IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ASOCIACIÓN DE TRABAJADORES FRONTERIZOS, JOSE DE LA CRUZ, SANDRA MORA, RODRIGO MORIN, SOLEDAD RENTERIA, AND MARISELA RODRIGUEZ,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR,

Defendant.

Civil Action No. EP-04-CA-0400-FM

THE DEPARTMENT OF LABOR'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

On November 5, 2004, Plaintiffs filed a Motion for Summary Judgment ("Summary Judgment Memo") pursuant to Federal Rule of Civil Procedure 56. The Department of Labor ("the Department") responds to the Motion for Summary Judgment pursuant to local rule CV-7.

I. INTRODUCTION

Plaintiffs Asociación de Trabajadores Fronterizos ("ATF") and six individuals originally sued the Department, state and local agencies, and corresponding agency officials in this Court on April 3, 2002. ATF v. Reed, Case No. EP-02-CA-0131-FM (W.D. Tex., filed April 3, 2002) ("Original Texas Case"). Plaintiffs' suit challenged Defendants' administration of job training benefits under the Trade Act of 1974 to

31

limited English proficient ("LEP") workers in El Paso, Texas. On December 17, 2003, this Court granted the Department's sealed Motion to Stay the Original Texas Case.

Six months after this Court granted the stay, ATF filed a nearly identical lawsuit in the Federal District Court for the District of Columbia, though they named only the Department as a defendant. ATF v. U.S. Dep't of Labor, Case No. 04-0993 (ESH) (D.D.C., filed June 17, 2004). Pursuant to the Judge's order in that case, ATF returned to the Western District of Texas to seek severance of "three core claims against DOL," namely:

> (1) whether the Trade Act prohibits DOL from allowing state agencies to approve incomplete training for trade-affected workers;
> (2) whether the Trade Act requires DOL to issue regulations naming what actions state agencies are required to take to achieve Congress's 80% wage replacement goal; and
> (3) whether the Trade Act prohibits DOL's on-the-job training regulation, 20 C.F.R. § 617.23(c).

Plaintiffs' Opposed Motion to Sever Claims Against Defendant U.S. Department of Labor ("Motion to Sever") at 2 (Exhibit "Exh." 1). The Honorable Judge Frank Montalvo granted Plaintiffs' Motion to Sever on October 20, 2004, and ordered Plaintiffs to "file an amended complaint in the severed action which restates their claims as in their Opposed Motion to Sever." Order Granting Plaintiffs' Opposed Motion to Sever Claims ("Severance Order") (Exh. 2). The Court directed the District Clerk to file the restated complaint under a separate cause of action. Severance Order at 3.

Pursuant to this Order, Plaintiffs filed their Post-Severance Complaint on October 26, 2004. On November 5, 2004, Plaintiffs filed a Motion for Summary Judgment. The Department now responds to that motion addressing the legal claims as set forth in this Court's Severance Order demonstrating that Plaintiffs are not entitled to summary judgment. Plaintiffs' Motion for Summary Judgment also presents a myriad of facts many of which, although not necessary to resolve Plaintiffs' legal claims, are in dispute. The Department has addressed these in Appendix A, attached hereto.[1]

I. STANDARD OF REVIEW

A. Summary Judgment Standard

Summary judgment is appropriate only if the record, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see generally Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Beeler v. Rounsavall, 328 F.3d 813, 816 (5th Cir. 2003); Houston Police Officers' Union v. City of Houston, 330 F.3d 298, 301 (5th Cir. 2003). A fact is material if it can affect the outcome of the lawsuit. Celotex, 477 U.S. at 322 (1986). A genuine dispute regarding a material fact exists if a reasonable fact finder could return a verdict for the non-movant. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

B. Deference Must Be Afforded to the Department's Statutory Interpretations

The Administrative Procedure Act permits Federal courts to review final agency action under certain limited circumstances. See 5 U.S.C. §§ 701-706 (2004). Plaintiffs assert that this Court has jurisdiction under § 706(1), providing for judicial review of agency action unlawfully withheld; § 706(2)(A), allowing review of agency action that is alleged to be arbitrary or capricious; and § 706(2)(C), permitting review of agency action

[1] If this Court determines that the issues presented herein cannot be determined *as a matter of law*, these matters are not ripe for summary judgment because material facts are in dispute as discussed in Appendix A.

to determine if it is in excess of statutory authority or short of statutory right.[2] Each of Plaintiffs' allegations share a common theme, namely, that the Department has erroneously interpreted the Trade Act.

A court tasked with reviewing an agency's interpretation of a statute the agency administers must engage in the familiar Chevron two-step analysis. Initially a court must determine whether Congress has directly addressed the question at issue. Chevron, U.S.A., Inc., v. Natural Res. Defense Council, Inc., 467 U.S. 837, 843 (1984). If Congress has spoken clearly, the court's interpretative task is at an end and the court must "give effect to [Congress'] unambiguously expressed intent." Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 320 (5th Cir. 2001) ("TOPUC") (quoting Chevron, 467 U.S. at 843). A court "may reverse an agency's interpretation of an unambiguous statute only if it does not conform to the plain meaning of the statute." El Paso Electric Co. v. FERC, 201 F.3d 667, 670 (5th Cir. 2000).

If, however, the reviewing court determines that the statute is ambiguous or silent as to the precise question at hand, "the court does not simply impose its own construction on the statute." Chevron, 467 U.S. at 843. Rather, the court must defer to the agency's construction of the statute unless it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844. Generally, courts will give deference to an agency's

---

[2] Plaintiffs have not properly brought their claim related to post-training wage rates under 5 U.S.C. § 706(1) because the Department has promulgated regulations that set forth the criteria to be used as a basis for making training determinations under 19 U.S.C. § 2296(a)(1), as required by 19 U.S.C. § 2296(a)(9). See 20 C.F.R. § 617.22 (2004). Norton v. Southern Utah Wilderness Alliance, 124, S.Ct. at 2373, 2379 (2004); Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999). In the case at bar, "[t]he agency has acted . . . . Petitioners just do not like what the [agency] did." Public Citizen v. Nuclear Regulatory Comm'n, 845 F.2d 1105, 1108 (D.C. Cir. 1988); see also, Sierra Club v. Peterson, 228 F.3d 559, 568, 570-71 (5th Cir. 2000) (holding where "the [agency] has been acting, but the [petitioners] simply do not believe that its actions have complied with the [relevant statute]," there is no § 706(1) jurisdiction). Plaintiffs have not cited § 706(2) as a basis for their post-training wage rate claims, but the Department will respond to this issue as if it were brought under § 706(2).

