Business Necessity for Job Level Four
Gaining Experience on the Job
Business Necessity for Job Level Four

- Drafting of job description requires careful review of:
  - employer’s job description
  - educational and experience requirements
  - offered wage
  - prior employment practices
  - industry standards
  - goals
  - the alien’s qualifications
  - prior petitions and applications for the alien,
  - and the O*Net Database to determine whether the employer’s requirements are normal.
Business Necessity for Job Level Four

- What triggers the requirement to document business necessity?
- 4 occasions would trigger business necessity
- the job requirements are not those normally required for the occupation.
- the job requirements exceed the SVP assigned to the occupation as shown in the O*Net job zones.
- the job requires foreign language
- the job involves a combination of occupations
Business Necessity for Job Level Four

- Although business necessity is triggered by job requirements that are not normal and not the actual job duties, the job requirements must bear reasonable relationship to the job duties.

- Job requirements are normal if they conform to the Department of Labor’s O*Net Database.

- In its first FAQ, Round I, released on March 3, 2005, the DOL stated the Certifying Officers will use as a starting list of requirements in the O*Net Job Summary specific to the SOC/O*NET code and Occupation Title provided by the SWA on the prevailing wage.
Business Necessity for Job Level Four

- important for a practitioner to review occupations, which may share core tasks with the tasks listed by the employer in order to suggest the most appropriate occupation to the SWA.
- This may allow an employer to find an occupation, within a job zone that would be commensurate with the employer’s requirements.
- For example, if an employer has a position, which shares core tasks with Computer Systems Analyst (15–1051.00) (Job Zone 4) and Operations Research Analyst (15–2031.00) (Job Zone 5), the employer may give the SWA enough reasons to classify the job as Operations Research Analyst, which allows for higher educational and experience requirements.
Business Necessity for Job Level Four

- BALCA defined the test for business necessity in *Information Industries, Inc.*, 1988–INA–82 (Feb. 9, 1989)(en banc). An employer must demonstrate that the job duties and requirements
- (i) bear a reasonable relationship to the occupation in the context of the employer’s business and are
- (ii) essential to perform the job in a reasonable manner.
- BALCA held that under this standard an employer cannot obtain alien labor certification by showing that the job requirements merely “tend to contribute to or enhance the efficiency and quality of the business,” nor does an employer have to establish dire financial consequences if the job is not filled or is filled by a U.S. worker who is not fully qualified.
Business Necessity for Job Level Four

- important to gather information not only about the particular job, but for the employer’s business as well,
- the requirements are both, reasonable in the context of this employer’s business and
- essential to perform the job duties in a reasonable manner for this particular business.
- If an employer’s requirements are not reasonable in the context of the employer’s business and are not essential to performing in a reasonable manner the job duties would not satisfy the test of business necessity.
- *Information Industry* gives an example of a job requirement for a lawyer to know how to play golf.
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- Start with the job description
- Include enough information to allow the CO to decide based on the job description alone that the job requirements are normal.
- Employer must document business necessity
- File the PERM after all business necessity documentation is in the audit file
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- What is not sufficient?
- Lack of documentation
- Lack of independent documentation – experts, risk managers, clients, etc.
- Employer’s mere assertions are not enough if the employer can obtain support documentation without problem. For example, talking about a contract but not producing the contract
- Employer’s assertions must be specific
- Employer’s credibility and consistency

In *Matter of Gencorp*, 87 INA 659 (Jan. 13, 1988), BALCA stated that written assertions which are “reasonably specific and indicate their sources or bases shall be considered documentation.”

In other words, the employer must be specific and identify the sources and bases for these assertions in the context of its business
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- What documents to use:
  - job postings from similar organizations;
  - Affidavits from supervisors or project managers directly responsible for the positions;
  - Letters from clients seeking specific educational credentials or experience;
  - Contracts with clients that specify certain experience and educational credentials;
  - Accreditation requirements;
  - Evidence of prior hiring practices;
  - Letters from professional organizations in the field familiar with the occupation, stating that the education and experience is justified for the particular job;
  - Expert opinions familiar with the industry;
  - Letters from academic institutions attesting that a specific level of knowledge can only be attained by a certain degree;
  - Letters from Risk Managers or insurance companies assessing risk if certain requirements are not present;
  - Letters from venture capitalists, that require certain credentials in order to invest in the business, and others.
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- Drafting the job to show that the requirements are normal – offensively:
- Describe and incorporate in the job description supervisory duties and the educational credentials of people supervised.
- *Matter of The Cherokee Group, 91INA– 280 (1992)*, BALCA held that where the employer is seeking a labor certification for the position of Chief Accountant “of a sizeable corporation, with supervisory duties over six other accountants, we conclude that Employer's requirement of a Master's degree in accounting is normal for the job.”
- *Matter of Key Management Group, Inc., 94 INA 00590 (1996)*, BALCA found that the requirements for a Chief Computer Programmer are justified. BALCA noted that the CO incorrectly determined that “the chief programmer should not be required to have a higher skill knowledge than the 20 programmers under his supervision.”
Business Necessity for Job Level Four

- Describe and incorporate in the job description the employer’s size and the position’s complexity.

