THE IMPACT OF PERM ON EXPERIENCE GAINED ON THE JOB AND ALTERNATIVE EXPERIENCE

By Nathan A. Waxman

Ascertaining what an employer’s “actual” minimum experience, or indeed, education, requirement for a position for which labor certification is contemplated, is often a challenging task. Two frustrating and at times perplexing issues complicate the advocacy work of drafting permissible experience requirements:

1) Since 1977, the legacy pre-PERM labor certification regulations have, with limited exception precluded an employer from requiring experience or training that the employee, the labor certification beneficiary, gained with the sponsoring employer.

2) What range of alternative experience, whether gained with the employer or acquired elsewhere, would be permissible? While pre-PERM regulations neither explicitly recognized, nor barred, alternative experience, conflicting lines of BALCA case law recognized that alternative experience requirements not explicitly and unreasonably tailored to the alien employee’s profile may be acceptable, if “unrestrictive.”

Ultimately, the permissible exceptions to the gained experience ban and the determination of the acceptable range of alternative experience within which both the alien employee and the hypothetical minimally qualified U.S. applicant could demonstrate eligibility constitute two sides to the same coin: Has the employer described a position for which the alien is actually qualified, and are there alternative job requirements not deemed to be tailored to the alien beneficiary’s particular experience and educational profile?

We shall briefly review the pre-PERM state of the law regarding experience gained with the same employer and briefly examine the pre-PERM alternative experience doctrine. Moreover we will contrast both with the seemingly simplified PERM provisions. While speculating as to the likely impact of PERM on typical legacy labor certification scenarios, prognostication as to the extent to which the considerable corpus of BALCA case law will continue to provide guidance to the Bar remains speculative.

I. The Gained Experience Bar and its Exceptions: Then and Now:

DOL has traditionally justified its ban on an employer’s imposition of experience requirements in labor certification on behalf of employees who gained that experience with their respective employer (“gained experience”) by invoking its statutory mandate under INA 212(a)(5)(A) to protect U.S. workers, who conceivably have been excluded from an opportunity to obtain that same experience that has been provided to the alien beneficiary.
The gained experience bar has provided Certifying Officers (COs) and BALCA with several decades of challenging scenarios regarding the range of permissible exception from its application, particularly in light of the text of the pre-PERM regulation, 20 CFR 656.21(b)(5), which has delineated the reach of the gained experience bar. Now superceded on March 28, 2005 by a significantly revised PERM successor regulation, the probable impact of PERM’s reformulation of the “traditional” ban on gained experience is in order. 20 CFR 656.21(b)(5) states as follows:

“The employer shall document that its requirements for the job opportunity, as described, represents the employer’s actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience that that required by the employer’s job offer. (emphases added).”

BALCA has developed an extensive, and not infrequently entertaining, case law directed towards delineation of the application of two exceptions to the bar on gained experience: dissimilarity of job opportunity and inability to train.

BALCA has also attacked the common law notion that separate corporate entities with which the experience was gained (generally a branch, parent, subsidiary or predecessor in interest of the employer) were separate and distinct entities from the employer for purposes of attributing the source of the employee’s experience. We shall consider the evolution of BALCA case law in this third basis for potentially exempting otherwise ostensibly gained experience from the regulatory bar.

We shall review the foregoing three exceptions to the gained experience bar in their legacy (pre-PERM) manifestation and will speculate as to how or whether the simplified and modified PERM reformulation of these mechanisms will play out.

