WHEN AND HOW SHOULD EMPLOYERS USE THE *KELLOGG* LANGUAGE IN PERM APPLICATIONS?

by Alexander Dgebuadze[*]

INTRODUCTION

The purpose of this article is to review the circumstances and factors necessitating employers' compliance with *Kellogg* requirements and to propose specific ways of expressing compliance in Program Electronic Review Management (PERM) applications for permanent employment certification (PERM labor certifications). The so-called *Kellogg* language became a requirement following the en banc decision of the Board of Alien Labor Certification Appeals (BALCA or the Board) in *Matter of Francis Kellogg*,[1] which, in pertinent part, stated:

> [W]here the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of §656.21(b)(5), unless the employer has indicated that applicants with *any suitable combination of education, training, or experience are acceptable*.[2]

BALCA based its holding on Department of Labor (DOL) regulations in effect at the time, namely, 20 CFR §656.21(b)(5), which provided that the employer's requirements "shall ... represent [its] actual minimum requirements for the job opportunity …," and 20 CFR §656.21(b)(2), which required that the employer "document" that its job opportunity was "without unduly restrictive job requirements …."

DOL attempted to codify the *Kellogg* language in the PERM regulations,[3] while retaining its long-standing standards for regulating "actual minimum requirements" and "unduly restrictive job requirements." However, as discussed in detail below, the PERM regulations only partially implemented the *Kellogg* holding. In many instances, the PERM form (ETA Form 9089) has proven difficult to interpret and complete, effectively hampering employers' proper attestation. DOL policy guidance and announcements have been muddled as to how an employer must comply, or even when the *Kellogg* language should be invoked. Several PERM-based BALCA decisions considered *Kellogg*'s substantive and procedural requirements, and introduced a measure of clarity in this area of labor certification law, but some tension between DOL's announced policy and BALCA's rulings persist. The goal of this article is to review the current state of the *Kellogg* rule, delineate substantive compliance requirements, and provide specific examples of use of the *Kellogg* language in PERM applications.

Francis Kellogg, Pre-PERM

In *Kellogg*, BALCA considered three panel decisions, which were based on similar facts and issues of law.[4] In each of these matters, the employer divided its job requirements into "primary requirements," which the alien did not possess, and "alternative requirements," which the alien appeared to possess. In BALCA's analysis, these employers were listing primary requirements "in compliance with §656.21(b)(2)," but were adding alternative requirements "which mirror[ed] the alien's actual qualifications."[5] BALCA noted that, in theory, alter-

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[1] *Matter of Francis Kellogg*, 94-INA-465, 94-INA-544, and 95-INA-68 (BALCA Feb. 2, 1998) (en banc).

[2] The "*Kellogg* language" is the shorthand for the italicized portion of the rule ordinarily phrased as "any suitable combination of education, training or experience is acceptable."

[3] Employment and Training Administration (ETA), Final Rule, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New Systems, 20 CFR Part 656, 69 Fed. Reg. 77326 (Dec. 27, 2004) (PERM regulations).

[4] *See Matter of Francis Kellogg*, 94-INA-465, *The Winner's Circle*, 94-INA-544, and *North Central Organized for Total Health*, 94-INA-68.

[5] *Matter of Francis Kellogg*, 94-INA-465, 94-INA-544, and 95-INA-68, at 5 (BALCA Feb. 2, 1998) (en banc).

native requirements would increase the pool of qualified U.S. applicants and, as such, any U.S. applicant with skills meeting these expanded requirements could apply and be considered for the job.[6] But the Board also saw these alternatives as a means of qualifying the alien with lesser, individually tailored qualifications while also advertising qualifications greater than those possessed by the alien.[7] Because the employer was willing to hire the alien with less than its primary requirements, the employer was essentially restricting the pool of qualified applicants and manipulating the process by discouraging qualified U.S. applicants who might be interested in the job to apply.

