CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE AAO ON H-1B VISA CREDENTIAL EVALUATIONS AND THE 'THREE-FOR-ONE" RULE

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As immigration practitioners, we file H-1B visa petitions all the time. We know that in each petition, the employer must demonstrate that the position requires a professional in a specialty occupation and that the foreign national – the intended employee – has the required qualifications. It's become common knowledge that progressively responsible work experience may substitute for any deficiency in the foreign national's education and everyone is pretty comfortable with the equivalency ratio of three years of work to one year of college training (the "three-for-one" rule). Under this rule, a foreign national with twelve years of work experience could be deemed to possess the equivalent of a four-year US baccalaureate degree and therefore qualified to hold a specialty occupation.Going forward on new H-1B petitions and especially as we gear up for the upcoming H-1B cap season, a recent non-precedent decision by the Administrative Appeals Office (AAO) discussing USCIS' recognition of any years of college-credit for a foreign national's training and/or work experience is worthy of some careful review as it provides detailed analyses that can help us ward off nasty Requests for Evidence (RFE) from the USCIS upon the filing of H-1B petitions.

The case involved an H-1B visa petition filed by a software solutions provider to employ a foreign national in the position of Senior Associate, Solution Architect. The petitioner based its beneficiary-qualification claim upon a combination of the beneficiary's foreign coursework (a three-year Bachelor of Commerce degree) and the beneficiary's work experience and training. The USCIS Director denied the H-1B petition and the AAO subsequently dismissed an appeal of the denial, both on the grounds that the petitioner failed to demonstrate that the beneficiary was qualified to perform the duties of the specialty occupation-caliber Software Developer position.In its decision to dismiss the appeal and

deny the petition, the AAO cited language at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and at section 214(i)(2)(C) of the Immigration and Nationality Act (INA). Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-lB nonimmigrant worker must possess:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
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> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
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> (C) (i) experience in the specialty equivalent to the completion of such degree,and(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 C.F.R. § 214.2(h)(4)(iii)(C), *Beneficiary qualifications,* provides for beneficiary qualification by satisfying one of four criteria. They require that the evidence of record establish that, at the time of the petition's filing, the beneficiary was a person either:

> (1) Hold(ing] a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
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> (2) Hold(ing] a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (4) Hav education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and hav recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The AAO pointed out that the clear, unambiguous language at both 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and at section 214(i)(2)(C) of the Act, stipulates that for classification as an H-1B nonimmigrant worker not qualifying by virtue of a license or qualifying degree, a beneficiary must possess TWO requirements –

the experience in the specialty equivalent to the completion of such degree; AND recognition of expertise in the specialty through progressively responsible positions relating to the specialty.The petitioner submitted three sets of credentials evaluation documents, each an evaluation of a combination of the beneficiary's foreign education and his work experience and training. Regarding the documentation of the beneficiary's work experience, the evaluations relied heavily upon an experience letter which indicated that the beneficiary had been employed full-time "from June 2008 through the present" and that he "currently serves in the position of Sr. Associate, Solution Architect." The letter provided a list of the beneficiary's current job duties. The AAO found the experience letter deficient in that it did not establish any progression in the beneficiary's duties and responsibilities or any progression through increasingly responsible positions that would meet the requirement, at 8 C.F.R. §214.2(h)(4)(iii)(C)(4), to show recognition of expertise in the specialty through progressively responsible positions directly related to the specialty in question. In other words, the AAO found that the experience letter did not indicate the position in which the beneficiary had initially been hired and whether the beneficiary still held that same position or whether the beneficiary's current position represented a promotion or a series of promotions. The AAO found that the letter identified only the beneficiary's current job duties in "relatively abstract terms of generalized functions" and did not state how long the beneficiary was performing in that current job. Because the letter failed to recount the beneficiary's prior positions with the employer and the duties and responsibilities of those prior positions, it therefore did not establish that the beneficiary had achieved progressively responsible positions to indicate recognition of expertise in the pertinent specialty, as the provisions at 8 C.F.R. §214.2(h)(4)(iii)(C)(4) include as an essential element for establishing a beneficiary's qualifications through a combination of education, training, and/or experience. The AAO held that the letter provided an insufficient basis for the evaluators to make any conclusions about the nature and level of college-course-equivalent knowledge that the beneficiary gained throughout his employment.

