REQUESTS FOR EVIDENCE

by Daniel C. Horne

ARE THE OUTSTANDING RESEARCHER REGULATIONS AUTHORIZED BY THE INA?

Dear Dan:

I just received a denial from the Nebraska Service Center, and I'm wondering whether there's anything you can do to help me solve it. I recently filed an immigrant petition on behalf of a private research laboratory under the "outstanding professor or researcher" category. The Service Center issued a Request for Evidence demanding that the petitioning company provide evidence that the permanent offer of employment was not terminable "at-will."

Of course, as is standard throughout the private sector, the petitioner has always offered its permanent positions on an "at-will" basis. The lab was unwilling to extend permanent offers of employment under the much more restrictive "good cause for termination" standard. After all, funding for private-sector scientific research can be volatile, and the institute needs the flexibility to let employees go should funding decline. In any event, lab was understandably worried about the precedent set by offering "termination for good cause" employment to a single foreign employee, when the position is otherwise identical to positions held by U.S. workers who have "at-will" terms.

Though I explained to the lab that the Service Center's requirement was based upon explicit regulatory language, the lab reiterated that it was in no position to change the terms of employment offers for one individual. Because we were unable to provide the written guarantee that the Service Center demanded, the petition was denied. The lab is livid about this situation, and its general counsel wants to know what we can do to fix things.

Specifically, the general counsel wants to know whether an administrative appeal would even be worthwhile. As far as I can tell, an appeal to the Administrative Appeals Office would be pointless, because the AAO is in no position to invalidate its own regulations. Further, I can't see any other reasonable way to interpret the regulation's explicit requirement for "good cause" employment. After discussions, the lab is willing to consider taking this matter to federal court, but I'm not sure how or whether we would prevail, given that the regulations are clear. What would you do?

-Permanently At Will in Portland

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Dear Will,

It seems to me that the only way you can achieve a happier result is to challenge the "outstanding researcher" regulation itself, as I agree the regulatory requirements are clear enough on their face. The only method by which you can do this would be a declaratory injunction in federal district court. If you feel the CIS regulations in question impose requirements not authorized by the Immigration and Nationality Act, then you need not wait to exhaust your administrative remedies with the AAO.

Assuming you can demonstrate to a federal district court that the CIS's regulations are *ultra vires* to the INA, you can instead file a declaratory injunctive action against the Nebraska Service Center in federal district court.[1] (If you'd like a sense of how to draft such a complaint, you may wish to review the treatise *Immigration Law & Procedure*, which contains a draft pleading for just such situations.[2])

Before rushing to the courthouse, of course, it would be best to map out how you plan to convince a federal judge or magistrate that a regulation in place since 1991 is *ultra vires* and unenforceable. What follows is my attempt to map out such a strategy.

The "outstanding researcher" regulations require petitioners to offer the beneficiary a "permanent" research position. Unlike the commonly understood definition of permanent (*i.e.*, indefinite) employment, the regulations define "permanent" thus:

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[1] *See, e.g.*, Heinl v. Godici, 143 F. Supp. 2d 593, 603 (E.D. Va. 2001) (citing Patlex Corp., Inc. v. Mossinghoff, 585 F. Supp. 713, 720 (E.D. Pa. 1983) ("Federal courts are not required to await final agency action before considering facial challenges to new regulatory schemes") and Allegheny Ludlum Corp. v. Comer, 1992 U.S. Dist. LEXIS 20950, 24 U.S.P.Q.2D (BNA) 1771, 1776 (W.D. Pa. 1992) ("The exhaustion doctrine is inapplicable to such a challenge because to exhaust remedies that are in and of themselves the problem would be an exercise in futility.")). *Id.* at 603 n.17.

[2] C. GORDON *et al.*, 9-B IMMIGRATION LAW & PROCEDURE, Exhibit 89 ("Sample Class Action Complaint for Declaratory, Injunctive and Mandatory Relief").

> *Permanent, 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.[3]

There are no two ways to read this regulation. If the petitioner is unable to guarantee that the beneficiary's employment will remain untouched "unless there is good cause for termination," then the immigration petition cannot be approved.

However, this regulatory requirement's origin is curious, as it appears nowhere in the INA. The INA defines eligible employment for an outstanding researcher as follows:

> *a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,*
>
> . . . .
>
> *or for a comparable position to conduct research in the area with a department, division, or institute of a private employer….*[4]

How the INS came to include this new "good cause for termination" requirement from the language cited above is a bit of a mystery. No such requirement appeared in the original 1990 Immigration and Nationality Act (IMMACT90), which amended the INA to create the "outstanding researcher" category.

