PERM Audits Are Coming Back—
A Detailed Look at Some Specific Pitfalls to Avoid
December 6, 2011

List of Cases and Materials Referenced in Presentation

Speakers: Ester Greenfield, Sharryn Ross, Ron Wada

Introduction – the Most Recent BALCA Decision

Department of Labor Stakeholders Minutes, October 5, 2011, AILA Doc. No. 11102768

Alternative Minimum requirements


Print and Other Advertisements

Matter of iFuturistics, Inc., 2010-PER-00631 (04/21/11) AILA Doc. No. 11042543
Matter of East Tennessee State University, 2010-PER-00038 (04/18/11) AILA Doc. No. 10082464
Matter of Emma Willard School, 2010-PER-01101 (09/28/11) AILA Doc. No. 11092935
Matter of CCG Metamedia, Inc., 2010-PER-00236 (03/02/11) AILA Doc. No. 11030334.
Matter of Credit Suisse Securities, 2010-PER-00103 (10/19/2010) AILA Doc. No. 10102033
Matter of Jesus Covenant Church, 2008-PER-200 (9/14/ 2009)
Employee Referral Programs

Matter of AQR Capital Management, 2010-PER-00323 (01/26/11) AILA Doc. No. 11012767
Matter of Deloitte Services LP, 2010-PER-00348 (03/02/11) AILA Doc. No. 11030333
Clearstream Banking S.A., 2009-PER-00015 (3/30/ 2010), AILA Doc. No. 10033130

Adequacy of Business Necessity Documentation

La Cantina Toscana, 2009-PER-00237 (4/7/2011), AILA Doc. No. 11041833,

Sufficiency of Recruitment Report

Matter of Simmons Audio Video Etc., Inc., 2010-PER-00167 (03/04/11) AILA Doc. No. 11030727
Matter of Quantifi, Inc., 2010-PER-00894 (05/12/11), AILA Doc. No. 11051361.

Sufficiency of Audit Documentation

Matter of Forest View Nursing Home and Rehab Center, 2010-PER-00106 (02/11/11) AILA Doc. No. 11022369.
Matter of Shastriji Pennsylvania Donuts Corp., 2010-PER-00437 (03/29/11) AILA Doc. No. 11040466
Matter of Nathan Littauer Hospital & Nursing Home, 2010-PER-01066 (08/16/11) AILA Doc. No. 11082960

The Other Most Recent BALCA Decision: Medical Residents

THE NTH DEGREE — ISSUES AND CASE STUDIES IN DEGREE EQUIVALENCY:
STRATEGIES FOR AVOIDING SUBSTANTIAL-EQUIVALENCE ISSUES UNDER GLOBALNET

BY RONALD Y. WADA

This is one of a series of articles discussing degree-equivalency issues and individual case questions posed by readers. Ron Wada is a member of the Bulletin’s editorial board and the author of the best-selling book AILA’s Focus on EB-2 & EB-3 Degree Equivalency, published by the American Immigration Lawyers Association. Readers may submit their degree-equivalency questions to Ron at wada@tandslaw.com. Questions and responses that are of general interest may be reproduced anonymously in this column.

Previous articles in this series have discussed the Department of Labor’s SVP system and substantial-equivalence requirements, as well as the recent BALCA decisions in Matter of AGMA Systems and Matter of Globalnet Management. Based on independent anecdotal reports from attorneys, DOL is now applying Globalnet to deny numerous PERM applications that were designed and filed long before the interpretation of substantial equivalence as set forth in Globalnet became widely known. The purpose of this article is to review alternative strategies for avoiding substantial-equivalence issues in PERM applications, and to consolidate practice tips from previous articles in this The Nth Degree series to provide a glimpse at how such strategies may play out with USCIS at the I-140 stage.


The DOL PERM regulations require that “[a]lternative experience requirements must be substantially equivalent to the primary requirements;” however, the term “substantially equivalent” is not defined in the PERM regulations. The term “substantially equivalent” was originally coined by BALCA in its 1998 en banc decision in Matter of Francis Kellogg; however, in Kellogg the test for substantial equivalence was expressed in terms of whether an applicant who qualifies under the alternate requirement can perform in a reasonable manner the duties of the job being offered, and NOT in terms of requiring that the number of SVP years for primary and alternative requirements match. For the first four years of operation of the PERM system the issue was ignored by DOL and simply lay dormant, a trap for the unwary.

