Labor Certification: Six Different Ways and Reasons for Establishing Dissimilarity between Two Employment Positions

Lorna Rogers Burgess
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What makes two jobs different in alien employment certification and labor condition attestation is difficult to determine. This Article explores the methodology applied by the Department of Labor in distinguishing between jobs in contexts including utilization of an alien's on-the-job training as a qualifying credential in labor certification and in challenging a wage survey.

I. INTRODUCTION

What makes two jobs different for the purposes of alien employment certification¹ and labor condition attestation² is often difficult

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1. Aliens immigrating to the United States on the basis of a job offer are excluded unless the Secretary of Labor has certified that there are insufficient United States workers able, willing, and qualified for the position and that employment of the alien will not adversely affect United States workers. 8 U.S.C. § 1182(a)(5) (Supp. III 1991). The regulations of the Department of Labor that establish the Alien Employment Certification procedure are found at 20 C.F.R. § 656 (1991).

to determine. This is particularly true at professional levels of endeavor, where an individual’s job performance is influenced by years of education, training, and experience. Yet in order to pursue professional employment authorization or permanent labor certification, the individuality of the worker and employment position must be reduced to the limited available codes and must be defined in such a manner that one employment position may be compared to another.

This Article explores the factors and methodologies that have been considered by the Department of Labor (DOL) in distinguishing between two jobs in several contexts. Most commonly, a distinction between two jobs must be established if an alien’s previous experience with the same employer is to be used as a qualifying credential in labor certification. Since, at the time an Application for Alien Employment Certification is filed, virtually all professional individuals are already employed, with nonimmigrant employment authorization, by the employer that is applying for certification, this issue is present in almost all professional labor certification matters. In some situations the alien has gained valuable training through employment by a related company in the United States or abroad. In others, the alien has gained valuable experience in the employer’s workplace and the employer is not able to document the infeasibility of training another worker despite the burden of this training to the employer.

Labor certification requires a strategic choice: the employer must either take the unreal approach of specifying as job requirements only the alien’s qualifications at initial hire or undertake


4. _The Department of Labor. Dictionary of Occupational Titles_ (4th ed. 1992) [hereinafter DOT], written by occupational specialists of the Department of Labor, classifies jobs normally found in the United States according to occupational code. The combined years of education, training, and experience thought normally to prepare an individual for a job are known as the “specific vocational preparation” (SVP). Each DOT code is assigned an SVP limit.

5. 20 C.F.R. § 656.21(b)(6) (1991). Note that 20 C.F.R. § 656.21(b)(6) has been renumbered by the Interim Final Rules of the Department of Labor, 56 Fed. Reg. 54,920 (1991). What was § 656.21(b)(5) has been deleted and §§ (b)(4) through (b)(7) have been renumbered so that § 656.21(b)(6) has now become § (b)(5). Because this Article analyzes decisions based on the old regulations, the citation to § (b)(6) will be used.

6. Form ETA 750 Parts A and B is filed to initiate the labor certification procedure. This form describes the job, the requirements for the job, and the alien’s background.


9. See _In re Avicom International, 90-INA-284_ (BALCA July 31, 1991), reprinted in 9 _Immigr. L. & Proc. Rep._ 133-65 (1992), which is one of the few cases in
the difficult task of distinguishing the offered job from the job in which the alien gained the experience. The first course ignores reality, yet the alternative of distinguishing between the two jobs is often difficult to document to the satisfaction of the Certifying Officer and more often than not results in an appeal.

This Article, however, is not limited to considering dissimilar jobs in the context of qualifying an alien with on-the-job training. Another context in which the dissimilarity between two jobs must be established, and which is addressed here, is in a challenge to a state wage determination. A successful challenge often requires establishing a dissimilarity between the job offered and those to which it is compared. This is commonly a problem in the H(1)(b) context, in which the aliens, previously described as possessing “distinguished merit and ability,” are often in cutting-edge jobs. The prevailing wage restrictions placed by the Immigration Act of 1990 on the H(1)(b) visa category necessitate the reduction of every H(1)(b) job to a recognized category that may then be assigned a salary by a state compensation statistician. That state compensationist may be equipped to statistically average salary information, but the information averaged cannot be reliable unless the wage survey has taken full account of the distinctions between jobs.

While the similarity between two jobs may need to be established to document the alien’s qualifying experience, the dissimilarity between jobs is also critical in articulating reasons for the rejection of which infeasibility of training has been demonstrated. The employer showed a change in corporate ownership which, coupled with a reduction in the workforce, left the alien as the sole remaining employee with the knowledge and training required of an electronics engineer. See also In re Bear Sterns & Co., Inc., 91-INA-248 (BALCA Apr. 13, 1992), in which infeasibility was established by evidence of the departure of five individuals without whose presence training could not be provided as it had been to the alien.

10. The Regional Certifying Officer of the Department of Labor adjudicates the labor certification request.

11. Appeals from the final determination of the Certifying Officer are made to the Board of Alien Labor Certification Appeals (BALCA), 20 C.F.R. § 656.26 (1991).


14. Id.

15. The alien must qualify for the position described on the Application for Alien Employment Certification at the time the application is filed.
United States applicants who lack qualifying experience or who cannot perform the advertised job duties. In addition, the dissimilarity between jobs should be considered in the decision of whether to file individual or blanket labor condition attestation forms. The dissimilarity between positions must also be analyzed if there has been any change in the job duties and a decision must be made as to whether the job remains the same as the one described in the labor certification, labor condition attestation, or other visa petition, or whether a new petition or application is required.

II. DISCUSSION

A. The Dissimilarity Between Jobs with Respect to Training Gained with the Employer

The provision at 20 C.F.R. § 656.21(b)(6) requires the employer to document that its requirements are the actual minimum requirements for the position. If the alien did not have the specified education, training, or experience at the time of initial hire, the requirement cannot be the actual minimum requirement for the job. The bulk of cases denied under 20 C.F.R. § 656.21(b)(6) are denied because the alien lacked the stated qualifications when he or she began performing the job functions.

