U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 November 2011

In the Matters of:

ALBERT EINSTEIN MEDICAL CENTER,
Employer,

on behalf of

JENNY CABAS VARGAS,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00379** A-08183-66472
DANAI KHEMASUWAN,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00380** A-08183-66394
ANTHONY BREHM,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00381** A-08183-66406
MARTINE DAVID,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00382** A-08183-66403
KAWIN TANGDHANAKANOND,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00383** A-08184-66741
GAIL ROSE-GREEN,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00384** A-08192-68841
NATASA MILOSAVLJEVIC,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00385** A-08192-68827
THERESA PATTUGALAN,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00386** A-08192-68815
ANDREEA CADAR,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00387** A-08192-68849
KAJAL RAMESH PATEL,	**BALCA Case No.:** ETA Case No.:	**2009-PER-00388** A-08233-80040

EVGENIA E. KORYTNAYA, — **BALCA Case No.: 2009-PER-00389**
ETA Case No.: A-08234-80630

BHASKAR PURUSHOTTAM, — **BALCA Case No.: 2009-PER-00390**
ETA Case No.: A-08253-85218

IKJOT KAUR, — **BALCA Case No.: 2009-PER-00391**
ETA Case No.: A-08255-85991

Aliens.

ABINGTON MEMORIAL HOSPITAL,
Employer,

on behalf of

LATHA ACHANTA, — **BALCA Case No.: 2009-PER-00433**
ETA Case No.: A-08221-76948

ADRIAN PIELEANU, — **BALCA Case No.: 2009-PER-00435**
ETA Case No.: A-08214-75155

NUTAN BHASKAR, — **BALCA Case No.: 2009-PER-00436**
ETA Case No.: A-08221-76958

PANDIT TRAILOKYA, — **BALCA Case No.: 2009-PER-00437**
ETA Case No.: A-08221-76984

Aliens.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Richard D. Steel, Esquire
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Stephen W. Manning, Esquire
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Portland, Oregon
For Amicus, American Immigration Lawyers Association

Before: **Burke, Colwell, Johnson, Purcell and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER OF REMAND

Introduction

These appeals arise under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).[1] These consolidated appeals present the common issue of whether a Certifying Officer (CO) of the Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC) may deny

[1] "PERM" is an acronym for "Program Electronic Review Management" system. In this Decision and Order, we will refer to the regulations in effect on or after March 28, 2005 as the "PERM" regulations. The regulations in effect prior to that date will be referred to as the "pre-PERM" regulations.

labor certification for medical resident positions on the ground that such positions do not constitute permanent employment. In addition, these appeals present issues relating to the scope of the Board's review when employers choose to forego reconsideration by the CO and instead appeal directly to the Board.

PART I

EVIDENTIARY AND PROCEDURAL RULINGS

Initially, we must determine what evidence and argument can be considered by the Board on review, and whether the record is sufficient to permit the Board to render an en banc decision in these matters.

A. Procedural Background

On July 1, 2008 and August 14, 2008[2] the CO accepted for filing the Employers' Applications for Permanent Employment Certification for the positions of "Senior Resident," and "Internists, General."[3] (AF 25-36, AF2 85-95). On March 20, 2009 and March 27, 2009, the CO denied certification on the ground that the job opportunity was not for permanent employment as required by 20 C.F.R. § 656.10(c). (AF 23-24, AF2 13-14). The CO found that the job opportunity "is for a medical resident, i.e. a student in graduate medical training. Because such a program is finite in nature, the

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[2] For purposes of this Decision and Order, we are citing to a representative Appeal File for each set of appeals. Citations relating to Einstein's appeals are based on the Appeal File for Jenny Cabas Vargas, 2009-PER-00379 and will be referred to as "AF." Citations relating to Abington's appeals are based on the Appeal file for Latha Achanta, 2009-PER-433 and will be referred to as "AF2." Because the appeal for Andreea Cadar, 2009-PER-00387 has a different procedural background, this appeal will be referred to as "AF3." For the Einstein appeals, the dates that each application was accepted for filing varied from July 1, 2008 through September 11, 2008. For the Abington appeals, all of the applications were accepted for filing on August 14, 2008, with the exception the application for Yagandhar Manda, 2009-PER-439, which was accepted for filing on September 2, 2008. The AF citations on the Appendix, however, are to the individual Appeal Files instead of the representative case files. *See* n.72, *infra*.

[3] Despite the different job titles, all of these applications involved medical residency positions. The duties listed for job title "Internal Medicine Resident" (and occupation titled "Senior Resident") are: "Evaluation and treatment of patients. Supervise first year (PGY-1) junior residents and medical students. Develop expertise in clinical and interpersonal skills. Intense training and duties in sub-specialty areas. Clinical and didactic teaching. Design elective portion of curriculum. Provide competent leadership and provide appropriate supervision and teaching to junior residents and medical students. Serve as role model for PGY-1 residents and medical students." (AF 27).

aforementioned medical residency training, in and of itself, is not permanent, but rather temporary employment." (AF 24, AF2 14).

On April 14, 2009, the Albert Einstein Medical Center (Einstein or AEMC) filed a request for review and presented legal arguments that the position was permanent in nature and that the CO's denial was contrary to at least 25 years of Department of Labor (DOL) approval of applications for medical residency positions. (AF 16-17). On April 24, 2009, the Abington Memorial Hospital (Abington or AMH) filed a request for reconsideration arguing that the position was in fact permanent in nature and that the Department of Labor had a longstanding policy to grant permanent labor certification for medical residents. (AF2 6-12). Abington's motion for reconsideration was accompanied by documentation in support of its arguments. (AF2 15-82).

On June 16, 2009, Abington withdrew its request for reconsideration, stated that it sought review by the Board of Alien Labor Certification Appeals (Board or BALCA), and requested that the CO immediately forward the administrative files to BALCA. (AF2-4).

On June 26, 2009, Einstein similarly requested that the CO immediately forward the appeal files for all of its cases to BALCA. (AF 14). On July 16, 2009, Einstein filed with both the CO and BALCA a "Motion for 'Immediate' Transfer of Indexed Appeal Files from Certifying Officer to Board of Alien Labor Certification Appeals." (AF 1-10).

On July 20, 2009, BALCA issued a Notice of Docketing and Order Setting Briefing Schedule in the Einstein cases. The Einstein Notice of Docketing instructed the parties to file position statements regarding whether BALCA had the authority to order the CO to send the case files to BALCA. The CO did not file a position statement on the issue of the Board's authority to order a transfer of the files, and instead forwarded the Einstein appeal files to BALCA on August 17, 2009. On August 20, 2009, BALCA consolidated the Einstein cases, and found that the issue of the Board's authority to order a transfer of the files was now moot.

On August 24, 2009, BALCA received filings from Abington seeking immediate transfer of the appeal files to BALCA and consolidation of the Abington cases. The CO agreed to send the appeal files to BALCA, and on September 14, 2009, BALCA received the Abington appeal files. Abington's request to consolidate the cases was granted on September 15, 2009.

On October 27, 2009, BALCA consolidated the two sets of cases, and sua sponte notified the parties that it would review the appeals en banc.

Following completion of briefing on the merits, on November 17, 2010 the Board issued an "Order Granting Certifying Officer's Motion to Strike and Directing Parties to Confer and Advise." The CO had argued in his appellate brief that all documents offered by the Employers offering factual evidence not in the record before the CO when he denied the applications are inadmissible under the regulations. The Board construed this argument as a motion to strike all of the documentation submitted by the Employers in support of their appeals, and granted the motion. Based on the regulatory limits on the scope of BALCA review, the Board also struck any legal argument that was dependant on that documentation. Given this ruling, the Board concluded that en banc review had been improvidently granted, and directed the parties to confer and advise on how to proceed.[4]

Thereafter, Einstein filed a motion to strike an exhibit appended to the CO's appellate brief and all legal argument that derived from that exhibit. Einstein and Abington later filed a joint motion for reconsideration of the Board's November 17, 2010 order. The parties filed an interim joint report seeking a stay on a final recommendation

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[4] The Board suggested that the CO consider waiving technical objections to the scope of the record before the Board for the purposes of this appeal only, and without creating a binding precedent, in the interest of administrative efficiency and because it might be mutually beneficial for all parties to have the Board render an en banc decision based on all of the evidence and argument presented on appeal. The Board alternatively suggested that if a compromise on the scope of the record for review could not be reached, the Employers consider withdrawing their requests for review for the purpose of a remand for reconsideration by the CO in full light of the evidence and arguments now being proffered.

to the Board on how to proceed. The stay was sought on the ground that the Board's ruling on the Employers' motions to strike and for reconsideration may significantly influence the parties' responses to the Board's November 17, 2010 order. Finally, the CO filed a consolidated response to the Employers' motions to strike and for reconsideration.

B. The Board's November 17, 2010 Order

As noted, the Board's November 17, 2010 order struck the Employers' evidence, and argument that derived from that evidence, on the ground that the regulations bar consideration by the Board of argument and evidence that was not in the record upon which the CO denied certification. Specifically, the regulation at 20 C.F.R. § 656.26(a)(4)(i)(2008) provides, in pertinent part:

> With respect to a denial[,] … the request for review,[[5]] statements, briefs, and other submissions of the parties and amicus curiae must contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.

20 C.F.R. § 656.26(a)(4)(i)(2008). The regulation at 20 C.F.R. § 656.27(c), provides, in pertinent part:

> (c) *Review on the record*. The Board of Alien Labor Certification Appeals must review a denial of labor certification under § 656.24 … on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs….

Accordingly, the Board on appeal may not consider evidence first presented in an appellate brief. *See Eleftheria Restaurant Corp.*, 2008-PER-148 (Jan. 9, 2009) (granting CO's motion to strike documentation of newspaper publication first presented in

[5] The current version of this regulation begins "with respect to a denial of the request for review…." In the November 17, 2010 order, we noted our agreement with the ruling in the panel decision, *Denzil Gunnels*, 2010-PER-628, slip. op. at 11 n. 7 (Nov. 16, 2010), that the phrasing "with respect to a denial of the request for review" was a scrivener's error resulting from changes from the proposed regulations made in the final rule. We reiterate our agreement with the *Gunnels* panel that this regulation was intended to read, "with respect to a denial, the request for review, statements, briefs.…"

conjunction with an appellate brief). Moreover, as the panel noted in *Tekkote*, 2008-PER-218, slip op. at 4 n.2 (Jan. 5, 2008), under pre-PERM law, the Board interpreted similar regulations as permitting general legal argument in briefs, but not permitting employers to present wholly new arguments not made before the CO.

In our November 17, 2010 Order, we noted that in both sets of appeals currently before the Board, the CO was treating the Employers' requests for review of the denial as motions for reconsideration, and both Employers expressly and unambiguously chose to forego such reconsideration by the CO and instead pursue direct appeals before BALCA. The consequence of that choice was that the Employers could not supplement the record with argument or evidence that was not before the CO when the CO denied the application. *See Denzil Gunnels*, 2010-PER-628, slip. op. at 14 (Nov. 16, 2010).

C. The Employers' Motion for Reconsideration of the November 14, 2010 Order

1. The Board's Decision to Construe the CO's Argument as a Motion to Strike

In their joint motion for reconsideration, the Employers first argue that the Board erred in construing as a motion to strike the argument made in the CO's brief that evidence not considered by the CO is inadmissible on appeal. The Employers contend that the CO's brief in proper context was legal argument and not a motion, and that if the Board is inclined to treat that portion of the CO's brief as a motion, the Employers are entitled to respond to the motion as provided for by 29 C.F.R. § 18.6(b).[6] The Employers contend that without an opportunity to respond to a motion, they have been denied procedural due process.

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[6] The Employers also argued that the CO "tucked away" the argument about the inadmissibility of the Employer's evidence on the last page of its brief, did not characterize the argument as a motion to strike, and drafted only four sentences on the point. The Employers argued that, in fact, the CO purposely did not file a motion to strike for fear that the CO's own evidence, namely Exhibit 1 appended to the CO's appellate brief, would also be stricken. These arguments are not persuasive. The CO's argument was not hidden but rather located under a prominent heading, we do not believe that the CO presented the scope of review issue as an argument rather than a motion in order to gain a tactical advantage, and the argument did not need more than a few sentences to state.

This argument is not convincing. As discussed above, the Board's scope of review is defined by regulation, and even if the CO had not made the argument that the Employer's evidence was not admissible, the Board would have sua sponte limited its review as required by 20 C.F.R. § 656.26(a)(4)(i) and 20 C.F.R. § 656.27(c).

Moreover, the Board issued the preliminary order striking the evidence first presented by the Employers on appeal for the very purpose of giving the Employers fair notice of what the Board would review pertinent to the merits of the appeal, rather than learning of the Board's determination not to consider the evidence in a final decision. The Board also issued the preliminary order to notify both parties of the Board's concern that without a fully developed record, en banc review appeared to be improvidently granted, and to suggest that the parties endeavor to find a compromise that would enable en banc review to proceed, or at least permit the matters to be returned to the CO for a full development of the record. Thus, treating the argument as a motion to strike assisted the Employers by exposing the scope of review issue prior to a decision on the merits.

Finally, the Employers' joint motion for reconsideration and Einstein's motion to strike are now being given full consideration. As discussed below, we are modifying our evidentiary rulings based on those motions and the CO's response.

2. Whether the Board Should Take Administrative Notice of the Parties' Documentation

a. *Matters on Which Administrative Notice May Be Taken on Appeal*

The Employers' second argument in their joint motion for reconsideration is that its evidence met the criteria for official notice under 29 C.F.R. §§ 18.45 and 18.201.[7] Those regulations provide:

[7] The Employers observed in their motion for reconsideration that "official notice" is more commonly known as "judicial notice." This is a correct observation. What is termed "official notice" or "administrative notice" in an Article I administrative court, is essentially the same as "Judicial Notice" in Article III and other courts.

§ 18.45 Official notice.

Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

§ 18.201 Official notice of adjudicative facts.

(a) *Scope of rule*. This rule governs only official notice of adjudicative facts.

(b) *Kinds of facts*. An officially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the local area,

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or

(3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.

(c) *When discretionary*. A judge may take official notice, whether requested or not.

(d) *When mandatory*. A judge shall take official notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard*. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.

(f) *Time of taking notice*. Official notice may be taken at any stage of the proceeding.

(g) *Effect of official notice*. An officially noticed fact is accepted as conclusive.

BALCA, which is housed within the Office of Administrative Law Judges (OALJ), United States Department of Labor, applies OALJ's Rules of Practice and Procedure at 29 C.F.R. Part 18 in reference to procedural matters not covered by the permanent labor certification regulations. *Gino Pizzeria & Ristorante*, 2009-PER-32, slip op. at 2 n.1 (Jan. 27, 2009). BALCA's adoption of the Part 18 procedural rules, however, is not open ended. Those rules are designed for administrative law judges conducting formal evidentiary hearings. BALCA, however, sits in a purely appellate capacity in the type of PERM appeal now before us.[8] While it is generally recognized that appellate courts have the discretion to take judicial notice of a fact for the first time on appeal, 21B FED. PRAC. & PROC. EVID. § 5110.1 at n.9 (2d ed. 2010), the court's exercise of that discretion is circumscribed by respect for the initial adjudicator's fact-finding role and avoidance of using that discretion solely to cure an insufficiency of evidence in the record. *Id*. at nn.17 and 19.[9] Judicial notice should not be used as a way to evade procedural restrictions on appellate review, *Id*. at n.33, although it is sometimes considered permissible for an appellate court to take judicial notice of a fact for the first time on appeal if the purpose is to support an affirmance of the initial adjudicator's decision. *Id*. at nn. 37-40.

The PERM regulations, like the regulations that preceded them, were very clearly designed to require all evidentiary development to occur before the CO. BALCA's scope of review is limited to the evidence and argument made before the CO. 20 C.F.R. §

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[8] The regulation at 29 C.F.R. 18.201(d) provides that taking official notice is mandatory "if requested by a party and supplied with the necessary information." Section 18.201 is found in Subpart B of 29 C.F.R. Part 18. Subpart B describes rules of evidence which are used by a judge who presides at the reception of evidence at a formal hearing under the Administrative Procedure Act (APA), 5 U.S.C. 554, 556 and 557. *See* 29 C.F.R. 18.101. In other words, Subpart B is designed to assist in the creation of the record before the initial finder of fact in formal agency adjudication. PERM appeals are, in contrast, purely appellate in nature, and are not formal APA hearings. Thus, we find that section 18.201(d) is inapposite in BALCA review of a CO's denial of permanent labor certification.

[9] *See also Harry Tancredi*, 1988-INA-441, USDOL/OALJ Reporter at 2 (Dec. 1, 1988) (en banc) ("[A]s the initial fact-finder in alien labor certification cases, it is the CO's job, not BALCA's, to weigh the evidence in the first instance."); *Investor's Realty*, 2008-PER-81 (Sept. 18, 2009) (quoting *Cathay Carpet Mills, Inc.*, 1987-INA-11 (Dec. 7, 1988) (en banc), to the effect that the regulatory requirement that the evidentiary record be developed before the CO "is an expression of the importance for labor certification matters to be timely developed before certifying officers who have the resources to best determine the facts surrounding the application").

656.27(c). As noted above, BALCA will consider general legal argument made in briefs, but not legal argument that raises entirely new theories not raised before the CO. 20 C.F.R. § 656.26(a)(4)(i).

