Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Charles J. Barranco, M.D.,	DATE: March 30, 1992
Petitioner,	Docket No. C-295
- v. -	Decision No. CR187
The Inspector General.	

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), the Inspector General (I.G.) notified Petitioner by letter dated August 9, 1990, that he was being excluded from participation in the Medicare and State health care programs until he obtained a valid license to practice medicine in the State of New York.[1] Petitioner was advised that his exclusion resulted from the surrender of his license to practice medicine in the State of New York while a formal disciplinary proceeding was pending before the New York State Board of Professional Medical Conduct. Petitioner was further advised that his exclusion was authorized by section 1128(b)(4)(B) of the Act. By letter of September 4, 1990, Petitioner requested a hearing before an administrative law judge (ALJ), and the case was assigned to me for hearing and decision.

The parties initially agreed to submit this case on Motion for Summary Disposition. On April 9, 1991, I ruled that: 1) the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act; 2) the I.G. had failed to establish that, as a matter of

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. § 1320a-7(h), to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

law, Petitioner should be excluded from participation in Medicare and Medicaid programs until he regained his license to provide health care in the State of New York; and 3) there were genuine issues of material fact in this case concerning Petitioner's alleged untrustworthiness.[2]

On August 19 and August 20, 1991, I conducted an in-person hearing in San Diego, California. Both parties submitted post-hearing briefs and replies. On January 29, 1992, following the parties submissions, the Secretary promulgated new regulations containing procedural and substantive provisions at 57 Fed. Reg. 3298 et seq. Both parties submitted briefs concerning the potential impact of these regulations. Based on the record and on the applicable law, I conclude that the new regulations do not apply to this proceeding. I further conclude that the indefinite exclusion imposed and directed against Petitioner by the I.G. is excessive. I conclude finally that the remedial purpose of section 1128 of the Act will be served in this case by the earlier of either: 1) a three year exclusion; or 2) an exclusion until such time as a State licensing agency reviews all of the factual and legal issues which were before the State of New York when Petitioner surrendered his license, and, based on the result of that review, either a) grants Petitioner a license, or b) if it is the agency in California, it takes no significant adverse action against his existing license. I modify the exclusion accordingly.

ISSUE

Following my Ruling of April 9, 1991, the sole issue remaining in this case is whether the exclusion imposed and directed against Petitioner by the I.G. is reasonable.

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[2] In my Ruling of April 9, 1991, I left open the possibility that additional evidence might be presented concerning the regulatory provisions of the licensing process in New York as it related to whether or not Petitioner had a license to practice medicine in New York in 1988. Ruling at 5. No further evidence was presented on this issue, and Petitioner did not argue this issue in his post-hearing briefing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed to practice medicine by the New York State Department of Education on August 10, 1953. I.G. Ex. 1/1.[3]

2. At all relevant times, Petitioner was a surgeon in New York, on staff at Salamanca District Hospital (Salamanca) and several other hospitals. Tr. 175 - 179.

3. During the late 1970's and early 1980's, Petitioner was required to provide medical services in Salamanca's emergency room (ER) on rotation, as were all physicians with staff privileges at Salamanca. Tr. 202.

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[3] Citations to the record and to Board cases in this decision are as follows:

I.G. Exhibits	I.G. Ex. (number/page)
I.G. Brief	I.G. Br. (page)
I.G. Reply Brief	I.G. R. Br. (page)
I.G. Regulations Brief	I.G. Reg. Br. (page)
I.G. Reply Regulations Brief	I.G. R. Reg. Br. (page)
Petitioner's Exhibits	P. Ex. (number/page)
Petitioner's Brief	P. Br. (page)
Petitioner's Reply Brief	P. R. Br. (page)
Petitioner's Regulations Brief	P. Reg. Br. (page)
Findings of Fact and Conclusions of Law	FFCL (number)
Departmental Appeals Board ALJ Decisions	DAB CR(decision no.)(date)
Departmental Appeals Board Appellate Panel Decisions	DAB (decision no.) (date)

4. On December 29, 1988, Petitioner was charged by the Department of Health, New York State Board for Professional Medical Conduct (State Board), with: 1) practicing with negligence on more than one occasion; 2) practicing with incompetence on more than one occasion; and 3) failing to keep records that accurately reflect the medical evaluation of patients. I.G. Ex. 1/6 - 7.

5. These allegations of negligence, incompetence and failure to keep records relate to Petitioner's care of eight patients (delineated patients A - H) in 1979 and 1980, one of whom Petitioner operated on at Salamanca, and seven of whom were Petitioner's patients in Salamanca's ER. I.G. Ex. 1/1 - 5.

6. Specifically, with regard to patient A, a 43 year old male on whom Petitioner performed surgery for a perforated ulcer, the State Board alleged that Petitioner: 1) improperly performed surgery; and 2) failed to adequately diagnose his condition and provide proper treatment after surgery. I.G. Ex. 1/1-2; P. Ex. 1/4.

7. Specifically, with regard to Patient B, a 73 year old female who had fallen down a flight of stairs, and complained of a prickly sensation in both shoulders radiating down her arms to her hands, the State Board alleged that Petitioner: 1) failed to obtain and/or document an adequate history; 2) failed to perform and/or document a complete physical exam; and 3) failed to provide proper treatment, including inappropriately prescribing medication. I.G. Ex. 1/2.

8. Specifically, with regard to Patient C, a 58 year old male with a complaint of heavy chest pressure radiating into the left arm, the State Board alleged that Petitioner: 1) failed to properly administer diagnostic studies to monitor, and treat his possible cardiac condition; and 2) failed to transfer him to a Coronary Care Unit (CCU) by advanced life support ambulance. I.G. Ex. 1/2-3.

9. Specifically, with regard to Patient D, a 92 year old man with chest and epigastric pain and vomiting, the State Board alleged that Petitioner: 1) failed to obtain and/or document an adequate history; 2) failed to perform and/or document a complete physical exam; 3) failed to perform and/or document adequate diagnostic studies and treat him, including improperly prescribing medication; and 4) failed to order transfer by advanced life support ambulance. I.G. Ex. 1/ 3 - 4.

10. Specifically, with regard to Patient E, a 33 year old woman with epigastric pain and nausea, the State Board alleged that Petitioner: 1) failed to obtain and/or document a history with emphasis on gastrointestinal system; 2) failed to perform and/or document diagnostic studies; 3) failed to perform a complete physical exam; 4) failed to provide adequate treatment, including improperly administering medications; and 5) failed to order transfer by ambulance. I.G. Ex. 1/4.

11. Specifically, with regard to Patient F, a 56 year old woman with complaints of nausea, chest heaviness, palpitations, and dizziness, the State Board alleged that Petitioner: 1) failed to perform and/or document a physical examination; 2) failed to obtain and/or document an adequate history; 3) failed to order and/or document adequate diagnostic studies; 4) failed to adequately treat her, including improperly increasing her medication. I.G. Ex. 1/4 - 5.

12. Specifically, with regard to Patient G, a 10 year old girl who had fallen on her left elbow, the State Board alleged that Petitioner: 1) failed to obtain and/or document an adequate history; 2) failed to perform and/or document a physical exam; and 3) failed to record his interpretation of the x-ray of this patient's elbow. I.G. Ex. 1/5.

13. Specifically, with regard to Patient H, a 67 year old man who fainted in church, the State Board alleged that Petitioner: 1) failed to obtain and/or document an adequate history; 2) failed to obtain and/or document a complete physical exam; 3) failed to perform appropriate diagnostic studies; and 4) inappropriately prescribed drug therapy. I.G. Ex. 1/5.

14. In the face of these charges, on January 12, 1989, Petitioner applied to surrender his license to practice medicine in the State of New York. I.G. Ex. 2.

15. Petitioner specifically stated that he was not contesting the charges alleged by the State Board. I.G. Ex. 2/1 - 2.

16. Petitioner agreed not to apply for restoration of his license for one year. I.G. Ex. 2/2.

17. On April 14, 1989, the New York State Board of Regents voted to grant Petitioner's application to surrender his license, and on April 27, 1989, New York's Commissioner of Education issued an Order executing Petitioner's license surrender. I.G. Ex. 3.

18. The Secretary of this Department (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662, May 13, 1983.

19. Section 1128(b)(4)(B) of the Act authorizes exclusions from the Medicare and Medicaid programs for any individual or entity who surrendered a license while a formal disciplinary proceeding was pending before a State licensing agency and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

20. On August 9, 1990, pursuant to section 1128(b)(4)(B) of the Act, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid until he obtained a valid license to practice medicine in New York.

21. There do not exist any disputed issues of material fact in this case that pertain to the I.G.'s authority to exclude Petitioner; therefore, summary disposition on that issue is appropriate. Ruling, April 9, 1991; See Federal Rules of Civil Procedure, Rule 56.

22. Petitioner surrendered to a State licensing authority his license to practice medicine and surgery while a formal disciplinary proceeding was pending which concerned his professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4)(B) of the Act. FFCL 14 - 17.