In Matter of AGMA Systems, BALCA agreed that a bachelor’s degree plus five years of experience is substantially equivalent to a master’s degree plus three years of experience, but declined to address whether a bachelor’s degree plus five years of experience is substantially equivalent to a master’s degree alone, as defined by the USCIS regulation at 8 C.F.R. §204.5(k)(2) and argued by the employer in that case. BALCA avoided addressing the thorny issue of whether the USCIS EB-2 degree equivalency rule describes job requirements that are “substantially equivalent” as required by the PERM regulation.

In Matter of Globalnet Management, issued on the same day as Matter of AGMA Systems, BALCA set forth a very strict standard for what will be considered a substantially equivalent alternative job requirement. Globalnet involved a Market Research Analyst position with a primary job requirement of a bachelor’s degree and two years’ experience, and an alternative

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1 See the list of articles in this series at the end of this article.
2 20 C.F.R. §656.17(b)(4).
3 Matter of Francis Kellogg. 1998 BALCA LEXIS 161 (BALCA Feb. 2, 1998) (en banc) (“there are legitimate alternative job requirements, which can, and should be permitted in the labor certification process . . . these alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered.”).
5 2009 BALCA LEXIS 221 (BALCA Aug. 6, 2009).
requirement of a high school diploma and fourteen years’ experience. The employer argued that the alternative requirement was substantially equivalent to the bachelor’s + 2 years based on the formula that three years of experience may be substituted for one year of college education, as permitted for H-1B status by the USCIS equivalency regulation at 8 C.F.R. §214.2(h)(4)(iii)(D). However, the BALCA panel dismissed consideration of USCIS regulations, stating, “These regulations do not apply to the Department of Labor’s Permanent Labor Certification program.”

Citing the PERM regulation at 20 C.F.R. §656.3 (definitions), and a 1994 pre-PERM DOL field memorandum, BALCA stated that “the PERM regulations outline minimum and maximum experience requirements for positions of different levels under the specific vocational preparation (SVP) definition,” and affirmed the Certifying Officer’s denial of the application, stating that “14 years of experience is not substantially equivalent to a Bachelor’s degree and 2 years of work experience,” and “the requirement of 14 years of experience significantly restricts the applicant pool and contravenes the SVP requirement.”

AGMA Systems and Globalnet provide two data points along a continuum of possible case scenarios. Based on AGMA Systems, we can be confident that DOL will consider a master’s degree plus three years of experience (MS+3) and a bachelor’s degree plus five years’ experience (BS+5) to be substantially equivalent; based on Globalnet, we now know that DOL will consider fourteen years of experience as not substantially equivalent to a bachelor’s degree plus two years of experience. What has also become clear is that based on Globalnet DOL is now denying PERM applications where an alternative job requirement is used and is based on the USCIS H-1B formula of three years of experience equals one year of college — the precise formula rejected in Globalnet. Between these data points lie other possible combinations of primary and alternative job requirements that have been used in PERM applications that remain pending for adjudication; how DOL and/or BALCA may decide to deal with these other combinations remains to be seen. Until additional clarification becomes available, there appear to be two basic strategies for safely avoiding substantial-equivalence issues in PERM applications:

1) Avoid using alternative job requirements entirely to eliminate any possibility that one could render the PERM application vulnerable to denial on the ground that the alternative requirement is not substantially equivalent to the primary requirement; or

2) If an alternative requirement must be used, structure it so that it is rated to have the same number of SVP years as the primary requirement under DOL’s SVP rules — for example, AGMA Systems confirms that a primary requirement of MS + 3 may have as an alternative requirement BS + 5.

These basic strategies can trigger additional questions when attempting to apply them to specific case scenarios to come up with job requirements that will satisfy both DOL and USCIS. In some cases, due to the disparity between agency requirements it may not be possible to meet the requirements of both agencies.

**Question:** How can PERM job requirements for a typical EB-3 “safe harbor” case be drafted to avoid the substantial-equivalence issue at DOL?

**Answer:** For the typical EB-3 “safe harbor” case involving a job requirement of a bachelor’s degree (or equivalent education) and less than five years of experience, it is safest to avoid using an alternative job requirement entirely. This can be done on Form ETA 9089 by:

1) Checking “Bachelor’s” at H.4 and placing any degree-equivalency language in H.14; or

2) Checking “Other” at H.4 and placing any degree-equivalency language in H.4A.

