

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
1111 20th Street, N.W.  
Washington, D.C. 20036



Date: **February 15, 2000**

Case Nos. **1997-INA-40**  
**1997-INA-232**  
**1997-INA-541**

*In the Matters of:*

**CHAMS, INC, d/b/a DUNKIN' DONUTS**  
*Employer,*

*on behalf of*

**KALLOR GEEVARUGHESE,**  
*Alien;*

**and**

**T&T DONUTS, d/b/a DUNKIN' DONUTS**  
*Employer,*

*on behalf of*

**WILMER PUBLICO,**  
*Alien;*

**and**

**BERWYN DONUTS, d/b/a DUNKIN' DONUTS**  
*Employer,*

*on behalf of*

**SAMUEL ANANDAPPA,**  
*Alien.*

Certifying Officer: **Richard E. Panati**  
**Philadelphia, Pennsylvania**

Appearances: Roseli G. Rosali, Esquire  
New York, New York  
for Employers Chams, Inc. and T&T Donuts

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For Employer Berwyn Donuts

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Washington, DC  
For the Certifying Officers

James J. Orlow  
American Immigration Lawyers Association  
*Amicus Curae* Brief

Before: Burke, Holmes, Huddleston, Jarvis, Neusner, Wood and Vittone  
Administrative Law Judges

JOHN M. VITTON  
Chief Administrative Law Judge

### **DECISION AND ORDER**

These matters arise from Employers' request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Baker.<sup>1</sup> The CO denied certification on the ground that each Employer had wrongly classified the position offered, and that the experience required was thus unduly required.<sup>2</sup> In making this determination, the CO relied on communications and documents obtained from prior applications. The Board has considered this

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<sup>1</sup>Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files ("Chams AF"; "T&T AF"; and "Berwyn AF"), and any written arguments. 20 C.F.R. 656.27(c).

<sup>2</sup>In each case, the Employer classified the offered position as a Baker, with two years of experience required. The Dictionary of Occupational Titles ("DOT") lists an SVP of 7 for Baker (*see* DOT (4th ed., Rev. 1991) 526.381-010), which translates into two years of training and/or experience. *See* DOT, Appendix C. The CO determined in each case that the job should have been classified as Doughnut Maker under the DOT, which lists "Baker" as an alternative title for the described position and has an SVP of 4 and (*see* DOT 526.684-010), or "3 to 6 months combined education, training, and experience." *See* DOT, Appendix C. Accordingly, the CO determined that the misclassification resulted in an unduly restrictive requirement.

matter *en banc* to determine if the inclusion of these communications and documents was proper, and, if so, the proper method of disclosing this information to the applicants.

### **STATEMENT OF THE CASE**

#### **Chams, Inc., 1997-INA-40**

Chams, Inc., (“Chams”) doing business as Dunkin’ Donuts, filed a labor certification on behalf of Kallor Geevarughese on December 19, 1995. (Chams AF 21). Chams listed this position with the Pennsylvania Job Center at this time. (Chams AF 22). On December 21, 1995, Chams was notified by the Regional Job Center in Philadelphia that its application for labor certification was not in compliance with the regulations. Specifically, the Job Center informed Chams that they had coded the position as “Doughnut Maker with an S.V.P. of ‘4’ - over three months up to and including six months” of experience. As Chams had listed two years of experience, it was informed that it “must either amend and reduce or provide business necessity” for this requirement. (Chams AF 19). Chams replied that the worker also prepares other baked goods, and that “the job of a Doughnut Maker is limited to preparation and baking of doughnuts.” Chams thus requested that the job be re-coded as that of Baker. (Chams AF 17).

The CO proposed to deny certification in a Notice of Findings (“NOF”) dated April 3, 1996. (Chams AF 12-14). “Based on the type of food services typically provided by Dunkin’ Donuts franchises,” the CO concluded that the job was properly classified as that of a Doughnut Maker. Accordingly, the CO found that the job requirement of two years of experience in the position was unduly restrictive. The NOF provided two options for rebuttal:

a. Submitting evidence that your requirement arises from a business necessity. To establish business necessity, an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer’s business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

-OR-

b. Reducing requirements to the DOT standard for full proficiency in the occupation. ...<sup>3</sup>

(Chams AF 13).

