The Labor Department's Green-Card Test -- Fair Process or Bureaucratic Whim?

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Governments everywhere, the United States included, are tasked with resolving disputes in peaceful, functional ways. One such controversy involves the tension between American employers seeking to tap specialized talent from abroad and U.S. workers who value their own job opportunities and working conditions and who may see foreign-born job seekers as unwelcome competition. Given these conflicting concerns, especially in the current economic climate, this article will review recent administrative agency decisions involving permanent labor certification – a labor-market testing process designed to determine if American workers are able, available and willing to fill jobs for which U.S. employers seek to sponsor foreign-born staff so that these non-citizens can receive green cards (permanent residence).

The article will show that the U.S. Department of Labor ("DOL"), the agency that referees such controversies, has failed to resolve these discordant interests to anyone's satisfaction; instead the DOL has created and oversees the labor-market test – technically known as the Program Electronic Review Management ("PERM") labor certification process – in ways that may suggest bureaucratic whim rather than neutral agency action.

The DOL's PERM process – the usual prerequisite[1] for American businesses to employ foreign nationals on a permanent (indefinite) basis – is the method prescribed by the Immigration and Nationality Act ("INA") for negotiating this conflict of interests in the workplace. At first blush, the statutorily imposed resolution seems reasonable, requiring the DOL to certify in each case that the position offered to the foreign citizen could not be filled by a U.S. worker and will not undercut wages and working conditions for U.S. workers, before the green-card seeker can pursue lawful permanent residence.[2] In the text of the statute, however, Congress did not elaborate on the procedure for certification, and passed the magic wand to the DOL.

Early iterations of the process go back decades;[3] but in 2004, the DOL conjured a comprehensive set of regulations describing the requirements of the labor certification process and inaugurating

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[1] Among others, the exceptions to this predicate process include Schedule A precertification under 20 C.F.R. §§ 656.5 & 656.15, in which the DOL precertifies certain occupations to bypass the labor market test – currently just nurses, physical therapists and individuals with exceptional ability in the sciences or arts – because a shortage of labor across the nation has been identified. The precertification for those of exceptional ability has, as a practical matter, been by and large supplanted by the category for those with extraordinary ability, which involves a petition to USCIS with no DOL involvement.

[2] INA § 212(a)(5), 8 U.S.C. § 1182(a)(5).

[3] For a detailed description and analysis of the history of the labor certification process, see Gary Edelman, "The Lawyer's Guide to 212(a)(5)(A): Labor Certification from 1952 to PERM", available at

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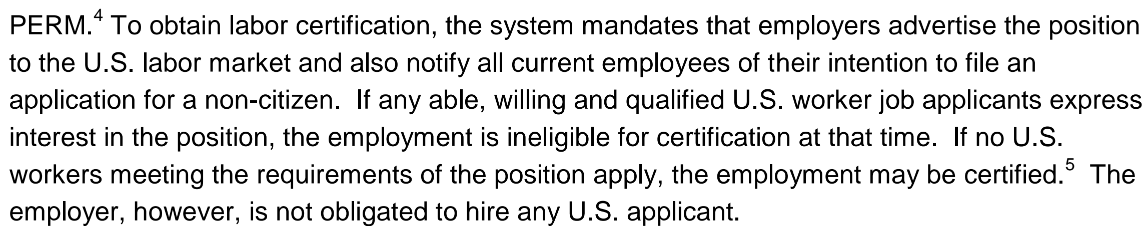

PERM.[4] To obtain labor certification, the system mandates that employers advertise the position to the U.S. labor market and also notify all current employees of their intention to file an application for a non-citizen. If any able, willing and qualified U.S. worker job applicants express interest in the position, the employment is ineligible for certification at that time. If no U.S. workers meeting the requirements of the position apply, the employment may be certified.[5] The employer, however, is not obligated to hire any U.S. applicant.

Although this seems relatively straightforward, the DOL's regulations prescribing the necessary steps for testing the labor market are a spider's web for the uninitiated. Moreover, no matter how punctilious the employer and her counsel may be, far too often they will find themselves blindsided by the DOL's ever-evolving position on the required steps for justifying the permanent hire of foreign employees.[6] Frustration by employers, foreign nationals and attorneys with the unpredictability and unforgiving adjudication of PERM applications has led stakeholders to mutter about DOL hostility toward employers, foreign nationals and the entire process as such, and to harbor suspicions of political pandering, capriciousness, incompetence or some combination of all of these. The administrative jurisprudence on this issue tells the tale.