23. Petitioner's surrender of his license in the face of charges, and where he had the opportunity to defend himself against such charges, creates a presumption or inference that he is as untrustworthy as an individual who loses his or her license after litigating the issue of their professional competence, performance, or financial integrity. In such circumstances, section 1128(b)(4)(B) authorizes the imposition of some period of exclusion. S. Rep. No. 109, 100th Cong., 1st Sess. 7, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 684, 688.

24. Section 1128(b)(4)(B) of the Act does not establish a minimum or a maximum term of exclusion.

25. The Secretary did not make the regulations promulgated on January 29, 1992 concerning permissive exclusions under section 1128(b) of the Act, 42 C.F.R. § 1001 Subpart C, apply retroactively to I.G. permissive

exclusion determinations pending ALJ hearings and decisions at the time the regulations were promulgated.

26. The remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy.

27. An ancillary remedial objective of section 1128 of the Act is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs.

28. Petitioner's reason for surrendering his license in New York was that he did not intend to return to New York to practice medicine and did not want to incur the cost of challenging the State Board's charges. Petitioner has held a license to practice medicine in the State of California since 1970 and had moved to California in 1984, prior to charges being filed against him in New York. Tr. 180 - 181, 185 - 186, 263.

29. Petitioner admitted that he did not read the application surrendering his license, even though it bears his signature. Tr. 261.

30. In 1979-1980, Salamanca was a 20 - 40 bed hospital located in a small town with a population of between 5,000 - 6,000. Tr. 194, 413. Salamanca's ER had the following limitations: 1) it was not staffed by a physician certified in emergency medicine. Tr. 196, 199 - 202, 388 - 390; 2) it had no medical technicians in the ER after 4:00 p.m. or on weekends -- they were on call after that time and were expected to arrive at the hospital within 15 - 30 minutes. Tr. 195 - 196, 210 - 211, 385; 3) it had no intensive care unit (ICU) or CCU. Patients needing an ICU would be transferred to the nearest ICU as soon as possible. The two hospitals with ICU's closest to Salamanca were 15 - 20 minutes away by car. Tr. 196 - 197, 384 - 385; 4) it had no advanced life support ambulance. Salamanca's ambulance had oxygen, but no electrocardiogram machinery or heart monitors on board. Tr. 198.

31. It was Petitioner's practice at Salamanca to transfer patients to other hospitals if they needed sophisticated emergency treatment. Tr. 230 - 231.

32. In 1979-1980, it would appear from the Salamanca medical records that it was Petitioner's practice to: 1) have the ER nurses fill out the medical history of

the patients and obtain their blood pressures and temperatures; and 2) record on patients' charts only positive findings from his physical examinations. Tr. 222 - 223, 281 - 282, 297 - 298; P. Ex. 2 - 5.

33. The charges upon which Petitioner's license surrender are based are very serious, directly relating to Petitioner's ability to adequately care for beneficiaries and recipients of the Medicare and Medicaid programs. FFCL 4 - 13.

34. As Petitioner did not contest the charges against him in New York, no licensing authority or court has ever evaluated the evidence against Petitioner and determined his guilt or innocence.

35. Petitioner admitted to the charges of poor record keeping in his care of the eight patients in question and, furthermore, Petitioner did not contest the charges of negligence or incompetence. FFCL 15, 22, 29; Tr. 261 - 263.

36. With regard to Patient A, the record before me is insufficient to establish the level of care that Petitioner provided to Patient A. P. Ex. 1; I.G. Ex. 10; Tr. 244 - 259, 431 - 433, 435 - 442. The opinions expressed by the I.G.'s consultant, Frederick C. Lane, M.D., as they relate to the care provided by Petitioner to Patient A at Salamanca, cannot be supported by the record.

37. After reviewing seven patient records (patients B - H), Dr. Michael Jastremski, the Director of Critical Care at University Hospital, State University of New York Health Science Center, Syracuse, New York, concluded that Petitioner provided substandard care in 1979 - 1980, as Petitioner's care of these patients failed to meet acceptable standards of medical care. Jastremski specifically noted, and I concur, that it is the responsibility of the treating physician to adequately document the history and physical of each patient. I.G. Ex. 11, 19.

38. With regard to Patient B, Petitioner admitted providing Patient B inadequate care in transferring her with only a neck collar. Tr. 448. His excuse for the care provided was the unavailability of a proper neck brace or materials to stabilize the neck while the patient was in transit to another hospital for more adequate treatment. Tr. 447 - 449.

39. Petitioner had responsibility for the emergency treatment of Patients B, C, D, E, F, G, and H, but failed to adhere to one or more of the following medical standards: 1) conducting sufficient diagnostic procedures to determine accurately the severity and cause of their symptoms and providing medication prior to such determination; 2) documenting his specific findings concerning the nature and severity of their condition; and 3) properly stabilizing their condition and ensuring proper medical attention during transport to another hospital. Tr. 204 - 207, 209 - 220, 226 - 235, 237 - 243, 445 - 470, 472 - 505; I.G. Ex. 11/1 -8, 19/2 - 8; P. Ex. 2 - 5.

40. Petitioner transferred possibly unstable cardiac patients (patients C, D, and E) in a regular ambulance or allowed a transfer by car, rather than requiring transport in an ambulance with advanced life support equipment. I.G. Ex. 11, 19.

41. Petitioner has practiced medicine in California since 1984 at urgent care centers and has performed surgery. Petitioner has medical staff privileges at three California hospitals. Tr. 182 -183; P. Br. 6.

42. In 1985, Petitioner was denied staff privileges at Scripps Memorial Hospital (Scripps), Encinitas, California, because he had failed to demonstrate his background, experience, professional training, and competence with sufficient adequacy to assure the medical staff of that facility that any patient treated by him would be given high quality medical care. I.G. Ex. 8, 9.

43. Following Petitioner's exclusion in 1990, the Medicare and Medicaid programs were billed for Petitioner's services on two occasions, even though Petitioner's exclusion prohibited such billings. I.G. Ex. 15, 16, 17, 18, 20.

44. Petitioner's conduct exhibits a consistent and continued pattern of a lack of attention to detail and meeting acceptable standards of medical practices relating to: 1) care of patients at Salamanca in 1979-80; 2) properly documenting and supporting his application for staff privileges at Scripps in 1985; and 3) ensuring the lack of billing of Medicare and Medicaid after his exclusion in 1990. This pattern of conduct demonstrates his untrustworthiness to provide services to the Medicare and Medicaid programs. FFCL 29, 38, 39, 40, 42, 43.

45. While at Salamanca, Petitioner's practice of documenting history and physical examinations of patients was deficient, whether or not it was the general practice of physicians in Salamanca's ER, and does not excuse his conduct. FFCL 35; Tr. 410. Petitioner's deficiencies in diagnostic studies, administering of medication or transport of cardiac/neurological patients were attributable to more than: 1) a lack of diagnostic equipment; 2) absence of an advanced life support ambulance at Salamanca; 3) lack of personnel to conduct the diagnostic tests; or 4) advice of cardiac specialists on the care of cardiac patients prior to transfer to a hospital with a coronary care unit. FFCL 30; Tr. 198, 211 - 212, 219 - 220, 238 - 239, 449, 462 - 463, 479, 496.

46. Since leaving Salamanca, Petitioner's practice in California has been to document both negative and positive findings of physical examinations. Tr. 222 - 223, 225 - 226, 297 - 298. There have been no allegations concerning the adequacy or competence of Petitioner's treatment of patients in California. Tr. 184 - 185.

47. The I.G. has not shown that an exclusion until Petitioner regains his license to practice medicine in the State of New York is reasonably necessary to satisfy the remedial purpose of section 1128 of the Act.

48. The remedial purpose of section 1128 of the Act will be satisfied in this case by modifying the exclusion imposed and directed against Petitioner to the shorter of either: 1) a three year exclusion; or 2) an exclusion until such time as a State licensing agency reviews all of the factual and legal issues which were before the State of New York when Petitioner surrendered his license, and based on the result of that review either a) grants Petitioner a license, or b) if it is the California agency, it takes no significant adverse action against his existing license.

RATIONALE

In 1979 and 1980, Petitioner was a surgeon in Salamanca, New York, on staff at Salamanca District Hospital. As a Salamanca staff physician, Petitioner was expected also to staff Salamanca's ER on a rotating basis. In 1984, Petitioner relocated to California, where he had held a medical license since 1970. In 1988, Petitioner was charged by the State Board in New York with negligence, incompetence, and poor record keeping with regard to the care of eight of his patients at Salamanca in the years

1979 and 1980. In the face of these charges, Petitioner surrendered his license to practice medicine in the State of New York.

Based on Petitioner's surrender, the I.G. determined to exclude him from the Medicare and Medicaid programs until he regained his license to practice medicine in New York. In my Ruling of April 9, 1991, I found that while the I.G. had a basis upon which to exclude Petitioner, genuine issues of material fact remained with regard to Petitioner's trustworthiness which issues, when resolved, might affect the length of Petitioner's exclusion. Petitioner is now asserting his trustworthiness and vigorously contesting the reasonableness of the length of the exclusion imposed and directed against him by the I.G.

