# UNITED STATES DEPARTMENT OF LABOR BOARD OF ALIEN LABOR CERTIFICATION APPEALS

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Washington DC 20001-8002

In the Matters of

ALBERT EINSTEIN MEDICAL CENTER Employer, 2009-PER-00379 to 391

and

ABINGDON MEMORIAL HOSPITAL Employer, 2009-PER-433, 435 to 437, 439

On Appeal of a Certifying Officer Decision

Brief of the American Immigration Lawyers Association, Amicus Curiae

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#### Introduction

Permanent employment, as the term is used in the context of applications for alien labor certification, is not defined by regulation. It is doubtful that the statute requires it at all. Even so, the decisional rule in place since 1994 has provided an administrative framework for determining permanence in connection with the applications of employers whose positions require certification under § 212(a)(5) and, who are seeking to hire non-citizens to fill the positions. On September 29, 1994, the Board of Alien Labor Certification Appeals released Matter of Vito Volpe, 91-INA-300, interpreting the regulation and drawing lines between temporary and permanent. Relying on regulations promulgated in a different context and under a different statutory scheme, the Board adopted a definition of "permanent full-time work" that excluded employment that by its nature is of seasonal or shorter duration within a yearly basis, no matter that it, in fact, recurs each and every year. Ten years later, the Board adhered to this framework. *Matter of Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004).

In the consolidated cases here, the Board is again required to determine what "permanent" means as it is applied to the position of medical residents.

Neither *Vito-Volpe* or *Crawford & Sons* will be of much help because both were decided incorrectly. They rely on an inappropriate interpretive analysis,

inapposite facts and posit an incomplete adjudicative framework.

Amicus, the American Immigration Lawyers Association, offers this brief to explain what "permanent full-time work" means for § 656.3. The framework proposed here provides a comprehensive approach to a recurring question of what is permanent and what is temporary. Because *Vito-Volpe* and *Crawford & Sons* are wrongly decided, they ought to be overruled and *stare decisis* poses no barrier to getting it right. AILA takes no position on the merits of the employers' claims nor whether the position of medical resident satisfies the definition of "permanent full-time work" proffered in this brief.

#### **Amicus Statement of Interest**

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts

of Appeal, and the Supreme Court of the United States.

### Argument

(1) Section 656 of the Title 20 of the Code of Federal Regulations regulates the alien labor certification process. The central purpose of this process is to countermand the inadmissibility ground found at § 212(a)(5) of the Immigration and Nationality Act which bars admission to certain non-citizens who are coming to the U.S. to work, if there are sufficient able, willing, qualified, and available to fill the position. To qualify for certification the position must be for "permanent full time work." 20 C.F.R. § 656.3.1

The regulations do not, however, explain what "permanent full time work" means. Two other sources flesh out its meaning and provide a framework for adjudicating applications for alien labor certification. The first is statutory: the Immigration and Nationality Act tells us that "permanent" is a relationship of a continuing or lasting nature, different than temporary, even though the relationship might be dissolved at some future point. 8 U.S.C. § 1101(a)(31). Applying the statutory definition to the regulation, permanent full-time work

interpreting the regulation fall short.

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This brief assumes that the regulatory requirement of "permanent" is valid. The statute, § 212(a)(5), appears clear on its face and that Congress did not require "permanent" as a requirement for certification. AILA points this out only as a means of explaining that the "permanent" requirement is of administrative creation and therefore, assuming its validity, it must be reasonably crafted to fulfill the purpose of the inadmissibility ground. As explained elsewhere in this brief, the present administrative decisions

means work that is of a continuing or lasting nature, different than temporary.

The second source concretizes this amorphous definition into something more practical: the reality of the workplace. The underlying policy of the labor certification process is that "[e]mployers should be able to recruit aliens to fill a bona fide job opportunity for which U.S. workers are not able, willing, qualified and available." Matter of Vito Volpe, 91-INA-300 at 11 (Guill, Assoc. Chief Judge dissenting). The reality of the workplace indicates that the duration of the work, while important, is not the dispositive factor in determining whether a position is "permanent". A continuing and lasting relationship may be recurrent year to year to year, may last several years, or it may be indefinite. The market is too varied and too fluid for any one factor such as duration to predominate. Permanent does not mean forever and no employer hires with forever in mind. Rather, an employer hiring for a permanent position anticipates an on-going relationship commensurate with the work. the reality of the workplace bring the nature of the employer's needs into the calculus. If the employer consistently needs the duties performed on a full time permanent basis and that need is ongoing by the employer, then the position can and should be considered permanent. See, Matter of Vito-Volpe, 91-INA-300 at 11 (Guill, Assoc. Chief Judge dissenting).