Of course, those familiar with the terms of employment in the academic world know that freedom from termination absent "good cause" is the very definition of tenure, which is the gold standard of employment in the academic sector.[5] However, the "outstanding researcher" category is not allowed exclusively for tenured academic positions, where employment is essentially protected from termination absent good cause. The category also extends to "tenure-track" positions within the academic sector and to "comparable positions" within the private sector.

Thus, the question arises: For a private-sector research position to be "comparable to" an academic tenured *or tenure-track* position, must it require that such the employment be protected against termination except for "good cause"? After all, tenure-track employment is very different from tenured employment, precisely because tenure-track employment – by definition a probationary period – contains no "good cause termination" guarantee.[6] Thus, no common-sense comparison between tenured positions, tenure-track positions, and private-sector research positions would suggest that "but for good cause" termination ought to be a requirement.

Though the legislative history's discussion of the "outstanding researcher" category is sparse, what little exists implies that Congress did not even expect that "tenure-track" positions would necessarily need to transform themselves into "tenured" positions: "*Further, if a tenure-track position was offered and accepted, but the alien subsequently failed to achieve tenure, the alien would not thereby lose permanent resident status.*"[7]

Thus, of paramount importance to Congress in the "tenure or tenure-track position" requirement was not the "termination for cause" as opposed to "employment at will" employment, but rather that tenure and tenure-track positions be distinguished from "non-tenure track" positions, which are, by definition, temporary offers of employment, typically regulated by annual contracts.[8] So, what was the INS thinking when it come up with this requirement? One would think a review of the regulatory history would shed light on its reasoning, but

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[3] 8 C.F.R. § 204.5(b)(2) (emphasis added).

[4] INA § 203(b)(1)(B), 8 U.S.C. § 1153(b)(1)(B).

[5] *See generally* FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 122-44 (1973), *cited in* Mayberry v. Dees, 663 F.2d 502, 513-14 (4th Cir. 1981); *see also* Mona Mort, *On Being Nontenured*, SCIENCE'S NEXT WAVE, Jan. 26, 2001, *available at* http://www .nextwave.sciencemag.org/cgi/content/full/2001/01/25/5.

[6] *See, e.g.*, Mayberry v. Dees, 663 F.2d 502, 515 (4th Cir. 1981) (tenure-track employment is probationary, and as such creates no lawful expectation of continued employment); Siu v. Johnson, 748 F.2d 238, 243 (4th Cir. 1984) *(*classic tenure-track employment is "essentially employment at will"); Colburn v. Trustees of Indiana Univ., 739 F. Supp. 1268, 1285 (S.D. Ind. 1990) (employer university considered tenure-track employment to be "at-will").

[7] Family Unity and Employment Opportunity Immigration Act of 1990, H.R. REP. NO. 723(I), 101st Cong., 1990, *reprinted in* 1990 U.S.C.C.A.N. 6710, 6739 (Sept. 19, 1990).

[8] For a full explanation of the differences between tenure track and non-tenure track employment, see, *e.g.*, Robin Wilson, *Contracts Replace the Tenure Track for a Growing Number of Professors*, CHRON. OF HIGHER EDUC., June 12, 1998, at A12.

reviewing the *Federal Register* only causes greater confusion.

For example, the original outstanding researcher regulations – proposed in 1991 – contained no requirement that permanent employment (whether academic- or private-sector) require "good cause for termination."[9] In fact, the originally proposed rule did not even bother to define "permanent" employment. Universities were required only to offer a "tenure or tenure-track" position,[10] and private employers were required only to offer a "comparable" research position.[11]

Furthermore, the INS recognized the lack of any private sector analog to academia's tenure or tenure-track employment:

> *The portion of the statute relating to employment after entry indicates that the alien will be coming to a tenured or tenure-track teaching position, a comparable research position with a university or institution of higher learning, or a comparable research position with a private employer. The Service believes the word comparable, used for researchers in universities or institutions of higher education, means a tenured or tenure-track position.* On the other hand, private or non-profit employers do not ordinarily give tenure to employees. A comparable research position with a private employer, therefore, would be one in which the job description and duties are comparable to those of a researcher at a university or institution of higher education.[12]

In other words, the terms of permanent employment were not to be the point of comparison, but rather the "job description and duties." This seems a reasonable attempt to respect congressional wishes that outstanding researchers be offered an opportunity to work in either the academic or private sectors, notwithstanding the different employment cultures between those two sectors.