In re Anderson-Mraz Design exemplifies this problem. The employer required four months of experience in the offered position of graphic design consultant. Not only was the employer unable to establish that the alien had such experience prior to joining the employer’s workforce, but the Board of Alien Labor Certification Appeals (BALCA) held that it was unnecessary to address the issue of whether the jobs were dissimilar because,

'[p]ut simply, the [e]mployer requires four months of experience in the job offered... Accordingly, if the [a]lien's internship is considered experience in a lesser related job, then the [a]lien does not meet the requirement. If, on the other hand, it is deemed to be the same as the job offered, then the [a]lien gained such experience with the same [e]mployer in essentially the same job.'

Training that the alien has gained while working for the same employer may not be used to meet the experience requirements in a

16. 20 C.F.R. § 656.21(b)(6) (1992) (previously 20 C.F.R. § 656.21(b)(7)).
17. Form ETA 9035, Application for Labor Condition Attestation, may be filed for an individual H(1)(b) worker or for all workers in the occupational category.
18. Many immigration forms must be amended or refiled if there have been changes in the job that are material to the benefit sought by the application.
20. Id. at B3-306.
labor certification unless the qualifications were gained in a dissimilar job, or unless the employer establishes the infeasibility of training another worker.21 Due to the difficulty of establishing infeasibility,22 and the not uncommon problem that the significant qualifications for the job have been gained while working for the employer, qualifying aliens with on-the-job experience more often than not requires establishing the dissimilarity between the job in which the experience was acquired and the job for which certification is sought. In re Inmos23 increased the frequency of this problem by concluding that the foreign parent of a company was the same employer. Other cases have similarly regarded separate United States corporations as the same employer.24

In re Delitizer Corp. of Newton25 was BALCA's seminal opinion on the use of an experience requirement that the alien gained with the same employer in a different job.26 In that case, BALCA listed the criteria it uses to determine whether two jobs are sufficiently dissimilar for the alien's experience in one job to be included in the requirements of another job under section 656.21(b)(6). To make the comparison, BALCA focused on:

1. job duties;
2. supervisory responsibilities; however, de minimis supervisory responsibilities are not sufficient to distinguish between two jobs;
3. job requirements;
4. the ranking of the position in the employer's job hierarchy;
5. the credentials of the previous holder of the position;

22. Infeasibility, however, has been established in a few cases. See supra note 9.
26. Extensive review of the various cases in which the dissimilarity of jobs was considered in the context of 20 C.F.R. § 656.21(b)(6) has already been published and will not be repeated here. See Lorna Rogers Burgess, Actual Minimum Job Requirements in Labor Certification, 23 SAN DIEGO L. REV. 375 (1986); Lorna Rogers Burgess, A New Look at Actual Minimum Job Requirements and Experience in Similar Occupations and with the Same Employer, 27 SAN DIEGO L. REV. 769 (1990).
(6) prior employment practices regarding the positions;
(7) the amount and percentage of time allocated to each job duty;
(8) salaries.\textsuperscript{27}

After the \textit{Delitzer} case had been remanded, BALCA held that the employer had failed to establish that the positions of cook and assistant cook (the positions involved in the matter) were sufficiently dissimilar.\textsuperscript{28}

One of the first cases to apply \textit{Delitzer} was \textit{In re Construction Technologies, Inc.},\textsuperscript{29} in which BALCA was unable to find that the positions of construction inspector trainee and construction inspector were different. The distinction drawn by the employer between the duties of the two jobs was that the inspector signed construction reports and evaluation letters on behalf of the company. BALCA concluded that this was not a change in job duties, but merely a heightened level of accountability for the same duties.\textsuperscript{30} Similarly, in \textit{In re Landor Associates},\textsuperscript{31} BALCA applied \textit{Delitzer} and found that the only distinction between the positions of junior designer and designer was an undetermined difference in degree of autonomy, which did not sufficiently distinguish the two jobs.\textsuperscript{32}

The applicant in \textit{In re Compinfo, Inc.}\textsuperscript{33} failed to distinguish two job positions on the grounds of different requirements and a higher salary. The offered position of computer analyst required one year of experience, which the alien had gained with the employer in a position with identical duties to the job offered. The distinction argued by the employer, that the offered position had a higher salary and required an M.S. degree not required by the position in which the alien was initially hired, was insufficient to establish a separate and distinct position, since the job duties appeared to be the same.\textsuperscript{34}

Several attempts have been made to distinguish between two jobs on the grounds that the jobs have different \textit{Dictionary of Occupational Titles (DOT)} codes. BALCA has held, however, that the fact that two positions are separately listed in the \textit{DOT} is not dispositive of the issue of whether they are sufficiently dissimilar under section 656.21(b)(6).\textsuperscript{35}

\textsuperscript{27} \textit{Delitzer}, 8 IMMIGR. L. & PROC. REP. at B3-228.
\textsuperscript{28} \textit{Delitzer}, 9 IMMIGR. L. & PROC. REP. at B3-141.
\textsuperscript{30} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{34} \textit{Id.} at B3-296.
\textsuperscript{35} \textit{In re Delaney's Restaurant}, 88-INA-174 (BALCA Oct. 30, 1991), \textit{reprinted in
The presence of supervisory responsibilities failed to distinguish two jobs in *In re Valmet Automation*, which involved the difference between the positions of senior software engineer and senior systems engineer. As described on the application, the job of senior systems engineer required a bachelor of science degree in computer engineering and five years of experience as a senior software engineer. Knowledge of the Finnish language was also required. The duties entailed design, analysis, and implementation of production management systems for the pulp industry. The employer argued that the senior systems engineer had supervisory responsibility and responsibility for continuing maintenance and improvement of systems management and client coordination, as well as a higher salary than the senior software engineer. The Certifying Officer concluded that the jobs were in the same occupation because the former was a prerequisite for the latter. BALCA affirmed, reasoning that although the jobs were not the same, they were not sufficiently dissimilar.