interpretation of a statute, so long as the interpretation is reasonable. Nat'l Cable & Telecomm. Assoc. v. Gulf Power Co., 534 U.S 327, 333 (2002) (citing Chevron, 467 U.S. at 842-44); see also Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (citing Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-51 (1991); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 414 (1993) ("Confronted with an ambiguous statutory provision, we generally will defer to a permissible interpretation espoused by the agency entrusted with its implementation."); Lyng v. Payne, 476 U.S. 926, 939 (1986); Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988)). In conducting this analysis, the inquiry should focus on whether the agency's action was reasonable, not whether the action was the "preferred" action. TOPUC, 265 F.3d at 320. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Chevron, 467 U.S. at 843 n.11.

Such deference is warranted because the agency has unique knowledge of the subject matter related to statutes the agency administers. See, e.g., Good Samaritan Hosp., 508 U.S. at 414 ("Confronted with an ambiguous statutory provision, [the court] generally will defer to a permissible interpretation espoused by the agency entrusted with its interpretation."). Deference is due an agency's interpretation of its statutes because of "the agency's superior expertise in the area of its authority." State of Florida v. Mathews, 526 F.2d 319, 324 n.10 (5th Cir. 1976). In particular, an agency's contemporaneous interpretation of a statute has "carr[ied] the day against doubts that might exist from a reading of the bare words of a statute." Good Samaritan Hosp., 508 U.S. at 414; see also

Udall v. Tallman, 380 U.S. 1, 16 (1965) (stating that an agency's interpretation of its own regulations is to be given substantial deference).

This considerable deference is especially compelling "whenever [a] decision as to the meaning or reach of a statute has involved reconciling conflicting policies. . . ." Chevron, 467 U.S. at 843 (citations omitted); see also Blackshear Residents Org. v. City of Austin, 659 F.2d 36, 38, 39 (5th Cir. Unit A Oct. 1981) (emphasizing that agency decisions on policy are due considerable deference by courts: "… policy decisions of this sort rest particularly within the informed discretion of an administrative agency" and concluding that, "[a]lthough appellants suggest that funds should be expended on projects they prefer … the court declines to make such a qualitative judgment."). Therefore, "if [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845 (quoting United States v. Shimer, 367 U.S. 691, 699-700 (1984)).

II. ARGUMENT

A. The Trade Act Does Not Require an 80% Post-Training Wage Rate

Plaintiffs claim that the Trade Act requires an 80% post-training wage rate. This claim is based on an erroneous construction of the Trade Act's statutory provisions and legislative history.[3] Because the Act does not require a specific post-training wage, the

---

[3] Plaintiffs continually refer to "the" purpose of Trade Act training as "return[ing] trade dislocated workers to employment at 80% or more of their prior wage." See, e.g., Summary Judgment Memo at 14, 16, 19, 21, 22. The Trade Act of 1974 included six express purposes. See Pub. L. 93-618, § 2. Those same six codified purposes remain unchanged despite subsequent amendments to the Act. See 21 U.S.C. § 2102. One of the six enumerated purposes appears to apply most directly to Trade Act Assistance --- "(4) to
(note continues on next page)

Secretary cannot violate and has not violated the Act by failing to issue regulations comporting with Plaintiffs' erroneous reading.

(1) <u>The Trade Act's Language and History Demonstrate That an 80% Replacement Wage is Not Required.</u>

Section 2296 of the Trade Act outlines the criteria the Secretary must follow to determine if a worker is eligible for training benefits under the Act. 19 U.S.C. § 2296. The Secretary must determine that there is no "suitable employment" available for a worker and that the worker would benefit from "appropriate" training. 19 U.S.C. § 2296(a)(1)(A) & (B). The training must also be reasonably available, suitable for the worker, and available at a reasonable cost. § 2269(a)(1)(D) & (F). In addition, the worker must be qualified for the training and there must be a "reasonable expectation of <u>employment</u>" following training. § 2296(a)(1)(E) & (C) (emphasis added). The Act does not include a requirement that training must lead to employment that provides at least 80% of the worker's previous wage.

Although Plaintiffs suggest that this Court must first determine Congressional intent in order to properly interpret the Trade Act, a court "must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." <u>Richards v. United States</u>, 369 U.S. 1, 9 (1962); <u>see</u> <u>also</u> <u>Dep't of Housing and Urban Dev. v. Rucker</u>, 535 U.S. 125, 132 (2002) (noting that "reference to legislative history is inappropriate when the text of the statute is unambiguous."); <u>United States v. Yeatts</u>, 639 F.2d 1186, 1189 (5th Cir. 1981) ("A statute should ordinarily be interpreted

---

provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm[s], workers, and communities to adjust to changes in international trade flows." 19 U.S.C. § 2102(4). Nowhere in the Act is an 80% wage replacement codified as a purpose either of the Trade Act generally, or of the Trade Act Assistance provisions more specifically.

according to its plain language, unless a clear contrary legislative intention is shown.") (citing United States v. Apfelbaum, 445 U.S. 115, 121 (1980) (emphasis added)). Here, Congress has given this Court all the direction necessary to interpret the Trade Act, in the Act itself.[4]

(a) "Suitable Employment"

Although Plaintiffs vociferously argue that the statute and the regulations require an 80% post-training wage replacement rate, neither the statute nor the regulations require any specific post-training wage.

In 1981, Congress amended the Trade Act, including extensive revisions of the training section of the statute. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-

[4] Plaintiffs' reliance upon UAW v. Brock, 816 F.2d 761, 765-67 (D.C. Cir. 1987), to suggest that this Court must look beyond the plain language of the statute in order to determine whether Congress has spoken to the issue of wage replacement is unpersuasive. The court in Brock was required to define "employment" for purposes of the Act, because the Act did not specifically define "employment." Brock, 816 F. 2d at 764. This Court need not go to the lengths of the Brock court in order to decide this case; Congress has not only defined the term at issue, but it has carefully and precisely used the term only once in the statute. Congress could not have been clearer:

> If the Secretary determines that -- (A) there is no suitable employment . . . available for an adversely affected worker, (B) the worker would benefit from appropriate training, (C) there is a reasonable expectation of employment following completion of such training, (D) training approved by the Secretary is reasonably available to the worker . . ., (E) the worker is qualified to undertake and complete such training, and (F) such training is suitable for the worker and available at a reasonable cost, the Secretary shall approve such training for the worker.

