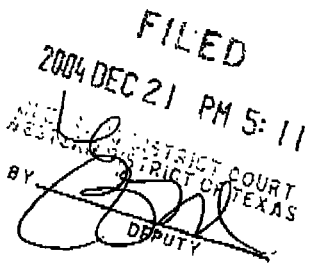
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION



ASOCIACIÓN DE TRABAJADORES FRONTERIZOS, et al. Plaintiffs;	§	
	§	EP-04-CA-400-FM
v.	§	
U.S. DEPARTMENT OF LABOR, Defendant.	§	

PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUMMARY JUDGMENT REPLY IN EXCESS OF FIVE PAGES

Plaintiffs seek the Court's leave to file a reply in excess of five pages in support of their pending motion for summary judgment, and in support would respectfully show the Court:

Local Rule CV-7(e) limits replies to five pages absent authorization by the Court. Plaintiffs have made every effort to succinctly reply to the argument presented by Defendant U.S. Department of Labor (DOL) in opposition to Plaintiffs' motion for summary judgment, and to aid the Court in resolving this entire case on summary judgment. The importance of the rights at issue in this case, the number of potentially affected individuals, the number of arguments attempted by DOL, and the nature of DOL's arguments all led Plaintiffs to balance the virtues of concision and completeness in their attached reply memorandum, which totals 19 pages.

Accordingly, Plaintiffs seek the Court's leave to exceed the page limit set forth in Local Rule CV-7(c) and file the attached reply on summary judgment.

Respectfully submitted,
TEXAS RIOGRANDE LEGAL AID, INC.

Dated: December 21, 2004

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the above document to be served upon the following counsel of record instantly by email on December 21, 2004:

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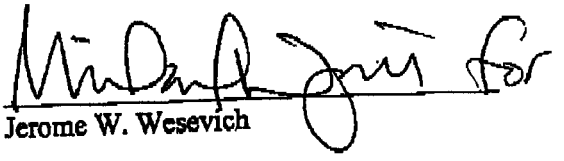

Jerome W. Wesevich

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

ASOCIACIÓN DE TRABAJADORES FRONTERIZOS, et al.	§	
Plaintiffs;	§	
	§	
	§	EP-04-CA-400-FM
v.	§	
	§	
U.S. DEPARTMENT OF LABOR,	§	
Defendant.	§	

ORDER

Upon consideration of Plaintiffs' motion for leave to file a summary judgment reply in excess of five pages, any opposition by Defendant, and the entire record herein, it is hereby ORDERED that Plaintiffs' motion be GRANTED, and that the clerk file for this Court's consideration the Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and the accompanying Reply Statement of Facts that Plaintiffs attached to their motion for leave to file a reply in excess of five pages.

SO ORDERED this _____ day of _____, _____

_____
HON. FRANK MONTALVO
United States District Judge

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;	§	Civil Action No. EP-04-CA-400-FM
v.	§	
U.S. DEPARTMENT OF LABOR, Defendant.	§	

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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In reply to the Department of Labor's Response to Plaintiffs' Motion for Summary Judgment (DOL Response), Plaintiffs would respectfully show the Court:

I. Introduction

This case is not about matters committed to agency discretion under *Chevron's* second step as DOL argues; it is about three specific matters that Congress itself directly decided, and is properly resolved under *Chevron's* first step without deference to DOL's interpretation of the law.[1] Plaintiffs are entitled to summary judgment on all three issues.

First, DOL concedes that the law prohibits the approval of incomplete training such as stand-alone ESL and GED classes for workers who need vocational training, and DOL admits that it allows incomplete training to be approved under what it claims are limited circumstances. DOL argues only that its violation of the law is not "systemic," but DOL's policy creating an exception to the law is itself a systemic violation regardless of how many workers are affected, and in any event there is no genuine issue but that DOL's exception is not applied in a limited fashion.

Second, DOL concedes that 80% wage replacement is the goal of Trade Act training, and that Congress ordered DOL to issue all regulations necessary to implement the statute. DOL has no regulations that implement Congress's 80% wage replacement goal, and instead allows state agencies to reject the standard. Rather than respond to Plaintiffs' claim, DOL makes up a new 80% wage-replacement issue that is not before this Court, and then smites its own straw man.

Third, the Act requires that training be provided on-the-job whenever possible, and Congress expressed that requirement by repeatedly using mandatory terms. DOL responded with a regulation that allows on-the-job training (OJT) to be entirely ignored. DOL defends

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[1] If Congress directly decided an issue, an agency's contrary interpretation of the law gets no deference. *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 & n.9 (1984); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (courts must look to each statute's text, structure, history, and purpose to decide whether Congress directly decided an issue under *Chevron*); DOL Resp. at 4, 14.

the regulation by citing congressional language that it claims softened Congress's directive, but that language does no such thing.

Throughout DOL's Response, the agency claims to draw on its expertise in applying the training statute in ways that enable limited English proficient (LEP) workers to enhance their skills as much as possible in light of the educational barriers they face.[2] But the facts in this case are not seriously challenged by DOL, and they paint an entirely different picture.[3] They show that DOL has consistently taken the low road when it comes to training LEP workers. DOL consistently applies the Trade Act in ways that increase the use of cheaper ESL and GED courses as substitutes for the bilingual vocational training that DOL knows these workers need.

As discussed below, Facts 71, 81, and 96 should be the only facts necessary to conclusively establish that DOL violates the Trade Act in the three respects claimed by Plaintiffs, and Facts 40 through 62 show that DOL compliance with the law would improve training outcomes for some if

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[2] The parties agree that the Trade Act must be liberally construed to help workers return to "suitable employment" as this term is defined in 19 U.S.C. § 2296(e). DOL Resp. at 15, 19; 20 C.F.R. §§ 617.2 & 617.52(a); *UAW v. Brock*, 568 F. Supp. 1047, 1053 (D.D.C. 1983), *aff'd in part*, 816 F.2d 761 (D.C. Cir. 1987). Unfortunately, DOL may not always be counted upon to apply the Trade Act in ways that help workers. *See e.g. Employees of Chevron v. DOL*, 298 F.Supp. 2d 1338, 1348-50 (Ct. Int'l Trade 2003) (This "case stands as a monument to the flaws and dysfunctions in the Labor Department's administration of the nation's trade adjustment assistance laws—for, while it may be an extreme case, it is regrettably not an isolated one. ... [A] growing line of precedent involving court-ordered certifications [evidences] the bench's mounting frustration with the Labor Department's handling of these cases. ... Whether the result of overwork, incompetence, or indifference (or some combination of the three), the Labor Department deprived workers of the job training and other benefits to which they are entitled.").

[3] To facilitate ready access to all of the parties' arguments as to each fact, the attached Reply Statement of Facts collects in one place all of the facts that Plaintiffs claim are undisputed, DOL's response to each fact, and Plaintiffs' reply to each response. Examination of this document shows that there is no genuine issue of material fact requiring a trial in this case. Nor is there apparently a dispute over the relevant evidence, for DOL's fact appendix largely consists of copies of the same documents submitted by Plaintiffs, which Plaintiffs deliberately selected to show that proof of the facts may be made largely through DOL's own statements and documents.

Under Rule 56, "a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1985). Here, DOL either concedes the critical facts or rests upon conclusory denials lacking the factual basis required by Rule 56(e). With no evidence to contest Plaintiffs' thoroughly supported statements of fact, DOL substitutes baseless objections and argumentation, none of which is sufficient under the rules to show that a genuine issue remains to be tried as to any of the stated facts. *See Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

not all LEP trade-dislocated workers. The injunction that Plaintiffs seek is not only necessary to secure DOL's compliance with Congress's decisions, but it is a modest means of achieving that compliance. In essence, the injunction would send DOL back to the regulatory drawing board to plan how it will fully comply with the law in cases where LEP workers qualify for the training Congress prescribed.

II. DOL Admits to Creating What is a Systemic Exception to the Training Completeness Requirement.

As to the applicable legal standard on training completeness, DOL concedes that the parties have no "dispute as to the Department's policy regarding this issue: the Department requires state agencies to approve training that renders an individual job ready." DOL Resp. at 17-18.[4] DOL bases its entire defense upon whether a systemic violation of this standard exists that requires a remedy from this Court. Yet DOL fully admits that it allows state agencies to approve training that is not expected to render a worker fully job-ready under what it claims are limited circumstances. DOL Resp. at 18-19 ("there may be isolated instances in which, because of the time and monetary constraints of the Trade Act, incomplete training may be approved"); DOL

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[4] As an aside, DOL suggests that the training completeness requirement is more a creature of DOL's regulation than of Congress's direct choice. DOL Resp. at 16. But because the parties agree on what the legal standard established by the regulation is, the source of the training completeness requirement need not be decided in this case. When there is no question of interpretation of an agency's regulation, federal courts enforce regulations against agencies under 5 U.S.C. § 706 just as they do statutes. *United States v. Caceres*, 440 U.S. 741, 754 & n.18 (1979) ("Agency violations of their own regulations, whether or not also in violation of the Constitution, may well be inconsistent with the standards of agency action which the APA directs the courts to enforce.").

Moreover, the statute's text—"reasonable expectation of employment following completion"—shows that Congress decided the training completeness issue. 19 U.S.C. § 2296(a)(1)(C). DOL offers only its conclusory assertion that Plaintiffs read this statutory text "out of context." DOL Resp. at 16 n.13. It does not attempt to explain how an agency could determine that a worker has a "reasonable expectation of employment following completion of such training" when the training under consideration for approval does not provide all of the skills that the worker needs to be job ready. *See also* Fact 67 (DOL admits that the criteria of 19 U.S.C. § 2296(a)(1) are themselves the source of the requirement that no training may be approved unless it will render a worker "job ready."); Fact 75 (remedial education was approved as Mr. Trejo's Trade Act training, and in the blank requiring an explanation of the source of the "reasonable expectation of employment" requirement having been met, "after vocational training" is written). The history of the statute as reflected in DOL's contemporaneous regulation, 20 C.F.R. § 617.22(a)(2), confirms that the decision was *Congress's*. Pl. Mem. at 9 & n.7.

Admission Nos. 19, 20, and 22 (PA-24, cited in Fact 71).[5] It is this very policy of allowing an exception to the law that Plaintiffs claim is a systemic violation of the applicable legal standard, and that Plaintiffs seek to correct by the proposed injunction. *See Hampe v. DOL*, 364 F.3d 90, 92 n.3, 95 (3d Cir. 2004) (summary judgment granting injunctive relief against DOL is ordered where DOL "knew of and condoned" a state agency's illegal policy under the Trade Act, "and even encouraged the policy").

DOL argues that its exception to the training completeness requirement is limited and necessary to protect workers. DOL Resp. at 19. But DOL's exception is neither limited nor necessary. Strict adherence to the training completeness requirement as written would not diminish any worker's access to training, and would improve training outcomes for many workers.

DOL's exception to the training completeness requirement is not limited, primarily because it does not appear in any formal DOL regulation or other policy statement. The exception is a wink and nod from DOL when state agencies approve incomplete training for LEP workers. *E.g.* Fact 70. Consequently, state agencies have no formal guidance on how to apply the exception, *i.e.* how to determine when a worker's pre-training skills "may be insufficient," or how to determine which of the available training programs provides "as many skills as possible." *See* Fact 71.

Historically, DOL has been well aware that the Texas Workforce Commission (TWC) has driven a truck through DOL's "limited" exception:

> TAA training is limited to 104 weeks by law and the worker must complete the proposed program and be job ready within this period. Many of the affected workers in El Paso required long-term training well beyond the 104 week period; thus necessitating a coordinated effort by all programs to provide the resources needed for a lengthy training. The training infrastructure was not in place to handle

[5] In light of the language of these three admissions and the requirement of Fed. R. Civ. P. 36(a) that a party "shall specify so much of [each requested admission] as is true and qualify or deny the remainder," DOL's suggestion that it really "*denied*" the policy at issue in this case is laughable. *See* DOL Resp. at 19 n.19.

> the volume or the needs of this special group of workers. Most workers required some ESL/GED plus skill training.

DOL Texas Trade Act Review (1/14/2000) at 10 (PA-39); Facts 68-70. Yet DOL has not complained to TWC about this, demanded specific corrective action, nor formalized its exception in a more coherent policy that would limit how broadly the exception is applied. Facts 70-74; Hearing Transcript (10/20/2003) at 28:2-9 (PA-19) (DOL's counsel admitted in response to this Court's pointed question that he is unaware of *any* changes that DOL has made in its policies for Trade Act administration).

DOL repeatedly urges the Court to ignore DOL's history of disregarding the training completeness requirement in El Paso,[6] and to focus on the present. But the Court need look no further than DOL's Response to see that DOL not only expects to continue applying the policy exception articulated in Fact 71, but that the exception is "especially likely" to affect the LEP workers that comprise ATF's membership. DOL Resp. at 19 & n.20; Fact 3. By attempting to justify its illegal exception on prudential grounds, DOL admits that the exception will continue to operate in Texas. Of course, DOL must admit that it allows less than complete training to be approved for some workers, because TWC conceded that it practices DOL's exception to the training completeness requirement. Fact 73. To understand how widely DOL's training completeness exception is being applied in El Paso, well past the 1997-2000 time period that DOL wishes to forget, the August 14, 2003 testimony of five-year veteran El Paso Trade Act case manager Gloria Candelaria is particularly relevant:

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[6] The evidence that TWC routinely approved incomplete Trade Act training for thousands of LEP workers in the 1997 to 2000 period, and did so with DOL's blessing, is thorough and conclusive, and includes DOL's admission at the October 20, 2003 hearing. Facts 68-76. For DOL to "assume *arguendo*" that this evidence is conclusive is utterly disingenuous. *See* DOL Resp. at 18 n.17.

> Q. Okay. Do you understand you – your testimony to be that, when you saw participants who needed vocational training, but also needed a lot of ESL and GED training, that you would recommend approval of a training contract, that ex— that consisted exclusively of ESL and GED courses, and wait until later to decide what vocational training would be approved for that worker?
> A. Yes, sir. Uh-huh.
> ...
> Q. What is your estimate of the percentage of people, who came to you requesting Trade Act training, who were enrolled in ESL and GED training?
> A. Roughly my estimate would be, about 90 percent.
> ...
> Q. Am I correct that there have been no changes that you're aware of, in the procedures that lead all the way up to your decision to recommend Trade Act training approval?
> A. Okay. The only changes that have taken place, is that we don't have the quality check people reviewing what we have submitted....
> Q. But the policies that we've discussed today, as far as how you decide what training to recommend for approval, those have not changed?
> A. They haven't changed.

Candelaria Depo. at 21:7-15, 23:1-5, 74:13-25 (PA-4), Fact 74. Thus, there is no genuine issue but that DOL's exception to the training completeness requirement is not applied in a limited way in El Paso, at present or in the past. Facts 68-76.

DOL claims that approval of Mr. Trejo's training complied with the Trade Act because a complete training program was ultimately provided to him. DOL Resp. at 20. But DOL does not dispute that TWC approved remedial education as Mr. Trejo's only Trade Act training even when the training approval form itself acknowledged that Mr. Trejo would have a reasonable expectation of employment only "after vocational training." Approval of remedial education for Mr. Trejo violated the training completeness requirement regardless of whether Mr. Trejo's tenacity ultimately enabled him to get the complete training that he needed. Fact 75.

Next, DOL suggests that "ESL/GED" was named as the occupation for which Mr. Gilbert was trained in March 2003 simply because ESL/GED may have been the only skill that Mr. Gilbert needed to become job ready. DOL Resp. at 20 & n.23 (approving of TWC's practice of naming

ESL/GED as the occupation in these cases). Unfortunately, DOL's representation to this Court is directly at odds with its own regulations, which require that an *occupation* be named as the object of Trade Act training for every worker. 20 C.F.R. §§ 617.22(f)(3) ("a training program may consist of a single course or group of courses which is designed and approved by the State agency for an individual to meet a specific occupational goal"); 617.23(d)(3) ("In determining suitable training the State agency shall exclude certain occupations, where ... the occupation provides no reasonable expectation of permanent employment."). Because TWC declined to name a target occupation for Mr. Gilbert's Trade Act training, no "reasonable expectation of employment" determination could have been made, and his training was by definition incomplete. *See also supra* at 6-7 (Ms. Candelaria described what happened to Mr. Gilbert as standard practice). That in December 2004, DOL would defend TWC's treatment of Messrs. Trejo and Gilbert as consistent with the law only confirms the continuing need for injunctive relief in this case.

DOL's exception to the training completeness requirement is no more necessary than it is limited. DOL invites this Court to accept that some workers' education is so deficient that they cannot be trained for any occupation whatsoever in the two and one-half years allowed by the statute, even though every one of those workers held a steady job before entering training. *See* 19 U.S.C. § 2291(a)(2) (requiring 6 months' employment before layoff). DOL offers nothing but its own speculation in support of its argument, and fails entirely to state, let alone support, how many workers would fall into this "untrainable" category, nor what basis could accurately be used to make a determination of "untrainability." There is no reason in logic or evidence to suggest that if

DOL enforces the training completeness requirement as written, this would result in fewer workers being approved for Trade Act training.[7]

The Court has undisputed evidence before it, however, to establish that strict adherence to the training completeness requirement would improve training outcomes for at least some LEP workers. DOL itself claims that adequate bilingual training opportunities are available to LEP workers in El Paso, and it told this Court that it is "horrified" that more workers are not in these programs. Facts 51-52. Thus, the parties agree that more workers in bilingual training programs as opposed to serial stand-alone ESL/GED training programs will result in better training outcomes for workers. *See also* Facts 49, 62 (serial training has been criticized as a waste of millions of federal taxpayer dollars). Nor is there any genuine issue of fact but that bilingual training renders workers job-ready faster than serial training. Fact 54. There is no genuine issue of fact but that strict adherence to the training completeness requirement would result in more workers enrolling in bilingual training, and that bilingual training is more effective in rendering workers job ready in higher paying occupations than is serial training. Facts 48 to 55; Pl. Mem. at 13-14.[8] In sum, the record firmly establishes that requiring absolute training completeness will

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[7] Moreover, DOL's own Office of Inspector General (OIG) conducted a detailed audit of Trade Act administration and squarely blamed the *absence of training approval standards* for hurting workers. DOL OIG 1993 Audit at 13-17 (PA-61); Fact 87. DOL's argument that *diminishing* the existing written standards for training approval by applying an unwritten exception would help workers is thus inconsistent with the conclusion of its own OIG.

[8] DOL's attempted response to these facts appears at DOL Resp. 20 n.22. All arguments in DOL's footnote 22 are irrelevant or wrong. That "remedial training is contemplated as approvable training under the Act" has nothing to do with which method of training produces better results for LEP workers, *see* Fact 67. DOL's training creation argument is not only irrelevant to which type of training is better for workers, it is wrong, because 20 C.F.R. § 617.23(a) shows that DOL not only has an "obligation to create training programs," but that it has delegated that obligation to state agencies, and Fact 51 proves that DOL does not consider the creation of bilingual programs to be the obstacle in El Paso. Plaintiffs debunk DOL's training "choice" argument at Pl. Mem at 12-13; Fact 40. DOL's argument that the "efficacy of each individual training decision is a factual contention" is irrelevant because what is at issue in this case is whether approving incomplete serial training is better for workers than approving bilingual training that renders them fully job-ready. The fact that workers may appeal decisions to State courts has nothing to do with which training method is better. DOL concludes note 22 with a conclusory whopper: "This matter is not ripe for summary judgment if a decision hinges on the factual issue regarding bilingual vs. serial training." DOL presents nothing to indicate that

increase the benefits that workers derive from bilingual training over the discredited serial training methods that are allowed under DOL's illegal policy as stated in Fact 71.

III. 80% Wage Replacement Is Congress's Goal for Training, and DOL Has Failed to Regulate as Congress Requires to Ensure That This Goal is Pursued in the Training Approval Process.

Contrary to DOL's assertions, Plaintiffs have never claimed that the Trade Act requires that post-training employment guarantee an 80% replacement wage, nor have Plaintiffs claimed that DOL violates the Trade Act by failing to issue regulations that require a specific post-training wage rate. Indeed, Plaintiffs agree that there is no statutory requirement that post-training employment must result in 80% wage replacement.

Because DOL fundamentally misstates Plaintiffs' claim, it devotes ten pages of its response to proving a point not at issue, and DOL largely fails to address Plaintiffs' actual claim—that DOL has failed to regulate the training approval process in pursuit of the Trade Act's *goal* of returning dislocated workers to employment paying at least 80% of their prior wages.[9] DOL agrees that 80% wage replacement is the goal of Trade Act training, but DOL never explains its failure to promulgate regulations requiring state agencies to pursue that goal when making training approval decisions. It is DOL's failure to comply with the statutory mandate to regulate, rather than a failure to require a particular outcome, that is at issue in this case.

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such a "factual issue" exists when it is DOL's duty to do so under Rule 56(e). *See* Facts 45-62; note 2, *supra*.

[9] While the 80% wage-replacement argument is DOL's most voluminous red herring, it by no means swims alone. For example, at page 16, DOL emphasizes that "there may be instances in which remedial education or ESL is all the training that an individual needs to become 'job ready,'" even though Plaintiffs' training completeness argument is explicitly and exclusively directed at the overwhelming majority of LEP workers who need *both* ESL and vocational training to become job ready. Facts 68-76. Next, at pages 21 and 22, DOL suggests that Plaintiffs' claims really belong in state court, when DOL previously conceded that this Court has jurisdiction to issue declaratory and injunctive relief if it concludes that DOL's policies violate the Trade Act. DOL Brief at 5, Civil Action No. EP-02-CA-131, Docket No. 75. And, at page 25, DOL explains that 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," even though Plaintiffs have not argued that the Trade Act contains such a requirement. *See also* note 8, *supra*.

A. Congress Established 80% Wage Replacement as the Goal of Trade Act Training

DOL admits that 80% wage replacement is the goal of Trade Act training:

> While this program provides trade-impacted dislocated workers with job search assistance and, if necessary, retraining, income support services, job relocation, and out-of-area job search assistance, its ultimate goal is to place participants in employment that pays at least 80% of their pre-dislocation wage.

DOL Monitoring Letter to TWC (3/8/2001) at 4 (PA-45); Fact 79; DOL Resp. at 11. In seeking discretion under *Chevron's* step two, however, DOL claims that this goal is a creature of DOL, not of Congress. *Id.*; Fact 77. Not true. The same Congress that enacted 19 U.S.C. § 2296(e), which defines "suitable employment" in terms of 80% wage replacement, stated:

> If the Secretary of Labor determines that there is no suitable employment available and suitable employment would be available if the adversely affected worker received the appropriate training, the Secretary may approve such training.

S. REP. NO. 97-139, 534 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 710, 800 (emphasis added). After Congress set the 80% wage replacement standard for suitable employment, DOL officially acknowledged: "The Act created a program of trade adjustment assistance (hereinafter referred to as TAA) to assist individuals, who became unemployed as a result of increased imports, return to suitable employment." 20 C.F.R. § 617.2 (emphasis added). DOL further admits that it has never promulgated a definition for "suitable employment" in 20 C.F.R. § 617.2 that differs from the 80% wage replacement standard of 19 U.S.C. § 2296(e). DOL Admission No. 26; Fact 77. DOL's designated Trade Act policy spokesperson testified that he understands this goal to be "Congress' intent." Kooser Depo. at 106:1 to 107:3; Fact 77. Any one of these facts conclusively establishes that Congress is the source of the 80% wage replacement goal for Trade Act training.

In support of its claim that DOL alone established the 80% wage replacement goal, DOL says that suitable employment was absent from the express purposes that Congress stated for Trade

Act training in the original 1974 Trade Act. DOL Resp. at 6 n.3. This argument only demonstrates a careless reading of the 1974 statute, for its text explicitly names "suitable employment" as the goal of Trade Act training. Fact 33. When Congress defined "suitable employment" in terms of 80% wage replacement in 1981, DOL's regulation incorporated Congress's definition of "suitable employment" into its statement of the sole purpose of Trade Act training. Facts 36-38.