A contrary result was reached in *In re Paradise Produce, Inc.* The application on behalf of a sales manager required six months of experience in the job offered or one year of experience as a fresh fruit and vegetable salesman as well as familiarity with exotic produce. The alien had initially been hired as a salesman with no experience in exotic fruits and vegetables. BALCA found that the positions of sales manager and salesman were sufficiently dissimilar under section 656.21(b)(6). The duties of the sales manager were to manage the company, plan and prepare work schedules, coordinate sales, take inventory, reconcile payments with sales receipts, keep records, supervise four employees, train employees, and negotiate. The salesman merely sold fresh fruits and vegetables, arranged the display, and advised customers. Their responsibilities were considered to be "qualitatively" different, and supervisory responsibility was significant to the difference. Moreover, the fact that one position was a logical progression to the other was held not to amount to a violation of section 656.21(b)(6).

9 IMMIGR. L. & PROC. REP. B3-160 (1992) (The position of second cook and cook's helper, who prepared the food, which was then cooked by the cook, was not dissimilar to the position of cook under § 656.21(b)(6).).


37. *Id.* at B3-105.


39. *Id.*
In *In re Advanced Computer Concepts*, the employer was successful in distinguishing the positions of computer technician and computer technician apprentice on the grounds that the former required a different level of skill and ability measured by an objective test. The advertised position of computer technician required one year of experience in the job offered or in the position of computer technician apprentice. Of the eighty-two applicants who applied for the job, forty-nine failed to attend scheduled interviews and thirty-three did not pass a written test designed to measure their ability to solve problems typically faced by the computer technician. The alien had gained his qualifying experience with the employer and had passed the written test.

BALCA held that the evidence clearly showed that different levels of skill, responsibility, and expertise were required in the two jobs and that the jobs involved different duties, different locations, and the use of different instruments. The evidence cited in the decision included a description of specific tasks performed by the technician but not by the apprentice because of the level of skill, ability, and experience required. Those tasks included independently detecting and isolating defective components, determining the cause of defects, determining the repair or replacement required, repairing the components, and giving cost estimates. An additional factor that appears to have influenced the decision was the fact that there was no automatic advancement from apprentice to technician. Rather, some apprentices never learned to perform the technician job. The fact the salaries were different was noted but not documented. The opinion distinguishes *In re Rod Fjellman Drywall Contractors*, issued the same day, in which BALCA found a drywall finisher and apprentice drywall finisher were not sufficiently dissimilar when the apprentice performed the same job duties as drywall finishers but the level of expertise and supervision varied.

Documented differences in the historical treatment of two positions in an employer's job hierarchy have provided a successful argument for distinguishing between two jobs under 20 C.F.R. §

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41. See also *In re Medical Research & Illustrations, Ltd.*, 88-INA-35 (BALCA Feb. 14, 1990), reprinted in *Immigr. L. & Proc. Rep.* B3-21 (1991) (holding that it was reasonable to evaluate ability to illustrate by a test).
43. *Id.*
44. *Id.*
45. *Id.*
47. *Id.*
656.21(b)(6). For example, In re Altera Corporation48 considered the difference between the positions of design engineer and product engineer. The requirements for a design engineer included a bachelor of science degree in electrical engineering and one year of experience in the job offered or in testing ASIC semiconductor devices. The alien had acquired one year of experience while working in the position of product engineer. The employer argued that the design engineer built new products whereas the product engineer tested products. The positions reported to different managers and received different salaries. The DOT did not help in the comparison, since neither job was listed. Applying Delitizer, BALCA held the positions were different in that the positions “work at different steps in the chain of production.”49 It is worth noting, in addition, that the positions also had different requirements, different locations in the organizational structure, reported to different positions in different departments, and had significantly different salary rates.50

In In re Panache Management and Consulting,51 failure to produce specific documentation of the historical treatment of two positions resulted in an inability to distinguish an investment banking management consultant from an entry-level investment banking management consultant. The offered position required an MBA in finance and one year in the job offered or in the related occupation of management consultant. The employer did not provide documentation, specifically required by the Certifying Officer, of the experience of the other management consultants when hired or of the experience of individuals who had held the positions previously. The alien’s advancement from the entry level to the offered position appeared to BALCA to be a career progression and not a change from one distinct position to another. In addition, although the alien’s experience had been gained consulting with a different client, BALCA found that the “slightly different nuances” of each assignment entailed on-the-job training.52

49. Id. at B3-31.
50. Id. at B3-32.
52. Id. at B3-262.
In *In re Kurt Salmon Associates, Inc.*, the employer unsuccess-
fully attempted a similar argument to distinguish between a consult-
ant analyzing a distinct vertical market and one analyzing an
industry in a country at large. In *re Marsh & McLennan, Inc.*, however, was successful in applying an argument similar to that of
Panache and Kurt Salmon. Marsh & McLennan involved the posi-
tion of Account Representative and International Coordinator with
responsibility for assembling and leading a team of specialists to
meet the needs of Korean multinational corporations, advising on
risk management, and coordinating client services. The requirements
for the position included one year of experience either in the job of-
fered or as an Insurance Broker or Insurance Broker Trainee. The
beneficiary had no experience prior to being hired by the employer
as an Insurance Broker Trainee. The Certifying Officer found the
trainee experience merely established experience in essentially the
entry level of the job described. Therefore, the employer had trained
the alien in violation of 20 C.F.R. § 656.21(b)(6). The employer ar-
gued that the training had provided only general experience common
in the industry and was designed to give broad exposure to insurance
concepts that could be obtained with any insurance brokerage firm.
The offered job, on the other hand, was specialized.

On review, citing *In re Delaney’s Restaurant*, BALCA held that
when the experience was gained as a trainee for the very job for
which certification is sought, “the employer carries a heavy burden
to establish the dissimilarity between the two
positions.” Nevertheless, as in *In re Precision Fabricating, Inc.*, the employer had es-

(1) The trainee duties were general rather than advisory and were mana-
gerial with respect to a specific area;
(2) Most significantly to BALCA, the job offered required supervision of
employees, initiation of client contact, and coordination of client services;
(3) The only similarity between the duties reflected on the ETA 750 was
risk analysis;
(4) The requirements for the two positions were different because the
trainee position required no experience. The record did not reflect the edu-
cation requirement for the trainee;
(5) The salaries were different;

