U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, D.C. 20001-8002

DATE: September 29, 1994

In the Matters of:

VITO VOLPE LANDSCAPING,
Employer

on behalf of:

PLUTARCO GERARDO IRIAS-ESGOTO,	Case No.:	91-INA-300
ARMANDO IRIAS-ESCOTO,	Case No.:	91-INA-301

Aliens

AND

EMERALD GARDENS LANDSCAPING, INC.,
Employer

on behalf of:

JOSE AMBROSIO MARTINEZ,	Case No.:	92-INA-170

Alien

AND

ALAMO LANDSCAPING, INC.,
Employer

on behalf of:

OSCAR FRANCISCO RIVERA-MARTINEZ,	Case No.:	91-INA-339
LUIS HUMBERTO ROMERO-MAJANO,	Case No.:	91-INA-323
CARLOS LUIS RIVERA-MARTINEZ,	Case No.:	92-INA-11

Aliens

Before: Judges Brenner, Chao, Clarke, Groner, Guill, Huddleston, and Litt;
Richard E. Huddleston, Administrative Law Judge

DECISION AND ORDER

This proceeding arises under § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 656. Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States, and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 3, 1993, a Notice and Order was issued giving notice that the Board had determined, on its own motion, that it would review, *en banc*, the following issue:

> Whether 'employment' is permanent and full-time as defined by 20 C.F.R. § 656.50 (now recodified as § 656.3) where the applicant would perform the job for a recurring nine to ten month period each year and would be paid a lower wage or no wage for two to three months of each year.

On June 21, 1993, John G. Parilla, Esq., Counsel for Alamo Landscaping, Inc., and Emerald Gardens Landscaping, Inc., submitted a Statement of Intent to proceed on behalf of the Aliens for each of his clients, dated June 10, 1993. On June 22, 1993, Mr. Vito Volpe of Vito Volpe Landscaping advised that he intended to proceed in this matter on behalf of the Alien. Also on June 22, 1993, a Statement of Interest was filed on behalf of the American Immigration Law Foundation and the American Immigration Lawyers Association as *amicus curiae*. On July 11, 1993, Franklin W. Abrams, Esq., on behalf of Vito Volpe Landscaping, filed a brief, and on October 11, 1993, filed a supplemental brief. On August 2, 1993, a brief was filed by Annaliese Impink, Esq., on behalf of the

[1] All further references to documents contained in the Appeal File will be noted as "AF *n,*" where *n* represents the page number.

Certifying Officer. On August 3, 1993, the American Immigration Law Foundation, as *amicus curiae*, filed a brief, and on October 12, 1993, filed a supplemental brief.

These cases arise as a result of six applications for permanent labor certification by the three above-named Employers engaged in the landscaping business.[2] In all six instances the Certifying Officer denied certification on the grounds that the Employers' job opportunities were not "permanent full-time" work as contemplated by 20 C.F.R. § 656.50 (now recodified as § 656.3). Thus, the CO found that the prospective job opportunities were not appropriate for certification under the permanent labor certification program.

The job opportunities described in each of these applications differ slightly. Four of the six applications list the job opportunity as that of "Landscape Gardener" while the two positions offered by Vito Volpe Landscaping are listed as that of "Lawn Service Worker." The job duties for each are listed as:

> Plan and execute small scale landscaping operations. Maintain grounds, cut the lawn, using blowers, edgers, weed machines; keep machines in good working conditions. Level soils, excavate and plant grass, plant and cultivate trees and shrubs; apply proper fertilizer; (three positions offered by The Alamo Landscaping, Inc.).
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> Cultivate lawns, using power aerator and thatcher and chemicals according to specifications. Uses thatcher to lift dead leaves and grass. Uses aerator to pierce soil to make holes for fertilizer and water. Distributes fertilizers, pesticides, and fungicides on lawn, using spreader. Records services rendered and materials used. Transports equipment to and from job site. Sprays lawn when necessary. In winter, does cleanups; (two positions offered by Vito Volpe Landscaping).
>
> Plan and execute small scale landscaping operations. Maintain grounds and landscape of private and business premises; plant and cultivate lawns and plantings, apply proper fertilizer; do minor asphalt and carpentry works; maintain and repair equipment used; (one position offered by Emerald Gardens Landscaping, Inc.).

The requirements listed for these jobs also differ slightly. All of the Alamo jobs require one year of experience in the job offered, with two of the three allowing an alternative one year in the related field of agricultural worker, while the third lists no related experience. The Vito Volpe jobs require three months of experience in the job offered or three months in the related occupation of farmer. The Emerald Gardens job also requires one year of experience in the job offered.

