

# **Actual Minimum Job Requirements in Labor Certifications: Application of Title 20, Section 656.21(b)(6) of the Code of Federal Regulations to Experience or Training Gained with the Employer**

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*Not infrequently a United States employer seeks labor certification for an alien who has worked for the employer previously. In such circumstances, it may be reasonable to require that the amount of experience the alien has gained be included in the application. Labor Department regulations preclude application requirements other than the actual minimum requirements of the employer. In addition, the employer must not have hired workers with less training or experience for a job similar to that in which the labor certification is sought. Departmental interpretation indicates that it is possible to require experience which the alien has gained working for the employer in a different occupation. Inconsistent application of this interpretation by the Department of Labor adjudicators leaves an employer at peril of losing a labor certification whenever an alien has been previously employed in a position with the petitioning employer even though the position is different than the one for which certification is sought.*

## **INTRODUCTION**

The Immigration and Nationality Act (INA)<sup>1</sup> provides for the ex-

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1. Immigration and Nationality Act § 201(a), 8 U.S.C. §§ 1101-1503 (1982),

clusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has granted them certification.<sup>2</sup> In order to obtain a labor certification, the alien's prospective employer must demonstrate that it has attempted to recruit United States workers for the position which it desires the alien to fill. Furthermore, the employer must show that hiring the alien would not adversely affect the wages and working conditions of similarly employed United States workers. The procedure and requirements for this certification are set forth in title 20, section 656 of the Code of Federal Regulations.<sup>3</sup>

This Article addresses the two-prong requirement of title 20, section 656.21(b)(6) of the Code of Federal Regulations which specifies that the employer must document: (1) that the requirements listed in its application for labor certification are the actual minimum requirements of the employer, and (2) that the employer has not previously hired workers with less training or experience for jobs similar to the one for which the labor certification is sought, or that it is not feasible to hire workers with less training or experience.<sup>4</sup> This issue particularly concerns the immigration practitioner whose client, an employer, seeks to obtain permanent labor certification for an alien who has worked for the client pursuant to a temporary visa<sup>5</sup> or who has been employed by the client abroad.<sup>6</sup>

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originally enacted as Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 [hereinafter cited as INA].

2. INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982). 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 the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined or certified to the Secretary of State and the Attorney General that (A) there are 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 153(a)(3) and (6) of this title, and to non-preference immigrant aliens described in Section 1153(a)(7) of this title.

3. The regulations were issued pursuant to the authority of INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982).

4. 20 C.F.R. § 656.21(b)(6) (1985).

5. Commonly used nonimmigrant visas authorizing temporary employment are the F/practical training, H1, J1, & L1. See 8 U.S.C. § 1101(a)(15)(F), (H), (J), and (L) (Supp. III 1985); 8 C.F.R. § 214.2 (1985).

6. See *In re Speedent USA Corp.*, 6 I. LAB. CERT. REP. (MB) 1-470 (1984) (84 INA 478), discussed in text accompanying note 19. The information following the date in the citations to A.L.J. decisions is the docket number of the case. This is provided for the convenience of those who may have ready access to the decisions through these

In addition to section 656.21(b)(6), labor certifications for aliens who have previously been employed by the employer have been denied based on other regulatory provisions. This Article briefly examines these other provisions and compares them to section 656.21(b)(6).

This Article concludes that pursuant to section 656.21(b)(6), experience which the alien gained with the employer is not a minimum job requirement if the alien was originally hired for the same position without that experience, unless the infeasibility of hiring a worker without that experience is demonstrated. If the experience was gained in a different position, the fact that it was gained with the same employer is irrelevant to whether it is a minimum job requirement.

### THE REGULATIONS

Section 656.21(b)(6)<sup>7</sup> 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.

The language of the regulation imposes two requirements, the second of which contains two alternatives: (1) The job requirements are the actual minimum requirements of the employer; and (2) Either the employer has not hired workers with less training or experience, or it is not feasible to hire workers with less training or experience.

In 1981, the Employment and Training Administration of the Department of Labor issued a *Technical Assistance Guide* (TAG)

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numbers.

7. In 1977, the Department of Labor published new regulations governing the labor certification process at 20 C.F.R. §§ 656.1-.62. These replaced prior regulations at 29 C.F.R. § 60 and were effective February 18, 1977. 42 Fed. Reg. 3441 (1977) (to be codified at 20 C.F.R. § 656). Twenty C.F.R. § 656 was amended by the Employment Training Administration of the Department of Labor (ETA) on December 19, 1980. 45 Fed. Reg. 83,926 (1980) (to be codified at 20 C.F.R. § 656). Effective January 19, 1981, the amendments were "intended to clarify some apparent ambiguities in the regulations, to make the regulations easier to read, and to reflect the experience of the ETA in administration of the regulations since 1977." There was no substantive change in 1981 to what is now 20 C.F.R. § 656.21(b)(6) (1985), although it was renumbered from 20 C.F.R. § 656.21(b)(14) (1980). Reference in the text will be made to either .21(b)(6) or .21(b)(14) depending upon which regulation was in effect at that time the decision was rendered.

which contains operating guidelines.<sup>8</sup> These guidelines supplement the departmental regulations published at title 20, section 656 of the Code of Federal Regulations.<sup>9</sup>

With respect to section 656.21(b)(6), 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. 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.<sup>10</sup>

TAG maintains that the job offer cannot include a requirement of the experience gained by the alien while working for the employer in that occupation. If the alien initially had been hired without the experience he gained on the job, that experience is not the actual minimum requirement for performance of the job. TAG distinguishes a situation where the experience was gained in a different occupation. That experience may be used if the employer customarily requires such experience for the job.

#### APPLICATION OF THE REGULATIONS

When an application for alien labor certification has been denied by the certifying officer,<sup>11</sup> a request may be made for administrative-

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8. EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T. OF LABOR, TECHNICAL ASSISTANCE GUIDE NO. 656, LABOR CERTIFICATIONS (1981) [hereinafter cited as TAG].

9. Directive to all regional and state agency offices from James T. Walker, Administration and Management, U.S. Dep't of Labor, Employment and Training Admin. (Sept. 2, 1981). The Department of Labor has represented that the TAG is the controlling interpretation of the regulations. See AILA JOINT LABOR LIASON COMM. MEETING REPORT (Feb. 1985). The TAG should at least be considered persuasive, if not controlling, as a contemporaneous interpretation of a regulation by the agency administering it. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

10. TAG, *supra* note 8, at 52-53. The TAG is inconsistent with the regulation in that it substitutes an "and" for the "or" in the second requirement of the regulation. This substitution has not been given significance by any of the cases examined and for that reason analysis of its significance is beyond the scope of this Article. But *c.f. In re Trus Joist*, 2 I. LAB. CERT. REP. (MB) 1-9, 1-11 (1980) (80 INA 63).

11. An application for labor certification, ETA (Employment and Training Administration) Form 750, is initially filed with the local state job service. That office issues a job order in conformity with the job description on the application for labor certification. In conjunction with that office, the employer must pursue the specific recruitment efforts detailed in the regulations. Upon completion of those recruitment efforts, the application and documentation of recruitment efforts is transmitted to the regional certifying officer of the Employment and Training Administration of the United States Department of Labor. See 20 C.F.R. §§ 656.20-.21 (1985). The certifying officer then makes a determination of whether to grant or deny the application based upon the procedural

judicial review by an Administrative Law Judge (A.L.J.).<sup>12</sup> Although some of the A.L.J. decisions are published in the *Immigration Labor Certification Reporter* (published by Matthew Bender),<sup>13</sup> the Department of Labor has not chosen to designate any of them as precedential.<sup>14</sup> Accordingly, the effect of the application of the regulations by an A.L.J. is at best "persuasive."<sup>15</sup>

This Article is based upon an analysis of eighty-three A.L.J. decisions issued between March 1978 and August 1985. In fifty-four of those decisions, denial of labor certification was affirmed; in sixteen, denial was reversed with certification ordered to be granted; and in thirteen the case was remanded to the certifying officer for further fact finding. The decisions were issued by thirty-three A.L.J.s, twenty of whom heard more than one case.

#### AN ALIEN'S ON THE JOB EXPERIENCE MAY NOT BE USED AS A JOB REQUIREMENT WHEN HE WAS INITIALLY HIRED FOR THE POSITION WITHOUT THE REQUIRED EXPERIENCE

The general rule which accounts for the resolution of numerous cases is that a labor certification will be denied under section 656.21(b)(6) when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position.<sup>16</sup> This rule is supported by the explanation in TAG and the

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criteria of compliance with the regulation or the two substantive criteria of the statute; availability or adverse effect. 20 C.F.R. § 656.24 (1985).

