' "[55]

Unfortunately, the *Maramjaya* court's statements have been taken by the AAO as a basis for disputing an employer's position that when it used the term "equivalent," and not "foreign equivalent degree," something other than a four-year bachelor's degree was intended.

> Here, [in *Maramjaya*,] the Court cannot say that USCIS imposed its own job requirement content nor displayed insensitivity to DOL's role. Additionally, the Court would be hesitant to focus on Covansys's subjective intent because DOL assesses requests for labor certification based on the language used in the Form ETA-750. If USCIS referenced employer intent, situations could arise where DOL verified that American workers were unavailable to fill the relevant job position based on a narrowed labor pool only to have USCIS approve a Form I-140 petition on behalf of an alien beneficiary who corresponds to a broader labor pool dictated by a given employer's supposed intent.[56]

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[49] *Id.* at 423.

[50] Reprinted as **Appendix A**.

[51] Judge Lamberth recognized in *Maramjaya* that the beneficiary had standing to sue in federal court over the I-140 petition despite not being an interested party before the agency. A review of the decision reflects that the Service made the same arguments that appear in other cases, such as in *George v. Napolitano*, 693 F. Supp. 2d 125 (D.D.C. 2010), but failed to convince the court that the plaintiff lacked Article III standing.

[52] *Maramjaya* at 14.

[53] 14 I. & N. Dec. 190 (Reg'l Comm'r 1972) (addressing burden of the petitioner).

[54] 381 F.3d 143 (3d Cir. 2004) (letter from petitioner was evidence that warranted consideration and acceptance by the Service).

[55] *Maramjaya* at 13 n.7, quoting *Madany*.

[56] *Id.*

In *Maramjaya*, the evidence of "subjective intent" was being offered by the beneficiary and not the petitioner that had actually prepared and filed the ETA-750. Unfortunately, what the *Maramjaya* court never considered is the Service's replacement of a term's actual meaning with a presumed meaning of a four-year bachelor's degree. The indisputable fact is that terms placed on the ETA-750 and ETA-9089 have meanings; in the absence of their reflection on the form, recourse should be had to secondary evidence and even sworn testimony of the party who completed the form. USCIS is limited to determining whether the beneficiary of an I-140 petition has what is required by the LC. While the content of the ETA Form 750 or 9089 is subject to interpretation by USCIS, its own understanding must be consistent with DOL's interpretation. DOL, and not USCIS, has ultimate authority over the content of the LC, which includes the job requirements. While the *Maramjaya* court talks in terms of avoiding a disruption to the parameters of the tested labor pool, the fact is that the definition imposed by USCIS on the term "equivalent" on any LC may have nothing to do with either what the sponsoring employer actually means or any effort to avoid adversely impacting the labor pool tested.

If USCIS were concerned regarding an employer's intent or DOL's understanding of the terms on its own form, the nature and tone of I-140 denials by both service centers and the AAO would be markedly different. In 2008, the AAO began citing *Maramjaya* because "the court upheld an interpretation that a 'bachelor's or equivalent' requirement necessitated a single four-year degree in a professional category."[57] The I-140 petitioner before the AAO is entitled to the statutory and regulatory rights governing adjudication of the petition, including compliance with governing circuit court precedent as well as notice of ineligibility of which it is unaware. The AAO cites *Maramjaya* for the principle that the word "equivalent" on an LC requires a bachelor's degree completed after four years even if this is not actually the petitioner's meaning in its use of the term. The decision in *Maramjaya* is the first judicial opinion in favor of USCIS discussing and answering the question of foreign educational equivalency involving the question of the term "equivalent."[58] However, the AAO incorrectly cites to *Maramjaya* as though it was issued by a U.S. Court of Appeals.

