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PRACTICE POINTERS IN RESOLVING PERM CONUNDRUMS: JOB REQUIREMENTS, DEGREE EQUIVALENCIES, EXPERIENCE WITH SAME EMPLOYER, AND TIMELINES

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Only a fool of a lawyer would check off questions on the PERM ETA-9089 form[1] without considerable deliberation. This article provides insightful practice pointers to assist the practitioner in answering some of the more problematic questions. While the article does not cover every conundrum, the authors have selected some of the more burning issues. These include whether the job requirements are normal to the occupation or not, defining degree equivalencies, addressing experience gained with the same employer, and date/timeline management. We also refer the reader to other PERM articles elsewhere in this handbook regarding issues not covered in this article.[2]

ARE THE JOB REQUIREMENTS NORMAL TO THE OCCUPATION?[3]

Form ETA-9089 requires the employer to state whether or not the requirements for the position are "normal" to the occupation. Based on the regulation,[4] question H.12 on the application requires an analysis of whether the employer's stated requirements exceed the Specific Vocational Preparation (SVP) scale identified for the occupation in the O*Net Job Zones.[5] The calculation of the applicable

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[1] 20 Code of Federal Regulations (CFR) §656.17(a)(1).

[2] *See, e.g.*, R. Kapoor, E. Litwin, D. Notkin & L. Rose, "A Magical Mystery Tour: Selected PERM Issues"; R. Guevara, D. Horne & S. Ellison, "Strategic Planning in the Post-PERM World: Approved Labor Certifications and the Latest Challenges that Follow"; R. Wada, "Seven Essential Concepts for EB-2 & EB-3 Degree Equivalencies."

[3] This section has been adapted from an article by Robert H. Cohen, "Are The Job Requirements Normal To The Occupation?" *A Bite Of Immigration From The Big Apple, Ninth Annual AILA New York Chapter Immigration Law Symposium Handbook* (AILA 2006).

[4] 20 CFR §656.17(h)(1) provides: "The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation [SVP] level assigned to the occupation as shown in the O*NET Job Zones."

[5] For a comprehensive discussion on O*Net requirements, SVP and an analysis of the business necessity requirement, *see* Stock and Forney, "The 'New Normal' Job Requirements: Understanding O*Net and Its Role Within PERM," *David Stanton Manual on Labor Certification* 25 (AILA 3d Ed. 2005); and the updated version, Seltzer and Forney,

continued

SVP level remains shrouded in ambiguity, leaving practitioners with inconsistent instructions on how to determine the appropriate level of SVP required for the described position.

SVPs Under the O*Net

The transition from the U.S. Department of Labor's (DOL) *Dictionary of Occupational Titles* (DOT) to O*Net has been well documented elsewhere.[6] However, one of the more interesting questions resulting from the transition concerns the elements to be included in the calculation of the SVP level to O*Net occupational unit descriptions. The SVP scale was originally intended to provide guidance to determine appropriate training levels for identified occupations. However, DOL has used it in the labor certification context to provide a bright line objective test to determine if an employer's requirements are normal for the occupation. It does not work well for this purpose.

The SVP level for each job description in the DOT was designated in the trailer following each listing. However, when the almost 12,000 job titles of the DOT were collapsed into the 1,100 occupational units of the O*Net, the SVP levels were calculated as an average and then rounded down for the several job titles that corresponded to each occupational description in O*Net.[7] O*Net states a range rather than a specific number. For many of the occupations that are the subject of PERM applications, the assigned Job Zone is either 4 or 5. The Job Zone 4 has an assigned SVP level of 7 < 8 and the Job Zone 5 provides for an SVP level of 8 and above. Interestingly, the process of assigning SVP levels for O*Net classifications identified five strata of occupations, including the first stratum of 193 occupational units with an SVP of 7.5 to 9.0.[8] This group of occupations included "most engineers, scientists, and high level professional positions," suggesting that these occupations would be in the most advanced job zone (5). However, a review of many of the engineering positions common to labor certification practice finds that these occupations were ultimately assigned to job zone 4 when the SVP value was rounded down.[9]

Because so many of the occupations for labor certification are within Job Zone 4, DOL has been asked to interpret 7 < 8 in light of their consistent statements that SVP levels are both mutually exclusive and must be whole numbers. Contrary to all known rules of statutory and language interpretation to give meaning to each word or phrase, DOL has responded that 7 < 8 means 7.[10] There appears to be no distinction between 7 and 7 < 8; the "less than 8" characters are surplusage that must be ignored.