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[2] Originally, these cases were consolidated with that of a fourth Employer, Heckscher Landscaping, Inc., whose application was filed on behalf of Jose Modesto Meja-Amaya, Alien, BALCA Case Number 91-INA-349. However, that appeal was dismissed by order of the Board on October 28, 1993, due to the Employer's failure to file a notice of intent to proceed as directed by the Board.

Although there are slight differences in the job opportunities, all six of these positions are for periods of employment of less than 12 months per year; all involve work during the growing seasons of the year, with reduced or no work during the winter months; and, all six positions are stated to be of a recurring nature, in that the work is performed year after year.

Discussion

Twenty C.F.R. Part 656 of the regulations governs the labor certification process for permanent employment of aliens in the United States. Employment is defined in § 656.3 as "permanent full time work by an employee other than oneself." However, Part 656 gives no definition for "permanent full time work." The Employers in these cases, as well as *Amicus*, urge us to find that the jobs in question here are permanent as they occur year after year, even though they do not last continuously for 12 months per year. The analogy is made to other jobs which have been considered to be permanent but which last for less than 12 months, such as school teachers, college professors, or professional athletes.[3]

At the outset, we note that the Act expressly recognizes "a member of the teaching profession" as an occupation within the ambit of permanent labor certification, 8 U.S.C. § 1182(a)(5)(A)(ii)(I), as do the regulations (at least with respect to college professors), 20 C.F.R. §§ 656.21(a) and 656.24. *See, Dearborn Public Schools*, 91-INA-222 (Dec. 7, 1993). *See also,* 20 C.F.R. § 656.1, which refers to 8 U.S.C. § 1182(a)(5)(A). The statutory authority for temporary labor certification is found in 8 U.S.C. § 1101(a)(15)(H). Therefore, we reject the analogy to permanent labor certifications granted to school teachers and college professors.

The Certifying Officer argues that the definitions of seasonal and temporary employment under 20 C.F.R. Part 655 apply to the facts of the instant cases. We agree.

Twenty C.F.R. Part 655, subpart A (§ 655.1, *et seq.)* sets forth the Labor Certification Process for temporary employment of aliens in occupations other than Agriculture, Logging, or Registered Nursing in the United States (referred to as H-2B workers). The parties agree that the positions in question here, Landscape Gardener or Lawn Service Worker, are occupations "other than Agriculture, Logging, or Registered Nursing." (*See,* CO's August 2, 1993, brief at page 12, footnote 9; *Amicus* August 3, 1993, brief at page 8.) Thus, applications for temporary labor certification in these occupations would be considered under subpart A of Part 655. However, § 655.3(b) provides that in making a determination on such applications, the policies of the United States Employment

[3] In support of their argument we are cited to decisions in *Los Angeles Unified School District*, 92-INA-21; *Montessori Academy*, 92-INA-66; *Valley Beth-Shalom School*, 91-INA-382; *Peter Noster High School*, 88-INA-131; *Tuskegee University*, 87-INA-561; and, *Matter of Talledega College*, 89-INA-209. Similarly, Counsel cites *Matter of Connoly Skis, Inc.*, 89-INA-232 and 89-INA-233, cases involving labor certification of professional athletes, as supporting its argument that the jobs involved in the instant cases may be considered "permanent." However, we note that, in the cases cited, the issue of whether the jobs in question were to be considered temporary or permanent were not challenged by the respective COs. Thus, the issue was not addressed by the Board.

Service set forth in 20 C.F.R. Part 652 and subparts B and C of Part 655 shall be followed in making the findings.

Subpart B of Part 655 (§ 655.90, *et seq.)* sets forth the Labor Certification Process for Temporary Agricultural Employment in the United States (referred to as H-2A Workers). Section 655.100(c) generally defines "agricultural labor or services of a temporary or seasonal nature." More specifically § 655.100(c)(2) defines "Of a temporary or seasonal nature" as follows:

> (i) '*On a seasonal or other temporary basis*.' For the purposes of this subpart, 'of a temporary or seasonal nature' means 'on a seasonal or other temporary basis', as defined in the Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).[4]
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> "*On a seasonal or other temporary basis*" is defined in 29 C.F.R. § 500.20(s)(1) to mean:
>
> (1) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind ***exclusively performed at certain seasons or periods of the year*** and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year. (Emphasis added).

Section 655.100(c)(2)(iii) further defines "*Temporary*" as "any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part."

In the instant cases, the jobs in question are for work which is performed on a seasonal basis because they are of the kind ***exclusively performed at certain seasons or periods of the year*** and which, from their nature, may not be continuous or carried on throughout the year. During the winter months of the year, each of these employers has little or no work for these employees because the weather and growing seasons preclude their landscaping activities.