The Dissimilarity Doctrine

The principal regulatory exception to the gained experience bar flows from the regulation’s limitation of the bar to experience or training provided by the employer in jobs “similar to that involved in the job opportunity.” Pre-PERM BALCA decisions had expended considerable effort in applying this rather transparent regulatory language. The key *en banc* precedent decision addressing the dissimilarity doctrine is unquestionably *Delitizer Corp. of Newton*. 238

*Delitzer* constituted a veritable Horatio Alger story chronicling the ascent of an industrious delicatessen clerk from lowly Jewish specialty cook to the lofty position of specialty head chef, masterfully assembling corporate platters of sumptuously displayed and elegantly garnished overstuffed sandwiches. BALCA sustained the Newton Massachusetts delicatessen’s appeal in *Delitzer*, recognizing the presence of sufficient

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238 88-INA-482, 1990 (*en banc*).
dissimilarity between the related occupation of specialty cook, apparently the beneficiary’s first incursion into the gustatory arts, and the substantially more responsible head chef position for which certification was requested. In so doing, BALCA established a qualitative multi-factorial test for determining whether qualifying experience gained with the employer is sufficiently dissimilar from experience in the sponsored position so as circumvent the regulatory bar.

The factors enumerated in Delitizer included the relative scope of the respective job-duties, the presence or absence of supervisory responsibility, the comparative position of the respective positions in the employer’s job hierarchy, whether promotion from the former was automatic or discretionary, whether the sponsored position was newly created, the respective salaries, and the percentage of time spent on the component duties of each job. In Delitizer’s wake, a profusion of sufficiently dissimilar and insufficiently distinguishable scenarios have challenged BALCA panels.

Many of the early food service decisions were inevitably doomed to failure, e.g., assistant cook/specialty cook, Hip Wo, Inc.239 where the distinction in duties related merely to the specialty cook doing final preparation, and Valley Ranch Barbecue240 where the distinction between assistant cook and cook was found not to involve a significant divergence in duties.

Cases involving professional positions in accounting, engineering and law have been far more instructive in illuminating the applicability of the Delitizer doctrine. Thus, e.g., different levels of skill, responsibility, experience and pay between machine operator and machine operator trainee sufficed in E&C Precision Fabricating, Inc.241 Similarly, in Deloitte & Touche242 the allegedly dramatic increase in complexity and compensation level vis-à-vis a junior versus a senior consulting position, combined with the presence of managerial duties in the latter and its absence in the former, won the day on appeal. A similar result obtained in Coopers & Lybrand243 where the extent to which promotion to senior accounting positions was demonstrated to be discretionary and subject to ostensibly savage competition, thereby enabling the use of alternative experience in the junior position.

Two important observations made by the Board in Delitizer should be recalled as we transition from BALCA’s qualitative multifactorial analysis to the more quantitative/percentage-of-duties model codified in the PERM final rulemaking. Delitzer rejects a simplistic reliance upon the use of DOT (now superceded by O*NET) occupational descriptions and job duties alone as differentia sufficient to enable use of gained experience. Moreover, Delitzer notes in dictum that supervisory responsibility per se, particularly where relatively de minimus, would not suffice to establish dissimilarity.

239 89-IN-24 (1990) (en banc).
241 89-IN-249 (1991) (en banc).
The proposed PERM regulation sought to unequivocally abolish any possibility of an employer requiring any experience gained by the alien with the employer, including with overseas related entities.

Moreover, the Notice to Proposed Rulemaking (NPRM) would have included within the definition of “employee” the mysterious hybrid category “contract employee,” a previously unencountered and conspicuously undefined concept, presumably distinct from independent contractor. Whether DOL intended this term to denote a self-employed individual, an employee of a contracting firm delegating personnel to the employer or simply an employee hired on a brief, contractually limited period, remains unclear.

DOL’s stated justification for this proposed broad-brush elimination of acquired experience was its apparent conviction that employers were willing to engage in any subterfuge to secure permanent residence for their presumably underpaid employees, to the obvious detriment of a beleaguered U.S. workforce. While the usual suspects, e.g. FAIR and the AFL-CIO, supported the NPRM on the exceptionless elimination of gained experience, high tech companies, AILA and a vast majority of other parties responding to the proposed regulation succeeded in persuading DOL that elimination of gained experience would be counterproductive in protecting U.S. workers. Commentors emphasized the potentially detrimental effect the proposed rulemaking would have on U.S. businesses by impeding expansion into new activities by precluding employers from transferring employees to emerging positions, particularly within the technology sector, and hastening the already accelerating export of research and development activities by multinational corporations abroad.