The applicant bears the burden of proving eligibility for visas or documents required for entry, or else establishing that he is not subject to exclusion under INA § 291, 8 U.S.C. § 656.21. The applicant-employer does not bear the ultimate burden of persuasion, for if he did he would be expected to prove the existence of what is nonexistent. Rather, the burden of the applicant-employer under 20 C.F.R. § 656.21 is the burden of production. This burden requires the employer to submit documentation of its recruitment efforts as required by the regulations. If the certifying officer finds those efforts unsuccessful, he must introduce sufficient competent evidence to overcome that adduced by the employer. Failing this, the certification must be issued. *Production Tool Corp. v. Employment Training Admin.*, 688 F.2d 1161, 1168-70 (7th Cir. 1982).

12. 20 C.F.R. § 656.26 (1985).

13. The IMMIGRATION LABOR CERTIFICATION REPORTER has been discontinued and superseded by the IMMIGRATION PROCEDURE REPORTER (Matthew Bender).

14. 20 C.F.R. § 656.27(a) (1985).

15. See *In re AKI Oriental Food Co.*, 4 I. LAB. CERT. REP. (MB) 1-598 (1983) (83 INA 170).

16. *In re Murphy Tomato Co.*, 6 I. LAB. CERT. REP. (MB) 1-111 (1984) (84 INA 316); *In re Speedent USA Corp.*, 6 I. LAB. CERT. REP. (MB) 1-570 (1984) (84 INA 478); *In re Cedar Fiber Co., Inc.*, 4 I. LAB. CERT. REP. (MB) 1-957 (1983) (83 INA 327); *In re Contract Cleaners*, 4 I. LAB. CERT. REP. (MB) 1-540 (1983) (83 INA 359); *In re Jerry Brown Imported Fabrics*, 4 I. LAB. CERT. REP. (MB) 1-148 (1982) (82 INA

language of the regulation itself. The rationale behind this basis for denial is that since the employer was willing to hire the alien without the experience, the experience must not be an actual minimum requirement for performance of the job.<sup>17</sup>

This principle has been applied even though the alien gained the experience while working for the employer abroad. In *In re Speedent USA Corp.*,<sup>18</sup> the employer contended that the alien gained the experience in China and that the Chinese employer was a different entity. The A.L.J. affirmed denial, however, because the names of the American and Chinese companies were similar, and insufficient documentation of their separateness had been provided.

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325); *In re Mecta Corp.*, 3 I. LAB. CERT. REP. (MB) 1-584 (1982) (82 INA 48); *In re Ross Roy, Inc.*, 2 I. LAB. CERT. REP. (MB) 1-986 (1981) (82 INA 127); *In re Pagoda 7 Restaurant*, 2 I. LAB. CERT. REP. (MB) 1-920 (1981) (82 INA 132); *In re Wind Tiki Restaurant*, 2 I. LAB. CERT. REP. (MB) 1-485 (1981) (81 INA 49); *In re Acme Refrigeration Eng'g*, 2 I. LAB. CERT. REP. (MB) 1-299 (1980) (80 INA 165); *In re R.H. Carlson Co.*, 1 I. LAB. CERT. REP. (MB) 1-1229 (1980) (80 INA 165); *In re People's Involvement Corp.*, 1 I. LAB. CERT. REP. (MB) 1-1075 (1979) (80 INA 37); *In re Courier-Citizen Co.*, 1 I. LAB. CERT. REP. (MB) 1-1041 (1979) (79 INA 330); *In re Rose Foundation d/b/a Union Univ.*, 1 I. LAB. CERT. REP. (MB) 1-998 (1979) (79 INA 313); *In re Caron Inc.*, 1 I. LAB. CERT. REP. (MB) 1-875 (1979) (79 INA 267); *In re Neurological Assoc.*, 1 I. LAB. CERT. REP. (MB) 1-692 (1979) (79 INA 1964); *In re FMC Corp.*, 3 I. LAB. CERT. REP. (MB) 1-156 (1979) (79 INA 170); *In re Educational Computer Corp.*, 1 I. LAB. CERT. REP. (MB) 1-418 (1979) (79 INA 30); *In re Union Carbide*, 3 I. LAB. CERT. REP. (MB) 1-152 (1978) (78 INA 168); *In re Kenall Mfg.*, 1 I. LAB. CERT. REP. (MB) 1-290 (1978) (78 INA 141); *In re Allied Chemical Co.*, 1 I. LAB. CERT. REP. (MB) 1-255 (1978) (78 INA 119).

17. Section 656.21(b)(14) provides that the employer must document that the job requirements, as described, represent the actual minimum requirements of the employer and that he has not hired workers with less training and experience for jobs similar to the one involved, or that it is not feasible to hire workers with less training and experience. Since it appears from the record that the alien was hired in the job without the two years of experience which the employer has fixed as an indispensable requirement for United States workers, there is a patent violation of § 656.21(b)(14).

*Kenall Mfg.*, 1 I. LAB. CERT. REP. at 1-294. See also *Acme Refrigeration Eng'g, Inc.*, 2 I. LAB. CERT. REP. at 1-301: "[I]f an alien has gained one year of job experience while working for a given employer and that same employer seeks labor certification on behalf of the alien, the alien cannot include the one year of work experience which he has gained while working for the employer as part of his work history." See *Rose Foundation*, 1 I. LAB. CERT. REP. at 1-998; *Educational Computer*, 1 I. LAB. CERT. REP. at 1-418; *Kenall Mfg.*, 1 I. LAB. CERT. REP. at 1-290. See *supra* note 5.

18. 6 I. LAB. CERT. REP. (MB) 1-470 (1984) (84 INA 478); see also *In re Safeco Ins. Co.*, 2 I. LAB. CERT. REP. (MB) 1-429 (1981) (80 INA 288). Although it is beyond the scope of this Article, the fact that the experience was gained abroad should distinguish the case. The intent of Congress in enacting 8 U.S.C. § 1182(a)(14), would not be violated by international firms hiring foreign workers in foreign countries. Nevertheless, it might encourage international corporations to train foreigners abroad for entry into the American labor market.

*If the Employer has Hired the Alien for the Position With Less Training or Experience Than Required in the Labor Certification, the Employer Must Prove it is Infeasible to Hire Workers With Less Training or Experience*

In a situation in which the alien has on the job experience in the position for which certification is sought, and that experience is required in the application for labor certification, section 656.2(b)(6) requires proof that it is infeasible to hire workers with less training or experience than listed in the application for labor certification. In many cases, where the alien has acquired training and experience while working for the employer, the employer has attempted to show compliance with section 656.21(b)(6) by demonstrating that it is infeasible to hire workers with less training or experience.<sup>19</sup>

### Changed Business Conditions

A common approach to establishing infeasibility is through documentation that business conditions have changed since the alien was

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19. *In re* Pancho Villas Restaurant, 6 I. LAB. CERT. REP. (MB) 1-479 (1984) (84 INA 489); *In re* Domenick's Pizza House, 6 I. LAB. CERT. REP. (MB) 1-960 (1984) (84 INA 448); *In re* Amy's Restaurant, 6 I. LAB. CERT. REP. (MB) 1-1138 (1984) (84 INA 407); *In re* Lancer II Restaurant, 6 I. LAB. CERT. REP. (MB) 1-234 (1984) (84 INA 460); *In re* Pancho Villa Restaurant, 6 I. LAB. CERT. REP. (MB) 1-337 (1984) (84 INA 458); *In re* Murphy Tomato Co., 6 I. LAB. CERT. REP. (MB) 1-111 (1984) (84 INA 316); *In re* Cangiano Pork Stores, 5 I. LAB. CERT. REP. (MB) 1-28 (1983) (83 INA 402); *In re* Ace Grinding Co., 5 I. LAB. CERT. REP. (MB) 1-153 (1983) (83 INA 341); *In re* Veselka Coffee Shop, 5 I. LAB. CERT. REP. (MB) 1-95 (1983) (83 INA 58); *In re* Polymer Research Corp. of America, 4 I. LAB. CERT. REP. (MB) 1-928 (1983) (83 INA 287); *In re* Geigers Cider Mill, 4 I. LAB. CERT. REP. (MB) 1-714 (1983) (83 INA 80); *In re* Contract Cleaners, 4 I. LAB. CERT. REP. (MB) 1-540 (1983) (82 INA 539); *In re* Giulio Cesare Ristorante, Inc., 4 I. LAB. CERT. REP. (MB) 1-534 (1983) (83 INA 78); *In re* Jerry Brown Imported Fabrics, 4 I. LAB. CERT. REP. (MB) 1-148 (1982) (82 INA 325); *In re* Cimarron Realty Trust, 2 I. LAB. CERT. REP. (MB) 1-1034 (1981) (81 INA 71); *In re* Thrifty Car Wash, 4 I. LAB. CERT. REP. (MB) 1-11 (1982) (82 INA 118); *In re* Louis Feder Co., 3 I. LAB. CERT. REP. (MB) 1-1050 (1982) (82 INA 239); *In re* Mastex Indus., Inc., 2 I. LAB. CERT. REP. (MB) 1-1095 (1981) (81 INA 211); *In re* Ross Roy, Inc., 2 I. LAB. CERT. REP. (MB) 1-986 (1981) (81 INA 127); *In re* Pagoda 7 Restaurant, 2 I. LAB. CERT. REP. (MB) 1-920 (1981) (81 INA 132); *In re* McAlicee Paper Co., 2 I. LAB. CERT. REP. (MB) 1-787 (1981) (81 INA 146); *In re* Safeco Ins. Co., 2 I. LAB. CERT. REP. (MB) 1-429 (1981) (80 INA 288); *In re* Fresh Meadow Country Club, 2 I. LAB. CERT. REP. (MB) 1-285 (1980) (80 INA 284); *In re* Trus Joist Corp., 2 I. LAB. CERT. REP. (MB) 1-9 (1980) (80 INA 63); *In re* Nylacarb Corp., 1 I. LAB. CERT. REP. (MB) 1-1152 (1980) (79 INA 368); *In re* Benihana of Tokyo, Inc., 1 I. LAB. CERT. REP. (MB) 1-1021 (1979) (79 INA 319); *In re* Chatham County West, 1 I. LAB. CERT. REP. (MB) 1-900 (1979) (79 INA 237); *In re* Gartenhausfurs, Inc., 1 I. LAB. CERT. REP. (MB) 1-886 (1979) (79 INA 279); *In re* Educational Computer Corp., 1 I. LAB. CERT. REP. (MB) 1-418 (1979) (79 INA 30); *In re* Allied Chemical Corp., 1 I. LAB. CERT. REP. (MB) 1-255 (1978) (78 INA 119).

