PERM's "Infeasibility to Train" Exception: A Tool for Hiring the Best Qualified Worker

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Introduction

This article aims to review the U.S. Department of Labor's (DOL) "infeasibility to train" exception, including a brief historical overview and key Board of Alien Labor Certification Appeals (BALCA) decisions. It will also attempt to distill a sensible approach and remedies available to employers who wish to sponsor foreign personnel for permanent employment in the age of lay-offs, ongoing weaknesses in the economy, and the objectively changing economic or business circumstances. Finally, the article will articulate defensible strategies for retaining and promoting foreign workers who have acquired the necessary skill and experience on the job.

Under the Immigration and Nationality Act, Section 212(a)(5)(A), 8 USC 1182(a)(5)(A),

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the [Secretary of Homeland Security] that . . . (I) there are not sufficient workers who are able, willing, *qualified* (or *equally qualified* in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and the place where the alien is to perform such skilled or unskilled labor… (Emphasis added.)

The terms "qualified" and "equally qualified" reflect the DOL's conflicting legal standards for labor certifications utilized by most U.S. employers, on the one hand, and colleges and universities, on the other. The Program Electronic Review Management (PERM) regulations[1] continue the agency's interpretation of "qualified" as being the same as "minimally qualified." DOL will deny a labor certification, which is filed under the basic labor certification procedure,[2] if it determines that a "minimally qualified" U.S. candidate is available to accept the job. But it will only deny a "special handling" labor certification,[3] if it finds that an "equally qualified" U.S. candidate is available for the job.

The "equally qualified" standard applicable to colleges and universities greatly enhances their ability to hire and retain foreign educators and faculty members if they are judged to be *more* qualified than any available American candidate. The "minimally qualified" standard, on the other hand, as used in the basic labor certification process, generally prohibits employers from requiring experience or training that the employee has received on the job. This creates severe obstacles to developing and retaining employees who enhance their knowledge and skill while working for the employer and wish to remain with the employer long-term. Sudden departures of such personnel may lead to operational disruptions or even loss of business opportunities compromising the employer's ability to continue to provide services or expertise essential to its customers. As is often the case, U.S. companies hire college graduates or workers with unrelated experience or training and offer them on-the-job training and opportunities to impart business-specific experience and expertise. Given the investment of time and resources that the employer has made in such workers, it should be both justified and encouraged to select these workers for further development, promotion,[4] and retention. However, as one immigration law practitioner noted, "In the real world, an employer wants to hire the best person for the job…. In the world of alien labor certification, however, life is very different. The basic labor certification process does not involve advertising

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[1] 20 C.F.R. Part 656, 69 Fed. Reg. 77,326 (Dec. 27, 2004) [hereinafter PERM regulations].

[2] 20 C.F.R. §656.17(i)(1) ("The job requirements, as described, must represent the employer's actual *minimum* requirements for the job opportunity.")

[3] 20 C.F.R. §656.18(b) ("The employer . . . must be able to document that alien was selected for the job opportunity in a competitive recruitment and selection process through which the alien was found to be *more qualified* than any of the United States workers who applied of the job.")

[4] By "promotion" the author means incremental increases in responsibilities and pay, short of assuming duties of a position that is no longer "substantially comparable" to one's previous position.

for or hiring the ideal person,"[5] but rather a minimally qualified one. Indeed, the ideal candidate for the job, i.e., one who best meets the qualifications of the position and has been successful performing it, must now compete – on an equal footing – with domestic workers who lack precisely the valuable experience, training and expertise that the candidate acquired since being hired.

In the supplementary information preceding the PERM regulations, the Department of Labor recognized that "[m]any employers hire applicants with the expectation that they will undergo some amount of on-the-job training."[6] But if the "employer [generally] cannot require domestic workers to possess training and/or experience beyond what the [foreign worker] possessed at the time of hire,"[7] the "best candidate" for the job would seem to have no path to permanent residence. In this circumstance, both the employer and foreign worker must wonder whether their existing employment relationship is worth further investment.

Summary of Legislative Background

U.S. immigration laws, and particularly the employment-based immigration system, were designed to protect the domestic labor market by controlling and regulating the "importation" of skilled and unskilled foreign workers into the United States.[8] In 1885, Congress passed the first labor law, the Contract Labor Act of 1885, which was intended to protect American workers against competition from immigrant laborers.[9]

More than six decades later, in 1952, Congress enacted the Immigration and Nationality Law, (INA) Pub. L. No. 82-414, 66 Stat. 163, which, among others, allowed for admission of non-citizens seeking to perform skilled or unskilled labor in the United States unless the Secretary of Labor certified that such entry would displace available U.S. workers or would otherwise adversely affect the wages and working conditions of similarly employed U.S. workers.[10] This law effectively reversed the nineteenth century ban on recruiting foreign workers; instituted what amounted to the first labor certification program of the country; and empowered the Secretary of Labor to grant certification unless he or she determined, *at his or her initiative*, that U.S. workers were available or that the wages and working conditions of such workers would be adversely affected.

