CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

REQUIRING A FOREIGN LANGUAGE UNDER PERM[1]

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by
Cyrus D. Mehta *

It is not uncommon for employers to sponsor foreign national workers through the labor certification process because of their linguistic abilities. The Department of Labor (DOL) has usually frowned upon an employer including a foreign language requirement in an advertisement that was used to test the US labor market to establish a shortage of domestic workers. An employer is usually required to justify the language requirement by showing it arose from business necessity.

Labor certification is the first step when an employer sponsors a foreign national worker for a green card. The employer must establish that no US workers are available for the position before it can electronically file an application for labor certification under the new system called PERM.

Before analyzing the PERM rule, which also requires a business necessity justification,[2] it is useful to historically examine "business necessity" in the context of a foreign language requirement.

Business Necessity Test for a Foreign Language Requirement

The business necessity test was established in *Matter of Information Industries, Inc.*, 88-INA-82 (BALCA 1989) and applied to any unusual or restrictive requirement to a position, including a foreign language requirement.

In *Information Industries,* the Board of Alien Labor Certification Appeals (BALCA) determined that a restrictive job requirement could be justified through business necessity by determining:

1. whether the requirement bears a reasonable relationship to the occupation,

in the context of the employer's business; and

2. whether the requirement is essential to perform the job duties in reasonable manner.

The following year, in *TEL-KO Electronics, Inc*., 1988-INA-416 (BALCA 1990) *(en banc)*, BALCA explained how the two pronged test in *Information Industries* could be applied to a foreign language requirement. The first prong is met when the employer has sufficiently demonstrated that a significant portion of its business is performed in a foreign language or with foreign speaking clients or employees. The second prong is met when the employer has sufficiently demonstrated that the employee's duties require communication or reading in a foreign language. Thus, in *TEL-KO Electronics,* the employer required successful applicants for the position of Electronic Engineer to have knowledge of Korean because its business consisted of the repairing, inspecting and servicing of electronic appliances of suppliers located in Korea. BALCA agreed with the employer that a significant portion of the duties included communication in Korean, thereby establishing a business necessity for its foreign language requirement. BALCA also found that the employer's "sample reports" sent to Korean companies, which were written entirely in Korean, supported the employer's statements that its employees communicate directly with Korean companies 95% of the time.

TEL-KO Electronics instructs that an employer justifying a foreign language requirement through business necessity must carefully document this need by submitting corroboration evidencing that a significant portion of the business is performed in the foreign language and that the sponsored employee will need to communicate in the foreign language, which in *TEL-KO Electronics* were the "sample reports" written entirely in Korean. Contrast this case with a more recent case, *Dual Electronics*, 2004-INA-00296 (BALCA 2005), where the employer's bald assertions that "90% of its business depends upon the foreign language," and that "90% of the customers are South Asian who did not speak English or are not fluent in English," were found to be insufficient to carry an employer's burden of proof in demonstrating business necessity for a Hindi speaking manager for a retain store.[3] Similarly, in *MDB Inc*., 2006-INA-18 (BALCA 2006), an employer who required an Export Coordinator/Agent to speak Mandarin Chinese and Tagalog in order to facilitate phone calls with overseas importers, and who submitted telephone bills, was unable to justify the need of

the foreign language through business necessity. BALCA noted, "Rather than submit relevant documentation, such as settlements, contracts, invoices, freight-handling agreements, reports, and correspondence which might document business necessity for the Mandarin Chinese and Tagalog languages, the Employer's limited its rebuttal to a letter by its President, with assertions only supported only by the documentation of telephone calls to countries where Tagalog and Mandarin is commonly spoken. Such documentation is suggestive that those languages are used in the Employer's business, but falls short of proving such." Id.