Procedurally, Petitioner argues that: 1) section 1128(b)(4)(B) is not retroactive and does not apply to him, as the conduct on which it is based occurred some years prior to section 1128(b)(4)(B)'s 1987 enactment (P. Br. 2 - 3); 2) because Petitioner has not been able to obtain copies of all relevant emergency room medical records from Salamanca, I should not consider the reports and declarations the I.G. has presented based upon those medical records (P. Br. 3 - 4); 3) the I.G. abused his discretion in this case by not performing an adequate investigation and by ignoring information provided to him by Petitioner (P. Br. 9 - 10); 4) the I.G. did not provide evidence of the qualifications and competence of the experts on which he relied (P. Br. 10 - 11); 5) neither the I.G. nor the consultants upon whose expert opinions he relied properly considered the actual conditions at Salamanca (P. Br. 11 - 13); 6) evidence as to Petitioner's post exclusion billings should not be considered because it was not considered by the I.G. in making the original decision to exclude (P. Br. 26); and 7) the new regulations should not apply to this case. P. Reg. Br. 1 - 3.

With regard to his trustworthiness, Petitioner argues that he has rebutted any presumption of his untrustworthiness arising from the surrender of his license by alluding to his education, training and employment history, including the fact that he is currently practicing in California and has medical staff privileges at three California hospitals (P. Br. 4 - 6) and by alleging: 1) that his move to California was made for personal and family reasons only, not to evade the State Board charges (P. Br. 5 - 7); 2) that he never closely read the surrender agreement and did not realize that he was not contesting more than the record keeping charges

(P. Br. 7 - 8); 3) that his reason for not contesting the State Board charges is that he no longer intended to practice in New York and did not want to go to the expense of litigating the matter (P. Br. 8); 4) that he has not had the chance to prove his innocence in any other forum (P. Br. 9); 5) that under the conditions existing at Salamanca in 1979-1980, he treated these eight patients properly (P. Br. 11 - 26); and 6) with reference to the post-exclusion billings, that he did everything he could to prevent such billing by notifying his employers of the exclusion and asking them to make sure he did not treat or bill Medicare and Medicaid patients even if they came to him, as he did not want to violate his exclusion (P. Br. 32).

The I.G. asserts that the State Board charges represent serious deviations from accepted medical practice. The I.G. argues that Petitioner's attempts to rebut these charges consist of denial and blaming others for his misconduct. Specifically, Petitioner's failure to adequately assess and document his patient's conditions on numerous occasions, and to appropriately diagnose, treat, and stabilize their conditions prior to transferring them to another hospital or discharging them altogether, cannot be excused by medical technicians only being on an on-call status on weekends. The I.G. argues that Petitioner's untrustworthiness is proven by sending patients to other facilities in cars or ambulances, with no advanced life support equipment or assessment of the seriousness of their conditions, or attempts to stabilize the conditions. I.G. Br. 35 - 36.

Further, the I.G. argues that Petitioner has offered no evidence to demonstrate that he has recognized the gravity of the charges against him or sought to correct his behavior. The I.G. asserts that Petitioner has never acknowledged that he rendered inappropriate or inadequate care, nor has he offered evidence that he would treat such patients differently, instead stating that he did not believe his care was negligent. The I.G. relies on the testimony of the State Board consultant that Petitioner should not be practicing in any State (I.G. Ex. 19/8). I.G. Br. 36.

The I.G. cites in support of Petitioner's exclusion Petitioner's actions following his move to California, including: 1) his post-exclusion billings; and 2) the problems with his application for staff privileges at Scripps. I.G. Br. 37 - 40; I.G. Ex. 9.

Finally, the I.G. argues that the new regulations apply to this case and are binding on me, mandating

Petitioner's indefinite exclusion in this case. I.G. Reg. Br. 2 - 5.

Petitioner's Exclusion Is Not A Retroactive Application Of Section 1128(b)(4)(B).

Petitioner has argued that because the conduct which gave rise to the State Board's charges of inappropriate care and treatment occurred prior to the effective date of section 1128(b)(4)(B), the law cannot be applied retroactively to exclude him. I disagree. This issue was addressed by both the ALJ and the appellate panel in the context of an exclusion based on a license revocation under section 1128(b)(4)(A). As the ALJ stated in the case of Leonard R. Friedman, M.D., DAB CR125 (1991) at 7, aff'd DAB 1281 at 12 (1991),

> The language of subsection 1128(b)(4)(A) is without qualifying terms or conditions. Furthermore, as demonstrated by the legislative history, Congress intended to protect Medicare and Medicaid patients from physicians whose license had been revoked by any state licensing authority. Moreover, in providing the Secretary with discretion to exclude based on revocation by any state licensing authority occurring immediately or shortly after enactment (September 1, 1987), Congress had to know that the underlying reason for the revocation would likely be conduct which had occurred prior to the effective date. Thus, by logical inference, Congress intended the 1987 amendments to apply even in those cases where the misconduct or other act which led to revocation occurred prior to August 18, 1987.

In the context of the issue of the retroactivity of the Act to Petitioner's case, it is irrelevant that the Friedman case dealt with the revocation of the physician's license as the basis for an action under section 1128(b)(4)(A), as the retroactivity issue is identical for both sections 1128(b)(4)(A) and 1128(b)(4)(B). Congress had to know that, in the context of an 1128(b)(4)(B) action, as of the effective date of the Act, the underlying reason for the license surrender would likely be conduct which had occurred prior to the effective date. Again, by logical inference, Congress intended the 1987 amendments to apply even in cases where the misconduct or other actions which led to a health care provider's surrender of his license occurred prior to the effective date of the Act, as long as the surrender of the license occurred after the effective date of the act. See, Betsy Chua, M.D., et. al., DAB CR76 (1990), aff'd DAB 1204 (1990).

Thus, section 1128(b)(4)(B) applies to any license surrender occurring after the effective date of the Act in 1987. Petitioner applied to surrender his license on January 12, 1989, and the surrender was executed on April 27, 1989. Since Petitioner's surrender occurred after the effective date of the statute, it is subject to section 1128(b)(4)(B), and there is no retroactive application of the Act.

In the absence of relevant medical records, the documentary evidence of opinions of the State Board's medical consultants is relevant and can be considered in evaluating Petitioner's trustworthiness to be a provider of Medicare and Medicaid.

Petitioner has argued that, since he has not been able to obtain copies of all relevant medical records from Salamanca, I should not consider any of the reports and declarations the I.G. has presented based upon them. I disagree. Petitioner has admitted to the inadequacy of his record keeping in the years 1979 and 1980. FFCL 14 - 17. At the time Petitioner admitted to this charge in 1989, copies of all the medical records upon which the charges were based were available to Petitioner. It is no one's fault that certain of the Salamanca medical records now have been destroyed. In the absence of the medical records of several of the patients (patients B, C, D) on which the State Board's action was based, I must rely on secondary evidence of what those absent records disclosed and the best evidence of that is the opinion of the State Board's consultant, based on his review of those records. Petitioner is not prejudiced by such reliance. He could have called the consultant as a witness and subjected him to cross examination, but chose not to do so. Instead, he presented his own testimony and that of another physician who practiced at Salamanca during the 1979 - 1980 time period. Thus, I can properly rely on the evidence presented in this case regarding Petitioner's practice of medicine at Salamanca in evaluating his trustworthiness.

The I.G. had authority to exclude Petitioner under section 1128(b)(4)(B) of the Act. Any complaint by Petitioner that the I.G. abused his discretion in this case, by not performing an adequate investigation and by ignoring information provided to him by Petitioner, is remedied by the fact that Petitioner was able to offer any such evidence in the course of the proceeding before me.

It is an open question as to whether I have the authority to decide if the I.G. has abused his discretion in this

case. Sheldon Stein, M.D., DAB 1301 (1992) at 8 - 9. Section 1005.4(c)(5) of the new regulations may preclude me from considering this question.[4] I do not, however, have to reach this question. Notwithstanding whether or not I have this authority, Petitioner has failed to make a preliminary showing that there has been any abuse on the part of the I.G. This is a derivative action. The I.G. based his decision on the surrender of Petitioner's license under the circumstances set out in section 1128(b)(4)(B) of the Act, and that is all he needed upon which to proceed. Moreover, Petitioner's argument with regard to whether or not the I.G. abused his discretion is misdirected. Petitioner's real concern is that the I.G., allegedly by ignoring the evidence Petitioner presented to him, directed and imposed an unreasonably lengthy exclusion against him. Petitioner, however, has had the opportunity to fully present evidence concerning the reasonableness of his exclusion in the hearing before me. Any deficiencies perceived by Petitioner in the I.G.'s investigation of this case have been cured by Petitioner's full opportunity to present evidence in this de novo hearing.

I am not relying on expert opinions introduced by the I.G. without any evidence of the experts' qualifications.

The I.G. has introduced expert medical opinions of two physicians who reviewed the eight cases in question for the State Board. One consultant reviewed the medical record of Patient A, the patient Petitioner operated on for a perforated ulcer. I.G. Ex. 10. On two occasions, the other consultant reviewed the charts of the seven patients Petitioner treated in Salamanca's ER. I.G. Exs. 11, 19.