In addition to the duration of the anticipated work, there are other discrete and easy to apply factors that, when viewed collectively, can easily

evince a permanent position from a temporary position. Work that satisfies these demands generally and consistently exhibits the same characteristics, even across different occupations. A significant indication of permanence is that the work is "career-oriented and for which the applicant has demonstrated a commitment[.]" Matter of Vito-Volpe, 91-INA-300 at 11 (Guill, Assoc. Chief Judge dissenting). It also generally provides sufficient compensation to the worker so that no additional employment is necessary. *Id.* Historically, a permanent position generally does not have a high-turnover of workers. *Id.* These factors, when viewed in a totality of the circumstances, add more than a gloss to looking strictly at the duration of the job. Indeed, these factors, including duration, present a pragmatic, hard-look at what permanent full time work means in the reality of the labor market. Like other factor driven analysis, each case is evaluated on its own merits with every factor viewed individually and collectively. In some circumstances, a single factor may indeed predominate; in other circumstances, a normally significant factor like high-turnover may be less important because of macro-economic changes. Over time, the application of the factors will become simple as case law develops. A factor driven analysis will allow the Board to adopt a dynamic approach to regulating the alien labor certification process.

(2) In *Matter of Vito-Volpe*, the Board rejected a totality of the circumstances approach. *Matter of Vito-Volpe*, *supra*, at 8-9. Instead, it drew a line

between permanent and temporary based on the duration of the work alone. *Id.* In concluding that duration alone was dispositive, the Board relied on the regulatory framework established for the non-immigrant temporary worker program at § 101(a)(15)(H) of the Act. Using the non-immigrant temporary worker program as a guidepost, the Board reasoned that the regulations implementing that program should also regulate the immigrant permanent worker program. *Id.* at 4-7.

It was inappropriate to so reason because Congress crafted statutorily distinct programs, cf.  $\S 101(a)(15)(H)(ii)(b)$  with  $\S 212(a)(5)$ . The purpose of the nonimmigrant H-2B temporary worker program is not analogous to the permanent worker program and its policies do not correspond sufficiently to make it a useful surrogate. On a more troubling legal note, the regulations for the non-immigrant H-2B temporary worker program were not designed or noticed to the public that they would be used for this purpose either. See, e.g., Immigration & Naturalization Service, Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 52 Fed. Reg. 5738, 5748 (Feb. 26, 1987) (Final Rule) (distinguishing immigrant purpose from the nonimmigrant worker program). It seems bad form, in addition to bad policy, to enact regulations for one purpose and then, deftly, use them for another. The public never had the opportunity to comment on the rules as they were actually to be employed and that deprives the regulators of critical information. For these reasons, Matter of Vito-Volpe was wrongly decided.

(3) The Board seemed to recognize the errors of *Vito-Volpe*. In *Matter of Crawford*, the Board confronted the *Vito-Volpe* rule directly and adhered to it, not because it made sense as a substantive rule, so to speak, but for doctrinal reasons outside the merits of the rule. Believing that *stare decisis* tied its hands, the Board held fast to *Vito-Volpe* in spite of its weak underpinnings. The Board was wrong to have retained the *Vito-Volpe* rule. The doctrine of *stare decisis* does not apply in administrative proceedings with the same force as in judicial forums. It is not even clear that it applies at all to the Board's decisions.