On the other hand, BALCA found that a dental clinic, which required its dentist to speak both Spanish and Persian (in addition to English!), was justified through business necessity because it operates as a walk-in clinic, of which 60% of its walk-in clients speak Spanish and 40% speak Persian. *Super Dental Care*, 2000-INA-49, 3 (BALCA 2001). As a walk-in clinic, it was not possible for the employer to know in advance who its potential clients would be and what language they may speak. Id. BALCA faulted the CO for alleging that the employer had other dentists who may not have spoken the languages, but did not seek for such specific information from the employer prior to the denial. [4]

Foreign Language Requirement To Communicate With Employees

In 2000, BALCA had begun to interpret a restrictive foreign language requirement in a somewhat different manner from other restrictive requirements, especially in *Matter of Lucky Horse Fashion Inc.,* 1997-INA-0182 (BALCA 2000). *Lucky Horse* involved the position of a sewing machine repairer, the requirements for which included the ability to speak three Chinese dialects. To justify this requirement, the employer submitted evidence that only ten percent of its workforce could communicate sufficiently in English to convey a machine problem to the repairer. Although BALCA did not dispute this evidence, it found that "the result of permitting an employer to establish business necessity for a foreign language, solely because all of its employees only speak a foreign language is to create a self-perpetuating foreign labor force that, as a practical matter, excludes all but a few US workers..." More importantly, BALCA drew a clear distinction between the employer's need to communicate with "Clients, customers and contractors" and the need to communicate with the employer's own employees.[5]

Fortunately, as will be examined later, the new PERM rule retains the traditional *Information Industries* "business necessity" standard for all restrictive requirements in a labor certification, including a restrictive language requirement, and also appears to have overruled *Lucky Horse*. However, cases filed prior to the promulgation of the PERM rule, March 28, 2005, may still need to comply with the restrictions in *Lucky Horse*, especially if the foreign language requirement is needed to communicate with the employer's own employees. As recently as 2007, BALCA upheld the denial of an application under *Lucky Horse* where the employer required a Kitchen Supervisor to speak Spanish because 90% of its kitchen and support staff were Spanish speaking and because a substantial number of its customers also spoke Spanish, and that it would lose substantial revenues if its supervisors and managers dis not speak, read and write Spanish. *Malnati Organization, Inc*., 2007-INA-00035 (BALCA 2007).

PERM Rule

Specifically, the new PERM rule, 20 C.F.R. §656.17(h)(2), provides that a foreign language requirement cannot be included, unless it is justified by business necessity.[6] It goes on to state that:

(h)(2) demonstrating business necessity for a foreign language requirement may be based upon the following:

(i) The nature of the occupation, e.g., translator; or

(ii) The need to communicate with a large majority of the employer's customers, contractors, or employees who can not communicate effectively in English, as documented by:

(A) The employer furnishing the number and proportion of its clients, contractors, or employees who can not communicate in English, and/or a detailed plan to market products or services in a foreign country; and

(B) A detailed explanation of why the duties of the position for which certification is sought requires frequent contact and communication with customers, employees or contractors who can not communicate in English and why it is reasonable to believe the allegedly foreign-language-speaking customers, employees, and contractors can not communicate in English.

By including the term "employees" in the above regulation, the new PERM rule

appears to have directly addressed the restrictions that BALCA set forth in *Lucky Horse*, especially with respect to an employer's need for a foreign language requirement to facilitate communications among its own employees. The commentary to the PERM rule further confirms that *Lucky Horse* has been retired! It agrees with the comments of the American Immigration Lawyers Association and other groups that there are working environments where safety consideration would support a foreign language requirement. The DOL also agreed that in certain industries and occupations language impediments could contribute to injuries to workers.[7]

Thus, one benefit of the new PERM rule is the shelving of *Lucky Horse* and its progeny that prevented employers from hiring foreign workers who could speak a foreign language for purposes of communicating with other employees within the workforce. The DOL has finally recognized the increasing number of people in the workplace that speak foreign languages, and the need for the employer to hire a foreign worker who can communicate with them so as to facilitate greater efficiency as well as safety.

On the other hand, 20 C.F.R. § 656.17(h)(2)(ii) codifies the two prong test of *Information Industries*, as modified by *TEL-KO Electronics* and adds that the foreign language requirement can further be justified if it is inherent to the nature of the occupation, e.g. translator. Thus far, there are no reported BALCA decisions interpreting § 656.17(h)(2), although practitioners should be guided by the pre-PERM decisions, discussed above, in justifying the requirement through business necessity.

