11-1-1999

A New Look at Actual Minimum Job Requirements and Experience in Similar Occupations and with the Same Employer: BALCA’s 20 C.F.R. Section 656.21 (b)(6)

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INTRODUCTION

In its Spring 1986 issue, the San Diego Law Review published an article that I authored entitled "Actual Minimum Job Requirements in Labor Certifications: Application of Title 20, § 656.21(b)(6) of the Code of Federal Regulations to Experience or Training Gained".


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with the Employer." That article discussed the cases which had been issued by individual Administrative Law Judges ("ALJs") on whether an employer seeking Alien Employment Certification may include experience which an alien employee gained while employed with that employer in the requirements for the job offered. Following publication of the 1986 article, the Board of Alien Labor Certification Appeals ("BALCA") was created by an amendment to 20 C.F.R. § 656.26 and § 656.27. BALCA has jurisdiction over all appeals filed on or after May 8, 1987. BALCA consists of designated ALJs who sit in panels of three or more. Although the regulations are silent as to the precedential value of the opinions, BALCA treats its opinions as binding upon itself. BALCA does not consider decisions issued by ALJs prior to establishment of BALCA as binding upon BALCA.

BALCA began issuing decisions in labor certification appeals in the Fall of 1987; BALCA has issued a number of decisions on the issues encompassed by § 656.21(b)(6). Those decisions have included rulings on the use of experience gained by the Alien in a dissimilar position, experience with an affiliated employer, and infeasibility of hiring Aliens lacking the experience. The purpose of this article is to supplement my previous article with the interpretations of 20 C.F.R. § 656.21(b)(6) advanced by BALCA.

2. 52 Fed. Reg. 11,217 (1987) (to be codified at 20 C.F.R. § 656.26(c)).
5. 20 C.F.R. § 656.21(b)(6) (1987) provides:
The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.
6. The regulations of 20 C.F.R. § 656 were promulgated by the Department of Labor in order to exercise that agency's authority pursuant to Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14)(1988), originally enacted as Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 [hereinafter cited as INA]. This section provides that:
(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from the United States:
(14) Aliens seeking to enter the United States, for purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are
I. SECTION 656.21(B)(6) HAS SIGNIFICANT PRACTICAL APPLICATION IN THE LABOR CERTIFICATION CONTEXT

The issues presented by 20 C.F.R. § 656.21(b)(6) have tremendous practical impact upon the certification of Aliens for employment within the United States. Frequently an Alien no longer holds the position in which initially hired by the employer because by the time the Application is filed, the Alien has gained relevant on-the-job experience in the employer's workforce. If the employer were to replace the Alien, the employer would be looking for an individual with the additional experience gained by the Alien while in the workforce. The following situations provide typical examples presented to the attorney by an employer requesting Alien Employment Certification.

ONE: The Alien has been employed as a worker. In that position, the Alien has gained familiarity with the operation of the equipment used in the employer's business, the time and staff requirements to

not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in Section 1153(a)(3) and (6) of this title, and to non-preference immigrant aliens described in Section 1153(a)(7) of this title.

A review of the legislative history of 20 C.F.R. § 656 and the provision at § 656.21(b)(6) was included in the introductory sections of the 1986 article and will not be repeated here. See supra note 1. The Department of Labor has listed § 656 on its agenda for regulatory review, 54 Fed. Reg. 44,842 (October 30, 1989), and bills are pending in Congress which would abrogate the Alien Employment Certification Procedure. H.R. 4300 approved by the House Judiciary Committee August 1, 1990, would replace the labor certification procedure with a labor attestation process. See 67 INTERPRETER RELEASES 917 (Aug. 20, 1990). This article is not intended to analyze whether the Department of Labor has complied with the authority delegated to it in promulgating § 656. This article is also not intended as an analysis of BALCA's methodology in selecting cases for en banc review or precedential status. Rather the purpose of this article is to interpret the BALCA analysis in order to provide practitioners with guidance in handling cases involving § 656.21(b)(6) issues. In this analysis, BALCA's interpretations will be reviewed with an intent to reveal the logical or legal inconsistencies. Nevertheless, I leave the hermeneutics of the propriety of BALCA's interpretive authority to another author at another time.

complete a project, the quality of product to be expected, and the
equipment repair and maintenance needs involved. Now a manage-
ment position in the department is available. The duties of a man-
ger require application of the experience described above. May the
Alien worker be promoted and have the experience gained consid-
ered to meet the requirement under § 656.21(b)(6)?

TWO: To effectively perform the functions of a sales engineer, the
employee must have had hands-on experience in the design of the
product. Initially employed by an affiliated company abroad, the
Alien performed engineering duties which included the design of the
product. The Alien was then transferred to the U.S. company. May
the design experience gained abroad be included in the requirements
for the position of Sales Engineer to be certified?

THREE: The Alien worked for the employer as a technician while
enrolled in evening school to complete an engineering degree. As a
technician, the Alien gained familiarity with the operation of the in-
strumentation used and the data produced. Upon earning the degree,
the Alien is offered a position as an engineer. This engineering posi-
tion involves both analyzing data and designing tests. The test design
includes selection of the instrumentation to be used, and this selec-
tion requires knowledge of the technology and nature of the data
produced. The Alien gained the knowledge of the technology in the
technician position. May the knowledge gained as a technician be
required for the position to be certified?

FOUR: The employer customarily hires entry level engineers with
Bachelor of Science degrees and no experience. During the first two
years, the engineer gains familiarity with the employer's operating
procedures and proprietary technology. At the conclusion of the two
years, the engineers are evaluated and promoted to the position of
senior engineer. May the two years of experience with the company's
operating procedures and technology be required in a labor certifica-
tion request for the position of senior engineer?

FIVE: The Alien is hired as a trainee and is specifically instructed
over a two year period in the job tasks. After two years, the Alien is
then promoted to the position which required the training. May the
experience gained in the trainee position be required for certification
of the other position?

SIX: The Alien is hired to perform research and development.
Over a period of time, the Alien has acquired cumulative sophisti-
cated knowledge and is now in an advanced research capacity lead-
ing investigative efforts. These efforts have resulted in the develop-
ment of a novel technology. May the cumulative experience or
experience with the novel technology be required for certification of
the advanced position?

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II. APPLICATION OF § 656.21(b)(6) TO CONTEXTS GOVERNED BY OTHER REGULATIONS HAS CREATED ANALYTICAL CONFUSION

Prior to analysis of § 656.21(b)(6), it is important to recognize that in many instances § 656.21(b)(6) and other regulations have been confused. Section 656.21(b)(6) states that the employer must document that its requirements are the actual minimum requirements for the position, and either that the employer has not hired employees for similar jobs without the requirements, or that it is not feasible to hire with less training and experience than required by the employer's job offer. One way in which this regulation is interpreted is from the following common sense approach: If the Alien did not have the education, training or experience required for the job when the Alien began performing the job functions, the requirement cannot actually be necessary to perform the job.

This interpretation seems to suggest that the employer must prove the necessity of the requirement and leads to confusion between the application of § 656.21(b)(6) and § 656.21(b)(2). Section 656.21(b)(2) requires the employer to establish a business necessity for unduly restrictive requirements. Although it is reasonable to believe that these facts suggest that the requirement is unduly restrictive, that issue is not part of § 656.21(b)(6), but rather is part of § 656.21(b)(2).