Stare decisis should almost never prevent the Board from adopting the best rule. True, the Board "cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." Haoud v. Ashcroft, 350 F.3d 201, 207 (1st Cir. 2003) (in deportation context). Rather, the Board must adhere to its precedents and make reasoned decisions. Id. However, the formalistic approach to stare decisis, which is a judicial doctrine, in the administrative law context is unsound. There is no doubt that predictability and stability are important values in any sort of adjudicative system. Matter of Crawford & Sons, 2001-INA-121 at 5 (Jan. 9, 2004). For the federal judiciary, stare decisis is a critical check on judicial discretion because of the vast – and to a large degree, unaccountable – power that federal courts hold. See, e.g., The Federalist No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("To avoid an

arbitrary discretion in the courts, it is indispensable that [the federal courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them[.]"). This is less so in the realm of administrative adjudication. The expertise the Board has developed in adjudicating labor certification claims should be exercised dynamically; with each case it decides and each rule it creates and then administers, the Board ought to learn and improve its approach. "Experience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances." Davila-Bardales v. INS, 27 F.3d 1, 5 (CA1 1994). The object of its regulation, the labor market of the United States, is the antithesis of static: it rolls, changes, swings, and sways in ways frequently unpredictable. The Board's decisions will maintain their usefulness when they apply a rule of decision because it is the best rule, not just because it was the first rule. *Stare* decisis, thus, should not compel adherence to an outdated or poorly designed decisional rule.

There are other reasons why *stare decisis* is an inapt fit for refusing to let go of *Matter of Vito Volpe*. It is not entirely clear to AILA that the Board holds the power to make law that would have *stare decisis* effect. The *sine qua non* of law-making power is the ability to bind third parties. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Unlike the Board of Immigration Appeals, the Board of

Alien Labor Certification Appeals has no regulation bestowing it with the ability to publish precedent and bind all lower adjudicators. E.g., 8 C.F.R. § 1003.1(g) (allowing BIA to "publish" an opinion thereby creating binding precedent for all the lower immigration adjudicators, including the Immigration Courts and District Directors.). There is no question that the Board's adjudication of a single claim binds the parties to its resolution in that claim. It is a different question, though, whether the Board's decision in a single claim – en banc or in panel – binds third parties or constrains non-parties in future cases. Hart v. Massanari, 266 F.3d 1155, 1176 (CA9 2001) (regarding judicial opinions, "[p]recedential opinions are meant to govern not merely the cases for which they are written, but future cases as well."); *Matter of E-L-H*, 23 I&N Dec. 814, 823 (BIA 2005) (applying precedent creation rule in removal context). Without the power to bind third parties, the law-making force of a Board decision is subject to doubt. Without a law-making power, the doctrine of *stare decisis* would be inapplicable.<sup>2</sup>

In *Matter of Crawford & Sons*, the Board grounded part of its reluctance to overrule *Vito-Volpe* on two Supreme Court authorities that stand for the same

AILA does not here address whether by adjudication, the Board could issue a decisional rule that declares its decisions to be precedent and bind lower adjudicators. One other point bearing mention is that it does not appear that the Board has a systemized reporter for its decisions. Instead, its decisions are issued in a permanent slip opinion. This can complicate the ability to create precedent because of the inaccessible nature of the decisions and the lack of a ready-reference for their citation. *Hart v. Massanari*, 266 F.3d 1155, 1168 n21 (CA9 2001) (explaining that a critical element of modern rules regarding precedent is the advent of the "standardization of case law reporting".)

point: stare decisis is particularly powerful when Congress could have, but did not supersede a judicial decision with new legislation. The Board cited to Justice Souter's dissent in Reno v. Bossier Parish School Board, 528 U.S. 320, 362-63 (2000) which referenced an earlier Supreme Court decision in Hilton v. South Carolina *Pub. Railways Comm'n*, 502 U.S. 197 (1991). These cases have little relevance to the issue at hand. First, the cases guide how judicial courts interpreting Congressional statutes are to view prior precedent. Here, the Board, an administrative law body, was interpreting its own regulations. The analytical difference between the two is vast; Congress does not draft regulations and would have little incentive to do anything with the *Vito-Volpe* decision. It really isn't all that significant either that the Department of Labor made no regulatory changes post-*Vito Volpe*. After all, the regulations do not contain a definition of "permanent full time work" – that definition came from the Board which is a component of the Department of Labor. Second, the Supreme Court cases were concerned with settled rights and expectations – principles that are not at play here. Third, as explained above, the mechanistic application of stare decisis in administrative law is doctrinally unsound because agencies are supposed to learn and adopt new decisions dynamically when the circumstances so warrant.

#### **CONCLUSION**

For the reasons explained above, the Board should overrule *Matter of Vito-Volpe* and *Matter of Crawford & Sons*. In their place, the Board should adopt a

factor-driven test for determining what constitutes permanent full time work for labor certification purposes.

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