Form ETA 9089 was not designed to elicit clear information regarding substantial-equivalence issues, so problems involving how DOL and USCIS may have differing interpretations for the same language on the form can arise here. Based on experience to date, if the “Bachelor’s” box is checked at H.4, USCIS has consistently interpreted degree-equivalency language entered in H.14 as MODIFYING the bachelor’s-degree requirement checked at H.4. Another way of saying the same thing is to check “other” at H.4 and enter the degree-equivalency language in H.4A. Both methods avoid defining an alternative requirement using H.8.

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6 Id. at 6.
7 Id. The reasoning employed by BALCA in the Globalnet decision seems flawed on a number of grounds, as discussed in a prior article in The Nth Degree series at 14 Bender’s Immigr. Bull. 1409 (Nov. 15, 2009) (Matter of Globalnet Management).
8 8 C.F.R. §214.2(h)(4)(iii)(D).
9 Based on numerous anecdotal reports received from attorneys.
If an alternative job requirement must be used, it should still be possible provided that the equivalency language that is used refers to alternative degrees only (e.g., “will accept three- or four-year bachelor’s degrees”) and does not attempt to equate years of experience with years of education such as the “three years of experience equals one year of college” formula from §214.2(h)(4)(iii)(D).

**Question:** What about cases where the alternative job requirements fall into the same SVP category, but have a different number of SVP years (e.g., MS+1 with a BS+5 alternative, MS+2 with a BS+5 alternative, Ph.D+0 with an MS+2 alternative are all within the SVP 8 range but add up to different SVP years)?

**Answer:** BALCA has yet not addressed this issue; both AGMA Systems and Globalnet stop short of defining a general rule for determining what job requirements are substantially equivalent. It seems likely that cases having such combinations are currently in the pipeline; if DOL elects to deny those applications the issue could be decided by BALCA in the near future. In the meantime, combinations that do not compute to the same number of SVP years must be viewed as risky at this point, and would best be avoided.

**Question:** What if an employer requires a BS + 5 but does not require a master’s degree as an alternative, and the beneficiary has a foreign master’s degree but has either a three-year bachelor’s degree or no bachelor’s degree at all? If I don’t list an alternative MS requirement on Form 9089, and just list the BS + 5, will I run into trouble with an EB-2 case because the beneficiary doesn’t have a “single source” bachelor’s degree?

**Answer:** This should work, provided that the beneficiary’s master’s degree is evaluated by the AACRAO EDGE database to be equivalent to either a foreign equivalent degree to either a U.S. master’s degree or a U.S. bachelor’s degree and the beneficiary also has five years of progressive, post-degree experience in the required field; in either case, USCIS should accept the beneficiary’s master’s degree in the required field as meeting the bachelor’s-degree requirement in this situation. 13 Three common situations where this question may arise are:

1) The beneficiary has a five-year master’s degree from a European university but no underlying bachelor’s degree;
2) The beneficiary has a three-year bachelor’s degree and a two year master’s degree from India (assuming that the degrees are in the required field and are from a properly accredited school);
3) The beneficiary has a three-year bachelor’s degree and a three-year master’s degree from India (assuming that the degrees are in the required field and are from a properly accredited school).

**Question:** Can the substantial-equivalence issue be avoided for a beneficiary who has 30+ years of experience as a Sales/Marketing Manager and Director, including six years working in the job offered by the employer, but no degree?

**Answer:** The first step is to recognize that this position will not qualify for EB-2 — the person occupying it does not hold an advanced degree and does not hold a U.S. bachelor’s degree or a foreign equivalent degree. Equivalent, non-degree education or experience will not meet the 8 C.F.R. §204.5(k)(2) definition of advanced degree needed for EB-2. Therefore, the minimum requirements for the position must be something else. Assuming the beneficiary does not have a background of exceptional or extraordinary abilities in sales or marketing, the only possible I-140 category for this position is EB-3, which includes skilled workers and therefore offers some flexibility as to how job requirements are specified.

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11 For example:
- Will accept a combination of degrees or diplomas equivalent to a bachelor’s degree;
- Will accept three- or four-year bachelor’s degrees;
- Will accept a bachelor’s equivalent based on a combination of education as determined by a professional evaluation service.