Accordingly, BALCA overruled a previous line of cases involving "permissive alternatives"[8] not in compliance with former 20 CFR §656.21(b)(2). It nevertheless noted that there were instances where alternatives would be legitimate and appropriate. In such situations, both primary requirements and alternative requirements would need to 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. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement ..., the alternative must also be considered as normal ....[9] (emphasis added)

BALCA also noted that in the context of alternative requirements, there might be other combinations of education, training, or experience that could qualify an applicant to perform the position in a reasonable manner. If these other combinations are not advertised, U.S. applicants with matching qualifications are not on notice of the job opportunity and are excluded from consideration. Consequently, the *Kellogg* holding mandated that employers indicate their acceptance of "any suitable combination of education training, or experience" where the alien only meets the alternative requirements and not the primary requirements.

Thus, BALCA had fashioned a rule which reinterpreted the "actual minimum requirements" regulation,[10] creating a new standard for addressing employers' alternative job requirements. Post-*Kellogg*, all alternative sets of requirements must be "substantially equivalent" to each other and each set must be "normal" to the occupation in question. Lastly, if the alien does not meet the job's primary requirements, but only potentially meets the alternative requirements because the employer chose to list them, the employer must be flexible and consider any suitable combination of education, training, or experience to obtain approval from DOL.

Current *Kellogg* Standards

On December 27, 2004, DOL promulgated PERM regulations which revised Parts 656 and 656 of Title 20 of the Code of Federal Regulations, implementing a redesigned permanent employment certification system.[11] Prior to the rule, DOL had proposed to eliminate the use of alternative requirements as a means of qualifying aliens for the employer's job opportunity, but was in the end persuaded that there were "legitimate instances where alternative job requirements, including experience in a related occupation, can and should be permitted in the permanent labor certification process."[12] The regulation at §656.17(h)(4) by and large adopts the *Kellogg* holding, as follows:

> (4)(i) Alternative experience requirements must be *substantially equivalent* to the primary requirements of the job opportunity for which certification is sought; and
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> (ii) If the alien 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

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[6] *Id.*

[7] *Id.* at 6.

[8] *Id.*

[9] *Id.*

[10] The Board of Alien Labor Certification Appeals' (BALCA) *Kellogg* ruling fits neatly with the "actual minimum requirements" rule premised on the Department of Labor (DOL) policy of generally prohibiting employers from requiring experience and training provided to aliens, here in the guise of alternative requirements, which U.S. applicants would not possess. *See* 20 CFR §656.17(i). It also implements the requirement that the position not be tailored to the alien's specific qualifications, which effectively excludes U.S. applicants who would qualify for the job but for the "tailored requirements." *See* 20 CFR §656.17(h).

[11] PERM regulations, 69 Fed. Reg. 77326.

[12] *Id.* at 77353.

> combination of education, training, or experience is acceptable. (emphasis added)

Additionally, DOL's Frequently Asked Questions (FAQ), Round 10,[13] provides:

> Advertisement Content
>
> Does the advertisement have to contain the so-called "*Kellogg*" language where the application requires it to be used on the application?
>
> Where the "*Kellogg*" language is required by regulation to appear on the application, it is not required to appear in the advertisements used to notify potential applications of the employment opportunity. However, the placement of the language on the application is simply a mechanism to reflect compliance with a substantive, underlying requirement of the program. Therefore, if during an audit or at another point in the review of the application it becomes apparent that one or more U.S. workers with a suitable combination of education, training or experience were rejected, the application will be denied, whether or not the *Kellogg* language appears in the application. (emphasis added)

DOL regulators' adoption of the *Kellogg* ruling with respect to the "substantially equivalent" test was incomplete, as it did not provide examples of substantially equivalent requirements. Instead, this determination would be made based on "whether the applicant can perform the job in a reasonable manner."[14] Further, subsection (ii) directed employers to state the *Kellogg* language on the application in appropriate circumstances, but was silent as to whether or how U.S. applicants would be made aware that the employer was flexible to accept any combination of education, training, or experience in lieu of its stated requirements. Indeed, the FAQ, Round 10, expressly states that the *Kellogg* language "is not required to appear in the advertisements used to notify potential applicants" of the job, but that its placement on the application "is simply a mechanism to reflect a substantive, underlying requirement of the program."

