DRAFTING EQUIVALENCY LANGUAGE IN PERM CASES

EB-2 PROFESSIONAL

INA 203 (b) (2)(A)

“In general.- Visas shall be made available, ………………. (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or …………….., and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.”

The statute does not limit the term ‘equivalent’ to mean any particular combination of education, training, degrees or experience but unfortunately neither does it define what is meant by the term 'equivalent'.

The DHS has provided a definition for the terms advanced degree and equivalent at 8 CFR 204.5(k)(2)

“Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.”

Progressive experience

As per the INS, Cronin Memo of Mar 20, 2000

“‘progressive experience’ is not defined by the Statute or regulations. Its plain meaning within the context of EB-2 adjudication is relatively simple: employment experience that reveals progress, moves forward, and advances towards increasingly complex or responsible duties. In short, progressive experience is demonstrated by advancing levels of responsibility and knowledge in the specialty”

The AAO and USCIS have taken the position in a series of unpublished decisions, that a beneficiary is required to have either a masters degree from a single source that is considered to be equivalent to a U.S masters degree or at the very minimum a single source degree, that is equivalent to a U.S bachelors degree plus 5 years of progressive experience. The AAO and USCIS do not permit equivalent education that does not culminate in a degree being awarded by an Academic institution or any combination of degrees or experience. USCIS and AAO have taken the position that three year bachelor’s degrees from several countries are not equivalent to U.S. bachelor’s degrees because a U.S bachelor’s degree takes four years to complete.

This interpretation is of questionable merit as:

1. It does not reflect the statute and is based on a very narrow reading of the term degree in the regulation.
2. It does not reflect criteria used by employers to recruit employees, U.S universities admitting foreign students or various professional licensing bodies.

3. On January 7, 2003, Efren Hernandez, Director of Business and Trade Services at USCIS’s Office of Adjudications, stated in a letter “You ask whether the reference to "a foreign equivalent degree" in 8 CFR §204.5(k)(2) means that the foreign equivalent advanced degree must be in the form of a single degree. Despite the use of the singular "degree," it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement. Provided that the proper credential evaluations service finds that the foreign degree or degrees are the equivalent of the required U.S. degree, then the requirement may be met.”

4. Again on July 23, 2003, Mr. Hernandez stated in another letter “You ask if the completion of a three-year university course of study resulting in a bachelor’s degree, followed by the completion of a PONSI-recognized post-graduate diploma program may be deemed to be the equivalent of a four-year U.S. bachelor’s degree. In my opinion such a combination may be deemed the equivalent of a four-year U.S. bachelor’s degree .... an alien in this scenario may combine that equivalent degree with five years of progressive experience in the specialty in order to satisfy the "advanced degree" requirements of INA §203(b)(2)(A) and 8 CFR §204.5(k)(2).”

5. INS Operations Instruction (OI 204.4(d)(5)) stated that an acceptable degree equivalency evaluation should "consider formal education only, not practice experience”. It never required an actual degree just formal education.

6. In the past USCIS used to routinely accept educational evaluations that combined degrees and diplomas to be equivalent to U.S Masters and bachelor’s degrees.

7. In the H-1B context 8 CFR 214.2(h)(4)(iii)(D) provides five methods of determining equivalency to a U.S bachelor’s degree (including one that states three years of work experience equals one year of undergraduate education).

8. In the context of foreign medical degrees, USCIS will consider a foreign bachelor of medicine degree to be equivalent to a U.S. Medical degree, if the alien has passed a licensing exam or provided a credible educational evaluation. The number of years it takes to complete the foreign bachelors in comparison with the number of years it takes to complete a U.S M.D. degree does not appear to be an issue, neither is the fact that a licensing exam is not five years of experience or a an academic degree from a college/ university (other professional degrees/licensing exams are not provided this privilege despite it being a sensible approach! 1).