B. Congress Requires DOL to Regulate as Necessary to Pursue 80% Wage Replacement

Congress ordered DOL to regulate Trade Act training as necessary to ensure that Congress's 80% wage replacement goal is pursued. 19 U.S.C. §§ 2296(a)(9) and 2320; 20 C.F.R. § 617.52(a). When interpreting an agency's enabling act under *Chevron*, the "inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented." *Brown & Williamson*, 529 U.S. at 159-60. The more an issue touches a statute's "core objective," the more courts search for a statutory construction that is consistent with Congress's expressed intent. *Id.* "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.*

C. DOL Does Not Regulate Trade Act Training Approval to Pursue 80% Wage Replacement

DOL has not issued any regulation stating what actions state agencies must take in the training approval process to pursue Congress's 80% wage replacement goal. Fact 81.[10] Although DOL has implemented Congress's "suitable employment" goal for other Trade Act benefits in

[10] DOL cites 20 C.F.R. § 617.22 in arguing that "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)." DOL Resp. at 4 n.2. But nothing in this regulation states what actions state agencies must take in the training approval process to pursue or consider Congress's 80% wage replacement goal. Fact 81.

other regulations, *see, e.g.*, 20 C.F.R. § 617.32(a)(4) (job search eligibility) and 20 C.F.R. § 617.42(a)(6) (relocation allowance eligibility), DOL admits that it "has carefully limited its use of suitable employment in the regulations" to avoid mentioning any wage replacement goal in its training regulations. DOL Resp. at 11 n.9. It is this absence of regulation for the Trade Act *training* benefit that Plaintiffs challenge in this case and that DOL, choosing instead to brief a non-issue, has failed to address.

Not only has DOL refused to issue a regulation implementing Congress's wage replacement goal for Trade Act training, it has explicitly informed state agencies that this goal is non-binding upon them! Fact 78 ("No objection."). This is why TWC feels free explicitly to reject Congress's 80% wage replacement goal in its official Trade Act administration policies, which DOL approved. Facts 89-94.

D. The Wage Replacement Injunction that Plaintiffs Seek Will Help Workers

Clearly, DOL could issue regulations requiring *consideration* of the 80% wage replacement goal in the context of training approval decisions, and it is undisputed that DOL has failed to do so. Only DOL's mischaracterization of Plaintiffs' claim leads it to conclude that Plaintiffs seek regulations prohibiting the approval of any training not *guaranteed* to lead to employment at 80% of prior wages. DOL Resp. at 15 and n.11. Nothing could be further from the truth. Plaintiffs seek to enjoin DOL to issue regulations that require state agencies at least to *pursue* Congress's wage replacement goal in their training approval decisions. These regulations do not demand a particular result as a condition of training, but would improve the training outcomes for LEP workers through the increased provision of bilingual vocational training instead of remedial education classes that carry no expectation of increased earning capacity after training. *See* Pl. Mem. at 22-23 (describing four specific options available to DOL).

IV. Congress Mandated that DOL *Provide* Trade Act Training On-The-Job Insofar as Possible, But DOL's Regulation "Makes OJT a *Priority*, Insofar as Possible."

DOL succinctly states why Plaintiffs seek summary judgment: "The Act only requires that OJT be provided insofar as possible. The Department makes OJT a ***priority***, insofar as possible." DOL Resp. at 24-25 (emphasis in original). DOL never defines what its "priority" means in terms of how state agencies must choose between on-the-job training and classroom training when both are available to a worker and both meet the requirements of the Trade Act. *Id*. at 25 n.26. DOL provides no guidance to state agencies as to how they are to choose among training options when both OJT and classroom training are available and meet all statutory requirements for a worker. Fact 96. Under this regulatory scheme, state agencies are free to disregard on-the-job training as a Trade Act training option. That is what TWC did for years on end. Facts 97-100. DOL knew this and allowed it. Fact 101. Plaintiffs seek summary judgment that DOL's regulatory scheme illegally diminishes the training options available to dislocated workers.

A. Congress Mandated that On-the-Job Training Be Provided Over Classroom Training

Congress unambiguously decided that "insofar as possible, the Secretary shall provide or assure the provision of [Trade Act] training on the job," and Congress reiterated that its statutory text "directs the maximum feasible use of training on the job." 19 U.S.C. § 2296(a)(1); S. REP. NO. 93-1298 at 93, *reprinted in* 1974 U.S.C.C.A.N. at 7279 (emphasis added). The words "shall," "assure," and "directs" all carry mandatory force, and do not confer discretion, thus keeping this case under *Chevron's* first step. *International Union, United Auto. Workers v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990) ("Considering the frequency with which it uses the two words, Congress can be expected to distinguish between 'may' and 'shall.'"). What these words require of DOL is explicitly superlative, *i.e.* do everything that is "possible" or "feasible" to assure that training is

provided on the job.[11] Thus, Plaintiffs submit that the plain meaning of the words chosen by Congress is that Trade Act training must be provided on the job when it is available to a worker and meets all requirements of the Trade Act.

DOL argues the contrary, claiming that this same statutory text vests it with discretion to approve classroom training over on-the-job training when both are available. DOL does not offer any explanation of how "shall," "assure," or "directs" can be consistent with DOL's interpretation of the statutory text in § 2296(a)(1). Instead, DOL points to three congressional statements that it claims support its position, none of which do.

First, DOL cites the phrase "the training programs that may be approved under paragraph (1) include but are not limited to" those listed in 19 U.S.C. § 2296(a)(5), and argues that this text confers discretion in choice of training methods. But the list of training options in § 2296(a)(5) is in no way inconsistent with the specific directive to the Secretary contained in § 2296(a)(1), and § 2296(a)(5) contains no words that indicate any modification of Congress's on-the-job training directive in § 2296(a)(1). *See United States v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004) ("One of the most basic canons of statutory interpretations is that a more specific provision takes precedence over a more general one."); *Int'l Trading Co. v. United States*, 306 F.Supp. 2d 1265, 1269 (Ct. Int'l Trade 2004) ("A canon of statutory construction is that a statute should be read to avoid internal inconsistencies."). Also, DOL admits that § 2296(a)(5) does not override the training completeness requirement in § 2296(a)(1), so there is no reason why § 2296(a)(5) should override the on-the-job training requirement of § 2296(a)(1) either. *See* Fact 67.

Next, DOL cites the following passage from the legislative history:

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[11] Congress has directed agency action "as practicable" at least 557 times, and it has directed agency action "as possible" at least 259 times. WESTLAW search of U.S.C.A. Database (search of TE((agency commis! department secretary) /p "as practicable").

> 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.

DOL Resp. at 23-24. DOL points to the phrase "While the bill does not bar the Secretary from providing any type of training which he may find appropriate," and claims that this confers discretion upon DOL to approve classroom training over on-the-job training. But DOL's reading is inconsistent with the remainder of the same sentence upon which DOL relies, it is inconsistent with the last sentence in the same paragraph, and it is inconsistent with the plain meaning of § 2296(a)(1). *See* DOL Resp. at 9 n.6 ("A permissive statement in a Senate report cannot change the statute Congress enacted."). In fact, the phrase on which DOL relies has a more limited meaning that raises no inconsistency. It only observes the fact that the statute does not include *language prohibiting* the Secretary from approving training that the Secretary finds to be appropriate, so that the sentence is accurately paraphrased as: "Congress did not express its preference for on-the-job training in prohibitory terms, *i.e.*, 'the Secretary may not ...,' but rather did so in positive terms, *i.e.*, 'the Secretary shall assure training on the job insofar as possible.'" This reading of the sentence at issue gives meaning to all terms and renders none of them inconsistent, a result that must be sought whenever possible in construing contemporaneous language. *Brown & Williamson*, 529 U.S. at 133.

Finally, DOL points to language from the Trade Act's 1981 legislative history, stating that "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 ...." DOL Brief at 24. But the law is settled that a later Congress may not modify the statute enacted by a prior

Congress using legislative history alone. *Adkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) ("If the enacted intent of a later Congress cannot change the meaning of an earlier statute, it should go without saying that the later unenacted intent cannot possibly do so."). In this case, the 1981 Congress did not even *attempt* to change the meaning of the 1974 Congress's statutory text. DOL invites this Court to read the phrase "is not required to" as modifying "on-the-job insofar as possible" but this is not how the sentence is structured. The phrase "is not required to" modifies "training," which accurately describes "existing law" before 1981, when Trade Act training was not an entitlement as it is today. Facts 33-35. This passage merely observes that no type of training was an entitlement before 1981, and has nothing to do with Congress's preference for on-the-job training when training is approved. The fact that the passage appears within Congress's report of existing law, not within its subsequent report of what Congress intends the law to be, shows that the passage cannot effect the change in the statute that DOL seeks.

In sum, DOL has identified no language that dilutes Congress's requirement that DOL "shall provide" Trade Act training on the job "insofar as possible."

B. On its Face, DOL's Regulation Fails to "Assure" That OJT Is Provided "Insofar as Possible"

There is no genuine dispute that DOL fails to assure that Trade Act training is provided on the job insofar as possible. While DOL argues that its regulation is consistent with the statute, the evidence of record contains DOL's admission that its regulation is weaker than the statutory standard. Fact 102.[12] Even entirely apart from Fact 102, DOL admits that even when OJT is

[12] DOL objects that Fact 102 "is meant to lead one to the conclusion that the Department admits that its regulations related to on-the-job training violate the statute." But the evidence itself, not Plaintiffs' statement of the evidence, is what must "lead one to the conclusion that the Department admits that its regulations related to on-the-job training violate the statute." DOL designated Mr. Kooser under Rule 30(b)(6) to speak on its behalf regarding DOL's Trade Act policies, Fact 14(c), and he testified:

available to a trade-affected worker and meets all requirements of the Trade Act, and is thus indisputably "possible," DOL does not require state agencies to approve it. Fact 96. DOL's Response itself repeatedly confirms DOL's intent to step back from the statute's absolute requirement. DOL Resp. at 24-25 ("***priority***, insofar as possible") (emphasis in original); *id.* at 23 (OJT "should be considered first among [the list of] possible training options"); *id.* at 26 ("the Department's policy is that OJT be presented to individuals as a first option"); *but see* DOL Response to Fact 96 ("Mr. Kooser testified that the Department requires states to do all that is possible to provide training on-the-job in the context of that state.").[13]

C. The Proposed OJT Injunction Would Expand Training Options for Workers

DOL attempts to justify its reading of the statute by explaining that "balancing an individual's skill level and desires with the available training provides the best results in placing workers into employment." DOL Resp. at 25. Plaintiffs entirely agree that this balance is essential, but without training options there is no balance to be struck. Plaintiffs have sued DOL

> Q. When you provide training to either your regional offices or to state Trade Act administrators, what do you tell them about on-the-job training?
> A. I tell them exactly what's in the regulations, that insofar as possible they are to put emphasis on on-the-job training, because that's what it says. That's what the requirement is.
> Q. Do you agree that there is a difference between insofar as possible putting emphasis on on-the-job training on the one hand and on the other [hand] insofar as possible provide training? The first says insofar as possible put an emphasis on it and the other one says insofar as possible do it. Do you agree that there's a difference there?
> A. Yes, insofar as possible they should do it, insofar as possible.
> Q. But you agree that the two options that I described, insofar as possible put an emphasis on it and insofar as possible do it, those are two different things, right?
> A. Somewhat, yes.
> Q. And the insofar as possible do it is stronger than the insofar as possible put an emphasis on it.
> A. That's correct. That's what I meant to say.

Kooser Depo. at 163:4 to 164:10 (PA-13). The word "emphasis" was unmistakably chosen by Mr. Kooser as his synonym for the word "priority" in 20 C.F.R. § 617.23(c)(1), and the fact that he chose a synonym does nothing to diminish the devastating impact of his testimony upon DOL. See DOL Resp. at 26 n.26 (defining "priority" in terms of its synonyms "precedence," "importance," and "urgency").

[13] DOL actually claims that TWC satisfies the "first option" standard simply by including a statement about OJT in a video that workers watch as a group before they ever see a case manager. DOL Resp. at 26 n.27; *see also* Fact 98. This mocks Congress's command that DOL assure that OJT be provided insofar as possible.

over failing to provide on-the-job training under its current regulatory scheme precisely to ensure that the available training options are as expansive as required by law. There is no genuine dispute but that through August 2003 over 17,000 workers qualified for Trade Act training in El Paso, and TWC did not provide Trade Act training on the job to a single one of them nor attempt to do so. Facts 23, 97-100. Nor is there a genuine dispute but that DOL knows that its current regulatory scheme provides cost and administrative disincentives to state agencies to provide training on-the-job. Fact 105. This, of course, means that state agencies may not provide training on the job for reasons much less honorable than achieving "the best results" for workers, and much less defensible. In sum, DOL's existing regulatory scheme is not only facially inconsistent with Congress's unequivocal command, but in practice it has proved that DOL does not assure that Trade Act training is provided on the job insofar as possible.

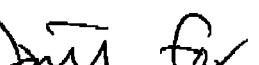
The injunction sought by Plaintiffs would leave to DOL, in the first instance, the decision as to how it will respect Congress's directive. DOL has many options available to it that will expand workers' access to on-the-job training as Congress commanded, including without limitation telling state agencies how they are expected to evaluate whether on-the-job training is appropriate for a worker, and how the choice of training options is to be made when multiple options meet the Trade Act's requirements for a particular worker.

V. Conclusion

The training at issue here is desperately needed by thousands of workers whose jobs were sacrificed for the sake of free trade and who were promised a remedy under the Trade Act. DOL's administration of the law fails to improve the job skills of LEP workers. The injunction sought by Plaintiffs requires no more than straightforward compliance with the statute, and will enable DOL to focus specifically on what rules are needed for training approval when qualified workers do not

speak English. DOL has failed to name any reason in fact or law as to why this case should not be resolved by issuing the proposed order that Plaintiffs' submitted with their summary judgment motion.

Respectfully submitted,
TEXAS RIOGRANDE LEGAL AID, INC.



Dated: December 21, 2004

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served upon the following counsel of record instantly by electronic mail on December 21, 2004:

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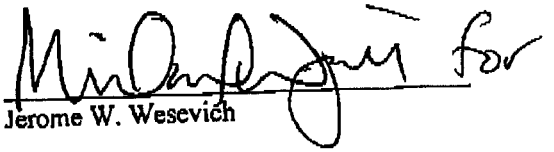

Jerome W. Wesevich

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

ASOCIACIÓN DE TRABAJADORES FRONTERIZOS, et al. Plaintiffs;	§	
	§	EP-04-CA-400-FM
v.	§	
U.S. DEPARTMENT OF LABOR, Defendant.	§	

PLAINTIFFS' REPLY STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

For the Court's convenience in determining whether Plaintiffs are correct that no genuine issue of material fact remains for trial, and this case is ready for summary judgment under Rule 56, below Plaintiffs collect: (1) Plaintiffs' statement of each fact as to which there is no genuine issue (identical to the facts filed with Plaintiffs' summary judgment motion); (2) Defendant Department of Labor's Response to each of Plaintiffs statements of fact under the heading DOL's Response; and (3) Plaintiffs' reply to each DOL Response under the heading Plaintiffs' Reply.

Table of Contents

I. PARTIES AND CLAIMS

1. Plaintiffs include the membership organization *Asociación de Trabajadores Fronterizos* (ATF), or Association of Border Workers, and 5 individuals.
Post-Severance Complaint ¶¶ 4, 8, Docket No. 1.

DOL's Response: No objection.

2. ATF is an advocacy and self-help workers' organization comprised of approximately 2,000 garment and other workers whose jobs have been lost or threatened due to foreign competition.
Glenn Depo. at 14:24 to 19:7 (PA-9);[1] Glenn History Affid. (7/5/2002) at 2 (PA-21); ATF Response to Department of Labor (DOL) Second Interrogatory No. 1 (PA-30).

DOL's Response: No objection.

3. Most ATF members are immigrants of Mexican national origin who communicate only in Spanish or are limited in their ability to communicate in English (limited English proficient or LEP).
Glenn Depo. at 14:24 to 16:12, 25:21 to 26:13, 61:15 to 62:25, 65:1 to 66:5 (PA-9); Glenn History Affid. (7/5/2002) at 1 (PA-21); Purnell Depo. at 43:7 to 44:7 (PA-16).

DOL's Response: No objection.

4. Numerous ATF members lost their jobs due to foreign competition that resulted from the North American Free Trade Agreement (NAFTA).
Glenn History Affid. (7/5/2002) at 2 (PA-21); DOL Brief at 7-8 (PA-26).

DOL's Response: No objection.

5. Since 1996, ATF's membership has always included numerous LEP workers who currently qualify for and are undertaking training under the Trade Act of 1974 (Trade Act) who have recently completed such training, and who are currently employed in industries that are vulnerable to layoffs due to foreign competition.
ATF Worker Declarations (PA-20); ATF Response to DOL Second Interrogatory No. 1 (PA-30); ATF Letter & Roster (5/30/2000) (PA-37); ATF Member Responses to DOL First Interrogatory No.

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[1] Pursuant to Loc. R. 7(b), the record evidence upon which Plaintiffs rely is included in the Appendix that is filed with this Statement of Facts. This evidence is cited in this document as "PA" (Plaintiffs' Appendix) followed by the tab number behind which the evidence appears.

1 (PA-28); Glenn Depo. at 25:18 to 26:13, 65:1 to 66:5 (PA-9); Glenn History Affid. (7/5/2002) at 2 (PA-21); Juarez Depo. at 138:11 to 139:18 (PA-12); Mora Depo. at 59:17 to 63:20 (PA-14); Renteria Depo. at 58:5 to 66:2 (PA-17).

DOL's Response: Objection: Vague, Speculative, Not Supported by the Cited Material. The Department does not have information related to ATF's membership since 1996, nor does the Department have a current membership list. The Department also does not have any information, beyond that related to the named Plaintiffs and the 20 affidavits provided as exhibits, related to ATF members that are undertaking or have completed Trade Act training. The Department has responded, individually, to the 20 affidavits below at pp. 47-48. Finally, there is no way to determine the veracity of the allegation that ATF members are employed in industries vulnerable to layoffs due to foreign competition.

Plaintiffs' Reply: DOL has offered no evidence to refute Plaintiffs' evidence; thus, there is no genuine issue as to the fact as stated. DOL does not specify any instance in which it claims that Plaintiffs' evidence is insufficient. Instead it claims that it wants more information than it has. But Rule 56(f) establishes a procedure for parties to follow when they want to resist summary judgment on the ground of insufficient information. DOL has not followed that procedure, and would not be successful in any event, because DOL had full discovery from ATF on these issues for over 16 months between April 2002 and August 2003. ATF has not declined to provide DOL any information that it sought. As to which industries are vulnerable to layoffs due to foreign competition, DOL had full access to ATF witnesses on this point, and it employs its own army of labor economists who could challenge ATF's sworn assertions if it disagrees. Instead, DOL presents this Court with no evidence to show that a genuine issue remains for trial here.

6. ATF's mission is to help Spanish-speaking workers on the United States-Mexico border seek better jobs and pay through job training, broader access to health care, and promotion of permanent jobs at living wages.
Glenn Depo. at 9:5 to 10:2, 12:1-15, 13:17-23, 25:18 to 26:13 (PA-9); Glenn History Affid. (7/5/2002) at 1-2 (PA-21).

DOL's Response: No objection.

7. Most of ATF's work is generated by workers who come to the organization with specific problems.
Glenn Depo. at 9:5 to 10:2, 12:1-15, 25:18 to 26:13 (PA-9).

DOL's Response: Objection: Relevance, Vague.

Plaintiffs' Reply: This fact is offered as background, and it is not material to Plaintiffs' motion for summary judgment.

8. ATF offers advocacy, advice, mediation, organizing, and legal referral services to workers experiencing displacement due to trade.
Glenn Depo. at 9:5 to 10:2, 12:1-15, 25:18 to 26:13 (PA-9); Glenn History Affid. (7/5/2002) at 1-2 (PA-21).

DOL's Response: No objection.

9. Since 1996, ATF has actively and consistently advocated before DOL for language-relevant job skills training to enable its members to get higher paying jobs.
Glenn Depo. at 12:1-15 (PA-9); Glenn History Affid. (7/5/2002) at 1-2 and attached Exhs. A through F (PA-21); ATF Letter & Roster (5/30/2000) (PA-37); Juarez Depo. at 138:11 to 139:18 (PA-12).

DOL's Response: No objection.

10. Defendant is the United States Department of Labor (DOL).
Post-Severance Complaint ¶ 9.

DOL's Response: No objection.

11. Plaintiffs claim that DOL violates the Trade Act by:

> **(a) allowing training to be approved for LEP workers that is not expected to render them fully job-ready;**
> **(b) allowing training to be approved for LEP workers without consideration of Congress's 80% wage replacement goal for Trade Act training; and**
> **(c) allowing classroom training to be approved for LEP workers without consideration of on-the-job training.**

Post-Severance Complaint ¶¶ 17-19.

DOL's Response: Objection: Fails to Conform to the Pleadings. The claims as outlined here are different than the claims as outlined in the Post-Severance Complaint. The Post-Severance Complaint discusses the claims in two sections, "Facts - Injury" and "Cause of Action." As stated in the "Facts -Injury" section, they are:

> …TWC and its officials, employees, and agents have acted or failed to act as follows:
>
> > a. they approve training that they know to be incomplete at the time of approval, in that they approve training for a worker knowing that the worker will need further training in order to become job ready in a particular occupation;
> > b. they fail to use 80% wage replacement as a standard for deciding what training may be approved for each worker; and

c. they ignore on-the-job training altogether in considering what training to approve, and they fail to require that on-the-job training be approved for a worker each time such an opportunity meets the requirements of 19 U.S.C. § 2296.

Post-Severance Complaint at 6 (Exh. 51). The claims as stated in the "Cause of Action" section are:

> "DOL allows state agencies to approve incomplete training, as described in Paragraph 17 above. This DOL action violates 19 U.S.C. § 2296(a)(1(C) and is subject to this Court's corrective injunction under 5 U.S.C. §§ 706(2)(A) and 706(2)(C);"
>
> "DOL has failed to issue regulations naming what actions state agencies are required to take to achieve Congress's 80% wage replacement goal for Trade Act training … This DOL inaction violates 19 U.S.C. §§ 2296(a)(9) and 2320, and is subject to this Court's corrective injunction under 5 U.S.C. § 706(1);" and
>
> "DOL allows state agencies to ignore on-the-job training … This DOL action violates 19 U.S.C. § 2296(a)(1) and is subject to …"

Post-Severance Complaint at 7-8 (Exh. 51).

Plaintiffs' Reply: DOL's response never mentions Post-Severance Complaint ¶¶ 17-19, which name the *violations* of law at issue just as the fact states. DOL never identifies any way in which it contends Plaintiffs' claims differ from the claims in their Post-Severance Complaint, nor why any difference raises a genuine issue as to the stated fact. DOL's response only continues DOL's history of sowing confusion by claiming not to understand how Plaintiffs' claim that DOL violates the law, using tactics similar to the ones that it attempted in its failed Motion to Strike Plaintiffs' Post-Severance Complaint. *See* EP-04-CA-400, Docket Nos. 2, 8, 9, 10, 11, 12, 13.

12. DOL concedes that Plaintiffs have standing to litigate the claims described in the preceding paragraph.

Hearing Transcript (10/20/2003) at 18:20 to 19:7 (PA-19).

DOL's Response: Objection: Calls for a Legal Conclusion. Whether or not Plaintiffs have standing is a legal question. The Department notes that, legally, it cannot waive the standing requirement for Plaintiffs at any time.

Plaintiffs' Reply: DOL conceded standing as stated. The legal significance of this fact is not at issue. This Court previously ordered the parties to brief the issue of ATF's standing. Civil Action No. EP-02-CV-131, Docket No. 98. ATF timely submitted its brief establishing that it has standing to litigate its claims. *Id*. at Docket No. 103. DOL failed to submit a response as ordered. *Id*. at Docket No. 98. DOL instead represented to this Court that it had studied the matter and concluded that it has no basis for challenging ATF's standing. Hearing Transcript (10/20/2003) at 18:20 to 19:7 (PA-19).

13. The three claims at issue in this litigation were severed from Civil Action No. EP-02-CA-131-FM.

Order in Civil Action EP-02-CA-131-FM (Docket 203).

DOL's Response: Objection: Vague. A response to this statement would depend on the claims being referenced. The Department understands that the three claims as presented in the October 20, 2004 Order of this Court have been severed from Civil Action No. EP-02-CA-131-FM.

Plaintiffs' Reply: Here DOL continues to fight a battle that it already lost. This fact has been extensively briefed, *see* Docket Nos. 9 and 12, and decided by this Court, *see* Docket No. 13.

14. Plaintiffs have taken the depositions of the following people for the following reasons:

DOL's Response: General Objection to All Subparts: Relevance, Not Supported by the Cited Material.

Plaintiffs' Reply: As officers of this Court, Plaintiffs' counsel represent that the reasons that they state below are exactly why they took the following depositions. *See also* EP-02-CV-131, Docket Nos. 118 and 121 (Plaintiffs' briefing on their motions to take in excess of ten depositions). The reasons are relevant to enable the Court to gauge significance of the deposition testimony that is cited in support of each fact in this document.