How does an employer comply with the substantive *Kellogg* requirement if it does not have to advertise its flexibility in accepting any combination of education, training or experience? Similarly, how would the certifying officer (CO) determine that an applicant with a random alternative combination of qualifications was improperly rejected? Here, DOL seems unconcerned that qualified U.S. applicants might be prejudiced by not being made aware of the job opportunity's requirements potentially matching their skills, thus unwittingly encouraging the employer to restrict the pool of U.S. applicants, instead of expanding it. In short, the initial set up of the requirement that the employer comply with *Kellogg* substantively and procedurally appears internally inconsistent and perhaps misleading to the employer. More significantly, it seems contrary to DOL's statutory mandate to protect the domestic labor force from unfair competition from foreign labor.

Fortunately, BALCA has resolved several key issues stemming from DOL's implementation of the *Kellogg* regulation, providing needed clarity on: (1) whether the CO may deny an employer's application for failure to write the *Kellogg* language on the ETA Form 9089; (2) when the *Kellogg* language is inapplicable; and (3) which alternative requirements fail the "substantially equivalent" test.

May the CO Deny an Application for Failure to State the Kellogg *Language on ETA Form 9089?*

In *Matter of Federal Insurance Co.*, the employer sought DOL certification for the position of property, machinery and marine underwriter.[15] Its primary requirements included a bachelor's degree and 60 months of experience "in the job offered" or 60 months of experience in underwriting, including 36 months of experience in marine underwriting.[16] Additionally, the employer was willing to accept four years of experience instead of the four-year degree.[17] The CO denied the application because it did not contain the *Kellogg* language, and also because the beneficiary was currently employed by the employer and was qualified for the position based on

[13] DOL Round 10 PERM FAQ, at 1 (May 9, 2007), *published on* AILA InfoNet at Doc. No. 07051160 (*posted* May 11, 2007).

[14] PERM regulations, 69 Fed. Reg. 77353.

[15] *Matter of Federal Insurance Co.*, 2008-PER-00037, at 3–4 (BALCA Feb. 20, 2009).

[16] *Id.*

[17] BALCA viewed these additional four years of experience as an alternative requirement. *See Federal Insurance*, at 3–4, and 8.

the alternative requirement of four years of experience instead of a degree.[18]

The employer established that it received only two applications which it rejected due to the applicants' lack of the required 60 months of experience, and did not analyze whether the candidates had a bachelor's degree,[19] a "primary [educational] requirement." Further, some of the employer's advertisements contained only experiential requirements such that the lack of a degree was not a factor in disqualifying the two applicants it considered.[20] Accordingly, the employer argued that its recruitment efforts did not discourage qualified applicants; that it did not misrepresent the job's actual minimum requirements; and that it did not unlawfully tailor its alternative requirements to the beneficiary.[21] Lastly, the employer contended that, while it was in actual substantive compliance with the *Kellogg* rule, it did not write the *Kellogg* language because it could not locate any regulation or guidance on how and where to write the language.[22]

BALCA agreed with the employer on all issues. Specifically, it noted that the form did not provide "a Section that even suggests that it would be the correct place to write the *Kellogg* attestation."[23] It proceeded to fault the DOL for developing no instructions on how and where to state the requirement, except for an informal statement in a document unavailable for public viewing.[24] Unsurprisingly, BALCA concluded that DOL's implementation of the *Kellogg* rule appeared to be defective:[25]