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1 In the Case of Chartered accountants from India, EDGE states passing the Final Examination of the Institute of Chartered Accountants of India (ICAI) and having been admitted as a fellow of the Institute is comparable to completion of a Bachelor degree awarded by an accredited college or university in the
United States. Despite the position of EDGE and USCIS’s evaluation of medical degrees based on passing licensing exams, USCIS and the AAO have been providing inconsistent decisions in evaluating Chartered Accountants from India. While there is no precedent decision by the AAO to turn to in regard to U.S degree equivalency of the degree conferred by the Institute of Chartered Accountants of India (ICAI), there have been numerous unpublished decisions were the AAO have reviewed EDGE to conclude that as EDGE confirms that ICAI associate membership upon passing the ICAI final examination represents attainment of a level of education comparable to a bachelor’s degree in the United States, holders of such qualifications hold the equivalent of a U.S bachelors degree in accounting. (AAO Decision LIN 06 208 52092, Dated Feb 02, 2010; AAO Decision LIN 07 098 52725, Dated Feb 12, 2008; AAO Decision LIN 03 254 52591, Dated Dec 26, 2007; AAO Decision SRC 05 254 50100, Dated Dec 26, 2007). At the same time USCIS and AAO have been denying cases with the statement that ICAI is a professional organization and not an academic institution (a college or university) that can confer an actual degree. Although the distinction between approvals and denials does not appear to have any relation to the individual beneficiary’s qualification or the evaluation service used, there appears to be a pattern of a higher likelihood of denial if the petition has been filed for EB-2 classification, although there is no logical reason why an evaluation of equivalency to a U.S bachelor’s degree should change depending on the classification requested in the I-140 petition. This pattern of inconsistent adjudication by the Service may fail the arbitrary and capricious test under Chevron. There are several reasons why the Indian Chartered Accountant qualification should be considered to be a single source degree equivalent to a U.S bachelor’s degree: 1. The chartered accountancy qualification is accepted by the Association of Indian Universities as equivalent to a Master’s degree for entrance into PhD Programs; 2. AAO decision LIN 07 098 52725, Dated Feb 12, 2008 on page 5 approaches this issue where it states “ ICAI is not an academic institution that can confer an actual degree with an official college or university record” to still conclude on page 10, that ICAI final examination and associate membership to be equivalent to a U.S bachelor’s degree in Accounting; 3. Merriam-Webster’s Collegiate Dictionary, delineating the definitions of college. As defined in 3e, a college is: “an institution offering instruction usually in a professional, vocational, or technical field.” The ICAI clearly fits this definition. Additionally, a commonsense interpretation of the intent of congress, when creating a category of visas for professionals with advanced degrees, would include advanced professional degrees conferred by professional institutions of learning; 4. AACRAO EDGE credentials evaluation database makes clear that those who pass the ICAI final examination need not combine this academic achievement with other diplomas or degrees to demonstrate that they have acquired the foreign equivalent of a U.S. bachelor’s degree in accounting. Rather, the passage of the final examination at’ this institute, an examination which is preceded by over five years of theoretical and practical instruction for those who enroll directly following the twelfth grade, together with ICAI associate membership, without more, amount to the equivalent of a U.S. bachelor’s degree in accounting; 5. Passing the exam is considered equivalent to a degree by authorities in India including the Government of India, the Union Public Service Commission, state governments and public/private sector organization; 6. The qualification is recognized for the purpose of qualifying to take the Uniform CPA examination as equivalent to a U.S bachelor’s degree in accounting; 7. The United States has signed and ratified the Lisbon Convention on the recognition of qualifications concerning higher education.
9. The definition of Professional Occupation at 20 CFR 656.3 includes the statement “……A beneficiary of an application for permanent employment certification involving a professional occupation need not have a bachelor’s or higher degree to qualify for the professional occupation. However, if the employer is willing to accept work experience in lieu of a baccalaureate or higher degree, such work experience must be attainable in the U.S. labor market and must be stated on the application form…….”

10. While a U.S. bachelor’s degree takes four years to complete, during the first two years a student is not required to undertake any courses in his bachelor’s degree specialty/major. The curriculum of the first two years of a U.S. bachelor’s degree is similar to what is known in the U.K. as A levels (13th year of school) or the foundational year (a prerequisite to join undergraduate degree for those lacking sufficient A levels) or in India as the Pre-University Degree: two years of education required prior to entering an undergraduate degree and consists of a curriculum restricted to either science, arts or commerce subjects. (In fact requires more specialization than the first two years of a U.S. bachelors degree) or Plus 2 (Last two years of school of 12 years of schooling). It is only in the beginning of his third year that a U.S undergraduate is required to choose a major. This is accurately reflected by the DOL allocating 2 years of SVP to an associate’s degree in a specialized subject and the same 2 years of SVP to a bachelor’s degree. Unlike the U.S. bachelors degree the majority of foreign three year bachelor’s degrees require three years of education in the specialty. So the argument that a foreign bachelor’s degree that takes three years to complete is not equal to a U.S. bachelor’s does not hold much merit. In fact an argument can be made that a U.S. bachelors degree is equivalent to two years of Undergraduate education in a specialty required to complete a foreign three year bachelor’s degree. If this argument is followed to its logical conclusion the foreign three year bachelor’s degree is a foreign degree above a U.S baccalaureate degree and therefore an advanced degree!