The phrase "or equivalent" and the foreign-degree-equivalency question have been raised in litigation because of the Service's restrictively improper application of *Matter of Shah*[59] as precluding the finding that a foreign degree completed in less than four years equates to a U.S. bachelor's degree. In *Grace Korean* and *SnapNames*, the federal courts agreed that this term can encompass an equivalent bachelor's degree based on a combination of education if the I-140 petition seeks skilled-worker classification. Unsurprisingly, I-140 petitioners began citing to both decisions in support of their argument that the use of the term "equivalent" does permit an employer to accept the combination of education determined to be equivalent to the degree required on an LC. Nevertheless, despite the AAO's reliance on the U.S. District Court decision in *Maramjaya*, the AAO has roundly disparaged the decisions issued by Magistrate Judge Papak and District Judge Mosman on the meaning of "equivalent." Furthermore, the AAO's decisions issued since these cases were handed down are marked by a harsh tone implying that the LC applications underlying the I-140 petitions in both *Grace Korean* and *SnapNames* were unlawfully tailored to suit the sponsored aliens' credentials.[60]

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[57] Matter of X, LIN 07 139 52638, at 11 (AAO Sept. 2, 2009), *available at* http://www.uscis.gov > LAWS > Administrative Decisions > B6 – Skilled Workers, Professionals, and Other Workers > Decisions_Issued_in_2009 > Sep022009_02B6203.pdf (last visited Dec. 9, 2010); Matter of X, EAC 06 081 53160, at 12 (AAO May 19, 2009), *available at* http://www.uscis.gov> B6 > Decisions_Issued_in_2009 > May192009_03B6203.pdf (last visited Dec. 9, 2010). Interestingly, as a side note, the *Maramjaya* court also found that the I-140 beneficiary had Article III standing in federal court to pursue a decision on the visa petition because an approval would establish a priority date from which he could benefit to adjust status based on another I-140.

[58] In *Confluence International, Inc. v. Holder*, 2009 U.S. Dist. LEXIS 25826, at *2 (D. Minn. Mar. 27, 2009), the court reported that the LC did not use the term "equivalent," only stating that a bachelor's degree was required. Yet the *SnapNames* court would have agreed that, when such language is used, a foreign equivalent degree is the requirement of the employer, given the absence of any language different than the terms used by 8 C.F.R. §204.5(l)(2). *See SnapNames*, 2006 U.S. Dist. LEXIS 87199 (D. *Ore. Nov. 30, 2006).

[59] 17 I. & N. Dec. 244 (Reg'l Comm'r 1977) (U.S. bachelor's degree "usually" requires four years to complete); Adam J. Rosen, *Educational Alchemy and the Irrelevance of Matter of Shah : The Foreign Equivalence of a Three-Year Foreign Bachelor's Degree Despite the 1997 UNESCO Convention on the Recognition of Qualifications concerning Higher Education in the European Region,* 13 Bender's Immigr. Bull. 1301 (Oct. 15, 2008).

[60] Matter of X, LIN 06 144 52827 (AAO June 23, 2009); Matter of X, SRC 07 205 51344 (AAO May 26, 2009). The decisions are *available at* http://www.uscis.gov > LAWS > Administrative Decisions > B6 – Skilled Workers, Professionals, and Other Workers > Decisions_Issued_in_2009 > Jun232009_06B6203.pdf and >

Grace Korean Did Not Expect CIS to Set Postal Rates or USPS to Issue Green Cards

The limitations on USCIS's authority were reported correctly by Magistrate Judge Papak in *Grace Korean* when he ruled that USCIS is precluded from imposing on the LC the Service's own definition of the terms appearing on the DOL forms.[61] Nevertheless, the AAO erroneously concluded that Judge Papak's decision does not warrant its deference for two reasons. First, *Grace Korean* allegedly does not distinguish itself from such Court of Appeals decisions as *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*,[62] *K.R.K. Irvine, Inc. v. Landon*,[63] and *Madany*[64] when the District Court states that the Service exceeded the bounds of its authority by defining the phrase "B.A. or equivalent." A comparison of these three decisions with *Grace Korean* reflects that even based on the text quoted by the AAO neither the Ninth nor the D.C. Circuit stated that USCIS has the authority to define the terms on the LC. It is inexplicable for USCIS to presume that every employer defines its job requirements in a manner that is tailored to 8 C.F.R. §204.5; in fact, such a practice on the scale supposed by USCIS raises the possibility that any potential charge of tailoring lacks a proper foundation in the sponsoring employer's intent. The U.S. courts of appeals state that USCIS has the authority to "make preference classifications," determine "preference classification eligibility not expressly delegated to DOL," and review "de novo ... whether the alien is in fact qualified to fill the certified job offer."[65] These courts of appeals did not conclude that USCIS can define the terms on DOL's LC forms, only that the Service can decide whether the sponsored worker has the credential sought by the terms of the job requirements.