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53. 87-INA-636 (BALCA Oct. 27, 1988), reprinted in 6 IMMIGR. L. & PROC. REP.
B3-105 (1989).
54. 91-INA-199 (BALCA July 2, 1992).
55. *Id.*
58. 89-INA-249 (BALCA Nov. 29, 1990), aff’d en banc, 89-INA-249 (BALCA
Feb. 15, 1991) (finding a Machine Operator to be sufficiently dissimilar to a Machine
Operator Trainee).
(6) The employer would hire an individual whose training was gained in another firm; and
(7) The trainee position did not automatically lead to the job offered but was requisite training for a number of positions in several divisions of the workforce.69

Similarly, in In re Morgan Stanley & Co.,60 the offered position of Global Equities Strategist was distinguished from the beneficiary's previous entry- and junior-level associate positions. The factors that persuaded the panel were:

(1) The entry-level position had provided experience comparable to that gained by an associate during the first year in any major financial or investment firm. The assignments involved general principles of asset management.
(2) The offered job entailed application of advanced and complex valuation techniques to accomplish specialized industry-specific research.
(3) Moreover, the jobs were bona fide positions in the employment hierarchy and were well documented by historical treatment. The firm did not "groom an employee for more senior positions by training them [sic] in a pretextually less senior position."61

The obvious credibility of the evidence that was offered to show the historically different treatment of two jobs also influenced BALCA in In re Western Savings & Loan Ass'n.62 Evidence that the position of Senior On-line Technical Analyst had previously been performed by consultants before the employer subsequently decided to make the position permanent was persuasive in showing that the employer did not improperly train the alien. In addition, the relative duties, requirements, and supervisory responsibilities were sufficiently dissimilar under 20 C.F.R. § 656.21(b)(6).63

It should be noted that a student is not an employee. Consequently, qualifications gained through education should not be considered as gained through on-the-job training, even though the student later became an employee. In In re Houston Graduate School of Theology,64 the Missions Coordinator, which was responsible for training evangelists, developing materials for them, and supporting them, required four months of training in a Christian seminary. The alien was studying theology at the seminary and working at the seminary as an adjunct professor-library assistant responsible for cataloging, book preparation, and teaching courses in

60. 91-INA-033 (BALCA Aug. 21, 1992).
61. Id.
62. 91-INA-164 (BALCA July 9, 1992).
63. Id.
64. 90-INA-491 (BALCA Dec. 6, 1991).
Chinese culture. The Certifying Officer proposed to deny certification on the grounds that the alien did not have the four months' training when hired. BALCA disagreed, holding both that the positions were dissimilar and that the training had been gained as a student, not as an employee, and hence was not barred by section 656.21(b)(6). On the other hand, experience gained working while going to school will not be the same as post-degree experience which requires the degree as a minimum job qualification and, therefore, may not qualify the alien for the job.65

In summary, the BALCA decisions that consider whether two jobs are similar in order to qualify an alien with on-the-job experience under 20 C.F.R. § 656.21(b)(6) have applied the eight criteria established by In re Delitzer:66 job duties, supervisory duties, job requirements, the position's location in the job hierarchy, the credentials of the previous person in the position, the previous treatment of the position, and salaries. Different titles, salaries, and requirements are present in most cases and therefore are not factors that, standing alone, will distinguish two jobs. Nor will the addition of supervisory responsibilities alone distinguish two jobs. It is the careful comparison between job duties, corroborated by different treatment of the positions by the employer, that appears to be the most important criterion for establishing a differentiation. The cases appear to be very fact specific. Moreover, BALCA appears to draw different conclusions from similar facts where those facts are not fully documented in the record below.

B. The Dissimilarity of Jobs in Relation to Pay Differences

Differences in compensation are one of the factors utilized to distinguish two jobs under section 656.21(b)(6). Conversely, the dissimilarity between two jobs is utilized to justify different salaries where the propriety of the salary is at issue in labor certification or labor condition attestation.

1. Pay Differences in Labor Certification

The statutory standard requires that wages offered to an alien do not have an adverse effect upon similarly employed United States workers.67 The "prevailing wage" standard is not included within the statute, but was devised by the DOL as a practical test of adverse

65. In some cases, experience gained while in school was found to be of a different kind from that required. See infra notes 139-40 and accompanying text.
effect. Prevailing wage is calculated as the average of wages paid to workers “similarly employed” in the area.\textsuperscript{68} The term “similarly employed” refers to those having “substantially comparable jobs in the occupational category in the area of intended employment,” or if there are none, jobs requiring a “substantially similar” level of skills.\textsuperscript{69}

In order for a prevailing wage determination to be relevant and accurate, the comparison of wages must be between comparable jobs. BALCA has, therefore, analyzed the differences between positions in order to determine whether two jobs are “similar.” BALCA’s analysis has led to the following decisions: an employer failed to establish that a secretary is not comparable to a stenographer;\textsuperscript{70} a companion for an elderly man was found not to be the same as a household worker, and the former therefore had a lower prevailing wage than the latter;\textsuperscript{71} the position of ultrasonic technician was found, after an analysis of its duties, to be substantially comparable to that of electronic technician;\textsuperscript{72} welders in the manufacture of durable goods were found not to be similarly employed to welders in all industries;\textsuperscript{73} and a laborer was found not to be the same as a carpenter.\textsuperscript{74} Additionally, inclusion of supervisory duties may result in a higher prevailing wage.\textsuperscript{75} The prevailing wage for a baker was found to be higher than that of an assistant baker,\textsuperscript{76} and a processing inspector, although not a supervisory position, oversaw, trained, and supervised other workers and therefore was assigned a higher prevailing wage than if the position had not had the duty to supervise other workers.\textsuperscript{77}

\textit{In re Tuskegee University}\textsuperscript{78} broadened the measure of similarity

\textsuperscript{69} Id.
\textsuperscript{73} In re South Gate Eng’g, Inc., 89-INA-215 (BALCA June 20, 1991).
\textsuperscript{74} In re Charles Eric Engstrom, 89-INA-370 (BALCA Sept. 27, 1990).
\textsuperscript{76} In re Birkham’s Solvang Danish Bakery, 88-INA-548 (BALCA Oct. 29, 1990).
to include the context of employment and established the principle that the determination of those “similarly employed” takes into consideration the totality of the job opportunity, not just the job duties and title. As interpreted by subsequent decisions, the totality of the job opportunity to be considered in determining the prevailing wage includes:

