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

A TRAP FOR THE UNWARY: EQUIVALENT DEGREES AND ALTERNATE REQUIREMENTS IN LABOR CERTIFICATION APPLICATIONS

Posted on February 5, 2016 by Cyrus Mehta

When a foreign national has a three year degree instead of a four year degree, or has no degree, and is able to establish an equivalent degree through a combination of education and work experience, or only through work experience, it is important that the PERM labor certification application be carefully drafted. While an equivalent degree might pass muster for an H-1B visa, it will not always for a labor certification and the subsequent I-140 immigrant visa petition.

20 CFR §656.17(h) requires that an alternative requirement must be substantially equivalent to the primary requirement of the job opportunity in a labor certification application. If the foreign national does not meet the primary job requirement, and while already employed by the sponsoring employer, only meets the alternative requirement, the labor certification will be denied unless the application states that *any suitable combination of education, training or experience is acceptable* (emphasis added). 20 CFR §656.17(h)(4)(ii) essentially adopts the holding of BALCA in *Francis Kellogg*, 1994-INA-00465, although in that case the primary and alternative requirements, namely, experience as a cook or salad maker, were not substantially equivalent, thereby necessitating that the employer accept any suitable combination of education, training or experience. In contrast to *Kellogg*, 20 CFR §656.17(h) requires consideration of this language even if there is substantial equivalence between the primary and alternative requirement.

Fortunately, if this language does not appear on the form, it is no longer fatal and practitioners can challenge a denial if the sole reason for the denial was the failure to insert this “magic language” on the application. In *Federal*

Insurance Co., 2008-PER-00037 (BALCA Feb. 20, 2009) the fact that the *Kellogg* language did not appear on the form could not be a ground for denial as there is no space on the ETA-9089 form for such language; and the *Kellogg* language also does not need to appear in recruitment materials. BALCA in *Federal Insurance* held that a denial would offend fundamental fairness and due process under *HealthAmerica*, 2006-PER-0001 (BALCA July 18, 2006). *HealthAmerica* is a seminal BALCA decision, which rejected the certifying officer's (CO) denial of the labor certification based on a typographical error recording a Sunday advertisement on the form, although the employer possessed actual tear sheets of the advertisement. BALCA rejected the CO's position that no new evidence could be submitted as the advertisement tear sheets were part of the PERM compliance recordkeeping requirement and thus was constructively submitted by the employer.

Notwithstanding the fact that the *Kellogg* magic language is not required, DOL's rigid insistence that alternate requirements be substantially similar becomes especially problematic when a position requires the minimum of a bachelor's degree but the foreign national qualifies based on equivalent work experience. It is important to draft PERM labor certification applications being aware of this pitfall, as well as the advertisements, so as to avoid a denial. *Globalnet Management*, 2009-PER-00110 (BALCA Aug. 6, 2009) is illustrative of this problem. In *Globalnet Management*,, BALCA held that a bachelor's degree plus two years of experience was not substantially equivalent to 14 years of experience. BALCA did not accept the argument that the alternative requirement of 14 years of experience comported with the well-established formula to determine equivalency under the H-1B visa, three years of experience is equal to one year of education under 8 CFR §214.2(h)(4)(iii)(D)(5), and held that the primary and alternative requirements were not substantially equivalent. BALCA relied on Field Memorandum No. 48-94 that set forth the years under the Specific Vocational Preparation (SVP) system for different educational attainments. Therefore, the appropriate alternative for a position requiring a B.S. degree plus two years of experience would have been four years of experience rather than 14 years of experience. While BALCA noted that 8 CFR §214.2(h)(4)(iii)(D)(5) may be persuasive in the absence of other guidance, citing *Syscorp International*, 1989-INA-00212, it nevertheless relied on Field Memo No. 48-94 in affirming the denial of the labor certification.

One reason why practitioners still include an alternative requirement relating to

an equivalent degree is to ensure that the requirement is consistent with the H-1B visa petition. It is not unusual to qualify a foreign national for an H-1B visa who may have the equivalent of a three year degree, and then makes up the fourth year through the equivalent of three years of experience. The following language, which previously passed muster would now put into jeopardy ETA-9089 applications that define an equivalent degree, as follows: "Employer will accept a three year bachelor's degree and three years of experience as being equivalent to one year of college." Under the reasoning employed in *Globalnet*, this assumes that the alternative requirement would involve 12 years of SVP lapsed time while a bachelor's degree would only require two years of SVP lapsed time. The employer faces a Hobson's choice. If the employer does not include what it means by an equivalent degree on the ETA-9089, the subsequent I-140 petition will fail. If an employer requires a bachelor's degree, and if the foreign national does not have the equivalent of a four year degree, and the ETA-9089 does not include a definition with respect to what it means by an equivalent degree, USCIS will assume that the employer required a four year degree and the foreign national would not be able to qualify for the position by virtue of not possessing such a degree.