The second AAO explanation offered for *Grace Korean* not warranting its deference is that the court cited "as legal support for its determination ... a case holding that the United States Postal Service has no expertise or special competence in immigration matters."[66] The AAO seems to think that because *Tovar v. U.S. Postal Service*[67] found that the post office warrants no deference on interpretation of the INA while USCIS has authority to interpret the statute, the holding in *Grace Korean* does not deserve any consideration. This is, like the AAO citation to *Maramjaya* as a U.S. Court of Appeals decision, an oddly disingenuous conclusion.

The *Grace Korean* opinion actually cites two cases for the proposition that "CIS has no authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification."[68] The first case *is* the Ninth Circuit decision in *Tovar*. However, the second is *Omar v. INS*,[69] which applies the principle in *Adams Fruit* and *Rambo* that when an administrative agency interprets statutory provisions that it does not administer, deference by the federal courts is not warranted.[70] Of course, the *Grace Korean* court understood that USCIS, unlike the USPS, has responsibility to administer the INA. But the court was trying to explain to the AAO that, just as the USPS has no authority to interpret the INA, USCIS has no authority interpreting the terms on an LC, which are within the sole authority of DOL pursuant to INA §212(a)(5)(A).

SnapNames Properly Highlights USCIS Imposition of Regulatory Definition on Terms of Job Requirements on Labor Certification

The court in *SnapNames* reviewed the evidence filed with USCIS and explained that it would not defer to the USCIS decision denying the visa petition, because the AAO's interpretation of the LC was found to be legally insufficient. The employer stated that a bachelor's degree or foreign equivalent is acceptable and sought to qualify the beneficiary based on a combination of education and experience. USCIS won a partial victory before the judge on the issue of the beneficiary qualifying under INA §203(b)(3)(A)(ii). Judge Mosman concluded in *SnapNames* that he would defer to USCIS's interpretation that the law precluded professional classification. The *SnapNames* court ruled for the Service because even when the LC uses the term equivalent, it cannot supersede the regulatory

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May262009_04B6203.pdf, respectively (last visited Dec. 9, 2010).

[61] *See* Metropolitan Stevedore Co. v Rambo, 521 U.S. 121, 137 n.9 (1997); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990).

[62] 736 F.2d 1305 (9th Cir. 1984).

[63] 699 F.2d 1006 (9th Cir. 1983).

[64] 696 F.2d 1008 (D.C. Cir. 1983).

[65] Matter of X, LIN 06 227 52100, at 6 (AAO Jun. 26, 2009), *available at* http://www.uscis.gov > LAWS > Administrative Decisions > B6 – Skilled Workers, Professionals, and Other Workers > Decisions_Issued_in_2009 > Jun262009_02B6203.pdf (last visited Dec. 9, 2010).

[66] *Id.* at 11.

[67] 3 F.3d 1271 (9th Cir. 1993).

[68] 437 F. Supp. 2d at 1178.

[69] 298 F.3d 710 (8th Cir. 2002), *overruled in part on other grounds*, Leocal v. Ashcroft, 543 U.S. 1 (2004).

[70] 298 F.3d at 714-15.

requirement for either a U.S. bachelor's degree or a foreign equivalent degree. The *SnapNames* court pointed out that if the term "equivalent" means the same thing as a U.S. bachelor's degree, i.e., a four-year credential, but from a foreign institution, then there is no need for use of the word "equivalent" on the ETA form. The word's use on the LC implies a meaning other than a single four-year bachelor's degree. The denial of EB-3 professional classification was upheld simply because the court felt compelled, by the regulation stating that a U.S. bachelor's degree or the foreign equivalent degree is acceptable, to overrule the intent of the sponsoring company.