A common error of the Certifying Officer ("CO") (which error has unfortunately appeared in BALCA decisions), is to confuse the application of these two subsections. Section 656.21(b)(2) specifi-

8. 20 C.F.R. § 656.21(b)(2) (1987) states:
(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
   (i) The job opportunity's requirement, unless adequately documented as arising from business necessity:
      (A) Shall be those normally required for the job in the United States;
      (B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of jobs;
      (C) Shall not include requirements for a language other than English.
   (ii) If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and or the combination job opportunity is based on a business necessity.
   (iii) If the job opportunity involves a requirement that the worker live on the employer's premises, the employer shall document adequately that the requirement is a business necessity.
   (iv) If the job opportunity has been or is being described with an employer preference, the employer preference shall be deemed to be a job requirement for purposes of this paragraph (b)(2).
ally addresses whether or not stated job requirements are “unduly restrictive.” This provision was ruled on in In re Information Industries, in which BALCA en banc held that job requirements must either be both normal and within the Dictionary of Occupational Titles (“DOT”) or have been documented as required by business necessity. The business necessity issue is dealt with exclusively in § 656.21(b)(2) and for that reason is not a consideration under § 656.21(b)(6). Accordingly, there is no need under § 656.21(b)(6) to justify the business necessity of the required experience; nor should such proof be requested by the CO unless § 656.21(b)(2) is applied. Furthermore, the language “unduly restrictive requirements” points to issues resolved under § 656.21(b)(2) rather than § 656.21(b)(6).

Similarly, the issue of whether the Alien has been offered wages, terms and conditions of employment which are more favorable than those offered in the job advertisement is not an aspect of § 656.21(b)(6) but is specifically considered under § 656.21(g)(8). Confusing § 656.21(b)(6) with other regulations has resulted in some analytically unsound opinions. It has also placed the employer in the position of having to guess which regulation the CO really meant: the one quoted or the one cited.

This confusion of separate regulations is exemplified by the following language excerpted from a district court’s review of a labor certification appeal:

10. Business necessity is defined by Information Industries: “[T]o establish business necessity under Section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer’s business and are essential to perform, in a reasonable manner, the job duties as described by the employer.” Id. at B3-187.
11. 20 C.F.R. § 656.21(g)(8) (1987) states:
(g) In conjunction with the recruitment efforts under paragraph (f) of this section, the employer shall place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers. The employer may request the local office’s assistance in drafting the text. The advertisement shall:

   (8) Offer wages, terms and conditions of employment which are no less favorable than those offered to the alien.
12. United Carburetors, Inc. v. Whitfield, 5 Immigr. L. & Proc. Rep. (MB) A3-73 (1988). This type of sloppy confusion between § 656.21(b)(2), 656.21(b)(6), and 656.21(g)(8) may contribute to a number of bad decisions rendered on this issue. See In re James Northcutt Assoc., 6 Immigr. L. & Proc. Rep. (MB) B3-171 (1988) (88 INA 311), in which, because the alien gained the experience on the job, the CO stated that the terms and conditions were less favorable than those offered the alien; the employer responded by proving “business necessity;” and BALCA affirmed denial under §
The Secretary argues that United Carburetor required one-month's experience in a similar job as part of the minimum requirements [sic], and that the plaintiff aliens were permitted to obtain this experience and training with the employer. Thus, the experience requirement was unduly restrictive in that the employer could similarly train United States workers who lacked the necessary skills. . . . The Certifying Officer noted that the employer “cannot offer wages, terms, and/or conditions of employment to United States workers which are less favorable than those offered the alien.” However, the Certifying Officer did not discuss this in [sic] light of the experience requirement. . . . The matter should be remanded for the Certifying Officer's sole consideration of whether the requirement of one-month's experience is an unduly restrictive job requirement in light of the treatment accorded the plaintiff aliens.¹³

Statements like the one quoted above leave the employer in a quandary as to what regulation to address in rebuttal. If the requirements are unduly restrictive, business necessity must be justified. On the other hand, if the issue involves wages, terms and working conditions, the employer should include in the rebuttal evidence of the salary terms and working conditions. If the error, however, is that the Alien gained required experience on the job, the employer should address § 656.21(b)(6) in rebuttal and document either the dissimilarity between the two positions or the infeasibility of hiring without the training required.

A. Experience Gained In A Similar Job

1. Consolidated Appeals of In re Delitizer Corp.

BALCA recently decided the consolidated appeals in In re Delitizer Corp.¹⁴ and In re Inmos Corp.¹⁵ These appeals presented the issue of whether an Alien's on the job experience may be required in labor certification in a manner consistent with § 656.21(b)(6). In the order consolidating the appeals, BALCA notified interested parties that a standard is needed for the determination of whether the employer has hired a worker, including the Alien, for a job similar to that involved in the job opportunity. BALCA specifically directed that the briefing should address both the concept of “similarity” and also whether the analysis of “similarity” should be confined exclusively to a comparison of the duties involved in the two jobs, or whether the evaluation should additionally include the relative job duties, job requirements, positions of the jobs in the employer's job

656.21(b)(6) on the basis of “disparity of treatment.”

¹⁴. 88 INA 482 (BALCA May 9, 1990).
hierarchy, and/or the prior employment practices of the employer regarding the relative positions. BALCA also requested an analysis of whether experience gained with the parent corporation of an international company constitutes experience that would disqualify under § 656.21(b)(6).

BALCA issued its opinion in Delitizer on May 9, 1990. In an en banc opinion authored by ALJ Romano, BALCA remanded Delitzer, holding that: “[W]here the required experience was gained by the Alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the Alien gained experience was not similar to the job offered for certification.” BALCA went on to state that considerations relevant to the dissimilarity between two occupations are not limited to comparison of the job duties. The consideration should include:

[R]elative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer’s job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

BALCA acknowledged in Delitizer that the CO has broad discretion in applying this standard. BALCA further noted in a footnote that the addition of “de minimis supervisory responsibilities” alone will not establish dissimilar positions.

BALCA found that the Chef position at issue in Delitzer involved the duty of supervision, which duty was not included in the position of Cook in which the Alien had been employed. BALCA further found that the employer had documented “sufficiently dissimilar duties.” Nevertheless, BALCA held that insufficient evidence existed to otherwise determine dissimilarity of the job positions and ordered remand. Accordingly, the opinion both finds that the duties are dissimilar and requires additional evidence of the nature suggested.

Delitzer was followed on June 1, 1990, with BALCA’s analysis of In re Inmos Corp. BALCA found in that matter that the sole evidence presented to distinguish the employer requesting certification from the foreign parent, where the Alien had gained experience, was the separate corporate identity. BALCA held that the existence of a separate corporate identity alone does not sufficiently distinguish two employers in the context of § 656.21(b)(6).

2. Position of AILA As Amicus in In re Delitzer Corp.

The position of the American Immigration Lawyers Association (“AILA”) in Delitzer recognized that, before applying § 656.21(b)(6), it is important to understand that § 656.21(b)(6) deals with different issues than § 656.21(b)(2). In order to establish an analytical method which logically related the § 656.21(b)(6) and §

16. 88 INA 482 (BALCA May 9, 1990).
17. Id.
18. Id. at n.10.
19. 88 INA 326 (BALCA June 1, 1990).
656.21(b)(2) inquiries, AILA's argument commenced with a commitment to the policy that the duties must be defined independently of the requirements and that the requirements are then evaluated in relationship to the duties.20

In order to implement this policy, AILA proposed that the inquiry under § 656.21(b)(6) ought to be limited to an analysis of the characteristics of the job duties. Although it is true that jobs often have different requirements, the identification of the job duties must be initially independent of evaluation of the requirements. This separation is logically required because the job requirements must be tested under § 656.21(b)(2) and the standard enunciated in Information Industries21 in order to determine whether they are reasonably related to performance of the job duties. Likewise, identification of the duties must precede analysis of the salary because the salary is measured in accordance with the prevailing wage for the described duties.