In 1965, Congress passed the amendments to INA and reversed the prior presumption in favor of admission of foreign workers[11] by placing the burden on the employer of the foreign worker. The employer must establish that the employment of the foreign worker would not displace available and qualified U.S. workers and that it would not adversely affect their wages and working conditions.[12] This law remains in effect to date. It presumes that foreign workers are *not needed* in the United States and, thus, should not be admitted to perform skilled or unskilled labor. To establish the need for foreign workers, the sponsoring employer must affirmatively demonstrate, to the satisfaction of the Secretary of Labor, that there is a shortage of available and qualified domestic workers in the area of intended employment and that the admission of foreign workers will not adversely impact the wages and working conditions of similarly situated domestic workers.[13]

In short, the labor certification provision of U.S. immigration laws reflects Congress' historical concern for U.S. workers who might be displaced by non-citizens seeking permanent employment in the country. The regulation in question is aimed at ensuring that U.S. job applicants are not disadvantaged vis-à-vis their foreign counterparts. It also carves out a very narrow exception, which enables the employer to use the experience and training it provides to qualify a *foreign worker* for the position, but only if the employer is successful in showing that it is no longer feasible to train a *U.S. worker* for this same position.

Infeasibility-To-Train Standards

The PERM regulations at 20 C.F.R. §656.17(i) state that:

> If the alien beneficiary already is employed by the employer, in considering whether the job

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[5] *See* Steven A. Clark, *Actual Minimum Requirements under PERM*, David Stanton Manual on Labor Certification 25 (AILA 3d ed. 2005).

[6] 20 C.F.R. Part 656, 69 Fed. Reg. 77,326, 77351 (Dec. 27, 2004).

[7] 20 C.F.R. §656.17(i)(3).

[8] *See* Thomas Alexander Aleinikoff, David A. Martin and Hiroshi Motomura, Immigration and Citizenship: Process and Policy 332 (5th ed. 2003) [hereinafter Aleinikoff].

[9] *Id.* at 332-3.

[10] U.S.C. §1182(a)(14) (1952).

[11] Aleinikoff, at 333.

[12] Information Indus.,Inc., 88-INA-92, 1989 BALCA LEXIS 658 (Feb. 9, 1989).

[13] Upon so demonstrating, DOL may grant certification.

> requirements represent the employer's minimum requirements, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic workers applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
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> (ii) *The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.*
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> * * *

(Emphasis added.)

Simply put, the regulations freeze the employer's "minimum requirements" in time (when the foreign worker was first hired), applying the prohibition of on-the-job training of foreign workers years later, when the employer decides to sponsor them for permanent employment. At this point in time, the foreign worker is by definition better qualified than any domestic worker without comparable training. If the foreign worker did receive employer-provided training, and the employer wants to proceed with his or her labor certification application, subsection (ii) allows the employer to show that it can no longer train a U.S. worker as it did the alien. The regulations, however, do not provide any guidance or criteria for demonstrating what exactly constitutes infeasibility-to-train, which leads to employer confusion, disagreements with DOL's interpretations, and protracted, inefficient and inconsistent adjudications.

What follows is a brief summary of BALCA cases which have accepted employers' infeasibility-to-train arguments based on "changed circumstances," including (a) personnel changes (lay-offs, worker attrition, or reductions in force/downsizing); (b) technological advancements; and (c) structural constraints resulting from third-party action.

Personnel changes (lay-offs, worker attrition, reductions in force, downsizing)

As a general rule, an employer must sufficiently document a change of circumstances in support of its argument of infeasibility.[14] The employer has a heavy burden of establishing why it is infeasible to offer the same favorable treatment to U.S. workers and provide them with the training that was given to the foreign national.[15]

In *Avicom International*, the employer sought a labor certification for the alien as an Electronics Engineer and attempted to require specific experience, which the alien did not posses when he was hired.[16] The employer admitted that the required experience and training were, in fact, imparted to the alien after he began work for the company. However, it argued that it had to retain its stated requirements because it was no longer feasible to hire someone with less training and experience.[17]

The circumstances compelling the employer to retain its current position requirements included a change in corporate ownership in the wake of which the employer significantly reduced its staff through lay-offs and normal employee attrition.[18] As a result, the alien became the sole remaining employee with the required knowledge and training." In other words, the company had no one else who was sufficiently knowledgeable and experienced to train an individual who possessed less than the required experience.[19] BALCA agreed that these facts warranted the finding of infeasibility and granted the labor certification.