1. job title;
2. job duties;
3. the nature of the business or institution: whether it is public or private, secular or religious, profit or nonprofit, multinational or individual;
4. the size of the employer;
5. the years of experience required to perform the job;
6. the educational credentials required for performance of the job;
7. the specialized skill applied in the job position; and
8. the seniority of the position within the employment hierarchy.79

When the Davis-Bacon Act80 applies to a position, it determines the prevailing wage. Consequently, a series of cases has challenged whether certain positions are subject to the Davis-Bacon Act. In general, those decisions do not consider the totality of the circumstances. They have held that, if the job opportunity involves an occupation covered by the Davis-Bacon Act, the wage must be determined in accordance with the Act even if the employer may not be subject to the Act, and thus the actual job position is not subject to the Act.81

In re John Lehne & Son82 found that, although the occupation of painter is covered by the Davis-Bacon Act, the schedule of occupations in the Act contains many subclassifications of painters, and the wage rate must be appropriate to the particular subclassification. Thus, BALCA held that the Davis-Bacon Act schedule of subclassification that most closely approximated the job offered was controlling. The case was remanded to the Certifying Officer with the guidance that the classification of painters “on construction up to and including 3 stories in height” might be applicable to “brush painters of residential homes in Los Angeles County.”83

81. See, e.g., In re Standard Drywall, 88-IN A-99 (BALCA May 24, 1988) (en banc).
82. 89-IN A-267 (BALCA Dec. 18, 1990); 89-IN A-313 (BALCA Dec. 12, 1990) (BALCA May 1, 1992) (en banc).
83. In re John Lehne, 89 IN A-313.
A recent opinion has analyzed the impact on salary of the preclusion of requiring on-the-job experience. In re University of North Carolina\(^\text{84}\) held that, since 20 C.F.R. § 656.21(b)(6) precludes requiring training and on-the-job experience, the advertised salary need not reflect the added on-the-job qualifications so long as the wage is the prevailing wage for the job as described without the additional qualifications precluded by 20 C.F.R. § 656.21(b)(6).\(^\text{85}\)

In summary, alien employment certification, whether or not the salary is the prevailing wage, requires a comparison between that salary and salaries paid for similar jobs. In this context, supervisory responsibility, job duties, and job requirements all seem significant in determining whether jobs are similar. Moreover, the differences are analyzed within the context of each area of employment. Hence, two kinds of residential painters may be dissimilar for prevailing wage purposes. In some situations, the totality of circumstances may also be considered in the measure of similarity.

2. Pay Differences in Temporary Employment in Specialty Occupations

Unlike the labor certification statute,\(^\text{86}\) the H(1)(b) statute, which was created by the Immigration Act of 1990 and amended in 1991,\(^\text{87}\) requires that those aliens be paid at least the "actual wage" paid by the employer to individuals with "similar experience and qualifications for the specific employment in question" or the "prevailing wage for the operational classification in the area of employment."\(^\text{88}\)

"Prevailing wage" for H(1)(b) purposes is defined in the same way as in labor certification and is calculated as the average rate of wages paid to workers similarly employed in the area of intended employment.\(^\text{89}\) "Similarly employed" means having a "substantially comparable" job in the occupational classification of the intended employment.\(^\text{90}\) If no workers are employed other than by the employer in the area of intended employment, "similarly employed" means having a job requiring a "substantially similar level of skills

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85. Id. at B3-19.
within the area of intended employment”; or, if there are none, having a “substantially comparable” job with an employer outside the area of intended employment.91

Although there are no cases to assist in the interpretation of the standard of prevailing and actual wage in the H(l)(b) context, the preamble to the labor condition attestation regulations provides useful guidance as to what is considered pertinent to the distinction between two jobs for compensation purposes.92 In fact, the preamble seems to be a summary of BALCA precedent determining which factors distinguish jobs. The preamble instructs that the “actual wage” is to be determined on the basis of what the employer pays “to all other individuals with similar experience and qualifications for the specific employment in question.”93 According to the DOL, Congress intended the following factors to be considered:

(1) experience, including length of experience, type of experience (e.g., supervisory), and depth or breadth of experience in the relevant field;
(2) qualifications, e.g., advanced degree, particular skills or abilities required, and a reflection of these dissimilarities in the pay system;
(3) education, e.g., advanced degree, educational achievement (such as grade point average or class rank), and reputation of university attended;
(4) job responsibility and function:

Are the H-1B nonimmigrant’s actual set of job duties, responsibilities and functions substantially similar to those of other workers employed in the specific occupation at issue?—e.g., are they similar with respect to their major or significant tasks? (Note: the job title alone is not dispositive of the issue. While like job titles presume like jobs with similar job duties, responsibilities and functions, this presumption may be rebutted with information regarding actual duties, responsibilities and functions. Further different job titles alone are meaningless if the job duties, responsibilities and functions are substantially the same.);

(5) specialized knowledge, e.g., a specialized research field that warrants a difference in pay; or
(6) “other legitimate business factors” that provide a bona fide basis for justifying different compensation levels in the specific occupation and relate to the job in question, conform to recognized principles, or can be demonstrated by accepted rules and standards, such as professional distinctions (publications, development

93. Id.
of a patent, receipt of an international prize), and meritorious performance rewarded by an existing pay system.\textsuperscript{94}

The preamble goes on to comment that in "rare" circumstances the H(1)(b) worker may be sought for employment in a "truly unique position, \textit{i.e.}, one which is unlike any other position at the workplace in regard to the factors [enumerated above]."\textsuperscript{95} Nevertheless, the DOL cautions that few positions will be truly unique "since this distinction cannot be established through varying job titles or minor variations in day-to-day work assignments where other individuals with similar experience and qualifications perform substantially the same duties and responsibilities as the H-1B nonimmigrant."\textsuperscript{96}

Examples are then provided: (1) a two-dollar-per-hour compensation difference based upon the fact that one worker supervises other employees; (2) a compensation difference based on knowledge of a certain software product and job duties of teaching it to other workers; (3) a difference of $10,000 per year between two Ph.D. research assistants with the same number of years of experience when one researcher "is on the cutting edge of a breakthrough in the field and his or her work history is distinguished by frequent praise and recognition demonstrated in writing and through awards" and the other researcher has a respectable work history but has not been internationally recognized. The salary difference is acceptable because it is based upon specialized knowledge, demonstrated in writing, even though the jobs have the same title and substantially the same duties and responsibilities.\textsuperscript{97}