The final PERM regulation, to DOL’s credit, recognizes that if the jobs are truly distinct, U.S. workers are not adversely affected by being denied training opportunities provided to the alien, as that training was in a different job. However, the PERM regulations significantly modified the Delitizer totality of circumstances test devised by BALCA 15 years ago. Delitizer provided a relatively easily applied methodology to determine the extent to which gained experience was permissible in a dissimilar position, or impermissible in a position too close for comfort.

As previously discussed, Delitizer and the extensive BALCA legacy in its wake have provided employers with a yardstick for differentiating jobs predicated on a diversity of internal factors, involving job duties as well as external factors such as compensation level, degree of discretionary authority, the relative positions in the employer’s hierarchy, and prior hiring and promotion patterns.

The final PERM regulations radically alter this landscape, substituting a test of “substantial comparability”. This test is based on whether the duties described in the application involve a greater than 50% convergence of job duties. The 50% is measured by actual hours expended in the job duties described in the application as compared with hours expended in the ostensibly divergent position in which the employee acquired the experience or training.
What impact might PERM have on the Delitizer scenarios outlined above? While the alien beneficiary in Delitizer himself might have met the PERM divergence of duties test, it remains to be seen how accounting and consulting firm associates who are promoted from mundane to more complex information technology, accounting or managerial consulting duties will fare under a test that would exclude such qualitative considerations as seniority, exercise of discretion and infrequency of upward mobility. Whether the previously cited Coopers & Lybrand\textsuperscript{244} Deloitte & Touche\textsuperscript{245} and similar cases will have continuing viability under a PERM analysis remains an open question. It is conceivable, however, that accountants promoted to auditors and paralegals to attorneys will be able to convert Delitizer quality of activity criteria into actual differentiable duties. For example senior accountants may be demonstrated to direct, review and scrutinize the work of subordinates, while staff accountants simply prepare tax returns. Similarly, an immigration paralegal could be described as engaging primarily in the drafting of Labor Certifications and I-129 petitions, but upon graduating from law school and achieving licensure, could be characterized as an associate attorney, performing client counseling, legal review and analysis duties.

Finally, practitioners may find helpful the PERM regulation’s inclusion of “position descriptions” in its enumeration of the suggested evidentiary bases for documenting (should the need arise, presumably as would be required in the event of an audit) the absence of substantial comparability. Accordingly, should the need arise, i.e., in the event of an audit, an employer should be able to convert Delitizer criteria into sufficient indicia of job divergence through well-crafted job descriptions. Finally, it should be noted that the final PERM regulations, like the NPRM, apply the ban on gained experience to “contract employees as well as employees. As was the case in the NPRM, the term “contract employee” remains undefined. However, it seems safe to assume that a contract employee is neither an independent contractor who would be essentially self-employed, nor an employee of a contracting company delegated to the employer’s work sit.

Infeasibility to Train

Although codified in the legacy regulations at 20 CFR 656.21(b)(5) as a permissible exception to the regulatory bar on gained experience, infeasibility to train tends to be an unfeasible alternative to the Delitzer differentiation approach. An application of the equitable doctrines of impossibility and/or changed circumstances, infeasibility to train has proven successful in some labor certifications at the CO level, particularly in live-in housekeeper or nanny scenarios where a parent had been at home when the employee was hired, and thereby was able to train the beneficiary, but subsequently returned to work and was unable to train a successor.

BALCA, however, has rarely permitted an infeasibility justification to the gained experience bar, and has imposed upon it an enhanced scrutiny standard.\textsuperscript{246} The

\textsuperscript{244} Supra, Coopers and Lybrand.
\textsuperscript{245} Supra, Deloitte and Touche
\textsuperscript{246} See 58th Street Restaurant Corp. (90 INA 58, 1991).
exceptional BALCA decision sustaining an appeal under such a theory is *Avicom International*\textsuperscript{247} where change in ownership and diminution of business, with accompanying reduction in staff, rendered the alien beneficiary the only remaining electrical engineer, establishing the employer’s burden of proof on the allegedly nearby irreparable harm that would be caused by the hiring of another worker lacking the experience that admittedly the alien had gained in the job.