Once the job duties of the respective jobs are identified, they may be compared. Sources which may be consulted to determine the similarity of the duties of the two positions include the DOT.22 This publication was written by occupational specialists of the Department of Labor with the specific purpose of distinguishing occupations normally existing in the United States. Jobs which are separately identified within the DOT are considered by the Department of Labor to be different occupations and for this reason the Department of Labor's classification in the DOT should control the § 656.21(b)(6) issue. Accordingly, AILA argued that different occupations in the DOT are not similar positions for the purposes of § 656.21(b)(6).23

AILA further proposed that even if two jobs are not assigned different DOT codes, they may be dissimilar for purposes of § 656.21(b)(6) if the actual tasks performed by the positions differ in significant respects. The tasks of the positions may be compared by analysis of the different features of the jobs. Some of the possible comparison factors include the following:

1. What equipment is used to perform the job?
2. In what physical environment is the job performed?

20. Amicus Brief at 4, In re Delitizer, 88 INA 482 (BALCA May 9, 1990).
23. Amicus Brief at 4-6, In re Delitzer, 88 INA 482 (BALCA May 9, 1990). See also Delitzer, 88 INA 482.
3. What are the physical requirements to perform the job?
4. What is the degree to which intelligence or mental aptitude is applied in the job function?
5. Whether the job includes responsibility over the work of others?
6. Whether the job involves the application of principles or theory to data?
7. Whether the job involves design or original thought?
8. Whether the job involves implementing a design or plan prepared by another?
9. What is the product or service which results from performance of the job?
10. How is performance of the job evaluated?
11. Who evaluates performance of the job?

Other sources of relevant information may also be considered. These sources may include job analysis surveys prepared by private, local, state and federal employment agencies, common industry designations, or the employer's own job hierarchies.  

The difference between the occupations of Cook and Chef in In re Delitizer Corp. may be resolved by a comparison of the job duties. The Application form listed as a requirement to perform the job of Chef experience acquired by the Alien while working for the employer as a Cook. The record described the Chef's duties to include supervising two cooks, planning menus, and instructing the cooks in preparing the foods on the menu. The advertised job was stated as follows:

EXPERIENCED Jewish Specialty Head Chef to plan menus and cook and supervise cooking of Jewish style dishes, dinners, desserts, and other foods according to recipes. Prepare meats, soups, sauces, vegetables, and other food prior to cooking, season and cook food and supervise the cooking of food according to prescribed methods using stove and cooking utensils. At least one year experience as Jewish Specialty cook.

The DOT Code assigned by the State Immigration Specialist was 187.161-010: "Chef, Head, Jewish Specialty." The job description listed in the DOT for this code is as follows:

187.161-010 EXECUTIVE CHEF (hotel & rest.) chef de cuisine; chef, head; manager, food production.

Coordinates activities of and directs indoctrination and training of CHEFS (hotel & rest.); COOKS (hotel & rest.); and other kitchen workers engaged in preparing and cooking foods in hotels or restaurants to insure an efficient and profitable food service: Plans or participates in planning menus and utilization of food surpluses and leftovers, taking into account probable number of guests, marketing conditions, popularity of various dishes, and recency of menu. Estimates food consumption, and purchases or requisitions foodstuffs and kitchen supplies. Reviews menus, analyzes recipes, determines food, labor, and overhead costs, and assigns prices to menu items.

25. An alternative code which could have been used is that of 33.131-014 CHEF (hotel & rest.). DICTIONARY OF OCCUPATIONAL TITLES 313.131-014 (4th ed. 1977).
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Directs food apportionment policy to control costs. Supervises cooking and other kitchen personnel and coordinates their assignments to insure economical and timely food preparation and cooking, sizes of portions, and garnishing of foods to insure food is prepared in prescribed manner. Tests cooked foods by tasting and smelling them. Devises special dishes and develops recipes. Hires and discharges employees. Familiarizes newly hired CHEFS (hotel & rest.) and COOKS (hotel & rest.) with practices of restaurant kitchen and oversees training of COOK APPRENTICES (hotel & rest.). Maintains time and payroll records. Establishes and enforces nutrition and sanitation standards for restaurant. May supervise or cooperate with STEWARD/STEWARDESS (hotel & rest.) in matters pertaining to kitchen, pantry, and storeroom.26

The job in which the experience had been gained was described on the ETA 750, Part B27 as:

Jewish Specialty Cook: Prepared and cooked Jewish-Style Specialty food and desserts under supervision of owner using stove and cooking utensils.

The DOT recognizes that the position of Cook is a different occupation than Chef. The position of Cook, 313,316-014,28 is described as follows:

313.361-014 COOK (hotel & rest.) cook, restaurant

Prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in hotels and restaurants: Reads menu to estimate food requirements and orders food from supplier or procures it from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests food being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies, sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.)]. May price items on menu. Usually found in establishments having only a few employees.29

Not only are the occupations of Cook and Chef separately designated in the DOT, it is clear that the duties of the Chef are not substantially the same as those of a Cook. The employer documented that the critical difference between the position in which the experience was gained and that for which certification was requested, was

27. The ETA 750, Part B, is that part of the Application for Alien Employment Certification form which describes the Alien's qualifications. See supra note 6.
29. Id.
that the Chef "supervised" two cooks and had greater responsibility. The Chef does not just prepare and cook the food, but plans the menus, instructs the cooks in the food preparation activities to implement the menu designed, and supervises the cooks. The functions of planning and supervising are not performed by the Cook.\footnote{30}

3. BALCA's Analysis Of In re Delitzer Corp.

BALCA prefaced its discussion of Delitzer with the notation that the statute, the legislative history, and the courts have not provided guidance on the legitimacy of prior experience gained with the employer, and in addition that comments are not included in the regulation on this issue.\footnote{31} BALCA then to a large extent adopted, without citation, the analysis of pre-BALCA ALJ decisions advanced in the 1986 San Diego Law Review article.\footnote{32} Delitzer reviewed BALCA's en banc and panel decisions. The en banc decisions are: In re Brent-Wood Products, Inc.,\footnote{33} and In re Creative Plantings.\footnote{34} In the former matter, the duty of reading blueprints, which was required for one job, was held not to distinguish the two positions. In the latter opinion, the employer failed to establish that different job duties would be performed by different positions. Panel decisions reviewed included In re Duthie Electric Corp.,\footnote{35} In re Eimco Process Equipment Co.,\footnote{36} In re Kurt Salmon Assoc. Inc.,\footnote{37} and In re Conde, Inc.\footnote{38} BALCA interpreted the results in the first two cases to be founded upon consideration of factors in addition to the job duties, and the latter two to be based exclusively upon analysis of duties.

BALCA agreed with AILA that the standard to be applied should be whether or not the two jobs are "similar." This is the nomenclature stated in the regulation itself.\footnote{39} BALCA, however, rejected AILA's argument that the comparison should be limited to job duties.\footnote{40} According to BALCA, the DOT catalog of "separately identi-
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fiable position[s]" has "no compelling or controlling relevance." BALCA bluntly stated that two jobs may have different DOT codes and still be similar in the context of § 656.21(b)(6). BALCA further held that AILA's argument, that comparison should be limited to job duties, "artificially narrow[s] the inquiry" and excludes other "potentially highly probative information." BALCA noted that Duthie, Eimco, In re Store Planning Assoc., and In re Dynamic Resources, Inc. considered information in addition to comparison of the duties to be relevant. In Duthie, which involved the difference between a Generator Mechanic and an Assistant Generator Mechanic, the additional information considered included the employer's customary hiring practices of individuals with the qualifications required, as well as the "level of responsibility, skill and supervision." BALCA stated that dissimilarity in Eimco was based on a history of recruiting and hiring with the qualifications required.