Accordingly, in the actual wage analysis, the factors acknowledged to bear upon compensation differences are the following:

- length of experience;
- type of experience;
- supervisory experience;
- depth of experience;
- breadth of experience;
- advanced degree;
- particular skills or abilities;
- dissimilar qualifications reflected in compensation structure;

\textsuperscript{94. Id.}
\textsuperscript{95. Id.}
\textsuperscript{96. Id.}
\textsuperscript{97. Id.}
(9) grade point average;
(10) class rank;
(11) reputation of university attended;
(12) job duties;
(13) job responsibilities;
(14) specialized knowledge;
(15) publications;
(16) patents;
(17) awards or other distinctions; and
(18) meritorious performance rewarded by an existing pay system.98

C. The Dissimilarity Between Jobs Resulting from Special Job Requirements

As seen in the actual wage analysis, the inclusion of special items of knowledge or skill in job requirements or job functions tends to distinguish an employment position for other purposes. For example, the special requirement of knowledge of import-export financing and foreign currency regulations required for the position of controller in In re Eastern International Impex Corp.99 was not the same as the general knowledge of international financing held by the applicant. Foreign currency experience primarily in international transportation was not equivalent to the required knowledge of import-export financing.100 In comparison, the employer failed in In re Atco Trading, Inc.101 to show that importing and marketing gourmet foods was so different from marketing other food products as to require two years of specialized experience in gourmet foods.

In general, a job that requires a foreign language is not the same as one that does not.102 Nevertheless, two positions within the same DOT code were not made sufficiently different by a requirement that the applicant be fluent in Spanish. Thus, the filing of a second application before the expiration of the six-month delay required when the jobs are in the same occupation was not justified.103

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98. Id.
100. Id. at B3-365.
Another special requirement generally found to distinguish jobs is licensure. A job that requires a license is not the same as one with similar duties that does not require licensure. Hence, an unlicensed medical assistant is not the same as the position of Physician's Assistant, which does require a license.  

When the special requirements appear not to be "within" the DOT, or appear not to be "normal" in the industry, business necessity must be established. Hence, special requirements prompt comparison to the DOT or "normal" positions.

Too many special requirements may not be normal. Some examples include: the requirement that a systems analyst have knowledge of a variety of computer hardware and operating systems, the requirement that a systems analyst possess twelve separate computer skills, and the requirement that a management consultant possess specific computer software and lighting experience.

Although the regulation provides that special requirements are unduly restrictive unless consistent with those defined in the DOT, the DOT does not list requirements. The DOT only describes duties. Hence, BALCA held in In re Garland Community Hospital that it must first be determined whether the job duties are within the job description in the DOT, and then whether the years of education, training, or experience requirement falls within the SVP limit.

In Garland Community Hospital, BALCA found that the duties described by the employer were "within" the duties described in the DOT for a Systems Analyst, DOT Code 012.167-066, because the functions were similar to those in the DOT description. BALCA then
measured the requirements against the Specific Vocation Preparation rating (SVP) of seven.\textsuperscript{112} Noting that the SVP of seven establishes an education or experience requirement of two to four years to learn the techniques, acquire information, and develop the facility needed for average performance in a specific job, and further noting that "the average 4-year college curriculum (except for liberal arts) [is regarded] as equivalent to about 2 years of specific vocational preparation,"\textsuperscript{113} a baccalaureate degree plus one year of experience in data processing is within the SVP of seven.\textsuperscript{114}

In summary, the inclusion of special requirements, such as technical knowledge, computer capabilities, and foreign languages, frequently calls for different treatment of a position. Moreover, exceeding the SVP is considered a significant factor.

\textbf{D. The Dissimilarity of Jobs in a Combination of Duties}

If two dissimilar jobs are merged into one job position, a combination of duties may be found that provokes the business necessity test.\textsuperscript{115} A combination of duties will be found where a job appears to be an expedient merger of two vocational endeavors normally filled by two different workers. Such a combination was found in \textit{In re Robert L. Lippert Theaters,}\textsuperscript{116} where the job duties involved handling all accounting functions for two theaters and a flea market as well as operating the automated projection and sound systems. The requirements included three years in business accounting and two to three years in motion picture projection.

\textit{In re Advanced Micro Devices, Inc.}\textsuperscript{117} upheld a specific combination of qualifications justified by business necessity. Two DOT codes were identified as applicable to the position of Product Line Analyst, that of Management Analyst, DOT code 161.167-010, and that of Systems Analyst, DOT code 012.167-066. The requirements for the position were an MBA in finance and one year of experience in the job offered or in the related occupation of software development, including work with personal computers, databases, and spreadsheet packages. The duties entailed the analysis of financial and operational results of a software product line for simplified instruction set

\textsuperscript{112} The SVP of seven, see supra note 4, is equivalent to two to four years of specific vocational preparation.
\textsuperscript{113} \textit{In re Garland Community Hosp.}, 9 IMMIG. L. & PROC. REP. at B3-73.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} 20 C.F.R. § 656.21(b)(2)(ii) (1992). Business necessity for a combination of duties need not be shown where the combination is consistent with the DOT, 20 C.F.R. § 656.21(b)(2)(B), the combination is normal, § 656.21(b)(2)(A), or is standard in the industry, § 656(b)(2)(ii).
\textsuperscript{116} 88-INA-433 (BALCA May 30, 1990).
processors.

Although BALCA did not disagree with the Certifying Officer’s characterization of the position as involving a combination of duties, the panel found that the employer satisfactorily justified the need for a background in software development as well as an MBA in finance. The opinion relies upon the following statement in Lippert Theaters: “[W]here the employer operates a genuinely unique venture, or possesses a unique technological innovation where one of the duties is something no second worker can perform, a combination including that duty would meet the announced [combination of duties] standard.”118

In In re May Majidi and Associates,119 BALCA agreed with the finding of the Certifying Officer that a position which required providing accounting services for the employer’s construction company and preparing tax returns for outside clients had a combination of duties.