19 U.S.C. § 2296(a)(1).

Plaintiffs' reliance on Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994), to distract the Court's attention from the plain language of the statute is also inapposite. Thunder Basin does not speak to this case. The Court in Thunder Basin was attempting to determine, in the face of statutory silence, whether judicial review was available for pre-enforcement claims. See Thunder Basin, 510 U.S. at 207-08 ("Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.") (internal citations omitted). The case at bar does not implicate judicial review or even proper interpretation of a facially silent statute. To the contrary, the Trade Act explicitly defines "suitable employment" and is straightforward regarding when the Secretary must take the availability of "suitable employment" into consideration. In this case, the plain language of the statute must control. See Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, 519 U.S. 248, 261 (1997) (recognizing that a statute's plain language controls unless it lead to results that are "absurd or glaringly unjust.") (quoting United States v. Rodgers, 466 U.S. 475, 484 (1984)).

35, § 2506, 95 Stat. 357 (1981). This marked the first time that Congress outlined the specific criteria for training eligibility under the Act. Significantly, in the 1981 Amendments, Congress used "suitable employment" only once and defined it for the limited purpose of § 2296 to mean: "work of a substantially equal or higher skill level than the worker's past adversely affected employment, and wages for such work at not less than 80% of the worker's average weekly wage."[5] 19 U.S.C. 2296(e). Congress included the term "suitable employment" for training eligibility purposes, but omitted the term "suitable" when referring to what employment would be reasonably expected to be available following training.[6] Congress' exclusion of the phrase "suitable employment" when referring to post-training employment demonstrates that the statute does not require an 80% post-training replacement wage. 19 U.S.C. § 2296(a)(1)(c); Keene Corp. v.

---

[5] Congress carefully distinguished "suitable employment," as defined for the purposes of the Trade Act from "suitable work" under the Federal-State Extended Unemployment Compensation Act of 1970 (EB), Pub. L. 91-373, § 202, 84 Stat. 708, which requires workers to seek and accept "any work which is within such individual's capabilities. . . ." Pub. L. 91-373, § 202(a)(3)(C). By defining "suitable employment" explicitly in the 1981 Amendments, Congress made clear that workers wishing to take advantage of the training opportunities available under the Act could not be considered disqualified for unemployment assistance or TAA benefits "by leaving lower-level or minimum wage EB-required work" to accept TAA training. H.R. CONF. REP. 97-208 (1981), reprinted in 1981 U.S.C.C.A.N. 1010, 1366. Thus, Congress guaranteed TAA eligible workers the ability to increase their skills and education through Trade Act Assistance training without losing their eligibility for income assistance for refusing "any work . . . within [the worker's] capabilities."

[6] Plaintiffs rely on Senate Reports from 1974 and 1981 for the proposition that Congress intended Trade Act training to result in an 80% replacement wage. See Summary Judgment Memo at 18. The Senate Report from 1974 states: "It is intended that every effort be made to place workers in suitable employment through the use of employment services provided for in Section 235 [which includes counseling, testing, and placement services] and that training be authorized only when the Secretary finds that suitable employment is not otherwise available." S. REP. NO. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7280. Congress language that "every effort be made" makes clear that this is a goal and not a requirement. Moreover, Congress had not defined the term for this version of the Act.

Moreover, the import of the 1981 Amendments is inescapable: Congress specifically used the term "suitable employment" once in the statute, and defined it precisely. After requiring the Secretary to determine if "suitable employment" was available, Congress assiduously avoided invoking the defined term again. A permissive statement in a Senate report cannot change the statute Congress enacted.

United States, 508 U.S. 200, 208 (1993) ("[w]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); Castillo v. Cameron County, Tx., 238 F.3d 339, 356 (5th Cir. 2001) (same) (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994)); Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999) ("It is a fundamental tenet of statutory construction that Congress intended to exclude language included in one section of a statute, but omitted from another section.").

In accordance with the Act's construction, the implementing regulations require that before training is approved the Secretary must determine that there is no "suitable employment" available to the displaced worker. As defined in the regulation (and exactly as defined in the Act), "suitable employment" means work "of a substantially equal or higher skill level than the worker's past adversely affected employment, and wages for such work at not less tha[n] 80% of the worker's average weekly rate."[7] 20 C.F.R.

---

[7] The historical evolution of the Trade Act is helpful in understanding the term "suitable employment." When Congress originally enacted the Trade Act in 1974, it did not define the term "suitable employment," nor does the concurrent legislative history illuminate what Congress meant by the term. However, an agency's contemporaneous construction of a statute is particularly relevant in determining the proper interpretation of a statute. Good Samaritan Hosp., 508 U.S. at 414 (allowing an agency's "contemporaneous construction . . . to carry the day against doubts that might exist from a reading of the bare words of the statute"). The 1975 regulations issued by the Department state that eligible workers should receive "testing, counseling, job referral, and other placement services . . . necessary to prepare the worker for full employment in accordance with the worker's capabilities and job opportunities," and that if "suitable employment [for eligible workers] is not otherwise available and the worker's employability would be improved thereby, the worker may be selected or referred to training . . . ." 29 C.F.R. § 91.17 (d) (1974), 40 Fed. Reg. 16304 (Apr. 11, 1975). Noticeably, the 1975 regulations do not require that training be limited only to those situations in which the post-training wage is 80% of the worker's previous wage; rather, the regulation, paralleling the statute, first requires a determination of whether "suitable employment" is available. If it is not, then both the statutory and regulatory focus shifts to improving the employability of the worker through training.