Chams’ rebuttal, consisting solely of a four page letter from its president, was filed on April 23, 1996. (Chams AF 8-11). The letter details Chams operations, indicating that it is a “Retail Franchise

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<sup>3</sup>The NOF went on to describe the procedure for readvertisement if Chams chose to reduce the requirement. (Chams AF 13).

Management” operation that must “satisfy high quality control standards set by the franchisor [and] meet a myriad of rigid product specifications for each item on its product line,” *inter alia*.<sup>4</sup> Chams alleged that it makes a number of different products, not just doughnuts, and that these products were made by hand – albeit to the franchisor’s specifications – and then provided to Dunkin’ Donuts outlet stores. Accordingly, Chams felt that its operations should be described “as a medium-sized high-volume **commercial bakery or institutional baker**.” (Chams AF 9) (emphasis in original). Chams emphasized that the Doughnut Maker position involves the making of doughnuts only. Further, Chams submitted that the Doughnut Maker position does not include the use of discretion, which it alleged will be used in the position at issue, and that the position is thus more properly classified as that of a Baker. (Chams AF 10-11).

The CO issued a Final Determination (“FD”) denying certification on September 6, 1996. (Chams AF 5-7). After noting the specific arguments listed above, the CO found that the position should be classified as a Doughnut Maker. (Chams AF 6-7). In detailing the factors that led the CO to this conclusion, the CO stated the following:

Your business is a franchised, fast food business. Based on a review of the franchise agreement reviewed in other Applications received in this office [in] other positions, one can be an accredited manager of a Dunkin Donuts by attending a 5 week course at Dunkin Donuts University in Braintree, Massachusetts. At the end of the course, one is equipped to manage a Dunkin Donuts. Three (3) weeks of the 5-week course is in production training to learn how to make all the Dunkin Donuts products.

Regarding this specific Application this office spoke with Mark Porell, Manager of Training at Dunkin Donuts University. Mr. Porell verified the above information. Mr. Porell stated that it would take no longer than 1 month to fully train someone to make the entire line of Dunkin Donut products. He also stated that in the “production shops,” which appears to fit the description of your business, it would actually take less time to become proficient in the occupation since the machinery is more sophisticated. At the absolute extreme, six months of training would produce a super experience[d] employee, according to Mr. Porell. Not coincidentally, this is also the DOT standard for this position.

Based on the above, you have not shown that the coding of this Application was incorrect and your requirement for 2 years of experience as a Baker exceed the normal requirement for this position.

(Chams AF 7).

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<sup>4</sup>It is noted for the record that the copy of the rebuttal letter had a number of passages that were mostly illegible, having apparently been marked through. (Chams AF 9-11). The parts of these passages that are readable indicate that they further detail the processes undergone by Chams in its operations. This illegibility, however, has no bearing on the result reached in this decision.

Chams requested review of the FD on October 11, 1996. (AF 1-4). The request was filed on the basis that it was error for the CO to classify the position as a Doughnut Maker instead of a Baker and that it was error for the CO “to give significant weight to the representations of the Dunkin Donuts University spokesman . . . totally ignoring those of the employer who runs the business.” This matter was referred to a panel, which on January 29, 1998, issued a Decision and Order affirming the CO’s denial. The panel agreed that the CO erred in relying on the information stated above, as it had not been disclosed in the NOF. However, the majority of the panel opined that there was enough evidence in the record to support the CO’s finding, even without the faulty evidence. Accordingly, the panel affirmed the CO’s denial.

On February 17, 1998, Chams filed a petition for review by the full Board. This petition was accepted in order to review the proper way in which a CO may challenge the job title and the appropriate process for a CO to follow when introducing independent evidence or “*ex parte*” communications.