(a) Since January 1997, Mr. Joseph Juarez has served as the DOL Regional Administrator who is responsible under 20 C.F.R. § 617.59(g) for monitoring and enforcing compliance with DOL's Trade Act regulations in Texas, and no current DOL employee is more knowledgeable about DOL's efforts in El Paso,
Juarez Depo. at 22:2 to 23:20, 119:16-19, 130:19 to 134:24 (PA-12);

DOL's Response: Mr. Juarez has specifically stated that he is not the most knowledgeable person at the Department about the "El Paso Trade Act training situation." See Juarez Depo. at 22-23, 119, and 130-134 (Exh. 35). Furthermore, Ann Cole, a Department employee who works under Mr. Juarez in the regional office, does not admit that Mr. Juarez is the most knowledgeable Department employee as Plaintiffs contend. See Cole's July Depo. at 143 (Exh. 32).

Plaintiffs' Reply: Mr. Juarez testified that Ms. Cole was the *only* DOL employee whom he believed had more knowledge about DOL's involvement in El Paso than he did. Mr. Juarez also testified about his personal extensive involvement in El Paso over the course of seven years, while Ms. Cole testified that her involvement in El Paso was limited to a few months in the year 2000. Thus, the fact is accurate as stated.

(b) DOL designated Ms. Ann Cole under Fed. R. Civ. P. 30(b)(6) to speak on its behalf regarding DOL's Trade Act enforcement efforts in El Paso,
Cole Depo. at 4:4 to 5:12 (PA-5);

DOL's Response: Ms. Cole was designated to testify in a more limited capacity. After reviewing Plaintiffs' citation, it is clear that Ms. Cole was designated to provide a description to Plaintiffs of what DOL has done "to enforce its policies regarding on-the-job training under the Trade Act, determinations of whether training produces a reasonable expectation of employment under the Trade Act, quality control of training that is approved under the Trade Act, and consideration of individual employability characteristics of dislocated workers when deciding what training to approve under the Trade Act. . . . those are the sole issues that she [was] dedicated to discuss and nothing beyond that." See Cole Depo. at 4-5 (Exh. 32).

Plaintiffs' Reply: Plaintiffs' August 2, 2002 letter referenced in the cited deposition transcript requested a Rule 30(b)(6) witness to testify on what DOL has done to enforce the Trade Act *specifically in El Paso*. DOL designated two witnesses in response to that letter: Ms. Cole to testify on enforcement, and Mr. Kooser to testify exclusively on DOL's Trade Act policies. So Ms. Cole was DOL's designated witness on El Paso enforcement efforts.

(c) DOL designated Mr. Curtis Kooser under Fed. R. Civ. P. 30(b)(6) to speak on its behalf regarding DOL's Trade Act policies,
Kooser Depo. at 4:7 to 5:22 (PA-13);

DOL's Response: No objection.

(d) Curtis Kooser named Mr. Edward Tomchick as the person at DOL who knows how DOL's policies for funding Trade Act training are created and implemented,
Kooser Depo. at 18:16 to 19:20, 35:8-12, 127:17 to 128:5, 131:15 to 132:12 (PA-13);

DOL's Response: No objection.

(e) Ann Cole named Ms. Kajuana Donahue as the person at DOL who has primary responsibility for Trade Act enforcement in Texas,
Cole Depo. at 16:15 to 17:11 (PA-5);

DOL's Response: The Department notes that Ms. Donahue, at the time the deposition was taken, had the responsibility of "Trade Act administration" in Texas, rather than enforcement, according to Ms. Cole's Deposition. See Cole Depo. at 16-17 (Exh. 32).

Plaintiffs' Reply: DOL's response notes a distinction without a difference, and Ms. Cole certainly did testify that Ms. Donahue is the DOL employee with "responsibilities for ensuring that the state -- the TWC administers the Trade Act in ways that comply with the DOL's policies," *i.e.* enforcement. Cole Depo. at 18:4-9.

(f) The Texas Workforce Commission (TWC) designated Ms. Mimi Purnell under Fed. R. Civ. P. 30(b)(6) to speak on its behalf regarding TWC's Trade Act policies,
Purnell Depo. at 7:18-21, 171:25 to 172:9 (PA-16);

DOL's Response: No objection.

(g) TWC's Trade Adjustment Assistance Coordinator is Mr. Harry Crawford, who is in charge of daily administration of the statute at issue, and whose testimony was adopted by Ms. Purnell,
Crawford Depo. at 9:15 to 10:11 (PA-6); Purnell Depo. at 11:20 to 12:1 (PA-16);

DOL's Response: The Department lacks sufficient information to establish whether or not Mr. Harry Crawford is currently in-charge of the daily administration of the statute at issue.

Plaintiffs' Reply: DOL's response does not challenge the fact as stated.

(h) Mr. Jose Guzman was TWC's supervisor in El Paso's Regional Trade Unit between April 1988 and March 2003,
Guzman Depo. at 5:4-22 (PA-10);

DOL's Response: No objection.

(i) Ms. Norma Bueno was one of several TWC mid-level program managers in El Paso's Regional Trade Unit, with 15 years' experience with TWC in El Paso before transferring positions in July 2003 to do similar Trade Act work in El Paso for a contractor of Defendant Upper Rio Grande Workforce Development Board (WDB),
Bueno Depo. at 5:12-25 (PA-3);

DOL's Response: No objection.

(j) Ms. Gloria Candelaria was a TWC workforce development specialist working directly with trade-dislocated workers in El Paso's Regional Trade Unit from 1999 through June 2003, when she transferred to manage Trade Act training cases for a WDB contractor,
Candelaria Depo. at 12:12-14, 71:7 to 72:25 (PA-4);

DOL's Response: No objection.

(k) Ms. Johnnie McDowell-Owens has spent 14 years in various workforce development positions in El Paso, and currently serves as plans and contracts manager for WDB.
Owens Depo. at 5:11-25 (PA-15).

DOL's Response: No objection.

15. DOL attorneys deposed every Plaintiff in this case, including ATF's Director, and at every deposition cited in this document, DOL had between one and four attorneys present, and had the opportunity to cross-examine each witness.
E.g. Bueno Depo. at 2:12-17 (PA-3); *see also* Fed. R. Civ. P. 32(a)(4).

DOL's Response: Objection: Relevance. Moreover, the Department has not had an opportunity to depose and/or cross examine any of the individuals identified in the affidavits at Facts 23, 74, 106 and 107.

Plaintiffs' Reply: DOL does not challenge the accuracy of this fact as stated. Plaintiffs respond to each one of the other Facts cited by DOL in each of those Facts.

16. DOL administers the Trade Adjustment Assistance (TAA) program under 19 U.S.C. §§ 2291, *et seq.*, including Trade Act training under 19 U.S.C. § 2296, and is required to prescribe all regulations that may be necessary for doing so.
19 U.S.C. §§ 2296(a)(9) and 2320.

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: DOL does not dispute the accuracy of this statement, regardless of whether it is interpreted as a conclusion of law or of fact.

17. Funds for all TAA benefits and administration are provided by the federal government through congressional appropriations that are distributed according to DOL funding decisions.
19 U.S.C. §§ 2296(a)(2), 2311(a), and 2317; Kooser Depo. at 41:5-15, 125:3-20 (PA-13).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: DOL does not dispute the accuracy of this statement, regardless of whether it is interpreted as a conclusion of law or of fact.

18. DOL has entered into agreements with all states, the District of Columbia, and Puerto Rico under which all 52 state agencies act as federal agents of DOL in deciding what Trade Act training benefits individual workers will receive.
Kooser Depo. at 48:15 to 49:12, 125:3-20; 137:11 to 138:7 (PA-13).

DOL's Response: Objection: Not Supported by the Cited Material. Mr. Kooser did not testify in this regard. See Kooser Depo. at 48-49, 125, and 137-138 (Exh. 36). However, the Department concedes that it has entered into an agreement with the State of Texas to help administer the Trade Act.

Plaintiffs' Reply: Mr. Kooser testified: "It is the responsibility of [DOL] to balance the [Trade Act training funding] request of all 50 states plus the District of Columbia and Puerto Rico as to how to allocate the available funds. Then a determination is made as to how much to allocate based on a given request." Kooser Depo. at 125:12-18 (PA-13). No state can receive Trade Act funding without executing an agreement to serve as a federal agent of DOL in administering the Trade Act. 19 U.S.C. § 2311(a)-(b). DOL does not dispute the accuracy of the stated fact, and it has ready access to the agreements cited.

19. The Texas Workforce Commission (TWC) has agreed to serve as a federal agent for making individual training approval decisions for Texas workers under the Trade Act.
Crawford Depo. at 9:19 to 10:11; 33:17 to 34:2 (PA-6).

DOL's Response: Objection: Characterization, Calls for a Legal Conclusion. Section 2311(a) of the statute does allow for state agencies, like TWC, in conjunction with local agencies, to "afford adversely affected workers testing, counseling, referral to training and job search programs, and placement services," as well as provide for payments and services under the Act. 19 U.S.C. § 2296.

Plaintiffs' Reply: DOL's response makes no sense in light of its concession in Fact 18 and the text of 20 C.F.R. § 617.59(e):

> Agent of United States. In making determinations, redeterminations, and in connection with proceedings for review thereof, a State or State agency which has executed an Agreement as provided in this section shall be an agent of the United States and shall carry out fully the purposes of the Act and this Part 617.

The fact is accurate and fully supported as stated.

20. To decide what Trade Act training to approve for each Texas worker, TWC employees must follow policies and practices that are approved, monitored, enforced, and paid for by DOL.
Kooser Depo. at 29:3 to 32:1 (PA-13); Crawford Depo. at 33:25 to 34:2 (PA-6).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Mr. Kooser testified that the policies are approved, disseminated, and monitored by the Department. Mr. Kooser

specifically stated that he had never been involved in and did not know of any instance in which an enforcement measure had to be used. Kooser Depo. at 30:3 to 31:8 (Exh. 36). Mr. Kooser did not refer to any practices that the Department approves, monitors, enforces, or for which it pays. Mr. Crawford testified, very generally, that his employees follow the federal rules and the procedures as outlined, by the state, in the Texas Trade Manual. The Department has approved this manual.

Plaintiffs' Reply: The cited evidence supports the fact as stated. *See also* Fact 14(b); Fact 14(e); Fact 28; DOL Policy GAL 15-90 at 2-3 (PA-67) ("The operating instructions in this document ... are issued to the cooperating State agencies as guidance provided by the Department of Labor in its role as the principal in the TAA program. As agents of the United States, the States and the cooperating State agencies may not vary from the operating instructions in this document ... without the prior approval of the Department of Labor. [T]he operating instructions in this document (or any subsequent or supplemental operating instructions) shall constitute the controlling guidance for the States and the cooperating State agencies in implementing and administering the provisions of [these operating instructions.]").

21. DOL issues policy directives to state agencies concerning Trade Act administration using the regulations in 20 C.F.R. Part 617, its General Administration Letters, its Training and Employment Guidance Letters, its Training and Employment Notices, and the monitoring reports that it periodically prepares for individual state agencies.
Kooser Depo. at 32:2 to 37:18 (PA-13); DOL Interrogatory Response Nos. 9 and 11 (PA-25).

DOL's Response: No objection. The Department also periodically conducts training on all its programs, including programs under the Trade Act.

22. DOL may assume direct responsibility for Trade Act administration in states that have demonstrated an inability to follow DOL instructions on how the program is to be operated.
19 U.S.C. § 2311(a)-(b); 20 C.F.R. § 617.59(f)-(g).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: DOL does not dispute the statement, regardless of whether it is interpreted as a conclusion of law or of fact.

II. FACTUAL BACKGROUND

23. El Paso, Texas has suffered roughly five times more NAFTA-related job losses than any other city in the United States. With a population of 584,113, El Paso suffered over 3 job losses for every 100 residents, while New York City, with a population of 8,085,742, suffered fewer than 3 job losses for every 7,000 residents.

Woodall Declaration at 1 (PA-23); U.S. CENSUS BUREAU, *7/1/2003 Est. of Population for Incorp. Places Over 100,000*, http://eire.census.gov/popest/data/cities/tables/SUB-EST2003-01.pdf

DOL's Response: Objection: Not Supported by the Cited Material. Moreover, the Department has not had the opportunity to evaluate this data and/or subject Mr. Woodall to cross examination.

Plaintiffs' Reply: Not only is Mr. Woodall's declaration based entirely upon DOL data, which DOL may access any time it wishes to confirm the accuracy of Mr. Woodall's numbers, but DOL has had the very Woodall declaration at issue since December 2002, nine months before discovery closed in the case from which this case was severed, and DOL never once requested Mr. Woodall's deposition. So DOL's claim that it "has not had the opportunity to ... subject Mr. Woodall to cross-examination" is preposterous. Moreover, Mr. Woodall's report that El Paso workers suffered 17,778 NAFTA job losses through May 2, 2002, roughly five times more than any other U.S. city, is corroborated by Congress's General Accounting Office, which also studied the matter for a slightly different time period and concluded that 17,069 El Paso workers suffered NAFTA job losses, and that "El Paso has the unfortunate distinction of having experienced the greatest number of NAFTA-related job losses in the United States." GAO Report at 56 (PA-72).

24. NAFTA particularly decimated El Paso's once-vibrant garment industry. Levi's, VF Corporation (Lee and Wrangler brands), Farah, Haggar's, Tony Lama Boots, and other companies closed major garment operations in El Paso, laying off some 20,000 workers, many of whom had sewn in El Paso for decades. Government, academic, and press reports thoroughly document the devastating impact that the NAFTA job losses have had on El Paso workers and their families and on the city's entire economy.
DOL OIG 2001 Audit at 55 (PA-73); GAO Report at 56-57 (PA-72); DOL Press Collection (PA-35); Woodall Declaration at 1 (PA-23); DOL Interrogatory Response No. 7 (PA-25); WDB Workforce Development Plan at WDB 245 (PA-82); Juarez Depo. at 16:14 to 22:1 (PA-12).

DOL's Response: Objection: Characterization. The Department notes that there have been massive lay-offs from El Paso's garment industry.

Plaintiffs' Reply: DOL's response does not even specify anything that it claims is mischaracterized, let alone provide any opposing evidence. No genuine issue remains to be tried as to this fact.

25. Of the El Paso garment workers who lost their jobs due to NAFTA, roughly 95% are of Mexican national origin, 65% are female, and 20% are female single heads of households.
DOL PREP Grant Contract at ETATOPL 3896 (PA-43); GAO Report at 56 (PA-72).

DOL's Response: No objection.

26. The overwhelming majority of El Paso garment workers who lost their jobs due to NAFTA have limited English proficiency.
Candelaria Depo. at 23:1-5 (PA-4); DOL OIG 2001 Audit at 54-55 (PA-73).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Ms. Candelaria testified only that she estimated that in her experience 90% of those requesting Trade Act training were enrolled in GED and ESL training. Candelaria Depo. at 23 (Exh. 31).

Plaintiffs' Reply: The difference in characterization is immaterial to this case, so Plaintiffs accept DOL's characterization, and restate the fact as follows: "The overwhelming majority of El Paso garment workers who qualified for and enrolled in Trade Act training have limited English proficiency." As thus stated, this fact is proved by the cited evidence.

27. Officials at the highest levels of DOL, including the Secretary of Labor personally, have acknowledged the need to improve the efficacy of training options available to LEP workers throughout the nation, particularly along the nation's border with Mexico and in El Paso.
DOL DC Meeting Minutes (9/28/1998) at 4-5 (PA-51); DOL Memorandum for the Secretary (4/23/98) (PA-47); El Paso Meeting Minutes (9/23/1997) at 4 (PA-49); DOL Memorandum for the Secretary (6/6/97) (PA-46).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Then Secretary of Labor Herman did not acknowledge the need to improve the efficacy of training options available to LEP workers. Rather, she "voiced the Administration's continuing commitment to ensuring that we are doing everything possible to see that El Paso and its citizens receive deserved and needed assistance – assistance that will provide them with meaningful lasting tools to compete and prosper in our economy." DOL DC Meeting Minutes (9/28/1998) at 5 (Exh. 4).

In addition, the DC Meeting Minutes are from over six years ago. None of the other documents cited specifically mentioned training LEP workers or the efficacy of the training. Rather, DOL Memorandum for the Secretary (4/23/98) (Exh. 5) mentioned "bilingual vocational skills training" and "learning basic skills such as . . . intensive work-based English." The El Paso Meeting Minutes (9/23/1997) at 3 (Exh. 6), stated that "bilingual training" was needed. The DOL Memorandum for the Secretary (6/6/97) (Exh. 7)) notes that "bilingual skills training" will be provided.

Plaintiffs' Reply: For example, DOL's "Very Important MEMORANDUM FOR THE SECRETARY" explained to Secretary Herman: "The targeted workers have exhausted their Trade Readjustment Assistance (TRA) payments and, after 18 months in traditional ESL/GED classes, have been unable to advance into vocational training or to find unsubsidized employment. In response to this situation, the Texas Workfoce Commission (TWC) has implemented the El Paso Re-Employment Pilot Project. This project will provide extensive case management and identify and implement customized training to include a re-tooling of the traditional ESL/GED classes with a focus on the integration of workplace literacy and occupational skills training and on-the-job

training." DOL Memorandum for the Secretary (6/6/97) at 1 (PA-46). Secretary Herman personally read this memo and approved the funding on the basis reported in the memo. *Id.* at 2. Thus, there is no genuine dispute but that the Secretary, as well as other high DOL officials acknowledged the need to improve the efficacy of training available to LEP workers.

28. DOL monitors press reports concerning Trade Act training, and uses these reports to assist it in carrying out its monitoring and enforcement responsibilities under 19 U.S.C. § 2311 and 20 C.F.R. § 617.59(g).
Juarez Depo. at 237:7 to 238:9 (PA-12); Cole Depo. at 134:9-15 (PA-5).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Mr. Juarez merely provided an affirmative answer to the question: "And you follow the press on issues that you deal with on a regular basis; is that correct?" It is unclear whether these issues necessarily pertain to the monitoring and enforcement responsibilities under the Act. Ms. Cole did not say that she has used these reports, but rather agreed with a hypothetical statement that she would use these reports. Cole Depo. at 134:9-15 (Exh. 32).

Plaintiffs' Reply: The cited evidence shows that there is no genuine issue as to the stated fact. The fact that DOL collected, marked, and commented on the press reports referenced in Facts 29 and 62 confirms that DOL uses press reports as stated.

29. DOL is aware of a long series of press accounts from numerous sources that raised concerns about the quality and effectiveness of training available to LEP workers in El Paso.
DOL Press Collection (*e.g.* "*Laid-Off Spanish Speakers Go On Hunger Strike*," El Paso Times 6/5/2000 at ETATOPL 2674) (PA-35).

DOL's Response: Objection: Characterization. The Department is aware of press accounts raising concerns about the quality and effectiveness of training workers in El Paso.

Plaintiffs' Reply: The cited and attached evidence in PA-35 includes a sample of 19 articles collected by DOL, and shows that there is no genuine issue as to the fact as stated.

30. DOL agrees that Congress's General Accounting Office accurately described Trade Act training circumstances in El Paso as follows:

> **El Paso has the unfortunate distinction of having experienced the greatest number of NAFTA-related job losses in the United States.**
>
> **While El Paso has experienced a net increase in jobs since 1994, these new jobs have required skill levels and language abilities beyond the capacity of most dislocated workers in El Paso, who were Hispanic, female, single heads of household, over the age of 40, with less than a high school education and limited**

> **English proficiency. Most had worked for years in the apparel industry, earning relatively good wages and benefits at companies like Levi-Strauss ....**
>
> **Perhaps the greatest criticism of assistance efforts we heard related to the ineffectiveness of the training. According to program officials, El Paso's training efforts were hindered by the lack of sufficient training infrastructure to meet the needs of its displaced workers. [M]any dislocated workers languished in English as a Second Language and English-language GED courses without making enough progress to move on to occupational training courses ….**

GAO Report at 60 (PA-72); Juarez Depo. at 336:21 to 337:11, 385:15 to 387:17 (PA-12).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. The Department has never agreed that this is an accurate description of Trade Act circumstances in El Paso. Mr. Juarez never reviewed nor agreed that the passage from page 56 of the GAO Report was an accurate description during his deposition. He reviewed pages 57-60 of the report and felt that there were no inconsistencies with what was written. Juarez Depo. at 335-37 (Exh. 35). Furthermore, Mr. Juarez did not discuss the GAO Report in pages 385-87, as Plaintiffs allege. Ms. Purnell testified that there were some inconsistencies with the passages in the GAO Report, particularly page 60. (Exh. 13). Purnell Depo. at 241-42 (Exh. 38). Thus, the Department disputes the Plaintiffs' allegation that it agrees that the GAO Report accurately described the circumstances in El Paso. (Exh. 13).

Plaintiffs' Reply: DOL's response shows that Mr. Juarez, DOL's employee who has personally overseen DOL's efforts in El Paso for seven years (*see* Fact 14(a)), agrees that the last two paragraphs of the GAO Report that are quoted in Fact 30 accurately described the Trade Act training circumstances that he experienced in El Paso. In light of Fact 23, whether Mr. Juarez also agreed with the first sentence of the quoted passage, "El Paso has the unfortunate distinction of having experienced the greatest number of NAFTA-related job losses in the United States," is immaterial. DOL's objection to Fact 30 is directed only at this first sentence. DOL's effort to raise a fact issue by citing Ms. Purnell's testimony fail because: (1) DOL never shows Ms. Purnell's quibbles with portions of GAO's description of El Paso events to be in any way material to Fact 30; (2) Fact 30 cites DOL's agreement, and Ms. Purnell is an employee of TWC; and (3) Ms. Purnell herself published a consistent, if not more damning, description of El Paso events than the one cited by GAO in Fact 30. *See* DOL OIG 2001 Audit at 54-57 (PA-73).

31. In September 2001, TWC reported to DOL's Inspector General the following about training opportunities for LEP workers in El Paso:

> **[TWC's] imperative became the identification and recruitment of vocational skills training institutions to develop … training that integrated work-related, on-the-job English with vocational training. The results were dismal. In some cases small training institutions that could serve very small numbers of workers, often fewer than 100, were the only institutions with the flexibility or the desire to meet the need of the workers. Larger institutions continued to deliver traditional [ESL] programming that was not tied to vocational outcomes.**

DOL OIG 2001 Audit at 57 (PA-73).

DOL's Response: Objection: Characterization. TWC reported to Mr. John F. Riggs, Regional Inspector General for audit, at the U.S. Department of Labor. TWC did not report to the Department's Inspector General. Further, the next paragraph applauds the fact the Workforce Board shifted its emphasis to job development and training: "It was apparent that without a major paradigm shift, workers were not going to reach a sufficient fluency in English to compete for the higher paying jobs in El Paso, nor could they receive vocational training. Therefore, the Upper Rio Grande Workforce Board, to their credit, shifted the emphasis of El Paso PREP from training to job development and placement." DOL OIG 2001 Audit at 57 (Exh. 14).

Plaintiffs' Reply: That TWC addressed its letter to the Regional Inspector General and not to the Inspector General is a distinction without a difference. The Office of Inspector General published the report that includes the letter at issue, not the Regional Inspector General. DOL OIG 2001 Audit at 1 (PA-73). There is no genuine issue but that the fact is accurate as stated.

III. STATUTORY BACKGROUND

32. Congress funds job training through dozens of federal programs in several agencies with varying statutory requirements (the largest of which is the Workforce Investment Act (WIA) which encompasses several sub-programs), but the Trade Act contains the only federal job training program that is explicitly provided as a remedy for workers.
DOL Policy TEN 8-02 at ETATOPL 5522-23 (PA-55); DOL OIG 2001 Audit at 4 (PA-73); see generally, The Workforce Alliance, *Skilling the American Workforce on the Cheap: Ongoing Shortfalls in Funding for Workforce Development* (Sept. 2003) (copy at http://www.workforcealliance.org/twa-funding-analysis-09.pdf) (cataloguing program costs).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: DOL does not dispute the statement, regardless of whether it is interpreted as a conclusion of law or of fact. Clearly the number of federal job training programs, and the number of agencies that administer them, are facts that DOL does not dispute.

33. Congress's original 1974 Trade Act training approval statute provided:
If the secretary determines that there is no suitable employment available for an adversely affected worker covered by a certification under Subchapter A of this chapter, but that suitable employment (which may include technical and professional employment) would be available if the worker received appropriate training, he may approve such training. Insofar as possible, the Secretary shall provide or assure the provision of such training on the job.
Trade Act of 1974, Pub. L. No. 93-618 at § 236, 88 Stat. at 2023 (emphasis added) (codified at 19 U.S.C. § 2296(A)).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: This statement does not call for a legal conclusion; it is a statement of what Congress did and where the cite to that Act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated.