13 If the beneficiary has a U.S. master’s degree, that will generally be acceptable for meeting a bachelor’s degree requirement; if the beneficiary has a foreign master’s degree, NSC will evaluate it on a case-by-case basis, and may consider the underlying education to make this determination. See NSC Liaison I-140 Practice Tips & Updates, 3-12-07, in Ronald Y. Wada, AILA’s Focus on EB-2 & EB-3 Degree Equivalency 253 (2007) (App. F-4); also available as AILA doc. No. 07031267 at 5 (Mar. 12, 2007). NSC left itself some wiggle room on foreign master’s degrees, but it appears that denials have been rare or nonexistent, as no cases raising this issue have been made known to the author.

The next step is to recognize that these facts are similar to the facts in *Matter of Globalnet*, so it will be best to (1) define a single primary requirement and avoid defining an alternative set of job requirements; and (2) avoid defining job requirements that are so far in excess of the SVP level defined by DOL for the occupation that it would be difficult to provide convincing business-necessity documentation.

With these factors in mind, try to hone the employer’s minimum requirements for the position. For purposes of illustration, let’s assume that the employer agrees that the minimum job requirement is a bachelor’s degree and four years as a marketing manager or sales manager. With these facts, the following formulation could work:

Bachelor's degree in Marketing, or equivalent,* (*will accept bachelor’s-degree equivalency prepared by a qualified credential evaluator), plus 4 years of experience in the job offered or the related occupation of Sales Manager.

Note also that this set of job requirements would exceed what DOL considers “normal” for Job Zone 4/SVP 7<8 occupations, and that therefore a business-necessity justification would most likely be needed in this situation.

**Previous articles in the Nth Degree series**

- 15 Bender’s Immigr. Bull. 423 (Mar. 15, 2010) (Drafting Form 9089 Job Requirements for a Typical EB-3 “Safe Harbor” Case)

**REMEMBER:**

The correct citation form for the BIB is Author, *Title*, 15 Bender’s Immigr. Bull. 569 (Apr. 15, 2010).
THE NTH DEGREE—ISSUES AND CASE STUDIES IN DEGREE EQUIVALENCY: TRAPS AND TIPS FOR DRAFTING PERM APPLICATIONS FOR SKILLED WORKERS

BY RONALD Y. WADA

This is a new installment in the Nth Degree series discussing degree-equivalency issues and individual case questions posed by readers. Ron Wada is a member of the editorial board for Bender’s Immigration Bulletin and the author of the best-selling book AILA’s Focus on EB-2 & EB-3 Degree Equivalency. He thanks readers who have provided valuable case questions in support of this column. Readers may continue to submit their degree-equivalency questions to Ron at wada@tandslaw.com.

NOTE: This article updates three prior articles in the Nth Degree series: Drafting Form 9089 Job Requirements for a Typical EB-3 “Safe Harbor” Case (March 15, 2010), Crossing the Borderland between DOL and USCIS Requirements (June 15, 2010), and Testing Your Knowledge of Degree-Equivalency Rules and Best Practices (July 15, 2010).

As reported in last month’s Nth Degree article, two new blips have suddenly appeared on my degree-equivalency radar that are serious enough to merit discussion and immediate dissemination:

- DOL has denied at least two recent PERM applications containing degree-equivalency language in Section H of Form ETA 9089 on the ground that DOL was unable to determine the minimum requirements for the positions.
- The AAO has issued a “Notice of Derogatory Information and Request for Evidence” in an EB-3 I-140 appeal, stating that the job requirements in the I-140 petition differed significantly from those in the I-129 H-1B petition for the same beneficiary, for the same job title and job duties, and demanding an explanation. The AAO also stated that it was prepared to enter a finding of fraud in the case, and may also have the PERM certification revoked based on willful misrepresentation.

For the past three years it had been a safe and reliable practice to include broad degree-equivalency language in Form ETA 9089 Section H for cases where the beneficiary met a bachelor’s-degree requirement by virtue of a combination of education, or education and experience. However, DOL and USCIS appear now to be developing potentially formidable traps for the unwary attorney – in essence, a set of virtual IEDs (improvised explosive devices) for PERM applications.

The purpose of this article is to describe the potential traps that may lay hidden when drafting a PERM application to support an EB-3 skilled worker petition, and to offer a visual guide to ensure that the relevant issues are considered. These traps can dramatically escalate the complexity of the PERM drafting task for a skilled worker. A single formulation may no longer work for all skilled-worker cases; instead, the strategy and language would have to be determined on a case-by-case basis. For many cases, it may not be possible

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1 A list of previous articles in the series is provided at the end of this article. Future articles in this series may appear on an irregular basis as issues become ripe for publication.