For the many occupations in Job Zone 4, this results in the assignment of an SVP of 7. Occupations well known to the immigration practitioner include those of electrical, civil, and mechanical engineers, software engineers and computer programmers, pri-

"O*Net, Normal Requirements, and Business Necessity," *The Reality of Business Immigration*, *AILA Midyear Conference Handbook* 55 (AILA 2006).

[6] *Id.*

[7] For a complete description of the conversion process used by DOL to assign SVP levels to O*Net Occupational Units, *See* Fredrick Oswald, *et al.,* "Stratifying Occupational Units by Specific Vocational Preparation (SVP)," (National Center for O*Net Development 1999), at *www.onetcenter.org/resToolsGen.html*, last visited Mar. 4, 2007.

[8] *Id.* at p. 10.

[9] A review of 17 professional architectural and engineering occupations identified by the "Browse by Job Family" tab on the right side of O*Net Screen entitled "Find Occupations" [*http://online.onetcenter.org/find/,* last visited Mar. 4, 2007] revealed 14 professional engineering and architectural positions in job zone 4 and three positions in job zone 5. Within the Computer and Mathematical job family, among 21 professional positions, three were rated job zone 5, seven were rated job zone 4, and seven were not yet rated.

[10] Like much of the law and policy in the labor certification field, this pronouncement from DOL is neither direct nor official. No simple statement of DOL policy regarding the interpretation of SVP 7<8 appears in either the regulation or even the Frequently Asked Questions (FAQ). Instead one must visit minutes of the AILA/DOL liaison meetings or listen to the discussion at AILA conferences by DOL personnel. The pattern has been that AILA members will state their understanding of the DOL policy, and then the DOL will confirm that the statement is accurate. For example, the question of interpreting SVP 7<8 was raised by the AILA liaison committee with Region VI on July 25, 2002 (pre-PERM). The DOL response referred to a memo prepared by AILA member, Josie Gonzales, and noted "AILA member Josie Gonzales has prepared an excellent summary regarding the conflict between the SVP skill levels for the DOT classifications and the SOC/job Zone skill levels. (See attachment)." The minutes are *published on* AILA InfoNet at Doc. No. 02081342 (*posted* Aug. 13, 2002); the memo from Josie Gonzales attached to the minutes as a separate document and was posted the same day. It is available as a PDF resource with the minutes. *See also* discussion between the discussion leader and Melanie Shay, DOL program manager, during the panel on Pre-Filing PERM Applications, AILA Annual Conference, June 15, 2006, San Antonio, Texas.

mary and secondary school teachers, accountants, and market research analysts. All are Job Zone 4, which as noted, has been assigned the SVP level of 7. However, the explanation of the Job Zone within the O*Net provides conflicting information regarding the SVP.[11]

Title	**Job Zone Four: Considerable Preparation Needed**
Overall Experience	A *minimum of two to four years of work-related skill*, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college ***and*** work for several years in accounting to be considered qualified. (Emphasis added.)
Job Training	Employees in these occupations usually need ***several years*** of work-related experience, on-the-job training, and/or vocational training. (Emphasis added.)
Job Zone Examples	Many of these occupations involve coordinating, supervising, managing, or training others. Examples include accountants, human resource managers, computer programmers, teachers, chemists, and police detectives.
SVP Range	(7.0 to < 8.0)
Education	Most of these occupations require a four-year bachelor's degree, but some do not.

This description, which *excludes* the value of formal education when calculating the SVP level, conflicts with the other instructions from DOL to *include* the value of formal education when calculating the SVP level. An example of such other instruction is in the commentary to the PERM regulations which provides:

> ETA plans to utilize the guidance provided in the administrative directive Field Memorandum No. 48-94, issued May 16, 1994, Subject: Policy Guidance on Labor Certification Issues (FM). In summary, the FM provided that a general associate's degree is equivalent to zero years SVP, a specific associate's degree is equivalent to two years; a bachelor's degree is equivalent to two years; a master's degree is equivalent to four (2 + 2) years; and, a doctorate is seven (2 + 2 + 3) years.[12]

This inclusion of education as part of the component of the specific vocational preparation is also noted in DOL's definition and explanation of the SVP levels on its website, *www.flcdatacenter.com/svp.aspx*. This description is not entirely clear, however, and describes vocational preparation as training and education which includes:

> [v]ocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective).[13]

Other discussion regarding including education in the SVP may be found in the memo referenced in the PERM comments quoted above. Barbara Farmer, former Regional Administrator for DOL, issued a memo in 1994 addressing several issues regarding the administration of the labor certification program.[14] Among the issues discussed was the specific question of how much education should be included in the calculation of the SVP levels. The summary of her discussion to include education in the SVP calculation appears at the end of the section as follows:[15]

> To summarize:

Degree	SVP
General Associate's	0
Specific Associate's	2
Baccalaureate	2
Master's	4 (2+2)
Doctorate	7 (2+2+3)

We are left with an O*Net Job Zone 4 which provides that a bachelor's degree plus two to four years of experience is normal, and an SVP for the same Zone 4 which provides that a bachelors plus zero to two years of experience is normal.