The Board recognizes that used with restraint, judicial notice is beneficial to fair and efficient appellate review. The Board's use of official notice in deciding permanent labor certification appeals is well established. A Westlaw search reveals that the Board has taken "official" or "administrative" or "judicial" or "administrative-judicial" notice in well over 450 cases, including in en banc decisions. Often, official notice is taken to make the discussion more easily understood by the reader or to flesh out what was assumed by the parties to be common knowledge.[10] The vast majority of use of judicial notice in Board decisions has been to take notice of information contained in government publications, such as O*Net, the OCCUPATIONAL OUTLOOK HANDBOOK, Postal Service publications, Internal Revenue Service web postings, the U.S. Social Security Death Index, and so forth. But official notice has been taken on occasion of substantive adjudicative facts, such as prior filings with the Board by the same law firm, or the status of ETA's website at a time relevant to the appeal.[11] BALCA has also occasionally taken judicial notice of substantive adjudicative facts in reversals or remands, such as in situations that could be characterized as clear government error or a violation of procedural due process.[12] Nonetheless, we are wary of exercising the discretion of an appellate body to take judicial notice in a manner so as to undermine the PERM regulations' clear and strict restrictions on the scope of BALCA's review authority.[13]

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[10] *E.g., Excore Consulting, Inc.,* 2010-PER-989 (Oct. 8, 2010) (administrative notice taken of Wikipedia article in order to explain meaning of abbreviation used in job description in the Form 9089).

[11] *E.g., Hawai'i Pactific University*, 2009-PER-127 (Mar. 2, 2010) (en banc) (official notice of archived version of ETA web site).

[12] *E.g., International Systems Technologies*, 2005-INA-175 (Sept. 8, 2005) (official notice of staffing chart that established that the person who signed a certified mail receipt was a USDOL official); *Brooklyn Amity School*, 2007-PER-64 (Sept. 19, 2007) (official notice taken that New York CO's office was still open at the time the employer filed its notice of filing). *See* 21B FED. PRAC. & PROC. EVID., *supra* at n.63 (noting that appellate courts do sometimes take judicial notice where the matter involved something akin to plain error).

[13] Compare the regulation stating the Board of Immigration Appeals' scope of review at 8 C.F.R. § 1003.1(d)(3)(iv) (2011) ("Except for taking administrative notice of commonly known facts such as current

Informed by these principles, we now turn to the documentation of which the parties have requested that the Board take administrative notice. For each document, the inquiry is twofold. First, it must be determined whether the document contains the type of information that qualifies for administrative notice. Second, if the document qualifies for administrative notice, it must be determined whether the Board will exercise its discretion as an appellate body to take administrative notice. We will not do so where it would undermine the PERM regulations' restriction on the scope of BALCA's review. In reviewing the specific documents, however, we are mindful that these appeals involve both the purely legal issue of what the PERM regulations mean when they refer to "permanent" employment, and the fact-finding implicated issue of whether the medical residency positions involved in these particular appeals fit within that regulatory definition. We are more inclined to take administrative notice on the purely legal issue than on the fact-finding implicated issue.

b. Rulings on Proffered Documentation

i. Affidavits and Letters

Einstein submitted an affidavit from Dr. Glenn Eiger, who is the Program Director of Einstein's Internal Medicine Residency Program (AEMC EX A), an affidavit from Anne Nolan-Peatman, who is Einstein's Administrative Director of Academic Affairs (AEMC EX B), and a letter from Dr. Michael Maves, the Executive Vice President of the American Medical Association (AMA) to Jane Oates, the Assistant Secretary to the Employment and Training Administration. (AEMC EX G). Administrative notice is not appropriate for any of these three exhibits. They all contain opinions, rather than generally known or readily verifiable facts. For example, Dr. Eiger's affidavit includes the statement that "Einstein does not view the Senior Medical Resident position as

events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.").

'finite'…" and contains information about the nature of Einstein's need for medical residents. The same is true of Anne Nolan-Peatman's affidavit, which contains the same assertions regarding Einstein's need for medical residents and how Einstein views the medical resident position. Dr. Maves' letter contains assertions regarding the percentage of international medical graduates that make up the domestic physician workforce and the effect of the DOL's denials.

Accordingly, these exhibits do not meet the criteria for administrative notice under 29 C.F.R. § 18.201 because they all contain facts that are subject to reasonable dispute, are not generally known, and are not readily verifiable. We also find that even if these exhibits were appropriate material for taking administrative notice, we would decline to exercise the discretion of an appellate body to take administrative notice because to do so would undermine the PERM regulations' restriction on the scope of BALCA's review.

ii. Official Department of Labor Documents

The Employers submitted six exhibits that can be considered official Department of Labor information or guidance. Some of this information is available on the Department of Labor's website, including FAQ responses posed on OFLC's website (AEMC EX E), and a job description for "Physicians and Surgeons" from the Bureau of Labor Statistics (BLS) OCCUPATIONAL OUTLOOK HANDBOOK, 2008-09 Edition (AEMC EX F, AMH EX 2). Also, the Employers submitted a copy of a 1983 Department of Labor memorandum. (AEMC EX C, AMH EX 3). The Employers submitted the Attachment to DOL General Administration Letter (GAL) No. 1-95 (AEMC EX H, AMH EX 5) and the Attachment to GAL No. 10-84 (AEMC EX I, AMH EX 4). Both of these GALs establish procedures for H-2B temporary labor certification in nonagricultural occupations. Additionally, Einstein submitted a screen shot, taken from ETA's website, showing a certified PERM application. (AEMC EX N).

Administrative notice may be taken of all of these exhibits. The CO agrees that administrative notice can be taken of OFLC's FAQ response regarding prevailing wage

determinations. Likewise, the CO agrees that administrative notice can be taken of the 1983 DOL Memorandum. As the CO notes, the reliability of all of these documents is not subject to any dispute, since all are clearly official DOL guidance. The accuracy of any of this documentation cannot, and has not, been questioned. Moreover, this is precisely the type of official Department of Labor authority over which the Board has historically taken official notice.

As the BLS OCCUPATIONAL OUTLOOK HANDBOOK is published by the DOL, it is also appropriate for the Board to take administrative notice of it as official DOL guidance. Additionally, BALCA has taken administrative notice in the past of the BLS OCCUPATIONAL OUTLOOK HANDBOOK. *See, e.g., The Cherokee Group*, 1991-INA-280 (Nov. 4, 1992). We find that taking official notice of the BLS OCCUPATIONAL OUTLOOK HANDBOOK does not undermine the PERM regulations' restriction on BALCA's scope of review, because the CO clearly considered a job description of the medical residency position in making his determination.

AEMC EX N is a screen shot from OFLC's website. OFLC has a "search case" tool on its website that allows individuals to find the status of a pending application by ETA case number. The screen shot shows that ETA Case Number A-08192-68849 (which is the ETA case number associated with Andreea Cadar, 2009-PER-00387) had the status of "certified" on March 9, 2009. While the CO argues that this screen shot cannot be corroborated, the ETA case number is provided, the website address and date stamp are listed on the exhibit, and there is no reason to believe that this exhibit has in any way been altered. Accordingly, we find that the fact that the OFLC website showed the status of Ms. Cadar's PERM application as "certified" on March 9, 2009 is not subject to dispute, and as an official government document, is the type of documentation on which we may exercise the discretion to take administrative notice. Whether consideration of the screenshot would undermine the regulatory proscription on the scope of the Board's review is a close question. The issue of whether the application was certified and therefore the regulatory procedure for revocation of an approved certification must be followed was first raised in the Employer's request for review. It was not before the CO

when the denial was issued. And since the Employer requested direct BALCA review rather than waiting for the CO to issue a decision on reconsideration, the argument was never addressed by the CO. We find, however, that the CO clearly would have known at the time of issuing the denial letter whether the application had previously been certified. Accordingly, the screen shot may be viewed as akin to situations where administrative notice is taken of a plain error by the government. Thus, we will take administrative notice of the screen shot for the purpose of determining whether the CO's failure to follow the procedure for revocation of a certified application was in error. We will also consider the screen shot in relation to the Employer's argument that the decertification procedure mandates de novo review by the Board. The merits of these arguments are discussed below in Part I-C.6. and Part IV of this opinion.

iii. Information Appearing on the Employers' Websites

The CO requests that official notice be taken of the content on the Employers' websites (CO 1). This information, however, does not contain generally well-known or readily verifiable facts. There is no reason to believe that the CO would have known or considered this information when making his determinations. Furthermore, the website printouts at CO 1 post-date the CO's determination, and official notice of this documentation would undermine the PERM regulations' restriction on BALCA's scope of review. Accordingly, we will not take administrative notice of the content on the Employers' websites.

iv. Information Appearing on AILA's Website

The DOL/AILA Liaison Meeting Minutes from May 27, 2004 (AEMC EX D), presumably printed from the American Immigration Lawyers Association's website, is not appropriate for official notice. These are informal meeting minutes, and the DOL has not placed this information on its own website as official guidance. The meeting minutes are not capable of accurate and ready determination by resort to sources whose accuracy

cannot reasonably be questioned. Accordingly, official notice of AEMC EX D is not appropriate.

v. Newspaper Articles

Einstein submitted newspaper articles from the Philadelphia Business Journal and The Wall Street Journal with its request for review. (AEMC EX J, K, L). These articles do not fall within the Official Notice rule, as they all contain facts that are not generally known or readily verifiable. Moreover, these newspaper articles post-date the CO's determinations in these cases and could not have been known to the CO when he made his determinations.

vi. Certified PERM Application

Einstein submitted a February 24, 2009 certified PERM application for Flor Mizrahi Lehrer for the position of medical resident. (AEMC EX M). It is the type of government document of which it is appropriate to take administrative notice. Although the fact that Ms. Lehrer's PERM application was certified is not generally known, it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The Employer has submitted a copy of the actual certified application, and the CO, who issued the certification, has not disputed the accuracy of the documentation. The CO does not dispute that medical residency positions had been certified in the past, and we view the documentation as in support of the Employers' general legal argument that the CO abruptly changed its practice regarding the certification of medical residency positions. Accordingly, we will take administrative notice of Ms. Lehrer's certified application, AEMC EX M. Nonetheless, we note that the Board has held that prior decisions of the CO to grant certification are not binding in future cases. *Garcia Recycling*, 1996-INA-254 (Mar. 6, 1998); *Verdi's Restaurant & Catering*, 1998-INA-239 (Mar. 19, 1999); *Roberto's Mexican Food, Inc.*, 2009-PER-187 (May 8, 2009); *Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990). *See also Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987) ("It is absurd to

suggest that the INS or any agency must treat acknowledged errors [in granting a petition] as binding precedent."). Accordingly, although we take administrative notice of the certification of Ms. Lehrer's application, it has had negligible importance to the Board's deliberations in these matters, especially given that the CO has not denied that it had certified medical residency positions in the past.

vii. ACGME Institutional Requirements

Abington submitted the Accreditation Council for Graduate Medical Education (ACGME) Institutional Requirements (AMH EX 6). While not characterizing it as judicial or official notice, courts,[14] BALCA,[15] and other agencies[16] have often referred to ACGME standards as authoritative on standards relating to graduate medical education. ACGME Institutional Requirements are capable of accurate and ready determination, and are clearly appropriate for the taking of official notice. Nonetheless, Abington proffered the ACGME standards in support of an argument that was never presented to the CO: that the CO erred in the denial determination when he characterized the residencies as "student" positions. Thus it could arguably undermine the PERM regulations' limitation on BALCA's scope of review if we were to take official notice of this documentation.

We find that the ACGME standards are such a uniquely authoritative source on graduate medical education that it is proper to take official notice of them for the purpose of informing the Board generally on how residency programs are administered and

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[14] *E.g., Shin v. Univ. of Md. Med. Sys. Corp.*, 369 Fed. Appx. 472, 482 (4th Cir. 2010) (court defers to appellee's standards for professional and academic achievement as established by the ACGME); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (court looks to ACGME standards to determine how often pediatric residents should be on call); *Deshpande v. Medisys Health Network, Inc.*, 2010 U.S. Dist. LEXIS 37891 (E.D.N.Y. Apr. 16, 2010) (court held that hospital is obliged to monitor its residency program pursuant to the mandated standards of the ACGME).

[15] *Presbyterian Medical Center of Philadelphia*, 1996-INA-61 (July 2, 1997) (affirming CO's denial of certification because the employer failed to prove that its medical residency program was approved by the ACGME).

[16] *E.g., Boston Medical Center Corp. and House Officers' Ass'n/Committee of Interns and Residents*, 330 N.L.R.B. 152, 155 (NLRB 1999) (NLRB looks to the ACGME to understand the role of Chief Medical Residents).

operate. However, taking generic official notice of the ACGME standards should not permit Abington to make an argument before the Board that was not raised before the CO. Accordingly, although we will take official notice of ACGME materials, we decline to find that taking such notice means that Abington's argument is properly before the Board.[17]

3. Evidentiary Limitations Imposed by 20 C.F.R. § 656.24(g)(2)

The Employers' third argument in their joint motion for reconsideration is that they would not have been permitted to submit the documentation about the permanent nature of the medical residency positions at issue because of the evidentiary limitations imposed by 20 C.F.R. § 656.24(g)(2) (2008). This provision, which was promulgated by ETA partly in response to the Board's decision in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), and in support of ETA's decision to bar any modifications to PERM applications once submitted, greatly limits the types of documentation that may be used by an employer to support a motion for reconsideration. The amended regulation permits a motion for reconsideration to be supported only by (1) evidence that was received in response to a request from the CO to the employer (which would usually be an audit notification) or (2) evidence that the employer did not have a previous opportunity to present, that existed at the time the application is filed, and that was maintained in support of the application. In the instant cases, the Employers contend that they could not have successfully presented the documentation at issue in support of a motion for reconsideration because (1) there was no audit by the CO, and (2) the necessary documentation is not the type of information that would normally be kept at hand under the regulations' record retention requirements at 20 C.F.R. § 656.10(f).

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[17] Even if Abington's argument that the CO erred by referring to its residency positions as "student" positions could be considered general legal argument that could be considered by the Board on appeal, it is not clear why such a misstatement is material. Although residents are medical school graduates and therefore no longer "students," an ACGME approved residency program is required to "provide graduate medical education (GME) that facilitates residents' professional, ethical, and personal development." ACGME Institutional Requirements at I.B.1. (AF2 26). The OCCUPATIONAL OUTLOOK HANDBOOK (2010-11 Ed. U.S. Bureau of Labor Statistics), characterizes a medical residency as "graduate medical education in a specialty that takes the form of paid on-the-job training, usually in a hospital."

The Employers acknowledged that the BALCA panel in *CVS Rx Services, Inc.*, 2010-PER-1108 (Nov. 16, 2010), found that evidence in support of a legal argument is not barred from consideration by the CO when deliberating on a motion for reconsideration where that evidence does not purport to amend the content of the Form 9089. The Employers, however, claim that the *CVS* ruling is not an effective remedy to the procedural unfairness of the amended reconsideration regulation because it would require employers, where there has been no audit, to request reconsideration, which is presently taking an unacceptably long time (allegedly approximately two years and eight months). Thus, the Employers are arguing that BALCA should not have stricken its evidence because it could not have submitted it in support of a motion for reconsideration, and because even if the *CVS* decision permitted it to submit the evidence, delays at ETA in ruling on reconsideration render such motions an ineffective procedure.

The PERM regulations are structured in such a way that the CO is permitted to deny an application without first conducting an audit. The facts that the only way for an employer to present documentation to rebut such a denial is to file a motion for reconsideration, and that the CO does not have the resources to make quick decisions on reconsideration, are not grounds for expanding BALCA's scope of review on appeal.

The Employers' motion correctly points out that ETA's amendments to the motion for reconsideration regulation at section 656.24(g) introduced analytical and practical problems in addressing motions for reconsideration that did not fit the concerns that prompted ETA to amend section 656.24(g) – principally ETA's intent to prohibit modification of applications once submitted. Those due process issues were recognized and addressed in the panel decisions in *Gunnels*, 2010-PER-628, and *CVS*, 2010-PER-1108. Those panel decisions addressed how that panel would interpret section 656.24(g) contextually in order to permit an employer to present evidence in response to a denial on issues that it did not have a prior opportunity to address where the evidence was not of the type that would have been found in an employer's "audit file." We find that the

Gunnels and *CVS* decisions were well-reasoned and resolve the potential procedural due process issues presented by the amended section 656.24(g).

Accordingly, we find that the Employers' argument that they would have been procedurally and practically barred from presenting its documentation while the case was before the CO, and that therefore BALCA should not have stricken the evidence, is not persuasive.

4. Alleged Futility of a Remand for Reconsideration

The Employers' fourth argument in their joint motion for reconsideration is that the Board should not force the Employers to withdraw their appeals to take a remand to the CO in order for the CO to consider their arguments and evidence on remand because the CO's appellate brief, which included full responses to each of the Employers' arguments point by point, makes it clear that the CO would not change his mind on reconsideration.

We decline to assume that the CO could not be persuaded on a remand to change his position on whether medical residency positions can be certified, even if it seems unlikely. Moreover, for the reasons stated below, we will proceed to decide this case en banc. We ultimately remand these cases – but not for the CO to complete the original reconsideration process. Rather, the remands are to permit the Employers an opportunity to provide additional evidence and argument based on this en banc decision.

5. Whether the State of the Law at the Time of the Employers' Request for Review Made Abington's "Audit File" Part of the Administrative Record

The Employers' fifth argument in their joint motion for reconsideration is that because the Board held in *HealthAmerica* that "audit files" are constructively part of the administrative record and are not "new evidence" barred by the rule on motions for reconsideration (as the rule existed at the time of *HealthAmerica*), information that Abington provided to the CO with its motion for reconsideration that was part of its

"audit file" was constructively part of the record, and therefore within the record for BALCA review. The Employers argue that because the panel decision in *Gunnels* had not yet been issued when Abington's petition for review was filed, it is not controlling.