The logic of the USCIS and AAO decisions is as follows:

1. In Matter of Shah 17 I& N Dec. 244 (Reg’l. Commr’ 1977) it was stated that a beneficiary with a bachelor’s degree from India (that took three years to complete) had not shown his degree was equivalent to a U.S bachelor’s degree, as U.S. Bachelor’s degrees take four years to complete.

2. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives conference report on the ACT, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.”
3. In 1990, thirteen years after Matter of Shah, congress enacted Section 203 (b)(2) of the INA. Congress is therefore presumed to have intended a four year degree, when it states that an alien “must have a bachelors’ degree” when considering equivalency for second preference, as it is assumed that Congress was aware of the agency’s previous treatment of bachelors degree when the new classification was enacted and did not attempt to alter the agency’s interpretation. (It is to be noted that there appears to be a fault in the logic followed by the AAO, as congress never actually used the term bachelors degree in Section 203 (b) (2) and it is questionable if the Explanatory statement of the committee of conference should be taken to mean congress intended a four year bachelors degree when enacting Section 203 (b) (2))

4. In 1991 while publishing the final rule for 8 CFR 204.5 the INS responded in the Federal register to criticism that the regulation required an alien to have bachelor’s degree as a minimum and that the regulation did not allow for substitution of experience for education. The INS stated “both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor’s degree.

5. The regulations at 8 CFR 204.5(k)(3)(i)(B) requires the submission of an “official academic record showing that the alien has a United States baccalaureate degree of a foreign equivalent degree”. For classification as a member of the professions, the regulation at 8 CFR 204.5 (l)(3)(ii)(C) requires the submission of “an official college or university record showing the date of the baccalaureate degree was awarded and the area of concentration of study”. The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional, is any less than the evidence required to show that the alien is a professional. To do so would mean allowing a lesser evidentiary standard for a more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means bachelors degree received from a college or university or an equivalent degree.” (Note this signifies that EB-3 professional classification petitions require a single source degree equal to a U.S bachelor’s degree).

6. As the regulation at 8 CFR 204.5 (k)(2) uses the term foreign equivalent degree in singular rather than stating foreign equivalent degrees, the beneficiary must have a single source degree that is equivalent to a U.S bachelor’s or masters degree.

The Supreme Court has stated in *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 842-44 (1984) that where a statute is ambiguous on a certain issue the agency interpretation of the statute has to be given deference as long as it is a permissible and reasonable interpretation of the Statute. (A reasonable interpretation does not have to be the best or most logical interpretation or the interpretation the court would have reached). So challenging the agency’s interpretation will not be an easy task and may require a showing that the agency has not considered factors it would have been expected to consider when interpreting the statute.
EDGE and education evaluations:

EDGE is an electronic database of foreign degree evaluations maintained by AACRAO (American Association of Collegiate Registrars and Admissions Officers). It is referred to in USCIS and AAO decisions as an authoritative source on educational credential evaluations. It is advisable to check what EDGE says about an alien's educational qualifications through an EDGE based evaluation. As EDGE is routinely updated, it is necessary to check if an evaluation obtained at an earlier point of time remains accurate.

Although the AAO and USCIS officially state that they are not bound by EDGE and do not endorse EDGE above any other credible sources regarding equivalency of educational credentials, practitioners find that decisions made by the Service routinely discredit evaluations that contradict EDGE. Federal courts have supported the Services reliance on EDGE².

As USCIS/AAO appear to have an unofficial policy/practice of treating EDGE as a primary authority on educational evaluations, an evaluation provided by educational evaluator has little chance of being recognized by the Service unless:

1. The degree has not been evaluated by EDGE; or
2. An evaluator preferably from ACCRAO itself states that there is more recent information that was unavailable/not considered in the EDGE evaluation;
3. An evaluator provides an evaluation that is based on objective documentation and analysis that cannot be overlooked (rather than based on their opinion).

In order to be eligible for an EB-2 I-140 two requirements need to be met:

1. The labor certification must require a U.S masters degree or equivalent.
2. The Alien beneficiary must possess the minimum qualifications required on the labor certification.