> The *Kellogg* ruling was premised in the notion that the employer who was willing to hire the alien despite not possessing the primary job requirements should recruit in a manner so as [to] inform potential U.S. applicants that the employer's requirements are in fact flexible. This was an effort by the Board to limit the employer's motive and opportunity to manipulate the process by narrowly describing its job requirements while still qualifying the alien even though the alien did not meet the primary requirements. In other words, it was intended to make it difficult for employers to tailor the application to the alien's specific qualifications.
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> The PERM regulations expressly require that the employer state on its *application* its willingness to accept applicants who possess any suitable combination of education, training, or experience. They do not expressly require that the *Kellogg* language appear in recruitment materials.... Thus, the CO's PERM implementation only seeks to follow part of the *Kellogg* ruling insofar as it requires only an attestation or pledge by the employer not to reject U.S. applicants who have a suitable combination of qualifications. *It does not seem to require employers actually to inform U.S. applicants during recruitment of the employer's flexibility in assessing who is qualified for the job*. (emphasis added)

Responding to the CO's contention that "the essence of the [*Kellogg*] requirement must be set forth clearly and distinctly so that neither misunderstanding nor prejudice can occur," BALCA stated:

> [T]he way the CO has implemented the *Kellogg* ruling under PERM would assist U.S. applicants only in limited situations where an employer received applications from applicants persistent enough to apply even though they did not meet the requirements actually listed in the advertisements.[26]

BALCA's main criticism of DOL's current *Kellogg* regulatory and policy framework is that it does not inform U.S. applicants of an employer's flexibility in accepting any suitable combination of education, training, or experience. In *Federal Insurance*, the employer in fact advertised its alternative requirements in some venues, disqualified the applicants for not meeting the alternative requirements, but did not memorialize its apparent compliance by including the *Kellogg* language on the form. Thus, denying the application of an employer who complied with the *Kellogg* requirement but failed to attest that it would not reject applicants with alternative qualifications violates the employer's due process rights and is fundamentally unfair.[27]

How then does an employer comply with *Federal Insurance* and the *Kellogg* regulations? Assum-

[18] *Id.*
[19] *Id.* at 4.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 5.
[23] *Id.* at 10.
[24] *Id.* at 11, 13.
[25] *Id.* at 9–10.
[26] *Id.* at 10.
[27] *Id.* at 10–13.

ing that an employer lists two or more sets of requirements (*i.e.*, "primary requirements" and "alternative requirements"), and the beneficiary who is already employed by the employer potentially qualifies for the job by possessing the skills matching those in the alternative requirements, an employer should list the alternative requirements in *some advertising venues* to claim substantive compliance, and may even consider including the "any suitable combination of education, training, or experience is acceptable" phrase in advertisements. However, the employer in this scenario need not write the *Kellogg* language on the form because it provides no defined section for attesting to its compliance. As a practical matter, if audited, an employer must be prepared to provide sufficient documentation to show that it complied with the rule and that it duly considered U.S. applicants with any suitable combination of qualifications.[28]

When Is an Employer Not Subject to the Kellogg *Language?*

According to BALCA, where an employer presents "two sets of requirements that are essentially the same," the *Kellogg* language requirement is not invoked.[29]

The employer in *Matter of Agma Systems* filed a labor certification application for a Software Engineer (Applications) requiring a master's degree and three years of experience or, alternatively, a bachelor's degree and five years of experience.[30] The employer did not require experience "in the job offered," but only experience gained in an alternative occupation.[31] Because the beneficiary qualified for the job through his bachelor's degree and five years of job-related experience, the CO denied the application on the ground that the application did not state that any suitable combination of education, training, or experience would be acceptable, as required by 20 CFR §656.17(h)(4)(ii).

On appeal, the employer argued that it did not include the *Kellogg* language because it was uncomfortable with its subjectivity.[32] It further noted that its "primary requirement [was] normal for the job and [that] the alternative [was] exactly equivalent ... to the primary requirement."[33] Additionally, the employer stated that it relied on the *Kellogg* decision for the proposition that there were circumstances where alternative requirements would be appropriate and therefore not subject to the *Kellogg* language.[34]

BALCA concurred with the employer stating:[35]

> [T]he Employer is arguing that it does not have a "primary" and "alternative" requirement but only two sets of requirements that are effectively equivalent. As such, it is not qualifying the Alien with lesser qualifications in the guise of "alternate" qualifications, but only complying with the way it needs to describe the job requirements to comply with the Yates memo.