Note that the regulation, in addition to requiring the employer to show that a significant portion of its business is based on the foreign language, also allows the employer to provide "a detailed plan to market products and services in a foreign country." 20 C.F.R. § 656.17(h)(2)(ii)(A). This clarifies the prior standard by allowing an employer who may presently not conduct a significant portion of its business in a foreign language, but who intends to do so in the future, which is can only do by hiring a worker who is fluent in a foreign language.[8] A market research study that was already in place at the time of the filing of the application would doubtlessly carry more weight.

20 C.F.R. § 656.17(h)(2)(ii)(B) also requires an explanation from the employer as to "why it is reasonable to believe that the allegedly foreign language speaking

customers, employees and contractors can not communicate in English." An employer, therefore, should not assume that the people it deals with do not speak English just because a significant portion of its business dealings is, for example, with Asian or Chinese supermarkets. *SeeU-Can Food Trading, Inc.,supra*. Further proof must be submitted to establish that the workers at these supermarkets who communicate with the employer are unable to speak English.

With respect to the additional ground for justifying a foreign language, on the grounds that it is inherent to the occupation (20 C.F.R. § 656.17(h)(2)(i)), it is not clear whether the DOL will rely on the description of the occupation in O*Net or rely on the employer's representation of the inherency of the language requirement in the occupation. If it is based on the former, this writer found very few occupations in O*Net, the most obvious being Foreign Language Teacher (25-1124) and Interpreters and Translators (27-3091), where the Summary Report listed knowledge of a foreign language as a requirement for performance of the job. [9] Can an employer assert that a foreign language requirement is inherent in the position of Import Manager, which co-relates closest to Purchasing Manager (11-3061) in O*Net, but which does not include knowledge of a foreign language in the Summary Report? While this is an open question, it would well behoove an employer relying on the inherency argument to also establish business necessity under 20 C.F.R. 656.17(h)(2)(ii)(A) & (B).

Audit Trigger

Unfortunately, recent experience has shown that checking "Yes" to Item 13 of Section H on Form ETA 9089 - "Is knowledge of a foreign language required to perform the job duties?" - seems to always trigger an audit.[10]

With respect to an audit, the DOL will cite 20 C.F.R. 656.17(h)(2)(i)&(ii) without requesting further documentation. Thus, employers must continue to rely on the evidentiary standards set forth in *TEL-KO Electronics* and its progeny to extensively document the business necessity justification for the foreign language. The documentation should not just consist of an employer's statement, but must also include evidence of communication in the foreign language. A useful guide is a Notice of Findings issued by the DOL on a pre-PERM labor certification requesting documentation for a language requirement

arising from business necessity, as discussed in *American Cable Company*, 2006-INA-00043 (BALCA 2007):

"In the NOF, the CO stated that if the Employer wanted to establish the business necessity for the Spanish language requirement, if must, at a minimum, answer the following questions:

- The total number of clients/workforce/suppliers served, and the percentage of those people who cannot communicate in English.
- The percentage of business that is dependent upon the language. Documentation, i.e., copies of correspondence, bills, file annotations, etc. should be submitted to support your response to this question.
- The percentage of time the worker would use the language.
- How employer has dealt with non-English speaking clients/workforce/suppliers in the past and/or is currently handling this segment of business.
- If you are claiming that the foreign language is required by business expansion plans, you must provide evidence that your company had a market research study and business expansion plan in place at the time of filing the application. The plan must clearly demonstrate the factual basis upon which your business expansion plan is based."[11]

Immigration practitioners may find useful this NOF discussed in *American Cable Company* to address audits based on a foreign language requirements under PERM.

While there is no exact science on avoiding an audit, it is advisable to describe the job duties in a way that establishes business necessity. So, for example, in Item 11 Section H, the description of job duties might including the following language, "Provide dental services for a customer base that is 7 percent Spanish speaking," or, "Oversee and direct the work of 80 plant workers, 65 of which only speak Spanish." Moreover, the employer in H 14 can assert that the foreign language requirement is needed to ensure safety of the workforce in the plant. Although impossible to project, such a strategy might be able to stave off an audit, and if not, it can at least be the starting point in the preparation of a rationale and documentation that can overcome an audit.[12]

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*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. He is also an Adjunct Associate Professor of Law at Brooklyn Law School where he will teach a course on Immigration and Work. 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 a former 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. He is a frequent speaker and writer on various immigration related topics.