This argument is not convincing. The regulation at section 656.24(g)(2) is clearly applicable to applications submitted after July 16, 2007. Abington's applications were submitted in the summer of 2008, and the amended regulation clearly applies. The fact that *Gunnels* was the first BALCA panel decision to conduct an in-depth analysis of the amended regulation is irrelevant.

Moreover, the constructive administrative record described in *HealthAmerica* covered documentation that was being held under the document retention regulation at 20 C.F.R. § 656.10(f), and not documentation created after the application was filed. Here, Abington claims that its "audit file" submitted with the motion for reconsideration constructively included an affidavit from the employer, DOL guidance confirming the long-standing policy to certify applications for residents, and evidence that physician positions are generally understaffed. Unless Abington had the foresight to include this documentation in its document retention file at the time it filed its application, it is not part of the constructive record contemplated by *HealthAmerica*.

6. De Novo Review of Application That Was "Decertified"

The Employers' final argument in support of reconsideration is that Einstein is entitled to de novo review[18] of Andreea Cadar's application, which is procedurally

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[18] We note that the regulation at 20 C.F.R. § 656.26(a)(4)(ii) (2010) provides that "[w]ith respect to a *revocation* or a debarment determination, the BALCA proceeding may be de novo." (emphasis added). On the other hand, the regulation at 20 C.F.R. § 656.27(c) provides that "[t]he Board of Alien Labor Certification Appeals must review a denial of labor certification under § 656.24, *a revocation of a certification under § 656.32*, or an affirmation of a prevailing wage determination under § 656.41 *on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs* submitted…." The discrepancy in the Board's appellate authority is striking.

The proposed amendments to 20 C.F.R. § 656.26 published in 2006 did not say anything about a de novo hearing before BALCA on a revocation or debarment determination. 71 Fed. Reg. 7655 (Feb. 13, 2006). Thus, the provision for a de novo hearing was added only in the final rule. The regulatory history

dissimilar to the other 16 consolidated cases because that application was initially certified, and then denied 37 days later. Einstein argues that this application was initially certified, but then "decertified," and that the CO did not follow the regulations at 20 C.F.R. §§ 656.30(d) and 656.32 concerning revocation of a certification.

Above, we took official notice of a screen shot from the OFLC website showing that the application filed on behalf of Ms. Cadar had the status of "certified" on March 9, 2009. This screen shot alone, however, is not sufficient to show that the application filed on Ms. Cadar's behalf was actually certified. The PERM regulations provide that if a labor certification is granted, the CO must send the certified application and complete Final Determination form to the employer and indicate that the employer may file all the documents with the appropriate DHS office. 20 C.F.R. § 656.24(d). As noted above, although Section O to Ms. Cadar's ETA Form 9089 states that the certification is valid from March 3, 2009 to August 30, 2009, the Appeal File contains no evidence that the CO actually signed the ETA Form 9089. Additionally, the date that the application was purportedly certified by the CO, August 12, 2009, post-dates the date of denial, which was April 14, 2009. (AF 22, 32). There is no evidence or allegation that Einstein received a certified application and complete Final Determination form for Ms. Cadar. Thus, despite the partial completion of Section O of the Form 9089 and evidence that ETA's web site at least temporarily displayed a "certified" status on its website, we find that without the CO's signature on Ms. Cadar's ETA Form 9089 a final approval of certification by the CO was never rendered. Thus, the regulation governing the procedure for revocation of a certification is not applicable.

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indicates that ETA's goal was to provide an expanded opportunity for an evidentiary hearing in debarment cases. Because revocations were included with this expansion, it appears likely that ETA was anticipating that such a debarment and revocation would occur in tandem, and that this would be the situation in which BALCA would invoke the discretion to conduct a de novo hearing (section 656.26(a)(2) only says that BALCA "may" conduct a de novo hearing). In other words, a hearing would be offered when the revocation and/or debarment included an element charging willful misrepresentation. This association seems probable given that ETA did not amend § 656.27(c), and that the prior regulations did not provide an opportunity for a de novo hearing by BALCA of a revoked certification. Accordingly, we find that BALCA has the discretion to institute a de novo hearing in the case of an appeal of a revocation, but absent unusual circumstances, a de novo hearing is reserved for situations where an employer has appealed a revocation and a debarment simultaneously.

D. Einstein's Motion to Strike

Following the Board's November 17, 2010 order striking the evidence attached to the Employers' brief and any argument grounded in that evidence, Einstein filed a motion to strike similar evidence and argument associated with the CO's brief. We concur that the CO can no more supplement the record with evidence or argument not considered by the CO than can employers. *See, e.g., Medical Care Professionals, Inc.*, 2008-PER-247 (July 17, 2009). Moreover, as explained above, the CO's Exhibit 1 is not information about which taking administrative notice is warranted. Accordingly, Einstein's motion is granted, and the Board has not considered the exhibit attached to the CO's brief or any argument that depends on it.

E. Whether a Sufficiently Developed Record Exists to Permit En Banc Review

The Board stated in the November 17, 2010 order that, in view of its ruling striking much of the most cogent evidence and argument from the Employers' case, en banc review had been improvidently granted. The Board stayed en banc review pending a directive that the parties consult to see if a compromise could be reached to permit the employers to perfect the record, either through a stipulation by the CO, or a withdrawal of the appeals for a remand to complete the reconsideration process. The parties were unable to agree to a compromise, and instead the Employers requested reconsideration of the Board's evidentiary ruling. Because we have reconsidered the evidentiary ruling and have modified that ruling, we now revisit the conclusion that en banc review was improvidently granted.

A case in which the evidentiary record is incomplete is not the ideal circumstance for an appellate body to conduct review en banc, even if all the parties concur that the issue involved is important and will affect a large number of interested persons and entities. Nonetheless, upon review of the present stance of the appeals, we conclude that the record is sufficient to render a decision on the legal issue of the meaning of "permanent" employment under the PERM regulations. As we explain below, however, we will remand this matter to permit the Employers to present evidence on the specific

question of whether the requirement of permanent employment bars medical residency positions from a labor certification under their particular residency programs.

F. Joint Motion for Stay of Due Date for Recommendation on How to Proceed

On December 10, 2010, the parties filed an "Interim Joint Report to the Board" in response to the directive in the Board's November 17, 2010 order for the parties to confer and provide a recommendation on how the Board should proceed. In the Joint Report, the parties asked the Board to stay the requirement of a recommendation because the Board's adjudication of the motion for reconsideration and the motion to strike could significantly influence the parties' responses to the Order. We deny the request for an additional opportunity to recommend a course of action for the Board. This matter is ready for decision.[19]

PART II
STANDARD OF REVIEW

The Board of Alien Labor Certification Appeals was established in 1987. As a matter of its de facto practice, BALCA engages in de novo review of the record upon which the CO denied permanent alien labor certification, together with the request for review, and any statements of position or legal briefs. Yet, BALCA has never explained why it employs a de novo standard of review.[20]

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[19] Einstein and Abington both requested oral argument. We find, however, that the briefing is adequate on the legal issues before the Board.

[20] The caselaw on the subject is sparse and sometimes ambiguous. In *RP Consultants, Inc.*, 2009-JSW-1, slip op. at 8 (June 30, 2010), it was noted that very few cases have addressed the standard of review employed by ALJs or BALCA judges for alien certification cases. In *Rancho Auto Body*, 1997-INA-58 (Dec. 18, 1998), Judge Lawson urged in dissent that BALCA enunciate, en banc, the proper scope and standard of review. In *Hong Video Technology*, 1988-INA-202 (Aug. 17, 2001), the panel reviewed the evidence de novo, but concluded that the CO did not "abuse his discretion" in denying certification. In *La Salsa, Inc.*, 1987-INA-580 (Aug. 29, 1988), the panel declined to determine the standard of review of a CO's denial of permanent labor certification; however, both the majority and dissent engaged in de novo reviews of the evidence.

The INA does not specify the process by which the Secretary of Labor is to make labor certification determinations. Thus, the procedure for review of a CO's decision to deny permanent alien labor certification is entirely a regulatory creation.

The initial 1965 regulations provided for appeals of denials of certification directly to the Secretary of Labor. 29 C.F.R. § 60.4 (1965); 30 Fed. Reg. 14979 (Dec. 3, 1965); 32 Fed. Reg. 867 (Jan. 25, 1967). In 1971, the regulations were changed to provide for appeals to a regional administrator (or his designee) who had not been involved in the initial determination. 29 C.F.R. § 60.4 (1971); 36 Fed. Reg. 2462, 2464 (Feb. 4, 1971); *see also* 39 Fed. Reg. 20964 (June 17, 1974). In 1977, the regulations were changed to provide for appeals to "hearing officers" appointed by the Department of Labor's Chief ALJ. 20 C.F.R. § 656.26(d) (1977); 42 Fed. Reg. 3447, 3448 (Jan. 18, 1977). Hearing officers could be either a designated DOL official or an ALJ. In 1980, the regulations were modified to delete references to hearing officers and to provide only for appeals to an "administrative law judge." 45 Fed. Reg. 83926, 83944 (Dec. 19, 1980). The 1977 and 1980 versions of the regulations described a hybrid approach to how the review would proceed. Those regulations provided that the hearing officer or ALJ was to review the denial of certification "on the basis of the record upon which the denial of certification was made, the request for review and any legal brief submitted." 20 C.F.R. § 656.26(e) (1980). Because this is the first type of review listed in the regulation, we find it implicit that this would be the default type of review. The ALJ, however, was afforded the discretion to direct that a hearing be held on the case. 20 C.F.R. § 656.26(e)(4) (1980). Nothing in the regulation or the rulemaking history states the criteria which the ALJ would use in deciding when to conduct purely appellate type review and when to direct that an evidentiary hearing be conducted. If a hearing was directed, it was to be conducted in accordance with Sections 5-8 of the Administrative Procedure Act, 5 U.S.C. § 553 *et seq*. 20 C.F.R. § 656.27(h) (1981); 45 Fed. Reg. 83933, 83945 (Dec. 19, 1980); 42 Fed. Reg. 3440, 3448 (Jan. 18, 1977).[21] As discussed more

[21] If a hearing was directed, the ALJ also had the discretion to receive additional documentary evidence offered by any party. 20 C.F.R. § 656.27(h) (1981). Unless the ALJ remanded the case to the CO for further fact-finding, the ALJ's decision was to be the final decision of the Secretary. 20 C.F.R. § 656.27(o) (1981).

fully below, Section 8 of the APA, states that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." Thus, it appears that ETA intended that an ALJ review a CO's decision de novo, at least where a hearing was conducted. But such a standard of review is implied rather than expressly stated.

On April 8, 1987, ETA published a rule establishing the Board of Alien Labor Certification Appeals within the Office of Administrative Law Judges to hear and decide appeals of denials of permanent alien labor certification. 52 Fed. Reg. 11217, 11218 (Apr. 8, 1987). As noted in the preamble to that rule change, while judges within OALJ are assigned to the Department, they are "pursuant to the Administrative Procedure Act, independent of the Department" and thus under the old rules "individually heard and decided permanent alien labor certification appeals." While ETA acknowledged that ALJ decisions had been, by and large, of high quality, it sought with the creation of BALCA to "enhance uniformity and consistency of decisions." Similar to the preceding regulation, BALCA was to review the denial of certification "on the basis of the record upon which the denial of certification was made, the request for review, and any Statements of Position or legal briefs submitted." 20 C.F.R. § 656.27(c) (1987). BALCA, however, was to sit in panels of three judges. 20 C.F.R. § 656.27(a) (1987). The provision permitting the direction of a hearing was retained, but instead of specifying the hearing procedure in the regulation and providing for formal APA hearings, the revised regulation merely referenced hearings under the OALJ rules of practice and procedure at 29 C.F.R. Part 18. Finally, ETA stated that "The appeal and other rights which may accrue to the public under the prior regulations remain unchanged. The only changes are to the organization of the body (Administrative Law Judges in the Department's Office of Administrative Law Judges) hearing appeals." 52 Fed. Reg. at 11218. Although individual ALJs would no longer decide appeals, by establishing BALCA within the Department's Office of Administrative Law Judges, it is clear that ETA intended to ensure that, where there was an appeal, the final review of denials of permanent labor certification would be made by an independent panel of ALJs. With some minor

variations, this continues to be the framework for BALCA review found in the PERM regulations. *See* 20 C.F.R. §§ 656.24(e), 656.26 and 656.27 (2010).

Since the time that BALCA was established, we are only aware of one instance in which BALCA directed that an evidentiary hearing be conducted.[22] That instance was a judicial inquiry into whether a lay representative presented forged documents to BALCA. *Tadeusz Kucharski, in re Judicial Inquiry re Miroslaw Kusmirek*, 2000-INA-116 (Sept. 18, 2002). This single instance of an evidentiary hearing directed by BALCA, therefore, did not involve review of the merits of the labor certification, but the conduct of a representative that occurred before BALCA.[23] *See also* BALCA JUDGES' BENCHBOOK, Chap. 26-I-B-1 (2d Ed. May 1992) ("The Board routinely affirms or reverses the CO's denial of certification. It has never directed that a hearing be held, although it has granted oral argument in several matters."). Thus, as a matter of well-established practice, BALCA has *always* reviewed the CO's denial determinations in an appellate capacity rather than ordering an evidentiary hearing.[24] Nonetheless, the fact that the regulations contemplated the discretion of ALJs or BALCA to conduct de novo evidentiary hearings indicates that the Department anticipated a strong level of review by BALCA.

Thus, we have closely reviewed the regulations and the regulatory history, and while the regulations are quite specific about the scope of the record BALCA is permitted to review, neither the regulations nor the regulatory history expressly state BALCA's standard of review. Nor did the regulations expressly state the standard of review used by any of the agency reviewers under the regulatory schemes that preceded the establishment of BALCA. At most, the reference to Section 8 of the APA when an ALJ

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[22] Because ALJ decisions involving permanent labor certification were rarely published prior to the establishment of BALCA, we have almost no information on how often, if ever, individual ALJs exercised the discretion to direct an evidentiary hearing under the pre-BALCA regulations.

[23] The decision on the merits of the appeal in *Kusmirek* was decided separately from the representative's conduct issue. *See Miroslaw Kusmirek*, 2000-INA-116 (Sept. 28, 2001).

[24] *See* n.18 *supra*, regarding BALCA's authority to conduct a de novo hearing on revocation and debarment appeals under 20 C.F.R. § 656.26(a)(4)(ii)(2010), where we hold that BALCA will reserve de novo hearings for situations where an employer has appealed a revocation and debarment simultaneous.

conducted a hearing under the pre-BALCA regulations implies a de novo standard of review.

The APA states the standard of review when the subordinate official conducts a formal APA hearing. Specifically, Section 557(b) of the APA provides, in relevant part:

> (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title [[25]].
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee [...] shall initially decide the case [...]. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

(emphasis added). The *Attorney General's Manual on the Administrative Procedure Act*, at 83 (1947) provides that, in reviewing an initial or recommended decision of a subordinate officer, "the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision--as though it had heard the evidence itself." Thus, if the initial decision had been made by an ALJ or hearing officer following a formal evidentiary hearing, and the governing statute or regulation did not specify the standard of review, the standard of review by the final agency decision maker would be de novo pursuant to the APA's default standard of review at Section 557(b).[26]

In the case of BALCA appeals, however, BALCA is reviewing the decision of a Certifying Officer from the Office of Foreign Labor Certification of the Employment and

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[25] Section 556 describes requirements for formal APA hearings.

[26] For example, the Administrative Review Board employs a de novo standard of review of ALJ decisions under the H-1B labor condition application regulation at C.F.R. § 655.845. *See Kersten v. Lagard, Inc.*, ARB No. 06-111, ALJ No. 2005-LCA-17 (ARB Oct. 17, 2008) (under the APA, the ARB, as the Secretary of Labor's designee, acts with all the powers the Secretary would have in making the initial decision); *United States Dep't of Labor v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-4 (ARB Apr. 30, 2001) (under the APA, the ARB has plenary power to review an ALJ's factual and legal conclusions de novo).

Training Administration. Section 557(b) of the APA does not define the standard of review of such direct review of the decision of an agency official who makes an ex parte decision on an application for a government certification without a formal evidentiary hearing.[27] Nonetheless, it is clear that BALCA was delegated the Secretary's authority to issue final decisions on applications for permanent alien labor certification appeals. Given that the APA provides for de novo review of an ALJ decision following a formal hearing unless otherwise specified by an applicable statute or regulation, agency appellate review of a subordinate official's ex parte decision without the trappings of a formal hearing suggests that that de novo review should also apply, unless the matter being reviewed is clearly committed to that subordinate official's discretion[28] or there exists some other legally recognized reason for affording a more deferential standard of review to the agency's decision.[29]

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[27] The APA also defines the scope and standard of review of agency decisions by federal courts. See 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Those standards of review, however, are not applicable to an agency's internal appellate review process. *See Noverola-Bolaina, v. Immigration and Naturalization Service*, 395 F.2d 131, 136-137 (9th Cir. 1968) (declining to follow the analysis in a 7th Circuit analogizing the Board of Immigration Appeals' standard of review to that of an appellate court under the APA); *Mull v. Salisbury Veterans Administration Medical Center*, ARB No. 09-107, ALJ No. 2008-ERA-8 (ARB Aug. 31, 2011) (the portions of the APA that apply to an appellate board within the administrative agency procedures are found at 5 U.S.C. §§ 551 and 552 rather than 5 U.S.C. § 701, et seq.).