The prevailing wage guidance issued by the DOL[16] provides additional support for the proposi-

[11] O*Net, From the Summary Report for Elementary School Teachers, Except Special Education, 25-2021, *http://online.onetcenter.org/link/summary/25-2021.00*, last visited Oct. 16, 2006 (emphasis added).

[12] PERM Final Rule, 69 *Federal Register* (Fed. Reg.) 77325, 77332 (Dec. 27, 2004).

[13] *www.flcdatacenter.com/svp.aspx*, last visited Oct. 11, 2006.

[14] Field Memorandum No. 48-94, Farmer, "Policy Guidance on Alien Labor Certification Issues," *published on* AILA InfoNet at Doc. No. 94052390 (*posted* May 23, 1994).

[15] *Id.*

[16] Emily Stover DeRocco, "Revised Prevailing Wage Determination Guidance" (May 17, 2005), *published on* AILA InfoNet at Doc. No. 05052066 (*posted* May. 20, 2005).

tion that education and experience must be separated when determining the proper SVP level. This wage guidance clearly describes the five-step process to complete the worksheet and determine the proper wage level. Education is addressed in Step 3 of the process, which must be separately determined from the experience assessed in Step 2 of the worksheet. The guidance clearly states, in bold text: "Education required for the job is addressed in Step 3 of the worksheet, and therefore the years of education required should not be considered in Step 2."[17] This suggests that the education and experience are not to be combined when determining the prevailing wage. Logic and consistency demand that the same analysis be applied to determine if the requirements are normal to the occupation.

The conflict between these different assessments becomes even more pronounced in certain occupations. The Market Research Analyst, O*Net code 19-3021, is within job zone 4 which, as noted, provides that a bachelor's degree is most common for the occupation. Yet the Education and Training Code assigned to the SOC classification is 3, stating that a master's degree is generally required.[18] This conflicting information simply can not be reconciled, and the practitioner is left guessing at the normal requirements for the market research analyst.

The inherent conflict within the O*Net regarding whether the SVP includes or excludes education remains unresolved despite the attempts of the American Immigration Lawyers Association's (AILA) DOL Liaison Committee to discuss the issue and secure clear guidance. There have not been sufficient audit experiences or decisions on the issue, nor, to this author's knowledge, has a case with this issue been sent to the Board of Alien Labor Certification Appeals (BALCA) for decision. Until DOL provides guidance, or BALCA issues a definitive decision, attorneys will be required to interpret this conflicting information and apply inconsistent standards to the employer's requirements before determining if those requirements are normal to the occupation.

DOL has stated that if the employer answers question H.12, "yes" (the requirements are normal to the occupation) and it is determined that the requirements do exceed the normal requirements, the application will be denied. The employer's ability to provide persuasive business necessity documentation to support the requirements will not be considered. Thus, many practitioners have taken the position that in doubtful cases, question H.12 should be answered "no," and business necessity evidence should be prepared to explain the context and reasons for the requirements. This may provide an opportunity to argue that the employer's requirements do not exceed the norm as established by the description of Job Zone 4, while they may exceed the SVP level of 7 only if education is added to the years of SVP. However, if the application is denied because the employer answered "yes" to H.12, and DOL disagrees, the employer is faced with making the arguments to BALCA, a long, arduous, and expensive alternative. On the other hand, commentators have advocated that H12 only asks the first part of the regulation: "Are the job opportunities requirements normal for the occupation?" and the regulation at 20 Code of Federal Regulations (CFR) §656.17(h)(1) encompasses both a qualitative and quantitative requirement.[19] Thus, if the job requirements exceed those under the SVP, but the duties of the position are consistent with the skills, knowledge and other work activities discussed in the O*Net occupation, the employer could still say "Yes" to whether the job requirements are normal to the occupation even though the requirements exceed the SVP or Job Zone.

The broader interpretation of Job Zone 4 as described by O*Net would be more consistent with real world experience. While the PERM regulation, as well as the historical interpretation of the pre-PERM regulation prohibiting "unduly restrictive" requirements,[20] suggests that there is an objective standard easily determined as to whether or not the requirements are normal, or in the language of the prior regulation, "unduly restrictive," the real world is fraught with shades of gray. In close cases, practitioners should be prepared to document the business necessity of the requirements. This evidence should meet the standards of the business necessity regulation although counsel may wish to suggest that it is offered more in the nature of background informa-

[17] *Id*. at p. 10.