The Employers and *Amicus* argue that the jobs in question must be considered "full-time" in that the employees clearly work at least 40 hours per week. We have no disagreement with this assertion, that the work being offered is full-time employment, **when they work.** It is further argued that where such employment is offered year after year, it must be considered "permanent" employment. Thus, they argue that these jobs must be considered "permanent full-time" work as contemplated by

[4] Subsection (ii) then quotes, for informational purposes, relevant portions of 29 C.F.R. § 500.20.

20 C.F.R. § 656.50 (now recodified as § 656.3). Ironically, we note that Employers' Counsel then argues that,

> Clearly, there are positions which are so seasonal that the job offered cannot be considered 'permanent', even if the intention is to employ the same individual year after year. Offers for employment in a summer camp, two months per year, for example, are clearly not offers for 'permanent employment.' In this case, we have the reverse situation--the employee will work 10 full months per year. (Employers' July 11, 1991, brief at page 2).

Counsel's argument, that the employment must be considered permanent since it is anticipated as occurring year after year, at first blush may be considered to be reasonable. Yet, if we should hold here that a 10-month per year employee is considered to be "permanent and full time," who will be next to argue that his employee is also "permanent" as the job is filled year after year. Under this logic the argument could be made that a landscape gardener who works 40 hours per week, for eight, seven or six months of the year, year after year, must also be considered to be a permanent employee. It is unclear how this reasoning would support Counsel's argument that, "clearly, there are positions which are so seasonal that the job offered cannot be considered 'permanent,' even if the intention is to employ the same individual year after year."

The Employers also argue that, as these landscape gardening jobs must be considered under the rules governing H-2B workers, we should consider the position taken by INS in its interpretation of its regulations at 8 C.F.R. § 214.2(h)(6)(i), (ii). The INS has held in *Matter of* , 3 *Immigration Law and Procedure Reporter* B2-106 (Administrative Appeals Unit, May 5, 1986),[5] that to be temporary, the need for services must be a one-time occurrence, or a seasonal, peakload, or intermittent need. The case cited involved chefs employed year after year at a resort during its peakload season, even though the resort continues to operate year round. The INS held that nine months per year was the "theoretical maximum" for such "**peakload**" employees to be considered temporary workers.

Thus, the Employers argue that the landscapers cannot be considered to be temporary workers as they surpass the nine-month theoretical maximum for peakload workers fixed by the INS.

The regulation at 8 C.F.R. § 214.2(h)(6)(i) and (ii) provides as follows:

> (6) Petition for alien to perform temporary nonagricultural services or labor (H-2B)--
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> (i) **General**. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and

[5] The decision is published in the *Immigration Law and Procedure Reporter*, with all references to the names of Petitioner and Beneficiaries having been redacted.

whose employment is not adversely affecting the wages and working conditions of United States workers.

(ii) Temporary services or labor--

(A) **Definition**. Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) **Nature of petitioner's need**. As a general rule, the period of the petitioners need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:

(1) **One-time occurrence**. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) **Seasonal need**. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(3) **Peakload need**. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(4) **Intermittent need**. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

In the instant cases, clearly the jobs in question are neither "one time occurrence" or "intermittent" as defined in § 214.2(h)(6)(ii) above. Further, there is no evidence before us that these

Employers regularly employ permanent workers to perform landscaping services, and that they need to supplement their permanent staffs on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the Employers' regular operations. Therefore, the positions in question here cannot be considered to be jobs to fill a "peakload" need. As such, the "theoretical maximum" set by INS for such peakload workers in *Matter of , supra*, has no application to these facts.

Clearly also, these landscaping jobs are "seasonal" (as defined in § 214.2(h)(6)(ii)(B)(2)) as the need for landscaping service is traditionally tied to a season of the year and is of a recurring nature. Further, the period during which landscaping services are needed is not unpredictable or subject to change; and there is no evidence that during the winter months, when landscaping services are not needed, such is considered a vacation period for the Employers' permanent employees. Employers have urged us to consider the payment of (lower) salaries during the "off season" as being similar to "paid vacation." (Employer's brief at 12). Again, there is no evidence before us that the Employers have permanent employees who are on paid vacation during the off-season. To the contrary, it is clear that these Employers simply have little or no work to be performed in these positions during those portions of the year.

Therefore, while the INS may have determined the theoretical maximum for "peakload" workers, such has no application to these "seasonal" workers.