In summary, BALCA's Delitzer decision establishes a standard to distinguish two positions in the context of § 656.21(b)(6). That standard is that experience gained by the Alien in a job that is not similar to that for which certification is requested may be used as a requirement. In order to use that experience, the employer must demonstrate that the two job positions are not similar. The employer should include the following evidence with respect to each position to establish that they are not similar:

1. The duties of each position.
2. The percentage of time spent performing each job duty.
3. Supervisory responsibilities of each position.
4. The requirements of each position.
5. The place of each position in employer's job hierarchy.
6. Whether either position is newly created.
7. History of the qualifications of previous hires in each position.
8. Respective salaries of the positions.

Furthermore, positions may not be distinguishable on the basis of duties alone, particularly where the distinguishing duty consists of

41. Id.
42. Id.
43. Id.
44. 89 INA 182 (BALCA Nov. 30, 1989).
48. Delitzer, 88 INA 482.
49. Id.
50. Id.
“de minimis supervisory responsibility.”

4. Other BALCA Decisions On Similar Jobs
   a. Decisions Issued Before In re Delitizer Corp.

Other BALCA decisions on § 656.21(b)(6) do not compel the conclusion reached in Delitizer that positions may not be distinguished on the basis of duties alone. Previous BALCA decisions on the issue include In re Creative Plantings, which involved the difference between Floral Designer and Assistant Floral Designer. The DOT code is not referenced. The job duties of a Floral Designer are described to include: plan, design, arrange and supervise. On the other hand, Assistant Floral Designer implements the design. The Assistant Floral Designer could be considered dissimilar to Floral Designer because of the functionally different tasks of supervision, planning and designing. Although BALCA upheld the denial in Creative Plantings, it was not because the positions of Floral Designer and Assistant Floral Designer were similar, but because, even if they were dissimilar, the employer’s description of the job did not involve the duties of the Floral Designer.

In re Conde, Inc. distinguished the positions of Senior Planner/Urban Designer and that of Planner. The former position involved the following job functions: supervise other technicians and draftsmen in formulation, preparation and processing of master plans, site plans and other activities. The position in which the Alien had gained experience was “Planner.” These were found to be different occupations because a Planner does not supervise others.

In re Iwasaki Images of America involved the difference between Replica Maker and Custom Drink and Dessert Replica Maker. The employer did not describe the job duties but attempted to distinguish the jobs due to the different products produced by each. The production of the different products may have involved different tasks but the employer failed to so document. Similarly, in In re Enhanced Performance Assoc., the employer failed to de-
scribe the job duties. It was not possible to analyze the difference between the position in which the experience was gained and the one for which certification was sought.

In In re Eimco Process Equipment Co., the occupation of Technician was distinguished from Developmental Engineer. The employer documented eight substantive job responsibilities which were not allowed, were performed only under supervision, or were not required for the position of Technician. In Delitzer, BALCA interpreted the result in this case to be predicated upon the consistency of the employer's requirements. In Delitzer, BALCA interpreted the result in this case to be predicated upon the consistency of the employer's requirements. This analysis on BALCA's part was unnecessary since the positions are clearly distinguishable on the basis of the duties required of each. The positions are generally considered distinct occupations and are described differently in the DOT. The Developmental Engineer uses independent and original thought in conducting engineering tasks and supervises and trains others; the Technician is not allowed to perform many of the substantive duties performed by the Engineer. Accordingly, the tasks performed are not substantially the same.

In re Kurt Salmon Assoc., Inc. concerned an application submitted by an international management consulting business. The difference between two Consultant positions in the apparel industry was at issue. The fundamental difference was that one position involved consulting with foreign companies whereas the other involved analyzing the apparel industry and developing strategies for industry development in one entire country. BALCA held that the employer failed to distinguish the tasks performed. The opinion is followed by a dissent which found that the employer had argued convincingly that there were substantial differences in the jobs. The dissent pointed out that the job for which certification was sought was much more complex, involved greater responsibility and required more experience. The dissent suggested that a stronger case would have been established by offering more of a direct comparison of the positions, including salary and degree of supervision. The majority on the other hand, did not compare the duties but stated "the basic talents employed" were the same.

58. Delitzer, 88 INA 482. See also supra note 51.
61. Id. at B3-108.
62. Id. at B3-108-09 (ALJ Tureck, dissenting).
63. Id. at B3-108.
In re Brent-Wood Products, Inc. involved an application for a Machine Setter, Woodworking, for which the duties were to set up machines for furniture manufacture and to assure that work orders were carried out per blueprint. The job required two years of experience. The Alien, who had no prior experience when hired by the employer at the age of seventeen, had been employed for eight years in what the employer characterized as three distinct positions: Set-up General Helper, Machine Setter I and Machine Setter II. In the Notice of Findings, the CO observed that although Part B indicated the Alien had gained the experience under a different job title, the “basic duties” were the same. Moreover, the in-house posting and the advertisement did not distinguish between the two job titles. Thus, according to the CO, regardless that the Alien was trained by the employer to perform the duties of the petitioned position. In addition, the CO directed the employer to justify the experience requirement under § 656.21(b)(2).

BALCA accepted that the Helper position was distinct from Machine Setter. BALCA compared the duties of Machine Setter I and II and found that the primary distinction was reading blueprints. The Alien had learned to do this while working as Machine Setter I. Since the Alien had learned to read blueprints on the job BALCA found the jobs to be the same. Accordingly, BALCA stated:

If the Alien learned [to read blueprints] while working as a Machine Set-up I, then, this undermines Employer's argument that the positions are separate and distinct. On the other hand, if the Alien learned it while he was employed as a Machine Set-up II, then he had no prior experience, and it is unduly restrictive for Employer to seek someone with two years of such experience.

In re Scientific Research Assoc. involved an application for a
Research Scientist in which the employer attempted to distinguish two positions on the grounds of additional responsibility, including the fact that the new position was minimally supervised and required supervision of more junior personnel. The new position’s duties also included responsibility for specific aspects of the research being conducted. The matter was remanded because the CO had not considered the information concerning the difference in the positions.\(^{67}\)

**b. Decisions Issued After In re Delitizer Corp.**

On July 23, 1990, BALCA issued three virtually identical opinions authored by Judge Guill regarding experience gained on the job.\(^{68}\) All three opinions followed Brent-Wood Products and applied the factors enunciated in Delitizer.

The Application for Alien Employment Certification in *In re Valley Ranch Barbecue* was submitted for the position of Cook. The advertisement required two years of experience in the job offered or in the related position of Assistant Cook.\(^{69}\) The Alien’s only qualifying experience was as an Assistant Cook and Cook in the employer’s work force. The employer argued that the jobs of Cook and Assistant Cook are two different positions. According to the employer, the Alien had been trained in the position of Assistant Cook, and when “able to handle the job duties, he was given the position of Cook.”