§ 617.22(a)(1)(i) (2004). "Suitable employment" is but one of six factors in determining when a claimant is eligible for training.[8]

Despite the Act's plain language, Plaintiffs cite to 20 C.F.R. § 617.2, a general introductory provision in the implementing regulations, which presents the Department's goal of assisting individuals in returning to suitable employment. Juarez Depo. at 222:6-9 ("Q: And as I understand your testimony, DOL's goal is to get everyone an 80% wage replacement job or better? A: That is the goal.") (Exh. 35). The only requirements established in the regulations are set forth in 20 C.F.R. § 617.22, which mirrors the statutory provision of 19 U.S.C. § 2296(a)(1). Just as in the statute, the regulations provide that training shall be approved if suitable employment is not available, 20 C.F.R. § 617.22(a)(1), and that there should be a reasonable expectation of employment following completion of the approved training. 20 C.F.R. § 617.22 never uses the phrase to refer to post-training wages.[9]

A court "may reverse an agency's interpretation of an unambiguous statute only if it does not confirm the plain meaning of the statute." El Paso Electric Co., 201 F.3d at

[8] In fact, the legislative history Plaintiffs cite supports the Department's interpretation: "It is intended that every effort be made to place workers in suitable employment through the use of employment services provided for in [the Act] and that training be authorized only when the Secretary finds that suitable employment is not otherwise available." S. REP. NO. 93-1278 (1974), reprinted in 1974 U.S.C.C.A.N. 7278-79, referencing the Trade Act of 1974, Pub. L. No. 93-618, § 236, 88 Stat. 1978 (1975). This illustrates that suitable employment is used in determining training eligibility and that immediate re-employment should be the first goal. Moreover, both the legislative history and the regulations support the Department's interpretation that 80% wage replacement is a goal, not a mandate, of Trade Act Assistance. See S. Rep. No. 93-1278 ("every effort should be made"); 20 C.F.R. § 617.2 (purpose).

[9] The Department has carefully limited its use of the phrase "suitable employment" in the regulations to maintain the statutory intent. The term "suitable employment" is only used in sections 617.2 (purpose), 617.18(b)(iii) (requirements for disqualification of trainees), 617.20(b)(3) (defining States' responsibilities in determining whether pre-training "suitable employment" is available), 617.23(a) ("If suitable employment as described in § 617.22(a)(1), is not otherwise available to an individual…it is the responsibility of the State agency to explore…training opportunities"), 617.32(a)(4) (job search eligibility), and 617.44 (relocation allowance eligibility). Once again, none of these sections use the phrase in the context of post-training wages.

670. Because there is no statutory requirement that training must lead to employment paying an 80% replacement wage, the Court should defer to the Department's interpretation of the Act.

(b) Appropriate Training Suitable For the Worker

If it is clear that there is no suitable work available to the trade affected worker, the Secretary must determine if there is appropriate training available. 19 U.S.C. § 2296(a)(1)(B). The regulations explain that "appropriate training" means that the approved training will directly address a worker's need for additional skills or remedial education. 20 C.F.R. § 617.22 (a)(2)(i) (2004). This interpretation is supported by the legislative history: "The conferees intend that training be appropriate to the employment opportunities reasonably available to the worker considering the occupational skills used by the worker in prior employment as well as new skills that might be acquired through a concentrated training program." H.R. CONF. REP. NO. 100-576 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1734.

Similarly, such training must be "suitable for the worker," and the worker must be qualified for any training approved, that is, the worker's physical and mental capabilities, educational background, and work experience must be assessed to ensure that the training approved adequately addresses the needs of the worker and the worker can complete the training. 20 C.F.R. § 617.22(a)(5) & (6). The House Conference Report regarding the 1988 Amendments to the Trade Act, which added the sixth criteria for training approval requiring training to be suitable for the worker and available at a reasonable cost, states that "[i]n determining whether training is suitable, the conferees intend training to enable workers to obtain reemployment within a reasonable period of time at a skill level other than they would have been able to obtain absent such training." H.R. CONF. REP. NO. 100-576 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1734. The House conferees did not interpret the Trade Act to require that training lead to an 80% replacement wage; rather, their understanding was that Trade Act training should increase the skill set of trade affected workers to facilitate the worker's rapid reintroduction into the workforce. This criterion is discussed further, infra, with regard to incomplete training.

(c) Reasonable expectation of employment

Trade Act training should culminate in a reasonable expectation of employment upon completion of the training. 20 C.F.R. § 617.22(a)(3)(i). A "reasonable expectation of employment" means that there is a fair and objective expectation that, upon completion of training, the worker has a reasonable possibility of obtaining a job utilizing the education and skills acquired from the training. 20 C.F.R. § 617.22(a)(3)(i). A guarantee of employment at the end of training is not required; rather an objective projection of market conditions should indicate that the education and skills acquired during training will be in reasonable demand in the job market upon completion of training. Id. As noted, neither the statute nor the regulations use the phrase "suitable" in this criterion. There is no requirement that employment following the completion of training provide an 80% replacement wage.

Plaintiffs cannot show that the statute requires any specific post-training wage rate, nor can they show that the Department's regulations or policies violate the statute. [10] Thus, summary judgment for the Plaintiffs on this issue must be denied.

---

[10] Plaintiffs' reliance upon Oregon Natural Res. Council v. Lyng, 882 F.2d 1417, 1427 (9th Cir. 1989) to support their contention that the Department must promulgate regulations mandating an 80% replacement *(note continues on next page)*

(2) This Court should defer to the Department's reasonable interpretation of the Trade Act

The language of the Trade Act is clear: there is no statutory requirement that approved training must lead to "suitable employment." The Court's inquiry should end here because Congress has spoken to the issue at hand. See Chevron, 467 U.S. at 842-43; United States v. Apfelbaum, 445 U.S. 115, 121 (1980).

However, if this Court were to find the statute ambiguous regarding whether post-training employment must result in 80% wage replacement, the Department's interpretation of the statute and the implementing regulations should be given deference because it is a reasonable interpretation. See Gulf Power Co., 534 U.S at 333 (citing Chevron, 467 U.S. at 842-44); see also Thomas Jefferson Univ., 512 U.S. at 512 (citing Martin, 499 U.S. at 150-51 (1991)); Good Samaritan Hosp., 508 U.S. at 414 ("Confronted with an ambiguous statutory provision, we generally will defer to a permissible interpretation espoused by the agency entrusted with its implementation."); Payne, 476 U.S. at 939; Tallman, 380 U.S. at 16 (stating that an agency's interpretation of its own regulations is to be given substantial deference).