On the other hand, in light of *Globalnet* it no longer remains viable to insist on consistency between the H-1B and the labor certification. Hence, if the primary requirement is a bachelor's degree and two years of experience, and the foreign national does not have a degree whatsoever, the substantially equivalent alternative that would be acceptable to DOL would be four years of experience, as opposed to 14 years of experience. There may be some concern that requiring this formula on the labor certification, which may pass muster for DOL, may still be problematic when the alien has filed an I-140 petition and is also extending the H-1B visa using the "3 for 1" equivalency formula to establish the equivalent degree to qualify for the H-1B occupation. There is some anecdotal evidence of the USCIS questioning the extension of the H-1B visa when the I-140 petition involving the same position did not require a degree. However, if this issue comes up during an H-1B adjudication, it should be argued that the discrepancy lies in the USCIS regulations and USCIS interpretations relating to H-1B and I-140 petitions, not in the beneficiary's job or the beneficiary's qualifications. USCIS ought not to deny an H-1B solely because a beneficiary who has been classified for an H-1B visa through an equivalent degree, either based on a combination of education and experience,

or purely through a requirement of 12 plus years of experience, is classified on an I-140 under the EB-3 skilled worker preference requiring something less than a bachelor's degree.

Finding ways to escape the *Globalnet* trap (and to achieve consistency with the H-1B) have not been successful. In *Microsoft Corporation*, 2011-PER-02563 (October 16, 2012), the employer indicated in items H.4 through H.7 in the ETA 9089 that its requirements for the position was a Bachelor's degree or foreign educational equivalent in Comp. Sci., Eng., Math, Physics, Business or related field and six months of experience in the job offered or in a computer-related occupation or student school project experience. The employer indicated in item H.8 that there was an acceptable alternate combination of education and experience, and specified that it would accept 3 years of work experience for every year missing from a four year college degree. The CO denied on grounds that the alternative requirement was not substantially similar to the primary requirement. When the employer appealed to BALCA, one of its arguments was that 20 CFR §656.17(h)(4)(i) did not apply as it was accepting an alternate combination of education and experience in H.8-C, rather than an alternate experience requirement. This argument, unfortunately, was shot down, since the employer created an alternate requirement by indicating in H.10 that it would require three years of work experience for every year of missing college education. The following extract from the BALCA decision in *Microsoft Corporation* is worth noting:

> *The Employer completed item H.8 indicating it would accept an alternate combination of education and experience, but that there was no alternate experience requirement. The Employer, however, completed box H.14 indicating that it will accept three years of work experience for every year of missing education from a four year college degree. Although not listed in item H.8C, box H.14 indicates that the position has, in effect, an alternate experience requirement which varies from zero to twelve depending on the level of education attained by the applicant. Therefore, the CO correctly applied § 656.17(h)(4)(i) in determining whether the alternate experience requirement is substantially equivalent to the primary requirement.*

The reason why labor certifications of this sort stumble is because there is an

alternative requirement, thus triggering 20 CFR §656.17(h)(4)(i). The employer can arguably require the equivalent of a bachelor's degree as a sole requirement, rather than insist on a bachelor's degree or the equivalent of such a degree, by checking No to H.6 and Yes to H.10 in ETA 9089, and explaining the equivalency formula in H.14. *See Matter of DNP America LLC,* 2012-PER-00335 (Oct. 6 2015) (employer properly answered No to H.6 because it did not require experience in the offered position, and was instead requiring experience in a similar position, which it appropriately indicated in H.10). This strategy too is likely to fail as the DOL may argue that an alternate requirement was created in H.10, as in *Microsoft,* although BALCA has yet to rule on such a fact pattern where the labor certification expresses one requirement, rather than a primary and alternate requirement.

While achieving consistency between the H-1B and the educational requirements on the ETA 9089 may be impossible based degree equivalencies through work experience, it behooves the employer to at least frame the alternate requirement appropriately as being substantially similar to the primary requirement so as to avoid a denial of the labor certification. For foreign nationals who have no degree and have qualified for their H-1B visa status through 12 years of work experience, including the formulaic "3 for 1" year rule as a way to express the equivalency on the labor certification will most certainly be fatal. Instead, this author has experienced success when the employer required a bachelor's degree in the specialized field as a primary requirement, and as an alternate, required two years of experience in the specialized field in lieu of a bachelor's degree. This is consistent with DOL's interpretation under *Kellogg* and 20 CFR §656.17(h)(4)(i) that the primary requirement of a bachelor's degree (requiring 2 years of SVP time) is substantially equivalent to the alternate requirement (which is two years of experience). If the position requires two years of experience in addition to a bachelor's degree, then the alternate requirement could be 4 years of experience in lieu of a bachelor's degree. Similarly, when a foreign national has a three year degree, the best practice is to require either a 3 or 4 year bachelor's degree plus the relevant experience.

Navigating immigration law is already challenging, and it becomes increasingly more so when one is dealing with the DOL and the USCIS, who are committed to different standards relating to equivalency. What is worse is that the goal posts are constantly moved, and what may have been acceptable previously is

unbeknownst to anyone suddenly not. Until both the agencies settle their differences, or legislation forces them to do so, the immigration practitioner will need to be constantly threading the needle when representing foreign clients with equivalent degrees in order to avoid a labor certification denial and successfully obtain permanent residency.