[18] The Education and Training Code can be determined by viewing the FLC wage results on the DOL website. *See, e.g., www.flcdatacenter.com/OesQuickResults.aspx?area=18140&code=19-3021&year=7&source=1* (last visited Apr. 1, 2007.)

[19] *See* Stock and Forney, *supra* note 5.

[20] 20 CFR §656.21(b)(2)(1)(A) [*repealed by* 69 Fed. Reg. 77325 (Dec. 27, 2004, *effective* Mar. 28, 2005)].

tion in the absence of a need for demonstrated business necessity.[21]

Although historically SVP included education, the new Job Zones classifications in O*Net appear to exclude education. This new interpretation is more consistent with today's real world analysis of job requirements. But until DOL provides clear guidance or BALCA issues a definitive decision explaining how the SVP is to be calculated, it will make more sense in close cases to answer question H.12 in the negative, prepare for an audit, and provide the business necessity documentation to justify the employer's requirements.

Practice Pointers

- If the academic and experience requirements in items H.4 through H.10 of the Form ETA-9089 clearly fall within the SVP as set forth by the appropriate Job Zone set forth in O*Net occupational description, the answer to the "normal to the occupation" question, Item H.12, should be "yes," the requirements are normal. Business necessity documentation is not required. For those positions in which the academic and experience requirements exceed the SVP level but are consistent with the education and experience as separately noted in the O*Net occupational description (*e.g.*, a Job Zone 4 occupation that requires a bachelor's degree and three years of experience), the employer will need to choose between two alternatives.
- Answer item H.12 "no" (the requirements are not normal to the position) and prepare documentation of business necessity in the event of an audit; or
- Answer item H.12 "yes" (the requirements are normal to the position) and be prepared to justify this in an audit; and if not successful, also be prepared to appeal a denial based upon the argument that normal to the occupation includes requirements that are within the parameters of the Job Zone designated by O*Net, notwithstanding the calculation that the requirements exceed the calculated SVP level, as rounded down during the conversion process of the DOT to O*Net.
- Anecdotal evidence suggests that DOL has approved cases in which the employer asserted the requirements are normal to the occupation if the requirements are within the SVP level **or** the Job Zone designated by O*Net occupational unit. But other anecdotal evidence suggests that the DOL has also approved cases where the employer asserted that the requirements are normal even if the requirements exceeded the SVP or Job Zone. The authors, however, recommend that if the requirements exceed both the O*Net Job Zone description and the SVP, the employer should clearly note that the requirements are not normal to the position, and prepare business necessity documentation.

DRAFTING THE 9089 TO ACCOUNT FOR A THREE-YEAR DEGREE

Three-year bachelor's degree programs present thorny issues for PERM applications and case strategies generally. With very few exceptions, if the alien holds a degree earned from a three-year program of study, an Employment-Based Second Preference Immigrant Visa Petition (EB-2) in the advanced degree category will not be approved.[22] Moreover, not only is EB-2 not an option, but an EB-3 case could be problematic if the Form 9089 is incorrectly drafted. A practitioner who does not recognize the minefields in this area could very well obtain an approved labor certification, only to have the case denied at the I-140 stage, with corresponding loss of priority date, and be faced with starting a new PERM case from scratch.

Understanding the Meaning of "Equivalent"

The key to understanding this issue is sorting out the meaning of "equivalent" in the various parts of the regulations and the statute. The meanings differ between H-1B and EB-2, and these differences are critical to drafting a permanent resident case.

In H-1B processing, equivalency to a U.S. bachelor's degree may be established by showing completion of a three-year foreign bachelor's degree program combined with either additional university-level education or additional work experience.[23] In particular, three years of specialized training and/or work experience is equivalent to one year of college level training—the so-called "three for one" rule.[24] There is no parallel rule in the immigrant visa context.

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[21] Many attorneys submitted "Non-Business Necessity" letters of explanation in the pre-PERM environment to address this issue and provide background support for the application.

[22] This article will not address the exceptional ability provisions of the regulations.

[23] 8 CFR §214.2(h)(4)(iii)(D).

[24] 8 CFR §214.2(h)(4)(iii)(D)(5).