3 The AAO stated,

You filed the ETA Form 9089 which supports the instant Form 1-140 petition. The position requires only a high school education and 24 months of experience in the proffered position. Your previous Form I-129 filing for the same position indicated that the position required the minimum of a baccalaureate degree. The duties listed on the Form I-140 and Form I-129 positions are nearly identical. Please explain the positions’ differing educational requirements . . . unless you can resolve the inconsistent information provided in these two filings with independent objective evidence, the AAO intends to dismiss the appeal and enter a formal finding of fraud into the record. The AAO may also invalidate the labor certification based on fraud or willful misrepresentation.

A copy of the AAO Notice is available online at http://nthdegreeupdate.blogspot.com/.

4 The drafting problem will be especially challenging for large employers with standardized job titles and job descriptions and employees with varying educational and experiential backgrounds filling those positions.
to find a bulletproof solution that avoids all risks, and the drafting task will boil down to estimating and selecting the least risky solution in each case.

**Trap #1: Substantial Equivalence**

Previous articles in the *Nth Degree* series have described last year’s BALCA decisions in *Matter of AGMA Systems* and *Matter of Globalnet Management* and discussed alternatives for avoiding substantial-equivalence issues. The safest approach is to state only a primary job requirement in Section H of the Form 9089. Where this is not possible, the next best approach to minimizing risk is to make the SVP years associated with the primary and alternative job requirements match. Neither BALCA nor the rest of DOL has suggested criteria other than SVP for measuring substantial equivalence. Accordingly, it appears that for any combination where the SVP years do not match, the greater the inconsistency in SVP years, the greater the risk of denial. The combination of *Globalnet* and subsequent denials of PERM applications by DOL based on the *Globalnet* reasoning have led many attorneys to alter the way their PERM applications are designed.

Retaining the combination of primary and alternative job requirements had certain advantages related to preserving consistency among applications for the same employer and same job title, and for prevailing wage determinations. However, by focusing on the substantial-equivalence issue, it is easy to lose sight of, and fall prey to, the other potential traps discussed below.

**Trap #2: Consistency with H-1B Status**

As mentioned in last month’s article, PERM applications that include job requirements that are not arguably consistent with an H-1B status may trigger significant difficulties at the I-140 stage. This should not be a problem for PERM applications used to support EB-2 I-140s or EB-3 professional I-140s, because the job requirements and beneficiary qualifications in those categories should be inherently consistent with a beneficiary holding H-1B status. The situation that requires special care involves consistency between job requirements stated in a PERM application that is destined to support an EB-3 skilled-worker petition and the job requirements stated in an underlying H-1B petition for the same beneficiary.

The fact pattern identified by the AAO as potentially meriting a finding of fraud and willful misrepresentation involved an EB-3 skilled-worker I-140 for a beneficiary holding H-1B status. The job requirement stated in the certified PERM application submitted with the I-140 was “a high school education and 24 months of experience.” On its face, this appears to be inconsistent with the H-1B petition by the same employer for the apparently same job and same beneficiary, so much so that the AAO was prepared to impose the severe penalty of entering a finding of fraud and willful misrepresentation in the case absent documentation that would adequately explain the discrepancy.

Most practitioners have been aware of the tension between USCIS policies in the EB-2 and EB-3 context and the regulation for H-1Bs (allowing three years of experience to substitute for one year of college) and have been careful to ensure that the job descriptions and requirements are consistent between the PERM applications and H-1B petitions filed for the same beneficiaries. The potential for a finding of fraud or willful misrepresentation should serve as a strong reminder to not lose sight of H-1B consistency when drafting PERM applications.

**Trap #3: Degree-Equivalency Language Too Broad**

The denial of a handful of PERM applications on the ground that DOL was unable to determine the minimum requirements for the position due to their

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6 Id. The BALCA decisions in *Matter of AGMA Systems* and *Matter of Globalnet Management* indicate only that where the primary and alternative job requirements match in terms of SVP years, the two requirements are substantially equivalent, but where they differ substantially (e.g., four SVP years versus fourteen), the two are not substantially equivalent. Whether more modest differences of one or two SVP years would be sufficient to justify a denial remains unknown.