- Matter of Verifone, Inc. 91 INA 98 (1992) the employer filed a labor certification for a Market & Product Development and listed the following duties: “A Master's Degree, or equivalent, in Business Administration, and 7 years of experience in the job offered, or 7 years experience in International Marketing experience with computer, or electronic goods.”. The application included other special requirements: “Experience in directing marketing personnel and engineers, performing marketing research, directing marketing strategies, preparing budgets, and providing technical consultation; and knowledge of electronic markets in Asia, Europe, and the U.S., data processing, an information systems, operations research, accounting, and International Marketing/finance sought.”

- BALCA concluded that the employer has met its burden because “the position in this case is a Vice President for Marketing and Product Development in an electronic goods firm employing over 800 persons, with gross annual sales in excess of $120 million. The Vice President will supervise 280 professional employees, many of whom have Bachelor's Degrees, and commands a salary of $120,000 per year.”
Business Necessity for Job Level Four

- Describe and incorporate in the job description customer’s expectations to maintain the employer’s credibility.

  *Matter of Verifone, Inc. 91 INA 98 (1992)*, BALCA accepted as business necessity the expectations of potential clients to protect the employer’s credibility.

- BALCA found the employer’s requirements justified where the employer has stated that “potential clients expect the Vice President to be well-educated and have a long history of prior experience; that to hire a person with fewer qualifications would cost the company credibility, confidence of clients, and loss of business.”
Business Necessity for Job Level Four

- Describe and incorporate in the job description clients’ specifications.
- *Matter of Princeton Information, Ltd.* 91 INA 116 (1992), the CO found that the requirements for a Master’s Degree for a Systems Consultant was unduly restrictive.
- The employer submitted a letter from its client AT&T that stated that “nearly all of the System Consultants employed by us possess Master's degrees as opposed to Bachelor's degrees. In our experience, an individual with only a Bachelor's degree will not be able to perform the above-mentioned responsibilities which, in turn, will adversely affect our business.”
- BALCA determined that Master’s degree is justified on business necessity because “the client is insisting that a person with such a degree be furnished for the particular consultation position involved in the instant case. . . The context of the Employer's business is that it furnishes consultants to its clients in accordance with the client's specifications. Consequently the Master's degree requirement bears a reasonable relationship to such business as it is being required by the client. It follows that it is essential to the performance of the consulting position that the employee have the required degree.”
Business Necessity for Job Level Four

- Describe and incorporate in the job description contract requirements. BALCA has found that an employer has justified requirements for specific coursework and GPA (as measurement of knowledge) where a contract with its most important customer requires it.

- In *Matter of Waste Documentation and Control, Inc*, 89 INA 229 (1990), the employer produced documentation that similar Research and Development firms require a G.P.A. of 3.5 and produced a letter from its client that reported that experience and expertise in Expert Systems was essential to continuing one of its most important contracts. The letter stated, in part “The development of software systems for Fluor Daniel requires experience with artificial intelligence Expert Systems... Waste Documentation and Control, Inc. must maintain this experience in order to be able to continue to work under our existing technical services contract. . . .”
Business Necessity for Job Level Four

- Describe and incorporate in the job description prior employment practices and accreditation requirements.

- In *Matter of Adelphi Laboratory, Inc.*, 93 INA 285 (1994), the employer sought a labor certification for the position of Clinical Laboratory Technologist and required a Bachelor of Science degree in medical technology or biochemistry and 2 years experience in the job offered.

- The employer also listed special requirements as the ability to perform diagnostic immunology and diagnostic immunohematology tests. The CO denied certification because the special requirements were unduly restrictive.

- However, BALCA reversed, finding that the employer has provided sufficient documentation that it has consistently required the ability to perform immunology and immunohematology tests in all Medical Technologists it has previously hired.

- In addition, BALCA found that the requirements are based on business necessity because the ability to perform these tests were necessary in order for the employer to maintain its ability to service its clients, as a diagnostic medical service, and failure to list these requirements would jeopardize the Employer's continued accreditation by the state of New York.
Gaining Experience on the Job

- Definition of employer – tax ID number
- Gained experience with the employer as an employee or a contractor
- The employer trained the alien but refuses to train a US worker
- Allowed only if the employer can prove that
  - The alien gained the experience while working for the employer in a position not substantially comparable to the position for which certification is being sought or
  - It is no longer feasible to train a worker to qualify for the position
Gaining Experience on the Job

- Substantially comparable job or position is defined as one where the same job duties are performed more than 50% of the time
- Bright line test
- Provide position description
- Percentage of time spent on different duties
- Organizational charts
- Cannot use education paid for by employer
Gaining Experience on the Job

- Do not require prior experience in the job offered H–6
- Requirement for prior experience must be listed in H–10 for alternate occupation
Gaining Experience on the Job

- Employer must show either
- It does not have capacity to train
- Or that it would be unfeasible to train

- No longer the capacity to train
  - Character of the employer has changed – volume increase, expansion, decrease
  - Mere statement that it is not feasible is not enough
  - Inefficiency is not enough
  - Retirement or downsizing is not enough unless the employer can show that the remaining staff cannot train US workers
Gaining Experience on the Job

- Employer must be able to quantify its business
- Business and hiring practices
- Identify training practices
- Infeasibility to train is even harder to meet
Questions?

For any questions regarding this presentation, please contact

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