In the end, the Board held that the *Kellogg* language requirement was not applicable[36]

> because we accept the proposition that a Master's Degree ... and three years of experience ... and a Bachelor's Degree ... and five years of experience ... are *substantially equivalent* requirements. In this instance, the employer does not have a "primary" requirement (even though the Form 9089 more or less forced it to list one of the requirements as such on the form). Rather, it has two sets of requirements that are *essentially the same*. Because there is no "primary" requirement, section 656.17(h)(4) is not invoked. In other words, the employer's application presents precisely the kind of alternative require-

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[28] This latter recommendation is based on DOL's statement that the application will be denied if it becomes apparent to DOL in the course of an audit, etc., that that the employer improperly rejected U.S. applicants "whether or not the *Kellogg* language appears in the application." *See* DOL Round 10 PERM FAQ, at 1 (May 9, 2007), *published on* AILA InfoNet at Doc. No. 07051160 (*posted* May 11, 2007). Of course, is not clear how a DOL case worker would know when to audit an application that does not affirmatively state the employer's openness to accept "any" alternative qualifications.

[29] *See Matter of Agma Systems*, 2009-PER-00132 (BALCA Aug. 6, 2009).

[30] The CO and the employer disagreed over what the employer's requirements were, mainly due to differing interpretations of the form, which BALCA noted was poorly designed to accommodate an employer's presentation of two sets of requirements. But in the end, BALCA agreed with the employer that it required MS +3 or BS +5. *Agma Systems*, 2009-PER-00132, at 2–6.

[31] *Id.* at 2, 5.

[32] *Id.* at 4.

[33] *Id.* at 5.

[34] *Id.* at 3–4.

[35] *Id.* at 8.

[36] *Id.* at 9.

> ments for a computer programmer position that the *Kellogg* decision recognized as "legitimate." Moreover, we find no indication in this matter that the job requirements were tailored to the alien's special qualifications. (emphasis added)

Thus, in accordance with *Agma Systems*, where an employer lists two sets of requirements that are substantially equivalent, or "essentially the same," an employer does not have to comply with the *Kellogg* language requirement. Indeed, considering BALCA's observation in footnote 2 of the decision, 20 CFR §656.17(h)(4) does not apply to applications factually similar to *Agma Systems*. In other words, where alternative requirements are not tailored to the alien's specific skills, and the primary and alternative requirements are the same, both the *Kellogg* rule and the *Kellogg* language are inapplicable.

Additionally, DOL's FAQ, Round 10 instructs employers not to include the *Kellogg* language if they require experience in an alternative occupation but not in "the job offered."[37] Specifically, the FAQ, Round 10 asks:

> Is the employer required to include the [*Kellogg*] statement ... on the application when the employer requires experience in an alternate occupation and not in the job offered?
>
> No, the employer is not required to include the statement on the application if the employer has indicated it requires experience in an alternate occupation and not in the job offered. The [*Kellogg* language] is only required where there are primary as well as alternative requirements....[38]

This nonbinding agency statement is consistent with DOL's *partial* implementation of the *Kellogg* rule, namely, its express requirement that the *Kellogg* language be included on the form, but not in advertisements so as to actually inform U.S. applicants of an employer's flexibility to accept alternative skills and qualifications. As such, it is not clear why requiring experience in an alternative occupation but not in "the job offered" would categorically exempt the employer from noting the *Kellogg* language in the form. Even without requiring experience in the job offered, the employer's requirements may still be presented as "primary" and "alternative." For instance, the employer may choose to require a master's degree and one year of experience in a related occupation, or a bachelor's degree and five years of experience in a related occupation,[39] without specifically needing anyone with experience in "the job offered." If the beneficiary is already employed by the employer and qualifies for the job through a bachelor's degree and five years of experience, a labor certification on behalf of the beneficiary would need to comply with the *Kellogg* rule. Thus, it may not be wise to rely on DOL's FAQ, Round 10 insofar as it overlooks the possibility of violating the *Kellogg* regulation even where no experience in "the job offered" is required.[40]

Which Requirements Are Not Considered "Substantially Equivalent"?

