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DIFFERENT STROKES: USING DIFFERENT EXPERIENCE REQUIREMENTS ON A LABOR CERTIFICATION AND I-140 PETITION

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We've pretty much gotten used to (but not accepted!) the vast inconsistencies that exist in degree-equivalency requirements with regard to filing an H-1B, a PERM or an I-140. We've been forced to cope with (though we will never understand!) the fact that the degree-equivalency regulations that govern EB-2 and EB-3 professionals are inconsistent with the degree-equivalency regulations that govern H-1B specialty occupations and that USCIS degree-equivalency regulations and the DOL's SVP scheme applied to labor certifications widely differ. We've come to understand how vital it is that we map out the entire green card process prior to filing a PERM application and that we anticipate every potential pitfall and make early strategic decisions to prevent them. Yet, despite all our hard-earned knowledge and efforts, most of us will, at some point, be forced to deal with an unanticipated snag on an equivalency issue especially when the government changes its interpretation on an particular foreign degree.

Ronald Y. Wada, who many of us turn to for guidance through the frustratingly obscure law of degree-equivalency, has written a new article, *The Nth Degree – Issues and Case Studies in Degree Equivalency: Crossing the Borderland Between DOL and USCIS Requirements*, 15 Bender's Immigr. Bull. 863 (June 15, 2010). The article addresses the differences between the reviewing practices of the DOL and USCIS. While we've always focused on degree-equivalency requirements, the article highlights a different issue – experience.

The PERM program established a "substantially comparable" standard when

considering whether prior experience gained on-the-job with the same employer may be used to qualify a foreign national for the job offered. Specifically, under the PERM regulations, a sponsoring employer is permitted to consider experience gained with that employer in instances where it establishes that the position in which the alien gained the qualifying experience is not "substantially comparable" to the job for which labor certification is being sought. Substantially comparable is defined by the regulations as a job or position requiring performance of the same job duties more than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii). Then, there is the USCIS rule, established in *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977), a precedent decision, which holds simply that the foreign national must possess the qualifications specified on the labor certification as of the priority date.

In his article, Mr. Wada writes, "Since the AAO has stated in numerous nonprecedent decisions (and federal courts have affirmed) that USCIS has the authority to determine whether the beneficiary meets the job requirements shown on the PERM application, once the labor certification is approved by the DOL the rule regarding what experience can be counted shifts to the USCIS rule." This circumstance could provide the escape from the snare of a badly designed PERM, provide another option when the foreign national presents new information at the I-140 phase ("Sorry, I guess I can't get all those experience letters after all!") or even help in instances where the USCIS attempts to revoke a previously approved I-140.

The Wada article presents the case where a PERM was designed with a Master's degree requirement and was certified. At the I-140 phase, the USCIS refuses to accept the foreign national's Master's degree deeming his credentials equivalent to only a U.S. Bachelor's degree. A bachelor's degree plus five years of post-baccalaureate progressive experience equates to a Master's degree. If the foreign national is able to demonstrate five years of progressive, post-degree work experience prior to the priority date of the PERM application, then under the USCIS policy in *Matter of Wing's Tea House*, the foreign national may yet qualify for the offered position and for EB-2. Importantly, the foreign national may even utilize experience gained on the job with the sponsoring employer – something he could not do during the labor certification phase especially if the two positions with the same employer were not more than 50% different! He may combine experience gained with a previous employer and experience gained with the sponsoring employer to arrive at the requisite 5

years of post-degree experience. It is only necessary that the foreign national meet the job requirements prior to the priority date, which is established when the labor certification is filed. USCIS does not set forth any "substantially comparable" standard à la the DOL.

Matter of Wing's Tea House could also work in instances where, whether it's an EB-2 or an EB-3 I-140, the foreign national belatedly discovers that her previous employer still harbors ill-will toward her and thus refuses to issue her an experience letter. If the foreign national is left short 1 year of experience and she had been employed with the sponsoring employer for at least 1 year before the labor certification was filed on her behalf, under *Matter of Wing's Tea House*, the foreign national could combine experience gained with the sponsoring employer and her previous experience to qualify her for the offered position despite the fact that her on-the-job experience would not have qualified her for the offered position at the labor certification phase due to the DOL's "substantially comparable" rule.

But will it actually work? Having said all that, we should bear in mind that the USCIS is afforded grounds in 20 C.F.R. §656.30(d) to invalidate a labor certification based on a finding of fraud or willful misrepresentation of a material fact involving the labor certification application. While the scenarios outlined above would not compel such a finding, is there a chance that the USCIS could request that the DOL revoke the labor certification? Under 20 C.F.R. §656.32(a) the DOL may revoke an approved labor certification, based on a finding that the certification was not justified. If the foreign national is found not to possess the degree or the experience listed on the PERM, which is not being used consistently at the time of the I-140, could it be held that the certification was not justified? It is interesting food for thought. However, *Matter of Wing's Tea House* indeed presents an innovative path that could possibly be used to save an I-140 in trouble.