The central requirement for the EB-2 Advanced Degree category is that the foreign national is a member of the professions holding an advanced degree or equivalent.[25] In addition, the regulations state the job must require an advanced degree.[26] An "advanced degree" is a U.S. degree or foreign equivalent degree above that of a baccalaureate.[27] The "equivalent" of an advanced degree will be found where the alien holds a U.S. baccalaureate degree or foreign equivalent degree followed by at least five years of progressive experience in the specialty.[28]

Thus, equivalency in the EB-2 context is either a foreign master's degree that is equivalent to a U.S. master's degree, or a foreign bachelor's degree that is equivalent to a U.S. bachelor's degree plus five years of progressive, post-baccalaureate experience. There is no provision for demonstrating equivalency to a degree (either advanced or baccalaureate) through a combination of educational programs or education and experience.[29]

For EB-3 purposes, you must recognize the difference between the skilled worker or professional within the first category of EB-3. A "professional" is defined as an alien who holds a U.S. bachelor's degree or foreign equivalent degree and who is a member of the professions.[30] Again, equivalency in this context does not allow for an equivalency through a combination of degrees or coursework nor through education and experience. Therefore, if a bachelor's degree is required and the alien does not have a U.S. bachelor's or foreign equivalent degree, the alien will not meet the requirements set forth on the face of the labor certification and the I-140 will be denied. An equivalent degree is a foreign degree from an academic institution that can be evaluated as the equivalent of a degree from an academic institution in the U.S.[31] The case could nevertheless be prepared to qualify for "skilled worker" qualification by stating on the 9089 that an alternate combination of education and experience is acceptable.[32] To qualify for skilled worker classification, the minimum requirements for the position must be at least two years of training or experience.[33] Because professionals and skilled workers fall into the same visa preference category, there is no drawback to setting up the case in this way.

In summary, unlike in the H-1B context, an EB-2 or EB-3 professional case cannot be grounded on the equivalent of a degree through some combination of education and/or experience. If the sponsored foreign national does not have either a U.S. bachelor's or foreign degree that in and of itself is equal to a U.S. bachelor's degree, then you cannot prepare the case as an EB-2 or an EB-3 professional. It must be prepared as an EB-3 skilled worker.

If you have concluded that the case must be EB-3, you must go on to prepare a strategy that clearly sets the case as either a professional or skilled worker in order to fall into the first of the two EB-3 categories (*i.e.,* professional/skilled worker rather than "other" worker.)

Note that even if you obtain a U.S. bachelor's equivalency for a combination of education and experience from an education evaluation company, USCIS may not find the equivalency in an I-140 EB-2 adjudication. As noted earlier, there is no provision in the EB-2 regulations allowing for the dem-

[25] INA §203(b)(2)(A).

[26] 8 CFR §204.5(k)(4)(i).

[27] 8 CFR §204.5(k)(2).

[28] 8 CFR §204.5(k)(2).

[29] *But see* Exchange of Letters between Efren Hernandez III, Director, Business and Trade Services, Legacy Immigration and Naturalization Service (INS) Office of Adjudications, and attorney Aron A. Finkelstein, HQ 70/6.2.8, Jan. 7, 2003, *published on* AILA InfoNet at Doc. No. 03041544 (*posted* Apr. 15, 2003). Although Mr. Hernandez opined that "it is not the intent of the regulations (8 CFR §204.5(k)(2)) that only a single-source foreign degree may satisfy the equivalent requirement," this opinion is not followed by the Nebraska Service Center (NSC) or the Administrative Appeals Unit (AAU). For a detailed discussion on recent decisions, *see* R. Wada, "PERM Strategies and Ad Hoc Rules For Beneficiaries With Three-Year Bachelor's Degr*ees*," 11 *Bender's Immigr. Bull.* 611 (June 15, 2006).

[30] 8 CFR §204.5(l)(3)(ii)(C). To show that the alien is a member of the professions, the petition must submit evidence showing that the minimum of a bachelor's degree is required for entry into the occupation. *Id.* This is shown through the statement of requirements on the Form 9089.

[31] A common fact pattern illustrates this obscure point. Many individuals present a three-year Bachelor of Commerce degree from India, followed by a one-year program in computer science from a professional development institution. In the past, this 3+1 combination of educational programs has been proposed as the equivalent of a four-year college education, *supra* note 28. However, this is no longer considered an equivalent degree as no academic institution has awarded a degree which can be found to be an equivalent degree. While it may be the equivalent education, it will not be considered an equivalent degree.

[32] Fields H.8.A, B, and C on the Form 9089.

[33] 8 CFR §204.5(l)(3)(ii)(B).

onstration of equivalency through an evaluation as there is in the H-1B regulations.