8 C.F.R. §214.5(h)(4)(iii)(D).

9 Reminder: This is not an issue for beneficiaries who are not in H-1B status, e.g., who hold L-1, O-1, or other status that does not require at least a bachelor’s degree.

10 8 C.F.R. §214.5(h)(4)(iii)(D).

11 A casual perusal of recent Sunday newspaper ads reveals more than one example of alternative job requirements that are not consistent with an underlying H-1B status. Hopefully, those ads were not placed as recruitment for PERM applications for beneficiaries who are in H-1B status.
degree-equivalency language creates a quandary: whether to continue using broad language (since the denials appear to be isolated at this time), or to use more specific language in the hope of avoiding a denial on this basis. The tradeoff is that equivalency language that is “clear and specific” is also of limited scope; the broader the language, the more likely it becomes that DOL would deny the PERM application on the ground that it cannot determine the minimum requirements for the job.

For unique, “one-off” positions, using more specific degree-equivalency language appears to be the option that minimizes risk. However, for common job titles involving recruitment for multiple similar positions such as Software Engineer, the choice is not so straightforward. Using different equivalency language for different positions having the same job title and same job description triggers other questions and potential risks: Why is one type of equivalency acceptable for one job while a different equivalency is acceptable for another job having the same title and description? One possible way to avoid that issue is to abandon any generic job description or pre-set mold and instead make the job description unique (which also properly reflects the reality), with a comparably unique set of job requirements.

**Trap #4: Prevailing Wage Considerations**

That prevailing-wage requirements must be met has been a well known axiom of PERM practice; it is included here as a “trap” as a reminder that in drafting options to minimize risks for Trap #1 (substantial equivalence) and Trap #2 (H-1B consistency) above, the options considered should also be evaluated against what prevailing wage would likely result so that any potential prevailing wage problems may be anticipated and resolved at the design stage.12

**Inconsistency in DOL PERM Adjudications**

In evaluating alternative drafting strategies, an important consideration for traps 1, 2, and 3 is the fact that adjudications, particularly at DOL, continue to be highly inconsistent. What is the likelihood of denial of a PERM application where the primary and secondary job requirements differ by one SVP year? For example, consider a primary job requirement of a bachelor’s degree and no experience and an alternative job requirement of three years of college and three years of experience. This combination is arguably consistent with a beneficiary’s underlying H-1B status, but there is an unknown and unquantifiable risk that it could trigger a substantial-equivalence issue at DOL.13 Similar considerations apply to DOL denials based on broad degree-equivalency language and to USCIS evaluations of consistency with a beneficiary’s underlying H-1B status. The anecdotal examples currently in hand are not sufficient to confirm a policy or even a trend as yet.

A Practice Tool

For those who wish to adjust their practices to account for these risks, at the end of this article is a practice tool to help visualize the problem and ensure that all of the potential traps described above are considered when completing PERM applications.

For any given case, one or more of the traps may not be present. For example, consistency with H-1B is not an issue for a beneficiary who is in L-1 or O-1 status; if there is no alternative job requirement, substantial equivalence is not an issue; if the position can be uniquely defined, broad degree-equivalency language may not be necessary; and if the salary associated with the position is equal to or greater than the Level IV wage for the occupation, the prevailing wage is not a constraint. The practice tool merely helps to ensure that each of the possible issues is given proper consideration when drafting a PERM application for a skilled worker.

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12 For example, under the facts of the case in Globalnet, the primary requirement of a bachelor’s degree and two years of experience would likely yield a Level I prevailing wage. If that requirement is omitted in favor of a primary requirement of no degree and fourteen years of experience in order to avoid the substantial-equivalence issue, the likely result would be a Level IV prevailing wage.