I do not rely on the expert opinion of Dr. Frederick C. Lane (I.G. Ex. 10), as I find the record before me insufficient to establish the level of care provided by Petitioner to Patient A.[5] FFCL 36. With regard to the

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[4] A full discussion of the new regulations and their affect on this case follows.

[5] Dr. Lane offered his opinion relying solely on the medical records of Patient A while at Salamanca and did not have the opportunity to review the subsequent record of Patient A at Erie County Medical Center where further medical evaluation of Patient A placed in doubt a number of the premises upon which Dr. Lane based his criticism of Petitioner's care of Patient A at Salamanca. Apparently, the I.G. could not locate Dr. Lane to obtain

ER patients, however, I have considered the expert opinion expressed by the State Board's consultant, Dr. Michael Jastremski. The I.G. has provided his qualifications as an expert in emergency medicine. I.G. Exs. 11 and 19 specifically identify this consultant as Director of Critical Care at a hospital and as Board Certified in Emergency Medicine, Internal Medicine, and Critical Care Medicine, as well as an Instructor of Emergency Medicine. Again, if Petitioner had a basis to challenge the qualifications of Dr. Jastremski, Petitioner could have subpoenaed and cross examined him.

In making my determination as to the reasonableness of the length of an exclusion, I am able to consider evidence not available to the I.G. at the time the I.G. made his decision to exclude.

By reason of section 205(b)(1) of the Act, this hearing is de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Kranz, DAB 1286 at 7 - 8 ; Bilang, DAB 1295 at 9., Joel Davids, DAB 1283 (1991) at 7; Vincent Baratta, M.D., DAB 1172 (1990) at 11. Either the I.G. or the Petitioner may offer such evidence; Petitioner to prove his trustworthiness (as, for example, Petitioner has done by introducing P. Exs. 6 - 15), and the I.G. to prove Petitioner is untrustworthy (as the I.G. has done in offering evidence as to Petitioner's alleged post-exclusion billings).

Applicability of new regulations to this case

Effective January 29, 1992, the Secretary promulgated new regulations (Parts 1001 - 1007) pertaining to his authority under the Medicare and Medicaid Patient and Program Protection Act (MMPPPA), Public Law 100-93, to exclude individuals and entities from reimbursement for services rendered in connection with the Medicare and Medicaid programs.[6] These regulations also included amendments to the civil money penalty authority of the Secretary under MMPPPA. For purposes of this proceeding, the specific regulatory provisions relating to permissive exclusions under section 1128(b)(4) of the Act (Section 1001.501) and appeals of such exclusions

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further clarification of his earlier opinions based on the records from Erie.

[6] These regulations can be found at 42 C.F.R. § 1001 et seq., 57 Fed. Reg. 3298 et seq.

(Part 1005) must be considered in terms of their applicability to this case.

The I.G. argues that these regulations are binding on me in determining the reasonableness of the indefinite exclusion imposed on Petitioner and apply even though the hearing was held prior to the effective date of the regulations.[7] I.G. Reg. Br. 2 - 5; I.G. R. Reg. Br. 1 - 4. In essence, the I.G. argues that under section 1001.501(b) Petitioner's exclusion must be for at least a period equivalent to the indefinite exclusion imposed on Petitioner, and the exceptions of subpart (c) do not apply to this case.[8] The I.G. further cites sections 1005.4(c)(1) and (5) to demonstrate that I have no authority to: 1) find the above cited regulation invalid; or 2) review the I.G.'s exercise of discretion to exclude or the scope or effect of such exclusion. Thus, once I ruled that the I.G. had authority to exclude Petitioner under section 1128(b)(4), there was nothing left for me to hear, as I have no authority to review or alter the period of exclusion chosen by the I.G.

In opposition, Petitioner argues that under the applicable case law the new regulations should be applied prospectively absent clear legislative intent under MMPPA that they be applied retroactively. P. Reg. Br. 1 - 3. Petitioner argues for imposition of an exclusion of one and a half years. Id. at 6. If, however, the I.G.'s

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[7] The I.G. argues that the new regulations became effective on January 29, 1992 and "apply to any exercise of ALJ authority on and after that date, and accordingly control all cases pending on January 29, 1992." I.G. R. Reg. Br. at 1. He further argues that "[t]he final regulations establish the current standards governing the implementation of the MMPPPA and therefore they must be given effect by the ALJ." Id. at 1.

[8] Proposed regulations covering the subject matter of the final regulations were published in the Federal Register on April 2, 1990. Since such publication, the I.G. has argued that the indefinite exclusionary period in Section 1001.501 reflects the intent of the Secretary as to the minimum exclusion, absent other factors, that is required in license revocation or surrender cases. ALJs and appellate panels of the DAB have uniformly concluded that such proposed regulations can be considered as guidance only, since the regulations were not yet published in final form and made effective. Walter J. Mikolinski, Jr., DAB 1156 (1990) at 20; Baratta, DAB 1172 at 8.

interpretation of sections 1001.501(b) and 1005.4(c) is accepted and the regulations are applied retroactively, I cannot modify the I.G.'s mandated indefinite coterminous exclusion. Accordingly, the entire record of the hearing on the reasonableness of Petitioner's exclusion would be rendered a nullity, since I would be compelled to find that the I.G.'s coterminous exclusion is reasonable.

Prior to the effective date of these regulations, there were no regulations implementing the I.G.'s permissive exclusion authority under section 1128(b) of the Act. The prior regulations relating to mandatory exclusions under section 1128(a) of the Act, 42 C.F.R. § 1001.125(b), were used as guidance in determining the reasonableness of exclusions under section 1128(b). The essential question to be resolved under the prior regulations, once it is determined that the I.G. has authority to exclude, is the length of time needed to protect program beneficiaries and recipients from an untrustworthy provider. The I.G. need only show that the exclusionary period imposed is "not extreme or excessive". See, 48 Fed. Reg. 3744 (1983).

Petitioners subject to exclusions imposed by the I.G. under section 1128 of the Act have the right to a de novo hearing under section 205(b)(1) of the Act. Generally, such hearings involve consideration of whether: 1) the I.G. had authority under the Act to impose the exclusion; and 2) the exclusion comports with the remedial purposes of the Act. Kranz, DAB 1286 at 7 - 8, Bilang, DAB 1295 at 9. In reaching a determination as to whether an exclusion meets the remedial purpose of the Act, the ALJ may consider all evidence regarding the reasonableness of an exclusion, including that which may not have been available to the I.G. when the decision to exclude was made. Davids, DAB 1283 at 7; Baratta, DAB 1172 at 11. Also, evidence of a petitioner's culpability, based on review of the derivative actions upon which the I.G. has authority to exclude, can properly be considered by the ALJ in determining the length of an exclusion. Bilang, DAB 1295 at 9.

Examination of the statutory language of section 205(b)(1) fails to demonstrate any restrictions on the scope or breadth of hearings held to review a prior decision of the Secretary, or, in this case, the I.G. as the Secretary's lawful delegate.[9] Moreover, as relates

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[9] Section 205(b)(1) of the Act provides in part: Upon request by any . . . individual . . . who makes a showing in writing that his or her rights may

to exclusions based on license revocation or surrender, an appellate panel of the DAB, upon review of the statutory purpose of section 1128 in general and section 1128(b)(4) in particular, has concluded:

> The scheme Congress established in section 1128 permits the Secretary to conserve program resources by relying where possible on other federal or state court or administrative findings. However, Congress did not require imposition of an exclusion on all providers who surrender their licenses, nor mandate any particular period of exclusion in such circumstances. Bilang, DAB 1295 at 8.

Similarly, the DAB has considered whether section 1128(b)(4) requires the imposition of a coterminous exclusion in all cases where the I.G. has authority to act based on the derivative action of a state licensing agency. An appellate panel concluded that:

> . . . [Considering the] permissive nature of an exclusion under section 1128(b)(4) of the Act [,] Congress did not require that any exclusion be imposed based on the action of a licensing board, much less that the period of exclusion be coterminous with licensure revocation. Kranz, supra at 11.[10]

The I.G. maintains that the new regulations are binding on me as of the effective date, January 29, 1992, and that they require me to affirm the coterminous exclusion imposed on Petitioner. Section 1001.501(b) establishes a coterminous exclusion as the minimum period of exclusion, except as provided in section 1001.501(c), in situations where, prior to the I.G.'s notice of exclusion, other

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> be prejudiced by any decision the Secretary has rendered, he shall give such . . . individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

[10] The DAB panel did note that the I.G. had proposed regulations which would make the minimum period of exclusion coterminous with the license suspension, or period of revocation, that is the basis for the exclusion. Kranz, DAB 1286 at 11.

licensing authorities, having been apprised of the licensing action upon which the exclusion is based, impose a lesser period of time, or decide to take no adverse action against a petitioner's existing license. There is no evidence of record to support application of either exception in this case.

Moreover, section 1001.501(b)(2) limits the factors that can be considered in lengthening or shortening the minimum period of exclusion. More importantly, however, this section of the regulations provides that the factors to be used to reduce the exclusion can only be considered when there exist one of the specified factors to increase the exclusion beyond the coterminous period provided for in section 1001.501(b). In this case, the I.G. is not seeking a longer period of exclusion than the minimum period. Thus, the regulations will not permit consideration of factors to reduce the exclusion. Furthermore, since I have already ruled that the I.G. has the authority to exclude under section 1128(b)(4)(B), there would be no purpose for any further hearing on the reasonableness of Petitioner's exclusion.