Practice Pointer: Where an employer undergoes personnel changes (reductions) such that the alien is the sole employee with the required knowledge and training, it will be permitted to use such knowledge and training to qualify the alien for permanent employment certification.

Similarly, the employer in *Johnson, Johnson & Roy, Inc.* argued that it was entitled to the services of the alien as a Landscape Architect who had worked for the employer for four years prior to being sponsored for permanent residence, and required the knowledge and experience that the alien acquired on the job.[20]

To invoke the infeasibility-to-train exception, the employer submitted evidence that, after the alien was hired, its regional business declined due to the substantial decrease in non-residential construction for

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[14] *See* Roque & Robelo Restaurant & Bar, 88-INA-148, 1989 BALCA LEXIS 746 (Mar. 1, 1989) (en banc).

[15] 58th Street Restaurant Corp., 90-INA-58, 1991 BALCA LEXIS 23 (Feb. 21, 1991) (en banc).

[16] 90-INA-284, 1991 BALCA LEXIS 204 (Jul. 31, 1991).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Johnson, Johnson & Roy, Inc., 94-INA-504, 1996 BALCA LEXIS 82 (Jul. 31, 1996).

which it provided landscape architectural services.[21] The employer further showed that it laid off six landscape architects in its Dallas, Texas office where the alien was assigned, transferred one architect to another state for lack of work, and that two others resigned.[22] Thus, the alien was the only full-time landscape architect who had specialized computer training. There would be no one else to train a new worker if the alien were to leave.[23] Lastly, it would be prohibitively expensive to hire the alien's replacement. So much so that, if the alien could not complete the project that had to be done entirely on the computer, the employer would lose its expected revenue from that project, which would jeopardize the remaining jobs at its Dallas location.[24]

BALCA granted the labor certification concluding that the employer was no longer able to offer the training it had offered the alien when he was hired. It is noteworthy that Chief Judge Vittone dissented from the majority opinion. He stated that infeasibility to train could be found if the employer only had one office and lacked the resources to train someone else because of the significant decline in its business, and if the alien was the only person capable of performing the job.[25] Judge Vittone dissented because he thought that the employer *created* the situation where it could argue infeasibility to train by laying off U.S. workers within the four years prior to the application and transferring one worker to another office.[26]

While the author appreciates, although not necessarily agrees with, Judge Vittone's logic,[27] the majority's position remains that lay-offs of U.S. workers may be harnessed to win the infeasibility-to-train argument and gain approval of labor certifications in times of economic distress and increasing joblessness. Here, the employer was granted reprieve from having to shut down its Texas operation by being allowed to hold onto a valuable employee despite the preceding lay-offs, resignations and reassignment.

Practice Pointer: *Johnson, Johnson & Roy, Inc.* stands for the proposition that an employer may invoke the infeasibility-to-train exception and be permitted to require the knowledge and training it provided to the alien, if it can demonstrate – due to the worsening business conditions – that it has had to lay off U.S. personnel; that the alien is the only person capable of performing the job (without whom there would be no one to train his replacement); and that his or her departure would lead to further loss of revenue, resulting in the shutdown of the business and the termination of the remaining staff.

Finally, *Bear Stearns & Company, Inc.* filed a labor certification application for the position of Senior Financial Analyst/Corporate Finance Group, Israel Section, relying on the experience and training that it provided to the alien.[28] The employer admitted that the alien obtained the necessary experience for the position through training with the employer and claimed that it could no longer offer such training due to personnel changes that occurred since the alien was hired. The employer specifically pointed to the five key employees who departed the company and without whom it could not provide training. BALCA noted that "personnel changes subsequent to Alien's training had made it *impossible* to train others in the same manner," and concluded that the employer succeeded in showing that it was no longer feasible to hire an employee for this position with less training or experience than required by the job offer.