The Department's interpretation of the statute and its regulations is entitled to deference because it closely follows the statutory language, liberally construes a remedial statute, and is permissible. See Rucker, 535 U.S. at 128-29, 136 (upholding HUD's regulations which "closely track the statutory language" because the regulations followed

---

wage for training approval is unavailing. In Lyng, the Secretary of Agriculture had not issued any regulations under § 10 of the Hells Canyon National Recreational Area Act, 16 U.S.C. § 460gg, et seq., including the regulations "of the sort" required in the subsections of statute. Id. at 1427. Unlike Lyng, this is not a case where the Secretary has refused to promulgate regulations; to the contrary, the Secretary of Labor has promulgated the specific regulations required by the Act. The Plaintiffs simply disagree with the content of those regulations. This is precisely the sort of claim that cannot be addressed by a court under § 706(1).

the plain meaning of the statute); Stinson v. United States, 508 U.S. 36, 44 (1993) ("[C]ourts must defer to the agency's interpretation so long as it is 'a permissible construction of the statute.'") (quoting Chevron, 467 U.S. at 842-43); K mart Corp., 486 U.S. at 292 ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute.") (citing United States v. Boyle, 469 U.S. 241, 246 n.4 (1985)); Labelle Processing Co. v. Swarrow, 72 F.3d 308, 318 (3rd Cir. 1995) (recognizing that where an agency's interpretation of a statute is reasonable, the fact that the agency's interpretation follows the statutory construction canon of liberally construing a remedial statute is an additional reason for the court to defer to the agency's interpretation); Warmtex Enterprises v. Martin, 953 F.2d 1133, 1137 (9th Cir. 1992) (where an agency's reading of its regulation is "consistent with the language and purpose of the statute" it is entitled to deference). If the Department were, contrary to an express Congressional mandate and supporting legislative history, to approve *only* training that resulted in an 80% post-training wage, the Department would unnecessarily limit the pool of potential training.[11]

---

[11] Plaintiffs cite to UAW v. Marshall, 584 F.2d 390, 395 (D.C. Cir. 1978) and UAW v. Brock, 568 F. Supp. 1047, 1053 (D.D.C. 1983), in support of their contention that the Trade Act must be liberally construed, due to its remedial nature. See Summary Judgment Memo at 16. Plaintiffs argue that their view more liberally construes the statute. However, Plaintiffs' argument, when taken to its logical conclusion, is that individuals will receive *no training at all* if the training available does not meet the very strict criteria Plaintiffs wish to impose. In short, if training is not available that would result in an 80% post-training wage, an applicant would be *ineligible* for training under the Act.

Plaintiffs also suggest that because there is a statutory cap on the amount of training money available per year under the Trade Act, more regulation is necessary to ensure equal funds are spent across the country. See Summary Judgment Memo at 17. Plaintiffs further suggest that wage replacement consideration is the appropriate vehicle to address this.

However, Congress considered a training cost ceiling for individual workers in 1988 and rejected it because "such costs may vary significantly from one region of the country to another and from one worker dislocation to another. However, the conferees expect the Secretary of Labor to set forth guidelines for State administering agencies to provide approved training at the lowest reasonable cost for the particular

(note continues on next page)

The Department's regulations allow for consideration of a wider range of training opportunities in order to meet every individual's personal training needs and desires. See, e.g., 19 U.S.C. § 2296(a)(1)(A) & (E) (requiring the Secretary to determine, based upon the particular trade affected worker's skill level and past earnings, whether suitable employment is available for the worker); § 2296(a)(1)(F) (requiring that any training approved be suitable for the particular worker).[12]

B. Departmental Regulations Already Require that Workers Be "Job Ready" Post-Training

The Act requires that a determination be made that a worker will benefit from training and that there is a reasonable expectation of employment following the training.[13] 19 U.S.C. § 2296 (a)(1)(B) & (C). The Trade Act does not specifically include the phrase "job ready" anywhere in Section 2296, the section governing training criteria.

The Department has, however, interpreted the phrase "appropriate training" and included a "job ready" requirement in its regulations. This interpretation is an attempt to

---

type of training in that region consistent with the objective of assisting import-impacted workers to obtain suitable skills to return to work as quickly as possible." H.R. CONF. REP. 100-576 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1733. The Department has, as expected, issued regulations requiring State agencies to consider costs when approving training. See 20 C.F.R. § 617.22(a)(6)(ii), (iii) and 617.22(b).

In addition to being the correct interpretation, the Secretary's interpretation of the training section of the statute provides a remedy to far more trade affected workers than the Plaintiffs' stringent demand. As such, it more liberally construes the Act.

[12] The Department has addressed specific factual contentions related to "suitable employment" in Appendix A.

[13] A "reasonable expectation of employment" is related to job market conditions, as discussed supra at p. 13. Plaintiffs use the criteria that there be a "reasonable expectation of employment" to support their argument that incomplete training cannot, by definition, provide a reasonable expectation of employment. See Summary Judgment Memo at 9. However, Plaintiffs take this criterion out of context. This is not relevant to the issue of complete training or "job readiness." This is a tool to ensure that individuals are being trained for jobs that should be available in the local job market after an individual completes the training.

provide individuals with the most effective training and as many skills as possible through that training. The regulations expand on § 2296(a)(1)(B):

> (2) *The worker would benefit from appropriate training.* (i) This means that there is a direct relationship between the needs of the worker for skills training or remedial education and what would be provided by the training program under consideration for the worker, and that the worker has the … capabilities to undertake … and complete the training. This includes the further criterion that the individual will be job ready on completion of the training program.