hired. Although at the time the alien was hired the business entity had been able to train an inexperienced worker on the job, it may no longer be feasible to train an employee because of changed business conditions. This exception was suggested in *In re Gartenhausfurs, Inc.*,<sup>20</sup> where the A.L.J. found it "highly unrealistic" to interpret the regulations in a way that failed to take change of business conditions over a six year period into consideration. "Surely that is not the intent of the Regulation."<sup>21</sup>

In *In re McAliece Paper Co.*,<sup>22</sup> a decrease in business scale justified a finding of infeasibility. The employer was able to show that since hiring the alien, his volume of business and labor force were so reduced as to preclude hiring an applicant in need of extensive training. The A.L.J. found this to be sufficient evidence of infeasibility since the "employer no longer enjoys the sufficient manpower nor the economic resources to conduct such instruction."<sup>23</sup> A contrary result, however, was reached in *In re Lancer II, Restaurant Corp.*<sup>24</sup> The A.L.J. held that documentation of a decrease in sales did not demonstrate infeasibility without a showing of the time needed to train, or evidence that the training would interfere with other workers.

An increase in business has also justified infeasibility. In *In re Veselka Coffee Shop*,<sup>25</sup> the employer adequately documented that expansion of business precluded hiring an inexperienced person as a cook. The A.L.J. observed that a good cook was indispensable to a successful restaurant and that the greater the pressure, the greater the gamble that an inexperienced cook would destroy the reputation of the restaurant.

In other cases, an increase in business was not sufficient evidence of infeasibility, because the employer either failed to document the business increase or failed to show why the business increase limited training capacity.<sup>26</sup> In *In re Giulio Cesare Ristorante, Inc.*,<sup>27</sup> increased volume was not sufficient to show infeasibility of training when the job was not that of chief cook. Moreover, in *In re Ace*

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20. 1 I. LAB. CERT. REP. (MB) 1-887 (1979) (79 INA 279); accord *In re Nylacarb Corp.*, 1 I. LAB. CERT. REP. (MB) 1-1152 (1980) (79 INA 368); *In re Cimarron Realty Trust*, 2 I. LAB. CERT. REP. (MB) 1-1034 (1981) (81 INA 71).

21. *Gartenhausfurs*, 1 I. LAB. CERT. REP. (MB) at 1-887.

22. 2 I. LAB. CERT. REP. (MB) 1-787 (1981) (81 INA 146).

23. *Id.* at 1-789-90.

24. 6 I. LAB. CERT. REP. (MB) 1-234 (1984) (84 INA 460).

25. 5 I. LAB. CERT. REP. (MB) 1-95 (1983) (83 INA 58).

26. See, e.g., *Nylacarb*, 1 I. LAB. CERT. REP. at 1-1152; *In re Inakaya Restaurant*, 3 I. LAB. CERT. REP. (MB) 1-483 (1981) (81 INA 86); *In re Thrifty Car Wash*, 4 I. LAB. CERT. REP. (MB) 1-11 (1982) (82 INA 118); *In re E.O. Mari, Inc.*, 4 I. LAB. CERT. REP. (MB) 1-530 (1983) (83 INA 72); *In re Mister Greenjeans*, 5 I. LAB. CERT. REP. (MB) 1-297 (1983) (83 INA 401).

27. 4 I. LAB. CERT. REP. (MB) 1-534 (1983) (83 INA 78).



*Grinding Co.*,<sup>28</sup> the A.L.J. suggested expansion of business should make it easier to provide training. In *In re Pancho Villa Restaurant*,<sup>29</sup> infeasibility to train due to a dramatic business increase was not substantiated. As a result of the increased sales, the A.L.J. concluded that the employer appeared more prosperous: "Employer has not shown why it can not train a new person with a staff of three cooks when it was able to do so with a staff of two . . . [He saw] no reason why the firing of an inexperienced cook would necessitate reducing the number of experienced cooks . . .," one of whom was the alien himself.<sup>30</sup> Even when training has been shown to involve additional expenses and a slowing down in production, some A.L.J.s have found these grounds insufficient to show infeasibility.<sup>31</sup>

These cases suggest that although it is a recognized principle that changed business conditions may constitute infeasibility to hire an inexperienced employee, many labor certifications are denied because the employer has not provided sufficient objective evidence of why the changed conditions limit the ability to train an inexperienced worker on the job.

Nevertheless, the A.L.J. decisions do not establish what factors must be demonstrated to show infeasibility. Some guidance, however, is provided by two cases which were remanded. In *In re Cimarron Realty Trust*,<sup>32</sup> the certifying officer failed to provide practical guidelines concerning the nature of documentation necessary to establish infeasibility. After the final determination,<sup>33</sup> the employer submitted a legal brief and an affidavit listing the relative size of the business, number of maintenance employees, operating costs, and complexity of machines. The affidavit tended to show that the business had been smaller and less busy when the alien was hired, and that current operations were greater, finances were tighter, and machines more complex. On remand, the A.L.J. required: 1) a list of all

28. 5 I. LAB. CERT. REP. (MB) 1-153 (1983) (83 INA 341). *Accord In re Al's Tool and Die Enterprises*, 2 I. LAB. CERT. REP. (MB) B3-89 (1985) (85 INA 24).

29. 6 I. LAB. CERT. REP. (MB) 1-337 (1984) (84 INA 458). *See also In re Amy's Restaurant*, 6 I. LAB. CERT. REP. (MB) 1-1138 (1984) (84 INA 407); *In re Pancho Villas Restaurant*, 6 I. LAB. CERT. REP. (MB) 1-479 (1984) (84 INA 489).

30. *Pancho Villa*, 6 I. LAB. CERT. REP. at 1-339.

31. *In re Geigers Cider Mill*, 4 I. LAB. CERT. REP. (MB) 1-714 (1983) (83 INA 80); *In re Ace Grinding Co.*, 5 I. LAB. CERT. REP. (MB) 1-153 (1983) (83 INA 341).

32. 2 I. LAB. CERT. REP. (MB) 1-1034 (1981) (81 INA 71).

33. The procedure followed by the certifying officer in rendering a determination is set forth in 20 C.F.R. § 656.25. If the labor certification is not granted, the certifying officer issues a "Notice of Findings" which the employer has an opportunity to rebut. If the rebuttal documentation does not cure the noted deficiencies, the certifying officer issues a "final determination."

maintenance mechanics hired, their education, experience, and minimum job qualifications; and 2) verification of why vocational training was insufficient. In *In re Cangiano Pork Stores*,<sup>34</sup> the A.L.J. ordered the case remanded to allow the employer the opportunity to present objective evidence to support his argument that, although personnel had not increased, the volume of business had. Suggested objective evidence included comparison of volume of sales and type and complexity of inventory.