Not surprisingly, the NPRM sought to eliminate this rarely successful exception to the gained experience bar. Nonetheless, the final PERM rule, preserved it intact noting approvingly that infeasibility is rarely invoked and accordingly that its retention, in impeccable bureaucratese, “will have little programmatic or operational impact.” Perhaps, ironically, this previously recondite exception will witness an unanticipated efflorescence in the brave new world of PERM practice.

**Definition of Employer: PERM Goes Global**

The traditional pre-PERM third and final means of attempting exemption from the gained experience bar was the contention that the experience was, in fact, gained with a different business entity; generally a predecessor organization, parent, branch, subsidiary, venture partner or other closely or remotely related business organization.

An early BALCA attempt to analyze this seemingly transparent issue was *Haden, Inc.*\textsuperscript{248} Regrettably, Haden conflated two entirely separate issues, whether requiring proprietary knowledge gained with the employer’s U.K. affiliate prima facie excludes U.S. workers, thereby precluding the existence of a bona-fide job opportunity, in violation of Section 656.29(c)(8), and whether any experience acquired with an overseas affiliate would be subject to the gained experience bar.

While *Haden* was remanded to the CO, it was ultimately inconclusive as to whether experience gained overseas might, if otherwise available in the U.S., be exempted from the gained experience bar. A series of BALCA decisions continued to undermine the autonomous affiliated company theory. Thus, *Inmos Corp.*\textsuperscript{249} held that for gained experience purposes an overseas parent company was not separate from its U.S. affiliate. Multiple U.S. companies were held to be the same when owned by the same individuals in *Salad Bowl Restaurant*\textsuperscript{250} and otherwise distinct companies were considered to constitute constructively the same employer when they had engaged in a reciprocal pattern of exchanging employees, *Obro Ltd.*\textsuperscript{251}

BALCA ultimately recognized, at least in the context of overseas-related entities, both the integrity of the corporate veil and the “increased globalization of the marketplace and the realities such a change in business operations present”. In *Rieter*

\textsuperscript{247} 90-INA-284 (1991).
\textsuperscript{248} 88-INA-245 (1988).
\textsuperscript{249} 88-INA-136 (1990).
\textsuperscript{250} 90-INA-200 (1991).
\textsuperscript{251} 90-INA-51 (1991).
Corp, BALCA remanded to the C.O. to determine whether experience gained with a foreign parent was gained at a distinct, operationally independent business entity. If such, BALCA would recognize an exemption from the gained experience bar.

In keeping with its generally disapproving spirit, the NPRM sought to abrogate Rieter, and unambiguously disallow experience gained with any domestic or international related, predecessor or successor company. This broad-brush approach was resoundingly condemned by all but the staunchest opponents of business immigration as economically counter-productive since it, like the ban on experience gained in different positions, was only likely to deter multinationals from expanding into or within the U.S. Moreover, critics of the proposed elimination urged that it was as likely to accelerate the already troubling outsourcing and migration abroad of research, development and production by multinationals. Regrettably, this trend is already being fueled and intensified by the unrealistic statutory limitation on H-1 availability.

Conspicuously to its credit, DOL acceded to the “legitimate interest of the U.S. business community,” as well as to the time-honored corporate veil doctrine in the final PERM rulemaking. Accordingly, the final rule amended section 656.17(i)(5)(i) to provide that an employer is an entity with the same Federal Employer Identification Number, provided it meets the revised regulatory definition of employer (e.g., not an agent for independent contractors) at revised Section 656.3. Conversely, an entity with a different FEIN or an overseas corporation without an FEIN, will be deemed a separate and distinct employer under PERM.