There are four possible minimum requirements described on a labor certification that will satisfy an EB-2 I-140 petition:

1. A U.S Masters degree;

²² In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Sunshine Rehah Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), a federal district court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its in reaching its conclusion.
2. A Foreign equivalent degree to a U.S masters degree.

3. A U.S bachelor’s degree plus five years of progressive experience.

4. A foreign equivalent to a U.S bachelor’s degree plus five years of progressive experience.

Does the beneficiary possess an advanced degree or the equivalent?

As per Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966) the burden of proof to establish eligibility for an I-140 petition rests with the petitioner. As per Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988) CIS uses an evaluation by a credential evaluation organization of a person’s foreign education as an advisory opinion only and it is the adjudicating officer that makes the final decision in regards to evaluations.

For the beneficiary to be found to have a masters or bachelors degree, the degree needs to be from a single source and generally speaking EDGE needs to recognize it to be equivalent to a U.S. Masters or Bachelors. Where EDGE states a degree is comparable to a number of years of education rather than a U.S degree, the beneficiary will not be found to possess the equivalent of a U.S degree. Additionally, even where EDGE states a credential represents a level of education comparable to a U.S degree, if the foreign credential is a diploma, or certificate rather than a degree, USCIS may not consider the credential to be equivalent to a U.S degree. It is to be noted that past AAO decisions and EDGE treat three years degrees from various countries differently. While three year bachelor’s degrees from India are not considered equivalent to a U.S bachelor’s, those from the U.K. are considered equivalent, as there is an additionally 13th year of schooling in the U.K. Special degrees of note: An Indian Bachelor of education degree that only takes one year to complete is considered a single degree equivalent to U.S bachelor’s degree (as it has an entry requirement of a three year bachelors degree), postgraduate diplomas from India (only if issued at an accredited university or an institution approved by the All India Council for Technical Education) entered after a three year bachelors degree are equivalent to a U.S bachelors degree (Some practitioners report that USCIS appears to be currently recognizing such diplomas as bachelors degrees although they failed to do so in the past), an Indian Masters degree program of two years duration (with entry requirement of three year bachelors degree) is equivalent to a U.S. bachelors if completed after a three year bachelor’s degree, an Indian technical or engineering degree of four years duration is equivalent to a U.S. bachelors degree, an Indian Masters of Engineering/technology/computer applications is equivalent to a U.S masters degree and a Bachelors of Medicine and Surgery (MBBS) is generally an advanced degree equivalent to a M.D. degree. Prior to drafting an ETA 9089 always verify with EDGE the educational equivalency of a beneficiary’s credentials.

Do not assume the foreign national hold a degree that will be recognized by USCIS to be the equivalent of a U.S masters degree because he is currently in H-1B status.

While the Regulations for EB-2 at 8 CFR 204.5(k)(2) and EB-3 professional at 8 CFR 204.5 (l)(2) require the minimum of a bachelors degree, the H-1B regulations at 8 CFR 214.2(h)(4)(iii)(C)(4) only require education, specialized training and/or experience that is considered equivalent to a U.S bachelors degree. H-1B regulations at 8 CFR 214.2 (h)(4)(iii)(D) permit five different methods of determining equivalency to a U.S bachelors degree (Including
the three years of experience equals one year of undergraduate education rule) but these methods of determining equivalency to bachelors degree are limited to the H-1B context and are inapplicable to the PERM/I-140 context. Any attempt to use the H-1B equivalency language on a form 9089 is likely to result in a finding by USCIS that the minimum requirements of the position are less than a bachelors degree and a denial of an EB-2 or EB-3 Professional I-140. An educational evaluation based on the H-1B equivalency regulations is unlikely to be recognized in the EB-2, EB-3 professional context.

**EB-3 PROFESSIONAL**

INA 203 (b) (3)(A) (ii) “Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.”