### Other Business Related Reasons

Some employers have been successful in showing that hiring and training an inexperienced employee is infeasible not because of changed business conditions but because of other business related reasons. One argument advanced by many employers is that a company's policy to train on the job is sufficient justification of infeasibility. An early decision, however, rejected the argument of the employer that it was infeasible to hire an employee who had not been trained on the job. In *In re Allied Chemical Corp.*,<sup>35</sup> the employer attempted to demonstrate that it was company policy to hire trainees and provide them with on the job experience. The A.L.J. explained that although the training program may have been appropriate for the company's general hiring purposes, it conflicted with the purpose of the INA.<sup>36</sup> The employer "cannot use such a training program to provide the necessary experience or training to the Alien. Labor certification cases do not involve the normal recruitment pro-

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34. 5 I. LAB. CERT. REP. (MB) 1-288 (1983) (83 INA 402).

35. 2 I. LAB. CERT. REP. (MB) 1-147 (1980) (80 INA 58).

36. Congress enacted INA § 212(a)(14) to protect the domestic labor force from job competition and adverse working conditions as a result of foreign workers entering the labor market. *Production Tool Corp. v. E.T.A.*, 688 F.2d 1161, 1168 (7th Cir. 1982). See H.R. REP. NO. 1365, 82nd Cong., 2d. Sess. 2 (1952), reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1705; S. REP. NO. 748, 89th Cong., 1st Sess. 2 (1965) reprinted in 1965 U.S. CODE CONG. & AD. NEWS 3328, 3329, 3333-34.

In 1965, Congress amended § 212(a)(14) which had provided that alien workers would be excluded if the Secretary of Labor found available United States workers or an adverse effect. The new amendment provided that alien workers would be excluded *unless* the Secretary affirmatively finds there are sufficient domestic workers available, and entry of the foreign worker will not adversely affect working conditions. Amendments to the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911, 917 (1965). The Labor Department regulations are designed to effectuate that purpose.

The labor certification provision in operation since Dec. 1, 1965, was intended to protect the interests of the American labor force, while at the same time serving as a regulatory valve for admission of workers whose skills are in short supply and whose talents and abilities would contribute to the national interest, welfare and economy.

*Review of the Operation of the INA as amended by the Act of Oct. 3, 1965, Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives, 89th Cong., 2d Sess. (1968)* (Statement of Stanley H. Rutterberg, Assistant Secretary, Dep't of Labor), quoted in O. TRELLESS & J. BAILEY, 2 IMMIGRATION AND NATIONALITY ACTS LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 12-85-112 (1979).

cedures that an employer would go through were it hiring a U.S. worker."<sup>37</sup> If the employer could train the alien, it could train a United States worker.

A contrary result was reached in *In re Trus Joist Corp.*<sup>38</sup> The employer successfully documented that it was infeasible to hire an inexperienced employee because its operations were unique. All employees had to be given on the job experience in order to participate in the singular industry. Moreover, the A.L.J. observed that employment of someone in an industrial management position "unfamiliar with the plant's operations seems obviously infeasible."<sup>39</sup>

The employer in *In re Phelps Time Recording Lock Corp.*,<sup>40</sup> failed to prove infeasibility to hire a dial decoder with less than one year on the job training experience. The employer stated that a minimum of one year training was necessary to read and decode the messages contained on the discs. The employer claimed it was the sole entity in the area offering such services and thus could not find employees with training gained elsewhere. Furthermore, the employer had difficulties in retaining employees long enough to complete the one year on the job training. Nevertheless, the A.L.J. upheld denial of labor certification because he found this evidence only showed "practical problems in hiring experienced dial decoders," not infeasibility of hiring an inexperienced worker.<sup>41</sup>

Infeasibility has been sufficiently demonstrated in cases which involve supervisory positions. In *In re Farmer Stutz*,<sup>42</sup> the A.L.J. ruled that it was "entirely reasonable to require a period of training and experience for a foreman position. While the Alien has gained his training and experience while employed by the employer, it does not necessarily follow that a violation of 20 C.F.R. § 656.21(b)(14) has occurred."<sup>43</sup> In *In re Chatham County West*,<sup>44</sup> denial of a labor certification was reversed when the employer successfully demonstrated that the position of assistant production foreman of a furniture plant was not a trainee position. The actual minimum job requirements of

37. *Allied Chemical Corp.*, 2 I. LAB. CERT. REP. at 1-149.

38. 2 I. LAB. CERT. REP. (MB) 1-9 (1980) (80 INA 63). The case was denied on other grounds. This is the sole "unique product" case known to the author. No reference is made in it to *Allied Chemical*.

39. *Id.* at 1-11.

40. 4 I. LAB. CERT. REP. (MB) 1-607 (1983) (83 INA 10).

41. *Id.* at 1-607.

42. 78 INA 129 (1978) (not reported in the IMMIGRATION LABOR CERTIFICATION REPORTER).

43. *Id.* at 4.

44. 1 I. LAB. CERT. REP. (MB) 1-900 (1979) (79 INA 237).

the position included experience gained on the job to learn the steps of furniture manufacture which the alien had gained in another of employer's plants. *In re Oriol Corp.* followed *Chatham County West* in reversing denial of labor certification,<sup>45</sup> where the employer had shown that the job was not routine, but rather, supervisory. These cases can also be explained on the basis that the experience gained was in an occupation different than the supervisory one for which certification was sought.<sup>46</sup>

A similar result has been reached for positions requiring cumulative specialized knowledge where it may be infeasible to hire an employee who has not been trained on the job. In *In re Washington University Department of Bio-Chemistry*,<sup>47</sup> the A.L.J. found "highly unrealistic," the finding by the certifying officer that experience gained on the job by a cancer research instructor could not be used in a labor certification because the alien had originally been hired without that experience. The employer argued that the learning was cumulative. The program involved "highly specialized bio-medical research with enormous scientific impact." Requiring the employer to train an inexperienced worker, with no guarantee of success was "to ignore the cumulative nature and social impact of this research, and force a misuse of public funds granted with the purpose of enlargement of the common good."<sup>48</sup>

In summary, if the employer hires an individual with less training or experience than required in the labor certification for the job for which certification is sought, section 656.21(b)(6) directs the employer to prove infeasibility of hiring an applicant lacking the training or experience. A prevalent approach to this proof is documentation that changed business conditions preclude hiring an inexperienced employee. Many cases are denied certification because the employer has failed to meet either his burden of providing objective evidence of specific changed conditions, or his burden of explaining why these conditions preclude training. It remains unclear, however, which factors must be demonstrated.

An alternative method of demonstrating infeasibility is by showing that the position or industry is unique and that on the job experience is inherent in the nature of the duties to be performed. Results are inconsistent, however, in cases advancing the argument of unique or specialized skills. Factors persuasive in one situation, are not persuasive in other seemingly similar situations.

The A.L.J. in *Washington University* was influenced by social pol-

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45. 2 I. LAB. CERT. REP. (MB) 1-959 (1981) (81 INA 13). The case also held that the alien possessed the necessary job qualifications before he was hired. *Id.*

46. See *infra* notes 59-73 and accompanying text.

47. 3 I. LAB. CERT. REP. (MB) 1-408 (1981) (81 INA 312).

48. *Id.* at 1-412.

icy concerns. Not only was the cancer research for public benefit, but it was "fueled by public money." The recognition in this case that areas of cumulative specialized knowledge necessitate use of experience gained on the job could be applied to labor certifications in various specialized and high tech fields.

*Experience Gained by an Alien While Working for the Employer in a Different Occupation may be Required for Labor Certification if the Employer Customarily Requires such Experience for the Job*

Often an employer seeks labor certification for an alien who has been working for the employer. The employer may wish to seek certification for a job which reasonably requires experience commensurate with that gained by the alien on job. There is authority that this may be done if it can be shown the employee gained the experience in another occupation. TAG states that experience gained by the alien while working for the employer in a different occupation may be required for labor certification if the employer customarily requires such experience for the job. TAG does not, however, define what a "different occupation" is.<sup>49</sup>

*Experience Cannot Be Utilized For Promotion To A Better Job*

Early opinions are inconsistent with the TAG statement that experience in a different occupation may be utilized.<sup>50</sup> These opinions are still relied upon, however, by certifying officers<sup>51</sup> despite the subsequent issuance of the TAG guidelines and its clarifying language, and despite the numerous other well-reasoned opinions adhering to

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49. The Department of Labor has published a separate volume, the *Dictionary of Occupational Titles* [DOT], which lists descriptions of thousands of jobs, and designates them by numerical codes. Although the Department of Labor has not stated that an occupation is "different" if differently designated in the DOT, it is reasonable to argue the persuasive effect of the DOT.