BALCA characterized the Final Determination to be denial of the Application on the basis of the employer’s failure to submit evidence that the positions were separate and distinct and stated that the CO had noted that the job duties of the two positions were the same. According to BALCA, prior to promotion to Cook, the Alien’s job duties involved preparing barbecue sauces, sandwiches, french fried potatoes, onion rings, baked potatoes, and cole slaw, and using and

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258, 59 (1988) (88 INA 99) (Majority and concurring opinion) contains a divided opinion as to whether the occupation or the specific employment position constitutes “similarly employed” in the § 656.40(a)(1) inquiry as to applicability of the Davis-Bacon Act. *See also In re Tuskegee Univ.*, 5 Immigr. L. & Proc. Rep. (MB) B3-172, B3-176 (1988) (87 INA 561) in which the application of “substantially comparable” in § 656.40(b)(2) included the special circumstances of the employer, not only the skill level involved.

67. 89 INA 32 (BALCA Feb. 9, 1989).


69. *In re Valley Ranch Barbecue*, 88 INA 239 (BALCA July 23, 1990). BALCA notes several discrepancies in the description of the job and its discrepancies. BALCA chose to resolve inconsistencies in the light most favorable to the employer.
cleaning grills, ovens, grinders, slicers, mixers, bowls, and kitchen utensils. The Cook performed all these duties except the cleaning and also performed the additional duties of cutting and trimming meats, determining the length and method of cooking meals, and carving short ribs and ham. BALCA found that the Cook had no supervisory responsibilities and that the "minor additional duties" had not been explained to "show significant dissimilarity in skill level and necessary training and experience." The distinction between the two jobs was characterized as "subtle." 70

BALCA held that the employer failed to demonstrate that the two jobs were sufficiently dissimilar to avoid the prescription regarding "similar" jobs in § 656.21(b)(6) and to "justify the requirement of different qualifying experience." 71

The Application in In re Hip Wo Inc. requested certification for the position of Specialty Cook — Chinese Foods, and required six months training in the job offered or in the position of Assistant Cook/Trainee — Chinese Style Foods. The Alien was promoted from the position of Assistant Cook to Chinese Specialty Cook. BALCA applied the factors in Delitizer and found that the only distinction in the job duties was that the Assistant Cook does not do the final preparation and cooking of the meals. According to BALCA, the record did not disclose that this duty required extra knowledge and responsibility, or that it was "significantly different" from assisting in "preparation, seasoning, cutting and cooking." Moreover, "there is no indication that the jobs have a significant distinction under the employer's job hierarchy, that the salaries offered are significantly different, or that a specialty cook has any significant supervisory responsibilities." 72

In re Dobbs House, Inc. involved the distinction between the positions in an airline catering company of First Class Food Specialist and Assistant First Class Food Specialist. The description of the job duties was found by BALCA to be almost "indistinguishable" but for the fact that the former position would have an assistant. This "de minimis" supervisory responsibility alone was held insufficient to distinguish the positions.

70. BALCA rejected employer's reliance upon In re Pollock, 4 Immigr. L. & Proc. Rep. (MB) B3-71 (1986) (86 INA 351), a pre- BALCA case where the positions of Journeyman/Carpenter and Construction Foreman were distinguished, because the test enunciated in Pollock was whether the positions were "separate and distinct." BALCA also repeated its rejection In re Vacco Indus., 87 INA 711 (BALCA March 10, 1988). BALCA was urged by the Office of the Solicitor to imply that "certification cannot be granted where the Alien received normally acquired experience with the same employer, even if the employer proves that the experience was obtained in an objectively recognized different job which is not similar to the job for which certification is being sought." 71

71. Id. The justification of qualifying experience should be a § 656.21(b)(2) consideration. The CO cited § 656.21(b)(2) in the Notice of Findings.

The three post-Delitizer cases cited are significant to § 656.21(b)(6) jurisprudence to the extent that they reflect BALCA’s efforts to apply Delitizer. In all three cases, the inability to distinguish the duties dominated the analysis. In all three cases, the other factors listed in Delitizer could be considered only superficially because evidence supporting them was not provided by the employer. Nevertheless, BALCA did not remand the cases to grant the employers an opportunity to address the additional factors.

The cases each involved positions conceded to be training positions. An alternative analysis would be that two jobs are similar for the purposes of § 656.21(b)(6) when one position is clearly designed by the employer to provide on the job training to equip the employee to assume the other position. This inquiry would be consistent with the principle that training should be provided to U.S. workers if it was provided to the Alien, but would limit the application of § 656.21(b)(6) to the situation where training has been specifically provided. In re Laura’s French Baking Company reached this result in analyzing the positions of Assistant Baker and Baker, in which the employer conceded the former was a training position for the latter.

5. The Policy Of The Regulation And Pre-BALCA Opinions

The policy furthered by § 656.21(b)(6) has traditionally been explained to be that if an Alien worker may be trained for the job, a U.S. worker may also be trained. In addition, the DOL assumes the employer is biased toward the tenured employee. For that reason, the employer may not exert good faith requirement efforts and may not have a bona fide job opening available.

A presumption exists that there are U.S. workers for the job, and the apparent biases accruing to a tenured Alien can be overcome by a good faith, intensive recruitment campaign for workers, which persuasively shows that there are no U.S. workers who are able, willing, qualified and available for the job. The burden of proof (persuasion) is on the employer and the Alien.

In their enthusiasm to enforce this policy, many pre-BALCA opinions failed to recognize the exception that experience in a different occupation may be utilized in labor certification, despite the fact

that this exception is contained in the regulation and clearly stated in the TAG.\textsuperscript{75}

\textit{a. Cases Which Did Not Follow The TAG}

\textit{In re Spanfelner}\textsuperscript{76} has frequently been credited as the source of the principle that an Alien's work experience may not be used for promotion to a better job. In that case, an Application for Alien Employment Certification for an Orchard Supervisor was denied in part because the employer failed to document that the Alien had the four years of experience required. The CO found that since the Alien was hired for the job without the experience, the four years were not the actual minimum job requirement. On appeal, the employer argued that the Alien had gained the experience in another position and then had been promoted to Foreman. The ALJ held that the record was unclear as to the position in which the Alien had gained his experience, and that “the better view is that an alien cannot use the work experience gained with an employer toward promotion to a better job.”\textsuperscript{76}

The ALJ who decided \textit{In re Spanfelner} acknowledged no authority for this “better view.”\textsuperscript{77} The case is inconsistent with the similar case, \textit{In re Farmer Stutz, Inc.},\textsuperscript{78} in which the supervisory responsibilities of a Foreman had been held to distinguish it from a nonsupervisory position. Nevertheless, the \textit{Spanfelner} line of cases held that an Alien's experience with the employer cannot be used at all.

\textit{In re Yale Univ. School of Medicine}\textsuperscript{79} followed \textit{Spanfelner} and

\begin{itemize}
\item \textsuperscript{75} Empl. and Training Admin., U.S. Dep’t of Labor, Technical Assistance Guide No. 656, Labor Certifications (1981) [hereinafter TAG]. See Burgess, \textit{supra} note 1, at 387 n.50 (1986). These guidelines supplement the departmental regulations published at Title 20, § 656 of the Code of Federal Regulations. With respect to § 656.21(b)(6), the TAG provides:

Minimum requirements at which the employer has hired or intends to hire a worker in the job offered should be reflected in the offer of employment. The employer must document that it has not previously hired workers with less training or experience than what is required in the job offer and that it is not feasible to do so.