In essence, the I.G. argues that the new regulation imposing a minimum coterminous exclusion in license revocation and suspension cases renders the State action upon which the exclusion is based determinative of the federal exclusion in cases where the I.G. offers no evidence to justify a longer period of exclusion. Such a position is totally contrary to a recent appellate panel opinion that concluded:

> If Congress had intended the state action to be determinative for federal purposes, Congress would not have made the exclusion permissive, nor have provided for de novo review. Bilang, DAB 1295 at 9.

If I conclude this regulation is binding on me even where its effective date is after 1) the date the I.G. made his determination to exclude and 2) an in-person hearing was provided Petitioner pursuant to existing DAB precedent,[11] then it is apparent that application of this regulation at this juncture of the proceeding profoundly impacts on the scope and breadth of the de

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[11] DAB precedent suggests that Petitioner has a right to rebut an inference of untrustworthiness arising from the surrender of his license and to present evidence demonstrating the unreasonableness of the I.G.'s coterminous exclusion.

novo hearing that Petitioner is provided by section 205(b)(1) of the Act. Acknowledging that I must follow these regulations and have no authority to declare them ultra vires, there still remains a question as to whether the Secretary intended these regulations to apply to pending cases.[12]

While the Federal Register notice accompanying the promulgation of these regulations provides for an effective date of January 29, 1992, it contains no indication, other than silence, as to whether the regulations are to apply to pending cases. Moreover, there is no indication in the legislative history of the MMPPPA or its statutory provisions that implementing regulations are to be applied retroactively.[13]

As I have indicated, the regulations pertaining to license revocation and suspension, section 1001.501, substantially alter the de novo hearing rights of a petitioner who objects to the imposition of a coterminous exclusion. Even though the proposed regulations have

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[12] 42 C.F.R. § 1005.4(c)(1) expressly prohibits ALJs from finding "invalid Federal statutes or regulations". Thus, I do not have the authority in hearing this case to decide that any regulation is ultra vires the Act. To the extent that regulations explicitly require me to act in a particular manner, I am obligated to apply that authority without questioning its lawfulness. I must apply the plain meaning of the regulations to this case, even though I might conclude that such application could be ultra vires the Act. Therefore, I make no analogies here as to whether the regulations are ultra vires the Act. However, I am also obligated to apply the regulations in a manner which is consistent with congressional intent, to the extent that I do not contravene the regulations' plain meaning. Therefore, in interpreting the regulations, I must read them consistent with the language of the Act. To the extent that the regulations are unclear or ambiguous, I must look to the language of the Act as controlling.

[13] When Congress in 1987 amended the MMPPPA to require a minimum mandatory five year exclusion in section 1128(a) cases, the legislative history explicitly stated that new section 1128(c)(3)(B) of the Act would apply only to cases where the conviction occurred after the Act was amended. Act, Section 1128, footnote 54. In contrast, the I.G. argues that his "mandatory" coterminous exclusion of Petitioner as required by section 1001.501(b) should be applied retroactively.

been pending since 1990, appellate panels of the DAB have concluded that such regulations are not binding on pending cases. Moreover, existing DAB precedent also demonstrates that the mandatory application of a minimum coterminous exclusion in section 1128(b)(4) cases, as required by section 1001.501(b), at best involves a new and different statutory interpretation of the Act.

It has generally been held that administrative rules should not be applied retroactively unless their language specifically requires that application. Bowen v. Georgetown University Hospital et al., 488 U.S. 204 (1988). Moreover, a statutory grant of rulemaking authority will not generally be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Georgetown University Hospital, 488 U.S. at 208.[14] As indicated previously, there is nothing in the Act expressly granting the Secretary the power to promulgate retroactive rules, nor do the new regulations expressly state that they apply retroactively.

It is also a generally accepted axiom of law that statutes affecting substantive rights and liabilities are presumed to have only prospective effect. United States v. Murphy, 937 F. 2d 1032, 1037 (6th Cir. 1991). The Court of Appeals considered and distinguished the legal argument cited by the I.G. that "[a] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974); see also, Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281 - 283 (1969); I.G. R. Reg. Br. 2 - 4. It held that: 1) Bradley is to be read narrowly and the phrase "substantive rights and liabilities" is to be construed broadly; and 2) where retroactive application would impose greater liabilities and affect substantive rights, then the law should be prospective only. Murphy, 937 F. 2d at 1038.

As to the issues of "manifest injustice" and, arguably, "substantive rights and liabilities", the I.G. contends

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[14] Further, in a concurring opinion, Justice Scalia indicated that the Administrative Procedure Act (APA) at 5 U.S.C. § 551(4) in defining "rule" refers to its "future effect" and consequently such rules can only be applied prospectively. Georgetown University Hospital, 488 U.S. at 215 - 216.

that since Petitioner was on notice of the coterminous exclusion and had an opportunity to be heard, he is not adversely affected by application of the new regulations. I.G. R. Reg. Br. at 3. The I.G.'s analysis defies logic. While it is conceded that the I.G. sought the same coterminous exclusion both prior to and after retroactive application of section 1001.501(b), there can be no doubt, as shown below, that Petitioner's hearing rights and opportunity for consideration of alternative forms of exclusion have been significantly narrowed, if not abrogated, by the new regulations if applied as interpreted by the I.G. Clearly, Petitioner's "substantive rights and liabilities" would be significantly impacted by the retroactive application of the new regulations. Moreover, even applying the test in Bradley, such retroactive application would equally result in "manifest injustice."

Consideration of these regulations must be made consistent with existing interpretations of the statutory provisions from which the regulations derive and with the requirements of due process. Greene, DAB 1078 at 17. Petitioner's expectation of continued participation as a program provider is a property interest protected by the due process clause of the Fifth Amendment. Ram v. Heckler, 792 F.2d 444, 447, (4th Cir. 1986). Accordingly, my interpretation of the retroactive effect of these regulations must include concern for Petitioner's due process rights in terms of his ability to present evidence to: 1) rebut the inference of untrustworthiness arising from his surrender of his license in New York; and 2) to show that the coterminous exclusion in his case is extreme or excessive, in that other relief is available which comports with the remedial purposes of the Act.

Retroactive application of section 1001.501, particularly adopting the I.G.'s interpretation of section 1005.4(c)(5) concerning the impact of the scope of review under section 205(b)(1), will have a profound affect on Petitioner's due process rights and his ability to obtain a fair hearing as contemplated by the Act. At this point in the proceeding (post an in-person hearing and the submission of briefs on issues raised at such hearing), to accept the I.G.'s position on applicability of the new regulations would amount to not only tilting the playing field but also changing the field entirely.

Absent a specific instruction in the Act or the Federal Register statement accompanying the regulations directing that they apply to pending cases, I must conclude, in the context of this case, that the Secretary did not intend

to substantially alter Petitioner's rights and render his previously conducted hearing a nullity.[15] To do otherwise would result in an injustice and deprive Petitioner of due process and the fair hearing contemplated by the Act. Hanlester Network, et al., CR181 (1992) at 45 - 48.[16]

Even assuming arguendo that the new regulations apply to this proceeding, there remains the question of whether Part 1001 is binding on the breadth and scope of a hearing held under section 205(b)(1) of the Act. The I.G. would apply section 1001.501(b) as imposing a mandatory minimum period of exclusion without any opportunity for Petitioner to seek review other than the I.G.'s authority to exclude. Moreover, the I.G. has argued that his indefinite exclusion of Petitioner in this case was an exercise of discretion which is not subject to review. While I believe that the I.G.'s position is a fair reading of the new regulation, as I have indicated in my discussion of applicable DAB precedent, the I.G.'s position is contrary to prior specific interpretations of sections 1128(b)(4) and 205(b)(1) of the Act. Such an interpretation makes a nullity of Part 1005 pertaining to appeals of exclusions, since the elaborate hearing procedures set forth there

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[15] Arguably, in circumstances such as exist in this case, where exclusions are put in place prior to a hearing and there is an acknowledged deprivation of property rights, in order not to contravene a petitioner's due process rights, any post-exclusion hearing must provide for a full review of the circumstances surrounding that exclusion.

[16] In Hanlester, the I.G. contended that: 1) the regulations are not intended to be applied retroactively to alter parties' preexisting substantive rights or to produce manifest injustice to the parties; and 2) Part 1001 of the regulations is not applicable to exclusion determinations by the I.G. which arose prior to the effective date of the regulations. Hanlester, at 44 - 45. There is nothing unique about the case at bar which warrants a different result from that which the I.G. conceded was proper in Hanlester. Moreover, the I.G's interpretation of the effect of section 1005.4(c)(5) to insulate his exclusion determination from review in a hearing held pursuant to section 205(b)(1) of the Act clearly is an alteration of Petitioner's preexisting rights and amounts to a manifest injustice adversely impacting on Petitioner's substantive rights and liabilities. See, Hanlester at 46 - 48.

would not be available in any case in which the I.G.'s exclusion is for the minimum period provided by the regulation. In short, in a case in which the I.G. imposed the minimum period of exclusion, petitioners would be deprived of the ALJ review of the reasonableness of the exclusion. Thus, under this regulation, the I.G. would make these minimum periods "mandatory" permissive exclusions similar to the minimum mandatory five year exclusion established by Congress for section 1128(a) violations. This interpretation seems to fly in the face of clear and direct statutory language and legislative history indicating that no minimum period of exclusion applies in matters arising under section 1128(b).