What will the impact of PERM’s extraordinary recognition of business reality be? Will separate U.S. subsidiaries (Cf, e.g. Buick and Chevrolet) of the same U.S. corporate group constitute distinct employers, thereby abrogating the “shell game” cases cited previously, such as Salad Bowl Restaurant, where two small closely held businesses were essentially twin branches of the same restaurant? Only time will tell. However, one commonly encountered scenario under the legacy regulations should definitely be acceptable; a contracting firm providing on-site information technology services on behalf of a third party will clearly be deemed a distinct employer for gained experience purposes.

Finally, it is presumed that the distinctness of business entities for gained experience purposes will not undermine the established principle that a new labor certification may be transferred to a successor employer if the original job opportunity, including proffered wage, duties and location of employment, remains the same, thereby continuing the existence of a bone fide job opportunity. See BALCA decisions in International Contractors, Inc and Law Offices of Jean-Pierre Kannor.

II. Alternative Experience: From BALCA to PERM

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253 89-IN-278 (1998).
Alternative experience constitutes the inevitable, and indispensable, complement to any analysis of experience gained on the job. What limitations does DOL place upon an employer’s alternative experience requirement?

Clearly an employer must offer one or several alternative experience and or education requirements in order to establish that an alien beneficiary lacking the job offer experience is qualified to perform the very position for which an unavailability of U.S. worker’s is alleged. Moreover, ethical and conscientious employers frequently seek to state acceptable alternative requirements on their applications for labor certification even in instances where the employee beneficiary qualifies under the primary job offered requirement, in order to broaden the minimum requirements and fully uphold their obligation to state actual minimum requirements. An additional and particularly compelling rationale for employer imposition of alternative requirements, even in instances of beneficiary eligibility under the primary set of requirements, is the need to reconcile the “actual minimum requirements” for the application at hand with prior applications submitted by the same employer for similar positions.

Indeed, in recent years, many petitioners whose business operations have necessitated heavy reliance upon labor certification, such as computer contractors, received assessment notices from SWAs and/or NOFs from COs, questioning the accuracy or veracity of stated requirements which appear inconsistent or incompatible with those indicated on prior applications. The automated infrastructure of PERM will doubtless intensify this trend, obligating employers to enumerate all previously indicated alternatives to primary job requirements in order to withstand a possible audit alleging that the employer had tailored the current or prior applications to the respective employee profiles, thereby contravening the employer’s regulatory obligation to state its actual minimum requirements for the position.

Moreover, as was forcefully urged in the AILA comment in response to the proposed abolition of alternative experience requirements, so doing would significantly limit the U.S. technology sector’s expansion into new and emerging technologies, in which few or any U.S. workers have primary qualifying experience. Accordingly, a brief review of BALCA’s distressingly inconsistent pronouncements on the permisibility of alternative requirements and a final pre-PERM prognostication on the place of alternative experience requirements in the brave new world of PERM is in order.

Early BALCA decisions relating to alternative job requirements addressed the concern of COs that such requirements violated the regulation at 20 CFR 656.21(b)(2), prohibiting requirements deemed to be unduly restrictive. BALCA’s skepticism focused upon two interrelated objections; first that such requirements were unduly tailored to the particularized resumes of the respective candidates for labor certification, and additionally, that the SVP (specific vocational preparation time) for the related position, e.g. dentist, often considerably exceeded the SVP for the primary position, e.g. dental hygienist.
In *Best Luggage*, a BALCA panel sanctioned an alternative education and experience requirement, albeit conceivably one that exceeded the SVP time deemed appropriate for the primary job requirements, holding the related requirement to be expansive, as opening the job opportunity to a larger potential set of U.S. candidates. Accordingly, *Best Luggage* allowed the use of alternative requirements, even those exceeding the SVP of the job offered, if they were reasonably related to the primary position’s job duties and did not appear to be transparently tailored to the alien employee’s prior experience.