20 C.F.R. § 617.22(a)(2).[14]

The Department's practice has been consistent with the requirements codified in the regulations. Plaintiffs admit, for example, that the Department has approved Texas's Trade Adjustment Assistance Policy and Procedure Manual -- a manual that includes the criteria that a worker be job ready upon completion of training. See Summary Judgment Memo at 10. Moreover, evidence at bar also demonstrates that the Department expects training to provide workers with all the skill necessary for employment. Tomchick Deposition ("Depo.") at 76:4-19 ("…if approved, [training] is supposed to have a person be job ready.") (Exh. 44); Smith Depo. at 21:1-5 ("Q: Describe what you mean by job ready. A: They have the skills that are needed to become employed or to be able to seek employment.") (Exh. 43); Purnell Depo. at 107:18 to 108:5; 115:23 to 116:1 (Exh. 38). The Department has reasonably interpreted the statutory language "appropriate training." There is no legal dispute as to what the regulations require. Nor is there a dispute as to

[14] This regulatory provision is related to § 2296(a)(1)(B) ("the worker would benefit from appropriate training") and not § 2296(a)(1)(C) ("there is a reasonable expectation of employment following completion of such training"), which is referred to in a separate regulatory provision. 20 C.F.R. § 617.22(a)(3).

the Department's policy regarding this issue: the Department requires state agencies to approve training that renders an individual job ready.[15]

(1) <u>There is No Systemic Evidence That the Texas Workforce Commission Does Not Comply With the Regulations.</u>

As explained, there is no legal dispute as to what the Department's regulations require. Plaintiffs' claim, however, raises a factual challenge by stating that the Department "allows TWC to approve stand-alone remedial education" under the Trade Act and that the "natural consequence" of this is that TWC approves incomplete training.[16] <u>See</u> Summary Judgment Memo at p. 11. However, Plaintiffs have provided no determinative evidence that the approval of incomplete training occurs on a systemic basis in El Paso.[17]

The Department recognizes that there may be isolated instances in which, because of the time and monetary constraints of the Trade Act, incomplete training may be approved for individuals on a case-by-case basis, but there has been no evidence of this

---

[15] Plaintiffs cite GAL 2-88 in fact 40 as support for the contention that the Department "routinely and strictly" limits worker choice. However, the GAL directs state agencies to make case-by-case determinations regarding training rather than dismissing any training program outright. DOL GAL No. 2-88 at 3 ("Q: May a State establish a standard to disapprove training for MA (masters) or higher degree? A: No. Training must be approved or disapproved on the basis of the five criteria at 20 CFR 617.22.") (issued pre-1988 amendments which added a sixth training criteria) (Exh. 12). The Department requires that training choices be made on a case-by-case basis. As Plaintiffs note in footnote 9, courts have upheld denials of training in situations where the training would exceed the statutory time limits. <u>See</u> Summary Judgment Motion at 13. The time limit on training is specifically outlined in the statute at 19 U.S.C. § 2293(a)(2).

[16] There is nothing natural about such a consequence. Indeed, there may be instances in which remedial education or ESL is all the training that an individual needs to become "job ready." Purnell Depo. at 116:7-11 (Exh. 38); DOL PREP Grant Contract at ETATOPL 03896 (Exh. 9).

[17] Assuming, <u>arguendo</u>, that in the few individual instances (out of thousands) Plaintiffs present, the State or local board violated the Department's regulations, Plaintiffs have still not established a systemic claim. If these individual instances do exist, such instances should be reviewed by the State Court as discussed <u>infra</u>, at pp. 21-22. Plaintiffs have also provided no evidence that there are *currently* problems with training determinations in El Paso or elsewhere in Texas. Plaintiffs' evidence comes mostly from 1997-2000.

presented at bar.[18] The Department expects that, if these situations arise, additional training would be funded by another source, such as the Workforce Investment Act.[19] Juarez Depo. at: 378:2 to 379:24 (Exh. 35); Smith Depo. at 61:8 to 62:5 (Exh. 43); DOL GAL No. 4-89 ("Remedial education was added as approvable training under Section 236 of the Act and States are not only allowed but strongly encouraged to obtain free training and to combine TAA funds with those from other Federal, State or private sources. Use of non-ETA funds for training along with delivery of training from non-TAA sources should necessarily be the result of the development and/or strengthening of existing linkages with Wagner-Peyser, JTPA Title III/EDWAA or other sources.") (Exh. 26). This is especially true when the alternative to providing as many skills as possible through training would be the *denial of any training* if other appropriate training is not otherwise reasonably available.[20] If Plaintiffs' argument is again taken to its ultimate conclusion, the Department would have to deny training to individuals that may need more than 130 weeks of training; individuals thus would be denied any job skills training,

[18] The 2002 Amendments provide for an additional 26 weeks of trade re-adjustment assistance, which the Department has interpreted as allowing up to 130 weeks of training where remedial training is required, increasing the likelihood that an individual worker will have sufficient time to complete the remedial education component of a training program and receive approved skills training. See DOL TEGL No. 11-02 at ETATOPL 08469-70. It should be noted that the approval of a training program, including remedial education, does not guarantee that the worker will successfully complete the training program. There will always be individuals who drop out of training or do not sufficiently progress through training.

[19] The Department reiterated this in its response to an admission Plaintiffs posed; a response which Plaintiffs only partially quote. Plaintiffs asked the Department to admit that it has a policy allowing approval of incomplete training. Of course, the Department *denied* this statement in the portion Plaintiffs omitted. The Department recognizes however, that there may be instances, when reviewed on a case-by-case basis, where the available weeks of training are insufficient to provide all of the training needed by an individual, but where approval of a training program which provides as many jobs skills as possible may be appropriate.

[20] The result that individuals may receive no training is especially likely when the affected population has characteristics like those of the trade affected population in El Paso: older workers with low literacy levels, low levels of English, and limited transferable skills.

which may include remedial training. The Department has attempted to avoid this ridiculous outcome by liberally construing this requirement in order to provide training to a larger group of affected workers.

In support of their argument that ESL and GED are approved without a vocational component to the training, Plaintiffs present facts 75 and 76, relating to two specific individuals. Mr. Raul Trejo, as presented in fact 75, was approved for a complete course of training including ESL/GED and commercial truck driving courses. See WDB Review of Training Opportunities Form (reflecting approval of truck driving program) (Exh. 27). Mr. Trejo did, in fact, complete truck driving courses.[21] This is not in violation of the regulations because this form reflects that a *complete training program* was approved, including remedial and vocational courses.[22] Mr. Rodolfo Gilbert's training form does reflect ESL/GED as the occupation, which is not an accepted practice under the regulations except in situations where an individual only needs this type of training in order to re-enter the workforce.[23] Plaintiffs have not shown that Mr. Gilbert, who incidentally is not a named Plaintiff, needed training beyond remedial training.