As an ALJ, my role is to follow applicable precedent, regulations, and statutes. I have no authority to do otherwise. Here, however, I am trying to reconcile regulations which arguably reflect the Secretary's interpretation of sections 1128 and 205(b)(1) with DAB precedent which also reflects the Secretary's interpretation of these statutory provisions. This conflict in interpretation can be reconciled only by utilizing the following interpretation.

It is clear that Part 1001 sets forth the policy and guidelines that the I.G. will follow in determining whether he has authority to exclude in a particular case and it describes what the scope and duration of that exclusion should be. It is customary, in hearings on exclusions, for the I.G. to call his special agent or analyst to describe the process that led to the decision to exclude. In this case, the analyst was called and described the process and factors that resulted in the decision to exclude Petitioner coterminous with the denial of his license to practice in New York. Tr. 60 - 97. Oftentimes there is reference to the "I.G. manual" which analysts use to support their exclusion recommendations. Thus, one clear purpose of Part 1001 is to codify factors to be considered by the I.G. in exclusion cases and the types of exclusions that will be sought in particular factual situations under sections 1128(a) and (b) of the Act.

There is no support in the language of the regulations, the preamble, or in the comments and responses, for a conclusion that Part 1001 limits the scope of hearings held pursuant to section 205(b)(1) of the Act. Part 1001 contains references to the I.G. and what actions or factors he will consider in imposing an exclusion under section 1128 of the Act. In contrast, the scope of the ALJ's hearing authority is covered under Part 1005. It is evident under section 1005.4(c) that the ALJ cannot:

1) invalidate Federal statues or regulations; 2) review the I.G.'s exercise of discretion in implementing section 1128(b) of the Act or determine the scope or effect of an exclusion arising thereunder[17]; or 3) set the period of exclusion to zero once the ALJ concludes that the I.G. has authority to exclude. However, section 1005.20 allows the ALJ to increase, decrease, or reverse the exclusion imposed by the I.G.[18]

My reading of Parts 1001 and 1005 leads me to conclude that Part 1001 relates solely to the exercise of the I.G.'s discretion to exclude. However, Part 1005 also makes it clear that, except for the limitations on my authority set out in section 1005.4(c), one of the purposes of the hearing is to address the issue of the reasonableness of the exclusion.[19] Why else provide that my decision may result in a change in the period of an exclusion imposed by the I.G.? In contrast, as previously discussed, accepting the I.G.'s interpretation of sections 1001.501 and 1005.4(c)(5) would deprive parties of the opportunity for ALJ review of the reasonableness of the exclusion in similar cases. This is a dramatic departure from the past and amounts to a significant curtailment of a petitioner's due process right to a hearing to review the I.G.'s determination under section 205(b)(1) of the Act.

Without an express statement from the Secretary that this was his intention in promulgating Parts 1001 and 1005, I

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[17] While this is a fair reading of the regulation, whether this precludes an ALJ from examining issues related to the scope of the I.G.'s discretion, or to an alleged abuse of discretion, is an open question. Stein, DAB 1301 at 8 - 9.

[18] This regulatory provision comports with the statutory language of section 205(b)(1) of the Act pertaining to the scope of review provided in a hearing held relating to objections raised to a decision by the Secretary.

[19] I cannot accept the I.G.'s interpretation of section 1005.4(c)(5) relating to his exercise of discretion as insulating his exclusion determinations from review under section 205(b)(1) of the Act. Even if it is ultimately concluded that I cannot review the I.G's exercise of discretion, this limitation should not be construed so broadly as to abrogate a petitioner's right to challenge the reasonableness of an exclusion imposed by the I.G.

cannot accept an interpretation that is in direct conflict with unambiguous DAB precedent which reaches a contrary conclusion. Such a fundamental change in the rights of parties seeking review of I.G. determinations pursuant to section 205(b)(1) of the Act must be based on an explicit pronouncement from the Secretary.[20] At this point, none exists. My interpretation is a reasonable reading of Parts 1001 and 1005. It is consistent with applicable precedent with regard to the I.G.'s authority under section 1128(b) and does not do violence to the fundamental due process hearing rights afforded petitioners under section 205(b)(1) of the Act.[21]

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[20] The I.G.'s interpretation of these regulations is tantamount to an unfettered exercise of his permissive exclusion authority. Once it is determined that the I.G. has authority to exclude, the length of an exclusion based on the minimum periods set forth in Part 1001 is completely insulated from any administrative or judicial review. Moreover, the duration of that exclusion is totally within the control of the I.G. and also not subject to administrative or judicial review (See, section 1001.3004 of the regulations relating to reinstatement of excluded parties). Such unbridled action on the part of the I.G. is not contemplated by the Act. The statutory scheme provides for post-exclusion hearings on the assumption that a meaningful due process review would be provided individuals or entities subject to exclusions imposed by the I.G. Under the I.G.'s application of these regulations, an individual's or entity's right to a hearing under section 205(b)(1) has been essentially eliminated. Such a result is likely to invite further judicial intervention into the I.G.'s section 1128 exclusion determinations, in order to ensure that the due process rights of excluded parties are protected and that a meaningful review of the I.G.'s actions is provided.

[21] The I.G. is now regularly asserting in pending section 1128(b) cases that ALJs are bound by Parts 1001 and 1005 and that where the minimum exclusion has been imposed there is no purpose to holding a hearing in response to a petitioner's challenge to the reasonableness of an exclusion. In fact, in a recent case, the I.G. argued that petitioner's hearing request should be summarily dismissed. Based on the principles discussed in this Decision, I will be affording petitioners the right to in-person hearings in these cases.

Exclusion of Petitioner until such time as he regains his license to practice medicine in the State of New York is so extreme or excessive as to be unreasonable.

In deciding whether or not an exclusion under section 1128(b)(4)(B) is reasonable, I must review the evidence with regard to the purpose of section 1128 of the Act. Davids, DAB CR137; Roderick L. Jones, DAB CR98 (1990); Frank J. Haney, DAB CR81 (1990).

Congress enacted the exclusion law to protect the integrity of federally funded health care programs. Among other things, the law was designed to protect program recipients and beneficiaries from individuals who have demonstrated by their behavior that they threaten the integrity of federally funded health care programs or that they could not be entrusted with the well-being and safety of beneficiaries and recipients. S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S. Code Cong. and Admin. News 682.

An exclusion imposed and directed pursuant to section 1128 of the Act advances this remedial purpose. The principal purpose is to protect programs and their beneficiaries and recipients from untrustworthy providers until the providers demonstrate that they can be trusted to deal with program funds and to properly serve beneficiaries and recipients. As an ancillary benefit, the exclusion deters other providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. H. R. Rep. No. 393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 3072.

Deterrence cannot be a primary purpose of imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes a civil remedial purpose, but punishment becomes the end result. Such a result has been determined by the Supreme Court to contravene the Constitution and is beyond the purpose of a civil remedy statute. United States v. Halper, 490 U.S. 448 (1989).

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places program integrity and the well-being of beneficiaries and recipients ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objectives, even

if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

No statutory minimum mandatory exclusion period exists in cases where the I.G.'s authority arises from section 1128(b)(4), nor is there a requirement that a petitioner be excluded until he or she obtains a license from the State where their license was surrendered or revoked. Mikolinski, DAB 1156 at 20. As indicated previously, the appellate panel in Bilang, DAB 1295 at 8, was quite explicit in describing the scope of remedial relief, if any, which may be warranted based on surrender of a license under section 1128(b)(4)(B):

> "... Congress did not require imposition of an exclusion on all providers who surrendered their licenses, nor mandate any particular period of exclusion in such circumstances."

However, an exclusion until a petitioner obtains a license from the State where his or her license was revoked is not per se unreasonable. Lakshmi N. Murty Achalla, M.D., DAB 1231 at 9 (1991); Richard L. Pflepsen, D.C., DAB CR132 (1991); John W. Foderick, M.D., DAB 1125 (1990).

By not mandating that exclusions from participation in the programs be permanent, however, Congress has allowed the I.G. the opportunity to give individuals a "second chance." An excluded individual or entity has the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider. Achalla, DAB 1231.

As I stated above, this hearing is, by reason of section 205(b)(1) of the Act, de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. I do not, however, substitute my judgment for that of the I.G. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (1983).