However, while *Best Luggage* sanctioned the specification of reasonably relevant alternative requirements, several BALCA panels rejected alternative requirements in relatively unskilled positions carrying decidedly lower vocational preparation times than would be permitted for the primary position. Thus in *Inexmezzo Inc.* and *Tres Amigos Mexican Restaurant*, related experience requirements as kitchen helpers were deemed insufficiently related to specialty cook positions as, according to the now obsolete DOT, kitchen helper is primarily a cleaning position, not a food preparation position. Typically cases that went before BALCA involved primary requirements establishing qualifying experience for skilled worker categories as opposed to positions for unskilled workers.

COs and BALCA panels, in the wake of the *Best Luggage*, eliminated the possibility of alternative requirements tailored to the profile of the alien beneficiary. In a trilogy of *en banc* decisions rendered in 1998, *Francis Kellogg*, *The Winner’s Circle*, and *North Central Organized Regionally for Total Health*, BALCA established a two-part test for assessing the appropriateness of alternative requirements:

1) The alternative experience requirement must be “substantially equivalent” to the experience required in the job offered, and

2) Because the employer has offered the position to an alien who qualifies for the job offer through related experience, the employer must similarly offer the position to U.S. workers possessing other permutations of education, training or experience sufficient to adequately perform the job.

We shall briefly review these two distinct components of *Kellogg* before considering their incorporation into a new PERM standard.

**Substantial Equivalence**

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257 94-INA-30 (1995)
258 94-INA-465.
259 94-INA-544.
260 95-INA-(1998) (*en banc*).
An applicant qualifying under alternative requirements must be objectively capable of performing the job duties in a reasonable manner. BALCA characterized this standard as a test of whether the alternative requirements were “substantially equivalent” to the primary requirements. This term, substantial equivalence, had not previously appeared in BALCA case law or in the labor certification regulations, and is presumably distinct from the suspiciously similar phrases like “substantially similar” and “substantially comparable,” which are present in pre-PERM Section 656.40 (b), the regulatory mechanism for determining the prevailing wage appropriate to a job described in a labor certification application.

Kellogg attempts elucidation of the previously unannounced concept of substantial equivalence by offering a concrete paradigm:

“For examples, where an employer offers a job as a computer programmer, either a degree in computer science or mathematics, or even programming experience without a degree might be considered as equivalent, and thus equally acceptable in a given case. But, these requirements 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”

The meaning of substantial equivalence is better understood by a brief review of the requirements specified by the respective employers in Kellogg and its two en banc companion cases. In Kellogg, the primary position was for a live-in cook, with a two year experience requirement squarely in line with the SVP, and the related experience requirement was two years as a live in housekeeper, a position for which the SVP was significantly less than two years. In Winner’s Circle, the primary requirement was two years as an Italian cuisine specialty cook, but the alternative two years in the related occupation of salad maker, which held a lower SVP than cook. In North Central, the primary requirement was a degree and one year’s experience in nutrition, and the alternative was a degree in medicine and one year in “a medical occupation.” While the North Central beneficiary, in common with the beneficiaries in Kellogg and Winner’s Circle, lacked experience in the primary position, it can hardly be said that a physician qualified for an unlicensed nutritionist position with “lesser qualification” that does a nutritionist.

The common denominator uniting the three en banc decisions consolidated in Kellogg is that, in BALCA’s review, each of the alien beneficiaries qualified for the primary employment through alternative education or experience requirements contrived by their respective employers to mirror their backgrounds and to exclude U.S. workers. In the Kellogg trilogy, BALCA renewed the holding of the Best Luggage panel that alternative job requirements would be deemed acceptable because they were expansive, ostensibly opening job opportunities for U.S. workers and therefore not violating the ban on unduly restrictive requirements under the legacy 20 CFR 656.21 (b)(2).

Kellogg transformed BALCA’s scrutiny of related experience requirements from the holding in Best Luggage that such requirements were acceptable if the primary
requirements were unrestrictive, into an inquiry as to whether the alternative requirements had been tailored to the alien in a “lesser” qualification to gain a higher immigrant visa category. Kellogg found alternative requirements involving less training or experience than those applicable to the job opportunity to be in violation of Section 656.21(b)(5).