When an employer has employed or currently employs the alien in the occupation for which certification is sought, the application for alien employment certification for the alien cannot include as a job requirement experience gained by the alien in that occupation while working for the employer. This is a valid exclusion since that experience was not required for the job when the alien was hired. However, if certification is sought in a different occupation, the employer may require experience with [sic] the alien gained with the employer if the employer customarily requires such experience for the job.

\item \textsuperscript{76} 1 IMMIGR. LAB. CERT. REP. (MB) 1-655 (1979) (79 INA 188) (this case was denied on a number of grounds: “taken together they present an overwhelming case for denial of certification”).

\item \textsuperscript{77} Id. at 1-657.

\item \textsuperscript{78} 78 INA 129 (October 21, 1978).

\item \textsuperscript{79} 2 IMMIGR. LAB. CERT. REP. (MB) 1-794, 1-797-98 (1981) (80 INA 155).
\end{itemize}
denied labor certification for a Cardiothoracic Researcher in order to further public policy, but made no attempt to examine the facts of the case under the regulation. The Alien had worked for the Yale School of Medicine for seven years on F and J visas. The school argued that the Alien gained the necessary skills through his experience as a Researcher I and Researcher II. Both positions were at a lower level than the position for which certification was sought. The ALJ ruled, however, that this violated the "intent" of the regulations. No effort was made in the decision to compare the duties of the respective positions.

b. Cases Which Did Follow The TAG

Another series of ALJ opinions followed the TAG and held that the Alien’s experience with the employer in a different occupation may be applied to the requirement of experience.80 As an example, In re New England Nuclear Corp.81 stated:

Nothing in the regulations, expressly or impliedly, provides that an employer is under an obligation to applicants other than an Alien to provide training similar to that experience gained by the Alien while working for the employer in a position other than that for which certifications is sought, or that an employer cannot require experience of applicants for a position in the company simply because the Alien acquired experience which qualified him for that position while working in another position in the employer’s workforce.

The fact that the Alien in that case qualified for the position by virtue of work with the employer in another position was, in itself, of no significance. Although the opinion does not discuss the comparable job duties, it holds that the positions of Technologist and Associate Technical Specialist are “distinct, legitimate, separate categorizations of job duties.”

A similar result was reached in In re International Forecasting.82 In that case, an Alien was hired as a Trainee to assist the company’s Currency Trader. Subsequently, the Alien was promoted to the position of Currency Trader. The ALJ found that the employer was seeking to fill a related but different position requiring more experience and skill than that required in the Alien’s original job. The ALJ rejected the CO’s statement that an Alien may not use work experience gained with the employer toward promotion. “Experience gained by the Alien with the employer in a capacity different from

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80. See Burgess, supra note 1, at 389 n.58 (1986).
the position being offered should not be a bar to the employer's ability to hire the Alien absent any evidence of tailoring the job requirements to the Alien's qualification."

In In re Store Planning Assoc., the ALJ based his opinion upon "a chart of the employer's job hierarchy, and comparative descriptions of the job opportunity and prior positions held by the Alien." The ALJ concluded that the opportunity was a bona fide position separate from any position previously held by the Alien.

In In re Dynamic Resources, Inc., the ALJ found that the job for which certification was sought was different from the position in which the Alien gained certain experience required for the job:

In this application the job for which Alien is seeking certification is different from the job in which she gained the experience. . . . The requirement of the two positions are different; it is not merely length of experience that is necessary for performance of this job but rather separate and distinct skills are required. The fact that the Alien achieved some of these skills for the higher level position while an employee of the employer is irrelevant in this case. It had been established through affidavits provided by the employer that the job requirements of the position offered were the actual minimum qualifications needed and was not tailored to the Alien.

In In re Coast Mailing Corp., the ALJ compared the job duties in a direct mail order operation of a Mail Sorter and Machine Operator. Since the duties differed, the ALJ held the positions were different and experience gained as Mail Sorter could be used as a requirement for Machine Operator. Another decision, In re San Fernando Electric Manufacturing, Inc., distinguished the position of Ceramic Advanced System Engineer from the positions of Janitor, Caser, Junior Engineer and Production Supervisor which the Alien had held while attending college in pursuit of his engineering degree.

III. EXPERIENCE GAINED WHILE WORKING FOR AN AFFILIATE OF THE EMPLOYER

Experience which the Alien gained prior to assuming the duties of the position to be certified may be included in the requirements without violation of § 656.21(b)(6). As discussed above, Delitizer established the standard for distinguishing two positions with the same employer. Nothing precluded use of the Alien's experience with a different employer. However, if the Alien gained the experience while working for an affiliate of the employer in the United States or abroad, the issue of whether the Alien has gained the experience with the "same employer" may arise. If the experience was gained

83. Id.
85. 5 IMMIGR. LAB. CERT. REP. (MB) 1-77, 1-180 (1983) (83 INA 360).
with the same employer, the experience must be analyzed under § 656.21(b)(6).

A. In re Inmos Corp.

In Inmos,° BALCA unequivocally rejected the argument that the fact that foreign and U.S. firms have separate corporate identities is sufficient to establish that experience with the foreign parent is not disqualifying under § 656.21(b)(6). As described in the opinion, the Application was for a Microcomputer Software Applications Engineer and required experience with the “transporter” and “OCCAM Software.” All applicants were rejected due to lack of experience with transporters or OCCAM software. The Alien had gained all of his experience with the transporter and OCCAM software while employed in the U.K. by the employer’s corporate parent.

The CO issued a Notice of Findings which objected to the requirements as unduly restrictive in violation of § 656.21(b)(2); U.S. applicants were not rejected for lawful job related reasons but instead were rejected because they did not fulfill the unduly restrictive requirements, in violation of § 656.21(b)(7); and because the Alien did not fulfill the restrictive requirements upon hire, “the employer cannot now require terms and conditions for hire which are less favorable to U.S. workers than those originally offered to the Alien” in violation of § 656.21(b)(6).

In response, to satisfy “business necessity”, the employer justified the requirements by emphasizing the uniqueness of the product and necessity of the transporter and OCCAM software requirement. The employer then argued unsuccessfully, in the alternative, that the Alien’s experience had not been gained “on the job” because it was gained abroad and that it would not be economically feasible to train U.S. workers. No explanation was provided as to why it would be infeasible to train U.S. workers, but the employer did explain that it frequently transferred individuals into the U.S. in nonimmigrant treaty visa status,° and that because of the infeasibility to train, it would import a series of nonimmigrant foreign workers trained by the employer abroad to hold the position. The matter was denied on the basis that the Alien had learned about the company’s unique product while working for the employer. On appeal, the employer

88. 88 INA 326 (BALCA June 1, 1990).
89. Nonimmigrant treaty investor visas, known as the E(2) visas, are granted to employees of a foreign investor to manage and direct or provide essential skills to their U.S. investment. 8 USC § 1101(a)(15)(E)(ii) (1989).
added the argument that the U.S. and U.K. companies had separate corporate identities and for that reason were technically not the same employer.

As amicus, AILA suggested that an operational test should be applied to determine the issue of whether two employers are the same rather than a test involving technical legal affiliation. AILA argued that entities which are legally related frequently know nothing of each other's operations, have different job requirements and function quite independently. This is particularly true in situations involving geographically remote or international entities since in such cases there is significant independence in human resource management. Due to the different educational and social systems in a foreign country, the criteria applied in a foreign country when employing an individual may be entirely different than that applied in the United States.\footnote{In re Inmos Corp., 88 INA 3226 (BALCA June 1, 1990) (Amicus Brief at 10-13).}

AILA proposed that where an employer is seeking to certify a position for which the beneficiary's experience in a similar job will be used to qualify the beneficiary for the position, the burden should be upon the employer to come forward with evidence to establish the independence of the entity's operations. Where this evidence credibly establishes such independence of operations, the fact that the beneficiary may have obtained his or her qualifications in a similar position with an affiliated overseas or domestic entity should not matter, because such experience is no different than that gained in a separate entity.\footnote{Id.} This analysis is consistent with the common law concept of the employer/employee relationship in which the most essential element is the right to order and control another, to direct the work, and to determine the manner in which the work shall be done.