In re Bear Stearns & Co.120 involved the position of Senior Financial Analyst in the corporate finance group. The job required a baccalaureate degree in finance and one year of experience in the job offered or in the occupation of financial analyst, as well as knowledge in COBOL, VAX, LOTUS, and COMPAQ 286/40. The Certifying Officer found a combination of duties because the job required the skills of a “financial analyst as well as a programmer or systems analyst.”121 The Certifying Officer also found that the alien had neither financial analyst experience nor computer capabilities when hired. The employer successfully argued that a combination of duties did not exist because the specified computer hardware and software knowledge required constituted tools used by the financial analyst in financial analytical work, not a wholly different job description as proscribed by section 656.21(b)(2)(ii). Thus, the special requirements of knowledge of COBOL, VAX, and LOTUS and familiarity with COMPAQ 286/40 did not transform the job into a combination of duties.122 However, BALCA also looked to see whether the tasks of financial analysis and utilization of hardware and software are “traditionally separate jobs.”123 Although the Certifying Officer contended that the position required the services of both a financial

118. Id. at B3-78.
119. 91-INA-198 (BALCA July 20, 1992).
120. 91-INA-248 (BALCA Apr. 13, 1992).
121. Id.
122. Id.
123. Id.
analyst and a computer professional, BALCA, after consideration of the DOT and the Occupational Outlook Handbook, concluded that modern business-related professions need familiarity with computer hardware and software and that these capabilities are not solely within the province of programmers or systems analysts. 

In summary, a combination of duties will be found where one job involves duties normally performed by two different workers or requires two different types of experience. Nevertheless, a position might not involve two traditionally separate jobs if the duties that appear dissimilar simply involve the use of tools necessary to carry out the job function.

E. Dissimilarity Between Jobs with Respect to Qualifying Experience

Experience in a dissimilar job will not qualify an applicant or an alien for a position. Experience in the job offered means experience in the same job duties, not just in a job of the same title. If an applicant's experience is in a dissimilar job, the employer may not only reject the applicant, but may not need to interview him or her.

A job opportunity is defined by its important duties, and any required qualifying experience must be in the core elements. In re Maple Derby, Inc. presents an analysis of the similarity of duties as used to measure an alien's qualifying experience or identify job-related reasons for rejecting United States applicants. The position of accountant required seven years of experience in the job offered. BALCA held that applicants with a "broad range" of education, training, or experience merited interviewing. However, experience in the "job offered" required a look at the "major duties," and years of experience in the general field were insufficient because the experience must mostly be in "similar" duties. Thus, to determine whether the alien met the job requirements, a comparison had to be made between the duties and requirements of the advertised position of

124. Id.
accountant and the duties of the alien’s previous jobs. In this case, the similarity was found to be such that, had that experience been with the same employer, it would have been disqualifying under section 656.21(b)(6). Therefore, the similarity of major duties qualified the alien for the job.

Other cases have also held that a job opportunity is defined by its important duties and qualifying experience must be in the core elements. Further, BALCA has held that, if job experience is important, an employer may fairly assume an applicant does not possess such experience if it is not listed on the applicant’s resume. Thus, BALCA found that experience as a salted cod fisherman would have been listed on the resume had the applicant had that experience, even though this requirement was not listed as a specific requirement but was included only in the duties. To the contrary, in In re Gorchev & Gorchev Graphic Design, a lack of experience in “photo art direction” and “special effects design” could not be presumed when mention of it was omitted from the resume. In Gorchev, BALCA held that in the case of a “subsidiary” requirement, “something a candidate might not indicate explicitly on his resume although he possesses it,” the employer has the burden of inquiring whether the applicant meets the requirement.

The requirements in In re Hotel Group of America included, in addition to a degree, five years of experience in the job offered or in the related occupation of management, with four of those years in hotel management, which could have included salaried hotel management training programs or management training programs as part of hotel administration courses. In a lengthy decision, BALCA compared in detail the jobs described by an applicant on his resume with the advertised requirements and found, based upon that comparison, that he had five years of hotel management experience.

128. Id. at B3-14.
129. Id. at B3-16.
132. See Gorchev & Gorchev Graphic Design, 8 IMMIGR. L. & PROC. REP. at B3-197.
133. Id. at B3-198.
135. Id. at B3-285.
Job duties were also scrutinized in In re H.P. Laboratories, which involved a job entitled “Statistical Analyst for Operations Research.” The requirements were an MBA and one year of experience in the job offered. The state office categorized the job as Financial Analyst rather than Statistical Analyst. An applicant found by the Certifying Officer to have been rejected for other than lawful job-related reasons had one year of experience as a financial analyst. The employer, with the assistance of letters from three academic authorities, characterized the financial analyst job description in the DOT as oriented to banking, investment, and brokerage, rather than production and manufacturing, which was the employer’s business. BALCA agreed with the employer because the Certifying Officer had failed to respond to the extensive rebuttal. BALCA also noted that the applicant’s experience had been in a retail chain store, whereas the job offered was in a research laboratory.

In In re Bently Nevada Corp., the employer attempted to establish the alien’s qualifying engineering experience by showing experience gained while in engineering school as a tutor and teacher. BALCA held that even if pre-degree experience gained as a student could be utilized, in this case it could not qualify the alien because the pre-degree experience was in teaching and tutoring, which is a different kind of experience from the engineering experience required. The alien had more than one year of engineering experience, but, other than two months, all had been gained with the employer.

In summary, the title of a job in which experience has been gained is not decisive in qualifying an alien or an applicant for an advertised position. Rather, the duties performed must be similar. Moreover, because a variety of duties may be performed in any given position, a comparison must be made of the core or significant duties. If duties are significant, they should be listed on a resume.

137. Id. at B3-309.
138. Id.
140. Id. at B3-335.
F. Dissimilarity Between Jobs Arising from Conditions of Employment

In a variety of contexts, conditions may render two positions dissimilar. For example, "live-in" domestic is considered to be a different job from a domestic position that does not require the employee to live with the employer. Also, geographical location may render two jobs dissimilar. In a prevailing wage determination, a comparison to a job outside the area of intended employment should not be allowed because a wage survey must take into consideration salary variations from region to region. Hence, the Occupational Outlook Handbook, which contains national averages, is not a reliable survey.

