



PERM CONUNDRUMS

Posted on February 22, 2008 by Cyrus Mehta

by

Cyrus D. Mehta [*](#)

In recent months, immigration practitioners are reporting an increase in audit notifications each time a PERM application is filed with the Atlanta and Chicago Processing Centers. The audits primarily request a "business necessity" justification for job requirements with the Department of Labor (DOL) finds excessive. An employer's job requirement will be considered excessive if it does not comport with the corresponding job level assigned to the occupation, in DOL's O*Net system (www.onetonline.org).

For example, if the O*Net job zone for the occupation is "7<8," the Standard Vocational Preparation (SVP) for this occupation, according to the DOL, is a maximum of 4 years for the position. The DOL equates a bachelor's degree to 2 years of preparation time and a master's degree to 4 years of preparation time. Thus, a job requiring a bachelor's degree (2 years of SVP) and 2 years of experience (2 more years of SVP), if designated under an SVP of "7<8," will be within the normal requirements. The employer's requirements of 4 years of elapsed time to prepare for the occupation comports with the 4 years of SVP under "7<8."

If an employer has requested a master's degree and 2 years of experience, it would exceed the normal preparation time for the position with an SVP of 7<8. A master's degree equates to 4 years of preparation time, and the 2 years of experience added on to the master's degree amounts to 6 years of preparation time required by the employer for the occupation.

"Business Necessity" is defined in *Matter of Information Industries*, 88-INA-92 (BALCA Feb. 9, 1989) and codified in 20 CFR § 656.17(h), which states: "To establish a business necessity, an employer must demonstrate the duties and

requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." Under the first prong of *Information Industries*, both duties and requirements must be linked to the employer's specific business operations to determine whether they are reasonable in that context. Under the second prong, the duties and requirements must be related to one another, and reasonably suited, in the context of the employer's business operations.

In responding to the audit request, the employer must take pains to establish though "business necessity" that the allegedly excessive requirements bear a reasonable relationship to the occupation and are essential to perform the job in a reasonable manner. Such evidence could include the employer's past hiring practice of employing people with similar education and experience for the position as well as industry standards that are compatible with the employer's.

The employer's business operations must also be described in detail, and it must be demonstrated that the requirements are essential to perform the duties of the position in the context of the employer's specific business needs.

If the employer requires experience for the job, and the foreign worker being sponsored obtained that experience with the same employer, it is essential for the employer to explain that the job duties have changed by 50 per cent. DOL audits, in addition to "business necessity" explanation, also requires further justification that the job duties have changed by 50 per cent in the event that the employer is relying on experience, which the foreign worker gained on the job.

We reprint an article entitled "[*Practice Pointers In Resolving PERM Conundrums: Job Requirements, Degree Equivalencies, Experience With Same Employer, And Timelines*](#)," where this writer is one of the authors along with the following distinguished immigration attorneys: Robert H. Cohen, Catherine Haight, and Grace Hoppin. It was presented in conjunction with the "PERM Workshop" at the American Immigration Lawyers Association's annual conference in Orlando, FL in June 2007. This article, even though published in 2007, would be helpful in drafting PERM applications that are grounded in law and can withstand an audit.

*** [Cyrus D. Mehta](#), a graduate of Cambridge University and Columbia Law**

School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. The firm represents corporations and individuals from around the world in a variety of areas such as business and employment immigration, family immigration, consular matters, naturalization, federal court litigation and asylum. Mr. Mehta has received an AV rating from Martindale-Hubbell and is listed in Chambers USA, International Who's Who of Corporate Immigration Lawyers, Best Lawyers and New York Super Lawyers. Mr. Mehta is immediate past Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar.