



United States Department of Justice
Civil Division

450 5th Street, N.W.
Washington, D.C. 20001
Tel: (202) 532-4329
Fax: (202) 305-7000
geoff.forney@usdoj.gov

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Marcia M. Waldron, Clerk
Office of the Clerk
Third Circuit Court of Appeals
601 Market Street, Room 21400
Philadelphia, PA 19106

RE: Louisiana Forestry Ass'n v. Secretary of Labor, No. 12-4030

Dear Ms. Waldron:

Appellees file this response to Appellants' December 5, 2013, letter discussing the Board of Alien Labor Certification Appeals' decision in *Island Holdings*, 2013-PWD-00002 (BALCA Dec. 3, 2013) (*en banc*). The BALCA decision represents a resolution of that individual case, but does not represent the legal position of the Secretary of Labor.

The Administrative Law Judges (ALJs) composing the BALCA are subordinate employees of the agency. *See* 5 U.S.C. § 3105; 52 Fed. Reg. at 11,217; Dep't of Justice, Legal Counsel Opinion, 14 Op. O.L.C. 1, 2-3 (1990). It is a basic principle of administrative law that the *agency* makes law and policy, not subordinate ALJs. *See Ho v. Donovan*, 569 F.3d 677, 682 (7th Cir. 2009); *Croplife v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003); *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989); Admin. Conf. of the United States, Recommendation 92-7, 57 Fed. Reg. 61,759, 61,763 (Dec. 29, 1992).

The BALCA's *Island Holdings* decision does not reflect the legal position of the Secretary of Labor because the BALCA erroneously rejected the Secretary of

Labor's own plain interpretation of the relevant regulatory provisions, as reflected in the preamble to the Interim Final Rule and a separate interpretive statement accompanying Appendix B.1 in the *Federal Register*. See 78 Fed. Reg. at 24,055; 76 Fed. Reg. at 21,036. In dismissing the Secretary's preamble discussions, the BALCA ignored the established principle that a preamble statement to a rule constitutes the best evidence of the agency's contemporaneous interpretation of a regulation, to which the courts owe substantial deference. See *Public Citizen v. Carlin*, 184 F.3d 900, 911 (D.C. Cir. 1999); cf. *Dearborn Public Schools*, 1991-INA-222 (BALCA Dec. 7, 1993) (*en banc*), (BALCA, as a non-Article III court, lacks inherent authority to rule on the validity of a regulation).

Because the BALCA's decision does not represent the *agency's* legal determination, the BALCA's decision has no bearing on the question presented in this appeal, which concerns the Secretary's decision and interpretation, not the erroneous ruling of necessarily subordinate ALJs.

Respectfully,

/s/Geoffrey Forney
GEOFFREY FORNEY
Senior Litigation Counsel
United States Department of Justice