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Challenges In H-1B Adjudications: Credentials Evaluations

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The H-1B visa for "specialty occupation" workers is often the best and only way for a U.S. employer to hire a foreign professional quickly (H-1B lottery aside). To qualify, the job must require at least a bachelor's degree in a specific field or an equivalent combination of education, training and work experience. Adjudicators at the U.S. Citizenship and Immigration Services recently have been creating significant stumbling blocks to proving that a foreign worker has the credentials required for H-1B petition approval. This article describes these obstacles and strategies to overcome them.

Establishing Degree Equivalence

Among recent trends in H-1B adjudications, USCIS, and especially its California Service Center, is making it increasingly hard to prove that a foreign worker has the equivalent of the degree required for classification. To do so, a foreign worker must possess a U.S. bachelor's degree or its equivalent in a specialty related to the offered job. The worker may satisfy this requirement in several ways, which include:

1. Easy: a U.S baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Harder: a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hardest: 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 recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Lately, USCIS has become extremely stringent in reviewing evidence of degree equivalence under the third criterion, i.e., proving educational and experiential combination degree equivalence. To show degree equivalence under this criterion, USCIS regulations say that the worker must have achieved "a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty." The regulations provide several ways to meet this requirement, including:

1) Determination by College Official

The foreign worker can obtain an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit based on an individual's training and/or work experience. Many of the established firms that provide credentials evaluations for immigration purposes have rosters of professors who can provide such evaluations, although employers that file multiple petitions might save time and money by identifying their own expert. Unfortunately, USCIS is challenging equivalency determinations by college officials at an alarming rate. One reason may be that USCIS' own standard reflects an unrealistic notion of how colleges actually work, since many college professor have the authority to recommend, but not grant, college level credit for training and/or experience. To convince USCIS that a foreign worker meets this criterion, it is important to find that needle in a haystack — a professor who has authority to grant credit, not just recommend it.

2) USCIS "3 for 1" Determination

The regulations allow USCIS to find degree equivalence based on the "3 for 1" formula.

This formula requires proof of three years of specialized training and/or work experience for each year of college-level training the foreign worker lacks. This specialized training and/or work experience must be proven by employment verification letters stating that the foreign national beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation [and] that the foreign national beneficiary's experience was gained while working with peers, supervisors or subordinates who have a degree or its equivalent in the specialty occupation. These phrases are critical; even if it seems obvious from the nature and level of the work performed, the employment verification letters should contain these specific words.

In addition to proving three years of experience for every year of missing college education, to obtain a USCIS "3 for 1" determination the H-1B petition must prove that the foreign worker has attained "recognition of expertise" in the specialty by submitting one of five types of evidence. These include: proof of recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or United States association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty occupation in a foreign country; or, achievements that a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although in theory USCIS should accept any one of these five types of supplementary documentation in connection with the "3 for 1" determination, in practice USCIS seems to be insisting on the first type, that is, recognition of expertise by at least two authorities in the same specialty occupation. Further, even when petitioners submit a college official determination instead of asking for a USCIS "3 for 1" determination, USCIS often insists on two evaluations. Therefore, it is best in every case relying on a combination of education and experience to submit two college official evaluations confirming recognition of the foreign national beneficiary's expertise in the specialty occupation, and not to rely solely on USCIS' determination that the foreign worker has combined experiential and education based degree equivalence.

Qualifying the Worker's Field of Study

Another disconcerting trend in H-1B adjudications is USCIS' rigid insistence that the foreign worker's

degree (single source or equivalency based) be in the field of study that the U.S. Department of Labor deems appropriate for the job. As a fundamental H-1B requirement, the job must require a particular degree, and the beneficiary must have that particular degree (or its equivalent). The DOL publishes an Occupational Outlook Handbook that purports to describe every occupation in the United States and its corresponding traditional educational preparation. Unfortunately, although this handbook was never intended for immigration purposes, USCIS has glommed onto it with religious fervor and denies petitions where the foreign worker's degree is not in the exact field described in the DOL's handbook. This is patently unrealistic because employers often accept related degrees. Further, employers may have legitimate business reasons to require a background that is not "traditional" for the occupation.

Several strategies increase the chances of obtaining obtain petition approval when a degree mismatch occurs. One is to obtain a college official equivalency (discussed above) for the degree prescribed by the DOL. Say, for example, that the position is for a market research analyst, which the DOL says traditionally requires a degree in marketing. The foreign worker has a degree in business administration, which USCIS generally does not consider a specialty field. If the worker also has at least three years of progressively responsible experience in marketing, it may be possible to obtain an opinion from an authorized college official verifying that the worker's combined education and experience yields the equivalent of a degree in business administration with a concentration in marketing. Generally, this will be sufficient to convince USCIS that the degree and the offered position are related.

Another strategy is available when it is not possible to establish that the foreign worker possesses the equivalent of the degree that the DOL considers "traditional" for the occupation. In that case, it is important to probe deeper with the petitioning employer to understand why it has offered the position to the foreign worker even though he or she lacks the traditional degree. Often there is indeed some nexus between the degree and the offered position. For example, a financial analyst at a firm that analyzes tech stocks might need a background in technology; by the same logic, an architect charged with managing large projects might need a degree in finance. If the offered position legitimately requires a degree other than that which is "traditional" for the occupation, it is important to map out the specific academic knowledge required for the job, and then show how the foreign worker's education fulfills these requirements.

Options on Petition Denial

If, despite your best efforts, the petition is denied, several options are available although reasonable minds differ on which is the best. Suing USCIS in federal court offers appellate review on a de novo basis, and also is likely the only way to effect positive change on a wide-scale basis. On the other hand, it is costly and time consuming, and outcomes have been mixed.

Some practitioners prefer to file a motion to reopen (to introduce new facts into the record) or to reconsider (to argue that USCIS was wrong on the law) with the Administrative Appeals Office of USCIS. While less costly than federal court litigation, such motions can also be fairly labor-intensive and can take months to be reviewed.

In some cases, the most efficient option may simply be to re-file the petition with an explanation as to why you believe the prior denial was incorrect or an explanation that you are submitting new evidence. While this does not set helpful precedent, it can be a quick fix.

Credentials Evaluations and Green Card Planning

One final consideration relating to credentials evaluations is whether the petitioner ultimately wishes to sponsor the foreign worker for PERM (permanent residency or a "green card"). If so, it is advisable to ensure that any credentials evaluation obtained for H-1B purposes is based on the EDGE (Electronic Database for Global Education) evaluation standard, which USCIS considers the gold standard. Further, it is important to note that the "3 for 1" standard explained above only applies in the context of an H-1B petition, and not in the context of a PERM application. Although there are a host of complex degree equivalency issues that can arise in the PERM context, with limited exception, the EB-2 advanced degree, and EB-3 professional categories require actual foreign degree equivalency and do not recognize equivalence based on education, training and experience.

Unfortunately, USCIS is increasingly restricting H-1B availability to foreign nationals who must rely on degree equivalency and credentials evaluations to prove that they qualify as "specialty occupation" workers. Until the agency falls into line with the Obama administration's mandate to streamline the process for foreign workers and their employers, immigration attorneys must use utmost care and strategic vision when preparing H-1B petitions.

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