III. Conclusion

This Article has explored the factors considered and the methodology applied by the DOL when the dissimilarity between jobs is at issue in a variety of labor certification and labor condition attestation contexts. What emerges is that it is very difficult to devise general rules for distinguishing two jobs. First, it is clear that any determination of dissimilarity is very specific to the facts documented in the record. Not only are the holdings very fact specific, but some arguments may have failed because the record had not been fully developed, while the same argument may have been successful in other cases.

In addition, it is clear that the reliability of the evidence often influences the decision of whether two jobs are different. For example, the preamble to the H(1)(b) regulations points out that it is differences "demonstrated in writing" that justify pay differences. Similarly the historical evidence of the employer's different treatment of two jobs is considered by BALCA as persuasive in the determination of similarity. This forensic concern over whether the evidence is bona fide is certainly a relevant concern, but it is not

141. See supra note 66 and accompanying text.
144. The American Heritage Dictionary (2d ed. 1982).
helpful to understanding why the factors evidenced differentiate two jobs.

Next, there appears to be a fundamental misunderstanding by the Certifying Officers and by BALCA of the standard of comparison. This is in spite of the fact that a process of comparison underlies the entire certification process. Section 656.21(b)(6) requires that the employer not have hired employees for “jobs similar to that involved in the job opportunity” with less education, training, or experience than that required by the job offer. Section 656.21(b)(2)(ii) requires a combination of duties to be found where “two dissimilar” jobs are merged into one job position. Section 656.21(b)(2)(i) requires a job to be “normal” or “within” the DOT, and a job is within the DOT if its duties are similar to those described in the DOT. Additionally, to qualify for a job, the alien and other applicants must have experience for the major part in “similar” duties. Furthermore, the prevailing wage is calculated by the average of wages paid to workers “similarly employed” in the area.\(^{146}\) “Similarly employed” refers to those having “substantially comparable jobs in the occupational category in the area of intended employment”\(^ {147}\) or, if there are none, jobs requiring a “substantially similar” level of skills.\(^ {148}\) The actual wage for labor condition attestation is that paid to all other individuals “with similar experience and qualifications for the specific employment in question.”\(^ {149}\)

In each one of these contexts, the standard is whether the jobs are “similar” or “dissimilar.” Yet, the concept of comparison is highly elastic. It relies on the assumption that the two things to be compared show comparable features while resting equally on the conclusion that they are not the same. Hence, when arguing that two jobs are dissimilar, it is important to identify the premise that it is only because the positions have something in common that they may be compared, and then set that premise in its proper place. Thus, the fact that one position is in the same occupation or provides training for another should not be conclusive because, if the jobs were not related, they would not be comparable.

This recognition is particularly telling in the 20 C.F.R. § 656.21(b)(6) context. It says little to conclude that one job provides training for another since, if it did not provide such training, the experience gained in the job would not be a prerequisite qualification to perform the job functions. Similarly, the prevailing wage definition of “similarly employed” as “substantially comparable” provides

\(^{146}\) 20 C.F.R. § 656.40.
\(^{147}\) Id.
\(^{148}\) Id.
\(^{149}\) Id.
no guidance because the two phrases mean the same thing. Moreover, as stated in the preamble to the H(1)(b) regulations, although in "rare" circumstances a worker may be sought for employment in a "truly unique position, i.e., one that is unlike any other position at the workplace," the DOL cautions that few positions will be truly unique "since this distinction cannot be established through varying job titles or minor variations in day-to-day work assignments where other individuals with similar experience and qualifications perform substantially the same duties and responsibilities."

In addition, adverbs such as sufficiently, clearly, and substantially, used to qualify the degree of comparison, do not assist in understanding why the conclusion has been reached. Such qualifiers seem to confuse the standard, rather than clarify it.

The determination of whether two jobs are similar is also influenced by the context. Two jobs that have been differentiated for the purposes of analyzing actual wage, for example, may not be distinguished for the purpose of identifying a DOT code.

Although the determination of similarity or dissimilarity may be influenced by the context in which the issue arises, the factors compared seem to be the same regardless of why the jobs are being compared. The factors that distinguish jobs for most purposes include the following: job titles, job salaries, DOT codes, job requirements, SVP level, supervision, exercise of independent judgment, job duties, and job hierarchy. Any one of these factors may be given more or less weight depending upon the context.

The following is a sample of factors that have been successful or unsuccessful in distinguishing jobs for the purpose of satisfying 20 C.F.R. § 656.21(b)(6) and other regulations. Factors that have been successful in distinguishing between two jobs include the following: major job duties, exercise of independent judgment, lack of automatic advancement, licensure, broad range of experience, specific vocational preparation, documented historical difference in employment hierarchy, general entry-level training applicable to a number of positions, ability as measured by an objective test, the totality of the circumstances, and geography. Factors that have not been successful in distinguishing between two job positions include the following: heightened level of accountability, degree of autonomy, consulting with different clients, DOT code, different subsidiary requirements, career progression, and ability to read blue prints not
measured by an objective test. Factors that in some instances do distinguish between two job positions and in other instances do not include the following: job titles, supervisory duties, special requirements, foreign language requirements, and salary.

Factors that distinguish between two positions in one circumstance may not distinguish them in another. The reason for this is apparently the variable weight assigned to each factor by the context, not the pertinence of the factors. In fact, the weight of any single factor may be increased by establishing its importance in the context. Thus, for example, if two jobs have different salaries, the extensive analysis of the justification for different salaries in the DOL's H(1)(b) regulations could be used to increase the importance of that factor in its new context. Similarly, the fact that a requirement is not normal or within the DOT may be emphasized to show why two jobs are different. The argument that a position includes a combination of duties can be equally persuasive. The conclusion that the alien could not use experience if it had been gained with the employer under section 656.21(b)(6) is persuasive to the argument that the experience qualifies the alien for the job.

In conclusion, what makes two jobs different in one context may not be determinative of difference in another context, but it may help. The comparison may be benefited by applying a different perspective. Moreover, factors may be given more weight with more explanation of their importance in the respective circumstance.