The AILA NSC liaison has pointed out that a new Form I-140 was introduced on January 6, 2010. Prior versions of Form I-140 had only one box to check for bachelor degreed professionals and skilled workers, and did not make a distinction between the two classifications. Thus, the differences between the professional with a Bachelor's degree and a skilled worker were without a distinction prior to the introduction of the new form. However the new form does require the petitioner to distinguish between a professional with a Bachelor's degree and a skilled worker. The definition of professional is set forth in the regulations at 8CFR 204.5(l)(2), which states: Professional means a qualified alien who holds at least a United States Baccalaureate degree or a foreign equivalent degree and who is a member of the professions. The application of this definition by NSC has resulted in the strict review of whether or not a foreign degree is the equivalent of a U.S. Bachelor's degree and does not recognize experience as the equivalent of a degree. Thus, the standard to determine equivalence for a professional position is often different from the standards set forth on the ETA 9089, which may permit alternative requirements that equate a pre-determined level of experience as a substitute for a degree. This standard is similar to the second preference regulation which also requires a specific degree that is the academic equivalent to meet the requirements of the second preference (EB-2). Petitioners should therefore carefully review qualifications to determine whether the beneficiary meets the qualifications of a professional, pursuant to Section 203(b)(3)(ii), or is a skilled worker under Section 203(b)(3)(i). In order to have an EB-3 petition approved in the professional category, the labor certification needs to require at least a U.S bachelor’s degree or a single source foreign equivalent degree. Additionally, the beneficiary must possess such a degree.

**EB-3 SKILLED WORKER**

INA 203 (b) (3)(A) (i) “Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”
Skilled workers and professionals share the same EB-3 priority date. If you have a beneficiary lacking a single source degree, equivalent to a U.S bachelor’s degree (example holder of a three year bachelor’s degree) it may be advisable to utilize the skilled worker category.

DRAFTING THE LABOR CERTIFICATION

The Cronin Memo states

“The terms “MA”, “MS” “Master’s Degree or equivalent” and Bachelor’s degree with five years of progressive experience,” all equate to the educational requirement of a member of the professions holding an advanced degree.”

It is essential, when drafting the labor certification to describe the experience requirement very clearly as “5 years of progressive work experience”. Where the labor certification is unclear in this regard adjudicators have been instructed to request a supplemental statement for clarification. When using the word equivalent on an ETA 9089 always state very clearly and definitely what is meant by equivalent (specify the equivalent education, degree, experience or exact combination). The DOL can deny an application if they cannot verify the actual minimum requirements. USCIS will give effect to any language other than the Kellogg Phrase “Any combination of education, training or experience is acceptable”. Do not use this phrase unless it is required and when you intend to use it, use the exact phrase with no variation. If the language is not identical and it can be interpreted to mean the minimum requirement is anything less than a U.S masters degree/a single source foreign equivalent or a U.S/single source foreign equivalent Bachelors degree plus five years of progressive experience, the labor certification cannot be used for an EB-2 I-140 approval. Likewise, when drafting for an EB-3 professional I-140 ensure the labor certification requires at least a U.S Bachelors or single source foreign equivalent degree. When filing for a skilled worker, make sure the minimum requirements equate to at least two years of training or experience. If filing for a skilled worker and a bachelors is required but an alternate equivalent is permitted, NSC has suggested checking bachelors in H-4 and checking yes in H-8 that an alternate level of education (other) is acceptable. 8-B should set forth the alternate and if space is limited add *see H-14 with a note in H-14 explaining the alternate combination of education/experience.

DRAFTING FOR DOL WITH SVP AND THE RULE THAT ALTERNATE REQUIREMENTS MUST BE SUBSTANTIALLY EQUAL IN MIND.

In addition to the above mentioned considerations in drafting a Form 9089 for approval of an I-140 petition, SVP levels need to be considered. If the minimum requirements listed exceed the SVP level for the position, business necessity documents justifying the SVP, must be added to the file. Additionally, if primary and alternate requirements are provided they must have substantially equivalent SVPs (See Matter of Globalnet Management). Please keep in mind, while USCIS states: a bachelor’s degree plus five year of experience equates to a master’s degree, DOL states: a master’s degree equals 4 years of SVP, a bachelor’s degree equals 2 years
of SVP and five years of experience is 5 years of SVP. If possible avoid the use of alternate requirements.

THE MINIMUM REQUIREMENTS SHOULD NOT BE TAILORED TO THE ALIEN

When drafting minimum requirements you are listing the minimum requirements for a position and not the qualifications of the Alien beneficiary. You cannot have an employer filing two or more Labor certification applications with different sets of minimum requirements for identical positions.

RECRUITMENT SHOULD REFLECT ACTUAL MINIMUM REQUIREMENTS

Ensure recruitment steps reflect any equivalency language stated on the form ETA 9089. The DOL could justify a denial based on U.S workers without a degree (but with the equivalent qualifications listed on the ETA 9089), not being made aware they would qualify for the position.