T&T Donuts, 1997-INA-232

T & T Corporation, (“T&T”) doing business as Dunkin’ Donuts, filed a labor certification on behalf of Wilmer S. Publico on February 5, 1996. (T&T AF 56). T&T listed this position with the Pennsylvania Job Center at this time. (T&T AF 51). On December 21, 1995, T&T was notified by the Regional Job Center in Philadelphia that its application for labor certification was not in compliance with the regulations. Specifically, the Job Center informed T&T that they had coded the position as “Doughnut Maker with an S.V.P. of ‘4’ - over three months up to and including six months” of experience. As T&T had listed two years of experience, it was informed that it “must either amend and reduce or provide business necessity” for this requirement. (T&T AF 52). T&T replied that the worker also prepares other baked goods, and that “the job of a Doughnut Maker is limited to preparation and baking of doughnuts.” T&T thus requested that the job be re-coded as that of Baker. (T&T AF 48).

The CO proposed to deny certification in a NOF dated January 15, 1997. (T&T AF 43-45). In the NOF, the CO determined that the Pennsylvania Job Center was correct, and that the position should be classified as a Doughnut Maker. The CO reasoned that, unlike a full-scale bakery, “Dunkin Donuts produces a large quantities [*sic*] of prepared doughnuts and a limited number of other pastries for consumption by the general public, i.e., fast food.” (T&T AF 44). The CO also informed T&T that he had reviewed Dunkin’ Donuts franchise agreements received with previously filed applications and that he had spoken with Mark Porell, Manager of Training at Dunkin’ Donuts University in Braintree, Massachusetts. Mr. Porell had informed the CO that “it would take no longer than 1 month to fully train someone to make the entire line of Dunkin Donut products. (T&T AF 45). The CO concluded that the job was properly classified as that of a Doughnut Maker. Accordingly, as with Chams, the CO found that the job requirement of 2 years of experience in the position was unduly restrictive, and provided T&T with the same two options for rebuttal.

T&T’s rebuttal was mailed on January 22, 1997, and consisted solely of a three page letter from its Vice-President for Operations. (T&T AF 40-42). As did Chams, T&T’s rebuttal relied in large

part upon its assertion that the alien would be making a large number of products, i.e., “brownies, croissants, muffins, cakes, shortcakes, bagels, biscuits, macaroons, munchkins, and other kindred pastries,” and that the DOT definition of Doughnut Maker applies to someone who only makes doughnuts.<sup>5</sup> (T&T AF 40-41). The rebuttal did not address the CO’s findings as to the previous franchise agreements. In regards to the statements of Mr. Porrell, the rebuttal stated the following:

To stress the obvious, the information provided by Mr. Mark Porell of the Dunkin’ Donuts University regarding the training requirements for doughnut makers would at best be only relevant to our operations as a franchisee of that business, and would have absolutely no bearing on the side of our operations which involve the production of a full range of bakery products. Furthermore, his opinion is no more than an expression of a standard minimum the franchise owner may impose on franchisees, and does not in any way, shape or form prevent a franchise holder from setting a much higher standard for his or her operations to produce franchise goods with a significantly higher quality than those food items sold in supermarkets.

(T&T AF 42).

The CO issued a FD denying certification on February 6, 1997. (T&T AF 37-39). After noting the specific arguments listed above, the CO concluded that the position should be classified as a Doughnut Maker. (T&T AF 39). In detailing the factors that led the CO to this conclusion, the CO stated the following:

The position is in a Dunkin Donuts franchised establishment. You produce large quantities of doughnuts and a limited line of other products, all encompassed in the Dunkin Donut product line. The product line is not varied and you have not documented that you produce a full line of baked goods similar to a full scale bakery.

While you have dismissed the information provided to this office by the franchiser by stating that you can set higher standards for the position, the violation of the regulations deals precisely with whether or not your requirements exceed the normal requirements for the position. . . . Your rebuttal is not convincing that this is other than a Dunkin Donuts producing the full line of Dunkin Donuts products, which according to the franchiser would take no longer than one (1) month of training to learn to produce.

(T&T AF 39).