[28] For example, the panel in *Denzil Gunnels*, 2010-PER-628 (Nov. 16, 2010), employed an abuse of discretion review standard to the PERM regulation that expressly grants the CO the discretion to treat an employer's request for reconsideration as a request for review. Similarly, in *Solectron Corp.*, 2003-INA-144 (Aug. 12, 2004), the panel considered the standard of review under the pre-PERM regulations for the CO's denial of an employer's request for reduction in recruitment (RIR). The Board found that because the regulation left the decision of whether to grant a request for RIR to the CO's discretion, the proper standard of review was an abuse of discretion standard.

[29] For example, in *RP Consultants, Inc.,* 2009-JSW-1 (June 30, 2010), the BALCA judge held that the abuse of discretion standard of review applies to the Center Director's or Administrator's decision on an employer's appeal of a prevailing wage determination arising under the provisions of 20 C.F.R. § 655.731. The BALCA judge cited a pre-PERM panel decision in *El Rio Grande*, 1998-INA-133 (Feb. 4, 2000), involving a prevailing wage determination under the Service Contract Act, and the Department of Labor's Administrative Review Board decision in *Dep't of the Army*, ARB Nos. 98-120, 98-121, and 98-122 (ARB Dec. 22, 1999). Those decisions in turn cited federal case law holding that under the Davis-Bacon Act and the SCA, "the substantive correctness of prevailing wage determinations is not subject to judicial review." Although *RP Consultants, Inc.* arose under the H-1B regulation at 20 C.F.R. § 655.731, appeals under that regulation are governed by the PERM regulation at 20 C.F.R. § 656.41, and accordingly this decision is also relevant to PERM appeals arising under 20 C.F.R. Part 656.

CO's also enjoy wide latitude when determining whether to grant or deny reconsideration of a denial of labor certification, and the Board has employed an abuse of discretion standard in regard to the CO's decision whether to reconsider or not (as opposed to the CO's decision whether or not to change his

In *Noverola-Bolaina, v. Immigration and Naturalization Service*, 395 F.2d 131 (9th Cir. 1968), the court considered whether the Board of Immigration Appeals' (BIA) scope of review of an Inquiry Officer's[30] deportation order permitted the BIA to make independent findings of fact. The court found that neither the Act nor the regulations provided an express statement that the BIA could make such independent findings; but the court found that the BIA had such power.[31] Although other factors influenced the court's ruling, the central circumstance relied on by the court was that the statute made the Attorney General responsible for making the final decision on deportations and that the Attorney General had delegated the authority to exercise such discretion to the BIA. The court noted that the BIA had always employed de novo review and had explicitly determined that it has the power to make independent findings of fact which were contrary to those of an Inquiry Officer in *Matter of B*___, 7 I&N Dec. 1, 36 (1956). The court observed that the APA standard of review stated in Sec. 8, 5 U.S.C. 1007, which provided at that time that the reviewing body, on administrative appeal, unless the agency's rules limits the issues, has "all the powers which it would have in making the initial decision" did not technically apply because of a provision of the INA, but nonetheless found the APA's use of the term "initial decision" was significant.

We find that the *Noverola-Bolaina* decision is instructive. BALCA's standard of review is defined neither by statute nor regulation. BALCA, however, has clearly been delegated the authority to make the Secretary of Labor's final decision on whether to

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decision on reconsideration). For example, in *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board found that the CO abused his discretion in flatly refusing to entertain a motion for reconsideration even though the regulations explicitly permitted motions for reconsideration. Similarly, in the pre-PERM decision in *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (en banc), the Board employed an abuse of discretion standard when reviewing a CO's decision not to reconsider a denial based on an untimely filing.

[30] The functions of a Special Inquiry Officer are now performed by Immigration Judges. *See* Section 371 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208.

[31] In 2002, the regulations governing the BIA's scope of review were modified to provide that the BIA will not engage in de novo review of findings of fact determined by an immigration judge, but will employ a clearly erroneous standard of review to such findings. The BIA, however, retains de novo review authority over questions of law, discretion, and judgment, and all of other issues in appeals from decisions of immigration judges, and for all questions arising in appeals from decisions of Service officers. *See In re S-H-*, 23 I&N Dec. 462 (BIA 2002).

grant an application for permanent alien labor certification. The fact that the regulations placed BALCA within OALJ establishes that the Department is providing for review by independent ALJs appointed under the APA, and therefore indicates that the Department anticipated an independent review of the facts and the legal conclusions by those ALJs. BALCA's longstanding practice has been to employ de novo review of a CO's determinations based on the evidence and argument before the CO when he made the decision to deny certification. And we conclude that the APA's default reservation of de novo review authority for the final agency reviewer of an initial decision rendered in an adjudicatory setting strongly suggests, indeed compels, the conclusion that the final agency reviewer would likewise retain de novo review authority of an initial decision rendered without a hearing.

Based on the foregoing, we find that BALCA's review of the CO's legal and factual determinations when denying an application for permanent alien labor certification is de novo, limited in scope by 20 C.F.R. § 656.27(c).

Finally, we note that in *HealthAmerica*, 2006-PER-1, slip op. at 12-13 (July 18, 2006) (en banc), the Board discussed whether "*Chevron*" deference[32] should be afforded a "FAQ" posted on ETA's web site. The Board concluded that whether a FAQ should be entitled to deference as persuasive authority depended on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. *HealthAmerica*, slip op. at 12 *et seq*. *See also S. Chae Holding, Inc.*, 2009-PER-135 (Mar. 31, 2009) (panel found that statement in preamble to PERM regulations was not entitled to *Chevron* deference). In the instant appeals, the CO's denial letters were fairly brief and did not describe the CO's rationale for denial in much detail. Moreover, we have found very little in the regulatory history or other agency writings that explain ETA's position on whether medical residency positions are certifiable based on their limited duration. The only detailed description of the CO's position on the issue is found in the CO's en banc

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[32] *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (deference afforded by the courts to an agency's construction and interpretation of federal statutes and implementing regulations).

brief. A reviewing authority owes little deference to agency interpretations announced for the first time in a litigation brief. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). Thus, in the instant appeals, we will consider the issue of the meaning of "permanent employment" de novo, without affording any special deference to the agency's interpretation of the regulation.[33]

PART III

ELIGIBILITY OF MEDICAL RESIDENCY POSITION FOR PERMANENT LABOR CERTIFICATION

A. Statement of the Issue

The PERM regulation at 20 C.F.R. § 656.10(c) requires an employer to attest that the job opportunity that is the subject of the PERM application is "for full-time, *permanent* employment for an employer other than the alien." 20 C.F.R. § 656.10(c) (2010) (emphasis added). The PERM regulation at 20 C.F.R. § 656.3 defines employment as "*[p]ermanent* full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3 (2010) (emphasis added). The PERM regulations, however, do not define "permanent."

The record before us establishes that Einstein and Abington hired foreign medical school graduates under the H-1B nonimmigrant program for their hospitals' medical residency programs. Upon completion of their internship or junior residencies, each of

[33] We note that in *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084, 1089-90 (6th Cir. 1987), the court reviewed the statutory history of the meaning of the H-2 requirement that the alien beneficiary be "coming temporarily to the United States to perform temporary services or labor." The court concluded that the legislative history did not provide a definitive answer to the meaning of "temporary services or labor." Rather the court "read this history to reflect the congressional intent to enact only the basic statutory framework, and to leave the details – such as the operating definition of the term 'temporary services or labor' – to be filled in by the administrative process." The court noted that the INS had historically given different interpretations to the meaning of the H-2 "temporary services or labor" limitation, and that the court could not say that one was more clearly correct than the other. The court found that the current interpretation was reasonable and not in conflict with the expressed intent of Congress.

the Aliens moved into senior residency positions.[34] The hospitals then filed permanent alien labor certification applications to support employment-based immigrant visa petitions based on those same senior residency positions. The Employers assert, and the CO has not denied, that for many years similar labor certification applications were granted. In the spring of 2009, however, the CO began denying applications for medical residency positions on the ground that they are not permanent employment as required by the PERM regulations. [35]

Although we refrain from assuming that Einstein and Abington hospital residency programs follow this model, according to the OCCUPATIONAL OUTLOOK HANDBOOK (2010-11 Ed. U.S. Bureau of Labor Statistics) (OOH), "[t]he common path to practicing as a physician requires 8 years of education beyond high school and 3 to 8 additional years of internship and residency." The length of the residency depends on the specialty selected, and subspecialties usually require an additional 1 to 2 years of residency. The OOH characterizes a medical residency as "graduate medical education in a specialty that takes the form of paid on-the-job training, usually in a hospital." According to the OOH, career advancement may involve the physician or surgeon starting their own practice or joining a group practice, teaching residents and other new doctors, or advancing to supervisory and managerial roles in hospitals, clinics, and other settings.

We begin with a review of the statutory and regulatory history of the treatment of medical internships and residencies for employment based immigration. The historical record reveals that the question is more complex than it may first appear and that the

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[34] See Appendix to this Decision.

[35] To the extent that the Employers are asking BALCA to hold that ETA could not suddenly enforce the regulation without notice and comment rulemaking, we find that BALCA does not have the authority to essentially invalidate a regulation's application to a particular group based on a prior lack of enforcement. In *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993) (en banc), the Board held that "BALCA, as a non-Article III court, lacks inherent authority to rule on the validity of a regulation [or] express authority to invalidate the regulations as written." USDOL/OALJ Reporter at 7. In *Dearborn*, the Board declined to review the validity of a regulation despite a clear conflict with the plain language of the Immigration and Nationality Act. Here, the conflict is not between the text of the regulation and a statutory provision, but rather an apparent inconsistency between ETA's non-assertion of regulatory definition of permanent employment as a substantive prerequisite to applicants involving medical residents, and the plain text of the regulations. BALCA does not have the authority to invalidate sections 656.3 and 656.10(c) on this basis.

Department of Labor's treatment of medical internships and residencies has diverged widely over the years.[36]

B. Historical Context

1. The 1952 Act

The responsibility of the Secretary of Labor to make certifications relating to immigration for the purpose of performing skilled or unskilled labor was introduced in the Immigration and Nationality Act of 1952 in Section 212(a)(14), P.L. No. 82-414, 182 Stat. 66, Sec. 214 (June 27, 1952), codified at 8 U.S.C. § 1182(a)(14) (1952). This was "permanent labor certification" in the sense that a foreign worker could immigrate under this provision and gain permanent residency as a result unless the Secretary of Labor took affirmative steps to certify that there were sufficient workers in the United States who are able, willing, qualified, and available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.[37]

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[36] *See generally* Aronson and Shenoy, *Permanence As a Fixture in Time: Permanent Resident Considerations for Medical Trainees*, IMMIGRATION & NATIONALITY LAW HANDBOOK 2008-09 at 137-146 (AILA 2008) (observing that although at first glance, it seems obvious that medical internships, residencies and fellowships cannot serve as the subject of a "permanent" employment because such positions "are limited to finite periods of training," the analysis of the question is nuanced); *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d at 1089-90 (finding that the legislative history does provide a definitive answer to the meaning to the H2 requirement of work of "temporary services or labor" and that INS historically has given different interpretations to the meaning of the H-2 "temporary services or labor" limitation, none of which were more clearly correct than another).

[37] As Gary Endelman noted in THE LAWYER'S GUIDE TO 212(A)(5)(A): LABOR CERTIFICATION FROM 1952 TO PERM, when the INA was enacted,

> … labor certification was phrased in the negative — immigrants subject to it were automatically admitted unless the Secretary of Labor made a positive finding of able, willing, qualified, and available U.S. workers. This structuring was clearly intended to give the DOL the affirmative power to intervene to protect U.S. workers during recessions or in response to specific situations where the welfare of U.S. workers was endangered. But the initiative was with the DOL, and unless the agency interposed, an immigrant worker was admitted under the applicable country quota.

www.ilw.com/articles/2004,1102-endelman.shtm (last visited May 4, 2011) (footnote omitted).

No statutory controls were in place to condition admissibility of such employment-based immigrants on an offer of permanent employment.[38]

The 1952 Act, on the other hand, excluded from the definition of "immigrant," "an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as an industrial trainee." 8 U.S.C. § 1101(a)(15)(H).[39]

In *Matter of M−S−H*, 8 I & N Dec. 460 (R.C. 1959), a hospital sought the services of two medical doctors from the Philippines for one year as interns. The beneficiaries had been granted first preference quota status to immigrate,[40] but then learned that the quota for the Philippines had been closed and would be for some time. Thus, a petition was filed for H-1 nonimmigrant visas for the internship positions. The Immigration and Naturalization Service (INS) District Director denied the petition on two grounds, one of which was that it had not been established that the positions sought to be

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[38] The 1952 Act did, however, condition admissibility for certain "urgently" needed immigrants, and ministers and dependents of ministers, on proof from the entity seeking classification of the alien under these immigrant categories showing the basis for the need for the alien's services. *See* Section 204 of the 1952 Act ("Procedure for Granting Immigrant Status Under Section 101(a)(27) or Section 203(a)(1)(A)").

[39] In *Matter of M−S−H*, 8 I & N Dec. 460 (R.C. 1959), the INS Regional Commissioner noted that this provision of the 1952 Act governing temporary visitors was considered by Congress to be substantially the same as section 3(2) of the Immigration Act of 1924. To be eligible for a nonimmigrant work visa the business the alien was coming for had to have been temporary and not of a continuing or permanent character. *Id.* at 461.

[40] A first preference quota immigrant visa was based on qualified quota immigrants whose services were determined by the Attorney General to be needed urgently in the U.S. because of the high education, technical training, specialized experience, or exceptional ability of such immigrants, and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the U.S. *See* Section 203(a)(1) of the 1952 Act.

filled were temporary.[41] On review, the INS Regional Commissioner held that the permanent nature of a hospital intern position precluded granting H-1 nonimmigrant status, despite the one-year limitation on the work. The Regional Commissioner focused on the circumstance that the work to be done was a permanent need of the hospital, even though the incumbent would move on to a residency following the internship. The Regional Commissioner stated that "[t]he proposed employment for only one year does not change the character of the position from permanent to temporary." *Id.* at 462.[42]

2. *1965 Amendments to the INA*

In 1965, Congress amended the INA in order to abolish the quota-based framework of the prior law while simultaneously strengthening controls to protect the United States labor market. One of the changes to strengthen labor market controls was an amendment to Section 212(a)(14) to place the burden on the employer petitioning for the intending immigrant to establish the conditions necessary to obtain the Secretary of Labor's labor certification. S. REP. NO. 89-748 (1965), *reprinted in* 1965 U.S.C.C.A.N., 3328, 3333. Moreover, beginning in 1965, a visa applicant was required to obtain a labor certification from the DOL to be eligible for an employment-based immigrant visa for permanent residency. *See* 8 U.S.C. § 1153(b)(3)(C) (1965).

The 1965 INA amendments established a preference scheme for issuing employment-based visas once DOL granted labor certification. Section 203(a) of the Act, 8 U.S.C. § 1153(a) (1965) provided preferences for two employment-based immigrant visas:

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[41] The other ground was that that it had not been established that the beneficiaries were bona fide non-immigrants.

[42] Both Employers argue that *Matter of M−S−H* is still valid precedent, and establishes that medical internships are permanent in nature because of the ongoing need of the employer for interns. (Abington En Banc Brief at 8; Einstein En Banc Brief at 12). But the ruling in *Matter of M−S−H* was that the *position* was permanent – not that the *employment* was permanent. This reflects a difference in analysis of nonimmigrant and immigrant petitions, and we do not find that *Matter of M−S−H* controls the definition of "permanent employment" under the PERM regulations.

> (3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States.
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> (6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

Section 203(a)(6) – the "sixth preference" category – specifically excluded aliens from receiving employment-based immigrant visas based on skilled or unskilled labor, if the labor was of a seasonal or temporary nature.[43] The First Circuit in *North American Industries, Inc. v. Feldman*, 722 F.2d 893 (1st Cir. 1983), found that the legislative history confirmed that Congress intended the sixth preference provision to mean that the alien would be performing work that was permanent in nature.[44] The 1965 Act, however,

[43] In *Matter of Knudsen*, 17 I & N Dec. 2807 (R.C. Jan. 5, 1979), the INS Regional Commissioner considered a sixth preference petition involving a foreign worker who had been hired under the H-2 program as a "Technical Consultant-Master Tanner-Dyer," and who was seeking immigrant status under the job title "Master Tanner-Dyer." The employer's contention was that the alien had been hired to plan, design, and establish a shearling department, and that once the purpose of that temporary position had been accomplished, what was now being petitioned for was a completely different position requiring the services of a worker on a day-to-day basis for an indefinite period of time. The Regional Commissioner focused on the difference in the job duties and found that the sixth preference was approvable (albeit he remanded the petition for consideration of a different issue). Thus, for a sixth preference petition to be approved, the petitioner had to establish that the job in which the beneficiary would be employed differed from the one for which an H-2 petition by the same employer had been approved previously. In other words, immigrant status was not available to a worker based on a job that the alien had filled pursuant to an H-2 nonimmigrant visa.

[44] This provision was suggested as an amendment to the bill by organized labor. In hearings before the House Subcommittee on Immigration and Nationality on H.R. 2580 to amend the INA, the ranking minority member of the Subcommittee, Congressman Moore, asked the spokesmen for the AFL-CIO, Mr. Meiklejohn and Mr. Biemiller what was meant by the phrase, "labor, not of a temporary or seasonal nature," to which Mr. Meiklejohn replied, "We say the jobs must be permanent in nature." *Hearings on H.R. 2580*, 89th Cong., 1st Sess. 5 (1965); *see also Feldman*, 722 F.2d at 899-900 (discussing legislative history). Additionally, Senate Report 748 stated that "The bill specifically provides that skilled or unskilled labor of a temporary or seasonal nature is not to be entitled to any preference under the selection system for the allocation of immigration visas." S. Rep. No. 89-748 (1965), *reprinted in* 1965 U.S.C.C.A.N., 3328, 3334.

did not include such a limitation on preference three professional/exceptional-ability immigrant visas.