---

[21] Plaintiffs agreed to informally remove Mr. Trejo from the Original Texas Case because he did, in fact, complete his commercial truck driving courses. See Letter dated 8/28/03, from Carmen E. Rodriguez, Counsel for Texas Rural Legal Aid, Inc., to Alex Fernández, Counself for the Department (Exh. 28) and Letter dated 8/22/02 from Robert L. Blumenfeld, Counsel for Upper Rio Grande Workforce Development Board to Carmen Rodriguez and Alex Fernández (Exh. 45).

[22] Plaintiffs argue that bilingual training is better than "serial" training, where English is taught prior to vocational courses, and that the Department should be placing individuals into bilingual training because it is "better." However, remedial training is contemplated as appropriate training under the Act. Further, the Department has no obligation to create training programs if they do not exist, nor does the Department force individuals to enroll in bilingual training if they choose ESL or GED classes. The efficacy of each individual training decision is a factual contention and the individuals may appeal these decisions through the State courts. See, infra, pp. 21-22. This matter is not ripe for summary judgment if a decision hinges on the factual issue regarding bilingual vs. serial training.

[23] Ms. Purnell testified that ESL/GED should not be listed as an occupation on a training contract if the individual requires more than ESL or GED to be "job ready." Purnell Depo. at 145:23-5 (TWC does not
(note continues on next page)

Even if taken in a light most favorable to Plaintiffs, these two instances are insufficient to establish a systemic violation of Departmental regulations -- or a de facto Departmental policy.[24] Furthermore, there is a readily available route through which those individuals can seek redress of their training assignment.

(3) <u>Aggrieved Individuals Must Seek a Re-Determination of Individual Benefits Through State Processes</u>

Section 2311 of the Trade Act states that "[a] determination by a cooperating State agency with respect to entitlement to program benefits under an agreement is subject to review in the same manner and to the same extent as determinations under the applicable State law and *only* in that manner and to that extent." 19 U.S.C. § 2311(d) (emphasis added). In addition, the Supreme Court has held in <u>UAW v. Brock</u> that Federal courts do not have jurisdiction to review individual benefit determinations because the Trade Act provides that any benefit determination by the State shall be reviewed only in the way that unemployment compensation determinations are reviewed. <u>See</u> <u>UAW v. Brock</u>, 477 U.S. 274, 284-85 (1986).

Accordingly, individuals must seek relief through the state courts under state law. <u>Brock</u>, 477 U.S. at 274 (1986). The review of individual benefit determinations does not

---

consider ESL/GED to be an occupation) and 116:7-11; 208:18-24 (remedial or ESL only is approvable) (Exh. 38). This is evidence that Texas follows the Department's regulations at 20 C.F.R. § 617.22(a)(2).

[24] Interestingly, of the five individually named Plaintiffs, only one completed training. <u>See</u> Mora Depo. at 50:2-13 (Exh. 39). At least two of the other individuals dropped out of training before it was over. Renteria Depo. at 48:4-10 (Exh. 41); De La Cruz Depo. at 30:9-11 (Exh. 46). The individual Plaintiffs also admit that they requested ESL or basic skills courses. <u>See</u> Marisela Rodriguez, TAA Contract Amendment Packet Checklist, ATF SEC 00090 (Exh. 23), Sandra (Rangel) Mora, Trade Affected Worker Assessment and Reemployment Plan, ATF SEC 3280-2 (Exh. 24), Marisela Rodriguez, AIE Assessment Evaluation Report, ATF SEC 3306 (Exh. 25); Morin Depo. at 13, 19-20 (Exh. 40); De La Cruz Depo. at 29 (Exh. 34); Rodriguez Depo. at 9, 11, 30-1, 46-7, 56 (Exh. 42); Mora Depo. at 4, 46 (Exh. 39); Renteria Depo. at 43-4 (Exh. 41). There is no evidence that the State violated the regulations with regard to the individual Plaintiffs; the individual Plaintiffs were approved for complete training, with ESL or GED and vocational skills training, and one even completed this training, in accord with the regulations.

fall within the purview of this Court. Only systemic violations of the Act or regulations can be adjudicated by this Court. If an individual is dissatisfied with the training program that is approved, the individual must appeal through the State's unemployment compensation appeal process.

Texas's Trade Adjustment Assistance Policy and Procedure Manual is consistent with the statute and regulations and requires that a worker be job ready at the completion of training. See Summary Judgment Memo at 10 (citing TWC Trade Adjustment Assistance Policy and Procedure Manual). Plaintiffs provide no evidence that TWC currently, as a matter of policy, approves training programs that consist only of remedial education, if not appropriate, or approves training programs that will not result in a worker being job ready if the training is completed successfully. Out of the thousands of applications for training programs TWC approves, Plaintiffs cite to only a handful where TWC allegedly did not approve a training program which would have resulted in the worker being job ready.[25] Plaintiffs have failed to show there is a systemic violation of the Department's policy that this Court can address, and summary judgment on this issue is not proper.

C. The Department's Regulation at 20 C.F.R. § 617.23(c) Regarding Methods of Training Is Properly Issued

Plaintiffs claim that the Trade Act requires the Department to "'assure' that training is provided on-the-job 'insofar as possible.'" See Summary Judgment Memo at 23. The Department agrees. The dispute, therefore, is over the meaning of this statutory mandate. In arguing that the regulations are in violation of the Trade Act, Plaintiffs jump to the baseless conclusion that the regulations differ in a significant way from the statute.

[25] See Appendix A for the Department's response to worker affidavits.

They do not. Plaintiffs ignore § 2296(a)(5), regarding what type of training the Secretary may approve, and they ignore the plain meaning of the phrase "insofar as possible." Plaintiffs' argument regarding on-the-job training ultimately fails because Plaintiffs would like the statute to mean something it does not.

19 U.S.C § 2296(a) states, in part:

> Insofar as possible, the Secretary shall provide or assure the provision of such training on the job, which shall include related education necessary for the acquisition of skills needed for a position within a particular occupation.

Section 2296(a)(5) adds that:

> The training programs that may be approved under paragraph (1) *include but are not limited to* --
> (A) on-the-job training,
> (B) any training program provided by a state pursuant to Section 1653 of Title 29 or Title I of the Workforce Investment Act of 1998 [29 U.S.C.A. § 2801 et seq.],
> (C) any training program approved by a private industry council established under section 1512 of Title 29,...

