Alien Work Experience on PERM Form 9089

On Form 9089, Item K on page 7 states, "List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification."

The instructions clearly mean the following:

(a) List all jobs (employment) during the last three years, immediately preceding the filing of the form;

(b) List any other experience (i.e., work experience or training) even if gained more than three years before the filing of the form.

Unfortunately, some preparers do not fully understand the instructions for Form 9089. Over the years, many labor certification cases have come across my desk, and I have seen variations on the theme:

(a) Cases where employers only wrote down experience gained during the last three years, to the exclusion of experience gained more than three years before the filing of the form. In such cases, the preparers did not read or fully understand the second part of the instruction advising experience gained any time in the past.

(b) Cases where employers wrote down experience gained more than three years before the filing of the form as if it had been gained during the last three years. In such cases, the preparers misunderstood the instruction, believing that experienced gained more than three years ago should be written on the form as if it had been gained during the three years before filing the form. In such cases, the dates are in error, but the experience is genuine.

(c) Cases where preparers excluded important experience or training because it was gained more than three years before the filing of the form. In such cases, the preparer may have believed that experience should not be put on the form or did need not be put on the form if it was gained more than three years before the filing of the form.

The information on the form should be used by the DOL to determine whether the alien appears qualified and whether the qualifications were gained before or after beginning work for the Employer. The DOL does not normally approve cases where aliens have gained experience with the Employer, while working for the employer, because it is not fair to US workers, who have not been granted the same opportunity to be trained by the Employer.

In the past, it has been common or even customary for Employer's to list the alien's qualifications on the labor certification form, and if the alien had more qualifications than required to establish minimum qualifications, Employers have sometimes omitted additional experience or training.

One of the reasons for the omission may be the difficulty in documenting experience or training gained some time ago. Another reason may be that the preparer documented the employer's minimum experience requirement during the last three years and saw no need to document additional experience or training gained more than three years before the filing of the form.

Unfortunately, some preparers have committed an error of omission by omitting important experience or training from the form due to any of the reasons stated above.

The remedy for such an error is to obtain clear and convincing documentation of the experience or training and submit it with the PERM form to DHS, along with the I-140 Petition, or in response to an Request for Evidence or Notice of Intend to Deny. The evidence may also be submitted on appeal, in the form evidence for consideration de novo.

The real issue is not whether an error was made on the form but whether the alien is qualified for the position and did not violate the regulations by gaining the experience with the employer. Such errors are normally not intentional misrepresentation, nor is the unintentional omission a form of material misrepresentation.

More difficult cases are those where the alien is qualified based on prior experience or training, but the preparer put the wrong dates for the alien's employment or training history, thinking that the dates had to be dates during the past three years, and not at any time in the past.

Although it seems totally illogical, I have reviewed cases where preparers entered the alien's experience correctly, but with the wrong dates, thinking that they were simply following the instructions on the form. If the
alien is qualified, and the dates on the form are incorrect for any reason, the error in the dates does not change the fact that the alien is qualified.

In such cases, employers and aliens may sign the form, believing that the preparer has properly prepared it without realizing that the dates are not correct. If the alien is qualified, whether gaining experience in the last three years or more than three years ago, it cannot be said that the error is material. It is just an error.

We are now seeing reports of I-140 petitions filed with DHS and denied where the preparer has placed the alien's experience on the form for the last three years, but has omitted additional experience beyond the last three years because it is not fully set forth on the form.

These I-140 petitions should be approvable by DHS, if the alien convincingly proves that he or she is qualified, even though the qualifications were gained more than three years prior to the filing of the form and were omitted from the form.

The qualifications may be in the form of training or work experience. In the case of training, there is no place on the 9089 to put an alien's prior training except to gerrymander the information into Part J into fields reserved especially to list the alien's prior education.

In such cases, DHS examiners may think that the experience or training was not placed on the form because it does not exist.

To rebut such a finding, the employer should provide conclusive evidence that the alien is qualified. Such evidence could include multiple information from all places of employment, copies of pay receipts or tax returns, entries in official "work books," affidavits from reliable affiants, and certificates or diplomas accompanying the work development.

For legal arguments to document alien qualifications, one must turn to the regulations. A petition for employment-based immigrants must be accompanied by any required document from the U.S. Department of Labor, such as a labor certification, and other required supporting documentation. 8 C.F.R. Sec. 204.5(a). The initial evidence must include "evidence relating to qualifying experience or training...and shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received." 8 C.F.R. Sec. 204.5(g)(l). The regulation allows that if "such evidence is unavailable, other documentation relating to the alien's experience or training will be considered." Id.

DHS denials of petitions with incomplete information usually cite Matter of Izummi, 21 I&N dec. 169 (Assoc. Comm. 1998), "a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts" and Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971), "a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements." With that elaboration, the DHS usually concludes that "it cannot be determined that the petitioner has met the required burden of proof" and denies the petitions.

It is important to remember that the AAO reviews denials of employment based petitions on a de novo basis, pursuant to Second and Ninth Circuit Court of Appeals decisions (See Dor v. INS,891 F.2d 997, 1002, n. 9 (2d Cir. 1989); Spencer Enterprises Inc. v. US, 229 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003). As such, they can review the case based on all the evidence in the record.

There is nothing in the Immigration Regulations or in the PERM Rule requiring the Service to accept documentation of experience or training only if it is listed on the application for labor certification. Indeed, the Immigration Regulation at 8 C.F.R. Sec. 204.5(g)(l) requires the Service to take an expansive view of the documentation of qualifying experience or training by requiring that "if such evidence is unavailable, other documentation relating to the alien's experience or training will be considered."

In addition, the PERM Form 9089 provides no detailed instructions or parameters on how qualifying training must be presented. ETA 9089 asks the employer to attest that the alien completed the training required for the position in Section J. There is no opportunity on Form 9089 where an employer may list the training completed. The Revised ETA Form 9089, expected to become effective in September 2009, has recast the template for providing information about the foreign worker and has included a specific section on Foreign Worker Training. Such information would typically be omitted from the PERM form by an Employer, even though it is an essential piece of information to establish the alien's qualifications. As explained above, the ETA has issued a Frequently Asked
Question advising how training information might be placed on the form, but there is no convenient or easily understandable way for this to be done.

For work experience, ETA 9089 asks for a listing of all jobs held during the past three years, but there is no warning on the form that training or experience not specifically listed on the form will be disregarded by the DHS when it reviews the I-140 petition.

Accordingly, when an I-140 petition is thoroughly documented, evidence about the alien's qualifications should be accepted by DHS, even though it was omitted from the 9089 Form Park K inadvertently or purposely by a poorly informed preparer, who may be the Employer himself!