Kellogg’s first leg involves the measurement of related experience by a standard of equivalence involving two separate issues. First, are the primary and alternative requirements substantially equivalent? Here the inquiry focuses upon whether one is a mere unskilled position and the other a skilled position carrying a considerably higher SVP. The higher SVP permits the alien to qualify for a higher preference category. Second, does the beneficiary’s satisfaction of the alternative requirement qualify him for reasonable performance of the duties of the position for which certification is requested?

BALCA’s obvious concern that employers have tailored alternative requirements to qualify employees for labor certification in positions, for which they in reality lack the qualifying experience, stems from its belief that the labor certification process has been abused by U.S. employers. The Kellogg trilogy placed an additional burden upon employers whose employees sought labor certification through satisfaction of alternative requirements: the employer must rebut the presumption that it has tailored the alternative requirements to the alien by offering the position to U.S. candidates possessing “any suitable combination of education, training or experience”.

We shall now examine this second prong of the Kellogg analysis of the permissibility of alternative requirements prior to examining the indelible shadow it has cost on the final PERM rulemaking.

**Kellogg’s Second Prong: Offering the Position to Applicants with Suitable Combinations of Education, Training or Experience.**

Kellogg’s rejection of the “permissive alternative” analysis in Best Luggage henceforth required employer to predict a range of suitable combinations of alternative education, training or experience that might be deemed appropriate from the perspective of the CO. Indeed, a landmark BALCA decision 6 years before Kellogg had determined that rejection of U.S. workers who do not meet an employer’s primary or alternative job requirements is in fact lawful, if they did not meet the employer’s explicit requirements as specified on the application for labor certification, with the important qualification that these requirements not be deemed “unduly restrictive”. Bronx Medical and Dental Clinic.261 Bronx Medical, however, was not a BALCA decision involving alternative requirements, as the CO had not challenged the employer’s specified related experience requirement on restrictiveness or actual minimum requirements grounds. On the contrary, Bronx Medical interpreted the CO’s responsibility to determine whether U.S. applicants might be qualified based on alternative qualifications. Under pre-PERM practice, this requirement is generally applied in the context of supervised recruitment, although rarely

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261 90-INA-479 (1992) (en banc).
invoked by COs within the RIR context. Accordingly, the exact interaction between *Bronx Medical* and *Kellogg*, and indeed the extent to which *Kellogg* virtually overrules *Bronx Medical*, has not, as yet been understood, as the vast majority of post *Kellogg* cases have circumvented supervised recruitment.

What, then, has been the impact of *Kellogg* on the waning years of the pre-PERM legacy labor certification process?

Perhaps surprisingly, and apparently under the direction of ETA headquarters, CO’s have generally trod lightly in applying *Kellogg’s* substantial equivalency and alternative requirements wings. In general COs have limited their application of *Kellogg’s* substantial equivalence test to cases in which the employer is conspicuously attempting to obtain EB3 classification for an unskilled worker, e.g. a child monitor with alternative requirement of domestic worker or a specialty chef with the related experience requirement of salad maker.

While COs have apparently restricted their application of substantial equivalence to obvious cases of boot-strapping, BALCA has applied the substantial equivalency test in at least one case where no ulterior motive was present. Thus in *Maryland Parkway Building*, the employer included a foreign CPA equivalency as an alternative requirement for a U.S. accounting position. Holding that the employer had not established that the alien’s foreign certification in accounting was equivalent to licensure as a CPA in the US, a panel found that the alternative requirement was restrictive. In this far from exemplary decision, the BALCA panel reasoned that a foreign certification in accounting was not a normal job requirement for such a position in the U.S. and also, citing *Kellogg*, that a foreign CPA degree was not substantially equivalent to U.S. certification in accounting.