[1] An earlier version of the article, Cyrus D. Mehta and Elizabeth T. Reichard, *Justifying "On-the-Job" Experience and Foreign Language Requirements Under PERM*, appeared in *PERM guidebook for Foreign Labor Certification*, LexisNexis Matthew Bender (Stephen Yale-Loehr, Ed.).

[2] 20 C.F.R. 656.17(h)(2).

[3] Immigration practitioners must be mindful of *Gencorp*, 1987-INA-659 (BALCA 1988), which held that although an employer's written assertion constitutes documentation, if the Certifying Officer requests documentation that has a direct bearing on the resolution of an issue is obtainable by reasonable efforts, the employer must produce it.

[4] *See also American Cable Company*, 2006-INA-0043 (BALCA 2007) ("Employer's President's statement, standing alone, does not credibly establish business necessity for the foreign language requirement"); *U-Can Food Trading, Inc*., 2005-INA-00207 (BALCA 2007) (Invoices in English and Chinese held to be insufficient to justify Bookkeeper who needed to "utilize Chinese language skills" to communicate with Asian/Chinese supermarkets and wholesalers).

[5] It should be noted, however, that *Lucky Horse* still allowed an employer to justify communication with employees under the "lawful market forces exception," which was discussed in a subsequent decision that it had sired, *Sunrise Floor Systems*, 2000-INA-58 2000-INA-58 (BALCA 2001). In that case, an employer's requirement that a janitorial supervisor speak Spanish was justified

because many workers in San Diego, a bilingual city, were from Mexico and Guatemala and did not speak English.

[6] Interestingly, the PERM proposed rule, 67 Fed. Reg. 30466, 30472-73 (May 6, 2002), sought to eliminate business necessity entirely but would have allowed limited exceptions if the job requirements were consistent with the description of the position under O*NET and where:

1. a US worker was employed in the position in the last 2 years with the same additional requirements;

2. the requirement, other than experience and education, was normal to the occupation, and

3. in the case of a foreign language requirement, it was consistent with BALCA case law.

Thus, the proposed rule would have eliminated the business necessity test set forth in *Information Industries* for restrictive requirements, but could have still preserved the employer's requirement of a foreign language "consistent with BALCA case law."

[7] 69 Fed. Reg 247, 77352 (Dec. 27, 2004) (codified at 20 C.F.R. pts. 655, 656).

[8] In *Remington Products, Inc.*, 89-INA-173 (BALCA 1991) (*en banc*) the Board stated: "The Act was not designed to prevent American employers from expanding their business to foreign markets . . . The question is whether or not the person hired for the job, who is going to travel and operate overseas in the performance of his duties, needs the specific foreign language capability in order to do so." Accordingly, in *Remington*, the Board found business necessity for the foreign language requirement, noting that the employer had estimated that about 40% of the people contacted in the expansion area do not speak English, that advertisements would be in the native language, and that the employer had submitted numerous internal and external documents, price lis ts, foreign language advertisements, etc. *Cf. Advanced Digital Corporation*, 90-INA-137 (BALCA 1991) (no definitive marketing plan was established to justify expansion abroad for "fluency with one of the Middle Eastern languages").

[9] Other occupations included Area, Ethnic and Cultural Studies Teachers, Postsecondary (25-1062); Anthropologists (19-3091.01); Public Relations

Managers (11-2031) and Immigration and Customs Inspectors (33-3021.05).

[10] 20 C.F.R. § 656.20

[11] Even though this was a pre-PERM case, the DOL appears to have been influenced by 20 CFR § 656.17(h)(2)(ii)(A) &(B).

[12] While tangential to the discussion, a foreign language requirement is likely to trigger an increase in the wage level as it may be considered a special or unusual skill. "A language requirement other than English in an employer's job offer is generally considered as a special skill for all occupations with the exception of teachers, instructors, interpreters and caption writers, and a point should be entered in the work sheet." *See* Emily Stover DeRocco, *Revised Prevailing Wage Determination Guidance* (May 17, 2005), *published on* AILA InfoNet at Doc. No. 05052066 (*posted* May 20, 2005). The Guidance also acknowledges that there may be circumstances where a foreign language requirement does not increase the complexity or seniority of the position (e.g. Specialty Cooks).