T&T requested review of the FD on March 6, 1997. (T&T AF 1-36). The request was filed on the basis that it was error for the CO to classify the position as a Doughnut Maker instead of a Baker, again arguing that a Doughnut Maker may only make doughnuts as the DOT mentions no other

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<sup>5</sup>T&T asserted that “[o]bviously, a doughnut maker does not make anything else other than doughnuts.” (T&T AF 41).

product than doughnuts in its description. (T&T AF 1). This matter was referred to a BALCA panel, which on January 29, 1998, issued a Decision and Order affirming the CO's denial. The panel noted that the DOT "is merely a guideline and should not be applied mechanically." *Lev Timashpolsky*, 1995 INA 033 (Oct. 3, 1996); *Promex Corp.*, 1989 INA 331 (Sept. 12, 1990). Further, the panel noted that the definition of Doughnut Maker is a less sophisticated position than the definition of a Baker in the DOT. Accordingly, the panel considered the sophistication of the position as described by T&T to determine which definition was better suited to the position offered. In making this determination, the panel noted that T&T had failed to produce any evidence to support a finding that it makes the products listed in its definition and that it had failed to rebut the CO's statements regarding the franchise agreement, by failing to indicate that it sells anything beyond the typical fare of a Dunkin' Donuts establishment or that it is even allowed to sell any such wares. As the employer's bare assertion without supporting evidence is insufficient to carry its burden of proof in this case, the panel affirmed the CO's denial. *Tri-P's Corp.*, 1988-INA-686 (February 17, 1988) (*en banc*).

On February 13, 1998, T&T filed a petition for review by the full Board. This petition was accepted in order to review the proper way in which a CO may challenge the job title and the burden which an employer bears to establish that the job is as described by its preferred classification. As the issues were factually similar to the Chams matter, the two cases were consolidated for *en banc* review.

*Berwyn Donuts, 1997-INA-541*

Berwyn Donuts, ("Berwyn") doing business as Dunkin' Donuts, filed an application for alien labor certification on behalf of Samuel Anandappa on April 4, 1996. (Berwyn AF 243-247). Berwyn originally listed this position as a "head baker" requiring three years of experience and three months of training. (Berwyn AF 243). The CO proposed to deny certification in a NOF dated December 11, 1996. (Berwyn AF 237-238). In the NOF, the CO informed Berwyn that "based on the nature of your business and the job duties listed in your [a]pplication," the CO had determined that the position should have been classified as a Doughnut Maker, which allows an experience requirement of up to 6 months. (Berwyn AF 237A). Accordingly, the CO determined that this requirement was excessive. In reaching the decision to change the job listing to that of Doughnut Maker the CO observed as follows:

Although the application has Berwyn Donuts as the employer on the application, this office called this place of business and it was identified as Dunkin' Donut [*sic*]. As Dunkin' Donuts is a franchise business, additional documentation must be provided by the Dunkin' Donuts Company that 3 years experience and three months training are the minimum experience required to perform the duties listed[.]"

(Berwyn AF 237A).

As before, the CO provided the employer with two methods of rebuttal: to submit evidence that the requirement arises from business necessity; or to amend the application to reduce the experience requirement appropriately. (Berwyn AF 237A-38).

Berwyn's rebuttal was mailed on February 13, 1997, and consisted of a three page letter from Berwyn's counsel along with a copy of the Dunkin' Donuts Process Manual. (Berwyn AF 29-231). Counsel's letters described in detail the duties of the position, as stated in the process manual, and argued that these duties are all contained within the DOT definition of Baker, and therefore the DOT definition of Doughnut Maker did "not cover the scope of the Head Baker's duties." (Berwyn AF 30-32). Specifically, Berwyn relied on the fact that the machines overseen and operated by the alien would be operated by hand. Berwyn felt that the Doughnut Maker description contemplates "the use of highly mechanized processes as one might expect in a large commercial bakery engaged in mass production of bakery products[.]" Further, Berwyn found it significant that the Doughnut Maker description "is limited only to the production of doughnuts and no other bakery products." (Berwyn AF 31).

The CO issued a FD denying certification on July 30, 1997. (Berwyn AF 26-28). After noting the specific arguments listed above, the CO concluded that the position should be classified as a Doughnut Maker. (T&T AF 39). In detailing the factors that led the CO to this conclusion, the CO stated the following:

You are primarily involved in the preparation and selling [*sic*] doughnuts and other fried dough products. Thus, Doughnut Maker is a more appropriate job title than Baker. All finished products including doughnuts and so called "fancy" products start with prepackaged mixes. Some products such as "croissants" are frozen. ... Bakers prepare their products from scratch. They do not use prepackaged mixes, toppings and fillings.