Practice Pointer: This line of cases holds that employers who have faced personnel changes, including lay-offs, reductions in force, staff attrition or voluntary resignations, may, in seeking labor certification on behalf of foreign workers, rely on experience and knowledge that the employer provided to such workers. To successfully use this argument, the employer must demonstrate that the foreign workers are the only employees with the required knowledge and training to perform their positions. In many instances, BALCA will consider the deteriorating business and economic conditions as being the cause of ensuing lay-offs and downsizing, as in *Avicom International* and *Johnson, Johnson & Roy, Inc.* What must be additionally present, however, are personnel changes (lay-offs, downsizing, attrition and resignations) and the fact that the non-citizen worker is

[21] *Id.*

[22] *Id*. at 2-4.

[23] *Id*.

[24] *Id*.

[25] *Id*. at 5.

[26] *Id*.

[27] Judge Vittone's focus on the layoffs and reassignment is misleading, at best, given that the two other landscape architects resigned on their own, and that the employer did not initiate lay-offs until after it started losing business due to the slowdown in non-residential construction. The author would further argue that the two architects who resigned could have done so after concluding that the company's existence was in jeopardy and that they would soon lose their jobs. All of these arguments undercut Judge Vittone's position that the employer proactively created the conditions enabling it to argue infeasibility to train. More likely, it was responding to the conditions that were beyond its control.

[28] *Bear Stearns & Company, Inc.*, 91-INA-248, 1992 BALCA LEXIS 78 (Apr. 13, 1992).

the sole remaining individual able to perform the job and/or train other workers. Under these circumstances, an employer should be able to show that it is no longer feasible to train U.S. workers in the same manner as the foreign worker, and that it may rely on the foreign worker's existing training for labor certification sponsorship.

Changing technological and economic circumstances

Not all changed conditions must be negative to successfully claim infeasibility to train, and some BALCA rulings require no appreciable personnel changes to invoke this exception.

The employer in *Vac-Tec Systems Inc.* filed a labor certification application of its Vice President of Technical Marketing four years after he was hired. Its advertised requirements included two years of experience in advanced technology ("cathodic arc deposition"), which the beneficiary did not have when hired.[29] In denying the application, the Certifying Officer (CO) asserted that "an Alien cannot use the work experience gained with the Employer toward promotion to a better job" and that it was "unfair" to require a U.S. worker to have the experience that the alien lacked when he was first hired, and that the employer "should be under an obligation to train a U.S. worker to have the same qualifications" that were now required.[30] The CO was in effect arguing that the foreign worker should not be rewarded by promotion even though he possessed the necessary skills and knowledge to perform the job. Rather, he had to yield to a U.S. worker who had none of the required skills and knowledge and would instead require extensive training before being able to carry out the duties of the position.

BALCA disagreed and recounted the following factors in reversing the CO:

- "[T]here has been a significant change in the business and the methods of operation of [this particular employer].[31]
- "[T]he technique or knowledge of the entire industry has been modified or changed" after the alien was hired and prior to his labor certification application.[32]
- "What the requirements for the job were in 1983 are different from that which was required in 1987."[33]
- "[T]he situation or the requirements for the job have substantially changed in the period of time between 1983 and 1987 because the industry itself has changed."[34]

Accordingly, BALCA stated that the employer was justified in requiring two years experience in "cathodic arc deposition," which had rapidly emerged as the dominant technology relied on by the employer for most of its revenue during the period of the foreign worker's employment. Responding to the CO's challenge that these requirements may also be "unduly restrictive," BALCA noted:

> The industry is highly competitive and one which is new and emerging. Therefore, since this is new technology[,] *it would not be wise or prudent to install in a managerial or decision making capacity one who has not had experience in this field. . . . [I]t would have resounding adverse effect if a person lacking the experience of [the foreign worker] were to be put in control of such operation*.[35]

(Emphasis added.)

Practice Pointer: Where there have been significant changes in the methods of operation and knowledge and technology requirements of an employer, and where the particular industry underwent changes producing new technologies, the requirements of a position may have substantially changed. Under these facts, an employer would be justified to retain the services of an experienced and knowledgeable foreign worker and would not be compelled to train a U.S. worker without the skills and experience essential to the job.

When training is impossible and the requirements cannot be reduced

The *Lutheran Medical Center* decision presented yet another set of changed circumstances that led to the employer's success in claiming infeasibility to train.[36] The employer sought to fill a newly created position of Clinical Assistant Physician and required a medical degree and three years of training in a residency approved by the Accreditation Council on

[29] Vac-Tec Systems, Inc., 88-INA-353, 1989 BALCA LEXIS 24 (Aug. 2, 1989).

[30] *Id*. at 2.

[31] *Id*. at 3.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*. at 4.