34. In 1981 Congress amended the 1974 Trade Act training approval text to provide: If the Secretary determines that—

> **(A) there is no suitable employment (which may include technical and professional employment) available for a 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 available to the worker from either government agencies or private sources (which may include area vocational education schools, as defined in section 195(2) of the Vocational Education Act of 1963, and employers), and**
> **(E) the worker is qualified to undertake and complete such training,**

the Secretary may approve such training for the worker. Upon such approval, the worker shall be entitled to have payment of the costs of such training paid on his behalf by the Secretary. 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.

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 § 2506, 95 Stat. 357, 884-85 (1981).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: This statement does not call for a legal conclusion; it is a statement of what Congress did and where the cite to that Act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated.

35. In 1988 Congress amended the 1981 Trade Act training approval text to provide: If the Secretary determines that—

> **(A) there is no suitable employment (which may include technical and professional employment) available for an adversely affected worker,**
> **(B) the worker would benefit from <u>appropriate training</u>,**
> **(C) there is a reasonable expectation of employment following completion of <u>such training</u>,**
> **(D) training <u>approved by the Secretary</u> is reasonably available to the worker from either governmental agencies or private sources (which may include area**

vocational education schools as defined in section 195(2) of the vocational Education Act of 1963, and employers)[,]

(E) the worker is qualified to undertake and complete <u>such training</u>, and

(F) <u>such training</u> is suitable for the worker and available at a reasonable cost,

the Secretary <u>shall approve such training</u> for the worker. Upon such approval, the worker shall be entitled to have payment of the costs of such (subject to the limitations imposed by this section) training paid on his behalf by the Secretary directly or through a voucher system. Insofar as possible, the Secretary shall provide or assure the provision of <u>such training</u> on the job, which <u>shall</u> include related education necessary for the acquisition of skills needed for a position within a particular occupation.

This text remains the same to this date.

Omnibus Trade and Competitiveness Act of 1988 (OTCA), Pub. L. 100-418 § 1424, 102 Stat. 1107, 1248-49 (1988) (emphasis added) (codified at 19 U.S.C. § 2296(a)(1) (2004)).

<u>DOL's Response</u>: Objection: Calls for a Legal Conclusion

<u>Plaintiffs' Reply</u>: This statement does not call for a legal conclusion; it is a statement of what Congress did and where the cite to that Act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated.

36. Congress defines "suitable employment" as follows:

For purposes of this section the term "suitable employment" means, with respect to a worker, 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 percent of the worker's average weekly wage.

19 U.S.C. § 2296(e); *see also* H.R. REP. NO. 158, 97th Cong., 1st Sess. at 276 (1981); Kooser Depo. at 103:3 to 104:15 (PA-13).

<u>DOL's Response</u>: Objection: Calls for a Legal Conclusion

<u>Plaintiffs' Reply</u>: This statement does not call for a legal conclusion; it is a statement of what Congress did and where the cite to that Act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated.

37. Three months after the Trade Act's enactment, DOL promulgated regulations that provide:

§ 91.2 Purpose. The purpose of this Part 91 [implementing the Trade Act] is to provide for prompt payment of trade readjustment allowances and other adjustment assistance to individuals covered by certifications, <u>to provide for prompt and effective assistance to such individuals in securing suitable employment</u>, and to implement the provisions of the Act uniformly and

> **effectively throughout the United States. The regulations in this Part 91 shall be interpreted and applied to achieve such purpose.**

29 C.F.R. 91.2 (emphasis added), 40 Fed. Reg. 16304 (Apr. 11, 1975).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: This statement does not call for a legal conclusion; it is a statement of what DOL did, when DOL acted, and where the cite to that act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated. The fact is relevant to contemporaneousness, as explained in Plaintiffs' Reply.

38. After Congress amended the Trade Act training statute in 1981, DOL restructured its TAA regulations, and in doing so named "suitable employment" as the statute's sole purpose:

> **§ 617.2 Purpose. The Act created a program of trade adjustment assistance (hereinafter referred to as TAA) to assist individuals, who became unemployed as a result of increased imports, return to suitable employment.**

20 C.F.R. § 617.2 (2004), originally published at 48 Fed. Reg. 9444, 9448 (Mar. 4, 1983); *see also* DOL Admission No. 26 ("DOL has not adopted any definition for 'suitable employment' as used in 20 C.F.R. § 617.2 which differs from the definition of 'suitable employment' in 19 U.S.C. § 2296(e).") (PA-24); Kooser Depo. at 103:3 to 104:15 (PA-13).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: This statement does not call for a legal conclusion; it is a statement of what DOL did, when DOL acted, and where the cite to that act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated. The fact is relevant to contemporaneousness, as explained in Plaintiffs' Reply.

39. While 20 C.F.R. § 617.22(f)(2) strictly limits the duration of Trade Act training to 104 weeks of total time in training, Trade Act amendments enacted in 2002 (which do not include any change to the statute at issue in this case) led DOL to issue policy guidance allowing up to 26 weeks of remedial education to be added to the 104-week training time limit.

DOL Policy TEGL 11-02 at 25-26 ("the unchanged training-related provisions [include the] six criteria for approving training which are found in ... 19 U.S.C. § 2296(a)(1)") (PA-64); DOL Memo (Jan. 1997) at 1 (PA-69).

DOL's Response: Objection: Calls for a Legal Conclusion. Moreover, the DOL TEGL states: "The 2002 Act allows up to 26 weeks of TRA for workers who must complete some remedial education before beginning their retraining programs. Therefore, the intent of the statute is interpreted as allowing a maximum of 130 weeks of training in cases where workers require remedial training." 2002 DOL Policy TEGL at 25 (Exh. 47).

Plaintiffs' Reply: DOL's Response makes a representation to the Court that is identical to Fact 39, regardless of whether it is interpreted to be a statement of fact or law. *See* DOL Resp. at 19 n.18. Thus, there is no genuine issue that the statement is accurate.

40. DOL routinely and strictly limits worker choice as to Trade Act training whenever DOL and its state agencies choose to do so and have a legal reason for doing so.
E.g. DOL Policy GAL 2-88 at 2-3 ("The [Trade Act] statute and regulations provide State agencies with the authority and responsibility to establish standards and procedures for approving occupations and training institutions. ... If either the length of the training or the type of training is inappropriate for the worker in relation to his/her background and the availability of jobs in the market (on completion of training) the State has the authority and responsibility to deny approval of such training.") (PA-57); *id.* at 4 (state agencies may disapprove certain worker training choices, including training for self-employment, occupations involving commission sales, airplane pilots, helicopter pilots, taxidermists, florists, cosmetology teachers and managers) (PA-57).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Plaintiffs' first sentence quoted should read, "The Trade Act of 1974 and applicable regulations at 20 CFR Part 617 provide State agencies with the authority and responsibility to establish standards and procedures for approving occupations and training institutions, both intra-state and inter-state under 20 CFR 617.23(d)(1)-(3) and 617.26(a) & (b)." DOL GAL 2-88 at 2 (Exh. 12).

The second sentence Plaintiffs quote (after the ellipsis) does not address the same question addressed by the first, but rather is more narrowly focused on a particular type of educated worker. The question posed is "May a State limit training to a teacher's certificate or 6 months of technical training when the worker has a Bachelor's Degree?" Id. at 3. The relevant portion of the answer is: "No. Although 20 CFR 617.22(f) gives the State authority to determine the appropriate length of training and 20 CFR 617.23(d) requires the State agency to determine the standards and procedures to select occupations and institutions where training may be approved, such determination may not be made on a blanket basis.

"The determinations must be made on an individual case basis. If either the length of the training or the type of training is inappropriate for the worker in relation to his/her background and the availability of jobs in the market (on completion of training), the State has the authority and responsibility to deny approval of such training."

Finally, Plaintiffs' citation and paraphrasing of the DOL GAL is wholly inaccurate. DOL GAL 2-88 at 4 (Exh. 12). The question is as follows: "(8) May a State establish standards for disapproving training for . . . (d) Training for Airplane Pilots, Helicopter Pilots, Taxidermists, Florists, Cosmetology Teachers and Managers. Response: The Trade Act of 1974 and applicable regulations do not identify specific occupations or occupational groupings as not being approvable; however, reasonable expectation of employment should be the primary consideration in approval of training." In short, the agency may disapprove certain worker training choices, but does not specify certain types of job training will not be approved; rather, determinations should be made on a case-by-case basis.

Plaintiffs' Reply: DOL's response ends by conceding that "the agency may disapprove certain worker training choices," which is all that Fact 40 claims. The evidence filed in support of Fact 40 simply shows numerous instances when DOL supports a state agency rejecting a worker's Trade Act training choice, and is accurately cited to establish the fact as written, especially with DOL's concession. Further similar examples of DOL's assertion of its right, if not responsibility, to deny worker choice of illegal training are found in Fact 67 in DOL's Response at 19, and in the cases cited in Plaintiffs' Mem. Supporting Summary Judgment at 13 & n.9. Fact 40 does not claim that DOL specifies that "certain types of job training will not be approved" or that "determinations should [not] be made on a case-by-case basis;" these are red herrings. There is no genuine issue but that Fact 40 is accurate as stated.

41. DOL has not provided state agencies with specific guidance on what actions state agencies must take to comply with its regulation requiring state agencies to "explore, identify, develop, and secure" necessary Trade Act training opportunities.
Kooser Depo. at 87:9 to 93:7 (PA-13); Cole Depo. at 91:25 to 94:4 (PA-5).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. At no time did Mr. Kooser testify in his deposition that the Department did "not provide state agencies with specific guidance," as Plaintiffs allege. See Kooser Depo. at 87-93 (Exh. 36). Furthermore, Ms. Cole never makes this statement during her deposition testimony; she only comments on whether the Department requires states to expand or create training opportunities under the Trade Act. See Cole Depo. at 91-94 (Exh. 32). Request for Production of Documents No. 43 and its supplemental request do not specifically state Plaintiffs' allegation that the Department has not "provided state agencies with specific guidance" either.

Plaintiffs' Reply: The cited evidence shows that there is no genuine issue as to this fact, particularly in light of the fact DOL should easily be able to cite what specific guidance it has provided to state agencies on this question if it claims to have done so, yet DOL has no guidance to cite in its defense.

42. DOL has not provided TWC with targeted funds to enable TWC to "explore, identify, develop, and secure" necessary Trade Act training opportunities as stated in 20 C.F.R. § 617.23(a).
Tomchick Depo. at 87:16 to 88:19 (PA-18); Purnell Depo. at 136:7 to 137:13 (PA-16).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Mr. Tomchick does not recall if Departmental funds were sent specifically to TWC to "explore, identify, develop, and secure" training opportunities. See Tomchick Depo. at 87-88 (Exh. 44). Furthermore, Ms. Purnell stated that TWC uses existing resources to carry out its Section 617.23(a) obligations, and that the agency has not asked for additional "bricks and mortar" funding, sought by Plaintiffs, to develop training opportunities. Purnell Depo. at 136:7 to 137:13 (Exh.38).

Plaintiffs' Reply: Fact 42 does not refer to what funds were requested, it refers to what funds were provided, considering that DOL was well aware of the enormous needs in El Paso at least since 1997. Mr. Tomchick was the DOL employee who knew how DOL's funding decisions were made and implemented, *see* Fact 14(d), and he could not identify any instance in which funds were made available to TWC pursuant to 20 C.F.R. § 617.23(a). Under these circumstances, the burden shifts to DOL to search its ready financial records to determine whether it has any evidence to contest Fact 42. DOL presents no evidence, so Mr. Tomchick's testimony is sufficient to prove that there is no genuine issue as to Fact 42.

43. DOL has not issued any policy guidance on how the Trade Act training statute and regulations are to be applied in the cases of LEP workers, despite its knowledge that LEP workers routinely present the special concerns that are raised in this litigation.
DOL Interrogatory Response No. 13 (PA-25); Juarez Depo. at 551:10-22 (PA-12).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Mr. Juarez testified that the Department has provided guidance. When asked, "Have you ever received any guidance from the national office on the issue of how to provide training to LEP workers?" the following colloquy occurred:

> A Yeah, the department has provided guidelines on how to address the entire – implement the entire LEP regulations. They have recently reissued those, how to provide services to all the – to that population.
> Q And those regulations cover bilingual case workers and how – how a worker can access services in a language other than English, but those regulations do not cover the issue of training and how you provide training
> A Well –
> MR. FERNANDEZ: Let him ask a question.
> Q Do they?
> A Well, the guidance regulations provide guidance on how to provide for provision of service. So any of our grantees that provide service and, hence, a grantee that provides training is providing service, would ensure that that population has access to those services, or, hence, training, that they aren't discriminated against, that they're able to reap the benefits of that service or of that training. So I would say because we're dealing with grantees, that you will have training providers that are our grantees, and that I would apply those LEP guidance to those grantees because they're getting federal dollars.
> . . .
> Q But other than that document, is there anything else that you're aware of in the way of guidance from the national office on training of LEP workers?
> A I don't recall a specific document, no, I do not. I do not recall another document.

Juarez Depo. at 550:7 to 551:22 (Exh. 48). Further, the cited documents do not support Plaintiffs' statement that DOL has "knowledge that LEP workers routinely present special concerns that are raised in this litigation."

Plaintiffs' Reply: The "guidance" referenced in the first sentence of DOL's response is described in Plaintiffs' Memorandum in Support of Summary Judgment at 7 n.6. Nothing in the text of this guidance, DOL's response, or DOL's evidence indicates that this guidance addresses how the Trade Act training statute is to be applied in the cases of LEP workers. DOL has no other guidance, as proved by Mr. Juarez's testimony as cited above. Accordingly, Fact 43 is accurate as stated. DOL's claim at the end of its response that Plaintiffs have not provided evidence to show that DOL has "knowledge that LEP workers routinely present special concerns that are raised in this litigation" is belied by Facts 27 and 30, and DOL OIG 2001 Audit at 56-57 (PA-73) ("[T]he federal trade program's guidelines originally designed to assist middle-age, middle-class, English-speaking factory workers in the Midwest and northeast, were simply extended to the NAFTA trade affected worker on the Texas-Mexico border with little adjustment to compensate for the significant differences in the population of these economically, culturally and geographically divergent areas.").

44. TWC has called for regulatory guidance from DOL on how Trade Act training should be provided to LEP workers.
DOL OIG 2001 Audit at 56-57 (PA-73).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. DOL OIG 2001 Audit at 56-57 (Exh. 14) does not mention any request by TWC for "regulatory guidance from DOL on how Trade Act training should be provided to LEP workers."

Plaintiffs' Reply: There is no genuine issue but that TWC cited *to DOL* the absence of federal regulatory guidance from DOL as one of the reasons for the difficulties faced by LEP trade-dislocated workers in El Paso. Presumably TWC does not want workers to face these difficulties. Thus, the evidence supports the inference that TWC calls for the absent regulatory guidance.

IV. BILINGUAL TRAINING

45. Training involves supplying missing skills that a person needs to be able to work in a particular job. Before an informed choice among training options may be made, an inventory is needed of each worker's skills before training, and a list of required skills is needed for each occupation that is under consideration as a target for training.
Request for Proposal PREP-003 at 5-6, 11 (PA-33).

DOL's Response: Objection: Properly the Subject of Expert Testimony, Source Not Designated as Such. No Opportunity for Cross-Examination, Document Not Used for Its Intended Purpose. Moreover, the document cited reflects that the Upper Rio Grande Workforce Development Board requested proposals to establish a training evaluation system similar to what is described in this paragraph.

Plaintiffs' Reply: No authority indicates that expert testimony is more reliable than other forms of evidence, and DOL does not disagree that the cited evidence proves Fact 45 as stated. Moreover,

the proposition that the starting and ending skills must be known in order to make informed choices among training options is logically required from the definition of "training" in terms of supplying missing skills. DOL's Response cites Trade Act legislative history acknowledging this very fact. In the words of Congress as cited to this Court by DOL: "the ultimate objective of training programs is the placement of a worker in actual employment," and "[t]he 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." DOL Resp. at 12, 25. Significantly, DOL offers no contrary evidence to create a genuine issue of fact.

46. The term "bilingual training," also called "integrated training," is used to describe a training program that integrates acquisition of the English language skills needed for a specific occupation with simultaneous acquisition of the vocational skills needed for that occupation. For example, a bilingual truck driving course would teach an LEP worker how to communicate in English about safety signs, manifests, and truck parts, while using a decreasing amount of Spanish instruction to teach the worker how to drive the truck.
Purnell Depo. at 104:17 to 105:7 (PA-16); Bostic Depo. at 37:22 to 39:12 (PA-2); Request for Proposal PREP-005 at 6-7 (PA-74); Hopkins Bilingual Training Slides (PA-77); GAO Report at 60 (PA-72).

DOL's Response: Objection: Properly the Subject of Expert Testimony, Source Not Designated as Such. No Opportunity for Cross-Examination, Document Not Used for Its Intended Purpose. Moreover, the example used in this paragraph is not contained in any of the documents cited.

Plaintiffs' Reply: No authority indicates that expert testimony is more reliable than other forms of evidence, and DOL does not disagree that the cited evidence proves the fact as stated. DOL offers no contrary evidence to create a genuine issue of fact. Indeed, DOL's Response uses the term "bilingual training" as defined in this fact. DOL Resp. at n.22. The example provided in the second sentence of Fact 46 is an example of application of the definition stated in the first sentence. Because the evidence proves that there is no genuine issue as to the first sentence, it does so as to the second as well.

47. The term "serial training," also called "linear" or "sequential" training, is used to describe a training program that consists of general remedial English courses followed by vocational training conducted in English. For example, a serial approach to training an LEP truck driver would require the worker to participate in general remedial ESL courses until the worker could qualify to enter a truck driving course that is offered to English-speaking individuals.
Purnell Depo. at 17:18-22 (PA-16); Owens Depo. at 9:20 to 10:15 (PA-15); GAO Report at 60 (PA-72).

DOL's Response: Objection: Properly the Subject of Expert Testimony, Source Not Designated as Such. No Opportunity for Cross-Examination, Document Not Used for Its Intended Purpose. Moreover, none of the documents cited include the example of the LEP truck driver cited above. The GAO Report at 60 (Exh. 13) does not define "serial training" or "linear" or "sequential" training. Rather, it merely states, "many of the participants in the El Paso PREP project needed either ESL (English-as-a-Second Language) and/or GED before they could meet the minimum qualifications required by employers." Id.

Plaintiffs' Reply: No authority indicates that expert testimony is more reliable than other forms of evidence, and DOL does not disagree that the cited evidence proves the fact as stated. DOL offers no contrary evidence to create a genuine issue of fact. The example provided in the second sentence of Fact 47 is an example of application of the definition stated in the first sentence. Because the evidence proves that there is no genuine issue as to the first sentence, it does so as to the second as well.

48. Bilingual training is used successfully nationwide, and even on a limited basis in El Paso, to provide LEP workers with the remedial and vocational skills that they need to be fully job ready to work in numerous occupations paying wages above $8 per hour.
Houde Depo. at 47:18-24; 62:7 to 63:17, 65:25 to 66:22, 82:15 to 83:17 (PA-11); Bostic Depo. at 78:17 to 79:20 (PA-2); Owens Depo. at 58:22 to 60:22 (PA-15); Bilingual Training Example at ETATOPL 2708 (PA-36); DOL LEP Slides at ETATOPL 8871 (DOL observes that a "best practice" in service delivery is to "create special courses that combine hands-on vocational training in the LEP population's primary language combined with ESL assistance and instruction") (PA-68); DOL Conference Agenda (3/11/2003) (PA-54); *see generally* DOL Report on Hispanic Workers (May 2002) at ETATOPL 4946 to 4960 (PA-48); Center for Law and Social Policy, *The Language of Opportunity: Expanding Employment Prospects for Adults With Limited English Skills* (Aug. 2003), http://www.clasp.org/DMS/Documents/1062102188.74/LEP_report.pdf

DOL's Response: Objection: Properly the Subject of Expert Testimony, Source Not Designated as Such. No Opportunity for Cross-Examination, Document Not Used for Its Intended Purpose. While the Department acknowledges that bilingual training can be used successfully, there is no evidence that bilingual training will lead to any particular wage. Ms. Houde stated that the occupations for which she offers training "shoot for" the $7 to $9 range, with the exception of child care worker. Houde Depo. at 47:18-24 (Exh. 49). She did not testify that any particular wage rate would be guaranteed.

Plaintiffs' Reply: Fact 48 does not contend that bilingual training "will lead to any particular wage;" DOL's response is a red herring. No authority indicates that expert testimony is more reliable than other forms of evidence, and DOL does not disagree that the cited evidence proves the fact as stated. DOL offers no contrary evidence to create a genuine issue of fact.

49. By 1997, DOL knew that:

(a) El Paso training institutions were overwhelmed with more trade-dislocated workers than any other city in the nation, including thousands who were LEP;
(b) serial training was used for almost all LEP trade-dislocated workers, who were almost all enrolled in remedial ESL or GED courses;
(c) almost no bilingual training was available to LEP workers in El Paso; and
(d) the number of bilingual training opportunities available to El Paso's LEP workers needed to dramatically increase if these workers were to receive effective training.

Juarez Depo. at 16:14 to 22:1, 39:4 to 41:16, 68:25 to 70:5, 132:1 to 134:24, 276:21 to 277:8 ("I think most everyone there understood that there was a crisis with the number of people being laid off and that the training opportunities weren't there"), 291:3 to 294:23, 355:8 to 358:4, 467:15-22 (PA-12); TWC Memo (2/25/1997) at ETATOPL 2399 (PA-34); DOL PREP Grant Contract at ETATOPL 3889-90 (PA-43); NEW YORK TIMES (5/8/97 at A23) at ETATOPL 2422 (TWC's Linda Williamson is quoted: "The past program has failed, without question.") (PA-35); Hearing Transcript (10/20/2003) at 28:2 to 30:12 (PA-19).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Mr, Juarez testified that, by late 1997, El Paso's training opportunities "needed to be addressed by the community" due to the large number of workers laid off. Juarez Depo. at 17 (Exh. 35). Mr. Juarez further testified that at the time "the training opportunities weren't there immediately for all of those people [laid off] at once." Juarez Depo. at 277 (Exh. 35). Further, Mr. Juarez was aware that there were limited bilingual vocational training opportunities in El Paso in 1997. Juarez Depo. at 467 (Exh. 35). Plaintiff provides no evidence that any of these alleged conditions persist. The evidence cited also does not support the proposition that bilingual training needed to dramatically increase to provide effective training.

Plaintiffs' Reply: The cited evidence proves that there is no genuine issue but that Fact 49 is accurate as stated. The evidence consists of more than Mr. Juarez's testimony, which is the only item discussed in DOL's reply. *See also* Fact 27 (describing the Secretary of Labor's personal knowledge of the facts cited in Fact 49). DOL's statement that "Plaintiff provides no evidence that any of these alleged conditions persist" has nothing to do with Fact 49, which accurately reports DOL's knowledge in 1997.

50. Between 1997 and 2003, DOL documented numerous failed efforts to expand the number of bilingual training opportunities available to LEP workers in El Paso.

TWC Memo (2/25/1997) at ETATOPL 2398-2400 (PA-34); DOL Timeline Memo (6/5/1997) at *passim* (PA-70); DOL PREP Grant Contract at ETATOPL 3889-90 (PA-43); El Paso Meeting Minutes at 1-2 (PA-49); DOL Draft El Paso Workforce Report (9/2/1998) at ETATOPL 5250, 5252-53 (PA-50); DOL Email (3/2/2000) at 1-3 (PA-71); TWC Letter (6/20/2000) at 1 (PA-52); DOL OIG 2001 Audit at 18-24 and 57 (PA-73); DOL Hopkins Grant Contract (1/21/2001) at ETATOPL 5304 ("Although a significant amount of money has been invested in El Paso's workforce development, a successful training program for LEP adult students has not been created. The institutions and instructors providing services have been using the standard English language development approaches which do not work with El Paso's adult learners. Thousands of displaced

workers continue to experience failure, year after year, as they attempt to transfer what they learn into the workplace.") (PA-53); WDB Workforce Development Plan (7/22/2002) at WDB 258 (WDB "is challenged with redesigning public education and worker training initiatives to prepare workers for not only technical fields but equip workers with a strong grasp of fundamental skills such as applied mathematics. The difficulty arises because of the need to have the ... proprietary school owners and community college presidents re-think their current philosophy toward education. The instilling of accountability measures in URGWDB contracts to service providers is already being implemented; however, this too presents a problem in that there are no other training providers available in the area.") (PA-82); Owens Depo. (8/13/2003) at 22:20 to 23:21 (PA-15).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. The Department disputes this characterization of evidence as showing "failed efforts." Rather, these documents either indicate that there were "concerns" or "challenges", but not failures. See e.g., TWC Memo (2/25/1997) at ETATOPL 2399 (Exh. 18) and DOL PREP Grant Contract at ETATOPL 3889-90 (Exh. 9), respectively. DOL Draft El Paso Workforce Report (9/2/1998) at ETATOPL 5250, 5252-53 (Exh. 15). The TWC Letter (6/20/2000) at 1 (Exh. 19) and WDB Workforce Development Plan (7/22/2002) at WDB 258 (Exh. 16) are not Departmental documents, and thus could not support the allegation that "DOL has documented numerous failed efforts . . ." Finally, Ms. Johnnie Owens McDowell does not testify that the Department's efforts have failed, but rather agreed that a tremendous need for training still existed, and notes that the Department is initiating programs for this purpose. Owens Depo. at 23:12 to 23:22 (Exh. 37).