Section 204 of the INA was also amended in 1965 to provide − under the section providing the "Procedure for Granting Immigrant Status" − that "any *alien* desiring to be classified as a preference immigrant under section 203(a)(3) (or any person on behalf of such an alien), or any *person desiring and intending to employ* within the United States an alien entitled to classification as a preference immigrant under section 203(a)(6), may file a petition with the Attorney General for such classification." P.L. 89-236, § 4 (codified at 8 U.S.C. § 1154(a) (1965)) (emphasis added). In other words, a visa petition under preference six required a petition from an employer with the desire and intent to employ the alien. But a preference three petition could be filed by the alien and did not include the qualification of a "person desiring and intending" to employ that alien.[45]

3. 1965 DOL Regulations – 29 C.F.R. Part 60

In 1965 the Secretary of Labor published regulations at 29 C.F.R. Part 60 to implement the new statutory requirement that employers obtain a labor certification from the Secretary of Labor. These regulations were titled "Part 60—Immigration; Availability of, and Adverse Effect Upon, American Workers." Final Rule, 30 Fed. Reg. 14979 (Dec. 3, 1965).[46] The focus under those regulations was on broad schedules of employment for which the Secretary had found either (1) an insufficient number of workers who were able, qualified, and available for employment, and in jobs the employment of aliens would not adversely affect wages and working conditions of United States workers similarly employed (known as Schedule A), or (2) it was not possible to make the statutory certification (known as Schedule B). For jobs not listed on those schedules, the alien was permitted to apply for certification with the Secretary.

[45] In stating the purpose of the bill that became the 1965 law, the Senate Committee on the Judiciary stated that the law established a "sixth preference for skilled and unskilled workers *who can fill specific needs* in short supply." S.Rep. No. 748, 2 U.S.C.A.N. 1965 at 3329. The Committee, however, said nothing about third preference visas having the purpose of filling specific needs.

[46] It was not until the 1976 proposed labor certification regulations at 20 C.F.R. Part 656 that the regulations referenced "permanent employment" in the title.

These regulations did not state a requirement for an offer of permanent employment. Nor did they contain a definition of employment. They did, however, note that *sixth preference* immigrants were defined by the INA as "qualified immigrants who are capable of performing specified skilled or unskilled labor, *not of a temporary or seasonal nature*…." 29 C.F.R. § 60.1 (1965) (emphasis added).

Schedule A of the Part 60 regulations was divided into Groups. 29 C.F.R. § 60.4 (1965). Group I included "[p]ersons upon whom an advanced degree has been conferred by accredited United States colleges and universities and who have been gainfully employed for at least two years in an occupation related to and dependent upon their area of academic specialization. Among physicians and surgeons, certification by the Educational Council for Foreign Medical Graduates may be substituted for two years of gainful employment." *Id*.

In *Matter of Chu*, 13 I & N Dec. 122 (R.C. 1969), a hospital filed a petition seeking a third preference immigrant visa for the beneficiary under the profession or occupation of "physician" with the occupational title of "intern." The Alien had been working for the hospital as an intern when the petition was filed. The District Director concluded that an intern could not be considered a professional in the field of medicine. On appeal, the INS Regional Commissioner concluded that a physician-intern met the relevant statutory definitions for a third preference visa, and found that the Alien fell into the Department of Labor's Schedule A, Group I blanket certification. The Regional Commissioner therefore approved the third preference visa. Although the focus of this decision was on whether an internship was a professional occupation within the meaning of the statute and not on whether such a job needed to be of a permanent nature, it is noteworthy that the Regional Commissioner did not raise a concern about the limited duration of an internship as a bar to issuance of the visa.

In contrast, in *Matter of Sun*, 12 I & N Dec. 800 (R.C. 1968), an individual filed a sixth preference petition for his mother for the position of housekeeper. The Department of Labor had issued a labor certification. The petitioner, however, was found by the INS

Regional Commissioner to be subject to a deportation order, a noncitizen, and neither a lawful resident alien nor a lawful nonresident alien. The Regional Commissioner held that because the petitioner's status was "neither permanent nor settled, it is within the District Director's judgment to find that the position to be filled on these records is less than permanent and to deny on that basis (section 203(a)(6) of the Act, … performing specified skilled or unskilled labor, not of a temporary nature or seasonal nature…)." The sixth preference petition was therefore denied.[47]

Thus, under the original 1960's era statutory and regulatory scheme, sixth preference immigrant visa petitions were denied where the employment underlying the petition was not of permanent nature. But we have found no evidence that third preference immigrants, and specifically medical interns or residents, were denied labor certification or visas on the ground that the positions were not of a permanent nature.

4. *Amendments to 29 C.F.R. Part 60*

The Part 60 regulations were amended several times. In 1967 a Schedule C was added to accommodate occupations which were in short supply generally, but not nationwide as in Schedule A. 32 Fed. Reg. 867 (1967). Schedule C included "[a]ny person qualified as a professional or who has exceptional ability in the sciences or arts and whose occupation is not listed in Schedule A." Physicians and surgeons were not listed in Schedule A or Schedule B at the time, and thus petitions for physicians apparently fell under Schedule C. Applications founded on the sixth preference were required to include both a form describing the alien's qualifications and a form describing the Alien's prospective employment in the United States. Although the regulation was awkwardly phrased, it appears that applications founded on the third preference were only required to include the form describing the alien's qualifications.

[47] *To the same effect Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981) (sixth preference immigrant status under section 203(a)(6) of the INA requires that the beneficiary have a permanent employment offer from the petitioner).

In 1971, the regulation was changed to add the occupation of "Medicine and Surgery" to the Schedule A, Group I advanced degree category. 36 Fed. Reg. 2464 (1971); 29 C.F.R. § 60.7 (1971). The amended regulation included "Occupational Definitions." The definition for "Medicine and Surgery" described which physicians and surgeons who did not have their medical degree conferred by a United States or Canadian medical school could also qualify for Schedule A precertification. One provision was for "an institution providing approved medical internship or residency training that the alien has met all of the requirements for appointment to an internship or residency and is being offered such appointment…." *Id.* Thus, the Secretary of Labor was not concerned under the 1971 version of Part 60 that a medical internship or residency was not certifiable because of the limited duration of such positions. Rather, medical internships or residencies were pre-certified if the alien had been offered an appointment into an approved internship or residency program.

The 1971 amendments provided that if the category of employment was on Schedule A, or the alien was claiming qualification as a professional or someone who has exceptional ability in the sciences or arts, the *alien* was to file a "Statement of Qualifications" Form MA 7-50A. *See* 29 C.F.R. § 60.3(a) and (e)(1) (1971). For other circumstances, the *prospective employer* was required to file both a Statement of Qualifications form and a "Job Offer for Alien Employment Form MA 7-50B." *See* 29 C.F.R. § 60.3(c) and (e)(2) (1971). A Schedule A labor certification was valid only for the *intended occupation* and geographic location set forth in Schedule A. 29 C.F.R. § 60.5(e)(1) (1971). A labor certification for a professional or someone who has exceptional ability in the sciences or arts whose category of employment was not included on Schedule A, was valid only for the *intended occupation* and geographic location set forth in the Statement of Qualifications form. 29 C.F.R. § 60.5(e) (2) (1971). All other labor certifications were valid only for the *particular job* and geographic location set forth in the Job Offer form. 29 C.F.R. § 60.5(e)(3) (1971). Thus, in 1971, the Secretary of Labor did not condition a labor certification on the existence of a specific job offer for labor certification applications for occupations that were not included on Schedule A − or for a professional or someone who has exceptional ability in the sciences or arts whose category of employment was not included on Schedule A. Only labor

certifications for applications that did not fall into these categories were conditioned on a job offer for a specific job.

We also note that the 1971 version of the regulations provided that "[t]he terms and conditions of the labor certification shall not be construed as preventing an immigrant properly admitted to the United States from subsequently changing his occupation, job, or area of residence." 29 C.F.R. § 60.5(f) (1971). Although the point of this regulation was apparently to make it clear that labor certification is not indentured servitude − it also makes it clear that the Secretary did not have an expectation that immigrants who received permanent residency that was based on a labor certification would necessarily continue the same employment over time after admission for permanent residency in the United States.

As described below, Part 60 was replaced in 1977 by a new set of regulations. From 1965 until their replacement in 1977, however, labor certifications for professional positions, whether on Schedules A or C or not, were not conditioned on a specific offer of employment, and as relevant to the issue before the Board, were not conditioned on an offer of *permanent* employment.

5. The 1976 Amendments to the INA

In 1976, Congress amended Section 203(a)(3), the third preference occupational category for members of the professions or those with exceptional ability in the sciences and the arts, to condition a visa on their services being sought by an employer in the United States. P.L. 94-571, § 4(2). The legislative history confirms that under prior law, a third preference petition could be made on the basis of the beneficiary's qualifications without the need for a prospective employer. The Administration had recommended, however, and the Congress agreed, that then current labor market conditions in the United States supported a requirement of a prearranged employment to support a third preference petition. H.Rep. No. 94-1553 (1976), *reprinted in* 5 U.S.C.C.A.N. 6080. *See*

also id. at 6086 (Section-by-Section Analysis).[48] Neither the statute nor the legislative history stated that the prearranged employment must be of a *permanent* nature.

Also in 1976, Congress passed the Health Professions Educational Assistance Act of 1976 (HPEA). P.L. No. 94-484; 8 U.S.C. § 1182 note (1976). Section 906(a) of the HPEA required the Secretary of Health, Education, and Welfare to develop data "to enable the Secretary of Labor to make equitable determinations with regard to applications for labor certification by graduates of foreign medical schools." Section 906(a) provided that this data were to include the number of physicians in a geographic area necessary to provide adequate medical care, including care in hospitals, nursing homes, and other health care institutions. The HPEA also restricted the immigration options of foreign physicians. As explained by attorney Robert D. Aronson:

> This legislation imposed new requirements on foreign physicians coming to provide clinical medical services or to enroll in graduate medical training programs. Also, H-1 entitlement was removed from foreign physicians enrolled in graduate medical training programs and providing client medical services (other than foreign physicians of international renown). Instead, the J-1 Exchange Visitor Program became the required visa classification for participation in programs of graduate clinical training. Furthermore, not only did this legislation impose a blanket home residence obligation on all J-1 medical trainees, but the waiver options were constricted by eliminating a "No Objection" statement from the home government as a means for seeking a waiver.
>
> As a result of this legislation, most foreign physicians could no longer qualify for H-1 status in order to practice clinical medicine.

Aronson, *Strategies for Nonimmigrant Foreign Physicians*, 1992-93 IMMIGRATION & NATIONALITY LAW HANDBOOK (AILA 1992). *See generally* H.Rep. No. 94-266, 4 U.S.C.A.N. 4988-5001) (describing Committee on Interstate and Foreign Commerce's concerns about the large percentage of foreign medical graduates in residency programs). This limitation on H-1 visas for foreign medical graduates continued until 1990 when the H-1 visa program was substantially modified.

[48] Congress also made several amendments to the labor certification provision at Section 212(a)(14) in 1976. These amendments, however, are not relevant to the issue presently before the Board.

6. 20 C.F.R. Part 656 - 1976-77 rulemaking

In 1976, ETA proposed a new set of labor certification regulations to be promulgated at 20 C.F.R. Part 656 which introduced a good faith labor market test by the sponsoring employer of the availability of United States workers as the basic procedure for most labor certification applications. Proposed Rule, 41 Fed. Reg. 48938 (Nov. 5, 1976). These regulations were titled "Labor Certification Process for the *Permanent* Employment of Aliens in the United States." (emphasis added).[49] The 20 C.F.R. Part 656 regulations were made a Final Rule replacing 29 C.F.R. Part 60 in 1977. Final Rule, 42 Fed. Reg. 3440 (Jan. 18, 1977). The regulatory history to the 1976-77 labor certification regulations does not explain in any detail why ETA decided to make such a fundamental change in administering the program from a focus on broad predetermined schedules of occupations to a focus on individualized labor market tests.

The Seventh Circuit, however, provided an explanation in *Production Tool Corp. v. Employment and Training Administration, U.S. Dept. of Labor*, 688 F.2d 1161 (7th Cir. 1982). In *Production Tool Corp.*, an employer challenged the Secretary of Labor's authority to promulgate regulations requiring an employer to advertise the position for which labor certification was sought. In its decision finding that the regulations were a valid exercise of the Secretary's authority to promulgate rules governing labor certification, the Seventh Circuit observed that the Department of Labor had been having difficulty defending denials of labor certification based on data that could not be shown to be reliable. Accordingly, the new regulatory scheme requiring employers to engage in a recruitment effort had the purpose of enabling "the Secretary to make informed decisions on the basis of reliable evidence." *Id*. at 1170.[50] Thus, the 1977 regulations

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[49] As noted above, the 29 C.F.R. Part 60 regulations were not identified in their title as regulations governing "permanent" employment.

[50] We note that in the preamble to the Final Rule, ETA indicated that it believed that the statutory scheme mandated that employers document an effort to recruit U.S. workers before deciding to employ aliens. 42 Fed. Reg. at 3440. *See also* 72 Fed. Reg. 27904, 27909 (May 17, 2009) (citing *Production Tool Corp.*, *supra*, for the proposition that the labor certification process that has been in effect since 1978 "is predicated on an employer's demonstrated unsuccessful efforts to recruit a domestic worker."). *See also*

were based on ETA's decade-long experience with statistically based labor certifications of broad categories of occupations, and the conclusion that individualized tests of the labor market were needed instead in most cases to adequately carry out the Secretary's obligations under Section 212(a)(14). Included in that individualized labor market test would now be a regulatory requirement of an offer of permanent employment by the sponsoring employer.

Specifically, in the Final Rule, ETA responded to one commentator's suggestion that it was unlawful for the Department to require that professionals have a job offer before they could receive a labor certification. ETA responded:

> The Department . . . has always believed that it could require job offers of any alien seeking to become the beneficiary of a labor certification as a reasonable method of carrying out the Secretary's statutory obligation. Heretofore the Department, recognizing that professionals were not required to have prearranged employment in order to obtain a visa, had decided not to require a job offer for a labor certification. However, it has been the Department's experience that it is very difficult to adequately determine the availability of U.S. workers without a job opportunity to which U.S. workers may be referred. Nor, absent a specific job opportunity can the adverse effect of an alien's employment of [sic] similarly employed U.S. workers be adequately determined. It should be noted too that Pub. L. 94-571 recently amended the Immigration and Nationality Act and that the law now requires prearranged employment for professionals for purposes of obtaining an employment related preference status.

42 Fed. Reg. at 3441. *See also* 41 Fed. Reg. at 48938 (announcement in preamble to proposed rule that it was being proposed that job offers must accompany labor certification applications of professionals). Therefore, 1977 marks the beginning of the regulatory requirement that labor certification applications for professionals be supported by a prearranged offer of employment. A new definitions section defined "employment"

ENDELMAN, THE LAWYER'S GUIDE TO 212(A)(5)(A): LABOR CERTIFICATION FROM 1952 TO PERM, *supra* (concluding that, based on DOL's poor record in defending statistically based labor certification determinations in federal court, the primary reason for the switch to individualized recruitment was "to create a solid administrative record that would reduce the potential for arbitrariness and withstand judicial scrutiny by requiring the employer to amass the most reliable information possible on potential adverse effect for review and action by the DOL.").

as "*permanent* full-time work by an employee for an employer other than oneself …." 20 C.F.R. § 656.50 (1977) (emphasis added). Accordingly, even though Section 203(a)(3) of the INA did not limit third preference visas to jobs "not of a temporary or seasonal nature" as did Section 203(a)(6) for sixth preference visas, *by regulation*,[51] beginning in 1977 the Department of Labor required that the sponsoring employer offer *permanent* employment in order to obtain a labor certification regardless of whether the visa petition would be under the third or sixth preference.[52]

The 1977 regulations, which also had the purpose of implementing the provisions of Title VI of the Health Professions Educational Assistance Act of 1976, no longer included the occupational category of "Medicine and Surgery" under Schedule A. The occupational definition that was formerly found in Schedule A under the 1971 version of 29 C.F.R. Part 60 was placed in the definitions section of the new 29 C.F.R. Part 656 regulations at 20 C.F.R. 656.50 (1977). The new definition – for "physicians and surgeons" – omitted any reference to medical internships or residencies.

7. 1980 Regulatory Amendments and the Technical Assistance Guide

In 1980, the Department amended the Part 656 regulations to address ambiguities, improve readability, and reflect ETA's experience in administering the program. Proposed Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States*, 45 Fed. Reg. 4918 (Jan. 22, 1980). The definition of employment was left unchanged. Final Rule, *Labor Certification Process for the Permanent Employment of Aliens in the United States*, 45 Fed. Reg. 83926, 83947 (Dec. 19, 1980). Although amended a number of times over the following decades, this was the broadest revision of

[51] We thus concur with amicus that the requirement of an offer of *permanent* employment is an administrative creation of the 20 C.F.R. Part 656 regulations, (Amicus brief at 4 and n.1) at least in regard to professional positions. It was a statutory requirement, however, for the old sixth preference visa category and is a statutory requirement for the current EB3 skilled and other labor categories.