The above discussion addresses problems seen at the USCIS I-140 stage with cases involving equivalencies, or lack thereof, to a U.S. bachelor's degree. But the other central government agency involved in the permanent resident process, the DOL, may also have problems with equivalencies. If a labor certification case includes advertising that stated a bachelor's degree requirement, but the Form 9089 includes an option for "equivalency," DOL could object that U.S. workers who lacked the degree but held equivalent experience were dissuaded from applying for the position. At its essence, a labor certification application involves a test of the U.S. labor market. DOL will view that test as flawed if the employer allows the sponsored foreign national to qualify through a combination of education and experience but U.S. workers are not advised that this is an option for them as well.

Practice Pointers

- Always get transcripts along with a degree. If the transcripts show a three-year program of study, be sure to research whether the applicable country's educational program includes 13 years of primary and secondary education, rather than 12, as in the United States.[34]
- Get an education evaluation done on a foreign degree prior to starting the PERM case. If you get an equivalency to a bachelor's degree but there were only three years of study, obtain a clear and detailed explanation from the evaluation company regarding the method used to convert the transcripts into comparable U.S. courses and credit hours. Note that not all evaluation firms are equivalent either, some are more reputable and trustworthy than others. The USCIS does not publish a list of evaluation firms whose opinions carry more or less weight, but it has stated on several occasions that the opinions are advisory only. Thus, the practitioner is advised to find an evaluation firm that can support its findings and conclusions with educational source material and logic. While this background may not be included in the formal evaluation, it should be available in the event that the evaluation is questioned or challenged by USCIS.

[34] Where a three-year program follows 13 years of primary and secondary education, a degree from such a program may be equivalent to a U.S. bachelor's.

If you learn that the foreign study or degree is not equivalent to a U.S. bachelor's degree, be sure to draft the case as an EB-3 skilled worker, rather than as an EB-2 or EB-3 professional. This means stating something other than, or in addition to, a bachelor's degree as the requirement. You must state an equivalency is acceptable, and must clearly define what that equivalency is. For example, "Bachelor's degree plus two years' experience or, in the alternative, two years of university-level education and an additional six years of work experience" (in addition to the already-required two years of work experience). Other formulations include: "In lieu of a four-year degree, employer will accept a three-year degree and one year of coursework as being equivalent to a four-year degree" or "will consider an equivalent degree as defined under 8 CFR §214.2(h)(4)(iii)(D)."[35]

EXPERIENCE GAINED WITH THE EMPLOYER

The labor certification program has long struggled with the requirement that the sponsored foreign national must not be treated more favorably than a U.S. worker applicant for the position. Of particular concern to DOL is whether a foreign national qualified for the labor certification by virtue of experience gained with the sponsoring employer, thereby putting U.S. worker candidates at a competitive disadvantage. When the proposed PERM regulations were published, DOL attempted to resolve this issue by barring any experience gained with the sponsoring employer from being used to qualify for the position.[36] DOL received numerous comments objecting to this proposal, and the final PERM rule largely retained the prior regulation's principle that experience gained with the sponsoring employer could be used to qualify for the position.[37] However, the PERM regulations have added several qualifications on experience gained with the employer that require careful analysis of the alien's employment history and caution in preparing the ETA 9089.[38]

[35] For an update on how the NSC is determining equivalencies on the 9089 application, *see* NSC Liaison Committee I-140 Practice Tips and Updates, *published on* AILA InfoNet at AILA Doc. No. 07031267 (*posted* Mar. 12, 2007).

[36] 67 Fed. Reg. 30465, 30498 (May 6, 2002).

[37] 20 CFR §656.17(i)(3); *see* 69 Fed. Reg. 77326, 77394 (Dec. 27, 2004).

[38] This article will not discuss how on-the-job training may impact actual minimum requirements. For a discussion of on-the-job training and its possible pitfalls, *see* Pelta, "Brave

continued

Federal Employer Identification Number (FEIN) Definition of Employer

One area of clarity that was provided in the PERM regulations is the definition of what is considered to be experience with the same petitioning employer: "same employer" means an entity with the same Federal Employer Identification Number (FEIN) as the PERM sponsor.[39] This has proven to be a significant benefit for multinational employers, who previously were limited in requiring any experience, skills or training that had been gained by aliens previously employed with affiliated entities outside the U.S.[40] Similarly, aliens who gained experience with a subsidiary or predecessor entity of the PERM employer can use that experience to qualify unless their prior employer used the same FEIN as the PERM sponsor.