Plaintiffs' Reply: The Court may decide whether the cited evidence is more accurately characterized as identifying "challenges" and"concerns" as DOL says, or "failed efforts" as Plaintiffs' say. Certainly the documents prove that success was not achieved as of the date of each document, which is what Plaintiffs mean by "failed effort." Even if there is a dispute about characterization, the difference is not material to decision of this case on summary judgment. DOL's point at the end of its response, that Ms. McDowell testified in August 2003 that "the Department is initiating programs for this purpose" is not only gratuitous, but it is misleading. Ms. McDowell testified that the Workforce Development Board has submitted a major grant to expand bilingual training options for LEP workers in El Paso, and that DOL has not acted on this grant. Ms. McDowell did not testify that DOL is in fact responding to the problems; she testified that WDB has asked DOL to respond to the problems, and no answer has yet come from DOL. There is no question but that DOL is *not* "initiating programs for this purpose," contrary to DOL's suggestion in the response above.

51. DOL claims that adequate bilingual training opportunities became available to trade-dislocated LEP workers in El Paso before October 2003. Plaintiffs disagree.
Hearing Transcript (10/20/2003) at 17:12 to 18:19, 28:2-20 (PA-19).

DOL's Response: Clearly this fact is in dispute as "Plaintiffs disagree." The Department maintains that Plaintiffs have not proven that any alleged bilingual training deficiencies presently exist, which

Plaintiffs must prove in order to obtain injunctive relief. Hearing Transcript, 10/20/2003 at 18:8-19 and 28:2-9 (Exh.-20).

Plaintiffs' Reply: Fact 51 is accurate as stated, as proved by the cited evidence. The parties do dispute whether adequate bilingual training is available in El Paso, but the existence of this dispute is immaterial to this motion for summary judgment. What is material is that both parties agree that bilingual training is better for LEP workers than serial training, and that bilingual training is underutilized in El Paso. Facts 48-53. The reason that these undisputed facts are material is that the parties agree that the statute at issue must be interpreted to improve training outcomes for workers. 20 C.F.R. § 617.52(a). Every one of Plaintiffs' interpretations of the statute would increase LEP workers' access to bilingual training. Fact 51 prove that present underutilization of bilingual training in El Paso, according to DOL itself, is not due to the absence of available bilingual training.

52. The fact that some of El Paso's LEP trade-dislocated workers continue to enroll in remedial ESL courses instead of available bilingual training opportunities "horrifies" DOL.
Hearing Transcript (10/20/2003) at 24:7-22 (PA-19).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. The cited discussion references the fact that, even though bilingual training is available, LEP trade-dislocated workers are, themselves, not choosing this training, even when presented with the information. Counsel for the Department stated, "And yet, there are courses currently being offered by the El Paso Community College that are being underutilized. I can't give you a good explanation for that, except to say that it horrifies *me*." Hearing Transcript (10/20/2003) at 24:15-19 (emphasis added) (Exh. 20).

Plaintiffs' Reply: For purposes of party admissions against interest, DOL's lawyer speaks for DOL before this Court. *Lockette v. Greyhound Lines, Inc.*, 817 F.2d 1182, 1186 (5th Cir. 1987) ("because a client speaks through his attorney in court, any statement made by the attorney is held to be an admission of the client"; declining to apply the "doctrine of judicial admissions" when the party specifically removed the attorney's authority to admit a fact). Moreover, DOL offers no evidence to explain how the fact as stated could horrify the lawyer even while DOL itself is not horrified in the least.

53. For most LEP workers, bilingual training is more effective than serial training at rendering workers fully ready to work in higher-paying occupations.
Hearing Transcript (10/20/2003) at 35:7-10 (PA-19); Purnell Depo. at 108:20-23 (PA-16); El Paso Meeting Minutes (9/23/1997) at 1-3 (PA-49); DOL Memo (10/8/1997) at ETATOPL 3320 (PA-41); DOL Memorandum for the Secretary (6/6/97) at 1 (urging the Secretary to support "a retooling of the traditional ESL/GED classes with a focus on the integration of workplace literacy and occupational skills training and on-the-job training") (PA-46); DOL Draft El Paso Workforce Report (9/2/1998) at ETATOPL 5248-50 (PA-50); GAO Report at 60 (PA-72).

DOL's Response: Objection: Properly the Subject of Expert Testimony, Source Not Designated as Such. No Opportunity for Cross-Examination, Document Not Used for Its Intended Purpose, Vague. Moreover, it is unclear what Plaintiffs are referring to in the statement "rendering workers fully ready to work in higher-paying occupations." Plaintiffs provide no explanation of what qualifies as "higher-paying." Further, the only citation which arguably supports Plaintiffs' claim that "bilingual training is more effective than serial training . . ." is from Mr. Blumenfeld's argument before the Court in which he stated, "And for the most part, the workforce board agrees with the plaintiffs that this bilingual integrated vocational training model is the best way to go for most people and for most cases." Hearing Transcript (10/20/2003) at 35:7-10 (Exh. 20) (emphasis added). The citation to Ms. Purnell's deposition does not support the proposition; Ms. Purnell never agreed that bilingual training is more effective than serial training at rendering workers fully ready to work in higher-paying occupations. The rest of Plaintiffs' citations do not state that bilingual training is more effective than serial training at rendering workers fully ready to work in higher-paying occupations.

Plaintiffs' Reply: The cited evidence proves that there is no genuine issue but that Fact 53 is accurate as stated. No authority indicates that expert testimony is more reliable than other forms of evidence. DOL offers no contrary evidence to create a genuine issue of fact. Fact 53 uses "higher-paying" to mean that bilingual training is more effective at preparing workers to enter occupations that pay more money than the occupations that those workers could enter using serial training. *See also* Plaintiffs' Reply to Fact 27.

54. Bilingual training provides LEP workers with all necessary language and vocational skills for a particular occupation faster than serial training.
Purnell Depo. at 101:23 to 104:12, 107:9-13 (PA-16); Request for Proposal PREP-005 at 6-7 (PA-74); Juarez Depo. at 358:21 to 359:13 (PA-12).

DOL's Response: Objection: Properly the Subject of Expert Testimony, Source Not Designated as Such. No Opportunity for Cross-Examination, Document Not Used for Its Intended Purpose. The first citation to Purnell's Deposition does not support Plaintiffs' factual allegation, as there is no mention of bilingual training versus serial training. See Purnell Depo. at 101:23 to 104:12 (Exh. 38). The Request for Proposal PREP-005 at 6-7 (Exh. 21) does not state that bilingual training actually can provide LEP workers with all necessary language and vocational skills for a particular occupation faster than serial training, but rather that the successful bidder "must describe a design that promotes the development of a comprehensive bilingual vocational training program that meets the criteria below and where participants can be successful in 18 to 24 months." Id. at 6. The Department objected to Plaintiffs' question to Mr. Juarez regarding whether integrated training allows workers to become job-ready faster than serial training, because the question called for an expert opinion. Mr. Juarez qualified his answer to say that he is not an expert, but that he would generally agree with that statement. Juarez Depo. at 358:21 to 359:9 (Exh. 35). Plaintiffs have provided no further evidence, such as statistical or studies by experts in educational theory, to support this allegation; they instead rely on non-expert deposition testimony. Also, this allegation assumes that an individual will qualify for and successfully complete the training described.

Plaintiffs' Reply: DOL cannot dispute that Ms. Purnell herself is a highly qualified training administrator with years on the ground in El Paso and roughly a decade of training policy experience at TWC, and Ms. Purnell testified: "Q. Do you agree that one of the benefits of [a bilingual] approach to training LEP workers is that the worker can be job ready faster than under a serial approach? A. Yes." Purnell Depo. at 107:9-13. Ms. Purnell did not need to be qualified as an expert witness to state what she knows from her vast personal experience. No authority indicates that testimony by a person certified as an expert is more reliable than other testimony. If DOL believes that expert testimony is needed, it would be welcome to provide it to show that a genuine issue remains to be tried here, but it makes no attempt. Indeed, DOL can have no basis for challenging this statement of fact, since it provided WDB with federal funds to support bilingual training programs precisely *because* bilingual training renders workers job ready faster than serial training. Request for Proposal PREP-005 at 6-7 (PA-74) ("Currently the principal workforce development strategy for this population is to provide them first with English skills through English-as-a-Second Language or Adult Basic Education programs, then move them into Pre-GED/GED programs, and finally place them in English-based vocational training and job placement. This sequence of training usually requires 3-5 years to complete, and few members of the target populations successfully complete the cycle. ... The successful bidder must describe a design that promotes development of a comprehensive bilingual vocational training program that meets the criteria below and where participants can be successful in 18 to 24 months."); *see also* Facts 27 and 48 (corroborating this passage). There is no genuine issue but that Fact 54 is accurate as stated.

55. Bilingual training motivates workers to complete training better than serial training, because bilingual training is always focused on one particular occupation and because progress toward job readiness in that occupation is more rapid.
Purnell Depo. at 117:9-17 (PA-16); Houde Depo. at 32:24 to 33:15, 82:15 to 83:17 (PA-11).

DOL's Response: Objection: Properly the Subject of Expert Testimony, Source Not Designated as Such. No Opportunity for Cross-Examination, Document Not Used for Its Intended Purpose, Characterization. Ms. Purnell testified that in her opinion one of the side benefits of bilingual training is motivation. Purnell Depo. at 117:9-17 (Exh. 38). The cited testimony does not support the allegation that bilingual training always focuses on one occupation or that progress toward job readiness is more rapid through bilingual training.

Plaintiffs' Reply: The cited evidence proves that there is no genuine issue but that Fact 55 is accurate as stated. *See also* Fact 46 (defining bilingual training in terms of focus upon a specific occupation); Fact 54 (bilingual training renders workers job ready faster than serial training). No authority indicates that testimony by a person certified as an expert is more reliable than other testimony. If DOL believes that expert testimony is needed, it would be welcome to provide it to show that a genuine issue remains to be tried here, but it makes no attempt.

56. Bilingual training requires a specialized curriculum to be developed for each occupation, and this occupation-specific curriculum development costs money.
Juarez Depo. at 377:7 to 378:14 (PA-12); Purnell Depo. at 124:17-20 (PA-16).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material.

Plaintiffs' Reply: DOL fails to specify any reason in support of its objection. The cited evidence proves that there is no genuine issue but that Fact 56 is accurate as stated.

57. Bilingual training requires specialized training for the instructors who provide this type of training to LEP workers, and this instructor training costs money.
Juarez Depo. at 377:7 to 378:14 (PA-12); Purnell Depo. at 124:12-15 (PA-16).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material.

Plaintiffs' Reply: DOL fails to specify any reason in support of its objection. The cited evidence proves that there is no genuine issue but that Fact 57 is accurate as stated.

58. Bilingual training is more expensive than ESL or GED courses.
Purnell Depo. at 112:2-5 (PA-16); Owens Depo. at 64:20 to 65:16 (PA-15); El Paso Meeting Minutes (9/23/1997) at 2-3 (PA-49).

DOL's Response: No objection.

59. Though DOL admits that it has authority to provide Trade Act money for the curriculum development and teacher training necessary to expand bilingual training programs, DOL has not made Trade Act money available for curriculum development or teacher training in El Paso.
Tomchick Depo. at 23:16 to 24:5 (PA-18); Purnell Depo. at 136:21 to 137:13, 158:16 to 160:13 (PA-16); Hopkins Memo to DOL (12/16/1999) at 1 (PA-42).

DOL's Response: Objection: Calls for a Legal Conclusion, Characterization, Not Supported by the Cited Material. The evidence does not support the implication that the Department has withheld money for curriculum development. Mr. Tomchick testified that states could request Trade Act money for curriculum development. Ms. Purnell testified that if she were aware that curriculum money was available, she would "explore what that meant" and look into requesting that funding. Purnell Depo. at 158-59 (Exh. 38). The "Hopkins Memo" to which Plaintiffs refer is an announcement that the Adult Bilingual Curriculum Institute, a collaborative project between the Upper Rio Grand Workforce Development Board and The Greater El Paso Chamber of Commerce, and funded by Texas, was suspending operations because of the lack of an "infrastructure and

[]investment needed to respond to the crisis of the workforce system." CRESPAR Memorandum, Dec. 16, 1999 (Exh. 11).

Plaintiffs' Reply: The cited evidence proves that there is no genuine issue as to the fact as stated, and DOL does not disagree or produce any contrary evidence. The fact does not use the word "withheld," nor is such an implication material to the fact as stated. The Hopkins Memo sent to DOL states that its El Paso bilingual curriculum development operations were suspended for lack of "funding." Hopkins Memo to DOL (12/16/1999) at 2 (PA-42). Of course, if any funding evidence existed that was inconsistent with Fact 59 as stated, it would be readily available to DOL, yet DOL produces no evidence in support of its position that a trial is needed on this issue. *See* Fact 42.

60. DOL has not provided any policy directives to state agencies concerning when they should provide bilingual training to LEP workers under the Trade Act.
DOL Interrogatory Response No. 13 (PA-25).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. This statement mischaracterizes the Department's Interrogatory Response No. 13 (Exh. 8). When asked "Please list each policy or practice that you have implemented concerning the extent to which you allow a worker's Trade Act training to consist of remedial ESL or GED course . . .", DOL responded as follows: "The regulation at 20 C.F.R. 617.21(g) provides that remedial education and ESL may be approved training if it meets the criteria set forth in 20 C.F.R. 617.22(a)." The regulation is the Department's policy. DOL Interrogatory Response No. 13 (Exh. 8). This response is in reference to ESL and GED training; it is unclear how this relates to when to provide bilingual training to LEP workers under the Trade Act.

Plaintiffs' Reply: If DOL has any policy directives that fall within the description in Fact 60, it should simply and readily be able to produce them. Instead, without any evidence, it merely disagrees over what it meant by its interrogatory response.

61. TWC continues to approve serial training for LEP workers under the Trade Act.
Candelaria Depo. at 20:15 to 24:8, 70:4 to 74:25, 93:24 to 94:20 (PA-4); Purnell Depo. at 67:12 to 68:11 (PA-16); Juarez Depo. at 355:8-12 (PA-12); Bostic Depo. at 37:22 to 39:12 (PA-2); Hearing Transcript (10/20/2003) at 24:7-22 (PA-19); ATF Worker Declarations (PA-20); Glenn Gilbert Affid. (PA-22).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Moreover, the Department has not had an opportunity to depose and/or cross examine any of the individuals identified in the affidavits at facts 23, 61, 74, 106 and 107.

Plaintiffs' Reply: The cited deposition testimony is set out in Part II of Plaintiffs' Reply Memorandum, and it proves that there is no genuine issue as to Fact 61. DOL is wrong that it has not had an opportunity to depose the declarants named in the evidence supporting Fact 61. DOL

actually deposed Mr. Glenn, and DOL had the declarations of Ms. Muñoz, Ms. Soriano, Ms. Valles, and Ms. Gomez several months before discovery closed in Civil Action No. EP-02-CA-131, and DOL never sought these declarants' depositions. The remaining seven declarations were served on DOL in July 2004 while parallel litigation was pending in the U.S. District Court for the District of Columbia, and DOL never sought their depositions, inside or outside that litigation. Moreover, the remaining seven declarations are not necessary for Plaintiffs to establish that there is no genuine issue of material fact as to Fact 61. The only evidence before the Court is that TWC continued to routinely approve serial training as of the time that discovery closed in this case's predecessor in August 2003. Two months later, DOL represented to this Court that DOL allows TWC to continue approving serial training for LEP workers whenever workers choose serial training. Hearing Transcript (10/20/2003) at 24:7-22 (PA-19). This evidence alone proves a continuing TWC practice. Finally, Plaintiffs' Reply to Fact 73 is applicable here, and Plaintiffs submit this reply as to this Fact 61 as well.

62. Serial training for LEP workers in El Paso has been criticized as ineffective and a waste of at least $106 million federal taxpayer dollars.

DOL OIG 2001 Audit at 9 ("Approximately $106 million in costs were incurred on behalf of 4,275 dislocated workers in El Paso, Texas, without substantial wage gains as a result of this investment.") (PA-73); NEW YORK TIMES (5/8/97 at A23) at ETATOPL 2422 ("'We know that the training you have received has been of no benefit to you,' said Juan Garcia, a retraining specialist with [TWC], as [a worker] nodded.") (PA-35); DOL Email on Wall Street Journal Article (3/2/2000) at 1 ("[T]he following is a question we need dotpoints to respond to[:] *The Department invested millions of dollars in the Dislocated Worker project on the Texas border in El Paso. Yet there was a recent Wall Street Journal article highlighting the total waste of these funds, essentially enriching the training providers but not helping the people be trained for jobs in demand and not helping the people find jobs. What went wrong and what are you doing to address the problem?*") (emphasis in original) (PA-71).

<u>DOL's Response</u>: Objection: Characterization, Not Supported by the Cited Material. The Wall Street Journal article noted is from March of 2000. The Department e-mail referred to was an internal e-mail simply stating that a Wall Street Journal article contained this information and the Department needed to respond. This is not the Department's response to this article.

<u>Plaintiffs' Reply</u>: The date of the Wall Street Journal article is of no relevance to its validity as a published criticism of the efficacy of serial training in El Paso. The characterization, "waste" of federal taxpayer dollars belongs squarely to DOL's senior administrator Shirley Smith, as quoted from her email. Regardless of whether the email may be called DOL's response to the article, Ms. Smith read the Wall Street Journal article and considered it to raise the question of whether ongoing serial training in El Paso is a waste of federal taxpayer money. That is certainly how Plaintiffs read the article, and how Plaintiffs anticipate the Court would characterize it as well, if necessary, considering the other evidence cited to which DOL does not respond. There is no genuine dispute but that the cited evidence supports Fact 62 as stated.

V. JOB READINESS VIOLATION

63. The Trade Act specifies six criteria that must all be met as a precondition to approval of any Trade Act training.
19 U.S.C. § 2296(a)(1)-(2); 20 C.F.R. §§ 617.21(f)-(g) and 617.22(a); DOL Policy GAL 15-90, Ch. 3 at 1 (19 U.S.C. § 2296(a)(1) "lists six criteria that must be met for approval of training[, and these] are intended to assure that training will lead to suitable employment") (PA-66); DOL Policy GAL 15-90 at ETATOPL 8855 (PA-67); DOL Policy GAL 2-88 at 8 (PA-57).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: DOL DOL cannot dispute the statement, regardless of whether it is interpreted as a conclusion of law or of fact, because the statement comes from DOL's brief to this Court:

> "Section 2296 of the Trade Act is the section that covers training. This section contains six criteria that must be met in order for an individual to qualify for training under the Trade Act. 19 U.S.C. § 2296(a)(1)(A)-(F). In addition to being certified, an individual must meet these criteria in order to receive training."

DOL Motion for Summary Judgment at 5, Civil Action No. EP-02-CV-131, Docket No. 156.

64. DOL directs that "Reasonable expectation of employment should be the primary consideration in approval of [Trade Act] training."
DOL Policy GAL 2-88 at 4 (PA-57).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material, Calls for a Legal Conclusion. The General Administration Letter cited by Plaintiffs stated that "reasonable expectation of employment should be the primary consideration in approval of training" in response to a question regarding whether States may establish standards for disapproving training for airplane pilots, helicopter pilots, taxidermists, florists, cosmetology teachers and managers. DOL GAL 2-88 at 4 (Exh. 12).

Plaintiffs' Reply: If DOL has published guidance to state agencies that clarifies or qualifies its policy as stated in Fact 64, it need only produce that document to establish that there is a genuine issue as to this fact. Otherwise, the only guidance available to Plaintiffs, and more importantly to state agencies, says that reasonable expectation of employment is the primary factor to be considered in Trade Act training approval.

65. Three months after Congress amended 19 U.S.C. § 2296 in 1988, DOL issued its regulation stating that a condition for the approval of any Trade Act training program is "that the individual will be job-ready on completion of the training program."
53 Fed. Reg. 48474, 48485-86 (Nov. 30, 1988); 20 C.F.R. § 617.22(a)(2); *see also* DOL Audit Notice Memo (10/20/93) at 1 ("The most recent changes to the TAA program contained in the

OTCA of 1988 emphasize the importance of training, rather than additional unemployment compensation as a means to assist workers to find suitable employment, and require training, unless specifically waived, as a condition to receive TRA payments.") (PA-60); OTCA, Pub. L. 100-418 § 1424, 102 Stat. at 1249 (the 1988 amendments to 19 U.S.C. § 2296 made training an entitlement for all trade-dislocated workers, increased the cap on training funds available each year to $120 million, prohibited self financed training, and added a second specific statutory directive to DOL to issue regulations specifying how state agencies must interpret every requirement in 19 U.S.C. § 2296(a)(1)).

DOL's Response: Objection: Calls for a Legal Conclusion

Plaintiffs' Reply: This statement does not call for a legal conclusion. It is a statement of what DOL did, when DOL acted, and where the cite to that act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated. The fact is relevant to contemporaneousness, as explained in Plaintiffs' Reply.

66. At least three times over the past decade, DOL has approved the following Trade Act training policy for use in Texas:

> **III. TAA TRAINING APPROVAL CRITERIA**
> **The Omnibus Trade and Competitiveness Act (OTCA) of 1988 provided an opportunity for the U.S. Department of Labor to elaborate on, and significantly expand the rules for approving TAA training. ... Following are the criteria which will be used to determine if a request for training can be approved. ....**
> **C. A reasonable expectation of employment exists following completion of the proposed training.**
> **Given the job market conditions expected to exist at the completion of the training, there must be a reasonable expectation [that] the worker will be able to find employment using the skills obtained while in training.**
> **The proposed training program must provide all the skills and requirements upon completion which are needed for the worker to be job ready. If the occupation for which the proposed training is preparing the worker requires a license, then the training program must include gaining the license. <u>The worker must be job ready in every aspect immediately upon completion of the training.</u>**

TWC Policy Manual at ETATOPL 5801-02 (PA-56); DOL Letter (9/13/2002) at 1 (PA-58); DOL Monitoring Letter to TWC (3/8/2001) at ETATOPL 4323 (PA-45); DOL Texas TAA Review (9/17/98) at ETATOPL 8566 (PA-65).

DOL's Response: No objection.

67. DOL admits that in 1988 Congress amended 19 U.S.C. § 2296:

> **to add remedial education and mixed-funding training as specified in new paragraph (5)(E). The addition of remedial education as a separate and distinct approvable training program is a significant change. Previously, remedial education was approvable only as part of a broader training program that also included skills training. With this change remedial education is approvable as a distinct training program, without the need to include skills training. Nevertheless, <u>in order to meet all of the criteria of [19 U.S.C. § 229]6(a)(1), remedial education may be approved as a separate and complete training program only where no skills training is necessary to make the worker job ready upon completion of the training.</u>**
>
> **...**
>
> **Remedial education may be approved as a training program for a worker when the six (6) criteria of [19 U.S.C. § 229]6(a)(1) are met. Remedial education may continue to be offered when included as an integral part of an overall training program for a worker. However, this amendment recognizes that for some workers, the use of remedial education to improve certain basic skills may be the <u>only</u> assistance an individual worker requires to return to suitable work.**

DOL Policy GAL 15-90 at ETATOPL 8855-56 (emphasis added) (PA-67).