13 Recall that BALCA has so far not addressed the impact of a small difference of only one SVP year; in Globalnet the difference was four SVP years for the primary job requirement versus fourteen for the alternative job requirement – a difference of ten SVP years. The current reality is that even PERM applications where the primary requirement is a master’s degree and zero years of experience and the alternative requirement is a bachelor’s degree and five years of experience continue to be approved by DOL, which is not inconsistent with Globalnet, and was the issue that BALCA specifically declined to address in Matter of AGMA Systems. More recently, in Matter of Talent IT Services, 2010-PER-00093 (BALCA Oct. 13, 2010), BALCA found a lack of substantial equivalence where the SVP level was the same between primary and alternative requirements, but the number of SVP years differed by two; BALCA observed that “focusing solely on the SVP level in determining whether the alternative requirements for a position were substantially equivalent to the primary requirements is too imprecise a measure in the present context.” It remains unclear what criteria, if any, DOL is using to deny some PERM applications based on lack of substantial equivalence, while approving others.
For purposes of illustration, we can apply this framework to work through the difficult fact pattern in *Globalnet*, which involved a primary requirement of a bachelor’s degree and two years of experience, and an alternative requirement of fourteen years of experience. One possible drafting solution that avoids the substantial-equivalence issue would go as follows:

- **Substantial equivalence:** Drop the requirement of a bachelor’s degree and two years of experience and define a primary requirement only of X years of post-secondary education and Y years of experience (e.g., three years of college and three or more years of experience); 14
- **Consistency with H-1B:** If the beneficiary is in H-1B status, it is possible to ensure that the values used for X and Y can be consistent with the underlying H-1B;
- **Degree-equivalency language:** Since there is no bachelor’s-degree requirement, no degree-equivalency language is needed;
- **Prevailing wage:** Since the beneficiary in *Globalnet* was clearly a senior person with many years of experience, it is likely that the prevailing wage would not be an issue.

### No Safe Harbor

The inconsistencies between degree-equivalency regulations and policies for H-1B, PERM, and EB-2 and EB-3 I-140 petitions have their greatest impact on PERM petitions that are designed for positions held by individuals who have no degree or whose degree is not in a field relevant to the occupation — i.e., skilled workers. In those situations, the focus should be on identifying the least risky solution, which will likely vary from one application to another depending on the specific facts. Since adjudications remain inconsistent, one possible approach is to ignore one or more of the traps until there is more evidence to demonstrate a significant risk. 15 A second approach might be to assign subjective “weights” to each trap or define a hierarchy, e.g., make H-1B consistency a paramount factor since it is necessary to comply with applicable regulations, 16 and defer consideration of other factors until more information is available. A third approach would be to treat the traps as real and devise the minimally risky solution in each case.

The lack of coordination and consistency among degree-equivalency regulations and policies for H-1B, PERM, and EB-2 and EB-3 I-140 petitions guarantees that there will be cases where one or another of these rules cannot be satisfied.

### Previous articles in the Nth Degree series

15 Bender’s Immigr. Bull. 1601 (Nov. 15, 2010) (Two Emerging Issues Affecting the EB-3 “Safe Harbor”)


15 Bender’s Immigr. Bull. 863 (June 15, 2010) (Crossing the Borderland between DOL and USCIS Requirements)

15 Bender’s Immigr. Bull. 733 (May 15, 2010) (Working with the EDGE Database)


15 Bender’s Immigr. Bull. 423 (Mar. 15, 2010) (Drafting Form 9089 Job Requirements for a Typical EB-3 “Safe Harbor” Case)

15 Bender’s Immigr. Bull. 267 (Feb. 15, 2010) (Interpreting the EDGE Database)

15 Bender’s Immigr. Bull. 75 (Jan. 15, 2010) (The Single Source Degree Rule)

14 Bender’s Immigr. Bull. 1557 (Dec. 15, 2009) (Two AAO Decisions on a Degree in Any Major)


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14 A variation on this idea would be to define the experience requirement in more specific terms (i.e., instead of requiring a certain number of years of general experience in the occupation, “particularize” or focus on specific experience required for the job such as “four years of experience in a management role”). Although this would not clearly be consistent with an underlying H-1B status, it is also not inconsistent and leaves open an argument that the education and experience required to gain the required management experience are implicit in and underlie the requirement of management experience. It may also be possible to identify analogous language for senior technical roles. This approach may better reflect the employer’s true minimum job requirement, as required by DOL.

15 One must then hope that the trap is not sprung in a crucial case.

16 A finding of fraud or willful misrepresentation is also a risk that is not worth taking.


PERM Drafting Issues for the EB-3 Skilled Worker

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Substantial Equivalence? (DOL)
Degree equivalency language too broad? (DOL)
Consistent with H-1B? (USCIS)
Prevailing Wage met? (DOL)

Skilled Worker

REMINDER:
The correct citation form for the BIB is Author, Title, 15 Bender's Immigr. Bull. 1741 (Dec. 15, 2010).