50. *In re Mecta Corp.*, 3 I. LAB. CERT. REP. (MB) 1-584 (1982) (82 INA 48); *In re Inakaya Restaurant d/b/a Robata*, 3 I. LAB. CERT. REP. (MB) 1-483 (1981) (81 INA 86); *In re Visual Aids Electronics Corp.*, 2 I. LAB. CERT. REP. (MB) 1-487 (1981) (81 INA 98); *In re Yale Univ. School of Medicine*, 2 I. LAB. CERT. REP. (MB) 1-794 (1981) (80 INA 155); *In re Langelier Co.*, 2 I. LAB. CERT. REP. (MB) 1-357 (1980) (80 INA 198); *Allied Chemical Corp.*, 2 I. LAB. CERT. REP. at 1-147; *In re Spanfeller*, 1 I. LAB. CERT. REP. (MB) 1-655 (1979) (79 INA 188).

51. The author knows of two cases denied on this basis in October 1985 by the certifying officer in Denver, Colorado.

the language of TAG.<sup>52</sup>

*In re Spanfelner*<sup>53</sup> generated the principle that an alien's work experience with the employer may not be used for promotion to a better job. A labor certification for an orchard supervisor was denied by the certifying officer pursuant to section 656.21(b)(14) because the employer failed to document that the alien had the four years of experience required in the application for labor certification. The officer found that since the alien was hired for the job without the experience, it was 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 A.L.J. held that the record was unclear as to the position in which the alien had gained his experience. The judge stated, however, that "the better view is that an alien cannot use the work experience gained with an employer toward promotion to a better job."<sup>54</sup> *Spanfelner* acknowledges no authority for its "better view." Nevertheless, the *Spanfelner* line of cases held that an alien's experience with his employer cannot be used at all. Experience is either not an actual minimum requirement since the alien was hired without it, or the alien has been promoted to a better job.

*In re Yale University School of Medicine*<sup>55</sup> followed *Spanfelner* by denying labor certification for a cardiothoracic researcher who had worked for the Yale School of Medicine for seven years on F & J visas.<sup>56</sup> The school argued that the worker gained the necessary skills through his experience as a Researcher I and Researcher II which were lower level positions than the one for which certification was sought. The A.L.J. commented that the alien had held these positions while in nonimmigrant status, which gave him exclusive right to the job to the exclusion of United States workers. The A.L.J. ruled, however, that this violated the "intent" of the regulations. *Yale University* is in direct contrast to *Washington University*,<sup>57</sup> decided by a different A.L.J. seven months later. No reference is made in the latter decision to *Yale University*.

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52. See *infra* note 59 and accompanying text.

53. 1 I. LAB. CERT. REP. (MB) 1-655 (1979) (79 INA 188). This case was denied on a number of grounds: "[t]aken together they present an overwhelming case for denial of certification." Note also that the A.L.J., although citing § 656.21(b)(14), states that the requirements are "unduly restrictive," a concern of § 656.21(b)(8). See *infra* notes 78-95 and accompanying text. But see cases discussed *supra* notes 42-48 and accompanying text.

54. *Spanfelner*, 1 I. LAB. CERT. REP. at 1-655.

55. 2 I. LAB. CERT. REP. (MB) 1-794 (1981) (80 INA 155). The certifying officer had previously denied this case on the ground of § 656.21(b)(9)(ii). It had been remanded to document efforts to recruit United States workers for the positions that the worker had been promoted to on the F & J visas.

56. These are nonimmigrant student and exchange visitor visas. See *supra* note 5.

57. See *supra* note 48 and accompanying text.

## Experience With The Employer In A Different Occupation May Be Used

Another series of cases<sup>58</sup> have followed TAG and have held that the alien's experience with the employer in a different occupation may be used. In *In re New England Nuclear Corp.*,<sup>59</sup> the A.L.J. 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 certification 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 work force.<sup>60</sup>

The judge ruled that the fact that the alien qualified for the position by virtue of work with the employer in another position was, in itself, of no significance.

A similar result was reached in *In re International Forecasting*.<sup>61</sup> 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 certifying officer denied labor certification. The A.L.J. reversed on the ground 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 A.L.J.

58. *In re Prefit Fabricators, Inc.*, 6 I. LAB. CERT. REP. (MB) 1-836 (1984) (84 INA 505); *In re Modern Plating Co.*, 6 I. LAB. CERT. REP. (MB) 1-1147 (1984) (84 INA 479); *In re Romano Inc.*, 6 I. LAB. CERT. REP. (MB) 1-1237 (1984) (84 INA 343); *In re Mister Greenjeans*, 5 I. LAB. CERT. REP. (MB) 1-297 (1983) (83 INA 401); *In re Dynamic Resources, Inc.*, 5 I. LAB. CERT. REP. (MB) 1-177 (1983) (83 INA 360); *In re Victor Sherman*, 5 I. LAB. CERT. REP. (MB) 1-21 (1983) (83 INA 293); *In re Phelps Time Recording Lock Corp.*, 4 I. LAB. CERT. REP. (MB) 1-607 (1983) (83 INA 10); *In re E.O. Mari, Inc.*, 4 I. LAB. CERT. REP. (MB) 1-530 (1983) (82 INA 72); *In re Tennessee State Univ.*, 4 I. LAB. CERT. REP. (MB) 1-338 (1982) (82 INA 257); *In re Store Planning Assoc.*, 4 I. LAB. CERT. REP. (MB) 1-239 (1982) (82 INA 195); *In re International Assoc. of Religion and Parapsychology*, 4 I. LAB. CERT. REP. (MB) 1-111 (1982) (81 INA 354); *In re Petit Fors*, 4 I. LAB. CERT. REP. (MB) 1-39 (1982) (82 INA 163); *In re Earl Williams & Sons, Inc.*, 3 I. LAB. CERT. REP. (MB) 1-431 (1981) (81 INA 298); *In re International Forecasting*, 2 I. LAB. CERT. REP. (MB) 1-1101 (1981) (81 INA 138); *In re New England Nuclear Corp.*, 2 I. LAB. CERT. REP. (MB) 1-518 (1981) (80 INA 272); *In re FMC Corp.*, 3 I. LAB. CERT. REP. (MB) 1-156 (1979) (79 INA 170).

59. 2 I. LAB. CERT. REP. (MB) 1-518 (1981) (80 INA 272).

60. *Id.* at 1-521 (emphasis in original).

61. 2 I. LAB. CERT. REP. (MB) 1-1101 (1981) (81 INA 138); see also *In re Store Planning Assoc.*, 4 I. LAB. CERT. REP. (MB) 1-239 (1982) (82 INA 195); *In re Dynamic Resources, Inc.*, 5 I. LAB. CERT. REP. (MB) 1-177 (1983) (83 INA 360).

also rejected the certifying officer'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 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."<sup>62</sup>

These decisions state that the employer must document that the positions are bona fide different positions. In *New England Nuclear*, the A.L.J. found that the job classifications of Technologist and Associate Technical Specialist appeared to be "distinct, legitimate, separate categorizations of job duties."<sup>63</sup> In *In re Store Planning Associates*,<sup>64</sup> based upon "a chart of the employer's job hierarchy, and comparative descriptions of the job opportunity and prior positions held by the alien," the A.L.J. concluded that the opportunity was a "bona fide position separate from any previously held by the Alien."<sup>65</sup> In *In re Romano, Inc.*<sup>66</sup> the alien was hired as a cook but was subsequently promoted to fill the position of chef. The employer successfully claimed that a chef position was a "far more responsible position requiring considerably greater experience."<sup>67</sup> In *In re Dynamic Resources, Inc.*,<sup>68</sup> the A.L.J. 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 requirements 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 were not tailored to the alien.<sup>69</sup>

In other cases, labor certification has been denied because the employer has failed to document the distinction between the two positions.<sup>70</sup> At least one has been remanded for additional evidence on the issue.<sup>71</sup>

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62. *International Forecasting*, 2 I. LAB. CERT. REP. at 1-1101.

63. *New England Nuclear*, 2 I. LAB. CERT. REP. at 1-522.

64. 4 I. LAB. CERT. REP. (MB) 1-243 (1982) (82 INA 195).

65. *Id.*

66. 6 I. LAB. CERT. REP. (MB) 1-1237 (1984); see also *Prefit Fabricators*, 6 I. LAB. CERT. REP. at 1-836.

67. *Romano*, 6 I. LAB. CERT. REP. at 1-1239.

68. 5 I. LAB. CERT. REP. (MB) 1-177 (1983) (83 INA 360).

69. *Id.* at 1-180.

70. *In re FMC Corp.*, 3 I. LAB. CERT. REP. (MB) 1-156 (1979) (79 INA 170); *In re Wind Tiki Restaurant, Inc.*, 2 I. LAB. CERT. REP. (MB) 1-485 (1981) (81 INA 49); *In re Phelps Time Recording Lock Corp.*, 4 I. LAB. CERT. REP. (MB) 1-607 (1983) (83 INA 10); *In re Victor Sherman*, 5 I. LAB. CERT. REP. (MB) 1-21 (1983) (83 INA 293).