(Berwyn AF 28).

The CO went on to explain that the decision was also "[b]ased on a review of the franchise agreement reviewed in other applications" involving Dunkin' Donuts franchises, and again referenced the conversation with Mr. Mark Porell, where Mr. Porell indicated that it would take no longer than one month to fully train someone to make the Dunkin' Donuts product line. Further, "[h]e also stated that in the 'production shops,' which appears to fit the description of [Berwyn's] business, it would actually take less time to become proficient in the occupation since the machinery is more sophisticated." (Berwyn AF 28). Accordingly, the CO found that the application had been correctly coded as a Doughnut Maker.

On August 13, 1997, Berwyn sought review of this FD by the Board. (Berwyn AF 1-23). The request was filed on the basis that, *inter alia*, the CO had based his decision on evidence not in the record, specifically the prior franchise agreements and the conversation with Mr. Porell. (Berwyn AF 19-22). This matter was referred to a panel, which on October 28, 1998, issued a Decision and Order affirming the CO's denial. The panel noted that the DOT "is merely a guideline and should not be applied mechanically." *Lev Timashpolsky*, 1995 INA 033 (Oct. 3, 1996); *Promex Corp.*, 1989 INA 331 (Sept. 12, 1990). Further, the panel noted that the DOT definition of Doughnut Maker is a less sophisticated position than the definition of a Baker. Accordingly, the panel considered the sophistication of the position as described by Berwyn to determine which definition was better suited to the position offered. In making this determination, the panel noted that Berwyn had submitted only the

Dunkin' Donuts Process Manual, which supported the inference that the products made were more like those made by a Doughnut Maker, and that the only evidence indicating any need for more sophistication in the position were mere statements by Berwyn. As the employer's bare assertion without supporting evidence is insufficient to carry its burden of proof in this case, the panel affirmed the CO's denial. *Tri-P's Corp.*, 1988-INA-686 (February 17, 1988) (*en banc*).

On November 16, 1998, Berwyn filed a petition for review by the full Board. This petition was accepted in order to review the proper way in which a CO may challenge the job title and the burden which an employer bears to establish that the job is as described by its preferred classification. As the issues were factually similar to both the Chams and T&T matters, the two cases were consolidated for *en banc* review.

## DISCUSSION

### *I. CO's challenging a job title and Employer's burden in proving that job title*

In each of these cases, the CO challenged the employers' classification of the position under the DOT, and the employer objected to the re-classification. It is well established, and was noted in the decisions in these matters, that the DOT is a flexible document, and that it should not be applied mechanically. *Lev Timashpolsky*, 1995-INA-33 (Oct. 3, 1996); *Promex Corp.*, 1989-INA-331 (Sept. 12, 1990). Using the DOT as an "occupational guideline" is necessary as the DOT is unable to list every job opportunity within the United States. Thus, the DOT must be utilized in a fashion that supports the intent of the law, and provides a flexible framework which must then be analyzed "in the context of the nature of Employer's business and the duties of the job itself." *Trilectron Indus.*, 1990-INA-188 (Dec. 19, 1991). As a result, it has been held that the CO may challenge, *inter alia*, the employer's classification of a particular position. *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 15, 1988) (*en banc*). Employer is then required to provide sufficient evidence to rebut the re-classification. *Theresa Vasquez*, 1997-INA-531 (July 9, 1998). The cases at bar present no basis for changing these precedents.

### *II. Introducing outside communications*

While the CO may contact outside sources in order to verify the information provided by an employer in a labor certification application, if this evidence is used to deny certification, the CO must advise the employer of the evidence being used against it in the initial NOF or a supplemental NOF, so that it may have an opportunity to rebut that evidence. *Shaw's Crab House*, 1987-INA-741 (Sept. 30, 1988) (*en banc*).<sup>6</sup> In both Chams and Berwyn, the CO failed to advise each employer as to the

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<sup>6</sup>In *Shaw's Crab House*, the Employer had submitted a letter in rebuttal to the NOF to verify the Alien's experience. The CO called the restaurant to verify this letter, and, in the FD, denied the application based on information discovered from that phone call. Further, the Employer had evidence that might have rebutted this information if it had been given the opportunity. The Board *en banc* held that it was error for the CO to not provide

(continued...)

evidence that it intended to use to deny certification until the FD. Specifically, the CO, in each NOF, merely informed these employers that the job was being re-classified to a definition with a lower SVP rating. The NOF's did not provide any indication regarding the evidence that was being relied upon to justify this classification.