The AAO also took issue with what it described as a "misinterpretation and misapplication of the so-called "three-for-one" rule" which evaluators use to recognize any three years of work experience in a relevant specialized field as equivalent to attainment of one year of college credit in that specialty. The AAO

stated that only one segment of the H-lB beneficiary-qualification regulations provides for the application of the three-for-one ratio, and that is the provision at 8 C.F.R. §214.2(h)(4)(iii)(D)(5), which reserves the application exclusively for USCIS agency-determinations and moreover, that portion of the regulations requires substantially more than simply equating any three years of work experience in a specific field to attainment of a year's worth of college credit in that field or specialty. The AAO pointed out that evaluators seem to have adopted as their standard of measure only the numerical portion of the ratio segment of the regulation at 8 C.F.R. §214.2(h)(4)(iii)(D)(5), that is, "three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks" and neglected to recognize the rest of the test which limits application of the "three-for-one" rule to only when USCIS finds that the evidence about the "the alien's training and/or work experience" has (1) "clearly demonstrated" that it included the theoretical and practical application of specialized knowledge required by the specialty occupation; (2) "clearly demonstrated" that it was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; AND (3) "clearly demonstrated" that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

> (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
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> (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
>
> (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
>
> (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Finding that the beneficiary's experience letter failed to meet these three criteria, the AAO held that such evidence did not qualify for recognition of any years of college-level credit.

The decision also points out that under 8 C.F.R. §214.2(h)(4)(iii)(D)(3), only a

"reliable credentials evaluation service that specializes in evaluating foreign education credentials" can evaluate a foreign national's education. In the instant case, the AAO therefore dismissed two evaluations prepared by individuals and not by credentials evaluation services as having no probative weight.

The AAO also found fault with one evaluation of the beneficiary's experience/training since the proof of the evaluator's own credentials qualifying him to provide the evaluation included an endorsement letter from the Chairman of the Department of Computer Science at the education institution where the evaluator was employed, dated four years prior to the evaluation and a letter from the Registrar which stated that the evaluator had the authority to "recommend college-level credit for training and experience" and did not state that he had the power to "grant" college-level credit or go into any detail as the specific extent of his authority in this regard. The letter from the Registrar was also dated a year prior to the evaluation.

The AAO decision also touched on the fact that two evaluations mentioned that the beneficiary had completed "professional development programs in a variety of computer technology and accounting-related subject" and provided no concrete explanatory information about the substantive nature of those programs and what their completion may have contributed in terms of equivalent U.S. college-level coursework.

With regard to any use of a foreign national's resume as evidence of his work experience, the AAO decision pointed out that a resume represents a claim by the beneficiary, rather than evidence to support that claim.

This is one non-precedent decision and the AAO seems to be taking a very hard line in denying a case where the beneficiary provided evidence of his work experience. Immigration practitioners who file H-1B petitions may feel that USCIS has not been taking such an extreme stance in previous petitions. It is up to each practitioner to discuss the issue with the prospective H-1B employer and decide on whether to submit a wealth of documentation with the initial H-1B petition or take the chance that the USCIS could issue an RFE. So what can we take away from this AAO decision?

- Most importantly, the "three-for-one" rule cannot be taken for granted. It is important that the foreign national obtain extremely detailed experience letters from former employers, which describe

each position that the foreign national has held such that the progressively responsible nature of the positions is evident and indicates the foreign national's level of expertise in the specialty. The description of the foreign national's duties and responsibilities should make it clear that his work included the theoretical and practical application of specialized knowledge required by the specialty occupation. The letters should also mention the foreign national's peers, supervisors and subordinates who have degrees in the specialty occupation. The H-1B petitioner must also demonstrate that the foreign national has recognition of expertise in the specialty evidenced by at least one type of a list of five types of documentation described above. This can be accomplished by submitting two expert opinion letters from two college professors along with contemporaneous evidence of their ability to grant college-level credit.

- Only a foreign credentials evaluation service may evaluate a foreign national's education. Accordingly, if the foreign national has a combination of education and work experience, the submission to the USCIS cannot contain only expert opinions from professors but must also include an evaluation from a foreign credentials evaluation service.
- Any evidence of the foreign national's training must be accompanied by transcripts and a discussion about the nature of the program and what each program is worth in equivalent U.S. college level coursework. Again, if relying on a college professor to do an equivalency, the evaluation must be corroborated with evidence from the college authorities that the professor has the authority to grant credits and must provide further details under what circumstances this professor is authorized to grant those credits.
- The foreign national's resume should never be used as documentation of his experience.