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Introduction

The Immigration and Nationality Act (INA) facilitates employment based immigration in five "preference" categories. The INA limits the First Preference (EB1) to three types of priority workers, including persons of extraordinary ability, outstanding professors and researchers, and multinational organization executives and managers. The Second Preference (EB2) category is reserved for members of the professions holding advanced degrees (or persons of exceptional ability) where the job opportunity requires an advanced degree or the equivalent. The Third Preference (EB3) includes professionals and skilled workers, provided that the job opportunity requires a bachelor's degree or two years of specialized training or experience. The Fourth Preference includes special immigrants, such as religious workers and some government workers, among others. Finally, the Fifth Preference category is designed for investors who make a substantial U.S. investment that create jobs for U.S. workers.

Due to the application of an employment based immigrant quota system which limits the number of employment based (EB) immigrants in each category each year and which also contains a "subquota" for citizens of each country, the EB2 category historically tends to be faster moving than the EB3 category, particularly for Chinese and Indian nationals. Hence we commonly receive questions about the distinction between the two categories. This article discussed the requirements for the EB2 and EB3 classifications, and highlights the differences between them. We also address the evolving "single source rule," and highlight some ways to reduce the risk of a U.S. Citizenship and Immigration Services ("CIS") challenge or denial of a case where it may otherwise apply. The claim of EB2 or EB3 is made in the I-140 Immigrant Petition that the employer files with U.S. Citizenship and Immigration Services ("CIS") and CIS makes a determination of whether to accept such claim. It is typically the underlying PERM (or pre-PERM) labor certification application skill set, however, that pre-determines which EB category will apply.

How Do I Qualify for the EB2 Category?

As mentioned above, the INA reserves EB2 classification for members of the professions holding advanced degrees or persons of exceptional ability¹ where the job requires at least an advanced degree or the equivalent. This article will focus on the former basis for EB2 classification, specifically, the various ways to demonstrate award of an *advanced* degree.

Regulatory guidance defines "advanced degree" as: (1) any U.S. academic or professional degree or a foreign equivalent degree above that of a baccalaureate; or (2) a U.S. baccalaureate degree or a foreign equivalent degree followed by at least five years of *progressive* experience in the specialty.² Additionally, the Conference Committee Report indicates that an individual with a U.S. Bachelor's degree plus at least 5 years of professional work experience will qualify for EB2 classification. H.R. Rep. No. 955, 101st Cong. 2d Sess. 121 (1990).

For purposes of EB2 classification, United States Citizenship & Immigration Service (USCIS) policy allows a beneficiary of an employment based immigrant petition to satisfy the advanced degree requirement through foreign degree equivalence comprised of a combination of degrees and education.³ Thus, when one reads the plain language of the

¹ The relevant section of the INA is §203(b)(2).

² Please see 8 C.F.R. §204.5(k)(2).

³ AILA InfoNet Doc. No. 03041544 (posted April 15, 2003.)

regulation, the beneficiary does not need to receive his or her foreign degree from a single source. However, the beneficiary may not apply a combination of education and experience to satisfy the advanced degree requirement.

If the beneficiary seeks to rely on a foreign degree equivalent only to a U.S. baccalaureate degree, the individual must also demonstrate five years of *progressive*, post bachelor's work experience. Legacy Immigration and Naturalization Service (INS) policy memoranda define "progressive experience" as "employment experience that reveals progress, moves forward and advances toward increasingly complex or reasonable duties. In short, progressive experience is demonstrated by advancing levels of responsibility and knowledge in the specialty."⁴ The beneficiary may attain EB2 classification by means of proving progressive work experience accrued in the U.S. or abroad.⁵

However, case-law instructs that, if the employer fails to define the job offer as requiring *progressive* experience on the labor certification, the Service should read the labor certification as a whole to determine whether a basis exists for EB2 classification.⁶ If the Service cannot find evidence in the labor certification that the job offer requires five years of progressive experience, the Service should request that the employer provide a supplemental affidavit establishing that the employer truly does require *progressive* experience, in accordance with the legacy INS definition. It is important to remember that the beneficiary has the burden of proof in establishing that his or her qualifying experience was progressive in nature. Typically, this is accomplished via an employment verification letter from the prior employer.

According to a legacy INS memorandum, a beneficiary of an employment-based immigrant petition may apply his or her years of experience to establish progressive work experience to satisfy the advanced degree requirement, and may apply the same years of work experience to satisfy any experience requirement beyond the advanced degree listed in the job offer summarized in the labor certification application. However, progressive work experience gained prior to attainment of an advanced degree will not satisfy a job offer requiring experience achieved subsequent to an advanced degree.⁷ Similarly, if the job offer requires a PhD, the successful applicant must actually hold a PhD or foreign equivalent. There is no experience equivalency.

It is important to remember that the EB2 category imposes a two part test: (a) the job must require an advanced degree or the equivalent; and (b) the foreign national must prove that he or she has an advanced degree or the equivalent. Even where an employee has a Ph.D. degree, if the job requires less than a bachelor's degree plus five years of progressive post-bachelor's experience, the skill set will translate to an EB3 and not an EB2 Immigrant Petition classification.

SOME EXAMPLES OF WHETHER PARTICULAR SKILL SETS MEET THE EB2 THRESHOLD

- (1) *The job offer requires a Master's degree, and 3 years experience in the job offered or in a related occupation.* This job offer qualifies for EB2 classification, assuming the beneficiary possesses these qualifications, because the offer requires at least an advanced degree.
- (2) *The job offer requires a Master's Degree and 3 years experience in the job offered or in a related occupation or a Bachelor's degree or foreign academic equivalent thereof and 5 years of progressive post bachelor's experience.* This job offer will qualify for EB2 classification, so long as the beneficiary holds these qualifications. Both alternatives meet the EB2 test. The first alternative fits within the analysis in (1) above, and the second fits within the bachelor's plus five years of progressive post bachelor's experience alternative sanctioned by CIS regulation.

⁴ *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants*, AILA InfoNet Doc. No. 00032703 (posted Mar. 27, 2000).

⁵ AILA InfoNet Doc. No. 03041544 (posted April 15, 2003)

⁶ 77 No. 19 Interpreter Releases 627, 644 (May 15, 2000.)

⁷ *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants*, AILA InfoNet Doc. No. 00032703 (posted Mar. 27, 2000).

- (3) *The job offer requires a Bachelor's degree or the foreign equivalent and 5 years experience..* The job offer fails to define whether the applicant must have attained the experience subsequent to receipt of the Bachelor's degree, and whether the experience is progressive. Assuming that the beneficiary qualifies for the position, the Service would request that the employer supply an affidavit describing the progressive nature of the experience required before issuing a decision on the petition. If the employer satisfies the Service's definition of progressive and the beneficiary can prove that the qualifying five years of experience was progressive, the Service should approve the petition. Such evidence is best submitted up front without waiting for a CIS Request for Evidence (challenge).
- (4) *The job offer requires a Master's degree and two year of experience or a Bachelor's degree, and four years experience..* This skill set translates to an EB3 treatment since the alternate of BS plus 4 falls short of the required BS plus five years of progressive, post BS experience. CIS' position is that if either alternative falls short of the EB2 threshold, the whole skill set will fall short.

How Do I Qualify For The EB3 Category?

Under the INA, EB3 classification is available to professionals, skilled workers, and a catch all category for other workers. Regulatory guidance defines "professional" as a qualified member of the professions who holds at least a U.S. Bachelor's degree, or a foreign university equivalent.⁸ The offered full-time job set forth in the labor certification must require at least two years of training or experience. Relevant post- secondary education satisfies the training requirement.⁹ Conversely, "other workers" includes individuals with less than two years of training and work experience.

For purposes of contrasting the EB2 and EB3 classifications, this article focuses on the EB3 classification provision for professionals. Unlike the EB2 category, an individual cannot qualify for EB3 classification based upon a combination of education, training and experience as a substitute for degree achievement. Instead, the Service has interpreted the regulations to permit only a foreign degree from *a single source* as the equivalent of a Bachelors degree. While it is arguably not supported by the regulation, the Service has evolved its single source interpretation over recent years and often seeks to deny an Immigrant Petition where the foreign national attended two different foreign schools and achieved a bachelor's degree at the second school based upon coursework completed at both schools. The Service defines a foreign degree as one awarded for completing a course of study at a higher learning institution outside the U.S. that is similar to a course of study at a higher learning institution inside the U.S. In order to establish foreign degree equivalence, the Service requires evidence that the foreign degree is the equivalent of a U.S. Bachelor's degree, offered in the form of a credential evaluation.

Generally, a U.S. Bachelor's degree is understood to represent completion of four years of academic coursework at an institution of higher education. A beneficiary holding a foreign degree will qualify for EB3 classification if the foreign credential consists of a single academic degree awarded by one institution, judged to be the equivalent of four years of academic coursework in the U.S. When articulating its job offer in the context of a labor certification application in situations where the credential evaluation relies on the foreign national's attendance at multiple foreign schools, the employer should be cognizant of the single source rule and specify, if true, that it will accept a bachelor's degree based upon a determination of equivalency, including an equivalency finding based upon multiple educational credentials or programs cumulatively found to equal a bachelor's degree. This way the employer can utilize language which specifically serves to override and proactively "defuse" the CIS' stringent single source rule.

Conclusion

In preparing a PERM labor certification, it is important to anticipate the CIS examination of the beneficiary's credentials when, all going well, the U.S. Department of Labor (DOL) approves the PERM application and the employer files the I-140 Immigrant Petition seeking EB2 or EB3 classification. By ensuring that the beneficiary will be able to satisfy

⁸ 8 C.F.R. §204.5(l)(2).

⁹ *Id.*

the "measuring stick" of required education and experience as interpreted by CIS, the employer can reduce the risk "matching" problems that can lead to a Request for Evidence or a denial. Further, the employer can, with the attorney's input, examine the proposed skill set to ensure that it accurately reflects the company's true minimum requirements and, if possible, position it for a CIS finding of EB2 rather than EB3 classification.

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