Determining the reasonableness of an exclusion is based in large part on the trustworthiness of a petitioner to provide health care to program recipients and

beneficiaries in the future. The assessment of trustworthiness in the context of a hearing under section 205(b)(1) of the Act frequently requires consideration of the degree of a petitioner's culpability for the acts and practices arising from criminal offenses or other conduct upon which the I.G. derives his authority to exclude. Such assessment is not relevant to whether the I.G. had authority to exclude in the first place, but only to whether the length of the exclusion mandated and directed by the I.G. is reasonable. Thus, here I considered evidence from Petitioner's license surrender proceeding, not to review the I.G.'s exercise of discretion in deciding to exclude Petitioner in August 1990 (see I.G. Ex. 6), but to evaluate the reasonableness of the indefinite exclusion sought by the I.G. and to give Petitioner an opportunity to rebut the presumption or inference of untrustworthiness arising from the surrender of his license in the face of disciplinary proceedings regarding his professional competency and performance as a health care provider.

The determination of when an individual should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a difficult issue. Prior to the recent promulgation of regulations pertaining to permissive exclusions under section 1128(b) of the Act, there were no regulations directly applicable to permissive exclusions. The prior regulations at 42 C.F.R. § 1001.125(b) pertaining to mandatory exclusions under section 1128(a) of the Act did generally provide some guidance in making this determination. Baratta, DAB CR62, aff'd DAB 1172; Leonard N. Schwartz, DAB CR36 (1989). However, these regulations were adopted by the Secretary to implement the law as it existed prior to adoption of the 1987 revisions to section 1128, which revisions included section 1128(b)(4)(B). They specifically applied only to exclusions for program-related offenses (convictions for criminal offenses related to the Medicare and Medicaid programs). This case involves the surrender of a license for reasons which are not concerned with program violations and where there has been no immediate program impact, no program damages, no incarceration, and no previous record of sanctions against Petitioner. Thus, these regulations are largely inapplicable. Their overriding principle, however, that a balance be struck between the seriousness and program impact of the offense and any existing factors which may demonstrate trustworthiness, or the lack thereof, guides my decisionmaking in this case. Kranz, DAB 1286 at 8.

The reasonableness of the exclusion is determined by considering the circumstances which indicate the extent of an individual's or entity's trustworthiness to be a program provider of services. Essentially, I evaluate the evidence to determine whether the exclusion comports with the legislative purposes outlined above. Thus, a determination of an individual's trustworthiness in a section 1128(b)(4)(B) case necessitates an examination of the following considerations: 1) the nature of the license surrender and the circumstances surrounding it; 2) the impact of the surrender on the Medicare and Medicaid programs; 3) whether and when the individual who surrendered his license recognized the gravity of the conduct that initiated the disciplinary proceeding; 4) the type and quality of help sought to correct the behavior leading to the license surrender; and 5) the extent to which the individual has succeeded in rehabilitation. Thomas J. DePietro, R.Ph., DAB CR117 (1991); Myron R. Wilson, Jr., M.D., DAB CR146 (1991); Dillard P. Enright, DAB CR138 (1991); Stein, DAB CR144.

In this case, Petitioner surrendered his license in the face of serious charges of professional misconduct which, if true, could have grave implications for the care of Medicare and Medicaid beneficiaries and recipients. Petitioner had moved to and was practicing medicine in California several years before the New York State Board instituted its proceeding against him. FFCL 28. These charges of misconduct occurred eight to nine years before the State Board's action. However, the State Board apparently felt that Petitioner's actions were grave enough to take action against his license years after the alleged activity occurred and even after Petitioner had left New York. Petitioner alleges that he surrendered his license only to avoid the expense of contesting charges against him in a State in which he never again intended to practice, not to escape the State Board's charges, and he notes that no court or licensing authority has ever made findings based on these allegations. Furthermore, Petitioner now also argues that the eight patients in question were properly treated.

Accepting that Petitioner surrendered his license to avoid the expense of litigation, that does not mean that the charges were baseless or that, while old and unlitigated, they do not impact on Petitioner's trustworthiness to participate in the Medicare and Medicaid programs today. In fact, in his application to surrender his license, Petitioner specifically admitted to the truth of these charges of incompetence, negligence, and poor record keeping. FFCL 14, 15. Even

now, Petitioner admits that, while he did not intend to admit to the charges of incompetence and negligence when he surrendered his license, he did intend to admit to the charge of poor record keeping. FFCL 29; Tr. 261 - 263.

With regard to the specific patients in question, in evaluating the evidence submitted in this case, which includes patient records, testimony from Petitioner and from Dr. Paul Sum, a colleague of Petitioner's from Salamanca, concerning the patients in question and the quality of care at Salamanca in 1979-1980, and the opinions of the two State Board consultants which underlay the State Board charges, I find that the evidence is insufficient in the case of Patient A to establish the level of care that Petitioner provided Patient A at Salamanca.

In order to establish that level of care, I would need to see the medical records from Salamanca, which have been destroyed. P. Ex. 16. I do have Patient A's medical record from Erie, where Patient A was transferred when, approximately six days after surgery for a perforated ulcer, he developed spiked fever, elevated pulse rate, drop in systolic blood pressure, and discharge from his surgery site. P. Ex. 1/8, 12, 16 - 20. Relying on Patient A's nursing care record from Erie, Petitioner argues that Patient A's condition on admission to Erie was "nonurgent". P. Br. 16. However, the nursing care record is contradicted by medical assessments of physicians who evaluated Patient A upon his admission to Erie. The surgical attending note in Patient A's Erie medical record reflects an impression of reperforation of ulcer with abscess formation, pulmonary failure, and cardiac and respiratory failure. P. Ex. 1/19. However, after emergency surgery was performed on Patient A at Erie, no reperforation of the ulcer or abscess was found in Patient A's progress notes, operative record, or autopsy. P. Ex 1/20, 305 - 306, 342.

There is no explanation in the Erie records for Patient A's apparent deterioration after surgery performed by Petitioner at Salamanca. What is apparent from such records is that, when Erie personnel inserted a chest tube in Patient A, he suffered injury to his liver and that complications from this injury apparently led to his death. P. Ex. 1/305, 341. The I.G. relies on Dr. Lane's opinion to support his position that Petitioner failed to properly treat Patient A at Salamanca. I.G. Br. 20 - 24. Dr. Lane's conclusion that Petitioner's treatment of Patient A resulted in reperforation of his ulcer and abscess, and that this was the cause of Patient A's deterioration at Salamanca, is not supported by the

subsequent treatment records from Erie. Moreover, Dr. Lane provided no supplemental opinion based on the Erie records in the State Board proceeding involving Petitioner and was unavailable to give further opinion in this proceeding. In short, the record supports a finding that Patient A's condition began to deteriorate after surgery at Salamanca, but I have no adequate basis to conclude that Petitioner's treatment of Patient A while at Salamanca was the cause of that deterioration. Having examined the degree of culpability of Petitioner as pertains to Patient A, even assuming his admission to the State Board, I conclude that he has rebutted the inference of untrustworthiness arising from his care and treatment of this patient.

With regard to Petitioner's seven ER patients, however, I am able to determine that, in some respects, Petitioner's care of these patients was substandard, even considering the limitations he faced at Salamanca. In 1979-1980, Salamanca was a small hospital in a rural area with limitations in terms of its ER equipment and staffing, from medical technicians to ambulance service. FFCL 30. When an emergency patient appeared at Salamanca, if that patient needed an ICU or a CCU or sophisticated emergency care, the patient was transferred to a hospital that could provide those services. FFCL 31. Petitioner has asserted that, given Salamanca's limitations, his care of his ER patients was acceptable. I am not so persuaded. From my review of the existing medical records from Salamanca for patients E, F, G, and H (P. Ex. 2 - 5), the testimony offered at the hearing, and the opinions offered by Dr. Jastremski, the State Board's consultant, accepted standards of medical practice indicate that Petitioner should have conducted more extensive diagnostic studies, been more diligent in his administration of medication, and ensured that high risk ER patients (e.g. cardiac or neurological) were stabilized prior to transfer and that any transport of such patients to another hospital was in a properly equipped ambulance.

Petitioner has sought to blame Salamanca, or the doctors upon whose advice he relied, for any purported deficiencies in the care of these patients.[22] For

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[22] In Petitioner's brief concerning the effect of the new regulations to his case, Petitioner, although stating that the regulations do not apply to his case, asked that the I.G.'s reasoning with respect to the definition of professionally recognized standards of health care be considered. 57 Fed. Reg. 3301. First,

example, Petitioner has asserted that the hospital didn't provide the proper equipment for immobilizing one patient's neck, that the lack of medical technicians and the poor quality of Salamanca's laboratory work limited what he could do to diagnose ER patients' conditions, and that when he prescribed Demerol for his cardiac patients and transferred them, it was done on the advice of a cardiac consultant. FFCL 30, 38, 45. Petitioner cannot, however, escape his own responsibilities for treating these patients. I accept that Petitioner was primarily a surgeon and was relying on his cardiac consultant's advice. However, as a physician also functioning in an ER on a regular basis, Petitioner bore some responsibility for acquainting himself with the latest ER techniques for managing potentially life-threatening situations.