Bar on Experienced Gained as a Contract Employee with Employer

While DOL established a bright-line rule with the FEIN test for "same" employer, a more confusing standard was created by the bar on requiring any experience the alien gained with the employer as a contract employee. The regulations state that DOL "will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee."[41] One author has suggested that by reading this rule in harmony with the FEIN test, the PERM regulation only bars an employer from requiring experience that the alien gained as a direct contractor with the employer.[42]

However, assuming that the regulations support a sponsoring employer requiring experience gained by the alien as a consultant or contractor who was placed with the sponsoring employer prior to his direct hire, it is not clear if this was in fact DOL's intent. DOL may have intended the rule to cover any experience that was gained as a consultant, and practitioners may wish to exercise caution in relying on experience that the alien gained as a consultant with the sponsoring employer. Relying on experience the alien gained as a consultant is not likely to result in an automatic denial, but if the ETA 9089 suggests that the alien gained the necessary experience for the sponsored role as a contract hire, DOL could issue an audit demanding more details, or proof that the consulting role was not simply a chance to gain the required experience. Time spent dealing with an audit, or having to appeal a denial, warrants care in drafting—no employer or alien wants to wait months or years for a decision when such delay could have been avoided by careful draftsmanship.

Less than 50 percent similar duties

For many employers, the means by which an alien's previous employment experience with the sponsoring employer may be used to qualify for the sponsored position is to show that the alien's experience was not in a "substantially comparable" job.[43] Specifically, the employer must show that the alien's previous job duties are less than 50% similar, based on the amount of time the alien spends performing the job duties.[44]

The comments to the PERM rule propose that limiting the comparative analysis to the job duties will simplify the distinguishing process and prevent the confusion and inconsistent standards that developed after *Matter of Delitizer Corporation of Newton*.[45] However, despite the comments suggestion that only job duties will be considered, the regulations propose that suitable documentation of this difference can be made with "position descriptions, the percentage of time spent on the various duties,

New World: Minimum Requirements, Business Necessity and Alternative Minimum Requirements under PERM," *David Stanton Manual on Labor Certification* 63 (AILA 3d Ed. 2005).

[39] 20 CFR §656.17(i)(5)(i).

[40] *See Matter of Inmos Corp.*, 88 INA 326 (Board of Alien Labor Certification Appeals (BALCA) 1990) (foreign national's experience in computer programming in the foreign parent could only be distinguished from the sponsoring employer by showing that they had different corporate identities); *but see Matter of Rieter Corp.*, 2000 INA 193 (BALCA Sept. 29, 2000) (acknowledging the "increasing globalization of the marketplace" and holding that foreign and American affiliates can distinguish themselves by showing "distinct, operational independence" from one another).

[41] 20 CFR §656.17(i)(3).

[42] Clark "Actual Minimum Requirements under PERM" *David Stanton Manual on Labor Certification* 25 (AILA 3d Ed. 2005).

[43] Interestingly, the standard adopted in the PERM regulations, differentiation of the jobs should be limited to a comparison of the job duties between the two positions, was submitted as an AILA *amicus* brief in *Matter of Delitizer Corporation of Newton*, 88 INA 482 (BALCA May 9, 1990) (en banc).

[44] 20 CFR §656.17(i)(5)(ii) (a 'substantially comparable' job or position means a job or position requiring performance of the same job duties more than 50% of the time).

[45] 69 Fed. Reg. 77325, 77354 (Dec. 27, 2004).

organization charts, and payroll records."[46] These factors seem to suggest that the *Delitizer* criteria may still carry weight in distinguishing positions, as it is unclear how payroll records could show how job duties are different in different positions.

DOL also applies the "50% similar test" to experience gained as a contract employee, and DOL will allow an employer to rely on experience the alien gained as a contractor, provided it may be shown that the alien's duties as a contractor are less than 50% similar to the alien's duties in the sponsored position.[47] This gives employers who hire contract staff an additional means to rely on experience gained as a contractor, apart from the FEIN test. Duties and responsibilities as a direct hire are often different than the job duties as a contractor, so this is an area that should be explored with clients.

"Infeasibility To Train" Exception

The PERM rule retained the "Infeasibility to Train" exception in addition to the "50% similar test."[48] If an employer relies on this exception, it must be sufficiently demonstrated that it would be infeasible to train a new U.S. worker employee due to unavailability of personnel who would conduct the training. It can be successfully used if the employer can demonstrate that its staff has been reduced and that the cost of training a new worker would be prohibitive in the context of the employer's limited resources, as well as if the employer has undergone expansion making it infeasible to train new workers.[49] Keep in mind that the use of this exception is more likely to trigger an audit as there is no provision on the ETA 9089 to signal that the employer is relying on this exception.