71. *In re Tennessee State Univ.*, 4 I. LAB. CERT. REP. (MB) 1-33 (1982) (82 INA



In summary, TAG specifies that an alien's experience with the employer may be permitted in a labor certification if it was gained in a job position separate from the one for which certification is requested. To do so, the employer must produce objective evidence that the positions are bona fide different jobs.

Despite the clarification of TAG, some certifying officers are inclined to adhere to pre-TAG cases which refuse to recognize the legitimacy of an alien's experience with the employer even when that experience is gained in a different position. This is troublesome to an immigration practitioner whose employer client seeks permanent labor certification for an alien who has been working for the employer on a temporary visa. Similar problems confront international organizations interested in relocating employees from abroad. When the position to be certified is clearly a different occupation, and requires as a minimum qualification the experience gained by the alien while on the temporary visa or abroad, the labor certification is in jeopardy of denial if the particular certifying officer chooses to follow the pre-TAG line of cases. This has significant impact in areas of cumulative and specialized knowledge, such as high tech industries, where the technology underlying the industry itself is in constant development. Skills learned one year become obsolete the next. For business purposes, encouraged<sup>72</sup> by the INA an employer may first employ an alien in the United States temporarily and later seek labor certification for a permanent position.<sup>73</sup>

#### ALTERNATIVE REGULATORY PROVISIONS

Thus far, this Article has addressed A.L.J. opinions which were decided pursuant to either section 656.21(b)(6) or the section of TAG providing operational guidance. In addition to denial under section 656.21(b)(6), certifying officers and A.L.J.s have cited other regulatory provisions and principles as grounds for denial of labor certification due to the alien's work experience with the employer.

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72. Congress intentionally encouraged international mobility by implementation of temporary work visas. See H.R. REP. NO. 91-851, 91st Cong., *reprinted in* 2d Sess., 1970 U.S. CODE AD. NEWS 2750.

73. The employer may have a legitimate intent to use the services of the alien for a temporary period and at the same time an intent to permanently employ the alien when the employer can legally do so. INS Policy Instruction, Sept. 23, 1985, *reprinted in* 62 INTERPRETER RELEASES 950, 965-66, 1149-50; 63 INTERPRETER RELEASES 3. *In re* H.R., 7 I. & N. Dec. 651 (BIA 1958). *In re* Bocris, 13 I. & N. Dec. 601 (BIA 1970); *In re* University of Okla., 14 I. & N. Dec. 213 (BIA 1972).

These other regulatory provisions include sections 676.21(b)(2),<sup>74</sup> 656.21(b)(7),<sup>75</sup> and 656.21(b)(9)(ii).<sup>76</sup>

### *Section 656.21(b)(2): Unduly Restrictive Job Requirements*

Section 656.21(b)(2) requires the employer to document that the job description is presented without "unduly restrictive job requirements." Job requirements are unduly restrictive unless they are those normally required for the job in the United States, or are those defined in the Dictionary of Occupational Title (DOT).<sup>77</sup> Examples of job requirements which are unduly restrictive include knowledge of languages other than English, involve a combination of duties, require a worker to live on the premises, or include employer preferences.<sup>78</sup> Unduly restrictive job requirements, however, may be included in the job description if the employer documents their business necessity.<sup>79</sup>

Conceptually, there is a close relationship between section 656.21(b)(2) and labor certification section 656.21(b)(6). Both sections are designed to prevent imposition of job requirements which only the alien can meet. Under section 656.21(b)(6), the inquiry is whether the alien has acquired the experience for the job from the employer. In section 656.21(b)(2), the inquiry is whether the job requirements are those normally required for the job. Whether the alien can fulfill the job requirements and where he gained the necessary experience, are irrelevant to this latter inquiry.<sup>80</sup>

The purpose underlying section 656.21(b)(2) is described in *In re Rockwell International Corp.*<sup>81</sup> At issue in *Rockwell* was the denial of labor certification for the corporation's manager of product devel-

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74. Formerly 20 C.F.R. § 656.21(b)(8) (1980) (The employer must document that the job offer is described without unduly restrictive requirements). *See supra* note 7.

75. Formerly 20 C.F.R. § 656.21(b)(15) (1980) (The employer must document lawful job-related reasons for rejecting United States workers who have applied for the job). *See supra* note 7.

76. 20 C.F.R. § 656.21(b)(9)(ii) (1980) (The alien must not be offered more favorable terms and conditions than United States workers). *See supra* note 7. This provision is no longer within § 651.21(b). *See infra* note 98.

77. *In re Park Place Sportswear*, 1 I. LAB. CERT. REP. (MB) 1-1006 (1979) (79 INA 302); *In re Uncle Chen, Inc.*, 1 I. LAB. CERT. REP. (MB) 1-1241 (1980) (80 INA 61); *see also In re Jetstream Systems Co.*, 1 I. LAB. CERT. REP. (MB) 1-966 (1979) (79 INA 300). For a description of DOT, *see supra* note 50.

78. 20 C.F.R. § 656.21(b)(2)(i)(c) (1985).

79. TAG, *supra* note 8, at 46-49. *See Rose Foundation*, 1 I. LAB. CERT. REP. at 1-1001.

80. *In re Sikes Construction Co.*, 85 INA 35 (May 22, 1985) (not reported in the IMMIGRATION LABOR CERTIFICATION REPORTER); *see also In re Golden West Baseball Co.*, 2 I. LAB. CERT. REP. (MB) B3-156 (1985) (85 INA 252) (remanded because the certifying officer applied § 656.21(b)(2) incorrectly to a situation in which the alien did not appear qualified for the job).

81. 1 I. LAB. CERT. REP. (MB) 1-912 (1979) (79 INA 264). The regulation was then codified as § 656.21(b)(8)(i) (1985).

opment. The unduly restrictive job requirements in that case included: five years of grade school, five years of high school, a Bachelors of Science in mechanical engineering, four to ten years experience, and contacts with overseas manufacturers. The A.L.J. concurred with the conclusion of the certifying officer that the requirements were unduly restrictive and not justified by business necessity. The A.L.J. also observed that the requirements closely paralleled the credentials of the alien. This contravenes the intent of section 656.21(b)(8)(i). Stated the judge: "The reason behind 20 C.F.R. § 656.21(b)(8)(i) is apparently to prevent the tailoring of job descriptions to fit a particular alien to the exclusion of comparably qualified U.S. workers."<sup>82</sup> The fact that the alien was employed by the employer in England was not pertinent to the decision.

In a recent decision, *In re Sikes Construction Co.*,<sup>83</sup> the denial of labor certification for a concrete finisher was reversed. The requirements for the job were either six months as a concrete finisher or one year as a concrete worker, and ability to set forms and finish concrete without supervision. The certifying officer denied certification pursuant to section 656.21(b)(2)<sup>84</sup> because it was unclear in what position the alien had gained his qualifying experience with the employer. The A.L.J. ruled that where a person received his work experience is not relevant to the determination of whether the qualifications were unduly restrictive. In reversing the denial of certification, the judge stated:

[In order to challenge the qualifications] the secretary must be able to demonstrate from the record that the prospective employer is attempting to tailor his requirements to exclude all but the alien applicant, or that the employer's specific requirements are irrelevant to the performance of the basic job in question, or that there is evidence of unreasonableness on the employer's part in establishing the particular requirements he has set up for the job in question. To require less would allow the Department of Labor to dictate employment needs and qualifications to all businesses attempting to hire from outside the domestic work force.<sup>85</sup>

Moreover, the requirements of the employer were neither tailored, irrelevant, nor unreasonable.

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82. 3 *Rockwell Int'l*, 1 I. LAB. CERT. REP. at 1-916.

83. 85 INA 35 (May 22, 1985) (not reported in the IMMIGRATION LABOR CERTIFICATION REPORTER).

84. The certifying officer also found that United States workers had been denied the position due to the non-job related reason that the employer failed to recruit through a union.

85. *In re Sikes Construction*, 85 INA 35, slip op. at 3 (May 22, 1985) (citing *Montessori Children's House and School, Inc. v. Secretary of Labor*, 443 F. Supp. 599 (N.D. Tex. 1977)).

In *Sikes Construction Co.*, the occupation in which the alien had gained his experience was unclear. On this record, the case could have been denied certification under section 656.21(b)(6). The employer's appeal was sustained, however, because the certifying officer misapplied section 656.21(b)(2) to a section 656.21(b)(6) issue.

If the job requirements are not unduly restrictive or can be explained by business necessity, the fact that the alien meets the job requirements will not constitute proof that the job requirements are tailored to the alien. In *In re Paulin Motor Co.*,<sup>86</sup> a denial of labor certification for a salesman of expensive cars was reversed despite the fact that the job description included requirements in excess of the DOT for auto salesmen. The A.L.J. found that this was not unduly restrictive since it was not unusual for more experience to be required for selling more expensive cars. Furthermore, the fact that the qualifications of the alien matched those of the job requirements was not conclusive evidence that the requirements were tailored to the alien.