<u>DOL's Response</u>: Objection: Calls for a Legal Conclusion

<u>Plaintiffs' Reply</u>: This statement does not call for a legal conclusion. It is a statement of what DOL did, when DOL acted, and where the cite to that act may be found. DOL does not dispute the accuracy of the quote or the cite. The fact is accurate as stated.

68. LEP trade-dislocated workers in El Paso typically need to acquire both vocational skills and English skills before they will be job ready in another occupation.

Juarez Depo. at 207:22 to 208:7 (PA-12); DOL Timeline Memo (6/5/1997) at 4 ("the intention all along had been to move [El Paso LEP] workers into vocational training programs when they had completed enough ESL/GED to qualify") (PA-70); DOL PREP Memo at 10 (PA-39); Purnell Depo. at 115:16 to 116:24 (PA-16).

<u>DOL's Response</u>: No objection.

69. DOL allows TWC to approve Trade Act training programs for LEP workers that consist exclusively of general remedial ESL or GED courses or both, even when TWC knows that these workers also needed vocational training before they will be job ready in another occupation.

DOL Interrogatory Response No. 7 (PA-25); DOL PREP Memo at 10 ("TAA training is limited to 104 weeks by law and the worker must complete the proposed program and be job ready within this period. Many of the affected workers in El Paso required long-term training well beyond the 104 week period, thus necessitating a coordinated effort by all programs to provide the resources needed for a lengthy training. The training infrastructure was not in place to handle the volume or the needs

of this special group of workers. Most workers required some ESL/GED plus skill training.") (PA-39); DOL PREP Grant Contract at ETATOPL 3889-92 and 3897-3903 (PA-43); Hearing Transcript (10/20/2003) at 30:1-12 (PA-19).

DOL's Response: Objection: Characterization, Not Supported by Cited Material, Relevance. The PREP Memo cited is a summary of the issues that arose in Texas as related to the PREP Project, which was conducted in 1998, thus it is not contemporaneous to this case. The DOL PREP Grant Contract is similarly not contemporaneous and does not support the allegation. The statements in the Hearing Transcript are, again, related to the PREP Project and not contemporaneous. The Department's Response to Interrogatory No. 7 requests the Department to list every action the Department has taken in El Paso since 1997 related to training opportunities. It is not relevant to the allegation.

Plaintiffs' Reply: The cited evidence proves that DOL blessed TWC's practice of routinely approving remedial education for thousands of LEP workers in El Paso throughout the 1997 to 2000 time period, even when TWC knew that the workers needed vocational training before they would be job ready. DOL even provided funding to establish the PREP program, which had the specific objective of extending the training time available to these trade-affected workers beyond the time allowed under the Trade Act. DOL's sworn response to Interrogatory No. 7 describes the PREP program and its objectives. The cited evidence proves the fact as stated.

70. DOL not only allows TWC to approve incomplete Trade Act training, but DOL has even studied the issue and recommended this practice:

> **What is your assessment regarding the situation and how do you think we should respond or what action should we take?**
>
> **Answer: This problem is just the tip of the iceberg. Workers in other border areas besides El Paso are faced with the same dilemma. ... The workers need ESL and Remedial and then skill training. ... TAA can only approve training for a maximum of 104 weeks. ... If they cannot read, write or speak English the appropriate initial training seems to be remedial.**
>
> **Let TAA continue to approve remedial. Once the worker is able to take the necessary aptitude test have [a funding source other than the Trade Act] enroll in Skills training ....**

DOL Memo (Jan. 1997) at 4 (PA-69); Juarez Depo. at 34:9 to 35:23, 53:4-13, 210:20 to 212:7, 469:10 to 470:18 (PA-12); Cole Depo. at 71:1 to 73:21, 114:6-17, 129:7-13 (PA-5).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. The DOL memorandum cited dates from January of 1997. Thus, it is not contemporaneous to this case. The information quoted does not specifically state that TWC was approving "incomplete training;" it merely acknowledges a dilemma regarding the need for ESL and remedial training. Preston Murray,

the UI Program Specialist, was recommending to Joseph Juarez that if a worker exhausted Trade Act training, JTPA or another similar funding source could be used to enroll the worker in skills training. Mr. Juarez testified that he had discussions with his staff regarding ESL training, and that he did not believe ESL only training was forbidden by the statute or the regulations, even if ESL only training does not provide all the skills needed for a specific job. See Juarez Depo. at 34-35, 53 (Exh.35).

Ms. Cole testified that the Department, when reviewing case files, wants to see specific occupations goals listed for workers receiving training under the Trade Act, including those receiving remedial training. She further testified that if a specific occupational goal was not listed, it would not violate DOL policy. See Cole Depo. at 73 (Exh. 32). However, Ms. Cole had testified immediately prior to that that no occupation listed on an intake was not something she would want to find during a review, and she testified that she did not, in fact, find this to be the case for any of the case files she reviewed. See Cole Depo at 73:9-14 (Exh. 32). Ms. Cole also testified that based on her experience in El Paso, workers with limited English proficiency were for the most part placed in ESL and GED programs, and not in vocational training programs. See Cole. Depo. at 114, 129 (Exh. 32). Ms. Cole also testified that she could not say she encountered a situation where a worker was offered ESL training but did not want it. See Cole Depo. at 114:18-23 (Exh. 32).

Plaintiffs' Reply: There is no dispute that the DOL memo dates from January 1997. The age of the memo does not diminish the fact that in it, DOL recommends the very policy that Plaintiffs claim is illegal. DOL attempts to spin the text of this memo to cast doubt on whether DOL recommended approving incomplete training, but DOL names no reason why this is not the only plausible reading of the text. The memo plainly makes a recommendation in response to Mr. Juarez's question, "what action should we take?" The memo specifies that "the workers need ESL and Remedial and then skill training." The answer: "let TAA continue to approve remedial. Once the worker is able to take the necessary aptitude test have [a funding source other than the Trade Act] enroll in skills training...." According to DOL's own policy statement, approving remedial training for a worker who is known to need both remedial and vocational training is illegal because it is incomplete training. Fact 67. DOL's response concedes that even as late as 2003, "Mr. Juarez did not believe ESL only training was forbidden by the regulations, even if ESL only training does not provide all the skills needed for a specific job." Not only is it remarkable that Mr. Juarez would not have known better at this late date given his extensive involvement in the training needs of LEP workers, it also perfectly consistent with Mr. Juarez having taken the advice quoted in the DOL memo. Ms. Cole did not know any better either, as shown by her testimony that in her experience in El Paso, LEP workers were for the most part placed in ESL/GED programs, and she did not see anything wrong with this. *See* Fact 68 (most LEP trade-dislocated workers in El Paso need both skills training and remedial education). Thus, the text of DOL's response only confirms that the cited evidence proves that no genuine issue of fact exists as to Fact 70.

71. DOL explains its practice of allowing approval of incomplete Trade Act training as follows:

> **The statute and regulations require that there must be a reasonable expectation of employment upon completion of training and that the worker will be job**

ready at the completion of training. There may be cases in which the assessment of a worker's skills indicates that the available 104 weeks of training, or 130 weeks if remedial education is needed, may be insufficient to provide all of the training needed by an individual to be job ready at the completion of training, and the individual may need additional training funded by another source. In such cases, the training program that may be approved should provide as many of the job skills as possible.

DOL Admission No. 22; *accord id.* Nos. 19, 20 (PA-24); Juarez Depo. at 53:4-13, 181:3 to 182:10 ("the law does not require that the participant be fully job ready") (PA-12); Kooser Depo. at 124:11 to 125:2 (PA-13); Donahue Depo. at 171:22 to 172:3 (PA-8).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. The regulations and the Department's policy require that an individual be job ready. In response to the Request for Admission, the Department *denied* that, since 1997, the Department has not required Trade Act training to render a worker job ready. See DOL's Response to Request for Admission No. 22 (Exh. 17).

Plaintiffs' Reply: In each one of the three cited DOL Admission Nos. 19, 20, and 22, DOL squarely admits that, although DOL has an absolute training completeness requirement in its regulations at 20 C.F.R. § 617.22(a)(2), DOL has nonetheless created the exception to the absolute training completeness requirement that is quoted in Fact 71. In light of the language of these three admissions (including "admitted") and the requirement of Rule 36(a) that a party "shall specify so much of [each requested admission] as is true and qualify or deny the remainder," DOL's suggestion that it really "denied" making the exception is laughable.

72. DOL acts to allow TWC to approve incomplete Trade Act training, as described in Fact 74 below, by:

(a) periodically stating its approval of this action as a matter of DOL policy;
(b) periodically monitoring TWC's compliance with the Trade Act and finding TWC in full compliance despite TWC's routine approval of incomplete training; and
(c) periodically providing funds that enable TWC to continue its practice of approving incomplete training.

See Facts 17, 59, 66, 69, 70, 71, 74, 112, and 114, and supporting record cites.

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. The Department's policy is that training render a worker job ready. The Department does, periodically, monitor States' compliance with the Trade Act. TWC was reviewed in 2000 and was not found to routinely approve incomplete training. The Department does still provide Trade Act funds to Texas. Please note the Department's response to the cited facts, 17, 59, 66, 69, 70, 71, 74, 112, and 114. The information in the various cited facts does not support this allegation.

Plaintiffs' Reply: DOL cannot seriously claim that "TWC was reviewed in 2000 and was not found to routinely approve incomplete training" when neither Mr. Juarez nor Ms. Cole believed that there

was anything wrong with approving incomplete training at that time, *see* Fact 70, and when DOL cites no evidence to indicate that DOL made any such finding. Instead, directly contrary to the unsupported representation that DOL now makes to this Court, DOL's January 2000 monitoring report states:

> TAA training is limited to 104 weeks by law and the worker must complete the proposed program and be job ready within this period. Many of the affected workers in El Paso required long-term training well beyond the 104 week period; thus necessitating a coordinated effort by all programs to provide the resources needed for a lengthy training. The training infrastructure was not in place to handle the volume or the needs of this special group of workers. Most workers required some ESL/GED plus skill training.

DOL Texas Trade Act Review (1/14/2000) at 10 (PA-39). After noting that TWC in fact routinely approved incomplete training, DOL included no compliance directions or warning to TWC concerning its practice. DOL's other objections to Fact 72 are equally fallacious. There is no genuine issue as to each of the facts cited in support of Fact 72, as described in the arguments below each one.

73. In continuing to approve incomplete Trade Act training for LEP workers, TWC claims to apply the DOL standard quoted above in paragraph 71.
Purnell Depo. at 208:3 to 209:16 (PA-16).

DOL's Response: The Department Cannot Respond to this Factual Allegation.

Plaintiffs' Reply: Presumably DOL's cryptic response here has to do with the stay in Civil Action No. EP-02-CA-131, for otherwise, Rule 56(f) requires DOL to provide an affidavit stating the reasons why it cannot presently provide contrary evidence if it wishes to resist summary judgment on the ground of inability to secure necessary evidence. Plaintiffs make two points in reply, assuming that DOL is claiming that the stay prevents it from responding. First, Plaintiffs' evidence supporting Fact 73 shows the absence of any genuine issue as to this fact at least through the close of discovery in Civil Action No. EP-02-CA-131 in August 2003; DOL had equal access to discovery during this time, and it has adduced nothing to contradict Plaintiffs' cited evidence. Second, as to the period after August 2003, what TWC has done regarding continued application of DOL's exception to the training completeness requirement (Fact 71) is not material to whether Plaintiffs are entitled to the injunctive relief that they seek. Even assuming for the sake of argument that TWC has suspended its application of DOL's policy as stated in Fact 71, if DOL's policy is not corrected by the injunction that Plaintiffs seek, nothing would prevent TWC from reinstating its pre-August 2003 practice at a later time. After all, Plaintiffs' have sued DOL here for DOL's illegal policies, and the only relevance of TWC's actions is to show that DOL's illegal policies have caused Plaintiffs legal harm. *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373, 2378 (2004) (The elements of a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. § 706, are: (1) the existence of a statutory requirement; (2) federal agency violation of the statutory requirement; and (3) harm to a Plaintiff that is fairly traceable to the federal agency violation.). TWC's pre-August 2003 practices amply show that DOL's policies, which have not changed since

August 2003, are fairly traceable to Plaintiffs' harm. Post-August 2003 evidence of TWC's conduct is thus unnecessary to grant Plaintiffs the relief that they seek.

74. TWC uses three methods to approve incomplete training for LEP workers who need both language and vocational skills before they will be job ready:

(a) it approves ESL and GED courses as a worker's sole training program while naming "ESL/GED" or another form of remedial education as the <u>occupation</u> for which the worker is being trained;

(b) approves remedial education as a worker's sole training program after naming a target occupation for the worker which requires vocational training; and

(c) it approves training programs that consist of remedial education classes followed by vocational training, while anticipating that the training program will have to be later amended to extend the length of remedial education to the exclusion of necessary vocational training.

Crawford Depo. at 69:1 to 70:8 and 72:19 to 76:4 (PA-6); Candelaria Depo. at 20:15 to 24:8 ("Roughly, my estimate would be, about 90 percent" of El Paso LEP workers were enrolled in ESL and GED as their Trade Act training), 70:4 to 74:25, 93:24 to 94:20 (PA-4); Guzman Depo. at 5:4 to 5:22 and 44:24 to 45:22 (PA-10); Purnell Depo. at 206:14 to 209:16 (PA-16); Owens Depo. at 58:14-18 (PA-15); DOL OIG 2001 Audit at 18-19, 36 (PA-73); TX Funding Documents (12/20/2001) at ETATOPL 7169-70 (DOL routinely approved TWC requests for Trade Act training funds based upon TWC's notice to DOL that TWC provides Trade Act training "in 266 different occupations, some of which are: law enforcement, drafting, nurse aide, cashier, paralegal, surgical technician ... truck driving, <u>ESL/GED</u>, and airframe/power plant mechanics") (emphasis added) (PA-59); DOL PREP Memo at 8 ("more than 90 percent of the participants enrolled in ESL had received extensions for participation in ESL classes") (PA-39); ATF Worker Declarations (PA-20); DOL OIG Draft Audit Findings (8/6/2001) at OIGTOPL 223-24 (TWC often scheduled vocational training for trade-dislocated workers in El Paso because "TAA funded training required a vocational component to be scheduled," but "that is misleading. Many of the enrollees simply didn't get any vocational training. Many other enrollees either received vocational training in name only ....") (PA-81).

<u>DOL's Response</u>: The Department Cannot Respond to this Factual Allegation.

<u>Plaintiffs' Reply</u>: Plaintiffs submit the identical reply for Fact 74 as they did for Fact 73 above.

75. For example, TWC approved basic remedial education as Mr. Raul Trejo's only Trade Act training even though his career goal is listed as "computers" which will require "vocational training," and TWC's case worker explains on the very training application that Mr. Trejo will only have a reasonable expectation of employment "after vocational training" that is not included in the approved training program.

Training Approval for Raul Trejo at 2-3 (PA-76).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. Mr. Trejo was approved for and completed commercial truck driving training. See WDB Review of Training Opportunities Form (reflecting approval of truck driving program) (Exh. 27).

Plaintiffs' Reply: The evidence cited in DOL's response shows that after Mr. Trejo began his incomplete training program, TWC had a complete training program approved for him. Violation of the Trade Act's training completeness requirement occurred at the outset, when TWC approved remedial education as Mr. Trejo's sole Trade Act training even when his training approval application itself stated that Mr. Trejo would not have a reasonable expectation of employment until "after vocational training," just as shown by the cited evidence. There is no genuine issue but that incomplete Trade Act training was approved for Mr. Trejo as stated in Fact 75, regardless of the fact that his tenacity ultimately enabled him to gain approval of a complete training program.

76. For another example, on March 7, 2003, TWC approved Trade Act training for Mr. Rodolfo Gilbert that consists exclusively of "Traditional ESL/Traditional GED" to prepare him for an occupation that TWC calls "ESL/GED."
Glenn Gilbert Affid. at 1, 3 (PA-22).

DOL's Response: Objection: Insufficient Data Presented; No Opportunity for Cross Examination. Plaintiffs present two documents related to Mr. Gilbert's training. The Department has no other information related to Mr. Gilbert beyond Plaintiffs' exhibits. The Department cannot ascertain what, if any, other training Mr. Gilbert may have taken or had approved. The Department also cannot ascertain whether Mr. Gilbert needed any training beyond ESL/GED.

Plaintiffs' Reply: On July 21, 2003, Plaintiffs identified Rodolfo Gilbert to DOL among Plaintiffs' first tier of witnesses that Plaintiffs expected to call at trial. Civil Action No. EP-02-CA-131, Docket No. 129. Plaintiffs' counsel, Jerome Wesevich, also represents that he provided Mr. Gilbert's training documents as in PA-22 to DOL well before this time, though in the time available for reply he has been unable to locate the cite for this. In any event, DOL knew well before discovery closed that Mr. Gilbert would testify, and DOL never sought his deposition. As for DOL's "other training" argument, since Trade Act training is limited to one training program per person by 20 C.F.R. § 617.22(f)(2), so DOL can indeed "ascertain what, if any, other training Mr. Gilbert may have taken or had approved." Of course the fact that ESL/GED is listed as the occupation for which Trade Act training was approved for Mr. Gilbert, in violation of 20 C.F.R. § 617.22(f)(2), makes it impossible to "ascertain whether Mr. Gilbert needed any training beyond ESL/GED," and it thus necessarily impossible for TWC to have concluded that Mr. Gilbert had a "reasonable expectation of employment" as an ESL/GED. DOL cannot escape the training completeness requirement by failing to name the occupation for which training is provided under the Trade Act as its own regulations require. There is no genuine dispute as to Fact 76.

VI. 80% WAGE REPLACEMENT VIOLATION

77. DOL admits that employment paying 80% or more of each worker's prior wages is Congress's goal for Trade Act training.
DOL Admission Nos. 3, 26 (PA-24); Kooser Depo. at 106:1 to 107:3 (PA-13); 20 C.F.R. § 617.2; 51 Fed. Reg. 45840 (Dec. 22, 1986) ("The amended TAA provisions are designed to assist adversely affected workers to return to work in equivalent or better employment as quickly as possible.").

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. The Department has set an 80 percent wage replacement goal for the Trade Act training program. See e.g., DOL Admission No. 3 (Exh. 17); Kooser Depo. at 148-49 (Exh. 36).

Plaintiffs' Reply: Plaintiffs' discuss this issue of whether Congress or DOL established the 80% wage replacement goal for Trade Act training in Part III.A. of Plaintiffs' Reply Memorandum.

78. In terms that are explicitly non-binding, DOL informs state agencies that the goal of Trade Act training is to produce 80% or more in wage replacement.
Cole Depo. at 35:15 to 43:4 (PA-5); Kooser Depo at 42:3 to 43:1, 106:1 to 107:3, 146:22 to 151:10 (PA-13); Juarez Depo. at 222:6-9, 227:23 to 228:1 (PA-12); Crawford Depo. at 23:7-10 (PA-6).

DOL's Response: No objection.

79. In numerous documents, DOL embraces the 80% wage replacement goal for Trade Act training.
E.g. GAL 15-90 Change 3 at 1 (the six criteria for training approval under 19 U.S.C. 2296(a)(1) "are intended to assure that training will lead to suitable employment"); DOL Monitoring Letter to TWC (3/8/2001) at ETATOPL 4324 ("While this program provides trade-impacted dislocated workers with job search assistance and, if necessary, retraining ... its ultimate goal is to place participants in employment that pays at least 80% of their pre-dislocation wage.") (PA-45).

DOL's Response: No objection.

80. In numerous documents, DOL rejects the 80% wage replacement goal for Trade Act training.
E.g. DOL Brief at 10 (absence of "suitable" before "employment" in 19 U.S.C. § 2296(a)(1)(C) shows that Congress "never intended training to lead to ... suitable employment") (PA-26); DOL OIG 1993 Audit at 78 ("the definition [of suitable employment under 19 U.S.C. § 2296(e) applies only to determine who qualifies for training, and] is being used out of context when applied to post-training employment") (PA-61); Juarez 9/13/2002 Letter to TWC at 1 (approving TWC policy manual whose only mention of wage replacement is: "[w]hether the employment pays 80% of the

affected average weekly wage is not a consideration in determining if there is a reasonable expectation of employment following training," *see* TWC Policy Manual, ETATOPL at 5843 in PA-56); DOL Advisory Board Minutes (9/26/2002) at 5 ("OIG reports of TAA in 1993 and 2001 have judged TAA program as failing if all workers are not provided 80% wage replacement .... There has been little cooperation from the OIG in looking at averages instead of each individual case. There needs to be an effort to get OIG to interpret the law differently.") (PA-80); Kooser Depo. at 42:3 to 43:19 (DOL "is in the process of changing" its policy on what the objective of Trade Act training is), 46:6-22 (PA-13).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. This statement mischaracterizes the Department's position and consistently held view regarding 80% wage replacement. The Department recognizes that 80% wage replacement is not a statutory mandate; however, the Department sets forth 80% wage replacement as a goal under the Trade Act. Plaintiffs refer to a Department Brief which simply recognizes that 80% is a goal and not a requirement. The 1993 OIG Audit letter reflects the Department's consistent interpretation that 80% wage replacement is a goal, not a statutory mandate. The Advisory Board Meeting Minutes Plaintiffs cite reflects the Department's consistent interpretation that an 80% replacement wage is a goal, not a requirement, and therefore the program should not be characterized as "failing" if TAA workers receive 100% replacement wages after two years, instead of merely 80% immediately following training. DOL Advisory Board Minutes at 5 (Exh. 10). Mr. Kooser was responding to a question asking for his understanding of the Department's objective for TAA training and he testified that he understood the Department was in the process of revising its policy. He did not testify that DOL rejects the goal of 80% wage replacement. See Kooser Depo. at 42-43 (Exh. 36).

Plaintiffs' Reply: In attempting to justify each of its statements, none of which it denies, DOL's response skips DOL's approval of TWC's explicit rejection of Congress's 80% wage replacement goal. *See also* Fact 93. The cited evidence supports the fact as stated.

81. DOL has no policy that states what actions state agencies must take to achieve the Trade Act's 80% wage replacement goal as they decide what Trade Act training to approve. Kooser Depo at 42:3 to 43:1 (PA-13); DOL Interrogatory Response No. 11 (PA-25); DOL Admission No. 5 (PA-24).

DOL's Response: Objection: Characterization, Not Supported by the Cited Material. State agencies are not required to condition approval of TAA training upon a determination as to whether training could lead to employment paying 80% or more of each worker's prior wages. DOL Admission No. 5 (Exh. 17).

Plaintiffs' Reply: If DOL has any policy directives that fall within the description in Fact 81, it should readily be able to produce them. Instead, while DOL has implemented Congress's "suitable employment" goal for other Trade Act benefits in other regulations, *see, e.g.*, 20 C.F.R. § 617.32(a)(4) (job search eligibility) and 20 C.F.R. § 617.42(a)(6) (relocation allowance eligibility), DOL's Reply acknowledges that DOL has set no standard for how state agencies must pursue

Congress's suitable employment goal in their Trade Act training approval decisions. DOL Resp. at 11 n.9; *see also* Fact 82. There is no genuine issue but that the fact is accurate as stated and supported by the cited evidence.

82. DOL does not require state agencies to take any action in the Trade Act training approval process to achieve 80% or more in wage replacement. Specifically, DOL does not require state agencies to:

(a) prohibit approval of any training program that is not reasonably expected to produce 80% or more in wage replacement;

(b) approve training that is reasonably expected to produce 80% or more in wage replacement whenever possible;

(c) identify and discuss every training option for each worker that may produce 80% or more in wage replacement, and inform workers that 80% or more in wage replacement is the objective of Trade Act training; or

(d) document (i.e., place in a writing that is signed by the worker and reported to DOL) the expected wage replacement consequences of the training chosen by the worker and the wage replacement consequences of the alternative training options that were discussed with the worker and rejected.

Cole Depo. at 35:15 to 43:4, 58:17 to 61:11 ("We do not make TWC meet that goal.") (PA-5); Juarez Depo. at 235:1 to 236:2 (PA-12); DOL Admission Nos. 4-5, 9-13 (PA-24); DOL Interrogatory Response No. 9 (PA-25); Kooser Depo. at 48:2-22, 106:1 to 109:3 (PA-13).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. A-D above, Plaintiffs suggested methods for achieving an 80% wage replacement, are not "facts." Deponents were not asked about the four scenarios suggested by Plaintiffs; rather, deponents were asked more generally what the Department required of states in order to meet the 80% replacement wage goal. Deponents testified that 80% was a goal, not a requirement. The Department has stated previously that "state agencies are not required to condition approval of Trade Act training upon any determination as to whether training could lead to employment paying 80% or more of each worker's prior wages." DOL Admission No. 5 (Exh. 17).