Employers also argue the nature of the Employers' needs rather than the nature of the job duties should be considered in determining whether a job is temporary or permanent, citing the decision of the Department of Justice, Board of Immigration Appeals, *Matter of Artee Corporation*, 18 I. & N. Dec. 366 (Comm. 1982), 1982 BIA Lexis 38. Thus, it is argued that the Employers here have a continuing need for landscapers and landscape gardeners, and as such, it is argued that the positions are permanent.

However, Employers' reliance upon the decision in *Artee*, *supra*, is also misplaced. We distinguish the instant cases on the facts. The jobs in *Artee* involved a Temporary Employment Service which provided skilled machinists, on an ongoing basis to its clients. As stated by the Board in *Artee*, "The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand." Under these facts, the Board looked to the nature of the Employer's needs, as opposed to the job duties. The Temporary Employment Service in *Artee* needed employees on a full-time, permanent basis even though the nature of an individual employee's job duties was to provide a temporary service to a client.

In the instant cases, the landscaping employers' need workers only for a maximum of 10 months per year, because their business is seasonal. During the off-season, workers are not needed. The fact that they will again need employees in successive years does not make the Employers' needs permanent.

Therefore, we hold that although these landscaping jobs may be considered "full time" during ten months of the year, and the need for these jobs occurs year after year, they cannot be considered permanent employment, as they are temporary jobs that 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.

The Employers in the cases before us may seek temporary labor certifications. If this results in a required testing of the availability of U.S. workers at the beginning of each ten-month period, that is a good result in accordance with the general policy of protecting job opportunities for U.S. workers.[6]

In making this finding, we are mindful of the dissenting comments by our colleagues, who have interpreted our decision as prohibiting permanent alien labor certification for any occupation that lasts for less than 12 months per year. We disagree with this interpretation, and emphasize that we are dealing with "temporary jobs that 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." If the Employers believe they can qualify for permanent labor certification on the basis that they will employ the aliens during the off-season, they may so apply. However, on the basis of the sparse record before us, they will have hurdles in their path. For example: Is there really work requiring full-time employment in the off-season, and if so, would this be an unduly restrictive combination of duties; or are U.S. workers put on paid vacation for this period (thereby taking the job out of the seasonal definition of 8 C.F.R. § 214.2(h)(6)(ii)(B)(2))?

Accordingly, the applications for permanent labor certification were properly denied by the Certifying Officer.

ORDER

The Certifying Officer's denials of labor certification are hereby **AFFIRMED**.

Entered for the Board, *en banc*:

Richard E. Huddleston
Administrative Law Judge

Associate Chief Judge Guill, joined by Judge Chao and Chief Judge Litt, dissenting:

The issue before the Board is whether employment is permanent and full-time as required by 20 C.F.R. § 656.3 when the employee will perform the job for a recurring nine to ten month period each

[6] Under the INS regulations at 8 C.F.R. § 214.2(h)(13)(iv) and (v), an H-2B alien engaged in seasonal employment may seek readmission to the United States or an extension of temporary labor certification under certain conditions. An alien seeking temporary labor certification must have a residence in a foreign country which he has no intention of abandoning. 8 U.S.C. § 1101(a)(15)(H).

year. The majority's decision effectively establishes a black-letter rule that excludes from permanent alien labor certification any occupation that includes a break in service during a twelve-month period.[7] That decision is based primarily on a conclusion that the work to be performed in the applications *sub judice* is seasonal as defined by 20 C.F.R. Part 655, Subpart B and 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) -- is therefore necessarily temporary -- and, as a result, permanent labor certification is not available. I do not agree with that result for three reasons.

First, the majority fails to consider that the permanent and temporary labor certification regulations implement different sections of the Immigration and Nationality Act ("Act"), and that each operates independently of the other.[8] Specifically, the majority does not explain what link between the two programs permits rejection of an application for permanent labor certification because one characteristic of the job opportunity, its seasonal nature, possibly fits the definition of seasonal as that term is used under the temporary labor certification regulation. Neither the Act nor the regulations provide a basis to conclude that just because seasonal employment is, in certain circumstances, certifiable under the temporary regulations, it can never be certified as permanent under the permanent certification regulations.