The appearance of the term therefore must have some other role, such as to mean "quantitatively equivalent education, but also an equivalent result."[71] The petition in *SnapNames* sought skilled-worker classification, which does not have a degree requirement, as do the EB-2 and EB-3 regulations, so the court ruled for the employer on the question of whether the Service was arbitrary and capricious in its denial of the skilled-worker classification request, but denied the plaintiff's request for professional classification.[72]

A review of the facts of *Grace Korean* and *SnapNames* reflect several reasons for the AAO to cease its citation of *Maramjaya* and begin according some deference to their reasoning. The most obvious distinction is that Judge Lamberth's decision is unpublished. As the Eighth and Ninth Circuits have explained, reliance on secretive rulings by any party for support of its position is contrary to basic principles of fairness and due process either because it is simply unconstitutional overreaching by the court or because it ignores the judgment of the court to limit the effect of a case to the specific parties.[73] The *Grace Korean* and *SnapNames* decisions are both available and serve as persuasive precedent, a category of treatment that cannot be claimed for *Maramjaya*. The AAO's reliance on *Maramjaya* is also highly questionable because the will rely on a decision such as *Rosedale Linden Park Company v. Smith*[74] for denial of an appeal while alleging that U.S. District of Oregon decisions lack sufficiently persuasive legal weight to satisfy the agency at the appeals or service center levels because they are district court decisions.

The final reason warranting greater deference to the decisions in the *Grace Korean* and *SnapNames* cases than in *Maramjaya* is that the employer that prepared and filed the LC underlying the litigated I-140 petition was not a party to the *Maramjaya* lawsuit; *Grace Korean* and *SnapNames* both included the petitioners as interested parties claiming that their intention was to sponsor the affected I-140 beneficiaries using the word "equivalent." If Mr. Maramjaya's sponsor had filed the lawsuit and explained in its complaint that it used the word "equivalent" because it intended to encompass Mr. Maramjaya's combined education, the result might have been the same as in the U.S. District Court for the District of Oregon.

In *SnapNames*, the court explained that USCIS's responsibility is to interpret the LC when it is approved by USCIS. This court recognized that this "can lead to some discontinuity" and therefore warrants some "sensitivity" by USCIS. "Thus, in interpreting the Labor Certification, the Service must start with the plain meaning of the petitioner's language, if such exists."[75] The court instructed USCIS that, since it lacks the authority to define the minimum requirements, the agency must review them on the LC as they were completed by the sponsor.[76] The court explained quite eloquently the rationale for fencing off the LC from USCIS's efforts at construing its terms:

> [S]uch deference [to USCIS's interpretation of the INA] is afforded in recognition that the agency has specific expertise over matters addressed in the statute it enforces. Natural Res. Def. Council, Inc. v. U.S. E.P.A., 966 F.2d 1292, 1297 (9th Cir. 1992) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). The labor certification is not analogous to the agency's statute in this manner. The labor certification is an occupational assessment performed by DOL based on the requirements specified by the prospective employer and petitioner. CIS does not have any particular expertise in relation to

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[71] 2006 U.S. Dist. LEXIS 87199, at *25.

[72] But the court raises the interesting possibility that a combination of education is qualitatively different than a combination of education with experience. *Cf.* Matter of Sea, 19 I. & N. Dec. 817 (Comm'r 1988) (explaining that professional's bachelor's-degree-equivalent can be based on a single degree, a combination of education, or education plus experience, but not solely on experience).

[73] *See* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (the Judicial Power Clause of Article III of the U.S. Constitution does not restrict a federal judge from treating some opinions as lacking binding force); Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (issuing decisions as unpublished and nonprecedential is unconstitutional because it allows courts to avoid accountability), *vacated,* 235 F.3d 1054 (8th Cir. 2000).

[74] 595 F. Supp. 829 (D.D.C. 1984).

[75] *SnapNames*, 2006 U.S. Dist. LEXIS 87199, at *18.

[76] *Id.* at *15 (quoting Rosedale & Linden Park Co. v. Smith, 595 F. Supp. 829, 833 (D.C.D.C. 1984)).