Further, Petitioner transferred patients, some with possible cardiac problems, to other hospitals in an ambulance without life support equipment, not even attempting to call an ambulance from another hospital which had such life support equipment. Tr. 231 - 234. Finally, while Petitioner asserts that he fully examined each of the ER patients and only recorded positive findings, from the medical records in evidence (P. Ex. 2 - 5), and because of Petitioner's admittedly poor record keeping, it is impossible to determine the extent of his examination of each patient. The notes in Petitioner's handwriting are sketchy and strongly suggest very limited histories and physicals being conducted by Petitioner. Most of the writing on the ER records is of the ER nurse who took a history and obtained vital signs from the patient. Moreover, it appears that Petitioner issued orders by telephone on some ER patients, directing their disposition without personally obtaining any history or conducting any physical examination of them to ascertain the severity of their condition.

In sum, I find that the ER patient records, the testimonial evidence of Petitioner and Dr. Sum, and the

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Petitioner must recognize that this definition does not apply to exclusions pursuant to section 1128(b)(4), but rather to exclusions pursuant to section 1156 or section 1128(b)(6) of the Act. I have, however, taken into consideration all of the surrounding circumstances, including the capabilities of the facility, in my assessment of Petitioner's conduct at Salamanca as it relates to whether minimum professional standards were met by Petitioner in his transfer of the patients in question.

opinions expressed by Dr. Jastremski support a finding that Petitioner failed to follow accepted standards of medical practice in his care and treatment of ER patients while at Salamanca in 1979-1980, including the conduct of history and physicals of such patients.[23] Moreover, Petitioner's poor record keeping illustrates an indifference to detail and a lack of care on his part which extends beyond the State Board's charges of poor record keeping and permeates other areas of his professional life. Such carelessness could impact adversely on Petitioner's trustworthiness as a participating physician. Other instances in the record of Petitioner's professional carelessness include: 1) Petitioner's assertion that, without reading it, he signed the surrender of his license to practice medicine; 2) Petitioner's misstatement of his qualifications on his application for staff privileges at Scripps Memorial hospital; and 3) Petitioner's lack of care to make sure that the clinics he worked for did not bill for his services after his exclusion from the Medicare and Medicaid programs. Such a physician has the potential for harming both beneficiaries and recipients of the programs, and in careless billing practices, the programs themselves.

At the same time, and recognizing Petitioner's propensity for indifference to detail, since 1979-1980 Petitioner does appear to have made some attempt to change his behavior. Petitioner now charts more than negative findings. Further, there is no evidence in the record and no assertion by the I.G. that Petitioner, other than the incident at Scripps and the billing incident referred to above, has been practicing in anything but a competent manner since relocating to California (and even in the four years between the incidents which led to these charges and Petitioner's relocation to California). The incidents for which Petitioner was charged happened a very long time ago, and the issues involving these ER patients, while significant, can be easily remedied. In fact, it appears that Petitioner is both practicing surgery and functioning as a physician in urgent care clinics in California without questions being raised as to his competence. P. Ex. 8. Thus, Petitioner has made

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[23] The standard of care that I am using to measure Petitioner's conduct at Salamanca is not based on the care that would be provided at a critical care unit in a trauma center. The deficiencies noted are basic to the proper and prudent care of patients in any circumstance.

progress in remedying the alleged behavior which led to the State Board charges.

The question here is what exclusion period is reasonably necessary to assure that Petitioner fully appreciates the seriousness of the unprofessional conduct which I have found, and the State Board charged, and what will ensure that he will not in the future engage in such conduct again. Kranz, DAB 1286 at 9. In this case, I find that the I.G.'s remedy, an exclusion until such time as Petitioner regains his license to practice medicine in the State of New York, is not reasonably related to this goal, and is, furthermore, not required by the Act.

The fact is that Petitioner never intends to return to practice medicine in the State of New York. Petitioner has vigorously argued that the very reason he did not contest the charges against him in the first place was that he did not want to incur the cost and time to seek licensure in a State in which he had no intention of practicing. Further, New York has no interest in Petitioner. To force New York to expend its limited resources in a license proceeding in which it has little interest, as the outcome of that proceeding would have no impact on New York residents, is unreasonable. It is extreme and excessive to force two uninterested parties into a State licensing proceeding for the sole purpose of laying a predicate for Petitioner being a provider of goods and services to the Medicare and Medicaid programs. Such an intrusion is arguably inconsistent with the remedial purposes of the Act, especially where beneficiaries and recipients of the Medicare and Medicaid programs, and the programs themselves, can be adequately protected by less onerous means. Such a punitive result is the type of outcome that the Supreme Court concluded in Halper is inconsistent with the remedial intent of statutes such as section 1128 of the Act. Since there exist remedial actions available to protect program recipients and beneficiaries short of requiring Petitioner to obtain reinstatement of his license to practice medicine in New York, such an exclusionary requirement in the context of this case would be tantamount to punishment, and constitutionally prohibited.

Petitioner did surrender his license in the face of serious allegations of misconduct. Where the danger of harm to patients is great, a lengthy exclusion is justified to insure that program recipients and beneficiaries are protected from even a slight possibility that they will be exposed to such danger. Bernard Lerner, M.D., DAB CR60 (1989); Michael D. Reiner,

M.D., DAB CR90 (1990); Norman C. Barber, D.D.S., DAB CR123 (1991); Wilson, DAB CR146. While, as I stated above, Petitioner has appeared to make some attempts to alter the practices that led to charges being filed against him, I am concerned that his propensity towards a lack of care in the details of his professional life, as illustrated by the incidents concerning Petitioner's post-exclusion billings, might still present some danger to the programs and their recipients and beneficiaries.

In this case, I am excluding Petitioner for three years, which period of exclusion is sufficiently lengthy for Petitioner to demonstrate his trustworthiness to provide services to the Medicare and Medicaid programs. Alternatively, Petitioner's exclusion could be less than three years if a State licensing agency reviews all of the factual and legal issues which were before the State of New York when Petitioner surrendered his license and, based on the result of that review, either: 1) grants Petitioner a license; or 2) if a review is done by the licensing agency in the State of California, takes no significant adverse action against his existing license. At the end of three years, or when a State licensing agency takes the actions described above, whichever is sooner, Petitioner would be eligible to apply for readmission to the programs.

I have fashioned an exclusion which provides Petitioner with a reasonable period of time to reaffirm his trustworthiness as a program provider, absent a current and thorough review of the New York charges by a State licensing agency. In the alternative, where such a review is undertaken by a State which has an interest in whether Petitioner is licensed to treat its citizens, and where Petitioner has an interest in proving his competency and integrity to practice there, I have established an indefinite exclusion. In past cases under section 1128(b)(4), the I.G. has sought and been upheld by appellate panels of the DAB in obtaining exclusions of an indefinite duration based on relicensure in the State where the original license was revoked, suspended or surrendered. Friedman, DAB 1281; Foderick, DAB 1125; Stein, DAB 1301. As the appellate panel concluded in Friedman, such a remedy is reasonable since that State, in exercising its decision on relicensure, would act in a careful and prudent manner in the best interest of its citizens. Friedman, DAB 1281 at 7. In such circumstances, it is appropriate for the Secretary, in discharging his responsibilities to the Medicare and Medicaid programs, to defer to such State in determining that a petitioner has demonstrated sufficient trustworthiness to justify seeking application for

readmission into the program. Here, the State of New York has no further interest in Petitioner -- he does not intend to practice there and the citizens of New York are not presently patients of his medical practice. As I have indicated, it is unreasonable and bears no relation to Petitioner's trustworthiness to impose an exclusion for an indefinite period (in Petitioner's case, for life) based on relicensure in New York. If Petitioner chooses not to seek a license in another State, or the State of California declines to review Petitioner's circumstances or takes no significant adverse action against Petitioner, a three year exclusion is a sufficient time for Petitioner to demonstrate his trustworthiness to seek readmission into the program.[24]

CONCLUSION

Based on the evidence in this case and the law, I conclude that the exclusion imposed and directed against Petitioner by the I.G. is so extreme and excessive as to be unreasonable. Therefore, I am modifying the exclusion to the earlier of either: 1) a three year exclusion; or 2) an exclusion until such time as a State licensing agency reviews all of the factual and legal issues which were before the State of New York when Petitioner surrendered his license and, based on the result of that

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[24] The I.G., at 42 C.F.R. § 1001.501(c)(2) of the new regulations pertaining to license revocation or suspension, provides for the consideration of early reinstatement in circumstances similar to those set forth in the indefinite part of my modification of Petitioner's exclusion. Thus, it appears that the I.G. recognizes the harshness of a narrow indefinite exclusion of the type originally directed and imposed against Petitioner. However, due to the uncertainty regarding the applicability of these regulations to this Petitioner, I have incorporated a similar provision in Petitioner's exclusion. Moreover, absent a triggering event by a State licensing authority, either on its own initiative or at Petitioner's, an exclusion of only an indefinite duration could lead to an unreasonable result where the exclusion lasts in excess of three years. As I have indicated, the record supports my conclusion that Petitioner's untrustworthiness to be a provider of services to the Medicare and Medicaid programs should be dissipated within three years.

review, either a) grants Petitioner a license, or b) if the review is done by the California licensing agency, takes no significant adverse action against his existing license.

/s/

Edward D. Steinman
Administrative Law Judge