In both Chams and Berwyn, the CO failed to disclose the evidence upon which the denial was based until the FD. In so doing, these employers were unable to respond to the evidence that the CO had gathered and intended to use to oppose certification. Accordingly, under the facts presented in these cases, the applications in both Chams and Berwyn are **REMANDED** to the CO so that these employers may have the opportunity to respond to the evidence upon which the denials were based.

A different situation is presented in the T&T matter. In that case, the NOF informed T&T that the CO had spoken with the Manager of Training at Dunkin' Donuts University and that it had reviewed franchise agreements from previous applications. (T&T AF 45). In response, T&T submitted an unsubstantiated three page letter of rebuttal. While the letter made allegations regarding the irrelevancy of some of the evidence that the CO had gathered, no direct evidence was presented to rebut that evidence. T&T presented only bare assertions. As has been stated in numerous Board decisions, bare assertions are generally insufficient documentation to carry an employer's burden of proof. *See, e.g., American Steel Door, Inc.*, 1998-INA-140 (October 6, 1998); *Instant Travel Service, Inc.*, 1998-INA-119 (October 7, 1998); *Dr. Avatar Singh Tinna*, 1996-INA-31 (June 4, 1997). Under the circumstances presented by this matter, it is clear that T&T's bare, self-serving assertions are not enough to carry its burden of proof, as these assertions were not very specific and gave no indication of the underlying bases.<sup>7</sup> *See Carlos Uye III*, 1997-INA-304 (March 3, 1999) (*en banc*); *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Greg Kare*, 1989-INA-7 (Dec. 18, 1989). Thus, the panel decision is affirmed, and the following order shall enter:

### **ORDER**

**IT IS ORDERED** that the Decision and Orders of the panels in the matters of *Chams, Inc.*, 1997-INA-40 and *Berwyn Donuts*, 1997-INA-541, are **VACATED** and **REMANDED** for further proceedings consistent with this decision.

**IT IS FURTHER ORDERED** that the Certifying Officer's denial of labor certification and the panel decision affirming that decision in the matter of *T&T Donuts*, 1997-INA-232, are **AFFIRMED**.

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<sup>6</sup>(...continued)

the Employer the opportunity to rebut this evidence and remanded it for further consideration. *Shaw's Crab House*, 1987-INA-741 (Sept. 30, 1988) (*en banc*).

<sup>7</sup>T&T, in its rebuttal, stated that the conversation with Mr. Porell did not address its "higher standards" and that it had "absolutely no bearing on the side of our operations which involve the production of a full range of bakery products" without indicating what these higher standards might be or what the scale of its production was in regards to the Dunkin Donuts products line and the alleged other "side" of its operations. (T&T AF 42).

JOHN M. VITTON  
Chief Administrative Law Judge

***Judge Holmes, concurring:***

I agree with the decision reached in *T&T Donuts*. Moreover, I have no quarrel with the stated reason for reviewing the decisions in the majority opinions in *Chams* and *Berwyn*: "...in order to review the proper process for a CO to follow when introducing independent evidence or 'ex parte' communications." Nevertheless, I, also, agree with the panel majority in these latter two cases which found that "there was enough evidence in the record to support the CO's finding even without the faulty evidence." (*Chams D&O*, p. 5). Thus the CO's failure to reveal these communications was "harmless error." In the interests of due process, however, no harm and much good may come from remand and, therefore, I concur rather than dissent.

Missing from the majority's opinion I submit, is positive support for the CO's going beyond a bureaucratic "blind eye" approach to labor certification cases and attempting to understand the company's operations so that his/her findings may be based on better knowledge. Such investigative powers as accomplished by the CO in these cases are fully authorized but too seldom utilized. Understanding an employer's operations better can even result in favorable rulings for that employer. If not, however, I agree with the majority that the CO should reveal such knowledge in his/her NOF so that the employer is fully apprized of the information for his rebuttal.