Rejection of U.S. Worker Applicants

What makes a U.S. worker unable or unqualified for a position? According to the regulations at 20 C.F.R. § 656.24(b)(2)(i):

The Certifying Officer must consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. For the purposes of this paragraph (b)(2)(i), a U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

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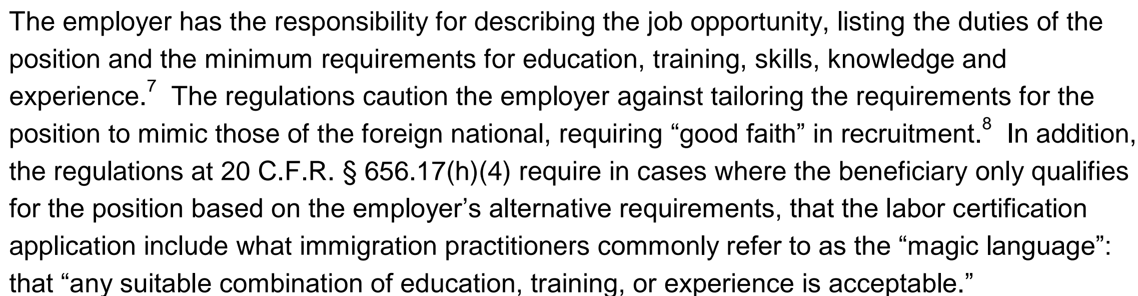
http://www.ilw.com/articles/2004,1102-endelman.shtm. (All websites cited herein were current as of June 19, 2013.)

[4] 69 Fed. Reg. 77326 (December 27, 2004) (codified at 20 C.F.R. § 655 et seq.). See also, Angelo A. Paparelli, "'Did You Ever Have to Make Up Your Mind?' Policy Choices Driving the New PERM Rule," 10-9 *Bender's Immigr. Bull.* 1 (2005).

[5] See, e.g., *Kennametal, Inc.*, 2010-PER-01512 (March 27, 2012) ("The PERM certification process requires that employers follow strict procedures if they wish to hire foreign workers to be employed in the United States. The purpose of these regulations is to ensure that there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the work for which the alien would be hired. See 20 C.F.R. § 656.1(a)(1). The regulations also seek to prevent the employment of aliens which adversely affects the wages and working conditions of U.S. workers similarly situated.")

[6] Arguably, BALCA's evolving standards should be deemed rulemaking subject to the notice and comment procedures set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.* Specifically, 5 U.S.C. §§ 553(b) and (c) require that an agency, which proposes to issue a rule, must publish a notice in the Federal Register indicating the time, place and nature of the public rulemaking procedure, and give interested parties an opportunity to participate in the rulemaking by submission of comments and/or data.



The employer has the responsibility for describing the job opportunity, listing the duties of the position and the minimum requirements for education, training, skills, knowledge and experience.[7] The regulations caution the employer against tailoring the requirements for the position to mimic those of the foreign national, requiring "good faith" in recruitment.[8] In addition, the regulations at 20 C.F.R. § 656.17(h)(4) require in cases where the beneficiary only qualifies for the position based on the employer's alternative requirements, that the labor certification application include what immigration practitioners commonly refer to as the "magic language": that "any suitable combination of education, training, or experience is acceptable."

Historically, as long as the DOL has not deemed the requirements for the position to be overly restrictive, the DOL accepted that a U.S. worker applicant could be deemed unqualified if she did not meet the minimum requirements for the position set forth by the employer.[9] The DOL concluded in multiple decisions that an employer could reject a U.S. worker on the sole basis of a resume, where there was no indication that the applicant met the minimum requirements for the position.[10] If the applicant had a broad range of work experience, education and training listed on the resume that related to the occupation, the DOL expected the employer to investigate further by contacting the applicant (i.e., assuming the applicant might meet the minimum requirements even if there were omissions of required skills or knowledge on the resume).[11] However, if the resume was silent as to the "major" requirements for the position, such as experience or educational credentials, the DOL conceded that it may be reasonable to assume that the applicant did not have that experience or education and reject her on that basis alone.[12]

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[7] See 8 C.F.R. § 656.17(h) and (i).

[8] Regarding the implicit good faith requirement in the regulations at 20 C.F.R. § 656, see, e.g., *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988).

[9] See *Concurrent Computer Corp.*, 88-INA-76 (Aug. 19, 1988) (en banc), as cited in *J.P. Morgan Chase & Co.*, 2011-PER-01000, 3 (July 16, 2012). ("A CO cannot dismiss an employer's stated job requirements in the absence of a determination that the job requirements are unduly restrictive.") See also *Adry-Mart, Inc.*, 88-INA-243 (Feb. 1, 1989) (en banc), as cited in *J.P. Morgan Chase & Co.*, at 4. ("Where there is no finding of unduly restrictive requirements, an applicant, whose resume shows he or she clearly does not meet the minimum requirements for the job, may be rejected without any further investigation.")

[10] See *Anonymous Management*, 88-INA-672 (Sept. 8, 1988) (en banc), as cited in *J.P. Morgan Chase & Co.*, at 4. ("An employer may reject a candidate on the sole basis of a resume that does not meet the minimum requirement. The burden is on the employer to demonstrate that the resume alone shows that there is no reasonable possibility that an applicant meets the job requirements") and *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (en banc).

[11] See *Blessed Sacrament School*, 96-INA-52, slip op. at 3 (Oct. 29, 1997), as cited in *Goldman Sachs & Co.*, 2011-PER-01064, 5 (June 8, 2012). ("Where the applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if the resume does not expressly state that he or she meets all the requirements, an employer bears the burden of further investigating the applicant's credentials.")