However, in promulgating the final regulation later that year, the INS contradicted its original reasoning:

> *In the final rule, the Service recognizes that a research position having no fixed term and in which the employee will ordinarily have an expectation of permanent employment is "comparable" to a tenured or tenure-track position within the meaning of section 203(b)(1)(B)(iii)(II) of the Act. The final rule has been modified to reflect this recognition.*[13]

Of course, there is a difference between a permanent position and a position that requires "good cause" for termination. Most employees today would agree that they are hired on a permanent (*i.e.*, indefinite) basis, not temporary.[14] But that hardly means they are not "at-will" employees. The Service took a logical leap in demanding that a position require "tenure" (that is to say, "termination only for good cause") to be considered permanent. Visa regulations in other contexts acknowledge that the difference between "tenure-track" and "non-tenure track" positions is that tenure-track is generally considered a permanent position, and non-tenure track is temporary.[15]

In essence, the regulations doubly misinterpret the language and intent for IMMACT90. First, they erroneously describe "tenure" and "tenure-track" positions as both requiring "good cause" for termination, when in fact tenure-track positions have no such quality.[16] Second, the regulations deem private-sector research positions as "comparable" to academic-sector positions only when those positions adopt "tenure" by another name, a concept that simply does not exist in the private sector.

As a result of this mistake, the Service manufactured employment requirements that simply do not exist in the private-sector world, not only without statutory authority, but in such a way as to frustrate congressional intent. The Service thus defined as "comparable" a

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[9] *See generally* 56 Fed. Reg. 30,703 (July 15, 1991).

[10] *See* 56 Fed. Reg. 30,703, 30,710 (July 15, 1991) (proposed rule 8 C.F.R. § 204.5(a)(3)(iii)(A)-(B)).

[11] *See* proposed rule 8 C.F.R. § 204.5(a)(3)(iii)(C), *in* 56 Fed. Reg. 30,703, 30,710 (July 15, 1991).

[12] 56 Fed. Reg. 30,703, 30,705 (July 15, 1991) (emphasis added).

[13] 56 Fed. Reg. 60,897, 60,899 (Nov. 29, 1991).

[14] *See* DAVID P. TWOMEY, LABOR AND EMPLOYMENT LAW (9th ed., 1994) (approximately 75% of all permanent full-time employment is on an "at-will" basis).

[15] For example, the original U.S. Information Agency regulations for the J-1 visa category simply treated "non-tenure-track" as interchangeable with "temporary." *See* 57 Fed. Reg. 46,679, 46,683 (Oct. 9, 1992): "To this end the proposed regulations require that appointments of professors and research scholars be temporary and not on a tenure track . . . ." This regulatory distinction between "temporary" and "tenure-track" positions remains in effect today. *See* 22 C.F.R. § 62.20(d)(i) (2004).

[16] *See supra* note 6.

situation that has no private-sector analogy, *after having admitted as much* when proposing those same regulations.

To sum up, the Service regulations imposing a "good cause termination" requirement to private-sector offers of employment to outstanding researchers have no basis in the INA, no basis in the legislative history of IMMACT90, and no explanation in the regulatory history. In fact, the legislative history and the initially proposed regulations contain much evidence suggesting that congress used the terms "tenure" and "tenure-track" simply to distinguish offers of permanent employment from offers of temporary employment. I believe the Service would have a hard time arguing that Congress meant to impose a "termination for good cause" standard upon private-sector research facilities sponsoring outstanding researchers. Upon a *de novo* review of the regulation, I believe most federal judges would believe you had the stronger argument. Of course, the Service would likely argue that its interpretation of the INA should be accorded great deference under the *Chevron*[17] standard of judicial review. However, *Chevron* standards of deference only apply to areas in which an agency has an particular expertise. On questions of law that do not meaningfully involve an agency's expertise (such as whether or not tenure-track positions tend to require "termination only for cause" to be considered permanent), courts are willing to grant *de novo* review.[18]

Armed with this outline of arguments, you may wish to speak with your client's general counsel and see whether the lab might be willing to file suit.

Do you have a business immigration related question for Dan? Feel free to contact Dan or challenge his assumptions via e-mail at *dan@kuver.com.* Any and all responses are welcomed!

[17] *See* Chevron USA v. NRDC, 467 U.S. 837 (1984), and progeny.

[18] *See, e.g.*, Patel v. Ashcroft, 294 F.3d 465, 467 (3d Cir. 2002); Gerbier v. Holmes, 280 F.3d 297, 302 (3d Cir. 2002).