**Alternative Requirements under PERM Kellogg Codified**

While *Kellogg* has been inconsistently applied by the COs and by BALCA panels, non restrictive alternative requirements have generally passed muster in the six years since *Kellogg*. However, the proposed PERM rulemaking, sought to eliminate alternative experience or education requirements by disallowing any such requirements, *in toto*, “other than those relating to the months or years [if education or experience] in the occupation.”[emphasis added]

The NPRM unambiguously grounded its proposed elimination of alternative requirements in its explicit contention that “in virtually all instances” related experience or alternative education or training requirements were imposed by employers seeking skilled workers on behalf of unskilled employees who were, in fact, employed in positions requiring less than two years of training or experience.

Not surprisingly, DOL received considerable opposition to its proposed elimination of alternative requirements. AILA, universities and a diversity of high-tech
companies succeeded in convincing DOL that the elimination of alternative requirements would have furthered off-shoring of emerging high tech jobs. Furthermore, elimination would have impaired the accessibility of employment opportunities in newly created positions to U.S. workers by discouraging employers from recruiting for multiple opening positions for which bona-fide opportunities for U.S. workers coexisted with intended sponsorship of alien workers.

In response to the considerable weight of persuasive testimony condemning the proposed elimination of alternative requirements, DOL elected to adopt what it characterized in the preamble to the final regulations as “a reasonable solution” by codifying Kellogg in PERM:

“(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought: and (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer’s alternative requirements, certification will be denied unless the application states that any suitable combination of education, training or experience is acceptable.”

Evidently the substantial equivalency doctrine is taken directly from Kellogg. Curiously, although the rule embraces the term substantial equivalency, it does not provide a definition or formula. However, the preamble to the regulation does affirm the codification of Kellogg into the regulation governing alternative requirements, thereby incorporating by reference the Kellogg parameters of this concept.

PERM’s codification of Kellogg’s second wing is more problematic. Like Kellogg, PERM’s alternative requirements regulation focuses upon scenarios where, “the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer’s alternative requirements.” As was the case in each of the three decisions comprising the Kellogg trilogy, an employer seeking certification on behalf of a beneficiary qualifying through alternative requirements will be obligated, under the PERM regulation, to offer the position to a qualified worker possessing a “suitable combination” of education, training or experience.

However, the PERM regulation adds an apparent additional limitation to Kellogg’s “suitable combination” requirement: that the alien beneficiary already be employed by the employer. Does this mean employed in the primary job, as opposed to another position, which may or may not constitute the qualifying alternative experience?

More significantly, does this qualification to the Kellogg doctrine imply that beneficiaries who are not incumbent employees are not within the scope of this requirement? Will DOL exempt employers seeking to qualify individuals who are not “already employed” from the obligation to state on their applications that any suitable combination of education, training or experience will be acceptable? Surely this possibility suggests that multiple subsidiary companies could legitimately refrain from including the phrase “any suitable combination” in their applications, especially in light
of the fact that PERM distinguishes between employers by their distinct Federal Employer Identification Number (FEIN).

Finally, what is a suitable combination? The limited case law interpreting and applying *Kellogg* leaves this matter unresolved. Moreover, it remains unclear how an employer should discharge its obligation to state on its application that any “suitable combination” would be acceptable. Specific boxes in Part H (Job Opportunity Information) of the automated Form 9089 allow employers to specify, respectively, alternative experience, training and education, but there is no affirmation regarding “any suitable combination” on the application.” Will inclusion of this language on posting notices suffice? Presumably no such verbiage would be expected in print advertising, especially in light of the preamble’s assurance that “the regulation does not require employers to run advertisements enumerating every job duty, job requirement and condition of employment.” The acceptable method of compliance has yet to be interpreted.

This review of experience gained with the employer and the complementary doctrine of acceptable alternative experience leaves much unclear regarding the mechanism of PERM and the extent to which the existing body of BALCA case law will provide guidance for the near term. While future agency guidance and BALCA analysis will unquestionably clarify both procedural and substantive issues, it should be observed that the gained and alternative doctrines, as incorporated into PERM, may well undergo less of a paradigm shift than other aspects of pre-PERM labor certification practice. To this extent, our understanding of the future justifies our review of the past.

**About the Author**

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