Whether a job requirement is "tailored" is also a relevant inquiry under section 656.21(b)(6) when the alien has gained experience on the job in a different occupation with the same employer. TAG addresses this issue in its explanation of section 656.21(b)(6): "[I]f certification is sought in a different occupation, the employer may require experience which the alien gained with the employer *if the employer customarily requires such experience for the job.*"<sup>87</sup>

One of the purposes of section 656.21(b)(6) is to prevent tailoring job requirements to an alien. This purpose was recognized in *In re Union Carbide Corp.*<sup>88</sup> "[O]ne of the purposes of [20 C.F.R. § 656.21(b)(14)] is to prevent employers from tailor making job requirements to fit the unique qualifications of an alien already on their payroll or one they wish to hire; thereby disqualifying U.S. workers who do not possess the required experience."<sup>89</sup> From a practical standpoint, requirements that are tailored specifically to the alien's background discourage other applicants.<sup>90</sup>

In *In re International Forecasting*,<sup>91</sup> the A.L.J. suggested that although experience with the employer in a different capacity was not

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86. 1 I. LAB. CERT. REP. (MB) 1-626 (1979) (79 INA 231); *see also In re International Assoc. of Religion and Parapsychology*, 4 I. LAB. CERT. REP. (MB) 1-11 (1982) (81 INA 354) (labor certification was granted to an alien with unique skills for an unusual job with a very limited field of potential applicants).

87. TAG, *supra* note 8, 52-53. (emphasis added).

88. *In re Union Carbide Corp.*, 3 I. LAB. CERT. REP. (MB) 1-152 (1978) (78 INA 168); *accord In Re Neurological Assoc.*, 1 I. LAB. CERT. REP. (MB) 1-692 (1979) (79 INA 164).

89. *Union Carbide*, 3 I. LAB. CERT. REP. at 1-155.

90. *Allied Chemical*, 1 I. LAB. CERT. REP. at 1-257.

91. 2 I. LAB. CERT. REP. (MB) 1-1101 (1981) (81 INA 138); *accord Neurological Assoc.*, 1 I. LAB. CERT. REP. at 1-692.

a bar to hiring the alien, it might be if there was evidence of tailoring the job requirements to the alien's qualifications. The suggestion was applied in *In re Aki Oriental Food Co.*,<sup>92</sup> to affirm denial of labor certification of an assistant manager in a wholesale retail Japanese food business. The job required one year of experience as a cook or one year of employment in purchasing and selling Japanese food. The qualifications of the alien consisted of one year as a cook employed by the employer. The A.L.J. did not dispute the propriety of utilizing the experience of the alien with the employer. Instead, the A.L.J. questioned the relevancy of the alien's experience as a cook to the position of assistant manager. The position would require knowledge of foods, prices, and delivery terms in buying and selling food, knowledge which could be acquired in positions other than that of a cook. Thus, experience as a cook was not an actual minimum job requirement under section 656.21(b)(6).

In summary, whether an alien has gained qualifying experience with the employer is irrelevant to section 656.21(b)(2). Unfortunately, a number of A.L.J. decisions interchange sections 656.21(b)(2) and 656.21(b)(6).<sup>93</sup> Although subsections 656.21(b)(2) and (6) are related in that both further a policy of preventing job descriptions which only the alien can meet, each section is distinct and includes different provisions for cure. An unduly restrictive job requirement under section 656.21(b)(2) may be cured by a showing of business necessity. Section 656.21(b)(6) proposes a different approach which involves a showing that a requirement is the employer's actual minimum job requirement. Although well reasoned attempts have been made to clarify the different applications of the two provisions,<sup>94</sup> there is still apparent analytical confusion.<sup>95</sup>

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92. 4 I. LAB. CERT. REP. (MB) 1-598 (1983) (83 INA 170); see also *Allied Chemical*, 1 I. LAB. CERT. REP. at 1-255.

93. See *In re Spanfelner*, 1 I. LAB. CERT. REP. (MB) 1-655 (1979) (79 INA 188); *In re ASA Construction Co.*, 1 I. LAB. CERT. REP. (MB) 1-662 (1979) (79 INA 109).

94. See *In re Victor Sherman*, 5 I. LAB. CERT. REP. (MB) 1-21 (1983).

95. The practical effect is that certifying officers and A.L.J.s often impose upon the employer the burden not found within the regulations, of proving a business necessity for an experience requirement, well within the DOT, and otherwise not unduly restrictive, simply because the alien qualifies due to work experience with the employer. Since § 656.21(b)(6) is directly applicable, the misapplication of § 656.21(b)(2) is unnecessary, and the resulting confusion avoidable. *In re Benihana of Tokyo, Inc.*, 1 I. LAB. CERT. REP. (MB) 1-1021 (1979) (79 INA 319); *In re Polymer Research Corp.*, 4 I. LAB. CERT. REP. (MB) 1-928 (1983) (83 INA 287). The author is aware of at least two Denver, Colorado cases denied in October 1985 because the qualifications which the alien had gained with the employer were "unduly restrictive."

*Section 656.21(b)(9)(ii): No less Favorable Wages, Terms and Conditions*

Numerous decisions prior to the 1981 amendments<sup>96</sup> cited section 656.21(b)(9)(ii) as authority for denial of a labor certification based on the rationale that the employer, by offering training to the alien, was offering the alien more favorable terms and conditions than those offered to United States workers.<sup>97</sup> Section 656.21(b)(9)(ii) required that an employer's advertisement must offer wages, terms, and conditions of employment which were no less favorable to United States workers than those offered to the alien:

The employer's advertising offers prevailing working conditions and requirements and the prevailing wage for the occupation calculated pursuant to § 656.40 of this part, states the rate of pay, offers training if the job opportunity is the type for which the employer customarily provides training and offers wages, terms, and conditions of employment which are no less favorable than those offered to the alien.<sup>98</sup>

Section 656.21(b)(9)(ii) was applied in *In re Educational Computer Corp.*<sup>99</sup> to deny certification because the employer offered the alien a higher salary than it advertised to United States applicants. The employer argued that the higher salary was based on the alien's knowledge of and experience with the procedures of the employer. This argument failed, however, to take into account the fact that the employer advertised for an experienced employee. Failure on the part of the employer to offer the job to United States workers at the same salary offered the alien was held to be a patent violation of section 656.21(b)(9)(ii).

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96. See 45 Fed. Reg. 83,926 (1980). See also *supra* note 7.

97. See *In re Store Planning Assoc.*, 4 I. LAB. CERT. REP. (MB) 1-239 (1982) (82 INA 195); *In re Thrifty Car Wash*, 4 I. LAB. CERT. REP. (MB) 1-11 (1982) (82 INA 118); *In re Mastex Industries, Inc.*, 2 I. LAB. CERT. REP. (MB) 1-1095 (1981) (81 INA 211); *In re New England Nuclear Corp.*, 2 I. LAB. CERT. REP. (MB) 1-518 (1981) (80 INA 272); *In re Safeco Insurance Co.*, 2 I. LAB. CERT. REP. (MB) 1-429 (1981) (80 INA 288); *In re Fresh Meadow Country Club*, 2 I. LAB. CERT. REP. (MB) 1-285 (1980) (80 INA 284); *In re Yale Univ. School of Medicine*, 2 I. LAB. CERT. REP. (MB) 1-794 (1981) (80 INA 155); *In re North Casteel Products*, 2 I. LAB. CERT. REP. (MB) 1-219 (1980) (80 INA 219); *In re Educational Computer Corp.*, 1 I. LAB. CERT. REP. (MB) 1-418 (1979) (79 INA 30).

98. 20 C.F.R. § 656.21(b)(9)(ii) (1980). This provision is no longer within § 656.21(b). But cf. 20 C.F.R. § 656.21(g) (1985). This section pertains to advertisements in a newspaper of general circulation or a professional journal in a newspaper of general circulation or a professional journal in conjunction with recruitment efforts. The advertisements must: (1) describe the job with particularity (20 C.F.R. § 656.21(g)(3)); (2) state the rate of pay which shall not be below the prevailing rate calculated pursuant to § 656.40 (20 C.F.R. § 656.21(g)(4)); (3) offer prevailing working conditions § 656.21(g)(5); (4) state the employers normally provide training (20 C.F.R. § 656.21(g)(7)); (6) offer wages, terms, and conditions of employment which are no less favorable than those offered to the alien (20 C.F.R. § 656.21(g)(8)). These standards also apply to the content of the notice posted by the employer at his place of business (20 C.F.R. § 656.21(b)(3)(i) (1985)).

