

## **Client Update: Adequate Documentation of Employer's Requirements Is A Current Focus of PERM Adjudications**

By William A. Stock\*

Employers seeking to employ a foreign national on an ongoing basis in the United States must seek to have that employee classified as an employment-based immigrant. Often, this “green card sponsorship” requires obtaining a certification from the United States Department of Labor that no US worker is “qualified, willing and able” to take the position offered to the prospective immigrant. Employers seek such a certification through the Department of Labor’s PERM system.

Because the ultimate question in a labor certification is not whether any US worker is available, but only whether a “qualified” US worker is available, the Department of Labor regulations require certain types of qualifications – education, experience and training requirements – to be “adequately documented as arising from business necessity.” To “adequately document” business necessity, “an employer must demonstrate the job 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.” This Update is meant to provide a brief guide to the process of preparation of convincing business necessity documentation in the course of preparing a labor certification through our office.

### **I. The Employer’s Statement**

The first and most important document establishing business necessity is the employer’s statement of justification for the requirement at issue. The Department of Labor relies on statements by employers if they are reasonable, specific and indicate the basis for the statement. Employers cannot simply say that their requirements are “justified by business necessity” without explaining the basis of that statement.

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Our first goal in the statement is to introduce the employer and its business to the Department of Labor. USDOL adjudicators do not have familiarity with every type of employer, their business, and the kinds of jobs for which labor certification is sought. Therefore, we strive to be clear and detailed in statements, explaining any technical terms used and how they relate to the position. Since the employer is intimately familiar with its positions and requirements, we will need to work together to explain clearly the reasons for the employer's requirements.

An employer's statement should first explain the employer's business operations overall, and then explain how the position to be filled fits into the employer's business. It should answer the following questions:

- What type of business is the employer in?
- What different types of employees are required to deliver the employer's product or service to its customers?
- Who are the employer's competitors?
- How sophisticated are the duties?
- What are the potential costs to the employer or customers if the duties are not done correctly?

These questions provide the context of the employer's business operations, and the answers introduce the employer to the Department of Labor. While the job description for the PERM application can only be a few sentences, this part of the statement is the opportunity to take each of those sentences and expand on them to provide a layperson's explanation of what that duty entails. Employers should never assume that the adjudicator at the Department of Labor is familiar with them or what they do.

Once the duties in the context of the employer's business operations are expressed, completely and with appropriate detail, the statement should set out a concise description of the requirements for the job from the labor certification form, and then expands to describe the reasons for those requirements, explaining:

- what the requirement actually is;
- how the level of experience and/or education required relates to the level of responsibility of the position;
- why a shorter period of experience, or a lesser degree, or an alternative requirement, would not be acceptable;
- what alternative requirements are acceptable; and
- what key competencies would make other alternative combinations of education, training and experience suitable.

The more complicated the requirement and the more it excludes potential candidates, the more detail the statement must provide about why the requirement is in place.

## II. Other Supporting Documentation

While a good employer's statement may be sufficient, it is normally a good idea, particularly with extensive and/or unusual requirements, to create a complete record by including evidence beyond the employer statement. For foreign language requirements, additional evidence is always required. Other supporting documentation could include:

- A statement from a source independent of the employer that explains the nature of the position and why the requirements of the position are necessary to perform the job duties.
- Letters from the employer's customers and even competitors to prove that the employer's requirement is normal in the industry and/or how client's or customer's requirements make it necessary for the employer to require certain skills or experience of its employees.
- Evidence of an employer's prior employment practices, such as preexisting job descriptions, dated advertisements for the position from newspapers, and resumes of prior holders of the position.
- Evidence of the time and cost of training in a particular skill (if the employer had to replace the alien) may establish that such a skill is, in fact required for the position. Evidence of any legal requirements to have staff with certain skill or experience.
- For foreign language requirements, documentation of the actual use of the foreign language by the person in the position to communicate with people who cannot speak English (e.g. business correspondence in the foreign language, with translations into English).

## III. Conclusion

Because USDOL so frequently audits cases with requirements they may not understand to be normal, we prepare business necessity documentation for nearly every labor certification that contains more than the simplest requirements. In a well-prepared labor certification, there is no need for an audit requesting documentation of "business necessity" to strike fear into the heart of the employer. Where the employer truly requires a particular skill set that was unavailable in the US workforce at the time the foreign national was hired, it should be straightforward to explain the requirement for that skill set in the context of the employer's business and document it as a valid requirement.

On the contrary side, where we have difficulty articulating the relationship between the duties of the position and the challenged requirements, or cannot produce independent verification that the requirements are normal and justifiable by business practices, it is a red flag that the requirement may not be acceptable to USDOL and, therefore, should be left out of the labor certification process.