[12] See *Gorchev* at 2 (When "an applicant's resume is silent on whether he or she meets a 'major' requirement such as a college degree, an employer might reasonably assume that the applicant does not and, therefore, rejection without follow up may be proper.") See also *Houston Music Institute, Inc.*, 19-INA-450 (Feb. 21, 1991), as cited in *Kennametal, Inc.*, 2010-PER-01512, 8 (March 27, 2012). ("Where the U.S. applicant clearly does not meet a stated job requirement, the burden shifts to the CO to explain adequately

With this as the historical baseline, we turn to more recent decisions. In *Goldman Sachs & Co.*, 2011-PER-01064, 6 (June 8, 2012), the DOL's Board of Alien Labor Certification Appeals ("BALCA") took a new tack in faulting the employer for rejecting all 35 of the applicants without an interview on the basis of their resumes. The explanation was far outside the longstanding guidelines above:

Deferring to the Employer's judgment that "any suitable combination of education, training or experience is accepted," (AF 487), it is apparent that they did not comply with their own requirements in good faith during the recruiting process. No candidate was interviewed, including two that facially met the employer's required skillset: a combination of education, training or experience. Further investigation could have indicated that, for example, applicant Mulrenan's experience with most of the Employer's categories would not [sic] yield a suitable combination.

This decision indicates that BALCA will throw the minimum requirements stated by the employer out the window when the employer includes the "magic language" that "any suitable combination of education, training or experience is accepted" for the position. The decision goes on to say that:

The Employer's expert does not even comment upon how applicant Mulrenan's education or training would be insufficient in combination with his experience, even if he is lacking 'critical subdisciplinary experiential requirements.' The summary statement at the beginning of the Employer's expert opinion that '[a]n applicant lacking (one or multiple) critical experience requirements cannot perform the job in a minimally competent way, and thus, could not reasonably be assumed to be potentially qualified,' is insufficient in that it does not address how Mulrenan's unique combination, of education, training, or experience could qualify him.

By including the "magic language," the employer was simply seeking to comply with the regulatory mandate at 20 C.F.R. § 656.17(h)(4) applicable when the minimum requirements include alternatives. Therefore, without any finding of unduly restrictive requirements, the DOL discarded the minimum requirements articulated for the position.

Similarly perplexing, in *Kennametal, Inc.*, 2010-PER-01512, 11 (March 27, 2012), the DOL faulted the employer for rejecting applicants for lack of knowledge of concepts fundamental to the occupation of mechanical engineer.

The Employer rejected these three applicants because they did not have knowledge of the physics concepts of heat transfer and fluid dynamics. While the Employer also notes that it determined the ineligibility of these three applicants after a phone interview with each, we agree with the CO that the Employer failed to consider whether any of these applicants would be

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why the U.S. applicant is qualified through a combination of education, training or experience, despite his or her failure to meet the stated requirement").

qualified for the position after an online tutorial or training course. The CO found that these courses are available online or as books and there is educational software designed specifically for engineers working with these subjects.

The regulations do not require that an employer consider whether applicants would be qualified for a position after an online tutorial or training course; rather, they require consideration of a "reasonable period of on-the-job training." (Earlier in the decision it indicates that the employer did address the infeasibility of on-the-job training.) Accordingly, the DOL made a new requirement out of whole cloth in rendering this decision, which few practitioners could have predicted.

In sum, the DOL's propensity to create tortuous new requirements for labor certification beyond the scope of the regulations has created a climate of uncertainty and a Hail Mary mentality among employers. Moreover, an unfortunate byproduct is that U.S. workers waste time on increasingly rigorous job interviews as candidates that, in the employers' assessment of the resumes submitted, would not make the first cut.

Changes to the Process in the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744

The Senate immigration bill, S. 744, currently on the floor proposes to modify the provisions at INA § 212(a)(5) regarding labor certification only insofar as STEM (science, technology, engineering and mathematics) workers will be exempt from the process. This indicates that the Senate Judiciary Committee, at least, recognizes the dearth of domestic talent in these areas, and proposes to skip the arguably redundant process of having the DOL certify that shortage on a case-by-case basis. If this provision is signed into law, it would be one small step toward a system that is not so dependent on the capricious vacillations of the DOL.

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The PERM labor certification process represents some of the more Kafkaesque tendencies of our government. When the target of such a program is perpetually moving, employers may end up wasting precious resources in a benighted attempt to keep a valued employee because the DOL decides he or she is fungible. This frustrates and disappoints all of the stakeholders: the U.S. workers who waste their time responding to advertisements that are testing the market, the foreign nationals who place their lives on hold waiting to see if the labor certification clears when they could pursue other opportunities abroad and the employers who, in addition to incurring the costs of recruitment, lose a key employee if the application is ultimately denied. A more universally advantageous and predictable platform for employing foreign nationals is not a whimsical request; rather, it is a needed step by the government to foster the rule of law.

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