[36] Lutheran Medical Center, 91-INA-302, 1993 BALCA LEXIS 106 (May 26, 1993).

Graduate Medication Education (ACGME).[37] Because the alien received necessary training in surgery through the employer's formal residency program, the CO proposed to deny certification under former 20 C.F.R. § 626.21(b)(5),[38] which among others, required that the employer document that its job requirements represented the actual minimum requirements and that it had not hired nor was it currently feasible to hire workers with less training or experience. To remedy the violation, the CO directed the employer to either reduce its requirements to those possessed by the alien at the time of commencing work, or to document the infeasibility to train new physicians without the required residency training.[39]

In its rebuttal, the employer explained that, subsequent to admitting the alien into its residency program in surgery, the ACGME withdrew accreditation and, accordingly, the employer was no longer permitted to accept any new residents in the field of surgery.[40] The employer also maintained that it could not reduce its requirement of three years of residency training because, under New York state law, all physicians were required to be licensed and that licensure could only be obtained following completion of three years of residency in an accredited residency program.[41]

BALCA agreed with the employer that "a change in circumstances has made it infeasible to offer the same training to U.S. workers that it offered to the Alien."[42] It noted that, after losing the ACGME accreditation, it became impossible for the employer to provide the same training to any surgery resident as it did for the alien, and that it created the position of Clinical Assistant Physician to perform the duties that had previously been performed by the residents.[43] BALCA further stated that, as a matter of state law compliance, the employer was not in a position to reduce its stated residency requirements of three years of postgraduate training in an ACGME-approved program, since these were the state-imposed prerequisites for licensing physicians. Finding that "the Employer can neither [legally] reduce its requirements, nor train U.S. workers to fill the position," BALCA reversed the CO's denial and granted the application.

Practice Pointer: *Lutheran Medical Center* provides a useful roadmap for winning an infeasibility-to-train argument without involving voluntary or involuntary staff changes, worsening business or economic conditions or the technological progress impacting the nature and requirements of a position. Here, the employer experienced structural changes resulting from third-party action that effectively precluded it from providing the training and experience it had previously been able to provide (e.g., loss of accreditation to conduct residency training). On the other hand, it was unable to reduce its stated position requirements to what the foreign worker possessed at the time of hire because doing so would run counter to applicable state laws (e.g., physician licensing requirements). If well documented, such circumstances would allow an employer to show that its stated requirements are its actual minimum requirements and that it is no longer feasible to qualify a U.S. worker without the training and experience possessed by the foreign worker.

Conclusion

A recent U.S. Court of Appeals decision reiterated that "one of the overarching purposes behind labor certifications [is] protection of the domestic labor force from competition."[44] Insulating U.S. workers' jobs (and working conditions and wages) from foreign competition must, nevertheless, be balanced against promoting economic growth and competitiveness, including meeting the legitimate needs of U.S. businesses of attracting and retaining global talent.[45] Careful balancing of these goals cannot be achieved if employers are consistently forced to trade knowledgeable and trained foreign workers for their domestic counterparts without similar training. Indeed, it would seem to be bad policy to compromise businesses' ability to retain qualified foreign personnel and compete successfully in the marketplace by compelling a hiring of a domestic worker who has had no comparable training or experience in the job.

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[37] *Id*.

[38] *Id*. at 2. BALCA refers to this section as it was codified in 1992. The current regulations at 20 C.F.R. §656.17(i)(3) retain this standard without significant change.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*. at 3.

[43] *Id*.

[44] Durable Manufacturing Co. v U.S. Department of Labor, Employment and Training Administration, 578 F.3d 497, 502 (7th Cir. 2009).

[45] *See* Demetrios G. Papademetrou, Doris Meissner, Marc R. Rosenblum, and Madeleine Sumpton, Aligning Temporary Visas with US labor Market Needs: The Case for a New System of Provisional Visas, Migration Policy Institute (2009), *available at* http://www.migrationpolicy.org/pubs/Provisional_visas.pdf.[last accessed Jul. 19, 2010].

This article has attempted to provide ways of easing the impact of the "minimum requirements" standard on U.S. employers who have invested in lengthy, business-specific training of foreign workers and have decided to sponsor them for permanent residence.[46] This appears possible in appropriate – albeit narrowly drawn – circumstances detailed in this article.

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[46] Discussing alternatives to the infeasibility-to-train exception of the "actual minimum requirements" rule, i.e., the "substantially comparable" and "FEIN" exceptions contained in 20 C.F.R. §656.17(i)(2) and (i)(5)(i)-(ii), respectively, is beyond the scope of this article.