Under 20 CFR §656.17(h)(1), "[t]he job opportunity's requirements … must be those *normally* required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones." This requirement restates the former 20 CFR §656.21(b)(2), minus the language on "unduly restrictive jobs requirements."[41] Further, pursuant to *Kellogg* and 20 CFR §656.17(h)(4), "alternatives must be substantially equivalent to each other."[42] This ensures that employers do not tailor alternative requirements to the alien's specific qualifications, while advertising qualifications substantially greater than those possessed by the alien, thereby restricting the pool of qualified applicants.

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[37] DOL Round 10 PERM FAQ, at 2 (May 9, 2007), *published on* AILA InfoNet at Doc. No. 07051160 (*posted* May 11, 2007).

[38] *Id.*

[39] In the author's view, a master's degree and one year of experience may not be "substantially equivalent" to a bachelor's degree and five years of experience based on Specific Vocational Preparation (SVP) calculation guidelines of the PERM regulations. *See* PERM regulations, 69 Fed. Reg. at 77388.

[40] The employer in this scenario would need to be in actual substantive compliance with the *Kellogg* rule by advertising its flexibility to accept alternative qualifications (under *Federal Insurance*), even though it might still not have to write the *Kellogg* language on the form because of its recognized deficiency to accommodate it.

[41] The only difference is that the former 20 CFR §656.21(b)(2), *available at http://edocket.access.gpo.gov/cfr_2001/aprqtr/pdf/20cfr656.21.pdf*, refers to the *Dictionary of Occupational Titles* as the source of occupational information rather than to O*NET's Job Zones, as in 20 CFR §656.17(h)(1).

[42] *Matter of Francis Kellogg*, 94-INA-465, 94-INA-544, and 95-INA-68, at 5 (BALCA Feb. 2, 1998) (en banc).

But PERM regulations do not provide clear standards for determining substantial equivalence for purposes of 20 CFR §656.17(h)(4)(1). During the notice and comment period preceding the publication of the PERM rule, DOL declined to apply the "related occupation" criteria of 20 CFR §656.17(k) to alternative requirements.[43] Thus, it fell on BALCA to once again explain "substantially equivalent" standards, which it did in *Matter of Globalnet Management*[44] and *Matter of ST Mobile Aerospace Engineering*.[45] Curiously, these decisions tackled the issue of which requirements were *not* substantially equivalent.

In each of these cases, the employer's alternative requirements were significantly higher, and more restrictive, than the primary requirements. Specifically, the employer in *Globalnet Management* required a bachelor's degree and two years of experience, or 14 years of experience.[46] In *ST Mobile Aerospace Engineering*, the employer required a bachelor's degree and no experience, and 12 years of experience in the alternative.[47] BALCA noted that, pursuant to 20 CFR §656.17(h)(4)(i), alternative requirements had to be substantially equivalent.[48] It then cited to 20 CFR §656.3 as "outlin[ing the] minimum and maximum experience for positions of different levels under the specific vocational preparation (SVP) definition," and to Field Memorandum No. 48-94 (May 16, 1994) as "expand[ing] on the SVP requirements and offer[ing] guidance in determining the appropriate SVP level based on the required education and experience."[49] In BALCA's view,

> The SVP levels ensure that the job requirements are tailored to the position rather than to the alien the employer is seeking to hire.[50]

It then applied the SVP guidelines to each employer's alternative requirements and found them disproportionately excessive rather than substantially equivalent, as required by 20 CFR §656.17(h)(4)(i).[51] Thus, BALCA upheld the denials, stating that PERM's "[SVP] guidelines apply to both primary and alternatives requirements" and reaffirming the *Kellogg* principle that,