An alternative analysis would be to adhere to the Immigration Service’s treatment of separate entities in the IRCA regulations concerning the use of the Form I-9. The INS definition of “employer,”\footnote{8 C.F.R. § 274a.1(g) (1980).} is limited to an entity who engages an employee for services or labor “to be performed in the United States.” Thus overseas employment could not be with the “same employer.”

With respect to domestic affiliates, for the purpose of assessing civil penalties for IRCA violations, two subdivisions of a respondent composed of distinct, physically separate subdivisions which do their own hiring “without reference to the practices of, or under the control of or common control with, another subdivision” are separate entities. For the purposes of execution of a new I-9, “continuing employment” includes a transfer from one to another “distinct unit of
the same employer” and continued employment by a “related, successor, or reorganized employer” which includes the same employer at another location; an employer who continues to employ some or part of a workforce following corporate reorganization, merger, sale of stock or assets; or an employer who is part of a multi-employee association who continues employment of a workforce of another party pursuant to the same collective bargaining agreement. In order to determine the separateness of two corporate entities, the level of control one employer has over the other’s operations and its employees may be considered. One or more corporate affiliates may be the “same” employer depending upon the level of control exercised by one over the employees or hiring practices of the other.

BALCA acknowledged that AILA’s proposed “operational test” may have merit in the international business world in which large conglomerates serve as holding companies for a variety of separate and sometimes competing corporate entities. Nevertheless, BALCA stated that the record in Inmos was found to support neither a determination that the two companies are in different businesses with nothing in common except a corporate entity connection, nor a determination that the companies are so unrelated that prohibition of experience with one would be inequitable. BALCA did not remand Inmos because BALCA did not consider it possible to overcome the evidence already in the record that the employers were the same due to the ease of transfer of nonimmigrant workers. This might have been a case in which infeasibility to train U.S. employees could have been established by documentation explaining why the training was conducted in the U.K. BALCA suggested that the employer may establish infeasibility to train but that in this case no evidence had been presented to support the assertion of infeasibility. Accordingly, Inmos established the rule that separate corporate identity alone will not establish that the alien’s experience with one corporation, even abroad, is experience gained with the employer in the § 656.21(b)(6) context.

B. Other BALCA Decisions

Prior to Inmos, BALCA had issued three opinions touching this issue: In re Haden, Inc. (Costello),94 In re Haden, Inc. (West),95 and

In re Yong Chow Restaurants.\textsuperscript{96} Certification in In re Haden, Inc. \textit{(Costello)} had been denied on the ground that the Alien had gained the experience while working with the employer. BALCA reversed and held that the evidence established that the experience had been gained, not on the employer’s workforce, but while working on joint projects between the employer and its sister company located in the U.K.\textsuperscript{97} BALCA was quick to point out in In re Haden, Inc. \textit{(West)} that Handen \textit{(Costello)} did not establish the rule that experience gained with a sister company in the United States or abroad would never violate § 656.21(b)(6) and that that case should not be interpreted to preclude the CO from investigating the interconnection between the two companies.\textsuperscript{98}

In re Young Chow Restaurant, also implied that showing that two employers are different legal entities may not be sufficient to demonstrate that they are separate employers.\textsuperscript{99} There were two Young Chow Restaurants: one incorporated in the District of Columbia and one in the State of Maryland. One of the restaurants was the employer, and the other provided the Alien his cooking experience. The majority of the panel articulated the view that the CO could require further evidence of the separateness of the entities despite their separate corporate identity.\textsuperscript{100}

\begin{itemize}
\item 98. It is clear that BALCA’s concern in \textit{Haden, Inc. (West)}, was whether there was a bona fide job offer. This concern is appropriately analyzed in § 656.20(c)(8) and is not addressed by § 656.21(b)(6). BALCA’s point seemed to be that the nature of the experience required was in proprietary matters, and such experience could not be obtained outside the companies who are party to the propriety. Hence, the job may not be certifiable because no U.S. worker could ever fill it. This logic is parallel to BALCA’s logic in the “inseparability” and “alter ego” line of cases such as \textit{In re Medical Equip. Designs, Inc.}, 5 Immigr. L. & Proc. Rep. \textit{(MB)} B3-267 (1988) (87 INA 673) and \textit{In re Lignomat U.S.A., Ltd.}, 7 Immigr. L. & Proc. Rep. \textit{(MB)} B3-123 (1989) (88 INA 276).

In those cases, BALCA insisted upon the policy that a genuine test of the U.S. market must be possible when an alien employment certification is requested. In \textit{Lignomat} and \textit{Medical Equipment}, BALCA held that no test is possible when the alien is the only individual who can fill the job. \textit{Haden (West)} suggested extending this principle to situations where the required experience is in proprietary matters and, as such, cannot be obtained outside the company. This analysis is absurd in light of the fact that the purpose of the statute is to prevent the displacement of U.S. labor by foreign labor. If there would be no job but for the alien, there is no displacement. More importantly, this analysis has nothing to do with § 656.21(b)(6) and is better battled elsewhere.
\item 100. \textit{Id.} at B3-182 (Schoenfeld and Tureck, dissenting). The dissent suggested the view that the Certificates of Incorporation are prima facie evidence that the companies are separate legal entities, and that procedural remand was inappropriate because the employer had come forward with this evidence.
\end{itemize}
C. Pre-BALCA Decisions

Generally, practitioners have assumed that experience gained with a foreign affiliate may be used in labor certification. The only pre-BALCA case which considered this issue was *In re Speedent USA Corp.*,\(^{101}\) in which the Alien had gained the required three years of experience with Speedent Corporation of Taiwan. No documentation other than the different names was presented to establish the separateness of the two companies. Certificates of incorporation, presented upon appeal, were not considered because they had not been part of the record below.

D. Factors to Establish that Two Employers are Not the Same

It is clear from the ruling of *In re Inmos Corp.* that the issue of whether experience has been gained with a separate employer under § 656.21(b)(6) requires more documentation than two certificates of incorporation showing that the employers are separate legal entities.\(^{102}\) *Inmos* does not state what additional documentation should be submitted. The decision does, nevertheless, provide some clues as to documentation which may be appropriate.

Documentation should be submitted to establish that the entities are distinct operational units with respect to the hiring and training of employees. The additional factors may include:

1. How the corporations are related, including identification of the parent; whether the relationship is through a common holding company; and whether the employers are in the same division.
2. Whether the employers are in the same business, and whether they are competing.
3. Whether or not the hiring practices are conducted by distinct physically separate subdivisions.
4. Hiring practices conducted in a foreign country according to practices particular to that country should constitute evidence that the employers are different.
5. The extent to which the hiring practices are commonly controlled. The fact that policy guidelines, job hierarchies or employment criteria are shared should not indicate control. Control should exist only when the specific and actual hiring decisions are reviewed or directed by a common source.
6. The extent to which the hiring employer may exercise independent judgment in hiring a transfer from the other entity.
7. The extent to which the hiring entity may consider other applicants in addition to the transferring employee.
8. Any other evidence of the “inequity” of prohibiting the experience.