99. 1 I. LAB. CERT. REP. (MB) 1-418 (1979) (79 INA 30).

In *In re North Star Castell Products*,<sup>100</sup> the A.L.J., relying on section 656.21(b)(9)(ii), ruled that more favorable terms and conditions were offered to the alien than to United States workers because it appeared that a number of vacancies were created to employ the alien, while similar vacancies were not created for domestic workers. Furthermore, because the alien gained experience while working for the employer, he enjoyed an unfair advantage over United States workers who were denied the same training and benefits accorded the alien.

The distinction between sections 656.21(b)(6) and 656.21(b)(9)(ii) was addressed in *In re New England Nuclear Corp.*<sup>101</sup> Under section 656.21(b)(9)(ii), if the employer hired and trained the alien in the skills needed for that position, the employer is required to offer other applicants the same training. By contrast, section 656.21(b)(6) provides that if the alien acquires job experience in another position within the work force of the employer, the employer is under no obligation to provide training similar to the experience the alien gained in the other position. Subsequent cases, however, have required the offer of "training" even though the on the job experience of the alien was acquired in different positions.<sup>102</sup>

A group of cases has arisen involving a situation where an alien working in a different capacity for an employer has, on his own initiative, trained himself for the position sought to be certified. This situation was first addressed in *In re Fresh Meadow Country Club*.<sup>103</sup> The alien, while working for the employer for six years as a waiter, busboy, and finally salad maker, trained himself to make the salads for the country club. The certifying officer denied certification under section 656.21(b)(14) because the alien had no experience prior to becoming a salad maker and the employer required six months in a related field. The A.L.J. affirmed denial and found that even if six months was the actual minimum requirement, the employer had offered the alien more favorable terms and conditions than those offered to United States workers which violated section 656.21

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100. 2 I. LAB. CERT. REP. (MB) 1-219 (1980) (80 INA 219); see also *In re Earl Williams & Sons, Inc.*, 3 I. LAB. CERT. REP. (MB) 1-431 (1981) (81 INA 298) (in which the A.L.J. considered it significant that the employer simultaneously advertised an entry level position and offered to train, and advertised for experience in a position for which labor certification was sought).

101. 2 I. LAB. CERT. REP. (MB) 1-518, 1-521 (1981) (80 INA 272).

102. See, e.g., *supra* notes 55-57 and accompanying text.

103. 2 I. LAB. CERT. REP. (MB) 1-285 (1980) (80 INA 284). These cases also raise the issue of experience gained while working for the employer in a different occupation.

(b)(9)(ii). The alien lived on the premises and had complete access to the kitchen in order to learn the art of salad making. “[T]hus . . . the employer is required to give American workers complete access to his kitchen facilities so that they may acquire skill in making salads as was done for the alien.”<sup>104</sup>

Other cases have allowed certification based on evidence that the alien was self-trained. The A.L.J. reversed denial of labor certification in *In re Domenick’s Pizza House*.<sup>105</sup> For four years, a dishwasher schooled himself during his spare time in Italian cooking by studying the chef, learning ingredients and proportions, eating meals in the restaurant, and developing “a sense of exactly how each dish should taste.” The experience he gained was a result of his own initiative, not the favorable treatment of the employer. “The fact that this experience was gained while working for the employer is irrelevant because it was acquired on the alien’s own initiative and in a separate and distinct position from the job in question.”<sup>106</sup> The decision makes no reference to *Fresh Meadow Country Club* or to section 656.21(b)(9)(ii).

In summary, in some decisions in which the alien has gained the experience necessary for labor certification, certification has been denied under section 656.21(b)(9)(ii) because of the less favorable terms and conditions of employment offered United States workers as a result of their not being afforded the training offered the alien. Section 656.21(b)(9)(ii) is applicable if the alien was trained in the position for which certification is sought, but not if the alien gained the experience in other positions.

#### *Section 656.21(b)(7): Lawful Job Related Reasons for Rejection of United States Workers*

A number of cases denying labor certifications on section 656.21(b)(6) grounds cite, as an alternative basis for denial, section 656.21(b)(7).<sup>107</sup> This section requires the employer to document rejection of United States worker applicants for lawful job related reasons. The cases denying certification under section 656.21(b)(7), hold that it is unlawful to reject United States workers because they do not meet job requirements which are found not to be the actual minimum requirements for the position. The rationale behind these

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104. *Id.* at 1-287.

105. 6 I. LAB. CERT. REP. (MB) 1-960 (1984) (84 INA 448).

106. *Id.* at 1-962.

107. See *In re Speedent U.S.A. Corp.*, 6 I. LAB. CERT. REP. (MB) 1-470 (1984) (84 INA 478); *In re Murphy Tomato Co., Inc.*, 6 I. LAB. CERT. REP. (MB) 1-111 (1984) (84 INA 316); *In re Cedar Fiber Co., Inc.*, 4 I. LAB. CERT. REP. (MB) 1-957 (1983) (83 INA 327); *In re Contract Cleaners, Inc.*, 4 I. LAB. CERT. REP. (MB) 1-540 (1983) (82 INA 359); *In re Thrifty Car Wash*, 4 I. LAB. CERT. REP. 1-11 (1982) (82 INA 118); *In re Courier-Citizen Co.*, 1 I. LAB. CERT. REP. (MB) 1-1041 (1979) (79 INA 330).



rulings is that the alien also did not meet the requirements when he was initially hired for that position.

These rulings, however, involve an unnecessary application of section 656.21(b)(7) to an issue which may be resolved under section 655.21(b)(6) alone. The issue under section 656.21(b)(6), whether the job has been offered with actual minimum job requirements during employer recruitment efforts, can be resolved prior to addressing whether responding United States workers have been rejected for lawful job-related reasons. If the job requirements are not the employer's actual minimum, the labor certification process has not been initiated in accordance with section 656.21(b)(6). Consequently, it is circular and redundant to hold that section 656.21(b)(7) has been violated due to this same insufficiency. Rather, section 656.21(b)(7) should only be applied to cases involving the rejection of United States workers for reasons other than those specifically addressed in section 656.21(b)(6).

### CONCLUSION

In labor certification cases, section 656.21(b)(6) precludes employer utilization of employment prerequisites which are not the employer's actual minimum requirements. This section specifically applies to situations in which an alien has worked for the employer who is seeking a labor certification, and by virtue of that employment meets the requirements for that job. Pursuant to this regulation, if the alien gained experience in the position for which certification is sought, the labor certification will be denied because the job requirements are not the actual minimum requirements of the employer. An exception will be permitted when the employer has documented the infeasibility of hiring an inexperienced employee. Infeasibility must be documented with objective evidence of business related reasons. A.L.J. rulings have upheld a finding of infeasibility when business conditions have changed, when unique operations are involved, or when cumulative specialized knowledge is necessary to perform the job.

If the alien's experience was acquired in a different occupation, the fact that it was acquired in the employer's work force is irrelevant. The employer, however, must sufficiently document that the two occupations are distinct. Such documentation may include a comparison of the DOT designations for the two job positions, the job duties involved, and the skills necessary to perform them. The employer, however, must be careful to avoid unreasonable or irrele-

vant job requirements which match the alien's unique background. Unreasonable and irrelevant requirements tailored to the alien's qualifications compromise the labor certification, not only because they may not be the actual minimum job requirements, but because they may also be unduly restrictive under section 656.21(b)(2).

Unfortunately, the immigration practitioner who strictly adheres to the language of section 656.21(b)(6) and to TAG remains in jeopardy of losing labor certification cases because of the inconsistent administration of the labor certification process by the Department of Labor. A.L.J. opinions have no precedential effect. Certifying officers may or may not choose to follow previous A.L.J. rulings even if they have been reversed on appeal.

Much time and expense is invested by immigration practitioners attempting to rebut the findings of certifying officers. The entire labor certification process would be more efficient if there were a uniform body of regulatory interpretation indicating a consistent standard of administration.

By taking an inconsistent approach to labor certification and by refusing to designate precedential opinions, the Department of Labor has failed to meet its duties under the INA and under other principles of administrative law and jurisprudence. It is hoped that eventually a resolution of the problems inherent in the labor certification process can be achieved through promulgation of a standard of administration and review of action. Until then, a practitioner's only recourse when a labor certification is arbitrarily denied due to inconsistent application and misapplication of the regulations is to litigation in the federal courts.<sup>108</sup>

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108. For arbitrary administration of its own regulations, review of agency action may be possible in a district court. *See* 28 U.S.C. §§ 2201-2202 (1982); 5 U.S.C. § 702 (1982); 28 U.S.C. § 1331 (1982); 28 U.S.C. § 1361 (1982); 28 U.S.C. § 2241 (1982); 8 U.S.C. § 1329 (1982).