[52] *See also* 42 Fed. Reg. at 3440 (the new regulations "set forth the responsibilities of employer who desire to employ aliens on a *permanent* basis" (emphasis added)).

the Part 656 regulations until rulemaking was instituted for the current PERM regulations.[53]

Among other changes, ETA added physicians and surgeons back to Schedule A, but only in locations where those medical specialties were in short supply. 45 Fed. Reg. 83926, 83927 (Dec. 19, 1980).

ETA issued a Technical Assistance Guide (TAG) in 1981 to provide supplementary information for explaining and applying the permanent labor certification regulations. Technical Assistance Guide No. 656 Labor Certifications (1981). The 1981 TAG included the occupation of "Intern"[54] within the category of "Physician and Surgeon." TAG at 2-3. The TAG's inclusion of medical interns as candidates for Schedule A perhaps indicates that ETA was still not concerned about the lack of permanency of such positions. But the TAG, and the regulations at 20 C.F.R. § 656.30(c), also made a distinction about the validity of Schedule A and non-Schedule A certifications. Schedule A certifications were valid only for the specific *occupation* on the application. Non-schedule A certifications were valid only for the specific *job opportunity*, specific alien for whom the application was granted, and area of intended employment stated on the application. TAG at 104. Because a Schedule A certification for an intern was viewed as a certification into an occupation, rather than a specific job opportunity, we do not draw the conclusion that the drafters of the TAG viewed medical internships as permanent job opportunities for an application under the basic labor market test process. Rather, the inclusion of interns on Schedule A appears to have been for the limited purpose of getting physicians started in their occupation in areas where there was a shortage of physicians or surgeons with the alien's medical specialty. *See* 20 C.F.R. §

[53] The Part 656 definition of "employment" has not changed since its publication in the 1977 regulations, except for being moved from section 656.50 to section 656.3. *See* 56 Fed. Reg. 54920 (Oct. 23, 1991) (interim final rule technical amendments that renumbered the definitions section).

[54] We note that this cannot be a reference to "Internist," as opposed to "Intern," as "Internist" is also listed in the TAG on the list of occupations within the definition of Physicians and Surgeons.

656.22(c)(2) (1981).[55] Non-schedule A positions apparently would still need to meet all the requirements for the basic process for applications involving individualized recruitment, thus including meeting the regulatory definition requiring full-time, permanent employment.

The TAG also identified categories of applications inappropriate for labor certification. TAG at 136-137. One category was for employers who are "temporarily in the United States, such as foreign diplomats, intracompany transferees, students, exchange visitors, and representatives of foreign information media." *Id*. at 136. The TAG explained:

> Due to their temporary status in the United States such employers cannot offer *permanent employment* to U.S. workers—*employment which is expected to continue indefinitely*. The conditions of employment would not comply with the definition of "employment" as described in the regulations.

Id. (emphasis added).[56] This section of the TAG is focused on the temporary nature of the employer. But it also shows that ETA's 1981 guidance on the meaning of permanent employment was that it is employment that is expected to continue indefinitely.

The 1980 regulations also introduced a requirement that positions involving live-in household domestic services include documentation of the alien's one year of paid experience. 20 C.F.R. § 656.21(a)(3)(iii)(3). The TAG explained that the purpose of this documentation "is to assure that the alien knows the demands unique to household domestic service work, has some attachment to the occupation, and will likely continue

[55] The procedure established in the 1980 regulations required a signed statement from the Regional Health Administrator (RHA) from the Public Health Service in the Department of Health, Education, and Welfare (HEW) that the physician or surgeon was Schedule A eligible. 45 Fed. Reg. 4919 (Jan. 22, 1980). In 1987, ETA removed physicians and surgeons from the Schedule A precertification list. 52 Fed. Reg. 20593 (June 2, 1987).

[56] We note that the policy that persons who are temporarily in the United States, including foreign diplomats, intracompany transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of the foreign information media cannot be employers for the purpose of obtaining permanent labor certification, was retained by the PERM regulations in the definition of "Employer." 20 C.F.R. § 656.3 (2005) (definition of "*Employer*," subsection (2).

working such occupation after arrival." TAG at 43. The TAG explained that "[e]xperience has shown that persons not previously employed in the occupation for a reasonable length of time generally do not remain in the occupation in the United States." *Id*. This regulation and interpretation under the TAG establishes that ETA recognized that some positions were unlikely to be filled over the long term by the sponsored alien, but that ETA nonetheless wanted to establish some assurance that the alien was at least minimally committed to the occupation. *See also Lawrence Weinstein*, 2005-INA-9 (Feb. 10, 2006) (en banc) (reiterating the conclusion of the Board in *Marvin and Ilene Gleicher*, 1993-INA-3 (Oct. 29, 1993) (en banc) that "it is logical that the one-year paid experience requirement is designed to demonstrate that the Alien is tied to this occupation….").

Thus, in 1981, ETA's policy was incongruous. Medical interns were eligible for precertification under Schedule A for locations where medical specialties were in short supply, with no evident concern that internships are of limited duration. The regulations and the TAG's guidance, however, indicate that for non-Schedule A applications under the basic process, in order to be eligible for labor certification, the employment offer must be of the variety that is expected to continue indefinitely. But ETA clearly permitted some positions, such as a child monitor, to be eligible for permanent labor certification that by their very nature could not continue indefinitely. For those occupations, ETA seemed only to look for a commitment by the alien to the occupation rather than a commitment by the sponsoring employer to long lasting employment.

8. 1983 Memorandum

As discussed above, we are taking administrative notice of an August 11, 1983 Memorandum titled "Processing Labor Certification Applications for Interns and Residents" from the Administrator for Regional Management,[57] addressed to all Regional Administrators. The 1983 Memorandum stated:

[57] The Memorandum is captioned "DOL/ETA/USES/FLC Div. of Nonag. Certifications." At the time, the foreign labor certification program was administered by the U.S. Employment Service.

> Recently it has come to the attention of the U.S. Employment Services, Division of Nonagricultural Labor Certifications, that it has been the practice in one regional office not to process permanent labor certification applications submitted by hospitals on behalf of interns and residents. The purpose of this communication is to **reaffirm ETS's long-standing policy to process permanent labor certification applications submitted by hospitals on behalf of interns and residents**. Such applications are to be processed in accordance with Section 656.21 of the regulations governing the labor certification process for the permanent employment of aliens in the United States.

(AF2 19) (emphasis added). Because this memorandum refers to processing applications under Section 656.21, which was the basic supervised recruitment process under the regulations in effect at the time, the memorandum was apparently not addressing a failure to process applications under Schedule A, but rather addressed other hospital residency programs. Thus, in 1983, ETA's managers of the labor certification program apparently did not consider the limited duration of a medical internship or residency as an inherent barrier to labor certification.

9. IMMACT90

Section 601 of the Immigration Act of 1990 (IMMACT90), Public Law 101-649, 104 Stat. 4978 (Nov. 29, 1990), renumbered the "excludable alien" section of the INA. Consequently, the citation to the labor certification provision became Section 1182(a)(5)(A) instead of Section 1182(a)(14).

IMMACT90 increased the number of employment-based immigrant visas and revised the preference scheme. Under the 1990 amendments, skilled workers, professionals, and other workers were assigned third preference within the employment-based immigrant categories. 8 U.S.C.A. § 1153(b)(3) (1991) (popularly known as the EB3 visa category). Section 1153(b) provides:

(b) Preference Allocation for Employment-Based Immigrants. – Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted as follows:

***

(3) Skilled workers, professionals, and other workers.-

(A) In general. - Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), *not of a temporary or seasonal nature*, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers. - Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, *not of a temporary or seasonal nature*, for which qualified workers are not available in the United States.

***

(C) Labor Certification Required. – An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(5)(A).

8 U.S.C. § 1153(b)(3) (1991) (emphasis added). Thus, under IMMACT90, skilled and "other" workers were not eligible for an immigrant visa if the labor to be performed was of a temporary or seasonal nature. The temporary or seasonal nature limitation, however, was not imposed on professionals under the EB3 category.

IMMACT90 also created a new "EB2" category for "qualified immigrants who are members of the professions holding *advanced* degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, *and whose services* in the sciences, arts, professions, or business *are sought by an employer in the United States*." 8 U.S.C. § 1153(b)(2)(A) (1991) (emphasis added). The job offer requirement for EB2 immigrants could be waived by the Attorney General for national interest reasons. 8 U.S.C. § 1153(b)(2)(B). *See generally In re New York State Dept. of Transportation*, 22 I&N Dec. 215 (BIA 1998). Thus, when IMMACT90 changed the preference scheme, it retained the job offer requirement for professionals holding *advanced* degrees under the new EB2 preference category; but in describing the EB3 professional category IMMACT90 did not include the job offer requirement.

The omission of the specific job offer requirement in Section 1153(b) for EB3 professional visa applicants, however, did not mean that EB3 professional visa applicants were exempted from the requirement of a job offer.

IMMACT90 also revised the procedure for granting immigrant status at Section 204 of the INA. As noted above, under the 1965 amendments, a preference three immigrant petition was not expressly required to identify an employer with the intent to employ the alien, whereas preference six petitions did. In pertinent part, the 1990 amendments replaced the old provision with the following: "*Any employer desiring and intending to employ* within the United States an alien entitled to classification under section … 203(b)(2), or 203(b)(3) … may file a petition with the Attorney General for such classification." P.L. 101-649, § 162(b) (codified at 8 U.S.C. § 1154(a)(1)(D) (1990), later re-designated 8 U.S.C. § 1154(a)(1)(F) by Section 1503(d)(1) of Public Law 106-386 (2000)). Thus, the EB2 and all three EB3 categories now require an employer with the desire and intent to employ the alien, to file the immigrant visa petition, at least

as of the time of the filing of the visa petition.[58] The INA itself, however, does not expressly state that the intention to employ must be for a job that is *permanent* in nature for either the EB2 or EB3 professional categories.[59]

10. American Competitiveness in the Twenty-first Century Act of 2000

The labor certification provision was amended in 2000 by the American Competitiveness in the Twenty-first Century Act of 2000, Pub.L. 106-313, 114 Stat. 1251, (AC21) to provide in Section 106(c) some job flexibility for certain applicants who had received a labor certification, but whose adjustment of status petitions had been delayed. The amendment provided that an approved labor certification would remain valid with respect to a new job accepted by the petitioner after the petitioner changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued. *See* 8 U.S.C. § 1154(j) (adjustment of status

[58] USCIS regulations require that a petition to classify an alien under an EB1, EB2 or EB3 preference must be filed on Form I-140. 8 C.F.R. § 204.5(a) (2010). The USCIS permits the petition to be filed by a U.S. employer "desiring and intending to employ an alien." 8 C.F.R. § 204.5(c) (2010). The Form I-140 requires the petitioner in Part 6, Question 7 to identify whether the underlying job offer is for a permanent position. The Instructions to Form I-140, state that "[w]ith the exception of the Alien of Extraordinary Ability … and National Interest Waiver … categories, all Form I-140 visa preference categories require a *permanent* job offer from a U.S. employer …." FORM I-140 INSTRUCTIONS (Rev. 04/08/11) (emphasis added). According to the USCIS ADJUDICATOR'S FIELD MANUAL "[i]n all cases an offer of employment must have been bona fide, and the employer must have had the intent, at the time the Form I-140 was approved, to employ the beneficiary upon adjustment." ADJUDICATOR'S FIELD MANUAL, Chapter 20.2(c) (USCIS Redacted Public Version updated through May 20, 2011). Chapter 22 of the ADJUDICATOR'S FIELD MANUAL, covering *General Form I-140 Issues*, is written in manner that assumes that an EB2 petition will involve a "permanent" job offer. *See also Memorandum from USCIS Acting Associate Director, Domestic Operations* (June 17, 2009) (I-140 for a physician beneficiary must establish that the physician, inter alia, meets "the minimum education, training and experience for the *permanent* physician position….") (emphasis added).

[59] EB1 petitions for persons of extraordinary ability, an outstanding professor or researcher, or a multinational executive or manager, do not require a labor certification. USCIS, however, requires that petitions by made by an employer "desiring and intending to employ a professor or researcher who is outstanding in an academic field under section 203(b)(1)(B)" include "[a]n offer of employment from a prospective United States employer" which shows that the a United States university or institution of higher learning is offering the alien a tenured or tenure-track teaching position in the alien's academic field, or is offering the alien a *permanent* research position in the alien's academic field; or a private employer offering the alien a *permanent* research position in the alien's academic field. 8 C.F.R. § 204.5(i) (2010). The USCIS regulation provides that "[p]ermanent, in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination." *Id*.

petition); 8 U.S.C. § 1182(a)(5)(iv) (labor certification); *see also* 8 U.S.C. § 1182(a)(5)(iii)(I) (2010) (labor certification for a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification). AC21 thus indicates that Congress's main concern is that the alien have a job offer in the occupation classification for which labor certification was granted rather the specific job for which labor certification was granted – at least when equitable grounds exist for permitting a change in the employer.

11. The PERM regulations – 2002-2004 rulemaking

When the PERM regulations were proposed in 2002, and the final rules published in 2004, they retained the regulatory definition of employment, and therefore the requirement that employment be permanent in nature. In this major revision of the Part 656 regulations, no commentators challenged the inclusion of the element of permanency in the regulatory definition of employment. Thus, in three major rulemaking exercises involving Part 656, the original rulemaking in 1976-77, the 1980 clarifying amendments, and the wholesale revision with the PERM program in 2002-2004, the concept of employment needing to be permanent in nature was never challenged. The PERM regulations make no distinction in regard to the definition of employment meaning *permanent* employment, based on whether the immigrant visas would be based on the EB2 category, or EB3 skilled workers, professionals, and other workers categories.

The PERM regulations also set out a series of attestations that a sponsoring employer must make in support of a PERM application. One of the required attestations is that the subject of the PERM application is "for full-time, *permanent* employment for an employer other than the alien." 20 C.F.R. § 656.10(c) (emphasis added). This attestation requirement was new to the PERM regulations. As in the case of the regulatory definition of employment, the regulations make no distinction between EB2 or the various EB3 categories of workers in regard to the requirement that the employer attest to offering permanent employment.

12. 2007 Amendments to the PERM Regulations

In 2007, ETA published a Final Rule implementing amendments to the PERM regulations. 72 Fed. Reg. 27904 (May 17, 2007). These amendments were intended "to enhance program integrity and reduce the incentives and opportunity for fraud and abuse related to the permanent employment of aliens in the United States." *Id.* at 27904.

Above, we noted that the central reason in the mid-1970s that ETA established a regulatory procedure in 20 C.F.R. Part 656 requiring an actual labor market test for most labor certification applications was to create a reliable record for decision making. That this remains the central purpose of Part 656 under the PERM attestation process was confirmed the 2007 rulemaking, where ETA stated:

> The Department's regulations at 20 CFR part 656 establish the fact-finding process designed to develop information sufficient to support the Secretary of Labor's determination, required under the statute, of the availability of or adverse impact to U.S. workers. The labor market test forms the basis for notice to U.S. workers of the job vacancy, for the recruitment process through which U.S. workers have the opportunity to apply and be considered for each job, and for employer attestations related to key terms and conditions of employment.

Id. at 27906.

Moreover, ETA's 2007 rulemaking explains in plain language how ETA views its mandate and why the Part 656 procedure is purposefully rigorous. In discussing comments on how regulatory amendments prohibiting substitution of aliens may negatively impact the ability of aliens to extend their stay beyond the sixth year of an H-1B visa, ETA observed that its role is not to accommodate all circumstances in which an employer may wish to hire an immigrant worker:

> The Department's mandate is not to preserve the opportunity or further the potential opportunity in all circumstances for an employer to hire an

> immigrant worker, nor is it a process driven by the interests of any or all aliens who may wish to enter the U.S. through employment-based immigration. The Department's mandate, rather, is to design and implement a secure framework within which an employer with legitimate business needs may determine the availability of U.S. workers and, if such workers are not found, bring in a foreign worker.

Id. at 27914-27915.

In discussing comments suggesting that institutions of higher education should be exempted from a prohibition on the barter, sale and purchase of approved labor certification on the ground that the regulations should be tailored to industries where abuses had been shown to occur, ETA noted that the prohibition was based on "a broader policy concern," that any such activity is contrary to the statute, and that "[t]here is no basis upon which to exempt one industry sector or type of employer." *Id.* at 27919.

In discussing comments relating to a new regulatory prohibition on any payment or reimbursement to the sponsoring employer from the alien or others for costs or fees relating to obtaining permanent labor certification, ETA enunciated a policy that when an employer seeks to sponsor an incumbent nonimmigrant alien for a permanent labor certification, one goal is to ensure that the employer is serious about engaging the alien in more permanent employment:

> We recognize the vast majority of aliens for whom permanent labor certifications are filed are already employed by the employer. In initiating the permanent residence process, the employer demonstrates a desire to retain the alien on a *more permanent basis* than permitted by his or her nonimmigrant status. The pre-existing relationship provides the employer with significant incentive to conduct the recruitment process in a manner that favors the alien. The cost incurred in the labor certification recruitment process by the employer serves as an identifiable disincentive to that outcome. It serves at least to make the employer examine the value it places on retaining the alien. By requiring employers to bear their own costs and expenses, including the representation of the employer, the Department is ensuring that the disincentive to pre-qualify the alien in the job opportunity−keeping the job open and the recruitment real−remains in the process. This enables the Department to remain in its statutory role as

> the arbiter of the presence of otherwise-eligible U.S. workers in relation to the admissibility of the alien.