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102. 88 INA 326 (BALCA June 1, 1990).
E. Decisions Issued After In re Inmos Corp.

One decision since Inmos has referenced the Inmos holding. The employer in In re Yamasho Inc.\textsuperscript{103} specialized in the business of supplying equipment to Japanese restaurants. The position for which certification was requested was Service Manager. Job requirements included a Bachelors Degree without specification of a discipline, three years of experience in the job offered, and fluency in the Japanese language. The Alien's experience had been gained in the position of Service Engineer. He had been employed in this position since March 1985. Initially he held this position in Japan and was then transferred to the U.S. on an L(1) Intracompany Transferee visa\textsuperscript{104} in 1986 to hold the same position. The employer utilized the letter it had written to the INS in support of the L visa to document the Alien's credentials.

BALCA compared the description of the job to be certified, the position held in Japan as documented in the letter to the INS, and the position to which the Alien was transferred. The only "easily discernible distinction" BALCA could find was supervisory and training responsibilities over two to three employees. These "de minimis supervisory responsibilities" alone did not distinguish the two positions. In re Delitizer Corp. was cited in a footnote, but no factor other than job duties was compared.

In Yamasho, approximately one year of the required experience had been gained with the Japanese parent in Japan and two years with the employer in the U.S. Apparently, the employer had not attempted to argue that the employer and its foreign parent were different entities. BALCA referenced Inmos, however, in a footnote for the principle that "the mere fact that experience is gained with a foreign affiliate of a corporation is insufficient to establish that the experience was not gained with the same employer".\textsuperscript{105}

IV. INFEASIBILITY OF HIRING AN EMPLOYEE WITH LESS TRAINING OR EXPERIENCE

Inmos may result in more reliance by employers upon the second exception to § 656.21(b)(6), infeasibility to train another employee. According to this exception, the employer may assert that, although the Alien was hired without certain experience, it is now infeasible to hire without that required experience. Although pre-BALCA cases sometimes recognized infeasibility due to business inefficiency,\textsuperscript{106}

\textsuperscript{103} 89 INA 203 (BALCA July 23, 1990).
\textsuperscript{105} Yamasho, 89 INA 203 (citing Inmos 88 INA 326).
\textsuperscript{106} See, e.g. In re M&R Plating Corp., 5 Immigr. L. & Proc. Rep. (MB) B3-12, B3-15 (1987) (87 INA 355) in which reduction in staff was held to sufficiently document
BALCA has frequently discounted employers’ assertions of “mere inefficiency” or inability to train due to changed business conditions.

A. Mere Inefficiency

In In re MMMATS, BALCA en banc declined to follow a line of pre-BALCA decisions in which infeasibility had been documented by business conditions which had changed since the initial hire and training of the alien. The position of Solderer Production Lineworker required one month of experience which the alien lacked when initially hired. The employer submitted a statement that business expansion had rendered training infeasible. BALCA upheld denial on the basis that this bare statement, without documentation to support it, was insufficient to document infeasibility.

In In re BSN Industries, Inc., the employer sought certification for an Extruder Operator and required one year of experience, ability to work from written job orders, and knowledge of a micrometer. The employer argued that when the alien had been hired, there had been only three machines and three operators and that the alien had been trained by a worker who had since retired. The increase in business and the current state of the workforce made it difficult to train new employees, since taking an experienced worker out of the production line would increase production costs to a point where the company could no longer compete with large manufacturers. BALCA upheld denial finding that “mere inefficiency” did not prove infeasibility under the regulations.

In In re Kurt Salmon Assoc., Inc., the employer argued that two years of experience was essential to perform the job. This argument, however, was rejected as a bare statement of infeasibility. It is possible that the problem with the requirement in this case was that the employer's proof addressed the business necessity of the requirement rather than the circumstances which rendered training infeasible. The same problem is evident in Inmos, in which, rather than explaining why training in the U.S. was not possible, the employer stressed the uniqueness and business necessity of the training which

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changed business conditions rendering it no longer feasible to hire and train. See also Burgess, 23 supra note 1, at 381 (1986).


had been acquired abroad.

In re C.G. Construction Corp.\textsuperscript{110} involved an application for a Stonemason for which one year of experience was required. The Alien had been working for the employer for two years and had spent the first year training for the position of Stonemason. The employer asserted that its need for Stonemasons arose from its expansion into the home building industry. It had hired a Stonemason who in turn trained the Alien. The employer asserted a need for one Stonemason on each of its three or more jobs in progress at any time, which precluded training an unskilled worker. BALCA, however, agreed with the CO that the employer had not documented that circumstances had changed so significantly as to render training an unskilled worker infeasible. BALCA further observed that the employer appeared to be in a better position now to train an unskilled worker than it had been when it hired the Alien since it now had three Stonemasons, including the Alien, to train an additional worker. BALCA also rejected the employer’s explanation that it could not complete a specified volume of work if it hired inexperienced workers.

\section*{B. Cumulative Knowledge}

The infeasibility of hiring an employee without on the job research and development experience which had been gained by the employee while working for the employer was established in In re Vac-Tec Systems, Inc.\textsuperscript{111}

In that case, during his several years of employment with the applying employer, the Alien had helped to develop the advanced technology upon which the employer’s business was based. The position was that of Vice President of Technical Marketing. It required a Ph.D. degree in Physics and Engineering, as well as two years of experience in research and development in thin film deposition including cathodic arc deposition and marketing. Although the alien qualified by experience gained with the employer, infeasibility to hire without this experience was established by evidence that the technology of the employer, as well as that of the entire industry, had been modified or changed since employment of the Alien. Accordingly, al-


though it was previously possible to hire without the required experience, it was no longer feasible to do so.

V. CONCLUSION

The creation of the Board of Alien Labor Certification Appeals has significantly improved the system of adjudication of Applications for Alien Employment Certification. Prior to BALCA's inception, § 656.21(b)(6) had been rendered virtually meaningless because of inconsistent application by individual Administrative Law Judges. In addition to their conflicting interpretation of this provision, their decisions, which frequently failed entirely to analyze the application of the regulations, prompted practitioners to question whether the administrative appeal provisions in labor certification were completely arbitrary.

BALCA has exerted significant attention to establishing viable standards in this area. Nevertheless, these standards are a long way from providing analytically sound and practical guidance to practitioners and Certifying Officers. Specifically, BALCA has confused § 656.21(b)(2) and § 656.21(b)(6) in application to actual minimum requirements. As a result, practitioners receive the request to justify business necessity under § 656.21(b)(6) and are forced into the position of guessing which regulation the rebuttal should address: business necessity under § 656.21(b)(2) or the issues appropriately considered in § 656.21(b)(6). BALCA has established the standard that experience in a dissimilar job may be used and has listed the factors to be analyzed in comparing two job positions. Nevertheless, although BALCA has suggested that these factors exist, it has yet to analyze in a meaningful fashion the factors relevant to establishing different employers and infeasibility.

This article has not made an attempt to reconcile the inconsistencies in BALCA's decisions on § 656.21(b)(6). Some BALCA opinions simply are poorly reasoned. Nevertheless, some opinions suggest that the deficiencies in the record may have resulted from the employer's failure to document the case. Good lawyering in the future may improve BALCA's jurisprudence. It remains the practitioner's obligation to use the standards that do exist, to fully document the labor certification request, to ensure that COs are applying the standards and regulations in adjudication of the case, and to urge BALCA to reconsider its poorly reasoned opinions.