Plaintiffs' Reply: The fact that DOL denied Admission No. 5 is not evidence that DOL may cite in its favor here. If DOL wishes to have evidence of denial, it must deny under oath. The text of Fact 82 does not assert that parts (a)-(d) are facts themselves; rather, it asserts the fact that DOL does not require state agencies to do any of the actions listed in part (a)-(d), which is proved by the cited evidence.

83. In deciding how to allocate Congress's annual Trade Act training appropriation among state agencies, DOL does not consider what wage replacement levels the state agencies expect workers to achieve using the requested training funds.

Tomchick Depo. at 46:5 to 48:22, 57:9 to 58:18, 80:20 to 84:6 (PA-18).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Mr. Tomchick's deposition testimony does not specifically address this assertion, nor was the question asked by Plaintiffs to Tomchick. See Tomchick Depo. at 46:5 to 48:22, 57:9 to 58:18, and 80:20 to 84:6 (Exh. 44).

Plaintiffs' Reply: The cited evidence proves the fact as detailed below. Moreover, if DOL did consider what wage replacement levels state agencies expect workers to achieve using the requested training funds, DOL need only say so in an affidavit to create a genuine issue of material fact. Recall that Mr. Tomchick was in charge of distributing among state agencies Congress's annual capped Trade Act training appropriation under 19 U.S.C. § 2296(a)(2). While DOL is correct that the question as phrased in the fact was not asked in Mr. Tomchick's deposition, the fact is a necessary inference from the questions that were answered in the cited testimony, including:

Q. Did you tell your staff to consider the results that states had achieved with the previous Trade Act training dollars in deciding how much money to approve for the state?
A. No.
...
Q. Do you know if your staff ever did consider that?
A. No.
Q. Did you require your staff to write down the entire bases for the recommended funding amount?
A. No.
Q. Do you know if there is documentation anywhere as to why a state's request for Trade Act training dollars was funded at the particular level.
A. No.
Q. You don't believe that that documentation exists?
A. That's correct.
...
Q. Is it your understanding that the same quality training in different parts of the country is going to cost the Federal Government a different amount of money?
A. I don't know.
Q. Is that a subject that is relevant to how the limited pool of Trade Act training money is distributed.
A. It may be. Again, I — again, there is a limited pool of money and depending on how many participants there may be in the program. I just don't know.

Q. Is DOL concerned when it gets the requests for Trade Act training money from the various states that some states are requesting the amount of money that they need to provide Cadillac training and other states are requesting the money that they need to provide Hyundai training to their workers?
Mr. Bernstecker [DOL Counsel]: Objection: Speculation that any state is acting in that manner.
Q. Has that been a concern for you as OTAA Director?
A. No.
Q. Never?
A. No.
...
Q. Do you know what the TAPR system is?
A. TAPR system is a reporting system. It reports the outcomes, you know, from the states—participant outcomes from the states.
Q. Is there anything about that outcome reporting taken into account in Trade Act training funding decisions?
A. No.
Q. Can you name any objective basis for being able to say that a trade-affected worker in Pennsylvania is receiving the same training benefit as the trade-affected worker in Texas?
A. No.

Tomchick Depo. at 46:5 to 48:22, 57:9 to 58:18, 80:20 to 84:6 (PA-18).

84. DOL knows that because Congress structured Trade Act training as a capped entitlement, DOL's approval of more Trade Act training funds for workers in some states can result in less training funds for workers in other states, and that consequently DOL must regulate as necessary to ensure equitable distribution of funds among states.
Kooser Depo. at 41:5-15, 132:3-16 (PA-13); DOL Policy GAL 4-89, Ch.1 at 4 (PA-63).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Mr. Kooser testified that Congress had capped funding for TAA and as a result, some states have been refused

assistance as a result of lack of funding. Kooser Depo. at 41, 132. (Exh. 36). The Department's GAL merely explains that decisions to provide supplemental TAA administrative funds will be made to the extent that funds are available (Exh. 26). Neither the testimony, nor the GAL demonstrates that DOL must regulate to ensure equitable distribution of funds among states.

Plaintiffs' Reply: An administrative error caused Plaintiffs to cite GAL-89, Change 1 at 4 instead of GAL-89 at 4, where, on the page that DOL Bates stamped as ETATOPL 08074, DOL's Trade Act policy directive states:

> The entitlement nature of the TAA program, plus the statutory limitation on the amount of funds which may be expended on training, requires the Department to institute procedures which ensure that States are funded equitably and that the $80 million training cap is not exceeded.

This, with Mr. Kooser's deposition testimony, and with the text of 19 U.S.C. § 2296(a)(2), proves that there is no genuine issue but that Fact 84 is accurate as stated.

85. The average amount of Trade Act training funds that DOL provides to state agencies for each qualified worker varies widely among states.

DOL Interrogatory Response No. 14 (PA-25); Kooser Depo. at 129:1-20 (PA-13).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The TAA Outcome Report reflects varying amounts of funding provided to California, Pennsylvania, and Texas.

Plaintiffs' Reply: Mr. Kooser testified that the amount "varies from state to state" and DOL's interrogatory response shows that from year to year, DOL paid between two to twenty-five times as much money to train the average Pennsylvania worker as it paid to train the average Texas worker. *See also* Facts 83 (DOL has no objective basis for funding decisions) and 112 (the average training cost over years is $2,144 for Texas workers and $8,354 for Pennsylvania workers). Hence, there is no genuine dispute but that the fact is accurate as stated.

86. DOL knows that training for higher wage occupations generally costs more than training for lower wage occupations.

Cole Depo. at 82:18-21 (PA-5); Juarez Depo. at 510:6-10, 511:1-6 (PA-12); Tomchick Depo. at 80:7-18 (PA-18).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The Department has denied this allegation previously. Plaintiffs' Requests for Admissions, No. 8 and Response, No. 8 (Exh. 17). Ms. Cole and Mr. Tomchick testified that in their respective experiences, training for higher wage costs more generally. Cole Depo. at 82 (Exh. 32), Tomchick Depo. at 80 (Exh. 44). Mr. Juarez's testimony is not on point. Mr. Juarez testified that in request for proposals, the higher the average cost per individual for training, the more training providers are attracted generally. Juarez Depo. at 510-11 (Exh. 35).

Plaintiffs' Reply: The fact that DOL denied Admission No. 8 is not evidence that DOL may cite in its favor here. If DOL wishes to have evidence of denial, it must deny under oath. That may be difficult after it designated Ms. Cole to speak on its behalf and she admitted the fact. *See* Fact 14(b). DOL's response only reiterates that Ms. Cole swore that she understood that training for higher wage occupations generally costs more. DOL has no basis for claiming that Ms. Cole only expressed her personal opinion whenever she says something that DOL considers inconvenient. If DOL had any contrary evidence, it was obliged to share it. The cited evidence proves the fact as stated.

87. DOL has known for over a decade that state agencies use vastly differing practices for taking wage replacement into account in their training approval decisions.

DOL OIG 1993 Audit at 12-17 (PA-61); DOL Advisory Board Minutes (9/26/2002) at 1-2 ("Indiana uses a guideline of 'equal or greater skill level' to complement the wage replacement requirements. This helps ensure the system will focus on getting participants jobs with more potential for growth.") (PA-80).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The OIG audit revealed that, within the nine sample states included in the audit, there was a disagreement among the states over whether 80% wage replacement was an appropriate measure of the success of the TAA program. The OIG audit does not reveal the sample state's practices for consideration of wage replacement when approving training. In addition, the DOL Advisory Board Minutes reveal only Indiana's practice.

Plaintiffs' Reply: Practices could not differ more widely than those of Indiana as described in the cited evidence, and those of Texas as proved in Fact 93. DOL has not only known of such widely varying practices, but been criticized by its own Office of Inspector General for allowing them, over a decade ago in the following passages from the 1993 OIG Audit cited in support of this fact:

> OIG found four areas where TAA program management should be improved to increase the program's effectiveness. These are: the TAA program was managed by [DOL's Employment and Training Administration] and the states without specific training or reemployment goals.
>
> ...
>
> *Disagreement Over Suitable Employment as a Goal*
>
> We encountered significant disagreement among the [nine] sampled states over using the suitable employment definition specified in [19 U.S.C. § 2296(e)], as amended, as the program goal. Although all states in our sample agreed that employment was a primary goal, several states felt strongly that it was inappropriate that "suitable employment" with the 80 percent criteria as defined in Section 236(e) of the Act, as amended, be considered a program goal.
>
> Based on our audit of the nine states, three states agreed with the OIG approach to defining suitable employment, one state did not comment, and the remaining five states disagreed with the OIG approach for various reasons.

DOL OIG 1993 Audit at 13, 16 (PA-61). The cited evidence proves the fact as stated.

88. DOL knows that state agencies achieve widely varying wage replacement results with Trade Act training, yet DOL has refused to regulate to achieve greater consistency in training objectives despite the repeated urging of its own Office of Inspector General.
DOL OIG 1993 Audit at 12-17, 30-32 (The response of DOL's Employment and Training Administration (ETA) "to the draft report was not in sufficient detail to resolve the findings and recommendations ... [t]herefore, the findings remain unresolved pending ETA's corrective action plan.") (PA-61); DOL Audit Notice Memo (10/20/93) at ETATOPL 7326-27 (no specific action or reply required) (PA-60); DOL Office of Inspector General Audit (2001) at 59 (JJ49) (DOL's ETA "agreed in concept with the recommendations presented in the draft report, [b]ut there was no agreement to implement any specific policy changes as a result."); DOL TAA Outcome Report (3/31/2003) (PA-62).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. There is no "consistency" requirement under the Act, and the Department has regulated under the Trade Act as required.

Plaintiffs' Reply: There is a consistency requirement under the Act:

> The Act and the implementing regulations ... shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act and this Part 617 throughout the United States.

20 C.F.R. § 617.52(b). DOL is just as plainly wrong about whether it has regulated under the Trade Act as required. The cited evidence proves that there is no genuine issue but that the fact is accurately stated, and DOL specifies no reason or evidence to resist this conclusion.

89. TWC has no policy that states how its employees are to take the Trade Act's 80% wage replacement goal into account when deciding what Trade Act training to approve.
Purnell Depo. at 172:10-15 (PA-16).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Ms. Purnell stated that she is not aware of any policy in which TWC's employees take into account the Department's wage replacement goals for Trade Act training when deciding what Trade Act training to approve. Purnell Depo. at 172:10-15 (Exh. 38).

Plaintiffs' Reply: Ms. Purnell was designated to speak on TWC's behalf under Rule 30(b)(6) specifically regarding TWC's Trade Act policies. Fact 14(f). Ms. Purnell testified:

> Q. If two different training options are available to a Trade-affected worker, one that pays 80 percent or more of prior wages and one that pays less than 80 percent of prior wages, does TWC say anything about which one must be chosen?
> A. No.
> ...

Q. So, speaking on behalf of TWC, is there any policy that is in effect in which TWC's employees take into account DOL's wage replacement goals for Trade Act training when deciding what training to approve under the Trade Act?

A. Not that I'm aware of, no.

Purnell Depo. at 168:5-10, 172:10-15 (PA-16). The fact as stated is established by the cited evidence.

90. TWC employees do not take any wage replacement goal, let alone the Trade Act's 80% wage replacement goal, into account in deciding what Trade Act training to approve.
Candelaria Depo. at 56:15 to 59:13, 70:4 to 74:25 (PA-4); Bueno Depo. at 94:8 to 98:2 (PA-3); Purnell Depo. at 166:21 to 168:20 (PA-16).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Moreover, the Department cannot respond to this factual allegation.

Plaintiffs' Reply: *See* Facts 89 and 91 through 94. Also, Plaintiffs submit the identical reply for Fact 90 as they did for Fact 73 above. The cited evidence proves the fact as stated.

91. From April 1998 to March 2003, Jose Guzman supervised TWC's Regional Trade Unit in El Paso, which had final authority to approve Trade Act training contracts, and he testified that he did not believe that any wage replacement goal whatsoever applied to Trade Act training.
Guzman Depo. at 5:4 to 5:22, 44:1 to 46:5, 57:12 to 59:18 (PA-10).

DOL's Response: No objection.

92. TWC case workers rely on TWC's policy manual as their source of policy guidance as they make Trade Act training approval decisions.
Crawford Depo. at 9:19 to 10:24, 33:25 to 34:2 (PA-6); Candelaria Depo. at 66:2-17 (PA-4).

DOL's Response: No objection.

93. The only statement that TWC's policy manual makes about wage replacement consequences of Trade Act training is:

> **Whether the employment pays 80% of the affected average weekly wage is <u>not a consideration</u> in determining if there is a reasonable expectation of employment following training.**

TWC's policy manual says nothing else about how the wage replacement consequences of training are to be evaluated or considered during the approval process.
TWC Policy Manual at ETATOPL 5843 (PA-56); Crawford Depo. at 30:5-9; 34:12 to 42:24 (PA-6).

DOL's Response: No objection.

94. DOL approved TWC's policy manual containing the language quoted in the previous paragraph at least three times: soon after NAFTA's passage, on March 2, 2000, and on September 13, 2002.
DOL Letter (9/13/2002) at 1 (PA-58); Crawford Depo. at 9:19 to 10:24, 33:25 to 34:2 (PA-6).

DOL's Response: No objection.

95. In El Paso, wage replacement rates for trade-dislocated workers typically range between 50% and 70%.
Cole Depo. at 44:8-22, 60:1 to 61:2 (PA-5).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Ms. Cole's testimony reflects her recollection of wage replacement rates for 2000. Cole Depo. at 44, 60-61 (Exh. 32).

Plaintiffs' Reply: DOL's response only reiterates that Ms. Cole, whom DOL designated to speak on its behalf concerning Trade Act monitoring and enforcement, *see* Fact 14(b), swore that she recalled that in El Paso, wage replacement rates for trade-dislocated workers typically range between 50% and 70%. If DOL had any contrary evidence, it was obliged to share it. The cited evidence proves the fact as stated.

VII. ON-THE-JOB TRAINING VIOLATION

96. DOL does not require state agencies to provide on-the-job training (OJT) instead of institutional training when both types of training are available to a worker and both meet the Trade Act's six requirements.
Cole Depo. at 112:3-14 (PA-5); Kooser Depo. at 156:8 to 157:18 (PA-13); Juarez Depo. at 440:16 to 441:22 (PA-12); DOL Admission Nos. 18, 27 (PA-24).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Mr. Kooser testified that the Department requires states to do all that is possible to provide training on-the-job in the context of that state. Kooser Depo. at 161:7-11 (Exh. 36). He also testified that on-the-job training should be considered first. Kooser Depo. at 156:8 to 157:18 (Exh. 36). Mr. Juarez does not refer to on-the-job training within the cited pages. Juarez Depo. at 440-41 (Exh. 35).

Plaintiffs' Reply: This fact simply reports DOL Admission Nos. 18 and 27 (PA-24). Moreover, DOL's response here makes an important point. It says that Mr. Kooser, DOL's Rule 30(b)(6) spokesperson on DOL's Trade Act policies, "testified that the Department requires states to do all that is possible to provide training on-the-job in the context of the state." This is all Plaintiffs seek

by their injunction, so DOL should have no objection to it. There can be no dispute that DOL simply does not "require states to do all that is possible to provide training on-the-job in the context of the state." *See* Facts 99-101, 104. The cited evidence proves the fact as stated.

97. TWC does not provide Trade Act training on the job in El Paso.
Candelaria Depo. at 59-14 to 60:1, 67:20 to 68:4, 70:4 to 74:25 (PA-4); Bueno Depo. at 47:7-9 (PA-3); Crawford Depo. at 88:15-20 (PA-6); Purnell Depo. at 47:17 to 47:24 (PA-16).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. While she did discuss on-the-job training, Ms. Candelaria was not asked this specific question. See Candelaria Depo. at 59-60, 67-68, 70-74 (Exh. 31). Ms. Bueno testified that she presents on-the-job training as an option to workers through the orientation process. Bueno Depo. at 47:13-25 (Exh. 30). On-the-job training was not utilized for Trade Act training as of the dates of these depositions, but the Department contends that not currently utilizing on-the-job training is different than not providing on-the-job training in El Paso.

Plaintiffs' Reply: DOL has a copy of TWC's Response to Plaintiffs' Interrogatory 1(c), in which Plaintiffs asked TWC to "identify every dislocated worker in El Paso whom you believe to have received any Trade Act training on the job since January 1, 1998," and to which TWC submitted the following sworn response: "No OJT contracts were written by the TAA Program in El Paso during this period." Of course, DOL knows that Rule 26(e) placed TWC under a continuing obligation to supplement this response if its accuracy changed at least through December 2003, and DOL knows that TWC never did so.

98. TWC does not attempt to provide Trade Act training on the job in El Paso.
Candelaria Depo. at 59-14 to 60:1, 67:20 to 68:4, 70:4 to 74:25 (PA-4); Bueno Depo. at 47:7-12 (PA-3); Crawford Depo. at 84:10-23 (PA-6).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Ms. Bueno testified that she presents on-the-job training as an option to workers through the orientation process. Bueno Depo. at 47:13-25 (Exh. 30). Mr. Crawford testified that on-the-job training is considered first in the approval process (Crawford Depo. at 83:24 to 84:9 (Exh. 33)), but, in general, on-the-job training opportunities for garment workers along the border involve minimum wage jobs, which is not desirable because the goal of training is to return a worker to as high a paying job as possible.

Plaintiffs' Reply: Ms. Bueno managed TWC's Trade Act training unit in El Paso and worked for TWC for 15 years, Fact 14(i), and she testified:

> Q. Have you or any of your workforce specialists ever placed anyone on on-the-job training?
> A. No.
> Q. Okay. And have you ever tried to place anyone on on-the-job training?

A. No.
Q. Is on-the-job training presented to the participant or the applicant as an option?
A. Yes.
Q. And how is that done?
A. Through our orientation process with a video.
Q. And what video is that?
A. It's the orientation video produced by the state.
Q. Okay. And when is the video presented?
A. At their first visit.
Q. Is it presented in a group or to each individual?
A. In a group.

Bueno Depo. at 47:7-25 (PA-3). Ms. Bueno's admission that she and her workforce specialists do not try to place participants in OJT is not vitiated by the fact that a group video mentioned a theoretical "option" of OJT to workers, *see* Fact 98 (no OJT was provided). The cited evidence proves the fact as stated.

99. TWC could take several available actions to develop on-the-job training opportunities in El Paso, including:

(a) promote the fact that up to 50% wage supplement is available to businesses for training workers on the job;

(b) target outreach efforts to industries most likely to be able to train workers on the job;

(c) maintain updated lists of OJT opportunities; and

(d) improve linkages between Workforce Investment Act and Trade Act training.

Kooser Depo. at 158:2 to 164:10 (PA-13); Cole Depo. at 107:1 to 108:19 (PA-5); Purnell Depo. at 262:18 to 263:9 (PA-16); Owens Depo. at 62:24 to 63:12 (PA-15); DOL PREP Grant Contract at ETATOPL 3901 (PA-43).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The testimony cited here reflects the components of the on-the-job training program as stated in (a) – (d), however none of the deponents specifically concluded that promoting these components would "develop on-the-job training opportunities" as Plaintiffs have concluded. The contract discusses the factors listed in this "undisputed fact," however the contract focuses on case-by-case analyses of workers to provide appropriate training and does not discuss specific actions related to on-the-job training.

Plaintiffs' Reply: The cited evidence proves the fact as stated. DOL quibbles over synonyms. Moreover, the fact is of such general applicability that DOL could readily provide an opposing affidavit if there were any genuine issue as to this fact.

100. DOL has monitored how often Trade Act training is provided on the job in El Paso.
Cole Depo. at 110:2-11 (PA-5).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Ms. Cole reviewed this data during a compliance review she conducted in 2000 based on 1999 data. Ms. Cole testified that this is not something regularly done for all communities. Cole Depo. at 110:2-11 (Exh. 32).

Plaintiffs' Reply: The only point of this fact is that if DOL wanted to know how often OJT is used in El Paso, it had actual access to the information, and it actually monitored the question at least once (which, of course, revealed that no OJT at all was provided, *see* Fact 97). That is all the fact says, and it is established by the cited evidence regardless of how regularly DOL actually decided to monitor OJT *after* it gained actual knowledge that no OJT was provided in El Paso.

101. Though DOL has "discussed on-the-job training as one of the training opportunities available to dislocated workers and employers" in El Paso, DOL has taken "no specific action" to encourage or assist in the creation, expansion, or improvement of on-the-job training opportunities there.
DOL Interrogatory Response No. 8 (PA-25).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The Department's interrogatory response reads: "The Dallas Regional Office, in its normal course of working with the State of Texas , the WDB, and other local community leaders such as the El Paso Chamber of Commerce, has discussed on-the-job training as one of the training opportunities available to dislocated workers and employers. There have been no specific efforts targeting on-the-job training." DOL Interrogatory Response No. 8 (Exh. 8). The Department encourages on-the-job training and requires, as provided in the Trade Act, that on-the-job training be considered first for individuals.

Plaintiffs' Reply: Interrogatory 8 to DOL states: "Please describe each action that you have taken since January 1, 1997 to encourage or assist in the creation, expansion, or improvement of on-the-job training opportunities in El Paso, and identify who took each action, when it was taken, and what documents describe or refer to it." Thus, all of the words in Fact 101 are in the interrogatory and in DOL's sworn response to it, so DOL's objections are baseless. Note that DOL provided its basically non-existent list of actions *after* it gained actual knowledge at least at one point that TWC simply did not provide on-the-job training in El Paso. Facts 97 and 100. The cited evidence proves the fact as stated. Finally, the last sentence of DOL's Response is gratuitous, unsupported by evidence, and irrelevant to whether there is a genuine issue as to the fact as stated.

102. DOL admits that a requirement that "training" be provided on the job "insofar as possible" is different and stronger than a requirement that on-the-job training be afforded a priority "insofar as possible."
Kooser Depo. at 164:1-10 (PA-13).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The exchange during Mr. Kooser's deposition does not amount to the Department "admitting" the contention above. Mr. Kooser used the language "put emphasis on on-the-job training," however Mr. Kooser clarified that he expects states to use on-the-job training insofar as possible. Kooser Depo. at 163:4-22 (Exh. 36). The entire exchange during the deposition, from page 160:9 to 164:10 makes this clear. The conclusion that the Department admits the statement in number 102 is misleading. This "undisputed fact" is meant to lead one to the conclusion that the Department admits that its regulations related to on-the-job training violate the statute. However, the Department maintains, as discussed in its Response, that the regulations and the statute are consistent.

Plaintiffs' Reply: The evidence, not Plaintiffs' statement of the evidence or any argument in DOL's response, is what must "lead one to the conclusion that the Department admits that its regulations related to on-the-job training violate the statute." DOL designated Mr. Kooser under Rule 30(b)(6) to speak on its behalf regarding DOL's Trade Act policies, Fact 14(c), and he testified as follows:

> Q. When you provide training to either your regional offices or to state Trade Act administrators, what do you tell them about on-the-job training?
> A. I tell them exactly what's in the regulations, that insofar as possible they are to put emphasis on on-the-job training, because that's what it says. That's what the requirement is.
> Q. Do you agree that there is a difference between insofar as possible putting emphasis on on-the-job training on the one hand and on the other [hand] insofar as possible provide training? The first says insofar as possible put an emphasis on it and the other one says insofar as possible do it. Do you agree that there's a difference there?
> A. Yes, insofar as possible they should do it, insofar as possible.
> Q. But you agree that the two options that I described, insofar as possible put an emphasis on it and insofar as possible do it, those are two different things, right?
> A. Somewhat, yes.
> Q. And the insofar as possible do it is stronger than the insofar as possible put an emphasis on it.
> A. That's correct. That's what I meant to say.

Kooser Depo. at 163:4 to 164:10 (PA-13). The word "emphasis" was unmistakably chosen by Mr. Kooser as his synonym for the word "priority" in 20 C.F.R. § 617.23(c)(1), and the fact that he chose a synonym does nothing to diminish the devastating impact of his testimony upon DOL. *See* DOL Resp. at 26 n.26 (defining "priority" in terms of its synonyms "precedence," "importance," and "urgency").

103. Since 1997, DOL has consistently written and collected documents that identify on-the-job training as a viable option for training LEP workers in El Paso.

E.g. Juarez Letter to ATF (6/6/2000) at 1-2 (E2958); DOL PREP Grant Contract at ETATOPL 3900-01 (PA-43); DOL Draft El Paso Workforce Report (9/2/1998) at ETATOPL 5250, 5262-63 (PA-50); DOL Memorandum for the Secretary (6/6/97) at 1-2 (PA-46); Juarez Depo. at 188:19 to 189:5, 374:2-15 (PA-12).