Id. at 27920 (emphasis added). Further, in addressing comments arguing that because aliens have an interest in labor certification and the sponsoring employer only benefits from the labor certification if the alien remains on the job beyond attaining permanent status, agreements for reimbursement of costs in obtaining the labor certification should not be prohibited, ETA reiterated that the purpose of labor certification is not to facilitate the alien's immigration and that an employer must be willing to bear the expenses of a labor certification application even though there is a risk that the alien may not work for it for long:

> … [T]he purpose of the labor certification is not to provide an alien with permanent residence, rather it is to certify that the alien's admission into the United States to work in a particular position will neither displace a U.S. worker nor distort the U.S. labor market. The fact that aliens may leave employment early or change employers is a risk which is no different from the risk of hiring any U.S. worker and which should be duly considered by employers as they carefully consider whether to invest the resources they believe are required to pursue an employment-based immigration solution to their workforce shortage.

Id. at 27922.

C. The Regulatory Purpose of the Permanent Employment Requirement

Based on the foregoing, we find that the laws and policies governing applications for labor certification for professional occupations, and specifically medical internships and residencies, have evolved over time. For many years, such applications were not required to establish an offer of employment for a specific employer, and immigration policy was to permit immigrant visas to be based on pursuit of an occupation as a professional rather than a specific job offer. Congress took a more restrictive path in the mid-1970s toward immigration of professionals, requiring for the first time prearranged employment. The DOL regulations from that time period reflect a tightening of controls, coincident with the decision to require individualized labor market tests to build a record

to support a labor certification determination. The conditioning of labor certification on an offer of *permanent* employment for professional occupations first appeared in the 1976-77 rulemaking. At least since IMMACT90, the INA requires that the petitioning employer under the EB2 and all EB3 visa categories have the "desire and intent to employ the alien." The Board has found nothing, however, either historically or under the current version of the INA that expressly mandates that labor certifications to be used to support EB2 and EB3-professional category visa petitions be conditioned on an offer of "*permanent*" employment in a specific job.

Accordingly, because we have found no statutory mandate that the job offer be for permanent employment for professional occupations under the EB2 and EB3 visa categories (whereas it is a requirement for occupations under the EB3 skilled and other labor visa categories), our focus is on what DOL was trying to achieve with the 1976-77 Part 656 rulemaking in which the requirement of a permanent job offer for professionals first appeared. That purpose was to use an actual labor market test as its basic process for obtaining reliable information needed to make the labor certification under Section 212(a)(5)(A) of the INA. Individualized recruitment is grounded on the notion that the labor market test be for a bona fide job opportunity in a localized market.[60] Thus,

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[60] When DOL changed the regulatory approach to focus on individualized labor market tests, the new regulatory scheme was dependent on the notion of a bona fide job opportunity. *See generally Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.,* 1989-INA-228 (July 16, 1991) (en banc); *Carlos Uy III*, 1997-INA-304 (BALCA Mar. 3, 1999) (en banc). In *Bulk Farms*, the issue before the court was the validity of a different aspect of the definition of "employment" found under section 656.50 (now 656.3) – that the employment must be by an employer other than oneself. The court's decision, however, is instructive because it explains why the regulatory definition of employment is essential to DOL's implementation of its statutory duties under the INA. The court wrote:

> The regulatory scheme challenged by Bulk Farms is reasonably related to the achievement of the purposes outlined in section 212(a). As the district court correctly noted, "the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue." *See* 20 C.F.R. § 656.21. This "good faith search" process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms--the ban on alien self-employment and the bona fide job requirement--make the good faith search process self-enforcing. These prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each year. Were the challenged regulations to be judged inapplicable to self-employed aliens, DOL would be forced to make ad hoc inquiries into each certification request−a task far more difficult and more time consuming than the current certification procedure. The challenged regulations also

requiring an offer of a permanent job for a position that was to support a visa for permanent residency was consistent with a DOL regulatory structure that depended on employers that were actively seeking to employ a worker for employment of a lasting and continuous nature. The existence of a continuous and lasting job offer goes to the essence of testing the labor market for whether employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. The type of job offered implicates the prevailing wage, the type of benefits and conditions of employment, the prospect for continued employment of new immigrants, and whether there is actually a shortage of U.S. workers for the job in question. In other words, a labor market test of a job of a limited duration would constitute a failure to test the labor market for the types of jobs over which the alien may be displacing a U.S. worker or causing the U.S. worker's wages and working conditions to be adversely impacted. Finally, the regulatory history of the 2007 amendments to the PERM regulations makes it clear that ETA recognizes that the employment relationship between the sponsoring employer and the alien may not be lasting, but that the regulations are designed to force employers to carefully assess whether its employment needs require resort to immigrant labor, and that the intent and desire to employ the alien is genuine.

D. Application of the Definition of Permanent Employment

The CO argues in his appellate brief that the definition of "permanent employment" in BLACK'S LAW DICTIONARY is the appropriate interpretation of the meaning of "permanent employment" within the context of the permanent labor certification program. BLACK'S LAW DICTIONARY defines permanent employment as "Work that, under a contract, is to continue indefinitely until either party wishes to terminate it for some legitimate reason." BLACK'S LAW DICTIONARY (8th Ed. 2004).

> represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL.

Thus, the regulatory scheme devised by DOL in the mid-1970s was grounded in real job openings clearly made available to qualified U.S. workers as a mechanism to obtain reliable information about the specific job opportunity to support the certification required by the statute.

A fundamental principal for interpretation of words or phrases in a statute or regulation is that, if that word or phrase has an accepted meaning in the area of law being addressed, that accepted meaning (or technical "term of art") governs. If the word or phrase is not defined by the statute or regulation and is not a term of art, the word or phrase is customarily given its ordinary meaning, often derived from the dictionary. Dictionary definitions are a starting point, and where the word or phrase has alternative meanings, context such as the statutory and regulatory purpose, must guide.[61]

Parsed out, the BLACK'S LAW DICTIONARY definition has three elements. First, the definition is based on work that is performed under a contract. Second, the definition specifies work that is to continue indefinitely. Third, the definition qualifies the concept that the work will continue indefinitely by noting that it is not expected that the work relationship will last forever. Initially, we will briefly address the straightforward first and third elements, and then turn to the second element – the concept of indefinite work – which is the central issue in these appeals. As noted above, when considering whether a dictionary definition is applicable, principles of statutory and regulatory construction instruct that the dictionary is only a starting point and that context is important. The reason ETA defined employment as permanent employment in 1977 was to help ensure the integrity of the labor market test. It is this purpose that sets the context for the meaning of "permanent" employment under 20 C.F.R. Part 656.

1. Work Under a Contract

The BLACK'S LAW DICTIONARY definition has its origin in contract law.[62] With the exception of live-in domestic workers under section 656.19(b)(2)(2010), the PERM

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[61] Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* at 5-7 (Aug. 31, 2008). Although CRS publications are prepared for Congress and are not made directly available to the public, many CRS reports, such as its report on statutory interpretation, are widely available on the Internet. (e.g, www.fas.org/sgp/crs/misc/97-589.pdf; opencrs.com/document/97-589/).

[62] *See* BLACK'S LAW DICTIONARY (5th Ed. 1979); BLACK'S LAW DICTIONARY (4th Ed. 1968) (citing cases involving allegations of breach of employment contracts as the source for its definition of "permanent employment").

regulations do not require a written employment contract.[63] Thus, the element of the BLACK'S LAW DICTIONARY definition suggesting that permanent employment is work under a contract does not precisely fit the context of labor certification if what is meant is a formal written employment contract. Nonetheless, the EB2 and EB3 categories that require a labor certification also require a prearranged offer of employment by the petitioning employer. Moreover, the requirement under section 656.10(c)(10) that the employer attest to an offer of full-time permanent employment carries with it the same implication – that there has been an offer and acceptance of employment.

2. *The Employment Relationship Is Not Forever*

The element of the BLACK'S definition of "permanent employment" recognizing that employment may, in the future, be ended by either party for a legitimate reason is consistent with the nature of the employment relationship between a sponsoring employer and foreign worker as commonly understood in U.S. immigration law.[64] Indisputably, "permanent" in the context of the labor certification regulations does not mean that the employee-employer relationship will continue forever. In *World Bazaar*, 1988-INA-54 (June 14, 1989) (en banc), the Board stated that under 20 C.F.R. § 656.50 (now § 656.3) of the regulations, "'permanent' does not necessarily mean forever. Rather, it can mean

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[63] But see *Gerata Systems America*, 1988-INA-344 (Dec. 16, 1988) (en banc), in which the Board found that an unsigned employment contract for the duration of one year that did not include how many hours per week the alien would work was insufficient to prove either permanent or full-time employment. USDOL/OALJ Reporter at 3-4.

[64] *See, e.g.,* Section 101(a)(31) of the INA, 8 U.S.C. § 1101(a)(31) ("a relationship may be permanent even though it is one that may be dissolved eventually…."); 29 C.F.R. § 60.5(f) (as published in a Final Rule in 36 Fed. Reg. 2462 (1971)) ("The terms and conditions of the labor certification shall not be construed as preventing an immigrant properly admitted to the United States from subsequently changing his occupation, job, or area of residence."); *Nardi v. Stevens Institute of Technology*, 60 F.Supp.2d 31 (E.D.N.Y. 1999) (a labor certification application asserting that a job offer for a visiting research professor was "permanent, contingent upon continued research funding" held "not to reflect the parties' intent to agree to be bound for lifetime employment"); Fragomen, Shannon and Montalvo, LABOR CERTIF. HANDBOOK § 1:7 (2010); Fragomen, Del Rey and Bersen, 2 IMMIGR. LAW & BUSINESS § 4:4 (2011):

> Permanent employment does not mean that either party is committed never to end the employment relationship. The same type of indefinite employment commitment that applies in the normal employer-employee relationship is sufficient to qualify as permanent employment.

'meant to last indefinitely' (American Heritage Dictionary 924, 2d Coll. Ed. 1982)…." DOL/OALJ Reporter at 3.

3. *Work of Indefinite Duration*

The second element of the BLACK'S definition is work of indefinite duration. Similar definitions are found in the legal encyclopedias AMERICAN JURISPRUDENCE 2D and CORPUS JURIS SECUNDUM. 27 AMJUR2D, *Employer Relationship* § 33 (…"permanent" or "lifetime" employment is generally treated as indefinite in duration and terminable at the will of either party…."); 30 C.J.S., *Employer-Employee* § 31 ("… a contract for permanent employment is generally no more than an indefinite general hiring or hiring at will…."). The CO argues that "[a] position with a finite or expected end date … is not a permanent position. If a position is not permanent or has a finite duration or expected end, it would not be logical to issue a visa with no end." (CO's Brief at 2). This is probably the most crucial element of the definition in regard to the instant appeals because, as generally, understood, medical residencies are of finite, albeit inexact, duration – usually three to eight years.

Our research has identified nine appeals to BALCA involving medical residents. The precise issue of whether medical resident positions were not permanent because of their limited duration, however, was not decided in those cases.[65] Neither have we found

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[65] *See Albert Einstein Medical Center*, 1996-INA-363 (Jan. 28, 1999); *Maricopa Medical Center*, 1997-INA-290 (May 29, 1998); *Albert Einstein Medical Center*, 1996-INA-46,47,59,60,74 (Feb. 9, 1998); *Catholic Medical Center*, 1995-INA-547 (July 25, 1997); *Presbyterian Medical Center of Philadelphia*, 1996-INA-61 (July 2, 1997); *Maimonides Medical Center*, 1993-INA-534 (Nov. 29, 1994); *Children's Hospital of Michigan*, 1993-INA-160 (July 26, 1994); *Cook County Hospital*, 1998-INA-64 (March 6, 1990); *Highland Hospital of Rochester*, 1988-INA-564, 569 (Nov. 16, 1989). In three of these cases, BALCA reversed the CO's denial and instructed the CO to grant permanent labor certification for medical residents. *See Albert Einstein Medical Center*, 1996-INA-46, 47, 59, 60, 74 (Feb. 9, 1998); *Children's Hospital of Michigan*, 1993-INA-160 (July 26, 1994); *Highland Hospital of Rochester*, 1988-INA-564, 569 (Nov. 16, 1989).

In *Maricopa Medical Center*, 1997-INA-290 (May 29, 1998), the Arizona Department of Economic Security determined that the medical resident position could not be approved because the job offered was not "permanent," as it was for a residency training program. The CO's Final Determination denied certification because the employer failed to use the National Resident Matching Program "physician match list" for the placement of medical school graduates and therefore failed to demonstrate that it recruited U.S. workers in good faith for the position. Therefore, while the SWA raised the issue that

BALCA decisions involving other occupations deciding the question of whether those applications may be denied on the ground of their finite duration.[66] Moreover, a thorough search of BALCA caselaw reveals that prior to these appeals, the CO has never offered, nor has BALCA adopted, a definition of what type of employment constitutes "permanent employment" in the context of a job of multi-year, but finite duration.

The concept of permanent employment including an element of "indefinite" duration in applying immigration related laws – while perhaps not a term of art – is consistent with the BLACK'S definition proffered by the CO. *See, e.g.*, 8 C.F.R. § 204.5(i) (USCIS definition for certain EB1 visa petitions); TAG at 136-137; *World Bazaar*, 1988-INA-54, *supra*. In our research, we have found that in the immigration area, the notion of indefinite duration of employment carries two elements: lasting duration and assurance of continuation.

a. Work of lasting duration

What constitutes work of a lasting duration is a bit nebulous. It is fairly clear that it cannot be work of a short-term nature. But when work changes from short-term to "lasting" is not easily determined.

The Employers point out that at 20 C.F.R. § 655.6(b), DOL defines its standards for temporary need in the H-2B program as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 C.F.R. § 214.2(h)(6)(ii)(B) (2009). The Employers contend that based on the

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medical residencies were training positions and not "permanent," the CO did not list this as a basis for denial of permanent labor certification.

[66] In *Technation Software Consulting Inc.*, 2007-INA-262 (Jan. 29, 2009), a case involving a computer consulting company, the panel in conducting a review of all the evidence under a bona fide job opportunity analysis, noted that the CO had been concerned about "the indefinite or variable nature of the employer's business, and thus questioned whether the alien's position will be full-time and permanent." Since the panel decided the case under the bona fide job opportunity analysis, it did not reach the question of whether the job fit the regulatory definition of full-time permanent employment.

DHS H-2B regulation's definition of work of a temporary nature, a residency position is not temporary, and must therefore be considered permanent.

The definition of temporary need referenced in section 655.6(b) was included in coordinated rulemaking by DHS and DOL in 2009. On December 19, 2008, the USCIS and DOL simultaneously published amended regulations governing the H-2B program. These amendments included a refinement of the definition of what constitutes work of a temporary nature, with DOL's regulations deferring to the DHS regulation. *See* 73 Fed. Reg. 78,104 (Dec. 19, 2008) (DHS regulation); 73 Fed. Reg. 78,020 (Dec. 19, 2008) (DOL regulation). The new regulation provides that "[e]mployment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.'" It further provides that "[g]enerally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years." 8 C.F.R. 214.2(h)(6)(ii)(B) (2008). The day before the publication of these final rules the United States Department of Justice, Office of Legal Counsel, issued an opinion letter memorializing informal advice that the Department of Justice had previously provided to DHS and its predecessor INS. *Meaning of "Temporary" Work Under 8 U.S.C. § 1101(A)(15)(H)(II)(B)*, 32 Op. O.L.C. 1-6 (Dec. 18, 2008) [hereinafter, *"Meaning of 'Temporary' Work"*]. The opinion letter dealt with whether the new regulatory definition was a permissible construction under the statute, and with prior advice given in a 1987 opinion letter. In many respects, the opinion letter addresses the same types of issues that are presented in the instant appeals by Einstein and Abington hospitals.

The opinion letter determined that the question of how long a position may last and still be considered temporary is one that Congress left to USCIS to answer. The opinion letter explained that the new rule makes it "even clearer than the current rule that work will not be considered 'temporary' unless it is restricted to a 'limited period of time' and the employer's 'need for the employee will end in the near, definable future.'" The opinion letter found that "[a]lthough the word 'temporary' is commonly applied to a period of a year or less, it has also been applied with some frequency to periods of up to

three years." *Id*. at 3 (footnotes omitted). Additionally, OLC explained that temporary work can last up to three years and noted that "USCIS may reasonably determine that work lasting longer than three years is likely to be permanent rather than temporary in nature." *Meaning of "Temporary" Work*, 32 Op. O.L.C. at 3 n.3 (*citing Temporary Workers Under § 301 of the Immigration Reform and Control Act*, 11 Op. O.L.C. 39, 41 n.7 (Apr. 23, 1987).

We agree with the Office of Legal Counsel's analysis of the question of why the H-2A and H-2B regulations do not define "temporary" in the same way. The OLC reasoned that different treatment of the H-2 cases is permissible because the H-2A and H-2B visa programs involve different kinds of work and different policies. *Id.* at 4-5. *See also Matter of Isovic*, 18 I & N Dec. 2933 (Comm. June 6, 1983) (standard for temporary nature of H-2 worker not applicable to petition for L-1 classification). Similarly, that an employer's need for the employees would not fit the regulatory definition of "temporary" under the H-2B regulations does not compel the conclusion that the work is necessarily for "permanent" employment under the permanent labor certification regulations. [67] As the CO explained in his appellate brief, "the H-2 program issues a certification allowing the employer to hire an alien to temporarily fill a position that is itself temporary. … The PERM program, in contrast … allows the alien to become an immigrant. It allows for permanent residency with the understanding that the alien can permanently fill that specific need." (CO's Brief at 3). The context is important. The mere fact that an offer of employment includes a commitment of at least three years does not in itself establish

[67] We also note that the USCIS regulation at 8 C.F.R. § 214.2(h)(1)(ii)(D) (2010) expressly excludes classification of graduates of medical schools coming to the United States to perform services as members of the medical profession from classification under H-2B visas:

> (D) An H–2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such services or labor. This classification does not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession. The temporary or permanent nature of the services or labor described on the approved temporary labor certification are subject to review by USCIS. This classification requires a temporary labor certification issued by the Secretary of Labor or the Governor of Guam prior to the filing of a petition with USCIS.

that the position in permanent in nature. Moreover, the Board's setting the tipping point at three years for eligibility for permanent labor certification would be arbitrary and constitute judicial rulemaking. It would introduce an opportunity for unscrupulous applicants to game the system by using term contracts to provide only minimal commitment to a job offer. Most importantly, it would permit employers to use a job with relatively short term commitments as the basis for immigration of a worker who would compete with similarly employed U.S. workers over a long term. It is difficult to square eligibility for sponsorship of an alien for permanent residency on the basis of a job that the employer has no intention to continue with the employee beyond a defined term of work.