See 19 U.S.C. § 2296(a)(5)(A)-(F) (emphasis added). When read together and in context, the phrases "insofar as possible" and "include but are not limited to," establish that while there are a number of training options available under the Trade Act, on-the-job training ("OJT") should be considered first among these possible training options.

Moreover, the legislative history supports this conclusion. Interestingly, to support their own conclusion, Plaintiffs cite to the Senate Report but omit a key sentence from the Report:

> ***While the bill does not bar the Secretary from providing any type of training which he may find appropriate, it clearly requires that the highest priority be given to developing and placing displaced workers in training on-the-job.*** The ultimate objective of training programs is the placement of a worker in actual employment. On-the-job training is, therefore, the most desirable type of training since it accomplishes this objective at the beginning rather than at the end of the

> process. The bill accordingly directs the maximum feasible use of training on the job.

S. REP. NO. 93-1298 at 93 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7279 (emphasis added to lines Plaintiffs omit). The 1981 House Report reiterates this intent:

> Under section 236(a) of existing law, the Secretary of Labor *may, but is not required to*, approve training (on-the-job insofar as possible) for an adversely affected certified worker ....
> Insofar as possible, the Secretary of Labor shall provide or assure provision of training on the job, which shall include related education necessary to acquire skills needed for a position within a particular occupation...

H.R. REP. NO. 97-158 at 275 (1981) (emphasis added; parentheses in original). This language expressly provides that OJT is to be given "the highest priority," while maintaining that the Secretary is *not required* to provide it.

The Department incorporates Congress' intention in its regulations, assuring that OJT is considered first among all available training options. See 20 C.F.R. § 617.23(c)(1). The regulation states, in part:

> (c) *Methods of training*. Adversely affected workers may be provided either one or a combination of the following methods of training:
> (1) Insofar as possible, ***priority will be given to on-the-job training***, which includes related education necessary to acquire skills needed for a position within a particular occupation...including training for which the firm pays the costs. This ensures that on-the-job training provides the skills necessary for the individual to obtain employment in an occupation rather than a particular job at a specific site; and
> (2) Institutional training, with priority given to providing the training in public area vocational education schools if it is determined that such schools are at least as effective and efficient as other institutional alternatives...

20 C.F.R. § 617.23 (emphasis added).

While not claiming that the Trade Act requires OJT, Plaintiffs do claim that, in violation of the Act, the Department's regulations reduce OJT to an option that state agencies may ignore. This argument is spurious. The Act only requires that OJT be provided "insofar as possible." The Department makes OJT a ***priority,*** insofar as possible.[26]

Even if the Act is ambiguous, the Department's regulations with regard to OJT constitute a permissible construction of the statute. Chevron, 467 U.S. at 843; Coal Employment Project, 889 F.2d at 1131 (quoting K Mart, 486 U.S. at 291). "The court must defer to the agency's interpretation so long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language." Coal Employment Project, 889 F.2d at 1131.

As stated in the Senate Report, "[t]he ultimate objective of training programs is the placement of a worker in actual employment." S. REP. NO. 93-1298 at 93, reprinted in 1974 U.S.C.C.A.N. at 7279. The Department, as the agency entrusted to administer the Trade Act, has determined that the statute does not require that OJT be available in every instance, and that balancing an individual's skill level and desires with the available training provides the best results in placing workers into employment. This is certainly a reasonable interpretation. See Young v. Cmty. Nutrition Inst., 476 U.S. 974, 981 (1986) ("[T]o sustain [an agency's interpretation], we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].") (citing

---

[26] One of Plaintiffs' arguments is that the "priority" assigned to OJT in the regulations is "undefined." See Summary Judgment Memo at 24. However, by definition, a priority is "precedence, especially established by order of importance or urgency" or "something afforded or deserving prior attention." The American Heritage Dictionary of the English Language, Fourth Edition, 2000; http://dictionary.reference.com/search?q=priority. If a term is not defined in the regulation itself, a court may rely on dictionary definitions. United States v. Sherburne, 249 F.3d 1121, 1126 (9th Cir. 2001). Clearly, a priority is something that deserves to be considered first or given precedence, thus it is not "undefined."

Chemical Manufacturers Ass'n v. Natural Res. Defense Council, Inc., 470 U.S. 116, 125 (1985)); City of Dallas, Tex. v. FCC, 165 F.3d 341, 346-47 (5th Cir. 1999) (citing Chevron). The Department encourages states to foster OJT opportunities, and the Department's policy is that OJT be presented to individuals as a first option, if available.[27]

III. CONCLUSION

Plaintiffs cannot show that the Trade Act requires the relief they seek. In addition, there are outstanding material facts in dispute, as outlined above and in Appendix A. For the foregoing reasons, the Department respectfully requests that Plaintiffs Motion for Summary Judgment be denied.

Respectfully submitted,

ALEXANDER FERNÁNDEZ
Deputy Associate Solicitor
Occupational Safety and Health

GARY BERNSTECKER
JOANNA HULL
Attorneys

(for)
ALEXANDRA TSIROS
Senior Trial Attorney
United States Department of Labor
Office of the Solicitor
200 Constitution Ave., NW
Room N-2454
Washington, D.C. 20210
202-693-5310

[27] Indeed, Texas does present OJT as a first option to individuals in Texas and in El Paso. Bueno Depo. at 47:13-25 (Exh. 30); Crawford Depo. at 83:24-84:9 (Exh. 33). See Appendix A for the Department's response to other facts related to OJT.

CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of December, 2004, a true and correct copy of the **U.S. Department of Labor's Response to Plaintiffs' Motion for Summary Judgment** and the **U.S. Department's Motion for Leave to File in Excess of Ten Pages** was caused to be delivered electronically and by U.S. mail to the following counsel of record in this Case:

Carmen E. Rodriguez
Jerome W. Wesevich
D. Michael Dale
Texas RioGrande Legal Aid, Inc.
1331 Texas Avenue
El Paso, TX 79901

Michael T. Kirkpatrick
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

Alexandra Tsiros

ALEXANDRA TSIROS
Senior Trial Attorney