Second, assuming *arguendo*, that it is appropriate to rely on the temporary labor certification regulatory scheme, those provisions focus only on the length of a given job opportunity within any one year period. In this regard, the regulations include a presumption that any job lasting 12 months or more is permanent, with the result that certification under the temporary certification regulations is precluded absent extraordinary circumstances. 20 C.F.R. § 655.101(g). Nothing in the temporary regulations, however, describes whether a job of less than 12 months in a given year, but recurring indefinitely in the future, is temporary for purposes of certification under the temporary labor certification provisions.[9] These regulations do not define whether recurring, seasonal employment is

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[7] The majority distinguishes teaching positions from other jobs on the ground that members of the teaching profession are explicitly mentioned by the Act; this special provision, however, relates to whether U.S. applicants for teaching positions subject to labor certification must meet the "minimally qualified" standard for the basic certification process or the "at least as qualified as" standard of the special handling provision. *See Dearborn Public Schools*,
91-INA-222 (Dec. 7, 1993) (*en banc*). Nothing in this statutory language either states, or authorizes an inference, that teaching positions are exempted from being permanent and full-time. In fact, an inference could be drawn from this language that Congress simply is not concerned with requiring unbroken service for permanent labor certification.

[8] The temporary labor certification regulations cited to by the majority set forth the procedures implementing 8 U.S.C. § 1101(a)(15)(H)(ii), which provide for nonimmigrant alien workers intent on performing temporary employment in the U.S. The permanent labor certification regulations at 20 C.F.R. Part 656 set forth the procedures implementing 8 U.S.C. § 1182(a)(5)(A), which provide for labor certification of certain immigrant workers.

[9] Notably, in *Maltsberger*, 93-TLC-6 (July 2, 1993) (*Maltsberger I*), and *Maltsberger*, 94-TLC-6 (June 6, 1994) (*Maltsberger II*), the Regional Administrator took the position that an employer cannot continually reapply for temporary labor certification when the work recurred year after year, despite the intermittent nature of the work during any one year. The administrator pointed out that the preamble to the pertinent regulations state that the longer the employer's need for a temporary worker, the more likely the need is actually permanent. *See Maltsberger*

(continued...)

temporary for purposes of applications filed under the temporary labor certification regulations. Thus, one cannot conclude that they define permanent full-time work under the permanent regulations.

Third, the majority's analysis fails to consider the policy underlying permanent labor certification, to wit: Employers 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. The reality of the workplace is that certain occupations, for reasons such as weather or custom, have periods in which work cannot be performed.[10] An employer's need to fill a bona fide job that lasts a substantial portion of the year but less than a full twelve months, may outweigh the risk that the certified alien may take another job for a short period. Thus, to implement the statutory purpose, in the absence of explicit regulatory authority to the contrary, I would hold that the regulations do not preclude certification of jobs that include a break in service. Rather, what the regulations do require is that an employer establish that the positions will last indefinitely and for a substantial portion of the year, permitting time off for customary vacation and sick leave and federal and state holidays.

The permanent labor certification regulations at 20 C.F.R. Part 656 provide a basis for the Secretary to make the required certification, *see* 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.11, by means of a labor market test. When a job lacks indicia that it is indefinite and that it will be performed for a substantial portion of the year, the Secretary may deny labor certification because of the risk that the certified alien will leave the job after a short period or during a break in performance of the job and take a position for which the labor market has not been tested.

Thus, an employer must document the indefinite and substantially continuous nature of the job offered if it arises as an issue in the application process. Proof of such permanence in individual cases requires that the employer demonstrate that the job duties are performed on a continuing basis, the job is career-oriented and for which the applicant has demonstrated a commitment, and that, historically, occupants of the position have remained year after year and are not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year. A short-term position, on the other hand, is inappropriate for permanent labor certification. Similarly, a job which is subject to one or more lengthy intermittent breaks during the course of a year, or demonstrates a high turnover of occupants from one year to the next is suspect because of the risk that the alien will obtain employment for which the labor market has not been tested or become a public charge. Proof of permanence may include documented experience of similar employers and occupations in the area where the work is to be performed. A new or expanding business may have a more difficult task in establishing permanence, but could submit evidence such as a concrete business plan with the part of the plan evincing permanence of employment clearly identified. *Compare Remington Products, Inc.*,

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[9](...continued)
I, at p. 6 (referring to RA's reference to 52 Fed. Reg. 20496, 20498 (1987)). While in both cases Judge Clarke ruled against the Regional Administrator and temporary certification was granted, the unique set of facts involved, including a finding of "extraordinary circumstances" pursuant to 20 C.F.R. § 655.101(g), made a determination based on the issue now squarely before the Board unnecessary.

[10] For example, school teachers, sailors in the Great Lakes, professional athletes, and construction workers.

89-INA-173 (Jan. 9, 1991) (*en banc*) (business plan necessary to establish business necessity for a foreign language requirement upon expansion into new market). In each case, the Certifying Officer must weigh the evidence to determine whether the employer has demonstrated a legitimate need for permanent, *i.e.* indefinite and substantially continuous, employment.

I would, therefore, remand the applications for reconsideration, with an opportunity for Employers to submit relevant additional evidence, according to the above-stated criteria.