> Alternative requirements are acceptable when they are substantially equivalent to the [job opportunity's primary requirements] and expansive rather than restrictive of the potential applicant pool.[52]

In short, *Globalnet Management* and *ST Mobile Aerospace Engineering* stand for the proposition that PERM SVP guidelines apply to both primary and alternative requirements, and that the SVP value of alternative requirements must not exceed the SVP value of primary requirements such that the alternative requirements would "significantly restrict the applicant pool"[53] or be "unduly restrictive, contrary to §656.17(h)(4)(i)."[54]

CONCLUSION

Based on the current *Kellogg* regulation and relevant BALCA interpretation discussed in this article, the following are examples of when and how employers may wish to use the *Kellogg* language in PERM applications:

- If an employer wishes to recruit with primary and alternative requirements, and the beneficiary who is already employed by the employer potentially qualifies for the job by possessing the skills specified in the alternative requirements, the employer should list its primary and alternative requirements in some advertising venues to

[43] PERM regulations, 69 Fed. Reg. at 77353.

[44] *Matter of Globalnet Management*, 2009-PER-00110 (BALCA Aug. 6, 2009).

[45] *Matter of ST Mobile Aerospace Engineering*, 2009-PER-00429 (BALCA July 9, 2010).

[46] *Globalnet Management*, 2009-PER-00110, at 2.

[47] *ST Mobile Aerospace Engineering*, 2009-PER-00429, at 2.

[48] *Globalnet Management*, 2009-PER-00110, at 5; *ST Mobile Aerospace Engineering*, 2009-PER-00429, at 4.

[49] *Globalnet Management*, at 5–6; *ST Mobile Aerospace Engineering*, at 4.

[50] *Globalnet Management*, at 6; *ST Mobile Aerospace Engineering*, at 4.

[51] It is not surprising that BALCA's SVP calculations led it to conclude that BS +2 (or 4 years of specific vocational preparation) was not substantially equivalent to 14 years of experience (or 14 years of specific vocational preparation; and that BS +0 (or 2 years of specific vocational preparation) was not substantially equivalent to 12 years of experience (or 12 years of specific vocational preparation). *See Global Management*, at 6; *ST Mobile Aerospace Engineering*, at 5.

[52] *See* G*lobal Management*, at 6; *ST Mobile Aerospace Engineering*, at 5.

[53] *See Globalnet Management*, at 6.

[54] *See ST Mobile Aerospace Engineering*, at 4.

claim compliance, and may even consider using the *Kellogg* language in some advertisements.

- The employer in the above example need *not* write the *Kellogg* language on the form because the form provides no defined section in which to attest to its compliance. The employer must, however, be prepared to provide sufficient documentation to show that it complied with the rule and that it *considered* U.S. applicants with suitable combinations of qualifications prior to rejecting them.
- Where an employer presents two sets of requirements that are essentially the same, the *Kellogg* language requirement is inapplicable. Additionally, where alternative requirements are not tailored to the alien's specific skills, and the primary and alternative requirements are the same, the *Kellogg* rule is inapplicable.
- DOL's FAQ, Round 10 instructs employers not to include the *Kellogg* language if they require experience in an alternative occupation but not in "the job offered." Employers are cautioned, however, that relying on this nonbinding agency statement may be unwise insofar as it overlooks the possibility of violating the *Kellogg* rule in instances where requirements are structured as alternatives, even where no experience in "the job offered" is required.
- Where the SVP value of alternative requirements significantly exceeds the SVP value of primary requirements, such alternative requirements are not "substantially equivalent," in violation of 20 CFR §656.17(h)(4)(i). Accordingly, to ensure compliance, employers are advised to structure their primary and alternative requirements with equal SVP values, whenever possible.
- If the beneficiary is not already employed by the employer, the *Kellogg* rule does not apply.

The above recommendations offer ways of documenting compliance with current *Kellogg* standards although there still remain interpretive differences between BALCA and DOL. Therefore, employers should carefully review all case facts when presenting their requirements as alternatives and preparing approvable PERM applications.