DOL's Response: [Footnote 1 following the evidence cite to E2958]: This letter was not provided in the exhibits, thus the Department cannot respond with respect to this particular supporting document.
Objection: Characterization, Not Supported by Cited Materials. These documents all discuss on-the-job training in different contexts, mostly in an anticipatory context. There is no conclusion that on-the-job training is a "viable option for training." See DOL Memorandum for the Secretary at ETATOPL 04474 (stating that the project will focus on "the integration of workplace literacy and occupational skills raining and on-the-job training") (Exh. 7); Juarez Depo. at. 188-89 (responding to a document he did not author in which the author anticipates 50 individuals will be placed in on-the-job training) (Exh. 35). The PREP Project ran during 1997-98 under special emergency circumstances in El Paso.

Plaintiffs' Reply: Had DOL ever concluded that on-the-job ceased being a viable option in El Paso, presumably it would have stopped writing about on-the-job training as if it were a viable option, and it would have questioned TWC documents that so treated this option. Plaintiffs deliberately avoided cluttering the record with the dozens of DOL documents that treat OJT as a viable option, and even without the letter cited as E2958, the remainder of the cited evidence proves the fact as stated. The letter cited as E2958 is identified in sufficient detail for DOL to discern that DOL produced the letter and Bates stamped it as ETATOPL 2958, so DOL could have responded despite the error of Plaintiffs' counsel in failing to attach the letter as an exhibit.

104. On-the-job training opportunities are available and used in El Paso by WDB under WIA, even for LEP workers.
WDB Interrogatory Response Nos. 2(c) and 2(d) (PA-27); WDB OJT Contract Lists (PA-83).

DOL's Response: No objection.

105. DOL's contemporaneous business records name several reasons why OJT is not used more frequently, all of which involve choices of DOL and state agencies, and none of which name lack of interest among businesses as a reason.
E.g. DOL Advisory Board Minutes (9/26/2002) at 5 ("OJT requires more state administrative resources. States need to develop ways to deal with that.") (PA-80); Id. ("After the IG reviewed OJT in the JTPA context, many states were scared off of providing OJT. Need to make states more comfortable with providing OJT to workers."); DOL Texas TAA Review (9/17/98) at ETATOPL 8566 ("Very few (only one currently in Texas) OJT contracts are prepared primarily due to the relative short length of the OJT compared to institutional training, and the fact that trade affected workers in Texas have almost overwhelmingly needed long term institutional training to become job ready rather than short term OJT. Most remedial training is lower cost due than other types of training ....") (PA-65); DOL Brief at 8 ("Because claimants do not receive remedial training if enrolled in OJT, claimants are reluctant to accept an OJT opportunity.") (PA-26).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Again, this statement is misleading. The DOL Advisory Board Minutes are just as they appear - minutes of a meeting. The meeting involved a discussion of issues and possible solutions. These minutes do not reflect Departmental policy. Even if this were the case, the notes also reflect the following individual statements: "TX tries to address ESL in a pre-vocational skills training context. Without these baseline skills, very difficult to get into immersion-type training like OJT;" "OJT had not been much of a draw because employees lost TRA eligibility once they started OJT." ATF SEC 05643 (Exh. 10). These statements relate to eligibility and claimant choice. In addition, the quotation from the Department's Brief does not reflect a Department or state agency choice, but clearly reflects claimant choice with regard to OJT. This statement is supported by the Advisory Board Meeting Minutes at ATF SEC 05643 ("OJT had not been much of a draw because employees lost TRA eligibility once they started OJT.") (Exh. 10). Page 7 of the cited brief clearly states that "employers are, in general, unwilling to offer OJT." Further, the quotation from the DOL Texas TAA Review, dates from 1998. 1998 DOL Texas TAA Review (Exh. 22). The remainder of the quotation is: "…however, the experience with NAFTA has been that pubic institutions have increased charges to the TAA program because of capacity issues and the development of more intensive training programs than were previously available."

Plaintiffs' Reply: DOL is correct that "Page 7 of the cited brief clearly states that 'employers are, in general, unwilling to offer OJT.'" But for DOL this is attorney argument, it is not evidence, i.e. a business record. Plaintiffs, in contrast, have cited ample evidence to prove the fact as stated. The fact that some of the evidence consists of meeting minutes does not diminish its probative value as a business record. The fact that some of the evidence dates from 1998 does not diminish its probative value as a business record. DOL's response even quotes without objection many of the facts established by this evidence which prove the fact as stated.

VIII. INJURY AND REMEDY

106. El Paso garment workers, including numerous ATF members, commonly earned between $8 and $13 per hour before they were laid off due to NAFTA.
DOL OIG 2001 Audit at 55, 63 (PA-73); Glenn Depo. at 120:10 to 121:6 (PA-9); Mora Depo. at 13:4 to 14:2 (PA-14); Renteria Depo. at 24:18-25 (PA-17); De La Cruz Depo. at 23:24 to 24:2 (PA-7); ATF Worker Declarations (PA-20); Training Approval for Raul Trejo at 1 (PA-76).

DOL's Response: Objection: Vague, Relevance. The Department cannot respond to whether garment workers "commonly earned" any particular wage. It is also unclear to what time period this allegations refers.

Plaintiffs' Reply: The stated wage range is broad because that is what the cited evidence proves. DOL has its very own Bureau of Labor Statistics that is the nation's leading source of wage data (see http://www.bls.gov/bls/blswage.htm), so presumably if contrary or more precise evidence were available, DOL would have provided it. The fact is relevant to show that workers who were able to support their families in dignity on $8 to $13 per hour are hurt, and hurt badly, when they get

training from DOL that only enables them to earn minimum wage of $5.15 per hour. It is impossible to guess whether the families whose trade-dislocated member earned $13 per hour are hurt worse than the families whose trade-dislocated worker earned $8 per hour, but the difference in pain is not material to this case; all that is material is that the pain is inflicted by the deficient training that DOL allows to be approved for LEP workers. Thus, the fact as stated is certainly relevant, but the breadth of the wages earned by the LEP workers before losing their jobs is not.

107. Numerous ATF members have undertaken and are undertaking Trade Act training programs that primarily consist of institutional ESL and GED courses, and that do not provide all skills necessary to be fully job ready in another occupation upon completion.
Mora Depo. at 69:16 to 76:17 (PA-14); Renteria Depo. at 49:15 to 53:23, 81:21 to 82:13 (PA-17); De La Cruz Depo. at 40:18 to 41:12 (PA-7); Training Approval for Raul Trejo at 2-3 (PA-76); Glenn Gilbert Affid. at 1-3 (PA-22); ATF Worker Declarations (PA-20); ATF Member Responses to DOL First Interrogatory No. 1 (PA-28); ATF Response to DOL First Request for Production (PA-32).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. See Fact 75 referring to Mr. Trejo's successful completion of commercial truck driving trainng. According to deposition testimony, the training programs of Plaintiffs Mora, Renteria, De La Cruz, Trejo, and Gilbert did include ESL and GED courses. However, Ms. Mora completed her training and received a certificate. Mora Depo. at 50:2-13 (Exh. 39). Ms. Renteria and Mr. De La Cruz voluntarily dropped out of their training courses. Renteria Depo. at 48:4-10 (Exh. 41); De La Cruz Depo. at 30:9-11 (Exh. 46). The Department has no further information on Mr. Gilbert beyond the two documents Plaintiffs cite.

Plaintiffs' Reply: The cited evidence shows that at one time, each person referenced was enrolled in in incomplete Trade Act training, even if in some cases, extended funding was ultimately found to enable the person to complete training, so the fact is accurate as stated.

108. After undertaking institutional training that primarily consists of institutional ESL and GED courses and that does not provide all skills necessary to be fully job ready, the only employment available to many of El Paso's former garment workers, including numerous ATF members, has been at or near the federal minimum wage of $5.15 per hour, including jobs at fast food restaurants.
Glenn History Affid. (7/5/2002) at 2 ¶ 12 (PA-21); Glenn Depo. at 120:10 to 121:6 (PA-9); ATF Member Responses to DOL Second Interrogatory Nos. 1 through 4 (PA-29); Mora Depo. at 12:1 to 13:1 (PA-14); Renteria Depo. at 76:5-7 (PA-17); De La Cruz Depo. at 37:25 to 38:8 (PA-7); Cole Depo. at 44:20-22 (PA-5); Owens Depo. at 75:18 to 76:16 (PA-15); Guzman Depo. at 17:5-15 (PA-10); Bostic Depo. at 37:22 to 39:12 (PA-2); Juarez Depo. at 552:8 to 554:10 (PA-12); DOL OIG 2001 Audit at 2, 13 (57% of workers who undertook serial ESL and GED training including and beyond Trade Act training earned under $6.00 per hour, and 16% earned minimum wage; "our audit

results ... raise substantial doubt regarding the effectiveness of the training provided for those individuals who were placed at jobs paying close to the minimum wage") (PA-73).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The Department disputes this assertion as there were many jobs available through training (i.e. – nursing assistants – Anamarc) that paid more than minimum wage in El Paso. There is no evidence that institutional training primarily consisting of ESL and GED does not provide all skills necessary to be fully job ready.

Plaintiffs' Reply: DOL's response indicates that DOL misconstrues this fact. It says that when LEP workers are provided incomplete training that primarily consists of ESL/GED courses, the only jobs available to most of them after training pay near minimum wage. Thus, while Plaintiffs entirely agree with DOL's statement that "there were many jobs available through training ... that paid more than minimum wage in El Paso," and indeed such training is the whole object of this lawsuit, the availability of these training programs is not relevant to this fact, which simply reports what happened to the people who did not get the training from Anamarc that DOL's response references. DOL's reference to ESL/GED not necessarily being incomplete is still irrelevant no matter how many times and in how many contexts DOL repeats it. The fact's text limits the workers to whom it applies as those who received incomplete training, and the evidence proves the fact as stated. DOL names no reason why not, nor does it present any contrary evidence.

109. In the sample forms that TWC published to train Trade Act case workers, TWC jokes about the minimum-wage consequences of Trade Act training for LEP workers as follows: "Bob Genius, SSN 123-45-6789, is attending full time training at Taco Bell University. He is attending the Taco Maker Program, which started on 1-10-00 and will end on 2-10-00."
TWC Sample Form Letter (PA-75).

DOL's Response: Objection: Relevance, Characterization.

Plaintiffs' Reply: Fact 109 simply quotes a TWC document that is relevant to numerous issues in the case, particularly DOL's failure to monitor and enforce TWC's compliance with the law in its training approval practices, especially for LEP workers.

110. Training for higher wage occupations generally costs more than training for lower wage occupations.
Cole Depo. at 82:18-21 (PA-5); Juarez Depo. at 510:6-10, 511:1-6 (PA-12); Tomchick Depo. at 80:7-18 (PA-18).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Ms. Cole and Mr. Tomchick testified that in their respective experiences, training for higher wage costs more generally. Cole Depo. at 82 (Exh. 32), Tomchick Depo. at 80 (Exh. 44). Mr. Juarez testified that in request of proposals, the higher the average cost per individual for training, the more training

providers are attracted generally. Juarez Depo. at 510-11 (Exh. 35). The Department has denied this allegation previously. Plaintiffs' Requests for Admissions, No. 8 and Response, No. 8 (Exh. 17).

Plaintiffs' Reply: The fact that DOL denied Admission No. 8 is not evidence that DOL may cite in its favor here. If DOL wishes to have evidence of denial, it must deny under oath. That may be difficult after it designated Ms. Cole to speak on its behalf and she admitted the fact. *See* Fact 86. The cited evidence proves the fact as stated.

111. For the average Pennsylvania worker during each year between 1997 and 2002, DOL typically spent two to 25 times the amount that it spent to train the average Texas worker under 19 U.S.C. § 2296(a).
DOL Interrogatory Response No. 14 (PA-25).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The chart provided in response to Interrogatory Response No. 14 reflects the number of participants and expenditures for TAA and NAFTA-TAA for fiscal years 1997-2002. (Exh. 8). This information is based on information provided by states and there may be inaccuracies.

Plaintiffs' Reply: The only evidence before the Court was provided by DOL, and DOL provides only argument, and no evidence concerning the source or extent of any inaccuracies. Because the numbers reported in the fact are accurately calculated from the cited evidence, there is no genuine issue for trial as to this fact.

112. Averaging all of DOL's Trade Act training expenditures between 1997 and 2002 for Texas and Pennsylvania yields an average Trade Act training cost of $2,144 for Texas workers and $8,354 for Pennsylvania workers.
DOL Interrogatory Response No. 14 (PA-25).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The chart provided in response to Interrogatory Response No. 14 reflects the number of participants and expenditures for TAA and NAFTA-TAA for fiscal years 1997-2002. (Exh. 8). This information is based on information provided by states and there may be inaccuracies.

Plaintiffs' Reply: Plaintiffs submit the identical reply for Fact 112 as they did for Fact 111 above.

113. DOL cannot name any objective basis for spending four times more money to train Pennsylvania workers than it does to train Texas workers who qualify for the very same training benefit.
Tomchick Depo. at 80:20 to 84:6 (PA-18).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The Department of Labor bases its funding decisions on requests from each State. State requests are based on the expected number of workers to be enrolled in training and the average cost of training per worker as reported by the State. States may not receive the full request because of funding limitations. Mr. Tomchick testified in response to the question of whether he could "name any objective basis for being able to say that a trade-affected worker in Pennsylvania is receiving the same training benefits as the trade-affected worker in Texas" that he could not. Tomchick Depo. at 84:1-6 (Exh. 44).

Plaintiffs' Reply: Mr. Tomchick's testimony, as quoted in Fact 83, shows that the cited evidence proves the fact as stated. Nor can Plaintiffs' discern any material difference between what DOL's response says Mr. Tomchick's testimony means, and what Plaintiffs say it means.

114. DOL does not use any objective basis to distribute Congress's capped appropriation for Trade Act training among state agencies, nor does it document the basis for its funding decisions.

Tomchick Depo. at 46:5 to 48:22, 53:15 to 58:18 (PA-18).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. Mr. Tomchick testified that he did not compare different States' average training cost per worker when making training approval recommendations. Tomchick Depo. at 46:5 to 48:18 (Exh. 44). However, at the time of the funding determinations, each State's request is evaluated with other States' funding requests. Tomchick Depo. at 53:15 to 54:11 (Exh. 44). He also testified that he did not require his staff to document the entire bases of their training funding recommendations. Tomchick Depo. at 46-48, 58 (Exh. 44).

The most recent methodology for fund allocation was issued in TEGL No. 6-04 (Exh. 52). ETA is allocating 75% of the $220 million - $165 million - to States as a base allocation based on average funding expenditures and average number of training participants for each State and is reserving 25% - $55 million - for distribution as needed for unexpected large layoffs or having training needs that exceed available funds. States will submit requests for the additional funding.

Plaintiffs' Reply: Mr. Tomchick's testimony, as quoted in Fact 83, shows that the cited evidence proves the fact as stated.

115. Congress has appropriated over $2 billion total for Trade Act training under 19 U.S.C. § 2296.

CRS Report at 17, Table 5 (PA-79).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. This allegation is based on a 1999 Report containing estimated figures.

Plaintiffs' Reply: DOL has ready access to a rough estimate of the amount of money that Congress has appropriated to DOL for Trade Act training, yet it makes no effort to dispute this statement of

fact. The appropriations amounts for Trade Act training since 1999 are public information, and available at http://thomas.loc.gov/home/approp/approplink.html, and the amounts before 1999 are reported in the cited evidence. They total over $2 billion. The precise amount is not material, for the only point of this fact is to show the magnitude of the program at issue, and the seriousness with which its administration deserves to be taken not only for the sake of the workers, but for the sake of the federal taxpayers who support the program.

116. ATF has devoted significant resources, time, and energy over seven years to undertake a broad range of activities to bring the issues presented in this case to the attention of officials at the highest levels of DOL, and to seek DOL's compliance with federal law as to each issue.
E.g. Glenn History Affid. (7/5/2002) at 1-2 and attached Exhs. A through F (PA-21); ATF Response to WDB Interrogatory No. 7 (PA-31); Juarez Depo. at 139:8-18 (PA-12); ATF Letter & Roster (5/30/2000) (PA-37); TWC Letter to DOL (6/20/2000) at 1 (PA-52); ATF Letter (5/29/2000) (PA-38); ATF Letter (1/18/2000) (PA-40).

DOL's Response: Objection: Relevance, Lack of Information.

Plaintiffs' Reply: The cited evidence proves the fact as stated. DOL had discovery from ATF for over 16 months as to this fact.

117. The effort required to undertake the work referenced in the previous paragraph has prevented ATF from addressing its other priorities.
Glenn Depo. at 121:7 to 122:1 (PA-9).

DOL's Response: Objection: Relevance, Lack of Information.

Plaintiffs' Reply: The cited evidence proves the fact as stated. DOL had discovery from ATF for over 16 months as to this fact.

118. ATF's inability to secure adequate training for its members after seven years of effort has frustrated ATF's organizational goals and its ability to grow in financial and human resources.
ATF Response to WDB Interrogatory No. 7 (PA-31); Glenn Depo. at 121:7 to 122:1 (PA-9); Mora Depo. at 62:16 to 63:3 (PA-14).

DOL's Response: Objection: Relevance, Lack of Information.

Plaintiffs' Reply: The cited evidence proves the fact as stated. DOL had discovery from ATF for over 16 months as to this fact.

119. WDB has proved itself consistently able to use bilingual training funded under WIA to achieve more than 80% in wage replacement for LEP dislocated workers in El Paso.
Owens Depo. at 58:22 to 60:22 (PA-15); WDB Wage Replacement Reports (PA-84); Houde Depo. at 47:18-24; 62:7 to 63:17, 65:25 to 66:22, 82:15 to 83:17 (PA-11).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The "WDB Wage Replacement Report" is actually titled, in part, the URGWDB Quality Assurance Report, which reflects various figures. The "worker earnings replacement rate" figures are not broken out by different methods of training (i.e., bilingual training). Owens did not testify that bilingual training achieved the wage replacement; rather, the testimony indicates that WDB wage replacement since January of 2001 has exceeded 80%. Owens Depo. at 57-58 (Exh. 37).

Houde testified regarding bilingual training, but appears not to be limited to the WDB program or its wage replacement rates. Houde Depo. at 47-50 (Exh. 49).

Plaintiffs' Reply: The cited evidence proves the fact as stated.

120. One reason for WDB's wage replacement success with WIA-funded training has been that WDB does not allow WIA money to be spent for training in low-wage occupations like child care, even while TWC continues to allow Trade Act money to be spent for child care training.
Owens Depo. at 57:19 to 58:13 (PA-15); Houde Depo. at 47:18 to 50:21 (PA-11); DOL OIG Draft Audit Findings (8/6/2001) at OIGTOPL 224 (PA-81).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. WIA and the Trade Act program are different programs with different requirements.

Plaintiffs' Reply: The fact does not assert that the programs have the same requirements. The point of the fact is that the Trade Act, which is supposed to be a remedy, is operated with standards less favorable to workers than WIA, which is a discretionary program to which no worker has a right to access.

121. DOL knows that increasing access to bilingual training for LEP workers in El Paso has been necessary to improve the economic benefit that workers derive from training.
DOL PREP Grant Contract at ETATOPL 3885, 3889-91, and 3895-96 (PA-43).

DOL's Response: Objection: Characterization, Not Supported by Cited Materials. The document cited by Plaintiffs, a grant from the DOL pursuant to the Job Training Partnership Act, is not evidence that the DOL knows bilingual training is necessary for trade-impacted workers in El Paso. See also the Department's Response to Fact 55.

Plaintiffs' Reply: The grant document shows that DOL awarded some $45 million under PREP with the stated objective of "reinventing" El Paso's training delivery system by providing more

bilingual training to LEP workers. Document also proves that the reason DOL considered PREP necessary was because serial training proved ineffective for LEP workers in El Paso. Though PREP never did reinvent El Paso's training infrastructure, *see* DOL OIG 2001 Audit (PA-73) and GAO Report (PA-72), the grant document in the cited evidence proves that DOL knows that increasing bilingual training access has been necessary for LEP workers to improve the economic benefit that workers derive from training.

122. The order that ATF seeks in this litigation mirrors orders that courts have on at least two separate occasions entered as a remedy for DOL's violations of the Trade Act.
UAW v. Brock, 568 F. Supp. 1047 (D.D.C.1983), *aff'd in part*, 816 F.2d 761, 767-69 (D.C. Cir. 1987), *order on remand*, UAW v. Brock, Civil Action No. 81-1954 (Final Order Signed and Filed June 30, 1987) (PA-78); DOL Policy GAL 7-94, Ch. 2 at ETATOPL 4308-12 (PA-44); ("Pursuant to the [U.S. District Court for the District of Columbia] decision and order in [Baker v. Reich] issued on June 11, 1996," state agencies must prospectively interpret "initial unemployment compensation benefit period" under the Trade Act in accord with the Court's order, and provide "retroactive relief" to affected workers under terms identical to Brock.); *see also* DOL Policy GAL 15-90 at 6-9 (ordering the same method of providing retroactive relief as in Brock for past Trade Act misinterpretations, but no mention of litigation impetus) (PA-67).

DOL's Response: Objection: Calls for a Legal Conclusion. Moreover, the only retroactive relief the Court can order is to require the Department to direct the State to correct erroneous determinations or make redeterminations, to the extent correcting determinations or making redeterminations is consistent with State law. UAW v. Brock, 816 F.2d 761, 768-9 (D.C. Cir. 1987); see also Hampe v. Butler, 364 F.3d 90, 94-5 (3rd Cir. 2004).

Plaintiffs' Reply: DOL accurately states the law here, as Plaintiffs have claimed for years in this case. *See* Order of Hon. Frank Montalvo, Civil Action No. EP-02-CA-131-FM, Docket No. 177 (and at least a half-dozen preceding party briefs). Plaintiffs are glad to have this retroactivity issue finally resolved once and for all. The Court can see for itself that Plaintiffs' proposed injunction in this case mirrors the standards stated in *Hampe* and in *Brock*. Plaintiffs certainly agree, and even emphasize, that these are the two key cases that state the standards by which this case should be decided.

ADDITIONAL MATTERS (Submitted by DOL)
The Department objects to each affidavit (Declarations (Exh. 50)) stated below as follows:
Virginia Delgado
DOL objects to paragraph 7 of her Affidavit on the ground that it is hearsay. DOL also objects to paragraphs 9, 10 and 11 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.
Antonia Saucedo

DOL objects to paragraph 7 of her Affidavit on the ground that it is hearsay. DOL also objects to paragraphs 9, 10 and 11 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Hermelinda Garcia

DOL objects to paragraph 7 of her Affidavit on the ground that it is hearsay. DOL also objects to paragraphs 9, 10 and 11 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Olga Montoya

DOL objects to the second sentence of paragraph 6 of her Affidavit on the ground that it is hearsay. DOL also objects to paragraph 8, 9, and 10 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Maria Llamas

DOL objects to paragraph 7 of her Affidavit on the ground that it is hearsay. DOL also objects to paragraphs 9, 10 and 11 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Irma Romero

DOL objects to paragraph 7 of her Affidavit on the ground that it is hearsay. DOL also objects to paragraph 9, 10, and 11 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Jose Montoya

DOL objects to paragraph 7 of his Affidavit on the ground that it is hearsay. DOL also objects to paragraph 9, 10, and 11 of his Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Berta Munoz

DOL objects to paragraphs 6 and 7 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Ofelia Soriano

DOL objects to paragraphs 6 and 7 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Maria Valles

DOL objects to paragraphs 6 and 7 of her Affidavit on the grounds that they consist of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to take the affiant's deposition.

Ana Gomez

DOL objects to paragraph 6 of her Affidavit on the ground that it consists of speculation. DOL further objects to the Affidavit on the ground that there has been no opportunity to the affiant's deposition.

Plaintiffs' Reply: Plaintiffs replied to these objections when they were first raised in Fact 61.

Respectfully submitted,
TEXAS RIOGRANDE LEGAL AID, INC.

Dated: December 21, 2004

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served upon the following counsel of record instantly by electronic mail on December 21, 2004:

Alexandra Tsiros
Office of the Solicitor
U.S. Dept. of Labor
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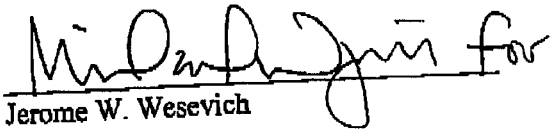

Jerome W. Wesevich