The temporary labor certification regulations' definition of "temporary" largely stems from the seminal Board of Immigration Appeals (BIA) decision in *Matter of Artee,* 18 I. & N. Dec 366, Interim Decision 2934, 1982 WL 190706 (BIA 1982), in which the BIA denied temporary labor certification to an employer because the employer did not have a temporary need for the work to be performed. The BIA found that the employer, a temporary employment service, needed "a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand." The BIA held that "It is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position." *Id*. at 367.

In its brief, Abington argues that it "is in a similar position to Artee Corporation, in that it always has a need for Upper-Year Residents in its internal medicine department." (Abington's En Banc Brief at 10). We agree that a hospital residency program maintains a permanent cadre of residents, and a hospital has a permanent need for residents. First, we point out that *Artee* establishes a temporary needs test for temporary labor certification; it does not establish a permanent needs test for permanent labor certification. Moreover, just because an employer's need for labor to be performed is permanent, *i.e*., ongoing and indefinite, does not mean that the job that the employer is offering to a foreign worker is permanent employment. Under the PERM program, the

actual job offered to the specific foreign worker must be permanent in nature. *Artee* stands for the principle that an employer cannot fill its permanent need for work to be performed with temporary H-2 workers. The PERM regulations require that an employer offer a foreign worker a permanent job to fill its permanent need, and seeks to prevent employers from bringing foreign workers to this country on a permanent basis with only the offer of a temporary job. Accordingly, under the PERM program, an employer must demonstrate that the job that it is offering to the foreign worker is permanent, a requirement that is separate and distinct from its duty to show that it has a permanent need for the duties to be performed. In short, just because the employer has a permanent need for the job duties to be performed, does not mean that the job that it is offering the foreign worker is permanent.

The Employers also argued that a job offer that is year-round and lasts at least 12 months is permanent employment. Citing *Vito Volpe Landscaping,* 1991-INA-300 (Sept. 24, 1994) (en banc) and *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004) (en banc), the Employers assert that BALCA has found that permanent, full-time employment requires that the employment is year-round, or ongoing for a full 12 months – a standard that its positions meet. In *Vito Volpe Landscaping,* the Board addressed the issue of whether recurring seasonal employment of less than 12 months of duration in any particular year constitutes full-time permanent employment, and determined that such employment was temporary where the jobs are exclusively performed during the warmer growing seasons of the year, and from their nature may not be continuous or carried on throughout the year. In *Crawford & Sons*, the Board declined to re-visit the ruling in *Vito Volpe* on stare decisis grounds. These cases focus on the seasonal nature of a position, which is not the issue before us. *Vito Volpe* was about breaks in employment. The duration of the employment over time was not at issue. Thus, we do not find *Vito Volpe* or *Crawford & Sons* to be instructive for the issue presently before the Board. Moreover, a commitment of only 12 months is simply too short a time to reasonably be construed as "lasting" employment in the context of permanent labor certification.

An employer that is only committing to a term of employment of limited duration may not be presenting the type of bona fide job opportunity that credibly represents a long term job opportunity, even if that job opportunity lasts several years. Accordingly, we find that under the PERM regulatory definition of "permanent employment," a job that presents a limited term of employment is not of "lasting" nature.

b. Assurance of continuation of employment

A second element of the concept of indefinite employment is the principle that the employer must have the capability and intention to provide lasting and continuous employment. In other words, work of an indefinite duration is tested in part by whether the employer has a continuing need for the work to be performed and the capability to offer on-going employment.

In *Amsol, Inc.*, 2008-INA-112 to -148 (Sept. 3, 2009), for example, the employer, whose business was the provision of temporary computer consulting services, filed applications under the pre-PERM regulations for labor certification to enable the aliens to fill the position of software engineer. The CO issued a Notice of Findings because she had been unable to determine whether or not the positions constituted full-time, permanent employment. The CO pointed out that the employer had not provided any evidence of a specific client or clients with whom the software engineers would consult, the length of time those consultations would be performed, or how the software engineers' employment status or compensation would be affected when a contract ended and no imminent assignment for the aliens existed. On rebuttal, the employer provided extensive documentation showing its bona fides as an ongoing business enterprise, including quarterly reports to show that it was offering a permanent position. The employer contended that the reports indicated that the company was continuously hiring and expanding its business, rather than periodically contracting its business as would be the case with temporary or seasonal employees. Despite this documentation, the CO denied certification. The BALCA panel found that the employer had met its burden in proving that the job offered was both full-time and permanent based on numerous

contracts showing the employer had a substantial amount of business, articles showing the growing trends in the information technology field, and tax returns evidencing the employer's high profits and that it could afford to employ numerous full-time employees. Although *Amsol* was largely focused on the employer's bona fides as a business entity, it evidences a concern that the employer was offering permanent employment in the sense that the software engineers would continue to be employed once an assignment to one client ended. In other words, the employer was required to establish that its business model included the ability and intention to employ software engineers as software engineers on a continuous basis.

An employer that is only committing to a term of employment of limited duration may be offering continuous employment during that term, but without an intention of offering further employment beyond the term, such employment is not of an indefinitely continuous nature.

E. Application of the Definition to Medical Residency Positions

The selection and employment of medical residents through a national resident matching program[68] does not square easily with the general labor market that applies to most hiring and on which the PERM regulations appear to have been premised. As noted above, in the instant cases the Aliens are all foreign medical school graduates who were accepted into the hospitals' medical residency programs under H-1B visas and as a result of a medical residency matching system. Thus, the Aliens were all incumbents in their positions as interns or junior residents without the type of general labor market test that would apply to most jobs. The movement from an internship or junior resident position to a senior resident position almost certainly does not open the job to the general labor market. It is a position in which the incumbent has been pre-selected, and for which there is not really any other worker who would be eligible. Consequently, to a large extent the application of the PERM regulations to medical residency positions is awkward and removed from the general labor market test environment on which the regulations were

[68] See generally the National Resident Matching Program website at www.nrmp.org.

premised. As noted by ETA in the 2007 rulemaking, however, the PERM regulations were based on broad policy concerns. ETA's mandate is not to design methods for every specific type of employment opportunity to be filled by immigrant labor, and regulatory requirements cannot necessarily exempt one industry sector or type of employer. Thus, the mere fact that a hospital wants to file a labor certification application for medical residency positions under the PERM regulations does not mean that regulatory requirements must be bent to accommodate the employment circumstances peculiar to medical residency programs. More specifically as pertinent to the instant appeals, that a medical resident position cannot meet the regulatory definition of permanent employment because it is of limited duration does not compel the conclusion that the regulatory scheme is deficient or that ETA failed to accommodate a legitimate employment opportunity.

As the CO noted in his appellate brief, it appears that an H-1B or J-1 visa would normally be sufficient to complete a medical residency. Thus, it is not clear why Einstein and Abington need to sponsor the Aliens for permanent residency to get the work they need from the Aliens. A question in the background of these appeals is why a hospital that does not have any firm intention to employ an alien foreign medical school graduate beyond the residency would go through the expense and effort required to file a permanent alien labor certification application on behalf of the alien? The only apparent reason is as a recruitment tool to attract foreign medical graduates to their residency programs. *See* Aronson and Shenoy, *Permanence As a Fixture in Time: Permanent Resident Considerations for Medical Trainees*, Immigration & Nationality Law Handbook 2008-09 at 145 (AILA 2008). In the case of medical residency programs as commonly understood, it appears that the employer's *desire and intent* to employ the aliens is not to engage them in lasting and continuing employment on an indefinite basis as medical residents but to provide the aliens a benefit of sponsoring them for permanent residency under an employment based immigrant visa as an inducement to join the employers' medical residency program. This is not the type of "desire and intent" to employ an immigrant required by Section 204 of the INA as amended by IMMACT90. Moreover, as ETA made clear in the 2007 rulemaking, the PERM regulations are not

designed "to preserve the opportunity or further the potential opportunity in all circumstances for an employer to hire an immigrant worker, nor is it a process driven by the interests of any or all aliens who may wish to enter the U.S. through employment-based immigration."

We take administrative notice that a September 14, 2010 BLS News Release reported that as of January 2010, the median number of years that wage and salary workers work for an employer is 4.4 years. Workers in management, professional, and related occupations had the highest median tenure (5.2 years), while workers in service occupations have the lowest median tenure (3.1 years).[69] Thus, a typical medical residency approaches or exceeds the median tenure for professional jobs in the U.S. Moreover, there is no expectation, requirement or guarantee that an immigrant will continue in the employment on which a labor certification was granted after permanent residency is established. Nonetheless, we conclude that the regulatory requirement of an offer of permanent employment is focused on a snapshot of the good faith intention of the employer at the time the labor certification is filed to make an offer of permanent employment – that is, indefinite employment of a lasting and continuous nature – within the expectations of any typical job offer.[70] An employer that has no intention to continue the employment of the immigrant beyond a set term of years cannot have the requisite intent. Medical residencies, as commonly understood, last only three to eight years and consequently cannot meet this definition of permanent employment. The hospital is committing only to employment of the worker for the duration of the residency, not to indefinite at-will employment.

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[69] www.bls.gov/news.release/tenure.nr0.htm (last visited July 18, 2011).

[70] That the relevant employer intent is tied to the date of the labor certification application is consistent with the INA. As discussed above, the AC21 amendments to the labor certification provision provided that an approved labor certification would remain valid in certain instances where adjustment of status petitions had been delayed with respect to a new job accepted by the petitioner after the petitioner changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Both Employers argued in their en banc briefs that the resolution of the issue before the Board will affect hundreds if not thousands of medical residents seeking to apply for labor certification in the future. Einstein argued that ETA's position will severely exacerbate a shortage of physicians in the U.S. and limit its ability to attract high caliber foreign medical physicians. (Einstein En Banc Brief at 26-29). We share some misgivings about whether U.S. immigration policy should perhaps offer an opportunity for permanent residency to alien medical school graduates prior to completion of a medical residency in view of the sure need for more physicians in the U.S. in the near future. Nonetheless, although BALCA decisions can have policy implications, BALCA is not a policy-making body. We decline to create an exception for medical residency programs by judicial fiat. Besides, we are not so certain the policy consequences will be as extreme as suggested. As the CO noted in his en banc brief, medical residents traditionally have used J-1 visas for graduate medical training, and H-1B visas may be extended up to six years. Moreover, if a hospital decides to offer a medical resident a career physician position, there is nothing to prevent it from applying for permanent labor certification at that time. (CO's En Banc Brief at 3-4). Of course, the hospital will have to establish at that time that it has been unable to recruit a qualified U.S. physician for that career position - but that is precisely what the law requires.

Above, we cited to the BLS OCCUPATIONAL OUTLOOK HANDBOOK for the common understanding of how medical residency programs work in the United States. Because of the way the instant cases arrived before the Board for en banc review, the record that we are permitted to review does not establish clearly that Einstein and Abington hospitals' residency programs follow the common model. As this decision is the first time BALCA has squarely considered the issue of the permanent nature of medical residency positions, and because we cannot determine for certain whether Einstein and Abington hospitals' residency program fit the typical model for such programs based on the record before us, we will remand these cases to provide the

employers an opportunity to demonstrate that each job offered fits the definition of permanent employment as articulated in this decision.[71]

PART IV

WHETHER THE CO's FAILURE TO FOLLOW THE REVOCATION PROCEDURE FOR DR. CADAR's APPLICATION WAS ERRONEOUS

As a final matter, we return to Einstein's argument that the CO was required to follow the regulatory procedure at 20 C.F.R. §§ 656.30(d) and 656.32 concerning invalidation and revocation of a certification in regard to Dr. Cadar's application, which allegedly was at least temporarily certified. We held above that Einstein had not proved that certification had actually been perfected for the application on behalf of Dr. Cadar, and therefore the revocation procedure was never invoked. Accordingly, we find that Dr. Cadar's application must be treated the same way on remand as the other applications. There is no proof that her application was actually certified, despite it appearing so temporarily on the ETA website. Thus, we hold that the section 656.30(d) and 656.32 procedures for revocation of a certification are not applicable to Dr. Cadar's application.

[71] For example, Einstein presented an affidavit from Glenn Eiger, the Program Director of the Internal Medicine Residency program at Albert Einstein Medical Center in Philadelphia, contending that "Einstein does not view the Senior Medical Resident position as 'finite', for Senior Internal Medicine Residents remain employed by Einstein through their PGY3 year and may remain employed by Einstein for additional PGY years as Chief Residents or sub-specialty fellows, and may further remain as attending physicians with our hospital." (Affidavit of Glenn Eiger, M.D. at 2). We also note, however, that Mr. Eiger also attested that "At Einstein, residency and related-positions can last for four (4), five (5), six (6), seven (7), eight (8) years, or even longer." *Id.* On remand, it should be noted that the labor certification applications were for Senior Residents – not for positions as Chief Residents, fellows, or attending physicians. An employer cannot establish permanent employment merely by conflating several distinct positions, which are only possible career paths.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denials of labor certification in these matters are **VACATED**, and that these matters are **REMANDED** for the Certifying Officer for further proceedings consistent with the above.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

APPENDIX

Case	Alien	Visa	Education	Hired As	Current Position	Labor cert. position
Einstein, 2009-PER-00386	Pattugalan, Theresa	H-1B	Philippines	Junior Resident (PGY-1) (AF 30) [72]	Senior Resident (AF 29)	Senior Resident (AF 25)
Einstein, 2009-PER-00391	Kaur, Ikjot	H-1B	India	Junior Resident (PGY-1) (AF 31)	Senior Resident (AF 30)	Senior Resident (AF 26)
Einstein 2009-PER-00388	Patel, Kajal	H-1B	India	Junior Resident (PGY-1) (AF 28)	Senior Resident (AF 27)	Senior Resident (AF 23)
Einstein 2009-PER-00380	Khemasuwan, Danai	H-1B	Thailand	Junior Resident (PGY-1) (AF 30)	Senior Resident (AF 31)	Medical Resident (AF 25)
Einstein 2009-PER-00385	Milosavljevic, Natasa	H-1B	Serbia & Montenegro	Junior Resident (PGY-1) (AF 30)	Senior Resident (AF 29)	Senior Resident (AF 25)
Einstein 2009-PER-00383	Tangdhanakanond, Kawin	H-1B	Thailand	Junior Resident (PGY-1) (AF 31)	Senior Resident (AF 30)	Medical Resident (AF 26)
Einstein 2009-PER-00387	Cadar, Andreea	H-1B	Romania	Junior Resident (PGY-1) (AF 30)	Senior Resident (AF 29)	Senior Resident (AF 25)
Einstein 2009-PER-00379	Vargas, Jenny Cabas	H-1B	Colombia	Junior Resident (PGY-1) (AF 31)	Senior Resident (AF 30)	Internal Medicine Resident (AF 26)
Einstein 2009-PER-00381	Brehm, Anthony	H-1B	South Africa	Junior Resident (PGY-1) (AF 30)	Senior Resident (AF 29)	Senior Resident (AF 25)
Einstein 2009-PER-00382	David, Martine	H-1B	South Africa	Junior Resident (PGY-1) (AF 30)	Senior Resident (AF 29)	Medical Resident (AF 25)
Einstein 2009-PER-00384	Rose-Green, Gail	H-1B	Jamaica	Junior Resident (PGY-1) (AF 30)	Senior Resident (AF 29)	Medical Resident (AF 25)
Einstein 2009-PER-00389	Korytnaya, Evgenia	H-1B	Russia	Junior Resident (PGY-1)	Senior Resident (AF 29)	Senior Resident (AF 25)

[72] The Appeal File (AF) references on this chart are to the individual cases listed rather than the representative case files used for other citations in this Decision and Order. *See* n.2, *supra*.

				(AF 30)		
Einstein 2009-PER-00390	Purushottam, Bhaskar	H-1B	India	Junior Resident (PGY-1) (AF 31)	Senior Resident (AF 30)	Senior Resident (AF 26)
Abington 2009-PER-00433	Achanta, Latha	H-1B	India	Medical Intern (PGY-1) (AF 50)	Upper Year Resident, Internal Medicine (AF 49)	Upper Year Resident, Internal Medicine (AF 45)
Abington 2009-PER-00435	Pieleanu, Arien	H-1B	Romania	Medical Intern (PGY-1) (AF 91)	Upper Year Resident, Internal Medicine (AF 90)	Upper Year Resident, Internal Medicine (AF 86)
Abington 2009-PER-00436	Bhaskar, Nutan	H-1B	Bulgaria	Medical Intern (PGY-1) (AF 50)	Upper Year Resident, Internal Medicine (AF 49)	Upper Year Resident, Internal Medicine (AF 45)
Abington 2009-PER-00437	Trailokya, Pandit	H-1B	Nepal	Medical Intern (PGY-1) (AF 50)	Upper Year Resident, Internal Medicine (AF 49)	Upper Year Resident, Internal Medicine (AF 45)