Practice Pointers

- Check the foreign national's employment history for employment with a foreign affiliate or an entity that the PERM sponsor acquired after the alien's initial hire date. Ensure that the ETA 9089 employment history clearly reflects the foreign national's dates of employment with each entity. If each entity's FEIN number is known, include the FEIN in Section K of the ETA 9089.
- If the foreign national has been a contractor or consultant, determine if he was a contractor with the employer prior to his hire. If he was, what were his duties in that role, and are they more than 50% different than his present role with the employer? If not, is there a likelihood of future job changes with the sponsor, and the PERM application could be for a future role that meets the 50% test?
- In assessing differentiation between different positions, have the foreign national and/or the sponsoring employer provide detailed analyses of the two roles. Look for other differentiating factors, such as supervisory duties, or where the positions are located in the organization. Make sure the ETA 9089 employment history sets forth the duties of each position clearly, so that the positions will be readily differentiated upon review by DOL.
- In demonstrating "infeasibility to train," we suggest that the PERM compliance file include a detailed statement justifying why it is no longer possible to train a U.S. worker, along with supporting documentation containing resignation letters of those staff members who previously trained the foreign national worker, payroll information, and an old and contemporary organization chart substantiating that no one can train the new employee.

TIMELINES/TIME PERIODS FOR RECRUITMENT ACTIVITIES AND POSTING

Counting the days to meet the regulatory requirements for the various periods of time which must be completed for various PERM activities can throw off all but the most mathematically-inclined practitioners. The following is a brief synopsis of how to approach these calculations.

Timelines

Timelines are relevant when calculating the number of days prior to, or after, a required event. For example, the regulations state that the mandatory recruitment steps must be conducted at least 30 days, but no more than 180 days, before filing an application.[50] This is a ***timeline***. When calculating a timeline, the day the event occurred is not counted.

[46] 20 CFR §656.17(i)(5)(ii).

[47] 20 CFR §656.17(i)(3)(i).

[48] 20 CFR §656.17(i)(3)(ii).

[49] *See Matter of Johnny's Famous Reef Restaurant*, 96 INA 135 (BALCA Oct. 27, 1997); *Matter of Super Seal Manufacturing Co.*, 1998 INA 417 (BALCA Oct. 12, 1989); *Matter of AEP Industries*, 1988 INA 415 (BALCA Apr. 4, 1989).

[50] 8 CFR §656 .17(e)(1)(i).

The next day is counted as day one and the last day of the event is included in the count.

For example, if a newspaper advertisement is placed on Thursday, February 1, 2007, the Thursday is not counted because it is the day of the event. Friday, February 2, is counted as day one of the timeline; Saturday, February 3 is day two, etc., up through Saturday, March 3, which is day number 30. The application can be filed on the 30th day after the event, Saturday, March 3, but not before. You come to the same result by counting back from the day of the filing. If the application is filed on Saturday, March 3, that day is not counted because it is the day of the event. Friday, March 2, becomes day one, Thursday, March 1, is day two, back to February 1, the 30th day. Under the limitation precluding filing in the 30 days prior to the date of filing, if an application was filed on March 3, 2007, a newspaper or national journal advertisement could have been placed as late as February 1, but no later.

Time Periods

Time Periods are the number of days during which an activity must take place. For example, the regulations state that a job order must be placed for 30 days[51] and the Notice of Filing must be posted for 10 consecutive business days.[52] When counting a time period, both the start date *and* the end date are included in the count. Thus, if a job order is placed from February 1, 2007, through March 2, 2007, February 1 is day one, February 2 is day two, and March 2 is day 30.

To determine the first date on which the application can be filed after posting a job order, the 30-day time period for the job posting and the 30-day prior-to-filing timeline must both be calculated. Following through with the example above, March 2 is the last day of the 30-day time period for the job order placement. For purposes of counting the time period that one must wait prior to filing, March 2 is an event day and therefore not counted. The timeline would start on March 3, day one, and would continue until April 1, the 30th day, which would be the earliest possible filing date for an application.

When both a time period and a timeline are being combined, such as the case when a job order posting is placed approximately two months prior to filing, it is generally better to count *forward* rather than *backward*, and the time period and the timeline should be counted separately.

Practice Pointer

- Bank in an additional two days prior to filing, in order to ensure that the case will not be denied for lacking one or two days in the timeline.

CONCLUSION

It is hoped that the pointers in this article will enable the practitioner to properly advise the client on adopting a controversial position, such as experience gained with the employer as a job requirement, prior to filing the application and to also avoid any nasty surprises in the event of an audit. And in the event of an audit, the practitioner will be properly armed to address and rebut these issues if they have been properly thought through and documented in the PERM compliance file.

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[51] 8 CFR §656.17(e)(i)(A).

[52] 8 CFR §656.10(d)(1)(ii).